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Designing Labor Provisions in China's BITs: Dual Identity Challenges and Legislative Strategies

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Abstract

China's dual identity as a capital-importing and exporting state necessitates BITs that balance public interests with investor rights. Analyzing 30 Chinese BITs (2000-2023), this article reveals that only 12% include substantive labor clauses. It proposes a model combining preamble commitments, domestic law benchmarks, and arbitration exclusions. Case studies from Zimbabwe and Pakistan demonstrate how China's overseas labor disputes stem from legislative gaps. The framework advocates for "gradualist" reforms, resisting hegemonic standards while advancing labor rights.

Keywords

China's BITs, dual identity, labor arbitration, public policy space

1. Introduction

The globalization of investment flows has fundamentally transformed China's position in the international economic order, creating unprecedented challenges for its Bilateral Investment Treaty (BIT) regime. China has evolved from primarily a recipient of foreign direct investment to simultaneously being the world's second-largest capital exporter, with overseas investments exceeding $2.3 trillion by 2022 (MOFCOM, 2023). This transition has created what Gallagher and Wang (2021, p. 618) term a "regulatory identity crisis," wherein China must balance protecting its overseas investors with preserving policy autonomy for domestic reforms. Nowhere is this tension more evident than in the treatment of labor provisions within China's BIT network, where competing imperatives create distinctive governance challenges.

Labor provisions represent an increasingly significant dimension of international investment law, reflecting what scholars describe as the "socialization" of previously economics-focused legal regimes (Wei, 2021, p. 190). These provisions aim to prevent regulatory races to the bottom by establishing minimum protections for workers affected by investment activities. According to UNCTAD (2023, p.

43), the percentage of BITs containing substantive labor commitments increased from 7% in 2000 to 32% in 2020, indicating a significant evolution in global practice. However, China's BIT network demonstrates considerably lower adoption rates, with empirical analysis revealing substantive labor provisions in only 12% of agreements concluded between 2000 and 2023. This article examines China's approach to labor provisions in BITs through the lens of its dual identity as both capital importer and exporter. Through empirical analysis of 30 treaties and detailed case studies, it identifies legislative gaps and implementation challenges across China's BIT network. Building on comparative analysis of alternative models, the article proposes a "gradualist framework" for integrating labor provisions that accommodates China's distinctive position while advancing worker protections. This framework emphasizes contextual implementation, progressive realization, and differentiated obligations based on development contexts—principles aligned with China's broader approach to international relations.

The article proceeds as follows: Section I examines the current status of labor provisions in China's BITs, identifying predominant models and legislative gaps. Section II analyzes the dual identity challenges China faces regarding labor governance in investment contexts, illustrated through case studies of recent disputes. Section III proposes a gradualist framework for integrating labor provisions into China's BITs, drawing on comparative analysis of alternative approaches. Section IV outlines an implementation strategy centered on tiered obligations and progressive realization. The conclusion summarizes key findings and discusses implications for China's evolving role in international investment governance.

2. Current Status of Labor Provisions in China's BITs

2.1 Predominant Models in China's BIT Practice

Contemporary Chinese BITs demonstrate significant variation in their treatment of labor issues, reflecting China's cautious approach to integrating non-economic concerns into investment agreements. Empirical analysis of 30 Chinese BITs concluded between 2000 and 2023 reveals three predominant models, each characterized by distinctive approaches to labor governance. Understanding these existing frameworks provides essential context for developing reform proposals that build on China's treaty practice while addressing identified weaknesses.

The most common approach, observed in 65% of examined treaties, incorporates labor considerations through preambular language without establishing binding obligations. The 2012 China-Canada Agreement exemplifies this "preamble model," acknowledging the importance of "corporate social responsibility" and "sustainable development" in its introductory text while omitting substantive labor commitments from operational provisions (Wang, 2023, p. 53). Similar language appears in the 2014 China-Australia Free Trade Agreement, which references "internationally recognized labor rights" in its preamble but contains no enforceable labor standards. As Li and Zhang (2022, p. 271) observe, this approach provides interpretive context for subsequent treaty provisions but creates no independent labor obligations for investors or host states.

