Asia-Pacific
Economic Cooperation

APEC-UNCTAD WORKSHOP ON INVESTOR-STATE DISPUTE SETTLEMENT

Report on the Outcome and Proceedings

APEC Committee on Trade and Investment
APEC Investments Experts Group

August 2011

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

Prepared by

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I. OUTCOME

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

Course Background

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

Participants and Resource Persons

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

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

Most participants were either involved in the preparation for or handling of investment disputes, or in the negotiation of international investment agreements. The quality of participants allowed for an in-depth coverage of topics, interesting discussions, sharing of experiences among participants and a rich dialogue with the speakers.

After the workshop, participants became members of UNCTAD's network of IIA experts, which allows for continued interactive discussion and dissemination of information on IIA issues and investment disputes.

Training Methodology

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

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

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

Training Material

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

Opening and Closing Ceremony

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

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

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

Evaluation and Follow-up

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

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

Course Organization

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

II. COURSE PROGRAMME

Background and objectives:

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

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

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

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

Host economy: Philippines

Venue: AIM Conference Center Manila

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APEC Secretariat:
Ms. Yumiko Honda, Programme Director, Investment Experts Group

DAY 1 - 22 June 2011

08:30 Conference registration

09:00 **Opening session**
Speakers:
Director Ann Claire C. Cabochan, Bureau of International Trade Relations, Department of Trade and Industry
Anna Joubin-Bret, UNCTAD

09:30 Coffee break

10:00 **Trends and Developments in Investor-State Dispute Settlement (ISDS)**
- Trends and developments in International Investment Agreements (IIAs)
- Recent developments in ISDS
- Comparative national policy developments
- International investment policy regime

Speaker: Anna Joubin-Bret, UNCTAD

Open discussion

11:30 **Admission and Establishment of Investments**
- Scope of protection
- Compliance with host State laws
- Relevant awards

Speaker: Anna Joubin-Bret, UNCTAD
Discussant: Justice Florentino P. Feliciano, Philippines

Open discussion

12:30 Lunch

SESSION 1: CORE ELEMENTS IN IIAs AND RECENT ARBITRAL AWARDS

14:00 **Definitions of Investment and Investor**
- Introduction of scope and definitions in IIAs
- Analysis and discussion of relevant arbitral awards, such as Phoenix v. Czech Republic, RDC v. Guatemala, Hamester v. Ghana, Anderson v. Costa Rica, Saba Fakes v. Turkey, Global Trading v. Ukraine, Rompetrol v. Romania, Micula et al. v. Romania, Tokios Tokeles v. Ukraine, TSA Spectrum de Argentina SA v. Argentina

Speakers:
Professor Hi-Taek Shin, Seoul National University
Yu-Jin Tay, Shearman and Sterling, Singapore
Discussant:
Elodie Dulac, King & Spalding, Singapore

Open discussion

16:00 Coffee break

16:30 **Fair and Equitable Treatment (FET)**

- Introduction to FET and minimum standard of treatment
- Normative standards
- Analysis and discussion or recent interpretations and awards by arbitral tribunals, such as Lemire v. Ukraine, AWG v. Argentina, Helnan v. Egypt, Merrill and Ring v. Canada, Toto Costruzioni v. Lebanon, Glamis Gold v. United States

Speaker: Christopher Thomas, Q.C., J.C. Thomas Law Corporation
Discussant: Professor Shotaro Hamamoto, Kyoto University

Open discussion

18:00 End of working day

DAY 2 - 23 June 2011

09:00 **Denial of Justice (Special Topic on FET)**

- Introduction of Denial of Justice, and in the context of FET
- Analysis and discussion of relevant interpretations and arbitral awards

Speaker: Elodie Dulac, King & Spalding, Singapore
Discussant: Professor Shotaro Hamamoto, Kyoto University

Open discussion

10:00 Coffee break

10:30 **Most-Favored-Nation (MFN) Treatment**

- Introduction to MFN
- Treaty foundations
- Analysis and discussion of relevant interpretations and recent awards by arbitral tribunals, such as Bayindir v. Pakistan, Wintershall Aktiengesellschaft v. Argentina

Introduction:
Anna Joubin-Bret, UNCTAD
Speakers:
Professor Guiguo Wang, City University of Hong Kong
Morgan Maguire, Investor-State LawGuide

Open discussion

12:00 Lunch

13:30 **Expropriation**

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

Speakers:
Professor Shotaro Hamamoto, Kyoto University
Alvaro Galindo, Ecuador

Open discussion

15:00 Coffee break

SESSION 2: DEVELOPMENTS IN INTERNATIONAL ARBITRATION AND IIAs

15:30 **Revision of Arbitration Rules**

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

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

17:30 Open discussion

18:00 End of working day

DAY 3 - 24 June 2011

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

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

Open discussion

09:45 **Transparency in Arbitral Proceedings**

Speakers:
Aloysius Llamzon, Permanent Court of Arbitration
Corinne Montineri, UNCITRAL

Open discussion

10:30 Coffee break

11:00 **Comparative Analysis of Asian BITs and FTAs**

Speaker:
Professor Guiguo Wang, City University of Hong Kong
Discussants:
Professor Shotaro Hamamoto, Kyoto University
Professor Hi-Taek Shin, Seoul National University

Open discussion

12:15 Lunch

SESSION 3: MANAGEMENT OF ISDS BY THE STATE

13:45 **New Research and Information on ISDS Cases and Texts from Arbitral Awards**

Speaker: Morgan Maguire, Investor-State LawGuide

14:15 **Conduct of Investor-State dispute settlement: What is involved for a State?**

Panelists:
Professor Guiguo Wang, City University of Hong Kong
Alvaro Galindo, Ecuador
Yu-Jin Tay, Shearman and Sterling, Singapore
Carla Sanchez Tabra and Marcio De La Cruz, Peru
Jane E. Yu, Philippines
Open discussion

15:30 **Dispute Prevention and Alternatives to Arbitration**

- Dispute prevention policies and measures
- Discussion of dispute resolution techniques other than international arbitration

Speaker: Anna Joubin-Bret, UNCTAD
Discussant: Professor Hi-Taek Shin, Seoul National University

Open discussion

16:30 **Closing remarks**

Speaker:
Solicitor General Jose Anselmo Cadiz, Republic of the Philippines

Distribution of Certificates

17:00 End of the workshop

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Summary

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

PHILIPPINE SECRETARIAT

Department of Trade and Industry

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

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

Office of the Solicitor General

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

IV. BIO NOTES OF KEY SPEAKERS

Elodie DULAC

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

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

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Florentino P. FELICIANO

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

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

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

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

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

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

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

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

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

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Alvaro GALINDO

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

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

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Anna JOUBIN-BRET

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

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

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HAMAMOTO Shotaro

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

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

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

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

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KHONG Cheng-Yee

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

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

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

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Aloysius P. LLAMZON

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

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

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

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

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

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

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

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

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

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

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

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

Over the course of his career he has advised States from various regions of the world on the negotiation and drafting of a number international trade and investment treaties.
In the area of international trade disputes, he has acted as counsel or legal advisor in GATT, WTO, Canada-United States Free Trade Agreement, and NAFTA trade disputes. He has also sat as a GATT panelist as well as a panelist in Canada-United States Free Trade Agreement Chapter 19 proceedings.

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

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

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

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Guiguo WANG

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

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

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

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

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

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

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V. TRAINING MATERIALS

1) UNCTAD publications

- Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking
- Investment Provisions in Economic Integration Agreements
- Preserving Flexibility in IIAs: The Use of Reservations
- Investment Promotion Provisions in International Investment Agreements
- The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries
- International Investment Rule-Making: Stocktaking, Challenges and the Way Forward
- Identifying Core Elements in Investment Agreements in the APEC Region
- Dispute Settlement: Investor-State Disputes Arising from Investment Treaties
- Investor-State Dispute Settlement and Impact on Investment Rulemaking
- Most-Favoured-Nation Treatment
- Scope and Definition
- Investor-State Disputes: Prevention and Alternatives to Arbitration
- Investor-State Disputes: Prevention and Alternatives to Arbitration II (advance draft)
- The Protection of National Security in IIAs
- The REIO Exception in MFN Treaty Clauses
- International Investment Agreements in Services
- South-South Cooperation in International Investment Agreements
- International Investment Agreements: Trends and Emerging Issues
- World Investment Report 2010: Investing in a Low-Carbon Economy
- Best Practices in Investment for Development: Case Studies in FDI
    - How to Utilize FDI to Improve Transport Infrastructure - Roads (Australia and Peru)
    - How to Utilize FDI to Improve Infrastructure - Electricity (Chile and New Zealand)
- Investment Policy Monitor No. 5

- Global Investment Trends Monitor No. 6

- IIA ISSUES NOTES:

    - Latest Developments in Investor-State Dispute Settlement
      IIA Issues Note No. 1 (2011)

    - Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims
      IIA Issues Note No. 2 (2010)

    - Latest Developments in Investor-State Dispute Settlement
      IIA Issues Note No. 1 (2010)

2) Selected International Investment Agreements

a. Bilateral Investment Treaties (BITs)

APEC Economy	**Partner Economy**
Australia	Argentina, Chile, China, Czech Republic, Egypt, Hong Kong (China), Hungary, India, Indonesia, Lao People's Democratic Republic, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Uruguay, Viet Nam
Brunei Darussalam	China, Republic of Korea, Oman
Canada	Argentina, Armenia, Barbados, Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, El Salvador, Hungary, Latvia, Lebanon, Panama, Peru, Philippines, Poland, Romania, Russian Federation (USSR), Slovakia, South Africa, Thailand, Trinidad and Tobago, Ukraine, Uruguay, Venezuela
Chile	Argentina, Australia, Austria, Belgium and Luxembourg, Bolivia, Brazil, China, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Republic of Korea, Lebanon, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, Uruguay, Venezuela, Viet Nam
China	Albania, Argentina, Australia, Austria, Bahrain, Belgium and Luxembourg, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Cambodia, Chile, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Denmark, Djibouti, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guyana, Hungary, Iceland, Indonesia, Islamic Republic of Iran, Italy, Jamaica, Japan, Jordan, Lao PDR, Latvia, Lebanon, Lithuania, Macedonia TFYR, Madagascar, Mongolia, Morocco, Myanmar, Netherlands, New Zealand, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, Romania, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, Uruguay, Viet Nam
Colombia	Chile, Italy, Peru, Spain, United Kingdom

Hong Kong (China)	Australia, Austria, Belgium and Luxembourg, Denmark, France, Germany, Italy, Japan, Republic of Korea, Netherlands, New Zealand, Sweden, Switzerland, Thailand, United Kingdom
Indonesia	Algeria, Australia, Bangladesh, Belgium and Luxembourg, Cambodia, Chile, China, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, India, Italy, Jamaica, Jordan, Kyrgyzstan, Lao PDR, Malaysia, Mauritius, Mongolia, Morocco, Mozambique, Netherlands, Norway, Pakistan, Romania, Singapore, Slovakia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Turkey, Ukraine, United Kingdom, Uzbekistan, Viet Nam, Yemen, Zimbabwe
Japan	Bangladesh, China, Egypt, Hong Kong (China), Republic of Korea, Mongolia, Pakistan, Russian Federation, Sri Lanka, Turkey, Viet Nam, United States
Republic of Korea	Albania, Algeria, Argentina, Austria, Bangladesh, Belarus, Belgium and Luxembourg, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Chile, China, Congo DR, Costa Rica, Czech Republic, Denmark, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hong Kong (China), Hungary, India, Indonesia, Islamic Republic of Iran, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Lao PDR, Latvia, Lebanon, Lithuania, Malaysia, Mauritania, Mexico, Mongolia, Morocco, Netherlands, Nicaragua, Nigeria, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, Uzbekistan, Viet Nam
Malaysia	Austria, Cambodia, Chile, Czech Republic, Denmark, Egypt, Ethiopia, Finland, France, Germany, Ghana, Hungary, Indonesia, Italy, Jordan, Kazakhstan, Korea DPR, Republic of Korea, Kyrgyzstan, Lebanon, Mongolia, Netherlands, Norway, Pakistan, Peru, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, United Kingdom, Uruguay, Viet Nam, Brunei/Indonesia/Malaysia/Philippines/Singapore/Thailand
Mexico	Argentina, Australia, Austria, Belgium and Luxembourg, Cuba, Denmark, Finland, France, Germany, Greece, Iceland, Republic of Korea, Netherlands, Portugal, Spain, Sweden, Switzerland, Uruguay
New Zealand	Argentina, Chile, China, Hong Kong (China)
Papua New Guinea	Australia, Germany, United Kingdom
Peru	Argentina, Australia, Belgium and Luxembourg, Bolivia, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Italy, Republic of Korea, Malaysia, Netherlands, Norway, Paraguay, Portugal, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, United Kingdom, Venezuela
Philippines	Argentina, Australia, Austria, Bangladesh, Belgium and Luxembourg, Cambodia, Canada, Chile, China, Czech Republic, Denmark, Finland, France, Germany, Italy, Republic of Korea, Myanmar, Netherlands, Pakistan, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom
Russia	Argentina, Austria, Belgium and Luxembourg, Canada, Cyprus, Egypt, Ethiopia, France, Germany, Greece, Hungary, Italy, Japan, Republic of Korea, Lebanon, Lithuania, Netherlands, Norway,

	Portugal, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, United States
Singapore	Cambodia, China, Czech Republic, Egypt, France, Germany, Hungary, Indonesia, Jordan, Mauritius, Mongolia, Netherlands, Pakistan, Peru, Sri Lanka, Switzerland, United Kingdom, Viet Nam
Chinese Taipei	Belize, Macedonia TFYR, Marshall Islands, Swaziland, Thailand
Thailand	Argentina, Bahrain, Bangladesh, Belgium and Luxembourg, Bulgaria, Cambodia, Canada, China, Croatia, Czech Republic, Egypt, Finland, Germany, Hong Kong (China), Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Jordan, Korea DPR, Netherlands, Peru, Philippines, Poland, Russian Federation, Slovenia, Sri Lanka, Sweden, Switzerland, Chinese Taipei, United Kingdom, Viet Nam, Zimbabwe, OPEC
United States	Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bulgaria, Cameroon, Congo, Republic of the Congo, Ecuador, Egypt, El Salvador, Estonia, Georgia, Grenada, Haiti, Honduras, Jamaica, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Republic of Moldova, Mongolia, Morocco, Mozambique, Nicaragua, Panama, Poland, Romania, Russian Federation, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad and Tobago, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan
Viet Nam	Australia, Austria, Belarus, Belgium and Luxembourg, Bulgaria, Cambodia, Chile, China, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Indonesia, Italy, Japan, Republic of Korea, Latvia, Malaysia, Netherlands, Poland, Romania, Singapore, Sweden, Switzerland, Tajikistan, Thailand, United Kingdom

b. Model BITs

- Canadian Model BIT
- United States Model BIT

c. Free Trade Agreements and other investment instruments

- Andean Community Decision 291: Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties
- APEC Non-binding Investment Principles
- Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies
- APEC Transparency Standards on Investment
- ASEAN Comprehensive Investment Agreement
- CAFTA Investment Chapter
- FTA between ASEAN, Australia and New Zealand
- FTA between Australia and Thailand
- FTA between Canada and Colombia Investment Chapter
- FTA between Canada and EFTA
- FTA between Chile and Canada
- FTA between Chile and Peru
- FTA between Chile and Mexico
- FTA between Chile and China
- FTA between China and New Zealand
- FTA between China and Peru

- FTA between China and Singapore Investment Chapter
- FTA between Japan and Brunei
- EPA between Japan and Indonesia
- FTA between Japan and Malaysia
- FTA between Japan and Mexico
- FTA between Japan and the Philippines
- FTA between Japan and Thailand
- FTA between Japan and Singapore
- FTA between Korea and Singapore
- FTA between Malaysia and Pakistan
- FTA between Malaysia and New Zealand
- FTA between Mexico and Bolivia
- FTA between Mexico, Guatemala, El Salvador and Honduras
- FTA between Singapore and Australia
- FTA between Singapore and India
- FTA between Singapore and New Zealand
- FTA between Singapore and Panama
- FTA between Thailand and New Zealand
- FTA between the United States and Colombia
- FTA between the United States and Korea
- FTA between the United States and Peru
- FTA between the United States and Chile
- FTA between the United States and Singapore
- NAFTA Investment Chapter

3) Teaching Material - Excerpts from UNCTAD Course on Dispute Settlement

1. General Topics
1.2 International Court of Justice *(Mr. P. S. Rao)*
1.3 Permanent Court of Arbitration *(Ms. B. Shifman, Mr. H. Holtzmann)*

2. International Centre for Settlement of Investment Disputes
2.1 Overview *(Mr. C. Schreuer)*
2.2 Selecting the Appropriate Forum *(Mr. A. Reinisch)*
2.3 Consent to Arbitration *(Mr. C. Schreuer)*
2.4 Requirements Ratione Personae *(Ms. M. Al-Sharmani)*
2.5 Requirements Ratione Materiae *(Mr. A. Escobar)*
2.6 Applicable Law *(Mr. G. S. Tawil)*
2.7 Procedural Issues *(Mr. E. Schwartz, Mr. R. Mohtashami)*
2.8 Post-Award Remedies *(Ms. D. Wang)*
2.9 Binding Force and Enforcement *(Ms. D. Wang)*

4) International Treaties on Arbitration and Related Instruments

ICSID

Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados

Including:

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

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

- Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje)

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

UNCITRAL

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

ICC

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

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

NY Convention

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

5) Selected Articles

Aguilar Alvarez, Guillermo, and Reisman, Michael W.: The Reasons Requirement in International Investment Arbitration: Critical Case Studies, Martinus Nijhoff Publishers, 2008.

Alexandrov, Stanimir A.: The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *ratione temporis.* In: The Law and Practice of International Courts and Tribunals 4: 19-59, 2005.

Antonietti Aurelia, " The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", ICSID Review, Foreign Investment law Journal, Vol. 21, No 2, 2006, pp. 427-448.

Bishop, R.D., Crawford, J., Reisman, W.M..: Foreign Investment Disputes, Kluwer Law International 2005.

Faya Rodriguez, Alejandro: A Quince Años del Capítulo XI del TLCAN: Un Análisis Económico y Jurídico. (*forthcoming 2009 - available*)

Faya Rodriguez, Alejandro: The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?, in Journal of International Arbitration, Volume 25, No 1, 2008, pp. 89-102. (*available*)

Gaillard, Emmanuel: "Establishing Jurisdiction Through a Most-Favored-Nation Clause", International Arbitration Law, in The New York Law Journal, Volume 233, No 105, June 2005. (*available*)

Gaillard, Emmanuel: "Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses", International Arbitration Law, in The New York Law Journal, Volume 234, No 68, October 2005. (*available*)

Garcia-Bolivar, Omar E.: Investor-State Disputes in Latin America: A Judgment on the Interaction Between Arbitration, Property Rights Protection, and Economic Development, in Law and Business Review of the Americas, Volume 13, No 1, Winter 2007, pp. 67-96. (*available*)

Legum, Barton: Options to Establish an Appellate Mechanism for Investment Disputes. In: Appeals Mechanism in International Investment Disputes 231-239 (Karl P. Sauvant, ed. 2008).

Paulsson, Jan: Avoiding Unintended Consequences. In: Appeals Mechanism in International Investment Disputes 241-265 (Karl P. Sauvant, ed. 2008).

Paulsson Jan: "The Conduct of Arbitral Proceedings Under the Rules of Arbitration Institutions, The WIPO Arbitration Rules in a Comparative Perspective", *Conference on Rules for Institutional Arbitration and Mediation*, (Articles 48 to 58 and 73 to 76), Geneva, Switzerland, 1995. (*available*)

Sacerdoti, Giorgio: Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards, 19 ICSID Rev. - FILJ 1, 2004.

Sornarajah, M.: The International Law on Foreign Investment, Second Edition, Cambridge University Press, 2004.

Schreuer, Christoph H.: Fair and Equitable Treatment in Arbitral Practice. Offprints of The Journal of World Investment and Trade, Vol. 6 No. 3, Geneva, June 2005.

Schreuer, Christoph H.: Three Generations of ICSID Annulment Proceedings. In: Annulment of ICSID Awards 17-42 (Emmanuel Gaillard & Yas Banifatemi, eds. 2004).

Schreuer, Christoph H.: The ICSID Convention: A Commentary, Cambridge University Press 2001.

Schreuer, Christoph H.: Travelling the Bit Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 The Journal of World Investment and Trade 231 (2004).

Teitelbaum, Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses, 22 Journal of International Arbitration 225 (2005).

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

Wälde, T., The "Umbrella" Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases, 6 Journal of World Investment and Trade 183 (2005)

6) Case Study Material

Aguas del Tunari Case Study *(decision on jurisdiction)*

Autopista Concesionada de Venezuela Case Study *(introductory note)*
Autopista Concesionada de Venezuela Case Study *(decision on jurisdiction)*
Autopista Concesionada de Venezuela Case Study *(decisiòn sobre competencia)*
Autopista Concesionada de Venezuela Case Study *(award of tribunal)*
Autopista Concesionada de Venezuela Case Study *(laudo del tribunal)*

CMS Case Study *(ancillary claims /objection of jurisdiction)*
CMS Case Study Key *(ancillary claims/ objection of jurisdiction)*
CMS Case Study *(expropriation)*
CMS Case Study Key *(expropriation)*

Luchetti Case Study *(jurisdiction ratione temporis)*
Luchetti Case Study Key *(jurisdiction ratione temporis)*
Agreement between Peru and Chile *(Spanish)*

Maffezini Case Study *(MFN Treatment)*
Maffezini Case Study Key *(MFN Treatment)*
Maffezini Case Study *(Spanish) (MFN Treatment)*
Maffezini Case Study Key *(Spanish) (MFN Treatment)*
Agreement between Argentina and Spain
Agreement between Chile and Spain

Metalclad Case Study *(expropriation)*
Metalclad Case Study Key *(expropriation)*
Metalclad Case Study *(Spanish) (expropriation)*
Metalclad Case Study Key *(Spanish) (expropriation)*

Methanex Case Study *(place of proceedings)*
Methanex Case Study Key *(place of proceedings)*
Methanex Case Study *(amicus curiae)*
Methanex Case Study Key *(amicus curiae)*
Methanex, letter on *non-disputing party participation*
Statement of the Free Trade Commission on *non-disputing party participation*

Milhaly Case Study *(ratione materiae)*
Milhaly Case Study Key *(ratione materiae)*
BIT between the US and Sri Lanka

Olguin Case Study *(expropriation)*
Olguin Case Study Key *(expropriation)*
Olguin Case Study *(Spanish) (expropriation)*
Olguin Case Study Key *(Spanish) (expropriation)*

Salini Case Study *(amicable dispute settlement)*
Salini Case Study *Key (amicable dispute settlement)*
Salini Case Study *(procedures for the initiation of a claim)*
Salini Case Study *Key (procedures for the initiation of a claim)*
Salini Case Study *(ratione materiae)*
Salini Case Study *Key (ratione materiae)*

Saluka Investments Case Study *(partial award)*

SGS Pakistan Case Study *(contract vs. treaty claims)*
SGS Pakistan Case Study Key (*contract vs. treaty claims)*
SGS Pakistan Case Study (*procedures for the initiation of a claim)*
SGS Pakistan Case Study Key (*procedures for the initiation of a claim)*
BIT between Switzerland and Pakistan

SGS Philippines Case Study *(contract vs. treaty claims)*
SGS Philippines Case Study Key *(contract vs. treaty claims)*
SGS Philippines Case Study *(procedures for the initiation of a claim)*
SGS Philippines Case Study Key *(procedures for the initiation of a claim)*
BIT between Switzerland and the Philippines

Tecmed Case Study *(fair and equitable treatment)*
Tecmed Case Study Key *(fair and equitable treatment)*
Tecmed Case Study *(Spanish) (fair and equitable treatment)*
Tecmed Case Study Key *(Spanish) (fair and equitable treatment)*
BIT between Spain and Mexico

Tokios Case Study *(Jurisdiction ratione personae)*
Tokios Case Study Key *(Jurisdiction ratione personae)*
Tokios Case Study *(Introductory Note)*
Tokios Case Study *(Procedural Order No.1)*
Tokios Case Study *(Decision on Jurisdiction)*
Tokios Case Study *(Dissenting Opinion)*
Tokios Case Study *(Procedural Order No.3)*

Vivendi Case Study Key *(replacement disqualification of arbitrators)*
Vivendi Case Study Key *(replacement disqualification of arbitrators)*
Vivendi Case Study Key *(initiation of a claim)*
Vivendi Case Study Key *(initiation of a claim)*

7) Collection of Cases

Please consult http://www.unctadxi.org/templates/Startpage____718.aspx for further reference on selected dispute settlement cases.

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

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

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

Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT).
- Decision on Provisional Measures, 6 April 2007 (PDF)
- Award of the Tribunal, 15 April 2009 (PDF)

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (Lithuania/Ukraine BIT).
- Procedural Order No. 1, 1 July 2003.
- Decision on Jurisdiction*,* 29 April 2004.
- Dissenting opinion, 29 April 2004.
- Procedural Order No. 3, 18 January 2005.
- Award and Separate Opinion, 26 July 2007.

The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 (Netherlands/Romania BIT).
- Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 18, 2008 (PDF)

Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 (Sweden/Romania BIT).
- Decision on Jurisdiction and Admissibility, September 24, 2008 (PDF)

TSA Spectrum de Argentina S.A. v. Argentina Republic, ICSID Case No. ARB/05/5 (Netherlands/Argentina BIT).
- Award, 19 December 2008 (English) (Spanish) (PDF)
- Concurring Opinion, Georges Abi-Saab (English) (Spanish) (PDF)
- Dissenting Opinion, Grant D. Aldonas (PDF)

Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Netherlands/Bolivia BIT)
- NGO Petition to Participate as *Amici Curiae*,August 29, 2002 (PDF)
- Letter from President of Tribunal Responding to Petition, January 29, 2003 (PDF)
- Decision on Respondent's Objections to Jurisdiction, October 21 2005 (English/Spanish) (PDF)

Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4 (Italy/Morocco BIT).
- Jurisdiction, 23 July 2001 (English) (PDF)

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2)
- Award of the Tribunal (March 15, 2002) (PDF)
- Separate concurring opinion, March 15, 2002 (PDF)

PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5.
- Decision on Jurisdiction, June 4, 2004 (PDF)

- Award, January 19 2007 (PDF)

Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26 (Spain/El Salvador BIT)
- Award of the Tribunal (August 2, 2006) (Spanish/English PDF)

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Kazakhstan, ICSID Case No. ARB/05/16 (Turkey/Kazakhstan BIT).
- Award, July 29 2008

Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9 (US/Argentina BIT).
- Decision on Jurisdiction, February 22, 2006 (PDF)
- Award, September 5, 2008 (PDF)
- Decision on Preliminary Objection to Application for Annulment, October 23, 2009 (PDF)
- Decision on Stay of Enforcement of Award, October 23, 2009 (PDF)

Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19 (US/Ecuador BIT).
- Award, August 18, 2008 (English) (Spanish) (PDF)

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

Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7)
- Decision on Jurisdiction (January 25, 2000) (PDF)
- Award of the Tribunal (November 13, 2000) (PDF)
- Rectification of the Award (January 31, 2001) (PDF)

Siemens v. Argentina, ICSID Case No. ARB/02/8 (Germany/Argentina BIT).
- Decision on Jurisdiction, August 3. 2004 (English) (Spanish). (PDF)
- Award, February 6, 2007. (PDF)
- Separate Opinion of Prof. Janeiro. (PDF)
- US Submission Regarding Arts. 53 and 54, ICSID Convention, 1 May, 2008. (PDF)
- Argentina's Response to US Department of State Letter, 2 June 2008(PDF)

Plama Consortium Limited v. Bulgaria (ICSID Case No. ARB/03/24 (Energy Charter Treaty))
- Decision on Jurisdiction, 8 February 2005. (PDF)
- Order on Provisional Measures, 6 September 2005. (PDF)

Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14 (Germany/Argentina BIT).
- Award, 8 December 2008 (PDF)

RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005 (UK/Soviet BIT).
- Award on Jurisdiction, October 2007 (PDF)

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

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

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

- Award, September 11, 2007 (PDF)

Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1)

- Award of the Tribunal (August 30, 2000) (PDF)

National Court Decision:

- Supreme Court of British Columbia, Reasons for Judgment of May 2, 2001, *The United Mexican States v. Metalclad Corporation,* 2001 BCSC 664 (PDF)
- Supreme Court of British Columbia, Supplementary Reasons for Judgment of October 31, 2001, *The United Mexican States v. Metalclad Corporation,* 2001 BCSC 1529.

Robert Azinian and others v. United Mexican States (ICSID Case No. ARB(AF)/97/2)

- Award of the Tribunal (November 1, 1999) (PDF)

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- Decision of the Tribunal on Objections to Jurisdiction (August 6, 2003) (PDF)

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- Summary of the Decision
- Decision of the Tribunal on Objections to Jurisdiction (January 29, 2004) (PDF)
- Declaration by one of the arbitrators (January 29, 2004) (PDF)

Ceskoslovenska Obchodni Banka, A.S. (COSB) v. The Slovak Republic (ICSID Case No. ARB/97/4)

- Decision on Objections to Jurisdiction (May 24, 1999) (PDF)
- Decision on the Further and Partial Objection to Jurisdiction (December 1, 2000) (PDF)

Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2)

- Award of the Tribunal (October 11, 2002) (PDF)

Tradex Hellas S.A. v. Albania (ICSID Case No. ARB/94/2)

- Decision on Jurisdiction, 24 December 1996. (PDF)
- Final Award, 29 April 1999. (PDF)

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- Partial Award, 13 September 2001. (PDF)
- Dissenting opinion, 13 September 2001. (PDF)
- Final Award, 14 March 2003. (PDF)
- Separate Opinion on Final Award, 14 March 2003. (PDF)
- Review by Svea Court of Appeal, 15 May 2003.

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- Final Award, 3 September 2001. (PDF)

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- Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004. (PDF)
- Partial Award, 17 March 2006. (PDF)
- Swiss Federal Tribunal Decision, 7 September 2006. (PDF)

Genin and others v. Estonia, Award (ICSID Case No. ARB/99/2)
(United States/Estonia BIT)

- Award, 25 June 2001 (PDF)
- Decision on Request for Supplementary Decisions and Rectification, 4 April 2002 (PDF)

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary
(ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT))

- Award, 2 October 2006 (PDF)

AES Summit Generation Ltd. v. Hungary (ICSID No. ARB/01/04)

- Settlement agreed by parties and proceedings discontinued at their request, 3 January 2002.

Telenor Mobile Communications A.S. v. Republic of Hungary (ICSID Case No. ARB/04/15 (Norway/Hungary))

- Award, 13 September 2006 (PDF)
- Summary of Award (PDF)

Petrobart Limited v. Kyrgyz Republic, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty)

- Award, 29 March 2005 (PDF)

Eureko B.V. v. Republic of Poland (Netherlands/Poland BIT)

- Partial Award and Dissenting Opinion, 19 August 2005 (PDF)
- Judgment of Court of First Instance of Brussels on setting aside of award, 23 November 2006
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Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18) (Lithuania/Ukraine BIT).

- Procedural Order No. 1, 1 July 2003 (PDF)
- Decision on Jurisdiction, 29 April 2004 (PDF)
- Dissenting opinion, 29 April 2004 (PDF)
- Procedural Order No. 3, 18 January 2005 (PDF)

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- Order, March 16, 2006 (PDF)

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(United Kingdom/Egypt BIT).
-Jurisdiction, 29 June 1999.
-Award on Merits, 8 December 2000.

Champion Trading Company and Ameritrade International v. Egypt, ICSID Case No. ARB/02/9 (US/Egypt BIT). -Award, 27 October 2006.

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Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Italy/Pakistan BIT). -Decision on Jurisdiction, 22 April 2005.*

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, ICSID Case No. ARB/02/13 (Italy/Jordan BIT). -Award, 31 January 2006.

France Telecom v. Lebanon (France/Lebanon BIT).

- Swiss Federal Tribunal Decision I, 10 November 2005.
- Swiss Federal Tribunal Decision II, 10 November 2005.

CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8)
Award of the Tribunal (May 12, 2005) (PDF)

Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12)
Decision on Jurisdiction (December 8, 2003) (PDF)
Award (July 14, 2006) (PDF)

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic(ICSID Case No. ARB/02/1)
Decision on Liability (October 3, 2006) (PDF)

Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7 (Italy/United Arab Emirates BIT). -Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007.

Fedax N.V. v Venezuela, ICSID Case No. ARB/96/3 (The Netherlands/Venezuela BIT). - Award, 9 March 1998.

Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6. (Italy/Morocco BIT). -Decision on Annulment, 18 January 2006 (not publicly available).

L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria, ICSID Case No. ARB/05/3 (Italy/Algeria BIT). - Decision, 12 July 2006 (French).

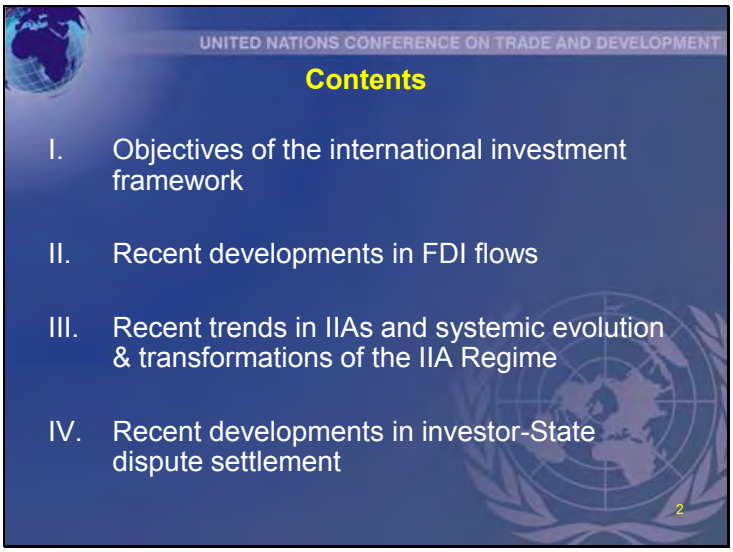
Fraport AG v. Philippines, ICSID Case No. ARB/03/25 (Germany/Philippines BIT). - Award, 19 July 2007.

VI. SPEAKERS' PRESENTATIONS

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

Slide 1

Slide 2



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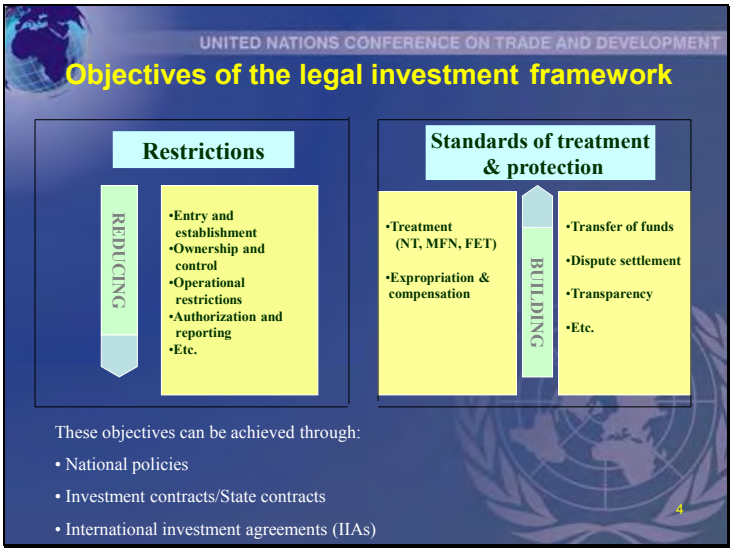

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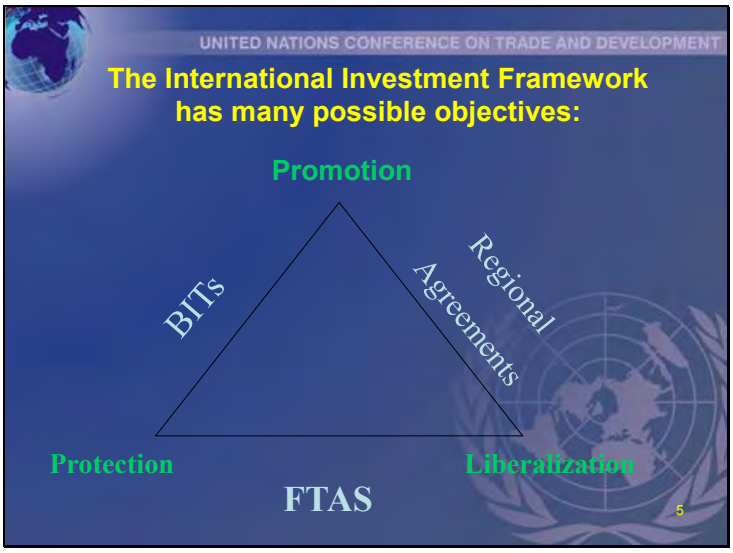

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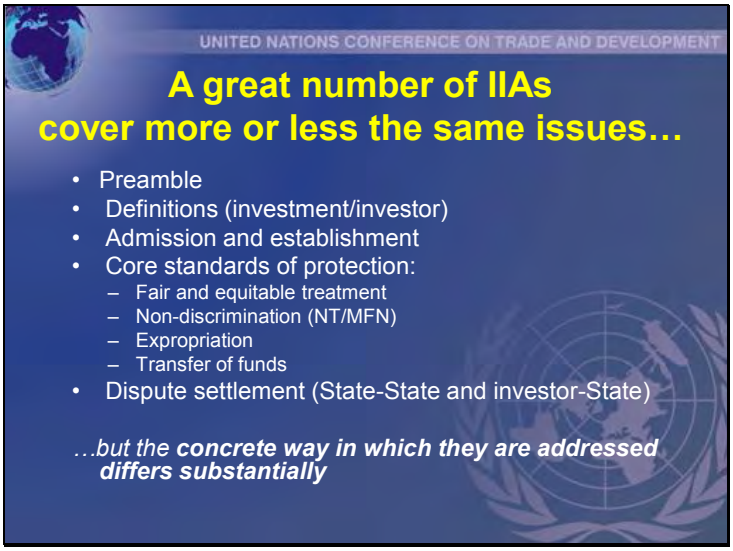

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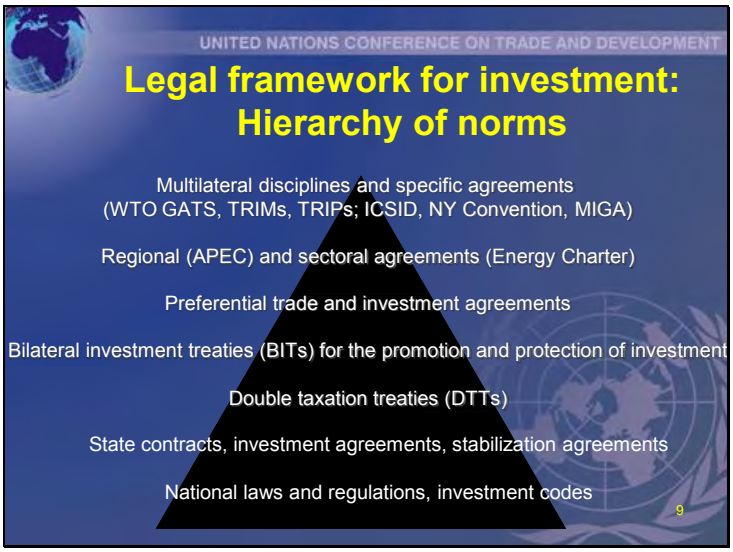

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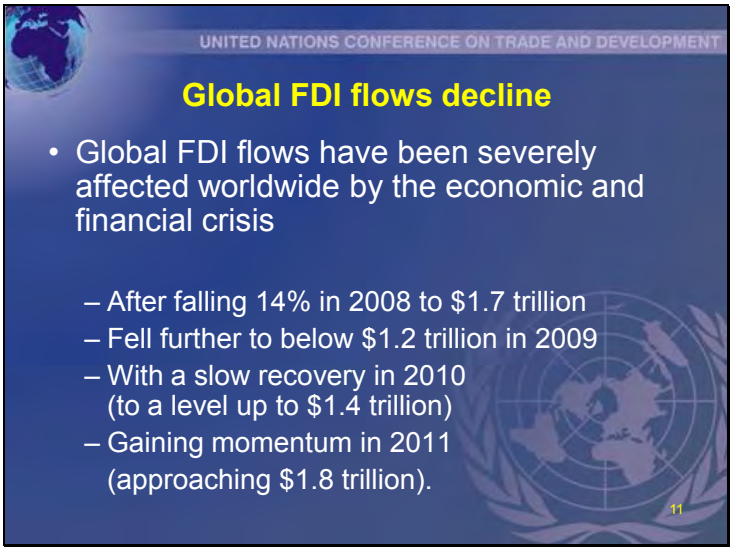

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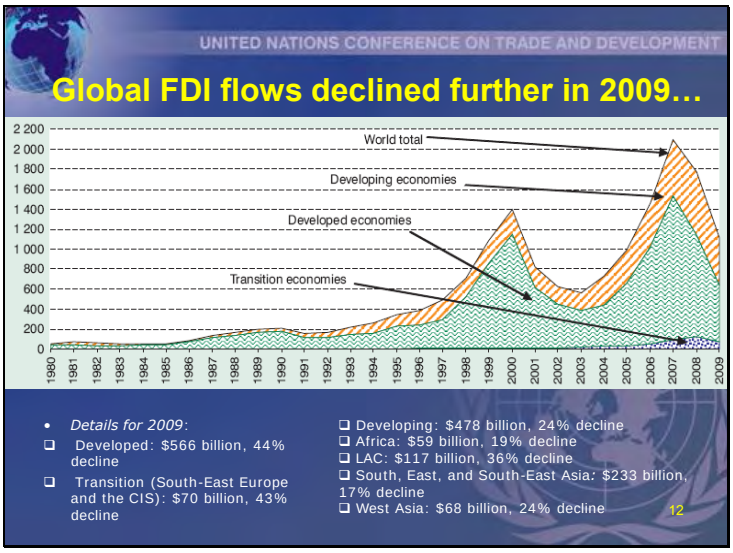

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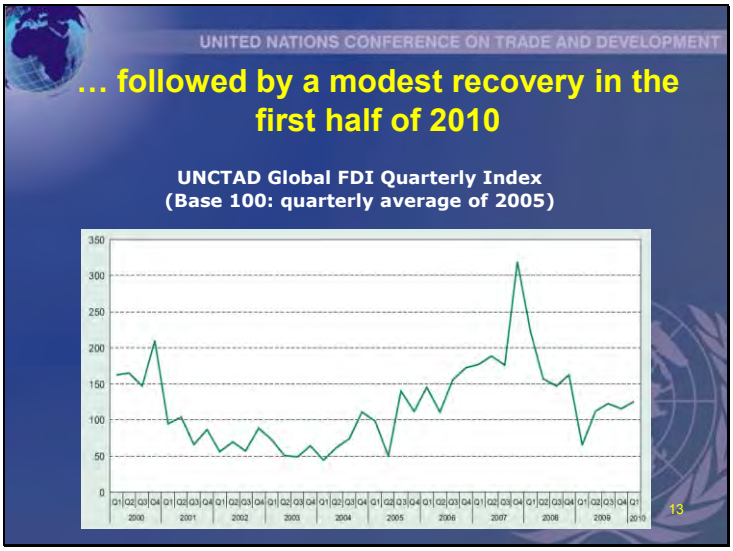

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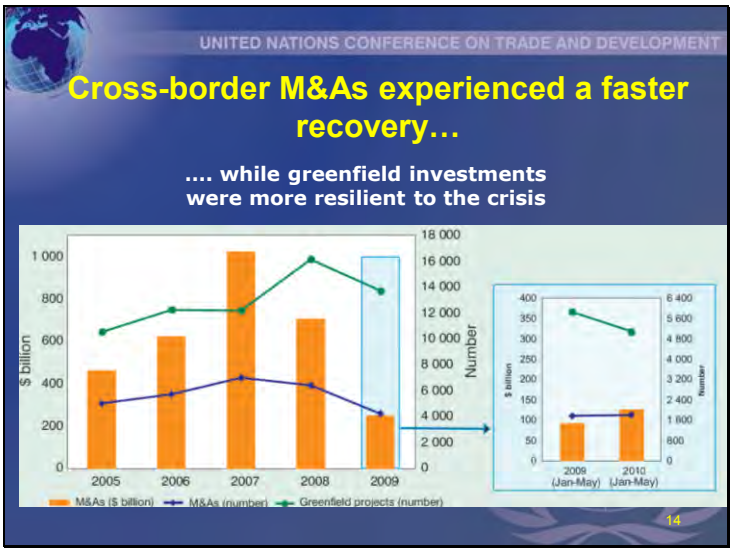

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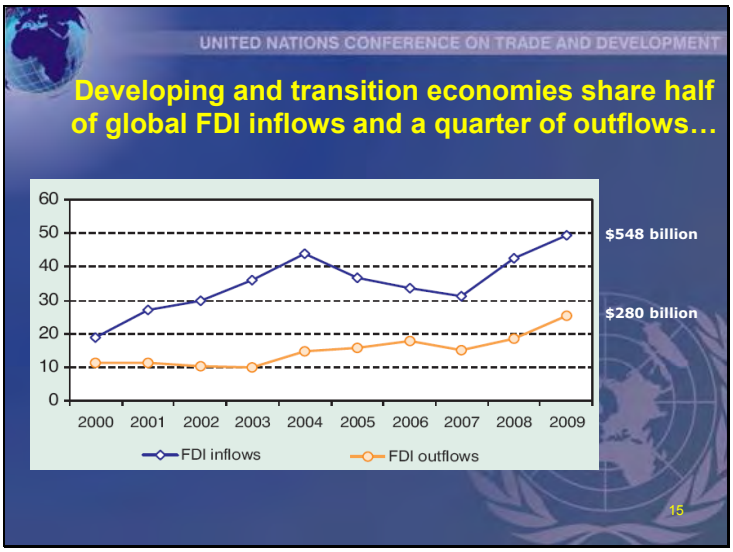

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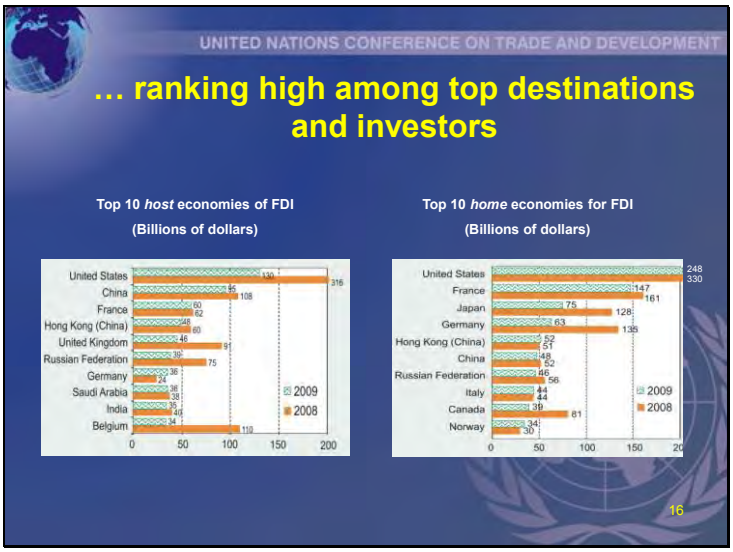

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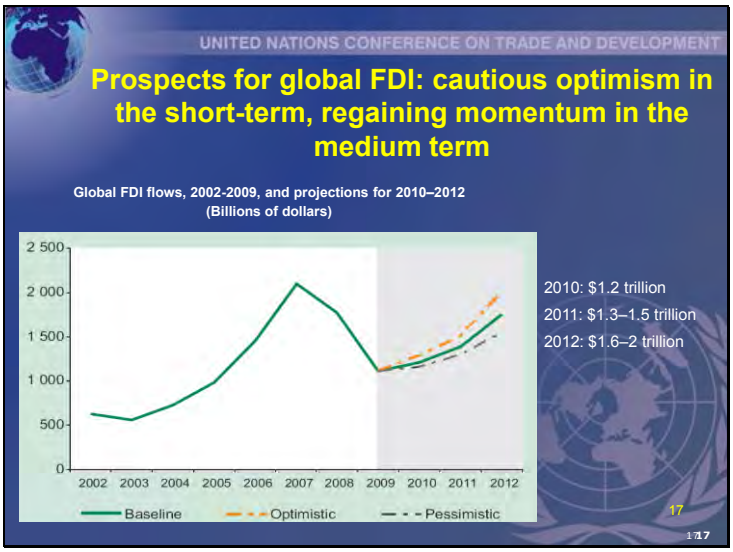

