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No-U-Turn Clauses in Chinese Investment Treaties

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Abstract

To prevent parallel proceedings, international investment agreements (IIAs) have incorporated the "fork-in-the-road" clause and "no-U-turn" clause to coordinate domestic and international proceedings to the same investment dispute. The "no-U-turn" clause is more flexible than the "fork-in-the-road" clause because it permits the investor to initiate international arbitration after commencing domestic proceedings against the same measure of the host state. When applying "no-U-turn" clauses in investor-state arbitration cases where China is the respondent state, China's relevant administrative litigation laws should be considered. This article explores two core issues that should be clarified when interpreting Chinese "no-U-turn" clauses, namely, the identity of the actor initiating domestic proceedings and the time when domestic proceedings can be withdrawn under Chinese law. By analyzing the deficiencies of the existing Chinese "no-U-turn" clauses which may cause ambiguity and impair their effectiveness in preventing parallel proceedings, this article proposes corresponding improvement suggestions. There should be more clarity in the wording of "no-U-turn" clauses that specify the identity of the party filing and withdrawing domestic proceedings. Additionally, China should establish more specific standards for allowing the withdrawal of administrative litigations.

Keywords

No-U-Turn Clause, Waiver Clause, Fork-in-the-Road Clause, ISDS

1. Introduction

In recent years, multiple proceedings have been initiated by investors in different forums against the same host state for substantially identical disputes as a result of the proliferation of international investment agreements (IIAs) (Judkiewicz,

2015; Cremades & Madalena, 2008: pp. 515-516). Parallel proceedings (also known as "concurrent proceedings") may result from the same dispute or two closely related disputes before different dispute resolution forums (Cremades & Madalena, 2008: p. 507; Reinisch, 2008: p. 114). Investors' practice of choosing the most favorable jurisdiction or court in which to file a claim can be defined as "forum shopping". In some circumstances, duplicative claims could result in a waste of resources and conflicting decisions, as well as a double recovery by claimants (UNCTAD, 2014: p. 86). To eliminate or minimize the undesirable effects of parallel proceedings, some IIAs provide for coordinated domestic and international proceedings to the same investment dispute through "fork-in-the-road" clauses and "no-U-turn" clauses (also known as "waiver" clauses) (Kaufmann-Kohler et al., 2020: p. 39).

"Fork-in-the-road" clauses stipulate that "the investor must choose between the litigation of its claims in the host State's domestic courts or through international arbitration and that the choice, once made, is final" (Dolzer, Kriebaum, & Schreuer, 2022: p. 267). The "fork-in-the-road" clause has, however, rarely prevented investors from seeking relief in two forums (UNCTAD, 2014: pp. 87-88). In many cases, investor-state arbitration (ISA) tribunals assess the investors' choice of jurisdiction by applying the "triple identity" test, which verifies whether both domestic litigation and international arbitration have the same parties, the same object, and the same cause of action (Voitovich, 2020: p. 44). Tribunals, however, often differentiate "treaty claims" from "contractual claims" when dealing with the identity of causes of action between domestic courts and investment tribunals (Mundi, n.d.). Besides, domestic proceedings often involve a claim brought by the investor's subsidiary in the host state rather than the investor itself, which defeats the identity-of-the-partie requirement (UNCTAD, 2014: pp. 87-88). Therefore, one tribunal indicates that "a strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect" (Voitovich, 2020: p. 45).

The "fork-in-the-road" clause may restrict investors' access to domestic court, whereas the "no-U-turn" clause has no such effect (UNCTAD, 2014: pp. 86-87). "No-U-turn" clauses are usually incorporated in IIAs signed by the United States and Canada. A prominent example is Article 1121 of the North American Free Trade Agreement (NAFTA), which requires the claimant to waive all domestic court proceedings relating to the same claim before submitting the claim to arbitration under Chapter 11 (Cremades & Madalena, 2008: p. 531). The Rwanda-United States of America BIT (2008) also has detailed rules for this, which requires the investor's notice of arbitration should be accompanied by "the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24"[1].

[1]Article 26.2(b) (ii) of Rwanda-United States of America BIT (2008).

