

Suggestions on the Development of China's Overseas Investment Insurance Legal System Under the Belt and Road Initiative

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doi:10.56397/SLJ.2022.12.04

Abstract

The proposal of the Belt and Road Initiative is influential on China's economic development and industrial transformation. It is not only clear evidence of China's comprehensively deepening reforms and all-round opening-up in the new era, but also a reform drive to build a community of human destiny and strengthen international cooperation and global governance. However, in the implementation of the Belt and Road Initiative, China's overseas investment insurance is facing a new situation, and the inadequacy of the legal system, leading to serious problems in terms of the insurance business model, the insurance capital model, the insurance coverage and the recovery mechanism of overseas investment insurance. Therefore, we should review and adjust China's overseas investment insurance legal system, strengthen the internal and external cooperation to address new risks, reconstruct the overseas investment insurance legal system and business model, introduce diversified capital, expand the definition of investment and investor, improve the subrogation clause in bilateral agreements, and make new suggestions on the development of China's overseas investment insurance.

Keywords: Belt and Road Initiative, overseas investment insurance, the legal system

1. Introduction

In recent years, China's overseas investment has grown rapidly, particularly in more than 60 countries and regions along the Belt and Road. However, at the same time, China's overseas investment insurance also has to deal with new challenges. The rise of unilateralism, trade protectionism and counter-globalization, especially in the wake of the epidemic, poses a

serious threat to the global economy and trade, including Belt and Road investments. Therefore, it is increasingly necessary for enterprises to take precautions against risks in the process of overseas investment. However, there are still many practical problems in the overseas investment insurance system to quicken the pace of Chinese enterprises' "going global", which needs to be further improved to prevent losses.

Hence, based on the experience of the existing overseas investment insurance system, China should establish a more comprehensive and meticulous one to protect the legitimate rights and interests of Chinese overseas investment enterprises and promote the common prosperity and sustainable development of the regional trade and economy under Belt and Road Initiative (BRI), a development strategy aiming to build connectivity and co-operation across six main economic corridors encompassing China and: Mongolia and Russia; Eurasian countries; Central and West Asia; Pakistan; other countries of the Indian sub-continent; and Indochina.

2. The Need for the Development of China's Overseas Investment Insurance System Under the BRI

China has become the second largest foreign investor in the world, and there is a growing demand for overseas investment insurance, especially under the Belt and Road Initiative. Chinese enterprises are actively investing overseas, and the number of their projects and the total amount of investment are especially large in BRI countries. According to the latest data from China Export and Credit Insurance Corporation (Sinasure), the only policy insurance company undertaking export and credit insurance business in China, the 2021 underwriting amount of China's policy and credit insurance reached US \$830.17 billion, of which US \$169.96 billion supported exports and investment to BRI countries, up 11.3% year-on-year.

2.1 Addressing Investment Risks Along the Belt and Road

Most of the Belt and Road countries are emerging economies with a relatively weak economic foundation, a single economic structure and poor economic stability. Some countries have complicated geopolitics and frequent regime changes, and their internal social resilience and debt servicing capacity are also low. The risks of China's direct investment in BRI countries mainly include political risks, economic risks and sociocultural risks. The political risks mainly arise from the political instability and policy changes of the host country. Economic risks mainly include sovereign credit risk and instability of the financial system of the host country. Social and

cultural risks mainly include the risks of cultural differences and social risks.

Among them, political risk has become one of the biggest obstacles to the implementation of BRI policies and the overseas investments from Chinese enterprises to the alongside countries and regions. According to the China Global Investment Tracker database, from 2013 to 2021, 51 Chinese investment projects under BRI have failed, involving US\$56.44 billion in total. Traditional political risk refers to the risk of loss to multinational companies due to changes in the domestic political environment or policies of the host country. In terms of legal risk, host BRI countries usually restrict the scope of foreign investment market access rights. On the one hand, they restrict the scope of foreign investment by limiting the areas of market access using "negative lists" or "positive lists", as well as special restrictions on security reviews and concessions, and on the other hand, they restrict the shareholding of Chinese investment enterprises to protect the shareholding of their domestic enterprises, thus giving them effective control over the investment projects. In the process of investment implementation, Chinese enterprises are not only faced with the risks in the host government's restrictive regulations such as exchange restrictions but also involved in other legal fields. For example, forced employment of local labor, trademark registration, green investment barriers, and other issues emerged in the process of Chinese enterprises' overseas investment under BRI. Sinasure protects overseas investors from economic losses resulting from traditional political risks such as expropriation, exchange restrictions, war and political riot, and breach of contract in the host country. However, non-traditional political risks, such as the risks of national security review, secondary sanctions, and outbreak control actions exceeding necessary limits, need to be further covered by its insurance. Meanwhile, an effective institutional system should be adopted to resist political risks and increase the incentive for Chinese companies to invest abroad along the Belt and Road.