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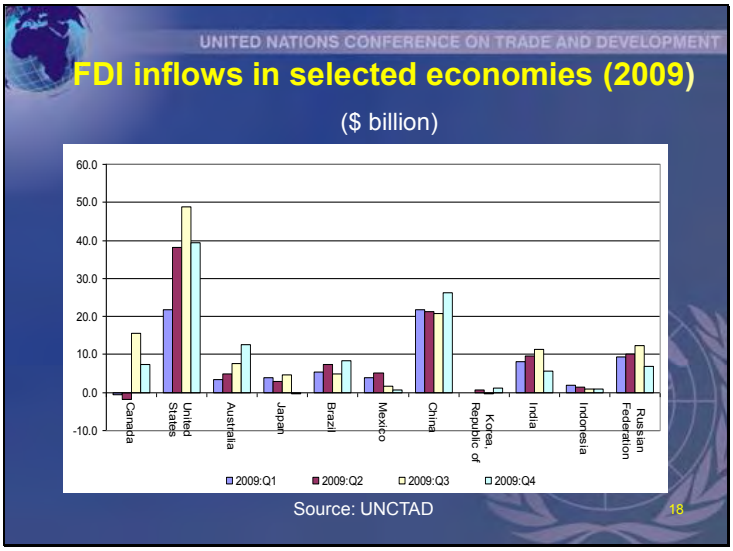

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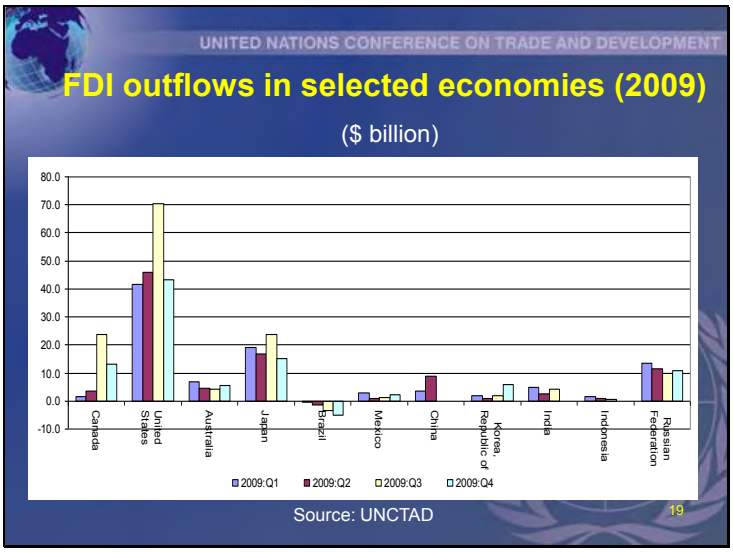

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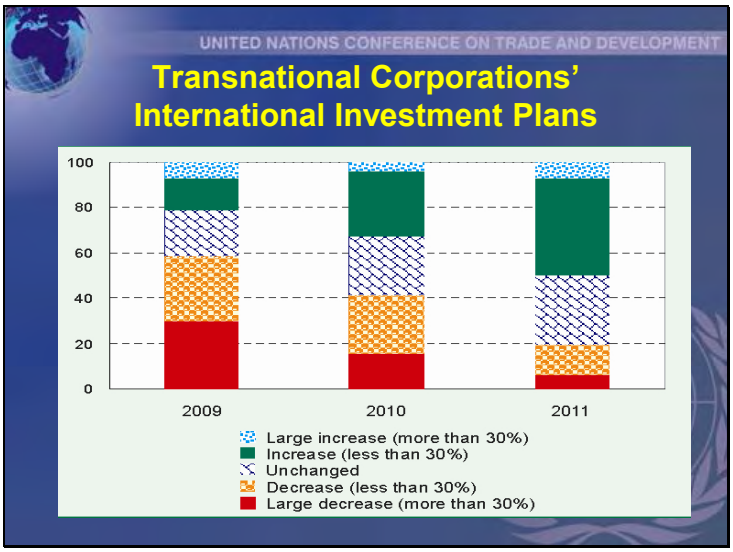

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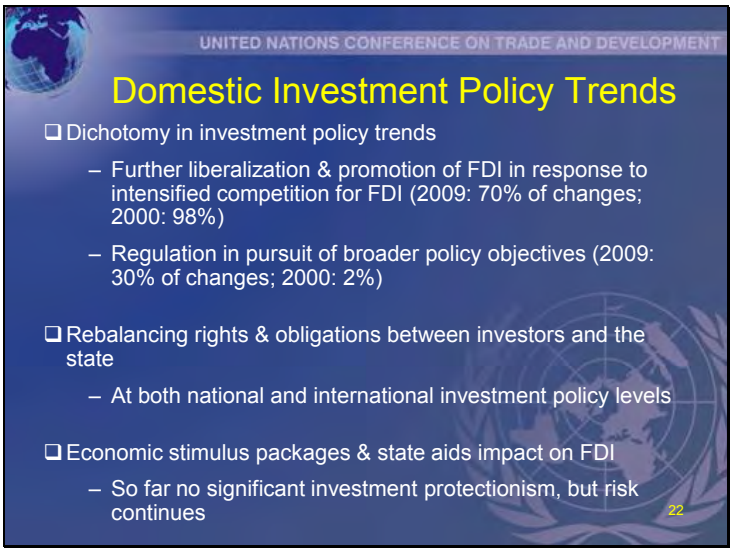

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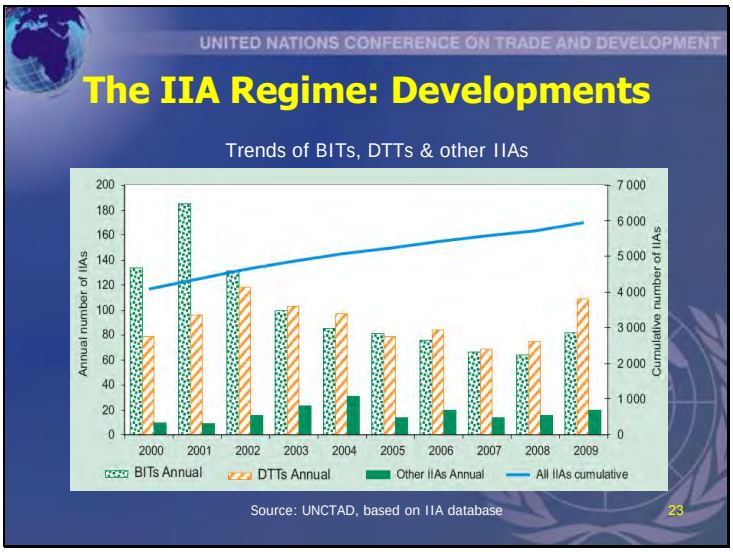

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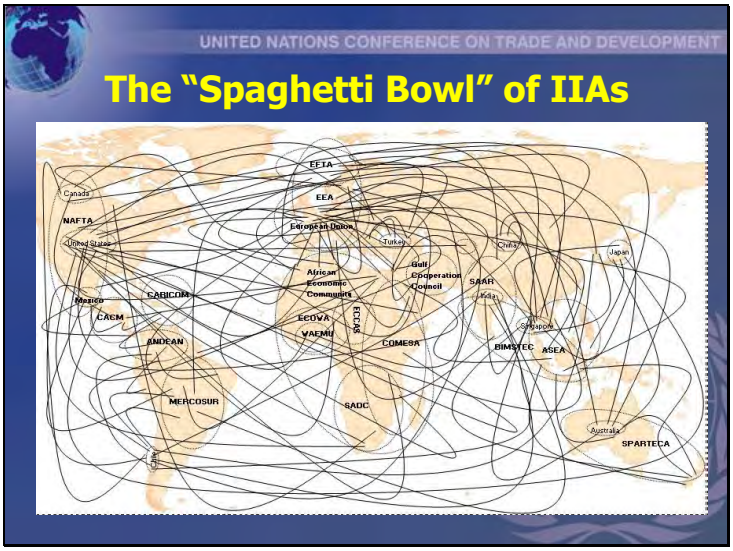

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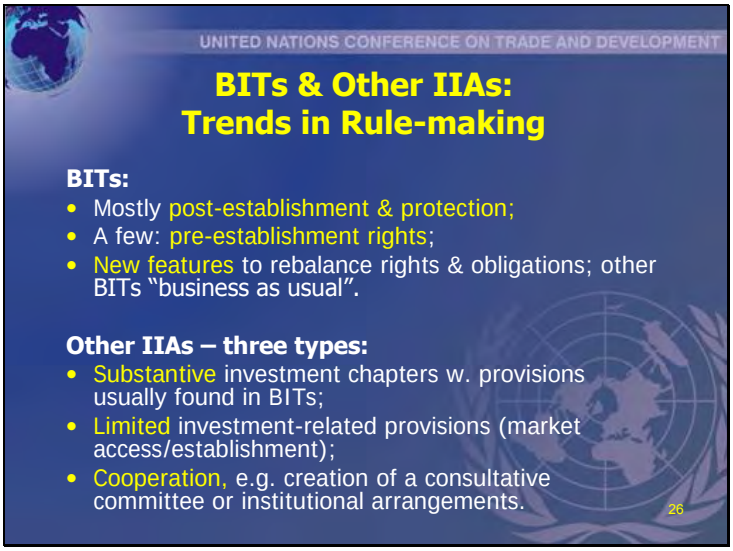

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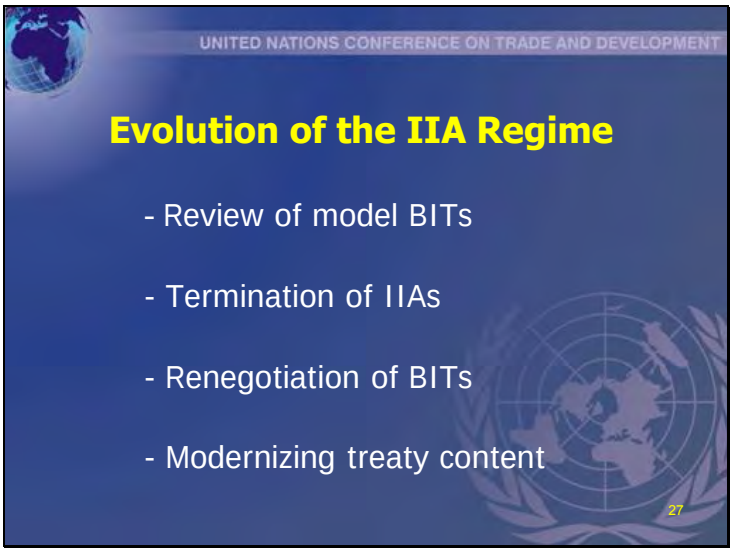

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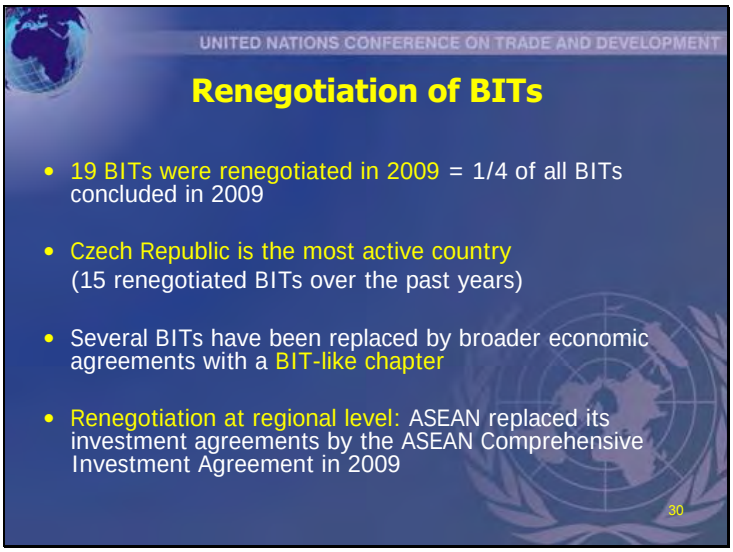

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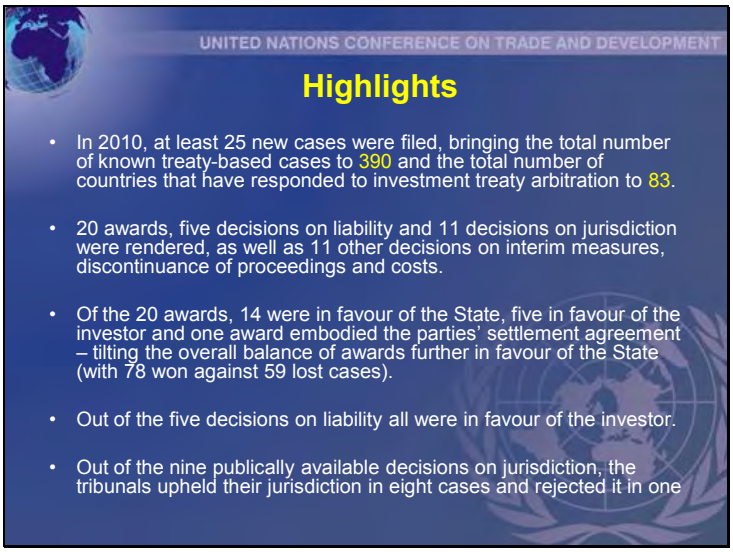

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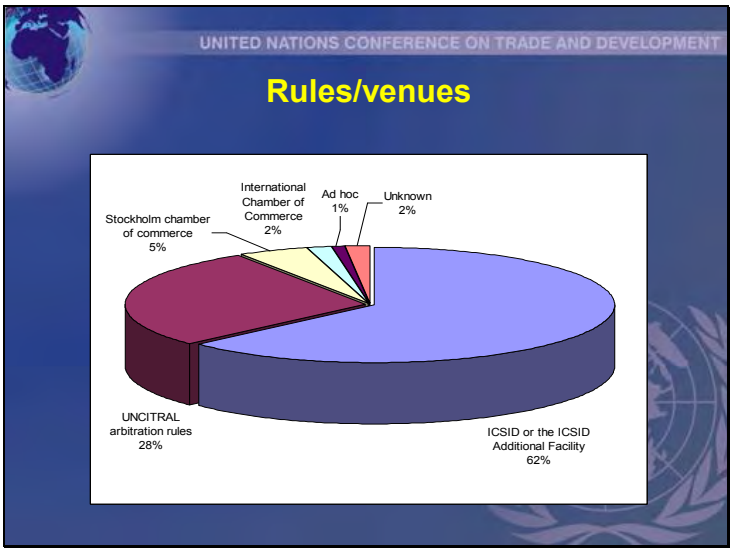

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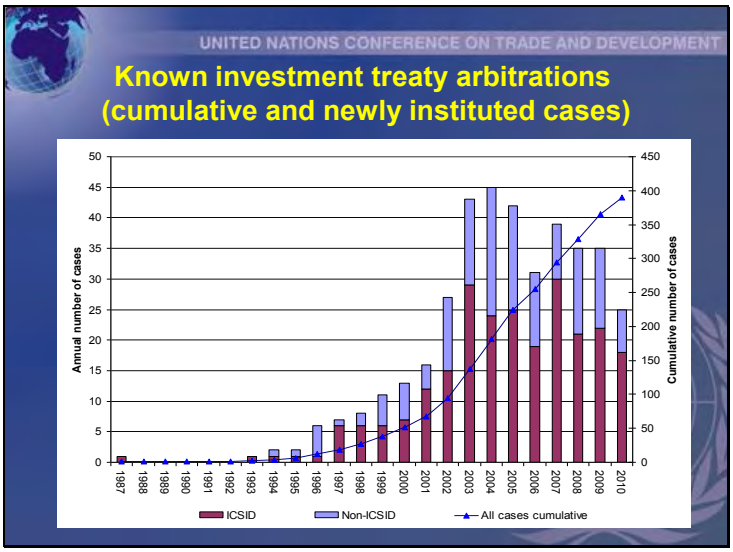

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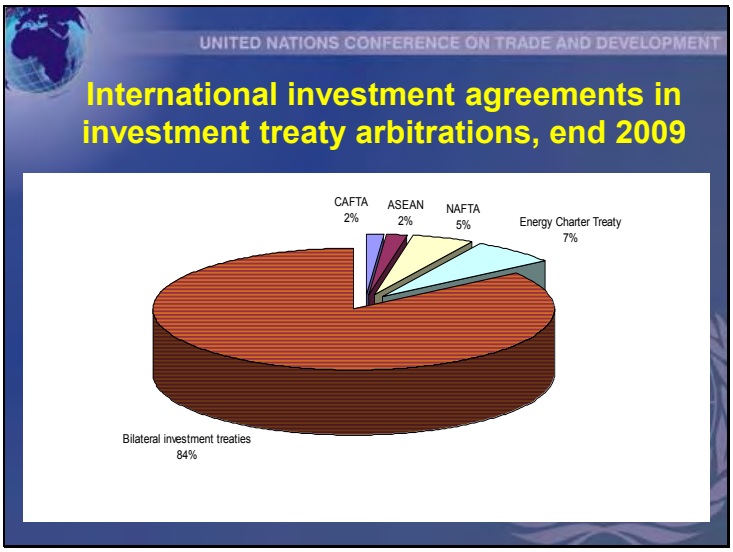

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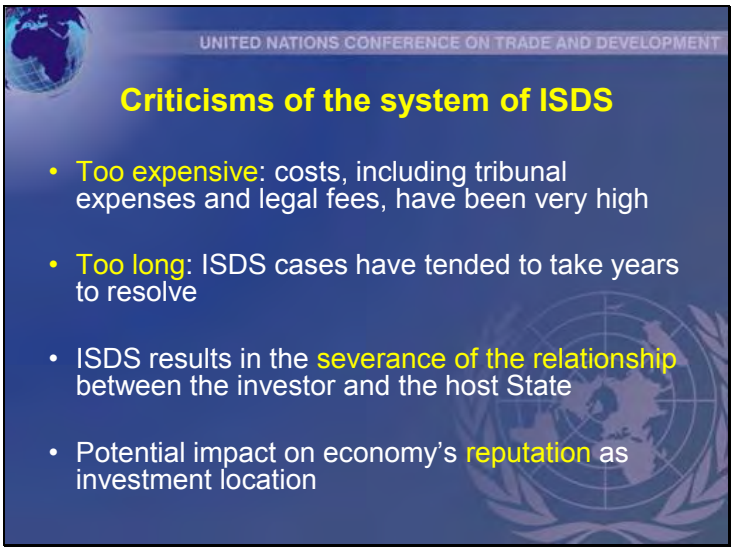

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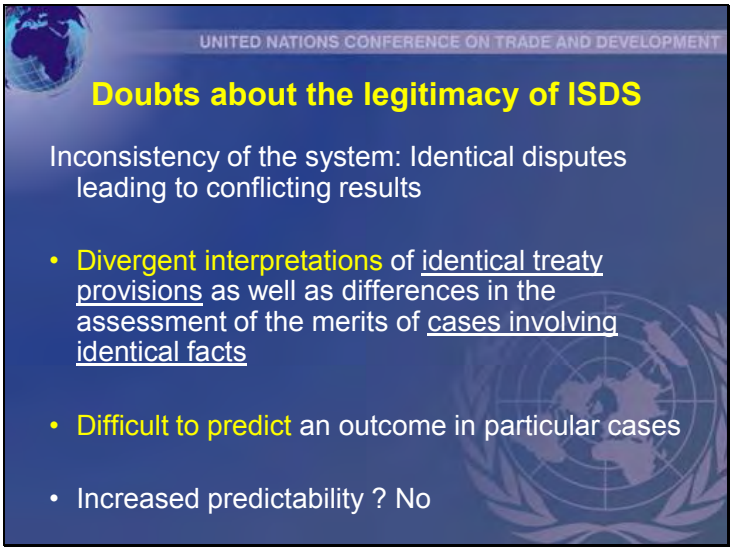

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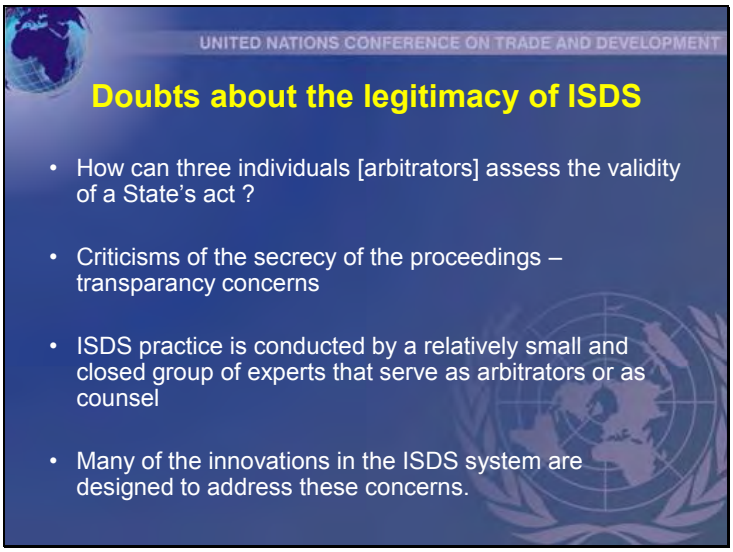

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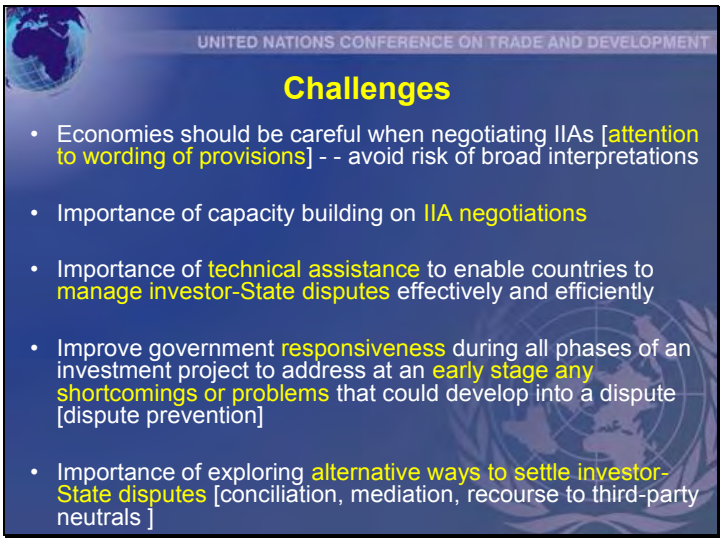

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ii. Admission and Establishment of Investments

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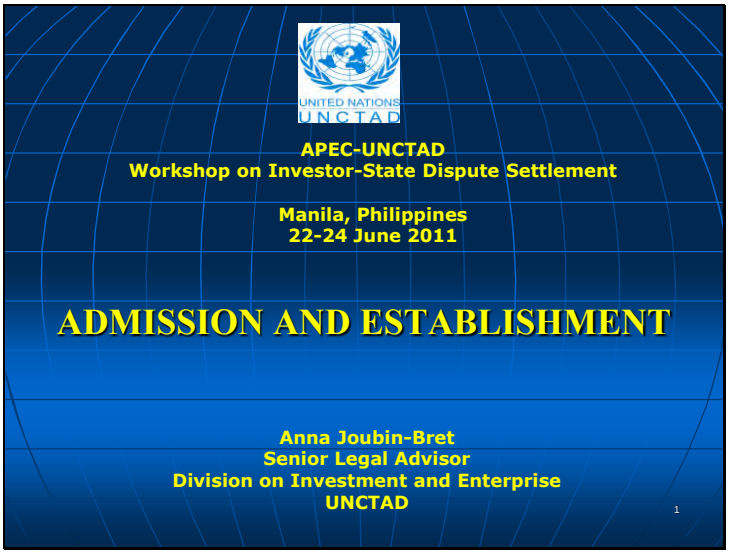

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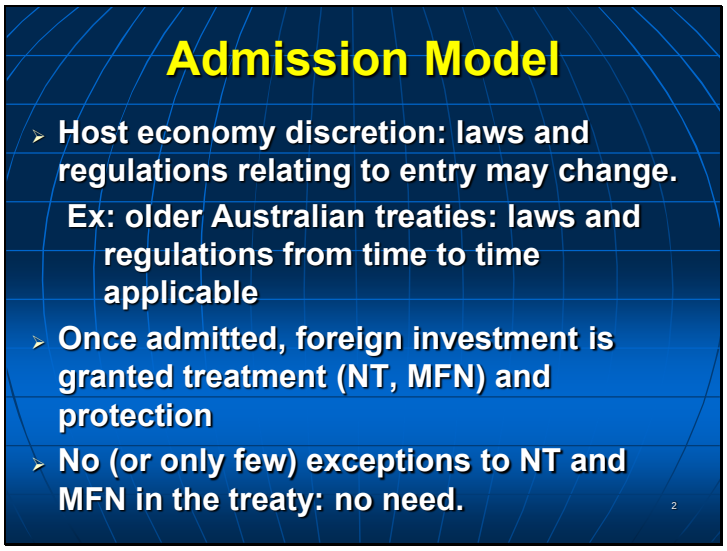

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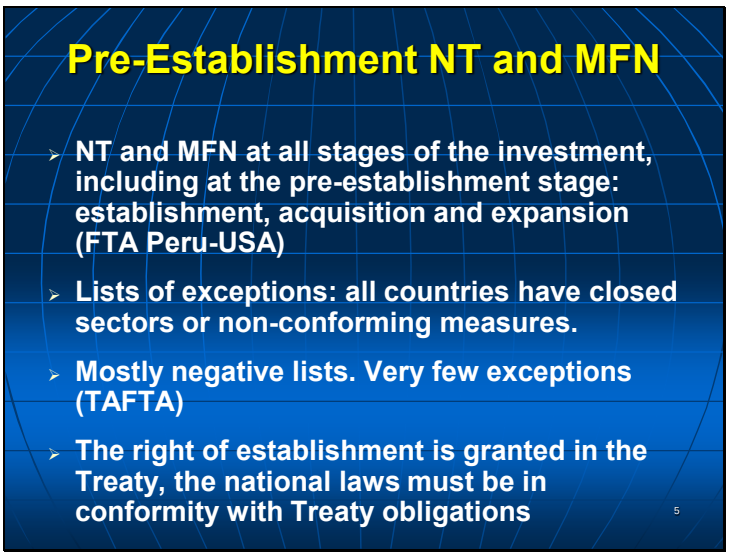

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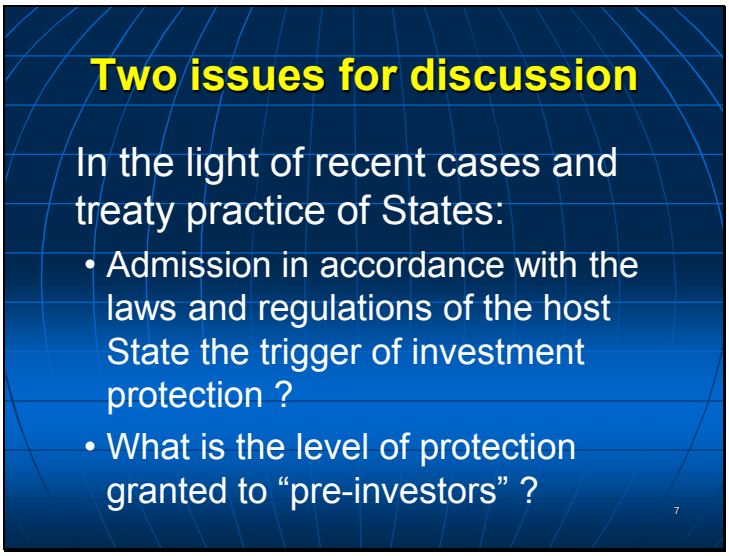

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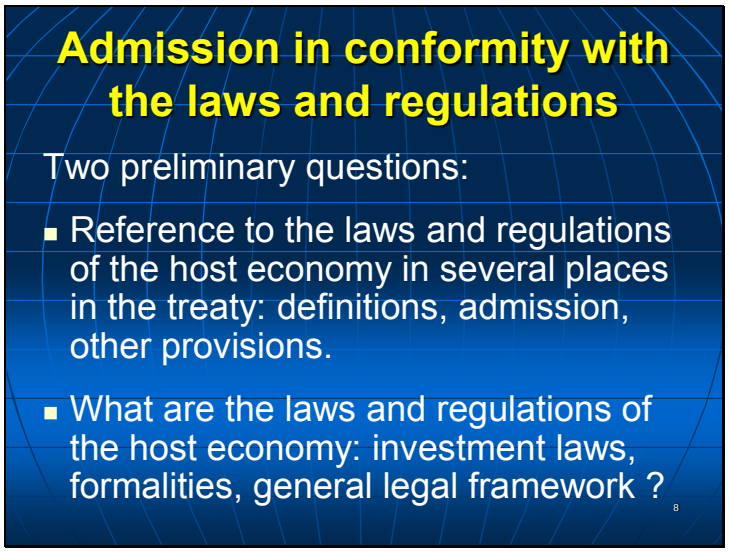

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Admission in conformity with the laws and regulations

- Same approach in *Tokios Tokeles vs. Ukraine*: severity of deviations from national law.
- In *Bayindir vs. Pakistan*: reference to host State laws refers to legality and since it did not violate Pakistani laws and regulations: tribunal had jurisdiction.

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Slide 11

Admission in conformity with laws and regulations

- *Aguas del Tunari vs. Bolivia*: included in the admission clause: "Subject to its right to exercise powers conferred by its laws and regulations, each Party shall admit such investment".
- Tribunal interprets reference to the "framework of its laws and regulations" as a reference "limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments".

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Slide 12

Admission in conformity with the laws and regulations

- *Fraport vs. Philippines*: Violation of the Anti-dumping Law (secret shareholders agreement).
- Tribunal found a violation of the ADL. Found that a failure to comply with the national law to which a treaty refers will have an international legal effect.
- Subjective assessment: good faith or intentional violation.
- No jurisdiction. Jurisdictional matter vs. Issue belonging to the merits (Cremades dissenting opinion).

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Slide 13

Admission in conformity with the laws and regulations

- *Inceysa v. Republic of El Salvador* (6August 2006, ICSID ARB/0326)
- Inceysa argued that denial of exclusivity was an expropriation of its rights under the contract and violated El Salvador-Spain BIT
- Tribunal found that Inceysa had made false representations to secure the contract
- Thus the investment violated the laws of El Salvador and could not be arbitrated pursuant to the BIT.
- CONTRAST: *Ioannis Kardassopoulos v. Georgia* (6 July 2007, ICSID Case No. ARB/05/18)
  - Where it was the *host State's own actions* that may have rendered the agreement illegal, the investment does not lose protection under the BIT.

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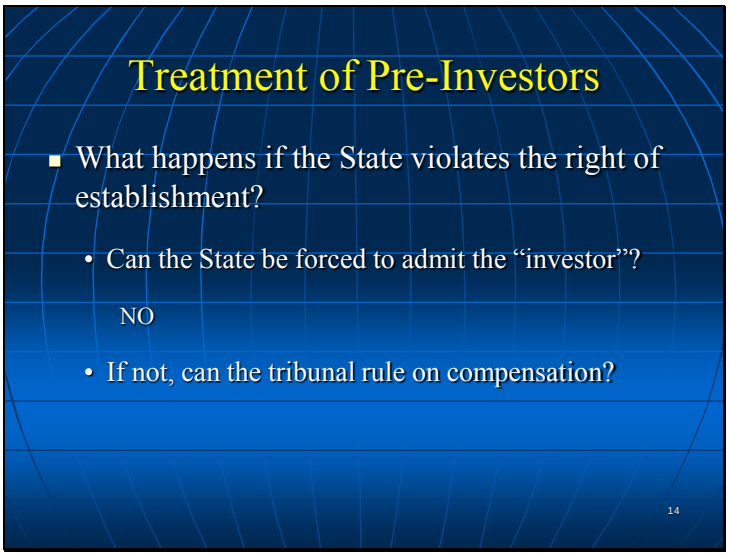

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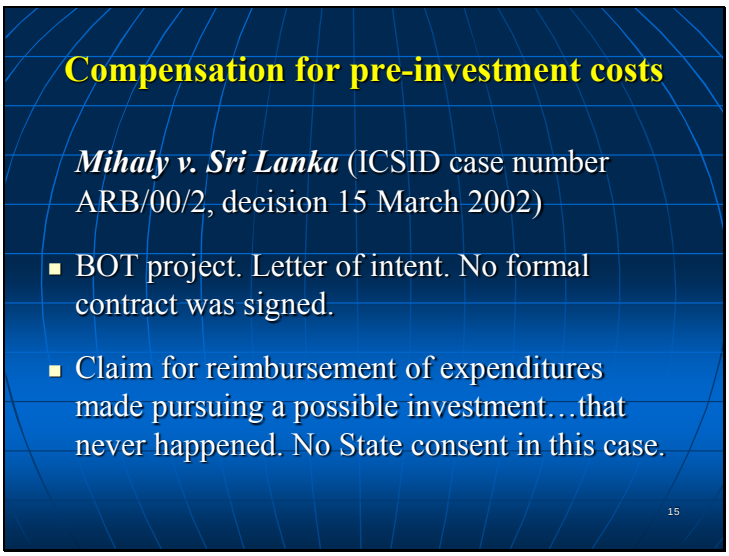

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Slide 18

William Nagel v. Czech Republic (cont'd)

- Tribunal: "Financial value" requires two basic features:
  - Value has to be real, not just potential
  - Concept of financial value has to be interpreted in accordance with domestic laws
  - Rights derived from cooperation agreement did not have financial value: no investment

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Slide 19

Violation of the Right of Establishment

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

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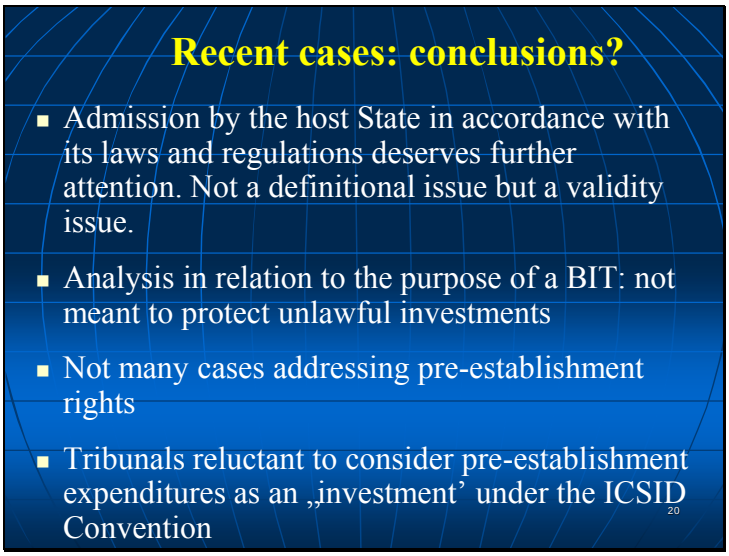
Slide 20



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iii. Definition of Investor

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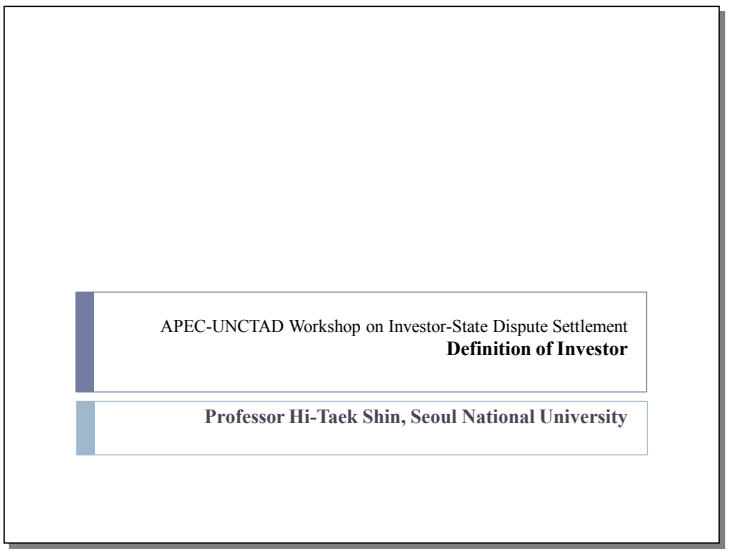

Slide 2

Slide 3

Definition of "Investor" – "Natural Person"

- ICSID Convention Article 25(2)
  - *"National of another Contracting State" means:*
  - *(a) any natural person*
    - *who had the nationality of a Contracting State other than the State party to the dispute*
    - *on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered …,*
    - *but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*

3

Slide 4

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

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

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Slide 5

Definition of "Investor" under IIAs – "Natural Person"

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

  2. The term "nationals" shall mean:

  a) in respect of the Republic of the Philippines, any natural person who is a citizen of the Republic of the Philippines according to its Constitution

  b) in respect of the Kingdom of Thailand, any natural person who possesses Thai nationality under the law in force in the Kingdom of Thailand;

- ASEAN Comprehensive Investment Agreement, Article 4

  *(d) "**investor**" means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State*

  *(g) "**natural person**" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies*

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Slide 6

Nationality of Individuals

- With respect to the nationality, domestic laws of the country whose nationality is claimed govern:
  - Tribunal may rule on nationality applying the relevant country's domestic law
- Links other than nationality
  - Residence, right of permanent residence or domicile
- Dual nationality
  - Individuals having dual nationality can benefit from IIAs of either country
  - "Effective nationality" test as applied in *Nottebohm* case: not accepted by ICSID tribunals absent a basis in the IIAs
  - BUT, nationals of the host State are considered domestic, even if they also hold the nationality of another state
  - Nationality as of when the claim is brought by the investor as well as when the claim is registered with ICSID

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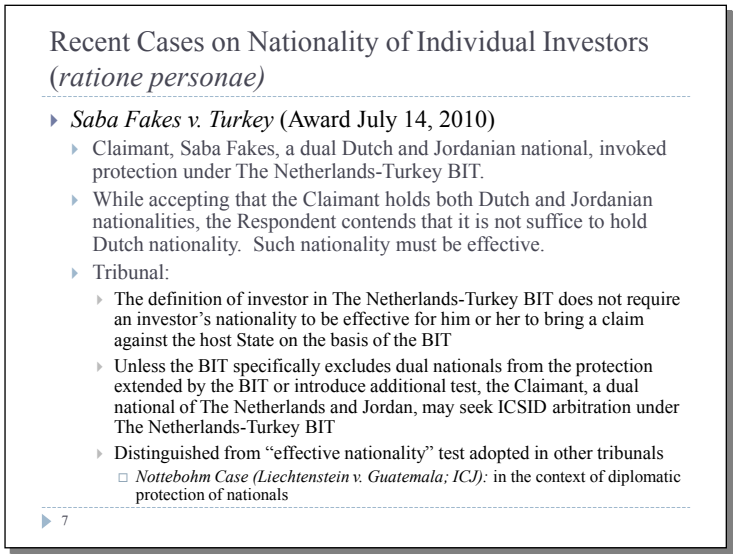

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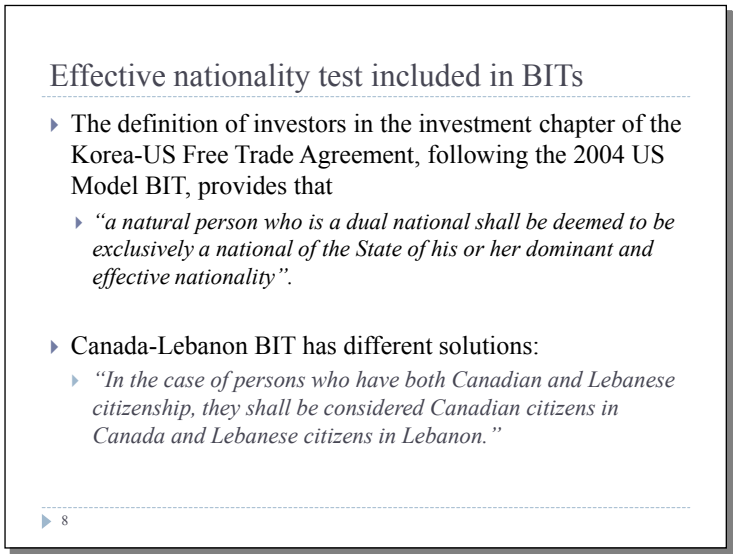

Slide 9

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

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

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Slide 10

Definition of "Investor" – Juridical Person

- ICSID Convention Article 25(2)(b):
- *(b) any juridical person*
  - *which had the nationality of a Contracting State other than the State party to the dispute*
  - *on the date on which the parties consented to submit such dispute to conciliation or arbitration and*
- *any juridical person*
  - *which had the nationality of the Contracting State party to the dispute on that date and*
  - *which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention.*

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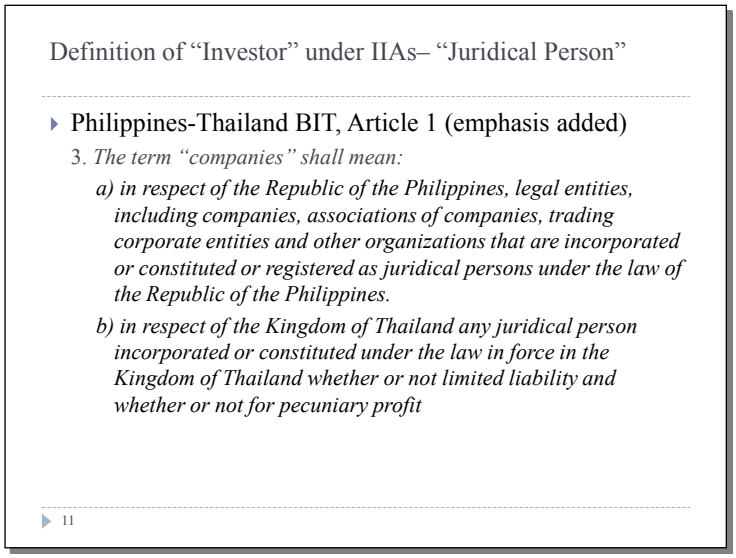

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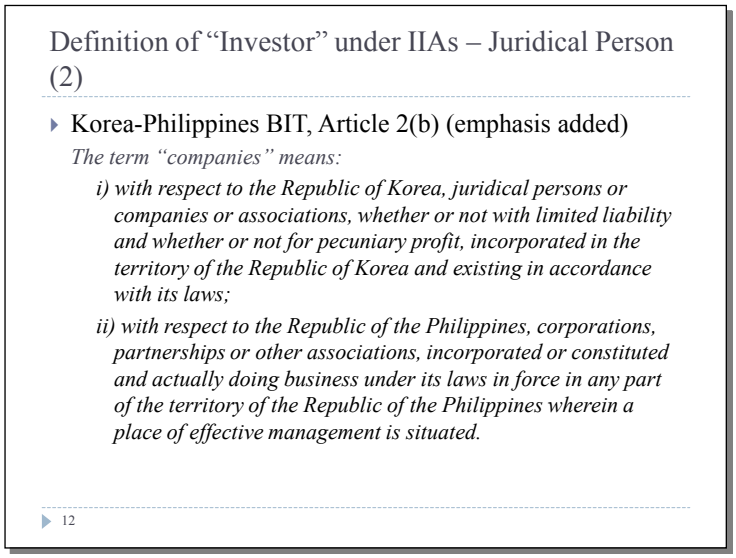

Slide 13

Definition of "Investor" under IIAs – Juridical Person (3)

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

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

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Slide 14

Nationality of Juridical Person

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

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Slide 15

Tests of Corporate Nationality: Country of Organization or Incorporation*

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

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

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Slide 16

Tests of Corporate Nationality: Country of Corporate Seat

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

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Slide 17

Tests of Corporate Nationality: Country of Ownership or Control

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

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Slide 18

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

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

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Slide 19

Problems of Treaty Shopping

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

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- *Rompetrol Group N.V. v. Romania* (Decision April 18, 2008)
  - The Claimant, The Rompetrol Group N.V., is a company established in The Netherlands under Dutch law. It is wholly owned by Rompetrol Holding, a Swiss company, which is owned by individuals having Romanian nationality.
  - The Claimant holds a majority shareholding in Rompetrol S.A., a Romanian company, and other Romanian companies.
  - Respondent: because the Claimant's "real and effective nationality"- determined on the basis of its ownership and control, the source of its capital, and the nature of its commercial operations- is that of the Responsibility, its Dutch nationality is not "opposable" to the Respondent
  - Tribunal:
    - The Netherlands-Romania BIT defines corporate nationality solely based on place of incorporation
    - Neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT

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Implications of *Tokios* and *Rompetrol* cases

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

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Local Company with Foreign Control

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

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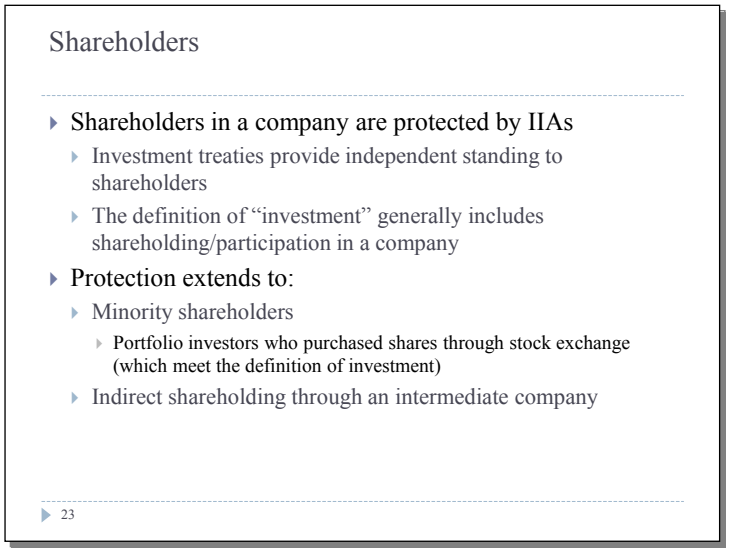

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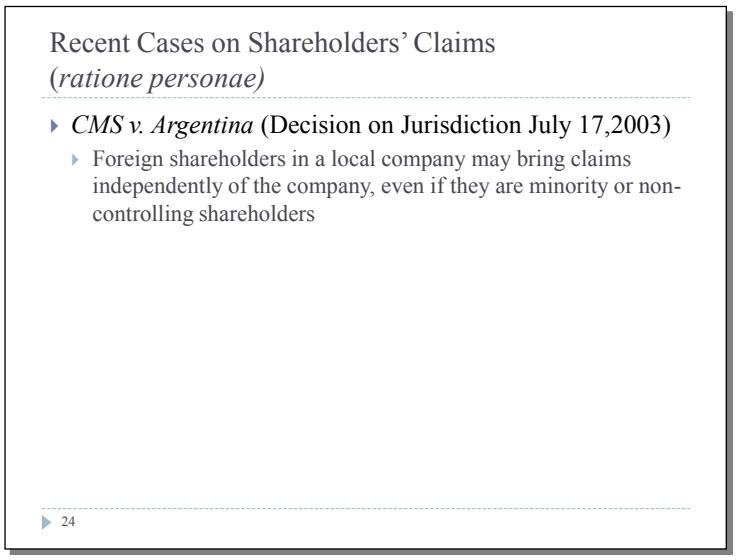

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Nationality Planning and Denial of Benefits

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

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Denial of Benefits Clause: Example

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

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

(a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;

(b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and

(c) an investor of another Member State that is a juridical person of such other Member State and to investment of such investor if investors of a non-Member State own or control the juridical person and the denying Member State does not maintain diplomatic relations with the non-Member State.

