



**Asia-Pacific
Economic Cooperation**

**Capacity Building for
International Investment Agreements**

Singapore, May 2008

Washington DC, November 2008

Investment Experts' Group
APEC Committee on Trade and Investment

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PROJECT SUMMARY

Background and Objectives

The APEC Capacity Building for International Investment Agreements is a project of APEC Investment Experts' Group (IEG). The project was sponsored in the IEG by the United States, and co-sponsored by Australia, Canada, Japan, Mexico, Peru and Singapore. Funding for the project was provided from APEC's Trade and Investment Facilitation Special Account, and by the East Asian and Pacific Affairs Bureau of the U.S. Department of State.

The purpose of this project was to improve understanding among APEC member economies of the scope and content of high-standard international investment agreements (bilateral investment treaties and trade agreements with investment provisions), and to enhance the capacity of member economies to negotiate and implement these agreements. The project was executed over two one-week workshops. The first workshop, held in Singapore in May 2008, focused on the substantive provisions of high-standard international investment agreements. The second workshop, held in Washington DC in November 2008, focused on the mechanics and management of investor-State dispute settlement under these agreements.

Project Outcomes

Over the course of two weeks, the workshops were attended by 100 investment negotiators and policy officials from all 21 APEC member economies. The workshops afforded participants a unique opportunity for meeting and discussion with leading private attorneys in the field of investment treaty law, scholars of international investment jurisprudence, and experienced arbitrators of investment disputes. Through two intensive one-week workshops, the project covered a comprehensive range of topics relating to high-standard international investment agreements: their scope and content; the interaction between policy objectives and treaty text; strategies for negotiation; trends and recent developments in international treaty practice (including the impact of arbitration on rulemaking); and a detailed examination of the mechanics and management of investor-State dispute resolution under these agreements.

Each five-day workshop was comprised of 20 sessions led by mixed panels of faculty that afforded participants broad insights into the issues being discussed, from the perspectives of those who negotiate investment agreements, those who study them, those who might bring an investor claim under the agreements, those who would defend States against such claims, and those who might serve as arbitrators in tribunals established to consider such claims. Participant feedback on the program and execution of the workshops was highly positive. Many commented that it was the best APEC workshop they had attended, and most commented that the workshops had contributed to an improvement of knowledge and skills that would help them in their official functions.

Workshop Organizer

The workshops of this project were organized by the International Law Institute (ILI), in partnership with the Office of the U.S. Trade Representative. The ILI is an independent, not-for-profit educational institution that specializes in providing training and technical assistance to government officials in the areas of law, economics, and good governance. ILI has provided training to over 15,000 officials from more than 185 countries. Its faculty and advisors include over 500 professionals of multiple nationalities from government, academia, multilateral organizations, and the private sector.

www.ili.org



WORKSHOP ONE

Singapore, 5-9 May 2008

Workshop Summary

The Week One workshop was held at Le Meridien Hotel in the Orchard Road area of Singapore. The workshop was attended by 48 participants from 20 APEC economies, as well as representatives of the APEC Secretariat. The workshop was instructed by a faculty of 13 investment agreement experts, including government officials from five APEC economies. At the end of the first day, participants and faculty attended a reception at Le Meridien, sponsored by the U.S. National Center for APEC. Additional hospitality for participants was also provided during the week by Fulbright and Jaworski LLP.

A central theme of Week One was that effective drafting and negotiating of international investment agreements (IIAs) requires a firm understanding of the substantive provisions of these agreements. The week began with a discussion of the role that investment agreements play in reducing risk for foreign investors, thereby facilitating cross-border investment. Panelists noted that although IIAs can contribute to a more favorable investment climate for certain investors, domestic institutions and infrastructure are equally important. A speaker from the private investment community expressed his support for the inclusion in IIAs of provisions that improve the domestic business environment (such as with respect to transparency).

During the week, panelists introduced the evolution of international frameworks for protecting foreign investment, beginning with a system in which investors relied on their home government to resolve disputes with a host state on their behalf. Panelists discussed the limitations of this model, both from the perspective of States and investors, and how these limitations led to development of the modern system of IIAs in the 20th century. The key innovation of this system has been the access to private remedies for investors.

The workshop addressed a number of important substantive issues for IIA drafters, beginning with foundational issues such as definitions of “investment” and “investor”. Panelists emphasized the importance of these definitions for establishing the scope of the agreement’s obligations, and thereby for establishing the jurisdiction of dispute settlement tribunals. Panelists discussed the interpretations of investor-State tribunals on issues such as dual nationality of investors and indirect ownership of assets. Panelists also discussed IIA approaches to the issue of admission and establishment of foreign investments, noting the interaction between the language of these provisions and fundamental policy questions regarding economies’ openness to foreign investment.

Days Three and Four of the workshop focused on core investor protections of IIAs – obligations concerning standards of treatment, protection from expropriation without compensation, the ability to freely transfer capital, and disciplines on the use of performance requirements. In this discussion, panelists focused on only on the meaning of IIA provisions relating to these obligations, but also on how these provisions have been interpreted by tribunals in the course of investor-State arbitrations.

For instance, panelists addressed the question of what constitutes an expropriation, with one panelist suggesting that the criteria established in IIAs and in customary international law for when an investment may be expropriated have become defining conditions for determining whether it has occurred. Panelists discussed attempts by IIA Parties to provide guidance to tribunals on this issue, particularly with respect to what constitutes an indirect expropriation, an area subject to several investor-State arbitrations.

IIA obligations regarding national treatment, most-favored nation treatment, and fair and equitable treatment were also explored in depth during the workshop. Panelists noted that the national treatment obligation, though conceptually straightforward, is in practice subject to differences in interpretation, particularly with respect to questions regarding “like circumstances”. In addition to standards of treatment, the panelists also discussed provisions in IIAs on free transfers and performance requirements, noting that these obligations, while not frequently the subject of investment disputes, are nevertheless extremely to the day-to-day operations of investors.

On the final day of the workshop, participants heard from panels comprised solely of APEC government officials responsible for the negotiation of IIAs. Panelists discussed the different approaches of their governments to the development of negotiating texts and strategies. Officials of economies with federal systems of governments and high stakeholder interest in IIAs described the long consultative processes that led to development of ‘model’ negotiating texts. Officials from economies that do not negotiate IIAs on the basis of a model described how their governments approach negotiations, for instance by developing texts on the basis of the most recent IIA concluded, or with reference to developments in the IIAs of other major trading economies. Panelists held an engaging discussion on the advantages and limitations of negotiating on the basis of a model text.

APEC-economy panelists also shared the experiences of their governments with respect to internal coordination during negotiations. They noted the importance of educating government ministries about the obligations and operation of IIAs, and of involving officials from across the government in negotiations – noting that this is particularly important in the identification and negotiation of “non-conforming measures”. Several panelists described formal mechanisms or commissions that had been established within their governments to serve this purpose. The importance of communication with key stakeholders during the negotiation process, including the domestic business community, was widely noted.

* * *

The full agenda, speaker biographies, and participant list for this workshop are included below. Presentation and reading materials for the workshop were provided to participants in paper and electronic form, and were posted to the APEC Collaborative System website.

