2021/22 Investment Law & Investor-State MEDIATOR TRAINING

# A General Introduction on Admission and Establishment of Investment

**Olga Boltenko**
*Partner*
*Fangda Partners*

FANGDA PARTNERS
方達律師事務所

# Admission and Establishment of Investment | General

**‘What type of investment and what type of investors is the host State willing to accept into the protective ambit of its treaties and/or domestic law’?**

**‘On what level is the acceptance and establishment regulated?’**

**‘What are the consequences of those regulations?’**

# Admission and Establishment of Investment | General (UNCTAD)

- **Admission**: Rights of admission deal with the right of entry or presence while rights of establishment deal with the type of presence that may be permitted. The right of admission may be temporary or permanent. Temporary admission may be sufficient where a foreign enterprise seeks a short-term presence for the purposes of a discrete transaction, but would be insufficient for the purposes of a more regular business association with the host country. Right of admission does not include the right to permanently establish itself in the host State.

- **Establishment**: A right of establishment ensures that a foreign investor, whether a natural or legal person, has the right to enter the host country and set up an office, agency, branch or subsidiary (as the case may be), possibly subject to limitations justified on grounds of national security, public health and safety or other public policy grounds.

# Session Overview

- Introduction: A Historical Foray
- Fundamental Concepts of Admission and Establishment |
- UNCTAD Pink Paper Series and Prof Peter Muchlinski
  - Domestic Control
  - Treaty Level
- Jurisdictional Issues:
  - Scope of Consent to Arbitration
  - Treaties that Require Pre-Approval
- Bribery and Corruption

# Admission and Establishment of Investment | A Foray into History

- Treaty practice in the 19th century protected alien property not on the basis of an autonomous standard, but by reference to the domestic laws of the host state.

- Article 2(3) of the Treaty between Switzerland and the U.S. of 1850:

> *'In case of … expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other,* ***shall be placed on an equal footing*** *with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained'*

# Admission and Establishment of Investment | A Foray into History

- **Gunboat diplomacy** by capital-exporting States through which they imposed their view of international law on foreign governments.

- **1868: Carlos Calvo** published **Derehco International Teorico y Pratico de Europa y America**:

  - All the vagaries of domestic law
  - Foreigners must assert their rights before domestic courts; they have no right of diplomatic protection or access to international tribunals

- **1907: the Drago-Porter Convention** was adopted to prevent the use of force for the collection of debt.


Piraeus port, Greece, in 1913, O*ld Postcard*

# Admission and Establishment of Investment | A Foray into History

- **1910: the Calvo doctrine** remained at the margins of the debate, the dominant position being that a State was bound by rules of international law separate from national laws.

- **1910: Elihu Root**, from 'The basis of protection to Citizens residing Abroad':

> *'There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.*
>
> *The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.'*

Elihu Root, former Secretary of War and State, and Senator.

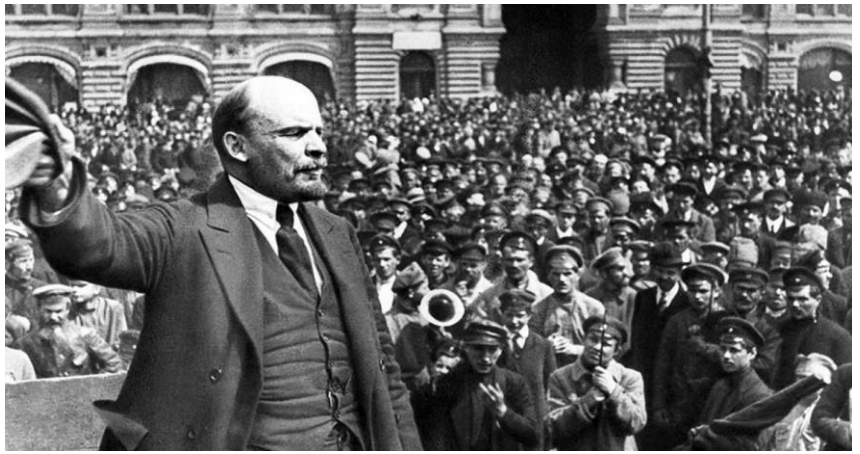
*This image is available from the United States Library of Congress's Prints and Photographs division*

# Admission and Establishment of Investment | A Foray into History

- **1917: The new-born USSR** expropriates enterprises without compensation and justifies the expropriation of alien property by reference to the national treatment standard.

