



*Overview on the Existing System of Resolution of Potential
International Investment Disputes concerning V4 countries
and China*

Dr. YE Bin

Assistant Professor, Deputy Head of EU
Law Office

Institute of European Studies

Chinese Academy of Social Sciences

Existing Framework for International Investment Protection

Domestic laws:

- *the laws on foreign investment of capital-import countries*
- *the laws on oversea investment of capital-export countries.*

International rules:

- *Customary International Law*
- *multilateral treaties*
- *bilateral investment treaties (BITs)*

International Investment Treaties

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, 1965)
- Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention, 1985)
- WTO rules
 - TRIMs and GATS
- Arbitration Rules of UNCITRAL
 - United Nations Commission on International Trade Law

1.1 ICSID Convention

- International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group based in Washington, D.C.
- provides a legal and organizational framework for the arbitration of disputes between Contracting States and investors who are nationals of other Contracting States
- To depoliticize the settlement of investment disputes.
- Over 150 countries have signed the ICSID Convention.

ICSID and China

- China and almost all MS of EU, merely except Poland, are contracting states of the ICSID Convention. The ICSID Convention entered into force for China on February 6, 1993.
- China declared that pursuant to Article 25(4) of the Convention, the Chinese Government would **only** consider submitting to the jurisdiction of the ICSID **over compensation resulting from expropriation and nationalization.**
- China has changed its position on ICSID Convention since 1998.
 - ☞ According the 1998 China-Barbados BIT, the investor can choose to submit any concerned dispute to ICSID or an arbitral tribunal set up under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
 - ☞ Similar clause in the 2003 China-Germany BIT and the 2005 China-Czech BIT.

Only three ICSID cases involved China

ICSID and V4

- Almost all Member States of EU, merely except Poland, are contracting states of the ICSID Convention.
- Although Poland do not accede the ICSID Convention, there are three ICSID cases between Poland and nationals of other states.
 - ☞ If non-contracting state and investor agree to refer their dispute to ICSID, ICSID will have the jurisdiction on the specific case.

ICSID Cases which China, Czech, Hungary, Poland or Slovak as Respondent

Respondent	Claimant	Case No.	Status
China	Ekran Berhad	ARB/11/15	Concluded
Czech	Phoenix Action Ltd	ARB/06/5	Concluded
Hungary	Le Chèque Déjeuner and C.D Holding Internationale	ARB/13/35	Pending
Hungary	Edenred S.A.	ARB/13/21	Pending
Hungary	Dan Cake (Portugal) S.A.	ARB/12/9	Pending
Hungary	Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt.	ARB/12/3	Pending
Hungary	Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft.	ARB/12/2	Pending
Hungary	Vigotop Limited	ARB/11/22	Pending
Hungary	Electrabel S.A.	ARB/07/19	Pending
Hungary	AES Summit Generation Limited and AES-Tisza Erőmű Kft.	ARB/07/22	Concluded
Hungary	Telenor Mobile Communications AS	ARB/04/15	Concluded
Hungary	ADC Affiliate Limited and ADC & ADMC Management Limited	ARB/03/16	Concluded
Hungary	AES Summit Generation Limited	ARB/01/4	Concluded
Poland	Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC	ARB(AF)/11/3	Pending
Poland	David Minnotte and Robert Lewis	ARB(AF)/10/1	Pending
Poland	Cargill, Incorporated	ARB(AF)/04/2	Concluded
Slovak	Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH	ARB/12/7	Concluded
Slovak	Branimir Mensik	ARB/06/9	Concluded
Slovak	Československa obchodní banka, a.s.	ARB/97/4	Concluded

1.2 MIGA Convention, 1985

- MIGA only offers political risk insurance (guarantees) to investors and lenders.
- It aims to insure cross-border investments made by investors in any MIGA member country into a developing member country.
- 180 Member Countries. China and All Member States of EU are MIGA's Contracting States.

MIGA

- MIGA Convention divide its member countries into :
 - ☞ industrialized countries (25)
 - including 17 EU Member States
 - In April 2005, World Bank classified Czech Republic as industrialized country.
 - ☞ developing countries (155)
 - include China, Hungary, Poland and Slovak
- MIGA has insured 39 projects invested to China, including 14 projects invested from EU Member State, but none from V4 countries.

1.3 WTO rules

- Agreement on Trade-Related Investment Measures (TRIMs Agreement)
- TRIMs Agreement can be considered as a breakthrough of international investment law, because it extends the national-treatment obligations and the general prohibition on quantitative restriction from trade law into investment law.

WTO rules

- GATS also deals with some kind of investment.
- The GATS addresses commercial presence, which also being foreign investment in services, as one of four modes of supply of services. For this reason, the GATS can be deemed as the first multilateral investment liberalization treaty.
- All V4 countries, EU and China are members of WTO. The future China-EU BIT shall be consistent with the investment related WTO rules.

