



PUSHING THE BOUNDARIES OF PRO BONO

*Meeting the Needs of Sovereign States for Investor-State Dispute Settlement
and Treaty Renegotiation in a Time of Pandemic*

- 24 September 2021 -

Housekeeping

- Please include your name and organization, institution, firm, or company under the virtual video of yourself.
- Please leave your videos on when reasonably possible so that Participants can see one another.
- *Discussion will be informal – **please put your questions in the chat box to be addressed after the main presentation.***



Session Description

- *Welcome from The Global Pro Bono Bar Association.*
- *Session Objective:*
 - *This session invites attendees to think about pro bono in a new way, challenging preconceptions about what constitutes pro bono work.*
- *Disclaimer:*
 - *This presentation is not offered as legal advice, which should be obtained only from properly licensed legal professionals on the basis of the specific facts of a given case. All natural persons, legal entities and events described herein are fictional. Any similarity to actual persons, entities or events is coincidental.*

Session Description

- *Focus of Discussion:*
 - *The mobilization of unique pro bono resources from civil society, the private sector & public authorities by the International Development Law Organization's Investment Support Programme for Least Developed Countries (ISP/LDCs).*
 - *This mobilization helps to meet the needs of least-developed countries through the provision of pro bono legal advice or representation.*
 - *This work is needed in preparation for the wave of pandemic-related claims anticipated to be asserted by foreign investors under international investment treaties and other legal instruments.*

Agenda

- Introductions of Presenters and Participants
 - Ice-Breakers: Pro Bono Conceptions & the COVID-19 Pandemic
- Topical Presentations & Discussion
 - Overview of Pandemic-Related Investment Disputes (Rob Houston)
 - Overview of the Work of the IDLO's ISP/LDCs (Alessandra Mistura)
 - A Practitioner's Perspective: Providing Pro Bono Support to the IDLO's ISP/LDCs (Louise Bond)
 - Pro Bono Legal Assistance in Global Economic Development (Marisa Razeek)
 - Q&A / Group Discussion
- Break / Stretching
- Group Exercise: Doing "Pro Bono" Work in Public International Law
- Audience Reaction Session
- Conclusion

Introductions

30-Second Presenter Self-Introductions

- Questions:
 - Who?
 - Role and Organization? Where?
 - Connection to ISP/LDCs?
 - Fun Fact?
- Presenters:
 - **Nicole Fraser**, The Global Pro Bono Bar Association (Facilitator)
 - **Marisa Razeek**, MEND Associates
 - **Alessandra Mistura**, International Development Law Organization
 - **Rob Houston**, The Global Pro Bono Bar Association
 - **Louise Bond**, K&L Gates LLP

Ice-Breakers: Pro Bono Conceptions & the COVID-19 Pandemic


Ice-Breaker No. 1

- Three volunteers:
 - What is your name?
 - What is your country?
 - What kind of legal work do you consider to be “pro bono”?



Ice-Breaker No. 2

- Three other volunteers:
 - What is your name?
 - What is your country?
 - What are some examples of laws put in place in your jurisdiction to fight the spread of COVID-19?
 - What impact do these laws have on foreign investors?
- For other participants:
 - Through a show of hands, have similar pandemic-related laws have been put in place in your own jurisdiction?



What laws have been put in place in your jurisdiction to fight the spread of COVID-19?

Overview of Pandemic-Related Investment Disputes (Rob Houston)

Terminology

- International Investment Agreements (**IAs**)
- IAs include:
 - Bilateral Investment Treaties (**BITs**)
 - Multilateral Investment Treaties (**MITs**)
 - Treaties with Investment Provisions (**TIPs**), such as Free Trade Agreements (**FTAs**)
- Many IAs provide the consent of States to Investor-State Dispute Settlement (**ISDS**), such as investor-State arbitration.
- The United Nations Conference on Trade and Development (**UNCTAD**) is one key source of information.
- The State in the territory of which an investment is made is the “**Host State**”.



