

Investment Treaty Protection and Arbitration: Key Things to Know

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Why are Investment Treaties and Investor/State Arbitration Relevant for your Business ?

- ❖ Companies make investments throughout the world, in various forms
- ❖ In doing so, interaction with State or State entities is commonly required to obtain permits, licenses, approvals; when the State is as a business partner, through the court system or otherwise
- ❖ When something goes wrong, in many jurisdictions, resorting to the local recourse or challenge mechanisms may not be satisfactory or efficient
- ❖ In addition to the usual measures to which modern investors resort to protect their investments, international law and investment treaties provide an additional layer of efficient protection that is often overlooked

Main substantive investor protections under investment treaties

- **Fair and Equitable Treatment**
- **Full Protection and Security**
- **Arbitrary or Discriminatory Measures**
- **Observance of Obligations (“Umbrella Clause”)**

TREATY BETWEEN
UNITED STATES OF AMERICA AND
THE ARGENTINE REPUBLIC
CONCERNING THE RECIPROCAL ENCOURAGEMENT
AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

2. a) Investment shall at all times be accorded **fair and equitable treatment**, shall enjoy **full protection and security** and shall in no case be accorded treatment less than that required by international law.

b) Neither Party shall in any way **impair by arbitrary or discriminatory measures** the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.

c) **Each Party shall observe any obligation it may have entered into** with regard to investments.

Main substantive investor protections under investment treaties

- **National Treatment**
- **Most-Favored-Nation Treatment**

TREATY BETWEEN
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CONCERNING THE RECIPROCAL ENCOURAGEMENT
AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

Main substantive investor protections under investment treaties

- **No Expropriation without Compensation**

TREATY BETWEEN

UNITED STATES OF AMERICA AND

THE ARGENTINE REPUBLIC

CONCERNING THE RECIPROCAL ENCOURAGEMENT

AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law.

Resolution of Investor/State disputes through international arbitration

TREATY BETWEEN

UNITED STATES OF AMERICA AND

THE ARGENTINE REPUBLIC

CONCERNING THE RECIPROCAL ENCOURAGEMENT

AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1992

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL): or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

Effectiveness of international arbitration in resolving Investor/State disputes

- Before the advent of modern investment treaties, investors lacked viable options to resolve disputes with host States.
- Today, investment treaties provide a neutral, fair, and expert means of resolving investor-state disputes.
- ICSID awards are not subject to appeal or review by national courts.
- Monetary awards must be recognized and enforced as if they are final judgments of domestic courts.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

Effectiveness of international arbitration in resolving Investor/State disputes

- ICSID arbitration only permits limited review of awards by way of interpretation, revision and annulment. No power to revise an award on the merits or to re-open the tribunal's decision on the evidence

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

State actions which may breach investors' rights under investment treaties and trigger international arbitration

Actions by the Executive / Ministries

- ❖ Cancellation of concessions for mining, oil and gas exploration and production, etc.
- ❖ Seizure of an investor's assets by the State
- ❖ Imposition of arbitrary or discriminatory taxation

Actions by Regulatory Agencies

- ❖ Arbitrary or discriminatory regulatory measures such as the withdrawal of industry subsidies
- ❖ Revocation of licenses to operate in industries such as telecommunications

State actions which may breach investors' rights under investment treaties and trigger international arbitration

Actions by the Judiciary

- ❖ Denial of justice and lack of due process before domestic courts

Actions by Local Municipalities

- ❖ Revocation of or refusal to provide permits necessary for the investor to conduct its business in the host State

Actions by Police/Security Forces

- ❖ Arbitrary or discriminatory criminal proceedings against an investor
- ❖ Failure to protect investors and their investments from physical harm arising from insurrection and political upheaval

Practical examples – findings of treaty breaches by arbitral tribunals

Veteran Petroleum Limited (Cyprus) v. Russian Federation *PCA Case No. AA 228, Final Award, 18 July 2014*

1442. It makes sense to regard a tax demand that is effectively motivated not by the aim of raising public revenue but by a purpose extraneous to taxation as an “arbitrary demand” that, in the words of the *EnCana* tribunal, cannot qualify for an exemption under a taxation carve-out.¹⁸⁷⁴ Such an interpretation is also supported by the statement of Claimants’ expert Professor Crawford, who was the presiding arbitrator in the *EnCana* arbitration and according to whom the decision was not meant to imply “that anything labelled as a taxation measure is excluded” by a taxation carve-out.¹⁸⁷⁵

1579. The Tribunal has earlier concluded that “the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.”²¹⁰² For the reasons that emerge in Part VIII, if the true objective were no more than tax collection, Yukos, its officers and employees, and its properties and facilities, would not have been treated, and mistreated, as in fact they were. Among the many incidents in this train of mistreatment that are within the remit of this Tribunal, two stand out: finding Yukos liable for the payment of more than 13 billion dollars in VAT in respect of oil that had been exported by the trading companies and should have been free of VAT and free of fines in respect of VAT; and the auction of YNG at a price that was far less than its value. But for these actions, for which the Russian Federation for reasons set out above and in preceding chapters was responsible, Yukos would have been able to pay the tax claims of the Russian Federation justified or not; it would not have been bankrupted and liquidated (unless the Russian Federation were intent on its liquidation and found still additional grounds for achieving that end, as the second criminal trial of Messrs. Khodorkovsky and Lebedev indeed suggests).

