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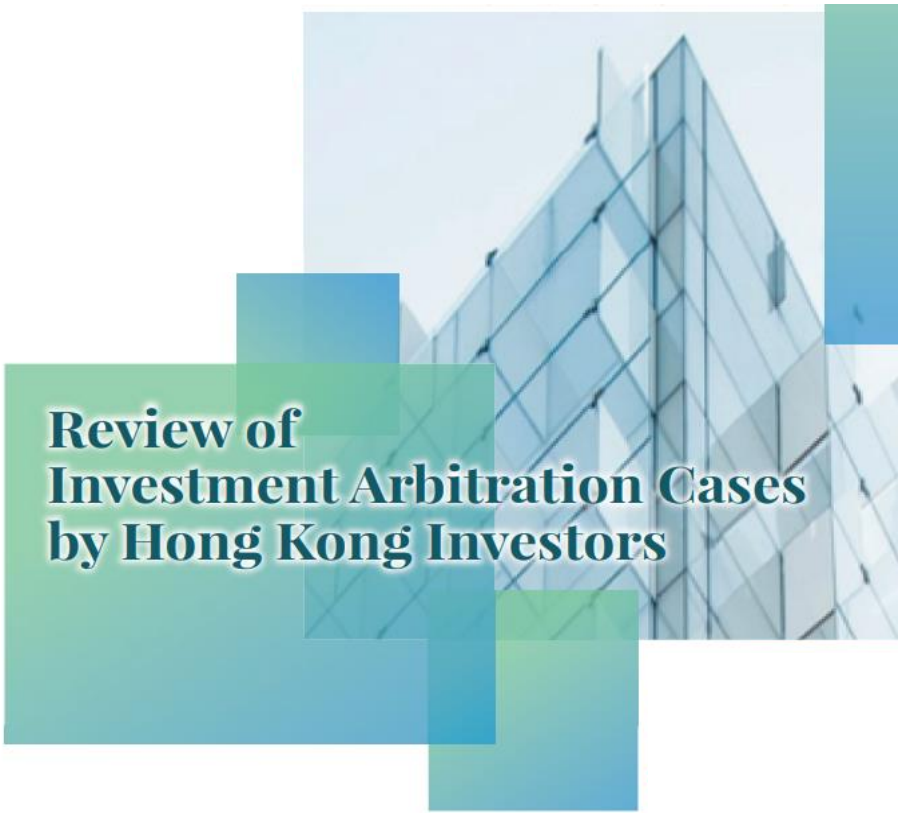

Nathaniel Lai

Foreign Legal Consultant
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Partner and Co-Leader, Global Arbitration, Trade and Advocacy
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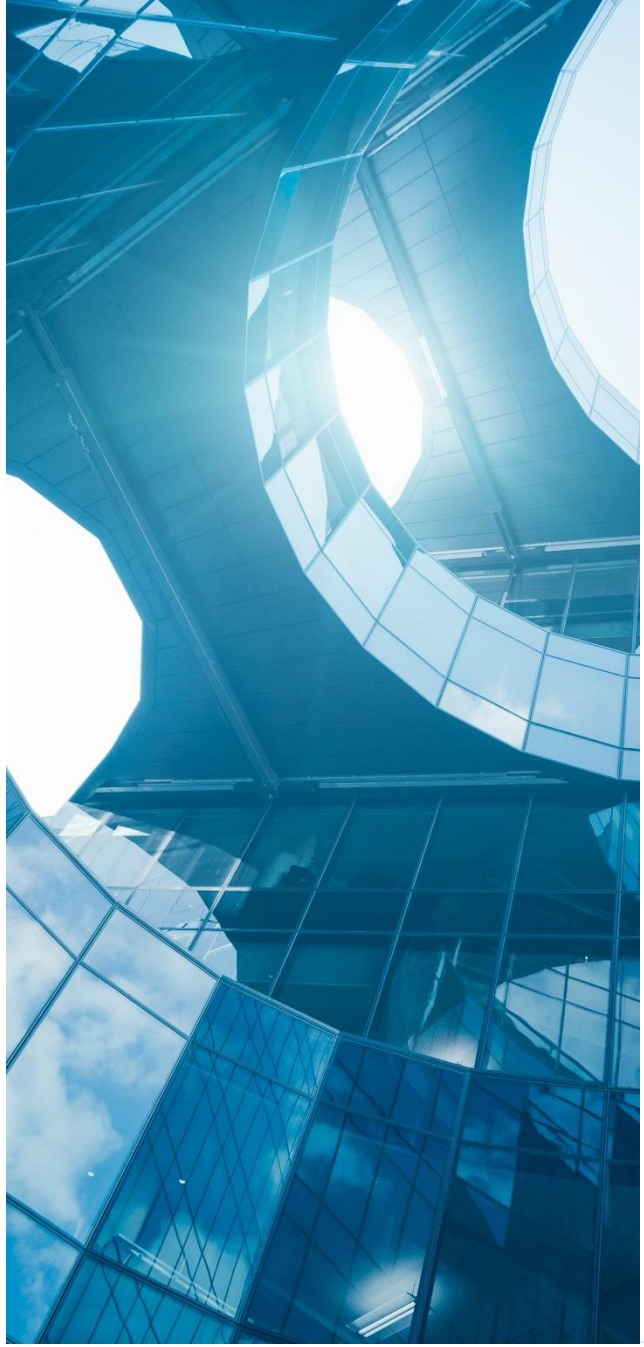

