Mapping Modifications to Investor-State Dispute Settlement in Bilateral Investment Treaty Design: A Case Study of China

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Introduction

In 1994, a Mississippi state court ruled that the Loewen Group, a Canadian funeral conglomerate, had committed illegal anti-competitive and predatory actions at the disadvantage of local American-owned funeral companies. After a series of legal maneuvers to appeal the verdict, Loewen initiated a suit against the United States in 1998 under the investor-state dispute settlement (ISDS) of NAFTA that demanded $725 million from the U.S. in compensation for the alleged violation of investor rights provided by the agreement. This prompted the U.S. in 2004 to propose a clarification to its international investment arbitration that narrowed the definitions of expropriation, investment, and investor in the design of its bilateral investment treaties (BITs).[1] This proposal was meant to alleviate a perceived problem with investor-state tribunals—the flawed procedural commitments inherent to ISDS: the risk of bias in individual arbitration, inconsistency in panel rulings, and an absence of an appeals process. With these factors combined, therefore, it seems that states have a justified concern for their sovereignty stemming from the threat of frivolous suit by foreign investors seeking market de-regulation and considerable settlement

[1] Manger and Peinhardt, "Learning and the Precision of International Investment Agreements," 925.

compensation.[2] Still, despite over 675 investment arbitration claims filed against 120 states through 2014, only a minority of states have attempted to withdraw from procedural commitments to ISDS in their BITs as the loss of international capital garnered from such agreements would be too high of a cost to bear.[3] Thus, states have increasingly sought to renegotiate their BITs in recent years to address perceived risk in ISDS commitments. However, a question remains: what has been the effect of this renegotiation on investment arbitration rules and procedures? More specifically, are the renegotiated BITs providing capital-importing states increased regulatory tractability, or are they affording capital-exporting states' international investors with expanded rights? If so, how are these redesigned ISDS measures reflected in evolving BIT textual content?

To further specify the breadth of the ISDS debate, one author identified that "respondents and claimants each win about one-third of the time, and arbitrations are settled about one-third of the time."[4] Furthermore, investors are more likely to win in the highly politicized industries of oil and gas, and states are more likely to win in developed countries.[5] Given that the trends of ISDS vary across industry and national context, the process by which states "renegotiate when they acquire new information about the legal and political consequences of their [ISDS] treaty commitments" will vary drastically, with the particular consideration that this learning occurs more so when states are involved in investment arbitration.[6] Thus, these case-specific variances produce a host of differing tactics states can deploy as principals to modify their BIT-ISDS treaties, ranging from "full system

[2] Peinhardt and Wellhausen, "Withdrawing from Investment Treaties but Protecting Investment," 572.
[3] Peinhardt and Wellhausen, 572 and 574.
[4] Wellhausen, "Trends In Investment Treaty Arbitration," 23.
[5] Wellhausen, 23.
[6] Haftel and Thompson, "When Do States Renegotiate Investment Agreements? The Impact of Arbitration," 44.

(i.e., systemic termination of all treaties with no intent to renegotiate) through to minor modifications to treaty texts."[7] Largely, however, states have increasingly sought to modify their BIT-ISDS commitments employing the tactics of renegotiation and termination, reflecting a "backlash against the regime and an attempt by governments to reclaim state regulatory space (SRS), especially in response to the threat of investment arbitration claims."[8] Although a common approach, the avenue of ISDS reform by modifying and limiting investor protection commitments in current and future treaties enumerate to reclaim SRS has not been universal, "[a] few states, such as China and Germany, have sought to expand the rights of foreign investors under future IIAs."[9] This complicates a common assumption throughout the debate within the ISDS reform literature: that experience—specifically experience with arbitration outcomes unfavorable to states—with ISDS will prompt a state to reclaim state regulatory space in renegotiated treaties and in terminated-to-renegotiate treaties, as such varies "with the nature of involvement in ISDS and with respect to different types of treaty provisions."[10] To pursue such ends, "states with greater involvement in ISDS are more likely to focus on SRS in substantive rather than procedural provisions in their treaty renegotiations."[11] The existing scholarship has generally reached such conclusions through the study of Western developed states and has left the question of how a different national context with differentiated SRS concerns could explain why "the investment protection standards themselves could be the main concern of governments, leading them to focus on those substantive provisions."[12] I seek to survey the latter explanation for

