Treaty Arbitration - Securing a Neutral Forum Against Foreign Governments

5.8.2018

Most foreign governments require disputes with parties with which they have agreements to be litigated in their courts using their domestic law. This tends to create an unwillingness, on the part the private party, to seek redress in local courts in order to pursue its rights given the tendency of such courts to often side with the government.

Under certain circumstances, the company doing business with a foreign government may be able to avoid local courts and instead bring its claim in a neutral international arbitration forum located in Washington, DC through the use of a Bilateral Investment Treaty (BIT) or a Multilateral Investment Treaty (MIT).

BITs or MITs (such as NAFTA) provide the investor with a right to "fair and equitable treatment" meaning the host stage will not engage in behavior that discriminates against the investor and/or in favor of domestic investors.

BITs and MITs also provide private companies with protection from expropriation by the state without fair compensation. This expropriation can be direct or indirect regulatory taking.

The rights granted in these treaties are district and separate from contractual rights. They are public international law rights provided by treaty law. As such, the law that is applicable in these disputes is not the law of the contract between the parties, but rather public international law (not the law of any particular government) that has been developed over the last few decades.

Treaty rights arise when there is some action or omission by the host state (or a state agent) that adversely affects the rights of the private company. They cover acts not only of the central government but also local governments, state agencies as well as state-owned companies.

Related Services

International Business

International Trade and Customs Specialty Team

Litigation and Dispute Resolution

For example, if a U.S company is doing business with Panama and the local Panamanian authorities levy unfair and discriminating taxes on the U.S. company, the latter would have a claim against the Panamanian government for the breach of the U.S.- Panama BIT and not the contract between the two parties. That said, even simple breaches of contract could, depending on the definition of the term "investment" in the BIT or the MIT, constitute a breach of the applicable treaty.

Both BITs and MITs contain provisions for arbitration for the resolution of disputes. The dispute clauses often require a period of negotiation (often 3-6 months) between the parties for amicable resolution of the dispute after which the company can resort to arbitration. The most effective mode of arbitration contained many of BITs and MITs is the International Centre for Settlement of Investment Disputes (ICSID).

ICSID is an arbitral institution that is part of, but also autonomous from the World Bank and located in Washington, DC. It was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (i.e., The Washington or ICSID Convention). Over 150 countries have executed the ICSID Convention and its caseload has grown considerably due to the proliferation of BITs in the last 25 years.

Due to its semi-public nature (cases filed by claimants against governments are posted on the ICSID website along with basic information about each case), the threat of ICSID arbitration can be used quite effectively against foreign governments and especially those that try to attract foreign investments in their territories, as a tool for settlement. Once filed, an ICSID arbitration can be a lengthy process. That process, however, is generally well-run and often yields a fair outcome given the expertise of most investment treaty arbitrators.

If you have any questions regarding treaty arbitration or ICSID, please contact the author of this alert.

Akin Alcitepe
202.454.2800
alcitepe@butzel.com