



**Asia-Pacific  
Economic Cooperation**



# **APEC-UNCTAD WORKSHOP ON INVESTOR-STATE DISPUTE SETTLEMENT**

## **Report on the Outcome and Proceedings**

**APEC Committee on Trade and Investment  
APEC Investments Experts Group**

**August 2011**

## Report on the APEC-UNCTAD Workshop on Investor-State Dispute Settlement

Prepared by

Bureau of International Trade Relations  
Department of Trade and Industry  
DTI International Building  
375 Gil Puyat Avenue  
Makati City, Philippines 1200  
Tel: +632 897 8292 Fax: +632 890 5149

Office of the Solicitor General  
134 Amorsolo St., Legaspi Village  
Makati City, Philippines 1200  
Telefax: +632 892 5794

United Nations Conference on Trade and Development  
Palais des Nations  
8-14, Av. de la Paix  
1211 Geneva 10, Switzerland  
Tel: +41 22 917 5897

APEC Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: +65 6891 9660 Fax: +65 6891 9690  
Email: [info@apcc.org](mailto:info@apcc.org)  
Website: [www.apcc.org](http://www.apcc.org)

© 2011 APEC Secretariat  
APEC#211-CT-04.5.



## Table of Contents

I	Outcome .....	5
II	Course Programme .....	9
III	List of Participants and Speakers .....	14
IV	Bio Notes of Key Speakers .....	26
V	Training Materials .....	35
VI	Speakers' Presentations	
	i Trends and Developments in Investor-State Dispute Settlement (ISDS) ....	49
	ii Admission and Establishment of Investments .....	72
	iii Definition of Investor .....	83
	iv Definition of Investment under Investment Treaties and the ICSID Convention .....	96
	v Fair and Equitable Treatment .....	113
	vi Denial of Justice (Special Topic on Fair and Equitable Treatment) .....	141
	vii Survey of Case Law on MFN Treatment .....	152
	viii Expropriation .....	161
	ix Valuation Methods in Expropriation .....	178
	x The PCA's Rules on Arbitration: Past, Present and Future Arbitration .....	186
	xi UNCITRAL Arbitration Laws .....	208
	xii Provisional Measures and Interim Relief .....	230
	xiii Transparency in Arbitral Proceedings .....	240
	xiv Current Work of UNCITRAL on Transparency in Treaty-based investor- State Arbitration .....	250
	xv Prevention of Investor-State Disputes and Alternatives to Arbitration .....	254
VII	Economy Presentations	
	i Peru – International Investment Disputes .....	264
VIII	Photo Documentation .....	279



## **I. OUTCOME**

The Workshop on Investor-State Dispute Settlement, held in Manila, Philippines, from 22 to 24 June 2011, was organized jointly by the Secretariats of APEC and UNCTAD, and hosted by the Office of the Solicitor General and the Department of Trade and Industry of the Government of the Republic of the Philippines.

### **Course Background**

This workshop formed part of a series of core elements projects that were undertaken during 2010-2011 by the APEC Investment Experts Group (IEG) in cooperation with UNCTAD. This series builds on the previous three phases of the "APEC IEG Core Elements of IIAs Projects" conducted in 2007, 2008, 2009 and the first half of 2010. Three activities of this series involve the preparation of studies on core elements, while three other activities are relevant technical assistance and capacity building projects. The Workshop on Investor-State Dispute Settlement is the third technical assistance component completed under this new phase of the core elements projects.

### **Participants and Resource Persons**

The workshop brought together 63 participants (43 women and 20 men) from 14 economies of the APEC region (China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand and Viet Nam). The list of participants is included in this report. The workshop was delivered in English.

A total of 13 recognized experts in the field of international investment treaty arbitration and negotiation delivered lectures and presentations, and facilitated interaction among participants. These experts are esteemed international lawyers from academia, international arbitral institutions, governments and international organizations, and some were private practitioners. All of them possess vast experience and knowledge in the area of investor-State dispute settlement. The list of these resource persons and their biographical notes are included in this report.

Most participants were either involved in the preparation for or handling of investment disputes, or in the negotiation of international investment agreements. 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 speakers.

After the workshop, participants became members of 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 for the workshop were prepared by UNCTAD's work programme on IIAs with support of the Office of the Solicitor General of the Philippines, to enable the participants to obtain the necessary expertise on the handling of investor-State disputes and the negotiation of IIAs. The programme of the workshop can be found below.

After an introductory session discussing the trends and developments in Investor-State Dispute Settlement (ISDS) and admission and establishment of investments, substantive issues were addressed through three sessions: core elements of IIAs and recent arbitral awards (covering definitions on investment and investor, fair and equitable treatment and denial of justice, most-favoured-nation treatment and expropriation), developments in international arbitration and IIAs (covering revision of arbitration rules, provisional measures and interim relief, transparency in arbitral proceedings and a comparative analysis of Asian BITs and FTAs), and management of ISDS by the State (covering a panel discussion on the subject and a presentation on dispute prevention and alternatives to arbitration).

Most topics were addressed in the following way: the presentation of the issue by a key expert, a commentary or discussion by a second expert, and an open discussion with all the participants to better illustrate the topic through an exchange of practices and experiences. Reference was made to a selection of particularly illustrative ISDS cases relevant to the IIA provisions discussed. The final day of the programme also included a panel discussion. The course was tailored to APEC member economies and made use of examples from the region, including treaty texts and arbitration cases.

## **Training Material**

Prior to the meeting, participants received a list of relevant ISDS cases to prepare for the workshop. At the meeting itself, participants received workshop material in the form of a CD which contains UNCTAD's main publications on investment, selected IIAs (including treaties signed by their respective economies), selected dispute settlement cases (including those most relevant to the workshop topics) and a bibliography. The table of contents of the CD is included below. Handouts of the presentations were also distributed during the workshop and are collected and made available on a final CD upon conclusion of the workshop.

## **Opening and Closing Ceremony**

The workshop was opened by Director Ann Claire C. Cabochan, Bureau of International Trade Relations, Department of Trade and Industry of the Philippines and Ms. Anna Joubin Bret, Senior Legal Advisor, Division on Investment and Enterprise (DIAE), UNCTAD.

Solicitor General Jose Anselmo I. Cadiz, Republic of the Philippines, delivered the closing remarks.

At the end of the workshop, participants received a certificate of attendance.

### **Evaluation and Follow-up**

UNCTAD and APEC evaluations of the workshop show very good results. Consolidation of UNCTAD's questionnaire showed that the course fully reached the expectations of 93% of the participants who completed the questionnaire. In addition, almost all of these participants rated the efficiency and the usefulness of the workshop to their official duties as either excellent (58%) or good (32%). The organization of the workshop was considered as excellent by 61% and good by the remaining 39%.

The UNCTAD secretariat has been asked to continue its research and technical assistance cooperation with APEC and its member economies through further activities, especially in the context of the core elements projects. This workshop further enhanced the working relationship between APEC and the UNCTAD secretariat. In 2011, all six activities of the current "Core elements beyond phase III" series of projects will reach completion and planning is now underway for a new series of projects for the year 2011-2012. Future activities could include further research projects and follow-up training courses and workshops on IIAs on an annual basis.

### **Course Organization**

The workshop was organized by Atty. Jane E. Yu, Senior State Solicitor, Office of the Solicitor General, Philippines and Ms. Marie Sherylyn D. Aquia, Senior Trade and Industry Development Specialist, Bureau of International Trade Relations, Department of Trade and Industry, Philippines; by Ms. Anna Joubin-Bret and Mr. Jan Knoerich from the International Investment Agreements Section, Division on Investment and Enterprise (DIAE), UNCTAD; and by Ms. Yumiko Honda and Ms. Norila bte Mohd Ali from the APEC Secretariat.

## **II. COURSE PROGRAMME**

### **Background and objectives:**

This activity forms part of the technical assistance component of an ongoing APEC Investment Experts' Group (IEG) project on the core elements of international investment agreements (IIAs). It constitutes the continuation of previous research projects on core elements (Phases I and II), as well as a series of three technical assistance activities (Phase III) - a regional training course on core elements (Kuala Lumpur), a workshop on investor-State dispute settlement (Manila) and a workshop on dispute prevention and preparedness (Washington, D.C.). The workshop content follows and updates the workshop on investor-State disputes settlement held in Manila in December 2009.

The Workshop on Investor-State Dispute Settlement is designed for government officials and policy-makers from the APEC economies involved in the management of investor-State disputes or negotiations of international investment agreements (IIAs).

The aim of the workshop is to review the interpretation and application IIA provisions in investor-State dispute settlement (ISDS) cases. Workshop participants will examine key substantive and procedural issues related to core elements of IIAs and analyze relevant arbitral awards. They will further learn about current revisions in arbitration rules. The workshop will also involve discussions on how States can manage investor-State disputes and analyze ways by which disputes may be prevented and avoided. By the end of the workshop, participants are expected to have a greater understanding of current practices in the area of ISDS and of recent arbitral awards interpreting and applying core elements and procedural issues of relevance to ISDS disputes.

Speakers will be experts in IIAs and ISDS, including government officials involved in ISDS, experienced arbitrators, academics, practitioners and experts from international organizations.

**Host economy:** Philippines

**Venue:** AIM Conference Center Manila

### **Coordination:**

Project overseers:

Atty. Jane E. Yu, Senior State Solicitor, Office of the Solicitor General, Philippines

Ms. Marie Sherylyn D. Aquia, Senior Trade and Industry Development Specialist, Bureau of International Trade Relations, Department of Trade and Industry, Philippines

UNCTAD Secretariat:

Ms. Anna Joubin-Bret, Senior Legal Advisor, Work Programme on International Investment Agreements, Division on Investment and Enterprise (DIAE)

Mr. Jan Knoerich, Associate Expert, Work Programme on International Investment Agreements, Division on Investment and Enterprise (DIAE)

APEC Secretariat:

Ms. Yumiko Honda, Programme Director, Investment Experts Group

## DAY 1 - 22 June 2011

- 08:30 Conference registration
- 09:00 **Opening session**  
*Speakers:*  
*Director Ann Claire C. Cabochan, Bureau of International Trade Relations,  
Department of Trade and Industry*  
*Anna Joubin-Bret, UNCTAD*
- 09:30 Coffee break
- 10:00 **Trends and Developments in Investor-State Dispute Settlement (ISDS)**  
- Trends and developments in International Investment Agreements (IIAs)  
- Recent developments in ISDS  
- Comparative national policy developments  
- International investment policy regime  
  
*Speaker: Anna Joubin-Bret, UNCTAD*  
  
Open discussion
- 11:30 **Admission and Establishment of Investments**  
- Scope of protection  
- Compliance with host State laws  
- Relevant awards  
  
*Speaker: Anna Joubin-Bret, UNCTAD*  
*Discussant: Justice Florentino P. Feliciano, Philippines*  
  
Open discussion
- 12:30 Lunch
- SESSION 1: CORE ELEMENTS IN IIAs AND RECENT ARBITRAL AWARDS**
- 14:00 **Definitions of Investment and Investor**  
- Introduction of scope and definitions in IIAs  
- Analysis and discussion of relevant arbitral awards, such as Phoenix v. Czech Republic, RDC v. Guatemala, Hamester v. Ghana, Anderson v. Costa Rica, Saba Fakes v. Turkey, Global Trading v. Ukraine, Rompetrol v. Romania, Micula et al. v. Romania, Tokios Tokeles v. Ukraine, TSA Spectrum de Argentina SA v. Argentina  
  
*Speakers:*  
*Professor Hi-Taek Shin, Seoul National University*  
*Yu-Jin Tay, Shearman and Sterling, Singapore*  
*Discussant:*  
*Elodie Dulac, King & Spalding, Singapore*

	Open discussion
16:00	Coffee break
16:30	<b>Fair and Equitable Treatment (FET)</b> <ul style="list-style-type: none"> <li>- Introduction to FET and minimum standard of treatment</li> <li>- Normative standards</li> <li>- Analysis and discussion of recent interpretations and awards by arbitral tribunals, such as <i>Lemire v. Ukraine</i>, <i>AWG v. Argentina</i>, <i>Helnan v. Egypt</i>, <i>Merrill and Ring v. Canada</i>, <i>Toto Costruzioni v. Lebanon</i>, <i>Glamis Gold v. United States</i></li> </ul> <p><i>Speaker: Christopher Thomas, Q.C., J.C. Thomas Law Corporation</i>  <i>Discussant: Professor Shotaro Hamamoto, Kyoto University</i></p> <p>Open discussion</p>
18:00	End of working day

## DAY 2 - 23 June 2011

09:00	<b>Denial of Justice (Special Topic on FET)</b> <ul style="list-style-type: none"> <li>- Introduction of Denial of Justice, and in the context of FET</li> <li>- Analysis and discussion of relevant interpretations and arbitral awards</li> </ul> <p><i>Speaker: Elodie Dulac, King &amp; Spalding, Singapore</i>  <i>Discussant: Professor Shotaro Hamamoto, Kyoto University</i></p> <p>Open discussion</p>
10:00	Coffee break
10:30	<b>Most-Favored-Nation (MFN) Treatment</b> <ul style="list-style-type: none"> <li>- Introduction to MFN</li> <li>- Treaty foundations</li> <li>- Analysis and discussion of relevant interpretations and recent awards by arbitral tribunals, such as <i>Bayindir v. Pakistan</i>, <i>Wintershall Aktiengesellschaft v. Argentina</i></li> </ul> <p><i>Introduction:</i>  <i>Anna Joubin-Bret, UNCTAD</i></p> <p><i>Speakers:</i>  <i>Professor Guiguo Wang, City University of Hong Kong</i>  <i>Morgan Maguire, Investor-State LawGuide</i></p> <p>Open discussion</p>
12:00	Lunch
13:30	<b>Expropriation</b>

- Introduction to Expropriation
- Expropriation and State regulations
- What constitutes just expropriation - valuation methods in expropriations
- Analysis and discussion of relevant arbitral awards, such as AWG v. Argentina, Chemtura v. Canada, RosInvest v. Russia, Saipem v. Bangladesh, Bernardus Henricus Funnekotter and others v. Zimbabwe, Renta 4 SVSA v. Russia

*Speakers:*

*Professor Shotaro Hamamoto, Kyoto University  
Alvaro Galindo, Ecuador*

Open discussion

15:00 Coffee break

**SESSION 2: DEVELOPMENTS IN INTERNATIONAL ARBITRATION  
AND IIAs**

15:30 **Revision of Arbitration Rules**

- Overview and revision of existing arbitration rules
- Relevance for investor-State dispute settlement provisions included in IIAs

*Speakers:*

*Aloysius Llamzon, Permanent Court of Arbitration  
Corinne Montineri, UNCITRAL  
Cheng Yee Khong, International Chamber of Commerce*

17:30 Open discussion

18:00 End of working day

**DAY 3 - 24 June 2011**

09:00 **Provisional Measures and Interim Relief**

*Speaker: Alvaro Galindo, Ecuador  
Discussant: Aloysius Llamzon, Permanent Court of Arbitration*

Open discussion

09:45 **Transparency in Arbitral Proceedings**

*Speakers:*

*Aloysius Llamzon, Permanent Court of Arbitration  
Corinne Montineri, UNCITRAL*

Open discussion

10:30 Coffee break

11:00	<p><b>Comparative Analysis of Asian BITs and FTAs</b></p> <p>Speaker:  <i>Professor Guiguo Wang, City University of Hong Kong</i></p> <p>Discussants:  <i>Professor Shotaro Hamamoto, Kyoto University</i>  <i>Professor Hi-Taek Shin, Seoul National University</i></p> <p>Open discussion</p>
12:15	<p>Lunch</p> <p><b>SESSION 3: MANAGEMENT OF ISDS BY THE STATE</b></p>
13:45	<p><b>New Research and Information on ISDS Cases and Texts from Arbitral Awards</b></p> <p>Speaker: <i>Morgan Maguire, Investor-State LawGuide</i></p>
14:15 State?	<p><b>Conduct of Investor-State dispute settlement: What is involved for a</b></p> <p>Panelists:  <i>Professor Guiguo Wang, City University of Hong Kong</i>  <i>Alvaro Galindo, Ecuador</i>  <i>Yu-Jin Tay, Shearman and Sterling, Singapore</i>  <i>Carla Sanchez Tabra and Marcio De La Cruz, Peru</i>  <i>Jane E. Yu, Philippines</i></p> <p>Open discussion</p>
15:30	<p><b>Dispute Prevention and Alternatives to Arbitration</b></p> <ul style="list-style-type: none"> <li>- Dispute prevention policies and measures</li> <li>- Discussion of dispute resolution techniques other than international arbitration</li> </ul> <p>Speaker: <i>Anna Joubin-Bret, UNCTAD</i>  Discussant: <i>Professor Hi-Taek Shin, Seoul National University</i></p> <p>Open discussion</p>
16:30	<p><b>Closing remarks</b></p> <p>Speaker:  <i>Solicitor General Jose Anselmo Cadiz, Republic of the Philippines</i></p> <p>Distribution of Certificates</p>
17:00	<p>End of the workshop</p>



### **III. LIST OF PARTICIPANTS AND SPEAKERS**

#### ***APEC PARTICIPANTS***

##### **CHINA**

1. Mr. Zhiyang CHEN  
Deputy Division Director  
Department of International Trade and Economic Affairs  
Ministry of Commerce  
No. 2 Dong Chang'an Avenue  
Beijing  
Tel. No.: +8610.6519.7204  
Fax: +8610.6519.7702  
chenzhiyang@mofcom.gov.cn

##### **INDONESIA**

2. Ms. Amanda YOSEANIE  
Investment Coordinating Board  
Jl. Jend. Gatot Subroto No. 44  
Jakarta  
Tel. No.: +6221.525.2008 ext. 3631  
Fax: +6221.525.2769  
amanda@bkpm.go.id; yoseanie\_manda2@yahoo.com
3. Ms. Revita SOFIA  
Investment Coordinating Board  
Jl. Jend. Gatot Subroto No. 44  
Jakarta  
Tel. No.: +6221.525.2008 ext. 1337  
Fax: +6221.526.9847  
revita.sofia@yahoo.co.id
4. Mr. Rizki Priyadi UTAMA  
Investment Coordinating Board  
Jl. Jend. Gatot Subroto No. 44  
Jakarta  
Tel. No.: +6221.525.2008 ext. 1630  
Fax: +6221.522.5818

##### **JAPAN**

5. Ms. MORISHITA Masako  
Official  
Economic Partnership Division, Economic Affairs Bureau  
Ministry of Foreign Affairs  
2-2-1 Kasamigaseki, Chiyoda-ku  
Tokyo 100-8910  
Tel. No.: +813.5501.8341  
Fax: +813.5501.8340  
masako.morishita@mofa.go.jp

6. Ms. YURI Goto  
Senior Investment Specialist  
FTA/EPA Division  
Ministry of Foreign Affairs  
1-3-1 Kasumigaseki, Chiyoda-ku  
Tokyo 100-8901  
Tel. No.: +813.3501.1700  
Fax: +813.3501.1592  
goto-yuri@meti.go.jp

## **KOREA**

7. Mr. OH Hyun Suk  
Director  
The Korean Commercial Arbitration Board  
43rd Flr., Trade Tower, World Trade Center  
Samseong-dong Gangnam-gu  
Seoul 135-729  
Tel. No.: +822.551.2020  
Fax: +822.551.2010  
ohs1905@kcab.or.kr
8. Mr. KAM Sangki  
Deputy Manager  
The Korean Commercial Arbitration Board  
43rd Flr., Trade Tower, World Trade Center  
Samseong-dong Gangnam-gu  
Seoul 135-729  
Tel. No.: +822.551.2020  
Fax: +822.551.2010

## **MALAYSIA**

9. Mr. MALIK Ayob ABDUL  
Senior Federal Counsel  
Attorney General's Chambers of Malaysia  
No.45, Persiaran Perdana, Presint 4  
Putrajaya 62100  
Tel. No.: +603.8872.2262  
Fax: +603.8890.3413  
malik@agc.gov.my
10. Ms. LATIFAH AIDA Abdul Latif  
Senior Executive  
The Central Bank of Malaysia  
International Department,  
Bank Negara Malaysia Jalan Dato'Onn  
Kuala Lumpur 50480  
Tel. No.: +603.2698 8044 ext. 7312  
Fax: +603.2692 6762  
latifahaida@bnm.gov.my

## **MEXICO**

11. Ms. Crista PEREZ  
Ministry of Economy Mexico  
Alfonso Reyes no. 30,  
18th floor Col. Condesa  
Mexico 06140  
Tel. No.:+5255.5729.9100 ext. 15422  
Fax: +5255.5729.9351  
crista.perez@economia.gob.mx
12. Ms. Ximena ITURRIAGA  
Ministry of Economy Mexico  
Alfonso Rey no. 30,  
18th floor Col. Condesa  
Mexico 06140  
Tel. No.:+5255.5729.9100 ext. 15424  
Fax: +5255.5729.9110  
ximena.iturriaga@economia.gob.mx

## **PAPUA NEW GUINEA**

13. Mr. Ahwong ASAN  
Investment Promotion Authority  
P.O Box 1281, Port Noresby, NCD  
Tel. No.:+675.321.3900  
Fax: +675.321.3094  
ahwong@ipa.gov.pg
14. Ms. Dorish LOVARE  
Department of Justice and Attorney-General  
P.O Box 591, Waigani, National Capital District  
Tel. No.:+675.301.2914  
Fax: +675.323.3661  
dorish\_lovare@justice.gov.pg

## **PERU**

15. Mr. Marcio DELA CRUZ  
APEC Trade Officer  
Ministry of Foreign Trade and Tourism-Mincetur  
Calle Uno Oeste 050, San Isidro  
Lima L27  
Tel. No.:+511.513.6100 ext. 1210  
Fax: +511.513.6100 ext. 1265  
mdelacruz@mincetur.gob.pe
16. Ms. Carla Yuliana SANCHEZ TABRA  
Lawyer  
Ministry of Economy and Finance of Peru  
Jr. Junin 319 Cercado de Lima  
Tel. No.:+511.311.5930 ext. 3543  
Fax: +511.626.9940  
csanchez@mef.gob.pe

## PHILIPPINES

Department of Trade and Industry  
Bureau of International Trade Relations  
4/F DTI International Bldg.  
375 Sen. Gil Puyat Avenue, Makati City

17. Ms. Ann Claire CABOCHAN  
Director  
Tel. No.: +632.659.8743  
Fax: +632.890.5149  
acabochan\_bitr@yahoo.com
18. Ms. Marie Sherylyn AQUIA  
Senior Trade and Industry Development Specialist  
Tel. No.: +632.897.8289/92 ext. 414  
Fax: +632.890.5149  
SherylynAquia@dti.gov.ph; apecbitr@yahoo.com
19. Ms. Carina VIRTUCIO  
Senior Trade and Industry Development Specialist  
Tel. No.: +632.897.8289/92 ext. 424  
Fax: +632.890.5149  
carinavirtucio@dti.gov.ph
20. Ms. Bianca Pearl SYKIMTE  
Trade and Industry Development Specialist  
Tel. No.: +632.897.8289/92 ext. 407  
Fax: +632.890.5149  
biancasykimte@yahoo.com; BiancaSykimte@dti.gov.ph
21. Ms. Katherine SINSON  
Attorney III  
Tel. No.: +632.897.8289/92 ext. 404  
Fax: +632.890.5149  
kgsinson@gmail.com

Board of Investments  
Industry and Investments Building  
385 Sen. Gil Puyat Avenue, Makati City

22. Ms. Sharon ESCOTO  
Division Chief  
Tel. No.: +632.897.6682 ext. 222  
Fax: +632.895.3701  
SREscoto@boi.gov.ph
23. Ms. Marjorie Ramos-Samaniego  
Director  
Legal Services Department  
Tel. No.: +632.897.6682 ext. 238  
Fax: +632.890.2151  
moramos@boi.gov.ph

24. Ms. Madonna CLARINO  
Tel. No.:+632.897.6682  
Fax: +632.890.2151  
MNClarino@boi.gov.ph
25. Ms. Ana Nina SERRANO  
Tel. No.:+632.890.2151  
ananinaserrano@gmail.com
26. Ms. Elyjean PORTOZA  
Tel. No.:+632.890.2151  
elj\_72@yahoo.com
27. Ms. Madelyn Joy ALMAZORA  
Tel. No.:+632.890.2151  
msalmazora@yahoo.com
28. Mr. Rommel MADRONIO  
Investments Specialist  
Tel. No.:+632.896.5167 ext. 222  
Fax: +632.895.3701  
rsmadronio@boi.gov.ph

Office of the Solicitor General  
134 Amorsolo St., Legaspi Village  
Makati

29. Mr. Eric Remegio PANGA  
Assistant Solicitor General  
eropanga@yahoo.com
30. Ms. Jane YU  
Senior State Solicitor  
Tel. No.:+632.892.5794  
janeyu.osg@gmail.com
31. Ms. Marsha RECON  
Senior State Solicitor  
Tel. No.:+632.893.0200  
marsha\_dulce@yahoo.com
32. Ms. Fenicar TABAO  
Senior State Solicitor
33. Mr. Dionis JACOB  
Associate Solicitor  
Tel. No.:+632.892.5794  
dpjacobe08@yahoo.com
34. Ms. Judy LARDIZABAL  
Associate Solicitor  
judy\_lardizabal@yahoo.com
35. Ms. Denise DY  
Associate Solicitor

Tel. No.:+632.817.9836  
denise.sy.dy@gmail.com

36. Mr. Michael MACAPAGAL  
Associate Solicitor  
Tel. No.:+632.817.9836  
mtmacapagal@gmail.com

37. Mr. Arnold MARTINEZ  
Associate Solicitor  
Tel. No.:+632.817.3211  
lawofarnold@yahoo.com

38. Ms. Josephine ARIAS  
State Solicitor II  
Tel. No.:+632.817.9870  
josephine.osg@gmail.com

39. Ms. Manelyn CATURLA  
State Solicitor II  
mecaturla@osg.gov.ph

40. Mr. Walter JUNIA  
State Solicitor  
Tel. No.:+632.892.5794  
walterjunia@yahoo.com

41. Ms. Lucy BUTLER-TORRES  
State Solicitor  
Tel. No.:+632.818.6381  
lucy\_butler@yahoo.com

42. Ms. Melanie QUIMBO  
State Solicitor  
Tel. No.:+632.894.4497  
maquimbo@yqhoo.com

43. Ms. Armi Beatriz BAYOT  
Attorney III  
Tel. No.:+632.817.9836  
armi\_bayot@yahoo.com

44. Ms. Charisse OLALIA  
State Solicitor  
Tel. No.:+632.817.3211  
charisse.olalia@gmail.com

Department of Justice  
DOJ Main Bldg., Padre Faura St.  
Manila

45. Ms. Marlyn ANGELES  
Senior State Counsel  
Tel. No.:+632.536.1293  
marlyn.angeles@gmail.com

46. Ms. Maria Laureen SUAN  
State Counsel  
Tel. No.:+632.523.8481 ext. 306  
lds.doj@gmail.com

47. Mr. Charlie GUHIT  
State Counsel  
Tel. No.:+632.523.8481  
charlie\_gee@yahoo.com

48. Ms. Grace ESTRADA  
State Counsel  
Tel. No.:+632.536.1293  
gle.doj@gmail.com

49. Ms. Mary Grace QUINTANA  
State Counsel  
Tel. No.:+632.536.1293  
mgq\_doj@yahoo.com

50. Ms. Berlin BERBA  
State Counsel  
Tel. No.:+632.523.8481 ext. 399  
Fax: +632.525.2218  
berlinberba@yahoo.com

Department of Foreign Affairs  
2330 Roxas Blvd., Pasay City

51. Ms. Irene Susan NATIVIDAD  
Executive Director  
Office of Legal Affairs

52. Ms. Azela ARUMPAC  
Acting Director  
Office of Legal Affairs  
Tel. No.:+632.834.4551  
agarumpac@yahoo.com

53. Mr. Arnel SANCHEZ  
Office of the Undersecretary of International Economic Relations  
Tel. No.:+632.834.3013  
Fax: +632.834.1451  
apecams@gmail.com; apecphil@gmail.com

Supreme Court of the Philippines

54. Ms. Anna Lea A. DY-UBARRA  
Office of Justice Sereno  
Telefax: +632.526.6416  
tsalmist@mail.com

## **RUSSIAN FEDERATION**

55. Ms. Yulia LENEVICH  
Deputy Chief  
Services and Investments Division  
Ministry of Economic Development  
18/1 Ovchinnikovskaya nab.  
Moscow, 115324  
Tel. No.: +7495.651.7652  
Fax: +7495.651.7620  
Lenevich@economy.gov.ru

56. Mr. Rinat GARDIEV  
Expert  
Services and Investments Division  
Ministry of Economic Development  
18/1 Ovchinnikovskaya nab.  
Moscow, 115324  
Tel. No.: +7495.651.7698  
Fax: +7495.651.7620  
Gardiev@economy.gov.ru

## **SINGAPORE**

57. Ms. Natalie MORRIS  
State Counsel  
Attorney-General's Chambers, Singapore  
No.1, Coleman Street, #10-00,  
The Adelphi Building  
Singapore  
Tel. No.: +656.322.3482  
Fax: +656.338.2979  
natalie\_morris@agc.gov.sg

## **CHINESE TAIPEI**

58. Mr. CHEN Yen-Po  
Specialist  
Investment Commission  
Ministry of Economic Affairs  
8F, No. 7, Sec 1, Roosevelt Road  
Taipei 10092  
Tel. No.: +8862.3343.5700 ext. 734  
Fax: +8862.2396.4207  
ypchen@moeaic.gov.tw

59. Ms. CHEN Ying-Ju  
Officer  
Department of Investment Services  
Ministry of Economic Affairs  
8F, No. 71, Guancian Road  
Taipei 10047  
Tel. No.: +8862.2389.2111 ext. 517  
Fax: +8862.2370.5565  
yjchen2@moea.gov.tw



## **THAILAND**

60. Ms. Nattinee NETRAUMPALI  
Investment Promotion Officer, Professional Level  
Thailand Board of Investment  
555 Vibhayadee-Rangsit Rd., Jatujak,  
Bangkok 10900  
Tel. No.: +662.553.8384  
Fax: +662.533.8318  
nattineenet@boi.go.th
61. Mr. Adisak JANTATUM  
Second Secretary  
Ministry of Foreign Affairs  
440 Sri Ayuthaya Rd.,  
Bangkok 10400  
Tel. No.: +662.643.5000 ext. 11065; +6281.628.6699  
Fax: +662.643.5041  
aj2151@caa.columbia.edu

## **VIET NAM**

62. Mr. MINH Truong  
Official  
Ministry of Planning and Investment  
6B Hoang Dieu Street,  
Ha Noi  
Tel. No.: +84.988.068.069  
Fax: +84.437.343.769  
truongminhmpi@yahoo.com
63. Mr. VINH Nguyen Xuan  
Ministry of Planning and Investment  
6B Hoang Dieu Street,  
Ha Noi  
Tel. No.: +84.988.022.588  
Fax: +84.438.458.149  
vinhnguyenmpi@gmail.com

## ***SPEAKERS AND RESOURCE PERSONS***

1. Ms. Elodie DULAC  
Senior Associate  
King & Spalding LLP  
9 Raffles Palace, Level 31-01, Republic Plaza  
Singapore 048619  
Tel. No.: +65.8499.7283  
Fax: +65.6303.6055  
edulac@kslaw.com
2. Justice Florentino FELICIANO  
Senior Counsel  
SyCip Salazar Hernandez & Gatmaitan  
7/F SyCipLaw Center

105 Paseo de Roxas  
Makati City 1226 Metro Manila  
Tel. No.: +632.982.3630  
Fax: +632.817.3567; +632.817.3896  
fpfeliciano@syciplaw.com

3. Mr. Alvaro GALINDO  
Counsel  
DECHERT LLP  
1775 I Street, N Washington, DC 20006  
Tel. No.: +1202.261.3316  
iea.arbitraje@gmail.com
4. Mr. Shotaro HAMAMOTO  
Professor  
Graduate School of Law, Kyoto University  
Yoshida Honmachi, Sakyo  
Kyoto 606-8501, Japan  
Tel. No.: +8175.753.3226  
Fax: +8175.753.3290  
hamamoto@law.kyoto-u.ac.jp
5. Ms. Anna JOUBIN-BRET  
Senior Legal Adviser  
Division on Investment and Enterprise  
United Nations Conference on Trade and Development  
Palais des Nations  
1211 Geneva 10 - Switzerland  
Tel. No.: +4122.917.5897  
anna.joubin-bret@unctad.org
6. Ms. Cheng-Yee KHONG  
Director and Counsel  
Legal (Arbitration)  
International Chamber of Commerce  
Suite 2, 12F Fairmont Building  
8 Cotton Tree Drive, Central, Hongkong  
Tel. No.: +852.3607.5601  
Fax: +852.2523.1619  
chengyee.khong@iccwbo.org
7. Mr. Aloysius LLAMZON  
Legal Counsel  
Permanent Court of Arbitration  
Peace Palace, Carnegieplein 2, 2217 KJ  
the Hague, The Netherlands  
Tel. No.: +316.1195.3301  
Fax: +317.0302.4107  
LLlamzon@pca-cpa.org
8. Mr. Morgan MAGUIRE  
Director of Operation & Management  
Investor-State Law Guide  
1000 Waterfront Centre, 200 Burrard Street  
Vancouver, B.C, Canada

Tel. No.:+1604.788.9596  
mmaguire@investorstatelawguide.com

9. Ms. Corinne MONTINERI  
Legal Officer  
United Nations Commission on International Trade Law  
Vienna International Center  
P.O. Box 500, A-1400  
Vienna, Austria  
Tel. No.:+431.26060.4074  
Fax: +431.260607.4074  
corinne.montineri@unvienna.org
10. Mr. Hi-Taek SHIN  
Seoul National University  
htshin@snu.ac.kr
11. Mr. Yu-Jin TAY  
Head, International Arbitration  
Shearman & Sterling LLP (ASIA)  
6 Battery Road #25-03  
Singapore 049909  
Tel. No.:+65.6230.3839  
Fax: +65.6230.3899  
YuJin.Tay@Shearman.com
12. Mr. John Christopher THOMAS  
J.C Thomas Law Corporation  
1000 Waterfront Centre, 200 Burrard Street  
Vancouver, B.C, Canada  
Tel. No.:+1604.961.6344  
Fax: +1604.689.7525  
jcthomas@thomas.ca
13. Mr. Guiguo WANG  
Dean and Chair Professor of Chinese and Comparative Law  
School of Law, City University of Hong Kong  
lwwgg@cityu.edu.hk

## **Summary**

APEC Participants	-	63	(43 females/20 males)
Speakers	-	13	(4 females/9 males)
Total	-	76	(47 females/29 males)

## ***PHILIPPINE SECRETARIAT***

Department of Trade and Industry

1. Ms. Charina J. Villarino
2. Mr. Miguel Paolo Esmero
3. Mr. Joseph Lining

4. Mr. Joseph Lacerna
5. Mr. Ryan Balmedina
6. Mr. Leonardo Conception
7. Mr. Edwin Castro

Office of the Solicitor General

1. Ms. Lizette Eusebio
2. Mr. Sisenando Galvez
3. Ms. Vilma Aino
4. Ms. Marilyn Balmaceda
5. Mr. Aristotle Masilang
6. Mr. Victor De Leon
7. Mr. Erwin Gonzales
8. Mr. Jose Cecilio
9. Mr. Isabelo Cabuay
10. Mr. Alberto Taquiqui

## **IV. BIO NOTES OF KEY SPEAKERS**

### **Elodie DULAC**

Elodie Dulac is an associate in King & Spalding's Singapore office and a member of the firm's International Arbitration Practice Group. Ms. Dulac has represented clients in commercial and investment arbitrations around the world, with a particular focus on Asia. She has worked on international arbitrations under the rules of the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), and the United Nations Commission on International Trade Law (UNCITRAL). In addition to her work as counsel, Ms. Dulac has been appointed as an arbitrator.

Prior to joining King & Spalding, Ms. Dulac worked in the international arbitration group of Shearman & Sterling in Singapore and in Washington, D.C.

Contact:  
edulac@kslaw.com

### **Florentino P. FELICIANO**

Florentino P. Feliciano is currently senior counsel at SyCip Salazar Hernandez & Gatmaitan, where he was a partner for nearly 25 years, and where he served as co-managing partner in 1981-1983 and managing partner in 1983 - 1986. He was counsel, negotiator and legal advisor to corporations engaged in pharmaceutical manufacturing and distribution, mining, petroleum refining and distribution, and banking, among others.

Justice Feliciano was appointed as a Justice of the Supreme Court of the Philippines in 1986, where he decided a large number of cases on commercial law, tax law, commercial arbitration, and the administration and recognition of domestic and foreign arbitral awards.

He was subsequently elected to the Appellate Body of the World Trade Organization in December 1995, and was chairman of the Appellate Body in 2000 - 2001, where he contributed substantively to the burgeoning jurisprudence of international trade law.

Justice Feliciano has been active in the field of international arbitration, acting as both an arbitrator and counsel in numerous international commercial and investment arbitration disputes in the International Chamber of Commerce (ICC), the International Centre for the Settlement of Investment Disputes (ICSID), the Stockholm Arbitration Institute, the China International Economic and Trade Arbitration Commission (CIETAC), and the Arbitration Tribunal under Article XV of the

1982 United Nations Convention on the Law of the Sea (UNCLOS). He also served on the Asian Development Bank Administrative Tribunal.

He is a member of the World Bank Administrative Tribunal and the senior advisory council on the South East Asian programme on ocean law and policy. He was also elected to the Institut de Droit International and the Curatorium of The Hague Academy of International Law. In 2005, he was elected an honorary member of the American Society of International Law. He is also a member of the Japan Commercial Arbitration Association (Tokyo); the World Trade Law Association's governing council (London); the International Development Law Institute (Rome); the International Institute of Humanitarian Law (San Remo); and the Asian Society of International Law.

He served at the Department of Justice as, among other things, legal adviser to the Philippines negotiating panels in the renegotiation of the US-RP Military Bases Agreement (1957) and the Philippines claim to Sabah (1963 - 1966). In July 2003, he was appointed by the president of the Philippines as chairman of a special fact-finding commission to look into the causes of the 2003 mutiny in Makati, Philippines.

Justice Feliciano served as a lecturer for a number of years at the Yale University School of Law and the University of the Philippines, College of Law. He has also lectured at The Hague Academy of International Law (1966) and at the Centre for Studies and Research of The Hague Academy, the US Naval War College, and the University of Bielefeld, among others. He has also authored numerous publications in the fields of domestic and international law, international investment law, and international arbitration.

Justice Feliciano received his Bachelor of Arts (BA; *summa cum laude*) and Bachelor of Laws (LLB; *magna cum laude*) degrees from the University of the Philippines, and obtained a Master of Laws (LLM) and a Doctor of Juridical Science (JSD) at Yale University. He was awarded a Doctor of Laws (*honoris causa*) by the Misamis University in the Philippines.

Contact:

7/F SyCipLaw Center  
105 Paseo de Roxas, Makati City  
1226 Metro Manila, Philippines  
Tel: (632) 982-3500 (PABX)  
(632) 982-3600  
(632) 982-3700  
(632) 982-3630 (Direct)  
Fax: (632) 817-3567  
(632) 817-3896  
fpfeliciano@syciplaw.com

## **Alvaro GALINDO**

Alvaro Galindo is Director of the International Litigation and Arbitration Unit at the Attorney General Office of the Republic of Ecuador. In this role, he represents the

Republic in numerous ICSID and UNCITRAL investor-State arbitration cases before international tribunals. Prior to his current position, Mr. Galindo was counsel for Ecuador in various international Arbitration cases under ICSID. He was also legal consultant at the International Centre for Settlement of Investment Disputes. As a Law Professor, he teaches International Law, International Arbitration Law, and Dispute Resolution under International Trade and Investment. He has also written numerous articles for Law Reviews on topics related to Arbitration and Investor-State Arbitration. He is a founding member of the Ecuadorian Institute of Arbitration. He is a member of the International Chamber of Commerce Task Force Group on Arbitration Involving States, and a member of the International Bar Association Sub-Committee on Investment Arbitration. He obtained his law degree in the Catholic University of Ecuador and his master's degree in international law at Georgetown University Law Centre.

Contact:

Procuraduría General del Estado República del Ecuador  
Avenida Amazonas No. 477 y Roca Edif.  
Río Amazonas, 6to. piso, oficina 601  
Quito-Ecuador  
(593 2) 250-2369 / 255-3980 / 222-2642  
Cel phone: 593 9 4702299  
agalindo@pge.gob.ec / iea.arbitraje@gmail.com

### **Anna JOUBIN-BRET**

Anna Joubin-Bret is Senior Legal Adviser at the Division on Investment and Enterprise, United Nations Conference on Trade and Development (UNCTAD), Geneva. She manages the advisory work on international investment law issues as well as the technical assistance programme on international investment agreements (IIAs). She oversees the research work and publishing activities of the programme, including the publication of the *UNCTAD Series on Issues in International Investment Agreements II*. She co-authored the UNCTAD publication on *BITs 1995-2006: Trends in Investment Rulemaking* and recent publications on alternative methods of treaty-based investor-State dispute resolution. Over the years she has contributed to numerous editions of the World Investment Report.

Ms. Joubin-Bret is current co-chair of the State Mediation Committee of the International Bar Association and serves as an expert to the International Chamber of Commerce Drafting Committee on revision of rules. She lectures in conferences and seminars on international investment law in all regions.

Contact:

UNCTAD/DIAE  
Palais des Nations  
1211 Geneva 10 - Switzerland  
Tél: +41 22 917 5897  
anna.joubin-bret@unctad.org

## **HAMAMOTO Shotaro**

Shotaro Hamamoto is a Professor at the Graduate School of Law in Kyoto University, Japan. Prior to this position, Professor at the Kobe University and *Professeur invité* at the Université de Paris I (Panthéon-Sorbonne).

He was an Advocate for the Japanese Government in the cases of —*Shinmaru*” (Japan v. Russia) and —*Tomimaru*” (Japan v. Russia) before the International Tribunal for the Law of the Sea (2007). He was - Assistant for the Spanish Government in the Fisheries Jurisdiction case (Spain v. Canada) before the International Court of Justice. He was an Arbitrator for the Japan Sports Arbitration Agency. He is the Japanese Representative (observer) at the Advisory Group on Legal Issues (T-DO LI), Monitoring Group of the Anti-Doping Convention, the Council of Europe and to the UNCITRAL Working Group II on Arbitration and Conciliation.

He has written numerous articles, notes and papers on international investment agreements, international law, economic law, arbitration. He obtained his law degree and master’s degree in law at Kyoto University. He obtained his Docteur en Droit at the Université de Paris II - Panthéon Assas in France. He is a member of the American Society of International Law, Japanese Society of International Law and Asian Society of International law.

Professor Hamamoto was born on 18 January 1970 in Fukuoka, Japan.

Contact:  
Graduate School of Law, Kyoto University  
Sakyo, Yoshida Honmachi  
Kyoto 606-8501  
JAPAN  
Fax: +81.75.753.3290  
hamamoto@law.kyoto-u.ac.jp

## **KHONG Cheng-Yee**

Ms Khong Cheng-Yee is the Director and Counsel of the ICC International Court of Arbitration Secretariat - Asia Office, based in Hong Kong.

Ms Khong trained in England where she graduated in law with honours and then obtained a Master’s degree in International Business and Management. She is admitted as a Solicitor of the Supreme Court of England and Wales and as an Advocate and Solicitor in Malaysia. A former member of the ICC Court Secretariat in Paris, Ms Khong practiced with a leading international law firm in London and Paris, as well as in Kuala Lumpur, where she specialised in international arbitration.

Prior to heading the ICC Court Secretariat’s Asia Office, Ms Khong was the Regional Director for ICC Dispute Resolution Services in Asia.

Contact:  
International Court of Arbitration Secretariat



Asia Office  
Suite 2, 12/F, Fairmont House  
8 Cotton Tree Drive  
Central, Hong Kong  
chengyee.khong@iccwbo.org

### **Aloysius P. LLAMZON**

Alloysius Llamzon is Legal Counsel at the Permanent Court of Arbitration where he assists arbitral tribunals in cases concerning maritime boundaries under UNCLOS Annex VII, territorial boundaries, peace agreements, bilateral and multilateral investment treaties, and commercial contracts as well as in disputes between various combinations of States, State entities, Intergovernmental Organizations, and private parties. He is also the diplomatic representative of the PCA in Singapore, Sri Lanka, Uganda, the Philippines, and various UN Missions in New York. He assists the PCA Secretary-General in UNCITRAL Arbitration Rules, treaty, and contract matters concerning the designation of an Appointing Authority or the direct appointment of arbitrators.

He is the Registrar of *Indus Waters Kishenganga Arbitration* (Islamic Republic of Pakistan v. Republic of India), since Jan. 2011 and Acting Registrar of the *Abyei Arbitration* (Government of Sudan / Sudan People's Liberation Movement/Army).

Mr. Llamzon was formerly a US Corporate Associate of Skadden, Arps, Slate, Meagher & Flom LLP of Hong Kong and Associate at the Romulo Mabanta Buenaventura Sayoc & de los Angeles Law Offices of the Philippines.

Mr. Llamzon obtained his BA degree from the Ateneo de Manila University School of Law. He holds a Master of Laws and Doctor of Juridical Science (JSD) (candidate) degree from the Yale Law School.

#### **Contact:**

Permanent Court of Arbitration Peace Palace Carnegieplein 2 2517 KJ The Hague  
The Netherlands

T: +31 70 302 4165 F: +31 70 302 4167

louie.llumzon@yale.edu

llumzon@pca-cpa.org

### **Morgan D. MAGUIRE**

Morgan D. Maguire is a lawyer, called to the Bar of the Province of British Columbia (Canada), and Director of Operation and Management for Investor-State LawGuide (ISLG), an on-line legal research database on investment treaty law.

His responsibilities with ISLG include: the development of new tools for displaying legal research content and the interrelationship between various legal materials; overseeing the ISLG document management and data capture process to ensure

quality and accuracy of content; overseeing the sales and marketing for ISLG; and managing the ISLG development and data capture teams and expert contributors.

Contact:

Investor-State LawGuide  
1000 Waterfront Centre  
200 Burrard Street, Mail Box #52  
Vancouver, BC V7X 1T2  
Canada  
Tel: +1 604 689 2710  
Mob: + 604 788 9596  
mmaguire@investorstatelawguide.com

### **Corinne MONTINERI**

Corinne Montineri is a Legal Officer in the International Trade Law Division of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). Her main field of activity relates to arbitration. She has been servicing the sessions of the UNCITRAL Working Group II (Arbitration and Conciliation) since October 2003 and is the Secretary of Working Group II which currently works on the preparation of a legal standard on transparency in treaty-based investor-State arbitration.

Ms. Montineri joined the United Nations Office of Legal Affairs in 2003. Prior to joining the United Nations Office of Legal Affairs, Ms. Montineri, a national of France, worked as a senior legal officer with multi-national companies, mainly on matters relating to merger and acquisition and international contracts, both in Europe and Asia-Pacific. Ms. Montineri holds law degree from the University of Pantheon-Sorbonne (Paris) and a degree in Economics and Finance from the Institut d'Etudes Politiques (Paris).

Contact:

UNCITRAL Secretariat  
Vienna International Centre  
P.O. Box 500  
A-1400 Vienna, Austria  
Tel: (+43 1) 26060 4074  
Fax: (+43 1) 26060 5813  
corinne.montineri@uncitral.org

### **Hi-Taek SHIN**

Dr. Hi-Taek Shin is a Professor of Law at Seoul National University School of Law and the director of the Center for International Economic and Business Law at Seoul National University. He received the LL.B and LL.M degrees from Seoul National University and the LL.M and J.S.D degrees from Yale Law School, and is an expert in international investment law and cross-border M&A transactions.

Prior to joining the law faculty at Seoul National University in 2007, Professor Shin was a partner at Kim & Chang, the leading law firm in Korea, where he specialized in mergers and acquisitions and foreign direct investment, with particular emphasis on cross-border investments and settlement of disputes arising from such cross-border investments, for more than twenty-five years. Professor Shin has extensive experience in representing multinational investors doing business in Korea and advising Korean companies investing overseas. Professor Shin was internationally distinguished as one of the world's best M&A lawyers.

Professor Shin has actively advised the Korean government on issues relating to the negotiations of many important international agreements. He also served as the director of the Korean Bar Association for International Relations. He was a member of the Presidential Advisory Commission on the National Economic Policy and currently serves as the chairman of the Law School Education Commission of Korea as well as the chairman of the audit committee of Woori Finance Holding Co., Ltd.

He is on the panel of arbitrators for International Centre for Settlement of Investment Disputes (ICSID) and the Korea Commercial Arbitration Board.

Contact:  
Seoul National University  
htshin@snu.ac.kr

## **TAY Yu-Jin**

Mr. Tay Yu-Jin is Counsel in Shearman & Sterling's International Arbitration Group in Singapore and leads its international arbitration practice in Asia. He specializes in international arbitrations concerning M&A, joint venture, construction and engineering, oil and gas, defence procurement and other general commercial disputes. Mr. Tay also specializes in investment treaty arbitration and has represented investors in treaty arbitrations and ICSID annulment proceedings as well as advised governments on treaty negotiation and drafting. Prior to joining Shearman & Sterling, Mr. Tay trained as a barrister at Fountain Court Chambers in London and has practised international arbitration in Paris and Washington, DC. Mr. Tay is a Council member and Fellow of the Singapore Institute of Arbitrators. Apart from counsel work, Mr. Tay has been appointed as arbitrator in ICC and SIAC arbitrations and is a member of the arbitrator panels of various arbitral institutions. Mr. Tay is a frequent speaker on international arbitration and has regularly been listed in leading global arbitration directories including *Global Arbitration Review's International Who's Who of Commercial Arbitration*, *Chambers Asia*, *Asia-Pacific Legal 500*, and *Euromoney's Guide to the World's Leading Experts in Commercial Arbitration*.

Contact:  
Shearman & Sterling  
YuJin.Tay@Shearman.com

## **J. Christopher THOMAS**

Christopher Thomas, Q.C. is a lawyer and Chartered Arbitrator who practices in the field of international trade and commercial law with emphasis on trade and investment regulation and dispute settlement. He was appointed Queen's Counsel in 2002 and has been designated a Chartered Arbitrator by the ADR Institute of Canada.

Over the course of his career he has advised States from various regions of the world on the negotiation and drafting of a number international trade and investment treaties.

In the area of international trade disputes, he has acted as counsel or legal advisor in GATT, WTO, Canada-United States Free Trade Agreement, and NAFTA trade disputes. He has also sat as a GATT panelist as well as a panelist in Canada-United States Free Trade Agreement Chapter 19 proceedings.

In the area of international investment disputes, he acted as counsel in 14 claims brought under the NAFTA and bilateral investment treaties and advised on third-party interventions in claims brought against Canada and the United States.

He has also acted (or is currently acting) as an arbitrator in 15 claims under various investment protection treaties. His practice is acts primarily as an arbitrator in international investment, trade and commercial disputes but also provides legal opinions and, occasionally as counsel (depending upon the matter).

He is Editor of Investor-State LawGuide, an on-line legal research database on investment treaty arbitration launched in March 2011.

Contact:

1000 Waterfront Centre,

200 Burrard street, p. o. box 48 Vancouver, B.C. V7X-1T2 Canada

Office: 604.689.0582

Mobile: 604.961.6344

jcthomas@thomas.ca

## **Guiguo WANG**

Guiguo Wang is Dean and Chair Professor of Chinese and Comparative Law, City University of Hong Kong.

Professor Wang is Chairman of the National Committee (HK) and Titular Member of the International Academy of Comparative Law; Chairman of the Hong Kong WTO Research Institute and Honorary Advisor of the Ombudsman of Hong Kong. He is also a Distinguished Professor of Law at Hunan Normal University School of Law, Changsha, China, Vice President of the Chinese Society of International Economic Law and Advisor to the Shenzhen Municipality on WTO affairs.

Professor Wang is an arbitrator of China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, Hong Kong International

Arbitration Centre, Panel of Arbitrators of Korean Commercial Arbitration Board and Chinese Arbitration Association, Taipei.

Professor Wang, holder of the JSD degree from Yale Law School and LL.M. degree from Columbia Law School, is the first Chinese recipient of the United Nations Legal Affairs Office and the United Nations Institute for Training and Research fellowship which enabled him to participate in the seminars offered by the International Court of Justice and to study at The Hague Academy of International Law, the United Nations and the World Bank. Professor Wang was also the first person from the mainland of China to obtain the JSD degree from Yale Law School since 1949.

Professor Wang has published more than 20 books and numerous journal articles in both Chinese and English including *Sino-America Economic Exchanges – The Legal Contributions* (1984), Praeger Publishers; *International Banking and Financial Law* (1988), Law Press; *China's Investment Law: The New Directions* (1988), Butterworths, Singapore; *Contemporary Legal Prescriptions for International Investment* (1988), Law Press; *International Economic Law* (1992), Wide Angle Press; *Wang's Business Law of China* (4th Ed., 2003), Butterworths; *The Law of WTO* (2003), Law Press; *International Trade Law* (2004), Peking University Press; *The Law of WTO – China and the Future of Free Trade* (2005), Sweet & Maxwell and *International Monetary and Financial Law* (3rd Ed., 2007), Law Press and *International Investment Law* (2nd Ed., 2008), Law Press.

Professor Wang was also invited to give a series of lectures at The Hague Academy of International Law in 2010.

Contact:  
School of Law  
City University of Hong Kong  
lwwgg@cityu.edu.hk

## **V. TRAINING MATERIALS**

### **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
- The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries
- International Investment Rule-Making: Stocktaking, Challenges and the Way Forward
- Identifying Core Elements in Investment Agreements in the APEC Region
- Dispute Settlement: Investor-State Disputes Arising from Investment Treaties
- Investor-State Dispute Settlement and Impact on Investment Rulemaking
- Most-Favoured-Nation Treatment
- Scope and Definition
- Investor-State Disputes: Prevention and Alternatives to Arbitration
- Investor-State Disputes: Prevention and Alternatives to Arbitration II (advance draft)
- The Protection of National Security in IIAs
- 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
- World Investment Report 2010: Investing in a Low-Carbon Economy
- Best Practices in Investment for Development: Case Studies in FDI
  - How to Utilize FDI to Improve Transport Infrastructure - Roads (Australia and Peru)
  - How to Utilize FDI to Improve Infrastructure - Electricity (Chile and New Zealand)
- Investment Policy Monitor No. 5

- Global Investment Trends Monitor No. 6
- IIA ISSUES NOTES:
  - Latest Developments in Investor-State Dispute Settlement  
IIA Issues Note No. 1 (2011)
  - Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims  
IIA Issues Note No. 2 (2010)
  - Latest Developments in Investor-State Dispute Settlement  
IIA Issues Note No. 1 (2010)

## 2) Selected International Investment Agreements

### a. Bilateral Investment Treaties (BITs)

<b>APEC Economy</b>	<b>Partner Economy</b>
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
Colombia	Chile, Italy, Peru, Spain, United Kingdom

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**

- Andean Community Decision 291: Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties
- 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
- CAFTA 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 Malaysia and New Zealand
- 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
- NAFTA 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

Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados

Including:

- Administrative and Financial Regulations  
*Reglamento Administrativo y Financiero*
- Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)

Reglas Procesales Aplicables a la Iniciación de los Procedimientos de Conciliación y Arbitraje (Reglas de Iniciación)

- Rules of Procedure for Arbitration Proceedings (Arbitration Rules)
- Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje)

- Rules of Procedure for Conciliation (Conciliation Rules)  
*Reglas Procesales Aplicables a los Procedimientos de Conciliación (Reglas de Conciliación)*

## **UNCITRAL**

- UNCITRAL Arbitration Rules (1976)  
*Reglamento de Arbitraje de la CNUDMI (1976)*
- UNCITRAL Conciliation Rules (1980)  
*Reglamento de Conciliación de la CNUDMI (1980)*
- UNCITRAL Model Law on International Commercial Arbitration (1985)  
*Ley Modelo de la CNUDMI sobre Arbitraje Comercial Internacional (1985)*
- UNCITRAL Model Law on International Commercial Conciliation (2002)  
*Ley Modelo de la CNUDMI sobre Conciliación Comercial Internacional (2002)*
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996)  
*Notas de la CNUDMI sobre Organización del Proceso Arbitral (1996)*

## **ICC**

Rules of Arbitration of the International Chamber of Commerce  
*Reglamento de Arbitraje de la Cámara de Comercio Internacional*

Including:

- Statutes of the International Court of Arbitration of the ICC  
*Estatuto de la Corte Internacional de Arbitraje de la CCI*
- Internal Rules of the International Court of Arbitration of the ICC  
*Reglamento Interno de la Corte Internacional de Arbitraje de la CCI*

## **NY Convention**

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

## **5) Selected Articles**

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 Banifatemi, 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).

Tortorola Ignacio and D. Di Pietro, Notes on the Requirement of Guarantees as a Condition for a Stay of Enforcement of ICSID Arbitral Awards

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 ratione personae*)  
Tokios Case Study Key (*Jurisdiction ratione 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) Collection 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.

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

- Claimant's Memorial on Jurisdiction, (March 15, 2006) (PDF)

- Respondent's Reply Memorial to Objections on Jurisdiction, (April 19, 2006) (PDF)
- Claimant's Reply Memorial on Jurisdiction, (April 23, 2006) (PDF)
- Respondent's Memorial on Objections to Jurisdiction, (October 11, 2006) (PDF)
- Decision on Jurisdiction, (May 17 2007) (PDF)
- Decision on the Application for Annulment, (April 16, 2009) (PDF)
- Dissenting Opinion of Judge Mohamed Shahabuddeen (PDF)

**Phoenix Action, Ltd. v. Czech Republic**, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT).

- Decision on Provisional Measures, 6 April 2007 (PDF)
- Award of the Tribunal, 15 April 2009 (PDF)

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

- Procedural Order No. 1, 1 July 2003.
- Decision on Jurisdiction, 29 April 2004.
- Dissenting opinion, 29 April 2004.
- Procedural Order No. 3, 18 January 2005.
- Award and Separate Opinion, 26 July 2007.

**The Rompetrol Group N.V. v. Romania**, ICSID Case No. ARB/06/3 (Netherlands/Romania BIT).

- Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 18, 2008 (PDF)

**Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania**, ICSID Case No. ARB/05/20 (Sweden/Romania BIT).

- Decision on Jurisdiction and Admissibility, September 24, 2008 (PDF)

**TSA Spectrum de Argentina S.A. v. Argentina Republic**, ICSID Case No. ARB/05/5 (Netherlands/Argentina BIT).

- Award, 19 December 2008 (English) (Spanish) (PDF)
- Concurring Opinion, Georges Abi-Saab (English) (Spanish) (PDF)
- Dissenting Opinion, Grant D. Aldonas (PDF)

**Aguas del Tunari S.A. v. Republic of Bolivia**, ICSID Case No. ARB/02/3 (Netherlands/Bolivia BIT)

- NGO Petition to Participate as *Amici Curiae*, August 29, 2002 (PDF)
- Letter from President of Tribunal Responding to Petition, January 29, 2003 (PDF)
- Decision on Respondent's Objections to Jurisdiction, October 21 2005 (English/Spanish) (PDF)

**Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco**, ICSID Case No. ARB/00/4 (Italy/Morocco BIT).

- Jurisdiction, 23 July 2001 (English) (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)
- Separate concurring opinion, March 15, 2002 (PDF)

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

- Decision on Jurisdiction, June 4, 2004 (PDF)

- Award, January 19 2007 (PDF)

**Inceysa Vallisoletana S.L. v. Republic of El Salvador**, ICSID Case No. ARB/03/26 (Spain/El Salvador BIT)

- Award of the Tribunal (August 2, 2006) (Spanish/English PDF)

**Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan**, ICSID Case No. ARB/05/16 (Turkey/Kazakhstan BIT).

- Award, July 29 2008

**Continental Casualty Company v. Argentina**, ICSID Case No. ARB/03/9 (US/Argentina BIT).

- Decision on Jurisdiction, February 22, 2006 (PDF)
- Award, September 5, 2008 (PDF)
- Decision on Preliminary Objection to Application for Annulment, October 23, 2009 (PDF)
- Decision on Stay of Enforcement of Award, October 23, 2009 (PDF)

**Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador**, ICSID Case No. ARB/04/19 (US/Ecuador BIT).

- Award, August 18, 2008 (English) (Spanish) (PDF)

**Glamis Gold, Ltd. v. The United States of America**, UNCITRAL (NAFTA).

- Decision, 20 July 2005 (PDF)
- Decision, 16 September 2005 (PDF)
- Decision, 17 November 2005 (PDF)
- Award, 8 June 2009 (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)

**Siemens v. Argentina**, ICSID Case No. ARB/02/8 (Germany/Argentina BIT).

- Decision on Jurisdiction, August 3, 2004 (English) (Spanish). (PDF)
- Award, February 6, 2007. (PDF)
- Separate Opinion of Prof. Janeiro. (PDF)
- US Submission Regarding Arts. 53 and 54, ICSID Convention, 1 May, 2008. (PDF)
- Argentina's Response to US Department of State Letter, 2 June 2008(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)

**Wintershall Aktiengesellschaft v. Argentine Republic**, ICSID Case No. ARB/04/14 (Germany/Argentina BIT).

- Award, 8 December 2008 (PDF)

**RosInvestCo UK Ltd. v. The Russian Federation**, SCC Case No. Arb. V079/2005 (UK/Soviet BIT).

- Award on Jurisdiction, October 2007 (PDF)



**MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile**, ICSID Case No. ARB/01/7 (Malaysia/Chile BIT).

- Final Award, May 25, 2004 (PDF)
- *Ad hoc* Committee's Decision on the Respondent's Request for a Continued Stay of Execution, June 1, 2005 (PDF)
- Decision on Annulment, March 21, 2007 (PDF)

**Parkerings-Compagniet AS v. Lithuania**, ICSID Case No. ARB/05/8 (Norway/Lithuania BIT).

- Award, September 11, 2007 (PDF)

**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)

**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)

**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)

**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).

**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.

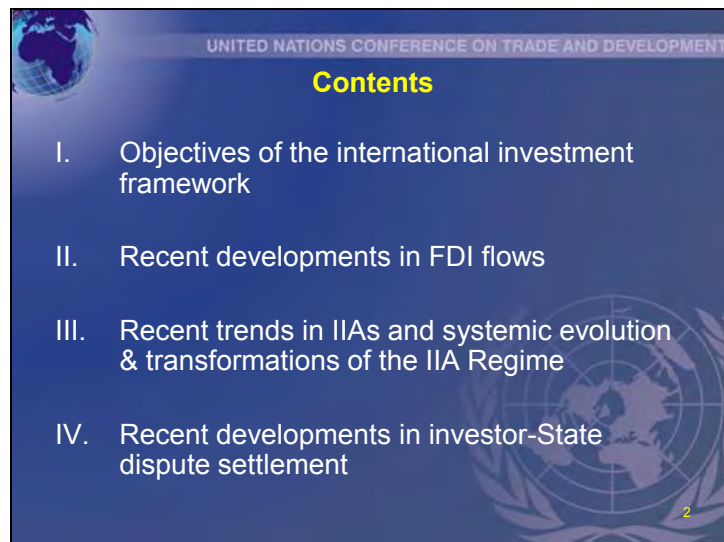
## VI. SPEAKERS' PRESENTATIONS

### i. Trends and Developments in Investor-State Dispute Settlement (ISDS)

Slide 1



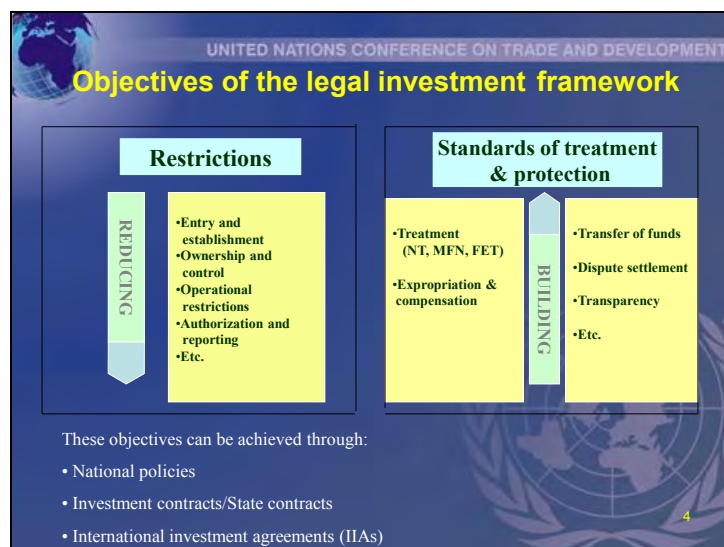
Slide 2



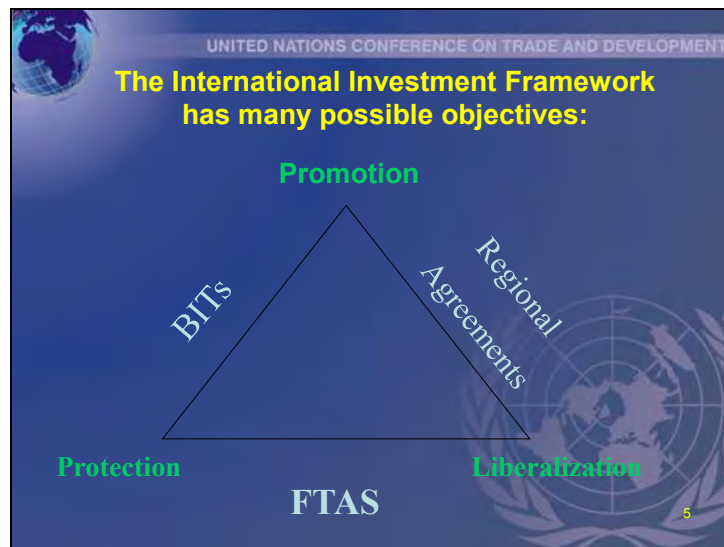
Slide 3



Slide 4



Slide 5



Slide 6

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**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)

Slide 7



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Why do economies 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**

Slide 8



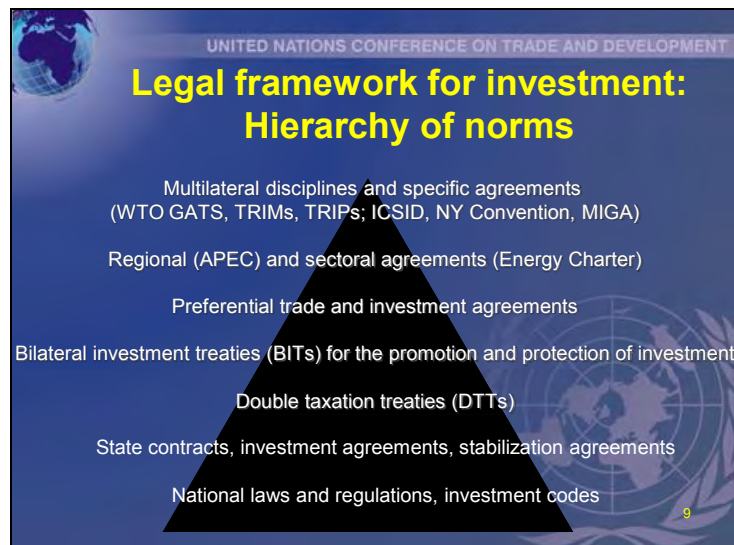
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## 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*

Slide 9



Slide 10



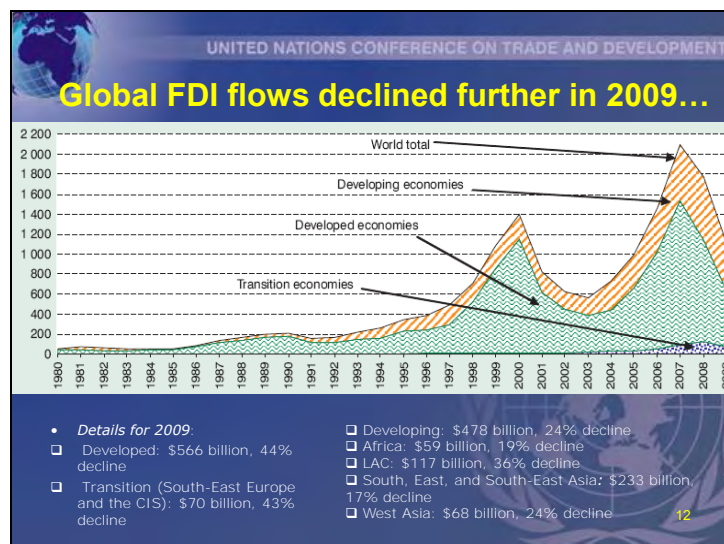


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

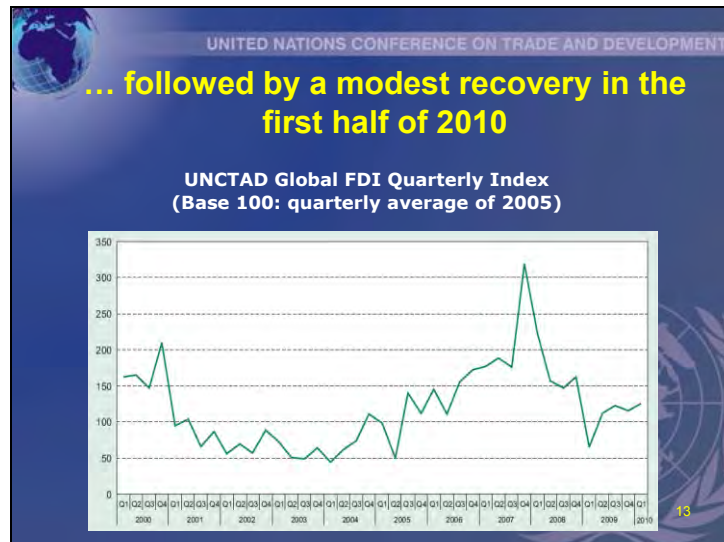
## Global FDI flows decline

- Global FDI flows have been severely affected worldwide by the economic and financial crisis
  - After falling 14% in 2008 to \$1.7 trillion
  - Fell further to below \$1.2 trillion in 2009
  - With a slow recovery in 2010 (to a level up to \$1.4 trillion)
  - Gaining momentum in 2011 (approaching \$1.8 trillion).

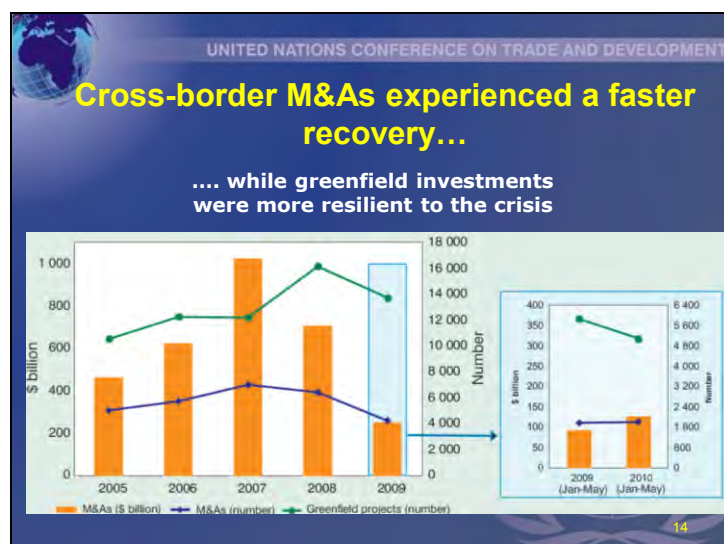
11



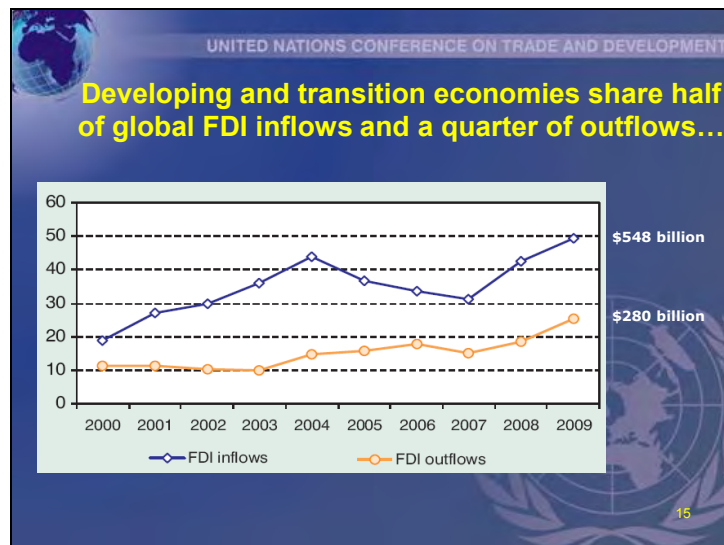
Slide 13



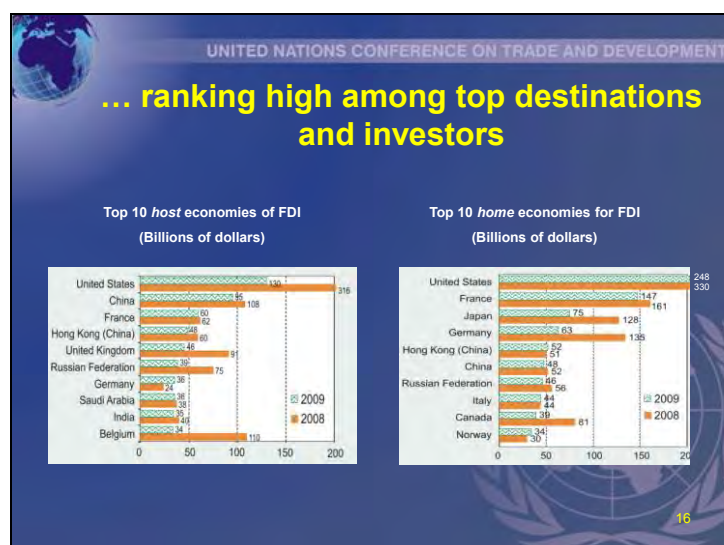
Slide 14



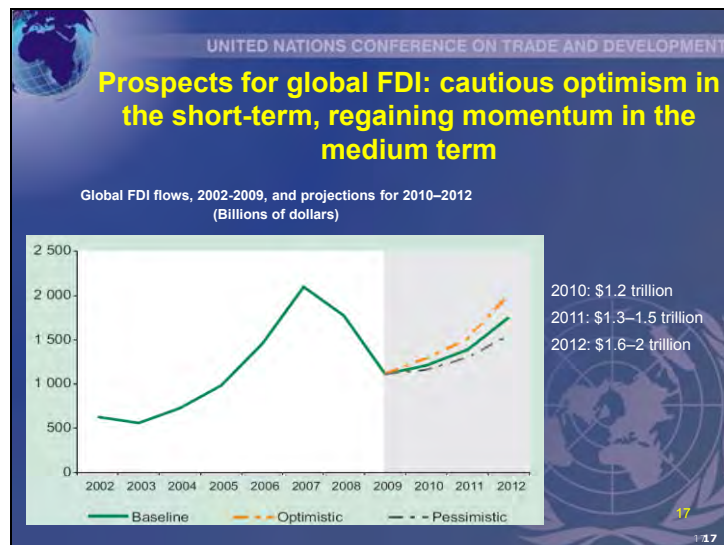
Slide 15



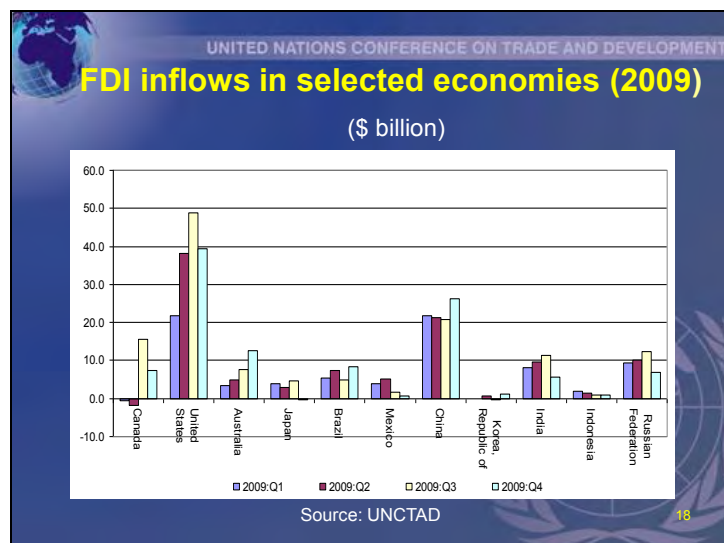
Slide 16



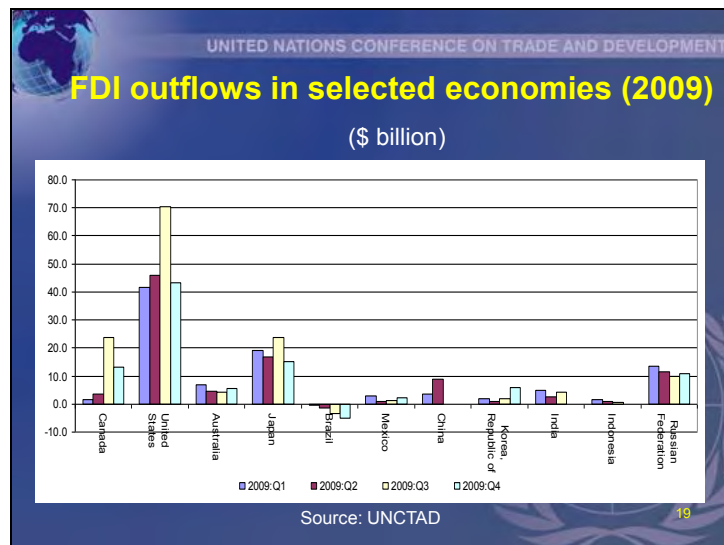
Slide 17



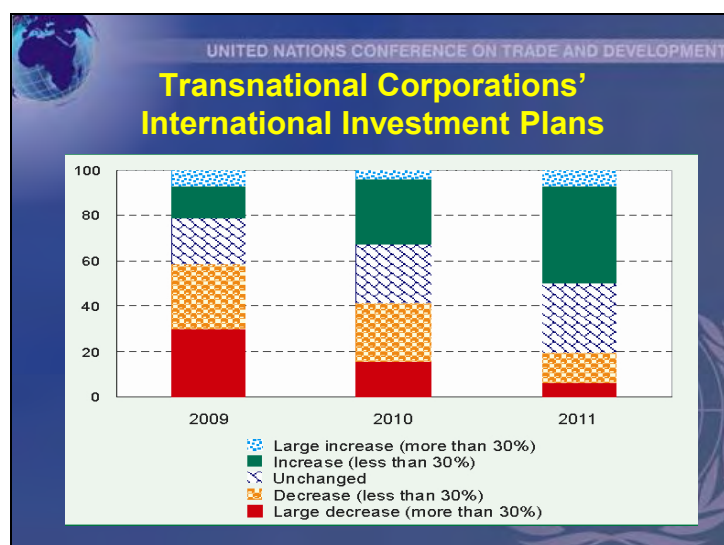
Slide 18



Slide 19



Slide 20



Slide 21

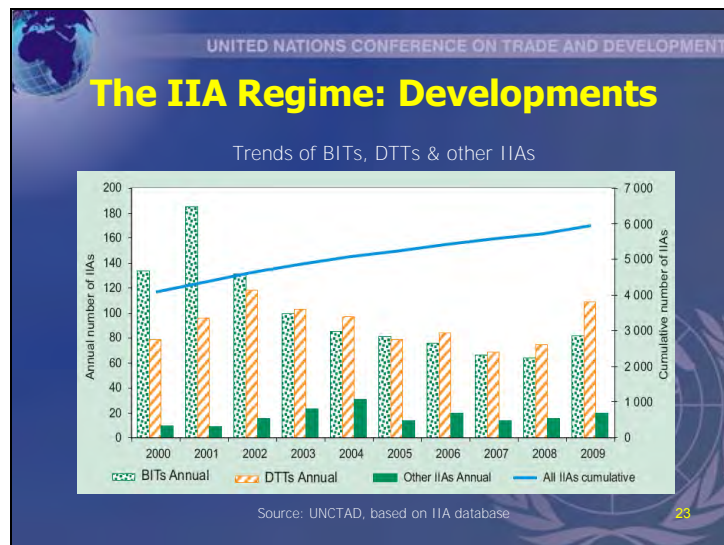


Slide 22

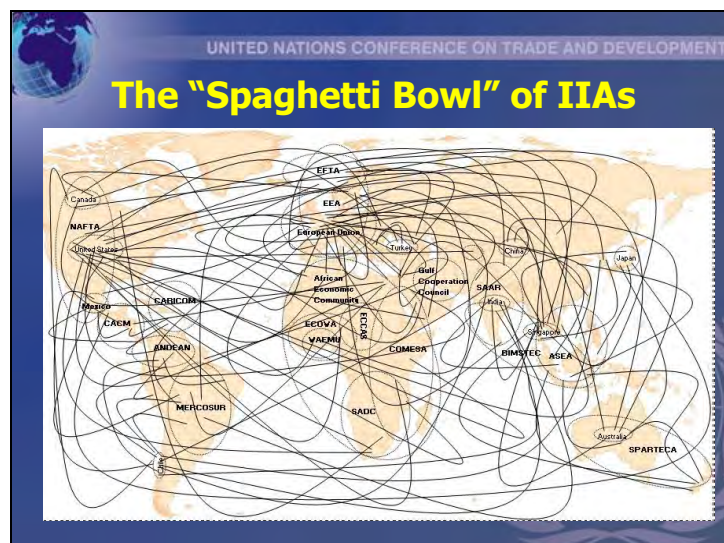




Slide 23



Slide 24



Slide 25




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### New BITs are increasingly sophisticated and complex

- United States & Canada Model BITs
- Added details and clarification
- Greater emphasis on public interests such as the protection of national security, environment, health and safety and workers rights.

25

Slide 26



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### BITs & Other IIAs: Trends in Rule-making

**BITs:**

- Mostly post-establishment & protection;
- A few: pre-establishment rights;
- New features to rebalance rights & obligations; other BITs "business as usual".

