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## Crossing the Ocean By Feeling For the BITs: Investor-State Arbitration in China's Bilateral Investment Treaties

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### Abstract

Although China began to sign bilateral investment treaties (BITs) in the 1970s, it refused to grant foreign investors the right to sue their host government in international arbitration tribunals. Few realize that China's treaty negotiators have in fact abandoned this restriction in almost every Chinese BIT signed since 1998, including those with Latin America. Scholars have suggested that China reversed its policy in order to support Chinese overseas investors or to fit its general economic liberalization strategy. However, China's BITs with Mexico, Peru, and Colombia as well as its arbitration case with Peru contradict these theories. I argue that China began signing open BITs to test the risks of granting open access to European countries and the United States, for whom open access is a key condition. China experimented gradually with open arbitration, just as it has experimented gradually with many economic changes since Reform and Opening began in 1978. This theory has interesting implications for China's future BITs—as international arbitration tribunals threaten to make this experiment permanent, China has added new restrictions that bring China's BITs closer to the US model and make a US-China BIT more likely. However, the US avoids BITs with capital-exporting countries, and China is now a large capital-exporter. The main obstacle to US-China BIT negotiations may no longer be the two nations' differences, but rather their similarities.

## Introduction

Although the People's Republic of China began signing bilateral investment treaties (BITs) in the 1970s, China's negotiators removed the teeth from the early BITs. They prevented enforcement by blocking foreign investors from suing the host government in international courts. Since 1998, interestingly, almost all Chinese BITs began to reject these restrictions and to allow foreign investors to bring governments before international arbitration tribunals. Some scholars have argued that China reversed its policy in order to support Chinese overseas investors. Others suggest that China gave in to pressure from developed countries or the WTO, or that the move fit China's general economic liberalization strategy. I argue against these theories, drawing upon evidence from China's most recent BITs and arbitration cases. I suggest instead that the Chinese government chose to allow arbitration in BITs with small developing countries starting in 1998 as an experiment. Since European and American governments demanded open arbitration as a prerequisite for signing new BITs with China, China began signing open BITs with smaller countries to test the risks it would face if it opened up to its largest investors.

I conclude by considering the implications of China's recent treaty behavior on its future BITs. As international arbitration tribunals threaten China's open access experiment, it has struggled to maintain what I call "bilateral sovereignty," or the right to control its treaties bilaterally without interference from third-party tribunals. China has added new provisions to its latest treaties to restrict

international arbitrators' room for interpretation. China has adopted restrictions similar to those in American BITs, improving its prospects of concluding a BIT with the US. However, the US avoids BITs with capital-exporting countries to protect the sovereignty of its courts, and China now exports massive amounts of capital. The main obstacle to US-China BIT negotiations may no longer be the two nations' differences, but rather their similarities.

### **China's Turning Point in Offering Investor Access to Arbitration**

Before 1998, the Chinese government shielded itself from international liability by restricting private foreign investors' access to arbitration in every BIT's investor-state dispute resolution clause. Investors could only bring governments to arbitration under these clauses if their dispute "involv[ed] the amount of compensation for expropriation."<sup>1</sup> Like Soviet BITs, Chinese BITs restricted arbitration to maximize its control over and minimize its liability for all private assets invested in China.<sup>2</sup>

The Chinese government thus escaped accountability for its treaty violations. Investors relying on these old BITs could only sue for a breach of the treaty in Chinese courts. International tribunals worry that local court action allows "self-determination" by the state, meaning that Chinese judges cannot be expected to rule

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<sup>1</sup> The wording in these clauses varies slightly. For a detailed discussion of differences in the wording of

<sup>2</sup> See for example USSR and Czechoslovakia BITs.

against the Chinese state.<sup>3</sup> Indeed, international law scholar Wenhua Shan reported in 2005 that Chinese local courts still suffer from bribery, political interference, and a general lack of objectivity, although the government has recently mandated that any foreign lawsuit rejected in the lower courts must be automatically reviewed by the higher courts.<sup>4</sup>

Beginning in 1998, Chinese negotiators deliberately permitted investors to bring governments to international arbitration for any violation of their country's BIT.<sup>5</sup> The China-Barbados BIT set the new standard for open access to arbitration: "If any dispute... cannot be settled within six months... the Investor shall have the right to choose to submit the dispute for resolution by international arbitration."<sup>6</sup> China transplanted the wording to BITs with Bahrain, the Democratic Republic of the Congo (DRC), Botswana, Iran, Brunei, and eleven other countries by the end of 2002.<sup>7</sup>

The Chinese government has weathered this policy change without a flood of lawsuits from foreign investors. International relations scholar Cui Yankun claims that the probability of expropriation in China today is "next to nothing."<sup>8</sup> Meanwhile,

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<sup>3</sup> *Renta 4 SVSA v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce Award on Preliminary Objections 024/2007, 20 March 2009, quoted in Luke Eric Peterson, "2. Holdings in Spanish Shareholders' Yukos Claim Come to Light," *International Arbitration Reporter* Vol. 2 No. 6 (17 April 2009), 6.

<sup>4</sup> Wenhua Shan, *The Legal Framework of EU-China Investment Relations* (Oxford: Hart Publishing, 2005), 256-258.

<sup>5</sup> Exceptions include the China-Ethiopia (1998), China-Bahrain (1999), and China-Qatar (1999) BITs. Gallagher and Shan, 41, 320.

<sup>6</sup> China-Barbados (1998) BIT, Article 9(2).

<sup>7</sup> Gallagher and Shan, 42.

<sup>8</sup> Cui Yangkun, "New Developments in China's Bilateral Investment Treaties (Zhongguo dijie shuangbian touzi tiaoyue de xin fazhan)," *Law and Society (Fazhi yu shehui)* March 2007, 706.

many Chinese companies can compete with foreign businesses, so loosening controls on the economy may actually help Chinese companies grow and increase their efficiency. Indeed, ten years after the Barbados BIT went into effect, no foreign investor has ever tried to bring the Chinese government before international arbitration.<sup>9</sup> Some scholars have warned that this investor-state relationship is only a “honeymoon,” but the government has not given investors many excuses to spoil the occasion.

