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Investment rules in Chinese preferential trade and investment agreements: is China following the global trend towards comprehensive agreements?

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Discussion Paper

7/2013

Investment Rules in Chinese Preferential Trade and Investment Agreements

Is China following the global trend towards
comprehensive agreements?

Axel Berger

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Abstract

Is China joining this trend towards preferential trade and investment agreements (PTIAs) that go beyond the investment rules found in Chinese bilateral investment treaties (BITs)? In this paper I empirically analyse investment rules incorporated in Chinese PTIAs using China's BIT practice and the international PTIA practice as benchmarks. The empirical analysis is based on a content analysis of Chinese PTIAs and BITs as well as selected partner country PTIAs. In addition to secondary academic sources, I conducted interviews with Chinese officials as well as relevant stakeholders and negotiators of a number of China's partner countries to shed light on the policy process driving the developments of China's PTIA practice. Based on this empirical analysis, I argue that China is pursuing a partially "NAFTA-ized" PTIA policy that is coherent with what China is willing to offer in the context of some of its more recent BITs. I show that innovative treaty language diffuses from its partner country PTIA policies in the process of negotiations towards China's PTIA policy. Accepting the partner countries' model texts as the basis for negotiations, innovative treaty language – including references to the international minimum standard, prohibition of performance requirements, transparency rules and environmental provisions – spreads to Chinese PTIAs. However, China stops short of consenting to partner countries' push towards the inclusion of commitments to liberalise its investment regime. For the Chinese government, PTIAs are not seen as a laboratory to go beyond the narrow focus of its BITs. Quite the opposite, its BIT practice defines the limits of China's PTIA policy.

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Abbreviations

ACFTA	ASEAN China Free Trade Area
ACIA	ASEAN Comprehensive Investment Agreement
APTA	Asia-Pacific Trade Agreement
ASEAN	Association of South-East Asian Nations
BIT	Bilateral Investment Treaty
DIE	Deutsches Institut für Entwicklungspolitik / German Development Institute
ECFA	Economic Cooperation Framework Agreement
FDI	Foreign Direct Investments
FET	Fair and Equitable Treatment
ICSID	International Center for the Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured-Nation Treatment
NAFTA	North American Free Trade Agreement
NT	National Treatment
PTA	Preferential Trade Agreement
PTIA	Preferential Trade and Investment Agreement
TNC	Transnational Corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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1 Introduction

In the wake of China's ever increasing economic importance, especially by the means of international trade, China is becoming an increasingly active player in global economic governance. In the World Trade Organization (WTO), China is increasingly using the established rules and dispute-settlement procedures to defend its own trade interests. Through the International Monetary Fund and the World Bank, China is increasing its influence due to greater voting rights and financial contributions. China has also been a driving force in setting up regional economic institutions, such as the Chiang Mai Initiative, which is a regional financial arrangement of the ASEAN Plus Three countries – a forum of the Association of South-East Asian Nations (ASEAN) and China, Korea and Japan.

In addition to its global role as a trade power and creditor, China's potential as a major source of foreign direct investment (FDI) has become ever more visible (e.g. Sauvant 2005; Buckley et al. 2007; Broadman 2007; Rosen / Hanemann 2009; Kubny / Voss 2010). For a long time China has been, and continues to be, the top destination of FDI flows among developing countries. In fact, the surge in Chinese exports to a large extent can be explained by investments of multinational enterprises in export-processing industries. Since the mid-2000s, however, Chinese outward FDI has been rising in absolute terms but also relative to inward FDI.¹

Against the background of China's changing international investment position, its role in the global governance of FDI has attracted more attention. China has been an enthusiastic signatory of 131 bilateral investment treaties (BITs) that establish rules and procedures to protect FDI flows.² The rationale behind China's international investment policy has been changing from attracting inward FDI to promoting outward FDI. This change in policy priorities is reflected in the shift from a restrictive to a legalised BIT approach, resulting in higher levels of legal protection for foreign investors in China and Chinese investors abroad (Cai 2006; Berger 2011; Gallagher / Shan 2009; Schill 2007). In addition to BITs, after its accession to the WTO in 2001 China started to negotiate preferential trade

1 According to official statistics, Chinese FDI outflows increased from US\$ 12.3 billion in 2005 to US\$ 68 billion in 2010 and dropped slightly to US\$ 65 billion in 2011. The noteworthy aspect about Chinese outward FDI is that it is growing faster than inward FDI. From 2005 to 2010 the ratio of outward relative to inward FDI flows grew from 0.17 to 0.6, whereas it dropped slightly in 2011 to 0.52 (UNCTAD 2012).

2 Please note that there exists no authoritative and complete list of Chinese BITs. The numbers on Chinese BITs presented in this paper are based on the compilation of the author on the basis of (1) a list of BITs that have entered into force, which is provided by the Ministry of Commerce of the People's Republic of China, online: <http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html> (accessed 2 Nov. 2012); (2) the list of Chinese BITs provided by UNCTAD; online: <http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28BIT%29/Country-specific-Lists-of-BITs.aspx> (accessed 2 Nov. 2012); and (3) a list of Chinese BITs (up to 2009) provided by Gallagher / Shan (2009).

agreements (PTAs).³ To this day, China has signed 11 PTAs, of which six include comprehensive rules on investment. I refer to them in this article as preferential trade and investment agreements (PTIAs).

Some scholars argue that PTIAs provide a distinct framework for negotiating investment rules that result in the inclusion of provisions that go beyond the set of rules usually found in BITs (e.g. Baetens 2013; Kotschwar 2009). Some of these BIT-plus rules were first introduced in the context of the North American Free Trade Agreement (NAFTA) and include market-access provisions in addition to comprehensive post-establishment investment protection, the prohibition of performance requirements, environmental measures, human rights protection, transparency requirements and references to the international minimum standard. Most recent examples for this trend are negotiations on so-called high-standard agreements such as the Trans-Pacific Partnership of 11 countries of the Pacific Rim, and the Transatlantic Trade and Investment Agreement between the United States and the European Union and its 27 member states.

Is China joining this trend towards comprehensive PTIAs that go beyond the investment rules found in its BITs so far? In other words, to what extent can a “NAFTA-isation” of Chinese PTIAs be observed? In this paper I empirically analyse investment rules incorporated in Chinese PTIAs using China’s BIT practice and the international PTIA practice as benchmarks. The empirical analysis is based on a content analysis of Chinese PTIAs and BITs as well as selected partner country PTIAs. In addition to consulting secondary academic sources, I conducted interviews with Chinese officials as well as relevant stakeholders and negotiators of a number of China’s partner countries to shed light on the policy process driving the developments of China’s PTIA practice.

Based on this empirical analysis, I argue in this paper that China is pursuing an adaptive and flexible PTIA policy that is influenced by the models and approaches adopted by its partner countries. I show that innovative treaty language diffuses from its partner country PTIA policies in the process of negotiations towards China’s PTIA policy. Accepting the partner countries’ model texts as the basis for negotiations, innovative treaty language – including references to the international minimum standard, prohibition of performance requirements, transparency rules and environmental provisions – spreads to Chinese PTIAs. However, there are limits to diffusion. China stops short of consenting to its partner countries’ push towards the inclusion of commitments to liberalise its investment regime. For the Chinese government, PTIAs are not seen as a laboratory to go beyond the narrow focus of its BITs. Quite the opposite – the BIT practice continues to define China’s PTIA policy.

The next section provides some stylised facts about the current wave of PTIAs and discusses the political economy rationale of including investment provisions in PTIAs. Section 3 discusses China’s BIT programme, which serves as a benchmark to assess the

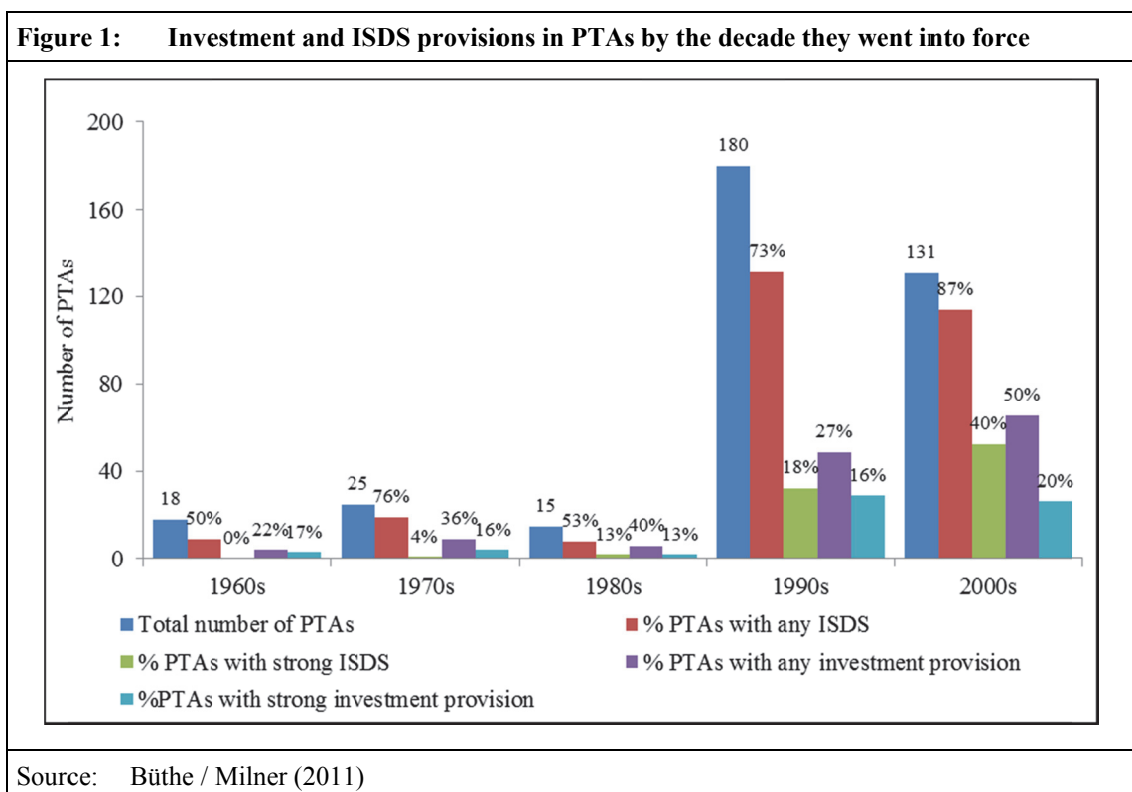
3 See online: <http://fta.mofcom.gov.cn/> (accessed 2 Nov. 2012).

development of investment rules in China's PTIAs. Section 4 starts with a general overview of Chinese PTIAs and provides a detailed analysis of PTIAs signed with Pakistan, New Zealand, Peru and ASEAN. Section 5 compares Chinese PTIAs with Chinese BITs and the partner countries' PTIA policies. Section 6 concludes.