In a word, Chinese enterprises' investments in BRI countries involve many risks in the host country, especially due to the complex geopolitical situation, the varying levels of economic

development and marketization, the restrictions of the legal system, and the differences between the business environment and that of China. Therefore, when Chinese enterprises invest in BRI countries, they must face up to the risks, and further improve the overseas investment insurance system for Chinese enterprises to invest overseas according to the new situation in BRI countries.

2.2 The Multilateral Investment Guarantee Mechanism Fails to Meet the Actual Demand

The Multilateral Investment Guarantee Agency (MIGA) was established in 1988 and is one of the five member institutions of the World Bank Group. China has been one of MIGA's 182 member countries since 1988. MIGA's mandate is to drive impactful foreign direct investment to developing countries by providing guarantees (political risk insurance and credit enhancement) to investors and lenders. MIGA's loans, grants, equity investments and guarantees to member countries, and private businesses totaled US \$104.4 billion in 2022. It can also enable developed countries to increase investment in developing countries to compensate for deficiencies in national overseas investment insurance and regional investment insurance systems. As a founding member of MIGA, Sinosure has signed a memorandum of understanding to establish a cooperative relationship, which should enable MIGA to play a role in the overseas investment insurance system. However, it is still rare for China to use the MIGA system.

First of all, MIGA's guarantee capacity is limited. Since the amount of guarantee provided by MIGA is based on the share of member States in MIGA, the smaller the share of a Member Country, the smaller the amount of guarantee available to it, which to a certain extent limits the development of outward investments. Although China is the sixth largest shareholder in the MIGA, its share is only 3.12%. Moreover, the amount of foreign investment made by Chinese enterprises under the BRI is considerable, which makes the number of guarantees that MIGA can provide insufficient to meet the needs. In terms of the number of cases, from April 1988 when China joined the MIGA Convention to October 2022, only five projects in China have been guaranteed by MIGA. Secondly, MIGA has high application requirements for

investment projects. It requires high social and environmental standards for investment projects, with specific data indicators for each standard. The investment field of Chinese enterprises participating under the BRI is mainly focused on infrastructure construction projects, which not only consume a great deal of manpower and material resources, but also involve complex and volatile human and natural environments. The standards for implementing such projects are still a long way from the high standards required by MIGA. Finally, the guaranteed scope of MIGA is limited. MIGA restricts the scope of eligible host countries to developing countries and only covers Member Countries' investments in developing countries but not in developed countries. However, the global financial crisis, triggered by the US subprime mortgage crisis, has shown that developed countries can take extraordinary measures against foreign investment in times of economic crisis, posing a threat to the security of foreign companies' investments, which MIGA cannot guarantee.

Therefore, the development of an overseas investment insurance system is necessary. In addition to providing a legal basis to protect overseas investment, a well-established foreign investment guarantee agency can also play the function of anticipating risks, promoting the sustainable development of foreign investment, and reducing the losses caused by risks associated with investing abroad.

3. Limitations of China's Overseas Investment Insurance System

In recent years, the current Chinese overseas investment insurance regime has lagged behind as the number of overseas investment insurance projects and amounts underwritten have been increasing. Although some achievements have been made in the legal system and operation mechanism of overseas investment insurance, it is practically unable to match the reality of the rapid development of overseas investment in practice.

