

***Making Investment  
Treaties Work for You***

**Alex Baykitch**

*Partner*

**Holman Fenwick Willan LLP**

# Making Investment Treaties work for you



Alex Baykitch

224665

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## What do you need to know about Investment Treaty Arbitration

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- Investment under an investment treaty usually covers a diverse range of activities and contributions that might broadly be said to lead to the acquisition of any right or asset by the investor
- Protections under an investment treaty are usually in addition to contractual rights that the investor will have against its counterparty
- The protection afforded by investment treaties is normally directly enforceable by the investor against the Host State – no involvement by government of home state required
- Claims have been brought against both developed and developing states

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## Types of Investment Treaties

- BITs – Treaties between two states with the aim of protecting and encouraging investment flows between their economies
- BITs create legal obligations and most also allow foreign investors to enforce these obligations directly against the Host State
- MITs are treaties between three or more states and create rights similar to those under BITs, eg:
  - ECT
  - NAFTA
  - ASEAN

## What rights do investors have under Investment Treaties

- Protection from expropriation or nationalisation without compensation
- Generally expropriation is allowed, if it is:
  1. for a public purpose
  2. non-discriminatory
  3. in accordance with due process
  4. subject to prompt, adequate and effective compensation
- Protection from indirect or regulatory expropriation without appropriate compensation
- Fair and equitable treatment
- Full protection and security
- National treatment

## What rights do investors have under Investment Treaties (cont)

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- Most favoured nation treatment
- Protection against breach of legal obligation – umbrella clauses
- Right to repatriate investment and returns
- Compensation for losses due to war or riot

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## Structuring Investments

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### Issues to consider

- The nationality and standing of the investor, especially in the light of its position in any chain of holding companies
- Whether the transaction qualifies as an investment for both investment treaty and ICSID purposes
- Whether any investment vehicle incorporated in the Host State may benefit from treaty protection

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## Structuring Investments (cont)

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- If the counterparty is a State entity, the appropriate dispute settlement provisions. An ICSID clause may be preferable but careful advice will be needed to ensure it is best suited to the parties needs eg consider whether you need the following:
  1. interim measures
  2. waiver of sovereign immunity for executing award
  3. how costs are to be divided
  4. where will the arbitration be located
- Whether dispute resolution procedures in any project or contract documents are consistent with the applicable investment treaty procedures

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