2 The political economy of including rules on investment in PTIAs

This section provides an introduction to the current wave of PTIAs as a basis for the discussion on China's PTIA practice and policy. In particular, the subsequent section discusses the rationales of including investment rules in PTIAs and different approaches that have been followed by countries worldwide in this respect. First of all, however, it is necessary to focus on the general trend of PTAs.

The surge in the number of PTAs is a recent phenomenon. Figure 1 shows that from the start of the 1960s to the end of the 1980s, a total of only 58 PTAs had been signed. In the 1990s, during the heydays of the spread of liberal economic policies in developing countries, a total of 180 PTAs entered into force. In the 2000s, a total of 131 PTAs were concluded. These PTAs have become more complex as a result of including disciplines other than trade in goods. The percentage of PTIAs with some kind of investment provision increased from 27 per cent to 50 per cent, and the proportion of PTIAs with comprehensive investment provisions increased from 16 per cent to 28 per cent. The same pattern can be noticed with regard to the inclusion of investor-state dispute settlement (ISDS) mechanisms.



What is the rationale of including rules on investment in PTIAs instead of pursuing standalone BITs? One of the most commonly cited reasons for including rules on investment in PTIAs are that *“such broader agreements can better respond to the needs of today’s economic realities, where international trade and investment are increasingly interconnected”* (UNCTAD 2012, 86). Over the last decades, transnational corporations (TNCs) have expanded their global value chains through intra-firm trade, greenfield investments as well as mergers and acquisitions. From such a perspective, it is consequential to address trade and investment provisions in one agreement to design a coherent set of rules that manages overlaps and avoids contradictory regulations. However, even if trade and investment rules are integrated in one text, it is far from certain that this will lead to more consistency and coherence, as PTIAs’ investment chapters, in practice, are often like a “copy-paste version” of a country’s BIT (Baetens 2013).

A second rationale for including rules on investment in PTIAs is the desire to further increase investment flows among the members and also from third countries. This argument in particular refers to market-access provisions, which are usually absent from BITs, with the notable examples of the treaties negotiated by the United States, Canada and Japan. A number of studies on the effectiveness of PTIAs in fostering FDI flows have found a positive relationship.⁴ Miroudot states that PTIAs *“generally do not improve on existing BITs with respect to protection of investment, but by adding the market access dimension and by regrouping trade and investment provisions under the same agreement signed for an indeterminate period, they offer a better package of disciplines for investors”* (Miroudot 2011, 320). This effect is being supported by a recent empirical study that compares BITs and PTIAs and finds a positive impact of market-access provisions in PTIAs. Interestingly, market-access provisions in BITs do not have a similar effect and *“foreign investors respond to BITs rather indiscriminately”* (Berger et al. 2012). This different impact of similar provisions on FDI flows – depending on the type of agreement – is striking. One explanation might be that while BITs merely *“influence the policy determinants of FDI”*, PTIAs, by also including rules on trade in goods and services, intellectual property rights, competition and performance requirements, *“also improve the economic determinants”* of the PTIA’s member countries (Miroudot 2011). Another explanation is the different political status of both types of agreements. BITs, though great in number, are usually negotiated without being subject to a larger public debate. *“The negotiation and ratification of [PTIAs] tend to be highly politicized and attract considerable public attention. This may help alert foreign investors about the government’s intention to induce new FDI and protect existing FDI”* (Berger et al. 2012). In short, the signalling effect of PTIAs towards foreign investors is thought to be higher.

A third and related argument for the inclusion of investment rules in PTIAs, is that it offers greater possibilities to negotiate and agree upon contentious issues that go beyond the set of rules that are usually included in BITs (Baetens 2013). Investment liberalisation,

4 For an overview of the literature on the effects of PTIAs on FDI flows, see Miroudot (2011).

that is, granting foreign investors national treatment in the pre-establishment phase, is a case in point. Investment liberalisation is a highly controversial issue in the context of BIT negotiations due to the fact that customary international law only covers the protection of investment in the post-establishment phase. By including such liberalisation commitments, host countries fear giving up their authority to regulate the admission of FDI. In light of current PTIA practice, however, investment liberalisation seems to be less contentious. In fact, most of the global PTIAs entail some kind of market-access provisions (Kotschwar 2009, Annex Table 7.5).

Beyond market-access provisions, PTIAs also offer more flexibility to include other BIT-plus provisions such as intellectual property rights that go beyond the level of protection enshrined in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Furthermore, PTIAs often include references to sustainable development, human rights protection, investment promotion and transparency, whereas such innovative treaty language is largely absent from BITs (Baetens 2013).

What explains this broader set of rules on investment contained in PTIAs in contrast to the narrow focus of mainstream BITs? One argument that is often used to describe the dynamics of multilateral trade negotiations can also be applied to PTIA negotiations. By covering a broad range of issues, PTIAs enable negotiating parties to seek package deals, whereby a concession from one party with regard to, among other things, investment liberalisation can be balanced by a concession from the other party in another issue area (Miroudot 2011). Other reasons that explain the inclusion of labour rights, environmental concerns, human rights and even special and differential treatment are spill-over effects from trade policy debates, where such claims have been widely discussed during the last decades and have found their way into trade rules (Baetens 2013).

The different rationales discussed above are reflected in the different approaches countries are taking to include rules on investment in PTIAs. Broadly speaking, three approaches – cooperation, protection and liberalisation – exist in the current PTIA practice.⁵ The first class of PTIAs entails provisions in which the contracting parties agree to seek deeper *cooperation* in order to promote mutual investment flows.⁶ A second group of PTIAs mirror the mainstream BIT approach by focussing on the *protection* of investments.⁷ These PTIAs establish far-reaching rights for foreign investors but limit the protection of investments to the post-establishment phase. Standard provisions such as national and most-favoured-nation (MFN) treatment, fair and equitable treatment, expropriation and transfer of funds only apply to foreign investments that are admitted by the host state. In most cases, foreign investors can have recourse to the ISDS mechanisms to enforce their rights in case of alleged breaches of the agreement by the host state. A third group of

5 This classification builds on the typology for economic integration agreements with investment rules proposed by UNCTAD (2006).

6 See e.g. China-Chile PTIA (2005), Art 112.

7 See e.g. China-Pakistan PTIA (2006), Chapter IX.

PTIAs contain rules on the *liberalisation* of investment flows. Although some of these PTIAs deal with investment liberalisation only – such as PTIAs of the European Union prior to the implementation of the Lisbon Treaty – more often than not, modern treaties combine investment protection standards for the pre- and post-establishment phase. In this respect NAFTA represents the blueprint for the current wave of modern PTIAs.

Suffice it to say that this categorisation of PTIAs represents only an abstract approximation of the actual treaty practice. Notably, the treaty language of PTIAs seems to be more flexible compared to BITs, which are often negotiated on a limited number of model texts. This flexibility inevitably leads to a larger variation in legal language in PTIAs. Nevertheless, this categorisation according to the three core elements of PTIA practice – cooperation, protection and liberalisation – represents a useful framework that helps to illustrate the evolution of Chinese approaches of integrating investment rules into PTIAs (see Table 2).

3 Three generations of Chinese BITs

Before turning to the questions concerning the extent to which Chinese PTIAs cover BIT-plus rules on investment and which of the three PTIA approaches outlined above China is pursuing, it is necessary to describe the evolution of China's BIT programme in this section. The analysis of Chinese BITs provides the necessary benchmark to assess the coverage of investment rules in Chinese PTIAs.⁸ China has been building up a dense network of BITs since it concluded its first treaty with Sweden in 1982. As of October 2012, China had negotiated 131 BITs, of which 102 are actually in force, making it the second-largest contracting party to BITs worldwide after Germany, which signed 137 as of June 2012. In addition, China negotiated a trilateral investment agreement with Japan and Korea in 2012. The majority of these agreements have been negotiated with developing countries, reflecting China's interest in strengthening diplomatic ties with those countries as well as, increasingly, providing a more favourable legal framework for increasing investment of Chinese companies abroad. In addition, China has negotiated BITs with FDI-exporting countries, mainly from Europe. Most of the agreements concluded with developed countries are actually renegotiated BITs that replace treaties that have been signed in the 1980s. Interestingly, China has not yet signed a BIT with the United States, which is mainly due to the peculiar approach of the United States to combine investment protection and liberalisation.⁹

8 For a detailed account of China's BIT policy, see Berger (2011). On Chinese BITs, see also Kong (2003, 105), Cai (2006), Chen (2006, 2007, 771), Gallagher / Shan (2009).

9 Whereas China and the United States are still engaged in BIT negotiations that started in 2008, Canada and China concluded their almost two-decades-long negotiations in 2012 on a Foreign Investment Promotion and Protection Agreement, which models a number of innovative features of the NAFTA countries' approach but lack a commitment to investment liberalisation.

With regard to the “strength” of investment protection, Chinese BITs can be distinguished in three generations (see Table 1). At the end of the 1990s, Beijing changed its international investment policy from a restrictive model accentuating the regulation of inward

1st generation	<i>Restrictive</i> approach	1980s–1998	<ul style="list-style-type: none"> - Modelled on the European BIT approach - No, or restricted, national treatment - ISDS only concerning the amount of compensation for expropriation
2nd generation	<i>Legalised</i> approach	1998– continuing	<ul style="list-style-type: none"> - Modelled on the European BIT approach - National treatment subject to national law (developing countries) or non-conforming measures (developed countries) - Full ISDS
3rd generation	<i>NAFTA-like</i> approach	2007– continuing	<ul style="list-style-type: none"> - (Partly) modelled on the NAFTA approach - Fair and equitable treatment in accordance with customary international law - MFN and national treatment “in like circumstances” - MFN treatment not extended to ISDS - Pre-establishment MFN treatment - Free transfer of funds exceptions in the case of financial crisis

Source: Author

FDI to a legalised approach¹⁰ emphasising the encouragement of outward Chinese FDI (e.g. Cai 2006; Berger 2011). Both approaches are modelled on the European approach,

10 Legalisation is a special form of institutionalisation – understood as the expansion of rules, norms and decision-making procedures that influence expectations, interests and behaviour of actors – and “represents the decision ... to impose international legal constraints on governments” (Goldstein et al. 2000, 385–386). The degree of legalisation varies substantially from one issue area to another and within issue areas over time. Along three main criteria – *obligation*, *precision*, and *delegation* – the degree of legalisation can be described as a continuum ranging from soft to hard law. In this respect, “[h]ighly legalized institutions are those in which rules are obligatory on parties through links to the established rules and principles of international law, in which rules are precise (or can be made precise

which provides investment protection in the post-establishment phase only and relies on vague and open-ended treaty language. A third generation of China's international investment-treaty-making has begun to take shape in recent years. This approach is modelled on the international investment policies pursued by the NAFTA countries and introduces a number of specifications to standard provisions such as fair and equitable treatment, MFN and national treatment, and includes exceptions to the free-transfer clause. The NAFTA-isation of Chinese BITs, nevertheless, is incomplete, as the Chinese government shies away from granting foreign investors market access in the form of a national treatment clause, which also includes the establishment phase – a standard provision in North American BITs and PTIAs. The three generations of Chinese BITs are explained in greater detail below.