[7] Langford, "Backlash and State Strategies in International Investment Law," 76.
[8] Thompson et al. "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, And Change In Treaty Design," 1.
[9] Gammeltoft-Hansen, "The Changing Practices of International Law," 77.
[10] Thompson et al., 23.
[11] Thompson et al., 21.
[12] Thompson et al., 9.

redesigning ISDS measures and demonstrate that there is not a strict binary between seeking regulatory tractability and expanding investor protections guiding ISDS reform. This illuminates how distinguishable effects on reformed BIT substantive and ISDS procedural treaty design across different contexts cannot be explained by one monolithic conception of SRS and regulatory tractability.

Nonetheless, I concur with the existing scholarship in most respects and broadly hypothesize that states acting out of concern for their sovereignty will primarily renegotiate their BIT-ISDS design to allocate the capital importing country with more flexibility in regulation and to moderate international investor rights, resulting in fewer successful ISDS cases for investor claimants. Yet, disparately, I will argue that the particular way in which a state addresses such concerns in its revised BIT substantive and ISDS procedural text is informed by the extent to which a state balances, "making credible commitments in order to gain investment versus ensuring sufficient legal certainty over the potential costs of commitment; and (2) the likelihood that they will be predominantly capital exporters or importers in the future.[13] Essentially, states that place a high value on the inflow of foreign capital will be more likely to strengthen investor rights when revising their BITs, resulting in more successful ISDS cases for investor claimants, and the converse would be expected for capital-exporting states. Through a case-study analysis of China's BIT-ISDS design evolution, I will demonstrate that the contextual calculus which informs how a state balances the aforementioned capital commitments can have distinguishable effects on reformed BIT substantive and ISDS procedural treaty design and text. To do so, I will utilize the United Nations Conference on Trade and Development's (UNCTAD) International Investment Agreements (IIAs) database, which monitors and maps IIA content. Specifically, I examined recent BIT's China signed with discrete ISDS reform provisions and compared the revised ISDS procedural content and the substantive treaty content to both past

[13] Langford, 100.

comparable treaties signed by China and other states in the same year, which included the same reformative provision. My research explores the treaties China adopted with advanced ISDS transparency measures. Compared to other countries' treaty content that has been adopted with the same advancements in that year, China's included a specific redesigned ISDS feature of limiting tribunal remedies. Specifying the type of remedies that may be granted by an ISDS tribunal indicates that China, as an increasingly capital-exporting nation, is seeking to enhance international investor rights by specifying them in the treaty text while simultaneously seeking to reform ISDS by enumerating "legal remedies that tribunals may grant to investors."[14] By attaching an additional textual specification to the treaties ISDS procedural content and utilizing the existing legal frameworks of ISDS for reform, China, therefore, further entrenches the incorporation of ISDS into the international legal system and itself as a party to the ISDS regime. This approach to ISDS reform contrasts with other agreements adopted that year, which mainly revised ISDS procedural content by including limitations on provisions subject to it and partitioning its legal centrality and jurisdiction. These cases illustrate the aforementioned line of thought that "states with greater involvement in ISDS…" who seek to reform it to reclaim state regulatory space are more likely to focus on… substantive rather than procedural provisions in their treaty renegotiations."[15] Importantly, the trends in China's advanced ISDS treaty content reveal how "investment protection standards themselves could be the main concern of governments, leading them to focus on those substantive provisions."[16] Significantly, China still represents a new case. Although it functionally expanded investor protection, it still modified its substantive provisions reflecting a concern regarding regulatory flexibility, adding a clause in its BITS with advanced ISDS transparency treaty preamble that referenced "a right to regulate (e.g.

