斯德哥尔摩商会仲裁院 ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

投资者 - 国家争议罕见中国投资者身影
Chinese investors rarely involved in investor-state disputes under BITs

中国与瑞典于 1982 年签订了第一份双边投资协定。此后，中国陆续与世界多个国家签订了一百多份双边协定，其中很多涉及投资保护方面的规定，让投资者可以在遭遇不公平的对待或者投资被征收的情况下向东道国政府提出赔偿请求。

众所周知，中国的海外投资在过去 20 年来迅速增长。自从中国政府在 1999 年倡导“走出去”政策以提高中国海外投资，中国已经在全球各地建立了数以千计的公司。尽管中国海外投资的规模已经很大，而且这些协定的投资保护覆盖面很广，但是目前中国投资者作为请求人参与投资者 - 国家争议案件仍然为数不多。根据联合国贸易和发展会议的投资者政策中心统计，目前只有四项投资案件涉及中国当事人。

中国 2010 年《双边投资保护协定范本》中规定，投资者因违反投资协定遭受损失或者损害的，可以向以下机构提交赔偿请求：(1) 作为争议当事方的缔约方的管辖法院；(2) 国际投资争端解决中心 (ICSID)；(3) 根据联合国国际贸易法委员会 (UNCITRAL) 国际商事仲裁示范法规则设立的临时仲裁庭；(4) 任何经争议各方约定的仲裁机构或者临时仲裁庭。

在解决投资者 - 国家争议中，选择管辖法院有重要影响：它会影响投资者是否有管辖权、裁决是否可以被反对，以及裁决的执行问题。它也可以决定仲裁程序的时长以及成本。投资协定所规定的管辖法院以及规则包括 ICSID、斯德哥尔摩商会仲裁院 (SCC) 和根据 UNCITRAL 规则设立的临时仲裁庭。每一个管辖法院都有自身的特点。

ICSID 仲裁是真正去国家化的程序：其诉讼只适用《ICSID 公约》，并不受到任何国家的仲裁法律和 / 或法院的约束。所有《ICSID 公约》的签署方都需要承认并执行

China signed its first Bilateral Investment Treaty (BIT), with Sweden, in 1982. Since then, it has concluded more than 100 BITs with countries all over the world. Most of these treaties include provisions on investment protection, allowing investors to file claims for compensation against the host government in the event of unfair treatment or expropriation of an investment.

It is well known that Chinese overseas investment has grown exponentially in the past two decades. Since 1999, when the central government launched its “Go Out” policy to promote investment abroad, Chinese investors have established thousands of companies and enterprises all over the world. Despite the scale of this foreign investment, however, and despite the extensive network of treaties protecting these investments, there have been few investor-state disputes involving Chinese investors as claimants. According to the UN Conference on Trade and Development's (UNCTAD) investment policy hub, there are only four known investment cases involving Chinese parties.

China’s 2010 model BIT provides that an investor who has incurred loss or damage from breach of an investment treaty may submit the claim: (1) to the competent court of the contracting party that is a party to the dispute; (2) to the International Centre for Settlement of Investment Disputes (ICSID); (3) to an ad hoc arbitral tribunal to be established under the UN Commission on International Trade Law (UNCITRAL) rules; or (4) to any other arbitration institution or ad hoc arbitral tribunals agreed by the disputing parties.

The choice of forum for settlement of investor-state disputes has important consequences – it may affect whether the investor will be able to establish jurisdiction, on what grounds the award can be challenged, and the enforcement of the award. It may also determine the length and cost of the arbitral proceedings. The fora and rules often provided for under

ICSID 仲裁裁决，如同其本国法院所作出的终审判决一样。ICSID 的程序是公开的，案件的细节会在网上公开，仲裁裁决结果也常常会发布出来。

SCC 是世界上根据自身规则解决投资者 - 国家争议的第二大管辖机构，仅次于 ICSID。SCC 在 2015 年有 12 件新登记的投资者 - 国家争议案件，至此，其已受理 90 多件该类仲裁案件。SCC 的投资者 - 国家案件中的投资者总计来自 23 个国家。其中最多的为俄罗斯当事人 (23 起案件)，之后为德国 (13 起案件)、荷兰 (10 其案件) 以及英国 (9 起案件)。这些争议案件很多都是根据《SCC 仲裁规则》进行审理的，而 SCC 同样可以管理这些案件并可以作为 UNCITRAL 规则下的指定机构。值得注意的是，在商事仲裁方面，中国与 SCC 有长久的联系。在二十世纪 80 年代，SCC 是中国国际经济贸易仲裁委员会以外获得中国认可的唯一可选机构。

