PANORAMIC

INVESTMENT TREATY ARBITRATION

China

LEXOLOGY

Investment Treaty Arbitration

Contributing Editors

Stephen Jagusch KC and Epaminontas Triantafilou

Quinn Emanuel

Generated on: October 30, 2024

Contents

Investment Treaty Arbitration

Key developments of the past year

Contributors

China

Gherson

Roger Gherson	roger@gherson.co.uk
Cong Gao	cgao@gherson.co.uk
Emma Anderson	eanderson@gherson.co.uk
Valeriya Grebenkova	vgrebenkova@gherson.co.uk
Leila Kanametova	lkanametova@gherson.co.uk

BACKGROUND

Foreign investment
What is the prevailing attitude towards foreign investment?

China is the largest developing economy host and the second-largest recipient of foreign direct investment (FDI) in the world. According to the Report on Foreign Investment in China 2023 published by the Ministry of Commerce of the People's Republic of China (MOFCOM), China aims to reasonably reduce the negative list for foreign investment access, protect the rights and interests of foreign investors in accordance with the law, and create a first-class business environment that is market-oriented, rule of law-oriented and internationalised. Indeed, China is regarded as one of the 'safest' regions from the rule of law by multinational corporations.

In 2022, China continued to promote the implementation of high-level investment liberalisation and facilitation policies, expand the scope of encouragement for foreign investment, introduce a number of policies and measures to support foreign investment in research and development centres, promote the attraction of foreign investment in the manufacturing industry, and intensify its efforts to provide services and safeguards for foreign-invested enterprises, implement national treatment for foreign-invested enterprises, protect the legitimate rights and interests of foreign investment, and further enhance the internationalised, rule-of-law and facilitated business environment. Despite the impact of the coronavirus pandemic, in 2022, the actual amount of foreign investment used in China achieved a year-on-year increase of 8 per cent to US$189.13 billion and has maintained steady growth.

The jurisdiction of Mainland China is distinct from those of Hong Kong, Macau and Taiwan Province of China. For this practical note and unless otherwise specified, the relevant investment treaty practice, Chinese legal system and Chinese law mentioned are only referred to as those of Mainland China.

Law stated - 30 September 2024

Foreign investment
What are the main sectors for foreign investment in the state?

According to the Report on Foreign Investment in China 2023, in 2022, the manufacturing sector remained the investment leader with the highest share of foreign investment in China, accounting for 26.3 per cent of China's actual foreign investment in use. In terms of service industries, the three service industries with the largest actual use of foreign capital) accounting for 46.1 per cent of China's attracted capital in total) were as follows:

- leasing and business services (17.5 per cent);
- scientific research and technology services (16 per cent); and
- information transmission, software and information technology services (12.6 per cent).

Scientific research and technology services and information transmission, software and information technology services saw increases of 32.6 per cent and 18.8 per cent, respectively. Others with a share of more than 5 per cent include wholesale and retail trade (7.7 per cent) and real estate (7.5 per cent).

In 2023, the actual use of foreign investment in the manufacturing industry amounted to 317.92 billion yuan, down 1.8 per cent, of which the actual use of foreign investment in the high-tech manufacturing industry increased by 6.5 per cent. The medical equipment and instruments manufacturing industry and the electronic and communication equipment manufacturing industry increased by 32.1 per cent and 12.2 per cent, respectively. The actual use of foreign capital in the service industry amounted to 776.08 billion yuan, decreased by 13.4 per cent. The actual use of foreign investment in construction; science and technology achievement transformation services; and R&D and design services increased by 43.7 per cent, 8.9 per cent and 4.1 per cent respectively. The high-tech industry attracted 423.34 billion yuan, accounting for 37.3 per cent of the amount of actual FDI used, up 1.2 per cent from 2022 as a whole, a record high.

Law stated - 30 September 2024

Foreign investment
Is there a net inflow or outflow of foreign direct investment?