[14] UNCTAD, "Reforming Investment Dispute Settlement: A Stocktaking."
[15] Thompson et al., 21.
[16] Thompson et al., 9.

regulatory autonomy, policy space, flexibility to introduce new regulations)."[17]

My findings pose significant implications for the scholarly ISDS reform debate. For one, they illustrate the complexity that a particular state's approach to renegotiating their BIT-ISDS commitments aren't informed exclusively by seeking investor protection or reclaiming state regulatory space; and that states don't exclusively seek to affirm investment protection standards questioned by experience with ISDS in renegotiating the substantive BIT text, it is possible to achieve such ends through revised ISDS procedural features as well. Furthermore, mapping the specific textual distinctions in BITs signed by China and how they strengthen specific commitments diversifies and modernizes the scholarship's understanding of how states compete for influence in multilateral organizations by altering their perceived rules constraining their competitiveness. Mapping such textual distinctions identifies how BIT-ISDS renegotiation illustrates how competitively incorporating "diverse economic models into a legal system designed with Western-style capitalist economies in mind" functionally operates. [18]

Background and Literature Review

There are some rudimentary answers within the existing literature about specifically how states go about renegotiating their BIT-ISDS commitments. As aforementioned, Haftel and Thompson identify that "states renegotiate when they acquire new information about the legal and political consequences of their treaty commitments, and that this learning occurs especially when states are involved in investment arbitration."[19] In other words, they find that states are more likely to renegotiate their BITs when they are progressively confronted with ISDS arbitral claims. Yet, Haftel and Thompson solely determine when a state will seek renegotiation, and do not identify the effects of the

[17] UNCTAD.
[18] Meyer and Park, "Renegotiating International Investment Law," 676.
[19] Haftel and Thompson, 44.

negotiated treaty on investment arbitration nor classify the character of the revised treaty design. Similarly, Manger and Peinhardt find that as a state increasingly experiences arbitral claims, a state will increase the legal precision of a particular BIT.[20] Precision refers to "...the specificity of state commitments-precise commitments occur when a treaty 'narrows the scope for reasonable interpretation."[21] Once more, the authors do not delineate what element of revised treaty design is enumerated with more legal precision or how such exhibits itself in the renegotiated treaty content. Other studies have indeed identified elements of BIT-ISDS that have been renegotiated with increased legal precision, describing one central issue within the controversy on ISDS as "the alleged lack of 'transparency' of the arbitral proceedings,"[22] and identified China's BIT renegotiation tactics to offer a solution to this controversy, concluding that "China's practice regarding ISDS transparency is rather limited, both with respect to treaty-making, as well as with regard to actual ISDS cases."[23] However, a key distinction Malanczuk describes is that in recent years, China has in fact increased the legal precision of its BIT-ISDS agreements by including broad and comprehensive ISDS clauses within them and "…although the requirement to go through domestic administrative review procedures first for a certain period before allowing resort to international arbitration is maintained…[this reflects the] increasing role of outward investment in China's economic development and the corresponding interest in effective investor protection rules and procedures."[24] Still, it is intriguing that China pursues ISDS reform through the avenue of transparency as it has a unique concern that "an under-standardized internal governance system might be exposed to international arbitration" and the unique politically sensitive issues "include but do

[20] Manger and Peinhardt, 937.
[21] Manger and Peinhardt, 922.
[22] Malanczuk, "China And The Emerging Standard Of Transparency In Investor-State Dispute Settlement (ISDS)," 66.
[23] Malanczuk, 105.
[24] Malanczuk, 85.

not limit to the attribution of acts of the Chinese Communist Party to the state, state-owned enterprises and competition policy, regional autonomy and ethnic policies."[25] Such issues are not experienced by Western capitalist democracies and would not pose a threat to their national sovereignty and thus would not be addressed in BIT substantive and procedural content. Although, despite the genuine sovereignty concerns posed to China by ISDS arbitration, it still believes the preservation of the mechanism of ISDS is advantageous given "…China's growing interests as a capital exporter, particularly along the Belt and Road route."[26]

