

INTERNATIONAL INVESTMENT LAW

Prof. Dr. Pia Acconci
pacconci@unite.it

BASIC GLOSSARY

- **FDI** = Foreign Direct Investment
- **BITs** = Bilateral Investment Treaties
- **ICSID** = International Centre for the Settlement of Investment Disputes
- **ICC** = International Chamber of Commerce
- **UNCITRAL** = UN Commission on International Trade Law

OUTLINE

- Origins of modern international investment law
- Reasons why there is a huge number of international investment treaties
- The link between such treaties and arbitration
- ‘Arbitration without privity’ The particular type of arbitration used for investment dispute settlement
- ICSID arbitration as a special tool for investment dispute settlement
- Cases-study (class discussions on cases, such as *Metalclad*, *Brandes*)

RELEVANT ACTORS

- States (independent and organized subjects)/Groups of States
- International Organizations (e.g. UN, OECD, WTO)
- Private Parties:
 - Investors = individuals and companies, especially MNEs (i.e. a network of controlled-companies all having independent legal personality). Investors are profit-making oriented
 - NGOs and other representatives of the 'society'

Home State/Host State

- Home State= the national State of the investor
- Host State= the State where the investment is made

The relationship between a foreign investor and a host State: Characteristics

- It is a long-term relationship
- The negotiating powers and positions of the parties tend to change:
the negotiating stage is advantageous for the foreign investor, whereas the project-implementation stage is advantageous for the host State (a shift in the bargaining power occurs)
- Technological and legal developments have contributed to large-scale foreign investments (e.g. infrastructure investments)

The *Ratio* of International Investment Law

- To deal with the two critical stages of the investment relationship:
 1. the negotiating stage
 2. the project-implementation stage
- To give answers to an investor that wants to legally act against a host State because such a State had, in good faith or in bad faith, undermined its profit-expectations
- To satisfy the foreign investor's need of protection

International Investment Protection

- The protection of foreign private property
- The issue of identifying appropriate standards of treatment/protection and appropriate remedies
- The relevance of the equality of opportunities and non-discrimination (on the basis of nationality) principles

PRINCIPAL ISSUES

- What is an investment?
- When can an investment be qualified as foreign?
- What obligations a State has toward foreign investors?
- What is an expropriation? When does it occur?
- What remedies are available in case of a dispute?

INTERNATIONAL LAW SOURCES

INTERNATIONAL CUSTOMS:

- 'evidence of a general practice accepted as law', i.e. evidence of a general practice which reflects a legal obligation
- they are binding upon all international law subjects

INTERNATIONAL TREATIES:

- they can be multilateral and bilateral
- they are binding only upon the contracting parties

SOURCES OF INTERNATIONAL LAW ON FOREIGN INVESTMENT

- In principle, either of the before-mentioned sources
- However, the exact content of customary rules is uncertain
- Therefore, treaty regulation is paramount
- No binding acts of international organizations (only some non-binding resolutions and guidelines)

BINDING ACTS OF INTERNATIONAL ORGANIZATIONS

- Decision-making power of a few bodies of some international organizations
- Their acts are binding only upon Member States of the organization
- The binding force of these acts depends on treaty provisions

The DEVELOPMENT of International Law on Foreign Investment

COLONIAL PERIOD:

- Members of international society were only industrialized countries
- Full security to foreign investors was customary international law (foreign property protection)
- Freedom of investment = the basic principle
- A violation of a foreign investor's property rights = A violation of its home State's rights
- Protection through home State's laws and/or military force

BASIC GLOSSARY

- **NIEO** = New International Economic Order
- **UNCTAD** = UN Conference on Trade and Development
- **‘Calvo Doctrine’** = the same treatment of foreign and national property, no home State’s interference and exclusive jurisdiction of national courts
- **OECD** = Organization for Economic Cooperation and Development

After the Russian Revolution and the Second World War

COMMUNIST IDEAS about private property (no protection)

DECOLONIZATION:

- Members of international society are industrialized countries, newly independent countries (i.e. developing countries) and some international organizations (i.e. the UN, World Bank, OECD)

POST-DECOLONIZATION:

- The adverse climate for FDI (NIEO)
- Traditional rules were challenged
- International disputes over conflicting interests
- The uncertainty of customary international law on FDI
- The rising number of international investment treaties

THE DEBATE OVER MINIMUM STANDARDS/NATIONAL TREATMENT AND TWO OPPOSITE CONCEPTS OF LIBERTY

DURING POST-DECOLONIZATION

- **INDUSTRIALIZED COUNTRIES SUPPORTED:**
 - the total liberty of private investors as regards their choices
 - the choices of investment depended on the profit-expectations of private investors (complete freedom of decision)

- **DEVELOPING COUNTRIES SUPPORTED:**
 - the total liberty of host States to exercise sovereignty, which covered not only territory, but also natural resources
 - the choices of investment had to be subjected to the needs and policies of the host States

INDUSTRIALIZED COUNTRIES' VIEW: every country had to guarantee

- Free admission
- Minimum standard of treatment
- Lawful expropriation [1938: 'Hull Formula' after Mexican nationalizations of US oil investments = a minimum standard], i.e. an expropriation
 - aimed at a public interest
 - non-discriminatory
 - followed by the payment of adequate, prompt and effective compensation ('full compensation')
 - followed by due process and the remedy of diplomatic protection failing domestic satisfaction

DEVELOPING COUNTRIES' VIEW: the denial of a minimum standard of protection

Each country was absolutely free to

- Accept or not FDI in its territory
- Lay down conditions governing foreign investor's choices
- Expropriate and nationalize FDI according (only) to its needs and resources ('appropriate compensation')
- Deny that disputes concerning FDI can be settled by protective diplomatic action of the foreign investor's national/home State (exclusive jurisdiction of host State's national courts)

NIEO GOALS

- A fair allocation of resources
- Technology transfer to developing countries
- Preferential trade conditions
- A reformation of the international monetary system
- A review of the dependency of developing countries from foreign capitals (restrictions on admission and post-establishment treatment of foreign investors)

A Change in the Attitudes of Developing Countries (after 1980s)

- Foreign capital = an instrument to finance economic development
- BITs
- Domestic policies to attract FDI through
 - tax credits
 - subsidies
 - consent to direct arbitration

FINAL REMARKS

on the DIFFERENT POSITIONS

- ‘Foreign country risk’ arose from the claims of developing countries (political risk)
- No legal security of FDI any longer
- Uncertainty of customary international law
- A great number of BITs



THANK YOU

prof. dr. Pia Acconci