

SIMPLIFYING MATTERS



  
ARBITRATION INSTITUTE  
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# International Investment Arbitration Involving Arab Parties: Issues and challenges **Inconsistent and Unintended Interpretations of the Applicable Provisions**

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## Principal messages of this presentation

- A number of basic terms used in investment protection treaties suffer from ambiguity and lend themselves to different interpretations.
- A lack of consistence and a lesser degree of predictability is the outcome.
- There is a need to overhaul early generations of treaties to strike an appropriate balance and increase foreseeability.

# The Sweden-Egypt BIT (entered into on 15 July 1978)

## What constitutes an "investment"?

[---]

have agreed as follows:

### *Article 1*

For the purpose of this Agreement:

(1) The term "investment" shall comprise every kind of asset and more particularly, though not exclusively,

(a) movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights;

(b) shares or other kinds of interest in companies;

# The definition of "Investment" in Black's Law Dictionary

"An expenditure to acquire property or assets to produce revenues"

The "Salini test" – not a helpful approach

# 2012 US Model Bilateral Investment Treaty

## Article 1: Definitions

For the purposes of this Treaty:

[---]

”investment” means every asset [---] that has the characteristics of an investment [---]

# Model Text for the Indian Bilateral Investment Treaty

[---]

1.7

For greater clarity, Investment does not include the following assets of an Enterprise:

[---]

(i) Any interest in debt securities issued by a government [---] or loans to a government-owned [---] enterprise;

(ii) Any pre-operational expenditure [---]

(iii) Portfolio investment

[---]

## Jurisdictional or substantive?

### Article 1, second paragraph, of the Sweden-Egypt BIT

[---]

provided that the investment has been made in accordance with the laws and regulations in the host country, but irrespective of whether the investment was made before or after the entry into force of this Agreement.

- *Inceysa Vallisoletana v El Salvador* , ICSID Case No. ARB/03/26
- *Fraport v Philippines* (majority decision – see dissenting opinion by Bernardo Cremades), ICSID Case No. ARB/03/25

# Protected investors – natural persons and legal entities

## Natural persons

### Article 1(2) of the Sweden-Egypt BIT

(b) in respect of Egypt, an individual who is a citizen of Egypt according to the Egyptian law.

- What about double nationality?
- "Effective nationality"

Double nationality occasionally accepted under BITs but *not* under the ICSID Convention (Article 25(2)(a))

- *Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/07, Award, paras 55, 63



# Protected investors – natural persons and legal entities (cont'd)

## Legal entities

### Article 1(3) of the Sweden-Egypt BIT

(b) in respect of Egypt, any legal person with its seat in Egypt or with a predominating Egyptian interest.

- Ownership or control?
- Indirect ownership?
- Minority holding?
- Nominal presence?
- Denial of privileges

# Protected investors – natural persons and legal entities (cont'd)

## Additional inquiries:

- Temporal aspect
- Forum shopping
- Fabrication of jurisdiction

## Examples:

- *Phoenix Action v Czech Republic*, ICSID Case No. ARB/06/5
- *Cementownia v Turkey*, ICSID Case No. ARB(AF)/06/2
- *KT Asia v Kazakhstan*, ICSID Case No. ARB/09/8

## Most Favoured Nation and National Treatment, respectively

### Article 2(2) of the Sweden-Egypt BIT:

(2) Investments by nationals or companies of either Contracting State on the territory of the other Contracting State shall not be subjected to a treatment less favourable than that accorded to investments by nationals or companies of third States.

- Does MFN apply to dispute resolution? (No)

# Fair and equitable treatment

## Article 2(1) of the Sweden –Egypt BIT

(1) Each Contracting State shall at all times ensure fair and equitable treatment to the investments of nationals and companies of the other Contracting State.

- An autonomous standard of protection?
- Minimum standard of treatment under customary international law?

*The Neer case*, Decision of 15 October 1926 of the General Claims Commission Mexico/USA

DENIAL OF JUSTICE – FAILURE TO APPREHEND OR PUNISH – INTERNATIONAL STANDARD. In absence of evidence establishing that action of authorities in failing to apprehend or punish those guilty of murder of American citizen amounted to an outrage or such a failure to reach international standard that would be conceded by every reasonable man, claim disallowed.

## Fair and Equitable Treatment (cont'd)

*Tecnicas Medioambientales SA ("Tecmed") v Mexico*  
ICSID Case No. ARB(AF)/00/2, Award para 154:

[---] The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [---]

## Fair and Equitable Treatment (cont'd)

NAFTA Free Trade Commission (FTC) issued a binding interpretation on 21 July 2001. According to this interpretation:

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.

[---]

### India-Korea FTA

FET and FPS "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of aliens.

## The Cordell Hull formula

[---]

and

(c) The measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be freely transferable between the territories of the Contracting States.

[---]

Note of 22 August 1938 from US Secretary of State Cordell Hull to the Mexican government

# Exhaustion of local remedies

## Article 8, first paragraph, of the Sweden-Egypt BIT

### *Article 8*

A dispute concerning the interpretation or application of this Agreement shall not be submitted to international settlement unless the domestic remedies have been exhausted.

## The criterion of "futility"

## Significance of "waiting periods"?

## The Energy Charter Treaty, Article 26(2)

If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

[---]



# The Umbrella Clause

**Article 10(1), last sentence, of the Energy Charter Treaty:**

Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

**What is the importance of the so-called umbrella clause (*clause de couverture*)?**

- *SGS v Pakistan*, ICSID Case No. ARB/01/13
- *SGS v Philippines*, ICSID Case No. ARB/02/6

# Thank you



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