

China's Investment Strategies: Where to Post Pandemic?

*Leon Trakman*¹

China's once geometrically expanding investment treaty regime is increasingly beset by unstable investment markets, politicized trade sanctions, and conflicting domestic demands on its financial reserves. A dilemma facing China is how to manage its relationships collaboratively with its treaty partners. At stake are treaties concluded by competitors like the EU with both developed and developing states that provide access to foreign markets previously serviced largely by China and its outbound investors.

This article scrutinizes China's likely responses to these formidable obstacles. One reaction is for China to selectively extend the policies underlying its planned domestic economy to global investment markets. In doing so, China risks being typecast as an investment overlord that turns developing states into dependencies rather than fully participating investment partners. A reconciliatory approach is for China to champion profitable dealings with shared benefits for its bilateral treaty partners and their investors. To redress these obstacles effectively is a key challenge for China. This Article explores that challenge in assessing how China is likely to protect both its national interests and the interests of foreign investors, consistently with its planned economy and the liberalization investment law.

I. INTRODUCTION	256
II. STRATEGIC CONFLICTS AND CHOICES	258
III. CHINA'S REALIGNED FOREIGN DIRECT INVESTMENT REGIME.....	262
IV. CHINA AS AN FDI DESTINATION	270

¹ Leon Trakman B. Com, LLB (Cape Town); LLM, SJD (Harvard); UNSW Emeritus Professor and Former Dean, Faculty of Law, University of New South Wales, Sydney. The author presented related studies on Investment Agreements and International Dispute Resolution online (February 2020-present); at NYU, Columbia and Georgetown (November-December 2017; January 2020); Sydney University (November 2019); Chinese University Hong Kong (August 2019); British Institute of International and Comparative Law, Japan (May 2018); Jiaotong University, Xi'an, China (June 2018). The author thanks Qiao Liu and Lei Chen, and fellow presenters and participants for their comments and insights, and Lynne-Marie Wade, Kunwar Bir Singh and Piyush Raj for their editorial assistance. The study was supported by research grants from the Australian Research Council and the Herbert Smith Freehills China International Business and Economic Law Centre (CIBEL).

256	<i>TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS</i>	[Vol. 32:2
V. COVID-19 AND INBOUND INVESTMENT		274
VI. WILL CHINA RETRENCH OUTBOUND INVESTMENT?.....		277
VII. CHINA'S EVOLVING INTERNATIONAL HORIZONS.....		280
VIII. CHINA'S DISPUTE RESOLUTION STRATEGIES		286
IX. RECONCILING IDEOLOGICAL TENSIONS		291
X. CONCLUSION.....		296

I. INTRODUCTION

There is an impending global challenge regarding how China responds to the changing conception of trade and investment liberalization propagated in the West for well over a century. One possibility is for China to capitalize on the declining entrenchment of liberalism in regulating international investment in the Postwar Economic Order. Another is for it to modify its international investment modeling on its planned economy, while still accommodating a declining liberalized model of international investment law carved by the West in the post-WWII era.²

China is expected to achieve these goals collaboratively with its investment partner states through their gainful participation in forming and performing under umbrella treaties and contracts.³ So motivated, China envisions enhancing its global economic and political ascendance in collaboration with different partner states along its local, regional, and global trade and investment routes. The conceived result is of groups of states participating in the transformation of global investment along China's Belt and Road (BRI) over which China exercises leadership.⁴

China is expected to achieve these collaborative ends differently from Western liberal states. On the one side is the Washington Consensus, in which the global liberal legal order has enshrined the privatization of international markets subject to the Rule of Law.⁵ On the other side, the Beijing Consensus envisions the operation of a directed legal order based on state capitalism

² See Muthucumaraswamy Sornarajah, *Chinese Investment Treaties in the Belt and Road Initiative Area*, 8 CHINESE J. COMP. L. 55 (2020) (differentiating China's investment treaties with developing and developed states along its BRI).

³ See, e.g., John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT. ORG. 379 (1982) (maintaining that the primary purpose of BITs is to promote and apply the rule of law to foreign investment, and, secondarily, to create a liberal investment regime).

⁴ See Simeon Djankovand, *The Rationale Behind China's Belt and Road Initiative*, in CHINA'S BELT AND ROAD INITIATIVE: MOTIVES, SCOPE, AND CHALLENGES (Simeon Djankovand, et. al. eds. 2016) (on China's motivations in building its Belt and Road and the Road's global significance).

⁵ See Weitseng Chen, *Debating the Consensuses*, in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC (Weitseng Chen ed., Cambridge Univ. Press 2017) (on China's adoption, adaptation, and reconstitution of the Washington Consensus).

extended incrementally through capacity building and infrastructure development.⁶ In applying the Beijing Consensus, China is perceived as expanding its legal order in a pragmatic manner, embodying its trade and investment agreements in “soft” law memoranda of understanding in support of formal trade and investment treaties.⁷ The Beijing Consensus is thereby pivotal to Chinese entities engaging in foreign direct investment (FDI) in accordance with China’s planned economic model, modified to incentivize other states in pursuit of profitability in cross-border investment markets.⁸

China is perceived as facing distinct obstacles in seeking to promote an alternative hegemonic world order to its liberal antecedents.⁹ A central challenge is for China to balance its planned international investment aspirations with liberalized initiatives attributed to a free global market. The “hard core” authoritarian nature of Chinese law is offset by its “soft” case-by-case application of that law in open investment markets.¹⁰ Its adaptable Memoranda of Understanding are equipoised against its adoption of Western-style investment treaties, such as between the United States, Canada, and Mexico under the former North American Free Trade Agreement (NAFTA). In achieving that balance, China is expected to reconcile its public policy shield with foreign investor protections within disparate bilateral investment treaties (BITs).¹¹ Important, too, is how that balance is likely to be embodied in a multilateral investment agreement (MIA).

This Article focuses on how China is likely to reform its international investment models, bilaterally, regionally and globally; how it does so collaboratively with International Investment Agreement (IIA) partner states; and how such collaboration is expected to transform international investment practice in a piecemeal yet pluralistic manner. It does so in light of tensions between China’s planned economy and the Westphalian model ascribed to and

⁶ See Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT’L ECON. L. 607 (2020) (on the distinctiveness of the Beijing Consensus and its divergence from the Washington Consensus).

⁷ See Heng Wang, *China’s Approach to the Belt and Road Initiative*, 22 J. INT’L. ECON.L. 29 (2019) (on China’s “soft” law approach in developing its BRI).

⁸ See Wenwei Guan, *Beijing Consensus and Development Legitimacy: The Evolution of China’s Foreign Direct Investment (FDI) Regime from a Law & Development Perspective*, 12 ASIAN J. COMP. L. 115 (2017).

⁹ M. P. Amineh *China’s Rise and the Question of Hegemony and World Order*, in THE CHINA-LED BELT AND ROAD INITIATIVE AND ITS REFLECTIONS 36–39 (2022) (“[R]aises two interconnected key questions: (i) Does China meet the requirements to create an alternative hegemonic world order; and (ii) Does it have sufficient capabilities to restructure and reform the existing liberal world order set by the United States after World War II?”).

¹⁰ See Shaffer & Gao, *supra* note 6, at 614 (on the attributes of the Beijing Consensus).

¹¹ See BRUNO ZELLER, ET AL., ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE PUBLIC POLICY EXCEPTION: INCLUDING AN ANALYSIS OF SOUTH ASIAN STATE PRACTICE (SPRINGER, 2021) (on public policy defenses to investor claims in ISDS disputes).

questionably still applicable to liberal democracies.¹² The article also does this recognizing the negligible research on the prospective impact of economic instability and geopolitical tensions on the BRI's direction and IIAs concluded with BIT partner states.¹³

II. STRATEGIC CONFLICTS AND CHOICES

China's future IIA strategy is foreshadowed by East-West trade conflict and retaliatory trade tariffs, prohibitions, and sanctions, with their spillover effects upon its international investment initiatives.¹⁴ A potential response by China is to identify an ever-growing income gap and wealth inequality between economically dominant neo-liberal Western states and their supplicant states within transnational investment markets. The perceived threat is of Western liberal states benefitting economic elites by artificially intermeshing their private corporate good with the public good.¹⁵ Complicating China's IIA strategy is an already polarizing debate over how it should redress such social-political and economic polarities through a reformulated international investment order.¹⁶

A more tempered response is for China to offset the neo-liberal tainting of international investment law and practice, not by rejecting neo-liberalism but by transforming asymmetrical foreign investment markets into a synergy between free and centrally planned economies.¹⁷ The rationale is that, while China has initially constrained its Belt and Road Initiative (BRI) through its ubiquitous planned economy, it has since balanced its planned market ideology with market liberalization to secure wider access to the global investment

¹² J.C. Weiss & J.L. Wallace, *Domestic politics, China's Rise, and the Future of the Liberal International Order*, 75 INT'L ORG., 635 (2021) (on China choosing key institutions and norms imbedded in the "Liberal International Order" to guide its "international behavior").

¹³ See Vera Schulhof et al., *The Belt and Road Initiative (BRI): What Will it Look Like in the Future?*, 175 TECH. FORECASTING SOCIAL CHANGE 175 (2022) (contending that "the mostly qualitative research on COVID-19 impacts on the BRI does not offer thorough descriptions of a potential future BRI" and identifying "[i]nsights in possible BRI future scenarios [that] may also help policymakers and businesses worldwide anticipate developments to prepare their responses and strategies").

¹⁴ David A. Ganz, *USMCA, Covid-19 and the US-China Trade War: North Americas Shifting Supply Chains*, in RESEARCH HANDBOOK ON TRADE WARS 362–38 (Edward Elgar ed., 2022) (noting that the economic pressures are "forcing enterprises operating in the United States to abandon or at least significantly reduce their dependence on Chinese sourcing").

¹⁵ See Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POLICY REV. 6, 7–13 (1988) (discussing the public-private schism in the classical liberal and neoliberal social and economic orders).

¹⁶ JACK RASMUS, THE SCOURGE OF NEOLIBERALISM: US POLICY FROM REAGAN TO TRUMP ## (CLARITY PRESS, 2019); Andrew Moravcsik, *The New Liberalism*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 709 (Robert E. Goodin, ed., 2013).

¹⁷ But see David A. Lake, *Economic Openness and Great Power Competition: Lessons for China and the United States*, 11 CHINESE J. INT'L POL. 237, ## (2018) ("[T]here is a chance that the United States, in the grips of economic nationalism, might abandon its historic policy of free trade and ignite a new race for economic privilege as well.").

order.¹⁸ That shift towards liberalization is evident in China's Foreign Investment Law (FIL) of 2020 that replaced the original three laws regulating FDI.¹⁹ The new law is expected to protect investors' rights within "a more open and amicable legal environment for attracting" investment, propelled by "high-level policies of motivating liberalization and facilitation."²⁰

This movement towards investment liberalization is demonstrated by the shift from the primacy that China accorded to its centrally regulated investment system in its early BIT models, to its progressive movement to Western-style treaties. Notably among these Western models was the North American Free Trade Agreement adopted by the United States, Canada and Mexico.²¹ China's ensuing BIT modeling has also demonstrated continuing reliance on domestic regulatory authority without eroding inbound investor protections.²² Its modeling also shifted, albeit incrementally, from local to regional, and then to global, treaty facilitation.²³ So impelled, China has provided infrastructure support to an expanding array of domestic and foreign investments. It has also facilitated investor loans through domestic Chinese banks and from the Asian Infrastructure Development Bank.²⁴

Epitomizing China's BRI regulatory regime is the release by the China State Council in June 2018 of its "Opinion Concerning the Establishment of

¹⁸ See Yingyi Qian & Jinglian Wu, *China's Transition to a Market Economy: How Far Across the River?* in HOW FAR ACROSS THE RIVER? CHINESE POLICY REFORM AT THE MILLENNIUM 31–65 (Nicholas C. Hope et al., 2003); *OECD Reviews of Regulatory Reform – China: Defining the Boundary Between the Market and the State*, ORG. FOR ECON. CO-OPERATING AND DEV 42–43 (2009), www.oecd.org/gov/regulatory-policy/42390089.pdf; Jinglian Wu & Guachuan Ma, *Whither China? Restarting the Reform Agenda*, 90 PAC. AFF. 329, 329–31 (2017).

¹⁹ See WANG CHEN, THE REPORT ON THE DRAFT OF PEOPLE'S REPUBLIC OF CHINA (PRC) FOREIGN INVESTMENT LAW, CENT. PEOPLE'S GOV'T (Zhongguo Zhengfuwang) (Mar. 9, 2019).

²⁰ Xianjun Feng & Chuanhui Wang, *China's Foreign Investment Law: Moving toward Greater Liberalization?*, 10 PENN STATE J.L. & INT'L AFF. 115, 118 (2022).

²¹ Alex Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 J. WORLD INV. & TRADE 843 (2015) (maintaining that China had engaged in a 'partial NAFTA-ization' of its IIAs since 2008).

²² See Axel Berger, *The Political Economy of Chinese Investment Treaties*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 151–68 (Ka Zeng, ed., 2019), (on agreements based on China's Model IIA, and China's shift away from IIA treaty models adopted by Western capital states); Leon Trakman, *Resolving the Tension Between State Sovereignty and Liberalizing Investor-State Disputes: China's Dilemma*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 34 (Julian Chaisee et al., eds., 2020) (describing the distinctions between China's Model BITs and BITs of Western Liberal States).

²³ See, e.g., Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575 (2009) (explaining China's transition from a participant to a leader in the global investment economy).

²⁴ See Tao Xie & Doglin Han, *In the Shadow of Strategic Rivalry, China, America and the Asian Infrastructure Development Bank*, 28 J. CONTEMP. CHINA 916 (2020) (explaining China's increasing reliance on the AIIB, in part in response to competition with the US).

the Belt and Road (Opinion).”²⁵ The Opinion focuses on establishing the International Commercial Court, as a part of the Chinese judicial system, to resolve international commercial disputes including along China’s expanding BRI. The purpose is to provide a more authoritative and specialized institution: to resolve international commercial disputes; to accommodate “soft law” within treaty “hard law”; and to do so through the tiered mechanism of mediation, arbitration, and litigation. The highlighted benefit of this specialized court is to resolve international commercial disputes transparently and authoritatively, consistent with a free international investment order.²⁶ The innovative nature of the court provides a single platform encompassing litigation, arbitration, and mediation on which to resolve international commercial disputes.²⁷

China is not alone in establishing an international commercial court. Other national judicial systems have also incorporated specialist commercial courts into their judicial systems. Singapore, for example, created the International Commercial Court to resolve international commercial disputes through uniform procedures, administered by internationally appointed specialist judges. Its Court’s responsibility is to provide transparent, authoritative, and binding judgments.²⁸ What distinguishes China’s International Commercial Court from Singapore’s Court is China’s capitalization on its global significance as a source of inbound and outbound investment, notably through its evolving BRI. What potentially constrains international confidence in China’s Court is concern over the extent to which its terms of reference will operate transparently and independently from the Chinese State.²⁹ The challenge for China is to demonstrate that the Court has the authority to decide investment disputes in the interests of the disputing parties. China’s collateral challenge demonstrates that when presented as the facilitator of international dispute resolution, its role is to affirm, not diverge from, the right of the parties to receive fair and equal treatment.³⁰

²⁵ See *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, CHINA L. INFO. DATA BASE, <http://www.lawinfochina.com/display.aspx?id=28393&lib=law> (last visited Dec. 27, 2021).

²⁶ See Weixia Gu, *China’s Law and Development: A Case Study of the China International Commercial Court*, 62 HARV. INT’L L.J. 68 (2021) (describing the significance of the State Council Opinion, inter alia, in the resolution of international trade and investment disputes).

²⁷ See Wenhua Shan & Yunya Feng, *The China International Commercial Court: Towards an Integrated Dispute Resolution System*, 29 ASIA PAC. L. REV. 107 (2021).

