











## I. EXECUTIVE SUMMARY OF THE WORKSHOP

### 1.1. Overview

The “***FTAAP Capacity Building Workshop on new trends in Investment Elements negotiations in FTAs/RTAs***” (the Workshop) was held virtually on August 03 – 04, 2021. This Workshop was organized by the Ministry of Foreign Trade and Tourism of Peru (MINCETUR) with the support of the co-sponsoring Economies: Canada, Chile, China, and Indonesia; with 124 participants (42% men and 58% women) from 18 Economies, including public authorities, senior representatives, directors, negotiators, legal advisors, and other specialists.

This Workshop is the output of a project presented at the first meeting of the APEC Investment Expert Group (IEG) in February 2020, approved in July 2020. Due to Covid-19 pandemic, the event was postponed to take place on the margins of the Third APEC Senior Officials Meeting (SOM3) in August 2021.

The Workshop was aimed at public officials who work in International Investment Agreement negotiations, in defending Economies facing international investment disputes, and officials who work in designing and implementing public-private investment policies.

The idea of this Workshop arises because, in recent years, Economies have been discussing and proposing novel trends and provisions for their inclusion in their International Investment Agreements (IIAs). These novel provisions are mainly related to the Economy’s regulatory space and the balance between this space and the guarantees granted to the investors through these agreements.

During the two days of the virtual Workshop, participants were provided with deep knowledge and experiences regarding the background of the new trends and provisions, their impact on IIAs, their scope, and their application. In addition, the discussions and exchange of views allowed participants to strengthen their capacity to engage on important topics, such as the right to regulate, responsible business conduct, small and medium-sized enterprises (SMEs) development, indigenous people’s rights compensation in IIAs and protection of the environment.

According to the ex-post Survey results of the Workshop, 30% of participants filling the Survey increased their knowledge of these topics.

The purpose of the Workshop is that public officials (who work negotiating International Investment Agreements or in investment disputes or formulating and implementing private investment policy), increase their capacity to decide how to negotiate or address these new provisions and trends within their working area.

The General Director of International Trade Negotiations of MINCETUR, Mr Jose Luis CASTILLO, opened the first session of Day 1, welcoming all participants to the Workshop. He noted that this project contributes directly to implementing the 2016 Lima Declaration on the Free Trade Area of the Asia-Pacific (FTAAP) as mandated by our Leaders. Mr CASTILLO also remarked that Peru is committed to continually developing and implementing projects at IEG and in other APEC sub-fora.

Before each speaker's presentation, the Project Overseer, Ms Veronica MASEDA, introduced the topics of the Workshop. The remainder of Day One focused on describing the public-private imbalance and other asymmetries within the content of IIAs; on discussing the right to regulate and on the rights of indigenous people, SMEs, supporting gender equality, among other important issues.

During Day Two, speakers from Canada, Spain, France, Colombia, and the United States analyzed specific topics, such as, the challenges ahead when addressing compensation in IIAs, evolution and new trends regarding the Minimum Standard of Treatment of Aliens (MST), the use of environmental provisions in dispute settlement arbitral procedures and the search for a code of conduct for adjudicators in Investor-State dispute settlement mechanism.

## 1.2. Event Details<sup>1</sup>

The event followed this format<sup>2</sup>:

### Day One Sessions

- 1) **Session One:** Opening remarks.
- 2) **Session Two:** Asymmetry within the content of International Investment Agreements: Paradigms and Implications.
- 3) **Session Three:** Investment-related provisions in Regional Trade Agreements: Towards better integration of business conduct and investment impact.
- 4) **Session Four:** International Investment Agreements and its relationship with Gender, Small and Medium-sized Enterprises development and Indigenous People.
- 5) **Session Five:** An experience of recent trends in International Investment Agreements: Addressing the Right to Regulate in investment provisions.

### Day Two Sessions

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<sup>1</sup> See Annex I for the complete agenda of the Workshop.

<sup>2</sup> The presentations made at the workshop are available at the following APEC website: <http://mddb.apec.org/Pages/search.aspx?setting=ListMeeting&DateRange=2021/08/01%2C2021/08/end&Name=Free%20Trade%20Area%20of%20Asia-Pacific%20Capacity%20Building%20Workshop%20on%20New%20Trends%20in%20Investment%20Elements%20Negotiations%20in%20Free%20Trade%20Agreements%20and%20Regional%20Trade%20Agreements%202021>.

- 6) **Session One:** Compensation in International Investment Agreements and investment chapters of Regional Trade Agreements.
- 7) **Session Two:** New tendencies and exceptions included in the provision regarding Minimum Standard of Treatment of Aliens.
- 8) **Session Three:** The Right to Regulate in investment claims: Types of Regulations potentially challenged.
- 9) **Session Four:** In the search for a Code of Conduct for Adjudicators in Investor-State Dispute Settlement.
- 10) **Session Five:** Use of environmental provisions included in International Investment Agreements within dispute settlement arbitral procedures.
- 11) **Session Six:** Final remarks.

The speakers were<sup>3</sup>:

- **Mr Manjiao CHI**, Founding Director - Center for International Economic Law and Policy, University of International Business and Economics, China.
- **Mr David GAUKRODGER**, Senior Legal Adviser - Organization for Economic Co-operation and Development.
- **Dr Sergio PUIG**, Professor of International Law at James E. Rogers College of Law, University of Arizona, USA.
- **Mr Rodrigo MONARDES**, Head of the Investment Division at the Undersecretariat for International Economic Relations at the Ministry of Foreign Affairs of Chile.
- **Ms Nathalie BERNASCONI-OSTERWALDER**, Executive Director – IISD Europe & Senior Director, International Institute on Sustainable Development (IISD).
- **Dr José Manuel ALVAREZ - ZARATE**, Director - Economic Law Department of the Postgraduate Programme in International Economic Law, Externado University of Colombia.
- **Dr Catharine TITI**, Research Associate Professor at CNRS-CERSA, University Paris II Panthéon – Assas, France.
- **Dr Katia FACH (PhD)**, Professor - University of Zaragoza, Spain.
- **Mr Patricio GRANE**, Partner - Arnold & Porter Kaye Scholer LLP.

## II. BACKGROUND

In recent years, Economies have been discussing and/or proposing novel provisions for their inclusion in their IIAs regarding the Economy's regulatory space and the balance between this space and the guarantees granted to the investors through these agreements.

The Workshop seeks to address novel trends and provisions included in the latest IIAs. These new provisions aim to modernize and reflect the current practices and trends in IIAs, related to an Economy's regulatory space and to Investor-state dispute settlement (ISDS) cases. As economies negotiate Free Trade Agreements (FTAs)/Regional Trade Agreements (RTAs) and have to

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<sup>3</sup> Annex II provides brief biographies of the speakers.



face international investment disputes, the objective of the Workshop is to provide participants with deeper knowledge and experience regarding the background of the new provisions, their impact in IIAs and their scope and application; as well as the capacity to use them within their working space.

### **III. EVENT SUMMARY**

#### **3.1. Day One Sessions**

##### **3.1.1. Session One: Opening remarks**

The Project Overseer, Ms Veronica MASEDA, welcomed the participants and explained that the purpose of this Workshop was to provide public officials working in negotiating IIAs, in investment disputes or in formulating private investment policy; with a better understanding and experiences on how to address or negotiate the new investment proposals and new trends which are being incorporated in novel IIAs.

The Project Overseer remarked that during the Workshop, the speakers will address these novel topics and trends related to different provisions included in IIAs; such as, the right to regulate of the economies, corporate social responsibility, investment and its relationship with other regulatory objectives, Minimum Standard of Treatment of aliens, compensation in ISDS mechanisms and the development of a code of conduct for arbitrators.

##### **3.1.2. Session Two: Asymmetry within the content of International Investment Agreements - Paradigms and Implications**

**Mr Manjiao CHI**, Founding Director of the Center for International Economic Law and Policy, University of International Business and Economics in China and the first guest speaker of the Workshop, started session two setting the scenario of the Asymmetry within the content of IIAs by asking why should we discuss or why should we learn or pay attention to the issue of “imbalance”.

