

INTERNATIONAL INVESTMENT LAW

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FRIDAYS: 6:30-9:15, CLASSROOM 114W

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COURSE STRUCTURE

Class 1 - Introduction to International Investment Law

Class 2 - International, National and Contractual Frameworks of Investment Protection

Class 3 - Expropriation

Class 4 - Most-Favored Nation / National Treatment

Class 5 - Fair and Equitable Treatment / Full Protection and Security

COURSE STRUCTURE

Class 6 - Defenses in International Investment Law: State Regulatory Space / **Group Assignment Submission**

Class 7 - Arbitral Process and Arbitral Institutions / **Group Assignment Presentation**

Class 8 - Jurisdiction and Admissibility / Admission and Establishment

Class 9 - Applicable Law and Interpretation; Revision

- FINAL EXAM -

GRADING

CLASS PARTICIPATION – 30%

GROUP ASSIGNMENT – 30%

FINAL EXAM – 40%

CLASS 1

INTRODUCTION TO INTERNATIONAL INVESTMENT LAW

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HISTORIC BACKGROUND

- Originally, the rules protecting what could be deemed as 'foreign investment' were not of significant interest; treaty practice in the 19th century protected alien property **not** by autonomous standards of international law, but on the basis of domestic law and equality between aliens and national citizens, in respect to indemnities for the damage they may have sustained: the implicit understanding was that every State would protect private property in its legal order and that such protection would suffice to protect an alien investor.
- In 1778 the USA and France conclude their first commercial agreement; several Friendship, Commerce & Navigation treaties were concluded between European allies and the USA; these treaties were mostly trade treaties, but also included provisions on compensation in case of expropriation.

HISTORIC BACKGROUND

- In 1917 the Soviet Union expropriated foreign investors without compensation and justified its action by 'national treatment standard'; the ensuing dispute led to the Lena Goldfields Award, where the Soviet Union was held to pay compensation to the alien claimant, on the basis of unjust enrichment.
- 1938: The Hull Doctrine: after Mexico nationalized American interests; this dispute led to diplomatic exchange where the US Secretary of State, Cordell Hull stated that international law 'allowed expropriation of foreign property, but required prompt, adequate and effective compensation'. Five decades after it was formed, the Hull rule would become a standard element of BITs and multilateral agreements (e.g. Energy Charter, NAFTA, etc).

