



International Dispute Resolution: Treaty Planning FAQs

Savvy companies structure their holdings abroad to gain investment-treaty protection.

How does treaty planning protect investments abroad?

To promote foreign investment, states have signed thousands of treaties, which seek to protect investors' assets abroad. Savvy companies structure their holdings abroad to gain investment-treaty protection.

What is a BIT?

"BITs," or Bilateral Investment Treaties, are between two sovereign states and protect each state's investors' investments in the territory of the other state. BIT-like protections are also often embedded in free-trade agreements, such as the multilateral Energy Charter Treaty, the ASEAN-China Investment Agreement, and the NAFTA between the U.S., Mexico and Canada. Increasingly, bilateral free-trade agreements also contain such protections. There are thousands of these investment-protection treaties, known generally as International Investment Agreements (or "IIAs").

What do IIAs protect?

Each treaty's protection differs, so each requires careful checking. Typically, protection extends to in-country investments in the "host" country such as: locally incorporated entities; rights in minerals; licenses; contractual rights; shareholdings; rights to money; and intellectual property rights.

What protections are there?

Details vary, but most typical protections include: (i) fair and equitable treatment (e.g. protection from arbitrary treatment, or denial of justice before the courts, or fundamental changes to the legal or tax regimes), (ii) treatment at least as good as a host-state company would receive, (iii) full protection and security (e.g. protection from riots or the military destroying your facilities), and (iv) expropriation only for a public purpose, with due process, no discrimination, and payment of prompt, adequate, and effective compensation.

Some treaties allow investors to claim for state breaches of contractual or legislative obligations, but this protection is more controversial.

Typically, the right to expatriate capital is also guaranteed, as well as the right to use expatriate staff in management positions, etc.

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What happens if a State breaches a treaty?

Many treaties give an investor a direct right of action against the state itself. Investors bring claims in international arbitration, outside host-state courts.

This international-arbitration option, in an independent forum, is in addition to an investor's contract rights.

How do you access IIA rights?

A claim can typically be brought by a qualified holder of an investment – either a direct parent or company further up the ownership chain. When here is an investment into a high-risk country, we often counsel inserting several holding companies of differing qualified nationalities into the ownership chain.

To ensure an investment qualifies for protection, an appropriately qualified national must hold the investment. Basically, the national must be established in a jurisdiction that has a treaty with the host state. (Note that not all states have IIAs with each other; and not all IIAs are created equal.)

For example, a party investing into Nigeria might form a Nigerian local company, held by a Dutch company, held in turn by a UK company, which in turn may be held by another ultimate investor. If Nigeria expropriates the investment, causes of action would likely in that circumstance lie under both the Nigeria-UK BIT and the Nigeria-Netherlands BIT. Both offer slightly different protections.

What about tax consequences?

Of course, any such planning should dovetail with tax planning.

When should we do this?

Ideally, before the investment is actually made. Post-investment restructuring to gain treaty protection may also be possible in certain cases. However, attempts to re-structure an investment to gain IIA protection, after problems with the host state have arisen, are less likely to work.

Does it work?

Yes. As of the end of 2010, the ICSID Secretariat (who administers many of these cases) had in excess of 120 cases. The last five years have seen many examples of investors winning significant awards against host states, and receiving significant success

in those awards either being voluntarily complied with or enforced against state assets.

Of course, some states do not pay, and most states likely perceive an IIA claim as a very aggressive action. So, filing an IIA case is typical only when an investment has been so badly damaged as to make ongoing business impossible.

Treaty rights can also help the investor in resolving a problem early, from a position of greater strength, with the host state. In other words, the ability of an investor to enforce IIA protections may facilitate a negotiated settlement with a host state.

Who can help with this?

Please either speak with your normal V&E contact partner who can arrange the appropriate advice, or directly contact one of the Vinson & Elkins lawyers listed below.



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