

Zhang, Qianwen

Research Report

China's "new normal" in international investment agreements

Columbia FDI Perspectives, No. 174

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Zhang, Qianwen (2016) : China's "new normal" in international investment agreements, Columbia FDI Perspectives, No. 174, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254008>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 174 May 23, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Maree Newson (mareenewson@gmail.com)

China's "new normal" in international investment agreements

by

Qianwen Zhang *

At the 2014 Asia-Pacific Economic Cooperation forum, President Xi stated that the Chinese economy is experiencing a “new normal” as its growth rate has slowed.¹ This shift is also reflected in China’s evolving approach to international investment agreements (IIAs), namely that China is adapting to prevailing international investment-law standards.

First, China is taking an increasingly positive attitude toward investor-state dispute settlement (ISDS), reflected in the broadening of China’s dispute-settlement clause from determining only the amount of compensation to now addressing almost all disputes. According to statistics released by the Ministry of Commerce, there are currently 132 Sino-foreign bilateral investment treaties (BITs), of which 103 are in force. Among these, 100 were signed before January 1, 2010, and 96 came into force before that date.

Except in the case of *Tza Yap Shum v. Republic of Peru* in 2007 (which involved a Hong Kong citizen), prior to 2010 China and Chinese firms had not played an active role before the International Centre for Settlement of Investment Disputes (ICSID). However, in the past five years, Chinese investors have brought significant claims, and China has appeared before ICSID a few times. In January 2010, Chinese investors filed a claim against Mongolia at the Permanent Court of Arbitration. In May 2011, China faced its first ISDS claim, commenced by a Malaysian corporation, Ekran Berhad. In September 2012, a major Chinese firm, the insurer Ping An, took Belgium to ICSID arbitration. In November 2014, ICSID accepted a second claim against China, brought by a Korean investor, Ansung. In December 2014, an investment claim was accepted from a Chinese state-owned enterprise (SOE), Beijing Urban Construction Group, against the Yemeni government.

These cases suggest that Chinese investors, especially certain large SOEs, are now more inclined to resort to ISDS. SOEs’ interest in ISDS may be partly attributed to China’s “go-out” policy. Chinese firms’ rare utilization of IIAs before 2010 may be due to their

unfamiliarity with, and insufficient emphasis on, ISDS. China and Chinese firms realize now the importance of ISDS and are prepared to participate in the system, respectively as respondent and as claimants.

Second, China has now adopted a broader perspective toward IIAs with respect to its treatment clauses. Though China had been opposed to pre-establishment national treatment for decades,² this standard has recently been adopted in several circumstances, including the China-United States (US) BIT negotiations. In September 2013, pre-establishment national treatment was introduced in the China (Shanghai) Pilot Free Trade Zone, and in the Fujian, Guangdong and Tianjin Pilot Free Trade Zones in April 2015, to test this approach in the concrete context of the China-US BIT negotiations. Foreign companies will receive pre-establishment national treatment in general, if and when the negative list approach included in China's Foreign Investment Law (Exposure Draft) comes into force.³ The State Council recently released its first opinion on the implementation of the negative list system of market access.⁴ It can be expected, therefore, that pre-establishment national treatment and the negative list approach are set to become China's "new normal", representing fundamental changes to China's IIA approach.

Third, China now seeks regional investment agreements in addition to its continuing BIT negotiations. China is one of the drivers of such agreements, e.g., the Regional Comprehensive Economic Partnership negotiations and the China-Japan-Republic of Korea free trade agreement (FTA). Thus, China is participating in the rise of trade and investment regionalism. The parallel development of Sino-foreign BITs and Sino-foreign FTAs could become a part of China's "new normal".

As China's outward foreign direct investment (FDI) is likely to exceed inward FDI for the first time in 2016, each at over US\$100 billion, China must better protect its foreign investors. A case in point is the 2015 China-Australia FTA, which includes ISDS provisions, in contrast to the preceding 2003 agreement between the parties. By studying other major countries with significant outward and inward FDI flows, China can gain new insights on how best to improve its own foreign investment legislation and IIA negotiations.

In conclusion, with the rise of China's outward FDI, we are likely to see a more open attitude toward high-standards IIAs—the "new normal".

* Qianwen Zhang (cdzqw@hotmail.com) is a Ph.D. Candidate at Sichuan University Law School. The author is grateful to Huiping Chen, Stephan Schill and Wenhua Shan for their helpful peer reviews, and to Sheng Zhang for his comments. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ "Xi's 'new normal' theory", *Xinhua*, November 9, 2014, available at http://news.xinhuanet.com/english/china/2014-11/09/c_133776839.htm.

² A broadening of post-establishment national treatment can be seen in Chinese IIA policy over the past few years; see Stephan Schill, "Tearing down the Great Wall: The new generation investment treaties of the

People's Republic of China", *Cardozo Journal of International and Comparative Law*, vol. 15 (2007), pp. 21-24.

³ Ministry of Commerce, "People's Republic of China Foreign Investment Law (draft) for public comment", Chinese version available at <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

⁴ State Council, "Opinion on the Implementation of the Negative List System of Market Access", Chinese version available at http://www.gov.cn/zhengce/content/2015-10/19/content_10247.htm.

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Qianwen Zhang, 'China's "new normal" in international investment agreements,' Columbia FDI Perspectives, No. 174, May 23, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu). A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Daniel Allman, daniel.allman@columbia.edu.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 173, Gabriel Bottini, "Using investor-state dispute settlement to enforce investor obligations," May 9, 2016.
- No. 172, Maria Borga, "Not all foreign direct investment is foreign: the extent of round-tripping," April 25, 2016.
- No. 171, Delphine Nougayrède, "Untangling the effects of special purpose entities on FDI," April 11, 2016.
- No. 170, Wenhua Shan, "An outline for systemic reform of the investment law regime," March 28, 2016.
- No. 169, Kaitlin Y. Cordes and Anna Bulman, "Land investments and human rights: how home countries can do more," March 14, 2016.

All previous FDI Perspectives are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.