Chinese Investment Treaties:  
The Case of Peru

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Topics

• FDI: Trends and Risks
• BIT and BIT Practice
• China’s BIT Practice
• New Developments
  • *Tza Yap Shum v. Peru*
  • Multilateral Attempts
• China’s Next Move
• Asia and China’s approach to multilateralism
• FDI: Trends and Risks
Global FDI inflows in 2010: 15% below their pre-crisis average
Global FDI Flows (2004-12) and Projections (2013-15) (Billion of dollars)
Investment Inflows by Regions
## FDI Flows, by Region 2010-12

<table>
<thead>
<tr>
<th>Region</th>
<th>FDI inflows</th>
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**Memorandum: percentage share in world FDI flows**

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<td>0.5</td>
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<td>0.1</td>
<td>0.1</td>
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</tbody>
</table>
Top Host Economies in 2012

(x) = 2011 ranking

1. United States (1)
2. China (2)
3. Hong Kong, China (4)
4. Brazil (5)
5. British Virgin Islands (7)
6. United Kingdom (10)
7. Australia (6)
8. Singapore (8)
9. Russian Federation (9)
10. Canada (12)
11. Chile (17)
12. Ireland (32)
13. Luxembourg (18)
14. Spain (16)
15. India (14)
16. France (13)
17. Indonesia (21)
18. Colombia (28)
19. Kazakhstan (27)
20. Sweden (38)
Top Investor Economies in 2012

(x) = 2011 ranking

1 United States (1)
2 Japan (2)
3 China (6)
4 Hong Kong, China (4)
5 United Kingdom (3)
6 Germany (11)
7 Canada (12)
8 Russian Federation (7)
9 Switzerland (13)
10 British Virgin Islands (10)
11 France (8)
12 Sweden (17)
13 Republic of Korea (16)
14 Italy (9)
15 Mexico (28)
16 Singapore (18)
17 Chile (21)
18 Norway (19)
19 Ireland (167)
20 Luxembourg (30)
Capital Import/Export (US$ millions)
## Increase in Capital Imports and Exports in Selected Countries (US$ millions)

<table>
<thead>
<tr>
<th>Region/Country</th>
<th>Capital Import</th>
<th>Capital Export</th>
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<td></td>
<td>2005</td>
<td>2010</td>
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<td>404,044</td>
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<tr>
<td>Brazil</td>
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<td>S. Korea</td>
<td>104,879</td>
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</table>
“May you live in interesting times...”

Risks for FDI:
• Political
• Economic Crisis
• Policy Change

2009/2010
Investments - National Regulatory Changes (percentages)
• BIT and BIT Practice
Network of IIAs

• Bilateral investment treaties (BITs)
• Free trade agreements (FTAs)
• Economic partnership agreements (EPAs)
• Regional integration agreements (EU, NAFTA, ECOWAS, CARICOM, MERCOSUR, COMESA, Arab investment agreement, ASEAN)
• Multilateral agreements (dealing with investment) (TRIPs, TRIMs, GATS)
Trends in IIAs 1983-2012

Average of 4 IIAs per week

Average of 1 IIA per week

Annual number of IIAs

Cumulative number of IIAs

BITs

Other IIAs

All IIAs cumulative
Over 300 economic cooperation agreements with investment provisions
BIT and BIT Practice: Background

• BIT: Bilateral Investment Treaty

  ➢ Purpose:
  ➢ Parties:
    ✓ Host State v. Home State
    (or Capital Importing State v. Capital Exporting State)
    ✓ Investor v. Host State

• BIT Practice:

• BIT Jurisprudence:
Growth of BITs Continues, now 2600
Top 10 Signatories of BITs (up to 2010)

Germany
China
Switzerland
United Kingdom
France
Egypt
Netherlands
Belgium and Luxembourg
Italy
Korea, Republic of
Known investment treaty arbitrations
(cumulative and newly instituted cases, 1987-2010)
Source: UNCTAD
Respondents in investment arbitrations (as of end 2010)
Source: UNCTAD