- **The Lena Goldfields Arbitration:**

  - 12 February 1930, Lena Goldfields commences ad hoc arbitration against the USSR under the arbitration clause in a concession agreement
  - The concession had been granted by the USSR in 1925 in respect of gold mining previously conducted by Lena's Russian subsidiaries until their dispossession by the USSR government in 1918
  - May 1930: the USSR withdraws from the arbitration and instructs its arbitrator to step down
  - 2 September 1930: the remaining arbitrators release a large monetary award against the USSR
  - 1935: Settlement Agreement



Arriving at the Finland Station in Russia's former capital of Petrograd, *Wikicommons*

# Admission and Establishment of Investment | A Foray into History

- **1938:** Mexico nationalises the US interests in the Mexican agrarian and oil businesses.
- The dispute leads to a frank diplomatic exchange, in which the US Secretary of State Cordell Hull wrote a famous letter to his Mexican counterpart:

  '*The rules of international law allow expropriation of foreign property but require prompt, adequate, and effective compensation*'
- The Mexican position echoed the Calvo doctrine.
- The emergence of an international minimum standard:

  *"A wide-spread sense that the alien is protected against unacceptable measures of the host state by rules of international law independent of those of the host state".*

Signing of the U.S.-Canada Trade Agreement, 16 November 1935, archives

# Admission and Establishment of Investment | A Foray into History

DEVELOPMENTS AFTER THE WWII

- **1945-1990:** major confrontations between the newly independent states and the capital exporting states about the status of customary international law governing foreign investment

- **1962:** UN GA Resolution 1803:

  *'In the case of expropriation, appropriate compensation would have to be paid' [Neither the Hull rule nor the Calvo doctrine]*

# Admission and Establishment of Investment | A Foray into History

## 1974: UN GA New International Economic Order:

*'Each state has the right .. to nationalise, expropriate of transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures … In any case where the question of compensation gives rise to a controversy, it shall be settled under domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States …'*

UN General Assembly 1960, *archives*

# Admission and Establishment of Investment | A Foray into History

- After the upheaval of World War II, efforts were made to improve conditions for cross-border trade and promote international capital flows.

- The idea began to circulate that, in order to promote foreign investment in developing countries (many of them newly independent), a system was needed that would protect foreign investors from nationalisation and discrimination and give them the ability to enforce these protections against their host State without the sponsorship or involvement of their home government.

# Admission and Establishment of Investment | A Foray into History

- In December 1945, the United States called negotiations of a multilateral agreement for the reciprocal reduction of tariffs on trade in goods.
- In July 1945, the US Congress granted President Harry S. Truman the authority to negotiate and conclude such an agreement.
- In February 1946, UNESCO adopted a resolution calling for a conference to draft a charter for the International Trade Organization.
- In 1947-1948, the Havana charter was negotiated in Cuba, resulting in the "Final Act of the United Nations Conference on Trade and Employment".
- By 24 March 1948, over 50 countries signed it.
- The Havana Charter never came into force because the US never ratified it.

The Members recognize that:

(a) international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress;

(b) the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments;

(c) without prejudice to existing international agreements to which Members are parties, a Member has the right:

(i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;

(ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment;

(iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;

(iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;

Final Act of the United Nations Conference on Trade and Employment

# Admission and Establishment of Investment | A Foray into History

- Despite efforts like the Havana Charter (1947), the community of nations was unable to reach a consensus on the **substantive** protections and standards.
- But multilateralism was successful in **procedural** terms: there was broad-based agreement that international arbitration was the best form for the resolution of disputes between foreign investors and host States.
- Two arbitration-focused multilateral treaties were then concluded:
  - the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and
  - the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

