利用双边投资协定保护境外投资的战略建议

“双边投资协定”实际上是一个非常有用的投资工具，无论是在“投资前”还是在“争议发生后”。最大限度的发挥双边投资协定的保护作用，应当是每个境外投资者的战略规划中必不可缺的一部分。

投资保护提供了一个有效规避政治风险的途径，对于中国投资者来说，非常幸运的是中国提供了世界上第二大双边投资协定的体系。

为了有效的发挥这个优势，在进行投资以及争议即将发生时，投资者都应当考虑到各种投资保护的可能性，并在战略上最大限度的运用这些投资保护

文　韩博

近年来，越来越多的中国企业在“走出去”开拓国际市场过程中，遇到了各种各样的问题，投资所在的东道国的政局变化、政策调整等影响投资人收益的风险时有发生，如何防范和应对这类风险，是中国境外投资尤其是长期投资必须面对的问题。当然，最好的方法是将所有的资本都投资于政治和法律稳定且透明的国家，但是市场和资源等因素经常迫使投资者考虑投资保障并不十分完善的国家。

如何防范投资投资东道国的政治和政策变化所产生的风险？双边投资保护协定（Bilateral Investment Treaties，简称 BITs ）为投资者提供了一个有力的工具。一旦双边投资协定的缔约国一方和另一方投资者之间发生争议时，投资者可以无需依靠外交保护或当地程序，而在国际仲裁庭向投资东道国提起索赔。实际上，双边投资协定不仅是规避风险的有力工具，也是非常有用的投资工具。最大限度的发挥双边投资协定的保护作用，应当是每个境外投资的战略规划中必不可缺的一部分。

双边投资协定的几个重要概念

在具体了解应当如何利用双边投资协定防范和应对投资东道国的政治、政策风险之前，企业有必要先厘清双边投资协定所涉及的四个重要概念：双边投资协定、投资、投资者以及投资待遇。

●双边投资协定

双边投资协定是两个国家之间，为鼓励和促进一国投资者到另一国境内投资，对相互投资者的投资待遇及投资保障作出承诺而签订的双边协定。中国所拥有的双边投资协定数量居世界第二，仅次于德国。在中国商务部的网站上，企业可以查询到中国所有已生效的双边投资协定（http://tfs.mofcom.gov.cn/column/2010.shtml）。

●投资

各双边投资协定都有对“投资”的定义，往往由一个广泛的定义和对资产类型的列举组成，以中国和德国的双边投资协定的定义为例：

“投资”一词系指缔约一方投资者在缔约另一方境内直接或间接投入的各种财产，包括但不限于：

（一）动产，不动产及抵押、质押等其他财产权利；

（二）公司的股份、债券、股票或其他形式的参股；

（三）金钱请求权或其他具有经济价值的行为请求权；

（四）知识产权，特别是著作权、专利和工业设计、商标、商名、工艺流程、商业秘密、专有技术和商誉；

（五）法律或法律允许依合同授予的商业特许权，包括勘探、耕作、提炼或开发自然资源的

韩博

韩　博（Robert Hunter）律师为霍金路伟律师事务所合伙人。霍金路伟律师事务所是全球排名前 10 位的国际知名律师事务所，2010 年 5 月 1 日起在世界拥有 40 多个办事处，霍金路伟律师事务所在中国的北京，香港和上海设有办事处。

韩博律师从事国际仲裁已有 20 多年，其专业领域为解决外国直接投资、特许权、项目及公司交易方面的纠纷。韩博律师主管霍金路伟的“有关投资保护及协议的仲裁”业务，在担任顾问律师的同时也担任仲裁员。

在伦敦及纽约办事处工作多年后，韩博律师于 2000 年开始在法兰克福办事处工作。其团队融合了普通法、大陆法和国际法的专门知识，可在世界各地从事国际仲裁事务。Global Arbitration Review2010 年度商事仲裁名人录中，韩博“排名居前”，Legal 500 将其评为 2009 年度“国际仲裁欧洲法律专家”；Juve Handbook 2009/2010 将其评为“国际仲裁领袖人物之一”。

韩博是英格兰及威尔士讼务律师，并以欧洲律师身份加入法兰克福律师协会。他是皇家特许仲裁员协会研究员、英国有效争议解决中心的认可调解员、国际商会国际仲裁院仲裁委员会委员、国际法协会会员。

韩博律师乐意回答任何与双边投资协定相关的问题，联系方式是 robert.hunter@hoganlovells.com。

特许权；

作为投资的财产发生任何形式上的变化，不影响其作为投资的性质。

除了原则性的定义，双边投资协定可能还会就受保护的“投资”提出进一步的要求，例如上述中德协定在协定的议定书中对受协定保护的“投资”还规定了两个要求：

（一）为了避免歧义，缔约双方议定第一条所指的“投资”，系指为了与企业建立持续的经济关系，尤其是那些能够对企业的管理产生有效影响的投资；

（二）“间接投资”系指缔约一方的投资者通过其完全或部分拥有的、住所在缔约另一方境内的公司所作的投资。

很多双边投资协定都规定了任何一项投资必须遵守东道国的法律法规，有的会以东道国的政府审批为前提，例如，东盟国家签订的双边投资协定多数有政府审批的要求。

●投资者

符合双边投资协定定义的“投资者”才能享受其保护，通常来说，与东道国签订协议国家的自然人和法人都可被视为“投资者”。国籍的界定主要根据缔约国的相关法律，判定自然人的国籍一般较为直接，但各个协定对法人的国籍标准却各不相同：有的采取公司注册地原则，有的则采取公司营业地原则。中国已签订的双边投资协定一般将中国投资者定义为：