UNCITRAL 仲裁多为临时仲裁，即没有仲裁机构的介入。ICSID 或者 SCC 等仲裁机构在任命及异议仲裁员的程序中提供协助、设定期限并执行、决定并处理仲裁费用。在临时仲裁中，仲裁庭自身可以管理仲裁，解决程序分歧并决定赔偿问题。

在 UNCITRAL 仲裁中，各当事人也可以约定某个机构作为指定机构或者管理机构介入到仲裁中，这些机构通常是位于海牙的常设仲裁法庭、SCC 或者位于巴黎的国际商会国际仲裁院。UNCITRAL 规则本身是跨国界的，但是其程序及仲裁裁决受到仲裁地的仲裁法律约束。

考虑到这些管辖法院在投资者 - 国家争议中的差异，投资者在选择于何地提起请求的时候有很多因素需要考虑：首先，投资者根据投资协定以及仲裁机构的规定是否有管辖权；其次，仲裁裁决在被请求国拥有资产的法域是否可执行。投资者可能考虑的其他因素还有机构行政协助的范围、程序的平均费用以及时长、可供使用的紧急或临时救济措施，以及这些规则通常的透明度。

在过去 20 多年，投资协定的网络在迅速扩展，而全球各地外国直接投资也增长迅速，投资者 - 国家争议同样如此。中国投资者在这个发展过程中出现了严重缺位。中国已经签署了一百多个双边投资协定，其中很多都包含投资保护规定。中国投资者虽然活跃于高风险投资环境中，但目前约 700 件投资者 - 国家争议案件中只有 4 件是关于中国投资者的。这个数字也着实令人感到意外。

> “在商事仲裁方面，中国与 SCC 有长久的联系”

investment treaties include ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and ad hoc arbitration under the UNCITRAL rules. Each of these arbitral fora have certain distinguishing features.

ICSID arbitration is a truly denationalized process; the proceedings are governed only by the ICSID convention and are not subject to national arbitration laws and/or the control of national courts.

All signatories to the ICSID convention are required to recognize and enforce an ICSID arbitral award as if it were a final judgment from the country's own national court. ICSID proceedings are public, details of the cases are published online, and the awards are frequently released.

The SCC is the second-largest forum in the world – after ICSID – for the settlement of investor-state disputes under its own rules. With 12 new investor-state cases registered in 2015, the SCC has seen almost 90 such arbitrations to date. Investors in SCC investor-state cases represent a total of 23 different nationalities, the most common being Russian (15 cases), followed by German (13 cases), Dutch (10 cases), and English (nine cases).

Most of these disputes are heard under the SCC arbitration rules, but the SCC also administers cases and serves as the appointing authority in arbitrations under the UNCITRAL rules. It is worth noting that China has a long-standing connection to the SCC with regard to commercial arbitration. During the 1980s, SCC arbitration was the only alternative to CIETAC, approved by the central government.

UNCITRAL arbitration is often ad hoc, meaning that no institution is involved. An arbitral institution, such as ICSID or the SCC, assists in the appointment and challenges of arbitrators, sets and enforces deadlines, and determines and handles the costs of the arbitration. In an ad hoc arbitration, the tribunal itself

> "China has a long-standing connection to the SCC"

administers the arbitration, resolves procedural disagreements, and decides on its own compensation.

The parties in an UNCITRAL arbitration can also agree to involve an institution as the appointing or administering authority – usually the Permanent Court of Arbitration in The Hague, the SCC, or the International Court of Arbitration of the International Chamber of Commerce in Paris. The UNCITRAL rules themselves are transnational, but the proceedings and the resulting award are subject to the arbitration law of the seat of the arbitration.

Given the differences among these fora for the settlement of investor-state disputes, there are numerous factors for an investor to consider when choosing where to bring its claim – primarily, whether the investor will be able to establish jurisdiction both under the investment treaty and under the rules of the arbitral forum; and whether the resulting arbitral award will be enforceable in a jurisdiction where the respondent state owns assets. Other factors include the extent of institutional administrative support, the average cost and length of proceedings, the availability of emergency or interim relief, and the level of transparency typically afforded by the rules.

In the past two decades, as the network of investment treaties and the global flows of foreign direct investments have increased substantially, so has the field of investor-state arbitration. Chinese investors have been largely absent from this development. China has concluded more than 100 BITs, most of which include investment protection provisions. Considering that Chinese investors are present and active in high-risk investment environments, it is surprising that only four of the almost 700 known investor-state cases to date have involved Chinese parties.

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