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Private Sector Role in Enforcement of Treaty Protections:
How Global Companies Use Rules to Open Markets
and Address Regulatory Problems

Andrew W. Shoyer
July 2006

Overview

- Global companies use rules found in
 - World Trade Organization
 - Free trade agreements
 - Bilateral investment treaties
 to create leverage and change negotiating dynamic with foreign regulators
- Companies incorporate rules into business strategy
 - when planning a transaction/investment, as well as
 - to resolve disputes when problems arise
- . . . and Japanese companies can do the same!

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Agreements cover all types of economic activity that crosses borders . . .

- Export and import of heavy machinery
- Cross-border asset management services
- Foreign direct investment in power plant
- Licensing of copyrights in music

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. . . and all types of government activity

- Taxation
- Environmental and labor regulation
- Government procurement decisions
- Jury awards in civil litigation

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Bilateral Investment Treaties: Market Access, Investment Protection And Dispute Settlement

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Japan's Bilateral investment treaties

Bangladesh (1999)	Mongolia (2002)
China (1989)	Pakistan (2002)
Egypt (1978)	Russia (2000)
Hong Kong China (1997)	Sri Lanka (1982)
Korea (2003)	Turkey (1993)
	Vietnam (2004)

- plus Mexico, Singapore and Malaysia EPAs

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International investment agreements

Core objectives

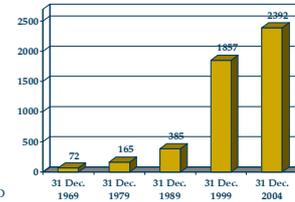
- Broad protection against government action
 - Any level of government
 - Variety of government actions
- Direct right of action for investors to enforce treaty rights against governments
- Neutral, international fora to arbitrate disputes

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Growth in total number of BITs worldwide

- 2,392 bilateral investment treaties (BITs) as of 2004
- Exponential growth in 1990s and 2000-05



Source: UNCTAD

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International investment agreements

Examples of leading signatories (as of June 1, 2005)

- Germany: 135 BITs concluded, 113 in force
- Switzerland: 117 BITs concluded, 105 in force
- United Kingdom: 105 BITs concluded, 92 in force
- France: 98 BITs concluded, 73 in force
- United States: 47 BITs concluded, 36 in force
- **Japan: 11 BITs concluded and in force**

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Other international investment agreements

- Investment chapters of free trade agreements
 - Singapore EPA
 - Mexico EPA
 - Malaysia EPA
- Energy Charter Treaty
 - Multilateral treaty applies to investments in energy sector
 - 52 members include most Western European countries, Kazakhstan, Mongolia, Poland, Romania, Russian Federation, Turkey, and Ukraine

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Common features

Broad definition of investment

- Company or enterprise
- Shares, stock, and other forms of equity, and bonds, debentures, and other forms of debt interests, in a company
- Contractual rights
- Tangible/real property
- Intangible property
 - Rights such as leases, mortgages, liens and pledges
- Intellectual property
 - Copyrights, trademarks, patents, and trade secrets
- Rights conferred by law
 - Licenses and permits

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Common features

Expansive definition of investor

- National of state that is party to agreement
- Entity organized in state that is party to agreement
- Subsidiary, wherever located, of entity organized in state party to agreement
 - Some treaties do not extend to cover indirect ownership

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Common substantive protections

General standards of treatment

- Non-discriminatory treatment: Most-Favored Nation (MFN) and National Treatment (NT)
- Fair and equitable treatment
- Full protection and security
- Treatment in accordance with international law
- No impairment of management, maintenance, use, enjoyment, or disposal of investments through unreasonable or discriminatory measures

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Common substantive protections

General standards of treatment

Mexico EPA Article 60 General Treatment

Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Note: This Article 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 the other Party. **The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.** A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

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Common substantive protections

