Kluwer Arbitration Blog

On Why Corporations Should Care About Investment Treaty Protection Now More Than Ever

Trinidad Alonso (Luther Rechtsanwaltsgesellschaft) · Sunday, March 24th, 2019

Introduction

In their *Fourth Turning Theory*, Howe and Strauss put forward the thesis that every cycle in Anglo-American history had concluded with a great crisis, a *fourth turning*, from which a new order with a new set of beliefs had emerged. According to their predictions, a new crisis should have started sometime around 2005 and would last some 20 years. Today, many support the idea that we are immersed in such a crisis. Rising political risk around the world indicates that Howe and Strauss may have been right. Global risks intensified during 2018 with geopolitical tensions at the forefront.[1)] The prospects for 2019 reinforce that trend: seven out of the top ten risks expected to increase in 2019 relate to the political environment.[2)] A related and perhaps inherent feature of the current political environment is the ongoing discussion on the reform of the international investment regime and particularly, of investor-state dispute settlement (ISDS), which has sometimes translated in reduced investment protection.

Political risks are a major concern for companies with foreign investments. When deciding to invest abroad, companies typically take into account, among others, the existence of a double taxation agreement. Investors less frequently seem to consider securing investment treaty protection (ITP) to benefit from a suitable bilateral or multilateral investment treaty. Unlike in previous *fourth turnings*, today corporations have these treaties at their disposal. Against the backdrop of rising political risk and hostile stances towards investor-state arbitration, corporations are strongly advised to obtain and take advantage of ITP, which will allow them to protect their current investments, pursue new investment opportunities and ultimately strengthen their business overall.

Why investment protection is important, today more than ever

Over the past years, unfair governmental interference has proved to be a reality all around the world, both in developing and advanced economies. Political risks have a direct impact on businesses active in foreign markets: more than 55% of large corporations ($1bn+ revenues) reported to have suffered losses from political risks in recent years.[3)] Due to the current risk climate, the majority of large companies have scaled back operations or avoided new investments altogether, thereby foregoing expansion.

But ITP is not only a suitable device for large multinational companies. In fact, while some up-front costs and planning is necessary to implement ITP, small and medium-sized companies likewise stand to benefit significantly. Claims before investment arbitration tribunals are not always in the hundreds of millions as it is not uncommon for damage claims to amount to seven-digit figures. In fact, ITP may be even more suitable for smaller companies who cannot afford political risk insurance premia but, due to the nature of their business, are drawn to markets where political risk is especially high.

Looking a year back, an array of politically risky events can be brought quickly to mind: from the continued rise of populism and protectionism around the world and the currency and debt crisis in Turkey, to the more recent crisis in Venezuela which has already resulted in confiscations.

Yet ITP is not only a protective device against *black-swan* events, those that occur rarely and unpredictably. ITP is also a versatile tool that allows for an optimal structuring (or restructuring) of investments. Recent developments have highlighted this versatility.

The past months have witnessed a turning point in investment protection within the EU since the *Achmea* decision was rendered in March last year. The development has been extensively discussed in this blog. This post summarizes this development, including the latest three declarations of the EU Member States on the legal consequences of *Achmea* (one by 22 Member States, a second one by Finland, Luxembourg, Malta, Slovenia and Sweden and a third one by Hungary alone). Crucially, EU Member States have aligned with the European Commission's position that intra-EU BITs are inapplicable between EU Member States and have expressed their intention to terminate intra-EU BITs. In line with the European Commission, Member States also consider that EU law sufficiently protect cross-border investors' rights. This is certainly not the position of arbitration tribunals who had an opportunity to express their views on that point: intra-EU investment protection has already been deemed insufficient by the tribunals in *Achmea*, *Marfin Investment* and *WNC Factoring*.[4] Member States do not appear themselves to be placing much confidence in the current EU investment protection system having committed to discuss the current dispute resolution mechanisms and to assess the need for new ones. As suggested in this other post, however, a deeper understanding of investment protection under EU law may be required. For now, structuring foreign investments to ensure optimal protection under a relevant treaty appears not only a reasonable and prudent course of action, but also one owing to proper due diligence. In the absence of an intra-EU BIT (or its inapplicability), an EU investor in the territory of another EU state may wish to structure its investment through a non-EU country.

The North America region has also seen a development in a similar direction with the signing of the new United States-Mexico-Canada Agreement (USMCA) in November last year. USMCA eliminates investor-state arbitration between the US and Canada and between Mexico and Canada and curbs investment protection – both procedurally and substantively – for US investors in Mexico and vice versa. The implications of USMCA have been discussed in this blog in more detail here. Although USMCA has not yet been ratified by any of its signatories, it is already necessary to assess its impact: investors relying on the protections of NAFTA may want to consider restructuring their investments to secure more robust investment protection through more suitable investment treaties.

The legitimacy of these suggestions is in line with case law dealing with corporate restructuring. It is uncontroversial that structuring or restructuring an investment in order to benefit from the protections of a BIT is permitted.[5)] In any event, and until the dust settles, investors may want to integrate these considerations into their investment decision-making process to protect their current investments and avoid foregoing investment opportunities in their markets of interest.

Conclusion

In the face of the turbulent political climate and its associated political risks, ITP should be placed at the forefront of investment decisions within corporations. Due to its value, flexibility and resource-efficient implementation it is imperative to corporate counsels to familiarize themselves with investment treaties and their implications. Integrating ITP into investment considerations and structuring investments in a timely manner can protect their assets, prevent losses and further their expansion.

This proposition has become more forceful in the face of rising political risks and the recent unfriendly stance towards investor-state arbitration around the world. It is premature and undoubtedly difficult to predict what type of world order will emerge out of the current crisis but it would be in any case desirable that it be one where investors' rights are adequately protected, and foreign investment preserved and facilitated.

The views expressed in this article are those of the author and do not represent those of Luther Rechtsanwaltsgesellschaft.

References

?1 World Economic Forum, *The Global Risks Report 2019*, 14th Edition, p. 6.

?2 *Ibid*, page 12.

?3 Oxford Analytica for Willist Towers Watson, *How are leading companies managing today's political risks? 2018 Survey and Report*, p. 3.

?4 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para 262, *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, para 589, *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award of 22 February 2017, para 300.

?5 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, para 585.

This entry was posted on Sunday, March 24th, 2019 at 7:19 am and is filed under Investment, Investment protection, Investor, ISDS, ISDS Reform
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.