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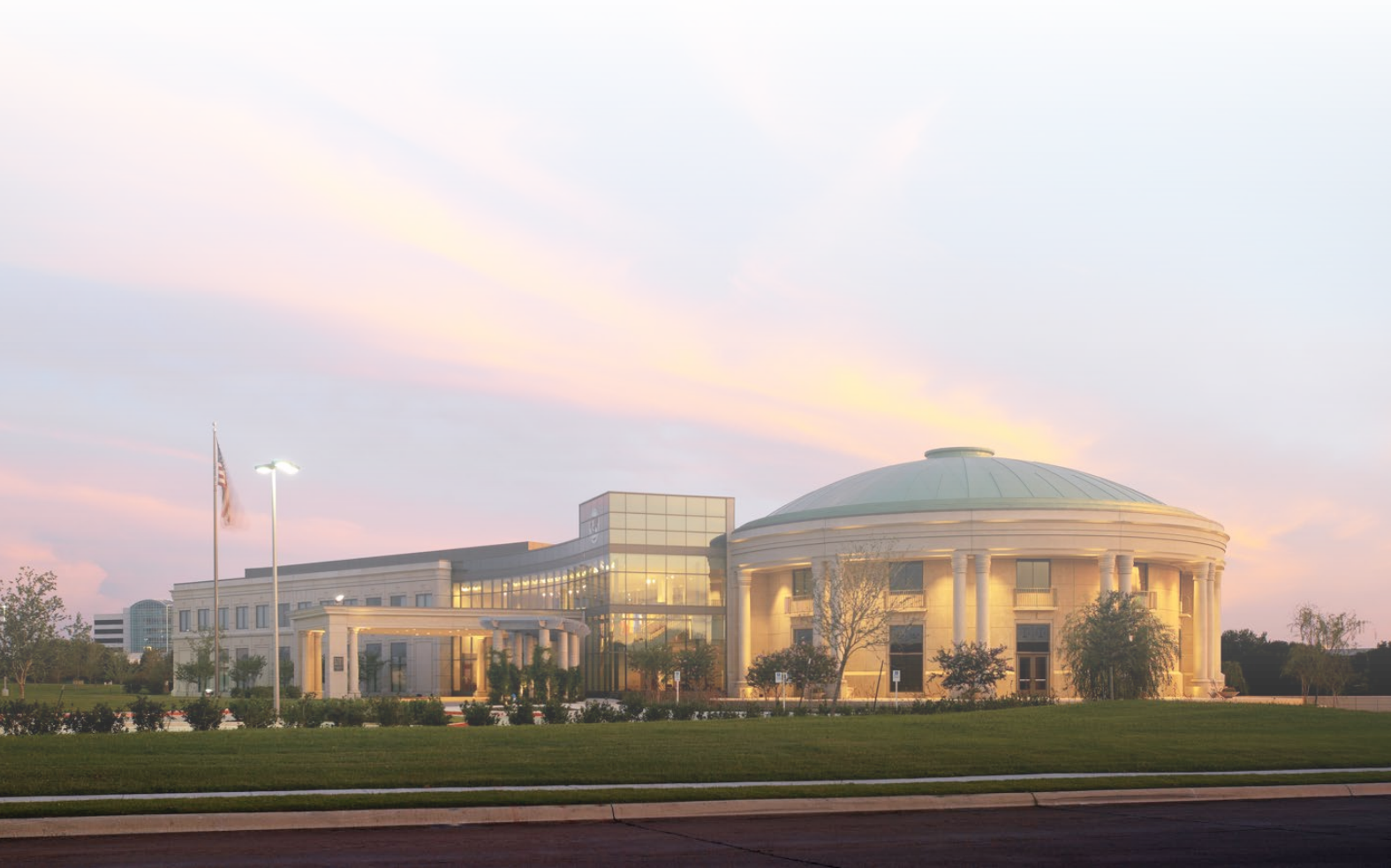

ITA IN REVIEW

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ARTICLES

CHINESE PARTICIPATION IN THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM

by Rafael T. Boza & D. Carolina Plaza

I. INTRODUCTION

As the global economy grows, international trade and investments across the world increase.[1] This has generated the proliferation of international investment agreements (IIAs), such as bilateral investments treaties (BITs), free trade agreements (FTAs), and multilateral investment treaties, to protect the rights of investors. With the protections given under IIAs, international disputes between foreign investors and states have also risen.[2]

