

Client Alert

Latham & Watkins
Litigation Department

HICEE B.V. v The Slovak Republic: a Timely Reminder to Structure Foreign Investments Carefully to Obtain Protection under International Law

In its recently released Partial Award of 23 May 2011, a majority of the UNCITRAL tribunal in *HICEE B.V. v The Slovak Republic* found that the applicable bilateral investment treaty between the Netherlands and Slovakia (the "BIT") did not extend its protections to investments held through a locally incorporated intermediary company. The majority's decision highlights the need for international investors to ensure that their investments are covered by bilateral investment treaties that provide effective legal protection.

Background to the Dispute

The Claimant owned and operated two Slovak health insurance companies, "Dovero" and "Apollo." Its interest in these entities was held through a locally incorporated holding company.

Legislative reforms to the insurance market allegedly prevented Apollo and Dovero from distributing profits to their shareholders, eradicating the value of these businesses to the Claimant. In late 2008, the Claimant commenced arbitration proceedings under the BIT against Slovakia for damages.

The Majority's Jurisdictional Finding

The BIT defines protected "investments" as, *inter alia*, "every kind of asset invested either directly or through an investor of a third State." The parties disagreed as to whether the phrase "directly or through an investor of a third State" included investments made through a locally incorporated intermediary entity.

The majority — comprised of Sir Franklin Berman and Judge Peter Tomka — concluded that the BIT did not extend its protections to investments made by a locally incorporated entity (*i.e.* the holding company) in other locally incorporated entities (*i.e.* Dovera and Apollo).

Since the holding company was an "investment" in its own right, the Claimant could only claim under the BIT in respect of losses sustained by that company. It followed that the losses must have been sustained as a result of Slovakia's treatment of the holding company, and not Dovera or Apollo. The majority concluded: "once the subsidiary/sub-subsidiary structure is found to lie outside the [BIT's] field of protection, it becomes obvious that treatment meted out to [the holding company's] own investments through

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one of its local subsidiaries does not meet this requirement, whether or not treatment of that kind might otherwise fall foul of the substantive standards under the [BIT]."¹

Judge Brower's Dissent

Dissenting from the majority, Judge Brower considered that investments held "directly" as per the BIT meant simply investing without the involvement of a third State, irrespective of the number of intermediary companies that may have been put in place. He also noted that the tribunal in *Eastern Sugar B.V. v Czech Republic* (SCC Case No. 088/2004), in which an identical BIT was in issue, had exercised jurisdiction in respect of a Dutch investment held through intermediary companies.

Tribunal Lends Support to Investment Treaty Structuring

Notwithstanding its jurisdictional finding, the tribunal recognised that corporate structuring "to secure advantages from incorporation or operation in a particular jurisdiction" was permissible.² In particular, the tribunal recognised that an appropriate ownership structure could be put in place to ensure that a foreign investor could benefit from the protections of a particular BIT.

However, the majority cautioned that the burden "rests on the investor to make sure that the structure chosen achieves his intended result, and to undertake all necessary precautions to that end."³

Comment

The decision of the majority in this case highlights that ambiguous wording in investment protection treaties can lead to devastating consequences for foreign investors should they fail to structure their investments properly. Investors making investments in jurisdictions in which there is a risk of expropriation or other Government interference should structure their investments to take advantage of BIT protection. BITs provide investors with effective recourse

against host States for damages through international arbitration. A remedy under a BIT is independent of and supplemental to a claim that an investor may have under an underlying contract.

The majority's advice that investors undertake all necessary precautions to ensure their investments are protected by applicable investment protection treaties is important. Not all BITs are the same, and many BITs contain ambiguous wording that undermines the treaty protection that might otherwise be available. Investors should obtain advice from specialist public international lawyers to avoid pitfalls such as those experienced by the Claimant in *HICEE B.V. v The Slovak Republic*.

About our Practice

Latham & Watkins has a dedicated team of globally recognized public international law experts who regularly act for both private entities and States in contentious and non-contentious matters. The team boasts a wide range of practical public international law experience, including the structuring of foreign investments.

Our lawyers are particularly engaged in advising clients on the effective resolution of disputes between international investors and host States, or between two or more States. Much of our work involves analysis of the impact of private and public international law on international commercial transactions. Our team works on matters related to every continent and region of the world.

Endnotes

¹ Para. 147.

² Para. 103.

³ Para. 140.

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