Chapter 8
Foreign Investment, Investment Treaties and Corruption in China and Hong Kong

Vivienne Bath and Tianqi Gu

Abstract This chapter focuses on the interaction of domestic regulation of corruption in China and Hong Kong and the increasing number of international arbitration cases brought by and against China. In conjunction with the enormous growth in foreign investment in China since it opened up at the end of the 1970s, China has developed a comprehensive network of international investment agreements (IIAs). Hong Kong is also a party to about 30 IIAs in its own name. Government and business corruption and bribery have been a problem in both jurisdictions. China and Hong Kong have taken active steps to criminalize, and to investigate and prosecute, corruption and to participate in major international initiatives relating to corruption. While corruption has, so far, made a limited appearance in the small number of investor–state dispute settlement (ISDS) cases brought by investors against China and cases brought against other states by Chinese and Hong Kong investors, based on existing material, a number of tentative conclusions and recommendations can be made. China should move towards a higher level of transparency, both in relation to ISDS cases and to its domestic criminal law system; both China and Hong Kong should play a more active role in prosecuting bribery by enterprises outside China, including by joining the OECD Convention on Combating Bribery of Foreign Officials; and, finally, China should consider including provisions relating to corruption in its future IIAs in order to demonstrate its commitment to the international war on corruption in business.

V. Bath (✉) · T. Gu
University of Sydney Law School, Sydney, NSW, Australia
e-mail: vivienne.bath@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/vivienne-bath.html

T. Gu
e-mail: Tianqi.gu@sydney.edu.au
URL: https://www.linkedin.com/in/tianqi-gu-115921228/?originalSubdomain=au

N. Teramura et al. (eds.), *Corruption and Illegality in Asian Investment Arbitration*,
Asia in Transition 22, https://doi.org/10.1007/978-981-99-9303-1_8

8.1 Introduction

Since the People's Republic of China (China) opened up to investment in 1979, foreign direct investment (FDI) into mainland China has rapidly increased. In 2020 and 2021, China was the second largest recipient of FDI in the world (after the United States), followed by the Hong Kong Special Administrative Region (Hong Kong) in third place.[1] China's outbound investment has also increased over the last 20 years. In 2020, China was the second-largest investor in the world, dropping to fourth place in 2021. Hong Kong was the seventh largest in 2021, falling from fourth in 2020. Hong Kong is the host of many major companies and is the beneficiary of—and intermediary for—Chinese investment, both outbound and inbound.[2]

China has a comprehensive network of international investment agreements (IIAs), comprised of bilateral investment treaties (BITs), investment chapters incorporated in free trade agreements (FTAs) and other bilateral and multilateral agreements. Hong Kong has signed about 30 IIAs in its own name. The number of investor–state dispute settlement (ISDS) cases against China, however, is surprisingly few, while no cases at all have been brought against Hong Kong. In contrast, Chinese and Hong Kong investors are becoming increasingly active in initiating ISDS.

Government and business corruption has been a problem in both jurisdictions. In the case of Hong Kong, since its establishment in 1974 the Independent Commission Against Corruption (ICAC) has been the centre and the symbol of the determination of the Hong Kong government to fight corruption in the public sector.[3] China is a party to major international initiatives relating to corruption, and has, at a central level, established a complex and detailed legislative and administrative regime involving both government and the Chinese Communist Party (CCP) for the purpose of fighting corruption in central and local governments, CCP entities and businesses. Reports suggest, however, that fighting corruption in the Chinese civil service is an ongoing battle, even at the highest levels.

This chapter provides an overview of foreign investment in China and Hong Kong; looks at the regulation of corruption and bribery; discusses China and Hong Kong's IIAs; looks at ISDS cases in China and Hong Kong; and concludes with observations and recommendations.

8.2 Foreign Investment in China and Hong Kong

8.2.1 Introduction: China

In 1978, in the aftermath of the Cultural Revolution, Deng Xiaoping moved away from the anti-foreign and closed door policies of his predecessors and introduced initiatives to attract foreign capital and foreign expertise through the initiation of the so-called Open Door policy.[4] China has gradually liberalized its economic controls and its approach to foreign investment in several carefully calibrated stages, as well

as building a legal and judicial system to support the opening up of the economy and the growth of the private sector. China is now the recipient of the second largest amount of FDI globally.[5]

The most significant factor in the rise of China and the growth of its economy was China's accession to the World Trade Organization (WTO) in 2001.[6] Although the WTO focuses on trade, rather than investment, as a latecomer to the WTO, China was obliged to negotiate the terms of its admission with major trading states such as the United States (US).[7] As a result of this, China made some significant concessions regarding the liberalization of FDI in the country, which were reflected in its 2002 Foreign Investment Catalogue.[8] This combination of China's opening up to investment and its improved international trading conditions was very advantageous to China. Its GDP grew from USD191.15 billion in 1980 to USD1.22 trillion in 2000. By 2010 it had reached USD6.09 trillion and in 2021 was USD17.73 trillion. FDI—both inbound and outbound—also grew significantly.

China's success in terms of international trade and FDI is not, however, free from controversy. The highly controlled way in which China has opened up its economy and the continuing role of the government and the CCP in all levels of the economy has been the subject of constant criticism, particularly from developed country investors.[9] Although China has benefitted enormously from the global trading system, it has also been the respondent in 49 cases in the WTO, as well as bringing 23 cases of its own and appearing as a third party in 195 cases.[10] Hong Kong has been a complainant in two cases and a third party in 22 cases.[11]

From the beginning of the twenty-first century, with the advent of the 'going global' policy,[12] the Chinese government has encouraged Chinese enterprises to make investments outside the country. China's very extensive investments overseas are focused in the areas of energy and mineral resources, although there is also significant investment in logistics, real estate and transport.[13] The fact that China is both a major recipient and a major contributor of FDI worldwide is highly relevant to the development and content of its network of IIAs and the engagement of both the Chinese government and Chinese enterprises in an increasing number of investment disputes.

8.2.2 The Legal Regime Relating to Investment

FDI in China was heavily regulated from the outset. The original legal regime subjected the establishment of a foreign investment enterprise in China to numerous government approvals and licences relating to the project and the project documents, and the registration of the investment enterprise and on-going operations. The presence of a foreign company in China, other than through a Chinese foreign investment entity (FIE), was limited to the establishment of a representative office or, in rare instances (such as operations run through a non-legal person joint venture in the oil or gas sector), through registration of the company itself. The scope of the business

of an FIE was narrowly drafted and limited to the activities for which the investors set up the company. Any change required a further government approval.[14]

In 2015 the government introduced the 'market access negative list' system. Pursuant to these reforms, the requirement for approval to be obtained for the establishment of all FDI was abolished. Under the new system, with some exceptions, investments can be made by way of registration.[15] Approvals are still, however, required for an investment in an industry set out on a negative list issued annually by the government. The negative list also sets out the sectors in which foreign investment is prohibited. Once established, FIEs—at least in theory—operate on the same terms (national treatment) as domestic Chinese investors. Requirements for operating permits or approvals apply to domestic and FIEs equally. In 2020, the Foreign Investment Law (FIL)[16] and its ancillary legislation came into effect and the 1979 Law on Chinese-Foreign Equity Joint Ventures, 1988 Law on Chinese-Foreign Contractual Joint Ventures and the 1986 Law on Foreign-Capital Enterprises were repealed, with a five-year grandfathering period for the existing FIEs to bring themselves into line with the new law.[17]

The Chinese government has reiterated its ongoing support for FDI through the issue of more liberalized negative lists and encouraged lists for foreign investment.[18] Despite the substantial amount of FDI in China, however, the slowdown in the Chinese economy in 2022,[19] the tightening of CCP controls over the economy and business under President Xi Jinping, a much stronger emphasis on national security as part of Chinese policy and cooler relations between China and the US and other developed countries,[20] have caused investors to be concerned about operations in China and the potential increased risk of disputes. Foreign government concerns have also been raised by China's outbound investment policies.

8.2.3 China's Outbound Investment: Regulation

The Chinese government initially limited and controlled outbound FDI (OFDI). Although the registration of OFDI is still required, criteria for government approvals have been considerably relaxed over the years.[21] OFDI by state-owned enterprises (SOEs) is subject to at least two layers of regulation prior to registration,[22] but is still encouraged. The government and the CCP favour OFDI which supports China's aspirations of increasing both its international influence and its economic security.[23] China's relatively aggressive approach to the acquisition of energy and mineral resources and, particularly, the acquisition of companies with advanced technology, has, however, received a less than positive approach from the developed world. The US, Australia, Canada, Germany, the UK and others have introduced legislative and regulatory responses aimed at preventing acquisitions by foreign companies which are seen as presenting a danger to domestic national security interests.[24] With more investment in both directions comes the prospect of more investment disputes. It is therefore no surprise that China and Chinese-owned companies have become much more active in the ISDS space in recent years.