# Admission and Establishment of Investment | A Foray into History | Backlash and Reform | UNCITRAL

## Key messages:

- Challenges posed by today's investor-State dispute settlement (ISDS) regime create momentum for its reform.
- Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.
- This note outlines five main reform paths.
  - Promoting alternative dispute resolution;
  - Tailoring the existing system through individual IIAs;
  - Limiting investor access to ISDS;
  - Introducing an appeals facility;
  - Creating a standing international investment court.
- Each of the five reform options comes with its specific advantages and disadvantages and responds to the main concerns in a distinctive way.
- Some of the options can be implemented through actions by individual governments and others require joint action by a larger group.
- The options that require collective action from a larger number of States would go further in addressing the existing problems, but would also face more difficulties in implementation.
- Collective efforts at the multilateral level can help to develop a consensus about the preferred course for reform and ways to put it into action.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series & Prof P Muchlinski

UNCTAD's Series on International Investment Agreements analyses the key concepts of core IIA provisions.

The ‘First-generation Pink Series’ or ‘Series One’ (1999-2005) sought to help countries participate as effectively as possible in international investment rulemaking.

The ‘Sequels’ or ‘Series Two’ update and complement this Series analysing how key issues in IIA provisions have evolved, particularly focusing on treaty practice and arbitral decisions.

In line with UNCTAD's mandate the Sequels analyse the development impact of IIA provisions and their respective formulations, and give policy options that strengthen the sustainable-development aspect of IIAs. Both generations represent a standard reference tool for IIA negotiators, policymakers, the private sector, academia and other stakeholders.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series & Prof P Muchlinski

- Peter Muchlinski is Emeritus Professor in International Commercial Law at the School of Oriental and African Studies (SOAS), University of London.
- Prior to joining SOAS he was Professor of Law and International Business at Kent Law School, University of Kent (2001-5).
- He has taught at the London School of Economics (1983-1998), and was the Drapers' Professor of Law in the Law Department of Queen Mary and Westfield College, University of London, from 1998 to 2001.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series

- It is the States' sovereign right, under customary international law, to control the entry and establishment of aliens within its territory.
- Such entry is a matter of domestic jurisdiction arising out of the State's exclusive control over its territory (Brownlie, 1998, p.522).
- Host States have a very wide margin of discretion when deciding on whether and under what conditions to permit the entry of foreign investors (Wallace, 1983, pp. 84-85).

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series

- Levels of the States' regulation of admission and control:

  - Domestic
  - International

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Domestic Legislation Levels

- Purpose to control entry of foreign investors for the host States:
  - a means of preserving national economic policy goals, national security, public health and safety, public morals and serving other important issues of public policy Domestic controls represent an expression of sovereignty and of economic self-determination, **whereby Governments judge FDI in the light of the developmental priorities of their countries rather than on the basis of the perceived interests of foreign investors.** (Dunning, 1993, ch. 20; Muchlinski, 1995, ch. 6).

- Levels of control vary from the most restrictive (prohibition of foreign investment either in certain industries or economy as a whole) to the most liberal (notification requirement, 'open-door' economies)

- 'Screening' by a dedicated foreign investment agency before foreign investment is accepted as such, and treaty protection is granted

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Measures of Control

1. **Controls over access to the host country economy**
   - Absolute ban on all forms of FDI (e.g. controls in some former centrally-planned economies prior to the transition process).
   - Closing certain sectors, industries or activities to FDI for economic, strategic or other public policy reasons.
   - Quantitative restrictions on the number of foreign companies admitted in specific sectors, industries or activities for economic, strategic or other public policy reasons.
   - Investment must take a certain legal form (e.g. incorporation in accordance with local company law requirements).
   - Compulsory joint ventures either with State participation or with local private investors.
   - General screening/authorization of all investment proposals; screening of designated industries or activities; screening based on foreign ownership and control limits in local companies.
   - Restrictions on certain forms of entry (e.g. mergers and acquisitions may not be allowed, or must meet certain additional requirements).
   - Investment not allowed in certain zones or regions within a country.
   - Admission to privatization bids restricted, or conditional on additional guarantees, for foreign investors.
   - Exchange control requirements.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Measures of Control | Prof P. Muchlinski

2. **Conditional entry into the host country economy**

**General conditions:**
- Conditional entry upon investment meeting certain development or other criteria (e.g. environmental responsibility; benefit to national economy) based on outcome of screening evaluation procedures.
- Investors required to comply with requirements related to national security, policy, customs, public morals as conditions of entry.