（一）根据中华人民共和国的法律，具有其国籍的自然人；

（二）经济实体，包括根据中华人民共和国的法律法规设立或组建且住所在华境内的公司、协会、合伙及其他组织，不论其是否营利也不论其为有限责任或无限责任。

●投资待遇

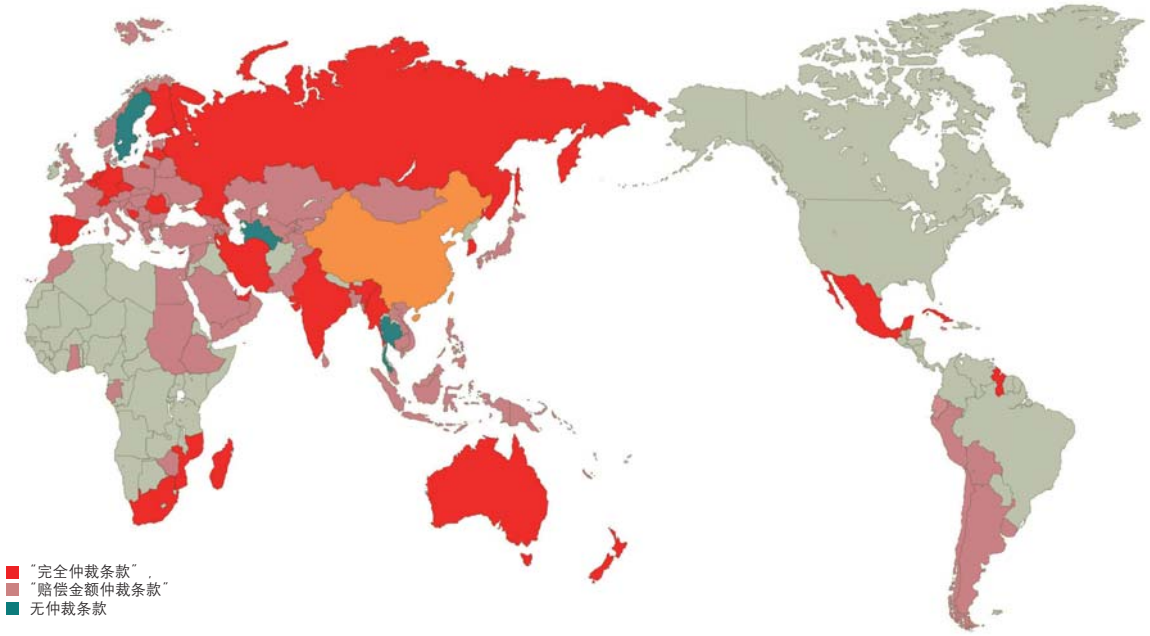
投资待遇是各个缔约国对投资保护的实质性担保，比如“最惠国待遇”（Most Favoured Nation Treatment）、“国民待遇”（National Treatment）和“公平公正待遇”（Fair and Equitable Treatment）等。“最惠国待遇”要求东道国保证给予投资者的待遇不低于给予第三国的待遇；“国民待遇”则要求东道国给予外国投资者不低于本国投资的待遇。

大多数的缔约国都同意给予投资者“公平公正待遇”，“公平公正待遇”在仲裁庭审中也已逐渐形成了较为明确的定义和几个被广泛接受的原则。这些原则包括：东道国政府的行为应当具有持续性、透明度，无专制无歧视，实施善意和合适的政策等。另一个尤为重要的原则是“保护投资者的合理预期”，即当东道国没有遵守在投资者投资时给出的承诺时，根据“保护投资者合理预期”的原则，东道国需要承担相应的责任。

例如，作者曾主办过一个关于双边投资协定的投资仲裁案，即是依据“保护投资者的合理预期”原则而取得胜诉的案例之一。作者代理的当事人系D国某工程公司，该公司为M国（该案应M国政府要求不公开审理，因此将该国政府名称以M国代替，作者注）一个通往机场的收费公路特许权的合作方之一，其他合作方包括F国某建筑公司以及M国本国的一个公司等，各合作方在当地设立一家公司，D国公司参股10%。基于详细可行性研究报告，对特许权的一系列条款的磋商（例如公路收费费率、特许权的期限、收费调整机制等）在投资者的内部资本回报率为16%的基础上进行，且该回报率不排除商业风险。但是，由于M国政府抑制了公路收费费率，实施一个持续的项目改善与收费公路存在竞争关系的免费公路，并且关闭了公路的主要目的地机场，导致收费公路的运营受到了不利的影响。十年后特许权公司持续赤字，数据分析显示再经营十五年的预期资本回报率也仅为5%。由于M国的当地私营公司及国有公司持有该特许权合作公司的多数股份，境外投资者无法说服这些股东以合作公司的名义起诉政府，只好被迫继续这个没有前景的投资。

D国和M国签订有双边投资协定，约定投资者可以就与东道国

地图1 已生效中国双边投资协定含“完全仲裁条款”和“赔偿金额仲裁条款”的情况



之间的争议提交国际仲裁，D 国公司据此向国际仲裁庭提起仲裁，要求 M 国政府赔偿损失。M 国政府称其从未对投资回报率作出任何的担保而不应当对投资者的预期资本回报率负责；D 国公司则阐述了预期资本回报率的形成原因和具体构成，预期资本回报率是怎样作为磋商基础贯穿特许权的谈判过程的，M 国政府的各个行为是如何直接影响了合作公司的回报率等事实，请求仲裁庭依据“公平公正待遇”中“保护投资者的合理预期”原则保护投资者的利益。最终 D 国公司胜诉。相比之下，该合作项目中的另一个境外投资者 F 国公司，却因为 F 国和 M 国之间没有双边投资协定而无法提起仲裁。

