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A Review of China's Sustainable Development Goals through International Investment Agreements

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Based on a comprehensive treaty survey, the article presents the general approaches to sustainable development goals (SDGs) in Chinese International Investment Agreements (IIAs). With the global trend towards investor responsibilisation, a new generation of investment policies places inclusive growth and sustainable development at the heart of efforts to attract and benefit from the investment. While there is still an overall lack of sustainable development provisions in existing Chinese IIAs, an increasing number of China's recent treatises move towards sustainability. Most sustainable development provisions in Chinese IIAs are carve-out provisions to preserve the States' regulatory space in public health, environment, and other SDGs. In recent IIAs, provisions include social and environmental obligations on investors, ranging from a mere signal of the Contracting Parties' commitment to sustainable development in the preamble, to corporate social responsibility (CSR) type provision in the form of no lowering of standards clauses or best endeavours provisions. Finally, procedural provisions on sustainable development safeguard substantive protections.

Introduction

We live in a world where the capacity of oceans to provide their vital services and the survival of the planet's biodiversity are at great risk; where our future generations may have to encounter a scarcity of resources to meet their needs and have to experience a less supportive environment. In August 2021, the United Nation's Intergovernmental Panel on Climate Change published a report based on more than 14,000 studies developed by scientists around the world. The report makes clear that global warming will only intensify over the course of the next 30 years.[1] Sustainable development is the only key to preventing this situation, which ensures a safe life for humans and a safer future for humanity.

Sustainable development can have different meanings in different contexts. The United Nations (UN) has articulated a right to development, which incorporates many aspects of the definitions of sustainable development current in the environmental, human rights and economics literature.[2]

In the environmental circle, the influential 'Brundtland Report' defined sustainable development as:

> [D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3]

In the development and human rights circles, the meaning of sustainable development encompasses efforts to 'reduce poverty, improve health, promote peace, human rights, gender equality, and environmental sustainability'.[4]

1 Intergovernmental Panel on Climate Change (IPCC), **Climate Change 2021: The Physical Science Basis**, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

2 Ibid.

3 **Report of the World Commission on Environment and Development: Our Common Future** (UN World Commission on Environment and Development, 1987).

4 UN Millennium Project (2005), **Investing in Development: A Practical Plan to Achieve the Millennium Development Goals**, UNDP, New York at 3.

From an economic point of view, 'achieving sustainable development entails liberalising trade and investment policy in order to facilitate the access of goods to foreign markets and to stimulate foreign investment flows'.[5]

International economic law plays an essential role in achieving the UN sustainable development goals (SDGs). However, investment treaties are often thought to be silent on investors' contributions to sustainable development. Indeed, one of the main criticisms against the investor-state dispute settlement (ISDS) is the asymmetric nature of investment treaties, which impose numerous obligations on the States, but do not seem to hold corporations accountable for the social, environmental and economic consequences of their activities. To date, few international investment agreements (IIAs) address sustainable development in any meaningful way.

In recent years, we have been witnessing a major paradigm shift or 'reconceptualization'[6] in the development of the IIA regime, which moves from investor protection to investor responsibilisation, with a view to foster IIAs' contribution to the realization of SDGs, or to progress towards the 'greenization' of IIAs.[7] As a result, a new generation of investment policies is emerging, which place inclusive growth and sustainable development at the heart of efforts to attract and benefit from the investment. The new generation investment policies recognize the need to balance the interests of investors in the protection of their investment with the regulatory interests of host States. Various stakeholders have proposed options to achieve a more tenable link between investment treaty instruments and SDGs:

- UNCTAD has introduced Investment Policy Framework for Sustainable Development to provide a guidance to negotiate sustainable-development-friendly IIAs;[8]
- OECD has suggested ways to advance sustainable development agenda and promote responsible business conduct in IIAs in 2014.[9] It has launched the Program on the Future of Investment Treaties in March 2021 to explores how the investment treaties could help meet climate challenges and achieve SDGs, including a survey on Climate Policies for Investment Treaties.[10]
- the International Institute for Sustainable Development (IISD) in April 2015 has proposed its Model International Agreement on Investment for Sustainable Development.[11]

Scholars have also suggested ways to improve sustainable development provisions of IIAs.[12]

What is the current status of existing Chinese IIAs with respect to SDGs? Is there a trend towards more sustainable treaty making in China's investment policy? What role does and should China play in making IIAs more sustainable? To address these questions, this article examines China's approaches on SDGs through a comprehensive review of its existing IIAs.