Throughout the 1980s and 1990s, China adopted a restrictive BIT policy that was characteristic of any given FDI-importing developing country.¹¹ While negotiating BITs in great numbers, China's international investment policy at that time remained marked by a reluctance to offer strong legal protection to foreign investors. With regard to relative standards of treatment of foreign investors, China hesitated to grant national treatment and not discriminate between domestic and international investors. The aim of protecting infant industries – and especially state-owned enterprises from foreign competition – may serve as an explanation in this regard. A number of BITs with developed countries, for example the 1986 China-UK BIT, Art. 3(3), made an exception and included provisions on national treatment; however, they contained far-reaching qualifications limiting the effective protection of foreign investments. Most Chinese BITs throughout the 1980s and the 1990s guaranteed MFN treatment only.

As for national treatment, China rather wearily granted foreign investors the right to access transnational arbitration as a means to settle disputes over breaches of substantive BIT provisions. Earlier BITs at times did not even contain ISDS provisions at all (e.g. the China-Sweden BIT (1982), the China-Norway BIT (1984), the China-Thailand BIT (1985) and the China-Austria BIT (1985)). China had started in 1985 to concede ISDS even before it signed the convention of the International Center for the Settlement of Investment Disputes (ICSID) on 9 February 1990. ISDS provisions in first-generation BITs, however, usually limited their scope to disputes concerning the amount of compensation due in case of expropriation and nationalisation (Chen 2006). In essence, this restriction reduced the effectiveness of ISDS provisions found in China's first-generation BITs, granting them a mere symbolic nature. They comply with the "*Chinese tradition of avoiding litigation*" (Kong 2003) and were meant to preserve the sovereign rights of host states' authorities in regulating FDI (Chen 2006).

through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraints of rules" (Abbott et al. 2000, 418).

11 If not otherwise indicated, the following paragraphs are based on Berger (2011).

In the second phase of its BIT policy, which started in 1998, China began to negotiate legalised investment treaties. China initiated a gradual shift towards stronger provisions for substantive and procedural investment protection. Chinese BITs today entail almost all standard provisions found in mainstream European-country BITs.

The China-Barbados BIT, signed in July 1998, can be described as a watershed because it was the first treaty to offer foreign investors unrestricted access to international arbitration.¹² This pioneering provision on ISDS, which was adopted in almost all BITs signed after 1998, marked the turning away from the first-generation BIT approach of restricted investment-dispute settlement. The standard ISDS clause of second-generation BITs allows the investor¹³ to submit “any dispute” to an international arbitration tribunal. Investors can usually choose between two different fora: the ICSID or ad hoc arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

Apart from comprehensive ISDS provisions, China gradually introduced a number of other treaty innovations such as a less restrictive approach towards the national treatment standard. Four different approaches towards national treatment can be assessed in the second generation of China’s BIT practice. First, until the year 2000, Chinese BITs with developing countries continued the traditional practice of not including national treatment provisions at all.¹⁴ Second, from the year 2000 onward, China included qualified national treatment in its BITs with developing countries.¹⁵ These treaties adopt the national treatment provisions found in first-generation BITs such as the 1988 China-UK BIT and grant national treatment “*without prejudice to its laws and regulations*”, limiting the effectiveness of the national treatment provision to a best-effort clause. Third, Chinese BITs that were concluded mainly with developed countries – and recently also with some developing countries – entail national treatment provisions that are less restrictive. The first treaty to include the new national treatment provision was the BIT concluded in 2001 between China and The Netherlands. These treaties usually included a protocol that permits China to maintain laws and regulations towards foreign investors that are incompatible with national treatment. China agrees in the protocol to include a standstill commitment towards these so-called non-conforming measures; in other words, it agrees not to increase discriminatory treatment towards foreign investors, and it promises to gradually remove such measures. Fourth, there is only one case – namely the BIT signed

12 There is no particular reason why the new model BIT text was applied in the negotiations with Barbados in the first place. Gallagher / Shan (2009, 40–41) argue that the decision of the Chinese government to adopt the legalised approach can be ascribed to the initiation of BIT negotiations with Canada in 1997.

13 In a limited number of cases, “either party” has the right to invoke the ISDS arbitration clause (e.g. China-Russia BIT 2006).

14 See China-Barbados BIT (1998), China-Quatar BIT (1999), China-Bahrain BIT (1999), China-Brunei BIT (2000).

15 See China-Botswana (2000), China-Iran (2000), China-Jordan (2001), China-Trinidad (2002), China-Côte d’Ivoire (2002), China-Guyana (2003), China-Djibouti (2003), China-Benin (2004), China-Uganda (2004), China-Russia (2006), and China-Mexico (2008). The treaty with France, signed in 2007, is an exception because it maintains the practice of qualifying NT.

with The Seychelles in 2007 – in which China conceded full national treatment to the foreign investors of the contracting party without including the above-mentioned grandfathering clause.

National treatment provisions included in recent BITs between China and developed countries are stronger than the best-effort provisions found in Chinese BITs with developing countries. Remarkably, China is able to make developed partner-countries¹⁶ bear more obligations than it is willing to itself. Whereas Chinese authorities are still allowed to discriminate against foreign investors, Chinese investors can rely on national treatment in the respective partner country. This expansion, however, of national treatment provisions in Chinese BITs, notwithstanding their limited applicability, can be explained by the growing acceptance of national treatment in Chinese law, especially with respect to China's accession to the WTO (Wang 2005, 778).

In recent years the Chinese approach towards international investment-treaty-making has been progressing and a third generation of Chinese BITs have come to the fore, which aim at striking a new balance between the rights of the investor and the host state. Compared to the shift at the end of the 1990s that resulted in the inclusion of unrestricted ISDS provisions and the granting of national treatment, the current policy shift takes a more gradualist approach towards the inclusion of innovative provisions. New treaty language is included in some BITs and PTIAs, but not in others. In particular, the most recent Chinese treaties seem to be inspired by North American countries' recent changes in their investment treaties in response to numerous ISDS claims in the context of NAFTA. This evolution of China's international investment treaty practice, according to Cai, represents an "Americanisation" of Chinese investment treaties (Cai 2009, 30). China is following the development of NAFTA countries to specify the meaning of substantive treaty provisions.

For the last few years, the Chinese government has started to include references to the concept of the minimum standard of treatment, thereby accepting the validity of a customary international law.¹⁷ This is a remarkable step because China traditionally rejected customary international law as a Western concept, potentially disregarding the interests of developing countries (Cai 2006, 468). The more balanced approach adopted in several recent Chinese BITs and PTIAs also becomes visible in the adoption of the term "in like circumstances" to specify the meaning of the clauses for MFN¹⁸ and national

16 See e.g. the BITs with The Netherlands (2001), Germany (2003), Finland (2004), Czech Republic (2005), Korea (2007) and Switzerland (2009). An exception to this rule is the BIT with India (2006), which also includes special and differential treatment with respect to national treatment. In a limited number of BITs, the grandfathering clause regarding non-conforming measures is not limited to China and applies for both contracting parties. See e.g. the BITs with Bosnia (2002) and the trilateral BIT between China, Korea and Japan (2012).

17 See e.g. China-Seychelles BIT (2007), China-Costa Rica BIT (2007), China-New Zealand PTIA (2008), China-Mexico BIT (2008), China-Colombia BIT (2008), China-Peru PTIA (2009), China, Japan and Korea BIT (2012), China-Canada BIT (2012).

18 See e.g. China-Cuba (2007), China-Korea (2007), China-Mexico (2008), China-Canada (2012).

treatment¹⁹ as well as for the compensation for losses.²⁰ The inclusion of such specifications aims at reducing the room for interpretation of transnational arbitration tribunals. Another innovative feature of China international investment policy-making is a transfer clause that includes exceptions to the free transfer of investment-related funds, thereby allowing contracting parties to restrict investment flows in the event of serious balance-of-payments or other macroeconomic difficulties. Of the most recent treaties, the trilateral investment treaty between China, Korea and Japan and the China-Canada BIT are the most elaborated investment treaties China has signed so far. In addition to the above-mentioned innovation, they include general exception clauses regarding the protection of “essential security interests”; transparency requirements regarding the publication of investment-related laws and regulations; and chapters on intellectual property rights, performance requirements and environmental measures.

Lasts but not least, China’s recent treaty practice includes small steps towards investment liberalisation. Although China is far from extending the national treatment clause to the pre-establishment phase of foreign investments, recent Chinese BITs and PTIAs²¹ include the term “admission” or “establishment” in the list of investment activities covered by the MFN clause.²² In such cases the MFN provision grants investors of the contracting parties the right to receive the best treatment regarding admission that each of them grants to investors of any third country.

The recent changes in China’s international investment-treaty-making – in particular the third generation of Chinese BITs – follow the international trend and aim to introduce a more balanced approach towards the protection of foreign investors. These innovations were first adopted by NAFTA countries and later spread to Asian and Pacific countries. It is important to stress that Chinese treaties with the ASEAN countries and Canada, Colombia, Japan, Korea, Mexico, Peru and New Zealand reflect this trend. China introduced these legal innovations in BITs and PTIAs at the same time. Notably, recent Chinese BITs signed with traditional capital-exporting European countries, such as the BIT with Switzerland, do not adopt these more balanced provisions but rely on the traditional European model, which is characterised by open-ended investment provisions granting foreign investors comprehensive rights *vis-à-vis* the host state. This particular pattern of China’s international investment policy-making points to the fact that China is pursuing a flexible approach that adapts to the BIT models preferred by the partner countries. In contrast, major capital exporters such as the United States are pushing through their model agreements and accepting only minor changes to their preferred

19 See e.g. China-Korea (2007), China-Mexico (2008), China-Colombia (2008), China-Peru FTA (2009), China-ASEAN BIT (2009), China-Korea-Japan BIT (2012), China-Canada (2012).

20 See e.g. China-ASEAN BIT (2009), China-Canada (2012).

21 See e.g. China-Latvia BIT (2004), China-Finland BIT (2004), China-Korea BIT (2007), China-New Zealand PTIA (2008), China-Peru PTIA (2009), China-ASEAN BIT (2009) and China-Korea-Japan BIT (2012).

22 In fact, market-access provisions are some of the main stumbling blocks of the ongoing negotiations between China and the United States (Berger 2011; Cai 2009).

policies (Vandevelde 2009). The same pattern becomes visible with regard to the national treatment clause, which, as described above, is weaker in BITs signed with developing countries compared with treaties signed with developed countries.

4 Chinese PTIAs

To what extent do Chinese PTIAs represent a departure from the three generations of Chinese BITs? It has been argued above that PTIA negotiations offer the possibility for the partner countries to go beyond the level of investment protection and liberalisation usually found in their BIT programmes. The subsequent section analyses the depth of investment provisions in Chinese PTIAs. On this basis, Section 5 investigates to what extent PTIAs are used by China to negotiate investment provisions that go beyond the set of rules found in its BITs and how Chinese PTIAs compare with global PTIA practice.