1580. Respondent has not explicitly expropriated Yukos or the holdings of its shareholders, but the measures that Respondent has taken in respect of Yukos, set forth in detail in Part VIII, in the view of the Tribunal have had an effect “equivalent to nationalization or expropriation”. The four conditions specified in Article 13 (1) of the ECT do not qualify that conclusion.

Taxation Measures – Arbitrariness, Expropriation

Practical examples – findings of treaty breaches by arbitral tribunals

Cargill, Incorporated v. United Mexican States
ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009

Conclusion of the Tribunal with respect to “Treatment No Less Favorable”

219. In the Tribunal’s view, there is no question but that, as a result of the IEPS Tax, the treatment received by suppliers of HFCS to the Mexican soft drinks industry was less favourable than the treatment received by suppliers of cane sugar. HFCS suppliers could no longer compete as a result of the IEPS Tax, whereas cane sugar suppliers were not affected.
220. Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect. The IEPS Tax was taken avowedly to bring pressure on the United States government. By its very design, then, it was directed at United States producers of HFCS because only in that way would pressure be brought to bear on the United States government. The import permit requirement, which was intended by the

**Taxation Measures –
Discrimination, National
Treatment**

Practical examples – findings of treaty breaches by arbitral tribunals

*Ampal-American Israel Corp., and others
v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, 21 February 2017)*

(e) Whether the Respondent has breached the Full Protection & Security Standard

283. The Tribunal must now determine whether the Respondent acted diligently in preventing the attacks on the Trans-Sinai pipeline and repairing the damage caused to the pipeline.
284. At the outset, the Tribunal acknowledges that the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution. Armed militant groups took advantage of the political instability, security deterioration and general lawlessness that ensued in the North Sinai²⁷³ to perpetrate the attacks on the Trans-Sinai Pipeline.
285. In this context, the Tribunal is of the view that the first attack on 5 February 2011 could not have been prevented by the Respondent and cannot amount to a breach of the full protection and security standard in itself. As Sole Arbitrator Paulsson said in *Pantechniki*: “[...] it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places.”²⁷⁴
286. However, the Tribunal considers the thirteen attacks that were perpetrated on the Trans-Sinai Pipeline as a whole in determining whether the Respondent has breached the standard of full protection and security under the Treaty.
287. It is apparent to the Tribunal that, when considering the totality of these attacks, a certain pattern emerges: an attack is perpetrated, to which GASCO reacts months later and then adopts some measures to heighten the security of the pipeline, those measures are seldom implemented (or there is no evidence on the record that they were), another attack happens, and so on.
288. The failure by State security forces in the Northern Sinai to take any steps to stop saboteurs from damaging the lifeline of the Claimants’ investment, whether preventive or reactive, is revealed by EGPC/EGAS’s technical report on the 12 July 2011 attack (attack no. 5): the report describes how, as the attack was unfolding, EGAS personnel made contact with an Egyptian army patrol and asked them to stop saboteurs from laying explosives on the pipeline at a facility just 1.5 kilometers away from where the patrol was stationed. The Egyptian security forces refused to mobilize. Some 40 minutes later, the explosives were detonated.²⁷⁵ Gas supply to EMG was cut-off for almost three months thereafter.
289. The Tribunal notes that the first four attacks had been carried out on the facilities between February and July 2011. Clearly, these four first attacks should have been seen as a warning to the Egyptian State that further attacks might be carried out if security measures were not taken and implemented.

Insurrection and political upheaval – Full Protection and Security

290. It is thus clear to the Tribunal that the failure by the Egyptian authorities to take any concrete steps to protect the Claimants’ investment from damage in reaction to third party attacks on the upstream pipeline system, as of the date of attack no. 5, to wit 12 July 2011, constitutes a breach of the obligation of due diligence that Egypt was required to exercise in ensuring the full protection and security of the Claimants’ investment.