In that line, the Speaker mentioned the importance of the IIA considering that many Economies around the world have conclude a large number of investment treaties. Likewise, he stated that even though rules in the different treaties seem very similar, in many other cases they are quite different in several aspects. Investment treaties are in the process of evolution and, in recent years, some discussions over the balance of treaties have been arisen.

Mr CHI highlighted the three main aspects of these discussions addressing the imbalances existing in IIAs. Namely between host and home Economies, between Economies and Investors, and between investors and the public/community of the host Economies. Mr CHI presented the main elements as follows.

First, regarding the imbalance between host and home Economies, modern investment treaties, especially bilateral ones, were mostly made after World War II. In the 1960s and 1970s, at the United Nations and other international

fora, several documents were adopted to help newly independent developing Economies claim their economic resources and sovereignty; notably the United Nations (UN) General Assembly Resolution N° 1803 (natural resources), which deals, in several paragraphs, with the Economies' rights to take expropriation measures.

At that time, investment treaties were used for protecting foreign investment in the newly independent Economies, in particular, reflecting a tension between Foreign Direct Investment (FDI) - exporting Economies (mainly industrial Economies like the USA and the European Economies) and FDI - importing Economies (mostly the newly independent developing Economies in the Asian-Pacific, Latin America, and African zones). The main contentious issues were the right to expropriate and the Standard of compensation.

Second, when talking about the imbalance between Economies and Investors, it is essential to mention that since the 1970s, FDI has become an important driving force for the economic development of many Economies. In that context, investment treaties concluded since the 1990s aim to protect FDI by incorporating clauses that regulate Economy's administrative power. Thus, when an Economy takes measures for a public interest, such as public health, environmental protection, national security, climate change; such measures could be deemed by investors as incompatible with some standards like the Fair and Equitable Treatment (FET), creating a "regulatory chill" effect.

Third, the private-public imbalance is closely connected with the imbalance between Economies and Investors. Mr CHI explained that modern investment treaties essentially addressed interstate and Economy-Investor relations. For instance, today, transnational investment activities encompass other stakeholders, such as local communities and indigenous groups, who are often involved or impacted by transnational investment activities.

In addition, Mr CHI said that while these other stakeholders were negatively impacted by foreign investments, they could not resort to investment treaties to address their concerns directly. Instead, they would have to resort to local remedies and domestic laws to seek reparation for such damages. In many economies, such remedies, even if granted by local courts, could be insufficient.

Thereafter, Mr CHI explained the three pillars of what he calls the **triangularization** of investment treaties which are important to understand this matter of imbalance of IIAs: a) regulatory actors (host and home economies), b) foreign investors who aim to be protected by investment treaties, and the third pillar is c) the impacted groups (local communities or indigenous groups). For instance, now we can see some Free Trade Agreements are incorporating clauses regarding social responsibilities. This kind of clause aims to regulate investors' conduct, which could be beneficial to local communities. Indeed, Mr CHI believes this is an area of Investment Law that needs more research.

Likewise, he considered that the goal of some reforms should be to make the investment treaties more inclusive, to better combating regulatory chill on host states, addressing societal concerns of stakeholders, and promoting sustainable development globally. Finally, Mr CHI stated that ISDS could play an essential role in amplifying or limiting the potential adverse effects of the imbalances, mainly through the interpretative power of arbitrators in ISDS. Indeed, in the existing ISDS reform agenda, especially the ICSID 4th rules revision and the UNCITRAL Working Group on ISDS, discussions consider the Asymmetry of IIAs and try to address it via procedural reforms; including limiting the interpretative power of arbitrators, imposing higher requirements on public international law background of arbitrators, and increasing transparency of ISDS proceedings.

### **3.1.3. Session Three: Investment-related provisions in Regional Trade Agreements: Towards better integration of business conduct and investment impact**

The second presenter, **Mr David GAUKRODGER**, Senior Legal Adviser - Organization for Economic Co-operation and Development, began this session by analyzing some broad developments in investment treaties. The development of some expansive interpretations of investment protection makes some treaties akin to a form of government support for targeted investment. While some governments have opposed such interpretations due inter alia to concerns about a level playing field, many treaties remain potentially subject to such preferential interpretations. This can raise questions including about what investment should be targeted in such contexts.

Mr GAUKRODGER noted the traditional lack of interest in regulating business conduct in investment treaties – interests in protection and the attraction of investment predominated. However, there is growing interest in addressing Responsible Business Conduct (RBC) and investment impact. In that context, he described different approaches in which investment treaties may interact with policies on business responsibilities, including through: a) treaty impact on Policy space for governments and, in particular, for their non-discriminatory regulation of business; b) provisions that buttress domestic law or its enforcement; or c) provisions that speak directly to business by, for example, encouraging the observance of RBC standards.

Regarding Policy space, Mr GAUKRODGER presented several elements to explain the reasons for the increased attention to “Policy space impact”: (i) it has mainly been due to concerns about regulatory autonomy, liability, and level playing field impact; ii) there is, however, greater understanding that policy space affects business conduct, given the primacy of domestic regulation of business; and (iii) increased understanding that the uncertainty of vague treaty provisions can increase the dissuasive effect of treaties on the regulation of business. As a general matter, there is increased recognition of the need for proper regulation of business to achieve social benefits.

An example of government actions on policy space is NAFTA economies policies on FET clauses. They are limited to the minimum standard of treatment (MST) under customary international law (CIL). They have required evidence of CIL status in widespread state practice, reject arbitral awards as a basis for CIL and expressly deny CIL status of many alleged FET elements applied in ISDS such as “legitimate expectations”. In that context, Mr GAUKRODGER said that it is prevalent to find in recent treaties, such as the Pacific Alliance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Regional Comprehensive Economic Partnership (RCEP) FET clauses limited to the MST.

Another group of recent treaties, such as the Brazil treaty model, RCEP, European Union-Japan, and the United Kingdom - Japan, includes SSDS rather than ISDS for investor protection. SSDS -acts as a restraint on expansive interpretations and claims, and is often associated with non-pecuniary remedies rather than damages.

As another example of recent government actions on policy space, Mr GAUKRODGER described the limitation imposed by domestic courts to some policy space concessions to protect constitutional rights, including the right of domestic investors to equal treatment. He emphasized decisions by the Colombian Constitutional Court on some treaties and by the French constitutional courts. The Court of Justice of the European Union has addressed investment treaty impact on “regulatory autonomy”.

Concerning the second category, “Buttressing Domestic Law”, Mr GAUKRODGER noted that there has been limited use of this element in the Investment context and that there is potential for expansion. The Speaker stated that this concept has been developed more in the Trade area than in Investment. There are some clauses in investment treaties that state that governments shall not lower standards to attract investment. In broader trade and investment treaties, some approaches include specific chapters on labor environment, anti-corruption, and other. They can incorporate existing standards negotiated elsewhere.

Turning to the third element regarding the “Speaking to business” concept, Mr GAUKRODGER started by explaining how Treaties can create incentives for better business conduct. Traditionally, treaty language on the issue has been rare and mostly limited to a minimum requirement of domestic law legality of the initial investment. These clauses have generated issues of interpretation. In terms of treaty practice, a few treaties have extended legality requirements to the “operation” of the investment and not only to the entry of the investment. There is also a debate today over whether serious illegality bars claims or award enforcement in the absence of express treaty language on legality.

Mr GAUKRODGER noted there were other forms beyond legality conditions to directly address business conduct. Available options could include (i) hortatory provisions encouraging governments to promote RBC or encouraging business directly; (ii) provisions for access to dispute settlement proceedings by affected third parties; (iii) conditions on treaty coverage or on

access to particular provisions based on sectoral requirements (such, as recent efforts to identify green trade and investment) or RBC due diligence requirements; (iv) conditions on remedies such as requirements to meet RBC standards in order to recover full compensation; or (v) obligations for business, either as a general provisions exempted from dispute settlement or as a possible basis for counterclaims.