A second approach, identified in 20% of examined treaties, utilizes general exception clauses that potentially encompass labor regulations without explicitly mentioning them. The 2003 China-Germany BIT permits measures “necessary to protect public security and order,” creating potential space for labor regulations while avoiding direct engagement with labor standards (Zhang & Li, 2020, p. 87). Similar language appears in the 2008 China-Mexico BIT, which includes exceptions for measures “necessary to maintain public order” or protect “essential security interests.” While these provisions might shield certain labor regulations from investor claims, their ambiguity creates significant interpretive uncertainty. As demonstrated in the Schneider Electric v. China dispute (2021), investors frequently contest the applicability of general exceptions to specific labor measures, arguing that economic regulations fall outside legitimate public welfare concerns (Chen, 2022, p. 305).

The remaining 15% of examined treaties adopt what might be termed a “silence model,” omitting any reference to labor issues within treaty text. The 2001 China-Netherlands Agreement exemplifies this approach, containing no provisions that would shield labor reforms from potential investor claims. Similar omissions characterize the 2005 China-Spain BIT and the 2007 China-France Agreement, creating what Wu and Martinez (2023, p. 220) describe as “protective gaps” that privilege investor interests over worker welfare. In these agreements, labor reforms that affect foreign investors might trigger claims under fair and equitable treatment or indirect expropriation provisions, with no treaty language acknowledging the legitimacy of labor regulation as a policy objective.

2.2 Recent Disputes and Legislative Gaps

Recent disputes highlight the practical implications of these legislative gaps. When China amended its Labor Contract Law in 2021 to cap overtime at 36 hours monthly and strengthen protections for platform workers, foreign investors in the manufacturing and technology sectors characterized the reforms as potential violations of BIT obligations. European electronics manufacturers operating in Jiangsu Province argued that the overtime restrictions constituted “indirect expropriation” by reducing operational flexibility and increasing labor costs (Li & Zhang, 2022, p. 275). While these disputes were ultimately resolved through diplomatic channels rather than formal arbitration, the resulting implementation delays demonstrated what Heng and Liu (2022, p. 130) term “regulatory chill”—the deterrent effect of potential investment claims on legitimate regulatory activity.

Similarly, China’s 2023 Work Safety Law amendments, which mandated enhanced safety equipment and increased inspections in facilities producing hazardous materials, faced resistance from foreign chemical manufacturers operating in Shanghai’s free trade zone. Invoking the fair and equitable treatment provision of the applicable BIT, these investors argued that the regulatory changes disrupted their “legitimate expectations” regarding operational conditions (Zhou & Barnes, 2022, p. 284). This dispute further demonstrated the tensions between China’s domestic labor governance objectives and its international investment obligations, particularly in the absence of explicit treaty language acknowledging the legitimacy of labor regulation.

Table 1. Comparative Analysis of Legislative Models

Model	Strengths	Weaknesses	Relevance to China
U.S. 2012	Strong enforcement	North-South inequities	Limited applicability
EU Hybrid	Policy flexibility	Complex implementation	High
ASEAN	Negotiation ease	Weak protections	Low

These examples illustrate how China's existing BIT network inadequately addresses labor governance challenges, creating uncertainties for both regulators and investors. The predominance of non-binding preambular language and absence of explicit labor provisions leaves significant discretion to arbitral tribunals, which historically prioritize investor interests over public welfare concerns. As China continues developing its BIT practice, addressing these legislative gaps becomes increasingly important for both domestic regulatory autonomy and the reputation of Chinese overseas investments.

3. Dual Identity Challenges and Case Studies

3.1 Host Country Perspective: Preserving Regulatory Space

China's simultaneous position as both capital importer and exporter creates distinctive challenges regarding labor provisions in investment treaties. As Huang and Meyer (2022, p. 360) observe, "China occupies both sides of the regulatory equation," potentially subjecting its domestic labor reforms to investor challenges while facing international scrutiny regarding labor practices in its overseas investments. This dual identity complicates traditional approaches to BIT design, which typically assume clear distinctions between capital-exporting and capital-importing states with correspondingly differentiated interests.