Practical examples – findings of treaty breaches by arbitral tribunals

Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9 Decision on Jurisdiction and Liability, 24 August 2015

a) *Breach of the obligation to accord fair and equitable treatment*

145. By rendering its 22 April 2008 decision, the Metropolitan Court of Budapest deprived Danesita of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person. Hungarian law provides for the possibility of an agreement between the debtor and its creditors. Danesita had the right to the convening of a composition hearing, under certain conditions which it met; the Metropolitan Court of Budapest, for its part, had the obligation to convene the composition hearing. It refused to do so, ordering instead Danesita to submit a number of documents which were not required by the law and were obviously unnecessary. At the same time it imposed changes in the draft composition agreement – such as the elimination of Dan Cake as a creditor having the right to participate in the composition hearing – as well as the withdrawal of pending objections to certain decisions of the liquidator, both of which were in themselves unfair and inequitable. By so doing, it rendered inevitable the sale of Danesita's assets and its demise as a legal person. This is a clear violation by the Hungarian State – of which the Metropolitan Court of Budapest is an organ – of its obligation to treat Portuguese investors in a fair and equitable manner.

146. The violation of the obligation to treat the investor in a fair and equitable manner took the form of a denial of justice. Arbitral Tribunals have used, in order to characterize judicial decisions as denials of justice, various expressions which all perfectly fit the Metropolitan Court of Budapest's 22 April 2008 decision: "administer[ing] justice in a seriously inadequate way,"¹⁷ "clearly improper and discreditable,"¹⁸ "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial

propriety...."¹⁹ The International Court of Justice defined denial of justice as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."²⁰ The decision of the Metropolitan Court of Budapest does shock a sense of juridical propriety.

**Denial of justice by Courts –
Fair and Equitable Treatment**

Practical examples – findings of treaty breaches by arbitral tribunals

Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award, 19 December 2016

352. The insistence on the use of Smeta represented a failure or refusal by multiple organs of Turkmenistan's government to observe the obligations undertaken by TAY in the Contract with respect to how Garanti Koza would be paid. The Tribunal has already found that the Contract relates to an investment by the Claimant in Turkmenistan. The obligations in the Contract were undertaken by TAY, which not only is an agency of Turkmenistan, but which, according to the Contract, was "acting on behalf and under instructions of the Government of Turkmenistan" when it signed the Contract,⁵¹² and which stated in the Contract that the Contract was concluded "on the basis of the Presidential Decree of Turkmenistan No. 9429 dated January 27, 2008."⁵¹³ It is not necessary to find TAY to be an organ of the State in order to conclude that the obligations it undertook in the Contract were obligations entered into on behalf of Turkmenistan with regard to Garanti Koza's investment in Turkmenistan within the meaning of Article 2(2) of the BIT.

353. The Turkmenistan government agencies responsible for insisting, in disregard of the obligations undertaken by TAY in the Contract, that Garanti Koza submit invoices in accordance with Smeta clearly were organs of the State. The Office of State Expert Review is a subdivision of Turkmenistan's Ministry of Construction.⁵¹⁴ The Ministry of Finance is itself a government ministry. And Turkmenistan's Central Bank is equally obviously an organ of the State.⁵¹⁵

354. The Tribunal accordingly concludes that TAY's undertaking to Garanti Koza to pay progress payment invoices based on the percentage completed of the lump-sum price of the Contract was an obligation entered into by TAY on behalf of Turkmenistan with regard to an investment in Turkmenistan of a UK company. The Tribunal further concludes that the Government of Turkmenistan, acting through its Office of State Expert Review, Ministry of Finance, and Central Bank, failed to observe and caused TAY to breach that obligation, in violation of Article 2(2) of the BIT.