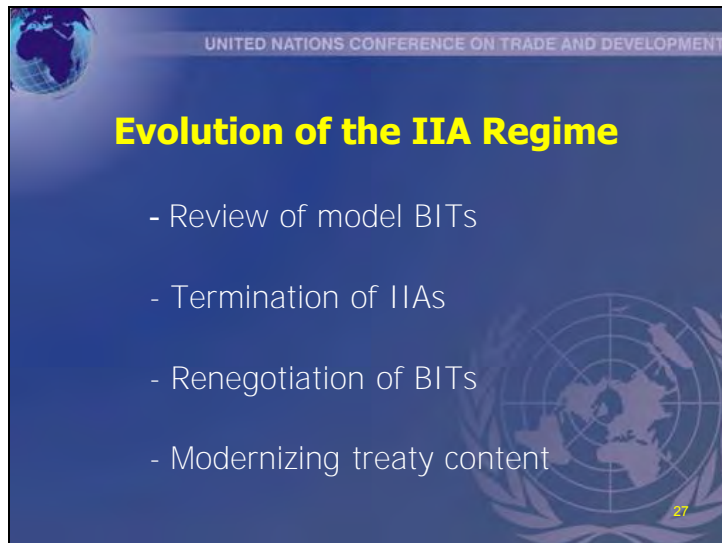
**Other IIAs – three types:**

- Substantive investment chapters w. provisions usually found in BITs;
- Limited investment-related provisions (market access/establishment);
- Cooperation, e.g. creation of a consultative committee or institutional arrangements.

26



Slide 27



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Evolution of the IIA Regime

- Review of model BITs
- Termination of IIAs
- Renegotiation of BITs
- Modernizing treaty content

27

This slide features a dark blue background with a faint United Nations emblem. The title 'Evolution of the IIA Regime' is in yellow. The list of topics is in white. A small globe icon is in the top left corner.

Slide 28



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Model BITs

- Review process concluded:  
France, Colombia, Mexico, Austria, Germany
- Review process under way:  
Argentina, Venezuela, Ecuador, Morocco, Bolivia,  
South Africa, Turkey, United States
- Main reasons for review:
  - establish clearer rules;
  - seek balance: investor & host country interests;
  - adjust model to new developments.

28

This slide features a dark blue background with a faint United Nations emblem. The title 'Model BITs' is in yellow. The list of topics is in white. A small globe icon is in the top left corner.

Slide 29



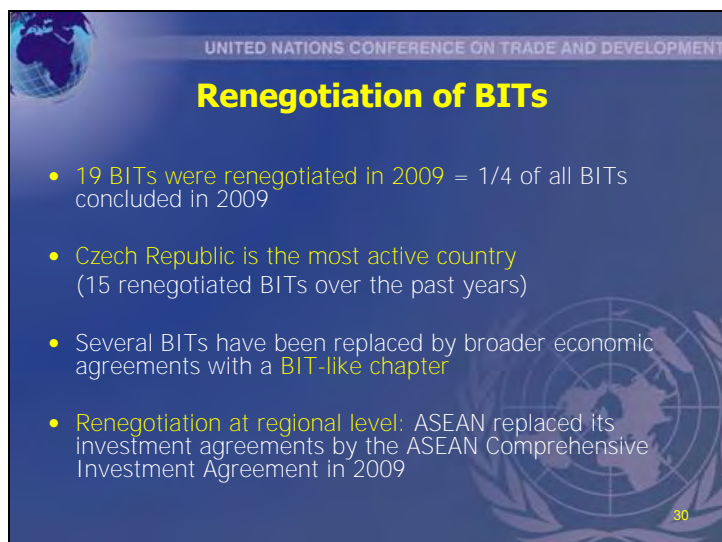
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Termination of IIAs

- **Ecuador:** Jan 2008 terminated 9 BITs: Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, Uruguay
- **Ecuadorian Constitutional Court:** BITs unconstitutional (such as Germany, China, Finland, United States & United Kingdom)
- **Ecuador:** withdrew from ICSID Convention
- **Bolivia:** ICSID withdrawal
- **Russian Federation:** official notification of its intention not to become Contracting Party of Energy Charter Treaty (ECT)

29

Slide 30



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Renegotiation of BITs

- **19 BITs were renegotiated in 2009** = 1/4 of all BITs concluded in 2009
- **Czech Republic is the most active country** (15 renegotiated BITs over the past years)
- Several BITs have been replaced by broader economic agreements with a **BIT-like chapter**
- **Renegotiation at regional level:** ASEAN replaced its investment agreements by the ASEAN Comprehensive Investment Agreement in 2009

30

Slide 31



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Important Development in 2009: EU



**EU Lisbon Treaty:** FDI competences transferred from Member States to the European Union

- Around 1200 extra-EU BITs to be gradually terminated;
- First EU negotiating partners: Canada, India, Singapore, Mercosur, Russia and China;
- EU - a negotiating partner with increased political clout and strength;
- An opportunity to update and modernize the old BITs.

31

Slide 32



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Modernizing Treaty Content

- Clarifying the scope of the treaty
- Introducing general exceptions that allow more room for regulation by the host economies
- Clarifying the scope and meaning of specific obligations
- Adding environmental clauses
- More detailed ISDS provisions

32

Slide 33



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**Creating a more coherent, balanced and effective IIA regime**

- IIAs should promote FDI without compromising the right to regulate
- Countries' reassessment of IIAs
- More coordinated and collective approaches required
- Capacity- and institution-building is essential

33

This slide features a dark blue background with a faint United Nations emblem in the bottom right corner. The title is in bold yellow text, and the bullet points are in white. A small globe icon is in the top left corner.

Slide 34




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**IV. Recent developments in investor-State dispute settlement**

34

This slide features a dark blue background with a faint United Nations emblem in the bottom right corner. The title is in bold yellow text. A small globe icon is in the top left corner.

Slide 35




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Highlights

- In 2010, at least 25 new cases were filed, bringing the total number of known treaty-based cases to **390** and the total number of countries that have responded to investment treaty arbitration to **83**.
- 20 awards, five decisions on liability and 11 decisions on jurisdiction were rendered, as well as 11 other decisions on interim measures, discontinuance of proceedings and costs.
- Of the 20 awards, 14 were in favour of the State, five in favour of the investor and one award embodied the parties' settlement agreement – tilting the overall balance of awards further in favour of the State (with 78 won against 59 lost cases).
- Out of the five decisions on liability all were in favour of the investor.
- Out of the nine publically available decisions on jurisdiction, the tribunals upheld their jurisdiction in eight cases and rejected it in one

Slide 36



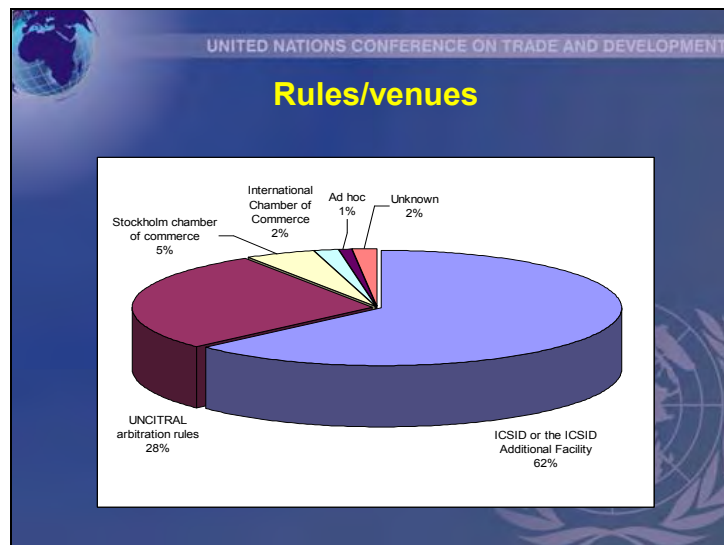
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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

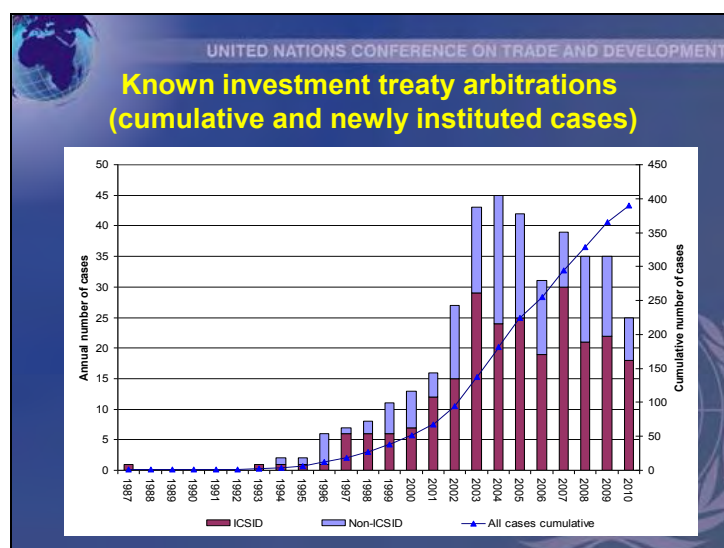
Of the total 390 known disputes:

- 245 were filed with ICSID (or the ICSID Additional Facility)
- 109 under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules
- 19 with the Stockholm Chamber of Commerce
- 6 with the International Chamber of Commerce and 4 were ad hoc.
- One further case was filed with the Cairo Regional Centre for International Commercial Arbitration.
- In 6 cases, the applicable arbitration rules are unknown so far.

Slide 37



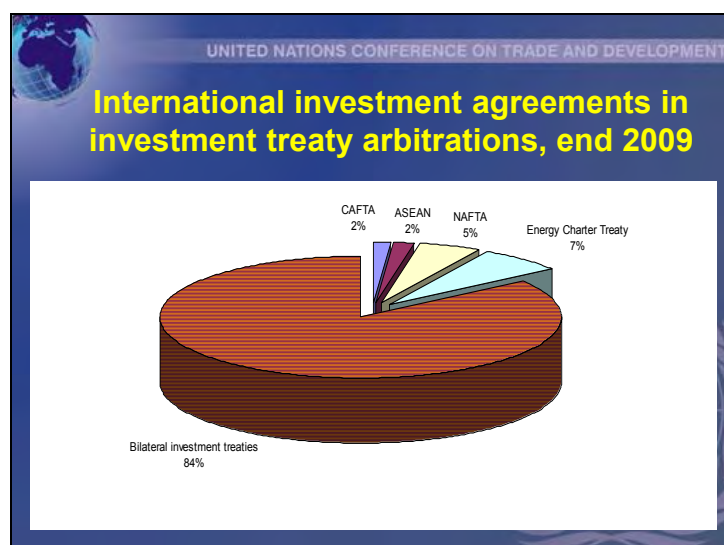
Slide 38



Slide 39



Slide 40



Slide 41

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Some disputes in 2010...

- In Latin and Central America, Bolivia and Venezuela responded to three new claims each as a result of **nationalization measures aiming at strengthening state control over strategic sectors**.
- Uruguay is responding to its **first claim** arising from consumer protection legislation involving **marketing restrictions** and labeling requirements of cigarettes
- In Central Asia, Kazakhstan and Turkmenistan responded to two new cases each relating to **energy and power facilities and construction projects**
- In Africa, Zimbabwe responded to two new cases relating to **timber processing** and commercial farms while Tanzania faced one new case dealing with a **power purchase agreement**.
- In Europe, Lithuania, Romania and Slovakia responded to a new case each relating to **alcohol industry, press distribution** and claims arising out of alleged reversal of **health insurance policy**.
- Canada faced one NAFTA case dealing with an investment in a **pulp and paper mill**.

Slide 42


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Evolving « jurisprudence »

- Significant increase in the number of investor-State disputes in the last decade
- Increase in the number of cases developed « jurisprudence » that evolves rapidly
- Need to keep up to date with latest developments, decisions and awards



Slide 43




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Criticisms of the system of ISDS

- **Too expensive:** costs, including tribunal expenses and legal fees, have been very high
- **Too long:** ISDS cases have tended to take years to resolve
- ISDS results in the **severance of the relationship** between the investor and the host State
- Potential impact on economy's **reputation** as investment location

Slide 44




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Doubts about the legitimacy of ISDS

Inconsistency of the system: Identical disputes leading to conflicting results

- **Divergent interpretations** of identical treaty provisions as well as differences in the assessment of the merits of cases involving identical facts
- **Difficult to predict** an outcome in particular cases
- Increased predictability ? No

Slide 45




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Doubts about the legitimacy of ISDS

- How can three individuals [arbitrators] assess the validity of a State's act ?
- Criticisms of the secrecy of the proceedings – transparency concerns
- ISDS practice is conducted by a relatively small and closed group of experts that serve as arbitrators or as counsel
- Many of the innovations in the ISDS system are designed to address these concerns.

Slide 46

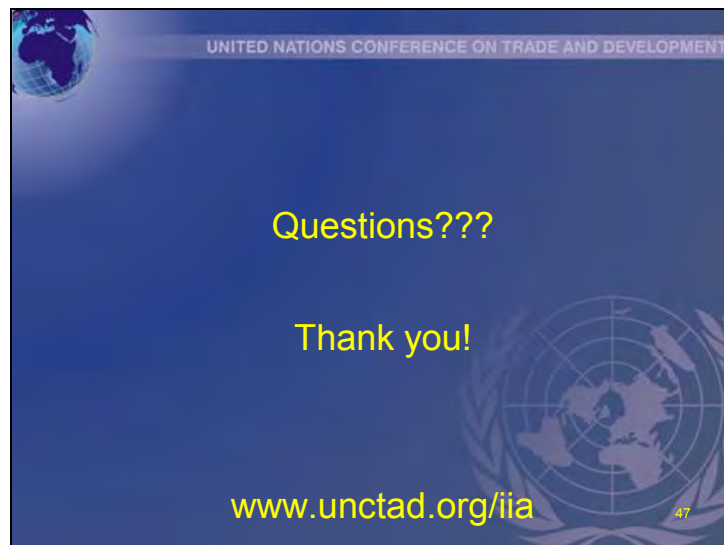


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Challenges

- Economies should be careful when negotiating IIAs [**attention to wording of provisions**] - - avoid risk of broad interpretations
- Importance of capacity building on **IIA negotiations**
- Importance of **technical assistance** to enable countries to **manage investor-State disputes** effectively and efficiently
- Improve government **responsiveness** during all phases of an investment project to address at an **early stage any shortcomings or problems** that could develop into a dispute [dispute prevention]
- Importance of exploring **alternative ways to settle investor-State disputes** [conciliation, mediation, recourse to third-party neutrals ]

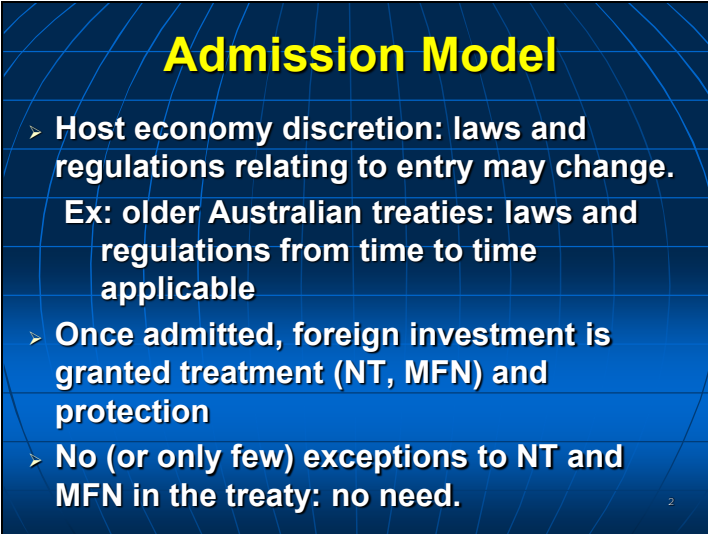
Slide 47



ii. **Admission and Establishment of Investments**

Slide 1





## Admission Model

- **Host economy discretion:** laws and regulations relating to entry may change.  
Ex: older 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.**

2



## Entry of Foreign Investment

**Two approaches in IIAs:**

- **Admission model:** entry in accordance with laws and regulations of the host economy:  
**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

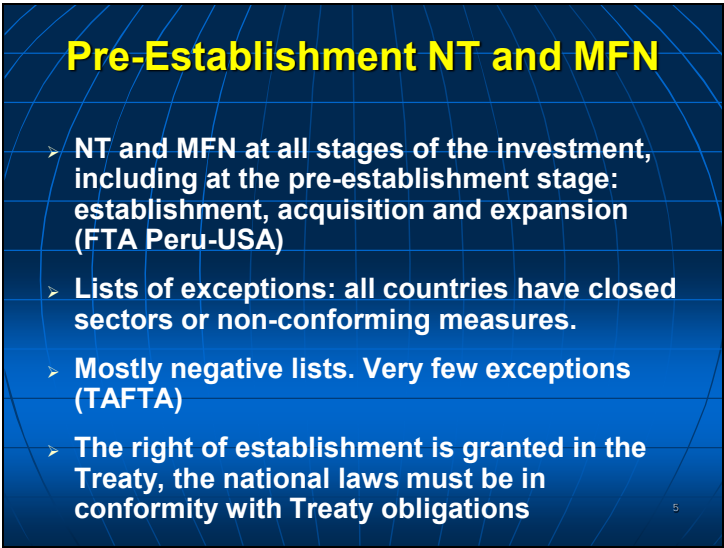
3

The slide has a blue background with a grid pattern. The title "Recent Examples" is in yellow. The list items are in white with yellow square bullet points.

## Recent Examples

- Canada – Peru FTA
- Philippines – Austria BIT
- China – Bosnia-Herzegovina FTA
- Korea (Rep.) – Mexico FTA

4

The slide has a blue background with a grid pattern. The title "Pre-Establishment NT and MFN" is in yellow. The list items are in white with yellow arrow bullet points.

## Pre-Establishment NT and MFN

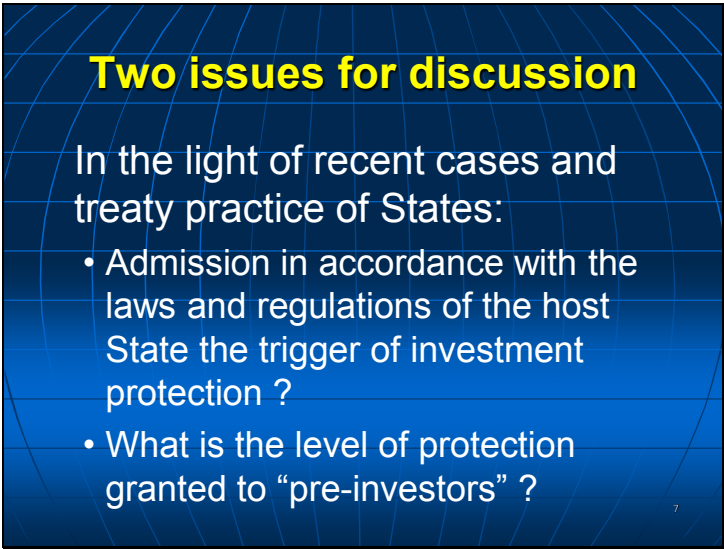
- NT and MFN at all stages of the investment, including at the pre-establishment stage: establishment, acquisition and expansion (FTA Peru-USA)
- Lists of exceptions: all countries have closed sectors or non-conforming measures.
- Mostly negative lists. Very few exceptions (TAFTA)
- The right of establishment is granted in the Treaty, the national laws must be in conformity with Treaty obligations

5

The slide has a dark blue background with a grid of lighter blue lines. The title "Example of Treaty" is written in yellow. Below it, there is a list of three items, each preceded by a small yellow square bullet point. The items are "Japan – Switzerland EPA", "Peru – United States", and "Mexico – United Kingdom BIT (2007)".

## Example of Treaty

- Japan – Switzerland EPA
- Peru – United States
- Mexico – United Kingdom BIT (2007)

The slide has a dark blue background with a grid of lighter blue lines. The title "Two issues for discussion" is written in yellow. Below it, the text "In the light of recent cases and treaty practice of States:" is written in white. This is followed by a list of two items, each preceded by a small white circle bullet point. The items are "Admission in accordance with the laws and regulations of the host State the trigger of investment protection ?" and "What is the level of protection granted to “pre-investors” ?".

## Two issues for discussion

In the light of recent cases 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 economy in several places in the treaty: definitions, admission, other provisions.
- What are the laws and regulations of the host economy: 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.

10

### **Admission in conformity with laws and regulations**

- *Aguas 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”.

11



### Admission in conformity with the laws and regulations

- *Fraport vs. Philippines*: Violation of the Anti-dumping 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).

12

### 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.

13

## Treatment of Pre-Investors

- What happens if the State violates the right of establishment?
  - Can the State be forced to admit the “investor”?  
NO
  - If not, can the tribunal rule on compensation?


14

## 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.

15



### 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.

16




### 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 Government of rights under the cooperation agreement: "claims to money or to any performance under contract having a financial value" = Investment

17

Slide 18

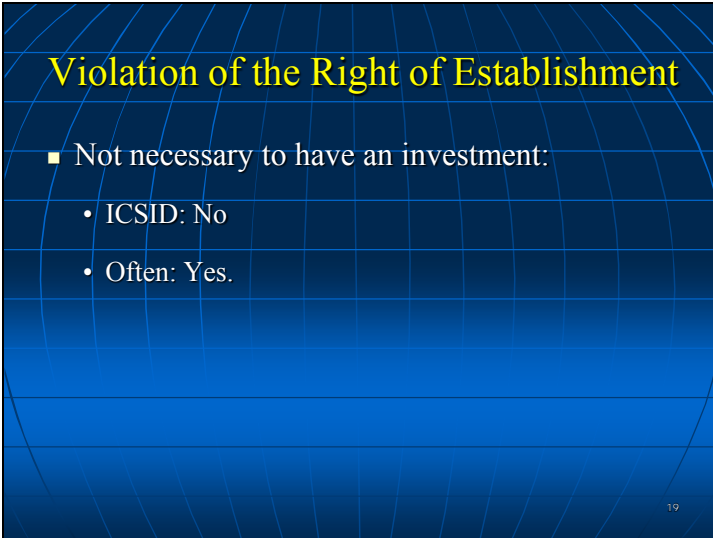


***William Nagel v. Czech Republic***  
(cont'd)

- 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

18

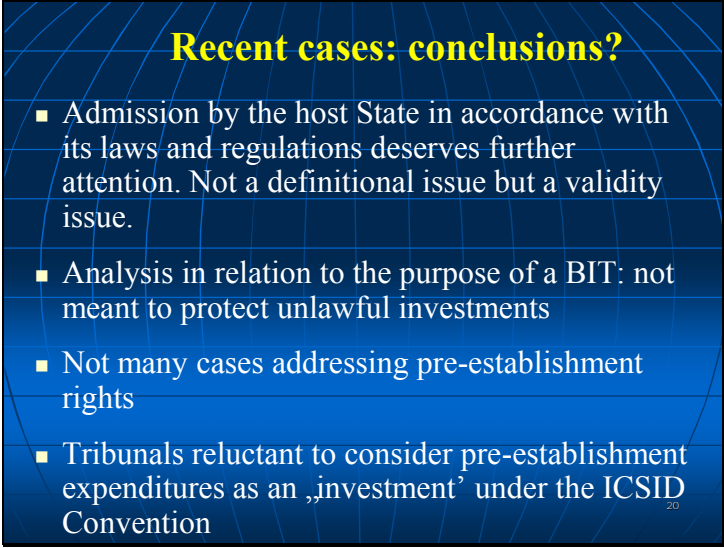
Slide 19



***Violation of the Right of Establishment***

- Not necessary to have an investment:
  - ICSID: No
  - Often: Yes.


19



**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

20



**Questions???**

21

### iii. Definition of Investor

Slide 1

APEC-UNCTAD Workshop on Investor-State Dispute Settlement  
**Definition of Investor**

Professor Hi-Taek Shin, Seoul National University

Slide 2

Investment and Investor: Threshold Definitions to determine Jurisdiction

---

- ▶ ICSID Convention Article 25(1)
  - ▶ *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.*
- ▶ Types of investors
  - ▶ Natural Persons (Individuals)
  - ▶ Juridical persons (Legal Entities)
- ▶ An investor must have a *foreign nationality* as determined by appropriate tests

---

▶ 2

### Definition of “Investor” – “Natural Person”

- ▶ ICSID Convention Article 25(2)
  - ▶ “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 ...,
      - ▶ but does not include any person who on either date also had the nationality of the Contracting State party to the dispute

▶ 3

### Definition of “Investor” – Relevant Link between the investor and her/his home State party to IIAs

- ▶ The question whether the claimant meets the definition of investor is routinely raised in an investment treaty arbitration by the respondent State in an objection to the jurisdiction (*ratione personae*) of the arbitration tribunal.
- ▶ The question relates to two aspects:
  - ▶ The investor must have nationality of her/his home State party to BIT to invoke the protection under such BIT; and
  - ▶ The investor must not have the nationality of the State party to the dispute
    - ▶ Legal implication of certain links between the investor (or shareholder of the investor) and the State party to the dispute – focus of controversy in many investment arbitration cases

▶ 4

Slide 5

### Definition of “Investor” under IIAs – “Natural Person”

► Philippines-Thailand BIT, Article 1(2):

2. The term “nationals” shall mean:

- a) in respect of the Republic of the Philippines, any natural person who is a citizen of the Republic of the Philippines according to its Constitution
- b) in respect of the Kingdom of Thailand, any natural person who possesses Thai nationality under the law in force in the Kingdom of Thailand;

► ASEAN Comprehensive Investment Agreement, Article 4

- (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

► 5

Slide 6

### Nationality of Individuals

► With respect to the nationality, domestic laws of the country whose nationality is claimed govern:

- Tribunal may rule on nationality applying the relevant country’s domestic law

► Links other than nationality

- Residence, right of permanent residence or domicile

► Dual nationality

- Individuals having dual nationality can benefit from IIAs of either country
- “Effective nationality” test as applied in *Nottebohm* case: not accepted by ICSID tribunals absent a basis in the IIAs
- BUT, nationals of the host State are considered domestic, even if they also hold the nationality of another state
- Nationality as of when the claim is brought by the investor as well as when the claim is registered with ICSID

► 6



Slide 7

### Recent Cases on Nationality of Individual Investors (*ratione personae*)

- ▶ *Saba Fakes v. Turkey* (Award July 14, 2010)
  - ▶ Claimant, Saba Fakes, a dual Dutch and Jordanian national, invoked protection under The Netherlands-Turkey BIT.
  - ▶ While accepting that the Claimant holds both Dutch and Jordanian nationalities, the Respondent contends that it is not suffice to hold Dutch nationality. Such nationality must be effective.
  - ▶ Tribunal:
    - ▶ The definition of investor in The Netherlands-Turkey BIT does not require an investor's nationality to be effective for him or her to bring a claim against the host State on the basis of the BIT
    - ▶ Unless the BIT specifically excludes dual nationals from the protection extended by the BIT or introduce additional test, the Claimant, a dual national of The Netherlands and Jordan, may seek ICSID arbitration under The Netherlands-Turkey BIT
    - ▶ Distinguished from "effective nationality" test adopted in other tribunals
      - *Nottebohm Case (Liechtenstein v. Guatemala; ICJ)*: in the context of diplomatic protection of nationals

▶ 7

Slide 8

### Effective nationality test included in BITs

- ▶ The definition of investors in the investment chapter of the Korea-US Free Trade Agreement, following the 2004 US Model BIT, provides that
  - ▶ *"a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality"*.
- ▶ Canada-Lebanon BIT has different solutions:
  - ▶ *"In the case of persons who have both Canadian and Lebanese citizenship, they shall be considered Canadian citizens in Canada and Lebanese citizens in Lebanon."*

▶ 8

### Recent Cases on Nationality of Individual Investors (*ratione personae*) –(2)

- ▶ *Micula et. al. v. Romania* (Decision on Jurisdiction and Admissibility September 28, 2008)
  - ▶ Claimants include two individuals with Swedish nationality, who were born in Romania and later renounced their Romanian nationality
  - ▶ Respondent: “effective nationality” test should be applied due to more close ties of the individual claimants to the Respondent State as compared to Sweden
  - ▶ Tribunal rejected the Respondent’s argument of effective nationality test by holding that
    - ▶ the ICSID Convention requires only that a claimant demonstrate that it is a national of a „Contracting State”; and
    - ▶ The Sweden-Romania BIT included no additional requirements.

▶ 9

### Definition of “Investor” – Juridical Person

- ▶ ICSID Convention Article 25(2)(b):
- ▶ *(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 purpose of this Convention.*

▶ 10

Definition of “Investor” under IIAs– “Juridical Person”

► Philippines-Thailand BIT, Article 1 (emphasis added)

3. The term “companies” shall mean:

- a) in respect of the Republic of the Philippines, legal entities, including companies, associations of companies, trading corporate entities and other organizations that are incorporated or constituted or registered as juridical persons under the law of the Republic of the Philippines.
- b) in respect of the Kingdom of Thailand any juridical person incorporated or constituted under the law in force in the Kingdom of Thailand whether or not limited liability and whether or not for pecuniary profit

► 11

Definition of “Investor” under IIAs – Juridical Person  
(2)

► Korea-Philippines BIT, Article 2(b) (emphasis added)

The term “companies” means:

- i) with respect to the Republic of Korea, juridical persons or companies or associations, whether or not with limited liability and whether or not for pecuniary profit, incorporated in the territory of the Republic of Korea and existing in accordance with its laws;
- ii) with respect to the Republic of the Philippines, corporations, partnerships or other associations, incorporated or constituted and actually doing business under its laws in force in any part of the territory of the Republic of the Philippines wherein a place of effective management is situated.

► 12

## Slide 13

### Definition of “Investor” under IIAs – Juridical Person (3)

- ▶ ASEAN Comprehensive Investment Agreement, Article 4 (emphasis added)

*(e) “**juridical person**” means any legal entity duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation*

▶ 13

## Slide 14

### Nationality of Juridical Person

- ▶ In the context of ICSID arbitrations, ICSID Convention sets the “outer limits”.
- ▶ The State parties to IIAs have discretion to further define “investors” for the purpose of the particular IIA within the “outer limits” set by the ICSID Convention.
- ▶ Ranges of legal entities in the definition of juridical persons in IIAs include:
  - ▶ Entities without legal personality (e.g., partnership, unincorporated association, branch of a corporation)
  - ▶ For profit or non-profit entities
  - ▶ Government-owned entities (e.g., Sovereign Wealth Funds)
- ▶ Tests of Corporate Nationality:
  - ▶ Country of organization or incorporation
  - ▶ Country of corporate seat
  - ▶ Country of ownership or control

▶ 14

Slide 15

### Tests of Corporate Nationality: Country of Organization or Incorporation\*

- ▶ Typical wording in IIAs:
  - ▶ “organized in accordance with the law applicable”
  - ▶ “incorporated or constituted under the law in force”
- ▶ Advantage: ease of application and stability of the nationality of the investor
- ▶ Disadvantage: links between the investor and its country of nationality could be insignificant – possibility of abuse of the system by a manipulative investor without conferring economic benefit to the country whose nationality is claimed
- ▶ ICSID tribunals: Absent other criterion in the particular BIT,
  - ▶ Tribunal will NOT introduce new requirements such as ownership or control
  - ▶ *Tokios Tokelés v. Ukraine* (Lithuania-Ukraine BIT); *Rompetrol v. Romania* (The Netherlands-Romania BIT)

[\*For succinct discussion of the tests of corporate nationality, please refer to Scope and Definition, UNCTAD Series on International Investment Agreements II]

▶ 15

Slide 16

### Tests of Corporate Nationality: Country of Corporate Seat

- ▶ Typical Wording in IIAs
  - ▶ “having its seat in the territory of one of the Contracting Parties”
- ▶ This test requires more significant relationship between the investor and the country of nationality - asks whether a corporation is effectively managed from a State whose nationality is claimed
- ▶ In general, “seat of a company” connotes the place where effective management takes place
- ▶ Some IIAs are even more specific, requiring a legal entity to carry out “real economic activities” (Colombia – Switzerland BIT 2006)

▶ 16

### Tests of Corporate Nationality: Country of Ownership or Control

- ▶ This test requires “genuine economic link” - a legal entity will be considered an investor of a state whose nationals own or control it
- ▶ The most difficult to ascertain and the least permanent
- ▶ This test could be adopted in conjunction with other tests – as a means of controlling treaty shopping
- ▶ The second clause in ICSID Convention Article 25(2)(b) incorporates “foreign control”

▶ 17

### Tests of Corporate Nationality: Nationality of a Local Company under Foreign Control

- ▶ A local company may still be treated as a foreign national because of “foreign control”
  - ▶ ICSID Convention Article 25(2)(b) provides that local companies controlled by nationals of another state may be treated as foreign nationals on the basis of an agreement (explicit or implied)
  - ▶ It reflected a need arising from the foreign investment laws of certain host States requiring an existence of locally incorporated company as an investment vehicle – protection of foreign shareholders in a locally incorporated company, i.e., wholly owned subsidiary or joint venture
  - ▶ The requirement of the “foreign control” in ICSID Convention Article 25(2)(b) sets an objective limit beyond which the ICSID jurisdiction cannot be granted.
    - *Vacuum Salt v. Ghana* – 20% shareholding by a Greek national in Ghanaian company insufficient to show foreign control

▶ 18

## Problems of Treaty Shopping

- ▶ *Tokios Tokelés v. Ukraine* (Decision on Jurisdiction 4/29/2004)
  - ▶ A company incorporated in Lithuania filed an ICSID arbitration against Ukraine invoking protection under Lithuania-Ukraine BIT
  - ▶ The Lithuanian company was owned and controlled by Ukraine nationals (who owned 99% of the shares and had the two thirds of the management)
  - ▶ The BIT defines “investor” solely by reference to the country of incorporation.
  - ▶ Respondent’s Objection: an abuse of the ICSID mechanism to protect investments made in a State by its own citizens with domestic capital through a foreign entity
  - ▶ The majority of the tribunal: Corporate veil will not be pierced to determine corporate nationality if the place of incorporation is the only criterion in the BIT
  - ▶ Dissenting opinion (Professor Weil): This finding undermines the object and purpose of the ICSID Convention

▶ 19

## ▶ *Rompetrol Group N.V. v. Romania* (Decision April 18, 2008)

- ▶ The Claimant, The Rompetrol Group N.V., is a company established in The Netherlands under Dutch law. It is wholly owned by Rompetrol Holding, a Swiss company, which is owned by individuals having Romanian nationality.
- ▶ The Claimant holds a majority shareholding in Rompetrol S.A., a Romanian company, and other Romanian companies.
- ▶ Respondent: because the Claimant’s “real and effective nationality”- determined on the basis of its ownership and control, the source of its capital, and the nature of its commercial operations- is that of the Respondent, its Dutch nationality is not “opposable” to the Respondent
- ▶ Tribunal:
  - ▶ The Netherlands-Romania BIT defines corporate nationality solely based on place of incorporation
  - ▶ Neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT

▶ 20

### Implications of *Tokios* and *Rompetrol* cases

- ▶ Arbitral tribunals tend to accept the permissive languages of IIAs which define “investor” solely by reference to the country of incorporation.
- ▶ Possibility of treaty shopping:
  - ▶ An investor from a third State or even a host State can obtain the benefits of IIA protection by channeling its investment through an intermediate holding company incorporated in a State which has an IIA with the host State

▶ 21

### Local Company with Foreign Control

- ▶ *TSA Spectrum de Argentina SA v. Argentina* (Award December 19, 2008)
  - ▶ The Claimant, an Argentine company, invoked protection under The Netherlands-Argentine BIT on the basis of “foreign control” per ICSID Convention Article 25(2)(b) second clause.
  - ▶ Tribunal recognized significant difference between the first clause and second clause of ICSID Convention Article 25(2)(b)
    - The first uses a formal legal criterion, that of nationality (*Tokios Tokelés v. Ukraine*; *Rompetrol Group N.V. v. Romania*)
    - The second uses a material or objective criterion, that of “foreign control” in order to pierce the corporate veil and reach for the reality behind the cover of nationality ; thus the existence and materiality of this foreign control have to be objectively proven for the establishment of ICSID jurisdiction.
  - ▶ Tribunal declined jurisdiction because an Argentina national was the ultimate owner of a Dutch investment vehicle

▶ 22



## Slide 23

### Shareholders

- ▶ Shareholders in a company are protected by IIAs
  - ▶ Investment treaties provide independent standing to shareholders
  - ▶ The definition of “investment” generally includes shareholding/participation in a company
- ▶ Protection extends to:
  - ▶ Minority shareholders
    - ▶ Portfolio investors who purchased shares through stock exchange (which meet the definition of investment)
  - ▶ Indirect shareholding through an intermediate company

▶ 23

## Slide 24

### Recent Cases on Shareholders' Claims (*ratione personae*)

- ▶ *CMS v. Argentina* (Decision on Jurisdiction July 17, 2003)
  - ▶ Foreign shareholders in a local company may bring claims independently of the company, even if they are minority or non-controlling shareholders

▶ 24

## Nationality Planning and Denial of Benefits

- ▶ Nationality planning or „treaty shopping’ is not illegal *per se*
  - ▶ However, tribunals have required that investments be made in good faith, not solely for treaty shopping (e.g., *Phoenix v. Czech Republic*)
- ▶ State’s countermeasures against nationality planning
  - ▶ Require a bond of economic substance between the corporation and the home State
  - ▶ Insert a „denial of benefits’ clause

▶ 25

## Denial of Benefits Clause: Example

- ▶ ASEAN Comprehensive Investment Agreement, Article 19 (emphasis added)

1. A Member State may deny the benefits of this Agreement to:

- (a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;
- (b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and
- (c) an investor of another Member State that is a juridical person of such other Member State and to investment of such investor if investors of a non-Member State own or control the juridical person and the denying Member State does not maintain diplomatic relations with the non-Member State.

▶ 26

### Denial of Benefits Clause: Example (2)

- ▶ The Korea-Japan BIT uses the ownership and control test which expressly enables either of the contracting parties to deny an investor the benefits of the agreement „*if investors of any third country own or control that investor of that other Contracting Party*’ and the latter fails to „*maintain normal economic relations with the third country*’ or the investor „*has no substantial business operations.*’ (Article 22(2) of Korea-Japan BIT 2002)
- ▶ Similar provision is also included in the investment chapter of the Korea-US FTA, and is intended to prevent investors from merely incorporating a business entity in the territory of the other contracting state for the purpose of gaining treaty protection. (Article 11.11 Korea-US FTA)

▶ 27

#### iv. Definition of Investment under Investment Treaties and the ICSID Convention



#### The Definition of "Investment" under Investment Treaties and the ICSID Convention

Yu-Jin Tay  
Shearman & Sterling

June 22, 2011, Manila

APEC-UNCTAD Workshop on  
Investor-State Dispute Settlement

## Slide 2

SHEARMAN & STERLING LLP

### Summary Of Presentation

1. Introduction
2. Survey of Different Approaches to Definition of Investment in Treaties
  - 2.1 Liberal Asset-Based Definition of Investment
  - 2.2 Closed List Definitions
  - 2.3 Limitation to Permitted Investment Under Host State Laws
  - 2.4 Limitation to Investments Approved in Writing
  - 2.5 Reference to Investment Characteristics
  - 2.6 Specific Exclusions of Types of Assets
  - 2.7 Other Conditions for Qualifying Investment
3. Impact of Article 25(1) of the ICSID Convention
4. Conclusion

June 22, 2011 2

## Slide 3

SHEARMAN & STERLING LLP

### 1. Introduction (1)

- ITs cover and protect certain defined "investments" by certain defined "investors".
- Hence, the definition of "investment" determines the extent of economic interests to which the Host Government is prepared to extend substantive IT protections.
- As arbitral practice developed, much has been revealed about the implications of particular definitional approaches or particular treaty wording.
- For definition of "investment", the broad, open-ended asset-based definition has been most dominant in investment treaties.
- Newer agreements have used techniques for focusing the scope of the definition with more precision.
- This trend was largely in reaction to arbitral awards which were perceived to have interpreted open-ended definitions in too extensive a manner.

June 22, 2011 3

## Slide 4

SHEARMAN & STERLING LLP

### 1. Introduction (2)

- Some treaties have started to use
  - a closed-list definition instead of an open-ended one,
  - or introduce certain objective criteria or elements to determine when an asset can be considered an investment,
  - explicitly excluding certain types of assets, and
  - employing other narrowing techniques

June 22, 2011 4

## Slide 5

SHEARMAN & STERLING LLP

### 1. Introduction (3)

- Many treaties provide for ICSID arbitration as the avenue for dispute resolution between investors and Host State.
- An additional complication that has emerged with regard to the term "investment" is the inter-relationship between its scope under the applicable IT and Article 25(1) of the ICSID Convention.
- Tribunals have differed as to which of the two approaches should be treated as decisive.
- As well as the exact meaning of "investment" under the ICSID Convention which requires the existence of an "investment" but does not define the term.
- An important question in this debate has been whether an investment must contribute to the economic development of the Host State before the ICSID Convention may apply.

June 22, 2011 5

## Slide 6

SHEARMAN & STERLING<sup>USP</sup>

### 2.1 Liberal Asset-Based Definition of Investment (1)

- The dominant approach in the vast majority of investment treaties is to adopt a broad asset-based approach to the definition of "investment".
- This approach basically states a general definition that "investment" means "every kind of asset".
- This is then followed by an illustrative, non-exhaustive list of covered investments.
- The list typically includes movable and immovable property rights, shares, contract rights, intellectual property rights and goodwill, business concessions etc.
- This definition arises in the vast majority of treaty disputes that have been referred to international arbitration.

June 22, 2011 6

## Slide 7

SHEARMAN & STERLING<sup>USP</sup>

### 2.1 Liberal Asset-Based Definition of Investment (2)

- See, e.g., Article 1 of the UK Model BIT:  
For the purpose of this Agreement:  
(a) "investment" means every kind of asset and in particular, though not exclusively, includes:  
i. movable and immovable property and any other property rights such as mortgages, liens or pledges;  
ii. shares in and stock and debentures of a company and any other form of participation in a company;  
iii. claims to money or to any performance under contract having a financial value;  
iv. intellectual property rights, goodwill, technical processes and know-how;  
v. business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.
- Listing is without limitation.
- Assets of "every kind" are included; even if they do not fall under the 5 categories.

June 22, 2011 7

## Slide 8

SHEARMAN & STERLING<sup>USP</sup>

### 2.1 Liberal Asset-Based Definition of Investment (3)

- Advantages:
  - Forms of foreign investment can be very diverse; rapidly changing economic circumstances create new ways of investment in foreign countries
  - Increasing array of foreign-owned assets that have economic value may validly be regarded as desirable foreign investment
  - Since it can be difficult to predict in advance what future forms of desirable investment could arise, the simplicity of an open-ended asset based "investment" definition can be attractive
  - A liberal and flexible definition of "investment" also sends positive signals to investors.
- Disadvantages:
  - Can be too liberal and risk the possibility that a transaction not thought to be an "investment" at the time the agreement was entered into might nevertheless become covered through such definition.
  - E.g. "claims to money and claims under a contract having a financial value" is very broad and could conceivably encompass "ordinary commercial transactions" and "portfolio investments" unless these are specifically excluded

June 22, 2011 8

## Slide 9

SHEARMAN & STERLING<sup>USP</sup>

### 2.1 Liberal Asset-Based Definition of Investment (4)

- As an illustration, investment treaty tribunals have found that the following assets or activities qualified as "investment" under ITs with broad definitions of investment:
  - shares in a company (*CMS v. Argentina* and many others);
  - a loan (*CSOB v. Czech Republic*);
  - a contract for pre-shipment inspection services (*SGS v. Philippines*, *SGS v. Pakistan*);
  - telecommunication licensing (*Nagel v. Czech Republic*);
  - construction contract (*Salini v. Morocco* and others);
  - *Petrobart v. Kyrgyz Republic*: a sale contract of 12 months duration (note that the Energy Charter Treaty, on the basis of which the *Petrobart* was brought, contains an even broader definition of "investment", which includes "marketing, or sale of Energy Materials and Products")

June 22, 2011 9

## Slide 10

SHEARMAN & STERLING LLP

### 2.1 Liberal Asset-Based Definition of Investment (5)

- Activities which have been held by arbitral tribunals not to qualify as an "investment" under ITs with broad definitions of investment include:
  - provision of a bank guarantee where the underlying contract was a sales contract (*Joy Mining v. Egypt*);
  - pre-contract expenditures (*Mihaly v. Sri Lanka*).

June 22, 2011 10

## Slide 11

SHEARMAN & STERLING LLP

### 2.2 Closed-List Definitions (1)

- A minority of investment treaties opt for a narrower definition of "investment" through an exhaustive list of categories.
- A closed list approach is distinct from the open ended approach in that it does not contain a conceptual chapeau or general definition to define investment ("every kind of asset...")
- Instead, it contains an extensive but finite list of tangible and intangible assets to be covered by the treaty
- And also contains certain clear exclusions of certain purely commercial transactions (including sales contracts and pure financial loans)

June 22, 2011 11



## Slide 12

SHEARMAN & STERLING<sup>137</sup>

### 2.2 Closed-List Definitions (2)

- See, e.g., Article 1139 of NAFTA:
  - Article 1139 lists the following exhaustive "investments":
    - (i) an enterprise, (ii) equity security of an enterprise,
    - (iii) debt security of an enterprise, (iv) loan to an enterprise,
    - (v) interest in an enterprise that entitles the owner to share in income or profits of the enterprise,
    - (vi) interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution,
    - (vii) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes, and
    - (viii) interests arising from the commitment of capital or other resources in the territory of the Party to economic activity in such territory.
  - Article 1139 also lists things which are not investments under NAFTA, e.g. (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise of a Party to an enterprise in the territory of another Party etc.

June 22, 2011 12

## Slide 13

SHEARMAN & STERLING<sup>137</sup>

### 2.3 Limitation to Permitted Investment Under Host State Laws (1)

- Certain treaties contain a specification that investment is covered only if made "in accordance with the laws of the host country".
- E.g. most China BITs provide that:
  - "[t]he term 'investment' means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter...."
- In treaties that apply this limitation, investment that is not established accordance with the host state's laws and regulations will not be considered a protected investment.
- Moreover, assuming that Host State investment laws will be written and applied to further development policy, this limitation is also intended to ensure that the investment is covered only if it is consistent with the Host State's development policy, and other policies (e.g. immigration or internal security) that impact investment.
- Depending on the exact formulation of the requirement, this limitation could conceivably be used to deprive an investor of treaty protection for serious violations of Host State law admitted during the life of the investment (i.e. after the investment is made).

June 22, 2011 13

## Slide 14

SHEARMAN & STERLING<sup>USP</sup>

### 2.3 Limitation to Permitted Investment Under Host State Laws (2)

- In arbitral practice, failure to comply with national laws and regulations could result in a tribunal refusing jurisdiction over a claim made by the investor.
  - E.g. *Fraport v Philippines* (Award, 2007) – where jurisdiction was refused where the Claimant had deliberately sought to evade nationality of ownership requirements under Philippine law, and where the Germany-Philippines BIT required that the investments be made in accordance with the laws of the Philippines.
- Other tribunals have gone as far as to treat the requirement to comply with local laws as *implicit* even when not expressly stated in the relevant BIT: *Plama v Bulgaria* (Award, 2008), *Phoenix v Czech Republic* (Award, 2009).
- *Phoenix v Czech Republic* (Award, April 2009): The relevant analysis is to take into account the laws in force at the time of the establishment of the investment, as opposed to later changes in legislation.

June 22, 2011 14

## Slide 15

SHEARMAN & STERLING<sup>USP</sup>

### 2.3 Limitation to Permitted Investment Under Host State Laws (3)

- But note that Tribunals have also held that Host States must behave with good faith. The withdrawal of an approval will not negate the fact that an investment has been made under the applicable investment law. Otherwise the Host State could unilaterally undermine the protection of the applicable BIT.
  - E.g. *Kardassopoulos v Georgia* (Decision on Jurisdiction, 2007) – a State cannot preclude the protection of the BIT “on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic laws.”
  - The need for good faith on the part of the Host State has also been reinforced in *Desert Line v Yemen* (Award, 2008). The State argued that the Claimant’s investment was not accepted by the Host State as an investment “according to its laws and regulations and for which an investment certificate is issued” (as required under the Oman-Yemen BIT). The State argued that no certificate had ever been issued so the investment was not covered. The Tribunal rejected this formalistic argument. On the facts, the investment had been accepted and welcomed by the Head of State in good faith and so the ex post facto imposition of formalistic qualifications was rejected.

June 22, 2011 15

## Slide 16

SHEARMAN & STERLING<sup>137</sup>

### 2.4 Limitation to Investments Approved in Writing (1)

- Another approach is to include a separate provision stating that a treaty shall apply only to investment made in accordance with the laws and regulations of the host country and/or previously approved in writing by host state officials:
- Thus in the new ASEAN Comprehensive Investment Agreement 2009 (Art. 4), the term "covered investment" means, with respect to a Member State:
- *"an investment in its territory of an investor of another Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State."*
- Annex 1 to the ASEAN Comprehensive Investment Agreement 2009 sets out the procedures that a Member State must follow where specific approval in writing is required for investments to be covered (i.e. procedure to inform other Member States of the approval in writing procedure)

June 22, 2011 16

## Slide 17

SHEARMAN & STERLING<sup>137</sup>

### 2.4 Limitation to Investments Approved in Writing (2)

- Some Southeast Asian treaties have previously adopted the approach that investments need approval in writing by the host state in order to be covered.
- See, e.g., Article 2(1) of Korea-Thailand BIT:
  - *"The benefits of this Agreement shall apply only in case where the investment of capital by the nationals or companies of one Contracting Party in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party."*
- See also Article II(3) of the ASEAN Agreement for the Promotion and Protection of Investments 1987, and *Yaung Chi Oo Trading v. Myanmar* (tribunal held that investment did not qualify under the ASEAN Agreement as approval in writing required had not been satisfied); but contrast *Desert Line v Yemen*.

June 22, 2011 17

## Slide 18

SHEARMAN & STERLING<sup>USP</sup>

### 2.5 Reference to Investment Characteristics (1)

- An emerging approach is to make express references in the definition of investment to “characteristics of an investment” – such as common economic features associated with an investment.
  - commitment of capital or other resources
  - expectation of gain or profit
  - assumption of risk
- This approach is exemplified by US BIT and FTA practice since 2003 and recent Japanese treaties (e.g. Japan-Malaysia FTA, Japan-Brunei EPA 2007).
- Can be found in the US-Singapore FTA 2003 and 2004 Model BIT.
- Also in the Norway 2007 Model BIT.

June 22, 2011 18

## Slide 19

SHEARMAN & STERLING<sup>USP</sup>

### 2.5 Reference to Investment Characteristics (2)

For instance, 2004 US Model BIT defines “investment” as:

- “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.”
- The definition then goes on to list non-exhaustively “forms that an investment may take”:  
e.g. (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, authorisations, 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.”

June 22, 2011 19

## Slide 20

SHEARMAN & STERLING LLP

### 2.5 Reference to Investment Characteristics (3)

- Where the asset under consideration lacks the characteristics of an investment, that asset is not to be treated as an investment regardless of the form it may take.
- The policy behind this definitional approach was to ensure that a broad definition of investment does not permit treaty protections to apply to 'ordinary' sales or services contracts.
- But note that it is difficult to define in advance what is an 'ordinary' services contract and what type of services contract may rise to the level of an investment that should be protected under the treaty.

June 22, 2011 20

## Slide 21

SHEARMAN & STERLING LLP

### 2.6 Specific Exclusions of Types of Assets (1)

- Some investment agreements specify that they apply to foreign direct, as opposed to portfolio, investment.
- Portfolio investment is investment of a purely financial character, where the investor remains passive and does not control the management of the investment.
- The main concern of portfolio investors is the appreciation of capital value and the return it can generate, regardless of any long-term relationship consideration or control of the enterprise.
- Portfolio investment does not generally lead to technology transfer, training of locals and other benefits associated with direct investment.

June 22, 2011 21

## Slide 22

SHEARMAN & STERLING LLP

### 2.6 Specific Exclusions of Types of Assets (2)

- For examples of restrictive language intended to operate to exclude portfolio investment, see:
  - Protocol to 2003 China-Germany BIT, which supplements broad open list definition of investment found at Article 1 of the BIT:
    - Ad Article 1(a): *"For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management."*
  - - see also European Free Trade Association-Mexico FTA:
    - *"For the purpose of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof. (Article 45).*

June 22, 2011 22

## Slide 23

SHEARMAN & STERLING LLP

### 2.6 Specific Exclusions of Types of Assets (3)

- A number of treaties also expressly exclude those foreign-owned assets that are intended for non-business use, such as vacation homes:
  - NAFTA (1992) Article 1139:
    - In the last 'catch-all' sentence of the illustrative list of investments: *"interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory..."*
  - Japan-Singapore EPA (2002), Article 72(a):
    - In a separate note: *"For the purposes of this Chapter, loans and other forms of debt"... and "claims to money and claims to any other performance under contract"... refer to assets which relate to a business activity and do not refer to assets which are of personal nature, unrelated to any business activity."*
- Definitions that have requirements such as these would help combat treaty-shopping after a dispute has arisen.

June 22, 2011 23

## Slide 24

SHEARMAN & STERLING<sup>USP</sup>

### 2.7 Other Conditions for Qualifying Investment (1)

- To qualify for IT coverage, an investment generally must be "in the territory" of one of the contracting states.
- See, e.g., Article II of the Swiss-Philippines BIT:
  - The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party...
- But note *SGS v. Philippines* (a liberal interpretation of the territory condition was adopted: tribunal found that SGS had made an investment in the Philippines, although the services under the disputed contract were performed mostly outside of the Philippines).

June 22, 2011 24

## Slide 25

SHEARMAN & STERLING<sup>USP</sup>

### 2.7 Other Conditions for Qualifying Investment (2)

- Timing issues: most ITs expressly state that they apply both to investments made prior and after their entry into force (distinguish from separate issue of date on which the dispute arose).
- See, e.g., Article 11 of the China Model BIT:
  - This Agreement shall apply to investment made prior or after its entry into force by investors of one Contracting Party in the territory of the other Contracting Party...
- See also *Nykomb v. Latvia* (tribunal summarily rejected argument that it did not have jurisdiction over an investment made prior to entry into force of the BIT).

June 22, 2011 25

Slide 26

SHEARMAN & STERLING<sup>USP</sup>

### 2.7 Other Conditions for Qualifying Investment (3)

- Tribunals have retained jurisdiction even where the investment had ceased to exist.
  - See *Jan de Nul v. Egypt* (tribunal dismissed objection to jurisdiction over an investment – a contract to dredge the Suez Canal – which had ceased to exist).
- Pre-contract expenditures: tribunals have held that absent specific consent by host state, these expenditures are not covered by definition of “investment”.
- Distinction depends on whether the expenditures were incurred before or after the contract became effective:
  - Compare *Mihaly v. Sri Lanka* (tribunal held that pre-contract expenditures did not qualify as an investment) and *PSEG v. Turkey* (tribunal accepted that expenditures incurred before any works commenced qualified as an investment as contract had become effective).

June 22, 2011 26

Slide 27

SHEARMAN & STERLING<sup>USP</sup>

### 3. Impact of Article 25(1) of the ICSID Convention (1)

- Article 25(1) of the ICSID Convention limits the jurisdiction of the Centre to legal disputes “arising directly out of an investment”.
- No definition of the term “investment” in the ICSID Convention.
- Interplay between the meaning of “investment” under IT and under ICSID Convention:
  - Objective approach is dominant: “Investment” is generally regarded as having an objective meaning under the ICSID Convention, i.e. a meaning independent from that under the applicable IT.
  - Subjective approach (i.e. definition of “investment” under the IT is sufficient, no independent meaning of “investment” under the ICSID Convention), while encountered, has found less support. See *Middle East Cement v. Egypt, MCI v. Ecuador*.
- Accordingly, two-step examination of the term “investment” likely to apply: under the IT and under the ICSID Convention. See, e.g., *MHS v. Malaysia* (Award) (“double-barrelled test”).

June 22, 2011 27



Slide 28

SHEARMAN & STERLING<sup>USP</sup>

### 3. Impact of Article 25(1) of the ICSID Convention (2)

- Following characteristics of an "investment" within the *objective* meaning of the ICSID Convention have been identified in case law (so-called *Salini* test):
  - a contribution of the investor (contribution of financial resources, know-how, equipment, personnel etc. will be taken into account);
  - a certain duration (2 years held to be sufficient duration in *Jan de Nul v. Egypt*);
  - participation in the risks of the operation;
  - contribution to the host state's development (controversy: compare *LESI Dipenta, Fakes v Turkey* (2010) and *Patrick Mitchell v. Congo* (annulment) / *MHS v. Malaysia*)
- *MHS v. Malaysia*: characteristics or jurisdictional requirements (i.e. must all the above characteristics be satisfied for an investment to exist within the meaning of the ICSID Convention)? The first *MHS* arbitrator read into Article 25 qualitative standards on top of quantitative standards.

June 22, 2011 28

Slide 29

SHEARMAN & STERLING<sup>USP</sup>

### 3. Impact of Article 25(1) of the ICSID Convention (3)

- The most extensive list of factors to be considered for the meaning of "investment" in Article 25(1) is found in *Phoenix v Czech Republic*, where the Tribunal opined:
  - "To summarise all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:
    - (i) a contribution in money or other assets
    - (ii) a certain duration
    - (iii) an element of risk
    - (iv) an operation made in order to develop an economic activity in the host State
    - (v) assets invested in accordance with the laws of the host State
    - (vi) assets invested bona fide."

June 22, 2011 29

## Slide 30

SHEARMAN & STERLING LLP

### 3. Impact of Article 25(1) of the ICSID Convention (4)

▪ As an illustration, investment treaty tribunals have found that the following categories of activities qualified as "investment" within the meaning of the ICSID Convention:

- running of hotels (*AMCO v. Indonesia*);
- constructions of dams (*Impregilo v. Pakistan*) and highways (*Bayindir v. Pakistan*);
- dredging of a canal (*Jen de Nul v. Egypt*);
- promissory notes (*Fedax v. Venezuela*);
- loans (*CSOB v. Slovak Republic*).

On construction contracts qualifying as "investment": see, e.g., *RFCC v. Morocco*, *Salini v. Morocco* and *Autopista Concesionada de Venezuela v. Bolivia*; *Bayindir v. Pakistan*.

June 22, 2011 30

## Slide 31

SHEARMAN & STERLING LLP

### 3. Impact of Article 25(1) of the ICSID Convention (5)

▪ Activities which have been held by arbitral tribunals not to qualify as an "investment" include within the meaning of the ICSID Convention:

- activities of a law firm (*Patrick Mitchell v. Congo*);
- maritime salvage contract (*MHS v. Malaysia*, subject to pending annulment proceeding);
- a supply contract for the sales of goods (ICSID refused to register the request for arbitration).

June 22, 2011 31

## Slide 32

SHEARMAN & STERLING<sup>LLP</sup>

### 4. Conclusion (1)

- If drafters of ITs do not wish to limit the categories of asset which may qualify as investment and benefit from protection under the treaty, a broad definition of investment (i.e. the typical definition containing a non-exhaustive list) is recommended.
- On the other hand, numerous options are open to drafters wishing to restrict protection to certain assets:
  - a carefully drafted exhaustive list;
  - expressly excluding certain assets from the definition of investment;
  - requiring the asset to possess certain characteristics to qualify as an "investment";
  - other conditions going to time, compliance with host state law etc.

June 22, 2011 32

## Slide 33

SHEARMAN & STERLING<sup>LLP</sup>

### 4. Conclusion (2)


- There is no such thing as a best definition of "investment"
- This is simply a reflection of each country's preferences and policies
- Understanding the implications of particular treaty approaches and wording will assist States to find a formula that would best suit their policy objectives
- Definitions alone cannot establish an appropriate balance between affording sufficient degree of protection to foreign investors and preserving the vital interests of the Host State (including its regulatory policy space)
- This fundamental goal needs to be kept in mind when drafting the definition in the IT and each individual substantive obligation of the IT.

June 22, 2011 33

Slide 34

SHEARMAN & STERLING LLP

**Contact Details**



**Yu-Jin Tay**  
Head, International Arbitration (Asia)

Shearman & Sterling LLP  
6 Battery Road, #25-03  
Singapore  
T +65 6230 3839  
F +65 6230 3899  
M +65 9720 2920  
E [yj.tay@shearman.com](mailto:yj.tay@shearman.com)

June 22, 2011 34

**v. Fair and Equitable Treatment**

Slide 1

Fair and equitable  
treatment

J. Christopher Thomas, QC, C. Arb.



Slide 2

Fair and equitable treatment

## Outline of presentation

- Introductory comments on the varied expression of FET in treaties
- The early experience of the NAFTA Parties and its impact on subsequent investment treaties and FTAs
- What legal sources should be considered by tribunals?
- Recent developments in the cases
- Conclusion

J. Christopher Thomas, LL.M.

Slide 3

Fair and equitable treatment

## Introduction

- Fair and equitable treatment is a widely used standard of treatment included in investment treaties worldwide
- It is frequently left undefined
- It is also expressed in different formulations
- This gives rise to interpretative issues when tribunals apply the standard, as expressed in the applicable treaty, to a concrete set of facts

J. Christopher Thomas, LL.M.

Slide 4

Fair and equitable treatment

## Relationship to the International Minimum Standard of Treatment

- Since the first BIT/NAFTA claims there has been a debate as to the meaning of FET and whether it is to be equated to or is a higher standard than the MST
- A wide range of arbitral opinion: from giving “fair” and “equitable” their dictionary meanings to the view that FET is a term of art equivalent to the MST at customary international law

T. Christopher Thomas, LL.M.

Slide 5

Fair and equitable treatment

## Complicating factors

- There is no standard formulation of the FET standard in treaty texts
- Sometimes it is a stand-alone phrase
- Sometimes it is linked to “treatment in accordance with international law”
- Sometimes it is linked to “treatment in accordance with *customary* international law”

T. Christopher Thomas, LL.M.

Slide 6

Fair and equitable treatment

## Complicating factors (cont.)

- Sometimes it is situated in a clause that contains other qualitative standards against which the State's conduct is to be judged:
  - Arbitrary or unreasonable...
  - Arbitrary and discriminatory...
  - Arbitrary, unjustifiable or unreasonable...

J. Christopher Thomas, 2009, p. 49

Slide 7

Fair and equitable treatment

## Article 2 of the Viet Nam - UK BIT

### ARTICLE 2

#### Promotion and Protection of Investment

- (1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and subject to its rights to exercise powers conferred by its laws, shall admit such capital.
- (2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

J. Christopher Thomas, 2009, p. 49

## Slide 8

Fair and equitable treatment

### Importance of preambles and objectives

- Tribunals frequently call upon preambular language in aid of their interpretation of the FET standard
- *Occidental v. Ecuador* Award notes: “Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’. The stability of the legal and business framework is thus an essential element of fair and equitable treatment.” (Award, para 183)
- *Lemire v. Ukraine* refers to the Preamble of the BIT, which establishes “that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...” and holds that “the FET standard was closely tied to the notion of legitimate expectations.” (Decision on Jurisdiction and Liability, paras 264-267, Award, para 69)

© Cambridge University Press

## Slide 9

Fair and equitable treatment

### Preambles and objectives (cont.)

*Total v. Argentina* Award observes that:

116. In various disputes between U.S. investors and Argentina under that BIT, tribunals have relied on the explicit mention in its preamble of the desirability of maintaining a stable framework for investments in order to attract foreign investment as a basis for finding that the lack of such stability and related predictability, on which the investor had relied, had resulted in a breach of the fair and equitable treatment standard. This reference is justified because, although such a statement in a preamble does not create independent legal obligations, it is a tool for the interpretation of the treaty since it sheds light on its purpose... (Award, para 116)

© Cambridge University Press



Slide 10

Fair and equitable treatment

## Preambles and objectives (cont.)

- *Total* draws an inference from the *absence* of any mention of stability and predictability in the applicable BIT's preamble:
 

"... This absence indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors."  
(Award, at para 116)

J. Christopher Thomas et al. 2010

Slide 11

Fair and equitable treatment

## NAFTA experience

- Article 1105 of the NAFTA, entitled "Minimum Standard of Treatment," provides:
 

"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."
- Early NAFTA cases led to concern amongst the 3 Parties
- *S.D. Myers* (breach of another Chapter 11 obligation cited in support of a finding of breach of Article 1105), *Pope & Talbot* (the "additive" theory of FET) *Metalclad* (the linking of "transparency" in Article 1802 to Article 1105)
- This led to the Free Trade Commission's Note of Interpretation

J. Christopher Thomas et al. 2010

Slide 12

Fair and equitable treatment

## FTC Note, adopted 31 July 2001, Section B

1. 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.
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).

J. Christopher Thomas and co. et.

Slide 13

Fair and equitable treatment

## This note spawned new treaty text in post-NAFTA BITs and FTAs

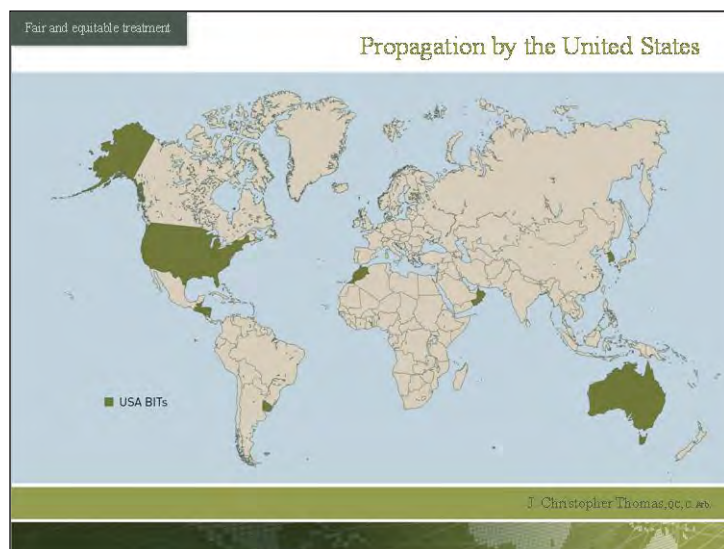
- The FTC Note text has found its way into many BITs and FTAs subsequently negotiated by the NAFTA Parties
- Mexican BITs and FTAs
- US Model BIT and specific BITs and FTAs
- Canadian Model FIPA, specific FIPAs and FTAs

J. Christopher Thomas and co. et.

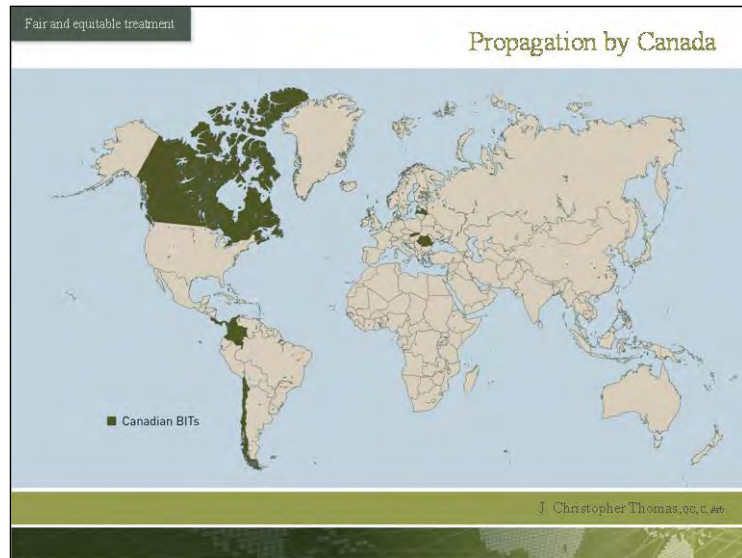
Slide 14



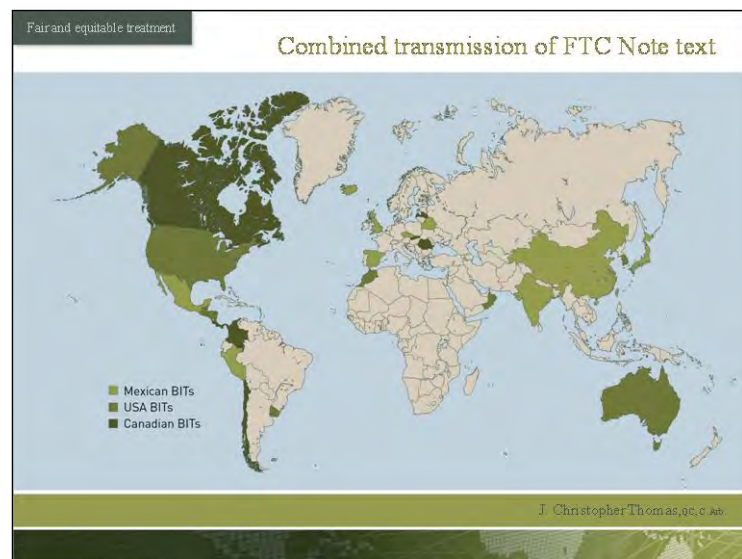
Slide 15



Slide 16



Slide 17



Slide 18

Fair and equitable treatment

## Relationship of the Note to prior treaties

- This change in treaty-making practice does not necessarily change the interpretation of pre-FTC Note treaties
- *Lemire v. Ukraine* discusses the point and rejects the respondent's argument that the FTC Note should be assimilated into the interpretation of a prior U.S. treaty

© Christopher Thomas, 2016

Slide 19

Fair and equitable treatment

## *Lemire v. Ukraine* Decision on Jurisdiction and Liability

252. Is this principle of assimilation between customary minimum standard and FET standard also applicable to the US – Ukraine BIT?

253. The answer must be in the negative. The BIT was adopted in 1996, and was based on the standard drafting then proposed by the US. The words used are clear, and do not leave room for doubt: “Investments shall at all times be accorded fair and equitable treatment ... and shall in no case be accorded treatment less than that required by international law”. What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights. (Decision, paras 252-253)

© Christopher Thomas, 2016

Slide 20

Fair and equitable treatment

### *Lemire v. Ukraine (cont.)*

254. In view of the drafting of Article II.3 of the BIT, the Tribunal finds that actions or omissions of the Parties may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith.

But note Voss' dissent:

- While I agree that the aforementioned positions do not retroactively apply to the BIT predating them, I disagree with the implication that they are of no relevance for interpreting the BIT. These positions were adopted in response to a trend of tribunals towards gradually expanding the scope of the FET standard as a non-contingent standard potentially according foreign investors preferential treatment over domestic investors in like cases. This trend started in 1997 with the *AMT case* and has since 2000 culminated in a proliferation of international investment claims on the basis of the FET standard. (Dissent, para 140)

J. Christopher Thomas, et al.

Slide 21

Fair and equitable treatment

### What legal sources should be consulted?

1. Customary international law?
2. International law, including all sources?
3. An independent, self-contained treaty standard?

J. Christopher Thomas, et al.



## Slide 22

Fair and equitable treatment

### A divide in the cases

- Since the 2001 FTC Note of Interpretation, the NAFTA cases have generally opted for #1 (but have varied in their approach to how the content of customary international law is determined)
- Non-NAFTA tribunals, *AWG v. Argentina* being one, have opted for #2
- Still others, *Tecmed v. Mexico*, being an example, have opted for the autonomous standard of fairness and equity

© Christopher Thomas et al.

## Slide 23

Fair and equitable treatment

### *Cargill v. Mexico* Award opts for #1

270. In approaching the task of ascertaining the customary international law standard of "fair and equitable treatment," the Tribunal emphasizes a foundational point to its mode of reasoning, which it simultaneously views as a point of weakness in some of the awards it has reviewed.

271. The shift in approach from seeking the meaning of "fair and equitable treatment" as a matter of treaty interpretation to seeking to ascertain the content of custom has fundamental implications for the legal reasoning of a tribunal. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so; namely, the language at issue and rules of interpretation...

© Christopher Thomas et al.

Slide 24

Fair and equitable treatment

## *Cargill v. Mexico Award*

(Award, para 271 cont.) ... A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but involves primarily a question of fact, where custom is found in the practice of States regarded as legally required by them. The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.

J. Christopher Thomas, et al.

Slide 25

Fair and equitable treatment

## *Grand River v. United States Award*

- Seems to take a similar approach on proof of customary international law:

218. ... In its discussion of the Claimants' asserted reasonable expectations claims, above, the Tribunal noted the Parties' opposing interpretations of international and domestic legal rules affecting, *inter alia*, Indian commerce in the United States. However, the Tribunal need not decide the many disputed points regarding the Jay Treaty, U.S. Indian law, or whether international rules have developed to provide the protections that the Claimants assert for individual First Nations investors. The more important question is whether the asserted legal protections are imported into the minimum standard of protection owed to foreign investments under customary international law and thus under Article 1105.

219. The Tribunal concludes that it has not been shown that they are. As the basis of the fair and equitable treatment standard of Article 1105, the customary standard of protection of alien investors' investments does not incorporate other legal protections that may be provided investors or classes of investors under other sources of law. To hold otherwise would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the Free Trade Commission in its binding directive. [Emphasis added.]

J. Christopher Thomas, et al.



Slide 26

Fair and equitable treatment

### *AWG v. Argentina* Award opts for #2

- *AWG* notes that the applicable BIT (Argentina-France) refers to “the principles of international law” rather than “the minimum standard under customary international law”
- Since the “formulation ‘minimum standard under customary international law’ or simply ‘minimum international standard’ is so well known and so well established in international law ... one can assume that if France and Argentina had intended to limit the content of fair and equitable treatment to the minimum international standard they would have used that formulation specifically. In fact, they did not.” (At para 184)

J. Christopher Hirsch, LL.M.

Slide 27

Fair and equitable treatment

### *Tecmed v. Mexico* Award opts for #3

155. The Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described above is that resulting from an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle, on the basis of which the scope of the obligation assumed under the Agreement and the actions related to compliance therewith are to be assessed.

J. Christopher Hirsch, LL.M.

Slide 28

Fair and equitable treatment

## Glamis Gold v. United States Award distinguishes *Tecmed* approach

- 609. ... it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed. It is thus necessary to look to the underlying fair and equitable treatment clause of each treaty, and the reviewing tribunal's analysis of that treaty, to determine whether or not they are drafted with an intent to refer to customary international law.
- 610. Looking, for instance, to Claimant's reliance on *Tecmed v. Mexico* for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico, defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain-Mexico BIT involved in the *Tecmed* proceeding provides that each contracting party guarantees just and equitable treatment conforming with "International Law" to the investments of investors of the other contracting party in its territory. Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State. Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the *Tecmed* tribunal itself states that it "understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation* ...". Thus, this Tribunal finds that the language or analysis of the *Tecmed* award is not relevant to the Tribunal's consideration.

J. Christopher Thomas, et al.

Slide 29

Fair and equitable treatment

## However, there is cross-fertilization

*Waste Management v. Mexico No. 2* sought to distill the NAFTA caselaw on FET:

98. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is 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. 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.

J. Christopher Thomas, et al.

Fair and equitable treatment

## Cross-fertilization (cont.)

- *Waste Management No. 2* has been cited in 18 subsequent decisions and awards, 12 of which are non-NAFTA cases
- So we see concepts / approaches developed by NAFTA tribunals under the FTC  
Note migrating to proceedings under other treaties

J. Christopher Thomas, C.A.A.

Fair and equitable treatment

## Cross-fertilization (cont.)

J. Christopher Thomas, C.A.A.

Slide 32

Fair and equitable treatment

## Sometimes the cross-fertilization goes in a one-way direction

- *Tecmed* is frequently cited by other investment treaty tribunals (currently in 31 non-NAFTA awards and decisions), but it is cited by NAFTA tribunals less frequently (5 times) and sometimes (as seen in *Glamis Gold* and *Cargill*) to distinguish the approach taken by that tribunal from that to be taken under the FTC Note of Interpretation

J. Christopher Howse, et al.

Slide 33

Fair and equitable treatment

## Recent cases: *Glamis Gold v. United States*

- Notable for the rather strict approach it took to the MST standard
- Resuscitates the *Neer* standard developed by the U.S.-Mexico Claims Commission in 1926
- *Neer* looked for treatment that amounts “to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” (Award, para 616)
- This marked a departure from prior post-FTC Note awards such as *Pope & Talbot (Damages Award)*, *Mondev*, *Waste Management II*, and *International Thunderbird*
- Focused on the burden imposed on the claimant to prove a rule of customary international law that was breached by the respondent State
- Notes also the possibility of “targeting” of a foreign investor or its investment
- Ultimately, the tribunal dismisses the claimed breach of Article 1105

J. Christopher Howse, et al.

Slide 34

Fair and equitable treatment

### *Cargill v. Mexico*

- Notable for the way in which it fits with *Glamis Gold* in terms of its overall approach to FET: (i) customary international law standard; (ii) onus on claimant to prove the existence of a rule of customary international law that has been breached by the respondent; (iii) the targeting of an investor breaches such a rule
- The tribunal finds that there was targeting of a small number of US investors as a result of a larger trade dispute between Mexico and the United States and that that measure (characterized as “manifestly unjust and akin to an act in bad faith”) constituted a breach of the FET standard (Award, paras 300, 303, 317, 550)

J. Christopher McCreary, et al.

Slide 35

Fair and equitable treatment

### *Merrill & Ring v. Canada*

- Notable for its “two scenarios” approach to the MST
- The “first track,” which focused on the rights of individuals, whereby the minimum standard became a part of the international law of human rights, applicable to aliens and nationals alike (which the tribunal considers to be obsolete and overtaken by recent developments and “the restrictive *Neer* standard has not been endorsed or has been much qualified)
- The “second track,” “also discernable in so far it concerns business, trade and investment” which the tribunal considers is “a requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*” (Award, paras 201-209)
- The tribunal examines Canada’s measures against both standards (Award, para 291 *et seq.*)

J. Christopher McCreary, et al.



Slide 36

Fair and equitable treatment

### *Merrill & Ring (cont)*

- Unlike other post-FTC Note of Interpretation tribunals (*Pope & Talbot* aside), this tribunal raises questions about the efficacy of the Note: "... the binding character of the FTC Interpretation does not mean that that interpretation necessarily reflects the present state of customary and international law. As the Investor has argued, the FTC Interpretation seems in some respect to be closer to an amendment of the treaty, than a strict interpretation. In any event, the Tribunal is mindful of the evolutionary nature of customary international law, as discussed below, which provides scope for the interpretation of Article 1105(1), even in the light of the Free Trade Commission's 2001 interpretation." (Award, para 192)

J. Christopher Mawhood, 2010

Slide 37

Fair and equitable treatment

### *Merrill & Ring (cont)*

- Simultaneously notes that transparency was unsuccessfully linked to the minimum standard of treatment (Award, para 208), but also asserts that transparency is "fast approaching" the standard of a general principle of law (Award, para 187)
- Rejects the application of the *Neer* approach: "In conclusion, the Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard." (Award, para 213)

J. Christopher Mawhood, 2010

Fair and equitable treatment

### *Merrill & Ring (cont)*

- Interesting discussion on inter-relationships between treaties:  
 “The Tribunal also notes that if the FTC Interpretation was construed so as to narrow the protection against unfair and inequitable treatment to an international minimum standard requiring outrageous conduct of some kind, then consistency would demand that the same standard be followed in respect of such claims made by the NAFTA States in respect of the conduct of other countries affecting business, trade or investments interests of their citizens abroad. Yet, this is not the case under current international practice. Customary international law cannot be tailor made to fit different claimants in different ways. To do so would be to countenance an unacceptable double standard.” (Award, para 212)

© Christopher H. Browne, 2010

Fair and equitable treatment

### *AWG v. Argentina*

- Finds that “just and equitable” and “fair and equitable” mean the same thing (Decision on Liability, para 183)
- Notes also that one of the three BITs applicable in the case does not contain a reference to “applicable rules of international law” while the two others do; notes that neither party “suggested that this difference in treaty language requires the Tribunal to give a different meaning to the fair and equitable standard in applying the Argentina-France BIT from that reached in applying the other two BITs ...” (Decision on Liability, para 183)
- Examines whether the reference to “international law” is to customary international law? Or to general international law?
- Holds that it must be measured against international law including all sources (Decision on Liability, paras 184-186)

© Christopher H. Browne, 2010

Slide 40

Fair and equitable treatment

### *AWG v. Argentina (cont.)*

- **Goes on to observe that FET is:**
  - (i) “a vague and ambiguous expression on its face and is not defined in any of the treaties applicable to these cases”
  - (ii) “it has been widely used in hundreds of investment treaties throughout the world over the years with the result that numerous arbitral tribunals have interpreted and applied it to investor-State disputes arising in a wide variety of circumstances”
  - (iii) it is a “flexible term that applies to all kinds of investments in all industries and economic endeavours”
  - (iv) “its application is crucially dependent on an evaluation of the facts of each case”
  - (v) as evidenced by its “wide use, generality, and flexibility, the term ‘fair and equitable treatment’ seems to be viewed by Contracting States as a basic standard of treatment to be accorded to investors” (Decision on Liability, paras 187-188)

J. Christopher Thomas, et al.

Slide 41

Fair and equitable treatment

### *AWG v. Argentina (cont.)*

- **Accords particular weight to prior arbitral decisions (in the interests of predictability and consistency in decision-making)**
- ***AWG* is a good example of the importance of Preambular language (Decision on Liability, paras 215-218)**
- **The majority emphasizes the preambles of 3 treaties in providing the foundation of its discussion of legitimate expectations (Decision on Liability, paras 223-231)**

J. Christopher Thomas, et al.



Slide 42

Fair and equitable treatment

### *AWG v. Argentina (cont.)*

- *AWG* also notable for the dissent of Pedro Nikken who takes issue with the majority's reliance upon the doctrine of "legitimate expectations":  
 "The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable.'" Therefore, *prima facie*, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT). In addition, I think that the interpretation that tends to give the standard of fair and equitable treatment the effect of a legal stability provision has no basis in the BITs or in the international customary rules applicable to the interpretation of treaties." (Dissenting opinion of Pedro Nikken, para 3)

J. Christopher McManis, LL.M.

Slide 43

Fair and equitable treatment

### *Lemire v. Ukraine*

- Another arbitration marked by dissent
- Majority and dissenting arbitrator agree that the application of the FET standard is not an exercise of an *ex aequo et bono* power
- Tribunal holds that it is an autonomous standard whose meaning is to be established on a case-by-case basis
- There must be a balanced approach
- Adverts to the intentions of the States party to the treaty (objectives and preamble)
- Focuses on stability and predictability, consistency and coherence
- Finds that dictionary definitions of 'fairness' and 'equity' do not assist
- Evidence of bad faith is not required to prove a breach of the standard

J. Christopher McManis, LL.M.

Slide 44

Fair and equitable treatment

### *Lemire v. Ukraine (cont.)*

- In relation to legitimate expectations, the majority focuses on the claimant's expectations at the time of his investment (Award, para 270)

J. Christopher Thomas, et al.

Slide 45

Fair and equitable treatment

### *Lemire v. Ukraine dissent of Jurgen Voss*

- Takes issue with the majority's focus on the investor's expectations:  
 "While the Majority focuses on Claimant's mindset at the time of his investment, it is generally established that only legitimate expectations qualify for protection under the FET standard and that expectations receive their legitimacy from conduct attributable to the host government. In the words of the PSEG Tribunal, "legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed". Similarly, the Parkings Tribunal stated that "the expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation (...) ". Also in line with this jurisprudence is the more recent NAFTA based ad hoc-arbitral decision in *Glamis Gold v. USA*: "Article 1105 (1) NAFTA [the FET standard] requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce the investment." (Dissent, para 41; emphasis and italics in original)
- Criticizes majority for failure to identify any promise or assurance and would hold that positive reactions to are too vague a basis for LE (Dissent, paras 42 *et seq*)

J. Christopher Thomas, et al.

Slide 46

Fair and equitable treatment

### *Helnan v. Egypt Award*

- Dispute arising out of a management contract to manage a hotel owned by an Egyptian state entity; after several inspections the hotel was downgraded from a 5 star to a 4 star hotel; there ensued a contractual arbitration between the parties which held that the contract has become “impossible to execute” and declared the contract terminated (dismissing the claims of both parties) but Helnan was awarded 12.5 M EGP under the concept of settlement of debts in performing its management obligations; the sum was duly paid
- Set-aside applications by Helnan were rejected by the Egyptian courts
- ICSID proceeding focused on the relationship between the contractual arbitration and the BIT claim

J. Christopher Henson, LL.M.

Slide 47

Fair and equitable treatment

### *Helnan v. Egypt (cont.)*

- Tribunal had to consider the effect of the local (Cairo) arbitration award upon the rights of the parties before it
- The matters to be determined by the tribunal had to be delineated from those aspects, if any, which the Cairo tribunal had ruled upon and which the ICSID tribunal had to accept without a review of its own (i.e., on the basis of *res judicata*) (Award, para 101)
- “An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.” (Award, para 106)
- Agreed with the distinction drawn in prior cases between contractual and treaty rights: “... each case will have to be reviewed in the light of the circumstances. When it is found by an international tribunal that the holding of the local award was determined strictly by considerations pertaining to contractual issues, it will not be appropriate for an international tribunal to replace the decision of the local court on a contractual issue subject to local law. Instead, *res judicata* will apply...” (Award, para 108)

J. Christopher Henson, LL.M.

Fair and equitable treatment

### *Toto v. Lebanon* Decision on Jurisdiction

- Notable for the tribunal's dismissal of FET claims at the jurisdictional stage
- Claimant complained of long delays in Lebanon's courts with respect to claims for compensation under a highway construction contract between the Claimant and entities of the State exercising governmental authority
- Claims submitted in 2001 remained unresolved up to 2007 (Request for Arbitration)
- Alleged denial of justice for the slow pace of the *Conseil d'Etat* proceedings
- Finding that "Only if there is *prima facie* evidence that the court delays in the case at stake are unfair and inequitable would the Tribunal have jurisdiction under Article 3.1 of the Treaty" the tribunal dismisses this claim for lack of evidence that the Claimant made use of local remedies to shorten the procedural delays
- "... In the absence of such evidence the Tribunal has no jurisdiction under Article 3.1 of the Treaty to decide whether the delays before the *Conseil d'Etat* were unfair and inequitable." (Decision, paras 153, 167-168)

Dr. Christopher H. Browne, LL.M.

Fair and equitable treatment

### *Toto v. Lebanon* (cont.)

- Claimant also challenged its inability to obtain information regarding the progress of the procedures before the *Conseil d'Etat* or to learn the name of the Magistrate in charge of the file as "contrary to the fundamental right to transparency," another breach of FET
- Summarily dismissed by the tribunal: "On the basis of the facts submitted, the Tribunal does not find a *prima facie* lack of transparency in the proceedings before the *Conseil d'Etat* that would give it jurisdiction to decide whether these facts amount to a breach of Article 3.1 of the Treaty." (Decision, para 173)
- Tribunal retains jurisdiction over the Respondent's alleged: (i) failure to expropriate certain lands for the project, (ii) the failure to remove Syrian troops, (iii) failure to protect legal possession, and (iv) the changes in its regulatory framework (Decision, para 174-176)
- The claim related to erroneous instructions and design is dismissed due to lack of sufficient *prima facie* evidence and due to the claims appear to be related to a standard duty in a construction contract, not involving "use of sovereign authority or '*puissance publique*.'" (Decision, para 175)

Dr. Christopher H. Browne, LL.M.

Fair and equitable treatment

## Different approaches on legitimate expectations

- *Lemire* majority focuses on a conception of I.E based on the legislative framework, emphasizing stability/predictability, consistency and coherence (Award, para 69)
- It finds expectations at a *general* and on a *specific level*: “On a general level, the Tribunal found that Claimant was entitled to expect that the Ukrainian regulatory system for the broadcasting industry would be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions; More particularly, Mr. Lemire had the legitimate expectation that Gala, which at the time was only a local station in Kyiv, would be allowed to expand on its own merits, in parallel with the growth of the private radio industry in Ukraine.” (Award, para 69)

*Key point*: “These legitimate expectations were not based on an individual negotiation between Mr. Lemire and the Ukrainian State; they represent the common level of legal comfort which any protected foreign investor in the radio sector could expect.” (Award, at para 70)

© Christopher H. Browne, 2014

Fair and equitable treatment

## Legitimate expectations (cont.)

- *Total* holds that: “In the absence of some ‘promise’ by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a ‘guarantee’ of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor...” (Award, at para 117)
- Contrast *Lemire* with *Glamis Gold*: like *Total*, *Glamis Gold* requires “specific assurances”: “As the Tribunal determines below that no specific assurances were made to induce Claimant’s ‘reasonable and justifiable expectations,’ the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105.” (Award, at para 622)

© Christopher H. Browne, 2014



Fair and equitable treatment

## Legitimate expectations (cont.)

- *AES v. Hungary* takes a similar approach: “The enquiry therefore turns to whether: (a) there were government representations and assurances made or given to Claimants at that time [of making the initial investment or re-confirming the existing investment], and upon which they relied, of the sort alleged; and (b) Hungary acted in a manner contrary to such representations and assurances.” (Award, para 9.3.17)

Dr. Christopher Thomas, LL.M.

Fair and equitable treatment

## Lessons from the cases

- Treaty text matters (tribunals focusing on the presence or absence of “customary” when considering international law – see *Glamis Gold, Cargill, Grand River, AWG*)
- Preambular and objectives language can have a significant impact on the interpretation of an FET obligation (see *Lemire, AWG, Total*)
- Dictionary definitions of “fair” and “equitable” are of little use (*AWG, Lemire*)
- Proof of bad faith not required (*Lemire, Glamis Gold, Cargill*)
- Determination of breach is heavily fact-dependent (*Waste Management II, AWG, )*
- Legitimate expectations plays a major role in the FET caselaw (*Lemire, AWG, AWG Nikken dissent, AES, Total*)
- Different views as to what gives rise to a legitimate expectation

Dr. Christopher Thomas, LL.M.

Slide 54

Fair and equitable treatment

## Helpful resource

- UNCTAD has prepared a new survey on Fair and Equitable Treatment
- The draft is comprehensive in scope and sets out variety of different suggestions for policymakers and negotiators
- Expected to be published soon but no exact date of publication has yet been set

J. Christopher Thomas, cc, c. 2013

Slide 55

Fair and equitable treatment

## The End

Thank you

J. Christopher Thomas, cc, c. 2013

vi. **Denial of Justice (Special Topic on Fair and Equitable Treatment)**

Slide 1

**Denial of Justice**  
**(Special Topic on Fair and Equitable Treatment)**

**Elodie Dulac**  
**King & Spalding**

**APEC-UNCTAD Workshop**  
**on**  
**Investor-State Dispute Settlement**

**Manila**  
**June 23, 2011**

---

**KING & SPALDING**

Slide 2

**Outline**

- I. Introduction
- II. The Relation Between FET and Denial of Justice: What Do the Treaties Say?
- III. Traditional “Definition” of Denial of Justice
- IV. Investment Treaty Tribunals and Denial of Justice
- V. Conclusion

---

**KING & SPALDING**

2



## I. Introduction

- Unity of the state under international law. A host state can be liable for the conduct of its courts (Article 4 of the ILC Articles).
- Introductory definition of denial of justice:  
*An “improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions” (Adede)*
- Denial of justice has its source in customary international law.
- FET held to encompass denial of justice, i.e. a situation of denial of justice has been interpreted as amounting to a breach of the FET.
- Some treaties expressly incorporate a reference to denial of justice in their FET provision. Most treaties do not.
- However, denial of justice does not exhaust the content of FET. Only a possible strand of it.

## II. Relation Between FET and Denial of Justice - What Do the Treaties Say?

- NAFTA Article 1105:
  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”.
- FTC Note dated July 31, 2011:
  1. 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.
  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.

## II. Relation Between FET and Denial of Justice - What Do the Treaties Say?

- 2004 US Model BIT:

### Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do 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;*

## II. Relation Between FET and Denial of Justice - What Do the Treaties Say?

- Article 11 of the ASEAN Comprehensive Investment Agreement:
  1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.
  2. For greater certainty: (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process;

### III. Traditional “Definition” of Denial of Justice

- Notion of denial of justice is generally viewed as two-fold: procedural denial of justice and substantive denial of justice.
- Notion not precisely defined. But typology of conducts giving rise to denial of justice has emerged.
- Question as to whether the notion of substantive denial of justice is necessary.
- No need to establish bad faith.
- Requirement to exhaust local remedies?

### III. Traditional “Definition” of Denial of Justice

- 1929 Harvard Draft on *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners*:

*“Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”*

### III. Traditional “Definition” of Denial of Justice

- **Procedural denial of justice:**
  - denial of access to courts, directly or indirectly, e.g. by imposing abusive requirements;
  - undue delays;
  - irregularities in the procedure, e.g. refusal to hear a party or preventing a party from adducing its evidence.
- **Substantive denial of justice:**
  - goes to the correctness of the court decision itself;
  - international tribunals are not court of appeals;
  - not every error of a national court will rise to a denial of justice. See discussion of the test later on.

### IV. Investment Treaty Tribunals and Denial of Justice

- ***Azinian v. Mexico* (NAFTA):**
  - first investment treaty case to have addressed denial of justice;
  - claim for termination of contract for waste disposal in Mexico. Contract was subject to the jurisdiction of Mexican courts. It was held invalid by three levels of Mexican courts.
  - tribunal stated that a denial of justice might be caused:
    - (a) if the relevant courts refuse to entertain the suit;
    - (b) if they subject it to undue delay;
    - (c) if they administer justice in a seriously inadequate way; or
    - (d) if there is a clear and malicious misapplication of the law.
  - As *Azinian* had not alleged any wrongdoing been pleaded by Mexican courts, the tribunal dismiss the claim.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Mondev v. USA (NAFTA):***

- claim by Canadian investors that they had been treated unfairly by the US as a result of decisions by the state courts of Massachusetts.
- contract with the city of Boston to develop certain land in Boston. Project failed to secure planning consent. Banks foreclosed on the property. Local partnership owned by the claimants sued before Massachusetts courts against city of Boston and Boston Redevelopment Authority. Jury verdict against the two respondents but judge held that BRA was entitled to statutory immunity. Court of appeal upheld the finding of immunity and set aside judgment against the city.
- Mondev sued under NAFTA, claiming breach of Article 1105 of NAFTA. Claim was concerned with the correctness of the court decisions, i.e. the fourth type of denial of justice listed in *Azinian v. Mexico*.

#### IV. Investment Treaty Tribunals and Denial of Justice

- Test formulated by the Mondev tribunal:
- The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA... is intended to provide a real measure of protection. In the end, the question is whether at an international level, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. (paras. 225- 226)

Tribunal found that none of the aspects of the court's decision breached that standard.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Loewen v. USA* (NAFTA):**

- Dispute between a Canadian investor and a US competitor in the funeral home business, O'Keefe. A jury trial held in Mississippi state court regarding which Loewen alleged that the trial judge allowed O'Keefe's lawyers to make extensive, irrelevant and highly prejudicial discriminatory references to Loewen's nationality, class and race, and that excessive punitive damages were awarded (USD 400 million) -- initially without even without the evidence on punitive damages having been presented.
- Tribunal held that: "we take it to be the responsibility of the state under international law... to provide a fair trial of a case to which a foreign investor is a part. It is the responsibility of a state to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice".
- Tribunal rejected the contention that bad faith or malicious intention was required. Instead, it adopted the formulation in *Mondev* and opined: "Manifest injustice in the sense of a lack of due process leading to an outcome that offends a sense of judicial propriety is enough".

#### IV. Investment Treaty Tribunals and Denial of Justice

- *Loewen* tribunal found that this standard was breached: "By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace... By any standard of evaluation, the trial judge failed to afford Loewen the process that was due". The tribunal concluded that "the whole trial (in local courts) and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment".
- Still, the tribunal held that trial court conduct did not amount to a violation of FET by the US because Loewen had failed "to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated". Tribunal considered that several appeal options were available, and that Loewen had failed to explain why it chose to settle rather than pursuing these domestic remedies.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Pey Casado v. Chile:***

- tribunal expressly makes the point that FET includes obligation not to deny justice, with reference to *Mondev* and *Loewen*;
- claimant's grievance: delay in court proceedings -- no decision in first instance by Chilean courts for 7 years (on its claim that some printing equipment be returned);
- tribunal cited *inter alia* J. Paulsson: "[...] delays may be 'even more ruinous' than absolute refusal of access [to justice], because in the latter situation the claimant knows where he stands and take action accordingly, whether by seeking diplomatic intervention or exploring avenues of direct legal action". Also referred to ECHR case law (7 years is an unreasonable delay);
- tribunal held that denial of justice and breach of the fair and equitable treatment because of this undue delay.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Jan de Nul v. Egypt:***

- investor claimed that both procedural (e.g. a joinder of two cases by the court; duration of the proceedings of nearly 10 years) and substantive denial of justice (on the ground that the court had failed to remedy a fraud by the contractual partner);
- tribunal held that relevant standard to trigger Egypt's responsibility for the conduct of its courts was denial of justice;
- tribunal endorsed the definition of denial of justice given by *Loewen* tribunal ("manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety");
- tribunal further endorsed the *Mondev* test ("in the end the question is whether... a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable");
- tribunal acknowledged that *Mondev* was an award rendered in the context of NAFTA and the minimum standard of treatment under customary international law, but held the *Mondev* test to be appropriate;

#### IV. Investment Treaty Tribunals and Denial of Justice

- Tribunal found that no procedural denial of justice (on duration of proceedings: held notably that issues were complex and highly technical, that the parties had filed extensive submissions and expert reports, so that duration of proceedings was unsatisfactory but did not rise to level of denial of justice);
- Tribunal found that no substantive denial of justice: no fraud in the first place so no failure by court to remedy the fraud.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Toto v. Lebanon:***

- dispute regarding compensation under a construction contract between the claimant and state entities;
- alleged denial of justice: delay in the proceedings before Lebanese Conseil d'Etat (over 6 years).
- considered ECHR case law as irrelevant as Lebanon is not a party to it (comp. with Pey Casado). Took into account decisions of the ICCPR Commission.
- set out criteria to assess whether delay was unreasonable: complexity of the matter, need for celerity of decision, diligence of claimant in pursuing the case. Also took into consideration context (political situation in Lebanon).
- tribunal found that claimant had not shown they had used available remedies to speed up proceedings.
- tribunal held that no jurisdiction to decide whether delays were unfair and inequitable.



#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Siag v. Egypt:***
  - Egypt's failure to comply with numerous judicial rulings in Siag's favour which ordered that the contract be respected and that Egypt return the property to Siag's local subsidiary.
  - the Tribunal accordingly finds that Egypt's actions failed to afford the Claimants due process of law. The Tribunal further considers that the failure to provide due process constituted an egregious denial of justice to Claimants, and a contravention of Article 2(2) of the BIT, in that Egypt failed to ensure the FET of Claimants' investment.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***GEA v. Ukraine (obiter):***
  - tribunal endorsed the *Mondev* test ("justified concerns as to the judicial propriety of the outcome");
  - claimant's alleged denial of justice court had not addressed one of the claimant's arguments;
  - tribunal found that courts took claimant's argument into account but rejected it;
  - tribunal concluded that no breach of FET.

#### IV. Investment Treaty Tribunals and Denial of Justice

- ***Pantechniki v. Albania:***
  - with reference to 1930s academic writings, the tribunal stated that “the general rule is that ‘mere error in the interpretation of the national law does not per se involve responsibility’. Wrongful application of the law may nonetheless provide ‘elements of proof of a denial of justice’. But that requires an extreme test: the error must be of a kind which ‘no competent judge could reasonably have made’”.
  - the tribunal envisaged that Albanian courts may have committed an “extreme misapplication of the law” (by holding that a contractual clause would violate public policy) that there appear to have been a “clear violation of fair procedure” because the court rejected the claim on a ground that the claimant had not invoked and thus had no occasion to address.
  - however, the tribunal ultimately did not decide these two issues as it found that the investor had failed to pursue reasonably available remedies.

#### IV. Conclusion

- Denial of justice may also be relevant to the assessment whether provisions of the treaty other than FET have been breached:
  - obligation to accord the investor a treatment less favourable than that required by international law (see, e.g., Article 10(1) of the Energy Charter Treaty and *Petrobart v. Kyrgyzstan* -- court stayed enforcement of decision in favour of investor further to letter from the vice prime minister requesting the court to delay enforcement);
  - expropriation (*Saipem v. Bangladesh*);
  - duty to provide effective means of asserting claims and enforcing rights.

## vii. Survey of Case Law on MFN Treatment

Slide 1



**Survey of Case Law on  
Most-Favoured-Nation (MFN) Treatment**

APEC-UNCTAD Workshop on Investor-State Dispute Settlement

22-24 June 2011  
Manila, Philippines

Morgan D. Maguire

[mmaguire@investorstatelawguide.com](mailto:mmaguire@investorstatelawguide.com)  
[www.InvestorStateLawGuide.com](http://www.InvestorStateLawGuide.com)

 **Investor-State  
LAWGUIDE™**

Slide 2



**Overview**

1. MFN clause to access international jurisdiction
  - a) Divergence in the case law
  - b) Context of the treaty text
  - c) Substantive vs. Jurisdiction
2. MFN clause to access substance obligations

 **Investor-State  
LAWGUIDE™**

### MFN in relation to access to international jurisdiction

- **Issue:** whether an MFN clause contained in an investment treaty can extend to a treaty's dispute resolution clause (jurisdiction clause).
- **Potential Effect:** MFN clause operates to replace one dispute resolution clause with another (from a treaty between the respondent State and a third party State), extending the range of disputes that qualify for international arbitration.



### MFN re: international jurisdiction Divergence in the case law

- Decisions finding that an MFN clause extends to access to dispute settlement
  - *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000
  - *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004
  - *Camuzzi International S.A. v. Argentine Republic (II)*, Decision on Objections to Jurisdiction, 10 June 2005
  - *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006
  - *Gas Natural SDG S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005
  - *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Separate Opinion of Todd Weiler, 7 April 2006
  - *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006
  - *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006
  - *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006
  - *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, October 2007
  - *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, 20 March 2009
  - *Austrian Airlines v. Slovak Republic*, UNCITRAL, Separate Opinion of Charles N. Brower, 20 October 2009
  - *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011



Slide 5

## MFN re: international jurisdiction Divergence in the case law

- Decisions finding that an MFN clause does not extend to access to dispute settlement
  - *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Separate Opinion on the Issues at the Quantum Phase, Ian Brownlie C.B.E., Q.C., 14 March 2003
  - *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004
  - *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005
  - *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 089/2004, Award, 21 April 2006
  - *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006
  - *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008
  - *Rento 4 S.V.S.A. et al. v. Russian Federation*, Award on Preliminary Objections, 20 March 2009
  - *Tao Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009
  - *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009
  - *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011



Slide 6

## MFN re: international jurisdiction Context in the treaty text

- Each decision must be examined within the context of its applicable treaty and the language contained in the MFN clause.
- MFN clauses applicable to the aforementioned decisions can be grouped into 3 broad categories based on the language of the provision



MFN re: international jurisdiction  
Context in the treaty text

Language categories:

1. “all matters”
  - Clause expressly states that MFN treatment shall apply to “all matters” of the treaty

**Example:**

- Article IV, *Argentina – Spain BIT (1991)*: “In **all matters** governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.”

 Investor-State  
LAWGUIDE™

MFN re: international jurisdiction  
Context in the treaty text

Application of “all matters” language

- Article IV, *Argentina – Spain BIT (1991)* [*Maffezini v. Spain*; *Gas Natural v. Argentina*; *Suez, Barcelona and Interagua v. Argentina*; *Suez, Barcelona and Vivendi v. Argentina*; *Telefónica v. Argentine Republic*]
- Article 2, *Belgium-Luxembourg – Russia BIT (1989)* [*Berschader v. Russia*]
- Article 4, *Argentina – Belgium-Luxembourg BIT (1990)* [*Camuzzi v. Argentina [II]*]
- Article 3, *Argentina – Italy BIT (1991)* [*Impregilo v. Argentina*]

 Investor-State  
LAWGUIDE™

## MFN re: international jurisdiction Context in the treaty text

Language categories:

2. “management, maintenance, use, enjoyment or disposal”
  - Clause creates an inclusive statement describing what activities are covered by MFN treatment

Examples:

- Article 3(2), *Argentina – United Kingdom BIT (1990)*: “Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.”
- Article 10(7), *Energy Charter Treaty (1995)*: “Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.”



## MFN re: international jurisdiction Context in the treaty text

Application of “management, maintenance, use, enjoyment or disposal” language

- Article 3(2), *Argentina – United Kingdom BIT (1990)* [*National Grid v. United Kingdom*; *AWG v. Argentina*]
- Article 3(2), *Russia – United Kingdom BIT (1989)* [*RosInvestCo v. Russia*]
- Article 10(7), *Energy Charter Treaty (1995)* [*Plama v. Bulgaria*]



## MFN re: international jurisdiction Context in the treaty text

Language categories:

3. “treatment”

- Clause does not specify or clarify the scope of MFN treatment

**Examples:**

- Article 3, *Argentina – Germany BIT (1991)*: “Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.”
- Article 3(2), *China – Peru BIT (1994)*: “The treatment and protection referred to in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.”



## MFN re: international jurisdiction Context in the treaty text

Application of simple “treatment” language

- Article 3, *Argentina – Germany BIT (1991)* [*Siemens v. Argentina*; *Wintershall v. Argentina*]
- Article 3, *Austria – Slovak Republic BIT (1990)* [*Austrian Airlines v. Slovak Republic*]
- Article 3, *Italy – Jordan BIT (1996)* [*Salini v. Jordan*]
- Article IV, *Hungary – Norway BIT (1991)* [*Telenor Mobile v. Hungary*]
- Article 5(2), *Russia – Spain BIT (1991)* [*Renta 4 v. Russia*]
- Article 3(2), *China – Peru BIT (1994)* [*Tza Yap Shum v. Peru*]





## MFN re: international jurisdiction

### Context in the treaty text

Observations re: comparing treaty language and tribunal formulations of MFN


- With the exception of *Berschader v. Russia*, all decisions where the applicable MFN clause contained “all matters” language, the tribunals found that the MFN provision extended to access to international arbitration
  - Note *Berschader* may be distinguished from other “all matters” cases since the tribunal seemed to base its finding on the clarification language contained in the MFN clause (“particularly to Articles 4, 5 and 6”) (see *Berschader v. Russia*, paragraphs 193-194)
- Mixed results for cases where the applicable MFN provision contained “management, maintenance, use, enjoyment or disposal” language (3 extend to dispute settlement and *Plama v. Bulgaria* does not)
- With the exception of *Siemens v. Argentina*, all decisions where the applicable clause contained simple “treatment” language, the tribunals found that the MFN provision did not extend to access to international arbitration



## MFN re: international jurisdiction

### Substantive vs. Jurisdiction

- Divergence in the case law concerning the possible distinction between the application of MFN treatment to substantive vs. dispute settlement (jurisdiction) clauses.
  - Possible distinction based on the principle of consent, and that an agreement to arbitrate must exist between the State and the investor in order for a tribunal to have jurisdiction over the matter before it.
    - *Helnan v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decisions of the *ad hoc* Annulment Committee, paragraph 40
- **Issue:** whether and under what conditions an investor can vary (by invoking the MFN clause) the conditions attached to the Respondent’s offer to consent (contained in the dispute settlement clause)



## MFN re: international jurisdiction Substantive vs. Jurisdiction

- Some cases presume that dispute resolution clauses invariably fall within the scope of an MFN provision unless the contrary is plainly demonstrated
  - *Maffezini v. Spain; Gas Natural v. Argentina; National Grid v. Argentina; Siemens v. Argentina; MTD v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004; *Suez, Barcelona and Interagua v. Argentina; Suez, Barcelona and Vivendi v. Argentina; AWG v. Argentina; Telefónica v. Argentina*
  - *Siemens v. Argentina*, paragraph 103: “The Tribunal concurs that the formulation [Article 3, *Argentina – Germany BIT (1991)*] is narrower but, as concluded above, it considers that the term “treatment” and the phrase “activities related to the investments” are sufficiently wide to include settlement of disputes.”
- Other cases have found that dispute settlement provisions cannot be presumed to fall within the scope of an MFN provisions unless the MFN provision expressly extends itself to dispute settlement.
  - *Plama v. Bulgaria*, paragraph 223: “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”
  - *Wintershall v. Argentina*, paragraph 172: “The requirement of such recourse can only be dispensed with [...] when the text of the MFN clause [...] itself permits the interpreter of the treaty to conclude that this was the clear and unambiguous intention of the Contracting Parties.”



## MFN in relation to substantive treaty standards

- Cases where an MFN provision was invoked to incorporate substantive standards from another treaty
  - *CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award, 14 March 2003*
    - Finds that a fair market value compensation standard would apply in any event based on the BIT's MFN clause (para. 500)
  - *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004
    - Applies an MFN provision to accord an investment fair and equitable treatment protections of other BITs (paras. 104 and 157)
  - *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008
    - Finds that the State breached its obligation to accord the investor the fair and equitable treatment imposed on the respondent by virtue of an MFN clause
  - *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009
    - Applies an MFN clause to import a fair and equitable treatment from another treaty entered into after the treaty in question (paras. 153-160 and 163-167)
  - *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010
    - Applies an MFN clause to import a fair and equitable treatment and treatment no less favourable than that required by international law clause (para. 16)
  - *Sergei Pashok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011
    - Holds that the BIT's MFN clause allows for the integration into the treaty of the broader provisions FET clauses contained in the Mongolia – United States BIT and the Denmark – United States BIT (paras. 570-573)



Slide 17

## Conclusions

- Difficult to spot trends due to divergence in case law
- Source of divergence is treaty language and interpretative approach
- More consistency found in the application of MFN to substantive obligations.



The logo for Investor-State LAWGUIDE, featuring a blue gear icon to the left of the text "Investor-State" in a serif font and "LAWGUIDE" in a bold sans-serif font below it.

Slide 18

*Thank you*

[mmaquire@investorstatelawguide.com](mailto:mmaquire@investorstatelawguide.com)  
[www.InvestorStateLawGuide.com](http://www.InvestorStateLawGuide.com)



The logo for Investor-State LAWGUIDE, featuring a blue gear icon to the left of the text "Investor-State" in a serif font and "LAWGUIDE" in a bold sans-serif font below it.

## viii. Expropriation

Slide 1



Asia-Pacific  
Economic Cooperation

**APEC-UNCTAD Workshop on  
Investor-State Dispute Settlement**

22-24 June 2011 Manila, Philippines



UNITED NATIONS  
UNCTAD



dti  
DEPARTMENT OF  
TRADE & INDUSTRY  
PHILIPPINES

# Expropriation



HAMAMOTO Shotaro  
Professor of International Law  
Graduate School of Law, Kyoto University  
Kyoto, JAPAN



1

Slide 2

## Introduction

- I. Review of Basic Issues
  - A) Definition & Scope
    - 1. *Direct Expropriation*
    - 2. *Indirect Expropriation*
  - B) Conditions
    - 1. *Under Customary International Law*
    - 2. *Under IIAs*
    - 3. *Practical Relevance of "Conditions"*
- II. Current Problems
  - A) Legitimate Exercise of Regulatory Power
    - 1. *Criticisms*
    - 2. *Case Analyses*
  - B) Assimilation into FET?

## Conclusion

2

### Slide 3

I. Basic Issues: A. Definition & Scope: 1. Direct Expropriation

### Direct Expropriation 1/2

The difference between a direct or formal expropriation and an indirect expropriation turns on whether **the legal title of the owner** is affected by the measure in question.  
*Dolzer & Schreuer, Principles of International Investment Law, OUP, 2008, p. 92.*

In implementation of the amended Section 16A of the [Zimbabwe Constitution], all the agricultural land owned by the Claimants were **"acquired by and vested in the State with full title** therein..."

*Funnekotter v. Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 Apr. 2009, para. 22.*

The final provision of Decree No. 178 **cancelled "all rights** (given earlier by the Georgian government to any of the parties) contradicting the present Decree".

[T]he circumstances of Mr. Kardassopoulos' claim present **a classic case of direct expropriation**, Decree No. 178 having deprived GTI of its rights in the early oil pipeline and Mr. Kardassopoulos' interest therein.

*Kardassopoulos & Fuchs v. Georgia, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, 8 Dec. 2000, paras. 159, 387.*

### Slide 4

I. Basic Issues: A. Definition & Scope: 1. Direct Expropriation

### Direct Expropriation 2/2

- in the case where (the title to) the property has not been transferred to the host State

[T]he treatment of Yukos and of Mr. Khodorkovsky changed dramatically after the latter had publicly criticized the Putin administration and after several projects suggested by Yukos seem to have been understood as threatening the government's control over the Russian petroleum resources. [...]

[T]he totality of Respondent's measures [various taxes and bankruptcy auction] were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with Yukos.

The Tribunal [...] is confronted with **a complete taking of all of the assets** of Yukos that amounts to nationalisation or expropriation of RosInvestCo's investment.

*RosInvestCo v. Russia, SCC Arbitration V (079/2005), Final Award, 12 Sept. 2010, paras. 614, 621 and 624.*

4

## Slide 5

I. Basic Issues: A. Definition & Scope: 2. Indirect Expropriation

### Indirect Expropriation

Although these forms of expropriation [indirect expropriation, *de facto* expropriation, etc.] do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which **do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.**

*Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 114 [English translation of the authentic Spanish text].

“any other measure with effects equivalent to expropriation”  
Art. 4(1), Philippines-Portugal BIT(2002)

“nationalization, expropriation or any other measure of similar characteristics or effects”  
Art. 6, Indonesia-Spain BIT (1995)

“any measure tantamount to expropriation”  
Art. 4(2), Japan-Vietnam BIT (2004)

5

## Slide 6

I. Basic Issues: A. Definition & Scope: 2. Indirect Expropriation

### Indirect Expropriation: requirements

- “substantial” deprivation

The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of **substantial deprivation**. [...]

[T]he Respondent has explained, the investor is **in control of the investment**; the Government does not **manage the day-to-day operations** of the company; and the investor has full ownership and control of the investment.

The Tribunal is persuaded that this is indeed the case in this dispute and holds therefore that the Government of Argentina has not breached the standard of protection laid down in Article IV(1) [expropriation] of the Treaty.

*CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 262-264.

6

Slide 7

I. Basic Issues: A. Definition & Scope: 2. Indirect Expropriation

### Indirect Expropriation: requirements

- “governmental” acts

Whether one or series of [contractual] breaches [by a State party] can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract **in the exercise of its sovereign authority**, or as a party to a contract.

*Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 June 2006, para. 315.

It is **the use by a State of its sovereign powers** that gives rise to **treaty breaches**, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty.

*Suez & Vivendi v. Argentina*, ICSID Case No. ARB/03/19 & *AWG v. Argentina*, Decision on Liability, 30 July 2010, para. 153.

Any other conditions? -> Chapter II

7

Slide 8

I. Basic Issues: A. Definition & Scope: 2. Indirect Expropriation

### Indirect Expropriation: examples

- revocation of “zone franche” certificate (*Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 Feb. 1999, para. 124; *Middle East Cement v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr. 2002, para. 107).
- local government’s denial of a construction permit without any basis (*Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, paras. 106-107).
- non-renewal of a hazardous waste landfill permit (*Tecmed v. Mexico*, *supra*, para. 117).
- breach of contracts (*Eureko v. Poland*, Partial Award, 19 Aug. 2005, paras. 240-241).
- government’s intervention leading to the cancellation by the investor’s local partner of the contract that formed the basis for the investor’s investment (*CME v. Czech Republic*, Partial Award, 13 Sept. 2001, para. 609).
- government’s intervention leading to the non-payment by a State-owned hotel of a sum due under contracts concluded between the hotel and the investor (*Alpha v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Nov. 2010, para. 410).
- decision of a tribunal of the host State to “deny the authority” of an arbitral tribunal established under a contract concluded b/w the investor and a public entity of the host State (*Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras. 128-129).
- physical seizure of investment (authorized) by the host State (*Wena v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 99).

8

## Slide 9

I. Basic Issues: B. Conditions: 1. Under Customary International Law

### 1. Under Customary International Law

- public purposes
- non-discrimination
- just/appropriate/adequate/full compensation
  - ◆ “the owner shall be paid appropriate compensation, in accordance with **the rules in force in the State** taking such measures in the exercise of its sovereignty and in accordance with **international law**” (UNGA Res. 1803 (XVII) (1962), “Permanent Sovereignty over Natural Resources”
  - ◆ “In any case where the question of compensation gives rise to a controversy, it shall be settled under **the domestic law of the nationalizing State**” (UNGA Res. 3281 (XXIX) (1974), “Charter of Economic Rights and Duties of States”

9

## Slide 10

I. Basic Issues: B. Conditions: 2. Under IIAs

### Under IIAs: Example

Each Contracting Party shall not take any measures of expropriation [...] except under the following conditions:

- a. the measures are taken for a lawful purpose, **for public interest** and **under due process of law**;
- b. the measures are **non discriminatory**;
- c. the measures are accompanied by provisions for the payment of **prompt, adequate and effective compensation**. Such compensation shall amount to **the fair market value** of the investments affected immediately before the measures of expropriation became a public knowledge. Such market value shall be determined in accordance with internationally acknowledged practices and methods or, where such fair market value cannot be determined, it shall be such reasonable amount as may be mutually agreed between the Contracting Parties hereto, and it shall be freely transferable in freely usable currencies from the Contracting Party.

Art. 4, Cambodia-Vietnam BIT (2000)

10



## Slide 11

I. Basic Issues: B. Conditions: 2. Under IIAs

### Public Purpose/Interest

The Hungarian parliament enacted a law to expropriate the investors' interest in the operation of a terminal at the Budapest Airport in 2001. The Government explained that such legislation was necessary because the operator performing such activities of strategic interest should only be an organization in which the State was the majority owner. In 2005, the Airport was privatized and a British company acquired a 75% minus one share.

The reference to the wording "*the strategic interest of the State*" [...] does not assist the Respondent's position [...]. While the Tribunal has always been curious about what interest actually stood behind these words, **the Respondent never furnished it with a substantive answer.** [...] [A] treaty requirement for "*public interest*" requires some genuine interest of the public. [...] With the claimed "*public interest*" unproved and the Tribunal's curiosity thereon unsatisfied, the Tribunal must reject the arguments made by the Respondent in this regard.

*ADC v. Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 Oct. 2006, paras. 431-433.

## Slide 12

I. Basic Issues: B. Conditions: 2. Under IIAs

### Non-discrimination

The investors had purchased 30% ownership in a State-owned insurance company and later agreed with the Polish Government to purchase a further 21%. Because of the political climate in Poland, the Government did not sell additional shares to the investors and took other measures to limit their interests in the company.

[T]he measures taken by [Poland] in refusing to conduct [the sale of the further 21%] are **clearly discriminatory.** [...] [T]hese measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep [the State-owned insurance company] under majority Polish control and **to exclude foreign control** such as that of Eureko. That discriminatory conduct by the Polish Government is blunt violation of the expectations of the Parties [...].

*Eureko v. Poland*, Partial Award, 19 Aug. 2005, para. 242.

12

Slide 13

I. Basic Issues: B. Conditions: 2. Under IIAs

### Due Process 1/2

- a variety of treaty provisions

“expropriatory measures shall be non-discriminatory and shall be taken under due process **of national law**” (Art. 4(1), China-Poland BIT (1998))

“Each Contracting Party shall not take any measures of expropriation [...] except under the following conditions: (a) the measures are taken [...] **in accordance with the law** [...]” (Art. 6(1), Chile-Indonesia BIT (1999))

“Neither Contracting Party shall expropriate [...] except: [...] (d) in accordance with due process of law and Article 5 **FET**, full protection and security and the obligations observance clause” (Art. 12(1), Japan-Laos BIT (2008))

“[no reference to due process]” (Art. 5(1), UK-Vietnam BIT (2002))

13

Slide 14

I. Basic Issues: B. Conditions: 2. Under IIAs

### Due Process 2/2

A land belonging to the investor was expropriated by a Ministerial Resolution 83 issued by the Egyptian Minister of Tourism in 1996 for the reason that the investor failed to honour its contractual commitments on timing. Egyptian administrative courts held that the resolution was illegal and cancelled it. The Egyptian Government took no steps to return the land to the investor. The applicable Egypt-Italy BIT provides that “Investments [...] shall not be [...] expropriated [...] except for [...] in accordance with due process of law”. (Art. 5(1))

Due process may be denied both **substantively** and **procedurally**. Egypt has not submitted to the contrary.

The Tribunal accepts that there were delays to the Project, but it does not accept that those delays provided a valid reason to cancel the contract and expropriate the Claimants’ investment. [...] It is important to note that the Supreme Administrative Court of Egypt held the same view. [...] Claimants accordingly suffered **a denial of substantive due process**.

In respect of **procedural abuse**, [...] [Claimants] **ought to have received notice** that the TDA was considering expropriating the investment. [...] [T]he failure by Egypt to provide such notice constitutes **a denial of due process** [...].

*Siag & Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras. 440-442.

Slide 15

I. Basic Issues: B. Conditions: 2. Under IIAs

### Compensation

- “adequate” (Art. 6(1)(a) Bahrain-Thailand BIT (2002))
- “adequate” & “amount[ing] to the market value” (Art. 6(1) Argentina-Thailand BIT(2002))
- “adequate” & “amount[ing] to the genuine value” (Art. 5(1) UK-Vietnam BIT (2002))
- “just” & “represent[ing] the actual value” (Art. 5(c), Belgium-Indonesia BIT (1970))
- “The compensation [...] shall be such as to place the nationals and companies in the same financial position as that in which the nationals and companies would have been if expropriation [...] had not been taken.” (Art. 5(2), China-Japan BIT (1988))
- “fair market value” (Art. 4(2), China-ROK BIT (2007))

“actual market value” (Art. 5, US-Argentina BIT) = **fair market value**  
*CAA & Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, para. 8.2.10.

“just compensation & genuine value” (Art. 5(c), Czech-Netherlands BIT) = **fair market value**  
*CME v. Czech Republic*, Partial Award, 13 Sept. 2001, para. 618.

“value” (Art. 4(2), Argentina-Germany BIT) = **fair market value**  
*Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, para. 353.

Slide 16

I. Basic Issues: B. Conditions: 3. Practical Relevance of “Conditions”

### “Lawful” and “unlawful” expropriation 1/2

[F]or reasons which the Tribunal will discuss [later], the valuation placed on Claimants’ shares was manifestly and grossly inadequate compared to the compensation which the Tribunal there holds to be necessary in order to afford adequate compensation under the BIT [...]. The Tribunal accordingly holds that the expropriation by the Presidium was **unlawful**. [...]

For expropriation, Article III of the BIT provides that “(c)ompensation shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known.” [...] [N]o relevant distinction can be drawn between the expressions “real value” and “**fair market value**.”

*Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 706, 785.

16

## Slide 17

I. Basic Issues: B. Conditions: 3. Practical Relevance of "Conditions"

### "Lawful" and "unlawful" expropriation 2/2

Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law ["to wipe out all the consequences of the illegal act"] in the present case. [...]

The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, **since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably**. [...] [I]n the present, *sui generis*, type of case the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed.

ADC v. Hungary, supra, paras. 483, 496-497.

17

## Slide 18

II. Current Problems: A. Legitimate Exercise of Regulatory Power

### 1. Criticisms

The NAFTA tribunal in the *Metalclad* case defined expropriation as not only "open, deliberate and acknowledged takings" of property such as outright seizure, but also "covert or incidental interference" with the use of property." This definition of takings clearly is much broader than what is allowed by U.S. courts and could have a crippling effect on the ability of NAFTA nation's to carry out **traditional governmental regulatory functions**.

Public Citizens, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy*, 2001.

18

## Slide 19

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

Metalclad: environmental measures

Metalclad, a US corporation, asserted that Mexico's local authorities wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that Metalclad had built in La Pedrera, San Luis Potosi, despite the fact that the project was allegedly built in response to the invitation of certain Mexican federal officials and allegedly met all Mexican legal requirements.

[T]he Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. In so doing, *the Municipality acted outside its authority*. [...] These measures, taken together with *the representations of the Mexican federal government, on which Metalclad relied*, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.

*Metalclad v. Mexico*, ICSID Case No. ARB(AF)/07/1, Award, 30 Aug. 2000, paras. 106-107.

19

## Slide 20

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

Tecmed: environmental measures 1/2

Mexican authorities refused to renew a Spanish investor's license to operate a hazardous waste landfill. The operating license of the landfill at the time of the investment was valid indefinitely. Later, the Instituto Nacional de Ecología (INE), an environmental agency of the Mexican government, changed the license terms to require renewal on an annual basis.

In July 1997, a new mayor took office in the municipality. This, coupled with *the widespread public protests against the landfill operation in its location*, led to an understanding between the investor and INE pursuant to which investor would continue operating the landfill until a new location was found for its operation.

In November 1998, when the investor applied for the renewal of its license, however, INE rejected its application, and later ordered the landfill to be shut down, giving rise to arbitration.

20

## Slide 21

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

Tecmed: environmental measures 2/2

[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are **proportional** to the public interest presumably protected thereby and to the protection legally granted to investments [...].

[T]he Municipality [...] and the Minister of [Environment] have insisted that Cytrar's Landfill operation complies with the Mexican legal provisions [...] or meets the requirements necessary not to impair the environment or public health. [...] **None of the parties [...] expresses concerns as to the danger that the Landfill may pose to public health, ecological balance or the environment.** To the contrary, their concerns are [...] to put an end to the political problems [...] caused by the Landfill [...]

Based on the above [...] the Arbitral Tribunal finds and resolves that the Resolution [refusal of the renewal of the license] and its effects **amount to an expropriation** in violation of Article 5 of the [Mexico-Spain BIT] and international law.

*Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 122, 129, 151.

21

## Slide 22

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

EnCana: taxation

EnCana, a Canadian investor, claimed that Ecuador's denials of VAT credits and refunds deprived EnCana's subsidiaries of certain tax refunds to which they were entitled, according to EnCana, under the Ecuadorian law.

[F]oreign investments like other activities are subject to the taxes and charges imposed by the host State. In the absence of a specific commitment from the host State, **the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change**, perhaps to its disadvantage, during the period of the investment. [...]

In principle a tax law creates a new legal liability on a class of persons to pay money to the State [...]. In itself such a law is not a taking of property; if it were, a universal State prerogative would be denied by a guarantee against expropriations [...]. **Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence** would issues of indirect expropriation be raised.

*EnCana v. Ecuador*, LCIA Case UN3481, Award, 3 Feb. 2006, paras. 173, 177.

22

## Slide 23

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**Biwater: taxation**

City Water, a subsidiary of the investor (BGT), was awarded a Certificate of Incentives under the Tanzanian law, which entitled it an exemption from VAT. In 2005, the Tanzanian Government withdrew the VAT exemption, alleging that City Water had not complied with the undertakings that had been made in order to obtain the Certificate.

The Arbitral Tribunal accepts BGT's characterisation of this act as a further contributing element in the Republic's expropriation. The act was **without any justification**, and in the Arbitral Tribunal's view, **unreasonable** and **unjustified**. The act also was clearly the exercise of sovereign executive authority, which adversely impacted upon City Water's rights, and its ability to continue to perform.

The evidential record does not support the Republic's allegation that City Water had not complied with the undertakings [...] and instead indicates that the withdrawal was connected to the other steps taken by the Republic against BGT and City Water at the time.

*Biwater v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 502, 707.  
23

## Slide 24

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**Middle East Cement: confiscation**

A ship Poseidon, owned by Middle East Cement Co., a Greek company under liquidation, was subjected to an administrative seizure by Egypt and then auctioned.

[I]t has to be examined whether there was a taking of the Poseidon, though, normally, a seizure and auction ordered by the national courts do not qualify as a taking, they can be a "measure the effects of which would be tantamount to expropriation" **if they are not taken "under due process of law"** [Art. 4(a), Egypt-Greece BIT]. [...]

The address of the Claimant and his attorney in Egypt were well known to the Authority [...]. Therefore, a matter as important as the seizure and auctioning of a ship of the Claimant **should have been notified by a direct communication** for which the law No. 308 [concerning administrative distraint] provided for [...]. Thus, the Tribunal concludes that the Poseidon was taken by a "measure the effects of which would be tantamount to expropriation" [...].

*Middle East Cement v. Egypt*, ICSID Cse No. ARB/99/6, Award, 12 Apr. 2002, paras. 139, 143-144.  
24

## Slide 25

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**CME: media licensing**

The investor, a German company, complained about interference with its contractual rights by the Czech Media Council, which forced the investor to accept the amendments to the contract in 1996 and led the other contracting party to terminate the contract with the investor.

Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State. The Council's actions and inactions, however, **cannot be characterized as normal broadcasting regulator's regulations** in compliance with and in execution of the law, in particular the Media Law. Neither the Council's actions in 1996 nor the Council's interference in 1999 were part of proper administrative proceedings. They must be characterized as actions designed **to force the foreign investor to contractually agree to the elimination of basic rights** for the protection of its investment (in 1996) and as actions (in 1999) supporting the foreign investor's contractual partner in **destroying the legal basis for the foreign investor's business** in the Czech Republic.

*CME v. Czech Republic,*  
Partial Award, 13 Sept.2001, para. 603. <sup>25</sup>

## Slide 26

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**LESI: termination of contract**

The Italian investor concluded a contract with an Algerian State organ for the construction of a dam. Following a modification of the construction method, the African Development Bank, which granted a loan for the project, requested Algeria to invite tenders on the basis of the new construction method. The Algerian State organ thus unilaterally terminated the contract.

Il est nécessaire que les mesures prises reviennent à une violation de l'Accord bilatéral, ce qui signifie en particulier qu'elles soient **de nature injustifiée ou discriminatoire**, en droit ou en fait. Ce n'est donc pas nécessairement le cas de toute violation d'un contrat. [...]

L'article 566 du Code civil algérien prévoit ceci : « Le maître de l'ouvrage peut, à tout moment avant l'achèvement de l'ouvrage, dénoncer le contrat et en arrêter l'exécution, à condition de dédommager l'entrepreneur [...] ». L'ANB a offert au Groupement [investisseur] une indemnisation [...].

*LESI c. Algérie*, CIRDI No. ARB/05/3,  
Sentence, 12 nov.2008, paras. 131, 135, 136. <sup>26</sup>



## Slide 27

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**Saipem: court judgment**

The Italian investor instituted an ICC arbitration on the basis of the contract that it concluded with a Bangladeshi public corporation. The First Court of the Subordinate Judge of Dhaka issued a decision revoking the authority of the ICC Arbitral Tribunal.

[B]oth parties consider that the actions of [...] Bangladesh **must be “illegal” in order to give rise to a claim of expropriation.** [...]

Having carefully reviewed the procedural orders referred to in the Revocation Decision as the cause of the ICC Tribunal’s misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. [...] [T]he Tribunal considers that the Bangladeshi courts **abused their supervisory jurisdiction** over the arbitration process. It is true that the revocation of an arbitrator’s authority can legitimately be ordered in case of misconduct. [...] However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct [...].

*Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras. 134, 154, 159. <sup>27</sup>

## Slide 28

II. Current Problems: A. Legitimate Exercise of Regulatory Power: 2. Case Analyses

**GEA: court judgment**

A German investor’s subsidiary commenced an ICC arbitration against a Ukrainian State-owned organ based on the contract that they concluded. The tribunal rendered an award in favor of the subsidiary, which requested the Ukrainian court to recognize and enforce the award. The court, however, refused to do so for the reason that the contract on the basis of which the arbitral award was rendered was invalid as it had been concluded by unauthorized persons.

[T]he Claimant has provided the Tribunal with no reason to believe that the courts of Ukraine were “applying a **discriminatory** law,” only that the Ukrainian courts came to a conclusion different to that which GEA had hoped. Moreover, contrary to *Saipem*, the Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were “**egregious**” in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow **deliberately** taken to thwart GEA’s ability to recover on the ICC Award.[...]

*GEA v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 236. <sup>28</sup>

## Slide 29

II. Current Problems: B. Assimilation into FET?

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*,  
Partial Award, 17 Mar. 2006, para. 255.

“normal”  
“non-discriminatory”  
“bona fide”  
= “fair and equitable”?

In all but a few cases of indirect expropriation, the tribunals also found a violation of the FET obligation. (exception: Goertz, Saipem)

29

## Slide 30

II. Current Problems: B. Assimilation into FET?

Tribunals often simply recall or repeats their findings on the FET obligation when they examine claims on indirect expropriation.

By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment **breaching Article 1105** [...], Mexico must be held to have taken **a measure tantamount to expropriation** in violation of NAFTA Article 1110(1).

*Metalclad v. Mexico*, supra, para. 104.

```

graph LR
    A[regulatory measures] --> B[indirect expropriation]
    C[substantial deprivation  
-(supra I. A. 2.)] --> B
    D[FET violation] --> B
    B --> E[lawful indirect expropriation?]
    style E fill:#f0f0f0
  
```

No Party may directly or indirectly nationalize or expropriate an investment [...], except: [...]. c. in accordance with due process of law and **Article 1105(1)** [...]

**Art. 1110(1) NAFTA**

## Slide 31

II. Current Problems: B. Assimilation into FET?

Methanex

California banned the sale and use of MTBE, a methanol-based gasoline additive, considered to be carcinogenic. Methanex, a Canadian producer of methanol, instituted an arbitration alleging that the ban was introduced to protect the US ethanol industry.

[A]s 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 alios*, a foreign investor or investment is not deemed expropriatory and compensable **unless specific commitments had been given** by the regulating government [...]. [I]n *Waste Management v. Mexico*, the tribunal stated, **with respect to the “minimum standard of fair and equitable treatment”**, that “in applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied upon by the claimant”. No such commitments were given to Methanex. [...] Hence, Methanex’s central claim under Article 1110(1) of expropriation [...] fails.

*Methanex v. USA*,  
Final Award, 3 Aug. 2005, Pt. IV, Ch. D, paras. 7, 8, 15. 31

## Slide 32

II. Current Problems: B. Assimilation into FET?

Cases in which the tribunal did not find an indirect expropriation

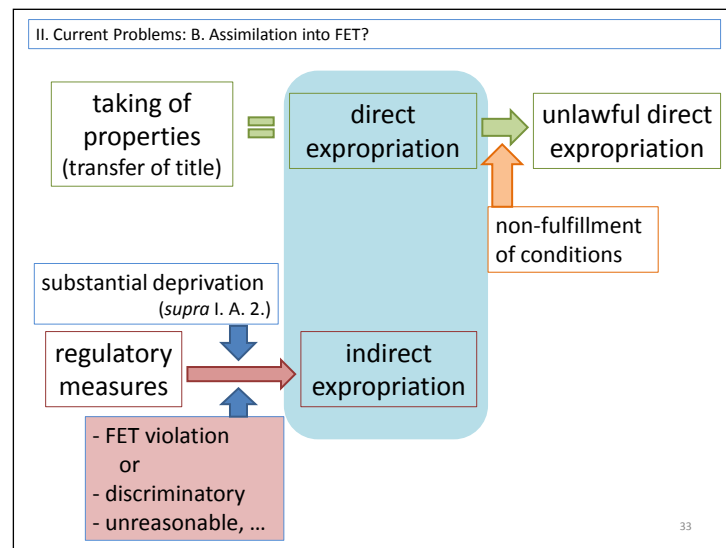
The Tribunal has determined [when it examined claims on FET] that the confiscation sanction was within the legal power of the Financial Guard and that it was applied in good faith [...]. [Therefore, no indirect expropriation.]

*EDF v. Romania*, ICSID Case No. ARB/05/13,  
Award, 8 Oct. 2009, para. 311.

[T]he Tribunal finds that the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did, to revoke EIB’s license. Its ultimate decision cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense in which those words are used in the BIT. [...] Under the present circumstances [...] Respondent cannot be held to have violated Article II(3)(a) of the BIT [on FET]. [...] The Republic of Estonia [...] did not violate the BIT [including the clause on expropriation].

*Genin v. Estonia*, ICSID ARB/99/2,  
Award, 25 June 2001, paras. 352, 363, 367.  
*See also* Decision on Claimants’ Request for Supplementary  
Decisions and Rectification, 4 Apr. 2002, para. 14.

Slide 33



Slide 34

II. Current Problems: B. Assimilation into FET?

Compensation: is the notion of “indirect expropriation” relevant?

The BIT establishes the rule that compensation for expropriation is to be based on “fair market value” of the investment; this principle, however, is of little use in the present arbitration, because the breach does **not amount to the total loss** or deprivation of an asset.  
*Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 Mar. 2011, para. 148.

Fair market value is indeed the applicable Treaty guideline for measuring damages in cases of expropriation. [...] Given **the cumulative nature** of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.  
*Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 362-363.

FET violation + “substantial deprivation” = FMV compensation?

34

Slide 35

Conclusion

Are criticisms addressed to arbitral awards on (indirect) expropriation justified?

35

## ix. Valuation Methods in Expropriation

Slide 1

**APEC-UNCTAD Workshop on  
Investor-State Dispute Settlement  
22-24 June 2011  
Manila, Philippines**

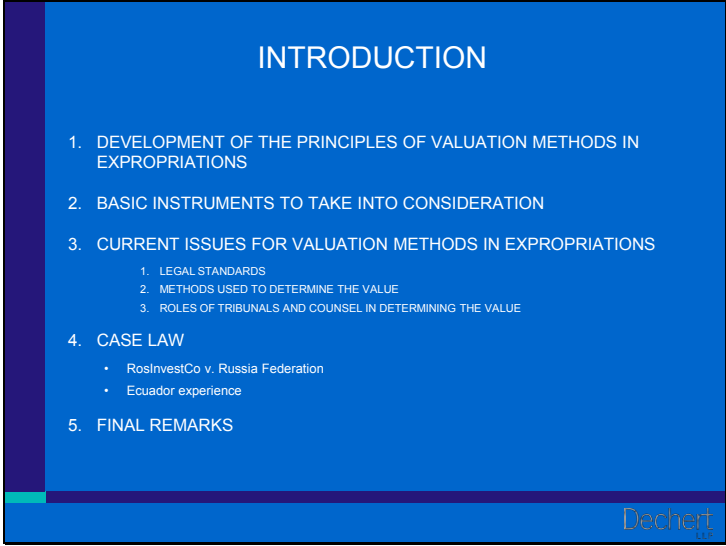
VALUATION METHODS (ONLY ?) IN EXPROPRIATIONS

ALVARO GALINDO C.

Dechert  
LLP

© 2011 Dechert LLP

Slide 2



## INTRODUCTION

1. DEVELOPMENT OF THE PRINCIPLES OF VALUATION METHODS IN EXPROPRIATIONS
2. BASIC INSTRUMENTS TO TAKE INTO CONSIDERATION
3. CURRENT ISSUES FOR VALUATION METHODS IN EXPROPRIATIONS
  1. LEGAL STANDARDS
  2. METHODS USED TO DETERMINE THE VALUE
  3. ROLES OF TRIBUNALS AND COUNSEL IN DETERMINING THE VALUE
4. CASE LAW
  - RosInvestCo v. Russia Federation
  - Ecuador experience
5. FINAL REMARKS

Dechert

Slide 3



## VALUATION METHODS IN EXPROPRIATIONS

1. DEVELOPMENT OF THE PRINCIPLES OF VALUATION METHODS IN EXPROPRIATIONS
  - Confrontation between capital-exporting and capital-importing countries (a.k.a. developed v. developing countries)
    - » Position of capital exporting countries: International law obligation of full compensation (the Hull Formula = *prompt, adequate and effective*)
    - » New International Economic Order
    - » UNGA Res. 1803, “*appropriate compensation*”, and
    - » UNGA Res. 3201, 3202 and 3281 “*Calvo Doctrine*”
  - A new era under investment treaties, in particular, the “*spaghetti bowl*” of BITs

Dechert

Slide 4

## VALUATION METHODS IN EXPROPRIATIONS

- OTHER INSTRUMENTS, BESIDES THE RELEVANT TREATIES AND/OR OTHER APPLICABLE LAW, TO TAKE INTO CONSIDERATION:
  - World Bank Guidelines on the Treatment of Foreign Investment:
    - Compensation will be *appropriate* if:
      - adequate, effective and prompt (Hull Formula)
    - Compensation will be *adequate* if:
      - based on Fair Market Value, i.e., determined immediately before the taking occurred or the decision became publicly known
      - Fair Market Value is acceptable if conducted according to a method agreed by the parties, or determined by a tribunal

Dechert

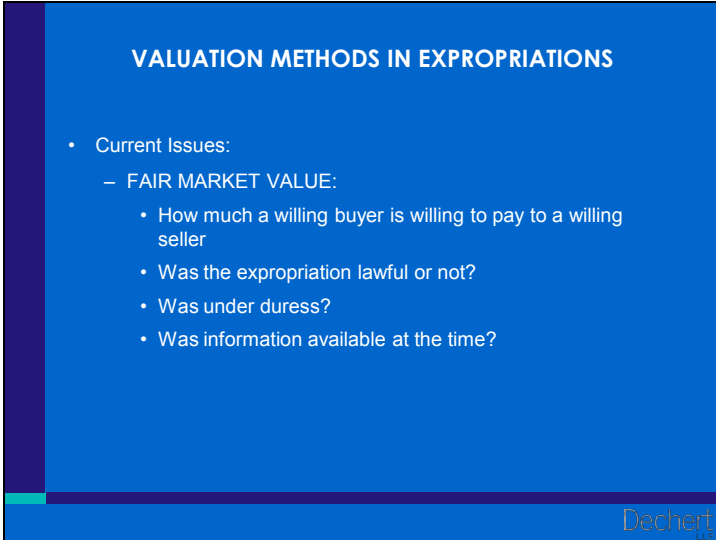
Slide 5

## VALUATION METHODS IN EXPROPRIATIONS

- Draft Articles on Responsibility of States for Internationally Wrongful Acts. Art. 36:
- *Article 36. Compensation*
  1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
  2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Dechert

Slide 6

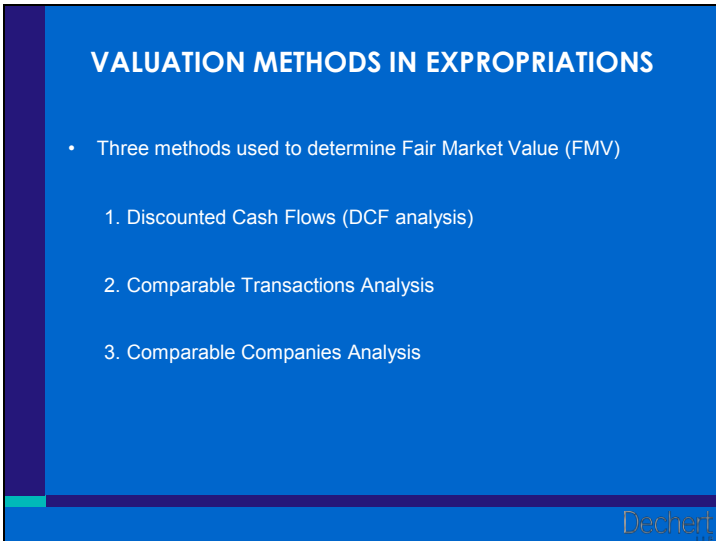


## VALUATION METHODS IN EXPROPRIATIONS

- Current Issues:
  - FAIR MARKET VALUE:
    - How much a willing buyer is willing to pay to a willing seller
    - Was the expropriation lawful or not?
    - Was under duress?
    - Was information available at the time?

Dechert

Slide 7



## VALUATION METHODS IN EXPROPRIATIONS

- Three methods used to determine Fair Market Value (FMV)
  1. Discounted Cash Flows (DCF analysis)
  2. Comparable Transactions Analysis
  3. Comparable Companies Analysis

Dechert



Slide 8

## UNITED KINGDOM-RUSIA BIT

*ARTICLE 5  
Expropriation*

*(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a purpose which is in the public interest and is not discriminatory and against the payment, without delay, of adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be made within two months of the date of expropriation, after which interest at a normal commercial rate shall accrue until the date of payment, and shall be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*

Dechert

Slide 9

## RosInvestCo UK Ltd. v. The Russia Federation Final Award 12 September 2010

623. A measure constitutes an expropriation if it has the effect of a substantial deprivation of property forming all or a material part of the investment, and if the measure is attributable to Respondent. If it is an expropriation, it is lawful if the requirements set forth in Article 5 IPPA are complied with.

Dechert

### RosInvest v. Russia Federation

636. Claimant's claim is based on the proportionate ownership of Yukos' expropriated assets represented by its shareholding in Yukos. It points out that Article 5(1) of the IPPA requires that compensation be paid to the investor within two months of expropriation, in the case of a lawful expropriation. In this case the expropriation is unlawful, not in the public interest, discriminatory and without payment of compensation. (¶¶248 – 254 C-I)

Dachert

### RosInvest v. Russia Federation

637. The IPPA is silent as to the standard of compensation in the case of an unlawful expropriation. Thus, the standard of compensation for an unlawful expropriation is the standard under customary international law. Claimant argues it is entitled to compensation for the expropriation pursuant to the Chorzow Factory (CLA-08) standard: "[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." Claimant points out that the Chorzow Factory standard has been upheld in multiple tribunals and courts and the case articulates the general principle of the consequences of the commission of a wrongful act. (¶¶255 – 261C-I)

Dachert

Slide 12

### RosInvest v. Russia Federation

- Par. 638:

from Yukos as of the date of the final award. Re-establishing the situation that would have existed but for the Respondent's unlawful conduct requires an examination of what Yukos would be worth today. (¶¶262 – 265 C-I)

Dachert

Slide 13

### RosInvest v. Russia Federation

688. The Tribunal considers that in the case of a damages award the payment of interest is necessary in order to ensure full reparation for the act which caused damage, but that the mode of calculation should be set so as to achieve a result of full reparation. The Tribunal considers that full reparation in this case must take into account the nature of Claimant's investment.

Dachert

Slide 14

### RosInvest v. Russia Federation

690. The Tribunal considers that applying compound interest to the damages sum in this case at anything more frequent than an annual basis would be unjust in light of the speculative nature of the investment by Claimant and its parent Elliott International. The Tribunal therefore considers that interest ought to be applied to the damages award at a base commercial lending rate, namely LIBOR.

Dechert

Slide 15

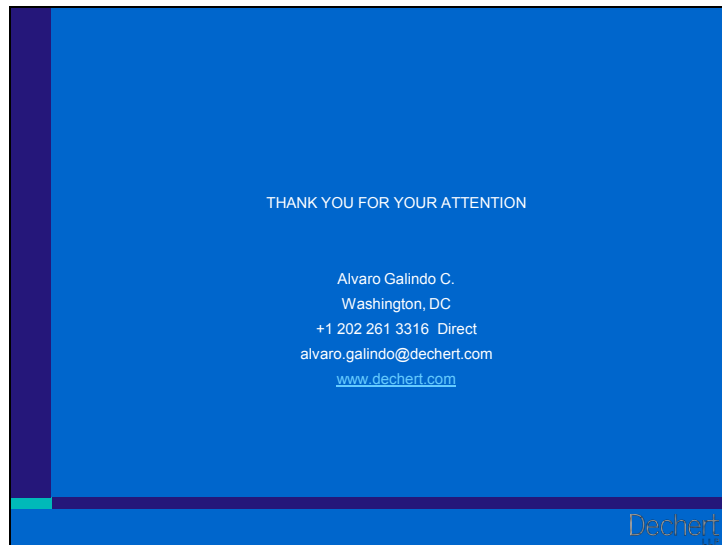
### RosInvest v. Russia Federation

- Par. 700:

substantive outcome of this dispute. Claimants have prevailed on jurisdiction and with regard to liability. Respondent has succeeded in so far as the quantum of damages claimed by Claimant, i.e. US\$ 232.7 million was reduced to a small portion of that amount, i.e. to US\$ 3.5 million. Thus, both sides have been partly successful and

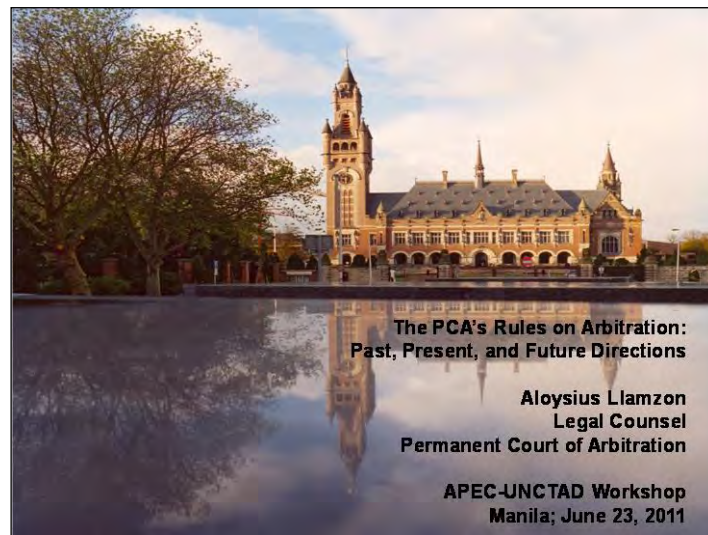
Dechert

Slide 16



**x. The PCA's Rules on Arbitration: Past, Present and Future Arbitration**

Slide 1





## Outline

1. Background on the PCA and its Historic Rules
2. The PCA and Investor-State Arbitration: The “Parallel Universe” of UNCITRAL Rules Arbitration
3. Current PCA Rules: Party Identity and Subject Matter
4. Revision of the PCA Rules: Looking to the Future

2  
[www.pca-cpa.org](http://www.pca-cpa.org)

## What is the PCA?



- Intergovernmental Organization composed of 112 Member States, including 16 of APEC's 21 Member Economies
- created in 1899 at the first Hague Peace Conference, at the initiative of Tsar Nicholas II
- Rationale: Peaceful settlement of disputes through arbitration is the best means of “ensuring to all peoples the benefits of a real and lasting peace...”
- First global framework for settling Inter-State disputes through arbitration

3  
[www.pca-cpa.org](http://www.pca-cpa.org)

## The Peace Palace: “The Seat of International Law”

- Purpose-built for the PCA
- With funding from Andrew Carnegie, building completed in 1913
- Now also hosts the ICJ, the principal judicial organ of the UN (jurisdiction is limited to States)
- Is the principal seat for international adjudication (ICJ) and international arbitration (PCA) between States

AND THE VICE-ROYS OF  
meeting and maintaining of the Hague (Hague of the Netherlands)

A COURT-HOUSE AND LIBRARY

FOR THE

PERMANENT COURT OF ARBITRATION  
ESTABLISHED BY THE TREATY OF THE 29th OF JULY 1908.


Believing that the establishment of a Permanent Court of Arbitration by the Treaty of the 29th of July 1908 is the most important step towards a worldwide international character which has been taken by the just Powers, as it most effectively tends to and further:



## The PCA's Current Docket (June 2011)

**53 pending cases:**

- 3 State-State arbitrations
  - Bangladesh/India (UNCLOS); Pakistan/India (Indus Waters Treaty); Mauritius/UK (UNCLOS)
- 30 arbitrations under bilateral or multilateral investment treaties
- 17 arbitrations under contracts between private parties and States or other public entities
- 2 arbitrations under a contract under the PCA Environmental Rules
- 1 national investment law arbitration



www.pca-cpa.org



Slide 6

## The Constitutive Treaties of the PCA: The First "Rules"

1899 and 1907 CONVENTIONS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

- Article 15, 1899 Convention
  - International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.
- Article 16, 1899 Convention
  - In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.
- Article 63, 1907 Convention
  - As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions... The time fixed by the 'Compromis' may be extended by mutual agreement by the parties, or by the Tribunal when the latter considers it necessary for the purpose of reaching a just decision.
- Article 81, 1907 Convention
  - The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

6  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 7

## Development of PCA Rules

### Heritage of Mixed Arbitration involving Foreign Investment

**1935: *Radio Corp. of America v. China***



*Radio Corp. of America*  
vs. *China*

La Haye, le 4 juillet 1935.

Monsieur le Secrétaire Général du Bureau International de la Cour Permanente d'Arbitrage

**L A H A Y E.**

Monsieur le Secrétaire Général,

J'ai l'honneur de vous faire parvenir une copie dûment certifiée de la décision arbitrale dans l'affaire Radio Corporation of America contre National Government of the Republic of China, dont je vous fais part à toutes fins utiles.

En réitérant mes remerciements très sincères et mon appréciation chaleureuse pour l'assistance prêtée par vos services dans cette affaire, je vous prie d'agréer, Monsieur le Secrétaire Général, l'expression de ma parfaite considération.

*Van Hamel*

Président des Arbitres.



7  
[www.pca-cpa.org](http://www.pca-cpa.org)



## Other Early 20<sup>th</sup> Century Rules

1922: ICC Rules for Settlement of Disputes between Traders of Different Countries

- Focuses on business disputes
- Two-tier conciliation and arbitration dispute resolution
- No party-appointed arbitrators; parties may select size of tribunal

1937: Rules on Commissions of Special Inquiry

- Approved by PCA Administrative Council on May 1, 1937

1955: ICC Rules of Conciliation and Arbitration

- First version of modern arbitration for business disputes
- Preamble: "The Chamber places its services at the disposal of all businessmen whenever its good offices are likely to conduce the settlement of such business disputes."

[www.pca-spa.org](http://www.pca-spa.org)

## 1962: PCA Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of which only One is a State

- First set of specialized rules for arbitration and conciliation involving states and nationals of other states
- Conceived by Prof. Pieter Sanders, who later advised the UNCITRAL in the creation of its Arbitration Rules 1976
- First PCA Rules that provide an alternative to 1899/1907 Conventions
- Legal basis is Art. 47 of 1907 Convention:
  - "The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration. The jurisdiction of the Permanent Court may ... be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal."

[www.pca-cpa.org](http://www.pca-cpa.org)

## Outline

1. Background on the PCA and its Historic Rules
2. The PCA and Investor-State Arbitration: The “Parallel Universe” of UNCITRAL Rules Arbitration
3. Current PCA Rules: Party Identity and Subject Matter
4. Revision of the PCA Rules: Looking to the Future

10  
www.pca-cpa.org

## The “Parallel Universe” of UNCITRAL Investor-State Arbitration

1. **How do you get there?**
  - by choice, agreement or default in BIT dispute settlement clauses
  - by national investment laws or contract agreement
2. **How many investment treaty cases are there?**
  - 110 known cases (in 2010)
  - probably more unknown cases
  - PCA has administered > 45 (vs. zero in 1990s)
3. **How are they different?**
  - ICSID Rules v. UNCITRAL Rules

11  
www.pca-cpa.org

**Ex. When Investor has a *choice* in a BIT**

e.g., [Australia-Chile FTA, Art. 10.16 \(3\)](#)

3. A claimant may submit a claim ...

- (a) under the **ICSID Convention**, provided that both the non-disputing Party and the respondent are parties to the ICSID Convention;
- (b) 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;
- (c) under the **UNCITRAL Arbitration Rules**; or
- (d) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.

[www.pca-cpa.org](http://www.pca-cpa.org)
[See also DR-CAFTA, Art. 10.16\(3\); AANZFTA, Art. 21\(1\)](#)



## ASEAN Comprehensive Investment Agreement (2009)

**SECTION B**

**Investment Dispute Between an Investor and a Member State**

**Article 28**  
Definitions

For the purpose of this Section:

(a) **'Appointing Authority'** means:

- (i) in the case of arbitration under Article 33(1)(b) or (c) the Secretary-General of ICSID;
- (ii) in the case of arbitration under Article 33(1)(d) the Secretary-General of the Permanent Court of Arbitration; or
- (iii) in the case of arbitration under Article 33(1)(e) and (f), the Secretary-General, or a person holding equivalent position, of that arbitration centre or institution;

**Article 33**  
Submission of a Claim

1. A disputing investor may submit a claim referred to in Article 32 (Claim by an investor of a Member State) at the choice of the disputing investor:

- (a) to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or
- (b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or
- (c) under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or
- (d) under the UNCITRAL Arbitration Rules; or
- (e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN; or
- (f) if the disputing parties agree, to any other arbitration institution.

### In what ways is Investor-State arbitration under the UNCITRAL Rules different from ICSID Arbitration?

#### 1. Institutional Support

ICSID	UNCITRAL
<ul style="list-style-type: none"> <li>Convention, Ch.I creates a specialized centre for investor-State disputes</li> </ul>	<ul style="list-style-type: none"> <li>Silent on administration by an institution. Parties can choose whether <i>ad hoc</i> or fully administered or something in between.</li> </ul>
<ul style="list-style-type: none"> <li>Schreuer and Dolzer: "standard clauses for use of the parties, detailed rules of procedure, institutional support [that] extends not only to the selection of arbitrators but also the conduct of arbitration proceedings: for instance, each tribunal is assisted by a legal secretary who is a staff member of ICSID; venues for hearings are arranged by ICSID; all financial arrangements surrounding the arbitration are administered by ICSID"</li> </ul>	<ul style="list-style-type: none"> <li>Parties prefer institution (reputation and convenience: PwC study 2008)</li> <li>Most investor-State disputes under UNCITRAL handled by an institution (e.g. PCA, LCIA, ICC, Stockholm, or ICSID)</li> <li>PCA has administered about 45 in last 10 years compared with zero in previous decade</li> </ul>

www.pca-cpa.org 15

### 1. Institutional Support - PCA

BIT and MIT-based Investor-State Arbitrations Administered by the PCA under the UNCITRAL Arbitration Rules

Year	Number of Cases
2005	9
2006	7
2007	13
2008	23
2009	34

- 45+ investor-State disputes at the PCA (30 BIT cases currently pending)
- manages deposit, maintains archive, logistical arrangements
- provides hearing space (free in Peace Palace or under Host Country Agreement elsewhere), helps constitute tribunal, resolves challenges
- helps with fees, assists tribunal with smooth running of procedure
- multinational, multilingual legal staff (from private and public sector)
- access to PCA Financial Assistance Fund for developing countries

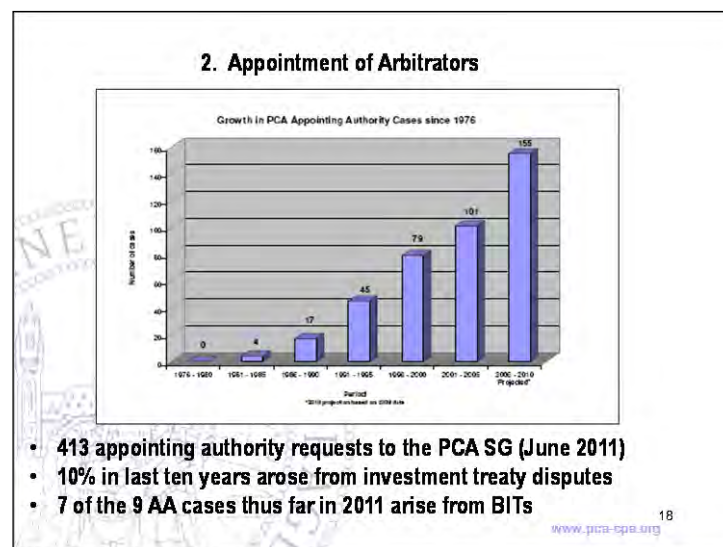
www.pca-cpa.org 16

Slide 17

2. Appointment of Arbitrators	
ICSID	UNCITRAL
<ul style="list-style-type: none"> <li>Art. 38: If parties fail to appoint arbitrators, Chairman of World Bank appoints from ICSID Panel</li> </ul>	<ul style="list-style-type: none"> <li>Art. 6-9: If parties fail to appoint arbitrators, can approach Appointing Authority (AA), or PCA SG to designate an AA (has had 413 requests)</li> <li>Not bound to pick from any particular pool of candidates</li> </ul>
<ul style="list-style-type: none"> <li>Chairman cannot appoint national of one of the parties</li> </ul>	<ul style="list-style-type: none"> <li>AA to take into account advisability of appointing a nationality other than parties</li> </ul>
<ul style="list-style-type: none"> <li>Arbitrators to be "relied upon to exercise independent judgment"</li> </ul>	<ul style="list-style-type: none"> <li>Arbitrators "independent and impartial"</li> </ul>
<ul style="list-style-type: none"> <li>Disclosure made after appointment</li> </ul>	<ul style="list-style-type: none"> <li>Disclosures made when approached in connection with a dispute (usually before appointment)</li> </ul>

www.pca-cpa.org 17

Slide 18





Slide 19



## PCA as Appointing Authority in Investment Treaties

### Ex. India / Indonesia BIT

#### Article 9

#### Settlement of Disputes Between an Investor and a Contracting Party

3. In case the dispute is submitted to arbitration or conciliation, the investor shall be entitled to refer the dispute to: ...

(b) an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), 1976, subject to the following modification:

(i) The appointing authority under Article 7 of the Rules shall be the **Secretary General of the Permanent Court of Arbitration at The Hague**. The third arbitrator shall not be a national of either Contracting Party.

...

[www.pca-cpa.org](http://www.pca-cpa.org)

19

Slide 20

3. Challenges to Arbitrators	
ICSID	UNCITRAL
<ul style="list-style-type: none"> <li>▪ Art. 57: Challenges “on account of any fact indicating a <b>manifest lack of the qualities</b> required by Art. 14(1)”</li> <li>▪ imposes a “heavy burden of proof to establish facts that make it obvious and highly probably, not just possible, that challenged person may not be relied on to exercise independent judgment”</li> </ul>	<ul style="list-style-type: none"> <li>▪ Art. 10: Challenge if circumstances give rise to <b>justifiable doubts</b> as to arbitrator’s impartiality or independence”</li> <li>▪ objective standard: “would a reasonable, informed person viewing the facts be led to conclude that there is a justifiable doubt as to the arbitrator’s independence and impartiality?”</li> <li>▪ Consistent with other rules, national tests and IBA guidelines</li> </ul>
<ul style="list-style-type: none"> <li>▪ Art. 58: Challenges decided by <b>co-arbitrators</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ Art. 12: Challenges decided by <b>Appointing Authority</b></li> </ul>
<ul style="list-style-type: none"> <li>▪ Rule 9: No time limit but challenges to be “prompt” and before close of proceedings</li> </ul>	<ul style="list-style-type: none"> <li>▪ Art. 11: Time limit of 15-days</li> </ul>

## Outline

1. Background on the PCA and its Historic Rules
2. The PCA and Investor-State Arbitration: The “Parallel Universe” of UNCITRAL Rules Arbitration
3. Current PCA Rules: Party Identity and Subject Matter
4. Revision of the PCA Rules: Looking to the Future

21  
[www.pca-cpa.org](http://www.pca-cpa.org)

## Current PCA Arbitration Rules

Arbitration Rules by Party Identity:

1. Optional Rules for Arbitrating Disputes between Two States (1992)
2. Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (1993)
  - Superseded 1962 Rules
3. Optional Rules for Arbitration Involving International Organizations and States (1996)
4. Optional Rules for Arbitration between International Organizations and Private Parties (1996)

Sector-Specific Arbitration Rules:

1. Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment (2002)
2. Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (in progress)

22  
[www.pca-cpa.org](http://www.pca-cpa.org)

## Other PCA Rules

1. PCA Conciliation Rules:
  - 1.1 Optional Conciliation Rules (1996)
    - Superseded 1962 Rules
  - 1.2 Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment (2002)
2. Optional Rules for Fact-Finding Commissions of Inquiry (1997)

23  
[www.pca-cpa.org](http://www.pca-cpa.org)

## Differences between UNCITRAL and PCA Two-State Rules

Principal Modifications from UNCITRAL Rules 1976:

1. Reflect the public international law character of disputes between States
  - Article 2: Notice may be delivered through diplomatic channels
  - Article 4: States must appoint an agent for proceedings
  - Article 13: Ability to continue proceedings in 3 and 5 member proceedings if one arbitrator fails to act or dies
  - Article 23: Increase in time periods to accommodate State operations
  - Article 32: Award not automatically rendered under the law of a country to maintain the international character of the proceedings
  - Article 33: Default applicable law is international law, not law of a particular state
  - Article 39: Role for PCA in determining costs of arbitration

24  
[www.pca-cpa.org](http://www.pca-cpa.org)



## Differences between UNCITRAL and PCA Two-State Rules (con't)

2. Indicate the role for the PCA International Bureau and Secretary General and PCA founding Conventions
  - Article 1: PCA International Bureau to act as Registry
  - Article 16: Presumption that place of arbitration is The Hague, but parties may choose otherwise (Host Country Agreements)
  - Article 39: Role for PCA in determining costs of arbitration
  - Article 41: PCA to hold and disburse deposits for costs
  - Non-member States may employ Rules and utilize PCA services; No requirement that PCA list ("Members of the Court") be utilized
3. Freedom to choose size of Tribunal: 1, 3, or 5 arbitrators
  - Article 5: Parties may choose five arbitrators, and have 30 days to agree upon the size of the tribunal, instead of just 15
  - Article 7: Procedure for selection of 5 arbitrators provided

25  
[www.pca-cja.org](http://www.pca-cja.org)

## Differences between UNCITRAL Rules and PCA Rules for Disputes where only One Party is a State

Principal Modifications from UNCITRAL Rules 1976:

1. Facilitate Effective Arbitration between State and Non-State Party
  - Article 1: Waiver of state immunity (*but note: jurisdiction v. execution*)
  - Article 13: Ability to continue proceedings in 3-member Tribunals if one arbitrator fails to act or dies
  - Article 26: Expanded rights of Tribunal to take interim measures to protect the rights of parties
  - Set time limits are often doubled.
2. Indicate the role for the PCA International Bureau and Secretary General and PCA founding Conventions
  - Same as under Two State Rules

26  
[www.pca-cja.org](http://www.pca-cja.org)

Slide 27

### PCA Rules "in Action"

PCA Two-State Arbitration Rules  
Belgium v. Netherlands (2005)  
(*"Iron Rhine"*)

The map illustrates the Iron Rhine region, showing the historic route (dashed green line), other existing railway tracks (solid black line), and motor highway (solid red line). The map covers parts of Belgium, The Netherlands, and Germany. Key locations marked include Antwerpen, Heusden, Breda, Maastricht, and others. The legend indicates: IRON RHINE - HISTORIC ROUTE, OTHER EXISTING RAILWAY TRACK, and MOTOR HIGHWAY.

