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Manjiao Chi[1]

ABSTRACT

Though the international law principle of permanent sovereignty over natural resources was originally designed for colonized peoples to pursue their right to self-determination, it has profound economic implications touching upon foreign investment protection and foreign trade governance. China traditionally held a developing country-positioned and ownership-oriented attitude towards resource sovereignty, stressing state ownership of natural resources. However, in recent years, because of China's economic rising and changing status in the international community as well as its frequent participation in international resource-related dispute settlement, China began to shift its attitude towards resource sovereignty to community-based and governance-oriented.

I. Introduction

The year 2012 marks the 50th anniversary of the adoption of United Nations General Assembly ("UNGA") Resolution 1803, titled Permanent Sovereignty over Natural Resource.[2] This Resolution, together with some others lay down the foundation of the international

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[2] Permanent Sovereignty over Natural Resource, adopted on 14 December 1962.

law principle[3] of sovereignty over natural resources (PSNR). Although the original roots of this principle were found in two main concerns of the UN, namely the economic development of underdeveloped countries and the self-determination of colonized peoples,[4] the rich economic implications of this principle shall not be overlooked, particularly with regards to foreign investment and trade regulation. It is even suggested that this principle represents an "expansion of international law into the field of economics", and is deemed as "a major development of the twentieth century".[5] Besides, the economic implications of the principle of PSNR is particularly important considering that economic development, instead of political independence, has become the main aspirations of the vast number of underdeveloped countries in the world today.

For historical reasons, China traditionally adopted an ownership-oriented view of resource sovereignty, claiming that all natural resources within its territory shall be owned by the state or the collective ("*Ji Ti*").[6] However, in recent years, China has risen to be the world's second largest economy and is actively engaged in global trade and investment activities. Such change prompted the shift of China's attitudes towards resource sovereignty from ownership-oriented to governance-oriented, which essentially obliges the exercise of resource sovereignty in a sustainable manner.

This paper explores China's changing attitudes towards resource sovereignty from an international economic law perspective, mainly by discussing China's legal systems of foreign investment protection and foreign trade regulation. In addition to the introduction (Part I) and the conclusion (Part VI), this paper is composed of four parts. Part II provides a brief discussion of the formation and development of the principle of PSNR; Part III briefly discusses China's existing natural resource law system and its major defects. These

[3] The term "international law principle" is difficult to be clearly defined. In this paper, this term is used in its broad and general sense, which should be differentiated from the term used in Art.38 of the Statute of the International Court of Justice, which effects a threefold division of existing international law into convention, international custom and general principle of international law. For further discussion on the meaning of "general principle of law", refer to, *e.g.,* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Cambridge University Press, 1953), at 1-26.

[4] Nico Schrijver, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (Cambridge: Cambridge University Press, 1997), at 369.

[5] See M. Shaw, INTERNATIONAL LAW (6th Edn.) (Cambridge: Cambridge University Press, 2008), at 40.

[6] Interestingly, the legal term "collective" ("*Ji Ti*") or "collective ownership" is important but vague in China. Although collective ownership (of farmland) is clearly codified in various Chinese laws, such as the Constitution and the Civil Law of the People's Republic of China, no national law provides a clear definition of this term. Theoretically, collective ownership means that farmland or resource properties are owned by an entire village or township; in practice, however, due to the vagueness of this term, the land or properties wind up in the hands of a few representatives who can easily expropriate it for lucrative private development. It is also argued that collective ownership is simply a different version of state ownership. Refer to, *e.g.*, Yongshun Cai, *Collective Ownership or Cadre Ownership? The Non-agricultural Use of Land in China*, 175 THE CHINA QUARTERLY 662, 662-680 (2003); Kent Ewing, *China Faces a Second Land Revolution*, ASIA TIMES ONLINE, available at http://www.atimes.com/atimes/China/JA03Ad01.html.

two parts set the scene for the ensuing discussion. Part IV focuses on foreign investment protection under Chinese law by examining the expropriation and compensation clauses ("E&C clauses") contained in China's International Investment Agreements (IIAs) and domestic laws and regulations. It also discusses China's shift of attitudes towards foreign investment protection in recent decades. Part V focuses on China's participation in resource-related international dispute settlement, including investment arbitration cases and WTO disputes. Finally, this paper concludes that, though China traditionally held an ownership-oriented view of resource sovereignty, it has gradually shifted to a governance-oriented view. Such attitudes shift is prompted by both China's unprecedented change of economic and political status in the international community and the profound external influences exerted by China's frequent participation in resource-related international disputes settlement in the recent decade.

II. The Formation and Development of the Principle of PSNR

The principle of PSNR has been developed over decades. It was first developed in the course of struggle for the right to self-determination by colonized peoples after World War II, including the right of newly-independent countries and other developing countries, the Latin American countries in particular, to freely dispose their natural resources.[7] This principle has evolved through several resolutions originating from a variety of UN organs, including resolutions adopted by the UNGA,[8] rather than conventional methods of international law-making such as evolving State practices or the conclusion of treaties.[9] Prof. Nico Schrijver has authoritatively elaborated on the development of the principle of PSNR in his book.[10] For the purpose of this paper, a brief introduction of the evolution of this principle is sufficient.

The early relevant UNGA resolutions are Resolution 523[11] and Resolution 626[12]. The former provides that "underdeveloped countries have right to determine freely the use of their natural resources",[13] and the latter states that "that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations".[14] A

7 Nico Schrijver, *Permanent Sovereignty over Natural Resources*, MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available at http://ilmc.univie.ac.at/uploads/media/PSNR_empil.pdf.

8 Ibid.

9 Nico Schrijver, *supra* note 3, at 371.

10 See *ibid*.

11 Integrated Economic Development and Commercial Agreements (Resolution 524), adopted on 12 January 1952.

12 Right to Exploit Freely Natural Resources and Wealth (Resolution 626), adopted on 21 December 1952.

13 Preamble, Resolution 524.

14 Preamble, Resolution 626.

notable move was taken in 1958, when the UNGA, through Resolution 1314,[15] established the Commission on Permanent Sovereignty over Natural Resources to survey the right to self-determination.[16] The result of the survey was acknowledged by the UNGA in Resolution 1803, despite the heated discussions between different blocs of countries.[17] For such reason, it has been suggested that Resolution 1803 "marks the ending of a discussion on the principle [of PSNR] which has been characterized by a great deal of consensus".[18] This Resolution contains eight functional paragraphs, covering various aspects of the principle of PSNR, including the right to dispose, use and control natural resources, the right to regulate foreign direct investment, the duty of international cooperation and the observance of foreign investment agreements in good faith.

In the years following the adoption of Resolution 1803, various other relevant UN instruments have been adopted, which furthered the development of the principle of PSNR. Two notable instruments are the *Declaration on the Establishment of the New International Economic Order*[19] and the *Charter of Economic Rights and Duties of States*.[20] The former clearly confirms that states shall enjoy "full permanent sovereignty over its natural resources and all economic activities".[21] And the latter provides that "every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities".[22]

These UNGA Resolutions and instruments lay down the rights and duties of states in exercising resource sovereignty, although, strictly speaking, they do not necessarily constitute a formal source of international law and their legal effects are uncertain.[23] Yet, more recently, the customary law status of the principle of PSNR has been clearly confirmed by the International Court of Justice (ICJ) in the Judgment in *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda)*. In this judgment, the ICJ, while recalling various relevant UNGA resolutions, Resolution 1803 and Resolution 3201 in par-

[15] Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination (Resolution 1314), adopted on 12 December 1958.

