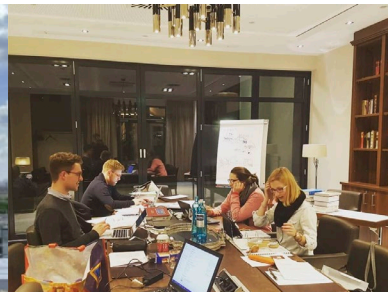


International Investment Arbitration Moot Court 2023/2024

Information Event and Introductory Lecture

24 October 2023, 6 p.m.
SEM 64 Juridicum



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What we want to tell you

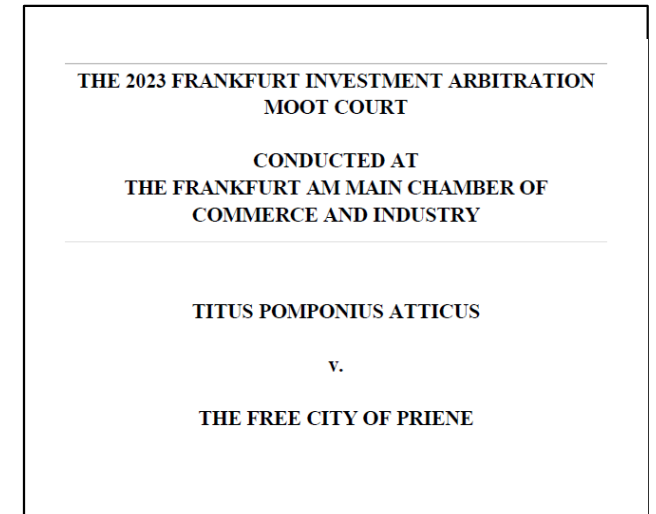
- What is the Frankfurt Investment Arbitration Moot Court?
- What is a Moot Court?
- What experiences did we make during last year's Moot?
- What do we expect from you?
- Timeline for the Preparation
- What can you gain from participating?
- Investment Law and Arbitration



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What is a Moot Court?

- (International) Student competition
- Analysis of a fictitious case
- Legal representation of a party to the case before a court or tribunal composed of 3 judges or arbitrators
- Written phase / oral phase
 - Written arguments in English for Claimant and Respondent
 - Simulated hearing, several rounds of oral pleadings





What is the Frankfurt Investment Arbitration Moot Court?

- Investment Arbitration Case
- Historical Background combined with modern investment protection law
- **9 “Claims”/ Issues:** Different areas of investment law and public international law; substantive and procedural questions
- Analyse the case as a team (4 students)
- Present arguments for claimant and respondent before an arbitral tribunal



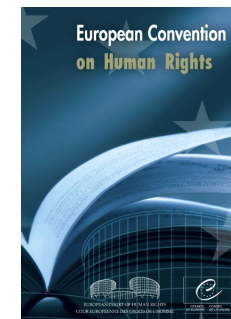
- **December 2023:** Publication of Case Study
- **Spring 2024:** Deadline for written arguments
- **Spring/early summer 2024:** Pre-Moots in Geneva, Milan, and Paris
- **June 2024:** 16th edition of the Moot Court: Global rounds in Frankfurt





Investment Arbitration MC - other Moot Courts: Differences?

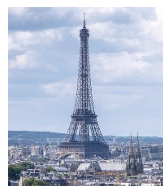
- Only a very short written phase:
“Skeleton Arguments” -> Focus is on
the oral presentation
- Oral Pleadings: 3 of the 9 claims
- Different areas of international law:
Investment law, public international
law, human rights law, ...





Travelling to the Final Event and to the Pre-Moots

- Participation in 1 **Pre-Moot** (Paris, Geneva, or Milan)
- ~ 3 days in May/June
- Travel costs reimbursed
- Participation **Final Rounds** in Frankfurt
- ~ 5 days in June
- Travel costs reimbursed



Requirements

- Participation until June 2024
- Motivation and Teamwork
- Balance Moot Court with your other commitments
- English
- No prior knowledge of international (investment) law required





What do we expect from you?

– Organisation of your Moot Court preparation

- January – March 2024:
 - meetings twice a week
 - 1 pleading session
 - 1 general session on topics such as research, case study, and investment law related questions (Jurisdiction, State Responsibility...)
 - Skeleton argument drafts once every two weeks
- April – June 2023:
 - meetings three times a week
 - 2-3 pleading sessions a week



What can you gain from participating?

