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# Investments International Standards

International Economic Law  
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## Goals


- Know different instruments of investment protection
  - ICSID
  - MIGA
  - NAFTA Chapter 11
- Understand different legal approaches
- Identify current problems

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**Example: Philip Morris vs. Uruguay**



- Bilateral Investment Treaty (BIT) Switzerland – Uruguay 1991
- Uruguay ratifies UN Tobacco Convention 2004
- New Uruguayan law on tobacco control 2008/09 contains i.a. provisions on packaging, product names
- Philip Morris brings claim against Uruguay under BIT Switzerland – Uruguay at World Bank's Centre for the Settlement of Investment Disputes (ICSID): violation of trademark protection
- Case pending (Case No. ARB/10/7)

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**ICSID Convention (Text No. 36) (1/2)**

- Provides for conciliation and arbitration of international investment disputes between states and investors
  - Procedures
  - Binding effect
- Jurisdiction (Art. 25)
  - Home country of the investor and the host state must be parties to the convention
  - Consent of the parties to submit a specific dispute

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**ICSID Convention (Text No. 36) (2/2)**

- Applicable law (Art. 42)
  - Law as agreed by the parties
  - Law of the contracting state party to the dispute and international law
  - Effects of „stabilisation clauses“?
- Annulment of the award (Art. 52)
- Recognition and enforcement (Art. 53-55)
  - Binding effect of awards (Art. 53)
    - Binding on both parties
    - Award is final: no appeal
    - Enforcement in national (federal) courts
  - Immunity (Art. 55)

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**MIGA (Text No. 38) (1/2)**

- Institutional framework
- Purpose
  - Insurance against non-commercial risks of investment
  - Enhancement of foreign direct investment in developing countries
- Covered risks in Art. 11(a)
  - Risk of currency transfers
  - Risk of expropriation and similar measures with exception of tax law, measures to avert a danger and for protecting the environment
  - Breach of contract without having recourse to a judicial or arbitral forum
  - Risk of war and civil disturbance
  - Non-honouring of sovereign financial obligations

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**MIGA (Text No. 38) (2/2)**

➤ Eligibility

- National of a member country other than the state party to the dispute
- Corporation, if
  - incorporated in a member state and
  - principle place of business in a member state or
  - majority of capital is owned by nationals of member countries
- State-owned companies if they operate on a commercial basis
- Cross-border investments
  - originating in a MIGA member country and
  - destined for a developing country

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**NAFTA Chapter 11 (Text No. 37) (1/3)**


➤ „Fair and equitable treatment“ (Art. 1105)

- National treatment and most favourite nation treatment
- International minimum standard
  - Transparency
  - Predictability

➤ „Full protection and security“ (Art. 1105)

- No attacks against investors and their investments including staff and facilities
- Defending investors and their investments including staff and facilities against attacks

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**NAFTA Chapter 11 (Text No. 37) (2/3)**

➤ Expropriation (Art. 1110)

- Requirements
  - Public Purpose
  - Non-discriminatory
  - Due process
  - Compensation (fair market value)
- Definition
  - Problem of measures which have effects similar to expropriation ("creeping expropriation")
  - Ambiguous jurisprudence: eg Metalcad v. United Mexican States, Pope & Talbot v. Government of Canada, S.D. Myers v. Government of Canada

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**NAFTA Chapter 11 (Text No. 37) (3/3)**

➤ Compensation

- Recourse to international practice
- Hull-Formula
  - Prompt
  - Adequate
  - Effective

➤ Arbitration (Art. 1120)

- ICSID
- Additional Facility Rules of ICSID
- UNCITRAL

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## **Current issues**

- Intersection of human rights and investments
- Responsibility of multinational corporations
  - Investment protection conditional to compliance with human rights?
  - Jurisdiction of arbitration tribunals for human rights violations?

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