[16] See para.1, Resolution 1314.

[17] For an introduction of the background of this Resolution, see generally Karol N. Gess, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis,* 13(2) INT'L & COMP. L. QUARTERLY 398 (1964); Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463 (1963).

[18] P.J.I.M. de Waart, Permanent Sovereignty over Natural Resources as a Cornerstone for International Economic Rights and Duties, 24 NETHERLANDS INT'L L. REV. 304, 311 (1997).

[19] Resolution 3201, A/RES/S-6/3201**,** adopted on 1 May 1974.

[20] Resolution 3281, A/RES/29/3281, adopted on 12 December 1974.

[21] See para.4(e), Resolution 3201.

[22] Art.2(1), Chapter II, Resolution 3281.

[23] There is no consensus as to the legal effects of UNGA resolutions. Some scholars argue that such resolutions have a quasi-legislative effect, while others deny them all legal effects. See, *e.g.*, Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4(2) INDIANA J. GLOBAL LEGAL STUDIES 259, 265 (1997).

ticular, clearly recognized that the principle of PSNR constitutes a principle of customary international law.[24]

Indeed, the world today is quite different from it was when Resolution 1803 was adopted fifty years ago. On one hand, self-determination of colonized peoples and struggle for political independence of underdeveloped countries seem no longer the theme of today's world. On the other, the international community has become increasingly interdependent and faces various new common challenges, such as environment protection and sustainable development. Alongside the world's transforming, the emphasis of the principle of PSNR has also "gradually shifted from a primarily rights-based to a qualified concept encompassing duties as well as rights".[25]

Given that the emphasis of the principle of PSNR has recently shifted to the economic fields, it is of interest to explore this principle from an international economic law perspective. Despite the broad coverage of the principle of PSNR, State's control and regulation of natural resource lie in the center of this principle. Practically, regulation of natural resources by state is often realized through regulating resource-related trade and investment activities. In this connection, Resolution 1803 contains explicit provisions with regards to foreign investment protection. It not only addresses "nationalization, expropriation or requisitioning" of foreign investment and investment dispute settlement,[26] but also deals with the observance of international investment agreements.[27] It is for such reason that the adoption of Resolution 1803 is deemed as the cornerstone of the development of the principle of PNSR with regards to foreign investment protection, though not the first move.[28] Besides, although this Resolution does not clearly mention the term "trade", it does cover "the exploration, development and disposition" of natural resources,[29] which could include regulation of international resource trade by states. While recognizing the economic (investment and trade) linkage of the principle of PSNR, this paper discusses China's shifting attitudes towards resource sovereignty and its implications from an international economic law perspective.

[24] See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *Judgment, I.C.J. Reports 2005*, para.244, pp.250-251.

[25] Nico Schrijver, *supra* note 6.

[26] See para.4, Resolution 1803.

[27] See para.8, Resolution 1803.

[28] While recognizing the importance of this Resolution, Lauterpacht observed that by the time Resolution 1803 was adopted, there were already existed a number of bilateral treaties in different forms regulating expropriation and compensation of foreign investment. See Elihu Lauterpacht, *supra* note 20, at 262-266.

[29] See para.2, Resolution 1803.

III. China's Natural Resource Law System and Its Major Defects

At the outset, it would be helpful to be briefly informed of the legal framework of China's natural resource law and its major defects before exploring China's shifting attitudes towards resource sovereignty. Normatively, China's natural resource law system can be understood either broadly or narrowly. In the broad sense, this system covers both natural resource governance laws and environmental protection laws; in the narrow sense, this system only includes natural resource governance laws.[30]

1. China's Natural Resource Law System in a Nutshell

China lacks a special law governing natural resources. Relevant natural resource law rules are scattered in different branches of laws, regulations and rules at different hierarchical orders. Normatively, China's natural resource laws have both domestic (national and local levels) and international law sources. Given the fragmentation of China's natural resource laws, it is neither necessary nor possible to produce an exhaustive list of them. Rather, a few key aspects of China's natural resource laws will be highlighted.

At the domestic level, the foundation of China's natural resource law system is laid down by the *Constitution of the People's Republic of China* ("Constitution").[31] There are also a number of other general and special national laws on the regulation of different types of natural resources, particularly the *Property Law of People's Republic of China* ("PRC Property Law")[32] and the *Environmental Protection Law of the People's Republic of China* ("PRC Environment Law").[33] In addition, there are also various regulations and rules at local levels.

At the outset, it is interesting to be informed that China's natural resource laws do not contain a clear definition of the term "natural resources", but several major national laws do provide non-exhaustive list of the types of natural resources. The Constitution, while addressing the state ownership of natural resources, provides that "All mineral resources, waters, forests, mountains, grasslands, unclaimed land, beaches and other natural resources are owned by the state".[34] In a similar way, PRC Environment Law, when defining the term "environment", provides that environment shall refer to "the total body of all natural elements and artificially transformed natural elements affecting human existence and development, which includes the atmosphere, water, seas, land, minerals, forests, grass-

[30] See Wen Boping, *On the Legal System of Environment and Resource*, Proceedings of the Chinese Society of Environment and Resource Law Symposium 2005, at 1095-1096 (original in Chinese).

[31] Adopted at the 5th Session of the 5th National People's Congress on 4 December1982 and amended at the 2nd Session of the 10th National People's Congress on 14 March 2004.

[32] Adopted at the 5th Session of the 10th National People's Congress on 16 March 2007.

[33] Adopted at the 11th Session the Standing Committee of the 7th National People's Congress on 26 December 1989.

[34] Art.9, the Constitution.

lands, wildlife, natural and human remains, nature reserves, historic sites and scenic spots, and urban and rural areas".[35] This law does not provide further interpretation of the listed types of "natural elements" despite its broad coverage.

The distinct feature of China's natural resource laws lies in the emphasis of state- ownership. Both the Constitution and the PRC Property Law stress the property nature of natural resources, ownership in particular, but neither of them contains concrete and operational provisions on exploitation, utilization, management and protection of natural resources. Such a gap is left to be filled mainly by the PRC Environment Law.[36] As stated, the Constitution provides that "All mineral resources, waters, forests, mountains, grasslands, unclaimed land, beaches and other natural resources are owned by the state".[37] Besides, with particular regards to the land use rights, the Constitution provides that "Land in urban areas is owned by the state", while "Land in rural and suburban areas is owned by the collectives ("*Ji Ti*")".[38] The PRC Property Law reiterates and enhances the state ownership of natural resources, which provides that "The ownership of the real property and the movable property that is exclusively owned by the state as prescribed by law shall not be acquired by any entity or individual".[39]

In addition to the above national laws, China has various special laws and regulations adopted on a resource-specific basis, addressing different types of natural resources. In 1984, China adopted its first national law on natural resource, namely the *Forestry Law of the People's Republic of China*.[40] Since then, China adopted many laws and regulations addressing a wide range of natural resources, such as grassland,[41] land,[42] mineral resources,[43] fishery,[44] wild animals,[45] wild plants,[46] energy-saving,[47] scenery resorts[48] and

[35] Art.2, the PRC Environment Law.

[36] Art.1 of the PRC Environment Law provides that the adoption of this law is for the purposes of "protecting and improving natural environment and the ecological environment, preventing and controlling pollution and other public hazards, safeguarding human health and facilitating the development of socialist modernization."

[37] Art.9, the Constitution.

[38] Art.10, the Constitution.

[39] Art.41, the PRC Property Law.

[40] Adopted at the 7th Session of the Standing Committee of the 6th National People's Congress on 20 September 1984.