The Investment Treaty Landscape



Investor-State Arbitration

- Dispute in Public International Law.
- Parties:
 - Investor as claimant.
 - Host State itself as respondent.
- Consent = Basis of Tribunal Jurisdiction:
 - Host State consent via an IIA (like the EO-WS BIT), domestic legislation, or contract.
 - Investor consent often in the process of satisfying pre-arbitral requirements under the terms of the relevant IIA.
- Arbitrators issue binding awards instead of court-issued judgments.
- Enforcement is directly against certain assets of the Host State and can be pursued in multiple jurisdictions (depending on local law and applicable treaties).



Substantive Protections

- Which substantive protections are available depends on the relevant IIA or other legal instrument.
- Common standards of substantive protection include:
 - **Fair & Equitable Treatment (FET)**
 - **Full Protection & Security (FPS)**
 - **Expropriation**
 - **Most-Favoured Nation (MFN)**
 - **National Treatment (NT)**
- Some IIAs also feature umbrella clauses.



Limitations on Claims

- The scope of claims available to investors is often subject to the following types of limitations:
 - Jurisdictional (i.e., going to the tribunal)
 - Admissibility (i.e., going to the claim)
- In addition, limitations may be characterized as follows:
 - Ratione Temporis = based on time
 - Ratione Personae = based on the person
 - Ratione Materiae = based on subject matter



Procedural Rules

- Procedural rules are determined by the IIA or other legal instrument and may be either institutional or *ad hoc*.
- Institutional arbitration rules may include:
 - The International Centre for Settlement of Investment Disputes (**ICSID**) Arbitration Rules; or
 - The Arbitration Rules of the United Nations Commission on International Trade Law (**UNCITRAL**)



Pandemic ISDS

- Governmental measures taken to fight the COVID-19 pandemic may also be seen to have breached substantive investment treaty obligations.
- Such governmental measures may include:
 - Restrictions on travel and tourism
 - Restrictions on international trade
 - Etc.
- The full impact of the pandemic on ISDS claims for Host States (including developing States) will not be known for years to come.



Overview of the Work of the IDLO's ISP/LDCs (Alessandra Mistura)

ISDS CHALLENGES FOR LDCs

Capacity Constraints

Resources Constraints

IAs Negotiation

Case Staffing

Investment Policy-Making

Cost, Quality and Control

Domestic Implementation of IIA Obligations

Solving ISDS at Early Stages

Ongoing Engagement and Treaty Management

Appointing Arbitrators and Handling Cases



EXISTING SUPPORT MECHANISMS FOR LDCS

1 Advisory Centre on WTO Law

- Beneficiaries are developing countries and LDCs
- Provides assistance in the form of:
 - Legal advice on WTO law
 - Support during WTO dispute settlement proceeding;
 - Capacity-building for government officials

2 Financial Assistance Fund, PCA

- Only provides eligible beneficiaries with financial assistance to meet costs of dispute settlement procedures administered by the PCA
- Assistance is subject to availability of funds
- Eligible costs include:
 - Fees and expenses of the arbitral tribunal
 - Expenses relating to award implementation
 - Counsels and expert fees

3 ICJ's Dispute Settlement Trust Fund

- Only provides eligible beneficiaries with financial assistance
- Assistance is also subject to availability of funds
- Eligible costs include expenses for:
 - Memorial and replies
 - Counsels and expert fees
 - Oral proceedings
 - Evidence
 - Execution of judgments

4 Regional Mechanisms

- **ALSF** (Africa)
 - Provides legal advice and technical assistance to African countries
 - Focuses on negotiation of commercial transactions, creditor litigation, and other related sovereign transactions or disputes
- **UNASUR Project** (South America)
 - Aims to establish a regional dispute advisory centre on investment law
 - Focuses on consultation and mediation, as opposed to ISDS

IDLO INVESTMENT SUPPORT PROGRAMME FOR LDCs

Overview

- Provides **legal and technical assistance**, and **complementary capacity building**, to LDC governments and SMEs on investment-related matters, including negotiations and dispute settlement.
- Conceived and designed by IDLO and UN-OHRLLS and funded by the **European Union**.
- Assistance is provided at **no cost** for and **on express request** from the beneficiaries.
- Roster of Experts available to provide investment-related assistance on a *pro bono* or reduced-fee basis

