

&China-SR/EU

Investment Protection

Katarína Brocková,
Faculty of International Relations
University of Economics in Bratislava

- ⌘ What does investment protection cover?
- ⌘ What are the main sources of investment protection law?
- ⌘ What should be done to improve the current situation?

Outline

- ⌘ Market access?
- ⌘ Standards of Protection of Substantive Rights of Investors?
- ⌘ Access to International Investment Arbitration?

What does Legal Protection of Investment cover?

- ⌘ **China-SR BIT**
- ⌘ *Awards of International Investment Tribunals*
- ⌘ **Public International Law in General (General Principles and CIL)**
- ⌘ *Anticipated EU-China BIT*

Sources of International Investment Law applicable to China-SR Investment Protection

- ⌘ a) movable and immovable property and other property rights;
- ⌘ b) shares in companies or other form of interest in such companies;
- ⌘ c) a claim to money or to any performance having an economic value;
- ⌘ d) intellectual property rights, including copyrights, trade marks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill;
- ⌘ e) concessions conferred by law, including the concessions to search for or exploit natural resources.

“Investment” under China-SR BIT

- ⌘ Not common in current EU MS/China BITs
- ⌘ Not covered by China-SR BIT
- ⌘ *Time to reconsider in future EU-China BIT?*

Market Access?

⌘ Common Core Provisions of Investment Treaties:

- ⌘ Most favoured nation treatment
- ⌘ National treatment
- ⌘ Compensation in case of direct/ indirect expropriation (*value?*)
- ⌘ Free transfer of capital
- ⌘ Fair and equitable treatment standard
- ⌘ Full protection and security
- ⌘ Access to international arbitration in case of dispute

Legal Standards of Protection of International Investment

⌘ A number of protections afforded to investors under IIAs as well as certain aspects of international investment arbitration create tensions and conflicts between rights of investors and policy space of the host state

Legal Protection of International Investment v. Policy Space of Host States

- ⌘ Environmental Protection
- ⌘ Human Rights (Labour Rights)
- ⌘ Sustainability

*Host State Policy Interests v.
Investment Protection*

⌘ FET standard

- ⌘ As prominent as controversial in IIAs
- ⌘ Referred to as „*catch all*“ clause
- ⌘ Addresses legitimate expectations of investors
- ⌘ Its vague language results in differing interpretations of its scope/applicability

*Legal protection of investment v.
policy space of host state*

⌘ *Panel in Tecmed v Mexico*

⌘ host country must conduct itself in such a manner as to “*not affect the basic expectations that were taken into account by the foreign investor to make the investment*”

⌘ *Other panels:*

⌘ Standard should not impose „*inappropriate and unrealistic obligations*“ on host state

⌘ Investor expectations should be „*reasonable and legitimate*“ in light of circumstances

FET standard in practice

⌘ Sustainable development perspective:

- ⌘ FET standard and decisions interpreting it have created uncertainty about its application
- ⌘ In case of application of *Tecmed-like* standards, host countries may feel restricted in its regulatory evolution especially in terms of environmental protection and protection of other public interests

FET v. sustainable development

⌘ Expropriation

⌘ *Compensation requirement* for both

⌘ *Direct* (physical taking of property, e.g. nationalization)

⌘ *Indirect expropriation* (regulatory taking – referring to host state's interference with investor's enjoyment of benefits of property without physical taking)

*Legal protection of investment v.
policy space of host state*

⌘ Investment arbitration tribunals have repeatedly stated that international human rights law has no relevance to international investment disputes

Legal Protection of International Investment

- ⌘ only **amount of compensation for nationalization and expropriation** can be submitted to international arbitration upon the request of investor
- ⌘ For all other investor-state disputes, **consent** is required before submitting to international arbitration

*Dispute settlement clause in current
China-SR BIT*

⌘ EU-China BIT

- ⌘ Scope of investment (both portfolio and FDI)-
different views as regards internal EU powers
- ⌘ Admission/market access
 - ⌘ Extending NT to pre-investment stage?
- ⌘ Substantive treatment – traditional standards
with police powers exception, specification of
measures violating the standards (*GATT
exceptions?*)
- ⌘ Dispute Settlement (division of responsibility)

Future of China-SR Investment Protection

Thank you
for your attention!