²⁸ See Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of its Game*, 85 ARB. 2 (2019) (noting that specialized international courts redress limitations in international commercial arbitration’s failure to satisfy such requirements as clarity and finality in decision-making).

²⁹ See Julien Chaisse & Jamieson Kirkwood, *Adjudicating Disputes Along China’s New Silk Road: Towards Unity, Diversity or Fragmentation of International Law?* 68 NETH. INT’L L. REV. 219 (2021) (describing obstacles created by legal diversity along China’s BRI).

³⁰ Kashif Imran Zadi et al., *Significance and Challenges for the China International Commercial Court for the Settlement of Commercial Disputes Under Belt and Road Initiative*, 8 MULTICULTURAL EDUC. 181 (2022). (“The creation of CICC into a solid line of defense for fairness, justice, and business displays China’s judicial civilization.”).

China's adoption of collaborative measures, including facilitating dispute resolution transnationally, is tactically influenced by interrelated factors. These include its historical commitment to foreign direct investment; the collaborative measures it adopts to achieve those ends; how it has applied those measures in its state-to-state and investor-state practice such as in transnational dispute resolution; and how likely it is to sustain those measures in the future.³¹

China is likely to be subject to a delicate balancing act in promoting its global collaborative aspirations. The assertion that China's purpose in developing institutions such as dispute resolution is to stabilize transnational infrastructure growth is countered by the accusation of it using those institutions to perpetuate its economic and political dominance, such as over-developing African states.³²

The contention that China's collaborative measures will recede in the face of ongoing financial instability in global markets is offset by recurring signs of both a staggered economic recovery and uncertainty over the beneficiaries of that recovery.³³ The contention that its BRI will recede into a failed economic initiative is countered by its depiction as vibrant and international in "geographical scope, the investment volumes and sectors, the funding structure, and also the orientation towards sustainability."³⁴

The prediction of China adopting reconciliatory measures such as the surprise China-U.S. announcement of their climate agreement at the COP26 summit in Glasgow in November 2021, is offset by continuing trade levies, duties, and sanctions imposed upon China and its retaliatory measures.³⁵

What is difficult to predict are the collaborative investment measures that China is likely to adopt when both planned and free-market ideologies to which it purportedly ascribes are subject to the aberrant vicissitudes of market pragmatism. To explore these issues entails reflecting on the background of China's foreign direct investment regime; its shifting balance between planned and liberalized investment modeling; and prospective movements in the direction of that balance in the future.³⁶

³¹ See *infra*, Sections VI & VII.

³² See ORG. FOR ECON. CO-OPERATING AND DEV., OECD BUSINESS AND FINANCE OUTLOOK 2018, 67–71 (2018).

³³ For challenges to China's BRI due to geopolitical tension, economic disruption, and de-globalization, see Jiatao Li et al., *Foreign Direct Investment along the Belt and Road: A Political Economy Perspective*, 53 J. INT'L. BUS. STUD. (2021).

³⁴ See Schulhof, *supra* note 13.

³⁵ *U.S. and China Announce Surprise Climate Agreement at COP26 Summit*, BBC, <https://www.bbc.com/news/uk-59240244> (last visited Nov. 14, 2021).

³⁶ See *infra*, Section IX.

III. CHINA'S REALIGNED FOREIGN DIRECT INVESTMENT REGIME

In the last four decades, China has moved from a planned economy to a balance between a planned domestic economy and a liberalized international economy.³⁷ It has grown into the largest global destination for foreign investment and the second-largest outbound investor-state, after the United States. Only Germany ranks above China in the number of Bilateral Investment Treaties it has concluded.³⁸

However, China's history of BITs and investor-state disputes is comparatively recent,³⁹ significantly post-dating the adoption of the Convention on the Settlement of Investment Disputes (ICSID) in 1966.⁴⁰ China concluded its first BIT with Sweden in 1982; its second BIT in 1989; and it ratified the ICSID Convention in 1993.⁴¹ It has devised three Model BITs: the first in the 1980s; the second in the mid-1990s; and the third in 1998.⁴² Each has furthered China's liberalized investment regime. China is currently finalizing its fourth Model BIT, while both bifurcating and extending its BIT program beyond its third Model in the interim.⁴³

China's evolving investment treaties reveal a shifting pattern that has increasingly favored protecting foreign investors. In extending those protections, China has reduced the public interest shield of host states from such protection. This shift is distinguishable from China's "first generation" BITs in the 1980s and 1990s which prioritized China's domestic interests over

³⁷ XI JINPING, THE GOVERNANCE OF CHINA II (2017).

³⁸ See Leon Trakman et al., *Investor-State Arbitration in China: A Comparative Perspective*, in DISPUTE RESOLUTION IN CHINA, EUROPE AND WORLD 231 (Lei Chen & Andre Janssen eds., 2020) (explaining China's expanding inbound investment under its evolving BIT regime).

³⁹ See UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (last visited, Jan. 1, 2022).

⁴⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Dec. 27, 1945, 2 U.N.T.S. 134 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention].

⁴¹ See e.g., K.M. Rooney, *ICSID and BIT arbitrations and China*, 24 J. INT. ARB. 704 (2007) (noting that, even after China's accession to the Washington Convention became effective, it was some years before China provided for ICSID arbitration in early BITs). On the ICSID, see generally, A.R. PARRA, THE HISTORY OF ICSID (2nd ed., 2017); M. Kinnear, *ICSID and International Investment Treaty Arbitration: Progress and Prospects*, in CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP (Wenhua Shan & Jinyuan Su, eds., 2015); Leon Trakman, *The ICSID under Siege*, 45 CORNELL INT. L.J. 603 (2012).

⁴² Wenhua Shan, *China and International Investment Law in* TRAKMAN ET AL., N. REGIONALISM IN INTERNATIONAL INVESTMENT LAW 214–52 (Trakman & Ranieri eds., 2013) (on the history of Chinese BITs concentrating on its current 1998 BIT).

⁴³ See Wenhua Shan & Hongrui Chen, *China-US BIT Negotiation and the Emerging Chinese BIT 4.0* in ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 223–52 (2016).

inbound investor incursions.⁴⁴ These early BITs limited the treaty protection to outbound investors, including Chinese State Owned Enterprises (SOEs), partly because China's inbound investments significantly outweighed its outbound investments.⁴⁵ China's "first generation" BITs also accorded significant national security protection to inbound investor states, more than it afforded due process protection to inbound investors. Swathed in national security barricades and limited rule of law protections for foreign investors,⁴⁶ China's early BITs somewhat insulated it as a destination state from prospective inbound investor claims brought through Investor-State Dispute Settlement (ISDS).⁴⁷

China's defensive stance at that initial stage of its foray into IIAs is discernible, both economically and politically. Viewed economically, China's early Model BITs reflected its status as a predominantly inbound investor-state, protecting local industry from foreign investors that offshored their profits. Considered politically, China's vigorous protection of its sensitive domestic sectors from foreign investment insulated it from threats to its national security.⁴⁸ Among these threats were takeover bids and market redirection impositions by foreign investors. Whereas Western liberal BITs accorded some level of due process, social rights, and environmental protection to foreign investors, comparable safeguards were largely absent from China's "first generation" BITs.⁴⁹

Much of this has changed. China's "second generation" and evolving "third generation" BITs have extended the scope of foreign investor shields against the regulatory swords of host states. Consistent with its advancement as the second-largest outbound investor-state, China has extended investor protection by treaty or contract to permit foreign investors to claim that China, or its investment treaty partners, had expropriated or otherwise taken their property.⁵⁰ Even though both its "first" generation treaties permitted foreign

⁴⁴ See Heng Wang & Lu Wang, *China's Bilateral Investment Treaties*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien Chaisse et al., eds., 2021).

⁴⁵ See Leon Trakman, *Investment law, Arbitration and China*, in INVESTMENT LAW AND ARBITRATION IN THE ASIA PACIFIC: CURRENT PRACTICE, EMERGING ISSUES, FUTURE PROSPECTS (2018).

⁴⁶ See Shen Wei, *DECODING CHINESE BILATERAL INVESTMENT TREATIES* (2021); see also Press Information Bureau Press Release, *Bilateral Investment Promotion Agreement with China* (Nov. 16, 2006).

⁴⁷ Dilini Pathirana, *A Look into China's Slowly Increasing Appearance in ISDS Case*, INT'L INST. FOR SUSTAINABLE DEV. (Sept. 26, 2017), <https://www.iisd.org/itn/en/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/>.

⁴⁸ Leon Trakman, *China's Regulation of Foreign Direct Investment*, in ASIA'S CHANGING INTERNATIONAL INVESTMENT REGIME 67–99 (Julien Chaisse et al eds., 2017).

⁴⁹ See Hiroki Yamada, *Forgotten Promises: Bilateral Investment Treaties Between CEE and China*, CHOICE (Nov. 6, 2020), <https://chinaobservers.eu/forgotten-promises-bilateral-investment-treaties-between-cee-and-china/>

⁵⁰ See NORAH GALLAGHER & WENHUA SHAN, *EXPROPRIATION AND COMPENSATION, IN CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE* (OXFORD, 2009).

investors to claim compensation for a government taking, China's treaties did not allow investor claims based on expropriation.⁵¹ China's strategic shift in policy in allowing expropriation claims since its "first" generation treaties, signified its willingness to permit a court or arbitration tribunal to determine whether China or an investment partner state had unlawfully expropriated foreign investor property.⁵² China's shift in policy also demonstrated its readiness to accommodate the evolving social rights focus on investment treaties adopted by developed states.⁵³

China was and remains politically and economically motivated to continue protecting inbound investors by treaty in order to attract inbound foreign investors to China, shielding its outbound investors from regulatory action by host states, and modernizing its investment treaties with both developed and developing states.⁵⁴

China is also incentivized to unify its treaty framework with developed BIT partners, such as EU member states, including by modernizing its twenty BITs with European countries within a pervasive EU-China framework.⁵⁵ Moreover, in modeling its IIAs on an adaptable investment treaty framework, China is increasingly regulating its IIAs with developing states in Africa differently from developed regions such as the EU.⁵⁶ It is also acting tactically in demonstrating the reciprocal and long-term economic benefits of its BRI, as illustrated in its negotiations with the EU.⁵⁷

Not anticipated a decade ago, China is progressively endorsing environmental and health safety standards in response to disastrous public health and safety implications domestically.⁵⁸ In endorsing health and safety

⁵¹ Karl P. Sauvant & Michael D. Nolan, *China's Outward Foreign Direct Investment and International Investment Law*, 18 J. INT'L ECON. L. 893 (2015).

⁵² See Trakman, *supra* note 48.

⁵³ See Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETH. INT'L L. REV. 503–51 (2020).

⁵⁴ See Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime A 'backward looking' Approach*, BROOKINGS INST. (Mar. 17, 2021), <https://www.brookings.edu/research/reforming-the-investment-treaty-regime/>.

⁵⁵ See Gisela Grieger, *EU–China Comprehensive Agreement on Investment: Levelling the Playing Field with China International Agreements in Progress*, EUR. PARLIAMENTARY RSCH. SERV. (Sept. 14, 2020), <https://epthinktank.eu/2020/09/14/eu-china-comprehensive-agreement-on-investment-levelling-the-playing-field-international-agreements-in-progresswith-china/>.

⁵⁶ See Zhang Monan, *How China and the EU can boost investment*, WORLD ECON. F. (Oct. 17, 2016) <https://www.weforum.org/agenda/2016/10/how-china-and-the-eu-can-boost-investment>; HUAQUN ZENG, CHINESE FOREIGN INVESTMENT LAWS: RECENT DEVELOPMENTS TOWARDS A MARKET ECONOMY (WORLD SCI. AND SINGAPORE UNIV. PRESS, 1999) (noting that, since 1993, Chinese foreign investment laws have adopted the principles underlying foreign investment laws in market economies).

⁵⁷ See Pei-Shan Kao, *The Political Economy of China's Strategic Layout in Europe: A Case Study of the Belt and Road Initiative*, 55 CHINESE ECON. 303–16 (2021).

⁵⁸ Tyler Cohen & Daniel Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy*, 5 CHINESE J. COMP. L. 110, 119–128 (2017).

measures in relation to renewable energy and sustainability, China is proactively supporting climate change and remedying ecological damage in China that has intergenerational implications.⁵⁹

In expanding the scope of its investment treaties in recognition of these threats to sustainable development of its economy, China has further economic and political justifications for incorporating its Western-style environmental protections in its remodeled IIAs while crafting them according to its own design and transfiguration.⁶⁰ The limited early evidence is that China will support human rights and environmental protection suits involving foreign investors being submitted to international tribunals rather than its domestic courts.⁶¹

Movements towards regulatory uniformity is also material to China's vacillating treaty negotiations with the EU.⁶² In place of diffuse pre-2000 investor protections based on Western models, such as in Chapter 11 of the North American Free Trade Agreement (NAFTA), China is motivated to bifurcate its IIAs.⁶³ It is motivated to accommodate divergent investment relationships based on their development and strategic significance to China's infrastructure initiatives.⁶⁴

Notwithstanding the piecemeal progression of China's IIAs over the last decade, its BIT pathway increasingly reflects two prevailing trends. First, China's investment pathway has shifted from its early BITs, in which it was predominantly a capital importer, to accommodate its ascendance as a capital exporter. Second, China's international BRI is being impeded by a global economic order in which its actual and prospective partner states are reverting from globalization to localization, notably in responding to threats ancillary to COVID-19.⁶⁵ Pronouncedly complicating that global order are structural economic schisms, particularly between creditor and debtor states,

⁵⁹ See *id.* (on China's provision, *inter alia*, for environmental protection in its BITs).

⁶⁰ See Wei, *supra* note 46 (on environmental protection clauses in Chinese BITs).

⁶¹ See Xuan Shao, *Environmental and Human Rights Counterclaims in International Investment Arbitration: At the Crossroads of Domestic and International Law*, 24 J. INT'L ECON. L. 157 (2021) (on investment arbitral tribunals as an alternative to domestic courts in adjudicating environmental and human rights counterclaims).

⁶² See K.F. Gómez, *Private Actors in International Investment Law*, in 9 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (2021).

⁶³ Leon Trakman, *China's Dilemma in Renewing Its Belt and Road Initiative*, in ASIAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2023 1 (Springer 2023).

⁶⁴ See ERIK BRATTBERG & EVAN A. FEIGENBAUM, CHINA'S INFLUENCE IN SOUTH ASIA: VULNERABILITIES AND RESILIENCE IN FOUR COUNTRIES, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (2021).

⁶⁵ See L. Clover Alcolea, *The COVID-19 Crisis: Core Investment Law Issues Revisited*, TDM (May 25, 2020), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1822>, (on lacuna in academic writing on claims against states as a result of an epidemic).

accompanied by unequal access to resources in a purportedly free-market order.⁶⁶

In a crucible is how China balances its progression from a debtor to a creditor state against the plight of developing states that remain significantly in debt. Important is how it remolds its model of investment multilateralism to recognize the ambivalence of vulnerable debtor states to globalization and returning to localization of trade and investment as their default position.⁶⁷

China's challenge in adopting a multilateral investment model is severalfold: to construct its treaties disparately to accommodate economic, social, and political divergences across its Belt and Road;⁶⁸ to modify those treaties to suit the localized needs of BIT partner states, consistently with its constraints;⁶⁹ and to do so incrementally, as it has done across Asia, Africa, Latin America, and the EU.⁷⁰ In contrast, the prospect of China playing a central role in formulating a multilateral investment agreement (MIA) is reinforced by the shared interest of leading states, such as the EU and China, in the formulation of such an agreement. China's central role in formulating a MIA was affirmed by new rules proposed for incorporation into the EU-China Comprehensive Investment Agreement (CIA).⁷¹ Had the EU-China CIA been agreed to, it would have provided a foundation for establishing multilateral rules under the auspices of the World Trade Organization (WTO).⁷²

China's pathway towards a multilateral investment agreement is nevertheless beset by challenges in managing the delicate interface between

⁶⁶ Wei, *supra* note 46 (on China's strategic passage along the pathway of investment liberalization).

