Event 2. Breakout Sessions

- **Mechanics**: Presentation and commentator from the IP team

- **Breakout Session 3: Sustainability Topics**
  - **Chair**: Ivan Nimac
  - **Presenter** Arthur Appleton, Syed A. Mahmood, Grahame Dixie
  - **Discussants**: Wim Douw
Sustainability Topics
Day 3
Arthur E. Appleton
Vienna
October 14, 2015
A. Introduction – Evolution of Sustainability in Trade Agreements

B. Evolution of Sustainability in Investment Agreements

1. Definitions
2. Important Emerging Concepts in BITs, MITs and Mega-Regionals
3. Legal obligations Being Placed on Investors
4. Client Country and NGO Concerns (discussion)
A. Evolution in Trade Agreements: A Precursor

- No mention of sustainability in the 1947 GATT Agreement, but Article XX(g) contains an important exception for conservation of exhaustible natural resources
- 1994 WTO Agreement (Marrakesh Agreement) speaks in preamble of sustainable development, and protection and preservation of the environment
  - Relied upon by the Appellate Body in the US – Shrimp case to interpret Article XX(g)
- TBT and SPS Agreements have environmental components
- GATT Article XX chapeau language remains important: no “arbitrary or unjustifiable discrimination”; no “disguised restriction on international trade”
B. Evolution in Investment Agreements: A Transition

• Are sustainability and investment mutually inconsistent?
  - Obviously not. It’s a question of balancing the importance of FDI and inward investment with the need to provide policy space for governments to act to meet legitimate concerns.

• Should sustainable development be the goal of IIAs? That is a more nuanced question. Recent agreements recognize the importance of Sustainability Objectives, and seek a policy balance.

• Widespread recognition that sustainability objectives are important but that sustainability can be used as a cover for protectionism: need for balance.

• TPP, TISA and TTIP will be important indicators of the future.
B. Evolution in Investment Agreements: Trends

Strengthening of sustainable development provisions

• Incorporations of provisions referencing protection of health, labor and the environment
• Incorporation of General Exceptions similar to Article XX(b) GATT (protection of human, animal or plant life or health)
• Agreement not to reduce standards to attract investment (no race to the bottom)

Nevertheless, still a strong preference to negotiate IIAs behind closed doors away from the NGO Community and Organized Labor.
1. Evolution in Investment Agreements: Definitions

• Definitions usually define the scope of any given IIA and ISDS.

• What is an “Investment”? Should “investment” include all investment agreements and investment authorizations?

• What is the “scope” of ISDS? Should it apply to the pre- and post-establishment phases? (Trend: narrower definition)

• Should there be “carve-outs” for sensitive sectors – i.e. mining, hydrocarbons and public works? (Trend: sometimes yes)

• More directly from the sustainability perspective:
  1) Are sustainability objectives only incorporated in the preamble and used for interpretation (context), or in the text?
  2) What should be the scope of GATT and GATS-type “exceptions”?
Evolution in Investment Agreements: Definitions

From the sustainability perspective:

3) How should “expropriation” be defined?

   a) Direct expropriation
   
   b) Indirect expropriation (seldom defined in BITs - issue is policy space if definition is too broad)
      - creeping: cumulative series of regulatory acts resulting in loss of value of investment
      - consequential: host State failure to manage the normative framework anticipated in a BIT
      - NAFTA examples: *SD Myers Inc. v. Canada*, and *Pope & Talbot Inc. v. Canada*

   Trend: exercise care so that indirect expropriation is more limited
No Party may directly or indirectly nationalize or expropriate an investment (...) or take a measure tantamount to nationalization or expropriation of such an investment (...), except:

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law (...); and
(d) on payment of compensation (...).