**Breach of Contract by State
– Umbrella Clause**

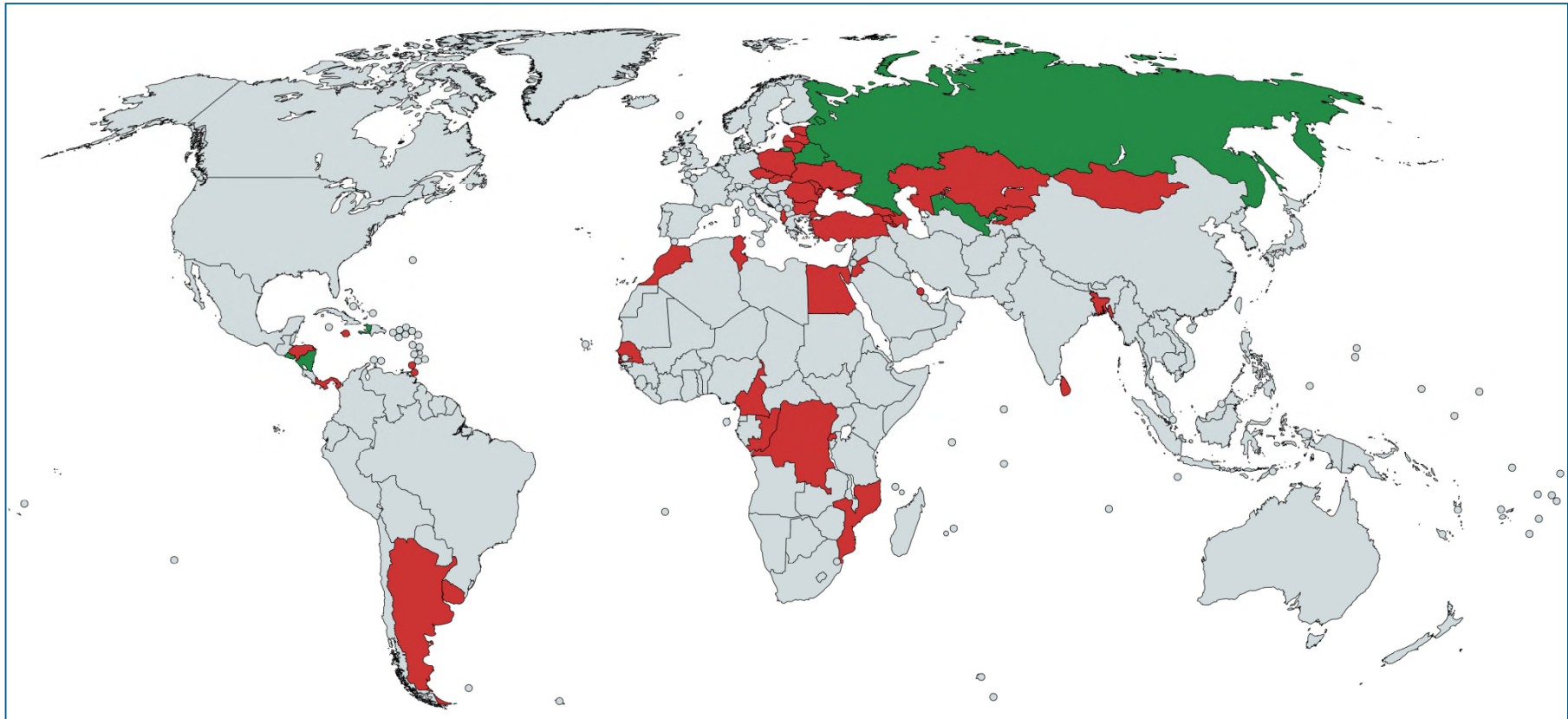
Investment Treaties and Investor/State Arbitration are not Insurance Policies against State Measures

- ❖ One needs to comply with several conditions to qualify for treaty protection
- ❖ The threshold to establish a treaty breach is high (and may be getting higher) – States have defenses including very legitimate ones
- ❖ Preserving a State's ability to regulate is key, as long as regulation complies with the standards of international law
- ❖ Investment treaties must be an additional tool that an investor should have in its hands when investing in any country

International Investment Treaties (“IIAs”)

Example - Bilateral Investment Treaties (BIT) of the United States

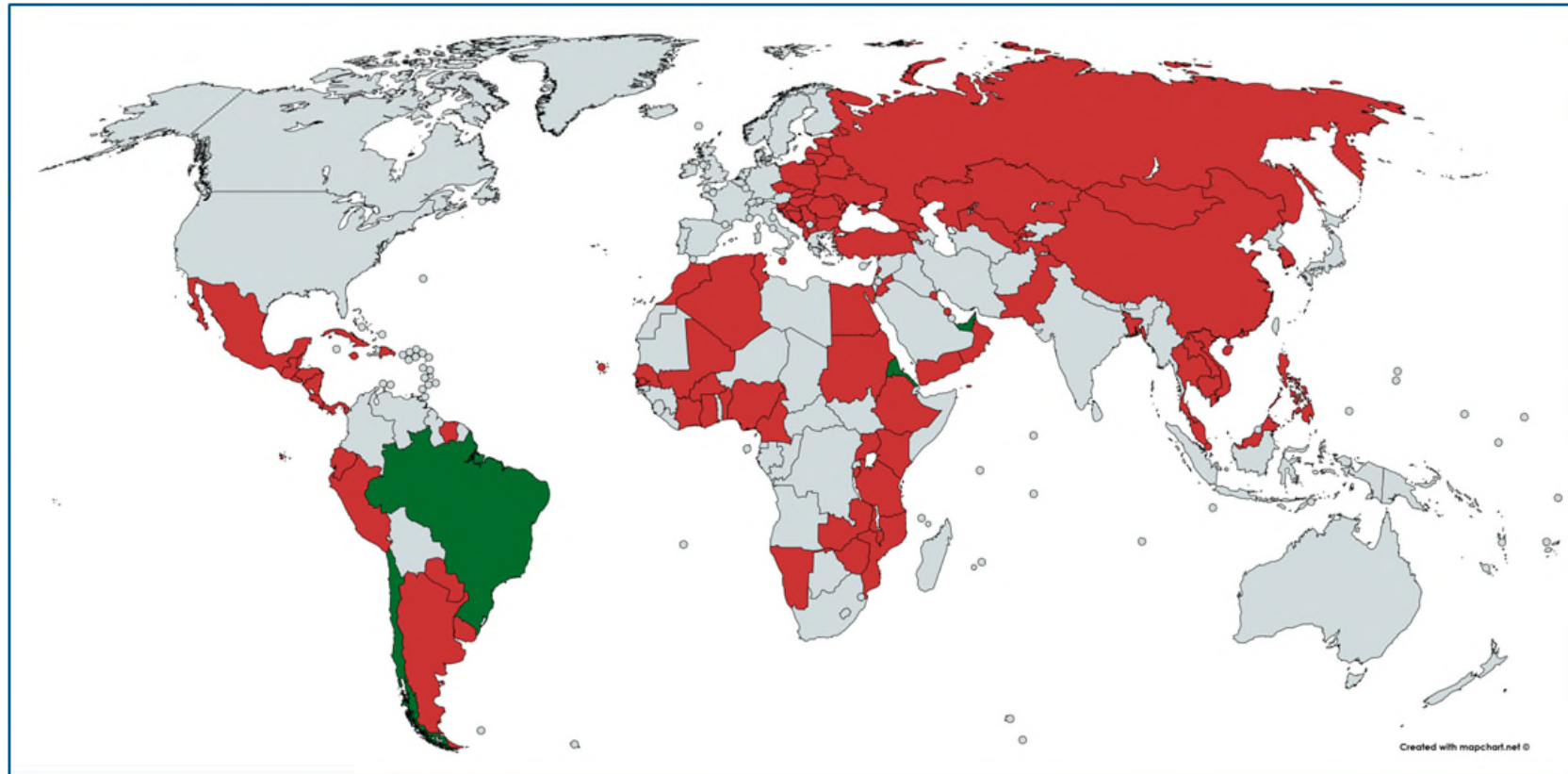
- **Countries with BITs in force**
- **Countries with BITs signed but not in force**