8.2.4 Hong Kong

As well as hosting a significant number of major corporations and businesses, Hong Kong has had a major role as an intermediary for Chinese trade, first while it was a British colony, and, since 1997, as a Special Administrative Region of China. It continues to play a major role as an intermediary destination for Chinese inbound and outbound investment, as well as so-called 'round robin' investment, where funds flow out of, and then back into, China.[25]

Hong Kong has always been open to foreign investment and investors. The Stock Exchange of Hong Kong is an important capital-raising venue, including for Chinese companies and foreign-owned Chinese businesses. Major Hong Kong companies are investors in China and other countries. Hong Kong's role as an intermediary destination is assisted by its tax regime, which allows for the flow-through of dividends from subsidiary to offshore investors, its historically well-regarded legal system and the reputation of its judiciary. However, foreign confidence has been shaken to some extent by direct Chinese intervention in Hong Kong in 2020 through the passage of the Hong Kong National Security Law.[26]

8.3 Governance and Corruption: The Regulation of Corruption and Bribery in China and Hong Kong

8.3.1 China's International Rankings

Despite its deep integration into the world economy, China is still viewed internationally as falling short in curbing corruption. Since 1995, China has consistently scored below 50 in the Transparency International Corruption Perception Index, which annually measures 180 jurisdictions across the world by their perceived levels of public sector corruption on a scale from 0 (highly corrupt) to 100 (very clean). Despite slight improvements, in 2023, China still had a score of 42 and a ranking of 76th, indicating that corruption is still considered to be a serious problem in the Chinese public sector.[27] China's global ranking in the WJP Rule of Law Index in 2023 was particularly poor (97 out of 142), although there were some positive indications in relation to absence of corruption (57 out of 142).[28]

8.3.2 International Participation

China has ratified UN anti-corruption conventions including the United Nations Convention against Transnational Organized Crime (UNTOC) (2000), in which state parties committed themselves to criminalize corruption in their national laws,[29] and the UN Convention against Corruption (UNCAC) (2003), which obliges parties to

establish criminal and other offences in domestic law to cover a wide range of acts of corruption.[30]

China is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[31] pursuant to which states criminalize and prosecute bribery by their own nationals and companies overseas. However, China has engaged with the OECD Working Group on Bribery as an observer.[32] China also participates in the International Association of Anti-Corruption Authorities (IAACA),[33] the Asian Development Bank (ADB) and the OECD-jointly led Anti-Corruption Initiative for Asia–Pacific, and has endorsed the Anti-Corruption Action Plan for Asia–Pacific in 2001.[34] This non-legally binding instrument also requires participants to ensure the existence and effective enforcement of legislation combatting corruption. In conjunction with China's 'Beijing Initiative for a Clean Silk Road',[35] which aims, among other things, to combat corruption on the Belt and Road, China has signed a memorandum of understanding on cooperation in combatting corruption with the UN.[36]

8.3.3 Domestic Legislation Combatting Bribery

China has adopted an extensive range of legislative measures to deal with corruption and bribery. These are directed at both bribery of government officials and corruption in the corporate sector. Bribery and corruption are dealt with primarily as criminal offences, although minor cases may also be handled administratively.

Criminal offences capture a wide range of acts of commercial and official bribery, focused on the bribery of—and bribe-taking by—state functionaries,[37] non-state functionaries and people who can leverage the influence of state functionaries, as well as bribery of foreign public officials and international public organization officials.[38] These offences are found primarily in the 1997 Criminal Law. Penalties are severe for both bribers and bribees. Bribery of or by employees of SOEs and commercial enterprises (commercial bribery) is also a criminal offence (Articles 163 and 164). Amendment XII to the Criminal Law, which came into effect on 1 March 2024, further extends the scope of corruption offences, particularly in the private sector. In 2011, the crime of bribery of foreign public officials and officials of international public organization officials for improper commercial interests was included in Article 164.[39] This amendment, although limited in scope, potentially applies to acts by Chinese persons or entities (including foreign owned entities established under Chinese law) outside China.[40]

China's 1993 Anti-Unfair Competition Law, as amended, prohibits both paying and accepting bribes in trade in goods or in order to obtain trade secrets (Articles 7 and 9). Other laws also penalize commercial bribery, including the Company Law,[41] the Foreign Trade Law,[42] the Drug Administration Law,[43] and the Construction Law.[44]

8.3.4 The CCP Anti-corruption Campaign

President Xi Jinping launched a sweeping anti-corruption campaign immediately after he became General Secretary of the CCP and President of China in 2012. This nationwide campaign was focussed on corruption within the CCP cadre system, particularly the high-level ranks, and has been implemented based on more than 50 newly issued CCP anti-corruption and internal control regulations. Under the CCP Central Commission for Discipline Inspection (CCDI) and the State Supervision Commission (now effectively integrated and referred to collectively as the 'Supervision Commission'), the campaign has been carried out with considerable vigour.

As part of its programme of tightening control over the overseas activities of SOEs and the ongoing anti-corruption campaign, China has also intensified its inspections of SOEs with a particular focus on corruption risks in their overseas operations. Since 2013, the Supervision Commission has conducted over 20 inspection tours of central SOEs.[45] Numerous large SOEs, including PetroChina and CNOOC, were found to be exercising lax control over offshore subsidiaries, which posed a risk of overseas corruption.[46]

8.3.5 Enforcement in China

The Supervision Commission (and the CCDI) took over investigation of corruption from the Supreme People's Procuratorate (SPP) and its associated bodies in 2018.[47] According to the reports of the SPP and the Supreme People's Court (SPC) in 2023, in the period 2018 to 2022, 119,000 cases of corruption, bribery and other duty-related crimes, involving 139,000 people, were concluded; 104 former officials at or above the provincial or ministerial level were prosecuted.[48] These cases include investigations and punishments of officials of the CCP, government organs, the People's Liberation Army and senior SOE executives. Senior officials are thus not immune to anti-corruption campaigns, although it is believed by various sources that political considerations play an important role in some of the investigations and prosecutions.[49] Corruption also affects the courts. Recent cases include the conviction of former justice minister Fu Zhenghua for corruption[50] and of former SPC judges Meng Xiang and Shen Deyong, for bribery,[51] while there are ongoing investigations into the legal and judicial system.[52]

There were 571 bribery criminal decisions published on the SPC's website, China Judgments Online[53] from 2007 to 2022, the majority of which date from after 2012 when the far-reaching anti-corruption campaign was launched. Cases involving foreign investment or even foreigners involved in bribery appear to be either rare or not published.

Bribery in China involving foreigners and foreign companies does, however, certainly occur. The US Securities and Exchange Commission (SEC), one of the

enforcement agencies of the US Foreign Corrupt Practices Act of 1977,[54] has pursued 37 foreign corruption cases where companies issuing stock in the US allegedly bribed Chinese government officials and employees of SOEs to facilitate operations in China.[55] It appears that the Chinese government has not pursued most of these cases.

China has, however, pursued legal action against foreigners and foreign investors in a number of well-publicized cases resulting in show trials. A particularly well-publicized case was the Rio Tinto case[56] where, in 2010, the Shanghai Intermediate People's court sentenced four executives of Anglo-Australian mining company Rio Tinto, including one Australian citizen, to lengthy prison terms for accepting bribes from Chinese companies and stealing commercial secrets. The criminal charges were filed almost immediately after Rio Tinto withdrew from a proposed acquisition deal with Chinalco, a state-owned Chinese aluminium producer, and after the collapse of the annual iron ore price negotiations between Chinese buyers and foreign sellers.[57] A justification for the lengthy sentences was in fact the 'enormous economic losses to relevant iron and steel enterprises of China',[58] resulting from the termination of the iron ore price negotiations. In 2014 the Changsha Intermediate People's Court convicted the Chinese subsidiary of UK pharmaceuticals corporation GlaxoSmithKline and several executives of bribing doctors in Chinese public hospitals.[59] According to Chinese authorities, the case should serve as a 'wake-up call' to foreign investors that Chinese laws apply to all companies operating in China equally, which is fundamental for a fair investment environment.[60]

While Amendment VIII to the Criminal Law raised hopes that China would begin to crack down on overseas bribery, there had until late 2023 been no published decisions on the crime of bribery of foreign public officials and international public organization officials since the creation of the offence. A recently published intermediate court decision applying this provision, however, hints at change.[61] Bribery by Chinese investors in foreign countries is reportedly not uncommon. By the end of 2022, the World Bank had blacklisted 172 Chinese companies for corruption, fraud, collusion and coercion, banning them from participating in World Bank-financed contracts for a certain period.[62] Although China has not previously actively pursued convictions for overseas bribery, SOEs and their executives, as well as CCP members, who are overseas may be subject to investigation as a result of the ongoing CCP anti-corruption campaign (Sect. 8.3.4). The success of the Beijing Initiative for a Clean Silk Road's commitment to more transparency and a bolstering of anti-corruption activities remains unclear.[63]

An overall issue in relation to corruption investigations and court cases is that publicly available information on the scope and nature of investigations is very limited.[64] When an investigation results in a determination that the person should be prosecuted, the case is handed over to the SPP for prosecution, as a result of which the person under investigation pleads guilty or is almost invariably convicted after a short trial.[65] Details on the charges and the evidence are kept secret. This lack of transparency is aggravated both by the lack of checks and balances in the Supervision Law on the power of the Supervision Commission and the fact that both the CCDI and the Supervision Commission (pursuant to the Supervision Law 2018, Article 2) are regulated by internal Party rules rather than law.

