NAGASHIMA OHNO & TSUNEMATSU

Session 3: 投資仲裁：実際に提訴するには
Investment Arbitration: Particular Procedural Issues?
”Interim Measures”
（暫定措置）

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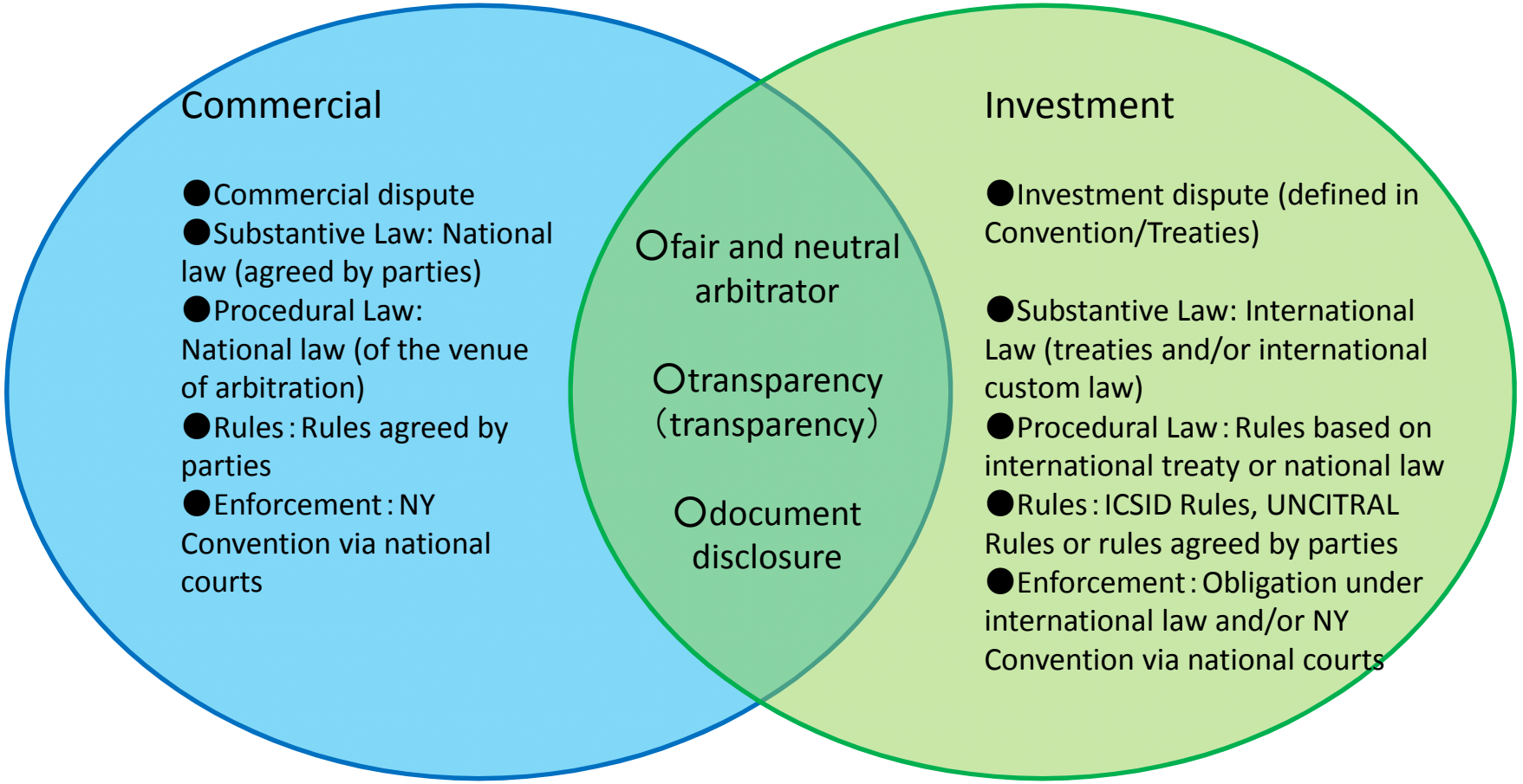
INVESTMENT V COMMERCIAL

