

PROTECTION AFFORDED BY INVESTMENT TREATIES IN DOUBT

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Investors should check the legitimacy of any public contracts awarded, though this can be difficult in jurisdictions where access to public records is restricted or the information held is not reliable

In a world where political uncertainty is increasing day by day, corporates need to manage the risks associated with international investments very carefully, attendees at a recent Iberian Lawyer event in Madrid were told.

Participants at the event – which was staged in collaboration with Dechert – heard that international investors are beginning to question the extent to which investment treaties provide protection, with one attendee citing the stance of the European Court of Justice (CJEU) in the dispute between Dutch insurance company Achmea and the Slovak Republic. In that case, the CJEU found that the arbitration clauses included in the international contracts on protection of investments agreed

between the parties are invalid, as they are in defiance of EU law.

Strategic planning is crucial when managing a wide range of risks that may arise not only due to changes in government policy, but also due to decisions by the legislature or the courts, attendees heard. A key step in this process is choosing a good local partner, and performing due diligence to identify potential issues, such as the legitimacy of any public contracts that may have been won. This is a challenge in certain jurisdictions where access to public records – such as commercial or property registers – is not open, or where the information held is not reliable. Structuring the investment not just for tax-efficiency purposes, but also in order to take advantage of existing agreements on reciprocal promotion and protection of investments (ARPPIs) is also important. For example, one attendee said it may be advantageous to channel an investment through a special purpose vehicle (SPV) in a third jurisdiction, if that jurisdiction has an ARPPI with the target country.



Governments open to negotiation

Participants heard that investment protection contracts are particularly useful in long-term projects, for example mining developments, where returns may only be obtained after years of very substantial investment. Governments are generally open to negotiating these contracts, and for clients it is key to have a tailored agreement in place, which may combine the most

suitable elements of other agreements already in existence. Jurisdiction issues may arise, however, in the event of a dispute, and it is vital to negotiate and include an arbitral clause which prevents parallel proceedings. Although investment protection contracts can be a useful form of protection alongside investment treaties, companies need to carefully plan a strategy and have clear objectives in mind if they're to avoid potential problems further down the line, one participant said.