Afterward, the Speaker described some recent innovative approaches in the Investment Chapter of the United States-Mexico-Canada Agreement (USMCA). He explained the USMCA largely eliminates the risk of ISDS claims against non-discriminatory measures. In detail, Canada and the USA have excluded ISDS from their bilateral relations under USMCA following a series of controversial claims and awards based in part on the interpretation of absolute standards such as FET in a manner contrary to government submissions.

The general regime in Annex 14-D of the USMCA for ISDS between the USA and Mexico limits the scope of ISDS to claims of discrimination, under the national treatment or most-favored-nation treatment provisions, or for direct expropriation; FET claims are excluded. Only SSSDS continues to apply to absolute standards like FET and is less subject to expansive interpretations.

Annex 14-E of the USMCA sets out a special regime for resolving certain Mexico-USA disputes through ISDS, under certain conditions. Claimant ability to make FET claims in ISDS, for example, is subject to two sets of conditions. First, the investment occur in specified economic sector. This allows governments to prioritize particular sectors. This could take account of various interests including sustainable development.

Second, there must be a central government contract with the investor. From the perspective of business conduct and sustainable investment impact, a contract requirement can allows governments to obtain enforceable RBC commitments. Recognized international standards developed at the OECD, the UN, or the International Labor Organization (ILO) could be incorporated rather than creating new standards. Those standards cover key issues such as consultation with stakeholders, including local communities or indigenous peoples, among other elements. Social pressures on companies might help in obtaining such RBC commitments, even if governments negotiating those contract requirements with investors have limited negotiating power.

Mr GAUKRODGER explained that the requirement of a contract can have additional effects. General rules on government contracting can become applicable and those rules often reflect an extensive body of learning about how governments can control their commitments. The requirement of a contract may help avoid vague government action being construed as enforceable promises. For instance, the USMCA provides that the central government contracts must be in writing and bilateral. Unilateral government acts such as licenses are excluded.

A contract requirement can also allow government policies to change over time without upsetting a treaty. If the government is not positively inclined towards ISDS, it can avoid signing contracts without the need to amend the treaty. A contract requirement can thus allow central governments to control the scope of national exposure to ISDS over time or to opt out if such a policy is desired.

In conclusion, Mr GAUKRODGER noted that business responsibilities and investment impact are dynamic policy areas for consideration by investment policy makers as societal and business expectations for business conduct change.

#### **3.1.4. Session Four: International Investment Agreements and its relationship with Gender, Small and Medium-sized Enterprises development and Indigenous People**

**Dr Sergio PUIG**, Professor of International Law at James E. Rogers College of Law, University of Arizona, started session Four by highlighting how Economies in the context of negotiating their IIAs have been exploring strategies for strengthen the rights and promoting the interests of some actors within the investment environment, such as indigenous people and SMEs, or for leveling the playing field through the incorporation of gender-related measures. In that context, the objective of this session was to highlight that actors such as SMEs, women, indigenous people, and other groups can be affected by IIAs.

First, Dr Sergio PUIG stated that the groups above have been affected by IIAs since the beginning of the negotiations because some governments negotiate IIAs without their inputs or priorities. For that, governments must ask themselves to which extent IIAs are connected with the extractive industries and how governments can include these groups in the negotiation of a treaty.

Then, Dr PUIG explained that these agreements, among their effects, may change governments' governance and regulatory priority. For instance, Economies might start thinking about the goals from the perspective of governance in different ways. Sometimes they could focus more on increasing investment volume and focus less on other aspects such as social mobility, income distribution, and democratic empowerment. Consequently, in this example the effect is that it decreases the empowerment of groups of people excluded from government's priority. Some governments are starting to react to this situation. However, most IIAs still do not include specific protections against this effect, affecting mainly women, indigenous people, and SMEs.

He also pointed out that it was necessary to focus mainly on how these issues were addressed directly in IIAs through reservations, exemptions, or carve-outs that restricted investors from seeking compensation. Going into more details, on the one hand, you can have carve-outs and reservations. Those carve-outs and reservations protect ex-ante specific sectors, industries, and policies from any challenges by investors or other governments. On the other

hand, there is also the possibility of having exemptions that primarily preserve policy space for future exigencies.

In practice, the Speaker said that the distinction between carve-outs and exemptions was minimal. However, he said it was clear that IIAs were better at establishing limits on what governments could do than establishing limits on what investors could do. Still, these IIAs were less compelling to include specific actions to support particular goals (social inclusion, protection of women, indigenous people, among others).

In cases of investment chapters that are part of commercial agreements, if there are not some exemptions included, the trend is that most of the issues related to SMEs, gender, and indigenous people tend to be regulated by separate chapters.

An example of exemptions that have been included in IIAs was the original NAFTA signed and negotiated in 1992. Canada made a reservation that makes very clear these protections that Mr PUIG mentioned: “*Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.*” The USA included a similar provision in NAFTA, and now a similar provision exists in USMCA.

Dr PUIG highlighted the relevance of linking the investment chapter to other chapters dealing with gender issues and SMEs. He explained that, in many Economies, most of the owners of SMEs are women, or they tend to have higher participation in SMEs. So, by protecting SMEs, we are also protecting women and gender. For instance, Article 14.17 (Corporate Social Responsibility) of the USMCA establishes some commitments to be supported by Parties of the USMCA, which may include different documents such as the OECD Guidelines for Multinational Enterprises (the standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples’ rights, and corruption). {At the same time, the USMCA has two important chapters, 23 and 25, on Labor and Small and Medium-Sized Enterprises. Finally, the USMCA also provides a platform for cooperation and information sharing to successfully incorporate women-owned SMEs into the regional supply chain (Article 25.2 (b) of the USMCA).

### **3.1.5. Session Five: An experience of recent trends in International Investment Agreements: Addressing the Right to regulate in investment provisions**

**Mr Rodrigo MONARDES**, Head of the Investment Division at the Undersecretariat for International Economic Relations of the Ministry of Foreign Affairs of Chile, presented new trends regarding the Right to Regulate in investment provisions. He started by discussing the importance of balancing investor protection and the Economy’s right to regulate and structured his presentation as follows.

Mr MONARDES explained that the Right to Regulate could be found in the principle of International Law of “Sovereignty”. Under this principle, sometimes Economies decide to negotiate with capital importing Economies or with a capital-exporting Economy. They could start negotiating with an Economy that is a massive investor in their own Economies. In this context, it is important that Economies need to be aware of the difficulty of balancing investor protection and economies' interests. Indeed, the Right to Regulate is something that Economies need to analyze on a case-by-case basis. It is also important to understand the context in which Economies are negotiating this type of Agreement.

Mr MONARDES also highlighted different approaches and policy options for negotiators to address the issue of the right to regulate within international investment agreements. First, it is important to understand the scope of application of this international Agreement fully. Second, governments can limit the scope by making some specific exclusions or just clarifying the scope, or making just blunt exclusions about sectors or activities governments do not want to cover under this type of Agreement. Third, another option to address the right to regulate is through its explicit recognition.

After identifying the context, according to Mr MONARDES, it is important to determine to which extent Economies should address the issue of the Right to Regulate within IIAs. To that purpose, it is crucial to define the scope of application of that IIAs. It is possible to limit the scope by making specific exclusions, clarifying the scope, or excluding sectors or activities that Economies do not want to cover under this type of Agreement.

Another option is that Economies can address the explicit recognition of the Right to Regulate in IIAs. Then, the Right to Regulate is about drafting the substantive provisions. Mr MONARDES stated that this is a critical issue that negotiators should be focusing on. It is also essential for negotiators to have a very clear view of the way this kind of provision needs to be understood. In other words, Economies need to predict what would be the elements which are giving to a tribunal to make an assessment and to make clear the content of the obligation within an International Investment Agreement.

