

Glossary

N.B. Many of the definitions of terms in this Glossary are based on definitions to be found in John Currie (2001), *Public International Law*, Irwin Law, Toronto.

Admission clause A provision in an IIA that limits the scope of the agreement's obligations to investments that have been admitted by a Party in accordance with its domestic law.

Alternative dispute resolution Processes for resolving disputes that do not involve litigation. Mediation, conciliation and negotiation are all forms of alternative dispute resolution.

Amicus curiae Latin. Literally, 'friend of the court.' Refers to a person (a 'non-disputing party') that presents arguments (written or oral) to a tribunal about the legal issues involved in the case in order to assist the tribunal in its decision.

Annulment The setting aside of an award made by a lower-level tribunal. In arbitrations under the ICSID rules, annulment refers to an annulment committee setting aside a decision of an ICSID arbitration tribunal.

Arbitration A method for resolving a dispute in which the disputing parties agree to submit the dispute to one or more persons (called 'arbitrators'). The parties agree to be bound by the arbitrator's decision. In most cases, arbitration decisions are based on the application of legal standards to the dispute.

Balance of payments accounts An accounting of monetary transactions between a state and all other states. The accounting includes payments for exports and imports of all goods, services, capital and financial transfers.

Bilateral investment treaty An international investment agreement between two states. Often referred to by its acronym 'BIT'.

Capital exporter An investor making an investment in a state of which the investor is not a national. The investor is said to be 'exporting' investment to the recipient state.

Capital-exporting state A state whose nationals are making investments in other states.

Capital flight Capital flight occurs when investors rapidly reduce their investments in the host state.

Capital-importing state A state that receives investments in the state from nationals of other states.

CARICOM An organisation of 15 Caribbean nations and dependencies. CARICOM's main purposes are to promote economic integration and co-operation among its members, to ensure that the benefits of integration are equitably shared, and to co-ordinate foreign policy. Its members are Antigua and Barbuda, The Bahamas,

Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

CARIFORUM The Forum of the Caribbean Group of African, Caribbean and Pacific (ACP) States, the body that comprises Caribbean states for the purpose of promoting and co-ordinating policy dialogue, co-operation and regional integration, including within the framework of the CARIFORUM–European Community Economic Partnership Agreement (EPA). Its participants are The Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

Commercial presence A mode of services delivery under the WTO *General Agreement on Trade in Services* that includes certain types of investments. In general, a service supplier of one WTO member is supplying a service through a commercial presence in the territory of another WTO member if (i) the supplier has a subsidiary or branch within the territory of that other member for the purpose of supplying that service, and (ii) the subsidiary or branch is owned or controlled by natural persons that are nationals of the first member or legal persons organised under the laws of the first member.

Common but differentiated responsibilities A principle in international law that recognises that states at different levels of economic, social and political development have different capacities to implement international legal obligations.

Compensation In the case of an award by a tribunal, the financial compensation that a person recovers for a breach of its legal rights by another who was under a duty to respect those rights.

Compulsory licence A licence granted by the state to a person that entitles that person to use a patent without requiring permission from the patent holder. The patent holder is usually paid a set fee for use of the patent. Compulsory licences are most frequently used in relation to patented medicines.

Conciliation A form of alternative dispute resolution in which the parties to the dispute request, in accordance with specific rules, a third party to facilitate the settlement of a dispute. While similar to mediation, it is more formal.

Counterclaim A claim made by the defending party in a lawsuit or arbitration that the complaining party has violated the defending party's rights. In an investor–state dispute settlement case, the term may refer to a claim by the state that the investor has not fulfilled its obligations under the applicable international agreement (e.g. a BIT or IIA).

Customary international law International law that exists independent of treaty law. It consists of rules of law that are derived from the consistent conduct of states in which the conduct is believed by the states to be required by law (Shabtai Rosenne (1984), *Practice and Methods of International Law*, Oceana, New York, at 55).

