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The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets

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Tax planning forms a natural part of any decision-making process regarding the optimal structure of foreign investments. Strangely enough, until recently, BIT-planning (i.e., planning to protect the investor's interests against unfair treatment by the host country's government via bilateral investment treaties), rarely received a seat at the table. Venezuela's actions in the oil and gas industry have emphasized, however, that the value of bilateral investment treaties cannot be overestimated. The decision by Mobil Corporation and ConocoPhillips to structure (or restructure) their investments in the Orinoco Oil Belt projects in Venezuela through a company incorporated under Netherlands law will probably save them billions of dollars. These investors invoked the protection of the Bilateral Investment Treaty entered into between the Kingdom of the Netherlands and Venezuela after the expropriation of their investments, and are currently involved in multibillion dollar arbitrations with Venezuela.

Foreign investors, especially those investing in emerging markets, are well advised to analyze not only the tax efficiency of a particular investment vehicle, but also the existence and substance of BITs to which the host country is a signatory. Sometimes

the tax and BIT analyses point to the same optimal investment vehicle. If not, the solution may be to use two investment vehicle layers so that optimal tax planning is combined with the best protection under BITs.

This article discusses what BITs are, how investors can enforce claims under BITs, and why using a Dutch or Curaçao entity and the associated extensive BIT treaty network of the Netherlands and Curaçao may prove useful when investing in countries that are perceived to be politically unstable. Finally, this article will also briefly address BIT developments in the EU.

What are BITs?

BITs are agreements between two countries protecting investments made by investors from one contracting state in the territory of the other contracting state. The purpose of BITs is to stimulate foreign investments by reducing political risk. The number of BITs entered into has increased exponentially over the last two decades. The first BIT was entered into between Germany and Pakistan in 1959. At the end of the 1980s, there were approximately 385 BITs, whereas currently the number approaches 3,000. Most BITs include the following substantive obligations that each country

undertakes toward investors from the other country, with only narrow exceptions:

- Treating foreign investors' investments *fairly and equitably*, i.e., not taking unreasonable or discriminatory measures and treating investments of foreign investors at least as favorably as investments from its own nationals and nationals of third states;
- Not *nationalizing or expropriating* investments from foreign investors, unless the measures taken are non-discriminatory, taken in the public interest, and while observing due process, are taken against payment of prompt, adequate, and fair compensation. Importantly, regulations substantially negatively affecting the value of an investment can qualify as an expropriation for these purposes; and
- Allowing funds relating to investments to be *freely transferred* by foreign investors without delay, which includes protection against foreign exchange restrictions. This protection was invoked several times under BITs entered into by Argentina.

In this article we only address bilateral investment treaties. Please note that there

are a few multinational treaties that also offer investment protection, the most important ones of which are NAFTA and the Energy Charter.

Enforcement of BITs

BITs are quite unique in that they provide a basis for claims by an individual person or company against a state. In an effort to avoid the need to turn to the national courts for a judicial remedy, BITs usually contain an arbitration clause submitting disputes to a neutral arbitration tribunal, normally the International Centre for Settlement of Investment Disputes (ICSID), the most frequently used alternative being arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Awards rendered by the ICSID are binding on parties and not subject to any court or other appeal, provided that an award can be annulled by a second ICSID panel, but only on grounds that are significantly narrower than the grounds that can be found in the New York Arbitration Convention. The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States on March 18, 1965 (the “Washington Convention”), as an initiative of the World Bank. The Washington Convention entered into force on October 14, 1966, after having been ratified by 20 countries. Under Article 54 of the Washington Convention, each of the current 150 states that have ratified it must recognize an award rendered pursuant to the Washington Convention as binding and must enforce the monetary obligations imposed by that award as if it were a final judgment of a court of that state. However, it should be noted that local law of the country in which enforcement is sought will ultimately determine whether particular sovereign assets can be seized.