3.1 Lack of Legislative System

In terms of legislation and regulation, although overseas investment insurance is a policy-based insurance, China has not formulated and enacted a special law to stipulate the legal system of overseas investment insurance. It is true that

currently overseas investment insurance and Sinosure are governed by the Insurance Law of the People's Republic of China (Insurance Law) inferring from the judicial interpretation and the administrative decision, but the Insurance Law is not suitable for overseas investment insurance. Article 2 of the Insurance Law limits the insurance acts governed by the Insurance Law to commercial insurance acts, while overseas investment insurance is policy insurance. In addition, the Insurance Law provisions for credit insurance as a separate category, so it cannot apply to overseas investment insurance. In a sense, China does not have a specific law that provides for a legal regime for overseas investment insurance. To date, there are only a small number of normative documents relating to overseas investment insurance in China. The State Council of the People's Republic of China (State Council) issued the Notice of the State Council on the Establishment of China Export and Credit Insurance Corporation in 2001, which meant that the overseas investment insurance business would be officially undertaken by SINORSURE, the wholly state-owned insurance company engaged in policy-based export and credit insurance business. Afterward, the Notice on Issues Relating to the Establishment of Risk Protection Mechanism for Key Overseas Investment Projects was jointly issued by the National Development and Reform Commission and Sinosure in 2005. The two documents are both fragmental and oversimplified, the former just regulates the formation of Sinosure; and the latter only covers three items of insurance coverage, policyholder qualifications, and types of insurance. Moreover, since the documents are at a lower level of legislation and effectiveness, their authority in regulating the overseas investment insurance system is weak, let alone the implementation effect. As the construction of the BRI progresses, more and more individual and corporate investors from China will go out in this direction, and the scale of overseas investment along the route will become larger and larger. The interests of Chinese investors need to be protected by a more scientific and reasonable overseas investment insurance system in China. Only these two notices as special documents are difficult to meet the actual demand. In particular, the documents lack specific contents such as the insurance procedures, leaving China's

overseas investment insurance regime without a regulatory basis. These include a narrow definition of the scope of eligible investments and eligible investors, which makes it difficult to provide adequate protection as a home country; a general definition of the scope of insurance coverage, which cannot adapt to the new political risks under the BRI; vague provisions on the insurance period, rates and payout amounts, which make it difficult to make the system truly operable; and a lack of information on the role of insurers in paying out compensation to policyholders. Moreover, it does not provide the legal basis for the insurance subject to obtain the right of subrogation after paying the insurance applicant, which also reflects the lack of clarity in the positioning of the function of the insurer. In terms of international agreements, most of the investment and trade agreements signed between China and other countries are bilateral investment agreements (BITs). Although such agreements play a certain role, their provisions on subrogation also have problems. As there is no unified BIT model, China even signed BITS with some countries without the word of subrogation, and the provisions on the form of investment are not clear. It brings regulatory obstacles to the realization of the right of subrogation by Sinosure, which may trigger legal risks.

3.2 Inadequate Business Model of the Insurer

In terms of the insurer, Sinosure is the only insurance institution that Chinese investors' economic losses in overseas investment and profits caused by political risks of a host country. As the only policy-oriented insurance company in China, Sinosure has set favorable conditions in its underwriting policy, compensation ratio, and insurance tenor for BRI countries' projects. However, it also brings some problems. First, the nature of SINOSURE is complex. It is not only an independent subject participating in the market economy, but also a state-owned policy-oriented organization, combining the power of approval and operation in one. Since there is barely any market competition, without a unified approval standard and supervision system, it is obviously not conducive to supervision and prone to corruption. In addition, overseas investment insurance systems are generally market-oriented worldwide, with government agencies not directly

involved but rather specialized companies engaged in the investment insurance business. The market operation mode is not only conducive to cost and profit accounting, but also helps to reduce the political doubts of the host country when Chinese enterprises invest in it, so as to reduce the political risks faced by Chinese investors in overseas investment. Therefore, the examination and approval function of Sinosure is not conducive to the commercialization and market-oriented development of its overseas investment insurance business, which may hinder the improvement of the overseas investment insurance system. In addition, different from the United States, which established a special government company responsible for the overseas investment insurance business, the overseas investment insurance business is only one of the many business items of Sinosure, which is not a specialized organization engaged in the overseas investment insurance business, but mainly engaged in the export credit insurance business. The various business functions of Sinosure make it difficult to concentrate on the underwriting business of overseas investment insurance, and it also lacks specialization and professionalism, which is not conducive to the further development of China's overseas investment system. In conclusion, in terms of institutional setup, China's overseas investment insurance system does not have a clear positioning of the main body, which is not conducive to the healthy development of China Sinosure, and also brings inconvenience and trouble to China's overseas investment enterprises. Therefore, the existing overseas investment insurance underwriting institutions need further reform.