As of September 2022, China has concluded 145 bilateral investment treaties (BITs), of which 106 are currently in force. In addition, it has signed 25 other treaties with investment provisions (most of them regional economic integration agreements), with 22 of them in force.[13] Despite China's increasingly important role in international economic system and legal order and high number of treaties, most of the Chinese IIAs do not contain detailed provisions on sustainable development.

5 J. VanDuzer, P. Simons, G. Mayeda, '**Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries**' (Prepared for the Commonwealth Secretariat, 2012).

6 On this perception see, e.g., S. Puig and G. Shaffer, '**Imperfect Alternatives: Institutional Choice and the Reform of Investment Law**' *American Journal of International Law* 112 (2018), 361; H. Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development', *Lewis and Clark Law Review* 17 (2013), 521 et seq. See also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 126.

7 M. Chi, 'The 'Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making' (2015), 18 *Journal of International Economic Law* 511.

8 See UNCTAD, **Investment Policy Framework for Sustainable Development** (2015).

9 OECD, Investment Treaty Law, **Sustainable Development and Responsible Business Conduct: A Fact Finding Survey** ('OECD Survey')', 26 June 2014.

10 OECD, **The Future of Investment Treaties**.

11 H. Mann, K. von Moltke, L.E. Peterson, A. Cosbey, **IISD Model International Agreement on Investment for Sustainable Development, Negotiators' Handbook (2nd Ed.)** (International Institute for Sustainable Development, 2006).

12 See e.g., J. VanDuzer, P. Simons, G. Mayeda, supra note 5; W. Alschner, E. Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 217; M. Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge, 2018); J. Hepburn, and V. Kuuya, 'Corporate Social Responsibility and Investment Treaties', in M. Cordonier Segger, MW Gehring, A. Newcombe (ed.), *Sustainable Development in World Investment Law*, 585 (Kluwer Law International, 2011).

13 Data from UNCTAD Investment Policy Hub, available at **https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china**.

Amongst China's existing IIAs which contain sustainable development provisions, its general approach can be divided into the following categories, namely, carve-out provisions for States' regulatory measures from substantive protections (1); reference to corporate social and environmental responsibility in substantive provisions (2); and procedural provisions on sustainable development (3).

1. Carve-out provisions for regulatory measures: the State's right to regulate

IIA provisions can be designed to ensure that IIA obligations do not prevent host states from acting to meet their SDGs. This can be achieved by including carve-out provisions for regulatory measures, in which non-discriminatory legal measures adopted for the purpose of legitimate public welfare (such as public health, safety and environment) are excluded from specific standards of protection or as a general exception.[14] Such approach is consistent with Article 9 of 'UN Guiding Principle on Business and Human Rights' which provides that:

> States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.[15]

Most of the sustainable development provisions contained in Chinese BITs are in the form of carve-out for regulatory measures, either as a general exception (a), a stand-alone environmental exception that exclusively addresses environmental, safety and public health concerns[16] (b), or as a carve-out provision in the context of specific substantive provisions (c), such as expropriation, fair and equitable treatment (FET), and most-favoured nations (MFN) clause.

a) General exceptions

A general carve-out, which provides a wide range of exceptions, is modelled after the General Agreement on Trade and Tariffs (GATT) (Art. XX). Three Chinese IIAs contain a GATT-style general exception, covering a wide range of exceptions including environment exceptions. Article 33(2) of the **China-Canada BIT** (2012) provides:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or *maintaining measures, including environmental measures:* (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. (Emphasis added)

Paragraph (b) and (c) are almost identical to the language used in GATT.[17] The **China-Turkey BIT** (2015) and the **China-Australia FTA** (2015) contain similar language of general exception.[18] **China-Australia FTA** (2015) goes further to exclude non-discriminatory measures for legitimate public welfare objectives from investor-state disputes claims.[19]

14 K.J. Vandevelde, 'Rebalancing through Exceptions' (2013), 17(2) *Lewis and Clark Law Review* 450.

15 J. Ruggie, **Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework**, 17th session, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011), Art. 9: 'States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'.