Workshop Agenda

TIME	DAY 1
8:00 – 8:45 am	<p><u>Registration</u></p> <p style="text-align: center;">Introduction to International Investment Law and Agreements</p>
9:00 – 10:30 am	<p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • What is investment in economic terms? • Contribution of investment to economic growth and development • Role of international investment agreements in strengthening the investment climate and promoting foreign investment • Who are investors: private and public sector investors • Why investors invest: corporate strategies
10:30 – 10:45 am	<p>Question and Answer</p> <p>Session Description: This session addresses the economic implications of the two main categories of foreign investment, direct investment and portfolio investment. It highlights the economic benefits of foreign investment, with an emphasis on the importance of private flows of foreign capital, especially for developing economies, and on methods to increase such flows including through bilateral and multilateral trade and investment agreements.</p>
10:45 – 11:00 am	<p>Break</p>
11:00 – 12:30 pm	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Historical background of international law of foreign investment • Promotion of foreign investment: from <i>ad hoc</i> approaches (investment contracts) to bilateral and multilateral approaches (bilateral and multilateral investment treaties and free trade agreements) • Sources of international law applicable to modern investment treaties and investor-state investment disputes
12:30 – 12:45 pm	<p>Question and Answer</p> <p>Session Description: This session provides an introduction to the international law of foreign investment; international initiatives that have been undertaken to encourage private flows of foreign capital; the role of international organizations such as the WTO, the UNCTAD, the World Bank, the</p>

TIME	DAY 1— <i>cont'd</i>
	<p>OECD and others in promoting improvement in investment climates and investment protection. The session will conclude by touching upon the sources of international law applicable in interpretation of investment treaties. The focus will be on the sources enumerated in Article 38 of the ICJ Statute. The more technical aspects of this subject will be covered in Week Two, Day 2, Morning Session 1, under the discussion of Applicable Law.</p>
12:45 – 2:15 pm	Lunch
2:15 – 3:45 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • The ICSID and MIGA Conventions • Discussion of BITs and multilateral agreements with investment provisions concluded by APEC economies • Latest generation of investment treaties: United States Model BIT of 2004 <p>Session Description:</p> <p>This session discusses the creation of the ICSID and later the MIGA Conventions as a direct response to the increasing needs, especially in developing countries, to attract foreign private capital; FCNs, BITs, and FTAs as vehicles to promote and protect foreign investment; and the increasing frequency with which investors have sought protection under BITs and other investment agreements</p>
3:45 – 4:00 pm	Break
4:00 – 5:30 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Investment treaties scope and coverage with an emphasis on selected investment treaties of APEC member economies • Specific scope issues: differences between international investment and trade; FTAs and their coverage of both subjects; investment agreements and regulation of services, taxation, and transparency issues; relationship of the latter to trade • Latest model investment treaties: U.S. Model BIT of 2004 • Negative list framework (brief mention; more extended discussion in Day 5)
5:30 – 5:45 pm	Question and Answer

TIME	DAY 1—<i>cont'd</i>
	<p>Session Description:</p> <p>This session will provide a general overview of the structure and operation of the new investment agreements and key provisions of such agreements, such as definitions, substantive standards of protection, and general exceptions. Furthermore, it highlights the differences between the international investment and international trade regimes; possible areas that they could overlap such as services; and the regulation of matters such as services, taxation and transparency under investment treaties; and the relationship and interaction between the latter and stand-alone chapters in FTAs dealing with the same. In addition, the session introduces some of the latest developments in the structure of investment treaties with an emphasis on the U.S. Model BIT of 2004. Finally, it briefly explains what a negative list is under investment treaties.</p>

TIME	DAY 2
9:00 – 10:30 am	<p style="text-align: center;">Investment Treaties: Key Definitions</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Traditional approaches to the definition of investment under investment agreements (e.g., exhaustive list, open list) • Definition of investment in the new investment agreements • Concept of investment under the ICSID Convention; Schreuer criteria/Salini test; recent decisions: <i>MHS v. Malaysia</i>; <i>Patrick Mitchell</i> Annulment
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2</u></p> <ul style="list-style-type: none"> • Who qualifies as an investor under the new investment agreements: issues of nationality, ownership, and control
12:15 am – 12:30 pm	<p>Question and Answer</p> <p>Session Descriptions:</p> <p>This session will contrast the concepts of “investment” and “investor” in the new investment agreements with those in earlier agreements. It will describe the different approaches to defining “investment,” such as exhaustive and non-exhaustive lists. It will also explain the significance of the concept for establishing jurisdiction <i>ratione materiae</i> of arbitral tribunals. It also explains which persons, whether natural or legal, qualify to invoke the protections of new investment agreements. In so doing, the session will particularly focus on examining the status of corporations as well as direct, indirect, and non-controlling shareholders for jurisdiction <i>ratione personae</i> of arbitral tribunals under both the ICSID Convention and the new investment agreements.</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Admission and establishment of investment • Pre-establishment rights • New approaches to admission and establishment under the U.S. 2004 Model BIT; other economies’ approaches towards the right of establishment with a particular emphasis on EU member-states • Exceptions

TIME	DAY 2— <i>cont'd</i>
3:30 – 3:45 pm	<ul style="list-style-type: none"> • Implications of establishment rights for other obligations under investment treaties such as national treatment <p>Break</p>
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Same topics continued • Dispute resolution provisions of investment treaties
5:15 – 5:30 pm	<p>Question and Answer</p> <p>Session Description: This session explains the concepts of admission and establishment; and the extent to which they have been applied in various investment treaty regimes. It also examines the implications of admission and establishment provisions for the core investment protections (e.g., national and most-favored-nation treatment, performance requirements) of the new investment agreements. Reference will be made to <i>Mihaly International v. Sri Lanka</i>. In addition, it will touch upon the various dispute resolution mechanisms of investment treaties (State - State and Investor - State).</p>

TIME	DAY 3
9:00 – 10:30 am	<p style="text-align: center;">Core Investment Protection Obligations I</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Expropriation • Compensation for expropriation (a brief discussion; more extended discussion in Week Two) • Exceptions to compensation • Expropriation, investment protection and regulation • Guidance on regulatory/indirect expropriation in the new investment agreements
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Same topics continued
12:15 am – 12:30 pm	Question and Answer
	<p>Session Description:</p> <p>These sessions examine the concept of expropriation; various forms that it can take, such as indirect or regulatory expropriation; and the prompt, adequate, effective standard for compensation. The latter part of the sessions will be dedicated to the discussion of the relationship between expropriation and regulation; how regulatory measures of the government can breach investment agreements; how governments can reduce their liability in this respect. This part of the sessions will address the texts providing guidance on the analysis of indirect expropriation claims that have been included in some recent investment agreements.</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Minimum standard of treatment, including fair and equitable treatment and full protection and security; BIT and NAFTA chapter 11 jurisprudence • Transparency and fair and equitable treatment; transparency under the 2004 U.S. Model BIT
3:30 – 3:45 pm	Break

TIME	DAY 3— <i>cont'd</i>
3:45 – 5:15 pm	<u>Afternoon Session 2:</u> <ul style="list-style-type: none"> • Same topics continued
5:15 – 5:30 pm	Question and Answer Session Description: These sessions examine the concept of the minimum standard of treatment of aliens in customary international law and the key customary international law standards of fair and equitable treatment and full protection and security. The discussion will address the interpretation of these concepts by various arbitral tribunals and their attempts to give content to these standards; the NAFTA Parties formal interpretive note of 2001 and its implications under customary international law; and the clarifying language on these standards included in the 2004 U.S. Model BIT and recent investment agreements. Cases to be discussed include <i>Tecmed</i> , <i>Saluka</i> , and <i>Mondev</i> .