China has been a latecomer to the current wave of regionalism. Only after its accession to the WTO did China started to conclude PTAs and it was not until 2007 that China's political leadership officially declared PTAs to be an important part of its international economic strategy (Cai 2009, 4). To this date, China has concluded 11 PTAs according to information provided by the Ministry of Commerce of the People's Republic of China.²³ The first PTA China signed was the Asia-Pacific Trade Agreement (APTA), a preferential trade agreement among developing countries of the South and South-East Asian region. This treaty, formerly known as the Bangkok Agreement, entered into force in 1975, and China acceded to APTA in 2001. Since then China has negotiated PTAs with Hong Kong and Macao (both in 2003), Chile (2005), Pakistan (2006), New Zealand (2008), Singapore (2008), Peru (2009), the ASEAN countries (2009) and Costa Rica (2010) and the cross-straits Economic Cooperation Framework Agreement (ECFA) with Taiwan. China is currently negotiating another five PTAs with the Gulf Cooperation Council, Australia, Iceland, Norway and the South African Customs Union.²⁴ In contrast to some older Chinese PTAs, the negotiations on these agreements cover investment rules in addition to, among other things, trade in goods and services. Under consideration are PTIAs with India, Korea, Japan and Switzerland.²⁵

China's overall PTA policy is driven by economic as well as political reasons that are also reflected in the choice of partner countries (Nakagawa / Liang 2011). On the one hand, the Chinese government negotiated PTAs to promote stable and peaceful relations with its Asian neighbours and to counter concerns about the potentially negative economic and political impacts of China's rise (Gao 2011). This rationale is rooted in Deng Xiaoping's famous doctrine that China's economic development depends on a stable and peaceful external environment. According to Nakagawa / Liang, "*the agreements with Taiwan,*

23 See online: http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (accessed 2 Nov. 2012).

24 See online: http://fta.mofcom.gov.cn/english/fta_tanpan.shtml (accessed 2 Nov. 2012).

25 See online: http://fta.mofcom.gov.cn/english/fta_yanjiu.shtml (accessed 2 Nov. 2012).

Hong Kong, Macao, ASEAN and Pakistan were primarily driven by geopolitical concerns” (Nakagawa / Liang 2011, 19). Thus, pursuing PTAs with other countries has become a means for China to demonstrate that its rise will be a peaceful one. In this respect, for example the former trade minister, Bo Xilai, stated in 2006 that China intends to “*give a lot while demand little*”²⁶ in the negotiations with ASEAN.

On the other hand, China negotiated PTAs to secure the supply of resources and agricultural products. The agreements with Peru, New Zealand, Chile and Costa Rica fall into this category (Nakagawa / Liang 2011, 19). China’s economic development model during the 1990s was characterised by increasing dependence on exports as a driver of growth. Consequently, China became increasingly dependent on the input of raw materials and intermediary goods from resource-rich countries and tried to secure these inputs also through the negotiation of PTAs with the above-mentioned countries. A positive side-effect, from a Chinese perspective, is that these small economies have been much more dependent on China as a trading partner than the other way around. Against the background of this asymmetric trade relationship, China could be sure of its greater bargaining power because “*while China could afford to ignore these economies, none of them could afford to ignore China*” (Gao 2011, 11). Furthermore, negotiating with countries that were relatively less important economically also meant that China could build up negotiating capacities without taking big risks for its long-term development (Gao 2011, 17) and without having to deal with intense lobbying from sectors negatively affected by the liberalisation measures.

Nakagawa and Wei summarise China’s PTIA policy as follows: “*As a result, China has signed most of its FTA agreements with small and medium sized economies, the negotiation process has been very flexible, pragmatic, and gradual and the scope of agreements tend to be shallow and less controversial to its partners*” (Nakagawa / Liang 2011, 19). The incorporation of investment rules in PTIAs also follows this pragmatic approach, which follows a case-by-case logic (Kong 2012, 1, 205). With respect to investment rules, China has been flexible and responsive to the model texts proposed by the respective partner countries, as is explained in greater detail below. The only limiting factor to China’s pragmatism was the inclusion of liberalisation commitments in its PTIAs that are not in line with China’s industrial policy, which relies on a selective admission system that results in discriminatory treatment against domestic and foreign investors.

Of the 11 operative PTAs, only six include comprehensive rules on investment (see Table 2). The Asia-Pacific Trade Agreement does not cover investment issues at all. The two Closer Economic Partnership Arrangements, concluded in 2001 with Hong Kong and Macao, only include provisions on investment promotion and facilitation. A similar

26 Quoted in Gao (2011, 14).

approach was taken in the agreement signed between China and Chile in 2005.²⁷ The ECFA, signed in 2010 by China and Taiwan, is a framework agreement, and therefore it includes only generic language on investment cooperation regarding issues of investment protection and facilitation (Wang 2011). The agreement with Singapore, from 2008, includes a short chapter on investment, which, however, does not include any substantive provisions. The investment chapter of the Singapore PTIA merely states that the China-ASEAN investment agreement, once signed, shall “*form an integral part of this Agreement*” as stated in Art. 84(1). China and Singapore, thus, do not create an extra layer of investment rules but incorporate the rules being negotiated in the context of a plurilateral PTIA. A similar approach was adopted in the China-Costa Rica PTIA from 2010. Article 89 of the Costa Rica PTIA reaffirms the China-Costa Rica BIT, which was signed in 2007 and provides high standards of investment protection.

The PTIAs with Pakistan (2006), New Zealand (2008), Peru (2009) and ASEAN (2009) include comprehensive and genuine investment rules and are analysed in greater detail in the following sections. I argue that China does not follow a coherent strategy with regard to the inclusion – or absence – of investment rules in PTIAs. In fact, some observers doubt that China has a clearly defined PTIA strategy (Kong 2012, 105). Overall, China adopts a narrow PTA strategy that focusses first of all on trade in goods and includes additional disciplines only in a later stage (Gao 2011, 7). As is explained in greater detail below, the inclusion of investment provisions in Chinese PTIAs is, to a large extent, a result of the interests of the partner country to include comprehensive and BIT-plus rules on investment and China’s flexibility in complying with these demands.

27 China and Chile are currently negotiating rules on investment that should supplement the existing agreement. See online: http://fta.mofcom.gov.cn/enarticle/enchile/enchilenews/201002/2135_1.html (accessed 2 Nov. 2012).

Table 2: Investment provisions in Chinese PTIAs and selected BITs

Agreement			Cooperation		Protection						Liberalisation		
Partner	Type	Year	Promotion	Framework for future negotiations	Definition of Investment / investor	NT* ³	MFN*	FET*	Expropriation	ISDS* ⁴	Right of establishment ⁵	Transfer of funds	Performance Requirements
Australia	BIT	1988			•		•	•	•	(•)		•	
Philippines	BIT	1992			•		•	•	•	(•)		•	
Finland	BIT	2001			•	•	•	•	•		(•)	•	
APTA ¹	PTA	2001											
Côte d'Ivoire	BIT	2002			•	(•)	•	•	•			•	
Germany	BIT	2003			•	•	•	•	•			•	
Hong Kong	PTIA	2003	•										
Macao	PTIA	2003	•										
Chile	PTIA	2005	•	•									
Pakistan	PTIA	2006	•	•	•	(•)	•	•	•			•	
New Zealand	PTIA	2008	•		•	•	•	•	•		(•)	•	•
Singapore ²	PTIA	2008	•		•	•	•	•	•		(•)	•	
Peru	PTIA	2009	•		•	•	•	•	•		(•)	•	
ASEAN	PTIA	2009	•		•	•	•	•	•		(•)	•	
Costa Rica	PTIA	2010	•		•	•	•	•	•			•	
Taiwan	PTIA	2010	•										
Korea, Japan	BIT	2012	•	•	•	•	•	•	•		(•)	•	•

Source: Author's compilation on the basis of a framework provided by UNCTAD, *Investment Provisions in Economic Integration Agreements* (UNCTAD 2006, 42)

* NT=national treatment, MFN=most-favoured-nation treatment, FET=fair and equitable treatment, ISDS=investor-state dispute settlement

¹ Asia-Pacific Trade Agreement; China acceded to APTA in 2001.

² The China-Singapore PTIA includes a chapter on investment, which stipulates that the provisions of the China-ASEAN investment agreement shall “be incorporated into and form an integral part of this Agreement” (Art. 84(1))

³ The brackets indicate that the national treatment clause is subject to the national law of the host country.

⁴ The brackets indicate that only disputes relating to the amount of compensation in case of expropriation can be submitted to international arbitration.

⁵ The brackets indicate that the right of establishment only relates to MFN treatment.

4.1 China-Pakistan 2006

The PTIA signed in 2006 with Pakistan was the first “*comprehensive bilateral agreement into which China has [...] entered. It covers trade and investment as well as other economic sectors*” (Wang 2011, 498). The Pakistan agreement was also the first Chinese PTIA with comprehensive, BIT-like rules on investment. The inclusion of rules on investment clearly was an innovation in terms of China’s PTA practice at that time. The rules offer investors a higher level of legal protection than the BIT that China and Pakistan signed in 1989.²⁸ However, compared to China’s BIT practice in the mid-2000s, the Pakistan PTIA offered nothing special.

Chapter 9 of the Pakistan PTIA includes all standard provisions that can be found in second-generation Chinese BITs negotiated with developing countries. These include a definition of investment and the investor; admission clause; fair and equitable treatment; national and MFN treatment; expropriation; free transfer of funds; and ISDS. As elaborated in Section 3, second-generation Chinese BITs with developing countries include more restrictions compared to BITs negotiated with developed countries. In the same way, the Pakistan PTIA includes an asset-based definition of investment but also includes a qualifying requirement that these investments have to be conducted “*in accordance with the laws and regulations*” of the host country (China-Pakistan PTIA Art. 46(1)). In contrast to the 1989 BIT, the Pakistan PTIA includes a national treatment clause, which, however, is qualified by the phrase “[w]ithout prejudice to [...] laws and regulations” (China-Pakistan PTIA Art. 48(2)). The transfer clause, too, is subject to the laws and regulations of the host country, thereby reflecting developing countries’ wishes to preserve higher levels of discretion for regulating FDI (Poulsen 2011).

The importance of the China-Pakistan PTIA, at least with respect to its investment chapter, does not result from its innovative legal language. For China, the Pakistan PTIA offered an opportunity to get acquainted with the process of negotiating complex economic cooperation agreements that go beyond the reduction of tariffs for trade in goods and include rules on services and investment:

As a latecomer in concluding FTAs, China started out on a regional track by first negotiating with its own Special Administrative Regions and friendly countries – Hong Kong, Macau, and, because it had always been on good terms, Pakistan. [...] Initiated in 2003, the China-Pakistan FTA has developed from a bilateral agreement on reducing tariffs into a comprehensive package, with five underlying agreements covering

28 The China-Pakistan BIT from 1989, among other things, did not include a national treatment clause and limited the scope of the ISDS provision to the disputes relating to the “*amount of compensation for the expropriated investment assets*” (Art. 10).

trade in goods, services, and bilateral investment liberalization, as well as other matters involving trade-related economic cooperation. (Wang 2011, 498)

Negotiating with a friendly developing country that does not figure high in either its trade or investment statistics,²⁹ China – without taking too big an economic risk – could test how investment rules can be integrated into a wider PTIA. As is discussed in the following sub-section, China pursued the same strategic motives with regard to the PTIA with New Zealand, but on a much higher level of complexity of economic rule-making.

