The Establishment of a Multilateral Investment Treaty for the 'One Belt, One Road' Initiative

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I. Introduction

The 'One Belt, One Road' (OBOR) initiative was proposed by Chinese president Xi Jinping in 2013. It comprises the "New Silk Road Economic Belt" and the "21st Century Marine Silk Road",[1] covering altogether seventy countries.[2] This initiative aims at realising development and prosperity of the OBOR states in various areas, removing barriers for investment.[3] Following the progress of the initiative, the majority of these countries have become important destinations for China's outbound foreign direct investment (FDI). In 2016, Chinese enterprises executed one-hundred fifteen merger and acquisition projects in OBOR states, for a total consideration of $6.64 billion. Meanwhile, China's FDI stock in OBOR states has reached $129.41 billion.[4] These investments have clearly stimulated the development of the countries involved. For instance, China's first industrial zone in Ethiopia has generated 13,000 employment positions.[5]

To achieve further success with the OBOR initiative, it is worth considering how to provide a legal environment that can promote investment flows. One important requirement for any legal regime is granting sufficient investment protection. Most foreign investments in OBOR states are prioritised to certain sectors of cooperation like agriculture, infrastructure or energy.[6] These investments are vulnerable due to their inherent characteristics. First, they are normally capital intensive, particularly in their initial stage. Secondly, they tend to have a long-term horizon, during which unexpected significant legal, political, economic and social changes can occur. Thirdly, they may closely relate to the public interest and become politically sensitive. Hence, they can trigger public protest or political interference.[7] Accordingly, investments in these sectors have occupied a large proportion of investment dispute settlements.[8]

This paper intends to explore the appropriate approach to ensure effective international legal protection for foreign investments in OBOR states and, as such, contribute to the success of the initiative as a whole. Part II offers a more detailed assessment of existing international legal protection mechanisms for foreign investments, and finds that the current framework is unsatisfactory. Under these circumstances, a multilateral investment treaty can be a better choice, both for investors and states. Therefore, the subsequent sections of this paper deal with designing multilateral investment treaty-clauses in detail. Specifically, Part III proposes that China should lead the OBOR treaty-making process while other

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1 The National Development and Reform Commission (NDRC), Ministry of Foreign Affairs (MFA) and Ministry of Commerce of the People's Republic of China (MOFCOM), 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (2015), <http://www.ndrc.gov.cn/gzdt/201503/t20150330_669392.html> accessed 12 December 2017.

2 See Belt and Road Portal, 'Profiles' <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076> accessed 12 December 2017.

3 NDRC, MFA and MOFCOM (n 1).

4 MOFCOM, National Bureau of Statistics of China (BSC) and State Administration of Foreign Exchange (SAFE), '2016 Statistical Bulletin of China's Outward Foreign Direct Investment' (2017) <http://fec.mofcom.gov.cn/article/tjsj/tjgb/201709/20170902653690.shtml> accessed 19 December 2017.

5 Jianing Cao, 'The Eastern Industrial Zone in Ethiopia has attracted 83 enterprises settled in, and generated 13 thousand employment posisions' *The People's Daily* (Beijing, 10 August 2018).

6 NDRC, MFA and MOFCOM (n 1).

7 Jan M Schüpbach, 'Foreign direct investment in agriculture: the impact of outgrower schemes and large-scale farm employment on economic well-being in Zambia' (*PhD thesis, Logo of ETH Zurich*, 2014) <https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/99536/eth-47518-02.pdf> accessed 21 December 2017; Jun He, 'One Belt, One Road': China's New Strategy and Its Impact on FDI', in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (eds), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration* (Springer 2017) 163; Huaxia Lai and Gabriel M Lentner, 'Paving the Silk Road BIT by BIT: An Analysis of Investment Protection for Chinese Infrastructure Projects Under the Belt & Road Initiative' (2017) 14(3) Transnational Dispute Management (TDM); Aweis Osman, 'China's Maritime Silk Road and the Future of African Arbitration' (2017) 14(3) TDM; Glenn Zacher, 'The Guide to Energy Arbitration Review' (2017) <http://globalarbitrationreview.com/static/the-guide-to-energy-arbitrations-review> accessed 20 December 2017.

8 Investment claims implicating sectors of agriculture, construction, energy (including electric power, oil, gas and mining) account for approximately 51% of the total ICSID caseload. See ICSID, 'cases', <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx> accessed 21 December 2017.

states actively participate; Part IV suggests that the treaty can draw inspiration from existing international instruments; and Part V proposes essential contents of the treaty. Finally, its significance is briefly evaluated at the end.

II. International Legal Protection for Foreign Investments

The most widespread international legal tools for protecting foreign investments are international investment agreements (IIA), including bilateral investment treaties (BIT) and other treaties containing investment provisions. Unfortunately, the existing IIAs between China and OBOR states are not satisfactory for the protection of FDI. One reason is the lack of valid IIAs. There has no IIA been concluded between China and ten OBOR states, and two other IIAs have not entered into force.[9] Another reason is that most existing IIAs fail to sufficiently protect foreign investments from both a substantial and a procedural point of view. For instance, national treatment, as one of the most common substantive standards of treatment, is not provided in BITs between China and forty-two OBOR states (although some of them are complemented by co-existing free trade agreements (FTAs)). Additionally, three other national treatment clauses are not legally binding. From a procedural point of view, BITs with China and forty-nine OBOR states only provide limited or no access to investor-state dispute settlement. The majority of them only allow disputes concerning the amount of compensation for expropriation to be submitted to international arbitration. Only in a few exceptional cases, access to arbitration is provided for other BIT breaches.[10] To the extent that bilateral and regional treaties overlap, or BITs and FTAs,[11] this may trigger confusion and uncertainty with regards to both investment protection and dispute settlement.[12]

Under such circumstances, the establishment of a multilateral treaty covering all OBOR states can be useful to creating a suitable legal framework. Although it is very challenging to establish a single framework that covers seventy different states compared to negotiating or upgrading BITs separately, it would have the several advantages. First, the multilateral treaty can apply to all states

9 See United Nations Conference on Trade and Development (UNCTAD), 'Investment Policy Hub' <http://investmentpolicyhub.unctad.org/IIA> accessed 23 December 2017.

