

Internationales Investitionsrecht

International Investment Law

Einführung und aktuelle Entwicklungen

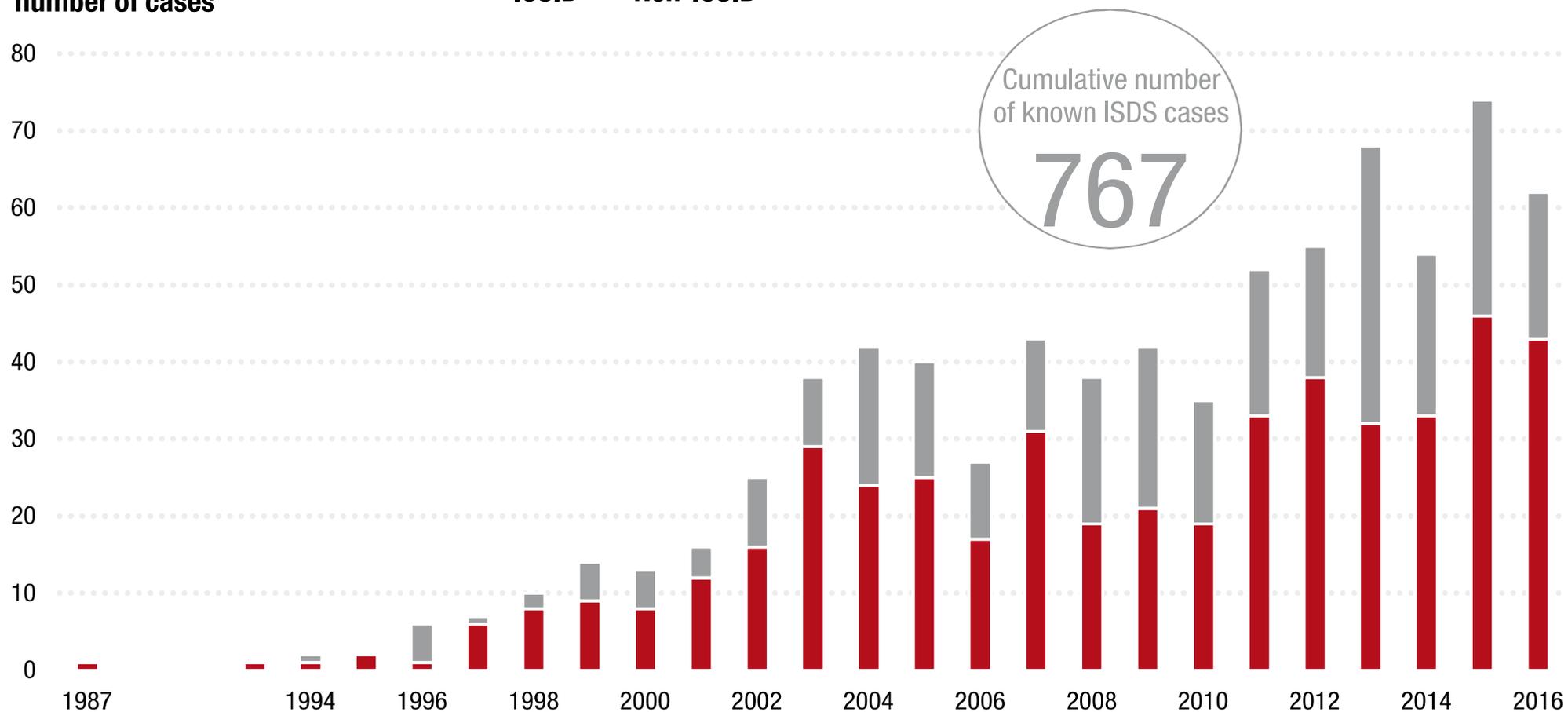
Introduction and Current Developments

Frühjahrstagung der Deutsch-Nordischen Juristenvereinigung e.V.
vom 8. bis 10. Juni 2018 in Riga

ISDS, TTIP, and CETA – Where does all the attention come from?