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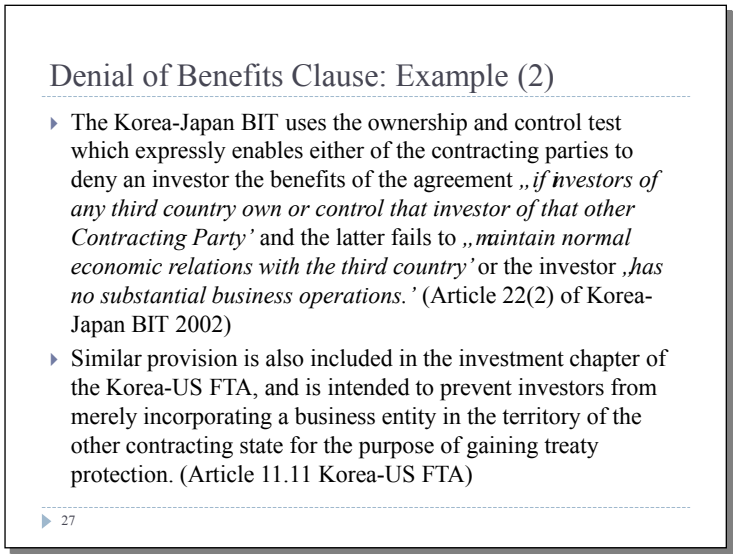

iv. Definition of Investment under Investment Treaties and the ICSID Convention

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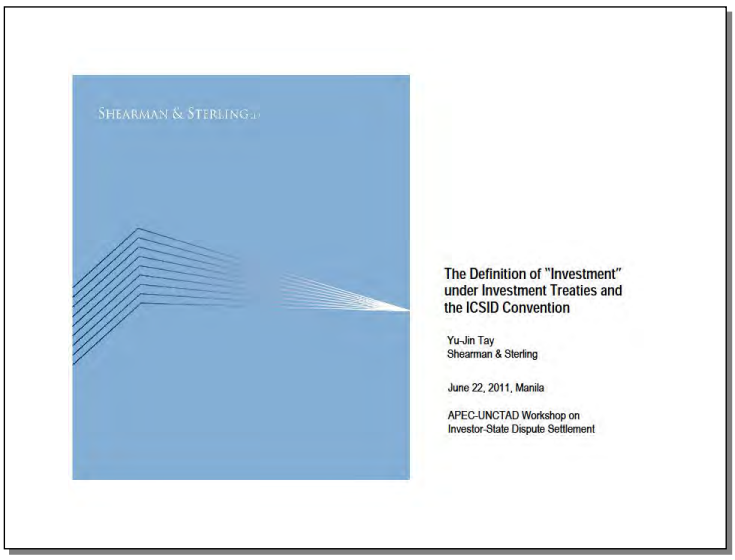

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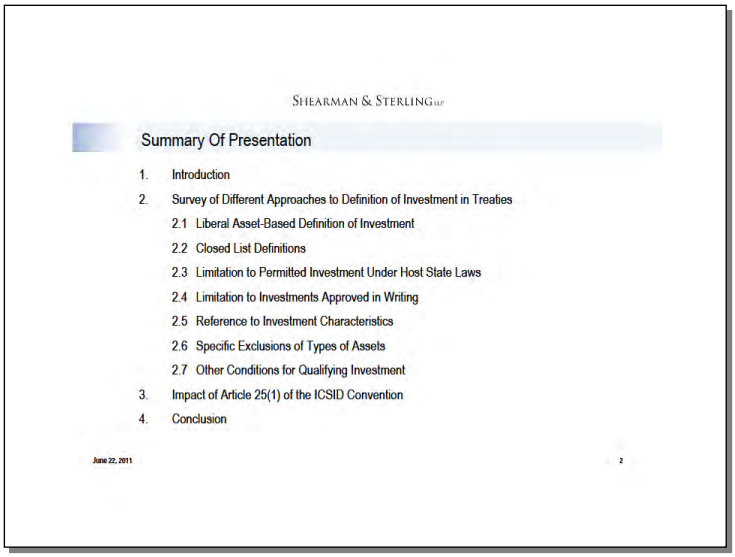

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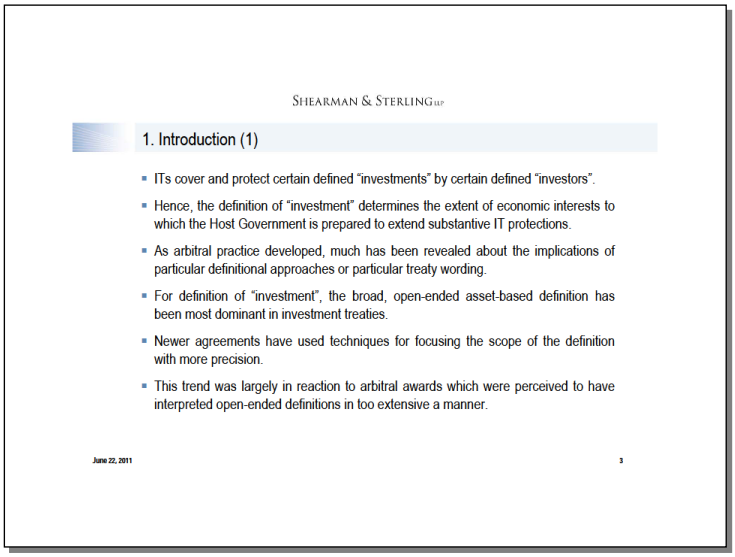

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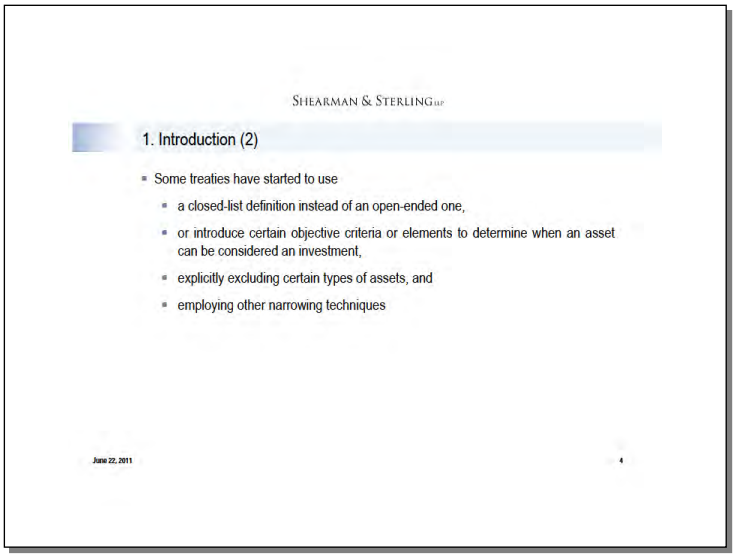

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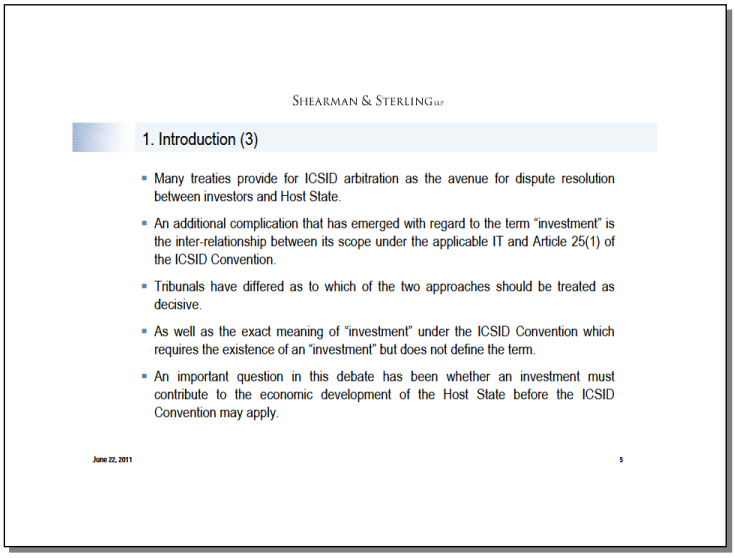

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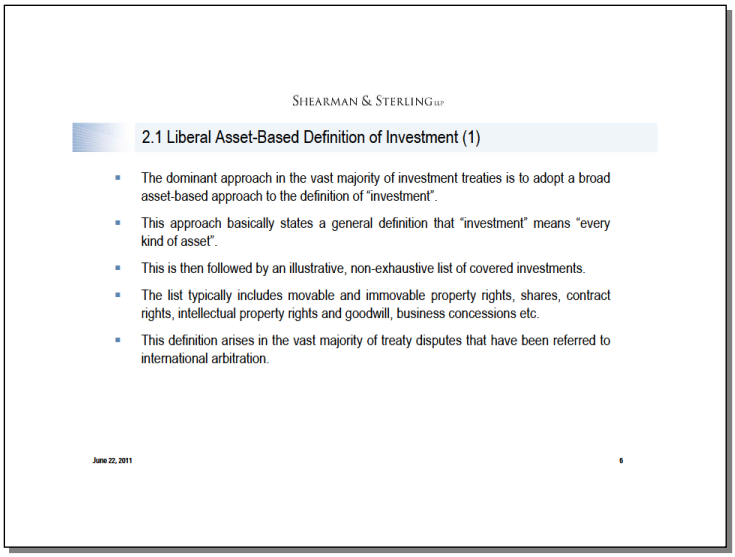

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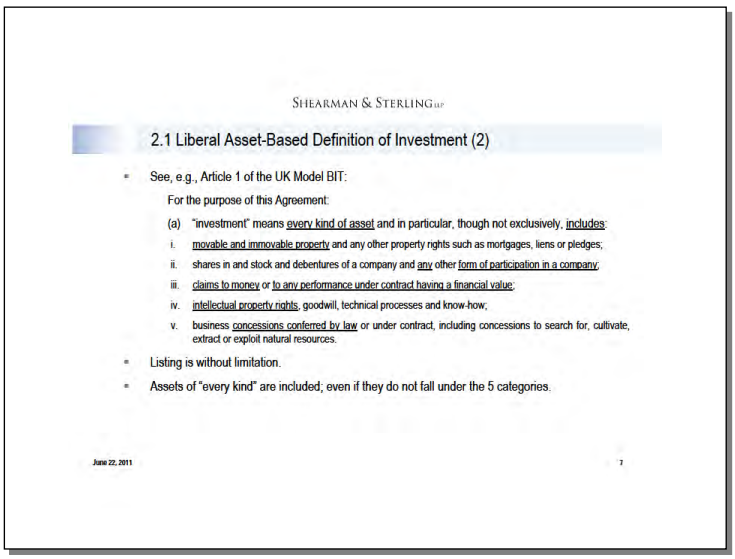

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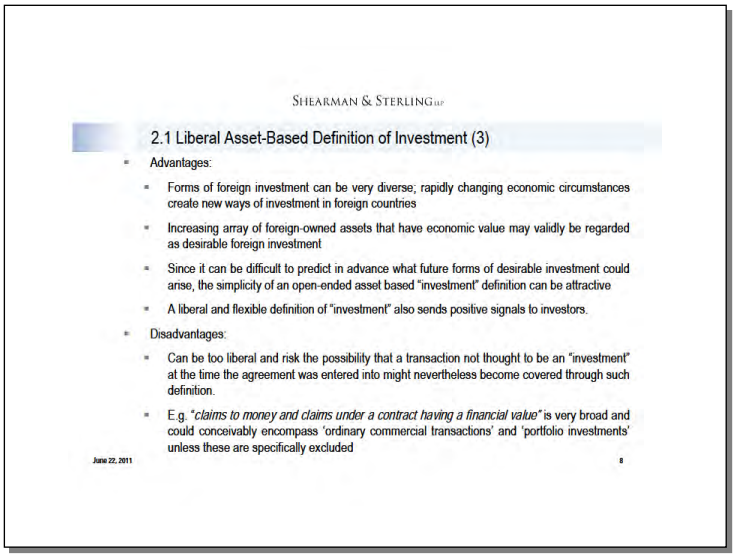

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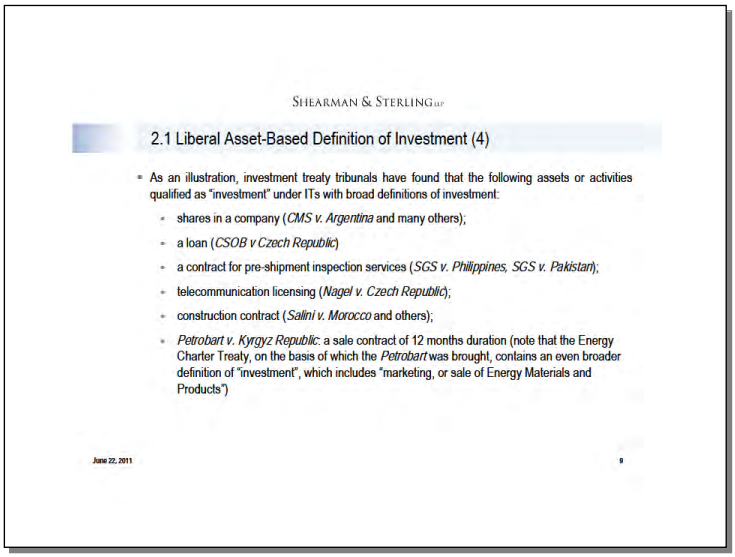

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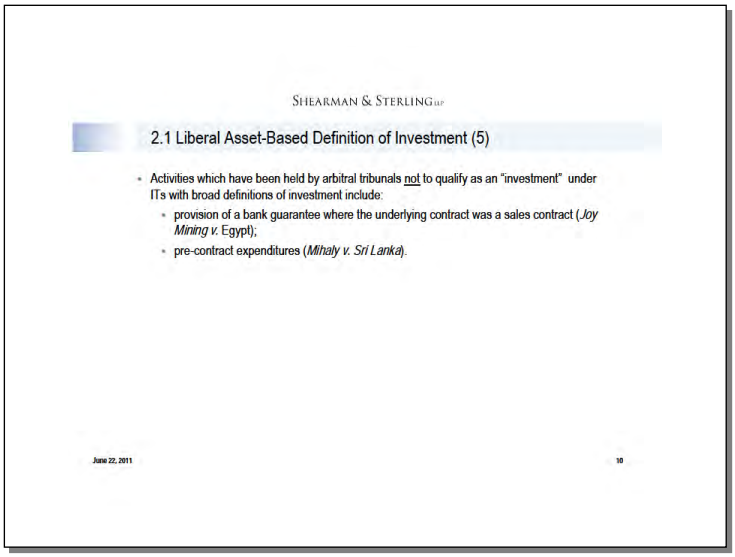

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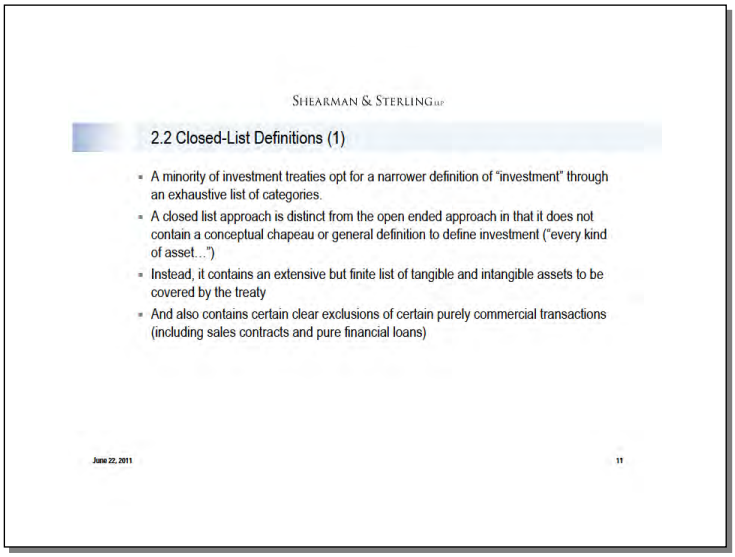

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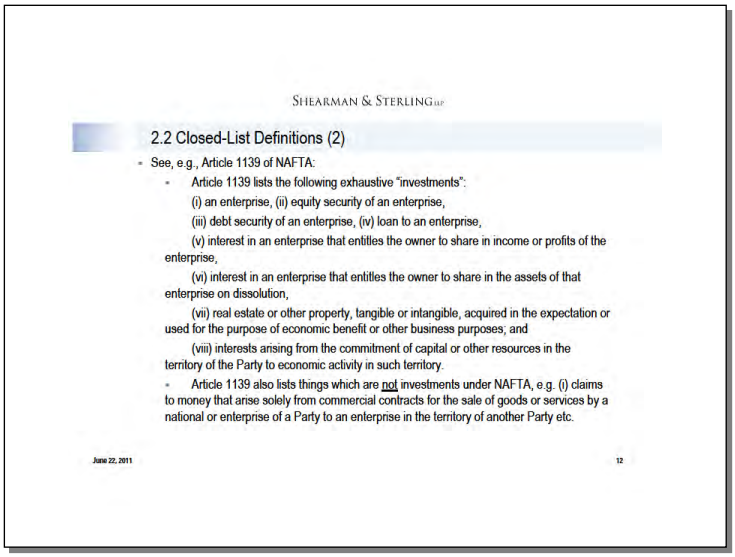

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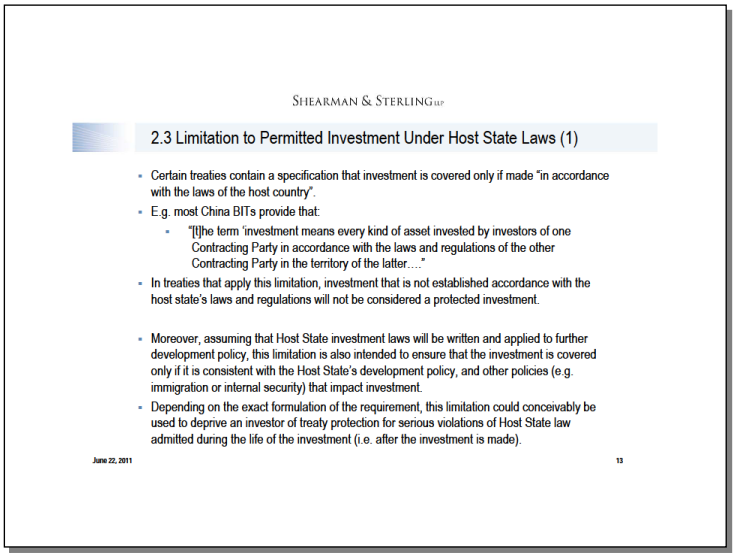

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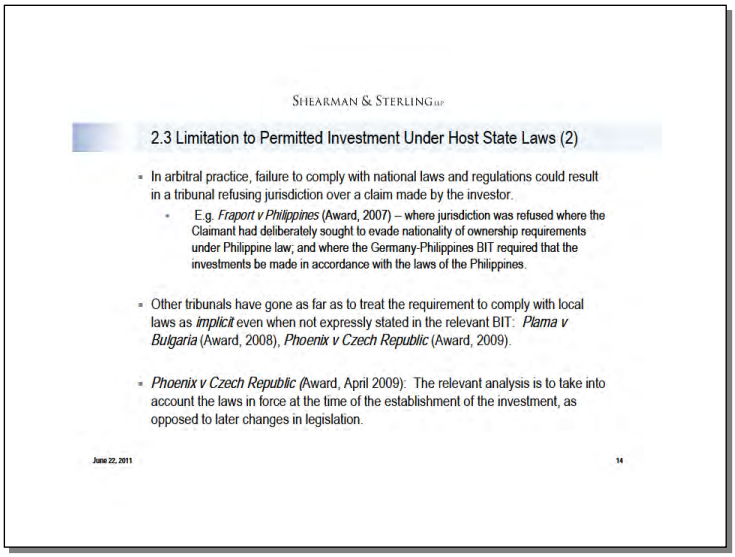

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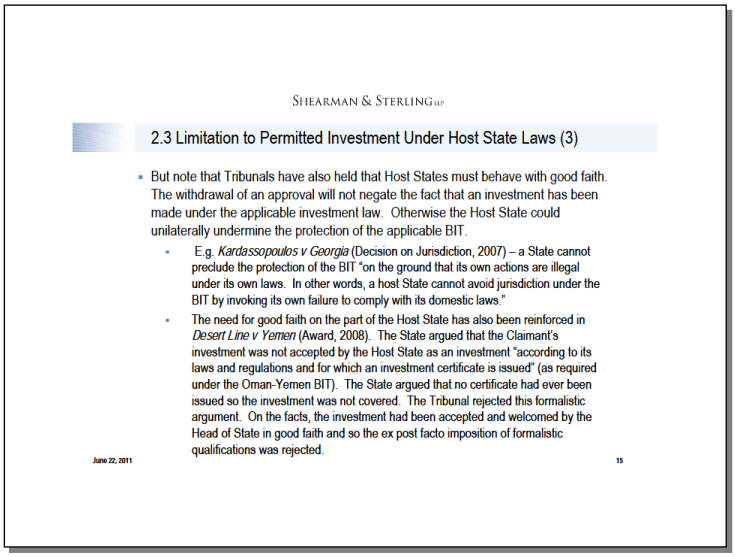

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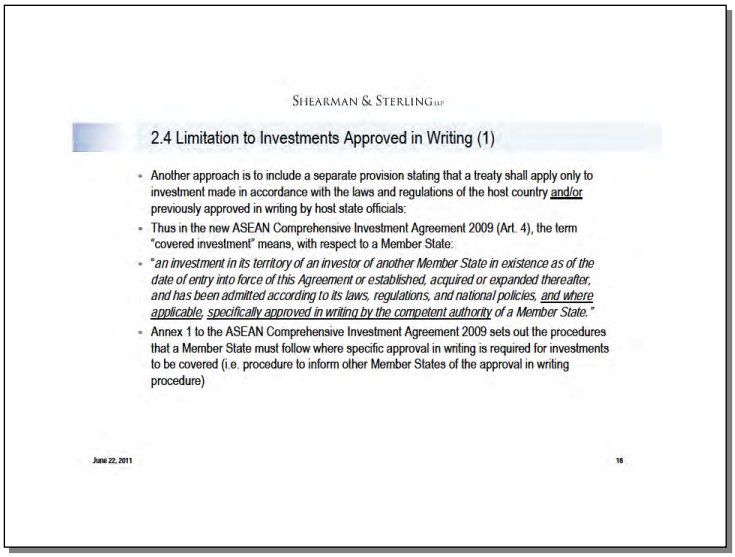

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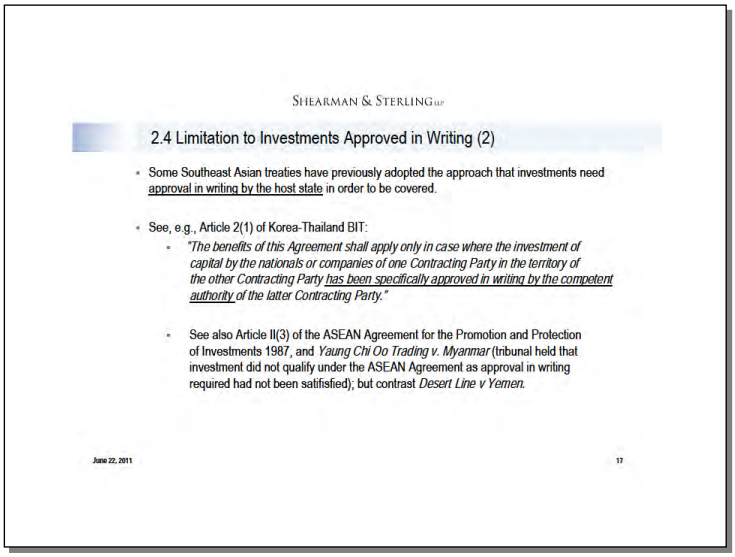

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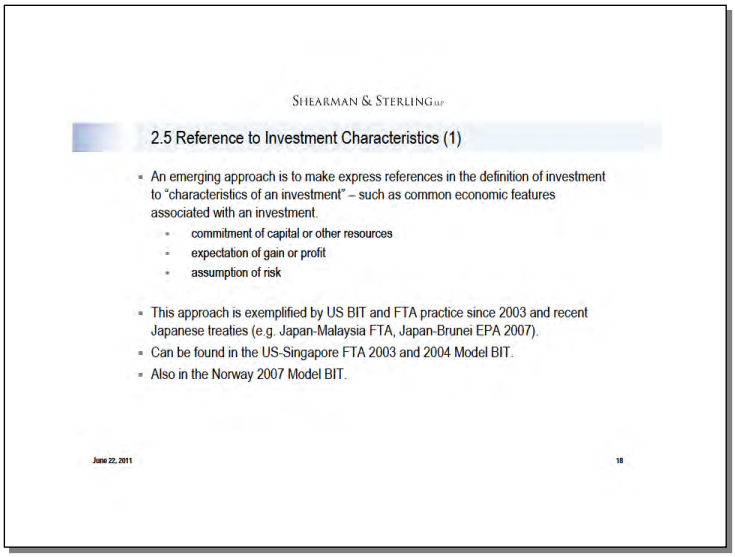

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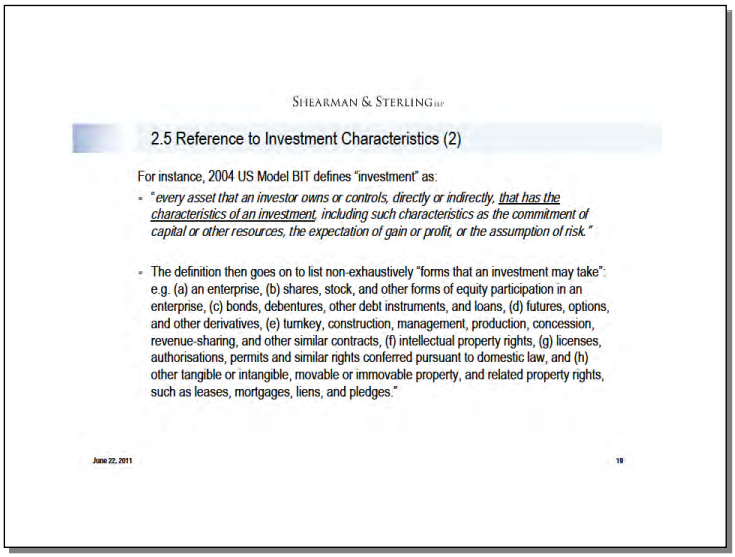

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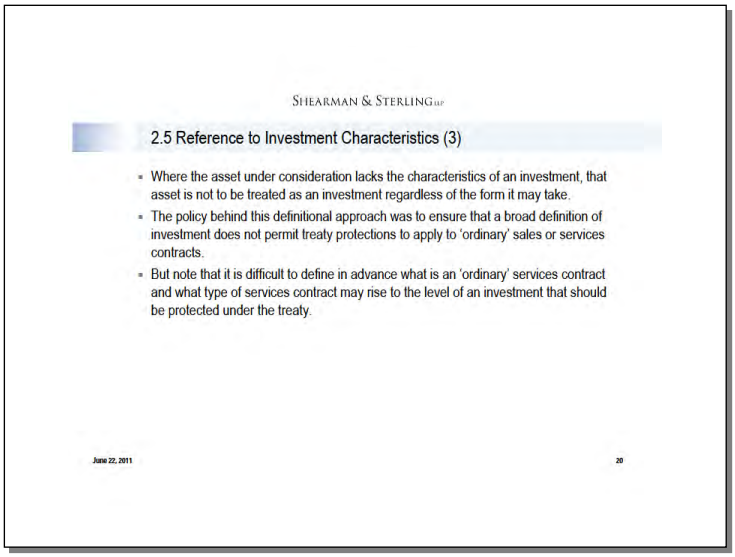

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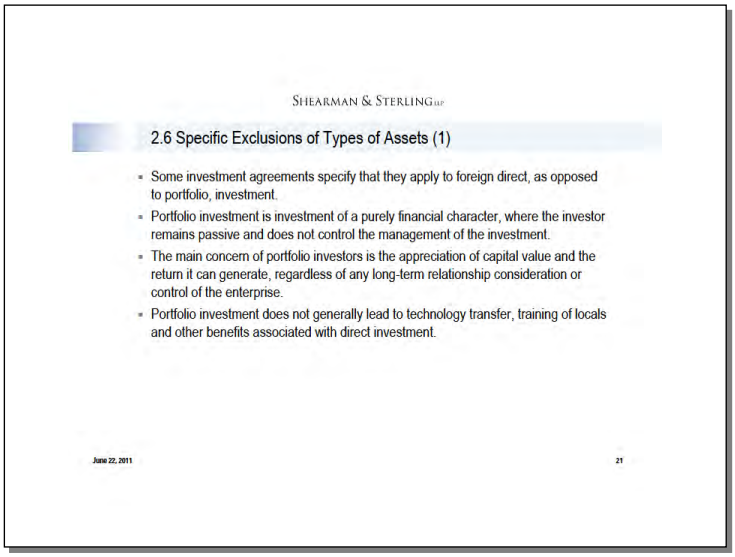

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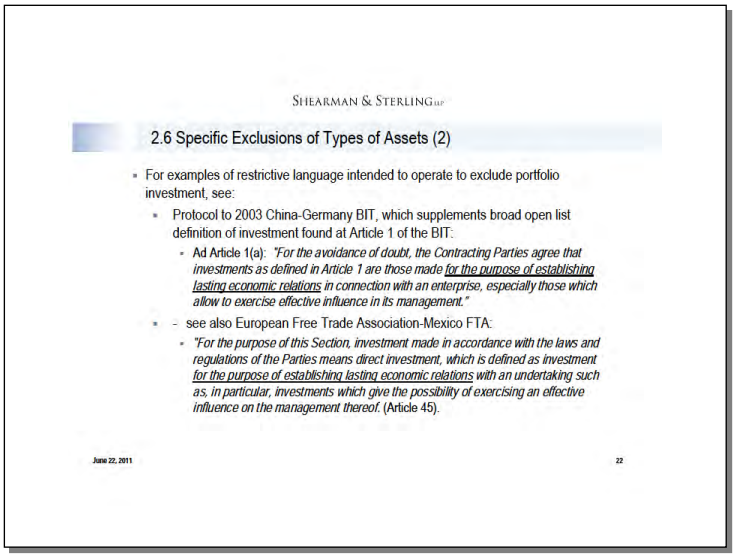

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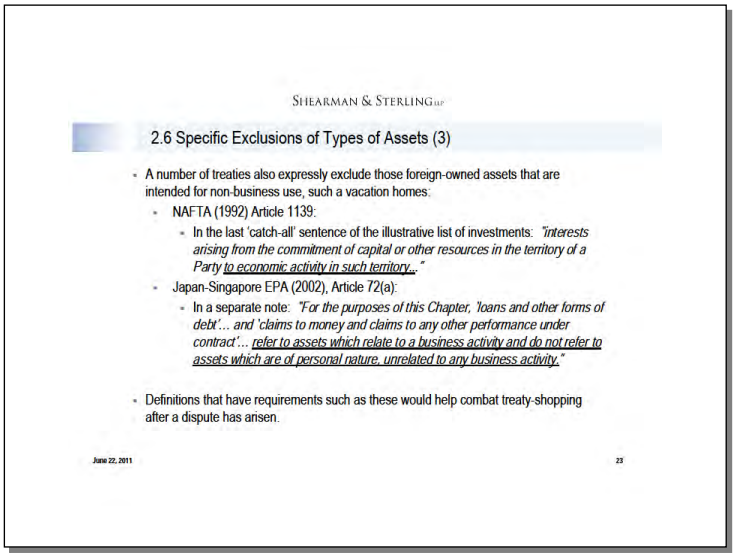

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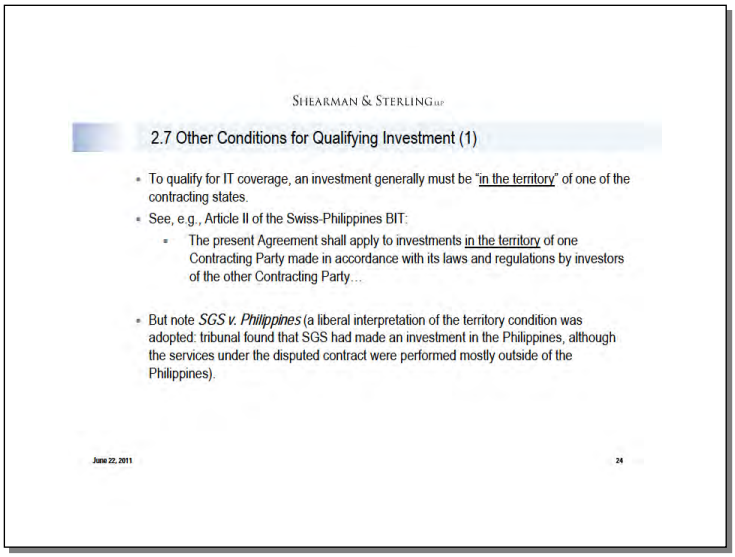

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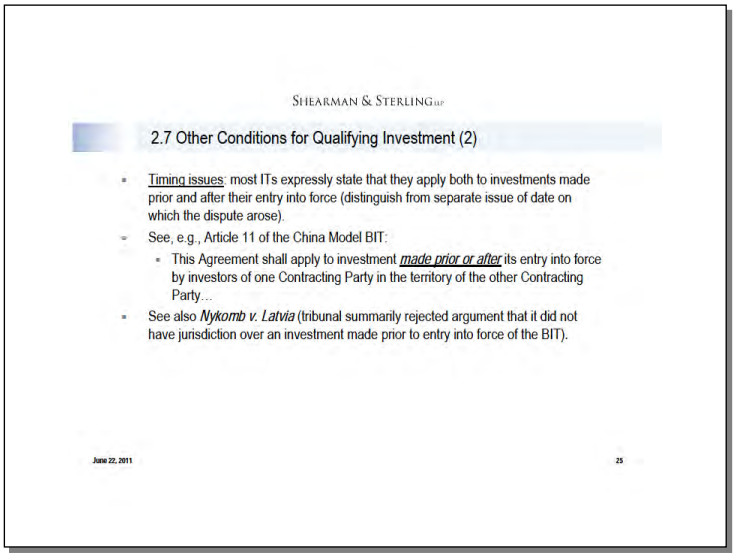

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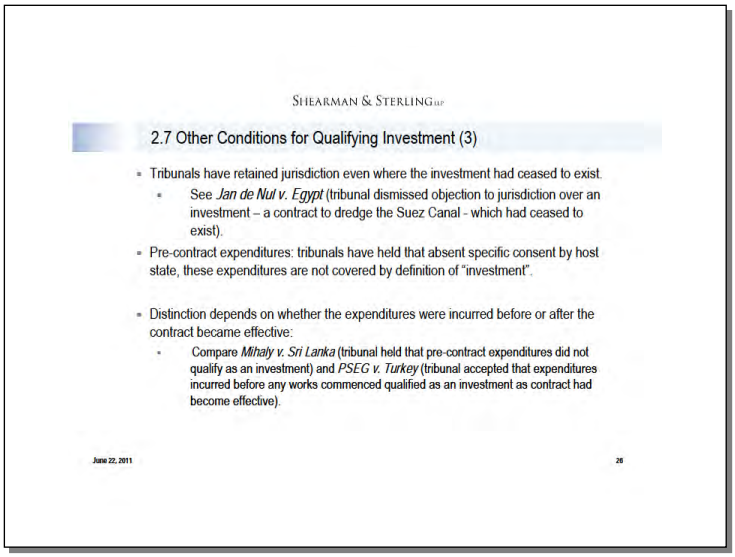

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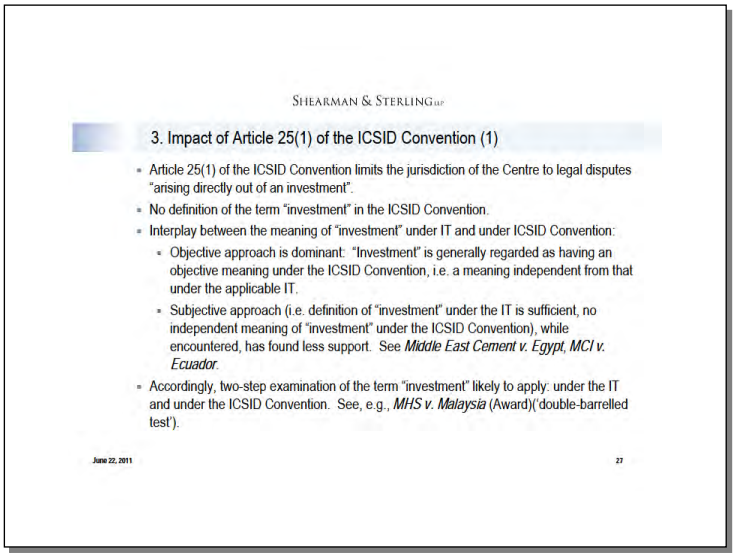

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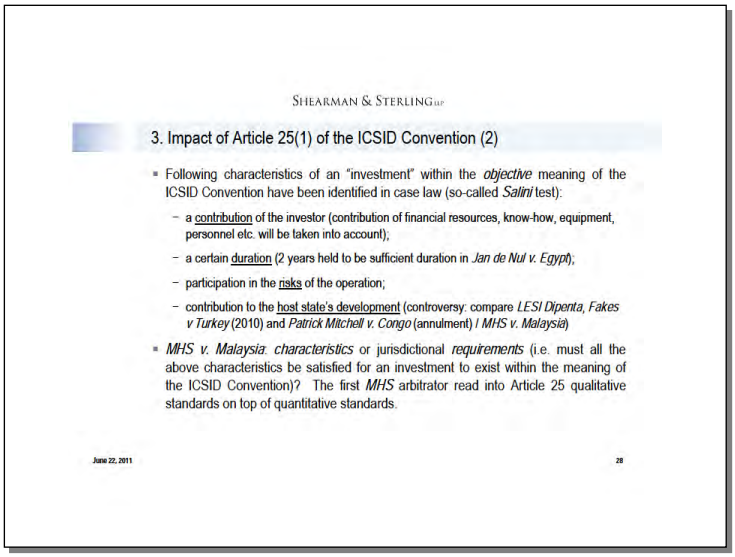

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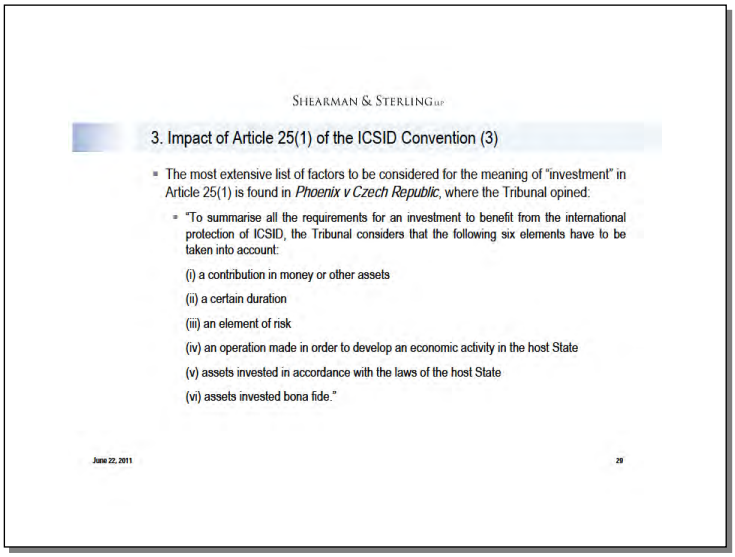

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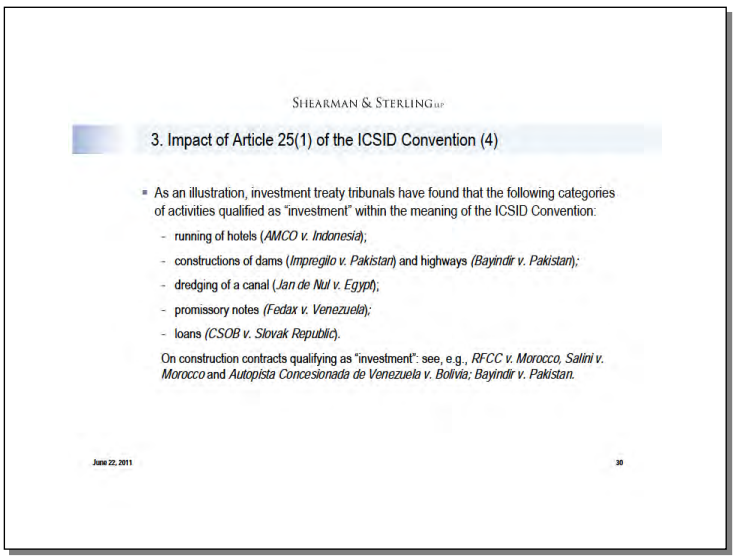

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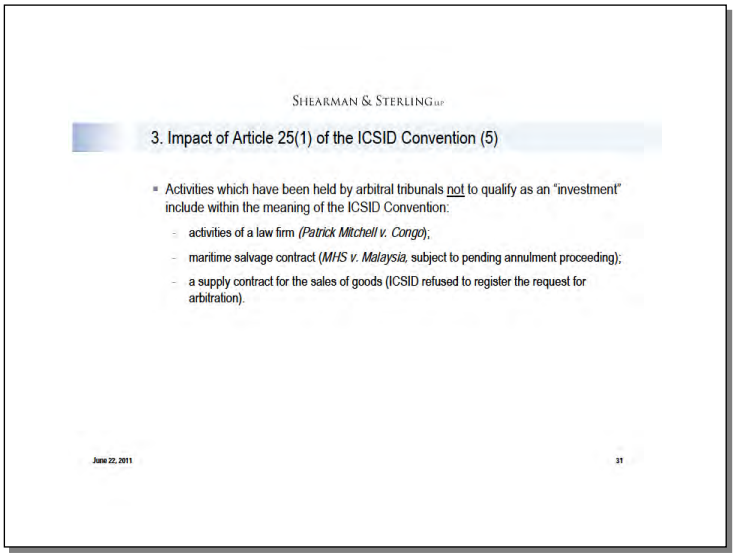

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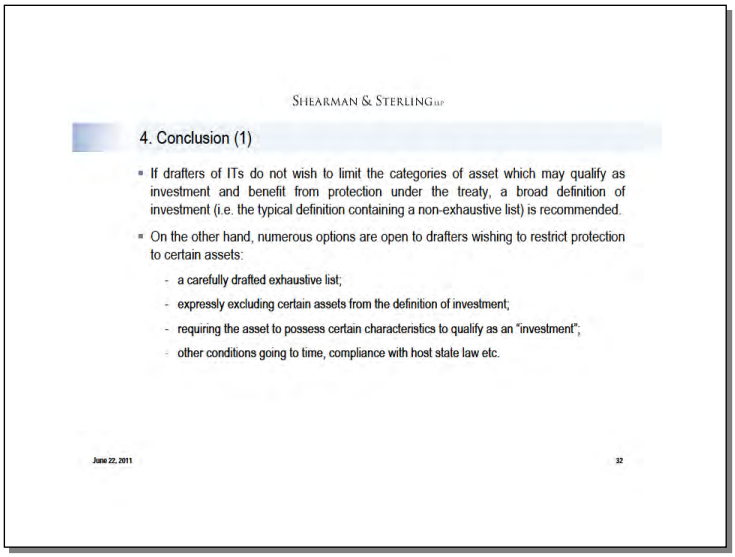

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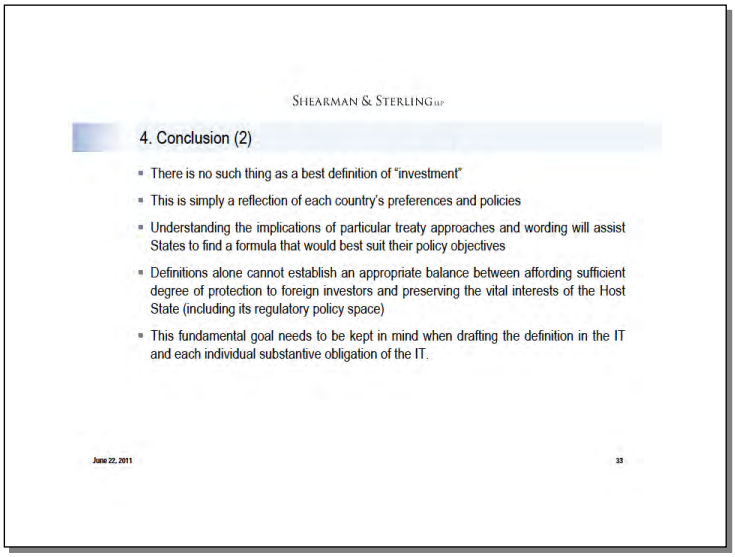

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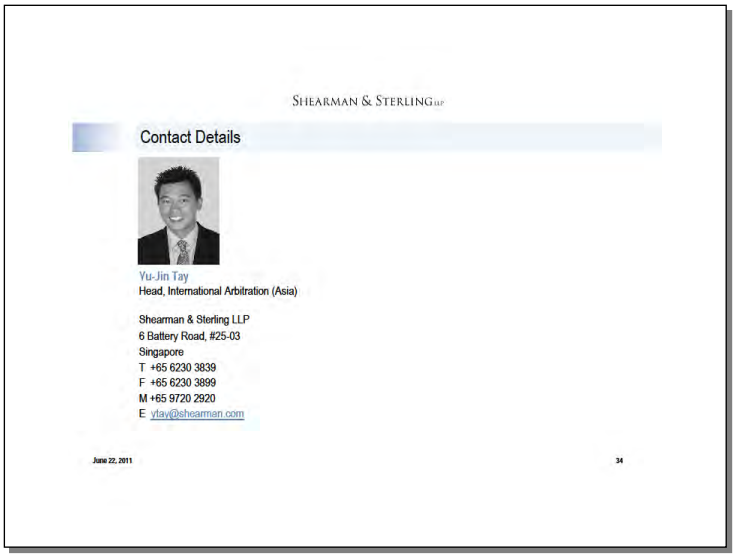

v. Fair and Equitable Treatment

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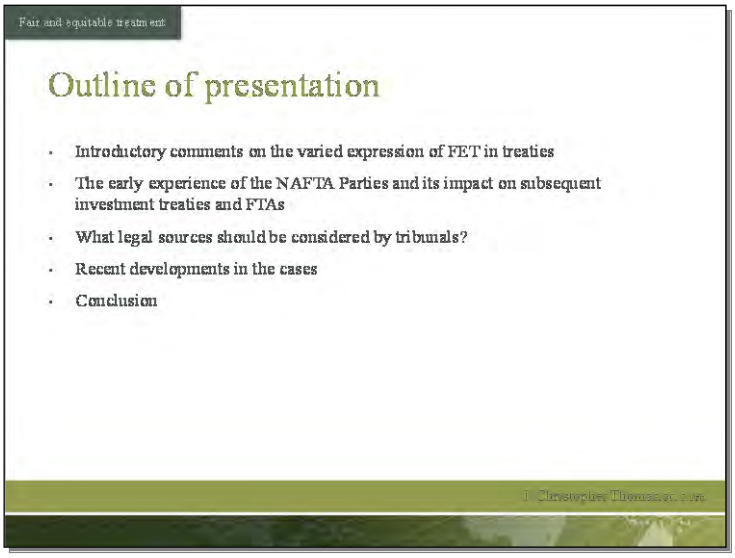

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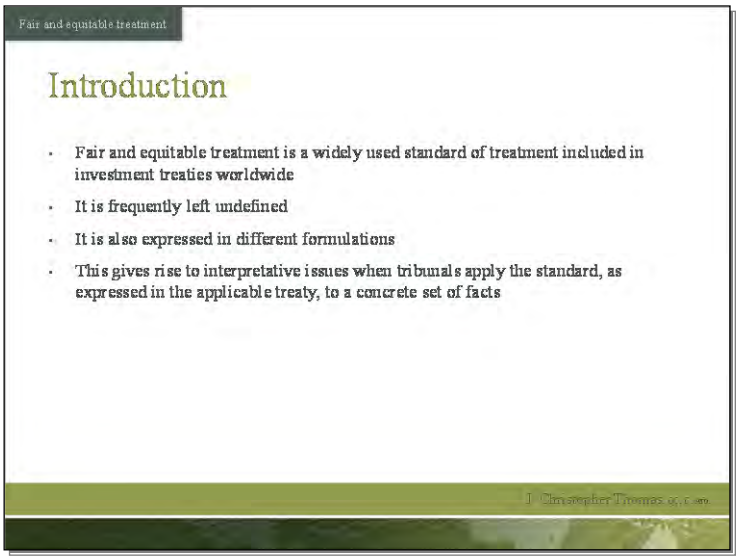

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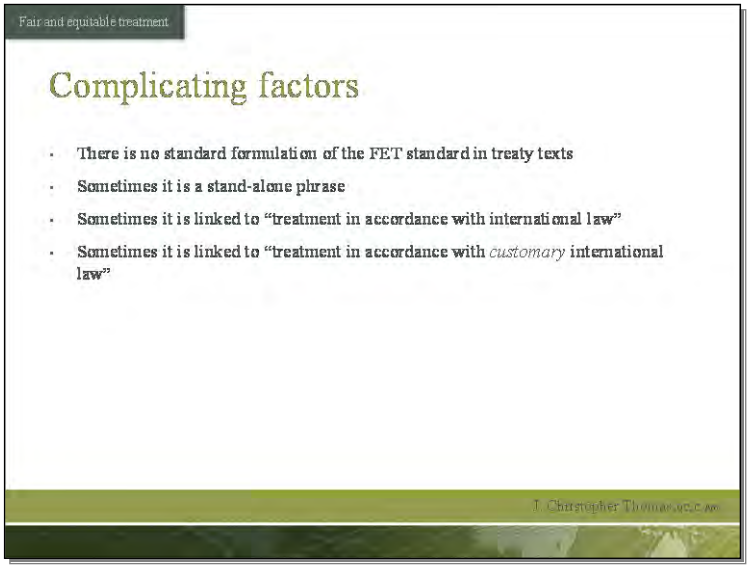

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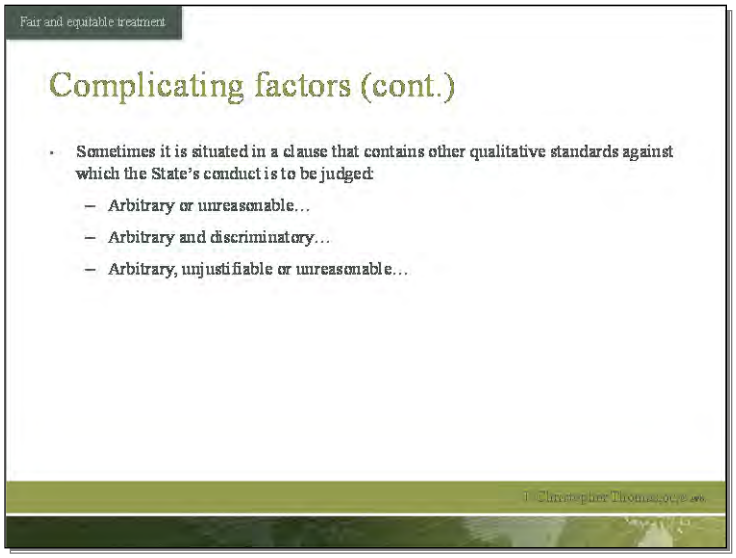