- 4 ECTS per semester + 4 ECTS per seminar paper
 - 2. Seminar Papers – based on your arguments
 - IREWI Students: Bachelor thesis (4 ECTS per semester + 8 ECTS)
- Elective module; competence in a foreign language
- Improving your language skills and your presentation skills
- Improving your legal argumentation skills
- Connecting with students and practitioners from all over the world
- Official Moot Court Prizes for the Winning Teams





Application procedure

- Applications with a CV and a letter of motivation in English by 15. November 2023 to hannah.grandits@univie.ac.at or nektarios.papadimos@univie.ac.at
- Personal interviews in November 2023



Timeline





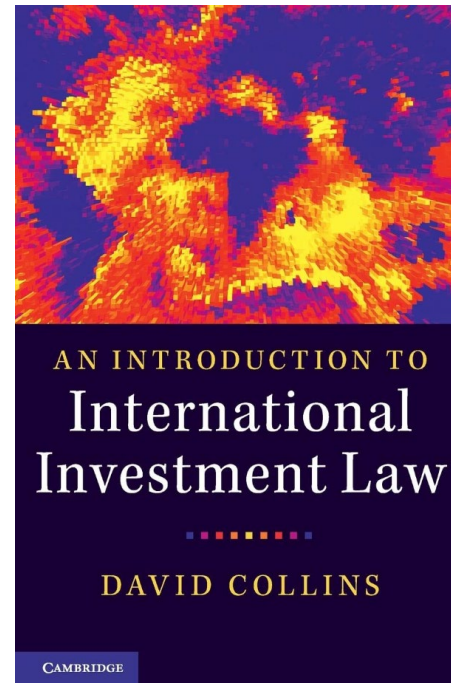
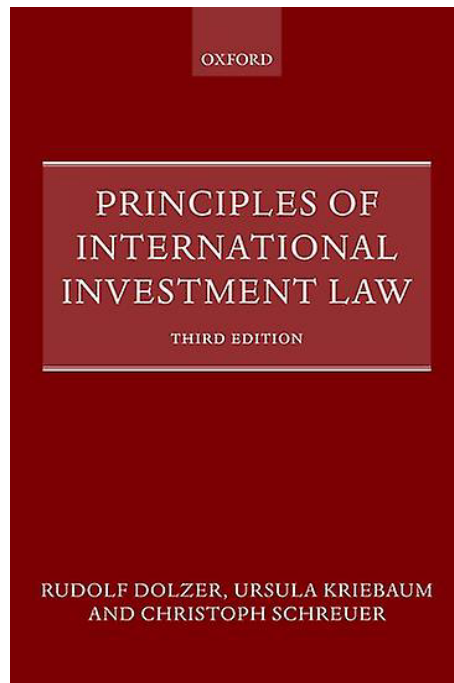
What experiences did we make last years?





What do you want to know?

Literature





universität
wien

Introduction to International Law & International Investment Law

FIAMC 2023-2024 Introductory Lecture – Nektarios Papadimos (24 October 2023)



International Law – Definition

International Law (Public International Law, Law of Nations) is the **set of rules, norms, and standards** generally accepted in relations between Nations. This body of legal rules and principles determine the international rights and obligations of Nation-States and regulate the operations of International Organizations. Also non-governmental entities and individuals have become part of Public International Law.

International Law thus provides **a means for States to practice more stable, consistent, and organised international relations.**

**PIL = a set of legal rules/norms/standards to balance the different interests/power/sovereignty of States
(and other entities) in the international legal order**

Subjects of International Law

- **What are the subjects of International Law?**
 - States
 - IOs
 - Private parties (e.g. individuals, companies/TNCs, Peoples) ???