### **The Going Abroad Explanation**

Most observers have concluded that the government began promoting open international arbitration as part of its “Go Abroad” strategy to encourage private and state-owned Chinese companies to invest overseas. In 1998, President Jiang Zemin urged government officials to “study how to speed up measures to develop the ‘Going Abroad’ strategy. Regions like Africa, the Middle East, Central Asia, and South America with large developing countries [have] very big markets and abundant resources; we should take advantage of the opportunity to get in.”<sup>10</sup> Axel Berger points out in support of this thesis that in the 1990s, China’s outward investment increased and it shifted toward signing BITs with developing

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<sup>9</sup> Some scholars speculate that the government could have kept a BIT dispute private. Nonetheless, international law scholar Tao Jingzhou reports confidently that the Investment Law division of the Ministry of Commerce assured him that China “has never been involved in arbitration arising from a BIT.” Tao Jingzhou, *Arbitration Law and Practice in China*, 2<sup>nd</sup> Edition (Frederick, MD: Wolters Kluwer, 2008), 17.

<sup>10</sup> Chen Yangyong. “The Shape and Significance of Jiang Zemin’s ‘Going Abroad’ Policy (Jiang Zemin zou chu qu zhanlüe de xingcheng jiqi zhongyao yiyi)” *Literature of the Chinese Communist Party (Dang de wenxian)* No. 1 (2009), <http://politics.csscipaper.com/cpc/document/7350.html> (6 Dec 2010).

countries.<sup>11</sup> Scholars both inside and outside China have credited open arbitration access to the “Going Abroad” strategy.<sup>12</sup> Gallagher and Shan’s landmark 2010 study of Chinese investment treaties does not advance this argument, but it does admit that “these changes are in line with China’s... increased amount of outward direct investment.”<sup>13</sup>

However, international law scholars all over China have criticized the idea that the “Going Abroad” strategy justifies granting investors the right to sue governments. In addition to benefiting Chinese investors, they warn, two-way BITs give foreign investors the chance to win enormous arbitration awards from the Chinese government. Chinese academics have criticized not only the treaties but also the government for “lacking a clear understanding and high level of

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<sup>11</sup> Axel Berger, “China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach,” *German Development Institute Discussion Paper* (Oct 2008), 24.

<sup>12</sup> Chinese sources include Fang Xun, “Research and Commentary on Chinese BITs under ICSID Jurisdiction since 1990 (90 niandai yilai zhongguo zai BITs zhong jieshou ICSID guanxia de yanjiu ji pingxi),” *Law and Society (Fazhi yu Shehui)* Sept 2010;

Chen An, “Distinguishing Two Types of Countries,” *Journal of World Investment and Trade* Vol 8 No 6 (Dec 2007): 775;

Zhan Weiling, “Analysis of International Investment Arbitration from China’s Perspective (Yi zhongguo shijiao fenxi guoji touzi zhongcai)” *People’s University Law School International Law Discussion* 30 May 2010, <http://www.rucil.com.cn/article/default.asp?id=1031> (6 Dec 2010).

Foreign sources include the Economist Intelligence Unit, “Evaluating a Potential US-China Bilateral Investment Treaty,” report prepared for the US-China Economic and Security Review Commission, (30 March 2010), [http://www.uscc.gov/researchpapers/2010/EIU\\_Report\\_on\\_US-China\\_BIT--FINAL\\_14\\_April\\_2010.pdf](http://www.uscc.gov/researchpapers/2010/EIU_Report_on_US-China_BIT--FINAL_14_April_2010.pdf) (6 Dec 2010);

Elodie Dulac and John Savage, “The Asia Pacific Arbitration Review 2007: China BITs,” *Global Arbitration Review*, <http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/19/china-bits/> (6 Dec 2010).

Michael Snarr argues that the open BITs encourage Chinese investors to invest in Europe. Michael S. Snarr, “Making Progress BIT by BIT on a US-China Bilateral Investment Treaty,” *China-US Trade Law Blog* (2 February 2010), <http://www.chinaustradelawblog.com/2010/02/articles/investment/making-progress-bit-by-bit-on-a-uschina-bilateral-investment-treaty-caaeaeaeaeaeaeae/> (6 Dec 2010).

<sup>13</sup> Gallagher and Shan, 378.

awareness.”<sup>14</sup> Chen An, China’s own nominee for arbitrator at the International Centre for Settlement of Investment Disputes (ICSID), has been one of the most critical voices.<sup>15</sup>

Chen An and others argue that despite its “Going Abroad” strategy, China does not benefit from strengthening investors with arbitration access. First, Chinese investors may be going abroad in record numbers, but foreign investment into China still dwarfs Chinese investment abroad by at least four to one.<sup>16</sup> The United States invests more than 50 times as much in China as China invests in the US; for Japan this figure is over 100 times.<sup>17</sup> Though Axel Berger supports the “Going Abroad” theory, he acknowledges that when Chinese negotiators opened access to arbitration in 1999, total inward FDI was over 66 times higher than outward FDI.<sup>18</sup>

It is worth noting that while inward FDI is still larger, its dominance has shrunk considerably. Data from China’s Ministry of Commerce 2009 show that the ratio of inward FDI to outward investment had dwindled to less than two to one, \$90 billion to \$56.5 billion by 2009.<sup>19</sup> Chen An argued that China should not

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<sup>14</sup> Fang Xun, 90.

<sup>15</sup> Chen An, “Should the four great safeguards in Sino-Foreign BITs be hastily dismantled?” *Journal of World Investment and Trade*, Vol 7 No 6 (Dec 2006): 899-933; Chen An, “Distinguishing Two Types”

<sup>16</sup> Fang Xun, 90

<sup>17</sup> Fang Xun, 90.

<sup>18</sup> Berger, 15.