De facto Latin. 'In fact'. Distinguished from *de jure*. For instance, *de facto* discrimination by a state refers to a law, regulation or administrative act that *in fact*

differentiates between one or more entities even if this differentiation is not expressly provided for in the law, regulation or administrative act (i.e., *de jure* discrimination).

De jure Latin. ‘Legally’ or ‘in law’. For instance, *de jure* discrimination by a state is discrimination by a law, regulation or administrative act of the state that, on its face, treats two groups differently.

Denial of benefits clause A clause in an international investment agreement that allows the host state to deny the benefits of the agreement to an investor or investment in specific circumstances. For instance, some agreements permit the host state to deny benefits to an investment if the investor does not have substantial business operations in the other party state to the IIA and it is controlled by persons that are not nationals or legal persons of that state.

Discounted cash flow A method of valuation of losses for the purposes of assessing damages for a breach of an IIA provision that is based on the present value of the estimated cash receipts expected from the investment in each future year of its expected economic life less each year’s expected cash expenditures to obtain those receipts. These present value of these net cash flows is calculated by discounting the cash flow for each year by a discount rate which reflects the expected rate of return on invested funds, taking into account expected inflation and the risk associated with the cash flows. The discount rate may be estimated based on the rate of return available in the same market on alternative investments of comparable risk. Discounted cash flow valuation is sometimes used in assessing the damages suffered by an investor whose investment has been expropriated.

Domicile of a corporation The state in which the corporation has its principal place of business.

Due diligence A person that is duly diligent is one that takes reasonable steps to fulfil its legal obligations. In the context of international human rights law, a duly diligent state is one that takes reasonable steps to protect the human rights of individuals from the acts of private parties that may violate such rights. In the same context, a duly diligent business actor is one that (i) takes reasonable steps to ensure that it is fully apprised of the potential adverse impacts of its presence and activities on the human rights of individuals and communities in the country in which it plans to invest or in which it is already in the process of investing, and (ii) takes reasonable steps to prevent, avoid and, if necessary, mitigate such impacts and reports on the effectiveness of such measures.

Due process The procedural safeguards that exist in law to ensure that a legal person is treated fairly and that its legal rights are respected.

Dynamic inconsistency Refers to the inconsistency between the policy preferences that a host state has before an investor has made an investment and those that it has after the investment has been made. For example, prior to an investment being made, a state that wants to attract investors has an incentive to create an attractive policy environment for investors with the goal of encouraging them to invest. A state may try to attract investment by providing financial incentives to investors such as low tax

rates. Once an investor has sunk its capital into the investment, however, the host country no longer needs to offer benefits to attract investment. It only has to offer benefits sufficient to keep the investment from leaving. These benefits are typically less than those needed to attract the investment because the investor often has sunk costs that cannot be recovered if it divested. The host state can take advantage of this situation by changing the policy regime after the investment has been made to confer fewer benefits on the investor, such as by raising taxes.

Enterprise liability The liability of a business enterprise as a whole. It is distinguished from the liability of a specific legal entity in a group of related entities whose agents directly participated in a legally wrongful act. Enterprise liability treats related entities (e.g. subsidiaries, affiliates and joint-venture partners) as a single unit for the purposes of imposing liability for a wrongful act.

Equity In law, equity refers to the legal principles that apply to a person to ensure that this person is treated fairly and justly. It can act to mitigate the sometimes harsh application of legal rules by taking into account contextual and background factors relevant to a fair and just decision.

Exception (to an international agreement) An exception in an international agreement exempts a party state to the agreement from the commitment to comply with an obligation set out in the agreement in relation to a particular state measure if the measure meets the requirements for the application of the exception. For example, general exceptions relating to health, the environment, public morals or law enforcement would allow a party to take some action otherwise forbidden by the agreement if that action met the requirements of the exception, including the promotion of one of these policy objectives.

Exhaustion of local remedies A requirement that a national of another state fully exploit all legal remedies available under the national law of the host state before that national (or, if the national's claim is espoused by his or her state of nationality, the national's state) may assert a claim under international law against the host state.