In that context, an example about recent trends and expressions of the Right to Regulate is the provision in article 8.9 from the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), which reaffirms Parties' right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

The second paragraph of this article 8.9 states the fact that if a party establishes a new regulation, including a modification of its legal framework that may affect an investment or may interfere with investor expectations, that does not amount to a breach of an obligation under the Investment Protection Section of CETA (Section D).



Another example is footnote 14 of the CPTPP Investment Chapter. This very interesting provision tends to reaffirm how national treatment and most favored nation obligations (Non-Discrimination) should be interpreted. The footnote of the CPPTP Investment Chapter aims to provide further guidance to tribunals to determine a breach of the obligations mentioned.

Article 9.6 of the CPPTP states further clarification regarding the breach of the obligation of Minimum Standard of Treatment by limiting expectations under this obligation and giving clarification on a specific topic (subsidies).

The speaker also explained at least three different approaches to address non-discriminatory measures in the context of expropriation, which entails different legal effects on how a tribunal should interpret a specific provision and which can be considered expressions of the Right to Regulate:

- a) Annex 9-B of the CPTPP Investment Chapter, which states that Non-discriminatory regulatory actions by a Party are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.
- b) Foreign Investment Promotion and Protection Agreement Model 2021 of Canada (FIPA), which prohibits discrimination based on nationality, giving severeness and purposes.
- c) Annex 8-A of the CETA Investment Chapter, which states that for greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.

So, when an APEC economy engages in this type of negotiations, in the end, the most important issue economies will be litigating about, is the objectives that the economy might have reached by imposing some regulation.

Finally, Mr MONARDES explained why it is vital to have the recognition of the right to regulate. Because, in the end, this kind of provision is always going to be interpreted, and the way that the economy drafts these obligations is going to be crucial for eventually having or not having responsibility under this Agreement and throughout the mechanism that the economy agrees on having this type of agreement.

## **3.2. Day Two Sessions**

### **3.2.1. Session One: Compensation in International Investment Agreements and investment chapters of Regional Trade Agreements**

In this session, **Ms Nathalie BERNASCONI-OSTERWALDER**, Executive Director of the International Institute on Sustainable Development (IISD) in Europe, explored compensation under International Investment Agreements

and under investment chapters of Regional Trade Agreements, which arbitral tribunals can award to foreign investors if they find that a host Economy has breached that treaty. The level of compensation is determined by a combination of factors, including the legal principles that govern compensation and jurisprudence on the same.

The guest speaker shared with participants the main aspects of this matter and some views to consider. She described the problem of compensation under international investment treaties by identifying the following elements: 1) The amounts of compensation being awarded are significant – and are increasing; 2) Large awards are made in regulatory disputes, even if the investment continues operating profitably; 3) Large awards are made for interference with planned investments that were never executed; 4) Existing approaches depart from accepted principles of international law and practices of other international courts; 5) Existing approaches are complex and expensive; 6) Arbitral jurisprudence is inconsistent; and 7) Arbitral tribunals do not take important contextual factors into account.

Starting with problem N° 1, Ms BERNASCONI-OSTERWALDER said that in the early 2000s, awards of compensation in the tens of millions of USD were considered large. These sums seem quaint in retrospect. Today, the most significant compensation award in investment treaty arbitration is the USD 40 billion awarded in *Hulley v. Russia*. This was the largest of several related claims arising out of the nationalization of *Yukos*, in which a total of USD 50 billion was awarded.

Ms BERNASCONI-OSTERWALDER shared with participants additional key information regarding cases with a large award of compensation. In detail, she explained there were about 50 known cases in which a tribunal has awarded compensation over USD 100 million. For example, the USD 4 billion award (excluding interest) in *Tethyan Copper v. Pakistan* in July 2019 was almost as large as the International Monetary Fund's (IMF) bailout that had been agreed two months earlier with the intention of saving the Pakistani economy from collapse.

Regarding problem N° 2, Ms BERNASCONI-OSTERWALDER explained that the existing treaty provisions on compensation had their roots in the decolonization era of the 1960s and 1970s. At that time, there were stark disagreements between developed and developing economies about the standard of compensation that should be paid for foreign-owned assets' expropriation. Recently, the provisions of investment treaties on compensation for expropriation reflected the view of developed economies: that compensation should equal the fair market value of an expropriated asset, regardless of the circumstances in which the asset had been acquired or the host state's ability to pay. Notwithstanding this fundamental disagreement, the assumption of both developed and developing economies was that investment disputes generally involved the seizure of foreign-owned assets by the host state.

Ms BERNASCONI-OSTERWALDER explained another problem (Problem N° 3) in recent arbitral practice: tribunal's willingness to base compensation on projections of an investment's expected future income across its entire life cycle. In that regard, there can be a vast discrepancy between the amount of money invested by the investor and the amount obtained in compensation. In *Tethyan Copper v. Pakistan*, an investor was awarded USD 4 billion plus interest for Pakistan's failure to grant the necessary approvals for the investor to build and operate a mine—even though the mine was never built. The tribunal based this compensation on estimating the income the investment would have earned over its entire 50-year operating cycle if the investment had been made.

The next problem (Problem N° 4) involves a discussion about the Arbitral Tribunals and their responsibility for increasing the amount of compensation awarded in investment treaty arbitrations. There is an increasing tribunals' willingness to base compensation on projections of an investment's expected future income across its entire life cycle.

Indeed, Ms BERNASCONI-OSTERWALDER explained the most common valuation technique used to calculate compensation on this basis was the discounted cash flow (DCF) method. Tribunal practice in this regard departs from previously accepted principles of international law and World Bank's guidelines on the valuation of foreign investment.

The Speaker also described how arbitral practice differs from the comparable practice of other international courts and tribunals. For instance, the World Trade Organization (WTO) dispute settlement system does not ordinarily compensate successful claimants. However, the European Court of Human Rights (ECtHR) allows private actors to sue states for monetary compensation. Nevertheless, compensation awards accorded in such disputes are far lower than those under investment treaties.

In detail, Ms BERNASCONI-OSTERWALDER highlighted in 2004, the shareholders of *Yukos* brought a case against Russia to the ECtHR. The case arose out of the events surrounding the nationalization of *Yukos* that gave rise to *Hulley v. Russia* and involved essentially the same legal claims in different forums. In the ECtHR, they were awarded EUR 1.87 billion (USD 2.3 billion), in what remains the largest award of compensation ever made by the ECtHR. In parallel, the *Yukos* shareholders were awarded a total of USD 50 billion in compensation in treaty-based ISDS claims.

Another problem (Problem N° 5) when describing compensation in IIAs and RTAs is the complexity of jurisprudence on compensation which increases costs, and disadvantages economies that lack in-house capacity to engage in detailed arguments about the intricacies of different valuation methods. Ms BERNASCONI-OSTERWALDER explained the DCF method is especially complex, as it relies on a complex set of interlocking forecasts and assumptions about the future of the investment for its entire lifespan.

For instance, foreign investors almost always argue for using this method, leading to more significant compensation awards. Claimant investors usually rely on specialized financial consultancies to provide expert evidence in support of their proposed valuations. In that context, host states must then retain financial experts of their own to refute the valuation evidence of the investor.

The complexity of the DCF method and the parties' reliance on expert witnesses drive up litigation costs. In *Tethyan Copper v. Pakistan*, the claimant spent USD 4.5 million on financial experts and USD 17.5 million on legal fees for the compensation phase of proceedings alone. Pakistan spent almost USD 10 million defending the compensation phase, including both financial experts and legal fees.

Focusing the discussion on problem N° 6, regarding inconsistent arbitral jurisprudence, Ms BERNASCONI-OSTERWALDER explained why the existing approaches in determining compensation amounts could be complex and expensive. Besides, they can also be highly inconsistent and leading to divergent outcomes. She specified that Arbitral approaches were inconsistent in at least three technical ways: 1) they diverge when it is considered appropriate or not to calculate compensation based on expected future income, 2) They take different approaches to the quality of evidence needed to back up projections that underpin future income-based calculations of compensations like DCF, and lastly, 3) they diverge in terms of how to account for risk in an investment's projected income stream across its entire life cycle.