Annual number of cases

■ ICSID ■ Non-ICSID

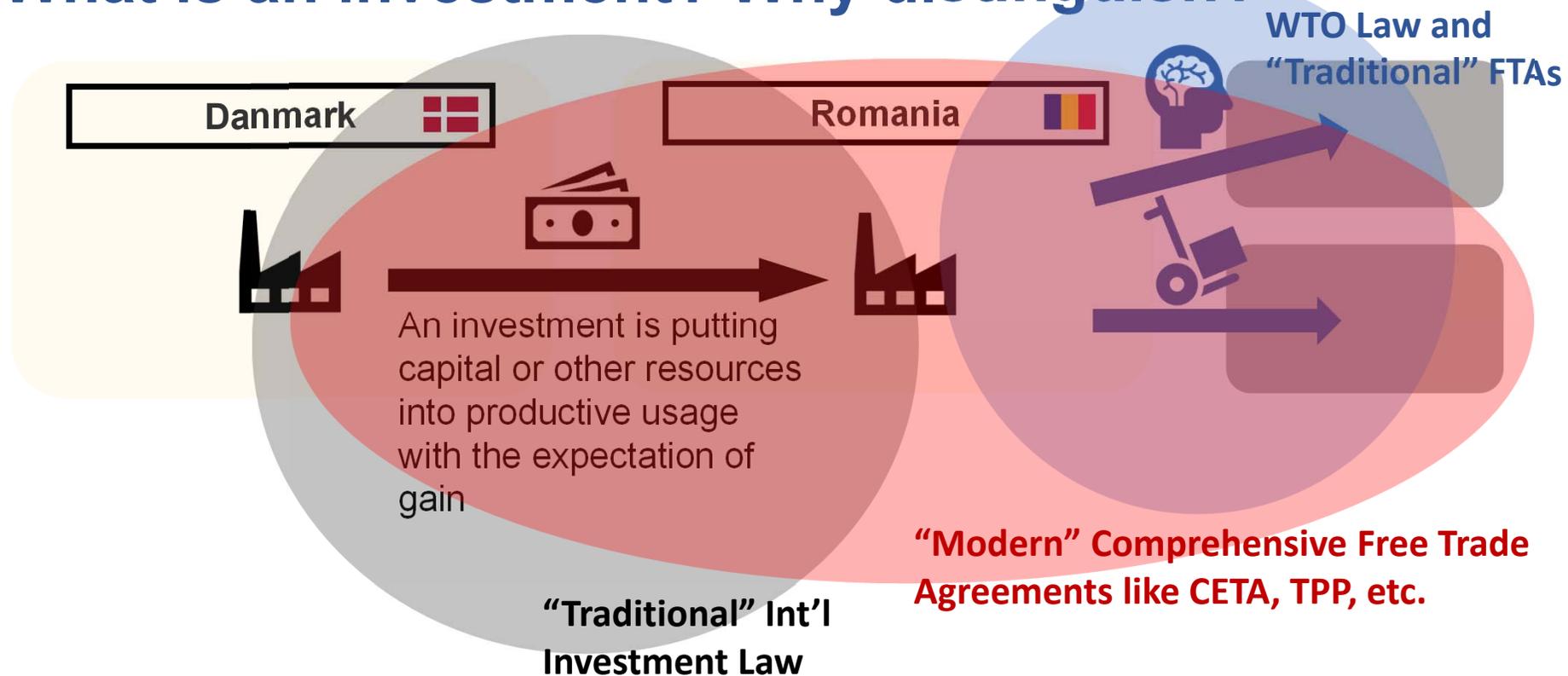


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Investments abroad – economic background and conflicts

Preliminary Remarks (1)

What is an investment? Why distinguish?

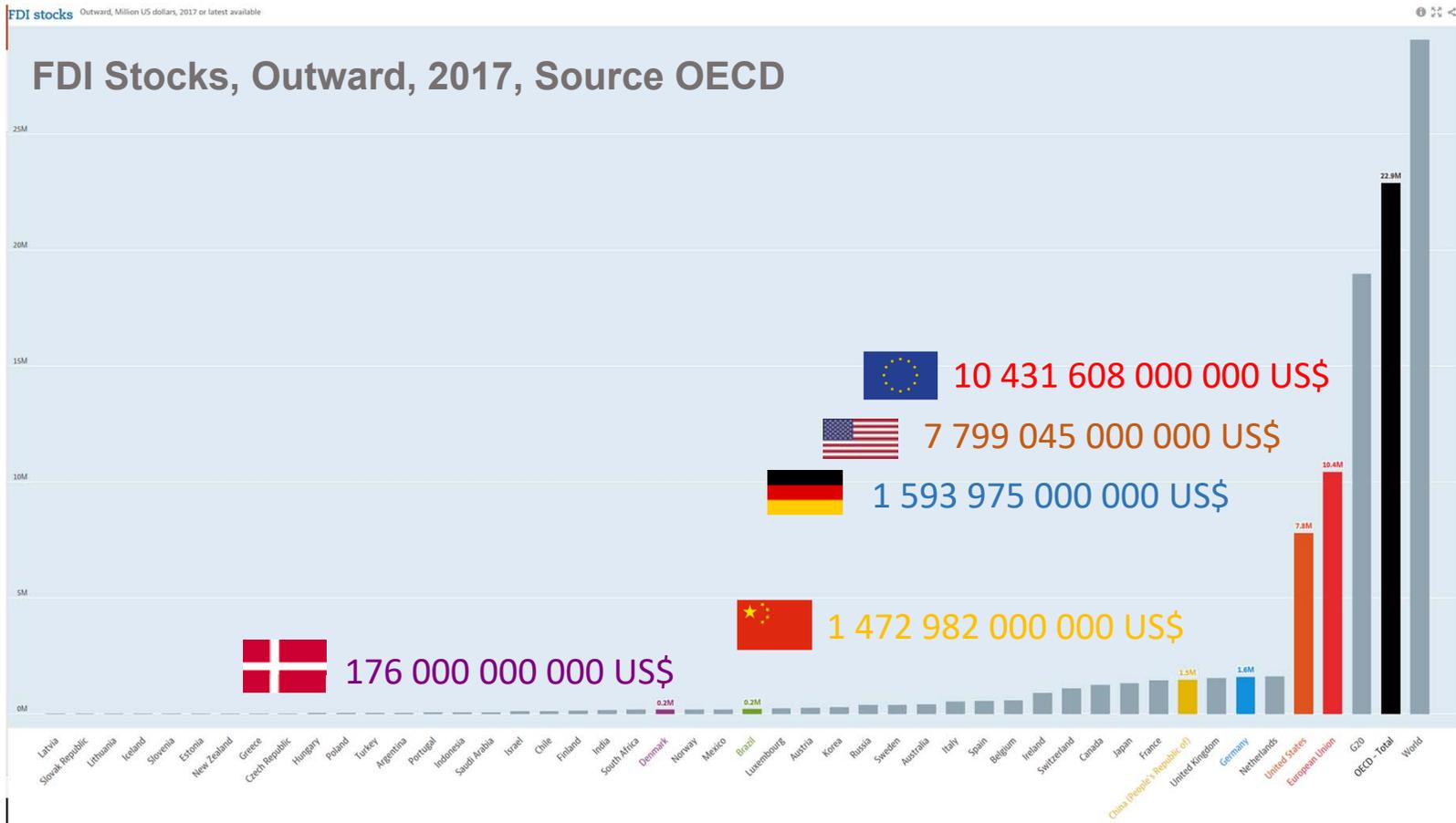


Preliminary Remarks (2)

- **Why does foreign investment happen?**
 - **Interests of the Investors**
 - Depends on economic theory – minimal overall consensus: profit
 - **Why do host States typically favour foreign investment?**
 - Development (esp. Less(er) Developed Countries (“LDCs”))
 - Technology transfer
 - Creating / expanding human capital
 - More competition – Foreign investment as a catalyst of the strengths and weaknesses of an economy
 - More efficiency of national firms
 - More jobs
 - More taxes

Preliminary Remarks (3)

Does foreign investment matter economically?



