

Investment Protection

Direct foreign investments, under the European Court of Justice's definition, encompass "*all foreign investments [...] which create sustained and direct relationships to the company to which capital is directed for the purpose of economic activity*", or "*capital, which from an investor residing in one country flows to a company in another country.*"¹ This broad definition provides flexibility favouring the EU Commission. The downside, however, is greater legal uncertainty; not an ideal prerequisite for investment.

These investments are protected by bilateral investment treaties (BIT) with, among other provisions, guarantees for discrimination-free treatment of investors or with the guarantee of a prompt, appropriate and effective compensation in cases of expropriation.

Previously, most bilateral investment treaties were concluded between countries without limitation to one economic sector. The first BIT came about in 1959 between Germany and Pakistan. Germany, with 139 signed bilateral investment treaties, 131 of which have entered into effect, heads the list of countries with BIT arrangements. It is essential, e.g., in the Energy Charter Treaty, that bilateral investment treaties grant investors of the other contracting party a direct right of action before international arbitrators in the event of a possible breach of contract (Investor-Country Complaints).

Today, the EU has the exclusive authority to negotiate investment protection and regulations for liberalisation, and to incorporate such rules in new EU free-trade agreements, which now also contain provisions for competition, or in stand-alone EU investment agreements. With third countries, such EU treaties therefore replace the bilateral investment treaties of the member states. As soon as EU investment agreements are concluded, foreign companies which invest in the EU, can, for the first time, lodge a complaint against the EU for any possible breach of obligations to protect investors.

Also integral to this subject are European legal regulations for the support of the EU for development of the entrepreneurial sector in third countries, reform of state-owned enterprises in developing countries, and for carrying out the strategic partnership between Africa and the EU (EU-Africa Infrastructure partnership).

¹ Decision from 23 Oct 2007, Kommission/Deutschland, Rs. C-112/05, Slg. I-8995, at 18.

We advise you concerning:

- notifying the EU Commission of bilateral agreements,
- the development of rules for investment protection,
- international negotiations,
- the exercise of implementation powers, which are conveyed through a bilateral investment treaty or through EU investment agreements,
- German bilateral investment treaties,
- applying for state investment guarantees (e.g., export credit guarantees, investment guarantees and the United Loan Guarantees of the Federal Republic of Germany),
- the clarification of status and validity of bilateral investment treaties,
- handling investor-state complaints,
- the conclusion of comparisons (EU Regulation No. 182/2011),
- the recognition and execution of arbitration awards.

We represent you in all legal disputes, especially in arbitration proceedings before the International Criminal Court, the International Centre for Settlement of Investment Disputes (ICSID), and before courts of the EU.

For further information, please contact your legal advisor at BSU Legal.