



# Bilateral investment treaties

## Managing the risk of government intervention

**BITs are powerful tools for managing and mitigating political risk in challenging legal environments and should be at the heart of any investment strategy.**

### Overview

Governments in emerging markets often react to economic or political pressures by taking sweeping measures at the expense of foreign investors. This can be seen in the African context, for example, in the recent Indigenisation and Economic Empowerment Act in Zimbabwe, and in the review and, in some cases, ultimate revocation of mining contracts in the Democratic Republic of Congo. The more risk an investor takes in its choice of host state, the higher the likelihood of adverse government measures, and the more critical it is for the investor to maximise the international protections available to it.

Bilateral investment treaties (BITs) provide a range of substantive rights and protections, such as protection from expropriation, for entities that invest abroad. More importantly, BITs provide investors effective recourse to enforce those rights, by claiming compensation before international tribunals from host states that have damaged their investments. There are some 3,000 BITs currently in force, hundreds of which have been signed by African states.

### Do you qualify for BIT protection?

BITs protect investors from one state with an investment in the other state that is party to the treaty. Qualifying as an investor depends on nationality. For legal entities, such as companies, this generally means being incorporated in one of the states party to the BIT.

Qualifying investments are generally defined to include any kind of asset, including shares, financial instruments, property rights, intellectual property, concessions and other contractual and legal rights. The asset must be present in the territory of the other state party to the BIT (the host state) in something more than a transitory fashion and in such a way as to expose the owner of that asset (the investor) to some enterprise risk.

### What kind of protection does a BIT provide?

BITs generally protect investors from legislative, regulatory and/or judicial actions of the host state of their investment if those actions are:

- expropriatory, either directly or indirectly;
- unfair or inequitable, including actions that violate investors' legitimate expectations;
- discriminatory as compared to nationals or investors from third states; or
- in breach of investment obligations or undertakings of the state

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Scenarios in which these provisions have been invoked include:

- traditional nationalisation of property, such as the alleged expropriation of oil fields in Nigeria and Venezuela;
- drastic government action following a financial crisis, such as the ‘pesification’ of dollar obligations by Argentina following its 2001 crisis;
- termination of licences or concessions, such as a water concession in Tanzania.

Most BITs provide investors with the right to launch international arbitral proceedings against the host state at the International Centre for Settlement of Investment Disputes (ICSID), an organ of the World Bank in Washington DC, or under the United Nations Commission on International Trade Law (UNCITRAL) rules.

BIT awards are binding on the host state and are usually complied with voluntarily. If not, they can be enforced against attachable assets of the host state through the courts in over 140 states worldwide. For example, in February 2010, farmers whose land was expropriated in Zimbabwe were able to attach, through the South African courts, four luxury mansions belonging to the Zimbabwean government in Cape Town.

## Mitigating risk before and after a dispute arises

Investors can structure investments in such a way as to attract optimal treaty protection – for example, by incorporating an intermediary investment vehicle in a state with a BIT in force with the host state. This treaty-planning can take place at the time an investment is made or later, at any time before a dispute arises.

Once a dispute arises, investors can use BITs as leverage in negotiations with the host state. By notifying the host state of a dispute under a BIT, an investor can signal that international recourse will be triggered if the state does not resolve the investment dispute amicably. If no satisfactory resolution is reached, the investor can unilaterally launch international arbitration against the host state claiming damages for treaty violations.

## Where we have seen this before

We have acted in 165 disputes between investors and states, some half of which arose under BITs. We have advised investors in Africa, the Middle East, Eastern Europe, Asia and Latin America on how to protect their investments using BITs – particularly in the energy and natural resources sector, which is especially vulnerable to protectionist measures by states.

In the past 20 years, BIT arbitrations have increased more than tenfold. In particular, since 2000, scores of investors have relied on BIT protection in arbitrations brought against Latin American states arising from protectionist measures taken by their governments. We have been at the forefront of these cases, obtaining the first award, for CMS Gas Transmission, in an ICSID arbitration against Argentina arising from its economic crisis (followed by favourable awards for BG Group and National Grid); representing ConocoPhillips in its dispute worth tens of billions of dollars against Venezuela following the expropriation of its oil fields; and representing over 30 more investors in arbitrations against Argentina, Bolivia, Ecuador and Venezuela alone.

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