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Why Should Countries with Limited Recognition Start Concluding BITs? – Several Overlooked Motives

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Introduction

The two main reasons why countries generally agree to sign bilateral or multilateral investment treaties (BITs or MITs) are to attract foreign direct investments, while at the same time protecting their own citizens' investments abroad by reducing political risk. Arguably, there might be multiple added values on top of these reasons for a specific group of countries or quasi-countries, meaning States with a limited recognition as such. This post will explore these added values by providing theoretical foundation and practical examples.

Building up consensus for their recognition

One of the four criteria that defines a State – according to article 1 of the 1933 Montevideo Convention on the Rights and Duties of States – is the capacity to enter into relations with other States. Now, the most obvious way a State may enter into relations with other States is through the conclusion of international treaties, bilateral or multilateral ones. One particular type of international treaty – that happens to be one of the most successful international instruments in terms of diffusion – is indeed the so-called BIT, with over 3,000 different BITs having been negotiated, signed and ratified all around the world by many different State Parties.

For States with limited recognition, there might be several other reasons to conclude bilateral investment treaties, other than enticing reciprocal investments from and to other States. One of these reasons would be to strengthen and increase the recognition of their statehood by the international community. In fact, should a State conclude a BIT with a country with limited recognition, that State would recognize the latter as a full-fledged State. Depending on whether the former State had previously recognized or not the latter, its recognition would be either express or implicit, respectively. Put differently, States' opinio juris confirming the statehood of the new emerging country would be reflected in the State practice of concluding international agreements with the new international entity.

The good thing about these kind of treaties is that both capital-exporting States as well as capital-importing States are inclined to sign as many BITs as they can (or at least they used to be, until recent years), because of the legal certainty with which these BITs vest the investment of their nationals and because of their capacity of boosting foreign investments. Besides, many States – that once used to be regarded as capital-importing States – are increasingly becoming capital-exporting powers with the new need of protecting their own citizens' investments abroad. Consequently, the foreign policy of countries with a limited recognition may use these BITs to leverage other States into recognize them (expressly or implicitly).

Effective control over national resources

Another of the four criteria that defines a State – always according to article 1 of the 1933 Montevideo Convention on the Rights and Duties of States – is the capacity to exercise effective control over the territory claimed by a State. And, indeed, these BITs may additionally represent for these partially recognized States an opportunity to make clear, officially and internationally, their *formal* and ***effective*** control over key resources or lands disputed by neighboring countries. On one hand, these States would *formally* claim their sovereignty over national resources by signing these treaties with other States – that subsequently would back up this sovereignty – and on the other hand, these countries would ***exercise effective control*** by virtue of entering into investment agreements with foreign companies to develop such resources. This way foreign investors, instead of entering into investment agreements with the neighbor or competing country over the disputed territory, might feel more comfortable in dealing directly with the authorities of the State, whose universal recognition is underway.

An opportunity to draw new and more suitable economic policies and delimit their international obligations

Further, the new BITs negotiated by these countries with limited recognition will clear any doubt about whether the BITs concluded by their bordering States, or predecessor State (or the State that allegedly continues to claim rights over their territories) are applicable or not to them. Obviously, a newly emerged country that negotiated its own BITs, whereby it pursues and reflects its own economic policy and goals shall not be dragged to an investment arbitration based on a BIT concluded by its neighbor or predecessor State (more often than not, an old BIT that presumably pursues different economic policies, not necessarily shared by the new State). The newly emerged State should not be bound by that treaty, unless, of course, that State expressed its consent to that BIT in writing and the other High Contracting Party to that treaty agrees to be bound by a BIT with a different Contracting Party, for instance, by means of Exchange of Notes. Consequently, the negotiation of new BITs will reinforce the fact that an emerging country possesses a different international legal personality from its predecessor or eventual trespassing neighbor State, whose international obligations shall not bind the emerging or seceding State.

