



**Asia-Pacific
Economic Cooperation**



**UNITED NATIONS
UNCTAD**

**APEC-UNCTAD WORKSHOP ON INVESTOR-STATE
DISPUTE SETTLEMENT: ISSUES AND CHALLENGES FOR
THE APEC REGION**

FINAL REPORT

Manila, Philippines
9-11 December 2009

**APEC Investments Experts Group
Committee on Trade and Investment**

February 2010

CTI 47/2009T

Organized jointly by the Secretariats of the Asia-Pacific Economic Cooperation (APEC) and of the United Nations Conference on Trade and Development (UNCTAD), and the Office of the Solicitor General, the Department of Trade & Industry and the Department of Justice of the Philippines



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APEC#210-CT-01.2

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OUTCOME

The Workshop on Investor-State Dispute Settlement: Issues and Challenges for the APEC Region, held in Manila, Philippines, from 9 to 11 December 2009, was organized jointly by the Secretariats of APEC and UNCTAD, and hosted by the Office of the Solicitor General, the Department of Trade and Industry and the Department of Justice of the Government of the Republic of the Philippines.

Course Background

The workshop constituted the third phase, activity two, of the APEC Investment Experts' Group (IEG) Core Elements Project, jointly undertaken in cooperation with UNCTAD. Phase I of the project included a stocktaking of core elements in 28 intra-APEC International Investment Agreements (IIAs). It examined core elements by analysing the way in which they may assist in liberalising, protecting and facilitating investment in and between the Parties to the agreements.

Phase II further enhanced the work with a significant analytical exercise: the mapping of a sample of 200 investment treaties. This work allowed identifying investment principles that are addressed in a consistent way and consistently included by economies in IIAs.

Phase III is the technical assistance part of the project and is based on the research undertaken under phases I and II. The APEC-UNCTAD Regional Training Course on the Core elements of International Investment Agreements in the APEC Region, held in Kuala Lumpur, Malaysia, on 15 to 19 June 2009, was the first activity of phase III. It aimed at fostering APEC-wide understanding amongst investment treaty negotiators and investment policy makers of key elements in investment liberalization, protection and facilitation.

This workshop constitutes the second activity of phase III. It aimed at developing human resources and institutional capacity to assist developing economies and economies in transition in the region on the negotiation and implementation of international investment agreements and in possible disputes arising between an investor and the State involving these agreements.

Participants and Resource Persons

The workshop brought together 64 participants (33 women and 31 men) from 15 economies of the APEC region (Chile, People's Republic of China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand and Viet Nam) and Colombia as guest in IEG. The list of participants is included in the report. The workshop was delivered in English.

Recognized experts in the field of international investment treaty arbitration and negotiation delivered lectures and presentations, and facilitated interaction among participants. These experts are esteemed international lawyers from academia, international arbitral institutions and governments, and some were private practitioners. All of them possess vast experience and knowledge in the area of investor-State dispute settlement. The list of these resource persons and their biographical notes is attached. National experts complemented the key experts' lectures and presentations by sharing their actual experiences on relevant treaty practice or giving a economy-specific perspective.

Most participants were either involved in the preparation for or handling of investment disputes, or in the negotiation of investment agreements. The quality of participants allowed for an in-depth coverage of topics, interesting discussions, sharing of experiences among participants and a rich dialogue with the resource persons.

At the end of the workshop, participants became member of UNCTAD's network of IIA experts, which allows for continued interactive discussion and dissemination of information on investment disputes and other IIA issues. The list of participants and their contact information are further made available on the APEC website to further facilitate interaction between participants beyond the workshop itself.

Training Methodology and Course Content

The programme and material for the workshop were prepared by UNCTAD's work programme on IIAs with support of the Office of the Solicitor General of the Philippines, to enable the participants to obtain the necessary expertise on the handling of investor-State disputes and the negotiation of IIAs. The programme of the workshop is attached.

After an introduction on the trends and developments in IIAs and Investor-State Dispute Settlement (ISDS), substantive issues were addressed through three sessions: the impact of recent ISDS cases on core elements, revision of arbitration rules and relevance for investor-State dispute settlement provisions included in IIAs, and conduct of investor-State arbitration and what is involved for the State.

Each topic was addressed in the following way: the presentation of the issue by a key expert, comments by national experts discussing relevant treaty practice or giving a economy-specific perspective on the issue, and a discussion with all the participants to better illustrate the topic through an exchange of practices and experiences. Reference was made to a selection of particularly illustrative ISDS cases relevant to the IIA provisions discussed. Moderators guided the speakers and participants through the separate parts of the programme. The final day of the programme also included two panel discussions.

The workshop began with an introductory session on foreign direct investment trends, particularly addressing developments in the conclusion of investment treaties and the emergence of investor-State disputes. The first day was devoted to the examination of basic concepts in investment treaties, especially the definition of protected investments and investors and the legal consequences of admission of

investments, as interpreted in recent awards. Experts also discussed investors' compliance with host State laws as a requirement for protection of investments. On the second day, basic legal protections accorded by host States to investors under investment treaties were discussed. The topics thus included fair and equitable treatment and minimum standard of treatment, full protection and security, most favored nation treatment and due process and compensation guarantees in case of expropriation. Other core elements, including umbrella clauses and national treatment, were also covered. On the final day of the workshop, the topics focused on the revision of arbitration rules governing investor-State dispute settlement. The workshop likewise tackled the issue of provisional measures by arbitral tribunals and the calculation of damages. The workshop closed with an assessment of the institutional, logistic and policy challenges faced by host States in the settlement of investor-State disputes.

The course was tailored to APEC member economies and made use of examples from the region, including treaty texts and arbitration cases. This was exemplified by comments made on specific economy experiences. Comments on state practice were provided by China, Chile, Ecuador, Colombia, and the Philippines. In addition, the final panel discussion was held among panellists from Japan, Mexico, the Philippines and Singapore.

At the end of the workshop, participants received a plaque and certificate of attendance. Undersecretary Elmer Hernandez of the Board of Investments of the Philippines delivered the closing remarks. He expressed gratitude to APEC and UNCTAD for sponsoring the workshop together with the Philippine Government. He expressed optimism that both of these international institutions will collaborate with the Philippine Government on more capacity building activities in the future.

Training Material

Participants received workshop material in the form of a CD-Rom which contains UNCTAD's main publications on investment, selected IIAs (including treaties signed by their respective economies), selected dispute settlement cases (including those most relevant to the workshop topics) and a bibliography. The table of contents of the CD-Rom is included below. Key publications and research papers were also distributed during the training course, as well as copies of the presentations. The organizers distributed case binders which contained the cases for discussion of every session. Four (4) case binders, two (2) CDs containing course materials, and copies of power point presentations were made available to the participants by placing them in a kit or distributing them during relevant sessions.

The presentations are made available on the APEC website, together with a copy of this report.

Opening Ceremony

The workshop was opened by Ms. Jane Yu, Office of the Solicitor General of the Philippines and Ms. Anna Joubin Bret, Senior Legal Advisor, Division on Investment

and Enterprise (DIAE), UNCTAD. Both welcomed participants and experts to the workshop and encouraged the sharing of experiences among participants. They explained the structure of the workshop, the methodology for the analysis of recent rulings and the application of these rulings to the practice of host States.

The keynote address was delivered by the Solicitor General of the Philippines and concurrent Acting Secretary of Justice Agnes VST Devanadera who thanked APEC and UNCTAD for working closely with the Philippine Government in building the capacity of public servants from APEC economies in the settlement of investor-State disputes. She emphasized the unique challenges faced by capital importing economies in resolving disputes involving international investments and called for greater cooperation among APEC economies to ensure compliance with commitments under investment treaties with due regard to the concerns and constraints faced by developing economies in implementing these agreements.

Evaluation and Follow-up

UNCTAD and APEC evaluations of the workshop show very good results. Consolidation of UNCTAD's questionnaire showed that the course fully reached the expectations of 83% of the participants. In addition, almost all participants rated the efficiency and the usefulness of the workshop to their official duties as either excellent (60%) or good (36%).

The UNCTAD secretariat has been asked to intensify its technical assistance work with APEC and its member economies through further activities, especially in the context of the Core Elements Project. This workshop provided an excellent opportunity for the UNCTAD secretariat and APEC to enhance their working relationship. Preparations are made for the organization of another advanced capacity-building activity, the APEC-UNCTAD Workshop on Dispute Prevention and Preparedness, to be held in Washington D.C. in 2010. Future activities could include follow-up workshops or training courses on international investment agreements, investor-State dispute settlement and related issues on a regular basis.

Course Organization

The workshop was organized by Mr. Eric Remegio O. Panga from the Office of the Solicitor General (OSG), Mr. Jose Vicente B. Salazar from the Department of Justice (DOJ), Ms. Jane E. Yu concurrently from the OSG and DOJ, and Ms. Marie Sherylyn D. Aquia, Department of Trade and Industry (DTI), all from the Government of the Republic of the Philippines; by Ms. Anna Joubin-Bret and Mr. Jan Knoerich from the International Agreements Section, Division on Investment and Enterprise (DIAE), UNCTAD; and by Ms. Hiroko Taniguchi and Ms. Norila bte Mohd Ali from the APEC Secretariat.



**APEC-UNCTAD Workshop on
Investor-State Dispute Settlement:
Issues and Challenges for the APEC Region
(Core Elements Phase III Activity 2)**

9-11 December 2009
Manila, Philippines

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and the Government of the Republic of the Philippines

WORKSHOP PROGRAMME

DAY 1

8:30 Conference registration

09:00 **Opening session**

Representatives of the Philippines, APEC and UNCTAD

09:30 Coffee break

10:00 **Keynote address**

Speaker: Acting Secretary of Justice and Solicitor General of the Philippines AGNES VST Devanadera

10:30 **The setting: trends in International Investment Agreements (IIAs) and recent developments in Investor-State Dispute Settlement (ISDS)**

Speaker: Jan Knörrich, Associate Expert, DIAE-UNCTAD

11:30 **Session 1: The impact of recent ISDS cases on core elements**

Moderator: Professor Doug Jones, Partner, International Arbitration and Major Projects Group, Clayton Utz (Sydney) and Law School of Melbourne University

The definition of investment

Key awards for discussion:

Malaysia Salvors v. Malaysia

Phoenix Action Ltd.v Czech Republic

Speaker: Professor Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School, United States of America

12:30 Lunch

- 14:00 **The definition of investor**
- Key awards for discussion:
Tokios Tokeles v. Ukraine
Rompetrol v. Romania
Micula et al. v. Romania
TSA Spectrum de Argentina SA v. Argentina
- Speaker: Peter Turner, Partner, Freshfields Bruckhaus Deringer LLP, International Arbitration Group, Paris*
- Commentator on State practice in IIAs: Xiaohong Xue, Ministry of Commerce, People's Republic of China*
- 15:00 Open discussion
- 15:30 Coffee break
- 16:00 **Admitting investment under the laws and regulations of the host State and the right of establishment in IIAs: scope of the protection**
- Key awards for discussion:
Aguas del Tunari vs. Bolivia
Salini Costruttori vs. Morocco
Mihaly vs. Sri Lanka
PSEG vs. Turkey
- Speaker: Anna Joubin-Bret, Senior Legal Advisor, DIAE - UNCTAD*
- 16:45 Open discussion
- 17:00 **Obligations or conduct of investors in the application of host State laws and regulations**
- Moderator: Eric Remegio O. Panga, Assistant Solicitor General, Office of the Solicitor General, Philippines*
- Key awards for discussion:
Inceysa v. Salvador
World Duty Free v. Kenya
- Speaker: Professor Doug Jones, Partner, International Arbitration and Major Projects Group, Clayton Utz (Sidney) and Law School of Melbourne University*
- Commentator: Brenda Horrigan, Partner, Salans LLP, Shanghai*
- 18:00 End of working day

DAY 2

- 09:00 **Session 1 – The Impact of recent ISDS cases on core elements (cont'd)**
- Moderator: Noriyuki Mita, Director for FTA, Ministry of Economy, Trade and Industry, Japan*
- Fair and Equitable Treatment (FET) and the Minimum Standard of Treatment (MST)**
- Awards for discussion:
- Rumeli Telekom and Telsim Mobil Telekomiskysyon Hizmetleri A.S v. Kazakhstan
 - Continental Casualty co. v Argentina
 - Duke Energy et al. v. Ecuador
 - Glamis Gold v. United States.
- Speaker: Anna Joubin-Bret, Senior Legal Advisor, DIAE-UNCTAD*
- Commentators:*
- Felipe Sandoval, Legal Adviser, Services and Investment, MOFA, Chile*
 - Alvaro Galindo, Director State Defense Group, Procuradoria General del Estado, Ecuador*
- 10:15 Open discussion
- 10:45 Coffee break
- 11:15 **Indirect expropriation**
- Moderator: Myrna Agno, Assistant Solicitor General, Office of the Solicitor General, Philippines*
- Speaker: Brenda D. Horrigan, Partner, International arbitration group, Salans LLP, Paris and Shanghai offices*
- 12:00 Open discussion and exchange of experience and views
- 13:00 Lunch

14:30

Session 1 (cont'd)

Moderator: Gloria Victoria Yap-Taruc, Assistant Solicitor General, Office of the Solicitor General, Philippines

Most Favoured Nation Treatment (MFN)

Awards for discussion:

The Maffezini/Siemens approach and the Plama/Salini approach in recent cases, including
Wintershall Aktiengesellschaft v. Argentina and
TSA Spectrum v. Argentina and RosInvestCo vs. Russia;
MTD Equity v. Chile and
Parkerings v Lithuania

Speaker: Anna Joubin-Bret, Senior Legal Advisor, DIAE- UNCTAD

15:30

Open discussion

15:45

Coffee break

16:15

Other core elements: recent cases in relation to national treatment and contract/treaty claims.

Speaker: Alvaro Galindo, Director, State Defense Group, Procuradoria General del Estado, Ecuador

Commentators on State practice in recent IIAs:

Ana Lucía Noguera Toro, Director of Foreign Investment and Services, Ministry of Trade, Industry and Tourism, Colombia

Jane Yu, Senior State Solicitor, Office of the Solicitor General, Philippines

17:15

Open discussion

18:00

End of working day

DAY 3

09:00 **Session 2 – Revision of arbitration rules and relevance for investor-State dispute settlement provisions included in IIAs**

Moderator: Anna Joubin-Bret, Senior Legal Advisor, DIAE - UNCTAD

Panelists:

Alvaro Galindo, State Defense Group, Procuradoria General del Estado, Ecuador

Brenda D. Horrigan, Salans LLP

Professor Michael Reisman, Yale Law School

Peter Turner, Freshfields Bruckhaus Deringer LLP

Forthcoming revisions of the ICC Rules and the relevance for investor-State disputes

Speaker: Jason Fry, Secretary General, International Chamber of Commerce Court of Arbitration, Paris

10:45 Coffee break

11:00 **Open discussion**

11:30 **Two recent developments in Investor-State disputes**

The use of provisional measures by arbitral tribunals against States – the experience of Ecuador

Speaker: Alvaro Galindo, Director State Defense Group, Procuradoria General del Estado, Ecuador

General practice used in calculation of damages and allocation of costs (arbitration costs and attorney's fees): recent trends, impact on IIAs and strategies in State defense

Speaker: Peter Turner, Freshfields Bruckhaus Deringer, LLP

12:45 Open discussion and exchange of views by participants and experts

13:00 Lunch

14:30 **Session 3: Conduct of investor-State arbitration: what is involved for a State?**

Moderator: Anna Joubin-Bret, Senior Legal Advisor, DIAE - UNCTAD

Panellists:

Derek Loh, State Counsel, Attorney-General's Chambers, Singapore

Mr. Hugo Gabriel Romero Martinez, Director, Office of Legal Counsel for International Trade Negotiations, Secretary of Economy, Mexico

Noriyuki Mita, Director for FTA, Ministry of Economy, Trade and Industry, Japan

Jane Yu, Senior State Solicitor, Office of the Solicitor General, Philippines

Jan Knörich, Associate Expert, DIAE-UNCTAD

16:30 **Closing remarks**

*Undersecretary Elmer Herdandez, Department of Trade and Industry, Philippines
Representatives of APEC and UNCTAD*

17:00 End of the workshop



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and the Government of the Republic of the Philippines

BIO NOTES OF KEY SPEAKERS

Jason A. Fry

Jason Fry, Secretary General, ICC International Court of Arbitration (Paris), LLB, BCL (Oxon), FCI Arb.

Prior to his appointment as Secretary General of the International Court of Arbitration in 2007, Mr Fry was a partner in the international arbitration practice of Clifford Chance LLP. He has significant experience as counsel, advocate and arbitrator in international arbitration proceedings. Mr Fry is a Solicitor of the Supreme Court of England and Wales and a Barrister and Solicitor of the High Court of New Zealand. He is a Fellow of the Chartered Institute of Arbitrator and was the Member for New Zealand of the International Court of Arbitration of the International Chamber of Commerce from 1999 until 2007. In that capacity he represented the ICC Court at the UNCITRAL Working Group on International Arbitration and Conciliation in relation to the 2006 amendments to the Model Law.

Alvaro Galindo

Alvaro Galindo is the Director of International Litigation and Arbitration Unit of the Attorney General Office of the Republic of Ecuador. In his role, he represents the Republic in numerous ICSID, and UNCITRAL investor-State arbitration cases before international tribunals. Prior to his current position, Mr. Galindo was counsel for Ecuador in various international arbitrations under ICSID. He was also legal consultant at the International Centre for Settlement of Investment Disputes. As a Law Professor, he teaches International Law and Arbitration Law in Ecuador. He has also written numerous articles for Law Reviews on topics related to Arbitration and Investor-State Arbitration. He is the Director of the Ecuadorian Institute of Arbitration.

He is a member of the International Chamber of Commerce Task Force Group on Arbitration Involving States (Special Drafting Committee), and a member of the International Bar Association Sub-Committee on Investment Arbitration.

He obtained his law degree in the Catholic University of Ecuador and his master degree in international law in Georgetown University, Washington, D.C.

Brenda D. Horrigan

Brenda D. Horrigan, a partner in the arbitration practice group, is based in Salans' Paris and Shanghai offices. She concentrates on international arbitration with a particular focus on disputes involving emerging markets.

Brenda has been actively involved in dozens of complex international arbitration matters at both the arbitration and enforcement stages, particularly in connection with disputes arising in connection with investments in countries of the Former Soviet

Union, Central/Eastern Europe and Asia. She has acted as counsel in arbitrations conducted under various arbitration rules, including those of the ICC, SCC, CIETAC, ICAC, ICSID and UNCITRAL, as well as arbitrator under the ICC rules. She has a background as a transactional lawyer and has advised on cross-border debt and equity financings, strategic investment transactions, corporate restructurings and related transactional matters in emerging markets. Prior to relocating to Paris, she spent several years in Salans' Moscow office, and she is a fluent Russian and French speaker.

Doug Jones

Professor Doug Jones AM is one of the leading arbitrators in the Asia-Pacific region. He is a Sydney-based partner in the Australian law firm of Clayton Utz where he heads the International Arbitration and Major Projects Groups of the firm. Doug is a door tenant at Atkin Chambers, London.

His experience includes acting as Arbitrator and Counsel in major international Arbitrations, and advising on major projects in the areas of buildings, road and rail infrastructure, power, potable and waste water, mining infrastructure and processing, and on on and offshore oil and gas. He has had extensive experience in PPP and PFI projects. Details of his experience can be found at www.dougjones.info.

He is currently Vice President of the Chartered Institute of Arbitrators, London (President Elect 2011), a foundation fellow and graded arbitrator of the Institute of Arbitrators & Mediators Australia, President, Dispute Review Board Foundation Australia and a member of a number of panels of International Arbitral bodies.

In January 1999 Doug was made a Member of the Order of Australia in recognition of his services to construction law and dispute resolution.

