HUNTON& WILLIAMS

Client Alert

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Record Year For Investor-State Arbitrations Stresses Call For International Investors to Proactively Assess Their Dispute Resolution Options

The International Centre for Settlement of Investment Disputes landed a record 52 new registrations in 2015,[1] cementing its status as a preferred forum for the resolution of disputes between international investors and host States. It also signals a larger continuing trend by international investors to look to bilateral or multilateral investment protection mechanisms in order to resolve disputes. Moreover, the expansion of both bilateral investment treaties ("BITs") and multilateral protections, such as the Energy Charter Treaty and the Trans-Pacific Partnership, provide investors with greater opportunities to structure their investments, both at the planning stages as well as through strategic restructuring, through a number of subsidiary entities to take advantage of the different treaties available.

ICSID's 2015 registrations were dominated by disputes involving energy, oil, gas, and mining investments. Historically, 60 percent of all cases registered under the ICSID Convention and Additional Facility Rules have invoked BITs as the basis of consent to establish ICSID jurisdiction. Of all ICSID proceedings concluded in 2015, 64 percent resulted in a decision by an ICSID tribunal. Of these decisions, 47 percent resulted in a full or partial award to the investor, 33 percent resulted in total dismissals, and the tribunals declined jurisdiction in only 20 percent. Spain led all host States with fifteen cases registered against it, while Argentina (two registrations) and Panama (one registration) were the only Latin American host States with claims registered against them in 2015.

Given these trends, a proactive review of available treaty protections to clarify enforceable rights and to identify access to ICSID arbitration should be conducted before claims accrue to enable investors to adequately protect their investments. Advance planning is particularly important if there are multiple BITs from which to choose, if the investment involves the acquisition of or merger with an existing company that may have accrued investment claims, or if the host State of the investment has renounced some of its BITs or the ICSID Convention as have Venezuela, Bolivia, and Ecuador. Moreover, it is critical to maximize your opportunities to enforce these rights through international arbitration administered by an impartial tribunal, rather than rely on the national courts of the host State. Understanding your options and changing course where necessary prior to the accrual of claims will provide some predictability to the dispute resolution process and ultimately reduce costs.

Hunton & Williams LLP's international arbitration practice is prepared to assist those who must make these considerations prior to entering into foreign direct investments, as well as those who need to bring a claim. Our team of international arbitration specialists can advise about the corporate structure required for international investments to take full advantage of the best available treaty protections.

Should you need any advice concerning these critical issues, please contact a member of the Hunton & Williams LLP's international arbitration team.

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[1] The ICSID Caseload – Statistics (Issue 2016-1), at 7.

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