The EU Regulation on Bilateral Investment Treaties: A Victory for Certainty

By Josh Kallmer, Laurent Ruessman, and Ian Laird (Crowell & Moring LLP)

Few things complicate international business planning more than uncertainty regarding the legal protections that companies enjoy when they invest across borders. Along with a sound commercial basis for cross-border transactions, companies seek stable, predictable regulatory and political environments. It is for this reason that last month's decision by the European Union to ensure the legal security of Member States' bilateral investment treaties (BITs) with third countries is so important.

What Did the EU Do?

Before the Lisbon Treaty took effect in December 2009, EU Member States had themselves the authority to negotiate BITs and other types of "investment protection" agreements with countries outside the EU. Over the course of a half century, from the negotiation of the first BIT between Germany and Pakistan in 1959, EU Member States concluded some 1,200 such agreements. The Lisbon Treaty, however, gives the EU exclusive authority over investment policy, including the authority both to negotiate future investment protection agreements with third countries and to determine the relationship between existing Member State agreements and EU law and policy.

On December 12, 2012, after almost two and a half years of consultation and deliberation with the European Commission, the European Parliament and the Council jointly adopted a regulation concerning the existing 1,200 agreements. The regulation confirms that Member State agreements will remain in force until and unless they are replaced by an EU investment agreement. This somewhat technical, almost ministerial act has great significance for the investment environments that both EU and non-EU companies face.

Why does it Matter?

Bilateral investment treaties are powerful tools for internationally engaged companies to protect their investments and compete on a level playing field in foreign markets. They provide companies with international law protections when investing overseas, such as protections against nationality-based discrimination, arbitrary and capricious treatment, uncompensated expropriations, and other harmful government conducts. Equally important, they allow companies to take host governments directly to binding international arbitration and seek a monetary remedy if they believe a government has breached the agreement.

Bilateral investment treaties are powerful tools for internationally engaged companies to protect their investments and compete on a level playing field in foreign markets.

Moreover, EU Member States have some of the strongest, most investor-friendly BITs in the world. Whereas countries in North America and elsewhere have in recent years negotiated agreements that pursue additional public policy objectives, such as the protection of labor rights and the environment, Member State BITs have largely stuck to their original purpose: protecting cross-border investment. The significance of this regulation, therefore, is not just that it preserves legal protections, but that it preserves very solid legal protections.

Furthermore, the regulation enhances certainty not just for EU firms but for a wide range of companies outside the EU who rely on the protections of EU Member State BITs. The benefits flow to three categories of companies in particular:

- Member State firms investing outside of the EU. The regulation means that EU Member State companies investing outside the EU will still enjoy the treaty protections that their governments have negotiated for them. So, for example, a German technology company investing in Russia continues to have protection for its patents, a Swedish telecommunications firm in India retains the right not to be discriminated against in the awarding of licenses, and an Italian energy company has protection against uncompensated expropriations in Kazakhstan.
- Companies outside the EU investing in EU

Bilateral Investment Treaties, Continued on page 4

© Thomson Reuters 2013

Bilateral Investment Treaties, From page 3

Member States. The regulation also ensures that companies from outside of Europe investing in certain EU Member States will avoid uncertainty over whether their investors will be protected. This means that a Qatari financial institution taking positions in French companies will still be able to freely repatriate its returns, a Korean automaker in Spain will face the same regulatory structure as a Spanish automaker, and an Australian retailer can hedge against generally high levels of political and regulatory risk in Romania.

The regulation ensures that companies from outside of Europe investing in certain EU Member States will avoid uncertainty over whether their investors will be protected.

- Companies outside the EU investing through EU Member States into third countries. Finally, a consequence of the regulation is that non-EU companies with affiliates in EU Member States may continue to benefit indirectly from their affiliates' treaty protections. As a result, a U.S. agricultural company investing through a Dutch subsidiary into Ukraine could still enjoy minimum levels of police protection for its processing facilities, a Canadian mining company that uses a Belgian affiliate to invest in Mongolia would not lose protections against expropriatory land use policies there, and a Brazilian energy services provider operating through Portugal could still rely on that country's BIT to receive protection in Mozambique.

To be sure, it will take several years for the EU itself to develop a comprehensive investment policy to pursue in future agreements. As a result, companies investing into, out of, or through the EU will encounter uncertainty for some time with respect to the scope and content of the protections they will enjoy in these agreements. Until that time, however, this regulation contributes substantially to providing certainty and predictability for internationally engaged companies regarding the legal protections they enjoy with respect to their investments covered by BITs involving EU Member States. ❑

Jonathan (Josh) S. Kallmer (jkallmer@crowell.com) is a counsel in Crowell & Moring's International Trade Group and is based in the firm's Washington, D.C. office. Mr. Kallmer's practice focuses on international agreements, principally in the area of cross-border investment. Josh advises clients regarding the implications of bilateral investment treaties (BITs) and the investment provisions of free trade agreements (FTAs) for their business objectives. Laurent Ruessmann (lruessmann@crowell.com) is a partner in the firm's Brussels office. He assists clients in a broad range of international trade and customs matters under EU and Member State legislation, as well as under the WTO agreements. Mr. Ruessmann's work involves advice and representation in connection with EU anti-dumping, anti-subsidy and safeguards procedures and litigation, as well as various other EU, WCO and WTO trade and customs matters. Ian A. Laird (ilaird@crowell.com) is a partner in the International Dispute Resolution Group of Crowell & Moring based in the firm's Washington, D.C. office. Mr. Laird's counsel work includes arbitrations held under the provisions of NAFTA, CAFTA-DR, the Energy Charter Treaty (ECT) and other international investment agreements, typically applying the arbitration rules of ICSID or UNCITRAL. He is licensed to practice as a Special Legal Consultant in Washington, DC.

Invitation to Publish

Since 1991, WorldTrade Executive, Inc., has published periodicals and special reports concerning the mechanics of international law and finance. See http://www.wtexecutive.com. If you have authored a special report of interest to multinationals, or compiled data we want to hear from you.

By publishing with WorldTrade Executive, Inc. you establish your firm as a thought leader in a particular practice area. We can showcase your work to the many corporate leaders and their advisers who turn to us for insights into complex international business problems. To discuss your project, contact Gary Brown, 978-287-0301 or Gary.Brown@Thomsonreuters.com.

 © Thomson Reuters 2013

"The EU Regulation on Bilateral Investment Treaties: A Victory for Certainty," Practical International Corporate Finance Strategies, Vol. 39, No. 1, Copyright 2013, Thomson Reuters/WorldTrade Executive