⁶⁷ See CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY (OXFORD, 2019) (on China's bilateral strategy with the US and the EU, regional strategy with the Free Trade Area of the Asia Pacific, and global investment strategies with its expanding BRI).

⁶⁸ On China's infrastructure partnerships along with its Belt and Road, see *China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*, OECD BUS. & FIN. OUTLOOK (2018), <https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf>. On China's Belt and Road Initiatives in Africa, see David Dollar, *Understanding China's Belt and Road Infrastructure Projects in Africa*, BROOKINGS INS. (2019), https://www.brookings.edu/wpcontent/uploads/2019/09/FP_20190930_china_bri_dollar.pdf.

⁶⁹ See G. MATTEO VACCARO-INCISA, CHINA'S TREATY POLICY AND PRACTICE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION: A COMPARATIVE AND ANALYTICAL STUDY (2021) (history of China's BIT's).

⁷⁰ See Lorenzo Cotula et al., *China-Africa Investment Treaties: Do They Work?*, INT'L INST. ENV'T & DEV. (2016), <https://pubs.iied.org/sites/default/files/pdfs/migrate/17588IIED.pdf>.

⁷¹ Uri Dadush & André Sapir, *Is the European Union's Investment Agreement with China Underrated?*, 9 BRUEGEL POL'Y CONTRIBUTION (2021) (proposing that the new rules in the CAI on subsidies, state-owned enterprises, technology transfer and transparency "will improve effective market access for EU firms operating in China" and "could also pave the way for reform of the multilateral rules under the World Trade Organization.").

⁷² On the apparent demise of the EU-China CIA, see Lily McElwee, *Rise and Demise of the EU-China Investment Agreement Takeaways for the Future of German Debate on China*, CENTER FOR INTERNATIONAL AND STRATEGIC STUDIES (March, 2023) <https://www.csis.org/analysis/rise-and-demise-eu-china-investment-agreement-takeaways-future-german-debate-china>

its domestic identity and global requirements. Those challenges reflect instability and macroeconomic problems⁷³caused by China's declining foreign reserves, and its competing financial commitments to health care and its aging population.⁷⁴

If China concludes that profits and related benefits generated by its IIAs support its domestic economic and social requirements, it has formidable reasons to maintain its BITs and Free Trade Agreements (FTAs). If it concludes that its financial outlays abroad are likely to exacerbate domestic financial shortfalls, it is incentivized to reduce its reliance on IIA. Reducing foreign direct investment, however, will come at a price. Developing states with the strongest need for inbound investment from China represent the most significant reason for China to withdraw from resourcing its outbound investments. If China is to base its IIA policies on outbound investment returns, it is motivated to evaluate the risks of partner states defaulting on project commitments and ancillary loans. Given that developing states are primary sources of such assistance, China has credible economic reasons to scale down its investments in such states to accommodate its domestic economic needs.⁷⁵

The proposition is not that, in balancing these cumulative domestic and international investment objectives, China faces irreconcilable choices. The one choice is for it to absorb the management costs of its BRI for the greater good and subordinate domestic investment to support its transborder Belt and Road. The other choice is for it to deglobalize its international investment regime in favor of domestic projects). The proposition is that, in pursuing its global political and economic leadership, China will take account of its accumulating costs and benefits in that endeavor. In providing infrastructure and financial assistance incrementally to developing states, China is motivated to ensure that its cumulative benefits outweigh its selective sacrifice of service to home-spun Chinese projects. It is expected to measure the aggregate gains in sustaining its national and transnational investment options, rather than measure gains and losses discretely and in isolation from each other.⁷⁶

A related cost-benefit issue is for China to determine whether and when its outbound investments are sufficiently profitable to absorb the accumulated costs of these investments. Suppose China is to facilitate economic development in partner states such as in Africa. In that case, it needs to base

⁷³ Dadush & Sapir, *supra* note 71.

⁷⁴ See Wen-Jun Tu et al., *Aging Tsunami Coming: The Main Finding from China's Seventh National Population Census*, 34 AGING CLINICAL & EXPERIMENTAL RSCH. 1159 (2022) (describing the massive injection of pension insurance funds approved by the Chinese State Council to improve public health standards, commencing in 2019).

⁷⁵ See Zhi Ji et al., *Problems and Perspectives of Sustainable Trade Development in China under the One Belt One Road Initiative*, 258 E3S WEB OF CONFERENCES 1 (2021) (describing China's massive revenue earned from its BRI over the last decade and its geopolitical benefits, offset by growing costs and political tensions for sustainment).

⁷⁶ See RASHMI BANGA, INDIAN COUNCIL FOR RSCH. ON INT'L ECON. RELS., IMPACT OF GOVERNMENT POLICIES AND INVESTMENT AGREEMENTS ON FDI INFLOW (2003).

its development assistance costs in Africa upon investment returns to its domestic economy in the longer term. China's further cost-benefit analysis entails evaluating when its economic aid to developing states in the short term is likely to stimulate their inbound investments into China in the long term.⁷⁷

A pragmatic rationale for China's cumulative gains-based assessment of inbound and outbound investments is to promote a long-term benefit in which the sum of those investments is greater than their separate parts. If China is to sustain its global investment regime, its gains must extend beyond short-term quantified profits to longer-term strategic alliances with partner states within regional and global markets. Enriching its BRI requires that China not only establish lucrative relations with discrete partner states, but that it sustains those benefits collectively with those partners. In that way, the BRI whole is greater than the arithmetic sum of its domestic part.⁷⁸

China's further construction of its BRI is likely to be incremental. Building strategic BRI operations requires it to enter into and refine discrete narratives with partner states and augment the collective value of the BRI, even when some connections are disrupted and not sustained.⁷⁹

China's hurdle in building and sustaining a shared BRI is to stimulate an intertwined BRI pathway in which the whole compensates for the bends and turns along with its irregular and patchy parts. In traveling along that Road, China's memoranda of understanding, infrastructure contracts, and umbrella BITs are interconnected, not insulated from one another. Its dispute resolution provisions are functionally interrelated: stipulating for the exhaustion of local remedies; specifying waiting periods before foreign investors can lodge ISDS claims; and placing limits on the scope of ISDS.⁸⁰

China also needs to propagate its narrative of being a "good neighbor, good friend and good partner" to nurture advancing BRI relations.⁸¹ That narrative is aimed at counterbalancing the critique that China is exploiting developing states to satisfy its ambitions of global dominance. China's affirmative posture is that it treats inbound foreign investors of partner states as it would like

⁷⁷ See Paul Hannon & Eun-Young Jeong, *China Overtakes U.S. as World's Leading Destination for Foreign Direct Investment*, WALL ST. J. (Jan. 24, 2021, 7:40 PM), <https://www.wsj.com/articles/china-overtakes-u-s-as-worlds-leading-destination-for-foreign-direct-investment-11611511200>.

⁷⁸ Zeng Lingliang, *Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny*, 15 CHINESE J. INT'L L. 517, 517 (2016) (describing a "global governance" encompassing both regional economic integration and partnership arrangements between States).

⁷⁹ See Yujia Zhao & May Tan-Mullins, *From the Ancient Silk Road to the Belt and Road Initiative: Narratives, Signalling and Trust-Building*, 23 BRITISH J. POL & INT'L RELS. 280 (2021).

⁸⁰ See Julien Chaisse, *China's International Investment Policy: Formation, Evolution, and Transformation(s)*, in 9 NIJHOFF INT'L INV. L. SERIES, INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 544 (Julien Chaisse & Luke Nottage eds., 2018).

⁸¹ See CAROLIJN VAN NOORT, CHINA'S COMMUNICATION OF THE BELT AND ROAD INITIATIVE: SILK ROAD AND INFRASTRUCTURE NARRATIVES (2021) (stating the narrative of China as a "good neighbor, good friend and good partner" including in its BRI relations with developing countries in Africa).

those states to treat its outbound investors.⁸² That reciprocity in investor treatment is unlikely to be linear or proportionate. It is more likely to operate instrumentally, such as in establishing a balance between safeguarding inbound investments and preserving stability in domestic markets. Neither China nor its partner states can disregard China's global economic dominance, nor the effect of that dominance upon BRI partner states. Contrarily, China's pursuit of profitable relationships will often require it to level the platform of economic dependence upon it to interdependence with it for shared gain.⁸³

In fostering such interdependence, China's collateral objective is to facilitate project integration, consistent with its own and its partner states' profit-seeking objectives.⁸⁴ Its means of achieving these objectives is through mutual engagement, such as in providing BIT partner state investors with reasonable access to China's domestic markets in return for access to the markets of partner states.⁸⁵ Attaining such interdependence also fosters cooperation among partner states over the portability of the proceeds of outbound investments, such as from the host to the home states of foreign investors.⁸⁶ It also entails China reconciling its "multiple identities" in maintaining such cooperation, in it being "simultaneously a regional and an emerging power."⁸⁷

China faces particular criticism that its BRI collaborations are subject to its rulemaking order and not truly collaborative.⁸⁸ The allegation is that China will embark on re-colonializing developing countries through its reliance on one-sided letters of understanding and treaty escape hatches grounded in its national interest. These assertions have abundant precursors among Western European states instigating one-sided Treaties of Friendship with post-

⁸² See, e.g., Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41 VIKALPA: J. FOR DECISION MAKERS 275 (2016) (explaining whether and how India's BITs promote inbound investment).

⁸³ See Li et al., *supra* note 33 (explaining the disruption of such interdependent relationships arising from economic instability, geopolitical tensions and de-globalization).

⁸⁴ See Yong Deng, *How China builds the credibility of the belt and road initiative*, J. CONTEMP. CHINA 1, 4–7 (2021) (on China's conception of its liberalized and liberalizing FDI regulatory framework). See also ROSELYN HSUEH, CHINA'S REGULATORY STATE: A NEW STRATEGY FOR GLOBALIZATION (2011) (exploring China's evolving strategy of economic liberalization).

⁸⁵ See Jingyuan Zhou, *A New Multilateralism? A Case Study of the Belt and Road Initiative*, 8 CHINESE J. COMP. L. 384 (2020) (elaborating on the development of China's rule-making role along its BRI).

⁸⁶ See Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005).

⁸⁷ Veysel Tekdal, , 31 PAC. , *China's Belt and Road Initiative: At the Crossroads of Challenges and Ambitions* China's Belt and Road Initiative: at the Crossroads of Challenges and Ambitions, 31 PAC. REV. 273, 273 (2018) (noting China's obstacles and ambitions in reconciling its multiple identities as a national, regional and global power).

⁸⁸ Maria Adele Carrai, Jean-Christophe Defraigne & Jan Wouters, *The Belt and Road Initiative and Global Governance: By Way of Introduction*, in THE BELT AND ROAD INITIATIVE AND GLOBAL GOVERNANCE 1 (Edward Elgar Pub. 2020) (responding to scholars who have, allegedly, not given enough credit to the BRI including China's collaboration with BRI partner states).

colonial developing states well into the Twentieth Century.⁸⁹ Their objectives included using such Treaties to acquire low-cost goods from developing countries for sale across lucrative developed markets.⁹⁰

The comparison between post-colonial Western Treaties of Friendship and China's BRI advancement is based on China replicating Western colonialization disguised as collaboration.⁹¹ Should China champion regulatory intervention to askew BRI collaboration, impacted states are motivated to retaliate against allegedly invasive regulations. Should China demand privileged treatment for its outbound investors from those states, it faces potential bloc reactions, such as from African states reacting to the perceived subjugation of their shared economic wellbeing.⁹²

How China responds to these challenges is influenced by its past investment cycles, its identification of strengths and deficiencies in its current cross-border investment strategies, and its capacity to build on those strengths and redress those weaknesses.

IV. CHINA AS AN FDI DESTINATION

The apprehension of China sublimating foreign investor protections to domestic protectionism in compliance with its planned market ideology is a long-standing argument advanced by Western liberal states.⁹³ That anxiety contrasts somewhat with reports of the alleged experiences of inbound investors in China. Considered by many as a welcoming destination for their

⁸⁹ See KENNETH J. VANDEVELDE, *THE FIRST BILATERAL INVESTMENT TREATIES: US POSTWAR FRIENDSHIP, COMMERCE AND NAVIGATION TREATIES* (2017) (exploring treaties of friendship as the first BITs in the post WW2 era).

⁹⁰ See FAISAL AHMED & ALEXANDER LAMBERT, *THE BELT AND ROAD INITIATIVE: GEOPOLITICAL AND GEOECONOMIC ASPECTS* (2021) (explaining the geopolitical and geo-economic attributes of China's Belt and Road in Eurasia and Africa historically, retraced to the present).

⁹¹ See Maja Glysing, *Belt and Road Initiative through Post-Colonial Theory: Does China's Belt and Road Initiative Fit the Post-Colonial Description of Draining a Developing State?* (June 6, 2022) (Bachelor's Thesis) (exploring China's use of its BRI for the "draining" of selected developing nations in the "post-colonial" era), <https://www.divaportal.org/smash/record.jsf?pid=diva2%3A1663149&dswid=5368>.

⁹² See William G. Dzekashu & Julius N. Anyu, *China's Belt and Road Initiative: Will it Make or Mar Development in the Central and West Africa Subregions?*, 10 J. PUB. ADMIN. & GOV. 19 (2020) (showing the contraction of trade and investment on China's BRI in Central and West Africa, and the reactions of the Forum on China-Africa Co-operation (FOCAC) in 2020 to declining FDI in the Region).

⁹³ See e.g., USTR, *USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices* (June 15, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products>; U.S. MISSION GENEVA, Ambassador Shea, *China's Trade-Disruptive Economic Model and Implications for the WTO* (July 27, 2018), <https://geneva.usmission.gov/2018/07/27/55299/>; see also Leah Wils-Owens, Office of Policy, Enft & Compliance, to Gary Taverman, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Sec'y for Enft and Compliance, (Oct. 26, 2017), 26, 2017) (on file with U.S. Dep't of Com., Int'l Trade Admin.), <https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf>; <https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf>.

investments, 83% of institutional investors with dedicated exposure to Chinese markets surveyed by the Economist Intelligence Unit in November 2019 said their investments in China had increased over the previous year.⁹⁴ Their view that China is a profitable investment destination was reflected in their confidence in the management of its economy,⁹⁵ and in promoting business growth and large-scale infrastructure projects there.⁹⁶ Inbound investors affirmed China's capacity, and tenacity, in growing from a poor agrarian country into the largest global FDI destination, all in less than fifty years.⁹⁷

China has further cemented its attractiveness to inbound investment by reducing its ownership of SOEs.⁹⁸ Its strategic intention is to avoid being perceived as managing FDI autocratically through its agents and surrogates; and to demonstrate its commitment to competitive investment practices across global markets.⁹⁹ In continuing to privatize SOEs, China has responded to the perception among prospective partner states and their investors that its SOEs are arms of the Chinese Government.¹⁰⁰ At the same time, a recent study suggests that China exercises "a unique degree of influence over its firms," and that state-owned and globally diversified firms "conform most closely to China's official guidance."¹⁰¹

China is also satiating the profit-seeking appetites of inbound investors from developed states by reducing barriers to investors' FDI entry into its markets at critical junctures, such as at times of declines in its foreign reserves.¹⁰² This is illustrated by China's reduction in 2017 of its 2015 negative list of industries through which it had formerly excluded foreign direct

⁹⁴ Tanner Brown, *China's Slowing Economy and Trade Troubles Aren't Scaring Some Foreign Investors*, BARRONS (Nov. 20, 2019), <https://www.barrons.com/articles/china-stocks-foreign-investors-51574262228>.