According to the statistics of the Ministry of Commerce and the Administration of Foreign Exchange, in 2023, China's outward direct investment across industries reached 1.04185 trillion yuan, an increase of 5.7 per cent over the previous year. In breakdown, domestic investors made non-financial direct investment in 7,913 overseas enterprises in 155 countries and regions around the world, with a cumulative investment of 916.99 billion yuan, up by 16.7 per cent.

In terms of inbound investment statistics, in 2023, the actual amount of foreign investment used was 113.31 billion yuan, down 8.0 per cent year-on-year, with the scale still at a historically high level. Major places of origin of actual investment in China from France, the United Kingdom, the Netherlands, Switzerland and Australia increased by 84.1 per cent, 81 per cent, 31.5 per cent, 21.4 per cent and 17.1 per cent, respectively (including data on investment through free economic zones).

Law stated - 30 September 2024

Investment agreement legislation
Describe domestic legislation governing investment agreements with the state or state-owned entities.

Chinese domestic law is the applicable law for a significant portion of investment contracts in China. For example, in terms of contracts for Chinese–foreign equity joint ventures (EJV), Chinese–foreign contractual joint ventures (CJVs), or Chinese–foreign joint exploration and development of natural resources, Chinese law shall be applied as long as these contracts are performed within the territory of Mainland China (article 467 of Civil Code). For other

investment contracts, Chinese law can also be chosen as the applicable law by parties' consent.

At the national level, the Civil Code provides the basic definitions, rights and liabilities of a natural person, a legal person and other entities, as well as general rules of applicable laws of foreign-related matters. Other relevant general national laws include the Civil Procedure Law, Partnership Enterprise Law and, most importantly, the Company Law.

The Company Law provides general rules for all companies registered in Mainland China, including limited companies and joint-stock companies with foreign investors. However, as the Company Law is not tailored for foreign investors and investment, it leaves significant blanks and even contradictions in legal practices. In this case, as a supplementary rule of application of law, when a provision of the Company Law differs from any other provisions of any law related to foreign investment, the latter will prevail.

The Foreign Investment Law (2019) (FIL) is the first legislation to unify inbound foreign investment policies in China, which is designed as the basic law focusing on the establishment of a basic institutional framework and rules in the aspects of market access, promotion, protection and management of foreign investment in China.

Regulations promulgated by the State Council, namely the central government of China, serve as a supplementary to the national law. Most of the detailed rules on implementations of foreign investment law are incorporated into types of regulations promulgated by the State Council or its affiliated ministries and departments. The most relevant regulation is the newly published Provision for Implementation of Foreign Investment Law, which took effect on 1 January 2020.

Although inferior in their legal effect compared with the national laws and regulations, local laws and regulations applicable in the place of investment are often of more practical importance. The implementation of certain national laws and regulations may be suspended with regard to the local governments of some economically special areas, in particular, the pilot Free Trade Zones launched in recent years.

The final set of sources are regulatory documents made by the central or local governments and their relevant departments concerning foreign investment, which shall comply with laws and regulations. Typical examples of regulatory documents related to foreign investment policies are the guidance on foreign investments. Currently, the most important guidance is the two catalogues for sectors in which foreign investors are encouraged to or prohibited from investing: the Catalogue of Industries for Encouraging Foreign Investment (2022 Version) and the Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2024 Version).

Law stated - 30 September 2024

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

According to the statistics from the International Investment Agreement Navigator, the database maintained by the international investment agreements (IIAs) section of the United Nations Conference on Trade and Development (UNCTAD), China entered into 145 bilateral investment treaties (BITs) up to August 2024. Of the 146 BITs, 108 are in force, 16 are signed but not yet in force and 22 have been terminated unilaterally by the other party. This number excludes BITs entered by Hong Kong SAR, China, Macao SAR, China or Taiwan, Province of China in their individual capacity.

In addition, China, Japan and Republic of Korea entered into a trilateral investment treaty on 13 May 2012, which came into force on 17 May 2014.