Doug is ranked Tier 1 - Most in Demand Arbitrator in Chambers Asia 2009, he is ranked (sole) Leading Lawyer in Australia in PLC Which Lawyer 2009/2010, and noted in Chambers Asia 2008 as "a leading light for Asia-Pacific arbitration work". He is named in The International Who's Who of Construction Lawyers 2008 as one of the Most Highly Regarded Individuals - Global. He is the only Australian lawyer nominated in the prestigious global list of the top nine lawyers.

Anna Joubin-Bret

Ms. Anna Joubin-Bret is Senior Legal Adviser with the Division on Investment and Enterprise of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.

She is an expert on national and international investment legal frameworks. She is providing expertise to developing countries through the delivery of technical assistance and capacity-building activities (training courses and advisory services) and participation in national, regional and international conferences and seminars. She also contributes to and oversees the publications of the Division, in particular the

Series on issues in international investment agreements, the Series on International Investment Policies for development, the seminal studies on international investment rule-making, and the investment policy reviews.

Ms. Joubin-Bret holds a post-graduate degree in Private International Law from the University of Paris I, Panthéon-Sorbonne. She graduated in International Economic Law and in Political Science.

She has been Legal Counsel in the legal department of the Schneider Group; General Counsel of the KIS Group and Director-Export of Pomagalski S.A.. She has been appointed judge at the Commercial Court in Grenoble (France).

Jan Knoerich

Mr. Jan Knoerich is an Associate Expert in international investment law and policies in the Division on Investment and Enterprise of the United Nations Conference on Trade and Development (UNCTAD). He joined UNCTAD's Work Programme on International Investment Agreements in 2008, where he works as a researcher in the area of investment policy analysis and as a coordinator of technical assistance and training activities. He contributes to the *UNCTAD Series on International Investment Policies for Development* and supports the intergovernmental activities of the programme. His main expertise is in the area of foreign direct investment and its development implications, as well as outward foreign direct investment from emerging economies.

Mr. Knoerich holds a Master's Degree in Diplomacy and International Relations from Seton Hall University, New Jersey, USA, and is candidate for a PhD in Economics at the School of Oriental and African Studies, University of London, United Kingdom. He speaks English, German, Chinese and French.

W. Michael Reisman

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School where he has been on the Faculty since 1965. He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council, the President of the Arbitration Tribunal of the Bank for International Settlements, a member of the Advisory Committee on International Law of the Department of State, Vice-Chairman of the Policy Sciences Center, Inc., and a member of the Board of The Foreign Policy Association. He has been elected to the *Institut de Droit International* and is Honorary Professor in City University of Hong Kong. He has published widely in the area of international law and served as arbitrator and counsel in many international cases. He was also President of the Inter-American Commission on Human Rights of the Organization of American States, Vice-President and Honorary Vice-President of the American Society of International Law and Editor-in-Chief of the American Journal of International Law. He has served as arbitrator in the Eritrea/Ethiopia Boundary Dispute and in the Abyei (Sudan) Boundary Dispute.

His most recent books are *Foreign Investment Disputes: Cases, Materials and Commentary* (with Bishop and Crawford) (Kluwer Law International, 2005); *International Law in Contemporary Perspective* (with Arsanjani, Wiessner & Westerman) (Foundation Press, 2004); *Jurisdiction in International Law* (Ashgate, 1999); *Law in Brief Encounters* (Yale University Press, 1999), Chinese Translation, Shenghuozhongde Weiguan Falu [Microscopic Laws in Life] (Shangzhou Chubanshe, Taipei, 2001); and *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (with Aguilar Alvarez, eds.) (Martinus Nijhoff Publishers, 2008).² A Chinese edition of his selected writings, *Understanding and Shaping International Law: Essays of W. Michael Reisman* was published by Law Press of China in 2007.

Peter Turner

Peter is a partner in the international arbitration group of Freshfields Bruckhaus Deringer LLP and is based in the Paris office.

Peter specialises in international arbitration, with a particular emphasis on investor - state arbitration under bilateral investment treaties. His extensive arbitration experience includes acting as counsel or arbitrator during arbitration proceedings under both ad hoc and institutional rules, including participating in several ADR proceedings. Peter has advised or represented clients across sectors as diverse as telecommunications, investment banking, infrastructure, and agro-industry.

Recognized by Global Arbitration Review as one of the top 45 arbitration lawyers under 45 years old in the world, Peter has published widely on international arbitration and investment treaty topics. He is also an advocacy trainer for NITA-UK, the National Institute for Trial Advocacy and Nottingham University's law school, and teaches a course on international arbitration to Masters students at the Institut d'Etudes Politiques de Paris (Sciences Po).

Peter was educated at Christ's College, Cambridge University. He speaks English, French and German.



**APEC-UNCTAD Workshop on
Investor-State Dispute Settlement:
Issues and Challenges for the APEC Region
(Core Elements Phase III Activity 2)**

9-11 December 2009
Manila, Philippines

Organized by the Secretariats of the Asia-Pacific Economic Cooperation (APEC),
the United Nations Conference on Trade and Development (UNCTAD)
and the Government of the Republic of the Philippines

TRAINING MATERIAL

1) UNCTAD publications

- Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking
- Investment Provisions in Economic Integration Agreements
- Preserving Flexibility in IIAs: The Use of Reservations
- Investment Promotion Provisions in International Investment Agreements
- The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries
- International Investment Rule-Making: Stocktaking, Challenges and the Way Forward
- Identifying Core Elements in Investment Agreements in the APEC Region
- Dispute Settlement: Investor-State Disputes Arising from Investment Treaties
- Investor-State Dispute Settlement and Impact on Investment Rulemaking
- The Protection of National Security in IIAs
- The REIO Exception in MFN Treaty Clauses
- International Investment Agreements in Services
- South-South Cooperation in International Investment Agreements
- International Investment Agreements: Trends and Emerging Issues
- Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows
- World Investment Report 2009: Transnational Corporations, Agricultural Production and Development
- Best Practices in Investment for Development: Case Studies in FDI
 - How to Utilize FDI to Improve Transport Infrastructure - Roads (Australia and Peru)
 - How to Utilize FDI to Improve Infrastructure - Electricity (Chile and New Zealand)
- IIA MONITORS:
 - Latest Developments in Investor-State Dispute Settlement
IIA Monitor No. 1 (2009), UNCTAD/WEB/DIAE/IA/2009/6/Rev1.

- Selected Recent Developments in IIA Arbitration and Human Rights
IIA MONITOR No. 2 (2009), UNCTAD/WEB/DIAE/IA/2009/7.
- Recent Developments in International Investment Agreements (2008–June 2009)
IIA MONITOR No. 3 (2009) UNCTAD/WEB/DIAE/IA/2009/8.

2) Selected International Investment Agreements

a. Bilateral Investment Treaties (BITs)

| APEC Economy | Partner Economy |
|---------------------|--|
| Australia | Argentina; Chile; China; Czech Republic; Egypt; Hong Kong, China; Hungary; India; Indonesia; Lao People's Democratic Republic; Lithuania; Mexico; Pakistan; Papua New Guinea; Peru; Philippines; Poland; Romania; Sri Lanka; Uruguay; Viet Nam |
| Brunei Darussalam | China, Republic of Korea, Oman |
| Canada | Argentina, Armenia, Barbados, Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, El Salvador, Hungary, Latvia, Lebanon, Panama, Peru, Philippines, Poland, Romania, Russian Federation (USSR), Slovakia, South Africa, Thailand, Trinidad and Tobago, Ukraine, Uruguay, Venezuela |
| Chile | Argentina, Australia, Austria, Belgium and Luxembourg, Bolivia, Brazil, China, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Republic of Korea, Lebanon, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, Uruguay, Venezuela, Viet Nam |
| China | Albania, Argentina, Australia, Austria, Bahrain, Belgium and Luxembourg, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Cambodia, Chile, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Denmark, Djibouti, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guyana, Hungary, Iceland, Indonesia, Islamic Republic of Iran, Italy, Jamaica, Japan, Jordan, Lao PDR, Latvia, Lebanon, Lithuania, Macedonia TFYR, Madagascar, Mongolia, Morocco, Myanmar, Netherlands, New Zealand, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, Romania, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, Uruguay, Viet Nam |
| Hong Kong, China | Australia, Austria, Belgium and Luxembourg, Denmark, France, Germany, Italy, Japan, Republic of Korea, Netherlands, New Zealand, Sweden, Switzerland, Thailand, United Kingdom |
| Indonesia | Algeria, Australia, Bangladesh, Belgium and Luxembourg, Cambodia, Chile, China, Cuba, Czech Republic, Denmark, Egypt, |

| | |
|-------------------|--|
| Japan | Finland, France, Germany, Hungary, India, Italy, Jamaica, Jordan, Kyrgyzstan, Lao PDR, Malaysia, Mauritius, Mongolia, Morocco, Mozambique, Netherlands, Norway, Pakistan, Romania, Singapore, Slovakia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Turkey, Ukraine, United Kingdom, Uzbekistan, Viet Nam, Yemen, Zimbabwe |
| Republic of Korea | Bangladesh; China; Egypt; Hong Kong, China; Republic of Korea; Mongolia; Pakistan; Russian Federation; Sri Lanka; Turkey; Viet Nam; United States |
| Malaysia | Albania, Algeria, Argentina, Austria, Bangladesh, Belarus, Belgium and Luxembourg, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Chile, China, Congo DR, Costa Rica, Czech Republic, Denmark, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala; Honduras; Hong Kong, China; Hungary, India, Indonesia, Islamic Republic of Iran, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Lao PDR, Latvia, Lebanon, Lithuania, Malaysia, Mauritania, Mexico, Mongolia, Morocco, Netherlands, Nicaragua, Nigeria, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, Uzbekistan, Viet Nam |
| Mexico | Austria, Cambodia, Chile, Czech Republic, Denmark, Egypt, Ethiopia, Finland, France, Germany, Ghana, Hungary, Indonesia, Italy, Jordan, Kazakhstan, Korea DPR, Republic of Korea, Kyrgyzstan, Lebanon, Mongolia, Netherlands, Norway, Pakistan, Peru, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, United Kingdom, Uruguay, Viet Nam, Brunei/Indonesia/Malaysia/Philippines/Singapore/Thailand |
| New Zealand | Argentina, Australia, Austria, Belgium and Luxembourg, Cuba, Denmark, Finland, France, Germany, Greece, Iceland, Republic of Korea, Netherlands, Portugal, Spain, Sweden, Switzerland, Uruguay |
| Papua New Guinea | Argentina, Chile, China, Hong Kong (China) |
| Peru | Australia, Germany, United Kingdom |
| Philippines | Argentina, Australia, Belgium and Luxembourg, Bolivia, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Italy, Republic of Korea, Malaysia, Netherlands, Norway, Paraguay, Portugal, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, United Kingdom, Venezuela |
| Russia | Argentina, Austria, Belgium and Luxembourg, Canada, Cyprus, Egypt, Ethiopia, France, Germany, Greece, Hungary, Italy, Japan, Republic of Korea, Lebanon, Lithuania, Netherlands, Norway, |

| | |
|---------------------------------|---|
| | Portugal, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, United States |
| Singapore | Cambodia, China, Czech Republic, Egypt, France, Germany, Hungary, Indonesia, Jordan, Mauritius, Mongolia, Netherlands, Pakistan, Peru, Sri Lanka, Switzerland, United Kingdom, Viet Nam |
| Chinese Taipei Thailand | Belize, Macedonia TFYR, Marshall Islands, Swaziland, Thailand Argentina, Bahrain, Bangladesh, Belgium and Luxembourg, Bulgaria, Cambodia, Canada, China, Croatia, Czech Republic, Egypt; Finland; Germany; Hong Kong, China; Hungary; India, Indonesia, Iran (Islamic Republic of), Israel, Jordan, Korea DPR, Netherlands, Peru, Philippines, Poland, Russian Federation, Slovenia, Sri Lanka, Sweden, Switzerland, Chinese Taipei, United Kingdom, Viet Nam, Zimbabwe, OPEC |
| United States | Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bulgaria, Cameroon, Congo, Republic of the Congo, Ecuador, Egypt, El Salvador, Estonia, Georgia, Grenada, Haiti, Honduras, Jamaica, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Republic of Moldova, Mongolia, Morocco, Mozambique, Nicaragua, Panama, Poland, Romania, Russian Federation, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad and Tobago, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan |
| Viet Nam | Australia, Austria, Belarus, Belgium and Luxembourg, Bulgaria, Cambodia, Chile, China, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Indonesia, Italy, Japan, Republic of Korea, Latvia, Malaysia, Netherlands, Poland, Romania, Singapore, Sweden, Switzerland, Tajikistan, Thailand, United Kingdom |
| Guest in IEG Colombia | Partner Economy Chile, Italy, Peru, Spain, United Kingdom |

b. Model BITs

- Canadian Model BIT
- United States Model BIT

c. Free Trade Agreements and other investment instruments: selection

- APEC Non-binding Investment Principles
- Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies
- APEC Transparency Standards on Investment
- ASEAN Comprehensive Investment Agreement
- CAFTA Investment Chapter
- FTA between ASEAN, Australia and New Zealand
- FTA between Australia and Thailand
- FTA between Canada and Colombia Investment Chapter
- FTA between Canada and EFTA

- FTA between Chile and Canada
- FTA between Chile and Peru
- FTA between Chile and Mexico
- FTA between Chile and China
- FTA between China and New Zealand
- FTA between China and Peru
- FTA between China and Singapore Investment Chapter
- FTA between Japan and Brunei
- EPA between Japan and Indonesia
- FTA between Japan and Malaysia
- FTA between Japan and Mexico
- FTA between Japan and the Philippines
- FTA between Japan and Thailand
- FTA between Japan and Singapore
- FTA between Korea and Singapore
- FTA between Malaysia and Pakistan
- FTA between Malaysia and New Zealand
- FTA between Mexico and Bolivia
- FTA between Mexico, Guatemala, El Salvador and Honduras
- FTA between Singapore and Australia
- FTA between Singapore and India
- FTA between Singapore and New Zealand
- FTA between Singapore and Panama
- FTA between Thailand and New Zealand
- FTA between the United States and Colombia
- FTA between the United States and Korea
- FTA between the United States and Peru
- FTA between the United States and Chile
- FTA between the United States and Singapore
- NAFTA Investment Chapter

3) Teaching Material - Excerpts from UNCTAD Course on Dispute Settlement

1. General Topics

1.2 International Court of Justice (*Mr. P. S. Rao*)

1.3 Permanent Court of Arbitration (*Ms. B. Shifman, Mr. H. Holtzmann*)

2. International Centre for Settlement of Investment Disputes

2.1 Overview (*Mr. C. Schreuer*)

2.2 Selecting the Appropriate Forum (*Mr. A. Reinisch*)

2.3 Consent to Arbitration (*Mr. C. Schreuer*)

2.4 Requirements Ratione Personae (*Ms. M. Al-Sharmani*)

2.5 Requirements Ratione Materiae (*Mr. A. Escobar*)

2.6 Applicable Law (*Mr. G. S. Tawil*)

2.7 Procedural Issues (*Mr. E. Schwartz, Mr. R. Mohtashami*)

2.8 Post-Award Remedies (*Ms. D. Wang*)

4) International Treaties on Arbitration and Related Instruments

ICSID

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados

Including:

- Administrative and Financial Regulations
Reglamento Administrativo y Financiero
- Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)

Reglas Procesales Aplicables a la Iniciación de los Procedimientos de Conciliación y Arbitraje (Reglas de Iniciación)

- Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje)

- Rules of Procedure for Conciliation (Conciliation Rules)
Reglas Procesales Aplicables a los Procedimientos de Conciliación (Reglas de Conciliación)

UNCITRAL

- UNCITRAL Arbitration Rules (1976)
Reglamento de Arbitraje de la CNUDMI (1976)
- UNCITRAL Conciliation Rules (1980)
Reglamento de Conciliación de la CNUDMI (1980)
- UNCITRAL Model Law on International Commercial Arbitration (1985)
Ley Modelo de la CNUDMI sobre Arbitraje Comercial Internacional (1985)
- UNCITRAL Model Law on International Commercial Conciliation (2002)
Ley Modelo de la CNUDMI sobre Conciliación Comercial Internacional (2002)
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996)
Notas de la CNUDMI sobre Organización del Proceso Arbitral (1996)

ICC

Rules of Arbitration of the International Chamber of Commerce

Reglamento de Arbitraje de la Cámara de Comercio Internacional

Including:

- Statutes of the International Court of Arbitration of the ICC
Estatuto de la Corte Internacional de Arbitraje de la CCI
- Internal Rules of the International Court of Arbitration of the ICC
Reglamento Interno de la Corte Internacional de Arbitraje de la CCI

NY Convention

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)

5) Bibliography

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Alexandrov, Stanimir A.: *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *ratione temporis**. In: *The Law and Practice of International Courts and Tribunals* 4: 19-59, 2005.

Antonietti Aurelia, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", *ICSID Review, Foreign Investment Law Journal*, Vol. 21, No 2, 2006, pp. 427-448.

Bishop, R.D., Crawford, J., Reisman, W.M.: *Foreign Investment Disputes*, Kluwer Law International 2005.

Faya Rodriguez, Alejandro: *A Quince Años del Capítulo XI del TLCAN: Un Análisis Económico y Jurídico*. (*forthcoming 2009 - available*)

Faya Rodriguez, Alejandro: *The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?*, in *Journal of International Arbitration*, Volume 25, No 1, 2008, pp. 89-102. (*available*)

Gaillard, Emmanuel: *"Establishing Jurisdiction Through a Most-Favored-Nation Clause"*, *International Arbitration Law*, in *The New York Law Journal*, Volume 233, No 105, June 2005. (*available*)

Gaillard, Emmanuel: *"Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses"*, *International Arbitration Law*, in *The New York Law Journal*, Volume 234, No 68, October 2005. (*available*)

Garcia-Bolivar, Omar E.: *Investor-State Disputes in Latin America: A Judgment on the Interaction Between Arbitration, Property Rights Protection, and Economic Development*, in *Law and Business Review of the Americas*, Volume 13, No 1, Winter 2007, pp. 67-96. (*available*)

Legum, Barton: *Options to Establish an Appellate Mechanism for Investment Disputes*. In: *Appeals Mechanism in International Investment Disputes* 231-239 (Karl P. Sauvant, ed. 2008).

Paulsson, Jan: Avoiding Unintended Consequences. In: Appeals Mechanism in International Investment Disputes 241-265 (Karl P. Sauvant, ed. 2008).

Paulsson Jan: "The Conduct of Arbitral Proceedings Under the Rules of Arbitration Institutions, The WIPO Arbitration Rules in a Comparative Perspective", *Conference on Rules for Institutional Arbitration and Mediation*, (Articles 48 to 58 and 73 to 76), Geneva, Switzerland, 1995. (available)

Sacerdoti, Giorgio: Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards, 19 ICSID Rev. - FILJ 1, 2004.

Sornarajah, M.: The International Law on Foreign Investment, Second Edition, Cambridge University Press, 2004.

Schreuer, Christoph H.: Fair and Equitable Treatment in Arbitral Practice. Offprints of The Journal of World Investment and Trade, Vol. 6 No. 3, Geneva, June 2005.

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Schreuer, Christoph H.: The ICSID Convention: A Commentary, Cambridge University Press 2001.

Schreuer, Christoph H.: Travelling the Bit Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 The Journal of World Investment and Trade 231 (2004).

Teitelbaum, Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses, 22 Journal of International Arbitration 225 (2005).

