

SELECTED ISSUES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION

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Lecturer: Josef Ostránský (josef.ostransky@graduateinstitute.ch)

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 the Czech Republic faces 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 rationales for and consequences of the current international investment regime.

Evaluation:

As the course is pass or fail, there is no need to have an elaborate system of grading. The course will be evaluated based on a short essay (500 words) on the topic assigned during the course.

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 help you navigate through the reading materials, read the "Questions for Discussion" assigned for each class before reading the texts. This will give you a hint of what you should be looking for in the readings.

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 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!

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 Bonnitcha

- 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 major 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?

Session 5:

Substantive International Investment Law: Differentiating Investment Protection Obligations – Investor’s Protected Interests; Expropriation, Contracts

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) (except for 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’?

- 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?
- 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; Denial of Justice

READING:

COMPULSORY:

- Josef Ostřanský, 'An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard', in Gattini, A., Tanzi, A, *General Principles of Law and International Investment Arbitration* (Brill, forthcoming 2016)
- *Metalclad v Mexico*, paras 28-69, 74-101.
- *MTD v Chile*, Decision on Annulment, paras 64-68
- 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:

- Legitimate expectations:
 - What can we say about the legal nature of expectations that are protected by BITs?
 - Are they international obligations? Are they general principles of law?
 - What difference does it make?
- What can be the source of legitimate expectations in practice?
- Is it a problem to protect expectations to fair and equitable treatment? If so, why?

- Is it a problem to protect expectations arising from contracts? If so, why?
- Is it a problem that expectations are used as the principal cause of action in investment arbitration? If so, why?
- 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:

- N Lavranos, 'EU Law and Investment Law: Two Worlds Apart?', *Global Arbitration Review*, 2015
- *Micula v Romania* (paras 318-329)
- EU Commission, 'The top 10 myths about TTIP: Separating fact from fiction', 2015 (particularly No. 4)
- JHH Weiler, 'European Hypocrisy: TTIP and ISDS', *EJILTalk*, 21 Jan 2015 <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>
- EU Commission, Factsheet, 'EU finalises proposal for investment protection and Court System for TTIP'
- EU Commission, Factsheet, 'Why the new EU proposal for Investment Court System is beneficial to both States and investors'

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.
- EU Commission, 'Draft Text of Transatlantic Trade and Investment Partnership – Trade in Services, Investment and E-Commerce'

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 new proposals prepared by the EU?
- 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?
- What do you think about the idea of the investment court proposed by the EU? Does it adequately address the criticism of IIL?
- What is your opinion now on the current system of IIL? Has it changed over the course? What do you see as major problems with the current system, if any?