

WORKSHOP AGENDA

APEC WORKSHOP ON INVESTOR-STATE ARBITRATION 3-7 November 2008, Washington, DC

TIME	DAY 1
8:00 – 9:00 am	<p><u>Registration:</u></p> <p style="text-align: center;">Jurisdiction: Scope of Disputes Subject to Arbitration</p>
9:00 – 10:30 am	<p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Art and science of managing investment disputes • Kinds of disputes subject to arbitration under investment agreements <ul style="list-style-type: none"> ○ Alleged breaches of investment treaties ○ Disputes that involve both alleged breaches of investment treaties and contract disputes • Forums available under BITs, free trade and regional agreements, and national laws • Introduction to the ICSID and ICSID Convention
10:30 – 10:45 am	<p>Break</p> <p>Session Description: This session begins with an overview of general approaches to managing investment disputes. It then discusses various types of disputes that may be submitted to arbitration under the provisions of new investment agreements; various forums in which an investment treaty dispute could be resolved; and an introduction to ICSID, the institution that administers a significant number of investment treaty disputes.</p>
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Jurisdiction of international tribunals • Requirement of consent (including under new agreements) • Identity of respondents: States; State entities; attribution • Identity of claimants: nationality and continuous ownership requirements, direct or indirect ownership and control; jurisdiction <i>ratione personae</i> • Subject matter jurisdiction, and jurisdiction <i>ratione materiae</i>:
12:15 am – 12:30 pm	<p>Question and Answer:</p> <p>Session Description: This session discusses the fundamental requirement of consent to arbitrate, and implications of consent for the jurisdiction of arbitral tribunals. This session also examines the identity of claimants and respondents under the provisions of investment treaties and under the ICSID Convention (i.e., requirements <i>ratione materiae</i> and <i>ratione</i></p>

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	<p style="text-align: center;"><i>personae</i>).</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none">• Breach of treaty v. breach of contract issues – <i>Vivendi</i> Annulment• Handling breach of contract issues in new investment treaties (no traditional umbrella clause; arbitration available only for breach of certain concession contracts)• Scope of dispute resolution clauses in investment treaties <p>Session Description:</p> <p>This session examines the distinction between contract and treaty claims, as considered by the <i>Vivendi</i> Annulment tribunal. It also examines further issues that would possibly narrow or broaden the scope of the disputes that can be submitted to an arbitral tribunal under an investment treaty. The focus of the session will be on the eligibility for investor-state arbitration of alleged contract breaches.</p>
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none">• Exhaustion of remedies; Article 26 of ICSID Convention• “No u-turn,” “waiver,” and “fork in the road” clauses• <i>Res judicata</i>• Forum election issues: arbitration clauses in investment contracts and their relationship to treaty obligations
5:15 – 5:30 pm	<p>Question and Answer:</p> <p>Session Description:</p> <p>This session discusses exhaustion of local remedies and treaty clauses which delineate how investors may choose among various dispute resolution fora. This session will also examine the effect of exclusive forum selection clauses in investment contracts.</p>

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DAY 2	
	Applicable Law
9:00 – 10:30 am	<p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Applicable law clauses of investment treaties • Article 42 of the ICSID Convention; role of domestic law of host States • Law applicable to procedure
10:30 – 10:45 am	<p>Question and Answer:</p> <p>Session Description: This session examines the “applicable law” provisions of new investment agreements. It further examines applicable law in an ICSID proceeding, and the interaction of the national law of the host State with international law and investment treaties. Finally, it discusses the law applicable to procedural issues.</p>
10:45 – 11:00 am	Break
	Mechanics of Arbitration
11:00 am – 12:30 pm	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Overview: investment arbitration and commercial arbitration models • Selection and appointment of arbitrators; applicable treaty clauses • Challenges to nominated arbitrators, IBA Guidelines • Conflicts of interest, IBA Guidelines <p>Session Description: This session begins with a discussion of the origin of the contemporary system of investor-State arbitration. It then examines in detail various legal and practical issues that may arise at the beginning of the arbitral process, including the important issue of selection of arbitrators and potential challenges to suggested arbitrators on grounds of conflict of interest.</p>
12:30 – 2:00 pm	Lunch
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Consolidation of claims—NAFTA Article 1126, approach in recent investment agreements • Consolidation in situations where the applicable treaty and arbitral rules lack provisions dealing with it; • Precluding frivolous claims: new approaches in recent investment

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	<p style="text-align: center;">agreements and in the amended ICSID arbitration rules</p> <p>Session Description: This session discusses various methods to consolidate related claims into a single arbitral proceeding and the issues that would arise, taking note of NAFTA Article 1126 jurisprudence, and reviewing ICSID decisions where arbitral tribunals have dealt with these issues. The session will also touch upon treaty approaches to precluding frivolous claims, and the approach adopted in the amended ICSID Arbitration Rules.</p> <p>3:30 – 3:45 pm Break</p> <p>3:45 – 5:15 pm <u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Venue: choosing the place of arbitration • Rules and procedural provisions under new investment agreements • Interim measures; ICSID and investment treaty provisions <p>5:15 – 5:30 pm Question and Answer</p> <p>Session Description: This session discusses procedural provisions of new investment agreements, including as they relate to choice of place of arbitration. The session will then examine various ways in which parties can request interim measures, and the approach to this issue in new investment agreements.</p>
DAY 3	
<p>9:00 – 10:30 am</p>	<p style="text-align: center;">Management of Arbitration I</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Training of legal and contracting staff in the governmental agencies • Selection and hiring of outside counsel • Maintaining project documents and records in anticipation of disputes • Coordination among government entities on preparation of the respondent’s case. • Coordination among State parties to the agreement on interpretive guidance for tribunals (e.g., 1128 submissions under NAFTA and similar provisions in recent agreements) <p>Session Description: This session will discuss the perspectives and experiences of APEC economy officials with respect to preliminary issues such as the training of legal staff for investment arbitration, the selection of</p>