TIME	DAY 4
9:00 – 10:30 am	<p style="text-align: center;">Core Investment Protection Obligations II</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • National treatment (NT) • Exceptions to NT • Cross reference to right of establishment <p>Session Description: This session examines the national treatment standard of protection in the new investment agreements and the exceptions to the standard that may be scheduled in a negative list. The discussion will consider the three-step approach to the analysis of national treatment claims developed in the context of various NAFTA cases, such as likeness issues and whether intent to discriminate is required on the part of the government. Cases to be discussed include <i>Feldman</i>, <i>Methanex</i>, and <i>Champion Trading</i>.</p>
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Most Favored Nation treatment (MFN) • Exceptions to MFN • How MFN works within the entire framework of a treaty • Cross reference to rights of establishment <p>Session Description: This session examines the standard of MFN treatment in the new investment agreements and the exceptions to the standard that may be scheduled in a negative list; origins of MFN in trade agreements; its application to procedural matters as applied in <i>Maffezini v. Spain v. Plama v. Bulgaria</i>; and its application to substantive matters.</p>
12:15 am – 12:30 pm	Question and Answer
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Transfers; significance of this issue for various countries; uniqueness of the U.S. approach to the issue of transfers • Performance requirements • Coverage of concession contracts and umbrella clauses

TIME	DAY 4— <i>cont'd</i>
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<u>Afternoon Session 2:</u> <ul style="list-style-type: none"> • Same topics continued
5:15 – 5:30 pm	Question and Answer
	<p>Session Description:</p> <p>These sessions examine provisions of the new agreements with respect to the transfer and repatriation of profits and performance requirements. It also examines the coverage of concession contracts in the new investment agreements and the relationship of these provisions to traditional umbrella clauses. Cases to be examined include <i>SGS v. Pakistan</i>, <i>SGS v. Philippines</i>, and the recent <i>El Paso</i> and <i>BP</i> cases.</p>

TIME	DAY 5
	Negotiation of Investment Treaties
9:00 – 10:30 am	<p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Development of investment negotiating texts and strategies • Coordination among national government agencies on the drafting of investment negotiating proposals and on negotiating strategies • Coordination between national and sub-national governments • Consultation with key non-governmental stakeholders (e.g., business representatives, labor unions, NGOs) on investment negotiations
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Same topics continued
12:15 am – 12:30 pm	Question and Answer
	<p>Session Description:</p> <p>During this session, government negotiators from APEC economies will address the internal coordination and external consultations required for the development of investment negotiating texts, the preparation of negotiating strategy, and the approval of new text proposals during the course of negotiations. The discussion will focus on, among other issues, the interaction between trade ministries or other lead negotiating agencies and the regulatory agencies whose authorities may be implicated in investment negotiations. Strategies for ensuring the support of key private sector stakeholders and sub-national governments will also be addressed.</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Negotiation and scheduling of exceptions for sensitive sectors or matters • Negotiation and scheduling of general exceptions • Relationship between APEC investment agreements and other multilateral and bilateral agreements
3:30 – 3:45 pm	Break

TIME	DAY 5— <i>cont'd</i>
3:45 – 5:15 pm	<u>Afternoon Session 2:</u> <ul style="list-style-type: none"> • Same topics continued
5:15 – 5:30 pm	Question and Answer Session description: This session focuses on the development by each side of a negotiating proposal for its negative list of exceptions and on the process of negotiating the negative list. It will also touches upon the negotiation of general exceptions. As in the morning session, this session will focus on the interaction between trade ministries or other lead negotiating agencies and the regulatory agencies whose authorities may be implicated in the negotiation of the negative list. Strategies for ensuring the support of key stakeholders will also be addressed.

Workshop Faculty

PERRY BECHKY

Academic, Arbitrator. Visiting Assistant Professor, University of Connecticut School of Law. Formerly Counsel At Shearman & Sterling, as a litigator primarily responsible for the management of million- and billion-dollar international disputes. Mr. Bechky has written and lectured extensively in the U.S. and abroad. Recent presentations include: "The Investment Case of the Year", at the University of Connecticut School of Law, February 2008, "Arbitration of Investment Disputes" and "Investment Climate: The Role of Investment Treaties", at the International Law Institute, December 2006, and "Multilateral and Bilateral Regulation of International Investments", at Howard University School of Law, Washington D.C., October 2005. J.D., Columbia University School of Law, 1993. B.A., with honors, Stanford University, 1990.

ALEXANDRE DE GRAMONT

Partner, Crowell & Moring. Specializes in International Dispute Resolution. Mr. Gramont has represented clients in a wide variety of international commercial arbitration and investor-state arbitration matters. Recognized by Chambers USA as one of the leading arbitration specialists in the United States. He has written and spoken about various legal issues, including international investment treaties and investment disputes. Recent publications include: "Key Issues and Recent Developments in International Investment Treaty Arbitration," ABA Section of International Law Meeting Materials, Spring 2007 (Co-author with Maria Gritsenko). Recent presentations include: "Debating the Necessity of a Necessity Defence For Investment Law," Investment Treaty Arbitration: A Debate and Discussion, Washington, D.C., May 17, 2007, "International Treaty Arbitration: Recent Developments and Predictions For The Future," ABA Section of International Law, 2007 Spring Meeting, Washington, D.C. , May 3, 2007, and "Political Risk and Investment Treaties: Navigating Risk and Managing Expectations Between Investors and Government," Institute of the Americas' Andean Energy Roundtable: Energy and Politics in Ecuador, Bolivia, Colombia & Peru in Quito, Ecuador, April 4, 2006. J.D., New York University, 1990. B.A., with high honors, Wesleyan University, 1986.

BRUCE PFLAUM

Managing Director for Asia, Russell Investment Group. Based in Singapore, Mr. Pflaum oversees the Group's Asian business, and is responsible for Russell's initiatives and business development in the region. Russell Investment Group is the global leader in the provision of multi-manager investment solutions. Russell is also recognized as one of the world's leading investment management and advisory firms, advising large investors in more than 30 economies on investment strategy. It's Chairman is a U.S. Member of the APEC Business Advisory Council. Mr. Pflaum first joined Russell in New Zealand in 1995 as Director of Consulting for Russell's New Zealand and Asian clients after more than 10 years of experience living and working in Asia. In 1997, he assumed overall responsibility for Russell's business development in Asia, and in 1999 became Managing Director of Russell's newly established Singapore office. A veteran of the trading markets, Mr. Pflaum spent nearly two decades in wide-ranging trading and risk management roles in the U.S., Japan and Hong Kong prior to joining Russell. During the course of his Asian experience he has dealt with a wide range of clients and financial issues across a variety of economies.

TODD J. GRIERSON-WEILER

Adjunct Professor, University of Calgary Faculty of Law and the Faculty of Law at the University of Western Ontario. Mr. Grierson-Weiler is a Member of the Law Society of Upper Canada. His practice focuses exclusively on investor-state arbitration. Mr. Grierson-Weiler has served as arbitrator, advising expert and co-counsel in over two dozen treaty disputes. In 2006 he was named by the Global Arbitration Review as one of its "45 Under 45" in the field of international arbitration and his name also appears on the Who's Who Legal list of international arbitrators. He is responsible for two popular international law web sites: www.naftaclaims.com, launched in 1999; and Oxford University Press' www.investmentclaims.com, which he co-founded in 2005. He has served as editor and co-author of three books on investment law and arbitration: "NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects, and Foreign Investment Law" (Transnational: New York, 2004); "International Investment Law and Arbitration: Leading Cases..." (Cameron May: London, 2005); and "Investment Treaty Arbitration and International Law," Vol. 1 (Juris: New York, 2008). Mr. Grierson-Weiler holds an M.A. and LL.B from the University Western Ontario, LL.M degrees from the Unievrstity of Ottawa and the University of Michigan, and is currently completing a doctorate in international economic law at the University of Michigan.

IAN LAIRD

Foreign Legal Consultant, Fulbright & Jaworski LLP. Focuses his practice in the field of international investment law and arbitration. Advises clients on issues related to bilateral and multilateral international agreements, such as the WTO Agreement, the NAFTA and Bilateral Investment Agreements. Mr. Laird has spoken extensively and published numerous articles on international investment arbitration. Recent publications include: "Standards of Treatment in International Investment Law: The Move Towards Unification" (Co-author with Todd Grierson-Weiler), in Muchlinski, Ortino and Schreuer eds., The Oxford Handbook of International Investment Law, Oxford University Press, 2008 forthcoming, "Fair and Equitable Treatment: Emergency Exception/State of Necessity", Chapter in Investment Treaty Law: Current Issues II, British Institute of International and Comparative Law (BIICL), 2007, and "Finality versus Consistency: Does Investor-State Arbitration Need An Appellate System?" (Co-author with Rebecca Askew), 7(2) Journal of Appellate Practice and Process 101, 2006. LL.M., University of Cambridge, Faculty of Law, Cambridge, U.K. (St. Edmund's College), 1998. LL.B., University of Windsor, Faculty of Law, Windsor, Canada, 1993. B.A., joint honors, McGill University, Montreal, Canada, 1987.

JAMES MENDENHALL

Partner, Sidley Austin LLP. Practices in the International Trade and Dispute Resolution group, concentrating in international trade policy and litigation. From 2005 to January 2007, Mr. Mendenhall served as the General Counsel of the Office of the United States Trade Representative (USTR). In that capacity, Mr. Mendenhall supervised U.S. participation in World Trade Organization and NAFTA disputes and handled all legal aspects of U.S. bilateral, regional, and multilateral trade negotiations. Mr. Mendenhall also served as the principal U.S. negotiator of the United States-Canada Softwood Lumber Agreement and was the USTR representative on the Committee on Foreign Investment in the United States. Prior to joining the U.S. Government, Mr. Mendenhall spent nine years in private practice, concentrating in the areas of trade remedies litigation, international arbitration, trade policy and litigation before World Trade Organization panels. J.D., with honors, Harvard Law School, 1992. B.A., with highest honors, University of Notre Dame, 1989.

BORZU SABAH

Consultant, Fulbright & Jaworski LLP. Focuses on International Investment and Commercial Arbitration. Mr. Sabahi currently assists in major international investment arbitrations under ICSID and UNCITRAL Arbitration Rules. Adjunct Professor of Law, Georgetown University Law Center. He has published and lectured on investor-state arbitrations and international investment law. Recent publications include "Investor-State Arbitration" (Co-author with Don Wallace, Jr., Christopher Dugan and Noah Rubins), forthcoming Oxford University Press 2008, "Compensation, Damages, and Valuation in International Investment Law" (Co-author with Prof. Thomas W. Wälde), in The Oxford Handbook of International Investment Law (Muchlinskin, Ortino, Schreuer (eds.)), forthcoming Oxford University Press 2008, and "National Treatment – Is Discriminatory Intent Relevant?", in Investment Treaty Arbitration: A Debate and Discussion, T. Weiler (ed.) Juris Publishing, 2007. SJD Candidate, Georgetown University Law Center, since 2004. LL.M., Georgetown University Law Center, 2002. M.A., Public International Law, with high honors, University of Tehran, Iran, 2000. B.A., Judicial Law, with distinction, University of Tehran, Iran, 1997.

JOHN SAVAGE

Partner, Shearman & Sterling LLP. He leads the firm's international arbitration practice in Asia. Mr. Savage has represented governments, corporations and high net worth individuals in over 60 international arbitrations, both institutional and ad hoc, including many investment treaty disputes. His practice focuses on the representation of Asian clients in arbitrations worldwide, and clients from outside Asia in arbitrations taking place in Asia. In addition to his work as counsel, Mr. Savage has been appointed as arbitrator in ICC, ICSID, KLRCA, SIAC and ad hoc arbitrations. Advisory Board Member, Investment Treaty Forum, British Institute of International and Comparative Law (BIICL) and Vice Chair of the Dispute Resolution and Arbitration Committee, Inter-Pacific Bar Association. Author of articles on international arbitration in various publications. Recent publications include: "Investment Treaty Arbitration and Asia: Survey and Comment", Asian International Arbitration Journal, Vol. 1, No. 1, 2005, "The International Comparative Legal Guide to International Arbitration 2004" (Singapore Chapter), and "New Opportunities For Resolving Disputes Involving Asian States" (FinanceAsia, January 2003). Guildhall University, Final Examination of the Law Society, 1991, First Class Honours. Maîtrise en droit privé, Université de Paris I - Panthéon-Sorbonne, 1990. LL.B., King's College London, University of London, 1988.

DON WALLACE, JR.

Chairman, International Law Institute. Professor of Law, Georgetown University Law Center. Counsel, Morgan, Lewis & Bockius. Courses taught include: Public International Law; International Business and Economic Law; GATT/WTO; International Monetary, Finance and Investment Law; Infrastructure Projects in Developing and Transition Countries; and Investor-State Dispute Settlement. Member, Secretary of State's Advisory Committee on Private International Law; US delegate to UNCITRAL; arbitrator; member panel of arbitrators of Cairo Regional Center for International Commercial Arbitration; member, Board of Directors, Institute of Investment and Arbitration, Cairo; member, American Law Institute; emeritus member, Board of Directors, International Development Law Institute, Rome; member, advisory committee, ABA/UNDP International Legal Resource Center; member, Legal Advisory Council; AEI Legal Center for the Public Interest; liaison of American Bar Association to UNCITRAL; correspondent, UNIDROIT, and vice president, Board of Governors, Uniform Law Foundation (UNIDROIT foundation), Rome; member, Academic Council, European Center for Peace and Development, UN University for Peace, Belgrade. Mr. Wallace has written and lectured extensively in the U.S. and abroad. Recent

publications include “Investor-State Arbitration” (Co-author with Christopher Dugan, Borzu Sabahi and Noah Rubins) (forthcoming Oxford University Press 2008). Eisenhower Exchange Fellow, 1976. Fellow, St. Antony's College, Oxford, 1973-74. Fulbright Fellow, Turkey, 1967. LL.B., cum laude, Harvard, 1957. B.A., with high honors, Yale, 1953.

APEC GOVERNMENT SPEAKERS

ANA AMPUERO (PERU)

Ana Ampuero is Legal Advisor to the Minister of Foreign Trade and Commerce. From 2004 to 2006, Ms. Ampuero worked as an advisor to the Legal Office of Peru's Private Investment Promotion Agency – PROINVERSIÓN. During this time, she was a member of the negotiation teams for the investment chapters of FTAs with Singapore, Thailand and the United States, and legal advisor to the Negotiating Commission for bilateral investment treaties with Belgium, Canada, Chile and Mexico. Ms. Ampuero was for 12 years a professor of Public International Law at the Pontifical Catholic University of Peru, and has taught this subject at Peru's Diplomatic Academy Foundation. She holds a law degree from the Law Faculty of Pontifical Catholic University of Peru, and has undertaken post-degree studies in Economic International Law and in Management.

JONATHAN KALLMER (UNITED STATES)

Jonathan (Josh) Kallmer is Deputy Assistant U.S. Trade Representative (USTR) for Investment. In this capacity, he is responsible for developing and implementing U.S. foreign investment policies, including by representing the United States in investment negotiations. He is the lead U.S. negotiator for the investment chapters of FTAs with Republic of Korea and Malaysia, and for bilateral investment treaty exploratory discussions with India and Russia. Mr. Kallmer was previously Assistant General Counsel at USTR, where he represented the United States in disputes before the World Trade Organization (WTO). Prior to joining USTR, Mr. Kallmer was an associate in the Washington, D.C. office of Hogan & Hartson L.L.P., practicing principally in the areas of international litigation/arbitration and international trade. He is a graduate of Stanford University and holds a law degree from the Georgetown University Law Center in Washington, DC.

YASUJIRO MIYAKE (JAPAN)

Yasujiro Miyake is Deputy Director in the Multilateral Trade System Department of the Ministry of Economy, Trade and Industry. As a negotiator, Mr. Miyake worked on the Japan-Malaysia FTA, as well as on WTO non-tariff barrier and tariff elimination issues in the Doha Development Round. He is currently in charge of negotiations on bilateral investment treaties and investment chapters of FTAs with China, India, Republic of Korea, and ASEAN, among others. Mr. Miyake has worked previously in the Research Institute of Economy, Trade and Industry, as well as in the Japanese Patent Office. He holds an LL.B. from the University of Tokyo, and LL.M. degrees from the University of Cambridge and University of Southampton (U.K).

ROBERT READY (CANADA)

Robert Ready is Director, Investment Trade Policy Division in the Department of Foreign Affairs and International Trade Canada. He manages the teams responsible for conducting Canada's international trade policy in the area of investment, including in foreign investment protection agreements (FIPAs), FTAs, in international organizations such as APEC and the OECD, and on issues relating to government procurement and corporate social responsibility. Prior to this assignment, Mr. Ready was Canada's lead negotiator for trade in services in the

WTO Doha Development Round. He has held a number of other positions in the public sector, including with Industry Canada, Investment Canada, and the Canadian House of Commons. Mr. Ready holds a B.A. (Hons) and a Masters in Public Administration (MPA) from Queen's University in Kingston, Ontario.

DAREN TANG (SINGAPORE)

Daren Tang is currently State Counsel with the International Affairs Division of the Attorney-General's Chambers of Singapore. He was a lead negotiator and legal counsel on the US-Singapore FTA, focusing on, inter alia, services and investment issues. Mr. Tang is currently involved in negotiations on a number of regional trade agreements, including the ASEAN-EU FTA, for which he is the ASEAN coordinator on Dispute Settlement. He holds an LL.B. from the National University of Singapore and an LL.M. from the Georgetown University Law Center in Washington, DC, where he was a Fellow of the Institute of International Economic Law.

Workshop Participants

Economy	Name	Title	Office	Ministry
Brunei Darussalam	Nurussa'adah Muharram	Second Secretary	Trade Development Unit	Ministry of Foreign Affairs and Trade
	Norhijradini Haji Saidi	Counsel		Ministry of Finance
Canada	Jasmine Rokolj	Trade Policy Officer		Foreign Affairs and International Trade
	Robert Ready	Director, Investment Trade Policy		Foreign Affairs and International Trade
Chile	Nicolas Munoz Montes	Counsel	Program for Defense in Foreign Investment Arbitration	Ministry of Economy
	Cristián Rodríguez Chiffelle	Legal Advisor	General Directorate for International Economic Affairs	Ministry of Foreign Affairs
People's Republic of China	Liu Keyi	Section Chief	Treaty and Law Department	Ministry of Commerce
	Han Yi	Deputy Section Chief		Ministry of Commerce
Hong Kong China	Agnes Cheung	Senior Government Counsel		Department of Justice
	Helen Yip	Trade Officer		Trade and Industry Department
Indonesia	Selamat Riyanto Hasiholan	Acting Head, Section for ASEAN Cooperation	Directorate for Regional Cooperation	Investment Coordinating Board
	Harditya Suryawanto	Head, Investment Section	Treaty Division	Investment Coordinating Board
Japan	Yasujiro Miyake	Deputy Director	Multilateral Trade System Department	Ministry of Economy, Trade and Industry
Republic of Korea	Won-Mog Choi	Investment Advisor to Ministry of Knowledge Economy		WTO Law Center, Ewha Womans University
	Yoo Jung Choi	Legal Assistant		WTO Law Center, Ewha Womans University
	Ja Young Kim	Legal Assistant		WTO Law Center, Ewha Womans University

Economy	Name	Title	Office	Ministry
Republic of Korea	Jaeyoung Lee	Investment Advisor to Ministry of Knowledge Economy		College of Law, Korea University
Malaysia	Thavamani Krishnan	Assistant Director		Ministry of International Trade and Industry
	Vinodh Mariappa	Assistant Director		Malaysian Industrial Development Authority
Mexico	Israel Octavio Torres López	Deputy Director for International Treaties		Ministry of Economy
	Claudio Saucedo Pagola	Deputy Director General for International Affairs	Directorate General of Foreign Investment	Ministry of Economy
New Zealand	Caroline Bayliss	Legal Advisor	Trade Negotiations Division	Ministry of Foreign Affairs and Trade
	Danie Beukman	Investment Lead Negotiator		Ministry of Foreign Affairs and Trade
	Rod Harris	Deputy Director	Trade Law Unit	Ministry of Foreign Affairs and Trade
	Ben King	Senior Policy Officer	Trade Negotiations Division	Ministry of Foreign Affairs and Trade
Papua New Guinea	Thomas Rhemmy Tarabu	Manager - Investment Promotions		Investment Promotion Authority
	Joan Waine	Assistant Director	Bilateral and Regional Economic Affairs Branch	Department of Foreign Affairs, Trade and Immigration
Peru	Ana Ampuero	Legal Advisor	Minister's Office	Ministry of Foreign Trade and Tourism
	Carlos Gallardo	Economist	General Directorate of International Economy, Competition and Private Investment Affairs	Ministry of Economy and Finance
Philippines	Esmeralda G. Fulgentes	Investment Specialist	Office of Industrial Policy, Board of Investments	Department of Trade and Industry
	Jose Vincente B. Salazar	Undersecretary		Department of Justice
Russia	Aleksandra Chagovets	Advisor, Services and Investment Division	Department of Trade Negotiations	Ministry for Economic Development and Trade

