

Treat your investment to some Treaty protection

Written by Devika Khanna

Given the volatile times we live in, clients are increasingly keen to ensure that their overseas investments benefit from the protection of Bilateral Investment Treaties (“BITs”)

The press is full of tales of woe of investors who have had assets nationalised, or suffered from discriminatory regulatory, legislative or judicial acts by a host state that undermine the value of their investments.

Those investors who cannot invoke a BIT are liable to end up arguing their case under local law before the host states’ domestic courts. However, for those able to rely on a BIT, the picture is thankfully very different. They can take their dispute with the host state directly to an impartial arbitral tribunal, subject it to international law standards, and enforce it with relative ease. BITs have therefore become an essential tool in the armoury of companies investing overseas.

BIT planning is important wherever in the World an investment is being made (and not just in countries perceived to be unstable or particularly ‘risky’). It is noteworthy that in 2013, approximately half of known investor-state cases were filed against developed states, mostly Member States of the EU¹.

Investors should also keep their plans under review in light of the changing BIT landscape; in particular as regards BITs between the EU and third states (as well as intra-EU BITs). The recently ratified Treaty between the EU and Canada² has arguably set the standard going forward.

Back to basics – what are BITs?

Bilateral Investment Treaties are treaties between two states aimed at encouraging the flow of investment, by one state committing to protect investments made by investors of the other state. Most BITs (of which there are in excess of 3000) give investors broad international law protection from investment risks in addition to any contractual rights they may have.

What do BITs protect against?

Taking the known investor-state cases from 2013 by way of illustration, the subject matter of disputes brought by investors to arbitration relate to:

- Changes to investment incentive schemes, in particular affecting the solar industry
- Cancellation or breach of contract by states
- Expropriation
- Revocation of licenses, permits, regulation of energy tariffs
- Wrongful criminal prosecution
- Unfair tax assessments or penalties
- Invalidation of patents
- Legislation relating to sovereign bonds

The most common protections contained in BITs and relied upon by investors are:

- **Prompt, adequate and effective compensation for expropriation** – this would apply for instance if assets are seized or nationalised, or in the event of indirect expropriation such as the cancellation of a concession or imposition of a punitive tax
- **Fair and equitable treatment** – this ensures the protection of an investors’ legitimate expectations to a predictable and stable economic environment
- **Full protection and security** – this provides for a guarantee of physical security of an investment
- **Free transfer of funds** – this would apply where a host state introduces restrictions on the repatriation of profits

¹Czech Republic (7 cases), Spain (6); Croatia (2), Hungary (2), Slovakia (2), Bulgaria (2), Cyprus (1), France (1), Greece (1), and Slovenia (1)

²Comprehensive Economic and Trade Agreement (CETA)

– **National treatment and Most Favoured Nation**

Treatment – this ensures that the host state treats the investor no less favourably than domestic and other foreign investors

BITs generally provide for investment disputes to be resolved through international arbitration rather than the host states' courts, and in some cases investors have a choice of forum³. The different mechanisms have pros and cons which are best weighed up in a given case:

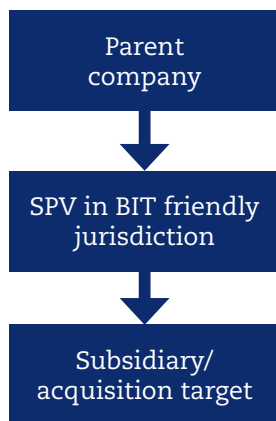
- **ICSID** arbitration (International Centre for the Settlement of Investment Disputes)
- **UNCITRAL** (ad hoc) arbitration
- Other – e.g. **ICC**, **SCC** arbitration

Treaty arbitration can in our experience create powerful leverage for settlement since its very existence is seen as a black mark on the investment record of the host state.

How can I benefit from BIT protection?

There is broad BIT coverage around the World (as well as several multi-lateral treaties such as the Energy Charter Treaty, NAFTA, and now CETA which provide for investment protection).

Structuring an investment to take advantage of a BIT often simply involves the incorporation of a special purpose vehicle in the investment structure:



There is broad consensus that (re)structuring an investment to gain BIT protection is legitimate provided it is done prior to a dispute having arisen between the state and investor.

At what stage in an investment should BIT planning be considered and what is involved?

Bilateral Investment Treaty Planning, like tax planning, is best advised on at the start of a project when the investment is made (whether a greenfield project or an acquisition), but we can advise you on how to ensure your investment receives the best protection available at any time prior to a dispute arising.

BIT planning is a cost effective mechanism for mitigating your investment risk, and structuring an investment in order to obtain treaty protection may also reduce your premium for political risk insurance.

Our analysis has three steps:

1. Identifying the relevant BITs in force depending on your present corporate structure, or advising on the incorporation of a SPV
2. Comparing the various applicable BITs' substantive and procedural provisions
3. Considering any exclusions or pitfalls in a particular BIT

How can I find out more?

Our arbitration team is on hand to advise you on the structuring (or restructuring) of investments in order to maximise your treaty protection, or to advise on a potential claim under a BIT.

³ In 2013, of 57 known cases, 31 were filed with ICSID, 20 under the UNCITRAL Rules and 3 SCC, 3 unknown. Investors should also beware of "fork in the road" provisions in some BITs which may rule out arbitration if a different dispute resolution mechanism is initiated.

Further information

Please send your BIT planning query to your usual contact in our team, or to

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