Regarding the problem N° 7, Ms BERNASCONI-OSTERWALDER emphasized existing principles on compensation under investment treaties are "all or nothing" in character. If a tribunal concludes that a host state's change in the regulatory arrangements governing investment does not breach an investment treaty, the investor receives no compensation. Suppose the tribunal concludes that the change does breach the investment treaty. In that case, the investor is awarded compensation for its loss caused by the regulatory change under the principle of "full reparation." Contextual factors are not relevant in the determination of compensation, with some limited exceptions. For instance, tribunals do not consider: a) The strength of the public interest rationale justifying interference with the investment; b) Misconduct on the part of the investor, subject to limited exceptions; and c) The host state's ability to pay.

Typically, investment treaties address the issue of compensation only concerning expropriation. Here, a treaty usually provides that a party may nationalize or expropriate investments only with fair and adequate compensation. Then the treaty clarifies that this refers to the fair market value of the investment. For other breaches, investment treaties typically do not offer any guide at all. Based on customary international law, Tribunals have filled that gap by using the principle of full reparation. In the end, there is not much difference in the calculation of damages because the amount awarded depends on the valuation techniques. When we think about the valuation techniques that are applied today, they are either backward-looking or

forward-looking. We have market-based and asset-based approaches, which are backward-looking, and then we have income-based approaches like the DCF method, which is forward-looking.

Ms BERNASCONI-OSTERWALDER added if we were to design principles to address some of the problems, i.e., the seven issues mentioned, we could say there are three clear principles: 1) the language should be as clear and specific as possible, 2) the language should be comprehensive, 3) we need to ensure that the compensation provisions are consistent.

Finally, she referred to some ideas and examples for reform. These included: balancing relevant factors; capping compensation to the investor's expenditures; integrating the notion of state gains; and applying national law to determine compensation. Examples of the balancing approach have been used in African instruments where criteria could be included in the IIAs to assess compensation on an equitable balance between the public interest and interest of those affected, having regard at all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment, and so forth.

### 3.2.2. Session Two: New tendencies and exceptions included in the provision regarding Minimum Standard of Treatment of Aliens

**Mr Jose Manuel ALVAREZ - ZARATE**, Director of the Economic Law Department of the Postgraduate Programme in International Economic Law, Externado University of Colombia, presented New Tendencies and Exceptions included in the provision regarding Minimum Standard of Treatment of Aliens. He started the presentation by describing the changes over the time on this Standard, including bilateral investment treaties (BIT) and FTAs signed by the United States of America from 1980 – 2021; BITs/FTAs signed by the United Kingdom from 1980 – 2000; and IIAs signed by developed Economies (Italy, France, United Kingdom, and Germany) with APEC Economies. In that context, Mr ALVAREZ - ZARATE explained the main changes in the language of this Standard.

In the second part of this presentation, Mr ALVAREZ - ZARATE described the main interpretations of FET and the Minimum Standard of Treatment (MST) in Arbitral Awards. See the following Table:

Table  
**Evolution of Fair and Equitable Treatment /Minimum Standard of Treatment**

Treaty	Arbitral Award / Comments
<i>OIC Agreement (1981)</i> <i>Article 8</i> 1. The investors of any contracting party shall enjoy, within the context of	<i>Hesham T. M. Al Warraq v. Republic of Indonesia</i> <u>Comment</u> : Although the OIC Agreement contained no FET

<p>economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors.</p>	<p>provision, Al Warraq sought to import the FET obligation contained in the United Kingdom–Indonesia BIT through the most-favoured-nation (MFN) clause in the OIC Agreement. Indonesia countered that the MFN provision only applied within the context of the same economic activity and that the two treaties addressed different activities. The Tribunal imported the FET clause, reasoning that the object and purpose of the OIC Agreement, as emphasized in the preamble, was investment promotion and protection, which conferred a broad range of rights on investors.</p>
<p style="text-align: center;"><i>Argentina – UK BIT (1990)</i> <i>Article 2</i></p> <p>(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant 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 investors of the other Contracting Party. (...)</p>	<p style="text-align: center;"><i>National Grid plc.</i> <i>v. The Argentine Republic,</i> <i>UNCITRAL. (3 November 2008)</i></p> <p>(...) 168. In their ordinary meaning, the term “fair” means “just,” “even-handed,” “unbiased,” “legitimate,” “reasonable.” Equitable is defined as “fair” and “just,” “just, fair, and right, in consideration of the facts and circumstances of the individual case.” While the definition of each term uses the other and underlines their relationship, two aspects stand out: the idea of even-handedness and the need to consider all the facts and circumstances of an individual case.</p>
<p style="text-align: center;"><i>NAFTA (1992)</i> <i>Article 1105</i></p> <p>Minimum Standard of Treatment 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.</p>	<p style="text-align: center;"><i>S.D. Myers, Inc. v. Government of Canada, UNCITRAL. Partial Award (13 November 2000)</i></p> <p>262. Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases (...) fair and equitable treatment (...) and ...full protection and security (...) cannot be read in isolation. They must be read in conjunction with the introductory phrase (...) treatment in accordance with international law.</p>
<p style="text-align: center;"><i>Mexico – Spain BIT (1995)</i> <i>Article 4 (1) y (2)</i></p> <p>1. Each Contracting Party shall guarantee in its territory fair and equitable treatment, in accordance with international law, for the investments made by investors of the other Contracting Party.</p>	<p style="text-align: center;"><i>Técnicas Medioambientales Tecmed c. Estados Unidos Mexicanos (ICSID Case No. ARB (AF)/00/2)</i></p> <p>154. (...) The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may</p>

<p>2. This treatment shall be no less favourable than that which is extended in similar circumstances by each Contracting Party to the investments made in its territory by investors of a third State.</p>	<p>know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.” (...)</p>
<p><i>Germany – Thailand BIT (2002)</i> <i>Article I</i> Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and endeavour to admit such Investments in accordance with its legislation and regulations framed there under. It shall in any case accord such investments fair and equitable treatment</p>	<p><i>Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL. Award (1 July 2009)</i> Specific Components of the Standard: - Protection of legitimate expectations: (...) - Good faith: (...) - Transparency, consistency, non-discrimination (...)</p>

After presenting these jurisprudences in Investment Arbitration, Mr ALVAREZ - ZARATE explained how MST has struggled for its recognition in the context of international investment law. Currently, the trend is to include some clarifications for the broad standard such as (i) a determination that there has been a breach of another provision of the agreement or another international agreement does not establish by itself that there has been a breach of this MST; (ii) the mere fact that a party takes action inconsistent with the investors’ expectations does not constitute a breach of this MST; (iii) the fact that a measure breaches domestic law does not establish by itself a breach of this MST.

However, until today, the Standard itself is vague in definition, scope, and content.

In sum, whatever the effects of interpretations by economies and arbitral tribunals could be, the severity of the threshold for this Standard is still high. The MST experienced opposition and evolution; what the future holds for this standard is to be seen.

### 3.2.3. Session Three: The Right to Regulate in investment claims: Types of Regulations potentially challenged

**Dr Catharine TITI**, Research Associate Professor at CNRS-CERSA at University Paris II Panthéon – Assas in France, shared with Participants a detailed overview of the right to regulate and the types of potentially challenged measures. For that, she explained and described the main aspects of the right to regulate as follows.

Dr TITI stated that a possible definition of the right to regulate could be the following: “*The right to regulate is the legal right of the State to take measures in derogation of commitments it has undertaken based on an investment agreement without having a duty to compensate affected investors*”. Two

elements are essential in this definition. One is that it is a legal right, so the main discussion of this session is about a fundamental right that economies have which is safeguarded through international law. And two, that there's no duty to compensate if an economy, in a concrete case, has this right to regulate.

Afterward, Dr TITI indicated that the principal means of safeguarding the right to regulate is through treaty law; the Tribunal will primarily focus on the treaty as first and foremost the applicable law in the given case. When it comes to treaty law, there are two primary means by which the right to regulate is safeguarded; first, the treaty's preamble; second, and this is the most important, treaty exceptions. In addition, she pointed out that some new treaties contain express statements outside the preamble to the effect that the states reserve their right to regulate with respect to given public welfare objectives.