⁹⁵ See MICHAEL J. ENRIGH, *DEVELOPING CHINA: THE REMARKABLE IMPACT OF FOREIGN DIRECT INVESTMENT* (2016) (maintaining China's receptivity to inbound investment and how the capacity of foreign investors helps drive China's economy).

⁹⁶ See Andrew Bloomenthal, *6 Factors Driving Investment in China*, INVESTOPEDIA (Apr. 30, 2020), <https://www.investopedia.com/articles/economics/09/factors-drive-investment-in-china.asp>.

⁹⁷ See Leon Trakman et al., *Investor-State Arbitration in China: A Comparative Perspective*, in *DISPUTE RESOLUTION IN CHINA, EUROPE AND WORLD*, 231 (Lei Chen & Andre Janssen eds., 2020) (explaining China's expanding inbound investment under its evolving BIT regime).

⁹⁸ See Paul Hubbard, *'Fragmented Authoritarianism' and State Ownership*, E. ASIA F.Q. Jan. 23, 2017, www.eastasiaforum.org/2017/01/23/fragmented-authoritarianism-and-state-ownership.

⁹⁹ See U.S.-China Econ. and Sec. Rev. Comm'n, *CHINESE STATE-OWNED ENTERPRISES AND U.S.-CHINA BILATERAL INVESTMENT* (2011) (explaining the long-standing view of Chinese SOEs adopted by the US Government).

¹⁰⁰ See Minghao Zhao, *Is a New Cold War Inevitable? Chinese Perspectives on US-China Strategic Competition*, 12 *CHINESE J. INT'L POL.*, 371-94 (2019).

¹⁰¹ See Randall W. Stone et al., *Chinese Power and the State-Owned Enterprise*, 76 *INT'L ORG.* 229, 229-50 (2022) (exploring patterns of China's political influence over FDI through comprehensive firm-level data on outward Chinese FDI from 2000 to 2013 and a six country-level measure of affinity for China).

¹⁰² See Ji et al., *supra* note 76.

investments.¹⁰³ The result is that China is rendering Chinese industries selectively more accessible.¹⁰⁴

Further easing barriers to foreign investment in its domestic markets, China is reducing foreign entry requirements in its Free Trade Zones (FTZs).¹⁰⁵ It is extending approval for foreign participation in joint ventures (JV), while continuing to regulate foreign entry and ongoing participation. Illustratively, China has modified its 50:50 joint venture rule to permit majority foreign ownership of joint ventures. It has transformed prohibitions on inbound investments in selected industries into restricted entry.¹⁰⁶

China is also refining preferential foreign entry requirements beyond traditional barriers such as import origins, competition with domestic industry, and the destination of foreign goods and services.¹⁰⁷ It is shifting from all-or-nothing barriers to entry rewards, such as reduced entry charges and prioritized access to Chinese banks for resourcing foreign investments. These new entry incentives reflect China's selective transition from the exclusion of foreign investment based on trade and investment rivalries to collaborative alliances.¹⁰⁸

Complementing its lowering of entry barriers to FDI, China uses its managerial, technical, and financial resources to enable foreign investors to maintain stable economic operations in the Chinese economy.¹⁰⁹ It provides them with expert advice, loans, and subsidies to support joint ventures in its domestic markets, such as in rendering technology transfers more accessible

¹⁰³ See Alexander Chipman Koty & Zhou Qian, *China's New FTZ Negative List Removes Restrictions on Foreign Investment*, CHINA BRIEFING (June 28, 2017), <https://www.china-briefing.com/news/china-removes-27-restrictions-on-foreign-investment-in-new-ftz-negative-list/> (on China's reduction of its FTZ negative list).

¹⁰⁴ Dorcas Wong, *How to Read China's 2018 Negative List*, CHINA BRIEFING (July 7, 2018), <https://www.china-briefing.com/news/how-to-read-chinas-2018-negative-list/>.

¹⁰⁵ See, e.g., Dorcas Wong, *China's FTZ Count Rise to 21 After Beijing, Hunan and Anhui Are Newly Added*, CHINA BRIEFING (Sept. 28, 2020), <https://www.china-briefing.com/news/chinas-ftz-count-rise-to-21-after-beijing-hunan-and-anhui-are-newly-added/>.

¹⁰⁶ See, e.g., *China to Drop 50:50 Rule and Allow Foreign Majorities in Joint Ventures*, AUTOVISTA24 (Apr. 18, 2018), <https://autovista24.autovistagroup.com/news/china-drop-5050-rule-and-allow-foreign-majorities-joint-ventures/>.

¹⁰⁷ See *China's Negative List for Foreign Investment Access*, CHINA BRIEFING (Dec. 28, 2021), <https://www.china-briefing.com/news/chinas-foreign-investment-negative-list-2021-edition-english-version/>.

¹⁰⁸ See Chunlai Chen, *The Liberalisation of FDI Policies and the Impacts of FDI on China's Economic Development*, in CHINA'S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018 (Ross Garaut et al. ed., 2019); Ken Davies, *China Investment Policy: An Update* (OECD Working Papers on Int'l Inv. No. 2013/01, 2013), https://www.oecd.org/china/WP-2013_1.pdf; Paul Edelberg, *Is China Really Opening Its Door to Foreign Investment?*, FOX ROTHSCHILD (Nov. 8, 2017), <https://www.foxrothschild.com/publications/is-china-really-opening-its-doors-to-foreign-investment/>.

¹⁰⁹ See Guo Shuai Deng Kong Qing Jiang, *FOREIGN INVESTMENT LAW PERSPECTIVE* (CHINA BUSINESS PRESS, 2019) (on the value of attracting and sustaining inbound foreign investment in China's domestic economy).

in operation.¹¹⁰ In establishing a consultive framework, China further energizes foreign investors to consolidate their relationships with suppliers, purchasers, financiers, and related commercial entities operating within China's domestic markets.¹¹¹

In seeking the reciprocal protection of its outbound investors under its IIAs, China is expanding the scope of its outbound investor protections. Its objective is to facilitate a commercially efficient balance between inbound and outbound investments that recognizes the value of both. China's related objective is to offset the risk of its BIT partner states replicating its national interest regulations to expropriate Chinese investments in their economies.¹¹²

China's receptiveness to inbound foreign investors is illustrated by its "New Foreign Investment Law," which came into force on January 1, 2020, and stipulates equal treatment of foreign and domestic investors.¹¹³ Its attractiveness to inbound foreign investors is affirmed in part by a 15.9% increase in FDI in the first eleven months of 2021. FDI flows into China's services sector rose by 17%, with a 19.3% increase in high-tech industries. FDI from China's ASEAN partner states in those sectors jumped by 24.7% and 23.7%, respectively.¹¹⁴

Evidence of foreign inbound investor satisfaction with China is also portrayed by the rarity of foreign investor ISDS claims against it.¹¹⁵ This depiction of satisfaction with China's treatment of such investors is not singularly persuasive. Foreign investors have good reason to avoid lodging claims against an empowered state like China that can tenaciously resist such claims.¹¹⁶

Moreover, not all of China's inbound investors are satisfied with its allegedly generous treatment. Some have claimed that their investments in

¹¹⁰ See Srividya Jandhyala et al., *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. CONFLICT RESOL., 1043 (2011).

¹¹¹ See Shigeo Kobayashi et al., *The "Three Reform" in China: Progress and Outlook*, JAPAN RSCH. INST. (Sept. 1999), <https://www.jri.co.jp/english/periodical/rim/1999/RIME199904threereforms/>.

¹¹² Wei, *supra* note 45.

¹¹³ See Foreign Investment Law of People's Republic of China, (promulgated by the Nat'l People's Cong., March 15, 2019, effective Jan. 1, 2020). The Law extends protections to foreign investors and provides for equality between foreign and domestic investors. For an English translation of that Law, see Changhao Wei, *Foreign Investment Law of the People's Republic of China (2019)*, CHINA L. TRANS. (Mar. 15, 2019), <https://cc.bingj.com/cache.aspx?q=March+15+2019%2c+%e2%80%9cForeign+Investment+Law+of+People%e2%80%99s+Republic+of+China%e2%80%9d+&d=4599854236435826&mkt=en-AU&setlang=en-US&w=jjgbEav-Ma4rxY-Z7i3lwsySANq6TUAL>.

¹¹⁴ See *China Foreign Direct Investment*, TRADING ECON., <https://tradingeconomics.com/china/foreign-direct-investment> (last visited Oct. 6, 2022).

¹¹⁵ Vivienne Bath & Luke Nottage, *International Investment Agreements and Investor-State Arbitration in Asia*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1–36 (2020).

¹¹⁶ See Leon Trakman, *China and Foreign Direct Investment: Does Distance Lend Enchantment to the View?*, 2 CHINESE J. COMP. L. 1 (2013) (describing the incongruity between China's BITs and limited ISDS claims brought against it).

China have been subject to regulation to accommodate local neighborhoods designated by Chinese government officials for building projects.¹¹⁷ This criticism also should not be overstated. Expecting undisputed satisfaction with China's treatment of its inbound investors builds a wall too high for China to climb.¹¹⁸

V. COVID-19 AND INBOUND INVESTMENT

The predominantly affirmative portrayal of China's treatment of foreign investors could also shift perceptibly in the wake of COVID-19.¹¹⁹ Typically, a BIT host state or inbound foreign investor is likely to defend its inability to perform a contract concluded under an umbrella BIT due to an alleged inability to reasonably foresee the advent of COVID-19 and avert or mitigate its impact. Such legal bases for nonperformance might vary from intervening supply shortages, price gyrations, and labor disruptions, as consequences of the Pandemic.¹²⁰

Threats to China's BRI, supported by IIAs, are investment risks that are also faced by other states. These risks include, among others, global supply chain blockages that undermine and disrupt the supply of goods and services, including investment. Semi-conductors, such as chip supplies from Taiwan and South Korea, are in short supply, and surging import oil and iron ore prices have impacted the financing of oil exploration, extraction, and delivery. Massive disruptions in Chinese markets have also impacted inbound FDI, such as in the financing stress experienced in its commercial property sector.¹²¹

COVID-19 has exacerbated these FDI obstacles.¹²² China's efforts to maintain the attractiveness of its domestic markets for FDI by demonstrating

¹¹⁷ *But cf.*, Bureau of Economic and Business Affairs, *Investment Climate Statements, Custom Report Excerpts: China, Germany, Poland, South Africa, Zimbabwe*, US DEPT. OF STATE, <https://www.state.gov/report/custom/02d742740d/> (referring to foreign investors who have reported that their land use rights were revoked and given to developers to build neighborhoods designated for building projects by government officials. Some investors also complained about receiving nominal compensation for such revocations).

¹¹⁸ See Michael H. K. Ng, *FOREIGN DIRECT INVESTMENT IN CHINA: THEORIES AND PRACTICES* (Routledge, 1st ed. 2015) (covering a theoretical (chs. 2–4) and practical (chs. 5–7) analysis of FDI in China, including addressing concerns of inbound foreign investors).

¹¹⁹ See Stephen Minas, *The Belt and Road, and the Pandemic Detour*, China Belt and Road Initiative (Mar. 12, 2021) (reviewing DANIEL DRACHE, A.T. KINGSMITH AND DUAN QI, *ONE ROAD, MANY DREAMS: CHINA'S BOLD PLAN TO REMAKE THE GLOBAL ECONOMY* (2019)).

¹²⁰ See V. Yaremko & Y. Frank, *Proving Impediments Associated with Performance of the Contractual Obligations During the Spread of COVID-19*, *TRANS. DISP. MGMT.* (June 2, 2020), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1828#citation>.

¹²¹ See *e.g.*, CHINA'S POLITICAL ECONOMY IN THE XI JINPING EPOCH: DOMESTIC AND GLOBAL DIMENSIONS (Lowell Dittmer, ed., 2021) (noting the impact, inter alia, of rising commodity prices, and currency instability upon China's financial recovery).

¹²² See *NEW FRONTIERS IN ASIA-PACIFIC INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION* (Shahla Ali et al. eds., 2020) (highlighting the challenges posed by COVID to international investment law in Asia).

stability and continuity across its economy are fraught. In loosening entry barriers to inbound investors through its changing investment laws, China is not necessarily promoting a consistent and irreversible influx of inbound investors.¹²³ Such variability in China's inbound investment regime is a potential source of market volatility and fractured inbound investment. Attenuating that investment market instability is whether China's market regulatory strategies that precede the Pandemic will remain "fit for purpose" in unstable investment markets following it.¹²⁴

A significant consequence of Instability in China's inbound investor markets is the prospect of ISDS claims being lodged against China, although the extent of such claims remains uncertain.¹²⁵ As a wealthy BRIC nation, China is less vulnerable to ISDS claims than most developing states. China is also more ably resourced and assiduous in responding to claims from affluent inbound investors, even though the latter have won significant claims against developing states.¹²⁶ China is also able to screen out prospective claimants based, inter alia, on their national affiliations, litigation history, and capacity to mount ISDS claims against China.¹²⁷

Yet, China cannot accurately screen out prospective inbound ISDS claimants. China cannot accurately predict whether an inbound foreign investment applicant is likely to lodge an ISDS claim against them. Nor are such predictions reliable when the nature and extent of economic disruptions arising from the Pandemic remain uncertain.¹²⁸

China is also likely to remain impregnable to persistent ISDS attacks. The lack of claims against China to date is likely to change as the economic impact of COVID-19, and ensuing trade sanctions, escalate. Moreover, well before the advent of COVID-19, foreign investors won significant ISDS claims against developed host states, such as Germany, for expropriating or otherwise

¹²³ Sheng Zhang, *Protection of Foreign Investment in China: The Foreign Investment Law and the Changing Landscape*, EUR. BUS. ORG. L. REV. 1, 1 (2022) (highlighting the 2019 Foreign Investment Law (FIL) that replaced the laws and regulations governing foreign investment in China for four decades).

¹²⁴ See e.g., Kerry Liu, *Covid-19 and the China Opportunity Narrative: Investment, Trade, and the Belt and Road initiative*, INT'L REV. APPLIED ECON. 1 (2022) (covering the impairment of China's Belt and Road arising from structural breaks following the Pandemic).

¹²⁵ Dilni Pathirana, *A Look into China's Slowly Increasing Appearance in ISDS Cases*, IISD INV. TREATY NEWS (Sept. 26, 2017), <https://www.iisd.org/itn/en/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/>.

¹²⁶ See GUS VAN HARTEN, *THE TROUBLE WITH FOREIGN INVESTOR PROTECTION* (OXFORD, 2020) (maintaining that ISDS protections often provide exceptional advantages to the wealthy).

¹²⁷ Ming Du, *Explaining China's Approach to Investor-State Dispute Settlement Reform*, EUROPEAN L. J. (2022 forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4150968 (examining the assertion that absence of ISDS claims against China is attributable to its lack of a rule of law tradition, including its treatment of inbound investors).

¹²⁸ See L. Clover Alcolea, *The COVID-19 Crisis: Core Investment Law Issues Revisited*, TRANS. DISP. MGMT. (2020), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1822> (on lacuna in academic writing on claims against states as a result of an epidemic).

regulating their inbound investments.¹²⁹ China's embroilment in trade and investment conflict since the Pandemic is likely to accentuate the prospect of such claims against it, especially given unexpected gyrations across global investment markets since early 2020.

China also faces obstacles in invoking the post-Pandemic economic fallout as a basis for a national interest defense, given its rebounding economy.¹³⁰ Arguably, the severity of COVID-19's impact upon particular sectors of its economy is often insufficiently severe to justify its regulatory action on national interest grounds. Evidencing China's economic capacity to sustain FDI shocks and notwithstanding its declining FDI in 2020, its inbound FDI rose by an average of 2.6 percent each year for some years preceding 2020.¹³¹ Other than its inbound FDI declining to 0.5 percent in the first seven months of 2020, China has remained an attractive FDI destination.¹³² Indications of its fiscal recovery since the early stages of COVID-19 also suggest that most sectors of its economy are no longer in retreat.

