Bird & Bird & One Belt One Road and Investment Treaty Disputes

Investment Treaty Arbitration for Disputes on the Silk Road

China is currently a party to 127 Bilateral Investment Treaties (BITs) and a further 22 treaties with investment protections (TIPs). These treaties provide Chinese companies making investments in another State with significant protections against conduct by the host State which adversely affects the value of the investment. Importantly, investors can bring claims for compensation directly against the host State, and international arbitration tribunals, rather than the local courts, then determine such claims. These investment protections are gaining increasing importance following the introduction of the Belt and Road Initiative ("BRI") by the Chinese President Xi Jinping in 2013. In this Guide, we consider the legal protection offered by investment treaties, as well as the investors and investments they may cover.

What are Investment Treaties?

An investment treaty is an international treaty under which two or more States agree certain rules for the protection of investments made in their territory by nationals of the other contracting State. The contracting States commit themselves to giving such investments certain standards of protection and to prohibit expropriation.

Investment Treaties and the BRI

Since the 1970s China has embarked on a massive BIT program. It is currently a party to 127 BITs and a further 22 TIPs. These investment treaties cover every major region and most countries of the world. The importance of the protections they afford investors has grown exponentially since 2013 and the launch of the BRI. The BRI is an ambitious infrastructure building strategy designed to connect China to other major economies along the Silk Road Economic Belt and the 21st Century Maritime Silk Road. Investments pledged currently total more than $900 billion spanning 65 countries representing 40% of global GDP.

What investments are covered?

The definition of "investment" varies from treaty to treaty, though many treaties have broad and overlapping definitions of what constitutes an investment which qualifies for protection.

Some tribunals have referred to a non-exhaustive test which provides that the following factors are relevant to determining whether an investment falls within the scope of a treaty:

- a contribution or commitment by the investor;
- performance of the project for a certain duration; and
- existence of a risk for the investor.

A wide range of investments have been held to qualify for protection, including:

- real estate transactions;
- an oil hedging contract;
- promissory notes;
- construction of highways and road networks;
- the operation of hotels;
- a settlement agreement; and
- options to buy property.

In addition, direct and indirect shareholdings can be qualifying investments. So an investment held

via an intermediate company can still be a protected investment, subject to the terms of the particular treaty.

Do I qualify for protection?

The protections afforded by an investment treaty only apply where the investor falls within the scope of the relevant treaty.

The definition of "investor" varies from one treaty to another. Under many treaties, an "investor" must be a national of, or incorporated in, a contracting State. However, some investment treaties apply a broader definition, to include corporate bodies of a third country in which an investor from a contracting State exerts a dominant influence, or which an investor from a contracting State controls indirectly.

What protections do Investment Treaties give?

The grounds of protection vary from treaty to treaty. Common standards of protection include the following:

1. *Prohibition of expropriation*

Provisions on expropriation typically provide that investments cannot be expropriated by the host State except in pursuit of a public purpose, on a non-discriminatory basis, and in accordance with due process of law. Critically, compensation must be provided.

Prohibited expropriation need not be direct or obvious. Disguised expropriation, which may be indirect or gradual ("creeping"), can qualify. For example, backdated tax charges have been found to amount to indirect expropriation, having resulted in a substantial deprivation of the economic use and enjoyment of an investment.

2. *Fair and equitable treatment*

This is generally understood to require States to maintain a predictable investment environment in accordance with the reasonable expectations of investors. Tribunals have held that the standard requires States to provide procedural fairness, act with transparency and ensure that investments are free from coercion and harassment.

Tribunals have found breaches of the fair and equitable treatment standard in respect of changes in public subsidy regimes in the energy market introduced by subsequent governments. Investors have also argued that changes in health regulations amount to a breach of this standard.

3. *Full protection and security*

Often interpreted as complementary to, and overlapping with, fair and equitable treatment, full protection and security usually concerns the physical protection of an investment. The standard can also extend, for example, to making available to an investor a functioning legal system.

4. *Non-discrimination*

Discrimination refers to differential treatment of an investor or investment (on the grounds of nationality, race, or other similar characteristic) that cannot rationally be justified.

So action by a host State which arbitrarily favours local investors over foreign investors may breach this standard of protection.

5. *Most Favoured Nation*

A Most Favoured Nation clause requires a host State to provide investors with treatment no less favourable than the treatment that it provides to investors of other States under separate investment treaties. MFN clauses are widely accepted as one of the most important standards of treatment provided by an investment treaty. Such clauses mean that investors from a country which has agreed an MFN clause with a host State are afforded the protections available to investors from other countries that have been able to negotiate more favourable terms with the host State.

What kind of action by a State is covered?

Action by a host State that breaches one of the standards of protection and that has a detrimental impact on the value of an investment can give rise to actionable claims for compensation by the investor.

Examples of State conduct which may breach an investment treaty include:

- Refusal to grant, revocation of, or failure to renew key licences or concession agreements (e.g. free zone licences);
- Denial of justice to an investor, whether through the court system or otherwise;
- State conduct which renders an investment unprofitable through targeted actions not imposed on domestic competitors;
- Backdated and unjustified tax charges; and
- Changes in regulatory regimes that are arbitrary, discriminatory or in breach of previous promises.

How do I pursue a claim against the host State?

To ensure the neutrality and impartiality of the process, investment treaties may include dispute settlement provisions which entitle investors to bring claims directly against host States. Such claims are decided by international arbitral tribunals, rather than the local courts of the host State. This ensures a degree of independence and impartiality in the body adjudicating upon the dispute. This is particularly important in BRI investment disputes as the host state may be politically unstable or lack a credible corporate governance or fair legal system.