International Investment Treaties (“IIAs”)

Example – Bilateral Investment Treaties of the Netherlands

- Countries with Bilateral Investment Treaties in force
- Countries with treaties signed but not in force



International Investment Treaties (“IIAs”)

- Examples of Multilateral Treaties with Investment Protection Provisions
 - North American Free Trade Agreement (1994) (NAFTA)
 - ASEAN Comprehensive Investment Agreement (2009)
 - Comprehensive Trade and Economic Agreement between Canada and the European Union (2016 – not yet in force)
 - Energy Charter Treaty (1994)
 - Organisation of the Islamic Conference (OIC) Investment Agreement (1981)

Qualifying for an investor-State claim: the “classic” definition of “Investor”

Agreement on encouragement and reciprocal protection of investments between the Republic of Bulgaria and the Kingdom of the Netherlands

(2) The term "investor" shall comprise:

a) with regard to the Kingdom of the Netherlands: natural persons having the nationality of the Kingdom of the Netherlands;

with regard to the Republic of Bulgaria: natural persons having the status of citizen of the Republic of Bulgaria;

b) with regard to either Contracting Party: legal persons constituted under the law of that Contracting Party;

c) with regard to either Contracting Party: legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (a) or by legal persons as defined in (b).

Qualifying for an investor-State claim: the “classic” definition of “Investor”

- The common response of tribunal’s when asked to “pierce the corporate veil” in presence of broad definition of legal persons

H&H Enterprises Investments, Inc.
(Claimant)

and

Arab Republic of Egypt
(Respondent)

ICSID Case No. ARB/09/15

The Tribunal’s Decision on Respondent’s Objections to Jurisdiction

68. Furthermore, the Tribunal considers that Claimant is a legal entity incorporated in the State of California, and thus fulfils the objective criteria for *ratione personae* provided for in Article 25(2)(b) of the ICSID Convention and Article I(1)(b) of the BIT. Respondent has not provided the Tribunal with any evidence or a legal basis that would justify piercing the corporate veil or otherwise disregarding Claimant’s nationality.

Qualifying for an investor-State claim: the “new generation” definition of “Investor”

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The text presented in this document is not binding under international law and will only become so after the entry into force of the Agreement.

* * *

COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)
BETWEEN CANADA, OF THE ONE PART,
AND THE EUROPEAN UNION
[AND ITS MEMBER STATES,

investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;

For the purposes of this definition, an **enterprise of a Party** is:

- (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
- (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);

Qualifying for an investor-State claim: the “new generation” definition of “Investor”

- Seeking to prevent claims from “shell” or “mailbox” companies



Investment provisions in the EU-Canada free trade agreement (CETA)

- CETA **does not protect so-called "shell" or "mailbox" companies**. To be qualified as an investor, it is necessary to have real business operations in the territory of one of the Parties.

Relevant CETA provisions: [Article 8.1: Definitions](#)

Qualifying for an investor-State claim: the “new generation” definition of “Investor”

- When are shell companies excluded?

