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International Investment Law
Lecture 1 – Nature, history and development
International Investment Law - Overview

• International investment law as a part of international economic law
• Main focus – admission and protection of foreign investment
• Shaped by underlying economic objective - to facilitate the flow of foreign investment
• Functional purpose – the ‘obsolescing bargain’ and the nature of investment risks
Overview of main actors and interests

- The investors
- The host states
- The home states
- Other actors/stakeholders?
The structural framework

• No uniform multilateral treaty framework – consists (primarily) of bilateral investment treaties (BITs)

• Investors customarily given individual and direct rights of recourse under international law

• Multilateral procedural framework consisting of a system of international arbitration
Functional characteristics

- ‘Hybrid’ arbitral process – based on the model of contractual/commercial arbitration
- Application of both international and municipal law
- Substitute for internal administrative and constitutional law law
Historical background: three main historical phases

- The surge in foreign investment until WW I – “heyday” of international arbitration and claims commissions
- Increased protectionism and conflicts from WW I to the end of the cold war
- The end of the cold war until the present – modern investment arbitration
Historical roots - foreign investment protection and customary international law

- The related concepts of diplomatic protection and state responsibility for injuries to aliens
- Based on ‘the Vattelian fiction’ – an injury inflicted on a national causes an injury to its home state
  - Cf the Mavromattis Palestine Concessions case (PCIJ, 1924):
    “By taking up the case of one of its subjects, and by resorting to diplomatic action or international judicial proceedings on its behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law”
- Two components – substantive and procedural
Diplomatic protection and foreign investment protection: General unsuitability

- Lack of control and credibility for individual investors
- Politicization of disputes
- Pretext for coercion and use of power (gunboat diplomacy)

- Two parallel movements towards the current international system:
‘Legal settlement’ of foreign investment disputes under traditional international law

- The Drago-Porter Convention (1907) outlawing the use of force
- Inter-state arbitration and court settlement of investment disputes
- ‘Mixed claims commissions’ with individual access for claimants
  - The Iran-US claims commission as the latest example
International commercial arbitration

• Precursor in contractual arbitration between states and foreign investors – the notion of internationalization
  – The Libyan oil arbitrations

• Adoption of the contractual model of arbitration in investment disputes
  – The 1965 ICSID-Convention
  – The 1958 New York Convention

➢ Common requirement of mutual consent
The substantive standards: early controversies

- The principle of **national** treatment versus the **international** minimum standard
- The Hull-formula of ‘prompt, adequate and effective compensation’
- An early controversy: the Calvo-doctrine
- The NIEO movement
The ‘New International Economic Order’ Movement

• Decolonization and the controversy between developing and developed countries after WW II
• Main points of controversy – absolute vs. relative standards
• The UNGA resolutions
  – UNGA Res. 1803 (1962) – an attempted compromise
• Main outcome: the principle of permanent sovereignty over natural resources
The treaty framework: main developments

- Provisions on investment protection in early US FCN-treaties
- The Havana-charter and the proposal for the ITO (1948)
- The Abs-Shawcroft Draft (1959) and the OECD Draft Treaty (1967) as the model for later BITs
- The ICSID Convention (1965)
- The surge in BIT-arbitrations from 2000
Development of the contemporary system: the BIT movement and the development of investment treaty arbitration

• First BIT in 1959, but bulk of development after 1990
• Investment treaty arbitration under ICSID as the driving factor:
  – Direct access for individual investors
  – No exhaustion of local remedies
  – Application of international law
  – Enforceability of awards and restriction of state immunity
• First investment treaty case in 1990 (AAPL v Sri Lanka)
• Today 142 pending cases only before ICSID and more than 2500 BITs entered into
Trends towards multilateralism in foreign investment protection

• A legacy of failed attempts
  – The Havana Charter and the OECD draft treaty (1967)
  – The MAI negotiations (1998)
  – Abandonment of initiatives under the WTO (2004)

• Two notable multilateral treaties – NAFTA and the ECT

• Multilateralism as a functional characteristic of the current fragmented system

• Continuing aspirations toward a multilateral system?
Continuing issues of controversy – two opposing perspectives

- The BIT movement as reflection of an emerging consensus on substantive law? (Cf Lowenfeld)
- The alleged legitimacy crisis
  - Continuing (but marginal) criticism of (1) the effectiveness of BITs; (2) the desirability of foreign investment and (3) the justification of investor-state arbitration
  - More potent legitimacy critique of the system’s functional characteristics?
    - Lack of transparency
    - Lack of sensitivity to public concerns, potential conflicts with human rights and protection of the environment
    - Discrimination of domestic investors
    - Risk of conflicting decisions, lack of a standing court
    - Etc.