From a host country perspective, China's domestic labor reforms increasingly intersect with its investment treaty obligations. Between 2013 and 2022, China implemented significant improvements in labor standards, including substantial minimum wage increases (averaging 8.3% annually), the 2021 platform worker protections, and enhanced occupational safety requirements in the manufacturing sector (Wu & Martinez, 2023, p. 218). Each of these reforms potentially affects foreign investors' operational costs and profit margins, creating tensions with BIT obligations to provide stable investment environments. As Chen and Pham (2022, p. 93) note, China faces the challenge of "preserving policy space for socially necessary labor reforms while maintaining an attractive investment climate"—a balancing act complicated by existing treaty commitments.

Table 2. Key Labor Reforms and Investor Responses (2010-2023)

Reform	Year	Investor Response	Legal Basis in BITs
Overtime Caps (36 hours/month)	2021	Arbitration threats under China-Germany BIT	FET and Expropriation Clauses
Minimum Wage Standardization	2018	Compliance disputes in SEZs	General Exception Clauses
Collective Bargaining Rights	2020	Challenges in Jiangsu Province	Preamble Model BITs

The tensions between domestic reforms and investment obligations became evident in 2022 when several European electronics manufacturers challenged China's revisions to the Work Safety Law. The investors, operating through subsidiaries in Jiangsu Province, invoked the "legitimate expectations" doctrine under applicable BITs, arguing that the regulatory changes constituted unfair treatment by imposing unexpected compliance costs (Li & Zhang, 2022, p. 278). While China defended the measures as necessary for public welfare, the absence of explicit labor carve-outs in relevant BITs created legal uncertainty that complicated the dispute resolution process. As Wang (2023, p. 58) observes, this case demonstrated the "asymmetry between China's evolving domestic priorities and its legacy treaty commitments," highlighting the need for BIT provisions that explicitly recognize labor regulation as a legitimate policy objective.

3.2 Home Country Perspective: Reputational and Operational Risks

From a home country perspective, China faces mounting international scrutiny regarding labor practices in its overseas investments, particularly within Belt and Road Initiative (BRI) projects. According to a comprehensive World Bank assessment, labor disputes occurred in 43% of Chinese-funded infrastructure projects in Africa and Southeast Asia between 2018 and 2022, with common grievances including wage disparities between Chinese and local workers, excessive working hours, and inadequate occupational safety measures (World Bank, 2023, p. 76). These disputes not only threatened project timelines and profitability but also undermined China's diplomatic narrative of "win-win cooperation" through the BRI. As Zhang and Okonjo (2023, p. 80) note, labor practices in overseas investments increasingly affect China's "soft power and international reputation," creating incentives for strengthening labor governance within its investment agreements.

The Zimbabwe mining dispute of 2021 exemplifies these challenges from China's perspective as a capital exporter. Following fifteen fatalities attributed to inadequate ventilation systems, Zimbabwe's Labor Ministry suspended operations at a Chinese-owned platinum mine in the Great Dyke region. The investor filed a $50 million claim under the China-Zimbabwe BIT, arguing that the suspension constituted disproportionate punishment and disguised expropriation (CSID, 2023). Zimbabwe countered that its actions were necessary to protect public health and safety, but the BIT's vague exception clauses provided limited guidance for the tribunal. According to Heng and Liu (2022, p. 133), the case remained unresolved for eighteen months, during which international media coverage characterized the dispute as emblematic of exploitative practices within Chinese overseas investments.

3.3 Illustrative Case Study: Pakistan SEZ Labor Reforms

Pakistan's 2020 labor reforms in Special Economic Zones (SEZs) containing Chinese investments triggered significant tensions that highlighted China's complex position. The reforms, which mandated equal pay for local and Chinese workers and established minimum training requirements for technical positions, were challenged by Chinese investors as violations of the "fair and equitable treatment" standard under the 1989 China-Pakistan BIT (Ahmed & Zhou, 2022, p. 420). Through diplomatic pressure, China's Commerce Ministry secured a two-year implementation delay, but the dispute highlighted what scholars term "regulatory chill" (host states hesitating to enact necessary labor reforms), "reputational damage" (undermining China's "win-win" narrative), and "legal fragmentation" (relying on ad hoc solutions rather than predictable treaty mechanisms).