16 M. Chi, supra note 7, at 519.

17 **Art. XX of GATT**, which provides that 'subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […] (b) necessary to protect human, animal or plant life or health; […] and (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

18 Art. 4.1, China-Turkey BIT (2015) provides that '1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory and necessary measures: (a) designed and applied for the protection of human, animal or plant life or health, or the environment; (b) related to the conservation of living or non-living exhaustible natural resources.' Art. 9.8, China-Australia FTA (2015) clarifies that such measures include 'environmental measures to protect human, animal or plant life or health'. For a list of Chinese IIAs and its texts, see **https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china.**

19 Art. 9.11(4), China-Australia FTA (2015), also discussed below at '3. Procedural provisions on sustainable development'.

b) Stand-alone exceptions

Some of the Chinese IIAs incorporate sustainable development provisions in stand-alone exception clause that exclusively addresses environmental, public health and safety concerns.

For instance, the **China–Mauritius BIT** (1996) provides that:

> [T]he treaty provisions 'shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants or the protection of its environment'. (Art. 11)

This treaty gives Contracting Parties broad discretion to take measures to protect public health or protect its environment. **China-Singapore BIT** (1985), **China-Sri Lanka BIT** (1986) and **China-New Zealand BIT** (1988) also contain exception to allow the states to apply prohibitions or restrictions directed to the protection of public health or the prevention of diseases and pests in animals or plants.[20]

The **China–United Republic of Tanzania BIT** (2013) seems to take a more balanced approach between state regulatory space and protection of investment, and provides clear conditions for Contracting Parties to take environmental measures necessary to protect human, animal or plant life or health.[21]

> [P]rovided that such measures are *not applied in an arbitrary or unjustifiable manner*, or do not constitute a disguised restriction on international investment, nothing in this Agreement shall be construed to prevent a Contracting Party from *adopting or maintaining environmental measures necessary to protect human, animal or plant life or health*. (Art. 10, Emphasis added)

c) Carve-out provisions in the context of specific substantive protection

Other IIAs provide the carve-out provisions in the contexts of specific substantive treaty protection, in order to balance the state's regulatory space and the protection of investment. Such carve-outs can be included in provisions of expropriation, fair and equitable treatment (FET), or most-favoured-nation (MFN).

Expropriation. In response to the backlash against ISDS, the trend in the recent treaty making consists of carve-out provisions to exclude certain regulatory measures from being held as expropriation. For instance, the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)** (2018), the **Canadian Model BIT** (2014), and the **US Model BIT** (2012), all exclude non-discriminatory regulatory actions that are 'designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment' from indirect expropriations, 'except in rare circumstances'.[22] The **Canadian Model BIT** (2021) made the legitimate public walfare exclusion without the language 'in rare circumstances'.[23]

A few of China's IIAs contain such carve-outs for expropriation. For instance, the **China-Colombia BIT** (2008) provides as follows:

> [N]on-discriminatory measures of a Contracting Party designed and applied for public purposes or social interest or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation. (Art. 4.2)

It further specifies what constitutes 'rare circumstances', such as 'a measure or series of measures being so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith'.[24] The **China-Uzbekistan BIT** (2011), the **China-Canada BIT** (2012), the **China-Tanzania BIT** (2013), the **China-Turkey BIT** (2015), the **China-Korea FTA** (2015), and the **China-Hong Kong CEPA Investment Agreement** (2017) similarly exempt non-discriminatory regulatory measures for lawful public welfare objectives (public health, safety and environment) from the indirect expropriation obligations.[25]