Commercial v Investment

- Commercial v Investment



Commercial v Investment

- AGREEMENT BETWEEN JAPAN AND THE REPUBLIC OF IRAQ FOR THE PROMOTION AND PROTECTION OF INVESTMENT
- 2012年日本イラク協定

1. Definitions（定義）
2. Promotion and Admission of Investment（投資の促進及び許可）
3. National Treatment（内国民待遇）
4. Most-Favoured-Nation Treatment（最恵国待遇）
5. General Treatment and Improvement of Investment Environment（一般的待遇及び投資環境の整備）
6. Access to the Courts of Justice（裁判所の裁判を受ける権利）
7. Prohibition of Performance Requirements（特定措置の履行要求の禁止）
8. Transparency（透明性）
9. Measures against Corruption（腐敗行為の防止に関する措置）
10. Entry, Sojourn and Residence（入国、滞在及び居住）
11. Expropriation and Compensation（収用及び補償）
12. Compensation for Losses or Damages（損失又は損害についての補償）
13. Subrogation（代位）
14. Transfers（資金の移転）
15. Temporary Safeguard Measures（一時的なセーフガード措置）
16. Settlement of Disputes between the Contracting Parties（両締約国間の紛争の解決）
17. Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party（一方の締約国と他方の締約国との間の投資紛争の解決）
18. Prudential Measures（信用秩序の維持のための措置）
19. Intellectual Property Rights（知的財産権）
20. Taxation（租税）
21. Joint Committee（合同委員会）
22. Health, Safety and Environmental Measures and Labour Standards（健康、安全及び環境に関する措置並び労働基準）
23. Denial of Benefits（利益の否認）
24. Review（見直し）
25. Headings（見出し）
26. Final Provisions（最終規定）

Commercial v Investment

- **“Substantive law”**
- ***Art 10 Promotion, Protection and Treatment of Investments***
  - *(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. **Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party**.*

Commercial v Investment

- **“Proportionality”（「比例原則」）**
- ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11***
- Even the Ecuadorian Constitution has this concept:
  - “Art 24. In order to ensure due process, the following basic guarantees must be observed, …
    - 3. Laws shall establish due proportionality between offences and penalties.” [397]
- Investment arbitration precedent’s referred to the principle:
  - MTD MTD Equity SDN.BHD. and other v. The Republic of Chile, ICSID Case No. ARB/01/7 (25 May 2004);
  - LG&E Energy Corp. and others v. The Argentine Republic, ICSID Case No. ARB/02/1 (3 October 2006);
  - Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (29 May 2003); and
  - Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (14 July 2006).
- Application of the Principle of Proportionality
  - the question of proportionality were:
  - (i) whether the Minister in fact had available to him some meaningful alternative short of declaring caducidad; and/or
  - (ii) whether in any event the sanction of caducidad was in this instance a proportionate response to the violation of Article 74 of the HCL committed by OEPC (note: national statutes).

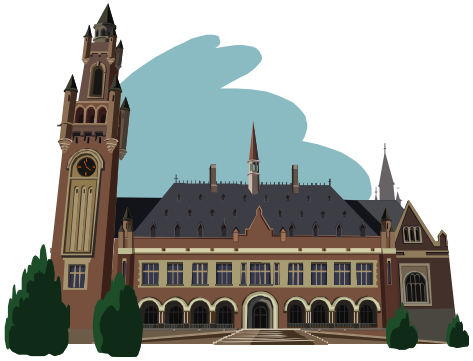
INTERIM MEASURES; PRELIMINARY ORDERS

Why “Interim measures”?

- ***“interim measures of protection”***
  - *An international tribunal’s order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law. (Black’s, 9 ed., pp 938)*
  - *日本法で言えば,「保全」(仮差押・仮処分)*

Various “Interim” Reliefs

- ***Various interim measures***
  - ***Who Orders?***
    - ***Interim measures by national court***
      - *Before arbitration*
      - *During arbitration*
    - ***Interim measures by arbitral tribunal***
    - ***Emergency interim measures***
      - *Emergency arbitration – before establishment of arbitral tribunal*
  - ***Nature of Determination***
    - ***Interim measures – UNCITRAL Art 17, 17A & 17H***
    - ***Preliminary Orders – UNCITRAL Art 17B***



Basis in Laws and Rules (1)

- ***UNCITRAL Model Law 2006***
  - *Article 17. Power of arbitral tribunal to order interim measures*
  - *(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.*
  - *(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is fi nally decided, the arbitral tribunal orders a party to:*
    - *(a) Maintain or restore the status quo pending determination of the dispute;*
    - *(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
    - *(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
    - *(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

Basis in Laws and Rules (2)

- ***UNCITRAL Model Law 2006***
  - *Article 17 A. Conditions for granting interim measures*
  - *(1) The party requesting an interim measure under article 17(2)(a), (b) and*
  - *(c) shall satisfy the arbitral tribunal that:*
    - *(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
    - *(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*
  - *(2) With regard to a request for an interim measure under article 17(2)(d),*
  - *the requirements in paragraphs (1)(a) and (b) of this article shall apply only*
  - *to the extent the arbitral tribunal considers appropriate.*

Basis in Laws and Rules (3)

- ***UNCITRAL Model Law 2006***
  - *Article 17 A. Conditions for granting interim measures*
  - *(1) The party requesting an interim measure under article 17(2)(a), (b) and*
  - *(c) shall satisfy the arbitral tribunal that:*
    - *(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
    - *(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*
  - *(2) With regard to a request for an interim measure under article 17(2)(d),*
  - *the requirements in paragraphs (1)(a) and (b) of this article shall apply only*
  - *to the extent the arbitral tribunal considers appropriate.*

Basis in Laws and Rules (4)