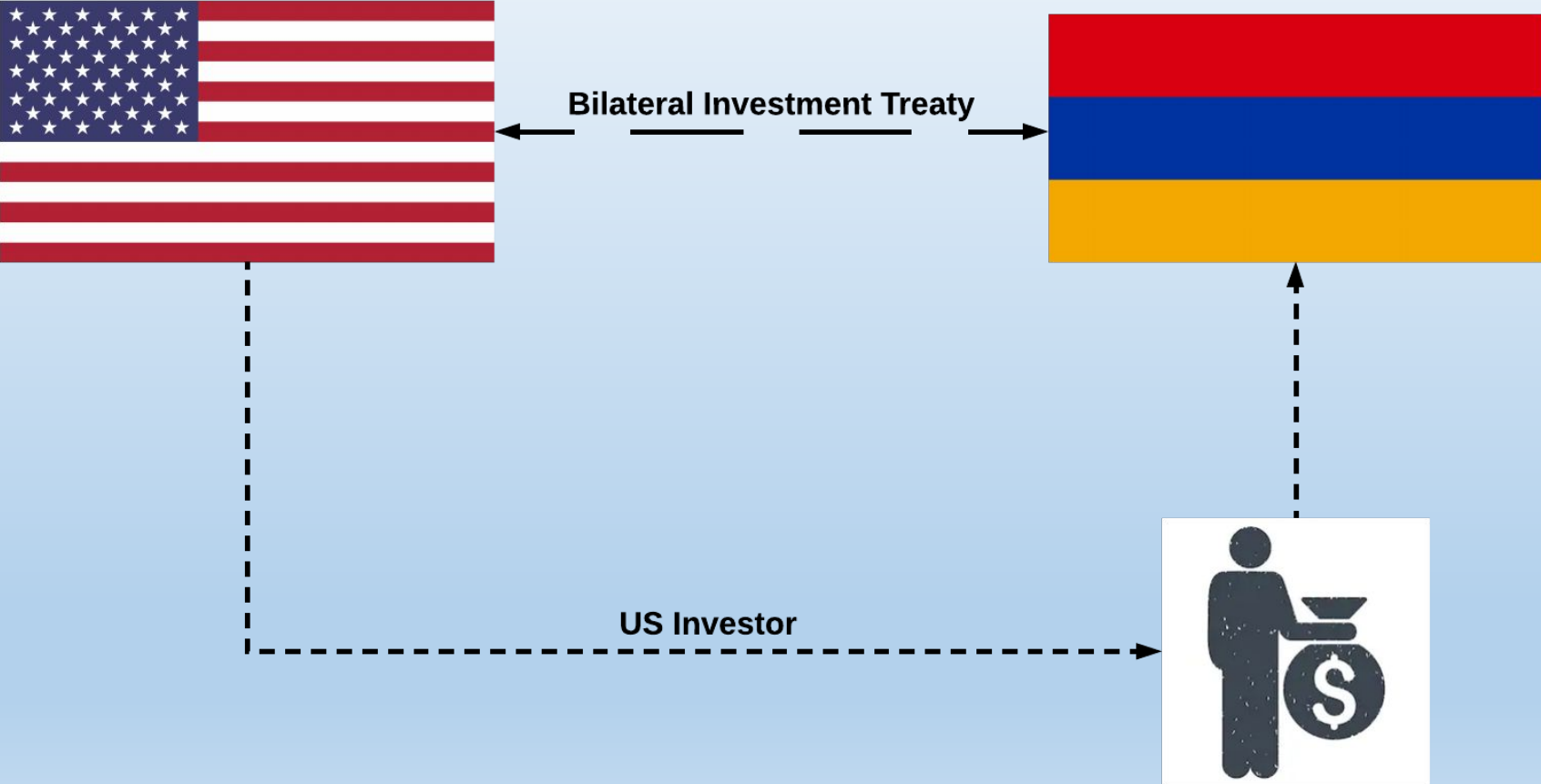
HISTORIC BACKGROUND

- In 1959 The era of modern investment treaties begun when Germany concluded a Bilateral Investment Agreement with Pakistan, in order to protect its national companies' investments, in accordance with the laws of the host state. Switzerland concluded its first treaty with Tunisia in 1961 and France with Tunisia in 1972. The USA followed in 1977, launching a set of agreements with a view to protect foreign investments abroad, mainly with developing states.
- 1969: First bilateral treaties between States did not contain any direct investor-state dispute settlement procedure; the submission of disputes would be done before the ICJ or through ad hoc state-to-state arbitration. **In 1969 the BIT between Italy and Chad offers for the first time arbitration between states and investors.**

HISTORIC BACKGROUND

- 1990 onward: after the collapse of the Soviet Union and the financial crisis in Latin America, the tide changed; developing states no longer called for 'permanent sovereignty' in the UN GA and tried to attract foreign investment by granting more protection to foreign investment than required by customary international law. Ever since, both developing and developed states have concluded investment agreements. More than 3000 BITs exist at a global level.
- Armenia has concluded 42 BITs, 35 of which are in ratified and in force

STRUCTURE OF INVESTMENT PROTECTION



ESSENCE OF INVESTMENT LAW

International investment law forms part of international economic law, together with international trade law. However, it has distinct features and a different structure that have to be taken into full consideration, when an analogy is drawn between trade law and IIL. IIL operates in a different fashion than an ordinary economic agreement or a trade transaction, in terms of **(a) cost**, **(b) time** and **(c) risk**.

(a) Cost: often, the business plan of a prospective investor involves a significant amount of money, goods, services and human resources that have to be sunk into the project; usually, this money has to be sunk on the outset, for the economic operation to be established and in order to start to apply. For example, in the *Fraport v. the Philippines* case, Fraport undertook a major investment plan in order to restructure and create the new Terminal III in Manila, and after having committed a considerable amount of money, the investment was expropriated. Besides, these resources are hardly transferable, since the machinery and installations of the project are specifically designed and tied to the particularities of the project and cannot be transferred to a different location, or that would require a disproportionate amount of money. Thereby, the investor will need a significant net of protection, to ensure that he will recoup the invested resources plus an acceptable rate of return during the subsequent period of investment.

ESSENCE OF INVESTMENT LAW

(b) Time: investment projects, contrary to commercial transactions that are a one-time exchange, may last up to 30 years. An investment means a long-term relationship with the host country and the investor will seek for legal guarantees against probable political risks inherent in the future intervention of the host State (under a new government) in the legal design of the project or the regulatory environment of the investment.

(c) Risks: the foreign investor undertakes the commercial risks inherent in the possible changes in the market. Those risks involve: new competitors, price volatilities, exchange rates, changes affecting the financial setting (e.g. an economic crisis). Withal, the investor bears additional risks, such as political interventions, inflation, changes in fiscal policy etc.

ESSENCE OF INVESTMENT LAW

Thus, the investor will seek to minimize the risks that may arise during the period of the investment through protective clauses that regulate the unilateral conduct of the State. The dynamics in the relationship between the investor and the State will differ, before and after the investment:

How and when? Before the investment or after?

- **Before the investment**, the investor is in the driver's seat, since the host State is keen to attract the investor. In principle, large projects are not typically made under the general laws of the State : the host State and the investor will negotiate a deal (investment agreement) that will adapt the general law of the host State to the specificities of the investment. The investor will seek for legal and other guarantees necessary in view of the nature and specificities of the project, taking into consideration bilateral and multilateral treaties that the host State has included (e.g. BITS, sectoral or regional agreements) or the guarantees of general international law. The protective safeguards may refer to: the applicable law, tax regime, inflation, obligation of the State to buy a certain volume of the product (especially in energy production), the pricing of the product, customs and tariffs for primal matter for the product and especially a future dispute settlement mechanism (usually, arbitration clause).

- **After the investment**, the dynamics change: once the money and resources are sunk into the project, influence and power tend to shift over the side of the host state. The central political risk lies in the subsequent change of circumstances, or in the change of position of the government that would alter the balance of risks and benefits thus frustrating the investor's legitimate expectations embodied in the business plan.

SOURCES OF INVESTMENT LAW

What are sources of international investment law?

- a) Treaties
- b) Customary international law
- c) General principles of law
- d) Unilateral statements
- e) Case law
- f) Binding authoritative interpretations

SOURCES OF INVESTMENT LAW: TREATIES

(1) ICSID

ICSID (International Convention on Settlement of Investment Disputes) is a multilateral convention providing for a common procedural framework for disputes arising between states (state-state disputes) or foreign investors (investor-state disputes) through a) arbitration, b) conciliation. ICSID does not contain substantive provisions; the simple fact of participating in ICSID does not mean consent to arbitration, for which there is a special procedure.

SOURCES OF INVESTMENT LAW: TREATIES

(2) BITs

BITs (Bilateral Investment Treaties) are treaties concluded between two States, with which they provide guarantees for the investments of investor from one State to the other. BITs consist in three parts:

(a) **Definitions:** on the meaning of 'investor' and 'investment'.

(b) **Substantive provisions:** setting common standards of protection, in particular (i) a provision on admission of investment, (ii) guarantee of 'fair and equitable treatment', (iii) guarantee of full protection and security, (iv) guarantee against discriminatory treatment, (v) guarantee of national treatment, (vi) guarantee of most favoured nation (MFN), (vii) guarantees against expropriation, (viii) guarantees for the freedom of payments.

(c) **Dispute Settlement provisions:** there are two kinds of provisions: (i) a clause that provides for investor-state arbitration before an ICSID Tribunal or another form of dispute settlement (ad hoc arbitration, conciliation), (ii) a clause providing for state-to-state arbitration (very rare in practice).

SOURCES OF INVESTMENT LAW: TREATIES

(3) Regional and sectoral agreements

Regional or sectoral agreements are general agreements that cover various topics, such as free trade, transit, services etc., but also contain investment clauses and procedural provisions. The most successful attempts to establish multilateral investment treaties were the North Atlantic Free Trade Agreement (NAFTA) and the European Energy Treaty (ECT).

SOURCES OF INVESTMENT LAW: CUSTOM

What is customary international law?

Article 38 (1) (b) of the Statute of the International Court of Justice explains customary international law as comprising of “(1) a general practice (2) accepted as law”. Further, in *Nicaragua* case –

“[...] for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief.. the subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. ”

SOURCES OF INVESTMENT LAW: CUSTOM

What about international investment law? How customary international law is applicable in this context?

ILL is primarily treaty based. However, account must also be had of customary rules of IL that govern the relations between the parties. In accordance with the VCLT Art. 31§3(c), 'There shall be taken into account, together with the context ... (c) Any relevant rules of international law applicable in the relations between the parties'.