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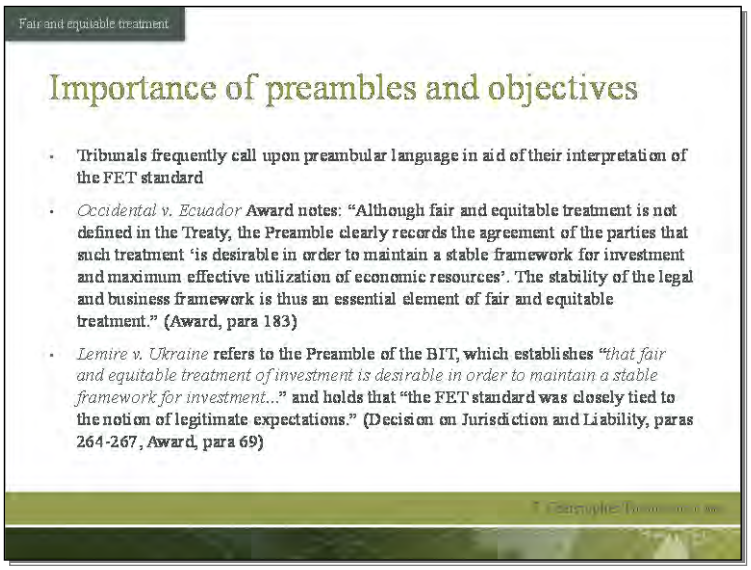

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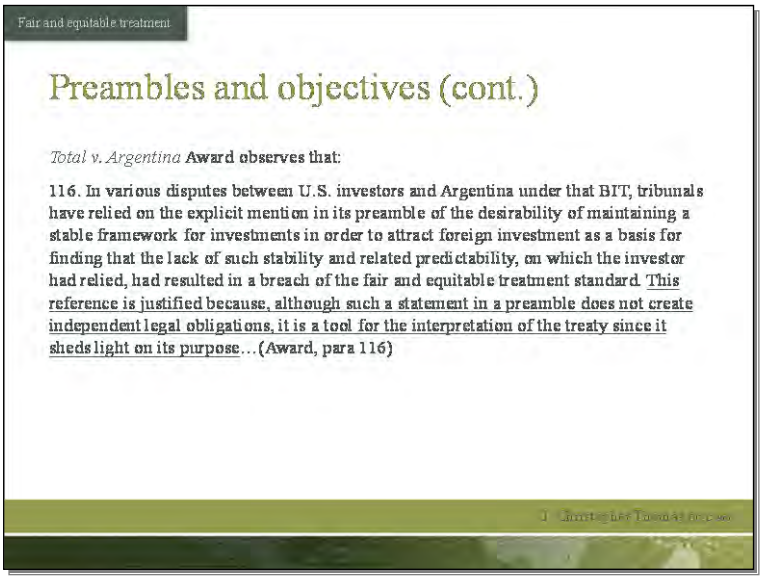

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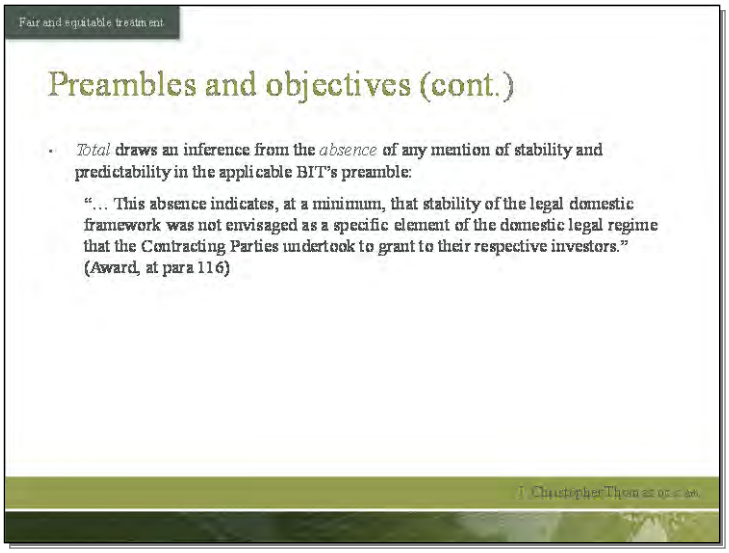

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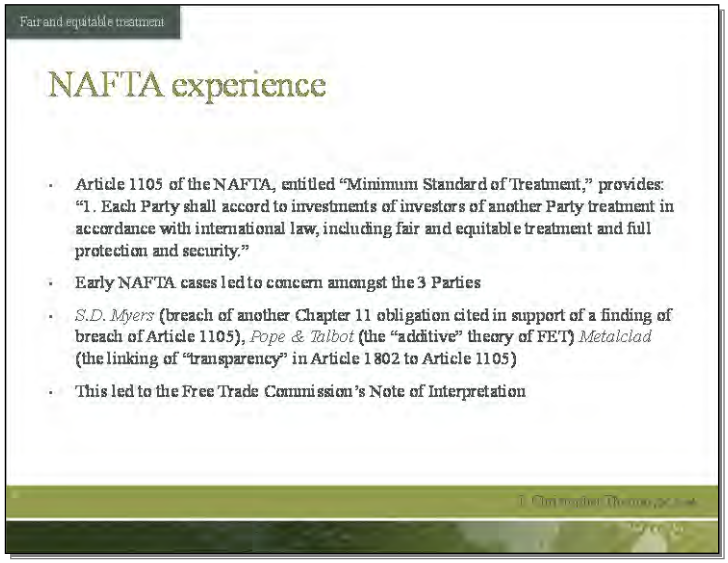

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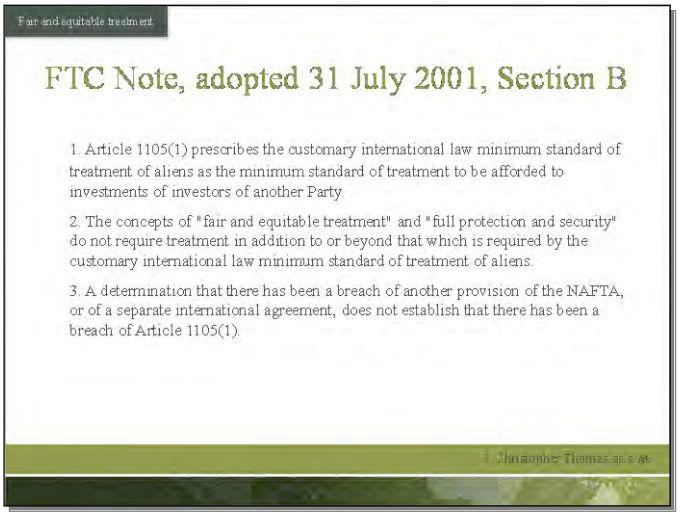

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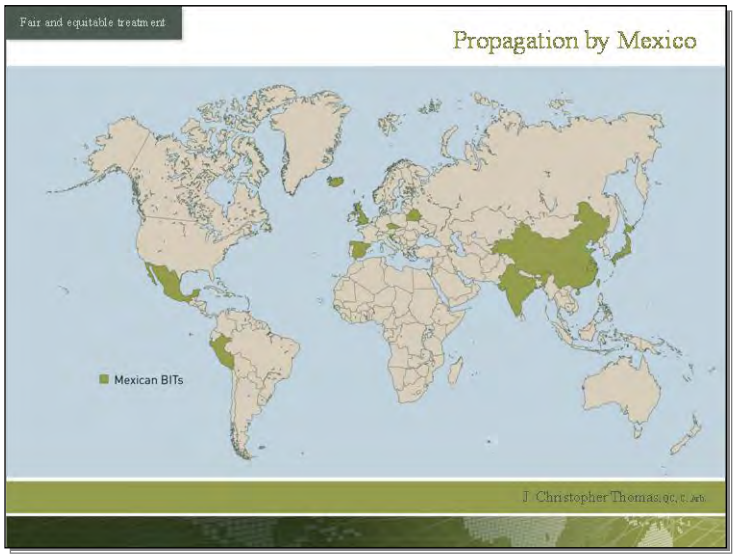

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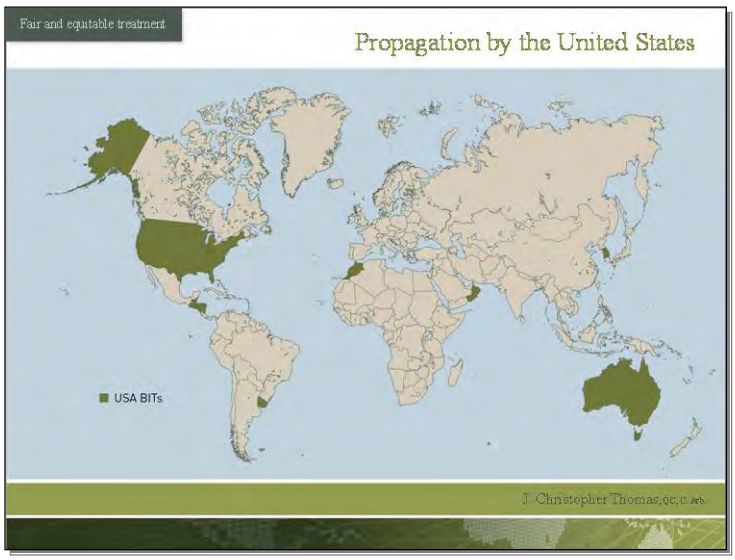

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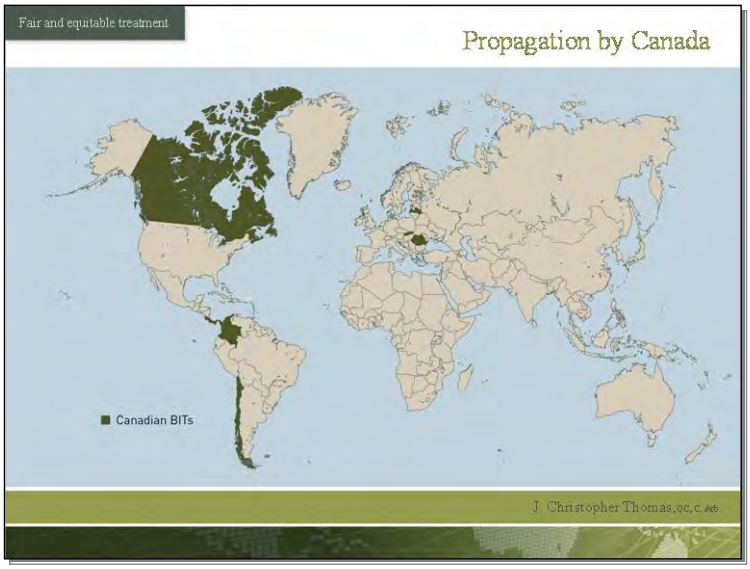

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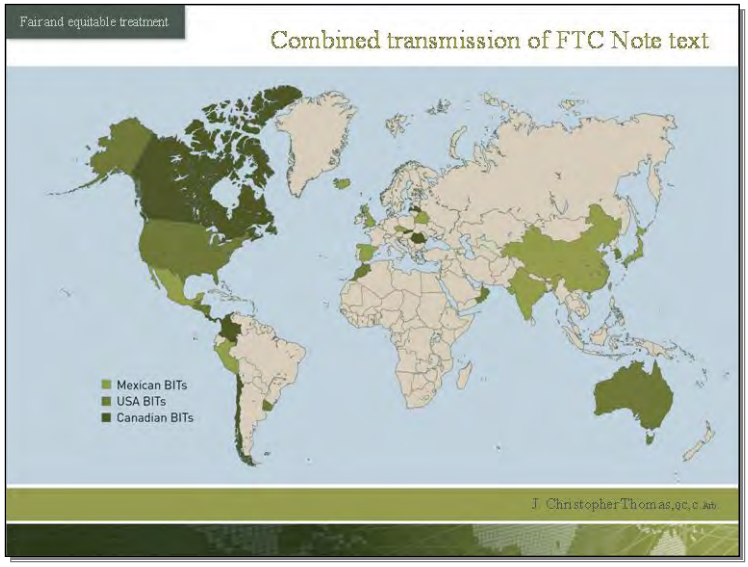

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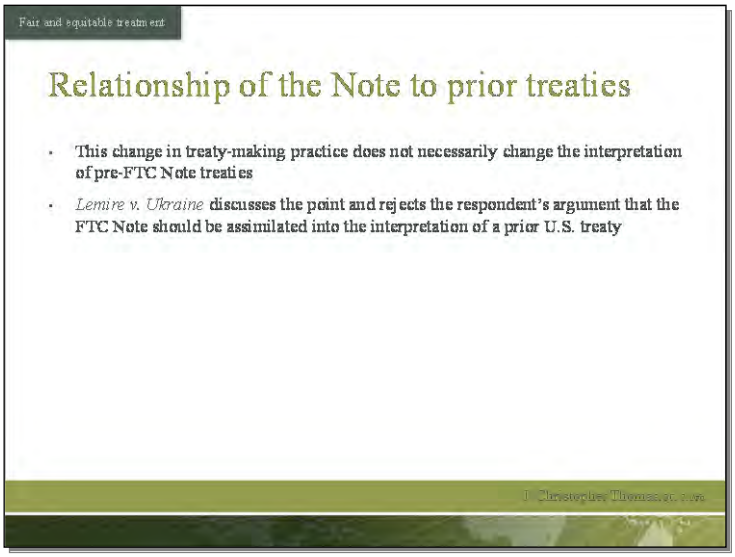

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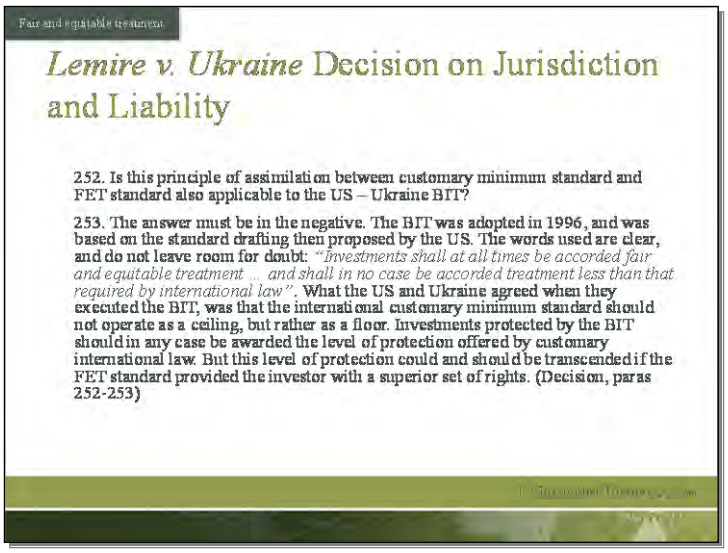

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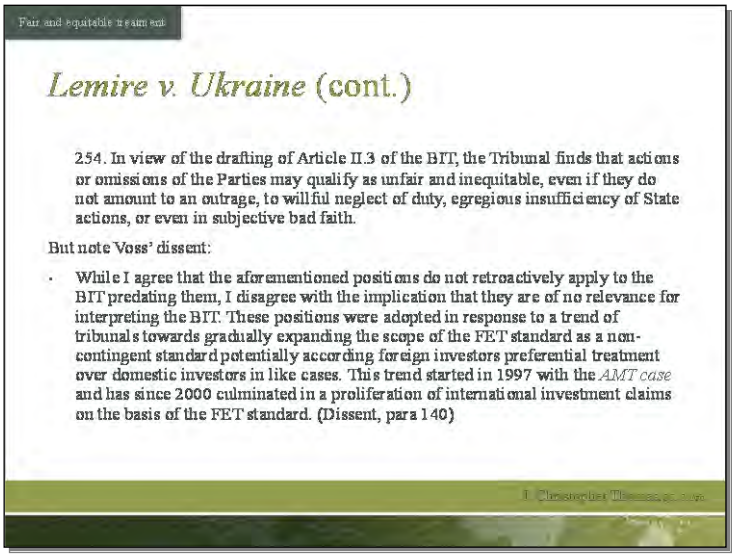

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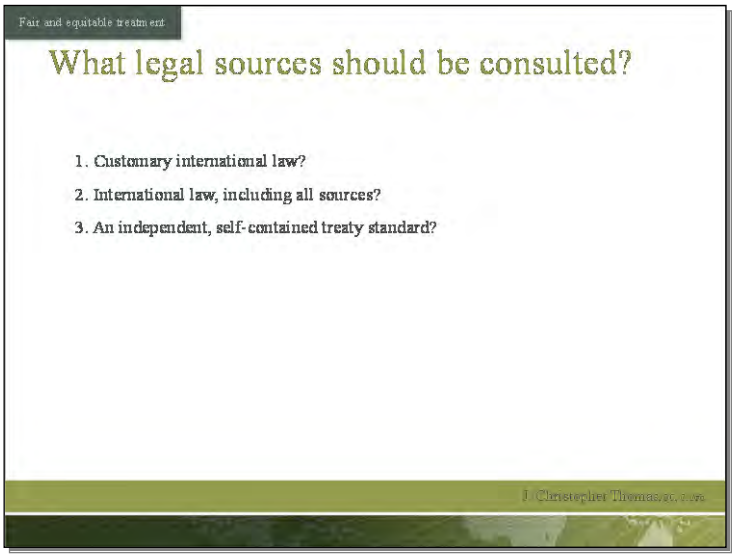

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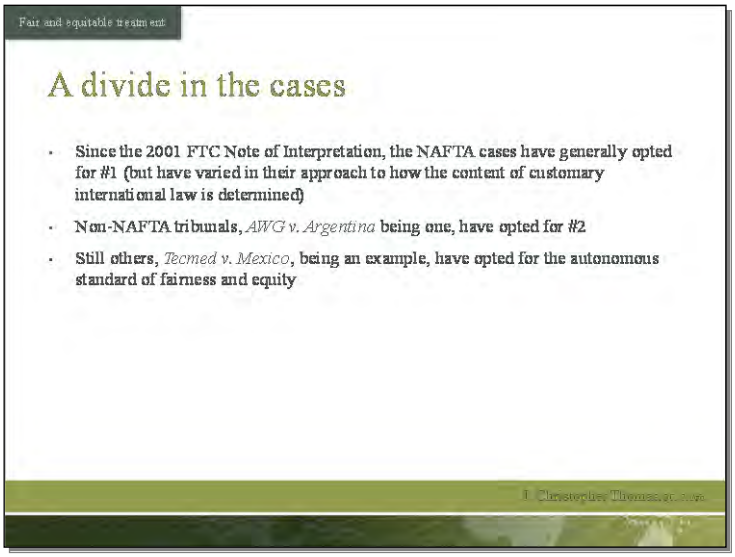

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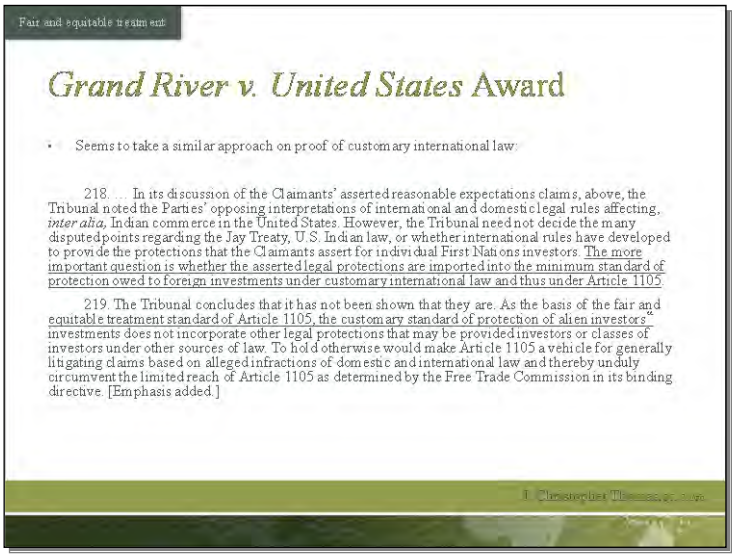

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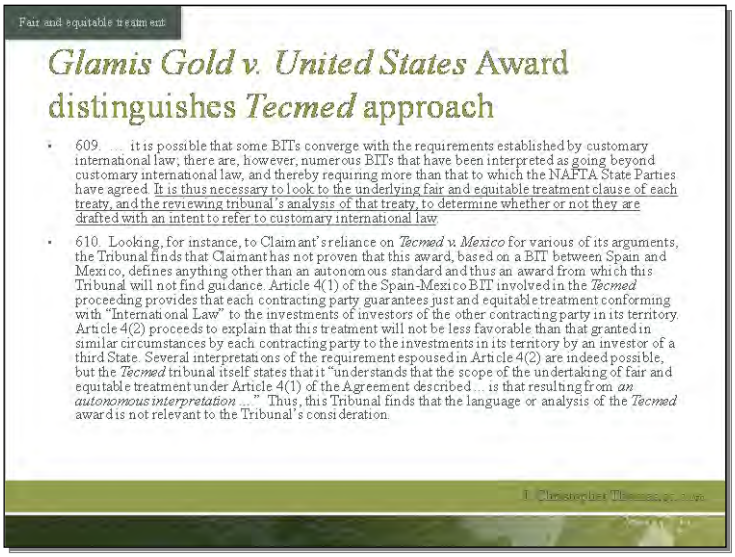

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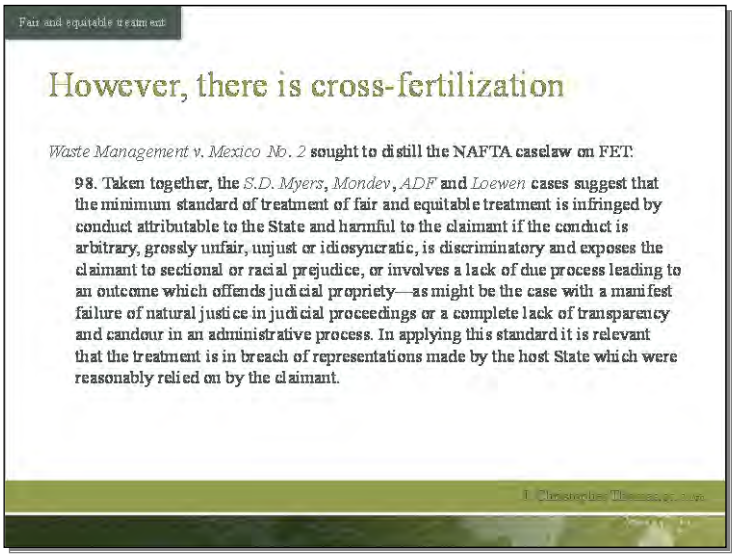

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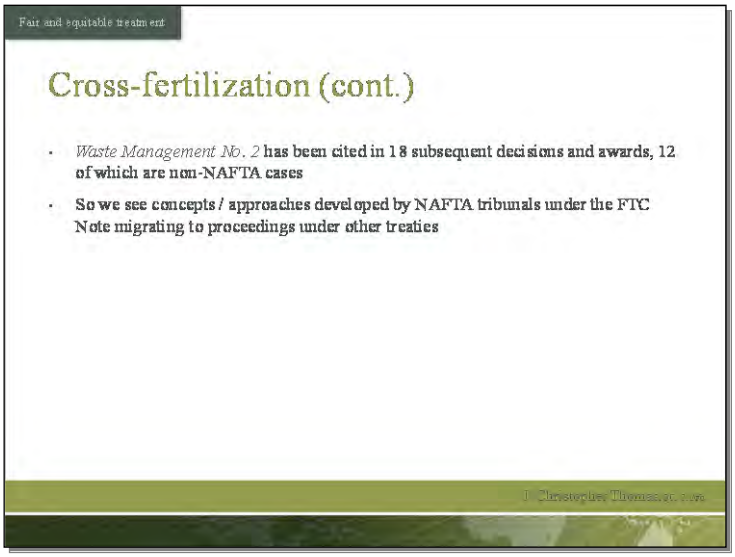

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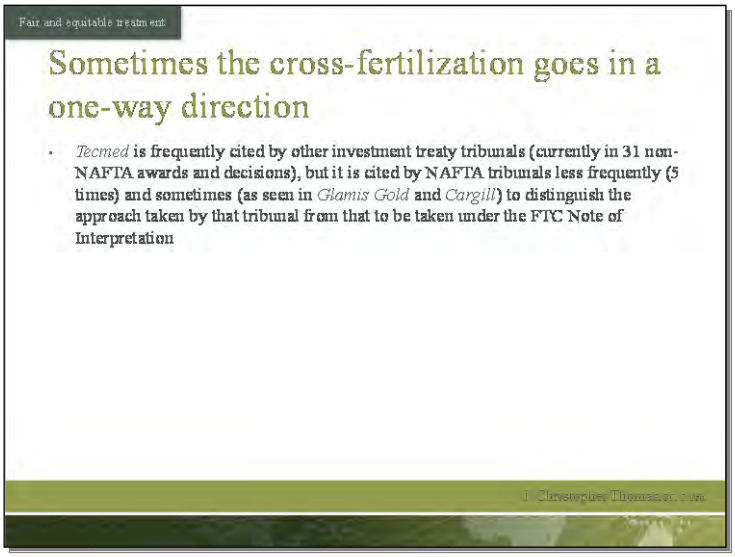

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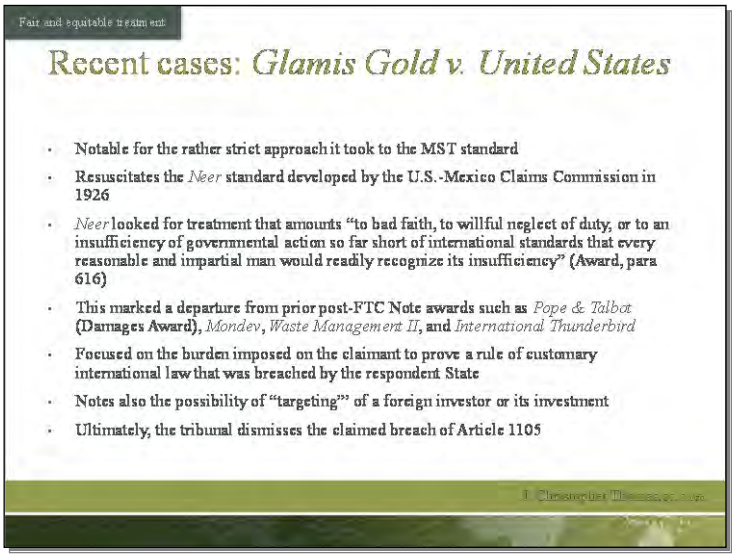

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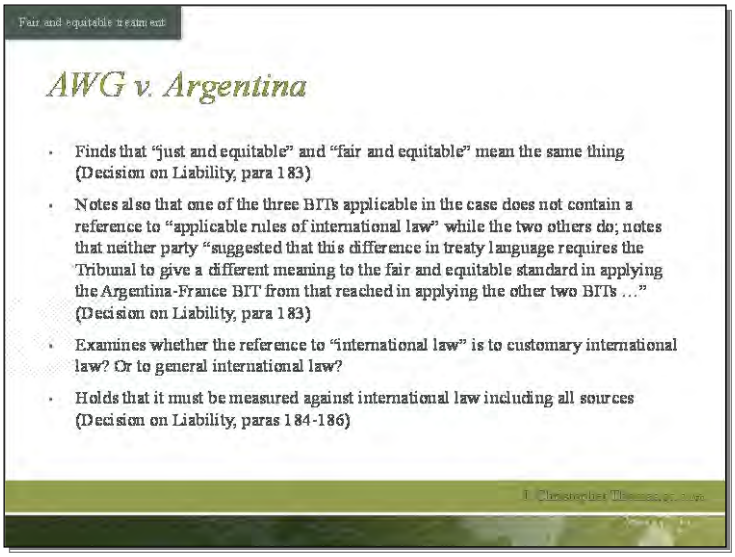

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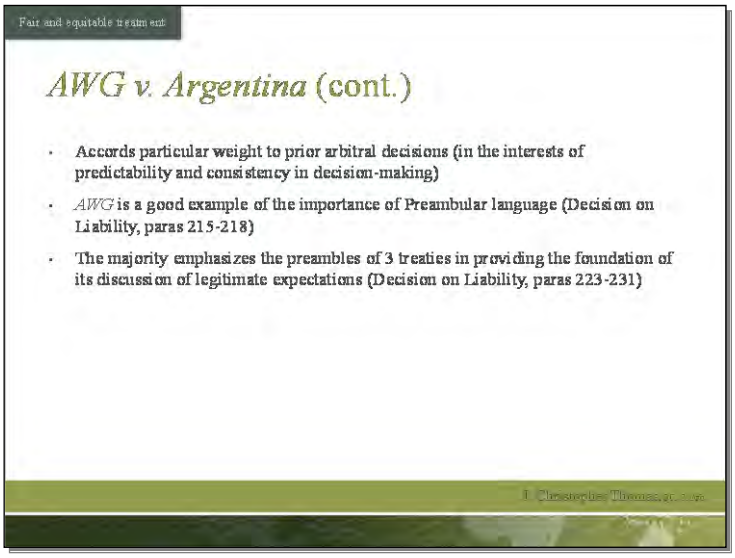

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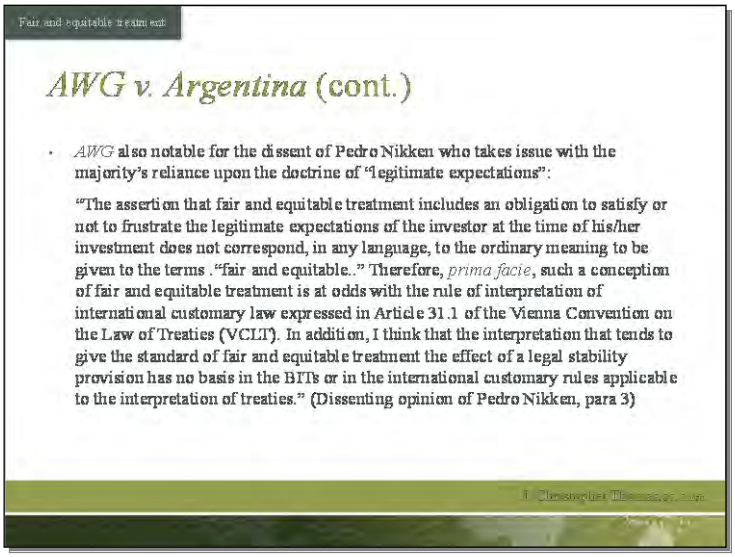

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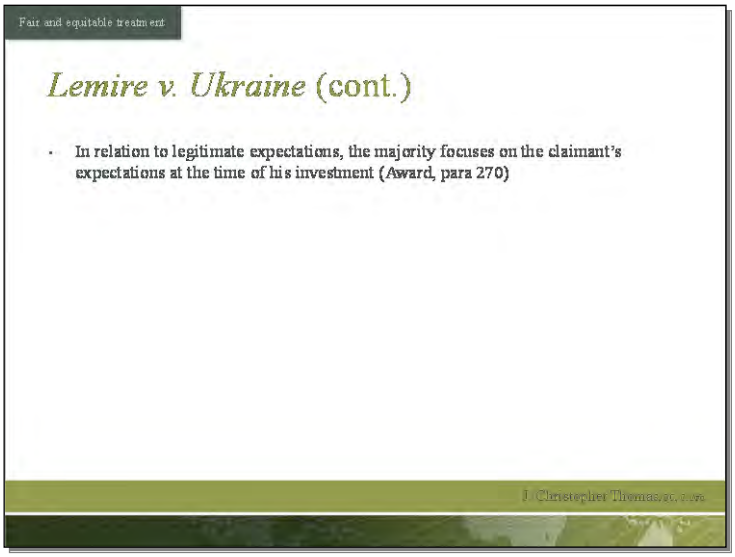

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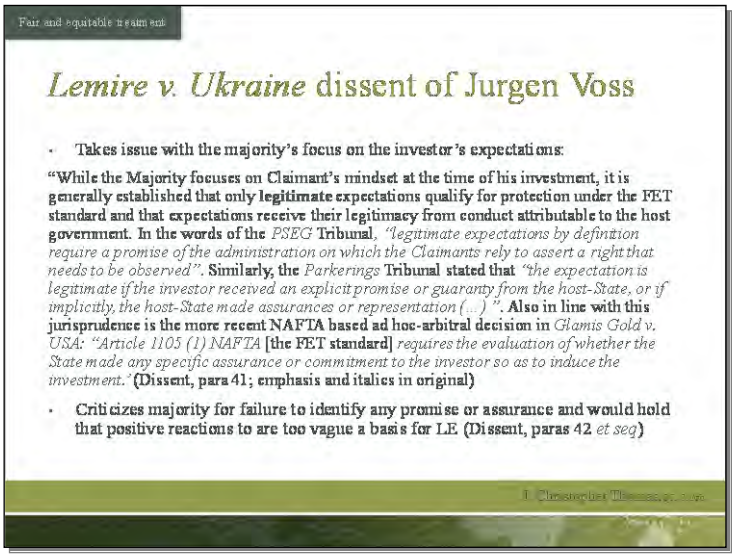

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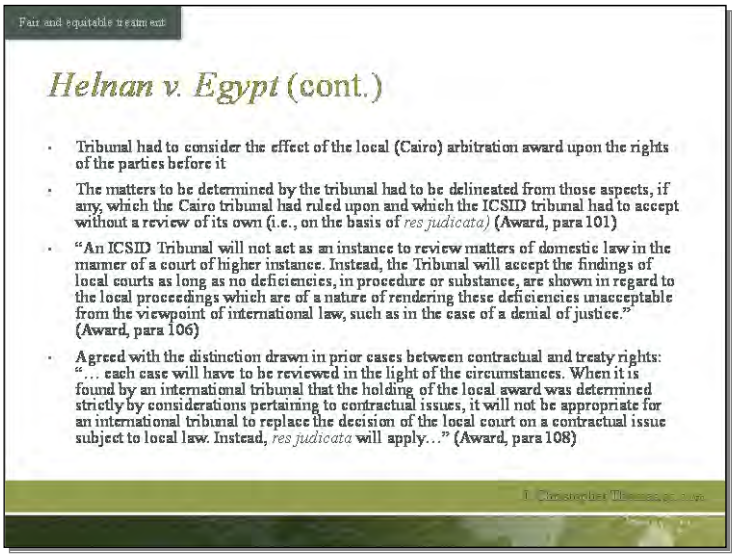

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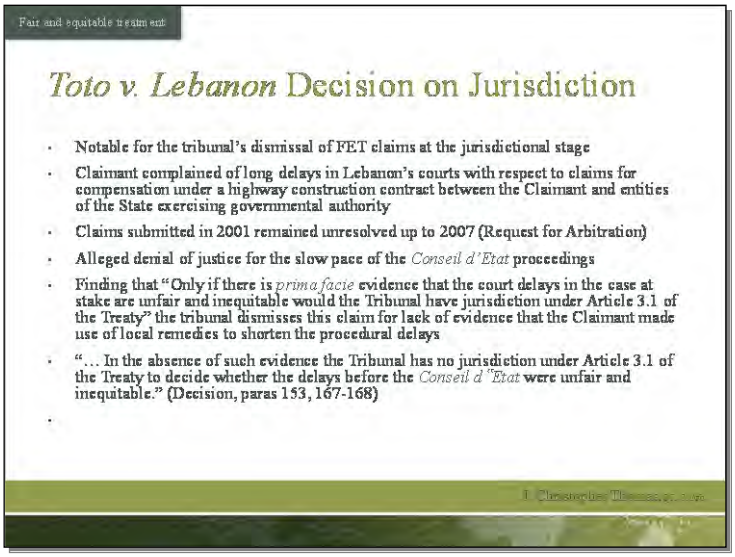

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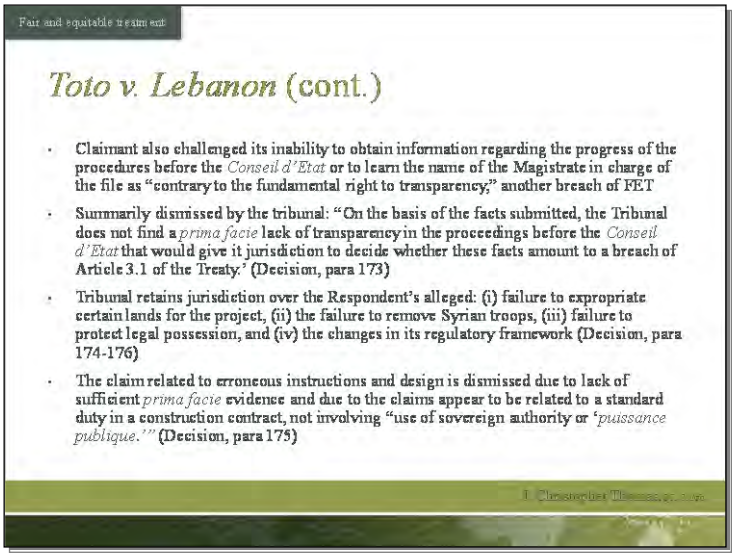

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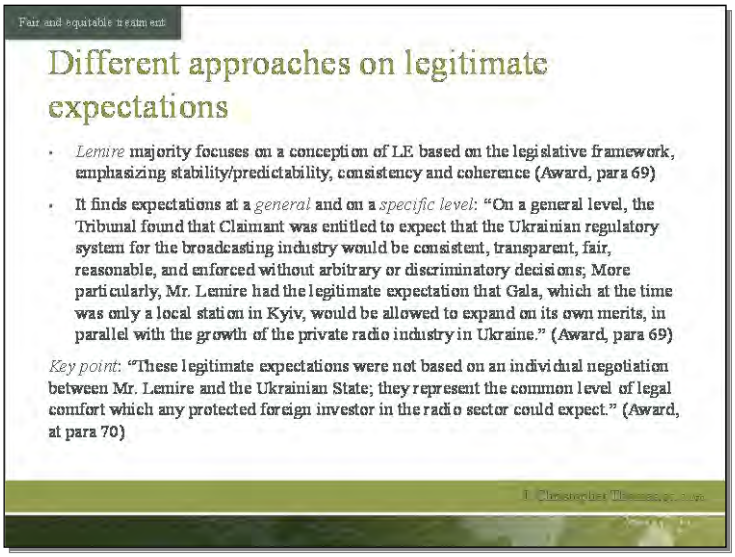

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vi. Denial of Justice (Special Topic on Fair and Equitable Treatment)

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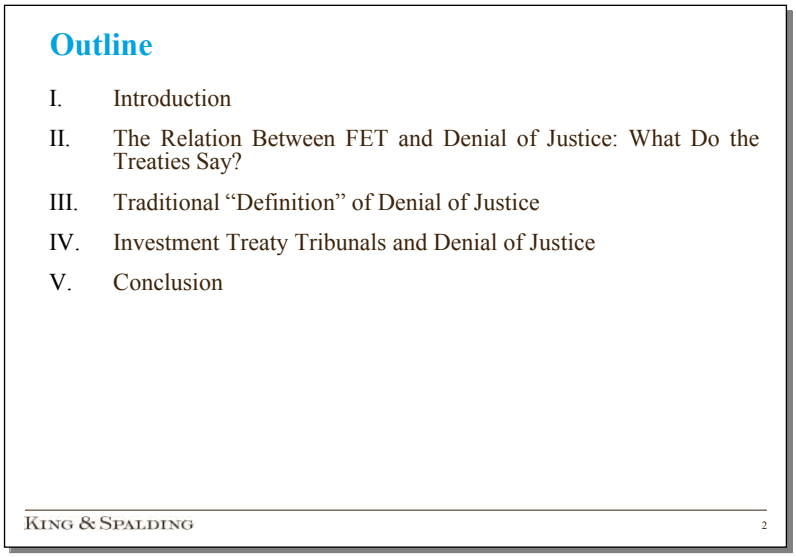

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I. Introduction

- Unity of the state under international law. A host state can be liable for the conduct of its courts (Article 4 of the ILC Articles).
- Introductory definition of denial of justice:

> *An "improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions"*
>
> *(Adede)*

- Denial of justice has its source in customary international law.
- FET held to encompass denial of justice, i.e. a situation of denial of justice has been interpreted as amounting to a breach of the FET.
- Some treaties expressly incorporates a reference to denial of justice in their FET provision. Most treaties do not.
- However, denial of justice does not exhaust the content of FET. Only a possible strand of it.

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

- NAFTA Article 1105:
  1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".
- FTC Note dated July 31, 2011:
  1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
  2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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

- 2004 US Model BIT:

Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

   (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;

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

- Article 11 of the ASEAN Comprehensive Investment Agreement:

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty: (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process;

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III. Traditional "Definition" of Denial of Justice

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

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III. Traditional "Definition" of Denial of Justice

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

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

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III. Traditional "Definition" of Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Investment Treaty Tribunals and Denial of Justice

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

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IV. Conclusion

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

vii. Survey of Case Law on MFN Treatment

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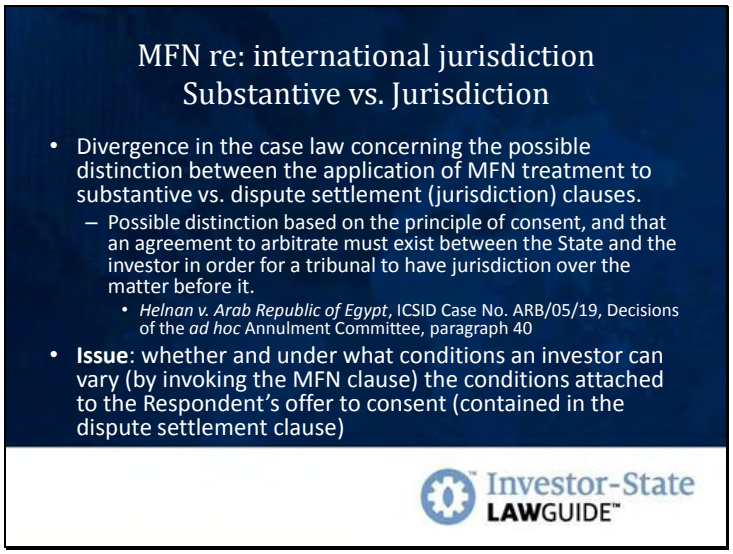

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viii. Expropriation

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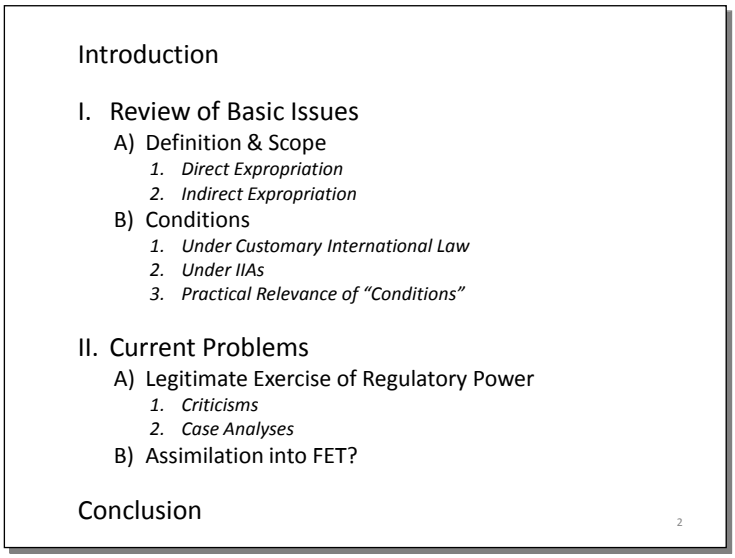

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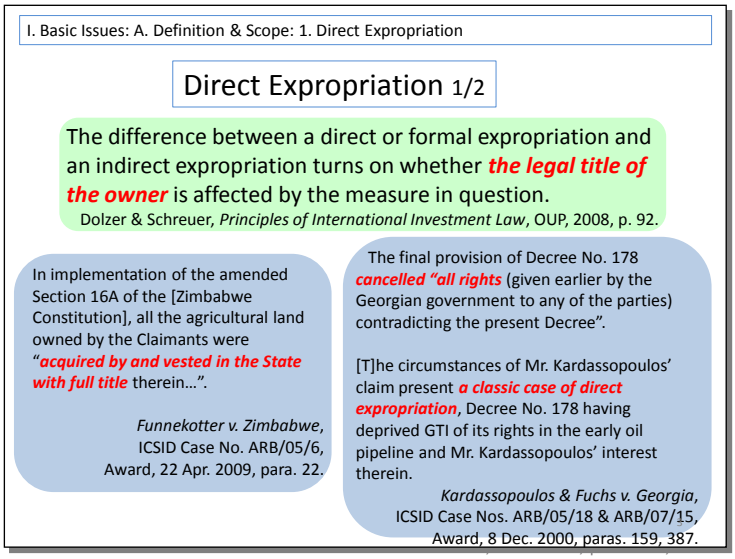

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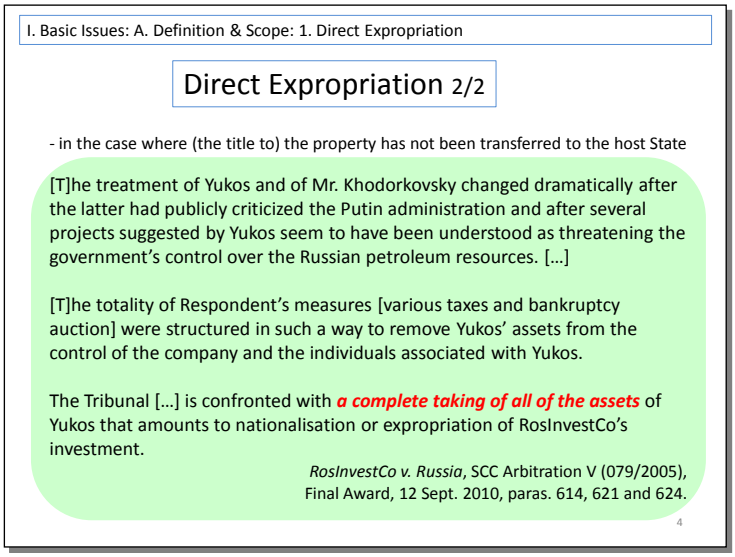

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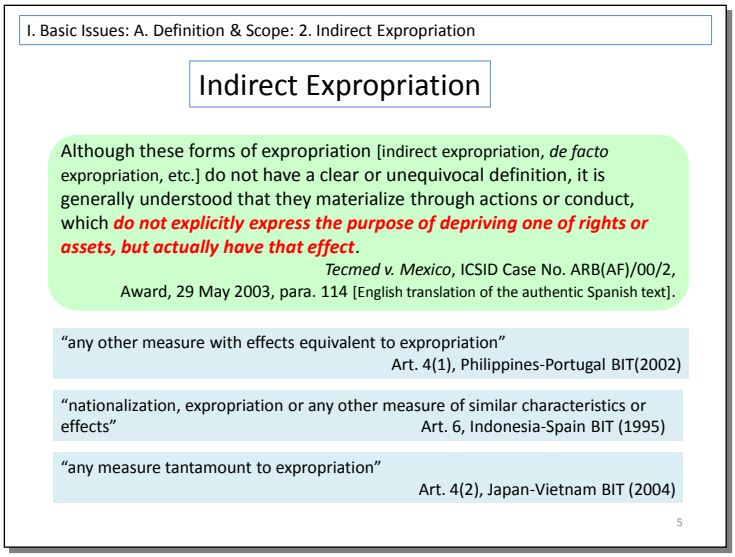

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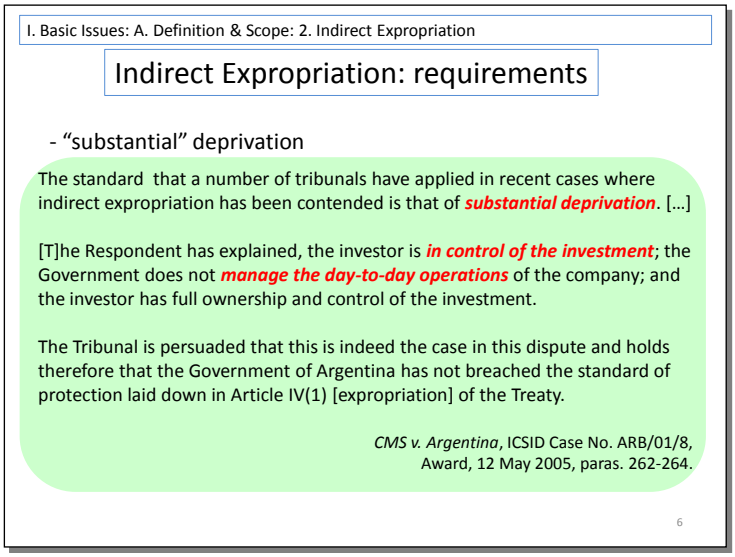