Economy	Name	Title	Office	Ministry
Russia	Nikolay Platonov	Deputy Head, Services and Investment Division	Department of Trade Negotiations	Ministry for Economic Development and Trade
Singapore	Daphne Hong	Senior State Counsel		Attorney General's Chamber
	Daren Tang	State Counsel	International Affairs Division	Attorney General's Chamber
	Ong Kiat Yeng	Senior Assistant Director		Ministry of Trade and Industry
	Tee Yiting	Assistant Director		Ministry of Trade and Industry
Chinese Taipei	Stefan C. W. Lin	Specialist	Department of Investment Services	Ministry of Economic Affairs
	Jen-Ni Yang	Deputy Chief Representative	Office of Trade Negotiations	Ministry of Economic Affairs
	Shu-Mei Yang	Senior Commercial Specialist	Department of Investment Services	Ministry of Economic Affairs
Thailand	Bonggot Anuroj	Senior Investment Promotion Officer	Board of Investment	Ministry of Industry
	Nathasit Diskul	Officer	Department of Trade Negotiations	Ministry of Commerce
	Wanaporn Techagaisiyavanit	Third Secretary		Ministry of Foreign Affairs
Viet Nam	Bui Hong Duong	Deputy Director, APEC-ASEM Division	Multilateral Trade Policy Department	Ministry of Industry and Trade
	Hoang Gia Khanh	Senior Expert	Department of Planning and Investment	Ministry of Industry and Trade
	Le Thi Hai Van	Deputy Head, Statistics and Policy Division	Foreign Investment Agency	Ministry of Planning and Investment
	Le Thi Le Thu	Officer		Ministry of Planning and Investment
United States	Jonathan Kallmer	Deputy Assistant U.S. Trade Representative for Investment	Office of the U.S. Trade Representative	Executive Office of the President
	Jai Motwane	Director for Services and Investment	Office of the U.S. Trade Representative	Executive Office of the President

WORKSHOP TWO

Washington DC, 3-7 November 2008

Workshop Summary

The second workshop of this project was held at the Latham Hotel in the Georgetown area of Washington DC. The workshop was attended by 52 participants from 19 APEC economies, and by a representative of the APEC Secretariat. The workshop was instructed by a faculty of over 40 experts – international investment attorneys, experienced arbitrators of investment disputes, government attorneys responsible for defense against investor claims, and staff of the International Center for the Settlement of Investment Disputes (ICSID). The workshop included a mock arbitration conducted in World Bank facilities used for actual ICSID arbitration hearings. On the second day of the workshop, participants and faculty attended a luncheon and roundtable discussion at the Four Seasons Hotel, hosted by the U.S. National Center for APEC.

The objective of the Week Two workshop was to provide a comprehensive review of all aspects of investor-State dispute settlement under IIAs. The workshop began with a discussion of the unique characteristics of the investor-State arbitration, and in particular the political considerations that are largely absent from similar litigation between private parties. Other aspects of investor-State arbitration noted by panelists as differing from other dispute settlement processes included its unique jurisdictional issues, differences in the selection processes for adjudicators, and the fact that investor-State tribunals are “extra-judicial” bodies.

Workshop panelists discussed the types of disputes that can be brought to arbitration under the provisions of IIAs, and the question of whether and when breaches of contract by a State can constitute a violation of international agreements. The workshop then delved into the issue of jurisdiction of tribunals and the identity and nationality of claimants, particularly with reference to disputes that may be brought before the ICSID. Panelists discussed scenarios involving investors of dual or changing nationality, and how these issues have been addressed in arbitral conventions, in IIAs, and by arbitral tribunals.

The second day of the workshop focused on discussion of applicable law in investor-State arbitrations, and on rules of procedure. Panelists noted the absence of a legal “hierarchy” for investor-State arbitration, and the role of precedent as informing, but not binding, the decisions of tribunals. Much discussion during these sessions focused on alternative approaches in IIAs to the forum selection, and requirements of “fork in the road” and “no U-turn” approaches. Panelists noted that the former approach could discourage the use of domestic courts as it removed an investor’s recourse to international arbitration. Participants queried whether a method could be found to more strongly encourage the use of local remedies in IIAs, without requiring it as a condition for bringing a dispute to arbitration.

Panelists discussed the importance of managing the process of selecting arbitrators well, and noted the impact this selection can have on the outcome of an investor-State arbitration. Among the factors identified by panelists as key in selecting an arbitrator were: experience and reputation; past awards and other writings; current caseloads; and potential conflicts of interest. Panelists also discussed provisions in recent IIAs aimed at achieving greater

efficiency in the arbitral process, such as those relating to consolidation of claims and the dismissal of frivolous claims.

On Day Three of the Workshop, representatives of APEC member economies spoke of their governments' approaches to preparing for and managing the investor-State arbitration process. The officials emphasized the need to develop a proper internal framework for responding to investor claims, including establishing clear responsibilities, ensuring coordination among ministries, and centralizing information. Panelists discussed factors that should be considered by States in deciding whether to manage cases "in-house" or to retain outside counsel. Panelists stressed the importance of including State defense attorneys in negotiations, of devoting resources to hiring and training qualified individuals, and to maintaining good contacts within the community of investment law, including through participation in workshops such as this.

On the afternoon of Day Three, participants attended a mock investor-State arbitration at the ICSID facilities of the World Bank. The mock, organized and performed by attorneys of Crowell and Moring LLP, involved a hypothetical dispute involving claims of expropriation, failure to provide fair and equitable treatment, discriminatory treatment, and other alleged breaches or a fictional IIA. The mock included demonstrations of client consultation, hearing procedures and arguments, witness preparation and examination, and the role of arbitrators in hearings.

Day Four of the workshop focused on discussion of types of arbitral awards, and mechanisms for the enforcement, challenge and annulment of awards. Panelists noted that in the majority of known investor-State arbitrations to date, investors have received little to no monetary compensation. They noted that, according to available research, investors have received a monetary award in approximately 20 of 200 known cases, and that the average award was less than 3% of the amount claimed (or US\$10 million). Panelists then discussed the procedures for obtaining recognition and enforcement of an award, and legal and political challenges that can arise in this process. Finally, panelists outlined circumstances under which governments can seek to have an award annulled or set aside.