Partners



A Practitioner's Perspective: Providing Pro Bono Support to the IDLO's ISP/LDCs (Louise Bond)

Pro Bono Legal Assistance in Global Economic Development (Marisa Razeek)



Pro Bono Legal Assistance in Global Economic Development

An ASEAN Perspective

*Marisa Razeek
MEND Associates*



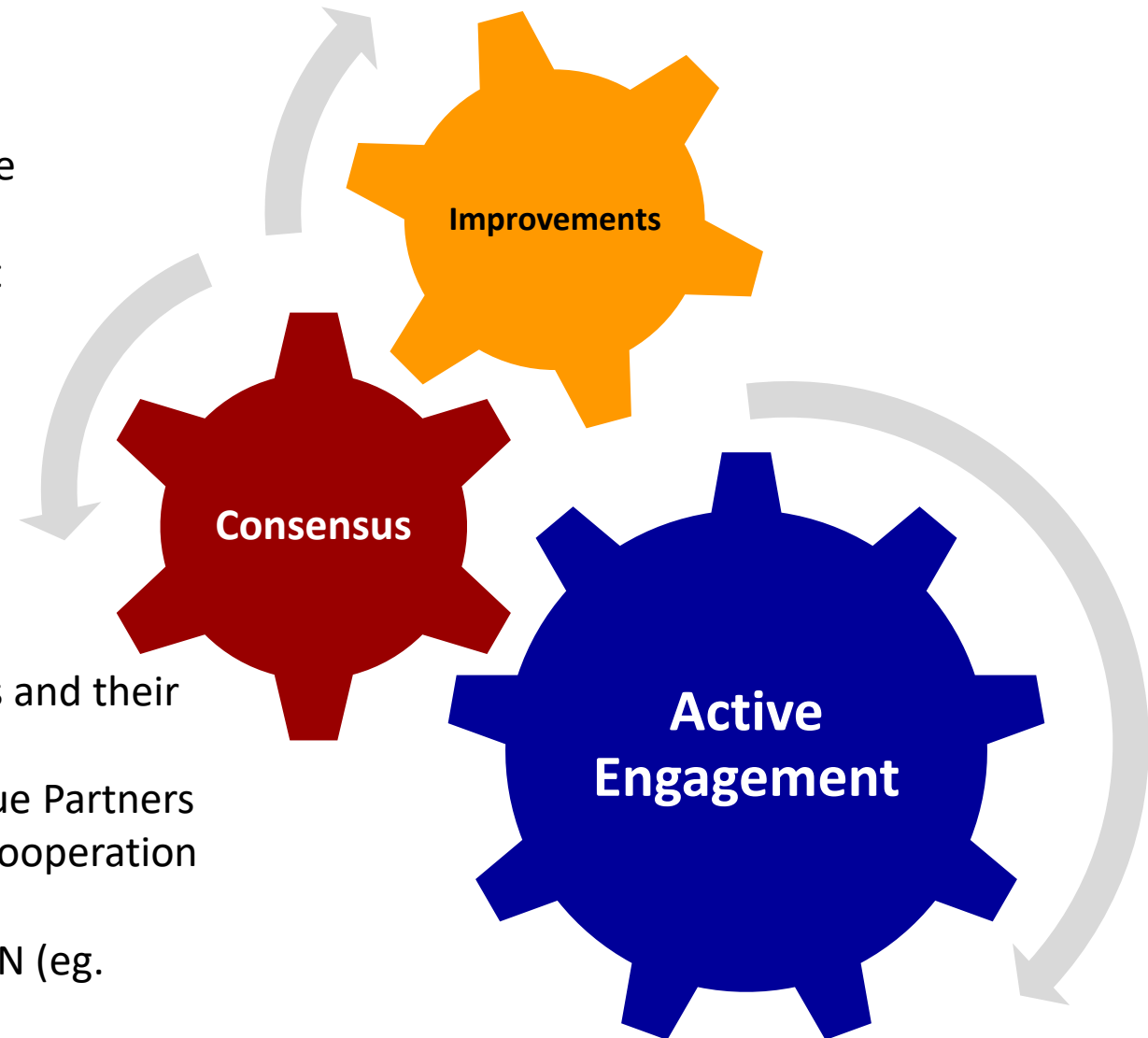
ASEAN Organs & Mechanisms

- ASEAN Leaders adopted recommendations of the High-Level Task Force on Reviewing the ASEAN Organs and Strengthening the ASEAN Secretariat

