MODULE 2: CORE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

African Institute of International Law

Training Workshop on Bilateral Investment Treaties and Arbitration

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Arusha, 17 February 2015
Session 1

- The concept of "investment" in investment treaties and the ICSID Convention
- The concept of an "investor" in investment treaties and the ICSID Convention
Example of multiple objections to jurisdiction: *Standard Chartered Bank v Tanzania*

Total of 13 objections to jurisdiction (and admissibility), including:

- No investment “of” the claimant
- Illegality of Investment
- Investment not made in good faith
- Investment not a valid “asset”
- No investment “in” Tanzania (or benefiting Tanzania)
- Failure to observe cooling-off period
- Claims contractual, not based on the treaty
Jurisdictional requirements of ICSID arbitration

Article 25(1) of the ICSID Convention

Chapter II
Jurisdiction of the Centre

Article 25
(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
Consent in the UK-Tanzania BIT

ARTICLE 8

Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

(2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

(3) If any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.
Consent with choice of forum

2. If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be submitted, at the choice of the Investor, to:

a) the competent court of the Contracting Party in whose territory the investment was made; or

b) an ad hoc tribunal of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

c) the International Centre for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States", opened for signature at Washington D.C. on 18th March 1965, in case both Contracting Parties become members of this Convention. As long as a Contracting Party which is party in the dispute has not become a Contracting State of the Convention mentioned above, the dispute shall be dealt with pursuant to the rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings of the ICSID.”

Article 12(2) of the Nigeria-Spain BIT
What is the aim of the BIT?

AGREEMENT
BETWEEN THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
AND THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA
FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania;

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;
Concept of “investment”

(a) “investment” means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

Article 1(a) of the UK-Tanzania BIT
No definition of “investment” in ICSID Convention

- Deliberate choice of drafters
  - Leave for the parties to define in their instrument of consent; or
  - Create an autonomous test

- Salini test (from *Salini Construttori v Marocco*, decision on jurisdiction, para 52):
  - Legal requirements or usual features?
  - Only applicable to ICSID cases?
Standard Chartered Bank v Tanzania

Would different wording lead to a different result?

“Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party”
(Article 9(1) of the Mozambique-Finland BIT)
“Investor” in the Tanzania-UK BIT

ARTICLE 8
Reference to International Centre for Settlement of Investment Disputes

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Concept of “investor” – natural persons

(c) “nationals” means:

(i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(ii) in respect of the United Republic of Tanzania: physical persons deriving their status as nationals of the United Republic of Tanzania from the law in force in the United Republic of Tanzania;

Article 1(c) of the UK-Tanzania BIT
Natural persons as “nationals” under ICSID Convention

Article 25(2) of the ICSID Convention

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
BITs can resolve conflicts of nationality

“’national’ means:

1. for Canada, a natural person who is a citizen or permanent resident of Canada; and

2. for Côte d’Ivoire, a natural person of Ivorian nationality;

except that:

3. a natural person who is a citizen of Canada and a national of Côte d’Ivoire shall be deemed to be exclusively national of the Party of his or her dominant and effective nationality; and

4. a natural person who has the citizenship or nationality of one Party and a permanent resident of the other Party shall be deemed to be exclusively a national of the Party of his or her citizenship or nationality”.

Article 1 of the Canada-Côte d’Ivoire BIT
Concept of “investor” – legal entities

(d) “companies” means:

(i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the United Republic of Tanzania: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Republic of Tanzania;

Article 1(d) of the UK-Tanzania BIT
Legal persons as “nationals” under ICSID Convention

(2) “National of another Contracting State” means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
Session 2

- The plea of illegality in relation to an investment
- Issues of timing
- Other common objections to jurisdiction and admissibility
Legality of investment as jurisdictional requirement

- Part of definition of investment when specified in the BIT (Article 1(a) of the UK-Tanzania BIT)?

