

Caspian Week 2019

## Investment protection: challenges for investors

Bryan Fok



Political and Non-Commercial Risks	Business and Commercial Risks
War and conflict	Changes in demand and supply
Changes in government	Financial risks
Changes in law and regulation	Operational risks
Legal Protection	
Protection under international law/national law	Contractual protection

# Investment treaties

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- > Multilateral and bilateral international agreements
- > Seek to promote foreign and cross-border investments
- > Guarantee minimum standards of protection to foreign investors:
  - Fair and equitable treatment
  - National treatment and “Most-Favoured” Nation Treatment
  - Protection against unlawful expropriation
  - Right to repatriate investment returns
- > Investor protection enforceable via international arbitration

# Investment treaties and arbitration in the Caspian region

Country	Total number of treaties	Number of intra-Caspian BITs	Number of cases as respondent
Armenia	49	5 (except Azerbaijan)	3
Azerbaijan	53	4 (except Armenia and Turkmenistan)	3
Georgia	38	5 (except Russia)	10
Iran	73	6	1
Kazakhstan	63	5 (except Turkmenistan)	17
Russia	90	5 (except Georgia)	24
Turkmenistan	34	4 (except Azerbaijan and Kazakhstan)	10

Only China, Egypt, France, Germany, Italy, Romania, Spain, Switzerland, Ukraine and Uzbekistan have BITs with all 7 Caspian countries

# Investment treaties and arbitration in the Caspian region

Multilateral treaties	Countries
Energy Charter Treaty	5 (Armenia, Azerbaijan, Georgia, Kazakhstan, Turkmenistan)
Economic Cooperation Organisation (ECO) Investment Agreement	4 (Azerbaijan, Iran, Kazakhstan, Turkmenistan)
Organisation of Islamic Cooperation (OIC) Investment Agreement	4 (Azerbaijan, Iran, Kazakhstan, Turkmenistan)
Treaty on Eurasian Economic Union	3 (Armenia, Kazakhstan, Russia)

No multilateral treaty covering all 7 Caspian countries

# Backlash against investment arbitration

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- > Yukos cases against Russia (USD 50 billion award under Energy Charter Treaty)
- > Russia withdrew from Energy Charter Treaty
- > Russia changed policy for future BITs:
  - Significant business activity requirement to qualify as investor
  - 180-day “cooling off” period
  - 2-year limitation period
- > As of 2019, approx. USD 659.6 million awarded against Kazakhstan
- > Ecuador and India announced termination of existing BITs
- > European Court of Justice ruled arbitration clause in intra-EU BITs incompatible with EU law
- > EU pushing for multilateral investment court

- > Contractual protection
  - Offshore dispute resolution (arbitration/court)
- > Political risk insurance
- > Host government guarantees and indemnities
- > Diplomatic protection of home state

Thank you for your attention.

**Bryan Fok**

bryan.fok@swlegal.ch

Schellenberg Wittmer Ltd / Attorneys at Law

15bis, rue des Alpes / P.O. Box 2088 / 1211 Geneva 1 / Switzerland

T +41 22 707 8000 / F +41 22 707 8001

[www.swlegal.ch](http://www.swlegal.ch)

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