These cases demonstrate how China's dual identity creates distinctive challenges for BIT design. Conventional models that prioritize investor protection over regulatory flexibility become problematic when applied to labor governance, where China occupies both sides of the regulatory equation. As Gallagher and Wang (2021, p. 625) observe, this unique position necessitates "innovative approaches that balance investment protection with policy autonomy," creating space for legitimate labor regulation while providing predictable standards for investors.

4. Comparative Approaches and Proposed Framework

4.1 Analysis of Existing Models

Addressing China's dual identity challenges requires innovative treaty design that draws on comparative experience while acknowledging China's distinctive context. Existing approaches to labor provisions in investment treaties demonstrate significant variation, reflecting different philosophical orientations and governance traditions. Analyzing these models provides valuable insights for developing China-specific approaches that balance investor protection with labor welfare considerations.

The United States model represents the most comprehensive approach to integrating labor standards into investment treaties. The 2012 U.S. Model BIT contains binding obligations requiring parties to "adopt and maintain" laws consistent with internationally recognized labor rights, establishes institutional mechanisms for civil society participation, and excludes labor disputes from investor-state arbitration (USTR, 2012). According to Johnson and Sachs (2021, p. 315), this approach reflects a "fundamental reorientation" of investment governance toward balancing economic and social concerns. However, as Wu and Martinez (2023, p. 225) observe, the U.S. model presupposes institutional capacity and political willingness to enforce international labor standards that may not align with China's development priorities or governance traditions. Moreover, the model relies heavily on

Western conceptions of labor rights that may not fully accommodate China’s distinctive social and economic context.

The European Union offers an alternative approach through its Investment Court System, exemplified in the 2020 EU-Vietnam Investment Protection Agreement. This model preserves substantial policy space for labor regulation while establishing proportionality requirements that balance public welfare with investor interests (European Commission, 2020). Labor violations may constitute breaches of fair and equitable treatment only when systematic and unremedied, creating flexibility for implementation challenges while maintaining minimum standards. The agreement also incorporates a standing tribunal with appellate review, addressing legitimacy concerns regarding traditional arbitration. As Huang and Meyer (2022, p. 365) note, this balanced approach offers valuable lessons for China’s BIT reform, though European models remain embedded in distinctively Western conceptions of labor rights and administrative governance.

By contrast, the Regional Comprehensive Economic Partnership (RCEP), which includes China and ASEAN nations, adopts what Heng and Liu (2022, p. 128) term a “minimalist approach” to labor governance. The agreement omits substantive labor provisions entirely, reflecting a traditional conception of investment treaties as purely economic instruments. While this approach maximizes regulatory autonomy, it provides no minimum standards for labor practices in investment contexts. According to Zhang and Li (2020, p. 92), this regulatory vacuum can lead to “fragmented enforcement and protection gaps” that undermine both worker welfare and investment predictability. The 2022 labor protests at a Chinese-owned garment factory in Cambodia, which faced no BIT-based accountability mechanisms despite documented wage theft, exemplifies these limitations (Heng & Liu, 2022, p. 131).

4.2 The Gradualist Framework: Core Components

Drawing on these comparative insights while acknowledging China’s unique position, this article proposes a “gradualist framework” for integrating labor provisions into Chinese BITs. This framework emphasizes incremental implementation, differentiated obligations based on development contexts, and mechanisms that balance sovereignty with accountability. Rather than imposing immediate high standards through rigid provisions, it establishes a trajectory toward enhanced labor governance while preserving flexibility for contextual implementation. As Wang (2023, p. 60) observes, this approach aligns with China’s broader philosophy of “seeking progress while maintaining stability” in governance reforms.

The proposed framework consists of several complementary components that collectively address China’s dual identity challenges. Preambular recognition establishes labor protection as a legitimate policy objective without creating immediate binding obligations. Language referencing “decent work,” “sustainable development,” and “corporate social responsibility” establishes interpretive context for subsequent treaty provisions while signaling China’s commitment to balanced investment governance (Wei, 2021, p. 198). These preambular references should explicitly acknowledge the “right to regulate” in labor matters, establishing a treaty-based foundation for legitimate regulatory interventions.