依靠国际仲裁解决投资争议

当双边投资协定的缔约国一方和另一方投资者之间发生争议时，双边投资协定提供的解决方式包括协商解决、调解、行政程序、东道国法院诉讼以及国际仲裁等。其中，国际仲裁是对于投资者来说相当重要和有力的权利，因为这意味着，在东道国违反义务时，投资者可以以自己的名义，根据国际法，在一个不受干预的中立的第三国设立的国际仲裁庭提起索赔，而无需依靠外交保护或东道国当地程序。

●投资争议仲裁的一般程序

与一般商业仲裁不同，如两国之间的双边投资协定中约定了仲裁条款，符合该仲裁条款的一国投资者与另一个国政府的投资争议可以直接递交仲裁庭，虽然投资者与东道国政府没有直接签署仲裁协议，但东道国已在双边投资协定中提出了要约，当符合协定要求的投资者接受该要约时，双方的仲裁协议就达成了。

该类仲裁的程序在许多方面与国际商业仲裁类似，既有非机构性仲裁，例如采用联合国国际贸易法委员会仲裁示范规则，也有机构性仲裁，例如国际商会 ICC、伦敦国际仲裁院 LCIA 以及斯德哥尔摩商会仲裁院 SCC。另外，许多协定也同意由解决国家与他国国民间投资争端中心（ICSID）进行仲裁，ICSID 是世界银行特别为解决这一类的投资纠纷而设立的国际机构（http://icsid.worldbank.org）。

此类仲裁裁决一般都会被认可而无需执行。事实上，裁决本身也构成了国际法义务的一部分，如不遵守裁决可能影响到东道国在国际金融和保险市场的信誉，因此裁决的遵守程度相当高。另外 ICSID 的裁决还享有特殊的地位，作为世界银行的合作人，公约可在裁决不被遵守的时候要求世界银行拒绝贷款给东道国，从而使其的仲裁裁决产生特殊的效力。

●中国已生效协定的仲裁条款

依据商务部网站提供的信息，截止 2010 年 10 月 31 日，中国已签订并生效的协定有 100 个，其中 97 个协定包含有投资争议仲裁的条款，它们大致可以分为两类：“补偿金额仲裁条款”和“完全仲裁条款”。

第一类，“补偿金额仲裁条款”指仅就征收的补偿金额的争议，可以提交国际仲裁庭仲裁。以中国和秘鲁签订的双边投资协定的“补偿金额仲裁条款”为例：

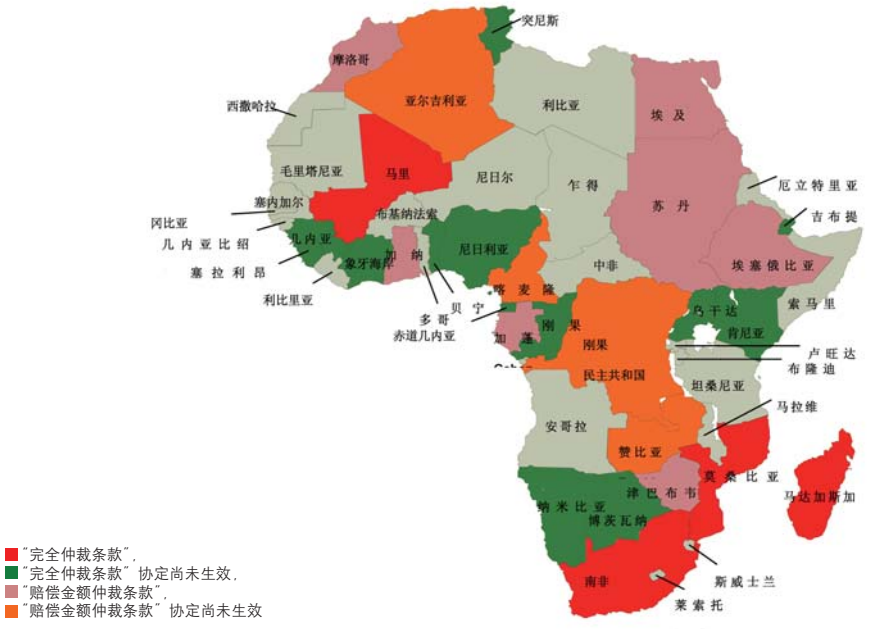
第八条

（一）缔约一方的投资者与缔约另一方之间就在缔约另一方领土内的投资产生的任何争议应尽量由当事方友好协商解决；

（二）如争议在六个月内未能协商解决，当事任何一方有权将争议提交接受投资的缔约一方有管辖权的法院；

（三）如涉及征收补偿款额的争议，在诉诸本条第一款的程序后六个月内仍未能解决，可应任何一方的要求，将争议提交根据一九六五年三月十八日在华盛顿签署的《关于解决国家和他国国民之间投资争端公约》设立的“解决投资争端国际中心”进行仲裁。缔约一方的投资者和缔约另一方之间有关其它事项的争议，经双方同意，可提交该中心。如有关投资者诉诸了本条第二款所规定的程序，本款规定不应适用。

地图2 中国与非洲国家已签订的双边投资协定含“完全仲裁条款”和“赔偿金额仲裁条款”的情况



这一类的双边投资协定通常会对“征收”进行定义，但是仍会产生一些争议。例如，蔡叶深与秘鲁政府投资争议仲裁案（Tza Yap Shum v. Republic of Peru，ICSID Case No. ARB/07/6 (China-Peru BIT)）是第一个也是目前唯一一个由中国投资者根据双边投资协定提起的国际仲裁案，该案由ICSID受理，目前尚在审理中。ICSID曾于2009年6月19日作出过对该案享有管辖权的裁决。