- No such language necessarily needed

- Jurisdiction denied / claim inadmissible:
  - Failure to fulfil conditions of treaty
  - Contrary to good faith
  - Breach of international law or international public policy
  - *Nemo auditur propiam turpitudinem allegans*
Legality of investment as jurisdictional requirement (cont’d)

- What about corruption? Aren’t both parties guilty?
- What if the illegality occurs during the life of the investment?
- What if the host state remained silent on a technical legal requirement until the case was brought?
Jurisdiction *ratione temporis*

- Does the BIT protect investments made before its entry into force?
  - Depends on the language of the treaty – but many treaties are silent
- Is there jurisdiction to hear disputes that arose before the BIT entered into force?
  - No – unless the treaty specifies otherwise
  - But note definition of when the dispute arose
- Can the breach occur before the BIT is in force?
  - No – ILC Article 13
  - A question of substantive protection, rather than jurisdiction
  - Preceding facts may still be relevant
Jurisdiction *ratione temporis* (cont’d)

- “Continuous nationality” rule
  - Under ICSID Convention, must be national on the date of consent and date of registration
  - What about at the date of the treaty breach? Or date of the award?
- Does the date of acquisition of investment have to predate the alleged breach?
- Abuse of process and treaty/nationality shopping
- When must the ICSID Convention have entered into force for the Contracting Parties?
Cooling-off periods

Article 8(3) of the UK-Tanzania BIT

- Six months from when?
- What does “otherwise” mean?
- What happens if the condition is not respected?
Forks-in-the-road

- The opposite of a requirement to litigate before local courts, so check carefully the treaty text

“1. Disputes that may arise between one of the Contracting Parties and an Investor of the other Contracting Party with regard to an investment, in the sense of the present Agreement, shall be notified in writing, including a detailed information, by the investor to the former Contracting Party. As far as possible, the parties concerned shall endeavour to settle these disputes amicably.

2. If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be submitted, at the choice of the Investor, to:
   a) the competent court of the Contracting Party in whose territory the investment was made; or
   b) [ad hoc arbitration under the UNCITRAL Rules]; or
   c) [ICSID Arbitration].”

Article 12 of the Nigeria-Spain BIT

- Originally not taken seriously, but recently increasingly so

- Test moving from triple identity (claims, subject-matter and parties) to “normative base” or “fundamental basis”
Denial of benefits

“Each party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”

Article I(2) of the United States-Ukraine BIT

When must the denial take place?
MODULE 3: STANDARDS OF INVESTMENT PROTECTION

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Arusha, 18 February 2015
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- Applicable law in investment treaty arbitrations
- Introduction to the common standards of investment protection
Applicable law

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Article 42(1) of the ICSID Convention
Prof Douglas’s rules on applicable law (ie it is complicated)

1. An investment treaty tribunal has the inherent authority to characterise the issues in dispute and determine the laws applicable thereto.

2. The law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law.

3. The law applicable to the issue of whether the claimant’s property rights constitute a protected investment is the investment treaty.

4. The law applicable to an issue relating to the jurisdiction of the tribunal and admissibility of claims and counterclaims is the investment treaty and, where relevant, the ICSID Convention.

5. The law applicable to the issue of whether the claimant is a national of a contracting state is the investment treaty and the municipal law of that contracting state.

6. The law applicable to the issue of whether a legal entity has the capacity to prosecute a claim before an investment treaty tribunal is the lex societatis.
Prof Douglas’s rules on applicable law (cont’d)

7. The law applicable to the issue of whether the host state is the proper respondent to the claim is the law governing the obligation forming the basis of the claim.

8. The law applicable to the issue of liability for a claim founded upon an investment treaty obligation is the investment treaty as supplemented by general international law.

9. The law applicable to an issue relating to a claim founded upon a contractual obligation, a tort or restitutionary obligation, or an incidental question relating thereto, is the law governing the contract, tort or restitutionary obligation in accordance with generally accepted principles of private international law.

10. The law applicable to an issue relating to the consequences of the host state’s breach of an investment treaty obligation is to be found in a sui generis regime of state responsibility for investment treaties.

11. The law applicable to an issue relating to the procedure of the arbitration is the investment treaty, the applicable arbitration rules and, in some cases, the law of the seat of the arbitration.

