



Business Information  
In A Global Context

# INVESTMENT TREATY ARBITRATION

The Latest Legal Developments, Tactics and Strategies  
to Give You a Competitive Edge



## HEAR FROM THE EXPERTS:

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Baker Botts

British Institute of International  
and Comparative Law

Chadbourne & Parke

Energy Charter Secretariat

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Vinge

22 – 23 SEPTEMBER 2010 | GUOMAN CHARING CROSS HOTEL | LONDON

## LEADING EXPERTS WILL PROVIDE VALUABLE INFORMATION AND IN-DEPTH INSIGHT ON:

- How to ensure you obtain adequate investment treaty protection at the formation of the contract
- What constitutes a “bona-fide” investment when treaty shopping?
- Examining the relationship between investment treaty arbitration claims and political risk
- Demystifying how arbitration tribunals have reached their decisions
- How are non-precluded measures clauses being interpreted?
- The latest on quantification of damages
- How investment treaties interact with social legislation
- Examining different rules on the enforcement of investment treaty arbitration awards
- The entry barriers for third-party intervention in investment treaty arbitration
- The increase in conflicts of interest and challenges to the arbitrator
- How do bribes paid in the obtaining of the investment affect potential remedies?


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Over the past decade, the International Centre for Settlement of Investment Disputes (ICSID) has seen remarkable growth in the number of arbitrations that it administers. In addition to the increase of bilateral investment treaties (BITs), The North American Free Trade Agreement (NAFTA), the Lisbon Treaty and the Energy Charter Treaty have ensured the amount of work in this area has continued to grow exponentially.

Both investors and States are crying out for the top advisors in investment treaty arbitration. Whether you are an experienced practitioner or new to the field, it is clear that you need to be fully versed on the latest decisions, trends and strategies being used in this complex area of law. As a result, there is huge opportunity to ensure you are ahead of the pack in terms of the advice you can offer.

#### Are you in a position to capitalise?

For this unique event, C5 has brought together the leading lawyers and arbitrators to provide you with the latest tools needed to initiate, conduct and succeed in investment treaty arbitration worldwide. In a series of highly practical sessions delivered by a faculty of the top minds in the field, you will get the most up-to-the-minute and relevant information possible on the issues shaping the investment treaty arbitration landscape now.

Developed with the leading arbitration lawyers and in-house counsel, this practical and highly sophisticated programme offers you the unparalleled opportunity to interact and network, as well as share knowledge with, experts and potential advisors or clients involved in the cases making the headlines across the globe. This event will feature unique sessions and opportunities for discussion built into the onsite programme that ensure that you not only learn the latest techniques and strategies, but also form lasting professional relationships.

**Investment Treaty Arbitration, in London**, has been fully researched and developed to ensure the latest cases, tactics, tips and techniques are shared amongst the industry experts from across Europe and beyond.

#### Topics to be covered will include:

- The latest on state of necessity defences
- Lessons learned from BIT arbitration which act as a warning for future investments
- Is using discounted cash flow really investor friendly?
- The importance of the Yukos Arbitration and its impact on investors
- What are the entry barriers for third-party investors in treaty arbitration?
- Reducing the cost of insuring for investors if they ensure sufficient investment treaty protection
- The current measure of damages in expropriation claims?

Be where your industry will be on 22nd – 23rd September 2010.

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### THE MUST-ATTEND EVENT FOR:

- Solicitors and barristers specialising in international arbitration
- In-house lawyers and heads of litigation for companies involved in cross-border investment projects
- Arbitrators and representatives from arbitration centres

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8.30 COFFEE AND REGISTRATION