蔡叶深先生是一位香港居民，他根据中国和秘鲁签订的双边投资协定对秘鲁提起投资者－国家仲裁，对其位于秘鲁的鱼粉公司被征收一事进行索赔，双方在庭审中有很多交锋，其中一点就是依据“补偿金额仲裁条款”仲裁庭有多少管辖权。

秘鲁政府认为依据协定第八条第三款的仲裁条款，仲裁庭对征收的补偿金额有管辖权，对判定政府行为是否为“征收”无管辖权，由于双方对秘鲁政府的行为是否属于“征收”尚存在争议，该案应当首先提交秘鲁的当地法院审理。然而协定第八条第三款规定了，一旦投资者将争议提交给了法院审理，投资者将不能再选择国际仲裁，经再三考量，仲裁庭裁定对秘鲁政府的行为是否属于协定受保护的“征收”同样具有管辖权。

第二类，“完全仲裁条款”则将由投资所产生的所有争议都包括在可以提交国际仲裁庭仲裁的范围。例如，1997年中国和南非签署的双边投资协定是中国第一个同意完全仲裁条款且已经生效的双边投资协定：

第九条

（一）缔约一方的投资者与缔约另一方之间就在缔约另一方领域内的投资产生的争议，应当尽可能由双方友好协商解决；

（二）在六个月内不能协商解决争议时，争议任何一方均可将争议提交国际仲裁庭仲裁，条件是涉及争议的缔约方可以要求投资者按照其法律、法规提起行政复议程序，并且投资者未将该争议提交该缔约方国内法院解决。

自1999年起，中国签订的双边投资协定多数为“完全仲裁条款”。本文所附的地图1显示了所有中国有已生效协定的缔约国的分布，地图2显示了非洲缔约国的分布，并包含了已签订未生效的双边投资协定，这些在等待国内批准程序生效的协定，几乎都规定了现代式的“完全仲裁条款”。

BITs应纳入境外投资者的战略规划

“双边投资协定”实际上是一个非常有用的投资工具，无论是在“投资前”还是在“争议发生后”。最大限度的发挥双边投资协定的保护作用，应当是每个境外投资者的战略规划中必不可缺的一部分。

●购买投资保险增加融资能力

除了依靠双边投资协定本身提供的投资保护，投资者还可以向中国唯一的出口信用保险机构中国出口信用保险公司购买投资保险，其承保范围包括征收、汇兑限制、战争及政治暴力及政府违约（http://www.sinosure.com.cn/sinosure/cpyfw/tzbx/gytzbx/gytzbx.html）。中国出口信用保险公司对“政府违约”的描述如下：

东道国政府违反或不履行与被保险人或项目企业就投资项目签署的有关协议，且拒绝按照仲裁裁决书中裁定的赔偿金额对被保险人或项目企业进行赔偿。

投资者在有双边投资协定的缔约国投资的可能会降低投资保险的费用，并会因为影响贷方对风险的预期而降低投资者的融资成本，特别是无追索权融资，有时还甚至决定了投资者的融资能力。在某些情况下，双边投资协定是境外投资取得国家资助方案项下的投资担保或出口融资的前提条件。

●运用“双边投资协定”评估政治风险

投资者在评估境外投资的风险和利润时，尤其在觉察到东道国的法律框架不完善、不公平或效率低下的情况下，应当充分考虑到双边投资协定的补充法律保护，及其在协定不能被完全遵守时仲裁条款所提供的国际法项下的救济。例如，一家F国公司拟投资一个长期的项目在R国，分析显示R国近期的政治和经济形势并不十分稳定，F国与R国虽然有双边投资协定但没有仲裁条款，经过对风险分析和争议解决方式的考量，F公司暂停了这项投资计划。

当投资者母国与东道国没有双边投资协定，或者是不完全保护的协定时，投资者完全可以考虑是否通过一个合适的第三国来组建其投资结构。

●组建合理的国际投资结构

在前文所提及的D国工程公司向国际仲裁庭提起仲裁、要求M国政府赔偿损失并最终胜诉的案例中，同样身为合作方的F国公司，却因为F国和M国之间无双边投资协定而无法提出国际仲裁。如果F国公司在作投资决策前就应当考虑到了这一问题，间接通过与M国有双边仲裁协定以及仲裁条款的第三国来组建其投资结构，则F国公司可以更好的保护其投资。例如，F国公司可以考虑与D国公司组建一个合资公司，以享有D国国籍的合资公司进行在M国的投资。

●保持“投资者”和“投资”的地位

在拥有了比较完整的国际投资保护之后，投资者应当谨慎保持“投资者”的地位，尤其是转让、重组、合并和变更等事项上，因为这些事项都可能导致投资者的国籍变化而令投资者失去适用协定的资格。例如，A国公司在B国投资并设立的一个项目公司，A国公司又将项目公司的股权转让给了C国公司，C国公司自然无法适用A国与B国的双边投资协定。

此外，许多国家的国内法律会对“投资”有额外的规定，例如规定境外投资者在项目公司所持有的股份不能超过49%，境外投资者不能实际控制项目公司等，违反了这些规定投资者将失去投资保护的资格，也包括双边投资协定的保护，尤其在协定已经规定了任何一项投资都必须符合缔约国的国内法的情况下。

