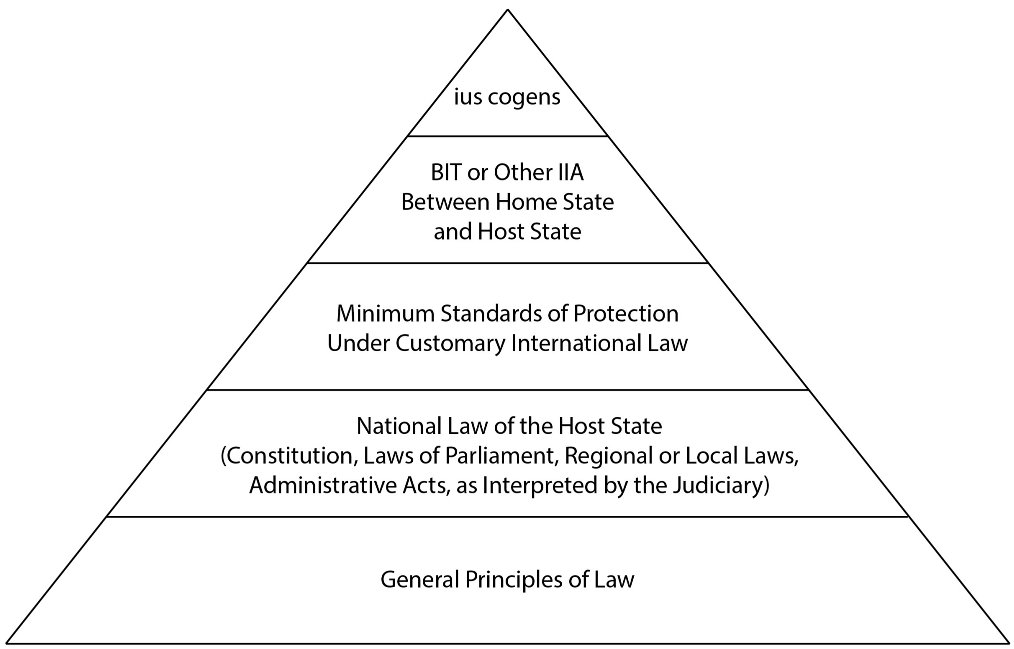
PART 7 – RESOURCES
Chapter 7.1
Checklist for Exams and Legal Briefs

By Frank Emmert

A. Sources of International Investment Law and Hierarchy of Norms

The Hierarchy of Norms in Int'l Investment Law



B. Protected Investment under National Law of the Host State => if yes, follow substantive standards of protection and available procedures under nat'l law (not covered here but not to be disregarded if there is any chance of obtaining fair and effective remedies domestically)

C. Protected Investment Under International Law

1) Protection under BIT or IIA

   a) investor covered by the treaty (= investor of the home country) AND

   b) investment covered by the treaty

2) Protection under Public Int'l Law (PIL)

   a) investor of the home country AND

   b) home country is bringing claim(s) on its own behalf (injury to citizen (both natural and legal person) is injury to state

D. Breach of Investment Protection Rules by the Host Country

Two Main Options

Expropriation

Violation of Treatment Standards

Direct Expropriation or Nationalization

Indirect Expropriation

1) Expropriation by Taking of Title (= direct expropriation) OR

2) Expropriation by Taking of Value (= indirect expropriation) defined as “tantamount to expropriation” = taking of all or very nearly all of the value;

Examples: MUCH higher taxes or min. wages, MUCH more expensive environmental regulations...

Important: While direct expropriations are quite rare and usually done in one explicit act, indirect expropriations may be accomplished in multiple steps that individually do not meet the threshold of substantial depravation of ownership rights (creeping expropriation).

For the distinction between indirect expropriation, which triggers claims to compensation, and regulatory interventions that do not, see below, G.

While indirect expropriation is covered by most BITs, only extreme cases are covered by PIL AND/OR

3) Violation of Full Protection and Security (FPS) defined as adequate physical and legal protection provided by police, military, courts, and other state organs of the host state, against acts of third parties (e.g. demonstrators, revolutionaries or even rouge state actors), against the investor and its facilities and staff AND/OR

4) Violation of MFN and/or National Treatment obligations in BIT or IIA (not covered by PIL)

AND/OR

5) Arbitrary State Action = blatant denial of Fair and Equitable Treatment (FET) not falling under C. 1) to 4)

“outside the realm of reason or facts” “state acting in bad faith”

“violation of <u>the</u> rule of law rather than <u>a</u> rule of law”

while most BITs and IIAs have FET clauses, only extreme cases are covered by PIL

E. Justifications for the Breach(es)

1) Expropriations (both direct & indirect) are among the sovereign rights of the host country (see e.g. UN Charter of Econ. Rights and Duties of States) and do NOT violate int'l law provided they are done

a) for the public benefit AND

b) against compensation that is

– full (actual value before expropriating measure becomes known) AND

– prompt (without delay) AND

– effective (in convertible currency and freely transferable) AND

c) subject to review by due process of law AND

d) non-discriminatory.