Furthermore, China has sought to gain international influence through the promotion of its model of ISDS reform, which has interestingly coincided with the expansion of "jurisdiction of its existing arbitral institutions to encompass foreign investment disputes…[to]...answer China's pressing need to protect Chinese investments abroad."[27] Since states acquire more information as they are involved in investment arbitration, preserving the mechanism of ISDS to continue acquiring more information is critical "as the BRI advances, the number of investor-state disputes between Chinese investors and host governments could very well increase… [and the] dispute settlement mechanisms that are currently available to Chinese investors are quite limited." [28] Indeed, such expansions of ISDS jurisdiction for the sake of investor protection and to provide Chinese investors with arbitration experience indicate that China is attempting to become more competitive in the international investment arbitration regime normatively. Nevertheless, the new ISDS mechanisms could also function "as trial runs for potential global reforms of the future. Once the mechanisms prove successful, China could incorporate institutions such as the SCIA and CIETAC in future IIAs as options for

[25] Wang, "China and Investor-State Dispute System: Cases, Issues and Implications," 32.
[26] Roberts and St. John, "UNCITRAL And ISDS Reform: China's Proposal."
[27] Chen, "China's Innovative ISDS Mechanisms and Their Implications."
[28] Chen.

traditional investor-state dispute settlement or propose its international commercial courts as an alternative to traditional ISDS." [29] Unfortunately, this scholar did not delineate exactly what ISDS mechanisms could accomplish such. This study seeks to identify how renegotiated ISDS provisions could "shift the locus of China-related dispute resolution from ICSID or other Western institutions to China, where Chinese parties will encounter a system that is more familiar to them," which is imperative for broadening the field's perception of how states compete in multilateral organizations for influence by revisiting its rules. [30]

The Argument

I will argue that China's particular case as an emerging non-Western power requires it to balance its concerns for its sovereignty with its evolving interests as a capital exporter in its renegotiated BIT-ISDS provisions treaties in a unique way. I expect that China will revise its BIT- ISDS content within ISDS in a way that will expand investor rights, however likely with unique peculiarities underspecified in the existing literature on the evolution of ISDS that reflect a renegotiation "...paradigm... prevalent in Asia and among...countries...[seeking]... a more active role in the international economic landscape…[as they]...fit diverse economic models into a legal system designed with Western-style capitalist economies in mind, they are inclined to defer issues that are especially intrusive into the domestic legal system, such as ISDS... [and instead] focus on pre-determined priorities during renegotiation."[31] This paradigm employed during the renegotiation of BIT-ISDS provisions, particularly after an existing agreement has been terminated, is no different than the theoretical logic that, "states are more likely to create new IOs when they believe their influence in existing institutions is constrained by outdated rules. Rather than attempting to maximize

[29] Chen.
[30] Chen.
[31] Meyer and Park, 676.

cooperative benefits, states often build institutions as part of a competition for influence in multilateral organizations."[32] Given that China is attempting to utilize its model for revised ISDS transparency measures to gain international legal influence as well as "to use...as evidence to support its credibility, both as a leading global investor and recipient of global investment. [Yet]... this may be a double-edged sword...because such treaty-based transparency obligations would also apply to cases brought by foreign investors against China."[33] Therefore, I posit that the textual content of China's BIT-ISDS provisions will reflect any additional treaty specifications included to address an unparalleled sovereignty concern, as the state understands "piecemeal negotiations will better serve their long-term interests. They lock in the benefits from the provisions they have already agreed, while deferring what are presumably more difficult negotiations."[34] Analyzing, even seemingly minute, both evolved BIT substantive and ISDS procedural treaty content is critical, as textual distinction must have significance;[35] otherwise, parties could simply subsume evolved provisions under a general clause, whereas parties choosing to include specific language indicates a stronger agreement to an item. Manger and Peinhardt's finding doubly informs this specificity that as a state increasingly experiences arbitral claims, it will increase the legal precision of an individual BIT to specify its commitments. The predicted evolved treaty content will be distinct from other nations acting out of ISDS-sovereignty concern, since China broadly seeks to preserve the mechanism of ISDS and will advance its BIT-ISDS content in such a way that does not undermine the legal jurisdiction of ISDS to balance the likelihood that in the near future China will not "be able to update its IIAs to allow for broader and stronger ISDS options for Chinese