10 ibid.

11 China has concluded both BITs and FTAs with OBOR states (such as South Korea), and some regional investment treaties have been concluded or are being negotiated, like the China-ASEAN BIT and the Regional Comprehensive Economic Partnership. See ibid.

12 Wolfgang Alschner, 'Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?' (2014) 17(2) Journal of International Economic Law 271.

in a more standardised and predictable manner.[13] Secondly, States with relatively weak negotiation powers could avoid the prolonged and burdensome process of concluding several BITs successively. Thirdly, the multilateral treaty could further guarantee the success of the OBOR initiative in several ways. Indeed, it would ensure long-term cooperation between and participation by the states in promoting and facilitating foreign investment. Given the long-term nature of the initiative, continuous commitment would be essential,[14] something that would be difficult to achieve without a binding instrument. Moreover, directly reducing investment risks,[15] an investment treaty would also indirectly improve developing states' domestic legal regime, as they would need to adjust their regulations to comply with the treaty.

III. States' Roles in the OBOR Investment Treaty-Making

According to the principle of "wide consultation, joint contribution and shared benefits" that China adheres to,[16] this paper suggests that the OBOR investment treaty should be concluded with China playing a leading role, but with all states involved participating actively in the process. This has the following reasons.

First, as the proposer of the OBOR initiative, China should assume responsibilities commensurate to its stature. Secondly, China is the largest host and home state for FDI among OBOR participants.[17] Thirdly, China is the most experienced investment treaty negotiator, having concluded more BITs than any other of the states involved.[18] However, China's leading role would not mean it should act as the main decider. Although China employs three model BITs to guide its investment treaty negotiations, the differences between the model BITs and the BITs subsequently concluded suggest that it also adapts to the circumstances of its

13 Maria Bun, 'The Energy Charter Treaty and Central Asia: Setting an International Standard for Energy-Related Disputes' (2017) 14(3) TDM.

14 Peter Ferdinand, 'Westward ho – the China dream and 'one belt, one road': Chinese foreign policy under Xi Jinping' (2016) 92(4) International Affairs 941.

15 UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) <http://unctad.org/en/Docs/diaeia20095_en.pdf> accessed 10 January 2018.

16 Jinping Xi, 'Towards a Community of Common Destiny and A New Future for Asia' (Keynote Address, the Boao Forum for Asia Annual Conference, 28 March 2015) <http://news.xinhuanet.com/english/2015-03/29/c_134106145.htm> accessed 11 January 2018.

17 UNCTAD, World Investment Report 2017 <http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf> accessed 13 January 2018.

18 ibid.

partners, and is open to their opinions and comments.[19] Indeed, the participation of other OBOR states would be important as this can make the treaty contents more palatable. The OBOR initiative is designed to respect the independent choices of, and align with the development strategies of all participants.[20] This can only be achieved through equal-footed consultation and negotiation. I would like to add that it appears also in the best interest of each state to participate actively in the process of treaty-making.[21] However, major western economic powers like the UK and Germany not involved.[22] Even if these countries eventually were to join the OBOR initiative, they may have less interest in the multilateral treaty, as it offers limited investment protection (to suit the need of developing countries) compared to the one being negotiated between China and the European Union.[23]

IV. The Process of the OBOR Investment Treaty-Making

China has signed various international instruments, including treaties and Memorandums of Understanding (MOU) with OBOR states, regarding either general cooperation or more specific issues. These mechanisms can contribute to China's leading role in the treaty-making process, while their acceptance by the OBOR states makes them decent templates for concluding the multilateral treaty. While treaties create binding international obligations, MOUs imply that the state parties have no intention of making legally enforceable rules.[24] These instruments

[19] For example, there exist significant differences between the 2003 Chinese Model BIT and the China – Republic of Korea BIT (adopted 07 September 2007, entered into force 1 December 2007) as well as the China – Mexico BIT (adopted 11 July 2008, entered into force 6 June 2009). See also Leon E Trakman, 'China's Regulation of Foreign Direct Investment', in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (eds), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration* (Springer 2017) 67.

[20] MFA, 'Foreign Minister Wang Yi Meets the Press' (8 March 2015) <http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1243662.shtml> accessed 11 January 2018.

[21] Justin Yifu Lin, '"One Belt and One Road" and Free Trade Zones – China's New Opening-up Initiatives' (2015) 10(4) Front. Econ. China 585.

[22] Asian News International (ANI), 'UK flags concern, doubts over OBOR project' *The Economic Times* (London, 02 February 2018).

[23] Reuters Staff, 'China, EU exchange market access offers for investment treaty talks' *Reuters* (Beijing, 16 July 2018).

[24] Paragraph VII of the Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative between the Government of the People's Republic of China and the Government of New Zealand (adopted and entered into force 27 March 2017) stipulates that the instrument only indicates the will of the parties. Such statement evinces its non-legally binding status. Terminology and form of the MOU also confirms this status. For the distinction between a treaty and an MOU, see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 28–35.

are either formal or informal, and can be divided into three categories: MOUs on OBOR cooperation; agreements or MOUs on sectoral cooperation;[25] and IIAs.

