US Bilateral Investment Treaties: Recent Developments

A Bilateral Investment Treaty (BIT) is an agreement between two States meant to promote and protect private investment by nationals (companies or individuals) of one State in the territory of the other State (the “host” State). A number of protections are offered to investors covered by a BIT, which often include guarantees of fair and equitable treatment, fair compensation in case of expropriation, full protection and security, national treatment, non-discrimination and sometimes a most favored nation clause. Most BITs also contain a dispute resolution provision allowing an investor to initiate arbitration proceedings against the host State for violations of the treaty, in many cases before the World Bank’s International Centre for Settlement of Investment Disputes (ICSID).

The United States is currently party to 48 BITs, including seven that have been signed but not yet ratified.1 It is also in negotiations to conclude several others. Globally, there are almost 3,000 BITs signed in the world. The United States is also party to several Free Trade Agreements (FTA), many of which contain chapters providing comparable protection for investments (such as the FTAs with Australia, Bahrain, Chile, Israel, Jordan, Morocco, Oman, Peru and Singapore). The North American Free Trade Agreement (NAFTA) and the Central American Free Trade Agreement (CAFTA-DR) are good examples of multilateral treaties entered into by the United States containing a chapter on investments.

Several developments have recently occurred on the US BIT scene, which are notable as much for the discussion and debate they have produced as for the fact that they lie at very different ends of the spectrum in their promotion of US BIT interests: a new model US BIT was announced, varying degrees of enthusiasm have been expressed with respect to BITs between the US and the BRIC nations and, in a somewhat contrary footnote, Bolivia’s previously announced termination of its BIT with the United States will take effect on June 10.

New Model US BIT

Several States now have their own “model” BIT, which they use as a template when entering into negotiations with another State for the conclusion of a new treaty. The United States is one such country, having had its own model BIT since 1982. The adoption of a new model BIT does not change existing treaties, but it will form the basis of the US position in negotiating future treaties.

On April 20, 2012, the Office of the United States Trade Representative released its newly revised and updated model BIT.2 This new model has been the subject of a lengthy review process that began in February 2009, and has been a significant focus of the Obama administration, which has been keen to promote foreign direct investment and ensure that “U.S. companies benefit from a level playing field in foreign markets.”3

US BITs are essential tools for US companies and nationals when considering investing abroad, or if faced by measures adverse to their
investment by the host State of the investment. Many US companies have already resorted to arbitration pursuant to the dispute resolution provision of a BIT. Currently, there are at least 13 pending ICSID arbitrations that have been brought by a US company or individual under a US BIT. There are also currently a number of other international arbitrations that have been initiated by US companies in non-ICSID fora, such as the Permanent Court of Arbitration and others. In addition, foreign subsidiaries of US companies have relied on BITs signed by third countries to bring claims against certain States.

WHAT IS THE NEW MODEL US BIT AND HOW DOES IT DIFFER FROM THE 2004 MODEL BIT?

The 2012 Model US BIT is an update of the 2004 Model US BIT, which formed a template for US BIT negotiations since its adoption. The 2012 revisions aim to eliminate what were seen as previous shortcomings and update and refresh the model text. A summary of the principal changes follows.

Financial Services (Article 20)

Modification of the financial services provisions of the Model US BIT was motivated in part by concerns about claims that might have been asserted under existing treaties as a result of US government actions in response to the recent financial crisis. Fears were raised in particular that similar actions in the future could result in claims by foreign state-owned enterprises (SOE) with investments in the financial services industry. Yet despite the call for more wide-ranging amendments, only the following changes were made:

- A footnote (no. 18) was added to Article 20 which clarifies the scope of “prudential reasons” and makes clear that exempted “measures relating to financial services” for such reasons can include measures to preserve “safety and financial and operational integrity of payment and clearing systems”

State-Owned Enterprises (Article 2.2)

This subject generated much discussion with regard to the scope of the obligations imposed by the BIT upon state-owned enterprises. One change was made in this regard.

Article 2.2(a) makes clear that the application to a state enterprise of the substantive obligations of the BIT also extends to entities that have been delegated governmental authority. The 2012 Model US BIT includes a new footnote (no. 8) to this provision, which clarifies that governmental authority can be validly delegated for the purposes of the BIT by “a legislative grant, and a government order, directive or other action transferring … governmental authority.” This additional language ensures that even when governments delegate their authority to SOEs through informal means, such enterprises are still bound to abide by the obligations of the State in the BIT.

Performance Requirements (Article 8)

The 2012 Model US BIT widens the scope of the prohibition against performance requirements found in Article 8. Performance requirements are prohibited by many BITs as it is generally felt they prejudice investors by setting requirements that cannot always be met (or would result in less desirable economic conditions if they were met).
Article 8 has been amended (at 8.1(h)) to now include a prohibition against a State requiring an investor to show a preference to (i) the host State’s technology and/or (ii) any particular technology.

**Transparency (Article 11)**

Transparency and public participation were given significant weight during the BIT review. Some significant changes resulted.

**Standards-Setting (Article 11.8)**

The provisions found under Article 11.8 of the 2012 Model US BIT are completely new and are designed to ensure that standards are developed transparently and openly. Article 11.8 requires a host State to allow investors to participate in the development of standard-setting within the host State. This includes the development of product standards and technical standards by central government bodies within the host State. It also includes an obligation upon the host State to recommend that non-governmental standard-setting bodies also allow investors to participate in the development of standards by those bodies. The provisions under Article 11.8 are subject to State-State dispute resolution, rather than to investor-State arbitration.