Please note that given that UN member states provide information to UNCTAD voluntarily, there may be discrepancies between the UNCTAD documents and a particular country's government website. According to the statistics published by the Department of Treaty and Law of the Ministry of Commerce (MOFCOM) online, only 105 BITs are in force. Another source that may worth cross-checking is the Treaty Database, maintained by the Ministry of Foreign Affairs of China.

In terms of Free trade agreements (FTAs), according to the FTA database maintained by the Ministry of Commerce, China has concluded 20 FTAs, including the Regional Comprehensive Economic Partnership (RCEP), which came into force on 1 January 2022. 11 FTAs are under negotiation.

Although China signed the International Energy Charter on 20 May 2015, China is not a member to the Energy Charter Treaty.

Law stated - 30 September 2024

Investment treaties
If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

China does not have any overseas territories.

Law stated - 30 September 2024

Investment treaties
Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

According to the BIT database of the Ministry of Commerce, China has entered several protocols with the following states to amend the BITs between the countries as follows:

- Sweden: China–Sweden BIT was concluded on 28 March 1982; Protocol was signed and became effective on 27 September 2004;
- Bulgaria: China–Bulgaria BIT was concluded on 27 June 1989; Protocol was signed on 26 June 2007 and came into force on 10 November 2007;
-

Slovak: China–Czech and Slovak BIT was signed on 4 December 1991 and came into effect on 1 December 1992; on 7 December 2005, China and Slovak Republic concluded an Additional Protocol, which came into force on 25 May 2007; and

- Romania: China–Romania BIT was concluded on 12 July 1994; Protocol was signed on 16 April 2007 and came into force on 1 September 2008.

Law stated - 30 September 2024

Investment treaties

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

China has not unilaterally terminated any bilateral or multilateral investment treaty.

China–India BIT (2005) was unilaterally terminated by India on 3 October 2018; China–Ecuador BIT (1994) was unilaterally terminated by Ecuador on 19 May 2019; China–Indonesia BIT (1994) was unilaterally terminated by Indonesia on 31 March 2015.

Law stated - 30 September 2024

Investment treaties

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Yes, and it is not uncommon. For example, while China–Japan BIT (1988) and China–Republic of Korea BIT (2008) are still in force, in 2012, China, Japan and the Republic of Korea concluded a trilateral investment treaty which coexists with the bilateral investment treaties concluded between any two of the three countries.

China and ASEAN (Association of South-East Asian Nations) concluded an Investment Agreement in 2009. Each of the 10 member states of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) has concluded BITs with China respectively. Therefore, the China–ASEAN Investment Agreement (2009) coexists with Brunei–China BIT (2000, not in force), Cambodia–China BIT (1996), China–Indonesia BIT (1994, terminated), China–Laos BIT (1993), China–Malaysia BIT (1988), China–Myanmar BIT (2001), China–Philippines BIT (1992), China–Singapore BIT (1985, terminated), China–Thailand BIT (1985) and China–Viet Nam BIT (1992).

In addition, considering that China has concluded 20 FTAs in which the provisions on investment often overlap with the bilateral/trilateral investment treaties concluded by the same parties. In particular, the RCEP, which has 15 member states including all the ASEAN states, China, Japan, Republic of Korea and New Zealand, coexists with all treaties mentioned in the above two paragraphs, as well as China – New Zealand BIT (1988).

Law stated - 30 September 2024

ICSID Convention

Is the state party to the ICSID Convention?

China signed the ICSID Convention on 9 February 1990. On 1 July 1992, China ratified the ICSID Convention. According to the ICSID database, the ICSID Convention finally entered into effect within the territory of China on 6 February 1993.

Before the ICSID Convention came into force in China, on 7 January 1993, China notified the ICSID secretary that the Chinese government would only consider submitting 'disputes over compensation resulting from expropriation and nationalisation' to the ICSID for settlement per article 25(4) of the Washington Convention.

Law stated - 30 September 2024

Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

China has yet to sign the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration that entered into force on 18 October 2017.

