SCOPE OF ARBITRATION IN CHINESE
BITS: POLICIES & IMPLICATIONS

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THE POLICIES THAT LED TO A NEW GENERATION OF BILATERAL INVESTMENT TREATIES

AND THEIR IMPLICATIONS FOR FOREIGN AND CHINESE INVESTORS

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ABSTRACT:

This article starts by analyzing the different ingredients that have come together to formulate the current state of China’s policy toward foreign investment. These ingredients are non-exhaustive in nature but are essential in setting the context for the issue to be discussed. Next, we move into the core issue: What are the implications of Bilateral Investment Treaties (“BITs”) that contain arbitration clauses, which incorporates a “narrow” or “broad” scope of arbitration? Specifically, how does the scope of arbitration affect foreign investors conducting Foreign Direct Investment (“FDI”) in China and how does it affect Chinese investors who conduct FDI abroad? In order to answer these questions we start by analyzing First Generation BITs, which contained a restrictive scope of arbitration. Next, we will analyze Second Generation BITs, which have recently been

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signed between China and countries such as Germany, Finland, and the Netherlands. These BITs contained a broad scope of arbitration. Taken account of these implications I will then address some of the issues that have arisen since the implementation of Second Generation BITs. Next, I will demonstrate some of the policies that may have led China to construe this new generation of BITs. This analysis will begin by briefly surveying the economic development from China’s reform in 1979 to the present in conjunction with China’s attitude toward investment arbitration over this period of time. I conclude that China’s attitude and policy toward investment arbitration has been inextricably intertwined with the development of its economic structure.

I. THE INGREDIENTS

a. A Symbolic Transformation

On the eighth second of the eighth minute of the eighth hour on August 8th, 2008 the People’s Republic of China (“China”) welcomed the world to the Beijing Olympic Games (“2008 Olympic Games”). No other event in China’s history has been as widely broadcasted or as closely followed by the international community.\(^2\) The exhilaration that led to the 2008 Olympic Game marked a transition in how the world viewed China’s attitude and outlook toward international cooperation. More importantly the message set forth by China as the host nation during The Games paralleled many of the initiative that it has taken in recent years to align its tracks with the world. The ceremony demonstrated the symbolic transformation of a nation that

had traditionally held the idea of self-sufficiency to a nation that is beginning to embrace the progressive norm of international cooperation.

b. Inflow of Foreign Direct Investment

With the success of the 2008 Olympic Games, China is looking forward to instill further confidence in the international community. At this very moment, construction and preparation is being made for the 2010 World Exhibition in Shanghai. However, games and exhibition are not the only plans on China’s agenda in catapulting itself onto the world stage. Since China joined the World Trade Organization in December 2001, the rate of foreign direct investment (“FDI”) pouring into its provinces has measured an unprecedented amount. Critics argued China’s per-capita GDP, which ranked 97 out of 178 countries in 2007, reflected the country’s much need for internal growth and development. On the other hand, it is hard for investors and proponents to ignore China’s large domestic market, its availability of cheap labor, and her rapid economic growth. These are some of the factors that attracted $83.5 billion dollars of foreign investment into China in 2007.

c. Outflow of Foreign Direct Investment

At the same time, China is looking beyond its borders for energy, resource, and investment opportunity. In 2007 China imported 1.5 billion barrels of oil and 3.87 billion cubic meters of natural gas from energy giants such as Venezuela, the Republic of Sudan, and Saudi

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6 Id.
Arabia. That same year, firms from China continued to acquire strategic assets outside of Asia, particularly in extractive industries in developed countries, Africa, and South America.

On the other side of the globe, China’s steel titans such as BaoSteel, SinoSteel, and ShaGang actively invested in large iron-ore mines and around the world. These are a few examples that comprised the $22.5 billion dollar outward FDI package from China in 2007.

The wheels of commerce have been accelerating at an exponential rate for China through the last decade. The growing rate of foreign investment into China and investment by Chinese companies abroad is undeniable. But behind this development, China is meticulously balancing the tradeoff between her interests as a capital exporting country that is interested in a broad scope of investment protection for her investors abroad and her interests as an inward foreign investment country that is interested in upholding state sovereignty in the form of regulation. This clash of interests is apparent in the formulation and progress of China’s Bilateral Investment Treaties.

II. BILATERAL INVESTMENT TREATIES & SCOPE OF ARBITRATION

Bilateral Investment Treaties (“BITs”) are a specific type of international treaty that provides for substantive as well as procedural protection for investors against the risk of investing in a foreign country. Protections guaranteed under BITs are essential to the establishment and the sustainability of an investment relationship. Most importantly, BITs

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8 Id. “The specific guarantees contained in the treaties aim at implementing structures that are essential for the functioning of a market economy. National and most-favored-nation treatment aim at ensuring a level playing field for the economic activity of foreign and domestic economic actors and are a prerequisite for competition. The
allow investors to seek direct legal protection against host nation in an event the host nation fails to comply with its obligations guaranteed under its investment treaty. 9 With over 120 BITs signed to date, China is ranked second only to Germany in the number of BITs signed in a global count. BITs have been recognized by investors as a mean to receive protection and attain compensation when conducting direct investment in a country abroad. Compared to the long and tedious process of attaining protection through diplomatic channels by the investor’s home state or the un-predictability of seeking recourse through a host country’s domestic courts, BITs have empowered investors with the unilateral ability to initiate arbitral proceedings against the host country. 10 When a dispute arises, an investor and the host state may proceed with an arbitral process via an ad hoc tribunal or submit the case into an institutional tribunal such as the International Center of Settlement of Investment Disputes (“ICSID”). In many cases the host nation may be a signatory of the Washington Convention, which would render the nation’s consent to ICSID jurisdiction. 11

In 1966 ICSID was established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or the Washington Convention (“Washington Convention”). 12 In short, ICSID provides facilities necessary for the conciliation protection against expropriation guarantees the respect for property rights as an essential institution for market transactions; capital transfer guarantees ensure the free flow of capital and contribute to the efficient allocation of resources in a global market. The umbrella clause backs up private ordering between foreign investors and the home State. Fair and equitable treatment and full protection and security ensure basic due process rights for foreign investors and require adequate police protection, features that are equally essential for the functioning of market economies.” Id. at 116-117.