Number of Already known BIT cases

- Argentina: 50
- Mexico: 18
- Czech Republic: 17
- Ecuador: 15
- Venezuela: 14
- Canada: 13
- United States: 12
- Ukraine: 11
- Poland: 10
- Egypt: 10
Respondent States by Region in ICSID Arbitrations (Concluded and Pending)

Figure 2. Respondent states (by region) in concluded and pending ICSID arbitrations

Nottage & Weeramantry (2011)
ICSID Claims Against Asian States Compared with the Rest of the World

Figure 3. ICSID claims filed against State respondents from Asia versus rest of the world

Nottage & Weeramantry (2011)
IIAs in Investment Arbitrations
(as of end 2009)
Source: UNCTAD

- NAFTA 5%
- Energy Charter Treaty 7%
- ASEAN 2%
- CAFTA 2%
- Bilateral investment treaties 84%
Increase in IIAs paralleled by an Increase in Investor-State Arbitration Cases

Of total know cases:
- 245 were filed with ICSID (or ICSID Additional Facility)
- 109 under the UNCITRAL arbitration rules
- 19 with the Stockholm Chamber of Commerce
- 6 with ICC and 4 ad hoc
- 1 with Cairo Regional Centre for International Commercial Arbitration
- 6 unknown
Trends in Investment Arbitration

ICSID Biennial Caseload Report 2010
Trends in Investment Arbitration

• Increasing arb cases
• More IIAs with common provisions - MFN, NT, FET, Expropriation, Free Transfer, ISD - APEC Report (2007)
• IIAs aimed at protecting investors & promoting FDI but recently creation of policy space cf. rule of law?
• China’s BIT Practice
China’s BIT Practice

• China: a big BIT player?
• Up to date, China signed 129 BITs
• China is also signing more and more FTAs and regional investment treaties, i.e., China-ASEAN Investment Agreement
• Why is China actively concluding BITs now?
• No single case brought by any foreign investor against China to ICSID
• Why?
China’s BIT Practice

• Capital-importing or capital exporting state?
Growth of China’s Outbound Investment (1990 – 2009)

US$100 million
China’s BIT Practice

• Chinese companies’ active overseas investments
  ▪ Lenovo’s acquisition of IBM
  ▪ Nanjing Auto’s acquisition of MG Rover
  ▪ CNOOC’s (failed) bid for UNOCAL

• Chinese government’s “go globally” policy
China’s BIT Practice

- China in early years
China’s BIT Practice

• China: a transitional period
China’s BIT Practice

• China: a policy U-turn switch in BIT practice

BITs in 2000-2010

- Western Europe: 31%
- Eastern Europe: 21%
- Asia: 20%
- Africa: 14%
- Americas: 14%
New Developments of Chinese BIT Practice

• *Tza Yap Shum v. Peru* (ICSID Case No. ARB/07/6, jurisdiction award in 2009, final award on merits 2011)

• *Ekran Berhad v PRC* (ICSID Case No. ARB/11/15) (filed in 2011)

• *Ping An v. Belgium* (filed on 19 Sep 2012)
• *Tza Yap Shum v. Peru*
New Developments

• The significance of *Tza Yap Shum v. the Republic of Peru*
Tza Yap Shum v Peru

- Tza, a Hong Kong resident, brought the case against Peru to ICSID
- Tza invested in Peru and set up TSG Peru S.A.C.
- The claim involved an alleged tax debt and a tax lien imposed by SUNAT on TSG
- SUNAT froze TSG’s bank accounts
- Freezing amounted to an expropriation without compensation?
Investor-State Arbitration Clause in Chinese BITs

- Scope of “dispute”
- Interplay between domestic and ICSID arbitration
- Consent to ICSID arbitration
- MFN clause to procedural rights
Investor-State Arbitration Clause in Chinese BITs