INVESTMENT *AD HOC* ARBITRATION

between

CLAIMANT

v/

THE SLOVAK REPUBLIC

RESPONDENT

AWARD

March 5, 2011

219. Similar conclusions must be drawn in respect of the "real economic activities" of [XXX] REDACTED TEXT in Switzerland. The 2007 tax return indicates a quite modest turnover and nothing has been exhibited for the outstanding years. The Claimant was unable to establish number and type of its clients, type of its operations, kind of contracts it enters into, quantity and type of personnel, nature and composition of its managing bodies. It even admitted that it has no employee.

224. Under the foregoing circumstances, the Claimant is far from meeting the standard imposed under the BIT. The Tribunal sides with the Respondent in that the BIT requires more than the mere incorporation in one of the contracting parties, and that Article 1(1) is a special (and rather uncommon) clause by which the two contracting States intended to exclude from treaty-protection "mailbox" or "paper" companies.²³¹

226. Now, the good faith ordinary meaning of the word "real" cannot but be "actual", or "effective", or "genuine", or "verifiable", or "visible", or "tangible", or "objective". The BIT preamble underlines that the purpose pursued by the two Contracting States was intensifying the economic cooperation to the mutual benefit of both States and fostering their economic prosperity. It is illogic to assume that the above goals could be achieved by giving treaty protection or by attracting into the host country "shell" companies which are unable to establish the kind and level of activities that they conduct in their own State. No State is anxious to promise special guarantees, privileges and protections to investors which bring no benefit to its economy.

227. Concluding on this matter, the Tribunal is of the view that [XXX] REDACTED TEXT is not an "investor" in the meaning of Article 1(1) of the BIT. This is *per se* sufficient to oblige the Tribunal to decline jurisdiction over the Claimant's claims.

Qualifying for an investor-State claim: the definition of “Investment”

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AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

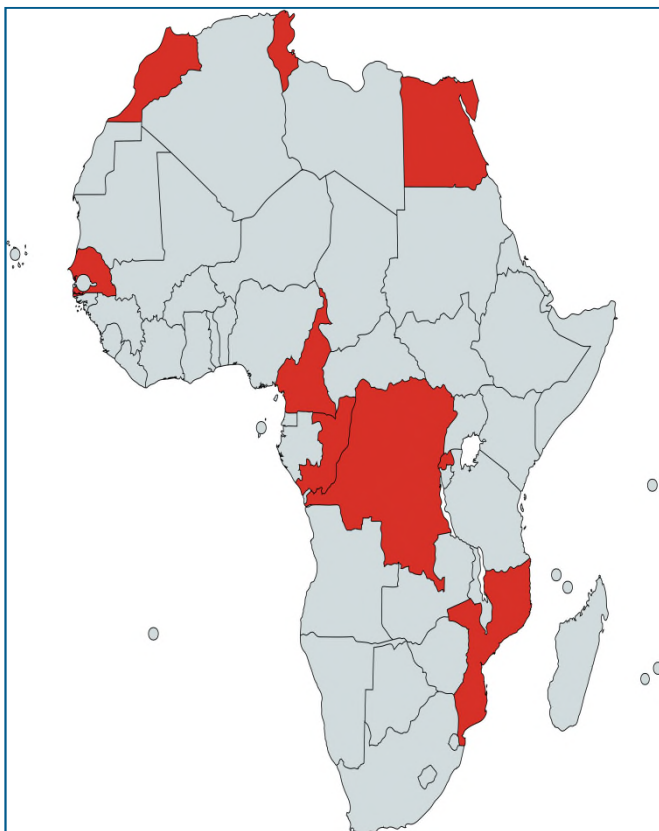
For the purposes of this Agreement:

- (1) The term "investment" means every kind of asset and more particularly though not exclusively:
 - a) movable and immovable property as well as any other rights in rem;
 - b) rights derived from shares, stocks, bonds and other kinds of interests in companies and joint ventures;
 - c) claims to money, to other assets or to any performance having an economic value with regard to the investment;
 - d) rights in the field of intellectual property including copyrights and trademarks, technical processes, goodwill and know-how;
 - e) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.

Investment Protection through Complex Structures and Protection of Indirect Investment

