HAN KUN
汉 坤 律 师 事 务 所
Han Kun Law Offices

Legal Commentary

January 29, 2026

BEIJING | SHANGHAI | SHENZHEN | HONG KONG | HAIKOU | WUHAN | SINGAPORE | NEW YORK | SILICON VALLEY

Safeguarding Overseas Assets: the Strategic Necessity of Pre-Investment Treaty Structuring for Chinese Outbound Investors

This article was jointly authored by Wei (Vincent) Sun, Yuxian Zhao, Long Liu, Yanlong Li, and Shuyu Wei from Han Kun Law Offices, together with Professor Robert Volterra and Haoyu Raofrom Volterra Fietta[1]

Introduction

As China's outbound investment footprint expands across infrastructure, energy, mining, technology, and real estate, Chinese companies are increasingly navigating complex political, regulatory, and commercial landscapes. While commercial contracts – such as joint-venture agreements – are fundamental, they often provide limited protection when the interference comes from the host State itself. This is particularly the case where the host State interferes with the investment but is not itself a party to the commercial contracts (for example, by refusing to renew licenses or by imposing sanctions or economic activity restrictions based on nationality). Real-life examples of such interference against Chinese investors can be seen happening recently in Europe, the Americas, Australia and Africa.

In scenarios where domestic remedies are ineffective, procedurally biased, or susceptible to political influence, a critical question arises: **how can Chinese companies investing overseas secure their assets against sovereign interference under international law?**

This article introduces a vital yet often unknown or overlooked tool: **Bilateral Investment Treaty (BIT) structuring.** Such treaties, signed between governments and provide benefits to businesses making investments between those countries. By establishing an ownership structure of their foreign investment that is optimised to get them such treaty protection, Chinese companies can ensure they have recourse to international law and arbitration against an interfering host State, when facing State-level disputes.

However, a common misconception persists among Chinese investors. Many assume that BIT planning is only relevant if China has a direct treaty with the destination country, or worse, that structuring can be arranged *after* problems arise. This is not true. Chinese companies can set up subsidiaries in other countries that then let them have BIT protection against the host country of their investment, even when China does not have a BIT (or not the best one). These misconceptions have led to costly outcomes,

[1] Yixin Yuan has contributions to this article.

including deadlocked domestic litigation, unenforceable arbitration awards, and multimillion-dollar losses.

Through two case studies, this article outlines practical strategies for leveraging public international law to protect overseas investments.

Two cases for understanding the catastrophic consequences of the lack of pre-investment structuring under public international law

- **Case A: without treaty protection, investors may bear losses with no recourse**

In the mid-2000s, a Chinese company entered into a joint development project with a foreign State's local government entity to build a commercial complex in a prime urban district. Although the project initially received approvals from various governmental authorities, the planning landscape changed repeatedly over the following years. Different government bodies issued conflicting directives. Some permitting the project to continue, others suspending or relocating it due to newly prioritised public infrastructure works and urban redevelopment plans. Despite the Chinese company's continuous efforts to revise and resubmit construction plans in line with shifting regulatory requirements, key local agencies ultimately refused to authorise construction on the grounds of public-safety risks. During this period, the foreign State dissolved the local governmental entity that had been the Chinese company's joint-venture partner. The foreign State denied any legal succession to the original contract. Domestic courts rejected the Chinese company's claims to compel administrative approval and refused to designate a successor for the dissolved governmental entity. The Chinese company has no other recourse to request compensation but to enter into endless and hopeless negotiation with this foreign State.

Here, this foreign State does not have a BIT with China, and this Chinese company did not structure its investment to a country having a BIT with this foreign State. After the dispute arose, it is too late for international protection to attach since the international investment arbitration tribunal will reject jurisdiction if the structure happens after the dispute with the foreign State becoming foreseeable[2]. The Chinese company was therefore forced to rely exclusively on domestic proceedings, where state-affiliated authorities declined to provide relief. After exhausting all available domestic remedies, the Chinese company had no remaining pathway to hold the host State accountable at the international level. As a result, the project collapsed, and the Chinese company suffered losses of approximately USD 100 million.

- **Case B: the "pyrrhic victory," winning without effective monetary recovery**

A Chinese company entered a major overseas mining project through a joint venture with a locally incorporated company. Although this local company had been formed with strong political backing and enjoyed support from senior government officials, the foreign State itself never formally

[2] *See Philip Morris Asia Limited v. The Commonwealth of Australia,* UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paragraphs 533 – 534. *See also ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, paragraphs 421 – 423; *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, paragraph 2.99.

established or owned the local company. The joint venture was granted long-term rights to develop a large mineral deposit, with the Chinese company holding the majority shares. Over time, however, the local partner repeatedly failed to contribute the agreed financial commitments, and the foreign State did not grant the necessary licenses for conducting the mining.