Law stated - 30 September 2024

Investment treaty programme

Does the state have an investment treaty programme?

It was not until the 1980s that China started to build its international investment treaty network. The first Chinese BIT was concluded with Sweden in 1982, followed by several BITs reached with European developed countries in the next few years, such as Germany (1983), France (1984), Finland (1984), Norway (1984), Netherlands (1985) and the United Kingdom (1986). Some Asian-Pacific countries, including Thailand (1985), Singapore (1985), Australia (1988) and Japan (1988), also were among the first countries that concluded BITs with China. Ghana (1989) was the first and only African country to reach a BIT with China at that time.

In the 1990s, there was a series of new BITs after China signed the ICSID Convention on 9 February 1990. During this decade, China entered into 69 BITs, nearly half of its total BITs, with countries worldwide, including countries in Africa and America. Several BITs were signed with former Soviet Union members and satellites after the dissolution. However, as China gradually transformed into a capital-exporting country, China changed its traditional position in the BITs concluded in the late 1990s. Those BITs started from China–Barbados BIT (1998) began to show characteristics of a greater emphasis on foreign investment protection.

After 2000, China slowed down its signing of investment treaties. Instead, there was a trend of renegotiating old BITs from the 1980s to incorporate modern provisions that conform with new needs in investment protection. To date, China has entered into BITs with its major investment partner countries worldwide except for the United States.

Law stated - 30 September 2024

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes
Does the state have a foreign investment promotion programme?

According to the Foreign Investment Guide of China (2023 Edition), on 12 October 2021, the Ministry of Commerce (MOFCOM) published the Outline of the 14th Five-Year Plan (2021-2025) for the Utilisation of Foreign Investment Through the Year 2035. This represents China's first comprehensive plan specifically focused on foreign investment utilisation.

The key objectives for the period of 2021-2025 are as follows:

- expansion of sectors open to foreign investment;
- enhancement of the structural framework for foreign investment utilisation;
- greater effectiveness of opening-up platforms;
- strengthening of the foreign investment management system;
- creation of a more favourable environment for foreign investors;
- establishing China among the top recipients of foreign investment globally;
- securing China's status as a major player in the global foreign investment landscape;
- further integration of foreign investment with outbound investment, foreign trade, and consumption promotion; and
- increased contribution of foreign investment to the domestic economy and the connection between domestic and international markets.

By 2025, China aims to:

- strengthen its competitive advantages in attracting foreign investment, with significant improvements in both the scale and quality of foreign investment;
- position itself as a key destination for transnational investment, underpinned by a world-class business environment;
- establish itself as an innovation and high-end manufacturing hub in East Asia; and
- develop new competitive advantages in international economic cooperation and competition.

Additionally, the China International Fair for Investment & Trade (CIFIT) remains a central platform for foreign direct investment (FDI) and international investment. As the only national-level event promoting two-way investment, CIFIT is also the largest investment exhibition globally, recognised by the Union of International Fairs (UFI). Its dual focus is on attracting foreign investment into China and supporting Chinese enterprises in expanding abroad.

Law stated - 30 September 2024

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Article 2 of the Foreign Investment Law (FIL) (2019) defines foreign investment as an investment activity directly or indirectly conducted by one or more foreign investors within the territory of China, including the establishment of foreign invested enterprises (FIEs), Merger & Acquisition, investment in new projects and other investment forms permitted by law.

Following the implementation of the FIL, establishing an FIE no longer requires prior approval but must instead be reported. According to article 34 of the FIL, foreign investors and FIEs are required to submit investment information to the relevant commerce authorities via the enterprise registration and credit information disclosure systems.

A separate regulatory framework governs M&A activities involving foreign investors, specifically the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors, issued by the Ministry of Commerce. M&A transactions must undergo review and approval by the appropriate government authorities before completion. Notably, foreign investors are prohibited from using M&A activities to circumvent restrictions on entering certain industries. For instance, foreign investors cannot acquire domestic enterprises operating in sectors where foreign investment is explicitly prohibited. Additionally, a national security review mechanism applies to M&A activities in sensitive industries, including military and defence, essential agricultural products, energy and resources, infrastructure, transportation, key technologies, and major equipment manufacturing.