<sup>19</sup> Inward FDI: Ministry of Commerce News Office (Shangwubu xinwen bangongshi), “The 2009 Situation of Foreign Direct Investment in China (2009 nian 1-12 yue quanguo xishou waishang zhijie touzi qingkuang),” *Ministry of Commerce of the People’s Republic of China Website (Zhonghua renmin gongheguo shangwubu)*, 15 Jan 2010,

<http://www.mofcom.gov.cn/aarticle/tongjiziliao/v/201002/20100206785656.html> (6 Dec 2010).

Outward investment: Ministry of Commerce, “2009 Statistical Bulletin of China’s Outward Foreign Direct Investment (2009 nian zhongguo duiwai zhijie touzi tongji gongbao),” *Department of Outward Investment*

strengthen investors until outward investment equals inward investment, but that day is fast approaching.<sup>20</sup> For example, in 2009 Americans invested \$3.6 billion in China and received \$908 million in return, a ratio slightly less than four to one.<sup>21</sup> Japan invested \$4.1 and China returned only \$84 million, around fifty to one.<sup>22</sup> China is slowly balancing its investments to and from developed countries.

The Chinese government would not have opened arbitration access to encourage investors to go abroad because few investors cared about the treaties. Chinese companies respond to measures that affect their business directly and frequently, rather than measures that promise expensive, five-year court cases with uncertain prospects for a favorable decision. According to Chen, Chinese companies do not pay attention to BITs when making investment decisions.<sup>23</sup> Only eighteen percent of overseas investors knew whether they were investing under BITs with open access to arbitration.<sup>24</sup> In fact, Chinese investors moved abroad so rashly that the Ministry of Commerce coined a special slogan: “Companies Going Abroad: Bravery Also Needs Caution.”<sup>25</sup>

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and Economic Cooperation Website (*Duiwai zhijie touzi he jingji hezou si*), 13 Sept 2010, <http://hzs.mofcom.gov.cn/accessory/201009/1284339524515.pdf> (6 Dec 2010).

<sup>20</sup> Chen An, “Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled?” *Journal of World Investment and Trade* Vol. 7 No. 6 (Dec 2006), 914.

<sup>21</sup> Ministry of Commerce News Office; Ministry of Commerce, 82.

<sup>22</sup> *Ibid.*, 78.

<sup>23</sup> Chen An, “Four Great Safeguards,” 917.

<sup>24</sup> *Ibid.*, 918.

<sup>25</sup> Ministry of Commerce 2009 Order No. 5 (*Zhonghua renmin gongheguo shangwubu ling 2009 nian di 5 hao*), “Management Measures for Investors Abroad (*Jingwai touzi guanli banfa*),” *Xinhua News* 16 Mar 2009, [http://news.xinhuanet.com/fortune/2009-03/16/content\\_11021992.htm](http://news.xinhuanet.com/fortune/2009-03/16/content_11021992.htm) (6 Dec 2010). Economic Information Newspaper (*Jingji cankao bao*), “Experts Suggest: Chinese Companies Going Abroad Bravery Also Needs Caution (*Zhuanjia jianyi: woguo qiye zouchuqu danda hai xu xinxi*)” *Xinhua News* 17 Mar 2009, [http://news.xinhuanet.com/fortune/2009-03/17/content\\_11023052.htm](http://news.xinhuanet.com/fortune/2009-03/17/content_11023052.htm) (6 Dec 2010).



If the Chinese government simply wanted to encourage overseas investment, it had at its disposal a slew of safer, faster, and more effective options. Investors did not surge abroad when China ratified its first round of new BITs from 1999 to 2003. They waited until 2004, when the State Council replaced the old outward investment “examination regime” with a “registration requirement.”<sup>26</sup> By streamlining the outward investment process, the State Council exerted far more power at far less risk than when it negotiated open access to arbitration. In 2009, the Ministry of Commerce again pushed outward investment to new heights by granting investors taxation, insurance, foreign exchange, and residence permit (*hukou*) benefits.<sup>27</sup> If their goal were to encourage outward investment through open arbitration access, China’s negotiators chose a remarkably blunt and ill-suited instrument.

Similarly, the Chinese government did not choose its new BIT partner countries to match the interests of Chinese overseas investors. If China had designed the new BITs to help its investors, we would expect the government to sign new treaties with Latin American and African countries receiving massive Chinese investment and to avoid BITs with developed countries investing in China. Its most important resource suppliers like Venezuela, Bolivia, and Argentina frequently nationalize private companies. China would suffer little risk in signing BITs with these countries, since almost none of their citizens invest in China.

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<sup>26</sup> Gallagher and Shan, 12.

<sup>27</sup> Invest in China Guide (Zhongguo zhinan), “Six Large-Scale Ministry of Commerce Measures to Support Companies Investing Overseas (Shangwubu liu da jucuo zhichi qiye duiwai touzi),” 27 Oct 2009, [http://fdi.gov.cn/pub/FDI/tzdt/dt/t20091027\\_113505.htm?fclose=1](http://fdi.gov.cn/pub/FDI/tzdt/dt/t20091027_113505.htm?fclose=1) (6 Dec 2010).

Instead, China rushed to sign BITs with countries that received little Chinese investment. Berger points out that China shifted toward signing BITs with developing countries in the 1990s.<sup>28</sup> However, it signed with most of its developing country partners before the shift to open arbitration in 1999. From 1999 to 2003, China signed and ratified BITs almost exclusively with small developing countries that had little investment to or from China. Proponents of the “Going Abroad” theory cite these years as evidence of China protecting its investors.<sup>29</sup> China did choose to sign with fifteen countries in Latin America, Asia, and Africa, regions that constituted roughly 90 percent of China’s total outward investment. However, the specific countries that China chose accounted for zero Chinese investment in Latin America, a half of a percent of its investment in Asia, and two percent of its investment in Africa.<sup>30</sup> The Netherlands stands out as the only developed country to sign a BIT with China during this initial period.<sup>31</sup> After four years spent signing BITs mostly with developing countries, China renegotiated its old European BITs *en masse*. After signing a BIT with Germany in 2003, China signed eight more BITs with developed nations in less than two years. It concluded 80 percent of its 2004-05

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<sup>28</sup> Berger, 19.

