

**C L I F F O R D**  
**C H A N C E**

**INVESTMENT TREATY PROTECTION**

# INVESTMENT TREATY PROTECTION

## 1

### KEY POINTS

- A** Bilateral (BITs) and Multilateral (MITs) Investment Treaties provide extremely valuable protection to foreign investors against government interference.
- B** Under BITs, signatory States promise to promote and protect investments (“investment” for these purposes includes assets or contractual rights) made in their territories by investors of other signatory States in a number of specified ways (for example, protection against expropriation without compensation).
- C** Crucially, BITs give foreign investors a direct right in international law to commence arbitration against the host State in the event of a breach. This remedy is distinct from remedies under national laws and remains available even if the host State changes its national laws. This remedy is also distinct from, and complementary to, any remedies in contract that a company may have against a counterparty.
- D** Investors can only take advantage of BITs if their investments are structured through entities in countries which have entered into BITs with the host State.

## 2

### WHY SHOULD AN INVESTOR CONSIDER TREATY PROTECTION?

- A** When investing in a foreign country, a business is exposed to a variety of political and other risks. Investment treaties go some way to mitigate that risk, by providing protection that would not otherwise be available.
- B** Investment treaty protection is particularly valuable because it provides a remedy that sits above national law. Even if domestic laws change over the life of an investment (which can often occur), the impact of that on the investor can be assessed against the international standards in the treaty, which a host State cannot unilaterally change.
- C** It is valuable also because it provides an additional remedy, distinct from and complementary to any contractual remedies which an investor may have against a counterparty – which may or may not be the State or a State entity. Sometimes such contractual and BIT claims can be brought in parallel.

# 3

## WHEN SHOULD AN INVESTOR CONSIDER TREATY PROTECTION?

- A** Ideally, ensure your corporate structure allows you to take advantage of investment treaty protection before making an investment in a new jurisdiction. That is, at the same time you structure for tax, check you are also protected under a BIT or MIT.
- B** As each BIT is individually negotiated, and slightly different, you need to check that the BIT that best fits your structure actually applies to the investing entity, and extends to cover the nature of the investment. The definitions in the treaty can be quite wide, but some are more limited, and may require evidence of engagement of the entity in economic activity etc.
- C** If you have already made an investment, it is not necessarily too late to obtain treaty protection. You may be able to restructure the investment to take advantage of a BIT or MIT at any point before a dispute arises.

# 4

## HOW DO INVESTMENT TREATIES WORK?

- A** Under a BIT, each State promises to promote and protect investments made in its territory by investors of the other State. As they are individually negotiated, each BIT will be slightly different, but the substantive protections are significant, and typically provide for:
  1. Protection against expropriation/nationalisation without compensation and observance of due process.
  2. Fair and equitable treatment (including abstaining from any discriminatory measures).
  3. Full protection and security (i.e. physical protection of the investment).
  4. Non-discrimination.
  5. National treatment: same treatment as that given to nationals of the host State.
  6. "Most Favoured Nation": treatment no less favourable than that given to nationals of any other countries not party to the BIT.
  7. Guarantee of repatriation of investment and returns.
  8. A commitment by the host State to observe all obligations it has in relation to that investor – whether those be in the treaty, in a contract or otherwise.
- B** The breach of any of these minimum standards may entitle an investor to compensation. Most importantly, BITs allow investors to bring international arbitration against host States.
- C** There are currently more than 2500 BITs in force, involving most countries in the world. There are also MITs such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) which offer protections similar to those found in BITs.

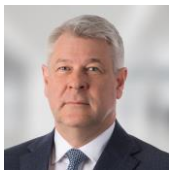
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## WHAT IS THE DISPUTE RESOLUTION PROCESS?

- A** If a dispute concerning the investment arises and a claim against the host State is possible under a BIT, a company can commence arbitration in accordance with the provisions of the relevant BIT – which may typically include ICSID or UNCITRAL rules.
- B** There will often be a choice of dispute resolution fora, and usually a specified “cooling - off” period to allow time for the parties to settle the case. However, the right to commence international arbitration can be lost if proceedings are commenced before the courts of the host State.
- C** Typically, there will be a panel of 3 arbitrators (of which each party will nominate one arbitrator). Once constituted, the tribunal will set the timetable and details for the process, including for submission of written arguments and evidence, and for the oral hearing.
- D** After the hearing, the tribunal will publish an award. An arbitral award can generally be enforced more easily than court judgments, particularly for awards made under the ICSID Convention, or where enforcement takes place in one of the 156 States that are party to the New York Convention.

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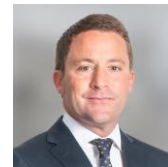
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