***Shen, Wei*: Decoding Chinese Bilateral Investment Treaties.** Cambridge: Cambridge University Press, 2021. ISBN 978-1-108-49098-6 (hardback). 354 pp. £95.-

In *Decoding Chinese Bilateral Investment Treaties*, Shen Wei, Distinguished Professor of Law at Shanghai Jiao Tong University Law School, aims to 'decode' the 'genetic elements' (p. 10) of China's bilateral investment treaty (BIT) law and practice. Shen's analysis extends far beyond China's BIT practice and addresses a range of related topics, including: domestic law reforms in China (one chapter, for example, is entitled 'China's Foreign Investment Law in the Past Four Decades'); the experience of China and Chinese investors in international investment arbitration; China's accession to the World Trade Organization; and detailed consideration of the 'return of the state' (p. 254) paradigm developed by José Alvarez (under which states reassert sovereign interests through a rebalancing of host state and foreign investor rights under more recent BITs).[1] Shen's book provides an encyclopedic account of China's investment treaty program and will serve as an indispensable resource for scholars, policymakers, and practitioners working at the intersection of international economic law and China.

Shen characterises China's BIT-negotiating strategy as 'dichotomic' (p. 4), reflecting considerable adaptability when transitioning between different sets of negotiations. China's BIT practice has evolved significantly over time – as closely examined by many scholars who, respectively, have identified distinct generations of Chinese BITs – but China's adaptability in concurrent sets of negotiations is particularly noteworthy.

China's BITs with Russia (concluded in 2006) and Mexico (concluded in 2008) illustrate such adaptability. The China-Russia BIT contains 13 articles; the China-Mexico BIT contains 32 articles. The China-Mexico BIT addresses many issues that are not covered in the China-Russia BIT, including an express contracting party consent to arbitrate, consolidation, interim measures of protection, and denial of treaty benefits by the host state. Notwithstanding such differences, both treaties generally would be considered part of the second generation of Chinese BITs, which Shen (consistent with the views of many scholars) identifies as beginning in the late 1990s, when China expanded investor protections and the scope of its consent to arbitrate investment disputes (coinciding with the introduction of China's 'Go Global' policy encouraging outbound investment by Chinese investors).

Regarding China's experience in investment arbitration, Shen addresses the imbalance between the large number of BITs concluded by China and the

1 See José E. Alvarez, 'The Return of the State', Minnesota Journal of International Law 20 (2011), 223-264.

DOI 10.17104/0044-2348-2022-2-507

relatively low number of cases involving Chinese BITs. Referring to this imbalance as the 'China disequilibrium' (p. 144) issue, Shen identifies a set of potential explanations that have been offered in response to the imbalance: a low number of treaty violations, limited investor protections under first generation Chinese BITs, and a preference for informal dispute resolution. With respect to first generation Chinese BITs, it is noteworthy that several tribunals – in *Tza Yap Shum v. Peru*, *Sanum v. Laos*, and *BUCG v. Yemen* – have allowed the scope of claims submitted to arbitration to include issues of both liability and quantum, even though applicable treaty language under those BITs could be interpreted as strictly limiting disputes to quantum issues. Thus, in several instances, even first generation Chinese BITs have provided a meaningful level of investor protection, which suggests that factors other than the outdated nature of many Chinese BIT likely have contributed to the 'China disequilibrium'. In addition, given a recent increase in claims brought by Chinese claimants, the 'China disequilibrium' might soon refer primarily to the experience of China as a respondent, with less applicability to the experience of Chinese investors as claimants.

Regarding the small set of investment treaty claims brought against China, Shen discusses two cases in some detail: *Hela Schwarz GmbH v. China* and *Ansung Housing Co., Ltd. v. China*. In the *Ansung Housing* decision, the claimant attempted to rely on the most-favoured-nation treatment (MFN) provision under the applicable China-Korea BIT to avoid a three-year limitation period under the treaty, arguing that many other Chinese BITs did not contain such provisions (p. 105). The tribunal rejected the argument, finding that the MFN provision did not extend to a State's consent to arbitrate, including the limitation provision. Shen observes that in its more recent BIT practice, China has clarified that MFN protections do not extend to procedural provisions in other treaties (p. 105).

Shen's discussion of the *Hela* case – which was brought under the China-Germany BIT and remains pending – focuses on the issue of parallel proceedings in domestic courts. The investment arbitration tribunal in *Hela* considered the claimant's request for provisional measures, which had been based on a concern that a domestic court in the Chinese city of Jinan would aggravate the dispute by ordering the evacuation and demolition of the claimant's manufacturing facilities in Jinan, as part of a renovation project organised by Jinan (pp. 183-184). The tribunal rejected the provisional measures request on grounds that most of the facilities already had been demolished (p. 184). Shen's discussion of the *Hela* case leads to a far larger discussion of China's strikingly different approaches to parallel proceedings in its BIT practice, which range from requiring a claimant to first initiate court proceedings before submitting a claim to arbitration to disallowing

 DOI 10.17104/0044-2348-2022-2-507

such a practice (pp. 194-197). Shen highlights the complexity and sensitivities associated with parallel proceedings, particularly in cases such as *Hela* where 'the fair treatment of all parties is of great concern to the Chinese government in terms of the public interest' (p. 207), and finds that the importance of striking an appropriate balance in such cases ultimately supports the establishment of some form of appellate mechanism for the investment arbitration regime.

