

Protecting Chinese Investments in Latin America

by Meg Utterback, Ronan J. McHugh and Sanjay J. Mullick

In recent years there has been tremendous investment by Chinese entities in Latin America. These investments have been frequently made under contracts with Latin American local, state and federal governmental entities. Bilateral investment treaties between China and numerous Latin American countries potentially protect such Chinese investors by authorizing them to bring legal claims related to their investments against the host country government directly and to settle those disputes in international arbitration, rather than in the domestic courts.

To date, one Chinese investor has sought to assert these rights in arbitration against a Latin American country: *Tza Yap Shum v. Republic of Peru*, a case concerning a fish flour production enterprise, for which the arbitral tribunal recently granted jurisdiction for certain of the claims to proceed on the merits. As Chinese investments in Latin America increase, there are likely to be more such cases, and Chinese investors should be aware of their rights as foreign investors both when such disputes arise, as well as when first planning and negotiating their investments in Latin America.

Bilateral Investment Treaties

China has entered into approximately 90 bilateral investment treaties ("BITs"). This includes BITs with many of the countries in Latin America, including Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, French Guyana, Guyana, Peru, Uruguay and the Falkland Islands (via a BIT with the UK).

BITs can protect Chinese investors and their investments in Latin America. While each BIT is different, typically a BIT defines the term "investment" to encompass such matters as infrastructure projects, including construction; ownership of land; shares in companies; establishment of manufacturing plants and operation of concession contracts. An investment may still enjoy protection under a BIT even if it was made before the treaty was enacted.

BIT Investor Protections

BITs provide Chinese investors in Latin America with various protections against wrongful acts of the host country government affecting the investment. These generally include protection against expropriation and against discrimination based on nationality, as well as a guarantee of fair and equitable treatment. While the scope and nature of the investment protection depends upon the BIT, a Chinese investor may have rights under a BIT:

- If the host government shuts down your operations.
- If a local company is subject to different, i.e., more beneficial, regulatory treatment.
- If the host government has denied you a permit.
- If the host government has not allowed you access to a hearing.
- If the host government has terminated or suspended your contract without adequate compensation.

Protecting Investment Rights By International Arbitration

BIT protections are enforceable under international law, which is separate and apart from the underlying investment contract. For example, where an investment contract is violated, a Chinese entity may have a claim both under the contract and also under a BIT. If the contract provides for disputes to be resolved in a local court, it may be more effective to seek recourse under the BIT. This is because BITs typically provide for disputes to be resolved in international arbitration at the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"), the United Nations Commission on International Trade Law (UNCITRAL), or by some other recognized institutional format in which the parties can select the arbitrators and maintain a certain degree of confidentiality over the proceedings.

Pillsbury has significant experience advising parties in investor-state BIT matters. BIT investment protections should be considered if you believe your rights concerning an investment may have been violated, as well as when formulating the structure for making an investment. For further information, please contact:

Meg Utterback **(bio)**
Shanghai
+86.21.61377988
meg.utterback@pillsburylaw.com

Ronan J. McHugh **(bio)**
Washington DC
+1.202.663.8134
ronan.mchugh@pillsburylaw.com

Sanjay J. Mullick **(bio)**
Washington DC
+1.202.663.8786
sanjay.mullick@pillsburylaw.com

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