9 Id.
10 Id.
11 See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, March 18, 1965, 17 UST 120, 575 UNTS 159. According to Article 25 of the ICSID Convention after ratification of the convention “jurisdiction of the centre shall extend to an legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” Id.
and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Arbitration clauses that designate ICISD as the institutional arbitral body are commonly found in investment contracts between governments of member countries and investors from other member countries. Under ICSID, member states have to “recognize an award…as binding and enforce it within its territory as if it were a final judgment of a court in that state.” The Washington Convention also places many restrictions on the host nation once ICSID arbitration is initiated.\(^\text{13}\) China became a signatory of Washington Convention in February 1993.\(^\text{14}\)

\(a.\) **Limited Scope of Dispute Settlement in China’s “First Generation” BITs and their Implications**

As of April 2009 there has been no cases brought against China under ICSID arbitration; much of this is due to China’s reservation under Article 25(4) of the Washington Convention, consenting to ICSID jurisdiction only if the case’s dispute is over compensation resulting from expropriation and nationalization.\(^\text{15}\) Furthermore, the dispute settlement mechanism contained in the first generation of Chinese BITs did not provide a generic or open-ended consent to ICSID or

\(^{13}\) See Monika C.E. Heymann, *International Law and the Settlement of Investment Disputes Relating to China*, 11 J. INT’L ECON. L. 507, 510-511 (2008). Once an arbitral tribunal is initiated by ICSID court of the host nation may not intervene with the course of the proceeding and will not have any influence over outcome of the decision. Furthermore, contrary to commercial arbitration, neither party may take legal action before a national court during an ICSID arbitration proceeding or after the award is rendered. *Id.*

\(^{14}\) *Id.* at 515.

\(^{15}\) *Id.* at 515-516.
any other type of ad hoc investor-state arbitration. A typical clause concerning a settlement of dispute in a First Generation Chinese BIT provides (“First Generation BIT”):

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an international arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) […] Any dispute concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted by mutual agreement to an ad-hoc arbitral tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

China’s BITs with Argentina (Article 8), Bolivia (Article 8), Cuba (Article 9), Ecuador (Article 9), Peru (Article 8), and Uruguay (Article 9) are excellent examples that provide similar dispute resolution mechanisms.

The implication of these First Generation BITs for foreigners is staggering. Take for example an Argentinean investor who is interested in investing in a vineyard in Northern China to expand its line of wine production. He invests heavily, builds the necessary infrastructure, hires the necessary labor, and transports the invaluable equipment, which together would make production possible. After years of successful production, the Chinese government decides to confiscate the production warehouse and the vineyard due to a land dispute. Before an arbitral
tribunal can decide whether the amount in compensation was sufficient, the foreign investor must attain a Chinese domestic court to concede that there was expropriation. To a foreign investor who is unfamiliar with China’s legal system this would be a mindboggling venture. Furthermore, even if the investor is able to attain competent counsel to represent the company (in a case of expropriation in a Chinese domestic court against the government of China), there is no telling the amount of time this process may take. The lack of confidence in domestic courts in asserting their independence from the central government acts as another disincentive for foreign investors coming into China. The implication set forth by this scenario invoked by first generation BITs counters China’s growing effort to attract FDI.

The limited scope of arbitration also has negative effects on Chinese investors who have invested abroad but who also seek protection under China’s BITs. China has been a member of the Washington Convention for more 15 years and has contributed $23 billion in foreign direct investment abroad in 2007 alone. Yet surprisingly, there has only been one Chinese investor who has ever filed a dispute as an investor party via ICSID against a host nation. Because of the narrow scope of arbitration in China’s BITs, any substantive breach of the BIT would not be adjudicated by means of international arbitration unless the host state consents, thus “effectively granting the host state a permanent veto over the possibility of resorting to international arbitration.”

Ironically, these problems faced by Chinese investors are exactly what ICSID and the Washington Convention set out to prevent. Instead under first generation BITs, a substantive

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19 Id. at 465. On February 12, 2007, Mr. Tza Yap Shum (“Mr. Shum”) brought a $20 million claim against the Peruvian government for alleged indirect expropriation of TSG Peru S.A.C. (“TSG”). TSG is involved in the manufacturing, distribution and export of fish flour to Asia. In 2004 TSG exported close to 30 million kilos of fish flour to China. Mr. Shum owns 90% of TSG’s stocks; however, Peruvian fiscal authorities froze TSG’s bank accounts in an attempt to recover over 12 million Soles (Peru’s currency; roughly $3.9 million) in taxes allegedly owed by the company. Id.

20 Id. at 455.
breach between a Chinese investor and a host nation must be submitted to a “competent court of the Contracting Party accepting the investment.” If a dispute were heard in a developing country’s domestic court, a Chinese investor would often be biased due to the court’s lack of independence from the host nation’s government.  

The backdrop created by China’s attempt to limit itself from *ad hoc* and ICSID arbitration was implemented to limit the scope of China’s exposure to internationals tribunals as a method for investment dispute resolution. Like other policies, protectionism can sometime hurt a host nation. Not only does too much protection degrade the confidence of foreign investors who seek political protection while investing into China, it also hurts Chinese investors who seek protection under Chinese BITs while investing abroad. These are some of the implications that spearheaded China’s decision to adopt a new generation of BITs.

*b. Recent Development in China’s “Second Generation” BITs and their Implications*

At the beginning of the 1990s, China began to negotiate more comprehensive dispute settlement provisions in its BITs.  

At the turn of the millennium, these provisions became the standard for a new generation of BITs. Unlike First Generation BITs, where the scope of dispute settlement was limited to compensation for expropriation, the Second Generation of Chinese BITs (“Second Generation BIT”) consents to arbitration in “any dispute between the investor and the host nation.” A typical clause concerning a settlement of dispute in a second generation BIT provides:

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21 See Schill, *supra* note 7 at 83.

22 *Id.* at 91. “Any dispute between an investor of one Contracting Party and the other Contracting Party under ICSID or *ad hoc* tribunal.” *Id.*

23 See Tung & Cox-Alomar, *supra* note 17 at 461. China’s BITs with the Netherlands (2001); Bosnia-Herzegovina (2002); Germany (2003); Finland (2004). *Id.*
(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.

(4) Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.24

Under this new breed of BITs, a foreign investor in China would have the opportunity to invoke ICSID or ad hoc arbitral jurisdiction in any dispute concerning investment against the host country. With these comprehensive arbitration clauses investors are no longer haunted by the problems of First Generation BITs. An investor would have the opportunity to bring forth a claim in front of an international arbitral tribunal to resolve a dispute rather than be confined to the domestic court system that investors often attempts to avoid.

