



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **FINAL REPORT**

Kuala Lumpur, Malaysia  
15-19 June 2009



CTI 31/2009T

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  
Ministry of International Trade and Industry (MITI), Malaysia



Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Table of Contents

OUTCOME .....	4
COURSE PROGRAMME.....	7
LIST OF PARTICIPANTS AND RESOURCE PERSONS .....	15
BIO NOTES OF KEY SPEAKERS .....	23
TRAINING MATERIAL .....	29

# OUTCOME

The Regional Training Course on the Core Elements of International Investment Agreements (IIAs) in the APEC Region, held in Kuala Lumpur, Malaysia, from 15 to 19 June 2009, was organized jointly by the Secretariats of APEC and UNCTAD, and hosted by the Ministry of International Trade and Industry (MITI) of the Government of Malaysia.

## Course Background

The training course constituted the third phase of the APEC Investment Expert 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 IIAs. It investigated the 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. This training course is the first activity of phase III. It aimed at fostering APEC-wide understanding among investment treaty negotiators and investment policy makers of key elements in investment liberalization, protection and facilitation.

## Participants and Resource Persons

The course brought together 62 participants (35 women and 27 men) from 16 economies of the APEC region (Australia, Brunei Darussalam, Chile, People's Republic of China, Indonesia, Japan, Malaysia, Mexico, New Zealand, Peru, Philippines, Russian Federation, Singapore, Chinese Taipei, Thailand, Viet Nam). The list of participants is included in the report. The course was delivered in English.

Participants benefited from presentations of experienced resource persons, who were former or actual negotiators of IIAs, legal practitioners, academics and experts from UNCTAD. The list of resource persons and their biographical notes is attached.

Most participants were involved in the negotiation of investment agreements. Some assume other functions relevant to the issue, such as handling investment disputes. 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 course, participants became member of the UNCTAD's network of IIA experts, which allows for continued interactive discussion and dissemination of information on IIA issues and investment disputes.

## **Training Methodology**

The course curriculum and material was prepared by UNCTAD's work programme on IIAs to enable the participants in obtaining the necessary expertise on the negotiation and implementation of IIAs. The programme of the training course is attached.

After an introduction on the universe of IIAs and the definition of investment, substantive issues were addressed through three sessions: investment liberalization, investment protection and investment facilitation. The course ended with a full day of a negotiation simulation.

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 country-specific perspective on the issue, and a discussion with all the participants to better illustrate the topic through an exchange of practices and experiences.

The final simulation exercise on the negotiation of an investment treaty gave a practical dimension to this learning process. The group was divided into ten negotiating teams resulting in five negotiations. It allowed participants to put into practice knowledge acquired during the course. Two resource persons provided the necessary coaching. Negotiations were followed by brief presentations by the negotiating teams and a debriefing session in which resource persons provided useful comments and advice to the participants. At the end of the course, participants received a certificate of attendance.

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 country experiences. Commentators were from Chile, China, Australia, Thailand, Japan, Malaysia and Peru. A representative from the Attorney General's Chambers of Malaysia also made a presentation.

## **Training material**

Participants received the training 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 and a bibliography. The table of contents of the CD-Rom is included. Key publications were also distributed during the training course, as well as copies of all presentations.

The presentations will be posted in the APEC website for further consultations.

## **Opening Ceremony**

The training course was opened by Ms. Datuk Dr Rebecca Fatima Sta Maria, Deputy Secretary General (Trade), MITI. Ms. Daratul Bai da Dzulkiyly, Assistant Resident Representative, UNDP Malaysia and Ms. Anna Joubin-Bret, Course Director, Senior Legal Advisor, Policies and Capacity-building Branch, Division on Investment and Enterprise (DIAE), UNCTAD, also participated.

## **Evaluation and Follow-up**

UNCTAD and APEC evaluations of the training courses show very good results. Consolidation of the UNCTAD's questionnaire showed that the course fully reached the expectations of 74% of the participants. In addition, participants rated the efficiency and the usefulness of the course to their official duties as excellent (42%) and good (50%).

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 course provided an excellent opportunity for the UNCTAD secretariat and APEC to enhance their working relationship. Planning is now underway to organize two other advanced capacity-building activities on investor-State dispute settlement and investment dispute prevention policies in 2009. Future activities could include follow-up training courses on IIAs on an annual basis.

## **Side Event**

At the request of the Attorney General's Chambers of Malaysia, a half-day workshop on Investor-State Dispute Settlement and Dispute Prevention Policies took place on 19 June 2009. The event provided a venue for presentations and open discussions on the trends and implications of investor-State dispute settlement, on dispute avoidance, prevention and alternative dispute resolution, and on the pros and cons of adopting a concise vs. comprehensive ISDS model text. The programme of the event is attached.

## **Course Organization**

The regional training course was organized by Ms. Ho Soo Quen, Ms. Atasha Mohd Noh, Ms. Norshahida Zolkiaply and Mr. Muhd Ikram Zulkurnain from the APEC Division, MITI, Ms. Roeslina Abbas, Ms. Gheeta Devi Rengasamy and Mr. Vinodh Mariappa from the International Cooperation Division, Malaysian Industrial Development Authority (MIDA), Ms. Anna Joubin-Bret, Ms. Marie-Estelle Rey and Mr. Jan Knoerich from the International Agreements Section, Division on Investment and Enterprise (DIAE), UNCTAD, and Ms. Hiroko Taniguchi and Ms. Norilabte Mohd Ali from the APEC Secretariat.



# **APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region**

15-19 June 2009  
Kuala Lumpur, Malaysia

Organized by the Secretariats of the Asia-Pacific Economic Cooperation (APEC) and of the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of International Trade and Industry (MITI), Government of Malaysia



## **COURSE PROGRAMME**

## **Background and objectives:**

This activity constitutes the third phase and the technical assistance component of an ongoing APEC IEG project on the core elements of investment agreements. It follows completion of Phase II encompassing a report on “investment principles” and the mapping of 200 international investment agreements (IIAs) and builds on the earlier Phase I report, “Identifying Core Elements in Investment Agreements in the APEC Region”.

The regional training course on the core elements of IIAs is designed for government officials and policy-makers from the APEC economies involved in negotiations on investment or in the management of investor-State disputes.

The aim of the workshop is to deepen knowledge and understanding of the key and emerging issues in investment liberalization, protection and facilitation. The course will explain the key issues, provide a stocktaking of treaty provisions, analyse the different approaches and the recent treaty practice, present cases of jurisprudence, identify options for negotiators, and study interactions between issues and concepts. The course will end with a simulation exercise of a negotiation allowing participants to put into practice the knowledge acquired. Examples of treaty provisions and arbitration cases will be linked to the practice and experience of the APEC region and economies. In addition, comparisons in approaches between APEC IIAs and APEC investment instruments will be provided when relevant.

Resource persons will be experienced negotiators, UNCTAD experts, university professors, arbitrators and practitioners.

**Host economy:** Malaysia

**Venue:** Sheraton Imperial Kuala Lumpur Hotel

### **Coordination:**

Project overseer: Ms. Ho Soo Queen, Senior Principal Assistant Director, APEC Division, Ministry of International Trade and Industry Malaysia

UNCTAD secretariat:

Ms. Anna Joubin-Bret, Senior Legal Advisor, Policies and Capacity-building Branch, Division on Investment and Enterprise (DIAE)

Ms. Marie-Estelle Rey, Legal Expert and Technical Assistance Coordinator, Work Programme on International Investment Agreements, Policies and Capacity-building Branch, DIAE

Mr. Jan Knorrich, Associate Expert, Work Programme on International Investment Agreements, Policies and Capacity-building Branch, DIAE



## Monday 15 June

- 09:00 **Opening Session**  
Datuk Dr Rebecca Fatima Sta Maria, Deputy Secretary General (Trade), MITI  
Daratul Bai da Dzulkiily, Assistant Resident Representative, UNDP Malaysia  
Anna Joubin-Bret, Course Director, Senior Legal Advisor, Policies and Capacity-building Branch, Division on Investment and Enterprise (DIAE), UNCTAD
- 09:30 Coffee break
- 10:00 **INTRODUCTION:**  
**International investment rule-making: trends and emerging issues**
- FDI: trends and implications
  - Objectives of the legal investment framework
  - Trends in IIAs
  - Features and challenges
- Jan Knöerich, Course Coordinator, Associate Expert, Work Programme on International Investment Agreements, DIAE, UNCTAD
- 11:15 **Scope and definition of investment and investor**
- FTA approach (investment and services)
  - BIT approach
  - ASEAN approach
  - Treaty practice and case law
- Presentator: Anna Joubin-Bret, Course Director, Senior Legal Advisor, DIAE, UNCTAD  
Commentator: Raimundo Gonzalez, Legal Advisor of Service, Investment and Air Transport Department, DIRECON, Chile
- 13:00 Lunch
- 14:30 **SESSION 1: INVESTMENT LIBERALIZATION**
- Admission and establishment of investment**
- Presentation of the concept
  - Treaty practice
  - Case law
  - Regional perspectives
- Presentator: Anna Joubin-Bret, DIAE, UNCTAD  
Commentator: Raimundo Gonzalez, Legal Advisor of Service, Investment and Air Transport Department, DIRECON, Chile
- 16:00 Coffee break

16:15

**National treatment**

- Presentation of the concept
- Ex ceptions
- Tr eaty practice
- Ca se law

Presentator: Alejandro Fay a, C onsultant, Pr ofessor o f Law, Universidad Iber icoamericana and U niversidad nacional a utónoma de M éxico, for mer C hief N egotiator of i nvestment tr eaties, Directorate Ge neral for Foreig n In vestment, Min istry o f E conomy, Mexico

Commentator: Wenhua Sha n, Pr ofessor, Xi'an Ji aotong U niversity, China, and Oxford Brookes University, England

18:00

End of the working day

## Tuesday 16 June

- 09:00      **Most-favoured-nation treatment**
- Presentation of the concept
  - Interactions and scope
  - Treaty practice
  - Case law
- Presentator: Alejandro Fayá, Consultant, Professor of Law, Universidad Iberoamericana and Universidad Nacional Autónoma de México, former Chief Negotiator of investment treaties, Directorate General for Foreign Investment, Ministry of Economy, Mexico
- Commentator: Michael Gardner, Policy Analyst, Foreign Investment & Trade Policy Division, Department of Treasury
- 11:00      Coffee break
- 11:15      **MFN (cont'd)**  
Discussions
- 11:45      **Transfer of funds**
- Presentation of the concept
  - Treaty practice and relevant case law
- David Pawlak, Consultant - International Arbitration, Washington D.C. & Warsaw, Poland, former Attorney-Adviser, Office of the Legal Adviser, US Department of State
- Anna Joubin-Bret, DIAE, UNCTAD
- 13:00      Lunch
- 14:30      **SESSION 2: INVESTMENT PROTECTION**
- Fair and equitable treatment**
- Presentation of the concept
  - Interactions with other standards
  - Treaty practice
  - Case law
- Presentator: David Pawlak, Consultant - International Arbitration, Washington D.C. & Warsaw, Poland, former Attorney-Adviser, Office of the Legal Adviser, US Department of State
- Commentator: Wenhua Shan, Professor, Xi'an Jiaotong University, China, and Oxford Brookes University, England
- 18:00      End of working day

## Wednesday 17 June

- 09:00      **Expropriation and compensation**
- Presentation of the concept
  - Treaty practice
  - Case law
- Presentator: Alejandro Fayá, Consultant, Professor of Law, Universidad Iberoamericana and Universidad Nacional Autónoma de México, former Chief Negotiator of investment treaties, Directorate General for Foreign Investment, Ministry of Economy, Mexico
- Commentator: Vilawan Mangklatanakul, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand
- 11:00      Coffee break
- 11:15      **Expropriation (cont'd)**  
Discussions
- 11:45      **Scheduling of reservations**
- Presentation of the positive and negative lists approaches and other approaches
  - Country experience
- Presentator: Masafumi Sugano, Deputy Director, Economic Partnership Division, Trade Policy Bureau, Ministry of Economy, Trade and Industry, Japan
- 13:00      Lunch
- 14:30      **Dispute settlement in IIAs**
- State-State vs. investor-State dispute settlement
  - ISDS mechanisms and rules (ICSID, UNCITRAL...)
  - Recent innovations in dispute settlement
- Anna Joubin-Bret, DIAE, UNCTAD
- Management of investment treaty disputes
- David Pawlak, Consultant - International Arbitration, Washington D.C. & Warsaw, Poland, former Attorney-Adviser, Office of the Legal Adviser, US Department of State
- 16:30      Coffee break
- The experience of Thailand in ISDS
- Vilawan Mangklatanakul, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand
- The experience of Malaysia with ICSID
- Osman Affendi, Attorney General Chambers of Malaysia
- 18:00      End of working day

## Thursday 18 June

- 09:00      **Coherence and consistency in IIAs**
- Ex planation
  - Analysis of ASEAN and APEC FTAs and BITs
- Presenter: Anna Joubin-Bret, DIAE, UNCTAD  
Commentators:  
Sufian Jusoh, NCCR Research Fellow, World Trade Institute (WTI),  
Berne, Switzerland  
Masafumi Sugano, Deputy Director, Economic Partnership Division,  
Trade Policy Bureau, Ministry of Economy, Trade and Industry,  
Japan
- 11:00      Coffee break
- 11:15      Preparation of the simulation exercise
- 13:00      Lunch
- SESSION 3: INVESTMENT FACILITATION**
- 14:30      **The generations of investment facilitation**
- Liberalization of FDI regimes
  - Marketing of economies
  - Investor targeting
- Anna Joubin-Bret, DIAE, UNCTAD
- 15:30      **Investment facilitation provisions in international investment agreements**
- Anna Joubin-Bret, DIAE, UNCTAD
- 16:15      Coffee break
- 16:30      **Alternative dispute resolution and dispute prevention policies**
- David Pawlak, Consultant - International Arbitration, Washington  
D.C. & Warsaw, Poland, former Attorney-Adviser, Office of the Legal  
Adviser, US Department of State
- 17:15      **The institutional framework for investment protection and promotion**
- National experiences
  - Technical assistance
- Anna Joubin-Bret, DIAE, UNCTAD  
Country experts: Vanessa Rivas Plata Saldarriaga, Legal Adviser,  
Office of International Economy, Competition and Private Investment  
Affairs & David Barrientos Gonzales, Third Secretary, Ministry of  
Foreign Affairs, Peru
- 18:00      End of working day

## Friday 19 June

09:00      **SESSION 4: SIMULATION EXERCISE**  
**Negotiation of a high-standard investment agreement**

Coaches:

Alejandro Faya, Consultant, Professor of Law, Universidad Iberoamericana and Universidad Nacional Autónoma de México, former Chief Negotiator of investment treaties, Directorate General for Foreign Investment, Ministry of Economy, Mexico

Jan Knöerich, Course Coordinator, Associate Expert, Work Programme on International Investment Agreements, D IAE, UNCTAD

**Preparation of the negotiations in small groups**

11:00      **Simulation of negotiations**

13:00      Lunch break as part of the practical exercise

14:30      Cont'd

16:00      **Debriefing:** presentation by each group of the results of the negotiation

17:00      **Closing session**

17:30      End of the training course



# **APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region**

15-19 June 2009  
Kuala Lumpur, Malaysia

Organized by the Secretariats of the Asia-Pacific Economic Cooperation (APEC) and of the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of International Trade and Industry (MITI), Government of Malaysia



## **LIST OF PARTICIPANTS AND RESOURCE PERSONS**

## LIST OF PARTICIPANTS

No.	Name	Tel. No./ E-mail
<b>AUSTRALIA</b>		
1.	<b>Mr. Michael Gardner</b> Policy Analyst Department of The Treasury Foreign Investment and Trade	Tel.No.: +612 6263 3082 E-mail : michael.gardner@treasury.gov.au
<b>BRUNEI DARUSSALAM</b>		
2.	<b>Ms. Dk. Nooraslana Pg Sallehuddin</b> Second Secretary Trade Development Department Ministry of Foreign Affairs and Trade	Tel.No.: + 673 238 3374 E-mail : nooraslana.sallehuddin@mfa.gov.bn
<b>CHILE</b>		
3.	<b>Mr. Raimundo Gonzalez</b> Legal Adviser Services, Investment and Air Transport Department	Tel.No.: (56-2) 827-5553 E-mail : rgonzalez@direcon.cl
4.	<b>Mr. Cristian Rodriguez</b> Legal Adviser Services, Investment and Air Transport Department	Tel.No.: (56-2) 827-5553 E-mail : crodriguez@direcon.cl
<b>PEOPLE'S REPUBLIC OF CHINA</b>		
5.	<b>Mr. Chen Chao</b> Deputy Director Ministry of Commerce	Tel.No.: 0086-10-65197778 E-mail : chenchao@mofcom.gov.cn
6.	<b>Mr. Li Sen</b> Officer Ministry of Commerce	Tel.No.: 0086-10-65197150 E-mail : lisen@mofcom.gov.cn
<b>INDONESIA</b>		
7.	<b>Mr. Noor Fuad Fitrianto</b> <b>Head Section, ASEM Corporation</b> Investment Coordinating Board, Directorate of Regional Cooperation	Tel.No.: +6221-5252769 E-mail : noorfuad_007@yahoo.co.uk
8.	<b>Mr. Nova Erlangga Masrie</b> Staff Investment Coordinating Board, Directorate of Regional Cooperation	Tel.No.: +6221-5252769 E-mail : Nova_masrie@yahoo.com
9.	<b>Mr. Abid Wahid Sasmito</b> Staff Investment Coordinating Board, Bureau of Legal and Public Relations	Tel.No.: +6221-5269874 E-mail : Wahid_8hide@yahoo.com



10.	<b>Ms. Erliana Novy Siregar</b> Staff Investment Coordinating Board Directorate of Bilateral and Multilateral Cooperation	Tel.No.: +6221-5202045 E-mail : Erliana.siregar@yahoo.com
11.	<b>Mr. Bambang Eko Sulistianto</b> Staff Investment Coordinating Board, Bureau of Legal and Public Relations	Tel.No.: +6221-5269874 E-mail : Bambang_bkpm@yahoo.co.id
12.	<b>Mr. Yudi Pramadi</b> Director International Economic Cooperation Ministry for Economic Affairs	Tel.No.: +6221-3521849 E-mail : yudip@ekon.go.id
13.	<b>Mr. Bobby Chris Siagian</b> Deputy Director International Economic Cooperation Ministry for Economic Affairs	Tel.No.: +6221-3521849 E-mail : bobsiagian@yahoo.com
14.	<b>Mr. Randi Anwar</b> Director for Regional Cooperation Investment Coordinating Board,	Tel.No.: +6221-5252769 E-mail : radianwar@bkpm.go.id
15.	<b>Mr. Amri Zuhdi</b> Deputy Director Intra Regional Cooperation Investment Coordinating Board	Tel.No.: +6221-5252008 E-mail : amri@bkpm.go.id
16.	<b>Mr. Bahris Paseng</b>	
<b>JAPAN</b>		
17.	<b>Mr. Takayuki Shiina</b> Officer Ministry of Economy, Trade and Industry	Tel.No.: +81-3-3501-5909 E-mail : shiina-takayuki@meti.go.jp
18.	<b>Mr. Masafumi Sugano</b> Deputy Director Ministry of Economy, Trade and Industry	Tel.No.: +81-3-3501-1700 E-mail : Sugano-masafumi@meti.go.jp
<b>MALAYSIA</b>		
19.	<b>Ms. Datin Noor Haliza Binti Mohd Noor</b> Deputy Director Economic Planning Unit	Tel.No.: 03-8888 2740 E-mail : haliza@epu.gov.my
20.	<b>Ms. Jeannie Christie</b> Assistant Director Economic Planning Unit	Tel.No.: 03 – 8888 2649 E-mail : jeannie@epu.gov.my
21.	<b>Ms. Nuruljannah Mohd Ariff Sabri</b> Senior Executive Bank Negara Malaysia	Tel.No.: 03 – 2698 8044 Ext.7905 E-mail : jannah@bnm.gov.my
22.	<b>Ms. Nik Nurazlina Ali</b> Manager	Tel.No.: 03- 2698 8044 Ext.8466

	Bank Negara Malaysia	E-mail : nuraz@bnm.gov.my
23.	<b>Ms. Kristina Rai</b> Manager Bank Negara Malaysia	Tel.No.: 03- 2698 8044 Ext. 7933 E-mail : Kristina@bnm.gov.my
24.	<b>Mr. Budiman Lutfi</b> Senior Federal Counsel Attorney-General's Chambers Malaysia	Tel.No.: +603 8885 5736 E-mail : lutfi@agc.gov.my
25.	<b>Mr. Kamal Baharin Omar</b> Senior Federal Counsel Attorney-General's Chambers Malaysia	Tel.No.: +603 8885 5708 E-mail : kamalbaharin@agc.gov.my
26.	<b>Mr. Simon Lee Yew Weng</b> Director, International Corporate Division, Malaysian Industrial Development Authority	Tel.No.: +603-22673668 E-mail : simon@mida.gov.my
27.	<b>Mr. Jayasigan Narayanan Nair</b> Senior Dep. Director, International Corporate Division, Malaysian Industrial Development Authority	Tel.No.: +603-22673670 E-mail : jeyasigan@mida.gov.my
28.	<b>Ms. Roeslina Abbas</b> Dep. Director, International Corporate Division, Malaysian Industrial Development Authority	Tel.No.: +603-22673671 E-mail : Roeslina@mida.gov.my
29.	<b>Ms. Noor Suziyanti Saad</b> Senior Assistant Director, International Corporate Division, Malaysian Industrial Development Authority	Tel.No.: +603-22673672 E-mail : suziyanti@mida.gov.my
30.	<b>Ms. Dato' Noorashikin binti Tan Sri Abdul Rahim.</b> Director, Kuala Lumpur Regional Centre for Arbitration.	Tel.No.: +603-2142 0103 E-mail : director@rcakl.org.my
31.	<b>Ms. Olivia Tan Swee Leng</b> Legal Counsel Kuala Lumpur Regional Centre for Arbitration	Tel: 603-2142 0103 Email: counsel2@rcakl.org.my
32.	<b>Ms. Shereen Khan</b> Legal Counsel, Kuala Lumpur Regional Centre for Arbitration	Tel.No.: +603- 2142 0103 E-mail : counsell@rcakl.org.my
33.	<b>Ms. Saovanee Chan Somchit</b> Associate Research and Investment Strategy Khazanah Nasional Berhad	Tel.No.: +603-2034 0142 E-mail : saovanee.chan@khazanah.com.my
34.	<b>Ms. Wan Khatina Nawawe</b> Senior Vice President Research and Investment Strategy Khazanah Nasional Berhad	Tel.No.: +603-2034 0134 E-mail : wan.khatina@khazanah.com.my

35.	<b>Ms. Talagavathi Karapayah</b> Director Investment Policy and Trade Facilitation Division Ministry of International Trade and Industry	Tel.No.: +603–6203 4714 E-mail : talaga@miti.gov.my
36.	<b>Mr. Hairil Yahri Yaacob</b> Senior Principal Assistant Director Investment Policy and Trade Facilitation Division Ministry of International Trade and Industry	Tel.No.: +603–6203 4711 E-mail : hairil@miti.gov.my
37.	<b>Ms. Mazmen Abdul Hamid</b> Assistant Director Investment Policy and Trade Facilitation Division Ministry of International Trade and Industry	Tel.No.: +603–6203 4764 E-mail : mazmen@miti.gov.my
38.	<b>Ms. Siti Sarah Rosli</b> Assistant Director Investment Policy and Trade Facilitation Division Ministry of International Trade and Industry	Tel.No.: +603 - 62035536 E-mail : sarah@miti.gov.my
39.	<b>Ms. Mariam Md Salleh</b> Director ASEAN Economic Cooperation Division Ministry of International Trade and Industry	Tel.No.: +603 - 62034779 E-mail : mariam@miti.gov.my
40.	<b>Ms. Sumathi Balakrishnan</b> Principal Assistant Director Multilateral Policy and Negotiations Division Ministry of International Trade and Industry	Tel.No.: +603 – 62034703 E-mail : sumathi@miti.gov.my
41.	<b>Ms. Madihah Zainol</b> Legal Advisor Ministry of International Trade and Industry	Tel.No.: +603 – 6203 1764 E-mail : madihah@miti.gov.my
42.	<b>Mdm Adelina Christine Awen Son</b> Assistant Secretary, Loan Management, Financial Market & Actuary Division Ministry of Finance	Tel.No.: +603 8882 3556 E-mail : adelina.awenson.treasury.gov.my
43.	<b>Mr. Imran Jamily Johari</b> Assistant Director Pemudah Secretariate Ministry of International Trade and Industry	Tel.No.: 603 6203 1876 E-mail : imran@miti.gov.my

44.	<b>Mr. Muhd Ikram Zulkurnain</b> Assistant Director Asia Pasific Cooperation Division Ministry of International Trade and Industry	Tel.No.: 603 6203 4707 E-mail : mikram@miti.gov.my
<b>MEXICO</b>		
45.	<b>Ms. Dolores Gloria Zamora Romero</b> Deputy Director Bilateral Treaties and APEC Ministry of Economic	Tel.No.: (52)(55) 52296167 E-mail : dzamora@economia.gob.mx
46.	<b>Ms. Mariel Velazquez De Landa</b> Deputy Director International Investments Agreements Ministry of Economic	Tel.No.: (52)(55) 52296100 E-mail : mvelazquexdel@economia.gob.mx
<b>NEW ZEALAND</b>		
47.	<b>Mr. Thomas Haidon</b> Trade Specialist Ministry of Foreign Affairs and Trade	Tel.No.: +64 4 439 8808 E-mail : Thomas.haidon@mfat.govt.nz
<b>PERU</b>		
48.	<b>Mr. David Barrientos Gonzales</b> Third Secretary Ministry of Foreign Affairs	Tel.No.: (511) 623 3187 E-mail : dbarrientos@rree.gob.pe
49.	<b>Ms. Rivas Plata Saldarriaga Vanessa del Carmen</b> Consultant Ministry of Economy and Finance	Tel.No.: (511) 3115930 ext 3538 E-mail : vrivasplata@mef.gob.pe
<b>PHILIPPINES</b>		
50.	<b>Ms. Fretti Ganchoon</b> State Counsel III Department of Justice	Tel.No.: (632) 536 0458 E-mail : fgganchoon@yahoo.com
51.	<b>Ms. Nyriam Sedillo Hernandez</b> Senior State Solicitor Office of the Solicitor General (OSG)	Tel.No.: (632) 892 20 87 E-mail : nyriamsusan@yahoo.com
<b>RUSSIAN FEDERATION</b>		
52.	<b>Ms. Alexandra Chagovets</b> Adviser of Services and Investment Division Ministry for Economic Development	Tel.No.: + 7 (495) 651-75-98 E-mail : ChagovetsAA@economy.gov.ru
53.	<b>Ms. Anna Zhur</b> Expert of Services and Investment Divison Ministry for Economic Development	Tel.No.: + 7 (495) 651-75-98 E-mail : ZhurAV@economy.gov.ru

<b>SINGAPORE</b>		
<b>54.</b>	<b>Ms. Ong Kiat Yeng</b> Senior Assistant Director Ministry of Trade and Industry WTO and International Trade Negotiations	Tel.No.: (+65) 6332 7724 E-mail : Ong-kiat-yeng@mti.gov.sg
<b>55.</b>	<b>Mr. Ong Chin Heng</b> State Counsel Attorney-General's Chambers International Affairs Division	Tel.No.: +65 6332 2912 E-mail : Ong_chin_heng@agc.gov.sg
<b>CHINESE TAIPEI</b>		
<b>56.</b>	<b>Mr. Haur-Jiunn Shyu</b> Officer Ministry of Economic Affairs	Tel.No.: 886-2-23892111ext. 614 E-mail : hjshu@moea.gov.tw
<b>THAILAND</b>		
<b>57.</b>	<b>Ms. Asara Punggalan</b> Senior Investment Promotion Officer Office of the Board of Investment	Tel.No.: +662 537 8084 E-mail : siriporn.n@boi.go.th
<b>58.</b>	<b>Ms. Potchamas Saengthien</b> Third Secretary Division of International Economic Affairs, Ministry of Foreign Affairs	Tel.No.: (662) 643-5000 ext 4065 E-mail : potchamass@mfa.go.th
<b>59.</b>	<b>Ms. Ruthaichanok Manivat</b> Head of International Investment Agreement Bureau International Economic Department, Bank of Thailand	Tel.No.: (662) 283 5384 E-mail : RuthaicM@bot.or.th
<b>60.</b>	<b>Ms. Kengjai Watjanapukka</b> Economist International Economic Department Bank of Thailand	Tel.No.: (662) 283 5190 E-mail : KengjaiW@bot.or.th
<b>VIETNAM</b>		
<b>61.</b>	<b>Ms. Thai Thu Phuong</b> Deputy Head of Investment Promotion Division Foreign Investment Agency Ministry of Planning and Investment	Tel.No.: 84-4-37343758 E-mail : phuongfia@mpi.gov.vn
<b>62.</b>	<b>Ms. Pham Thi Thuong</b> Official Department of Legislation, Ministry of Planning and Investment	Tel.No.: 84-8044515 E-mail : Thuongpham411@yahoo.com

## LIST OF RESOURCE PERSONS

### **Osman Affendi**

Attorney General Chambers of Malaysia

### **Alejandro Faya**

Consultant, Professor of Law, Universidad Iberoamericana and Universidad nacional autónoma de México, former Chief Negotiator of investment treaties, Directorate General for Foreign Investment, Ministry of Economy, Mexico  
Tel: + 52 55 55538630, Email: afayardz@gmail.com

### **Anna Joubin-Bret**

Course Director, Senior Legal Advisor, Policies and Capacity-building Branch, Division on Investment and Enterprise (DIAE), UNCTAD  
Tel: +41 22 917 5897, Fax: +41 22 917 0194, Email: anna.joubin-bret@unctad.org  
Sufian Jusoh

### **Jan Knoerich**

Course Coordinator, Associate Expert, Work Programme on International Investment Agreements, DIAE, UNCTAD  
Tel: +41 22 917 5911, Fax: +41 22 917 0194, Email: jan.knoerich@unctad.org

### **Vilawan Mangklatanakul**

Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand  
Tel: 66 2 643 5000 ext 4095, Fax: 66 2 643 5250, Email: vilawanm@mfa.go.th

### **David Pawlak**

Consultant - International Arbitration, Washington D.C. & Warsaw, Poland, former Attorney-Adviser, Office of the Legal Adviser, US Department of State  
Tel: +48 511 242 010, Email: dapawlak@aol.com

### **Wenhua Shan**

Professor, Xi'an Jiaotong University, China, and Oxford Brookes University, England  
Email: shan@mail.xjtu.edu.cn



# **APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region**

15-19 June 2009  
Kuala Lumpur, Malaysia

Organized by the Secretariats of the Asia-Pacific Economic Cooperation (APEC) and of the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of International Trade and Industry (MITI), Government of Malaysia



## **BIO NOTES OF KEY SPEAKERS**

### **Alejandro Faya-Rodriguez**

Consultant on economic law, with a focus on foreign investment, treaties and regulation. He majored on law from the *Universidad Iberoamericana* of Mexico City, and has a Master in Law from the *University of Oxford* and a Master in Compared Public Policies from the *Latin-American Faculty of Social Sciences*.

In the private sector, he was a member of the law firms *Camil Abogados* and *Lopez Velarde, Heftye y Soria*, where he participated in several investment projects (foreign and national) and corporate transactions.

From 2003 to 2009 he worked for the Ministry of Economy of Mexico, where he was Director of Legal Affairs and Deputy Director-General of International Affairs of the Directorate-General for Foreign Investment, as well as Senior Legal Advisor for competitiveness projects. Among others, he negotiated the last ten international investment treaties entered into by Mexico and gave legal opinion on bills and proposals on investment, including their consistency with treaties; also, on issues related to competition, regulatory improvement and competitiveness.

He works for governments and public entities, international organizations and think tanks. He is Professor of Law, at postgraduate level, in the *Universidad Iberoamericana* and the *Universidad Nacional Autónoma de México*, where he teaches law on foreign investment, treaties and economic regulation. He has several publications and has been speaker in numerous seminars on investment and international law issues.

### **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.

### **David Pawlak**

David Pawlak, an attorney admitted to the bar of the State of New York, provides advisory and representation services in international arbitration matters with a focus on investor-State disputes.

Mr. Pawlak has represented clients in arbitration matters under the rules of the United Nations Commission on International Trade Law (UNCITRAL); the International Centre for Settlement of Investment Disputes (ICSID) Additional Facility; the International Arbitral Center of the Austrian Federal Economic Chamber, Vienna (VIAC); and the International Chamber of Commerce (ICC).

Mr. Pawlak's recent engagements include, among other matters, serving as lead counsel to the Slovak Republic in defense of a multi-million Euro investment treaty claim. He also led the defense of a multi-million dollar claim brought against Poland under the UNCITRAL Arbitration Rules and the Poland-U.S. bilateral investment treaty. He has been retained to advise the Ukraine in connection with two ICSID investment treaty matters.

Mr. Pawlak also has assisted the Colombian government in the implementation of its investment treaty obligations. UNCTAD has called upon him to provide training on investment treaty matters for officials from dozens of governments at courses in Ukraine, Belarus and Peru. He also has provided technical assistance to Morocco on the investment provisions of the Morocco-US Free Trade Agreement.

Until August 2005, Mr. Pawlak served as an Attorney-Adviser in the Office of the Legal Adviser at the US Department of State. He was a key member of the US legal team dedicated exclusively to investment treaty matters. The US team has prevailed in every investor-State arbitration that has been decided to date. He also advised on the drafting and negotiation of investment and dispute resolution provisions in BIT and investment chapters of FTAs.

Prior to beginning work with the US Department of State in 2001, Mr. Pawlak was an associate at Milbank, Tweed, Hadley & McCloy in New York. Prior to Milbank Tweed, he held the position of Assistant District Counsel in the US Department of Justice Honors Program.

Mr. Pawlak earned the US Department of State's Meritorious Honor Award for his work on investment treaty arbitration. He received the *Pro Bono Publico* Award from the law firm Milbank Tweed Hadley & McCloy.

Mr. Pawlak is a graduate of the University of Pittsburgh's joint-degree program offered by the School of Law and Graduate School of Public and International Affairs (JD/MPIA) and holds a graduate certificate from the University's Center for Latin American Studies. He also undertook graduate studies at the Johns Hopkins School for Advanced International Studies. Mr. Pawlak earned his undergraduate degree from the University of Michigan at Ann Arbor.

Mr. Pawlak has written on international arbitration and trade and investment treaty issues, including a book chapter entitled *Managing Investment Treaty Obligations And Investor-State Disputes: A Guide for Government Officials* (Kluwer International Law 2008).

### **Wenhua Shan**

Professor Wenhua Shan is the Dean and Tengfei Professor of International Law at the School of Law of Xi'an Jiaotong University, PR China. He is also Professor of International Law at Oxford Brookes University, UK. Graduated with PhDs from both the University of Cambridge and Xiamen University, Professor Shan has written extensively on international investment law and arbitration and has advised various governments and investors on investment treaty negotiations and arbitration cases. His recent publications include *Chinese Investment Treaties: Policies and Practice* (co-authored with Ms Norah Gallagher, OUP 2009), *The Legal Framework of EU-China Investment Relations: A Critical Appraisal* (Hart Publishing 2005) and *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008). He was recently awarded the title of "State Council Special Allowance Expert" by the State Council of PR China.



UNCTAD



Asia-Pacific  
Economic Cooperation

## **Workshop on Investor-State Dispute Settlement And Dispute Prevention Policies**

**Attorney General's Chambers, Malaysia  
19 June 2009, Training Room, 4<sup>th</sup> Floor**

### **Programme**

09:00 **Welcome address**

09:15 **Investor-State dispute settlement: trends and implications**

This module will present recent trends in the conclusion of international investment agreements (IIAs), highlight interpretations given by arbitral tribunals of key concepts of investment protection, and present recent developments in investor-State dispute settlement. It will discuss systemic issues, especially related to existing inconsistencies in the decisions made by international arbitral tribunals. Substantive issues, e.g. related to definitions, fair and equitable treatment and expropriation, will be reviewed through the analysis of particular case studies.

10:15 **Open discussion**

10:30 **Coffee / tea break**

10:45 **Dispute avoidance / prevention and alternative dispute resolution**

This module will address the issue of dispute avoidance, understood as the possibilities for early intervention to prevent a potential dispute from escalating to international arbitration. It will also discuss various approaches to the use of alternative dispute resolution methods once a dispute has already emerged. The experiences of Malaysia and other countries in the APEC region with both dispute avoidance and alternative dispute resolution are analyzed.

11:45 **Pros and cons of adopting a concise vs. comprehensive ISDS model text**

NAFTA-based ISDS introduced a comprehensive dispute settlement mechanism which has been adopted into the model investment texts of countries such as the US, Canada and Australia. This has been seen as attempting to replicate dispute settlement provisions which are already contained in the ICSID Arbitration Rules or UNCITRAL Arbitration Rules. An analysis of the relevant policy considerations in adopting comprehensive NAFTA-based ISDS provisions will be discussed in this module.

12:45 **Open discussion**

This interactive session provides a venue for further discussion of Malaysia's particular experiences with investor-State dispute settlement, dispute avoidance and alternative methods of dispute resolution.

13:00 Lunch

Resource persons:

Ms. Anna Joubin-Bret,

*Senior Legal Advisor, Division on Investment and Enterprise, UNCTAD*

Mr. David Pawlak

*International Arbitration, Washington DC & Warsaw, Poland, former Attorney-Adviser, Office of the Legal Adviser, US Department of State*

Dr. Vilawan Mangklatanakul

*Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand*



# **APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region**

15-19 June 2009  
Kuala Lumpur, Malaysia

Organized by the Secretariats of the Asia-Pacific Economic Cooperation (APEC) and of the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of International Trade and Industry (MITI), Government of Malaysia



## **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
- International Investment Rule-Making: Stocktaking, Challenges and the Way Forward
- Dispute Settlement: Investor-State Dispute Arising from Investment Treaties
- Investor-State Dispute Settlement and Impact on Investment Rulemaking
- 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 2008: Transnational Corporations and the Infrastructure Challenge
- IIA MONITORS:
  - Latest Developments in Investor-State Dispute Settlement  
IIA Monitor No. 1 (2009), UNCTAD/WEB/DIAE/IA/2009/6/Rev1.
  - Recent Developments in International Investment Agreements  
IIA Monitor No. 2 (2008), UNCTAD/WEB/DIAE/IA/2008/1.

## 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, 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
Japan	Bangladesh, China, Egypt, Hong Kong (China), Republic of Korea, Mongolia, Pakistan, Russian Federation, Sri Lanka, Turkey, Viet Nam, United States
Republic of Korea	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
Malaysia	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



Mexico	Argentina, Australia, Austria, Belgium and Luxembourg, Cuba, Denmark, Finland, France, Germany, Greece, Iceland, Republic of Korea, Netherlands, Portugal, Spain, Sweden, Switzerland, Uruguay
New Zealand	Argentina, Chile, China, Hong Kong (China)
Papua New Guinea	Australia, Germany, United Kingdom
Peru	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
Philippines	Argentina, Australia, Austria, Bangladesh, Belgium and Luxembourg, Cambodia, Canada, Chile, China, Czech Republic, Denmark, Finland, France, Germany, Italy, Republic of Korea, Myanmar, Netherlands, Pakistan, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom
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	Belize, Macedonia TFYR, Marshall Islands, Swaziland, Thailand
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

## 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
- C AFTA 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 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
- N AFTA 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*)

2.9 Binding Force and Enforcement (*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

Including:

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

#### **UNCITRAL**

- UNCITRAL Arbitration Rules (1976)
- UNCITRAL Conciliation Rules (1980)
- UNCITRAL Model Law on International Commercial Arbitration (1985)
- UNCITRAL Model Law on International Commercial Conciliation (2002)
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996)

#### **ICC**

Rules of Arbitration of the International Chamber of Commerce

Including:

- Statutes of the International Court of Arbitration of the ICC
- Internal Rules of the International Court of Arbitration of the ICC

#### **NY Convention**

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

## 5) Bibliography

Aguilar Alvarez, Guillermo, and Reisman, Michael W.: *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, Martinus Nijhoff Publishers, 2008.

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.

Schreuer, Christoph H.: Three Generations of ICSID Annulment Proceedings. In: Annulment of ICSID Awards 17-42 (Emmanuel Gaillard & Yas Bani fatemi, eds. 2004).

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 ratione 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 razione personae*)  
Tokios Case Study Key (*Jurisdiction razione 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](http://www.unctadxi.org/templates/Startpage_718.aspx) for further reference on selected dispute settlement cases.

### **Metalclad Corporation v. United Mexican States** (ICSID Case No. ARB(AF)/97/1)

- Award of the Tribunal (August 30, 2000) (PDF)  
**National Court Decision:**
- Supreme Court of British Columbia, Reasons for Judgment of May 2, 2001, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 (PDF)
- Supreme Court of British Columbia, Supplementary Reasons for Judgment of October 31, 2001, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529.

### **Robert Azinian and others v. United Mexican States** (ICSID Case No. ARB(AF)/97/2)

- Award of the Tribunal (November 1, 1999) (PDF)

### **Emilio Agustín Maffezini v. Kingdom of Spain** (ICSID Case No. ARB/97/7)

- Decision on Jurisdiction (January 25, 2000) (PDF)
- Award of the Tribunal (November 13, 2000) (PDF)
- Rectification of the Award (January 31, 2001) (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)

### **SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan** (ICSID Case No. ARB/01/13)

- Decision of the Tribunal on Objections to Jurisdiction (August 6, 2003) (PDF)

### **SGS Société Générale de Surveillance S.A. v. Republic of the Philippines** (Case No. ARB/02/6)

- Summary of the Decision

- Decision of the Tribunal on Objections to Jurisdiction (January 29, 2004) (PDF)
- Declaration by one of the arbitrators (January 29, 2004) (PDF)

**Ceskoslovenska Obchodni Banka, A.S. (COSB) v. The Slovak Republic** (ICSID Case No. ARB/97/4)

- Decision on Objections to Jurisdiction (May 24, 1999) (PDF)
- Decision on the Further and Partial Objection to Jurisdiction (December 1, 2000) (PDF)

**Mondev International Ltd. v. United States of America** (ICSID Case No. ARB(AF)/99/2)

- Award of the Tribunal (October 11, 2002) (PDF)

**Tradex Hellas S.A. v. Albania** (ICSID Case No. ARB/94/2)

- Decision on Jurisdiction, 24 December 1996. (PDF)
- Final Award, 29 April 1999. (PDF)

**Plama Consortium Limited v. Bulgaria** (ICSID Case No. ARB/03/24 (Energy Charter Treaty))

- Decision on Jurisdiction, 8 February 2005. (PDF)
- Order on Provisional Measures, 6 September 2005. (PDF)

**CME Czech Republic B.V. v. Czech Republic**, UNCITRAL. (The Netherlands/Czech Republic BIT).

- Partial Award, 13 September 2001. (PDF)
- Dissenting opinion, 13 September 2001. (PDF)
- Final Award, 14 March 2003. (PDF)
- Separate Opinion on Final Award, 14 March 2003. (PDF)
- Review by Svea Court of Appeal, 15 May 2003.

**Lauder v. Czech Republic** UNCITRAL (United States/Czech Republic BIT).

- Final Award, 3 September 2001. (PDF)

**Saluka Investments BV (The Netherlands) v. The Czech Republic** (Dutch/Czech BIT)

- Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004. (PDF)
- Partial Award, 17 March 2006. (PDF)
- Swiss Federal Tribunal Decision, 7 September 2006. (PDF)

**Genin and others v. Estonia**, Award (ICSID Case No. ARB/99/2) (United States/Estonia BIT)

- Award, 25 June 2001 (PDF)
- Decision on Request for Supplementary Decisions and Rectification, 4 April 2002 (PDF)

**ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary** (ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT))

- Award, 2 October 2006 (PDF)

**AES Summit Generation Ltd. v. Hungary** (ICSID No. ARB/01/04)

- Settlement agreed by parties and proceedings discontinued at their request, 3 January 2002.

**Telenor Mobile Communications A.S. v. Republic of Hungary** (ICSID Case No. ARB/04/15 (Norway/Hungary))

- Award, 13 September 2006 (PDF)
- Summary of Award (PDF)

**Petrobart Limited v. Kyrgyz Republic**, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty)

- Award, 29 March 2005 (PDF)

**Eureko B.V. v. Republic of Poland** (Netherlands/Poland BIT)

- Partial Award and Dissenting Opinion, 19 August 2005 (PDF)
- Judgment of Court of First Instance of Brussels on setting aside of award, 23 November 2006
- Judgment of Court of First Instance of Brussels on challenge to arbitrator, 22 December 2006

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

- Procedural Order No. 1, 1 July 2003 (PDF)
- Decision on Jurisdiction, 29 April 2004 (PDF)
- Dissenting opinion, 29 April 2004 (PDF)
- Procedural Order No. 3, 18 January 2005 (PDF)

**Western NIS Enterprise Fund v. Ukraine**, ICSID Case No. ARB/04/2 (US/Ukraine BIT).

- Order, March 16, 2006 (PDF)

**Wena Hotels Ltd. v. Arab Republic of Egypt**, ICSID Case No. ARB/98/4 (United Kingdom/Egypt BIT).

-Jurisdiction, 29 June 1999.

-Award on Merits, 8 December 2000.

**Champion Trading Company and Ameritrade International v. Egypt**, ICSID Case No. ARB/02/9 (US/Egypt BIT). -Award, 27 October 2006.

**Helnan International Hotels A/S v. Arab Republic of Egypt**, ICSID Case No. ARB/05/19. -Decision on Jurisdiction, 17 October 2006.

**Joy Mining Machinery Limited v. Egypt**, ICSID Case No. ARB/03/11 (United Kingdom/Egypt BIT). -Award on Jurisdiction, 30 July 2004.

**Impregilo S.p.A. v. Islamic Republic of Pakistan**, ICSID Case No. ARB/03/3 (Italy/Pakistan BIT). -Decision on Jurisdiction, 22 April 2005.



**Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan**, ICSID Case No. ARB/02/13 (Italy/Jordan BIT). -Award, 31 January 2006.

**France Telecom v. Lebanon (France/Lebanon BIT).**

-Swiss Federal Tribunal Decision I, 10 November 2005.

-Swiss Federal Tribunal Decision II, 10 November 2005.

**CMS Gas Transmission Company v. Argentine Republic** (ICSID Case No. ARB/01/8) Award of the Tribunal (May 12, 2005) (PDF)

**Azurix Corp. v. Argentine Republic** (ICSID Case No. ARB/01/12)

Decision on Jurisdiction (December 8, 2003) (PDF)

Award (July 14, 2006) (PDF)

**LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic**(ICSID Case No. ARB/02/1)

Decision on Liability (October 3, 2006) (PDF)

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

-Award, 19 January 2007.

**Soufraki v. United Arab Emirates**, ICSID Case No. ARB/02/7 (Italy/United Arab Emirates BIT). -Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007.

**Fedax N.V. v Venezuela**, ICSID Case No. ARB/96/3 (The Netherlands/Venezuela BIT). - Award, 9 March 1998.

**Consortium R.F.C.C. v. Kingdom of Morocco**, ICSID Case No. ARB/00/6. (Italy/Morocco BIT). -Decision on Annulment, 18 January 2006 (not publicly available).

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

- Decision on Jurisdiction, 17 May 2007.
- Dissenting Opinion, 19 February 2009.
- Decision on the Application for Annulment, 16 April 2009.

**L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria**, ICSID Case No. ARB/05/3 (Italy/Algeria BIT). - Decision, 12 July 2006 (French).

**Fraport AG v. Philippines**, ICSID Case No. ARB/03/25 (Germany/Philippines BIT). - Award, 19 July 2007.



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region

Kuala Lumpur, Malaysia  
15-19 June 2009

## International investment rule-making: trends and emerging issues

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. Features and challenges

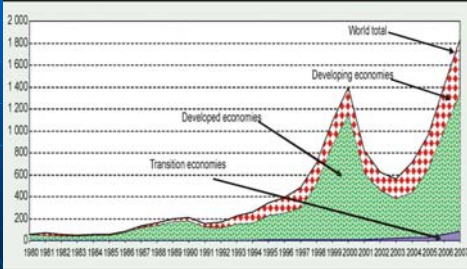
2

## Foreign direct investment: trends and implications

3

## Global FDI inflows surpassed the peak of 2000...

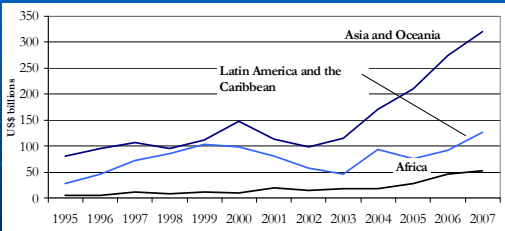
FDI inflows, globally and by group of economies, 1980-2007 (\$ billion)



\$1.8 trillion in 2007

4

## ... with record flows in developing regions ...

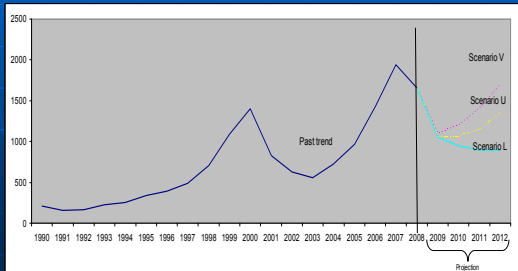


Africa: \$53 billion (+16%) – record  
LAC: \$126 billion (+36%) – record  
LDCs: \$13 billion (+4%) – record  
East Asia: \$157 billion (+19%) – record  
South-East Asia: \$61 billion (+18%) – record  
South Asia: \$31 billion (+19%) – record  
West Asia: \$71 billion (+12%) – record

5

## ... but FDI flows set to decline in 2008, with a rising trend in the medium term.

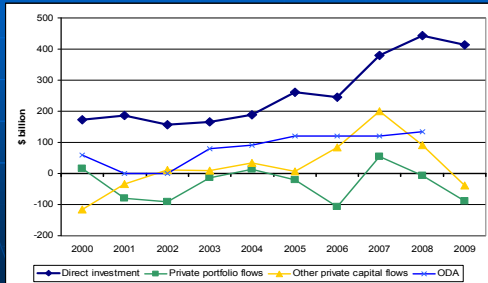
Worldwide FDI inflows with three different trajectories, 1990-2012



UNCTAD expects worldwide FDI down by 15% in 2008

6

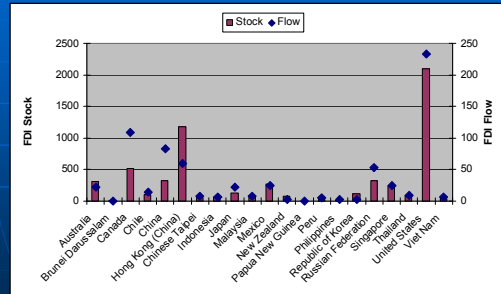
## Net capital flows to developing countries, 2000-2009



7

## FDI into APEC Economies

Inward FDI stock and flows into APEC economies 2007 (\$ billion)

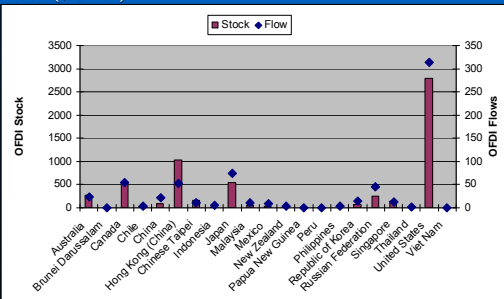


Total: US\$ 6 trillion, 40% of world FDI stock  
Total: US\$ 700 billion, 38% of world FDI flows

8

## Outward FDI from APEC Economies

Outward FDI stock and flows from APEC economies 2007 (\$ billion)



Total: US\$ 6 trillion, 39% of world outward FDI stock  
Total: US\$ 662 billion, 33% of world outward FDI flows

9

## Emerging issues

- Protection of strategic industries
- Economic Crisis
- Increase in South-South FDI
- Emerging economies as outward investors

10

## Implications of the financial crisis

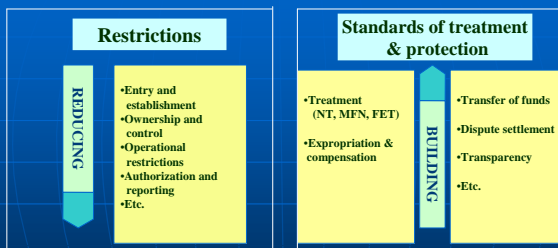
- The global economic and financial crisis has come to dominate international economic relations
- This raises important questions about the role that the international investment regime can play in responding to today's global challenges
- Several governments are taking emergency measures in response to the crisis, frequently addressing social and economic concerns
- These measures may also have serious implications for FDI and TNC operations

11

## Objectives of the legal investment framework

12

## Objectives of the legal investment framework



These objectives can be achieved through:

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

13

## Legal framework for investment: Hierarchy of norms



14

## 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)

15

## 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**

16

## 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)

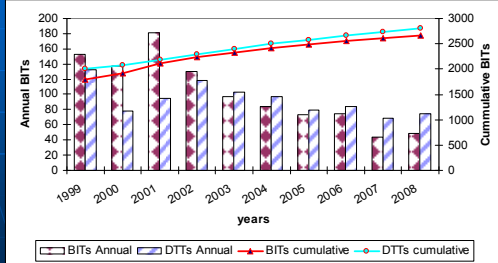
...but the **concrete way in which they are addressed** differs substantially

17

## Trends in international investment agreements

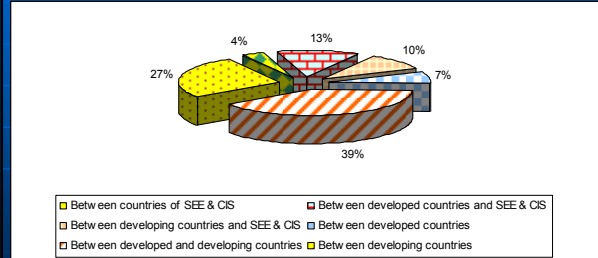
18

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



19

## BITs concluded by country group



20

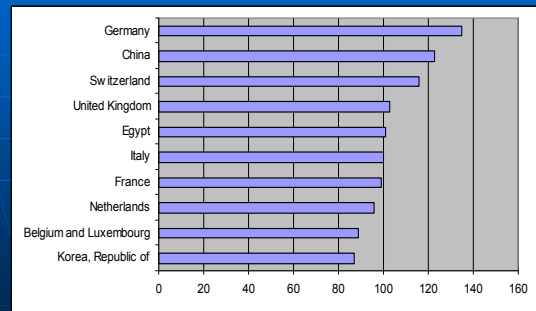
## Increased role of developing countries

- 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.

21

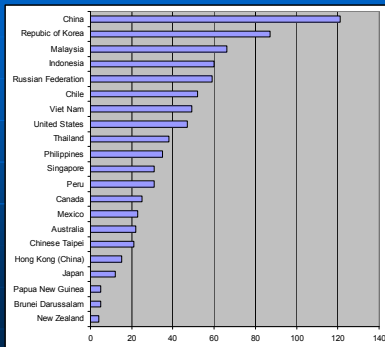
## The top ten signatories of BITs in the world, June 2008



22

## BITs in APEC

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



Total: 808 BITs, ~ 31% of globally concluded BITs

23

## 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

24

## 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 254 as of June 2008

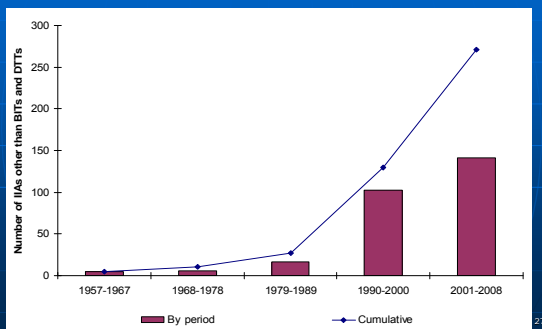
25

## EIAs 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)

26

## Over 250 trade agreements with investment provisions



27

## 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

28

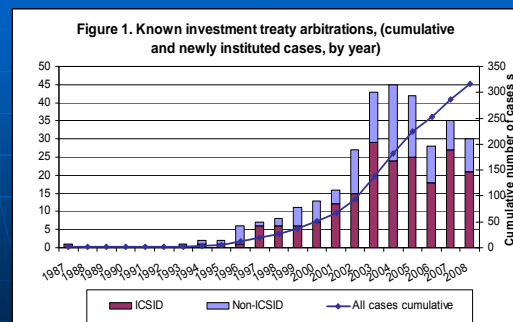
## The increase in IIAs has been paralleled by an increase in investor-State disputes

→ The cumulative number of treaty-based cases reached 318 known claims by end 2008.

→ 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.

29

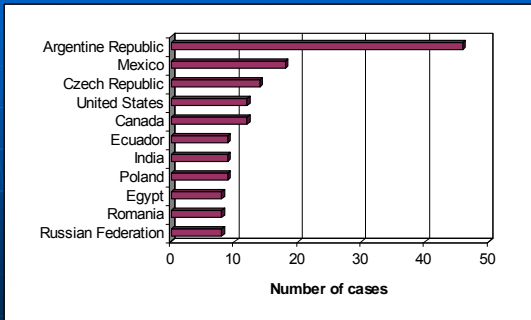
## Known investment treaty arbitrations



30

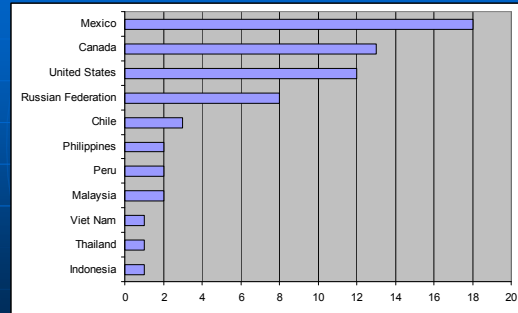


## Known investment treaty claims, by defendants



## 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

## Features and Challenges

## 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)

## 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

37

## Challenges 1 – IIAs and development

Developing countries need to ascertain how to best integrate IIAs into their economic development policy.

They must in particular retain sufficient policy space to promote economic development, without undermining the effectiveness of the agreements.

38

## Challenges 2 – Policy Coherence

Developing countries should try to establish and maintain policy coherence in the face of a large number of interacting IIAs.

This entails creating a coherent national development policy, which may require extensive discussions among different governmental agencies and consultations with the private sector and civil society.

39

## Challenges 3 – Sufficient capacity

Developing countries need to ensure that they build up sufficient capacity to analyze the scope and content of obligations, which they take on when concluding an IIA.

Developing countries need to ensure that they have the necessary (human) resources to negotiate agreements that appropriately reflect their interests and needs.

40

## Challenges 4 – Effective implementation

Developing countries should ensure effective implementation of the treaty commitments they have assumed.

Implementation entails, for instance, completing the ratification process, and bringing national laws and practices into conformity with treaty obligations.

41

## Challenges 5 – Adaptation to new global trends

Capital importing countries that are now also becoming capital exporters have to reconsider their position when negotiating IIAs, to account for the parallel objectives of attracting inward FDI and protecting their own foreign investors abroad.

42

[iia@unctad.org](mailto:iia@unctad.org)  
[www.unctad.org/iia](http://www.unctad.org/iia)

43



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

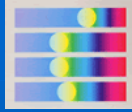
Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## SCOPE AND DEFINITIONS

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

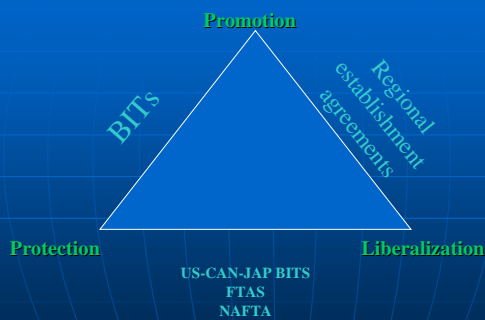
## DEFINITIONS

Definitions are key:

- What/who are we talking about?
- Who benefits from investment liberalization policies?
- Who is protected?
- Who is entitled to claim?

2

The international framework for investment  
BITs/IAs have several possible objectives:



3

## DEFINITIONS

- Definition of 'investment'
- Definition of 'investor'
- Link investment of an investor: ownership and control
- The laws and regulations of the host country
- Definition of 'territory'
- Other definitions

4

## DEFINITION OF INVESTMENT

Depending on the purpose of the treaty:

- Open-ended asset-based definition
- Enterprise-based
- Additional criteria
- Closed list and/or exceptions

5

## Definition of Investment

**Open-ended asset-based definition : broad protection**

Illustrative list including usually:

- Movable and immovable property rights
- Various types of interest in companies
- Claims to money and claims under a contract having a financial value
- Intellectual Property Rights
- Business concessions and other contractual rights

6

## Definition of Investment

Example of asset-based definition: art. 1.3 Agreement among the Government of Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand for the Promotion and Protection of Investments (1987)

For the purpose of this Agreement:

...

3. The term "investment" shall mean every kind of asset and in particular shall include, though not exclusively:

- a) movable and immovable property and any other property rights such as mortgages, liens and pledges;
- b) shares, stocks and debentures of companies or interests in the property of such companies;
- c) claims to money or to any performance under contract having a financial value;
- d) intellectual property rights and goodwill;
- e) business concessions conferred by law or under contract including concessions to search for, cultivate, extract, or exploit natural resources.

7

## Definition of Investment

Example of asset-based definition: art. 4 ASEAN Comprehensive Investment Agreement

For the purpose of this Agreement:

...

(c) "investment" means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

- (i) movable and immovable property and other property rights such as mortgages, liens or pledges;
- (ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;
- (iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;
- (iv) claims to money or to any contractual performance related to a business and having financial value;
- (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and
- (vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

The term "investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment:

## Definition of Investment

Enterprise-based definition:

targeted investment liberalization + protection

9

## JAPAN-INDONESIA EPA ART: X02

For the purposes of this Chapter:

- (a) the term "investments" means every kind of asset owned or controlled, directly or indirectly, by an investor, including:
  - (i) an enterprise;
  - (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
  - (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
  - (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
  - (v) claims to money and claims to any performance under contract having a financial value;
  - (vi) intellectual property rights, including copyrights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new variety of plants, trade names, indications of source or geographical indications and undisclosed information;
  - (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations, and permits; and
  - (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;

Note: Investments also include amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees.

A change in the form in which assets are invested does not affect their character as investments.

10

## DR-CAFTA : CRITERIA

"investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

11

## DEFINITION OF INVESTMENT

### Key issues:

- > **Claims to money:** will all claims to money be covered? Even those claims to money not related to FDI? What about payments derived from commercial transactions or from the sale of goods and services?
- > **Debt instruments:** will all debt instruments be covered? What about those debt instruments with short-term maturity? Should there be a minimum maturity term specified?
- > **Intellectual property rights (IPRs):** should a reference to a legal framework be included? Would only those IPRs provided in accordance to domestic legislation be considered an investment? Those IPRs existing pursuant international agreements?
- > **State Contracts:** need for special treatment in definitions or substantive parts of the agreement.
- > **Exclusions:** Public debt? Property acquired not for an economic activity (i.e. real estate)?
- > **Criteria:** what about the Salini test? Contribution to development; Malaysian Historical Salvors

12

## DEFINITION OF INVESTMENT

### New trend: the Closed-list: Canada-Peru

Investment means:

- (I) an enterprise;
- (II) an equity security of an enterprise;
- (III) a debt security of an enterprise

...

but does not include a debt security, regardless of original maturity, of a state enterprise;

(IV) a loan to an enterprise

...

but does not include a loan, regardless of original maturity, to a state enterprise;

...

but investment does not mean,

(X) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or

...

(XI) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (I) through (IX);

13

## DEFINITION OF INVESTMENT

Exclusions: Republic of Korea-Singapore FTA, Chapter 10, art. 10-1 (footnote) (2005).

Investment does not mean,

(a) claims to money that arise solely from:

- (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party,
- (ii) the extension of credit in connection with a commercial transaction, such as trade financing, and

(b) an order entered in a judicial or administrative action and do not involve the kinds of interests set out in subparagraphs (a) to (h).

14

## Recent Cases

- Issue: Scope of ICSID Convention art. 25  
Investment is a necessary condition but not defined

- Double keyhole

- Wording
  - Criteria
- } Should not be contradictory

15

## Definition of Investor

- Natural persons
- Juridical persons
- The link with investments:
  - Owned and controlled
  - Directly or indirectly

16

## DEFINITION OF INVESTOR

### Natural Persons

- Criteria: Nationals/citizens of the Parties
- Protection for double nationals? dominant and effective nationality criteria
- Permanent residents: Canadian approach
- Nationality criterion more often used than residence criterion. Sometimes combination: NZ/Singapore CEP Agreement.

17

## Natural Persons - Example

### Art. 4. ASEAN Comprehensive Investment Agreement

For the purpose of this Agreement:

...

(d) "investor" means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State;

...

(g) "natural person" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies;

18



## Juridical Persons

Criteria to determine the nationality of the legal entity/investor:

- country of organization or incorporation
- Country of the seat
- Combination of criteria

**The link with investment: ownership and control**

19

## Juridical Persons – Example 1

**Traditional approach: definition of the investor**  
**Article 1: Definition (China-Germany BIT of 2003)**

The term "investor" means:

- (a) in respect of the Federal Republic of Germany: any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit; (...).
- (b) in respect of the People's Republic of China: economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not.

20

## Juridical Persons

**Japan-Indonesia EPA Art.X02**

- b) the term "investor of a Party" means a national or an enterprise of a Party, that seeks to make, is making, or has made, investments except branch of an enterprise of a non-Party which is located in [ the territory of ] the Party;
- (c) the term "national of a Party" means a natural person having the nationality of a Party in accordance with its applicable laws and regulations;
- (d) the term "enterprise of a Party" means any legal person or any other entity duly constituted or organized under the law of a Party, whether for profit or otherwise, and whether privately owned or controlled or governmentally-owned or controlled, including any corporation, trust, partnership, joint venture, sole proprietorship, association, organization, company or branch;
- (e) an enterprise is:
  - (i) "owned" by an investor if more than 50 percent of the equity interests in it is beneficially owned by the investor; and
  - (ii) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;

21

## Juridical Persons

Approaches in recent FTAs:

- Definition of investment
- Definition of investor
- Definition of an investment of an investor of a Party: investment owned or controlled directly or indirectly by an investor of such Party
- Definition of ownership and control :

**Ex: Australia-India BIT: art 1-h (i) and (ii)**

For the purposes of this Agreement, a company is regarded as being controlled by a company or by a natural person, if that company or natural person has the ability to exercise decisive influence over the management and operation of the firstmentioned company, specifically demonstrated by way of:

- (i) ownership of 51% of the shares or voting rights of the first mentioned company, or
- (ii) the ability to exercise decisive control over the selection of the majority of members of the board of directors of the first mentioned company

22

## Juridical Persons

**EX: GATS art. 28 (n)**

...

(n) a juridical person is:

- (i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
- (ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
- (iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

...

23

- **Direct and indirect control: implications on dispute settlement**
- **Implications on shell companies, third-Party investors,...**
- **On possible technical solution: Denial of benefits clause**

24

## Juridical Persons

*USA BIT Model, 2004*

### Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party:
  - (a) does not maintain diplomatic relations with the non-Party; or
  - (b) adopts or maintains measures with respect to the non-Party or an investor of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and investors of a non-Party, or of the denying Party, own or control the enterprise.

## Investor

- Key issues in recent FTAs:
- Pre-establishment disciplines
- Definition of the potential investor: treaty coverage for an investor that has made or is in the process of making or is seeking to (or attempts to) make an investment.

## Scope of the Agreement

### Territorial coverage of the treaty

- Maritime areas
- Airspace
- Reference to international law

### Temporal coverage

- Protection of investments made prior to the entry into force
- Protection after termination
- Disputes arising from investments

### Explicit limitations or exclusions

- ASEAN Comprehensive Investment Agreement art. 3, 2+3 and art. 4

## Scope of the agreement

- Application to different levels of government
- Relevant when one of the negotiating Parties has a federal system.
- The agreement will apply to all levels of government, irrespective of the domestic legal limitations that the federal government may have.
- Federal government will ensure compliance with international obligations.
- The best-in-State treatment.

## SCOPE AND COVERAGE

### Application *ratione materiae*

- A priori exclusion from the coverage of the agreement of certain economic activities or regulatory areas (such as air transport services, financial services, government procurement, subsidies, etc)
- Application to taxation matters
- Exclusions: portfolio investment not covered (Framework Agreement on the ASEAN Investment Area), limitation to certain sectors ( Energy Charter Treaty)
- Critical issue: services/investment.

## Investment and Services

### Three approaches for investment in services:

- Investment-based approach: investment is exclusively covered by the disciplines of the investment chapter ( NAFTA) or by an investment agreement. This approach does not make a difference between services investments and non-services investments. Usual BITs self-contained approach. Also ASEAN Comprehensive Investment Agreement, art. 3.5



## **Investment and Services**

- **Services-based approach: services FDI is exclusively covered by the disciplines of the services chapter of an agreement or an agreement on trade in services: GATs, Asean Framework Agreement on Services**
- **Mixed approach: in most FTAs-RTAs: services investment is covered in both investment and services chapters. Liberalization provisions/protection provisions.  
E.g. Thailand-Australia (structure of chapters)**



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

# Scope and Definition on Investment and Investor

## Chile's Approach

June 2009

Raimundo González  
Legal Adviser of Services, Investment Department

General Directorate of Economic International  
Affairs  
Ministry of Foreign Affairs  
CHILE

## DEFINITION ON INVESTMENT AND RELATED COMMITMENTS AND DISCIPLINES

### Related Commitments and Discipline

- Scope and coverage: Broader definition the MORE protection to the investor
  - Every kind of asset
  - Specific assets
  - Exception: Public Debts
- in NT, MFN etc
- Transfer: commitment to permit transfer (in and/or out)

### BITS

- **CROATIA**
  - "investment" means any kind of asset, provided that the investment has been admitted in accordance with the laws and regulations of other Contracting Party, and shall include in particular, though not exclusively :
- **INDONESIA**
  - "investment" means any kind of asset, provided that the investment has been transferred to the territory of the other Contracting Party and has been admitted in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, although not exclusively:

### Kinds of assets and exclusion

- movable and immovable property and any other property rights, shares, stock and any other kind of participation in companies, a loan or other claim to money etc
  - Non exhaustive list but included in the list imply an obligation
  - Exception
    - Does not include a debt instrument of a Party or state enterprise

### FTA

- CANADA/MEXICO (NAFTA)**
  - **investment** means:
    - an enterprise;
    - a debt security of an enterprise
    - where the enterprise is an affiliate of the investor, or
    - a loan to an enterprise
    - contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions. or
- USA**
  - **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:...

## DEFINITION ON INVESTOR AND RELATED COMMITMENTS AND DISCIPLINES

## Related Commitments and Discipline

- Scope and coverage: Broader definition more protection to the investor
  - Party and State enterprise
  - enterprise of a Party (juridical person)
  - national of a Party
- Level of Protection (pre or post establishment)
- Definition of "seeks to invest"
- Disciplines and commitments NT, NMF.

## Investor

### Chile – Croatia BIT

- "investor" means the following subjects which has made an investment in the territory of the other Contracting Party in accordance with the present Agreement :
  - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
  - (b) legal entities, including companies, corporations, business associations and other legally recognised entities. Which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat together with effective economic activities in the territory of that same Contracting Party.

## Investor

### Chile –USA

- **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;

## Investor

### Chile – Colombia

- **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make<sup>[1]</sup>, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;
- <sup>[1]</sup> For greater certainty, the Parties understand that an investor attempts to make an investment when has made the essentials acts necessary to concrete an investment, such as the canalization of resources for the constitution of the capital of an enterprise and the obtainment of permits or licences, among others.



¡¡Thanks!!  
[rgonzalez@direcon.cl](mailto:rgonzalez@direcon.cl)

Raimundo González  
Legal Advisor of Services, Investment Department  
General Directorate of Economic International Affairs  
Ministry of Foreign Affairs  
CHILE





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

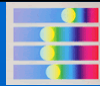
Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## ADMISSION AND ESTABLISHMENT

**Anna Joubin-Bret**

Senior Legal Advisor  
Work Programme on international investment agreements  
Division on Investment  
UNCTAD

## 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

## Admission Model

- Host country discretion: laws and regulations relating to entry may change.  
Ex: old 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.

## 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

## Two issues for discussion

In the light of recent jurisprudence 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” ?

## 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 ?

### 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.”

### 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.

### Admission in conformity with laws and regulations

- *Agua 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”.

### 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).

### 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.

### 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.

## 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.

## 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

## *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

## 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





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

# Pre establishment Chile's Approach

June 2009

Raimundo González  
Legal Adviser of Services, Investment Department

General Directorate of Economic International  
Affairs  
Ministry of Foreign Affairs  
CHILE

## PRE ESTABLISHMENT A CRITICAL PHASE

## Pre and Post establishment

- All BITs Protect investment in the post establishment phase this is the investment has been made in the territory of one of the Parties.
- Investment admitted in accordance with the laws and regulations of the Party.
  - Investment made is protected.
  - Future investor will be subject to existing laws (could or not be less favorable)
  - Investor who seeks to invest is not.

## Where and What?

1. **Definition of investor:**  
investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;
2. **National Treatment**  
Each Party shall accord to investors of the other 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 in its territory.
3. **Most Favorate Nation**  
Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

## Pre establishment

### Protects:

Investor who seeks to investment  
Investment that has not been established (in the process)

### > Why?

Isn't giving the investor **too much protection**?

> Is it a "blank check"? NO

## Requirements and Exceptions

1. Requisite of nationality  
dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality.
2. Reservation of sectors and measures in Annex I and II
3. General Exception in the FTA applicable to all Chapter (GATS and GATT).
4. A party may submit a claim to arbitration if:  
(i) the respondent has breached an obligation under Section A; and  
(ii) the claimant has incurred **loss or damage** by reason of, or arising out of, that breach; and
5. Footnote Chile Colombia and Perú FTA.
  - For greater certainty, the Parties understand that an investor attempts to make an investment when has made the essentials acts necessary to concrete an investment, such as the canalization of resources for the constitution of the capital of an enterprise and the obtainment of permits or licences, among others.



GOBIERNO DE CHILE  
DIRECCION GENERAL DE RELACIONES  
ECONOMICAS INTERNACIONALES

¡¡Thanks!!

[rgonzalez@direcon.cl](mailto:rgonzalez@direcon.cl)

Raimundo González  
Legal Advisor of Services, Investment Department  
General Directorate of Economic International Affairs  
Ministry of Foreign Affairs  
CHILE





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

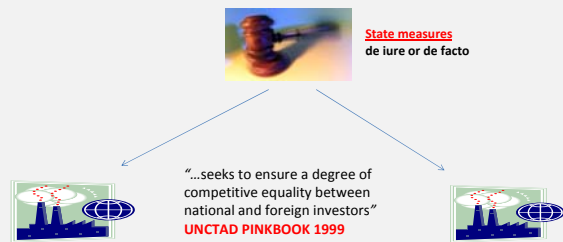


APEC-UNCTAD Regional Training Course  
**National Treatment**

Alejandro Faya-Rodríguez  
 Consultant, Counsellor-at-law, MJur, MPP  
 Professor of International Law on Foreign Investment

Kuala Lumpur, June 2009

## Object and purpose



## Legal qualifications

- ✓ **Relative standard:** case-by-case comparison
- ✓ **Similar objective situations**
- ✓ **Discrimination by reason of nationality**

## Negotiation approaches: “basic coverage”

Elemento	Efecto
<b>Pre-establishment</b>	Grants access rights. It applies to the “establishment, expansion and acquisition”.
<b>Post-establishment</b>	One the investment is made “under the law”. Applies to activities such as the “administration, use, operation, administration and disposal”.
<b>Investment</b>	The protection is restricted (e.g. China and Australia).
<b>Investment/investor</b>	The protection covers both vehicles (common practice).
<b>Like circumstances</b>	Part of the normal functioning of the NT clause, whether included or not.
<b>Exceptions</b>	They differ depending on the pre or post-establishment approach. There are general and specific exceptions.

## Article 75 Japan-Malaysia FTA

1. Each Country shall accord to **investors** of the other Country and to their **investments** treatment no less favourable than that it accords **in like circumstances** to its own investors and to their investments with respect to the **establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition** of investments (hereinafter referred to in this Chapter as “investment activities”).
- 2...
- 3...

## Russia-Thailand BIT (2002)

### Article 3 Treatment of Investments

1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws by investors of the other Contracting Party **treatment no less favourable** than that it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.
2. Each Contracting Party shall in its territory accord investors of the other Contracting Party, **as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable** than that which it accords to its own investors or investors of any third State, whichever is more favourable.

## Exceptions

### Pre-establishment

- ✓ Existing and future measures
- ✓ 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

## Article 10.9 Korea-Singapore EFTA

1. Articles 10.4, 10.7, and 10.8 shall not apply to:
  - (a) any existing non-conforming measure that is maintained by a Party as set out in its Schedule to Annex 9A;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in paragraph (a); or
  - (c) ...
2. Articles 10.4, 10.7 and 10.8 shall 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 9B
3. ...
4. Articles 10.4 and 10.8 shall not apply to:
  - (a) government procurement by a Party; or
  - (b) subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance.
5. ...

## Article 129 Peru-China FTA

1. ...
1. ...
1. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment:
  - (a) to socially or economically disadvantaged minorities and ethnic groups; or
  - (b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.
4. ...

## Jurisprudence

1.
  - Identify subjects of comparison
  - National versus foreigner
2.
  - Consider the treatment each comparator receives
  - Difference must show a less favorable treatment
3.
  - Consider any factors that may justify a differential treatment

## STEP 1: basis of comparison

### 1. Same business or economic sector

...article 1102 [NAFTA] “invites an examination of whether a non-national investor complaining of less favorable treatment is in the same business sector or economic sector as the local investor...” PCB waste

SD Myers v Canada

## STEP 1: basis of comparison

### 2. Same economic sector & activity

SECTOR & ACTIVITY	CASE
cigarettes: producers/resellers	Feldman v Mexico
cotton commercialization: free market / fixed price governmental programs	Champion Trading v Egypt
Package delivering: postal / courier	UPS v Canada * With dissident opinion
steel producers: with respect to their potential use in a highway project	ADF v USA

## STEP 1: basis of comparison

### 3. "Less like" but available comparators

"...it would be as perverse to ignore identical comparators if they were available and use comparators that were less like, as it would be perverse to refuse to find and apply less like comparators when no identical comparators exist".

Methanol/Ethanol

Methanex v USA

"In like situations cannot be interpreted in the narrow sense advanced by Ecuador as the purpose 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". Local producers/exporters of cigarettes

Occidental v Ecuador

## STEP 1: basis of comparison

### 4. Direct competitors

"ALMEX and the Mexican sugar industry are in like circumstances. Both are part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets".

ADM v Mexico

"We conclude that where the products at issue are interchangeable and indistinguishable from the point of view of the end-users, the products, and therefore the respective investments, are in like circumstances. Any other interpretation would negate the effect of the non-discriminatory provisions..."

CPI v Mexico

Sugar/High fructose corn syrup

## STEP 2: less favorable treatment

#### • Damage must be

- real, not hypothetical, and
- verifiable

"The question may be raised whether the equality of treatment accorded by the Respondent to the Investor and to US steel manufacturers and steel fabricators was more apparent than real... evidence of discrimination, however, is required".

ADF v USA

## STEP 3: finding legitimate causes for differentiated treatment

"...the interpretation of the phrase like circumstances in Article 1102 must take into account...the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of like circumstances must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest".

SD Myers v Canada

"...it is clear that the concept of national treatment as embodied in NAFTA and similar arrangements is designed to prevent discrimination on the basis of nationality, or by reasons of nationality".

Feldman v Mexico

## STEP 3: Finding legitimate causes for differentiated treatment

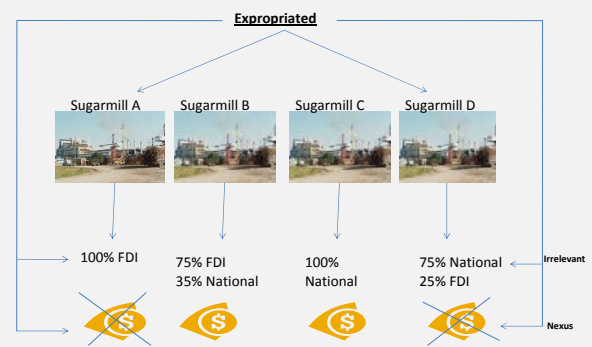
"Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that: (i) **do not distinguish, on their face or de facto, between foreign-owned and domestic companies**, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA".

Pope & Talbot v Canada

No equality when it comes to illegality!

Thunderbird v Mexico

## Example



## Other relevant elements

- **Burden of proof:**
  - The investor must establish at least a “*prima facie*” case
  - The burden then shifts to the State as to justify any legitimate ground for differentiated treatment
- **Intent:**
  - Highly important for evidence purposes
  - However, no need to prove a “subjective intent”, as the “effect test” may be enough
  - But necessity of evidence on the negative effect remains

## Conclusions

- The NT clause continues to be an essential element of BITs. Its purpose is to guarantee equality of competitive conditions, linked to material treatment
- Advisable to draft the standard in a precise manner
- When pre-establishment is granted, exceptions do provide an important degree of flexibility for governmental public policies
- When it comes to the standard application, there is an interesting jurisprudential pattern (3-Steps), mainly from the NAFTA

## Conclusions

- However, there is an important degree of flexibility, especially for Step 1 (identifying the comparators)
- **Of paramount importance:**
  - to compare what is reasonably comparable, and
  - safeguard measures and policies that do not discriminate by reason of nationality

Thanks!

[afaya@afconsulting.com.mx](mailto:afaya@afconsulting.com.mx)

[afayardz@gmail.com](mailto:afayardz@gmail.com)





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



UNCTAD-APEC  
REGIONAL TRAINING COURSE

# National Treatment

Professor Wenhua Shan

Xi'an Jiaotong University, China

Oxford Brookes University, England



# Contents

- I. The Chinese practice and rationale
- II. Regional practice and prospect



# I. The Chinese practice and rationale

- The practice
- The rationale



# The Practice: Evolution of NT provisions

1. No NT
2. Best Effort NT
3. Substantially Qualified NT
4. NT Subject to Local Law
5. NT Subject to Grandfather Clause
6. Full Post-Admission NT



# 1. No NT

- Most Chinese BITs so far. (more than 70 out of the 120 plus Chinese BITs)
- Why?



## 2. Best Effort NT

- “...either Contracting Party shall *to the extent possible*, accord treatment *in accordance with the stipulations of its laws and regulations* to the investment of nationals or companies of the other Contracting Party the same treatment as that accorded to its own nationals or companies.”



## 3. Substantially Qualified NT

- “For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed “treatment less favourable” for either Contracting Party to accord discriminatory treatment, *in accordance with its laws and regulations*, to national and companies of the other Contracting Party, in case it is really necessary for the reasons of public order, national security or *sound development of national economy*.”[1]

[1] Japan BIT, Point 3 of the Protocol.





## 4. NT Subject to Local Law

- *Without prejudice to its laws and regulations,* each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.[1]  
[1] Latvia BIT, Article 3(2).



# **5. NT Subject to Grandfather Clause: Mexico BIT 2008**

## **Article 3 National Treatment**

- 1. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.**
- 2. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments**



# New Zealand FTA Ch 11 2008

## Article 138 National Treatment

Each Party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by the investors of the other Party treatment no less favourable than that accorded, *in like circumstances*, to the investments and associated activities by its own investors.



# New Zealand FTA Ch 11 2008

## Article 141 Non-Conforming Measures

- 1. Article 138 does not apply to:
  - (a) any existing non-conforming measures maintained within its territory;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a);
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
- 2. The Parties will endeavour to progressively remove the non-conforming measures.
- 3. Notwithstanding anything in paragraph 1, Article 138 shall not apply to any measure, which with respect to each Party, would not be within the scope of the national treatment obligations in any of that Party's existing bilateral investment treaties.



# China-Peru FTA 2009

## **Article 129: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.
3. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to socially or economically disadvantaged minorities and ethnic groups.<sup>12</sup>

## **Article 130: Non-Conforming Measures**

1. Article 129 (National Treatment) does not apply to:
  - (a) any existing non-conforming measures maintained within its territory;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
2. The Parties will endeavour to progressively remove the non-conforming measures.



## 6. Full Post-Admission NT?

- Each Contracting Party shall apply on its territory to the investors of the other Party, with respect to their investments and activities related to the investments, a treatment not less favourable than that granted to its investors, or the treatment granted to the investors of the most favoured nation, if the latter is more favourable. ...[1]



[1] Seychelles BIT, Article 5.



# Summary of Chinese practice

- No pre-establishment NT
- Post-establishment NT substantially qualified (general policy)
  - Best effort
  - Domestic law
  - Grandfather clause



# The rationale

- Planning economy legacy
  - Socialist legacy
  - The “comparator”/ “like investor” problem
- General level of economic development
  - Strong enough?





## II. Regional practice and prospect

1. Practice: APEC Non-Binding Investment Principles:
  - **National Treatment**
  - *With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.*



# Compromise

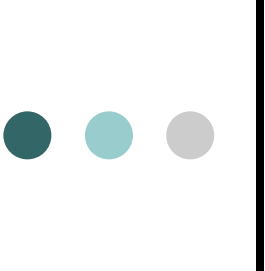
- Pre and post establishment commitments;
- “like circumstances” qualification;
- Substantial restriction:
  - *“With exceptions as provided for in domestic laws, regulations and policies,”*



# APEC Study 2007

“APEC IIAs show consistency in the approach to drafting national treatment provisions, although they vary in terms of extending it to pre-establishment phase or limiting it to post-establishment phase of an investment”

-----APEC: Identifying Core Elements in Investment Agreements in the APEC Region, Dec 2007



# The way ahead: A more liberal NT Provision?

The key lies in pre-establishment NT commitments:

- A negative list (NAFTA) approach?
  - Most liberal, but
  - also most demanding
- A positive list (GATS) approach?
  - Eg. Australia-Thailand BIT and New Zealand Thailand BIT



# Australia-Thailand FTA

## Art 904

- **Pre-establishment National Treatment**

In the sectors inscribed in Annex 8, and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, with respect to the establishment and acquisition of investments in its territory.

- **Schedules of Commitments on Services and Investment**

- Schedule of Commitments of Australia [See separate document]
- Schedule of Commitments of Thailand [See separate document]



# Summary

- The Chinese practice and rationale
  - Practice: from resistance to gradual acceptance
  - Rationale: economic system and economic level
- Regional practice and prospect
  - Practice: pre-establishment NT or not?
  - Prospect: negative or positive list?



*Thank you!*

## Professor Wenhua Shan

School of Law  
Xi'an Jiaotong University  
28 Xianning Xi Road,  
Xi'an 710049, P R China  
Tel: +86 29 8266 5823  
Fax: +86 29 8266 5823  
Email:  
shan@mail.xjtu.edu.cn

Department of Law  
Oxford Brookes University  
Heading Hill Hall  
Oxford OX3 0BP, UK  
Tel: 01865 484936  
Fax: 01865 483937  
Email:  
wshan@brookes.ac.uk



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



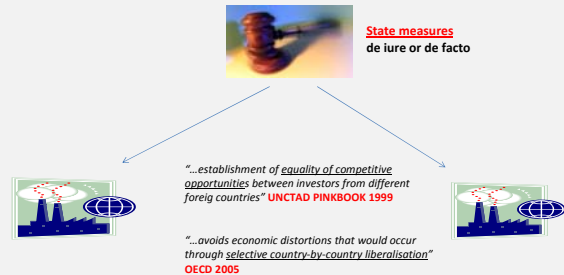


APEC-UNCTAD Regional Training Course  
**Most-Favored-Nation Treatment**

**Alejandro Faya-Rodríguez**  
 Consultant, Counsellor-at-law, MJur, MPP  
 Professor of International Law on Foreign Investment

Kuala Lumpur, June 2009

## Object and purpose



## Legal qualifications

- ✓ **Relative standard:** case-by-case comparison
- ✓ **Ejusdem generis:** attracts “same category” matters
- ✓ **Similar objective situations**
- ✓ **Discrimination by reason of nationality**

## International Law Commission

“...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”.

## Negotiation approaches: “basic coverage”

Elemento	Efecto
<b>Pre-establishment</b>	Grants access rights. It applies to the “establishment, expansion and acquisition”.
<b>Post-establishment</b>	Once the investment is made “under the law”. Applies to activities such as the “administration, use, operation, administration and disposal”.
<b>Investment</b>	The protection is restricted (e.g. China and Australia).
<b>Investment/investor</b>	The protection covers both vehicles (common practice).
<b>Like circumstances</b>	Part of the normal functioning of the MFN clause, whether included or not.
<b>Exceptions</b>	They differ depending on the pre or post-establishment approach. There are general and specific exceptions.

## NAFTA article 1103

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

## 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 Model BIT (2004)

### Article 9 Reservations and Exceptions

1. Articles 3, 4, 6 and 7 shall not apply to:
  - (a) any existing non-conforming measure that is maintained by
    - (i) a Party at the national level, as set out in its Schedule to Annex I, or
    - (ii) a sub-national government;
  - (b) ...
  - (c) ...
2. Articles 3, 4, 6 and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.
3. Article 4 shall not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its schedule to Annex III.
4. In respect of intellectual property rights, a Party may derogate from Articles 3 and 4 in a manner that is consistent with the WTO Agreement.
5. The provisions of Articles 3, 4 and 6 of this Agreement shall not apply to:
  - (a) procurement by a Party or state enterprise;
  - (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.
6. ....
7. The provisions of Article 4 of this Agreement shall not apply to financial services.

## Jurisprudence

- Not really about competitive conditions or "material treatment"
- Instead, about getting rid of provisions of the basic treaty or altering its procedural or substantive content ("treaty shopping") in the context of a particular claim

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

## Arguments for an expansive approach

- BIT's objective (preamble)  
MTD Equity, Gas Natural, Suez
- 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 an expansive approach

- Principle of "*expressio unius est exclusio alterius*"  
MTD Equity, Suez, Natural Grid, RosInvestCo
- Plain application  
CME, Camuzzi, Bayindir, RosInvestCo
- Negotiation context  
Maffezini, 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

## 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

## 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

## 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."

## 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???

## 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

## 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".

Hungary

Telenor v

## Literature

"...Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State's consent strictly. As the discussion in Chapter 3 above has shown, (Dispute Resolution Provisions) the balance struck in investment treaties between the various dispute settlement options is often the subject of careful negotiation between the State Parties, selecting from a range of different techniques. It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State Parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration. The same point could be made with even more force in the case of a comparison between ICSID and other forms of arbitration which the State Parties may have specified in particular investment treaties. The result, will be that the Most Favoured Nation clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide."

Campbell, Shore & Weiniger (2007)

## Literature

"...the critical issue is not to determine whether procedural issues are part of the protection to investment, or if substantive provisions of third treaties may heighten the level of protection of the basic treaty, as they may of course...what matters is the intent of the parties and a reasonable and correct interpretation."

"The fact that an investor has to exhaust local remedies and other has not to, has to fulfill procedural requirements or use a particular forum not applicable to another, or may only bring international claims whereas another investor can settle contractual claims, does not fall into the discriminatory treatment the MFNC is about. And neither does it when an investor has a national treatment or fair and equitable right, apparently narrower than that of a third investor, or when an investor is covered against indirect expropriation whereas another investor is covered only against direct expropriation. Those are just different rules, arising from different treaties, from different negotiations".

Faya-Rodríguez (2008)

## To consider...

- Generally speaking, is “treaty shopping” at hand with the object and purpose of the MFN clause?
- Are equality of competitive conditions contained in other BIT’s? Or in State measures and conduct?
- *Ex ante* assessment? Objective test of damage?
- Generic clause *versus* specific arrangement? Past agreement *versus* present agreement?
- Is the MFN clause supposed to operate in the context of the remaining provisions of equal force and value?

## Conclusions

- The MFN clause continues to be an essential element of BITs. Its purpose is to offer equality of competitive conditions, linked to material treatment
- Language matters! Need to refine legal technique and be precise
- Out of the “basic operational coverage”, there is no evidence that countries pursue different objectives when including an MFN clause, no matter variations in language

## Conclusions

- From the jurisprudence, we could reconcile some of the decisions by an “effect test”. However, the legal reasonings are quite contradictory
- There is a fair concern as to the manner many tribunals have applied the MFN standard
- States are advised to ponder any risks and concerns and take actions, both regarding existing and future BITs

Thanks!

[afaya@aficonsulting.com.mx](mailto:afaya@aficonsulting.com.mx)

[afayardz@gmail.com](mailto:afayardz@gmail.com)



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

**APEC-UNCTAD Regional Training Course on the  
Core Elements of International Investment  
Agreements in the APEC Region**

15-19 June 2009  
Kuala Lumpur, Malaysia

**TRANSFER OF FUNDS  
SELECTED TEXTS**

**Work Programme on International Investment Agreements  
Policies and Capacity-building Branch  
Division on Investment, Technology and Enterprise Development  
UNCTAD  
Palais des Nations  
1211 Geneva 10, Switzerland  
Fax: + 41 22 917 0194, Email: [iaa@unctad.org](mailto:iaa@unctad.org)  
Website: [www.unctad.org/iaa](http://www.unctad.org/iaa)**

# **BIT BETWEEN BELGIUM-LUXEMBOURG AND THAILAND**

## **ARTICLE 6 TRANSFER OF INVESTMENTS AND RETURNS**

1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the free transfer of the capital and of all the returns relating to their investments after the payments of usual taxes and costs.

2. The earnings of nationals of either Contracting Party who are allowed to work in connection with an investment in the territory of the other Contracting Party shall also be freely transferred in freely usable currency.

3. Transfers shall be made in a freely usable currency at the rate applicable on the day transfers are made.

4. The guarantees referred to in this Article shall at least be equal to those granted to the investors of the most favoured nation.



# NAFTA - CHAPTER 11

## Article 1109: Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

- (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (d) payments made pursuant to Article 1110; and
- (e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities;
- (c) criminal or penal offenses;
- (d) reports of transfers of currency or other monetary instruments; or
- (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

# GENERAL AGREEMENT ON TRADE IN SERVICES

## *Article XI*

### *Payments and Transfers*

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for **current transactions** relating to its specific commitments.
2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on **any capital transactions** inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

## *Article XII*

### *Restrictions to Safeguard the Balance of Payments*

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
2. The restrictions referred to in paragraph 1:
  - (a) shall not discriminate among Members;
  - (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
  - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
  - (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

**ECONOMIC PARTNERSHIP AGREEMENT**  
**BETWEEN THE CARIFORUM STATES**  
**OF THE ONE PART**  
**AND**  
**THE EUROPEAN COMMUNITY**  
**AND ITS MEMBER STATES**  
**OF THE OTHER PART**

**TITLE III**  
**CURRENT PAYMENTS AND CAPITAL MOVEMENT**

**ARTICLE 122**  
Current payments

Subject to the provisions of Article 124, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on and to allow all payments for current transactions between residents of the EC Party and of the CARIFORUM States to be made in freely convertible currency.

**ARTICLE 123**  
Capital movements

1. With regard to transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title II, and the liquidation and repatriation of these capitals and of any profit stemming therefrom.
2. The Parties shall consult each other with a view to facilitating the movement of capital between them in order to promote the objectives of this Agreement.

**ARTICLE 124**  
Safeguard measures

1. Where, in exceptional circumstances, payments and capital movements between the Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in one or more CARIFORUM States or one or more Member States of the European Union, safeguard measures with

regard to capital movements that are strictly necessary may be taken by the EC Party or the concerned Signatory CARIFORUM State or States for a period not exceeding six months.

2. The Joint CARIFORUM-EC Council shall be informed forthwith of the adoption of any safeguard measure and, as soon as possible, of a time schedule for its removal.



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Transfers of Funds

### APEC-UNCTAD Regional Training Course on International Investment Agreements

David A. Pawlak  
Kuala Lumpur, Malaysia  
June 15-19, 2009

David A. Pawlak LLC

1

## Topics To Be Covered

- Overview and Purpose
- Formulations among APEC Economies
- Selected Policy Issues – Balance of Payments Exceptions
- Example Tribunal Decision

David A. Pawlak LLC

2

## Overview and Purpose

- A core element of APEC IIAs
- Provides investors a right to transfer funds related to an investment
- Coverage
  - Transfers in to the host State
  - Transfers out of the host State
  - No forced repatriation by the *home* State (NAFTA)
- Absolute obligation
- Balance of payments exceptions

David A. Pawlak LLC

3

## APEC Economies – Formulations

- Typically all transfers freely permitted – an illustrative list
- Only certain transfers permitted – a closed list
- 18 APEC IIAs impose some limitations
  - Balance of payments problems
  - Macroeconomic difficulties
  - Consistent with IMF Articles of Agreement
- Application of laws *provisos*

David A. Pawlak LLC

4

## Japan-Republic of Korea IPPA (2003), art. 12

1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor . . . may be freely transferred into and out of its territory without delay. Such transfer shall include, in particular, though not exclusively:

- (a) the initial capital and additional amounts to maintain or increase an investment;
- (b) profits, interest, dividends, capital gains, royalties or fees;
- (c) payments made under a contract including a loan agreement;
- (d) proceeds of the total or partial sale or liquidation of investments;
- (e) payments made in accordance with Articles 10 and 11;
- (f) payments arising out of the settlement of a dispute under Article 15;
- (g) earnings and remuneration of personnel engaged from other Party.

2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer. [...]"

David A. Pawlak LLC

5

## Malaysia-Viet Nam (1992), art. 6: Repatriation of Investment

(1) Each Contracting Party shall, subject to its laws, regulations and administrative practices allow without unreasonable delay the transfer in any freely usable currency:

- (a) the net profits, dividends, royalties, technical assistance and technical fees, interest and other current income, accruing from any investment . . . ;
- (b) the proceeds from total or partial liquidation of any investment . . . ;
- (c) funds in repayment of loans related to an investment; and
- (d) earnings of citizens and permanent residents of the other [ ] Party . . .

(2) The exchange rates . . . shall be the rate of exchange prevailing at the time of remittance.

(3) [T]ransfers . . . [shall be accorded] treatment as favourable as that accorded to transfers originating from investments made by investors of a third State."

### EFTA-Mexico FTA (2000), art. 46

“The EFTA States and Mexico shall with respect to investments in their territories by investors of another Party guarantee the right of free transfer, into and out of their territories, including initial plus any additional capital, returns, payments under contract, royalties and fees, proceeds from the sale or liquidation of all or any part of an investment.”

### Japan-Mexico EPA (2005), art. 72 Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Article 58 [National treatment] relating to cross border capital transactions and Article 63 [Transfers]:
  - (a) in the event of serious balance-of-payments and external financial difficulties or imminent threat thereof; or
  - (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.”

### NAFTA Article 1109: Transfers

#### Exceptions

4. [A] Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
  - (a) bankruptcy, insolvency . . . ;
  - (b) [ ] securities;
  - (c) criminal offenses;
  - (d) reports of transfers . . . ; or
  - (e) the satisfaction of judgments.[ . . . ]

### NAFTA Article 1109: Transfers

1. [A]ll transfers relating to investment . . . freely and without delay [including]:
  - (a) profits, dividends, interest, capital gains, royalties, management fees, technical assistance [ ], *returns in kind* and other amounts derived from investment;
  - (b) proceeds from the sale . . . or [ ] liquidation;
  - (c) payments [ ] under a contract . . . ;
  - (d) payments made pursuant to Article 1110; and
  - (e) payments arising under Section B.
2. [F]reely usable currency at the market rate of exchange . . .

### NAFTA Article 1109: Transfers (cont'd)

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

### NAFTA Article 1109: Transfers (cont'd)

#### Exceptions

4. [A] Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
  - (a) bankruptcy, insolvency . . . ;
  - (b) [ ] securities;
  - (c) criminal offenses;
  - (d) reports of transfers . . . ; or
  - (e) the satisfaction of judgments.[ . . . ]

## NAFTA Article 2104: Balance of Payments

### Exception to Article 1109 Transfers Provision

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraphs 2 through 4 and are:
  - (a) consistent with paragraph 5 to the extent they are imposed on transfers other than Cross-Border trade in financial services; or
  - (b) consistent with paragraphs 6 and 7 to the extent they are imposed on Cross-Border trade in financial services.

## NAFTA Article 2104: Balance of Payments (cont'd)

### Exception to Article 1109 Transfers Provision

- General Rules
2. As soon as practicable after a Party imposes a measure under this Article, the Party shall:
    - (a) submit any current account exchange restrictions to the IMF for review under Article VIII of the Articles of Agreement of the IMF;
    - (b) enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties; and
    - (c) adopt or maintain economic policies consistent with such consultations.

## NAFTA Article 2104: Balance of Payments (cont'd)

### Exception to Article 1109 Transfers Provision

- General Rules
3. A measure adopted or maintained under this Article shall:
    - (a) avoid unnecessary damage to the commercial, economic or financial interests of another Party;
    - (b) not be more burdensome than necessary to deal with the balance of payments difficulties or threat thereof;
    - (c) be temporary and be phased out progressively as the balance of payments situation improves;
    - (d) be consistent with paragraph 2(c) and with the Articles of Agreement of the IMF; and
    - (e) be applied on a national treatment or most-favored-nation treatment basis, whichever is better.

## NAFTA Article 2104: Balance of Payments (cont'd)

### Exception to Article 1109 Transfers Provision

- General Rules
4. A Party may adopt or maintain a measure under this Article that gives priority to services that are essential to its economic program, provided that a Party may not impose a measure for the purpose of protecting a specific industry or sector unless the measure is consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF.

## NAFTA Article 2104: Balance of Payments (cont'd)

### Exception to Article 1109 Transfers Provision

5. Restrictions imposed on transfers, other than on cross border trade in financial services: [a-d]
- Restrictions on Cross-Border Trade in Financial Services
6. A Party imposing a restriction on Cross-Border trade in financial services:
    7. In consultations under paragraph 6(b), the Parties shall:
      - (a) consider if measures adopted under this Article comply with paragraph 3, in particular paragraph 3(c); and
      - (b) accept all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and BoPs . . . .

## US-Singapore FTA Article 15.7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
  - (a) contributions to capital;
  - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
  - (c) interest, royalty payments, management fees, and technical assistance and other fees;
  - (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
  - (e) payments made pursuant to Article 15.6 and Article 15.5.4; and
  - (f) payments arising under Section C.



## US-Singapore FTA Article 15.7: Transfers

- Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
- Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in an investment authorization or other written agreement between the Party and a covered investment or an investor of the other Party.
- Notwithstanding paragraphs 1, 2, and 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its law relating to:
  - bankruptcy, insolvency, or the protection of the rights of creditors;
  - issuing, trading, or dealing in securities, futures, options, or derivatives;
  - financial reporting [f]or . . . law enforcement or financial regulatory authorities;
  - criminal or penal offenses; or
  - ensuring compliance with orders or judgments in judicial or administrative proceedings.

## US-Singapore FTA Article 15.7: Transfers

- Exchange of Letters
- Annex 15A

## Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

### ARTICLE V

- [A]ll transfers related to an investment to be made freely and without delay into and out of its territory [including]: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
- [T]ransfers shall be made in a freely usable currency at the prevailing market rate of exchange . . .
- [E]ither Party may maintain laws and regulations . . . through the equitable, nondiscriminatory and good faith application of its law.

## Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

“This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs. This explains moreover the detailed list of permitted transfers that most BITs set forth. On the other hand, the Treaty terms show that such freedom is not without limit.” ¶ 239

## Continental Casualty Co. v. Argentina, ICSID, Award, Sept. 5, 2008

- Argentine CNA prevented from transferring to US;
- Type of transfer at issue not within any art. V categories;
- Merely a change of type, location and currency of part of an existing investment;
- A short term deposit abroad;
- Not a transfer related to an investment protected under art. V.

## Testimony before US Congress on US BITs

### Capital Controls

“We are concerned that current provisions on financial transfers would limit governments’ ability to use legitimate measures designed to restrict the flow of capital in order to protect themselves from financial instability. Without adequate measures to prevent and respond to such financial instability, broad sustainable development will remain out of reach for many developing countries. The increased frequency and severity of financial crises also hurts U.S. economic interests, as crisis-stricken countries devalue their currencies and flood the U.S. market with under-priced exports in order to recover.”

- Testimony of Thea Mid Lee, Policy Director AFL-CIO Before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means “Investment Protections in U.S. Trade and Investment Agreements,” May 14, 2009 (<http://www.transnational-dispute-management.com/news/20090514-testimonies.pdf>)

## Testimony before US Congress on US BITs (cont'd)

### Capital Controls

“The United States should ensure – for the sake of developing economies, international financial stability, and its own economic interests – that countries have the policy flexibility needed to impose capital controls in appropriate circumstances. Also, as the international community begins an important discussion on global financial regulation, it is crucial that these international investment agreements not provide an obstacle to needed regulatory reform.”

