

Fundamental Concepts of International Investment Law and Arbitration

Zdeněk Nový

Important milestones

- 1958 – NY Convention
- 1959 – first BIT
- 1965 - ICSID
- 1981 - Iran-US Claims Tribunal
- 1987 – first arbitration, where the tribunal based its decision on BIT, rather than on investment contract

Why IIA?

- Neutrality of arbitration
- Immunity of foreign states
- Possible refusal to decide the case by the local courts on public policy grounds

The concept of int. Inv. Law and arbitration

- Procedure: Arbitration as a dispute resolution mechanism
- Substance: Public International Law (in event national law)

Types of IIA

- Institutional:
 - ICSID or PCA based on int. Treaty
 - Other, e.g. SCC or ICC on their own arbitration rules (backed by lex fori, i.e. Swedish, resp. French law)
- Ad hoc (UNCITRAL Rules)

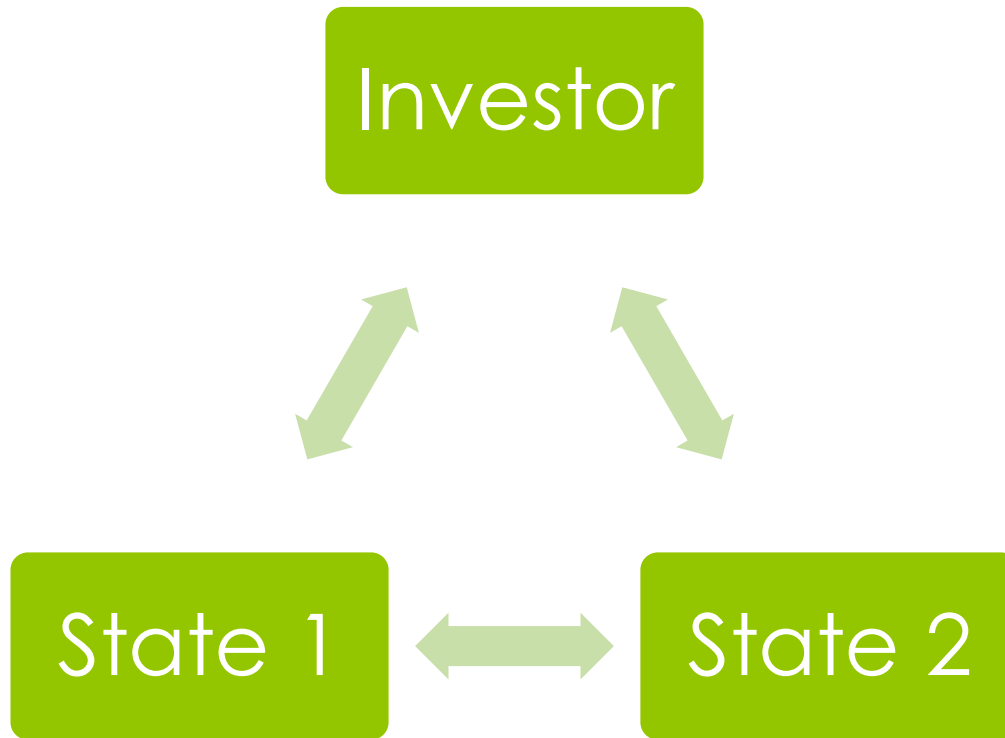
Legal Bases

- Treaty (most often):
 - BITs (approx. 3000)
 - MITs (Energy Charter, NAFTA) ICSID)
- Investment contracts (Typical in 1970-1980s)
- Domestic legislation (e.g. South Africa)
- Other sources of international law – customs, general principles of law as per art. 38 (1) ICJ Statute

Treaty as the Central Source

- IIA based on an international treaty as one of the main sources of international law
- An important implication – state consent is a precondition of IIA
- „Arbitration without privity“ – the jurisdiction of arbitrators does not stem from a contract, but a treaty

Two or more state give rights to an investor



Awards are not precedents, but are important

- A doctrine of precedent does not exist in int. law
- Nevertheless, arb. tribunals look at the previous cases (the majority of which is available online)

Interpretation of treaties

- Articles 31-33 Vienna Convention on the Law of Treaties (codifying international customary law)
- Most discussed by academics: article 31 (3) VCLT – „systemic integration“

Three Phases of IIA proceedings

- Jurisdiction
 - Admissibility
 - Merits
- (Enforcement)

Jurisdiction

- Investment
- Investor

Investment

- Definition in the applicable law (treaty)

Criteria

- Territory (ratione loci)
- Time (ratione temporis)
- Assets Covered (ratione materiae)
- Legality of investment („in accordance with domestic law“)

The so-called Salini test

- A substantial commitment or contribution;
- Duration;
- Assumption of risk;
- Contribution to economic development;
- Regularity of profit and return.