Although not specifically referring to environmental measures, the **China-Japan-Korea Trilateral Investment Agreement** (2012) and the **China-India BIT** (2006) both exclude non-discriminatory regulatory actions for the purpose of 'legitimate public welfare' or 'public interest' from expropriation, 'except in rare

20 Art.11, China-Singapore BIT (1985); Art. 11; China-Sri Lanka BIT (1986); Art. 11, China-New Zealand BIT (1988).

21 M. Chi, supra note 7, at 521.

22 Annex 9-B, the **CPTPP** (2018); Annex B.13, the **Canada Foreign Affairs and International Trade, Foreign Investment Protection and Promotion Agreement (FIPA) Model Text** (2014); Annex B.4(B), Model Treaty between The Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, (2012).

23 Article 9(3), **Canada Foreign Affairs and International Trade, Foreign Investment Protection and Promotion Agreement (FIPA) Model Text** (2021).

24 Article 4.2, **China-Cambodia BIT (2008).**

25 Art. 6.3, **China-Uzbekistan BIT (2011);** Annex B. 10, **China-Canada BIT** (2012); Art. 6.3, **China-Tanzania BIT** (2013); Article 5.3, **China-Turkey BIT (2005);** Annex 12-B, 3(b), **China-Korea FTA (2015);** Annex 3, **China-Hong Kong CEPA Investment Agreement (2017).**

circumstances', such as 'when an action or a series of actions by a Contracting Party is extremely severe or disproportionate in light of its purpose'.[26]

Fair and equitable treatment (FET). The **China-Madagascar BIT** (2005) contains carve-out provisions in the FET. Article 3.2 provides that 'measures for reasons of security, public order, health, ethical and environmental protection and other reasons' shall not be regarded as obstacles to FET.

Most-favored nation clauses (MFN). Some exceptions are provided in the context of MFN clauses. For instance, the China-Austria BIT (1985) and the **China-Brunei Darussalam BIT** (2000) provide that measures that have to be taken for 'reasons of public safety and order, or public health and morals' are not deemed to be 'treatment less favourable' within the meaning of MFN. [27]

2. Corporate social and environmental responsibility

Beyond the regulatory carve-out, there are calls to create some positive social and environmental obligations on investors in IIAs. Recently, the UN Independent expert on the promotion of a democratic and equitable international order recommended that States should include in BITs and FTAs 'specific provisions on the legal responsibility of transnational corporations and investors to make reparation for environmental, health and other damage caused by their activities'.[28] The UNCTAD also stresses the importance of ensuring that the 'global policy environment remains conducive to investment in sustainable development'.[29]

Scholars have classified three types of legal obligations of investors in IIAs, namely, provisions signalling a commitment to corporate social responsibility (CSR) (a), indirect obligations (b), as well as direct obligations (c) on investors.[30]

a) Provisions signalling a commitment to corporate social responsibility

A soft approach consists of including provisions in IIAs, often in the preambles, that signal a commitment to sustainable development and/or CSR by the Contracting Parties.[31] Even though the preambles generally do not confer contractual rights or obligations on the Contracting Parties, they may play an assistive role in the interpretation of treaty clauses as 'contexts'[32] and in ascertaining the objects and purpose of the treaty.[33]

A number of Chinese IIAs contain language that signal a commitment to sustainable development. Some treaties explicitly used the language of 'CSR' or 'sustainable development' in their preambles. For instance:

- The **China-Tanzania BIT** (2013) and the **China-Uzbekistan BIT** (2011) emphasized the importance of 'encouraging investors to respect corporate social responsibilities'; and 'to promote healthy, stable and sustainable economic development'.
- The **China-Canada BIT** (2012), the **ASEAN-China Investment Agreement** (2009),[34] and the **China-Peru FTA** (2009) specifically acknowledge the principles of 'sustainable development'.
- The **China-Pakistan FTA** (2006) and the **China-Chile FTA** (2005) recognise the need to promote sustainable development 'in a manner consistent with environmental protection and conservation'.