There are three key features in applying these American "no-U-turn" clauses, which make them different from "fork-in-the-road" clauses. Firstly, "no-U-turn" clauses focus on the same "measure" that is alleged to have been breached to prevent parallel proceedings about that measure. Moreover, investors and their investments (such as host-state enterprises owned or controlled by investors) should waive their right to initiate or continue proceedings concerning the same measure under such clauses (UNCTAD, 2014: p. 90). Furthermore, regarding the form of waiver, the claimant should provide a written waiver.

It can be found that the "no-U-turn" clause is more detailed than the "fork-in-the-road" clause, and its advantages are also reflected in multiple aspects. Firstly, it prevents investors from circumventing the identity-of-the-parties requirement by utilizing their multi-layered holding structure to initiate duplicative proceedings in domestic courts and international arbitration under different names. Secondly, it circumvents the traditional *litis pendens* requirement of identifying the cause of action by permitting investors to turn to international arbitration after filing the claim in a domestic court or tribunal (UNCTAD, 2014: p. 90). Thirdly, since the "no-U-turn" clauses focus on an identical "measure" of the host state rather than the identical "dispute", the problems resulting from the distinction between treaty claims and contract claims can be avoided (Dias Simões, 2017: pp. 77-78). Last but not least, the written waiver statement is more intuitive and helps to improve the efficiency of the tribunal.

The "no-U-turn" clause is more flexible than the "fork-in-the-road" clause (which makes the investor's choice of forum final) since it permits the investor to seek international arbitration after starting domestic proceedings relating to the same measure of host state. If the investor decides to resort to international investment arbitration, it should discontinue the domestic court proceedings or waive its right to initiate new such proceedings (Kaufmann-Kohler et al., 2020: p. 203). Considering that domestic proceedings of host states may resolve disputes satisfactorily, "no-U-turn" clauses may have reduced potential investment arbitration claims (Kaufmann-Kohler et al., 2020: p. 31).

China remains one of the most attractive destinations for foreign direct investment (FDI) inflows (UNCTAD, 2023). Many of China's IIAs (particularly those signed after 2000) contain broadly worded dispute resolution clauses. For example, China-Germany BIT (2003) provides that the investos are authorized to initiate arbitration proceedings regarding "any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party"[2]. "No-U-turn" clauses are also beginning to appear in China's ISDS provisions during this period. Since the Chinese government has already invoked the no-u-turn clauses as a defense in an ISA case[3], it is necessary to explore the application of "no-U-turn" clauses in the context of Chinese domestic law.

Structurally, this paper has four parts. In addition to Part 1 (Introduction), this paper explores the application of "no-U-turn" clauses in Chinese investment

[2]Article 9 (1) of China-Germany BIT (2003).

[3]Hela Schwarz GmbH v. People's Republic of China (ICSID Case No. ARB/17/19).

treaties. Part 2 analyzes the two most important and controversial issues that should be considered when applying the "no-U-turn" clauses in ISA cases involving China as the respondent state, that is, the identity of the actor initiating domestic proceedings and the time when domestic proceedings can be withdrawn under Chinese domestic law. Part 3 raises proposals for redesigning "no-U-turn" clauses to more effectively prevent parallel proceedings. Part 4 concludes.

2. Analysis of No-U-Turn Clauses in China's IIAs

It should be noted that these clauses are not drafted as precisely as American "no-U-turn" clauses, which may result in controversies and vague language may not be sufficient to prevent investors from seeking relief in two different forums. For one thing, all of China's "no-U-turn" clauses stipulate that it is the "investor" who should withdraw the dispute from the domestic court, but do not mention the host-state enterprise owned or controlled by the investor (**Table 1**). China's "no-U-turn" clauses cannot prevent investor's forum shopping in this situation since the investor cannot withdraw the administrative litigation brought by its investment in a Chinese court. For another, except for the Canada-China FIPA, which explicitly states that "the measure of China alleged to be a breach of an obligation under Part B", all other BITs use the term "dispute" or "issue", which may produce the same effect as the "fork-in-the-road" clause. As analyzed above, in the practice of "fork-in-the-road" clauses, tribunals usually focus on "identical disputes" and emphasize the distinction between treaty claims and contract claims, vent when they are based on the same host state's measure alleged, which facilitates the generation of parallel proceedings (Dias Simões, 2017: p. 77). In addition, since these Chinese "no-U-turn" clauses do not require investors and their investments to provide written waiver statements, it is difficult for the tribunal to intuitively determine whether the investor has succeeded in withdrawing its domestic proceedings because tribunals may consider that such an issue is intertwined with the merits. Although China's "no-U-turn" clauses are more essentially identical to American "no-U-turn" clauses, their wording is somewhat similar to that of traditional "fork-in-the-road". Therefore, China's "no-U-turn" clauses are actually a combination of American "no-U-turn" clauses and "fork-in-the-road" clauses.