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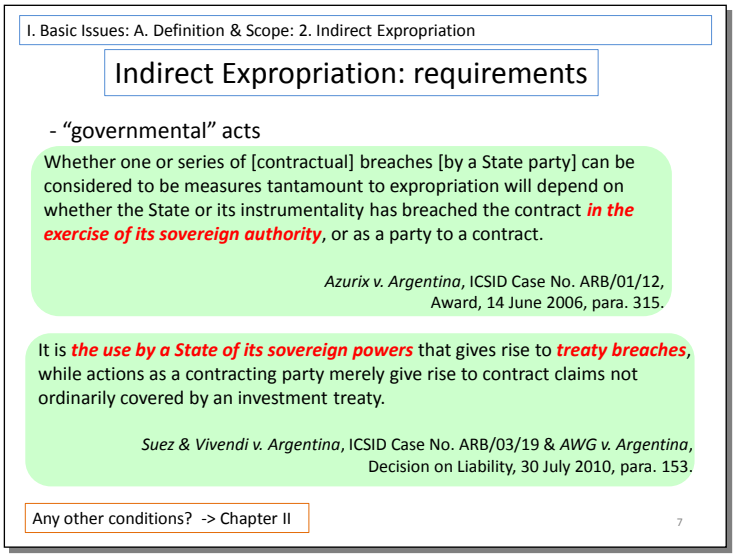

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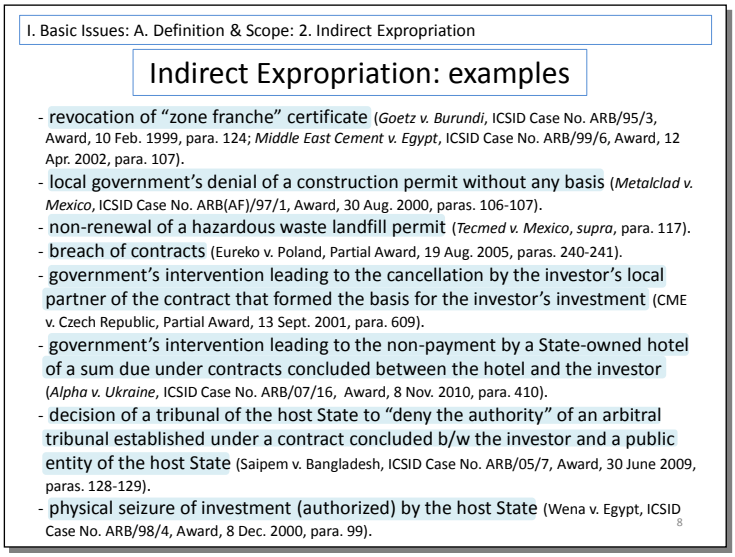

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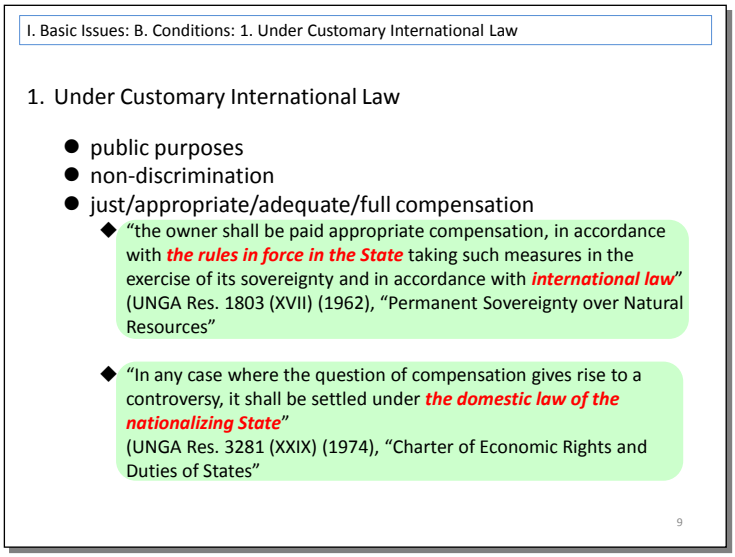

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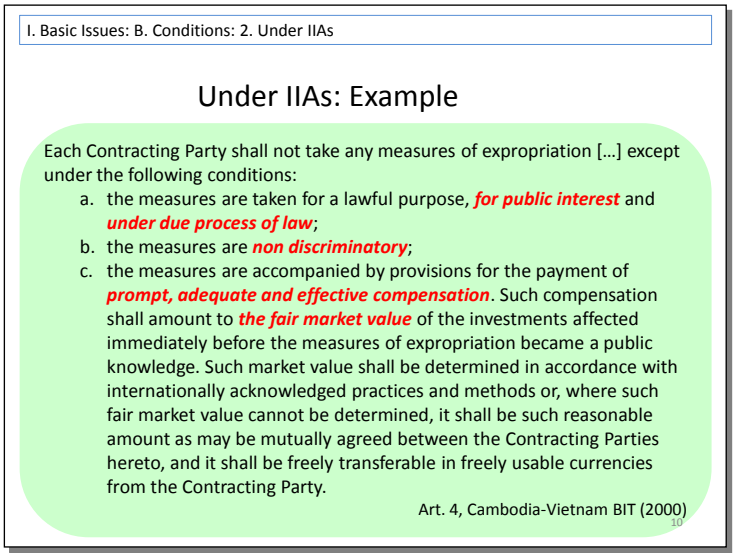

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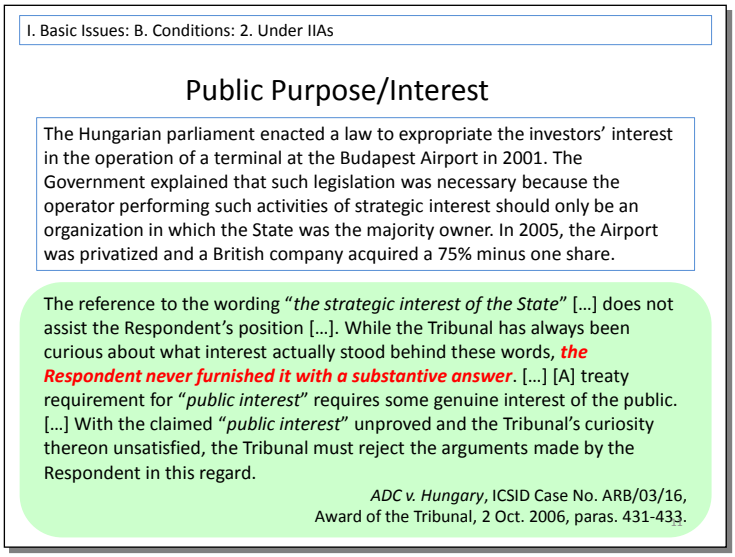

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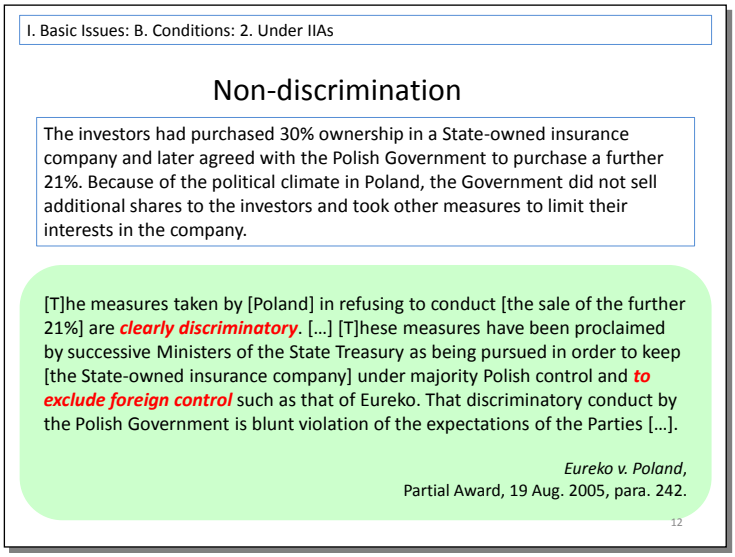

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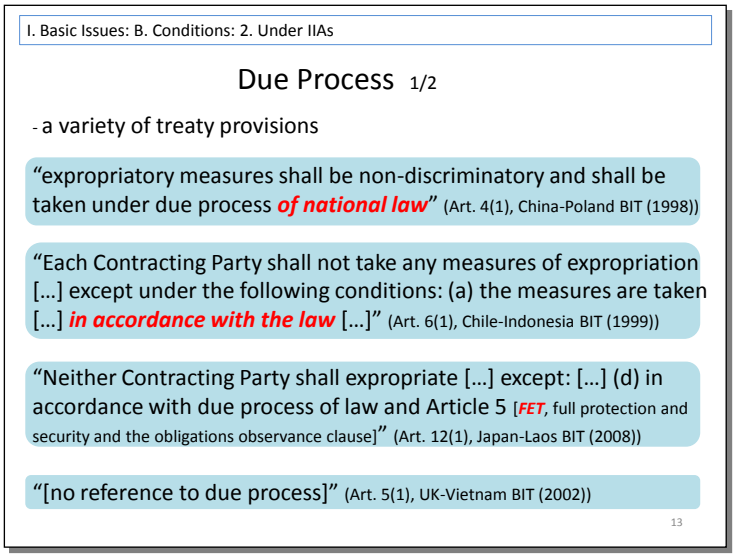

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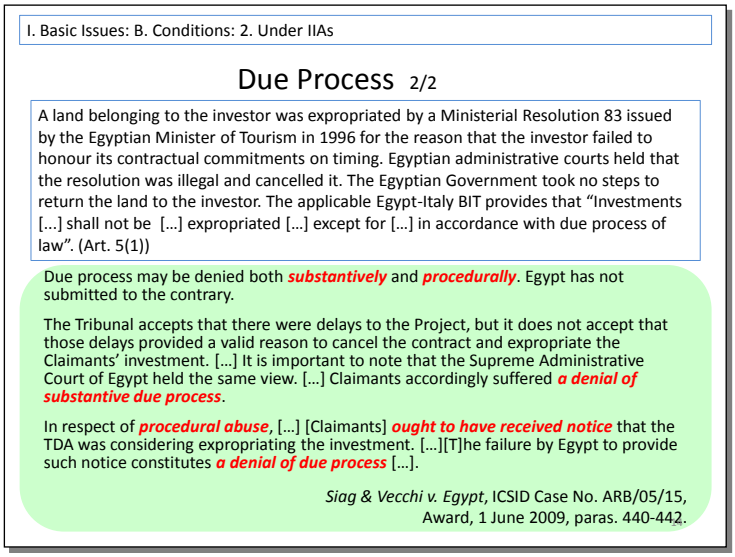

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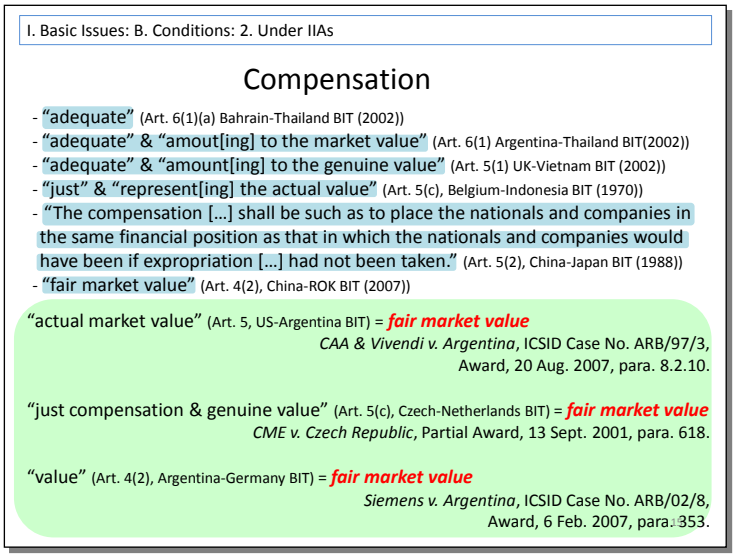

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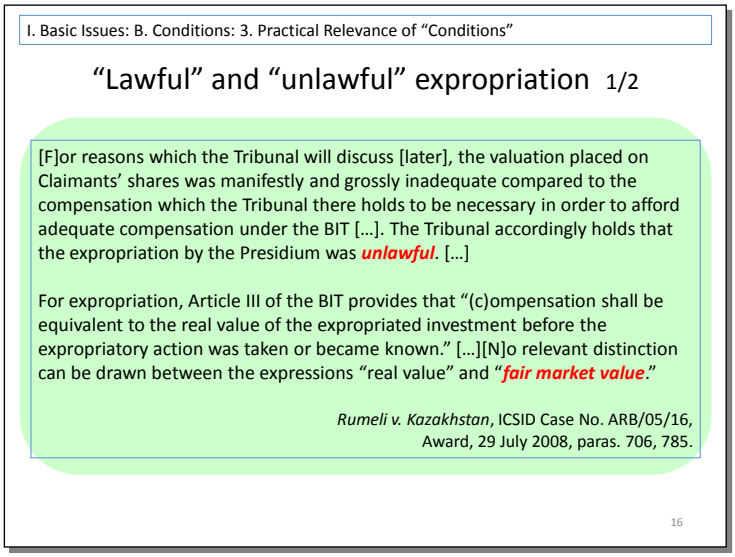

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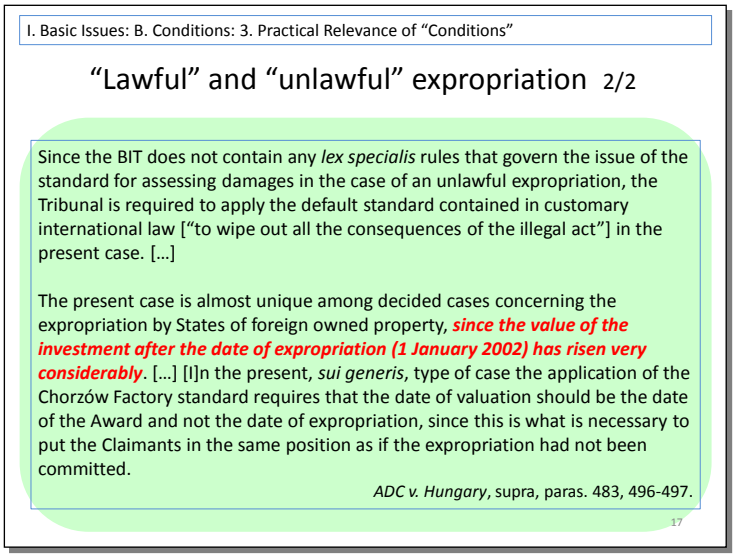

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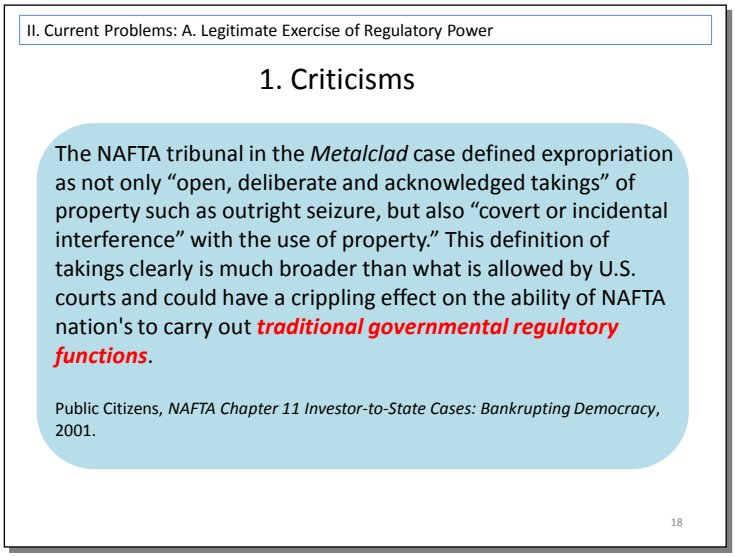

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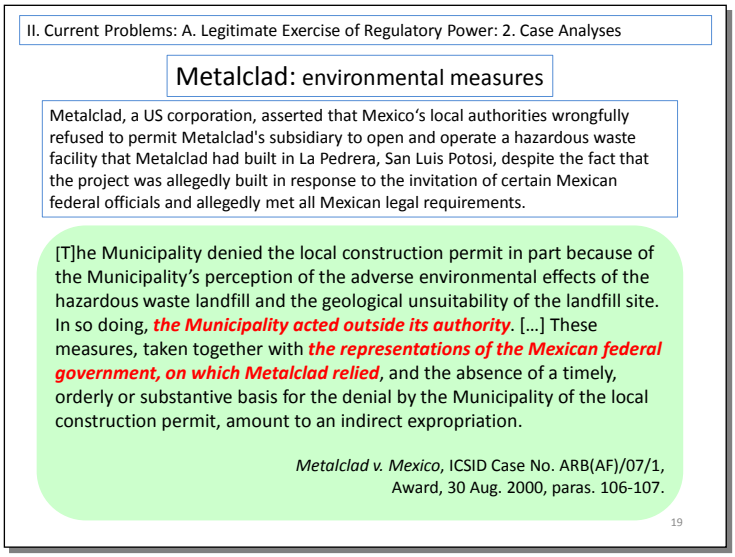

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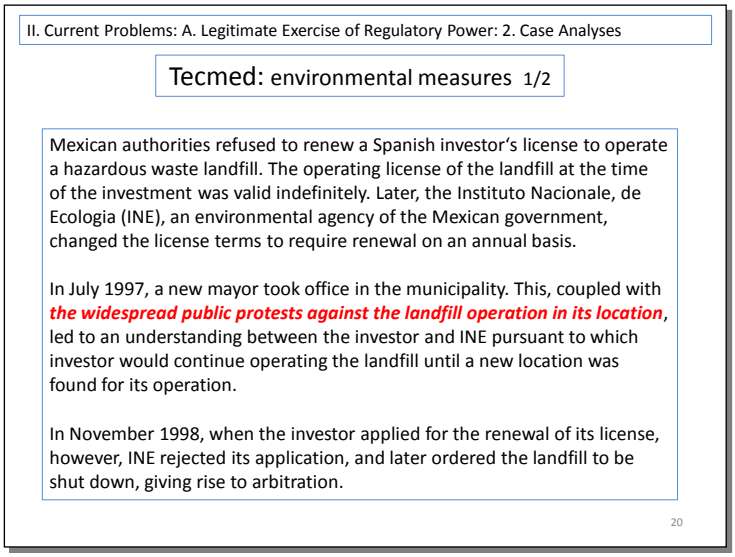

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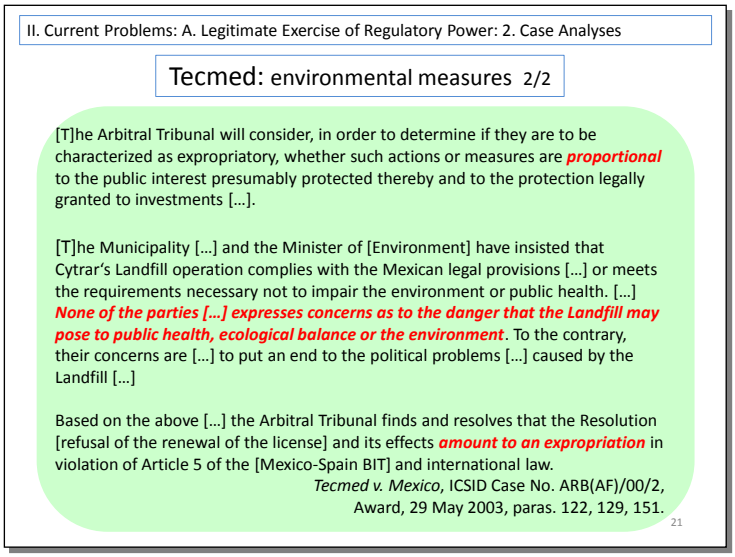

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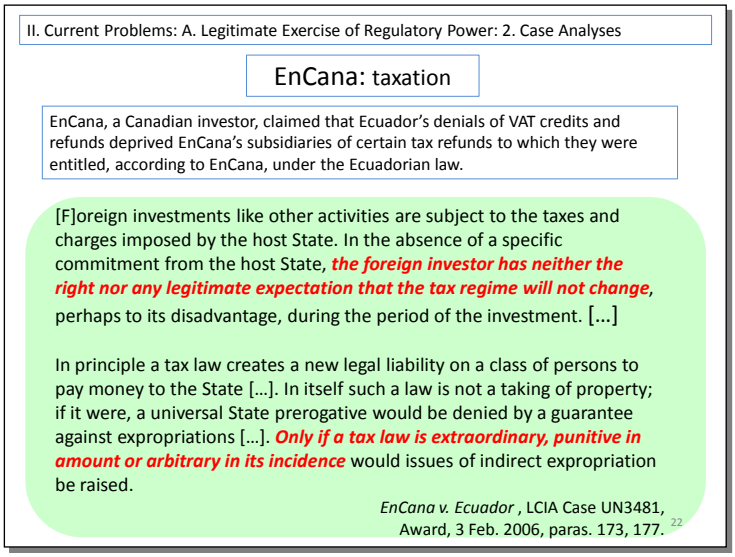

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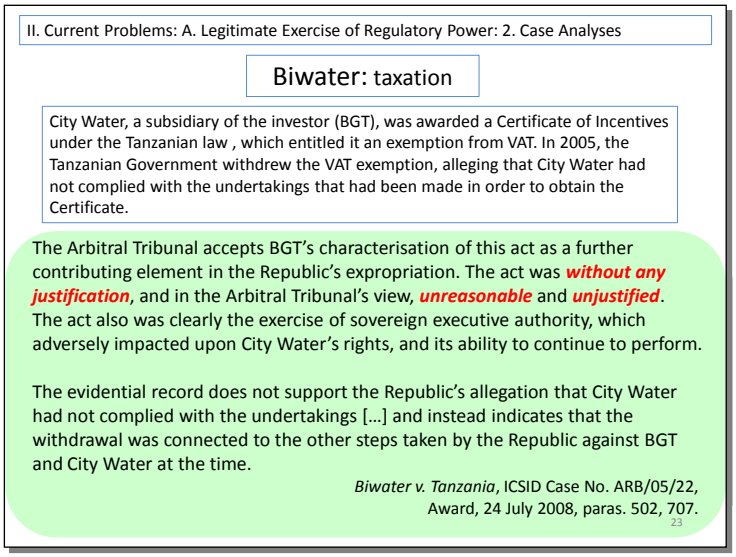

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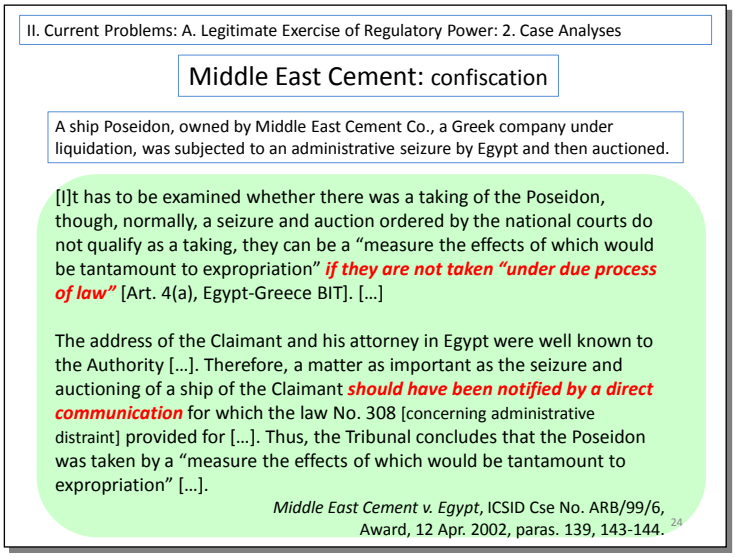

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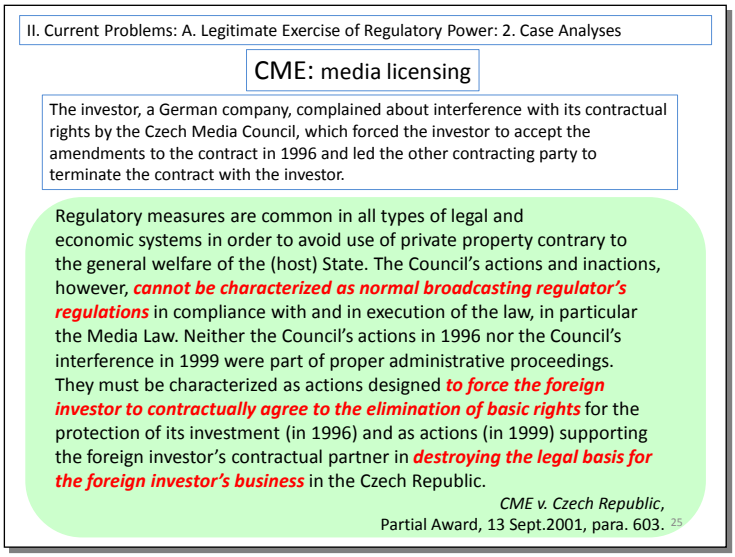

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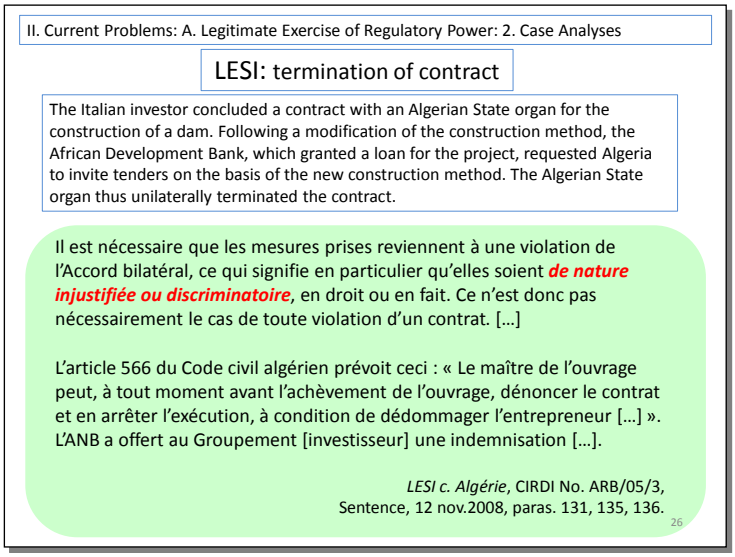

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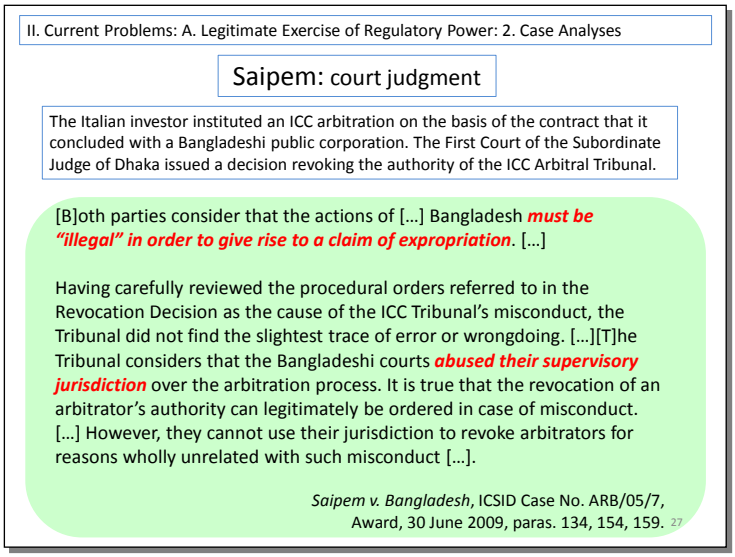

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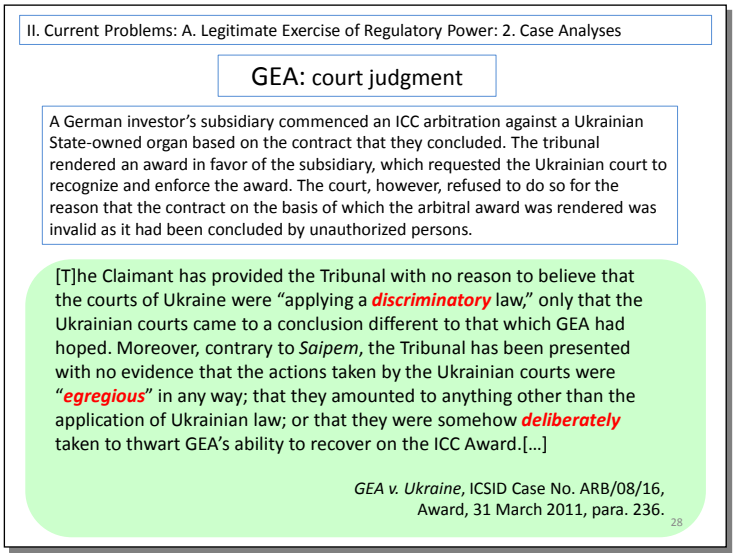

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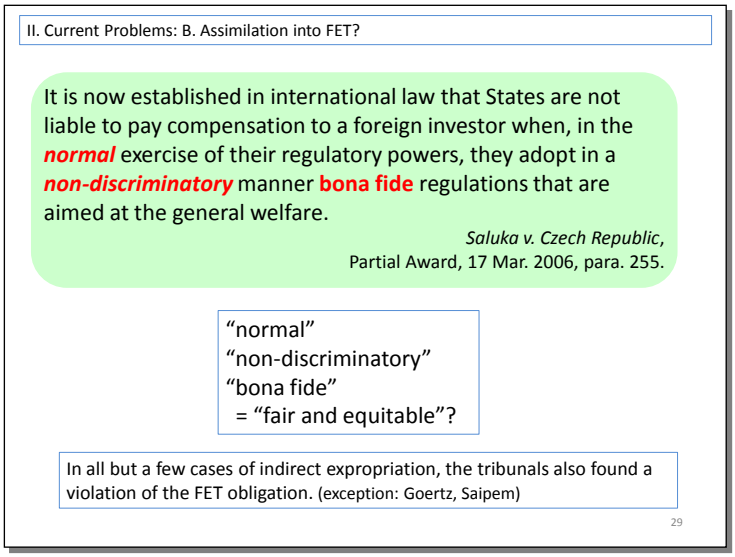

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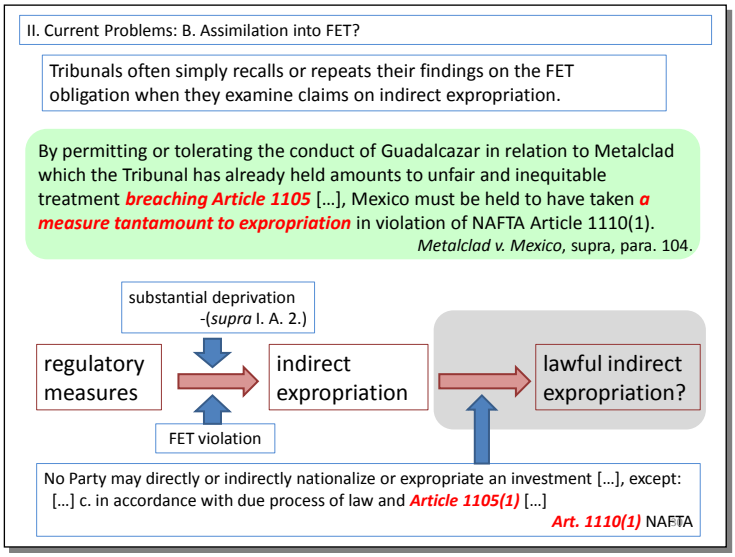

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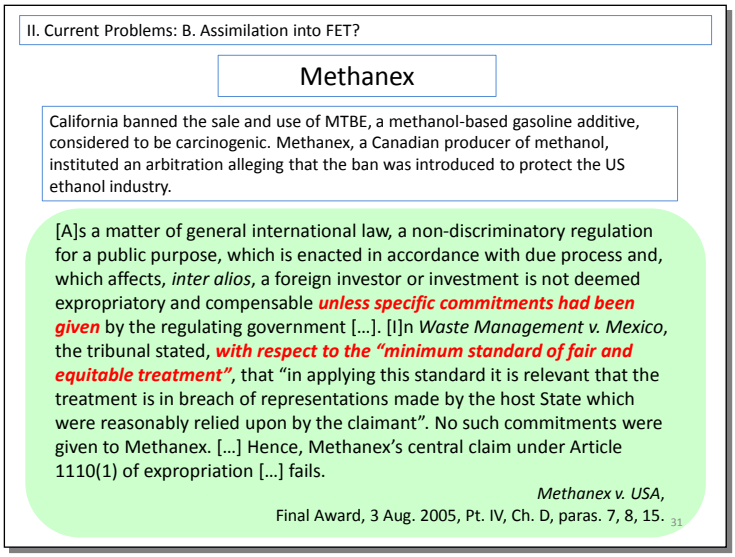

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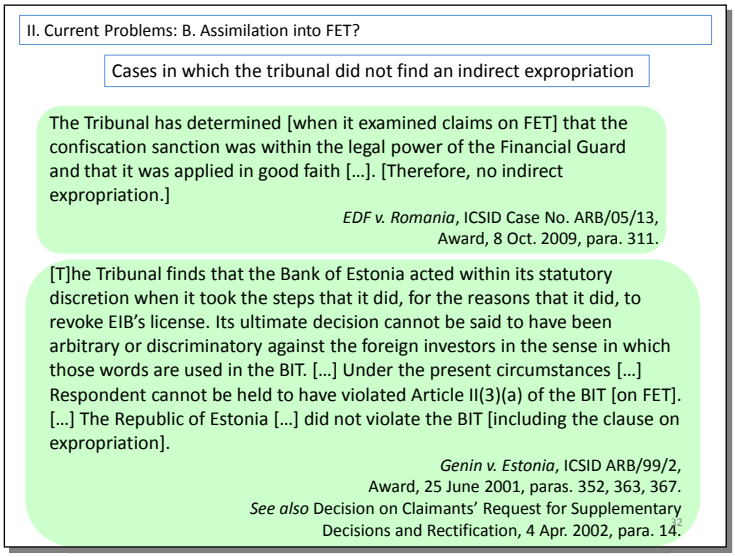

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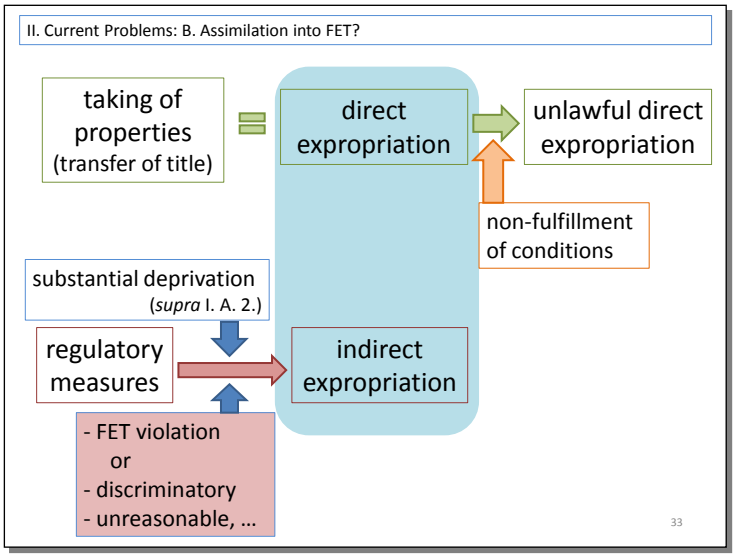

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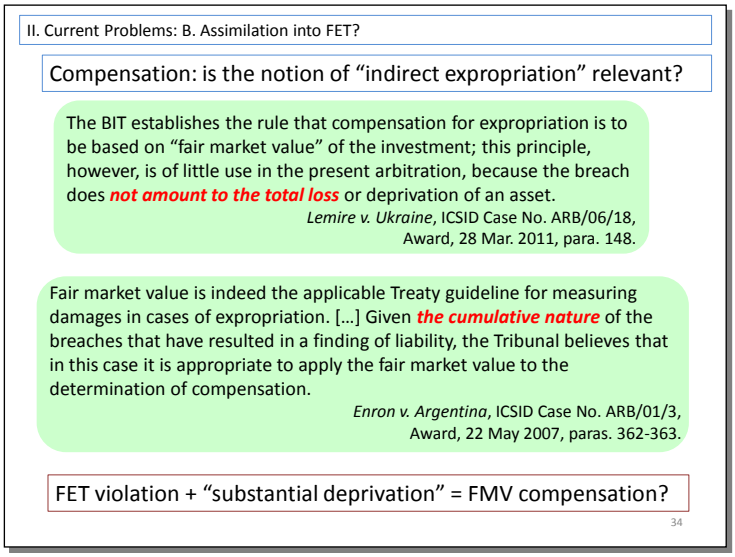

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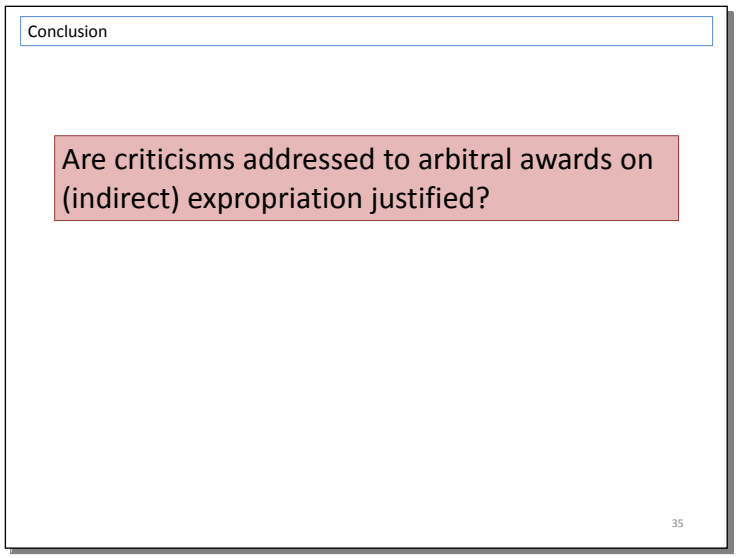

ix. Valuation Methods in Expropriation

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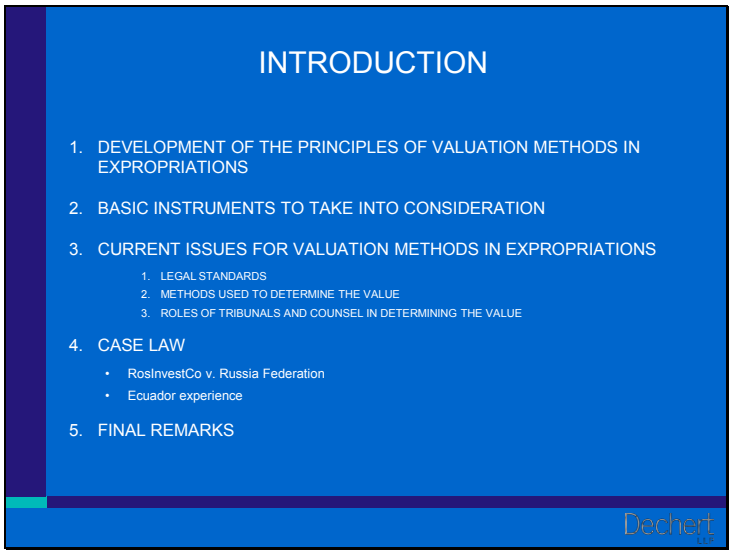

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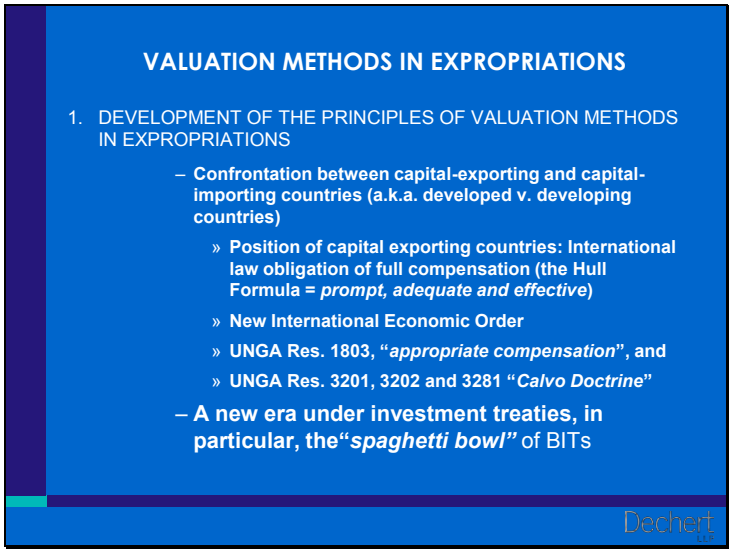

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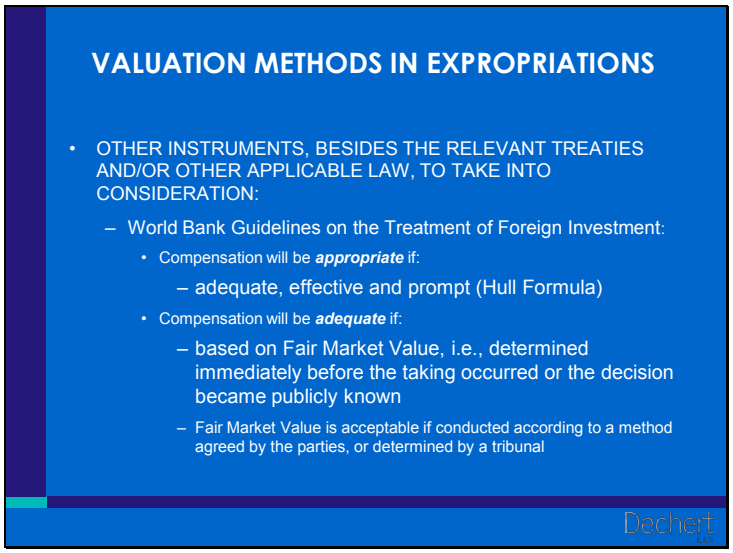

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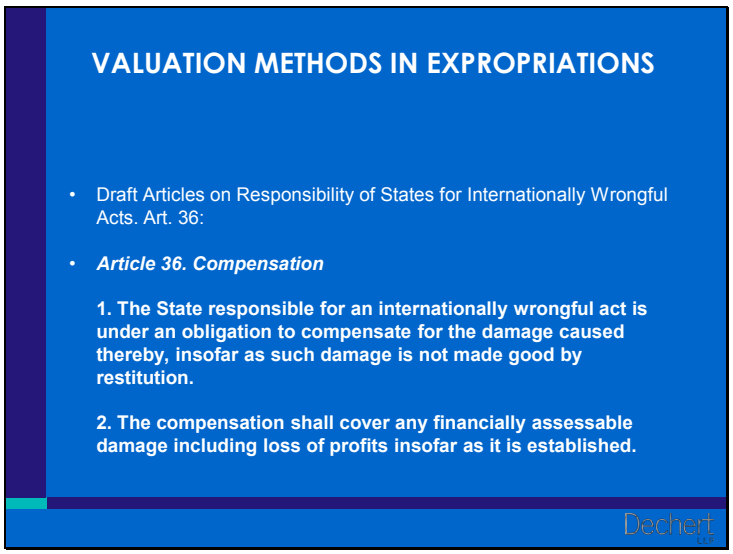

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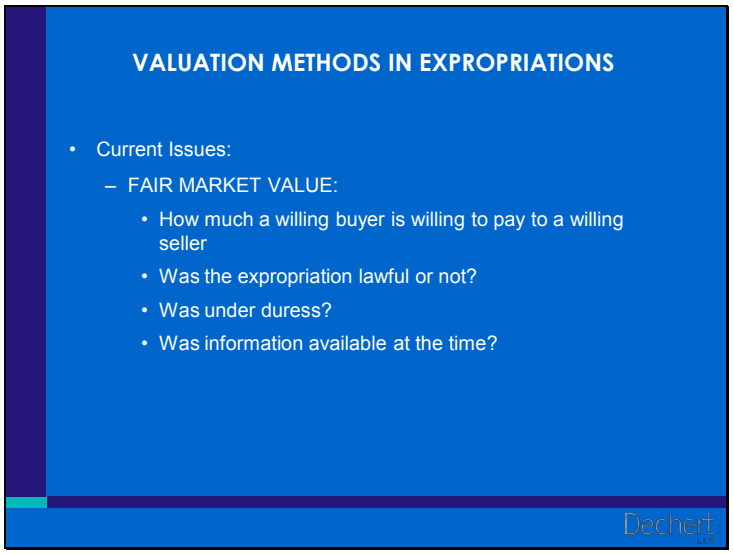

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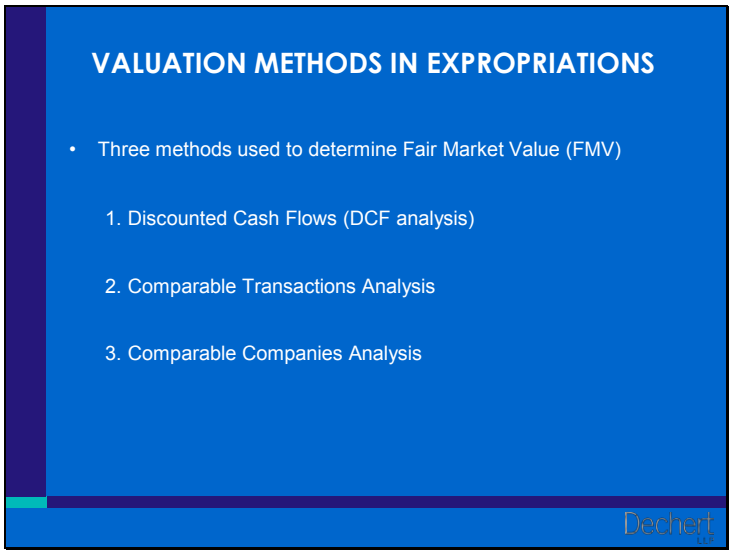

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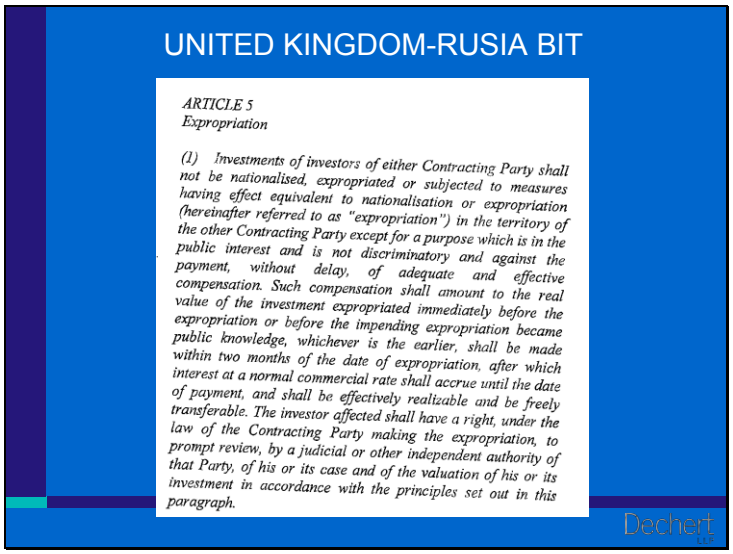

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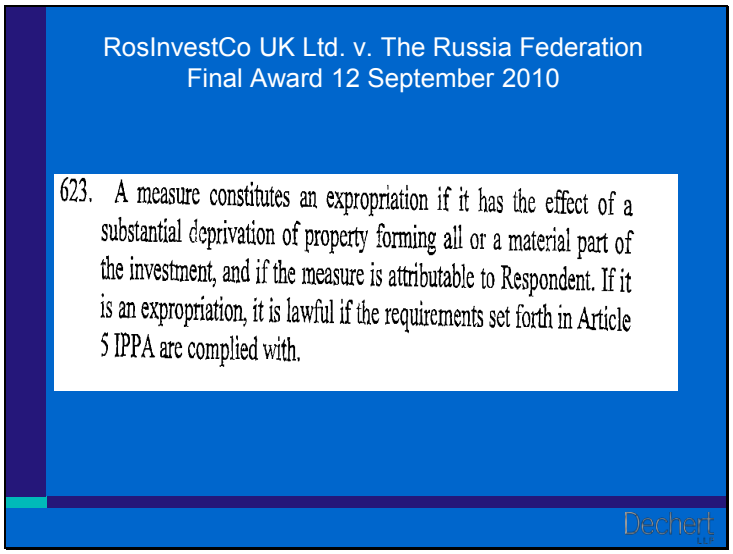

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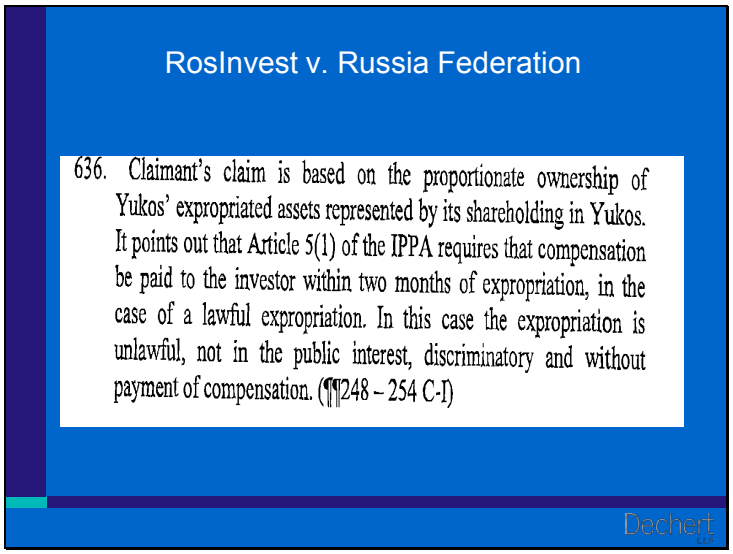