<sup>29</sup> Fang Xun, 90.

<sup>30</sup> The Africa figures omit Nigeria, a significant capital-importer from China, because Nigeria’s 2001 BIT came as a surprise to the Chinese. They had signed a restricted BIT with Nigeria in 1997, but the Nigerian government failed to ratify it domestically. Ironically, when they returned to the negotiating table in 2001, they signed a BIT that was less favorable to Nigeria due to the open access provision.

Percents calculated from 2003 data in Ministry of Commerce, “2009 Statistical Bulletin,” 78-82. List of open-access BIT partners taken from Gallagher and Shan, 42.

<sup>31</sup> List from Gallagher and Shan, 42.

BITs with developed countries that exported far more capital to China than they imported.<sup>32</sup>

China maintained its focus on developed country BITs by resuming negotiations with the US and Canada in 2007 and 2008, respectively.<sup>33</sup> The US negotiations had fallen apart in 1989 over the Chinese government's brutal response to the Tiananmen Square demonstrations. But even before Tiananmen, they had reached a stalemate since the Chinese refused to accept the US's unshakable requirement of open access to arbitration.<sup>34</sup> By finally offering the US side open arbitration, the Chinese side rekindled negotiations in 2007. The Going Abroad Theory cannot explain why China would continue to pursue of open access BITs with capital exporters.

## **Other Theories**

Some scholars have argued that China accepted open access to arbitration because developed countries and the World Trade Organization (WTO) forced China to accept new international economic norms. In their landmark 2009 study of Chinese BITs, Gallagher and Shan assert that China's State Council first approved open access during BIT negotiations with Canada, meaning that "the breakthrough

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<sup>32</sup> List from Gallagher and Shan, 42.

<sup>33</sup> Gallagher and Shan, 383.

<sup>34</sup> Stephan Schill, "Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China," *Cardozo Journal of International and Comparative Law* Vol. 15 (2007): 82; Chen An, "Distinguishing Two Types," 773.

was actually achieved by the efforts of the Canadians in 1997.”<sup>35</sup> Indeed, Canada could have exerted particularly great pressure on China because the Asian Financial Crisis had just slashed China’s foreign exchange reserves.<sup>36</sup> Similarly, scholars point out that when China joined the WTO in 2001, the WTO forced it to eliminate some investment protections and pressured it to liberalize.<sup>37</sup>

The China-Canada and China-Germany BIT negotiations demonstrate that Chinese negotiators do respond to pressure from developing countries. German negotiators persuaded China to remove key phrases safeguarding “local laws and regulations” that appear in all other Chinese BITs.<sup>38</sup> Two months later, China reinstated these phrases into its next BIT and never allowed another country to remove them. China’s quick change of heart suggests that the Germans successfully pressured them into removing the clauses.

However, China did not cave in to foreign pressure over access to investor-state arbitration, a point illustrated by the timing of the negotiation process. The Chinese government chose to open access to arbitration at a moment when no developed countries could have forced its hand. China and Canada broke off BIT negotiations in 1997 with the onset of the Asian Financial Crisis, though China soon recovered comfortable levels of foreign exchange. In 1998, the Chinese State

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<sup>35</sup> Gallagher and Shan, 41.

<sup>36</sup> Ken Davies, “China’s foreign exchange reserves, 1977-2010,” *Chinability Blog*, <http://www.chinability.com/Reserves.htm> (6 Dec 2010).

<sup>37</sup> Schill, 99; Cui Yankun, 706; Gallagher and Shan, 320.

<sup>38</sup> Article 1(1) of the China-Germany BIT omits “subject to local laws and regulations” in the definition of investment, while Article 2(1) lacks the usual requirement to “Admit such investment in accordance with its laws and regulations.” The wording of the National Treatment clause also excludes the usual caveat.

Council suddenly chose to approve a request by Ministry of Commerce negotiators to grant open arbitration in the Suriname BIT. Although the 1998 Suriname BIT fell through, the Ministry of Commerce used the State Council's approval to sign open access into the Barbados BIT in 1999. Chinese negotiators have agreed to open access in almost every BIT since then. Gallagher and Shan credit China's "more liberal policy since joining the WTO in 2001," but China signed open arbitration clauses before entering the WTO.<sup>39</sup>

Unable to pin down any truly decisive factor, scholars also credit the change to China's broader effort to open up its economy, facilitate inward and outward investment, and show greater respect for international treaties.<sup>40</sup> The German negotiators to the China-Germany BIT reported that the Chinese side had itself demanded open access to arbitration because it was determined to provide "the international standard of investment protection."<sup>41</sup> Gallagher and Shan suggest that China slowly accepted international law on many fronts around that time, granting BIT access to arbitration as part of that trend. China's open access to arbitration "was no doubt influenced by several factors, including China's ratification of the ICSID Convention in 1993, its more liberal policy towards international law and international commitments since joining the WTO in 2001, and its definite shift in

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<sup>39</sup> Gallagher and Shan, 320.

<sup>40</sup> Schill, 99-100.

<sup>41</sup> Schill, 43.

policy towards international arbitration.”<sup>42</sup> They identify Chinese policies as liberal but cannot explain why the government was motivated to liberalize its policies.

The Chinese government did not open up to arbitration as part of a general trend; it must have had a compelling reason. China slowly developed market-based socialism and joined the WTO because each offered clear economic benefits, but open arbitration does not offer any proven economic benefit. Susan Franck agrees with protectionist Chinese scholars that “the specific impact of investment treaty arbitration is... unclear.”<sup>43</sup>

### **Recent Evidence: China Holds Back**

One final, contrary clue is that although the Chinese government seems eager to sign an open BIT with any individual country, it has blocked attempts to retroactively open its remaining old BITs. In three separate ways, the Chinese government has fought to prevent international arbitration tribunals from granting open access to all the countries still left with restrictive Chinese BITs.