[41] Law on Grassland of the People's Republic of China, adopted at the 11th Session of the Standing Committee of the 6th National People's Congress on 18 June 1985.

[42] Law on Land Management of the People's Republic of China, adopted at the 16th Session of the Standing Committee of the 6th National People's Congress on 25 June 1986.

[43] Law on Mineral Resources of the People's Republic of China, adopted at the 15th Session of the Standing Committee of the 6th National People's Congress on 19 March 1986.

[44] Law on Fishery of the People's Republic of China, adopted at the 14th Session of the Standing Committee of the 6th National People's Congress on 20 January 1986.

[45] Law on Wild Animal Protection of the People's Republic of China, adopted at the 4th Session of the Standing Committee of the 7th National People's Congress on 8 November 1988.

[46] Regulations on Protection of Wild Plants of the People's Republic of China, adopted by the State Council on 30 September 1996, issued pursuant to State Council Order No.204.

meteorological resources.[49] Most of these laws are adopted in mid 1980s and amended since the 21st century to meet the changing needs of China's economic development. Similar to the Constitution and the PRC Property Law, almost all of these laws and regulations stress state ownership over natural resources, but none clearly defines the specific type of natural resource covered thereby.[50]

Besides the special laws, other national laws also contain resource-related provisions. A typical example is *the Criminal Law of the People's Republic of China*.[51] Art.340 through Art.344 of this law respectively prohibits such resource-related crimes as illegal fishery, hunting of precious animals, use of farm lands, mining and lumbering. These provisions are necessary supplements to the above special laws. In addition to these national laws and regulations, many ministerial regulations and implementing rules have also been issued by the relevant ministries and local governments to address various resource-related issues.

At the international law, China is a contracting party to many multilateral treaties covering various resource-related issues. To list a few, China ratified the 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* on 12 December 1985,[52] signed the 1992 *Convention on Biological Diversity* on 11 June 1992,[53] and ratified the 1982 *Convention on the Law of the Sea* on 15 May 1996.[54] It is also possible that China will join more resource-related international organizations or conventions in the near future.[55]

[47] Law on Energy-Saving of the People's Republic of China, adopted at the 28th Session of the Standing Committee of the 8th National People's Congress on 1 November 1997.

[48] Regulations on Scenery Resorts of the People's Republic of China, adopted by the State Council on 6 September 1996, issued pursuant to State Council Order No.474.

[49] Law on Meteorology of the People's Republic of China, adopted at the 12th Session of the Standing Committee of the 9th National People's Congress on 31 October 1999.

[50] See, *e.g.*, Art.3, the Law on Forestry of the People's Republic of China; Art.9, Law on Grassland of the People's Republic of China; Art.2, Law on Land Management of the People's Republic of China; Art.3, Law on Mineral Resources of the People's Republic of China; Art.3, Law on Wild Animal Protection of the People's Republic of China.

[51] Adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979, amended by 5th session of the 8th National People's Congress on 14 March 1997.

[52] The status of the Convention is available at http://whc.unesco.org/en/statesparties/.

[53] The status of the Convention is available at http://www.cbd.int/convention/parties/list/.

[54] The status of the Convention is available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#.

[55] For instance, China plans to formally accede to the International Renewable Energy Agency (IRENA) in 2013, available at http://www.mlr.gov.cn/xwdt/jrxw/201301/t20130114_1174973.htm (original in Chinese).

2. Major Defects of China's Natural Resource Law System

As can be seen from the above introduction, China's natural resource laws have defects. Technically speaking, China lacks a comprehensive law on natural resources. Laws and regulations at both national and local levels governing the ownership, exploitation, utilization and management of natural resources and those governing protection and sustainable development of natural resources are divided into two categories. In other words, Chinese laws on using natural resources and protecting environment are segregated. Further, each category of law and regulations are made on a resource-specific basis and are thus seriously fragmented.

The fragmentation of law is amplified by the fact that different categories of laws are implemented by different government organs. In 2008, China established the Ministry of Land and Resources (MLR) and the Ministry of Environmental Protection (MEP) as two constituent organs of the State Council of China (China's Central Government).[56] According to their respective mandate, MLR is charged of *inter alia* the protection and reasonable use of land, mineral, ocean and other natural resources,[57] while MEP is charged of *inter alia* dealing with important environmental problems, preventing, controlling pollution and guiding, coordinating and supervising ecological development.[58] Given the close connection between using natural resources and protecting environment, the work division between MLR and MEP is somehow vague and overlapping. Besides, the lack of coordination between these ministries sometimes produce tensions between exploitation and utilization of natural resources for economic growth and protection of natural resources for sustainable development.

Besides, China's laws neither provide a clear definition of the term "natural resource" nor operable criteria to help distinguish state ownership from private ownership, despite their stress on state ownership of natural resources. In practice, the high level of state grip of natural resources and the vagueness of China's laws often lead to insufficient protection of resource-related private property rights and could result in inappropriate intervention in international trade and investment activities. For such reason, it is unsurprising to see that China's natural resources laws and regulations are frequently challenged and criticized at both national and international levels.

At the national level, a typical defect of the implementation of the resource laws is arbitrary expropriation of resource-related private properties in the name of defending state ownership, which has been brought to the spotlight by several widely-reported recent cas-

[56] Art.2(1), Notice on Organization Establishment of the State Council of the People's Republic of China, Doc. No. Guo Fa (2008) 11, available at http://www.gov.cn/zwgk/2008-04/24/content_953471.htm (original in Chinese).

[57] The mandate of MLR is available at http://www.mlr.gov.cn/bbgk/zyzn/201009/t20100908_762243.htm (original in Chinese).

[58] The mandate of MEP is available at http://www.mep.gov.cn/zhxx/jgzn/ (original in Chinese).

es. In June 2012, China's northeastern Heilongjiang Province issued *the Regulation on Exploitation and Protection of Climate Resources of Heilongjiang Province*. According to this Regulation, enterprises must obtain prior approval for exploitation of wind or solar energy, and such energy, if confirmed, shall be owned by the state. This regulation has been widely criticized, yet the provincial Government of Heilongjiang claimed that it is in full conformity with Art.9 of the Constitution and other relevant national laws and regulations.[59] In another case, it has been reported in July 2012 that Gushi County of central China's Henan Province issued a regulation requiring local peasants to pay "natural water fee" for using rain water for irrigation, claiming that rain water is state-owned natural resource.[60]

At the international level, many natural resource management measures of China are challenged for inconsistency with China's international obligations. This has happened in several recent investment arbitration cases and WTO cases involving China.[61] For instance, in *China—Raw Materials* (DS394/DS395/DS398), the challenged measures of China cover various laws and regulations concerning export management of several types of raw materials (mostly mineral resources) adopted by a number of state organs, including the Standing Committee of the National People's Congress (China's top legislature), the State Council (China's central government), Ministry of Foreign Economics and Trade (the predecessor of the Ministry of Commerce), General Administration of Customs and the State Council Tariff Policy Commission.[62] In the recent investment arbitration case against China (*Ekran Berhad v. People's Republic of China*), Ekran Berhad as the investor challenged the local measures concerning land use rights. A more detailed discussion of these cases will be provided in Part V of this paper.

IV. Expropriation of Foreign Investment under Chinese Law

Regulation of nationalization and expropriation of foreign investments stands at the forefront of investment protection. As mentioned, one of the most important elements of the principle of PSNR is that host state has right to nationalize foreign investments within its territory for public interest purpose and against compensation. In the words of the Resolution, "public interests requirement" requires that nationalization must be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests; while the "compensation requirement" requires

[59] Available at http://news.xinhuanet.com/politics/2012-06/20/c_112260656.htm (original in Chinese).