4.2 China-New Zealand 2008

The PTIA concluded with New Zealand in April 2008, which entered into force in October 2008, is a milestone for China “*because it is not only the first one that China signed with an OECD country. More importantly, it includes the most complicated investment rules in the history of China’s investment treaties [at that time]*” (Cai 2009, 4–5). In contrast to the above-mentioned treaty with Pakistan, the PTIA with New Zealand not only updated the restrictive BIT from 1988 in line with China’s BIT practice. The investment chapter of the China-New Zealand PTIA also included a number of innovations in terms of legal language, which was absent from most of China’s second-generation BITs. What is more, the China-New Zealand PTIA was the starting point of the most recent phase of China’s international investment policy-making. This led to a NAFTA-isation of Chinese third-generation BITs, which strike a better balance between the rights of the investor and those of the host country. While some BITs already included some innovative elements of third-generation Chinese BITs,³⁰ the New Zealand PTIA was the first agreement to comprehensively address these issues.

China and New Zealand agreed to enter into negotiations on a PTIA in November 2004 after the two countries conducted a Joint Study in which they assessed the feasibility of such an agreement (Ministry of Commerce of the People’s Republic of China / Ministry of Foreign Affairs and Trade 2004). Another prerequisite for the commencement of formal negotiations was New Zealand’s recognition of China’s market economy status. The complex negotiations spanned more than three years and included 15 bilateral meetings.³¹ Right from the start of the negotiations, it was New Zealand that proposed including an investment chapter in the PTIA.³² The aim was not only to include comprehensive rules on the post-entry protection of investments. For New Zealand, the value added from having a

29 Chinese outward FDI to Pakistan accounted for 0.07 per cent of total outflows in the period 2003–2005 (three year average) and 1.11 per cent between 2006 and 2008; see Ministry of Commerce of the People’s Republic of China (2008).

30 See e.g. China-Seychelles BIT (2007), China-Cuba BIT (2007), China-Korea BIT (2007) and China-Costa Rica BIT (2007).

31 See online: <http://www.chinafta.govt.nz/1-The-agreement/index.php> (accessed 2 Nov. 2012).

32 Anonymous interview with a senior BIT negotiator, September 2012.

PTIA with an investment chapter was to cover market-access obligations as well. The final agreement, however, does not include rules that directly lead to the deregulation of both parties' investment admission regimes such as a national treatment clause that extends to the admission phase of a foreign investment. China refused to include such market-access provisions. Instead, China agreed to New Zealand's proposal to include a pre-establishment MFN clause that would ensure that investors from New Zealand benefit from more preferable treatment due to China entering into negotiations with a third country in the future.³³ This was not the first time that China agreed to include a pre-establishment MFN clause.³⁴ In terms of investment liberalisation, the New Zealand PTIA included one innovative feature that has not been included in any BIT as of yet, namely the freedom of transfers relating to the pre-establishment phase of an investment BIT (Gallagher / Shan 2009, 101).

Although the New Zealand PTIA has little to offer in terms of investment liberalisation, the investment protection dimension includes a number of interesting innovations that go beyond China's BIT practice at that time. The investment chapter of the China-New Zealand PTIA has been examined in previous studies (e.g. Kalgerimis 2009). In the following, I therefore only focus on those aspects of the New Zealand PTIA that differ from China's mainstream BIT practice.

First of all, the New Zealand PTIA is special because it included a qualified fair and equitable treatment clause with a reference to "*commonly accepted rules of international law*".³⁵ Traditionally, Chinese academics and policy-makers have been dismissive towards the application of customary international law, as China has not participated in the formation of this "Western" concept. In two BITs that China signed in 2007 with The Seychelles and Costa Rica, the fair and equitable treatment clause, therefore, only included references to "*principles of International Law*",³⁶ which is less precise compared to the legal language used in treaties of the NAFTA countries. The New Zealand PTIA follows this cautious approach by referring to "*commonly accepted rules of international law*" but, in addition,

attempts to define and substantiate the [fair and equitable treatment and the full protection and security] standards by

33 According to an anonymous interview in September 2012, New Zealand was aware of the fact that China would be hesitant to make such a big concession in a PTIA with a small economy such as New Zealand. By the means of including a pre-establishment MFN clause, New Zealand wanted to benefit from any preferential treatment that China would grant other countries. Especially noteworthy in this respect were the negotiations between Australia and China at that time. Given the significant investment flows between China and Australia, New Zealand was expecting Australia to achieve a much better result in terms of market access.

34 The Chinese BITs with Japan BIT (1988), Korea BIT (1992) and Finland (2004) contain provisions that extend MFN treatment to the pre-establishment phase (Gallagher / Shan 2009, 101).

35 See Art. 143(1). Interestingly, according to an anonymous interviewee, it was China that proposed to include such a qualified fair and equitable treatment clause in the New Zealand PTIA.

36 See China-Seychelles BIT (2007), Art. (4) 1 and China-Costa Rica BIT (2007), Art 3. Cited in Gallagher / Shan (2009, 161).

referring to certain elements, such as denial of justice and non-discrimination. Also, it differentiates the standard from other standards established under the treaty by stipulating the breaching the latter does not automatically lead to breach of the [fair and equitable treatment] standard. (Gallagher / Shan 2009, 132)

The fair and equitable treatment standard of the New Zealand PTIA, thus, stops short of making reference to the customary international law concept. The BIT that China signed with Mexico shortly after the conclusion of the New Zealand PTIA indirectly accepted customary international law by referring to state practice and opinion juris. The PTIA that China signed with Peru in 2009 made explicit reference to the concept, as is elaborated below. The evolution of the fair and equitable treatment clauses in these treaties – BITs as well as PTIAs – exemplifies China’s gradual acceptance of standards influenced by the NAFTA approach.³⁷

Secondly, the New Zealand PTIA included the phrase “*in like circumstances*” in the MFN and national treatment clauses, again following a trend that was started by the NAFTA countries to limit the application of these two clauses.³⁸ In light of recent controversies with respect to the reach of the MFN clause, the New Zealand PTIA explicitly states that the MFN clause “*does not encompass a requirement to extent to investors of the other Party dispute resolution procedures.*”³⁹ The China-New Zealand PTIA, furthermore, is the first Chinese BIT that explicitly prohibits the use of performance requirements by incorporating the WTO Agreement on Trade-Related Investment Measures.⁴⁰

Thirdly, the New Zealand PTIA includes a number of safeguards that preserve the contracting parties’ “*right to regulate*”.⁴¹ One of the most controversial provisions of the negotiations between China and New Zealand has been the expropriation clause and its Annex.⁴² In Annex 13 paragraph 4 of the New Zealand PTIA, the contracting parties specify the cases that constitute an indirect expropriation, namely actions of the

37 Interviews of the author with international BIT negotiators, September 2012, revealed that the drafting of the fair and equitable treatment clauses of the New Zealand PTIA and the Mexico BIT were the result of intense discussions. Whereas China was rather hesitant to accept these NAFTA-style provisions in the negotiations with New Zealand and Mexico, in the negotiations with Peru in 2009 China was more willing to accept a fair and equitable treatment clause that referred explicitly to customary international law. China’s hesitation was less a result of an outright rejection of the concept of more precise clauses; rather, it was influenced by China’s unfamiliarity with the concept of customary international law.

38 China included the phrase “*in like circumstances*” with regard to the MFN clause already in BITs with Cuba (2007) and Korea (2007) and with regard to the national treatment clause in BITs with Korea (2007).

39 See China-New Zealand PTIA (2008), Art. 139(2).

40 The China-Korea BIT (2007), Art. 2(3) states that the contracting parties shall not “*impose unreasonable or discriminatory measures on investments by investors of the other Contracting Party concerning local content, technology transfer or export performance requirements.*”

41 See China-New Zealand PTIA (2008) Preamble (“*Upholding the rights of their governments to regulate in order to meet national policy objectives, and preserving their flexibility to safeguard the public welfare*”).

42 According to an anonymous interview, September 2012, China was reluctant to include restrictions to the expropriations clause.

contracting parties that are discriminatory in effect or are “*in breach of the state’s prior binding written commitment to the investor.*”⁴³ Notably, Annex 13 states that

[e]xcept in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state’s regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.

Furthermore, the New Zealand PTIA includes a chapter on general exceptions that also applies to the chapter on investment.⁴⁴ Those exceptions include actions of the contracting parties to protect their essential security interests; the adoption of restrictions on the transfer of funds in cases of serious balance of payment difficulties and other external financial difficulties; as well as measures relating to taxation. Most of the clauses relating to essential security clauses are self-judging.

Last but not least, the New Zealand PTIA includes an innovative ISDS chapter that is much more elaborate compared to the standard second-generation BITs of China.⁴⁵ Cai states that the ISDS chapter of the New Zealand PTIA mimics a number of features from NAFTA countries’ BITs (Cai 2009, esp. footnotes 136 to 139). Those legal innovations include preliminary procedures, included in Art. 153, that require the investor to give notice to the contracting party before submitting the claim. Furthermore, Art. 154(2) permits a state party to “*file an objection that [an investor’s] claim is manifestly without merit or is otherwise outside the jurisdiction or competence of the tribunal.*” The ISDS chapter also allows the contracting parties to issue a joint interpretation on any provision of the treaty that is binding on the tribunal in case of a dispute. Art. 156 allows for the consolidation of claims from multiple investors with regard to one dispute. Finally, Art. 157 of New Zealand’s PTIA follows the NAFTA countries’ approach for increasing transparency with regard to all tribunal documents.

4.3 China-Peru 2009

The China-Peru PTIA was the first treaty negotiated with a Latin American country that reflected China’s growing investments in this region’s natural resource sector. In March 2007 both parties agreed to conduct a joint feasibility study that aimed at analysing impacts of a PTIA on both countries and drawing recommendations for the subsequent negotiations. After the conclusion of the joint feasibility study, the heads of state of Peru and China agreed in September 2007 to launch official negotiations towards a PTIA (Ministry of Foreign Trade and Tourism of Peru / Ministry of Commerce of the People’s

43 See China-New Zealand PTIA Annex 13(4).

44 See China-New Zealand PTIA Chapter 17.

45 According to an anonymous interview in September 2012, it was again New Zealand that wanted to include these safeguards in the ISDS chapter.

Republic of China 2007, 5). The first round of bilateral negotiations took place in January 2008.⁴⁶ Both parties agreed on a final PTIA text and concluded the negotiations after eight rounds in November 2008. The treaty was signed on 28 April 2009 and entered into force on 1 March 2010.

