CHAPTER 4

The Development by States of Model Bilateral Investment Treaties

Chester Brown*

1 Introduction

As someone who has both British and Australian nationality, it seems particularly appropriate to be participating in this commemoration of the 20th anniversary of China’s ratification of the ICSID Convention. Both States have negotiated bilateral investment treaties (“BITs”) with China – the United Kingdom in 1986, and Australia in 1988. Both of these BITs were negotiated before China became a State party to the ICSID Convention in 1993 (and in the case of Australia, before it became a State party to the ICSID Convention in 1991). This is reflected in the investor-State dispute settlement clauses in both BITs. For instance, the United Kingdom – China BIT provides in Article 7 that:

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* Professor of International Law and International Arbitration, University of Sydney; Barrister, 7 Selborne Chambers (Sydney); Door tenant, Essex Court Chambers (London) and Maxwell Chambers (Singapore). This is a revised version of a lecture delivered at the “China and ICSID: International Workshop and Roundtable on International Law and Investment Arbitration”, Xi’an Jiaotong University, China, on 28 June 2012. It develops ideas first presented in Chester Brown, “Introduction: The Development and Importance of the Model Bilateral Investment Treaty,” in Commentaries on Selected Model Investment Treaties, ed. Chester Brown (Oxford: Oxford University Press, 2013), p. 1. The author is extremely grateful to Reuben Ray of Clayton Utz, Sydney, for providing excellent research assistance.


1. A dispute between a national or company of one Contracting Party and the other Contracting Party concerning an amount of compensation which has not been amicably settled within six months of written notification of the dispute shall be submitted to international arbitration.

2. Where the dispute is referred to international arbitration, the national or company and the other Contracting Party concerned in the dispute may agree to refer the dispute either to:

   (a) an international arbitrator to be appointed by the parties to the dispute;
   (b) an ad hoc arbitral tribunal to be appointed under a special agreement between the parties to the dispute; or
   (c) an ad hoc arbitral tribunal established under the [UNCITRAL Rules.]

(3) If after a period of three months after the dispute is referred to arbitration under paragraph (2) above there is no such agreement, the parties to the dispute shall be bound to submit it to [UNCITRAL arbitration].

There is no mention of ICSID in this investor-State dispute settlement provision of the United Kingdom – China BIT. Turning to the Australia – China BIT, this provides in Article 12 that:

1. In the event of a dispute between a Contracting Party and a national of the other Contracting Party relating to an investment or an activity associated with an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

2. If the dispute has not been settled within three months from the date either party gave notice in writing to the other concerning the dispute, either party may take the following action:

   (a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies; and
   (b) where the parties agree or where the dispute relates to the amount of compensation payable under Article VIII, submit the dispute to an Arbitral Tribunal constituted in accordance with Annex A of this Agreement.