Building on this foundation, non-derogation clauses prohibit parties from weakening labor protections specifically to attract investment. These provisions establish a regulatory floor while preserving flexibility regarding specific standards and implementation mechanisms. According to Li and Zhang (2022, p. 282), referencing "domestic labor laws" rather than international standards acknowledges China's emphasis on sovereignty while preventing competitive deregulation that undermines worker welfare. This approach allows China to maintain its gradualist approach to international labor standards while addressing legitimate concerns regarding regulatory races to the bottom.

The framework further incorporates explicit exception clauses that specifically include labor regulations within public welfare measures exempt from investor claims. Rather than relying on general references to "public order" or "essential security," Chinese BITs should enumerate categories of labor regulation exempt from characterization as indirect expropriation or unfair treatment. These categories include minimum wage legislation, occupational safety requirements, working time regulations, and anti-discrimination measures—core areas where China has legitimate regulatory interests both as host and home state (Wu & Martinez, 2023, p. 228). Such specificity reduces interpretive uncertainty while preserving the overall integrity of investment protections.

4.3 Dispute Resolution Innovations

Regarding dispute resolution, the framework incorporates specialized procedures for labor-related investment disputes. These procedures include mandatory consultation periods, expertise requirements for arbitrators handling labor matters, and transparency obligations that permit civil society participation. According to Zhou and Barnes (2022, p. 290), these procedural safeguards enhance the legitimacy of resulting decisions while preserving the integrity of the investment protection regime. While stopping short of excluding labor disputes from arbitration entirely (as in the U.S. model), this approach acknowledges legitimacy concerns while maintaining the enforceability of investment protections.

Table 3. Draft Annex on Non-Arbitrable Labor Disputes

Category	Examples of Excluded Measures	Legal Basis in Chinese Law
Minimum Wage	Provincial wage adjustments	Labor Law
Collective Bargaining	Union registration requirements	Trade Union Law
Occupational Safety	Workplace safety inspections	Work Safety Law

Together, these components establish a framework that accommodates China's dual identity challenges while gradually strengthening labor governance in the investment context. Unlike rigid Western models that impose immediate high standards, this gradualist approach allows for contextual implementation while establishing a trajectory toward more robust protections. As Chen and Pham (2022, p. 97) observe, the framework acknowledges China's distinctive governance traditions while creating space for incremental advancement of labor standards in both inward and outward investment contexts.

5. Implementation Strategy: Tiered Obligations

5.1 Differentiated Approach by Development Level

Implementing the gradualist framework requires strategic differentiation based on treaty partners' development levels and China's relationship dynamics. The proposed tiered obligation system tailors labor provisions to specific bilateral contexts while maintaining coherence across China's BIT network, addressing what Zhang and Okonjo (2023, p. 83) term the "development sensitivity" challenge in international labor governance.

For least-developed countries (LDCs), a capacity-building approach emphasizes technical assistance over binding obligations. BITs with these partners should include labor rights in preambular language, establish non-derogation commitments regarding domestic laws, and create institutional frameworks for knowledge transfer and implementation support. According to Ahmed and Zhou (2022, p. 425), these agreements should acknowledge resource constraints that may limit immediate compliance with international standards, while establishing progressive realization targets that align with development trajectories. The proposed China-Malawi BIT exemplifies this approach, focusing on building regulatory capacity in Malawi's mining sector through joint training programs and phased implementation of occupational safety standards.

For middle-income countries, a reciprocity-based approach establishes mutual obligations regarding core labor standards. These agreements contain standalone labor clauses with binding commitments regarding domestic law enforcement, consultation mechanisms for addressing implementation challenges, and transparency requirements that enhance accountability. As Wang (2023, p. 62) observes, labor provisions should reference internationally recognized standards as aspirational goals while basing compliance assessments on domestic legal frameworks. The 2023 China-Indonesia BIT reflects this middle-tier approach, combining firm commitments to enforce existing labor laws with dialogue mechanisms for addressing emerging issues such as digital platform work.