‘A subject of international law is an entity possessing **international rights and obligations** and having the capacity to a) maintain its rights by **bringing international claims**, and b) to **be responsible for its breaches of obligations** by being subjected to such claims’ (Crawford, *Principles*, 105)

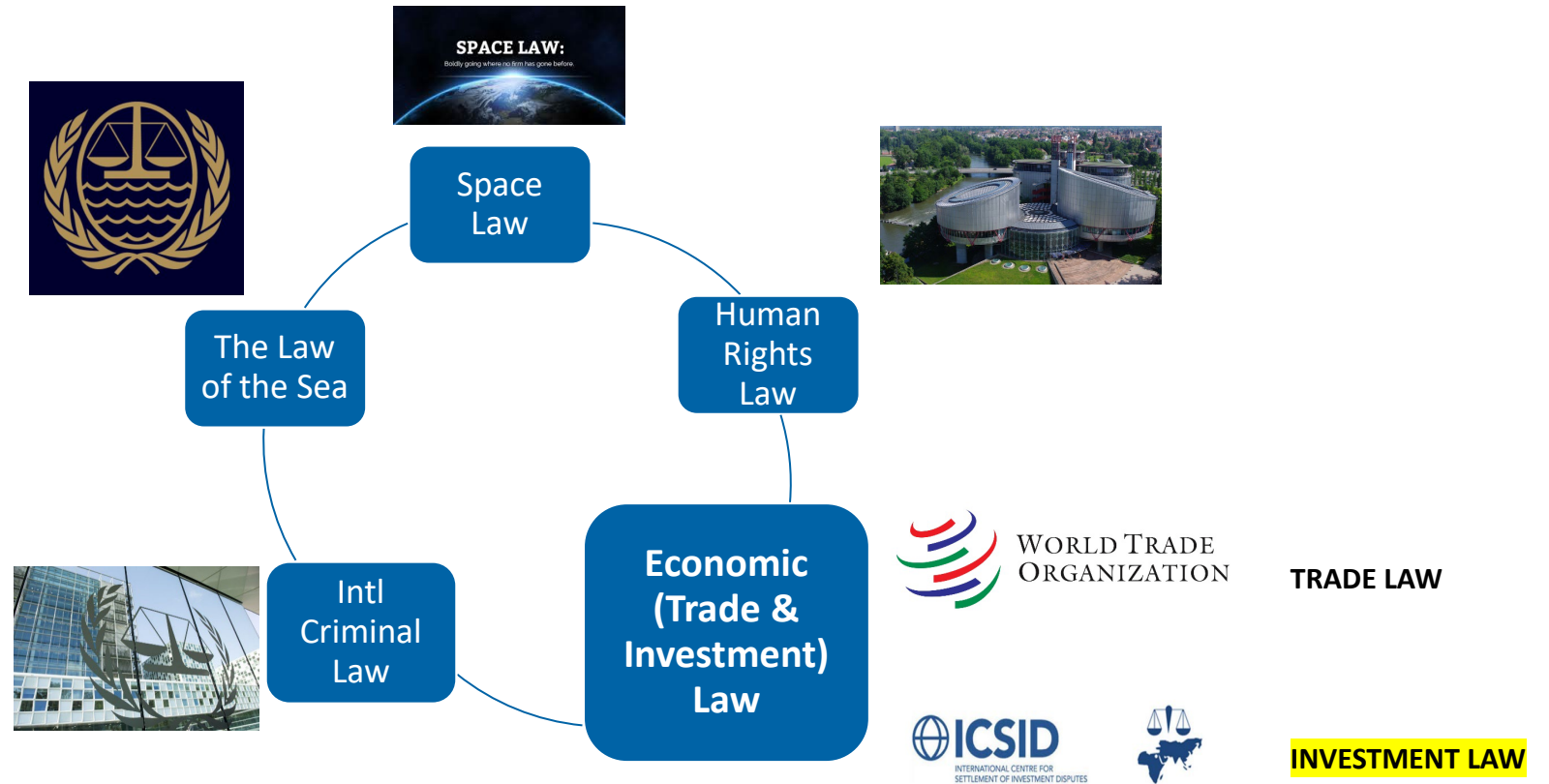
Sources of International Law

- **What are the sources of International Law?**

Article 38.1, Statute of the ICJ:

- Treaties
- customary international law
- general principles of law (e.g. *bona fide*, *res judicata*)
- ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law’

The scope of activities covered by PIL has grown over the years to include additional topics, e.g. human rights, international environmental law, international criminal law, **international economic law**, etc.



International Investment Law as part of PIL

- **What does this mean?**
 1. Application of legal rules, custom, or general principles of PIL to international investment law (e.g. Vienna Convention on the Law of Treaties (1969), or the law of State responsibility, etc)
 2. Interaction with other parts of PIL (e.g. trade law, HR, environmental law)

International Investment Law – Terminological Clarifications

- International Investment Law (IIL)
- International Investment Arbitration = the method (arbitration) used to settle international investment disputes
- Investor-State Dispute Settlement (ISDS) = general term, incl. arbitration
- **‘Investor-State’** = indicates the parties to a dispute (investor, State)
- BITs = Bilateral Investment Treaties
- MITs = Multilateral Investment Treaties (e.g. ECT, USMCA)
- FTAs = Free Trade Agreements
- IIAs = International Investment Agreements (general term, incl. BITs, MITs, FTA-Investment Chapter)

International Investment Law – Definition

- **International investment law** is an instrument/branch of PIL that governs foreign direct investment (FDI) and the resolution of disputes between foreign investors and sovereign States (investor-State).
- **FDI** = a category of cross-border investment in which an investor resident in one economy (home-State) establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy (host-State) (see OECD)

Subjects of International Investment Law

- **What are the subjects of IIL?**
 - **States**
 - Private parties (individuals, companies) – **investors**
- Partial legal capacity of individuals and corporations in IIL
 - Substantive rights in International Law (protection of investor and investment)
 - Effective enforcement mechanism (Investor-State Dispute Settlement – ISDS)

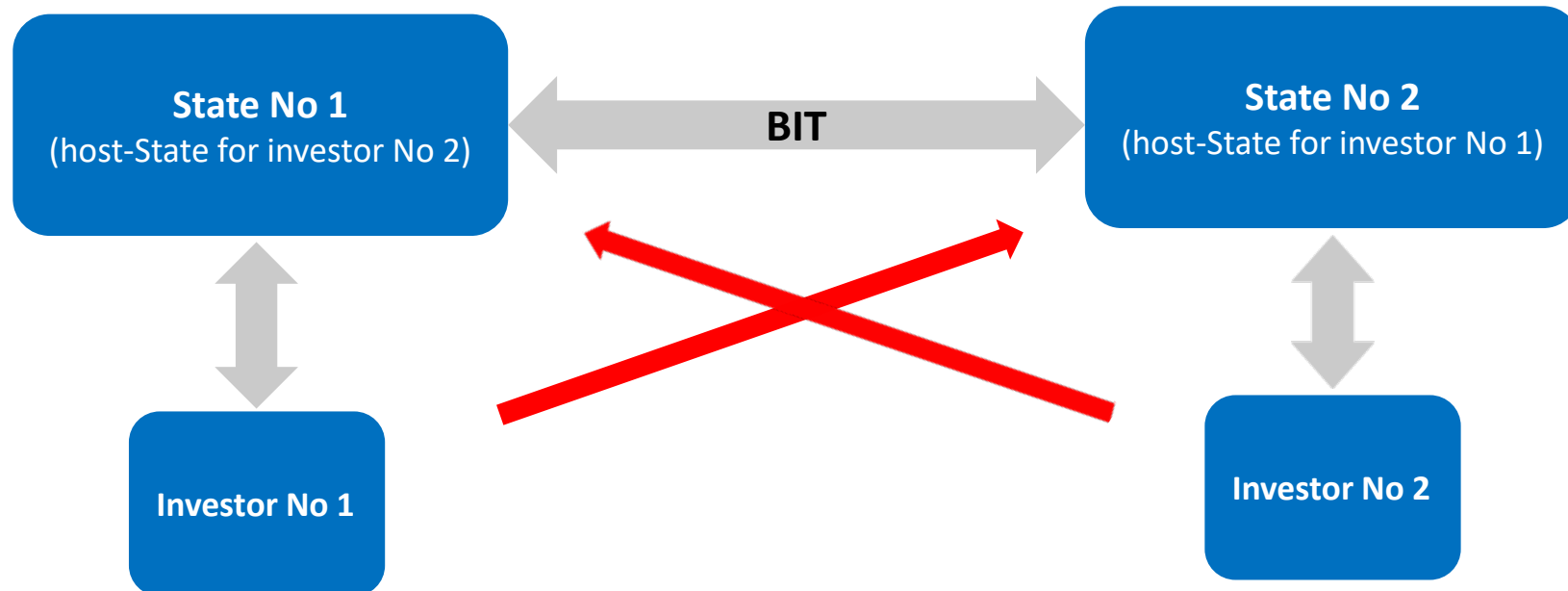
Sources of International Investment Law

- **What are the sources of IIL?**

Article 38.1, Statute of the ICJ:

 - Treaties (BITs, FTA-Investment Chapters, VCLT-1969, ICSID Convention, etc)
 - customary international law (e.g. obligation to compensate, rules of attribution, etc)
 - general principles of law (e.g. *bona fide*, *res judicata*)
 - ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law’
 - it depends, sometimes, ... but not binding!(e.g. WTO panel reports, past arbitral awards)

International Investment Law – Structure



International Investment Law – Topics

- **Investor** → jurisdiction *ratione personae*
- **Investment** → jurisdiction *ratione materiae* (subject-matter of the dispute)
- **Substantive Standards of Protection** – Treatment of Investors:
Most Favoured Nation (**MFN**), **national treatment**, Fair and Equitable Treatment (**FET**),
Full Protection & Security (**FPS**), (protection against unlawful) **Expropriation**
- **ISDS** > Arbitration (jurisdiction of the tribunal, admissibility of claims, ..., enforcement of the award)

International Investment Law – ‘Investor’

- Individuals or companies
- Nationality of the investor: Why important?
 - Substantive standards of the BIT apply only to the respective nationals
 - Jurisdiction of international tribunals is determined by the claimant’s nationality (jurisdiction *ratione personae*)

International Investment Law – ‘Investor’

- **Article 1, Netherlands-China BIT:** the term ‘investor’ means,
 - (a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;
 - (b) economic entities, including companies, corporations, associations, partnerships and other organisations, incorporated and constituted under the law and regulations of either Contracting Party and have their seats in that Contracting Party, irrespective of whether or not for profit and whether their liabilities are limited or not.

International Investment Law – ‘Investment’

- **The *Salini* test** (criteria, elements):
 - contribution of money/assets
 - certain duration
 - element of risk
 - contribution to the economic development of the host-State → controversial ...

Substantive Standards of Protection in Investment Treaties

- **Non-discrimination Standards**
 - National Treatment, Most Favoured Nation Treatment (MFN)
 - Protection against arbitrary or discriminatory measures
- **Rules on Expropriation**
 - Take-over, or regulatory measures that totally deprive an investment of its value
 - Public interest, non-discrimination, due process, compensation (prompt, adequate, effective)
- **Fair and Equitable Treatment (FET) ~ 'good faith'**
 - Legal stability and protection of legitimate expectations, transparency → radical changes with detrimental effects can amount to a violation of FET
 - Procedural propriety and due process in judicial and administrative proceeding
- **Full Protection and Security (FPS)**
 - Protection against physical interference by the host-State or third parties