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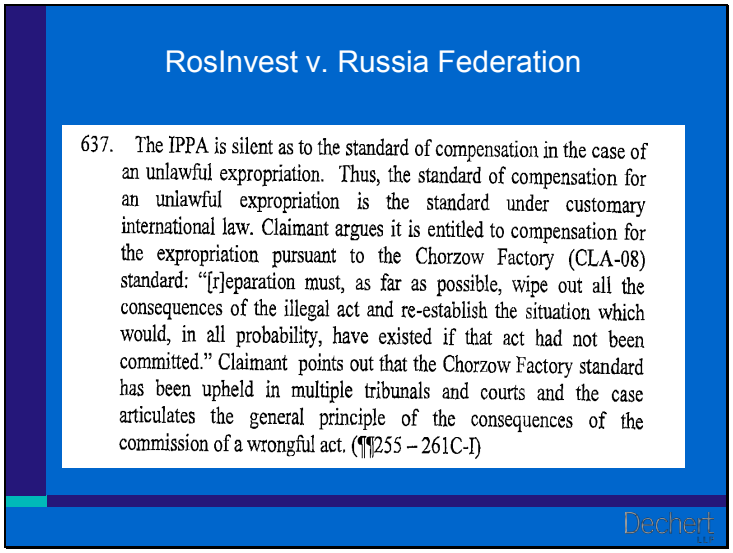

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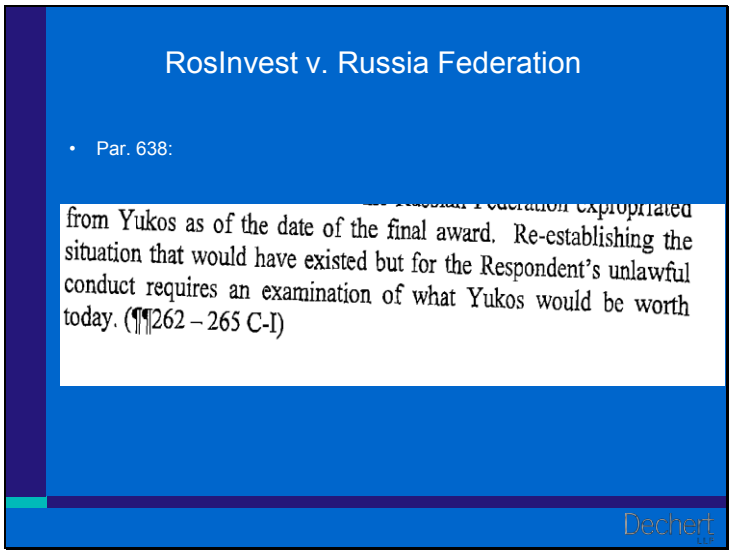

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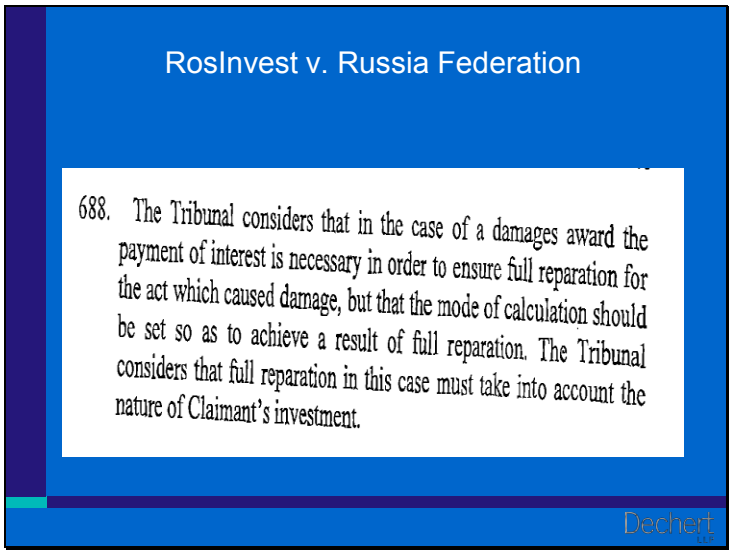

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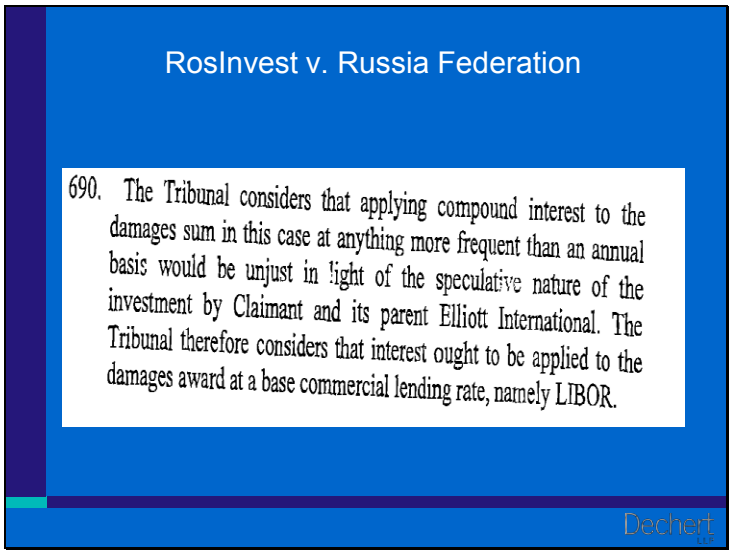

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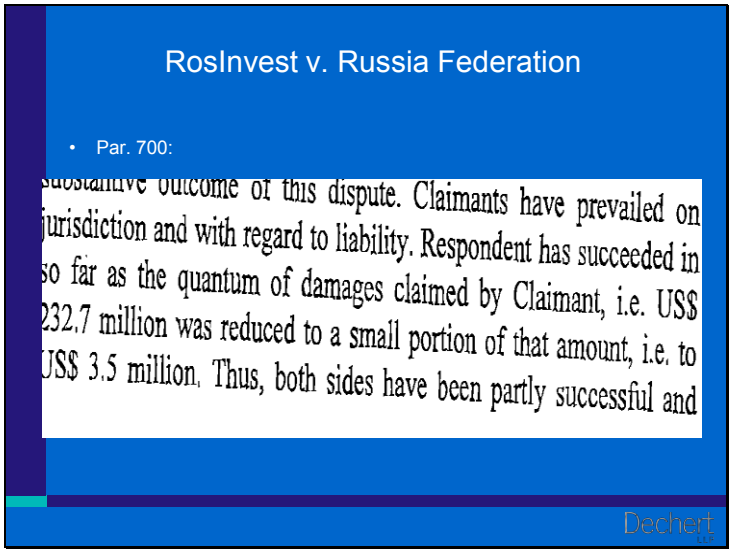

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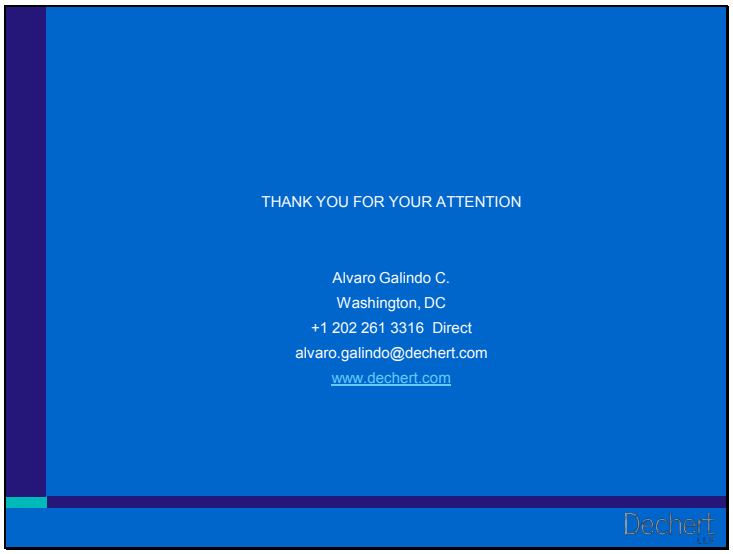
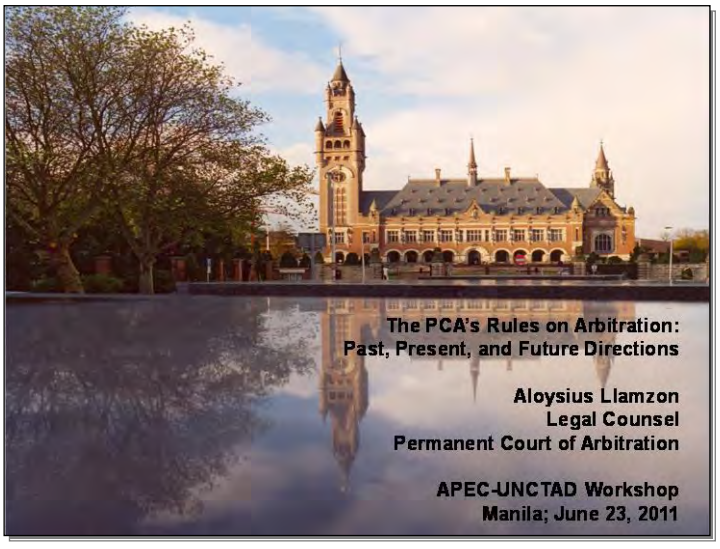


x. The PCA's Rules on Arbitration: Past, Present and Future Arbitration

Slide 1



Slide 2

Outline

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

Slide 3

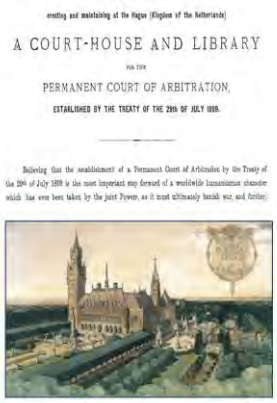
What is the PCA?

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

Slide 4

The Peace Palace: "The Seat of International Law"

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



Slide 5

The PCA's Current Docket (June 2011)

53 pending cases:

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

Slide 6

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

1899 and 1907 CONVENTIONS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

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

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www.pca-cpa.org

Slide 7

Development of PCA Rules

Heritage of Mixed Arbitration involving Foreign Investment

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

RCA

La Haye, le 4 juillet 1935.

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

LA HAYE.

Monsieur le Secrétaire Général,

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

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

Président des Arbitres.

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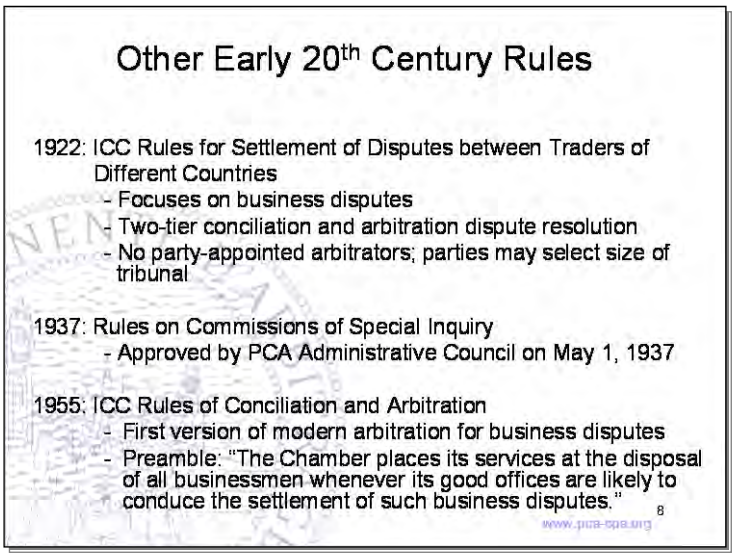
Slide 8



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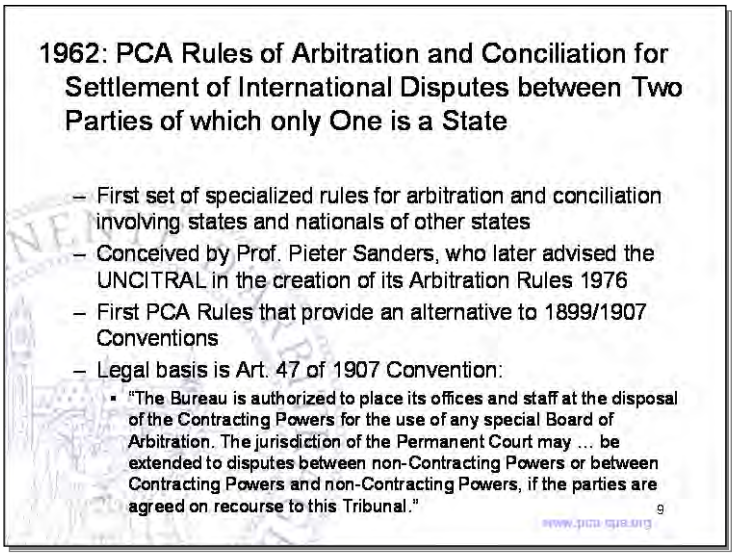

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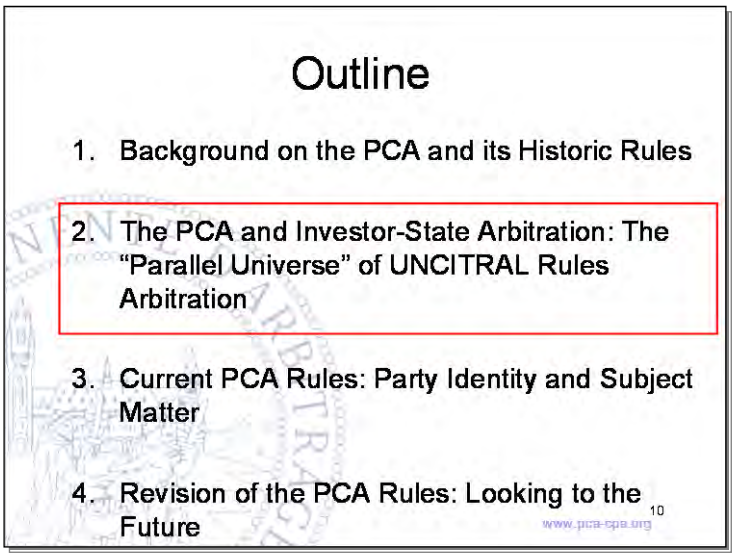

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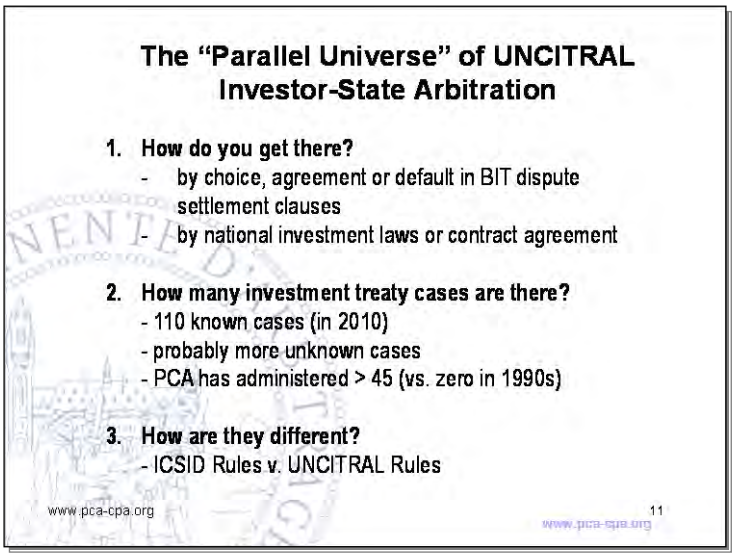

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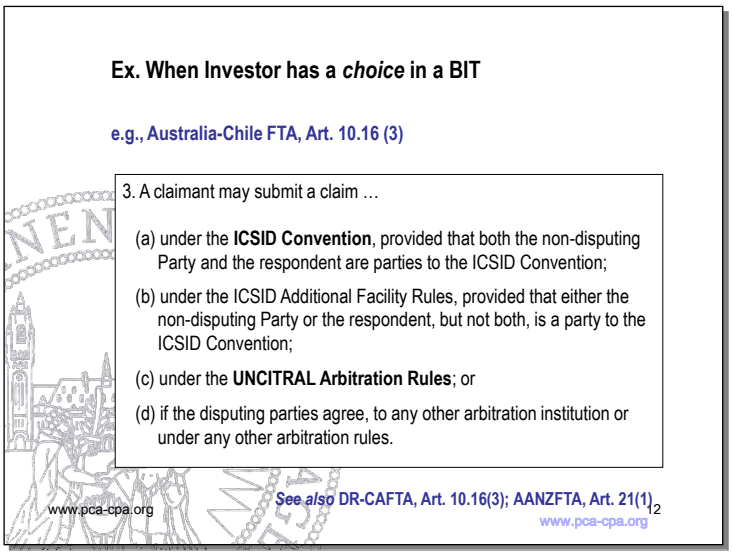


Slide 13

Slide 14

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

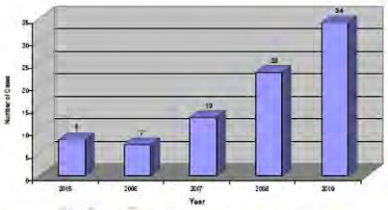
1. Institutional Support

ICSID	UNCITRAL
▪ Convention, Ch.I creates a specialized centre for investor-State disputes	▪ Silent on administration by an institution. Parties can choose whether *ad hoc* or fully administered or something in between.
▪ Schreuer and Dolzer: "standard clauses for use of the parties, detailed rules of procedure, institutional support [that] extends not only to the selection of arbitrators but also the conduct of arbitration proceedings: for instance, each tribunal is assisted by a legal secretary who is a staff member of ICSID; venues for hearings are arranged by ICSID; all financial arrangements surrounding the arbitration are administered by ICSID"	▪ Parties prefer institution (reputation and convenience: PwC study 2008) ▪ Most investor-State disputes under UNCITRAL handled by an institution (e.g. PCA, LCIA, ICC, Stockholm, or ICSID) ▪ PCA has administered about 45 in last 10 years compared with zero in previous decade

Slide 16

1. Institutional Support - PCA

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



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

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2. Appointment of Arbitrators

ICSID	UNCITRAL
▪ Art. 38: If parties fail to appoint arbitrators, Chairman of World Bank appoints from ICSID Panel	▪ Art. 6-9: If parties fail to appoint arbitrators, can approach Appointing Authority (AA), or PCA SG to designate an AA (has had 413 requests) ▪ Not bound to pick from any particular pool of candidates
▪ Chairman cannot appoint national of one of the parties	▪ AA to take into account advisability of appointing a nationality other than parties
▪ Arbitrators to be "relied upon to exercise independent judgment"	▪ Arbitrators "independent and impartial"
▪ Disclosure made after appointment	▪ Disclosures made when approached in connection with a dispute (usually before appointment)

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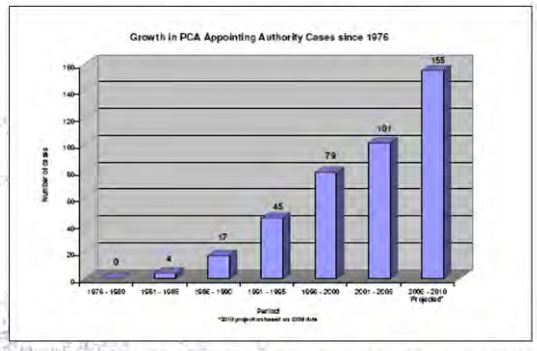
2. Appointment of Arbitrators



- 413 appointing authority requests to the PCA SG (June 2011)
- 10% in last ten years arose from investment treaty disputes
- 7 of the 9 AA cases thus far in 2011 arise from BITs

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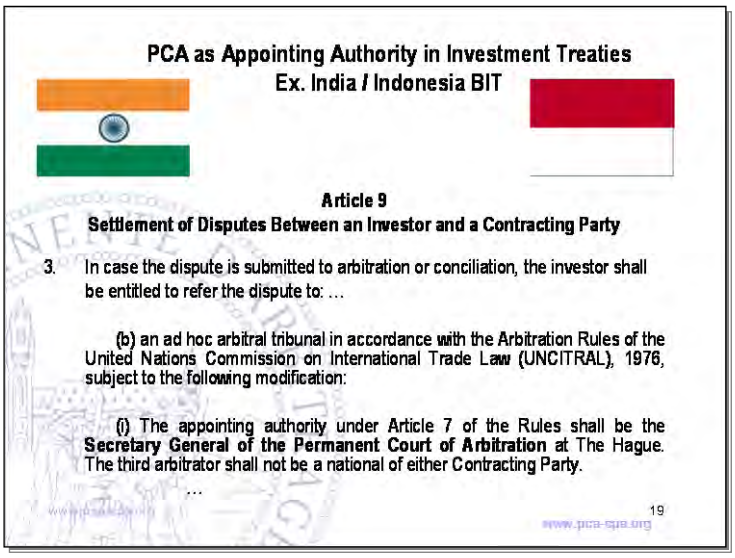

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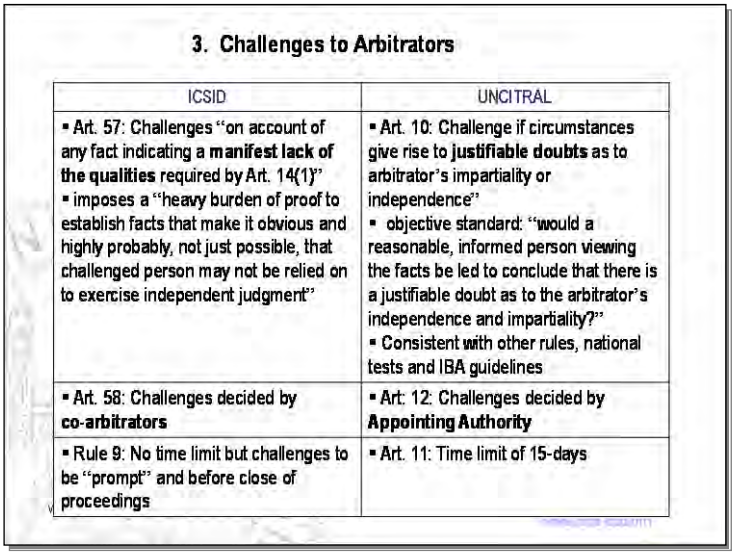

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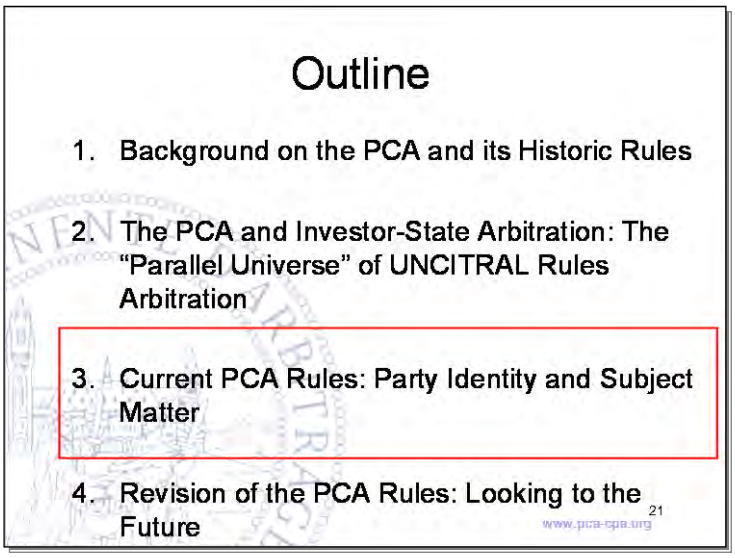

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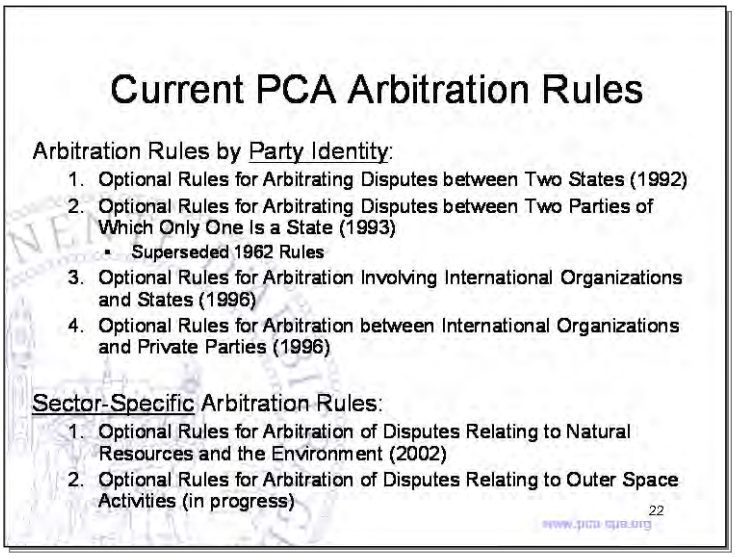

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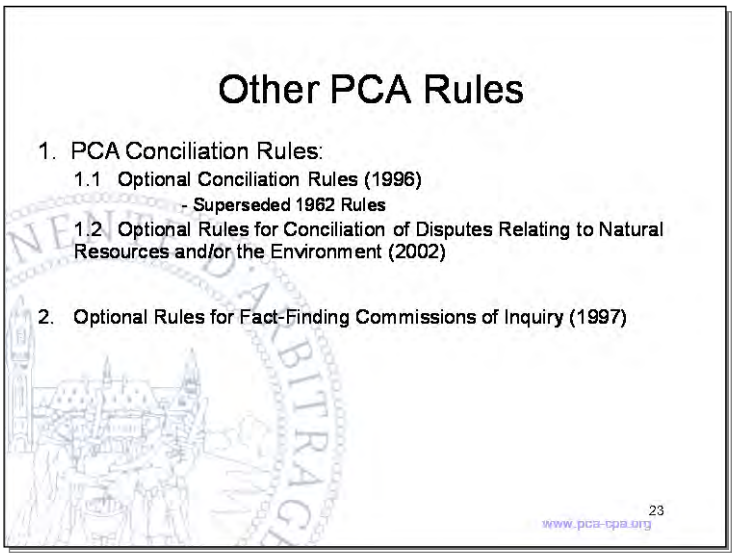

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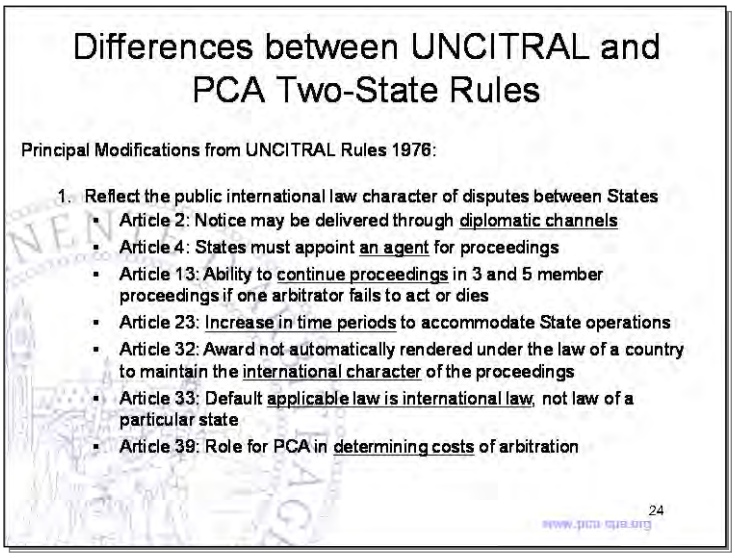

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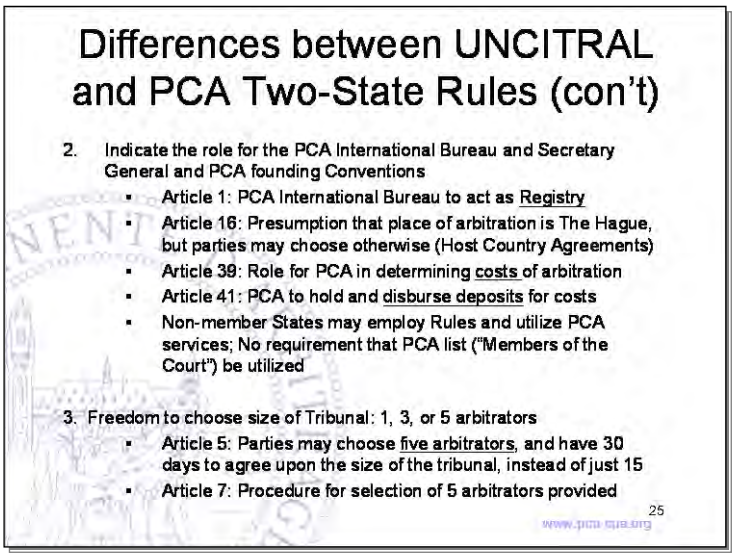

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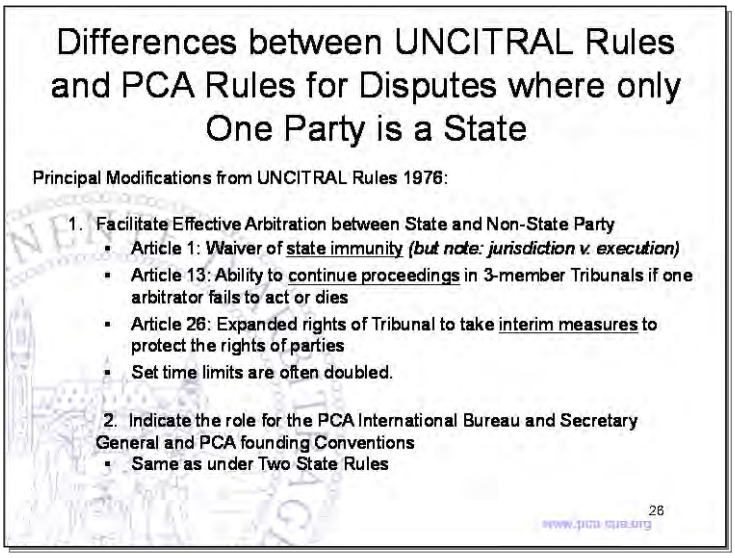

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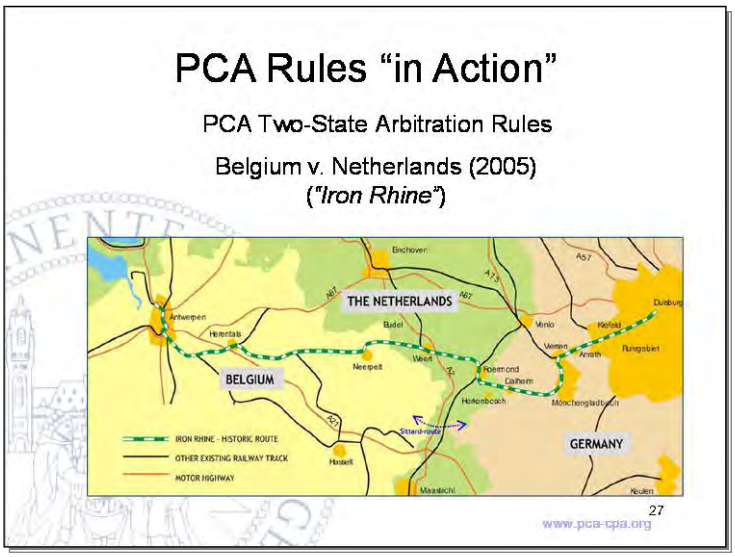

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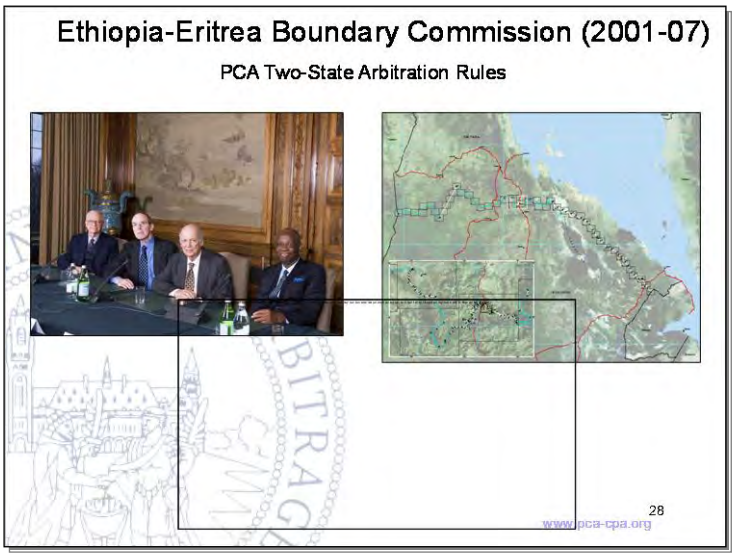

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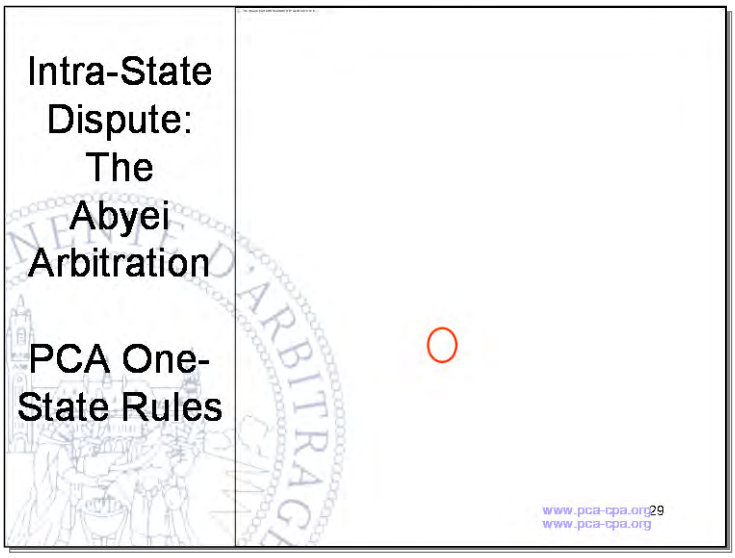

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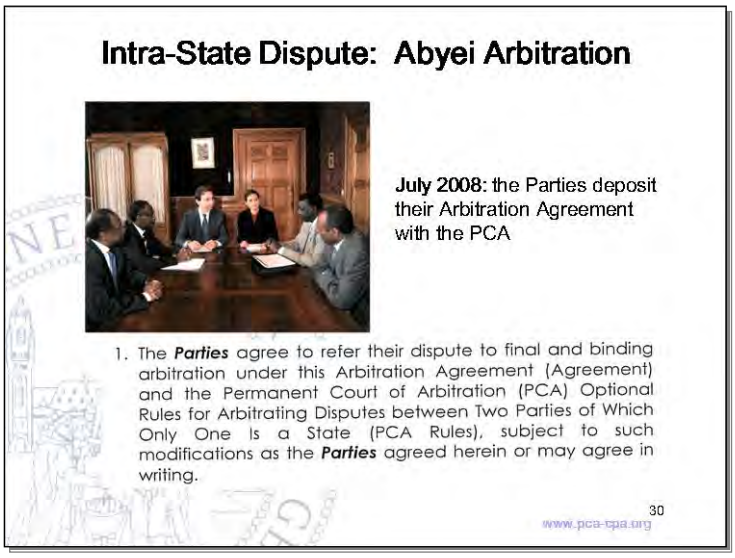

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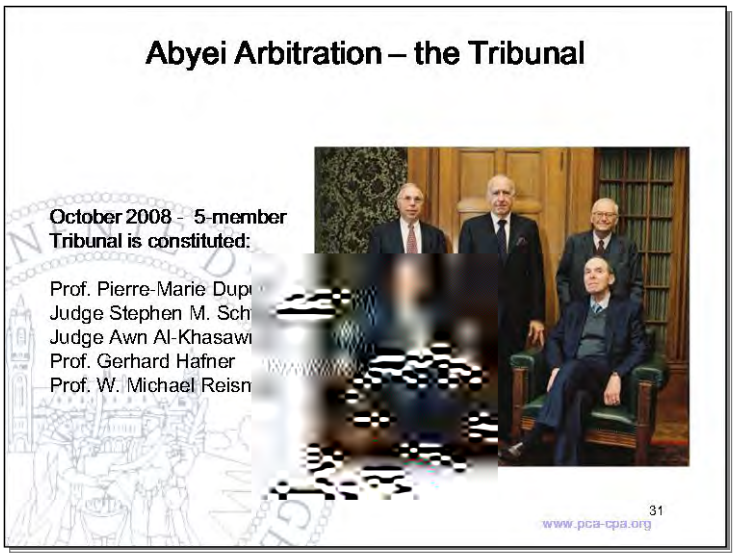

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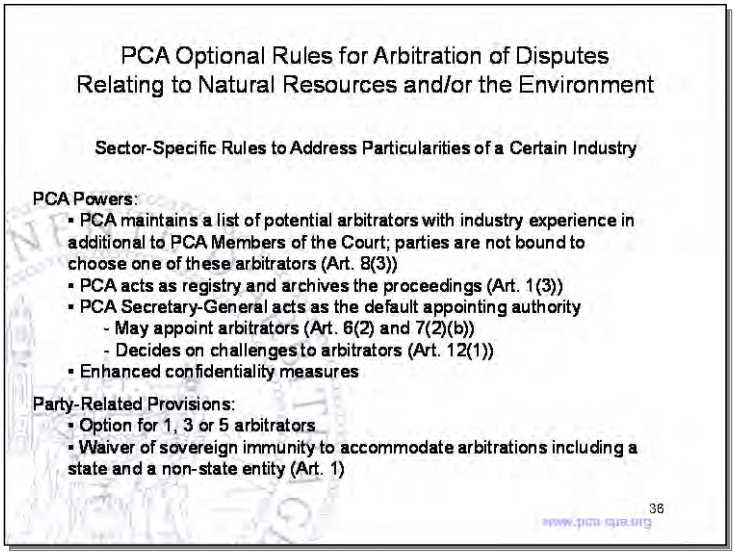

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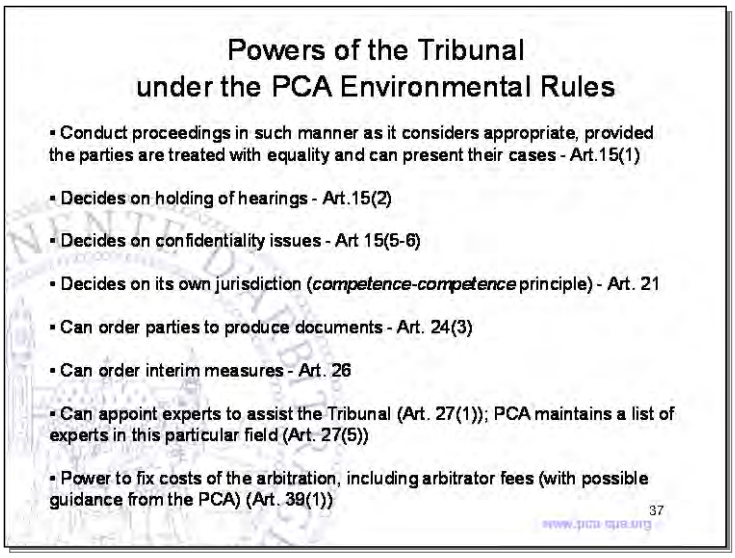

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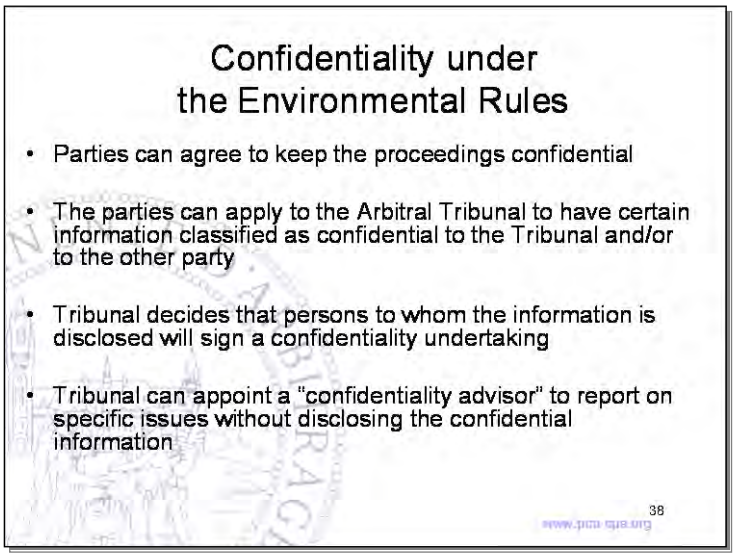

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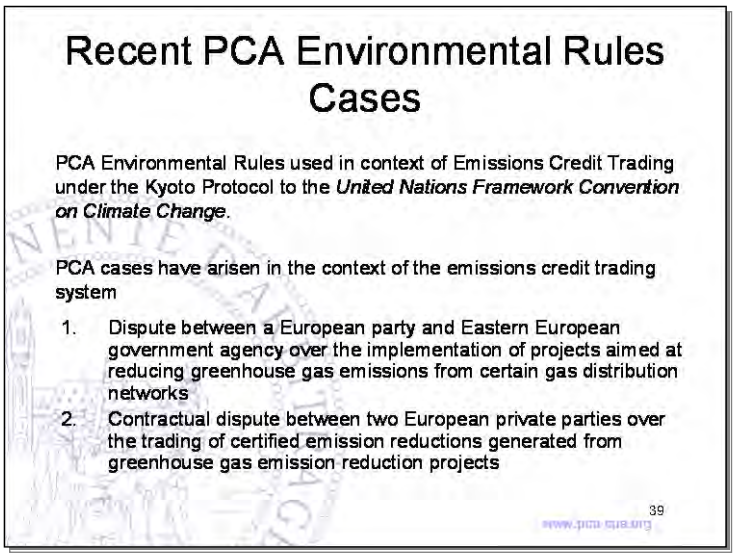

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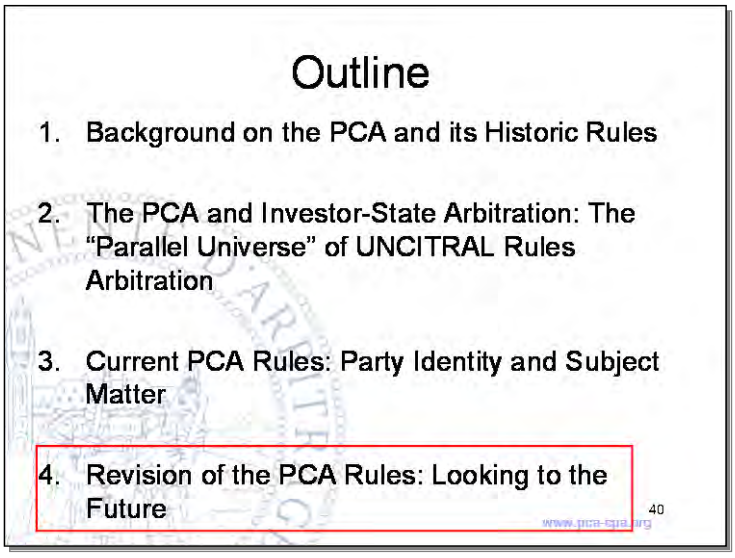

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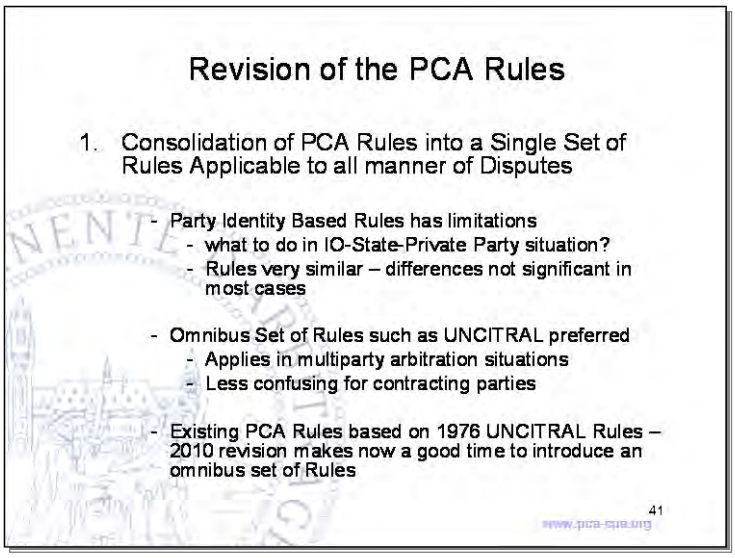

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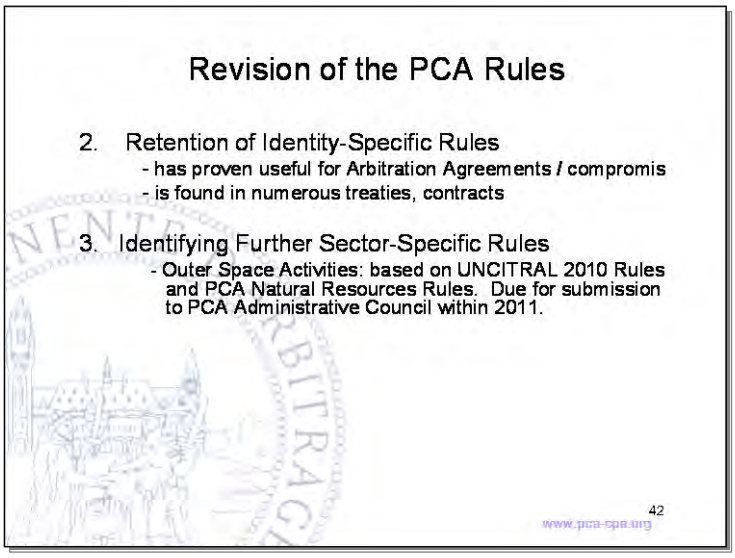

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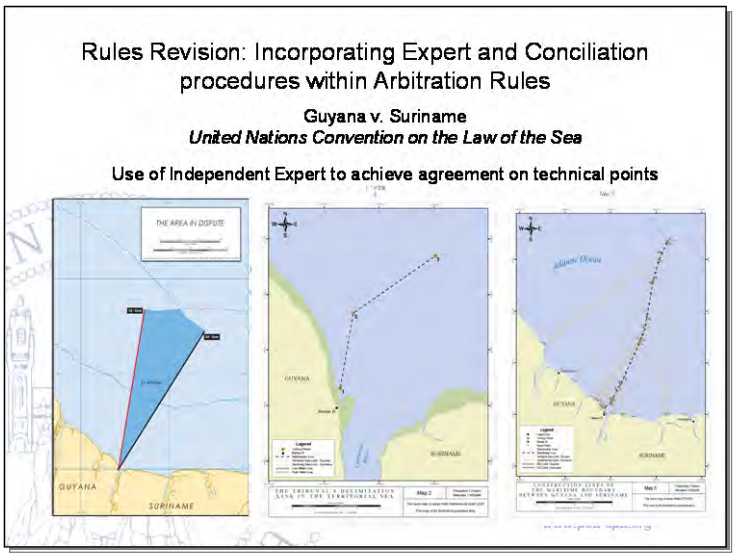

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xi. UNCITRAL Arbitration Laws

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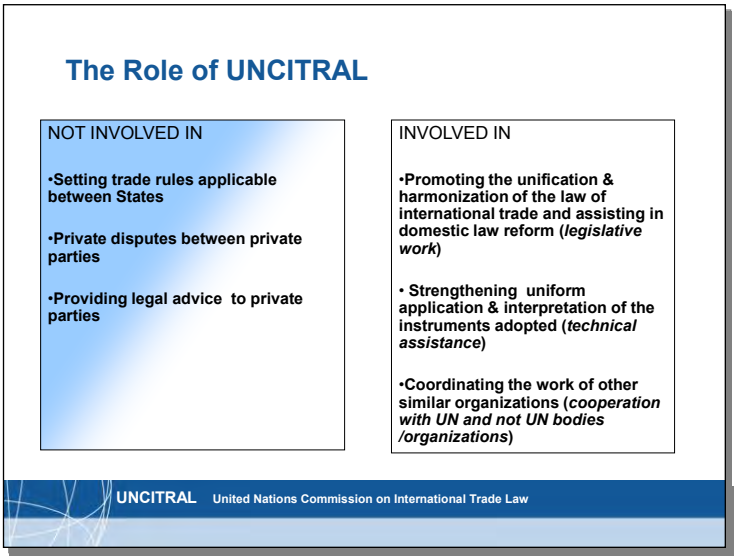