8.3.6 Summary: China

China has set up a domestic system criminalizing and punishing corruption and the acceptance of bribes by government officials, CCP members and others. The number of investigations and prosecutions continues to be high, which suggests both that investigation and enforcement are ongoing and that long-term success in combatting corruption continues to be evasive. Based on publicly available data and cross-searching on China Judgements Online, however, it appears that CCP anti-corruption cases have, on the whole, not resulted in substantial numbers of investigations into and accusations against non-official bribers, including foreign investors.

In addition, political elements to some prosecutions of high-level officials, as well as what appear to be politically motivated detentions of foreigners (such as the two Canadians arrested and held during the detention of Huawei executive Meng Wanzhou in Canada),[66] raise serious concerns about the neutrality and independence of the Chinese justice system in sensitive and political cases.

8.3.7 Hong Kong

Hong Kong has a generally good reputation internationally regarding the regulation and prosecution of corruption and bribery. It was ranked 14th in the 2023 Corruption Perceptions Index issued by Transparency International[67] and 9th out of 142 in the 'free of corruption' ranking in the WJP Rule of Law Index 2023 (and 23rd overall).[68] Hong Kong is subject to UNCAC through China's accession.[69]

Hong Kong's reputation is largely based on ICAC and the legislation which supports it. ICAC was established by the Independent Commission Against Corruption Ordinance (ICAC Ordinance)[70] in 1974 in response to widespread corruption within the Hong Kong civil service (particularly the police) and has extensive powers to investigate and cause the prosecution of public sector corruption in Hong Kong.[71] The ICAC Commissioner has a broad general duty under s12 of the ICAC Ordinance to investigate corrupt practices and prevent corruption. It is also responsible for investigating breaches under the Prevention of Bribery Ordinance (Cap 201), which covers bribery of Hong Kong public servants, and in connection with public tenders and auctions, and also deals with corrupt agency transactions in business.[72]

The Ordinance is territorial in scope, and does not refer specifically to foreign officials, although they may potentially breach the Ordinance while taking a bribe in Hong Kong as an agent for their employer.[73] Transparency International has in fact commented critically on Hong Kong's lack of laws (and enforcement) in relation to bribery of foreign officials.[74]

ICAC is a member of a number of regional and international groups dealing with corruption, including IAACA, Asia–Pacific Economic Cooperation—Anti-Corruption and Transparency Experts' Working Group, ADB/OECD Anti-Corruption Initiative for Asia–Pacific and the Economic Crime Agencies Network.[75]

8.4 International Treaties and Arbitration: China and Hong Kong in the International Sphere

8.4.1 China: Introduction to Treaties; China in the International Sphere

Since 1982, when China signed its first BIT with Sweden, it has been active in negotiating and signing BITs with both developed and developing states.[76] As of February 2024, China had signed 124 BITs, of which 107 were in force.[77] It signed a succession of treaties throughout the 1980s, 1990s and the first decade of the twenty-first century, by which time several early treaties were up for renegotiation. China became a party to the ICSID Convention in 1993[78] and is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[79]

More recently, China has moved towards negotiating bilateral and regional FTAs, many of which include chapters on investment. In many cases, the existing BIT has remained in force, which means that there may be several layers of commitments relating to investments. At the time of writing, China has signed 29 treaties with investment provisions, of which 24 are in force. The majority of these are bilateral agreements.[80]

In addition to China's IIAs, it has become increasingly active in the international sphere, including through its participation in the UNCITRAL discussions on reform of the ISDS system.[81] China did not raise the question of corruption in its substantive submission in 2019, but did support higher standards regarding the conduct of arbitrators.[82] In addition, when China was the Chair of the G20 in 2016, the G20 Guiding Principles for Global Investment Policymaking were issued, which, among other things, supported the promotion of responsible business conduct and corporate governance (Article 8).[83]

Several Chinese arbitration institutions have issued rules on International Investment Arbitration.[84] Although it seems unlikely that foreign sovereign states would be enthusiastic about submitting investor–state disputes conducted under the auspices of a Chinese arbitral institution, as opposed to a truly international one, submission may be required as part of transactions involving Chinese companies. An example is found in a loan agreement between Kenya and the China Export Import Bank in 2014.[85] A new Foreign State Immunity Law also came into effect on 1 January 2024. This law adopts a restricted theory of immunity in relation to sovereign states and their entities when they are sued in China.[86]

8.4.2 Hong Kong: Introduction to Treaties

Hong Kong became a party to several BITs and trade agreements when it was a British colony, and has entered into several agreements in its own name (starting with a BIT with the UK in 1998)[87] since it became a Special Administrative Region of China. It currently has 20 effective BITs with a range of mainly developed countries, as well as with South Korea, Mexico and several Middle Eastern states.[88] In addition, it has entered into nine agreements with investment provisions (including agreements with China and Macao).[89]

Hong Kong nationals may also be able to bring claims against host states by utilizing investor protections in China's BITs. The first claim brought by a Chinese investor, for example, was the case of *Tza Yap Shum v. Peru*,[90] brought against Peru by a Hong Kong resident (and Chinese national) under the China–Peru BIT. PCCW, a subsidiary of a Hong Kong telecoms company, has recently brought a case against Saudi Arabia under the China–Saudi Arabia BIT.[91]

The structure and content of Hong Kong's treaties vary considerably, depending on the other party. For example, Hong Kong's recent BIT with Mexico (2020)[92] includes provisions on environment, health and other regulatory objectives, as well as corporate responsibility. The 2019 Investment Agreement between Australia and Hong Kong (replacing the 1993 BIT in the aftermath of the Philip Morris case)[93] includes provisions making clear that an investor–state arbitration cannot be brought regarding Australia's legislation on tobacco products,[94] as well as similar provisions to the Mexico BIT.[95]

Hong Kong is a party to both the ICSID Convention and the New York Convention.[96] The Hong Kong International Arbitration Centre (HKIAC) hears a large number of international arbitrations, and two investor–state arbitrations were submitted to the HKIAC in 2018.[97] Of these, one was brought under the Korea–US FTA and details of the other are unknown.[98]

8.4.3 Discussion: Treaty Content

China's approach to treaties has been, as one would expect, closely tied to its aims in relation to FDI. China's much-analysed treaties are as a result generally divided into several generations, each with different features.[99] The earlier treaties were generally very limited in content. In particular, they did not provide for pre-establishment national treatment, contained only a short list of investor protections (generally relating to direct expropriation and most favoured nation treatment) and allowed ISDS only in connection with disputes relating to the quantum of investment. The severely limited scope of these older treaties resulted in the failure of the AsiaPhos case against China in 2023 (Sect. 11.5.1) and have also proved problematic for the ever-increasing number of Chinese investors attempting to rely on the treaties.[100]

However, China's later treaties in the last 20 years have provided investors of both (or all) states involved with greater protections.[101] For example, Chap. 10 of the Regional Comprehensive Economic Partnership (RCEP) (although RCEP does not include an ISDS provision) contains a broad definition of investment (including a requirement that a covered investment 'where applicable' be admitted subject to host Party laws);[102] includes 'establishment' and 'acquisition' in the National Treatment (Article 10.3) and most-favoured nation provisions (Article 10.4);[103] refers to 'customary international law' in relation to the treatment of investment provision (Article 10.5); provides for a negative list in relation to Non-Conforming Measures (Article 10.6); and includes indirect expropriation in the definition of expropriation (Article 10.13 and Annex 10B).