However, China has plausible, but limited, public interest justifications for reinforcing necessity¹³³ and economic hardship¹³⁴ defenses under customary international law. China is facing declining revenues due to trade sanctions and investment restrictions, exacerbated since the advent of COVID-19. These disruptions accentuate market risks, such as price surges, supply shortages, and receding demand. They impact workplace supply and demand. Accompanying these financial pressures is China's need to invest in its aging population, redress inadequate social servicing, and remedy ecological damage.¹³⁵

The contention that the Chinese economy has endured significant financial shock adds legitimacy to its national interest defense, demonstrated through sector-based economic hardship, or even necessity.¹³⁶ Intertwined fiscal constraints, public safety threats, and environmental hazards also likely

¹²⁹ Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6).

¹³⁰ Ian Johnson, *China's Lost Decade*, N.Y. REV. (Sept. 27, 2012) <http://www.nybooks.com/articles/2012/09/27/chinas-lost-decade/>.

¹³¹ *China Foreign Direct Investment*, TRADING ECON., <https://tradingeconomics.com/china/foreign-direct-investment> (last visited Jan. 8, 2022).

¹³² *Id.*

¹³³ See J.P. Moyano García, *Customary Law Defenses Against COVID-19 Investment Claims*, TRANS. DISP. MGMT. (2020), <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1830>.

¹³⁴ See Klaus Peter Berger & Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, 6 MCGILL J. DISP. RESOL. 76 (2019) (on the law relating to force majeure and hardship including the issuance of force majeure certificates by the CCPIT).

¹³⁵ See e.g., PETER BALÁŽ, ET AL., CHINA'S EXPANSION IN INTERNATIONAL BUSINESS: THE GEOPOLITICAL IMPACT ON THE WORLD ECONOMY 161–235 (Palgrave Macmillan, 2020).

¹³⁶ See W. Mark et al., *Necessity and the Covid-19 Pandemic*, 15 CAP. MKT. L.J. 277 (2020) (on the defense of necessity as a rule of customary international law under Article 25 of the International Law Commission's Draft Articles on Responsibility of State for internationally wrongful acts).

legitimize China's regulation of foreign investments and restrict its liability for compensation. The extent to which these results may eventuate, and their economic impact post-Covid-19, remains unclear.

China is also likely to provide COVID-19 shields to selected domestic sectors arising from contract claims by inbound investors. The China Council for the Promotion of International Trade (CCPIT) has already done so by issuing force majeure certificates to domestic defendants as defenses against foreign investor claims of contract default.¹³⁷ Such certificates are provided for in Article 94 of the "Contract Law of The People's Republic of China," which entitles parties to terminate contracts due to force majeure or impossibility.¹³⁸

China is motivated to continue issuing force majeure defenses that provide performance relief to contract parties due to circumstances beyond their reasonable control and ability to foresee, such as the economic ramifications of successive waves of COVID. The changing "new normal" also provides a basis for China to adopt a national interest test post-COVID that includes necessity and economic hardship.¹³⁹ The issuance of force majeure certificates under Chinese law is likely to reinforce such defenses.

VI. WILL CHINA RETRENCH OUTBOUND INVESTMENT?

China's once geometrically accelerating outbound investments are now subject to mounting erraticism in financial markets, escalating inflation, and competing demands on its foreign exchange reserves.¹⁴⁰ China faces formidable choices over whether to create, solidify, or withdraw from outbound FDI initiatives, especially in a financial world that is still reeling from the Pandemic.¹⁴¹ China also has strategic allocation options regarding whether it will selectively withdraw its support for outbound FDI to satisfy domestic social security demands from which it will be reluctant to retreat.¹⁴² As a result, China is juxtaposed between allocating financial resources to infrastructure

¹³⁷ *More Than 4,300 Force Majeure Certificates Issued to Exporters*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE, BEIJING SUB-COUNCIL (Feb. 28, 2020, 3:29 PM), *see also* Huileng Tan, *China Invokes 'Force Majeure' to Protect Businesses — but the Companies May Be in for a 'Rude Awakening*, CNBC (Mar. 6, 2020, 2:30 AM), <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html>.

¹³⁸ *Contract Law of the People's Republic of China*, CHINA ORG. (Feb. 12, 2011) http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21908031.htm.

¹³⁹ *See* Ş. Esra Kiraz & Esra Yıldız Üstün, *COVID-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards*, 25 UNIF. L. REV. 437 (2020) (on the use of a certificate of force majeure issued to a Chinese buyer).

¹⁴⁰ *See* Yu Yvette Zhang et al. *Challenges and Opportunities Facing the Chinese Economy in the New Decade: Epidemics, Food, Labor, E-Commerce, and Trade*, CHINESE ECON. 373 (2021) (on challenges to China in protecting its FTZs.)

¹⁴¹ *See* Jing Fang et al., *On the Global COVID-19 Pandemic and China's FDI*, 74 J. ASIAN ECON., (2021) (on the risks and challenges to inbound FDI during and after the Pandemic).

¹⁴² *See* RICHARD HEINBERG, *THE END OF GROWTH: ADAPTING TO OUR NEW ECONOMIC REALITY* (2011).

initiatives and fulfilling domestic social commitments, such as old-age pensions, health care, environmental protection, and employment.¹⁴³

Added to China's outbound investment constraints are economic sanctions imposed on its outbound investors which are heightened by COVID-19.¹⁴⁴ Those constraints include the selective blacklisting of Chinese entities, the exclusion of imports from specific Chinese sectors, and the imposition of taxes and duties on inbound Chinese goods in those sectors. The further result is a trickle-down effect of such sanctions on the relevant financial market, including in the states that impose such sanctions on China.¹⁴⁵

China's responses to these objectives are critical. Its potentially mutually contradictory objective is to protect its outbound investors from external regulatory constraints while endeavoring to limit and sometimes appease inbound investor claims against it.¹⁴⁶ A related challenge is to determine whether and how it should restrict inbound investor protections, such as on national security grounds, while accounting for the impact of those restrictions upon its outbound investors in partner investor states. This imposes a macro-economic dilemma for China to avoid using national security shields against inbound investors if it wishes to discourage BIT partner states from raising corresponding national security shields against Chinese inbound investors.¹⁴⁷ A longer-term strategic dilemma for China is to consider the likely sequela of it raising national security defenses to inbound investor claims upon the continuity, not only of investor-state dealings, but also state-to-state relations.

Measured in macro-economic terms, China has much to gain by expanding Chinese outbound investments and a significant amount to lose in failing to do so. As an illustration, it has built diverse international assets of approximately \$1 trillion between the advent of the Pandemic and the first quarter of 2021.¹⁴⁸ With its state-controlled and private enterprises, it has financed multiple BRI projects that have aided development in otherwise disadvantaged states and paved the way for infrastructure expansionism along its BRI.¹⁴⁹ Chinese regional and affiliated banks, such as the Asian Infrastructure Investment

¹⁴³ See Hongwei Liao et al., *Outward FDI, Industrial Structure Upgrading and Domestic Employment: Empirical Evidence from the Chinese Economy and the Belt and Road Initiative*, 74 J. ASIAN ECON., (2021) (an empirical analysis on the correlation between China's outward FDI and growth of its domestic economy, particularly employment).

¹⁴⁴ Fang et al, *supra* note 141.

¹⁴⁵ See Ganz, *supra* note 14.

¹⁴⁶ See Fassory Sangaré, *International Trading Wars and Governance: The Effect of COVID-19*, 6 BUS. & ECON. DEV. 73 (2021) (on protective measures in trade wars in the COVID-19 era).

¹⁴⁷ See Mark McLaughlin, *State-Owned Enterprises and Threats to National Security Under Investment Treaties*, 19 CHINESE J. INT'L L. 283 (2020).

¹⁴⁸ Tony Fang & John Hassler, *Globalization, Political Economy, Business and Society in Pandemic Times*, 36 INT'L BUS. & MGMT. 1, 1–10 (on China's global economic and political influence in Pandemic times).

¹⁴⁹ *Id.*

Bank (AIIB), in turn, have provided financial support for such projects.¹⁵⁰ Chinese contractors have supplied project equipment, materials, and managerial expertise.¹⁵¹ In continuing to support the construction of these projects, China is likely to compound its FDI profits and those of its outbound investors.

China is nevertheless expected to incur significant economic and political costs in seeking to secure such profits. Those costs are not unlike China's struggle to expand its trade and investments westwardly two thousand years ago, during the Han Dynasty (206 BCE–220 CE).¹⁵² With Central Asia as the epicenter, Chinese dynasties have for centuries supported the construction of Westbound roads on which Chinese merchants sold silk, spices, jade, ivory, glass, gold, and other precious metals. Traffic along these roads were subject to interruption. They were disrupted by Roman and Byzantine competition in trade and investment during the Tang Dynasty (618–907 CE). Disruptive, too, were rivalries along merchant roads, such as between European merchants traveling east and competing with Chinese merchants traveling west. Some of these economic disruptions are exemplified in the current East-West "cold war" over the continuing of cross-border trade and investment, as intensified with the onset of the Pandemic. Less likely to herald a "cold war" is competition between China's BRI and the EU's Global Gateway. However, that rivalry could regress into trade and investment warfare.¹⁵³

What is unlikely to eventuate is that China's modern Belt and Road will be vanquished in the intermediate future. China may retreat intermittently from its BRI, as it did sporadically on its ancient Silk Road.¹⁵⁴ But its ancient

¹⁵⁰ See CHINA'S GLOBAL REACH: THE BELT AND ROAD INITIATIVE (BRI) AND ASIAN INFRASTRUCTURE INVESTMENT BANK (AIIB) (Suisheng Zhao, ed., 2020) (on the AIIB's importance, regionally and globally, in financing China's BRI expansion). See also CHINA'S NEW GLOBAL STRATEGY: THE BELT AND ROAD INITIATIVE (BRI) AND ASIA INFRASTRUCTURE INVESTMENT BANK (AIIB), VOL. I (Suisheng Zhao, ed., 2020) (on the AIIB funding infrastructure projects in Asia).

¹⁵¹ CRISTIANO RIZZI ET AL, CHINA'S BELT AND ROAD: THE INITIATIVE AND ITS FINANCIAL FOCUS (2018) (focusing on the role of institutions, such as international banks and banks in China in supporting China's OBOR (BRI) Initiative.).

¹⁵² See, e.g., TOM MILLER, CHINA'S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD (2017) (noting China's inspiration to build infrastructure projects across Asia, Europe and Africa based on its ancient Silk Road history traditions and modern economic development initiated in the mid-20th Century).

¹⁵³ See e.g., Anurag Roushan, *EU to Announce Own Infrastructure Plan to Rival China's Belt and Road Initiative*, REPUBLIC WORLD (Nov. 16, 2021), <http://www.republicworld.com/world-news/europe/eu-to-announce-own-infrastructure-plan-to-rival-chinas-belt-and-road-initiative.html>.

¹⁵⁴ See Muhammad Afzaal, *Prospects for China's Belt and Road Initiative (BRI): Implications, Assessment and Challenges*, 28 ASIA PAC. BUS. REV. 130 (2022) (reviewing China's globalization and the Belt and Road Initiative (2020)) (on the history of China's BRI, from the inception of the Silk Road to the present).

Silk Road was never vanquished; nor is China's BRI likely be trammled in the foreseeable term.¹⁵⁵

The immediate obstacles to China's consolidation of the BRI are also not intractable. Significant countervailing factors demonstrate its ability to offset the global economic slowdown in FDI, tactically allaying foreign investor aversion to join its BRI, and allocate capital to sustain it.¹⁵⁶ In place of confrontation, China's leaders envisage cross-border cooperation, bolstered by intercultural and economically enriching BRI exchanges. Its goals, as enunciated by Xi Jinping, stress openness, innovation, and sustained dialogue with IIA partner states and their investors. The means of fulfilling those goals, President Xi opined in June 2021, is for China to finance BRI developments along that path in a manner that protect the "vital interests" of partner countries for their shared good, however it is conceived.¹⁵⁷

VII. CHINA'S EVOLVING INTERNATIONAL HORIZONS

China has crafted a modern Belt and Road that is distinctive but also diverse in nature and operation. Not unlike its ancient Silk Road, China's modern pathway is transregional in nature. But its global reach is far more extensive than was its ancient predecessor. Moreover, in travelling along the ancient Silk Road, all "roads used to lead to Rome. Today they lead to Beijing."¹⁵⁸

Economic turmoil flowing from destructive waves of COVID-19, coupled with geo-political global conflict, nevertheless destabilize the BRI.¹⁵⁹ China's well-trodden pathway is subject to ebbs and flows arising from political destabilization and market irregularities. Investment outflows from China are subject to import and export licensing requirements, levies and duties, and cross-border financing restrictions.¹⁶⁰ China's anticipated response is to impose taxes and duties on investment inflows from countries that restrict Chinese outbound investments. Faced with restrictions on Chinese outbound investments, China is reasonably expected to impose antidumping and

¹⁵⁵ See TIM WINTER, *GEOCULTURAL POWER: CHINA'S QUEST TO REVIVE THE SILK ROADS FOR THE TWENTY-FIRST CENTURY* (2019) (on China's geo-cultural and political appropriation of its ancient Silk Road).

¹⁵⁶ Weidong Liu & Michael Dunford, *Inclusive Globalization: Unpacking China's Belt and Road Initiative*, 1 AREA DEV. AND POL'Y 323 (2016) (on China's BRI as "a call for an open and inclusive (mutually beneficial) model of cooperative economic, political and cultural exchange (globalization) that draws on the deep-seated meanings of the ancient Silk Roads.").

¹⁵⁷ *Id.* at 323–340.

¹⁵⁸ See PETER FRANKOPAN, *THE NEW SILK ROADS: THE PRESENT AND FUTURE OF THE WORLD* 117 (2019) (discussing the competing global political, economic, and social "roads" in the modern era, and China's growing influence on their development).

¹⁵⁹ See Daria Davitti et al., *COVID-19 and the Precarity of International Investment Law*, IEL COLLECTIVE (May 6, 2020), <https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878>.

¹⁶⁰ See Dan Steinbock, *U.S.-China Trade War and Its Global Impacts*, 4 CHINA Q. INT'L STRATEGIC STUD. 515 (2018).

countervailing duties on imports from countries like Australia, against whom China filed a claim before the World Trade Organization (WTO) in 2021.¹⁶¹

How China will retaliate against states that restrict entry to inbound Chinese trade and investment in the intermediate and longer term remains an issue. One response is for China to adopt reciprocal and proportionate measures to states that blacklist inbound Chinese goods and services. The risk is that China or the opposing state will ratchet up their regulatory measures, leading to the downward spiral in cross-border FDI. The ancillary risks are twofold. First, inbound investors from oppositional states will be trapped in a widening spiral of intrusive regulations imposed by the host state. Second, such intrusive regulations will lead to fractious ISDS claims against those host states.¹⁶²

China faces critical issues in determining how to redress prospective ISDS claims against it in a post-Pandemic financial world. Possible responses include whether China will conclude BITs with standardized ISDS clauses, protecting itself from claims brought by investors from BIT partner states, balancing against the risk of inbound investors from those partner states invoking those clauses to protect themselves from inbound Chinese investors. At issue is the scope and timing of dispute resolution options, such as whether they provide for state-to-state dispute resolution to precede, accompany, post-date, or substitute for ISDS.¹⁶³

China's election among such dispute resolution options entails advanced and continuous planning. One of the considerations is whether investor protections and state defenses provided for by contract will be required to comply with dispute resolution provisions under an umbrella treaty. Any method China chooses to adopt to protect its national interest which is perceived as undermining or diverting from current treaty dispute resolution measures, will potentially strain its relationship with its partner states and their inbound investors.¹⁶⁴ Attenuating those strains lies the perception of China extending its national security defenses and limiting investor protections outside of the treaty framework. At their most volatile, these strains in China's partner relationships undermine both the effectiveness of its BIT treaties and destabilize investment contracts concluded outside the purview of such treaties,¹⁶⁵ particularly in the COVID era. At their most expansive, restrictions on trade and investment directed at discrete industries

¹⁶¹ Joshua Nelson, *China Files WTO Complaint Against Australia Over Anti-Dumping and Countervailing Duties*, JURIST (June 26, 2021), <https://www.jurist.org/news/2021/06/china-files-anti-dumping-complaint-against-australia-in-the-wto/>.