Dr TITI continued explaining that the preamble does not include legally binding independent obligations. However, the preamble can be used in an interpretation in accordance with the Vienna Convention on the Law of Treaties. So, it can be a powerful tool to help to interpret substantive provisions that exist in the main body of the treaty.

Treaty exceptions are the principal means by which the right to regulate is safeguarded. Treaty exceptions can be general or specific, depending on whether they target broad or specific measures. Some of the most common treaty exceptions concern essential security interests. Such provisions specify that nothing in this Agreement should be interpreted as preventing a Party from taking measures to protect the state's essential security interests. There are also exceptions related to the protection of the environment, measures for the protection of public health, the protection of public order, and the protection of culture. In the opinion of the speaker, these are the ones that form the core of the right to regulate because this right is associated with measures taken to protect the public interest.

These are the exceptions most commonly identified as safeguarding the right to regulate in new treaties. In reality, other types of exceptions are common too and they can also safeguard the state's right to regulate, such as exceptions to the most-favored-nation treatment.

Increasingly, treaties have been including exceptions. About ten years ago, it was North-American treaties that included exceptions for essential security interests, the protection of the environment, and so on. New generation treaties tend to include safeguards for the right to regulate more broadly, in other words, beyond North America too. Still, they tend to be the minority of treaties in existence, since most treaties currently in force are old generation treaties. New treaties tend to not only have exceptions that allow states to take measures for the protection of the environment, essential security interests and so on, but we also have treaties that specify sometimes both in the preamble and the body of the treaty that the parties reaffirm their right to regulate.



Finally, the speaker stressed the significance of the issue of balance. In the past, investment treaties were focused on protecting foreign investment, not including any safeguard for the host Economy. Increasingly, some new treaties can seem essentially more preoccupied with safeguarding the parties' right to regulate than protecting investment. Balance is necessary, but we each tend to perceive balance differently.

#### **3.3.4. Session Four: In the search for a Code of Conduct for Adjudicators in Investor-State Dispute Settlement**

**Dr Katia FACH**, Professor of the University of Zaragoza, presented this topic by describing the current situation and the recent developments in the Investment Arbitration System regarding the Code of Conduct for Adjudicators in Investor-State Dispute Settlement and its positive future. For that, she explained some key aspects.

First, Dr FACH indicated that although ICSID is the main institution in the management of investment arbitrations, its provisions on the arbitrators' actual ethical duties have been, so far, both brief and generic. Article 14 of the ICSID Convention illustrates it: *"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."*

According to Dr FACH, the outcome has been a gap in practice regarding the specifications for and assessment of the crucial role of investment arbitrators in settling investment disputes. In that line, the speaker stated that along with the EU's strong desire to regulate the ethical aspects of adjudicators' duties in its latest generation of IIAs, (whether already in force or still under negotiation); a growing number of non-European IIAs and Model Agreements also contain provisions that include references to ethics and sometimes, additionally, provide a code of conduct for investment adjudicators.

In the same vein, Dr FACH explained that since 2017, UNCITRAL Working Group III has pondered on the need for a potential content of an Investor-State Dispute Settlement Reform and has devoted particular attention to ISDS court members. As the winds of change point towards creating a Multilateral Investment Tribunal, the need to count on an all-embracing code of conduct with a vocation for universality is becoming more evident.

ICSID has responded to these global perspectives by partnering with UNCITRAL to present a 2020 Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. Although the Code of Conduct is still at the draft stage, it is worth devoting time to analyzing its content and paying attention to the justifications and clarifications provided by its institutional authors. This also entails indirectly analyzing other recent codes of conduct compared with the new ICSID-UNCITRAL proposal.

Second, the ICSID-UNCITRAL 2020 Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement contains 12 articles entitled: Definitions (Article 1); Application of the Code (Article 2); Duties and Responsibilities (Article 3); Independence and Impartiality (Article 4); Conflicts of Interest: Disclosure Obligations (Article 5); Limit on Multiple Roles (Article 6); Integrity, Fairness, and Competence (Article 7); Availability, Diligence, Civility, and Efficiency (Article 8); Confidentiality (Article 9); Pre-appointment Interviews (Article 10); Fees and Expenses (Article 11); and Enforcement of the Code of Conduct (Article 12).

A general introduction complements the document, and a commentary accompanies each article. To make this section more systematic, the content of the Draft Code of Conduct is studied according to the following internal subdivision: (a) Opening section; (b) Overview of adjudicators' obligations; (c) Detailed provisions on principles and requirements regarding investment adjudicator's conduct; and (d) The enforcement of adjudicators' ethical obligations.

Finally, Dr FACH explained that regarding the prediction of the future about the conduct of investment adjudicators, even if there is not yet a global answer to this topic, she is optimistic about the last document of UNCITRAL regarding the code of conduct of adjudicators.

### **3.3.5. Session Five: Use of environmental provisions included in International Investment Agreements within dispute settlement arbitral procedures**

**Mr Patricio GRANE**, Partner at Arnold & Porter Kaye Scholer LLP, explained the importance of IIAs in recognizing Economies' sovereign right to adopt measures to protect the environment and to require that foreign investment be consistent with such measures and with the Economy's environmental protection policies. Mr GRANE described how IIAs recognize such sovereign rights varies. It may be found in the preambles of the IIAs, in their definition of investments, in performance requirement provisions, in obligations to grant national treatment, in obligations to grant fair and equitable treatment, in the prohibition of indirect expropriation without compensation, among others. His presentation was divided into (i) taxonomy of the provisions in IIAs dealing with the environment and (ii) a discussion about the limited jurisprudence from ISDS tribunals that have interpreted the scope of such provisions. In those lines, Mr GRANE shared with Participants some discussion elements, as follow:

Protecting the environment must be a priority for every single Economy in the world. That is not incompatible with protecting human rights, eradicating poverty, and encouraging economic development. Quite the contrary, preserving the environment promotes all those goals. Such is the importance of protecting the environment that it should be a legally binding obligation for all Economies in accordance with their means and the specific circumstances.

The protection of foreign investment through treaties must be sufficiently clear by tribunals and investors. They understand that Economies enjoy the discretion of adopting environmental measures and that Economies will not be liable for compensation even when such actions harm their investments.

An example of environmental protection is the preamble of the China-Trinidad Tobago Treaty of 2002, which states that “*Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application*”. Another example is the Energy Charter Treaty which provides in its preamble that “*the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects*” are to be taken into account, and also expressly recognizes that “*the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal*”.

A broad example of a legal instrument for Economies to protect specific public policy objectives is the recognition of the right to adopt measures to regulate public policy objectives which could be found in the preamble of the Japan-Kenya BIT of 2016, which states, “*recognizing that this Agreement is designed to allow each Contracting Party to regulate, and to introduce new measures relating to, investments in its Area to meet national public policy objectives*”.

Some treaties mention sustainable development in the definition of investment. The Morocco-Nigeria BIT of 2016 is an example because it defines investment as an enterprise and its assets in accordance with the law of the host Economy “*which contribute sustainable development of that Party*”.

Other groups of treaties make exceptions to national treatment in relation to measures related to the environment. An example is the Russian Federation-Sweden BIT of 1995, which includes exceptions to national treatment under the Parties legislations, allow new exceptions to preexisting investments, and if “*the exception is necessitated for the protection of the environment as well as the maintenance of defense, national security and public order, morality and public health*”.

Annex 9-B of CPTPP states expressly in Annex 9-B that “*Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances*”. Similarly, the Canada-Korea FTA of 2014 states that, except in rare circumstances, such as when a measure “*cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives (such as, public health, safety, environment, among others) do not constitute indirect expropriations.*”

There are also treaties recognizing this right of the host Economy. An example of these treaties is the Peru-El Salvador BIT of 1996 and the Canada-EU

CETA of 2016. However, these treaties state a performance requirement such as protecting natural resources and the environment, including limitation on the available number and scope of concessions granted. In addition, Peru-Japan 2008 BIT expressly “*recognize that it is inappropriate to encourage investment by investors of the other Contracting Party and a non-Contracting Party by relaxing (...) environmental measures (...)*”.

