

**Investment Protection Agreement
between Switzerland and China**

A Swiss Investor's Perspective

Anh HUYNH

May 2010

I. Introduction

On April 14, 2010 the Agreement between Switzerland and China on the Promotion and Reciprocal Protection of Investment (hereinafter the “Switzerland-China BIT”) has come into force. The objective of the Switzerland-China BIT is to ensure that Swiss investments in China (and vice versa) are accorded standards of protection recognized under international law. The Switzerland-China BIT replaces the original agreement which has been in force since 1987.

Hereinafter, we will discuss the rights of Swiss investors in China under the Switzerland-China BIT, in particular with respect to their seeking for protection of investment against any improper governmental interference.

The Switzerland-China BIT enables Swiss investors to bring a dispute against China with respect to their investments in China before independent international arbitration tribunals with transparent procedures and internationally recognized standards rather than domestic courts applying their own rules.¹ But before we highlight the arbitration clause the scope of protection provided by the Switzerland-China BIT needs to be addressed.

II. Investors and Investments

Swiss investors covered by the Switzerland-China BIT are (a) natural persons who are, by Swiss law, considered to be Swiss nationals, (b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under Swiss law, and (c) legal entities established under the law of a third state but effectively controlled by natural persons as defined in (a) or by legal entities as defined in (b).²

The Switzerland-China BIT covers the broadest possible range of “investment”. In the language of the Switzerland-China BIT it protects “every kind of assets”.³ It includes in particular (a) any movable and immovable property and any related property rights such as servitudes, mortgages, liens, pledges and usufructs, (b) shares, parts or other kind of participation in companies, (c) claims to money or to performance having an

¹ Art. 11 Switzerland-China BIT

² Art. 1 para. (2) Switzerland-China BIT

³ Art. 1 para. (1) (a) Switzerland-China BIT

economic value, (d) copyrights, industrial property rights, know-how and goodwill, and (e) any business concessions under public law.⁴

III. Protection

The Switzerland-China BIT offers various protections to Swiss investors. Most importantly, it guarantees Swiss investors the best of the treatments China provides to its own or other countries' investors. Such protections include the following in particular:

1. Fair and Equitable Treatment

China shall grant fair and equitable treatment to investments and returns of Swiss investors and Swiss investors shall enjoy full protection and security in the territory of China. In essence, this provision protects the right of a Swiss investor to carry out its business free from unreasonable and discriminatory measures.⁵

The Switzerland-China BIT contains a so-called "umbrella clause".⁶ This provision requires China to respect contractual obligations entered into with a Swiss investor. The purpose of this provision is to turn such contractual obligations into a protected right under the Switzerland-China BIT such that a breach of a contractual obligation of China becomes a violation of the Switzerland-China BIT.

2. National Treatment and MFN Treatment

National treatment guarantees a Swiss investor treatment no less favorable than China grants to its own nationals in same circumstances. Measures which may violate national treatment include discriminatory taxation and tariffs, any procedural, residency, licensing or other regulatory requirements favoring domestic parties, subventions of nationals etc.

Most-favoured-nation ("MFN") treatment grants a level of protection to Swiss investors which shall be equal to the highest level that China provides to investors of any other countries in same circumstances.

⁴ Art. 1 para. (1) Switzerland-China BIT

⁵ Art. 4 para. (1) Switzerland-China BIT

⁶ Art. 8 Switzerland-China BIT

Some BIT's guarantee national treatment and MFN treatment before and after investments are admitted in the host state in which case a prospective investor is accorded investment access equivalent to that of domestic investors or third state investors, commonly with certain industry sectors excluded (pre- and post-establishment phase).¹ The Switzerland-China BIT, however, does only cover the post establishment phase. Admission of investments in China (including provision of permits or authorizations with after admission) remains subject to domestic laws and regulations.⁸

3. Repatriation of Profits

Swiss investors shall have the right to repatriate profits and move capital out of China. The transfer of funds shall be made without delay in a freely convertible currency and at the prevailing market exchange rate applicable in China and on the date of transfer.⁹

China made some reservations with regard to payments relating to loans and proceeds from sale or liquidation of an investment. The granting of free transfer only apply provided that the loan agreement has been registered with the relevant foreign exchange administration authority and the transfer of sale or liquidation proceeds complies with the relevant exchange control regulations. Further, with regard to China, a transfer is made "without delay" if effected within such period as normally required for the completion of transfer formalities, but not exceeding two months.¹⁰

4. No Expropriation without Compensation

Under the Switzerland-China BIT, Swiss investors are guaranteed freedom from direct and indirect expropriation, nationalization or other measures having the same effect without compensation. Most importantly, such compensation shall be prompt and adequate, *i.e.* at market value immediately before the expropriatory action was taken or became public and including interest at a normal commercial rate.