Investment treaty arbitrations are conducted under various rules, including the UNCITRAL Arbitration Rules or through the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

ICSID is an independent, depoliticised and self-contained institution. Arbitration awards issued by ICSID tribunals cannot be challenged in local courts. Instead, ICSID arbitration awards are subject only to an annulment process administered through ICSID itself.

In addition, in response to the launch of the BRI and the significant investment opportunities it is bringing, various arbitration institutions in the region have launched arbitration rules seeking to attract BRI related investment claims. These institutions include CIETAC, the SIAC and the HKIAC.

Examples of recent disputes brought by Chinese investors

Although China has entered into a significant amount of BITs since the 1970s, the amount of investment treaty disputes it has been involved in is comparatively small; only 8 ICSID disputes in total. However, this is widely expected to change as a result of the BRI and the huge numbers of projects involved.

Examples of disputes brought by Chinese investors include:

- A claim arising out of the cancellation of licences in the Tumurtei iron ore mine in Mongolia.
- Claims arising out of the Belgium government's bailout, and subsequent nationalisation and sale to a third party, of the financial institution in which the claimants had invested, in the context of the 2008 financial crisis.
- A claim by the Beijing Urban Construction company (BUC) against Yemen arising out of the alleged forced deprivation of the BUC's assets and contract concerning a project for the construction of an airport terminal in Sana'a.

Get in touch

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William has a wealth of experience in international commercial and investment treaty arbitration.

Based in Stockholm, William is an international arbitration lawyer and litigator with expertise in commercial and investment arbitration. He is a core member of the firm's Nordic International Arbitration Group.

He acts for corporations, financial institutions, and sovereign states across all major sectors and regularly appears as advocate before international arbitral tribunals administered by the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the Hong Kong International Arbitration Centre (HKIAC) among others. He accepts appointments as arbitrator in English, Chinese, and Spanish language arbitrations and is admitted to the CIETAC Panel of Arbitrators.

William teaches on the Investment Treaty Arbitration Masters Program at Uppsala University and has guest lectured at Stockholm University and California State University. He holds degrees in Law (Cornell Law School), International Relations (Univ. Cambridge) and Chinese Languages (SOAS).

He is a member of the Bar of the State of New York and has around a decade of dispute resolution experience, including experience from practice in New York, Hong Kong, Paris at Clifford Chance.

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With over 15 years of experience, Garreth is a partner in the London office. He has significant experience as lead counsel in cross-border and international disputes.

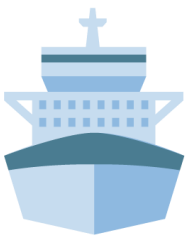
Garreth represents clients in complex commercial disputes, as well as investment treaty arbitration. He has conducted arbitrations under various rules (including ICC, ICSID, LCIA, SIAC, UNCITRAL and WIPO) and under a wide variety of national laws, including English, US, Canadian, European, African and Chinese laws.

Garreth is instructed in matters relating to Africa, Europe, Russia, North America and China. In addition to his counsel work, Garreth is increasingly sought after as an arbitrator and is appointed on LCIA and ad hoc arbitrations as sole and co-arbitrator. He is on the LCIA's Database of Arbitrators and WIPO's List of Arbitrators.

Garreth is consistently recognised in the legal directories, including Legal 500, 2014-2017, GAR100, 2017, Who's Who Legal: Arbitration 2018, Who's Who Legal: Arbitration – Future Leaders 2017, and Super Lawyers 2015.

He is a regular speaker at conferences, and is a member of various arbitration bodies including the LCIA, ICC, IBA and CIArb. Prior to joining us, Garreth practised for a number of years as a barrister at Matrix Chambers, London.

Garreth graduated with a BA and an LL.M from Cambridge University.



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Jonath Jonathan is a partner in our International Dispute Resolution practice, based in Singapore. He has been involved in a range of significant and high-value disputes and arbitrations in Singapore and more widely in Asia, Europe and the United States. He has successfully represented MNCs, banks, international contractors, media and broadcasting agencies, telecoms operators and consultants on a variety of disputes.

As an experienced arbitration practitioner, Jonathan has advised and represented clients in arbitrations conducted under most of the major institutional rules, including the Singapore International Arbitration Centre (SIAC) Rules, the International Chamber of Commerce (ICC) Rules, the London Court of International Arbitration (LCIA) Rules and the United Nations Commission on International Trade Law (UNCITRAL) Rules. Jonathan is a Fellow of the Chartered Institute of Arbitrators and is also a Director and Hon.

Secretary of the Singapore Branch of the Chartered Institute of Arbitrators. He regularly speaks at conferences, events and in-house client seminars on current topics relating to dispute resolution and arbitration.

Jonathan accepts appointments as arbitrator and has also been appointed by the Singapore International Arbitration Centre (SIAC) as arbitrator (including as sole arbitrator) on various disputes. Jonathan is also on the Kuala Lumpur Regional Centre for Arbitration's (KLRCA) panel of arbitrators.

Dual qualified in both Singapore and England & Wales, he is a past recipient of the Law Society of Singapore Advocacy Prize and is mentioned in the Asia Legal Business 2016 "40 under 40" list of lawyers. Jonathan holds a Bachelor of Laws degree from the University of Singapore.

Recent accolades

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