• Testimony of Thea Mid Lee, Policy Director AFL-CIO Before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means “Investment Protections in U.S. Trade and Investment Agreements” May 14, 2009 (<http://www.transnational-dispute-management.com/news/20090514-testimonies.pdf>)

## V. Conclusion

- Right of transfer of funds related to an investment
  - Into the host State
  - Out of the host State
  - No forced repatriation by home State
- A Core Element of APEC Economies' IIAs
- Various APEC formulations
  - Appropriate limits on free transfers

## Thank you

David A. Pawlak

Grojecka 40/m 11  
02-320 Warsaw  
Poland  
+48.22.822-6081  
+48.511.242-010

1661 Crescent Place  
Washington, D.C. 20009  
USA  
+1.202-667-5797  
+1.917.969-9868

dapawlak@davidpawlak.com



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Fair and Equitable Treatment

### APEC-UNCTAD Regional Training Course on International Investment Agreements

David A. Pawlak  
Kuala Lumpur, Malaysia  
June 15-19, 2009

David A. Pawlak LLC

1

## FET – Topics To Be Covered

- Overview – Competing FET Interpretations
- FET Formulations among APEC Economies
- History of the NAFTA Parties' Interpretation
- NAFTA Decisions & the Free Trade Commission
- US View of The FET Standard
- Interpretations by Non-NAFTA Tribunals
- Clarification of Standards In Recent Treaties

David A. Pawlak LLC

2

## Overview – Competing FET Interpretations

- Customary int'l law minimum standard of treatment
- Autonomous Standard (embracing CIL MST components)
- Textual Analysis

David A. Pawlak LLC

3

## APEC Economies – Formulations of the FET Standard

### No reference to international law

India-Indonesia BIT, art. 3(2)

“Investments . . . of each Contracting Party shall at all times be accorded *fair and equitable treatment* in the territory of the other Contracting Party.”

David A. Pawlak LLC

4

## APEC Economies – Formulations of the FET Standard

### Addressing relationship between FET and international law

- NAFTA 1105(1) & FTC Interpretation  
(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.
- Chile-Peru ALC (signed 2006)

David A. Pawlak LLC

5

## APEC Economies – Formulations of the FET Standard

### Addressing relationship between FET and international law (*cont'd*)

- Japan's 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 to or beyond that which is required by the customary international law minimum standard of treatment of aliens [...]”

David A. Pawlak LLC

6

## APEC Economies – Formulations of the FET Standard

Omit any reference to FET and the minimum standard

- Australia-Singapore FTA (2003)
- New Zealand-Singapore FTA (2001)
- New Zealand-Thailand CEP (2005)

## For Further Information

- U.S. Department of State
  - [www.state.gov/s/l/c3439.htm](http://www.state.gov/s/l/c3439.htm)
- Mexico's Ministry of Economy
  - <http://www.economia.gob.mx/?P=5500>
- Foreign Affairs & International Trade Canada
  - <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp>

## NAFTA Article 1105: Minimum Standard of Treatment

(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.

## Scope of NAFTA Article 1105(1)

- Customary International Law Obligations – **Yes!**
- All International Law Obligations – **No!**

## Basis for U.S. Interpretation

- OECD Draft Convention on the Protection of Foreign Property, 1963 and 1967
- OECD Committee on International Investment and Multinational Enterprises Survey, 1984
- U.S. Bilateral Investment Treaties
- Canadian Statement of Implementation of the NAFTA, 1994

## Basis for Claimants' Interpretations

- Writings of publicists
  - F.A. Mann's 1981 British Yearbook of International Law article

## 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)

## 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].”

## 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).

## FTC Interpretation July 2001

“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.”

- FTC Interpretation of July 31, 2001 ¶ B(1)

## FTC Interpretation July 2001

“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.”

- FTC Interpretation of July 31, 2001 ¶ B(2)

## FTC Interpretation July 2001

“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).”

- FTC Interpretation of July 31, 2001 ¶ B(3)



## 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.”

## 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

## 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? . . .

## 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.”

## 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 . . . .

## 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.”

## 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.”

## 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

## US View of NAFTA FET Standard

US Counter-Memorial in *Glamis Gold v. USA*, dated Sept. 19, 2006 (*cont’d*)

- 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

## Competing Interpretations Recap

- Customary int’l law minimum standard of treatment
  - 2004 US Model BIT & Recent Treaties
- Autonomous Standard
- Textual Analysis

## Autonomous Standard - Components

“(i) refraining from discriminatory conduct;

(ii) providing security for reasonable, investment-backed expectations;

(iii) refraining from arbitrary conduct; and

(iv) providing transparency and due process.”

## *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

**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

**Saluka v. Czech Republic, UNCITRAL,  
Partial Award, March 17, 2006, ¶ 309**

- “[FET] is an *autonomous* Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct [ ] that clearly provides disincentives to foreign investors. [W]ithout undermining its legitimate right to take measures for the protection of the public interest, [the State] has therefore assumed an obligation to treat a foreign investor’s investment in a way that *does not frustrate the investor’s underlying legitimate and reasonable expectations*. A foreign investor whose interests are protected under the Treaty is entitled to expect that the [State] will *not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)*.”

**Evolution of Treaty Practice**

- Clarification of Standards, e.g. :
  - U.S.-Australia
  - U.S.-Singapore FTA
  - U.S.-Morocco FTA
  - U.S.-Chile FTA
  - 2004 US Model BIT
  - US-Colombia TPA
  - Canada’s new model

**U.S.-Australia FTA**

**Article 11.5: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

<sup>11-1</sup>Article 11.5 shall be interpreted in accordance with Annex 11-A.

## U.S.-Australia FTA

### Article 11.5: Minimum Standard of Treatment<sup>11-1</sup> (Cont'd)

2. For greater certainty, . . . “fair and equitable treatment” . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights. The obligation in paragraph 1 to provide:

(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; . . .

<sup>11-1</sup>Article 11.5 shall be interpreted in accordance with Annex 11-A.

## U.S.-Australia FTA

### Article 11.5: Minimum Standard of Treatment<sup>11-1</sup> (Cont'd)

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.

<sup>11-1</sup>Article 11.5 shall be interpreted in accordance with Annex 11-A.

## U.S.-Australia FTA

### Annex 11-A Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.5 and Annex 11-B *results from a general and consistent practice of States that they follow from a sense of legal obligation*. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

## V. Conclusion

- Various APEC Economies’ FET formulations
- NAFTA Parties’ interpretation
- Non-NAFTA Tribunal interpretations of FET standards
  - Defensive & offensive reliance on IIAs
  - Attracting FDI
  - Future Negotiations - Learning from Other States’ Experiences

## Thank you

David A. Pawlak

Grojecka 40/m 11  
02-320 Warsaw  
Poland  
+48.22.822-6081  
+48.511.242-010

1661 Crescent Place  
Washington, D.C. 20009  
USA  
+1.202-667-5797  
+1.917.969-9868

dapawlak@davidpawlak.com



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



# UNCTAD-APEC REGIONAL TRAINING COURSE

## Fair and Equitable Treatment

Professor Wenhua Shan  
Xi'an Jiaotong University, China  
Oxford Brookes University, England

# Contents

- I. Chinese practice and proposed change
- II. Regional practice and prospect



# I. Chinese Practice and Proposed Change



1. Chinese practice
2. Proposed change



# 1. Chinese Practice

- A. **No FET Clause**
- B. **Location**
- C. **Criteria of reference**
- D. **Exception**



## A. No FET clause

- Rare: eg. BITs with Japan, Korea, Turkey, former Czechoslovakia, Romania (both 1983 & 1994 versions) and Belarus
- Reasons: ?
- Implications: Can FET be presumed?





## B. Location

- Preamble:
  - Rare: Sweden, Denmark BITs
  - Legal effect?
  - Repeated in following substantive articles
- Substantive provisions:
  - Promotion and protection of investment
  - Standard of treatment
  - Both: implications: application to both admission and operation phases?



## C. Criteria of reference

- *Domestic Law of the Host State*
  - “Each Contracting party shall, subject to its laws and regulations, at all times ensure equitable treatment to the investments of the investors of the other Contracting Party.”---Finland BIT 1984, Article 3.
  - IL relevant?
- *Present treaty*
  - “2 . Investments approved under Article 2 shall be accorded fair and equitable treatment and protection in accordance with this Agreement.”---Singapore BIT 1985, Article 3(2).
  - Repetition of protection, or additional obligation?
  - IL relevant?



## C. Criteria of reference

- *Principles of International Law*
  - Party-Accepted PILs: “The treatment and protection referred to in Paragraphs 1 and 2 of the Article 3 in the Agreement (FET) shall not be less favourable than that contained in *generally recognised principles and rules of international law* accepted by both contracting Parties.” 1984 BLEU BIT
  - Common PILs: Article 143 Fair and Equitable Treatment
    1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.

---New Zealand FTA Ch11



## C. Criteria of reference

- *Principles of International Law*

- IMS:

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with *international law, including fair and equitable treatment* and full protection and security.
2. *For greater certainty, this Article prescribes the international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party.* 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 international law minimum standard of treatment of aliens *as evidence of State practice and opinio juris*. 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. --Mexico BIT 2008



## C. Criteria of reference

- *Other BIT standards: MFN or/and NT*
  - 1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
  - 2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with investments of investors of *any third State*. ---Poland BIT, Article 3.



# Exceptions

- Express exceptions:
  - Rare: “all or nothing” approach
  - Public order exception: “for the maintenance of public order and in defence of the State law.”---BLEU BIT 1984, Article 3 (2).
- Implied exceptions?



## 2. Proposed change

### Article 3 Fair and Equitable Treatment

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party in its territory fair and equitable treatment and full protection and security.
2. “Fair and equitable treatment” requires, in particular, that investors and their investment are not denied equitable treatment in relevant judicial or administrative procedures, or are subject to unfair or inequitable obligations, *in according with the law of the host state and general principles of law.*
3. “full protection and security” requires that the contracting parties, when performing the duties of investment protection and security, adopt reasonable necessary measures, which *under any circumstances shall not means that investors be treated more favourably than nationals* of the Contracting party in which the investment is made.
4. 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.

# Calove in Chinese BIT?

- Domestic law standard
- National treatment maximum
- Relevance of IL?







## II. Regional practice and prospect

### 1. APEC practice

- No mentioning in APEC Non-Binding Principles
- APEC 2007 study conclusion:
  - Included in all by three APEC IIAs
  - Largely undefined
  - Five approaches: similar to Chinese practice
    - No reference to IL (India-Indonesia BIT)
    - FET, and no less than MFN (Lebanon-Malaysia BIT)
    - NAFTA (FET by IL +interpretative note; Japan BITs with Mexico and Philippines)
    - North American Model BITs (FET=IMS)
    - No FET/IMS: eg Australia-Singapore FTA

# APEC prospect on FET



- Emerging APEC consensus on FET=IMS;
  - Recent APEC BIT practice including notably Sino-Mexico BIT
- Continuous tension between domestic and international standards in defining FET?



# Conclusion

- Chinese practice:
  - Diversity in acceptance, location, criteria and exceptions
  - Growing acceptance of international
- Proposed change: FET=NT?
- APEC practice: diversity and growing acceptance
- APEC prospect: consensus or controversy?

*Thank you!*



## Professor Wenhua Shan

School of Law  
Xi'an Jiaotong University  
28 Xianning Xi Road,  
Xi'an 710049, P R China  
Tel: +86 29 8266 5823  
Fax: +86 29 8266 5823  
Email: shan@mail.xjtu.edu.cn

Department of Law  
Oxford Brookes University  
Heading Hill Hall  
Oxford OX3 0BP, UK  
Tel: 01865 484936  
Fax: 01865 483937  
Email: wshan@brookes.ac.uk



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training Course  
**Expropriation**

Alejandro Faya-Rodríguez  
 Consultant, Counsellor-at-law, MJur, MPP  
 Professor of International Law on Foreign Investment

Kuala Lumpur, June 2009

## Concept

- Not defined by treaty, but by customary international law
- Some treaties may even complicate things!
  - “Additional” categories
  - Measures “similar” to expropriation, instead of “equivalent”

## Concept

### Direct

- Formal transfer of title
- Outright seizure

### Indirect

- Total or substantial deprivation, with an “equivalent effect”
- No formal transfer of title

## Other notions

- Nationalization = full scale
- “Creeping” = progressive, a type of “indirect”

## Conditions

- A sovereign right of States
- But subject to certain rules:
  - Due process
  - No discrimination
  - Compensation
  - Public purpose

## Article 1101 of NAFTA

1 ¿how many categories?

1. No Party may **directly** or **indirectly** nationalize or expropriate an investment of an investor of another Party in its territory or **take a measure tantamount to nationalization or expropriation** of such an investment (“expropriation”), except:
  - (a) for a **public purpose**;
  - (b) on a **non-discriminatory basis**;
  - (c) in accordance with **due process** of law and Article 1105(1); and
  - (d) on payment of **compensation** in accordance with paragraphs 2 through 6.

....

## US Model BIT (2004)

### Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either **directly** or **indirectly through measures equivalent to expropriation or nationalization** ("expropriation"), except:

- (a) for a **public purpose**;
- (b) in a **non-discriminatory** manner;
- (c) on payment of **prompt, adequate, and effective compensation**; and
- (d) in accordance with **due process of law** and Article 5 [Minimum Standard of Treatment](1) through (3).

## New Zealand-China FTA

### Article 145

1. Neither Party shall **expropriate**, nationalize or take **other equivalent measures** ("expropriation") against investments of investors of the other Party in its territory, unless the expropriation is: (a) for a **public purpose**; (b) in accordance with **applicable domestic law**; (c) carried out in a **non-discriminatory manner**; (d) not **contrary to any undertaking** which the Party may have given; and (e) on **payment of compensation** in accordance with paragraphs 2, 3 and 4.

2-4...

## World Bank Guidelines (1992)

### IV EXPROPRIATION AND UNILATERAL ALTERATIONS OR TERMINATION OF CONTRACTS

1. A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have **similar effects**, except where this is done in accordance with **applicable legal procedures**, in pursuance in good faith of a **public purpose, without discrimination** on the basis of nationality and against the payment of **appropriate compensation**.

...



Attention!

## Compensation standards

- **Customary international law**
  - Just compensation (Norwegian shipowners)
  - Full reparation (Chorzow Factory)
  - Prompt, adequate and effective compensation (Formula Hull)
  - Just compensation/full value (Iran-U.S. Mixed Tribunal)
  - Appropriate compensation (UN)
- **International investment agreements**
  - Fair market value (NAFTA, World Bank Guidelines, CAFTA, Korea-Singapore FTA, Japan-Malaysia EPA, China-Peru FTA, World Bank Guidelines)
  - Value or genuine value (Netherlands Model BIT, Indian Model BIT, UK Model BIT)
  - Market value (Australia-Uruguay BIT)

## Compensation – the relevant factor

- Investment tribunals are essentially compensation tribunals
- However, international law may distinguish between:

- Expropriations "per se" 
- Expropriations "submodo" 

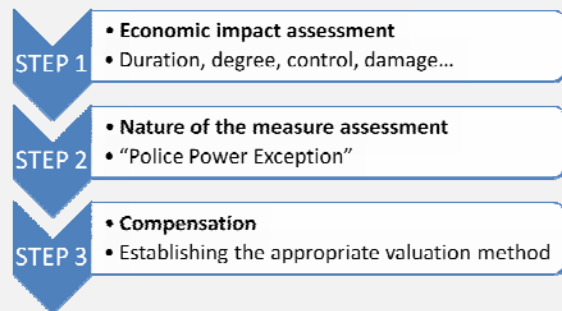
## ¿What may be expropriated?

- Under customary international law, only property rights
- However, under investment treaties other concepts defined as "investments" may also be expropriated
  - e.g. contracts
- Certain intangibles cannot (or should not) be expropriated
  - "Market share", "goodwill" or "expectations"

## ¿Which measures?

- Legally, any “measure”, but more often stemming from administrative or legislative action:
  - Decrees (direct)
    - » *Santa Elena v Costa Rica*; *ADC v Hungary*
  - Denial or revocations of permits, licenses or concessions
    - » *Metalclad v Mexico*; *Tecmed v Mexico*; *Middle East Cement v Egypt*
  - Taxation
    - » *Occidental v Ecuador*; *Revere Copper v OPIC*
  - Health
    - » *Vivendi II v Argentina*
  - Corporate interference
    - » *CME v Czech Republic*

## Determining an indirect expropriation



## Step 1: economic impact

- Total or substantial damage
  - » substantial = cuasitotal = “equivalent effect”
- Partial or temporary damages, mere interference or non control-depriving measures are insufficient

## Step 1: economic impact

### **Beneficiality**

*“In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI’s initiative, but only for a time. Conrado 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 Myers v Canada**

### **Control**

*“... the regulatory action has not deprived the Claimant of control of his company... interfered directly in the internal operations... or displaced the Claimant as the controlling shareholder”.*

**Feldman v Mexico**

*“...there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part”.*

**PSE v Turkey**

## Step 1: economic impact

### **Partial damage**

*“...mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required”.*

**Pope & Talbot v Canada**

*“...A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated...”*

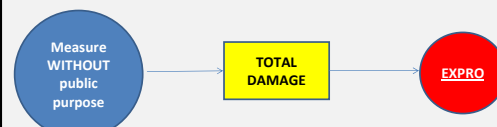
**Sempra v Argentina**

*“In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment’s economic value.*

*Interference with the investment’s ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation”.*

**LG&E v Argentina**

## Step 2: nature of the measure

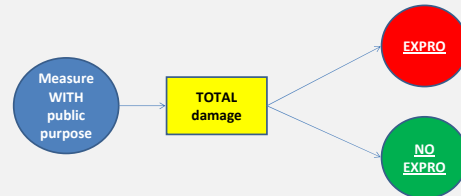




## Step 2: nature of the measure

Legitimate expectations/ investor's risk	<ul style="list-style-type: none"> <li>Waste Management II v Mexico</li> <li>Thunderbird v Mexico</li> </ul>
"Bona fide" character of the measure	<ul style="list-style-type: none"> <li>SD Myers v Canada</li> </ul>
Due process; discrimination	<ul style="list-style-type: none"> <li>Methanex v USA</li> <li>Eureko v Poland</li> </ul>
Transparency	<ul style="list-style-type: none"> <li>Metalclad v Mexico</li> </ul>
Proportionality	<ul style="list-style-type: none"> <li>Tecmed v Mexico</li> </ul>

## Step 2: nature of the measure



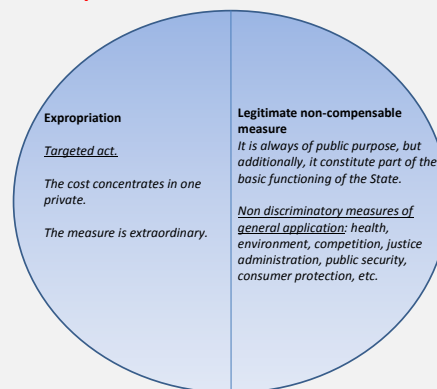
## Step 2: nature of the measure

*"While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking".*

*"Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".*

**Santa Elena v Costa Rica**

## Step 2: how to draw the line?



## Step 2: police powers

*"...state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation".*

Ian Brownlie, Principles of Public International Law

*"...bona fide taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of States".*

Restatement (Third) of the Foreign Relations Law of the US

## Step 2: police powers

*"...regulatory conduct is unlikely to be subject of legitimate complaint".*

**SD Myers v Canada**

*"... 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 alia, 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**

## Step 2: police powers

***"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 non-discriminatory manner bona fide regulations that are aimed at the general welfare".***

**Saluka v Czech Republic**

## US Model BIT (annex on expro)

- (a) 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:
  - (i) 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;
  - (ii) the extent to which the government action interferes with distinct, **reasonable investment-backed expectations**; and
  - (iii) the **character** of the government action
- (b) 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**.

## MIGA Convention (1985)

The Agency may guarantee eligible investments against a loss resulting, inter alia, from:

*"any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories".*

## Step 3: Compensation

- Depending the type of investment
- The "discounted cash flow" method should apply in limited cases
- The compensation for expropriation is different from the compensation for other breaches

## Conclusions

1. There is no "magic formula" as to determine an indirect expropriation. A case-by-case analysis is mandatory, taking into account all relevant factors
1. However, jurisprudence has shown a solid pattern. As opposed other standards, the threshold remains high
2. International law has yet to draw the line between non-compensable and expropriatory regulations

## Conclusions

4. Negotiators are advised to reflect customary international law in the treaty, in a very precise manner. No need to expand the concept!
5. Upon a claim, the main defense lays in showing a partial damage, or in evidencing a legitimate exercise of the State police powers

Thanks!

[afaya@aficonsulting.com.mx](mailto:afaya@aficonsulting.com.mx)

[afayardz@gmail.com](mailto:afayardz@gmail.com)



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Expropriation: A comment

Vilawan Mangklatanakul  
17 June 2009

## Current Practice

- No real distinction between “direct” and “indirect” expropriation
- No clear definition of “indirect” expropriation
- An “equivalent effect” test
  - transfer of property/deprivation of control of investment/total damage
- Assessment on a case by case basis

## General BIT’s provisions

- “shall not be expropriated, nationalised or subjected to any other measures having effect equivalent to nationalisation or expropriation”
- Public purposes related to internal needs
- Due process of law
- Non-discriminatory basis
- Prompt, effective and adequate compensation

## Problems

- Vague language creates uncertainty
- Difference in interpretation
- What is “customary international law”?
- Lawyers and government often do think the same way

## Practices in FTA negotiations

- US Model: Attempt to specify the criteria/factors in determining an expropriation
- Prefer to decide between the Parties to a treaty than to leave it to decision of arbitrators
- Increasingly adopted in recent FTA negotiations in ASEAN, ie ACIA, ANZFTA

## Rules for interpretation

### ■ Annex 1 Expropriation and Compensation

1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
2. Article 9(1) addresses two situations:
  - (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
  - (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
  - (b) whether the government action breaches the government’s prior binding written commitment to the investor whether by contract, licence or other legal document; and
  - (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose.<sup>[1]</sup>
4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b). (ANZFTA)

[1]“Public purpose” shall be read with reference to Article 9(1)(a) and Article 9(6).

## Taxation measures

- “If there is a dispute described in article 18.1 (Scope and Definitions) of Chapter 11 (Investment) that may relate to a taxation measure, the relevant Parties, including representatives of their tax administrations, shall hold consultations. Any tribunal established pursuant to section B (Investment Disputes between a Party and an investor) of Chapter 11 (Investment) **shall accord serious consideration to a joint decision** of the relevant Parties as to whether the measure in question is a taxation measure. For this purpose, Article 25.7 (Conduct of the Arbitration) of Chapter 11 (Investment) shall apply *mutatis mutandis*.” (ANZFTA Ch. 15 art 3.4)

## Exception 1

- **To protect welfare objectives such as public health, safety and the environment**
  - “Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in paragraph 2(b).” (ACIA Annex 2 para 4)

## Exception 2

- **Issuance of Compulsory licences**
  - “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.” (ACIA art. 14.5)

## Exception 3

- **Special treatment in case of expropriation relating to land**
  - “For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States’ respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.” (ACIA art. 14.1 fn 2)

## (cont.)

- “Notwithstanding Paragraphs 1, 2, 3 and 4, in the case where Singapore or Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid legislation. Such compensation shall be subject to any subsequent amendments to the aforesaid legislation relating to the amount of compensation where such amendments follow the general trends in the market value of the land.” (ANZFTA ch.11 art. 9.6)

## Future...

- Be precise when drafting an expropriation clause
- Indicate policies of State Parties to the treaty
- It is a matter for negotiation
- Do not leave too much room for interpretation when a dispute arise
- Create a mechanism for binding interpretation of State Parties



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

# Scheduling of Reservations

A Negotiator's Perspective

June 17, 2009

**Masa Sugano**

Deputy Director  
Economic Partnership Division  
Ministry of Economy, Trade and Industry

## I. The Basics

### 1. What is this all about?

Let's start with what we've already got ..... in APEC !

**APEC Model Measure for Investment**  
(Latest version as submitted to CTI, November 2008)

**Modality of commitments\***

*Sets out the modality of commitments for the NT, MFN and performance requirements*

- national treatment, most-favoured-nation treatment and performance requirements obligations do not apply to:
  - existing non-conforming measures that the Parties agree to set forth in the agreement, or
  - any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities that the Parties agree to set forth in the agreement if it is not possible to limit the exclusion to existing measures
- amendments or modifications of existing non-conforming measures **generally** do not decrease their conformity with respect to the national treatment, most-favoured-nation treatment and performance requirements obligations

*The specific approach of commitments may be agreed by the Parties.*

**What does this text tell us?**

- The title itself cannot be completely agreed.  
(→ negative vs. positive list)
- Note the use of the word "generally" in the second half.  
(→ concept of "standstill" almost universally shared, but not quite)

### 2. Positive lists and negative lists

#### (1) Positive list approach

- Also known as "schedule of commitments".
- Inspired largely from GATS.
- Decreasing prevalence within APEC, but is sometimes applied in the context of the pre-establishment phase (see below).

**APEC Convergence and Divergence Study**  
(Latest summary for the Investment chapter, April 2009)

**National Treatment (NT)**

Except for the twelve exceptional FTAs that do not have an investment chapter, all the assessed FTAs provide for national treatment. Twenty-four FTAs\* provide **NT on both pre-establishment and post-establishment phase by negative list approach** and three FTAs\*\* adopt the **positive list approach on pre-establishment NT**.

Some economies may have a policy of taking a positive list approach on pre-establishment NT, and this could become a challenge in a scenario of harmonizing FTAs.

\* Australia-Singapore, Australia-US, Peru-US, NAFTA, Canada-Chile, US-Chile, Korea-Chile, US-Korea, US-Singapore, NZ-Singapore, Singapore-Korea, ASEAN-USA, Japan-Mexico, Japan-Chile, Japan-Singapore, Japan-Malaysia, Japan-the Philippines, Indonesia-Japan, Australia-Chile, Brunei-Darussalam-Japan, Canada-Peru, Japan-Viet Nam, Peru-Singapore, Australia-ASEAN-New Zealand

\*\* Australia-Thailand, Japan-Thailand, NZ-Thailand

### Example of a positive list

(Japan-Thailand FTA: Japan's only example)

Sector or subsector	Industry classification	Limitations on national treatment	Commitments on performance requirements
Section B. SECTOR-SPECIFIC COMMITMENTS			
ALL NON-SERVICE SECTORS AND SUBSECTORS NOT LISTED BELOW			
I. Sector: Agriculture, Forestry, and Fisheries (except fisheries within the Territorial Sea, Internal Waters, Exclusive Economic Zone and Continental Shelf provided in Item 4 of Section B)	JSC 01 Agriculture JSC 02 Forestry JSC 03 Fisheries JSC 04 Aquaculture	None except that Japan may maintain the following Existing Measures: <b>Existing Measures</b> Foreign Exchange and Foreign Trade Law (Law No. 228 of 1949), Article 27 Cabotage Order and Foreign Direct Investment (Cabinet Order No. 261 of 1980), Article 1. <b>Disciplines of the Existing Measures</b> The prior notification obligation under the Foreign Exchange and Foreign Trade Law does not apply to foreign investors who intend to make investment in agriculture, forestry and fisheries (except fisheries within the Territorial Sea, Internal Waters, Exclusive Economic Zone and Continental Shelf provided for in Item 4 of Section B).	As indicated in Horizontal Commitments.  As indicated in Horizontal Commitments.