Roadmap of Discussions

- Introduction to Investor-State Dispute Settlement (**ISDS**) [*Adrian Lai*]
- Arbitration Without Privity [*David Fong*]
- Application of China's Bilateral Investment Treaties ('**BITs**') to Hong Kong [*David Fong*]
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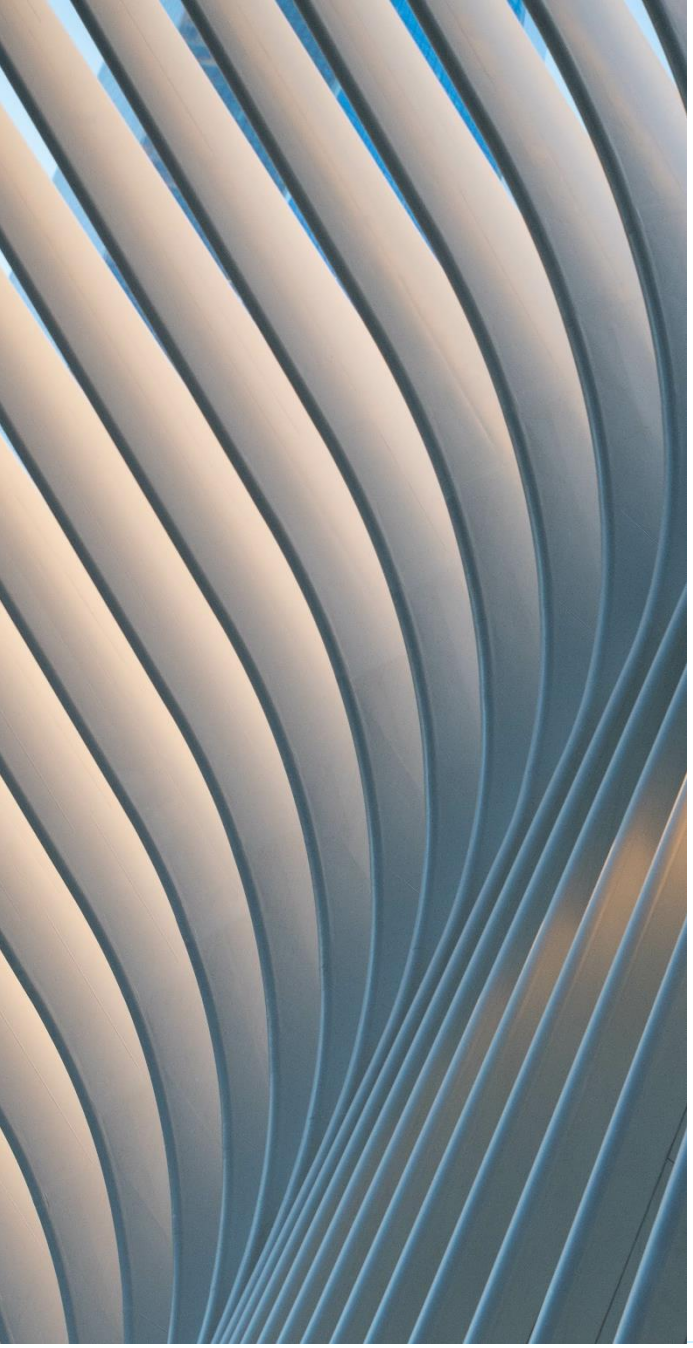
  - Russia-Ukraine Conflict and Russia's Nationalisation Bill
  - China's Belt and Road Initiative ('**BRI**')



Use of Hong Kong IPPAs – Overview

- Hong Kong has entered into 22 Investment Promotion and Protection Agreements (IPPAs), and is continuing to negotiate these agreements with various jurisdictions.
- Provide investment protections for Hong Kong investors separate from investment protections under China's investment treaties.
- Contain typical investment treaty protections, including compensation for expropriation, fair and equitable treatment.
- Some examples: Australia; Canada; the UK; France; Germany; Austria; Japan; Korea; ASEAN; Thailand; the UAE
- Currently under negotiation / negotiations concluded but pending signing: Bahrain; Maldives; Myanmar; Iran; Russia; Turkey

Use of Hong Kong IPPAs (cont.)

- Contain dispute resolution mechanisms similar to those seen in BITs, including investor-State arbitration.
- E.g.: Hong Kong-Australia Investment Agreement:

ARTICLE 10

Settlement of Investment Disputes

A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

Use of Hong Kong IPPAs (cont.)

(A) THE PHILIP MORRIS CASE

- *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12):
  - Dispute concerning Australia's introduction of legislation requiring uniform plain packaging for tobacco products.
  - Australia objected to the suit.
  - Argued that PMA deliberately restructured its assets after the dispute had arisen in order to take advantage of the Hong Kong-Australia investment agreement, which amounted to an abuse of rights.

Use of Hong Kong IPPAs (cont.)

(A) THE PHILIP MORRIS CASE: Tribunal's Conclusions and Findings

- Mere fact of restructuring an investment to obtain investment treaty protections is not *per se* illegitimate.
- However, initiation of a treaty-based investor-State arbitration is an abuse of rights when an investor has changed its corporate structure to obtain treaty protection at a point in time when a specific dispute was 'foreseeable'.
- 'Foreseeable': When there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise. High threshold and depends on the circumstances of each particular case.
- Unlikely to be an abuse of rights if corporate restructuring was justified independently of the possibility of bringing an investor-State claim.

Use of Hong Kong IPPAs (cont.)

(A) THE PHILIP MORRIS CASE: Tribunal's Conclusions and Findings (cont.)

- PMA was aware that Australia would introduce the uniform 'plain' packaging legislation when it acquired the shares of Philip Morris Limited ('**PML**'), a trading company incorporated in Australia which held certain intellectual property rights in Australia.
- The main and determinative reason for the corporate restructuring was the intention to bring a claim under the Hong Kong-Australia investment agreement, using the Hong Kong entity as claimant.
- The tribunal dismissed PMA's claim, finding it was an abuse of rights and therefore inadmissible.

Use of Hong Kong IPPAs (cont.)

- The Aftermath: Australia and Hong Kong entered into a new IPPA in January 2020 following the *Philip Morris* case, which carved out tobacco control measures from the scope of ISDS.
- Takeaways from *Philip Morris* for Hong Kong investors and foreign investors looking to re-domicile in Hong Kong:
  - 'Treaty shopping' is not *per se* an abuse of rights – well-accepted that companies may restructure to obtain investment treaty protection.
  - But once it is foreseeable that a dispute will arise with the State, it may be an abuse of rights to restructure at that point in time solely to take advantage of a favorable investment treaty.
  - If you want to take advantage of Hong Kong's IPPA protections, make sure you have an appropriate corporate structure in place. Once a dispute is on foot, it may be too late.

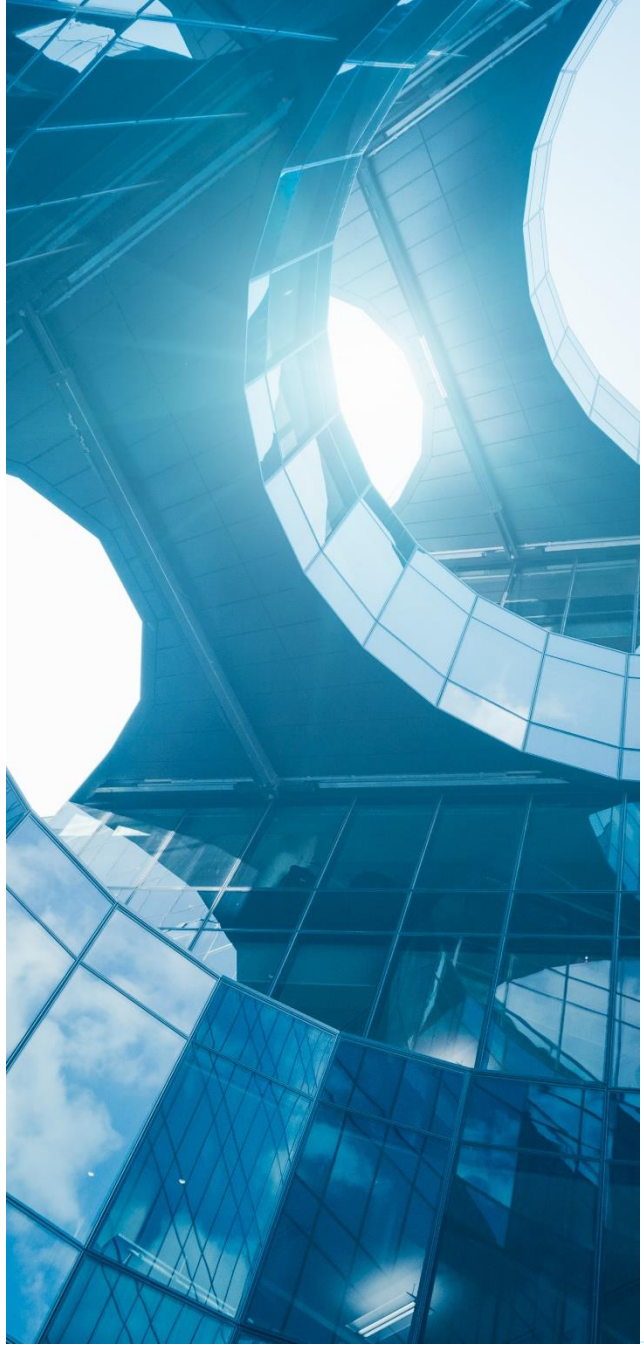
Use of Hong Kong IPPAs (cont.)