Hela Schwarz v. China demonstrates the limited validity of such clauses[4]. In this case, Hela Schwartz, a German investor, initiated an International Centre for Settlement of Investment Disputes (ICSID) arbitration against China according to the Germany-China BIT. China's preliminary objection asserts that the investor has failed to comply with the "no-U-turn" clause of the China-Germany BIT because the investment (a German-owned company in China) has brought the dispute before the Chinese courts, which barred the claimant from submitting the same dispute to this tribunal (Investment Arbitration Reporter, 2020).

[4]Hela Schwarz GmbH v. People's Republic of China (ICSID Case No. ARB/17/19).

Table 1. No-U-Turn Clauses in Chinese IIAs (emphasis added).

Country	Year	Text
Netherlands	2001	Article 10(2): An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court.
Germany	2003	Protocol to the Agreement: 6. To Article 9: With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only: … (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.
Finland	2004	Article 9.3: An investor who has submitted the dispute to national court referred to in paragraph 2 (a) of this Article may nevertheless have recourse to one of the Arbitral Tribunals mentioned in paragraph 2 (b) and 2 (c) of this Article, if the investor has withdrawn his case from national court before judgement has been delivered on the subject matter. In that case the Contracting Party to the dispute shall agree to the submission of the dispute between it and investor of the other Contracting Party to international arbitration in accordance with this Article.
Switzerland	2009	Article 11 (4): A dispute that has been submitted, in accordance with paragraph (2), to a competent court of the Contracting Party concerned, may only be submitted to international arbitration after withdrawal by the investor of the case from the domestic court.
Canada	2012	Annex C.21: Conditions Precedent to Submission of a Claim to Arbitration: Party-Specific Requirements Where the claim concerns a measure of China: 2. An investor who has initiated proceedings before any court of China with respect to the measure of China alleged to be a breach of an obligation under Part B may only submit a claim to arbitration under Article 20 if the investor has withdrawn the case from the national court before judgment has been made on the dispute. This requirement does not apply to the domestic administrative reconsideration procedure referred to in paragraph 1.

As for the domestic proceedings in China, Hela's subsidiary in China was dissatisfied with the expropriation decision and sued the Municipal Government of Jinan for its decision to expropriate House No. 9. The Jinan Intermediate People's Court issued an administrative ruling in 2016, which dismissed the petition. Hela's subsidiary then appealed to the Shandong Provincial Higher People's Court. The Shandong Provincial Higher People's Court rejected the appeal and upheld the original decision in the second instance. The investor (the parent company) was dissatisfied with the Chinese court's decision and submitted an arbitration request to ICSID (Du, 2019: p. 131). China contended that the investor failed to comply with the "no-U-turn" clauses in the China-Germany BIT, which provide that a dispute "can be withdrawn by the investor" once it has

been filed with a Chinese court. However, the tribunal rejected China's request for bifurcation because it held that to determine whether the investor had violated the no-u-turn clauses, it had to be adequately informed of the issues, including jurisdiction, merits, as well as questions of evidence[5].

There are two key issues to consider when examining a "no-U-turn" clause in ISA cases where China is the respondent host state: the identity of the actor initiating domestic proceedings and the time when domestic proceedings may be withdrawn under Chinese law.

2.1. The Identity of the Party to Initiate Domestic Proceedings

According to "no-U-turn clauses" in China's IIAs, it is the investor who should withdraw the dispute from the domestic court. However, different "no-U-turn" clauses do not establish a uniform standard for the identity of the actor initiating domestic proceedings. While some provisions do not specify the identity of the actor, others explicitly state that the actor is an investor[6]. The question arises whether foreign investors are eligible to bring administrative litigation against the government according to Chinese law. The answer is yes. Pursuant to The Administrative Litigation Law of the People's Republic of China (2017 Revision), "a person subjected to an administrative action or any other person which is a citizen, a legal person, or any other organization with an interest in the administrative action shall have the right to file a complaint against the administrative action."[7] Foreign nationals, stateless persons, and foreign organizations can conduct administrative litigation in China and have equal litigation rights and obligations as Chinese citizens and organizations[8]. In this situation, the investor can withdraw the dispute from the domestic court.