• Scope of “dispute”
  ▪ A restrictive formulae in defining the term “dispute” in old-generation of Chinese BITs
  ▪ Article 8(3) of Peru-China BIT: “a dispute involving the amount of compensation for expropriation may be submitted at the request of either party to the international arbitration of the ICSID”
Investor-State Arbitration Clause in Chinese BITs

• Scope of “dispute”
  ▪ A heavy contentious issue in the case of Taz Shum Yap v. the Republic Peru
  ▪ Peru: “involving” means “limited to” or “exclusively” so arbitration only covers “disputes related to the determination of the value of the investment” but excludes important matters such as whether expropriation has taken place
  ▪ Claimant: the scope is expanded to expropriation
Investor-State Arbitration Clause in Chinese BITs

• Scope of “dispute”
  ▪ Tribunal: followed the guidance in Article 31 of the Vienna Convention
  ▪ The principle to interpret the treaty is “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”
Investor-State Arbitration Clause in Chinese BITs

• Scope of “dispute”
  ▪ Relied on the Oxford Dictionary: “involving” means “to enfold ... include” and supported a broader interpretation so that the BIT permitted arbitration of claims concerning “all aspects of expropriation such as “whether an instance of expropriation ... has taken place ... and whether compensation will be paid.”
  ▪ Tribunal also applied a textual interpretive methodology to support this wider interpretation
Investor-State Arbitration Clause in Chinese BITs

• Scope of “dispute”
  ▪ A divided BIT arbitration jurisprudence
  ▪ More recent Chinese BITs (starting with the Barbados-China BIT 1998) are moving to a more liberal term of “dispute” allowing “all investment disputes” to be referred to ICSID arbitration
  ▪ So does the ASEAN-China Investment Treaty
Investor-State Arbitration Clause in Chinese BITs

• Interplay between domestic court and ICSID arbitration
  ▪ The application of the “fork-in-the-road” clause in the Peru-China BIT (Article 8).
  ▪ Peru: Article 8 outlines a three-step process
  ▪ Interplay between domestic courts and ICSID arbitration: first come first served
  ▪ This sequence is confirmed by the Peru-China FTA.
Investor-State Arbitration Clause in Chinese BITs

• Interplay between domestic court and ICSID arbitration
  ▪ Tribunal looked into the “ordinary meaning” of Articles 8(2) and 8(3) but reached an opposite conclusion.
  ▪ Tribunal did not emphasize the estoppel nature of the “fork-in-the-road” provision.
  ▪ Instead, the Tribunal viewed the jurisdictional relation of the domestic court and international arbitration tribunal as a “horizontal configuration.”
Investor-State Arbitration Clause in Chinese BITs

• Interplay between domestic court and ICSID arbitration
  ▪ Tribunal considered the “overall context of the BIT.”
  ▪ The fork-in-the-road provision has been watered down by some newer Chinese BITs.
Investor-State Arbitration Clause in Chinese BITs

• Interplay between domestic court and ICSID arbitration
  ▪ The ASEAN-China Investment Treaty: “... in the case of Indonesia, Philippines, Thailand, and Viet Nam, once the investor has submitted the dispute to their respective competent courts or administrative tribunals or to one of the arbitration procedures [regarding any of ICSID, ICSID Additional Facility Rules, UNCITRAL or ad hoc arbitration], the choice of the procedure is final.”
Investor-State Arbitration Clause in Chinese BITs

• Consent to ICSID arbitration
  ▪ Consent to arbitration under the Peru-China BIT is a hybrid one: not only quantum disputes but also “any disputes concerning other matters” as long as “the parties to the dispute so agree.”
  ▪ Peru argued it did not give consent to arbitrate this [expropriation] dispute. Nor did China.
  ▪ Tribunal did not thoroughly considered this issue.
Investor-State Arbitration Clause in Chinese BITs

