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Investment Arbitration Workshop – Ministry of Justice, Vietnam

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Agenda

- Introduction
- International Investment Law – BITs
- Treatment Standards
- International Investment Arbitration
- How to prepare the state apparatus for investor claims

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International Investment Law – BITs

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International Investment Law - Historic Background

- Diplomatic Protection
  - Provides for a "minimum standard" of protection of foreign nationals
  - No expropriation without compensation
  - Dispute as to the amount of compensation: Developed states argue for prompt, adequate and effective compensation *(Hull formula)* while developing states argue for appropriate compensation *(Calvo doctrine)*
  - A foreign national himself cannot bring a claim for violation of the law of diplomatic protection against the state
  - His home state can "espouse" such claim and bring it to an international court or tribunal, provided both states have agreed to the jurisdiction
  - Before this can happen, the foreign national must have exhausted all available local remedies (local remedies rule)

  Disadvantages from the perspective of investors:
  - little and unclear material protection standards
  - Investors have no right to bring a claim and cannot be sure that their home state will do so
  - Home state has no effective means either if the host state refuses to cooperate

International Investment Law - Historic Background

- Era of diplomatic protection: “Gunboat Diplomacy”
- From 1919: Agreements on Friendship, Commerce and Navigation
- From 1959: Era of modern International Investment Treaties (IITs), in particular Bilateral Investment Treaties (BITs)
- From 1969: BITs contain investor-state arbitration
- January 1991: BIT between Vietnam and Belgium and Luxembourg is concluded (still in force)

➡ Depolitisation of conflicts

➡ Effective protection

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International Investment Treaties

International Investment Treaties

- Main source of international investment law
- Two main objectives: to promote and to protect foreign investment
- Bilateral Investment Treaties (BITs)
  - Two states guarantee protection to investors from the respective other state and provide for arbitration in case of breaches
  - Germany is world leader in BITs (currently 130 BITs are in force)
  - There are approx. 3,000 BITs in force worldwide
  - Vietnam has concluded 60 BITs of which 43 are in force
  - Great differences – fragmentation of the law

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International Investment Treaties

- Multilateral Agreement: ASEAN Comprehensive Investment Agreement

- Investment chapters in Free Trade Agreements (FTAs):
  - ASEAN – Australia – New Zealand FTA

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International Investment Treaties

Content of IITs

- Scope of application
- Substantive rights
- Dispute resolution mechanism

IITs – Scope of Application

Applicability ratione materiae: “investment”

Article 1 (1) of the Vietnam – Singapore BIT:

*“The term "investment" means **every kind of asset** permitted by each Contracting Party in accordance with its laws and regulations, **including, though not exclusively**, any :*

***(a)** **movable** and **immovable** property and other property rights such as mortgage, lien or pledge;*

***(b)** **share**, stock, debenture and similar **interests in companies**;*

***(c)** **title** to money or to any contract having an economic value;*

***(d)** **copyright**, industrial **property rights** (such as patents for inventions, trade marks industrial design), **know-how, technical processes, trade names and goodwill**; and*

***(e)** **business concession** conferred by law or under contract to search for, cultivate, extract or exploit natural resources.”*

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IITs – Scope of Application

Applicability ratione materiae: “investment”

- The term “investment” covers a **wide range of assets** and goes beyond what everyday speech might qualify as an “investment”.

- From an overall perspective, the wording of the definitions of “investment” included in the international investment agreements ratified by **Vietnam** is rather **extensive** and thereby provides for a **high degree of substantive protection** of investments.

- Most treaties binding Vietnam are similar to the BIT between Vietnam and Singapore as cited above.

- However, some treaties offer an even more detailed definition of investment (see Article 1(2) of the Vietnam-Japan BIT).

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IITs – Scope of Application

Applicability ratione materiae: "investment"

Article 1 (2) of the Vietnam – Japan BIT:

*"The term "investments" means **every kind of asset** owned or controlled, directly or indirectly, by an investor, **including**:*
*(a) an **enterprise** (being a legal person or any other entity constituted or organized under the applicable laws and regulations of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a company, corporation, trust, partnership, sole proprietorship, branch, joint venture, association and organization);*
*(b) **shares**, stocks or **other forms of equity participation** in an enterprise, **including rights derived therefrom**;*
*(c) bonds, debentures, loans and other **forms of debt**, including rights derived therefrom;*
*(d) **rights under contracts**, including turnkey, construction, management, production or revenue-sharing contracts;*
*(e) **claims to money and to any performance** under contract having a financial value;*
*(f) **intellectual property rights**, including trademarks, industrial designs, layout-designs of integrated circuits, copyrights, patents, trade names, indications of source or appellations of origin, and undisclosed information;*
*(g) **concession rights** including those for the exploration and exploitation of natural resources; and*
*(h) **any other tangible and intangible, movable and immovable property**, and any related property rights, such as leases, mortgages, liens and pledges.*

*Investments include the **amounts yielded by investments**, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments."*

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IITs – Scope of Application

Applicability ratione personae: “investor”

Article 1 (2) Vietnam – South Korea BIT

*“The term "investor" means any **natural** or **juridical** person who invests in the territory of the other Contracting Party.*

*(a) the term **"natural person"** means with respect to either Contracting Party a natural person having the **nationality or citizenship** of that Party in accordance with its laws.*

*(a) the term **"juridical person"** means with respect to either Contracting Party, any entity **incorporated or constituted** in accordance with, and **recognized** as a juridical person by its laws, such as public institutions, corporations, authorities, foundations, companies, partnerships, firms, establishments, organizations and associations irrespective of whether their liabilities are limited or otherwise, and whether or not organized for pecuniary profit.“*

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IITs – Scope of Application

Applicability ratione personae: "investor"

- The "host state" only has to protect **investors** that are **"foreign"**, i.e. that are attributed to the "home state".