Preliminary Remarks (4)

- **What can go wrong?**

- **Economic risk:**

- flowing from ordinary commercial (**market**) activities (management, competition, technology...)

- **Political risk:**

- Capital bound in a foreign jurisdiction – investor is “prisoner of a leviathan”
 - State measures adversely affecting property rights and profits due to changing policy in the host State, e.g. by expropriation, discrimination, restricting transfer of earnings, not fulfilling commitments, physical interference (acts of war, terrorism, or military coups)

Preliminary Remarks (5)

- How to manage political risk?



Market

e.g. higher risks – higher returns necessary, risk insurances (Euler Hermes)



Public international law (“PIL”)

Int’l Investment Law

Sources of International Investment Law

Sources (1)

- **Customary International Law (“CIL”) – Law of Aliens**
 - Originally: Taking of alien property without full compensation unlawful
 - *arg.*: Property of the alien is part of the property of the home State of the alien; does not fall within the sovereign jurisdiction of the host State
 - Russian, Mexican Revolutions, Decolonialisation...
 - Today’s status (still) unsettled
 - Hull-Doctrine (1871-1955) v. Calvo-Doctrine (1824-1906):
 - International Minimum Standard (full, prompt, adequate compensation) vs. aliens had no rights greater than citizens of the host State

Sources (2)

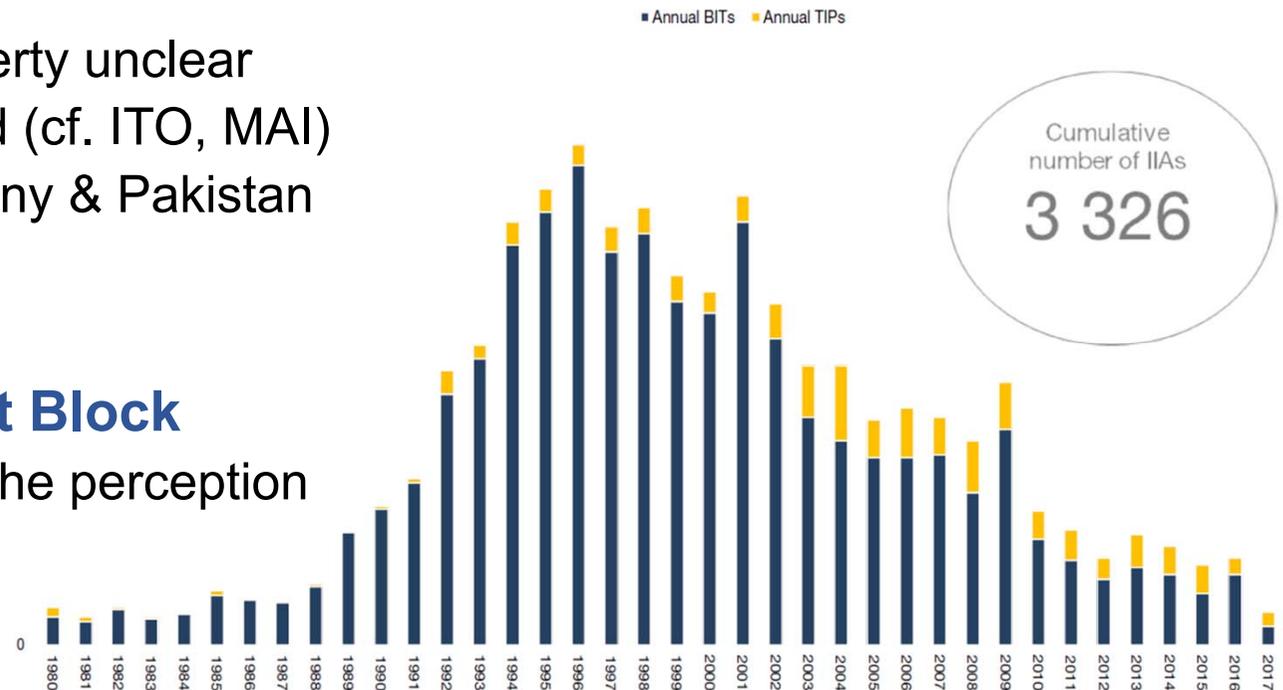
- **Main legal source: Bilateral Investment Treaty (“BITs”)**

- CIL-status of foreign property unclear
- Multilateral way foreclosed (cf. ITO, MAI)
- 1959: first BIT btw. Germany & Pakistan
- 1989: about 400 BITs

- **Breakdown of Communist Block**

- Liberalisation; Change in the perception of foreign investment
- Today: 3326 BITs (and other IIAs)

Figure 2: Trends in IIAs signed, 1980-2017



Source: ©UNCTAD, IIA Navigator.