The People's Republic of China has become a prominent player in the global economy, attracting substantial foreign direct investment (FDI) and emerging as a significant source of "outward direct investment."[3] Notably, foreign direct investment from China reached nearly 2.8 trillion US Dollars in 2022.[4] Further, China has a significant network of BITs protecting foreign investments. According to the United Nations Conference on Trade and Development (UNCTAD), China has 107 BITs in force as of 2021.[5]

Despite this, China's involvement in the investor-state dispute settlement (ISDS)

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[1] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: Investor-State*, 11 (2003), https://unctad.org/system/files/official-document/iteiit30_en.pdf.

[2] *See* International Centre for Settlement of Investment Disputes (ICSID), THE ICSID CASELOAD-STATISTICS, Issue 2024-1 at 4 (2024), https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf [hereinafter ICSID CASELOAD-STATISTICS] (Between 1972 to 1992, 28 cases were registered in the ICSID; from 1993 to 2012, 391 cases where registered; and from 2013 to 2023, 548 cases were registered.).

[3] Norah Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31 ICSID REV. 88, 88 (2016).

[4] *Foreign Direct Investment (FDI) from China-Statistics & Facts*, STATISTA (2024), https://www.statista.com/topics/5290/foreign-direct-investment-from-china/#topicOverview.

[5] UNCTAD, *IIAs by Economy*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed May 19, 2024).

system has been relatively limited. China remarkedly has not been involved in many ISDS cases, neither as claimant, through Chinese investors, nor as a respondent state. Since 2007, Chinese nationals have initiated only 13[6] cases before the International Centre for Settlement of Investments Disputes (ICSID) and China has been named as respondent in only 6 ICSID cases.[7] China likewise has had only a handful of cases before the Permanent Court of Arbitration (PCA), and we identified four involving Chinese claimants and two with China as respondent.[8] Compare this to the overall ICSID case load in the same period (since 2007) of 745 cases.[9] In this article, we briefly explore China's participation in the ISDS system, highlighting the arguments made by Chinese nationals as investors and by China as a respondent state, and evaluate three cases that we consider noteworthy.

II. ALLEGATIONS OF CHINESE INVESTORS AS CLAIMANTS

A. *Statistics: Chinese Investors as Claimants in Comparison with the Total Cases*

As stated, China's participation in the ISDS system has been relatively limited. The overall ICSID case load since 2007 is 745 cases, out of which only 13 cases were brought by Chinese investors.[10] This means that these cases represent only 1.7% of all ICSID cases. Moreover, out of the 140 PCA cases,[11] only 4 were brought by Chinese investors, constituting 2.8% of all PCA cases.[12]

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[6] There is a 14th case listed in the ICSID Caseload Statistics: *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Co.*, ICSID Case No. ARB/10/20. For purposes of this article, this case will not be taken into consideration as belonging within the ISDS system because the dispute arose out of a contract between two companies: Standard Chartered Bank and Tanzania Electric Supply Company.

[7] *See* ICSID, CASES, https://icsid.worldbank.org/cases/case-database (last accessed May 19, 2024) [hereinafter ICSID CASE DATABASE].

[8] *See* PERMANENT COURT OF ARBITRATION (PCA), CASES, https://pca-cpa.org/cases/ (last accessed May 19, 2024) [hereinafter PCA CASE DATABASE].

[9] *See* ICSID CASE DATABASE, *supra* note 7.

[10] *See* ICSID CASE DATABASE, *supra* note 7.

[11] There are 139 ISDS cases that have been made public by the PCA, and one of them, which we take into consideration here, *Jing v. Ukraine*, has not been made public yet. *See* PCA CASE DATABASE, *supra* note 8.

[12] *See* PCA CASE DATABASE, *supra* note 8; *see also Wang and others v. Ukraine*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1105/wang-and-others-v-ukraine (last accessed May 19, 2024).

B. *Description of Allegations*

The allegations brought by Chinese investors in the ICSID and PCA cases have been remarkably similar to those brought by investors of other nationalities. These include violations of the national treatment, fair and equitable treatment, and full protection and security provisions as well as claims of expropriation and the applicability of the most-favored nation provisions.