- Legal nature of such investors
  - Natural persons
  - Juridical persons

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IITs – Scope of Application

Applicability ratione personae: "investor"

- Natural persons as "investors"
  - Single condition: **natural** person must be "**foreign**"
    - Universal criterion: **nationality or citizenship** of the home state
    - Some investment treaties also consider a natural person as "foreign" if that person has a right to **permanent residence** in the home state.
      - Bilateral agreements with Malaysia and Australia
      - Multilateral treaties between ASEAN and China as well as Korea, Comprehensive Investment Agreement among ASEAN Member States

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Natural persons as “investors”
  - How is the nationality of a natural person determined in arbitration?
    - Generally, the law of nationality depends on the **home state’s national legislation** on nationality and citizenship.
    - But: **Arbitral tribunals** determine the investor’s nationality independently based on their application and interpretation of the national law.
    - Arbitral tribunals have mostly adopted a **generous approach** and have, in general, confirmed the home state’s nationality of an investor.

IITs – Scope of Application

Applicability ratione personae: “investor”

- Juridical persons as “investors”
  - Two conditions need to be fulfilled with regard to **juridical** persons:
    - Juridical person must have legal capacity.
    - Juridical person must have the nationality of the home state.

  - First condition: Juridical person must, in principle, have **legal capacity**.
    - But: investment treaties may explicitly qualify entities which lack legal capacity as “investors” under that treaty.
      - Examples: Vietnam’s BIT with Singapore states that in respect of Singapore any company, firm, association or body, with or without legal personality established or registered under the law in force in the Republic of Singapore qualifies as company under the BIT

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Juridical persons as “investors”
  - Second condition: Juridical person must have the **nationality** of the home state
    - Which **criteria** may possibly be applied in investment treaties in order to determine the nationality of a company?
      - **incorporation** or **constitution** under home state’s law
      - **seat (*siège social*)** in the home state
      - **effective business operations** in the home state
      - **control** of the juridical person **by shareholders being nationals** of the host state
      - **Combinations** of these criteria.

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Juridical persons as “investors”
  - Second condition: Juridical person must have the **nationality** of the home state
    - Which criteria are the **most common** in Vietnam’s treaties?
      - **Incorporation** of the entity under the home state’s law
        - Examples: BITs with Singapore, Malaysia, Investment Agreement between ASEAN and Korea
      - combination of **incorporation** and **seat** in the home state
        - Examples: BITs with China, Austria
      - combination of **incorporation** and/or **control by nationals**
        - Examples: BITs with Japan, Netherlands, Australia

IITs – Scope of Application

Applicability ratione personae: “investor”

- Juridical persons as “investors”
  - Second condition: Juridical person must have the **nationality** of the home state
    - Example: Which criteria would apply under the **Vietnam – France BIT**?

Article 1 (3) Vietnam – France BIT:

*« Le terme de « sociétés » désigne toute personne morale **constituée** sur le territoire de l'une des Parties contractantes, conformément à la legislation de celle-ci **et** y possédant son **siège social**, **ou** **contrôlée** directement ou indirectement par des nationaux de l'une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l'une des Parties contractantes et constituées conformément à la législation de celle-ci. »*

*(« The term « company » describes each juridical person **constitued** in the territory of one of the Contracting Parties in conformity with the legislation of that Contracting Party **and** having its **seat** in that Party’s territory or each juridical person directly or indirectly **controlled** by nationals of one of the Contracting Parties or by juridical persons which have their seat in the territory of one of the Contracting Parties and were constituted in conformity with the legislation of that Party. »)*

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Juridical persons as “investors”
  - Second condition: Juridical person must have the **nationality** of the home state
    - Which criteria may apply if a French investor initiates arbitration?
      - The BIT thus applies to two alternatives establishing the nationality of juridical persons under the BIT:
        - 1st alternative: **incorporation** and **seat** of the entity in France
        - 2nd alternative: **direct or indirect control** of the entity by French natural or juridical persons (i.e. shareholders)
          - Note: State of incorporation and seat of the person are irrelevant under the 2nd alternative.

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Issue: Dual nationality of investors
  - Introduction: Both natural and juridical persons may, under certain circumstances, have **two nationalities** and thus possibly benefit from **different protection standards** (deriving from Vietnam’s investment treaties with different home states).
  - Examples:
    - A natural person is born in one state (and thereby acquires that state’s nationality pursuant to *ius solis*) while his parents are nationals of a different state (and the person therefore acquires their nationality through *ius sanguinis*). The person may possibly have of two nationalities and thus invoke different investment treaties that the two home states have concluded with the host state.
    - A company is incorporated and has its seat in one state. However, most of its shareholders are nationals of a different state. Under most BITs, the entity qualifies as a national of the first state (state of incorporation). Under few BITs (like the Vietnam-France BIT), however, it may be considered as a national of the second state, too (home state of the shareholders).