●选择有利的争议解决方式

一旦出现了一个潜在的争议，投资者应当有策略的寻求最理想的解决方式，在争议之初对程序的选择会对结果产生实质性的影响，尤其在法院管辖和国际仲裁不能同时适用的情况下。例如前文提及的“蔡叶深与秘鲁政府投资争议仲裁案”中，蔡叶深成功获得了国际仲裁庭的管辖。此外，当投资者购买了投资保险时，应当立即联系保险机构，这不仅是获得赔付的前提，也有利于投资者在进入仲裁程序前获得本国政府的支持。

综上，投资保护提供了一个有效规避政治风险的途径，对于中国投资者来说，非常幸运的是中国提供了世界上第二大双边投资协定的体系。为了有效的发挥这个优势，在进行投资以及争议即将发生时，投资者都应当考虑到各种投资保护的可能性，并在战略上最大限度的运用这些投资保护。

【作者非常感谢中国律师金依依在准备本文时提供的实质性帮助】

Bilateral Investment Treaties ("BITs") are very useful tools for foreign investors, both at the stage of making their investments and when disputes arise. Every outbound investor should consider the availability and level of protection a BIT can provide in relation to any particular investment as an essential part of their strategic planning, since this can be an effective method to manage and mitigate political risk

Chinese investors are fortunate that China provides the second-largest number of BITs in the world, second only to Germany. This article explores how investors can best make use of this advantage

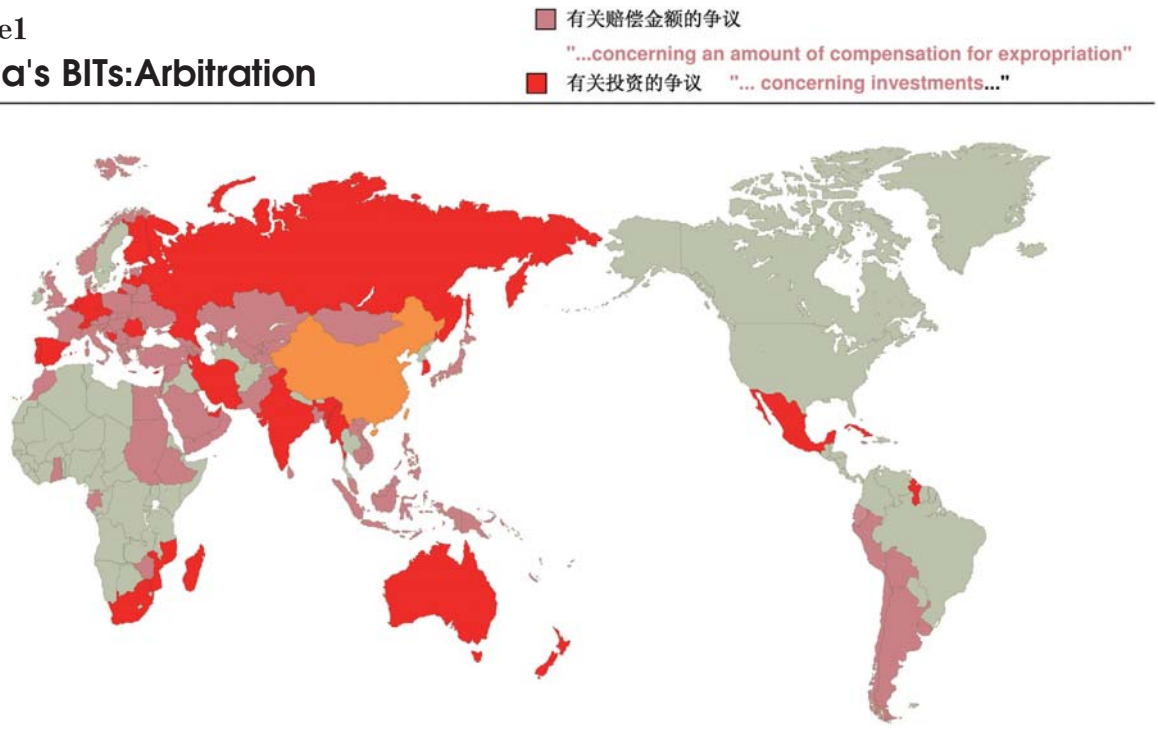
Strategic Suggestion on Using China's Bilateral Investment Treaties to Protect Outbound Investment

By Robert Hunter

An increasing number of Chinese companies are beginning to encounter a variety of risks as a result of their growing presence on the international markets. Examples of such risks, which can have a direct influence on the strategic and commercial interests of the investor, include changes in the political situation and policy adjustments in the market of the investments.

One of the key strategic considerations that should be made by any investor with outbound investments, especially where the investment is intended to be long-term, is how best to avoid these kinds of risks materialising and how to deal with them when they do. Bilateral Investment Treaties ("BITs") provide an effective tool in this respect. In particular, once a dispute arises between a contracting state and the investor of the other contracting state, the investor can typically bring it to arbitration before an international tribunal without having to rely on diplomatic protection or local judicial proceedings. In fact, a BIT is not only a powerful risk management tool but also a useful investment tool, particularly with regard to financing and investment guarantees. The protective function provided by BITs should therefore play a key role in every investor's strategic planning.

Figure1
China's BITs:Arbitration



Some Important Concepts about BITs

Before delving into the details of how to use BITs to avoid and deal with the risk from host state's politics and policy, it is necessary first to clarify four important related concepts: "BITs", "Investment", "Investor" and "Treatment".

