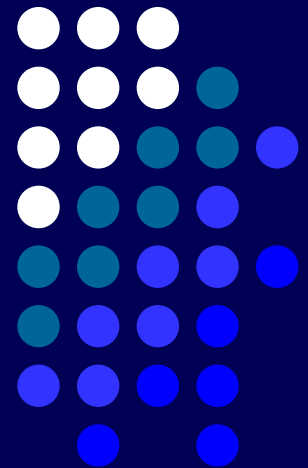
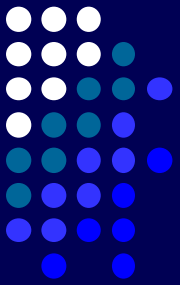


Award as an Investment: The Value of an Award or the Cost of Non- Enforcement

Professor Loukas Mistelis
School of International Arbitration
Queen Mary University of London

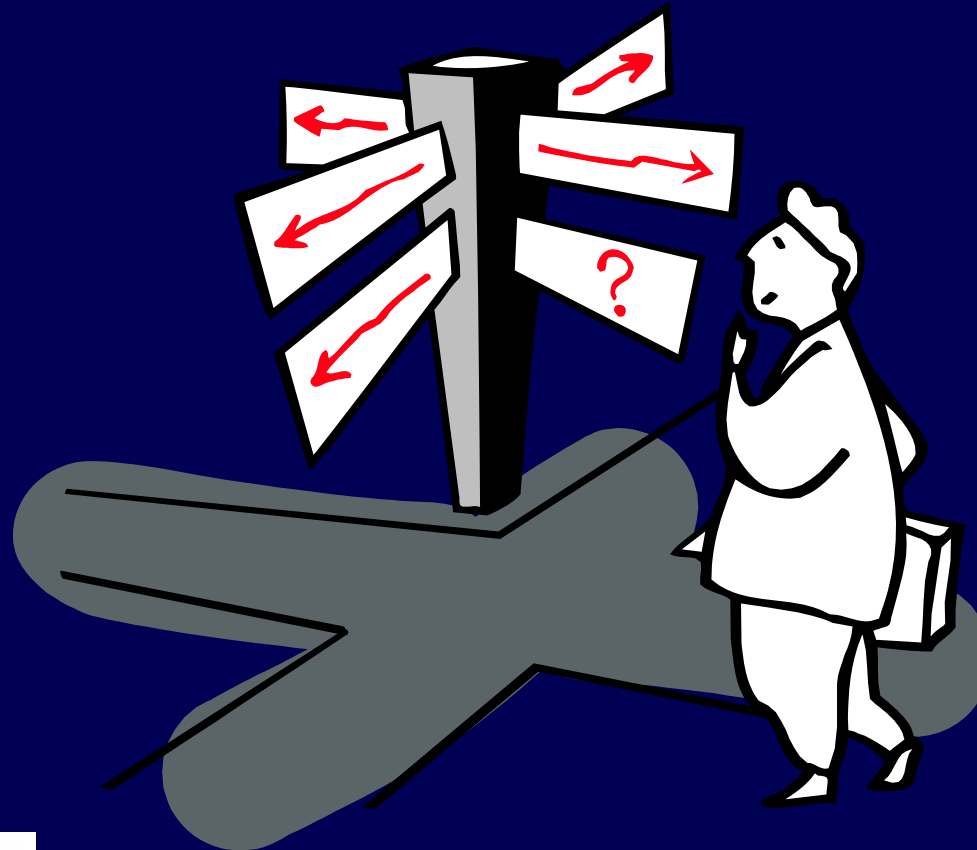


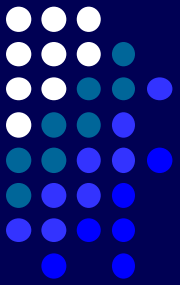
Kiev Arbitration Days 16 November
2012



WHAT NEXT

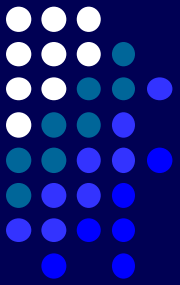
- What happens after you get an award?





