

# INTRODUCTION TO INTERNATIONAL INVESTMENT LAW

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## *Description of the Course:*

When a Czech company invests in a foreign country, what protections is it entitled to under international law? What are the remedies available to the company to enforce its rights in cases of prejudice to the company's economic activities? Yet, what legal constraints faces the Czech Republic as a State when it intends to adopt regulation for the protection of a public interest that might negatively affect foreign investors? This course introduces the basic precepts of international law of foreign investments and addresses precisely this type of questions. The course will focus chiefly on procedural and dispute settlement aspects of investment treaty arbitration, such as legal nature of the regime, jurisdiction of the tribunal, admissibility of claims, and remedies. It will also cover selected public international law aspects of the substantive investment protection both in customary and in treaty law (particularly bilateral investment treaties – BITs, NAFTA Chapter 11, Energy Charter Treaty, and comprehensive free trade agreements with investment chapters). Lastly, the course touches upon social, political and economic consequences of the current international investment regime.

## *Message from the teacher:*

Read carefully the assigned readings prior to the class, the classes are designed to be interactive and to discuss the material you have read. If you don't read, we can't have a discussion; that will go to the detriment of your learning curve, but also to the detriment of those of others', as they will be deprived of your no doubt interesting insights and reactions. If you don't have time to read them carefully, at least skim through them or ask your classmates to recap them for you (obviously, you should do this only in exceptional circumstances).

As the course is based on discussion, you are encouraged to think critically about what you have read, what I've said in the class, or what your classmates have said. You are encouraged to challenge what you read and hear.

In order to have fruitful discussions, do not be afraid to ask question about what you do not understand or about what you disagree with. There are no stupid questions. Likewise, do not be afraid to answer the question I will be posing during the classes.

As International Investment Law (IIL) is intellectually challenging field of law, you will sometimes have to question and reconsider assumptions and

dogmas about the law which you have learned. Do not worry about that; you should find it liberating in the end.

As it is a field that crosses, and for some blurs, divisions between private and public law, between international and municipal law, you might find yourself puzzled. Again, don't you worry about that; it's the law all the same, at the end of the day.

And the last remark, particularly do not be puzzled by some tribunals' legal pronouncements; investment arbitration decisions are far from consistent and are at times replete with poor legal reasoning. That is something that makes this field extremely attractive, but at the same time controversial.

Welcome to the law's laboratory; Welcome to international investment law! Hope you will enjoy this course! I am looking forwards to our discussions and to learning from you!

## *Syllabus*

### *Session 1:*

#### *History and Evolution of International Investment Law (IIL), Institutional Structure of the current IIL, Rationales of the current form of IIL*

##### READING:

###### COMPULSORY:

- D Wallace, et al. *Investor-State Arbitration* (Oxford UP 2011) (**pages 11-43 selected paragraphs**)
- J Salacuse, *The Law of Investment Treaties* (Oxford UP 2009) (**pages 91-7, 108-15**)
- J Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge UP 2014) (**pages 17-20**)
- G Monbiot, 'A Gunpowder Plot against Democracy', *Guardian* 4 November 2014
- J Alvarez, *The Public International Law Regime Governing International Investment* (Brill Nijhoff 2011) (**pages 75-93**)
- ICSID Convention, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1965 (Particularly, its Preamble, Art 25, 42)

###### SUGGESTED:

- J Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies', 1982 *Intl & Comp L Q* 686
- G van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion', (2010) 2 *Trade & Development* 1, 19

##### QUESTIONS FOR DISCUSSION:

A brief history: From diplomatic protection to investment treaty arbitration:

- What have been the factors influencing the creation, evolution and nature of IIL?
- What have been the major reasons for investment disputes?
- What have been the means for settling investment disputes?
- What do you think about the mechanism of diplomatic protection?
- What does the evolution of IIL tell us about the changes in international law in general?
- What do you think about the fact that most BITs are negotiated between developed and developing countries?

B) International investment agreements (IIAs), investment treaty arbitration, and forums for investment disputes:

- Institutions and forums for investment disputes: ICSID and *ad hoc* treaty arbitration
- Taking into account of what happened prior to the 1965, and considering NIEO movement, why do you think such a multilateral convention such as ICSID actually came to existence?
- What are the typical provisions of BITs?
- What are the main difference between FCN and BITs? And between e.g. European and US BITs?