This active treaty-making policy could avoid some surprising and undesirable outcomes in Investor-State arbitrations, such as the Decision on Jurisdiction in *World Wide Minerals Ltd. v. The Republic of Kazakhstan* (19 October 2015, UNCITRAL arbitration) holding the respondent State bound by the 1989 Canada-Soviet Union BIT for facts that occurred between 1996-97 (viz. five years after the dissolution of the Soviet Union) and despite the fact that Russia – and not Kazakhstan – is regarded as the legal successor of the Soviet Union.

ISDS by arbitration

The inclusion of arbitration as investor-State dispute settlement (ISDS) mechanism is desirable both for investors and the countries with limited recognition. For the former, it provides for a neutral forum and ensure the effectiveness of the rights bestowed by the BITs. For the latter, arbitration is also the optimum solution because of their specific problems and the possibility to define clearly the contours of a dispute. Indeed, these countries often face interferences from surrounding States which could affect investors' assets located in their territory and trigger their responsibility for any omission of protection. Since arbitration is based on consent, it allows to curtail in a clear way the scope of parties' consent to arbitrate and, accordingly, the tribunal's mandate. Thus, these countries could expressively leave every dispute with investors arising from compensation claims for damages due to armed conflict or civil disturbances outside of the scope of the arbitration provision.

A practical comparison

An example of a country with a limited recognition that, consciously or unconsciously, adopted this policy of concluding BITs is the Republic of Kosovo, whose independence was declared on 17 February 2008. For instance, Kosovo entered into a BIT with Switzerland on 27 October 2011, in force as of 13 June 2012. Currently, 111 out of 193 United Nations Member States have recognized it as a full-fledge State. And according to some critics (whether rightly or wrongly), Kosovo enjoyed a somehow hasty recognition indeed.

Whereas an example of a country that is missing out on this opportunity (and, actually, is paying the price thereof) is the Sahrawi Arab Democratic Republic (SADR or Western Sahara), whose independence was proclaimed on 27 February 1976. This State has not concluded any BIT yet. Currently, 84 out of 193 United Nations Member States have recognized it as a full-fledged State. Missing out on this opportunity has taken its toll on the SADR, since British and French oil companies have applied for and been granted oil exploration and production licenses in Western Sahara with the Office National des Hydrocarbures et des Mines (ONHYM), the Moroccan state oil agency (instead of applying with the SADR Petroleum Authority). Despite the UN Legal Office stating that any oil exploration and exploitation in the SADR's territory would be in violation of the international law, unless obviously the Saharawis consent to it, these foreign companies preferred to enter into petroleum agreements with Morocco. In this respect, it is noteworthy to remember that Morocco has signed around 80 BITs. Maybe if the SADR had signed as many BITs, these foreign investors would have instead negotiated with the SADR authorities the relevant Producing Sharing Contracts for their respective projects. Plausibly, deciding with whom to enter into these contacts, either Morocco or the SADR, is not a matter of financial or technical resources of the given State party involved (since probably Morocco also does not have the required know-how, financial means, or the will to allocate public money for these projects, otherwise it would have conducted the explorations by itself). It is, arguably, more a question of legal certainty and what State can offer more guarantees for the projects at hand. Being that the very purpose of these BITs is to provide the foreign investor with such additional guarantees, the SADR will conceivably have better luck with foreign investors (meaning investors will see in the SADR a business partner and will sit at the table of negotiations with its Government to develop its national resources in Western Sahara), when the SADR starts concluding BITs. Most importantly, in this respect, the inclusion of an arbitration provision as ISDS mechanism in these BITs is of the essence to gain the trust of those foreign investors.

Conclusion

In a nutshell, the conclusion of BITs by countries with a limited recognition may:
1. strengthen their statehood,
2. boost their effective control over natural resources for the good of its people,
3. help to redefine new economic policies consistent with their actual needs, and

4. clarify their international obligations vis-à-vis other States.

The views expressed in this article are those of the author and DO represent those of the law firm Bottega DI BELLA.

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This entry was posted on Thursday, March 1st, 2018 at 7:01 am and is filed under BIT, Investment agreements, Investment Arbitration, Investor-State arbitration, ISDS
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