ASEAN Way

All decisions are based on consensus & consultations

- Under each ACC, there are Sectoral Ministerial Bodies and their subsidiaries
- Each ASEAN Organ is actively engaged with its Dialogue Partners & other external parties to pursue ASEAN economic cooperation & external engagements
- Close engagement with entities associated with ASEAN (eg. AIPA, ABAC & ALA)

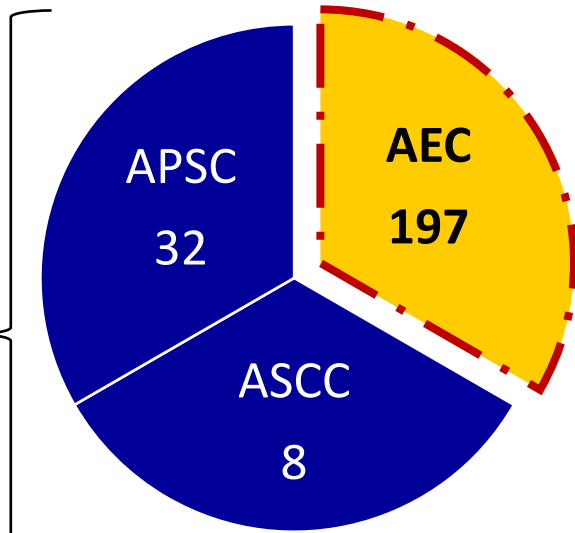




Integration agenda & policies made with:

- Non-legally binding: Statements, Declarations, Communiques, etc.
- Legally binding: Treaties, Agreements, Protocols, MOUs, etc

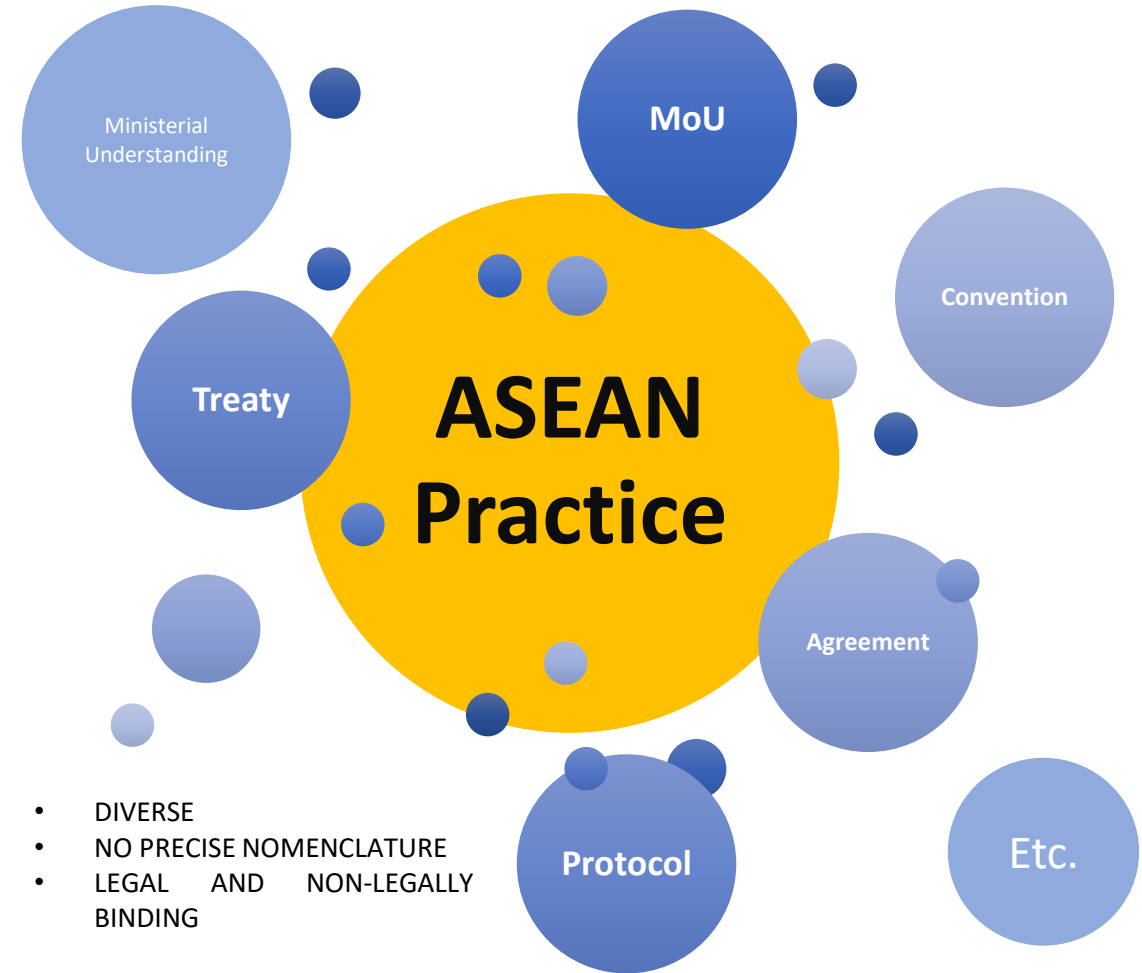
March 2019: 237 ASEAN Legal Instruments concluded