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Issue: Dual nationality of investors
  - General question: Which are the **legal implications** of dual nationality in investment arbitration?

  - Some international treaties may determine the implications:
    - Bilateral treaties between Vietnam and another state
    - Multilateral treaties concluded by ASEAN
    - ICSID Convention

  - **Bilateral investment treaties** concluded by Vietnam
    - BIT with Austria: Article 1 (2) (c) extends the scope of application of the BIT to entities which are established under the law of Austria, Vietnam or a third state but controlled by Austrian investors. Thus even Vietnamese entities with a majority of Austrian shareholders might be entitled to invoke the BIT against Vietnam as the host state.
    - BIT with Argentina: Article 1 (3) provides that the BIT does not apply to foreign investments made by investors which are permanent residents in the host state. This provision is relevant for investors who are Argentine and Vietnamese citizens and permanently live in one of both states.
    - BIT with Australia: Article 2 (2)-(5) provides for a complex set of rules in this context.

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Issue: Dual nationality of investors
  - **Multilateral treaties** concluded by **ASEAN** generally rule out that an investor being a national of both home and host state initiates arbitration.
    - Article 14 (2) (b) of the Investment Agreement between ASEAN an China
    - Article 18 (2) of the Investment Agreement between ASEAN and South Korea
    - Article 18 (3) of the FTA between ASEAN and Australia and New Zealand

IITs – Scope of Application

Applicability ratione personae: "investor"

- Issue: Dual nationality of investors
  - **Article 25 (2) (a) of the ICSID Convention** defines a "national" as follows:

> *"National of another Contracting State means any **natural** person who had the nationality of a Contracting State other than the State party to the dispute […] but **does not include** any person who […] **also had the nationality of the Contracting State** party to the dispute."*

  - **Natural** persons being dual nationals of both home and host state thus may not initiate arbitration proceedings against the host state.
  - **But:** Since Vietnam has not signed the Convention, this rule does not apply. However, Article 1 (6) of the **ICSID Additional Facility Rules** (which equally excludes proceedings brought by the host state's nationals) applies where arbitration takes place under these rules as provided for in some of Vietnam's BITs:
    - Vietnam – Japan BIT: application pursuant to Article 14 (3) (1)
    - Vietnam – India BIT: application depending on both states' consent pursuant to Article 9 (3) (b) of the BIT

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Issue: Dual nationality of investors
  - In the absence of international treaties the implications of dual nationality are less evident.
  - However, some **case law** has developed in that regard.
  - Scenario 1: The investor is a national of the **home** state and a **third** state.
    - In general, arbitral tribunals clearly tend to confirm the investor’s nationality of the home state.
    - Dual nationality does not hinder arbitration if both nationalities are effective. The fact that the investor lives abroad (i.e. not in the home state) does not render his nationality ineffective (*Olguín v. Paraguay*), even if the investor lives in the host state (*Feldman v. Mexico*).
    - Assessment: Dual nationals appear to have full access to investment arbitration proceedings under scenario 1.

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IITs – Scope of Application

Applicability ratione personae: “investor”

- Issue: Dual nationality of investors
  - Scenario 2: The investor is a national of the **home** state and the **host** state and no particular regulation in the treaty exists. To our knowledge, there is no established case law for this scenario.

1st line of reasoning: effective nationality test applies as rule of international law

  - It can be argued that **real and effective nationality test** should apply as a a rule of international law; this is an argumentation which has been advanced in some cases but was not considered by the tribunals (e.g. in *Champion Trading et al v Egypt*, where Tribunal disregarded this argument because of the clear wording of Article 25 ICSID)
  - Effective nationality test means that only the nationality to which there is a genuine link or which is dominant should be considered
  - Disputed whether this test actually is a rule of international law

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IITs – Scope of Application

Applicability ratione personae: “investor”

Scenario 2: The investor is a national of the **home** state and the **host** state and no particular regulation in the treaty exists.

2nd line of reasoning: if effective nationality test does not apply

- **Arguments for the investor** to bring arbitral claim:
  - Some treaties explicitly exclude arbitration in such a scenario. Where there is no such explicit agreement limiting the investor’s access to investment arbitration, arbitration may therefore be possible.
  - Dual nationals would otherwise enjoy less legal protection of their investments than foreign investors.
- **Arguments for the state to reject jurisdiction**:
  - Ratio of BITs is to protect foreign investors, not domestic investors
  - The wording of the relevant investment treaties often states “disputes between one Contracting party and an investor of the **other** Contracting Part y(e.g. France-Vietnam BIT)
  - Dual nationals shall not enjoy further legal protection than their fellow countrymen.
  - Article 25 ICSID Convention (which excludes arbitration proceedings under scenario 2) could constitute a general rule of international law.