★ BITs

A Bilateral Investment Treaty is a treaty established between two countries to encourage and promote investments by one state's investors in the other, above all by providing the promise of appropriate investment treatment and guarantees to investors. China has the second most BITs of any state. (Only Germany has more.) The Chinese Ministry of Commerce's ("MOFCOM") website lists all of China's BITs that have been signed and ratified. The world map on page44 of this article shows the states with which China has such treaties in force.

★ What Is An Investment?

Each investment treaty defines what constitutes an "investment" for the purpose of that treaty. Treaties typically contain a broad definition of "investment" as well as a non-exhaustive list illustrating the types of investment. This is an example from the China-Germany BIT of 2003:

The term "investment" means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:

(a)movable and immovable property and other property rights such as mortgages and pledges;

(b)shares, debentures, stock and any other kind of interest in companies;

(c)claims to money or to any other performance having an economic value associated with an investment;

(d)intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, 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; and any change in the form in which assets are invested does not affect their character as investments.

In addition to such principal definitions, a BIT may impose further requirements. For example, the same Chinese-German BIT cited above contains in a protocol to the treaty two additional significant requirements or qualifications:

(a)For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow it to exercise effective influence in its management.

(b)"invested indirectly" means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party.

Additionally, many treaties require that an investment be made in accordance with the laws and regulations of the host state. Sometimes they also stipulate that investments also be "approved" by the host government. This latter restriction is quite typical in the BITs of ASEAN (Association of South East Asian Nations) states.

★ Who Is An Investor?

Only "investors" within the meaning of the applicable investment treaty can rely on its protection. Generally all natural and legal persons that possess the nationality of another contracting state can be considered an "investor". Determining nationality is usually straightforward in relation to natural persons. In relation to legal persons it is stipulated differently in different treaties: some treaties use the criterion of registration, others define the criterion by reference to establishment. Some go further and define specific thresholds of control. Chinese BITs usually define an investor either as:

(a) a natural person who has the nationality of the People's Republic of China in accordance with its laws; or

(b) an economic entity, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether

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Robert has been based in Frankfurt since 2000 following substantial periods in London and New York. His team combines Common Law, Civil Law and international law expertise and is able to conduct international arbitrations all over the world. He is listed in the Global Arbitration Review's Who's Who of Commercial Arbitration 2010 as "highly rated", in the Legal 500 2009 as a "European Legal Expert for international arbitration" and in the Juve Handbook 2010/2011 as "one of the leading names in international arbitration".

Robert is a Solicitor-Advocate of England and Wales and admitted to the Frankfurt Bar as a European Lawyer. He is a Fellow of the Chartered Institute of Arbitrators, a CEDR-Accredited Mediator and a member of the Arbitration Commission of the ICC International Court of Arbitration and of the International Law Association.

their liabilities are limited or not.

★ Substantive Guarantees of Appropriate Treatment

Standards of Treatment of investments are the substantive guarantees of investment protection promised by the contracting states. These include National Treatment, Most Favoured Nation Treatment and Fair and Equitable Treatment. By submitting to Most Favoured Nation Treatment, the host state assumes an obligation to treat investments of investors no less favourably than it treats investors of third states. National Treatment means the host state will treat the investments of foreign investors no less favourably than it treats those of its own nationals.

The promise of fair and equitable treatment of investments is one of the central guarantees of investment treaties and is present in most treaties. It has developed through arbitral jurisprudence into a set of fairly well defined and widely accepted standards of good governance. These standards include the obligations to act consistently, transparently, without arbitrariness or discrimination, in accordance with good faith and proportionately to the policy aims involved. A particularly important aspect of fair and equitable treatment is the observance of the investor's "legitimate expectations" by reason of which a host state may be held liable to account for its non-observance of any assurances it gave to the investor at the time of the making of the investment.

By way of example, the author of this article represented an engineering company from State D that was the principal promoter of a BIT Tollway concession in State M. Other partners in the venture included a construction company from State F and a local company from State M. The partners established a local project company in which our client held a 10 per cent stake. In the context of detailed feasibility studies, the terms of the concession (e.g. toll rates, the length of the concession period, a toll adjustment clause) were negotiated on the basis of certain assumptions with the common intention between the investors and State M of enabling the initial investors to generate an internal rate of return on equity of about 16 per cent, subject to a contractual allocation of certain commercial risks. The construction and operation of the Tollway were negatively affected by acts of the government of State M including an imposed reduction of the Toll rates, a continuous programme of improvements to untolled roads competing with the Tollway, and the closure of the airport which the Tollway had been built to serve. These acts led to a dramatic reduction in revenue and over time, in turn, to a significant accumulated deficit and a vastly reduced expectation of return on equity at the end of the Concession period in about a further 15 years' time.

The foreign investors were unable to persuade the majority local private and state shareholders to pursue the concession company's legitimate contractual claims against State M.

Our client claimed its loss against State M in an arbitration that it brought to an international tribunal appointed under the applicable BIT. State M argued that it had never provided any guarantee for the investment return and therefore should not be responsible. We were able to demonstrate that our client's expected return on investment had been based upon identifiable objective criteria in the feasibility studies and negotiations, that these amounted to legitimate expectations at the time the investment was made, and that these expectations had been negatively affected by State M acts after the investment had been made. On this basis, our client requested the tribunal to compensate it for the effect of these acts upon the value of its investment. The tribunal accepted this argument and our client obtained a favourable award and damages. By way of contrast, the other foreign investor (whose State, F, had not entered into a BIT with State M) could not rely on a treaty claim and as a result received no equivalent compensation for its losses from the same factors.