C) Economic and other justifications for IIAs:

- What is the 'grand bargain' behind the BITs signing
- How would you distinguish neo-classical economic theory and economic nationalism theory described in Bonnitca
- What do you think about the potential impact on the rule of law and good governance?

D) Critiques:

- What does Alvarez mean by Horizontal, Vertical, Ideological and Rule of Law critiques? Do you share these concerns?
- How would you address them considering the problems identified previously together when we discussed the ancestors of ISDS?

## *Session 2:*

### *The Hybrid Nature of the Current Regime? Paradigms of the IIL; Nature of Investor's Rights*

READING:

- Z Douglas, *The International Law of Investment Claims* (Cambridge UP 2009) **Chapter 1**
- J Ostránský, 'The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict', (2015) 6 J Intl Disp Settlement 1, **pages 148-53** (*The Importance of Characterization of the Investor's Rights*)

- M Paparinskis, 'Analogies and Other Regimes of International Law', in: Z Douglas, J Pauwelyn, and JE Viñuales, eds., *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford UP 2014) (cf see suggested A Roberts, *Clash of Paradigms*, AJIL)
- *ADM v Mexico*, **paras 1-5, 161-5, 168-75, 180**
- *Corn Products v Mexico*, **paras 161, 165-70, 175**

#### QUESTIONS FOR DISCUSSION:

- The hybrid nature of the current system? What Douglas means by that?
- What Douglas means by derivative and direct rights model?
- How would you distinguish the two alternative theories of direct rights (direct substantive rights theory/procedural rights theory)?
- What are the consequences of these different conceptions of investors' rights?
- What were the Mexican Corn Sugar disputes about?
- What does it mean to solve legal issues by analogies?
- How often you would need to use such reasoning in domestic law?
- How is it relevant in international law and in IIL in particular?

### *Session 3:*

#### *Traditional Law of State Responsibility and Investment Treaty Regime of State Responsibility*

#### READING:

##### COMPULSORY:

- *ILC Articles on State Responsibility for Internationally Wrongful Act*
- J Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', ICSID Review - FILJ (**pages 127-134**)
- Z Douglas, 'Investment Arbitration and ICSID Regime of State Responsibility' in Crawford, Pellet Ollesen, *The Law of International Responsibility* (Oxford UP 2010) (**pages 815-832**)

##### SUGGESTED:

- Douglas, ICSID Regime of Responsibility (832-842)

#### QUESTIONS FOR DISCUSSION:

- What is meant by the conception of primary and secondary rules in the law of state responsibility?
- What are the basic elements of State responsibility?
- What is meant by IIL as a special regime of State responsibility?

- What are the consequences of non-application of the rules of diplomatic protection (continuous nationality, exhaustion of local remedies) in investment treaty arbitration?
- What is the nature of the nationality test under Art 25 of the ICSID Convention?
- What was the *Tokios Tokeles* case about?
- What do the ILC Articles say about remedies and what types of remedies are available in investment treaty arbitration?

### *Session 4:*

#### *Investment Treaty Arbitration: Jurisdiction and Admissibility*

READING:

COMPULSORY:

- Douglas, *Investment Claims*, **Chapter, 3**
- J Paulsson, 'Jurisdiction and Admissibility', in *Global Reflections on International Law, Commerce and Dispute Resolution* (2005)
- J Paulsson, 'Arbitration without Privity', (1995) 10 ICSID Review – FILJ 2, 232 (pages 232-4, 236-41)

SUGGESTED:

- Douglas, *Investment Claims*, Chapters 4, 5, 6, 11
- *Abaclat v Argentina*, Award and Dissenting Opinion

QUESTIONS FOR DISCUSSION:

- Notion of investment and investor and the *quid pro quo* nature of investment treaty arbitration:
- What is the difference between the orthodox or classical model and the US Model?
- What is meant by the term jurisdiction of an international tribunal?
- What are the two majors conditions of establishing jurisdiction in investment treaty arbitration?
- Jurisdiction versus admissibility? What is the difference between the two concepts?
- Do you agree with the distinction? If so, what are the consequences of the distinction?
- Can you explain what happened in the *SGS v Philippines* case?