The Emboldened Investor: Recent Trends in Investor-State Arbitrations Brought by Chinese Entities

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This article highlights the recent exponential growth in the number of Chinese investors resorting to international arbitration where disputes have arisen with States in which they have invested. The authors discuss whether this trend (1) represents a departure from previous Chinese dispute resolution policy, and (2) is likely to continue in light of increases in the country's foreign direct investment activity.

Introduction

Recent years have witnessed exponential growth in the number of Chinese investors resorting to international arbitration where disputes have arisen with States in which they have invested. This trend marks a departure from China's long-standing policy of attempting to resolve such disputes informally or through political channels and is only likely to continue as Chinese outward foreign direct investment (FDI) levels increase and diversify.

China encourages high levels of outward FDI

Outward FDI by Chinese companies, including State-owned entities (SOEs), has grown rapidly since the turn of the century.[1] The Chinese government has actively encouraged such outward investment, not least with the adoption in 2013 of the Belt and Road Initiative (the BRI), a national strategy designed to promote economic development at home and abroad. The BRI is the world's biggest development programme ever undertaken by a single country; it has seen

more than US$1 trillion[2] invested in some 3,000[3] projects across the developing world, with a particular focus on the energy, metals and mining, and transport sectors.

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Under the auspices of the BRI, Africa has been the largest recipient of Chinese investment, seeing a vast expansion of its road and rail networks, including the introduction of standard gauge railways in Kenya, Nigeria and Ethiopia. Chinese funding has also led to the construction of a deep-water port in Algeria, a new water pipeline in East Africa and two major hydroelectric projects in Uganda. In Asia, Chinese money has similarly been heavily invested in railways, notably in Indonesia, Laos and Malaysia, while the China-Pakistan Economic Corridor has introduced a suite of investments to improve road, rail and air transportation systems in Iran, Afghanistan, the Central Asian Republics (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and the wider region.

Perhaps unsurprisingly against this backdrop, China had more companies on the Fortune Global 500 list than any other country in 2023, including veteran drivers of the BRI, such as China State Construction Engineering, the Industrial and Commercial Bank of China and China Railway Construction.

There has recently been a decline in large-scale BRI projects, following the introduction in 2021 of a new government policy focusing on ‘Small and Beautiful’ projects, which are deemed to be less costly, less risky and more lucrative. This shift in focus has seen Chinese companies increasingly investing in electricity transmission and the energy transition; further growth is anticipated in manufacturing in new technologies (such as batteries), renewable energy, trade-enabling infrastructure (such as pipelines and roads), information communication technology (such as data centres), resource-backed deals (such as those involving mining, oil and gas), and high visibility or strategic projects (such as railways).[4]

BITs offer Chinese investors legal protections, including the right to seek investor-State dispute settlement

Irrespective of their scale, Chinese investments abroad are (at first blush at least) well protected by an extensive network of bilateral investment treaties (BITs) between China and investment host States. BITs are agreements between two States concerning the treatment of investors from one State (the home State) investing in the other State (the host State). They are designed to foster investment and therefore set out standards by which foreign investors can expect to be treated by host States.

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BITs contain important protections to investors against illegitimate State actions, particularly in high-risk jurisdictions. Common and key substantive protections in these treaties include fair and equitable treatment (FET), a broad standard that encompasses a prohibition against the host State adopting arbitrary or discriminatory measures, together with a prohibition against expropriation (except for a public purpose, on a non-discriminatory basis and accompanied by prompt, adequate and effective compensation). Many BITs also provide that investors should be afforded a secure investment environment (including physical security) and that treatment of foreign investors should be on a par with that accorded to domestic investors or investors from a third State.

The real 'teeth' of BITs is, however, a procedural one, *viz* international investor-State dispute settlement (ISDS), whereby an investor has a right of recourse to a neutral international arbitral tribunal in the event of the host State's breach of the BIT's substantive protections. Thus, *in Tza Yap Shum v Peru,*[5] the tribunal found that certain tax measures adopted by Peru constituted both an arbitrary taking of the investors' fishmeal business in breach of the FET standard and an unlawful indirect expropriation under the China-Peru BIT 1994.