8.4.4 Treaty Content on Corruption

China's treaties have tended to follow the traditional BIT model, which focuses on investment protection and does not include provisions dealing with human rights, environmental conditions, health and other social issues.[104] Recent treaties, however, are more likely to include provisions relating to the right of host countries to protect public health and the environment.[105] The inclusion in IIAs of provisions relating specifically to corruption is generally a relatively recent phenomenon, and builds on the gradual move towards the inclusion of references in IIAs acknowledging the importance of environmental, health, corporate governance and social welfare.[106] It appears that the RCEP, which was signed in 2020, is the only treaty to which China is a party which contains a provision which specifically covers corruption. Article 17.19 requires each party to take appropriate measures to prevent and combat corruption in relation to matters covered by the RCEP, in accordance with its own laws and regulations. The Article is, however, excluded from the dispute settlement chapter. (The RCEP, unusually, also contains a provision in the Denial of Benefits clause in the Investment Chapter (Article 10.14.7) which allows a party to deny the benefits of the RCEP where an investor has made an investment in breach of the host state's laws or regulations which implement the Financial Task Force (FATF) Recommendations. In the investment context, these relate mainly to the confiscation of the proceeds of money-laundering and crime.)[107]

In contrast, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a multilateral FTA signed by 11 countries around the Pacific Rim, contains a complete chapter on transparency and anti-corruption. Chapter 26 imposes obligations on member states in relation to both legislation on corruption and enforcement. In September 2021, China formally applied to accede to the CPTPP.[108] These purportedly comprehensive CPTPP anti-corruption provisions, however, will not necessarily compel China to switch to a more rigorous approach to foreign-investment-related corruption: the CPTPP does not impose anti-corruption obligations that are materially stricter than the existing obligations of China under other international legal instruments on corruption, particularly UNCAC. Although

the CPTPP state-to-state dispute settlement mechanism applies to Chap. 26 and thus arguably makes the obligations more enforceable than those under UNCAC, most CPTPP anti-corruption obligations require states to *endeavour* to adopt appropriate or necessary measures. Article 26.9, which includes provisions designed to improve enforcement, is specifically excluded from the CPTPP dispute settlement mechanisms (Article 26.12).

Signing up to the CPTPP provisions would therefore probably not widen China's potential liability in the event of a claim by an investor that its investment had been expropriated or otherwise severely affected by reason of China's failure to meet its commitments under Chap. 26. It would, however, demonstrate China's commitment to criminalizing and eliminating bribery and corruption domestically. It would also show China's support for anti-corruption efforts of governments of other state parties and potentially send a message to its own outbound investors that it is serious about opposing corruption overseas.

8.4.5 Treaties and Domestic Law and Courts

Chinese treaties generally include, in the definition of 'investment' or elsewhere in the treaty, provisions which limit treaty protection to investments made in accordance with the law of the host country.[109] This may be helpful (although not essential) to a claim that a tribunal does not have jurisdiction where an investment is established unlawfully due to corrupt or illegal behaviour and is thus not an investment for the purposes of the treaty, or as a matter going to jurisdiction because there is no consent to arbitrate a dispute relating to such an investment.[110] Corruption may also become relevant in relation to the admissibility of claims relating to corruption or consideration of the merits of a particular claim. Domestic law is clearly relevant here, although an international investment tribunal is not bound to apply decisions of a domestic court, and makes its own determinations on the law to be applied, and thus the relevance, content and impact of domestic law.[111]

The impact of corruption in a Chinese treaty-based case has not been tested. It is not clear, however, that under domestic law corruption would necessarily automatically invalidate government approvals or render an investment contract void. Under the FIL (Article 36), if a foreign investor invests in a prohibited field or sector, the relevant department must order it to stop its activities and dispose of the shares or assets (as well as confiscating any illegal gains). If it invests in a restricted field or sector, it will be ordered to make corrections and only if it fails to do so will the provisions above apply. An SPC Interpretation of the FIL[112] clarifies this by providing that an investment contract in a prohibited sector, or a restricted sector made without approval (which may be retrospectively obtained), will be held to be invalid (Articles 4 and 5). It does not address the issue of an approval obtained by bribery. However, the Administrative Licensing Law (Article 69) provides that an administrative approval (which could include an approval to invest in a restricted sector, or a licence required for operations) obtained by fraud, bribery or any improper means *shall* be revoked,

without any protection for the interests of the licensee—unless revocation would cause 'great damage to the public interest'.

Article 52(5) of Contract Law and its successor, Article 153 of China's Civil Code, includes violation of 'the mandatory provisions of laws and administrative regulations' as one of the statutory grounds for avoiding a contract. A civil juristic act that offends public order or good morals is void. The meaning and scope of these provisions, however, is far from clear and subject to judicial interpretation.[113] Although these provisions could apply to bribery, it appears that, under domestic law, the presence of bribery may not necessarily result in invalidity of the underlying approvals or contracts, although Chinese law gives the courts and government officials considerable power and discretion to deal with bribery.

A related issue is the potential role of domestic court decisions (whether criminal, civil or administrative) in ISDS claims. Despite the comprehensive network of anti-corruption rules in China, there are a number of potential problems for parties in ISDS cases seeking to rely on domestic court decisions, including claims of lack of independence of the courts, lack of transparency in court cases and difficulties faced by a tribunal in the assessment of evidence underlying a court decision. This indicates that if the corruption defence is raised, a tribunal will need to assess all such allegations ab initio and determine for itself to which extent the domestic conviction can be relied upon as proof of corruption and what the appropriate standard of proof should be in the relevant circumstances.[114]

8.5 Disputes and Cases: China and Chinese Investors

8.5.1 Disputes Involving China and Chinese Investors; Hong Kong

Until quite recently, very few investor–state arbitrations had been instituted against China. At the time of writing, the UNCTAD Investment Policy Hub[115] records nine cases which have been brought against China (excluding cases against Hong Kong, Macao and Taiwan). Of these, one was settled,[116] two were decided in favour of China (both on jurisdictional grounds)[117] and one was discontinued[118] while the remainder are pending.[119] It also records 19 cases where China was the home state of the investor. Of these, two were decided in favour of the investor against the host state (Peru and Nigeria);[120] three were decided in favour of the host state (Mongolia, Belgium and Ghana);[121] one was settled after a win by the investor at the jurisdictional stage (Yemen);[122] one was discontinued (Greece)[123] and other cases are pending, while new cases continue to be brought.[124] Unfortunately, much of the detail of the submissions and decisions in these cases is not publicly available.

8.5.2 Comments

As an initial point, what is clear from the cases against China in which some material is publicly available (Ansung, Hela Schwartz and AsiaPhos)[125] is that the Chinese government, once engaged in arbitration, is a determined antagonist. For example, China succeeded in defending the case brought by Ansung on the basis that the case was time-barred under the China–Korea BIT and was successful against AsiaPhos on the basis that the arbitration clause in the China–Singapore BIT is limited to disputes involving the amount of compensation. In Hela Schwartz, China attempted (unsuccessfully) to bifurcate proceedings so that jurisdiction could be argued separately and in advance of the merits.[126] This suggests that, in the case where a corruption defence was available, China would argue that the tribunal had no jurisdiction where possible.

The second point is that, as noted above, in practice there is limited transparency regarding the ongoing conduct of the arbitrations. In Ansung, for example only the award is available on the ICSID website. In Hela Schwartz, in contrast, the procedural orders in the arbitration are available (pursuant to Procedural Order 1, Article 27, which provides that the parties consent to ICSID publication of the award and any order or decision made in the proceedings) and provide some insight into the nature of the dispute. Information on cases can otherwise be derived only from public filings (e.g., AsiaPhos Limited, which is listed in Singapore), press reports and other online reports.

China is not a party to the Mauritius Convention on Transparency[127] and its treaties generally do not include provisions on transparency of arbitral proceedings. Provisions of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration[128] were referred to in the China–Australia Free Trade Agreement (CHAFTA), although they have not been adopted.[129] Specific provisions relating to transparency regarding ISDS are, however, incorporated in the CHAFTA itself (Article 9.17). (The 1988 Australia–China BIT, which is still in force, does not contain any provisions relating to transparency of arbitration.) Several Hong Kong treaties, for example with Australia (Article 30), do include provisions on transparency.

It is therefore not clear whether corruption is or was relevant in any of the existing cases against China. Publicly available material on *Goh v. China* (brought under the Singapore BIT), however, indicates that the claimant alleges that local officials engaged in embezzlement unlawfully seized his property after he was imprisoned by colluding with state banks and corrupt judges, leading to the loss of his investments in Qingdao.[130] In view of the significant role played by governments at all levels in China in regulating the entry and operation of foreign investment, corruption could well play a role in future cases.