First, in 2006, arbitration tribunals hinted that a foreigner investing under an old BIT might be able to sue the government through the “Most Favored Nation” clause. Investors can claim a violation of the Most Favored Nation (MFN) clause if they are treated worse than investors from a third nation. Numerous investors have

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<sup>42</sup> Gallagher and Shan, 320.

<sup>43</sup> Susan Franck, “Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,” *Global Business and Development Law Journal* Vol. 19, (2007): 373.

attempted to use MFN claims to replace a specific clause in their treaty with a more favorable BIT signed by the host government. The arbitration community is deeply divided; Lochnie Hsu reports that “[t]he smorgasbord of decisions [on MFN clauses] cannot be fully reconciled.”<sup>44</sup> Tribunals found in *Plama v Bulgaria*, *Berschader v Russia*, *Telenor v Hungary*, and *Wintershall v Argentina* that the MFN clause has to specifically enumerate the areas that it protects.<sup>45</sup> The *Renta 4 v. Russa* and *RosInvest Co. v Russia* tribunals found that the MFN clause has to explicitly exclude any areas that it does not cover.<sup>46</sup> Chinese treaty experts noticed the *RosInvest* precedents, which could allow investors with restrictive Chinese BITs to automatically enjoy the benefits of a new, open BIT.<sup>47</sup>

Chinese negotiators have responded to these cases in China’s most recent BITs by restricting the Most Favored Nation clause from applying to arbitration. First, China’s 2008 BIT with Mexico restricts MFN treatment to “the operation, management, maintenance, use, enjoyment, or disposal of investments.”<sup>48</sup> Because this BIT does not explicitly include or exclude dispute resolution, the *Plama*, *Berschader*, *Telenor*, and *Wintershall* tribunals would reject jurisdiction over MFN

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<sup>44</sup> Lochnie Hsu, “MFN and Dispute Settlement: When the Twain Meet,” *Journal of World Investment & Trade* Vol.7 No. 1, (February 2006): 25-37.

<sup>45</sup> *Plama Consortium Limited v. Bulgaria*, ICSID *Decision on Jurisdiction*, Case No. ARB/03/24 (8 Feb 2005); *Berschader v. Russia*, SCC *Award*, Case No. 080/2004 (21 Apr 2006); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID *Award*, Case No. ARB/04/15 (13 Sept 2006); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID *Award*, Case No. ARB/04/14, (8 Dec 2008), [http://ita.law.uvic.ca/alphabetical\\_list\\_content.htm](http://ita.law.uvic.ca/alphabetical_list_content.htm) (6 Dec 2010).

<sup>46</sup> *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC *Award on Preliminary Objections*, Case No. 24/2007 (20 Mar 2009); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC *Award on Jurisdiction*, Case No. Arb. V079/2005 (Oct 2007), [http://ita.law.uvic.ca/alphabetical\\_list\\_content.htm](http://ita.law.uvic.ca/alphabetical_list_content.htm) (6 Dec 2010).

<sup>47</sup> Xu Chongli, “From Substance to Process: Dispute over the Scope of Use of Most Favored Nation Treatment (Cong shiti dao chengxu: zuihuiguo daiyu shiyong fanwei zhi zheng),” *Law and Business Research (Fasheng yanjiu)* Vol. 2, 2007.

<sup>48</sup> China-Mexico BIT 2008, Article 4(1), in Gallagher and Shan, 515.

cases brought under this BIT, while the *Renta* and *RosInvest* tribunals might allow the case.<sup>49</sup> However, the investor treatment clause in the 2008 Colombia-China BIT explicitly states that “this treaty’s Most Favored Nation treatment rules do not apply to any treaty-based investment dispute resolution mechanism, such as the rules from this treaty’s 8<sup>th</sup> and 9<sup>th</sup> Articles.”<sup>50</sup> No arbitration tribunal could find jurisdiction to hear a MFN case from this BIT. China is attempting to ban restricted-BIT investors from gaining open access to arbitration through the back door, so to speak.

Second, the Chinese government has taken measures to block investors from stealing open access to arbitration through “shell companies.” Investors have figured out that they can invest in restricted-BIT countries through fake company offices, even just a mailbox, in a third-party country with open access to arbitration. Then international tribunals will allow them to file claims under the third-party country’s BIT with the host country rather than under China’s restricted BIT.<sup>51</sup>

China attempted to stop this so-called “treaty shopping” by applying their BITs only to companies with “substantial” investment. Its 2008 Mexico and Colombia BITs require a company investor to be “constituted or otherwise

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<sup>49</sup> Though the *Renta* and *RosInvest* tribunals argue that one would still have to consider other factors before borrowing provisions from another treaty, including the general versus specific nature of the original provisions the investor sought to replace.

<sup>50</sup> China-Colombia BIT (Zhonghua renmin gongheguo zhengfu he gelunbiya gongheguo zhengfu guanyu cujin he baohu touzi de shuangbian xieding), 22 Nov 1998, Article 3(3), <http://vip.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=eag&Gid=100670197> (3 Dec 2010). Note: The Colombian Senate just ratified the BIT in late October. Yongxian Huang, “Colombian Senate ratifies Sino-Colombian Investment Treaty (Gelunbiya can yiyuan pizhun gezhong touzi baohu xieding),” *Xinhua News* 27 Oct 2010, [http://news.ifeng.com/world/detail\\_2010\\_10/27/2913388\\_0.shtml](http://news.ifeng.com/world/detail_2010_10/27/2913388_0.shtml) (6 Dec 2010).

<sup>51</sup> Gallagher and Shan, 81.



organized under the law of a Contracting Party” and “engaged in substantive business operations in the territory of that Contracting Party.”<sup>52</sup> China is again attempting to ban investors in restricted-BIT countries from stealing open access to arbitration. This effort will only succeed, however, if other countries use similar language to prevent Chinese investors from suing under their BITs.