• Consent to ICSID arbitration
  ▪ China’s Article 25(4) declaration.
  ▪ More recent Chinese BITs include an express (unconditional) consent.
  ▪ Examples include the Peru-China FTA.
Investor-State Arbitration Clause in Chinese BITs

• MFN treatment to procedural rights
  ▪ Claimant invoked Article 12 of the Peru-Colombia BIT under which a Columbian investor is entitled to file directly with ICSID a claim concerning “any dispute of legal nature” against Peru.
  ▪ Tribunal: each MFN clause is an “individualized” one having its own scope.
  ▪ Tribunal focused on the “intention of the parties in the text.”
Investor-State Arbitration Clause in Chinese BITs

• MFN treatment to procedural rights
  ▪ Tribunal sided with *Plama* (but *not Maffezini*) and adopted a more restrictive approach.
  ▪ Tribunal did not import the dispute resolution clause from the Peru-Colombia BIT into the Peru-China BIT
  ▪ There has been substantial contradiction in BIT arbitration jurisprudence.
  ▪ What is the rationale of the Tribunal’s ruling?
Investor-State Arbitration Clause in Chinese BITs

• MFN treatment to procedural rights
  ▪ ASEAN-China Investment Treaty: “For greater certainty, the obligation [in this MFN clause] does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this Agreement.”
Expropriation under BIT Law

Peru-China BIT

“Neither Contracting Party shall expropriate, nationalize or take similar measure (hereinafter referred to as “expropriation” against investments of investors of the other Contracting Party in its territory, unless the following conditions are met:

a) for the public interest;
b) under domestic legal procedures;
c) Without discrimination;
d) Against compensation.
“Indirect Expropriation”

- BITs usually do not define “expropriation” and leave the specific contours of the concept to customary international law
- The lack of a uniform definition is the greatest source of trouble
“Indirect Expropriation”

In deciding the legal nature of SUNAT’s measures, the tribunal looked into two critical elements:

• The effects of the measures
• The severity of the effects
“Indirect Expropriation”

• The effects of the measures
  ✓ The tribunal focused on the harm to TSG caused by SUNAT’s measures
  ✓ The tribunal equated expropriation with serious harm
“Indirect Expropriation”

• The severity of the effects
  - The tribunal followed the case law
  - Cf: LG&E Energy Corp. v. Argentine Republic in which the tribunal stated that “interference with the investment’s ability to carry on its business [be severe enough to generate a need for compensation] is not satisfied where the investment continues to operate, even if profits are diminished”
  - In Tza Yap Shum, TSG’s net sales dropped from S/. 80 million to S/. 3.4 million
  - Tribunal: SUNAT’s measures “constituted a blow to the heart of TSG’s operational capacity”
“Indirect Expropriation”

• Peru’s argument
• Evidentiary requirement of a causal link between a measure and subsequent damage?
• Impact is determined based on facts
• BIT jurisprudence
• Problem with the tribunal’s approach in this case
“Indirect Expropriation”

• The severity of the effects
  ➢ Duration:
  ➢ SUNAT’s interim measures lasted for one year and were then extended for another two years
Exemptions

The tribunal reviews the reasons to exempt the unlawful conduct or international responsibility of Peru:

• Exercise of legitimate regulatory power
  ✓ “presumptive legitimacy”
  ✓ Public interest argument (similar to the “general welfare” doctrine)
Exemptions

• Exercise of legitimate regulatory power
  ✓ How to determine the legitimacy of regulatory instruments?
  ✓ “due process” element
    ➢ Measures must not deployed in a confiscatory, abusive or discriminatory manner
    ➢ The proceedings must be reasonable
Exemptions

- China-Peru BIT does not mention an exception clause
- China-Peru FTA:
  ✓ a deprivation of property shall not be discriminatory in effect, “either as against the particular investor or against a class of which the investor forms part; or … in breach of the state’s prior binding written commitment to the investor, whether by contract, license, or other legal document”
Comments on *Tza Yap Shum*

