



**Asia-Pacific  
Economic Cooperation**

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## **Mitigating the Risk of Potential Unanticipated Consequences in the Context of ISDS**

Submitted by: Sidley Austin LLP



**Capacity Building on Existing International  
Investment Agreements in the APEC Region,  
Relevance, Emerging Trends, Challenges and  
Policy Options to Address Coherence in Treaty  
Making  
Lima, Peru  
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BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.



*"Mitigating the Risk of Potential Unanticipated Consequences  
in the Context of ISDS"*

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## Objective

To provide investment negotiators and those responsible for managing investor-State cases with legal tools for addressing potential unanticipated consequences resulting from the "spaghetti bowl" of International Investment Agreements (or "IIAs") in the APEC Region



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## Peru's BITs in Force

- Argentina-Peru BIT
- Australia-Peru BIT
- BLEU-Peru BIT
- Bolivia-Peru BIT
- Canada-Peru BIT
- China-Peru BIT
- Colombia-Peru BIT
- Cuba-Peru BIT
- Czech Republic-Peru BIT
- Denmark-Peru BIT
- Ecuador-Peru BIT
- El Salvador-Peru BIT
- Finland-Peru BIT
- France-Peru BIT
- Germany-Peru BIT
- Italy-Peru BIT
- Japan-Peru BIT
- Malaysia-Peru BIT
- Netherlands-Peru BIT
- Norway-Peru BIT
- Paraguay-Peru BIT
- Portugal-Peru BIT
- Romania-Peru BIT
- Spain-Peru BIT
- Sweden-Peru BIT
- Switzerland-Peru BIT
- Thailand-Peru BIT
- United Kingdom-Peru BIT
- Venezuela-Peru BIT



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## Peru's Other Investment Agreements with ISDS Provisions

- Canada-Peru FTA, Chapter 8
- Chile-Peru FTA, Chapter 11
- China-Peru FTA, Chapter 10
- Costa Rica-Peru FTA, Chapter 12
- Korea-Peru FTA, Chapter 9
- Mexico-Peru FTA, Chapter 11
- Panama-Peru FTA, Chapter 12
- United States-Peru FTA, Chapter 10
- Singapore-Peru FTA, Chapter 10
- Pacific Alliance Additional Protocol, Chapter 10\* (Chile, Colombia, Mexico, Peru)
- Trans-Pacific Partnership, Chapter 9\* (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, US, Vietnam)

\* Not yet entered into force



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## Potential Unanticipated Consequences

1. Claims by unintended investors
  - a) Investments controlled by nationals of the host State
  - b) Investments controlled by nationals of a third State
  - c) Investments that are restructured after the dispute arose
2. Most-favored nation (MFN) clause applied to procedural requirements for ISDS
3. Parallel proceedings under separate treaties relating to the same investment



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## Claims by Unintended Investors – *Renée Levy & Gremcitel S.A. v. Peru*

- Timeline:
  - Feb. 2005 – Ms. Levy *allegedly* invested in Gremcitel
  - 2005 – The Levys learned that a Historical Commission recommended protecting Gremcitel's land
  - Oct. 9, 2007 – Ms. Levy *actually* invested in Gremcitel
  - Oct. 10, 2007 – Peru issued a resolution protecting Gremcitel's land
- Result:
  - The tribunal had jurisdiction *ratione temporis* and *ratione personae*
  - But there was an "abuse of process"

Source: *Gremcitel*, Award at paras. 155, 161, 187, 189, 195.



## Claims by Unintended Investors – *Renée Levy & Gremcitel S.A. v. Peru*

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- The “transfer of shares [to Ms. Levy] occurred on 9 October 2007, only one day before the 2007 Resolution”—a “striking proximity of events [that was] not a coincidence.”
- There was “a pattern of manipulative conduct.”
  - “[T]he Claimants asked [their] notary...to backdate corporate resolutions by 5 years.... Mr. Levy then returned to see [the notary]...when this arbitration was already underway, requesting the ‘rectification’ of the backdated notarization to ensure that the date of the alleged...transfer was well documented. Thus, [the Claimants] attempted to correct false information with further false information, on which the Claimants then relied to establish the Tribunal’s jurisdiction... [I]t is obvious that the only reason the Claimants sought to backdate the documents was to manufacture the Tribunal’s jurisdiction.”

Source: *Gremcitel*, Award at paras. 188, 194 (emphasis added).



## Claims by Unintended Investors – *Pac Rim Cayman LLC v. El Salvador*

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- Timeline:
  - 2004 - Pac Rim applied for mining permits
  - Before Dec. 2007 – El Salvador’s “*de facto* mining ban” began; the ban was unknown to Pac Rim at the time
  - Dec. 2007 – Pac Rim changed its nationality from the Cayman Islands to the United States
  - Mar. 2008 – The President of El Salvador confirmed his opposition to granting mining permits; through this announcement, Pac Rim learned of the mining ban
- Result:
  - The tribunal had jurisdiction *ratione temporis*
  - No abuse of process

Source: *Pac Rim*, Decision on Jurisdiction at paras. 2.16, 2.25, 2.59-60, 2.76, 2.94, 7.1.