Finally, the Chinese government argued against its own citizen to prevent an international tribunal from hearing an expropriation case under a restricted BIT. In 2007 a Hong Kong investor named Tza Yap Shum attempted to bring expropriation charges against Peru at ICSID, the first time an investor has ever filed an international arbitration case under a Chinese BIT. He did this in spite of the fact that the 1994 China-Peru BIT specifically restricts disputes to those “involving the amount of compensation for expropriation.”<sup>53</sup> To assist Peru in its defense and thereby ensure that the tribunal did not find jurisdiction over the case, China sent one of the original negotiators of the BIT, a team of international law scholars, and thousands of pages of court documents.<sup>54</sup> Fan Jianghong, the Chinese negotiator, testified that China had intended this clause to prevent international arbitrators from deciding whether or not a state had expropriated a given investor’s assets.<sup>55</sup>

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<sup>52</sup> China-Mexico BIT 2008, Article 1(a); China-Colombia BIT 2008, Article 1(2).

<sup>53</sup> 1994 China-Peru BIT, Article 8(3).

<sup>54</sup> *Tza Yap Shum v. Republic of Peru*, ICSID *Decision on Jurisdiction and Competence*, Case No. ARB/07/6 (19 Jun 2009), <http://www.transnational-dispute-management.com/article.asp?key=1576> (6 Dec 2010); Chen An, “Queries to the Recent ICSID *Decision on Jurisdiction Upon the Case of Tza Yap Shum v. Republic of Peru*,” *Journal of World Investment and Trade* Vol 10 No 6 (Dec 2009): 861.

<sup>55</sup> Fan Jianghong, Witness Statement, 10 Sept 2009, at para. 24, in *Tza Yap Shum v Republic of Peru*, 38.

However, the tribunal found for Tza Yap Shum, against both China and Peru. It determined that the word “involving” cast doubt on China’s intentions according to the Vienna Convention’s guidelines on interpreting treaties. It argued that any investor who sued the state for expropriation in local courts would be shut off from subsequent international arbitration by the “fork-in-the-road clause.” Since the BIT’s preamble pledges to “encourage investment,” the tribunal argued that the BIT must allow some form of dispute resolution, and thus it must allow entire expropriation cases. It rejected the Chinese argument that China had clarified its intentions through a clear “official policy,” though almost every old BIT contained a similar provision and many international scholars believe in such a policy.<sup>56</sup> The decision drew upon precedent from a similar wording-based decision in *European Media Ventures v. Czech Republic*.<sup>57</sup>

Chinese scholars were outraged by the tribunal’s decision. Chen wrote that the decision came to the “great surprise of Chinese scholars.” These scholars, including Chen, wrote a flurry of articles protesting it.<sup>58</sup>

The Chinese government voiced its own protest by writing a new clause into its latest BITs that will block similar cases in the future. China’s negotiators inserted a brand-new clause at the end of the China-Colombia BIT that would have ensured that Tza Yap Shum could not access international arbitration. The clause requires

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<sup>56</sup> Chen An, “Queries to the Recent ICSID Decision,” 847-8; *Tza Yap Shum* Decision.

<sup>57</sup> *European Media Ventures SA v. Czech Republic*, UNCITRAL Award on Jurisdiction (15 May 2007), unpublished but reviewed in *The Czech Republic v. European Media Ventures SA* [2007] EWHC 2851.

<sup>58</sup> Chen An, “Queries to the Recent ICSID Decision,” 831; Wang Nan, “The Problem of Using China’s Foreign Bilateral Investment Treaties Toward Hong Kong (Zhongwai shuangbian touzi xieding dui xianggang de shiyong wenti),” 20 Apr 2010.

investors who claim that the government expropriated their assets using taxes to first argue their case with the host government’s tax department, then allow their home government to decide if the taxation was actually tantamount to expropriation.<sup>59</sup> Since Tza Yap Shum had claimed that the Peruvian government unjustly froze his assets for tax violations, this clause would have given the Chinese government a chance to throw out his case. It is reasonable to assume that China essentially wrote this provision, not Colombia, because China allows its partners little influence over the terms of its BITs. As the Chinese and Peruvian negotiators testified during *Tza Yap Shum v Peru*, “the negotiations between Peru and China were substantially based on the Chinese draft of the BIT.”<sup>60</sup> Thus China responded specifically to Tza Yap Shum by blocking his strategy in its later BITs.

### **An Experiment in Open Access**

A plausible explanation for China’s decision on arbitration should address four puzzles: the government’s timing, BIT partner country selection, sacrifice of sovereignty, and recent efforts to stop universal open BIT access. I argue that the Chinese government chose to begin testing open arbitration on small developing countries in 1998 in order to prepare for impending negotiations with developed countries that demanded access to arbitration.

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<sup>59</sup> “Tax Measures (Shuishou cuoshi),” Article 14(5), China-Colombia 2008 BIT

<sup>60</sup> *Tza Yap Shum* decision, 37.

First, this experiment with smaller countries would explain the Chinese government's particular timing and partner country selection, which did not match its Going Abroad strategy. For the first four years, the government only signed new treaties with small developing countries and a safe European country, the Netherlands, in order to minimize the experiment's risk. With no arbitration cases in its first four years, China began to renegotiate its BITs with European countries from 2003-2006. These European BITs had finished their first 10- or 15-year terms around 1999. Thus the European governments had probably been pressuring the Chinese government to renegotiate its BIT since around the time of the Surinam/Barbados decision.

Still free from arbitration cases, the government began to negotiate with the Canadians and US in 2007 and 2008. With no disputes in nine years, it offered open access to the US and Canada, aware that neither country would sign a BIT without this key clause.<sup>61</sup> One Chinese scholar even argued that the US and China would quickly sign the BIT now that China had eliminated the arbitration roadblock.<sup>62</sup> So the timing and partner country selection can be explained by an incremental experiment: first, China tested the new open BITs on small developing countries in order to study the risks of opening renegotiated European BITs; second, it renegotiated open European BITs to test the waters for open BITs with the US and Canada.