Some treaties specifically refer to the three pillars of sustainable development as identified by the UN as interdependent and mutually reinforcing elements, namely (i) economic development, (ii) social development, and (iii) environmental protection.[35] The **China-Switzerland FTA** (2013) affirms the aim

26 Art. 5, **China-India BIT (2006)**; Art. 2(c), **Protocol of the China-Japan-Korea Trilateral Investment Agreement (2012)**.

27 Art. 3, **China-Austria BIT (1985)**; Art.3, **China-Brunei Darussalam BIT (2000)**.

28 **Report of the Independent Expert on the promotion of a democratic and equitable international order**, Alfred-Maurice de Zayas, UN General Assembly, A/HRC/30/44, para. 62(o).

29 Preface, UNCTAD, '**World Investment Report: Investment and the Digital Economy**' (2017).

30 K. Nowrot, The Other Side of Rights in the Process of Constitutionalizing International Investment Law: Addressing investors' Obligations as a New Regulatory Experiment (Universität Hamburg, 2018).

31 Ibid.

32 Art. 31(2) of the **Vienna Convention on the Law of Treaties** (1969) provides : 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

33 Id. at Art. 18: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'. See M. Chi, supra note 7, at 515.

34 **ASEAN - China Investment Agreement** (2009) (https://investmentpolicy.unctad.org).

35 See e.g., **the China-Korea FTA (2015),** the **China-Iceland FTA (2013),** the **China-New Zealand FTA (2008),** and the recently concluded **Regional Comprehensive Economic Partnership** (RCEP 2020), to which China is a signatory state.

to encourage enterprises to observe internationally recognised guidelines and principles. The use of terminology 'aim' and 'encourage' – in the preamble – shows the Contracting Parties' intentions without creating legal obligations. The **China-Korea FTA** (2015) provides a chapter on 'Environment and Trade', refers to international instruments on sustainable development,[36] and reaffirms in its preamble the parties' commitments to:

> [P]romoting economic development in such a way as to contribute to the objective of sustainable development.

Other IIAs did not use the language 'sustainable development', but referred to the core elements of sustainable development, such as 'health, safety and environmental measures'. For instance, the preambles of the **China-Guyana BIT** (2003) and **China-Trinidad and Tobago BIT** (2002) recognize that the objectives of the treaties:

> [C]an be achieved without relaxing health, safety and environmental measures of general application.

The preamble of the China–Japan–Korea Trilateral Investment Agreement (2012) also emphasizes the importance of investors to comply with the laws and regulations of the hosting states, which contribute to the economic, social and environmental progress.

b) Indirect obligations

Another approach requires the Contracting Parties to the IIAs to consider and adopt measures aimed at regulating as well as guiding the behaviour of investors, but does not directly impose obligations on these private actors.[37] Depending on the nature of such obligations, it can be either in the form of 'no lowering of standards' clause or 'best endeavours' provisions.

No lowering of standards clause

Some provisions in the IIAs impose legally binding obligations on the Contracting Parties to maintain existing national environmental, labour and social standards. Such provisions are sometimes referred to as 'no lowering of standards' clause, or 'minimum standards',[38] meaning that state parties to an IIA may not lower or alter domestic laws in their respective jurisdictions to attract foreign investment.[39] The most prominent example of this approach is North American Free Trade Agreement (**NAFTA**), and the subsequent United States-Mexico-Canada Agreement (**USMCA**), which impose an obligation on signatory states to uphold their domestic laws on the environment and labour standards.[40]

A few Chinese IIAs contain 'no lowering of standards' clause. For instance, the **China-Canada BIT** (2012) (Art.18.3) provides that the Contracting Parties recognize that:

> [I]t is inappropriate to encourage investment by waiving, relaxing, or otherwise derogating from domestic health, safety or environmental measures.

The recent **China-Cambodia FTA** (2022) contains a separate section on 'Environmental Measures' (Art. 8.4), which specifically provides:

> Recognising the importance of promoting investment for green growth, the Parties shall refrain from encouraging investment by investors of the other Party by relaxing environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of investments in its territory.