⁷ Cp. Korea-Japan BIT, BIT's signed by USA.

⁸ Art. 3 para. (1) Switzerland-China BIT

⁹ Art. 5 Switzerland-China BIT

¹⁰ Protocol to Switzerland-China BIT, ad art. 5

5. Losses due to War

Swiss investors whose investments suffer losses in the territory of China due to war or other armed conflict, revolution, state of emergency, civil disturbances or other similar events shall receive treatment, in regard to restitution, indemnification, compensation or other settlement, no less favorable than that accorded by China to its own investors or investors of any third state.¹¹

IV. International Arbitration Tribunals

Disputes between investors and a host state may arise from different reasons. Commonly, the context of such disputes are expropriation, nationalization, non-recognition or wrongful termination of contracts, discrimination by law or de facto or any regulatory measures taken by China negatively affecting the value of an investment. What can a Swiss investor undertake to protect its investments in China if such are jeopardized or suffer a loss due to any improper act or omission (*i.e.* act or omission in violation of the Switzerland-China BIT) from China?

Under the Switzerland-China BIT, a Swiss investor has the right to bypass domestic courts and to sue China in international arbitration tribunals after a six month negotiation period: In case a dispute between a Swiss investor and China with respect to investments arises it shall be attempted to solve the dispute by consultations between the parties. If no solution were to be found within six months, the Swiss investor can file the dispute either with the competent domestic courts in China or commence an international arbitration procedure. Swiss investors have the choice between arbitration under the ICSID Convention or under the UNCITRAL Arbitration Rules.¹² The decision from the arbitration tribunal is final and binding and may be executed without delay.¹³

However, it has to be noted that China has made a reservation to this arbitration clause such that China may require the Swiss investor to first exhaust its domestic administration review procedure before commencing the arbitration procedure. Such domestic review procedure shall not exceed three months.¹⁴

¹¹ Art. 7 Switzerland-China BIT.

¹² Art. 11 para. (1) and (2) Switzerland-China BIT

¹³ Art. 11 para. (7) Switzerland-China BIT

¹⁴ Protocol to Agreement Ad Article 11 paragraph (2) (a)

V. Attribution of a Private Company's Acts to China

Addressee of the Switzerland-China BIT provisions is China, *i.e.* its governmental organs. But do acts or omissions by entities governed by private law fall within the scope of protection as well? While the Switzerland-China BIT itself does not provide any guidelines international arbitration tribunals have in certain decisions further specified the question of attribution of a private company's acts or omissions to the state. If an entity is owned or controlled by the state, or if its purpose is to carry out governmental functions, this gives rise to a rebuttable presumption that it is a state entity. Where state entities perform acts of governmental rather than commercial nature such actions should be attributed to the state.¹⁵

VI. Scope of the Switzerland-China BIT

The Switzerland-China BIT applies to any existing investments, *i.e.* investments made prior or after the entry into force of the Switzerland-China BIT. However, the Switzerland-China BIT does not apply to claims or disputes arising out of events which occurred prior to its entry into force.

¹⁵ Cp. Maffezini (Emilio Agustin) v Kingdom of Spain, Decision on Objections to Jurisdiction, 25 January 2000, 5 ICSID Reports 396 cited in: James Crawford SC, Ten Investment Arbitration Awards that Shook the World: Introduction and Overview.

* * * * *
* * *
*

DISCLAIMER

This publication is not intended to provide accurate information in regard to the subject matter covered. Readers entering into transaction on the basis of such information should seek additional, in-depth services of a competent professional advisor. Eiger Law, the author, consultant or general editor of this publication expressly disclaim all and any liability and responsibility to any person, whether a future client or mere reader of this publication or not, in respect of anything and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon