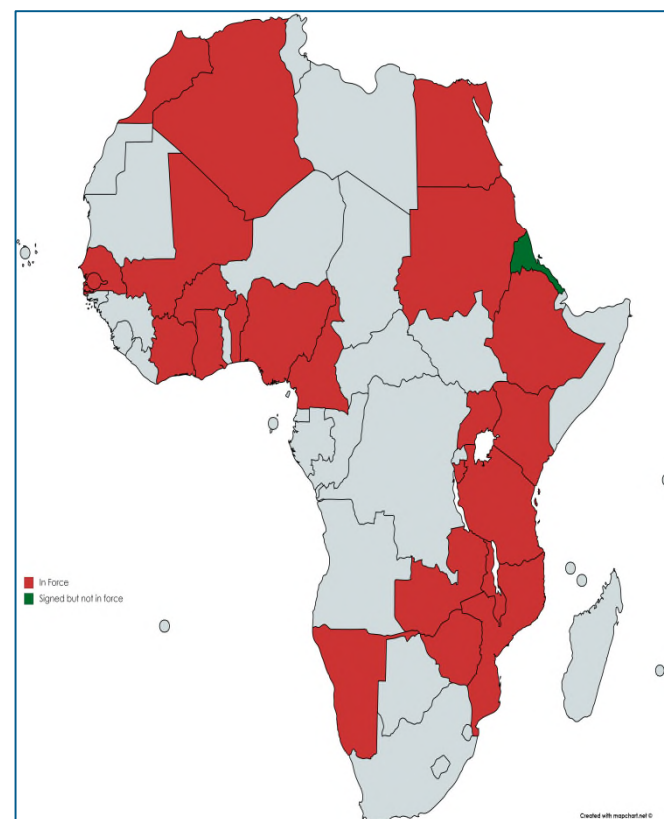
How to Structure an Investment to Qualify for Protection under Treaties: example

U.S. IIAs with African States



- Countries with treaties in force
- Countries with treaties signed but not in force

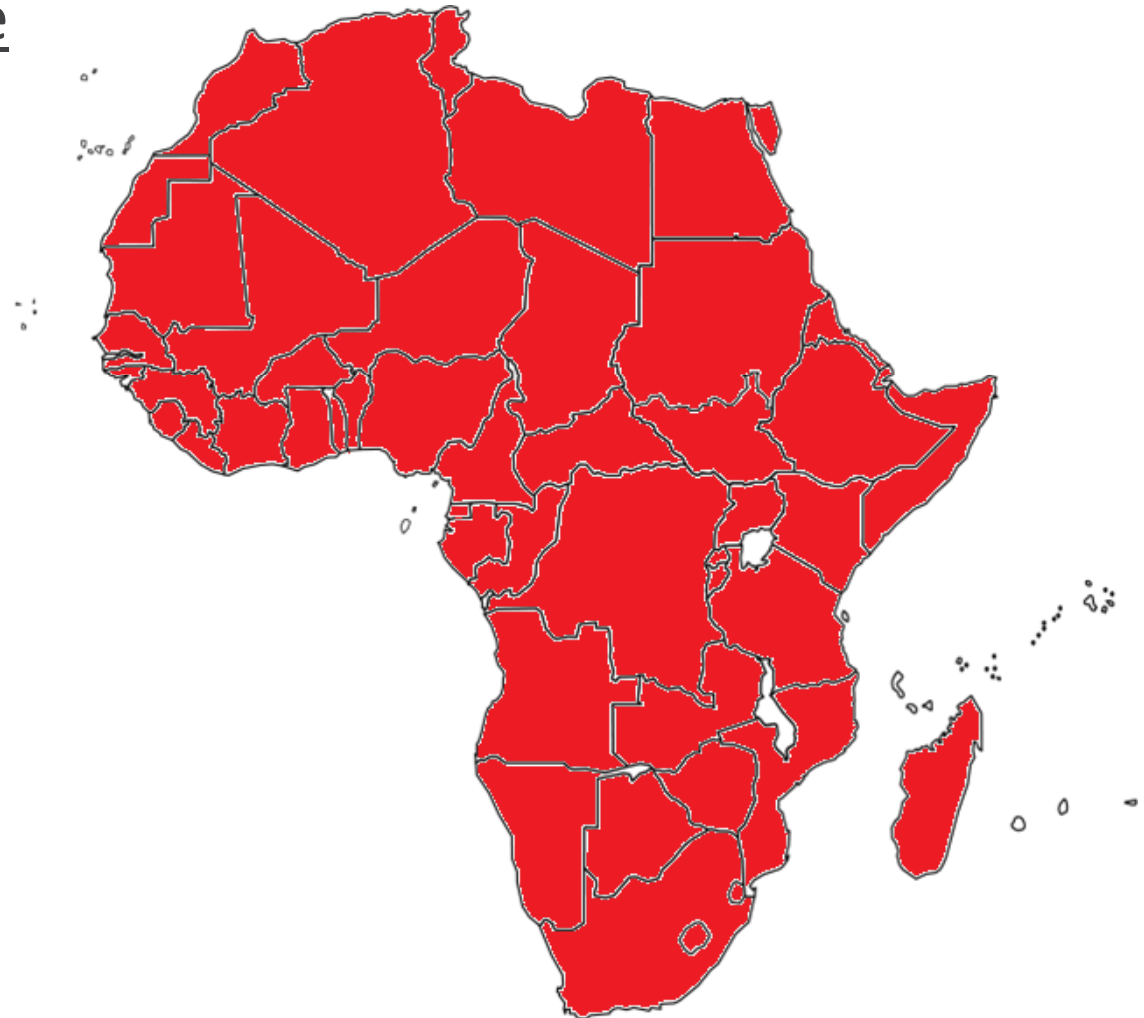
Netherlands IIAs with African States



Investment Protection through Complex Structures and Protection of Indirect Investment

How to Structure an Investment to Qualify for Protection under Treaties: example

Every African State has at least one BIT in force, so it is almost always possible to structure the investment to enjoy investment protection



Investment Protection through Complex Structures and Protection of Indirect Investment

How to Structure an Investment to Qualify for Protection under Treaties: example

- Investment in Ghana
 - There is no US – Ghana BIT
 - 8 BITs in force available (China, Denmark, Germany, Malaysia, Netherlands, Serbia, Switzerland, United Kingdom)
- Consider content of BITs and check tax status
- Netherlands – Ghana BIT

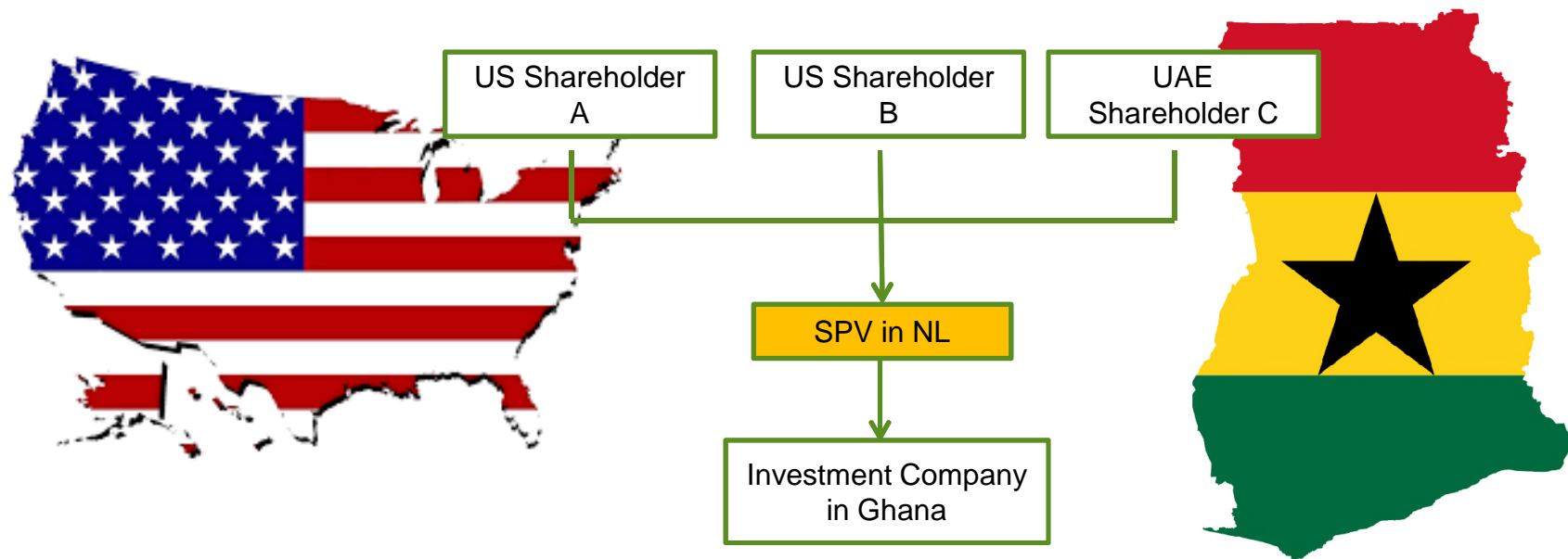


(b) the term 'nationals' shall comprise with regard to either Contracting Party:

- natural persons having the nationality of that Contracting Party in accordance with its laws;
- without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party; and
- legal persons located either in Ghana or the Netherlands and controlled, directly or indirectly, by nationals of that Contracting Party.

Investment Protection through Complex Structures and Protection of Indirect Investment

How to Structure an Investment to Qualify for Protection under Treaties: example



Investment Protection through Complex Structures and Protection of Indirect Investment

- Importance of “timing” of the restructuring to avoid problems of admissibility due to allegations of “abuse of process” or “abuse of rights”
 - ❖ Before the dispute (*Mobil v. Venezuela* (2010); *Phoenix v. Czech Republic* (2009))
 - ❖ Before the dispute “looms” (*René Rose Levy and Gramcitel v. Peru* (2015))

185. However, a restructuring carried out with the intention to invoke the treaty’s protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.²¹⁸ In this respect, the Tribunal agrees with the test suggested in *Pac Rim* whereby “a specific future dispute” must be “foresee[able] [...] as a very high probability and not merely as a possible controversy”.²¹⁹ In the Tribunal’s view, this test

Conclusion

Add investment treaties
to your checklist when considering
an investment abroad or assessing
the level of protection that your current
investments around the world have
and assess whether to resort to their
provisions in case of dispute