**Conditions based on capital requirements:**
- Minimum capital requirements.
- Subsequent additional investment or reinvestment requirements.
- Restrictions on import of capital goods needed to set up investment (e.g. machinery, software) possibly combined with local sourcing requirements.
- Investors required to deposit certain guarantees (e.g. for financial institutions).

**Other conditions:**
- Special requirements for non-equity forms of investment (e.g. BOT agreements, licensing of foreign technology).
- Investors to obtain licences required by activity or industry specific regulations.
- Admission fees (taxes) and incorporation fees (taxes).
- Other performance requirements (e .g. local content rules, employment quotas, export requirements).

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Measures of Control | Prof P. Muchlinski

1. **Controls over ownership**

   - Restrictions on foreign ownership (e.g. no more than 50 per cent foreign-owned capital allowed).
   - Mandatory transfers of ownership to local firms usually over a period of time (fade-out requirements).
   - Nationality restrictions on the ownership of the company or shares thereof.

2. **Controls based on limitation of shareholder powers**

   - Restrictions on the type of shares or bonds held by foreign investors (e.g. shares with non-voting rights).
   - Restrictions on the free transfer of shares or other proprietary rights over the company held by foreign investors (e.g. shares cannot be transferred without permission).
   - Restrictions on foreign shareholders rights (e.g. on payment of dividends, reimbursement of capital upon liquidation, on voting rights, denial of information disclosure on certain aspects of the running of the investment).

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Measures of Control | Prof P. Muchlinski

**3. Controls based on governmental intervention in the running of the investment**

- Government reserves the right to appoint one or more members of the board of directors.
- Restrictions on the nationality of directors, or limitations on the number of expatriates in top managerial positions.
- Government reserves the right to veto certain decisions, or requires that important board decisions be unanimous.
- 'Golden' shares to be held by the host Government allowing it, for example, to intervene if the foreign investor captures more than a certain percentage of the investment.
- Government must be consulted before adopting certain decisions.

**4. Other types of restriction**

- Management restrictions on foreign-controlled monopolies or upon privatization of public companies.
- Restrictions on land or immovable property ownership and transfers thereof.
- Restrictions on industrial or intellectual property ownership or insufficient ownership protection.
- Restrictions on the use of long-term (five years or more) foreign loans (e.g. bonds).

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Treaty Level | Prof P. Muchlinski

- The State's right to control admission and establishment contrasts with increasing pressures for market access and rights of establishment arising out of the process of globalization.

- The States' right to regulate access domestically is unrestricted, so there is no compulsion in law upon a prospective host State to grant such rights to foreign investors.

- On the other hand, States seeking to encourage FDI may restrict their discretion both domestically and through international agreements, by treaty clauses that guarantee rights of entry and establishment for foreign investors.

- The rights of admission, if granted, are treaty-based rights. They are not based in customary international law. They operate as exceptions to the general customary law principle that recognizes the right of States to admit or exclude aliens from the territory of the State.
  - National Treatment and MFN standards

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Treaty Level | Prof P. Muchlinski

- Most investment treaties follow the Admission and Establishment control model where it links the Admission and Establishment to the domestic laws of the host State.

- This model does not offer positive rights of entry and establishment, leaving the matter to national discretion.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Treaty Level | Prof P. Muchlinski

- The Agreement on Investment and Free Movement of Arab Capital among Arab Countries of 1970, reasserts, in article 3, each signatory's sovereignty over its own resources and its right to determine the procedures, terms and limits that govern Arab investment. However, by articles 4 and 5, all such investments are accorded NT and MFN once admitted.

- The 1987 ASEAN Investment Agreement follows the general practice in BITs and applies only to '*investment brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this agreement*.'

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Treaty Level | Prof P. Muchlinski

The combined National Treatment & MFN Model:

This model has its origins in United States BIT practice. The United States model BIT states in article II (1):

'*With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter 'national treatment'), or to investments in its territory of nationals or companies of a third country (hereinafter 'most favored nation treatment'), whichever is most favorable (hereinafter 'national and most favored nation treatment')*'

(United States model BIT 1994, in U N CTA D, 1996a, vol.III, p. 197; and UNCTAD, 1998b).

