



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
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APEC#209-CT-01.5



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Course on the Core Elements of
International Investment Agreements in
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ADMISSION AND ESTABLISHMENT

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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