¹⁶² See CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 141 (2015) (elaborating on such proportionality in ISDS).

¹⁶³ See Afzaal, *supra* note 154.

¹⁶⁴ See, e.g., Kobayashi et al., *supra* note 111.

¹⁶⁵ Hyun-Hoon Lee, Kazunobu Hayakawa, & Cyn-Young Park, *The Effect of COVID-19 on Foreign Direct Investment*, 52 GLOBAL ECON. REV. 1 (2023) (on the destabilizing impact of the Pandemic in the formation and performance of FDI agreements).

and states, extend to other industries and other states. That scenario is typified by reciprocal import-export restrictions on raw materials from Australia into China. The scenario is replicated by reciprocal import-export restrictions in other industries, between China and other Western states with which China has investment treaties. The result is to open a Pandora's box of reciprocal dispute resolution scenarios involving a widening range of industries and states.¹⁶⁶

China's response to reciprocal trade restrictions is to avoid the spiraling of disputes from its exercise of national security defenses, especially extending beyond liberal conceptions of state protections under international investment law. So understood, China's adaptive strategy is to avoid this spiral by increasing investor protections and reduced national security constraints on those protections. That adaptive strategy is illustrated in China's dispute resolution planning over the course of three generations of Model BITs. China's changes included the liberalization of its regulatory machinery away from domestic courts to investor-state arbitration.¹⁶⁷ It concluded BITs under its first-generation Model BIT that restricted the rights of inbound investors from treaty partner states. Its successive model BITs also widened the scope of investor protections.¹⁶⁸ China also liberalized its BITs contextually, in recognition of its asymmetrical BIT relationships, such as between developed and developing states, as well as the lengthy delay since its third generation BIT.¹⁶⁹

The significance of China's endorsement of these liberal reforms is diminished by its reservations in adopting the ICSID based primarily on jurisdiction, coupled with the limited number of cases in which it has engaged in ISDS under such multilateral Conventions.¹⁷⁰ While China has liberalized the treaty protections accorded to inbound investors, those developments are reflected more in its second and third generation treaties than in actual ISDS awards.¹⁷¹ What is absent, therefore is evidence on how ISDS tribunals

¹⁶⁶ See Weihuan Zho & James Laureceson, *Demystifying Australia-China Trade Tensions*, 56 J. WORLD TRADE 51 (2022).

¹⁶⁷ Leon Trakman & Kunal Sharma, *Jumping Back and Forth between Domestic Courts and ISDS*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW 316, 316–38 (Steffen Hindelang & Markus Krajewsk eds., 2016).

¹⁶⁸ See Heng Wang & Lu Wang, *China's Bilateral Investment Treaties*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (2020) (describing changes and trends in Chinese bilateral investment treaties).

¹⁶⁹ See CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL AND GLOBAL LAW AND POLICY (Julien Chaisse ed., 2019) (detailing China's bilateral, regional and global investment strategy).

¹⁷⁰ China notified the ICSID on January 7, 1993 of its reservation to the ICSID Convention, stating that "pursuant to Art. 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the ICSID disputes over-compensation resulting from expropriation and nationalization." *About ICSID*, ICSID, <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30> (last visited Sept. 23, 2020).

¹⁷¹ See Wang & Wang, *supra* note 44.

construe such treaty provision reforms and how domestic courts review those constructions. The result is a narrow jurisprudence on state regulations and investor protections in China's BITs, absent evidence of how those regulations and protections are construed by courts of law.

The proliferation of China's BITs accentuates the narrowness of BIT jurisprudence due to the need to interpret dispute resolution provisions differently according to the generation of the BIT.¹⁷² That uncertainty extends beyond the interpretation of dispute resolution provisions in Chinese BITs to their interpretation generally, such as in construing the scope of investor protections in ISDS. This uncertainty is conspicuously exemplified in the draft EU-China Agreement which leaves investor-state dispute settlement to the subsequent agreement between China and the EU.¹⁷³ The uncertainty includes whether the parties adopt dispute resolution choices beyond ISDS, such as for a multilateral investment court (MIC), and whether that choice resembles the EU's MIC.¹⁷⁴ Illustratively, a China-EU MIC could provide for an appellate division to address appeals from trial investor-state decisions. It could also contain specific rules governing the appointment of trial and appellate judges and the conduct of proceedings.¹⁷⁵ That model could provide the basis for a MIC adopted by the WTO.¹⁷⁶

The extent to which China's future dispute resolution provisions include domestic options is uncertain as well. For example, China has already provided for investor-state disputes to be heard by the China International Economic Trade Arbitration Association (CIETAC), as distinct from global investor-state institutions such as the ICSID and UNCITRAL.¹⁷⁷

This growth of domestic arbitration options to resolve international investment disputes is only one option for China. Another option is whether to opt for a single multinational arbitration choice contained in a Model Free Trade and Investment Agreement and/or disparate alternatives. Among these

¹⁷² *Id.*

¹⁷³ See Xiaoyu Fan, *Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI) Negotiation and the ISDS Reform*, 8 CHINESE J. COMP. L. 635–638 (2020); CHINA, THE EU AND INTERNATIONAL INVESTMENT LAW: REFORMING INVESTOR-STATE DISPUTE SETTLEMENT 248 (Li Yuwen et al., eds., 2019).

¹⁷⁴ See Wei, *supra* note 46.

¹⁷⁵ Katia Fach Gómez, *EU-China Negotiations on Investor State Dispute Settlement within The CAI Framework: Are we on the right track?*, REVISTA GENERAL DE DERECHO EUROPEO 55, 61–71 (2021) (discussing the failure of the China-EU draft Agreement to provide for ISDS and uncertainty over its prospective attributes.)

¹⁷⁶ See REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE, 61–73 (Bernard Hoekman et al., eds., 2021).

¹⁷⁷ *Id.* (noting CEITAC's adoption of ISDS, with the approval of the Chinese Government); see Huiping Chen, *China's Innovative ISDS Mechanisms and Their Implications*, 112 AJIL UNBOUND 207–11 (2018); see also Manjiao Chi, *The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?*, 28 ASIA PAC. L. REV. 279–96 (2021); Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETHERLANDS INT'L L. REV. 503–551 (2020) (on China's reforms on ISDS, including resort to CEITAC).

alternatives are bilateral investor-state mechanisms for resolving disputes contained in different BIT models; pluralistic dispute resolution options such as regional investment treaty models that take account of the economic development in partner states; and diplomatic methods of resolving disputes over political risks to foreign investors beyond litigation.¹⁷⁸

China's existing investment treaty practices do not preclude it from changing direction in the future, including in resolving investor-state disputes. Beyond BITs referring disputes to domestic courts, China's adoption of alternatives to ISDS is limited to date. It has provided for online dispute resolution to resolve investor-state disputes arising from smart contracts.¹⁷⁹ It is also under pressure to consider alternatives to ISDS in negotiating investment treaties, such as in its negotiations with the EU member states.¹⁸⁰ However, China has continued to adopt ISDS extensively and consistently with its third-generation Model BITs, including also providing the parties with a choice between ISDS and domestic judicial proceedings. It has continued to stipulate that investor-state disputes be decided under the Rules of the ICSID, a creature of the World Bank, or under the UNCITRAL Rules that refer investor-state disputes to the Permanent Court of International Arbitration.¹⁸¹

China could modify these institutional structures perceptibly within a shifting global economy. It could incorporate dispute avoidance options into BITs such as mediation. It could revert to an international investment treaty with its own distinctive dispute avoidance and resolution measures. Nor do its existing treaty models prevent China from reverting to historical measures of addressing investor-state disputes, such as through diplomatic measures in which host and home states use their good offices to resolve such disputes.¹⁸² There is also a case for China adopting a comprehensive and unified dispute settlement mechanism to replace existing BRI options.¹⁸³

¹⁷⁸ Carolina Moehlecke & Rachel L. Wellhausen, *Political Risk and International Investment Law*, 25 ANN. REV. POL. SCI. 485–507 (2022) (discussing international investment law as a means of mitigating political risk to foreign investors and reliance on ISDS, among other means, to resolve disputes arising from such risks).

¹⁷⁹ Julien Chaisse & Jamieson Kirkwood, *Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution*, 5 STAN. J. BLOCKCHAIN L. & POL'Y. 62–91 (2022).

¹⁸⁰ Vera Wegmann & David Hall, *The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms*, 87 INT'L REV. ADMIN. SCI. 480–96 (2021).

¹⁸¹ See e.g., CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 10–69 (2d ed. 2001); Jane Y. Willems, *The Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction*, 8 S.C.J. INT. L. & BUS. 1–62 (2011); Monika C.E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 11 J. INT'L ECON. L. 507–26 (2008); and *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/about/member-states/database-of-member-states> (last visited Oct. 6, 2021).

¹⁸² On such diplomatic measures, see *infra*, Part VIII.

¹⁸³ Zhipeng He & Jianzhou Zhao, *A China-Led Comprehensive Dispute Settlement Mechanism for the Belt and Road Initiative: Is It Too Early?*, 29 ASIA PAC. L. REV. 86–106 (2021) (discussing the arguments for and against China adopting a uniform dispute resolution mechanism).

An alluring option is for China to enter into multilateral investment agreements with a plurality of states that provide a shared dispute resolution model. China is currently an active participant in ongoing discussions on reforming investor-state dispute resolution institutions under the auspices of the United Nations Commission on International Trade Law Working Group III (UNCITRAL WG III) which addresses among other things, a multilateral appeal mechanism.¹⁸⁴ However, agreement among states upon multilateral measures is likely to face roadblocks and require trade-offs, such as in agreeing on the value, structure, and operation of a multilateral appellate tribunal. States will likely resist multilateral measures they consider threats to their sovereignty, particularly given the range of state powers at issue, not least of all, China's growing global influence.¹⁸⁵ However, it is conceivable that China will support a multilateral institutional option, such as that which was adopted under the auspices of the WTO, to provide the "institutional architecture" for resolving investment disputes.¹⁸⁶ It is also plausible that the WTO will adopt and develop the EU-China Comprehensive Agreement on Investment as part of its global "institutional architecture."¹⁸⁷ Significantly, too, is the subsequent prospect of a WTO dispute resolution institutional architecture ameliorating the global impact of accelerating trade conflict, such as between the US and China, that has repercussions on global trade and investment markets.¹⁸⁸

A related option is for China to support a judicialized model of international dispute resolution that resembles, or deviates from, the EU's Multilateral Investment Court.¹⁸⁹ A tactical issue is whether it sacrifices preferred dispute resolution options, such as ISDS in BITs, to secure multilateral support for a one-size-fits-all institution for dispute resolution,

¹⁸⁴ See UNITED NATIONS UNCITRAL, *UNCITRAL Working Group III: Investor-State Dispute Settlement Reform* (Sept. 21, 2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/210921_status_of_work_wg_iii.pdf.

¹⁸⁵ Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETH. INT'L L. REV. 503 (2020).

¹⁸⁶ See Hang Wang, *Selective Reshaping: China's Paradigm Shift in International Economic Governance*, 23 J. INT'L ECON. L. 583, 606 (2020).

¹⁸⁷ See Jürgen Kurtz & Baihua Gong, *The EU-China Comprehensive Agreement on Investment: A Model for Investment Coverage in the World Trade Organization?*, in REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE (Bernard Hoekman, et. al. eds., 2021) (e-book).

¹⁸⁸ See Fu Chen & Guofeng Wang, *A War or Merely Friction? Examining News Reports on the Current Sino-US Trade Dispute in The New York Times and China Daily*, 19 CRITICAL DISCOURSE STUD. 1 (2022) (discussing the extent to which the US-Sino trade war that commenced in 2018 was grounded in a response to China's political-economic ideology and the US's related national security concerns).

¹⁸⁹ Hongling Ning & Tong Qi, *Multilateral Investment Court: The Gap Between the EU and China*, 4 CHINESE J. OF GLOB. GOVERNANCE 154 (2018) (detailing obstacles between the EU and China in institutionalizing an international investment court); MARC BUNGENBERG & AUGUST REINISCH, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT: OPTIONS REGARDING THE INSTITUTIONALIZATION OF INVESTOR-STATE DISPUTE SETTLEMENT 167-87 (2019) (discussing the benefits attributed to an international investment court, namely, the rule of law, reduced costs of investment protection, transparency, consistency in case law, and effective enforcement of MIC decisions).

such as the WTO. Should that institution be unable to function, as the current experience with WTO's Appellate Body, an alternative mechanism might be adopted, such as an interim appeals mechanism embodied in the comprehensive Sino-EU agreement. That mechanism could be adopted in a modified form by the WTO.¹⁹⁰

The question of whether China will continue to subscribe to ISDS or diverge in adopting it in different BITs, FTAs, and a multilateral investment agreement remains. Conversely, China might continue to support the institutionalization of ISDS, attempt to remodel it, or reject it in favor of alternative measures.

VIII. CHINA'S DISPUTE RESOLUTION STRATEGIES

In making strategic choices among institutional structures to govern dispute avoidance and resolution structures, China will most likely assess these choices primarily according to its perception of their normative value.¹⁹¹ The common denominator linking the strategic choices is its need to model dispute resolution options according to their economic efficiency and political sustainability, measured over time, place, and space. For example, China can be expected to utilize a gains-based analysis in choosing variants of bilateral and multilateral models.¹⁹² Illustratively, it could modify such dispute resolution options in response to systemic but variable threats to their applicability, such as in response to the vulnerability of the market sector and post-Pandemic disruptions. The central issue is the affordability of these dispute resolution alternatives and the parties' capacity to invoke them in an efficient and cost-effective manner.¹⁹³

China's institutional options are diffuse but, arguably, capable of being harmonized. One global option is for China to move beyond a predominantly two-tiered BIT treaty program between Western liberal states on the one hand and developing states in Asia and Africa on the other. Another option is to develop a multi-tiered investment regime that provides for both. China could also use this strategy to pluralize its investment treaties through a tactical combination of multilateral options.¹⁹⁴ Its common denominator might be to resort to selective bilateralism within the framework of an umbrella investment treaty, or as operating distinctly from it.

¹⁹⁰ See PETROS C. MAVROIDIS, *THE WTO DISPUTE SETTLEMENT SYSTEM: HOW, WHY AND WHERE?* 572 (2022) (on the right of appeal before the WTO).

¹⁹¹ Leon Trakman & David Musayelyan, *The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration*, 31 ICSID REV. 194 (2015).

¹⁹² Michael M. Du, *China's "One Belt, One Road" Initiative: Context, Focus, Institutions, and Implications*, 2 CHINESE J. GLOBAL GOVERNANCE 30 (2016) (on the cost to China of negotiating a multilateral investment treaty as distinct from the costs of its BIT program).

¹⁹³ See Leon Trakman, *China and Foreign Direct Investment: Looking Ahead*, in CHINA AND INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION 137-41 (Qiao Liu & Wenhua Shan eds., 2016).

¹⁹⁴ Binh Duong Nguyen, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, 22 J. INT'L ECON. L. 523, 526 (2019).