Expropriation The act of a state that takes away the property of the owner or substantially deprives the owner of the benefits of the property. In the case of international investment law, it generally refers to the taking of benefits of an investment from a foreign investor. The state may or may not appropriate the expropriated benefits for itself. A **direct expropriation** involves the state taking property from the investor, generally by assuming title to the property, for instance through a seizure. An **indirect expropriation** involves the state taking actions short of acquiring title to the property where the actions interfere in a substantial way with the investor's enjoyment of the benefits of the investment.

Fair and equitable treatment A legal requirement contained in many international investment agreements that the host state not seriously abuse investors or their investments or treat them in an arbitrary or discriminatory manner.

Foreign direct investment Investment by an investor of one state in another state in which the investor obtains a lasting interest in some entity in the host country economy over which the investor exercises a significant degree of control.

Fork in the road provision A provision in an international investment agreement that provides that once a party has chosen one remedy it is barred from pursuing other remedies. For instance, the agreement may give an investor the option of pursuing relief in the domestic courts of the host state or relief through investor–state arbitration, but forbid it to pursue both forms of relief. Once the investor chooses to seek relief in domestic courts or through investor–state arbitration, the choice is irrevocable and precludes resort to the other remedy.

Forum non conveniens Latin. Specifically, the term means that the forum before which parties to a legal dispute have appeared is not the appropriate forum for the resolution of the dispute. More generally, the law of *forum non conveniens* is the set of domestic legal rules that regulate the jurisdiction of a tribunal to deal with a dispute brought before it.

Free transfer of funds obligation An obligation in an international investment agreement for the host state not to restrict an investor’s ability to transfer funds out of the host state. Free transfer of funds obligations may be unqualified, in which case no limitations are permitted, or qualified, in which case the state may put in place limitations on transfers for certain specified purposes.

Government procurement The purchasing of goods and services by a government or public authority (for instance by a government agency).

Hard law International legal rules that states consider binding.

Home state The state of an investor.

Host state The state in which an investment is made. The state is said to ‘host’ the investment.

Human rights The fundamental rights enjoyed by a human being simply by virtue of his or her humanity.

ICSID arbitration rules The arbitration rules under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States that are contained partly in the Convention and partly in the Rules of Procedure for Arbitration Proceedings (Arbitration Rules). These rules have been used in approximately two-thirds of investor–state arbitrations.

Implementation (e.g. of an international agreement) The process by means of which a state gives effect in its domestic law to its international legal obligations in accordance with its domestic constitutional system.

Indigenous peoples Ethnic groups that existed in a territory prior to colonisation.

Intellectual property Intangible property (as opposed to physical property such as land or chattels) that can include copyrights, patents, industrial designs, trademarks, trade names, geographical indications, trade and business secrets, technical processes, know-how and goodwill.

International agreement An agreement between two or more states in which each state is bound by the terms of the agreement under international law. Also known as a treaty.

International human rights law The international legal rules relating to the protection of the basic human rights of all human beings. See ‘human rights’ above.

International humanitarian law The international legal rules that restrict the means and methods of warfare and protect non-combatants and other persons not participating in the conflict.

International instrument International agreements and non-binding international documents. The former create rights and duties for the parties and, sometimes, for third parties. The latter may express existing obligations and/or non-binding norms or principles.

International investment agreement An international agreement whose subject matter is foreign investment. It is an umbrella term that can refer to provisions relating to investment found in many types of international agreements, including bilateral investment treaties, regional investment agreements, and investment chapters of bilateral and regional free trade agreements. Often referred to by its abbreviation ‘IIA’.

International minimum standard of treatment The minimum standard in accordance with which a foreign national must be treated by the host state under customary international law.

International treaty See ‘international agreement’.