The third point is that, although investors are becoming more willing to bring cases against China, there are still very few cases, and even fewer are brought by major international companies. There are a range of theories as to why this is so.[131] In the authors' opinion, the small number of ISDS cases brought, particularly by major companies, is influenced by two primary factors: the limited scope in older

treaties for ISDS to be brought at all, and, secondly, the desire of major investors to keep open opportunities to invest and operate in China. The fact that cases brought so far have appeared mainly to involve more recent treaties and smaller claimants (with the possible exception of Hela Schwartz) or individuals seems to support this.

Finally, it is not clear whether or how an ICSID or other ISDS award can be enforced against the Chinese government itself.[132] China maintains a commercial exception to the New York Convention[133] and has historically ascribed to the absolute view of sovereign immunity.[134] The new Foreign State Immunity Law, however, now applies the restrictive approach to immunity in relation to foreign states involved in litigation in China, which suggests that China is moving towards a less absolute approach. Its approach to enforcement of an adverse decision in ISDS (in its own courts or elsewhere), however, remains unclear.

Chinese outbound investors have become considerably more active in bringing arbitral claims themselves, few of which (it appears) involve corruption, although *Wang Jing v. Ukraine*[135] presents interesting issues of treason, national security and breach of anti-trust rules.[136] The *Sanum v. Laos* cases, which involved investors from Macao and were brought under the China–Laos BIT over Chinese objections, are discussed in more detail in Chap. 15. *Alpene v. Malta*[137] is a case brought under the China–Malta BIT but does not appear to have any relationship with China or Hong Kong other than the incorporation of Alpene in Hong Kong. This case presents allegations of corrupt behaviour by the agents of Malta.

In the case of the two cases based on Hong Kong treaties, neither *Philip Morris v. Australia*[138] or Shift Energy *Japan KK v. Japan*[139] appear to raise issues of corruption.

8.6 Conclusions and Recommendations

There are several tentative comments and recommendations arising from this discussion regarding China and Hong Kong, their investment treaties and corruption.

First, China and Hong Kong have, in accordance with their international obligations, established detailed systems of laws and regulations to deal with corruption at a domestic level, relating to official corruption and to commercial corruption involving companies and businesses. However, in China, the commanding position of the CCP (through the CCDI) in investigations, the focus on CCP rules and CCP members and the potential role of domestic and international politics in prosecutions raise concerns about the implementation of this system and the independence of the courts in politically sensitive cases, which are very likely to be material in an ISDS case.

The second issue is that of transparency. In the small number of ISDS cases brought against China so far, there has been little transparency in relation to the claims or the evidence. Certainly, some of the lack of information may be due to the claimants in the various cases. However, it would cast more light on the facts and the progress of claims, as well as the reasons for decisions, if China applied the UNCITRAL Rules on Transparency and, to the extent possible, allowed for the publication of documents

in hearings and for open hearings. At the domestic level, even though Chinese courts should, under the Criminal Procedure Law,[140] hold open trials, Chinese practice and recent legal authority have used business secrets, personal information, national security and other excuses to ensure that trials that may be sensitive are closed to the public gaze.[141] A more open approach, both domestically and internationally, to the administration of justice would allow parties on all sides to assess and discuss the issues that are raised.

Third, neither China (with one recent exception) nor Hong Kong have, so far, vigorously pursued criminal convictions through the court system for bribery outside China. In view of the amount of overseas investment made by Chinese (and Hong Kong) companies, both state-owned and private, it is recommended that China becomes a party to the OECD Convention (on behalf of Hong Kong as well as the mainland) and demonstrate its commitment to fighting corruption internationally and openly, following the example of Argentina, Brazil, Bulgaria, Peru, Russia and South Africa.[142]

Finally, at the international level, China's treaties do not currently have any provision regarding corruption, other than in the RCEP, although China's application to join the CPTPP would require it to sign up to the detailed corruption chapter in that treaty. Given the importance of investment to China, both inbound and outbound, China should consider, as it has done regarding provisions on the environment and other social welfare considerations, including in its treaties provisions encouraging the adoption and implementation of provisions relating to corruption in international investment. While this may not require a change to China's domestic law, it would send the message to China's partners and its own outbound investors that China takes seriously the elimination of corruption both inside and outside China.

Notes

1. UNCTAD 2022, p. 9.
2. Ibid., p. 21.
3. ICAC website, https://www.icac.org.hk/en/home/index.html, accessed 24 April 2023.
4. Howell 1991, p. 119 ff.
5. UNCTAD 2022, p. 9; USD181 billion in 2021. Hong Kong outbound investment was USD141 billion.
6. WTO 2001, Protocol on the Accession of the People's Republic of China.
7. Office of the United States Trade Representative (USTR) 2001.
8. State Council of China 2002, Guobanhan [2002] No. 17.
9. Milhaupt and Zheng 2015.
10. WTO, Disputes by member: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm accessed 5 February 2024.
11. Ibid.
12. Shen and Mantzopoulos 2013.
13. AEI China Global Investment Tracker: https://www.aei.org/china-global-investment-tracker/ accessed 24 April 2023.
14. Bath 2011.

15. Opinions of the State Council on Implementing the Market Access Negative List System 2015; Standing Committee of the National People's Congress 2016, Decision on Revising the Laws on Foreign-invested Enterprises and associated regulations.
16. Foreign Investment Law of the People's Republic of China 2019.
17. Ibid., Article 42.
18. Zhou 2022; National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) 2022, Catalogue of Industries for the Encouragement of Foreign Investment (2022 version); NDRC and MOFCOM 2021, Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Edition).
19. World Bank 2022a.
20. *The Economist* 2022a and b.
21. NDRC et al. 2017, Guiding Opinions on Further Guiding and Regulating the Direction of Outbound Investment; NDRC 2017, Administrative Measures for Outbound Investment by Enterprises; MOFCOM 2018, Interim Measures for the Record-filing (Verification and Approval) and the Reporting of Outbound Investment Projects.
22. For example, Ministry of Finance 2017, Interim Measures for the Administration of Central State-owned Capital Operating Budget Expenditure; State-owned Assets Supervision and Administration Commission of the State Council (SASAC) 2017, Measures for the Supervision and Administration of Overseas Investments by Central Enterprises.
23. Ibid.
24. For example, Foreign Investment Reform (Protecting Australia's National Security) Act 2020 (Australia); Executive Order 14083 of September 14, 2022 (United States); K2Integrity 2021 (The United Kingdom, Germany and Canada).
25. Xiao et al. 2022.
26. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region 2020; US Department of State 2022.
27. Transparency International 2023 accessed 5 February 2024.
28. World Justice Project 2023, https://worldjusticeproject.org/ accessed 5 February 2024.
29. UNTS Vol 2225 p. 209, New York, entered into force 29 September 2003.
30. UNTS Vol 2349, p. 41, New York, entered into force 14 December 2005.
31. OECD, https://www.oecd.org/corruption/oecdantibriberyconvention.htm accessed 24 April 2023.
32. OECD 2021.
33. IAACA, https://www.iaaca.net/about-iaaca/membership accessed 5 June 2023.
34. OECD, http://www.oecd.org/corruption/anti-corruption-initiative-for-asia-pacific.htm accessed 5 June 2023.
35. *China Daily* 2019.
36. United Nations Office on Drugs and Crime 2019.
37. 'State functionary' is broadly defined in the Criminal Law to include personnel of state organs, state-owned companies or enterprises or institutions, and people's organizations, as well as personnel appointed or sent by these entities to non-state-owned entities to carry out public service. Criminal Law, Article 93.
38. Other crimes include crimes of acceptance of bribes by an entity, offering bribes to or by an entity, and bribing as an intermediary. The crime of holding unidentified property is a useful charge brought against state functionary bribees in China's judicial practice. Criminal Law, Articles 163 and 164, and Chap. VIII.
39. Amendment VIII to the Criminal Law of the People's Republic of China (2011).
40. State Council of China 2013.
41. Article 147.
42. Article 33.
43. Article 141.
44. Articles 17 and 18.
45. CCDI n.d.
46. See e.g., CCDI 2015a; CCDI 2015b.