The situation would be more complicated if the foreign investor had established a Chinese-foreign equity joint venture. A foreign investor may file a shareholder representative litigation in Chinese courts to challenge the administrative actions taken by administrative agencies they deem to have infringed upon their joint ventures' lawful rights and interests. According to Company Law of the People's Republic of China (2023 Revision), if the legitimate rights and interests of a company are impaired and any losses are caused to the company, its shareholders may initiate a lawsuit in a Chinese court, as long as the shareholders separately or aggregately holding 1% or more of the total shares of the company for at least 180 consecutive days[9]. As the lawsuit referred to in this clause does not exclude administrative litigation, shareholder-representative litigation can also be applied to administrative litigation. The investor may there-

[5]Hela Schwarz GmbH v. People's Republic of China (ICSID Case No. ARB/17/19), Procedural Order No.3, paras. 77-80.

[6]China-Netherlands BIT (2001), China-Finland BIT (2004), the Foreign Investment Promotion and Protection Agreement (FIPA) between Canada and China (2012).

[7]Article 25 of the Administrative Litigation Law of the People's Republic of China (2017 Revision).

[8]The Administrative Litigation Law of the People's Republic of China (2017 Revision), Articles 98-100.

[9]Article 189 of the Company Law of the People's Republic of China (2023 Revision).

fore withdraw the case from the domestic court if it initiates an administrative litigation against the host state government in its own name.

There is, however, a risk of parallel proceedings occurring when "no-U-turn" clauses only require the investor to withdraw the dispute from the national court. The five BITs that contain "no-U-turn" clauses define "investment" as "shares, debentures, stock and any other kind of interest in companies". Therefore, Chinese-foreign equity joint ventures can be deemed as investments of foreign investors. Given that the foreign investor has not submitted the dispute to the national court, if the joint venture has filed administrative litigation in a Chinese court and obtained a binding judgment, the investor cannot withdraw the dispute from the domestic court because it did not initiate the litigation in its own name. In this case, the investor may still be able to challenge the same measure of host state in international arbitration and obtain double dipping.

If the "no-U-turn" clauses do not specify the identity of the party submitting the dispute to the national courts[10], it is assumed that the party includes investors and their investments (such as host-state enterprises owned or controlled by the investors). Generally, the enterprise established by foreign investors in the host state is defined as an "investment". For instance, the Canada-China FIPA stipulates that an enterprise is an investment[11]. While other China's BITs that contain "no-U-turn" clauses adopt slightly different terminology from that of the Canada-China FIPA (2012), they also specify that "investment" refers to "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"[12]. If the "no-U-turn" clauses do not specify the identity of the party submitting the dispute to the national courts[13], it is assumed that the party includes investors and their investments (such as host-state enterprises owned or controlled by the investors).

A "no-U-turn" clause that does not specify the identity of the party in domestic proceedings faces the same dilemma as a "fork-in-the-road" clause when determining whether the parties are the same in domestic and international proceedings. The arbitral jurisprudence demonstrates that tribunals usually "distinguish between the different legal personalities of the parties involved in the proceedings and do not regard investors and their investments as one entity " (Cozac, 2016: p. 52). In this situation, "no-U-turn" clauses will not be able to perform their role in preventing parallel proceedings.

2.2. The Timing to Withdraw the Domestic Proceedings

The Administrative Litigation Law of China provides that the plaintiff or appellant may withdraw the case from the domestic court before the court issues its judgment or ruling, and the court will determine whether it will allow the with-

[10]China-Germany BIT (2003), China-Switzerland BIT (2009).
[11]Canada-China BIT (2012), article 1.
[12]China-Finland BIT, article 1.
[13]China-Germany BIT (2003), China-Switzerland BIT (2009).

drawal[14]. There are three stages at which a litigation can be withdrawn: withdrawal the filing of the complaint, withdrawal of the appeal and withdrawal of the retrial application. There are two types of withdrawals, based on the subjective attitude of the actors. The first type is an application for withdrawal by the parties themselves, while the second type is an automatic withdrawal, where the plaintiff or appellant does not prepay the case acceptance fee[15]. In China's no-u-turn clauses, "withdrawal" refers to the first type.