Analogously for a Chinese investor seeking political protection while investing abroad, any substantive breach of the BIT can be adjudicated by means of arbitration thus eliminating the host states’ permanent veto over the possibility of resorting to international arbitration.25 Since many of China’s Second Generation BITs are signed with developing nations that lack a strong and reputable judicial system, a Chinese investor will not be “disincentivized” by the prospect of

24 Investment Promotion and Protection Treaties, P.R.C.-F.R.G., art. 9, December 1, 2003, 10 Investment Treaties (ICSID) (emphasis added).
25 See Tung & Cox-Alomar, supra note 17 at 455.
entering into an unpredictable court case in a foreign court against its respective central
government. China is beginning to realize, under today’s circumstances, invoking international
standards is no longer just a consideration in a globalized investment network by becoming
increasingly permeable for investors.

The development and the implementation of these new dispute settlement provisions has
also raised certain questions, the most interesting of which are: (i) whether China’s reservation
under Article 25(4) of the Washington Convention to hear cases only involving the amount in
compensation would affect investors when a claim is brought against China under a Second
Generation BIT\(^{26}\); (ii) whether investors, who are nationals of First Generation BITs, be afforded
the same scope of political protection by invoking the Most Favored Nation Clause; and (iii)
whether wording of the relevant BITs would determine the jurisdiction of an arbitral tribunal.

III. NEW ISSUES ARISING FROM CHINA’S SECOND GENERATION BITs

a. China’s Reservation to ICSID Jurisdiction under Article 25(4) of the Washington
   Convention

When China became a signatory of the Washington Convention, it exercised reservation
under Article 25(4) to submit to ICSID jurisdiction only in disputes over compensation arising
from nationalization and expropriation.\(^{27}\) The Washington Convention is silent on the legal
effects of such declaration. According to Article 2(1)(d) of the Vienna Convention on the Law of
Treaties, a reservation is considered as a declaration whereby a state purports to exclude or to

\(^{26}\) See Heymann, supra note 13 at 517-518.
\(^{27}\) Id. at 517.
modify the legal effect of certain provisions of a treaty in their application to that state. But what does this mean for a foreign investor investing in China? Does this mean: 1) China’s acceptance of ICSID jurisdiction is limited to investment disputes over compensation resulting from expropriation and naturalization or 2) is it just a declaration of intent as to which dispute China wants to accept in the future without substantive legal effects? Under the Washington Convention, ICSID tribunal may establish jurisdiction when: 1) the state has ratified the convention and 2) when the state had expressly consented to jurisdiction pursuant to Article 25(1). Focusing on the second prong, Article 25(4) of the Washington Convention states that a declaration of reservation under the section shall not constitute express consent required by Article 25(1). In addition, according to the legislative history of the Washington Convention ratification of the convention alone does not constitute consent to ICSID jurisdiction. Because China’s reservation under Article 25(4) does not constitute express consent to ICSID jurisdiction, it does not hold legal consequence in conflict with its new BITs. In other words, due to China’s express consent in its new generation of BITs, a foreign investor conducting FDI in China may bring forth any dispute under ICSID arbitration despite of China’s reservation under Article 25(4) of the Washington Convention. Although this may instill much confidence for investors who are nationals protected under the Second Generation of BITs, it is unsure whether investors who are nationals of the First Generation BITs would be afforded the same scope of dispute resolution.

b. Most Favored Nation Clause as a Methodology to Invoke ICISID Jurisdiction

28 Id.
29 Id.
30 Id. at 518. Article 25(4) of the Washington Convention declares that a reservation accepting ICSID jurisdiction for certain investment disputes under the said section does not have legal effect. Id.
31 Id.
32 Id. at 510.
Many BITs contain a Most Favored Nation Clause (“MFN Clause”), which states that a host nation will not subject an investor to treatment less favorable than another investor who is a national from a third state.\textsuperscript{33} The objective of the MFN Clause is to assure that all investment coming into a host nation should be treated without discrimination. The relevant questions becomes to what extent does the MFN clause apply to provisions concerning the settlement of disputes and, if it does not apply, is that \textit{stare decisis} for investors seeking protection under the first generation of China’s BITs? For example, the BIT signed between China and the United Kingdom in 1986 does not recognize the jurisdiction of ICSID or any \textit{ad hoc} tribunal for all disputes other than the amount in compensation, but under Article 3 it contains the following MFN clause:

\begin{quote}
(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment \textit{less favorable than that which it accords to investments or returns of nationals or companies of any third State}.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party as regards their management use enjoyment or disposal of their investments, to treatment \textit{less favorable than that which it accords to nationals or companies of any third State}.\textsuperscript{34}
\end{quote}

Can an English investor argue that the ICSID clause in the newly signed Chinese-Finnish BIT applies to him because the Chinese-English BIT gives him the right to have his investment treated no “less favorable than that which it accords to investment or returns of nationals or companies of any state?”

Two recent cases have shed light on the application of MFN Clause when it comes to investors who are nationals of First Generation BITs. In \textit{Maffezini v. Kingdom of Spain}, an

\textsuperscript{33} Id. at 519.
\textsuperscript{34} Investment Promotion and Protection Treaties, P.R.C.-U.K., art. 3, May 15, 1986, 2 INVESTMENT TREATIES (ICSID) (emphasis added).
Argentinean national invoked the MFN clause and argued that the shorter waiting period of the BIT between Chile and Spain (six-month waiting period) should be applied instead of the eighteen-month waiting period (required under the Argentina-Spain BIT).\textsuperscript{35} Even though the relevant MFN Clause did not refer to dispute settlement, the tribunal concluded: “today’s dispute settlement arrangement are \textit{inextricably} (emphasis added) related to the protection of foreign investor” and that the modern development international arbitration “are closely linked to the material aspects of the treatment accorded.”\textsuperscript{36} Therefore, the MFN Clause should be implemented to the shortened the waiting period from an eighteen-month to a six-month waiting period.\textsuperscript{37} On the other hand, in \textit{Plasma Consortium Ltd. v. Republic of Bulgaria} the arbitral tribunal “explicitly rejected that a MFN clause could be used to invoke ICSID arbitration when there is no ICSID arbitration clause in the relevant BIT.”\textsuperscript{38} Plasma Consortium is a Cypriot Company seeking protection under the Cyprus-Bulgaria BIT. The tribunal held that “a contracting state cannot be presumed to have agreed to [ICSID arbitration] by incorporating dispute resolution provision from other treaties negotiated in an entirely different context.”\textsuperscript{39} The distinction between \textit{Maffezini} and \textit{Plasma Consortium} can at best be differentiated as a matter of procedural versus substantive adoption of dispute settlement provisions via a MFN clause.\textsuperscript{40} Thus the