[32] Pratt, "Angling for Influence: Institutional Proliferation in Development Banking," 27.
[33] Malanczuk, 107.
[34] Meyer and Park, 676.
[35] Meyer and Park, 676.

investors."[36] This, combined with China's desire to pursue "innovative models for ISDS, such as "arbitration + mediation, [to]...accumulate experience and human resources, both of which will empower China to offer new perspectives on reforming the ISDS system," anticipates that the revised BIT-ISDS measures will be novel and disparate.[37] The disparateness of these renegotiated measures, by virtue of China seeking to enhances its competitiveness for influence in an international investment regime designed for Western-capitalist legal systems, will furthermore exhibit a distinct Chinese reformative ISDS model to break the monopoly of existing Western-initiated investment institutions.[38]

The Evidence

To test my hypothesis, I utilized UNCTAD's IIA Mapping Project Database to find BIT's that China had signed in recent years, which included an ISDS provision, and more importantly, a specific advanced ISDS transparency in arbitral proceedings feature. In the view of the ISDS reform scholarship, "the latest development includes investment arbitration (ISDS transparency), establishing openness and publicity requirements to secure public access to arbitral proceedings between a foreign investor and a state."[39] These features could consist of (a) requiring documents to be made publicly available (b) requiring hearings to be open to the public, and (c) regulating amicus curiae submissions by third non-disputing parties. The database mapped two BIT's China signed that included such features, and the agreements were the China - Mexico BIT (2008) and the Australia - China FTA (2015). The advanced ISDS transparency provision that the 2008 China - Mexico BIT included was requiring documents to be made publicly available and the provisions in the 2015 Australia - China FTA were also requiring documents to be made publicly available and additionally

[36] Roberts and St. John; Chen.
[37] Chen.
[38] Chen.
[39] Malanczuk, 73.

regulating amicus curiae submissions by third non-disputing parties. I then searched for other BIT's in the database with the same mapped advanced ISDS transparency provisions signed in the same year which were closest in treaty signature date to the previous BIT's by other countries, which produced the following two agreements: the 2008 Panama - Sweden BIT and the 2015 Canada - Guinea BIT.

Furthermore, to simultaneously discern if the evolution in treaty content was a product of a particular state's treaty-negotiation process and if there was a modification in substantive treaty text to address overarching ISDS concerns potentially, I lastly searched the database for similar BIT's signed by those states at an earlier time that contained a mapped ISDS clause. These comparative agreements were the 1998 Barbados - China BIT (compared the China's 2008 agreement), the 1988 Australia - China BIT (compared to China's 2015 FTA), the 2006 Germany- Guinea BIT (compared to the 2015 Guinea BIT), and the 2000 Croatia - Sweden BIT (compared to the 2008 Sweden BIT). The 2008 Panama - Sweden BIT only required documents to be made publicly available, whereas the 2015 Canada - Guinea BIT included all three advanced transparency provisions. Although each treaty comparative-dyad contains the same revised and novel ISDS transparency feature in its treaty content, a major distinguishing in BIT-ISDS procedural feature signed by China was each specified the available types of remedies in each dyad, meaning that the treaty "specifies the types of remedy that a tribunal may award, for example payment of monetary damages and restitution of property (with the right to pay monetary damages in lieu of restitution)."[40] This indicates that China is attempting to precisely enumerate investor rights from its previously rudimentary ISDS policy while simultaneously incorporating itself further to the ISDS regime by textually specifying its commitment to such. Interestingly while the 2008 Panama - Sweden BIT and the 2015 Canada - Guinea BIT did not contain this provision, nor did their earlier comparable counterparts, the Panama - Sweden

[40] UNCTAD.

agreement did contain a novel procedural alternative to arbitration clause, which provides the alternative of "Voluntary ADR (conciliation/mediation),"[41] instead of ISDS. This marked a divergence in treaty content from the earlier 2000 Croatia - Sweden BIT. This finding emphasizes a difference in other states' approaches to ISDS reform than China's, as this revised ISDS measure offers an avenue to divert the ISDS rather than affirm its legal centrality.

