

# Research on China's Overseas Investment Expropriation Insurance —Based on MIGA's Experience and Enlightenment

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**Abstract.** With the promotion of the "Belt and Road" initiative, the scale of China's overseas FDI has been growing exponentially, and the exposure of Chinese enterprises to overseas investment to political risks has also been on the increase. It is common for major capital-exporting countries in the world to safeguard themselves against overseas investment risks by creating an overseas insurance system for such investments. Amongst them, the Multilateral Investment Guarantee Agency (MIGA) is a representative insurance system, which is also a modality that China can learn from. At this moment, the China National Export and Credit Insurance Corporation (Sinasure) is the exclusive domestic commercial enterprise that covers overseas capital investment insurances in China. There are still some deficiencies in the scope of coverage, insurance premium regulations and underwriting conditions in the field of insurance. This essay investigates the issues of collection on insurance for Sinasure 's overseas ventures, learns from MIGA's insurance system, and puts forward suggestions for improvement.

**Keywords:** Overseas investment insurance, expropriation, indirect expropriation, China Export & Credit Insurance Corporation.

## 1. Introduction

For a long time, promoting overseas investment has been regarded as an important development approach in China. As of 2020, China has established 44,000 overseas enterprises, and the stock of foreign investment has reached 2.2 trillion US dollars, making positive contributions to promoting national economic growth and building a sustainable global economy. However, in view of the increasingly severe international situation, in order to achieve a high level of overseas investment, an unavoidable prerequisite issue is how to prevent the political risks of overseas investment. Economic losses caused by political risks to investors are often more serious than commercial risks. Considering that the political atmosphere in some of the "Belt and Road" countries is still uncertain and that China invests abroad mostly in sectors like finance and energy where politics has a significant impact, the concentration of political risks will have a very serious impact on China's overseas investment.

Domestic investors often face many political risks such as nationalization expropriation, government default, terrorism, etc. in the process of overseas investment. Prediction, difficult relief and other characteristics should be the content that Chinese overseas investment enterprises need to focus on when "going out".

China is both a host country and an investor. The complex and ever-changing international situation makes China face multiple risks and challenges in international investment. For example, when the Chinese government takes control measures against foreign investors in the public interest, the investors may resort to arbitration tribunals or international courts in the name of indirect expropriation, or the overseas investment properties of Chinese foreign investment enterprises may be subject to host country government discriminatory treatment, etc. Therefore, it is of great necessity and practical significance to improve the identification standards of overseas investment insurance for mediating conflicts and disputes in China's international investment, protecting the legitimate property interests of Chinese nationals, and promoting mutual assistance in global trade.

## **2. The Scope and Significance of Expropriation Insurance**

### **2.1. Expropriation and Indirect Expropriation**

Expropriation is a subordinate concept of political risk. In the field of international investment, the political risks of the host country mainly include government intervention and sanctions, expropriation and expropriation, civil strife and war [1]. Among them, the loss caused by expropriation to investors and the probability of occurrence are relatively high, which is what overseas investment enterprises need to focus on when "going out" [2]. There are two main forms of expropriation: direct expropriation and indirect expropriation. Expropriation in the traditional sense is usually direct expropriation, which is characterized by the transfer of property ownership and actual control.

Since the 1980s, host countries have increasingly adopted the method of indirect expropriation [3]. Although the concept of indirect expropriation is not uniformly expressed in international law, various international treaties include "any other measure similar to expropriation", "other measures with the same effect as expropriation" and "any other measure with the same effect or nature as expropriation". " and other wordings, but the substantive meaning to be expressed is indirect expropriation. In fact, indirect expropriation is also called encroaching expropriation, which means that instead of directly physically transferring the possession of the investor's investment property, it is to take relevant measures to interfere with the investor's right to possess, use, dispose of, and benefit from the property, partly or to a large extent deprive investors of their reasonable expectations of their investments. Increased minimum wages, stronger laws and regulations, import and export restrictions and bans, price controls, prolonged temporary asset seizures, and control over profit transfers are all examples of common indirect collection strategies in practice currently.

### **2.2. The Scope and Significance of Expropriation Insurance**

Expropriation insurance refers to a type of insurance in which relevant investment insurance agencies are responsible for compensation when investors suffer partial or total losses of qualified investment properties owing to expropriation or nationalization processes initiated by the government of the host country.