47. See combined CCDI and Supervision Commission, https://www.ccdi.gov.cn/.
48. SPC 2022; SPP 2022; *People's Daily Online* 2023.
49. See, for example, comments on conviction of Fu Zhenghua (former justice minister) in Lemaître in 2022.
50. Zheng 2022.
51. Zhuang 2023a, 2023b.
52. Rui 2021; Li 2018.
53. Zhongguo Caipan Wenshu Wang (China Judgements Online) at https://wenshu.court.gov.cn accessed 15 December 2022.
54. 15 U.S.C. §§ 78dd-1.
55. US Securities and Exchange Commission 2022.
56. See Bath 2012; State Council of China 2010.
57. Jiang 2018; Bath 2012, p. 8.
58. English version of judgment (translated by *The Australian*), p. 57, cited in Bath (2011), note 114.
59. BBC 2014.
60. State Council of China 2014.
61. Yin 2024.
62. World Bank 2022b.
63. Tower and Staats 2020.
64. See Chow 2015 on the lack of transparency in anti-bribery investigations.
65. The conviction rate for criminal offences in 2020 and previous years is reportedly higher than 99.95%. See Safeguard Defenders 2021.
66. *The Economist* 2021; Chow 2015. See also Li 2018 on corruption problems in the Chinese court system.
67. Corruption Perceptions Index 2023.
68. World Justice Project 2023, Hong Kong.
69. Department of Justice, Government of the Hong Kong Special Administrative Region 2022, External Affairs https://www.doj.gov.hk/en/external/treaties.html, accessed 24 April 2023.
70. Laws of Hong Kong, cap. 204.
71. Manion 2004, pp. 28–83; ICAC website.
72. The ICAC also administers the Elections (Corrupt and Illegal Conduct) Ordinance, which is not discussed here.
73. See discussion in van de Pol et al. n.d.-a.
74. Transparency International 2020, p. 92.
75. ICAC website, International Collaboration and Capacity Building, https://www.icac.org.hk/en/icd/work/iccb/index.html, accessed 24 April 2023.
76. Bath 2020; see generally Vaccaro-Incisa 2021.
77. UNCTAD Investment Policy Hub.
78. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, https://icsid.worldbank.org/about/member-states/database-of-member-states, accessed 24 April 2023.
79. (New York, 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed 24 April 2023.
80. UNCTAD Investment Policy Hub.
81. UNCITRAL Working Group III.
82. Ibid., Submission from the Government of China 2019, A/CN.9/WG.III/WP.177.
83. G20 Trade Ministers Meeting Statement, Annex III 2016.
84. Bath 2020, p. 374 ff. Note, however, that although draft amendments are currently under consideration to change this, Article 2 of the Arbitration Law 2017 currently limits arbitration to disputes 'between citizens, legal persons and other organizations of equal status in law', which would exclude investor–state arbitration. Herbert Smith Freehills 2022.
85. The Export–Import Bank of China and the Government of the Republic of Kenya 2014, Article 15.

86. PRC Foreign State Immunity Law, translation by China Law Translate, https://www.chinalawtranslate.com/en/foreign-immunities-law/, accessed 5 February 2024.
87. Signed 30 July 1998; entered into force 12 April 1999.
88. UNCTAD Investment Policy Hub.
89. Ibid.
90. ICSID Case No. ARB/07/6.
91. *PCCW Cascade (Middle East) Ltd. v. Kingdom of Saudi Arabia* ICSID Case No. ARB/22/20.
92. Article 1.
93. Hepburn and Nottage 2016.
94. Note 14 to Section C.
95. Articles 15 and 16.
96. See notes 78 and 79.
97. HKIAC website, Statistics, https://www.hkiac.org/about-us/statistics.
98. UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/896/seo-v-korea.
99. See detailed discussion in Li and Bian 2020, p. 505 ff.
100. See, for example, *Beijing Shougang Mining Investment Co Ltd et al. v. Mongolia and Beijing Everyway Traffic* (PCA Case No. 2010-20) and *Beijing Everyway Traffic and Lighting Technology Company Limited v. Republic of Ghana* (PCA 2021-15), in both of which the tribunals held that they had no jurisdiction under a similar provision. Djanic 2023a.
101. See Haftel et al. 2022 on the approach of developing states with a substantial amount of investment abroad to treaty terms.
102. Expanded on in Article 10.10, allowing the imposition of special formalities.
103. Not applicable to Cambodia, Lao PDF, Myanmar and Vietnam.
104. Chi 2015; Ofodile 2013.
105. Lo 2020. See also RCEP Annex 10B.4, which excludes non-discriminatory regulatory actions 'applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilization' from the scope of indirect expropriation.
106. Yan 2020, 2022.
107. FATF 2022, R.3.
108. ABC 2021.
109. UNCTAD mapping brings up 101 entries for China and Hong Kong which include this in the definition. Yin, however, comments that in the case of some more recent treaties, such as those with Germany and Uganda, this provision does not appear. Yin 2020 p. 487.
110. Le Moullec 2022, pp. 22, 25; Yin 2020, p. 487.
111. See, for example, the decision in the tribunal in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) (2018); request for annulment refused 2020.
112. Issued 26 December 2019; effective 1 January 2020.
113. SPC 2016; Contract Law Interpretation (I); Contract Law Interpretation (II), Article 14; Guiding Opinions. For a discussion of China's progressive restriction of the statutory grounds for voiding contracts, see detailed discussion in Xi 2022, pp. 81–90.
114. See, in contrast, Yin's view that the host state raising a corruption defence should be obliged to show that allegedly corrupt officials have been prosecuted. Yin 2020, p. 505.
115. UNCTAD, Investment Policy Hub. Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/. All as of April 2023.
116. *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15) (2011; China-Malaysia BIT).
117. *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) (2014; Korea-China BIT); *AsiaPhos Limited et anor v. People's Republic of China* (ICSID Case No. ADM/21/1) (2020; Singapore-China BIT).

118. *Macro Trading Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/20/22) (2020; China-Japan BIT).
119. *Hela Schwarz GmbH v. People's Republic of China* (ICSID Case No. ARB/17/19) (2017; China-Germany BIT); *Jason Yu Song v. People's Republic of China* (PCA Case No. 2019-39) (2019; China-United Kingdom BIT); *Goh Chin Soon v. People's Republic of China* (ICSID Case No. ARB/20/34 discontinued) (PCA Case No. 2021-30) (2020, China-Singapore BIT); *Montenero v. China* (2021; China-Switzerland BIT).
120. *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) (2007; China-Peru BIT); (*Zhongshan Fucheng v. Nigeria* (ad hoc) (2018, China-Nigeria BIT).
121. *Beijing Shougang et al. v. Mongolia* (PCA Case No. 2010-20) (2010, China-Mongolia BIT*); Ping An Life Insurance et al. v. Kingdom of Belgium* (ICSID Case No. ARB/12/29) (2012, BLEU-China BIT); *Beijing Everyway Traffic and Lighting Technology Co Ltd v. Republic of Ghana* (PCA 2021-15) (2023, China-Ghana BIT).
122. *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30) (2014 China-Yemen BIT).
123. *Jetion and T-Hertz v. Greece* (ad hoc) (2019, China-Greece BIT).
124. See UNCTAD Investment Policy Hub. See also Bohmer 2022 (Ecuador); Djanic 2023a, b; *(Trinidad and Tobago) and PowerChina HuaDong Engineering Corporation et al. v. Vietnam* (ICSID Additional Facility—Arbitration Rules) (2022) ARB (AF) 22/7 (ASEAN-China Investment Agreement).
125. See notes 117 and 119.
126. *Hela Schwarz GmbH v. People's Republic of China*, Procedural Order No. 3.
127. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), https://uncitral.un.org/en/texts/arbitration/conventions/transparency, accessed 30 November 2022.
128. Effective 1 April 2014.
129. See Chap. 9 and Side Letter on Transparency Rules Applicable to Investor State Arbitration (providing for discussions relating to the incorporation of the Transparency Rules).
130. Bohmer 2020.
131. Lindmark et al. 2022.
132. Ku 2022.
133. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
134. Set out in China's submission in *Democratic Republic of the Congo v. FG Hemisphere Associates* [2011] HKCFA 41.
135. *Wang Jing, Li Fengju, Ren Jinglin and others v. Republic of Ukraine* (2020), brought under China-Ukraine BIT.
136. Global Security 2021.
137. ICSID Case No. ARB/21/36; Malta Independent 2021.
138. *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12).
139. *Shift Energy Japan KK v. Japan; claim unsuccessful*. Bohmer 2023.
140. Criminal Procedure Law of the PRC (1979), Article 188.
141. Bath 2012.
142. OECD, https://www.oecd.org/corruption/oecdantibriberyconvention.htm.

