




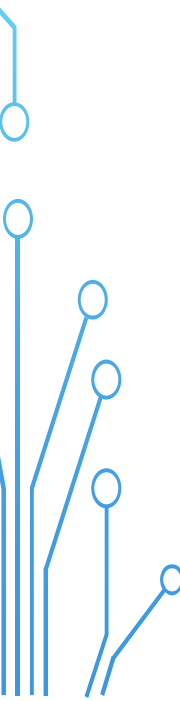

12<sup>TH</sup> ASIAN LAW INSTITUTE CONFERENCE

# CONSOLIDATION OF CLAIMS ARISING UNDER AN INTERNATIONAL INVESTMENT AGREEMENT: WHAT IS AT STAKE?

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## Introduction

- Claims arising under the **same** international investment agreement or IIA.
  - Under the same IIA, multiple claims arise because:
    - (1) Scope of the term 'investor';
    - (2) State-measures tend to affect more than an investor; they affect an industry or group of enterprises.
  - In this presentation:
    - (a) Did IIAs typically address consolidation?
    - (b) Model 1: NAFTA
    - (c) Model 2: ACIA
    - (d) Interpreting the qualifiers
    - (e) Can a party or tribunal unilaterally consolidate?
    - (f) Concluding analysis
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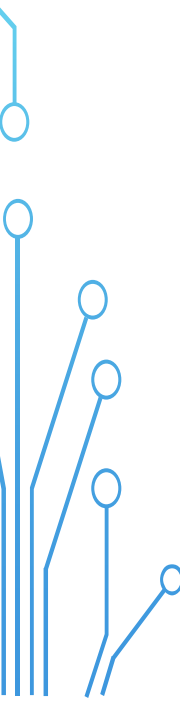
## Did IIAs typically address consolidation?



### **Singapore-UK IIA (1975)**

*Article 8:* Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submits to [ICSID] for settlement by arbitration under [the ICSID Convention] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of other Contracting Party shall be treated...as a company of the other Contracting Party...”



# Model 1: NAFTA

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investment matters. The roster members shall be appointed by consensus and without regard to nationality.

## **Article 1125: Agreement to Appointment of Arbitrators**

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

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3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing investors against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

# Model 2: ACIA



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ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future;

**REAFFIRMING** the need to move forward from the AIA Agreement and the ASEAN Agreement for the Promotion and Protection of Investments signed in Manila, Philippines on 15 December 1987 ("ASEAN IGA"), as amended, in order to further enhance regional integration to realise the vision of the ASEAN Economic Community ("AEC");

## Article 37 Consolidation

Where two or more claims have been submitted separately  
to arbitration under Article 32 (Claim by an Investor of a

## Article 37 Consolidation

Where two or more claims have been submitted separately to arbitration under Article 32 (Claim by an Investor of a Member State) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

1. Subject to paragraph 2 and 3, the disputing member State may make publicly available all awards, and decisions produced by the tribunal.

2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

## Interpreting the Qualifiers: “law or fact in common”?

**CANFOR CORPORATION  
V.  
UNITED STATES OF AMERICA**

**TEMPEC ET AL  
V.  
UNITED STATES OF AMERICA**

**UNITED STATES OF AMERICA  
V.  
TERMINAL FOREST PRODUCTS LTD.**

### **ORDER OF THE CONSOLIDATION TRIBUNAL**

Before the Arbitral Tribunal established under Article 1126 of the NAFTA and comprised of:

Professor Armand L.C. de Mestral, Arbitrator  
Davis R. Robinson, Esq., Arbitrator  
Professor Albert Jan van den Berg, Presiding Arbitrator

Secretary of the Tribunal: Mr. Gonzalo Flores, ICSID

Washington, D.C., 7 September 2005

“...an objective, fact-driven standard which an Article 1126 Tribunal can apply as it deems appropriate under the circumstances. Determining what is efficient under Article 1126(2) is not an accounting exercise of drawing up a matrix of comparative advantages and disadvantages and applying relative weighing factors.”

“...('Fair') That requirement indicates that the interests of all parties involved should be balanced in determining what is the procedural economy in the given situation. For example, a balance needs to be struck between a hearing that is longer for one party but at the same time shorter for another...”



## Can a party or tribunal unilaterally consolidate?



*Illustrative example:*

- Security interests in bonds issued by Country Y
- Investors are nationals of Company X
- Country Y takes a measure that deprives holders of security interests in bonds issued of much of their value
- Many investors of Country X nationality bring arbitral claims under Y-X BIT. They do so jointly.
- Respondent State, Country Y, objects
- The treaty or any other relevant instrument does not address consolidation

Issue: How should the tribunal respond?



# Can a party or tribunal unilaterally consolidate?

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

In the proceedings between  
**GIOVANNI ALEMANNI AND OTHERS**  
(CLAIMANTS)

- and -

**THE ARGENTINE REPUBLIC**  
(RESPONDENT)

(ICSID Case No. ARB/07/8)

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## DECISION ON JURISDICTION AND ADMISSIBILITY

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**Members of the Tribunal**  
Sir Franklin Berman KCMG, QC, President  
Professor Karl-Heinz Böckstiegel, Arbitrator  
Mr J. Christopher Thomas QC, Arbitrator

*Secretary of the Tribunal*  
Ms Anneliese Fleckenstein

*Date of Dispatch to the Parties: November 17, 2014*

INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

**ABACLAT AND OTHERS**  
(Case formerly known as **GIOVANNA A BECCARA AND OTHERS\***)  
(CLAIMANTS)

and

**THE ARGENTINE REPUBLIC**  
(RESPONDENT)

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## DECISION ON JURISDICTION AND ADMISSIBILITY

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**ARBITRAL TRIBUNAL**  
Professor Pierre Tercier, President  
Professor Georges Abi-Saab, Arbitrator  
Professor Albert Jan van den Berg, Arbitrator

Secretary to the Tribunal:  
Mr. Gonzalo Flores

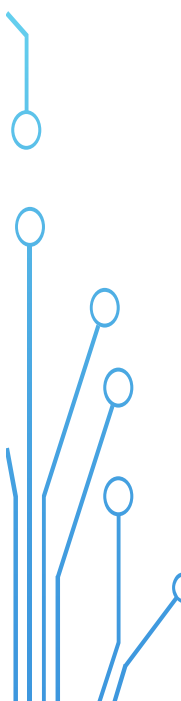
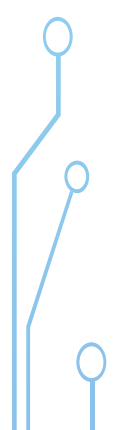
Date of dispatch to the Parties: 4 August 2011





## Concluding Analysis



1. If the State-parties want the tribunal to possess the power to consolidate, it must provide for this in the IIA.
  2. Moreover, it should include detailed requirements to guide the steps in the tribunal's approach to the question of whether to consolidate. "Efficiency and fairness" should be supplemented by posited procedure so that the balancing exercise is not exclusively in the tribunal's discretion.
  3. IIAs should give tribunals constituted under it the power to consolidate upon request of one party AND on its own unilateral motion. As to the latter, strict requirements, and limited to claims arising under that IIA.
  4. In any, State-parties should provide in the IIA procedural directions for consolidated proceedings and/or right to approach State-parties collectively on such questions.
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# Thank You!

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