In terms of the actual operating mechanism of the overseas investment insurance system, China is currently in a unilateralist mode. Sinosure does not take whether to sign bilateral investment protection agreements with host countries as the premise of underwriting, which leads to the lack of bilateral or multilateral investment protection agreements signed by China and other countries, and the prevention and protection mechanisms in the event of investment risks still need to be improved and perfected. There is a lack of specialized overseas investment risk assessment agencies and specialized law firms to carry out

professional analysis and provide high-quality legal defense services for overseas investments, making it difficult to provide professional investment risk assessment and prevention advice.

3.3 Difficulty in Recovering Compensation for Overseas Investment Insurance

As of now, there is no legal regulation in China that gives Sinosure the right of subrogation, which is the most important insurance right. In particular, the legal status of Sinosure is vague, and even if it acquires the right of subrogation, it will encounter the problem of subject matter ineligibility, i.e., it will not be eligible to exercise the right of subrogation because it is not a qualified investment entity. In the event of a genuine underwritten risk, Sinosure would not have the ability to enforce its subrogation rights and would not be able to recover from the host country. In such circumstances, if China is still at a disadvantage in resolving disputes with the host country, it is even more difficult for Sinosure's subrogation rights to be realized. Under the unilateral model, overseas investment insurance is not premised on bilateral agreements and China's subrogation rights cannot be recognized by the host country, so Sinosure's recovery is mainly through the diplomatic protection route, and friction during negotiations, and negotiations can easily lead to conflicts between countries. Under the unilateral model, Sinosure is not able to obtain subrogation rights after paying out losses to investors and therefore has difficulty in recovering from the host government following the law, and therefore also has difficulty in realizing the investor's right to claim for damages.

4. Improvement of China's Overseas Investment Insurance System Under the Background of "The Belt and Road" Initiative

4.1 Improving Legislation on the Overseas Investment Insurance System

Currently, there are two main international legislation models for overseas investment insurance. One is the U.S. standard bilateral outward investment insurance system that implements an overseas investment insurance system in domestic law with a bilateral investment guarantee agreement with the host country as a legal prerequisite. The other is a German-style unilateral foreign investment insurance regime in

which the investor government and the government of the investee country do not sign a bilateral investment guarantee agreement and only regulate the covered foreign investment projects following domestic law. The unilateral legislation model, which is not subject to bilateral investment agreements, has played a greater role in facilitating the development of overseas investment activities and the export of capital, but has shortcomings in protecting the interests of investors. However, as bilateral investment treaties are increasingly used to regulate the international investment environment, it is necessary to combine the investment guarantee system in domestic law with the investment guarantee agreement in international law, so that the country's outward investors can obtain dual protection in domestic law and international law. By the end of 2021, China had signed 57 bilateral investment treaties (BIT) with Belt and Road countries. As a next step, China needs to promote the negotiation process with more BRI countries through legislation, and at the same time consider promoting the establishment of a multilateral or regional investment guarantee mechanism under the BRI, so that multilateral or regional treaties can eventually be adopted to protect foreign investors. In the long run, it is more reasonable for China to adopt a mixed mode of bilateral mode as the main mode and unilateral mode as the supplement, or bilateral mode as the principle and unilateral mode as the exception, in the field of investment insurance.

At the level of international law, it is recommended that China restart the drafting of the BIT model, so as to provide a reference for China to sign or modify BIT with BRI countries along and strengthen the protection of digital investment. In addition, it is suggested to accelerate the legislative process of China's Overseas Investment Law and stipulate overseas investment insurance with a special chapter, thus serving as a superior law to guide the practice of overseas digital investment insurance. In 2010, the Ministry of Commerce of China drafted a model BIT, Agreement between the Government of the People's Republic of China and a Government on the Promotion and Protection of Investment [hereinafter referred to as China Model BIT2010]. Although this model has not been substantially

modified in the past decade or so, it provides some reference for the revised or signed BITs after 2010. However, during this period, the business environments and risks of China's overseas investment have changed greatly. Therefore, the China BIT should keep pace with The Times, meet the development needs of the "Digital Silk Road", and be revised and improved to provide a reference for China's current signing or revising of the BIT.