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Treaty Level

**Hong Kong ASEAN Investment Agreement (2017):**

**Article 1 Definitions**
**For the purposes of this Agreement:**

(b) covered investment means, with respect to a Party, an investment in its Area of an investor of any other Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, **and has been admitted, according to its laws, regulations and policies, and where applicable, specifically approved in writing by its competent authority;**

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Jurisdictional Issues

- Potential limits on consent to arbitration

  - *Tethyan v. Pakistan*

    - the treaty does not impose a strict legality or a formal admission requirement upon the asset but rather implies that, at the time the investment is made, **it must be accepted by the relevant authorities or officials representing the host State**
    - an investment that violates the host State's laws and investment policies and thus **does not fulfil the admission requirement is not an *investment* for the purposes of the treaty** and is thus not subject to the standards of protection under the treaty;
    - the non-fulfillment can be invoked by the host State as a defense against claims of the investor based on a violation of any standard of protection; however, it **cannot give rise to a liability of the investor** for a loss of opportunity as the respondent claims.
    - **even though the treaty does not link the admission requirement exclusively to the conduct of the investor, it is a general principle that the State cannot rely on its own failure to escape its liabilities under international law; reasons that are not within the investor's sphere of responsibility cannot deprive an investment of its protection under the treaty**

# Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1

**Article 1**
**Definitions 1. For the purposes of this Agreement:**

(a) ‘investment’ means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time and includes:

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Jurisdictional Issues

- Jurisdictional issues: treaties that require pre-approval of investments
  - *Rizvi v. Indonesia*
    - the plain and ordinary meaning of 'granted admission in accordance with' contemplates an admission procedure, culminating in a grant or denial of admission; in this case, the investment is required to be 'granted admission in accordance with' a particular piece of legislation
    - finds that the '*granted admission in accordance with*' includes investments granted admission pursuant to conditions imposed by Indonesia with respect to sectors that are open to investment, but finds that there is insufficient evidence that the claimant's investment was granted de facto admission
    - the BIT specifies that investments in the territory of the State only come within the scope of the treaty if they have been granted admission in accordance with State law; by its terms, Article 2(1) of the BIT is clearly a provision which stipulates a condition which must be fulfilled for the treaty beneficiary to have access to treaty protection
    - **Opinion of Professor Sornarajah finds that the view relating to admission being possible by having regard to the cumulative effect of a course of conduct does not fit the language of BIT Article 2(1), which requires admission at the point of entry; it is at the point of entry, that the legislation requires assessment of the suitability of the foreign investment, having regard to the economic policies of the host State**

# Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13

ARTICLE 2

**Scope of the Agreement**

(1) This Agreement shall only apply to investments by nationals o companies of the United Kingdom in the territory of the Republic o Indonesia which have been granted admission in accordance with the Foreig Capital Investment Law No. 1 of 1967 or any law amending or replacing it.

(2) In the event of the law of the United Kingdom making provision regarding the admission of foreign investment, investments by nationals o companies of the Republic of Indonesia in the territory of the Unite Kingdom made after the coming into force of such provisions shall onl enjoy protection under this Agreement if they have been admitted in accord ance with such provisions.

(3) The rights and obligations of both Contracting Parties with respe to investments made before 10 January 1967 shall be in no way affected b the provisions of this Agreement.

# Fundamental Concepts of Admission and Establishment | UNCTAD Pink Paper Series | Jurisdictional Issues

- *Churchill and Planet v. Indonesia* Decision on Jurisdiction finds that the admission requirement in both BITs is a one-time occurrence, a gateway through all investors must pass once; the admission requirement is consequently of a jurisdictional nature; it necessarily applies at the time of entry into the host State and not during the entire operation of the project

- *Al-Warraq v. Indonesia* Final Award agrees with the decision in *Rizvi v. Indonesia* that the BKPM administered process is not a requirement for the admission of foreign investments in the banking sector

# World Duty Free v Kenya | IISD Summary

- In June 2000, World Duty Free initiated ICSID proceedings against the Republic of Kenya. It alleged that Kenya had breached contractual obligations it owed the Claimant and had illegally taken the Claimant's property when, in relevant part, Kenyan officials ordered in 1989 that a court-appointed official take over management and control of World Duty Free. As a remedy, the Claimant sought restitution and damages, including lost profits and exemplary damages.