Wälde, T., The "Umbrella" Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases, 6 Journal of World Investment and Trade 183 (2005)

6) Case Study Material

Aguas del Tunari Case Study (*decision on jurisdiction*)

Autopista Concesionada de Venezuela Case Study (*introductory note*)

Autopista Concesionada de Venezuela Case Study (*decision on jurisdiction*)

Autopista Concesionada de Venezuela Case Study (*decisión sobre competencia*)

Autopista Concesionada de Venezuela Case Study (*award of tribunal*)

Autopista Concesionada de Venezuela Case Study (*laudo del tribunal*)

CMS Case Study (*ancillary claims /objection of jurisdiction*)

CMS Case Study Key (*ancillary claims/ objection of jurisdiction*)

CMS Case Study (*expropriation*)

CMS Case Study Key (*expropriation*)

Luchetti Case Study (*jurisdiction racione temporis*)

Luchetti Case Study Key (*jurisdiction ratione temporis*)
Agreement between Peru and Chile (*Spanish*)

Maffezini Case Study (*MFN Treatment*)
Maffezini Case Study Key (*MFN Treatment*)
Maffezini Case Study (*Spanish*) (*MFN Treatment*)
Maffezini Case Study Key (*Spanish*) (*MFN Treatment*)
Agreement between Argentina and Spain
Agreement between Chile and Spain

Metalclad Case Study (*expropriation*)
Metalclad Case Study Key (*expropriation*)
Metalclad Case Study (*Spanish*) (*expropriation*)
Metalclad Case Study Key (*Spanish*) (*expropriation*)

Methanex Case Study (*place of proceedings*)
Methanex Case Study Key (*place of proceedings*)
Methanex Case Study (*amicus curiae*)
Methanex Case Study Key (*amicus curiae*)
Methanex, letter on *non-disputing party participation*
Statement of the Free Trade Commission on *non-disputing party participation*

Milhaly Case Study (*ratione materiae*)
Milhaly Case Study Key (*ratione materiae*)
BIT between the US and Sri Lanka

Olguin Case Study (*expropriation*)
Olguin Case Study Key (*expropriation*)
Olguin Case Study (*Spanish*) (*expropriation*)
Olguin Case Study Key (*Spanish*) (*expropriation*)

Salini Case Study (*amicable dispute settlement*)
Salini Case Study Key (*amicable dispute settlement*)
Salini Case Study (*procedures for the initiation of a claim*)
Salini Case Study Key (*procedures for the initiation of a claim*)
Salini Case Study (*ratione materiae*)
Salini Case Study Key (*ratione materiae*)

Saluka Investments Case Study (*partial award*)

SGS Pakistan Case Study (*contract vs. treaty claims*)
SGS Pakistan Case Study Key (*contract vs. treaty claims*)
SGS Pakistan Case Study (*procedures for the initiation of a claim*)
SGS Pakistan Case Study Key (*procedures for the initiation of a claim*)
BIT between Switzerland and Pakistan

SGS Philippines Case Study (*contract vs. treaty claims*)
SGS Philippines Case Study Key (*contract vs. treaty claims*)
SGS Philippines Case Study (*procedures for the initiation of a claim*)
SGS Philippines Case Study Key (*procedures for the initiation of a claim*)

BIT between Switzerland and the Philippines

Tecmed Case Study (*fair and equitable treatment*)

Tecmed Case Study Key (*fair and equitable treatment*)

Tecmed Case Study (*Spanish*) (*fair and equitable treatment*)

Tecmed Case Study Key (*Spanish*) (*fair and equitable treatment*)

BIT between Spain and Mexico

Tokios Case Study (*Jurisdiction racione personae*)

Tokios Case Study Key (*Jurisdiction racione personae*)

Tokios Case Study (*Introductory Note*)

Tokios Case Study (*Procedural Order No.1*)

Tokios Case Study (*Decision on Jurisdiction*)

Tokios Case Study (*Dissenting Opinion*)

Tokios Case Study (*Procedural Order No.3*)

Vivendi Case Study Key (*replacement disqualification of arbitrators*)

Vivendi Case Study Key (*replacement disqualification of arbitrators*)

Vivendi Case Study Key (*initiation of a claim*)

Vivendi Case Study Key (*initiation of a claim*)

7) Selection of Cases

Please consult http://www.unctadxi.org/templates/Startpage____718.aspx for further reference on selected dispute settlement cases.

Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10 (UK/Malaysia BIT).

- Claimant's Memorial on Jurisdiction, (March 15, 2006) (PDF)
- Respondent's Reply Memorial to Objections on Jurisdiction, (April 19, 2006) (PDF)
- Claimant's Reply Memorial on Jurisdiction, (April 23, 2006) (PDF)
- Respondent's Memorial on Objections to Jurisdiction, (October 11, 2006) (PDF)
- Decision on Jurisdiction, (May 17 2007) (PDF)
- Decision on the Application for Annulment, (April 16, 2009) (PDF)
- Dissenting Opinion of Judge Mohamed Shahabuddeen (PDF)

Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT).

- Decision on Provisional Measures, 6 April 2007 (PDF)
- Award of the Tribunal, 15 April 2009 (PDF)

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (Lithuania/Ukraine BIT).

- Procedural Order No. 1, 1 July 2003.
- Decision on Jurisdiction, 29 April 2004.
- Dissenting opinion, 29 April 2004.
- Procedural Order No. 3, 18 January 2005.
- Award and Separate Opinion, 26 July 2007.

The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 (Netherlands/Romania BIT).

- Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 18, 2008 (PDF)

Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 (Sweden/Romania BIT).

- Decision on Jurisdiction and Admissibility, September 24, 2008 (PDF)

TSA Spectrum de Argentina S.A. v. Argentina Republic, ICSID Case No. ARB/05/5 (Netherlands/Argentina BIT).

- Award, 19 December 2008 (English) (Spanish) (PDF)
- Concurring Opinion, Georges Abi-Saab (English) (Spanish) (PDF)
- Dissenting Opinion, Grant D. Aldonas (PDF)

Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Netherlands/Bolivia BIT)

- NGO Petition to Participate as *Amici Curiae*, August 29, 2002 (PDF)
- Letter from President of Tribunal Responding to Petition, January 29, 2003 (PDF)
- Decision on Respondent's Objections to Jurisdiction, October 21 2005 (English/Spanish) (PDF)

Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4 (Italy/Morocco BIT).

- Jurisdiction, 23 July 2001 (English) (PDF)

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2)

- Award of the Tribunal (March 15, 2002) (PDF)
- Separate concurring opinion, March 15, 2002 (PDF)

PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5.

- Decision on Jurisdiction, June 4, 2004 (PDF)
- Award, January 19 2007 (PDF)

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**APEC-UNCTAD Workshop on
Investor-State Dispute Settlement:
Issues and Challenges for the APEC Region
Manila, Philippines
9-11 December 2009**

**Protection of Investments that Contravene
Host State Laws and Regulations:
Inceysa v. El Salvador and World Duty Free v. Kenya**

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**Protection of Investments that Contravene
Host State Laws and Regulations:
Inceysa v. El Salvador and World Duty-Free v. Kenya¹**

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1. Introduction

International Investment Agreements ("IIAs") have become the most widely used treaty for the promotion and reciprocal protection of investments. They have increased in number from a total of 386 in the 1980s to 5754 by the end of 2008.²

More importantly, host States that sign IIAs offer protection to investors in their State. Compensation may be had for losses resulting from expropriation, armed conflict, revolution, discriminatory treatment of foreign investors and requisitioning or destruction of their property by a State's forces or authorities, amongst other disturbances.

In the case of disputes, most IIAs provide that any dispute arising between the State and the investor concerning the interpretation or application of the treaty which is not resolved through negotiations may be submitted to arbitration. Typically, this arbitration will take place under the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). This is a fundamental element of the protection extended to investors, that being access to justice in the event of a dispute.

But what of investments that result from fraud, bribery or corruption of officials in the host State? Do these investments enjoy the benefits and protections offered by IIAs? What power does the arbitral tribunal have to address illicit behaviour? These are some of the many questions addressed in this paper.

2. The principles of international law

Arbitral tribunals are "the natural judges of international trade, and they are the natural guardians of ethics and good morals in international commerce".³ They are therefore ideally

¹ The author gratefully acknowledges the assistance provided in the preparation of this paper by Trina Ng and Jennifer Ingram, Legal Assistants, of Clayton Utz, Sydney.

² UNCTAD, *Recent Developments in International Investment Agreements (2008–June 2009)* (IIA MONITOR No. 3 (2009) International Investment Agreements) available at <http://www.unctad.org/en/docs/webdiaeia20098_en.pdf>.

³ Alexis Mourre, "Part ii, Chapter 11: Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal" in Loukas A Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (2009) 207, 209.

placed to take a stand against illicit behaviour in international transactions, such as fraud, corruption and bribery, particularly those between States and foreign investors.

Of course, the arbitral tribunal does not have the power of a domestic judge to implement the criminal laws of a state and impose the relevant sanctions. Instead, recourse must be had to the principles of international law. Such principles have been utilised in various awards, both in isolation and in combination, to combat illicit behaviour by refusing jurisdiction and removing the said investment from protection of the relevant IIA. This principles are discussed below.

2.1 Good faith

Good faith is a supreme principle of international law. It is founded on the presumption that a legal relationship is entered into on the basis of the confidence each party has in the other. Looked at in another way, parties would not enter a legal relationship if they did not have confidence in the other party because commitments would inevitably be breached, contrary to the maxim *pacta sunt servanda*. Thus, to avoid this consequence, good faith is imposed as a generally accepted rule or standard.⁴

The principle of good faith requires parties to "deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage".⁵ It thus governs all aspects of legal relations. With regard to the content of the duty, it has been said that:

*"In the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties."*⁶

It has long been recognised that international instruments granting protection to foreign investors through arbitration must be applied in good faith. In *Amco Asia Corporation et al v. Indonesia* the tribunal said:

*"[T]his is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say be taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."*⁷

This statement is equally valid for IIAs. Indeed it has been said that while States can, in theory, contract out of most rules of international law in their treaty relations, they cannot contract out of the system of international law and therefore remain bound by its principles.⁸

Thus, in the context of IIA, both the State and the foreign investor presupposes that the other party has entered the agreement in good faith. Consequently, a party cannot benefit from its rights under the treaty where it has not acted in good faith. In particular, it cannot benefit from

⁴ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* ICSID 2 August 2006 (Inceysa v. El Salvador) paragraph 233.

⁵ A. D'Amato, Good Faith, *Encyclopedia of Public International Law*, Vol 7, p 107 (R. Bernhardt, ed. 1984).

⁶ *Inceysa v. El Salvador* paragraph 231.

⁷ *Amco Asia Corporation et al v Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, paragraph 14.

⁸ John Pauwelyn, "Role of Public International Law in the WTO Law", 95 *AJIL*, 2001, 539.

arbitration under the IIA. In order to prevent the abuse of the system of international investment protection under the ICSID Convention, and ensure that only investments that are made in compliance with the international principle of good faith are protected, the arbitral tribunal must refuse jurisdiction.

2.2 International public policy

The term "international public policy" signifies "an international consensus as to universal and accepted norms of conduct that must be applied in all fora".⁹ This clearly encompasses the principle of good faith, discussed above, but it goes further to incorporate a series of fundamental principles that constitute the very essence of the State. Its essential function is to preserve the values of the international legal system against actions contrary to it.¹⁰

It has been said that the term "in accordance with law", found in numerous IIAs, is a manifestation of international public policy. This derives from its purpose in maintaining respect for the law through its sanctioning of illegal acts and their resulting effects.¹¹ The inclusion of the term demonstrates an intention on the part of States to exclude from protection those investments made in violation of its laws.

The arbitral tribunal, while clearly not empowered to apply the criminal law in the same way as a domestic judge, can instead use international public policy to combat international crime in private trade. When faced with illicit behaviours such as fraud, bribery and corruption, which violate domestic criminal laws, the arbitral tribunal can use the principles of international public policy as the basis of refusing jurisdiction. The rationale for such action is that "[i]t is not possible to recognise the existence of rights arising from illegal acts, because it would violate the respect for the law which ... is a principle of international public policy".¹²

2.3 *Nemo auditor propriam turpitudinem allegans*

In circumstances where the illicit behaviour complained of involves a bribe, the question arises whether the party responsible should be able to claim restitution of the bribe. The principle of *nemo auditor propriam turpitudinem allegans* prevents such restitution.

Nemo auditor propriam turpitudinem allegans essentially provides that no person shall be entitled to his own turpitude. There are various other maxims associated with this principle, including:

- *ex dolo malo non oritur* - an action does not arise from fraud;
- *malitiis nos est indulgendum* - there must be no indulgence for malicious conduct;
- *dolos suus neminem relevat* - no one is exonerated from his own fraud;
- *in universum autum haec in er re regula sequenda est, ut dolos omnimodo puniatur* - in general, the rule must be that fraud shall be always punished;
- *unusquisque doli sui poenam sufferat* - each person must bear the penalty for his fraud; and

⁹ *World Duty Free Company Limited v. Republic of Kenya* ICSID 4 October 2006 (World Duty Free v. Kenya).

¹⁰ *Inceysa v. El Salvador* paragraph 245.

¹¹ *Inceysa v. El Salvador* paragraph 246-247.

¹² *Inceysa v. El Salvador* paragraph 249.

- *nemini dolos suosprodesse debet* - nobody must profit from his own fraud.¹³

Nemo auditor propriam turpitudinem allegans can also form the basis of an action to refuse protection under a IIA. Applying the principles above, a foreign investor that effectuates an investment by means of an illegal act cannot seek benefit nor protection from the host state under an IIA, including access to international arbitration, because its act has a fraudulent origin and nobody can benefit from his own fraud.

3. The principles in practice

Two International Centre for Settlement of Investment Disputes ("ICSID") awards, *Inceysa Vallisoletana S.L. v. Republic of El Salvador* ("*Inceysa v. El Salvador*") and *World Duty Free v. Republic of Kenya* ("*World Duty Free v. Kenya*"), provide examples of the way in which the principles discussed above can operate in practice to address illicit behaviour. These are explored in detail below.

3.1 Inceysa v. El Salvador

(a) Facts

In 1999, the Ministry of the Environment and Natural Resources of El Salvador ("MARN") organised a public bid for a mechanical inspection services contract (the "Contract") in El Salvador. Three offers were evaluated, with the Inceysa Vallisoletana, S.L. ("Inceysa"), a company incorporated under the laws of the Kingdom of Spain, was awarded the Contract.

The merits basis of Inceysa's request for arbitration were allegations that MARN breached the Contract by later hiring other companies to provide the services for which it had contracted with Inceysa and failing to facilitate Inceysa's provision of services in several regards, thereby violating the Agreement for the Reciprocal Promotion and Protection of Investments signed between the Kingdom of Spain and El Salvador (February 1995)¹⁴ (the "BIT"). That breach, Inceysa claimed, amounted to unjustified unilateral termination of the Contract and an indirect deprivation or expropriation of Inceysa's rights thereunder.

With respect to jurisdiction, Inceysa submitted that El Salvador's consent to protect foreign investments by signing the BIT was absolute and could not now be qualified. To place any limitation on that consent would be tantamount to a unilateral withdrawal by El Salvador of its consent to arbitrate, contravening Article 25 of the ICSID Convention.

In its Memorial on Objections to Jurisdiction, however, El Salvador submitted that while it had consented to protect foreign investments made in El Salvador under the BIT, that consent did not extend to protecting investments that were the consequences of fraud. The Contract, El Salvador submitted, was just such an investment. In particular, El Salvador submitted that "[t]he Investment Treaty was meant to protect only investments made in accordance with the host State's laws, and the parties consented to ICSID jurisdiction only over disputes arising from such legal investments."¹⁵

Inceysa, El Salvador alleged, had engaged in numerous counts of fraud. Amongst these were: Inceysa's provision of falsified financial statements with its tender in the public bid; fabrication of its strategic partner for the purposes of winning the bid; deliberate falsification of the career

¹³ *Inceysa v. El Salvador* paragraph 240.

¹⁴ Available at: http://www.unctad.org/sections/dite/ia/docs/bits/spain_elsalvador_sp.pdf (in Spanish).

¹⁵ Memorial on Objections to Jurisdiction, pp. 69–70.

and experience of Mr. Antonio Felipe Martínez Lavado, on whom Inceysa based much of its alleged suitability to perform the contract; failure to disclose its relationship with ICASUR, a company that bid for the tender contract alongside Inceysa, amounting to deceit; and falsification of contracts supposedly signed by Inceysa with municipalities in the Philippines and in Panama.

(b) **Significant findings**

In declining jurisdiction over the merits of the matter, the Tribunal effectively agreed with the entirety of El Salvador's submissions. Core to its decision was a recognition and application of general principles of law stemming from public policy and part of Salvadoran law,¹⁶ each of which it was held Inceysa's fraudulent conduct offended. These shall be dealt with in turn.

(i) Violation of the principle of good faith

The Tribunal stated that:

"Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time."¹⁷

Indeed, it would be anomalous to suggest that any State would consent to the protection of investments and in turn to the jurisdiction of the ICSID on the possibility that future investors might engage in bad faith behaviour. Rather, it is more apposite to surmise that "El Salvador gave its consent to the jurisdiction of the Centre, *presupposing good faith behaviour* on the part of future investors."¹⁸

(ii) Violation of the principle of *nemo auditur propiam turpitudinem allegans*

Nemo auditor propiam turpitudinem allegans, expressed in Spanish as *nadie puede beneficiarse de su propia torpeza o dolo*, essentially means that no person shall be entitled to his own turpitude. It is founded on the precept of justice and has taken various forms across numerous decisions.¹⁹

Hence the fact that the Contract was effectuated by means of Inceysa's several illegal acts meant that it could neither benefit from the investment nor from protections granted by El Salvador, in this case, access to international arbitration. In reaching this decision, the Tribunal commented that "[a]llowing Inceysa to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be *a serious failure of the justice that this Tribunal is obligated to render*. No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."²⁰

¹⁶ *Inceysa v. El Salvador* paragraph 243.

¹⁷ *Inceysa v. El Salvador* paragraph 232.

¹⁸ *Inceysa v. El Salvador* paragraph 238.

¹⁹ *Inceysa v. El Salvador* paragraph 241.

²⁰ *Inceysa v. El Salvador* paragraph 244 (emphasis added).

(iii) Violation of the principles of international public policy

Pertinent to our particular emphasis on the host State's laws, the Tribunal commented in this case that the wording used in the BIT - "in accordance with host State's laws and regulations" - is a clear manifestation of international public policy.²¹ The inclusion of the term "in accordance with law" in the BIT, for the reciprocal protection of investments, had a direct effect of sanctioning illegal acts and their concomitant effects.

El Salvador's claim, therefore, that "[i]f one Investment Treaty is read as protecting fraudulent or illegal investments, the others are open to the same interpretation", was upheld by the Tribunal. "[T]reaties should be interpreted where possible to exclude fraud, not encourage it."²²

(c) **Application of the principles of international law**

Where an investment is tainted by illegality, it would, in most cases, not be an investment in accordance with host State's laws and regulations. And where that is the case, *Inceysa v. El Salvador* would seem to lead to the conclusion that such an investment would lose the protection of the BIT under which the host State consented to have related disputes arbitrated. That is not only in the interests of domestic public policy and principles of good faith and justice, but it flows logically from the demands of international public policy.

It is this emphasis on *ordre public international* that informed the Tribunal's decision in the case of *World Duty Free v. Kenya*, discussed in section 3 below. There, the arbitration was not requested under any BIT but arose from a dispute resolution clause in the relevant contract. Similar acts of illegality were perpetrated by World Duty Free, namely the bribery of Kenya's then-President Moi. These acts contravened the relevant Kenyan and English laws as well as, more importantly, international public policy, compelling the Tribunal to decline jurisdiction over the merits of World Duty Free's claims.

The fact that the Tribunal declined jurisdiction to arbitrate the matter notwithstanding that the right to arbitrate arose from the Contract rather than an investment protection mechanism under any BIT, indicates the seriousness with which adjudicators will look upon fraudulent investments. Courts and tribunals are, after all, typically averse to interfering in the contractual relations between parties. For the purposes of this discussion, therefore, the consequence may well be that the concept of "protection under a BIT" becomes a misnomer with respect to investments that are illegal under the laws of the host State.

A closer look at the significant facts and findings of *World Duty Free v. Kenya* follows.

3.2 World Duty Free v. El Salvador

(a) **Facts**

In 1989 House of Perfume, the corporate predecessor of World Duty Free Company Limited ("World Duty Free") (the Claimant), entered into an investment agreement with Kenya (the Respondent) after the predecessor's agent, Nasir Ibrahim Ali, was solicited to give a US\$2 million "personal donation" to Kenya's then President, Mr Daniel arap Moi. The agreement involved the construction, maintenance and operation of duty-free complexes at Nairobi and Mombasa International Airports. The maintenance and operation was to be for a duration of

²¹ *Inceysa v. El Salvador* paragraph 246.

²² *Inceysa v. El Salvador* paragraph 251.

ten years with an option to renew for a further ten years under the same terms and conditions, subject only to renegotiation of rent. Consideration was to be paid to the Kenyan Government in the amount of US\$1 million per annum for both complexes.

Both House of Perfume, which later became World Duty Free in 1990, and Kenya performed their obligations under the agreement until World Duty Free was placed in receivership by a Kenyan court. World Duty Free then initiated arbitration proceedings to recover damages and restitution for Kenya's alleged expropriation of its property and multiple violations of the investment agreement. This was done pursuant to Article 9 of the agreement, which stated:

(1) The parties hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes ("the Centre") all disputes arising out of this Agreement or relating to any investment made under it for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention").

(2) It is hereby stipulated:

(a) that the Company is a national of the United Arab Emirates;

(b) that the transaction to which this Agreement relates is an "investment" within the meaning of the Convention;

(c) that any arbitral tribunal constituted pursuant to this Agreement shall be conducted in accordance with the Rules of Procedure for Arbitration Proceedings of the Centre in effect on the date on which the proceeding is instituted.

The parties each appointed arbitrators to the tribunal on 24 August 2000. On March 19 2003 Kenya filed an Application for Dismissal of the Claimant's Claims with Prejudice, which was supported by a counter-memorial dated 18 April. WDF submitted its response in July 2004.

In December 2004 the tribunal issued a Procedural Order, ordering an oral hearing on the following limited preliminary issues:

i) Whether the Respondent was legally entitled to avoid and did avoid by its Counter-Memorial dated 18 April 2003, the "House of Perfume Contract";

ii) Whether the Respondent at any time prior to 18 April 2003 lost its legal right to avoid the "House of Perfume Contract" by affirmation or otherwise; and

iii) Whether the Claimant is legally entitled to maintain any of its claims in these proceedings as a matter of public policy or ordre public international, including any rule based on the maxims "ex turpi causa non oritur actio" or "nemo auditor propriam turpitudinem allegans".

World Duty Free claimed that in order for House of Perfume to be able to do business with the Kenyan Government, Mr. Ali was required to make a "personal donation" to the then President of the Republic of Kenya in the amount of US\$2 million, which World Duty Free contended was "part of the consideration paid by House of Perfume to obtain the contract".

Furthermore, World Duty Free claimed that when the Kenyan Government placed it into receivership, the purported receiver mismanaged and effectively destroyed its assets. Thereafter, Mr. Ali was informed that the receivership would be lifted only if Mr. Ali "declined to give prosecution evidence" in the trial against Goldenberg International Ltd, the company of Mr. Pattni, through which Mr. Pattni devised a massive fraud to provide illicit funds for President Moi's campaign.

Core to Kenya's submissions was that the Contract was unenforceable; it arose out of a contract tainted by bribery which, as a matter of both Kenyan and English law and of international public policy, renders the contract voidable.

In that respect, World Duty Free submitted first, that bribery is not a strict liability offence and the element of *mens rea* was here missing; secondly, that even if both legal *and* illegal consideration had been given for the contract, the illegal consideration was "severable"; thirdly, dismissal of the case on the public policy ground would allow Kenya to profit from its far more serious illegalities; and fourthly, that Kenya lost its right of rescission when it breached the contract by illegally expropriating World Duty Free's investment.

To this, Kenya replied that no question of relative moral culpability arises in the context of international public policy, which is for the benefit of the public and not for the parties. Furthermore, it submitted that its right to rescission was not lost because it could not have known of Mr. Ali's bribe, which was heavily concealed from just about everyone.

(b) **Significant findings**

The Tribunal decided that the fraud perpetrated by World Duty Free's predecessor precluded it from the investment protection mechanism of arbitration contained in the Contract. This decision was made despite the fact that the bribery involved the then-President of Kenya *and* despite the fact that the Kenyan Government had since taken no action to prosecute ex-President Moi for corruption nor to recover the bribery funds.

At the crux of the Tribunal's decision was the finding that bribery contravened international public policy, which was also deemed a matter of English and Kenyan domestic public policy. Furthermore, bribery was criminally sanctioned in both English and Kenyan law and numerous Conventions had been signed and cases heard concerning the international community's efforts to reduce corruption in international business transactions. Thus, as the Tribunal held, it was in the interests of protecting the public at large that such a decision be rendered, especially in the context of the poverty-ridden Kenyan public.

Indeed, the Tribunal highlighted Judge Lagergren's words in International Criminal Court Case No. 1110, which involved an agreement between a public undertaking and an Argentine businessman where a 10 per cent commission was to be paid to him by the public body for an energy project. Judge Lagergren held that the exorbitant amounts of money made it:

*"impossible to close one's eyes to the probable destination of amounts ... and to the destructive effect thereof on the business patten with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."*²³

The requirement that an investor behave in accordance with the host State's laws and regulations would seem, from this case, to extend to laws and regulations embracing all domestic laws and policy *and* international public policy that has been absorbed into the State's legal norms. Where a foreign investment breaches that international public policy, it logically also breaches the host State's laws and regulations and must, as a consequence, lose the protection afforded to it under an IIA and, in this case, the contract, namely, access to arbitral justice.

²³ (emphasis added).

3.3 Significance of these decisions in the context of international practice

In both *Inceysa v. El Salvador* and *World Duty Free v. Kenya*, the respective Tribunals found that the investments, the products of illegality in the form of fraud or bribery, were not in accordance with the host State's laws and regulations. Consequently, the parties were precluded from arbitrating the merits of their disputes against El Salvador and Kenya respectively, a protective mechanism that was available under the BIT and contract respectively.

Two remarks must be made with respect to this outcome. These will be dealt with in turn.

(a) **The answer to unfairness**

Of immediate concern in *World Duty Free v. Kenya* was the fact that Kenya's highest political officer, its President, was implicated in the corruption. Equally disturbing was the fact that the Kenyan Government had made no attempt to prosecute President Moi for that corruption nor to recover the bribery funds in civil proceedings following his term of office. An obvious question is why ICSID declined jurisdiction and thereby protected the Kenyan government.

The answer to this question lies in the fact that international public policy, upon which ICSID based the greater part of its reasoning, concerns not the protection of the parties in question, "but the public"; no question of relative moral culpability thus enters into the equation.

International public policy was thereby elevated above questions of private behaviour and agreements. In this case, the decades-long efforts in Kenya, a country riddled with poverty and abuses of public trust, to combat corruption played a large part in ICSID's deliberations. As did the enormous spectrum of Conventions and instruments that have come to the fore on the international stage that sanction illegal and fraudulent behaviour on the part of public officials. This, the Tribunal intimated, was of far greater consequence than the unfairness that at first glance appeared to arise from its preliminary decision in this case.

(b) **Keeping in line with international developments**

The outcomes of both cases echo the stance that the international community has taken towards corruption overall, that being bribery, fraud and other forms of illegality involving public officials. Over the past few decades, various instruments laying down the obligations of States to implement measures that combat bribery have come to the fore. Among these are the 1996 Inter-American Convention Against Corruption, the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 1999 Council of Europe Criminal Law Convention on Corruption, and the 2003 United Nations International Agreement on Illicit Payments.²⁴ In fact, in *World Duty Free v. Kenya*, the Tribunal highlighted the many pan-African conventions entered into by Kenya in an effort to combat bribery and which informed the Tribunal's hardline against World Duty Free's acts of bribery.

More importantly, UNCTAD has highlighted the emergence of documents containing norms on corporate responsibility.²⁵ Of particular significance is the OECD Guidelines for Multinational Enterprises, which set out in its introductory paragraph:

²⁴ See United Nations Conference on Trade and Development (UNCTAD), *Key Terms and Concepts in IIAs: A Glossary* (UNCTAD Series on Issues in International Investment Agreements) (2004) 90.

²⁵ See United Nations Conference on Trade and Development (UNCTAD), *Key Terms and Concepts in IIAs: A Glossary* (UNCTAD Series on Issues in International Investment Agreements) (2004) 91–2.

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage."

This emphasis on corporate responsibility is also reflected in the Tribunal's decisions in *Inceysa v. El Salvador* and *World Duty Free v. Kenya*.

With the growing efforts to combat corruption and thereby increase security of transactions in the global market, these international developments may see tribunals take an even harder stance towards investments that contravene host State's laws. This can be said, after all, to be a means of protecting the legal system in those States.

4. Conclusion

When the seemingly disparate discourses of international arbitration and criminal law intersect, it is the arbitral tribunal's role to ensure the morals and ethics of international trade are protected. This is primarily achieved through various principles of international law such as good faith, international public policy and *nemo auditor propriam turpitudinem allegans*, which allow the tribunal to refuse jurisdiction and withdraw the offending investment from the protection and benefits offered by an IIA. Given the growing international consensus on the need to target illegality in international trade, it is unsurprising that arbitral tribunals, when faced with such a situation, are taking a firm stance to show that they will not be tolerated.

Conference Papers

01- The setting: trends in International Investment Agreements (IIAs) and recent developments in Investor-State Dispute Settlement (ISDS)

Jan Knoerich, Division on Investment and Enterprise, UNCTAD

02 - The Definition of Investor - Brief introduction of China's practice

Xue Xiaohong, Ministry of Commerce (MOFCOM), China

03 - Admission and Establishment

Anna Joubin-Bret, Division on Investment, UNCTAD

04 - Fair and Equitable Treatment and the Minimum Standard of Treatment

Anna Joubin-Bret, Division on Investment, UNCTAD

05 - Fair and equitable treatment. Chile's experience

Felipe Sandoval, Services and Investment Department, MOFA, Chile

06 - Discussion of Indirect Expropriation

Brenda Horrigan, International Arbitration Practice Group

07 - APEC-UNCTAD Most-Favored-Nation Treatment

Anna Joubin-Bret, Division on Investment, UNCTAD

08 - National Treatment and Treaty claims / contract

Alvaro Galindo C., Director of International Litigation and Arbitration, Republic of Ecuador

09 - Umbrella Clauses in Recent Colombian IIAs

Ana Lucía Noguera, Ministry of Trade, Industry and Tourism, Columbia

010 - Arbitration under the UNCITRAL and ICSID Rules

Alvaro Galindo C., Director of International Litigation and Arbitration, Republic of Ecuador

011 - Provisional Measures: the Experience of Ecuador

Alvaro Galindo C., Director of International Litigation and Arbitration, Republic of Ecuador

012- Investor – State Dispute Settlement Mexican Experience

Hugo Gabriel Romero Martínez, Mexico

013 - Japan's Experience: The Possible Alternative to ISDS

Ministry of Economy, Trade and Industry, Japan

014 - Exploring Alternatives to Investment Treaty Arbitration and the Prevention Of Investor-State Disputes

Jan Knörich, Division on Investment and Enterprise, UNCTAD


APEC-UNCTAD Workshop on Investor-State Dispute Settlement: Issues and Challenges for the APEC Region


Manila, Philippines
 9-11 December 2009

The setting: trends in International Investment Agreements (IIAs) and recent developments in Investor-State Dispute Settlement (ISDS)

Jan Knoerich
 Associate Expert
 Work Programme on International Investment Agreements

Overview of Presentation

1. Foreign direct investment: trends and implications
2. Objectives of the legal investment framework
3. Trends in international investment agreements (IIAs)
4. Trends in investor-State dispute settlement (ISDS)
5. Challenges

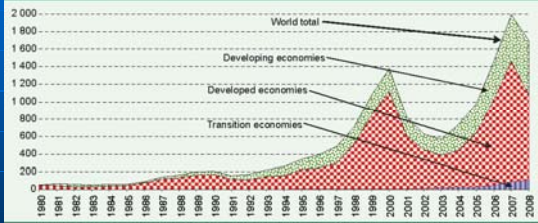
2

Foreign direct investment: trends and implications

3

The crisis ends the 4 year FDI boom

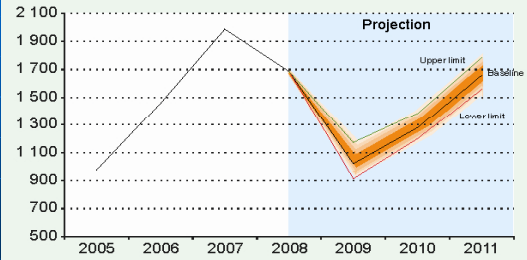
FDI inflows, globally and by group of economies, 1980-2008 (\$ billion)



- Global FDI declined from \$2 trillion (2007) to \$1.7 trillion (2008)
- FDI flows to **developed economies** fell by 29%, to \$962 billion
- FDI flows to **developing economies** rose 17%, to \$621 billion
- **Transition economies** posted a new record high, with inflows reaching \$114 billion, a 26% increase

4

Global FDI Prospects, 2009-2011



- Global FDI flows are expected to **fall further** to below \$1.2 trillion in 2009
- with a **slow recovery in 2010** (to a level up to \$1.4 trillion)
- gaining **momentum in 2011** (approaching \$1.8 trillion)

5

The FDI landscape has shifted in favor of developing economies

Average 1999-2001

- Developing economies: 21%
- South-East Europe and the CIS: 1%
- Developed economies: 78%

Average 2007-2008

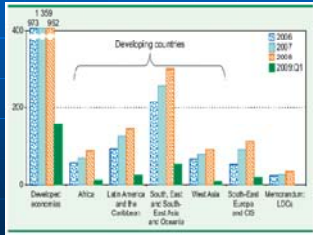
- Developing economies: 31%
- South-East Europe and the CIS: 6%
- Developed economies: 63%

The share of **developing & transition economies** in inward FDI accounted for 43% in 2008 (31% in 2007).

6

FDI to developing countries reached record levels in 2008

FDI inflows, by groups of economies, 2006-2009:Q1
\$ billion



For 2008:

Africa: \$88 billion, 27% increase – record

LAC: \$144 billion, 13% increase – record

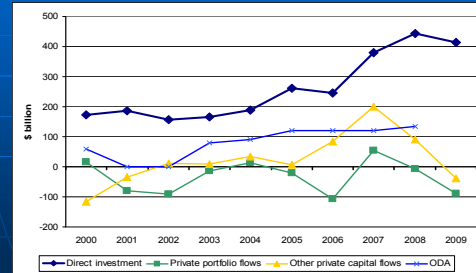
East Asia, South Asia, South-East Asia: \$298 billion, 17% increase – record

West Asia: \$90 billion, 16% increase – record

Least developed countries: \$33 billion – record

7

Net capital flows to developing countries, 2000-2009

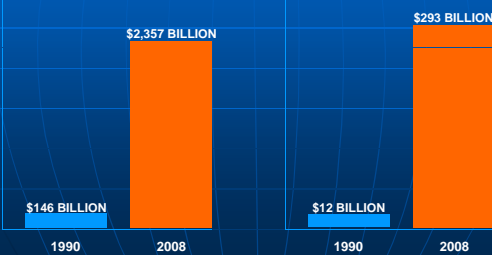


8

The rise of outward FDI from the South

The FDI stock of the TNCs from the South increased by 15 times

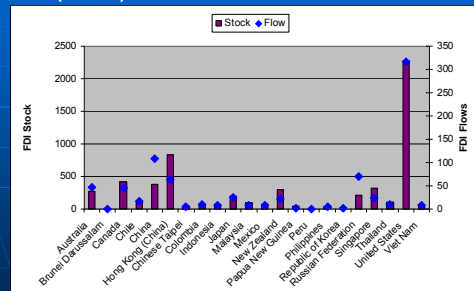
Annual outflows of FDI by the South increased by 23 times



9

FDI into APEC Economies

Inward FDI stock and flows into APEC economies 2008 (\$ billion)

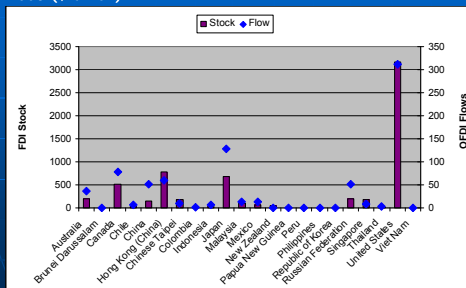


Total stock: US\$ 6 trillion, 40% of world FDI stock
Total flows: US\$ 800 billion, 47% of world FDI flows

10

Outward FDI from APEC Economies

Outward FDI stock and flows from APEC economies 2008 (\$ billion)



Total stock: US\$ 6.4 trillion, 39% of world outward FDI stock
Total flows: US\$ 784 billion, 42% of world outward FDI flows

11

Important current issues

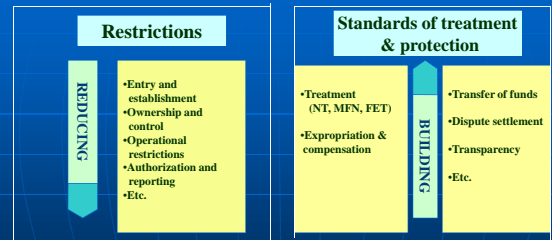
- Protection of strategic industries
- Economic Crisis
- Increase in South-South FDI
- Emerging economies as outward investors
- Emergence of FDI by Sovereign Wealth Funds (SWFs)

12

Objectives of the legal investment framework

13

Objectives of the legal investment framework



These objectives can be achieved through:

- National policies
- Investment contracts/State contracts
- International investment agreements (IIAs)

14

Legal framework for investment: Hierarchy of norms



15

The international investment legal framework: role and objectives

International investment agreements (IIAs):

- Contribute to the creation of a **stable, predictable and transparent regulatory framework** for international investment - strengthen the enabling framework for FDI (promotion, protection, liberalization)
- Facilitate the **coordination of investment relations** (relations between host States, home States, international investors and other development stakeholders) through internationally agreed common denominators
- **Complement national laws** on investment (interface between national and international investment policies)

16

Why do countries sign IIAs?

For host countries (traditionally developing)

- To improve their investment climate and to attract foreign investors
- To portray a positive international image of 'openness'

For home countries (traditionally developed)

- To protect their investments abroad
- Some countries are both capital importing and exporting (both home and host) - twin objectives: investment attraction and investment protection.