Practical Reporting System

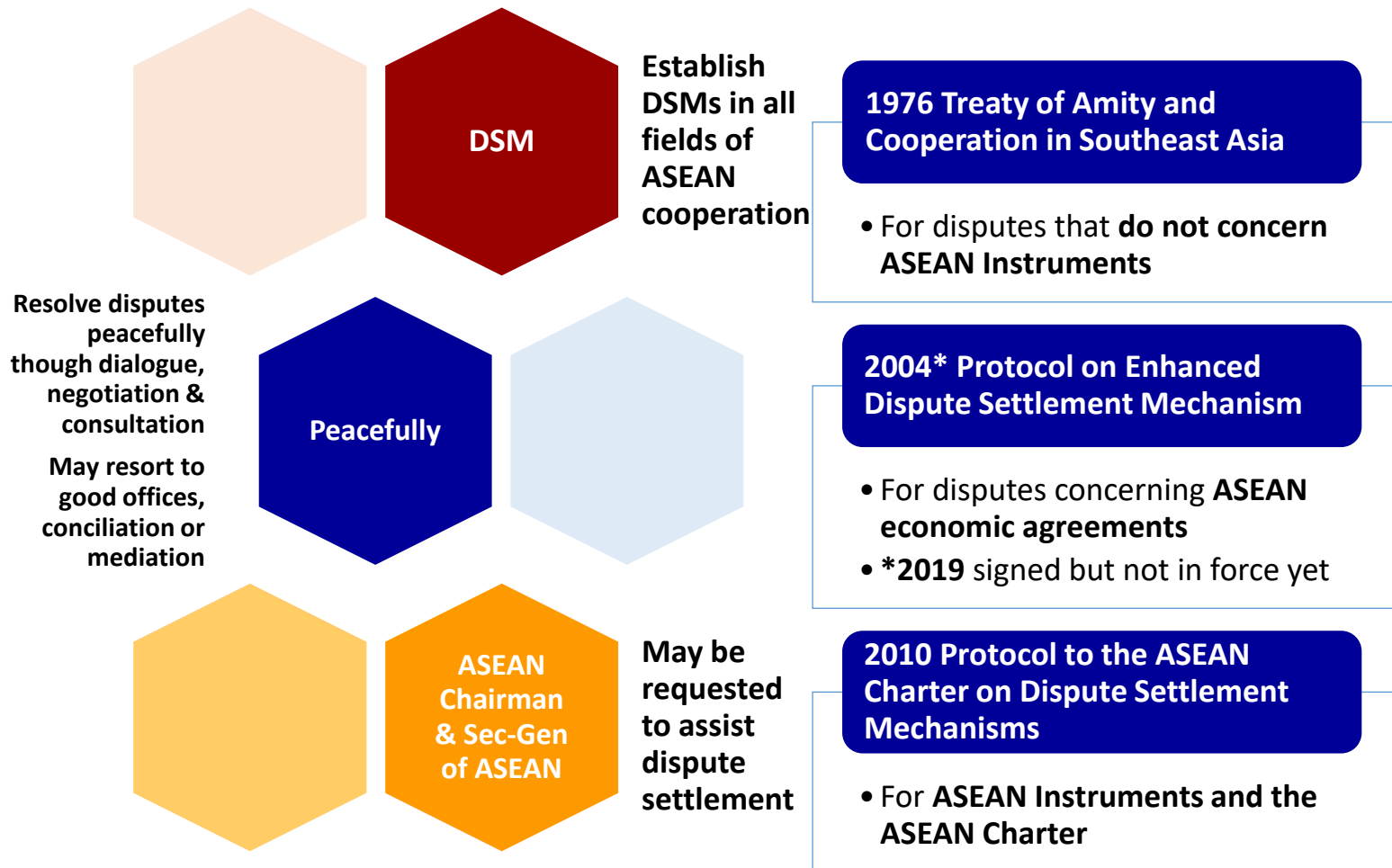
- Annual reporting from AMS on their ratification and domestic implementation
- Recommended by the HLTF on Reviewing the ASEAN Organs and Strengthening the ASEAN Secretariat
- To have a robust reporting system on the legal status of ASEAN legal instruments and their implementation
- System developed based on internal data collection that services the various ASMBs
- Overall – ASEAN legal instruments are well implemented