**Regulatory Transparency (Article 11.2)**

The provisions concerning the publication of regulatory actions and transparency in host State regulatory and administrative matters have been expanded in the 2012 Model US BIT. While the 2004 Model US BIT required parties to publish in advance any laws, regulations, procedures, administrative rulings of general application and adjudicatory decisions, a new article (11.3) has been added to the 2012 Model US BIT. This increases the notification and commentary obligations in relation to the above situations. More explanations and substantive comments are now required from a host State in these instances.

**Environmental Obligations (Article 12) and Labor Obligations (Article 13)**

These sections of the 2012 Model US BIT sparked some debate. On the one hand, environmental organizations and labor unions argued for stricter provisions and for specific standards and controls to be set, alleging that the provisions under the 2004 Model US BIT were weak and unenforceable. On the other hand, many businesses argued for the provisions to be cut altogether. In the end, the 2012 Model US BIT positioned itself between these two standpoints.

The new Model US BIT places an obligation on host States to recognize and enforce domestic environmental and labor laws and to commit not to derogate from them (articles 12.1, 13.1, 12.2, 13.2). A consultation procedure has also been set out (articles 12.6 and 13.4), whereby parties are entitled to request a consultation with regard to these matters. However, these provisions are not subject to any kind of dispute resolution, other than the consultation procedure set out at articles 12.6 and 13.4.

**Appellate Mechanism**

The 2004 Model US BIT contained a requirement, in Annex D, that the parties commence negotiations over an appellate mechanism for investment arbitration within a fixed period of time. It was felt, however, that this was ineffective because of the considerable difficulties in obtaining any consensus as to what appellate mechanism would be desirable.

In the 2012 Model US BIT, Annex D was deleted in favor of a provision in the text of the BIT providing that there is no fixed time period for commencing discussions.

**Territorial Seas**

The definition of the “territory” of a party has been modified to expressly include territorial seas as defined by customary international law. Territorial seas had not been specifically included in the definition in the 2004 Model US BIT;
rather, the definition had been left entirely blank, to be completed by the parties during the BIT negotiations.

**REACTIONS TO THE NEW MODEL US BIT**

Reactions to the new Model US BIT have been markedly divided. Opponents claim that it has barely changed from the 2004 version and that it does not do enough to protect domestic public interests. Supporters, however, strongly welcome the revised Model US BIT, seeing it as evidence of US commitment to open markets, the protection of US investments overseas and the elimination of foreign barriers. They especially praise the localized technology and transparency and standard-setting measures. Yet even the supporters state that they are “very disappointed” that the new model did not go further and that many of their proposed changes during the review process were simply overlooked and not included, such as recommendations to tighten the core substantive investment law protections in Articles 3 – 10.

**Other Developments: US BIT Negotiations with BRIC countries**

In other developments, there has been a recent increase in interest in the conclusion of US BITs from at least some of the BRIC countries. On April 16, 2012, US Secretary of State Hilary Clinton spoke at the National Confederation of Industries in Brasilia, at which she urged negotiations for a US-Brazil BIT: “We need to explore a bilateral investment treaty. We need to consider in the future free trade agreements. We need to look at how the United States and Brazil can anchor economic growth and democratic values not only for the region, but around the world.” Whether this will come to fruition will remain to be seen, as Brazil has traditionally been opposed to BITs, evidenced by the fact that no such agreements are in force in Brazil.

At the Fourth US-China Strategic and Economic Dialogue in Beijing, on May 4, 2012, China and the United States committed to scheduling a seventh round of negotiations for the conclusion of a BIT, and also committed to intensify such negotiations. Negotiations for a potential BIT between India and the US have made “active” progress according to Nancy Powell, the US Ambassador to India, who also confirmed that a new round of talks will begin soon. Russia has also publicly indicated recently that it is interested in engaging in talks with the United States concerning a BIT.

**Not a Happy Ending in Every Case: Bolivia’s Termination of its BIT with the United States**

There has been increasing defiance by certain Latin-American countries, including Bolivia, Venezuela and Ecuador, over BITs and their dispute-resolution clauses. In 2011, Bolivia announced the termination of its BIT with the United States, effective June 10, 2012.

Bolivia originally signed the US/Bolivia BIT on April 17, 1998, and the treaty came into force on June 6, 2001. Notwithstanding the BIT’s termination, current investments that were made while the US/Bolivia BIT was in force will continue to be covered by the provisions of that treaty for the next 10 years pursuant to Article XVI, paragraph 3. In other words, the termination will only affect US investments in Bolivia made after June 10, 2012, which will no longer be protected by the treaty. For US companies considering investing in Bolivia going forward, ways will still exist to structure investments to achieve protection under another treaty, subject to conditions.

*For more information about the topics raised in this Legal Update, please contact any of the following lawyers.*

**Dany Khayat**

+33 1 53 53 43 43
dkhayat@mayerbrown.com
Endnotes

1 See http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp

2 For text of Model US BIT, see http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf


4 As of May 24, 2012, for the global list of pending ICSID arbitrations, see: http://icsid.worldbank.org/ICSD/ProfileServlet?requestType=GenCaseDtlsRH&actionVal=ListPending

5 Statement released by the Emergency Committee for American Trade (ECAT) on April 20, 2012.