Impact of IIAs on FDI flows? Diverging views
Impact on economic development? Diverging views

17

A great number of IIAs cover more or less the same issues

- Preamble
- Definitions (investment/investor)
- Admission and establishment
- Core standards of protection:
 - Fair and equitable treatment
 - Non-discrimination (NT/MFN)
 - Expropriation
 - Transfer of funds
- Dispute settlement (State-State and investor-State)

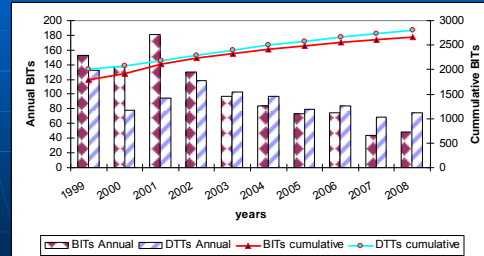
...but the *concrete way in which they are addressed* differs substantially

18

Trends in international investment agreements

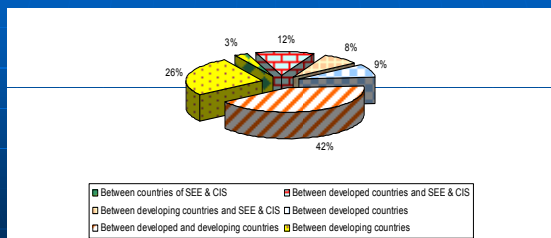
19

The network of BITs continues to grow rapidly, there are now over 2500 BITs



20

BITs concluded by country group up to end 2008



21

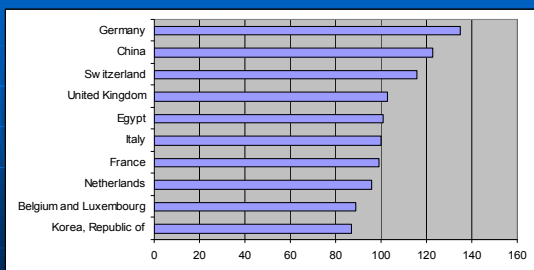
Increased role of developing countries

- Growing number of developing countries involved in the conclusion of IIAs:
 - 76% of all BITs
 - 61% of all DTTs
 - 81% of all other IIAs
- Growing number of South-South IIAs:
 - 27% of all BITs
 - 35% of all other IIAs

This also reflects growing outward FDI from developing countries.

22

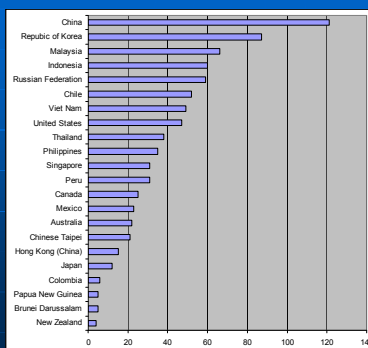
The top ten signatories of BITs in the world up to end 2008



23

BITs in APEC

BITs concluded by APEC economies, 1 June 2008 (cumulative)

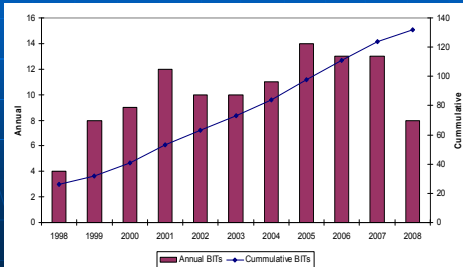


Total: 814 BITs,
~ 31% of globally concluded BITs

24

Renegotiation of BITs increasingly common

Number of renegotiated BITs, annual and cumulative (1998-2008)



25

New generation of BITs: Increasingly sophisticated and complex

- **United States and Canadian model BITs (2004)**
- **Tend to be increasingly sophisticated in content**
- **Clarifying in greater detail the meaning of a number of standard clauses**
- **Putting more emphasis on public policy concerns, such as the protection of national security, health, safety, the environment, and labor rights**

26

Economic integration agreements with investment provisions

- International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (including trade, services, competition, intellectual property)
- These agreements can be free trade agreements, regional integration agreements, partnership agreements, or economic cooperation agreements
- The total number of such economic agreements with investment provisions exceeded 273 as of end 2008

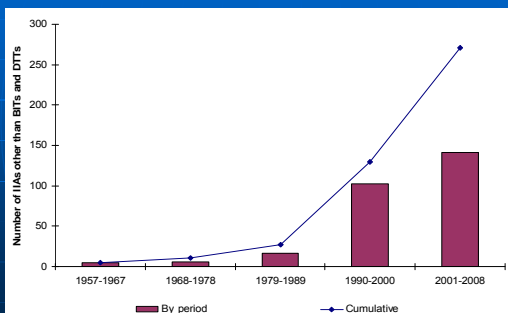
27

FTAs with investment chapters concluded in 2008

- Economic Partnership Agreement between Japan and Vietnam – The provisions of the BIT between Japan and Viet Nam signed (November 2003) are incorporated into and form part of this Agreement
- Free Trade Agreement between Pakistan and Malaysia
- Free Trade Agreement between Canada and Colombia
- Free Trade Agreement between EFTA and Canada
- Free Trade Agreement between Canada and Peru
- Free Trade Agreement between China and New Zealand
- Free Trade Agreement between ASEAN and Japan
- Free Trade agreement between Singapore and Peru
- Free Trade Agreement between Chile and Australia
- Free Trade Agreement between the EFTA States and Colombia
- Trade, investment and development cooperative agreement between the United States and the Southern African Customs Union (SACU)
- Trade and Investment Framework Agreement between the United States and the East African Community (EAC)
- Free Trade Agreement between Singapore and China
- Interim Agreement on Trade and Trade-related matters between the European Community and Bosnia and Herzegovina
- Economic Partnership Agreement between the CARIFORUM States and the European Community
- Economic Partnership Agreement between the EC and Côte d'Ivoire
- Free Trade Agreement between Singapore and the Gulf Cooperation Council (GCC)

28

Over 250 trade agreements with investment provisions



29

Investment in the multilateral context

- Historical overview: The Havana Charter, the World Bank Guidelines, the UN Code of Conduct, the OECD MAI
- Investment in the WTO
- Investment-specific agreements: dispute settlement (ICSID, NY Convention,...), insurance (MIGA)...
- Limited membership: OECD rules, APEC
- Limited scope: Energy Charter Treaty, GATS, TRIMs, TRIPs

30

Systemic features of the IIA universe

The existing system is

- **universal** (nearly every country has signed at least one BIT)
- **atomized** (thousands of agreements that lack any system-wide coordination and coherence)
- **multi-layered** (different levels and overlaps)
- **multifaceted** (IIAs also include rules that address other related matters, such as trade in goods, trade in services, intellectual property, labour issues or environmental protection)

31

The spaghetti bowl of IIAs



Other features of the IIA universe

The existing system is

- primarily protective, only moderately liberalizing
- indirectly promotional
- evolving and innovative
- only contains investor rights, not investor obligations
- does not address development concerns to a large extent

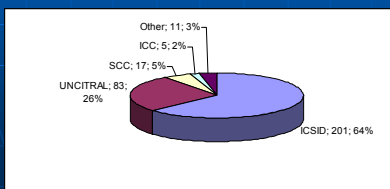
33

Trends in investor-State dispute settlement

34

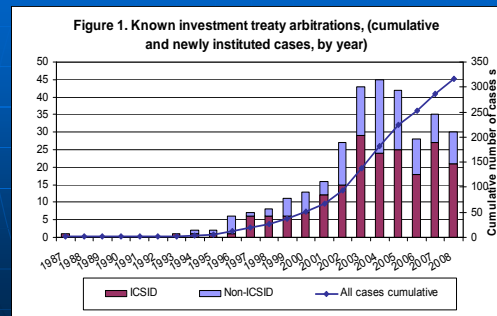
The increase in IIAs has been paralleled by an increase in investor-State disputes

→ The cumulative number of treaty-based cases reached 317 known claims by end 2008.



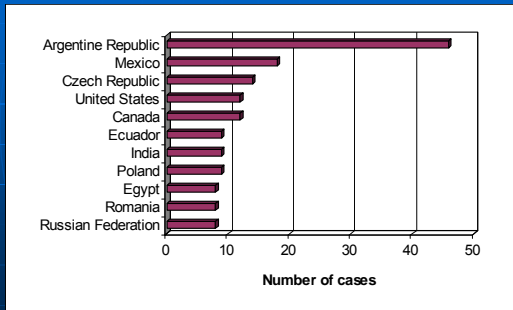
35

Known investment treaty arbitrations



36

Known investment treaty claims, by defendants



Involvement of developing / developed countries

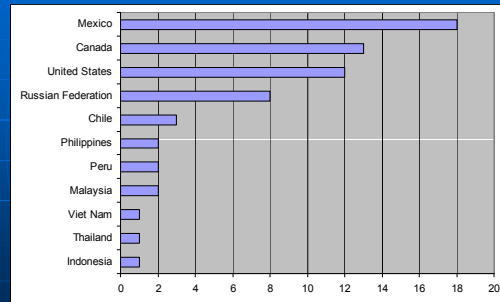
- At least 77 governments have faced investment treaty arbitration:
 - 47 developing countries
 - 17 developed countries
 - 13 countries with economies in transition
- Among the investors that lodged claims:
 - 92% were from developed countries
 - 20 cases were filed by investors from developing countries
 - 9 cases were filed by investors from transition economies

Further features of the ISDS mechanism

- The most used IIAs in investment treaty arbitration are:
 - BITs (almost 250 claims)
 - NAFTA (48 claims)
 - Energy Charter Treaty (20 claims)
- Of the 96 concluded cases by end of 2008:
 - approximately half (51) were decided in favour of the State
 - about half (45) were decided in favour of the investor (with a total of \$2.8 billion awarded)

ISDS in APEC

Known investment treaty arbitrations in APEC countries



Total of 63 cases, 20% of all known cases worldwide

ISDS mechanism: concerns

- Increasing use of the ISDS mechanism
- High costs involved in conducting procedures
- Arbitration awards can involve huge sums
- Potential impact on a country's reputation as investment location
- Technical complexity of ISDS: concerns on the technical capability of developing countries to handle investment disputes that they face
- While the awards rendered in these proceedings have helped to clarify the meaning and content of individual treaty provisions, some contradictory decisions have also created uncertainty.
- Differences in arbitration rules, while offering foreign investors the choice of various options, contribute to incoherence and lack of predictability of the system
- Financial crisis may trigger new disputes

Challenges

IIA universe: challenges

- Policy coherence
- Effective implementation of international commitments
- IIAs and development
- Develop sufficient capacity of developing countries

43

ISDS mechanism: challenges

- Getting ready for arbitration
- Develop sufficient capacity to handle investment disputes
- Finding alternatives to arbitration
- Preventing investment disputes

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www.unctad.org/iia

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The Definition of Investor

---brief introduction of China's practice

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Ministry of Commerce(MOFCOM),China

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Overview of China's IIAs

- BITs
130 have been signed
- FTAs
5 (New Zealand, Pakistan, Singapore, Peru, ASEAN)

China's practice of The Definition of Investor

- 2. The term "investor" means nationals or enterprises of one Contracting Party who are investing or have invested in the territory of the other Contracting Party:
 - (a)The term "national" means a natural person who has nationality of either Contracting Party in accordance with the applicable laws of that Contracting Party;
 - (b)The term "enterprise" means any legal entities, including companies, firms, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seat in that Contracting Party, irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not."
 - (c)Legal entities constituted under the laws of a non-Contracting Party but directly owned or controlled by nationals in paragraph (a) or enterprises in paragraph (b).

China's practice of The Definition of Investor

- 1 Natural person
 - *Modle text* :
"The term "national" means a natural person who has nationality of either Contracting Party in accordance with the applicable laws of that Contracting Party;"

China's practice of The Definition of Investor

- China-Newzealand FTA
Article 135: "natural person of a Party means a national or a permanent resident of a Party under its laws. Until such time as China enacts its domestic law on the treatment of permanent residents of foreign countries, this Chapter does not impose obligations on a Party with respect to the permanent residents of the other Party except for the obligations in Articles 142, 143, 144, 145 and 148."

China's practice of The Definition of Investor

- Chinese Nationality Law (adopted on 1980)
"Article 3: The People's Republic of China does not recognize dual nationality for any Chinese national."
- China -- Colombia BIT
"This Agreement shall not apply to investments made by natural persons who have nationality of both Contracting Parties."

China's practice of The Definition of Investor

- 2 Legal entities

- Model text


The term "enterprise" means any legal entities, including companies, firms, associations, partnerships and other organizations, **incorporated or constituted** under the laws and regulations of either Contracting Party and **have their seat in** that Contracting Party, irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not."

China's practice of The Definition of Investor

- 3 "directly owned or controlled"

"Legal entities constituted under the laws of a non-Contracting Party but **directly owned or controlled** by nationals in paragraph (a) or enterprises in paragraph (b)."

Thank you!


APEC-UNCTAD Workshop on Investor-State Dispute Settlement: Issues and Challenges for the APEC Region
 Manila, Philippines
 9-11 December 2009

ADMISSION AND ESTABLISHMENT

Anna Joubin-Bret
 Senior Legal Advisor
 Work Programme on international investment agreements
 Division on Investment
 UNCTAD
 Philippines, December 2009

1

Admission Model

- **Host country discretion: laws and regulations relating to entry may change.**
Ex: older Australian treaties: laws and regulations from time to time applicable
- **Once admitted, foreign investment is granted treatment (NT, MFN) and protection**
- **No (or only few) exceptions to NT and MFN in the treaty: no need.**

2

Entry of Foreign Investment

Two approaches in IIAs:

- **Admission model: entry in accordance with laws and regulations of the host country: NO LIBERALIZATION**
- **Pre-establishment model: right of establishment . National treatment at the pre-establishment stage (Western Hemisphere, Japan, Korea): LIBERALIZATION : removal of barriers to access**

3

Recent Examples

- Canada – Peru FTA
- Philippines – Austria BIT
- China – Bosnia-Herzegovina FTA
- Korea (Rep.) – Mexico FTA

4

Pre-Establishment NT and MFN

- **NT and MFN at all stages of the investment, including at the pre-establishment stage: establishment, acquisition and expansion (FTA Peru-EE.UU.)**
- **Lists of exceptions: all countries have closed sectors or non conforming measures.**
- **Mostly negative lists. Very few exceptions (TAFTA)**
- **The right of establishment is granted in the Treaty, the national laws must be in conformity with Treaty obligations**

5

Example of Treaty

- Japan – Switzerland EPA
- Peru – United States
- Mexico – United Kingdom BIT (2007)

6

Two issues for discussion

In the light of recent cases and treaty practice of States:

- Admission in accordance with the laws and regulations of the host State the trigger of investment protection ?
- What is the level of protection granted to “pre-investors” ?

7

Admission in conformity with the laws and regulations

Two preliminary questions:

- Reference to the laws and regulations of the host country in several places in the treaty: definitions, admission, other provisions.
- What are the laws and regulations of the host country: investment laws, formalities, general legal framework ?

8

Admission in conformity with the laws and regulations

- *Salini vs. Morocco*: Definition “in accordance with the laws and regulations of the aforementioned party”.
- Tribunal found that it is not a definitional issue but a validity issue.
- “Seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.”

9

Admission in conformity with the laws and regulations

- Same approach in *Tokios Tokeles vs. Ukraine*: severity of deviations from national law.
- In *Bayindir vs. Pakistan*: reference to host State laws refers to legality and since it did not violate Pakistani laws and regulations: tribunal had jurisdiction.

10

Admission in conformity with laws and regulations

- *Aguas del Tunari vs. Bolivia*: included in the admission clause: “Subject to its right to exercise powers conferred by its laws and regulations, each Party shall admit such investment”.
- Tribunal interprets reference to the “framework of its laws and regulations” as a reference “limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments”.

11

Admission in conformity with the laws and regulations

- *Fraport vs. Philippines*: Violation of the Anti Dummy Law (secret shareholders agreement).
- Tribunal found a violation of the ADL. Found that a failure to comply with the national law to which a treaty refers will have an international legal effect.
- Subjective assessment: good faith or intentional violation.
- No jurisdiction. Jurisdictional matter vs. Issue belonging to the merits (Cremades dissenting opinion).

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Admission in conformity with the laws and regulations

- *Inceysa V. Republic of El Salvador* (6 August 2006, ICSID ARB/0326)
- Inceysa argued that denial of exclusivity was an expropriation of its rights under the contract and violated El Salvador-Spain BIT
- Tribunal found that Inceysa had made false representations to secure the contract
- Thus the investment violated the laws of El Salvador and could not be arbitrated pursuant to the BIT.
- **CONTRAST:** *Ioannis Kardassopoulos v. Georgia* (6 July 2007, ICSID Case No. ARB/05/18)
 - Where it was the *host state's own actions* that may have rendered the agreement illegal, the investment does not lose protection under the BIT.

13

Treatment of Pre-Investors

- What happens if the State violates the right of establishment?
 - Can the State be forced to admit the “investor”?
- NO
- If not, can the tribunal rule on compensation?

14

Compensation for pre-investment costs

Mihaly v. Sri Lanka (ICSID case number ARB/00/2, decision 15 March 2002)

- BOT project. Letter of intent. No formal contract was signed.
- Claim for reimbursement of expenditures made pursuing a possible investment...that never happened. No State consent in this case.

15

Compensation for pre-investment costs

Zhinvali Development Limited v. Georgia
(ICSID N°Case No. ARB/00/1)

- Rehabilitation of a hydro-electric power plant in Georgia. Pressure from international financial institutions for transparent bidding process.
- Expenses such as feasibility studies, consultancy costs, travel expenses, legal fees, lost profit.
- Definition of investment in the 1996 Georgia investment law and compliance with art. 25 of ICSID Convention.

16

Compensation for pre-investment costs

Willy Nagel vs. Czech Republic (SCC. Case 049/2002)

- Cooperation agreement between Mr. Nagel (GB) and the national telecommunications agency
- Consortium for licences for telephone mobile operators. Not awarded.
- Deprived by the Czech Govt of rights under the cooperation agreement: “claims to money or to any performance under contract having a financial value” = Investment

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William Nagel v. Czech Republic (cont'd)

- Tribunal: “Financial value” requires two basic features:
 - Value has to be real, not just potential
 - Concept of financial value has to be interpreted in accordance with domestic laws
- Rights derived from cooperation agreement did not have financial value: no investment

18

Violation of the Right of Establishment

- Not necessary to have an investment:
 - ICSID: No
 - Often: Yes.

19

Recent cases: conclusions?

- Admission by the host State in accordance with its laws and regulations deserves further attention. Not a definitional issue but a validity issue.
- Analysis in relation to the purpose of a BIT: not meant to protect unlawful investments
- Not many cases addressing pre-establishment rights
- Tribunals reluctant to consider pre-establishment expenditures as an 'investment' under the ICSID Convention

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Questions???

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APEC-UNCTAD Workshop on Investor-State Dispute Settlement:
Issues and Challenges for the APEC Region

Manila, Philippines
9-11 December 2009

Fair and Equitable Treatment and the Minimum Standard of Treatment

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Philippines, December 2009

FET and the MST

- Fair and Equitable Treatment
 - Different formulations
 - No FET
 - FET but no source
 - FET international law
 - FET CIL
 - FET and relative standards
 - Recent interpretations
 - What can countries do?
- Minimum standard of treatment
 - Evolution in the formulation
 - NAFTA 1105
 - Recent treaties: US-Peru, Japan-Mexico, Chile, Canada
 - NAFTA decisions
 - FTC interpretation
 - Post-FTC awards
 - Some concerns ?

In APEC economies: FET

- No reference to FET or to the MST:
 - Australia – Singapore FTA of 2003
 - New-Zealand-Singapore FTA of 2001
 - New-Zealand – Thailand CEP of 2005
- FET with no reference to a source: International law
 - India-Indonesia BIT (article 3-2)

« Investment of each Contracting Party shall at all times be accorded *fair and equitable treatment* in the territory of the other Contracting Party ».

In APEC economies: FET is part of MST and governed by CIL

- NAFTA 1105 (1): Each Party shall accord to investments of investors of another Party treatment *in accordance with international law, including fair and equitable treatment and full protection and security*.
- FTA between US and Peru
- Japan IIAs with Mexico and the Philippines:
 - « Note: This article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. The concepts of « fair and equitable treatment » and « full protection and security » do not require treatment in addition or beyond that which is required by the customary international law minimum standard of treatment of aliens [...] ».

TECMED v. Mexico, ICSID AF, Award, May 29, 2003, ¶ 154 excerpts

[I]n light of the good faith principle established by international law, [the provision] requires the Contracting Parties to provide to international investments *treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*. The foreign investor expects the host State to act in a consistent manner, *free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . .

TECMED v. Mexico, ICSID AF, Award, May 29, 2003, ¶ 154 excerpts

“The foreign investor also *expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State* that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. . . . The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. [. . .]”

**Saluka v. Czech Republic, UNCITRAL,
Partial Award, March 17, 2006**

Dutch-Czech BIT, art. 3(1)

“Each Contracting Party shall ensure *fair and equitable treatment* to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.”

- No reference to international law

7

**Saluka v. Czech Republic, UNCITRAL,
Partial Award, March 17, 2006, pp. 60-61**

- General standards cannot be reduced to a precise statement of rules
- Not a decision *ex aequo et bono*
- Not an open-ended mandate to second-guess government decision-making
- Specification through judicial practice

8

Content of FET – recent cases

Obligation by the host State to maintain a *stable and predictable legal and business framework* in line with the investor’s legitimate expectations (Tecmed)

PSEG v. Turkey (2007): changes in both the legislative environment as well as in attitudes and policies of the administration are contrary to the need to ensure a stable and predictable business environment for investors to operate in, as required...by the Treaty.

Enron v. Argentina (2007): violation of FET as « the stable legal framework that induced the investment is no longer in place.. »

9

Content of FET – recent cases

- MCI Power Group v. Ecuador (2007): the investor’s expectations must be paired with a legitimate objective that « does not depend solely on the intent of the parties, but on certainty about the contents of the enforceable obligations ».
- However, in 2008 in Duke Energy v. Ecuador, the tribunal acknowledges that the investor’s expectations about the stability of the legal and business environment are important but « to be protected, they must be legitimate and reasonable at the time when the investor makes the investment ». No violation.

10

Content of FET – recent cases

- Factors to be evaluated to establish legitimate expectations:
 - Continental Casualty Co v. Argentina:
 - (i) the specificity of the undertaking allegedly relied upon;
 - (ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*;
 - (iii) unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance;
 - (iv) centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant.

11

Content of FET – recent cases

- Tribunals try to give content to the State’s obligation to grant FET:
- Rumeli Telekom A/S and Telsim Telekomikasyon Hizmetleri AS vs. Kazakhstan:
 - (a) the state must act in a transparent manner; (b) the state is obliged to act in good faith; (c) the state’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; (d) the state must respect procedural propriety and due process. It also added that “the case law confirms that to comply with the standard, the State must respect the investor’s reasonable and legitimate expectations”.

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FET invoked in all 13 decisions on merits rendered in 2008

- FET rejected in:
 - LESI v. Algeria
 - Jan de Nul v. Egypt
 - Plama Consortium v. Bulgaria
 - Helnan International Hotels vs. Egypt
 - Metalpar vs. Argentina
- FET accepted in:
 - National Grid v. Argentina
 - Continental Casualty v. Argentina
 - Duke Energy v. Ecuador
 - Rumeli Telekom v. Kazakhstan
 - Biwater Gauff v. Tanzania
 - Pey Casado v. Chile
 - Desert Line Projects v. Yemen.

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NAFTA Decisions

- *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 (Award) (Aug. 30, 2000)
- *S.D. Myers v. Canada* (Partial Award) (Nov. 13, 2000)
- *Pope & Talbot, Inc. v. Canada* (Award) (Apr. 10, 2001)
- *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, 2001 BSCS 664 (May 2, 2001)

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NAFTA Free Trade Commission

- The trade ministers of the three NAFTA countries
- **Article 2001(2):** The FTC shall “resolve disputes that may arise regarding [the Agreement’s] interpretation or application.”
- **Article 1131(2):** “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under [Section B of Chapter Eleven].”

15

FTC Interpretation July 2001

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Mondev Int’l v. USA, ICSID AF, Award, Oct. 11, 2002

“Article 1105(1) did not give a NAFTA Tribunal unfettered discretion to decide for itself, on a subjective basis, what was ‘fair’ or ‘equitable’ in the circumstances of each particular case . . . the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’ without reference to established sources of law.”

17

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

United Parcel Service (“UPS”) v. Canada, Award on Jurisdiction, Nov. 22, 2002

- No customary international law minimum standard of treatment implicated by anticompetitive practices

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

ADF v. USA, ICSID AF, Award, Jan. 9, 2003

“We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. . . .

[W]e ask: are the U.S. measures here involved inconsistent with a general customary international law standard of treatment requiring a host State to accord “fair and equitable treatment” . . . to foreign investments in its territory? . . .

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Loewen v. USA, ICSID AF, Award, June 26, 2003

“‘[F]air and equitable treatment’ and ‘full protection and security’ . . . constitute obligations only to the extent that they are recognized by customary international law. . . . To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v. United Mexican States*, *S.D. Myers, Inc. v. Government of Canada* and *Pope & Talbot, Inc. v. Canada* may have expressed contrary views, those views must be disregarded.”

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Waste Management II v. Mexico, ICSID AF, April 30, 2004, ¶ 98

“[T]he minimum standard of treatment of [F&ET] is infringed by conduct attributable to the State and harmful to the claimant if . . . arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Waste Management II v. Mexico, ICSID AF, April 30, 2004, ¶ 98 (*cont’d*)

“ . . . In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”

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NAFTA Decisions after the FTC Interpretation of Article 1105(1)

International Thunderbird Gaming Corp. v. Mexico, (UNCITRAL) Final Award, Jan. 26, 2006

“a gross denial of justice or manifest arbitrariness falling below acceptable international standards”

And also holding that . . .

“the administrative process requirement is lower than that of judicial process.”

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US View of NAFTA FET Standard

US Counter-Memorial in *Glamis Gold v. USA*, dated Sept. 19, 2006

- addressing the absence of “any relevant State practice to support its contention that States are obligated under international law to provide a transparent and predictable framework for foreign investment.” pp. 226-27
- addressing the absence of “of any customary international law rule requiring States to regulate in such a manner – or refrain from regulating – so as to avoid upsetting foreign investors’ settled expectations with respect to their investments.” pp. 230-33
- rejecting attempts to “lift one factor to be considered in an indirect expropriation claim [i.e., legitimate expectations] and adopting that factor as the sole test for a violation of the minimum standard of treatment.” pp. 233-34

24

Two possible approaches

- MST – CIL: clarify content and understanding by the parties
- FET: clarify the source. Possible exceptions. A violation of any other treaty provision does not constitute a violation of FET.

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Questions???

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Fair and equitable treatment. Chile's experience

Felipe Sandoval
Services and Investment Department
MOFA

Negotiation context

- Essentially technical, yet highly political
- Timing
- Must achieve legal certainty / consistent drafting
- Intention is clearly stated

BITs experience

- 50 agreements signed
- 38 agreements in force
- Negotiation moratorium

BITs experience

- Belgium – Luxembourg Economic Union
July 1992
- Malaysia November 1992
- United Kingdom January 1996
- Indonesia April 1999

Belgium - Luxemburg

- Art. 3. Protection of Investments
“All investments, existing and future, made by the investors of any of the Contracting Parties shall enjoy, in the territory of the other Contracting Party, fair and equitable treatment.”

Malaysia

- Art. 3. Protection of Investments
Paragraph 2.
“To all the investments of investors of any of the Contracting Parties, shall be accorded, at all times, fair and equitable treatment, and shall enjoy full protection and security in the territory of the other Contracting Party.”

United Kingdom

- Art. 2 Promotion and Protection on Investments. Paragraph 2.

“Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.”

Indonesia

- Art. 3 Promotion and Protection of Investments. Paragraph 2.

“To investments of investors of each Contracting Party shall be accorded, at all times, fair and equitable treatment, and shall enjoy adequate protection and security in the territory of the other Contracting Party.”

Results

- Different wordings
- Did we mean the same?
- No reference to CILMST

Chile – US FTA

- Signed June 2003
- New stage of negotiations
- NAFTA plus

NAFTA `94

- Art. 1105. Minimum Standard of Treatment. Paragraph 1.

“Each Party shall accord to investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

NAFTA II

- Is not clear about:
- Customary international law
- The content of fair and equitable treatment
- Relationship with other treaty provisions

NAFTA III

- Int. law V. customary international law (Metalclad `00 and S.D. Myers `00)
- Content in addition or beyond (Pope and Talbot `01 and Tecmed `03)
- Violation on transparency = violation of MST (Metalclad `00)

NAFTA Free Trade Commission

- Binding interpretation of Article 1105, issued on July 21, 2001.
- It reflects the Parties intention
- Intends to establish a level of consistency in arbitral decisions

Free Trade Commission II

- Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).

Free Trade Commission III

- UPS case:
- Recognizes the binding character of the FTC interpretation.
- With respect to the content:
"the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard."

Free Trade Commission III

- ADF case:
- Recognizes the binding character of the FTC interpretation.
- Fair and equitable treatment refers to the CILMST

Free Trade Commission IV

- Loewen case:
- Recognizes the binding character of the FTC interpretation.
- *"The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not establish by a breach of another provision of NAFTA..."*

Chile – US FTA II

- Chile – US FTA (2004) follows the NAFTA FTC binding interpretation design
- Article 10.4

Chile – US FTA III

- Article 10.4: Minimum Standard of Treatment
 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provides.
 - (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

MTD case

- Chile – Malaysia BIT 1992
- Malaysian investor 1997
- Developer
- Already invested several million dollars
- The real state project required re zoning
- Request for arbitration June 2001
- ICSID tribunal award 2004
- Violation of fair and equitable treatment
- Objectives of BIT: to promote and to protect

MTD case

- Fair and equitable shall be analyzed in the way most conducive to fulfilling the objectives of the BIT, to protect investments and create conditions favorable to investment.
- Case was partially annulled (2007).
- Damages were reduced due to the lack of due diligence by the investor



APEC-UNCTAD Workshop on Investor-State Dispute Settlement: Discussion of Indirect Expropriation

Manila, December 2009

Brenda Horrigan

What is “indirect expropriation”?

Most BITs provide for protection against both direct expropriation, and those measures “equivalent to” or “having an effect of” expropriation, although the wording of such provisions differs, e.g.:

“Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation (hereinafter referred to as “expropriation”), except for a purpose in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt, adequate and effective compensation”

Finland Model BIT

“Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures or direct or indirect dispossession, total or partial, having similar effect, unless [lawful, non-discriminatory and with compensation] *Czechoslovak – Belgium/Luxembourg BIT*

2

What is “indirect expropriation”? (cont.)

No uniform definition; requires a case-by-case analysis

Broadly speaking, refers to a total or substantial deprivation of the rights associated with an investment, without formal transfer or seizure, having effects equivalent to those of a direct expropriation:

“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.” *Tippetts*

“... it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.” *Starrett Housing*

3

What rights can be expropriated?

Indirect expropriation can be of both tangible and intangible property rights:

“It is also well established that an expropriation is not limited to tangible property rights.”

Wena Hotels Ltd. v. Arab Republic of Egypt

“[...] the restrictive notion of property as a material “thing” is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing.”

Methanex v. United States of America

4

What rights can be expropriated? (cont.)

It is also widely accepted that contract rights can be expropriated:

“Nor can the Tribunal accept the argument that the term “expropriation” applies only to *jus in rem*. The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. [...] Clearly, those rights were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor. Moreover, it has long been recognized that contractual rights may be indirectly expropriated.”

Southern Pacific Properties v. Egypt

However, the mere breach of contract by a State, without more, is not expropriation:

“The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.”

Waste Management v. Mexico

5

What measures can be challenged?

Any measure taken by the State or subdivisions thereof is potentially open to challenge, e.g.:

- Measures that impact licenses, permits, concessions (*Metalclad, Tecmed, Waste Management*)
- Disproportionate tax increases (*Revere Copper*)
- Arrest and expulsion of investor or other key personnel (*Biloune, Benvenuti & Bonfant*)
- Replacement of the owners’ management by government-imposed personnel (*Starret Housing, Tippetts*)
- Revocation of a free zone permit (*Middle East Shipping*)
- Targeted environmental regulation (*Methanex*)

6

Relevant factors in determining whether indirect expropriation exists

- The measure must have a significant and long-lasting effect on the economic benefit and value of the investment:

"...the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investments. ...In considering whether measures taken by government constitute expropriation the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as the result of them."
Telenor v Hungary

"While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral..."
Tippetts

"... the Media Council's actions and omissions ... caused the destruction of the [joint venture's] operations, leaving the [joint venture] as a company with assets, but without business."
CME v Czech Republic

7

Relevant factors in determining whether indirect expropriation exists (cont.)

Where the measure does not result in a substantial deprivation, expropriation is usually not found

"In this case, the Interim Order and the Final Order were designed to, and did, curb SDM's initiative, but only for a time. Canada realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed. The Tribunal concludes that this is not an expropriation case"
SD Meyers v Canada

"...the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner...mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required"
Pope & Talbot v Canada

8

Relevant factors in determining whether indirect expropriation exists (cont.)

- Also important to evaluate whether the measure interferes with reasonable investment-backed expectations of an investor (particularly where such expectations are created by assurances given by the host State):

"These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."
Metalclad v Mexico

"...Even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent – as well as the Resolution 82 – violate the Agreement, such expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law"
Tecmed v Mexico

9

Relevant factors in determining whether indirect expropriation exists (cont.)

But investment treaties are not intended to protect against the normal "risk" of doing business:

"...it is not the function of the international law of expropriation... to eliminate the normal commercial risks of a foreign investor..."
"...as investment tribunals have repeatedly said, investment treaties are not insurance policies against bad business judgements"
Waste Management II v Mexico

"Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level ... continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process."
Methanex v USA

10

Relevant factors in determining whether indirect expropriation exists (cont.)

- Lack of State "intent" to expropriate, or lack of State benefit from the expropriation, are generally not key factors:

"the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".
Tippetts

"The Treaty refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate."
Siemens

"expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State"
Metalclad

11

Exception for legitimate regulatory takings

- The "purpose" and "nature" of a measure are, however, part of the relevant analysis in order to establish a valid regulatory act not subject to compensation, an issue widely accepted under customary international law

"It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner bona fide regulations that are aimed at the general welfare."
Saluka

"[...] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."
Methanex v. USA

12

Exception for legitimate regulatory takings (cont.)

- Mere assertions of a "public interest" regulatory purpose are not enough; the existence of a legitimate regulatory act must be shown:

"In the Tribunal's opinion, a treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met." *ADC v. Hungary*

"If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*

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Exception for legitimate regulatory takings (cont.)

- Recent decisions seek to balance a State's right to act in the public interest with an obligation to protect investors' rights:

"In addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality" *Tecmed v Mexico*

- Key is that the measure be for a public purpose and be a non-discriminatory measure of general application

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Changes to Investment Treaty Provisions

- In light of concerns over the possible scope of indirect expropriation, some States are including elaborate carve-outs in their newer treaties to exempt certain types of regulatory action.
- The impact and interpretation of such provisions remains to be fully seen

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Expropriation Explanation under 2004 US Model BIT

Annex B

Expropriation

The Parties confirm their shared understanding that:

- Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
- An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
- Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
- The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - the character of the government action.
 - Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

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Expropriation Explanation under 2004 Canada Model BIT

Annex B.13(1)

Expropriation

The Parties confirm their shared understanding that:

- Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
- The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
 - the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
 - the character of the measure or series of measures;
- Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

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Thank you!





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 **APEC-UNCTAD Workshop on Investor-State
Dispute Settlement:
Issues and Challenges for the APEC Region** 

Manila, Philippines
9-11 December 2009

**APEC-UNCTAD
Most-Favored-Nation Treatment**

Anna Joubin-Bret
Senior Legal Advisor
Work Programme on International investment agreements
Division on Investment
UNCTAD

Philippines, December 2009

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Historical Overview

- ✓ FCN Treaties
- ✓ GATT
- ✓ International Law Commission
- ✓ GATS
- ✓ BITs / FTAs / EPAs

2

Rationale for an MFN provision in IAs:

"...establishment of equality of competitive opportunities between investors from different foreign countries" **UNCTAD PINK SERIES 1999**

"...avoids economic distortions that would occur through selective country-by-country liberalization" **OECD 2005**

Important - 3 Objectives of IAs:

- ✓ Liberalization
- ✓ Protection
- ✓ Promotion

3

Legal Nature of MFN treatment Clause

- ✓ **Discrimination on grounds of nationality**
- ✓ **Treaty-based**
- ✓ **Relative standard:** requires comparison
- ✓ **De facto and de jure discrimination**
- ✓ **Ejusdem generis:** applies to "same category" matters
- ✓ **Similar objective situations:** like "circumstances"

4

International Law Commission Draft Articles on Most-Favoured-Nation

MFN Treatment Provision:
"...a treaty provision whereby a State undertakes an obligation towards another State to accord most-favored treatment in an agreed sphere of relationships..."

MFN treatment being such:
"...treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State".

5

Life Cycle of Investment

6

Different approaches: "basic coverage"

| Element | Effect |
|----------------------------|--|
| Pre-establishment | Grants right of establishment. It applies to the "establishment, expansion and acquisition". |
| Post-establishment | Once the investment is made "in conformity with the host State's laws and regulations". Applies to activities such as the "administration, use, operation, administration and disposal". |
| Investment | MFN applies only to "investment" i (e.g. China and Australia). Narrow scope. |
| Investment/investor | MFN treatment applies to both (common practice). Sometimes two separate paragraphs. |
| Like circumstances | Part of the normal functioning of the MFN clause, whether included or not. |
| Exceptions | They differ depending on the pre or post-establishment approach. Systemic (REIO, taxation) and country specific exceptions. |

Pre - Establishment

CAFTA Article 10.4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments

Post Establishment

Mexico-UK BIT (2007)

ARTICLE 2 Admission of Investments

Each Contracting Party shall admit investments in accordance with its laws and regulations.

...

ARTICLE 4 National Treatment and Most-Favoured-Nation Provision

Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords, in like circumstances, to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords, in like circumstances, to its own nationals or companies or to nationals or companies of any third State.

Exceptions

Pre-establishment

- ✓ Existing and future measures
- ✓ International agreements
- ✓ Intellectual property rights
- ✓ Government procurement
- ✓ Subsidies

Post-establishment

- ✓ Regional Economic Integration Organizations ("REIO"): e.g. free trade areas, customs or monetary unions, labor markets
- ✓ Taxation: International agreements and/or domestic law

Canada - Peru FTA ()

Article 808: Reservations and Exceptions

1. Articles 803, 804, 806, and 807 do not apply to:
 - (a) any existing non-conforming measure that is maintained by (i) a national government, as set out in Schedule to Annex I, or (ii) a sub-national government;
 - (...)
2. Articles 803, 804, 806, and 807 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub / sectors or activities, as set out in its schedule to Annex II.
3. In respect of intellectual property rights, a Party may derogate from Articles 803, 804 and subparagraph 1 (f) of Article 807 in a manner that is consistent with the TRIPS Agreement and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement.
4. The provisions of Articles 803, 804 and 806 do not apply to:
 - (a) procurement by a Party or a state enterprise; or
 - (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.

Recent Cases

- Very few cases about material / effective treatment. Why ? Not much discrimination ?
- "material treatment"
- Importing (Attracting) more favourable conditions from other treaties.
- Importing (Attracting) procedural provisions (ISDS provisions) from other treaties

Note: Substantive v. Procedural

- Divide in interpretation between:
 - Maffezini, Siemens
 - Gas Natural, Suez, Natural Grid.

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Two issues for discussion

- MFN treatment interpreted and analyzed by tribunals: what is treatment? What is more favourable? **Comparison between two investors** of different nationality and characterize the State measures.
- MFN treatment used to import content from another treaty either to derogate or add to the basic treaty. **Comparison between treaties**.