The investment chapter in Peru's PTIA deviates in a number of provisions from China's standard second-generation BIT practice in the 2000s and thus reflects China's flexibility in responding to the model texts put forward by partner countries. In line with the PTIA signed with New Zealand and the BITs signed with Mexico and Colombia, the Peru PTIA falls into the third generation of Chinese BITs. As has been the case in the context of other negotiations, the "NAFTA-isation" of the contents of the China-Peru PTIA was not a result of a proactive policy of China. On the contrary, interviews with senior Peruvian negotiators revealed that it was Peru that successfully pushed China to accept the Peruvian model text as a basis for the negotiations.⁴⁷ For Peru, the negotiation of investment rules in the context of a PTIA – in contrast to a stand-alone BIT – offered the possibility to realise a more comprehensive outcome in light of its recent BIT policy reform.⁴⁸ This reform was implemented after the conclusion of Peru's landmark PTIA with the United States in 2006 and included a shift, among other things, towards market-access provisions and references to customary international law as a way of specifying the meanings of central treaty provisions.

Peru was not able to make China agree to market-access rules. Similarly to the New Zealand PTIA, the final text only includes a commitment, in the form of a pre-establishment MFN clause, to multilateralise possible market-access concessions that China grants in future BITs with third countries in the future. The national treatment clause of the Peru PTIA also includes the usual grandfathering rule, which allows China to maintain existing non-conforming measures. While China was not willing to go beyond its established BIT policy in terms of investment liberalisation, the Peru PTIA was the first treaty in which China agreed to include the phrase "customary international law" to specify the meaning of the concepts of fair and equitable treatment and full protection and security. In a technical sense, China had already agreed to incorporate this standard in the BIT with Mexico by referring to state practice and opinion juris. However, from a political point of view, the explicit incorporation of this Western standard represents a major step forward for China's BIT policy.

46 See <http://english.mofcom.gov.cn/article/newsrelease/significantnews/200711/20071105236116.html> online: (accessed 2 Nov. 2012).

47 Interview with Peruvian BIT negotiators, September 2012.

48 Initially, China wanted to negotiate a BIT-like investment chapter in order to update the existing first-generation BIT with Peru. See interview with Peruvian BIT negotiator, September 2012.

4.4 China-ASEAN 2009

The signing of the China-ASEAN investment agreement on 15 August 2009 was the last part in a series of agreements that constitute the ASEAN China Free Trade Area (ACFTA). The negotiations with the ASEAN countries for working towards ACFTA date back to 1997, when South-East Asian countries were severely hit by the East Asian financial crisis (Gao 2011, 3). In fact, due to the crisis, “*China was presented with the first opportunity for real FTA negotiations*” (Gao 2011, 3). The process of working towards ACFTA was initiated by China’s President, Jiang Zemin, in December 1997 – in the midst of the East Asian financial crisis – at the first China-ASEAN summit, where he called to build a “*Good Neighboring Partnership of Mutual Trust*” (Gao 2011, 3). An ASEAN-China Expert Group on Economic Cooperation was established to work on a feasibility study concerning ACFTA that was published in October 2001 (ASEAN-China Expert Group on Economic Cooperation 2001). On the basis of this feasibility study, both parties agreed during the 2001 summit to establish ACFTA within 10 years. As a first step towards ACFTA, China and the ASEAN countries signed the Framework Agreement on Comprehensive Economic Cooperation on 4 November 2002, which created the foundation for the subsequent sectoral agreements on trade in goods and dispute settlement (both signed in 2004), the trade in services agreement (signed in 2007), and finally the investment agreement. In contrast to most PTIAs, ACFTA was not negotiated according to the single undertaking approach but as separate agreements (Nakagawa / Liang 2011, 21).

The main objectives of ACFTA are stated in Article 1 of the Framework Agreement and include measures to “*progressively liberalise and promote trade in goods and services as well as create a transparent, liberal and facilitative investment regime.*” With regard to Article 5 of the Framework Agreement, China and the ASEAN countries agree to “*(a) enter into negotiations in order to progressively liberalize the investment regime; (b) strengthen co-operation in investment, facilitate investment and improve transparency of investment rules and regulations; and (c) provide for the protection of investments.*”

Whereas the latter goal is in line with China’s overall BIT policy, the objectives to liberalise investment regimes and to facilitate investment flows are novel features. The intra-ASEAN Comprehensive Investment Agreement (ACIA) and other PTIAs that ASEAN signed with Australia, New Zealand and Korea in 2009 include liberalisation commitments that provide for national and MFN treatment in the pre- and post-establishment phase in combination with a negative list approach.⁴⁹ The China-ASEAN investment agreement provides comprehensive rules for investment protection and facilitation but falls short with regard to the objective of investment liberalisation. Similarly to previous PTIAs, in terms of content the China-ASEAN investment agreement resembles the third generation of Chinese BITs. It does not offer anything special that

49 See ACIA (2009), Arts. 5, 9 and 20; ASEAN-Australia-New Zealand PTIA, Arts. 4, 12, 14 and 16; ASEAN-Korea PTIA, Arts. 3 and 15.

would go beyond the commitments China had already made in other BITs. Therefore, Xiao concludes that the *“Investment Agreement is a regionalization of the Chinese new BITs and, in this sense, represents ‘old wine in the new bottle’”* (Xiao 2010, 20).

The negotiations on an investment agreement started in 2003 with the establishment of the China-ASEAN Trade Negotiation Committee Working Group on Investment. The negotiations between ASEAN and China were conducted on the basis of the ASEAN Investment Area Framework Agreement from 1998 and its Protocol from 2001. This template contained high standards of investment protection and liberalisation that exceeded the level of investment protection of Chinese BITs. China did not propose its own model text but accepted the ASEAN template as the basis for the negotiations *“for a lack of a more suitable one”* (Chen 2006, 146). For ASEAN countries, the main rationale of having a comprehensive investment agreement – in addition to the existing 10 BITs they had signed with China – was to open up the Chinese market for investments (ASEAN-China Expert Group on Economic Cooperation 2001). However, this insistence on the inclusion of liberalisation commitments was opposed by China due to the adjustment process of the Chinese economy, in particular the incomplete reform of state-owned companies, and differences in the registration systems for national and international investors (Chen 2006, 149). According to Chen, the *“investment liberalization issue was debated from the very beginning and has led to deadlock”* (Chen 2006, 147). The final compromise reached between China and the ASEAN countries did not entail a commitment to investment liberalisation in the form of a pre-establishment national treatment clause. National treatment applies only to the post-establishment phase and includes the usual disclaimer for non-conforming measures. Similarly to the New Zealand and Peru PTIAs, the China-ASEAN PTIA includes a pre-establishment MFN clause, which also covers the admission and establishment phase of an investment project.⁵⁰ For ASEAN countries, that lack of market-access provisions in the final treaty text represents a major deficiency of the agreement that should be revised in subsequent negotiations.⁵¹

Apart from the sensitive issue of market-access provisions, the text of the China-ASEAN PTIA is proof of China’s flexible approach to PTIA negotiations, as it resembles in large parts the ASEAN Comprehensive Investment Agreement, which was signed on 26 February 2009.⁵² The China-ASEAN PTIA belongs to the third generation of Chinese BITs. In contrast to Chinese second-generation BITs, the China-ASEAN PTIA includes a fair and equitable treatment clause, which states that *“fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principles of due process”* and that a breach of another provision of the agreement or another international agreement does not establish a breach of the fair and equitable treatment clause. In contrast to the New Zealand PTIA – or the Mexico BIT

50 See China-ASEAN PTIA, Art. 5(1).

51 Interview with ASEAN negotiator, September 2012.

52 Interview with ASEAN negotiator, September 2012.

for that matter – the China-ASEAN investment agreement entails a fair and equitable treatment clause that does not refer to “*commonly accepted rules of international law*” or even customary international law. Instead, it mimics Art. 11 of the ASEAN Comprehensive Investment Agreement from 2009, which also lacks such a clarification.

Furthermore, the transfer clause of the China-ASEAN PTIA includes a number of exceptions, including the right to impose capital controls in the case of a serious balance of payment crisis, which is in line with the rules of the IMF.⁵³ Additionally, the China-ASEAN investment agreement grants national and MFN treatment in the case of the free transfer of funds.⁵⁴ The China-ASEAN PTIA includes chapters on general exceptions and security exceptions as well as a chapter on transparency requirements. A novel feature of the China-ASEAN PTIA are the chapters on the promotion and facilitation of investment that originate from the ASEAN Comprehensive Investment Agreement and also reflect the original objectives laid down in the Framework Agreement.

The analysis of this section focussed on the investment chapters of China’s PTIAs and showed that China’s approach to including investment rules does not follow a coherent strategy. In most cases, however, with the exception of market-access rules, China complies with the proposals put forward by the partner country. The next section approaches this analysis from the perspective of China’s BIT policy and its partner countries’ PTIAs.

5 The depth of investment rules in Chinese PTIAs

The aim of this section is to investigate whether China uses PTIAs to negotiate investment provisions that go beyond the narrowly defined set of rules incorporated in Chinese BITs, as has been the case in global PTIA practice. Section 5.1 compares Chinese PTIAs and BITs and Section 5.2 compares Chinese PTIAs with the PTIAs that partner countries have negotiated with other countries. I adopt a rather selective approach. Chinese PTIAs are assessed against the most comprehensive Chinese BIT to this date, namely, the China-Canada BIT, signed in 2012. Likewise, I have selected the most far-reaching partner country PTIAs as a benchmark to assess China’s willingness to comply with global PTIA practice.

The institutional variance of Chinese PTIAs – in contrast to Chinese BITs and partner country PTIAs – will be assessed according to seven dimensions of investment-related rules, namely: market access, non-discrimination, standards of treatment, performance requirements, transparency requirements, environmental provisions and dispute settlement. These dimensions have been selected because they represent key standard provisions of global BIT practice (e.g. non-discrimination, standards of treatment and