1. National Treatment Provisions

National treatment provisions stipulate that contracting states must provide investors and investments from the other contracting states treatment no less favorable than that given to their own investors and investments.[13] In that regard, Chinese investors have argued that respondent states have provided them with a less favorable treatment in comparison to the those contracting states' nationals.

For example, in *Alpene Ltd. v. Malta*,[14] Alpene, a Chinese investor who indirectly owned a Maltese bank, brought an action against Malta, arguing that Maltese officials subjected the bank to wrongful, arbitrary, and discriminatory measures that domestically owned banks did not face.[15] Although the case is still pending, if the tribunal finds that a discriminatory treatment was given to Alpene's investment based on its nationality, it could constitute a violation of the provision.

2. Most-favored Nation Treatment ("MFN") Provisions

MFN provisions require that contracting states give investors and investments from the other contracting states treatment no less favorable than the one given to investors and investments from other states.[16] Chinese claimants have argued that through the application of these provisions, arbitral tribunals should have jurisdiction to hear cases that they otherwise could not.

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[13] AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS 591 (2020).

[14] Alpene Ltd. v. Malta, ICSID Case No. ARB/21/36, Request for Arbitration (June 4, 2021).

[15] *Id.* ¶¶ 3, 8-9; *Alpene*, ICSID Case No. ARB/21/36, Notice of Dispute, ¶ 3 (Aug. 20, 2020).

[16] REINISCH & SCHREUER, *supra* note 13, at 686.

For example, in *Ansung Housing Co. v. China*,[17] discussed below, the claimant argued that the MFN provision contained in the relevant treaty would allow the tribunal to have jurisdiction over its claims allegedly brought outside the limitations period.[18] The tribunal disagreed, finding that the plain reading of the MFN provision does not extend China's consent to arbitrate, and therefore, the claim was time-barred.[19] Similarly, in *Beijing Everyway Traffic and Lighting Co. v. Ghana*,[20] the investor alleged that the MFN clause would allow Chinese investors to make claims that investors from the UK and Denmark could make.[21] Again, the tribunal disagreed, finding that the MFN provision did not expand its jurisdiction because those provisions cannot substitute for consent to arbitration.[22]

3. Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS") Provisions

Contracting states are obliged to provide FET to investors and their investments along with FPS.[23] The meaning of the FET and FPS principles are still debated.[24] The *S.D. Myers, Inc. v. Canada*[25] tribunal stated that there is a violation of the FET obligation when an investor "has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[26] On the other hand, FPS provisions provide that a state must "guarantee [s]tability in a secure environment, both physical, commercial and legal."[27]

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[17] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017).

[18] *Id.* at 124.

[19] *Id.* at 138, 141.

[20] Beijing Everyway Traffic and Lighting Co. v. Ghana, PCA 2021-15, Award on Jurisdiction (Jan. 30, 2023).

[21] *Id.* ¶ 93.

[22] *Id.* ¶¶ 287, 298

[23] REINISCH & SCHREUER, *supra* note 13, at 254.

[24] *Id.* at 272.

[25] S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

[26] *Id.* ¶ 263.

[27] Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award ¶729 (July 24, 2008).

It is common practice to see both of these provisions together.[28]

4. Expropriation

Generally, expropriation by a state is not prohibited. However, if a state decides to expropriate an investment, it must provide adequate compensation to the investor.[29] In *Shum v. Peru*,[30] discussed below, the claimant argued indirect expropriation based on actions of the Peruvian tax authorities.[31] The arbitral tribunal found indirect expropriation by the tax authorities because of the nature, duration, and impact of the measures taken against the claimant's investment.[32]

III. DEFENSES ARGUED BY CHINA AS RESPONDENT

A. *Statistics: China as Respondent in Comparison with the Total Cases*

China's participation as respondent in the ISDS system has been even more limited than Chinese investors' participation as claimants. Since 2007, out of the 745 ICSID cases, China has been the respondent in only six of them. This constitutes 0.8% of all ICSID cases.[33] In the same line, out of the 140 PCA cases, only two named China as respondent, which constitutes 1.4% of all PCA cases.[34]

B. *Description of Defenses*

Most of China's ICSID and PCA cases do not provide information about the defenses China raised; however, from the available information, the most common defenses China raised were that the investor claims were time-barred, the tribunal lacked jurisdiction, and China had the power to expropriate.