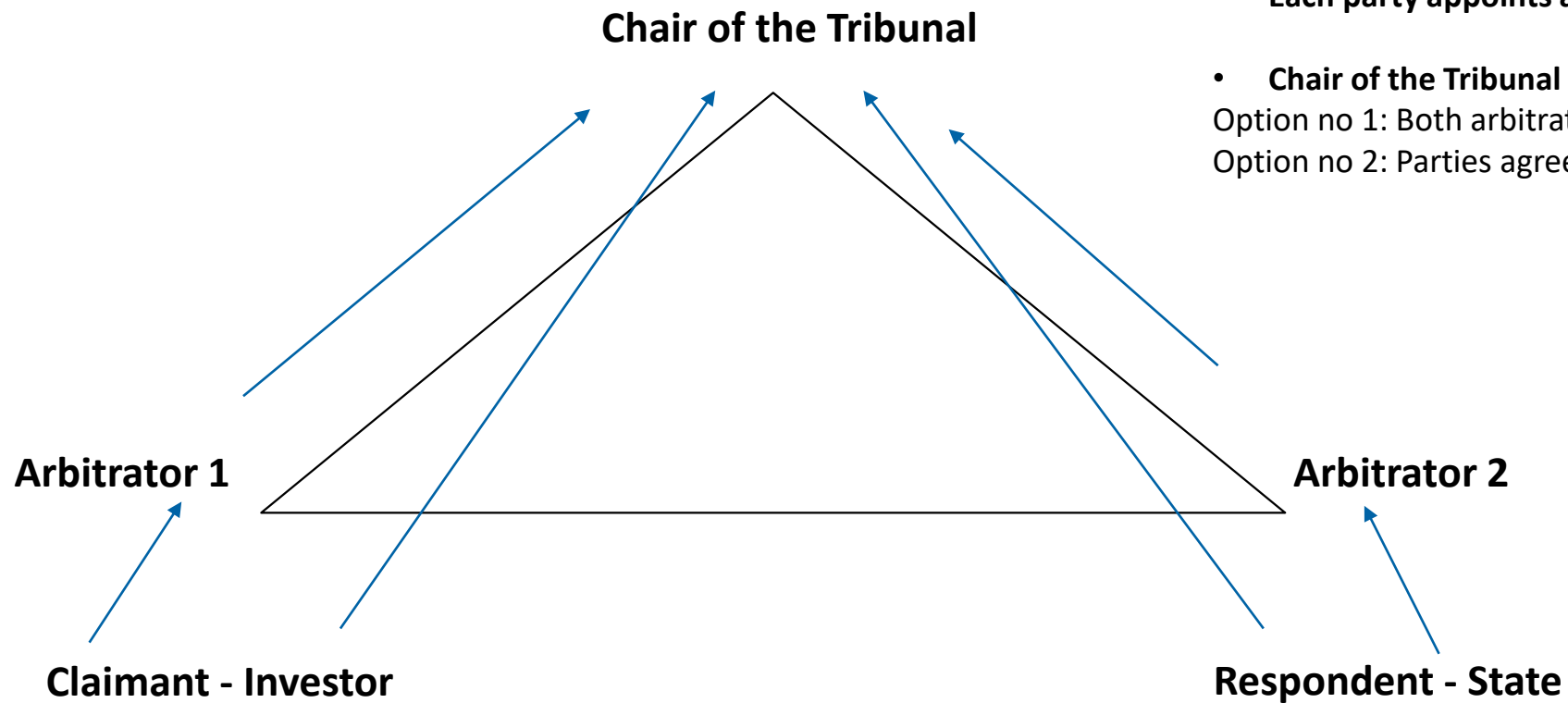
ISDS – Investor State Dispute Settlement

- Investor-State Disputes
 - **Action in National Courts** (BUT: bias, national law applicable, lack of expertise, etc)
 - **Arbitration**
 - Dispute settlement before an International Tribunal (access to an int'l remedy)
 - Based on **consent** given in an investment contract, investment treaty (e.g. a BIT), or in foreign investment law (national law) **in advance**
 - Limited review of arbitral awards

Investor-State Arbitration – Arbitral Institutions and Rules

- ICC, LCIA, SCC, SIAC, *etc*, UNCITRAL
- PCA – Permanent Court of Arbitration (in The Hague)
- ICSID – International Center for Settlement of Investment Disputes (under the auspices of the World Bank)
 - ICSID Arbitration Rules
 - Limited review of arbitral awards
 - Independent enforcement mechanism
 - ICSID Additional Facility Rules: they authorise the ICSID Secretariat ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.

Constitution of the Arbitral Tribunal – Party flexibility



- Each party appoints an arbitrator
- **Chair of the Tribunal**
Option no 1: Both arbitrators agree on a Chair
Option no 2: Parties agree on a Chair

Arbitral proceedings – Stages / Phases

- Jurisdiction (of the arbitral tribunal – *ratione personae, ratione materiae, ratione temporis*)
- Admissibility (of claims) → ‘it refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim’ (see *Erhas Dis Ticaret Ltd Sti, et al v. Republic of Turkmenistan*, PCA Case No 2013-27, Separate Declaration of Stanimir A Alexandrov dated 19 May 2015, para 5)
e.g. waiting periods
- Merits (violation of substantive standards of protection, e.g. expropriation, FET)
- Award

The Backlash against Investor-State Arbitration and Reform Efforts

- **Critical issues**

- Regulatory chill: The threat of possible claims under ISDS may chill regulatory activity of States (right to regulate)
- Pro investor bias in arbitral proceedings?
- Vague protection standards, lack of transparency in proceedings, high costs of proceedings
- Priority of investment protection over other legitimate societal objectives, such as public health, protection of the environment

- **Reform process**

- The right to regulate in modern Investment Treaties (e.g. exception clauses in favour of the State)
- Establishment of a Multilateral Investment Court – institutionalisation of the system
- UNCITRAL Working Group III – ISDS reform

The Development of modern International Investment Law – An Overview