Customary law may play a major role in the practice of investment arbitration for a number of topics, such as: State responsibility, damages, rules on expropriation, denial of justice, nationality of investors.

SOURCES OF INVESTMENT LAW: GENERAL PRINCIPLES OF LAW

What are general principles of law?

According to Art. 38(1)(c) of ICJ Statute, one of the sources of IL is 'the general principles of law recognized by civilized nations'; in case of lacunae in the treaties, general principles of law may play a key role in filling the gaps for the purposes of substantive investment protection and arbitration proceedings by means of interpretation.

These include:

- a) Good faith
- b) Estoppel
- c) Burden of proof
- d) Right to be heard

GENERAL PRINCIPLES OF LAW: GOOD FAITH

Sempra v. Argentina concerned Sempra's investment in two natural gas distribution companies, together serving seven Argentine provinces, and a number of measures adopted by the Argentine Republic which, in the Claimant's view, modified the general regulatory framework established for foreign investors under which Sempra made its investment.

Sempra, a US investor, held an equity interest in two Argentinean gas distribution companies, CGS and CGP, which had been created during the privatization campaign in early 1990s. At that time, in order to attract foreign investors, Argentina enacted legislation which guaranteed that tariffs for gas distribution would be calculated in US dollars (paid in pesos at the prevailing exchange rate) and that automatic semi-annual adjustments of tariffs would be based on the US Producer Price Index (US PPI). In the circumstances of the economic crisis that developed in Argentina in early 2000s, the Government abrogated the guarantees provided at the time of privatization, which led to a very substantial reduction in the profitability of the gas distribution business and, accordingly, returns on Sempra's investment.

To avoid the default of CGS and CGP, in December 2001 Sempra lent them US\$56 million. In 2002, Sempra initiated ICSID arbitral proceedings claiming multiple violations of the 1991 Argentina-US BIT and requesting damages. The Tribunal found that Argentina's measures breached fair and equitable treatment standard and the umbrella clause. Other claims were dismissed.

GENERAL PRINCIPLES OF LAW: GOOD FAITH

Sempra argued that Argentina had breached the standard of fair and equitable treatment, by: failing to act in accordance with good faith, thus frustrating the legitimate expectations of the claimant and interfering with its property rights, violating and repudiating assurances and representations offered to attract foreign investment, altering the legal and business environment upon which the Claimant had relied in making the investment, failing to provide a stable and predictable legal environment, and abusing its rights [§ 290]. The question posed was whether good faith as a general principle of law applies in the context of investment law.

The award held that there is a ‘a requirement of good faith that permeates the whole approach to the protection granted under treaties and contracts [§299]’

GENERAL PRINCIPLES OF LAW: GOOD FAITH

Rumeli v. Kazakhstan: The Tribunal held that Kazakhstan had expropriated Rumeli and Telsim's 60% stake in the telecommunications company KaR-Tel and awarded damages of US \$125 million (the "Award"). Kazakhstan sought the annulment of the Tribunal's damages award on the basis that it was "inexplicable, being based on inconsistent, illogical or nonexistent reasons," and that the Tribunal had failed to adequately State the reasons for its decision on the quantum of damages.

The Claimants contended that the Award was easy to follow and was not lacking in reasons, and that Kazakhstan's complaints related exclusively to the correctness of the award. One of the questions was the application of the principle of *nemo auditor propriam turpitudinem allegans* [no one can be heard to invoke his own turpitude]. According to Respondent, being part of a worldwide fraudulent scheme, Claimants' investment was made in violation of the principle of good faith. The Tribunal applied the *nemo auditor propriam turpitudinem allegans* principle, by stating that 'in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host State laws and regulations' (§319), but found no conclusive evidence that found in the record any conclusive evidence that Claimants' investment would have violated the principle of good faith, the principle of *nemo auditor propriam turpitudinem allegans* or international public policy.

GENERAL PRINCIPLES OF LAW: ESTOPPEL

Grynberg v. Grenada: Initiated in 2005, the ICSID claim was one of a host of legal avenues pursued by Jack J. Grynberg, the president and CEO of RSM Production Corporation, in an effort to gain an exploration license for oil and gas reserves that may lie off the coast of Grenada. One of the issues put forward was the principle of collateral estoppel. The Respondent government asserted that Claimants' claims must be dismissed under the doctrine of collateral estoppel.