→ Please also refer to the WTO guideline (S/L/92, 28 March 2001) for the general principles in the scheduling of commitments in the GATS context.

#### (2) Negative list approach

- Also known as "reservations".
- Inspired largely from NAFTA and the OECD / MAI draft text.
- Increasingly prevalent among APEC economies; strongly associated with the pre-establishment phase.

#### Basic structure of the negative list approach

**Agreement text**

- Scope
- Definitions
- NT
- MFN
- PR, SMBD
- Reservations and exceptions
- General treatment / minimum standard of treatment
- Transparency
- Expropriation and compensation
- Protection from strife
- Transfer
- ISDS, SSDS
- Joint committee

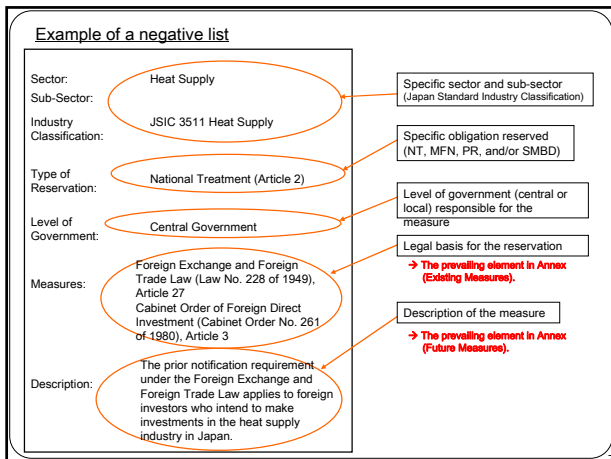
**Annex (Existing Measures)**

- Specifies existing measures which do not conform to the NT, MFN, PR, and/or SMBD obligations.
- Often associated with concepts of "standstill" and "ratchet effect".

**Annex (Future Measures)**

- Excludes certain sectors or matters from the NT, MFN, PR, and/or SMBD obligations, even if no conflicting measures currently exist.
- Relating existing measures are sometimes annotated for transparency purposes. ("Future Measures" is not a literally accurate title.)





## II. A Few Further Topics

- ### 1. "Standstill" and "ratchet effect"
- (1) "Standstill"
- Amendments or modifications of the existing measures must not decrease their conformity with respect to the NT, MFN, PR, and SMBD obligations compared to the time of the signing of the agreement.
  - Foreign ownership ceiling:
    - 50% (signing of agreement) → 75% → 25% ❌
    - 50% (signing of agreement) → 75% → 60% ✅
- (2) "Ratchet effect"
- Amendments or modifications of the existing measures must not decrease their conformity with respect to the NT, MFN, PR, and SMBD obligations as they existed immediately before the amendment or modification.
  - Foreign ownership ceiling:
    - 50% (signing of agreement) → 75% → 25% ❌
    - 50% (signing of agreement) → 75% → 60% ❌

- (3) Evolution of Japan's approach
- Haphazard process of trial and error – took nearly a decade to arrive at a clean and concise method to incorporate the concepts of "standstill" and "ratchet effect".
- Japan-Singapore EPA (2002)**
- A single negative list. No wording to the effect of "standstill".
  - However, some of the individual Descriptions implicitly depict "standstill".
    - "According to Article 10 of the Seeds and Seeding Law, a foreigner.....cannot enjoy a breeder's right except in any of the following cases....."
- Japan-Malaysia EPA (2006)**
- A single negative list.
  - The cover sheet of the Annex stipulates that an asterisk (\*) is used to specify a reservation of an existing measure, with "standstill". A plus sign (+) is used to specify reservations in which "standstill" applies only for existing investors.
    - "...the reservations with an asterisk (\*) are related to existing measures that do not conform with obligation imposed by Article 75 (=NT), Article 76 (=MFN), or paragraph 1 of Article 79 (=PR). The reservations without an asterisk (\*) are related to specific sectors, sub-sectors or activities for which the Country may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by Article 75, Article 76, or paragraph 1 of Article 79; however, any amendment or modification of an existing measure or adoption of a new measure for sectors, sub-sectors or activities without an asterisk (\*), shall not be more restrictive to existing investors and existing investments as defined in paragraph 4 of Article 80 (=Exceptions and Reservations) than the measures applied to such investors and investments immediately before such amendment or modification or adoption, unless such sectors, sub-sectors or activities are indicated with the symbol "+"."

- Japan-Peru BIT (2008)**  
(and most recent Japanese IIAs)
- Two negative lists, one for existing measures with "ratchet effect", and another without such restrictions (i.e., Future Measures).
  - "Ratchet effect" concisely spelled out in the main text (Article 8, Paragraph 1).
    - "Articles 3 (=NT), 4 (=MFN), 6 (=PR), and 12 (=SMBD) shall not apply to:
      - (a) any existing non-conforming measure that is maintained by.....
      - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
      - (c) an amendment or modification to any non-conforming measure referred to in subparagraph (a), provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification, with Articles 3, 4, 6 and 12.
- Compare the provision of the Japan-Peru BIT with the rather complicated Japan-Malaysia EPA.
  - Difference in time is as great a factor as the difference in the partner.

- ### 2. Treatment of the services sector
- Services chapter negotiators also face a choice between negative and positive lists.
  - Because of the close relationship with GATS, positive lists are relatively more used in the services chapter than in the investment chapter.
  - As a result, when Mode 3 supply of services is within the scope of the investment chapter, there is a possibility of a contradiction between the style of reservations / commitments used in the two chapters .
    - (i.e., negative list for the investment chapter and positive list for the services chapter, despite dealing with the same measures)
    - This is less of an issue for economies adopting the Cross-Border Trade in Services framework (Mode 1, 2, 4 only), since the two sets of reservations / commitments would deal with completely different sets of measures, with no overlap.

- Possible solutions to reconcile the two styles:

- 1) Adopt the Cross-Border Trade in Services approach.
- 2) Reserve the entire services sector in the investment chapter.
  - Drawback: must devise an adequate coordination clause, otherwise the level of commitment would be drastically reduced.
- 3) "Flip-side reservation"
  - Reserve the entire services sector, [except for those sectors and matters included in the schedule of commitments for the services chapter.](#)
  - Allows the investment chapter to maintain the framework of the negative list, while deferring to the preference of the other Party to adopt a positive list for all services including Mode 3.

### 3. Negotiating reservations

#### (1) Creating the lists of reservations

- Requires extensive intra-governmental coordination.
- Existing Measures
  - Time consuming but straightforward.
  - Must require all regulatory divisions of all agencies to examine their regulations for compatibility with the NT, MFN, PR, and SMBD obligations.
  - If not compatible, then include it in the list.
- Future Measures
  - Quite a delicate process.
  - Each agency must debate and determine the sectors and matters to put forward to include in the Future Measures list. These may or may not involve existing regulations.
  - Cannot simply include every sector and matter put forward; otherwise, every agency would be tempted to protect their own little fields.
  - If too many sectors and matters are included, it could result in a decay of trust between the negotiating partner.

#### (2) Negotiating reservations

- Unlike those based on positive lists (remember GATS.....), negotiations based on negative-list reservations are not conducive to haggling.
- In the best scenario, both parties would simply exchange their best offers from the outset, thereby allowing more time to debate and refine the main text of the IIA.
- Usually, real negotiation for reservations do take place. However, they generally consist of the following:
  - Generic exchange of commercial interests.
  - Questions on the background of Future Measures reservations.
  - Requests to move a Future Measures reservations into the Existing Measures list, if the reservation is based on a specific regulation.

#### (3) Maintaining reservations

- IIA negotiators (or embassies, chambers of commerce, interested investors) are advised to keep track of the other party's latest change in regulations listed under Existing Measures. There's no sense in the "ratchet effect" if you don't know what it is ratcheted against.
- IIA negotiators **must** keep track of the latest changes in regulations listed in their own Existing Measures. A thorough inter-agency process is highly valuable; even the Congress must be well advised.
- Otherwise.....

(End of presentation)



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## Dispute Settlement in International Investment Agreements

Anna Joubin-Bret  
Senior Legal Advisor  
DIAE, UNCTAD

1

## State – State Dispute Settlement

2

### Types of dispute settlement

- **State-to-State:** the settlement of disputes between State parties to the Agreement. (e.g. investment agreements; the WTO Dispute Settlement Body).
- **Investor-to-State:** allows private investors to submit claims against a host State to international arbitration (eg. BITs and many FTAs).
- Most IIAs contain both types of mechanisms.

3

### Two reasons to use State-State

1. Exercise of diplomatic protection
2. Dispute over the interpretation or application of an investment treaty

4

### What's in State-to-State provisions

- Consultations and negotiations (time-period).
- Ad-hoc arbitration.
- Constitution of tribunal (standard).
- Applicable law (not always specified): provisions of the IIA and rules and principles of international law.
- Arbitral award: final and binding.
- Most IIAs are silent on the nature of remedies to be awarded by tribunals and on the implementation of arbitral awards.
- Costs.

5

### Investor-to-State Dispute Settlement

- Consultations and negotiations (time-period).
- Most IIAs do not require exhaustion of local remedies.
- In some, resort to local courts precludes subsequent submission to international arbitration.
- Direct resort to international arbitration (institutional or ad hoc):
  - ICSID Convention
  - ICC or the Stockholm Chamber of Commerce
  - UNCITRAL Arbitration Rules

6

### Investor-to-State

- Constitution of tribunal (as per arbitral rules).
- Applicable law: IIA's provisions; law of the host-State; investment contract, rules of international law.
  - ICSID Convention (Article 42): *absent agreement between parties, the tribunal shall apply the law of the host State and the applicable rules of international law.*
- Arbitral awards: final and binding, but require *exequatur* (except in the case of ICSID awards).
  - ICSID Members shall recognize and enforce the awards in their territory as if they were final judgements of a State court.

7

### WTO dispute settlement

- Consultations (60 days).
- Establishment of a panel (3 experts).
- Final panel report (within 6 months).
- Adoption of report (60 days) unless DSB rejects it by consensus or one of the parties appeals it.
- Appellate Review (60 days); adoption of report (30 days).
- Bring the measure into conformity with the agreement within a "reasonable period of time" (15 months); if not:
  - compensation (eg. tariff reductions).
  - suspension of concessions (cross-retaliation).

8

### Access to dispute settlement

- **WTO DSU:** only Member States can initiate proceedings under the DSU. Non-governmental bodies do not have direct access to the system.
- **Investor-to-State:** investors may submit a dispute with a host State to an international tribunal, without having to resort to the diplomatic protection of their home State.

9

### Access to dispute settlement

- Investors in services act as the pivotal link between "investment law" and "trade law".
- Services companies can either pursue a remedy under:
  - the WTO General Agreement on Trade in Services (GATS).
  - ISDS.

10

### Types of legal remedies

- **DSU:**
  - bring the measure into conformity with WTO rules.
  - no award of damages.
  - appellate review.
- **Investor-to-State:**
  - monetary compensation or restitution in kind.
  - no requirement to modify laws or policies.
  - review or annulment of the award (eg. irregularities in the procedure).

11

### Implementation and enforcement

- **DSU:**
  - immediately or within "a reasonable period of time".
  - compensation or suspension of equivalent concessions.
  - only DSU remedies authorized. No unilateral sanctions.
- **Investor-to-State:**
  - reference to international conventions for the enforcement of awards (New York Convention, ICSID).
  - non-compliance: home State can bring a claim under the IIA's State-to-State procedures, or
  - resort to remedies provided under international law.

## Differences between two types of dispute settlement systems

### DSU under WTO

- No access of private parties to DSU.
- No award of damages.
- Bring the measure into conformity with WTO.
- Affected Member can resort only to the remedies available under DSU.

### Investor-to-State

- Direct access to international arbitration.
- Monetary compensation.
- No requirement to change policies.
- If non-compliance: home State can resort to inter-State procedures or to international law remedies.

13



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



## Investor-State Dispute Settlement

Anna Joubin-Bret  
Senior Legal Advisor  
DIAE, UNCTAD

### 1. Consultation and negotiation

- Limit the **scope of the dispute**: "disputes arising from the application and interpretation of the Agreement". The dispute settlement mechanism should not apply to any kind of dispute (e.g. a conflict regarding the interpretation or application of a domestic law should not be settled by this mechanism).
- **Consultation and negotiation**. Efficient mechanisms for ADR, credibility, consistency with treaty obligations, enforceability.
- **Timing**: Starting date and ending date for the cooling-off period.
- The disputing party shall submit a **written request** for consultation or negotiation with a view to settle the dispute amicably.

### 2. Scope of the claim

- Define who can submit a claim (a national and an enterprise)
- Claim brought by the investor
- Claim brought by the investment
- Define the scope of the claim (a breach of an obligation under the agreement and existence of loss or damage linked to the breach)
- Not any dispute, not any matter in relation with an investment

### 3. Submission of a claim to arbitration

If the dispute cannot be settled through consultation and negotiation within the cooling-off period, the disputing party or either party may submit a claim either:

- (a) to the competent court of the State in whose territory the investment has been made;
- (b) to national arbitration;
- (c) to international arbitration:
  - under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both Parties are parties to the ICSID Convention;
  - under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent, but not both, is a party to the ICSID Convention;
  - under the UNCITRAL Arbitration Rules; or
  - under any other arbitration institution or under any other arbitration rules, if the disputing parties agree.

### 3. Submission of a claim to arbitration (Cont.)

- To avoid the multiplicity of forum in which an investor could settle a dispute, it is useful to introduce a provision on the definite choice of the investor: the investor chooses to go either to local court or to arbitration.
- Once this choice has been made, there is no possibility to use the other mechanism to settle the dispute ("fork in the road" provision).
  - Example: If an investor elects to submit a claim to a court or administrative tribunal of the party in whose territory the investment has been made, that election shall be definitive and the investor may not thereafter submit the claim to arbitration.
- The consent of each party to arbitration should be given.

### 3. Submission of a claim to arbitration (Cont.)

- **Limitations**: it could be relevant to mention that a claim should not be submitted to arbitration after a certain period of time.  
Example: No claim may be submitted to arbitration if more than **three years** have elapsed from the date on which the disputing party first acquired, or should have first acquired, knowledge of the breach and knowledge that the natural or juridical person has incurred loss or damage.



#### 4. Selection of arbitrators / Constitution of a tribunal

Certainty and predictability in the procedure: It is common to define how the arbitral tribunal should be constituted and the arbitrators appointed

- Unless the disputing parties otherwise agree, the Tribunal shall comprise 3 arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- Appointing authority for an arbitration. In case the arbitral tribunal has not been constituted within a certain period (3 months?) from the date on which a claim was submitted to arbitration, the President of the International Court of Justice, on the request of either disputing party, shall appoint, in his/her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General of ICSID can also play this role.
- Issue of nationality of the arbitrators.
- To facilitate the appointment of arbitrators, it could also be recommended to maintain a roster of arbitrators experienced in international law and investment matters.

#### 5. Interim measures of protection

- During the time of the arbitration, it might be relevant to apply measures of protection.
  - Example: A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of a disputing party.

#### 6. Governing law

- For a state-of-the-art agreement, it is important to include a provision on the governing law for arbitration. Indeed, a Tribunal shall decide the issues in dispute in accordance with the Agreement, the national laws of the host State of the investment and applicable rules of international law.
- Role of the Sub-Committee on investment to interpret a provision of the treaty. Interpretation binding on the arbitral tribunal?

#### 7. Final award

Provisions on the final award are quite standard:

- Where a tribunal makes a final award against a party, the tribunal may award, separately or in combination, only:
  - (a) monetary damages and any applicable interest;
  - (b) restitution of property, in which case the award shall provide that the party may pay monetary damages and any applicable interest in lieu of restitution;
  - (c) where a claim is submitted to arbitration by a juridical person, an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.
- A tribunal may also award costs and attorneys' fees in accordance with this Agreement and the applicable arbitration rules.
- A tribunal may not award punitive damages.

#### 8. Finality and enforcement of an award

It is relevant to have an article on enforcement of the award:

- An award made by a tribunal shall be final, and binding on the disputing parties in respect of the particular case.
- Subject to the applicable revision, annulment or set aside procedures, a disputing party shall abide by and comply with an award without delay.
- Each Party shall provide for the enforcement of an award in its territory.
- If a disputing Party fails to abide by or comply with a final award, the Party whose investor was a party to the arbitration may have recourse to the dispute settlement procedure between Member States. In this event, the requesting Party may seek:
  - (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
  - (b) a recommendation that the Party abide by or comply with the final award



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

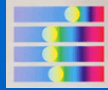
Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## International Centre for Settlement of Investment Disputes (ICSID)

Anna Joubin-Bret  
Senior Legal Advisor  
Work Programme on IIAs, DIAE

## Introduction to ICSID

### What is ICSID?

- One of the 5 organizations of the World Bank Group
  - ICSID (*established in 1966*)
- ICSID has 143 Contracting States

### What is ICSID mission?

- ICSID provides facilities for conciliation and arbitration of investment disputes between a State and a national of another State
- ICSID works to promote international investment for development by providing investors and States with an independent forum for dispute settlement

### What Is the Structure of ICSID?

- **Administrative Council**
  - One representative from each Contracting State
  - Chairman: *ex officio* President of the World Bank
  - Elects Secretary General and Deputy Secretary General
  - Adopts:
    - ICSID Regulations and Rules
    - ICSID annual budget
- **Secretariat**
  - Secretary-General (Meg Kinnear)
  - Chief Counsel
  - Approx. 10 Counsels
  - Responsible for administering the Centre
  - Responsible for maintaining the Panel of Conciliators and Arbitrators

### Jurisdiction of the Centre

## ICSID Jurisdiction

Consent: Main Condition for ICSID Arbitration or Conciliation

- Sources of Consent to ICSID Arbitration or Conciliation:
  - Contracts
  - Investment Laws
  - Bilateral Investment Treaties
  - Multilateral Agreements (NAFTA, ECT, CAFTA)

## Article 25 of the Convention:

“The jurisdiction of the Centre shall extend to **any legal dispute arising directly out of an investment**, between a **Contracting State** (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a **national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre**. When the parties have given their consent, no party may withdraw its consent unilaterally.”

## Article 25 of the Convention *(cont.)*

1. Written Consent
2. *Ratione Personae*
3. *Ratione Materiae*

## Articles 25(1) and (3) of the Convention: *ratione personae* jurisdiction

“(…) a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) (…)”

“Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.”

## Article 25(2)(a) of the Convention: *ratione personae* jurisdiction

“National of another Contracting State” means:

“(a) any **natural person** who had the **nationality of a Contracting State other than the State party to the dispute** on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, **but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.**”

## *Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/07)

“Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.”

“(…) had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. (…) Since, as found by the Tribunal, Claimant was not an Italian national under the laws of Italy at the two relevant times, this Tribunal does not have jurisdiction to hear this dispute.”

*Champion Trading et al. v. Egypt*  
(ICSID Case No. ARB/02/9)

“What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. (...) The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality **clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention.** The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants.”

Article 25(2)(b) of the Convention:  
*ratione personae* jurisdiction

“(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

*Champion Trading et al. v. Egypt*  
(ICSID Case No. ARB/02/9)

“Neither the Treaty nor the Convention contain any exclusion of dual nationals as shareholders of companies of the other Contracting State, contrary to the specific exclusion of Article 25 (2)(a) of the Convention regarding natural persons.

The Respondents did not adduce any precedents or learned writings according to which dual nationals could not be shareholders in companies bringing an ICSID action under the Treaty.

The Tribunal therefore holds that **it does have jurisdiction over the claims of the two corporate Claimants.**”

Article 25(1) of the Convention:  
*ratione materiae* jurisdiction

“(...) any legal dispute arising directly out of an investment (...)”

- Conflicts of rights, NOT conflicts of interests
- No definition of the term “investment”

(Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States)

*Joy Mining Machinery Ltd. v. Egypt*  
(ICSID Case No. ARB/03/11)

“The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.”

How Has the Conduct of Proceedings Changed?

- Innovative provisions in NAFTA
  - Other two NAFTA Parties participate on questions interpretation of the treaty
- No confidentiality in proceedings
  - Some NAFTA hearings open to the public: *UPS v. Canada* and *Methanex v. United States of America*
- Third Party participation (*Methanex v. USA*)
- Provisions allowing for consolidation of proceedings

### A further change:

More than half of ICSID's proceedings are conducted in two languages

## Initiation and Conduct of an Arbitration Proceeding

## Initiation and Conduct of ICSID Proceedings

- Contents of a Request for Arbitration
- Screening and Registration of a Request
- Constitution of an Arbitral Tribunal and the Role of the ICSID Secretariat
- Procedural Framework of the Proceeding
- The Role of the Secretary of the Tribunal

## Contents of a Request for Arbitration

### Requirements set forth in:

- Rule 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”)

## Screening & Registration of a Request for Arbitration

### Requirements set forth in:

- Convention Article 25
- Convention Article 36

Article 36(3): “The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, **that the dispute is manifestly outside the jurisdiction of the Centre.**”

## ICSID Arbitral Tribunals

- Usually three members
- Each party appoints one member
- The third, who serves as President of the Tribunal, appointed by agreement of the parties
- If a party refuses to appoint an arbitrator or if there is no agreement on the President, the Centre can appoint the missing arbitrator on request of either party

## Procedural Framework of the Proceeding

### First Session of the Tribunal

- Preliminary and organizational matters (*e.g.*, place of proceeding, language(s), dates for written pleadings, production of evidence)
- If no agreement, the Arbitral Tribunal decides

### Hearings

- Jurisdiction and the merits
- Held in Washington, D.C., unless otherwise agreed
- Oral pleadings; examination and cross examination of witnesses and experts, questions of the Tribunal

## The Secretary of the Tribunal

- Assists the Arbitrators
- Is the channel of communications between the parties and the Tribunal
- Drafts procedural orders
- Organizes hearings
- Administers the finances of the case

## The Award

- Tribunal renders Award after it has heard the case
- Post award remedies available:
  - Rectification – Convention Article 49(2)
  - Interpretation – Convention Article 50
  - Revision – Convention Article 51
  - Annulment – Convention Article 52

## The Award *(cont.)*

Annulment possible on the following grounds:

1. Tribunal not properly constituted
2. Tribunal manifestly exceeded its powers
3. Corruption on part of a Tribunal member
4. Serious departure from fundamental rule of procedure
5. Award failed to state reasons on which it is based

## Amendments to the ICSID Arbitration Rules:

- Rendering of the Award
- Oral procedure (open hearings)
- Submissions of non-disputing parties

## Amendments *(cont.)*

- ICSID to publish excerpts of the legal conclusions applied by tribunals

## Amendments *(cont.)*

- Unless either party objects, tribunals may allow other persons, besides the parties, to attend or observe all or part of the oral hearings

## Amendments *(cont.)*

- Under certain conditions, tribunals may allow a person or a State that is not a party to the dispute to file a written submission with the tribunal





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Managing Investment Disputes: A Guide for Government Officials

APEC-UNCTAD Regional Training Course  
on International Investment Agreements

David A. Pawlak  
Kuala Lumpur, Malaysia  
June 15-19, 2009

David A. Pawlak LLC

1

## Topics To Be Covered

### I. Introduction

- Facts & figures
- Consequences for States

### II. Recommendations for . . .

- Effective administration of investment obligations
- Effective management of investment disputes

### III. Conclusion

David A. Pawlak LLC

2

## Damages Claims: Facts & Figures

- *Eureko (NL) v. Poland* (ad hoc)
  - Up to \$14.5 billion in damages
- *Libananco (Cyriot) v. Turkey* (ICSID)
  - “Not less than \$10.1 billion,” costs & interest
- *Yukos (UK-Isle of Man) v. Russia* (UNCITRAL)
  - \$33 billion including two related Cyriot claims

David A. Pawlak LLC

3

## Awards: Facts & Figures

- *CME v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003)
  - \$270 million plus interest
- *ADC Affiliate Ltd v. Hungary*, ICSID, Award (Oct. 2, 2006)
  - ~\$76 million plus certain costs

David A. Pawlak LLC

4

## Costs of Defense: Facts & Figures

- Czech Republic
  - Budgeted \$13.8 million in 2005 for defense of investor-State claims
- *PSEG v. Turkey*, ICSID, Award (Jan. 19, 2007) ¶¶ 352
  - Together, parties spent nearly US \$21 million on prosecution and defense of the claim

David A. Pawlak LLC

5

## Costs of Defense: Facts & Figures

- *Pey Pescado v. Chile*, ICSID, Award (May 8, 2008) ¶¶ 723-24, 731
  - arbitration costs US \$4.2 million
  - Claimant’s legal costs US \$11 million
  - Chile’s legal costs US \$4.3 million
- *Plama v. Bulgaria*, ICSID, Award (Aug. 27, 2008) ¶¶ 310-12
  - Claimant’s legal costs US \$11 million
  - Bulgaria’s legal costs US \$ 13.2 million

David A. Pawlak LLC

6

## II. Effective Administration Of Investment Obligations & Disputes

- Properly begins long before any investor complaints
- “In-house” team or outside expertise
- Key decisions required during first 6 months of any dispute
- Nine recommendations . . . .

David A. Pawlak LLC

7

## III. Recommendations

1. Designate Lead State Agency
2. D.C.-based Liaison To Lead State Agency
3. Designate Interagency Contact Persons For Investment
4. Lead State Agency Budget
5. Authority To Collect And Produce Evidence
6. Authority To Pursue Settlement
7. Informal Procedures For Interagency Consultation
8. Public Procurement Procedures
9. Payment & Reimbursement Of Settlements & Awards

David A. Pawlak LLC

8

### 1. Lead State Agency

- (i) serve as a resource on investment treaty obligations & disputes;
- (ii) retain records relating to arbitration proceedings for policymakers and counsel;
- (iii) serve as primary interlocutor for aggrieved investors;
- (iv) facilitate early amicable settlements;

David A. Pawlak LLC

9

### 1. Lead State Agency (cont'd)

- (v) collect evidence and information from other agencies regarding investment issues;
- (vi) develop State’s “institutional memory” on investment matters, including contributions of expert outside counsel; and
- (vii) in the event of a claim, take the lead in State’s defense (*e.g.*, liaise with outside counsel and experts).