## Preventing Claims by Unintended Investors

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- If no limitations in text of IIA:
  - Can argue “abuse of process” or lack of jurisdiction *ratione temporis*
- Can limit jurisdiction *ratione temporis* in text of IIA:
  - Provide that covered dispute is one that “arises after” investor gains nationality of home State
- Can limit jurisdiction *ratione personae* in text of IIA:
  - Define “legal person” as requiring substantial business activities in home State
  - Define “natural person” as requiring dominant nationality of home State



## Preventing Claims by Unintended Investors – Denial of Benefits/Advantages Clauses

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- Article 17 of Energy Charter Treaty:

\*Each Contracting Party reserves the right to deny the advantages of this Part [III] to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or
- (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
  - (a) does not maintain a diplomatic relationship; or
  - (b) adopts or maintains measures that:
    - (i) prohibit transactions with Investors of that state; or
    - (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.”



## Preventing Claims by Unintended Investors – Denial of Benefits/Advantages Clauses

- *Yukos* tribunal:
  - “Article 17 [of the ECT] specifies...that it concerns denial of the advantages of ‘this Part,’ *i.e.*, Part III of the ECT. Provision for dispute settlement under the ECT is not found in ‘this Part’ but in Part V of the Treaty.”
  - “Article 17(1) does not deny *simpliciter* the advantages of Part III of the ECT—as it easily could have been worded to do—to a legal entity if the citizens or nationals of a third State own or control such entity and if that entity has no substantial business in the Contracting Party in which it is organized.”
  - “[I]f the passage in Respondent’s First Memorial...is construed as an exercise of the reserved right of denial, it can only be prospective in effect from the date of that Memorial. To treat denial as retrospective would, in the light of the ECT’s ‘Purpose’...[,] be incompatible ‘with the objectives and principles of the Charter.’”

Source: *Yukos*, Interim Award on Jurisdiction and Admissibility at paras. 441, 456-58 (emphasis added).



## Preventing Claims by Unintended Investors – Denial of Benefits/Advantages Clauses

- Article 10.12 of CAFTA:
  - “1. A Party may deny the benefits of this [Investment] Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
    - (a) does not maintain diplomatic relations with the non-Party; or
    - (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.
  2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this [Investment] Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.”



## Preventing Claims by Unintended Investors – Denial of Benefits/Advantages Clauses

- *Pac Rim* tribunal:
  - “As expressly worded in CAFTA, it is significant that the ‘benefits’ denied under CAFTA Article 10.12.2 include all the benefits conferred upon the investor under Chapter 10 of CAFTA, including both Section A on ‘Investment’ and Section B on ‘Investor-State Dispute Settlement.’ ... This jurisdictional issue under CAFTA does not therefore resemble the more limited issue under Article 17(1) of the Energy Charter Treaty....”
  - “[T]he Respondent’s consent to ICSID arbitration in CAFTA Article 10.16.3(a) is necessarily qualified from the outset by CAFTA Article 10.12.2....”
  - “[T]he Tribunal finds that...the Claimant is owned by Pacific Rim Corporation, a legal person of a non-CAFTA Party [i.e., Canada].”
  - The Claimant was “akin to a shell company with...insubstantial activities.”
  - “[T]he Claimant...can receive no benefits from Part 10 of CAFTA...and this Tribunal can have no jurisdiction....”

Source: *Pac Rim*, Decision on Jurisdiction at paras. 4.4, 4.75, 4.82, 4.90, 4.92.



## Most-Favored Nation (MFN) Clauses

- Two lines of MFN cases:
  - MFN clauses do apply to procedural requirements for ISDS
  - MFN clauses do not apply to procedural requirements for ISDS
- The text of the MFN clause matters
  - Article IV of Spain-Argentina BIT:
    - “In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”
    - The *Maffezini* tribunal applied this MFN clause to allow an investor to bypass the 18-month domestic litigation requirement in the BIT’s ISDS provisions

Source: *Maffezini*, Decision on Jurisdiction at paras. 38, 53, 64.





## Narrowing Most-Favored Nation (MFN) Clauses

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- Article 9.5 of the TPP:

"1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B."



## Parallel Proceedings

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- *CME v. Czech Republic*

- The Czech Republic argued that it was an "abuse of the Dutch treaty [that] Mr. Lauder, who purportedly controls CME, has brought arbitration proceedings under the 'US Treaty' in which Mr. Lauder makes identical allegations and seeks identical relief."
- The tribunal dismissed the Czech Republic's abuse of treaty claims.
- CME was awarded US \$270 million under the Netherlands-Czech BIT.

- *Ronald Lauder v. Czech Republic*

- On the other hand, in a case concerning the exact same facts but under a different BIT (US-Czech BIT v. The Netherlands-Czech BIT), Mr. Lauder was awarded no damages; this was because "none of the actions or inactions of the [Czech] Media Council caused a direct or indirect damage to Mr. Lauder's investment."

Source: *CME*, Partial Award at para. 177; *CME*, Final Award at p. 161; *Lauder*, Final Award at para. 313.



## Limiting Parallel Proceedings

- Article 9.20 of the TPP:

“No claim shall be submitted to arbitration under this Section unless...the notice of arbitration is accompanied...by the claimant’s and the [domestic] enterprise’s written waivers, of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.18 (Submission of a Claim to Arbitration).”



## Conclusions – Addressing Potential Unanticipated Consequences

1. Preventing claims by unintended investors
  - a) Can limit jurisdiction *ratione temporis* in text of IIA
  - b) Can limit jurisdiction *ratione personae* in text of IIA
  - c) Can include “denial of benefits” clause in text of IIA
  - d) If such limitations not in text of IIA, can limit by asserting “abuse of process”
2. Can narrow MFN clauses so that they do not apply to procedural requirements for ISDS
3. Can limit parallel proceedings involving the same claimant under separate treaties through a waiver provision



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