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# **Conflict or Cooperation – Climate Change and International Investment Law**



# International Investment Law and the Climate Change Regime

- Functionally separate legal regimes based on different objectives and concerns
- Key aspects of international investment law – protection of foreign investment to facilitate economic development
- Relevance of investment law in the climate regime – potentially dual function
  - 1) Constrain regulatory measures and policies
  - 2) Facilitate private climate and energy investment
- Is there a need for harmonization, i.e. to what extent and how are specific values and concerns underlying the climate regime relevant in an investment law context?
  - 1) Is it conceivable that underlying climate concerns and objectives may affect the legitimacy of a regulatory measure interfering with an investment?
  - 2) Is it, conversely, conceivable that climate concerns and objectives underlying an investment may affect the protection of that investment?

# The Basic Architecture of International Investment Law

- Based on a global network of Bilateral (and some multilateral) Investment Treaties (BITs)
- Common structure and similar substantive standards in individual treaties
- Common framework of dispute settlement – the ICSID and NY Conventions
- Legal development through case law

# Typical Structure of a BIT

- Definition of “Investment” and “Investor”
  - Defines the scope of the treaty
- Substantive standards of treatment
  - Defines the level of protection
- Investor-state dispute settlement
  - Provides the remedy

# Case example

- A multinational company Y makes a multibillion dollar investment in country X to build a steel production plant with its own power supply based on the cheap coal resources of country X
- Before the investment is made an investment contract is entered into guaranteeing the level of taxes and duties for a period of 30 years
- After 10 years, the progressive new government of country x enacts new legislation implementing an emission quota system.
- This raises production cost for company Y, it renders further production unprofitable and forces the company to close down the production plant

# The concept of “investor of one contracting party”

- Nationality requirement
- Formal vs substantive criteria to determine nationality
  - Companies – formal incorporation vs substantial link requirement
  - Cf the *Nottebohm* and *Barcelona* traction criteria in general international law
- Is there a need to avoid treaty shopping?
  - Suppose that (i) Norway does not have a BIT with country X, (ii) company Y is a Norwegian company canalizing the investment through a single purpose company in the Netherlands to benefit from its BIT with country X, and (iii) that company Y does not have any business in or substantial links with the Netherlands
  - Should company Y notwithstanding be entitled to rely on the Netherlands BIT for protection against country X’s regulatory attempts to combat climate change?

# The notion of "investment"

- Determines the material scope of protection
- Typically broadly defined to include "any asset" with economic value
- Formal requirement or substantive issue concerning right to regulate vs. protection of private rights?
- What constitutes the protected "investment" of company Y?
  - The property rights to its production facilities?
  - Or also the contractual guarantees regarding the level of taxes and duties?

# Substantive protective standards: the Expropriation standard

- Compensation requirement in case of direct or indirect expropriation
- Crucial distinction between ordinary and legitimate regulation and indirect expropriation
  - The "effects" or "deprivation" criterion
  - To what extent is the underlying public policy relevant?
- Does the imposition of climate quotas constitute indirect expropriation?
  - Does it matter that the company obtained guarantees of a certain level of taxes and duties?
  - Would it have mattered if the new regulation instead came as a result of discoveries of a toxic waste product from the production causing substantially higher incidents of cancer in the local population?

# Other common substantive standards

- Umbrella clauses
- Fair and Equitable Treatment
- Full Protection and Security
- Non-discrimination (MFN and National Treatment)
- Freedom of transfer

# Dispute settlement: investor-state arbitration

- Arbitration – usually based on the ICSID convention
- Typical jurisdictional requirements
  - “Legal dispute”
  - “...arising directly out of an investment”
  - Limitation to “treaty claims” – alternatively “any legal dispute”
- No requirement to exhaust local remedies – ICSID Convention art 26

*“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”*

- Suppose now that the investment contract between Country X and Company Y contains an exclusive jurisdiction clause referring all disputes “arising in connection with the investment” to the local courts?

# Dispute Settlement: The Arbitral Award

- ICSID art 54 – shall be recognised and enforced under the municipal law of all member states “as if it were a final judgment of a court of that state”
- NY Convention – shall be recognised and enforced subject to limited exceptions (art V), e.g. ordre public, excess of competence etc.
- Ordinary rules on state immunity against execution apply, cf. ICSID art 55
- Suppose that country X is ordered to pay 250 MUSD in compensation to company Y – company Y then seeks enforcement of the award by seizure of assets belonging to country X in Paris
  - Can country X claim state immunity in its defence?
  - Is it conceivable that the environment/climate concerns underlying the measures could be relevant in the determination of whether country X enjoys immunity?