A final ISDS procedural modification was that the modernized BIT's signed by China no longer included a provision to "submit an investment dispute to the domestic courts of the host State, whether as an option alongside other ISDS forums or as a mandatory step before submission of a claim to arbitration," whereas their earlier comparable counterparts did include this provision. [42] Interestingly, many specifications about transparency when observing the 2000 Croatia - Sweden BIT compared to the 2008 Sweden BIT are located in the substantive treaty text and did not change in their later versions, which was not observed in the comparison to China's BIT content evolution.

Furthermore, there were other noteworthy revisions and additional substantive content included in these modernized BITs, notably that the 2015 Australia - China FTA included a clause in its preamble that referenced the "right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations)."[43] This was not specified in the 1988 Australia - China BIT. It is important to distinguish all of these particular textual specification advancements in China's recent BIT-ISDS content from the general trend of ISDS reform. All of the agreements identified thus far specified novel procedural ISDS revisions that entailed: provisional measures, consolidation of claims, and affirming a binding interpretation by contracting parties or their joint committee. Thus, China has an observably different ISDS renegotiation strategy to balance its investor protection with state

[41] UNCTAD.
[42] UNCTAD.
[43] UNCTAD.

regulatory space and gain influence in the international ISDS regime compared to other countries seeking to reclaim state regulatory space.

One alternative explanation for the advanced ISDS procedural feature of specifying the available types of remedies as an indicator of China's distinctive ISDS reform and renegotiation process is that this is a common approach to securing investor protection and that China is learning from the observed experience of other states. One author has identified that "the United States has negotiated agreements [such as] NAFTA and the 2012 Model BIT, [where] the ISDS provisions state that a tribunal may award only monetary damages and/or restitution of property [to] preclude an arbitration tribunal from requiring amendment, repeal, or passage of any statute or regulation in U.S. law."[44] However, it is likely that the other distinctions such as novel preamble references to state regulatory space observed in China's advanced BIT-ISDS content are not included in the revised BIT-ISDS content of other Western nations. Indeed, the 2008 Rwanda – United States of America BIT which contained novel revised ISDS transparency features (in this instance juxtaposed against the 1986 Bangladesh – United States of America BIT) and limited arbitrational remedies did not include the reference to the right to regulate in its preamble.[45] To further ascertain if China is merely learning from the observed behaviors of other states seeking ISDS reform, I compared other non-Western capitalist democracies BIT-ISDS treaty evolution to China's as well as other states whose capital-importing balance is shifting. In respect to the former, I analyzed the content of the 2008 Russian Federation – Venezuela, Bolivarian Republic BIT in contrast with the 1993 Argentina – Venezuela, Bolivarian Republic of BIT, and found that the modern Venezuelan agreement did not reference the right to regulate in its preamble, nor did it limit arbitrational remedies in its ISDS procedural content. In respect to the latter, I examined two increasingly capital-

[44] Congressional Research Service, "Issues In International Trade: A Legal Overview Of Investor-State Dispute Settlement," 25.
[45] UNCTAD.