There are currently 183 cases pending before the ICSID, including the \$7 billion case *Mobil Corporation, Venezuela Holdings B.V. and others v. Venezuela* and the \$30 billion case *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, both based on

the BIT entered into between the Kingdom of the Netherlands and Venezuela. In the *Mobil* case, the arbitration panel confirmed, in accordance with existing case law from ICSID panels, that the fact that a Dutch intermediary holding company was added to the structure years after the original investment and probably with a view to the political environment in Venezuela, did not negatively affect the rights of Mobil to seek protection under the Dutch BIT. In the *ConocoPhillips* case, the arbitral tribunal ruled on September 3, 2013, that Venezuela has unlawfully expropriated the investments of ConocoPhillips in three oil projects in Venezuela by failing to offer just compensation for the taking of ConocoPhillips assets in the oil projects. The arbitration will continue to determine the level of compensation. Venezuela (27) and Argentina (24) head the list of countries against which the most ICSID cases are pending.

BIT Due Diligence

Not all BITs are created equal. If a host country has entered into multiple BITs, it is worthwhile to review the contents of those BITs in order to determine which BIT provides the best protection for a specific investment. Some BITs are worded more investor-friendly than others. We’ll explore below some of the issues to look for when doing due diligence on BITs:

- *Which investments are protected?* Each BIT will have a definition of “Investments.” Some of these definitions are worded broadly, but it may also be the case that BIT protection is only awarded to a narrow category of investments, or that certain investments are expressly excluded. It may, for example, be limited to protection of equity interests.
- *When does the BIT apply?* It will be important to see whether BIT protection is only granted to citizens of, and companies incorporated under the laws of, or having their head quarters in, the contracting state, or whether for example, companies in third countries owned and/or controlled by such citizens or corporations also qualify for protection.

- *Term of BIT protection.* BITs are entered into for a specific term and may, or may not, be extended for a certain period after a termination notice has been given. In addition, it may be important to check whether the protection is also afforded to investments made before the BIT becomes effective.

Use of Dutch or Curaçao Investment Vehicles

Dutch or Curaçao investment vehicles are already often used for tax reasons. Dutch policy aims at removing international double taxation, and the Netherlands has therefore entered into nearly 100 international tax treaties. In addition, Dutch tax law does not provide for withholding tax on outbound interest and royalties. Lastly, profits received by a Dutch parent company from a foreign subsidiary or made through a permanent establishment situated abroad are exempt from taxation in the Netherlands (often referred to as the “participation exemption”). The extensive BIT treaty network of the Netherlands and Curaçao provides another strong argument for using a Dutch or Curaçao investment vehicle when making foreign investments in countries which are perceived to be politically risky.

The Kingdom of the Netherlands entered into 97 BITs of which 89 are currently in effect. These BITs generally apply to The Netherlands, Curaçao, St. Maarten, and Aruba. Curaçao is probably the only well-known off-shore jurisdiction that provides the benefit of such an extensive BIT treaty network. The model treaty on which most are based is considered to be very investor-friendly. The issues referred to above are dealt with as follows:

Which Investments Are Protected?

In virtually all BITs entered into by the Kingdom of the Netherlands, the definition of “investments” is worded broadly and is open-ended. The definition generally covers any kind of asset, including, but not limited to: (1) movable and immovable property and security rights in relation thereto; (2) rights derived from shares,

bonds, and other interests in corporations and joint ventures; (3) monetary claims; (4) intellectual property rights; and (5) rights to explore, extract, and win natural resources and other rights granted under public law.

To Which Investors Does the BIT Apply?

The Dutch Kingdom's BITs typically not only apply to citizens and corporations of the Netherlands, Aruba, Curaçao, and St. Maarten, but also to foreign corporations that are directly or indirectly controlled by such citizens or corporations. A significant number of BITs of other countries require qualifying investors to be both established in the contracting country and to have their head office there. These other BITs would therefore *not* provide protection on the basis of intermediary holding companies located in the state that entered into the BIT with the host country. The Dutch Kingdom's approach gives a lot of flexibility to structure investments in a tax efficient manner, while allowing the investor at the same time to benefit from the rights granted to investors under the relevant BIT, since it is possible to use multiple layers of investment vehicles. Almost all Dutch Kingdom BITs provide protection as long as there is a Dutch or Dutch Caribbean vehicle in the corporate structure.