David A. Pawlak LLC

10

### 2. Washington, D.C.-based Liaison To Lead State Agency

- Existing Ministry of Foreign Affairs position
- Washington, D.C. Embassy official
  - ICSID Liaison
  - Coordinate with MFA officials elsewhere, *e.g.*,
    - Brussels;
    - investor’s home state capital;
    - place of arbitration in non-ICSID cases

David A. Pawlak LLC

11

### 3. Contact Persons For Investment Matters

- Establish interagency network of government representatives . . .
  - Every relevant central government agency
  - Significant regional & local government units

David A. Pawlak LLC

12

#### 4. Lead State Agency Budget

- A permanent fund
- Sufficient resources for first year of costs for an investor-State proceeding

#### 4. Lead State Agency Budget (cont'd)

- “[To] provide the Department of State with a dependable, flexible, and adequate source of funding for the expenses . . . related to preparing or prosecuting a proceeding before an international tribunal, . . . there is established an International Litigation Fund.”

22 U.S.C. § 2710(d)(1)

#### 5. Authority To Collect And Produce Evidence

- Power to gather evidence from all relevant government agencies and instrumentalities
- Legal consequences for uncooperative agencies or officials
- Establish procedures in advance for sensitive or confidential materials

#### 6. Authority To Pursue Settlement Of Investment Disputes

- Frequent amicable settlements
- 3 or 6 month “cooling off” period
- Authority to engage in *and conclude* settlement discussions, subject to interagency consultation

#### 7. Interagency Consultation

- Establish network of all relevant agency officials to facilitate . . .
  - Interagency cooperation
  - Timely completion of required consultations
  - Flow of information to Lead State Agency
  - Prompt elevation of contested issues

#### 8. Public Procurement Procedures

- Competing Objectives
  - Transparency
  - Expeditionness
- Exemption from procurement rules at LSA’s option

## 9. Payment And Reimbursement Of Settlements & Awards

- Who pays?
  - National budget
  - Offending ministry's budget
  - Hybrid models

## V. Conclusion

- Take stock of investment obligations
- Assess capacity to manage investor complaints
- Follow up seminar at all levels of government
- Adopt experience-based recommendations

## Thank you

### David A. Pawlak

Grojecka 40/m 11  
02-320 Warsaw  
Poland  
+48.22.822-6081  
+48.511.242-010

1661 Crescent Place  
Washington, D.C. 20009  
USA  
+1.202-667-5797  
+1.917.969-9868

[dapawlak@davidpawlak.com](mailto:dapawlak@davidpawlak.com)  
<http://www.davidpawlak.com/>



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@appec.org](mailto:info@appec.org)  
Website: [www.appec.org](http://www.appec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Thailand's Experience on Investor-State Dispute Settlement:

Vilawan Mangklatanakul  
17 June 2009

## BIT-FTA Experiences

- Thailand concluded 39 BITs and 6 FTAs, containing Investment Chapters (ACFTA, AANZFTA, AKFTA, JTEPA, TAFTA, TNZFTA)
- Ongoing FTA negotiations: Thai-India, Thai-EFTA, ASEAN-India, BIMSTEC

## Current Positions of Thailand

- The scope of 'investment' covers only FDI
- Provide investor-state dispute settlement provisions
- Provide protection for post-establishment stage only
- Excludes performance requirements, pre-establishment breaches

## Coverage of Protection

- NT/ MFN Treatment
- Fair and equitable treatment
- Expropriation and Compensation
- Free transfer
- Subrogation

## Model Clause

- Consultation
- If failed, investors can submit to
  - A competent national court
  - Ad hoc arbitration under UNCITRAL
  - ICSID, in case both contracting parties are contracting states to the Convention on the Settlement of Investment Disputes between states and nationals of Other States, 1965

## Model Clause (cont.)

- Decision is made on the basis of
  - National laws and regulations of the Contracting States
  - Provisions of the Agreement
  - Applicable rules of international law
- Decision is final and binding on the parties to the dispute
- Examples: Article 106 of the JTEPA, Articles 28-41 of the ACIA, Article 917 of Thailand-Australia FTA

## Relevant laws

- Arbitration Act B.E. 2545 (2002)
  - Adopting UNCITRAL Model Law
  - Recognition and enforcement of foreign arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958
  - Covering disputes on international civil and commercial matters
  - Arbitration Award
    - Enforceable by the relevant courts
    - Grounds for refusal of foreign award (section 43)

## ICSID?

- Thailand is a signatory to the ICSID Convention since 6 December 1985, but has never ratified it.
- Difficulties:
  - Types of dispute/ prior consent (article 25)
  - Enforcement of the award as a final judgment (article 54 (1))

## Concession contract

- Concession contract: administrative/ commercial contract
- Section 15 of the Arbitration Act: In a contract between a government agency and private party, whether administrative contract or not, the parties thereto may agree to settle their disputes by arbitration. The parties to the contract shall be bound by such arbitration agreement.

## Government policy

- Cabinet decision re: arbitration & concession contract between government agency and foreign investor
  - Administrative contract
  - No prior consent unless approved by the cabinet
  - Adopt Thai law as applicable law

## Relation with BIT

- Breach of concession contract is automatically a breach of treaty?
- BIT provision, e.g. Thai-Jordan art. 10(2), Thai-Germany art. 7(2)
  - "Each contracting party shall observe any other obligation it may have entered into with regard to investments of investors of the other contracting party"

## Recent Cases

- **Under contract:** Bangkok Expressway Plc (BECL) vs Expressway and Rapid Transit Authority of Thailand (ETA)
- **Under BIT:** the Walter Bau Case



## BECL vs ETA

- In 1998, BECL submit a claim against ETA to a Thai arbitral tribunal seeking compensation for its failure to deliver areas for construction an expressway
- In 2003, the Civil Court upheld the arbitral award that the government must pay Bt 6 billion.
- In 2009, the Supreme Court refuse to enforce the award on the ground that they are corruption in the process of approving the concession contract.

## Walter Bau Case

- Germany-Thailand BIT of 2002
- Walter Bau is a minority investor in Don Muang Tollway, a local Thai company
- Based on a concession to construct and operate Don Muang highway
- In October 2009 Arbitral tribunal decided that it has jurisdiction over the case
- The case is still pending

## Concluding Remarks

- Dilemma: the need to attract FDI VS the need to protect domestic businesses
  - To strike the right balance is difficult
- BIT/FTA obligations are very wide and considered by the government to be favourable to investors
- Increased litigation
- Arbitrators often not taking into account public policy and implementing public international law



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## Interactions and Policy Coherence

**Anna Joubin-Bret**

Senior Legal Advisor

Work Programme on international investment agreements

Division on Investment

UNCTAD

## TRENDS

Among the most important recent trends is the **increasing number and complexity of IIAs**

- risk that countries face overlapping and sometimes inconsistent obligations
- possibly detrimental to their policy objectives.

**Several factors: substantive, systemic, subject-specific**

## IMPLICATIONS

→ Countries and companies operate within an **increasingly intricate framework of multi-layered and multi-faceted investment rules**, which may contain overlapping and perhaps even inconsistent obligations.

→ This may render economic policies of host countries **more complicated**.

→ Complex treaty structures could to some extent **deter foreign investors** as it becomes increasingly difficult for them to properly assess the degree of protection and liberalization afforded by IIAs.

## Several Factors

- Divergent model agreements
- Protection-oriented BITs and liberalization-oriented FTAs
- Compatibility/implementation at the national level

## Challenges to the Management of the IIA Network

In view of the increasingly complicated network of IIAs and the different interpretations of treaty provisions given by arbitration tribunals, the maintenance of **policy coherence** becomes a major challenge for States.

## POLICY COHERENCE FOUR ASPECTS

- First, identify similarities and dissimilarities: stocktaking and monitoring.
- Second, coherence **between different IIAs** to which countries are a party; sometimes, this may even be a concern with regard to different provisions of the *same* IIA.
- Third, coherence among IIAs concluded with **one** other country.
- Fourth, coherence with **domestic** economic and development policies.

## Interactions Within an IIA

- Cumulating interactions: services/investment chapters in FTAs, ISDS/general DS in the FTA
- Contradiction interactions: policy-space issues
- Explication interactions: definitions or exceptions with substantive provisions

## Interactions With Other IIAs

- Reinforcement interactions: services-related provisions reinforcing GATs
- The MFN provisions (see below)
- Cumulating interactions: dispute settlement provisions (FTAs/WTO)
- Contradiction interactions: interactions with State Contracts

### EXAMPLE 1 DIFFERENT MODES OF INVESTMENT

One IIA may establish an upfront liberalization based on a **"top-down" approach**, whereas another IIA may provide for gradual market access on the basis of a **"bottom-up" strategy**

→ As a result, the **degree of liberalization** may be **unclear** for an economic activity covered by both agreements.

→ Soft law v.s. hard law approaches

### EXAMPLE 2 APPLICATION OF THE MFN CLAUSE

The application of the MFN Clause may, against the intention of a contracting party, **incorporate** into the IIA certain **procedural or substantial rights** from other IIAs.

→ This may lead to **unexpected results**.

→ The problem has been exacerbated by some recent contradictory interpretations on the scope of the MFN clause by arbitration tribunals.

### EXAMPLE 3 ADMITTING FDI?

Most BITs leave it to the **discretion of host countries** of whether they want to admit foreign investment or not.

By contrast, **regional free trade agreements** increasingly include establishment rights for foreign investors.

Market access rights are also provided for in the **GATS**. Implication on investment in services.

### EXAMPLE 4 UMBRELLA CLAUSE

The so-called **"umbrella" clause** extends the protection by the IIA to **"any other obligation"** of the contracting parties in respect of an investment.

→ As a result, a breach by the host country of such other obligation (e.g. one deriving from a contract with the investor) becomes a **violation of the IIA**, and the latter's **dispute settlement mechanism applies** - an outcome that a contracting party to the IIA may wish to avoid.

## **CONSISTENCY: DOMESTIC CONCERNS**

- The negotiation of IIAs includes **interrelated and complicated policy issues** that, at least in principle, touch upon a whole range of **domestic concerns**.  
(Ex.: social and environmental matters)
- Balancing private and public interests:
  - Protect host country interests: clarification, stronger emphasis on public policy concerns, strengthen public role in ISDS. Transparency.
  - **create a certain balance** between rights and responsibilities of investors.
- Preserving regulatory flexibility to pursue national policies.

## **CONCLUSIONS**

- **Stocktaking: IIA reviews**
- **Dealing with inconsistencies in IIAs: revising, clarifying, keeping track, limiting the agenda, active involvement in ISDS**
- **Transparency in the conduct of investment negotiations and ISDS plays a key role in securing the necessary support for and legitimacy of IIAs**
- **Addressing domestic concerns: balancing PP interests**



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Consistency and Inconsistency in ASEAN Investment Agreements

Sufian Jusoh  
NCCR Research Fellow, World Trade Institute, Bern, Switzerland

APEC-UNCTAD Regional Training Course on the Core  
Elements of International Investment Agreements in the  
APEC Region, 15-19 June 2009  
Kuala Lumpur, Malaysia

## Order of Presentation

- (1) Why consistency is important but difficult to achieve;
- (2) Examples of consistencies and inconsistencies in ASEAN Investment Agreements; and
- (3) Conclusion.

## Structure of ASEAN Investment Agreements

ASEAN Investment Agreements mainly:

- Covering 4 pillars i.e. liberalisation, protection, facilitation and promotion
- Generally similar provisions:
  - National Treatment,
  - Treatment of investments,
  - Transfers,
  - Expropriation and Compensation,
  - Subrogation,
  - BOP Safeguards,
  - General Exceptions,
  - Transparency,
  - State-State Dispute Settlement,
  - Investor-State Dispute Settlement, and 1 Schedule (reservation lists of Member States and also bilateral partner)

## Why Consistency is important?

- Predictability in the management of the agreements;
  - Post-signing and implementation.
- Prevention and management of dispute.
- Reason:
  - Managers of the IGA are different from the negotiators.
  - Negotiators may come from various departments which may not manage the agreements.
  - peculiarity and demand of trading partners may contribute to inconsistencies in various IGA signed by the same country.

## Review of ASEAN Investment Agreements

- ASEAN Australia New Zealand Free Trade Agreement Investment Chapter signed in Cha-am Thailand, 2009.
- ASEAN Comprehensive Investment Agreement, signed in Cha-am Thailand, 2009.
- ASEAN Korea Investment Agreement signed in Jeju Island, 2 June 2009.

## The ACIA

- incorporates elements of investment liberalisation, promotion, awareness, facilitation, and protection. Investment liberalisation will be progressive with a view towards achieving a free and open investment environment in the region in line with the goals of the ASEAN Economic Community (AEC).
- seek to improve investors' confidence in the region and encourage further development of intra-ASEAN investment, especially among multinational corporations based in ASEAN through expansion, industrial cooperation and specialisation. It will contribute to enhancing economic integration.

## AANZFTA

- the single most ambitious undertaking made by ASEAN since expanding its outward-looking economic regime to include region-to-region free trade agreements with major trading partners.
- the first time ASEAN has embarked on comprehensive FTA negotiations covering all sectors including goods, services and investment, intellectual property simultaneously; AND
- the agreement is the most comprehensive trade agreement that ASEAN has ever negotiated.

7

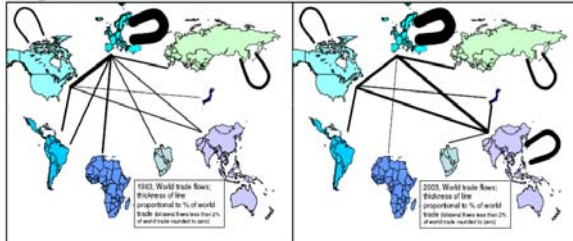
## AKFTA

- complements the Trade in Goods Agreement which was signed on Aug 26, 2006 and Trade in Services Agreement on Nov 21, 2007;
- promote investment flows and create a liberal, facilitative, transparent and competitive investment regime in ASEAN and Republic of Korea through:
  - progressively liberalising the investment regime; creating conducive environment for ASEAN and Republic of Korea's investors and their investments; promoting cooperation on a mutually beneficial basis; encouraging and promoting the flow of investments and cooperation between ASEAN and Republic of Korea; improving transparency of investment rules; and providing for the protection of investments.

8

## Problems in Managing the Spaghetti Bowl in the multi-polar trade world

Figure 1: World direction of trade, 1963 and 2003.



Note: The left panel shows world trade flows in 1963; the thickness of lines indicates the bilateral flow's share of world trade (flows less than 2% are rounded to zero for clarity). The right panel shows the same for 2003.  
Source: WTO (2004), GATT (1996, Table A.13).

Source: Baldwin 2006 9

## Scope of the Agreement

- ACIA
  - does not cover pre-establishment.
  - Applies to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement
- Compared with ASEAN – Korea:
  - does not cover pre-establishment.
  - Does not apply to investment 'claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement.'
  - This implies that only existing and future investment between ASEAN Member States be protected.

10

## Covered Investment

- ACIA – has to be specifically approved in writing.
- AANZFTA – has been admitted by the host party
  - \* Thailand – it has to be approved in writing,
  - Vietnam –has been specifically registered/ approved in writing).
- AKFTA – specifically approved in writing by competent authority.

11

## Investor

- ACIA - "a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State";
- AANZFTA and AKFTA- "a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment in the territory of another Party";
  - (fn) "seeks to make" an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor of another Party that has initiated such notification or approval process.

12



## National Treatment

- All national treatment provisions refer to the 'like circumstance'
- But different approach in drafting:
  - ACIA - 'in relation to investor'- "...with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."
  - (note the difference is underlined) , AANZFTA and AKFTA follows the ACIA wordings.

13

## National Treatment (2)

### AANZFTA and AKFTA

- the application of the National Treatment is subject to work programme.
- "Work Programme" concept: the parties to further discuss the applications and the schedules upon a certain period after entry into force of the Investment Agreement.

14

## MFN

- ACIA – refers to 'like circumstances' for 'admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.'
- AKFTA – subject to a 'work programme'.
- AANZFTA – still subject to a 'work programme'.

15

## MFN (2)

### ACIA

- General MFN treatment does not mean that 'as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from:
  - (a) any sub-regional arrangements between and among Member States; or
  - (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.

16

## Senior Management

- Covered in the ACIA and AKFTA
  1. A Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality.
  2. A Member State may require that a majority of the board of directors of a juridical person of that Member State, be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment.

17

## Work Programme

- AANZFTA and AKFTA
- AANZFTA:
  - schedules of reservations; treatment of investment in services which does not qualify as commercial presence in Chapter on Trade in Services; the application of MFN treatment, and procedures for the modification of schedules of reservations.
- Discussions to be concluded within 5 years from the date of entry into force.

18

## Work Programme

### AKFTA:

- MFN Treatment;
- TRIMs-plus elements on Performance Requirements; Schedules of Reservations;
- Procedures for modification of Schedules of Reservations;
- Annex on Expropriation and Compensation;
- Annex on Taxation and Expropriation; and
- Investment Dispute Settlement between a Party and an Investor of any other Party.

As in AANZFTA, discussions to be concluded within 5 years.

19

## Few Other Observations

- All investors must read the ASEAN agreements with care – many footnotes with exclusions and special provisions for certain ASEAN member states.
- ASEAN Agreements must be read with the BITs. No clear provision whether BITs are now repealed, null and void.
- BIT, where applicable still relevant, e.g. in the AKFTA – in reference to submission to jurisdictions/forums.

20

## Conclusions

- ASEAN Members States have more restrictive approach as between themselves in the ACIA;
- ASEAN Members States are more open when dealing with the bilateral partners; and
- ASEAN Agreements requires careful management approach.

21

## Thank You

[Sufian.jusoh@wti.org](mailto:Sufian.jusoh@wti.org)  
[Sufian.jusoh@wtiadvisors.com](mailto:Sufian.jusoh@wtiadvisors.com)



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Coherence in IIAs

An Impossible Dream?

June 18, 2009

**Masa Sugano**

Deputy Director  
Economic Partnership Division  
Ministry of Economy, Trade and Industry

### I. How inconsistencies arise

- Ignorance (photo-ops)
- Negotiating power
- Temporal (c.f., USA, China)

### II. Japan's experience

- Temporal  
(photo-op BITs → FTA era → strategic BITs)
- Negotiating power (vs. Latin America)
  - FET / MST
  - Note on indirect expropriation
  - Characteristics of investment
  - PR / SMBD
  - Treatment of Mode 3
  - Length of ISDS article

### III. Dealing with inconsistencies

#### (1) Coping with inconsistencies

- We're screwed anyways.
  - Investor can choose disciplines and forums
    - \* NT reservations vs. FET
    - \* ICSID vs. UNCITRAL
  - Treaty shopping
    - \* Investors will set up offshore companies and use your "best" BIT
- Work with a checklist.
  - Have a handy version, extensive version

#### (2) Avoiding inconsistencies

- Have a smart MFN clause.
- Create "trademarks" --- Earn respect!
  - Philippines (ICSID)
  - Thailand (positive list)
  - Canada, France (cultural exceptions)
  - Japan (corruption prevention)
  - China (pre-NT, "duty of investors"?)
- ✓ Reservations should be trademarks, too.
- Choose your negotiating partners.
  - Macchiavellian style
  - Establish regional standards  
(ACIA → vs. China, Korea, Aus-NZ .... Japan?)



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region

15-19 June 2009  
Kuala Lumpur, Malaysia

## The Three Generations of Investment Promotion

Anna Joubin-Bret  
Senior Legal Advisor  
DIAE, UNCTAD

1

## Investment promotion

### Three generations:

1. Liberalization of FDI regimes
2. Marketing of countries
3. Investor targeting

2

## 1. Liberalization of FDI regimes

- ✓ **Reduction of barriers to FDI**  
Opening up more sectors to foreign investment, lifting of ownership restrictions and employment of non-nationals, etc.
- ✓ **Strengthening of standards of treatment for foreign investors**  
National treatment, legal protection to foreign investors, etc.
- ✓ **Enhancing the functioning of the market**  
Competition rules, supervision of banking and financial services, protection of IPRs, consumer and environmental standards, effective systems of accounting and reporting, BITs, DTTs.

3

## Liberalization of FDI regimes

National regulatory changes, 1992-2007

Year	'92	'93	'94	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07
No. of countries that introduced investment regime changes	43	57	49	64	65	76	80	83	89	71	70	82	102	93	93	98
No. of regulatory changes	77	100	110	112	114	150	145	139	150	207	246	242	270	205	184	98
% More favourable to FDI	100	99	98	95	86	89	94	94	98	93	95	90	87	80	80	76
% Less favourable to FDI	-	1	2	5	14	11	6	6	2	7	5	10	13	20	20	24

Source: UNCTAD

4

## 2. Marketing of countries

- ✓ **Investment promotion perceived by governments as a necessary public function**
- ✓ **Fast growing numbers of national, sub-national and local IPAs**  
196 national IPAs and around 300 sub-national IPAs (UNCTAD database)
- ✓ **Establishment of the World Association of Investment Promotion Agencies (WAIPA) in 1995**  
Presently 228 member IPAs from 156 countries

5

## Marketing of countries through IPAs

### Role of IPAs:

- ✓ Image-building
- ✓ Investment generation (incl. targeting)
- ✓ Investor facilitation
- ✓ Investor aftercare
- ✓ Policy advocacy

6

## Marketing of a location

Image-building example from the web site of THINK LONDON, the official FDI agency of London  
(www.thinklondon.com)

**WELCOME TO LONDON  
THE ULTIMATE CITY FOR BUSINESS**

*"London is the ultimate place to do business. Voted Europe's best city for business for 16 consecutive years, it offers you unrivalled opportunities – plus the skilled people, huge choice of locations and the expert support you need to make the most of them."*

7

## 3. Investor-targeting

### DEFINITION

Targeting is a way of maximising investor interest through the development and confidential promotion of investment projects tailored to the highest commercial priorities of those investors.

8

## Investor-targeting

- ✓ Governments follow national strategies to attract FDI in specific sectors to help them in furthering country development objectives
- ✓ Development of clusters and locational brand names
- ✓ Use by IPAs of investor-targeting strategies and techniques

9

## 9 Phases of Investor-Targeting

1. Identification of national and regional priorities
2. Sector and project prioritisation
3. Candidate company screening
4. Confirmation of targeting priorities
5. Development of specific projects
6. Matching TNCs to project proposals
7. Corporate appraisals
8. Identification of key executives
9. Initiation of contact and promotion

10

## Why investor targeting?

- Growing competition for foreign investment
- Helps to achieve strategic development goals
- Provides the opportunity to target companies with good corporate governance records
- Offers best prospects for success
- Improves efficient use of limited resources
- Enhances the understanding of corporate requirements by IPAs and governments

11

**AFTERCARE:  
A core function  
in investment promotion**

12

### DEFINITION

Aftercare can be any type of service provided by public sector organizations after the foreign investor has established a legal entity in the host country.

Its purpose is to improve the implementation rate of investment projects and encourage reinvestments.

13

### Examples of aftercare

- ✓ "Support was provided to a local subsidiary of a major international company to win a contract for the supply of components for a substantial capital goods product. The IPA assisted the local subsidiary in demonstrating that the region had the capability (infrastructure, supplier base, skilled labour...) to service the contract, and, in addition, provided a financial support package."
- ✓ "The IPA established a linkages programme after recognising that investors were not benefiting from a structured system of sourcing materials from local producers."
- ✓ "Continues facilitation of immigration formalities and the establishment of a technical committee to resolve implementation problems for major projects."

14

### The Reinvestment Potential of Aftercare

- ✓ 770,000 foreign affiliates worldwide.
- ✓ In certain regions, especially in developed countries, up to 70% of investment is linked to the existing investment base.
- ✓ UNCTAD-WAIPA survey respondents estimated on average that 32% of inward FDI is coming from reinvestments.
- ✓ In a 2004 UNCTAD-RBSC survey on the offshoring of services among the largest 500 European TNCs, as many as 40% of respondents stated that factors beyond pure benchmarking affect their off-shoring decisions, including internal lobbying by their foreign affiliates.

15

### Rationale for aftercare

#### The business case for aftercare

- Established TNCs are a "captive audience"
- Aftercare is less costly than attracting new investors
- An IPA's role of "trusted adviser" is most effective
- Satisfied TNCs become ambassadors for a location
- Aftercare contributes to an IPA's policy advocacy work

#### The economic development case

- Potential benefits of FDI can be increased through effective aftercare programmes, introducing new technologies, international linkages, university links in new R&D, etc.
- Strategically chosen interventions can support economic development objectives

16

### Aftercare services

- ✓ **Administrative services** – enable TNC operations
- ✓ **Operational services** – support the effective and efficient operation of the TNC
- ✓ **Strategic services** – have impact on the future direction of the firm

17

### The aftercare service space

The aftercare service space				
Type of Service	Strategic	Establish firm so that it operates successfully and performs its mandate	Competition legislation, product development, R&D capabilities	Where does the firm want to be in 5 years time - strategic leader, centre of excellence?
	Operational	Find office space, factory, recruit staff, purchase and install ICT equipment, power, etc	Staff training, new premises, improve connectivity, local supply chains	Local R&D, University collaboration, deep relationships with unions
	Administrative	Visas, import permits, operate in free trade zone, work permits for spouse	International school, obtain food and drugs administration approvals	Agreement with tax authorities, collaborate with public sector on planning and transport
		Short term	Medium term	Long term
Time				



## Elements in operating an aftercare unit

- ✓ Understand the investor community
- ✓ Develop objectives and identify partners
- ✓ Assess the resources situation and develop organizational options – *the company friend; the project approach; the aftercare team approach; the integrated approach*
- ✓ Segment, target, position and design the aftercare programme
- ✓ Deliver services, monitor and evaluate the results

19

## Challenges and best practices

- ✓ *The role of the Internet*
- ✓ *Institutional credibility*
- ✓ *Capability of employees*
- ✓ *Influencing TNCs*
- ✓ *Continuity*
- ✓ *Customer responsiveness*
- ✓ *Proactive versus reactive approaches*
- ✓ *Client Management*
- ✓ *Organisational involvement*
- ✓ *Evaluation of IPA aftercare impacts*
- ✓ *The human factor*

20

## A Practical Approach To Policy Advocacy

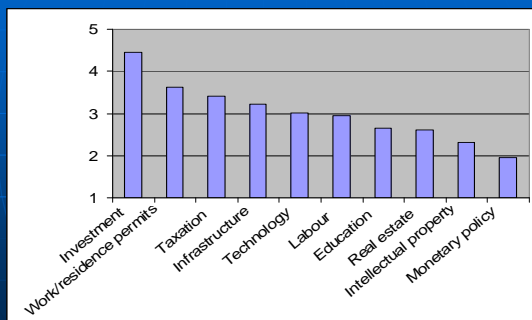
21

## Definition: Policy Advocacy by IPAs

- IPA efforts to effect changes in **regulations, laws and government policies** pertaining to:
  - Investment
  - Trade
  - Immigration
  - Taxes
  - Labour
  - Real estate
  - Intellectual property rights
  - or any area which affects investment promotion and facilitation or other IPA goals, such as sustainable development.