Note: Preliminary data for 2017

Basic Design of a BIT / Investment Chapter in a FTA

Basic Design - Overview

Bilateral Investment Agreement / Investment Chapter in Comprehensive Free Trade Agreement

Scope of Application

Definition "Investment"

Definition "Investor"

Standard of Protection

Absolute Standards of
Protection (esp. "FET")

Relative Standards of
Protection (esp. "NT" and
"MFN")

Dispute Settlement

State-State Dispute
Settlement

Investor-State Dispute
Settlement ("ISDS")



Key Term: “Investment”

“Investment” (1)

Norway 2007 Draft Model BIT

AGREEMENT
BETWEEN
THE KINGDOM OF NORWAY
AND

.....
FOR THE
PROMOTION AND PROTECTION OF INVESTMENTS

“Investment” (2)

ARTICLE [2] DEFINITIONS

2. "Investment" means: **Every kind of asset owned or controlled, directly or indirectly**, by an investor of a Party, including, but not limited to:

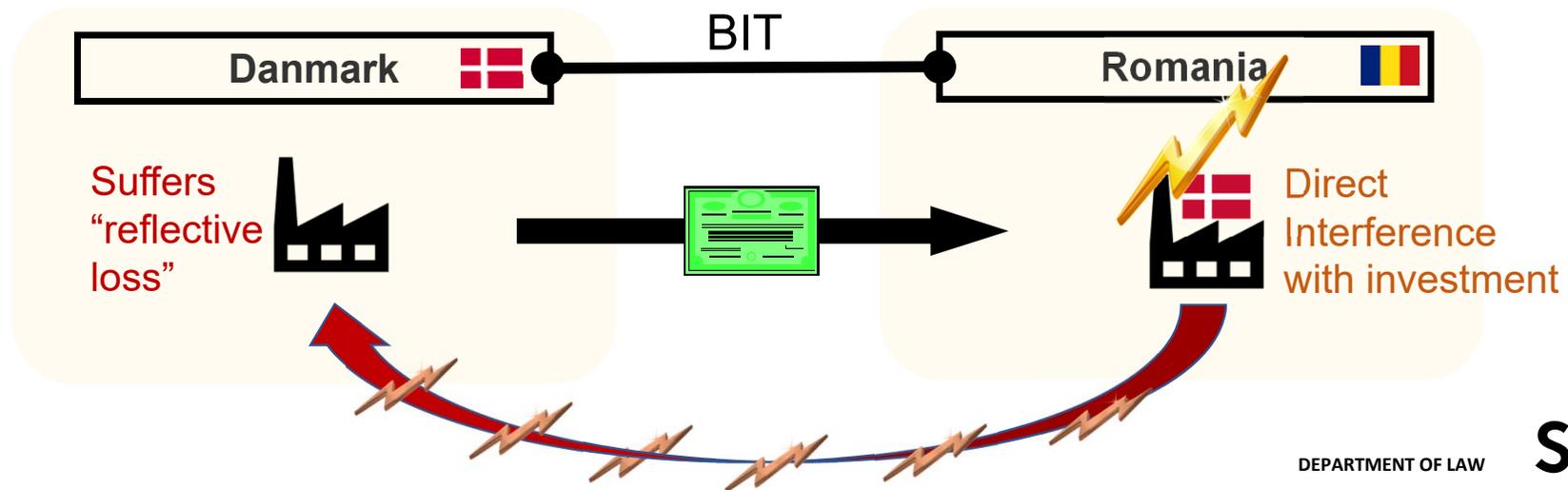
- i. **any entity** established in accordance with, and recognised as a legal person by the law of a Party, whether or not their activities are directed at profit;
- ii. shares, stocks or other **forms of equity participation** in an enterprise, and rights derived therefrom;
- iii. bonds, debentures, loans and other **forms of debt**, and rights derived therefrom;
- iv. **rights under contracts**, including turnkey, construction, management, production or revenue-sharing;
- v. contracts;
- vi. **claims** to money and claims to performance;
- vii. **intellectual property rights**;
- viii. **rights** conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;
- ix. any other tangible and intangible, movable and immovable **property**, and any related property rights, such as leases, mortgages, liens and pledges

In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

“Investment” (3)

- **Protection of indirect investment in BITs**

- BIT principally protects legal positions of shareholders regarding the corporation founded in the host State:
- Not only the corporation in the host State alone (which might count as foreign by virtue of the definition of “investor” in the BIT) can bring a claim, but, additionally, also its shareholders for reflective loss (Distinguish: direct interference with shareholder rights such as voting rights)



Key Term: “Investor”/ “Nationality”

“Investor” (1)

Norway 2007 Draft Model BIT

ARTICLE [2] *DEFINITIONS*

"Investor" means:

- i. **a natural person** having the **nationality of**, or **permanent residence** in, **a Party** in accordance with its applicable law; or
- ii. **any entity** established in accordance with, and **recognised as a legal person by the law of a Party**, and engaged in **substantive business operations in the territory of that Party**, such as companies, firms, associations, development finance institutions, foundations or similar entities irrespective of whether their liabilities are limited and whether or not their activities are directed at profit.

“Investor” (2)

- **Nationality**

- P: Dual nationality

- **Investor**

- Natural persons → reference to domestic law → E.g. Germany: Art. 116 German Basic Law in conjunction with Law on Citizenship
- Juridical persons → Seat, place of incorporation and/or control over corporation

Standards of Protection

Steffen Hindelang

Substantive Standards of Protection

- **Moment of protection**

- Market Access – Pre-accession protection
 - Usually admitted according to the legal framework prevailing in the host State
 - Exception: occasionally USA
- Treatment – Post-accession protection

- **Standards of protection**

Absolute Standards of Protection	Relative Standards of Protection	Umbrella Clause
F&E Treatment	NT	
Full Protection and Sec.	MFN	
Free transfer of payments	Non-discrimination clause	
Expropriation		

Absolute Standards of Protection (1)

- **Fair and Equitable Treatment**

- Most important and most frequently invoked standard of protection in investment arbitration

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ARTICLE [5] GENERAL TREATMENT AND PROTECTION

Each Party shall accord to investors of the other Party, and their investments treatment **in accordance with customary international law**, including **fair and equitable treatment** and **full protection and security**.

German Model BIT 2008

Art. 2 (2)

Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting **State fair and equitable treatment** as well as **full protection** under this Treaty.