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[28] REINISCH & SCHREUER, *supra* note 13, at 540.

[29] *Id.* at 5.

[30] Shum v. Peru, ICSID Case No. ARB/07/6, Award (July 7, 2011).

[31] *Id.* ¶¶ 74-85.

[32] *Id.* ¶¶ 156, 170.

[33] *See* ICSID CASE DATABASE, *supra* note 7.

[34] *See* PCA CASE DATABASE, *supra* note 8; *see also Wang and others v. Ukraine*, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1105/wang-and-others-v-ukraine (last accessed May 19, 2024).

C. *Investor Claims are Time-Barred*

As a general practice, in international arbitration, claimants have a set time to submit their claims to an arbitral tribunal in order to preserve the jurisdiction of the tribunal.[35] In ISDS cases, the limitation period is found in the relevant treaty, and when the claim falls outside of such period, the tribunal will declare its lack of jurisdiction and dismiss the case.[36] This is because the limitation period is a component of the state's consent to arbitration. This happened in *Ansung Housing*, further explained below, where the tribunal dismissed the case because the three-year limitation period in which the investor could have made the claim had lapsed.[37]

D. *Lack of Jurisdiction of the Tribunal and China's Indirect Power to Expropriate.*

Jurisdiction is an essential component of international arbitration and arbitral tribunals must have jurisdiction to resolve international disputes.[38] One type of jurisdiction tribunals must have is *ratione materiae* jurisdiction, equivalent to subject-matter jurisdiction.[39] *Ratione materiae* jurisdiction requires the claimant to show its qualification as an investor under the relevant treaty as well as proof that its investment is protected under the relevant treaty.[40] When *ratione materiae* jurisdiction is lacking, the arbitral tribunal must dismiss the case.[41] In *AsiaPhos Ltd. v. China*,[42] also discussed below, the tribunal dismissed the claim because according to the relevant treaty, China's consent to arbitration did not extend to the determination of whether its actions constitute an expropriation but rather only to the amount of

[35] Saar Pauker, *Admissibility of Claims in Investment Treaty Arbitration*, 34 ARB. INT'L 1, 1 (2018).

[36] *Id.*

[37] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017), ¶¶115-22.

[38] JOSEFA SICARD-MIRABAL & YVES DERAINS, INTRODUCTION TO INVESTOR-STATE ARBITRATION 41-74 (2018).

[39] Romesh Weeramantry & Clementine Packer, *Corruption and Fraud in Investor-State Arbitration: Central Asian Experience*, *in* INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTES IN CENTRAL ASIA: EMERGING ISSUES 435, § 16.02 (Kiran Nasir Gore et al. eds., 2022).

[40] *Id.*

[41] FREDERIC G. SOURGENS ET AL., EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION § III(A) (2018).

[42] AsiaPhos Ltd. v. China, ICSID Case No. ADM/21/1, Award (Feb. 16, 2023).

compensation once such an expropriation occurs.[43] The tribunal further stated that according to the relevant treaty, the claimant needed to challenge the expropriation's measures before the Chinese national courts.[44]

IV. CASE STUDIES

A. *Ansung Housing Co. v. China (ICSID Case No. ARB/14/25)*

One interesting case involving China as respondent is *Ansung Housing*, which was dismissed for lack of jurisdiction. The tribunal, comprising Prof. Lucy Reed (President), Dr. Michael C. Pryles, and Albert Jan van den Berg, rendered its award on March 9, 2017.[45] The dispute arose from Ansung's investment in a golf and country club and luxury condominiums in the Jiangsu province. The Korean-incorporated claimant faced several government-induced obstacles, including increasingly demanding land use requirements, higher prices for the land than initially agreed, and limitations on its rights to use the land.

The tribunal dismissed the case based on the three-year limitation period stipulated in the China-Korea BIT.[46] Ansung's claims were deemed time barred because they were filed after the expiration of this period.[47] Additionally, Ansung's argument to invoke the MFN clause of the BIT to bypass the limitation period was unsuccessful.[48] The tribunal held that the limitation period was a condition to China's consent to arbitration, which could not be circumvented by the MFN clause.[49]

The *Ansung Housing* case highlights several key issues. First, it underscores the importance of adhering to limitation periods specified in BITs. Investors must be vigilant in monitoring these periods to ensure their claims are timely. Second, the case illustrates the limitations of the MFN clause in extending procedural rights,

[43] *Id.* ¶ 187.