9.00 CO-CHAIR'S OPENING REMARKS

Bernardo M. Cremades  
Partner, B. Cremades y Asociados

Jean-Claude Najar  
Senior Counsel, GE

PRE-INVESTMENT PROTECTION CONSIDERATIONS

9.15 WHAT STEPS CAN YOU TAKE AT THE FORMATION OF THE CONTRACT TO ENSURE ADEQUATE INVESTMENT TREATY PROTECTION?

Jean-Claude Najar  
Senior Counsel, GE

Dr Sabine Konrad  
Partner, K&L Gates

Dr Julian Lew QC  
20 Essex Street

- Preventative steps to be taken by companies
  - how to build treaty protection into your project structure
  - how do you rely on it as things go wrong?
- Ensuring investment treaty protection is available
  - clarifying the scope of investment treaties in place
    - application of disputes clauses in BITs and MITs to actions that occurred before the treaties became effective
  - defining the relationship between property rights and the public interest
  - do existing BITs cover all territories in which the investment is concerned?
- Enforceability of provisions of the contract
  - choice of neutral arbitration forum – arbitration without privity
  - ICSID and ad hoc arbitrations using UNCITRAL Rules
    - reasons for choosing one over another
    - what are the choice of law concerns?
- Lessons learned from BIT arbitration which act as a warning for future investments
- What are the dispute resolution provisions of the agreement with the State?
  - interface between varying dispute provisions in the contract and the Treaty

10.45 MORNING REFRESHMENTS

11.15 HOW ARE THE ARBITRATION TRIBUNALS INTERPRETING TREATY SHOPPING?

Matthew Coleman  
Partner, Steptoe & Johnson

Luis González García  
Matrix Chambers

- Can investors legitimately structure their investments to ensure that they are protected by an investment treaty?
  - what does treaty shopping involve?
  - when is such action impermissible?
  - the distinction between treaty shopping and forum shopping
  - mechanisms in treaties that hinder treaty shopping

- Treaty shopping and Article 25(2)(b) of the ICSID Convention
- Update on recent case-law on treaty shopping

12.00 HOW DO INVESTMENT TREATIES AFFECT POLITICAL RISK INSURANCE?

Bernardo M. Cremades  
Partner, B. Cremades y Asociados

- Examining the overlap between investment treaty arbitration claims and political risk
  - expropriation
  - civil unrest
- Insuring cross-border projects
  - looking more favourably at projects that have investment treaty protection
  - how much do underwriters need to know?
- Extra protection for investors
  - recovery against States where other rights do not exist
- Reducing the cost of insuring for investors if they ensure sufficient investment treaty protection
- How does subrogation operate with reference to political risk cover?
- The link between investment incentive agreements and OPIC insurance in the US
  - State-to-State Arbitration
  - under what circumstances can OPIC take action themselves?

12.45 LUNCH

14.00 THE LATEST INVESTMENT TREATY ARBITRATION DECISIONS AND THEIR IMPACT

Moderated by:

Isabelle M. Hautot

General Counsel, Orange – France Telecom Group

George Burn

Partner, Salans

Khawar Qureshi QC,

Serle Court Chambers

- Demystifying how arbitration tribunals have reached their decisions
  - have they been consistent?
- Varying interpretations of treaty terms by different arbitral tribunals
  - what constitutes an investment?
    - recent case-law guidance
    - *Romak v. Uzbekistan*
    - *MHS Annulment*
- Examining cases that have been dismissed on jurisdictional grounds
- The latest on state of necessity defences
- How should Non-Precluded Measures (NPM) clauses be interpreted?
  - how can these limit a country's liability in exceptional circumstances?
- Tribunal approaches to interpreting fork-in-the-road clauses
  - *Pantechniki v. Albania*
- Human rights and protection of freedom of speech
  - *President Alende Foundation v. Chile*
- Recovery of moral damages by sovereigns
  - *Cementownia v. Turkey*
  - *Europe Cement v. Turkey*
  - *Desert Line v. Yemen*

- How should national and international norms interact with each other to establish criteria for takings?
  - *Kelo v. City of New London*
- Assessing the availability of interim relief in investment treaty arbitration