CETA Text

Article X.9: Treatment of Investors and of Covered Investments

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 6.**
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. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.
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 deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

Absolute Standards of Protection (3)

- Fair and Equitable Treatment (cont.)
 - Legitimate Expectations

TECNICAS MEDIOAMBIENTALES TECMED S.A. v. THE UNITED MEXICAN STATES

CASE No. ARB (AF)/00/2, May 29, 2003

Award, para. 154

“The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, 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.”

Absolute Standards of Protection (4)

- **Full protection and security**

- Host State's duty to protect from third party interference

Art. 4(1) German Model BIT 2008

Investments by investors of either Contracting State **shall enjoy full protection and security** on the territory of the other Contracting State.

CETA

Article X.9: Treatment of Investors and of Covered Investments

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 6. [...]

5. For greater certainty, '**full protection and security**' refers to the **Party's obligations** relating to **physical** security of investors and covered investments."

Absolute Standards of Protection (5)

- **Free transfer of payments** (in connection with investment)
 - Often specified; coupled with obligation to permit transfer in a freely convertible currency, e.g.:

Art. 5, German Model BIT 2008

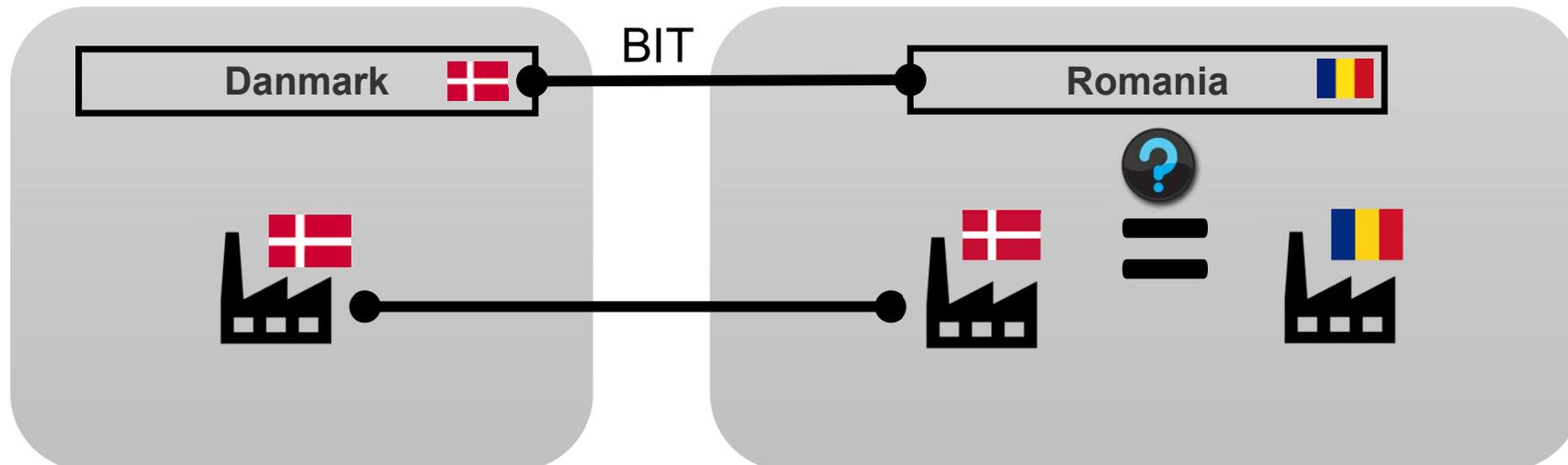
(1) Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment, in particular

1. The principle and additional amounts to maintain or increase the investment
2. The returns
3. The repayments of loans
4. The proceeds from the liquidation or the sale of the whole or any part of the investment
5. The compensation provided for in Article 4

Transfers under Article 4 (2) or (3), under the present Article or Article 6, shall be made without delay at the market rate of exchange applicable on the day of the transfer. A transfer shall be deemed to have been made without delay or made within such period as is normally required for the completion of transfer formalities. The period shall commence with the submission of the corresponding application, where such an application is necessary, or the notification of the intended transfer, and must in no circumstances exceed two months.

Relative Standards of Protection (1)

- **National Treatment ('NT')**
 - Comparability between local and foreign investors?



Relative Standards of Protection (2)

- **National Treatment ('NT') (cont.)**

- **P: Standard of comparison:** Investors in same sector or cross-sector?

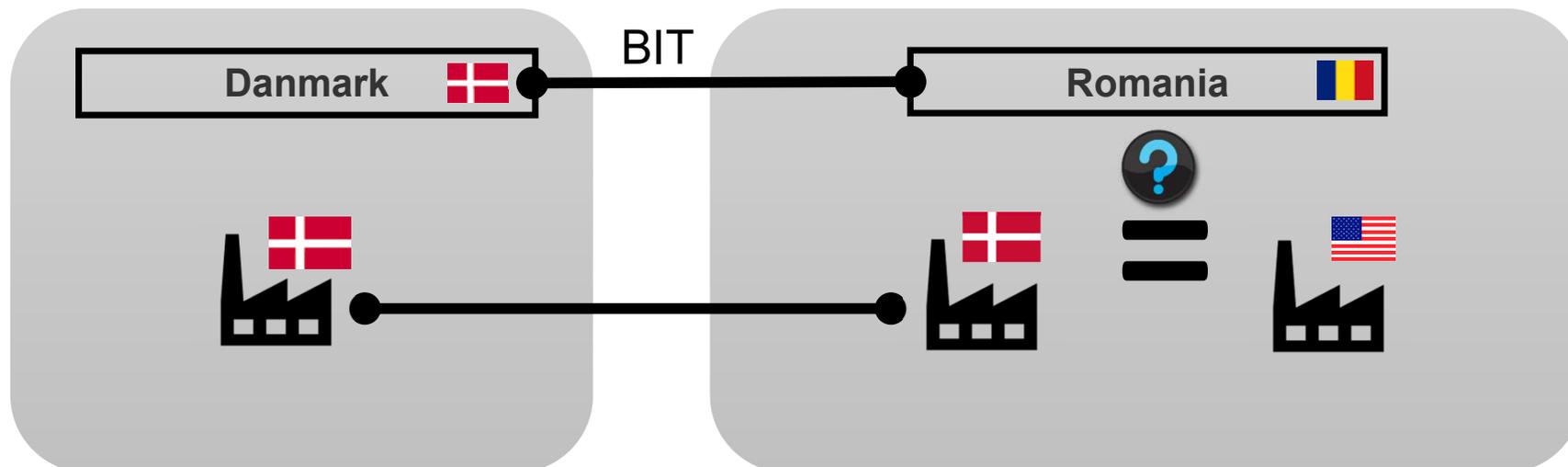
- The interpretation of “like circumstances” must take the legal context of the NAFTA into account; the interpretation invites an examination of whether the claimant is in the same “sector” as a national investor, where “**sector**” has a **wide connotation that includes the concepts of “economic” and “business” sectors** (S.D. Myers v. Canada, Partial Award, 13 Nov 2000, para. 250)

