

# INTRODUCTION TO INTERNATIONAL INVESTMENT LAW

## *Syllabus Cont'd*

### *Session 5:*

#### *Substantive International Investment Law: Differentiating Investment Protection Obligations – Investor's Protected Interests; Expropriation*

##### READING:

- Z Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Douglas, Pauwelyn, Vinuales, *The Foundations of International Law: Bringing Theory into Practice* (Oxford UP 2014) (minus paragraphs assigned for the next session, and minus paras 1.159-1.171)

##### QUESTIONS FOR DISCUSSION:

- What is the merits phase of arbitral proceedings and what is its purpose?
- What causes of action has a claimant available in investment treaty arbitration? What factors influence the availability?
- What conceptions of investment Douglas mentions? Can you explain the difference and its importance?
- What Douglas means by the strategic use of different conceptions of an investment by arbitral tribunals?
- What do you think about the distinction between right and value?
- How one distinguishes investment-as-property and investment-as-contract? What is meant by 'exclusion strategy' and 'governance strategy'?
- Expropriation
  - What is the *de facto, indirect, or regulatory expropriation*?
  - Can a contract be expropriated?
- What is meant by investment-as-value?
  - Can investment-as-value serve as a basis of adjudicating liability

### *Session 6*

#### *Substantive International Investment Law: Fair and Equitable Treatment - Legitimate Expectations; Protection of Contractual Rights, Denial of Justice*

##### READING:

##### COMPULSORY:

- Douglas, 'Protection, Investment' paras 1.94-1.108, 1.115-1.158
- Z Douglas, 'International Responsibility for Adjudication: Denial of

Justice Deconstructed', International and Comparative Law Quarterly, pp 1 - 34 DOI: 10.1017/S0020589314000402, Published online: 03 September 2014 (selected parts)

- *Saipem v Bangladesh*, paras 179-181

#### QUESTIONS FOR DISCUSSION:

- Contracts and jurisdiction:
  - What are umbrella clauses?
- Contracts and responsibility:
  - How can international attach responsibility (international, not-contractual) to State's conduct related to a contract?
- Legitimate expectations:
  - What can be a source of expectations that are protected by BITs?
  - How are they protective in substance?
- Denial of Justice (DoJ):
  - Why is DoJ a special category of international wrongful act?
  - What does the rule on the exhaustion local remedies play in DoJ?
  - What is meant by procedural approach to DoJ?
  - Violation of international norms by domestic courts and DoJ?

### *Session 7:*

#### *Substantive International Investment Law: MFN and National Treatment*

#### READING:

##### COMPULSORY:

- *UPS v. Canada*, case summary; Award paras. 173-181
- *Parkerings v. Lithuania*, case summary (first 6 pages: "facts, held, analysis"); Award paras. 362-380, 390-392
- *Berschader v. Russia*, case summary; Award, paras. 47 (text of the applicable treaty) 62-64, 85-88; 159-194 Separate Opinion (Weiler), paras. 1-7, 15-26
- Comparing treaty texts document

##### SUGGESTED:

- Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2 Journal of International Dispute Settlement 1, 97
- S Schill, 'Allocationg Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis for Jurisdiction – A Reply to Zachary Douglas' (2011) 2 Journal of International Dispute Settlement 2, 353

## QUESTIONS FOR DISCUSSION:

- What was the *UPS* case about? What was one of the main problems with UPS' argument?
- What is the predicate of finding a violation of national treatment? What is the test?
- What was the *Parkerings* case about?
  - What was the test used by Parkerings to determine violation of discriminatory provisions of the BIT?
  - What was the different from the *UPS* case?
  - Do you agree with the tribunal when it says that there is no reason to distinguish between different non-discrimination provisions (FET and international minimum standard, MFN, and national treatment)?
- What is *ejusdem generis* principle?
- What was the *Berschader* case about?
  - What was the problem for Berscheders in order to seize the tribunal?
  - What did Berschaders argue?
  - What did the majority say about the claims?
  - What did the dissenter Weiler say about the majority's approach to treaty interpretation?
- What goals have been attempted to achieve through the application of MFN to dispute settlement clauses?

## *Session 8:*

### *Revision, Future of IIL, EU law and current topics*

#### READING:

##### COMPULSORY:

- JHH Weiler, 'European Hypocrisy: TTIP and ISDS', EJILTalk, 21 Jan 2015 <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>
- N Lavranos, 'EU Law and Investment Law: Two Worlds Apart?', *Global Arbitration Review*, 2015
- EU Commission, 'The top 10 myths about TTIP: Separating fact from fiction', 2015 (particularly No. 4,
- *Micula v Romania* (paras 318-329)
- New draft Indian Model BIT of 2015

##### SUGGESTED:

- J Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 Journal of International Economic Law 1.

#### QUESTIONS FOR DISCUSSION:

- What did the tribunal in *Micula* said about the interaction between the BIT and EU law?
- Where would you situate the decision in *Micula* on the spectrum of perspective on the relationship between IIL and EU Law (Lavranos' short report)? What position you identify yourself with and why?
- How can we approach the potential conflicts between BITs and EU Law? What legal rules and principles you can apply?
- Lavranos mentions 'the return of the host state' what does he mean by it?
- Can you demonstrate it by looking at the text of the Indian Model Draft BIT?
- Hot Topic: Investor-State Dispute Settlement (ISDS) in Trans-Atlantic Trade and Investment Partnership (TTIP)
  - Recall the arguments in the Guardian article from the first session. How successful do you think EU Commission was in addressing them?
- What do you think about the arguments voiced by Weiler?
- After what we have learned what do you think about the ISDS system in its current form? What would you change?