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IITs – Scope of Application

Applicability ratione personae: "investor"

- Issue: Dual nationality of investors
  - Scenario 3: The investor is a juridical person with the nationality of the **home** state. On the contrary, its **shareholders** are nationals of the **host** state.
    - The prevailing view in case law qualifies such juridical persons as foreign investors and thus refuses to "pierce the corporate veil" and to deny such investors the access to arbitration (see *Tokios Tokeles v. Ukraine*).
      - Argument: Otherwise, the tribunal would impose a new definition of the term "investor" upon the state parties to the BIT (*Saluka v. Czech Republic*), namely a definition considering the shareholders' nationality.
    - One arbitral tribunal has however disagreed with the above view:

> Award in *Burimi and Eagle Games v. Republic of Albania*:
> *"(I)t strikes the Tribunal as anomalous that the principle against use of dual nationality in 25(2)(a) would not transfer to the potential use of dual nationality in 25(2)(b). Otherwise, any dual national who is a national of the Contracting State to a dispute could circumvent the bar on claims in Article 25(2)(a) by establishing a company in that state and asserting foreign control of that company by virtue of his second (foreign) nationality."*

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IITs – Scope of Application

Applicability ratione temporis

- In general, the BIT has to be in force at the time of the alleged violation of investor rights

- An international treaty enters into force with its ratification by the participating states (cf. Articles 6 - 18 VCLT)

- A treaty loses its legal force a certain period of time after its termination by one of the contracting parties
  - So-called “survival clauses”
  - Ensures that investors do not lose protection suddenly

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Treatment Standards

IITs – Substantive Investor Rights

- Most-favoured nation treatment (MFN treatment)
- National treatment
- No impairment of the investment by arbitrary or discriminatory measures
- Full protection and security
- No expropriation without prompt, adequate and effective compensation
- Fair and equitable treatment
- Observance of obligations ("umbrella clause") -> not found in Vietnam's BITs
- Transfer of profits
- <u>Generally not</u>: Access to the foreign market

"*Scattergun-approach*"

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Standards of Non-Discrimination

Standards of Non-Discrimination

Overview

a) General

b) Most-favoured Nation Treatment

c) National Treatment

d) Arbitrary or Discriminatory Measures

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a) General

Requirements of a Discrimination in General

- Like circumstances
  - (P) Determining the compare group

- Unequal treatment
  - (P) Discriminatory intent or de facto discrimination

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b) Most-favoured Nation Treatment

No Discrimination compared to Investors from Third States

> ***Article 3 (1) Vietnam – South Korea BIT***
> *"Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is […]* ***not less favourable*** *than that which it accords to investments and returns of* ***investors of any third country****."*

- MFN clauses are mainly applied to make use of standards of protection in other IITs. Example:
  - The BIT the investor can rely on only provides for "appropriate compensation"
  - However, it contains an MFN clause
  - The host state has concluded another BIT with a third state which provides for "prompt, adequate and effective compensation"
  - The investor can thus invoke the compensation clause included in the BIT concluded between the host state and the third state.

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b) Most-favoured Nation Treatment

Classic dispute: May investors invoke MFN clauses to rely on a less strict dispute resolution clause in another IIT? (*Maffezini v. Spain*)

- Dispute resolution clause in the applicable BIT may require cooling-off period or pursuit of local remedies for a certain time. It may also be limited only to certain legal questions (e.g. amount of compensation in case of expropriation).
- Dispute resolution clause in another BIT of the host state may be unrestricted/unlimited
- Is it possible to rely on the unrestricted/unlimited dispute resolution clause through the MFN clause?
- Decisive question: What means “treatment” in an MFN clause?

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c) National Treatment

No Discrimination Compared to Investors from the Host State

Article 2 (1) Vietnam – Japan BIT
"Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments ***treatment no less favorable than the treatment*** *it accords in like circumstances to its* ***own investors*** *and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment activities")."*

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d) Arbitrary or Discriminatory Measures

No Impairment through Arbitrary or Discriminatory Measures

Article III (1) Vietnam – Cambodia BIT
*"Each Contracting Party […] shall not **impair**, by unreasonable or **discriminatory** measures, the operation, management, maintenance, use, enjoyment or disposal [of investments] by those nationals."*

- Discriminatory measures:
  - Additional requirement of impairment
  - No limitation to a specific compare group

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d) Arbitrary or Discriminatory Measures

No Impairment through Arbitrary or Discriminatory Measures

- Arbitrary measures:
  - An action "not founded on reason or fact" (*Lauder v. Czech Republic*)
  - "An act which shocks or at least surprises a sense of juridical propriety" (*ELSI Case*)

> ***Article 2 (3) Vietnam – Germany BIT***
> *"Eine Vertragspartei wird die Verwaltung, die Verwendung, den Gebrauch oder die Nutzung der Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei in ihrem Hoheitsgebiet* ***in keiner Weise durch willkürliche*** *oder diskriminierende* ***Maßnahmen beeinträchtigen****."*

- This BIT appears to be the only investment treaty to which Vietnam is a party that explicitly prohibits arbitrary measures.

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Full Protection and Security

3) Full Protection and Security

Obligation of the State to Actively Protect an Investment

Article 6 (1) ASEAN – Australia – New Zealand FTA:
*"Each Party shall accord to covered investments fair and equitable treatment and **full protection and security**."*

- Unlike other IIT guarantees, Full Protection and Security (FPS) requires the host state to become active

- Protection against harm done to the investment by private third parties

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3) Full Protection and Security (cont'd)

Details

- Due diligence obligation:
  - No absolute liability for any harm done to the investment
  - "Reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances" (*AAPL v. Sri Lanka*)

- Dispute: Protection only against physical harm or also against any kind of loss of value of the investment?