Certain treaties are more ambitious, and they exclude ISDS altogether regarding legislation that provides for high levels of environmental protection. For example, the Belgium-Luxembourg-Colombia BIT of 2009 provides and expressly recognizes “*the right of each Contracting Party to establish its levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify its environmental legislation accordingly, each Contracting Party shall strive to ensure that its legislation provides for high levels of environmental protection and shall strive to continue improving this legislation*”.

In that context, treaty practice varies. It has developed over the years, taking different forms. The various forms in which those environmental protections are recognized or reflected in treaties are crucial. It is essential because the tribunals that apply those treaties will do so starting from the Vienna Convention on the Law of Treaties, which is considered a codification of customary international law and state practice concerning treaties. So, to avoid having to face claims related to these kinds of environmental protection measures, it is important to adopt very robust provisions that make manifestly clear that an Economy has this broad exception to adopting measures to protect the environment without fear of liability. Economies could also consider available jurisprudence and Awards from ISDS tribunals that have interpreted the scope of such provisions.

### **3.3. Session Six: Final remarks**

Concluding remarks were presented by Mr Diego LLOSA, Vice-Minister of Foreign Trade of MINCETUR. He noted the importance of keeping working with APEC economies to continue with the Leaders’ mandate of implementing the 2016 Lima Declaration on the Free Trade Area of the Asia-Pacific. In that regard, he announced that further discussions and future capacity-building sessions could be developed on investments and other areas to continue building knowledge among APEC officials for the eventual negotiation of the FTAAP.

## **IV. Additional conclusions, recommendations, or suggestions from Speakers**

Main conclusions of the Speakers are as follows:

- ✓ Goals of investment reform: Mr Manjiao CHI believes that the goal should be to make the investment treaties more inclusive; not only to simply make them more balanced between the host Economy and foreign investors. New

treaties should better combat regulatory chill on host Economies, address stakeholders' societal concerns, and promote sustainable development.

- ✓ Mr David GAUKRODGER concluded that business responsibilities and investment impact our dynamic policy areas as well as societal and business expectations leading to business conduct. He thinks investment treaty policy may have lagged behind other fields such as regulatory autonomy and business conduct. He informed that incorporating business responsibilities in investment treaties will form an essential part of a new OECD work program on the future of investment treaties, which was launched in March 2021. These discussions will consider challenges such as climate change, increased inequality in many jurisdictions, expectations for business conduct, and greater competition for investment. Discussions Will be focused on the many existing treaties and consider potential changes in their content to better align them with current designs and insights. They will be part of OECD's work in the future.
- ✓ Regarding the protection of indigenous people and other vulnerable groups, Dr Sergio PUIG concluded that it should be included as part of the negotiations of the IIAs. He stated that more could be done to limit discrimination, such as understanding the effects of some provisions like national treatment and providing specific safeguards for policy implementations that can contain the impact of those provisions. Other issues could be how to make IIA less of a burden for vulnerable communities through linking some of the emerging rules of international law on benefit-sharing for indigenous people; by mandating that governments could conditionate specific economic benefits, could concession contracts o the implementation of the process of fair compensation and could direct sharing of benefits for vulnerable populations.
- ✓ Mr Rodrigo MONARDES shared a preliminary conclusion regarding the right to regulate. He thinks that by negotiating IIAs as usual, Economies are putting some constraints on their ability to pursue legitimate public policy objectives, because measures could and will be challenged by Investors if they are affecting their rights under the Agreement. In the end, to scope the specific standards of protection and obligations, it is essential to address the right to regulate and to manage Economies regulatory authority in terms of what Economies are going to regulate in the future. Another important issue is the need to address specific sensitivities that you have as an economy. So, negotiators have to review their practice, the past course of the Economies, and arbitral awards and decisions. This is a constant exercise that Economies need to do to negotiate IIAs because sensitivities, awards, and trends may change.
- ✓ Dr Titi concluded that treaty exceptions are the foremost means by which the right to regulate is safeguarded. Some of the most common treaty exceptions concern essential security interests. There are also exceptions related to the protection of the environment, measures for the protection of public health, the protection of public order, and the protection of culture.

These are the ones that form the core of the right to regulate because this right is associated with measures taken to protect the public interest.

- ✓ Ms Nathalie BERNASCONI-OSTERWALDER concluded that the assessment of fair and adequate compensation should be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and; taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment. These are elements that usually are not taken into account today. Compensation is a critical and still is an overlooked issue in investment treaty-making. The complexity and technicality of existing jurisprudence are sometimes daunting but should they do not need to be a barrier to reform, examples of alternative approaches are beginning to be integrated.
- ✓ Dr Fach concluded that regarding the prediction of the future about the conduct of investment adjudicators.
- ✓ Mr Patricio GRANE concluded that Economies must have the necessary regulatory space to adopt measures that protect the environment. Economies should do so without fear of being ordered to pay compensation, which can be hundreds of millions of dollars, and to do so without the fear of facing potential claims. The only way to avoid facing these claims is to adopt very robust provisions that make manifestly clear that Economies have this broad exception to adopting measures to protect the environment without fear of liability. These provisions cannot open the door to abuses, which only mask discrimination or are adopted in bad faith.

## Annex I

### Agenda

#### **Day One Sessions**

*Tuesday, August 3*

##### **Session One:** Opening remarks

Official Opening & Welcome: **Mr Jose Luis CASTILLO, General Director of International Trade Negotiations, Ministry of Foreign Trade and Tourism of Peru**  
Introduction: **Ms Veronica MASEDA Beaumont, Project Overseer, Ministry of Foreign Trade and Tourism of Peru**

6:00am-6:10am (Lima time) / 7pm-7:10pm (Singapore time)

##### **Session Two:** Asymmetry within the content of International Investment Agreements: Paradigms and Implications

6:10am-6:40am (Lima time) / 7:10pm-7:40pm (Singapore time) + 10min Q&As.

**Speaker: Mr Manjiao CHI, Founding Director - Center for International Economic Law and Policy, University of International Business and Economics, China**

##### **Session Three:** Investment-related provisions in Regional Trade Agreements: Towards better integration of business conduct and investment impact

6:50am-7:20am (Lima time) / 7:50pm-8:20pm (Singapore time) + 10min Q&As.

**Speaker: Mr David GAUKRODGER, Senior Legal Adviser - Organization for Economic Co-operation and Development**

#### **BREAK 10 Minutes**

##### **Session Four:** International Investment Agreements and its relationship with Gender, Small and Medium-sized Enterprises development and Indigenous People

7:40am-8:10am (Lima time) / 8:40pm-9:10pm (Singapore time) + 10min Q&As.

**Speaker: Dr Sergio PUIG, Professor of International Law at James E. Rogers College of Law, University of Arizona**

##### **Session Five:** An experience of recent trends in International Investment Agreements: Addressing the Right to Regulate in investment provisions.

8:20am-8:50am (Lima time) / 9:20pm-9:50pm (Singapore time) + 10minQ&As.

**Speaker: Mr Rodrigo MONARDES, Head of the Investment Division at the Undersecretariat for International Economic Relations of the Ministry of Foreign Affairs of Chile**

**Day Two Sessions**  
*Wednesday, August 4*

**Session One:** Compensation in International Investment Agreements and investment chapters of Regional Trade Agreements

6:00am-6:20am (Lima time) / 8:00pm-8:20pm (Singapore time) + 10min Q&As.

**Speaker: Ms Nathalie BERNASCONI-OSTERWALDER, Executive Director – IISD Europe & Senior Director, International Institute on Sustainable Development (IISD).**

**Session Two:** New tendencies and exceptions included in the provision regarding Minimum Standard of Treatment of Aliens

6:30am-6:50am (Lima time) / 7:30pm-7:50pm (Singapore time) + 10min Q&As.