A new investment project refers to instances where a foreign investor, either individually or jointly with other investors, including Chinese nationals, invests in a new project within China.

Moreover, article 4 of the FIL introduces a framework of pre-establishment national treatment combined with a negative list for foreign investment.

The concept of 'pre-establishment national treatment' ensures that foreign investors and their investments receive treatment no less favourable than that accorded to domestic investors at the stage of investment entry.

The Negative List for Foreign Investment Access specifies sectors where investment is prohibited, and foreign investors are not allowed to invest in these sectors. For sectors where investment is restricted, foreign investors must comply with the conditions set forth in the negative list. In sectors not listed on the Negative List for Foreign Investment Access, management is carried out under the principle of equal treatment for both domestic and foreign investment.

The Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Edition) and the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones (Negative List) (2021 Edition) were issued on 27 December 2021 and came into effect on 1 January 2022.

Finally, where the international treaties or agreements concluded or acceded to by China provide for more favourable treatment for the access of foreign investment, the relevant provisions may prevail.

Law stated - 30 September 2024

Relevant regulatory agency
Identify the state agency that regulates and promotes inbound foreign investment.

The Foreign Investment Guide of China (2023 Edition) states that the division of responsibilities outlined in the Foreign Investment Law, the Ministry of Commerce (MOFCOM) serves as the department in charge of commerce, while the National Development and Reform Commission (NDRC) acts as the authority overseeing investment. Along with other relevant departments, they work collaboratively to promote, protect, and manage foreign investment within their respective areas of responsibility. MOFCOM strives to develop a foreign investment promotion system with Chinese characteristics, establishing a national service network and encouraging local regions to build foreign investment promotion agencies, thereby forming a multi-level foreign investment promotion framework.

At the national level, the Investment Promotion Agency of MOFCOM, as a state-level investment promotion institution, is responsible for implementing national policies on opening up, promoting China's investment environment, and creating platforms to encourage cross-border industrial investment. Organisations such as the China Association of Enterprises with Foreign Investment, the China International Investment Promotion Agency, and the China Council for the Promotion of International Trade are also actively involved in foreign investment promotion efforts.

Law stated - 30 September 2024

Relevant dispute agency
Identify the state agency that must be served with process in a dispute with a foreign investor.

In general, the government agency dealing with investor–state arbitrations initiated against China is the Department of Treaty and Law of the Ministry of Commerce. This is specified in some BITs. In Canada–China BIT (2012), article 22.3 provides that notice of arbitration and other documents shall be served to the Department of Treaty and Law at the Ministry of Commerce. The China–Angola BIT (2023) confirms the same position in Annex D. Nevertheless, China–Cuba BIT (modified in 2010) only mentions that the notice should be served to the Ministry of Commerce without specifying the department.

Law stated - 30 September 2024

INVESTMENT TREATY PRACTICE

Model BIT
Does the state have a model BIT?

China has not officially published any versions of model BITs. However, some scholars may have opportunities to access the internal versions of current and previous model BITs through their sources in the Chinese Ministry of Commerce (MOFCOM). According to Norah

Gallagher and Wenhua Shan's book *Chinese Investment Treaties: Policies and Practice* published in 2009, MOFCOM has maintained and updated three model BITs up to 2008.

Gallagher and Shan also roughly divided the Chinese BITs signed between 1982 and 2008 into three generations based on the model BITs. Those that followed Models I and II were categorised as first generation and largely concluded between 1982 and1989. Most BITs concluded between 1990 and 1997 were labelled as second generation. BITs based on Model III were classified as third generation and covered nearly all BITs reached after 1998. This classification method has been endorsed and adopted by other scholars. In a recent book published on China's contemporary BITs, Matthew Levine follows Gallagher and Shan's approach by further classifying BITs concluded after 2008 as the fourth generation.