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Expropriation

4) Expropriation

Overview

a) Direct and Indirect Expropriation

b) Legal and Illegal Expropriation

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a) Direct and Indirect Expropriation

No Formal Transfer of Title is Required

Article 9 (2) Vietnam – Japan BIT
*"**Neither Contracting Party shall expropriate or nationalize** investments in its Area of investors of the other Contracting Party or take **any measure tantamount** to expropriation or nationalization (hereinafter referred to as "expropriation") except […]."*

- IITs protect both against direct and indirect expropriation without compensation

a) Direct and Indirect Expropriation (cont'd)

No Formal Transfer of Title is Required (cont'd)

- Direct expropriation means a formal transfer of title to the investment

- Indirect expropriation means measures which fall short of a formal transfer of title but which have the same economic effect
  - "creeping expropriation" / de facto expropriation
  - Indirect expropriation requires a "substantial loss of control or economic value"
  - Sole effects doctrine
  - Police Powers exception

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a) Direct and Indirect Expropriation (cont'd)

Police Powers Exception

- As part of their sovereignty, states may adopt regulatory measures
- Such measures may sometimes have an expropriatory effect on investments
- It was deemed to strong an infringement of state sovereignty if states had to pay compensation in these cases:

> ***Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, para. 255***
> *"States are not liable to pay compensation to a foreign investor when, in the* ***normal exercise of their regulatory powers****, they adopt in a* ***non-discriminatory*** *manner* **bona fide** *regulations that are aimed at the* ***general welfare****."*

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a) Direct and Indirect Expropriation (cont'd)

Police Powers Exception (cont'd)

- The exact requirements for the police powers exception are far from clear.

- There is agreement that the requirements named in Saluka are generally the right ones. Details are yet unclear.
  - Other tribunals have additionally required that the regulatory measures have to be proportional to the welfare aim pursued
  - They have weighed the effects on the investor against the value of the welfare aim (*Tecmed v. Mexico*)
  - Also, a frustration of the investor's legitimate expectations was taken to add to a finding of indirect expropriation.

b) Legal and Illegal Expropriation

Expropriation Can Be Justified

Article 9 (2) Vietnam – Japan BIT
"Neither Contracting Party shall […] expropriation or nationalization […] ***except****:*
(a) for a ***public purpose****;*
(b) in a ***non-discriminatory*** *manner;*
(c) upon payment of prompt, adequate and effective ***compensation****; and*
(d) in accordance with ***due process of law****."*

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b) Legal and Illegal Expropriation (cont'd)

Expropriation Can Be Justified (cont'd)

- An expropriation will not be illegal under international law if certain requirements are met
  - Public interest: No high threshold / host state has margin of appreciation
  - No discrimination
  - Due process: The investor must be able to have a court check on the legality of the expropriation

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b) Legal and Illegal Expropriation (cont'd)

Expropriation Can Be Justified (cont'd)

- Criteria for compensation (so-called *Hull Formula*)
  - Prompt compensation: Compensation must be paid immediately upon expropriation
  - Adequate compensation: Compensation at market value (calculation may be very difficult)
  - Effective compensation: Compensation in a freely convertible currency

Fair and Equitable Treatment

Fair and Equitable Treatment

FET – A Very Vague Standard of Protection

Article 9 (1) Vietnam – Japan BIT
*"Each Contracting Party shall accord to investments in its Area of investors of the other Contracting Party **fair and equitable treatment** […]."*

- Investors invoke FET probably in every case in which they complain about a breach of the BIT
- An award will always depend on the circumstances of each case
- Arbitral tribunals have created a body of case law of certain typical situations of a FET breach
- There is no difference between "fair" and "equitable"

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Fair and Equitable Treatment

The Investor's Legitimate Expectations are Protected

- The investor may rely on specific assurances by the host state's officials

- Mere contract breaches:
  - No clear jurisprudence
  - No breach of FET if the contract breach could have equally been committed by a private party
  - No breach of FET if the investor could pursue the contract breach before a domestic court but did not do so

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Fair and Equitable Treatment

Transparent and Predictable Business Environment

- Predictability as the Basis of Investment Activity

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, Award, 29 May 2003, para. 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 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."*

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Fair and Equitable Treatment

Transparent and Predictable Business Environment

- Of course, the host state must still be able to change its laws

> ***Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, para. 305***
> *"No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the* ***host State's legitimate right subsequently to regulate domestic matters in the public interest*** *must be taken into consideration as well."*

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Fair and Equitable Treatment

Transparent and Predictable Business Environment

- Mere breaches of domestic law do not suffice to find a breach of FET
  - “Something more” is required (*ADF v. United States*)
  - Breaches have to be systemic and have to seriously affect the stability and predictability of the investment’s legal framework

- Some tribunals have required investors to first unsuccessfully pursue local remedies

Fair and Equitable Treatment

Protection Against Judicial Injustice

- FET also guarantees investors a certain standard of treatment by the judiciary

- Protection against
  - Denial or obstruction of access to courts
  - Unwarranted delay in the judicial process
  - Gross deficiency in in the judicial process
  - Manifestly unjust judgement (high threshold!)