Expropriation insurance can play the following roles: First, in the face of overseas markets full of political risks, investors urgently need effective risk prevention mechanisms to improve their legal rights and interests from being easily violated. In most cases, the triggering of political risks means that development projects will be stranded indefinitely, investment costs will be greatly increased, and even investors will suffer huge economic losses. Whether seeking judicial relief in the host country or from an international arbitration institution, the disparity in status between overseas investors and the host country government will make it difficult for overseas investors to achieve their relief goals. The above risks need to be guarded against by means of expropriation insurance. Secondly, for the host country, a sound expropriation insurance system can attract more overseas investment and stimulate the willingness of potential overseas investors to invest. Under the behavior pattern of businessmen seeking advantages and avoiding disadvantages, even for countries or regions with certain political risks, investors may still choose to invest after purchasing comprehensive insurance and evaluating profit margins, thereby promoting more FDI inflows to developing countries in need nation. Finally, for the home country of overseas investment, clarifying the insurance coverage of expropriation insurance and providing efficient and convenient insurance solutions for domestic enterprises is an important path to mediate international investment conflicts and disputes and promote domestic economic development.

### **3. The current situation of China's overseas investment insurance collection— —Taking China Securities as an example**

At present, there are mainly three types of insurance institutions that carry out insurance collection business: one is the official export credit insurance agency, which is mainly operated by the governments of various countries. China's official export credit insurance agency is China Export & Credit Insurance Corporation (hereinafter referred to as Sinosure); the other is multilateral financial institutions, including the World Bank Group's Multivariate Investment Guarantee Agency (MIGA); the third is commercial insurance companies, usually some multinational commercial insurance groups with higher ratings.

At present, China Credit Insurance mainly provides insurance services for political risks of investment projects. Founded on December 18, 2001, Sinosure is funded by the Chinese government to provide financial support including insurance, guarantees and government loans for Chinese companies engaged in cross-border investment and transactions. Its types of overseas investment insurance include expropriation risk, exchange risk, war risk, default risk and other political risks and commercial risks. In terms of expropriation insurance, the relevant insurance clauses of Sinosure Insurance are as follows:

#### **3.1. Scope of Insurance Liability**

At present, the scope of insurance liability of Sinosure expropriation insurance only includes direct expropriation, not indirect expropriation. China Credit Insurance mainly underwrites the nationalization, confiscation, expropriation or acts without proper legal procedures by the host country government, which deprives the insured or the project company of the ownership and management rights of the investment project and the right to use and control the investment project funds risk.

#### **3.2. Underwriting Conditions**

##### **3.3.1 Qualifications of the Insured**

Non-financial institutional legal persons registered in China; non-financial institutional legal persons registered overseas and whose actual control is controlled by Chinese-funded legal persons; domestic and foreign financial institutions can be the insured. Unless otherwise approved, natural persons and unincorporated organizations are excluded from being suitable for investors.

##### **3.1.2 Subject Matter of Insurance**

For the investment method, the insurable subject of overseas investment establishes an enterprise outside China or obtains the ownership and operation of an existing enterprise through sole proprietorship, new joint venture, acquisition, merger, shareholding, capital injection, capital increase, reinvestment, equity replacement and other means. Management rights, product control rights and other economic activities related to rights and interests can be insured for expropriation insurance. For the country where the investment project is located, Sinosure demands that the country where the investment project is located be one with a largely stable political economy, that the insured project adhere to local laws and regulations as well as the economic interests of the investment home country, and that it have received all necessary approvals for the investment project.

##### **3.1.3 Insurance Period**

Expropriation insurance has two insurance periods, namely the commitment insurance period and the initial insurance period. The promised insurance period is the longest period for the insurance company to undertake the insurance liability. It is chosen by the insured and agreed by the insurance company. The promised insurance period is generally 3-20 years. The initial insurance period is generally 3 years, and the insurance can be renewed every year after the expiration, and the insured has the right to choose whether to renew the insurance.

### 3.1.4 Insurance Amount

The insurance amount of expropriation insurance includes the maximum insurance amount and the current insurance amount. The first one, chosen by the insured and approved by the insurance company at the start of the initial insurance period, refers to the total liability limit assumed by the insurer during the committed insurance period. The latter is the limit of liability that the insurance company will accept during the current insurance term, and it shall be agreed upon at the start of the current insurance period by both the insured and the insurance company. The insurance amount paid by Sinosure generally does not exceed the total amount of overseas investment it underwrites. The insurance premium for overseas investment is unanimously determined at about 85%-95%, and a relatively fixed ratio of about 1% is determined for the insurance premium.