In 2011, Wen Xiantao, director of the Administrative Law Division of MOFCOM, published a series of articles illustrating every provision of a recently drafted model BIT prepared by MOFCOM in April 2010. BITs concluded after 2010 have closely followed this draft model BIT (the Model BIT 2010 or Model IV), in particular, China–Uzbekistan BIT (2011) and China–Tanzania BIT (2013).

Law stated - 30 September 2024

Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

A publicly accessible central repository of treaty preparatory materials does not currently exist. However, the Ministry of Commerce has made available a list of Free Trade Agreements (FTAs) that are either under negotiation or being considered. For each FTA, relevant news updates and studies are published, providing insights into the ongoing negotiations.

Law stated - 30 September 2024

Scope and coverage

What is the typical scope of coverage of investment treaties?

Based on the Model BIT IV, the term 'investment' means 'any kind of asset that has the characteristics of an investment, invested by an investor of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.' Specifically, the Model BIT IV explicates that a capable investment should have the following characteristics: the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. However, this is not common in the old Chinese BITs based on Model I to III.

Law stated - 30 September 2024

Protections

What substantive protections are typically available?

Article 5 of the Model BIT IV provides fair and equitable treatment and full protection and security to foreign investments. Under article 5.1, 'fair and equitable treatment' means that investors of one contracting party shall not be denied fair judicial proceedings by the other contracting party or be treated with obvious discriminatory or arbitrary measures. Article 5.2 provides that 'full protection and security' requires that contracting parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. Although wordings differ in each generation, these are commonly seen in all generations of Chinese model BITs.

Article 6 of the Model BIT IV regulates expropriation, where both direct and indirect expropriation is prohibited unless:

- it was in the public interest;
- it was in accordance with domestic legal procedure and relevant due process;
- it was non-discriminatory; and
- compensation was given.

These are also commonly seen in all generations of Chinese model BITs, save for exceptions and twists in different BITs.

Article 14.2 of the Model BIT IV provides the umbrella clause where 'each contracting party shall observe any written commitments in the form of agreement or contract it may have entered into with the investors of the other contracting party with regard to their investments'. Although umbrella clauses are not as common as other substantive protections, it still appears in quite a large amount of Chinese BITs.

All of China's international investment agreements include national treatment (NT) and/or most-favoured-nation (MFN) clauses. Traditionally, the NT clause provided under Chinese BITS should be 'without prejudice to its applicable laws and regulations', and not applicable to the establishment, acquisition and expansion of investment, compared with the MFN treatment. Furthermore, the MFN clause explicitly excludes dispute settlement provision under the Model BIT IV.

Law stated - 30 September 2024

Investor obligations and state rights

What obligations, if any, do investors have under existing BITs, and what is the impact of such obligations on investor protections?

Investors in general have an obligation to act in accordance with local laws and regulations. Under article 1.1 of the Chinese Model BIT (2010), a capable investment under the treaty should be made 'in accordance with the laws and regulations of' the host state. In addition, any change in the form of investments will not affect their character as investments if such a change is in accordance with the laws and regulations of the host state.

In addition, although there is no express obligation in the BITs regarding human, social and environmental rights, article 10 of the Chinese Model BIT (2010) specifies that a host state is not prevented from 'adopting or maintaining environmental measures necessary to protect human, animal or plant life or health'. Accordingly, it might be inferred that the

investor has the duty to obey the environmental measures imposed by the host state as far as such measures are not applied in an arbitrary or unjustifiable manner or do not constitute a disguised restriction on international investment.

Law stated - 30 September 2024

Investor obligations and state rights

What rights, if any, does the state have to bring counterclaims under existing BITs?

There is no provision under the existing BITs to regulate the China's right to bring counterclaims. To date, China has not brought any counterclaims.