Accordingly, this section proposes that the treaty-making process can develop in three directions. Namely, OBOR states could transform (a) MOUs into investment agreements; (b) MOUs on sectoral cooperation into sectoral investment agreements; and (c) existing IIAs into a multilateral treaty. The first two directions can reach an acceptable standard of treatment between MOUs and agreements,[26] whereas the last one can be the point of reference regarding form and substance of the treaty. As is discussed below, these three directions can operate concurrently and supplement each other to establish the treaty more efficiently. Meanwhile, IIAs between other OBOR states can also be used as important points of reference After the conclusion of the OBOR investment treaty, a multilateral FTA can be negotiated, which may incorporate the investment treaty as one of its components.

A. From MOUs to investment agreements

Although MOUs on OBOR cooperation are not legally binding, they do record states' political commitment to an initiative,[27] especially with regards to investment cooperation.[28] These MOUs require parties to formulate detailed plans of bilateral cooperation within a certain period of time after the MOUs coming into effect.[29] The practice gained in the intermediate period can make the cooperation sufficiently mature to be subsequently governed by a legally binding agreement. In the future, this agreement can perhaps serve as a common base for the negotiation of a future investment treaty.

This approach complies with the common sense notion that the OBOR initiative should be implemented in a practical way.[30] It may also be more acceptable to state parties, as the benefits of the cooperation have already been shown. However, one would need to ensure that the progress with each party involved is

[25] See Xinhua, 'Full text: List of deliverables of Belt and Road Forum' (2017) <http://www.xinhuanet.com/english/2017-05/15/c_136286376.htm> accessed 11 January 2018.

[26] Donald J Lewis and Diana Moise, 'One Belt One Road (OBOR) Roadmaps: The Legal and Policy Frameworks (2017) 14(3) TDM.

[27] China – New Zealand Memorandum of Arrangements (n 24) paragraph I: Cooperation Objectives.

[28] ibid paragraph III: Cooperation Areas.

[29] ibid. Some plans have been published, like the Five-Year Plan of Action on Lancang-Mekong Cooperation (2018–2022). See Belt and Road Portal, 'Bilateral Documents' <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10061> accessed 1 February 2018.

[30] Li Zhu, 'The Construction Model of "One Belt and One Road": Mechanisms and Platforms' in Rong Wang and Cuiping Zhu (eds) *Annual Report on the Development of the Indian Ocean Region (2015): 21st Century Maritime Silk Road* (Springer 2015).

relatively similar and no deep disparities arise. Consistency in this respect may be achieved through soft powers and influence.[31]

B. From MOUs on sectoral cooperation to sectoral investment agreements

China has signed MOUs or agreements with OBOR states in various key sectors, such as infrastructure, energy and agriculture.[32] Compared to general MOUs, MOUs or agreements on specific sectors are more detailed with regards to the industries involved.[33] The parties to these MOUs and agreements are the departments responsible for the sectors concerned, instead of the states.[34]Their tasks include adopting measures and policies to promote investments, determining key cooperation industries and proposing major projects.[35] Therefore, these MOUs and agreements are more practical and implementable, and can serve to formulate concrete plans and roadmaps.

Sectoral plans can cover various aspects of investments, including salient issues like market access, approval procedures, substantive treatment, post-entry investment management and supervision. As the plans are not legally binding, they provide more flexibility for states to modify their cooperation. Again, once the scheme has matured, reference to existing practices can serve as a stepping stone for concluding legally binding sectoral agreements.

C. From iias to an OBOR investment treaty

There exists a spaghetti bowl of IIAs between OBOR states, including bilateral and regional investment treaties and FTAs containing investment provisions. The tangle is becoming even more intricate as new IIAs like the Regional Comprehensive Economic Partnership (RCEP)[36] are being negotiated. Although the fragmented regime can pose daunting challenges and risks, it also provides

31 For examples of China's means of exerting influence, see Council on Foreign Relations, 'China's Big Bet on Soft Power' (2018) <https://www.cfr.org/backgrounder/chinas-big-bet-soft-power> accessed 11 August 18.

32 See Xinhua (n 25).

33 The Framework Agreement on Enhancing Industrial Capacity and Investment Cooperation between the NDRC of China and the UAE (signed 2017), art 1 stipulates that priority sectors for investment cooperation are oil and gas processing, and nonferrous metals; art 6 provides that each party shall bear respective expenses arising from the cooperation.

34 MOUs on transport cooperation are signed between the Ministry of Transport of China and relevant government departments of other OBOR states. See Xinhua (n 25).

35 The Framework Agreement (n 33) art 4 and 5.

36 See Association of Southeast Asian Nations, 'RCEP' <http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership> accessed 2 February 2018.

ample materials for the construction of a comprehensive OBOR investment treaty. After several generations, IIAs have gradually evolved from brief to more sophisticated and balanced.[37] While older IIAs are inconsistent with the needs of both investors and states, due to insufficient investment protection, absence of investor-state arbitration and regulatory latitude, newly-concluded IIAs, as well as those underway, offer a decent point of reference. Besides, existing multilateral initiatives covering some of the OBOR states, like the Energy Charter Treaty and the Trans-Pacific Partnership, can be consulted. Their conclusion seems to imply that the standards adhered to are acceptable to at least some of the OBOR states.

After its conclusion, the multilateral treaty can serve as a stepping stone towards a full-fledged FTA. China has proposed already to establish and expand free trade areas with OBOR states.[38] An OBOR FTA would promote FDI flows and trade and regional integration even more strongly.[39] Moreover, it could further reduce investors' transaction costs and allow states to make coordinated decisions on economic matters.[40] As the making of FTAs tends to attract considerably more public attention than BITs,[41] negotiating the OBOR FTA at a later stage may be appropriate, as it reduces the intensity of public concerns.