53 China-ASEAN PTIA (2009), Art. 10(5).

54 China-ASEAN PTIA (2009), Art. 10(2).

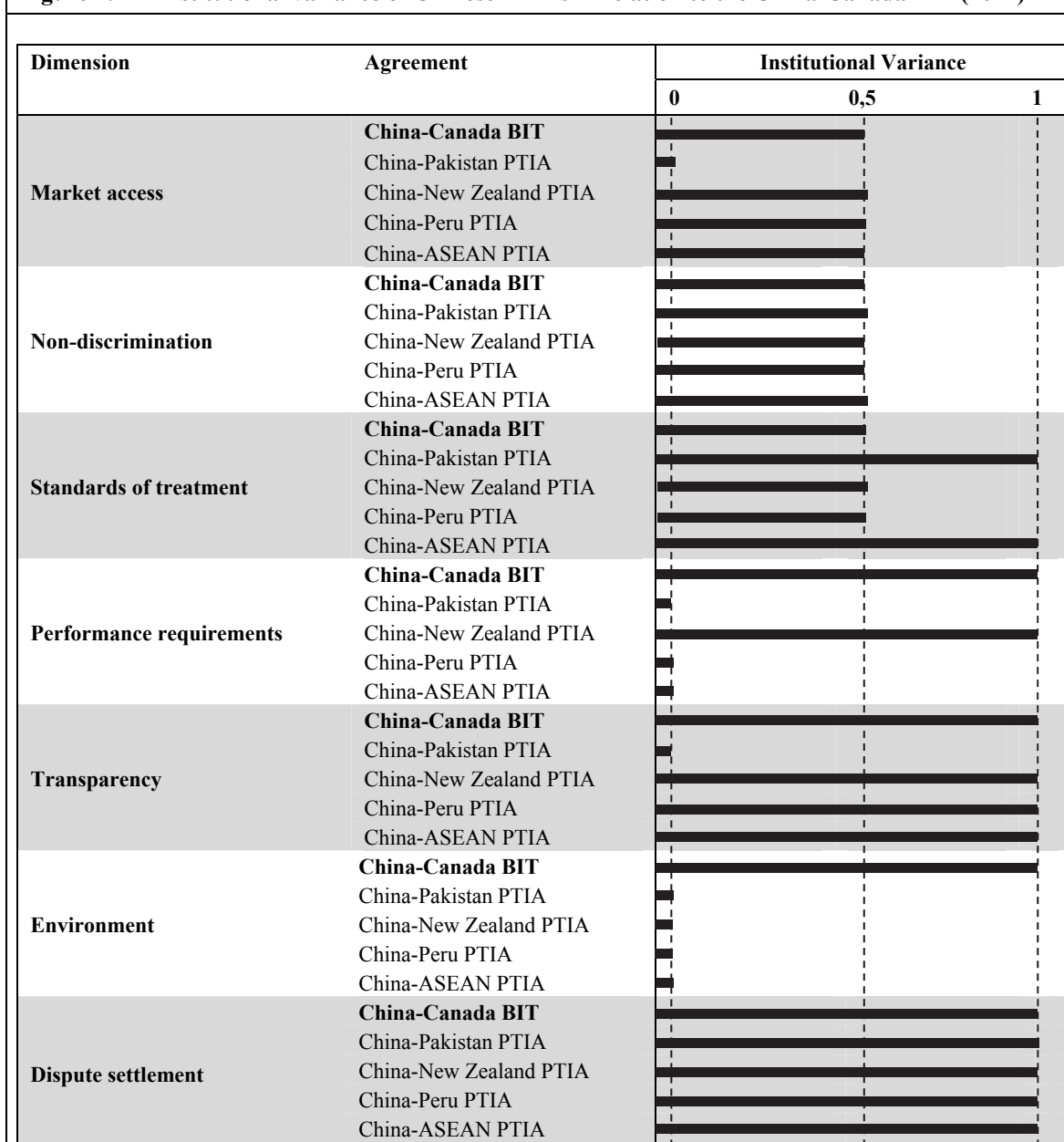
dispute settlement) as well as provisions that have been introduced in the context of recent innovative BITs and PTIAs (market access, transparency requirements and environmental provisions). The agreements have been coded to indicate the “strength” of each of the above-mentioned dimensions (see explanation in footnote to Figure 2). I use bar diagrams to visualise the institutional variances of different treaties along the seven dimensions. The scales of the dimensions are independent from each other and do not represent quantifiable measures of the respective dimension.

5.1 Are Chinese PTIAs more than just an extension of its BITs?

This section compares Chinese PTIAs against China’s BIT practice. The most comprehensive BIT China has concluded is the agreement with Canada signed in September 2012.⁵⁵ The negotiations initiated in 1994 by Canada were based on a Canadian model treaty that was very different from the Chinese model treaty at the time. The text of the Canadian BIT resembles the Canadian model treaty from 2004 and includes references to the international minimum standard of treatment; provisions on performance requirements; general exceptions for public policies to preserve the environment or financial stability; transparency requirements; and detailed ISDS rules. All these innovative treaty provisions have already been included in one or the other previous Chinese BITs, as explained in Section 3. However, the China-Canada BIT combines all of these innovations in one treaty and thus represents the current benchmark for Chinese BITs.

In Figure 2, China’s PTIAs with Pakistan, New Zealand, Peru and ASEAN are compared with the China-Canada BIT along seven dimensions. In accordance with China’s BIT policy since the late 1990s, all Chinese PTIAs include comprehensive ISDS provisions and follow the Chinese practice of granting national treatment only, subject to a grandfathering clause for non-conforming measures (non-discrimination dimension). With regard to standards of treatment, Chinese PTIAs also follow Chinese BIT practice, which both includes restricted (subject to customary international law) and unrestricted fair and equitable treatment clauses. Innovative treaty provisions such as performance and transparency requirements and environment chapters are included on a case-by-case basis, indicating that China has no coherent and proactive policy in this respect. Market access has been the most important aspect for New Zealand, Peru and ASEAN in pursuing a PTIA with China. However, with regard to market access, too, China is not willing to grant anything additional compared to its BIT policy.

55 In addition to the actual treaty text, the Canada BIT is also special because of its negotiation history, which dates back to 1994. The length of the negotiations are explained by China’s accession to the WTO, which led to an adjournment of the official talks, the revision of Canada’s model BIT and changes within the Chinese negotiation team. Equally important, however, was that, for the first time, the negotiations with Canada exposed China to a different style of drafting BITs. In fact, China used these negotiations to learn from Canada’s model treaty, which forms part of the North American approach to international investment policy-making and includes more detailed provisions than the mainstream European-style BIT. See interviews with Canadian negotiators April 2011 and June 2012.

Figure 2: Institutional variance of Chinese PTIAs in relation to the China-Canada BIT (2012)

Source: Author.

Notes: The visualisation of Figure 2 and 3 of the institutional variance of Chinese PTIAs and selected partner country treaties is based on the coding of seven dimensions of investment-related rules typically found in modern PTIAs. The following scales have been attributed to the eight dimensions:

Market access: 0 = no market-access provisions, 0.5 = pre-establishment MFN only, 1 = pre-establishment national treatment

Non-discrimination: 0 = post-establishment MFN only, 0.5 = post-establishment national treatment subject to grandfathering of non-conforming measures or to national law, 1 = full national treatment

Standard of treatment: 0 = no fair and equitable treatment, 0.5 = fair and equitable treatment in accordance with customary international law, 1 = full fair and equitable treatment.

Performance requirements: 0 = not covered, 1 = permission of performance requirements

Transparency requirements: 0 = not covered, 1 = transparency requirements

Environment: 0 = not covered, 1 = environmental exceptions

Dispute settlement: 0 = no ISDS, 0.5 = restricted ISDS, 1 = full ISDS

The Pakistan PTIA is modelled on China's second-generation BIT approach towards developing countries. This treaty is an example of the types of PTIAs that include investment chapters that are copied and pasted into the partner countries' BITs. Although the investment chapter of the Pakistan PTIA includes an open-ended fair and equitable treatment clause and a comprehensive ISDS mechanism, it lacks all of the innovative dimensions of Chinese third-generation BITs. China's other PTIAs include a number of such innovative dimensions, but they are not as comprehensive as the China-Canada BIT. The New Zealand PTIA comes close to the benchmark of the China-Canada BIT; it only lacks an environmental chapter.⁵⁶ In addition, the Peru and ASEAN PTIAs lack a chapter that prohibits performance requirements.

Compared to China's third-generation BITs, as represented by the China-Canada BIT, China's PTIAs have nothing additional to offer. Investment rules negotiated in the context of PTIAs do not exceed the boundaries of China's recent BIT policy. In fact, from the perspective of China, PTIA and BIT are two sides of the same coin. It has been argued above that China pursues PTIAs for geo-political as well as genuine economic reasons. With regard to the latter, China prefers to focus on the trade in goods component of PTIAs. Including additional dimensions, by contrast, has not been a priority of China's PTIA policy-making to date (e.g. Gao 2011; Nakagawa / Liang 2011). This observation is supported by the empirical analysis of this article. I have shown in previous sections that New Zealand, Peru and ASEAN have demanded the inclusion of comprehensive investment rules that go beyond mainstream BITs. In particular, they have tried to use PTIA negotiations to push China to agree to extend the market-access logic from trade in goods and services to investments. However, although China has been willing to accept partner countries' respective model treaties that are geared towards NAFTA as the basis for negotiations, its flexibility has been limited and does not involve making concessions in the area of investment liberalisation beyond granting pre-establishment MFN treatment.

5.2 Comparing Chinese PTIAs with international treaty practice

I have argued above that Chinese PTIAs are a continuation of China's BIT policy by other means. How do Chinese PTIAs compare with international treaty practice? As explained in Section 2, on an international level PTIAs can be distinguished into three broad categories: firstly, PTIAs that entail only rules that establish mechanisms to promote deeper cooperation on investment protection and promotion; secondly, PTIAs that entail BIT-like provisions for the protection of investments in the post-establishment phase; and thirdly, PTIAs that additionally include commitments for the liberalisation of investment flows.

As shown in Table 2, most of the early PTIAs fall into the first category of global PTIA practice. The treaties with the APTA countries, Hong Kong, Macao, Chile and the latest

⁵⁶ Please note that in addition to the PTIA, China and New Zealand have signed a separate Environment Cooperation Agreement and a Memorandum of Understanding on Labour Cooperation.

treaty with Taiwan include, if at all, only generic provisions on investment cooperation. Chinese PTIAs concluded after 2006, with the exception of the Economic Cooperation Framework Agreement with Taiwan, entail provisions on the protection of investment flows and fall under the second category of global PTIA practice. This pattern becomes most obvious in the PTIA with Costa Rica, which merely reaffirms the BIT signed in 2007 between the two countries. But also the PTIAs signed with Pakistan, New Zealand, Peru and ASEAN follow this pattern and fall short of including market-access provisions.