Law stated - 30 September 2024

Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Article 13.1 of Model IV provides that an investment dispute between an investor and a host state shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, including conciliation procedures. Compared with the corresponding provision in Model III, Model IV specifically adds the conciliation procedures in the compulsory negotiation stage, which is followed by the China–Uzbekistan BIT (2011) and the China–Tanzania BIT (2013). The minimum duration for the amicable negotiation before moving forward to any subsequent court proceedings or international arbitration under the BIT is six months from the date the negotiation is initiated per article 13.2 of Model IV.

The last section of article 13.2 of Model IV grants the host state the right to require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of the host state before submitting to international arbitration.

After the mandatory cooling period for amicable settlement and the administrative review procedure, an investor who is unsatisfied with the results of previous proceedings may submit a claim to a competent court of the host state or an international arbitral tribunal per article 13.2 of Model IV. Article 13.2 provides investors with the following three options for international arbitration:

- the ICSID arbitration provides that both contracting states are parties to the ICSID Convention;
- an ad hoc arbitral tribunal to be established under the UNCITRAL Arbitration Rules; or
- any other arbitration institution or ad-hoc arbitral tribunal agreed to by the disputing parties.

Law stated - 30 September 2024

Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

No. In 2010, China provided comments on transparency in treaty-based investor-state arbitration to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II. In the submission, China confirmed that there was no provision on transparency or publicity regarding treaty-based investment arbitration in bilateral or multi-lateral treaties entered into by China. Further, given the confidentiality of arbitration, China did not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-state investment disputes.

Subsequently, in the China–Australia FTA (2015), both China and Australia consented in the exchanges of letters that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would not apply to investment arbitration initiated under the FTA unless otherwise agreed by the parties.

Law stated - 30 September 2024

Insurance

Does the state have an investment insurance agency or programme?

China Export and Credit Insurance Corporation (Sinosure) is a state-owned policy insurance company with an independent legal personality established with state funding to support China's foreign economic and trade development and cooperation. Sinosure provides insurance and other services for foreign trade and foreign investment cooperation. Overseas investment insurance products launched by Sinosure provide a risk management tool for enterprises making overseas investments. Under article 9 of the Chinese Model BIT IV, after the insurance agency has paid the claim, it will exercise its right of subrogation to seek compensation from the host government in accordance with the contractual agreement or the BIT.

Law stated - 30 September 2024

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

According to the Investment Policy Hub, maintained by the UN Trade and Development (UNCTAD) and Investment Arbitration Reporter, there are at least nine known investment treaty arbitrations where Mainland China is the Respondent.

- Ekran Berhad v People's Republic of China (ICSID Case No. ARB/11/15)
- Ansung Housing Co Ltd v People's Republic of China (ICSID Case No. ARB/14/25)
- Hela Schwarz GmbH v People's Republic of China (ICSID Case No. ARB/17/19)
- Jason Yu Song v People's Republic of China (PCA Case No. 2019-39)

- Macro Trading Co Ltd v People's Republic of China (ICSID Case No. ARB/20/22)
- AsiaPhos Limited and Nowest Chemicals Pte Ltd v People's Republic of China (ICSID Case No.ADM/21/1)
- Goh Chin Soon v People's Republic of China (ICSID Case No. ARB/20/34)
- Mr Goh Chin Soon v People's Republic of China (PCA Case No. 2021-30)
- Eugenio Montenero v People's Republic of China (case number unknown)

Law stated - 30 September 2024

Industries and sectors

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Of the nine publicly known arbitration cases, five pertain to real estate or construction, one involves food production, one relates to oil or mining licences, one concerns the service sector, and one remains unspecified.

Law stated - 30 September 2024

Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Based on the publicly known cases, China seems to have a history and preference for appointing well-known arbitrators who have extensive knowledge of public international law and international arbitration.

Law stated - 30 September 2024

Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Based on the publicly known cases, China has a history of appointing specific arbitrators. The internal counsel of the government is usually the Department of Treaty and Law of the Ministry of Commerce.