[60] But this news was denied by local government officials, available at http://news.china.com.cn/2012-07/05/content_25813184.htm (original in Chinese).

[61] Refer to Part V of this paper.

[62] See Request for Consultations by the United States, WT/DS394/1, 25 June 2009.

that investors shall be paid appropriate compensation in accordance with the rules in force in the state and in accordance with international law.[63]

Although China is a party to various multilateral investment treaties,[64] there is no such international treaty dedicated to the issue of investment protection.[65] In fact, foreign investment protection is regulated by China's domestic laws and its Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). According to the statistics of the Ministry of Commerce of the People's Republic of China (MOFCOM), up to present, China has concluded 132 BITs, with 102 now in force.[66] It is generally agreed that China's BITs can be roughly divided into two generations: BITs concluded before late 1990s are deemed as the first generation BITs, while those concluded thereafter are second generation BITs.[67] China has also concluded 10 FTAs with foreign countries, Taiwan, the Hong Kong and Macau Special Administrative Regions.[68] This Part briefly discusses the expropriation and compensation clauses ("E&C clauses") in China's national laws and BITs.

[63] See para.4, Resolution 1803.

[64] China signed the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 9 February 1990, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English; China became a member state of the 1988 Convention Establishing the Multilateral Insurance Guarantee Agency (MIGA Convention), on 30 April 1988, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:20122866~menuPK:64020025~pagePK:64020054~piPK:64020408~theSitePK:278036~isCURL:Y,00.html; China acceded to the World Trade Organization (WTO) on 11 December 2001, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; China ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 22 January 1987, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[65] M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3rd Ed.) (Cambridge: Cambridge University Press, 2010), at 415.

[66] A list of China's BITs is available at the official website of the Department of Treaty and Law of the Ministry of Commerce of the People's Republic of China (MOFCOM). It must be noted this website only lists BITs in force, while the BITs that have been signed but not yet in force are excluded. This list is available at http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html.

[67] However, it is also suggested that China's BITs can be divided into three generations. Generally, BITs concluded before the late 1990s are first generation BITs; those concluded between the late 1990s and mid 2000s are second generation BITs; while those concluded after mid 2000s are deemed third generation BITs. See, *e.g.*, Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, 7(4) TRANSNATIONAL DISPUTE MANAGEMENT 1, 3 (2010); Congyan Cai, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 (2) J. INT'L ECON. L. 457, 462 (2009).

[68] A list of China's FTAs is available at the official website of the Department of International Affairs of the Ministry of Commerce of the People's Republic of China (MOFCOM), available at http://fta.mofcom.gov.cn/english/index.shtml.

1. E&C Clauses of China's BITs

E&C clauses often form a typical part of BITs,[69] and almost all Chinese BITs contain various forms of E&C clauses. The investment chapters of some FTAs also contain E&C clauses similar to those of China's BITs.[70] Although E&C clauses are not the decisive factor for categorizing China's two generations of BITs,[71] the E&C clauses of China's first generation BITs do carry some difference from those of the second generation BITs. In this sense, it is helpful to explore China's changing attitudes towards E&C of foreign investments through studying the E&C Clauses of its two generations of BITs.

On this issue, the old and new *Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments* (China-Germany BIT) provide a good example. The old China-Germany BIT was concluded in 1983,[72] and the new China-Germany BIT was concluded in 2003,[73] which replaced the old one. They represent China's first and second generation BITs respectively, and both contain E&C clauses.

Art.4(1) of the old China-Germany BIT provides that:

> Investors of the Contracting State shall be protected within the territory of the other Contracting State, and the security of such investment should be safeguarded. A Contracting State may expropriate the investment made in its territory by an investor of the other Contracting State only for public interest, under due process of law and against compensation. The compensation shall be paid without unreasonable delay and shall be convertible and freely transferable between the territories of the Contracting States.

Further, the Protocol of the old China-Germany BIT clarifies the relevant wording of the above clause.[74] Art.4(1) of the Protocol provides that "expropriation shall include national-

[69] See, Marco Bronckers & Reinhard Quick (ed.), NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, (The Netherlands: Kluwer Law International, 2000), at 48.

[70] See, e.g., China-ASEAN FTA contains a separate investment chapter titled "Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN", available at http://fta.mofcom.gov.cn/topic/chinaasean.shtml.

[71] It is suggested that the major differences between the two generations of BITs are the acceptance of a comprehensive investor-state arbitration clause and the incorporation of national treatment standard by the second generation BITs. See, *e.g.*, Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15(1) CARDOZO J. INT'L & COMP. L. 73, 89-100 (2007); Kim M. Rooney, *ICSID and BIT Arbitrations and China*, 24(6) J. INT'L ARB. 689, 702 (2007); Ye Ji, *Voluntary "Westernization" of the Expropriation Rules in Chinese BITs and Its Implications: An Empirical Study*, 12(1) J. WORLD TRADE & INVESTMENT 81, 83 (2011).

[72] Available at http://tfs.mofcom.gov.cn/aarticle/h/au/201002/20100206787044.html.

[73] Available at http://tfs.mofcom.gov.cn/aarticle/h/au/201001/20100106725086.html.

[74] The Protocol is an integral part of the BIT, which is available at http://tfs.mofcom.gov.cn/aarticle/h/au/201002/20100206787044.html.

ization and other measure the effects of which would be tantamount to expropriation or nationalization"; Art.4(3) of the Protocol provides that "compensation shall be equivalent to the value of the investment immediately before the expropriation has become publicly known. The Contracting States shall negotiate on the amount of the compensation."

The new China-Germany BIT bears some difference from the old BIT with regards to the E&C clause. Art.4(2) of the new China-Germany BIT provides that:

> Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier. The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable. Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the clauses of Article 9.

As can be seen, the above two E&C clauses bear similarities and differences. On one hand, there are several similarities. (1) Both clauses confirm that in general foreign investments shall be free from expropriation and nationalization and that compensation shall be paid in case of expropriation. (2) Both clauses adopt a broad meaning of expropriation, which includes direct or indirect expropriation, nationalization and other measures with equivalent effects. (3) Both clauses confirm that expropriation measures can only be taken upon satisfaction of public purpose and compensation requirements.[75]

On the other hand, the two E&C clauses also carry some notable differences, with the general impression being that the clause of the new BIT appears more complicated and enforceable than that of the old BIT. The major difference lies in their respective compensation standards. Although the new BIT seems a bit more lenient on the requirements of expropriation, it is much stricter as to the compensation compared with the old BIT. Specifically, the compensation standard of the new BIT has several features: (1) The amount of compensation shall be "equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known,

[75] According to Ye Ji's research, out of China's 131 BITs, 109 BITs adopted fours requirements for expropriation, namely (1) compensation, (2) public purpose, (3) due process of law and (4) non-discrimination. The rest 22 BITs adopt two or three of these requirements. Obviously, the two China-Germany BITs adopt the first two requirements. See, Ye Ji, *supra* note 70, at 83.

whichever is earlier" and "shall carry interest at the prevailing commercial rate until the time of payment". (2) The payment of compensation must be made "without delay". (3) Compensation must also be "effectively realizable and freely transferable". Besides, (4) the old BIT is silent as to the interest of compensation, but the new BIT expressly addresses this issue. Given these features, it is interesting to observe that, although the compensation standard of the new BIT is not verbally identical to the "Hull Formula", namely "adequate, prompt and effective", they are quite similar in essence.