\textsuperscript{35} Id. at 520.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 520-521.
\textsuperscript{39} Id. Similarly in \textit{Salini v. Jordan}, an ICSID tribunal held that the Italy-Jordan BIT showed no intention to have dispute settlement matters covered by the MFN clause, and that the said clause should not be applied to the extent of dispute settlement. In \textit{Berschader v. Russia}, an \textit{ad hoc} tribunal held when confronted with the text of the Belgium-Russia BIT the treaty did not indicate that the MFN clause applied to all matters covered by the treaty and therefore is impossible to apply such clause to all provisions of the treaty. \textit{See} Luke Eric Peterson, \textit{Majority Frowns on Using MFN Clauses to Obtain Wider Arbitration Options}, January 11, 2008, at 5, 7, available at http://www.iisd.org/pdf/2008/itn_jan11_2008.pdf.
\textsuperscript{40} \textit{See} Heymann, supra note 13 at 520. Noting that some leading writers on the subject has differentiated that the application of the MFN clause as a matter reacting to the scale of what creating investors propose to “borrow” from other treating. Therefore a requesting a tribunal to shorten a 18 months waiting period prior to pursuing international
application of a MFN clause, when applied to dispute resolution provision is limited to the rules of procedure and it may not be used to substitute consent by the respective state to ICSID jurisdiction. This also means that the English investor will not be able to rely on the MNF Clause to invoke ICSID jurisdiction and would be bound by the limited scope of arbitration set forth by original English-Chinese BIT.

It is important to note that despite the Maffezini and Plasma Consortium decision, an investor should not assume that ICSID jurisdiction could never be invoked via the MFN clause. Because arbitrators are not formally bound by the doctrine of stare decisis in international arbitration, future decisions will depend on a multitude of factors such as the intent of the parties, the scope of the MFN clause, and the negotiating history of the relevant BIT.

c. Russia & the Czech Republic: The Interpretation of Other Narrowly Drawn Arbitration Clauses and their Implications on First Generation Chinese BITs

arbitration is a procedural request that is much less “radical” to “borrow” or “transplant” a completely different dispute settlement provision found in another BIT. See Peterson, supra note 39 at 7.

41 See Tai-Heng Cheng, Precedent and Control in Investment Treaty Arbitration, 30 FORDHAM INT’L L.J. 1014, 1015 (April 2007). (Arguing that although arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judgment, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.)

42 Unlike the Maffezini line of cases where the presiding arbitrators held that as “a matter of principle MFN provisions in BITs should be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise,” the Berschader case held that an MFN provision should only reach the arbitration provision of other treaties “where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.” First, the majority held the Belgium-Russia BITs did indicate the MFN clause should be applied to all matters covered under the treaty. However, the majority held that this was clearly impossible to do. Secondly, the court noted the parties in the treaty further clarified the application of the MFN clause by stating it applies “particularly to Articles 4, 5 and 6.” Since none of these articles include investor-state dispute settlement, the court held there is no indication that the parties intended the MFN clause to reach into the dispute settlement provision. Lastly, the majority determined whether the parties may have shared the view that investor-state arbitration was an essential element of investment protection and because the agreement was signed in 1989, where there was no generally accepted approach to the question of whether an arbitration clause is encompassed by a MFN clause, the majority declined to apply the MFN clause to the dispute settlement provision. Todd Weiler, an arbitrator in the Berschader tribunal in his dissenting opinion, stated MFN clauses should apply to all aspects of the regulatory environment government by an investment protection treaty, including dispute settlement. See Peterson, supra note 39 at 8.
In an event where a foreign or Chinese investor may not be protected under the same umbrella as those who are nationals or are dealing with countries that are under China’s second generation of BITs, the wording of the relevant BITs may determine the jurisdiction of an arbitral tribunal. This is also assuming that the tribunal refused to adopt a broader scope of arbitration via invoking the MFN clause. China is not the only country that has narrowly worded arbitration clauses in its BITs. In the past, countries like Russia and the Czech Republic have also entered into BITs with narrowly worded arbitration clauses. In two recent cases Berschader v. Russia and EMV v. Czech Republic, narrowly constructed arbitration clauses were tested by international tribunals. In Berschader, the arbitral tribunal held that the Belgium-Russian BIT provided arbitration only in cases of dispute “consenting to the amount or mode of compensation” to be paid under Article 5 (expropriation clause) of the present Treaty.” Therefore, the arbitrators held the tribunal lacked jurisdiction to hear a claim of whether expropriation had occurred given the narrow wording of the said BIT. On the other hand, in EMV v. Czech Republic, the arbitral tribunal held that the Belgium-Czech Republic BIT was worded

44 Id. at 8.
45 See Luke Eric Peterson, Award in Berschader v. Russia BIT Arbitration is Finally Made Available to Public, International Treaty New, January 11, 2008, at 3, available at http://www.iisd.org/pdf/2008/itn_jan11_2008.pdf. Vladimir and Moishe Berschader, Belgian nationals, sued the Russian government alleging breach of Belgium & Luxemburg-Russia BIT. The Belgian pair accused the Russian government of failing to pay for millions of dollars in construction work performed on the Russian Supreme Court building and due to these loses, it drove the company into bankruptcy. The tribunal held that they lacked jurisdiction over the dispute. Furthermore, the two members of the tribunal determined that Berschader’ indirect investment in Russia were not protected under the terms of the Belgium-Russia BIT. Id. at 3-4.
46 See Luke Eric Peterson, UK Courts Declines to Overturn Jurisdiction in Czech TV Broadcasting Arbitration, December, 14 2007, at 5, available at http://www.iisd.org/pdf/2008/itn_dec14_2007.pdf. European Media Ventures (“EMV”), a Luxemburg based company, initiated an arbitral claim again the Czech Republic via an ongoing investment treaty. An ad hoc tribunal upheld jurisdiction in a dispute related to liability for expropriation. The Czech Republic insisted that Article 8 of the Luxemburg-Czech Republic BIT permits investor-state arbitration in case of disputes concerning compensation due by virtue over the amount of compensation owing in the event of expropriation. Thus, the tribunal lacked jurisdiction to examine whether the Czech Republic was liable for expropriation. The Czech Government appealed to the UK High Court of Justice (“High Court”), the High Court upheld the tribunal’s decision chaired by Lord Mustill, Prof. Christopher Greenwood, and Julian Lew. EMV
in a less restrictive fashion, specifically the BIT provided for arbitration “concerning compensation due by virtue of [expropriation].” Therefore, the tribunal upheld jurisdiction to decide whether expropriation had occurred.\textsuperscript{47}