Types of ASEAN Legal Instruments





Dispute Settlement Mechanisms

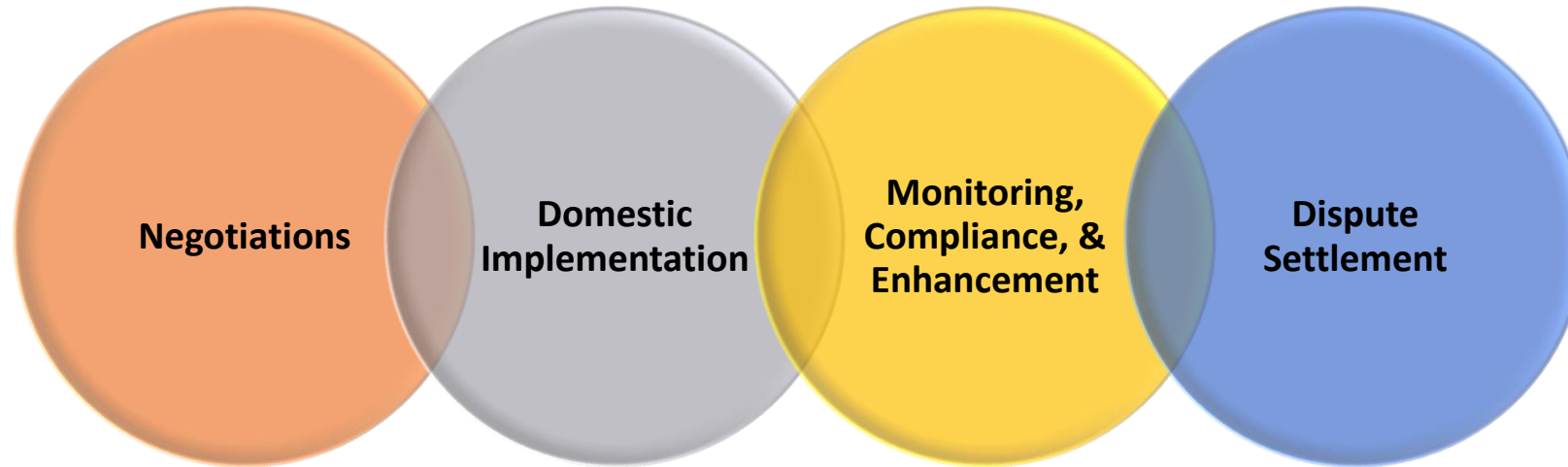


DSM Funding

- Art. 20 EDSM Protocol houses the DSM Fund which has equal contribution from AMS; in 2004, initial contributions were US\$33,300 per AMS
 - If any AMS uses the DSM Funds, that AMS will need to replenish funds taken
- Although ASEAN DSMs are well established from TAC to Enhanced DSM with clear procedures and timelines, for some reason, **AMS have never resorted to such mechanisms as yet.**
- Until now, all disputes between AMS have been resolved through consultations did not require adjudication processes.
 - The question is: Is this good or bad?