- Some IPPAs have more stringent requirements making treaty shopping difficult.
  - E.g. Hong Kong-Mexico IPPA: definition of ‘investor’ requires enterprises to not only be constituted under Hong Kong law but to also be ‘engaged in substantive business operations in the area of the HKSAR’.

Use of Hong Kong IPPAs (cont.)

(B) RECENT USE OF HONG KONG IPPAs

- It has been reported that a Hong Kong-based renewable energy fund has lodged an investment arbitration claim against Japan under a Japan-Hong Kong investment agreement.
  - Dispute reportedly centres on whether Japan's pullback on a renewable energy subsidy scheme exposed investors to unreasonable risks.
  - The subsidy scheme was introduced at a time when solar equipment costs were falling rapidly, creating a powerful incentive that successfully brought large numbers of investors to Japan in search of land to build solar farms.
  - Claimant reportedly argued that the Government of Japan began cutting the feed-in tariff rates, as well as then introducing retroactive deadlines for plants licensed before those constraints existed to start operating. The regulatory uncertainty and lower-than-expected tariffs have contributed to a recent surge in solar company bankruptcies.



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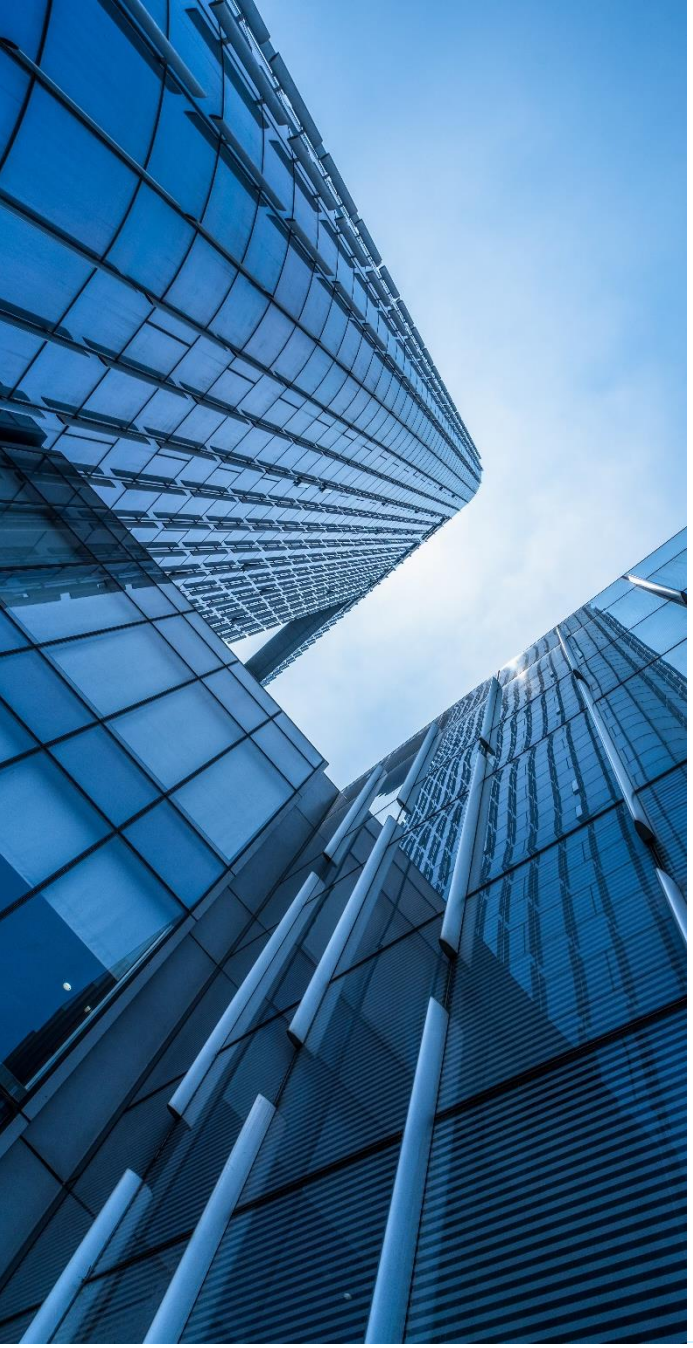
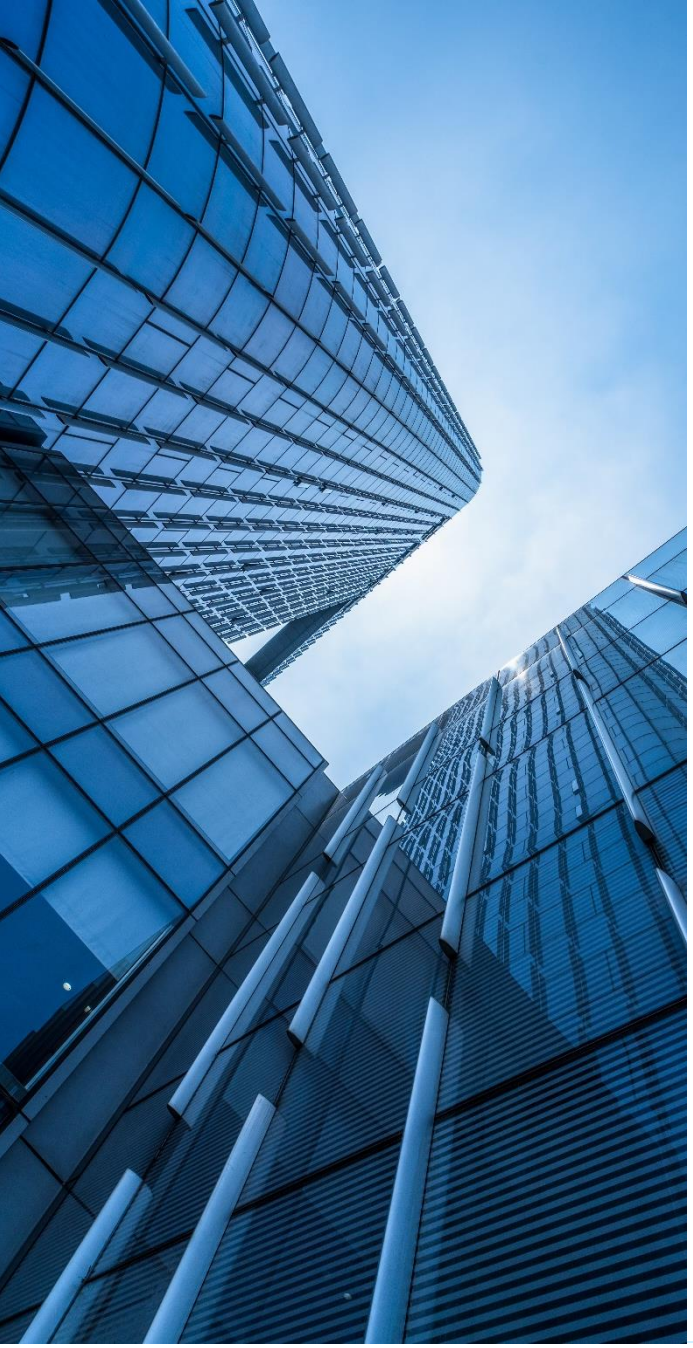