NAFTA examples: *SD Myers Inc. v. Canada*, and *Pope & Talbot Inc. v. Canada*
2. Important Emerging Concepts: Environment (OECD Study)

- General language in preambles that mentions env’l concerns and establishes protection of the env’t as a concern (66 treaties)
- Reserving policy space for env’l regs for the entire treaty; (most common type of language (82 treaties)
- Reserving policy space for env’l regs for specific, limited subject matters (performance requirements and national treatment); (20 - mostly FTAs)
- Indirect expropriation (12 contain provisions clarifying that non-discriminatory env’l regs is not indirect expropriation;
- Not lowering envl standards (49 discourage relaxing env’l regs. to attract investment;
- Env’l matters and investor state dispute settlement (16 provide for recourse to env’l experts by tribunals. One treaty excludes investor state claims based on obligations undertaken in the treaty’s env’l provisions.
- General promotion of progress in env’l protection and cooperation (20 encourage strengthening of env’l regs and cooperation.
2. Important Emerging Concepts: Public Health (UNCTAD)

- UNCTAD review of 13 IIAs concluded in 2014 (7 BITs and 6 “other IIAs”) and found that most included sustainable development-oriented features:
  - General exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources (11 treaties)
  - Recognition that parties should not relax health, safety or environmental standards in order to attract investment (11).
  - Nine of the above reference protection of health and safety, labor rights, the environment or sustainable development in the preamble.
3) Legal Obligations: Trans-Pacific Partnership (Wikileaks Advanced Investment Chapter 20 Jan. 2015)

• The Investment Chapter does not refer to sustainable development, but its preamble states:

“Recognizing the inherent right to regulate and resolving to preserve the flexibility of the Parties to protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, and public morals;”

• Article II.15 protects environmental, health or other regulatory objectives (but measures must be consistent with the chapter):

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.”
Annex II-B on Expropriation -- Article 3(b) provides that: “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances”

Observations:

1) Recognition of the importance of environment and public welfare objectives, but measures must be consistent with the Chapter
2) No Mention of sustainable development
Legal Obligations: TPP (Wikileaks Early Environmental Chapter Nov. 2013)

- The 2013 environmental draft is more or less aspirational and hortatory.
- Absence of mandatory provisions
- Absence of an enforcement mechanism (no penalties or sanctions)
- Politically, it is difficult to know without seeing the text what the final draft contains and what will happen since the United States has not signed some of the multilateral environmental agreements that might otherwise be incorporated into TPP (Kyoto, CBD, Rights of Indigenous People), and since Republicans and Democrats will have different views and different expectations on what TPP should look like.
- The 2013 draft met with substantial criticism from the NFO Community.
### Promoting Sustainable Investments
- Establishing the obligations and responsibilities of the investor to ensure investments are sustainable, including env’l assessment and management systems
- Maintaining and promoting the general ability of states to protect the env’t
- Supporting env’t regulatory processes
- Ensuring that states effectively enforce their env’t laws
- Ensuring that the env’t liabilities of foreign investors can be fairly acted upon, including in the home state;
- Providing access to env’t-related information on investments and investors;
- Preventing the lowering of env’t standards in order to attract or maintain investments
- Developing effective citizen instigated review processes

### Promoting Sustained FDI
- Creating reasonable investor certainty and predictability
- Preventing arbitrary and discriminatory acts against an investor by establishing rules for:
  - expropriation of any assets;
  - the application of national treatment rules;
  - the application of minimum international standards of treatment
- Letting investors manage the business, with mobility of assets and personnel
- Providing non-biased legally-binding dispute resolution processes
Client Country and Business NGO Concerns:

- ICC 2012 Investment Guidelines contain provisions on labor and technology transfer as well as CSR
- NAFTA contains side agreements for labor and environment
Annexes


DISCUSSION

- Legal Issues: Relationship between investment law, environmental law, intellectual property (health issues) etc.
- Client Country Concerns
- NGO Concerns
- Emerging Trends: Lip-Service or an attempt to seek a balance?
- Economic relationship between investment and sustainable development
THANK YOU