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In determining investor-State disputes, international arbitral tribunals set out their conclusions in final and binding awards with which States typically comply, failing which investors may rely on a number of international instruments to ensure that awards are recognised and enforced, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966 (the ICSID Convention).

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The ISDS protections afforded by BITs, including arbitration, are particularly important where an investor does not have an underlying contract with a host State. BIT protection is arguably essential for BRI investments made in countries in which politics is unstable and the rule of law is not rigorously applied.

Historically, few Chinese investors have sought BIT protection

It has been reported that of some 1,300 known investor-State arbitrations, the number of cases brought by Chinese claimants is in the low twenties.[6] This is a surprisingly small figure, particularly bearing in mind the number, scale, location and complexity of BRI projects, together with the fact that 10% of these projects have been designated as "troubled".[7]

Commentators have often attributed the low number of Chinese claimant parties in investor-State arbitration to a strong cultural aversion to formal and adversarial dispute resolution processes.[8] Chinese SOEs may be particularly unwilling to engage in investor-State arbitration so as to avoid the possibility of damaging political relationships between China and host States.[9]

Another reason is likely to be the inherently limited nature of certain 'older generation' Chinese BITs, typically concluded before 1997, which often contain narrow dispute resolution clauses limiting the jurisdiction of tribunals to determining a claimant's losses following breach rather than determining the existence of a breach itself. 'Newer generation' Chinese BITs, by contrast, generally include comprehensive arbitration provisions giving access to arbitration for all disputes between investors and host States.

For example, in *Beijing Shougang & Ors v Mongolia*,[10] three Chinese investors in a Mongolian iron mine brought arbitration proceedings against Mongolia following the State's decision to cancel their mining licence. The investors contended that Mongolia had breached their rights under the China-Mongolia BIT 1991, including FET and the prohibition against expropriation. However, the arbitration clause in the China-Mongolia BIT was limited to disputes "involving the amount of compensation for expropriation". As such, the question of whether an expropriation had taken place first had to be established in a different forum, such as a national court, before a tribunal constituted under the auspices of the China-Mongolia BIT could quantify the consequent loss. The tribunal therefore found that it did not have jurisdiction to hear the investors' claims.

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Similarly, in *Ping An Life Insurance v Belgium*,[11] the tribunal found that it lacked jurisdiction to hear the claimant's claims under the BLEU (Belgium-Luxembourg Economic Union)-China BIT 1986, which restricted arbitration to disputes that "[arose] from an amount of compensation for expropriation, nationalisation or other similar measures".

Decisions such as these illustrate that investment arbitration might in certain cases represent an inadequate remedy

for wronged investors, and either the 'older generation' BITs themselves or the findings in these cases may have discouraged putative claimants from bringing claims against States in which they have invested. Although other tribunals have adopted a more liberal approach to similar arbitration provisions,[12] there remains a "China disequilibrium" in investor-State arbitration when the relatively small number of claims is read against the number of BITs to which China is party (146, of which 108 are in force) and the amount of Chinese outward FDI.[13]

A growing number of Chinese investors are now resorting to BIT protection

Irrespective of the cause of the historical disinclination towards investor-State arbitration, there is no doubt that over the last few years there has been a noticeable uptick in the number of BIT claims brought by Chinese investors. As at July 2024, more than two-thirds of all cases involving Chinese parties had been filed in the previous five years alone.[14]

This trend likely reflects a growing awareness of investors' rights of recourse to arbitration (particularly under 'newer generation' BITs).[15] It suggests a growing comfort on the part of Chinese parties to engage in formal dispute resolution proceedings, possibly because China has itself adopted a more positive stance towards arbitration,[16] reflected in (among other things) a surge in the number of professional third party funders in the Mainland.[17]

