



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

Presentations

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Investor-State Dispute Settlement

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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