Under that doctrine a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or Tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or Tribunal, adding that it is well established as a general principle of law applicable in international courts and Tribunals being a species of *res judicata*. The Tribunal agreed that collateral estoppel is a general principle of law and proceeded to examine its application in that case.

GENERAL PRINCIPLES OF LAW: BURDEN OF PROOF

Alpha v. Ukraine: Beginning in 1994, Alpha Projektholding GmbH (an Austrian investor), concluded several joint-activity agreements (JAAs) with Hotel Dnipro, a Ukrainian State-owned enterprise in Kiev, for the reconstruction of the hotel building. Under the agreements, Alpha would take a bank loan to pay Pakova—the company that would undertake the renovation—and would receive minimum monthly payments from Dnipro. However, Dnipro's deteriorating finances led it to renegotiate one of the JAAs in 2000, suspending the minimum monthly payment until 2006 and prolonging the term of the agreement. Ultimately, the hotel's dire financial straits led the Ukrainian government to transfer the authority to manage Dnipro from the State Tourist Administration to the State Administration of Affairs (SAA), which requested an official audit of Dnipro's financial activities. The audit indicated that Alpha's investment in Dnipro and its implementation were unlawful under Ukrainian law, due to misappropriations of funds and noncompliance with accounting standards. Although Dnipro's new management reassured Alpha that the JAAs remained valid, Alpha no longer received payments under any of the JAAs as of July 2004.

GENERAL PRINCIPLES OF LAW: BURDEN OF PROOF

After consultations between the Austrian and Ukrainian governments broke down, Alpha initiated ICSID arbitration against the Ukraine under the Austria-Ukraine Bilateral Investment Treaty (BIT) in 2007. Alpha claimed that the cessation of payments and other acts by Dnipro and the Ukrainian government amounted to breaches of several BIT provisions, including those on expropriation, fair and equitable treatment, and the umbrella clause.

On the issue of the burden of proof, the Arbitral Award notes that the ICSID Convention, the ICSID Arbitration Rules and the BIT do not provide guidance for determining which party bears the burden of proof. Nonetheless, the Tribunal accepted that it is a widely recognized practice before international Tribunals that the burden of proof rests upon the party alleging the fact (*onus probandi actori incumbit*).

GENERAL PRINCIPLES OF LAW: RIGHT TO BE HEARD

Fraport v. the Philippines: The dispute has arisen out of an investment made by Fraport, which is a German company, in a Philippine company, later known as PIATCO. In 1997, the Philippine government conferred upon PIATCO the concession rights for the construction and operation of an international passenger terminal at Manila's principal airport, known as Terminal III. At the end of November 2002, the President of the Philippines declared that her Government would not honor the Terminal 3 contracts as the Solicitor General and the Justice Department have determined that all five agreements covering the NAIA, most of which were contracted in the previous administration, are null and void. By this point, the terminal was almost complete. Fraport requested arbitration, while the government expropriated the terminal with a commitment to pay just compensation under domestic law. Fraport was initially unsuccessful in its claim under the Germany-Philippines BIT.

GENERAL PRINCIPLES OF LAW: RIGHT TO BE HEARD

On 6 December 2007, Fraport AG Frankfurt filed with the Secretary-General of the ICSID an application in writing requesting the annulment of the Award, in accordance with Art. 52 § 1 of the ICSID Convention, which states that 'either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.' Fraport alleged that the Tribunal committed a serious departure from a fundamental rule of procedure in two respects: first, the presumption of innocence (*in dubio pro reo*) and second, the failure to allow for a rebuttal on the significance of new evidence admitted after the closure of proceedings, in breach of its right to be heard.

GENERAL PRINCIPLES OF LAW: RIGHT TO BE HEARD

In fact, the Tribunal relied upon evidence from the investigation leading to the decision of the Prosecutor on the criminal complaint concerning Fraport's alleged breach of the Agreement, and that evidence was admitted after the close of proceedings in denial of **Fraport's right to be heard**. The Panel accepted that the requirement that the parties be heard is undoubtedly accepted as a fundamental rule of procedure applicable to international arbitral proceedings generally, a serious failure of which could merit annulment.

SOURCES OF INVESTMENT LAW: UNILATERAL STATEMENTS

What are unilateral statements?