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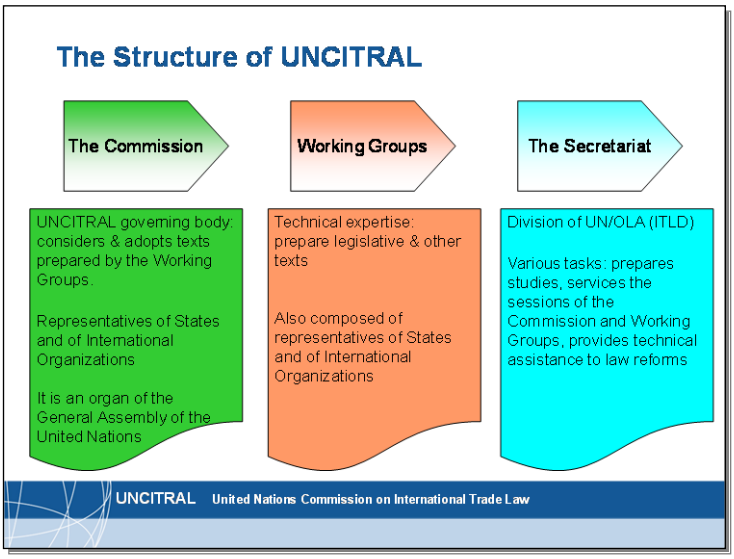

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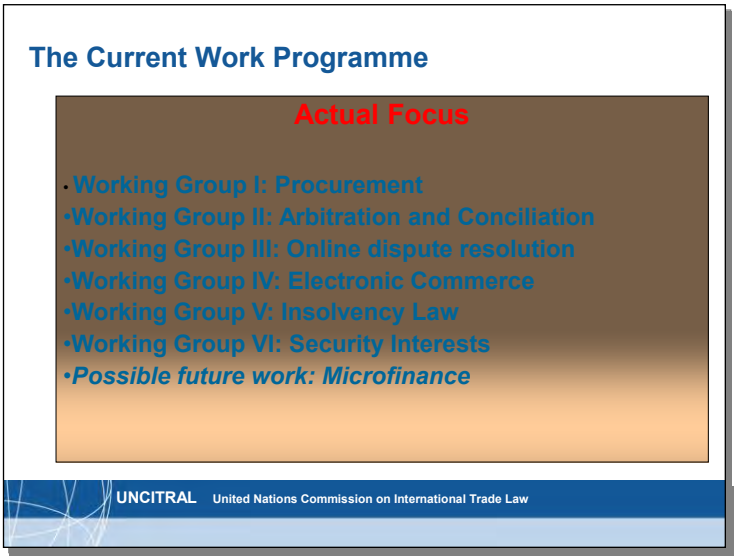

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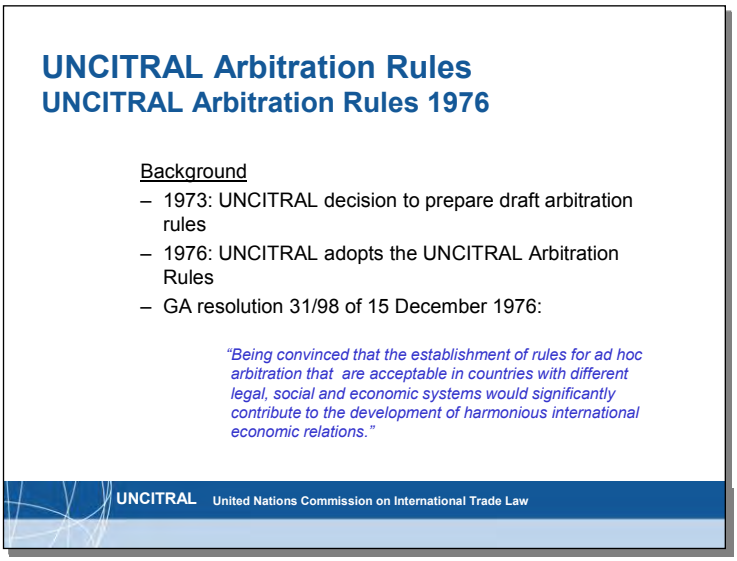

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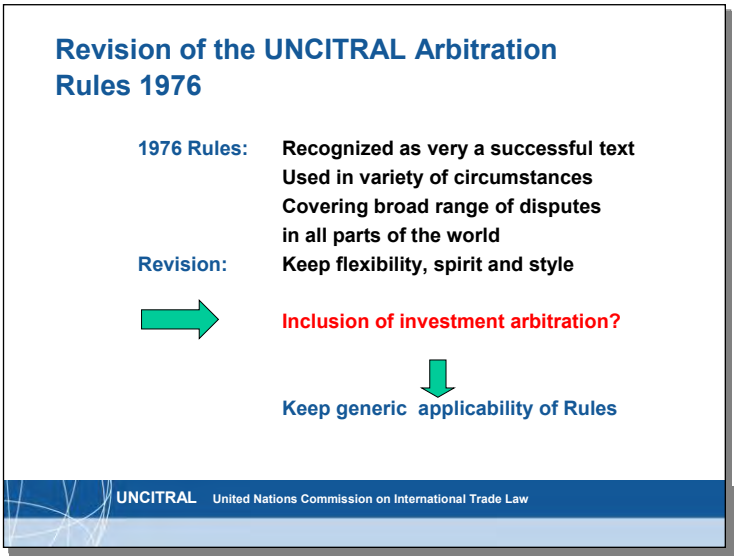

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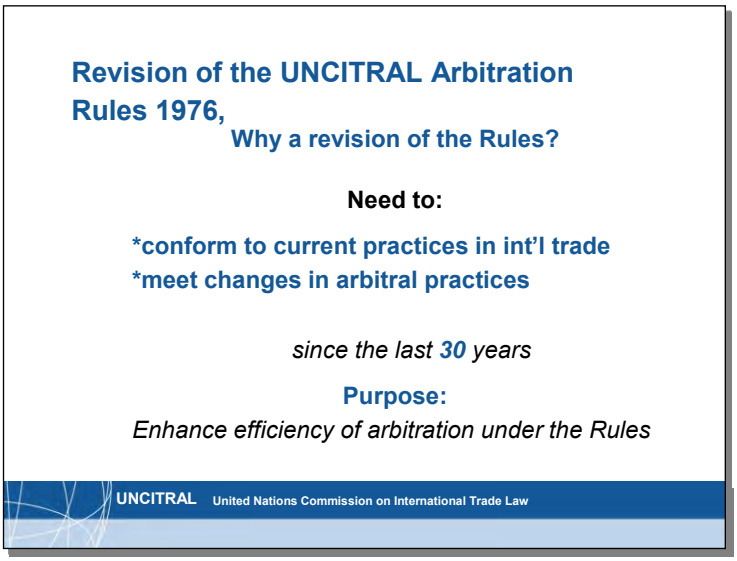

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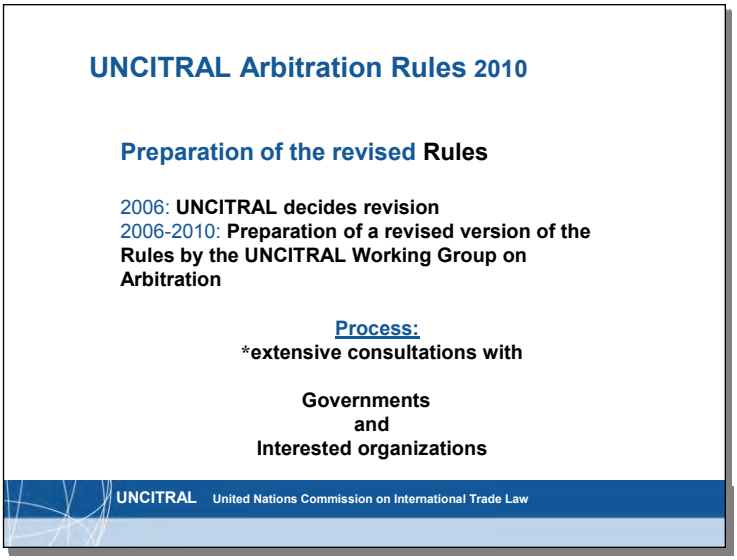

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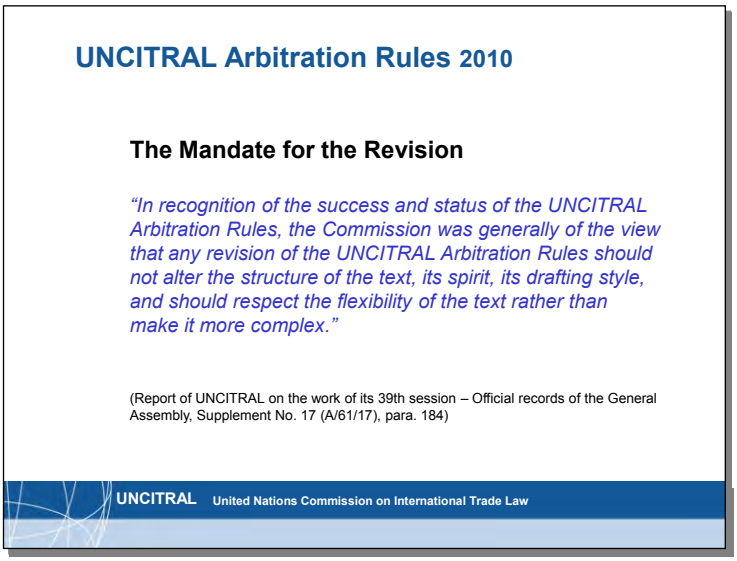

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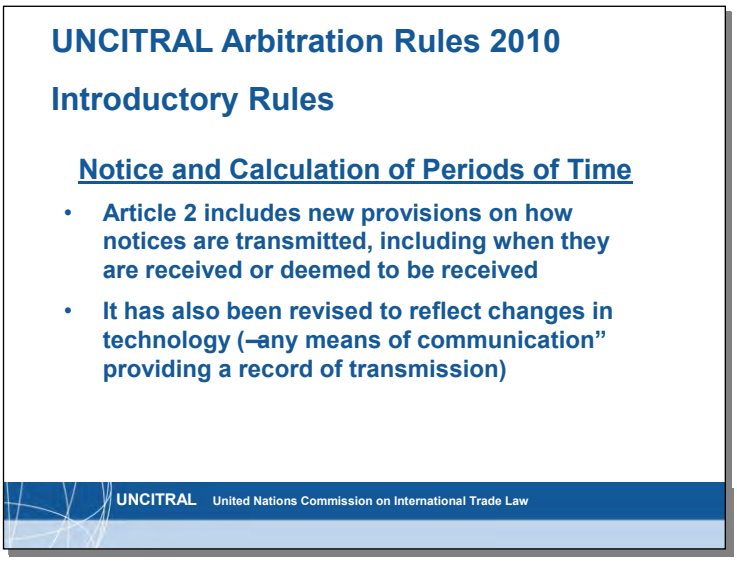

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UNCITRAL Arbitration Rules 2010
(ii) Composition of the Arbitral Tribunal

Number of arbitrators

- Default number: 3 arbitrators (as in 1976 Rules)
- For cases of non-participating respondents:
  article 7 (2): the appointing authority may decide to appoint a sole arbitrator under certain conditions
  - *A party has proposed that a sole arbitrator be appointed*
  - *The other party(ies) have not responded*
  - *The other party(ies) have not participated in the appointment of a second arbitrator*
  - *The appointing authority, at the request of a party, may "appoint a sole arbitrator (...) if it determines that, in view of the circumstances of the case, this is more appropriate."*

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UNCITRAL Arbitration Rules 2010
Introductory Rules

The role of the appointing authority

Assistance to the parties, if needed, in particular for:

- the composition of the arbitral tribunal, challenge and replacement of an arbitrator
- the determination of fees and expenses of the arbitrators

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UNCITRAL Arbitration Rules 2010 - Composition of the Arbitral Tribunal

Appointment of Arbitrators

- Articles 8 and 9 reflect the provisions of the 1976 version of the rules on the appointment procedure where there the arbitral tribunal is composed of 1 or 3 members
- Article 10 *(new provision):*
  - *Appointment of arbitrators in case of multi-party arbitration*
  - *Arbitral tribunal composed of a number of arbitrators other than 1 or 3*
  - *Failure to constitute the arbitral tribunal*

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UNCITRAL Arbitration Rules 2010

Composition of the Arbitral Tribunal

Disclosure By and Challenge of Arbitrators

- Article 11 deals with the duty of arbitrators to disclose; the Rules contain model statements of independence
- Articles 12 and 13 address the procedure for challenging an arbitrator

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UNCITRAL Arbitration Rules 2010

Composition of the Arbitral Tribunal

Replacement of an Arbitrator

Two innovations

- **Article 14 (2) – in exceptional circumstances, a party may be deprived of its right to appoint a substitute arbitrator**
- **After the closure of the hearings, the AA may authorize the other arbitrators to proceed with the arbitration and make any decision or award**

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UNCITRAL Arbitration Rules 2010

Composition of the Arbitral Tribunal

Exclusion of Liability

- **Article 16 – specific immunity for the tribunal and the AA**

"Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

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UNCITRAL Arbitration Rules 2010

(iii) Arbitral Proceedings

General Provisions ("*the magna carta*")

Article 17 (*former article 15*)

→ *key principle of the Rules: discretionary power of the arbitral tribunal*

Para. 1: treatment of parties with equality & reasonable opportunity to present case + tribunal's duty to enhance procedural efficiency ("*conduct the proceedings so as to avoid unnecessary delay & expense")*

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UNCITRAL Arbitration Rules 2010

Arbitral Proceedings

Article 17 (*former article 15*)

***new* Para. 2**: tribunal shall establish provisional timetable of arbitration

enhance efficiency of proceedings

***new* Para. 5**: joining multiple parties in a single proceeding

"one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds… that joinder should not be permitted because of prejudice to any of those parties"

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UNCITRAL Arbitration Rules 2010

Arbitral Proceedings

Statement of Claim, Statement of Defence

- Article 20, 21 and 22

  - option for the parties to treat the Notice of Arbitration and the Response to Notice of Arbitration as statement of claim / statement of defence

  - statement of claim / statement of defence "*should*" be accompanied by all documents or evidence

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UNCITRAL Arbitration Rules 2010

Arbitral Proceedings

Interim measures, Article 26

→ *More detailed provisions*
→ *based on Article 17 of the UNCITRAL Model Law*

New:

- paragraph (2): definition of interim measure
- paragraph (5): power of arbitral tribunal to modify, suspend or terminate an interim measure it has granted upon party's application or its own initiative
- paragraph (6): tribunal may require security for measure
- paragraph (8): liability for costs

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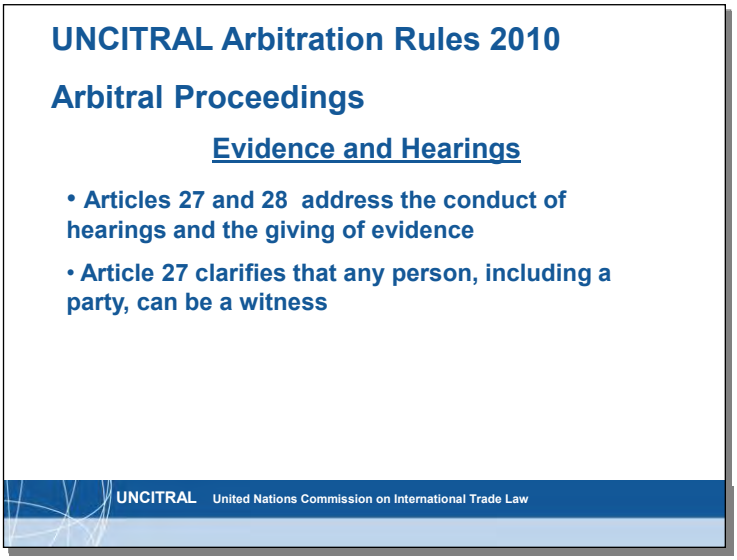

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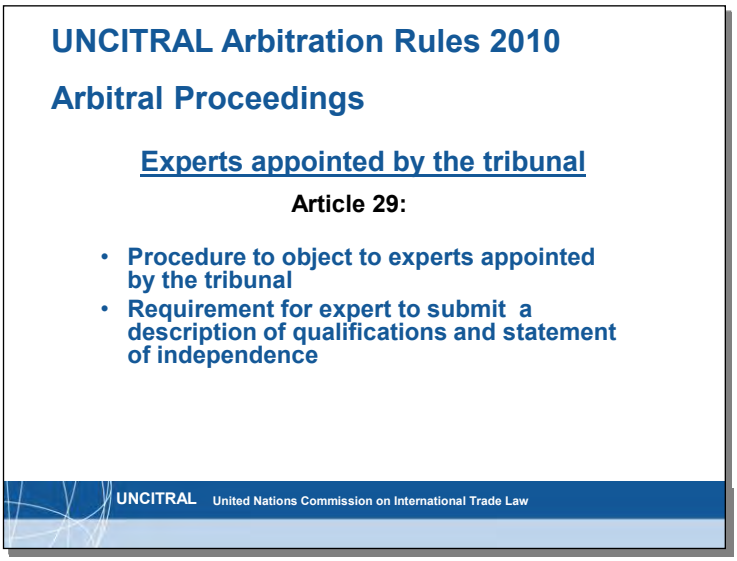

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UNCITRAL Arbitration Rules 2010

Arbitral Proceedings

Default

- Article 30 (1): the arbitral tribunal can order the proceedings to terminate where the claimant "has failed to communicate its statement of claim" and it shall order the proceedings to continue when the " respondent has failed to communicate its response to the notice of arbitration or its statement of defence".

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UNCITRAL Arbitration Rules 2010

Arbitral Proceedings

Waiver of Right to Object

- Article 32 – broadens the possibility of the waiver of objections for non-compliance with the Rules

  the party that failed to object has the burden to ~~–~~*show that, under the circumstances, its failure to object was justified*"

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UNCITRAL Arbitration Rules 2010

(iv) The Award

Form and Effect of the Award

- Article 34 – the meaning of –finality" of an award under the Rules
- Article 34 (5) – no general duty of confidentiality

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UNCITRAL Arbitration Rules 2010

The Award

Applicable Law, Amiable Compositeur

- Article 35 – clarifies that the parties may agree on the application of –*rules of law*"; but where the parties have failed to agree on the applicable law, the tribunal shall directly choose the law —it determines to be appropriate".

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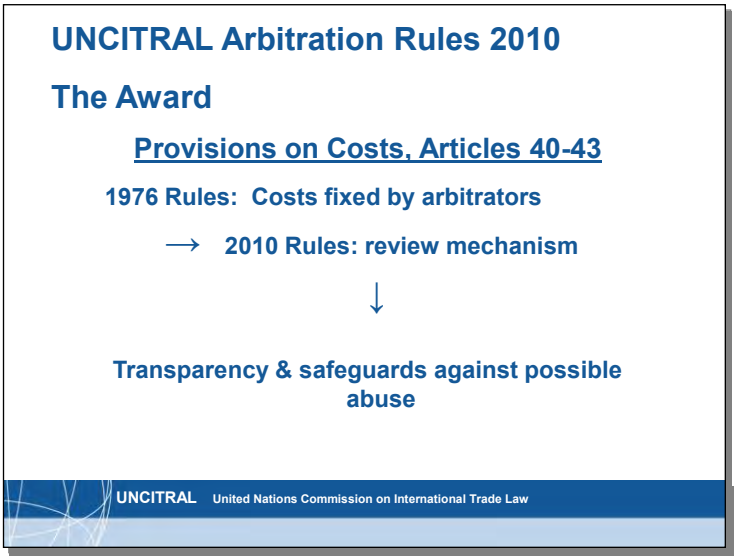

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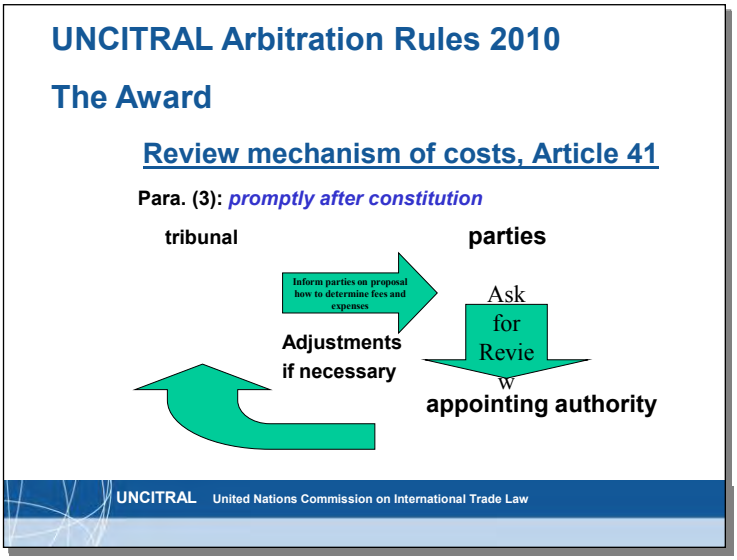

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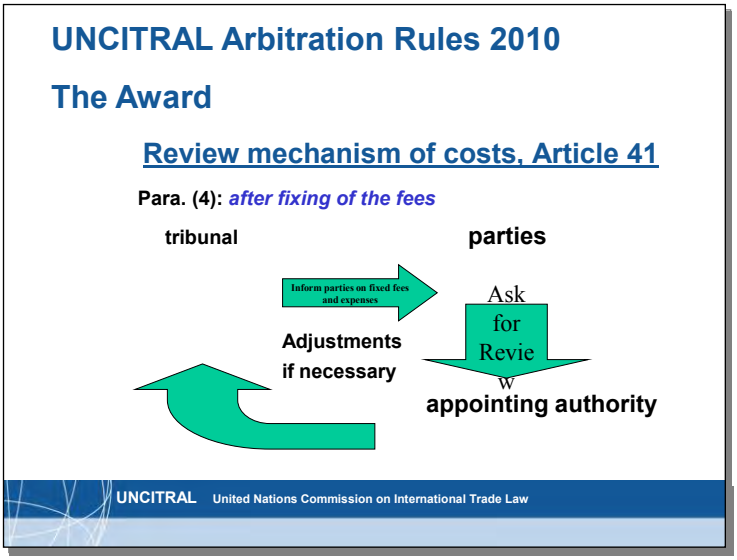

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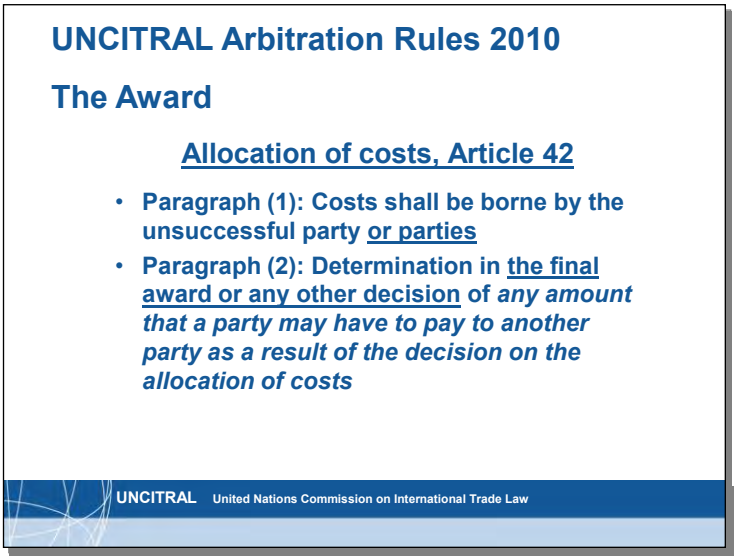

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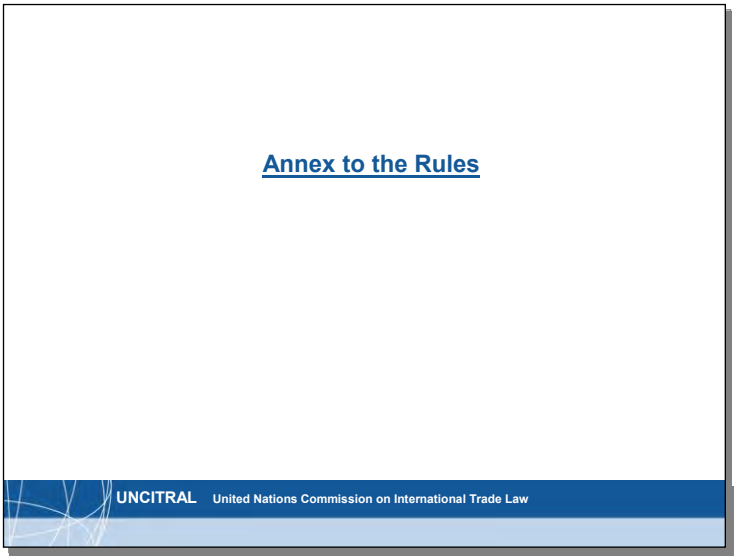

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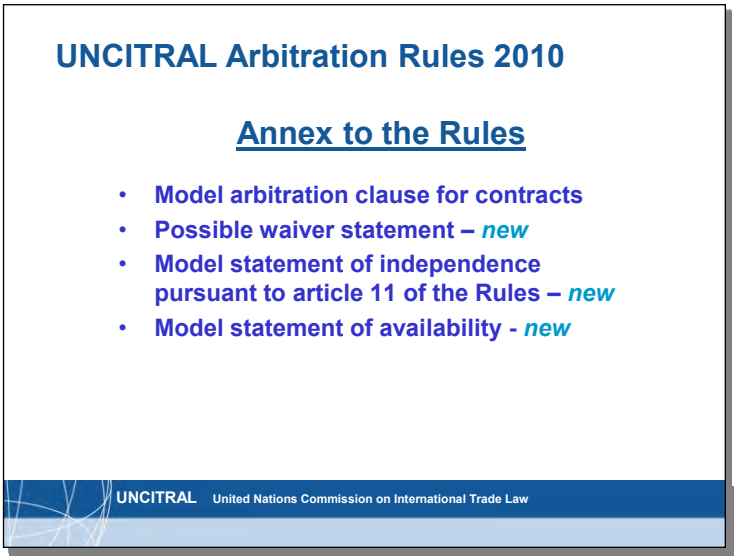

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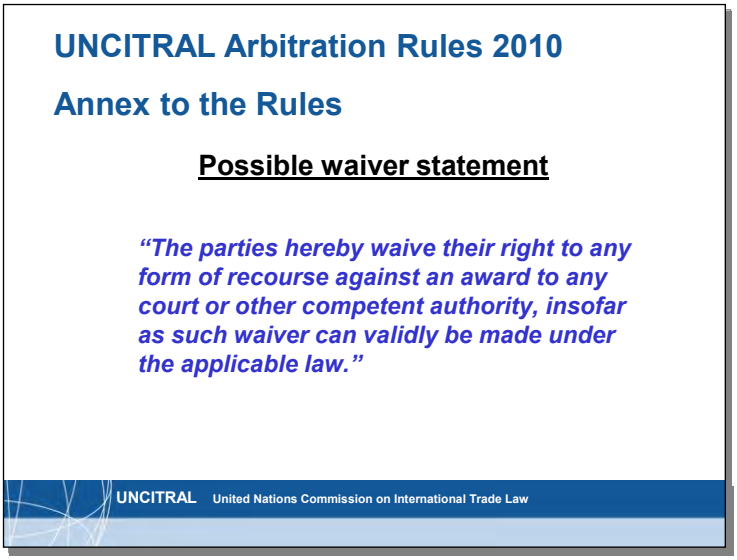

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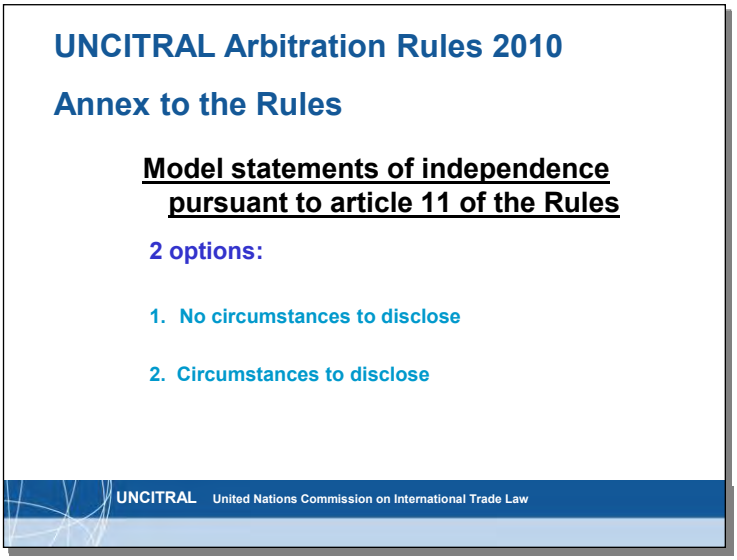

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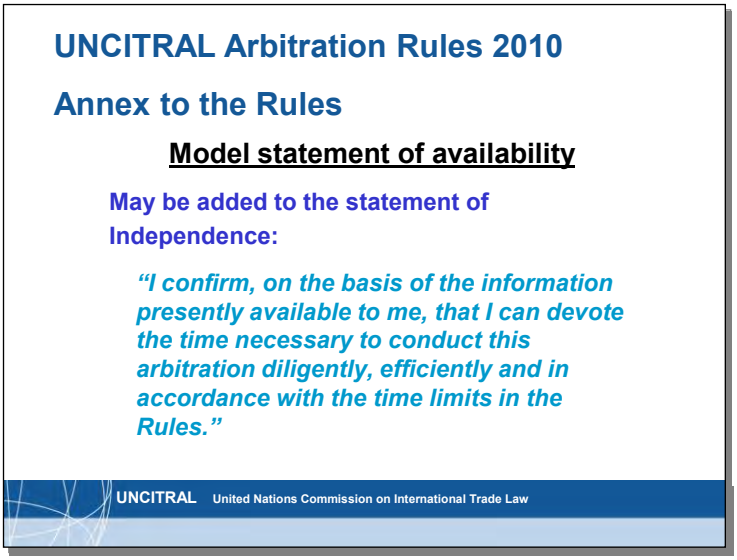

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xii. Provisional Measures and Interim Relief

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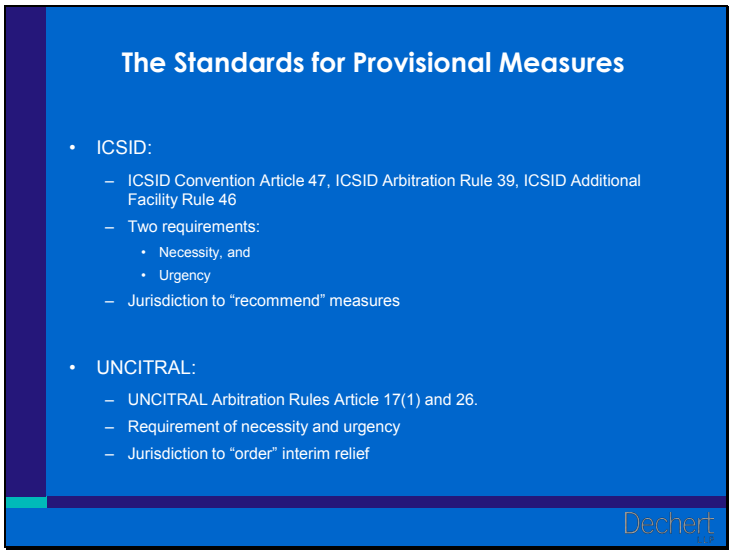

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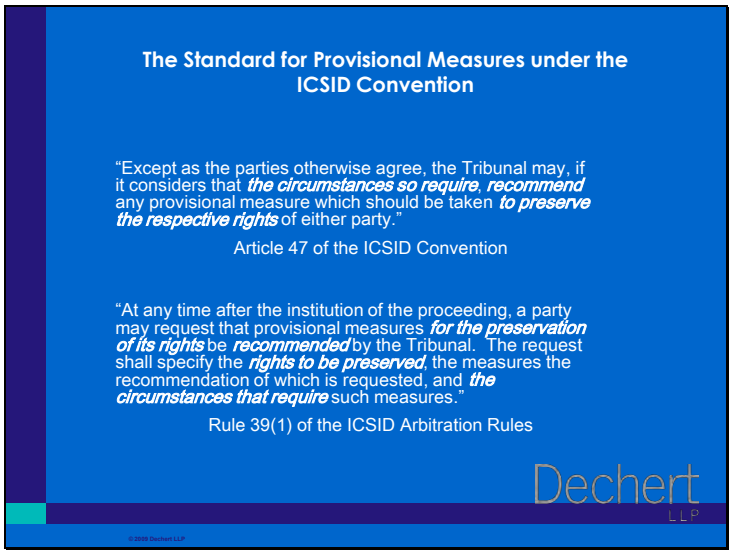

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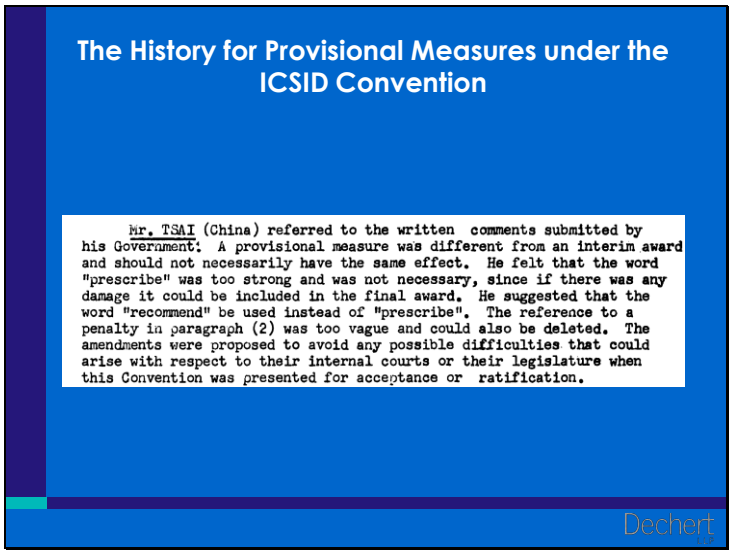

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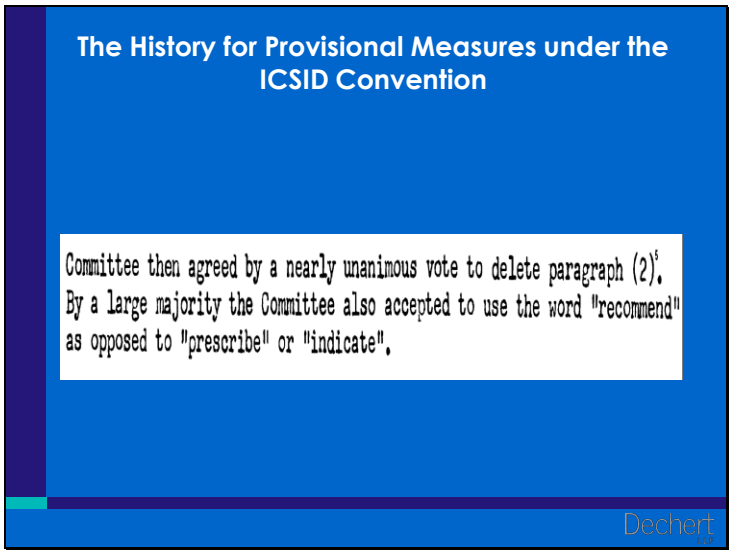

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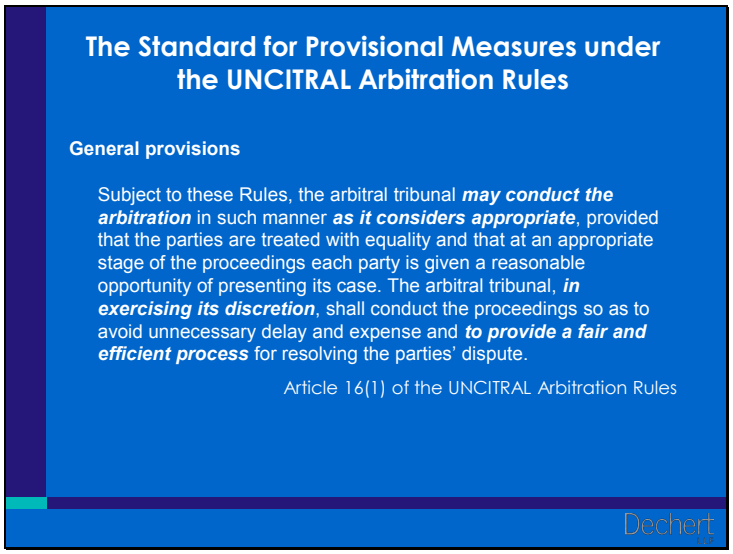

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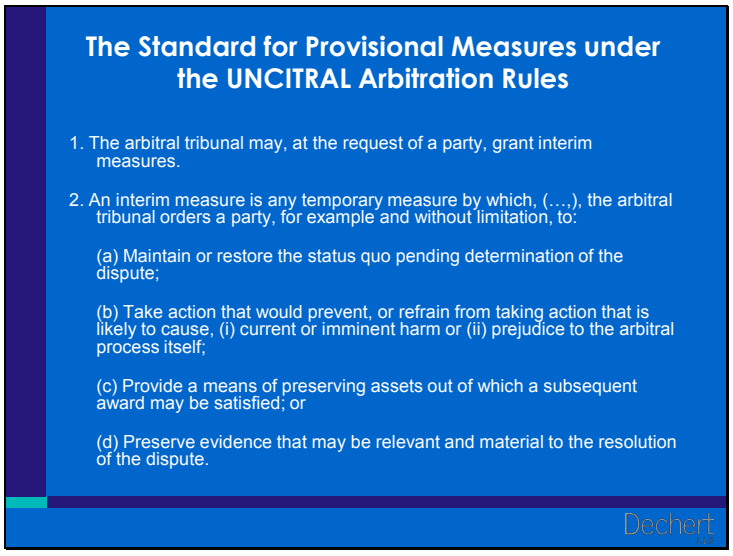

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The Standard for Provisional Measures under the UNCITRAL Arbitration Rules

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(…)

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Dechert

Slide 10

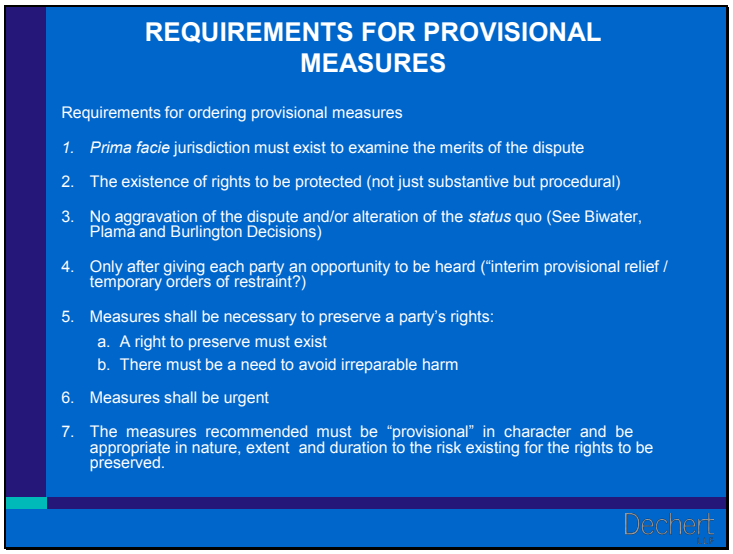
Interpretation by UNCITRAL Tribunals

Chevron and Texaco v. Ecuador: Order of Interim Measures, 9 February 2011

- The Tribunal has the "power" to render interim measures
- By its nature, binding on the parties
- Can be rendered as interim awards

Dechert

Slide 11



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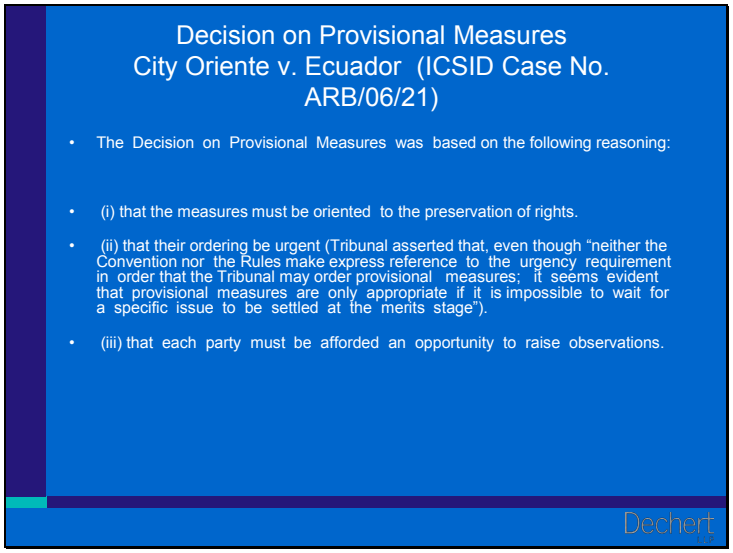

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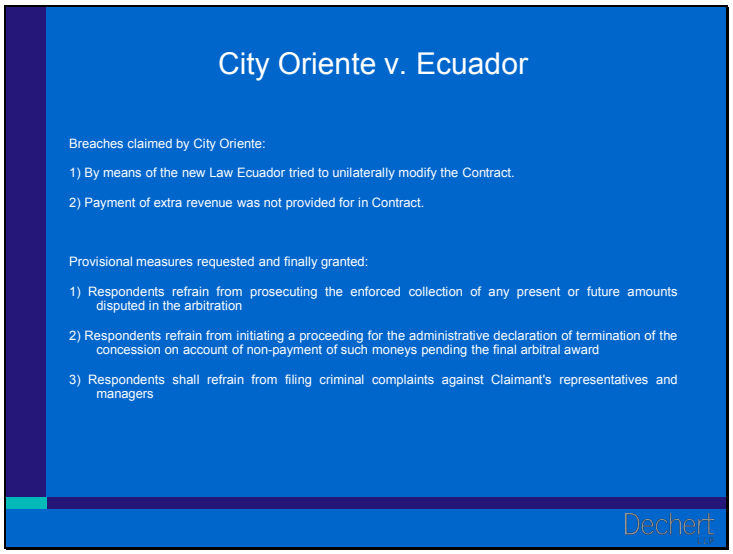

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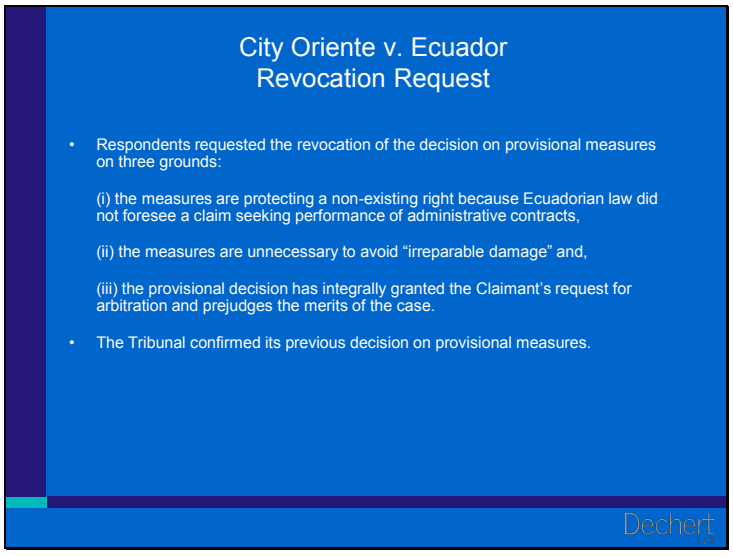

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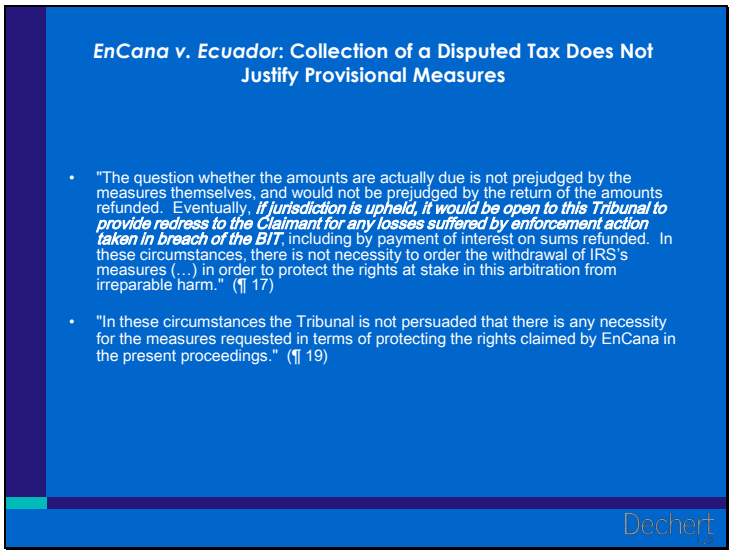

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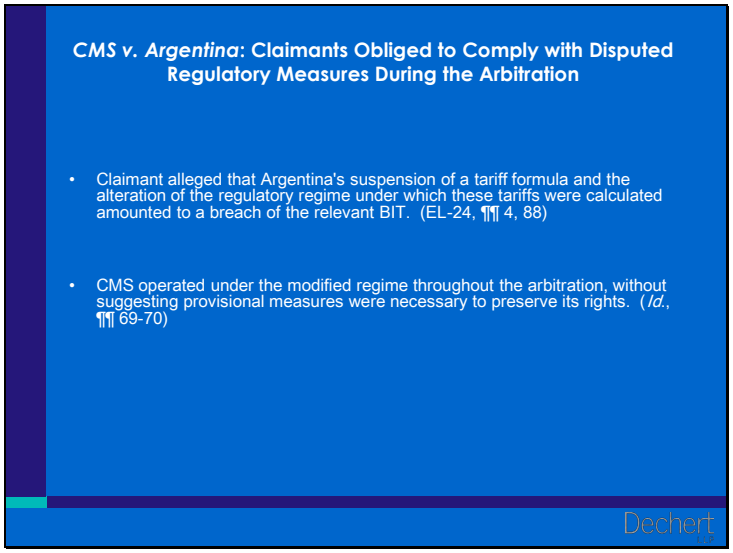

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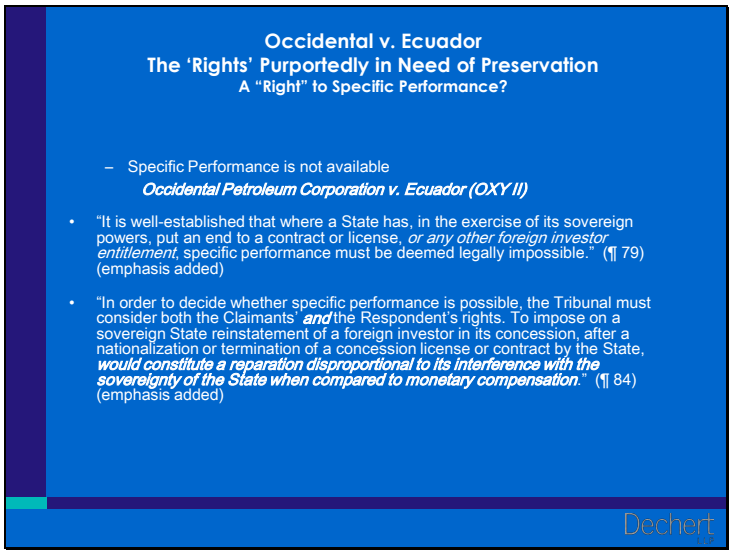

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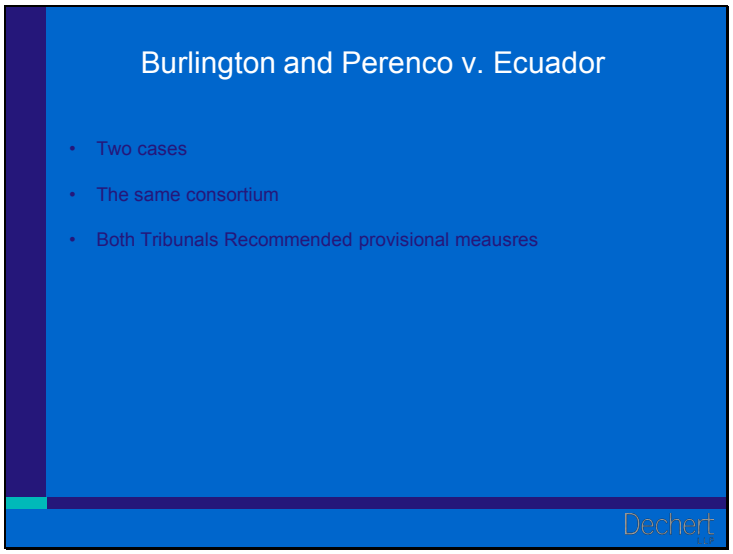