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Investment Arbitration

Introduction to Investment Arbitration

Overview

a) The basis of the arbitral tribunal's jurisdiction

b) Jurisdiction

c) Illegality

d) Cooling-off periods

e) Denial of benefits

f) Prima facie test

g) Transparency

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a) The Basis of the Arbitral Tribunal's Jurisdiction

Conclusion of an Arbitration Agreement

- In the IITs, the states make an offer for the conclusion of an arbitration agreement.
- The investors declare their acceptance of the offer to arbitrate impliedly, by initiating the arbitration
- Logically, there is only a valid offer to arbitrate if the IIT is applicable!
- For the tribunal to have jurisdiction, the dispute must fall within the scope of application of the BIT ratione materia, personae and temporis!

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a) The Basis of the Arbitral Tribunal's Jurisdiction

Conclusion of an Arbitration Agreement (cont'd)

Article 13 Vietnam – Singapore BIT

1. "*Any **dispute** between a **national or company** of one Contracting Party and the **other Contracting Party** in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be s**ettled amicably through negotiations** between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.*

2. *If the **dispute cannot be thus resolved** as provided in paragraph (1) of this Article **within six months** from the date of the notice given thereunder, then the Contracting Party and the investor concerned shall **refer the dispute** to either conciliation in accordance with the United Nations Commission on International Trade Law Rules of Conciliation, 1980 or to **arbitration** in accordance with the United Nations Commission on International Trade Law Rules on Arbitration […].*"

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b) Investment Definition

The Presence of an Investment is Central to Any Claim

- It is absolutely necessary that there is an investment within the meaning of the applicable IIT

c) Illegality

What happens if the investor acts illegally?

- Naturally, host states do not want to grant protection to investors which act in violation of the host state's domestic law

- However, hardly any of the IITs concluded by Vietnam contain illegality clauses in their investment definitions:

> ***Article 4 (1) Vietnam – Bulgaria BIT:***
>
> "*The investments should be made in accordance with the laws and regulations in the territory of the respective Contracting Party.*"

- The other IITs do not address illegality specifically. Nonetheless, it has been argued that even without illegality clauses, investors breaching domestic law cannot rely on the IIT.

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c) Illegality (cont'd)

Applying Illegality Clauses in an IIT

- Generally, in case of an IIT with an illegality clause, the tribunal will decline jurisdiction if it finds illegality:
  - Legality is a requirement for the existence of an investment under the IIT
  - An investment under the IIT is a requirement for jurisdiction
- Illegality means that the investment activity as a whole is illegal or that the *per se* legal investment was obtained by illegal means
- Tribunals have interpreted illegality clauses restrictively because declining jurisdiction has far-reaching consequences

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c) Illegality (cont'd)

Restrictive Application of Illegality Clauses

- Minor illegality / mere formal shortcomings do not lead to the exclusion of jurisdiction
- Mistakes made by the investor in good faith may be disregarded so that jurisdiction can be upheld
- Tribunals have considered illegality during the life of the investment (meaning after the making of the investment) to be irrelevant for jurisdiction (it may play a role for merits or damages)

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c) Illegality (cont'd)

IITs without Illegality Clauses

- Even without a specific requirement of legality in the IIT, a tribunal will reject a claim that is tainted by illegal behaviour of the investor
- Since legality is not a requirement for the existence of an investment, tribunals have however not declined jurisdiction in these cases
- <u>Example</u>: Plama v. Bulgaria

c) Illegality (cont'd)

Plama v. Bulgaria

- Decided under the ECT which does not contain an illegality clause in its investment definition
- The investor had obtained a concession only by misrepresentations to the host state
- The tribunal found that it had jurisdiction to hear the case
- However, it rejected the claim on the merits: Based on the general principle of law that no one may profit from his own wrong *(nemo auditur propriam turpitudinem allegans)*, the tribunal concluded that the investor could avail itself of any of the substantive guarantees of the ECT.

d) Cooling – off period

- Many IITs concluded by Vietnam provide for attempts at amicable settlement, so called cooling-off periods that have to be fulfilled before an arbitration can be initiated

- Cooling-off periods in Vietnam's IITs vary between 3 and 6 months

Article 7 (2) Vietnam – Malaysia BIT:

"**If the dispute cannot be thus resolved** as provided in paragraph (1) of this Article **within 6 months** from the date of the notice given thereunder, then the Contracting Party and the investor concerned shall refer the dispute to either conciliation in accordance with the United Nations Commission on International Trade Law Rules of Conciliation, 1980 or to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976 subject to the following provisions: *[…]*"

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d) Cooling - off period

- Tribunals often do not enforce cooling-off periods, argue it is only a procedural requirement

- Some Tribunals order stay of proceedings if cooling-off period has not been fulfilled

- Some Tribunals indeed see it as a jurisdictional requirement and decline jurisdiction if it has not been fulfilled

- Should be raised early

e) Denial of benefits clause

Important policy tool found primarily in the investment chapters of the ASEAN's mulitlto attack treaty shopping

- Benefits of the treaty can be denied under two conditions:
  - Investor is juridical person of a Party but has no substantial business activities in the territory of this Party
  - Investors of a non-party or the denying party own or control the juridical person

Article 17 (1) Investment Agreement ASEAN – Korea:

*"A Party may **deny the benefits** of this Agreement to an investor of any other Party that is a **juridical person** of such other Party and to investments of such investor if the juridical person has **no substantial business activities in the territory of the Party** under whose law it is constituted or organised, and **investors of a non-Party, or of the denying Party, own or control** the juridical person."*

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e) Denial of benefits clause

- Some denial of benefits clauses have been interpreted by arbitral tribunals not to refer to the dispute resolution provision. However, the clauses in the ASEAN agreements should be understood to mean that that all benefits of the agreement can be denied, including possibility to initiate arbitration

- It will need to be argued whether denial can be invoked retrospectively, i.e. after an arbitration has already been initiated. This possibility is disputed.