[44] *Id.* ¶ 185.

[45] Ansung Housing Co. v. China, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017).

[46] *Id.* ¶ 143.

[47] *Id.*

[48] *Id.* ¶ 138.

[49] *Id.* ¶¶ 138-141.

particularly when such rights are explicitly tied to a state's consent to arbitration. This decision reaffirms that procedural conditions precedent, such as limitation periods, are not easily circumvented by MFN clauses.

B. *Huawei Technologies Co. v. Sweden (ICSID Case* No. ARB/22/2)

Another noteworthy case involving a Chinese entity is *Huawei Technologies Co. v. Sweden*,[50] which is currently in progress. Huawei initiated this arbitration against Sweden and challenged its exclusion from the 5G network rollout bidding process. Sweden's telecommunication regulator had banned Huawei and ZTE from participating in the bidding process for the 5G communication networks over security concerns. Huawei contends that these actions violate the China-Sweden BIT.

The tribunal, led by Gabrielle Kaufmann-Kohler (President) and with Jane Willems and Zachary Douglas, is examining whether Sweden's actions violate the national treatment and FET standards and whether they constitute indirect expropriation of Huawei's investments in Sweden.[51] The outcome of this case will be significant in determining the extent of protection offered under BITs against regulatory actions motivated by national security concerns.

The *Huawei Technologies* case is particularly important due to its geopolitical implications. Sweden's ban of Huawei is part of a broader trend among Western countries to limit the involvement of Chinese technology companies in critical infrastructure, citing national security concerns.[52] The case raises important questions about the balance between national security and investment protection under international law. Specifically, it will test the limits of the national treatment

[50] Huawei v. Sweden, ICSID Case No. ARB/22/2, Request for Arbitration (Jan. 7, 2022).

[51] *Id.* ¶¶ 94-99.

[52] *See* Ryan Browne, *Top EU official urges more countries to ban China's Huawei, ZTE from 5G networks*, CNBC (June 16, 2023), https://www.cnbc.com/2023/06/16/eu-urges-more-countries-to-ban-chinas-huawei-zte-from-5g-networks.html; *accord* Christina Cheng, *Is the EU Finally Headed Towards a Ban on Huawei?*, CHINAOBSERVERS (Sept. 7, 2023), https://chinaobservers.eu/is-the-eu-finally-headed-towards-a-ban-on-huawei/; *see also* REUTERS, *U.S. actions against China's Huawei*, https://www.reuters.com/graphics/USA-CHINA/HUAWEI-TIMELINE/zgvomxwlgvd/.

and FET standards as well as the definition of indirect expropriation in the context of regulatory measures aimed at protecting national security. We saw something similar with Argentina's financial crisis and regulatory measures in the early 2000s, which gave rise to a number of important cases,[53] none of which were deferential to Argentina's economic policy concerns.[54]

C. *AsiaPhos Ltd. v. China (ICSID Case No. ADM/21/1)*

The case of *AsiaPhos Ltd. v. China*[55] involves claims of expropriation related to phosphate mines in the Sichuan province. AsiaPhos alleged that provincial directives led to the shutdown and sealing of its mines, which were located within a planned panda reserve and the Jiudingshan Nature Reserve.

The tribunal, chaired by Klaus Sachs (President) and with Albert Jan van den Berg and Stanimir Alexandrov, had to determine whether it could entertain claims regarding the occurrence of expropriation. The tribunal concluded it could not, as the scope of arbitral consent in the relevant BIT was limited to disputes concerning the amount of compensation, not the existence of expropriation itself.[56] This limitation underscores the importance of clearly defined terms within BITs regarding the scope of disputes that can be arbitrated.

The *AsiaPhos* case demonstrates the complexities involved in determining the scope of arbitral consent under BITs. By restricting the tribunal's jurisdiction to disputes over the amount of compensation, the BIT effectively limits the ability of investors to challenge the legitimacy of expropriation itself. This case also highlights the tension between environmental conservation efforts and investment protection.

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[53] *See* Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 451-52 (2007) (stating that by "2004, thirty-five ICSID cases were pending against Argentina, most of which were based on measures the government introduced to address the economic crisis in 2001").