Investor

- A national of another state
- Both natural and legal persons (and even other entities)

Criteria

- Natural persons – effective and continuing (?) nationality
- Legal persons – incorporation, seat or control

Shareholders

- Under many BITs foreign shareholders of local companies are protected against interference with their share by the host state

Lis Pendens

- CME v. Czech Republic and Lauder v. Czech Republic (critique of two opposite outcomes)

Admissibility

- Meaning: Whether the claim is „mature enough“ to be enforced
- Exhaustion of local remedies
- Cooling off periods
- Fork-in-the-road clauses
- No prescription as in domestic law

Merits

- Substantive standards of protection:
 1. Minimum treatment
 2. Uncompensated expropriation
 3. Fair and equitable treatment
 4. Full protection and security
 5. National treatment
 6. MFN treatment
 7. Prohibition of arbitrary or discriminatory measures

Minimum treatment under customary law

- So called Hull formula – no expropriation without adequate and prompt compensation
- Denial of justice (classical book of Jan Paulsson)
- Evidence of minimum standard (<http://legal.un.org/riaa/>)

Expropriation

- Not defined in BITs (definition taken from customary international law – namely IUSCT at: <http://www.iusct.net/>)
- Not ephemeral taking that deprives investor from substantial portion of its investment
- Basic thesis – state may expropriate (almost) anything on its territory

Lawful v. unlawful expropriation

- Lawful – public purpose, non-discrimination, due process, and compensation, including interest
- Unlawful – at least one of these conditions not met – the result is damages

Direct v. indirect expropriation

- Direct taking v. other means
- Actions and omissions (but see *Olguín v. Paraguay*)
- Creeping or de facto expropriation (*Generation Ukraine v. Ukraine*)
- Expropriation by all organs, including courts (*Saipem v. Bangladesh, Award*)

Recent discussion

- Right to regulate stemming from customary international law v. expropriation and standards of treatment
- Does compensation belong to investor if state enacts a bona fide and non-discriminatory statute?
- Energy cases (Spain – Eiser v. Spain/solar energy/ Vattenfall v. Germany case /nuclear energy/)
- Regulation of tobacco products (Phillip Morris v. Australia,)

Standards of treatment

- Summa divisio:
- Contingent – one has to look for a comparator – national treatment, MFN treatment
- Non-contingent – FET, full protection and security

Fair and equitable treatment

- The most often raised standard by investors
- Main issue:
- Is it autonomous on minimum standard defined in the Neer decision (egregious conduct)?
- FET is generally „milder“ than minimum standard under the Neer

FET (2)

- Types of behaviour contrary to FET:
- Gross misapplication of domestic law
- Undue delay
- Extreme procedural irregularities, which shock or at least surprise anyone with sense of justice
- No bad-faith conduct is required
- Legitimate expectations (the changes in regulatory framework)

Arbitrary and/or discriminatory measures

- The ICJ ELSI case (1989) offers definition of arbitrary:

'arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law' (para. 128)

- An overlap with FET
- Tribunals tend to prefer other standards, like FET, even if the action of the state is arbitrary

Full protection and security

- Originally: protection of the physical sphere of the investor and the investment
- Nowadays: also legal security – changes in legal framework may violate the standard
- The standard of behaviour is due diligence (not strict liability)
- Protection against non-state actors (AAPL v. Sri Lanka)

MFN Treatment

- Aim: non-discrimination among foreigners
- Meaning: a possibility to invoke provisions of other investment treaties
- Basic Condition: *Ejusdem generis* – the provision invoked must be of the same kind as that in the original treaty

MFN (2)

- What is certain:
 - It is possible to invoke substantive provisions of other treaties (e.g. standard of FET)
 - It is not possible to invoke basic rules, like definition of investor or investment, which define the scope of the original treaty

A contested issue

- May procedural provision on settlement of disputes be invoked?
- Two opposites: Maffezini v. Spain (yes) v. Plama v. Bulgaria (no)

Remedies

- Starting point Chorzów Factory case (PCIJ 1928):
 - All consequences caused by an illegal act must be wiped out
 - Full compensation
 - Primary remedy = Restitution, if possible

Remedies II

- Investment treaties – typically damages
- Damages = actual loss + loss of profit + interest + interest on interest
- Damages may be also moral (Desert Line v. Yemen):
- NP – for sure
- Legal persons – rather not

Specific provisions

- Transfer of capital clauses
- Umbrella clauses
- Preservation clauses
- „War“ and „emergency clauses“
- Sunset clauses
- Carve-out clauses (excluding e. g. Taxation)

Enforcement

- State enjoys enforcement immunity under international customary law
- Two avenues:
- ICSID (art. 53-55)
- Non-ICSID (the NY Convention on Recognition and Enforcement of Foreign Awards or national legislation)

Waiver of immunity

- Jurisdictional v. Execution immunity
- State waive their jurisdictional immunity by entering into a BIT
- However, states cannot waive execution immunity otherwise than by express waiver