A typical First Generation Chinese BIT submits jurisdiction to an arbitral tribunal when the claim involves \textit{the amount of compensation for expropriation}. This is analogous with the more restrictive clause interpreted by the \textit{Berschader} tribunal. Pursuant to the \textit{Berschader} ruling, a foreign investor seeking to invoke arbitral jurisdiction under First Generation BITs will face a roadblock if the tribunal is to determine anything other than the amount of compensation. This means a tribunal would not have jurisdiction to determine whether expropriation had taken place. Under the same circumstances, a Chinese investor would not be able to bring a claim through arbitration against a host nation to determine actual expropriation in hopes that jurisdiction can be invoked via a broader scope of interpretation. This is not an area generalization can be made but it is important to note that although future tribunals may take the \textit{Berschader} decision under advisement, the outcome of their decision will be based on two important factors. The first factor is the specific wording used under the BIT which a party wishes to use to invoke arbitral jurisdiction and the second factor is the interpretation of narrowly scoped arbitration clauses by arbitral tribunals as it applies to that specific BIT.

\subsection*{IV. \textbf{China’s Economic Development and Its Affect on BITs}}
\subsubsection*{a. Old Policies Favoring Protectionism in a Time of Capital Influx}

demonstrated to the High Court that BITs that intended to limit an arbitral board to hear cases over the amount and not whether there has been expropriation used limiting language like “the amount” or “method.” Conversely the Luxemburg-Czech BIT did not use such restrictive language. The High Court held that the tribunal had jurisdiction to determine whether the investor was entitled to compensation at all. \textit{Id.} at 6.\\textsuperscript{47} \textit{Id.}
Eleven years before China ratified the Washington Convention, it signed its first BIT with Sweden in 1982. The China-Sweden treaty lacked many of the characteristics that one would see in a Second Generation BIT. Nevertheless, it was a great step forward in a time where China was slowly progressing into the world stage. Even then “neo-economic” reform was manifesting within members of the Chinese Communist Party (“CCP”). The 1979 Reform & Openness Policy (“R&O Policy”), led by some of the most influential members of the Chinese government, marked the theoretical ideology behind a new generation of economic reformation. The R&O Policy was the keystone that held together the arch of China’s economic policy for decades to come. After centuries of skepticisms and resentment, China finally began to view foreign investment and international law with cautious acceptance. The momentum of growing economic development that started pursuant to the R&O Policy played a pertinent role in China’s modern economy. But more importantly, China’s attitude and policy

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48 See Investment Promotion and Protection Treaties, P.R.C.-Swed., art. 6, March 29, 1982, 2 INVESTMENT TREATIES (ICSID). Under Article 6 of the China-Sweden BIT, only disputes concerning the interpretation or application of the treaty are subject to arbitration by an ad hoc tribunal. The scope of arbitral jurisdiction in the China-Sweden BIT is narrower than the subsequent BITs that China signed which allows for arbitral determination on the amount of compensation in an event of expropriation. This left foreign direct investors with no hopes of resolving dispute and liability arising from their investment other than going through complicated diplomatic channels or unpredictable legal procedure through China’s domestic courts. Id.

49 From the Communist Revolution in 1949 to the economic reform period of 1979, China’s foreign policy can be defined as an economic order that emphasized the “sovereignty of States over their natural resources and [was a country] denied any substantial protection of foreign investment under international law.” China’s foreign policy was characterized by the Five Principles of Peaceful Co-Existence, consisting of mutual respect for sovereignty and territorial interest, mutual nonaggression, non-interference of internal affair, equality and mutual benefit, and peaceful co-existence. See Schill, supra note 7 at 77.

50 In 1978, pragmatists led by Deng Xiao Ping within the Chinese Communist Party (“CCP”) spearheaded reforms to modernize China’s economy. Under Den’s direction, China established relations with the West thus marked the start of rapid economic that followed. At the core of the reform, was the idea of “Reform and Openness” (改革开放). The goal of Deng’s policy was based on the modernization of four core sectors in China: agriculture, industry, science, and technology. The modernization process was accelerated by stepping up the volume of foreign trade, especially with that of Japan and the West. In addition, Deng’s policy established Special Economic Zones (经济特区) to attracted foreign companies. The legacy of the Reform and Openness Policy, promulgated by Deng, paved the road for foreign direct investment coming into and out from China to this day.

51 See Schill, supra note 7 at 77. “Similar to the Great Wall built in an attempt to protect various dynasties from raids by foreign powers between the third century BC and the beginning of the 17th century, the PRC isolated itself form the international community and shielded itself against foreign economic and political influences by setting up ideological fortifications against foreign investors and their protection by international law.” Id.
toward international law and thus international arbitration has been inextricably intertwined with the development of its economic structure.