Assignment of Right to Sue

Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania (ICSID Case No. ARB/15/41):

- Claim under a State-investor agreement: The Implementation Agreement Between Tanzania and Independent Power Tanzania Limited ('**IPTL**') dated 8 June 1995 (the '**Implementation Agreement**'), which contained an ICSID arbitration clause.
- Under the Implementation Agreement, Tanzania gave various undertakings and assurances in favour of IPTL and 'its permitted successors and assigns', including the exclusive right to finance, insure, construct, complete, own, operate and maintain a power plant.
- IPTL raised funds through a loan under a facility agreement. As security for the loan, IPTL assigned all its rights under the Implementation Agreement to the lenders' Security Agent.
- The Facility Agreement was restructured between 1999 and 2005. In August 2005, SCB HK acquired the loan and related security.
- Stepping into IPTL's shoes under the Implementation Agreement, SCB HK brought an ICSID arbitration against Tanzania.

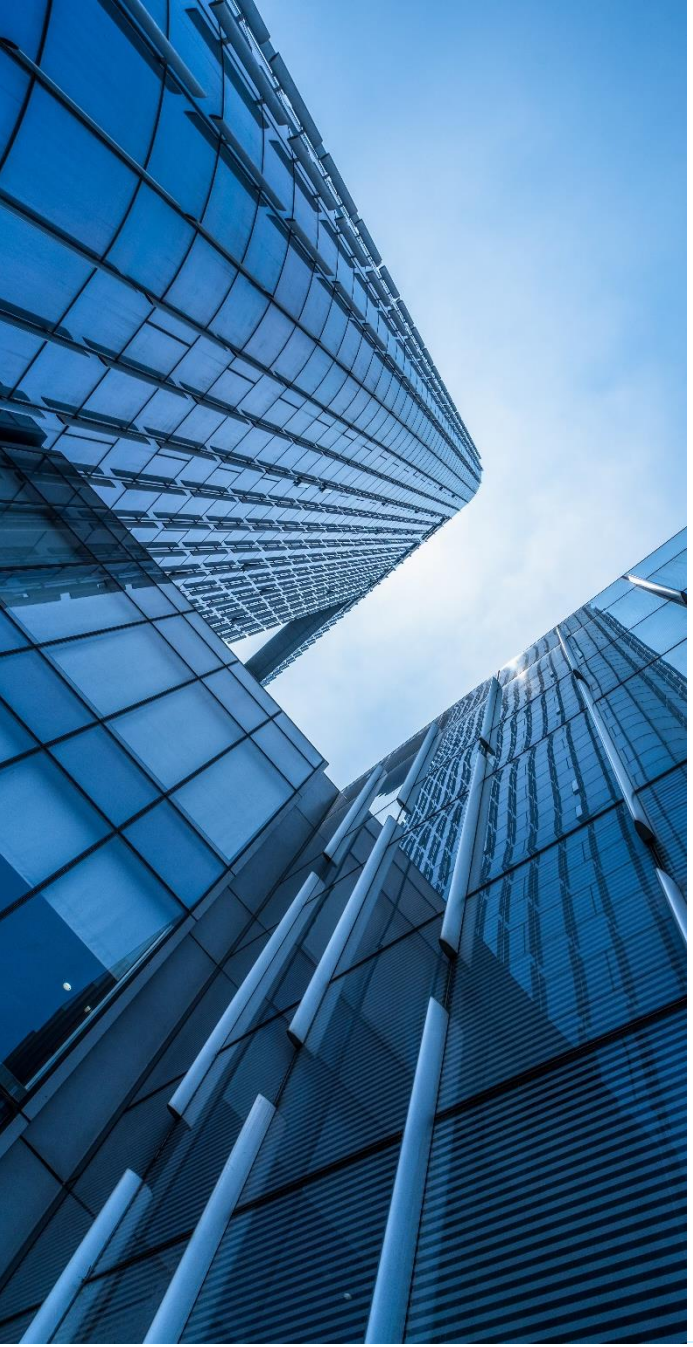


Assignment of Right to Sue (cont.)

- Tanzania objected to jurisdiction, arguing that assignment of IPTL's rights under the Implementation Agreement was invalid because it had not given prior written consent.
- Dispute centred on assignment provisions in the Implementation Agreement:

