

BITs – STILL VALUE FOR MONEY

The March 2018 judgment of the Court of Justice of the European Union in the case of *Slovak Republic v Achmea BV* ("*Achmea*") held that an arbitration clause in an intra-EU bilateral investment treaty (or "BIT") was incompatible with EU law. This has cast some considerable doubt over the utility of intra-EU BITs as a means of protecting European investors' rights when investing in other EU Member States.

However, the utility for investors of BITs that are not between EU Member States remains undiminished – as demonstrated by the steady flow of Awards rendered in investors' favour.

Examples from the past eighteen months include successful claims:

- for US\$ 320 million by *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* against Argentina for the unlawful expropriation and breach of the fair & equitable treatment standard regarding investments in Argentinean airlines (ICSID Case No. ARB/09/1, Award of 21 July 2017);
- for US\$ 324 million by *Koch Minerals* against Venezuela for the unlawful expropriation of fertilizer plants (ICSID Case No. ARB/11/19, Award of 19 October 2017);
- for US\$ 39 million by *Caratube International Oil Company* against Kazakhstan for the unlawful expropriation of rights under an oil exploration contract (ICSID Case No. ARB/13/13, Award of 27 September 2017);
- for US\$ 140 million by *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* against Spain for breach of the fair & equitable treatment and legitimate expectations standards (ICSID Case No. ARB/13/36, Award of 4 May 2017); and
- for US\$ 18 million by *Bear Creek Mining Corporation* against Peru for the unlawful expropriation of rights to a silver mine (ICSID Case No. ARB/14/21, Award of 30 November 2017).

Politically-motivated threatened expropriations also continue to feature in the headlines. In July 2017, Tanzania enacted laws asserting "*permanent sovereignty*" over its natural resources and drastically amended its mining code. In March 2018, the Democratic Republic of Congo revised its mining code, doubling the State's equity interest, imposing local shareholder requirements, increasing royalty rates and imposing a 'super profits' tax. In South Africa, the President of the African National Congress, Cyril

Key issues

- BITs are treaties between two States.
- BITs prescribe minimum standards of protection to foreign investors against governmental interference.
- BITs give investors the right to claim compensation in independent international arbitration against the Host State.
- Whenever there is a risk of government interference, investors should consider structuring their investments through an entity incorporated in a country which has entered into a BIT with the host country.
- Political uncertainty coupled with legal uncertainty following *Achmea* highlight the need to consider investment protection and structuring concerns carefully and well in advance of any investment being made.

Ramaphosa, has just announced that the ANC will support the amendment to Section 25 of the South African Constitution to "*explicitly*" expropriate land without compensation.

Closer to home, the UK Labour Party has signalled its intent to implement a nationalisation policy across several strategic sectors (including: railways; energy; water; and the postal service), which has unsettled many foreign (including non-EU) investors in the UK.

This tendency towards nationalistic or protectionist policies shows no signs of abating. To the extent that BITs that are not between EU Member States remain available to investors, they therefore still provide valuable protections against interference with investments when Host Governments take steps to implement such policies.

This briefing provides a quick 'refresher course' on BITs, including: their principal terms; the scope of the protections that they can offer; and how to lock in the benefit of those protections.

BIT 'REFRESHER COURSE'

What are BITs?

BITs are short agreements – often of no more than ten or so pages - entered into between two States. BITs provide for the mutual promotion and protection of "investments" made by "investors" of each State in the other State.

What is an "investment"?

"Investments" are normally defined as "every kind of asset". These therefore include: equity interests in locally-incorporated companies; rights under contracts; physical assets; and loans made by a foreign lender to a borrower in the Host State in question (perhaps in the form of e.g. a shareholder or intra-group loan).

What standards of protection do "investments" benefit from?

BITs prescribe certain minimum standards of protection, which are intended to ensure the promotion and protection of "investments". The formulation of these standards varies from BIT to BIT, and their meaning is undergoing a constant process of development in international case law. However, whilst each BIT is individually negotiated and must therefore be read carefully, most BITs generally include several, if not all of, the following standards of protection:

- *No unlawful expropriation* - the Host State must not expropriate investments of investors from the other contracting State unless it is done for a public purpose, is non-discriminatory, is in accordance with the due process of law, and prompt, adequate and effective compensation is paid.
- *Fair and Equitable Treatment* - the Host State must not harm the investment by unreasonable or arbitrary conduct, or act in a way which is not transparent or contrary to the reasonable expectations of the investor.
- *Full Protection and Security* - the Host State must physically protect the investment.
- *Non-discrimination* - the Host State must not act in a way that discriminates against investments of investors of the other contracting State.

- *National Treatment* - the Host State must grant investors the same treatment that is given to its nationals.
- *Most-Favoured-Nation Treatment* - the investor is entitled to treatment as favourable as that given to nationals of any third countries.
- *Comply with obligations* - some BITs require the Host State to comply with all its obligations entered into in relation to the investment, which may include all its contractual obligations.

As these standards are prescribed by treaty, they are interpreted in accordance with international law, unless the BIT provides otherwise.