The 1980s was a period that reflected the initial development of China’s economy following the 1979 R&O Policy.52 The development of special economic zones, the acceptance of foreign investment, and favorable tax treatment for foreign investors attracted FDI into China. During the same period, China passed legislation in numerous fields in an effort to attract international capital to spur the country’s development and to accommodate the new influx of foreign investors who entered the country’s market. But it was clear that China was not ready to resolve FDI dispute by resorting to reputable arbitral institutions such as ICSID. Arbitration, the accepted method of FDI dispute resolution, was limited in China’s BITs in an attempt to protect the government from liability and disputes. China’s protectionist policy is reflected in the scope of arbitral clauses found in its First Generation BITs.53

In the 1990s, China was invigorated with another wave of economic reforms, this time it was again backed by prominent members of the CCP within the central government.54 With an average economic growth of 8% each year, driven by an annual increase in foreign capital inflow, China signed the Washington Convention in February 1990 to accommodate the growing wave of international investors who demanded protection. Economic reforms also took in the form of legislation that favored foreign direct investors interested in entering China’s market.55

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54 During the 14th National Communist Party Congress in 1992 backed Deng’s renewed push for market reforms stating that China’s key task in the 1990s was to create a “socialist market economy.” Economic reformation became the hallmark of a ten-year development plan for China.
55 “The size of China’s domestic market, the availability of cheap labor, and her rapid rates of economic growth account for her attractiveness as a destination for foreign investment. Tax incentives further add to attracting foreign
With growing amount of FDI, pressure also mounted against the Chinese government to implement more comprehensive scope of arbitration in order to address issues in an event of liability and dispute. In the early 1990s, China entered into BITs with Spain and Greece that called for arbitration of “any dispute concerning the breach of the BIT,” subject to consent of the Chinese government for issues that went beyond compensation.\textsuperscript{56} This marked a transition in Chinese BITs in that the treaties did not directly reject disputes on issues other than the amount in compensation. Nevertheless, China’s BITS did not start to contain comprehensive dispute arbitration clauses until the next decade.

As a capital import country with an average of $30 billion of FDI each year between 1990-2000,\textsuperscript{57} China upheld state sovereignty and regulatory leeway by limiting the arbitral jurisdiction of its BITs. This forced investors to resolve the bulk of their disputes under China’s domestic courts, which in turn permitted the government to have control over FDI related matters. By limiting the arbitral scope of its BITs, China did not want international tribunals to make pertinent decisions with matters (as far as China was concerned) that were within China’s own sovereignty. Furthermore, China’s cautious acceptance of international participation is reflected in its reservation under the Washington Convention. Because foreign investors were conducting business within its borders, China viewed the ability to adjudicate issues arising from these investments as a matter of state sovereignty. Therefore, allowing foreign or international tribunal to adjudicate these matters would equate to China waiving that jurisdiction.

investors. In addition, China’s accession to the WTO in December 2001 resulted in lowering trade barriers and granted greater access for Chinese foreign markets...Furthermore the liberalization of the trade in services under General Agreement on Trade in Services provides foreign investors with greater opportunities for participation on a wider sphere of commercial activities.” See Schill, supra note 7 at 79.

\textsuperscript{56} See Mark A. Cymrot, Investment Dispute with China, 61-OCT DISP. RESOL. J. 80, 82-83 (2006).

Between 1990-2000, China also exported an annual average of $2.2 billion in FDI to foreign countries. Compared to the amount inward FDI into China, this was trivial.\textsuperscript{58} However, the rising capital of outward FDI from China would eventually steer future Chinese BITs in a new light and incentivize treaties that incorporate a full scope of arbitral dispute resolution.

\textit{b. New Policies Calls for Elimination of Protectionism}

In 2005 China had inward FDI amounting to more than $72 billion dollars, placing it as one of the top three recipients in the world. Since the New Millennium, the Chinese government has proposed further economic reform programs like the Five Year Economic Plan in October 2005.\textsuperscript{59} At the same time, China’s outward FDI has also risen concurrently.\textsuperscript{60} Between 2005 and 2006 China’s outward FDI increased from $12.3 billion to $21.2 billion.\textsuperscript{61} The Chinese government, who owned large shares in State Owned Enterprise (“SOE”), played a central role in contributing to the bulk of the nation’s outward FDI.\textsuperscript{62} These SOEs, administered by Chinese government’s ministries and agencies contributed to 73.5\%, 82.3\%, and 83.3\% of China’s outward FDI respectively from 2003-2005.\textsuperscript{63} To put this into perspective, in 2004, private firms in China accounted for a mere 1.5\% of the country’s total outward FDI.\textsuperscript{64} The Chinese

\textsuperscript{58} Id. At an annual average of $2.2 billion this would have been less than 7\% of the FDI capital that was entering China at the time. \textit{Id.}
\textsuperscript{59} In March 2006 The National Peoples’ Congress approved the 11\textsuperscript{th} Five-Year Economic program (2006-2010) aimed at building a harmonious society through more balanced wealth distribution and improved education, medical care, and social programs. The plan called for 45\% increase in the GDP. \textit{Id.}
\textsuperscript{60} \textit{See Leonard K. Cheng and Zihui Ma, China’s Outward FDI: Past and Future, July 2007, at 8, available at http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf.} (A systematic analysis of the size and composition of China’s outward FDI in 2003-2005.) In 2005, 40.3\% of China’s FDI flow went into business services; 18.6\% went into manufacturing; 18.4\% went into wholesale and retail; 13.7\% went into mining and petroleum; 4.7\% went into transportation and storage. \textit{Id.}
\textsuperscript{62} \textit{See Cheng and Ma, supra note 60 at 9-10.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id. at 10 n.6.}
government spearheaded China’s FDI abroad and thus was its largest stakeholder. With more than $22 billion of FDI in 2007 alone, it is apparent why Chinese investors would want to seek protection under BITs that calls for comprehensive dispute resolution via arbitration and why the Chinese government would be at the forefront to support and implement this change.

The reality is simple: SOEs conducting FDI in countries, who are not signatories of Second Generation BITs, had to submit substantive breaches involving the investment to a competent court of the contracting party accepting the investment. For example, in 2005 Latin America became the number one target for China’s FDI; it comprised of 52.74% of China’s total outflow. But most of China’s trading partners in Latin America are countries that are not signatories of Second Generation BITs. Thus, China’s protection under its own treaty while investing abroad is greatly limited. SOEs in Latin America must face many of the risks that arise in an event of dispute during the course of their investment. Since SOEs are administered by China’s central government, any disputes other than the amount of compensation in an event of expropriation would directly impinge upon the economic welfare of the Chinese government. But to make matters worse the institutions that have this power are foreign domestic courts. The idea that domestic courts of a foreign country may one day exercise jurisdiction over China’s SOEs and thus decide the economic interest of the Chinese government must not have been considered when First Generation BITs were drafted.