2) In case of indirect expropriations, there is no requirement to pay compensation (to counter-act "regulatory chill") if the measure is for the public benefit and is proportionate and non-discriminatory. For details, see below, G. (disputed!).

3) Emergency measures and the doctrine of necessity

LG&E Energy v. Argentine Republic, pp. 66 et seq. (disputed!)

4) Other circumstances precluding wrongfulness?

F. Legal Remedies

1) Legal Remedies under BIT or IIA

a) can usually be initiated by the investor AND

b) typically give a choice of different arbitration formats/institutions AND

c) result in an award that can be recognized and enforced under the NY Convention; AND

d) money goes directly to the investor.

2) Legal Remedies under PIL

a) can only be initiated by the home country of the investor (in most countries investors can only request/lobby for protection; very few, like USA, have formalized procedures giving some rights to investors)

b) will go to ICJ if both countries have submitted to its jurisdiction OR

c) will go to PCIA or another arbitration institution if both countries agree after dispute has arisen OR

d) do not provide formal remedies in court or arbitration but may still open mediation options if both countries agree OR

e) leave only diplomatic remedies and other PIL remedies (economic sanctions etc.) AND

f) even if the home country receives compensation there is no int'l rule that it has to pass it on to the investor

3) Procedure

generally follows the applicable rules agreed upon by the parties and/or mandated by the dispute settlement institution; may require investor-state mediation before arbitration

4) Quantum Calculation

a) required compensation = "fair market value" (What is the "market"? How can the market value be determined? When should the value be determined? Day before...?)

b) 1st option: Book Value or (declared) tax value = assets minus liabilities, depreciation, etc.

c) 2nd option: Net Investment (Should expatriated profits be deducted? How can future earnings potential be taken into account?)

d) 3rd option: Discounted Cash Flow (Looks at past profit and loss analysis = cash flow to predict future profit and loss; normally requires 2-3 years of profitable operations; accounts for future risk by "discounting" future revenue projections to prevent unjust enrichment, i.e. getting fully paid without having to do the work and encounter the risk)

Step 1: cash flow = revenue projection

Step 2: operating and other expense/cost projection (revenue minus cost = profit)

Step 3: risk projection = discount rate to be applied in proportion to risk and time

e) 4th option: "All Relevant Circumstances" (can account for questionable evidence, co-responsibility of the investor, counter-claims of the host state, general considerations of equity and unjust enrichment, etc.)

f) 5th option: Replacement Value

g) 6th option: Full Restitution of Fair Market Value AND Future Profits in case of illegal expropriation

h) Causation and contributory fault?

i) Non-pecuniary remedies if there is no economic loss? (potentially important for distribution of procedural costs)

5) Recognition and Enforcement

G. Legitimate Regulation or Indirect Expropriation Triggering Compensation?

To be classified as an indirect expropriation, an act or omission needs to meet the following criteria:

1) "Investor" and "Investment" covered by a BIT or IIA? AND

2) Interference with the investment by or attributable to the host state? AND

3) Interference with classic ownership rights of the investor, i.e. to use and enjoy the investment in any way desired, within normal confines of the law? AND

4) Interference substantially deprives the investor from the use, control, and enjoyment of the investment, asset, or its value? AND

5) without, however, a formal transfer of title or outright seizure of the investment? (that would make it a direct expropriation) AND

6) Interference is nevertheless long-lasting or permanent and not merely temporary? HOWEVER

7) NOT done for non-economic reasons in the public interest, i.e. not for the protection of the health and safety or humans, animals, or plants, the environment, or cultural, or educational, or similar purposes, provided, HOWEVER

8) any measure taken for such non-economic reasons would still have to be proportionate, i.e.

   i) suitable to actually promote the stated non-economic goal(s) = step in the right direction, AND

   ii) necessary to promote those goals, i.e. there is no alternative that would be readily available, less restrictive for the investor or investment, and yet similarly effective in protecting the stated goals, AND

   iii) there is a reasonable relationship between the significance of the goal(s) and the seriousness of harm, the probability of the goal(s) being impaired, i.e. the chances of the harm materializing, and the interference with the investor or investment.

   In other words, a serious and long-lasting interference is only justifiable as a regulatory intervention that does not trigger compensation if the measure is necessary to protect an important non-economic goal that is acutely endangered, and there are no viable and less restrictive alternatives.

9) In addition, to escape compensation for indirect expropriation, the interference must not violate certain general principles of law, in particular with regard to transparency, due process, non-retroactivity, non-discrimination, etc. AND

10) the interference must not violate specific commitments made to the investor by the host state.

Nota bene: ##1 to 6 are generally accepted criteria for an indirect expropriation. By contrast, ##7 to 10 are still emerging as exceptions for justified regulatory measures that do not amount to indirect expropriation, although they may meet the other criteria, such as lasting and substantial depravation of core ownership rights.

Chapter 7.2
Useful Literature and Links

by Frank Emmert & ???

Chapter 7.3
Glossary
by Frank Emmert & ???

compulsory licensing of IP	could be interpreted as taking of property subject to compensation, problematic for live-saving drugs not otherwise available or affordable in the host country
indirect direct investment	
ICSID	
UNCTAD	