What if the standards of protection are breached?

The breach of any of these minimum standards of protection may entitle a qualifying "investor" to compensation (being restitution and/or damages).

BITs often require "prompt, adequate and effective compensation" to be made. Monetary compensation is generally assessed to be the "fair market value" of the investment, i.e. what a willing buyer would pay a willing seller.

Where the affected property is a going concern, such as a business, tribunals often determine the net present value of the likely future income stream.

Who can benefit from these standards of protection?

An "investor" can normally only take advantage of the protections afforded under a BIT – and bring a claim against the Host State – if they are either:

- an individual with the nationality of a country which has entered into a BIT with the Host State in question;
- an entity incorporated in a country which has entered into a BIT with the Host State in question; or
- (in some BITs) an entity which is incorporated in the Host State in question, but which is controlled by nationals of the other State.

Forum for claims under a BIT

Provided an "investor" meets the above criteria and can demonstrate that they have an "investment" in the Host State, BITs allow them to refer claims against the Host State for breaches of the standard of the protection to international arbitration.

This frees the "investor" from having to bring proceedings in the local courts (which may, potentially, be partial to the Host State's position). No separate arbitration agreement need be negotiated between the qualifying "investor" and the Host State before international arbitration proceedings can be commenced. This is because the Host State's consent to refer disputes to international arbitration is given when the Host State entered into the BIT.

The qualifying "investor" will normally be able to choose between several different rules and fora. Typically, these include: (i) the rules of the International Centre for the Settlement of Investment Disputes (ICSID); (ii) the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL); and (iii) the rules of one of the arbitral institutions such as the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC).

Most BITS require a notice of dispute to be served, and then prescribe a "cooling-off period" of between three and nine months, during which the parties are encouraged to pursue settlement negotiations. If no amicable settlement can be reached, then a formal Request for Arbitration can then be served under the applicable arbitration rules.

How many BITS are there?

Globally, over 2,900 BITS have been entered into. Of these, just over 2,500 are in force. There is therefore considerable scope for "investments" to be made into a Host State through a fund-flow structure such as to attract the benefits of a BIT that that Host State has been entered into.

A list of BITS can be found on a database maintained by the United Nations Conference on Trade and Development (UNCTAD) at <http://investmentpolicyhub.unctad.org/IIA>, - however, it is always prudent to check with the respective Governments to ensure that the BIT that has been identified is in force (or to see if a BIT that is not yet listed has come into force).

Conclusions

Where there is a risk of political influence being exercised by the Government of the Host State, then, where possible, "investors" should attempt to structure their "investments" through a company in a jurisdiction that has a BIT with the Host State in which the investment is being made (and, in the case of an investment in an EU Member State, through a company incorporated in a non-EU jurisdiction).

This simple step can provide significant value for the money. For modest advisory fees, financially significant "investments" can be given considerable extra protection, which in turn gives significant comfort to "investors", their shareholders and lending banks.

CLIFFORD CHANCE'S BIT EXPERIENCE

Clifford Chance has extensive BIT experience all around our network and remains at the forefront of developments in this area. We also regularly assist with investment protection strategies and structuring issues when investments are being planned.

Recent mandates acting for investors includes advising:

- Bawabet Al Kuwait Holding in an ICSID arbitration against Egypt brought under the Kuwait-Egypt BIT concerning Government-imposed gas price increases and the removal of free zone tax status;
- Manchester Securities in an UNCITRAL Rules, PCA-administered case brought against the Republic of Poland under the US-Poland- BIT concerning the discriminatory invalidation of mortgages and the expropriation of Manchester's investment by the Polish courts;
- Invenergy Renewables in an UNCITRAL Rules, PCA-administered case brought against the Republic of Poland under the US-Poland BIT concerning violations of several contracts concluded by Invenergy's subsidiary companies with the Polish State-owned companies and regulatory changes to the support scheme for wind energy investments;

- STEAG GmbH in an ICSID claim against the Kingdom of Spain regarding damages arising out of changes in the renewable energy production industry regulatory framework;
- Cortec Mining Kenya in a dispute against the Republic of Kenya concerning the revocation of a mining licence in relation to Mrima Hill, home to the third largest undeveloped rare earth deposit in the world;
- Mr Valery Belokon in an UNCITRAL arbitration against the Kyrgyz Republic under the Latvian-Kyrgyzstan BIT in respect of claims concerning the expropriation of Manas Bank and violations of the fair and equitable treatment standard; and
- Shell Nigeria Ultra Deep Ltd in an ICSID arbitration against the Federal Republic of Nigeria, brought under the Netherlands-Nigeria BIT, concerning the expropriation of an oil exploration licence.

Our experience for Host State Governments includes advising:

- the Government of Poland in an Energy Charter Treaty claim regarding the operation of an oil product business in Poland worth over US\$700 million; and
- the Government of Taiwan in an arbitration under UNCITRAL Rules administered by the Permanent Court of Arbitration under the Singapore-Taiwan FTA. The matter concerns allegations of interference with rights associated with the ownership of shares in a banking company.

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