V. Essential Contents of the OBOR Investment Treaty

Although the international investment treaty landscape is extremely fragmented, comprising around three-thousand IIAs,[42] core elements of most investment treaties are substantively rather similar. They generally include the definition of foreign investments, rules on the establishment and admission of investments, expropriation and compensation.[43] Provisions concerning investment protection standards, permitted exceptions and dispute settlement are essential, and their design is decisive to the success of the OBOR initiative. To promote common security and sustainable development,[44] on the one hand, the OBOR

37 Meg Kinnear, 'ICSID and International Investment Treaty Arbitration: Progress and Prospects' in Wenhua Shan (ed), *China and International Investment Law: Twenty Years of ICSID Membership* (BRILL 2015) 9.

38 NDRC, NFA and MOFCOM (n 1).

39 Molly Lesher and Sébastien Miroudot, 'Analysis of the Economic Impact of Investment Provisions in Regional Trade Agreements' in OECD Trade Policy Papers No. 36 (OECD Publishing 2006).

40 Chang-fa Lo, 'A Comparison of BIT and the Investment Chapter of Free Trade Agreement from Policy Perspective' (2008) 3 Asian Journal of WTO & International Health Law and Policy 147.

41 Qingjiang Kong, 'Bilateral Investment Rule-Making: BITs or FTAs with Investment Rules?' (2013) 13 The Journal of World Investment & Trade 638.

42 See UNCTAD, 'World Investment Report 2017' (n 9).

43 UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (2007) <http://unctad.org/en/docs/iteiia20065_en.pdf> accessed 4 February 2018.

44 NDRC, MFA and MOFCOM (n 1).

investment treaty should provide advantageous treatment of investments. On the other, carefully structured provisions are necessary, in particular with respect to the applicable reservations and exceptions, to ensure that states retain enough regulatory space. Therefore, a balanced approach should be adopted when designing these clauses.

Moreover, the dispute settlement mechanism is also important, as it can ensure the correct application of substantive clauses, thus implementing the intention of state parties and the aim of the OBOR initiative. Additionally, as State-Owned Enterprises (SOEs) play a leading role in the OBOR investment strategy,[45] special concerns regarding the regulation and protection of FDIs by SOEs must also be considered. Against this background, this section develops essential treaty provisions. A summarising table has been included at the end.

A. Standards of investment treatments

The three most common standards of protection in IIAs are national treatment (NT), most-favoured nation treatment (MFN) and fair and equitable treatment (FET). Over the years, these provisions have generally become longer and more complex. There are two main developments that merit further discussion. One is that an increasing number of IIAs grant foreign investors a right of establishment by expanding NT and MFN into the pre-establishment phase, subject to certain reservations and exceptions.[46] The other is that more details and carve-outs are being included, resulting from prior rulings in investment dispute cases.[47] To achieve the goals of the initiative and be palatable to the states involved, standards of protection clauses in the OBOR investment treaty should follow both trends.

With regards to the former trend, it should be observed that a right of establishment can guarantee predictability, security and transparency concerning market access. While protections in the pre-establishment phase are becoming commonplace, liberal market access rules can distinguish a treaty from others and effectively lure foreign investors, especially into emerging markets that lack other appealing features.[48] Therefore, the inclusion of these provisions in an investment

[45] MOFCOM Trade Remedy and Investigation Bureau, 'China's SOEs lead the OBOR investment' (2017) <http://trb.mofcom.gov.cn/article/zuixindt/201709/20170902641583.shtml> accessed 4 February 2018.

[46] UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (n 43).

[47] Kinnear (n 37)

[48] Axel Berger, *et al*, 'Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box' (2013) 10 International Economics and Economic Policy 247.

treaty is particularly beneficial to OBOR states with an otherwise relatively unattractive investment climate.

However, the right of establishment is rarely provided for in China's IIAs with OBOR states. Currently, there are only four IIAs that manifestly provide MFN in the pre-establishment phrase, while no valid IIAs so far provide pre-establishment NT.[49] Indeed, states traditionally prefer to reserve the sovereign right to grant admission to and establishment of foreign investments, to preserve sufficient discretion, and to better pursue their own development needs.[50] However, this trend is changing gradually. For instance, as early as 1994, the Asia-Pacific Economic Cooperation has published non-binding investment principles granting pre-establishment NT and MFN.[51] In 2013, China agreed to negotiate a BIT with the United States which included a right to pre-establishment NT,[52] and the negotiations had been basically completed in 2015.[53] Moreover, the final version of the Trans-Pacific Partnership Agreement (TPPA),[54] concluded by eleven states, including Asian developing countries,[55] also includes pre-establishment NT and MFN.[56] These changes indicate that some developing countries are becoming more open to the idea of higher standards of liberalisation. As FDI remains a key driving force of their development, while FDI inflows in developing Asia have actually decreased in the past two years,[57] states are perhaps more inclined to accept the provision of pre-establishment rights.

However, carve-outs to investment treatment are equally essential, as they enable host states to make the rights of foreign investors compatible with national development objectives, and reserve certain flexibility for economic and social concerns. Sectoral carve-outs can be shaped in the form of either a positive or a negative list. Commonly, the former tends to limit the coverage of investment protection to a larger extent and thus suits host states that only plan to liberalise

[49] See UNCTAD, 'World Investment Report 2017' (n 9).

[50] UNCTAD, 'National Treatment' (1999) <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf> accessed 5 February 2018.

[51] The APEC Non-Binding Investment Principles (endorsed 1994, revised 2011).

[52] China Daily, 'China to open a wider door to foreign investment' (2017) <http://www.chinadaily.com.cn/opinion/2017-01/04/content_27857988.htm> accessed 7 February 2018.