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	outside counsel, and coordination activities within and between governments.
10:30 – 10:45 am	Break
10:45 am – 12:15 pm	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Facts in investment arbitration: taking of evidence, IBA Guidelines • Production of documents: exchanges of relevant documents between parties, by agreement or by order of the arbitration tribunal; implications of laws on secrecy; protection of proprietary information • Approaches to preparation of memorials and briefs
12:15 am – 12:30 pm	<p>Question and Answer:</p> <p>Session Description: This session will discuss various issues related to the taking and production of evidence, such as the implications of laws on document secrecy, the effect of non-production, and adverse inferences. The session concludes with a general discussion of effective advocacy methods.</p>
12:30 – 2:00 pm	<p>Lunch</p> <p style="text-align: center;">Management of Arbitration II—Demonstration Exercise</p>
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none"> • Organizing the proceedings: pre-hearing conferences • Fact witnesses and expert (legal, financial, and accounting) witnesses, preparation of witnesses • Organization of hearings • Examination and cross-examination of witness
3:30 – 3:45 pm	Break
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Same topics continued
5:15 – 5:30 pm	<p>Question and Answer:</p> <p>Session Descriptions: By way of enactment, these sessions will illustrate some of the practical tasks that counsel must perform during the course of an investment arbitration, including organization of pre-hearing conferences, the preparation of fact and expert witnesses, and hearing examination.</p>

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

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3:45 – 4:00 pm	<p>Session Descriptions: These sessions discuss various issues related to enforcement of, and challenges to, arbitral awards under the ICSID and New York Conventions, as well as under national laws, including UNCITRAL Model Law. In this context, they will also discuss State sovereign immunity defenses against the attachment of assets.</p>
4:00 – 5:30 pm	<p>Break</p> <p style="text-align: center;">Transparency and Third-Party Participation in Arbitral Proceedings</p> <p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none"> • Transparency requirements in new investment agreements; publication of awards and submissions • Third Party participation, <i>amici curiae</i>, civil society groups • Amendment of ICSID and UNCITRAL Rules to allow for third party participation <p>Session Description: This session examines the extent to which arbitral proceedings must be conducted transparently, as reflected in the text of investment treaties, and as required by some arbitral tribunals. It also examines the status of <i>amici curiae</i> under various investment treaties, the ICSID Arbitration Rules, and other arbitral rules; and the impact of the participation of the <i>amici</i> on arbitral proceedings.</p>
DAY 5	
9:00 – 10:30 am	<p style="text-align: center;">Strategies for Avoiding Arbitration</p> <p><u>Morning Session 1:</u></p> <ul style="list-style-type: none"> • Legal and policy coordination among government entities • Coordination between national and local governments • Standing dispute review boards
10:30 – 10:45 am	Break
10:45 – 12:15 am	<p><u>Morning Session 2:</u></p> <ul style="list-style-type: none"> • Negotiation, mediation and conciliation mechanisms: how to design and use them
12:15 am – 12:30 pm	<p>Question and Answer</p> <p>Session Description: These sessions will discuss the experiences of APEC member</p>

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	<p>economies with respect to methods for managing investor relations and avoiding investor-State arbitration. These methods may include general practice such as enhanced coordination among government agencies to avoid treaty-inconsistent actions; institutional arrangements such as standing review boards; and technical arrangements such as alternative dispute resolution, mediation and conciliation mechanisms, which can be used after a dispute has arisen.</p>
12:30 – 2:00 pm	<p>Lunch</p> <p style="text-align: center;">Key Developments and Trends in Investor-State Arbitration</p>
2:00 – 3:30 pm	<p><u>Afternoon Session 1:</u></p> <ul style="list-style-type: none">• Concerns regarding the inconsistency of arbitral awards on certain issues• Attempts to create an appellate mechanism for ICSID; U.S. contemplation of ad hoc bilateral appellate tribunals in its 2004 Model BIT and recent FTAs
3:30 – 3:45 pm	<p>Break</p>
3:45 – 5:15 pm	<p><u>Afternoon Session 2:</u></p> <ul style="list-style-type: none">• Impact of investor-State arbitration on investment rulemaking; trends in treaty drafting• The growing complexity, cost and “judicialization” of the process—and ways to deal with these developments
5:15 – 5:30 pm	<p>Question and Answer:</p> <p>Session Descriptions: These sessions will examine, among other things, recent developments, trends, and policy issues in investor-State arbitration, and how these impact on the future of the system.</p>