One of these SOEs, Sinopec Corp. is one of the largest energy companies in China and has recently expanded its interests to extract crude oil from African nations like Gabon, Sudan, 

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65 See Cheng and Ma, supra note 60 at 26. In 2005 China’s trading partners in Asia constituted the second largest outflow of FDI (35.7%). However, like their Latin American counterparts, BITs signed between China and these Asian countries had very limited scope of arbitral jurisdiction leaving investors, mainly SOEs, with similar dilemmas.
and Ethiopia. Sinopec Corp. is a publicly listed company with 68% of its interest held by Sinopec Group, which is wholly owned by the Chinese government.\textsuperscript{66} Therefore, the Chinese government has an exuberant interest in the performance of Sinopec Corp., especially in its large FDI abroad. Taking into account of the relevant background information, let us postulate a scenario between a dispute that arises between Sinopec and Ethiopia pursuant to venture to extract oil from the region. The dispute resolution provisions of investment treaties signed between China and Ethiopia conforms to the ones found in First Generation BITs.\textsuperscript{67} In an event that a dispute arises between Sinopec and the Ethiopia, Sinopec would be forced to resolve the dispute under Ethiopia’s domestic courts pursuant to the Article 9 (Dispute Resolution Provision) of the Ethiopian-Chinese BIT.\textsuperscript{68} Since the Chinese government owns substantial interest in Sinopec, an Ethiopian court would be directly adjudicating a case that involves the financial interest of the Chinese government. The only options for Sinopec are 1) to attain competent counsel to adjudicate the dispute through the Ethiopian court system (one that lack independence from its central government) or 2) request the Chinese government to step in and reach a resolution via diplomatic channels. But both options are tedious and unpredictable in its process and outcome compared to the option of adjudicating the dispute under international arbitration. In analyzing the dispute resolution clause found in the Ethiopian-Chinese BIT, the proceeding issues are apparent.

\textsuperscript{67} See KluwerArbitration Bilateral Investment Treaties: Agreement Between The Government of the Federal Democratic Republic of Ethiopia and The Government of The People's Republic Of China Concerning The Encouragement and Reciprocal Protection of Investments; \textit{http://daytona.law.miami.edu:2350/arbitration/DocumentFrameSet.aspx?ipn=28815} (last visited April 27, 2009). Pursuant to Article 9 of the Ethiopia-China BIT, “any dispute between an investor of one Contracting party”[…] “shall be entitled to submit the dispute to the competent court the contracting party accepting the investment”[…]“and if a dispute involving the amount of compensation for expropriation ca not be settled within six months […] it may be submitted at the request of either party to an ad hoc tribunal or arbitration under the auspices of [ICSID].” \textit{Id}.  
\textsuperscript{68} \textit{Id}.\n
The proceeding scenario shows how the policy of protectionism, which may have been beneficial when China was largely an import investment nation, undermines China’s FDI interests abroad as an export investment nation. By 2000 it was clear that China was no longer just a *capital investment nation*, she also became a *capital exporting nation* that needed broad ranges of investment protection for her investors abroad.\(^{69}\) With these competing interests, China realized she should not just look to what is happening internally in making their decisions. In sum, protectionism policy cannot be successfully implemented for a country that is both an importer and exporter of FDI.\(^{70}\) Thus, the balance between China’s interest as a capital exporting and capital importing country will result in position that will not favor either.\(^{71}\)

China’s First Generation BITs were testament of its protectionist policy in a time where there were substantial inward FDI and minor outward FDI. With the increase of outward FDI in recent years, protectionist policies hindered China’s ability to resolve issues while investing abroad. Chinese investors were confronted with some of the same problems that foreign investors faced when a dispute arose in the course of their investment in China. In the 1990s the amount of outward FDI from China was only 10% of the FDI coming into the country.\(^{72}\) In 2007 that percentage increased 27%, which amounted to $22.5 billion.\(^{73}\) Chinese investors poured FDI into host nations; at the same time these investors did not want to be subject to the jurisdiction of a foreign court in an event of a dispute. The only way to resolve the dilemma is to discontinue the protectionist policies that underlined the drafter’s intent in First Generation BITs.

\(^{69}\) See Schill, *supra* note 7 at 115-116.

\(^{70}\) *Id.*

\(^{71}\) *Id.*


\(^{73}\) *Id.*
It is hard to say definitively whether Second Generation BITs, which incorporated comprehensive dispute resolution via arbitration, were anticipatory or reactive measures of China’s growing outward FDI. Nevertheless the effect of outward FDI by Chinese investors played a crucial role in the formulation of a new generation of BITs that provides “protection” for foreign and Chinese investors in a global context. China signed its Second Generation BITs with nations like Bosnia-Herzegovina (2002), Finland (2004), Germany (2003), Guyana (2003), the Netherlands (2001), and Trinidad (2002). The proceeding BITs prove comprehensive dispute resolution via arbitration is the norm for China’s future BITs. This fundamental change in China’s investment treaty should strengthen the confidence of foreign investors in China’s policy to create a safe and reliable investment environment that is based on the notions of stability, reliability, and predictability.

V. CONCLUSION

China’s economic growth in recent years has been astounding, but more importantly its growth potential seems limitless. In the midst of all the excitement, it is very easy to forget that China has only had 60 years of economic development. Between 1949-1978 China had a centralized planned economy, it was not until 1979 that China jump-started its economic policies by implementing partial capitalistic market regimes. In the last 30 years, it has become clear to China that the elements necessary to sustain stable economic growth do not grow in a vacuum. Factors such as politics, law, technology, natural resources, human capital, foreign policy, and energy invariably affect the development of a country’s economy. But this is not a one-way

74 See Tung & Cox-Alomar, supra note 17 at 461.
street; the economy in turn also affects these factors. In this case, China’s economic growth affected a specific field of law: arbitration in the context of BITs.

China’s growing economy has taken the country into new horizons. Chinese policy makers and legislators are implementing standards that promote stability, reliability, and predictability. In an age of globalism, the international standard has become the equitable standard of conducting transactions in our modern economy. When a country conducts economic affairs on a global scale and receives foreign investment from a diverse portfolio of other countries, it has no choice but to implement international standards in its commercial dealing. In order to achieve these standards, a nation cannot implement protectionist policies. In recent years, China has found itself to be a classic example of such a nation.

The international standard for investment protection seeking dispute resolution under BITs is the incorporation of broad scope arbitration. Without a comprehensive methodology to resolve disputes the very purpose of BITs would be undermined. The protection mechanisms provided for FDI investors under BITs include: the MFN Clause, the Protection Against Expropriation, Capital Transfer Guarantees, the Umbrella Clause, and Fair and Equitable treatment.75 However, without a broad arbitration jurisdiction, investors must attain protection through diplomatic channels by the investor’s home state or seek recourse through a host country’s domestic court. Depending on the country that the investor is dealing with, the degree of diplomatic cooperation between the investor and investing nation may vary from extensive to minimal. Furthermore, the competence of the host nation’s domestic court system may sometime

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75 *Id.* at 116-117.
attract or repel investors. These are some of the problems that arose from First Generation BITs for foreign and Chinese investors.