[53] Xinhua Net, 'China, U.S. basically complete text negotiation on BIT' (2015) <http://www.xinhuanet.com/english/2015-03/07/c_134046188.htm> accessed 7 February 2018.

[54] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "TPPA") (adopted 8 March 2018, not yet entered into force) <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed 9 February 2018.

[55] Maclean's, 'Canada, TPP members agree to revised deal without the U.S.' (2018) <http://www.macleans.ca/politics/ottawa/canada-tpp-members-agree-to-revised-deal-without-the-u-s/> accessed 9 February 2018.

[56] TPPA (n 54) arts 9.4 and 9.5.

[57] UNCTAD, 'World Investment Report 2017' (n 17).

their market gradually. Conversely, the latter potentially narrows the discretion of host states significantly, and thus fits countries that wish to benefit from readily increased openness and a more competitive market environment.[58] But this distinction does not always hold true. The degree of openness depends primarily on the actual contents of the lists, and the adoption of a negative list does not necessarily imply a more open market if the list is a very comprehensive one.[59] Compared to the positive approach, a negative list does offer a higher degree of regulatory transparency, because of the comprehensive inventory of non-conforming measures provided.[60] Accordingly, this negative approach requires states to sort out carefully domestic legislation before composing the list.[61] Such a requirement can impose difficulties on states with a complex or chaotic legal system. Considering that countries participating in the OBOR investment treaty are in different stages of their development, it might be necessary to adopt a more flexible stance—allowing states to choose their approach themselves. This could be a positive, negative, or hybrid one, containing both a positive and a negative list.[62]

Furthermore, it is necessary to introduce mechanisms in the treaty to regulate state parties' future changes to their lists. This could be achieved through either 'standstill' or 'ratchet' clauses. The former requires countries not to adopt more restrictive non-conforming measures than those in the list and to decrease the degree of market openness after the conclusion of the treaty. Conversely, the latter prevents parties from taking any backward steps after they unilaterally decide to further open the market.[63] Jointly, these two clauses can ensure progressive and continuous liberalisation of international trade.

The second trend in investment protection standards, that is, the use of greater details and exceptions, is most obvious in MFN and FET clauses. As outlined above, this development may be considered a response to tribunal interpretations

58 UNCTAD, 'International investment agreements: Flexibility for development' (2000) <http://unctad.org/en/Docs/psiteiitd18.en.pdf> accessed 10 February 2018.

59 China was widely criticised for not truly opening its market after adopting the national negative list for foreign investments in domestic law for the first time, as the negative list is too board and too restrictive. Paul Edelberg, 'Is China Really Opening Its Doors to Foreign Investment?' (2017) <https://www.chinabusinessreview.com/is-china-really-opening-its-doors-to-foreign-investment/> accessed 11 February 2018.

60 UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) <http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf> accessed 28 May 2018.

61 European Commission, 'Services and investment in EU trade deals: Using "positive" and "negative" lists' (2016) <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf> accessed 11 February 2018.

62 Such a flexible approach has been successfully used in some IIAs, including the China – Australia FTA (entered into force 20 December 2015) Annex III.

63 European Commission (n 61).

and evidences the influence of case law on treaty design.[64] After MFN clauses were successfully invoked by some investors to benefit from better dispute settlement clauses inserted in other treaties of the host state,[65] recently concluded treaties explicitly bar such interpretations to dispel any doubts.[66] This trend can similarly be followed by the OBOR investment treaty.

In turn, the drafting of FET is more complicated. With their vague wording, FET clauses are invoked by investors practically in every investment arbitration case, often successfully.[67] The precise interpretation of the FET standard is unclear, due to certain inconsistencies in the practices of investment tribunals. On the following aspects, in particular, there seems to be no consensus: (a) the relationship between FET clauses and customary international law;[68] (b) the relationship between FET and other treaty obligations;[69] and (c) generally the substantive content of the FET standard.[70] Accordingly, IIAs are limiting the interpretative discretion of tribunals and enhancing the predictability of arbitral awards.

As most OBOR states are developing countries that may need to intervene in their economy more frequently or with more incisive action, explicit clarifications on the FET clause should be provided to preserve enough latitude for states to regulate several matters in the public interest. These clarifications include (a) a clear linkage of FET to the international minimum standard of treatment, which tends to establish a relatively high liability threshold and outlaws only gross violations; (b) a stipulation that breach of any other treaty norm will not constitute a breach of the FET standard;[71] and (c) identification of the content of FET. As the substantive content of the international minimum standard of treatment is rather unclear and

64 Kinnear (n 37).

65 For example, *Maffezini v Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 [56].

66 For example, China – Uzbekistan BIT (entered into force 1 September 2011) art 4(3).

67 UNCTAD, 'Fair and Equitable Treatment' (2012) <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 12 February 2018.

68 Some tribunals considered FET equal to international minimum standards of treatment. For example *Genin v Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 [367]; while some others interpreted FET based on the plain meaning of the terms. For example, *Enron v Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 [258], [259].

69 Some tribunals held that violation of any other treaty obligations constitutes a violation of FET. For example, *SD Myers v Canada*, UNCITRAL, Partial Award, 13 November 2000 [266].

70 Many tribunals tried to identify specific elements of FET, some of which have been widely accepted, like the protection of investors' legitimate expectations; while others have generated concerns and criticisms regarding transparency. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009) 278, 291.

71 This will be more important after the conclusion of the OBOR FTA, as it may protect host states from numerous suits based on FET but triggered by violations outside the coverage of investment arbitration: see UNCTAD, 'Fair and Equitable Treatment' (n 67).

controversial,[72] an exhaustive list of substantive obligations can reduce the risk of an expansive reading by tribunals.