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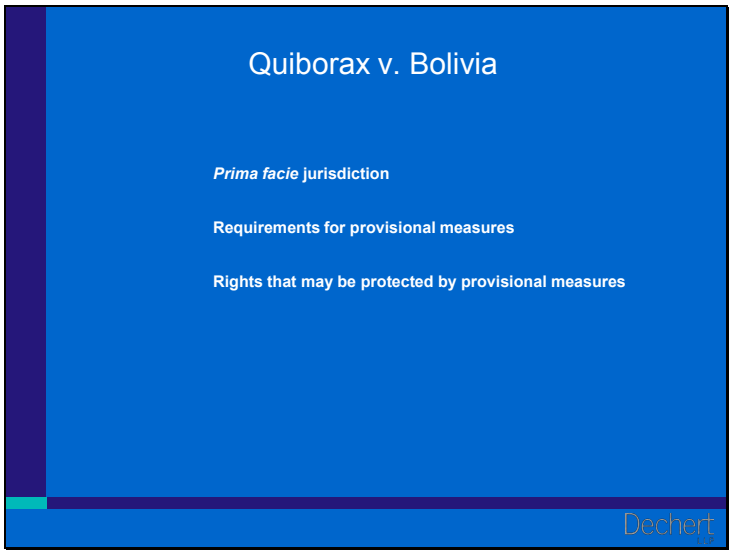

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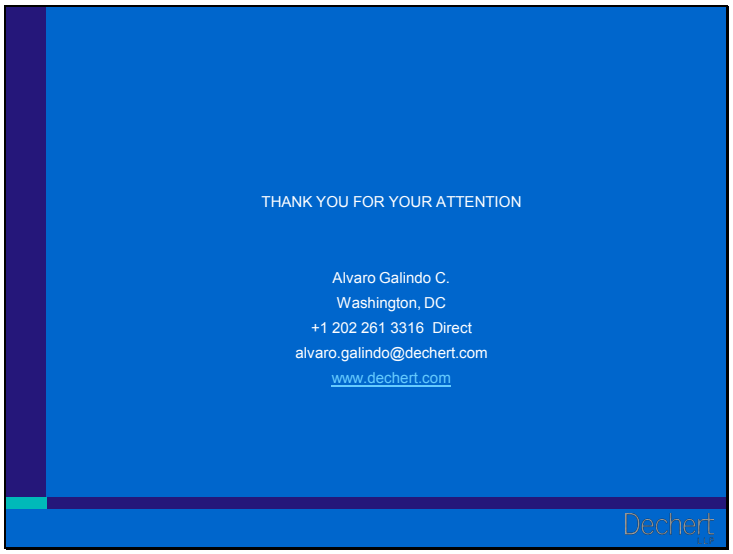
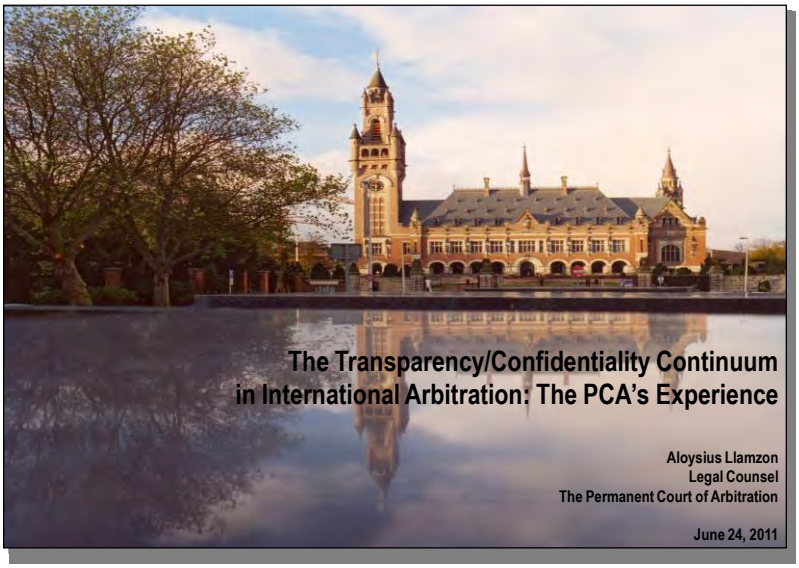


xiii. Transparency in Arbitral Proceedings

Slide 1

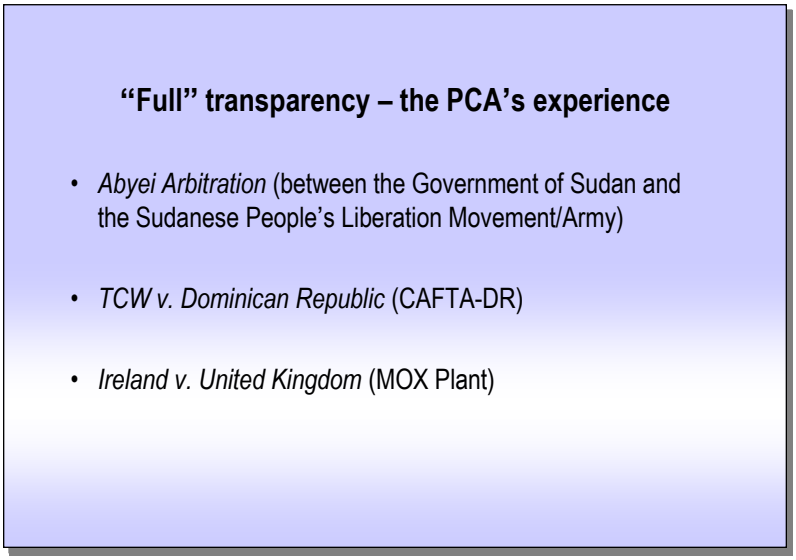


Slide 2

Different levels of transparency sought

- No transparency: Parties might wish to preserve confidentiality
- "Partial" transparency: Parties might agree to publicize certain aspects (e.g. case name; commencement of the arbitration; name of arbitrators; name of parties' representatives; submissions; procedural orders; awards)
- "Full" transparency: Parties might opt for maximum transparency (entire written pleadings available to public; hearing open to public)

Slide 3



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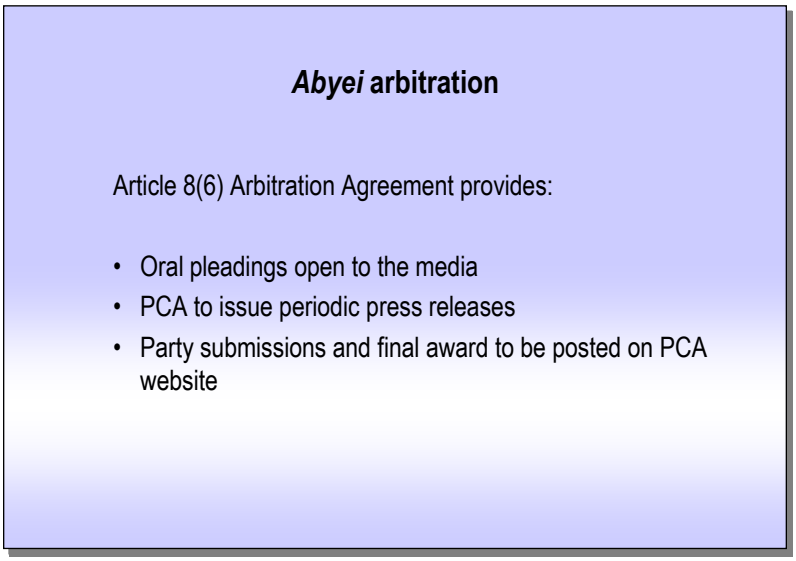


Slide 5

Abyei

April 2009: Public Hearings in The Hague

July 2009: Award rendering live in Peace Palace and webcast to Abyei Town

Slide 6

"Partial" transparency – the PCA's experience (1)

State to State Arbitration

- *Indus Waters Kishenganga Arbitration* (Pakistan v. India): Existence of the case, the date of initiation, the relevant Treaty, the names of the Parties, and the identity of the members of the Tribunal are all public
- *Bangladesh v. India* (UNCLOS Annex VII): Existence of the case, the date of initiation, the relevant Treaty, the names of the Parties, and the identity of the members of the Tribunal are all public
- *Guyana v. Suriname* (UNCLOS Annex VII): The Parties' submissions, the Procedural Orders, the meeting and hearing transcripts, the Site Visit Report, and the Award are published

Slide 7

"Partial" transparency – the PCA's experience (2)

Investment Treaty Arbitration

- *European American Investment Bank (Austria) v. The Slovak Republic*: The existence of the case, the relevant Treaty, the names of the Parties' representatives, and the identity of the members of the Tribunal are all public
- *Saluka Investments B.V. (the Netherlands) v. The Czech Republic* : The Decision on Jurisdiction and the Partial Award are published
- *Vito G. Gallo v. Government of Canada* (NAFTA Chapter 11): the Parties' submissions, the Procedural Orders, the Confidentiality Order, the ICSID Decision on the Challenge of an Arbitrator, and several letters from the Tribunal to the Parties and vice versa concerning procedural matters

Slide 8

"Partial" transparency – the PCA's experience (3)

Contract Arbitration

- *Eurotunnel*
  The Partial Award and the Dissenting Opinion are published

Slide 9

PCA cases completed between 2000 and June 2011

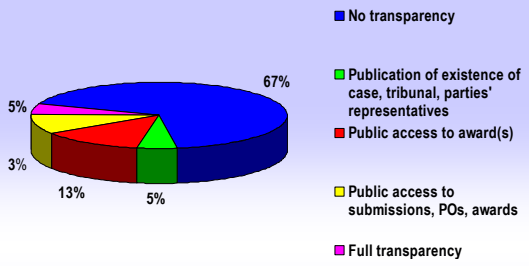
- Number of PCA cases completed between 2000 and June 2011: 61
- Number of PCA cases with "full" transparency: 3
- Number of PCA cases with "partial" transparency: 17

  - publication of existence of dispute, tribunal, and parties' representatives (3);
  - additionally, public access to award(s) (8);
  - additionally, public access to submissions, procedural orders etc. (6);

- Number of PCA cases with no transparency: 41

Slide 10

PCA cases completed between 2000 and June 2011

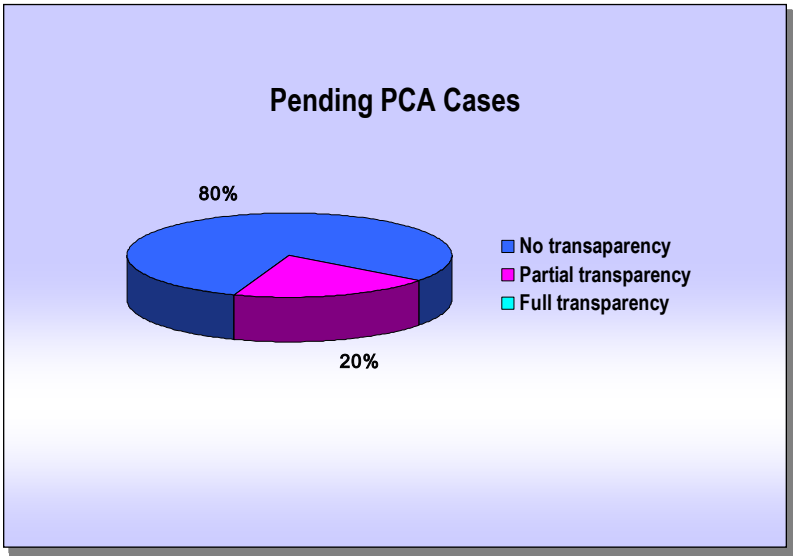


Slide 11

Pending PCA Cases

- Number of PCA Cases currently pending: 49
- Number of PCA Cases with “full” transparency: 0
- Number of PCA Cases with “partial” transparency: 10
- Number of PCA Cases with no transparency: 39

Slide 12



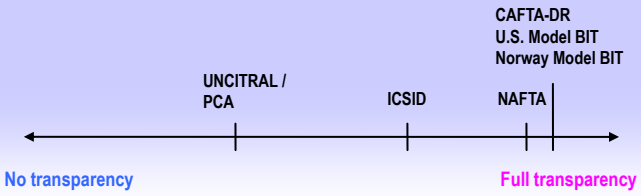
Slide 13

Different sources of transparency and confidentiality obligations

1) Bilateral and multilateral investment treaties
2) National arbitration laws
3) Arbitration rules
4) Arbitration agreements
5) Terms of appointment
6) Procedural orders

Slide 14

Rough continuum



Slide 15

Registration of disputes

BITs and ECT	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
▪ Silent on publication of existence of dispute	▪ Filing of notice of arbitration/request for arbitration with NAFTA Secretariat; Secretariat must maintain those documents in a public register	▪ Public registration of all disputes: names of parties, date of registration, general subject matter of dispute, constitution of tribunal	▪ No central registry or requirement that existence of cases be publicly registered

Slide 16

Public access to hearings

BITs	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
▪ Hearings shall be open to the public (U.S. Model BIT 2004, Norway Draft Model BIT 2007)	▪ By 2004, all NAFTA parties had announced a policy consenting to open hearings; but consent of claimant still necessary	▪ The tribunal may allow third parties to attend or observe hearings unless either party objects	▪ Hearings are to be held *in camera* unless agreed otherwise by the parties

Slide 17

Participation by third parties

BITs	NAFTA	ICSID	UNCITRAL
▪ The Tribunal may allow *amicus curiae* submissions (U.S. Model BIT 2004, Norway Draft Model BIT 2007)	▪ No provision of the NAFTA limits a tribunal's discretion to accept written submissions from third parties	▪ The tribunal may allow *amicus curiae* submissions after consulting both parties	▪ Silent on participation of third parties; but tribunals have held that the broad discretion under Article 15 encompasses the power admit *amicus curiae* briefs

Slide 18

Public access to documents

(submissions, procedural orders etc.)

BITs	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
▪ All documents submitted to, or issued by, the tribunal shall be made public (U.S. Model BIT 2004, Norway Draft Model BIT 2007, Japan-Mexico FTA)	▪ Nothing in the NAFTA precludes the parties from providing public access to documents submitted to, or issued by, the tribunal	▪ Each party may publicly disclose briefs and other submissions	▪ Silent on public disclosure of documents and other information

Slide 19

Public access to awards

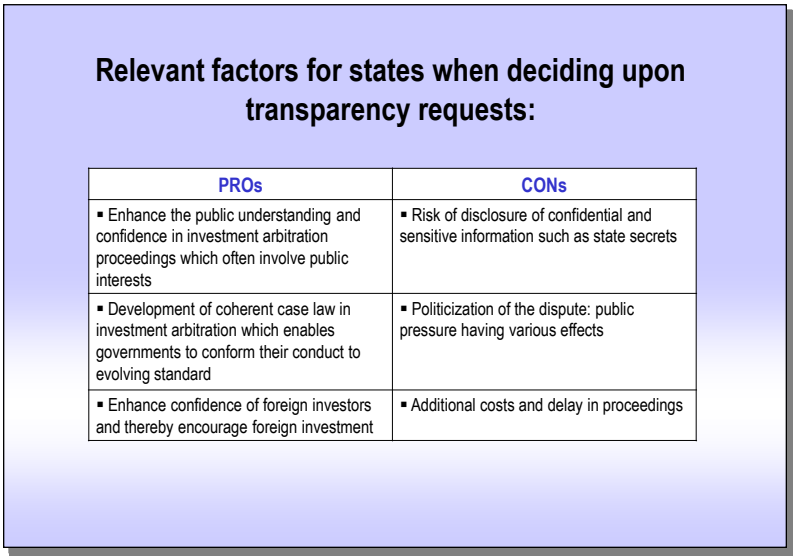
BITs and ECT	NAFTA	ICSID	UNCITRAL; PCA Optional Rules
▪ **ECT**: A copy of the award shall be deposited with the Secretariat, which shall make it generally available ▪ **U.S.**: The Respondent shall make the awards available to be public ▪ **Norway**: All awards shall be made publicly available ▪ **Japan-Mexico FTA**: Either disputing party may make available to the public an award	▪ Arbitrations involving Canada and U.S.: either party may make available to the public an award ▪ Arbitrations involving Mexico: the applicable arbitration rules apply to the publication of an award	▪ ICSID is prohibited from publishing awards without the consent of the parties, but is required to promptly publish excerpts of the legal reasoning of every award; but each party may publicly disclose an award	▪ Award may be made public only with consent of both parties

Slide 20

Most Common Investment Arbitration Rules: ICSID v. UNCITRAL

ICSID	UNCITRAL
▪ public registration of all dispute	▪ no registration requirement, but parties may agree to publish details
▪ non-parties might be present at hearings unless either party objects	▪ hearings shall be held *in camera* unless the parties agree otherwise
▪ non-disputing party submissions allowed under certain conditions after consulting both parties	▪ silent on non-disputing party, but tribunals have allowed submissions under general power in Art. 15
▪ parties may publicly disclose briefs and other submissions	▪ silent on public disclosure of submissions
▪ awards are published; absent consent, extracts published.	▪ awards may be made public only with consent of both parties

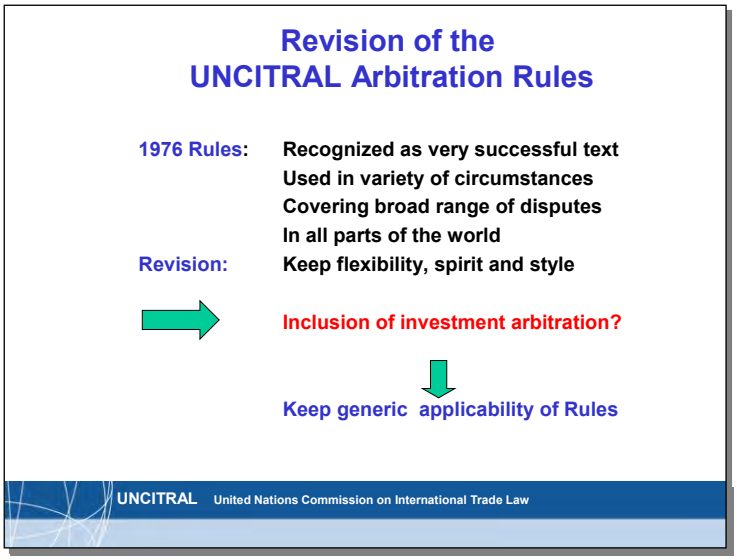
Slide 21



xiv. Current Work of UNCITRAL on Transparency in Treaty-based investor-State Arbitration

Slide 1

Slide 2



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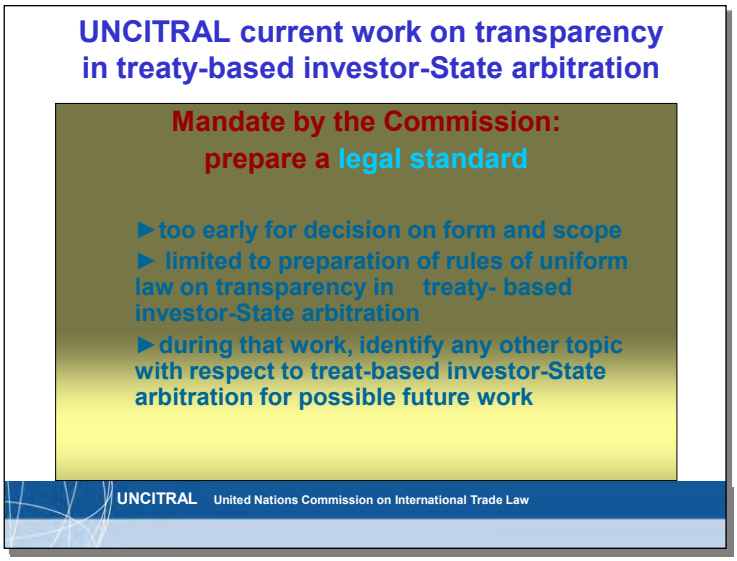

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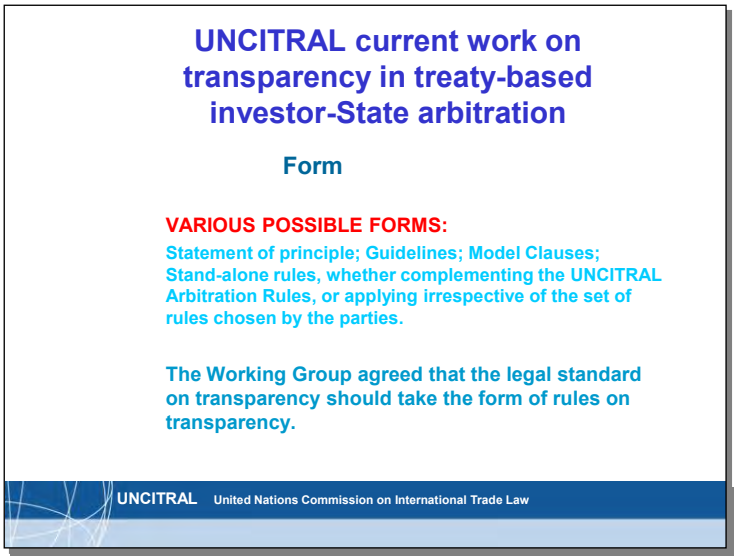

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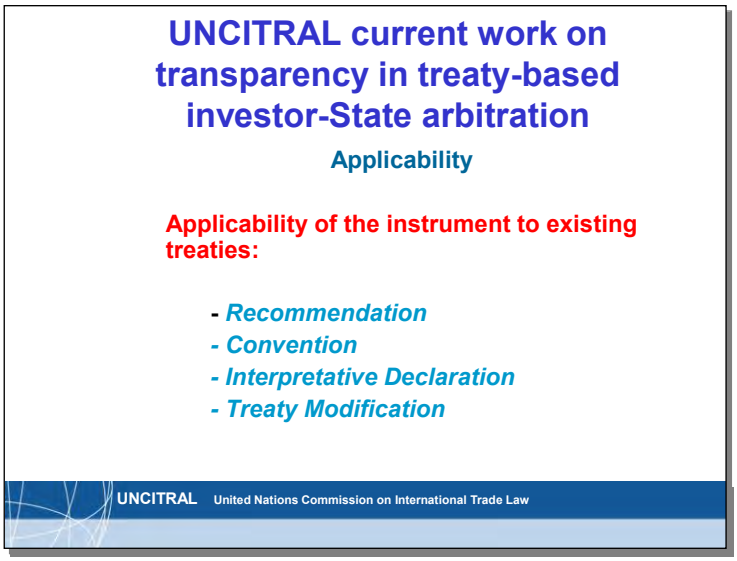

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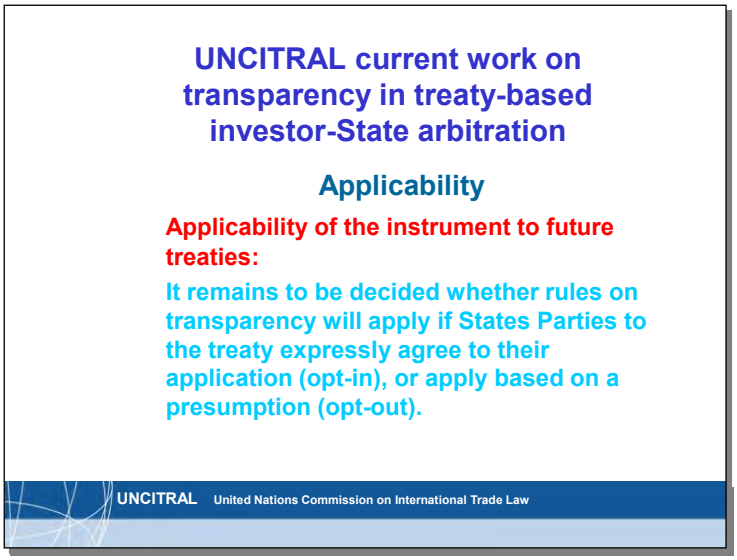

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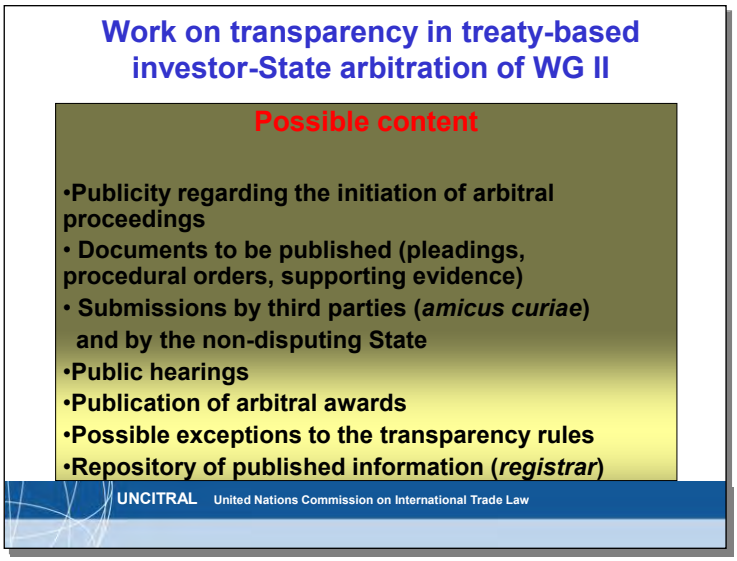

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xvi. Prevention of Investor-State Disputes and Alternatives to Arbitration

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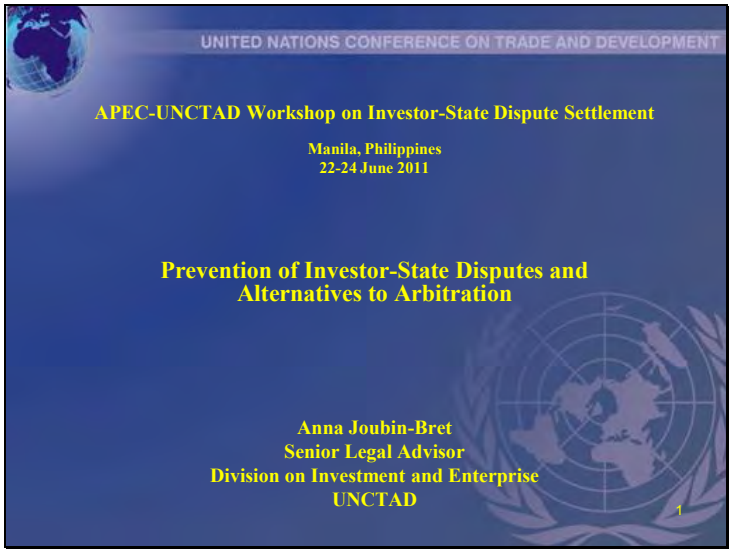

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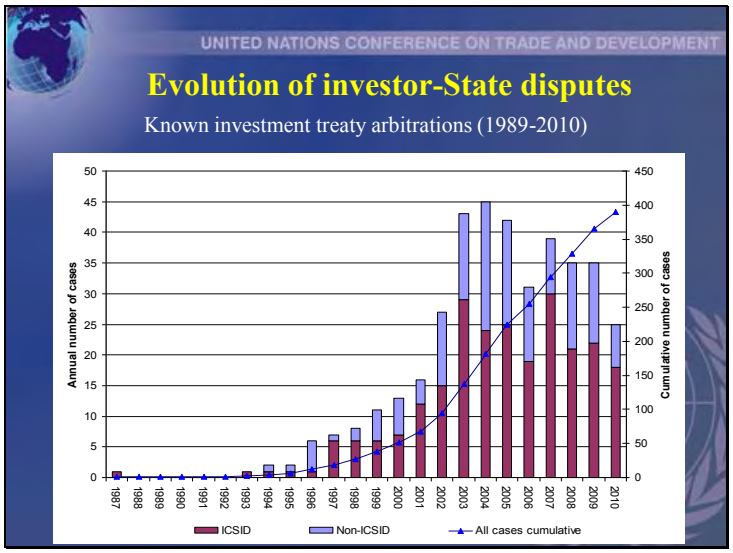

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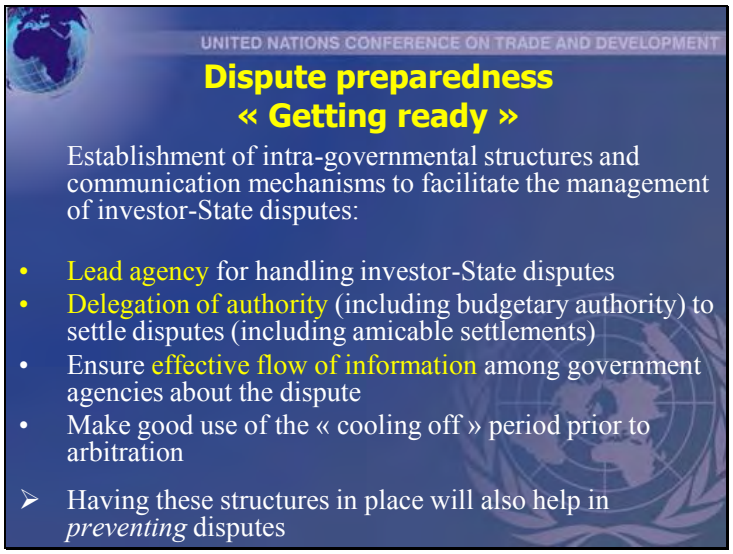

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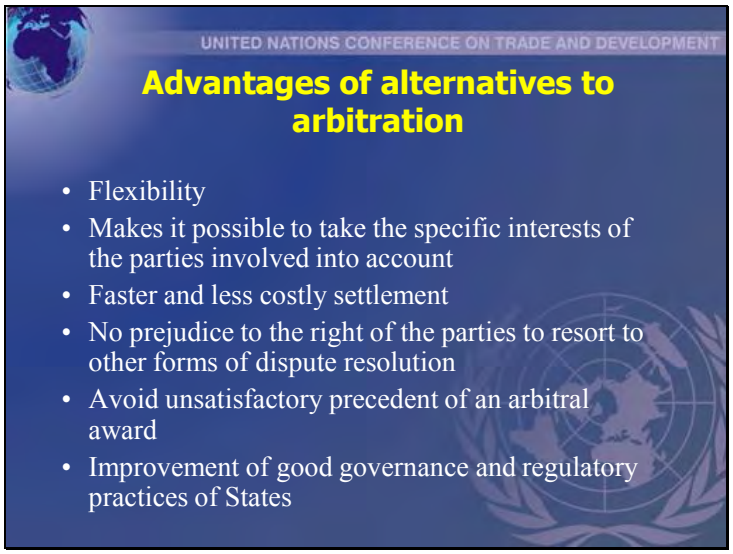

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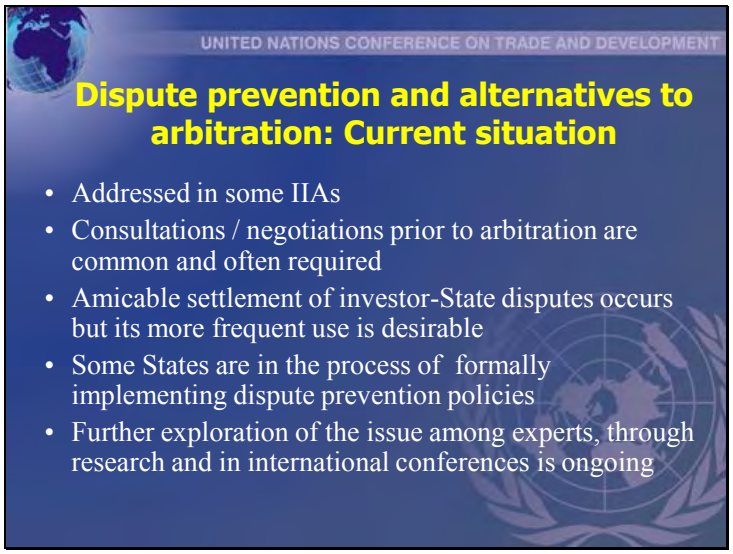

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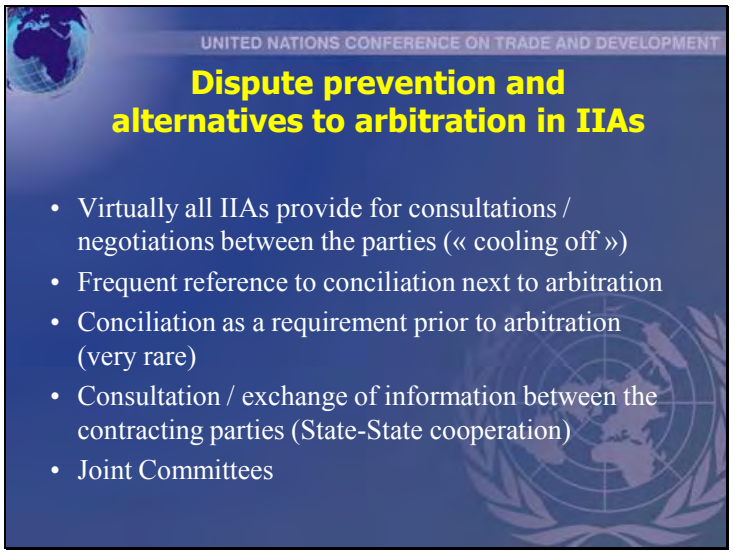

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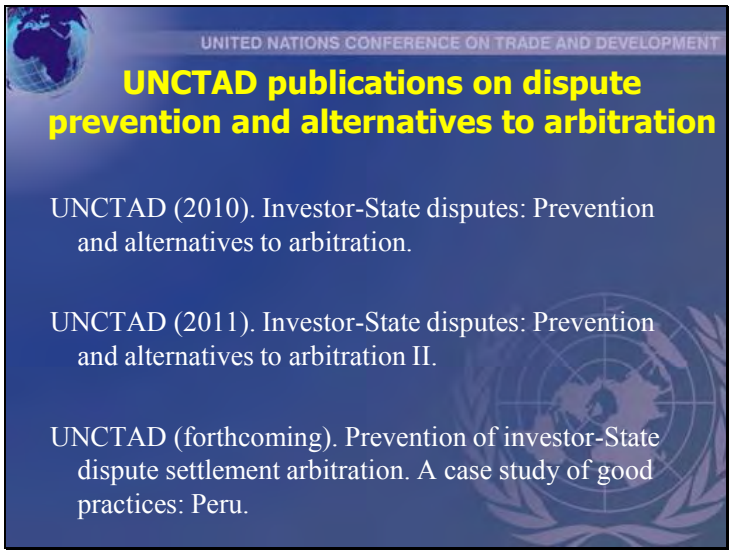


Slide 19

VII. ECONOMY PRESENTATIONS

i. Peru – International Investment Disputes

Slide 1

INTERNATIONAL INVESTMENT DISPUTES

Ministry of Economy and Finance and Ministry of Foreign Trade and Tourism joint pressentation.

REPUBLIC OF PERU

Slide 2

STATE COORDINATION AND RESPONSE SYSTEM FOR INTERNATIONAL INVESTMENT DISPUTES

Establishment of a legal framework

- In December 2006 there was Law approved that sets the State Coordination and Response System for International Investment Disputes (Law No. 28933) to optimize State response, centralize information on investment agreements and covenants, and define coordination procedures for Public Entities involved in a dispute.
- Regulations approved by Supreme Decree No. 125 – 2008 – EF that creates the content of Law No. 28933, with regard to general concepts, procedures, System members, transparency and criteria of mandatory application in writing dispute settlement clauses.
- Regulations approved by Supreme Decree No. 002 – 2009 – EF establishing the procedures for hiring law firms.

Slide 3

The System

Scope of competence

- Investment disputes between foreign investor and Public Entities
- International dispute settlement mechanisms.

Objectives

- To optimize the response and coordination within the public sector.
- To centralize information on
  - ✓ Investment Covenants or Treaties signed by the various goverment levels, and Dispute Settlement clauses that refer to international mechanisms.
  - ✓ Disputes.
- To set an alert mechanism
- To establish responsibility for the costs.
- To standardize dispute settlement clauses, where possible.

Slide 4

The System

Duties:

- Manage the information and coordination centralized system .
- Dispute surfacing control .
- Receive Direct Negotiations or Dispute notices.
- Set and keep record of Agreements and Treaties.

Coordinator

- Ministry of Economy and Finance (MEF)

Special Commission:

- Is attached to the Ministry of Economy.
- It represents the State in Direct Negotiations and Arbitration Stage.

Slide 5

Duties of The Special Commission

- Participate in the direct negotiation stage.
- Propose the hiring of lawyers and professionals.
- Appointment of arbitrators.
- Set the strategy guidelines
- Contribute in the arbitration process.
- Approve provision of resources.
- Define responsibility of Public Entity involved

Slide 6

The Alert System

- Every Governmental Agency concluding an agreement or treaty regarding investment issues, sending the settlement of investment disputes to international mechanisms, must inform the Coordinator of the System.

- In case of being notified about the investor's intention to demand, the Governmental Agency must inform in detail to the Coordinator.

Slide 7

International Investment Disputes

- Law 28933 defines **International Investment Disputes** as those ones between the Peruvian State and either national or international investors, thorugh international mechanisms of dispute settlement.
- International Dispute Settlements can only be derived from:

a) **Agreements** celebrated between Public Entities and national or international investors where privatization contracts, concesion contracts, legal stability contracts, explotation licensing and all the ones refered in this law

b) **Treaties** that have in it investment content where the dispute settlement procedures between the Peruvian State and national or international inverstors is stated.

Slide 8

Investment Agreements

- Peru has signed more than 30 International Investment Agreements (Bilateral Investment Treaties and Free Trade Agreements) that underpin its liberalization policy.

Slide 9

Fora where BITs y TLCs arbitration is allowed

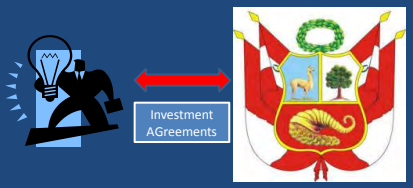
- Investment Agreements, BITs y TLCs that the Peruvian state have subscribed bgive thre ways for disute settlement:

✓ ICSID
✓ UNCTAD.
✓ Judiciary of one of the countries

- Once one is elected there is no right to change it.

Slide 10

Dispute Settlement Steps



International Investment Dispute

MEF
Coordinador

Special Comission

Local Judiciary

Conciliation

Arbitraje

Direct Treatment

Investor

Slide 11

Processes at the ICSID

So far Peru has participated in nine different processes at the CIADI, WB, Washington D.C., of which four of have being won and five are in procedure.

Slide 12

Number of Case in ICSID	Claimants	Acuerdos de Inversion / BITs	Decisiones finales
ARB 98/6 (1998)	Compagnie Minière Internationale Or S.A.		Settlement agreed by the parties and proceeding discontinued at their request
ARB 03/4	Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.)	APPI Chile-Perú	El Tribunal, mediante laudo de fecha 07.02.2005 se declaró incompetente ante la demanda por FALTA DE JURISDICCION RATIONE TEMPORIS.
ARB 06/13	Aguaytia Energy, LLC	Contrato de concesión Convenio de Estabilidad Jurídica	El Tribunal mediante laudo, rechazó por unanimidad la solicitud presentada por la demandante.
ARB 03/28	Duke Energy International Peru Investments No. 1 Ltd.	Contrato de concesión Convenio de Estabilidad Jurídica	El Tribunal declaro fundada en parte la demanda, ordenando el pago de S 20 millones al Peru

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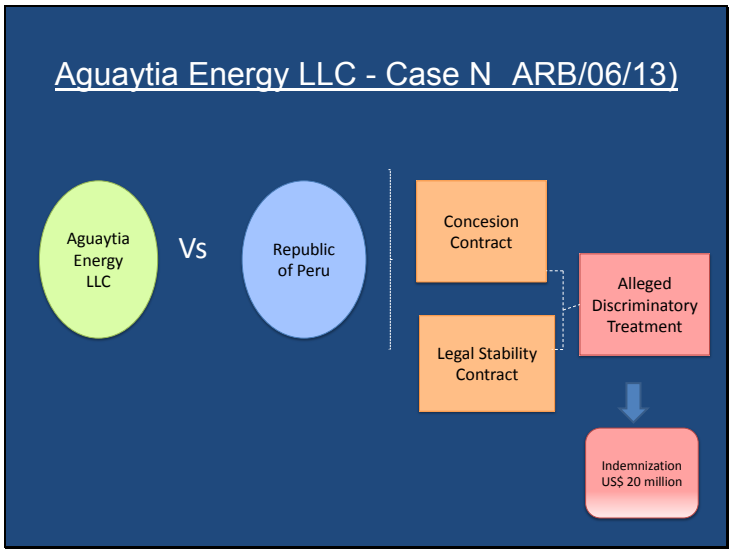

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Aguaytia Case
Brief introduction

- Aguaytía had shares in ETESELVA enterprise.
- ETESELVA is an electric transmision company, that subscribed a public concesion contract with the Peruvian state in the nineties. At the same time, it subscribed a Legal Stability contract in which the no discrimination clausule is stated
- Some years later, the Colombian company ISA won the permit to construct an electric transmision line.
- Aguaytía sued the Peruvian Republic to the ICSID because it opposed to the alleged discrimination case made in favor of the Colombia company. It pointed that the discrimination consisted on the way on applying electric fares and in the examination of the Electric Transmision Systems: while the Colombian systems where qualifed as primary ones, and the ones of ETESELVA as secondary ones, obtaining a difference in the way investment recovery should proceed.

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Aguatya Case
Legal Aspects

- Aguaytía sued the state for not granting action to its legal stabillity contract, alledging that the non discrimination clausule was violated, stating that as the Peruvian state gave easinees to other enterprises to work in this sector, the non discrimination obligation was discriminated.
- At first, it seemed that instead of defending non discrimintion it was trying to favor «most favoured Investment», as a derived one from the MFN stated in every Peruvian BIT.
- Being that the case, Aguaytia argued that the State provided better and more conditions to future enterprises in this sector. That was its reason to start the trial.

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Aguatya Case
Interesting Facts

- The right of no discrimination regarding investment is not an automatical benefit that the Peruvian State will provide to enterprise n 2 when it did gave to enterprise N 1.

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Aguatya Case
Interesting Facts

- The Peruvian State has the right to differentiate, but not to discriminate. Futhermore, it has the right to regulate certain economic activities and determine the rights and responsibilities that will order the relation with investors in public procurement matters. (Similar to the right to choose the internal configuration of the contracts that works in the private sector, but with the proper moderation attained to the State function).

- It means, that without eliminating the possibility to apply or deny jointly many contracts at the same time, is not possible to ask the State to improve the condition of a prior contract in comparison with a later one.

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On page 43 on this decision there were the possible reasons for the alleged discrimination

Peru has breached the Conite Agreement by taking actions inconsistent with the stability of AEL`s right to non-discrimination:

a) OSINERG/CELE COPRVMEN applying more favourable treatment to Etecen (a state entity) and ISA (an investor in the same sector) than ETESELVA in the classification of transmission line as PTS or STS. This violation has been exacerbated by the recognition of such discrimination by the Constitutional Court, and the subsequent failure of Peru to remedy the position.
b) Osinerg (Enery Regualtor) /MEM (Ministry of Energy and Mines) applying more favourable treatment to other private and state –held generation companies than Temoselva in allocating the responsability for paying the tariff for the use of STS lines;
c) Osinerg/CELE-COPRVMEM affording more favorable treatment to BOOT investors than to Eteselva in setting the tariff governing the amounts payable for the use of transmission lines by third parties ; and
d) Allowing other foreing investors to take advantage of a more favourable investment mechanism (i.e. the BOOT) than was available to AEL, but denying acces tu such mechanism to AEL .

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Aguaytia Case

- On pages 51 to 54 the Tribunal, succinctly, develops the argument to justify its decision in favour of the Republic of the Peru. In its basis, mainly points out that what is relevant is that the main legal norms of the legal framework stabilized in accordance with the contract that was in force at the time of hire.
- Then adds that the applicant never proved that the right to non-discrimination was important for him, not proved that he understood at the time of hire by this Pact is not changed for the investor, nor tested - adds the Court - that there is a substantive right to non-discrimination.
- Finally, the Court adds that it is relevant to the Convention that the State does not issue laws related to non-discrimination which can affect the head of the Convention of stability.

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Aguaytia Case

- The final decision established that the right to non discrimination is a secondary one, an accesory one, in the framework of a contract of legal stability.
- The contracts of legal stability (as any other contract) can contain a series of attached clausules that may be no related directly to the conditions of the contract. But they are documents that are due to be respected in a compulsory manner.
- In other words, it exists the right to non discrimination in the legal framework of legal stability, but at the same time is a right that is indepedent of all the main body of conditions of the contract. It means that, one can revert or affect the right to non discrimination according to different reasons, without implying that the legal conditions have been modified.

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Aguaytia Case

- The Tribunal should have fixed a position stating how or how not did Peru discriminated in any sense what Aguaytia said.
- For that matter exists in Peru and internationally a equality test that demands for the next steps to be taken:
- 1 : Verificación of the difference.

  2 : Determination of the level of intensity of the intervention that afects the equality.

  3 : Verification of the existence of a consittuional end in the differentiation.

  4 : Test of «rightfulness».

  5 : Test of neccesity.

  6 : Test of proportionality in strict sense or weighted measure.

This test was cited by Jorge Avendaño (law expert representing the demandant) and María Teresa Quiñones (law expert repsetenting the Peruvian State). Beside the importance of this equality test, there was not any further reference or deepper examination.

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Aguaytia Case

- Regarding the content of the decision, the tribunal did not establish that both, ISA and ETESELVA investments were diferent in nature. Being such that case, it was no possible that both could be treated equally.
- Furthermore, it omitted the reference to the electric investment legislation that give plenty of reasons that allows the Peruvian State to have different considerations to differente kind of investment in the electrical sector.

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Aguaytia Case

- ISA is a concession of public infrastructure works, with strong contractual predominance, in response to the relevant case was the construction of the work and the law of concessions of Peru allows for public works concessions tariff regime is regulated in the same contract.
- This is a concession with a defined term, a property in the public domain in a way that at the end of the concession, the concession assets accrues in favour of the State.
- The qualification of transmission systems is regulated in the contract, in accordance with applicable regulations of concessions. Meanwhile, ETESELVA is a concession of public service, with strong regulatory predominance, in response to the relevant was the public service itself and not so much the work to be executed. This is a concession with an indefinite term, public area, but being that of the concession assets are assets of private domain that are not reversed in favor of the State with the expiry of the concession. The qualification of transmission systems (if they were primary or secondary) was reserved for the administrative authorities.

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Conclusions

- On the Aguaytía vs. Perú case, we concur with the final decision that says that Peru has not violated the non discrimination clausule, but Peru does not agree with some reasons for this:
  - Peru observes that this decision is made upon that there is no way of proving of Aguaytia company that may suggest a violation in this sense.
  - Peru considers that this decision could ahve been deeper and more exhaustiveby showing how the non discrimiantion clausle was not violated.
- It was not a violation because
  - (a) not every differentiated treatment is discriminatory,
  - (b) diferentiation could/must not have any justification
  - (c) and in this case, the difference consisted that while one was a concesion on infraestructure, and the other consisted on concesion on services

VIII. PHOTO DOCUMENTATION

Speakers and participants of the APEC-UNCTAD Workshop on Investor-State Dispute Settlement held on 22-24 June 2011 at the AIM Conference Center Manila in Makati City, Philippines.

Ms. Anna Joubin-Bret during the Session on “Trends and Developments in ISDS”, 22 June 2011.

Ms. Bret, Ms. Elodie Dulac, Mr. Yu-Jin Tay and Prof. Hi-Taek during the session on “Definition of Investor”, 22 June 2011

Justice Florentino P. Feliciano makes a point during the open forum, 22 June 2011.

Mr. Christopher Thomas and Professor Shotaro Hamamoto during the session on “Fair and Equitable Treatment”, 22 June 2011.

Participants listen intently during the session on “Fair and Equitable Traetment”, 22 June 2011.

Participants from Malaysia, Mexico and the Philippines.

Ms. Elodie Dulac and Professor Hamamoto during the session on “Denial of Justice (Special Topic on Fair and Equitable Treatment)”, 23 June 2011.

Dr. Alvaro Galindo, Professor Guiguo Wang and Ms. Cheng Yee Khong.

Participants and speakers interact during the break.

Mr. Morgan Maguire, Ms. Bret and Professor Wang during the session on “MFN Treatment”, 23 June 2011. Ms. Corinne Montineri looks on.

Professor Shin raises a question during the open forum.

Dr. Galindo during the session on “Expropriation”, 23 June 2011.

Ms. Bret makes the introduction during the session on “Developments in International Arbitration and IIAs” with speakers Mr. Aloysius Llamzon, Ms. Corinne Montineri and Ms. Cheng Yee Khong, 23 June 2011.

Delegate from Thailand raises a question during the open forum, 23 June 2011.

Delegate from the Philippines raises a question, 23 June 2011.

Delegates from Singapore, Japan, Thailand and the Philippines during the welcome reception hosted by the Philippines' Department of Trade and Industry, 23 June 2011.

Participants and speakers during the welcome reception, 23 June 2011.

Participants at the start of the Day 3 of the workshop, 24 June 2011.

Dr. Galindo, Ms. Bret and Mr. Ilamzon at the session on “Provisional Measures and Interim Relief”, 24 June 2011.

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Session on “Transparency in Arbitral Proceedings” with Ms. Montineri and Mr. Llamzon, 24 June 2011.

Professor Wang and Professor Shin during the session on “Comparative Analysis of Asian BITs and FTAs”, 24 June 2011.

Economy presentations from the Philippines and Peru, 24 June 2011.

Participant from Malaysia raises a question during the open forum, 24 June 2011.

Dr. Galindo, Ms. Bret, Ms. Jane Yu and Mr. Tay during the session on “Conduct of Investor-State Dispute Settlement: What is involved for a State””, 24 June 2011.

Solicitor-General Anselmo Jose Cadiz gives the closing remarks.

Presentation of certificates and tokens of appreciation to the speakers, 24 June 2011.