The PCJ and the ICJ have held that ‘unilateral declarations may be legally binding, if the circumstances and the wording of the statement are such that the addressee is entitled to rely on them’ [ICJ, Nuclear Tests, § 268]. In the context of IIL, unilateral statements of the State addressed to the investor and creating legitimate expectations, may entail binding legal consequences. The binding effect of legitimate expectation has been examined mostly in cases involving Fair and Equitable Treatment (FET). Unilateral Statements on behalf of the host State may acquire a binding legal effect through the principle of good faith.

SOURCES OF INVESTMENT LAW: CASE LAW

How does the power of precedent work in international investment law?

Similar to court practice in US and UK? Are the decisions of tribunals binding on the subsequent tribunals?

What about permanently acting arbitral institutions (e.g. ICSID)?

SOURCES OF INVESTMENT LAW: CASE LAW

- It is a well-established principle of IIL that Tribunals in investment arbitration **are not bound by previous decisions of other Tribunals.**
- Every Tribunal is established ad hoc and only for the purposes for the specific arbitration between the specific parties.
- Previous decisions do not have any binding effect on future investment settlement proceedings.
- ***AES v. Argentina*** is to date the award where the legal relevance of previous ICSID decisions was discussed most extensively.

SOURCES OF INVESTMENT LAW: CASE LAW

AES v. Argentina

The case concerned AES' investment in eight electricity generation companies and three major electricity distribution companies in Argentina, and Argentina's alleged refusal to apply previously agreed tariff calculation and adjustment mechanisms. Argentina raised some preliminary objections with regards to the jurisdiction of the Tribunal. In its Counter-Memorial, AES further referred to several ICSID Tribunal decisions on jurisdiction (Vivendi I, II, CMS, Azurix, LG&E v. Argentina, ENRON, SIEMENS A.G. v. Argentina). The argument made by the Claimant on the basis of these decisions, treated more or less as if they were precedents, tends to say that Argentina's objections to the jurisdiction of this Tribunal are moot if not even useless since these Tribunals have already determined the answer to be given to identical or similar objections to jurisdiction.

SOURCES OF INVESTMENT LAW: CASE LAW

AES v. Argentina

Argentina, on the other hand, stressed that the Tribunal's jurisdiction is based upon the ICSID Convention (Art. 25), in conjunction with the BIT for the protection of investments in force between Argentina and the home State of the foreign investor; each BIT is specific as compared to other BITs and has a different and defined scope of application, thus it is not a uniform text. The consent granted by signatory States of BITs shall not be extended by means of presumptions and analogies, or by attempting to turn the *lex specialis* into *lex generalis*. The reading of some awards may lead to believe that the Tribunal has forgotten that it is acting in a sphere ruled by a *lex specialis* where generalizations are not usually wrong, but, what is worst, are illegitimate. Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.

SOURCES OF INVESTMENT LAW: CASE LAW

AES v. Argentina

To that end, the Tribunal held that ‘each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system’. In § 30 the Tribunal stressed that ‘each Tribunal remains sovereign and may retain, ... a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these Tribunals on a specific point of law, it is free to adopt the same solution.’

SOURCES OF INVESTMENT LAW: CASE LAW

In principle, precedents from investment arbitral Tribunals are not binding; nonetheless, Tribunals usually rely, or at least refer to previous awards, in order to substantiate their reasoning. Reliance on previous cases may have substantial advantages, in particular:

- (1) **Uniformity** of international investment law instead of fragmentation, ensuring the harmonious development of international investment and the homogenous application and interpretation of investment treaties.
- (2) **Predictability** of decisions and stability of the law, ensuring the rule of law and legal certainty, protecting legitimate expectations of the parties, creating a stable legal environment for investments (Saipem SpA v. Bangladesh).
- (3) **Equality between different investors against the State** , that would otherwise suffer the outcome of different awards based on a differential treatment even though the factual circumstances of the cases are strongly similar,
- (4) **Enhancement of the authority** of judicial making-process of arbitral awards.

SOURCES OF INVESTMENT LAW: CASE LAW

To this end, the Tribunal in the case of ***Saipem v. Bangladesh*** acknowledged that 'it must pay due consideration to earlier decisions of international Tribunals ... subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases... it also believes that, subject to the specificities of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law.'

SOURCES OF INVESTMENT LAW: BINDING INTERPRETATIONS

What are binding authoritative interpretations?