Despite the Chinese company's efforts to stabilise the project, various government agencies began creating administrative obstacles: delaying approvals, citing environmental or community concerns as grounds to halt operations altogether. Some key ministries refused to issue necessary authorisations for mining or for the transfer of concession rights. With no BIT in force between China and the host State, the Chinese company lacked any international treaty-based avenue to hold the government accountable under international law.

When the dispute escalated, the Chinese company's only legal remedy was to invoke the commercial arbitration clause in its joint-venture contract and initiate proceedings against the local partner at an international commercial arbitration institution. Even if the Chinese company were to win such an arbitration, this victory would be largely symbolic: the local partner had limited assets and was financially incapable of satisfying an award. Because the company was privately incorporated and not legally owned or controlled by the State, the Chinese company had no chance to pierce the corporate veil to enforce the award against the government itself. With no treaty protection, no basis for State responsibility, and no jurisdiction before an international investment tribunal, the Chinese company would be unable to elevate the claim to the international level to secure actual compensation paid by the foreign State.

This scenario demonstrates a recurring structural risk: without taking into account the international law to have a proper pre-investment structure, even a favourable commercial arbitration award may amount to nothing more than an "empty win": legally valid on paper but unenforceable in real money in practice, leaving the Chinese company with significant sunk costs and no effective remedy.

Strategic planning: how to secure BIT protection

A BIT is an international agreement concluded between two sovereign States to promote and protect cross-border investments. Under a BIT, each State commits to safeguard the investments made in its territory ("**host State**") by investors from the other State ("**home State**")[3]. In doing so, BITs create binding obligations under public international law. These obligations are not merely political commitments or soft-law guidelines; rather, they constitute enforceable legal duties. When a host State breaches these duties by, for example, expropriation or other forms of interference, foreign investors can seek compensation or other remedies through international investment arbitration against the host State directly, without the need of having an arbitration clause signed with the host State.

Once an investor and its asset satisfy the definitions under a certain BIT, the protections of the BIT become fully applicable. This includes access to international investment arbitration, a neutral forum where

[3] *See* Marc Jacob, "Investments, Bilateral Treaties," *Max Planck Encyclopedia of Public International Law*, June 2014, accessed December 2, 2025, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1061.

investors can bring claims directly against the host State. This is something impossible under domestic law and commercial arbitration alone. It is precisely this feature that makes BIT structuring essential: without it, investors lack any treaty-based pathway to hold a foreign State accountable under international law.

For more details, please refer to our previous article: "*Hankun's Guide to Overseas Business: Treaty Protection and Investment Arbitration (I) – Overview（汉坤企业出海系列：条约保护及投资仲裁（一） — 概览篇）*".

If the Chinese companies in the above two cases had used the BITs to structure their investment, what would be the different results

I. General strategy to get BIT protections

Contrary to popular belief, the absence of a BIT between China and the investment host State **does not necessarily** preclude Chinese companies from enjoying BIT protection. The key lies in **treaty structuring**: utilising a jurisdiction that *does* have a favourable BIT with the host State. Critical steps include:

- **Step 1: Comprehensive BIT Mapping:** identifying all BITs previously signed and ratified by the host State (the invested destination);
- **Step 2: Substantive Strength Analysis:** analysing the breadth and strength of substantive protections in each BIT;
- **Step 3: Procedural Access Evaluation:** evaluating procedural access to investor–State arbitration; and
- **Step 4: Broader Commercial Considerations:** considering broader factors such as tax efficiency, corporate governance and political risk.

II. How to apply the above strategy and how would the outcome differ

- **Step 1: Comprehensive BIT Mapping**

The first step in BIT planning is to categorise all investment treaties that the host State has signed and ratified.

If this exercise had been carried out in Case A, the Chinese company would have discovered that although the host State had no BIT with China, it did maintain BITs with many jurisdictions commonly used for outbound investment structuring. Any of these jurisdictions have the potential to be a viable home for a treaty-protected holding company. A comprehensive BIT review would be able to show that Chinese company was not limited by China's treaty network; rather, it could rely on the host State's treaties with a third State. Similarly, in Case B, a BIT reviewing exercise would have revealed that the host State was party to BITs with jurisdictions offering stable legal systems, predictable corporate regulation, and access to strong treaty protections. In both cases, this first step alone would have opened the door to structuring options unavailable to the investors due to their decision to invest

directly from China.

- **Step 2: Substantive Strength Analysis**

The second step is to analyse comprehensively the relative strength of all the BITs identified in the first step and to shortlist at least ten BITs. Not all BITs are created equal.