Pro Bono Assistance Can Enhance Trade & Investment Linkages & Development



- To encourage **updates in treaty obligations** in line with recent global disputes or cross-subject matters e.g. inclusion of traditionally non-trade matters into trade and investment obligations, such as environmental and labour considerations

- To assist **transposing international obligations** into domestic (federal, state, local) laws and regulations
- **Dissemination and training to state and local policymakers** on impact of decisions on trade and investment agreements

- **Treaty research** in preparation for updates and future amendments
- Assistance to ensure government-related entities are aware of regulatory implications
- **Regulatory impact assessments (unbiased)**

- Encourage clarification, development, and evolution of treaties
- **Coverage to include developing countries instead of only least-developed countries**
- Dispute may be solved quicker if countries worried less of financial implications of DSM
- For ASEAN, can also improve the usage of the DSM Protocols and enhance the involvement of the ASEAN Secretariat akin to the WTO DSB

MEND

Thank you.

Q&A / Group Discussion

Break / Stretching

Group Exercise: Doing “Pro Bono” Work in Public International Law

Training Scenario

- ***Western Patriapauperum* (WS)** is a land-locked developing State with a per capita GDP of approximately USD 500.
- ***Eastern Opulentus* (EO)**, on the other hand, is a prosperous developed State with a per capita GDP of approximately USD 42,000.



Training Scenario - Timeline

- **1992:** The EO-WS BIT
 - EO proposes the terms of its model BIT to WS as a way of promoting and protecting foreign investment, and EO and WS sign the terms as the EO-WS BIT.
 - The terms of the EO-WS BIT provide broad protection to covered investors of EO when making covered investments into WS.
 - The terms also provide Host State consent to investor-State arbitration under the UNCITRAL Arbitration Rules.
- **1993:** The BIT enters into force and continues with no change today.

Training Scenario - Timeline

- **2015:** The Eastern Opulentus Mining Company (EOMC).
 - Receiving reports of significant deposits of rare-earth minerals in the territory of WS, EOMC approaches WS regulators to propose undertaking a mining concession agreement.
 - EOMC's proposed operation is initially rejected by WS environmental authorities, but is later approved after large cash donations in USD arrived anonymously at the headquarters of the WS Prime Minister's political party.
 - WS signed a 90-year concession agreement with EOMC for exploration and extraction of any rare-earth minerals found by EOMC.

Training Scenario - Timeline

- **2016 - 2017:** EOMC's Investment & Operations.
 - EOMC disregards international best practices in establishing a mining operation that results in substantial environmental degradation and pollution of the local groundwater.
 - Significant birth defects are reported among members of the local population that receive their drinking water from the local groundwater reservoir.
 - EOMC's local management knowingly employs forced labour in operating the investment and overlooks sexual slavery conducted on its site of operations.

Training Scenario - Timeline

- **2018:** The Public Response.
 - As a result of negative publicity arising from EOMC's questionable record of corporate social responsibility, members of the local community and local and international NGOs call upon the Government of WS to terminate the concession contract with EOMC.
 - The Government of WS meets with EOMC to discuss termination of the concession contract, but EOMC threatens to initiate investor-State arbitration against WS seeking USD 1.5 billion in damages, including lost profits.
 - Ultimately, no action is taken by the Government of WS.

Training Scenario - Timeline

- **2020: The Pandemic Response.**
 - The COVID-19 pandemic took a significant toll on the widely unvaccinated population of WS, and in response, the Government of WS suspended operation of all concession agreements involving large numbers of workers (including that of EOMC).
 - After six months of suspended operations, the Government of WS terminates the concession contract under the contract's *force majeure* clause.
 - EOMC initiates investor-State arbitration against the Government of WS, alleging breach of various protections under the EO-WS BIT.