Sometimes, investment treaties or regional agreements provide for a mechanism (or a body) of authoritative interpretation of the specific treaty itself! In that case, the interpretation given by that body (albeit it is not a precedent) has a binding legal effect, in accordance with the VCLT 1969 Art. 31 § 3(a) 'There shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

For example, in the NAFTA there is a mechanism according to which the Free Trade Commission (FTC), a body composed by representatives of the three State parties (US, Mexico, Canada) may adopt binding interpretations of the NAFTA (Art. 2001(1)). Hitherto, the FTC has made an authoritative interpretation on the terms of 'fair and equitable treatment' and 'full protection and security', under Art. 1105 NAFTA, which NAFTA Tribunals have accepted as binding.

INTERPRETATION OF INVESTMENT TREATIES

How are investment treaties different from ordinary commercial contracts?

What is the difference in interpretation?

Treaties are interpreted with techniques employed in public international law □ VCLT Article 31

Thus, the following factors should be considered for interpretation □ (1) text of the treaty, (2) original will of parties and subsequent agreements, (3) object and purpose of the treaty, (4) secondary means of interpretation

PRIMARY MEANS OF INTERPRETATION

(1) Text of the treaty

In accordance with Art. 31 § 1 VCLT, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

As the ICJ held in *Guinea-Bissau v. Senegal* in 1991, 'the rule of interpretation according to the natural and ordinary meaning of the words is not absolute one: where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.'

PRIMARY MEANS OF INTERPRETATION

(2) Original will and subsequent agreements

Looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the 'subjective approach', in contradistinction to the 'objective approach' □ Expressions or geographical names contained in the instruments are to be given the meaning they had at the time the instrument was concluded.

For the purposes of treaty interpretation, the context includes, apart from the text and the annexes/preamble, according to Art. 31 § 2 (a), (b):

(a) Any **agreement** relating to the treaty made between all the parties in connexion with the conclusion of the treaty; for example, in the *Fraport v. the Philippines* case, the Tribunal used in its reasoning the instrument of ratification which was exchanged between Germany and the Philip-pines.

(b) Any **instrument** which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

PRIMARY MEANS OF INTERPRETATION

(2) Original will and subsequent agreements

Art. 31 § 3 (a), (b) - there shall be taken into account, together with the context [but do not constitute the context itself]:

- Any **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions; On the importance of authoritative interpretation of investment treaty provisions and their binding effect, see above.
- Any **subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- Any relevant rules of international law applicable in the relations between the parties

PRIMARY MEANS OF INTERPRETATION

(3) Object and purpose

This approach does not attach so much of importance to the text of the treaty or the intentions of the contracting states, rather than the aim sought by the instrument; given that this takes a distance from the subjective will of the parties, it gives a larger breathing space for judicial law-making.

In this respect, Art. 31 § 1 provides that every treaty has to be interpreted 'in the light of its object and purpose.' In investment treaties, the object and purpose of the treaty is often found in the preamble [context], which highlights the positive role of Foreign Investment in general and the nexus between an investment-friendly climate and the flow of foreign investment. In the case of *Amco v. Indonesia*, the Tribunal pointed out that investment protection is in fact in the interest of the host State in the long-term: 'to protect investments is to protect the general interest of development'.

SECONDARY MEANS OF INTERPRETATION

- If the interpretation in accordance with Art. 31 [text, context, object, purpose, subsequent agreements] is sufficiently clear, there is no need to refer to supplementary means of interpretation, unless the Tribunal wishes to confirm the meaning.
- If the interpretation in accordance with Art. 31 is **unclear, or leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable**, then Article 32 provides for supplementary means of interpretation, inter alia: **(a) the travaux préparatoires** and **(b) the circumstances of its conclusion**.

SECONDARY MEANS OF INTERPRETATION

The **travaux préparatoires** are regularly taken into account by the Tribunals, when they are brought into their attention. The most striking example of preparatory works is **ICSID** Convention: the drafting history of ICSID (contrary to most BITs) is well documented in detail and available through an analytical index.

NAFTA, for a number of years, did not have its drafting history published. States had access to the documents reflecting the negotiating process but individuals did not. This led to serious inequality of arms and complaints. In 2004, the FTC released the negotiating history of Chapter 11 of the NAFTA, which deals with investment.

THANK YOU