### 3.1.5 Subrogation Right System

The insured object of credit insurance is not the thing itself but the credit insurance interests, so after the occurrence of an insured accident, there are usually cases where the right of subrogation is exercised. The purpose of overseas investment insurance is to protect the overseas investors and investment interests of the country, but the object of its subrogation is another sovereign country. Obviously, a country cannot claim rights against another country in accordance with domestic law, and may be subject to host country. Therefore, the subrogation right of overseas investment insurance needs to be realized through bilateral investment agreements, diplomatic means or multilateral investment guarantee agencies.

At present, there are mainly two modes of exercising the right of subrogation in overseas investment insurance: one is that a bilateral investment agreement must be signed with the host country to underwrite overseas investment in the host country, represented by the United States; the other does not require a contract with the host country. Sign a bilateral investment agreement, represented by Japan, Japanese overseas investors investing in countries that have not signed a bilateral investment agreement with Japan can also apply for overseas investment insurance from Japanese insurance companies.

The Japanese model should be a stage that every country has to go through in the development of overseas investment insurance, and Sinosure is currently adopting this unilateral model. China has currently signed bilateral investment agreements with 104 countries, including 56 countries of the "Belt and Road", which can be said to have covered major investment countries, but the time to adopt the US model is not yet ripe, because China's economic Unbalanced development, overseas investment targets a wide range of regions, and overseas investment is still in its infancy.

## 4. MIGA's Experience with Collection Risks

### 4.1. The Emergence of MIGA

In the 1960s and 1970s, many developing countries suffered from frequent political risks [4], foreign investors suffered heavy losses, foreign investment was withdrawn, and commercial loans gradually replaced foreign direct investment, leading to high external debt in developing countries, a deepening debt crisis, and weak economic growth. To safeguard the interests of international investors and promote more foreign direct investment (FDI) flows to developing countries to boost their economic development, the World Bank Group (WBG) presided over the development of the Multilateral Investment Guarantee Agency Convention (commonly known as the Seoul Convention) in 1985, based on which the Multilateral Investment Guarantee Agency (MIGA) came into being.

MIGA is the world's first and so far the only international economic organization dedicated to underwriting "political risk", and aims to provide political risk guarantees and technical support for foreign investment in developing nations, to promote investment in developing nations, and to support economic growth, poverty eradication and the improvement of people's livelihoods.

Article 11 of the Seoul Convention stipulates that MIGA's insurance coverage includes the following five categories: currency exchange insurance; expropriation or similar measures insurance;

insurance against contract violation; insurance coverage for conflict and riots; and other non-commercial ventures.

## **4.2. MIGA's Specific Provisions on Expropriation Insurance**

The Seoul Convention defines expropriation and similar measures as statutory or executive actions, or slack behaviour, procedures undertaken by the Government of the host country to practically deny the policyholders possession of their investments or their control of them, or of a substantial portion of the proceeds which it is entitled to derive from that investment. With the exception of universally applicable, non-governmental discrimination in the administration of economic services within the national territory by the authorities of a State [5].

The specific provisions of MIGA on expropriation insurance are discussed below in terms of the conditions of coverage, the duration of insurance, the amount of insurance and the subrogation regime.

### **4.2.1 Conditions of Coverage**

#### **4.2.1.1 Eligibility of Insured**

For the definition of qualified investor (also qualified insured), the Seoul Convention stipulates that the policy holder must be a physical being outside the territory of the host country and have the national origin of a Member of the United Nations; or a legal person legally registered and having a place of business in a Member State other than the host country; or a legal person the majority of the capital of which is owned by a Member State or Member States other than the host country, or by its nationals.

In addition, if the host country agrees and the capital originates from outside the host state. On the basis of a joint application by the host country and the investor, approved by a special majority vote of the Board of Directors of the Multilateral Investment Guarantee Agency (MIGA), the scope of qualified investors may be extended to natural persons in the host state, or legal persons legally registered in the territory of the host country or legal persons whose majority of the capital is owned by the nationals of the host country.