Term of BIT Protection

The BITs of the Dutch Kingdom are in most cases valid for an initial period of 15 years. They usually also apply to investments that have been made before the date of entry into force. Unless a six-month advance termination notice has been given by one of the contracting states before its expiry date, they will automatically be extended for 10 years. Importantly, in the case of a termination, the provisions of the BIT generally survive for a further period of 15 years for investments that were made before its termination. Consequently, the Dutch Kingdom-Venezuela BIT that has been terminated upon Venezuela's request as of November 1, 2008, will for example, remain in force until November 1, 2023, for investments made before November 1, 2008.

BITS in Effect

Netherlands	89
Curaçao	89
Brazil	0
China	100 (not including U.S.)
India	65 (not including U.S.)
U.S.	40
Cayman Islands	0
Bermuda	5
Canada	27

BITs and BRICs

Below, we will briefly describe the BIT situation in the BRIC (Brazil, Russia, India and China) countries and provide, if applicable, some details of the BITs entered into by the BRICs with the Kingdom of the Netherlands, which are among the most investor-friendly BITs entered into by the relevant countries.

Brazil

Brazil executed 14 BITs, including one with the Kingdom of the Netherlands, but apparently had a change of heart and has not ratified any of them. It is not a party to the Washington Convention.

Russian Federation

The Russian Federation is a signatory to 44 BITs. The Russian Federation, or rather its predecessor, the Soviet Union, entered into a BIT with the United States in 1992, but never ratified it, so it is not effective. The BIT with the Kingdom of the Netherlands became effective in 1991. Russia has executed the Washington Convention, but has not ratified it.

The Dutch-Russian BIT has the following features:

- The definition of investments is very broad and includes, for example, intellectual property rights and concessions to explore natural resources.
- It offers protection for the benefit of intermediary holding companies.
- It offers direct access to ad hoc arbitration with arbiters to be appointed by the president of the chamber of commerce in Stockholm.

India

India has 65 BITs in effect, with a few pending. There is no BIT with the United States. The BIT between India and the Kingdom of the Netherlands has the following main features:

- The definition of investments is very broad and includes for example intellectual property rights and concessions.
- It offers protection for the benefit of intermediary holding companies.
- It offers access to ICSID or UNCITRAL arbitration.

China

China entered into about 100 BITs. The list does not include the United States. When investing in China, U.S. investors could therefore benefit from interposing an intermediary holding company from a jurisdiction with an investor-friendly China BIT. Obviously, interposing the intermediary holding company should not result in the payment of additional taxes, so the choice of jurisdiction will also depend on a thorough tax analysis. Interposing a Dutch intermediary holding company may fit the bill.

The Dutch-China BIT has the following features:

- The definition of investments is very broad and includes, for example, intellectual property rights.
- It also offers protection for the benefit of intermediary holding companies.
- It offers direct access to ICSID or UNCITRAL arbitration (contrary to many other China BITs).

In the case of China, it is especially interesting that the BIT offers protection for the benefit of intermediary holding companies. Given that the Dutch-China Tax Treaty provides for a 10 percent dividend withholding tax, whereas, for example, an investment by a Hong Kong entity would only trigger a 5 percent withholding tax burden, the investment should not be directly made through a Dutch subsidiary. To add BIT protection, the Dutch subsidiary should be interposed

above, for example, such Hong Kong entity. Interposing the Dutch entity will not lead to additional taxes, given the Dutch participation exemption for subsidiaries (income derived through qualifying subsidiaries are not subject to corporate income tax) and the fact that dividends paid by the Dutch entity to a U.S. parent can be made without dividend withholding tax, either by using the U.S.-Dutch Tax Treaty, or by structuring the Dutch entity as a “cooperative.”

Developments in the EU

As of December 1, 2009, the EU became exclusively authorized to enter into new BITs on behalf of its member states. However, existing BITs entered into by an EU member state remain effective, unless and until the EU enters into a new BIT with the relevant other state.

Conclusion

When contemplating foreign direct investments, especially in emerging markets, BIT due diligence should be part of the work undertaken. Basing the decision on which investment vehicle to use solely on tax considerations may prove costly if a host government takes hostile action.

Using a Dutch or Curaçao entity may not only make sense from a tax perspective, but also because of the extensive BIT network of the Netherlands and Curaçao.

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