- If possible, such denial should be declared before an investor initiates arbitration

f) Prima facie test

Dismissing Claims that are Baseless on their Face

- Arbitral tribunals have regularly looked at questions of the merits as part of jurisdiction

- A tribunal will decline jurisdiction if it finds that
  - even if taking the facts as pleaded by the claimant,
  - there cannot be a breach of any of the substantive guarantees of the IIT

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f) Prima facie test

Dismissing Claims that are Baseless on their Face

- Tribunals have called this approach the “prima facie test” or “Oil Platforms test”

- The legal basis for applying the prima facie test is not entirely clear. Some argue that there is no “dispute” in the meaning of the arbitration clause in the IIT if a case fails the prima facie test.

g) Transparency

Investment Arbitration Proceedings Touch Upon Issues of Public Interest

- Arbitration in general is mostly a confidential process
- However, many investment arbitration cases deal with projects that are of high interest to the public
- UNCITRAL Rules on Transparency provide for full transparency of the proceedings
  - The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application.
  - The Rules on Transparency apply in relation to disputes arising out of treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree -> to be kept in mind for future treaties

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Arbitration Proceedings

International Center for the Settlement of Investment Dispute (ICSID)

- ICSID is an arbitral institution specifically intended for investment disputes
- ICSID was founded within the framework of the World Bank in 1965
- Provides services in arbitration and conciliation

Arbitration Proceedings

International Center for the Settlement of Investment Dispute (ICSID)

- The legal basis of ICSID is the ICSID Convention which has been ratified by 150 states (e.g. jurisdiction of ICSID tribunals)

- Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (e.g. request for arbitration)

- Rules of Procedure for Arbitration Proceedings (e.g. appointment of arbitrators, written and oral procedure, taking of evidence)

Arbitration Proceedings

Specific Features of ICSID – No Lex Arbitri

- ICSID proceedings are "delocalised" and only the ICSID Convention and the ICSID Rules apply. ICSID proceedings are thus not subject to any domestic arbitration law.

- Annulment of awards only pursuant to Article 52 ICSID Convention

- Recognition and enforcement of awards only according to Articles 53 - 55 ICSID Convention
  - ICSID awards imposing a pecuniary obligation have to be treated like domestic court rulings of last instance (Article 54 ICSID)
  - However, states may invoke sovereign immunity as a defence against enforcement (Article 55 ICSID)

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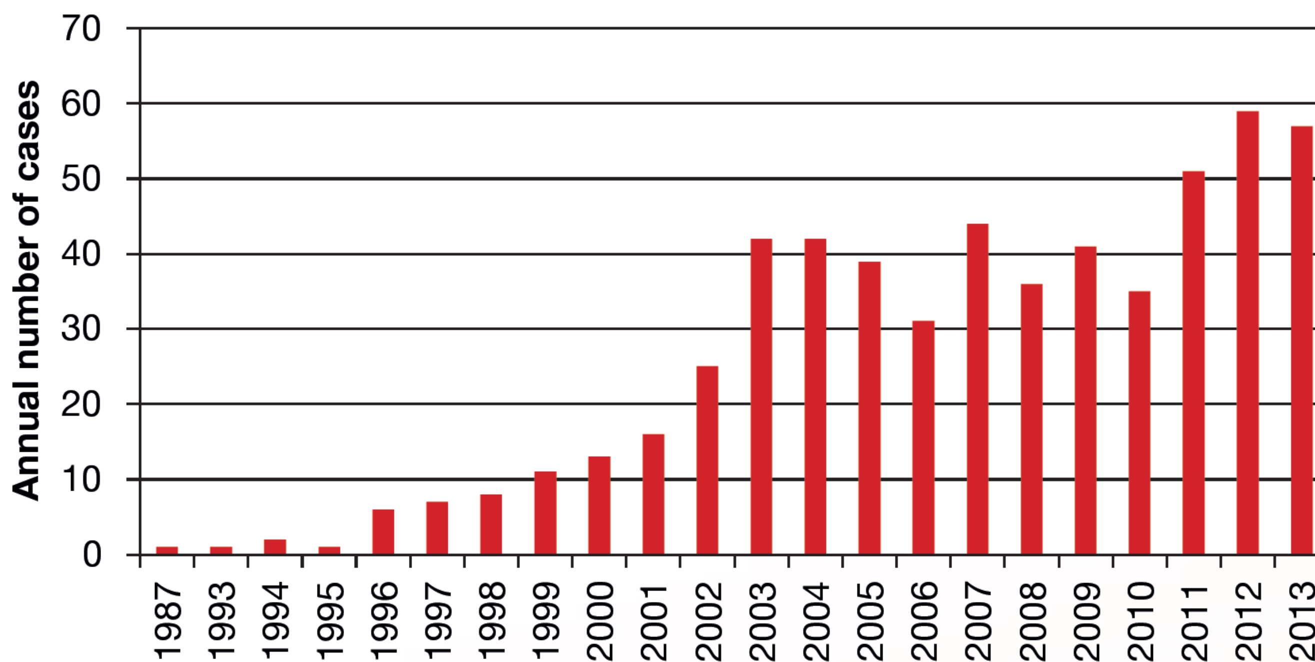
ICSID Arbitration