#### **4.2.1.2 Subject matter of insurance**

In terms of the form of investment, the Seoul Convention does not impose any special restrictions on either equity or non-equity direct investment. For example, franchise agreements, product or profit-sharing agreements, technical assistance and management agreements, operating lease agreements, etc. MIGA can also continuously expand the form and scope of qualified investment based on development needs.

In terms of investment time, it includes new investment implemented after the application for guarantee, as well as reinvestment with past investment income or additional investment in existing projects.

In terms of investment region and nature of investment, MIGA only guarantees projects invested in developing countries, and requires that the investment projects be developmental in nature, consistent to the national development targets of the recipient nation and conducive to the national economic and social progress of the host nation.

### **4.2.2 Scope of Insurance Liability**

The scope of liability of MIGA expropriation insurance is not limited to direct expropriation, but also includes indirect expropriation [6]. Based on this, as far as the risk of expropriation under MIGA is concerned, as long as government legislation or administrative actions (including nationalization, confiscation, seizure, attachment, freezing of investment property, etc.) actually have the effect of expropriation, resulting in the investor losing ownership, control or being deprived of the main proceeds of the investment, they are all within MIGA's guarantee. In recent years, in the practice of OFDI, indirect expropriation measures are more common than direct expropriation, and the host government often does not directly expropriate the investor's investment property, but achieves the effect of expropriation by means of revocation of business permits, cancellation of business

certificates, and impediment of business operations through disconnection of water, electricity and power supply, etc. The extension of the expropriation insurance by MIGA is more in line with the actual needs of many investors, and expands the scope of the protection of the investor.

#### **4.2.3 Insurance period**

MIGA's current guarantee period is generally 3 to 15 per cent of the total number of years, which can be extended up to 20 years by agreement under exceptional cases. MIGA, with developmental as one of its main purposes, mainly underwrites long-term international investment political risks, and the long insurance period provided by the institution is of great significance to many infrastructure projects in developing countries, which are subject to large investment and long payback period.

#### **4.2.4 Amount of Insurance**

The Seoul Convention does not set a cap on the amount of insurance coverage. In the case of equity investments, MIGA covers up to 90 per cent of the total amount invested plus earnings up to five times the amount of the capital contribution; in the case of loans or loan guarantees, MIGA covers up to 95 per cent of the principal amount of the loan plus interest earnings up to 150 per cent of the principal amount; and in the case of technical assistance or other agreements, MIGA covers up to 95 per cent of the value of the total disbursements made under the agreement [see MIGA Information on risk coverage posted on the MIGA website. The information on risk coverage is published on the website of MIGA.] In general, according to MIGA's practice, in the field of overseas investment, the investor generally bears 5-20% of the risk loss, and MIGA bears 80-95% of the risk loss.

#### **4.2.5 Subrogation System**

MIGA pays or agrees to pay compensation to the insured, i.e., obtains the right of subrogation, i.e., the entitlement to compensation for political risk from the host Government where the risk occurs, and each Member State should recognize this right of MIGA. The subrogation right of the insurer is the core of the insurance law, and the subrogation right of MIGA is also the key of the mechanism of the Seoul Convention. The recognition of this right makes the investment disputes between two "unequal" subjects, namely, the State of origin and the foreign investor, transformed into a mediation mechanism between the subject of international law, the State and international organizations, and restricting the immunity from sovereignty of host countries in a majority of development states.

## **5. Issues and Improvements of China's Overseas Investment Expropriation Insurance**

### **5.1. Aspects of liability coverage for overseas investment expropriation insurance**

The scope of insurance liability of China's expropriation insurance does not include encroaching expropriation. MIGA's expropriation insurance covers not only the expropriation, nationalization, expropriation, confiscation, seizure and freezing of assets as direct measures by the host country, but also cannibalistic expropriation. Cannibalizing expropriation means that although the measures taken by the host country do not constitute expropriation of the investor's assets, such behaviors have the effect of expropriation, such as regulations on income tax, increase in tariffs, and minimum wages for employees [7]. In order not to cause economic friction among countries, modern countries are more and more inclined to take encroaching expropriation measures when taking expropriation measures. The expropriation insurance in China's overseas investment insurance system does not include encroaching expropriation, which is not in line with the current international political and economic situation and is not very reasonable. Therefore, encroaching expropriation should be included in expropriation insurance.

