Investment protection in Africa

OVERVIEW

Investment treaties provide a way for investors to mitigate sovereign risk problems, including those arising from changing regulatory frameworks. Companies investing in Africa may be able to structure their investment to take advantage of the protections provided by over 400 bilateral investment treaties which African countries have entered into with developed countries. For example, Egypt has entered into over 100 investment treaties, with both developed and developing countries, while Nigeria has entered into more than 20 such treaties, including with France, Germany, the Netherlands and the United Kingdom.

Investment treaties typically provide investors with a means of obtaining compensation where their investments have been expropriated, or where a State has failed to accord an investment "fair and equitable treatment". Key to this latter standard is the requirement for a State to respect the legitimate expectations that an investor might have when making its investments. Such expectations might arise from explicit or implicit government assurances. Investors also have a legitimate expectation in a stable and predictable legal and administrative framework that meets certain minimum standards.

Investment treaties typically contain an offer by a State to arbitrate investment disputes with investors of the other contracting party to the investment treaty. By commencing arbitration, a foreign investor can accept this offer, without the need for further agreement. This is a powerful remedy, as it allows an investor to bring a claim before an international forum. This may be particularly important where there are concerns as to the functioning and independence of the domestic legal system where an investment is made.

The protections provided by the network of investment treaties vary from country to country, and from treaty to treaty. It may be that an investment is already covered by an investment treaty. However, if investments are not covered by such treaties, an investor will be left only with remedies before local courts, or perhaps a contractual arbitral mechanism, if this has been negotiated. Existing investments may be restructured to take advantage of investment treaties where clients are concerned about sovereign risk. If investors wait until a dispute has arisen, it will be too late to take advantage of the protections offered by such treaties. When making investments in countries where sovereign risk is an issue it is prudent to take into account the protections afforded by investment treaties.

Even if there is no investment treaty in place, however, it may be possible to seek protection of investments under a national investment law, if such a law is in force in the host country. However, investment protection under national investment laws often falls short of the scope or standard of investment protection provided in a typical investment treaty.

INVESTING IN SIERRA LEONE – A CASE STUDY

To give one example, if a company were to consider investing in Sierra Leone, it needs to be aware of the fact that unlike many other countries, Sierra Leone is not a party to a significant number of investment treaties. The investment treaty which is likely to provide the best protection for foreign investors is the UK-Sierra Leone BIT. Sierra Leone has entered into an investment treaty with Germany but this treaty does not contain a mechanism for investors to bring claims against Sierra Leone.

The scope of investment protection in the UK-Sierra Leone BIT is broad. It includes the core international standards such as "fair and equitable treatment" and prohibits expropriation, except where accompanied by prompt, adequate and effective compensation. Further, the coverage of the BIT is broad. It extends to investments made directly and indirectly in Sierra Leone.

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The BIT contains an offer by Sierra Leone to arbitrate disputes with UK investors. Such an investor can accept Sierra Leone's offer to arbitrate by commencing arbitration within a framework administered by the International Centre for the Settlement of Investment Disputes ("**ICSID**"). The ICSID Convention is a multilateral convention, to which 147 States are parties. Any resultant ICSID award is enforceable before the courts of any ICSID contracting party as though it were a final judgment of the courts of that State.

Absent protection by the UK-Sierra Leone BIT, foreign investments in Sierra Leone are provided with some degree of protection by the Investment Promotion Act 2004 (the "**Act**"). The Act covers all foreign investment and not just that by UK companies, or UK nationals, but by companies or nationals of any nationality. However, it only extends to direct investments in Sierra Leone.

Further, the protections offered by the Act are limited compared to those provided in the UK-Sierra Leone BIT. The Act prohibits the expropriation or nationalisation of investments, except where this is required for a public purpose and is accompanied by prompt and adequate compensation. There is no provision for investments to be accorded "fair and equitable" treatment. This latter standard offers broader protections.

Significantly, the Act does contain consent to arbitration. This is important because it will allow a neutral forum to decide an investor's claims. However, Sierra Leone is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and it may therefore be problematic to enforce an award in courts of Sierra Leone.

Depending on other issues such as tax, it may therefore be beneficial for a foreign investor in Sierra Leone to structure its investment through companies incorporated in the United Kingdom, in order to benefit from the protection afforded by the UK-Sierra Leone BIT.

EXPERIENCE OF HOGAN LOVELLS

Hogan Lovells has advised a range of clients in relation to investment protection, in Africa and elsewhere. We have also acted, and continue to act, in numerous investment treaty arbitrations, both for investors and States.

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