Investors, conducting FDI abroad, look for predictability, especially in an event that a dispute may arise. Second Generation BITs provide investors with the stability they seek. A foreign investor investing in a host nation would have the opportunity to bring forth a claim in front of an international arbitral tribunal to resolve a dispute rather than be confined to a host nation’s domestic court system. In addition, the incorporation of broad arbitration clauses eliminates the host nation’s permanent veto over resorting to international arbitration. This is a factor that shows why to this date there has been no ICSID cases against China and why there has been only one case filed by a Chinese investor against a host nation. The narrow scope of First Generation BITs disincentivized investors entering into foreign markets due the unpredictability of their court systems. A broad arbitration clause in BITs is the key to resolving this issue and will incentivize investors to conduct more FDI in the future. When investors are incentivized to invest abroad, the result is more permeability and potential in the overall scope of market growth.

Investors who are nationals of First and Second Generation BITs have raised issues in the recent years that are of interest to the practice of international arbitration. One of the issues is how would China’s reservation under Article 25(4) under the Washington Convention affect investors who are signatories of Second Generation BITs. By going through a logical analysis, the conclusion can be made that China’s express consent in its Second Generation BITs would allow an investor from that country to bring any dispute to arbitration despite of China’s reservation. The two remaining issues involve investors who are nationals of First Generation BITs but seek to incorporate the broad scope arbitration clause found in Second Generation BITs
by invoking the MFN Clause or by arguing the specific wording of the relevant BIT. Pursuant to the ruling in *Maffezini* and *Plasma Consortium*, the application of the MFN clause may not be used to substitute consent to incorporate a dispute resolution provisions from another treaty negotiated in an entirely different context. In addition, because of the restrictive wording in arbitration clauses found in First Generation BITs, an arbitral tribunal would most likely follow the ruling in *Berschader* where a tribunal found insufficient jurisdiction to hear any dispute cases other than the amount in compensation. Despite of these shortcomings, investors should follow the development of the relevant and related BITs. Because arbitrators are not formally bound by *stare decisis*, future decisions will depend on a multitude of factors.

China’s new attitude under Second Generation BITs may also affect the future course of its arbitration institutions. Some of these institutions, which primarily conduct commercial arbitration, have the potential, reputation, and infrastructure to become future hubs for investment arbitration. With large amount of FDI, there is no reason why China should not retool and update existing arbitral institutions and attract investors to resolve FDI dispute under its own institutions.

The most notable Chinese arbitration institutions are the China International Exchange and Trade Arbitration Commission and the Beijing Arbitral Commission. China International Exchange and Trade Arbitration Commission ("CIETAC") is one of the most reputable commercial arbitration centers around the globe. The CIETAC was founded by the Foreign

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76 *See* Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 42 (2005); China Trade Exchange and Trade Arbitration Commission ("CIETAC"). *See also* http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited April 27, 2009; Established in 1956, CIETAC is also one of the world’s busiest international arbitration centers amounting to 979 cases in 2005 and 981 cases in 2006; Since China’s accession into the WTO, CIETAC has
Trade Arbitration Commission to reach an arbitral resolution in an event of a commercial dispute. In recent years, the CIETAC has become one of the largest commercial arbitration centers in the world. The institution resolved more than 8,000 disputes between 1993 and 2003. Since 1988, the CIETAC has changed its applicable rules six times in order to meet the ever changing demands of the global community and to strive for impartiality and fairness in its arbitral proceedings. CIETAC is not the only candidate among China’s arbitral institutions. Although a primarily domestic arbitral group, the Beijing Arbitration Commission (“BAC”) is considered as China’s top arbitration institutions. Since its inception in 1995, the BAC has accepted more than 4,000 cases. The BAC played an essential role in addressing issues in international construction projects prior to the 2008 Olympic games. With proper development, arbitral institutions such as the CIETAC and BAC have the potential to hear investment dispute cases that will arise from Second Generation BITs.

The reason behind this incorporation is not without justification. Foreign investors who plead their case under Chinese arbitral tribunals have seen the presence of Chinese arbitrators as a sign of bias in favor of the Chinese party. This is also true for Chinese investors when it’s the other way around. If the CIETAC decides to adjudicate investment arbitration case, Chinese investors who are conducting FDI abroad but are unfamiliar with ICSID’s procedure would have become the world’s busiest arbitral institution in terms of case load and has arbitrated for parties of 45 countries other than China.

78 See Reinstein, supra note 76 at 43.
79 See Kaplan, supra note 77 at 783-784.
81 See Reinstein, supra note 76 at 43.
82 Id.
83 See Kaplan, supra note 77 at 785. If for no other reason than Chinese arbitrators understand the legal position of the Chinese party better because of their rearing in China. Id.
the opportunity to plead their case before a more familiar venue. This arrangement would not be seen as bias to either party since the CIETAC has gained positive reputation with both Chinese and foreign investors in recent years. Because Second Generation BITs incorporate a broad scope of arbitration clauses, the CIETAC should update its institution so it may hear investment dispute cases in the future.84 In doing so, the process will also compel the CIETAC to further amend procedures and modernize its policies to reach international accepted standards. In addition to the CIETAC, another Chinese arbitration institution that has the potential to hear investment arbitration cases is the BAC. The BAC’s performance has been closely followed by the international community in recent years and has also gained reputation with both Chinese and foreign investors. In sum, China should internationalize and promote its own arbitral institutions to become some of the leading investment arbitration centers in the world.

The theme of the 2008 Olympic Games was “One World, One Dream.”85 The global community was awed by China’s organization, performance, and preparation. China has become a world power that is expected to perform above and beyond expectations. As China focuses on finding its position in the international arena, it also needs to build the infrastructure required to sustain its economic growth. The recent focus of the Chinese government on the development of its legal system is a clear indication of China’s recognition on the importance of a comprehensive legal structure. China’s legal policies will pave the road for its economic future and determine the role it will play in the international community.

84 Of course, much of this is assuming that the CIETAC will address the criticism that has been raised by investors and will incorporate the necessary infrastructure to accommodate investment arbitration.