Historic Development of Investment Arbitration Proceedings



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ICSID Arbitration

Vietnam not yet a member of ICSID

- In 2006 Vietnam was said to sign ICSID but so far it has not signed
- Most BITs concluded by Vietnam provide for ICSID in case both Contracting States are members of ICSID and otherwise for ad hoc proceedings under the UNCITRAL Arbitration Rules.
- Some BITs concluded by Vietnam also provide for arbitration under the ICSID Additional Facility Rules

UNCITRAL Arbitration

Particularity of UNCITRAL Arbitration – Jurisdictional Objections

Article 21 (3) UNCITRAL Rules

> "*A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim*."

- *Oostergetel v. Slovak Republic* Final Award finds that under the UNCITRAL Rules, objections to jurisdiction must be raised prior to defences on the merits and therefore an objection raised later is to be disregarded

- *CME v. Czech Republic* Partial Award finds that the respondent is deemed to have waived a defence on jurisdiction because it was raised too late

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ICSID Additional Facility Arbitration

Time for raising jurisdictional objections under ICSID Additional Facility Rules

Article 45 (2) ICSID Additional Facility Rules:

> "*Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General* ***as soon as possible*** *after the constitution of the Tribunal and* ***in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial*** *or, if the objection relates to an ancillary claim, for the filing of the rejoinder- unless the facts on which the objection is based are unknown to the party at that time*."

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What does a typical arbitration look like?

Initial steps of an arbitration

- Investor submits Request for Arbitration
- Selection of the Tribunal – necessity to participate
- Case Management Meeting
- Determination of specific rules and timetable

State's tasks in the early stages of the arbitration

- Retain legal counsel
- Appoint an arbitrator
- Fully investigate the facts, identify witnesses, gather relevant documents
- Develop a strategy
- Identify experts

Further course of the arbitration

- Exchange of written submissions
- Potentially document production
- Potentially bifurcation of the proceedings, i.e. separation of jurisdiction and merits
- Hearings with cross-examination of witnesses and experts
- Post-hearing submissions
- Award

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Document Production

- Often cumbersome procedure where potentially sensitive documents need to be submitted to the other party
- Every party can request the production of documents, which are material and relevant
- Only limited excuses for non-production such as irrelevance, confidentiality or loss / destruction
- Danger of negative inferences if documents are not produced
- Necessity to fully engage with all relevant state bodies to obtain relevant documents

Hearings

- Opening statements

- Examination of witnesses
  – Anglo-American style cross-examination
  – Necessity to prepare

- Examination of experts
  – Cross-examination or
  – Expert conferencing

- Sometimes closing statements

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How to prepare the State Administration for investor claims

Investor has a strategic advantage

- Vietnam has been successful in attracting more foreign investments over the last years
- Prospect for increasing investment is good, Vietnam ranks 9 of the countries named as top prospective economies for 2014-2016 in the UNCTAD World Investment Report 2014
- Increasing investments entail risk of further investor-state arbitrations
- An investor has months or even years to prepare the filing of a claim. A state is then often faced with short deadlines, e.g. only 30 days to appoint an arbitrator under the UNCITRAL Rules
- State must avoid as much as possible to be caught on the back foot

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Pitfalls in investment arbitrations

- Appointment of arbitrators – often short deadline, only 30 days from receipt according to UNCITRAL Rules; once the right is forfeited there is hardly a way back
- Raising jursidictional objections – these need to be raised as early as possible, otherwise they may be considered to be waived
- Responding to factual allegations made by the investor – all alleged facts, if possible need to be rebutted in a timely fashion, otherwise they may be considered conceded
- Witnesses – States sometimes choose not to name witnesses. This has often been detrimental to the state's position

Suggestion to prepare the state apparatus

- Clear competencies: Ideally, there should be a specific department handling investment protection claims by investors; if competencies need to be determined once the claim is there, this will delay other essential tasks such as fact finding

- Clear instructions: Any request for arbitration should be received by the decision-maker as early as possible; there should be clear instructions to the Ministry's post office as to who should receive letters from arbitral institutions and investors, no time can be lost

- Clear roadmap: Legal advice should be readily available – the Ministry may decide to have a preferred law firm or a panel of law firms ready to be contacted once a claim is received

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How to react when a claim is received

- Legal advice should be sought so that appointment of an arbitrator can be made and objections be filed timely
- The facts need to be fully investigated
- Potential witnesses should be contacted
- Potential experts should be identified and contacted
- Full co-operation between all state bodies, witnesses and law firm should be ensured
- Good communication between State and law firm should be ensured, e.g. by allocating one state official to be in constant contact with legal advisers

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