For example, in Case A, the key risks the investor ultimately faced include dissolution of the joint-venture counterparty, refusal to designate a successor, contradictory governmental directives, and long-term deprivation of the project's value, which requires a well-drafted BIT containing protections addressing all the risks. A careful comparison of the host State's BITs would have shown that certain BITs contained broad definitions of expropriation and strong Fair and Equitable Treatment (FET) language protecting investors from arbitrary administrative conduct, while other BITs contain restricted definitions. If a BIT also included an umbrella clause elevating contractual commitments to treaty status, it would have provided far superior protection than other BITs that lacked such provisions. After finishing this step, at least ten BITs should be shortlisted.

- **Step 3: Procedural Access Evaluation**

The third step is to evaluate the procedural access that each BIT provides.

Even the strongest substantive protections are ineffective if the BIT does not grant direct access to investor–State arbitration. For example, in Case A, the investor would have needed a treaty allowing immediate recourse to International Centre for Settlement of Investment Disputes ("**ICSID**") or United Nations Commission on International Trade Law ("**UNCITRAL**") arbitration without requiring lengthy domestic litigation or subjecting the investor to restrictive "fork-in-the-road" provisions. For example, if a BIT required an 18-month domestic litigation period before arbitration, while another BIT allowed the investor to bypass local courts and proceed directly to ICSID, the second BIT would have been procedurally superior. In Case B, procedural access was even more crucial. If one of the host State's BIT allowed arbitration for any alleged violation, whereas its BITs with another jurisdiction restricted arbitration to expropriation claims or the quantum only claims, the first BIT would have been the more effective and powerful choice. Through this procedural analysis, both companies should have ensured direct recourse against the host State rather than being trapped within domestic systems or limitations to their claims.

- **Step 4: Broader Commercial Considerations**

The fourth step requires consideration of broader commercial and regulatory factors such as tax efficiency, corporate governance, and political risk. A holding company jurisdiction with favourable taxation arrangements could significantly reduce the overall tax burden of a long-term commercial project.

Again, it is important to emphasise that not all BITs are equal, and the choice of treaty cannot be made mechanically. Each BIT contains its own definitions of investment and investor, substantive protections, procedural pathways, and limitations. The effect of these differences can dramatically alter a Chinese company's rights. In practice, counsels specialising in international law must evaluate

and rank potential treaties through a multi-factor analysis, including but not limited to: whether the BIT grants tribunals full jurisdiction over all treaty breaches (rather than limiting claims to quantum or certain issues only); whether the treaty expressly protects investments made before its entry into force; whether its expropriation, fair and equitable treatment, umbrella clause and other protections are well drafted to address the specific risks that Chinese company faces; and whether the proposed restructuring jurisdiction has credible, commercially rational reasons for use. It is a comprehensive work requiring professional service by international law lawyers.

In Case A and Case B, had these Chinese companies structured their investments through a jurisdiction protected by a BIT with the host State, the results in both cases would have been fundamentally different. Instead of relying solely on domestic courts or unenforceable commercial awards, they would have been entitled to invoke the full suite of investment protections granted by international law and bring claims directly against the host State.

In Case A, if the Chinese company had structured its investment through a BIT-protected vehicle, the host State's dissolution of the joint-venture counterparty, refusal to designate a successor, and effective deprivation of the investment's value would constitute unlawful expropriation. The investor could claim compensation equivalent to the fair market value of the project, which is far beyond what domestic courts were prepared to recognise.

In Case B, had the Chinese company structured its investment through a BIT-protected jurisdiction, instead of suing a bankrupt local partner, the Chinese company could have brought a claim against the host State for its role in obstructing licenses. This would have transformed an unenforceable commercial award into a binding international award payable from the State's sovereign resources.

III. Timing is critical: Chinese companies investing overseas should restructure as soon as possible, ideally before a potential dispute with the host State has crystalised

BIT protection can be obtained through restructuring after an investment has been made. But it is only effective if the investment is structured before the dispute becomes foreseeable with high probability. As discussed above, international tribunals consistently reject jurisdiction where treaty structuring occurs after early indicators of conflict have already appeared.

In both Case A and Case B, by the time systemic obstacles emerged (including governmental refusal to issue approvals, dissolution of contractual counterparties, administrative blockages, and clear signs of State hostility) the disputes had already become foreseeable. Restructuring at that stage would have been considered an abuse of process, and any subsequent claim under a BIT would likely have been dismissed for lack of jurisdiction.

This is why proactive planning is indispensable. Chinese companies "going global" must adopt a proactive legal strategy. By establishing a treaty-protected structure at the outset – long before the first sign of trouble – investors secure a powerful shield that can make the difference between a total loss and a full recovery.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Wei (Vincent) SUN

Tel: +86 21 6080 0399
Email: wei.sun@hankunlaw.com

Yuxian ZHAO

Tel: +86 21 6080 0272
Email: yuxian.zhao@hankunlaw.com

Long LIU

Tel: +86 10 8516 4212
Email: long.liu@hankunlaw.com

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