MFN treatment : 2 cases

- **Parkerings v. Lithuania (2007)**
- The Norwegian investor challenges the allocation of a project to a Dutch investor.
- « Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. However, to violate international, discrimination must be unreasonable or lacking proportionality. For instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary in each case, to evaluate the exact circumstances and the context. » [para 368 – p. 78]

MFN treatment: 2 cases (2)

- **Bayindir v. Pakistan (2009)**
- An Turkish investor claims that he has been expelled from a project on grounds of costs and favoritism for other contractors (national and foreign).
- The tribunal establishes that the similarity (of circumstances) must be examined as far as the contractual terms and conditions are concerned
- Lack of evidence of a discrimination. The claim is not sustained.

MFN treatment to attract from another treaty

- Unclear « jurisprudence ».
- Wording of the basic treaty: generally vague. In all matters...
- Objectives of investment treaties
- Intention of the Parties
- Investment/Trade. In Trade MFN is key, in Investment NT is key. Behind the border..

| EFFECT SOUGHT | CASES |
|---|--|
| Override a procedural prerequisite for the submission of a claim to arbitration | <i>Maffezini v Spain, Siemens, Gas Natural, Suez, National Grid, Wintershall v Argentina.</i> |
| Alter the jurisdictional threshold | <i>Plama v Bulgaria, Salini v Jordan, Telenor Mobile v Hungary, RosInvestCo v Russia, Berschader v Russia.</i> |
| Benefit from "broader" or additional substantive content | <i>AAPL v Sri Lanka, ADF v United States, Bayindir v Pakistan, MTD Equity v Chile.</i> |
| Alter the BIT's time dimension | <i>Tecmed v Mexico, MCI v Ecuador.</i> |
| Override a general emergency exception clause | <i>CMS v Argentina.</i> |
| Change the standard of compensation for expropriation | <i>CME v Czech Republic.</i> |

| EFFECT SOUGHT | RESULT |
|---|--|
| Override a procedural prerequisite for the submission of a claim to arbitration | Mostly allowed (except for <i>Wintershall v Argentina</i>) |
| Alter the jurisdictional threshold | Mostly denied (except for <i>RosInvestCo v Russia</i>) |
| Benefit from additional substantive content. | Allowed when the effect is "additive". Denied when the third benefit is hypothetical |
| Alter the BIT's time dimension | Denied |
| Override a general emergency exception clause | Denied |
| Change the standard of compensation for expropriation | Allowed |

What can Countries do? Assessment and policy options

1. Wide and Unconditional MFN Clause

- Application to pre-establishment
- Application to MFN to post-entry MFN
- Qualifiers such as "like circumstances"
- Systemic exceptions: REIO, taxation
- Country / Sector specific exceptions
- Exceptions for past or future treaties

What can Countries do? Assessment and policy options (Cont)

2. Clarifying the Scope of MFN – Narrowing its application

- Details regarding the meaning of treatment: phases, activities, investment activities,...
- Specifically ruling out treaty shopping: the "Maffezini footnote".

What can Countries do? Assessment and policy options (Cont)

3. No MFN Clause

- This approach notes the difference between trade agreements and investment agreements.

4. Addressing the Past *vis a vis* Preserving the Future

- Bilateral Exercise – Parties amend treaty.
- Unilateral Exercise – make a statement.
- In the future: revise approach.

Arguments for an expansive approach

- MFN clause broad wording
Maffezini, Suez, Natural Grid
- Relation between dispute settlement and protection afforded to foreign investors
Maffezini, Siemens, Gas Natural, Suez, Natural Grid

Arguments for a restrictive approach

- Lack of evidence of a "less favorable treatment"
AAPL, ADF, Plama
- Importance of specific negotiated arrangements
Tecmed, MCI
- Risks of "treaty shopping"
Saini, Plama, Telenor, Wintershall

Arguments for a restrictive approach

- Intent of the parties as deduced from a reasonable interpretation
Salini, Plama, Berschader, Wintershall
- Necessity of an unambiguous consent to arbitration
Plama, Berschader, Telenor, Wintershall
- *Ejusdem generis* principle
CMS

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The debate - procedure

- **Positive approach:** the MFN clause does extend to procedural aspects, unless the basic treaty leaves no doubt that the Contracting Parties intended to exclude them
- **Negative approach:** the MFN clause does not extend to procedural aspects, unless the basic treaty leaves no doubt that the Contracting Parties intended to include them

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The debate - substance

Yet to see how the MFN clause may modify the substantive content...

Tecmed approach

"...matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause".

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The debate - substance

Siemens approach

*"...the purpose of the MFN clause is to **eliminate the effect of specially negotiated provisions** unless they have been excepted..."*

Is that so???

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Risks-concerns

"... When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed..."

"... The present Tribunal fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the "basket of treatment" and "self-adaptation of an MFN provision" in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties".

Plama v Bulgaria

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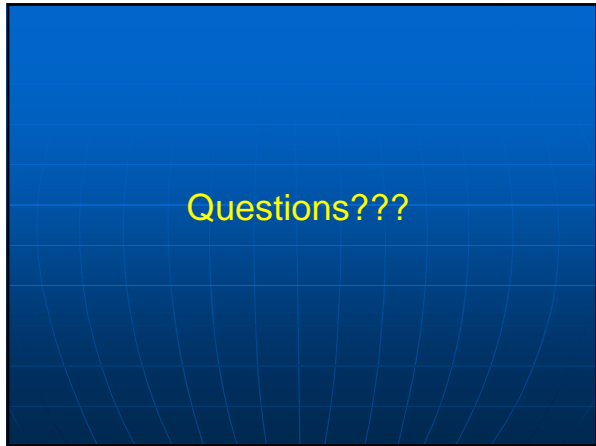
Risks-concerns

"...the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty, and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not".

"...the wide interpretation also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State".

Telenor v Hungary

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National Treatment and Treaty claims / contract claims

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APEC Workshop on Investor-State Dispute Settlement
Manila-Philippines, December 2010

*Presentation made in his personal capacity-not for citation

Colombia-Mexico-Venezuela Free Trade Agreement (1994)

- Each Party shall accord to investors of another Party, and to their investments treatment not less favorable than that which it accords, in like circumstances to its own investors and investments.

Art. 17-03(1)

India – Indonesia BIT (1999)

Each Contracting Party shall, *subject to its laws and regulations*, accord to investment of investors of the other Contracting Party treatment no less favorable than that which is accorded to investments of its investors.

Art. 4(3)

Mexico-Japan Economic Partnership Agreement (2004)

Each Party shall accord to investors of the other Party and to their investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments...

Art. 58(1)

NAFTA (1994)

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Art. 1102(1)

1996 Chile – UK BIT

Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investment or returns of its own investors...

Art. 3(1)

- *Identification of relevant subjects for comparison – are they in “like circumstances”?*
- Consideration of the relative treatment each subject received – has an investor or an investment been accorded less favorable treatment?
- Whether the different treatment is justified – are there any legitimate, non-protectionist rationales to justify different treatment?

2007 Norway Model BIT

The Parties agree/ are of the understanding that a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.

Occidental Exploration & Prod. Co. v. Ecuador (2004)

- “[I]n like situations” cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.

Award ¶1

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Umbrella Clause interpretation by arbitral tribunals

Operative only where it is possible to discern a shared intent of the parties that any breach of contract is a breach of the BIT

■ *SGS v Pakistan*
■ *Joy Mining v Egypt*

Umbrella clause interpretation by arbitral tribunals

- Limits umbrella clauses to breaches of contract committed by the host State in the exercise of sovereign authority

■ *Pan American Energy v Argentina*
■ *El Paso Energy v Argentina*

Umbrella clause interpretation by arbitral tribunals

- The effect of umbrella clauses is to internationalise investment contracts, thereby transforming contractual claims into treaty claims directly subject to treaty rules

■ *Fedax v Venezuela*
■ *Eureko v Republic of Poland*
■ *Noble Ventures v Romania*

Umbrella clause interpretation by arbitral tribunals

- Operative and may form the basis for a substantive treaty claim, but it does not convert a contractual claim into a treaty claim.
 - It provides a basis for a treaty claim even if the BIT in question contains no generic claims clause
 - *SGS v Philippines*
 - *CMS v Argentina (Annulment)*
 - the umbrella clause does not change the proper law of the contract, including its provisions for dispute settlement

■ MCI v. Ecuador Tribunal

- “The Tribunal notes that in the *Vivendi v. Argentine Republic* case on partial nullity it was inferred that having recourse to the domestic forum for breaches of contract does not involve exercising the right to choose an alternative under the BIT, unless the claim in the domestic forum is based on a breach of the BIT”

- Duke v. Ecuador Tribunal
Art. II(3)(c) reads as follows:
Each party shall observe any obligation it may have entered into with regard to investments.

“The significance of umbrella clauses has been heavily debated since *SGS Société Générale de Surveillance SA v. Pakistan* and no consistent view has emerged from cases so far. Whether an umbrella clause in a BIT necessarily elevates any breach of contract by a State to the level of a breach of treaty is a controversial question. Indeed, some tribunals have included into the scope of an umbrella clause contractual obligations such as payment when others have favored obligations assumed through law or regulation.” Par. 319.

“Another open question is whether sovereign interference is needed to constitute a breach of an umbrella clause. While, as indicated by Respondent, language to that effect appears in some cases such as *CMS v. Argentina* and *Pan American Energy & BP v. Argentina* and *El Paso v. Argentina* a majority of decisions do not formulate such distinction.” Par. 320

“The Tribunal finds that the Respondent violated its obligations vis-à-vis Electroquil under the PPAs and Ecuadorian law in respect of the late establishment of the Payment Trusts, their poor implementation, the irregular imposition of fines and the non-payment of interest for late payment arising under the 96 Liquidation Agreement. In this manner, the Respondent breached its obligations under the umbrella clause of Article II(3)(c).” Par. 325

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UMBRELLA CLAUSES IN RECENT COLOMBIAN IIAs

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Issues and Challenges for the APEC Region
Manila, December 2009

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- Recent IIAs:
 - USA: Exception- "Investment Agreements"

II. UMBRELLA CLAUSE AND DEFINITION OF INVESTMENT: UNDERCOVER UMBRELLA CLAUSE?

- Concessions
 - Model BIT and recent examples
- Juridical Stability Contracts
 - Law 963 of 2005
 - Canada Annex on Legal Stability Contracts

CONCLUSIONS

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Colombia's IIAs

| BITs | |
|---------------------|---|
| In force | - Peru (2003) - Spain (2007) - Switzerland (October 2009) |
| Signed | - Peru Enhanced (Dec 2007) - China (Nov 2008) - India (Nov 2009) |
| Negotiations | - United Kingdom (closed negotiations) - Korea (closed negotiations) - France - Japan - Germany (suspended) |
| Total: | 11 |

| Investment Chapters in FTAs | |
|-----------------------------|--|
| In force | - G-2 Mexico (1995) - Chile (Feb. 2009) |
| Signed | - USA (2006) - North Triangle - El Salvador, Guatemala, Honduras (2007) - EFTA (Nov 2008) - Canadá (Nov 2008) |
| Negotiations | - EU |
| Total: | 8 |

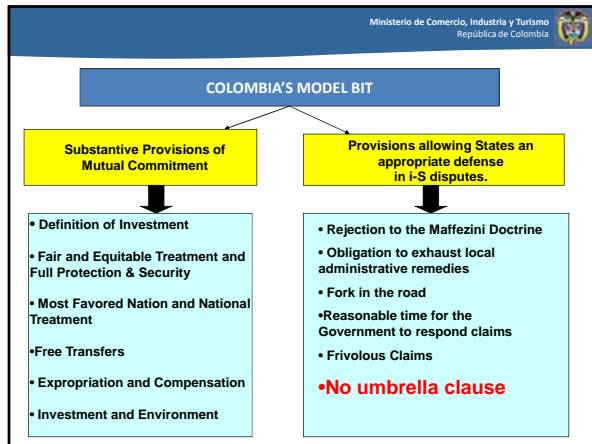
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Negotiations Agenda

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Colombia's Model BIT

*Colombia's BIT model intends to accord protection to investors under international law standards, **while enabling the State to perform an appropriate defense in case of investor-State arbitration.***



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As a general rule...

No Umbrella Clause

Colombia's BIT model does not include an umbrella clause:

▪ ICSID case *SGS v. Philippines* (2004) - WIDE INTERPRETATION

“To summarise the Tribunal’s conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent of content of such obligations into an issue of international law”.

Example: China, India, Spain, etc.



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Nevertheless, there is an exception...

Colombia – United States FTA

Article 10.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

And (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

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Colombia – United States

Article 10.28 Definitions

Investment agreement means a written agreement^[1] between a national authority^[2] of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor.

(a) **with respect to natural resources that a national authority controls,** such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) **to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications;** or

^[1] “Written agreement” refers to an **agreement in writing**, executed by both parties, whether in a single instrument or in multiple instruments, **that creates an exchange of rights and obligations**, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

^[2] For purposes of this definition, **“national authority” means an authority at the central level of government.**

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Colombia – United States: Exception

In this case, the umbrella clause operates through certain investment agreements provided for in the I-S Dispute Settlement section

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What is the issue?

Since every contract is an investment, any breach of the contract could be considered a violation of the Treaty.

Contract = investment

↓ ? ↓

Breach = Violation

↓ ? ↓

Undercover Umbrella Clause

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Model BIT

"2.1. **Investment** means every kind of economic assets that have been invested by investors of a Contracting Party in the territory of the other Contracting Party in accordance with the law of the latter including in particular, but not exclusively, the following:

(...)

e) Concessions granted by law, administrative act or contract, including concessions to explore, grow, extract or exploit natural resources;"

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Differentiation between Contract Claims and Treaty Claims

International Law Commission (ILC) Articles on State Responsibility
Comments re: Art. 4

"The breach by a State of a contract clearly does not as such entail a breach of international law. Something further is required before international law becomes relevant, e.g. a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it may amount to an internationally wrongful act."

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Contract and Treaty May Overlap

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Conclusions

- Colombia's general policy is to not include Umbrella Clauses in its IIAs.
- However, the only exception is provided in the FTA between Colombia and the US.
- The inclusion of certain contractual obligations in the definition of investment does not necessarily entail an "undercover" umbrella clause in Colombia's IIAs.

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Conclusions

- The wide definition of investment in the IIAs affords contracts an international standard of protection, but does not turn contract claims into treaty claims.
- As James Crawford rightly asserts:
"What a BIT does is to provide an additional layer of protection for the one transaction: the investment is protected by the BIT, but the BIT should not be used as a vehicle to rewrite the investment agreement"





Arbitration Under the UNCITRAL and ICSID Rules

Alvaro Galindo C.
Director of International Litigation and Arbitration
Republic of Ecuador

APEC Workshop on Investor-State Dispute Settlement
Manila-Philippines, December 2010
*Presentation made in his personal capacity-not for citation

Arbitration Under the UNCITRAL and ICSID Rules

- **UNCITRAL Rules** – adopted by the U.N. General Assembly on December 15, 1976 designed for commercial arbitration
- **ICSID Rules** – promulgated in 1966, last amended in April 2006, designed specifically for investor-State arbitration, comprised of four sets of rules

Arbitration Under the UNCITRAL and ICSID Rules

- **Convergence of procedures**
 - similarities initiation/commencement
 - constitution of the tribunal
 - organizational phase
 - preliminary treatment of jurisdictional issues
 - written phase, hearings, post hearing submissions, award

Arbitration Under the UNCITRAL and ICSID Rules

- What rules to be applied:
 - **Claimants choose** – if choice provided
- **Different regimes** – not just different rules of procedure; choice of UNCITRAL avoids tests of ICSID Convention

Arbitration Under the UNCITRAL and ICSID Rules

- **Party autonomy to modify rules**
 - UNCITRAL – parties have free hand
 - ICSID – no provision for modification, but some rules written as default solution if no party agreement

Arbitration Under the UNCITRAL and ICSID Rules

- **Constitution of tribunal**
 - UNCITRAL – no nationality restrictions; party appointed arbitrators choose presiding arbitrator
 - ICSID – neither party may select arbitrator of either nationality; parties together choose third arbitrator choose the presiding arbitrator,
- **Constitution in case of failure to choose**
 - UNCITRAL – appointing authority agreed to by parties, otherwise SecGen of PCA appoints appointing authority; appointing authority chooses arbitrators not chosen in his/her discretion; party may lose right to appoint after request made to appointing authority
 - ICSID – Chairman of Admin Council chooses from ICSID list if possible; party may still appoint after request made to SecGen

Arbitration Under the UNCITRAL and ICSID Rules

- **Challenges to arbitrators**
 - UNCITRAL – "justifiable doubts as to impartiality or independence"; appointing authority decides
 - ICSID – "manifest lack of reliability to exercise independent judgment"; other members of the tribunal decide

Arbitration Under the UNCITRAL and ICSID Rules

- **Written submissions**
 - UNCITRAL – pre-memorial pleading stage; jurisdictional objections waived if not made in statement of defense
 - ICSID – merits memorial is first written submission (after request for arbitration has been registered); jurisdictional objections may be made as late as counter-memorial on the merits

Arbitration Under the UNCITRAL and ICSID Rules


- **Preliminary legal objections**
 - UNCITRAL – Methanex: not allowed
 - ICSID – Within 30 days of constitution of tribunal, respondent may object that "claim is manifestly without legal merit"
- **Costs**
 - UNCITRAL – Tribunal sets own fees, which shall be reasonable; institutional fees avoidable
 - ICSID – Tribunal's fees set according ICSID schedule; ICSID administrative fees apply

Arbitration Under the UNCITRAL and ICSID Rules

- **Recourse against award**
 - UNCITRAL – no internal recourse; subject to municipal law remedies/defenses
 - ICSID –subject to annulment procedure; to be treated as final judgment of national courts

Arbitration Under the UNCITRAL and ICSID Rules

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Provisional Measures: the Experience of Ecuador

Alvaro Galindo C.
Director of International Litigation and Arbitration
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APEC Workshop on Investor-State Dispute Settlement
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Provisional Measures: the Experience of Ecuador

- **Limits on scope of authority to grant**
 - Prima facie jurisdiction
 - Only after giving each party an opportunity to be heard (“interim provisional relief?”)
 - Should not prejudice the merits of the dispute

Provisional Measures: the Experience of Ecuador

- **Requirements**
 - UNCITRAL – “the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute including” the conservation of goods
 - ICSID – “the Tribunal may, if it considers that the **circumstances so require, recommend any provisional measures that should be taken to preserve the respective rights of either party**”

Provisional Measures: the Experience of Ecuador

- **Right to be Preserved**
 - must be a “theoretically existing” right; right to damages remedy unaffected
 - Specific performance of the contract
 - Non-aggravation of the dispute
 - Preservation of the status quo
 - Preserve the effectiveness and integrity of the proceedings; exclusive recourse under ICSID
 - Rights of answering party

Provisional Measures: the Experience of Ecuador

- **Required by circumstances – necessity and urgency**
 - Necessity –where “the actions of a party are capable of causing or of threatening irreparable prejudice to the rights invoked” - Oxy II ¶ 59
 - But when is prejudice irreparable? If injury is compensable by a monetary award? When is economic loss ever not compensable by monetary award?
 - Urgency – Imminence of prejudice? Or when prejudice is likely to occur anytime before the tribunal issues an award?