General standards of treatment

- NAFTA tribunals, after three NAFTA countries adopted same standard in 2001, take narrow approach to fair and equitable treatment
 - **Mondev**: "Fair and equitable treatment" and "full protection and security" are elements of "minimum standard of treatment" under international law. Their content evolves, and is measured by current, not historical, standards.
- Compare narrow approach under NAFTA to rulings of BIT tribunals unconstrained by Free Trade Commission's interpretation
 - **Tecmed**: Fair and equitable treatment provision of relevant treaty is "autonomous, ... according to its ordinary meaning." To interpret it otherwise would "deprive[] [the provision] of any semantic content or practical utility of its own, which would surely be against the intention of the Contracting Parties."
- Does tribunal's view on whether fair and equitable treatment is additive to minimum standard affect ruling on facts?
 - **CMS Gas**: Tribunal did not rule on relationship between fair and equitable treatment and minimum standard because respondent's act – failure to maintain stable and predictable business environment – violates both standards

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Common substantive protections

General standards of treatment

- Umbrella clause
 - **Example**: Article 2.3 of Hong Kong BIT provides: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."
 - Governments must meet their contractual obligations
 - Governments must not abuse their sovereign powers to invalidate or avoid their obligations
 - May be explicit treaty provision or may be implied in general provisions like "fair and equitable treatment"

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Common substantive protections

Specific prohibitions

- Expropriation or nationalization (including regulatory takings and repudiation of contracts) except:
 - For public purpose
 - On non-discriminatory basis, and
 - With prompt, adequate compensation, generally equivalent to real value of investment under normal conditions before expropriation

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Common substantive protections

Specific prohibitions

- What is an expropriation?
 - Direct seizure of property
 - Nationalization
 - Arbitrary termination of a contract or concession
 - Regulatory taking
 - Creeping expropriation
- What is *not* an expropriation?
 - Bona fide, non-discriminatory use of police power

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Common substantive protections

Specific prohibitions

- Restraints on free convertibility
- Performance requirements

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Growth in Investor-State Disputes

- According to the United Nations, at least 229 treaty-based cases through end of 2005
 - Over 2/3 filed after 2001
 - 48 treaty-based cases brought in 2005
- 135 cases brought before World Bank's International Centre for Settlement of Investment Disputes (ICSID)

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Common contexts of investment disputes

- Privatization
- Creeping expropriation through series of measures that destroy value of investment
- Repudiation or wrongful termination of government contracts and concessions
- Discrimination *de jure* or *de facto*
- Regulatory measures that impair arbitrarily the value of an investment

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Examples of investment disputes

- Lanco v. Argentina
- Impregilo v. Pakistan
- PSEG v. Turkey
- Cargill v. Poland
- ADM and Tate and Lyle v. Mexico
- Fireman's Fund v. Mexico
- Lucchetti v. Peru
- CAA and Vivendi Universal v. Argentina

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Resolution of investment disputes

Consent of the parties

- State parties consent to dispute settlement by signing the BIT - a "standing" offer to arbitrate
- Investor consents through submission of claim in the forum of its choice

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Resolution of investment disputes

The "fork in the road"

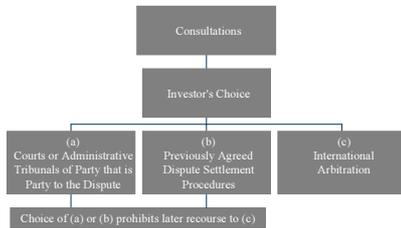
- Investor may pursue dispute:
 - (1) In courts or administrative tribunals of host country
 - (2) In accordance with any applicable, previously agreed dispute settlement procedures
 - (3) Through international arbitration
- Typically, choice of (1) or (2) precludes later recourse to (3)

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Resolution of investment disputes

The "fork in the road"



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Resolution of investment disputes

International arbitration

- If investor pursues international arbitration, investor may submit dispute for binding arbitration:
 - To International Centre for Settlement of Investment Disputes (ICSID), if available
 - To Additional Facility of Centre, if Centre is not available
 - In accordance with UNCITRAL Arbitration Rules
 - To any other arbitration institution or in accordance with any other arbitration rules, if agreed by both parties to the dispute