- **P: Different treatment de jure / de facto**

- Within the scope of Art. 1102 NAFTA: **no reason to treat de facto and de jure discrimination differently**; a finding of disproportional disadvantage caused by the measure is not necessary in cases of de facto discrimination (Pope & Talbot v. Canada, Award on the merits of phase 2, 10 Apr 2001, para. 43)

Relative Standards of Protection (3)

- **Most-favored Nation Treatment ('MFN')**
 - Comparability between two foreign investor?



Relative Standards of Protection (4)

- **Most Favored Nation Treatment ('MFN') (cont.)**

- **P:** Can an investor invoke more opportune clauses of host State BITs with third States? → Examination of all BITs concluded with the host State
 - The investor can invoke the MFN clause to incorporate substantive standards of other IITs (White Industries v. India, Final Award, 30 Nov 2011, para. 11.1.1 et seqq.)
 - Limits: “**regime change**” (imported standard does not fit in the broader scheme of the applied BIT)

“The MFN provision does not permit the selective picking of components from each set of conditions, so as to manufacture a synthetic set of conditions to which no State’s nationals would be entitled.” (Hochtief v. Argentina, Decision on Jurisdiction, 24 Oct 2011, para. 98)

Relative Standards of Protection (2b)

- **Most Favored Nation Treatment ('MFN') (cont.)**

- **P: Procedural standards of protection**

- esp. access to Investor-State Dispute Settlement (establishment of an arbitral tribunal's jurisdiction); Circumvention of waiting periods before initiating arbitration

- **MFN does not apply to dispute settlement provisions.** The clause cannot be used to create the jurisdictional basis for a tribunal to hear contract claims. (Salini v. Jordan, Decision on Jurisdiction, 15 Nov 2004, paras. 102 et seqq.)
 - If the provisions of the IIT clearly reflect an intention by the parties to restrict jurisdiction in a specific way, an **MFN clause cannot overcome this restriction** (Austrian Airlines v. Slovakia, Final Award, 9 Oct 2009, paras. 122 et seqq.)
 - In case investors of a different nationality are granted a choice between litigation and arbitration, a foreign investor without that choice is **treated less favorable** (Hochtief v. Argentina, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 Oct 2011, para. 100)

Umbrella Clauses and Investment Contracts

Umbrella Clause und Investment Contracts (1)

- Inclusion of commitments/claims outside the framework of the respective BIT – i.e. from investment contracts or domestic law
- Danger: elevating commercial disputes to PIL disputes (see below)
- Eschewal of costly double litigation (BIT and investment contract); eschewal of domestic courts
- Classical:

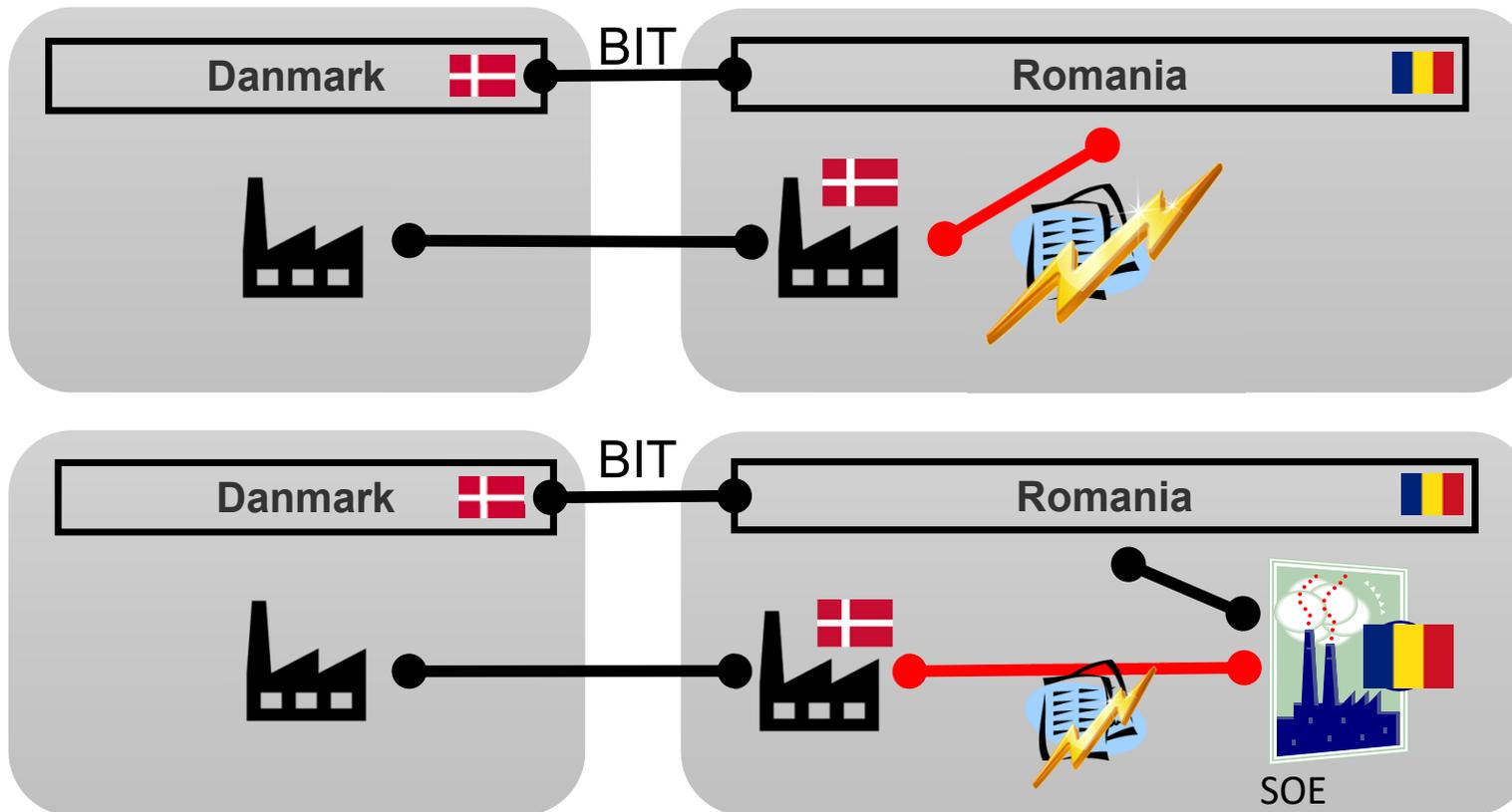
Art. 7 (2) German Model BIT 2008

Each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.

- CETA: **no** umbrella clause

Umbrella Clause und Investment Contracts (2)

- Exemplary situations:



Umbrella Clause und Investment Contracts (3)

- **Scope of classic umbrella clause**
 - Internationalization of host State obligations vis-à-vis the investor?
 - **P:** Which obligations?
 - All?
 - Only contractual obligations?
 - Only specific obligations (which are of certain importance to the investment at hand)?
 - Also **statutory** investment-related obligations (e.g. Argentine legislation in the field of gas transport for foreign investors)?
 - violation of obligations set forth in domestic law can constitute a breach of an umbrella clause (LG&E v. Argentina, Decision on liability, 3 Oct 2006, paras. 169 et seqq.)

Defences

When a State accepted foreign investment, was it also accepting the risk of national economic disaster?

[Cf. Brownlie, sep. op., in CME v, Czech Rep., 9 ICSID Rep. 412, 431]

Defences

- **ILC Articles – circumstances precluding wrongfulness**
 - **Force Majeure (Art. 23 ILC Articles) and Necessity (Art. 25 ILC Articles)**
 - E.g. Argentine cases → Currency devaluation impairing expected profits
 - Invocation of “Necessity”
- **BIT emergency provisions**
- **Non-commercial concerns; Right to regulate; e.g.:**

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ARTICLE [12] *RIGHT TO REGULATE*

Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.

Expropriation

Steffen Hindelang

Expropriation (1)

- Generally permitted in (the law of aliens and) BITs; subject to prerequisites
- **Conditions** for lawful expropriations:
 1. **Acting in public interest** (“only for public benefit”)
 2. **Non-discriminatory** (if necessary limited to “MFN”)
 3. **“Legality”** (observance of a national procedure where appropriate and, if need be, its verifiability)
 4. **Compensation** “without delay“ (prompt), “subject to interest”, “effectively realizable” + “freely transferable” (effective), Value immediately before the date on which the state measure became publicly known (full) → **“Hull Formula”**

Expropriation (2)

Norway 2007 Draft Model BIT

ARTICLE [6] *EXPROPRIATION*

1. A Party **shall not expropriate** or nationalise an investment of an investor of the other Party **except in the public interest** and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Expropriation (3)

Article X.11 CETA: Expropriation

Neither Party may nationalize or expropriate a covered investment **either directly, or indirectly** through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except:

- (a) for a **public purpose**;
- (b) under **due process** of law;
- (c) in a **non-discriminatory** manner; and
- (d) against **payment of prompt, adequate and effective compensation**. [\[Hull formula\]](#)

(cont.)

For greater certainty, this paragraph shall be interpreted in accordance with Annex X.11 on the clarification of expropriation.

2. Such compensation shall amount to the **fair market value** of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. The compensation shall also include **interest at a normal commercial rate** from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.
4. The investor affected shall have a right, under the law of the expropriating Party, to **prompt review of its claim** and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.
5. This Article **does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights**, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement').
6. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation.

(cont.)

Annex X.11 CETA: Expropriation

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through **formal transfer of title or outright seizure**; and

indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it **substantially deprives** the investor **of the fundamental attributes of property** in its investment, including the **right to use, enjoy and dispose** of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a **case-by-case, fact-based inquiry** that considers, among other factors:

the **economic impact** of the measure or series of measures, although **the sole fact that a measure** or series of measures of a Party **has an adverse effect on the economic value** of an investment **does not establish that an indirect expropriation has occurred**;

the **duration** of the measure or series of measures by a Party;

the extent to which the measure or series of measures interferes with distinct, **reasonable investment-backed expectations**; and **[shift from fair and equitable treatment clause to indirect expropriation clause in case of disappointment of legitimate expectations?]**

the character of the measure or series of measures, notably their **object, context and intent**.