In addition to the compensation standards, the two BITs are also different with regards to the conditions of expropriation and the determination of the amount of compensation. As to the conditions of expropriation, the old BIT contains the requirement of "due process in law", while the new BIT omits it. There is no clear reason for such omission. A possible explanation seems to be that, if such "due process in law" refers to the domestic law of the Contracting State instead of international law, then it would be of no substantial use since state can change its laws to evade such requirement. As to the determination of the amount of compensation, the old BIT provides that "The Contracting States shall negotiate on the amount of the compensation", while the new BIT provides that "the amount of compensation shall be subject to review by national courts, notwithstanding the clauses of Article 9 [Settlement of Disputes between Investors and one Contracting Party]". The new BIT grants the investor access to international arbitration if it is not satisfied with the decision of the national court, which seems more sensible for foreign investors.

2. E&C Clauses in China's National Laws

Besides international treaties, China's national laws also contain E&C clauses concerning foreign investments. The Constitution has two general clauses with regards to the legal status and protection of foreign investments in China: Art.18 addresses investments of foreign enterprises, Sino-foreign enterprises or other organizations;[76] Art.32 deals with investments of foreign individuals.[77] The PRC Property Law then reiterates China's de-

[76] Art.18 of the Constitution provides in relevant part that "The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the clauses of the laws of the People's Republic of China…. All foreign enterprises, other foreign economic organizations and Sino-foreign joint ventures within Chinese territory shall abide by the laws of the People's Republic of China. Their lawful rights and interests are protected by the laws of the People's Republic of China."

[77] Art.32 of the Constitution further provides that "The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory; foreigners on Chinese territory must abide by the laws of the People's Republic of China."

termination of protecting foreign investments.[78] Besides, China also adopted three special laws exclusively address foreign investment regulation, namely *the Law of Sino-Foreign Equity Joint Venture of the People's Republic of China* (Equity Joint Venture Law),[79] *the Law of Sino-Foreign Contractual Joint Venture of the People's Republic of China* (Contractual Joint Venture Law),[80] and *the Law of Foreign-Owned Enterprise of the People's Republic of China* (Foreign Enterprise Law).[81] These laws, also widely known as the "three foreign- related enterprise laws", form the cornerstone of China's foreign investment law system. Practically, they were adopted to help implement China's policy of economic reform and opening up, particularly to help attract, utilize and regulate foreign investments in China.

Art.2 of the Equity Joint Venture Law provides that:

> The state shall not nationalize or expropriate the joint venture; under special circumstances, based on the need of social and public interests, expropriation of the joint venture may be allowed in accordance with legal process and compensation shall be paid accordingly.

An almost identical E&C clause is found in Art.5 of the Foreign Enterprise Law, except for the verbal change of "joint venture" to "foreign-owned enterprise".

Comparing the E&C clauses of China's national laws and those of China's BITs, one is to find that China actually adopts a "dual-track" system regarding protection of foreign investments. Specifically, China's national laws grant a lower level of protection of foreign investments compared with China's BITs, though their E&C clauses look quite similar. China's national laws recognize three general conditions of expropriation of foreign investments, namely (1) public and social interests, (2) legal process and (3) compensation. However, these conditions are different from those of China's BITs. Such difference can have significant practical implications. For instance, the definition of the term "public and social interests" is unclear, and it is arguable whether this term has the same meaning of the term "public interests" of China's BITs. Besides, it is obvious that the term "legal process" in China's national laws is no equivalent to "due process of law" in China's BITs. Finally, as to the compensation standard, China's national laws only provide that expro-

[78] Art.4 of the PRC Property Law provides that "The property rights of the State, collective, individual and other property right holders shall be protected by law, and shall be free from infringement of any institute or individual."

[79] Adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979, amended at 4th Session of the 9th National People's Congress on 15 March 2001.

[80] Adopted at the 1st Session of the 7th National People's Congress on 13 April 1988, amended at 18th Session of the Standing Committee of the 9th National People's Congress on 31 October 2000.

[81] Adopted at the 4th Session of the 6th National People's Congress on 12 April 1986, amended at 18th Session of the Standing Committee of the 9th National People's Congress on 31 October 2000.

priation shall "be compensated accordingly". According to mainstream Chinese scholars, such compensation standard conforms to the standard of the Charter of Economic Rights and Duties of States and is proper.[82] Yet, practically speaking, this standard is extremely vague and cannot match the *de facto* "Hull Formula" provided in some of China's second generation BITs. The disparity in foreign investment protection offered by China's domestic laws and BITs could help explain why foreign investors are not prone to choose local remedies in China but prefer to international arbitration to settle their investment disputes.

3. China's Shifting Attitudes towards E&C of Foreign Investments

Expropriation and compensation of foreign investments has been and still is a thorny issue in international law.[83] Nowadays, although host states' power of nationalization and expropriation of foreign investments is less disputed, controversy remains as to the compensation for expropriation.[84] Traditionally, developed and developing countries have different positions on compensation of expropriation. Developed countries, mainly investment-exporting ones, often insist on a full fair market value compensation reflected in the "Hull Formula"; while developing countries, mainly investment-importing ones, often insist on national treatment standard of compensation which is something less than the fair market value.[85] Given such controversy, it is indicative and interesting to examine the compensation standards in the E&C clauses of China's BITs.

China and its mainstream scholars traditionally view expropriation and compensation of foreign investments from a developing country perspective. They stress host states' right of investment regulation and deem the power to expropriate foreign investments as an inherent aspect of state sovereignty.[86] This position somehow reflects China's past experience of expropriating foreign investment without even paying any compensation, happened in the 1950s after the Communist Party of China (CPC) came into power and adopted the policy of "slow motion nationalization" to build the socialist state.[87] In light of such historical background, it is not difficult to understand that China and its mainstream scholars not only strongly object the "Hull formula", but also the application of international law in determining the compensation.[88]

[82] See, *e.g.*, Huaqun Zeng (ed.), INTERNATIONAL INVESTMENT LAW (Beijing: Peking University Press, 1999), at 36.

[83] See M. Sornarajah, *supra* note 63, at 271& 412-423.

[84] Ji Ye, *supra* note 70, at 83.

[85] Andrew Newcombe & Louis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (The Netherlands: Kluwer Law International, 2009), at 377.

[86] Norah Gallagher & Wenhua Shan, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (Oxford: Oxford University Press, 2009), at 295.

[87] *Ibid.*, at 278-279.

[88] See Ye Ji, *supra* note 70, at 83.

In this regard, the opinion of Prof. An Chen, former President of Chinese Society of International Economic Law (CSIEL), is quite typical. According to Chen, although Resolution 1803 correctly recognizes the right of underdeveloped countries to nationalize foreign investments, it has some defects. First, the compensation standard contained in this Resolution ("appropriate compensation") is quite vague and actually represents a compromise between underdeveloped and developed countries. Second, this Resolution provides that compensation shall be decided both by referring to domestic law and international law,[89] which leaves the door open for international arbitrators to apply international law but not domestic law in deciding compensation. On this point, Chen further opines that the compensation standards in Resolution 3171[90] and the Charter of Economic Rights and Duties of States are more reasonable because both provide that compensation of expropriation is to be determined based on state law without necessarily referring to international law standards.[91] Finally, while referring to the relevant wording of the Preamble of Resolution 1803,[92] Chen also deems it unfair for this Resolution to protect the property of the developed states acquired during their colonial rule of the underdeveloped.[93]

Chen's opinions received wide support among mainstream Chinese scholars. For instance, Prof. Huaqun Zeng, the current President of the CSIEL, found that the expropriation and compensation clauses contained in the national laws of some developing countries provided that whether and how to compensate foreign investments shall be decided by their national laws, and opined that "such clauses adhere to the spirits of Art.2(2)(c) of the Charter of Economic Rights and Duties of States, reflect the developing countries' stance of defending their sovereignty and dignity of law while protecting foreign investment".[94]

[89] Resolution 1803, para.4.