The **China-Hong Kong CEPA Investment Agreement** (2017), the **China-Korea FTA** (2015) and the **China-Korea-Japan Trilateral Investment Agreement** (2012) similarly provide a 'no lowering of standards clause in the section of environmental measures.[41]

The **China-Switzerland FTA** (2013) reaffirms the parties' commitment to the effective implementation in their laws and practices of multilateral environmental agreements to which they are a party, as well as of the

36 China-Korea FTA (2015), at Chapter 16: the Stockholm Declaration on the Human Environment (1972), the Rio Declaration on Environment and Development (1992), Agenda 21 of 1992, the Johannesburg Plan of Implementation on Sustainable Development (2002), and the Outcome Document of UN Conference on Sustainable Development Rio+20 '**The Future We Want**' (2012).

37 K. Nowrot (2018), supra note 30.

38 A. Dimopoulos, 'Standards of Responsible Investment and International Investment Law' in P Delimatsis (ed) The Law, Economics and Politics of International Standardisation (Cambridge University Press, 2015) at 353.

39 J. Hepburn and V. Kuuya, supra note 12, at 600.

40 **Art. 1114 of NAFTA** (entered into force 1 Jan. 1994) provides that 'the Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor'. NAFTA was substituted by **USMCA**, which entered into force on 1 July 2020. Arts. 23.4 and 24.4 of USMCA contains similar language with respect to environment and labor standards.

41 Art. 25, China-Hong Kong CEPA (2017); Art. 12.16, China-Korea FTA (2015); Art. 23, China-Korea-Japan Trilateral Investment Agreement (2012).

environmental principles and obligations reflected in the international instruments. In addition to the no lowering standards requirement, the parties are also required to:

> [S]trive to further *improve* the level of environmental protection by all means, including by effective implementation of their environmental laws and regulations'. (Art. 12.2(1), Emphasis added)

It also provides guidance for the preparation and implementation of measures related to the environment, by emphasizing:

> [T]he importance … of taking account of scientific, technical and other information, and relevant international guidelines'. (Art. 12.2(3))

The agreement in principle for the **EU-China Comprehensive Agreement on Investment** (EU-China CAI), [42] which is a remarkable example of China's commitment to sustainable development in its treaty making, contains a separate section on investment and sustainable development. Notably, the draft text of the EU-China CAI provide the following no lowering standards requirement with respect to the environment and labour, including commitments:

- not to encourage investment by weakening or reducing the levels of protection afforded in domestic labour or environmental laws;
- not to waive or derogate from, or offer to waive or derogate from, its labour or environmental laws as an encouragement for investment;
- not, through a sustained or recurring course or action or inaction, fail to effectively enforce its environmental or labour laws, as encouragement for investment. (Sub-section 2, Arts. 2; Sub-section 3, Art. 2)[43]

Best endeavour provisions

Some IIAs use softer language, by requiring the signatory states to 'encourage' corporations to 'voluntarily' adhere to CSR standards in their internal policies and operations. This approach is sometimes referred to as the 'best endeavours' approach.[44]

Depending on how states interpret these types of best endeavour provisions, 'encouragement could go as far as enacting domestic laws that provide for preference being granted to CSR-compliant companies in awarding public contracts, or financial encouragement such as tax breaks to these same companies'.[45] Others have proposed that export credit agencies establish some kind of social and environmental screening as part of the application process for export assistance.[46]

One example of the best endeavour provision is the **draft Dutch Model BIT**,[47] which requires the states to encourage investors to voluntarily incorporate into their internal policies those internationally recognized CSR standards, guidelines and principles that have been endorsed or are supported by that Party.[48]

Very few Chinese IIAs contain the best endeavour provision. A noticeable exception is the **EU-China CAI**, which shows the Contracting Parties' commitment to promote responsible business practices, including by:

> *[E]ncouraging* the *voluntary* uptake of relevant practices by businesses, taking into account relevant internationally recognised guidelines and principles, such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises'. (Sub-section I, Art. 2 Emphasis added)

42 **China-EU CAI**, 30 Dec. 2020.