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<sup>61</sup> Gallagher and Shan note that these are the two "toughest" BITs for China to negotiate because of this requirement and the length of their usual BITs. Gallagher and Shan, 384.

<sup>62</sup> See Cai Congyuan, "China--US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications," *Journal of International Economic Law*, Vol. 12 No. 2 (2009): 457-506, <http://econpapers.repec.org/article/oupjieclw/> (6 Dec 2010).

The Chinese government relinquished domestic sovereignty in order to benefit from new BITs with capital-exporting countries. While opening access to arbitration alone does not spark a flood of investment, it offered China the chance to conclude new BITs that would most likely increase both inward and outward investment flows. The Chinese government was eager to discover the benefits that a BIT with the US, one of its largest and most recalcitrant investment partners, could provide.

This arbitration experiment has many precedents in China's cautious path of economic reform. Grandfathers of reform Deng Xiaoping and Chen Yun have famously advocated "Crossing the river while feeling for the stones." The government began incrementally reforming the agricultural sector from 1979 onward, increasing the state's grain prices, then allowing above-quota grain sales on the market, and finally abolishing the state monopoly purchasing system. The central government allowed local officials to form township and village enterprises, slowly relinquished the sectoral monopolies held by state-owned enterprises (SOEs), and finally began privatizing the lowest-performing SOEs. In each area of its domestic economy, China has been gradually experimenting. It should not be such a surprise that it might also "feel for the stones" in liberalizing its BITs.

At the same time, the Chinese government blocks retroactive opening of all its old BITs because it is still testing open arbitration. The 2008 Mexico and Colombia BITs demonstrate that the government is still adjusting its approach to arbitration. Since the government has not yet settled firmly on arbitration, as most

observers assume, it resists the universal conversion of its more than eighty remaining BITs that still restrict arbitration. Among these restricted BIT partners are large capital exporters, most notably the UK and Japan.

Instead of individual countries, the Chinese government is worried about the epistemic community of lawyers, arbitrators, and scholars who influence the decisions of international arbitration tribunals. Although each BIT is negotiated between only two countries, the international disputes are all settled by ICSID, Stockholm Chamber of Commerce, UNCITRAL and other tribunals which rely heavily on precedents from other tribunals' judgments on other countries' BITs.<sup>63</sup> The parties select their lawyers and arbitrators freely, however, a few popular individuals are recycled continually through both positions. For example, the head arbitrator of *Renta v Russia* runs the law firm that represented Berschader in *Berschader v Russia*.<sup>64</sup> Another of the three *Renta* arbitrators had represented EMV in *EMV v Czech Republic*.<sup>65</sup> Renta's lawyer has represented at least two other investors in recent MFN cases.<sup>66</sup> This is only a quick survey of the scholars involved in *Renta* that have appeared in other recent MFN cases.

Chinese and other scholars have been worried by ICSID and the international arbitration community's broad BIT interpretations since long before *Tza Yap*

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<sup>63</sup> Jeswald Salacuse, *The Law of Investment Treaties* (New York: Oxford University Press, 2010):13-14.

<sup>64</sup> *Renta* Decision; *Berschader* Decision.

<sup>65</sup> *Renta* Decision; *EMV* Decision.

<sup>66</sup> *Siemens v Argentina*; *Austrian Airlines v Slovak Republic*

*Shum*.<sup>67</sup> Chen Wenzhu, for example, argues that ICSID is guilty of “serious abuse.”<sup>68</sup> Uglješa Grušić shows that ICSID tribunals consistently give liberal interpretations that expand its jurisdiction.<sup>69</sup> However, she argues that these decisions “reflect the intention of the parties” because they support the object and purpose of investment instruments, which is to promote and protect investments.”<sup>70</sup> Still, the Chinese and Peruvian governments agreed on how the *Tza Yap Shum* tribunal should have interpreted the wording of their BIT, but the tribunal contradicted them. I would suggest that these rulings may reflect the parties’ original intentions often, but not always.

### **Implications for China-US BIT Negotiations**

The open access experiment theory outlined above has important implications for China’s future BIT negotiations. As the Chinese negotiators were hoping, their experimentation with new, liberal provisions makes a China-US BIT more likely. However, blocking retroactive opening by international courts also impacts the China-US BIT.

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<sup>67</sup> Yu Jingsong, “The Recent Development and Effects of China’s International Investment Treaties (Guoji touzi xieding de jinqi fazhan ji dui zhongguo de yingxiang),” *Legal Expert (Faxuejia)*, Mar 2006; Zuo Yanjun, “Research into Problems of ICSID’s Jurisdiction over BITs (BIT zhong yu ICSID guanxiaquan youguan wenti de tanjiu),” CNKI Database (Jul 2010), <http://www.docin.com/p-12137840.html> (6 Dec 2010).

<sup>68</sup> Chen Wenzhu, “Investigation into the Reform of the ICSID Arbitration Mechanism, (ICSID zhongcai jizhi gaige yanjiu),” *Law View (Fazhi zaixian)*, CNKI Database, (6 Dec 2010).

<sup>69</sup> Uglješa Grušić, “The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes,” *Journal of World Investment and Trade* Vol 10 No 1 (Feb 2009): 100.

<sup>70</sup> *Ibid*, 100.

China is struggling not for state sovereignty but for “bilateral sovereignty”—the power to sign BITs without ceding international tribunals space to broadly interpret the BIT provisions. As China gives up some sovereignty in the context of these BITs, it at least expects to make the rules governing this loss of sovereignty. For this reason, it strongly opposes the influence of the third actor, the epistemic community. The most recent China-Mexico and China-Colombia BITs show China’s willingness to uphold liberal measures, but also its determination to specifically curtail the space of the epistemic community. Instead of blocking arbitration directly, China attacked the tribunals’ power by limiting the MFN clause and imposing the new Tza Yap Shum-inspired tax dispute procedure.

