

The background is a dark teal color. It features several abstract shapes: a large teal circle on the left, a smaller teal circle at the top right, a red vertical rectangle at the top right, a large teal circle on the right side, and a small teal circle at the bottom right. The title text is centered and reads:

Fundamental Concepts of International Investment Law and Arbitration

ZDENĚK NOVÝ

Important milestones

2

Introduction inot Investment Law

- ▶ 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 of 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)

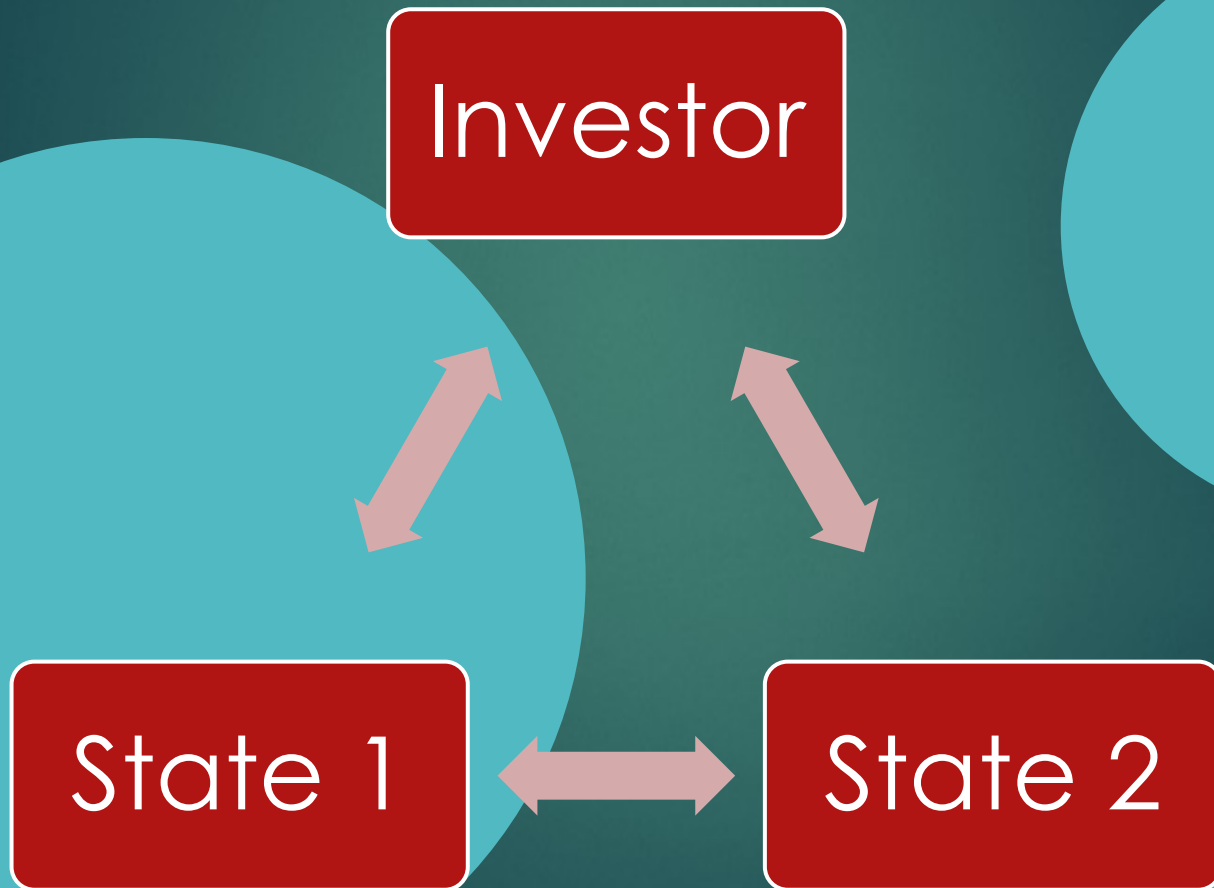
Legal Bases

- ▶ 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 investment treaties

10

- ▶ Articles 31-33 Vienna Convention on the Law of Treaties (codifying international customary law)

Means of interpretation under VCLT

- ▶ Good faith
- ▶ Ordinary meaning
- ▶ Inner context of the treaty
- ▶ Object and purpose
- ▶ Subsequent agreements and practice
- ▶ External context of the treaty (customary law and other treaties between the BIT parties)

Three Phases of IIA proceedings

- ▶ Jurisdiction
- ▶ Admissibility
- ▶ Merits
(Enforcement)

Jurisdiction

13

- ▶ Investment
- ▶ Investor

Introduction into Investment Law

Investment

14

- ▶ 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 essential distinction

16

- ▶ ICSID
- ▶ Non-ICSID

Investment - introduction

The so-called double key hole test

17

- ▶ There must be an investment under:
 - ▶ A) BIT
 - ▶ B) ICSID

Investment - introduction

ICSID

- ▶ Art. 25
- ▶ Not too outspoken as to what is investment
- ▶ The tribunals must have add their interpretation of the terms
- ▶ The result: the so-called Salini test

The so-called Salini test

19

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

The rationale behind the Salini criteria?

20

Investment - introduction

What is an investment thus?

21

Investment - introduction

- ▶ It may be a tangible or intangible asset having economic value connected to the territory of the host state
 - ▶ Examples:
 - ▶ Moveable and immovaeble assets
 - ▶ Shares
 - ▶ Rights to monetary performace
 - ▶ Bonds
 - ▶ Good-will or know-how

Investors: an overview

- ▶ Natural persons
- ▶ Legal persons
- ▶ Joint ventures or partnerships?