China's gains-based assessment of FDI benefits and losses is also likely to include a tactical assessment of the economic and political ramifications of selective treaties and contractual bilateralism and regionalism. For example, China could sign primarily bilateral treaties with developed states such as Australia under the China-Australia BIT treaty,¹⁹⁵ but rely predominantly on its outbound investors to conclude infrastructure contracts with developing African states.¹⁹⁶ Key to modeling infrastructure contracts might be for China to balance formal conceptions of state sovereignty as absolute and indivisible against the functional reality of 'unequal sovereignty' between China and its developing partner states.¹⁹⁷ Tactical, too, is whether China adopts a multitiered treaty program in which it seeks to harmonize disparate agreements between developed and developing states, including in recognition of 'unequal sovereignty' extending beyond its own "unequal" treaty and contractual partnerships. In so doing, it could assist in engineering an International Investment Agreement [IIA] molded to reconcile such shared "inequality" collaboratively across participating states.¹⁹⁸

Revising its dispute resolution measures could induce China to displace existing mechanisms, such as eliminating ISDS. This would reflect the current mistrust many developing states feel about ISDS.¹⁹⁹ For example, South Africa, an advanced developing country, has reverted to reliance on domestic courts to resolve investor-state disputes after losing an ISDS claim to a wealthy Western inbound investor.²⁰⁰ The problem in providing for courts to resolve investor-state disputes in treaties with developing states is concern that some lack rule of law traditions and favor home states over inbound foreign investors from advanced countries.²⁰¹ That criticism of reliance on domestic courts is reflected

¹⁹⁵ See Agreement Between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, Austl.-China, July 11, 1988 (1988 Austl. Treaty Series 14).

¹⁹⁶ Tyler Cohen & David Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy*, 5 CHINESE J. COMP. L. 110, 120-21 (2017); Dilini Pathirana, *Making an Arbitration Claim under Chinese BITs: Some Inferences from Recent ISDS Cases*, 5 CHINESE J. COMP. L. 420, 430 (2017).

¹⁹⁷ See Matthias Vanhullebusch, *China's International Investment Strategy: Towards a Relational Normativity*, 21 J. WORLD INV. & TRADE 921 (2020) (discussing China's movement towards multilateralism and its bilateral investment treaty program).

¹⁹⁸ See Shuk Ying Chan, *On the International Investment Regime: A Critique from Equality*, 20 POL., PHIL. & ECON. 202 (2021) (discussing unequal sovereignty in international investment treaty negotiations and agreements).

¹⁹⁹ See John Anthony VanDuzer & Patrick Dumberry, *Investor-State Dispute Settlement, in PROMOTING AND MANAGING INTERNATIONAL INVESTMENT: TOWARDS AN INTEGRATED POLICY APPROACH* 223 (J. A. VanDunzer & P. Lebland eds., 2020) (explaining the rejection and selective reinstatement of ISDS).

²⁰⁰ Protection of Investment Act of 2015 (S. Afr.), art.13(5); see Tarcisio Gazzini, *Travelling the National Route: South Africa's Protection of Investment Act 2015*, 26 AFR. J. INT'L & COMPAR. L. 242, 243 (2018).

²⁰¹ See Dimitry Vladimirovich Kochenov & Nikos Lavranos, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors, Rights in Backsliding Member States of the European*

in China's own proposed ISDS reforms, which it adopted in 2019. That reform entailed using ISDS to shift away from state protectionism to greater respect for the rule of law.²⁰²

A less invasive model is for China to modify the nature of ISDS, such as in selecting ISDS Standing Panels and prescribing ISDS procedures. The primary purpose is to redress the concern, primarily among developing states, that arbitrators appointed from standing panels allegedly decide over 50% of foreign investor claims against developing states.²⁰³ The risk for China favoring a modified ISDS panel system is in being accused of seeking to reconstruct the panel system self-interestedly to favor its interests and those of its outbound investors.

A seeming compromise is for China to adopt two investor-state disputes, one with developing states that rely on domestic courts and the other with developed states that favor ISDS. An obstacle with this bifurcated model is the failure to recognize resistance to ISDS by some developed states. For example, in losing several investor-state claims to large US-based corporations, Canada retreated from ISDS without rejecting it.²⁰⁴ A further obstacle is in China moving beyond both ISDS and domestic courts in favor of pluralistic options, including international commercial arbitration.

A tactical option is for China to negotiate to imbed state-to-state arbitration as a supplement or substitute for investor-state dispute settlement. While this option is seldom pursued today, it was embodied in early BITs, as evidenced in *Italy v. Cuba*,²⁰⁵ *Peru v. Chile*²⁰⁶, and *Ecuador v. US*.²⁰⁷ China could adopt state-to-state arbitration to protect its expanding outbound investors from the regulatory action of host states. The impediment to this option is that developing partner states might fear China's potential strategic advantages in state-to-state arbitration. Some might also prioritize their economic and political relationship with China over protecting their outbound

Union, HAGUE J. ON THE RULE OF L. 1 (2021) (discussing how the rule of law in investment disputes is backsliding before courts of EU member states).

²⁰² See Matthias Vanhullebusch, *China's International Investment Strategy: Towards a Relational Normativity*, 21 J. WORLD INV. & TRADE 921 (2020) (exploring China's proposal to reform ISDS to shift from state protectionism to greater respect for the rule of law).

²⁰³ See Leon Trakman, *Standing Panels in Investor State Arbitration: A Step Forward*, in INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 613 (J. Chaisse & L. Nottage eds., 2018); JULIEN CHAISSE, CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY (2019).

²⁰⁴ See Jerry L. Lai, *A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms*, 35 EMORY INT'L L. REV. 259 (2021) (explaining Canada's retreat from ISDS following the successful Ely Lily ISDS claim against Canada and the modified treatment of ISDS under the new USMCA).

²⁰⁵ See *The Republic of Italy v. The Republic of Cuba* (Ad. Hoc Trib. 2008), <http://www.italaw.com/cases/580>.

²⁰⁶ See *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, <https://www.italaw.com/cases/389>.

²⁰⁷ See *The Republic of Ecuador v. U.S.*, Case No. 2012-5 (Perm. Ct. Arb. 2012), <http://www.italaw.com/cases/1494>.

investors in China or defending claims brought by inbound Chinese investors.²⁰⁸

As a less invasive alternative, China could promote state-to-state reconciliatory measures. One illustration is treaty reliance on state-to-state mediation relating to disputes involving outbound investors and host states. State-to-state mediation in such cases is not without precedent, including recently in negotiating the China-EU Bilateral Investment Treaty.²⁰⁹ An impediment to China incorporating mediation into its IIAs, as in the case of state-to-state arbitration, is fear among developing states of China initiating mediation to vigorously protect its outward Chinese investors and defend against inbound investors. A further obstacle is the limited provision for conciliation and mediation in IIAs generally, and not limited to China.²¹⁰

Nevertheless, criticism of China securing an undue advantage over partner states in state-to-state mediation and arbitration is overgeneralized. China has cogent reasons to demonstrate the transparency of such processes. Building sustainable state-to-state relationships with developing states hinges upon it winning and retaining their confidence. With developing states enjoying the benefit of inbound Chinese investments, China can build sustained relationships with them through mutual enrichment. These relationships can contribute to less developed states evolving into developing states, and to developing states growing into developed states that invest in China's economy.²¹¹ Supporting such collaboration between China and its BRI partners is a shift to dispute avoidance measures, notably to mediation, to allay overready recourse to litigation or arbitration.²¹²

A tactical option is for China to champion diplomatic measures by which home and host states resolve investment disputes themselves. This option has a long history in Treaties of Friendship, Navigation, and Commerce and is

²⁰⁸ See Michele Potestà, *Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?*, in *THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION* 241 (Shaheez Lalani & Rodrigo P. Lazo eds., 2014) (explaining the perceived costs and benefits of relying on state-state arbitration, how China could provide for it, and how it could maximize upon the benefit of adopting it).

²⁰⁹ See Chunlei Zhao, *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, 17 *CHINESE J. INT'L L.* 111 (2018).

²¹⁰ See Romesh Weeramantry et al., *Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis*, *ICSID REV.* (2022) (noting that only 13.2% of IIA's studied provide for conciliation and mediation).

²¹¹ See Andreas Buser, *Recalibrating Policy Space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?*, in *THE BRICS IN THE NEW INTERNATIONAL LEGAL ORDER ON INVESTMENT* 163 (Congyan Cai, et al. eds., 2020) (explaining China's evolving BIT program in response to a changing international investment regime).

²¹² See Ignacio de la Rasilla, *Sharp Ears to Hear a Thunderclap? The Rise of Mediation in the International Dispute Prevention and Settlement System of the Belt and Road Initiative*, 29 *ASIA PAC. L. REV.* 167 (2021).

informally used in investment treaty practice.²¹³ However, it is not widely and formally embodied in modern investment treaties. Its use is subject to comparable criticisms directed at state-to-state mediation and arbitration. Should China champion the diplomatic option, its intercession could be conceived as sovereign overlordship in which developing states are vassals within a Chinese empire. The general proposition reinforces this criticism that developing states ordinarily lack the resources to defend their investors' interests "equally" in diplomatic negotiations with both advanced Western states and modern China. The converse criticism is that states, both developing and developed, will not feel obligated to defend their outbound investors, or that they fear diplomatic reversals or economic reprisals from China in attempting to do so.²¹⁴ As a result, home states are likely to intervene selectively on behalf of their outbound investors, according to the investors' significance to their home state, such as in being state-owned or affiliated.

In effect, the criticisms of China resorting to state-to-state diplomacy have limitations, not unlike state-to-state arbitration and mediation. The inescapable reality is that state-to-state diplomacy is often an informal component in dispute resolution regardless of whether it is provided for in IIAs. The fact that such diplomacy is not publicly acknowledged is part of its advantages.²¹⁵

China faces adverse reactions if it is perceived as using state-to-state diplomacy to coerce partner states to grant concessions to Chinese investors. The risk extends beyond retaliatory action by target states, such as terminating investment dealings on grounds of economic hardship. The longer-term prospect is of aligned blocs of states, such as in advancing Africa, adopting collective action against the perception of China pressuring discrete states to forego state defenses in favor of inbound Chinese investors. Such joint action is likely to be ideologically overlaid if retaliatory blocs of states support a rule-based system of law to preserve their regulatory authority as sovereign states.²¹⁶ The challenge for China is to diminish the reciprocal risk of its regulatory shields being breached by inbound investors from advancing developing states bringing ISDS claims against it.

Given the obstacles to China relying entirely on alternatives or variations to ISDS, a collaborative alternative is for China to promote, or adapt, a

²¹³ See KENNETH J. VANDEVELDE, *THE FIRST BILATERAL INVESTMENT TREATIES U.S. POSTWAR: FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES* (Oxford Univ. Press, 2017) (describing the U.S.'s first postwar bilateral treaties).

²¹⁴ James McBride et al., *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative> (Jan. 28, 2020).

²¹⁵ See Thomas Ameyaw-Brobbe, *A Critical Juncture? COVID-19 and the Fate of the US-China Struggle for Supremacy*, 184 *WORLD AFF.* 260 (2021) (contrasting the U.S.'s and China's diplomatic efforts to build their international investment regimes between 2017 and 2020).

²¹⁶ See Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 *HARV. INT'L. L.J.* 391 (2012) (explaining the collective purpose of states to promote foreign investment through a rule-based system that limits state authority to regulate such investment).

multilateral dispute resolution option. Its purpose is to unify that option across global investment markets encompassing multiple states and foreign investors. The benefit to China in subscribing to such a multilateral agreement is to influence the direction of state-to-state and investor-state dispute resolution. That multilateral dispute resolution option would also limit China's vulnerability to assertions of its invoking ISDS refinements and diplomatic measures outside the framework of that multilateral agreement to overpower developing partner states. Reaching such a multilateral agreement nevertheless poses the enormous uphill battle of agreement by multiple states that diverge both ideologically and functionally about the value and operability of such an agreement. That task encompasses, but extends beyond, the tension between China's planned domestic economy and its engagement in a free market global economy.²¹⁷

IX. RECONCILING IDEOLOGICAL TENSIONS

In choosing among alternative dispute resolution options to resolve international investment disputes, one issue China faces is potential conflicting ideological preferences and functional hurdles. These intrusions are sometimes unmistakably delicate and inescapably contentious. Readily illustrating China's equivocation is its initial denial of foreign investors' right to claim that a BIT partner has expropriated their property, while allowing them to establish an unlawful taking by other means.²¹⁸ In issue is the tension between China shielding its planned economy from accusations of unlawful expropriation and the countervailing risk of it deterring inbound investment. Under scrutiny is whether and how China rebalances its planned and global free-market commitments in light of that tension.²¹⁹

China's predicament in expanding or restricting investor protections is politically delicate and economically fraught. Should China strenuously regulate inbound investments, foreign investors are likely to claim that China has engaged in unfair investment practices. They will assert that China invoked its domestic security unreasonably to confiscate their assets; and that it denied their rightful protections under customary international law.²²⁰ China's defense will likely be that, as a host state, it has sovereign authority to adopt such regulatory measures, and that its exercise of that authority is

²¹⁷ See LEON TRAKMAN, *RESOLVING THE TENSION BETWEEN STATE SOVEREIGNTY AND LIBERALIZING INVESTOR-STATE DISPUTES: CHINA'S DILEMMA*, HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien Chaisse et al., eds., 2021).

²¹⁸ Thomas Lehmann, *How Do Chinese Investment Treaties Protect the State's Police Powers from Investors' Expropriation Claims? A Fourth Generation of Chinese International Investment Treaties*, QUEEN MARY UNIV. OF LONDON: EUPLANT BLOG (Dec. 15, 2020), <https://www.qmul.ac.uk/euplant/blog/items/how-do-chinese-investment-treaties-protect-the-states-police-powers-from-investors-expropriation-claims-a-fourth-generation-of-chinese-international-investment-treaties.html>.

²¹⁹ See Trakman, *supra* note 217.

²²⁰ *Foreign Direct Investment - The China Story*, WBG (July 16, 2010), <https://www.worldbank.org/en/news/feature/2010/07/16/foreign-direct-investment-china-story>.

protected by treaty and complies with customary international investment law.²²¹ Its formal rationale for such action is that it has the authority to regulate inbound FDI according to its conception of the national interest and its police powers.²²²

China's defenses are still unlikely to halt a progression of future inbound investors' claims against it. Inbound investors from Australia have contemplated ISDS claims under the China-Australia Free Trade Agreement for China's alleged discrimination against them, causing them economic harm.²²³ A Task Force on the impact of China's BRI upon the United States has proposed more generally, "a response that rests on four pillars: mitigating the economic risks of BRI, improving U.S. competitiveness, strengthening the multilateral response to BRI, and protecting U.S. security interests in BRI countries."²²⁴ That response is already taking place in a retreat from a negotiated U.S.-China trade and investment agreement, accentuated by accelerating economic sanctions and blame directed at China for global health and economic crises.²²⁵

Large-scale foreign investors, such as multilateral corporations, are also positioned to lodge ISDS claims against China. Outbound U.S. investors are also likely to receive U.S. Government support in lodging ISDS proceedings against China, given concerns about China's growing BRI and the U.S. Task Force's warning about China's expanding BRI.²²⁶ Viewed comparatively, China's seeming impregnability is countered by the fact that well-healed companies have already proceeded against developed states like Germany and Canada and secured awards.²²⁷ China is unlikely to be unassailable in facing comparable claims from deep pocket global entities, just as its BIT partner states are likely to be assailable to claims from inbound Chinese investors.²²⁸

Claims against China are likely to arise on grounds that it has denied fair and equitable treatment to inbound investors and for relying unreasonably on

²²¹ *The Reign of Law in International Investment Decision-Making*, INVEST. CLAIMS, OXFORD UNIV. PRESS, <https://oxia.oup.com/page/IC-summer-academy-2017/the-reign-of-law-in-international-investment-decisionmaking> (last visited Aug. 3, 2021).