Shen's analysis is particularly effective when considering the interaction between China's investment treaty practice and domestic law reform. Perhaps the most striking example of such interaction occurred in 2013. That year, BIT negotiations between the United States (US) and China were quite active and led to a public announcement by China's Ministry of Commerce (MOFCOM) that China had agreed to negotiate a BIT with the United States on a 'negative list' basis, under which sectors not listed on a 'negative list' of excluded sectors would be open to foreign investment. That same year, the Shanghai Free Trade Zone (FTZ) was established and the Shanghai Municipal Government issued a negative list applicable to foreign investment in the Shanghai FTZ (p. 34). Over the next several years, this negative list approach to foreign investment was expanded, on an incremental basis, to certain FTZs and provinces in China, ultimately leading to the issuance of a China Negative List, applicable nationwide, in 2018 (p. 35). As Shen observes, the 'key reason for China vigorously promoting the reform of its foreign investment regulatory system with its negative list as the core lies in the pressure exerted by developed countries such as the USA and the EU in relevant BITs negotiations' (p. 40).

Shen's conclusion includes several key insights. First, it 'appears that China, as a capital exporter, possesses the capability to influence the shape of BITs and FTAs even for other developed states […] (which) is changing the dynamics between the two sides […] from one-way to two-way interaction' (p. 328). Second, China's 'regional FTA network' presents 'a new framework to maximize China's growing bargaining leverage and influence' (p. 329). Third, 'the scale and speed of domestic economic and governance reform have an impact on China's international economic policies and its determination and capability to make more concessions in BIT negotiations' (p. 331). Fourth, 'China's desire and ability to engage in bilateral, regional and global integration are strong indicators of the government's interest in a path of market-oriented reform' (p. 331). Fifth, China 'largely supports the policy choice to refine and improve the existing (investor-state dispute settlement) system as it lacks willingness and ability to invest in a better alternative which may depart from the liberal value that other stakeholders would support' (p. 332). With these insights, Shen again recognises the intertwined relationship

that exists between China's investment treaty practice and domestic law reform.

It has been more than a decade since the publication of the seminal work on China's BIT program by Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties: Policies and Practice* (Oxford 2009). In that sense, Shen, in his 2021 publication, has the opportunity to consider China's BIT practice from a new perspective: the development of the practice in the 2010 s and into the 2020 s. In some respects, and for the reasons discussed below, that opportunity could have been seized with greater force.

With respect to international economic law rulemaking in the late 2010 s, the practice of the United States and the Association of Southeast Asian Nations (ASEAN) is particularly noteworthy, but for quite different reasons. Regarding US practice, the United States withdrew from the Trans-Pacific Partnership (TPP) agreement in 2017, and is not participating in either of the two Asia-Pacific 'mega-regional' trade agreements, both of which include investment chapters and have entered into force: the TPP's successor agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). In addition, progress with respect to US-China BIT negotiations appears to have stalled, as part of a larger Trump administration retreat from international engagement, although the potential remains for some form of renewed momentum under the Biden administration. Notwithstanding such developments, Shen finds ongoing US influence as a rulemaker through continuing reliance by other states on US treaty practice from earlier decades; as one example, Shen observes that the 2004 Australia-United States Free Trade Agreement has 'inspired other countries such as Australia and New Zealand in their FTA-making' (p. 328). Given such ongoing US influence, Shen finds that the United States 'ultimately dominates the discourse' (p. 328) on regional trade agreements and that the United States and the European Union appear to be 'leading the course' of international investment law (p. 328). But characterisations made in the 2020 s concerning US leadership in international economic law rulemaking – particularly with respect to rulemaking in the Asia-Pacific region – should be informed by the US retreat from such leadership that occurred during the Trump administration in the 2010 s.

Regarding ASEAN practice, Shen includes detailed discussion of the treaty practice of ASEAN as an inter-governmental organisation as well as the practice of individual ASEAN member states. Throughout the book, the RCEP agreement is addressed, but its significance is understated. RCEP – which is often referred to as the world's largest trade agreement – was an ASEAN-led initiative that has further advanced ASEAN's reputation as a

 DOI 10.17104/0044-2348-2022-2-507

leading rule-maker in the region. The RCEP negotiating objectives reinforced both ASEAN's leadership role and the principle of ASEAN centrality, under which ASEAN is to serve as the focal point for external relations in the region. A 2020s account of China's BIT practice and, more broadly, international economic law rulemaking in the Asia-Pacific region, should closely consider the enhanced stature of ASEAN as a rule-maker.

One final point concerns the actors who negotiate China's BITs and represent China as a respondent in investment arbitration. In the *Ansung Housing Co., Ltd. v. China* case, for example, China was represented not only by two private law firms but also by a team of lawyers from MOFCOM. The capacity of government lawyers not only to negotiate treaties but also to actively represent their government in investment arbitration is noteworthy; while BITs are negotiated by government officials, BIT claims often are defended by private lawyers. In addition to representing China in investment arbitration, lawyers based at MOFCOM do, at times, publish articles and accept speaking engagements. One prominent example would be the Director-General of the Department of Treaty and Law at MOFCOM, Li Yongjie. The publicly-available insights of government lawyers can help to decode the practice of governments.

Professor Shen has made a great contribution to international economic law scholarship. *Decoding Chinese Bilateral Investment Treaties* reflects a comprehensive understanding of China's practice in the area of international investment law and policy.

Mark Feldman, Shenzhen/China

DOI 10.17104/0044-2348-2022-2-507 ZaöRV 82 (2022)