3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is **so severe** in light of its purpose **that it appears manifestly excessive**, **non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives**, such as health, safety and the environment, **do not constitute indirect expropriations**.

Dispute settlement in international investment law: *Investor-State Dispute Settlement (“ISDS”)*

Investor-State Dispute Settlement (1)

Before adversarial proceedings: Amicable Settlement

Art. 10 German Model BIT 2008

(1) **Disputes concerning investments between a Contracting State and an investor** of the other Contracting State should as far as possible be **settled amicably** between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to **institute conciliation proceedings** under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (**ICSID**).

- Cooperative, non-adversarial dispute resolution process; the goal is to clarify the issues, to endeavour to bring about agreement on mutually acceptable terms
- Conciliation: Conciliator may request relevant documents, hear witnesses, make site visits and issue recommendations to assist the parties in reaching mutually acceptable terms
- Parties are expected to cooperate in good faith

Investor-State Dispute Settlement (2)

Adversarial proceedings

Art. 10, German Model BIT 2008 (cont.)

(2) If the dispute cannot be **settled within six months** of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, **be submitted to arbitration**. The two Contracting States hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute settlement mechanisms of the investor's choosing:

1. arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (**ICSID**), **provided both Contracting States are members of this Convention**, or
2. arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the **Additional Facility for the Administration of Proceedings by the Secretariat of the Centre**, where the personal or factual preconditions for proceedings pursuant to figure 1 do not apply, but at least one Contracting State is a member of the Convention referred to therein, or
3. an individual arbitrator or an **ad-hoc arbitral tribunal** which is established in accordance with the **rules** of the United Nations Commission on International Trade Law (**UNCITRAL**) as in force at the commencement of the proceedings, or
4. an **arbitral tribunal** which is established pursuant to the **Dispute Resolution Rules of the International Chamber of Commerce (ICC)**, the **London Court of International Arbitration (LCIA)** or the **Arbitration Institute of the Stockholm Chamber of Commerce**, or
5. **any other form of dispute settlement** agreed by the parties to the dispute.

Investor-State Dispute Settlement (3)

Art. 10, German Model BIT 2008 (cont.)

(3) The **award shall be binding and shall not be subject to any appeal or remedy** other than those provided for in the Convention or arbitral rules on which the arbitral proceedings chosen by the investor are based. The award shall be **enforced** by the Contracting States **as a final and absolute ruling under domestic law**.

(4) Arbitration proceedings pursuant to this Article shall take place at the request of one of the parties to the dispute in a **State** which is a **Contracting Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958**.

(5) During arbitration proceedings or the enforcement of an award, the Contracting State involved in the dispute shall not raise the objection that the investor of the other Contracting State has received compensation under an insurance contract in respect of all or part of the damage.

Investor-State Dispute Settlement (4)

- **Typical mechanisms for dispute settlement**

- a) **Institutionalized**

- *International Centre for Settlement of Investment Disputes, **ICSID***
 - *International Chamber of Commerce, **ICC** (NB: Reform/Supplementation of Rules of Arbitration for investment law-related disputes)*
 - *London Court of International Arbitration, **LCIA***
 - *Swedish Chamber of Commerce, **SCC***

- b) **Ad-hoc**

- **Initiation of arbitration**

- By investor
 - By host State (of limited practical relevance so far due to material clauses in BITs); cf. Gabon / Société Secrete S.A.)

Investor-State Dispute Settlement (5)

• Advantages of ICSID Arbitration

- in comparison to **national courts**
 - Neutral, depoliticised appraisal of a dispute
 - “Delocalised proceedings” → independence from arbitration law of the place of proceedings
- in comparison to **other awards**
 - ICSID Awards
 - Not subject to review by state courts, cf. Art. 53 ICSID Conv.
 - Readily enforceable due to equality with national arbitration awards (no recognition), cf. Art. 54 ICSID Conv.
 - Other awards with place of proceedings outside Denmark
 - **Recognition** → currently only regulated by international treaties & conventions → New York Convention

Outlook: Intra-EU Investment Arbitration (6)

- **CJEU's Achmea Decision (C-284/16)**
 - May 2016: request for preliminary ruling by the Bundesgerichtshof (German Federal Court of Justice, [I ZB 2/15](#)) in
 - 2012: Slovak Republic challenged arbitral award in favour of a Dutch investor ([PCA Case No. 2008-13](#)) rendered on the basis of the *1992 Agreement on Encouragement and Reciprocal Protection of Investments* between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic ('[NCS BIT](#)')
 - *Arg.* of Slovak Republic: **lack of jurisdiction** → recourse to an investment tribunal provided for in the BIT incompatible with EU law

Outlook: Intra-EU Investment Arbitration (7)

- **CJEU's Achmea Decision ([C-284/16](#)) (cont.)**

“Articles 267 and 344 TFEU **must be interpreted as precluding** a provision in an **international agreement concluded between Member States**, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an **investor from one of those Member States may**, in the event of a dispute concerning investments in the other Member State, **bring proceedings against the latter Member State before an arbitral tribunal** whose jurisdiction that Member State has undertaken to accept.”



- What will happen to currently ongoing intra-EU investment arbitrations?
- Will intra-EU investment arbitration come to an immediate close after the CJEU's judgement?
- Any lesson learnt for EU agreements with third countries, i.e. CETA, Singapore, or Vietnam?
- Impact on investment protection clauses?

Outlook: Intra-EU Investment Arbitration (8)

- **CJEU's Achmea Decision (C-284/16) (cont.)**
 - More: Steffen Hindelang, The Limited Immediate Effects of CJEU's Achmea Judgement, VerfBlog, 2018/3/09, 2018, available at: <https://www.steffenhindelang.de/publikationen/the-disruption-of-the-eus-judicial-dialogue-by-intra-eu-investment-tribunals-and-the-limited-immediate-effects-of-cjeus-achmea-judgement/>