[90] Permanent Sovereignty over Natural Resources, adopted on 17 December 1973.

[91] For instance, para.3 of Resolution 3171 provides that "Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures." Similarly, Art.2(2)(c) of the Charter of Economic Rights and Duties of States provides that "To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[92] The relevant paragraph of the Preamble of Resolution 1803 provides that "nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule".

[93] See An Chen (ed.), MODERN INTERNATIONAL ECONOMIC LAW (3rd Ed.) (Beijing: Higher Education Press, 2012), pp.94-95 (original in Chinese).

[94] See Huaqun Zeng (ed.), *supra* note 80, at 28 (original in Chinese).

Indeed, from a developing country position, the above opinions are not without merits. However, both China and the world are different from they were several decades ago. Historically, China has remained as an investment-importing country for a long period since late 1970s. Yet, such status has gradually changed since the adoption of the "Going Abroad" policy to encourage Chinese enterprises to invest overseas in late 1990s.[95] Today, China is a leading country in both investment-importing and exporting.[96] The change of economic status requires China to negotiate BITs to offer Chinese enterprises and their overseas investments a higher level of protection. Thus, despite its persistent self-positioning as a developing country, China has gradually shifted its investment policy from stressing investment regulation to investment protection. As suggested by Ye Ji, China has gradually changed its pro-investment- importing country policies and is willing to grant a higher level of protection to foreign investments in case of expropriation, which is more pro-investment-exporting countries and their nationals (i.e. foreign investors), phenomenon described by Ji as "voluntary westernization of China's BITs".[97]

On this issue, a brief comparison of the compensation standards of the two China- Germany BITs could be illustrative. In short, the compensation standard of the old BIT has several key elements, including (1) "without unreasonable delay", (2) "convertible and freely transferable" and (3) "equivalent to the value of the investment". While the key elements of the compensation standard of the new BIT include (1) "equivalent to the value of the investment", (2) "without delay", (3) "carry interest" and (4) "effectively realizable and freely transferable". Comparing these two standards, several observations can be made: First, the compensation standard of the new BIT is much more favorable to foreign investments than that in the old BIT. Second, the elements of the compensation standard in the new BIT, considered in their totality, are not substantively different from the elements of the "Hull Formula", although it might be premature to assert that China has fully embraced this Formula in its second generation BITs.

In fact, the upgrading of the compensation standards in China's BITs can also be sensed from China's recent BIT practices. For instance, some recent BITs provide that "compensation shall be equivalent to the fair market value of the expropriated investment" or similar terms.[98] It is suggested by some Chinese scholars that the term "fair market value"

[95] See, e.g., Monika C. E. Heymann, International Law and the Settlement of Investment Disputes Relating to China, 11(3) J. INT'L ECON. L. 507, 524 (2008).

[96] According to the *Statistical Bulletin of China's Outward Foreign Direct Investment* issued jointly by Ministry of Commerce of People's Republic of China, National Bureau of Statistics of People's Republic of China and State Administration of Foreign Exchange, China's net amount of outbound investment in 2011 is 74.65 trillion US dollars, ranking number 6 in the world and increased by 8.5 percent compared with that in 201. Available at http://www.mofcom.gov.cn/aarticle/tongjiziliao/dgzz/201208/20120808315019.html (5 January 2013).

[97] Ye Ji, *supra* note 70, at 83.

[98] See, e.g., Art.5(1)(c), Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the King-

could imply acceptance of the "Hull Formula".[99] However, since China's BITs, particularly its second generation BITs are seldom tested in investment arbitration cases, it remains to be seen how international arbitrators would interpret the compensation standard contained therein.

V. China's Participation in International Resource-Related Disputes

Resource-related legislations and activities of states could be subject to international scrutiny. In this sense, resource-related international dispute settlement provides an opportunity to observe the limits of resource sovereignty. This part, mainly through case study, discusses two types of resource-related international dispute settlement in which China is involved, investment arbitration and WTO dispute settlement, and briefly analyzes the relevance of these cases and China's attitudes towards resource sovereignty.

4. Resource-Related Investment Disputes

Although the principle of PSNR generally allows investment disputes to be settled by national courts of the host state, it does require host state to settle disputes through international arbitration if there is an agreement so requires.[100] As a matter of fact, resource-related and environment-related international investment disputes are frequently seen nowadays.[101] China is a contracting state to the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID Convention) and has concluded a large amount of IIAs containing investor-state arbitration ("ISA") clauses. China bears a treaty obligation to settle resource-related investment disputes through international arbitration.

Despite its large number of IIAs, China does not have many investment disputes. Up to present, there are only four ISA cases based on China's BITs.[102] Not all cases are re-

dom of the Netherlands, signed on 26 November 2001, available at http://tfs.mofcom.gov.cn/aarticle/h/au/201001/20100106725830.html%3Cbr/%3E.

[99] See Ye Ji, *supra* note 70, at 85.

[100] See para.4, Resolution 1803.

[101] See Nathalie Bernasconi-Osterwalder & Lise Johnson (eds.), INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010, available at http://www.iisd.org/publications/pub.aspx?pno=1469.

[102] These cases are, listed chronologically, *Tza Yap Shum v. The Republic of Peru* ("Tza Yap Shum case"), ICSID Case No.ARB/07/6, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending; *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd. and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia* ("Heilongjiang case"), available at http://www.pca-

source-related, though they all arose out of investment issues. Based on the information available,[103] only the Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd. and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia ("Heilongjiang case") and the Ekran Berhad v. People's Republic of China ("Ekran case") are resource-related, concerning mining rights and land-use rights respectively.

The Heilongjiang case was filed by three Chinese investors against Mongolia in 2010, following the cancellation of a mining license in 2009. This is an *ad hoc* arbitration case under the 1976 UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration ("PCA"). In this case, the Claimants contended that Mongolia's actions breached the terms of a Mongolian investment law for the protection of foreign investors, and the terms of the China-Mongolia BIT.[104] Up to date, this case is pending and no further information is publicly available.

The Ekran case is the first case in which China is sued by a foreign investor based on a Chinese BIT, registered by the Secretary-General of the ICSID on 24 May 2011. This dispute is reported to relate to a lease over several pieces of lands in Hainan Province, whose estimated value is 6 million US dollars. The lease was revoked by the local authorities in 2004 on the grounds that the investor had failed to develop the lands as stipulated under the local legislation.[105] Ekran invoked China-Malaysia BIT to claim for compensation. According to the ICSID, this case has been suspended pursuant to the agreement between Ekran and China on 22 July 2011, and no further information is publicly available.

Because both the Heilongjiang case and the Ekran case failed to produce any substantive awards or decisions so far, and because there lacks publicly available details of these cases, it is difficult to ascertain what precise resource-related measures of Mongolia and China were challenged and how international arbitrators would determine the compliance of these measures with the BIT or other applicable international law rules. Yet, the Ekran case makes it clear that foreign investors have access to international arbitration to settle

cpa.org/showpage.asp?pag_id=1378; *Ekran Berhad v. People's Republic of China* ("Ekran case"), ICSID Case No.ARB/11/15, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending; and *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* ("Ping An case"), ICSID Case No. ARB/12/29, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

[103] One has to note that many investment arbitration cases are not made public, particularly before the completion of the arbitration proceedings.