Resolution of Investment Disputes through The Use of BITs

There are a number of alternative ways to resolve disputes between a contracting state and an investor. These may include negotiation, mediation, administrative proceedings and proceedings before the host state's courts. Nonetheless, international arbitration under a BIT is a very important and powerful right for investors since it means that if a host state breaches its obligations the investor can himself bring a claim before an international arbitral tribunal in its own name, under international law and in a neutral seat. This provides a forum for binding resolution outside the procedural control of the host state and without the need for the investor to have to rely on either diplomatic protection from its own government or local procedures in the host state.

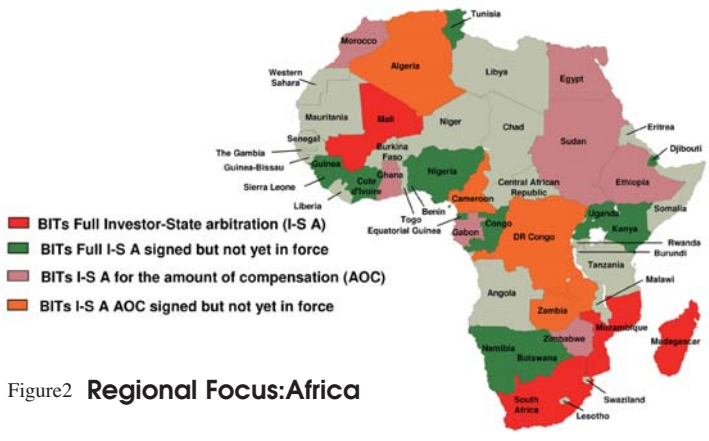


Figure2 **Regional Focus:Africa**

★ Typical Aspects of Investment Arbitration Procedure

In contrast to a commercial arbitration agreement, an investor will typically submit a dispute arising between it and another state directly to an international arbitral tribunal even where no arbitration agreement has been signed directly between it and the government, relying instead on the fact that the host state has included a consent to such arbitration in the applicable BIT with the investor's own state. In this case, the arbitration agreement will consist of the state's offer to arbitrate such disputes in the BIT itself and the acceptance of this offer by an investor who qualifies for protection of his investment under the terms of that BIT.

Investment arbitration proceedings are in many ways similar to international commercial

arbitrations; there are ad hoc arbitrations, often incorporating the UNCITRAL Rules, or institutional arbitrations, e.g. under the rules of the ICC, LCIA or Stockholm Chamber of Commerce. Many investment treaties also offer submission to arbitration under the so-called "ICSID" rules. Such arbitrations are administered by the International Centre for the Settlement of Investment Disputes ("ICSID"), a member of the World Bank Group created specifically for the administration of such investment disputes by the Convention on the Settlement of Investment Disputes between States and Members of Other States ("ICSID Convention"). (You can find information about ICSID on its website at http://icsid.worldbank.org/ICSID.)

BIT awards, including ICSID awards, are commonly honoured without the need for enforcement. The high level of compliance with such awards can be attributed to the facts that they constitute international law obligations in themselves and that their non-observance may prejudice the host state's creditworthiness in the international financial and insurance markets. ICSID's affiliation with the World Bank is said to lend particular effectiveness to ICSID awards as there is a perception that non-performance may lead to the withholding of World Bank loans from the non-fulfilling state.

★ Types of Arbitration Consents in China's BITs

China has signed and ratified 100 BITs as of 31 October 2010; 97 of these include a consent to investor-state arbitration. These consents can be sorted in two categories:

The first category consents to Investor-State Arbitration regarding the Amount of Compensation. Such consents stipulate that only disputes concerning the amount of compensation for expropriation can be submitted to an international arbitration tribunal. An example of such a consent is Article 8 of the China-Peru BIT:

(a) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(b) If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

(c) If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington D.C., on March 18, 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the disputes so agree. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

Although BITs typically contain a definition of what constitutes "expropriation", disputes may still arise not only about the amount of compensation but also about whether there has been an expropriation in the first place.

Tza Yap Shum v. Republic of Peru, ICSID Case No ARB/07/6 (based on the China-Peru BIT) is the first case brought by a Chinese investor before ICSID based on a BIT. The case is still pending, following a jurisdictional award that was made on 19 June 2009 that had to determine the scope of such an "amount of compensation" consent to arbitration.

Mr Tza Yap Shum, a Hong Kong resident, issued proceedings against Peru under the China-Peru BIT, claiming compensation for the alleged expropriation of his Peruvian fish flour company. The two parties disagreed over the scope of Peru's consent to investor-state arbitration.

Peru objected to the tribunal's jurisdiction, arguing that according to the Article 8 Para 3 of the relevant BIT the tribunal enjoyed jurisdiction only over the "amount of compensation" but did not have the right to determine whether there had been an "expropriation" within the meaning of the treaty. Peru argued that the determination of whether or not there had been an expropriation should be submitted to the local court. However Article 8 Para 3 last sentence of the treaty stipulated that if the investor had first brought a dispute to the local court, he would be precluded from taking the dispute to an international arbitration tribunal under the BIT. After careful consideration, the tribunal determined that it did have jurisdiction to determine not only the amount of compensation but also whether the act of the Peruvian Government fell within the meaning of "expropriation" in the BIT.

The second type of clause, which can be described as "full" Investor-State Arbitration, provides that all disputes arising from the investment are included in the scope of international arbitration. The China-South Africa treaty signed on 1997 is the first BIT entered into and ratified by China that stipulates consent to full I-S A:

Article 9:

(a) Any dispute between an investor of one contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(b) If the dispute cannot the settled through negotiations within six months, either Party to the dispute shall be entitled to submit the dispute to an international arbitral tribunal provided that the Contracting Party involved in the dispute may require the investor to initiate administrative review procedures in accordance with its laws and regulations, and provided that the investor has not submitted the dispute to a domestic court of that Contracting Party.