### **5.2. Overseas Investment Levy Insurance (OILI) Amount and Premiums**

The regulations of China Export & Credit Insurance Company on the insurance amount and premium for levying insurance lack flexibility. MIGA's regulations on insurance premiums:

“Premiums are determined according to the circumstances of each project, depending on the specific country, sector, project and type of insurance. The guarantee conditions of each guarantee contract shall be determined by the agency in accordance with the regulations and regulations issued by the board of directors, but Institutions shall not guarantee the full amount of insured investment losses”. However, China's overseas investment insurance agencies determine about 85%-95% of the insurance amount for overseas investments regardless of country, industry, or period, and a relatively fixed ratio of about 1% for insurance premiums [8]. In fact, international investment often faces different degrees of political risk due to different host countries, industries and periods of investment. A relatively fixed proportion of insurance amount and premiums cannot reflect the political risks of an investment, which is not conducive to the ultimate realization of subrogation rights.

So, it is necessary for us to have a relatively flexible regulation on insurance amount and premiums. In terms of insurance amount, when China's overseas direct investment is in a slump, China's overseas investment insurance institutions can appropriately increase the proportion of insurance amount to stimulate overseas direct investment out of the trough; When the momentum of China's overseas direct investment is too strong or the risk is too high, China's overseas investment insurance institutions can appropriately reduce the proportion of insurance amount. This will prevent China's overseas direct investors from overly relying on the full compensation of underwriting institutions, while allowing underwriting investment losses to occur and expand. In terms of insurance premiums, we believe that in China's overseas investment insurance, different overseas investments may encounter different political risks, and different rates should be determined based on different host countries, industries, and periods, while considering diplomatic and political factors. For example, China's investment in energy, infrastructure and other projects overseas is much more politically risky compared to some labor-intensive production enterprises, and these industries should charge higher insurance premiums.

### **5.3. Aspects of the conditions of coverage for overseas investment expropriation insurance**

As for the underwriting conditions, MIGA mainly examines them from three aspects: qualified investment, qualified investor and qualified host country. If we examine the qualification of the underwriting conditions of China's Overseas Investment Collection Insurance (OICI) according to these three aspects, we will find that the underwriting conditions of China's OICI still need to be improved in terms of qualified investment.

Both MIGA and the overseas investment insurance systems of various countries regard the ability of overseas investment to promote the economic development of the host country as an important condition for examining qualified investment. However, according to the requirements of China Export & Credit Insurance Corporation (CECIC)'s "Insurance Guide" for qualified investment, it only requires that the investment must be in line with China's national policies and economic and strategic interests, and does not put forward any requirements on its impact on the host country's economic development [9]. However, in practice, if the investment is not in line with the host country's development objectives and cannot effectively promote the host country's economic development, the possibility of political risk is quite high. Obviously, the above provisions of the China Export & Credit Insurance Corporation (CECIC) Guidelines on qualified investment are not comprehensive.

With regard to qualified investment, MIGA requires that investment must be consistent with the economic development objectives of the host country, whereas our country does not have such a requirement for underwriting conditions, so it is clear that our requirements for underwriting conditions are insufficient in comparison with those of MIGA and need to be improved. Therefore, China should learn from the practice of MIGA and require that overseas investments be favourable to the economic development of the host country and the investor's home country [10].

## 6. Conclusion

In conclusion, a study on the issue of expropriation risk in China's overseas investments, based on lessons learned from the Multilateral Investment Guarantee Agency (MIGA), highlights the significance of establishing an effective insurance system for overseas investments. With the rapid growth of China's outward FDI and the increase in political risks faced by Chinese companies investing overseas, it is crucial to address the challenges and protect the legitimate rights and interests of investors. By drawing on the insurance system of the MIGA, the study makes recommendations for the China Export & Credit Insurance Corporation (CECIC) to improve its insurance coverage, terms and underwriting conditions in the field of overseas investment insurance, especially in the area of expropriation risks. A sound expropriation insurance mechanism not only protects the interests of investors, but also helps to attract more foreign investment, support the development of host countries and mitigate conflicts and disputes in China's international investment landscape. Therefore, further efforts should be made to strengthen the comprehensive framework for China's overseas investment insurance to ensure a favourable environment for sustainable and secure investment at home and abroad.

## Authors Contribution

All the authors contributed equally and their names were listed in alphabetical order.

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