**Speaker: Dr Jose Manuel ALVAREZ-ZARATE, Director - Economic Law Department of the Postgraduate Programme in International Economic Law, Externado University of Colombia**

**Session Three:** The Right to Regulate in investment claims: Types of Regulations potentially challenged

7:00am-7:20am (Lima time) / 7:00pm-7:20pm (Singapore time) + 10min Q&As.

**Speaker: Dr IUR Catharine TITI, Research Associate Professor at CNRS-CERSA, University Paris II Panthéon – Assas, France**

**BREAK 10 Minutes**

**Session Four:** In the search for a Code of Conduct for Adjudicators in Investor-State Dispute Settlement

7:40am – 8.00am (Lima time) / 8:40pm-9:00pm (Singapore time) + 10min Q&As.

**Speaker: Dr Katia FACH, Professor - University of Zaragoza, Spain**

**Session Five:** Use of environmental provisions included in International Investment Agreements within dispute settlement arbitral procedures

8:10am – 8.40am (Lima time) / 9:10pm-9:40pm (Singapore time) + 10min Q&As.

**Speaker: Mr Patricio GRANE, Partner – Arnold & Porter Kaye Scholer LLP**

**Session Six:** Final remarks: **Mr Diego LLOSA, Vice-Minister of Foreign Trade, Ministry of Foreign Trade and Tourism of Peru**

8:50am – 9:00am (Lima time) / 9:50pm-10pm (Singapore time)



## **Annex II Speakers**

### **Day One Sessions**

#### **Manjiao CHI (Cliff): Session Two**

Manjiao CHI (Cliff) is Professor and Founding Director, Center for International Economic Law and Policy (CIELP), University of International Business and Economics (UIBE), China. He is Deputy Chair, UNCITRAL Academic Forum on ISDS; Co-Chair, ASIL Asia Pacific Interest Group. Founding editor of *Asian Yearbook of International Economic Law*, author of numerous books and articles, frequent speaker in major international law conferences, and visiting professor of leading schools across the world. In 2021, he delivered a course in The Hague Academy of International Law. He has experience of international commercial and investment arbitration, WTO litigation, treaty negotiation and trade policy-making.

#### **David GAUKRODGER: Session Three**

David GAUKRODGER leads OECD policy analysis on investment treaties and works with OECD, G20 and other governments. He worked earlier on the OECD Anti-Bribery Convention. He also helped design a G20-mandated peer review system to evaluate compliance with international standards for the exchange of tax-related information. David was previously a Special Counsel with Sullivan & Cromwell LLP. He graduated from Sciences Po Paris with a “mention lauréat” and obtained law degrees with distinction from the University of Toronto and the Université de Paris I. He was a law clerk for Justice Gerard La Forest at the Supreme Court of Canada.

#### **Sergio PUIG: Session Four**

Sergio PUIG is a Professor of International Law at the James E. Rogers College of Law, University of Arizona. His previous academic track includes positions as lecturer and teaching fellow at the Stanford University – School of Law and Duke University – School of Law. He is an expert in international trade law, international investment law, free trade agreements, and international dispute settlement, with a particular focus on the NAFTA (now USMCA) as well as economic rights of indigenous peoples. He also worked as a legal counsel at the Secretariat of the International Centre for Settlement of Investment Dispute or ICSID, the world's leading institution devoted to international investment dispute settlement. Professor Puig holds a law degree from Instituto Tecnológico Autónomo de México – ITAM (México), and two degrees (Master and Doctor of the Science of Law, respectively) from Stanford Law School.

#### **Rodrigo MONARDES: Session Five**

Rodrigo MONARDES is a Lawyer, LL.M. from Heidelberg University. For the last 13 years at the Undersecretariat for International Economic Relations (SubREI) of the Ministry of Foreign Affairs of Chile. Currently is Head of the Investment Division at SubREI, since 2020.

Previously, he held the position of Counsellor at the Permanent Delegation of Chile at the OECD, advisor in Trade, Agriculture and Investment issues and under this capacity was Chair of the Working Party of the Trade Committee of the OECD between 2016 and 2019. In addition, he was Head of the Services and Investment Division. Services and Investment Lead for the TPP negotiations, Co-chair of the Investment Expert Group of APEC. He was involved on behalf of Chile in investment negotiations such as, Australia, China, Thailand and Pacific Alliance. Between 2010 and 2013 he was appointed as Head of the OECD Division.

## **Day Two Sessions**

### **Nathalie BERNASCONI-OSTERWALDER: Session One**

Nathalie BERNASCONI-OSTERWALDER, LL.M, is Executive Director of IISD Europe and directs the Economic Law & Policy Programme of the International Institute on Sustainable Development (IISD). In this role, she manages IISD's work on international trade, investment, and finance. On a sectoral level, this work spans across sustainable agriculture, mining, and infrastructure. She also oversees IISD's function as the Secretariat of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) and the China Council for International Cooperation on Environment and Development (CCICED). Nathalie has extensive legal, policy, and training experience in the areas of public and private international law, trade, investment, sustainable development, human rights, international environmental law, and international dispute settlement. She is based in Geneva and is fluent in English, German, and French.

### **Jose Manuel ALVAREZ - ZARATE: Session Two**

Jose Manuel ALVAREZ-ZARATE is Director of the Economic Law Department of the Postgraduate Programme in International Economic Law, Externado University of Colombia. He holds a degree in Administrative Law and a Ph. D. He has been visiting scholar at American University Washington College of Law, 2016-2017; Visiting Professor, Fundação Getulio Vargas, Rio de Janeiro, Brazil, October-November, 2015, and Visiting Research Fellow, British Institute of International and Comparative Law, London, England, May-June, 2009. He has been teaching and practicing in the fields of IEL, administrative regulatory law and dispute settlement for more than twenty-eight years and has been widely published. His legal experience includes consultancy for private and public entities in trade negotiations and international business, as well as acting before administrative courts, arbitration panels, the Andean Tribunal and international arbitration.

### **Catharine TITI: Session Three**

Catharine TITI, Dr IUR., FCIArb, is a tenured Research Associate Professor at the French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas, France. She serves on the Board of the European Society of International Law (ESIL), as a Deputy Chair on the Academic Council of the Institute for Transnational Arbitration (ITA) of the Center for American and International Law (CAIL), and on the Steering Committee of the Academic Forum on ISDS, whose work contributes to the discussions in Working Group III of the United Nations Commission

on International Trade Law (UNCITRAL WG III). She is a member of the International Law Association (ILA) Committee on Rule of Law and International Investment Law and she sits on the Editorial Board of the Yearbook on International Investment Law & Policy (Columbia/OUP). Catharine is a Fellow of the Chartered Institute of Arbitrators (FCIArb), she sits on the panel of arbitrators of the Court of Arbitration for Art (CAfA).

#### **Katia FACH: Session Four**

Katia FACH, is tenured Professor (Profesora Titular) of Private International Law at the University of Zaragoza (Spain). She holds a European PhD *summa cum laude* from the University of Zaragoza, and an LLM *summa cum laude* (prize Edward J. Hawk) from Fordham University. Katia is the author of numerous monographs, book chapters and articles on international economic law, international arbitration, international mediation, private international law, and comparative law. Katia has also been involved in diverse international litigation and arbitration cases in the USA and Europe, and acts frequently as independent arbitrator or mediator in international and internal controversies. In 2020, she has been designated by the Kingdom of Spain as conciliator to the conciliators' panel of the ICSID.

#### **Patricio GRANE: Session Five**

Patricio GRANE is a Partner in the London office of Arnold & Porter. He specialises in international investor-State arbitration, commercial arbitration, international trade and public international law and is widely acknowledged as a leading individual in the field by a variety of independent legal directories. Patricio has represented over a dozen sovereign States (including APEC members), as well as multinational corporations, in complex high-value disputes across numerous geographies, sectors and subject matters. He has led a number of high-profile, politically sensitive investment arbitrations.