On the final day of the workshop, a broad array of panelists discussed strategies by which States can seek to avoid arbitration, including through alternative dispute resolution mechanisms. Panelists from APEC governments stressed the importance of understanding and fulfilling IIA obligations, including through education of officials at sub-national levels of government. The final sessions of the workshop were focused on discussion of key current issues in the investor-State arbitration, such as attempt to achieve greater transparency and participation in the arbitration process, and to achieve greater consistency in arbitral decisions.

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The full agenda, speaker biographies, and participant list for this workshop are included below. Presentation and reading materials for the workshop were provided to participants in hard-copy and electronically on a compact disc.

Workshop Agenda

TIME	DAY 1
8:00 – 9:00 am	<p><u>Registration:</u></p> <p style="text-align: center;">Jurisdiction: Scope of Disputes Subject to Arbitration</p>
9:00 – 10:30 am	<p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Art and science of managing investment disputes • Forums available under BITs, free trade and regional agreements, and national laws • Introduction to the ICSID and ICSID Convention
10:30 – 10:45 am	<p>Break</p> <p>Session Description:</p> <p>This session begins with an overview of general approaches to managing investment disputes. It then discusses various types of disputes that may be submitted to arbitration under the provisions of new investment agreements; various forums in which an investment treaty dispute could be resolved; and an introduction to ICSID, the institution that administers a significant number of investment treaty disputes.</p> <p style="text-align: center;">Breach Contract v. Breach of Treaty</p>
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Kinds of disputes subject to arbitration under investment agreements <ul style="list-style-type: none"> ○ Alleged breaches of investment treaties ○ Disputes that involve both alleged breaches of investment treaties and contract disputes • Effect of breach of contract in customary international law • Breach of contract in investment treaties: Umbrella clauses; handling breach of contract issues in new investment treaties (no traditional umbrella clause; arbitration available for breach of certain concession contracts) <p>Session Description:</p> <p>This session begins with an examination of the status of contracts in international law, and the distinction between contract and treaty claims, as considered by the <i>Vivendi</i> Annulment tribunal. It then examines how breach of contract issues are handled in investment treaties that have umbrella clauses and those that do not have such clauses.</p>

TIME	DAY 1— <i>cont'd</i>
12:15 – 12:30 pm	Question and Answer
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p data-bbox="384 533 667 566"><u>Afternoon Session 2:</u></p> <ul data-bbox="443 566 1249 678" style="list-style-type: none"> • Jurisdiction of international tribunals • Requirement of consent (including under new agreements) • Scope of dispute resolution clauses in investment treaties <p data-bbox="384 723 667 757">Session Description:</p> <p data-bbox="499 757 1369 902">This session discusses the fundamental requirement of consent to arbitrate, and implications of consent for the jurisdiction of arbitral tribunals. It then examines the effect of a narrow or broad dispute resolution clause in admitting or excluding contractual disputes.</p>
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<p data-bbox="384 1059 667 1093"><u>Afternoon Session 2:</u></p> <ul data-bbox="443 1093 1385 1283" style="list-style-type: none"> • Identity of respondents: States; State entities; attribution • Identity of claimants: nationality and continuous ownership requirements, direct or indirect ownership and control; jurisdiction <i>ratione personae</i> • Subject matter jurisdiction, and jurisdiction <i>ratione materiae</i>
5:15 – 5:30 pm	<p data-bbox="384 1317 667 1350">Question and Answer:</p> <p data-bbox="384 1395 667 1429">Session Description:</p> <p data-bbox="499 1429 1353 1561">This session also examines the identity of claimants and respondents under the provisions of investment treaties and under the ICSID Convention (i.e., requirements <i>ratione materiae</i> and <i>ratione personae</i>).</p>

TIME	DAY 2
9:00 – 10:30 am	<p style="text-align: center;">Applicable Law</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Applicable law clauses of investment treaties • Article 42 of the ICSID Convention; role of domestic law of host States • Law applicable to procedure <p>Session Description: This session examines the “applicable law” provisions of new investment agreements. It further examines applicable law in an ICSID proceeding, and the interaction of the national law of the host State with international law and investment treaties. Finally, it discusses the law applicable to procedural issues.</p>
10:30 – 10:45 am	Break
10:45 am – 12:15 pm	<p style="text-align: center;">Avoiding Parallel Proceedings</p> <p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Exhaustion of remedies; Article 26 of ICSID Convention • “No u-turn,” “waiver,” and “fork in the road” clauses • <i>Res judicata</i> • Forum election issues: arbitration clauses in investment contracts and their relationship to treaty obligations
12:15 – 12:30 pm	<p>Question and Answer:</p> <p>Session Description: This session discusses exhaustion of local remedies and treaty clauses which delineate how investors may choose among various dispute resolution fora. This session will also examine the effect of exclusive forum selection clauses in investment contracts.</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p style="text-align: center;">Mechanics of Arbitration</p> <p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Rules and procedural provisions under new investment agreements • Selection and appointment of arbitrators; applicable treaty clauses • Challenges to nominated arbitrators, IBA Guidelines • Conflicts of interest, IBA Guidelines

TIME	DAY 2— <i>cont'd</i>
	<ul style="list-style-type: none"> • Venue: choosing the place of arbitration • Interim measures; ICSID and investment treaty provisions <p>Session Description: This session begins with a discussion of the origin of the contemporary system of investor-State arbitration. It then examines in detail various legal and practical issues that may arise at the beginning of the arbitral process, including the important issue of selection of arbitrators and potential challenges to suggested arbitrators on grounds of conflict of interest. It will then discuss procedural provisions of new investment agreements, including as they relate to choice of place of arbitration. Finally, the session will examine various ways in which parties can request interim measures, and the approach to this issue in new investment agreements.</p>
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Consolidation of claims—NAFTA Article 1126, approach in recent investment agreements • Consolidation in situations where the applicable treaty and arbitral rules lack provisions dealing with it; • Precluding frivolous claims: new approaches in recent investment agreements and in the amended ICSID arbitration rules
5:15 – 5:30 pm	<p>Question and Answer</p> <p>Session Description: This session discusses various methods to consolidate related claims into a single arbitral proceeding and the issues that would arise, taking note of NAFTA Article 1126 jurisprudence, and reviewing ICSID decisions where arbitral tribunals have dealt with these issues. The session will also touch upon treaty approaches to precluding frivolous claims, and the approach adopted in the amended ICSID Arbitration Rules.</p>