Natural persons

- ▶ Diplomatic protection – a ‘genuine link’ (the Nottebohm Case – ICJ)

Investment law

- ▶ The problem of double nationality
- ▶ the effective, dominant nationality – a matter of proof

Legal persons

- ▶ Incorporation (the ICJ Barcelona Traction case)
- ▶ Seat
- ▶ Control

Problems

- ▶ the interpretation of the phrase 'an investor of the Contracting Party'

Shareholders

27

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

Problems with regard to shareholders

- ▶ Treaty shopping
- ▶ Denial of benefit clauses
- ▶ Abuse of rights/process as a reaction

Joint ventures and partnerships

- ▶ Are these protected investors under a BIT?
- ▶ In KG GmbH & Co. Investor under German-Czech BIT?
- ▶ Position in general international law divided on the issue (Some authors argue that only members, i.e. natural persons of the partnership are protected, others say that also partnerships enjoy legal protection)

The role of national law

- ▶ Traditionally, a link must exist between an investor and the investment treaty party (i. e. state)
- ▶ Thus: no relation to national law, no investment protection
- ▶ But...

An autonomous subjectivity based solely on the BIT?

- ▶ Some tribunals see an autonomous concept of subjectivity in the treaty
- ▶ An unresolved issue depending on many variables (like a relationship between international and national law)

Lis Pendens

32

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

Admissibility

33

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- ▶ 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

35

- ▶ 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, but against a just, prompt and effective compensation

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 discussions

39

Introduction inot Investment Law

- ▶ 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

40

- ▶ 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 frequently raised standard by investors
- ▶ Main issues:
 - ▶ Is it autonomous on minimum standard defined in the Neer decision (egregious conduct)?
 - ▶ FET is generally „milder“ than minimum standard under the Neer case
 - ▶ Does FET standard include the protection of legitimate expectations?
 - ▶ Can a state regulation amount to a breach of FET standard?

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 dilligence (not strict liability)
- ▶ Protection against non-state actors (AAPL v. Sri Lanka)

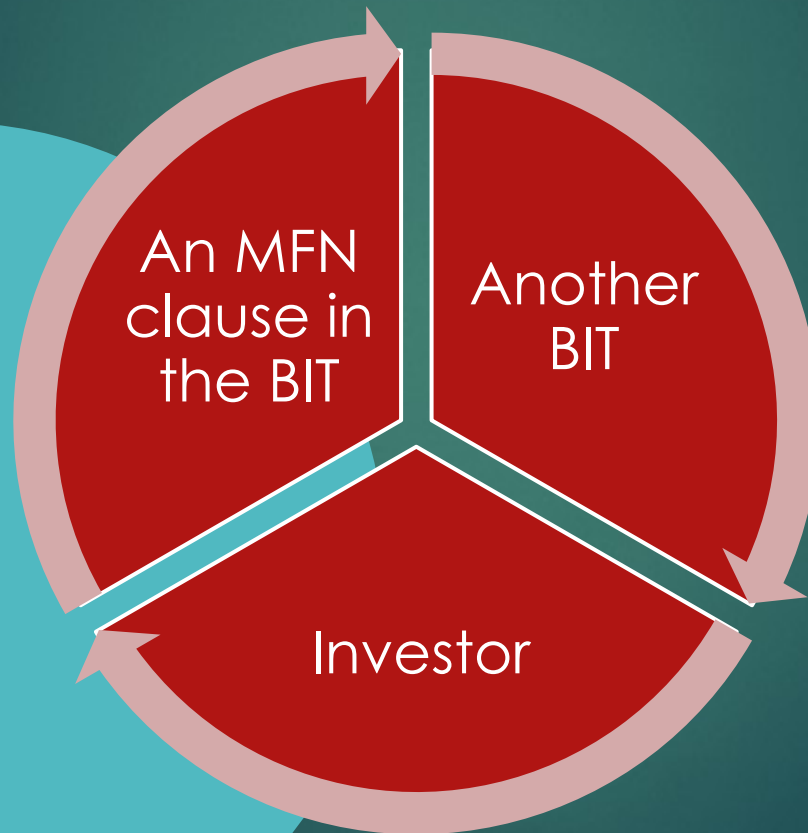
MFN Treatment

45

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- ▶ 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 – operating instructions



MFN (cont.)

- ▶ What is certain:
 - ▶ It is possible to invoke are 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

48

- ▶ May procedural provision on settlement of disputes be invoked by virtue of an MNF clause?
- ▶ Two opposites: *Maffezini v. Spain* (yes) v. *Plama v. Bulgaria* (no)

Remedies

- ▶ Starting point = the Chorzów Factory case (PCIJ 1928):
 - ▶ All consequences casued by an illegl act must be wiped out
 - ▶ Primary remedy = Restitution, if possible
 - ▶ For material harm= compensation
 - ▶ For immaterial harm = satisfaction

Remedies II

50

Introduction inot Investment Law

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

Specific provisions

51

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

Recognition and Enforcement

52

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- ▶ Two avenues:
 - ▶ ICSID (art. 53-55)
 - ▶ Non-ICSID (the NY Convention on Recognition and Enforcement of Foreign Awards or national legislation)

Annulment of the award

53

- ▶ ICSID – autonomous régime of annulment
- ▶ Non-ICSID – the rules of *lex loci arbitri* apply

Waiver of immunity

54

- ▶ Jurisdictional v. Execution immunity
- ▶ State waive their jurisdictional immunity by entering into a BIT (Walter Bau v. Germany)
- ▶ However, states cannot waive execution immunity otherwise than by an express waiver (e.g. In a contract)