Most of the BITs China that has signed since this time include a consent to 'full' I-SA. The map at Figure 1 shows the states with which China currently has BITs in force, distinguishing between those with "full" investor-state arbitration (shown on the legend as "I-SA"), investor-state arbitration limited to the Amount of Compensation only (shown as "AOC") and those that contain no consent to I-SA at all. Figure 2 is a map concentrating on the Africa region. This map shows in addition those states with which China has signed BITs that have not yet come into force, again distinguishing between those BITs with full I-SA and those with

AoC I-SA. As can be seen, almost all of these BITs awaiting ratification contain the more modern type of full arbitration clause.

BITs Should Be Integrated into Investors Strategic Planning

The protection a BIT can offer is a very useful investment tool indeed, both in strategic planning before an investment has been made or after a dispute has arisen. Given the level of protection they afford they should form part of the strategic planning of any company investing substantially overseas.

★ Purchase Investment Insurance to enhance financing ability

In addition to relying on the rights of protection under the BIT itself, the investor can purchase investment insurance from the only export credit insurance institution in China, China Export and Credit Insurance Corporation. It covers the risk of expropriation, exchange limitation, war and violation and Government breach (http://www.sinosure.com.cn/sinosure/cpyfw/tzbx/gytzbx/gytzbx.html). Government Breach refers to situations where:

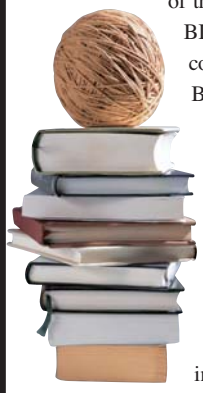
"the host state breached or did not fulfil relevant agreement signed with the insured or project company, and refuse to compensate the insured or project company according to the arbitration award."

The existence of investment guarantees provided by BITs may be important not only in providing assurance to the investor but also by reducing the cost of investment insurance and the cost of financing, especially in so-called "non-recourse" financing, since the lenders' perception of risk may be influenced as well. In some cases this may even prove decisive as to the availability of financing. Under some circumstances, the existence of a BIT may itself be a prerequisite to the granting of an investment guarantee or export finance under a state-sponsored scheme.

★ Use BITs to evaluate political risk

When evaluating an investment's risk and profitability, investors need to consider the essential supplementary legal protection and remedies that BITs provide, especially in the case of perceived inadequacy, unfairness or ineffectiveness in the host state's domestic legal framework.

This can be illustrated by the following example, known to the author. A company from state A is interested in investing in a long-term, capital-intensive project in state B. Its analysis indicates that state B offers an insufficiently stable and predictable political and administrative framework and that its courts offer insufficient assurance of the enforcement of its contractual rights. There is a BIT between A's state and state B but this does not contain a consent to investor-state arbitration and State B declines to offer such a clause in the investment agreement. On the basis of its risk analysis and the lack of opportunity to enforce its rights in investor-state arbitration, company A decides not to proceed with the project.



★ Establish reasonable or alternative international investment structures

Where an investor's own home state has no or an inadequate BIT with the host state of the investment, the investor may consider whether it can protect its investment by structuring its investment through a holding in an acceptable third state.

In the case between company X and state Y, X's partner company Z could not bring an international arbitration claim as there was no BIT between state Y and Z's home state. Had it been aware of this when making its investment, it might have been able to protect its investment by structuring it indirectly through a third state that had entered in to a BIT with M state, e.g. by establishing a joint venture with D with the same nationality as D. When considering such a structure, it is vital to check the precise wording of the BIT between the state of the holding company and the host state with regard to whether it protects investments held in such a structure.

★ Maintain status of "Investor" and "Investment"

After obtaining comprehensive international protection, the investor should be careful to maintain its status as "investor". Assignments, reorganisations, mergers and changes of status may each give rise to the risk of losing such status, particularly whether it involves a change of nationality. For example, where a company that is a national of state A invests in a project company in state B but then transfers the shares of the project company to a company in state C, the company in state C will not be protected by a BIT between state A and state B but will have to rely on such BIT as may exist between state B and state C.

In addition, the domestic legislation of many states contain special regulations as regards the definition of "investment", such as requirements that foreign investors' shares in a project company may not exceed 49% of its share capital and that foreign investors may not otherwise control the project company. A failure to observe such requirements risks losing protection of the investment under the applicable BIT, particularly where the BIT includes a requirement that an investment conform to local law.

★ Choose Beneficial Disputes Settlement

As soon as a potential dispute looks likely, the investor should strategically analyse the optimal tactics and potential avenues of dispute resolution. Choices of procedure made early on in a dispute can substantially affect the outcome. This is particularly the case where the BIT or investment agreement stipulates that the investor may choose either the jurisdiction of court and international arbitration but not both (see, e.g., the extracts from the China-Peru and the China-South Africa treaties quoted above). Where the investor has investment insurance, it should contact the insurance institution immediately when the dispute occurs. This may not only be a condition of the insurance, but it might also have the benefit that the investor may obtain support from its government to solve the dispute before having to go to arbitration.

Conclusion

Investment protection offers an effective means to manage and limit exposure to political risk. Chinese investors are fortunate that China offers the second most comprehensive investment treaty programme in the world. To use this advantage effectively, investors should consider the availability of protection and the optimisation of its use in a strategic manner both at the time of making its investment and as soon as any dispute looks likely to arise.

[The author is grateful to YiYi Jin for her substantial assistance in the preparation of this article.]