- Tribunal’s pragmatic approach
- Legal v. economic approach
  - Peru-China FTA requires an assessment of “the economic impact of the government action” to establish the existence of an indirect expropriation
Importance of *Tza Yap Shum*

- 1st China BIT case
- Critical issue yet tested
- China’s history of nationalizing foreign investment
- So-called new state order and “creeping re-nationalization”
- International law’s influence on domestic law and practice
# Domestic Law v. BIT Law

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<td>Public interest</td>
<td>Narrowly defined; no “presumable legitimacy”, “legalistic” approach</td>
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<td>Under domestic legal procedure</td>
<td>N/A</td>
<td>Availability of “effective remedy”, routinary, non-abusive and non-discriminatory</td>
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<tr>
<td>Without discrimination</td>
<td>N/A</td>
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<td>Against compensation</td>
<td>[just] compensation: fair market value</td>
<td>“adjusted book value” “market value”</td>
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• New Developments
New Developments of Chinese BIT Practice

• More FTA negotiations
• Signed BIT (FIPA) with Canada in 2012 (China’s third generation BIT)
• Negotiation with the Energy Charter Treaty’s team for China’s possible accession
• BIT negotiations with the US: a long march?
New Developments of Chinese BIT Practice

• ASEAN-China Investment Agreement in 2009
• China-Korea-Japan Trilateral Investment Treaty in 2012
New Developments

• China-ASEAN Investment Agreement
ASEAN BIT Practice

• ASEAN’s Framework Agreement on the ASEAN Investment Area in 1998
• ASEAN members are active players in concluding BITs
• But not active in BIT arbitration arena
ASEAN BIT Practice

BITs between ASEAN Member States and Trading Partners (1966-2010)
ASEAN BIT Practice

Growth of BITs between ASEAN Member States and Trading Partners (1966-2010)
New Developments

• The significance of the ASEAN-China BIT in terms of “treaty behaviour”
  ➢ Consent clause: Malaysia-UK BIT 1981 vs. Malaysia-China BIT 1988
  ➢ Definition of “dispute”: Netherlands-Indonesia BIT 1968 vs. China-Indonesia BIT 1994
New Developments

• The significance of the ASEAN-China BIT in the BIT context
  ✓ the latest progress in establishing an ASEAN-China free trade area
  ✓ Promoting regional harmonisation in East Asia
New Developments

• China-Korea-Japan TIT
Korea’s BIT Practice

• Korea signed 86 BITs since 1969, and 8 FTAs since 2003
• National controversies surrounding the Korea-US FTA
• This trilateral investment treaty becomes a first step for Korea in its post-Korea-US FTA investment landscape
Japan’s BIT Practice

• Japan signed fewer BITs than other investment-exporting countries
• Having been more aggressive recently
• Now Japan has 19 BITs (including the TIT), 15 came into effect
• It has 13 EPAs but some of them do not have investment chapters
BITs among China, Korea and Japan

• Korea-China BIT 1992
• Korea-China BIT 2007
• China-Japan BIT 1988
China-Korea-Japan TIT

• Signed on 13 May 2012
China-Korea-Japan Relationship

• Economic significance

➢ China is the largest trading partner to Korea
➢ Korea is one of a few economies that enjoys a trade surplus with China (US$53 billion in 2012)
China-Korea-Japan Relationship

• Political significance

➢ Bilateral relationship: a free trade negotiation between Korea and China
➢ President Park’s first Asian state visit
➢ North Korea’s nuclear program and the global society’s de-nuclearisation efforts
China-Korea-Japan TIT

• Legal significance:

- First treaty among three countries in the economic field
- A ground stone for the future trilateral free trade agreement
- A key step for a higher level of economic harmonisation in North East Asia
ICSID Mechanism