For a lawsuit to be successfully withdrawn in China, the following conditions must be met: 1) Petitioner for withdrawal must be either the plaintiff, the appellant, the original plaintiff or original appellant, or their specifically authorized agents; 2) the application for withdrawal of the suit represents the plaintiff's true intention; 3) withdrawal requests should be made before a judgment is rendered; 4) if the defendant changes the alleged specific administrative action, such action "does not violate the prohibitive provisions of the laws and administrative regulations, and does not damage the public interests and legal rights and interests of others"; 5) with the court's approval to withdraw[16]. There are two consequences after the parties file an application to withdraw the litigation. If the court finds that the above conditions have been met, it will make a ruling on approval of the withdrawal of the suit. In the event that the court considers that the application for withdrawal does not meet the above requirements, it shall render a judgment in time[17].

It should be taken into account that if an investor or its investment has filed a dispute to a national court and obtained an effective judgment of the second instance, but the petitions for retrial of this case can still be withdrawn, will such a case be deemed to meet the requirement of "no-U-turn" clauses? The Supreme People's Court of China has made a detailed interpretation of the conditions that parties need to meet when petitioning for retrial[18]. The six-month period during which the parties may apply for a retrial is a terminus fatale, and there can be no suspension or interruption of this period. It must be determined whether the parties are qualified to initiate a retrial first, and if so, the six months following the effective original judgment or ruling should still be considered the period of time in which the parties can withdraw the dispute under Chinese law.

Although it may seem that the decision to withdraw or abandon a lawsuit can be decided by the parties themselves, this is not the case. In China's litigation system, the judge takes the lead in the trial process. Neither the relevant laws nor

[14]Article 62 of the Administrative Litigation Law of the People's Republic of China (2017 Revision).

[15]Article 61 of Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China (2018).

[16]Article 2 of the Rules of the Supreme People's Court on Some Issues concerning the Withdrawal of an Administrative Suit (2008).

[17]Provisions regarding the withdrawal of the administrative litigation in China: Article 62 of the Administrative Litigation Law of the People's Republic of China (2017 Revision), Articles 60-61 of the Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China (2018).

[18]Article 110 of the Interpretation of the Supreme People's Court on Application of the Administrative Litigation Law of the People's Republic of China (2018).

judicial interpretations explicitly specify the criteria for whether or not a court permits a withdrawal, so judges have considerable discretion in this regard[19]. The question arises: if an investor or its investment sues a local government in a national court, will the court make an impartial decision without interference, even if it knows that the Chinese government may be challenged in an international arbitration if the withdrawal is approved? However, even if the court's decision not to grant withdrawal is legal and fair, investors may still doubt the neutrality of the judge in the host state, and may challenge the state in ISA on other grounds.

3. Suggestions

Based on the above analysis, it can be concluded that China's existing "no-U-turn" clauses are drafted with imprecise wording that may create ambiguity. On the one hand, as a result of a lack of explicit provisions regarding the identity of the actor initiating domestic proceedings, the ISA tribunal may consider that the parties to the different proceedings are not the same. On the other hand, it is also unclear when investors will be able to withdraw the domestic litigation according to the IIAs and Chinese laws. Considering the insufficiency of the "no-U-turn" clauses mentioned above, this section proposes suggestions to improve the "no-U-turn" clauses in China's IIAs.

To address the problem that some "no-U-turn" clauses do not specify the identity of the party in the domestic proceedings, China can refer to the waiver provisions in Canada's IIAs. Such provisions require both investors and their investments to "sign a written waiver of any right to initiate or continue any other proceeding in any other forum with respect to the measures alleged in its claim to constitute a breach." (Marshall, 2009) For instance, Article 26 of the Canada-Jordan BIT (2009) stipulates that:

> "1. A disputing investor may submit a claim to arbitration under Article 22 only if:
> …
> (e) the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 22…."