[104] Luke E. Peterson, Chinese Interests Sue over Iron Ore License Termination, 3(10) INVESTMENT ARBITRATION REPORTER, 27 June 2010, at 17-18.

[105] Available at http://www.ashurst.com/publication-item.aspx?id_Content=6135.

resource-related investment disputes based on Chinese BITs and that international arbitrators may review China's resource-related measures and acts and may order compensation in case they rule in favor of the investors.

In the past years, a substantial part of foreign investments have been channeled to the resource and energy industries in China, and China keeps encouraging more foreign investments to new energy industries in recent years.[106] Meanwhile, a significant amount of Chinese outbound investments have also been put to resource-related and energy-related sectors in many parts of the world, particularly in African countries.[107] In light of such factual background, although reported resource-related investment arbitration disputes involving China's BIT are small in number at this point of time, it is highly possible that China and Chinese enterprises will confront more disputes in the future.

5. Resource-Related Trade Disputes

In the field of international trade dispute settlement, there have emerged quite a few resource-related disputes based on different WTO agreements.[108] In almost all these disputes, the complainants claimed that the resource-related trade measures of the respondents constitute violations of various WTO agreements. Though the WTO Dispute Settlement Body (DSB) is authorized to apply "covered agreements" listed in Appendix 1 of the *Understanding on Rules of Procedures Governing the Dispute Settlement* (DSU) to adjudicate disputes,[109] it is possible for the Panels and the Appellate Body (AB) to consider certain non-WTO law rules due to the non-self- contained nature of WTO legal system.[110] At this juncture, the principle of PSNR may come into play in WTO dispute settlement. As discussed below, China has raised the principle of PSNR in WTO dispute settlement to justify its resource-related trade measures in three disputes, though China's arguments were not supported by the Panel and the AB.

[106] See Xinhua News Agency, *China Encourages Foreign Investments to Energy-Saving and Environmental Protection Industries*, available at http://www.gov.cn/banshi/2007-12/11/content_830494.htm (original in Chinese).

[107] China's outbound investments to energy and mining industries in African countries have increased over the past years, available at http://www.chinanews.com/cj/2011/04-27/3002315.shtml.

[108] WTO, WORLD TRADE REPORT 2010, Section E, available at http://www.wto.org/english/res_e/publications_e/wtr10_e.htm.

[109] Art.1(1), DSU. This provision provides that "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement."

[110] See, *e.g.*, Joost Paulwelyn, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge: Cambridge University Press, 2003), at 35-40; James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L. QUARTERLY 248, 263-270 (2001).

China acceded to the WTO in late 2001, and has grown into a frequent user of WTO dispute settlement mechanism over the past decade.[111] Up to now, China has been involved in 41 cases either as complainant or respondent.[112] Despite the diversity of WTO agreements applied and complexity of legal issues raised in these cases,[113] there are six WTO cases in which China's resource-related measures are challenged, namely *China–Raw Materials* (DS394/DS395/DS398)[114] and *China– Rare Earth* (DS431/DS432/DS433).[115] It is particularly worth noting that the former group of cases are the only ones in which a WTO member (China) expressly invoked the principle of PSNR to justify its resource-related trade measures which were later held by the Panel and the AB not WTO-compliant.

In *China–Raw Materials*, the complainants (the U.S., EU and Mexico) submitted that China's various types of export restrictions imposed on several raw materials violated Art.VIII (Fees and Formalities Connected with Importation and Exportation), Art.X (Publication and Administration of Trade Regulations) and Art.XI (General Elimination of Quantitative Restrictions) of the GATT 1994 and various provisions of the Protocol on the Accession of the People's Republic of China ("China Accession Protocol"). To respond, China argued, *inter alia*, that its restrictions could be justified by Art.XX(g) of the GATT 1994 (Environmental Exception). Particularly, China "insisted that nothing should interfere with their sovereignty over such natural resources" by citing the principle of PSNR.[116] On this point, China essentially argued that regulation of natural recourses within its territory, including imposing export restrictions on resources shall fall within the scope of its permanent sovereignty.

The Panel, while referring to several UNGA Resolutions and other international treaties, such as Resolution 1803, Resolution 626 and the Convention on Biological Diversity, clearly recognized states' permanent sovereignty over natural resources as the ability for states to "freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development.[117] Yet, despite the

[111] See Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2009 — A Statistical Analysis*, 13 J. INT'L ECON. L. 205, 216-217 (2010).

[112] A list of China's WTO cases is available at http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (visited 4 February 2013).

[113] For a general review of China's participation in WTO dispute settlement in the past decade, refer to Chi Manjiao, *China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts*, 15(1) J. INT'L ECON. L. 29 (2010).

[114] See China–Measures Related to the Exportation of Various Raw Materials, DS394/DS395/DS398, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm.

[115] See China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, DS431/DS432/DS433, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm.

[116] The Report of the Panel, WT/DS394/R, WT/DS395/R & WT/DS398/R, para.7.356.

[117] The Report of the Panel, WT/DS394/R, WT/DS395/R & WT/DS398/R, para.7.380.

Panel's consideration of the principle of PSNR in interpreting WTO exceptions, it found that "restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty". To support its finding, the Panel referred to various international law materials, particularly the Permanent Court of International Justice's (PCIJ) consideration of the principle of PSNR in the case on *Jurisdiction of the European Danube Commission between Galatz and Braila.*[118] Based on such analysis, the Panel ultimately found that China's exercise of its resource sovereignty did not allow it to derogate from the commitments it had undertaken under the WTO system.[119] The Panel held that:

> The principle of sovereignty over natural resources affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development. Conservation and economic development are not necessarily mutually exclusive policy goals; they can operate in harmony. So too can such policy goals operate in harmony with WTO obligations, for Members must exercise their sovereignty over natural resources consistently with their WTO obligations. In the Panel's view, Article XX(g) has been interpreted and applied in a manner that respects WTO Members' sovereign rights over their own natural resources.[120]

China–Raw Materials went through both Panel and AB proceedings. As a result, China's environmental exception arguments were substantively rejected and China is required to bring its measures in conformity with WTO law. China has expressed its intention to implement the DSB recommendations and rulings in this dispute, and the reasonable period of time ("RPT") for such implementation would expire on 31 December 2012.[121] Although the RPT has already expired, there is no information publicly available regarding China's implementation of the DSB recommendations and rulings in this dispute.

The decision of *China–Raw Materials* may shed light on the general question of the relationship between resource sovereignty and WTO obligation of a state. As mentioned, the Panel held that, while China bears WTO obligation not to take certain forms of restrictive measures on natural resources exportation, such obligation does not necessarily violate China's resource sovereignty. This is because China has already exercised its sovereignty in acceding to the WTO and thus has accepted treaty obligation to regulate its trade in natural resources in a WTO-complaint manner, which includes no imposition of export

[118] The Report of the Panel, WT/DS394/R, WT/DS395/R & WT/DS398/R, para.7.379.

[119] Sonia E. Rolland, *China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute*, ASIL INSIGHTS, June 19, 2012, Volume 16, Issue 21, available at http://www.asil.org/pdfs/insights/insight120619.pdf.

[120] The Report of the Panel, WT/DS394/R, WT/DS395/R & WT/DS398/R, para.7.381.