China may have more success securing its bilateral sovereignty in the future because it has begun to copy new protectionist measures designed by the veteran US negotiators. Until now, China has struggled to define its intentions and close loopholes which expose it to legal interpretations handed down by the epistemic community, which occurred in the Tza Yap Shum dispute over the word “involving.” But China has begun to copy the time-tested treaties of the US. For example, the China-Colombia BIT for the first time copies the US provision on exceptions for “essential security.” Chen An recommended this measure in order to buffer China’s BITs against the creeping jurisdiction of international tribunals.<sup>71</sup> China also copied the new Colombia BIT tax provision from the US’s own taxation provisions.<sup>72</sup>

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<sup>71</sup> Chen An, “Four Great Safeguards,” 911.

<sup>72</sup> See for example the 2000 US-Honduras BIT, Article XIII.



Chinese scholars have discussed other protections commonly used by the US, such as differentiating treatment between developed and developing countries. Multiple scholars have suggested that China could restrict arbitration for developed countries while allowing open BITs with developing countries.<sup>73</sup> Yet, it would have to severely limit its MFN clauses in order to prevent developed-country investors from simply borrowing these more advantageous terms used in developing country BITs. This proposal imitates the US strategy of confining its BITs to developing countries so that only the few outward investors from these countries have the right to sue the US government.<sup>74</sup> Interestingly, other Chinese scholars have criticized differentiated treatment of developed and developing countries because it could damage China's reputation as a leader among developing countries.

Since China seeks to align itself with BITs based on the US model, not only to conclude a US-China BIT but also to secure its bilateral sovereignty, it has improved the chances of successful US-China BIT negotiations. American scholars suggest that the BIT negotiations are not promising because the US brings a 43-article model BIT to the table, far more detailed than China's. But the detailed provisions of the US BIT would also benefit Chinese capital exporters. Zhao Jun argues that since China and

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<sup>73</sup> Chen An "Distinguishing Two Types of Countries"; Zhao Jun, "Discussion on Broadening the Usage of BIT MFN Clauses for Procedural Matters (Lun shuangbian touzi tiaoyue zuihuiguo daiyu tiaokuan kuozhang shiyong yu chengxuxing shixiang)," CNKI Database (6 Dec 2010).

China could also fine-tune its treaties to the new standard set by the Free Trade Area of the Americas (FTAA), which refers to a specific MFN court case in order to clarify its disagreement with that decision.

<sup>74</sup> Economist Intelligence Unit, 7.

the US are now both major capital-exporters and –importers, “the knife cuts both ways” and thus China should remain calm in the negotiations.<sup>75</sup>

Indeed, China has recently shown interest in standard US provisions it had previously avoided. One such area is environmental and labor standards. While the Chinese had previously avoided all mention of environment and labor concerns, its 2003 Guyana BIT mentions environmental protection in the Preamble.<sup>76</sup> Even more surprising, the 2008 China-Colombia BIT’s new “essential security” clause mentions that environmental protection could justify an exception to the BIT’s other provisions.<sup>77</sup>

China’s shift toward the US BIT model may improve its chances of concluding a BIT with the US, except that the US has thus far only signed BITs with capital-importing countries. The US government avoids signing BITs with capital-exporting countries to protect the sovereignty of its national courts.<sup>78</sup> Thus the main obstacle to US-China BIT negotiations may no longer be the two nations’ differences, but rather their similarities. China faces an uphill battle because it exports hundreds of times more capital to the US than it did during the previous negotiations in the 1980s. Ironically, the US may balk at agreeing to open arbitration with China, although China changed its policy in part to please the US.

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<sup>75</sup> Zhao Nan, 2.

<sup>76</sup> China-Guyana 2003 BIT, Preamble.

<sup>77</sup> China-Colombia 2008 BIT, Article 5.

China also appears to be eliminating performance requirements as required by the WTO TRIMS Agreement, though Chinese scholars have suggested ways to get around it.

Zhao Jun, 2.

<sup>78</sup> Economist Intelligence Unit, 7.

China might actually improve its chances of concluding a BIT with the US if it convinces the US to restrict the access to arbitration. The US could then sign its first BIT with a capital-exporter without compromising the exclusive sovereignty of the US courts. The US would not restrict arbitration in its treaties with developing countries, while European countries would not restrict arbitration for any treaties. Thus the US would need to differentiate the China BIT from its other BITs, which would require excluding access to arbitration from the Most Favored Nation clause.

If the US or China did indeed begin to differentiate its treaties between developing and developed countries, the new BITs would deepen inequalities inherent in the bilateral negotiations process. This would strike a blow to the global equality of the entire bilateral investment treaty system. In the end, the damage that differentiation would do to the global BIT network could finally push developing countries to unite in pursuit of a nondiscriminatory multilateral investment treaty.

## **Conclusion**

Previous scholars have not convincingly explained why China began accepting international investor-state arbitration in 1998. China's most recent BITs and the *Tza Yap Shum* arbitration case show that China still opposes giving all its BIT partners access to arbitration. Thus their actions cannot be explained by the "Going Abroad" strategy, WTO and developed country pressure, or China's general economic liberalization. The Chinese government has accepted open arbitration but

continues to oppose universal access because it is experimenting. It chose to test open arbitration on small developing countries in order to study the risks of renegotiating European BITs and signing new ones with the US and Canada.

Today, rather than avoiding universal access because of any one particular country, China is trying to reserve its right to deny open access in future BITs. Thus China seeks to prevent international arbitration tribunals from establishing a precedent would allow all of its BIT partners open access. China has added new provisions to its latest treaties to restrict international arbitrators' room for interpretation. It is attempting to maintain its "bilateral sovereignty," or the right to share power with its partner countries without the interference of international tribunals.

China has begun to protect itself against international tribunals by adopting the same protections used in American BITs. Therefore, it now faces better prospects of concluding a BIT with the US. However, the US avoids BITs with capital-exporting countries to protect the sovereignty of its courts, and China is now a capital-exporter. The main obstacle to US-China BIT negotiations may no longer be the two nations' differences, but rather their similarities.

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