Investment A broad term including assets and interests held by an investor in an asset or enterprise. For the purposes of an international investment treaty, ‘investment’ is a term defined in the agreement that sets out the kinds of assets and interests held by an investor to which the agreement applies. A definition of ‘investment’ can be ‘open’ if it includes every kind of asset, or ‘closed’ if it is limited to specific forms of assets identified in the agreement.

Investment contract A contract between a state and an investor in regard to an investment. It specifies the commitments and obligations of both the state and the investor towards each other in respect of an investment. Investment contracts are a common alternative or complement to an international investment agreement.

Investor A person that acquires assets (equity, debt securities, real estate, etc.) with the expectation of a financial return on those assets. For the purposes of an international investment treaty, ‘investor’ is a term defined in the agreement that sets out the kinds of persons whose investments are protected under the agreement.

Investor–state arbitration Arbitration under an international investment treaty between an investor and the state in which the investment is located with the purpose of settling an investor–state claim. See ‘arbitration’ above.

Investor–state claim A complaint by a foreign investor that it or its investment has suffered a loss as a result of conduct of the state in which the investment is located that is a legal wrong under an international investment agreement between that state and the investor’s state. Typically the investor’s claim is to receive compensation for the loss it has suffered as result of the wrong.

Juridical person See ‘legal person’ below.

Jus cogens Latin. A rule of international law that is recognised as being so fundamental to the maintenance of the international legal order that it cannot be set aside or suspended even on the consent of states. Sometimes called ‘peremptory norms’ or ‘non-derogable norms’ of international law.

Legal person Also ‘juridical person.’ An entity subject to the law. For the purposes of international investment agreements, a ‘legal person’ typically includes any entity constituted or organised under the law of a state, such as a corporation, trust or partnership, whether publicly or privately owned, and includes a state or a sub-state entity (such as a region, province or municipality).

Mediation An alternative dispute resolution process whereby two parties consent to assistance by a third party in negotiating a solution to the dispute.

Most favoured nation treatment The obligation under an international investment treaty requiring a party state to treat investors of the other party state and their investments no less favourably than it treats investors of any other state and their investments. Also called the ‘most favoured nation obligation’ or ‘most favoured nation protection’. Often referred to by its abbreviation ‘MFN’.

Multinational enterprise See ‘transnational corporation’ below.

National schedule of commitments A list forming part of the *General Agreement on Trade in Services* that sets out for a WTO member the services activities with respect to which it commits to grant national treatment and market access subject to any limitations written into the schedule.

National treatment The obligation under an international investment treaty requiring a party state to treat investors of the other party state and their investments no less favourably than it treats its own investors and their investments.

Natural person A human being. It is distinguished from a ‘legal person’.

Negative list An approach to drafting an IIA whereby a state creates a list of measures, sectors or policy areas to which some or all of the provisions of the agreement do not apply. Anything not listed is subject to the obligations in the agreement.

Negotiation An alternative dispute resolution process whereby the parties to a dispute meet to exchange information about their interests, set out their legal positions, and propose various resolutions of the dispute. No third party is involved in this process.

Non-conforming measure See ‘reservation’ below.

Obligation to protect In international human rights law, it is the obligation of the state to exercise due diligence to protect individuals within its territory and subject to its jurisdiction from violations of human rights caused by third parties, including investors.

Obsolescing bargain See ‘dynamic inconsistency’ above.

Party (to a treaty or international agreement) A state that is bound by the terms of an international agreement.

Party state See ‘party’ above.

Performance requirement An obligation imposed on an investor by the host state that obliges the investor to take some specific action in order to achieve the state's policy objectives. For example, a host state may specify that a foreign investor may import capital into the host state only if it hires local workers.

Polluter pays principle The principle in environmental law that the person causing pollution must bear the costs associated with it.

Portfolio investment An investment in debt and equity securities that is intended only for financial gain and that does not create a lasting interest in or control over an enterprise.

Positive list An approach to drafting an IIA whereby a state creates a list of measures, sectors or policy areas to which specific provisions of the agreement apply. Anything not listed is not subject to those provisions in the agreement.