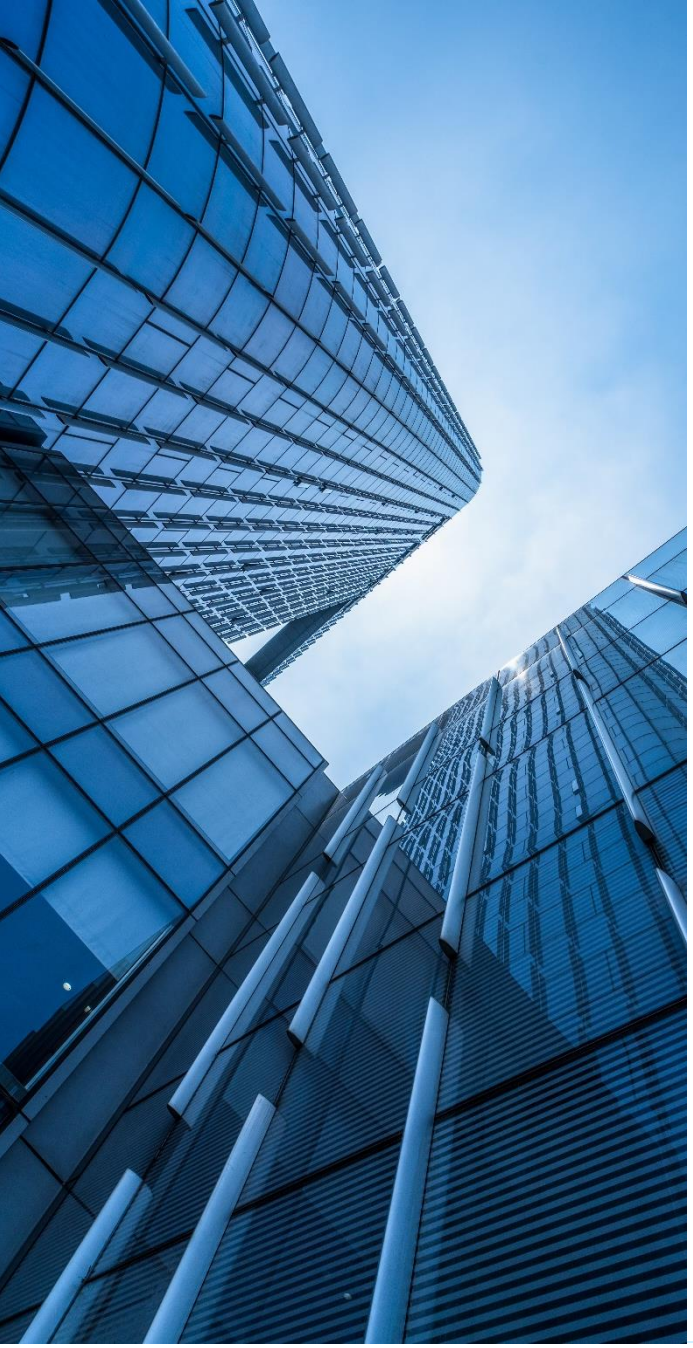
> ***15.1 Assignment***
>
> *No assignment or transfer by a Party of this Agreement or such Party's rights or obligations hereunder shall be effective without the prior written consent of the other Party.*

> ***15.2 Creation of Security***
>
> *(a) Notwithstanding the provisions of Article 15.1, for the purpose of financing the construction and operation of the Facility, the Company may, upon prior written approval of the GOT, whose consent shall not be unreasonably withheld, assign or create a security interest to the Lenders pursuant to the Financing Documents in, its rights and interests under or pursuant to:*
>
> *(i) this Agreement;*
> *(ii) any agreement included within the Security Package;*
> *(iii) the Facility;*
> *(iv) the Site;*
> *(v) the movable property and intellectual property of the Company; or*
> *(vi) the revenues or any of the rights or assets of the Company.*



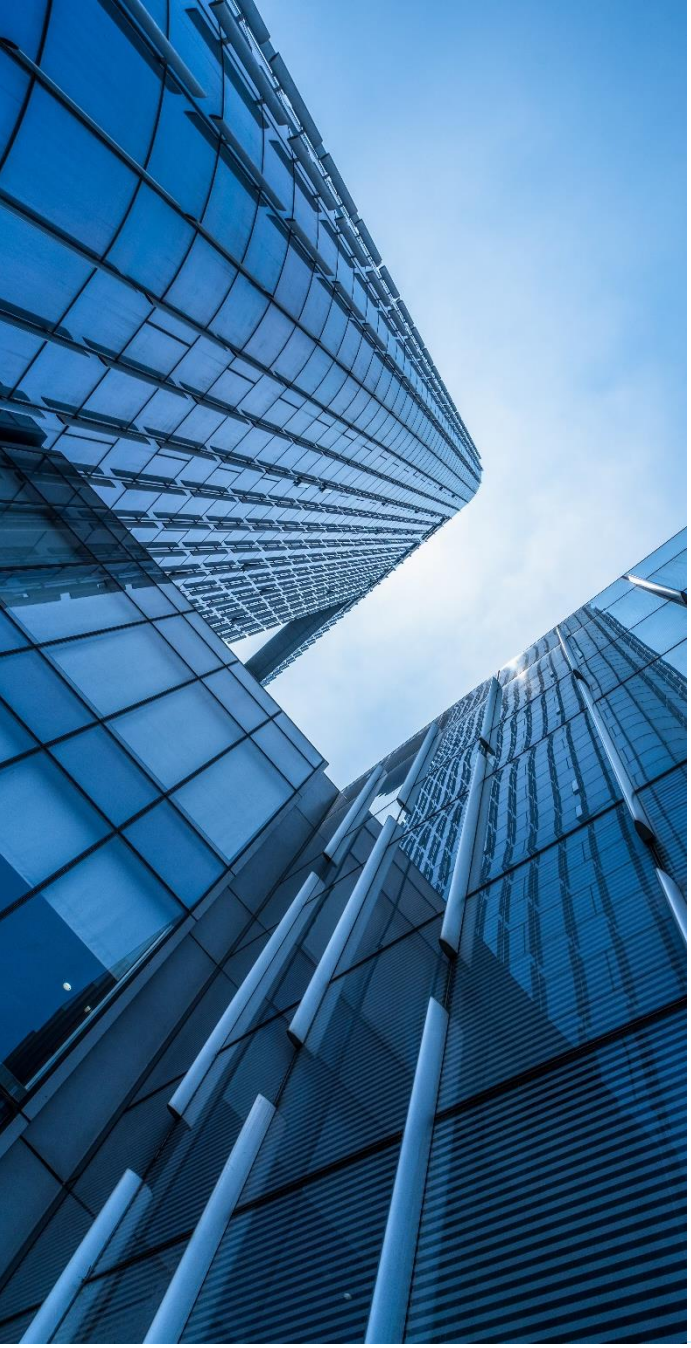
Assignment of Right to Sue (cont.)

- Tanzania's arguments:
  - Contractual arguments regarding interpretation of the assignment provisions.
  - Commercial reason for prohibition in assignment is that the counterparty has a commercial interest in knowing the identity of who can decide to sue it. Where the party is a sovereign State, this interest is a matter of national security and public policy. Tanzania has a legitimate interest in and concern about the identity, nature and nationality of its contractual counterparties, in particular in relation to power plant projects.
  - Implied requirement that consent be obtained for assignments. Every time a private party contracts with a sovereign State in relation to major infrastructure public utilities projects, 'it is implied in the negotiations and the final agreements that the counterparty would not change without the sovereign's approval'.