importing states BIT-ISDS content evolution and observed similar results. The 2007 Germany – Jordan BIT did not evolve from a previous Bulgaria – Germany BIT in that it still did not reference a right to regulate in the preamble or enumerate arbitrational remedies.[46] Furthermore, the 2016 Mexico - United Arab Emirates BIT evolved from the 1996 Argentina – Mexico BIT to expand investor protection by specifying limited arbitrational remedies, still it did not reference the right to regulate in its preamble, illustrating the distinction between China's BIT-ISDS reform tactics in comparison to other states whose capital-importing balance is shifting.[47] Overall, much more case comparison of treaty text is required in this study to produce further empirically generalizable claims about how China's ISDS reform negotiation process is informed and what distinguishable implications such have on BIT language and content. Still, this study already presents significant findings demonstrating a distinct array of tactics China employs when renegotiating its BIT-ISDS content underspecified in the existing literature. The significance of these findings is also made apparent when in conversation with China's own experience as a target of such ISDS complaints, of which it has only been a respondent state in four total cases.[48]

In contrast, other states analyzed had a much more extensive history as an ISDS respondent state and would logically seem to have a larger prerogative to modernize their BITs with ISDS provisions. The absence of an extensive ISDS respondent history is largely explained by China's historical preference to downplay investor disputes and negotiate rather than adjudicate them as low-cost dispute management and control.[49] Considering that China, although inexperienced with the ISDS regime, wants to entrench its centrality and propose a particular model of reform to it, the discrete variances in such have meaning. This distinctive model

[46] UNCTAD.
[47] UNCTAD.
[48] UNCTAD.
[49] Wang, 31.

could be explained by the notion that "ISDS adjudication may be used by China's leadership to convey its determination of reform to the domestic stakeholders, especially the local governments…In the Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law, China's leadership clarifies the goal of this administration is to build a Law-based governance system [that is a] negative list system of government powers." [50] Accordingly, my findings emphasize the distinction of China's BIT-ISDS reform as it pursues this end and as it renegotiates its interests as its capital-importing balance evolves.

Conclusion

I ultimately sought to answer how states renegotiate their influence in the international investment regime by revising the rules within a multilateral lateral organization, i.e. ISDS within BITs, when there is a perceived constraint imposed by such rules. I explored how the revised institutional rules of ISDS reformative measures to address a myriad of unique sovereignty concerns on behalf of respondent states evidenced themselves in either renegotiated or modernized agreement with an advanced ISDS transparency clause content to discern if these procedural or substantive revisions reclaimed state regulatory space or expanded investor protection. Additionally, I sought to trace these content differences to a distinct decision-making calculus guided by the shadow of future international capital commitments to illustrate the various complexities left underspecified in the existing literature on a given ISDS-reform advocacy through a case study of China. I centrally argued that China has increasingly strengthened its position as a capital-exporting nation through initiatives such as the BRI to compete for international influence against hegemonic Western nations. It accordingly sought to incorporate itself into a Western international investment regime in a manner that did not expose it to further domination by comprising the sovereignty of its legal system. To

[50] Wang, 32.

achieve such influence, this negotiated incorporation enabled China to secure state regulatory space of its state-owned economy while balancing its needs to expand investor protection as its international investments grow as the BRI approaches completion. To test this argument, I identified BITs with ISDS provisions recently signed by China that contained ISDS specific advanced transparency features and compared them to agreements with identical transparency provisions signed in that year and found that China's BITs contained significant textual differences. These differences were located within both the substantive treaty and ISDS procedural text and indicated a specific set of commitments driven by the avenues China currently seeks to increase its competitiveness within the international investment regime.

While the treaties signed by China did indeed expand investor protection, they also did so in a way that did not detract from the legal centrality of ISDS not observed in comparable agreements and notably appeared to address state regulatory concerns in the substantive BIT content. This was achieved by limiting arbitrational remedies available to ISDS tribunals to grant to investors, referencing the right to regulate in the treaty preamble, and limiting workarounds to ISDS arbitration. Much more case comparison is necessary to confirm this pattern and to identify additional nuances in China's BIT-ISDS content. However, this study's findings thus far are significant for adding complexity to the notion that states solely pursue ISDS renegotiation to either reclaim state regulatory space or affirm investor protection in their competition for influence in multilateral organizations.

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