B. Exceptions to substantial investment treaty obligations

General exception clauses allow states to adopt necessary good faith measures that *prima facie* appear to breach treaty norms without violating the treaty as such. In addition to clarifications and carve-outs to investment treatment, general exceptions are important to protect social values and address public concerns, especially when host states have less leeway to control and restrict foreign investment after granting establishment rights.[73] However, very rarely do OBOR states' IIAs contain exception provisions. Although states can raise the necessity defence under customary international law, even when the applicable IIA does not explicitly stipulate any exception as such, the requirements for the defence are strict and difficult to satisfy,[74] while its interpretation is controversial and inconsistent.[75] Therefore, it is advisable to include exception clauses that can be invoked more easily and offer greater certainty. Conversely, certain safeguards are necessary to prevent the abuse of exceptions.

Safeguards can be imposed in various manners, and may adopt both a substantive and a procedural point of view.[76] However, the following two express requirements should be included in any case. One is necessity, the other is non-discrimination. These two requirements can, at least conceptually, restrict the

[72] There is controversy regarding the standard of international minimum treatment. Some arbitral tribunals held that it is the same as in the Neer case. For example, *Glamis Gold v the US*, UNCITRAL, Award, 8 June 2009 [616]. Conversely, others highlighted the evolutionary nature of customary international law. For example, *Merrill and Ring v Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010.

[73] UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (n 43).

[74] There are five requirements for the necessity defence: (a) essential interests of the state are subject to great and imminent peril; (b) the measure adopted is the only way to safeguard these interests; (c) the measure does not impair essential interest of other states or the international community; (d) the obligation has the possibility to invoke necessity; and (e) the state has not contributed to the existence of the emergency situation itself. Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, art 25.

[75] With the same factual background, the tribunals in *CMS v Argentina* and *LG&E v Argentina* draw opposite conclusions on whether Argentina was eligible to evoke the necessity defence under customary international law. See CMS, ICSID Case No. ARB/01/8, Award, 25 September 2007 [319]–[331]; LG&E, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 [238]–[242], [255]–[257].

[76] For substantial limitations, some IIAs only exempt specific parties from certain obligations, like the Germany – Mexico BIT (entered into force 23 February 2001) art 3(1); for procedural limitations, the Japan – Vietnam BIT (entered into force 19 December 2004) art 15 requires the state invoking the exception to notify its contracting party.

abuse of non-conforming measures by host states and protect foreign investments in exceptional circumstances.

Nevertheless, the arbitral interpretation of necessity varies. Therefore, recent IIAs tend to include a self-judging clause, to prevent tribunals from conducting their assessments on whether the situation of necessity can be established, but rather leave this to be determined by the host state adopting the measures.[77] In such circumstances, tribunals can only review whether the measure has been implemented in good faith.[78] Although some tribunals argue that the standard of good faith review will not differ much from a substantive review under a non-self-judging clause,[79] it is widely accepted that with a self-judging clause in place, tribunals will lower their (more deferential) review standard.[80] As the circumstances of OBOR states vary significantly, a self-judging clause can retain their discretion and thus better suits different needs. However, states may also use self-judging clauses to dilute investor protection. Such risks may be mitigated by asking tribunals to take into account the host state's stage of development when conducting the good faith review.[81]

There are several types of general exceptions, two of which are essential to the OBOR investment treaty. One is the national security exception, which can ensure public order, and thus is particularly needed by a number of states. The other is the protection of health, environment and natural resources. These two sets of exception clauses can contribute to the goals of achieving security and sustainable development while attracting foreign investments, and thus should be mandatory provisions of the treaty. Additionally, there exist exception clauses for other policy objectives, including the preservation of cultural and linguistic diversity and cultural heritage. Here, states can customise general exception provisions according to their needs and development policies.

C. Dispute settlement mechanisms

The issue of dispute settlement is essential to the application and enforcement of IIAs, and thus fundamental to the achievement of treaty goals and the balance of interests between foreign investors and host states. Accordingly, the design of

[77] For example, TPPA (n 54) arts 9.16 and 29.2.

[78] State parties are required to perform every treaty in good faith under customary international law. See Vienna Convention on the Law of Treaties 1969 art 26

[79] For example, LG&E (n 75) [214].

[80] For example, *Continental Casualty v Argentina*, ICSID Case No. ARB/03/09, Award, 5 September 2008 [182].

[81] States' level of development has affected the merits of several investment arbitral awards. For example, *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 [76]–[82].

the dispute settlement mechanism is also important for the success of the OBOR initiative.

Investment arbitration can impose heavy financial burdens on litigating parties. According to an OECD survey, the average legal and arbitration costs in reviewed cases are over $8 million.[82] The amounts of compensation awarded to foreign investors can also be substantial. In an IISD survey, the average sum in eighty-three reviewed awards exceeded $8 billion.[83] Most OBOR states have already faced a number of investment claims.[84] Therefore, it is also desirable to mitigate the costs and legal risks faced by host states in investment dispute settlement. This section addresses the concerns from two points of view. One is the possibility to establish an OBOR investment treaty commission; the other is the drafting of dispute settlement provisions in the treaty itself.

A treaty commission could be established as a permanent institution, composed of official representatives and legal experts from all states. First, it could supervise and support the implementation of the treaty in state parties. Particularly developing countries may require legal advice regarding various issues of implementation, especially when they need to change domestic laws. Moreover, whenever the commission would spot a potential breach, it could inform the country concerned and suggest corrections, to minimise the risk of possible claims. The legal advice provided by such a commission is usually not legally binding, and thus states are free to decide whether they intend to follow it. However, reports of supervision activities are commonly published, and thus reveal states' compliance. Consequently, countries that ignore these reports may face greater risks of disputes and less foreign investment.