[54] *See id.* at 478 (citing to the CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, case that "recognized that Argentina had not singled out foreign investors for discriminatory treatment" but "found that the government had denied such investors the stable regulatory framework advertised to foreigners throughout the 1990s," which constituted a violation of fair and equitable treatment).

[55] AsiaPhos Ltd. v. China, ICSID Case No. ADM/21/1, Award (Feb. 16, 2023).

[56] *Id.* ¶ 187.

Governments may face challenges in balancing the need to protect natural reserves with their obligations under IIAs.

V. BROADER IMPLICATIONS AND FUTURE TRENDS

The involvement of China in ISDS cases, though currently limited, is likely to increase as the country's outbound investments continues to grow and its economic influence expands. This trend will bring to the forefront several critical issues in international investment law.

For example, the interpretation of BIT provisions will continue to evolve as tribunals address new and complex disputes involving Chinese investors and the Chinese state. The *Huawei Technologies* case, for instance, may set important precedents[57] regarding the treatment of national security exceptions in BITs. As more countries impose restrictions on Chinese technology firms, the outcomes of these cases will shape the future landscape of international investment law.[58]

Further, the balance between regulatory sovereignty and investor protection will remain a contentious issue. Governments worldwide are increasingly adopting measures to protect public interests, such as national security, public health, and environmental conservation. These measures often conflict with the protections afforded to foreign investors under BITs. Current and future disputes will likely test the limits of regulatory exceptions and the scope of investor rights under

[57] Even though in ISDS cases tribunals are not "technically" bound by prior decisions, a practice of *stare decis* has nevertheless developed and continues to thrive. *See generally* David McArthur et al., *The Role of Precedents in Investment Treaty Arbitration*, *in* IN-DEPTH: INVESTMENT TREATY ARBITRATION (Barton Legum ed., 8th ed. 2024), *available at* https://www.lexology.com/indepth/the-investment-treaty-arbitration-review/the-role-of-precedents-in-investment-treaty-arbitration.

[58] *See e.g.*, Georgetown University, Center for Security and Emerging Technologies, *FCC Bans Sale of New Devices From Chinese Companies Huawei, ZTE and Others* (Nov. 28, 2022), https://cset.georgetown.edu/article/fcc-bans-sale-of-new-devices-from-chinese-companies-huawei-zte-and-others/#:~:text=The%20Federal%20Communications%20Commission%20voted,equipment%E2%80%94over%20national%20security%20concerns; *see also* Ben Lutkevich, *TikTok bans explained: Everything you need to know*, TECHTARGETS.COM (May 2024), https://www.techtarget.com/whatis/feature/TikTok-bans-explained-Everything-you-need-to-know.

international law.[59]

Finally, China's approach to ISDS and its engagement in international arbitration will be closely watched by other countries and investors. China's strategy in negotiating and implementing BITs, as well as its responses to ISDS claims, will influence global investment practices. As China continues to refine its legal framework for protecting outbound investments, other countries may adopt similar approaches.

VI. CONCLUSION

China's participation in the ISDS has been limited. Since 2007, only 1.7% of all ICSID cases were brought by Chinese investors as claimants and in only 0.8% of the cases was China the respondent. Similarly, out of all PCA cases, only 2.8% were brought by Chinese investors and in only 1.4% was China the respondent. Chinese investors have claimed violation of the national treatment, FET, and FPS standards as well as claiming expropriation and the applicability of MFN provisions. On the other hand, China's most common defenses are the lack of jurisdiction of the tribunal, its power to expropriate, and the prescription of the limitation period to present claim.

Despite its limited participation, China's involvement in international investment disputes provides valuable insights into the complexities of global investment protection, from the terms of the IIAs to the management of disputes. The cases of *Ansung Housing*, *Huawei Technologies*, and *AsiaPhos*, cited above, illustrate the diverse challenges facing investors and the intricate legal issues surrounding BITs. As China's role in global investment grows, its engagement with ISDS mechanisms and the evolution of its BITs will impact the future of international investment law.

[59] *See e.g.*, Eco Oro Minerals Corp. v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Direction on Quantum, ¶441 *et seq.* (Sept. 9, 2021) (discussing whether an environmental protection decree, banning mining in a sensitive area of Colombia's highlands was an expropriation).

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