2.1 The BITs concerning China and V4 countries

Country	BIT amounts
China	90
Czech	79
Hungary	58
Poland	62
Slovak	40

Country	Bilateral Investment Treaties between China and Individual V4 Countries	Date of Signing	Effective Date
Czech	Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments	4.12.1991	1.12.1992
	Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments	8.12.2005	1.9.2006
Hungary	Agreement between the Republic of Hungary and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments	29.5.1991	1.4.1993
Poland	Agreement between the Government of the Polish People's Republic and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments	7.6.1988	8.1.1989
Slovak	Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments	4.12.1991	1.12.1992
	Additional Protocol between the Government of the Slovak Republic and the Government of the People's Republic of China to the Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments	7.12.2005	25.5.2007

2.21 Definition of “Investment”

- In the BITs between China and other states, the term of investment is almost same, which means every kind of asset invested in connection with economic activities by foreign investors.
- The 2003 China-Germany defines it more clear, which explicitly includes direct investment and indirect investment.
 - ☞ FDI means the shareholder participates effectively in the management of that company or in its control. This contrast with indirect investment, commonly referred to as “portfolio investment”, where there is no intention to influence the management and control of an understaking (Communication from the Commission, Towards a Comprehensive European International Investment Policy, Brussels, 7.7.2010).
 - ☞ The Lisbon Treaty grants the Eurorpean Uion exclusive competence merely on FDI but indirect investment.
 - ☞ Therefore, the future China-EU BIT will be a mixed agreement, which need the member states of EU participate the BIT negotiation and shall be ratified by the member states.

2.22 Treatment of Investment

- equitable treatment
- national treatment (NT)
 - ∞ Non NT: the 1991 China-Hungary BIT and the 1988 China-Poland BIT
 - ∞ NT: the 1991 China-Czech&Slovak BITT
- most-favoured-national treatment (MFN)
 - ∞ The scope of the treatments in 2005 China-Czech BIT are less than that of NAFTA, which regards establishment, acquisition and expansion.

2.23 Market Access

- The China-US BIT talks are being conducted on the basis of pre-establishment national treatment, accompanied by a “negative list” approach (“US-China trade talks a ‘turning point’ in relations”, China Daily, 24.10.2013).
- The China-EU BIT negotiation is also based on the starting point with the adoption of a ‘negative list’, which specifies bans and restrictions on types of foreign investments (“China, EU talking investment”, China Daily, 22.1.2014).
- How to enumerate the negative list will be the most tough task for both China and EU.
- The Ministry of Commerce of China is consulting on amending the laws on three kinds of foreign-invested enterprises or ventures.

3 The Existing System of Resolution of Potential Investment Disputes

- 3.1 State-state Dispute Settlement Clause
- 3.2 Investor-State Dispute Settlement Clause

Settlement of Disputes between investor and state

China-Czech
BIT, 2005

Step 1: Negotiation; Step 2: the investor can choose to

- a) the competent court of the Contracting Party, or;
- b) ICSID, or;
- c) an ad hoc arbitral tribunal, established under the Arbitration Rules of UNCITRAL or otherwise

China-
Hungary,
1991

Arbitral tribunal, only concerning the amount of compensation for expropriation.

China-
Poland,
1988

Step 1: file complaint with the competent authority, only concerning the amount of compensation for expropriation;

Step 2: refer to competent court or an ad hoc international arbitral tribunal.

China-
Slovak,
1991 and
2005

Step 1: Negotiation; Step 2: the investor can choose to:

- a) the competent court of the Contracting Party, or
- b) mediation, or an ad hoc arbitral tribunal, established under the Arbitration Rules of UNCITRAL, concerning the amount of compensation for expropriation. The award can be enforced under 1958 New York Convention.

4 Suggestions

- *The future China-EU BIT shall provide efficient protection on investment and due policy space for investor host country to manage public interests. How to enumerate the negative list will be the most tough task for both China and EU.*
- *Although EU has exclusive competence on FDI, there are huge space for V4 countries to **promote investment**.*
 - ☞ *visa exemption or more flexible visa policy*
 - ☞ *specific policy for promoting investment, for example: tax policy*

Suggestions

- *V4 countries shall participate actively in EU-China BIT negotiation because V4 countries remains competence on portfolio investment.*
- *To attract investment from China, how V4 group enumerate its negative list in the future BIT?*
- *In the futre China-EU BIT, Can V4 countries design a regional or special derogation clause which give non-discrimination consideration to transition countries or devolving countries?*
 - ☞ *The future BIT will be ratified by all member states. V4 countries has opportunity to bargain with EU institutions.*