Further, the point at which an investor can withdraw a dispute from a Chinese court seems not clear enough. Article 15 of the Administrative Litigation Law of the People's Republic of China (2017 Revision) and Article 148 of the Civil Procedure Law of the People's Republic of China (2023 Amendment) do not specify

[19]Article 62 of the Administrative Litigation Law of the People's Republic of China (2017 Revision).

the criteria under which the court will allow a plaintiff to withdraw the complaint. Therefore, the judges have considerable discretion over this issue. Assuming an extreme situation in which local governments influence judges' decisions regarding whether to allow the withdrawal of the complaint to avoid being challenged in international arbitration, it may be difficult for investors to fully exercise their right under the "no-U-turn" clause. Even if the judge maintains his impartiality perfectly, due to investors' natural distrust of the judicial system of the host state, two adverse consequences may occur: one is that investors will give up seeking relief in the host state and directly choose international arbitration for the fear of violating the "no-u-turn" clause; the other is that if investors are not satisfied with the national court's judgment, they may still use this as an excuse to resort the host state to investment arbitration and obtain double relief. Therefore, this paper suggests that "no-U-turn" clauses should incorporate a more explicit trigger point. Further, relevant domestic rules should be coordinated with the time points for withdrawing cases outlined in IIAs, and set clear standards for the domestic court to follow. By doing so, it can not only reduce parallel proceedings, but also enhance the transparency of China's judicial system, thereby encouraging investors to use domestic judicial procedures first and promoting an efficient dispute resolution process.

4. Conclusion

There are several types of provisions provided in IIAs to prevent parallel proceedings, and two of the most commonly used are the "fork-in-the-road" clauses and the "no-U-turn" clauses. In light of the fact that "no-U-turn" clauses are more flexible than "fork-in-the-road" clauses, it is capable of striking a balance between the protection of investments and reducing the litigation burden of host states. Therefore, the "no-U-turn" clause seems to be a better choice than the "fork-in-the-road" clause. Given that a majority of existing Chinese IIAs adopt broadly worded dispute resolution clauses, it is important to coordinate domestic and international proceedings regarding the same investment disputes to prevent double dipping. The "no-U-turn" clauses were seen in BITs signed between China and Germany, Netherlands, Finland, Switzerland, and Canada.

The existing Chinese "no-U-turn" clauses, however, are drafted with imprecise language which may lead to ambiguity. For one thing, they did not set a uniform definition for the identity of the party initiating domestic proceedings. A "no-U-turn" clause that does not specify the identity of the party in domestic proceedings will face the same dilemma as a "fork-in-the-road" clause because the ISA tribunal will need to decide whether the parties are the same in domestic and international proceedings. Foreign investors have the right to file administrative litigation against local governments in Chinese courts under Chinese laws. In this circumstance, "no-U-turn" clauses can have its full effect. Nevertheless, since none of the existing Chinese "no-U-turn" clauses include the investor's enterprise (the investment) as the party initiating and withdrawing the

domestic proceedings, the ISA tribunal may find that investors have not initiated a domestic proceeding against the same measure of the host state before, thus not violating the "no-U-turn" clauses.

For another thing, it is also unclear when investors will be able to withdraw the domestic litigation according to the IIAs and Chinese laws. It can be assumed that if the parties are qualified to initiate a retrial first, then the six months following the effective original judgment or ruling should still be considered the period of time in which the parties can withdraw the dispute under Chinese law. It is important to note, however, that since neither relevant laws nor judicial interpretations explicitly specify the criteria for allowing a withdrawal, judges are left with considerable discretion to determine whether to permit the withdrawal. This could either undermine investors' rights under "no-U-turn" clauses or enable investors to challenge the host state to international arbitration on other grounds (such as a denial of justice by the domestic court for refusing to permit the withdrawal of the complaint constitutes a denial of justice), rendering "no-U-turn" clauses null and void.

To address these problems, this article proposes that China should redesign the "no-U-turn" clauses in future IIAs-making, and establish more specific standards for allowing the withdrawal of administrative litigations. Specifically, the "no-U-turn" clauses should be drafted more clearly, identifying who files and withdraws domestic proceedings and setting forth the requirement for written waivers. Moreover, China should establish a more definite point at which domestic proceedings can be withdrawn and narrow the judges' discretion regarding the withdrawal of the complaint. By doing so, the "no-U-turn" clauses will be truly effective in promoting amicable and efficient resolution of disputes between investors and host states.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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