- ***UNCITRAL Arbitration Rules 2010***
  - *Article 26 (Interim Measures)*
  - *1. The arbitral tribunal may, at the request of a party, grant interim measures.*
  - *2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:*
    - *(a) Maintain or restore the status quo pending determination of the dispute;*
    - *(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;*
    - *(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
    - *(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

Basis in Laws and Rules (5)

- ***UNCITRAL Arbitration Rules 2010***
  - *Article 26 (Interim Measures)*
  - *3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:*
    - *(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
    - *(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

Enforceability

- ***Traditional view***
- ***UNCITRAL Model Law 2006***
  - *(1) An interim measure issued by an arbitral tribunal shall be recognized as **binding** and, unless otherwise provided by the arbitral tribunal, enforced upon application to **the competent court**, irrespective of the country in which it was issued, subject to the provisions of article 17 I.*
  - *(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.*
  - *(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.*

EXAMPLE OF INTERIM MEASURES

Examples of Interim Measures

- **<u>Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23</u>**
  - *Legal Basis: US-Ecuador BIT*
  - *Arbitration Rules & Institution: UNCITRAL Arbitration Rules & PCA*
  - *Notice of Arbitration: 23 September 2009*
  - *(1st) Hearing: 20 March 2010*
  - *Claimant's Request for Interim Measures: 1 April 2010*
  - *Order on Interim Measures: 14 May 2010*
  - *Memorial on Jurisdictional Objections: 26 July 2010*
  - *Claimant's Memorial(s): 6 September 2010*
  - *Order for Interim Measures: 9 February 2011*
  - *1st Interim Award on Interim Measures 25 January 2012*
  - *1st Partial Award on Track 1 17 September 2013*

Chevron et al v Ecuador (1)

- **Procedural Order, 28 January 2011 (reference to the Order 14 May 2010)**
  - *1. The Tribunal re-confirms Paragraphs 1(i) to (iv) of its Order dated 14 May 2010 (as amended); namely:*
    - *(i) The Claimants and the Respondents are both ordered to maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of nay public statement tending to compromise these arbitration proceedings;*
    - *(ii) The Claimants and the Respondent are both ordered to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal;*
    - *(iii) The Claimants and the Respondent are both ordered not to exert, directly or indirectly, any unlawful influence or pressure on the Court addressing the pending litigation in Ecuador known as the Lago Agrio Case;*
    - *(iv) The Claimants and the Respondent are ordered to inform the Tribunal (in writing) of the likely date for the issue by the Court of its judgment in the Lago Agrio Case as soon as such date becomes known to any of them;*
    - *(omitted)*

Chevron et al v Ecuador (2)

- **Order for Interim Measures, 9 February 2011**
  - *(E) Bearing in mind the Respondent's several obligations under the BIT and international law, including the Respondent's obligation to carry out and provide for the enforcement of an award on the merits of the Parties' dispute in these arbitration proceedings (assuming this Tribunal's jurisdiction to make such an award), the Tribunal orders:*
    - *(i) the Respondent to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case; and*
    - *(ii) the Respondent's Government to inform this Tribunal, by the Respondent's legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this order for interim measures;*
  - *pending further order or award in these arbitration proceedings, including the Tribunal's award on jurisdiction or (assuming jurisdiction) on the merits;*

Chevron et al v Ecuador (3)

- **Order for Interim Measures, 9 February 2011**
  - *(F) The Tribunal records that it is common ground between the Claimants and the Respondent in these arbitration proceedings, as also re-confirmed by the Respondent at the oral hearing on 6 February 2011 (omitted) that, under Ecuadorian law, a judgment entered in a domestic proceeding at first instance (such as a first-instance judgment in the Lago Agrio Case) is not final, conclusive or enforceable during the pendency of a first- level appeal until at least such time as that appeal has been decided by the first-level appellate court;*

  - *(G) The Tribunal continues Paragraph C (1) to (3) of its order of 28 January 2011 (which order is incorporated by reference herein);*

Sergei Paushok et al v Mongolia

- **Order on Interim Measures, 2 September 2008**
  - *1-**Payment to Respondent of the Windfall Profit tax owing by GEM (including interest and penalties) is suspended** until the Tribunal has ruled on the merits of Claimants' request for relief.*
  - *2-Taking note of the undertaking previously made by Respondent on March 19, 2008 and confirmed at the Hearing, **Respondent shall refrain from seizing or obtaining a lien on the assets of GEM and other assets of Claimants** in connection with the WPT owing to Respondent or from directly or indirectly taking any other action leading to the same or similar effect, except in accordance with the Tribunal's Orders, and shall allow GEM and Claimants to maintain their ordinary business operations in Mongolia.*
  - *3-Following their previous undertaking in that regard on March 26, 2008, **Claimants shall not move assets out of Mongolia, nor take any action which would alter in any way the ownership and/or financial interests of Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent**. Sale and pledges of gold are authorized provided the funds thus obtained are used for the ordinary business operations of GEM. (omitted).*

ご静聴ありがとうございました

- Question & Answers