²²² Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions*, 59 B.C.L. Rev. 2825 (2018); Alison Giest, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 CHI. J. INT'L L. 321, 337 (2017).

²²³ Ronald Mezan, *Exporters Mull ISDS Legal Action Against Beijing*, FIN. REV. (Dec. 17, 2020, 11:14 AM), <https://www.afr.com/politics/federal/exporters-mull-isds-legal-action-against-beijing-20201216-p56o11>.

²²⁴ COUNCIL ON FOREIGN REL., INDEPENDENT TASK FORCE REPORT NO.79, CHINA'S BELT AND ROAD: IMPLICATIONS FOR THE UNITED STATES vii (2021) [hereinafter Independent Task Force Report No.79].

²²⁵ See Jacques deLisle, *When Rivalry Goes Viral: COVID-19, U.S.-China Relations, and East Asia*, 65 ORBIS 46, 46 (2021).

²²⁶ See Independent Task Force Report No.79, *supra* note 224.

²²⁷ See Steinbock, *supra* note 160.

²²⁸ See Axel Berger, *The Political Economy of Chinese Investment Treaties*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 151, 151–66 (Ka Zeng ed., 2019).

economic instability or volatility in investment markets caused by COVID-19. The risk to China is that allegations of it denying due process protections could render its “bumpy” BRI even bumpier.²²⁹

China and its state-owned or controlled entities will be accused of grounding its regulatory action, not limited to expropriation, upon dubious premises, such as the debilitating effect of COVID-19 upon its domestic economy. It will be denounced for subjecting vulnerable states and their local industries to economic subordination along its Belt and Road. China-skeptics will declare that inbound Chinese SOEs are not legally entitled to investor protections because they are state-owned and should not receive the protection accorded to foreign investors that are not state-owned.²³⁰

Destination states will conceivably deny treaty protections to SOEs on grounds that they are government, not private entities. They will do so even though such action undermines treaty investor protections unless the applicable treaty excludes SOEs as ‘investor’ claimants. Such action will compound the assertion that inbound investors are being treated unfairly and contrary to the rule of law.²³¹

Perceptions of unfairness in ISDS proceedings also extend well beyond China. Outbound investors from wealthy developed states have long been considered unfairly advantaged over developing states.²³² Such assertions of inequality between ISDS parties are often attributed to both investor and state parties themselves: large corporate investors are financially advantaged in arbitration proceedings over developing states, while developed states are advantaged over investors from developing states. Assertions of inequality are also attributed to perceived biases among arbitrators. Based on case studies, arbitrators with commercial backgrounds more often favor investor claimants. Those with governmental backgrounds favor respondent states.²³³ Whether these assertions are fully justified, they nevertheless suggest that China and its outbound investors are not materially more advantaged than the US, EU and their respective investors that have enjoyed sustained ISDS advantages.

As a result, the proposition that China has an exceptional benefit elides over the advantages Western states and their outbound investors have enjoyed in neo-colonial times. These comparative realities have nevertheless not dissuaded Western liberal states from imposing escalating trade sanctions

²²⁹ See Li & Bian, *supra* note 185; *A Bump in the Road?*, GRANT THORNTON (Aug. 1, 2018), <https://www.grantthornton.global/en/insights/articles/bump-in-the-road/>.

²³⁰ See Zhao, *supra* note 100.

²³¹ *China's Foreign Investment Law and Related Regulations Mark a New Era for Foreign Investment in China*, BAKER MCKENZIE (Mar. 3, 2021, 8:54 PM), <https://www.bakermckenzie.com/en/insight/publications/2020/01/new-era-for-foreign-investment-in-china>.

²³² See Campbell McLachlan, *Equality of Parties before International Investment Tribunals: The Institute of International Law Resolution 2019*, 35 ICSID REV. 419 (2020) (on whether investment arbitration offers a fair and balanced method for resolving investment disputes).

²³³ See Trakman, *supra* note 217.

upon China.²³⁴ Manifestly part of an accelerating saga of macro-economic politics, these entry barriers to inbound Chinese investment are based on incendiary allegations: that China is a central cause of volatility in global trade and investment markets. Justifications for imposing such barriers include conspiracy theories of China using the COVID virus to disrupt global markets. Geopolitical justifications for such barriers include erecting barriers to inhibit China from spreading its planned economic modelling transnationally. It is not that the justifications for such barriers are unsubstantiated or overstated, but rather that politicized China-bashing serves as an inflammatory torch to undermine China's global FDI leadership and its institutional constructions such as the BRI that sustain that leadership.²³⁵

Such barriers also invite China to react, by displaying its capacity to retain its ideologically overlaid economy, while still complying with the grounding norms of a free market global investment order. Supporting China's reaction is the rationale that states retain their domestic economic ideologies as preconditions to their participation in the global investment order. Supporting China's distinctive BRI is its "emphasis on connectivity" in facilitating development along "economic corridors consisting of hard and soft infrastructure networks."²³⁶

A BRI that emphasizes connectivity through development is arguably distinguishable from an authoritarian incantation of post-colonialism. China's coalescence between its centrally planned ideology and a liberalized free investment market supports economic development through connectivity. So conceived, its BRI constitutes "power in transition" away from neo-liberal colonialism and towards economic development.²³⁷

This account does not fully respond to the portrayal of China as pursuing such developmental ends in its own historical image. The panoramic vista of it seeking connectivity through development is of the re-emergence of an even more confrontational Communist China than in the 1950s, reinforced by China's lofty but self-interested investment aspirations.²³⁸ SOEs, presented as managers of development, are portrayed as invading warriors acting as agents

²³⁴ See Jack Rusmus, *Trump's "Real Trade War": Subverting China's Technological Advance Global Research*, GLOB. RSCH. (Jan. 22, 2019), <https://www.globalresearch.ca/trumps-real-trade-war-subverting-chinas-technological-advance/5665992>.

²³⁵ Xie Yu & Yongai Jin, *Global Attitudes toward China: Trends and Correlates*, 31 J. CONTEMP. CHINA 1 (2022) (noting that "public opinion on China has experienced a downward trend overall, especially in developed and democratic countries").

²³⁶ Tolga Demiryol, *Between Geopolitics and Development: The Belt and Road Initiative and the Limits of Capital Accumulation in China*, CHINA REP. 410, 410 (2022).

²³⁷ Enyu Zhang & Patrick James, *All Roads Lead to Beijing: Systemism, Power Transition Theory and the Belt and Road Initiative*, CHINESE POL. SCI. REV. 1 (2022) (examining, inter alia, the BRI in relation to power transition theory).

²³⁸ See Yu & Jin, *supra* note 235, at 1–16.

for the Peoples' Party, attempting to subordinate developing states along a China-controlled BRI.²³⁹

The sweeping analogy is of China replicating the West's disempowerment of early developing states in eras past, but in a more authoritarian manner.²⁴⁰ The depiction is of China acting as a militarized mega-state, exerting its regulatory authority along a controlled BRI highway, dotted with its strategically planned and controlled BITs.²⁴¹ So depicted, China is portrayed as an aberrant mega-power, challenging the sovereignty of developing states, extending its regulatory authority extra-territorially, licensing inbound investments,²⁴² and shielding itself from ISDS claims.²⁴³ So portrayed, China is envisioned subduing dissent over the nature, direction, and extent of travel along its ever-growing BRI highway.²⁴⁴ It is depicted as arming its outbound investors with reinforced shields against the often outmoded swords brandished by developing host states.²⁴⁵

These rejoinders overlook that China has sound geopolitical and commercial reasons to treat BRI states and their investors reasonably and fairly along its BRI. Presenting itself as a welcoming investor state, a studied analysis of public opinion in over seventy countries maintains that “[on] average, the BRI increases the net public approval rating of the Chinese leadership in these countries by fifteen percentage points.”²⁴⁶ China is motivated to maintain its global image while also strengthening its Belt and Road. China's means of doing so is through ‘flexible institutionalisation’

²³⁹ See e.g., OECD, STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR AN OPPORTUNITY? (2016) (noting that unfair competition is often identified with the unfair advantages accorded to SOEs).

²⁴⁰ See Muthucumaraswamy Sornarajah, *Mutations of Neo-Liberalism in International Investment* 3 TRADE L. AND DEV., 203–04 (2011); MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 284–93 (CAMBRIDGE, 2015).

²⁴¹ See Office of United States Trade Rep., *Joint Statement by the United States, European Union and Japan at MC11* (Dec. 12, 2017) (noting that this criticism of China is identified primarily with states engaging in unfair trade dealings, contrary to the WTO).

²⁴² See Adaeze Agatha Aniodoh, *Sovereign Authority Within the Construct of Bilateral Investment Treaties*, 65 J. AFR. L. 1 (2021) (considering the diminution of the monetary sovereignty of host states when they sign bilateral investment treaties).

²⁴³ Manjiao Chi & Zongyao Li, *Administrative Review Provisions in Chinese Investment Treaties: “Gilding the Lily”?*, 12 J. INT'L DISP. SETTLEMENT 125 (2021) (on China's adoption of administrative review in over half of its IIAs, its apparent movement away from such reviews, but uncertainty over its future use of them).

²⁴⁴ This criticism of China is identified primarily with states engaging in unfair trade dealings, contrary to the WTO. See Office of United States Trade Rep., *Joint Statement by the United States, European Union and Japan at MC11* (Dec. 12, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states> (“[T]o eliminate these and other unfair market distorting and protectionist practices by third countries.”).

²⁴⁵ YUWEN LI & CHENG BIAN, CHINA'S FOREIGN INVESTMENT LEGAL REGIME: PROGRESS AND LIMITATIONS. (ROUTLEDGE, 2022) (discussing China's position on foreign arbitration and ISDS reform).

²⁴⁶ Yang Gongyan et al., *Money Talks?: An Analysis of the International Political Effect of the Chinese Overseas Investment Boom*, 29 REV. INT'L. POL. ECON. 202 (2022).

including balanced IIAs and dispute resolution measures not limited to ISDS provisions.²⁴⁷ Its flexibility extends to ‘obsolescing bargains’ in which discrete infrastructure projects are nearing completion; the host state is acquiring project control, but China wishes to remain integral to the project after the bargain has terminated.²⁴⁸ China’s challenge is to devise an amalgam of flexible measures, such as in settling disputes, that maintains the upward trajectory of its economy and political leadership.

X. CONCLUSION

This article argues that China’s regulation of foreign direct investment is guided by its centrally planned economy, while still taking into account a predominant free investment market.²⁴⁹ Illustrating that guidance is China’s willingness to constrain its national security defenses by recognizing investor protections identified with a free international investment market.²⁵⁰ Still, China is critically depicted as the prototype socialist state that directs its international investment regime according to its domestically planned economy. Its accommodation of Western Liberal measures, such as to protect foreign investors by treaty, is depicted as a self-serving instrument, which affirms its authority over FDI flows under the guise of state-to-state and investor-state collaboration.²⁵¹

This article shifts away from such ideological stereotyping of China to examine the nature of China’s regulation of foreign direct investment, and its reasons for and ability to sustain that regulation in the immediate future.

China faces formidable dangers in maintaining its stature as a global investment leader. Following decades of unprecedented growth into the largest investment destination and second-largest source of outbound investment, its capacity to sustain its FDI growth is being retested, but not

²⁴⁷ See Jiangyu Wang, *Flexible Institutionalization: A Critical Examination of the Chinese Perspectives on Dispute Settlement for the Belt and Road*, 29 ASIA PAC. L. REV. 70 (2021) (proposing “flexible institutionalization” as an analytical framework by which China develops a China-made BRI dispute resolution mechanism).

²⁴⁸ See Michael Bennon & Francis Fukuyama, *The Obsolescing Bargain Crosses the Belt and Road Initiative: Renegotiations on BRI Projects*, 38 OXFORD REV. ECON. POL’Y 278 (2022) (examining the BRI through the obsolescing bargain analysis to evaluate the practices of Chinese SOEs and policy banks in mitigating political risks).

²⁴⁹ Lisa Toohey & Jonathon Crowe, *The Illusory Reference of the Transitional State and Non-Market Economy Status*, 2 CHINESE J. COMP. L. 333, 333–34 (2014) (challenging the distinction drawn between market and non-market economies on grounds of “the diversity of regulatory regimes and market mechanisms around the world”). *But cf.*, Ilaria Espa, & Philip Levy, *The Analogue Method Comes Unfastened – The Awkward Space between Market and Non-Market Economies in EC-Fasteners*, 17 WORLD TRADE REV. 313 (2018).

²⁵⁰ Wenhua Shan & Hongrui Chen, *China–US BIT Negotiation and the Emerging Chinese BIT 4.0.*, in C.L. LIM, *ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 223–52 (CAMBRIDGE, 2016).

²⁵¹ See *e.g.*, JOHN ROSS, *CHINA’S GREAT ROAD: LESSONS FOR MARXIST THEORY AND SOCIALIST PRACTICES* (PRAXIS PRESS, 2021) (on China’s progress as a socialist state in social and economic development).

vanquished.²⁵² China's investment regime is subject to spiraling inflation, growing domestic demands on its resources and declining foreign reserves. These financial impediments influence China's gains-based assessment of whether and how to modify its international investment planning in response to these changing domestic demands.

This article illustrates these propositions in relation to China invoking COVID-19 as a defense to its expropriation of inbound investments. China's challenge is to demonstrate its inability to reasonably foresee and avert the Pandemic's devastating effect as the basis for its denial of treaty protections afforded to investors.²⁵³ In contrast, its developing BIT partner states generally face fewer obstacles in invoking necessity or economic hardship to justify their inability to foresee or avert the Pandemic's effect, such as in failing to repay a Chinese bank loan.²⁵⁴

Particularly important are the institutions and processes which China adopts to resolve investor-state disputes. This article explores China's tactical incentives to favor a multilateral investment agreement (MIA), among other options. An MIA can promote greater uniformity across states, such as in procedures by which to avoid or resolve investor-state disputes. An MIA among a critical mass of states can also limit the critique that China is dictating state-to-state dispute resolution measures through its BITs. The hurdle in establishing an MIA is for signatory states to concur on its terms, such as in balancing the protection of inbound investments against the host state's national interests. A daunting task specifically for China in supporting an MIA is to reconcile its planned domestic economy with a global post-liberal investment order. In play is the saliency of China redressing, not perpetuating, incongruent investment protocols that destabilize its global investment ambitions.

Important to China is the contention that its BRI is not perceived as being based on strident policies and impregnable rules that dictate the future of trade and investment agreements concluded under its rubric. Insofar as China can justify that contention, it can enable developing states to participate in carving out the future direction of the BRI, including in resolving investment disputes arising along that pathway.²⁵⁵

²⁵² See e.g., PETER BALÁŽ ET AL., FDI AS A DRIVING FORCE OF CHINA'S EXPANSION, in CHINA'S EXPANSION IN INTERNATIONAL BUSINESS: THE GEOPOLITICAL IMPACT ON THE WORLD ECONOMY 161–235 (MACMILLAN, 2020).

²⁵³ Julien Chaisse, *Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?*, 13 CONTEMP. ASIA ARB. J. 99 (2020); J.P. Moyano García, *Customary Law Defenses Against COVID-19 Investment Claims*, TRANS. DISP. MGMT. (2020).

²⁵⁴ See *id.*

²⁵⁵ See Li Xiangyang, *High-Quality Development and Institutionalization of the BRI*, 1 EAST ASIAN AFFS. 1 (2021) (maintaining that “the development orientation of the BRI . . . does not set rules as a threshold during its initial stage, thus providing opportunities for developing countries to participate in international economic cooperation”).

By these means, China can facilitate confidence in the shared economic benefits of the BRI and the best way for participants to secure economic benefits from such travel.