LEX ET VERITAS

# BITs: Weapons of Legal Destruction?

## An interview with George Kahale, III, Chairman, Curtis, Mallet-Prevost, Colt & Mosle LLP

George Kahale

**AR3: What are bilateral investment treaties (BITs) and how wide-spread is the use of such treaties internationally and among African countries?**

GKIII: BITs are treaties for the protection of foreign investment. There are now around 3,500 BITs (and multilateral investment treaties) in the world, the vast majority of which were entered into in the last 25 years. African states are parties to many of these treaties. Typically, these treaties give private investors the right to bring international arbitration proceedings against states for violation of standards of protection, such as fair and equitable treatment, that are often loosely defined and subject to abuse, and that have in fact been stretched by many tribunals far beyond what the states entering into the treaties ever imagined. That and other problems in the international system of dispute settlement is why I have referred to BITs as "weapons of legal destruction".

**AR3: What are some of the principal risks you see for African countries in adhering to BITs?**

GKIII: These are the same risks faced by all countries entering into BITs. It used to be that the risk was almost exclusively on the developing countries, as one of the driving forces behind these treaties is pressure from U.S. and European multinationals to get protection for their investments in Latin America, Asia and Africa. But now we see important claims against European countries as well, and even talk of a huge claim against the U.S.

relating to the proposed Keystone pipeline project. The problem is not just that too many questionable legal decisions have been rendered, but also that many of these cases, or "megacases", involve enormous claims. The idea of a multibillion-dollar claim was almost unthinkable a short while ago. Now a billion dollar claim is commonplace, even if a meritorious one is still rare. The combination of hugely inflated damage claims and inherent bias against states in the system makes it dangerous, particularly for states that are ill-equipped to defend themselves.

AR3: **And in terms of benefits in signing BITs, what are those?**

GKIII: It is not clear that there are any. The benefit was supposed to be an increase in foreign investment, but the evidence is spotty. In any event, even if foreign investment did increase, the question many countries are now asking is whether the gain was worth the pain.

AR3: **How would you advise a country that has not signed BITs to go about making a decision? What advice would you give?**

GKIII: The first advice I would give would be to pause and think again. Without significant changes in investor-state dispute settlement (ISDS), I would recommend against signing, at least until the pros and cons have been fully analyzed and understood throughout the government. It is unfortunate that too many BITs have been entered into without serious analysis, or, as one former government official conceded, as a photo-op. The problem is that these are long-term commitments. The threat posed by the treaties hastily entered into in the 1990s has only become evident over the last ten years. If a state is convinced that it should enter into an investment treaty, it should carefully review the clauses most susceptible to abuse and adopt drafting solutions, although that is likely only to reduce, not eliminate, the potential for abuse. I would also recommend avoiding altogether clauses such as most favored nation (MFN), and study the concepts Brazil, which traditionally has avoided BITs, has been exploring recently, including a BIT without private international arbitration.

AR3: **For those governments which have already signed BITs, should they consider opting out of these agreements, or possibly renegotiating their terms?**

GKIII: I would recommend that each treaty be reviewed with a view to either termination or renegotiation.

AR3: **To the extent the BIT regime has problems, do you believe it can be repaired?**

GKIII: That is not at all clear, which is why I believe the matter should be the subject of discussion at the highest international levels. There are no easy solutions, and in fact many believe that the system functions very well. The first step in any reform is recognition of the problem, and we do not yet have sufficient recognition. Of course, if a multibillion-dollar award was ever rendered against the U.S., such as the 50 billion Yukos award against Russia, then my guess is things will begin to change rather rapidly.

PROFILE

## GEORGE KAHALE

George Kahale has been chairman of Curtis, Mallet-Prevost, Colt & Mosle LLP since 2008, when the position was created after he served 15 years as the firm's Managing Partner. He maintains an active practice in both international transactions and international arbitration. Mr. Kahale has acted as lead counsel in some of the world's largest and most publicized transactions and infrastructure projects in the international petroleum industry, representing energy ministries and national oil corporations in many oil and gas producing countries. He also has been lead counsel in several of the world's largest international arbitrations. Focus Europe recently named Curtis, Mallet-Prevost, Colt & Mosle, as the world's top International Arbitration firm, by caseload.