References

ABC (2021) China Formally Applies for CPTPP after Lobbying Australia, 17 September 2021. https://www.abc.net.au/news/2021-09-17/china-applies-to-join-cptpp/100469342

Bath, V. (2011) The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China. In: V. Bath and L. Nottage (eds) *Foreign Investment and Dispute Resolution Law and Practice in Asia.* Routledge, London, pp 68–89

Bath, V. (2012) China, International Business, and the Criminal Law. *Asian-Pacific Law & Policy Journal* 13 (1): 1–35

Bath, V. (2020) China's Role in the Development of International Investment Law – from Bystander to Participant. *Asian Journal of WTO and International Health Law* 15: 359–397

BBC (2014) GlaxoSmithKline fined $490m by China for Bribery, 19 September 2014. https://www.bbc.com/news/business-29274822

Bohmer, L. (2020) Singaporean Real Estate Developer Launches Treaty-based Arbitration against China. Investment Arbitration Reporter, 17 September 2020. https://www.iareporter.com/articles/singaporean-real-estate-developer-launches-treaty-based-arbitration-against-china/

Bohmer, L. (2022) Chinese Miner Makes Good on Earlier Threat to Bring Ad Hoc Treaty Claim against Ecuador. Investment Arbitration Reporter, 6 October 2022. https://www.iareporter.com/articles/chinese-miner-makes-good-on-earlier-threat-to-bring-ad-hoc-treaty-claim-against-ecuador/

Bohmer, L. (2023) Japan Prevails in Its First Known Treaty Arbitration. Investment Arbitration Reporter, 13 February 2023. https://www.iareporter.com/articles/japan-prevails-in-its-first-known-treaty-arbitration/

CCDI (2015a) Zhongyang Dier Xunshizu Xiang Zhongguo Shiyou Fankui Zhuanxiang Xunshi Qingkuang [The Second Central Inspection Group Gave Feedback on Special Inspection to PetroChina]. https://www.ccdi.gov.cn/yaowenn/201506/t20150616_49536.html

CCDI (2015b) Zhongyang Dier Xunshi Zu Xiang Zhongguo Haiyou Fankui Zhuanxiang Xunshi Qingkuang [The Second Central Inspection Group Gave Feedback on Special Inspection to CNOOC]. https://www.ccdi.gov.cn/yaowenn/201506/t20150615_49535.html

CCDI (n.d.) Shijiujie Zhongyang Gongzuo Xunshi Zhuanti [Inspection Work of the 19th Central Committee]. https://www.ccdi.gov.cn/xsxcn/

Chi, M. (2015) The 'Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and Its Implications for China's Future Bit-Making. *Journal of International Economic Law* 18 (3): 511–542

China Daily (2019) Beijing Initiative for the Clean Silk Road, updated 26 April 2019. https://www.chinadaily.com.cn/a/201904/26/WS5cc301a6a3104842260b8a24.html

Chow, D. (2015) How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws Symposium: Corruption and Compliance: Promoting Integrity in a Global Economy. *UC Davis Law Review* 2015 (2): 685–700

Djanic, V. (2023a) Tribunal Declines Jurisdiction over Arbitration brought under China-Ghana BIT. Investment Arbitration Reporter, 6 February 2023. https://www.iareporter.com/articles/tribunal-declines-jurisdiction-over-arbitration-brought-under-china-ghana-bit/

Djanic, V. (2023b) Trinidad Faces Its First Known BIT Case in Over Two Decades, as Subsidiary of Chinese Fortune 500 Company Lodges ICSID claim. Investment Arbitration Reporter, 7 April 2023. https://www.iareporter.com/articles/trinidad-faces-its-first-known-bit-case-in-over-two-decades-as-subsidiary-of-chinese-fortune-500-company-lodges-icsid-claim/

FATF (2022) FATF Recommendations. https://www.fatf-gafi.org/en/topics/fatf-recommendations.html

Global Security (2021) Motor Sich. https://www.globalsecurity.org/military/world/ukraine/motor-sich.htm

Haftel, Y. et al. (2022) High-income Developing Countries, FDI Outflows and the International Investment Agreement Regime. *World Trade Review* 21 (1): 1–17

Hepburn, J. and L. Nottage (2017) Case Note: Philip Morris Asia v. Australia (September 29, 2016). *The Journal of World Investment and Trade* 18 (2): 307–319

Herbert Smith Freehills (2022) Inside Arbitration: Proposed Amendments to China's Arbitration Law – A Sign of Internationalisation? https://www.herbertsmithfreehills.com/insight/inside-arbitration-proposed-amendments-to-chinas-arbitration-law-a-sign-of

Howell, J. (1991) The Impact of the Open Door Policy on the Chinese State. In: G. White (eds) *The Chinese State in the Era of Economic Reform.* Palgrave Macmillan, London, pp 119–146

Jiang, H. (2018) Beaming Light on Australia's National Interest Test: An Empirical Study of Chinese Investments Under It. *Asia Pacific Law Review* 26 (1): 14–35

K2Integrity (2021) The United Kingdom, Germany, and Canada Unveil Updates to Investment Screening Regimes, 29 July 2021. https://www.k2integrity.com/en/knowledge/policy-alerts/the-united-kingdom-germany-and-canada-unveil-updates-to-investment-screening-regimes/

Ku, J. (2013) Enforcement of ICSID Awards in the People's Republic of China. *Contemporary Asia Arbitration Journal* 6 (1): 31–48

La, M. (2020) The Evolution of Chinese International Investment Agreements and Their Potential Impacts on Human Rights Protections for the "Belt and Road Initiative" Countries. *Asian Journal of WTO & International Health Law & Policy* 15 (2): 399–400

Le Moullec, C. (2022) The Clean Hands Doctrine: A Tool For Accountability of Investor Conduct and Inadmissibility of Investment Claims. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 84 (1): 13–37

Lemaître, F. (2022) New Anti-Corruption Purge in the Chinese Communist Party, Le Monde, 23 September 2022. https://www.lemonde.fr/en/international/article/2022/09/23/new-anti-corruption-purge-in-the-chinese-communist-party_5997949_4.html

Li, L. (2018) The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State. *Law & Social Inquiry* 37 (4): 848–877

Li, Y. and C. Bian (2020) China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options Netherlands. *International Law Review* 67: 503–551

Lindmark, F. et al. (2022) Explaining China's Relative Absence from Investment Treaty Arbitration. In: D. Behn et al. (eds) *The Legitimacy of Investment Arbitration: Empirical Perspectives.* Cambridge University Press, Cambridge, pp 424–466

Malta Independent (2021) Pilatus Bank Seeks Compensation, Alleges Corruption in Choice of Liquidation Lawyers, Malta Independent, 2 September 2021. https://www.independent.com.mt/articles/2021-09-02/local-news/Pilatus-Bank-seeks-compensation-alleges-corruption-in-choice-for-liquidation-lawyers-6736236414

Manion, M. (2004) *Corruption by Design: Building Clean Government in Mainland China and Hong Kong.* Harvard University Press, Cambridge, US.

Milhaupt, C. and W. Zheng (2015) Beyond Ownership: State Capitalism and the Chinese Firm. *The Georgetown Law Journal* 103 (3): 665–722

OECD (2016) G20 Trade Ministers Meeting Statement, 9–10 July 2016, Shanghai. https://www.oecd.org/daf/inv/investment-policy/G20-Trade-Ministers-Statement-July-2016.pdf

OECD (2021) Working Group on Bribery in International Business Transactions, 2021 Annual Report. https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm

Office of the United States Trade Representative (USTR) (2001) USTR Releases Details on U.S.-China Consensus on China's WTO Accession. https://ustr.gov/archive/Document_Library/Press_Releases/2001/June/USTR_Releases_Details_on_US-China_Consensus_on_China%27s_WTO_Accession.html

Ofodile, U.E. (2013) Africa-China Bilateral Investment Treaties: A Critique. *Michigan Journal of International Law* 35 (1): 131–211

People's Daily Online (2023) Highlights of Work Reports of Supreme People's Court (SPC) and Supreme People's Procuratorate (SPP), 8 March 2023. http://en.people.cn/n3/2023/0308/c90000-10218696.html

Reuters (2017) China Jails Former Senior Judge for Life in Graft Case, 16 February 2017. https://www.reuters.com/article/uk-china-corruption-court-idUKKBN15V0ZZ

Rui, G. (2021) Corruption in China: Ex-judges and Prosecutors Caught Breaking Rules on Conflicts of Interest. South China Morning Post, 5 September 2021. https://www.scmp.com/news/china/politics/article/3147592/corruption-china-ex-judges-and-prosecutors-caught-breaking

Safeguard Defenders (2021). Presumed Guilty. https://safeguarddefenders.com/en/publications

Shen, R. and V. Mantzopoulos (2013) China's "Going Out" Policy: Inception, Evolution, Implication. *Journal of Business and Behavioral Sciences* 25 (2): 121–136