- At issue was a 1989 contract between the Claimant and Kenya, pursuant to which the Claimant would construct, maintain and operate duty-free complexes at two airports in Kenya. The 1989 Agreement also contained an arbitration clause providing that, if there were a dispute between the parties, the parties would submit it to ICSID for resolution by an arbitral tribunal pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

- In December 2002, the Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement. Upon discovery of that information, Kenya sought to dismiss the Claimant's case on the grounds that, because the relevant contract had been procured through payment of a bribe, the contract was void and unenforceable as a matter of public policy. Based on those developments, in December 2004 the Tribunal declared that the parties had to address, and it had to decide, certain fundamental issues— namely, (1) whether a bribe was paid by the Claimant to the former president, (2) if so, whether the 1989 Agreement was procured as a result of the bribe and (3) if the Agreement had been obtained by the bribe, whether it was valid and enforceable under applicable domestic laws and public international law (para. 129).

- Based on its assessment of the facts and relevant principles of domestic and international law, the Tribunal held the Claimant had in fact procured the 1989 Agreement through a bribe to the former Kenyan President and that, consequently, the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

# World Duty Free v Kenya | Award Extracts

133. Nevertheless, the Parties differ on the way in which they qualify that payment. Kenya considers that it is a bribe given in order to obtain the Agreement on which the claims are based. World Duty Free considers it a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of Harambee; the Claimant recalls that this system is "largely anchored in cultural practices when people are able to pull whatever resources they have, 'in particular' to finance community projects".

134. The Tribunal is aware of the fact that, on the occasion of visits to heads of State, gifts are often exchanged as a matter of protocol. It has also noted the report of the Task Force on Public Collections or "Harambees" presented in December 2003 to the Minister of Justice of Kenya. According to this report "the concept of Harambee had its root in the African culture where societies made collective contribution toward individual or communal activities" and this practice became popularised by President Kenyatta just after Kenyan independence. However, the report adds that "over the years, the spirit of Harambee has undergone a metamorphosis which has resulted in gross abuses. It has been linked to the emergence of oppressive and extortionist practices and entrenchment of corruption and abuse of office".

# World Duty Free v Kenya | Award Extracts

142. In this respect, the Tribunal first notes that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries. This was the case in Kenya in particular in 1989, under the Kenyan Prevention of Corruption Act of 1956, and is still the case under the Anti-Corruption and Economic Crimes Act of 2003.

144. The same trend can be observed in Africa: on 11 July 2003, in Maputo, Mozambique, the Heads of States and Governments of the African Union approved a Convention on Preventing and Combating Corruption10, which has been signed by 39 African States (including Kenya) and has already been ratified by 11 of these 39 States. In this Convention, the Member States of the African Union declare themselves "concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples". They "acknowledge that corruption undermines accountability and transparency in the management of public affairs as well as socioeconomic development in the continent".

# World Duty Free v Kenya | Award Extracts

157. In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.

172. It is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction. Nonetheless the Tribunal notes the approach taken by the English House of Lords in *Kuwait* v *Iraqi Airways (Nos 4 & 5)* [2002] AC 883 at 1100ff, as expressed by Lord Steyn in paragraphs 111-116. The House of Lords there declined to recognise as a matter of English public policy a local Iraqi law (as part of the applicable law) which formed part of flagrant breaches of international law by Iraq. Lord Steyn, invoking "l'ordre public véritablement international" relied on, inter alia, the "magisterial paper" by Professor Pierre Lalive cited by the Tribunal earlier in this Decision (at paragraph 139 above). If it had been necessary, therefore, the Tribunal would likewise have been minded to decline in the present case to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy and (if different) English public policy as part of English law

# Admission and Establishment of Investment | Conclusion

- It is the States' sovereign right, under customary international law, to control the entry and establishment of aliens within its territory
- Voluntarily adjusted to attract foreign investment
- May lead to jurisdictional issues
- Matters of policy