## 15.00 THE LATEST ON THE QUANTIFICATION OF DAMAGES IN INVESTMENT TREATY ARBITRATION

**Emmanuelle Cabrol**  
Partner, Herbert Smith

- What is the current measure of damages in expropriation claims?
  - role of causation in awarding damages
    - *Biwater v. Tanzania*
    - *Lauder v. Czech Republic*
    - *CME v. Czech Republic*
- What are the differences between an ex-ante calculation with interest and an exposed calculation?
- Standard of compensation for lawful and unlawful expropriation: new trends
  - *Vivendi*
  - *Siemens*
  - *ADC*
- Valuation of a contract: breach of contract damages v. fair market value
  - using discounted cash flow (DCF) to value assets
    - what problems are associated with the discount factor?
    - is the DCF really investment friendly?
- How should damages be measured when an international obligation is violated?
- The rise in compromise agreements in cases of contributory negligence on the part of the investor

## 15.45 AFTERNOON REFRESHMENTS

## 16.00 DEVELOPMENTS IN THE INTERPRETATION OF CORE INVESTMENT PROTECTIONS

**N. Jansen Calamita, Director**  
Investment Treaty Forum, British Institute of International and Comparative Law

**Gautam Bhattacharyya**  
Partner, Reed Smith

- Prohibition against discriminatory treatment
  - most favoured nations treatment (MFN)
- Expropriation of investments
  - nationalisation of sectors
  - seizures of specific investments
  - how much deprivation is too much?
  - developments in “creeping” expropriation
    - evaluating substantial deprivation of the use or value of an investment
- Unreasonable interference with property rights
  - forced renegotiation of contracts
  - cancellation of operating licence
- Fair and equitable treatment
  - what are the criteria?
    - is there a definitive shape?
  - should the fair and equitable treatment standard be differentiated according to
    - the level of development?
    - governance capacity?
    - resources of host countries?
  - careless acts

- does action affecting investors’ legitimate expectations and legal and business stability constitutes a breach of the fair and equitable treatment standard?
- to what extent can you claim a breach when there was no representation by the Government on which you relied when making the investment
  - is it a requirement?
  - can the representation be implicit?
- Are breaches of WTO obligations seen as breaches of investment treaties?
  - General Agreement on Tariffs and Trade (GATT) jurisprudence
- Breaches of the Lisbon treaty
  - consequences of *EC v. Austria*

## 17.00 CHAIR’S CLOSING REMARKS AND END OF DAY ONE

DAY TWO: 23 SEPTEMBER 2010

## 9.00 CO-CHAIR’S OPENING REMARKS

**Bernardo M. Cremades**  
Partner, B. Cremades y Asociados

**Jean-Claude Najar**  
Senior Counsel, GE

## 9.05 HOT AREAS FOR INVESTMENT TREATY ARBITRATION

**Alejandro A. Escobar**  
Special Counsel, Baker Botts

**Paulo Fohlin**  
Partner, Vinge

**Jeffrey Sullivan**  
Counsel, Allen & Overy

- South America
  - Venezuela
    - what are the reasons for current activity?
    - increase in expropriations
    - issues raised by Venezuela’s actions and what that means for
    - oil industries
    - shipping industries
    - what claims are currently being brought?
  - Ecuador
    - *Occidental*
    - *Chevron*
    - Windfall-tax cases
  - Bolivia
- China
  - The extent of the possibility to arbitrate liability and quantum under PRC’s old generation investor-state arbitration clauses
  - The scope of PRC’s restricted old generation investor-state arbitration clauses vs the scope of PRC’s unrestricted new generation arbitration clauses
  - The scope of PRC’s old generation MFN clauses as regards procedural protection and pertinent developments in the MFN saga
- Central and Eastern Europe
  - The relationship between investment treaties and EU law
  - The European Commission’s involvement in EU investment disputes
  - The impact of the Lisbon Treaty on investment treaties