SPC (2016) Shanghai Minlurun Trading Co., Ltd. v. Shanghai Gangyi Trading Co., Ltd. (Case about Disputes over a Sales Contract)]. Supreme People's Court Gazette: 231 (1). http://gongbao.court.gov.cn/Details/af64749e6db04478101d4b70b38f43.html?sw=

SPC (2022) Zuigao Renmin Fayuan Gongzuo Baogao—2022 Nian 3 Yue Zai Di Shisanjie Quanguo Renmin Daibiao Dahui Diwuci Hiuyi Shang [Report on the Work of the Supreme People's Court at the Fifth Session of the 13th National People's Congress held virtually on March 22, 2022]. http://gongbao.court.gov.cn/Details/2c16327a4bc6cc0a26a9caa5450d2a.html

SPP (2022) Zuigao Renmin Jianchayuan Gongzuo Baogao—2022 Nian 3 Yue Zai Di Shisanjie Quanguo Renmin Daibiao Dahui Diwuci Huiyi Shang [Report on the Work of the Supreme People's Procuratorate at the Fifth Session of the 13th National People's Congress held virtually on March 22, 2022]. https://www.spp.gov.cn/spp/gzbg/202203/t20220315_549267.shtml

State Council of China (2010) Shanghaishi Diyi Zhongji Renmin Fayuan Dui Lituoan Zuochu Yishen Panjue [Shanghai No.1 Intermediate People's Court Issued First Instance Verdict on Rio Tinto Case] 29 March 2010. http://www.gov.cn/jrzg/2010-03/29/content_1567679.htm

State Council of China (2013) Cong Gelasu Shikean Tanxun Chenzhi Kuaguo Shangye Huilu Zhilu [Begin with the GlaxoSmithKline Case: Explore the Road to Punish Transnational Commercial Bribery] 22 July 2013. http://www.gov.cn/gzdt/2013-07/22/content_2452745.htm

State Council of China (2014) Gelan Sushike Zhongguo gongsi Beifa Renminbi 30 Tiyuan [GlaxoSmithKline China was Fined 3 Billion Yuan] 19 September 2014. http://www.gov.cn/xinwen/2014-09/19/content_2753139.htm

The Economist (2021) As Canada frees a Huawei Boss, China Lets Two Canadians Out of Jail, 25 September 2021. https://www.economist.com/united-states/2021/09/25/as-canada-frees-a-huawei-boss-china-lets-two-canadians-out-of-jail?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=Cj0KCQjwgLOiBhC7ARIsAIeetVC7wBBT2Z8y279lkjdaJ40yzirhakpSZS-THkIHVvYVpNb8seHo6ZUaAnFpEALw_wcB&gclsrc=aw.ds

The Economist (2022a) Showing More Bottle; China and Europe, 30 July 2022, p 38

The Economist (2022b) The Coming Storm; Chaguan, 29 October 2022, p 40

The Export-Import Bank of China and The Government of the Republic of Kenya represented by the National Treasury of Kenya (2014) Buyer Credit Loan Agreement for the Kenya Mombasa-Nairobi Standard Gauge Railway Project (Contract No.1410302052014210766). https://int.nyt.com/data/documenttools/Kenya-China-Docs-2/e099c795dfcc47ce/full.pdf

Tower, J. and J. Staats (2020) China's Belt and Road: Progress on 'Open, Green and Clean?' United States Institute of Peace. https://www.usip.org/publications/2020/04/chinas-belt-and-road-progress-open-green-and-clean

Transparency International (2020) Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention. https://www.transparency.org/en/publications/exporting-corruption-2022

Transparency International (2023) Corruption Perceptions Index. https://www.transparency.org/en/cpi/2023

UNCTAD (2022) World Investment Report 2022. https://unctad.org/system/files/official-document/wir2022_en.pdf

UNCTAD Investment Policy Hub. https://investmentpolicy.unctad.org/international-investment-agreements

United Nations Commission on International Trade Law (UNCITRAL) Working Group III: Investor-State Dispute Settlement Reform (2019) Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China, A/CN.9/WG.III/WP.177. https://uncitral.un.org/en/working_groups/3/investor-state

United Nations Office on Drugs and Crime (2019) The United Nations and China Sign Agreement on Combating Corruption. https://www.unodc.org/unodc/en/frontpage/2019/October/the-united-nations-and-china-sign-agreement-on-combating-corruption.html

US Department of State (2022) 2022 Investment Climate Statements: Hong Kong. https://www.state.gov/reports/2022-investment-climate-statements/hong-kong/

US Securities and Exchange Commission (SEC) (2022) SEC Enforcement Actions: FCPA Cases. https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases

Vaccaro-Incisa, G.M. (2021) China's Treaty Policy and Practice in International Investment Law and Arbitration: a Comparative and Analytical Study. Nijhoff International Investment Law Series. Brill, Leiden, Vol 17

Van de Pol, M., et al. (n.d.) Anti-Corruption in Hong Kong. Baker McKenzie Hong Kong. https://www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-hong-kong/

World Bank (2022a) The World Bank in China, Overview. 29 September 2022. https://www.worldbank.org/en/country/china/overview#1

World Bank (2022b) Procurement - World Bank Listing of Ineligible Firms and Individuals. https://www.worldbank.org/en/projects-operations/procurement/debarred-firms

World Justice Project (2023), WJP Rules of Law Index 2023. https://worldjusticeproject.org/rule-of-law-index/

WTO (2001) Protocol on the Accession of the People's Republic of China WT/L/432. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True

Xi, C. (2022) Contract Law and Financial Regulation in China: An Illegality Perspective. *Journal of Contract Law* 38 (1): 79–100

Xiao, L.S. et al. (2022) Mainland China's Inward and Outward Foreign Direct Investment Stock: Evidence from Tax Havens and Round-Tripping Investment. *Journal of Financial Research* 500 (2): 40–60

Yan, Y. (2020) Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric. *Balance Journal of International Economic Law* 500(2): 989–1013

Yan, Y. (2022) The Inclusion of Anti-corruption Clauses in International Investment Agreements and Its Possible Systemic Implications. *Asian Journal of WTO and International Health Law and Policy* 17 (1): 141–173

Yao, S. et al. (2010) China's Outward FDI and Resource-Seeking Strategy: A Case Study on Chinalco and Rio Tinto. *Asia-Pacific Journal of Accounting & Economics* 17 (3): 313–325

Yin, H. (2020) Difficulties Confronted by ICSID Tribunals in Deciding International Investment Corruption Cases and Possible Solutions. *Frontiers of Law in China* 15 (4): 481–505

Yin, C. (2024) A New Era for China's Overseas Anti-Corruption Campaign, 2 February 2024. https://thediplomat.com/2024/02/a-new-era-for-chinas-overseas-anti-corruption-campaign/

Zheng, W. (2022) Former Chinese Justice Minister Fu Zhenghua Jailed for Life for Corruption. South China Morning Post, 22 September 2022. https://www.scmp.com/news/china/politics/article/3193415/former-chinese-justice-minister-fu-zhenghua-jailed-life

Zhou, Q. (2022) China Further Expands the Encouraged Catalogue to Boost Foreign Investment. China Briefing, 1 November 2022. https://www.china-briefing.com/news/china-2022-encouraged-catalogue-updated-implementation-from-january-1-2023/

Zhuang, S. (2023a) Chinese Supreme Court Judge Jailed for 12 Years for Corruption. South China Morning Post, 12 April 2023. https://www.scmp.com/news/china/politics/article/3216812/chinese-supreme-court-judge-jailed-12-years-corruption

Zhuang, S. (2023b) Former Top Chinese Court Judge Shen Deyong Pleads Guilty to Taking US$9 Million in Bribes, South China Morning Post, 12 May 2023. https://www.scmp.com/news/china/politics/article/3220349/china-former-supreme-peoples-court-judge-shen-deyong-pleads-guilty-accepting-bribes-more-us9-million?utm_source=email&utm_medium=share_widget&utm_campaign=3220349

Vivienne Bath is Professor of Chinese and International Business Law at Sydney Law School, Associate Director—International of the Centre for Asian and Pacific Law at the University of Sydney and a member of the China Studies Centre at the University of Sydney. Her teaching and research interests are in international business and economic law, private international law and Chinese law. She has studied in Australia, the United States, China and Germany and has extensive professional experience in Sydney, New York and Hong Kong, specialising in foreign investment and commercial transactions in China and the Asian region.

Tianqi Gu is a PhD candidate at the Sydney Law School, working on Reforms on Chinese State-Owned Enterprises and Chinese Outbound Investment. She holds an LLB from Dalian Maritime University (China), and LLMs from University College London and the University of Sydney respectively. She is also the holder of an Australian Government Research Training Program Scholarship.