43 The EU-China CAI also includes the parties' commitments to comply with environmental and labour treaties they have ratified, including UN Framework Convention on Climate Change and the Paris Agreement and International Labour Organization (ILO) conventions, to honour their commitments under the ILO Declaration on Fundamental Principles and Rights at Work (Sub-Section 2, Arts. 4 and 6, and Sub-Section 3, Art. 4), as well as to make continued and sustained efforts to pursue the ratification of the ILO Fundamental Conventions on forced labour (Sub-section 3, Art. 4).

44 A Dimopoulos, supra note 38, at 356.

45 J. Hepburn and V. Kuuya, supra note 12, at 609.

46 J. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press, 2006), at 189.

47 **Dutch Model BIT**, 22 Mar. 2019, For a comment, see Marike R. P. Paulsson, **'The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI'**, (Kluwer Arb. Blog, 18 May 2020).

48 Art. 7, Dutch Model BIT (2019). Another interesting feature in the Dutch Model BIT (Art. 23) is to allow the tribunals to 'take into account any investor non-compliance with the United Nations Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises' when it determines compensation.

c) Direct obligations

The most direct way to regulate is to incorporate norms that contain explicit obligations of investors. Until recently, the direct approach was mostly found only in a few model BITs.[49] The most noticeable example of direct obligations adopted in the IIAs is the **Morocco-Nigeria BIT** (2016), which requires foreign investor, in the *pre-establishment* phase, to conduct environmental and social impact assessments of their potential investments and, to apply the precautionary principle to their environmental assessment screening processes (Art. 14), prohibits investors to engage in practices of corruption (Art. 17); requires investors to 'meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices' (Art. 19). On *post-establishment* obligations, Article 18 provides that 'investors and investments shall uphold human rights in the host state' (18.2). It also includes obligations to act in accordance with core labour standards (18.3), and the obligation not to circumvent international environmental, labour and human rights obligations of the host and/or home state (18.4).

So far, no existing Chinese IIAs have incorporated direct obligations on investors. Most countries are still reluctant to include direct obligations of investors in their IIAs, due to a lack of political will and reluctance from business community.

3. Procedural provisions on sustainable development

In addition to the substantive sustainable development provisions, some IIAs also contain procedural provisions on sustainable development. For instance, The **US Model BIT** (2012), the **Canadian Model BIT** (2021), and **USMCA**, all contain procedural sustainable development provisions.[50] Such provisions include the 'clause of expert reports', which allows tribunals to appoint experts to report 'factual issues concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding' during the investor state arbitration proceedings, or the 'clause of consultation', which allows the Contracting Parties to consult when settling environmentally sensitive disputes.[51]

The **China-Canada BIT** (2012) includes a clause of consultation to ensure that contracting parties do not encourage investment by sacrificing health, safety or environmental considerations. In case one of the Contracting Parties takes such actions, the other party is entitled to request consultations to address such concerns (Art. 18(3)).

The **China-Australia FTA** (2015) contains a clause of consultation and a notice requirement to protect the carve-out provisions for public welfare objectives. If the respondent deems that its disputed measure falls within such a carve-out, it could deliver a notice elaborating the basis for its position to the claimant and non-disputing party, which is referred to as the 'public welfare notice'. This notice will lead to a 90-day consultation between the respondent and non-disputing party, during which the dispute resolution procedure will be suspended (Art. 9.11). The public welfare notice is an innovative approach and serves as a strong safeguard for State's regulatory autonomy.

The **EU-China CAI** establishes a comprehensive mechanism to address differences under the section 'Investment and sustainable development', including a clause of consultation and a clause of expert reports. In case of any matters within this section:

- A Party may request consultations with the other Party by delivering a written request to the other Party. (Art. 1)
- If the disagreement has not been satisfactorily resolved through consultations within 120 days, or a longer period agreed by both Parties, after the delivery of the request for consultations, a Party may request the establishment of a Panel of Experts to examine the matter. (Art. 3)
- The Panel of Experts shall issue a final report to the Parties no later than 180 days from the date of its composition, after which the Parties should consult and discuss measures to address the matter, based on the report. (Art. 4)

49 L. Johnson, L. Sachs, J. Coleman, 'International Investment Agreements, 2014: A Review of Trends and New Approaches' in L. Johnson, L. Sachs, *Yearbook on International Investment Law and Policy 2015-2016*, at 58 (Oxford, 2018). For instance, Ghana, Botswana, India (Ch. III, **India Model BIT**, 2015), and the African Union (Ch. 4, **Draft Pan-African Investment Code, 2016)**., have included in their model BITs and related guiding instruments provisions on investors' obligations. See W. Alschner, E. Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' in F. Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives*, 217, at 228 (Cambridge University Press, 2013).

