CARLTON FIELDS

Rules Of The (International) Road: Protect Your Overseas Business and Investments

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A company that wishes to engage in cross-border trade or invest in or establish a business outside of the United States must consider several factors. First, as this article discusses, it must assess which country to invest in, and whether that country provides certain fundamental safeguards for its investment. **Bilateral Investment Treaties** A bilateral investment treaty (BIT) is an agreement between two nations that protects, to a recognized extent, the investment of the nationals of one country from unfair treatment by the other country. These treaties, which apply to direct investment in the host country, protect you in the event you are discriminated against in procurement, and also provide an arbitration mechanism if you enter into a contract with a government entity or enterprise and have a dispute—a major protection. BITs typically give investors assurances of fair and equitable treatment, and protection from, or compensation for, expropriation. Many BITs require the host country to treat the investor as favorably as it treats its own nationals. BITs also provide for free transferability of invested funds in and out of the host country. Absent a BIT, a country cannot be sued or brought to an arbitration. But if a BIT is violated, an investor has access to an arbitration method for resolving disputes with the host country. Through a BIT, the host country agrees to allow itself to be pursued in an arbitral proceeding brought before the International Center for the Settlement of Investment Disputes (ICSID). ICSID is a World Bank construct, and the decisions of its arbitration panels are published, providing guidance to investors and their counsel regarding issues that may arise during investments. BIT arbitration also benefits investors by allowing them to avoid having to pursue remedies in the host country's courts. **Latin American And Caribbean Transactions** The United States currently has signed and ratified 41 BITS. Of these, nine are in effect in Latin America (including the Caribbean). These are: Argentina, Bolivia, Ecuador, Grenada, Honduras, Jamaica, Panama, Trinidad & Tobago and Uruguay. Whenever possible, choose projects in countries that have BITs with the United States. Free Trade Agreements (FTAs) entered into by the United States contain the same types of protections as BITs, including similar dispute resolution provisions. To date, the United States has signed FTA's with 20 countries, including, in the Americas, Canada, Mexico, Panama, Colombia, the Dominican Republic, Costa Rica, Nicaragua, Honduras, Guatemala, El

Salvador, Chile and Peru. All have dispute resolution provisions, many of which contain a choice of forum provision. Often, there are pre-selected panels of arbitrators available to resolve disputes under the rules established by each FTA. Protections similar to BITs and FTAs are available in many other countries. An awareness of these protections is fundamental to successful overseas business transactions.

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