



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

## **Presentations**

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## Managing Investment Disputes: A Guide for Government Officials

APEC-UNCTAD Regional Training Course  
on International Investment Agreements

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Kuala Lumpur, Malaysia  
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## 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

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## 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

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## 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

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## 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

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## 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

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## 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 . . . .

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## 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

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### 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;

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### 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).

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### 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

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### 3. Contact Persons For Investment Matters

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

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#### 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

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## 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

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## Thank you

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