

## Workshop on Resolution of International Trade and Business Disputes

### Investment Treaty Arbitration

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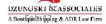
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## Foreign Direct Investment



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## Legal Framework

- International instruments
  - Multilateral Treaties, e.g. ICSID, NAFTA, Energy Charter, Asean, TPP
  - Bilateral Treaties, e.g. BITS; FTA
  - Instruments, e.g. UNCITRAL Rules, ICSID Additional Facility, ICC Rules;
- National laws
  - Investment laws
  - Trade policy documents
- Constitutional law implication

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## Where to settle your investment dispute?

- ICSID;
- UNCITRAL
  - Germany/Hong Kong 1996
  - Myanmar/Philippines 1998
- Courts of host State
  - Mozambique/USA 1998 (other options: ICSID, UNCITRAL)
  - India/Australia 1999 (other options: as ibid)
- ICC
  - Ukraine/UK 1993 (other options: ICSID, UNCITRAL)
  - Many French BITs
- ICJ
- SCC, etc.

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## Basic Concepts

- Additional Facility
- Autonomous regime
- Arbitration Agreements without Privity;
- Sovereign Immunity
- KEY PROTECTIONS
- CONSENT
- Investment

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## Host Government - You can be sued!

- Who can bring a claim? CMS v Argentina
- Failure to appear or present case shall not be deemed an admission of other party's allegations
- Parallel Proceedings
- Costs – Sanctions
- Investment “in accordance with law” provision in BIT  
*Inceysa Vallisoletana SL v El Salvador*, ICSID case No. ARB/03/26

Umbrella Clause

MFN



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## Foreign Investors -Asking your legal counsels

- No general obligation of confidentiality
- Treaty v Contract claims:
  - Can a contract claim be a treaty claim as well?  
*SGS v. Pakistan*, ICSID case no. Arb/01/13, 42 ILM 1290 (2003)
  - Can a contract claim be a treaty claim as well ?  
*SGS v. Philippines*, ICSID case no. Arb/02/6

Exclusive contractual choice of court

Fork-in-the-Road



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## Practitioners: Pay attention

- ICSID tribunal will take “formal note” of failure to comply with evidentiary process
- Interim Relief: Tribunal cannot **order** interim measure, can only make recommendations
- Enforcement: Pressure of negative inference, World Bank/IMF funding
- *Amicus Curiae* and ICSID



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## Practical Recommendations

- Careful and precise drafting by States of ITs will reduce scope for confusion and disputes, including Agencies of host States whose actions may affect foreign investment should be aware of the State's international obligations and exposure under ITs, and should act with those in mind.
- If an IT dispute arises, engage specialist lawyers early and try to negotiate resolution before any arbitration (e.g., consider mediation).
- If arbitration does start, use specialist arbitrators, lawyers and experts.
- Consider early, legitimate enforcement or anti-enforcement strategies.

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*Thank you for not Sleeping!*

## Q&A

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