Law stated - 30 September 2024

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes. China entered into the New York Convention with two reservations under Article I (3) on 22 January 1987. Accordingly, China would only apply the New York Convention on the basis of reciprocity and to differences arising out of commercial disputes determined under Chinese law. The New York Convention has been in effect in China since 2 April 1987. The Supreme People's Court (SPC) of China promulgated a judicial explanation on the implementation of the New York Convention in China on 10 April 1987, with a detailed illustration of the two reservations (the 'Judicial Explanation') discussed below.

First, China will only apply the New York Convention to arbitration awards made in the territory of another contracting state. If an arbitration award is made in a non-contracting state, then a competent Chinese court should decide the recognition and enforcement with reference to the relevant rules under the Civil Procedure Law. According to the latest amendment to the Civil Procedure Law, a Chinese court will rely on an applicable international treaty between China and the country where the arbitration award is made, or if there is no such a treaty, the principle of reciprocity when deciding the recognition and enforcement of an arbitration award.

Second, China has claimed that it applies the New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under Chinese law. The SPC further detailed such legal relationships as 'economic rights and obligations arising from contracts, torts or relevant legal provisions', which include the sale of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labour service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accident and ownership disputes.

Though the list of applicable legal relationships is incomplete, the SPC particularly emphasised that disputes between foreign investors and the host government are excluded from the list. This exclusion means that arbitration awards of investor-state disputes, either made by institutional or ad hoc tribunals, cannot be recognised or enforced in China through the New York Convention. However, as an exceptional case, China–Czechoslovakia BIT (1991) provides that the arbitral award, rendered by an ad hoc tribunal under United Nations Commission on International Trade Law (UNCITRAL) rules, should be recognised and enforced by the New York Convention.

Law stated - 30 September 2024

Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

To date, China has not received any unfavourable awards.

Law stated - 30 September 2024

Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

To date, China has not received any unfavourable awards.

Law stated - 30 September 2024

Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

Although awards made under the ICSID Convention can be enforced under articles 53 and 54 of the ICSID Convention, other arbitral awards against China may be hard to enforce in China, given the country has made reservations on investor-state arbitration when ratifying the New York Convention. Investors may have to seek diplomatic channels when enforcing the award. To avoid the overuse of diplomatic channels, China–Switzerland BIT (2009) disallows a state from pursuing, through diplomatic channels, a dispute submitted to international arbitration unless the other state does not abide by and comply with the arbitration award. This rule is also seen in China–Columbia BIT (2009), article 9.9, where both states may only pursue through diplomatic channels when the host state of a dispute fails to comply with a court decision or arbitral award.

Law stated - 30 September 2024

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

On 1 September 2023, China amended its Civil Procedure Law, which came into effect on 1 January 2024. One of the most important amendments was to change the standard for determining the domicile of arbitral awards in China from the 'seat of the arbitral institution' to the 'place of arbitration', which is in line with article I (3) of the New York Convention.

On 1 September 2023, the Law on State Immunity of Foreign States was promulgated, which came into force on 1 January 2024. Article 12 provides that a foreign state will not enjoy immunity before a Chinese court in terms of from judicial review of the following issues relevant to arbitration of a dispute arising out of a commercial activity or an investor-state dispute, including where China is a party:

- the validity of the arbitration agreement;
- the recognition and enforcement of the arbitral award;
- the setting aside of the arbitral award; and
- any other matters provided for in the law to be examined by the courts of China with respect to the arbitration.

In other words, it confirms that Chinese courts have the jurisdiction to recognise and enforce investor-state arbitration awards. Any state, including China itself, shall not enjoy immunity from judicial review of an investor-state arbitral award where the state is a party to the arbitration. According to the Supreme Court of China, this provision is in line with the Washington Convention.

Finally, the long-running discussion on the amendment of the Arbitration Law may reach the final stage soon according to the recent Legislative Programme published on 7 September 2023, where it was listed in the first category of 'draft laws the conditions of which are relatively mature and which it is proposed to submit for deliberation during its term of office'.

Law stated - 30 September 2024