Provisional Measures: the Experience of Ecuador

- **Effect of granting request**
 - “Order” vs. “recommend” – ICSID Convention (art. 47) and ICSID Rules of Arbitration (Rule 39) use the term “recommend” but Tribunals have interpreted their authority as equivalent to issuing an “order”
 - Negotiating history does not support

APEC-UNCTAD Workshop on Investor-State Dispute Settlement: Issues and Challenges for the APEC Region

Manila, Philippines
9-11 December 2009

Investor - State Dispute Settlement

Mexican Experience

Hugo Gabriel Romero Martínez

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December 11, 2009 1

| | |
|---------------------------------|----------------------|
| Robert Azinian et al | • NAFTA |
| Metalclad Corporation | • NAFTA |
| Waste Management Inc. I | • NAFTA |
| Marvin Roy Feldman | • NAFTA |
| Técnicas Medioambientales, S.A. | • BIT Mexico - Spain |
| Fireman's Fund | • NAFTA |
| Waste Management Inc. II | • NAFTA |
| GAMI Investments | • NAFTA |

2

| | |
|--|---|
| International Thunderbird Gaming Corporation | • NAFTA |
| Bayview Irrigation et al | • NAFTA |
| Archer Daniels Midland | • NAFTA |
| Gemplus, S.C. y Talsud, S.A. | • BIT Mexico - France, Mexico - Argentina |
| Corn Products International | • NAFTA |
| Cargill Inc | • NAFTA |

3

Procedural Rules

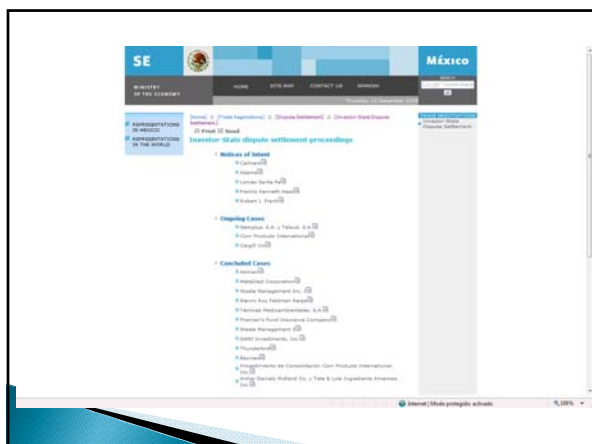
| Cases | RULES |
|--|---------------------------------|
| Azinian | Additional Facility Rules ICSID |
| Metalclad Corporation | Additional Facility Rules ICSID |
| Waste I | Additional Facility Rules ICSID |
| Feldman | Additional Facility Rules ICSID |
| TECMED | Additional Facility Rules ICSID |
| Fireman's Fund | Additional Facility Rules ICSID |
| Waste II | Additional Facility Rules ICSID |
| GAMI | UNCITRAL |
| Thunderbird | UNCITRAL |
| Bayview | Additional Facility Rules ICSID |
| Procedimiento de consolidación CPI-ADM | Additional Facility Rules ICSID |
| ADM | Additional Facility Rules ICSID |

4

Place of the arbitration

| Case | Place of the arbitration |
|---|--------------------------|
| Azinian | Toronto, Canadá. |
| Metalclad | Vancouver , Canadá. |
| Waste I | Washington, D.C. |
| Feldman | Ottawa, Canadá. |
| TECMED | Washington, D.C. |
| Fireman's Fund | Washington, D.C. |
| Waste II | Washington, D.C. |
| GAMI | Washington, D.C. |
| Thunderbird | Washington, D.C. |
| Bayview | Washington, D.C. |
| Procedimiento de Consolidación CPI y ADM. | Washington, D.C. |
| ADM | Toronto, Canadá. |

| CASO | LUGAR DEL ARBITRAJE |
|------------------|---------------------|
| Gemplus y Talsud | Washington, D.C. |
| CPI | Toronto, Canadá. |
| Cargill | Toronto, Canadá. |



NAFTA 1128 Submissions

| Case | Country | Interpretation | |
|----------------|----------------|----------------|------|
| Metalclad | Canada | 1110 | |
| | United States | 1121 | |
| Waste I | Canada | 1121 | |
| Feldman | Canada | 1102 | |
| | Estados Unidos | 1117 | |
| Fireman's Fund | Canada 1* | Chapter XIV | |
| | Canada 2* | | 1131 |
| | United States | | 1416 |
| Waste II | Canada | 1110 | |
| GAMI | United States | 1116 y 1117 | |
| Thunderbird | Canada | 1102 | |
| | United States | 1116 y 1117 | |
| Bayview | United States | 1102 y 1105 | |

Results of proceedings

| In favour of Mexico | In favour of investors |
|---------------------|------------------------|
| AZINIAN | METALCLAD CORPORATION |
| WASTE I | FELDMAN |
| FIREMAN'S FUND | TECMED |
| WASTE II | ADM |
| GAMI | CPI |
| THUNDERBIRD | CARGILL |
| BAYVIEW | |

| Cases | Claims | Proved claims |
|----------------|---------------------|---------------------|
| Azinian | NT, MSOT, Exp. | None |
| Metalclad | MSOT, Exp. | Exp. |
| Waste I y II | MSOT, Exp. | None |
| Feldman | NT, MSOT, Exp. | NT, Exp. |
| TECMED | NT, MFN, MSOT, Exp. | MSOT, Exp. |
| Fireman's Fund | Exp. | None |
| GAMI | NT, MSOT, Exp. | None |
| Thunderbird | NT, MSOT, Exp. | None |
| Bayview | NT, MSOT, Exp. | None |
| CPI | NT, PR, Exp. | NT |
| ADM | NT, PR, Exp. | NT, PR |
| Cargill | NT, MSOT, PR, Exp. | NT, MSOT, PR |
| Renave | MSOT, NT, MFN, Exp. | Expecting for award |

NT National Treatment; MFN Most Favored Nation, MSOT Minimum Standard of Treatment, Exp Expropriation, PR Performance Requirements,

Previous steps in a procedure

- ▶ Consultations to resolve a dispute.
- ▶ Explanation the consequences of some acts to national authorities.
- ▶ Negotiation to avoid a procedure.
- ▶ Avoid pressure of investors.

Decision of the Tribunal


- ▶ Restitution / compensation.
- ▶ Interests until payment.
- ▶ Cost.
- ▶ Expenses of the Tribunal and Secretariat.

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**APEC-UNCTAD Workshop on Investor-State
Dispute Settlement:
Issues and Challenges for the APEC Region**

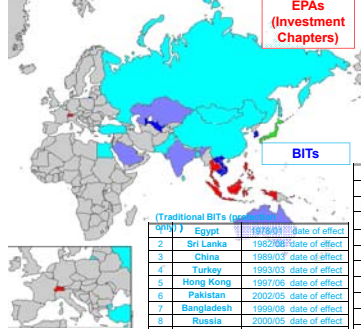
Manila, Philippines
9-11 December 2009

**Japan's Experience:
The Possible Alternative to ISDS**



1. Japanese International Investment Agreements (IIAs)

Fifteen BITs as well as nine EPAs that include the Investment Chapter have come into force.



| EPAs (Investment Chapters) | | |
|----------------------------|-------------|------------------------|
| 1 | Singapore | 2002/11 date of effect |
| 2 | Mexico | 2003/4 date of effect |
| 3 | Malaysia | 2008/7 date of effect |
| 4 | Philippine | 2008/12 date of effect |
| 5 | Chile | 2007/9 date of effect |
| 6 | Thailand | 2007/11 date of effect |
| 7 | Brunei | 2008/7 date of effect |
| 8 | Indonesia | 2008/7 date of effect |
| 9 | Switzerland | 2008/9 date of effect |
| | Australia | ongoing |
| | India | ongoing |
| | GCC | ongoing |

| (Recent BITs (liberalization and protection)) | | |
|---|--------------|-----------------------------|
| 10 | Korea | 2003/01 date of effect |
| 11 | Vietnam | 2004/12 date of effect |
| 12 | Cambodia | 2008/07 date of effect |
| 13 | Laos | 2008/08 date of effect |
| 14 | Uzbekistan | 2009/09 date of effect |
| 15 | Peru | 2009/12 date of effect |
| | Saudi Arabia | 2008/05 ad hoc in principle |
| | China-Korea | ongoing |
| | Colombia | ongoing |
| | Kazakhstan | Under consideration |
| | Oster | Under consideration |

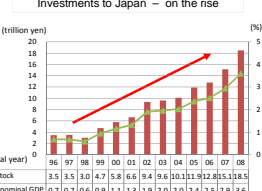
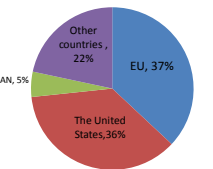
| (Traditional BITs (protection)) | | |
|---------------------------------|------------|------------------------|
| 1 | Egypt | 1978/01 date of effect |
| 2 | Sri Lanka | 1982/08 date of effect |
| 3 | China | 1983/03 date of effect |
| 4 | Turkey | 1983/03 date of effect |
| 5 | Hong Kong | 1987/06 date of effect |
| 6 | Pakistan | 2002/05 date of effect |
| 7 | Bangladesh | 1993/05 date of effect |
| 8 | Russia | 2000/05 date of effect |
| 9 | Mongolia | 2000/03 date of effect |

2. Japan's basic position to IIA's -as home country-

Japan has promoted IIAs as a "home country (capital exporting country)" rather than a "host country (capital importing country)".

Although FDI to Japan has been increasing rapidly in recent years, its share of GDP is still small when compared to that of other major developed countries. And, FDI to Japan is much smaller than FDI from Japan.

| | (Stock) (billion yen) |
|----------------|------------------------------|
| FDI from Japan | 61,740 |
| FDI to Japan | 18,456 |

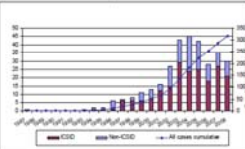



source: JETRO

3. No case with Japan as Respondent

Although numbers of cases have been increased rapidly, respondents tend to be developing countries and NAFTA countries.
---> No case with Japan!

Referrals to arbitration (1987-2008)



source: UNCTAD
Latest Developments in Investor-state dispute settlement (IIA MONITOR No. 1 (2009))
<http://www.unctad.org/viewdoc/webdefault.do?app=pdf>

Number of cases by country (up to December 2008)

| Respondent | Number of Cases |
|----------------|-----------------|
| Argentina | 48 |
| Mexico | 18 |
| Czech Republic | 15 |
| Ecuador | 14 |
| Canada | 13 |
| U.S.A. | 12 |
| Ukraine | 11 |
| Poland | 10 |
| Egypt | 9 |
| India | 9 |
| Venezuela | 9 |
| Russia | 8 |
| Japan | 0 |

source: UNCTAD

4. Japan as home country

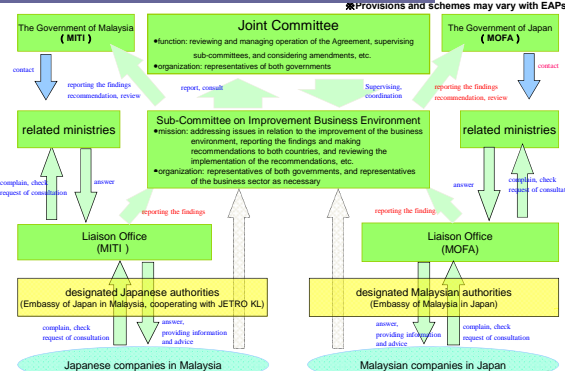
- Only one case involving a Japanese-affiliated company
 - Saluka vs. Czech Republic (UNCITRAL rules; Czech-Netherlands BIT)
 - * Saluka was a Netherlands-based subsidiary of Nomura.
- Why so less ISDS by Japanese companies in spite of large out-flow investment?
 - interest in continuing business?
 - ✓ Much investment in manufacturing, services such as retail and distribution
 - ✓ Rather than governmental contract based business in energy and public services or one-shot project based business like infrastructure construction
 - preference to amicable methods (less exposure to law-suits)?
 - however, ISDS is regarded as last resort and fundamental condition for investments.

5

5. Basic Frameworks of "Improvement of the Business Environment"

Chapter e.g. Japan-Malaysia EPA

Provisions and schemes may vary with EPAs.



6. What is the Investor's View ?

Most of the requests by Japanese companies for "Improvement of the Business Environment" in APEC economies are requests about facilitation of the investment, namely making the investment activities smoother (for instance : improving complexity and delay of administrative procedures etc.) in addition to requests about liberalization of the investment. Investors also have strong interest in **transparency of legislations and administrative procedures.**

Requests for "Improvement of the Business Environment" in APEC economies

| Liberalization of investment | Facilitation of investment |
|--|--|
| Restrictions on entry of foreign capitals | Indigested legislation, abrupt changes |
| Performance requirements | Inefficient administrative procedures, regimes and practices |
| Restriction on profits remittance abroad /Exchange controls | Overly protective labor act |
| Restrictions on movement of natural persons /Requirement to employ persons | Implementation of intellectual property rights |
| | Price controls/Monopoly etc |
| | Inadequacy of infrastructure/Lack of incentives for foreign investment |

REFERENCES :
Japan Business Council for Trade and Investment Facilitation
- Issues and Requests relating to Foreign Trade and Investment in 2008 -
http://www.jbcti.org/moodle/top_e.html


7. Results of business environment improvement in Mexico and Malaysia

Japan has held the Committee with many EPA partners continually.

| Japan-Mexico EPA The Committee held in April 2006, May 2006 and May 2007 | Japan-Malaysia EPA The Sub-Committee held in March and October 2007 |
|---|--|
| <p>Main Participants</p> <p>GOJ (MOFA, METI, Embassy of Japan in Mexico), JETRO Mexico Center, Nippon Kaikan (Japan-Mexico Economic Committee), The Japan Chamber of Commerce and Industry in Mexico, Japan Magaquadors Association, Government of Mexico (Ministry of Economy), etc.</p> | <p>Main Participants</p> <p>GOJ (MOFA, METI, Embassy of Japan in Malaysia), JETRO KL Center, The Japanese Chamber of Commerce and Industry in Malaysia, JAMECA, Government of Malaysia (MITI), etc.</p> |
| <p>Requests from Japan side *</p> <ul style="list-style-type: none"> > Improvement of public safety <ul style="list-style-type: none"> → Damage decreased by opening a hotline connecting with the related ministry. > Anti-counterfeit, Standards and Conformity <ul style="list-style-type: none"> → Opening a hotline connecting with IMPI > Improvement of tourism <ul style="list-style-type: none"> → Introducing custom declaration cards for travelers in Japanese > Improvement of customs and taxation procedure <ul style="list-style-type: none"> → Opening a hotline connecting with the central customs, considering Japanese enterprises when amending customs procedure > Infrastructure improvement | <p>Requests from Japan side *</p> <ul style="list-style-type: none"> > Improvement of quality of electricity <ul style="list-style-type: none"> → Budgeting for infrastructure improvement > Improvement of shortage of gas supply <ul style="list-style-type: none"> → Starting consideration in the government > Improvement of public safety (truck hijack prevention) <ul style="list-style-type: none"> → Strengthening patrol and setting monitoring cameras, etc. > Anti-counterfeit |
| <p>Requests from Mexico side *</p> <ul style="list-style-type: none"> > Improvement of import procedure of agricultural products > Support for SME > Entering service of nonstop flights* | <p>Requests from Malaysia side *</p> <ul style="list-style-type: none"> > Information provision relating industrial standards > Implementation of EPA (confirmation of ROO etc.) |

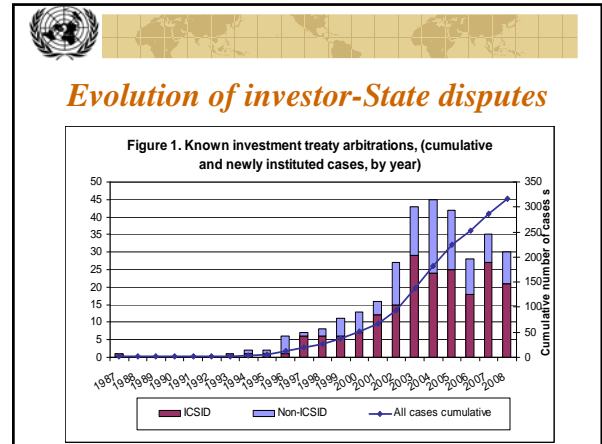
* Requests and results below are as of 2007.


* Aero Mexico started services between Narita and Mexico City in November 2006.




EXPORING ALTERNATIVES TO INVESTMENT TREATY ARBITRATION AND THE PREVENTION OF INVESTOR-STATE DISPUTES

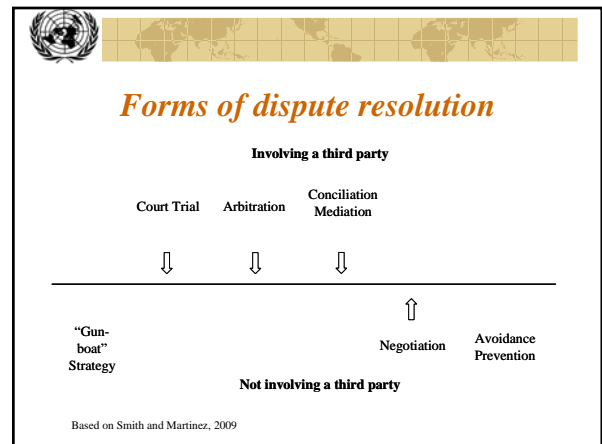
Manila, 9-11 December 2009
 Jan Knörich
 Associate Expert
 Division on Investment and Enterprise, UNCTAD



- 
- ### *Special nature of investor-State disputes*
- Involves a sovereign as a defendant and measures taken by a sovereign State (central and local governments)
 - Dispute is governed by international law
 - International arbitration as the main option
 - Relationship between the disputants involves a long-term engagement
 - Amounts at stake are high

- 
- ### *Advantages of international arbitration*
- Depoliticizes the dispute
 - Adjudicative neutrality and independence
 - Original perception: arbitration is swifter, cheaper, more flexible, more familiar for economic operators
 - More control over litigation procedure
 - Sense of legitimacy (good reputation of the procedure)

- 
- ### *Disadvantages of international arbitration*
- Generally expensive, involving significant amounts of money
 - Very time consuming
 - Control over the procedure is limited
 - Can harm the relationship between investor and State
 - Concerns about the legitimacy of the ISDS system
 - Focus entirely on the payment of compensation





Possible alternatives to investment treaty arbitration

- Methods of alternative dispute resolution (ADR) that seek to **resolve existing disputes** (conciliation, mediation, negotiation)
- Dispute prevention policies (DPPs) that attempt to **prevent conflicts** between investors and States from emerging and escalating into a dispute



Advantages of alternative approaches

- Flexibility
- Makes it possible to take the specific interests of the parties involved into account
- Faster and less costly settlement
- No prejudice to the right of the parties to resort to other forms of dispute resolution
- Avoid unsatisfactory precedent of an arbitral award
- Improvement of good governance and regulatory practices of States



Challenges posed by alternative approaches

- Not binding on the parties
- Investors and States lack familiarity and experience with alternative approaches
- Considered as a waste of time and funds
- Not suitable for all types of investment disputes and IIA provisions
- Obstacles when a sovereign State is involved
- Lack of transparency



Alternative approaches in IIAs

- Virtually all IIAs provide for consultations / negotiations between the parties (« cooling off »)
- Reference to conciliation next to arbitration
- Conciliation as a requirement prior to arbitration (rare)
- Consultation / information between the contracting parties (State-State cooperation)



Rules and forums for alternative dispute resolution

- Rules: ICSID, UNCITRAL, AAA, ICC
- Institutions:
 - International arbitration institutions
 - Regional forums
 - Mediation centers
 - At national level: ADR centers, investment promotion agencies (IPAs)



Dispute avoidance and preventative measures

- Information and alert system
- Targeting sensitive sectors
- Administrative review
- Inter-institutional arrangements (establishment of a lead agency)
- Ombuds and mediation services
- State-State cooperation (joint commissions, diplomatic relations)



Questions

- Is the current way how investment disputes are resolved satisfactory? Why or why not?
- Which alternative approaches to arbitration do you consider feasible in the context of investment disputes?
- What is your understanding of existing and previous experiences with the use of ADR or dispute prevention policies in the context of investment disputes? What works well and what does not?
- How can ADR and other alternatives to arbitration be applied more effectively in investor-State disputes? What would be required in your view?