3. The *investment dispute* shall at the request of the disputing investor be submitted to either:

(a) a competent court of the disputing Contracting Party;
(b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available;
(c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available;
(d) arbitration under the UNCITRAL Arbitration Rules; or
(e) if agreed with the disputing Contracting Party, any arbitration in accordance with other arbitration rules,

provided that, for the purposes of subparagraphs (b) through (e):

(i) the *investment dispute* cannot be settled through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Contracting Party; and

(ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.
ICSID Mechanism

• Interplay between domestic court and ICSID arbitration
  ▪ a “fork-in-the-road” provision?
  ▪ a “horizontal configuration”?
ICSID Mechanism

• Interplay between domestic court and ICSID arbitration
  ▪ Condition to the choice of fora: consultation by the disputing parties
  ▪ A 4-month window period
  ▪ A safety mechanism saving the host government from ICSID arbitration without prior consultation
China-Korea-Japan TIT : Substantive Issues

• Definition of “investment”

- “every kind of asset owned or controlled, directly or indirectly, by an investor”
- But without a reference to “in accordance with laws and regulations of the host state”
China-Korea-Japan TIT: Substantive Issues

• “Expropriation”

• Expropriation is not allowed except:
  ✓ For a public purpose;
  ✓ On a non-discriminatory basis;
  ✓ In accordance with its laws and international standard of due process of law; and
  ✓ Upon compensation

• Covers “indirect expropriation”
China-Korea-Japan TIT : Substantive Issues

• Merely security exception clause
• Applicable law
• Relationship with other agreements
China-Korea-Japan TIT

• MFN treatment to procedural rights
  ➢ BIT jurisprudence is divergent on whether an MFN provision applies to the ICSID scheme
  ➢ The consensus appears that it does not apply unless there is a clear indication in the BIT
China-Korea-Japan TIT

• MFN treatment to procedural rights
  ➢ TIT makes it clear that the MFN obligation does not extend to the ICSID mechanism.
China’s Next Move

• China’s BIT negotiations with the EU and the US ->
  global benefits:
  ➢ To open up its domestic market to greater competition
  ➢ To create a rule-based international economy
  ➢ To strengthen the international rule of law
  ➢ To build up stronger economic ties with China
China’s Next Move

• China’s BIT negotiations with the EU and the US ->
  global benefits:

  ➢ To import international standard into domestic legal system and to strengthen its economic governance
  ➢ To give China a greater stake in global trade
  ➢ To give Chinese companies easier access to the EU and US markets
  ➢ To help deepen local reforms: fighting favouritism and corruption, removing onerous regulations, improving uneven law enforcement, and shrinking the advantages enjoyed by the SOEs
China’s Next Move

• China’s BIT negotiations with the EU and the US -> difficulties:
  ➢ Equal treatment of foreign and domestic investors
  ➢ No arbitrary and unfair treatment of foreign investors
    ✓ There must be compensation at fair market value for any nationalization or expropriation
    ✓ Ban on trade-distorting measures such as requirements for local content, exports and technology transfer
  ➢ Investors should be able to transfer funds in or out of the country, without delay, at a market rate of exchange
  ➢ A broad scope
    ✓ China’s new approach that any sector should be presumed to open to foreign investment
    ✓ Current approach: confining foreign investment in a narrow list of authorized sectors so China should shorten its initial list of exclusions
Status Quo of Global Investment Legal Framework
Multilateralism?! 

• Multiple overlapping FTAs with investment provisions
• IIAs proliferate at all levels
• Constituting a complex system of multi-layered and multi-faceted investment treaties
Asia’s Multilateralism

• The significance of the TIT
• Asia’s approach to multilateralism
  - ASEAN + China
  - ASEAN + Korea
  - ASEAN + Japan -> EPA with ASEAN but only with a consultation clause
  - China-Korea-Japan TIT
  - Energy Charter Treaty?
China’s Multilateralism

• Multiple overlapping FTAs with investment provisions
• IIAs proliferate at all levels
• Constituting a complex system of multi-layered and multi-faceted investment treaties
Questions?

Thank you.