

## Investment protection for Asian Investors in Africa

### INTRODUCTION

Over the past three decades, Africa has attracted a significant amount of Asian outbound investment. As States such as Japan and China race to engage with Africa, it is prudent for investors to consider whether protection of their investments under international law is available and how they may structure their investments to reduce the risks involved. However, investors may also be able to restructure existing investments to take advantage of investment treaties.

### INVESTMENT PROTECTION

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 investments, or restructure existing investments, to take advantage of the protections provided by over 400 bilateral investment treaties ("BITs") which African countries have entered into. For example, Egypt has entered into over 100 investment treaties, 14 of which are with Asian States. Further, Ethiopia has entered into more than 20 such treaties, including with China and Malaysia. Asian and African States have entered into close to 100 BITs.

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.

### STRUCTURING AND RESTRUCTURING INVESTMENTS

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 investors 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.

### PROBLEMS FOR JAPANESE INVESTORS

A Japanese company considering investing in Africa needs to be aware that, currently, Japan only has one BIT in place with an African State; the Japan-Egypt BIT. A Japan-Mozambique BIT was signed in September last year; however, it has not yet entered into force.

Depending on other issues such as tax, it may therefore be beneficial for a Japanese company to structure its investment through companies incorporated in a jurisdiction which has a BIT in place with the recipient State. For example, if a foreign investor based in Japan wanted to invest in Sierra Leone, it may be able to take advantage of the UK-Sierra Leone BIT by structuring its investment through the UK.



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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 extends to investments made directly and indirectly in Sierra Leone and contains an offer by Sierra Leone to arbitrate disputes with UK investors.

## **PROBLEMS FOR CHINESE INVESTORS**

China has already entered into BITs with 14 African States. Assuming that there is a BIT in force with the recipient State, the challenge for foreign investors in China is to ensure that the protection provided by the relevant BIT is adequate. For example, a number of China's early BITs such as the China-Ghana BIT only provide for arbitration of disputes involving the amount of compensation for expropriation. In practice, this significantly limits the investment protection available.

As explained in relation to Japan above, foreign investors based in China may also be able to access a greater level of investment protection by structuring their investments through a third State.

## **CHECKLIST**

As Asian investment in Africa increases, an important consideration for the investors will be how to reduce sovereign risk. In order to help foreign investors navigate the route to investment protection, we have compiled a checklist which can be used to analyse both future and existing foreign investments. The checklist should be an integral part of your corporate due diligence process – no different than analysis of tax treatment – when a merger, acquisition, restructuring, or new venture involves foreign investment.

If you would like to receive a copy of the checklist or have any questions please contact [Markus Burgstaller](#) (London); [Jonathan Leach](#) (Singapore); [Patric McGonigal](#) (Tokyo); or [Jonathan Stoel](#) (Washington, DC).

## **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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