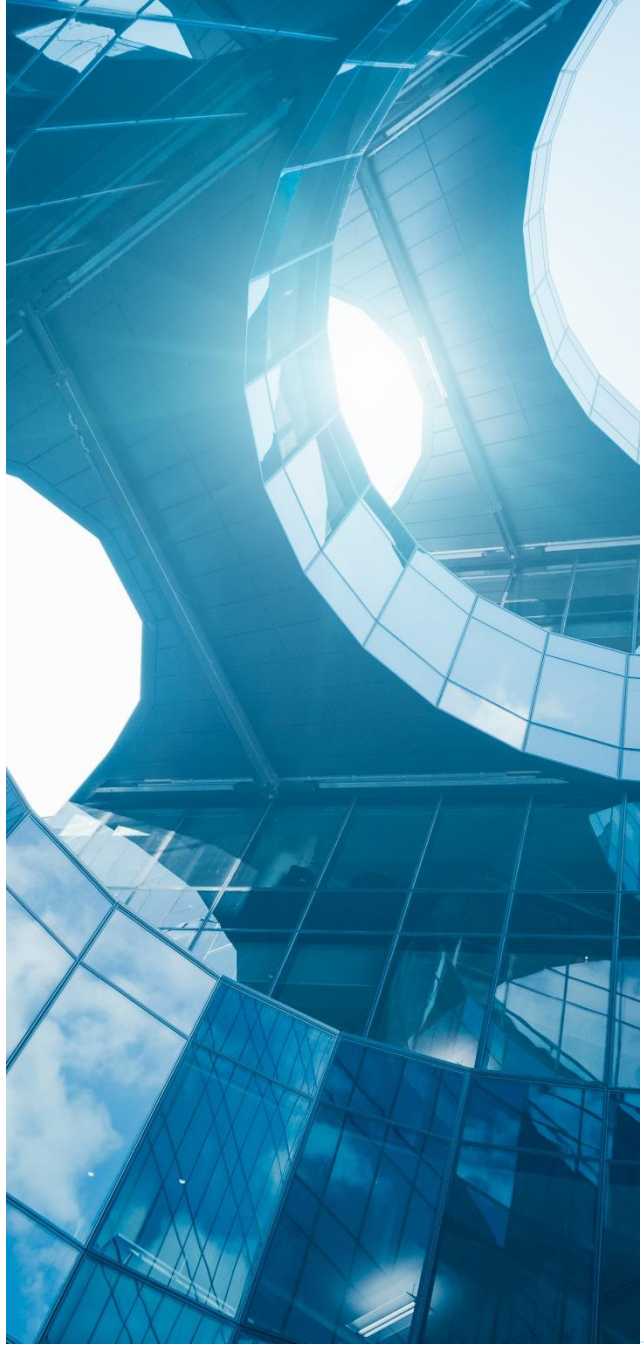
Assignment of Right to Sue (cont.)

- Tribunal's findings:
  - Tanzania's concern that it be given opportunity to know who it would be dealing with as a matter of national security and public policy is fully addressed in Art 15.1, which renders assignment ineffective unless prior written consent is given.
  - Art 15.2 creates an exception to Art 15.1. Under Art 15.2, Tanzania accepted IPTL could assign or create a security interest in favour of its lenders subject only to IPTL having obtained prior written consent.
  - Written consent was given, even if not 'prior', in the form of various government letters and signatures mentioning the assignment. These constituted both consent to assignment and relinquishment of the right to require *prior* consent.
  - As Tanzania waived the right to require prior consent, the assignment was valid.



Assignment of Right to Sue (cont.)

- Tanzania also argued that SCB HK is not a 'national of another Contracting State' as necessary for ICSID jurisdiction:
  - Nationality must be assessed at the *time of consent to arbitration*, i.e. the date of the Implementation Agreement, as well as when the request for arbitration is filed.
  - IPTL was a Tanzanian national at both points in time, and so not a national of 'another' Contracting State.
- SCB HK argued that it is a Hong Kong entity and thus a national of the PRC, i.e. 'another' Contracting State. As SCB HK is bringing the claim as assignee, it is SCB HK's nationality that is relevant, not IPTL's (the assignor's) nationality.
- Tribunal accepted SCB HK's argument: As the legal assignee of IPTL's rights, SCB HK is entitled to enforce IPTL's rights in its own name. As a Chinese national, it is a national of another Contracting State.



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  - **China's Belt and Road Initiative ('BRI')**

Investment Protection Considerations in Light of Recent Developments

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill

WHY THIS MATTERS:

- On 9 March 2022, Russia's ruling party, United Russia, announced that a government commission had approved the first step towards nationalising assets of foreign firms that leave Russia in the wake of economic sanctions over Ukraine.
- On 16 March 2022, the draft law 'On the External Administration for the Management of the Organization' was approved by the Russian Central Bank and is pending adoption by the Russian Parliament.
- The new law will apply to Russian companies with foreign shareholders (25% or greater ownership) based in 'unfriendly' jurisdictions.
- The list of 'unfriendly' jurisdictions includes the US, the EU, Canada, the UK, as well as Albania, Andorra, Australia, Iceland, Japan, Lichtenstein, Micronesia, Monaco, Montenegro, New Zealand, North Macedonia, Norway, San Marino, Singapore, South Korea, Switzerland, Taiwan, and Ukraine.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill

WHY THIS MATTERS:

- If the 'unfriendly' parent company ceases operations in Russia, members of the Russian company's board, or certain government officials, may apply to a local commercial court for 'external administration' of the Russian company.
- On 13 April 2022, Reuters reported that Russian lawmakers tabled a proposal to appoint VEB, the State development bank, or other entities, as external managers.
- The court will supervise the restructuring, and may take control of company assets and operations.
- If, within five days, the foreign owners withdraw their decision to leave Russia (or agree to continue operations pending a sale to a buyer that will continue running the business), the external administration proceedings may be withdrawn.
- If the foreign owner does not reverse its decision, the company's assets will be transferred to a new company, and the new company's shares will be sold at auction.
- The 'old' company will be liquidated.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill

WHAT INVESTORS CAN DO:

- Affected foreign investors can assert claims against Russia in international arbitration under BITs for Russian government action that:
  - Results in the discriminatory expropriation of their assets, or in their expropriation without the payment of prompt, adequate and effective compensation;
  - Results in the effective loss of the management, use, or control of their investments, or a significant depreciation of the value of their assets; and
  - Interferes with the use and enjoyment of their investments in Russia.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill

WHAT INVESTORS CAN DO:

- These treaties may give parent companies recourse against Russian government action undermining the value of their investments, including:
  - Rights that are enforceable directly by investors in binding international arbitration;
  - Compensation from Russia for the loss of value of their investments, i.e., their local subsidiaries, assets, and contractual relationships with Russian counterparties; and
  - Potentially interim measures, (i) to temporarily suspend one or more of the procedures under the legislation, (ii) to preserve or retrieve sensitive information; and (iii) to preserve equipment or goods held by the local subsidiaries.
- Awards issued by investor-State tribunals may be enforced against frozen Russian assets of State Agencies or even State-owned companies.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill (cont.)

RELEVANCE FOR HONG KONG/CHINESE INVESTORS:

- Neither China nor Hong Kong is listed as an 'unfriendly' jurisdiction.
- However, to the extent their investments are routed through 'unfriendly' jurisdictions, Hong Kong/Chinese investors may be impacted.
- What recourse may Chinese investors have under the China-Russia BIT?
  - Protection encompasses indirect investment.

