In Chinese Investment Treaties, Questions Arise on Who Qualifies for Protection

Skadden

01 / 30 / 17

This article is from Skadden's *2017 Insights*.

Contributing Partners

Julie Bédard
São Paulo

Lea Haber Kuck
New York

Rory A. McAlpine
Hong Kong

Timothy G. Nelson
New York

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Despite recent criticism from some quarters concerning the use of investment treaties and free trade agreements, the Chinese investment treaty system remains firmly in place. Since 1982, the People's Republic of China (PRC) has concluded over 100 investment treaties with a variety of countries, including numerous African, Latin American and Southeast Asian states. This reflects not only a "capital exporting" trend toward foreign investment by PRC enterprises, but also the PRC government's long-standing policy of fostering protection of those investments.

The terms of Chinese bilateral investment treaties (BITs) vary according to the year they were made and the counterparty state involved. They often provide protection against expropriation of investments along with investor-state arbitration of disputes before tribunals constituted by the International Centre for Settlement of Investment Disputes (ICSID) or established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), or ad hoc tribunals to determine the extent of compensation due in cases of expropriation. The precise scope of disputes that can be arbitrated (including whether such disputes can involve nonexpropriation claims) has occasionally stirred controversy, and investors must always consult the precise terms of the treaty in question.

One hot-button issue is the question of who qualifies for protection as a "Chinese" investor. The wording of PRC investment treaties typically protects PRC nationals or companies, without elaborating on the criteria for establishing such nationality. The question is whether individuals or companies from "special administrative regions" of China, Hong Kong and Macau may be included in this definition.

Two arbitral tribunals have answered this in the affirmative. In *Tza Yap Shum v. Peru*, an ICSID tribunal held that a Chinese citizen from Hong Kong was entitled to claim damages under the China-Peru BIT. The 2009 case later resulted in an award of damages to the investor as compensation for state interference with a factory he owned in Peru.

More recently, in the case of *Sanum v. Lao Republic*, an UNCITRAL tribunal held in 2013 that a Macau corporation could take advantage of the China-Laos BIT. *Sanum* was the subject of a spirited challenge by the Laos government in the courts of Singapore, where the arbitration was based. In 2015, a single judge of the Singapore High Court annulled the jurisdictional ruling, holding that Macau investors could not avail themselves of the treaty because "the PRC-Laos BIT does not apply to Macau." But in September 2016, the Singapore Court of Appeal (the nation's highest court) restored the award, holding, on its own independent review of the China-Laos BIT, that its terms embraced Macau investors. The Singapore appeal court's ruling has not quelled controversy over this issue. In October 2016, the PRC's Ministry of Foreign Affairs reacted by stating that it disagreed with the decision, that only mainland Chinese investors are entitled to treaty protection, and that Hong Kong and Macau investors should not be allowed to take advantage of Chinese nationality for such purposes. The issue is complicated by the fact that Macau and Hong Kong still have their own independent investment treaties with some countries — as highlighted recently by *Philip Morris v. Australia*, in which the claimant attempted to use the Hong Kong-Australia BIT (and its UNCITRAL arbitration clause) as a basis for challenging "plain packaging" legislation. (The case was dismissed on jurisdictional grounds, without any discussion of the status of Hong Kong or the substantive merits of the tobacco legislation in question.)

Assuming future arbitral tribunals follow these rulings (and the PRC government does not terminate or otherwise curtail the scope of treaty coverage), investors incorporated

or based in the two special administrative regions (Hong Kong and Macau) — potentially including corporations that are owned by non-Chinese investors — could utilize PRC investment treaties as a means of protecting their investments and seeking damages for expropriation.

The continuing debate over whether Chinese investment treaties cover only mainland investors or extend to Hong Kong and Macau serves to underscore a broader point — that the PRC government has its own trade, development and investment promotion agenda, and that Chinese trade and investment treaties may well play a significant (if not heightened) role in the decade ahead, in line with the greater overseas deployment of Chinese capital.