Secondly, the commission could also help with dispute settlement. This can be achieved by providing a sound platform for mediation between investors and states. Compared to investor-state arbitration, mediation is speedier and cheaper, and thus could ease the burden for the parties involved. Moreover, mediation is more informal, and hence more likely to achieve a mutually acceptable solution.[85] Alternatively, notes of interpretation could be issued upon the request

[82] OECD, 'Investor-State Dispute Settlement Public Consultation: 16 May – 9 July 2012' (2012) <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf> accessed 10 April 2018.

[83] D. Rosert, 'The Stakes are High: A review of the financial costs of investment treaty arbitration' (2014) <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 10 April 2018.

[84] 57 OBOR states have faced investment claims so far, among which 16 have faced more than 10 claims, while 6 of which than 20 claims. See UNCTAD, 'Investment Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> accessed 11 April 2018.

[85] Jeswald W Salacuse, 'Is there a Better Way – Alternative Methods of Treaty-Based, Investor-State Dispute Resolution (2007) 31 Fordham International Law Journal 138.

of parties involved in an arbitration procedure. These are binding upon both the present tribunal and future ones. As long as the interpretation note is clear and understandable, and does not amount an amendment of the treaty, such an approach could increase certainty and predictability.[86] Furthermore, it will ensure that treaty provisions are responsive to the needs of the states involved. Finally, the enforcement of arbitral awards could be facilitated through the commission providing investors with useful information on matters such as asset availability and location. The aforementioned functions could effectively reduce the legal risks faced by host states. Consequently, they may be more willing to accept a higher standard of protection in the treaty.

Some scholars propose to design a dispute settlement centre specifically for OBOR investor-state arbitration.[87] This commendable proposal seeks to accommodate the peculiarities of OBOR states and investors, but may not work as expected. If the treaty offers foreign investors a unilateral choice between listed fora, including the OBOR dispute settlement centre, foreign investors may hesitate to prefer a newly established institution over popular and experienced ones. Thus, the centre may struggle to play a meaningful role. However, the other option is viable neither. It is very rare nowadays to provide only one available forum to foreign investors,[88] as such an approach is considered too restrictive. Additionally, even without establishing a new dispute settlement centre, states can still shape arbitration proceedings according to their specific needs by explicitly defining detailed rules regarding various procedural aspects, such as the qualifications of the arbitrators. Therefore, it is both impractical and unnecessary to establish a dispute settlement centre specifically for the OBOR initiative.

In sum, legal risks and costs are essential concerns of host states when they decide whether to accept a higher standard of investment protection. Therefore, a dispute settlement mechanism that can mitigate the risks and financial burdens of states can, perhaps somewhat counter-intuitively, also benefit foreign investors.

[86] Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Emmanuel Gaillard (ed) *Fifteen Years of NAFTA Chapter 11 Arbitration* (JURIS, 2011) 175.

[87] For example, Lewis and Moise (n 26).

[88] States have gradually increased the number of fora available to foreign investors. The proportion of treaties offering only one forum has declined since the early 1980s, and since 2009 no such treaty exists. OECD, 'Dispute settlement provisions in international investment agreements: A large sample survey' (2012) <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf> accessed 30 June 2018.

D. Special issues about state-owned enterprises as foreign investors

With the rapidly increasing amount of foreign investments made by SOEs,[89] issues regarding these institutions have attracted much attention and intense debate.[90] There exist various concerns, which can be invoked as strong reasons to bar their activities. For instance, the China-owned Ralls Corporation was ordered by the US to divest a part of its assets for national security reasons.[91] As Chinese and other SOEs play an important role in OBOR investment projects,[92] it is important to consider their protection while safeguarding the interests of host states.

The foremost issue in this regard is the coverage of treaty protections. Very rarely do investment treaties explicitly refer to sovereign investors.[93] Unless an explicit provision to the contrary is present, investment treaties should be interpreted as covering SOEs, as the term 'investor' is broadly defined to include all kinds of legal entities.[94] However, the qualification of SOEs as investors under investment treaties is still debatable without clarification, especially in investment dispute settlement.[95] As SOEs usually operate in highly capital-intensive industries, they are more likely to incur investment disputes.[96] Accordingly, it is important to guarantee SOEs' standing in arbitration through their manifest inclusion in the investor definition. Similarly, state-owned vehicles like sovereign wealth fund and

[89] There were about 650 state-owned multinational enterprises with around 8,500 foreign affiliates in 2010, while in 2017 the numbers have grown to 1,500 and 86,000 respectively. UNCTAD, World Investment Report 2011 <http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf> accessed 29 May 2018; UNCTAD, 'World Investment Report 2017' (n 9).

[90] ibid. See also the contribution of Bian elsewhere in this Special Issue.

[91] The White House, 'Order Signed by the President regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation' (2012) <https://obamawhitehouse.archives.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c> accessed 29 May 2018.

[92] Wu Gang, 'SOEs Lead Infrastructure Push in 1,700 "Belt and Road" Projects' (*Caixin Global*, 9 May 2017) <https://www.caixinglobal.com/2017-05-10/101088332.html> accessed 30 May 2018.

[93] Yuri Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A fact finding survey' (2015) *OECD Working Papers on International Investment* 2015/01 (OECD Publishing 2015).

[94] UNCTAD, 'The protection of national security in IIAs' (2009) <http://unctad.org/en/docs/diaeia20085_en.pdf> accessed 30 May 2018.

[95] For circumstances under which the definition of "investor" should not include SOEs, see Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected?' (2011) 6(2) Journal of International Law and International Relations 1.

[96] Lauge N Skovgaard Poulsen, 'States as Foreign Investors: Diplomatic Disputes and Legal Fictions' (2016) 31(1) ICSID Review 12.

governments themselves can also be included, to cover sovereign investments as broadly as possible.

