

## Investment Treaty Arbitration - A nutshell

By *Melanie Willems*



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ICSID arbitration has been a buzzword for some time. Significant amounts of money have been awarded and paid to investors who brought claims against states, or state entities. But what is the framework for such largesse, and why is it relevant to construction companies?

As to the framework, the International Centre for the Settlement of Investment Disputes was created in 1965. Since then, states have entered into a network of bilateral investment treaties which protect investors against states harming their investments made through unfair and inequitable treatment, discrimination or outright expropriation.

ICSID arbitrators have given the concept of 'investment' a wide definition, beyond injecting capital or funds, and it includes construction. An EPC contractor who has won a major government project is likely to qualify as an investor. The construction of a complex facility, or an infrastructure asset, has been confirmed as an investment activity in a number of cases.

The ICSID Convention does not say how substantial a project has to be before it can be an investment. Arbitrators will deal with each project on an individual basis, and there is no minimum threshold in terms of value or duration. So, a foreign government project worth a few million US\$ can be an 'investment', protected under any treaty in force between your home state and the state of the investment.

Consider the example of a US engineering and power company that won a turnkey contract to build a power plant in Turkey. The Turkish government then sought to change the deal, and the US company withdrew after protracted negotiations. The US investor brought an ICSID

claim, arguing for its lost profits that would have been made on the entire project.

That was rejected since the deal had collapsed at the pre-construction stage, but the ICSID arbitrators did award damages for the costs incurred in negotiating and preparing the technical and legal aspects of the construction project. Contractors sometimes think such costs are 'at their risk' - but in appropriate circumstances, they could be recoverable.

Contractors can and should manage their corporate structure to their advantage. If investing in State X, and there is an investment treaty with State Y, then have a special purpose vehicle incorporated in State Y enter into the contract.

ICSID tribunals have upheld picking treaty jurisdictions as being part of an investor's commercial freedom.

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