CHAPTER 7

China’s BIT’s and Arbitration Practice: Progress and Problems

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1 Introduction

China signed the ICSID Convention almost twenty years ago and it entered into force on 6 February 1993.¹ We are here this week to consider the developments and evolution in international law since this important milestone for China. Much has changed in the intervening two decades, not just in China but also globally. There has been a fundamental shift in economic power away from the West towards the East and also a dramatic change in the international legal framework for foreign investments. The significant and rapid increase of bilateral and multilateral investment treaties entered into by countries have changed the landscape of investor protection. Since China signed the ICSID Convention the types of bilateral investment treaties (BITs) being negotiated have also changed. One clear example is the move towards accepting international arbitration for all investment disputes arising under a treaty. It was not just China that moved towards this more liberal approach but many other states including Russia, the former Soviet bloc nations and Latin America. The increased protection of foreign investment combined with direct access for an aggrieved investor to international arbitration in these treaties seemed to revolutionise the older system overnight. It has been asserted that this “arbitration entitlement is one of the most progressive developments in the procedure of international law of the past fifty years. It is consistent with the development

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of international human rights (including the right to own property) and with dethroning the State from its status as the sole subject of international law.”

When China ratified the ICSID Convention in 1993 the average number of cases registered each year at ICSID was about two. Today, this is close to forty claims filed annually at ICSID and of course there are many investment arbitration cases taking places under other institutional rules as well as ad hoc arbitrations. As a direct result, and perhaps inevitably, there have also been significant developments in the investment arbitration jurisprudence, both in relation to procedural matters and substantive law.

I have been tasked with considering some of the changes that have taken place in the twenty years since China ratified the ICSID Convention 1965. There have been so many changes to the investment treaty regime it would be impossible to consider them all. So for the purposes of staying within the time limits set by the programme for this event, I have selected several specific areas that I believe will be of interest to China. This paper will start with a general brief review of China’s position with regard to its treaty practice so as to put her changing approach to investment protection in context. China is only a relatively recent active participant in concluding investment treaties and yet has

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3 See the ICSID Caseload—Statistics January 2013 available online at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. See also the UNCTAD IIA Note on *Recent Developments in Investor-State Dispute Settlement*, March 2013 confirming that 2012 saw the highest number of known treaty-based disputes filed in one year (62).