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Risk Reduction in Energy Shipping: Investment Treaty-Based Strategies for Energy Shipping Investors

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Introduction

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- Overview of treaty-based investor protections
- How host States can reduce the risk of liability under investment treaties
- How foreign investors in energy shipping can protect their investments through investment treaties
- Sample cases that illustrate treaty-based investor protections

Treaty-Based Protections from the State and Investor Perspective

Investment Treaties – The Basics

- Investment treaties are treaties between the investor's state and the host state.
  - Approximately 3000 in force.
  - Cover nearly 2/3 of FDI according to UN.
  - Claims range from a few million to over 100 billion.

- They create **enforceable** standards of treatment by the state.
  - Investor can bring binding arbitration against state.
  - No need for a direct relationship or contract with the host state.
  - Award is enforceable like a state court judgment around the world.

Investment Treaties – The Basics

- They create enforceable **standards of treatment** by the state.
  - Protection against expropriation
  - Fair and equitable treatment
  - Full protection and security
  - National treatment
  - Most favored nation
  - Transfer of payments in freely convertible currency
  - Umbrella clauses

- Benefits:
  - **For the state:** investment treaties help create an environment that attracts capital and promotes development.
  - **For the investor:** investment treaties provide enforceable guarantees to avoid state interference, mitigate country and investment risk.

Example: The Energy Charter Treaty

- Covers all aspects of commercial energy activity:
  - **Trade**: create open and non-discriminatory energy markets throughout its member states.
  - **Transit**: set terms under which energy can be traded and transported across various national jurisdictions to international markets.
  - **Investment:** protect investors and their investments from political risks involved in investing into a foreign country.
  - **Energy efficiency**: strive to minimize harmful environmental impact.
  - **Dispute resolution**: provides for dispute resolution under ICSID, Additional Facility, UNCITRAL, and SCC rules.
- *Yukos* case (2014): $50 billion award

The State Perspective

- The protections offered by investment treaties can encourage investors to invest in the home state.

- It is important for States to understand their liability under investment treaties before evaluating State actions that may impact investors:
  - Consider implications of agreeing to protections at negotiation stage.
  - Conduct a review of BITs in force to understand the potential constraints on policy and state action.
  - Ensure the appropriate legal officer monitors BITs, claims and potential claims.
  - Consider previous cases where similar measures were challenged.

The Investor Perspective

- Investment treaties can mitigate risk through enforceable standards of protection (in lieu of or in addition to political risk insurance).

- It is important for investors to understand the benefits of investment treaties:
  - Invest strategically with treaty coverage in mind.
  - Consider existence of treaties at pre-investment stage.
  - Know whether the investor's country of nationality has a BIT with the country of investment.
  - If so, are protections robust?
  - Understand what alternatives exist if there is no BIT or protections are inadequate.

Potential Claims

- If a potential claim arises:
  - An arbitration is not always necessary or advisable.
  - The existence of treaty rights can create a space for dialogue.
  - Most treaties have a “cooling off” period that envisions a mandatory period of six months or more for negotiations.
  - Investors are usually open to discussions.
  - States will often want to avoid a public arbitration.
  - Sometimes arbitration is unavoidable.
  - Investors and states need specialist advice at this stage.

Sample Cases

Sample Cases

- ***Tidewater v. Venezuela* (2015) – ICSID**
  - Tidewater provides transportation services to petroleum companies, principally for offshore operations. The company was providing support, via a subsidiary, to national oil company PDVSA.
  - Tidewater and six related companies initiated arbitration against Venezuela. Two claimants invoked jurisdiction under the Barbados-Venezuela BIT; the others, under the Venezuelan Investment Law.
  - The Tribunal found jurisdiction under the BIT only, and dismissed the remaining claims.
  - The Tribunal agreed with remaining claimants that the State's seizure of claimants' vessels amounted to expropriation, awarding approx. $50 million in compensation.
  - **Prime example of an expropriation scenario that can affect shippers, and illustrates the need to understand which agreements provide State consent to dispute resolution.**

Sample Cases

- ***Laskaridis v. Ukraine* (2012) – UNCITRAL**
  - Investor contracted for the purchase of refrigerated cargo vessels from a state-controlled shipyard.
  - Due to financial difficulties, the shipyard failed to deliver a vessel that Claimants alleged was fully prepaid.
  - Claimants initiated an arbitration under the Greece-Ukraine BIT.
  - Case settled after the jurisdictional stage.
  - **Claims may arise from nominally commercial activity with State-owned entities, not just from government action.**

Sample Cases

- ***MINE v. Guinea* (1988) – ICSID**
  - Guinea and MINE entered into a contract to create a shipping company to transport Guinean bauxite to foreign markets, but the company never began operating.
  - MINE alleged that Guinea failed to give the company's management the necessary authority to conclude the transportation contracts, and that it had granted to another company bauxite rights reserved to MINE.
  - MINE commenced arbitration against the Republic of Guinea for breach of contract, and an award was issued in its favor.
  - Later, an ad hoc Committee annulled the award on the ground of failure to state reasons.
  - **Arbitration can resolve disputes arising from joint ventures or contracts involving a State or State-owned entity.**

Sample Cases

- ***Inmaris v. Ukraine* (2010) – ICSID**
  - German company Inmaris operated a sailing vessel owned by a Ukrainian public entity.
  - The parties agreed that Inmaris would pay to renovate the vessel in exchange for the right to operate it under a bareboat charter contract.
  - After the renovation was complete, Ukraine demanded additional payments from Inmaris. When Inmaris refused, Ukraine prohibited the vessel from leaving its territorial waters.
  - Inmaris initiated arbitration under the Germany-Ukraine BIT.
  - The Tribunal rejected Ukraine's argument that the contract was a mere commercial transaction, and determined that Inmaris' operation of the vessel constituted a protected investment.
  - **Charter party activities may constitute protected investments.**

Sample Cases

- ***Mamidoil v. Albania* (2015) – ICSID**
  - Greek firm specializing in transport, storage and sale of petroleum products built and operated an oil tank farm in an Albanian port.
  - With EU and World Bank support, Albania rezoned the port to ban fuel vessels there as part of its modernization of the port system.
  - Tribunal decided that business activities (construction and operation of the farm, establishment of a subsidiary, and its lease) constituted a single investment.
  - No indirect expropriation: essential characteristics of ownership were unaffected; loss of value alone was insufficient.
  - No FET violation: claimant had not obtained required permits and was aware of Albania's problematic legal and regulatory framework
  - **Illustrates the breadth of the concept of investment and the limits of substantive protections.**

Conclusions

Conclusions

- When making any investment in jurisdictions of potential political risk, prudent investors can no longer afford to be unaware of international investment protections.
- If the host country interferes with your investment, treaty protection and competent advice may allow you to seek compensation.
- As evident from the sample cases, investment arbitration increasingly protects energy shippers' assets and logistic activities.
- Treaty (re-)structuring provides effective protection at comparatively little cost.
- Not considering international legal protections at the outset could mean foregoing available coverage or remedies.

Questions?

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