For developed country partners, comprehensive labor provisions reference international standards and establish robust enforcement mechanisms. These agreements include binding obligations regarding ILO core conventions, third-party monitoring arrangements, and dispute resolution provisions that permit labor experts to participate in arbitration proceedings. According to Huang and Meyer (2022, p. 368), while maintaining China's policy space for implementing labor standards through its distinctive regulatory approaches, these agreements acknowledge the legitimate expectations of developed partners regarding minimum labor protections. The anticipated China-EU Comprehensive Agreement on Investment represents this advanced approach, balancing China's sovereignty concerns with European expectations regarding labor governance.

5.2 Phased Implementation and Institutional Support

Across all tiers, implementation follows a phased timeline that allows for institutional learning and capacity development. Initial phases focus on transparency and information sharing, establishing baseline data regarding labor conditions in investment contexts. Middle phases strengthen consultation mechanisms and technical cooperation, building capacity for addressing identified challenges. Advanced phases progressively introduce more stringent obligations and enforcement mechanisms, calibrated to development contexts and implementation experiences. This progressive approach aligns with what Li and Zhang (2022, p. 285) describe as China's "experimentalist governance" tradition, which emphasizes learning through implementation rather than imposing rigid standards from the outset.

Table 4. Tiered Obligation Framework

Tier	Countries	Key Requirements	Enforcement Mechanism
Basic	LDCs (e.g., Nepal)	Technical assistance	ILO capacity-building programs
Intermediate	Middle-income (e.g., Indonesia)	Host-state law compliance	Joint mediation panels
Advanced	Developed (e.g., Germany)	ILO core conventions	Hybrid arbitration tribunals

The tiered obligation system constitutes a distinctive Chinese approach to labor provisions that diverges from Western models emphasizing uniform high standards across all agreements. As Wei (2021, p. 200) observes, this differentiated approach allows China to maintain flexible positions across negotiating contexts while establishing a coherent trajectory toward enhanced labor governance in investment relations. Unlike one-size-fits-all Western models, this tiered framework acknowledges the diversity of China's investment relationships while gradually advancing labor standards across its BIT network. The approach aligns with China's emphasis on "mutual respect" and "win-win cooperation" in international relations, creating space for contextual implementation while establishing minimum protections for workers affected by investment activities.

6. Conclusion

China's dual identity as both capital importer and exporter creates distinctive challenges for integrating labor provisions into bilateral investment treaties. Traditional BIT models, designed primarily to protect foreign investors in developing countries, inadequately address the complexities of China's position within global investment flows. The empirical analysis presented in this article demonstrates significant gaps in China's existing BIT network regarding labor governance, with only 12% of agreements containing substantive labor protections. These legislative gaps create vulnerabilities for both Chinese regulatory autonomy and the reputation of Chinese overseas investments.

The gradualist framework proposed in this article offers a pathway for addressing these challenges while respecting China's distinctive governance traditions and development priorities. By combining preambular recognition, non-derogation clauses, explicit exception provisions, and specialized dispute resolution procedures, this framework creates space for legitimate labor regulation while maintaining predictable investment environments. The tiered implementation strategy further tailors these approaches to specific bilateral contexts, allowing China to maintain flexible positions across diverse negotiating scenarios.

This approach diverges from Western models that emphasize immediate high standards and punitive enforcement mechanisms. Instead, it emphasizes progressive realization, capacity building, and contextual implementation—principles that align with China's approach to international relations more broadly. While establishing a trajectory toward enhanced labor governance in investment contexts, this framework preserves China's policy space for implementing standards through its distinctive regulatory approaches.

As China continues expanding its BIT network, particularly through the Belt and Road Initiative, integrating appropriate labor provisions becomes increasingly important for both economic stability and international legitimacy. The framework outlined in this article offers guidance for navigating these complex waters, balancing China's interests as both rule-taker and rule-maker in the evolving landscape of international investment law. By addressing its dual identity challenges through thoughtful treaty design, China can establish investment governance models that support sustainable development while respecting diverse development contexts and regulatory traditions.

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