22

## Policy Areas by Importance to IPAs



Source: UNCTAD Survey of 55 IPAs, 2006-2007

23

## The Goals

1. Shape the investment climate to attract greater inflows of FDI
2. Promote policies that will allow greater benefits to be extracted from that FDI
3. Build national competitiveness in a global economy

24

## IPA Limitations

- IPAs are policy advocates not policy-makers
- Some stakeholders may oppose change
- Understanding of the private sector and the investment climate may be poor
- May not have a full picture of national goals
- Resource limitations and pressure to show short-term results in terms of FDI inflows may push policy advocacy aside

25

## IPA Advantages

- Best position within government to understand overall investor decision-making
- Many influential natural allies: foreign business, domestic business and (potentially) domestic labour
- Much of the policy advocacy groundwork is already done in other IPA activities

26

## A 4-Step Approach



27

## I. Problem ID/Agenda-Setting

- a. Decide what counts as a problem, based on IPA goals and client consultations
- b. Study the context of the problem
- c. Prioritize problems based on impact and likelihood of change
- d. Articulate actionable agenda items

28

## II. Develop the Best Policy Remedy

- Formulate several alternative policy fixes
- Example Problem:
  - Underdeveloped agroprocessing sector
- Example Policy Remedies:
  - Tax incentives
  - Looser restrictions on foreign ownership, employment
  - Industrial parks w/ committed, reliable utilities and communications infrastructure
- Choose based on explicit evaluative criteria, e.g. *likelihood/amount of FDI, anticipated spillovers, implementation/advocacy costs, negative side effects, likelihood of change*

29

## III. Advocate the Policy

- Prepare
  - Research and specific policy proposals (Steps I and II)
  - Communications material (newsletters, reports, press releases)
  - Evidentiary support (case studies, market analysis, impact reports)
- Persuade decision-makers, opponents, the public
- Publicise
  - to frame the debate
  - to build consensus indirectly
  - to educate
- Mobilise
  - Beneficiaries,
  - "Champions"
  - Partners
  - Supporters
- Build consensus through...

30

## IV. Monitor and Evaluate

1. Is the policy change effected having the impact it was meant to have?
2. Have there been any unintended consequences of the policy which detract from its overall effectiveness?
3. Could the policy be improved further?
4. Were the costs - financial, political, etc. - expended on the change worth the resulting benefits?
5. What lessons were learned in effecting the change that could be used to improve the effectiveness of future policy advocacy efforts?

31

## Mauritius' Case: Overcoming Resistance from Domestic Business

- IPA recognised VA export potential of seafood industry
- Proposed framework for FDI attraction to Ministry
- Resistance raised from small local operators and fishermen
- Workshops for domestic stakeholders to learn differences between artisanal and industrial fishing industries
- Committee set up to review problems w/ the reforms and propose remedies on a monthly basis
- Final result: fewer constraints, less bureaucracy, and an industry growing—for foreign and domestic firms—with the stimulus of FDI

32

## 7 Tips for More Effective Policy Advocacy

1. Have a PA master plan
2. Build capacity for research and communication—internally and through partners
3. Advocate proactively and assertively
4. Expand the IPA's policy horizon
5. Avoid "self-serving" policy proposals
6. Constantly educate stakeholders
7. Mobilise and institutionalise support

33

## Investment promotion and the crisis: Policy implications

34

## How can investment promotion institutions or agencies (IPAs) deal with the crisis?

Less FDI will mean tougher competition for investment projects. At the same time, many IPAs are facing difficulties in securing adequate public funding from governments that are stretched for money. IPAs should therefore reassess their current activities and provide their governing bodies with plans on how to face the new challenges.

### Remedies that should be considered...



35

## ...strengthen investor aftercare services

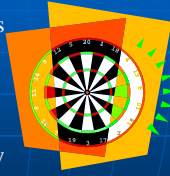
- ✓ To soften the blow of the economic slowdown on the established business community.
- ✓ To strengthen the ties between foreign affiliates and the local economy, e.g. by promoting and developing local supply chains.
- ✓ To develop a reputation that the host government cares for investors.



36

### ...target investors in promising sectors

- ✓ IPAs should shift their promotion efforts towards those foreign markets and economic sectors that offer better FDI prospects.
- ✓ The crisis can provide an opportunity to target new types of investors, such as investors from the South.



37

### ...advocate policies to improve the investment climate

- ✓ IPAs should address immediate problems that companies face due to the crisis...
- ✓ ...and work to strengthen competitiveness in the long run, through improved infrastructure, legal framework, education, and training.



38

### ...and improve the effectiveness of IPA operations

- ✓ IPAs should review their roles and activities in order to strengthen effectiveness and efficiency.
- ✓ The roles and activities of IPAs should be adapted to changed circumstances



39



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5



APEC-UNCTAD Regional Training  
Course on the Core Elements of  
International Investment Agreements in  
the APEC Region



15-19 June 2009  
Kuala Lumpur, Malaysia

## Investment promotion provisions in International investment agreements

**Anna Joubin-Bret**

Senior Legal Advisor

Work Programme on international investment agreements  
Division on Investment  
UNCTAD

## Why do countries sign IIAs?

For **host countries** (traditionally developing)

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

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.

2

## The importance of investment promotion provisions in IIAs

- IIAs do not always have a substantial impact on FDI inflows
- In some cases the correlation between the conclusion of IIAs and increased FDI flows is weak
- Therefore investment promotion provisions in IIAs need to be strengthened

3

## IIAs and investment promotion strategies

- The prime objective of IIAs from a host country perspective is to attract FDI
- IIAs should be seen as an integral part of national investment promotion strategies
- IIAs create a stable and predictable legal environment for attracting FDI
- Despite this: IIAs focus clearly on investment protection NOT promotion

4

## Only a few IIAs include investment promotion provisions

- Only a small minority of IIAs include specific investment promotion provisions
- Investment promotion provisions are drafted as voluntary commitments (not legally binding)
- Usually the provisions are very broad, without follow up mechanisms
- IIAs are evolving rapidly, new issues are involved – this is an indication that countries are interested in exploring new provisions
- Opportunity to strengthen investment promotion provisions in IIA negotiations

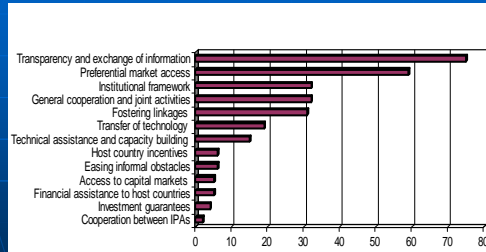
5

## Examples of investment promotion provisions in IIAs

- Transparency and exchange of information
- Creation of an institutional framework
- Joint activities (investment seminars)
- Fostering linkages (stimulate joint ventures)
- Transfer of technology
- Host country incentives
- Technical assistance
- Easing of informal obstacles to investment
- Cooperation between investment promotion agencies

6

## Forms of investment promotion measures in IIAs



7

## Transparency and exchange of information

ECONOMIC PARTNERSHIP AGREEMENT BETWEEN INDONESIA AND JAPAN

"Article 98

Promotion and Facilitation of Investment

1. (a) Both Parties shall cooperate in promoting and facilitating investments between the Parties in the energy and mineral resource sector through ways such as:

[...]

(ii) facilitating the provision and exchange of investment information including information on the laws, regulations and policies of the Parties;

(iii) encouraging and supporting investment promotion activities of each Party or the business sectors of the Parties, relating to, in particular, the exploration, exploitation and production of energy and mineral resource goods and the infrastructural facilities in the energy and mineral resources sector; and

(iv) discussing effective ways of creating stable, equitable, favourable and transparent conditions for investors"

8

## Transparency and exchange of information

Economic Partnership Agreement between Japan and Thailand

" Each Party shall ensure that its laws, regulations, administrative procedures, and administrative rulings of general application with respect to any matter covered by this Chapter [Investment] are published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them "

9

## Creation of an institutional framework

Economic Partnership Agreement between Japan and Mexico

Article 139: Cooperation in the Field of Trade and Investment Promotion

For the purposes of the effective implementation and operation of this Article, a Sub-Committee on Cooperation in the Field of Trade and Investment Promotion (hereinafter referred to in this Article as "the Sub-Committee") shall be established pursuant to Article 165 [Joint Committee]

The functions of the Sub-Committee shall be: (a) reviewing the implementation and operation of this Article; (b) discussing any issues related to this Article; (c) reporting the findings of the Sub-Committee to the Joint Committee".

10

## Joint activities

The Free Trade Agreement between Panama and Singapore

"Article 16.3

investment promotion shall include: organizing joint investment promotion activities, conferences, seminars, workshops, meetings, outreach/education programs, and joint promotion activities of specific projects of interest."

11

## Fostering linkages

The Free Trade Agreement between Tunisia and Turkey

"Article 37

With the view to further enhance trade and economic activities, the Parties shall give priority to promoting business and investment opportunities as well as joint ventures between small and medium sized enterprises (SMEs) of the two countries. Within this context, the Parties will:

- exchange expertise on entrepreneurship, management, research and management centers, quality and production standards;
- provide market information to create investment opportunities;
- furnish published documents concerning SMEs."

12



## Transfer of technology

### Encouraging transfer of technology:

Cooperation Agreement between EU and Sri Lanka

"The Contracting Parties will, in accordance with their mutual interest and the aims of their development strategy in this area, **promote scientific and technological cooperation with a view to: (a) fostering the transfer of know-how and stimulating innovation**"

13

## Transfer of technology

### Restricting transfer of technology:

Economic Partnership Agreement between Japan and Chile

Performance Requirements

"Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with investment activities of an investor of a Party or of a non-Party in its Area:

[...]

**transfer technology**

[...]"

14

## Technical assistance

Economic Framework Agreement between ASEAN and India

"[t]he Parties agree to implement **capacity building programmes and technical assistance**, particularly for the New ASEAN Member States, in order to **adjust their economic structure and expand their trade and investment with India**"

15

## Host country incentives

- Host developing countries often use fiscal instruments, such as tax holidays, favorable tax regimes and exemptions to attract FDI
- Some IIAs address the issue of host country incentives:

The Agreement on Promotion, protection and Guarantee of Investments between the Member States of the Islamic Conference:

"The contracting parties will endeavour to **offer various incentives and facilities for attracting capitals** and encouraging its investment in their territories such as commercial, customs, financial, tax and currency incentives, especially during the early years of the investment [...]" (emphasis added)."

16

## Host country incentives

The BIT between the Czech Republic and the United Arab Emirates:

"Article 2  
Promotion and Protection of Investments  
[...]"

(ii) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, **incentives** and other forms of encouragement and **the host State shall grant them all assistance, consents, approvals, licenses and authorizations to such an extent and on such terms and conditions** as shall, from time to time, be determined by the laws and regulations of the host State."

17

## Host country incentives

- As illustrated above, most IIA provisions on incentives are drafted in a general manner
- No sufficient clarification as to the conditions under which such measures should be granted, and to what extent
- This may create difficulties when the agreement enters the implementation phase

18



## Incentives and performance requirements

- Some IIAs condition the granting of incentives with the fulfillment of some performance requirements
- Host countries may impose certain types of requirements on foreign investors, requiring them to achieve certain objectives
- The objective: maximize the beneficial impact of foreign investment on national development objectives

19

## Easing of informal obstacles to investment

Free Trade Agreement between the EFTA States and Lebanon

"The EFTA States and Lebanon shall aim to promote an attractive and stable environment for reciprocal investment. Such promotion should take the form, in particular, of [...]  
(c) development of uniform and **simplified administrative procedures**"

20

## Cooperation between investment promotion agencies

- Joint promotion activities may take the form of closer cooperation between investment promotion agencies of the contracting parties
- Most IIAs do not mention investment promotion agencies and their role in promoting foreign investment
- A few agreements call for closer collaboration in this respect

21

## Cooperation between investment promotion agencies

The Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area (1998):

"In respect of the Promotion and Awareness Programme, Member States shall:

- Organise joint investment promotion activities e.g., seminars, workshops, inbound familiarisation tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation;
- Conduct regular consultation among investment agencies of ASEAN on investment promotion matters;
- Organise investment-related training programmes for officials of investment agencies of ASEAN;
- Exchange lists of promoted sectors/industries where Member States could encourage investments from other Member States and initiate promotional activities; and
- Examine possible ways by which the investment agencies of Member States can support the promotion efforts of other Member States."

22

## Cooperation between investment promotion agencies

The investment promotion article of the Cotonou Agreement between the European Union and the group of African, Caribbean and Pacific states (ACP) calls specifically on the parties to:

*"support capacity building for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment"*

23

## Cooperation between investment promotion agencies

The FTA between the Republic of Korea and Singapore:

- The co-operation between the Korea Trade- Investment Promotion Agency ("KOTRA") and the International Enterprise Singapore Board ("IE Singapore") [...] shall include the following:
  - joint organisation of industry specific business missions and activities which are focused on mutually agreed high growth sectors, including but not limited to, the infocommunications technology, electronics, automotive, food & beverage and the logistics sectors;
  - electronically linking the online business matching databases of the Parties to bring together companies keen on establishing business ties with each other;
  - facilitation of Korean enterprises to explore new markets in the region through Singapore and business collaboration with Singaporean companies by setting up a Korean Business Support Centre in Singapore, and subject to there being sufficient demand and interest by Singaporean companies, Singapore will establish a Business Centre in Korea; and
  - using all reasonable efforts to encourage each Party's companies to participate in exhibitions organised by the other Party, in particular if the exhibitions pertain to sectors which the Party is actively promoting in its country.
- The Parties shall, where appropriate, facilitate such co-operation between KOTRA and IE Singapore.

24

## Voluntary commitments or binding obligations ?

- Contrary to investment protection, investment promotion provisions are not legally binding
- Drafted in a very general manner (except in rare cases)
- No follow-up mechanism to monitor if the provisions have been implemented
- Ample flexibility for the parties as to how and whether or not to implement them

25

## Strengthening investment promotion provisions

- Investment promotion provisions are active in nature (commitment to do something) – investment protection provisions are passive (refrain from discriminatory measures)
- Most IIAs focus on host country measures (transparency, easing of obstacles to investment)
- Need to put more focus on home country measures (technical assistance, TOT, financial assistance to host countries, )
- Establish a follow up mechanism (council or a committee to monitor investment promotion provisions)

26

## Conclusion

- A major deficiency in most IIAs dealing with investment promotion is their lack of specificity
- They often provide no details on the pre-conditions and modalities of the investment promotion activities agreed upon
- Strengthening investment promotion provisions will contribute to more balanced IIAs (currently the provisions favour the capital exporting country)
- It will also increase the impact of IIAs on FDI flows

27

THANK YOU

28

## Open discussion:

### Investment promotion provisions in IIAs: the role of IPAs

29

#### Making use of IIAs

- To what extent does your IPA use international investment agreements in its investment promotion strategy?

#### Involvement in the negotiations of IIAs

- Is your IPA involved in the actual negotiations of international investment agreements?
- What kind of provisions would you like to see included in IIAs?
- Is your IPA involved in IIA feasibility studies and identification of treaty partners?

#### Application of IIAs

- To what extent are investment promotion provisions in IIAs applied? What is the role of your IPA in implementing these provisions?
- Do you cooperate with IPAs from other countries as a result of an IIA Provision?

30



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

# Avoidance and Settlement of Investment Disputes

APEC-UNCTAD Regional Training Course  
on International Investment Agreements

David A. Pawlak  
Kuala Lumpur, Malaysia  
June 15-19, 2009

## Topics To Be Covered

- I. Intro - Colombian case study
- II. Effective Legal Frameworks
- III. Effective Administrative Practices
- IV. Consultations Practice Tips
- V. Overcoming Settlement Obstacles

## I. Introduction

- Colombian case study
  - Stocktaking for targeted training
  - Recommendations

## II. Stocktaking

- Assess investment obligations
- Assess capacity to manage disputes

## II. Stocktaking (cont'd)

- Identify sensitive sectors
  - Inward investment flows sources & destinations
  - Key “covered” sectors (e.g., telecoms)
  - Relevant regulatory authorities
- Target training to relevant officials

## II. Stocktaking (cont'd)

- Catalog past investor claims and complaints:
  - Nationality of the investor
  - Relevant economic sector
  - Offending law, regulation or practice
  - Resolution of the dispute

## II. Stocktaking (cont'd)

- Take advantage of prior analyses, *e.g.*:

UNCTAD Investment Policy Review, Vietnam, Sept. 2008  
<http://www.unctad.org/Templates/webflyer.asp?docid=10104&intItemID=2554&lang=1&mode=highlights>

OECD Investment Policy Review, Peru, Nov. 2008  
[www.oecd.org/daf/investment/countryreviews](http://www.oecd.org/daf/investment/countryreviews)

OECD Investment Policy Toolkit  
[www.oecd.org/investment/pfitoolkit](http://www.oecd.org/investment/pfitoolkit)

## Recommendations

1. Designate Lead State Agency
2. D.C.-based Liaison To Lead State Agency
3. Designate Interagency Contact Persons For Investment
4. Lead State Agency Budget
5. Authority To Collect And Produce Evidence
6. Authority To Pursue & Conclude Settlement
7. Informal Procedures For Interagency Consultation
8. Public Procurement Procedures
9. Payment & Reimbursement Of Settlements & Awards

## Recommendations (cont'd)

- Effective Legal Frameworks
- Effective Administrative Practices

## II. Effective Legal Frameworks

- Lead State Agency
- Authority To Collect & Produce Evidence
- Authority To Pursue & Conclude Settlement
- Payment & Reimbursement Of Settlements & Awards

## Lead State Agency

- (i) serve as a resource on investment treaty obligations & disputes;
- (ii) retain records relating to arbitration proceedings for policymakers and counsel;
- (iii) serve as primary interlocutor for aggrieved investors;**
- (iv) facilitate early amicable settlements;**

## Lead State Agency (cont'd)

- (v) collect evidence and information from other agencies regarding investment issues;
- (vi) develop the State's "institutional memory" on investment matters, including the contributions of expert outside counsel; and
- (vii) in the event of a claim, take the lead in State's defense (*e.g.*, liaise with outside counsel and experts).

## Authority To Collect Information And Evidence

- Power to gather evidence from all relevant government agencies & instrumentalities
- Legal consequences for uncooperative agencies or officials
- Establish procedures in advance for sensitive or confidential materials

David A. Pawlak LLC

13

## Authority To Pursue Settlement

- Frequent amicable settlements
  - ICSID registry
  - UNCTAD statistics for 2008
    - 46 cases discontinued following settlement
  - NAFTA examples
    - Settlement
    - Deterrence

David A. Pawlak LLC

14

## Authority To Pursue Settlement (cont'd)

### US-Singapore FTA art. 15.14 Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent *should initially seek* to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

David A. Pawlak LLC

15

## Authority To Pursue Settlement (cont'd)

### US-Singapore FTA art. 15.15 Submission of a Claim to Arbitration

Provided that . . .

- > Written notice of intent to arbitrate at least 90 days before submission of claim (Art. 15.15(4)).
- > Six months must have elapsed since events giving rise to claim (Art. 15.15(5))

David A. Pawlak LLC

16

## Authority To Pursue Settlement (cont'd)

- Authority to conduct *and conclude* settlement
  - Who
  - When
  - Value
  - Other legal requirements

David A. Pawlak LLC

17

## Payment And Reimbursement Of Settlements & Awards

- Who pays?
  - National budget
  - Offending ministry's budget
  - Hybrid models

David A. Pawlak LLC

18

## Payment And Reimbursement Of Settlements & Awards (cont'd)

- *Ad hoc* allocation of resources
- **Standing Fund**
  - US Judgment Fund
  - <http://www.fms.treas.gov/judgefund/background.html>

## III. Effective Administrative Practices

- Publicly-known Lead State Agency
- Publicly-known contact person(s)
  - Interagency consultations
  - Speaking with one voice
  - Transparency of process

## III. Effective Administrative Practices (cont'd)

- Establish interagency contact group
  - Sub-central governments
  - State-owned enterprises
- Informal procedures for interagency consultation
- Interagency agreement regarding outside communications re claim

## III. Effective Administrative Practices (cont'd)

- Meet with officials at relevant agencies
- Collect relevant documents/archival records
- Identify experts/witnesses to assist counsel
- Organize in-house team to address claim and assist outside counsel

## III. Effective Administrative Practices (cont'd)

- Information memorandum
- Press release, with advice from counsel
- Budgetary authority to settle
- Timelines for action

## IV. Productive Consultations (cont'd)

- When held?
- Preparations for consultations
  - Expert input
  - Relevant agencies
  - Outside counsel
  - Confidential case analysis memo
  - Language issues



## IV. Productive Consultations (cont'd)

- **State participants**
  - Representatives from all relevant central government agencies
  - Representatives from all relevant levels of government
  - Authorized decision makers
- **Claimant-investor participants**
  - Counsel
  - Company executive should accompany counsel
  - Authorized decision makers

## IV. Productive Consultations (cont'd)

- **Inquiries – Listening mode**
  - Facts
  - Legal theories
- **Costs Awards**
  - Provide specific examples (*E.g.*, Methanex; Plama)
- **Follow-up**
  - Initial recommendations memo
  - Inter-agency input
  - Coordinated communications with investor
  - Encourage additional consultation meetings

## V. Overcoming Obstacles

- **Official unwillingness to agree to payment absent an award**
- **Government transitions**
- **Insufficient engagement on the part of decision makers**
- **The Press – a 4th pillar of government?**

## V. Overcoming Obstacles (cont'd)

- **Timing may be key (critical junctures for settlement)**
- **Attorney payment structure**
- **The desire for an award by parties, their counsel and the tribunal**
- **Confidentiality of settlement negotiations and terms**
- **Creative solutions short of monetary payment**

## VI. Conclusion

- **Assess obligations and capacities**
- **Adopt practical recommendations to enhance settlement prospects**
  - Effective legal frameworks *and*
  - Effective administrative practices
- **Seize opportunity of consultation meetings with investors**
- **Anticipate obstacles to achieve settlement**

## Thank you

David A. Pawlak

Grojecka 40/m 11  
02-320 Warsaw  
Poland  
+48.22.822-6081  
+48.511.242-010

1661 Crescent Place  
Washington, D.C. 20009  
USA  
+1.202-667-5797  
+1.917.969-9868

dapawlak@davidpawlak.com





# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

Produced for:  
Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

©2009 APEC Secretariat

APEC#209-CT-01.5

## Peruvian Investment Disputes Coordination System

Vanessa Rivas Plata (Ministry of Economy and Finance)  
David Barrientos (Ministry of Foreign Affairs)

## Peruvian Investment Disputes Coordination System

- Previous situation
- Current situation: Law 28933
- Regional actions or projects

## Previous Situation - 1

Context:

Liberalization and attraction of FDI (from 90's)

- Disputes arise and there was not an institutional structure
  - Representation of the Peruvian State was taken over by the Ministry of Foreign Affairs, that oversaw the coordination of the defense and hired international lawyers to represent us in ICSID. (Compañía Minera Internacional, Lucchetti SA)

## Previous situation



## Previous Situation - 2

- Ad hoc Committees were created in order to optimize the coordination and response of the Peruvian State in the arbitration proceedings (Aguaytía Energy; Duke Energy cases)
- Ad hoc Committees were chaired by the Ministry of Economy and Finance, but the representation and the recruitment of international lawyers continued to fall on the Ministry of Foreign Affairs.

## Current Situation: Law 28933

- Law 28933 created the Investment Disputes Coordination System with the following objectives:
  - a) Improve the response and coordination within the public sector in order to face International Investment Disputes, enabling a timely and appropriate care.
  - b) Collecting the information of the agreements and investment treaties (BITs FTAs) that refer to international investment dispute settlement mechanisms.
  - c) Establishing a mechanism to alert the arising of any International Controversy Investment.
  - d) Centralizing the information regarding the International Investment Disputes

## Application of the Investment Disputes Coordination System (Law 28933)



- Enacting a legal framework allowing a timely and effective care of the investment disputes that arise out between investors and the Peruvian State, providing an adequate level of coordination between relevant sectors, organizations and institutions.
- Establishing roles and competences for each of them within their functional capabilities and allocating resources that are necessary for these purposes.
- Establish a clear mechanism for registration and updating of the commitments made by the State in signing treaties or agreements on investment that refers to international mechanisms for dispute settlement.

## Application of the Investment Disputes Coordination System (Law 28933)



- Provides a mechanism for alerting in order to get the appropriate and organized attention of the State when such conflicts arise.
- Establishes the composition of a multisectoral commission, with participation of Ministry of Justice, Ministry of Foreign Affairs and Ministry of Economy and Finance, and the various public entities involved, which may participate in the negotiations and in planning the defense strategy.
- Assign the responsibility of hiring lawyers and other professionals needed in cases that require the legal defense of the State in international investment disputes and provides budgetary mechanisms for the expenses arising from it.

## Alert Mechanism



## Legal Advisory Centre on Investor – State Disputes project



- Reasons for creating the Centre:
  - The exponential growth of agreements (BITs and FTAs) and the disputes arising from them.
  - Obstacles for the majority of developing countries in order to address the procedures of the ISDS:
    - Lack of permanent professionals in order to deal with defense
    - High costs of the State's defense in arbitration proceedings
- Objective of the Centre:
  - Enhance the capability of the States in order to face international investment disputes (prevention, advisory, representation, capacity building)

## Legal Advisory Centre on Investor – State Disputes



- Characteristics
  - Intergovernmental
  - Independent
  - Legal and financially efficient in terms of cost - benefit.
- Services of the Centre
  - It should provide high quality professional services in the same way that most recognized lawyers do.

The Centre should provide a variety of services according to its budget and experience. Could be developed gradually services, defense equipment and training to Local defense.

- 

## 2 Centres?



- The UNASUR project
- The Central American countries and Colombia project