TIME	DAY 3
9:00 – 10:30 am	<p style="text-align: center;">Management of Arbitration I</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Training of legal and contracting staff in the governmental agencies • Selection and hiring of outside counsel • Maintaining project documents and records in anticipation of disputes • Coordination among government entities on preparation of the respondent’s case. • Coordination among State parties to the agreement on interpretive guidance for tribunals (e.g., 1128 submissions under NAFTA and similar provisions in recent agreements) <p>Session Description: This session will discuss the perspectives and experiences of APEC economy officials with respect to preliminary issues such as the training of legal staff for investment arbitration, the selection of outside counsel, and coordination activities within and between governments.</p>
10:30 – 10:45 am	Break
10:45 am – 12:15 pm	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Facts in investment arbitration: taking of evidence, IBA Guidelines • Production of documents: exchanges of relevant documents between parties, by agreement or by order of the arbitration tribunal; implications of laws on secrecy; protection of proprietary information • Approaches to preparation of memorials and briefs
12:15 – 12:30 pm	<p>Question and Answer:</p> <p>Session Description: This session will discuss various issues related to the taking and production of evidence, such as the implications of laws on document secrecy, the effect of non-production, and adverse inferences. The session concludes with a general discussion of effective advocacy methods.</p>
12:30 – 2:00 pm	Lunch

TIME	DAY 3— <i>cont'd</i>
2:00 – 3:30 pm	<p style="text-align: center;">Management of Arbitration II—Mock Arbitration</p> <p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Organizing the proceedings: pre-hearing conferences • Fact witnesses and expert (legal, financial, and accounting) witnesses, preparation of witnesses • Organization of hearings • Examination and cross-examination of witness
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Same topics continued
5:15 – 5:30 pm	<p>Question and Answer:</p> <p>Session Descriptions: By way of enactment, these sessions will illustrate some of the practical tasks that counsel must perform during the course of an investment arbitration, including organization of pre-hearing conferences, the preparation of fact and expert witnesses, and hearing examination.</p>

TIME	DAY 4
9:00 – 10:30 am	<p style="text-align: center;">Compensation, Damages, and Non-Pecuniary Remedies</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Compensation and damages; standards of compensation for various violations of investment treaties • Restitution of property v. money damages • Valuation of investment; choice of valuation experts • Awarding interest; simple v. compound interest • Arbitration costs and legal fees: costs follow the event v. American rule
10:30 – 10:45 am	<p>Question and Answer:</p>
10:45 – 11:00 am	<p>Session Description: This session examines standards of compensation for violation of investment treaty provisions; valuation methods; possible ways that governments can reduce the amount of compensation; and the extent of governments' obligations to abide by non-pecuniary remedies ordered by an arbitral tribunal.</p>
10:45 – 11:00 am	<p>Break</p>
11:00 am – 12:30 pm	<p style="text-align: center;">Recognition, Enforcement, Challenges and Annulment of Arbitration Awards</p> <p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Recognition and enforcement under the ICSID Convention • Recognition and enforcement under the New York Convention • Enforcement provisions in the new agreements, including annulment and set aside provisions • Immunity of sovereign property from execution <ul style="list-style-type: none"> ○ relevant treaties and laws ○ exceptions to immunity: commercial activities, waiver
12:30 – 2:00 pm	<p>Lunch</p>
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Grounds for challenging ICSID awards, annulment proceedings • Challenge and set aside procedures under the New York Convention and UNCITRAL Model Law

TIME	DAY 4— <i>cont'd</i>
3:30 – 3:45 pm	Question and Answer
	<p>Session Descriptions: These sessions discuss various issues related to enforcement of, and challenges to, arbitral awards under the ICSID and New York Conventions, as well as under national laws, including UNCITRAL Model Law. In this context, they will also discuss State sovereign immunity defenses against the attachment of assets.</p>
3:45 – 4:00 pm	Break
	<p>Transparency and Third-Party Participation in Arbitral Proceedings</p>
4:00 – 5:30 pm	<p><u>Afternoon Session 2:</u></p>
	<ul style="list-style-type: none"> • Transparency requirements in new investment agreements; publication of awards and submissions • Third Party participation, <i>amici curiae</i>, civil society groups • Amendment of ICSID and UNCITRAL Rules to allow for third party participation
	<p>Session Description: This session examines the extent to which arbitral proceedings must be conducted transparently, as reflected in the text of investment treaties, and as required by some arbitral tribunals. It also examines the status of <i>amici curiae</i> under various investment treaties, the ICSID Arbitration Rules, and other arbitral rules; and the impact of the participation of the <i>amici</i> on arbitral proceedings.</p>

TIME	DAY 5
9:00 – 10:30 am	<p style="text-align: center;">Strategies for Avoiding Arbitration</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Legal and policy coordination among government entities • Coordination between national and local governments • Standing dispute review boards
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Alternative dispute resolution • Negotiation, mediation and conciliation mechanisms
12:15 – 12:30 pm	Question and Answer
	<p>Session Descriptions:</p> <p>These sessions will discuss the experiences of APEC member economies with respect to methods for managing investor relations and avoiding investor-State arbitration. These methods may include general practice such as enhanced coordination among government agencies to avoid treaty-inconsistent actions, as well as institutional arrangements such as standing review boards. They will then focus on alternative dispute resolution, mediation and conciliation mechanisms, which can be used to resolve disputes without arbitration.</p>
12:30 – 2:00 pm	Lunch
	<p style="text-align: center;">Key Developments and Trends in Investor-State Arbitration</p>
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Concerns regarding the inconsistency of arbitral awards on certain issues • Attempts to create an appellate mechanism for ICSID; U.S. contemplation of ad hoc bilateral appellate tribunals in its 2004 Model BIT and recent FTAs
3:30 – 3:45 pm	Break

TIME	DAY 5— <i>cont'd</i>
3:45 – 5:15 pm	<p data-bbox="395 309 667 342"><u>Afternoon Session 2:</u></p> <ul data-bbox="443 349 1377 495" style="list-style-type: none"> <li data-bbox="443 349 1302 421">• Impact of investor-State arbitration on investment rulemaking; trends in treaty drafting <li data-bbox="443 427 1377 495">• The growing complexity, cost and “judicialization” of the process— and ways to deal with these developments
5:15 – 5:30 pm	<p data-bbox="395 533 683 566">Question and Answer:</p> <p data-bbox="395 607 675 640"><u>Session Descriptions:</u></p> <p data-bbox="501 647 1385 752">These sessions will examine, among other things, recent developments, trends, and policy issues in investor-State arbitration, and how these impact the future of the system.</p>

Workshop Faculty

STANIMIR ALEXANDROV

Partner, Sidley Austin LLP. Mr. Alexandrov focuses his practice in the areas of international dispute resolution, including investor-State arbitration and international commercial arbitration, and resolution of trade disputes before the World Trade Organization (WTO). He has represented private parties and governments in arbitration before the International Centre for Settlement of Investment Disputes (ICSID), as well as the International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL), and American Arbitration Association (AAA) international arbitrations. He has also represented governments in WTO disputes. Mr. Alexandrov has been appointed to the ICSID's Panel of Arbitrators and Panel of Conciliators and has served as an arbitrator in a number of cases. He has appeared as an expert witness in international arbitration on investment treaty interpretation. Mr. Alexandrov's current and recent international arbitration cases include representation of global investors, such as Bayindir Holdings, Vivendi, Fireman's Fund Insurance Co., General Electric, Bechtel, Impregilo S.p.A., and Cargill, as well as representation of sovereigns, including Costa Rica, Turkey and Peru. S.J.D., George Washington University Law School; LL.M., George Washington University Law School; J.D., Moscow Institute of International Relations; B.A., Sofia University.

MARKHAM BALL

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