At the level of domestic legislation, as China does not have a specific law on overseas investment protection, for the time being, a Law on Overseas Investment Protection can be enacted, with a special chapter on overseas investment insurance law to coordinate the relationship between overseas investment insurance and commercial insurance.

First of all, the law should be enacted to reflect the policy characteristics of overseas investment insurance and the differences in the application of the law between overseas investment insurance and commercial insurance. Overseas investment insurance agencies are government-funded institutions, rather than ordinary profit-oriented corporate entities, and should be distinguished from commercial insurance companies in the application of regulatory laws. For example, when the United States enters into bilateral investment guarantee agreements with other countries, the other country is generally required to recognize the status of overseas private investment companies as non-commercial legal persons, and the other country's laws on the management of commercial insurance or financial institutions cannot be applied. As a state-owned policy insurance company, Sincure's business policies and operating rules are different from those of ordinary commercial insurance companies. Since China has already formulated the Insurance Law, which belongs to the upper law and the relevant legislation of overseas investment insurance belongs to the lower administrative regulations compared with the normative document of the State Council, the insurance business of overseas investment insurance should have been adjusted according to the Insurance Law. However, Article 1 of the Insurance Law defines the insurance industry as a commercial insurance behavior, and there are obvious problems in applying it to

policy-based insurance companies. Therefore, as a policy insurance act, overseas investment insurance should be subject to separate legislation different from ordinary commercial insurance.

Secondly, the law is formulated in favor of highlighting the prominent position of overseas investment insurance, both for the sake of the integrity of the legislative logic, which emphasizes investment protection before providing for investment insurance, and to coordinate the relationship between overseas investment insurance and other investment and promotion normative documents formulated by the State Council and various ministries and commissions. In China's current legal system of overseas investment insurance, there are dozens of relevant laws, regulations and normative documents formulated by the State Council and various ministries and commissions, most of which are of the same level of effectiveness, making it difficult to highlight the overarching position of the basic rules of overseas investment insurance in its application, and prone to conflicts in the application of laws. It is reasonable to take the Overseas Investment Protection Law as the superior legislation to stipulate the basic principles and main issues of overseas investment insurance, and to use regulations, rules and other normative documents as the lower supporting implementation rules, which also helps to solve the problem of conflict of laws application.

Thirdly, the enactment of the Overseas Investment Protection Law is in line with China's pre-determined plan to build an overseas investment protection and insurance system. As early as 2013, this law was initiated and drafted jointly by the National Development and Reform Commission and the Ministry of Commerce. This also shows that the design of a special chapter on overseas investment insurance under the framework of the Overseas Investment Law is also in line with the original intention of the legislator. Having resolved the issue of the legislative model, further specific provisions of the legislation are needed to incorporate the core content of the existing normative documents. China has already accumulated rich experience in overseas investment insurance, and with the promotion of the "One Belt, One Road" construction, the development of the scale of China's overseas

investment has also put forward requirements for the improvement of the overseas investment insurance system, and the requirements for a special chapter on overseas investment insurance law are met in terms of necessity and feasibility. In a word, the time is ripe for the enactment of separate legislation.

4.2 Reform the Operating Capital Mode of Overseas Investment Insurance

4.2.1 Adjust the Business Model

The Insurance Law provides that the insurance industry and the banking, securities and trust industries shall be operated and managed separately, with insurance companies being established separately from banking, securities and trust business institutions. According to this provision, China's insurance industry adopts a separate management model. As a result, the current business of Sinosure is relatively simple, mainly concentrated in the insurance industry, and its expanded business is limited to limited fields such as guarantee, which prevents Sinosure from engaging in investment promotion business in other areas of the insurance business. Faced with the demand for diversified overseas investment by enterprises in the BRI, Sinosure can only provide indirect support to enterprises through other means. For example, Sinosure and the Bank of China signed a comprehensive cooperation agreement to integrate various investment promotion methods. In 2018, the US Congress passed the Better Utilization of Investments Leading to Development Act of 2018 (the BUILD Act of 2018), which authorized the merger of Development Credit Administration (DCA) of United States Agency for International Development (USAID) and the Overseas Private Investment Corporation (OPIC) to create the new United States International Development Finance Corporation (USDFC), thus forming a dual-track mechanism of USAID, the Millennium Account Corporation (MCC) for development assistance and USDFC, USTDA for investment assistance, with USAID becoming an integrated investment promotion agency combining investment and financing. In addition, Russia's overseas investment insurance agency has also integrated its investment insurance and financing operations. Therefore, from the perspective of long-term development, breaking away from the divisional