27  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 28

### Ethiopia-Eritrea Boundary Commission (2001-07)

PCA Two-State Arbitration Rules


The slide features a photograph of four men in suits seated at a conference table, representing the Ethiopia-Eritrea Boundary Commission. To the right is a map of the region, showing the boundary between Ethiopia and Eritrea. The map includes a legend and a scale bar.

28  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 29

# Intra-State Dispute: The Abyei Arbitration


## PCA One- State Rules



[www.pca-cpa.org](http://www.pca-cpa.org)29  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 30

## Intra-State Dispute: Abyei Arbitration



**July 2008:** the Parties deposit their Arbitration Agreement with the PCA


1. The **Parties** agree to refer their dispute to final and binding arbitration under this Arbitration Agreement (Agreement) and the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (PCA Rules), subject to such modifications as the **Parties** agreed herein or may agree in writing.

30  
[www.pca-cpa.org](http://www.pca-cpa.org)

### Abyei Arbitration – the Tribunal

October 2008 - 5-member  
Tribunal is constituted:

Prof. Pierre-Marie Dupuy  
Judge Stephen M. Schwebel  
Judge Awn Al-Khasawneh  
Prof. Gerhard Hafner  
Prof. W. Michael Reisman



31  
[www.pca-cpa.org](http://www.pca-cpa.org)

### Abyei Arbitration April 2009 Public Hearings in Peace Palace



[www.pca-cpa.org](http://www.pca-cpa.org)



Slide 33






Slide 34

**Abyei Arbitration**  
**July 22, 2009 Final Award**

Award Rendering watched on Live Webcast in Abyei Town (Tribal Leaders, National Government, UN)

Award-Rendering Ceremony in the Peace Palace, The Hague



Slide 35

**Use of the PCA International Organization – State Rules:  
An Example**

**FINANCING AGREEMENT BETWEEN THE  
EUROPEAN COMMUNITY AND THE ASEAN UNIVERSITY  
NETWORK (2000)**

**ARTICLE 26  
ARBITRATION**

Any dispute between the Community and the Beneficiary, arising from the implementation of this Agreement which is not settled by common accord by the Parties in due time, shall be settled by arbitration, in accordance with the Permanent Court of Arbitration's Optional Rules for Arbitration involving International Organisations and States (The Hague). ...

35

Slide 36

**PCA Optional Rules for Arbitration of Disputes  
Relating to Natural Resources and/or the Environment**

**Sector-Specific Rules to Address Particularities of a Certain Industry**

**PCA Powers:**

- PCA maintains a list of potential arbitrators with industry experience in addition to PCA Members of the Court; parties are not bound to choose one of these arbitrators (Art. 8(3))
- PCA acts as registry and archives the proceedings (Art. 1(3))
- PCA Secretary-General acts as the default appointing authority
  - May appoint arbitrators (Art. 6(2) and 7(2)(b))
  - Decides on challenges to arbitrators (Art. 12(1))
- Enhanced confidentiality measures

**Party-Related Provisions:**

- Option for 1, 3 or 5 arbitrators
- Waiver of sovereign immunity to accommodate arbitrations including a state and a non-state entity (Art. 1)

36

Slide 37

### Powers of the Tribunal under the PCA Environmental Rules

- Conduct proceedings in such manner as it considers appropriate, provided the parties are treated with equality and can present their cases - Art.15(1)
- Decides on holding of hearings - Art.15(2)
- Decides on confidentiality issues - Art 15(5-6)
- Decides on its own jurisdiction (*competence-competence* principle) - Art. 21
- Can order parties to produce documents - Art. 24(3)
- Can order interim measures - Art. 26
- Can appoint experts to assist the Tribunal (Art. 27(1)); PCA maintains a list of experts in this particular field (Art. 27(5))
- Power to fix costs of the arbitration, including arbitrator fees (with possible guidance from the PCA) (Art. 39(1))

37  
www.pca-ecpa.org

Slide 38

### Confidentiality under the Environmental Rules

- Parties can agree to keep the proceedings confidential
- The parties can apply to the Arbitral Tribunal to have certain information classified as confidential to the Tribunal and/or to the other party
- Tribunal decides that persons to whom the information is disclosed will sign a confidentiality undertaking
- Tribunal can appoint a "confidentiality advisor" to report on specific issues without disclosing the confidential information

38  
www.pca-ecpa.org

## Recent PCA Environmental Rules Cases

PCA Environmental Rules used in context of Emissions Credit Trading under the Kyoto Protocol to the *United Nations Framework Convention on Climate Change*.

PCA cases have arisen in the context of the emissions credit trading system

1. Dispute between a European party and Eastern European government agency over the implementation of projects aimed at reducing greenhouse gas emissions from certain gas distribution networks
2. Contractual dispute between two European private parties over the trading of certified emission reductions generated from greenhouse gas emission reduction projects

39  
[www.pca-eps.org](http://www.pca-eps.org)

## Outline

1. Background on the PCA and its Historic Rules
2. The PCA and Investor-State Arbitration: The "Parallel Universe" of UNCITRAL Rules Arbitration
3. Current PCA Rules: Party Identity and Subject Matter
4. Revision of the PCA Rules: Looking to the Future

40  
[www.pca-eps.org](http://www.pca-eps.org)



Slide 41

## Revision of the PCA Rules

1. Consolidation of PCA Rules into a Single Set of Rules Applicable to all manner of Disputes
  - Party Identity Based Rules has limitations
    - what to do in IO-State-Private Party situation?
    - Rules very similar – differences not significant in most cases
  - Omnibus Set of Rules such as UNCITRAL preferred
    - Applies in multiparty arbitration situations
    - Less confusing for contracting parties
  - Existing PCA Rules based on 1976 UNCITRAL Rules – 2010 revision makes now a good time to introduce an omnibus set of Rules

41  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 42

## Revision of the PCA Rules

2. Retention of Identity-Specific Rules
  - has proven useful for Arbitration Agreements / compromis
  - is found in numerous treaties, contracts
3. Identifying Further Sector-Specific Rules
  - Outer Space Activities: based on UNCITRAL 2010 Rules and PCA Natural Resources Rules. Due for submission to PCA Administrative Council within 2011.

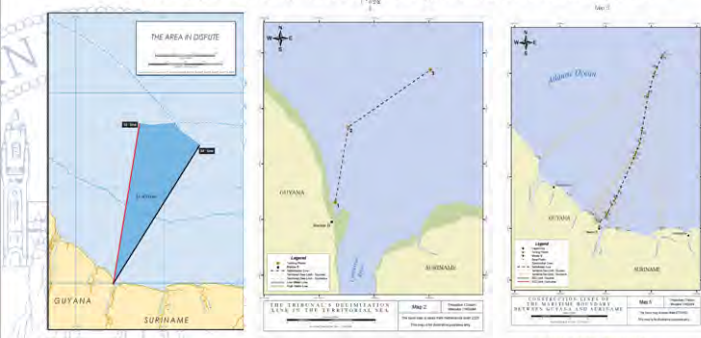
42  
[www.pca-cpa.org](http://www.pca-cpa.org)

Slide 43

**Rules Revision: Incorporating Expert and Conciliation procedures within Arbitration Rules**

**Guyana v. Suriname**  
*United Nations Convention on the Law of the Sea*

**Use of Independent Expert to achieve agreement on technical points**



The slide contains three maps. Map 1, titled 'THE AREA IN DISPUTE', shows a triangular area of maritime dispute between Guyana and Suriname. Map 2, titled 'THE MARITIME BOUNDARY BETWEEN GUYANA AND SURINAME', shows the maritime boundary between the two countries. Map 3, titled 'COMPARISON OF THE MARITIME BOUNDARY BETWEEN GUYANA AND SURINAME', shows the maritime boundary with the area of dispute highlighted. The maps are labeled with 'GUYANA' and 'SURINAME' and include a scale bar and a north arrow.

Slide 44

**Canada-US Softwood Lumber Dispute:**  
Independent Advisor utilized in relation to confidentiality

PCA Deputy Secretary-General acts as an "independent advisor" for an arbitration between Canada and the United States

Advisor reviewed the redactions and summaries of produced documents for completeness and accuracy



The slide contains two photographs. The left photograph shows a large stack of softwood lumber. The right photograph shows a yellow forklift loading a stack of softwood lumber. The forklift is positioned in front of a large stack of lumber. The background of the right photograph shows a softwood lumber mill with a conveyor belt and a crane.

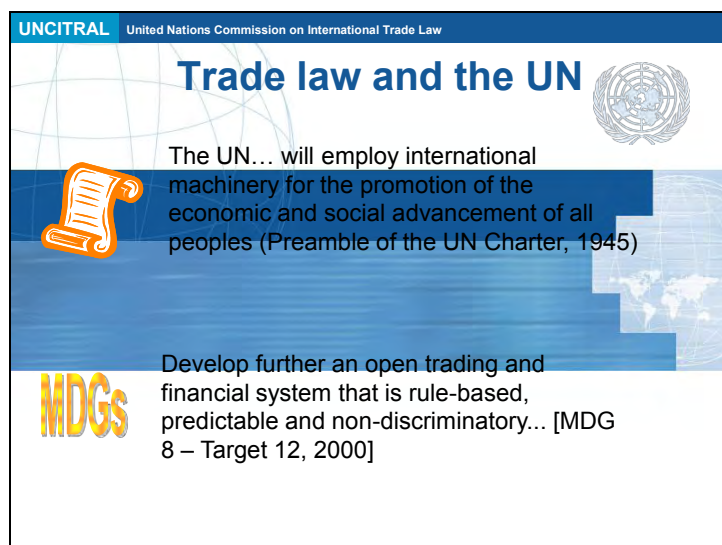
44  
[www.pca-cpa.org](http://www.pca-cpa.org)

## xi. UNCITRAL Arbitration Laws

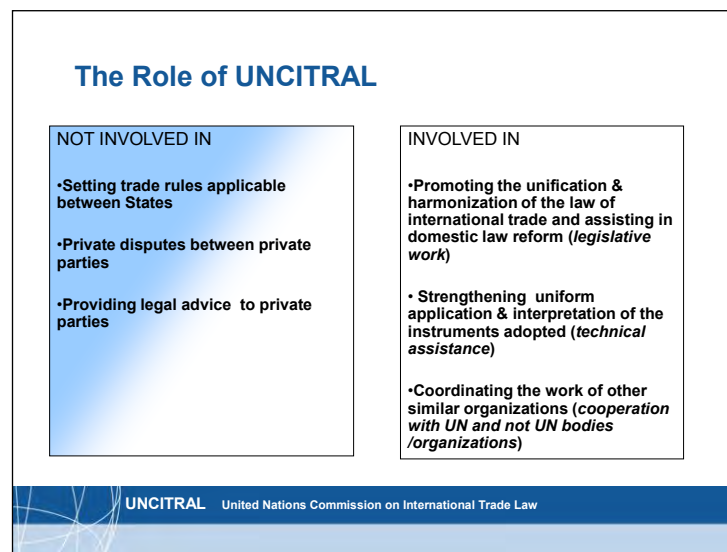
Slide 1



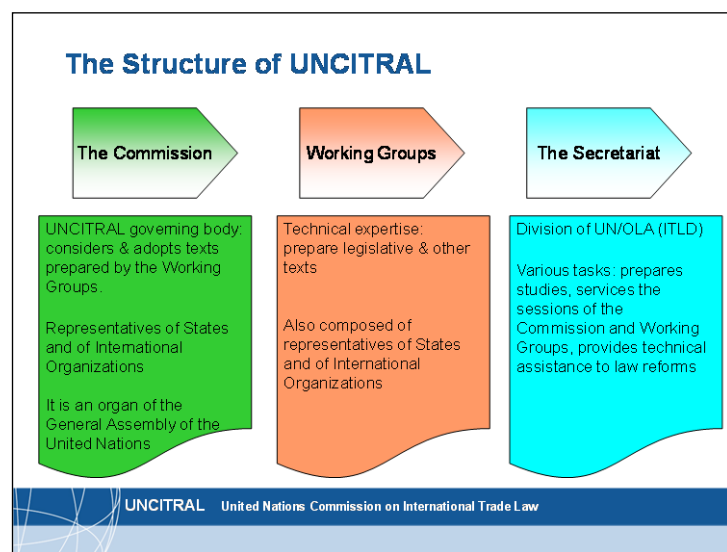
Slide 2



Slide 3



Slide 4



Slide 5

## The Current Work Programme

**Actual Focus**

- Working Group I: Procurement
- Working Group II: Arbitration and Conciliation
- Working Group III: Online dispute resolution
- Working Group IV: Electronic Commerce
- Working Group V: Insolvency Law
- Working Group VI: Security Interests
- Possible future work: Microfinance

UNCITRAL United Nations Commission on International Trade Law

Slide 6

## UNCITRAL Arbitration Rules

### UNCITRAL Arbitration Rules 1976

Background

- 1973: UNCITRAL decision to prepare draft arbitration rules
- 1976: UNCITRAL adopts the UNCITRAL Arbitration Rules
- GA resolution 31/98 of 15 December 1976:

*"Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations."*

UNCITRAL United Nations Commission on International Trade Law

Slide 7

### Revision of the UNCITRAL Arbitration Rules 1976

**1976 Rules:** Recognized as very a successful text  
Used in variety of circumstances  
Covering broad range of disputes  
in all parts of the world

**Revision:** Keep flexibility, spirit and style

➡ **Inclusion of investment arbitration?**

↓  
Keep generic applicability of Rules

UNCITRAL United Nations Commission on International Trade Law

Slide 8

### Revision of the UNCITRAL Arbitration Rules 1976, Why a revision of the Rules?

**Need to:**

- \*conform to current practices in int'l trade
- \*meet changes in arbitral practices

*since the last 30 years*

**Purpose:**  
*Enhance efficiency of arbitration under the Rules*

UNCITRAL United Nations Commission on International Trade Law


Slide 9

## UNCITRAL Arbitration Rules 2010

### Preparation of the revised Rules

2006: **UNCITRAL decides revision**  
2006-2010: **Preparation of a revised version of the Rules by the UNCITRAL Working Group on Arbitration**

Process:  
\*extensive consultations with  
**Governments  
and  
Interested organizations**

 **UNCITRAL** United Nations Commission on International Trade Law


Slide 10

## UNCITRAL Arbitration Rules 2010

### The Mandate for the Revision


*"In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex."*

(Report of UNCITRAL on the work of its 39th session – Official records of the General Assembly, Supplement No. 17 (A/61/17), para. 184)

 **UNCITRAL** United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

**When did they come into force?**  
Article 1(2): the revised Rules apply to arbitrations where the arbitration agreement was concluded on or after 15 August 2010, unless the parties agreed otherwise. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### (i) Introductory Rules

Scope of Application

- Article 1— remove the requirement that an arbitration agreement must be in writing
- Revision to the model arbitration clause

 UNCITRAL United Nations Commission on International Trade Law




Slide 13

## UNCITRAL Arbitration Rules 2010

### Introductory Rules

#### Notice and Calculation of Periods of Time

- Article 2 includes new provisions on how notices are transmitted, including when they are received or deemed to be received
- It has also been revised to reflect changes in technology (“any means of communication” providing a record of transmission)

 UNCITRAL United Nations Commission on International Trade Law

Slide 14

## UNCITRAL Arbitration Rules 2010

### Introductory Rules

#### Notice of arbitration and response thereto

#### Article 4 (Response to the notice of arbitration)

– *new provision:*

- *Better balance between the parties*
- *Better idea of the position of the parties at the beginning of the proceedings*
- *Parties may elect to treat notice of arbitration and response thereto as statement of claim or defence (articles 20 and 21)*
- *Catering also for multiparty arbitration*

 UNCITRAL United Nations Commission on International Trade Law

Slide 15

**UNCITRAL Arbitration Rules 2010**

**Introductory Rules**

**Representation and Assistance**

- **Article 5 – the Tribunal may at any time require proof of the representative’s authority**

UNCITRAL United Nations Commission on International Trade Law

Slide 16

**UNCITRAL Arbitration Rules 2010**

**Introductory Rules**

**Designating and Appointing Authorities**

**The appointing authority**

- **May be an arbitral institution or a person chosen by the parties**
- **If parties cannot agree:  
the Secretary-General of the PCA will designate the appointing authority**

UNCITRAL United Nations Commission on International Trade Law


Slide 17

## UNCITRAL Arbitration Rules 2010

### (ii) Composition of the Arbitral Tribunal

#### Number of arbitrators

- Default number: 3 arbitrators (as in 1976 Rules)
- For cases of non-participating respondents:  
article 7 (2): the appointing authority may decide to appoint a sole arbitrator under certain conditions
  - *A party has proposed that a sole arbitrator be appointed*
  - *The other party(ies) have not responded*
  - *The other party(ies) have not participated in the appointment of a second arbitrator*
  - *The appointing authority, at the request of a party, may "appoint a sole arbitrator (...) if it determines that, in view of the circumstances of the case, this is more appropriate."*

 UNCITRAL United Nations Commission on International Trade Law

Slide 18

## UNCITRAL Arbitration Rules 2010

### Introductory Rules

#### **The role of the appointing authority**

**Assistance to the parties, if needed,  
in particular for:**


- the composition of the arbitral tribunal,  
challenge and replacement of an arbitrator
- the determination of fees and expenses of  
the arbitrators

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010 - Composition of the Arbitral Tribunal

### Appointment of Arbitrators

- Articles 8 and 9 reflect the provisions of the 1976 version of the rules on the appointment procedure where there the arbitral tribunal is composed of 1 or 3 members
- Article 10 (*new provision*):
  - *Appointment of arbitrators in case of multi-party arbitration*
  - *Arbitral tribunal composed of a number of arbitrators other than 1 or 3*
  - *Failure to constitute the arbitral tribunal*

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Composition of the Arbitral Tribunal

### Disclosure By and Challenge of Arbitrators

- Article 11 deals with the duty of arbitrators to disclose; the Rules contain model statements of independence
- Articles 12 and 13 address the procedure for challenging an arbitrator

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Composition of the Arbitral Tribunal

#### Replacement of an Arbitrator

##### Two innovations

- Article 14 (2) – in exceptional circumstances, a party may be deprived of its right to appoint a substitute arbitrator
- After the closure of the hearings, the AA may authorize the other arbitrators to proceed with the arbitration and make any decision or award

 **UNCITRAL** United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Composition of the Arbitral Tribunal

#### Exclusion of Liability

- Article 16 – specific immunity for the tribunal and the AA

*“Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.”*

 **UNCITRAL** United Nations Commission on International Trade Law

**UNCITRAL Arbitration Rules 2010**

**(iii) Arbitral Proceedings**

**General Provisions (“the magna carta”)**

**Article 17 (former article 15)**

→ *key principle of the Rules:*  
*discretionary power of the arbitral tribunal*

Para. 1: *treatment of parties with equality & reasonable opportunity to present case*  
*+ tribunal’s duty to enhance procedural efficiency*  
*(“conduct the proceedings so as to avoid unnecessary delay & expense”)*

UNCITRAL United Nations Commission on International Trade Law

**UNCITRAL Arbitration Rules 2010**

**Arbitral Proceedings**

**Article 17 (former article 15)**

*new Para. 2:* *tribunal shall establish provisional timetable of arbitration*

*enhance efficiency of proceedings*

*new Para. 5:* *joining multiple parties in a single proceeding*

*“one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds... that joinder should not be permitted because of prejudice to any of those parties”*


UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Arbitral Proceedings

#### Statement of Claim, Statement of Defence

- Article 20, 21 and 22
  - option for the parties to treat the Notice of Arbitration and the Response to Notice of Arbitration as statement of claim / statement of defence
  - statement of claim / statement of defence “*should*” be accompanied by all documents or evidence

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010


### Arbitral Proceedings

#### Interim measures, Article 26

- *More detailed provisions*
- *based on Article 17 of the UNCITRAL Model Law*

New:

- paragraph (2): definition of interim measure
- paragraph (5): power of arbitral tribunal to modify, suspend or terminate an interim measure it has granted upon party's application or its own initiative
- paragraph (6): tribunal may require security for measure
- paragraph (8): liability for costs

 UNCITRAL United Nations Commission on International Trade Law

Slide 27

## UNCITRAL Arbitration Rules 2010

### Arbitral Proceedings

#### Evidence and Hearings

- Articles 27 and 28 address the conduct of hearings and the giving of evidence
- Article 27 clarifies that any person, including a party, can be a witness

 **UNCITRAL** United Nations Commission on International Trade Law

Slide 28


## UNCITRAL Arbitration Rules 2010

### Arbitral Proceedings

#### Experts appointed by the tribunal

**Article 29:**

- Procedure to object to experts appointed by the tribunal
- Requirement for expert to submit a description of qualifications and statement of independence

 **UNCITRAL** United Nations Commission on International Trade Law



## UNCITRAL Arbitration Rules 2010

### Arbitral Proceedings

#### Default

- Article 30 (1): the arbitral tribunal can order the proceedings to terminate where the claimant “has failed to communicate its statement of claim” and it shall order the proceedings to continue when the “respondent has failed to communicate its response to the notice of arbitration or its statement of defence”.


 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Arbitral Proceedings

#### Waiver of Right to Object

- Article 32 – broadens the possibility of the waiver of objections for non-compliance with the Rules
  - the party that failed to object has the burden to *–show that, under the circumstances, its failure to object was justified*


 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### (iv) The Award

#### Form and Effect of the Award

- Article 34 – the meaning of “finality” of an award under the Rules
- Article 34 (5) – no general duty of confidentiality

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### The Award

#### Applicable Law, Amiable Compositeur

- Article 35 – clarifies that the parties may agree on the application of “~~rules of law~~”; but where the parties have failed to agree on the applicable law, the tribunal shall directly choose the law —it determines to be appropriate”.

 UNCITRAL United Nations Commission on International Trade Law

Slide 33

## UNCITRAL Arbitration Rules 2010

### The Award

Provisions on Costs, Articles 40-43

1976 Rules: Costs fixed by arbitrators

→ 2010 Rules: review mechanism

↓

Transparency & safeguards against possible abuse

 UNCITRAL United Nations Commission on International Trade Law

Slide 34

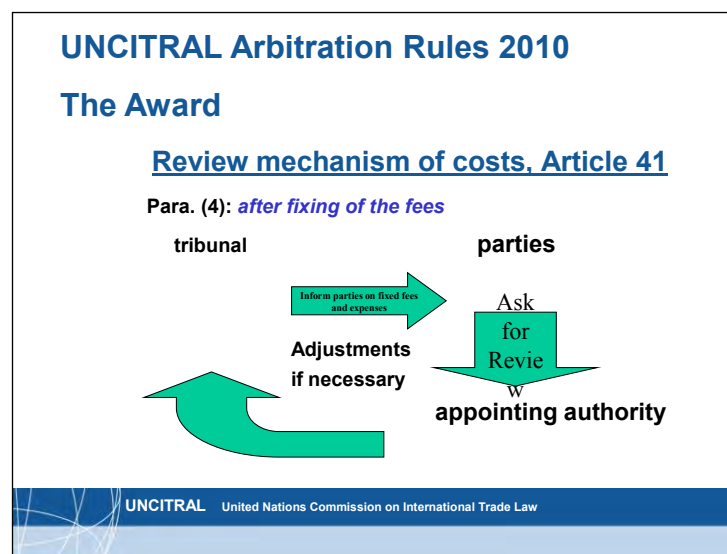
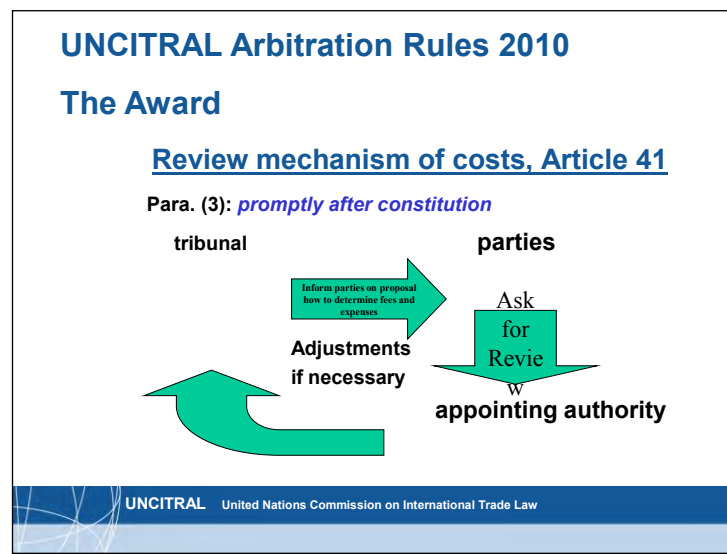
## UNCITRAL Arbitration Rules 2010

### The Award

Definition of costs, Article 40

- Costs shall be fixed in the final award, and, if appropriate, in another decision
- Requirement of reasonableness of fees and expenses

 UNCITRAL United Nations Commission on International Trade Law




Slide 37

## UNCITRAL Arbitration Rules 2010

### The Award


#### Allocation of costs, Article 42

- Paragraph (1): Costs shall be borne by the unsuccessful party or parties
- Paragraph (2): Determination in the final award or any other decision of any amount that a party may have to pay to another party as a result of the decision on the allocation of costs

 UNCITRAL United Nations Commission on International Trade Law

Slide 38


#### Annex to the Rules

 UNCITRAL United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Annex to the Rules

- Model arbitration clause for contracts
- Possible waiver statement – *new*
- Model statement of independence pursuant to article 11 of the Rules – *new*
- Model statement of availability - *new*


 **UNCITRAL** United Nations Commission on International Trade Law

## UNCITRAL Arbitration Rules 2010

### Annex to the Rules

#### Possible waiver statement

*“The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.”*

 **UNCITRAL** United Nations Commission on International Trade Law


**UNCITRAL Arbitration Rules 2010**

**Annex to the Rules**

**Model statements of independence  
pursuant to article 11 of the Rules**

**2 options:**

1. No circumstances to disclose
2. Circumstances to disclose

 **UNCITRAL** United Nations Commission on International Trade Law


**UNCITRAL Arbitration Rules 2010**

**Annex to the Rules**

**Model statement of availability**

**May be added to the statement of  
Independence:**

*“I confirm, on the basis of the information  
presently available to me, that I can devote  
the time necessary to conduct this  
arbitration diligently, efficiently and in  
accordance with the time limits in the  
Rules.”*

 **UNCITRAL** United Nations Commission on International Trade Law

Slide 43

**Work on transparency in treaty-based investor-State arbitration of WG II**

**Interested in more:**

*Working papers, UNCITRAL Standards, etc.:*

***[www.uncitral.org](http://www.uncitral.org)***

 **UNCITRAL** United Nations Commission on International Trade Law

Slide 44

**UNCITRAL Arbitration Rules 2010**

**Thank you**

**[corinne.montineri@uncitral.org](mailto:corinne.montineri@uncitral.org)**

 **UNCITRAL** United Nations Commission on International Trade Law



## xii. Provisional Measures and Interim Relief

Slide 1



**APEC-UNCTAD Workshop on  
Investor-State Dispute Settlement  
22-24 June 2011  
Manila, Philippines**


PROVISIONAL MEASURES AND INTERIM RELIEF

ALVARO GALINDO C.

Dechert  
LLP

© 2008 Dechert LLP

Slide 2



**The Standards for Provisional Measures**

- ICSID:
  - ICSID Convention Article 47, ICSID Arbitration Rule 39, ICSID Additional Facility Rule 46
  - Two requirements:
    - Necessity, and
    - Urgency
  - Jurisdiction to “recommend” measures
- UNCITRAL:
  - UNCITRAL Arbitration Rules Article 17(1) and 26.
  - Requirement of necessity and urgency
  - Jurisdiction to “order” interim relief

Dechert  
LLP

Slide 3

### The Standard for Provisional Measures under the ICSID Convention

"Except as the parties otherwise agree, the Tribunal may, if it considers that *the circumstances so require, recommend* any provisional measure which should be taken *to preserve the respective rights* of either party."

Article 47 of the ICSID Convention

"At any time after the institution of the proceeding, a party may request that provisional measures *for the preservation of its rights* be *recommended* by the Tribunal. The request shall specify the *rights to be preserved*, the measures the recommendation of which is requested, and *the circumstances that require* such measures."

Rule 39(1) of the ICSID Arbitration Rules

Dechert  
LLP

© 2008 Dechert LLP

Slide 4

### The History for Provisional Measures under the ICSID Convention

Mr. TSAI (China) referred to the written comments submitted by his Government: A provisional measure was different from an interim award and should not necessarily have the same effect. He felt that the word "prescribe" was too strong and was not necessary, since if there was any damage it could be included in the final award. He suggested that the word "recommend" be used instead of "prescribe". The reference to a penalty in paragraph (2) was too vague and could also be deleted. The amendments were proposed to avoid any possible difficulties that could arise with respect to their internal courts or their legislature when this Convention was presented for acceptance or ratification.

Dechert

Slide 5

### The History for Provisional Measures under the ICSID Convention

Committee then agreed by a nearly unanimous vote to delete paragraph (2)<sup>4</sup>. By a large majority the Committee also accepted to use the word "recommend" as opposed to "prescribe" or "indicate".

Dechert

Slide 6

### Interpretation of ICSID Arbitral Tribunals

- Notwithstanding the wording "recommend":
- Mafezzini v. Spain
- Pey Casado v. Chile
- Perenco v. Ecuador

These Tribunals have reached the conclusion that "recommend" means not just a recommendation, but "an order"

Dechert

Slide 7

## The Standard for Provisional Measures under the UNCITRAL Arbitration Rules

**General provisions**

Subject to these Rules, the arbitral tribunal *may conduct the arbitration* in such manner *as it considers appropriate*, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, *in exercising its discretion*, shall conduct the proceedings so as to avoid unnecessary delay and expense and *to provide a fair and efficient process* for resolving the parties' dispute.

Article 16(1) of the UNCITRAL Arbitration Rules

Dechert

Slide 8

## The Standard for Provisional Measures under the UNCITRAL Arbitration Rules

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, (...), the arbitral tribunal orders a party, for example and without limitation, to:
  - (a) Maintain or restore the status quo pending determination of the dispute;
  - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
  - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Dechert

## Slide 9

### The Standard for Provisional Measures under the UNCITRAL Arbitration Rules

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(...)

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Dechert

## Slide 10

### Interpretation by UNCITRAL Tribunals

Chevron and Texaco v. Ecuador: Order of Interim Measures, 9 February 2011

- The Tribunal has the “power” to render interim measures
- By its nature, binding on the parties
- Can be rendered as interim awards

Dechert

## Slide 11

### REQUIREMENTS FOR PROVISIONAL MEASURES

Requirements for ordering provisional measures

1. *Prima facie* jurisdiction must exist to examine the merits of the dispute
2. The existence of rights to be protected (not just substantive but procedural)
3. No aggravation of the dispute and/or alteration of the *status quo* (See *Biwater, Plama* and *Burlington* Decisions)
4. Only after giving each party an opportunity to be heard ("interim provisional relief / temporary orders of restraint?")
5. Measures shall be necessary to preserve a party's rights:
  - a. A right to preserve must exist
  - b. There must be a need to avoid irreparable harm
6. Measures shall be urgent
7. The measures recommended must be "provisional" in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved.

Dechert

## Slide 12

### Decision on Provisional Measures City Oriente v. Ecuador (ICSID Case No. ARB/06/21)

- The Decision on Provisional Measures was based on the following reasoning:
  - (i) that the measures must be oriented to the preservation of rights.
  - (ii) that their ordering be urgent (Tribunal asserted that, even though "neither the Convention nor the Rules make express reference to the urgency requirement in order that the Tribunal may order provisional measures," it seems evident that provisional measures are only appropriate if it is impossible to wait for a specific issue to be settled at the merits stage).
  - (iii) that each party must be afforded an opportunity to raise observations.

Dechert

## Slide 13

### City Oriente v. Ecuador

Breaches claimed by City Oriente:

- 1) By means of the new Law Ecuador tried to unilaterally modify the Contract.
- 2) Payment of extra revenue was not provided for in Contract.

Provisional measures requested and finally granted:

- 1) Respondents refrain from prosecuting the enforced collection of any present or future amounts disputed in the arbitration
- 2) Respondents refrain from initiating a proceeding for the administrative declaration of termination of the concession on account of non-payment of such moneys pending the final arbitral award
- 3) Respondents shall refrain from filing criminal complaints against Claimant's representatives and managers

Dechert

## Slide 14

### City Oriente v. Ecuador Revocation Request

- Respondents requested the revocation of the decision on provisional measures on three grounds:
  - (i) the measures are protecting a non-existing right because Ecuadorian law did not foresee a claim seeking performance of administrative contracts,
  - (ii) the measures are unnecessary to avoid "irreparable damage" and,
  - (iii) the provisional decision has integrally granted the Claimant's request for arbitration and prejudices the merits of the case.
- The Tribunal confirmed its previous decision on provisional measures.

Dechert

## Slide 15

**EnCana v. Ecuador: Collection of a Disputed Tax Does Not Justify Provisional Measures**

- "The question whether the amounts are actually due is not prejudged by the measures themselves, and would not be prejudged by the return of the amounts refunded. Eventually, *if jurisdiction is upheld, it would be open to this Tribunal to provide redress to the Claimant for any losses suffered by enforcement action taken in breach of the BIT*, including by payment of interest on sums refunded. In these circumstances, there is not necessity to order the withdrawal of IRS's measures (...) in order to protect the rights at stake in this arbitration from irreparable harm." (¶¶ 17)
- "In these circumstances the Tribunal is not persuaded that there is any necessity for the measures requested in terms of protecting the rights claimed by EnCana in the present proceedings." (¶¶ 19)

Dechert

## Slide 16

**CMS v. Argentina: Claimants Obligated to Comply with Disputed Regulatory Measures During the Arbitration**

- Claimant alleged that Argentina's suspension of a tariff formula and the alteration of the regulatory regime under which these tariffs were calculated amounted to a breach of the relevant BIT. (EL-24, ¶¶ 4, 88)
- CMS operated under the modified regime throughout the arbitration, without suggesting provisional measures were necessary to preserve its rights. (*Id.*, ¶¶ 69-70)

Dechert



## Slide 17

### Occidental v. Ecuador

#### The 'Rights' Purportedly in Need of Preservation

A "Right" to Specific Performance?

- Specific Performance is not available  
*Occidental Petroleum Corporation v. Ecuador (OXY II)*
- "It is well-established that where a State has, in the exercise of its sovereign powers, put an end to a contract or license, *or any other foreign investor entitlement*, specific performance must be deemed legally impossible." (§ 79) (emphasis added)
- "In order to decide whether specific performance is possible, the Tribunal must consider both the Claimants' *and* the Respondent's rights. To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, *would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.*" (§ 84) (emphasis added)

Dechert

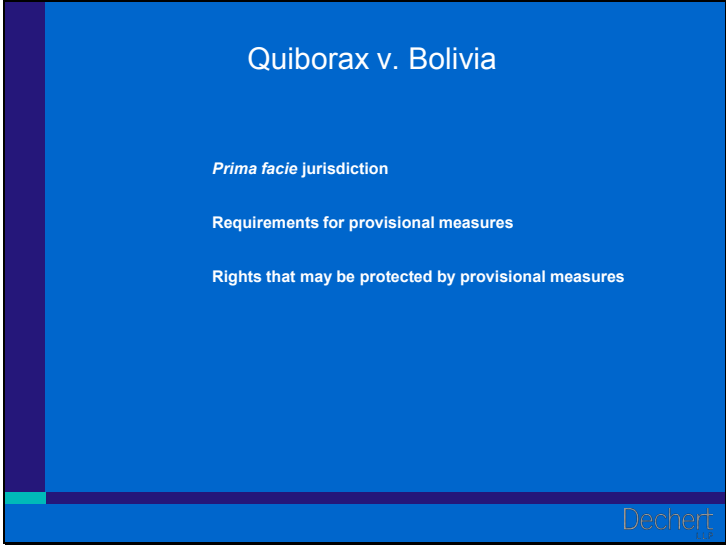
## Slide 18

### Burlington and Perenco v. Ecuador

- Two cases
- The same consortium
- Both Tribunals Recommended provisional measures

Dechert

Slide 19



## Quiborax v. Bolivia

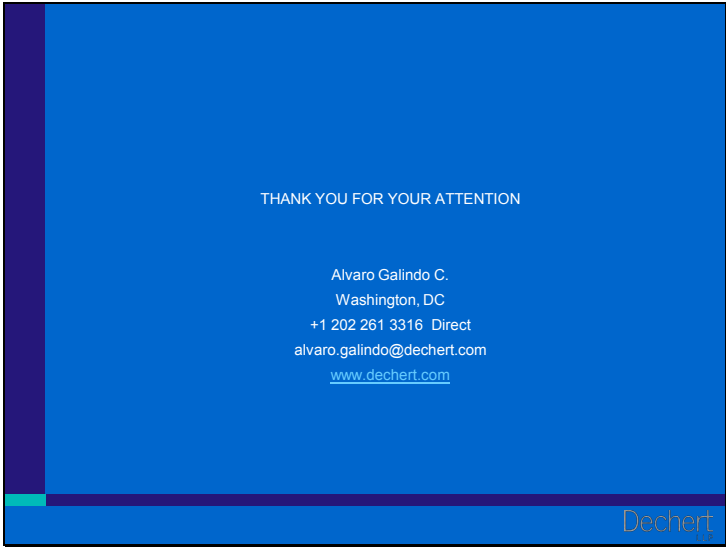
*Prima facie* jurisdiction

Requirements for provisional measures

Rights that may be protected by provisional measures

Dechert

Slide 20



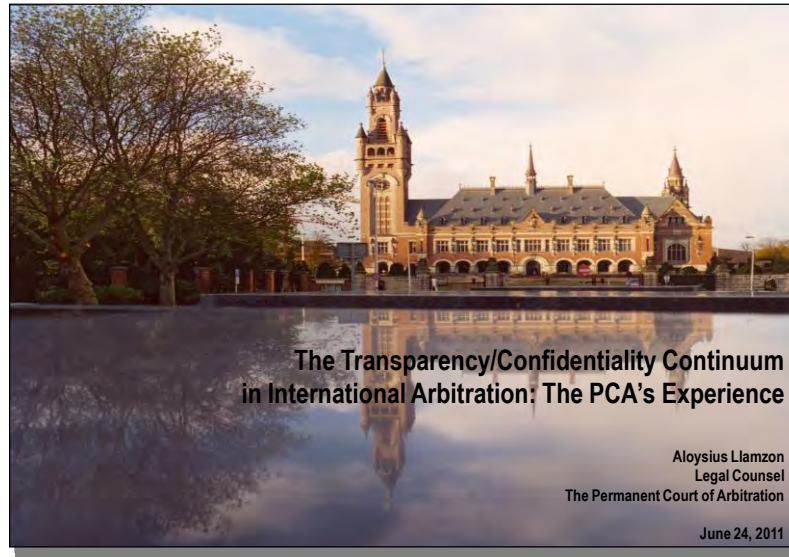
THANK YOU FOR YOUR ATTENTION

Alvaro Galindo C.  
Washington, DC  
+1 202 261 3316 Direct  
[alvaro.galindo@dechert.com](mailto:alvaro.galindo@dechert.com)  
[www.dechert.com](http://www.dechert.com)

Dechert

### xiii. Transparency in Arbitral Proceedings

Slide 1



Slide 2

**Different levels of transparency sought**

- No transparency: Parties might wish to preserve confidentiality
- "Partial" transparency: Parties might agree to publicize certain aspects (e.g. case name; commencement of the arbitration; name of arbitrators; name of parties' representatives; submissions; procedural orders; awards)
- "Full" transparency: Parties might opt for maximum transparency (entire written pleadings available to public; hearing open to public)

Slide 3

### **“Full” transparency – the PCA’s experience**

- *Abyei Arbitration* (between the Government of Sudan and the Sudanese People’s Liberation Movement/Army)
- *TCW v. Dominican Republic* (CAFTA-DR)
- *Ireland v. United Kingdom* (MOX Plant)

Slide 4

### ***Abyei* arbitration**

Article 8(6) Arbitration Agreement provides:

- Oral pleadings open to the media
- PCA to issue periodic press releases
- Party submissions and final award to be posted on PCA website

Slide 5

**Abyei**

**April 2009:** Public Hearings in The Hague




**July 2009:** Award rendering live in Peace Palace and webcast to Abyei Town





Slide 6

**“Partial” transparency – the PCA’s experience (1)**

State to State Arbitration

- *Indus Waters Kishenganga Arbitration* (Pakistan v. India): Existence of the case, the date of initiation, the relevant Treaty, the names of the Parties, and the identity of the members of the Tribunal are all public
- *Bangladesh v. India* (UNCLOS Annex VII): Existence of the case, the date of initiation, the relevant Treaty, the names of the Parties, and the identity of the members of the Tribunal are all public
- *Guyana v. Suriname* (UNCLOS Annex VII): The Parties’ submissions, the Procedural Orders, the meeting and hearing transcripts, the Site Visit Report, and the Award are published