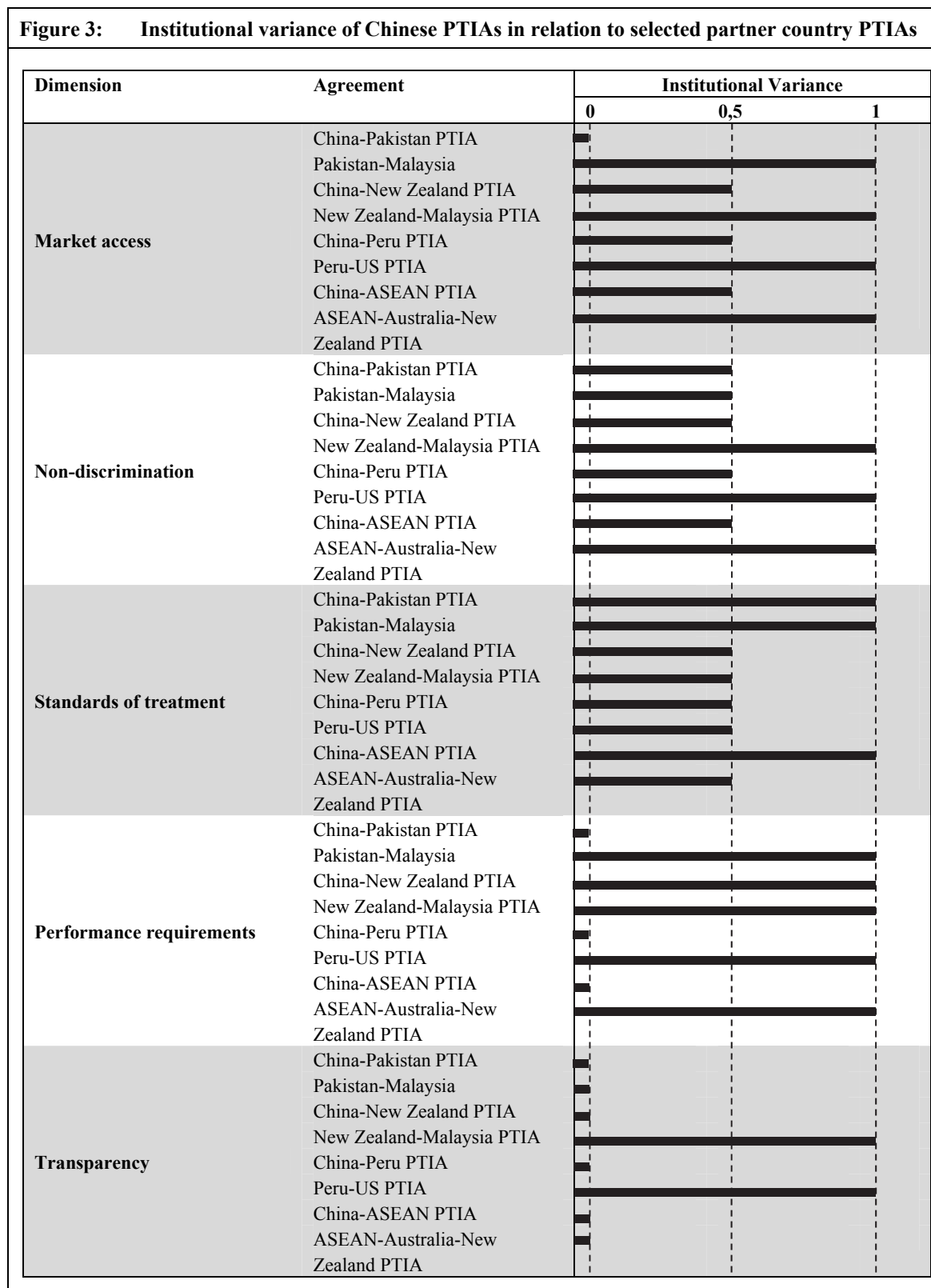
China's hesitance to include rules on the protection of investments in the pre-establishment – in addition to the post-establishment – phase in its PTIAs becomes especially evident when compared with the treaties that China's partner countries signed with third countries. Figure 3 includes the four Chinese PTIAs with Pakistan, New Zealand, Peru and ASEAN, which have comprehensive investment rules. As I have argued in Section 4 on the basis of interviews with negotiators, New Zealand, Peru and ASEAN countries opted to negotiate investment rules in the context of a PTIA, primarily with the aim of pushing China towards a further liberalisation of its investment regime. This finding is confirmed by the PTIAs that these partners have negotiated with third countries. Comprehensive agreements, such as the New Zealand-Malaysia PTIA, the US-Peru PTIA and the ASEAN-Australia-New Zealand PTIA, all include market-access provisions and high non-discrimination standards that go beyond the level of investment liberalisation that China is willing to accept. In addition to ISDS, these treaties include BIT-plus provisions such as for the environment as well as transparency and performance requirements. Even Pakistan has been willing to consent to the inclusion of market-access provisions in a PTIA with Malaysia. Although China has been willing to include some of the above-mentioned BIT-plus provisions, it has been defensive when it comes to investment liberalisation. The only concession China was willing to make was the inclusion of a pre-establishment MFN clause in the PTIAs with New Zealand, Peru and ASEAN. This pattern, however, is also visible in China's BIT practice.

For China, PTIAs are not the tool to introduce new and innovative investment rules, as is the case with other countries. To a certain extent, China has been responsive to the partner countries' requests to include comprehensive investment rules. However, the comparison with Chinese BITs shows that this pattern is also apparent regarding these single-purpose agreements. In fact, almost all of the innovative treaty language included in Chinese PTIAs had already been incorporated in BITs, as argued in Section 3. For China, BITs and PTIAs are two sides of the same coin. From a policy-diffusion perspective,⁵⁷ it is interesting to note that China has been willing to incorporate innovative NAFTA-inspired investment rules in individual agreements. However, this spreading of global norms has not resulted in a reform of China's international investment policy to date. In contrast to other major capital exporters, China is not negotiating PTIAs or BITs on the basis of a coherent and authoritative model text. However, the Chinese government is currently

57 On policy diffusion in general, see Simmons / Dobbin / Garrett (2008).

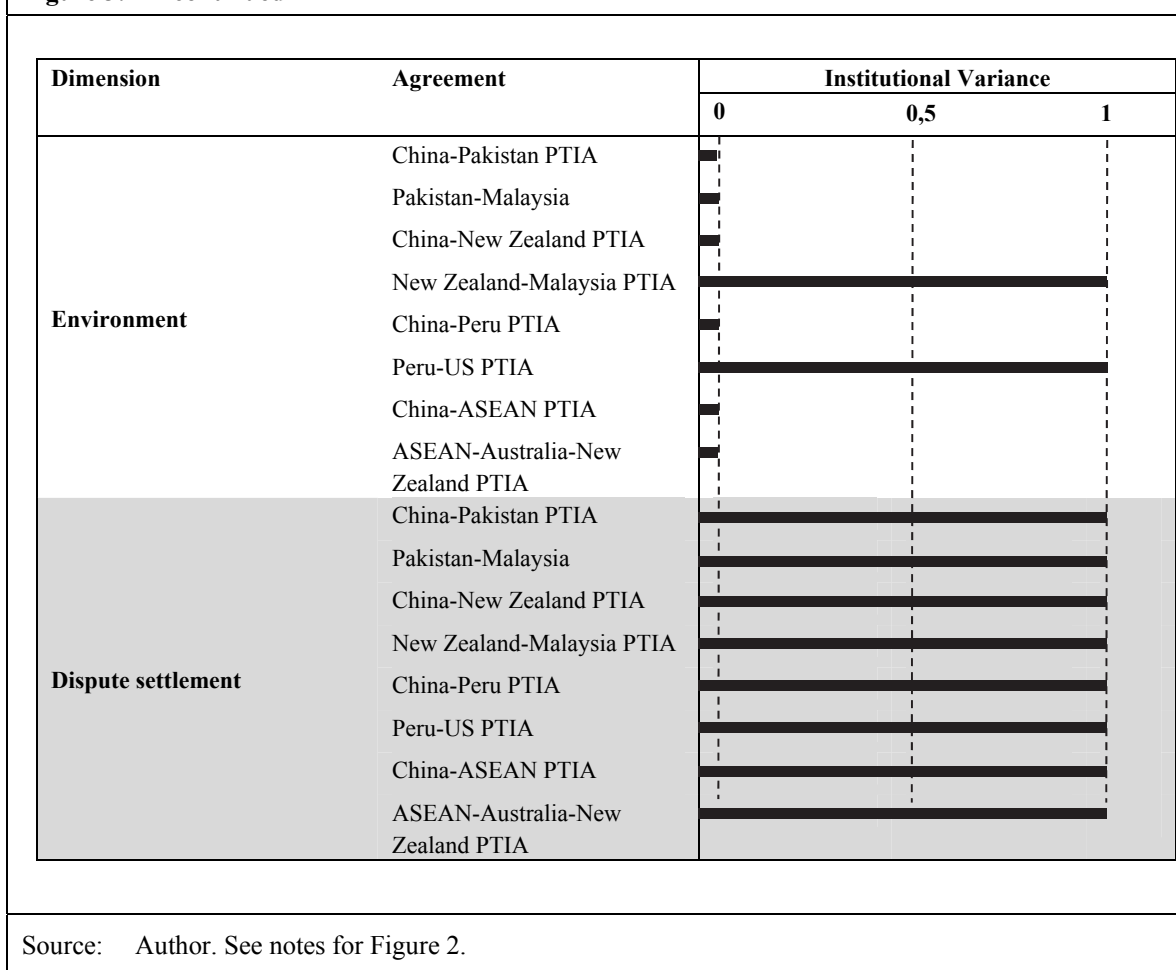
contemplating drafting a model text,⁵⁸ and the negotiations with partner countries that pursue a NAFTA-like international investment policy could indeed influence this process.

Figure 3: Institutional variance of Chinese PTIAs in relation to selected partner country PTIAs



58 Anonymous interview, October 2012.

Figure 3: continued



6 Conclusion

The prior chapter has provided an empirical analysis of the coverage and depth of investment rules in Chinese PTIAs in comparison with China's BIT practice and the international PTIA practice as benchmarks. China is a latecomer to the current global wave of PTIAs. Only after the accession to the WTO did China pursue the bilateral and regional path of economic integration. China's PTIAs are primarily focussed on trade in goods. China's bilateral and regional trade policy is characterised by a great degree of flexibility, and Chinese PTIAs are negotiated *"on an individually tailored basis in order to address the varied demands of the participating countries"* (Wang 2011, 498). The empirical analysis in this article supports this argument also with regard to the inclusion of investment rules in Chinese PTIAs. Out of the 11 Chinese PTAs, only the treaties with Pakistan, New Zealand, Peru and ASEAN include an original and comprehensive investment chapter. In addition, the treaties with Singapore and Costa Rica merely incorporate the investment agreements between China and ASEAN, and China and Costa Rica, respectively. Furthermore, interviews with partner country negotiators and the juxtaposition of Chinese PTIAs with the agreements of respective partner countries with

third countries show that China's position is flexible enough to adapt its partner countries' interests.

China's flexibility with regard to the inclusion of investment rules, however, has its limits. I have argued that China's BIT policy – more specifically the third generation of BIT policies – defines the limits of China's PTIA policy. In fact, the contents of Chinese PTIAs and third-generation BITs are coherently drafted and represent two sides of the same coin. This characteristic of Chinese international investment policy-making becomes most apparent with regard to investment liberalisation. Countries such as New Zealand and Peru and ASEAN countries – in line with the global treaty practice – used PTIA negotiations to extend the market-access logic from trade in goods and services to investment, and include pre-establishment national treatment provisions. China has been defensive with regard to commitments that go beyond the level of investment liberalisation found in Chinese BITs. If at all, China is willing to grant MFN treatment in the pre-establishment phase.

In sum, Chinese PTIAs – and Chinese third-generation BITs for that matter – are influenced by a new kind of investment policy that originated in the context of NAFTA and seeks a better balance of the protection of foreign investors and host countries' right to regulate. However, this NAFTA-isation of Chinese PTIAs and BITs is only partial, as China is not willing to include full investment liberalisation commitments. Furthermore, I have shown that this NAFTA-isation of Chinese investment agreements is not a result of a deliberate policy design, for example in the form of a new model treaty, but rather a result of flexibility to adapt to the interests of its partner countries.

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