Manifest inclusion of SOEs in the investor definition is the starting point for equal treatment of private and sovereign investors, which needs to be further guaranteed through non-discrimination provisions included in the treaty. As relative standards, their specific contents depend on the treatment accorded to comparable investors. Therefore, the criteria to select comparable investors are crucial. Inclusion of a qualification such as "in like circumstances" can provide guidance to the selection of comparable investors.[97] However, it is possible to treat ownership structure as a difference in circumstances, and thus accord sovereign and private investors different treatments.[98] Therefore, further clarifications are necessary to assure an overall examination and avoid limiting the analysis to only one factor.[99]

In my view, it is impractical and unnecessary to distinct investments made by SOEs from private investments. First, the main concerns of host states regarding SOEs, like national security and competitive neutrality can be mostly addressed by exception clauses.[100] Secondly, except ownership structure, home states have various approaches to assert influence or control over foreign investments. This blurs the distinction between investors and their home states,[101] as private investors can also act as sovereign investors under such circumstances, and so a distinction would be arbitrary. Thirdly, assumptions regarding the different goals of SOEs and private enterprises are not necessarily valid. One is that private enterprises operate for purely shareholder value maximisation motives; the other is that SOEs behave differently from private enterprises. Both can be easily rejected by counter-examples.[102] Although investments made by SOEs, on average, tend to pose higher risks to host states, their sovereign's ownership is not a determinative factor.[103] Accordingly, the risks triggered by private investments should not be overlooked,

[97] UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (n 43).

[98] Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprises in the Context of International Investment Agreements?' (2016) 31(1) ICSID Review 45.

[99] A sample provision can be Article 4 of the Croatia – Azerbaijan BIT (adopted 2 October 2007, entered into force 30 May 2008).

[100] Wang (n 98).

[101] Poulsen (n 96).

[102] Larry C Backer, 'Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment' (2009) 41(2) Georgetown Journal of International Law 101.

[103] James E Mendenhall, 'Assessing Security Risks Posed by State-Owned Enterprises in the Context of International Investment Agreements' (2016) 31(1) ICSID Review 36.

and the approach to assess SOEs should be largely the same as the one for private investments.

As sovereign investors tend to be large and resourceful, they are typically able to enter industries with large upfront costs like natural resources and infrastructure,[104] in which most private investments find it difficult to operate. As these sectors are key to the common development of the OBOR states, it is important to grant sufficient protection to SOEs, to ensure their operation in an investment-friendly environment.

Although building a multilateral OBOR investment treaty is an ambitious and difficult task, once concluded, it can contribute significantly to the making of an even wider-ranging international instrument in two ways. First, the OBOR treaty can open itself up to other states, and thus has the potential of becoming a global mechanism. Secondly, if it would be necessary to design a new international investment treaty, the OBOR treaty can be a great point of reference, a successful response to the need of both home and host states in various stages of development.

[104] Poulsen (n 96).

PROPOSED ESSENTIAL TREATY CONTENTS

Section	Treaty provisions	Proposed contents
Standards of investment treatment	Most-favoured nation treatment	Application to the pre-entry phrase
		Sectoral carve-outs and limitation of changes after conclusion of the treaty
		Qualification of "in like circumstance"
		Application to pre-entry phrase
		Sectoral carve-outs and limitation of changes after conclusion of the treaty
		Qualification of "in like circumstances"
		Explicit exclusion of its application to dispute settlement clauses
	Fair and equitable treatment	Linkage to the international minimum standard of treatment
		Disconnection with the breach of other treaty norms
		Identification of substantive contents
	Requirements of their invoking	Self-judging necessity
		Non-discrimination
Exceptions to substantial investment treaty obligations	Mandatory exception clauses	National security exceptions
		Exceptions for the protection of health, environment and natural resources
	Optional exception clauses	Customisation according to states' needs and development policy
	Treaty commission	Supervision and support the implementation of the treaty
		Assistance with investment dispute settlements
Dispute settlement mechanisms	Dispute settlement clauses	Coverage of essential substantive treaty obligations
		Exclusion of certain treaty provisions opted for by the states
State-owned enterprises	Definition of "investor"	Inclusion of state-owned enterprises

Table I. Proposed essential treaty contents

VI. Conclusion

Despite the significant amount of foreign investments in OBOR states and the high risks these investments face, existing legal protection is insufficient at both the domestic and the international level. Compared to negotiating or upgrading bilateral IIAs between different OBOR states, a comprehensive multilateral OBOR treaty can be a more efficient and beneficial solution to the problem. The making of this treaty can be conducted under China's leading role and with the active participation of other OBOR states. The content and the structure of the treaty can be made based on existing international instruments concluded between OBOR states and practice gained during the promotion of the initiative, which can make the treaty more acceptable and easier to be concluded.

As the OBOR initiative aims at promoting sustainable development and common security of the states involved, a balanced approach should be adopted, which can lure more foreign investments while effectively protect the interests of host states. Essential treaty contents relating to the goals of the initiative include standards of investment treatment and their exceptions, as well as a dispute settlement mechanism. Besides better investment treatments, greater details are also necessary. Moreover, considering the leading role played by SOEs, it is important to extend the protection of the treaty to these enterprises.

The construction of a multilateral OBOR investment treaty is no less ambitious and difficult than the initiative itself, as the states involved vary significantly. This may be the reason for China to begin building the legal framework with signing BITs.[105] However, its conclusion will be of great significance to both the development of states involved and the global investment legal regime.

[105] Until 2016, China has signed BITs with 56 OBOR states. MOFCOM, 'China has signed investment agreements with 56 States along the belt and road' (2016) <http://www.mofcom.gov.cn/article/difang/201606/20160601331178.shtml> accessed 31 May 2018.