50 Arts. 12(6), 13(4) and 32, **The 2012 Model Treaty between The Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, (2012)**; Art. 38, **Canada Foreign Affairs and International Trade, Foreign Investment Protection and Promotion Agreement (FIPA) Model Text**, (2021); Art. 24.29 of the USMCA — environment consultations.

51 M. Chi, supra note 7, at 524.

Such procedural provisions not only help 'establish a workable mechanism to discuss and settle environmental issues, but also restricts the arbitral tribunal's treaty interpretation power in investor state arbitration'.[52]

Concluding remarks

Based on the above treaty survey, we can see that there is still an overall lack of sustainable development provisions in existing Chinese IIAs. Only 42 IIAs (24.7%) out of the total 170 BITs, FTAs and multilateral treaties with investment provisions contain sustainable development provisions, including those contained in the preamble.

That said, we can observe a trend that places the emphasis on balancing investment protection and sustainable development objectives. Most of the treaties that contain sustainable development provisions are from China's new generation IIAs concluded from 2010 onwards, which generally take a more balanced approach towards investor protection.[53] An increasing number of Chinese IIAs contain carve-out provisions to preserve the States' regulatory space in public health, environment and other SDGs.

Some more recent Chinese IIAs have gone further to include some social and environmental obligations on investors. While most of such provisions merely signal the Contracting Parties' commitment to sustainable development in the preamble, a handful of Chinese IIAs incorporate some CSR type of provisions, either in the form of no lowering of standards clause or in the form of the best endeavours provision. Some contain procedural provisions on sustainable development to safeguard substantive protections. The most remarkable example is the EU-China CAI. Although there are still rooms for improvement (for instance, some of the key recommendations from the Sustainability Impact Assessment Report in 2017 were not adopted),[54] China commits to a number of concrete obligations concerning sustainable development for the first time. These recent treaties show a positive movement towards making IIAs more sustainable. One may expect that such trend will be maintained in China's future treaty making.

While Africa has been an active player in integrating the sustainability indicator in its negotiation of IIAs since 2006, China has not yet been a rule-maker in the integration of sustainability into investment governance despite its potential influence in the global arena. China could and should play a more active role to lead the global initiatives aimed at rebalancing IIAs towards investors' responsibilisation, moving from carve-out provisions to imposing more positive and direct obligations on investors, paired with procedural mechanisms to assess their implementation.

52 Ibid.

53 For a discussion on China's three generation of investment treaty making, see K. Fan, '**Foreign Direct Investment and Investment Arbitration in China**', in C. Esplugues (ed.) *Foreign Investment and Investment Arbitration in Asia*, at 25 (Intersentia, 1st Ed., 2019).

54 The **Sustainability Impact Assessment in Support of an Investment Agreement between the EU and China-Final Repor**t provides a number of recommendations, including recommendations to retain adequate policy space to protect human rights (recommendation 6); to address private actors' potential abuse of human rights and to consider the full reange of permissible preventative and remedial measures (recommendation 7); to encourage compliance with international labour, environmental, human rights standards by EU and Chinese investors (recommendation 12); and to encourage the parties to create a monitoring mechanism focusing on company behaviour (recommendation 14). None of the above were adopted in the EU-China CAI draft text. For critiques on the EU-China CAI, see Joe Zhang, '**What Does the Draft European-Union-China Comprehensive Agreement on Investment Mean for Sustainable Development**?' (2021), *International Institute for Sustainable Development*, 26 Jan. 2021; Lorenzo Cotula, 'EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section' (2021), 6 Business and Human Rights Journal 2 at 360-367.