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It is also possible that Chinese SOEs have been emboldened to bring investor-State claims by the case of *Beijing Urban Construction Group v Yemen*, in which BUCG, the investor, brought a claim concerning a contract to construct an airport terminal facility in Sana'a. Yemen contended that as BUCG was an SOE, it was an agent of the Chinese State rather than a 'national' of China, and that the tribunal did not have jurisdiction to hear State-to-State disputes under art 25(1) of the ICSID Convention. The tribunal held that BUCG was performing its construction work as a commercial contractor and not as an agent of the Chinese State and was not fulfilling Chinese governmental functions.[18] Consequently, it accepted that BUCG was a national of China whose claims could be heard by the tribunal. Following this decision, the path has been cleared for Chinese SOEs to bring claims against States, so long as they do not act as agents of China or discharge a public function in the host State in making their investments.

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Some of the most recent claims brought by Chinese investors are discussed below. Naturally, given the average length of investment treaty arbitration proceedings, many claims that have recently been commenced have not been resolved at the time of writing, but nonetheless merit discussion as they are indicative of the marked shift in favour of investor-State arbitration.

(1) Corporate takeovers and telecommunications raising national security issues

Global geopolitics and national security concerns have given rise to a number of claims brought by Chinese investors.

In 2020, a group of Chinese investors in Ukrainian aviation engine manufacturer Motor Sich commenced arbitration following Ukraine's move to block a takeover of the company by Beijing Xinwei Technology Group.[19] Motor Sich had reportedly supplied engines for Russia's helicopter fleet until military exports to Russia were banned by Ukraine in 2014. The Chinese takeover was therefore barred for reasons of national security, according to public sources. The Chinese investors have alleged that Ukraine's actions have breached various provisions of the China-Ukraine BIT 1992.

National security was also the apparent concern underpinning Ghana's rescission of a contract for intelligent traffic management granted to Chinese investor Beijing Everyway Traffic & Lighting Tech Co Ltd, prompting a dispute which in turn gave rise to arbitration under the China-Ghana BIT 1989.[20]

Likewise, Chinese telecommunications company Huawei is a party to several current arbitrations relating to the attempted roll-out of its 5G technology. In 2022, Huawei brought a claim against Sweden[21] and commenced proceedings against the UK in 2022 and 2023[22] - in both cases in response to decisions to ban Huawei following US government claims in 2022 that the Chinese government would use Huawei equipment for intelligence-gathering purposes. Huawei also threatened to bring a claim against the Czech Republic in 2019 after a State agency alleged that the company's technology posed a threat to cybersecurity. No arbitration has, however, been commenced to date.[23]

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(2) Telecommunications generally

Huawei is not the only Chinese telecommunications operator to have had recourse to investor-State arbitration recently. Indeed, the telecommunications sector is increasingly lending

itself to investor-State disputes.[24] In 2021, the directors of Chinese-owned telecoms operator Emaxx Telecom brought a claim against Cambodia under the ASEAN-China Investment Agreement 2009 concerning the revocation of the operator's licence following an alleged failure to pay taxes.[25] In the same vein, in 2022 Chinese investor PCCW Cascade (Middle East) Ltd commenced an arbitration against Saudi Arabia under the China-Saudi Arabia BIT 1996,[26] reportedly in relation to the withdrawal of its licence to provide fixed-line and broadband communications services.