## 10.15 **ARBITRATION ACTIONS UNDER THE ENERGY CHARTER TREATY**

**Graham Coop**

**General Counsel, Energy Charter Secretariat**

- Why has there been an increase in the number of claims under the ECT?
- Examining the intra-EU cases
  - what are the standards “developed countries” should be applying?
- The importance of the *Yukos Arbitration*
  - impact on investors?
    - State cannot unilaterally disregard its international legal obligations
- What is the impact of growth in energy in South-East Asia on ETC membership and potential future claims?
- Rejection of claim as fraudulent
  - *Cementownia v. Turkey*

## 11.00 **MORNING REFRESHMENTS**

### 11.15 **ENFORCEMENT OF ARBITRATION AWARDS**

**Tom Sprange**

**Partner, Steptoe & Johnson**

- Enforcement Generally
  - Why is enforcement more relevant?
  - What are the issues facing a investor seeking to enforce an Award
  - Which States have tended honoured their awards?
  - Which States have tended to avoid compliance?
  - Common tactics adopted by States
  - Is there a market for investors to sell the awards into the open market? *CMS v Argentina*
- Enforcement Challenges
  - Recognition
  - Execution
  - Sovereign Immunity and available assets
  - Post Award relief and security
  - The impact of annulment proceedings on enforcement

### 12.15 **THE RISE OF THIRD-PARTY INTERVENTION IN INVESTMENT TREATY ARBITRATIONS**

**David Herlihy**

**Counsel, Skadden, Arps, Slate, Meagher & Flom**

- Third party funding in arbitration: recent developments
- Availability of third party funding in investment treaty arbitration
- Handling a co-funded investment treaty claim: practical issues for counsel and clients
- Under what circumstances are awards bought by third parties?
- Policy debate: is third party funding appropriate in investment treaty arbitration?

## 12.45 **LUNCH**

### 13.45 **CHALLENGING THE ARBITRATOR: CONFLICTS OF INTEREST AND ANNULMENT**

**Melanie Willems**

**Partner, Chadbourne & Parke**

- Examining the increase in conflicts of interest
  - challenging arbitrators on the basis of acting simultaneously as arbitration counsel

- challenging on the basis of prior writings
- is the ICSID test too lenient?
- What are the rights of annulment under ICSID?
  - excess of powers by the original tribunal that issued the award
  - serious departure from a fundamental rule of procedure
  - award's failure to state the reasons on which it was based
- Can the parties agree to deal with arbitrator challenge applications outside of ICSID rules?
  - is this achievable?
  - where can the challenge be made?
- Using annulment applications to avoid enforcement
  - lessons learned from *Klökner v. Cameroon*
- Quality standards and transparency of information on arbitrations

### 14.30 **EXAMINING THE LINK BETWEEN CORRUPTION AND INVESTMENT TREATY ARBITRATION**

**Ali Malek QC**

**3 Verulam Buildings**

- How do bribes paid in the obtaining of the investment affect potential remedies?
- In what circumstances does bribery give an automatic nullification of investment treaty relief?
- What are the difficulties surrounding the proving of bribery?
  - *EDF v. Romania*
  - *Biwater Gauff*

### 15.15 **SOCIAL LEGISLATION AND ITS IMPACT ON INVESTMENT TREATIES**

- What is the effect of the Black Economic Empowerment legislation in South Africa on existing contractual rights?
- Examining social legislation in Zimbabwe
- The need for existing right or licence holders to concede a certain proportion of their rights, to local interest
  - is this a breach of the treaties?
  - how much can States legislate without breaching their treaty obligations?
- How are investment treaties starting to interact with sensitive areas such as healthcare reform?
  - Slovakia Republic health insurance reform
    - to what extent can the state regulate what the companies do with health insurance funds?
    - are they entitled to distribute the as profits as they see fit?
    - is the State entitled to change its policies and in response to the concerns of the electorate?
- How is investment treaty arbitration entering new sectors?
  - *Philip Morris Tobacco v. Uruguay*

## 16.00 **CHAIR'S CLOSING COMMENTS AND END OF CONFERENCE**

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Date: 22 – 23 September 2010

Time: 9:00am – 5:00pm (Registration Opens at 8:30am)

Venue: Guoman Charing Cross Hotel

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