

ANALYSIS

Bilateral Investment Treaties

Familiarity With BITs Essential For U.S. Companies Considering Foreign Investments

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U.S. companies that invest in foreign countries operate under a global legal framework that has been vitally transformed in recent years. Traditionally, foreign investors who were mistreated by host states had no effective recourse outside the host state's courts. Today, a vast network of bilateral investment treaties (BITs), which give foreign investors private rights of action before neutral arbitral bodies, covers the globe. Successful planning and structuring of foreign investments must take this new legal regime into account.

Bilateral Investment Treaties

The first bilateral investment treaties with substantive investment protections and neutral procedural mechanisms appeared in 1969. After a slow start, BITs began to proliferate dramatically in the 1990s. Today there are over 2,400 BITs, as well as several important multilateral investment treaties, including NAFTA and the Energy Charter Treaty. The United States has entered into some 40 BITs. For U.S. companies planning foreign investments, it is important to know that the U.S. has entered into BITs with, for example, Argentina, Bulgaria, Cameroon, Egypt, and Jamaica, but not with such prominent investment targets as Brazil, China, or Nigeria.

The investments protected by BITs are broadly defined. They include not only productive facilities such as factories and mines, but also equity participation, intangible property, concession contracts, intellectual property, and licenses. However, simple cross-border sales of goods are generally not considered investments for these purposes.

BITs perform two critical functions. First, they provide substantive protections to investors. Second, they provide for the resolution of investor-state disputes before a neutral arbitral body.

Substantive Protections

BITs contain what amounts to an investment bill of rights. These substantive protections reduce the need to rely on the often amorphous principles of international law. Instead, investors may rely on guarantees inscribed in the treaties themselves.

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BITs contain both comparative and absolute guarantees. Comparative guarantees require the host state to treat foreign investors no less favorably than domestic investors and other foreign investors. Absolute guarantees forbid uncompensated expropriations, arbitrary measures, local content requirements, and unfair judicial and administrative proceedings. They also require the host state to treat foreign investors fairly and equitably, provide full protection and security, and allow funds to be freely transferred into and out of the country.

Dispute Resolution Provisions

The dispute resolution provisions found in BITs make these substantive protections meaningful. By authorizing aggrieved investors to file claims before a neutral arbitral body, these treaties generally remove any need to submit such claims to the host country's courts, a highly unfavorable venue, and waive the host state's sovereign immunity with

respect to such claims. Most BITs allow the investor to file arbitration claims with the International Centre for Settlement of Investment Disputes (ICSID), an autonomous arm of the World Bank devoted to the resolution of investor-state disputes, often with the option to choose another international arbitration institution or to proceed under ad hoc rules promulgated by the United Nations Commission on International Trade Law (UNCITRAL). By executing the treaty, each signatory country promises to enforce all arbitral awards resulting from this process.

This system is working, as evidenced by the number of claims being filed. As of this writing, there are 110 investor-state cases pending before ICSID alone, and many others pending before such bodies as the International Chamber of Commerce or proceeding under the UNCITRAL Rules. Moreover, countries that have received adverse awards have paid the awards in most cases, bolstering the confidence of investors in the investor-state arbitration process.

Risk Reduction

This combination of substantive guarantees and a neutral dispute resolution process removes at least some of the risk historically associated with foreign investment. If the host country seizes your factory, freezes your bank account, adopts an unexpected and targeted regulation that puts you out of business, or hits you with a novel and discriminatory tax, you no longer are limited to seeking relief in the host country's courts under the host country's laws or pleading with the U.S. government to intercede on your behalf. You now can file BIT claims before neutral arbitrators with the authority to issue binding and enforceable awards.

That is not to say that the new regime is a perfect solution. Dispute resolution proceedings are often slow and costly, and the lack of a true appellate mechanism sometimes results in inconsistent interpretations of identical treaty provisions and a patchwork of hard-to-reconcile awards. But virtually everyone agrees that this imperfect but impartial process is far superior to the old regime of one-sided courts and diplomatic intervention (whether by gunboat or otherwise).

Impact on Foreign Investments

U.S. companies can take affirmative steps to make the most of the risk-reduction offered by BITs. Periodic audits of foreign investments to search for potential treaty claims are advisable. In addition, companies should incorporate “nationality planning” into their foreign investment structuring. Nationality planning involves an investigation into available BITs and their provisions before structuring a foreign investment.

For example, suppose you are a U.S. company intending to bid for a concession in Indonesia. The United States does not have a BIT with Indonesia. Does that mean you cannot obtain BIT protection for your intended investment? Not at all. Indonesia does have a BIT with the Netherlands. You may be able to obtain the protections of that Indonesia-Netherlands BIT by having your Dutch subsidiary (existing or newly created) bid on the concession.

Even if the country in which you intend to make the investment does have a BIT with the United States, it may also have a BIT with Germany that has more favorable investor protections. In that case, too, you may decide to make the investment through a German vehicle to take advantage of those greater protections. Alternatively, if you have already made the investment, you may be able to use the most-favored nation provision in the U.S. BIT to incorporate the more favorable provisions from the Germany BIT.

Of course, accounting for BITs is just one factor in deciding how to structure a transaction—tax concerns may be a higher priority. But in today's world of bilateral and multilateral

investment treaties, nationality planning has a central role to play in assessing and reducing the inherent risk involved in investing abroad.

Conclusion

U.S. companies increasingly have operations in foreign countries, whether across the globe in Asia or nearby in the Caribbean. In structuring and managing those foreign investments, they can ill afford to disregard the multitude of bilateral and multilateral investment treaties that govern the legal relations between host states and foreign investors. Accounting for the availability of BIT protections in investment planning and taking advantage of those protections in the face of adverse host-state measures is now an essential aspect of global management.

Securities

Eleventh Circuit to Rehear Ruling Over WorldCom Ads

The U.S. Court of Appeals for the Eleventh Circuit agreed Feb. 16 to rehear en banc a panel's divided conclusion late last year that NASD and Nasdaq Stock Market Inc. were immune from being sued under Florida law over advertisements implying that WorldCom Inc. stock was a good investment (21 CCW 338, 11/8/06) (*Weissman v. NASD*, 11th Cir., No. 04-13575, 2/16/07).

According to the panel's decision, between December 2000 and June 2002, plaintiff Steven Weissman purchased 82,800 shares of WorldCom stock on behalf of his minor children. When WorldCom collapsed, he lost almost his entire investment. In his diversity lawsuit against NASD and Nasdaq, Weissman contended that he relied on the defendants' print and television ads in Florida—designed to induce investors to purchase stocks traded on Nasdaq—touting WorldCom as a “great company” whose accounting complied with generally accepted accounting principles.

The self-regulatory organizations countered with a motion to dismiss the allegations, which the lower court denied. The district court held that while NASD and Nasdaq were

absolutely immune with respect to 1934 Securities Exchange Act-mandated regulatory or disciplinary functions, they were not entitled to such immunity in this case because Weissman's complaint related to private commercial conduct.

The Eleventh Circuit affirmed in part. It concluded that the defendants were, in fact, immune from suit over the dissemination of WorldCom's financial statements. However, it ruled, NASD and Nasdaq did not carry their burden of demonstrating entitlement to absolute immunity from Weissman's claims over their for-profit commercial activity.

Text of the court's order is available on the court's Web site at <http://www.ca11.uscourts.gov/enbanc/issues/eb04-13575order.pdf>.