(3) Energy and resources

Other sectors in which investor-State arbitration traditionally proliferates include energy, metals and mining, with politics and the environment often lying at the heart of such cases. For example, Chinese mining company Junefield Gold Investments filed a claim against Ecuador in 2022 in relation to its investment in the Rio Blanco silver and gold mine, following the State's alleged failure to ensure a police presence at the mine in the face of anti-mining protests and a court order for the suspension of mining activities.[27] Similarly, in 2023, Zijin Continental Gold is reported to have filed a claim against Colombia in relation to its investment in the Buriticá gold mine in relation to the State's alleged failure to guarantee physical safety within the investor's concession area, the project having been hindered by criminal gangs and allegations of illegal mining.[28] In 2024, Ganfeng International Trading and two of its UK subsidiaries brought proceedings against Mexico following the adoption of a law which nationalised the State's lithium resources (in relation to which the investors allegedly hold rights).[29]

(4) Construction

The construction sector similarly spawns plenty of investor-State disputes, and Chinese investors in this sector are no exception. In 2022, Chinese SOEs PowerChina and China Railway brought two separate arbitrations (under the ASEAN-China Investment Treaty 2009 and the China-Vietnam BIT 1991) concerning Vietnam's rescission of a contract to construct a hydropower project.[30] In 2023, SOE China Machinery Engineering Corporation (CMEC) brought a claim against Trinidad and Tobago concerning its investment in an aluminium smelting complex and the alleged wrongful termination of the smelting project by the State. CMEC claims that the China-Trinidad and Tobago BIT 2002 has consequently been breached, including its provisions on FET and expropriation.[31]

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(5) BRI projects

Only one BRI project has generated an investor-State arbitration to date, so far as the authors are aware. In *Zhongshan Fucheng v Nigeria*,[32] brought under the China-Nigeria BIT 2001, the arbitral tribunal held that the respondent had unlawfully evicted the claimant from a free trade zone in

which the latter held management and development rights. Acting through a number of State organs, including the police, Nigeria was found to have breached its FET obligations as well as to have expropriated the investor's investment. The tribunal noted that the Nigerian courts' failure to provide any relief to the investor (upon application) compounded the wrongfulness of the State's actions. In addition to awarding compensation to the investor for the loss of its rights, the tribunal determined that Nigeria's conduct warranted an award of moral damages for the physical maltreatment and intimidation of the investor's management personnel.

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Conclusion

In short, Chinese investors in a variety of traditionally arbitration-friendly sectors (most notably energy and telecommunications) are evidently increasingly inclined to turn to investor-State arbitration, reflecting a greater recognition of the benefits of arbitration and growing confidence in the arbitral process. Moreover, given the scale of Chinese investments in politically unstable countries and increasing geopolitical uncertainties, it seems likely that investor-State arbitration will increasingly be seen as an essential tool of risk mitigation for Chinese investors abroad.

There is every reason to suppose that a new generation of investors in greener, cleaner and smaller projects will similarly look to arbitration clauses (where available) to protect their investments abroad. Prudent investors across all sectors should therefore carefully consider how best to structure their investments to ensure BIT protection.

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Chinese investors in the United States may want to give especial consideration to this question in the absence of a BIT between China and the US, and *all* Chinese investors abroad will want to bear US government policy in mind, given the influence and potential ramifications of the administration's rhetoric beyond US borders (to which Huawei has borne witness).

1 FDI levels rose from US$28 billion in 2000 to US$2.9 trillion in 2023. Source: Statista, *Foreign direct investment (FDI) from China - statistics and facts* (21 October 2024), available at https://www.statista.com/topics/5290/foreign-direct-investment-from-china/.

2 Griffith Asia Institute at Griffith University (GAI) and the Green Finance & Development Center of the Fanhai International School of Finance at Fudan University (GFDC), *China Belt and Road Initiative (BRI) Investment Report 2023* (February 2024), p 1, available at https://www.griffith.edu.au/__data/assets/pdf_file/0033/1910697/Nedopil-2024-China-Belt-Road-Initiative-Investment-report.pdf and https://greenfdc.org/china-belt-and-road-initiative-bri-investment-report-2023/ .

3 *The Belt and Road Initiative in 10 Figures*, China-Britain Business Focus (China-Britain Business Council (CBBC)) (24 October 2023), available at https://focus.cbbc.org/the-belt-and-road-initiative-in-ten-figures/.

4 GAI/GFDC report, *supra* (n 2).

5 *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Award, 7 July 2011.