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Book Review: Bilateral Investment Treaty Claims: The Essentials

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“This handbook sets out in clear, succinct and user-friendly language the key issues to be aware of when dealing with BITs”

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Long gone are the days when international investment law may have been perceived as simply the subject of academic interest and consideration. The proliferation of bilateral investment treaties (BITs), the dramatic increase in the invocation of multilateral investment treaties (MITs) and the growing inter-play between investment and international commercial arbitration in recent years all mean that it is imperative for practitioners of international arbitration to have a clear understanding of the fundamental elements of a BIT and the issues that arise with BIT claims. Such an understanding is required both at the transactional stage when agreements are being drafted and at the time a dispute arises or is contemplated. The need for such an understanding is driven by increasing client awareness of and sophistication regarding BITs, the

need to ensure that clients are properly advised and greater global professional competition.

As the distinguished arbitrators and academics Rudolf Dolzer and Christoph Schreuer note in the foreword to the book: "The multitude of bilateral treaties in the area of investment protection has created a confusing picture of patchwork regulation. Despite their large numbers, BITs by no means cover all foreign investments. Moreover, the diversity of standards and procedures offered by BITs has led to considerable inequality among investors of different nationalities in different countries. The appropriate remedy is often seen in the, as yet, unattainable goal of a grand multilateral treaty. But there are benefits to bilateralism and the resulting fragmentation. BITs offer a high degree of flexibility to states in deciding with whom and to what extent they wish to enter into treaty relations on investment protection. The diversity of economic relations among states and disparate ideas about the preferred modes of investment protection stand in the way of universally acceptable standards."

It is not surprising then that navigating one's way, especially at the outset, through the various aspects of a BIT claim can be confusing and overwhelming. The rate of change has been rapid and the growth of jurisprudence significant.

A clear path

This handbook sets out in clear, succinct and user-friendly language the key issues to be aware of when dealing with BITs. Qureshi begins by setting out the background to investment treaty arbitration and provides some interesting ICSID caseload statistics and provides useful research tools. The key issues of what is a BIT and the contents of a typical BIT are then considered.

The useful checklist provides a comprehensive and helpful summary of these issues for both seasoned practitioner and novice alike. It covers a wide range of considerations, including: the date the BIT enters into force; the timing of the alleged breach; whether there is an identifiable investor; whether there is an identifiable investment; fair and equitable treatment; expropriation; breach of the obligation to provide full protection and security, most-favoured nation provisions and their implications; "umbrella clauses" and their implications; whether there are explicitly incorporated procedural requirements to be followed; whether there is sufficient evidence to make out a prima facie case of breach of a BIT; the value of the claim; and "just and equitable" damages.

The section dealing with additional considerations looks at the topical and important issues concerning the use of preliminary/provisional measures, security for costs, abuse of process, illegality and third party funding

The role of national courts is considered in the next section. This highlights the important issues surrounding the role of national courts in supporting investment treaty arbitration proceedings and the enforcement of investment arbitration awards.

Key materials

The appendices provide key reference materials in one easy to handle resource. Annex 1 includes a sample BIT. Annex 2 includes relevant legislation, rules and guidelines, extracts of the ICSID Convention, the ICSID Arbitration Rules, the ICSID Enforcement Act (England and Wales) and the Code of Conduct for Litigation Funders (January 2014). Annex 3 contains recent BIT arbitration decisions which impact upon key concepts.

As Professors Dolzer and Schreuer also note in their foreword to the book: "The present volume is a most useful manual for practitioners and students alike. It offers a practice-oriented overview of the most important features of BITs and their application by tribunals." I fully agree.

Joe Tirado, partner & global co-head of international arbitration & ADR, Garrigues UK LLP. This handbook has been published as part of a three-book series, the other texts dealing with Public International Law Before the English Courts and Conflict of Interest in Arbitration. The author has donated all royalties to the Bar Benevolent Fund.