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Resolution of investment disputes

Enforcing investment obligations

- Compels arbitration in international forum (e.g., ICSID, UNCITRAL) under international law
- Money damages
- ICSID Convention has self-contained enforcement mechanism
 - Article 53: "Each party shall abide by ... the terms of the award"
 - Article 54: "Each Contracting State shall recognize an award ... 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"
 - Failure to comply constitutes breach of bilateral and multilateral treaty obligations (i.e., BIT and ICSID Convention)

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Resolution of investment disputes

Annulment of awards

- Annulment procedure narrower than appeal
 - Remedies only procedural and due process-type errors
 - Does not correct errors in law or fact
- ICSID Convention, 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.

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The WTO and Free Trade Agreements: What They Cover And How They Work

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Japan's International trade agreements

- Multilateral
 - Agreement Establishing the World Trade Organization (WTO) (1995)
- Bilateral Economic Partnership Agreements (EPAs)
 - Singapore (2002)
 - Mexico (2004)
 - Malaysia (2005)
 - Thailand
 - Indonesia
 - Korea
 - Philippines
 - Chile
- Plurilateral EPAs
 - ASEAN (2003 framework)

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General approach in using treaty rules to solve commercial problems

- 1 Is a government measure impeding market access or distorting conditions of competition?
- 2 Is there an agreement in place with rules that address the measure?
- 3 If so, then generate claims, pursue enforcement action
- 4 If not, then use negotiating dynamic to create rules or secure solution

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Model problem

- To raise revenue to pay for customs infrastructure improvements, Dominican Republic imposes a fee on each express delivery shipment = 3 percent of the value of the shipment
- In light of complaints, Dominican Republic converts the basis of the fee = 16 monetary units per kilogram
- As a result of the new fee, the cost of doing business for US express delivery service providers increases by \$50,000 per month
- DR-CAFTA completed, not yet in force, awaiting exchange of diplomatic notes

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Success (and failure) stories

- China – Viagra Temporary Regulation
- Pakistan/India – mailbox/exclusive marketing rights
- Mexico – basic telecom services
- EU – trademarks and geographical indications
- EU – agricultural biotechnology
- US – “zeroing” in antidumping procedures
- Argentina – footwear safeguards
- EU – ban on beef grown with hormones

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Before the beginning: assessing a dispute

- How good are the facts? Do they add up to a clear and appealing case of violation?
- What is the measure? Domestic law, regulation or practice?
- Are the WTO obligations clear?
- Is the legal precedent important?
- Are there legal/political DEFENSIVE concerns?

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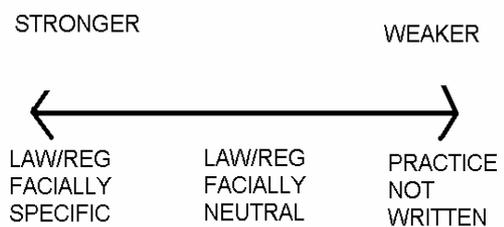
Before the beginning: assessing a dispute

- What is the value of the case commercially?
 - Time frame of WTO dispute and lack of remedy for past damage; uncertainty over ultimate outcome; commercial *support* for some trade barriers
- Is the case important for non-economic reasons?
- Who is the opposing party?
- Are there allies (co-complainants, third parties)?

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Range of Measures - Stronger to Weaker



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WTO Dispute Settlement: Four Stages

- Consultations (4 months)
- Panel Proceedings (15 months)
- Appellate Review (5 months)
- Implementation (12 months)
- TOTAL TIME UNTIL RESULT: 3 YEARS

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Conclusions

- Invocation of rules **establishes credible threat - creates leverage**
- For industry, victory generally defined **without** need for dispute settlement proceedings
 - “real time” win comes through negotiation
- Global companies now consider rules
 - before making transaction or investment, and
 - for protection, after transaction goes bad

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