EU reveals the future of BITs between European States and the rest of the world

The European Union reveals the future of bilateral investment treaties between European States and the rest of the world: a re-assuring message to investors

When the Lisbon Treaty entered into force in December 2009, the European Union (EU) was granted exclusive competence over its member states for dealing with ‘foreign direct investment’. This competence, part of the EU’s common commercial policy, extended to bilateral investment treaties concluded between EU member states and third countries (Extra-EU BITs). At the time, there were already over 1,000 Extra-EU BITs in existence, whose future status required clarification.

On 9 January 2013, a new European regulation dealing with the status of Extra-EU BITs comes into force - Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and third countries – (the Regulation). The Regulation clarifies how member states and the EU will enforce existing Extra-EU BITs and negotiate new Extra-EU BITs in light of the preparation by the European Commission (Commission) itself of future bilateral investment treaties that will replace existing bilateral investment treaties entered into by member states.

The Regulation is a welcome development of the EU’s investment policy. It confirms the validity of existing bilateral investment treaties until the EU decides to replace them. As such, the Regulation is a clear demonstration that the EU is keen to maintain a high level of investor protection both within and outside its territory and that the Commission has heeded various warnings, including ours – see our previous client briefing on this issue.

Status of existing Extra-EU BITs

- The default position is that Extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU itself and the relevant third countries (the EU BITs).
- Extra-EU BITs signed after December 2009 will need to be reviewed by the Commission in order to ensure their compliance with EU law.
- Although the Commission is not directly empowered to require member states to terminate or renegotiate an existing Extra-EU BIT, the Commission and the relevant member state must ‘enter into consultations’ if one or more provision(s) of the relevant Extra-EU BIT constitutes a ‘serious obstacle’ to the EU’s negotiation of a future treaty with the relevant third country. Such consultations will determine whether the relevant member state needs to renegotiate or terminate the relevant Extra-EU BIT.
- However, the Regulation ignores the survival clauses in most bilateral investment treaties, which usually guarantee protection for existing investments for 10 to 15 years after termination. Any termination of Extra-EU BITs would be subject to these ‘sunset clauses’.

Status of future Extra-EU BITs

- Where the EU has not concluded a BIT with a third country, member states will still be able to open talks with trading partners. However, such talks will need to be approved and supervised by the Commission, which may also require the member states to include relevant provisions in the treaty under negotiation in order to ensure compliance with EU law.
- In relation to future bilateral investment treaties or free-trade agreements to be negotiated by the EU, there have been suggestions that Canada, India and Singapore will form part of the EU’s first wave of negotiations. Other ASEAN countries, Japan and the Arab Spring countries may be part of a second wave.
- There is, however, currently no model EU BIT and little guidance at EU level as to the investment protections that will be included in any EU BIT. As the negotiations with Canada are showing, it appears likely that the EU will be guided by the content of existing Extra-EU BITs as a starting point.

How will this impact on the resolution of disputes?

- If a dispute arises from existing, amended or newly executed Extra-EU BITs, the Commission will have the right to participate in the proceedings in order to ensure the best defence against any claims.
- The Commission furthermore proposes to issue another regulation on ‘establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party’ (the Proposed Regulation), which would cover the conduct of claims against EU member states under existing Extra-EU BITs.
- The default position under the Proposed Regulation would be that the member state would act as the respondent in any investment claim. However, the Commission would still have the discretion to decide who the proper respondent might be in circumstances where the claim arose from measures taken by EU institutions.
- The Proposed Regulation would also empower the EU to override the wishes of a member state and to dictate that claims be settled in cases where ‘there is an overriding interest of the Union at stake’.
- Regardless of the eventual allocation of financial responsibility between the member state and the EU, provision would also be made in the Proposed Regulation for the prompt payment by the EU of any settlement agreed or award rendered in the investor’s favour.