[121] Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Disputes *China–Measures Related to the Exportation of Various Raw Materials* (WT/DS394, WT/DS395, WT/DS398), WT/DS394/19, WT/DS395/18 & WT/DS398/17, 7 December 2012.

restrictions on certain raw materials. In a more general sense, it is argued that this decision takes away the right of WTO members to use export duties as a legitimate tool for economic development, for they are not allowed to keep a greater share of their natural resources for domestic use and instead must sell their resource-based products to all domestic and foreign purchasers on an equal basis.[122]

The decisions of the Panel and the AB in *China–Raw Materials* have attracted wide attention and some criticisms, particularly from developing country perspectives. For instance, it has been argued that "For all the wisdom and foresight framed into the GATT and then WTO Agreements, the drafters appear to have either missed the issue of export taxes, underestimated future concerns, or perhaps intentionally reserved this area to the Contracting Parties as 'policy space'."[123] Julia Ya Qin described that this decision "exposed the highly irrational aspect of the world trading system".[124] Particularly, Qin argued that this decision is "arguably inconsistent" with the principle of the PSNR:

> Although the exercise of such right is without prejudice to the treaty obligations a nation undertakes of its own free will, the WTO should take care to respect this fundamental principle of international law in the design of its trade disciplines. Since the GATT already prohibits the use of non-tariff measures to restrict exports for developmental purposes, the only legitimate means a WTO Member may employ to claim a larger share in the distribution of its natural resources is through export duties. Thus, when the WTO obligates a Member to eliminate export duties on resource products, as it has done with several acceding Members, it strips away the right of that Member to dispose freely of its natural resources for developmental purposes. When such obligations are made virtually immutable, as is the case with the several acceding Members, it amounts to permanent alienation of a Member's ownership right to claim a larger share of its natural resources for domestic use. Such an arrangement is arguably inconsistent with the concept of permanent sovereignty over natural resources.[125]

China's losing of *China–Raw Materials* somehow paved the way for more disputes against China's resources-related policies in WTO dispute settlement. A typical example of such follow-up disputes is *China–Rare Earth*, jointly initiated by the U.S., EU and Japan on 13

[122] Julia Ya Qin, *Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, 5 (46) J. WORLD TRADE 1147, 1148 (2012).

[123] Daniel Crosby, *WTO Legal Status and Evolving Practice of Export Taxes*, ICTSD BRIDGES, Year 12, No.5, October-November 2008, available at http://ictsd.org/i/news/bridges/32741, at 3.

[124] Julia Ya Qin, *supra* note 121, at 1147.

[125] *Ibid.*, at 1186.

March 2012.[126] This dispute is still pending the Panel proceeding, thus China's legal arguments are not known. Despite several studies focusing on the potential impacts of this dispute,[127] it might be premature at this point of time to provide a well-informed and balanced assessment of the substantive issues raised therein. However, as indicated by the Requests for Consultations submitted by the complainants, the factual backgrounds and the alleged violations of this dispute are very similar to those in *China–Raw Materials*.[128] In light of such similarity of these two disputes, it is highly likely for China to put forward similar or even identical legal arguments, including the argument of the principle of PSNR. Such likelihood could be particularly high considering the sensitivity of the product involved in *China–Rare Earth* and the international pressure China faced in recent years.

VI. Concluding Remarks

Despite its comparatively short history, the principle of PSNR is an evolving concept. It was originally designed to support the colonized peoples and countries to fight for their self-determination and political independence after World War II. However, in the past several decades, great changes have taken place to the world economic and political landscapes. Accordingly, the emphasis of the principle of PSNR has also shifted from political independence to sustainable development. While recognizing the political significance of this principle, one should be aware of its profound economic implication with particular regards to resource-related investment and trade regulation.

Traditionally, China held ownership-oriented and state-centered attitudes towards resource sovereignty. As suggested by China's national laws, China often one-sidedly stresses state or collective ownership of natural resources but ignores the concerns of sustainable development thereof. Such attitudes, to a certain extent, are even deemed as

[126] See China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, DS431/432/433, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm.

[127] There are a few papers dedicated to the case of *China–Rare Earth* in the light of the WTO decision in the case of *China–Raw Materials*. See, *e.g.*, Han-Wei Liu & John Maughan, *China's Rare Earths Export Quotas: Out of the China-Raw Materials Gate, But Past the WTO's Finish Line?*, 15(3) J. INT'L ECON. L. (2012), Advanced Access, First published online: November 18, 2012, doi: 10.1093/jiel/jgs037; Elisa Baroncini, *The China-Rare Earths WTO Dispute: A Precious Chance to Revise the China-Raw Materials Conclusions on the Applicability of GATT Article XX to China's WTO Accession Protocol*, CUADERNOS DE DERECHO TRANSNACIONAL (Octubre 2012), Vol. 4, No.2, pp. 49-69, available at http://e-revistas.uc3m.es/index.php/CDT/article/download/1611/686.

[128] As can be seen from the Requests for Consultation, the major claims raised by the Complainants are quite similar to those in *China–Raw Materials*. See, China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum - Request for consultations by the United States, WT/DS431/1; China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum - Request for consultations by the European Union, WT/DS432/1; China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum - Request for consultations by Japan, WT/DS433/1.

a useful ideological instrument for defending China's political independence. Yet, on the other hand, China has committed to a higher level of protection of resource-related foreign investments in its IIAs (second generation BITs in particular) and is under international obligation to regulate resource-related trade in a WTO-compliant manner. Thus, China's resource-related trade and investment regulative measures and activities could be subject to international review, and could be ruled as violating China's international obligations. This could particularly be the case considering that China is actively engaged in international investment and trade activities and has grown into a leading economy in the world in recent years. As shown by WTO dispute settlement, despite the recognition of China's resource sovereignty over its natural resources, the Panel and AB of the DSB held that the challenged resource-related measures of China were inconsistent with China's WTO obligations.

China's international commitments and changing economic status will inevitably influence its natural resource governance regime. In light of such background, it seems necessary and appropriate for China to shift its attitudes towards resource sovereignty from ownership-oriented to governance-oriented. China's attitudes shift is ongoing, which is driven by both internal and external forces. Internally, China's economic rising and expansive trade and investment activities, particularly its increasing overseas investments in recent years urge China to adjust its traditional developing country (southern country)-positioned policy-making and treaty-negotiation preference. Externally, China is also heavily influenced by participation in resource-related international disputes settlement, particularly WTO dispute settlement, which actually requires China to adjust its traditional idea which sees the exercise of resource sovereignty as a mere internal issue. Such external pressure and influence remind China that the impacts of its exercise of resource sovereignty may be subject to international restriction and scrutiny, and requires China to exercise such sovereignty in a more multilateralized manner. Although China's attitudes shift towards resource sovereignty appears subtle and mild at this point of time, it may foreshadow future policy changes at a more fundamental level and in a wider spectrum.

Das Forschungskolleg „Zukunft menschlich gestalten“ der Universität Siegen basiert auf einer gemeinsamen Initiative der Universität Siegen, dem Land Nordrhein-Westfalen und der Stiftung Zukunft der Sparkasse Siegen. Es ist das Ziel des Forschungskollegs, die interdisziplinäre und fächerübergreifende Forschung an der Universität Siegen zu Zukunftsfähigkeit und der Zukunftsgestaltung zu fördern und deren internationale Vernetzung voranzutreiben. Dabei basiert das Kolleg auf der Erkenntnis, dass die Gestaltung einer menschenwürdigen und nachhaltigen Zukunft es erfordert, die Grenzen der herkömmlichen Fachdisziplinen zu überschreiten.