Training Scenario - Timeline

- **2021:** Pro Bono Support.
 - The Government of WS requested technical support from the ISP/LDCs.
 - The ISP/LDCs issued a call for proposals from its partner law firms.
 - Your public interest law firm responded and received the assignment.
 - You have been tasked as follows:
 - 1) Review the merits of EOMC's claims under the EO-WS BIT; and
 - 2) Assist the Government of WS in revising the EO-WS BIT to reduce the risk of such claims in the future (e.g., for the next pandemic).

Question 1: Investor

- *If the text to the right were in the EO-WS BIT, would EOMC be a covered investor?*

(e) "investor" means:

- (i) any natural person possessing the citizenship of or permanently residing in one Contracting Party in accordance with its laws; or*
- (ii) any enterprise incorporated or duly constituted in accordance with applicable laws of one Contracting Party, who makes the investment in the territory of the other Contracting Party.*

Source: Article 1(e), Canada-Lebanon BIT (1997), available at UNCTAD.org
(<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/620/download>).

Question 2: Investment

- *If the text to the right were in the EO-WS BIT, would the concession contract be a covered investment?*

ARTICLE 1

Definitions

For the purposes of this Agreement

- (a) “ investment ” means every kind of asset and in particular, though not exclusively, includes :**
- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;**
 - (ii) shares, stock and debentures of companies or interests in the property of such companies;**
 - (iii) claims to money or to any performance under contract having a financial value;**
 - (iv) intellectual property rights and goodwill;**
 - (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;**

Source: Article 1(a), Cameroon-UK BIT (1982), available at UNCTAD.org
(<https://investmentpolicy.unctad.org/international-investment-agreements/countries/34/cameroon>).

Question 3: FET / FPS

- *If the text to the right were in the EO-WS BIT, would WS have breached its public international law obligations under the EO-WS BIT?*
 - *What would the Investor say?*
 - *What would the Host State say?*

Article 4 Protection of investments

1. *Each Contracting Party shall at all times ensure fair and equitable treatment to investments.*
2. *Each Contracting Party shall, subject to its laws, grant full legal protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments through unjustified or indiscriminate measures.*

Source: Article 4(1-2), Argentina-Australia BIT (1995), available at UNCTAD.org (<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/72/download>).

Question 4: Defences

- Host States have defences in customary international law as reflected in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (**ILC Articles**).
- These defences include force majeure (see ILC Article 23).
- Would WS have a defence for any action it may have taken in breach of its obligations under the EO-WS BIT based on force majeure?
 - What would the Investor say?
 - What would WS say?

Article 23 Force majeure

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*
2. *Paragraph 1 does not apply if:*
 - a) *the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or*
 - b) *the State has assumed the risk of that situation occurring.*

Source: ILC Articles on the Responsibility of States for Internationally Wrongful Acts, available at UN.org (https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

Question 5: Treaty Revision

- *Based on the discussion above, how would you advise the Government of WS to consider revising and re-negotiating its BIT with EO?*



Conclusion: A Reflective Discussion

Reflective Discussion

- Traditional Conceptions of “Pro Bono”
 - Limited court representation (e.g., traffic court or sentence mitigation)
 - Research for NGOs
 - Legal Advice Clinics
 - Mediation of Neighbourhood Disputes
 - Etc.
- BUT: Assisting LDCs with needed legal advice and representation is also “pro bono” work.
- What other types of non-traditional legal work should be included in our understanding of “pro bono”?



How to Get Involved

- Thank you for your kind attention in today's session. Please visit us at www.probonobar.org.
- The secret word is...
- Get involved! Please feel free to contact us via email to learn more:
 - **Rob Houston:** rob@probonobar.org
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 - **Marisa Razeek:** marisaaisha.mend@gmail.com
 - **Nicole Fraser:** nicole.fraser@probonobar.org
 - **Louise Bond:** louise.bond@klgates.com



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