What is an award?

- An arbitral award
 - Concludes the dispute as to specific issues determined in the award, it has res judicata effect between the parties and terminates the tribunal's jurisdiction (if it is final)
 - Disposes the parties' respective claims
 - It may be challenged at the courts of the place of arbitration
 - It may be challenged in the courts at the place of arbitration

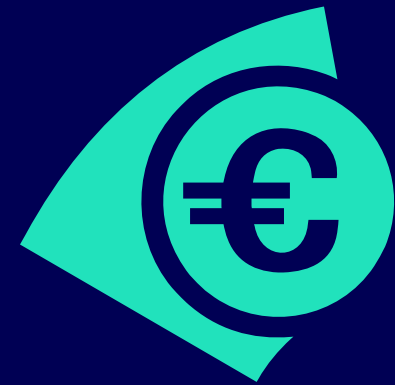
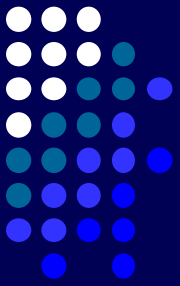


Award: legal nature ?

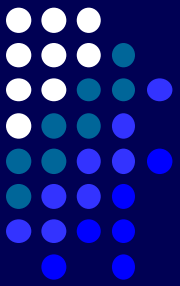
- A promise to pay?
- A negotiable instrument?
- A de facto and de jure functional equivalent of a judgment
- Pros and cons



Economic value of an award – Award as an investment

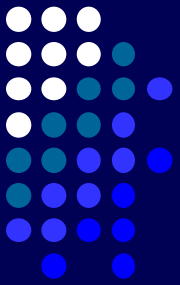


Non-Enforcement of an award may be a breach of BIT

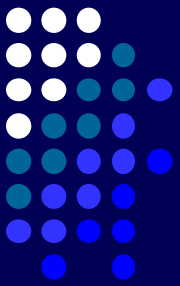


- *Saipem v Bangladesh* – ICSID Case no ARB/05/7 – 21 March 2007 (Kaufmann-Kohler, Schreuer & Otton)
- *ATA v Jordan* – ICSID Case no ARB/08/2 – 18 May 2010 (Fortier, El Kosheri & Reisman)
- *White Industries v India* (UNCITRAL) – 30 November 2011 (Rowley, Brower & Lau)
- *Chevron & Texaco v Ecuador*

Non-Enforcement of an award not a breach of BIT



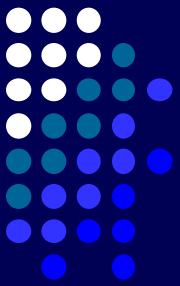
- *GEA Group v Ukraine* – ICSID Case no ARB/08/16 – 31 March 2011 (van den Berg, Landau & Stern)
- *Frontier Petroleum Services v Czech Republic*, UNCITRAL PCA case – 12 November 2010



Concluding Remarks I

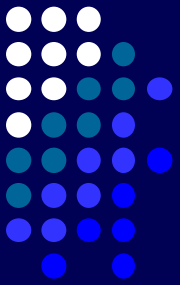
- Key question: can an award or an arbitration agreement be deemed an investment, capable of protection in accordance with a BIT?
- Wrongful judicial inaction or unlawful judicial interference may trigger investment protection under BIT and the ICSID Convention

Concluding Remarks II – Five condition



- The jurisdiction of tribunals will have to be based on relevant BITs and/or the ICSID Convention which in the case of the BITs will have to include sufficiently broad language to accommodate such claims;
- The tribunal will have to establish that state interference with the award will be subsumed to relevant BIT definition of “investment” ;
- Judicial interference may include unlawful, systemic judicial inaction which may violate legitimate expectation of award creditors;
- In all cases the judicial attitude should not be tenable, even if arguable and should be abusive or discriminatory or arbitrary or in bad faith;
- The assessment of state conduct, be it expropriation or denial of justice or full protection and security will have to satisfy the standards prevalent in the relevant treaty and/or customary international law

Thank you!



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