## **“Partial” transparency – the PCA’s experience (2)**

### Investment Treaty Arbitration

- *European American Investment Bank (Austria) v. The Slovak Republic*: The existence of the case, the relevant Treaty, the names of the Parties’ representatives, and the identity of the members of the Tribunal are all public
- *Saluka Investments B.V. (the Netherlands) v. The Czech Republic* : The Decision on Jurisdiction and the Partial Award are published
- *Vito G. Gallo v. Government of Canada* (NAFTA Chapter 11): the Parties’ submissions, the Procedural Orders, the Confidentiality Order, the ICSID Decision on the Challenge of an Arbitrator, and several letters from the Tribunal to the Parties and vice versa concerning procedural matters

## **“Partial” transparency – the PCA’s experience (3)**

### Contract Arbitration

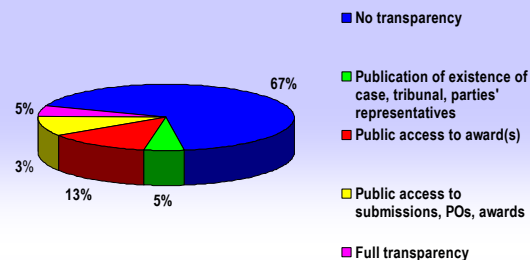
- *Eurotunnel*  
The Partial Award and the Dissenting Opinion are published



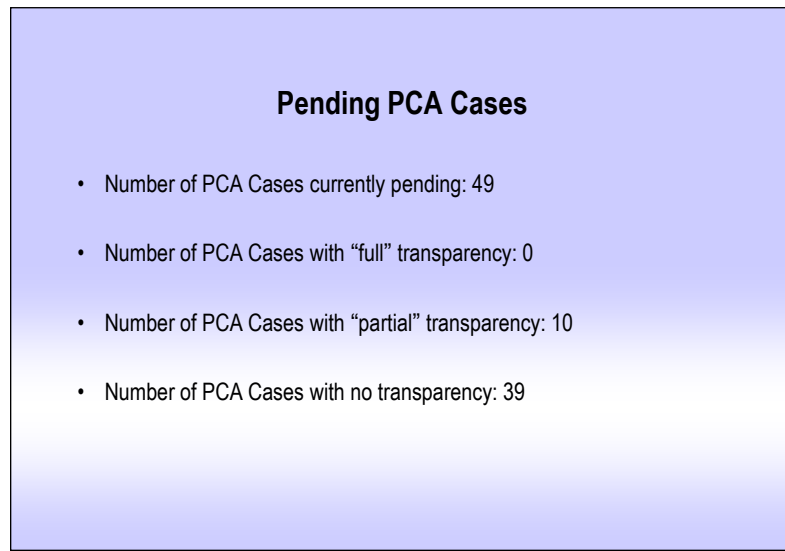
### PCA cases completed between 2000 and June 2011

- Number of PCA cases completed between 2000 and June 2011: 61
- Number of PCA cases with “full” transparency: 3
- Number of PCA cases with “partial” transparency: 17
  - publication of existence of dispute, tribunal, and parties' representatives (3);
  - additionally, public access to award(s) (8);
  - additionally, public access to submissions, procedural orders etc. (6);
- Number of PCA cases with no transparency: 41

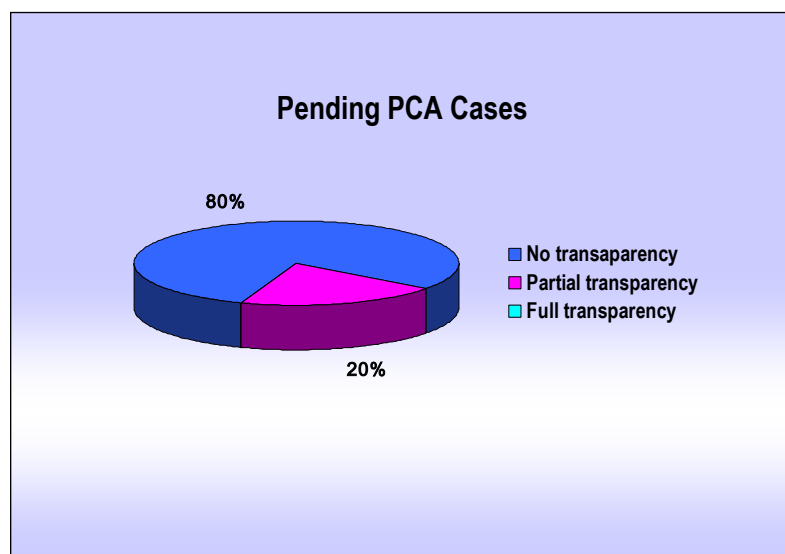
### PCA cases completed between 2000 and June 2011



Slide 11



Slide 12





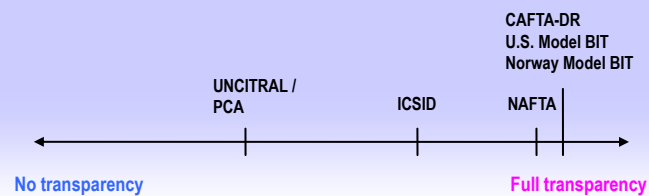
Slide 13

### Different sources of transparency and confidentiality obligations

- 1) Bilateral and multilateral investment treaties
- 2) National arbitration laws
- 3) Arbitration rules
- 4) Arbitration agreements
- 5) Terms of appointment
- 6) Procedural orders

Slide 14

### Rough continuum



Slide 15

Registration of disputes			
BITs and ECT	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
<ul style="list-style-type: none"> <li>▪ Silent on publication of existence of dispute</li> </ul>	<ul style="list-style-type: none"> <li>▪ Filing of notice of arbitration/request for arbitration with NAFTA Secretariat; Secretariat must maintain those documents in a public register</li> </ul>	<ul style="list-style-type: none"> <li>▪ Public registration of all disputes: names of parties, date of registration, general subject matter of dispute, constitution of tribunal</li> </ul>	<ul style="list-style-type: none"> <li>▪ No central registry or requirement that existence of cases be publicly registered</li> </ul>

Slide 16

Public access to hearings			
BITs	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
<ul style="list-style-type: none"> <li>▪ Hearings shall be open to the public (U.S. Model BIT 2004, Norway Draft Model BIT 2007)</li> </ul>	<ul style="list-style-type: none"> <li>▪ By 2004, all NAFTA parties had announced a policy consenting to open hearings; but consent of claimant still necessary</li> </ul>	<ul style="list-style-type: none"> <li>▪ The tribunal may allow third parties to attend or observe hearings unless either party objects</li> </ul>	<ul style="list-style-type: none"> <li>▪ Hearings are to be held <i>in camera</i> unless agreed otherwise by the parties</li> </ul>

Slide 17

Participation by third parties			
BITs	NAFTA	ICSID	UNCITRAL
<ul style="list-style-type: none"> <li>The Tribunal may allow <i>amicus curiae</i> submissions (U.S. Model BIT 2004, Norway Draft Model BIT 2007)</li> </ul>	<ul style="list-style-type: none"> <li>No provision of the NAFTA limits a tribunal's discretion to accept written submissions from third parties</li> </ul>	<ul style="list-style-type: none"> <li>The tribunal may allow <i>amicus curiae</i> submissions after consulting both parties</li> </ul>	<ul style="list-style-type: none"> <li>Silent on participation of third parties; but tribunals have held that the broad discretion under Article 15 encompasses the power admit <i>amicus curiae</i> briefs</li> </ul>

Slide 18

Public access to documents (submissions, procedural orders etc.)			
BITs	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
<ul style="list-style-type: none"> <li>All documents submitted to, or issued by, the tribunal shall be made public (U.S. Model BIT 2004, Norway Draft Model BIT 2007, Japan-Mexico FTA)</li> </ul>	<ul style="list-style-type: none"> <li>Nothing in the NAFTA precludes the parties from providing public access to documents submitted to, or issued by, the tribunal</li> </ul>	<ul style="list-style-type: none"> <li>Each party may publicly disclose briefs and other submissions</li> </ul>	<ul style="list-style-type: none"> <li>Silent on public disclosure of documents and other information</li> </ul>

Slide 19

Public access to awards			
BITs and ECT	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
<ul style="list-style-type: none"> <li>▪ <b>ECT:</b> A copy of the award shall be deposited with the Secretariat, which shall make it generally available</li> <li>▪ <b>U.S.:</b> The Respondent shall make the awards available to be public</li> <li>▪ <b>Norway:</b> All awards shall be made publicly available</li> <li>▪ <b>Japan-Mexico FTA:</b> Either disputing party may make available to the public an award</li> </ul>	<ul style="list-style-type: none"> <li>▪ Arbitrations involving Canada and U.S.: either party may make available to the public an award</li> <li>▪ Arbitrations involving Mexico: the applicable arbitration rules apply to the publication of an award</li> </ul>	<ul style="list-style-type: none"> <li>▪ ICSID is prohibited from publishing awards without the consent of the parties, but is required to promptly publish excerpts of the legal reasoning of every award; but each party may publicly disclose an award</li> </ul>	<ul style="list-style-type: none"> <li>▪ Award may be made public only with consent of both parties</li> </ul>

Slide 20

Most Common Investment Arbitration Rules: ICSID v. UNCITRAL	
ICSID	UNCITRAL
▪ public registration of all dispute	▪ no registration requirement, but parties may agree to publish details
▪ non-parties might be present at hearings unless either party objects	▪ hearings shall be held <i>in camera</i> unless the parties agree otherwise
▪ non-disputing party submissions allowed under certain conditions after consulting both parties	▪ silent on non-disputing party, but tribunals have allowed submissions under general power in Art. 15
▪ parties may publicly disclose briefs and other submissions	▪ silent on public disclosure of submissions
▪ awards are published; absent consent, extracts published.	▪ awards may be made public only with consent of both parties

Slide 21

Relevant factors for states when deciding upon transparency requests:	
PROs	CONs
▪ Enhance the public understanding and confidence in investment arbitration proceedings which often involve public interests	▪ Risk of disclosure of confidential and sensitive information such as state secrets
▪ Development of coherent case law in investment arbitration which enables governments to conform their conduct to evolving standard	▪ Politicization of the dispute: public pressure having various effects
▪ Enhance confidence of foreign investors and thereby encourage foreign investment	▪ Additional costs and delay in proceedings

#### xiv. Current Work of UNCITRAL on Transparency in Treaty-based investor-State Arbitration

Slide 1





Slide 2

### Revision of the UNCITRAL Arbitration Rules

**1976 Rules:** Recognized as very successful text  
Used in variety of circumstances  
Covering broad range of disputes  
In all parts of the world

**Revision:** Keep flexibility, spirit and style

 **Inclusion of investment arbitration?**

 **Keep generic applicability of Rules**

**UNCITRAL** United Nations Commission on International Trade Law

Slide 3

### UNCITRAL current work on transparency in treaty-based investor-State arbitration

**Mandate by the Commission:**  
**prepare a legal standard**

- ▶ too early for decision on form and scope
- ▶ limited to preparation of rules of uniform law on transparency in treaty-based investor-State arbitration
- ▶ during that work, identify any other topic with respect to treaty-based investor-State arbitration for possible future work

**UNCITRAL** United Nations Commission on International Trade Law


Slide 4

**UNCITRAL current work on  
transparency in treaty-based  
investor-State arbitration**

**Form**

**VARIOUS POSSIBLE FORMS:**  
Statement of principle; Guidelines; Model Clauses;  
Stand-alone rules, whether complementing the UNCITRAL  
Arbitration Rules, or applying irrespective of the set of  
rules chosen by the parties.

The Working Group agreed that the legal standard  
on transparency should take the form of rules on  
transparency.

 **UNCITRAL** United Nations Commission on International Trade Law


Slide 5

**UNCITRAL current work on  
transparency in treaty-based  
investor-State arbitration**

**Applicability**

**Applicability of the instrument to existing  
treaties:**

- *Recommendation*
- *Convention*
- *Interpretative Declaration*
- *Treaty Modification*

 **UNCITRAL** United Nations Commission on International Trade Law

Slide 6

**UNCITRAL current work on  
transparency in treaty-based  
investor-State arbitration**

**Applicability**

**Applicability of the instrument to future  
treaties:**

It remains to be decided whether rules on  
transparency will apply if States Parties to  
the treaty expressly agree to their  
application (opt-in), or apply based on a  
presumption (opt-out).

UNCITRAL United Nations Commission on International Trade Law

Slide 7

**Work on transparency in treaty-based  
investor-State arbitration of WG II**

**Possible content**

- Publicity regarding the initiation of arbitral proceedings
- Documents to be published (pleadings, procedural orders, supporting evidence)
- Submissions by third parties (*amicus curiae*) and by the non-disputing State
- Public hearings
- Publication of arbitral awards
- Possible exceptions to the transparency rules
- Repository of published information (*registrar*)

UNCITRAL United Nations Commission on International Trade Law



Slide 8

**Work on transparency in treaty-based investor-State arbitration of WG II**


**Interested in more:**

***[www.uncitral.org](http://www.uncitral.org)***

 **UNCITRAL** United Nations Commission on International Trade Law

**xvi. Prevention of Investor-State Disputes and Alternatives to Arbitration**

Slide 1


 **UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

**APEC-UNCTAD Workshop on Investor-State Dispute Settlement**

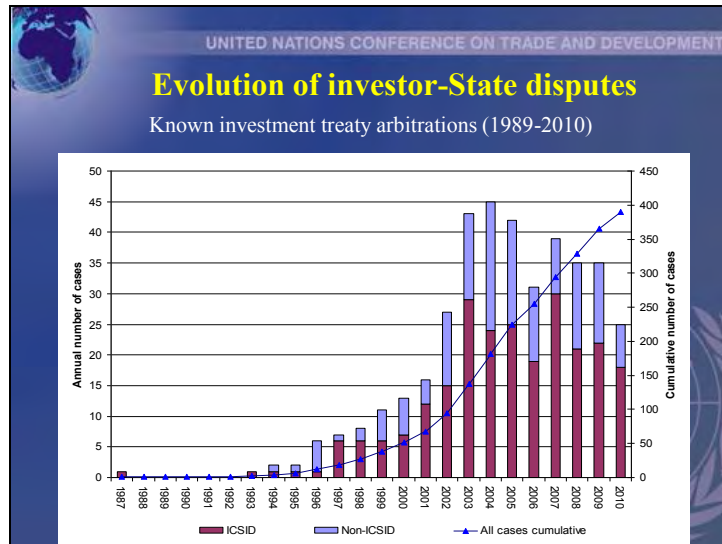
Manila, Philippines  
22-24 June 2011

**Prevention of Investor-State Disputes and Alternatives to Arbitration**

**Anna Joubin-Bret**  
Senior Legal Advisor  
Division on Investment and Enterprise  
UNCTAD

 1

Slide 2



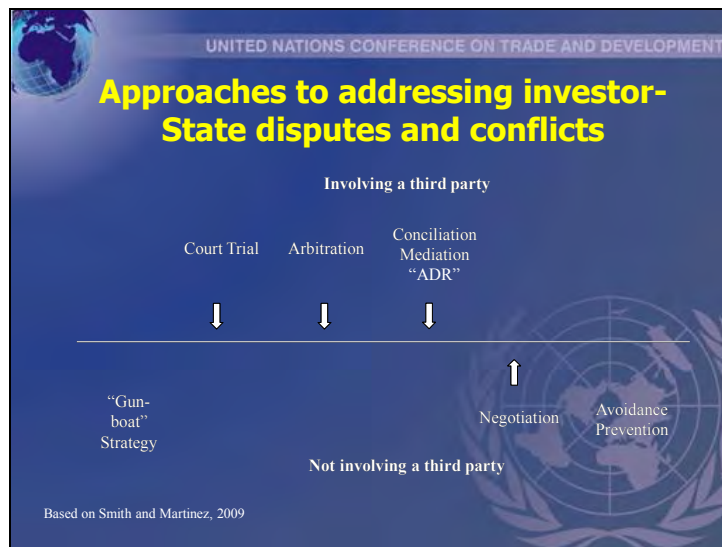
Slide 3

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Special nature of investor-State disputes

- The dispute involves a sovereign as a defendant and measures taken by a sovereign State (central and local governments)
- Dispute is governed by international law
- International arbitration as the main option
- Relationship between the disputants often involves a long-term engagement
- Amounts at stake are high

Slide 4



Slide 5

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Prevention of investor-State disputes

Dispute prevention policies (DPPs) attempt to **prevent conflicts** between investors and States from emerging and escalating into a dispute

They can take a **variety of forms**, such as:

- Monitoring and early alert mechanisms
- Communication with investors
- State-State cooperation
- Dispute preparedness (« getting ready »)

The slide features a title, a paragraph explaining the purpose of dispute prevention policies (DPPs), and a bulleted list of various forms these policies can take. The background includes a globe icon and the United Nations Conference on Trade and Development logo.

Slide 6



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Dispute prevention: Monitoring and early alert

- Information and early alert mechanisms for detection of conflicts with investors
  - Effective **communication mechanisms** among State agencies dealing with foreign investors
  - One **lead agency** responsible for managing foreign investment-related issues and investor-State disputes
- **Monitoring** sectors that are:
  - Frequented by foreign investors
  - Prone to investor-State conflict

Slide 7



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Dispute prevention: Communication with investors

The investor is given an opportunity and an avenue to communicate any concerns to the host economy government:

- Investment “**after care**” (e.g. through investment promotion agencies)
- Ombudsman or **ombuds services**
- **Administrative review** of contested measures

Slide 8



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT


### Dispute prevention: State-State cooperation

The home State of the investor and the host economy cooperate on issues related to mutual foreign investments:

- **Joint Commissions** or Committees (as provided in some IIAs)
- **Diplomatic relations** and exchanges

➤ However, (re-)involvement of the home State may be controversial

Slide 9



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT


### Dispute preparedness « Getting ready »

Establishment of intra-governmental structures and communication mechanisms to facilitate the management of investor-State disputes:

- **Lead agency** for handling investor-State disputes
- **Delegation of authority** (including budgetary authority) to settle disputes (including amicable settlements)
- Ensure **effective flow of information** among government agencies about the dispute
- Make good use of the « cooling off » period prior to arbitration

➤ Having these structures in place will also help in *preventing* disputes

Slide 10



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Investor-State arbitration and its alternatives

Methods to resolve **existing disputes**:

- **Arbitration** is an adjudicative mechanism, rights-based approach, « win-lose »
- **Alternatives to arbitration** achieve amicable settlement through interest-based approaches, potentially « win-win »:
  - These include methods of alternative dispute resolution (ADR): conciliation, mediation, early neutral evaluation, fact-finding etc.

➤ Arbitration and alternative methods can be run in parallel (e.g. through concurrent med-arb)

Slide 11




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## Advantages of international arbitration

- Depoliticizes the dispute
- Adjudicative neutrality and independence
- Original perception: arbitration is swifter, cheaper, more flexible, more familiar for economic operators
- More control over litigation procedure compared to national courts
- Sense of legitimacy (good reputation of the procedure)

Slide 12




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### **Disadvantages of international arbitration**

- Generally expensive, involving significant amounts of money
- Very time consuming
- Control over the procedure is limited
- Can harm the relationship between investor and State
- Concerns about the legitimacy of the ISDS system
- Focus entirely on the payment of compensation

Slide 13




UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### **Advantages of alternatives to arbitration**

- Flexibility
- Makes it possible to take the specific interests of the parties involved into account
- Faster and less costly settlement
- No prejudice to the right of the parties to resort to other forms of dispute resolution
- Avoid unsatisfactory precedent of an arbitral award
- Improvement of good governance and regulatory practices of States



Slide 14



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Challenges posed by alternatives to arbitration

- Not binding on the parties
- Investors and States lack familiarity and experience with alternative approaches
- Considered as a waste of time and funds
- Not suitable for all types of investment disputes and IIA provisions
- Obstacles when a sovereign State is involved
- Lack of transparency
- Problems of implementation (e.g. having an adequate pool of experienced third-party neutrals)

Slide 15



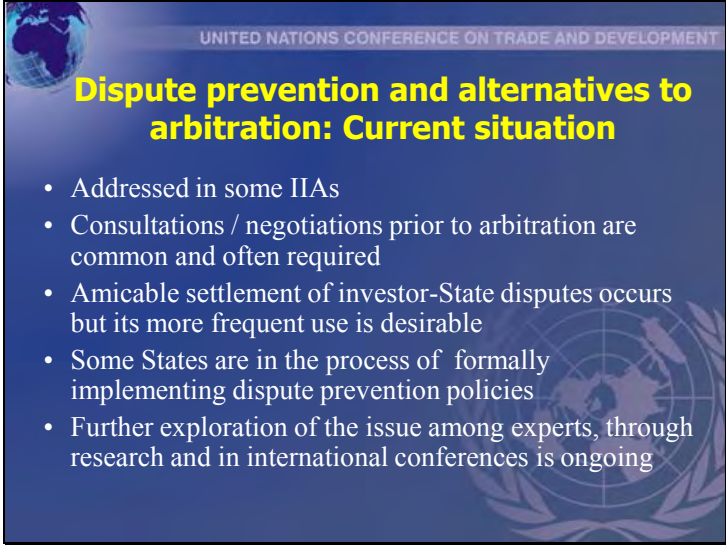
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### Rules and forums for alternative dispute resolution

- Rules: ICSID, UNCITRAL, AAA, ICC
- Institutions:
  - International arbitration institutions
  - Regional forums
  - Mediation centers
  - At national level: ADR centers, investment promotion agencies (IPAs)



Slide 16



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### **Dispute prevention and alternatives to arbitration: Current situation**

- Addressed in some IIAs
- Consultations / negotiations prior to arbitration are common and often required
- Amicable settlement of investor-State disputes occurs but its more frequent use is desirable
- Some States are in the process of formally implementing dispute prevention policies
- Further exploration of the issue among experts, through research and in international conferences is ongoing

Slide 17

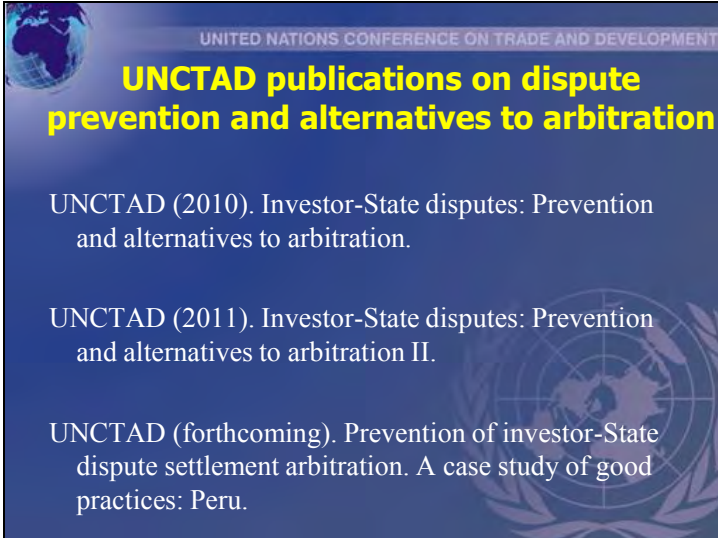


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

### **Dispute prevention and alternatives to arbitration in IIAs**

- Virtually all IIAs provide for consultations / negotiations between the parties (« cooling off »)
- Frequent reference to conciliation next to arbitration
- Conciliation as a requirement prior to arbitration (very rare)
- Consultation / exchange of information between the contracting parties (State-State cooperation)
- Joint Committees

Slide 18



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**UNCTAD publications on dispute prevention and alternatives to arbitration**

UNCTAD (2010). Investor-State disputes: Prevention and alternatives to arbitration.

UNCTAD (2011). Investor-State disputes: Prevention and alternatives to arbitration II.

UNCTAD (forthcoming). Prevention of investor-State dispute settlement arbitration. A case study of good practices: Peru.

The slide features a dark blue background with a faint UN emblem in the bottom right corner. The title is in bold yellow text, and the list of publications is in white text.

Slide 19



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Questions???

Thank you!

[www.unctad.org/iaa](http://www.unctad.org/iaa)

19

The slide features a dark blue background with a faint UN emblem in the bottom right corner. The text is in yellow, and the URL is in white. The number 19 is in the bottom right corner.

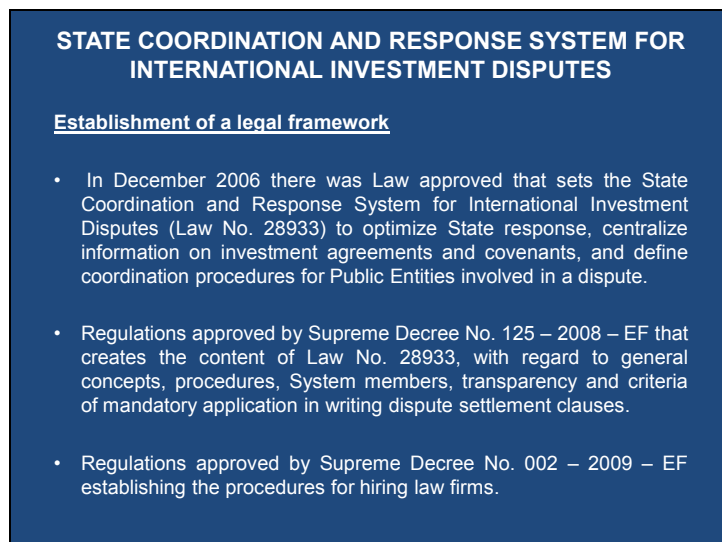
## VII. ECONOMY PRESENTATIONS

### i. Peru – International Investment Disputes

Slide 1



Slide 2



Slide 3

## The System

**Scope of competence**

- Investment disputes between foreign investor and Public Entities
- International dispute settlement mechanisms.

**Objectives**

- To optimize the response and coordination within the public sector.
- To centralize information on
  - ✓ Investment Covenants or Treaties signed by the various government levels, and Dispute Settlement clauses that refer to international mechanisms.
  - ✓ Disputes.
- To set an alert mechanism
- To establish responsibility for the costs.
- To standardize dispute settlement clauses, where possible.

Slide 4

## The System

**Duties:**

- Manage the information and coordination centralized system .
- Dispute surfacing control .
- Receive Direct Negotiations or Dispute notices.
- Set and keep record of Agreements and Treaties.

**Coordinator**

- Ministry of Economy and Finance (MEF)

**Special Commission:**

- Is attached to the Ministry of Economy.
- It represents the State in Direct Negotiations and Arbitration Stage.

Slide 5

## Duties of The Special Commission

- Participate in the direct negotiation stage.
- Propose the hiring of lawyers and professionals.
- Appointment of arbitrators.
- Set the strategy guidelines
- Contribute in the arbitration process.
- Approve provision of resources.
- Define responsibility of Public Entity involved

Slide 6

## The Alert System

- Every Governmental Agency concluding an agreement or treaty regarding investment issues, sending the settlement of investment disputes to international mechanisms, must inform the Coordinator of the System.
- In case of being notified about the investor's intention to demand, the Governmental Agency must inform in detail to the Coordinator.



## International Investment Disputes

- Law 28933 defines **International Investment Disputes** as those ones between the Peruvian State and either national or international investors, through international mechanisms of dispute settlement.
- International Dispute Settlements can only be derived from:
  - a) **Agreements** celebrated between Public Entities and national or international investors where privatization contracts, concession contracts, legal stability contracts, exploitation licensing and all the ones referred in this law
  - b) **Treaties** that have in it investment content where the dispute settlement procedures between the Peruvian State and national or international investors is stated.

## Investment Agreements


- Peru has signed more than 30 International Investment Agreements (Bilateral Investment Treaties and Free Trade Agreements) that underpin its liberalization policy.



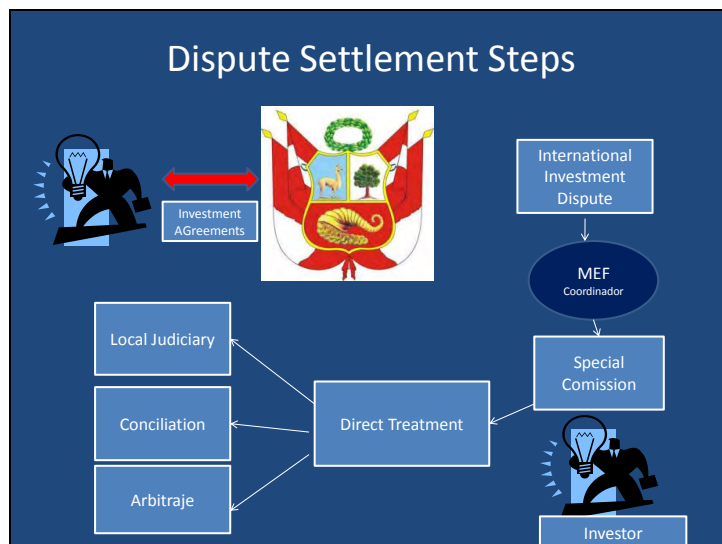
Slide 9

## Fora where BITs y TLCs arbitration is allowed

- Investment Agreements, BITs y TLCs that the Peruvian state have subscribed bgive thre ways for disute settlement:
  - ✓ ICSID
  - ✓ UNCTAD.
  - ✓ Judiciary of one of the countries
- Once one is elected there is no right to change it.



Slide 10



Slide 11

## Processes at the ICSID

So far Peru has participated in nine different processes at the CIADI, WB, Washington D.C., of which four of have being won and five are in procedure.

Slide 12

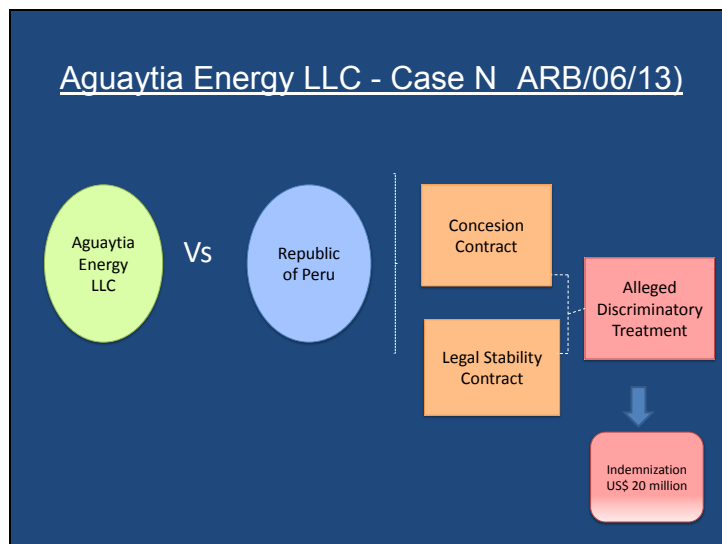
Number of Case in ICSID	Claimants	Acuerdos de Inversion / BITs	Decisiones finales
<a href="#">ARB 98/6</a> (1998)	Compagnie Minière Internationale Or S.A.		Settlement agreed by the parties and proceeding discontinued at their request
<a href="#">ARB 03/4</a>	Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.)	APPI Chile-Perú	El Tribunal, mediante laudo de fecha 07.02.2005 se declaró incompetente ante la demanda por FALTA DE JURISDICCION RATIONE TEMPORIS.
<a href="#">ARB 06/13</a>	Aguaytia Energy, LLC	Contrato de concesión Convenio de Estabilidad Jurídica	El Tribunal mediante laudo, rechazó por unanimidad la solicitud presentada por la demandante.
<a href="#">ARB 03/28</a>	Duke Energy International Peru Investments No. 1 Ltd.	Contrato de concesión Convenio de Estabilidad Jurídica	El Tribunal declaro fundada en parte la demanda, ordenando el pago de S 20 millones al Peru



Slide 13

PENDING CASES			
ARB/10/2	Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A.	Contrato de Concesion BIT Argentina- Peru	
ARB/10/17	Renée Rose Levy de Levi	BIT Francia -Peru	
ARB/07/6	Tza Yap Shum	BIT China - Peru	
ARB/11/9	Caravelí Cotaruse Transmisora de Energía S.A.C.	Contrato de concesión de	
	Gremcitel	BIT Francia - Peru	

Slide 14



## Aguaytia Case Brief introduction

- Aguaytia had shares in ETESELVA enterprise.
- ETESELVA is an electric transmission company, that subscribed a public concession contract with the Peruvian state in the nineties. At the same time, it subscribed a Legal Stability contract in which the no discrimination clause is stated
- Some years later, the Colombian company ISA won the permit to construct an electric transmission line.
- Aguaytia sued the Peruvian Republic to the ICSID because it opposed to the alleged discrimination case made in favor of the Colombia company. It pointed that the discrimination consisted on the way on applying electric fares and in the examination of the Electric Transmission Systems: while the Colombian systems were qualified as primary ones, and the ones of ETESELVA as secondary ones, obtaining a difference in the way investment recovery should proceed.

## Aguatya Case Legal Aspects

- Aguaytia sued the state for not granting action to its legal stability contract, alleging that the non discrimination clause was violated, stating that as the Peruvian state gave easiness to other enterprises to work in this sector, the non discrimination obligation was discriminated.
- At first, it seemed that instead of defending non discrimination it was trying to favor «most favoured Investment», as a derived one from the MFN stated in every Peruvian BIT.
- Being that the case, Aguaytia argued that the State provided better and more conditions to future enterprises in this sector. That was its reason to start the trial.

Slide 17

### Aguatya Case Interesting Facts

- The right of no discrimination regarding investment is not an automatic benefit that the Peruvian State will provide to enterprise n 2 when it did gave to enterprise N 1.

Slide 18

### Aguatya Case Interesting Facts

- The Peruvian State has the right to differentiate, but not to discriminate. Furthermore, it has the right to regulate certain economic activities and determine the rights and responsibilities that will order the relation with investors in public procurement matters. (Similar to the right to choose the internal configuration of the contracts that works in the private sector, but with the proper moderation attained to the State function).
- It means, that without eliminating the possibility to apply or deny jointly many contracts at the same time, is not possible to ask the State to improve the condition of a prior contract in comparison with a later one.

## Slide 19

On page 43 on this decision there were the possible reasons for the alleged discrimination

Peru has breached the Conite Agreement by taking actions inconsistent with the stability of AEL's right to non-discrimination:

- a) OSINERG/CELE COPRVMEN applying more favourable treatment to Etecen (a state entity) and ISA (an investor in the same sector) than ETESELVA in the classification of transmission line as PTS or STS. This violation has been exacerbated by the recognition of such discrimination by the Constitutional Court, and the subsequent failure of Peru to remedy the position.
- b) Osinerg (Energy Regulator) /MEM (Ministry of Energy and Mines) applying more favourable treatment to other private and state -held generation companies than Temoselva in allocating the responsibility for paying the tariff for the use of STS lines;
- c) Osinerg/CELE-COPRVMEM affording more favorable treatment to BOOT investors than to Eteselva in setting the tariff governing the amounts payable for the use of transmission lines by third parties ; and
- d) Allowing other foreign investors to take advantage of a more favourable investment mechanism (i.e. the BOOT) than was available to AEL, but denying access to such mechanism to AEL .

## Slide 20

### Aguaytia Case

- On pages 51 to 54 the Tribunal, succinctly, develops the argument to justify its decision in favour of the Republic of the Peru. In its basis, mainly points out that what is relevant is that the main legal norms of the legal framework stabilized in accordance with the contract that was in force at the time of hire.
- Then adds that the applicant never proved that the right to non-discrimination was important for him, not proved that he understood at the time of hire by this Pact is not changed for the investor, nor tested - adds the Court - that there is a substantive right to non-discrimination.
- Finally, the Court adds that it is relevant to the Convention that the State does not issue laws related to non-discrimination which can affect the head of the Convention of stability.

## Slide 21

### Aguaytia Case

- The final decision established that the right to non discrimination is a secondary one, an accessory one, in the framework of a contract of legal stability.
- The contracts of legal stability (as any other contract) can contain a series of attached clauses that may be no related directly to the conditions of the contract. But they are documents that are due to be respected in a compulsory manner.
- In other words, it exists the right to non discrimination in the legal framework of legal stability, but at the same time is a right that is independent of all the main body of conditions of the contract. It means that, one can revert or affect the right to non discrimination according to different reasons, without implying that the legal conditions have been modified.

## Slide 22

### Aguaytia Case

- The Tribunal should have fixed a position stating how or how not did Peru discriminated in any sense what Aguaytia said.
- For that matter exists in Peru and internationally a equality test that demands for the next steps to be taken:
  - 1 : Verificación of the difference.
  - 2 : Determination of the level of intensity of the intervention that affects the equality.
  - 3 : Verification of the existence of a consituional end in the differentiation.
  - 4 : Test of «rightfulness».
  - 5 : Test of neccesity.
  - 6 : Test of proportionality in strict sense or weighted measure.

This test was cited by Jorge Avendaño (law expert representing the demandant) and María Teresa Quiñones (law expert repsetenting the Peruvian State). Beside the importance of this equality test, there was not any further reference or deepper examination.

## Aguaytia Case

- Regarding the content of the decision, the tribunal did not establish that both, ISA and ETESELVA investments were different in nature. Being such that case, it was not possible that both could be treated equally.
- Furthermore, it omitted the reference to the electric investment legislation that give plenty of reasons that allows the Peruvian State to have different considerations to different kind of investment in the electrical sector.

## Aguaytia Case

- ISA is a concession of public infrastructure works, with strong contractual predominance, in response to the relevant case was the construction of the work and the law of concessions of Peru allows for public works concessions tariff regime is regulated in the same contract.
- This is a concession with a defined term, a property in the public domain in a way that at the end of the concession, the concession assets accrue in favour of the State.
- The qualification of transmission systems is regulated in the contract, in accordance with applicable regulations of concessions. Meanwhile, ETESELVA is a concession of public service, with strong regulatory predominance, in response to the relevant was the public service itself and not so much the work to be executed. This is a concession with an indefinite term, public area, but being that of the concession assets are assets of private domain that are not reversed in favor of the State with the expiry of the concession. The qualification of transmission systems (if they were primary or secondary) was reserved for the administrative authorities.

## Conclusions

- On the Aguaytía vs. Perú case, we concur with the final decision that says that Peru has not violated the non discrimination clause, but Peru does not agree with some reasons for this:
  - Peru observes that this decision is made upon that there is no way of proving of Aguaytía company that may suggest a violation in this sense.
  - Peru considers that this decision could have been deeper and more exhaustive by showing how the non discrimination clause was not violated.
- It was not a violation because
  - (a) not every differentiated treatment is discriminatory,
  - (b) differentiation could/must not have any justification
  - (c) and in this case, the difference consisted that while one was a concession on infrastructure, and the other consisted on concession on services

## VIII. PHOTO DOCUMENTATION



Speakers and participants of the APEC-UNCTAD Workshop on Investor-State Dispute Settlement held on 22-24 June 2011 at the AIM Conference Center Manila in Makati City, Philippines.





Ms. Anna Joubin-Bret during the Session on “Trends and Developments in ISDS”, 22 June 2011.



Ms. Bret, Ms. Elodie Dulac, Mr. Yu-Jin Tay and Prof. Hi-Taek during the session on “Definition of Investor”, 22 June 2011



Justice Florentino P. Feliciano makes a point during the open forum, 22 June 2011.



Mr. Christopher Thomas and Professor Shotaro Hamamoto during the session on “Fair and Equitable Treatment”, 22 June 2011.





Participants listen intently during the session on “Fair and Equitable Treatment”, 22 June 2011.



Participants from Malaysia, Mexico and the Philippines.



Ms. Elodie Dulac and Professor Hamamoto during the session on “Denial of Justice (Special Topic on Fair and Equitable Treatment)”, 23 June 2011.



Dr. Alvaro Galindo, Professor Guiguo Wang and Ms. Cheng Yee Khong.





Participants and speakers interact during the break.



Mr. Morgan Maguire, Ms. Bret and Professor Wang during the session on “MFN Treatment”, 23 June 2011. Ms. Corinne Montineri looks on.



Professor Shin raises a question during the open forum.



Dr. Galindo during the session on “Expropriation”, 23 June 2011.





Ms. Bret makes the introduction during the session on “Developments in International Arbitration and IIAs” with speakers Mr. Aloysius Llamzon, Ms. Corinne Montineri and Ms. Cheng Yee Khong, 23 June 2011.



Delegate from Thailand raises a question during the open forum, 23 June 2011.



Delegate from the Philippines raises a question, 23 June 2011.



Delegates from Singapore, Japan, Thailand and the Philippines during the welcome reception hosted by the Philippines' Department of Trade and Industry, 23 June 2011.





Participants and speakers during the welcome reception, 23 June 2011.



Participants at the start of the Day 3 of the workshop, 24 June 2011.



Dr. Galindo, Ms. Bret and Mr. Ilamzon at the session on "Provisional Measures and Interim Relief", 24 June 2011.





Session on "Transparency in Arbitral Proceedings" with Ms. Montineri and Mr. Llamzon, 24 June 2011.



Professor Wang and Professor Shin during the session on “Comparative Analysis of Asian BITs and FTAs”, 24 June 2011.



Economy presentations from the Philippines and Peru, 24 June 2011.





Participant from Malaysia raises a question during the open forum, 24 June 2011.



Dr. Galindo, Ms. Bret, Ms. Jane Yu and Mr. Tay during the session on “Conduct of Investor-State Dispute Settlement: What is involved for a State”, 24 June 2011.



Solicitor-General Anselmo Jose Cadiz gives the closing remarks.





Presentation of certificates and tokens of appreciation to the speakers, 24 June 2011.