> For the purpose of this Agreement,
> 1. The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particularly, though not exclusively, includes:
> a) movable and immovable property as well as any property rights;
> b) shares, stocks and any other kind of participation in the capital of commercial organizations;
> c) claims to money or to any other performance having an economic value associated with an investment;
> d) intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, technology and technical process, know-how and good-will;
> e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.
> Any change in the form in which assets are invested does not affect their character as investments if such change does not contradict the laws and regulations of the Contracting Party in which territory the investments were made.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill (cont.)

RELEVANCE FOR HONG KONG/CHINESE INVESTORS:

- What recourse may Chinese investors have under the China-Russia BIT?
  - In terms of substantive protections:
    - (i) Fair and equitable treatment:

> 1. Each Contracting Party shall ensure in its territory fair and equitable treatment of the investments made by investors of the other Contracting Party and activities in connection with such investments.
>
> Without prejudice to its laws and regulations, neither Contracting Party shall take any discriminatory measures that might hinder management and disposal activities in connection with of investments.

    - (ii) National treatment and most-favoured nation clauses:

> 2. Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities connected in connection with such investments by investors of the other Contracting Party treatment not less favourable than that accorded to the investments and activity activities connected with such investments by its own investors.
>
> 3. Neither Contracting Party shall subject investments and activities connected with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and activities in connection with such investments by the investors of any third State.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill (cont.)

RELEVANCE FOR HONG KONG/CHINESE INVESTORS:

- What recourse may Chinese investors have under the China-Russia BIT?
  - In terms of substantive protections:
    - (iii) Compensation for expropriation:

> 1. Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the measures are taken for the public interests and meet all of the following conditions:
>
> (a) under domestic legal procedure;
>
> (b) without discrimination;
>
> (c) against compensation.
>
> 2. The compensation mentioned in paragraph 1 of this Article shall be equivalent to the market value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest calculated from the date of expropriation until the date of payment at the LIBOR rate for six months US dollar credits. The compensation shall be paid without delay in any freely convertible currency.

Investment Protection Considerations in Light of Recent Developments (cont.)

(A) Russia-Ukraine Conflict and Russia's Nationalisation Bill (cont.)

RELEVANCE FOR HONG KONG/CHINESE INVESTORS:

- What recourse may Chinese investors have from the China-Russia BIT?
  - ISDS clause provides for resolution of disputes between investors and Russia.
  - Investors will have to elect between the Russian courts, ICSID arbitration, or *ad hoc* arbitration under the UNCITRAL Rules.

1. Any dispute between a Contracting Party and an investor of the other Contracting Party, related to an investment, shall be as far as possible settled amicably through negotiations.

2. If the dispute cannot be settled amicably through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted:

a) to the competent court of the Contracting Party that is a party to the dispute; or

b) to the International Center Centre for Settlement of Investment Disputes (the Centre) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on March 18, 1965 (subject to it entered into force for both Contracting Parties) or Additional Facility Rules of International Centre for Settlement of Investment Disputes (provided that the Convention has not entered into force for either Contracting Party); or

c) to an ad hoc arbitration court in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. Once the investor has submitted the dispute to the competent court of the concerned Contracting Party or to the Centre or to the ad hoc arbitration court, the choice of one of the three procedures shall be final.

4. The arbitration award shall be based on:

- the provisions of this Agreement;
- the laws and other regulations of the Contracting Party in whose territory the investment has been made including the rules relative to conflict of laws; and
- the rules and universally accepted principles of international law.

5. The arbitration award shall be final and binding on both parties to the dispute. Each Contracting Party ensures enforcement of this award in accordance with its legislation laws and other regulations.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's Belt and Road Initiative (BRI)

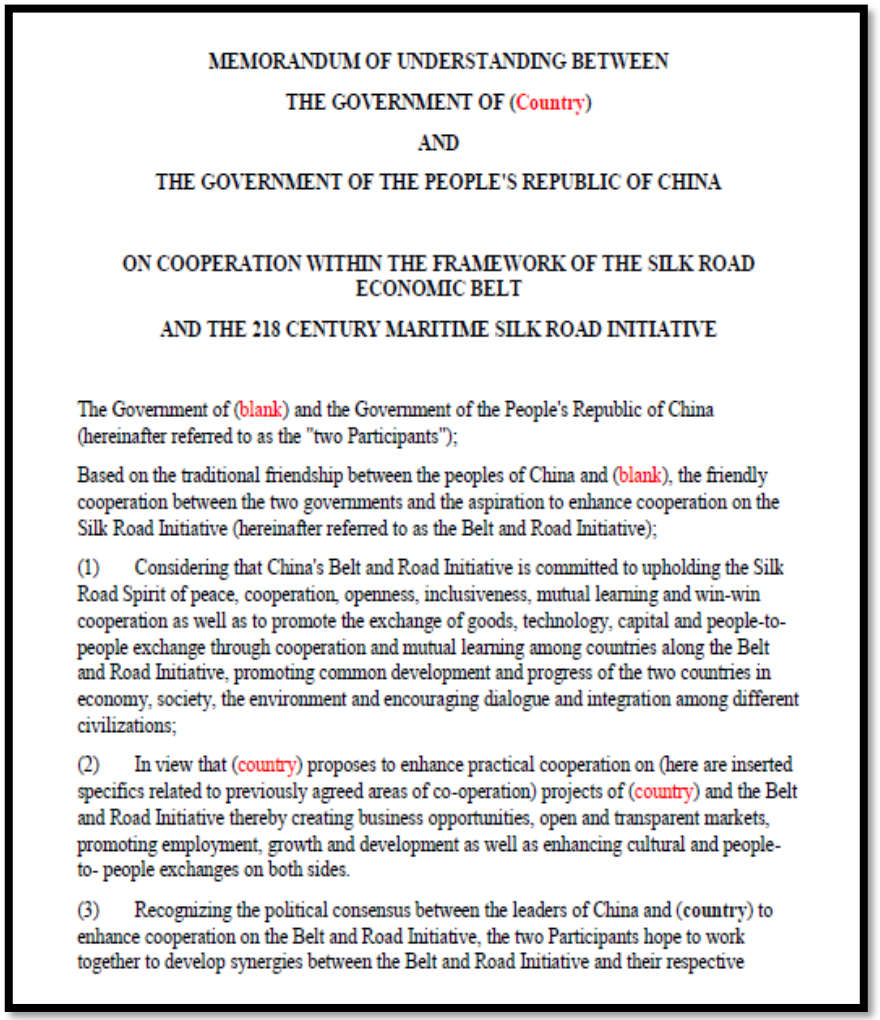
- China's BRI strategy seeks to connect Asia with Africa and Europe via land and maritime networks with the aim of improving regional integration, increasing trade and stimulating economic growth.