12. The choice of law rules set out in this chapter are compatible with Article 42(1) of the ICSID Convention.
Common concepts of investment protection

Article 2(2) of the UK-Tanzania BIT
Session 2

- Fair and equitable treatment
- Protection of legitimate expectations in investment law
FET explained – option 1

“[FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”

TECMED v Mexico, para 154
FET explained – option 2

“[FET standard] is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”

Waste Management v Mexico (II), para 98
FET – some conditions

- Legitimate expectations
- Due process
- Non-discriminatory, reasonable treatment
- Stable and transparent legal framework
- No harassment or coercion
- No bad faith action or abuse of power
- Proportionate action
- No denial of justice

How about “caveat investor”?
How are legitimate expectations created?

- Expectations must be objectively reasonable;
- Contract can be a source of evidence about expectations;
- Expectations must be generated by State conduct directed at the investor;
- Expectations are to be shaped by the investor’s ‘burden of performing its own due diligence in vetting the investment’;
- Expectations must be based upon the host state’s legal regulatory regime; and
- Investors must respect the allocation of functions across governmental departments, preventing one organ from binding another.

*Invesmart v Czech Republic*, paras 249-258
Reformulating the FET obligation?

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
   a. Denial of justice in criminal, civil or administrative proceedings;
   b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
   c. Manifest arbitrariness;
   d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
   e. Abusive treatment of investors, such as coercion, duress and harassment; or
   f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.”

EU-Canada draft agreement
Session 3

- Expropriation and ensuring regulatory freedom
- Full protection and security – physical or legal security?
- Most-favoured nation and national treatment: defining similarities and differences
Expropriation

ARTICLE 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
Indirect expropriation

“This is a broadly framed provision. The Treaty encompasses not only direct expropriation (i.e. a formal Government taking) but also de facto or indirect expropriations which do not involve actual takings of title but nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor.”

*Biwater v Tanzania*, para 453
Indirect expropriation and right to regulate

- When does state regulation constitute expropriation?
  - “Police powers” generally recognised as a sovereign right
    - Proportionality?
    - Margin of appreciation?

- Effect of measure – on investor’s rights or value of investment?

- Main criterion: “Nature and magnitude of the interference” with the property (*Electrabel v Hungary*, jurisdiction, para 6.53)
  - Loss of almost entire value and ability to continue business required – reduction of profits not sufficient
  - Loss must be permanent

- What is the “investment” that has been expropriated?
Full Protection and Security (FPS)

- Obligation of due diligence or strict liability?
- Protection against government or third party action?
- Physical or legal security?
NT and MFN treatment

- When is treatment the same, when is it less favourable? When is differential treatment justified?
- What is “treatment”? Is access to investment arbitration on more favourable terms “treatment”?

**ARTICLE 3**

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
Session 4

- International responsibility for the acts of the domestic judiciary
Treaty breach by domestic judiciary

Jan de Nul v Egypt (1)

- Denial of Justice defined:

“[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”.

Loewen v. USA, para 132 (emphasis added)
**Jan de Nul v Egypt (2)**

- “Procedural” and “substantive” Denial of Justice?
  - Procedural:
    - Espousal of an expert’s report with no independent analysis
    - Delay
    - Dilatory consolidation
    - Ultra vires findings
  - Substantive:
    - Failure to account for fraud in the proceedings
  - Need to exhaust local remedies as entire system of justice is on trial
Other BIT breaches committed by the Judiciary

- Specific provision about providing “effective remedies”
- FET?
  - Generally accepted that limited to Denial of Justice
- Expropriation?
  - Sole effects doctrine – particularly problematic
  - Illegality required – but how can it be ensured that this does not turn into appeal?
- Umbrella clause?
- Interplay with jurisdiction – Is there an investment if a domestic court has found that the right / property did not validly pass to the investor?
Investment arbitration materials publicly available

- ICSID website: https://icsid.worldbank.org
- International Treaty Arbitration: http://italaw.com
- UNCTAD treaty database: http://investmentpolicyhub.unctad.org/IIA
Thank you for your attention!

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