business model and granting Sinosure the right to raise finance in addition to investment insurance, and transforming Sinosure into a comprehensive investment promotion agency, will have a positive effect on supporting the development of China's overseas investment. The restructuring of Sinosure's business model and the completion of its transformation from a single investment and political risk insurance agency to a comprehensive investment promotion agency will not only meet the risk control needs of overseas investors, but also provide financial support, and its business model reform has a deep practical foundation.

4.2.2 Explore Capital Cooperation Models

Judging from the current practice of many countries, political risk insurance is not a restricted business area for private capital, and there is a trend for private capital to gradually expand its participation in political risk insurance. In order to supplement the insurance funds of investment insurance institutions, enhance their ability to underwrite risks, and fulfill the functions of Sinosure in providing risk protection for overseas investment enterprises by national policies on foreign affairs, foreign trade, industry, finance and finance, the state should allow private capital to enter the field of overseas investment insurance as a supplement. In order to ensure that Sinosure is a policy insurance company, it can learn from the model of overseas private investment companies and cooperate with private capital in the form of reinsurance and risk sharing, and explore other modes of cooperation with private capital such as equity cooperation.

4.2.3 Expand the Insured Subjects and Coverage

Although the insurance guidelines issued by Sinosure include natural persons as qualified foreign investors, there are no relevant provisions in our legislation, nor are natural persons considered as subjects of foreign investment in judicial practice. It is worth reflecting on this situation. Firstly, in China, more and more natural persons are in possession of large amounts of capital, some of which even exceed those of corporate entities, and they are fully capable of making market investments and competing with foreign enterprises and individuals. Secondly, in the practice of attracting foreign investment, China has always allowed foreign natural persons

to invest in China, while our natural persons are not allowed to invest in China, which has formed an unreasonable national treatment, which is not conducive to enhancing the overall competitiveness of China's foreign investment entities in the international market. Finally, the bilateral investment protection agreements signed between China and other countries all provide for natural persons to make outward investments, and many countries also have such provisions in their legislation, which shows that such provisions are in line with the development trend of outward investment law.

Meanwhile, at present, the scope of coverage of China's foreign investment insurance includes four major categories: expropriation, exchange restrictions, war and political riots, and government default. With the development of the international situation, terrorist activities have become one of the main factors threatening global security. The security situation in some BRI regions is worrying and provides conditions for terrorist activities. Terrorist activities are a direct threat to China's investments in these regions and must therefore be covered by the outbound investment insurance system.

4.2.4 Improving the Subrogation Clause

The Subrogation clause is a legal guarantee that overseas investment insurance institutions can recover the insurance compensation paid to investors from the host country's government. Subrogation clauses are now a common practice in China's bilateral investment promotion and protection treaties. The subrogation clause in China-Canada BIT (2012), for example, is generally expressed as follows: If a Contracting Party or its Agency makes a payment to one of its investors under a guarantee or contract of insurance it has granted to a covered investment of that investor, the other Contracting Party shall recognize the transfer of any right or claim of that investor to the first mentioned Contracting Party or its Agency. The subrogated right or claim shall not be greater than the original right or claim of the said investor. Such right may be exercised by the Contracting Party or any agent thereof so authorized. However, compared with other countries, the subrogation clauses in the investment promotion and protection agreements concluded by China are more principled. This

provision clearly states that other states recognize the rights of the Chinese government or government agent as an investor after the Chinese government or government agent has made payments to the investor. However, when the State authorizes the agency to bring a claim against the host State on the basis of subrogation, it faces a number of unspecified issues, such as the legal nature of the insurance conduct of an overseas investment insurance agency, whether it is regulated by the host government, and the relationship to the right of diplomatic protection. Compared to other countries, the subrogation provisions in China's foreign investment promotion and protection agreements are more principled. Therefore, it is necessary to make provisions on the specific issues of the exercise of the subrogation right, such as the legal nature of Sinosure's insurance, the relationship between the rights of subrogation and diplomatic protection, and the exemptions from the relevant regulatory laws of the host country.

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