China's planned Belt and Road Initiative. (SOURCE: Chinese Government)

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

- Overview of memoranda of understanding ('**MoU**') between China and BRI countries:
  - ❖ Parties to the BRI MoUs agree to cooperate on the following five priorities –
    - (i) Policy coordination;
    - (ii) Infrastructure connectivity;
    - (iii) Unimpeded trade;
    - (iv) Financial integration; and
    - (v) Connecting people.



MEMORANDUM OF UNDERSTANDING BETWEEN

THE GOVERNMENT OF (Country)

AND

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

ON COOPERATION WITHIN THE FRAMEWORK OF THE SILK ROAD ECONOMIC BELT

AND THE 218 CENTURY MARITIME SILK ROAD INITIATIVE

The Government of (blank) and the Government of the People's Republic of China (hereinafter referred to as the "two Participants");

Based on the traditional friendship between the peoples of China and (blank), the friendly cooperation between the two governments and the aspiration to enhance cooperation on the Silk Road Initiative (hereinafter referred to as the Belt and Road Initiative);

(1) Considering that China's Belt and Road Initiative is committed to upholding the Silk Road Spirit of peace, cooperation, openness, inclusiveness, mutual learning and win-win cooperation as well as to promote the exchange of goods, technology, capital and people-to-people exchange through cooperation and mutual learning among countries along the Belt and Road Initiative, promoting common development and progress of the two countries in economy, society, the environment and encouraging dialogue and integration among different civilizations;

(2) In view that (country) proposes to enhance practical cooperation on (here are inserted specifics related to previously agreed areas of co-operation) projects of (country) and the Belt and Road Initiative thereby creating business opportunities, open and transparent markets, promoting employment, growth and development as well as enhancing cultural and people-to- people exchanges on both sides.

(3) Recognizing the political consensus between the leaders of China and (**country**) to enhance cooperation on the Belt and Road Initiative, the two Participants hope to work together to develop synergies between the Belt and Road Initiative and their respective

Sample BRI MoU

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

– Stated to be non legally binding.

Part V Legal Status

(13) This MOU does not constitute legally binding obligations for the two Participants. It is only an expression of their common will to jointly advance the Belt and Road Initiative.

– No explicit investment protection clauses: Typically makes references to existing agreements and institutions that are legally binding and/or operational on both a bilateral and multilateral basis.

(5) The two Participants will promote the bilateral cooperation based on the following principles:

(i) Guided by the principles of extensive consultation, joint contribution and shared benefits, the two Participants will respect each other's' core interests and major concerns and deepen political mutual trust;

(ii) In accordance with the vision of cooperation, development and win-win progress under the Belt and Road Initiative, the two Participants will make full use of existing bilateral cooperation mechanisms, multilateral mechanisms that they have both joined, and existing effective regional cooperation platforms to form synergy, give each other support and share experience so as to complement and fully display each other's strengths.

(12) Through exchange of high-level visits and existing governmental and non-governmental exchange mechanisms, the two Participants will build a multi-tiered information-sharing platform in diverse fields and with multiple channels to share information resources, increase transparency and encourage participation of people in all sectors of society.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

- 3 broad forms of Chinese BITs:
  - First generation (negotiated between 1982 and 1989, before China joined ICSID):
    - Provide either no ISDS provisions at all or a narrowly constructed ISDS clause that only admits the amount of compensation for expropriation to arbitration.
  - Second generation (negotiated between 1990 and 1997):
    - Restrictive ISDS with limited access to ICSID (China acceded to the Washington Convention 1966 on 6 February 1993, with reservation under Article 25(4): limited to amount of the compensation from expropriation).
  - Third generation (negotiated since 1998):
    - Include, among others, the agreements signed with the ASEAN member States, Uzbekistan, Russia and Germany.
    - Provide substantial protection of investments, including national treatment and most-favoured nation status as well as access to ICSID arbitration tribunals.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

– Investment treaties with BRI States:

1st/2nd Generation BITs	
BIT	**Date of Signature**
China-Mongolia BIT	25 August 1991
China-Ukraine BIT	31 October 1992
China-Tajikistan BIT	9 March 1993
China-Morocco BIT	27 March 1995
China-Zimbabwe BIT	21 May 1996
China-South Africa BIT	30 December 1997
3rd Generation BITs	
BIT	**Date of Signature**
China-Ethiopia BIT	11 May 1998
China-Mozambique BIT	10 July 2001
China-Tunisia BIT	21 June 2004
China-Madagascar BIT	21 November 2005
China-Turkey BIT	29 July 2015

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

– Hong Kong's IPPAs with BRI States:

BRI State	Date of Entry into Force
Austria	1 October 1997
Thailand	12 April 2006
Kuwait	14 September 2013
Vietnam	17 June 2019
United Arab Emirates	6 March 2020

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

- The HKUST Institute for Emerging Market Studies ('**HKUST IEMS**') has made findings on legal protections to Chinese investors under the BRI projects:
  - Vast majority of investment treaties in force between China and the BRI countries belong to the first and second-generation BITs and are characterised by terms that are encouraged but not required.
  - They contain ISDS clauses with a limited amount of compensation payable to investors in case of expropriation.
  - They provide for the establishment of *ad hoc* tribunals (rather than access to ICSID arbitration tribunals) that can only decide cases dealing with the amount of compensation in case of expropriation.
  - Several BRI countries do not have any investment agreement with China or Hong Kong, including Afghanistan, Iraq and Nepal.

*The HKUST IEMS report can be found here: file:///C:/Users/nchia/Downloads/sejko-protecting-fdi-bri-hkustiems-tlb33%20(1).pdf.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

TAKEAWAYS:

- Contractual protections are often limited – they do not adequately cover against sovereign and political risks.
- From a forward planning perspective, unless the relevant BRI 'host State' has a new generation BIT or MIT with China, investors may need to think carefully about availing itself to a more advantageous investment treaty granting broad protection rights and unfettered access to ISDS.
- However, there may be an issue with 'treaty shopping'
  - E.g. *Philip v Morris* issue on abuse of rights.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

TAKEAWAYS:

- Contrast with 'front end' treaty shopping – when an investment is planned in advance so that the investment may benefit from a favourable regulatory environment.
- But careful planning has to be undertaken to ensure the investor falls within the definition of a 'national' or an 'investor' under the relevant BIT.

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

TAKEAWAYS:

- Some treaties adopt the requirement of a 'seat' or 'place of effective management'. Examples:
  - Article 1(4) of the Philippines-UK BIT (1980):

> 4. The term "company" of a Contracting Party shall mean a corporation, partnership or other association, incorporated or constituted and actually doing business under the laws in force in any part of the terri of that Contracting Party wherein a place of effective managemen situated.

  - Article 1(2)(a) of the China-Germany BIT (2003):

> - any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit;

Investment Protection Considerations in Light of Recent Developments (cont.)

(B) China's BRI (cont.)

TAKEAWAYS:

- Alternatively, some treaties may incorporate 'denial of benefits' clauses. Example:
  - Article 17(2) of the US-Rwanda BIT:

> 2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.