Preamble The preamble of an international agreement is the portion of the agreement in which the party states express their general intentions and goals in entering into the treaty. The preamble is distinguished from the substantive provisions, which set out the parties' specific rights and duties and does not create binding obligations.

Precautionary principle A principle in international environmental law that a state is entitled to regulate the activities of nationals and foreign nationals operating in its territory with a view to avoiding future harms, even in the absence of scientific certainty about the risk of the harm or the effectiveness of the measures put in place to prevent it.

Pre-establishment rights The rights of an investor under an international investment agreement that exist prior to the investment being admitted into the host state market. These rights protect their investors interests before they establish their business in the host state.

Preferential trading arrangement An arrangement, often in the form of an international agreement, between two or more states, in which each state promises to give more favourable treatment to goods and services imported from the other state(s) party to the agreement than it gives to imports from non-party states.

Prudential measures Measures taken by states to preserve the soundness and integrity of their financial institutions, to protect investors, insurance policy holders, policy claimants, depositors and other financial market participants or to ensure the integrity and stability of their financial system as a whole.

Punitive damages Compensation awarded to a plaintiff or complainant to punish the defendant for its actions and to dissuade it and others from taking similar actions in future. Punitive damages are distinguished from compensatory damages, which are intended to provide the plaintiff with compensation for the violation of its legal rights. While the value of compensatory damage awards is determined by the magnitude of the loss resulting from the violation of the right, the amount of punitive damages may not be related to the loss.

Race to the bottom A situation in which states, provinces or territories are in competition, for instance, to attract investors, with the result that these entities seek a competitive

advantage by lowering or dismantling currently existing regulatory standards. In a race to the bottom, the result is generally an overall lowering of regulatory standards.

Ratification The process in which a state consents to be bound by an international agreement that has been negotiated and adopted by it and the other negotiating party states.

Regulatory chill The discouragement of domestic legislators from enacting laws and regulations for fear of the negative repercussions (perceived or real) of doing so, such as the risk of investor–state arbitration claims.

Reparations The remedy under which a party that has been found to have committed an internationally wrongful act must eliminate, as far as possible, the consequence of that wrongful act. It can include restitution, compensation and satisfaction.

Reservation A statement by a party to an international agreement that either modifies the legal effect of one or more of the agreement's provisions as it applies to that state or excludes the application of that provision to it. Reservations are not generally symmetrical, i.e. they are typically different for each party to an international agreement. Reservations may also be described as provisions addressing 'non-conforming measures'.

Responsibility to respect Under the legally non-binding Guiding Principles on Business and Human Rights, the moral duty of private actors, including investors, to respect human rights.

Restitution A remedy for a legally wrongful act that involves restoring the state of affairs that existed prior to that act.

Right of establishment In the context of international investment law, a right set out in an international agreement in which the host state commits to allowing a foreign investor to enter its market and carry on business.

Right to development As defined in the *UN Declaration on the Right to Development*, the right to development is 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'

Right to regulate The right asserted by a state to use domestic laws and regulations to control the activities of those operating in its territory. A right to regulate may be set out in the provisions of an international agreement. Some states believe that the right to regulate is implicit in the sovereignty of the state, and so need not be specifically identified in an international agreement in order to be exercised.

Satisfaction A remedy for a legally wrongful act that aims to address moral, non-material damage suffered by the victim of that act. For example, an apology may be a form of satisfaction for a legal wrong.

Schedule (to an international agreement) An appendix to a treaty that typically defines the obligations of a party to the treaty in a specific way. A schedule may list

specific commitments made by a state to comply with some or all the obligations of an IIA in listed sectors of activity or policy areas. Such a positive list of commitments may be accompanied by reservations that cut back the scope of the obligations undertaken. See 'positive list' above. Alternatively, a schedule could list specific state measures, sectors of activity or policy areas that are excluded from some or all of the obligations in an IIA. This is a 'negative list'. For example, a negative list could set out specific measures to which a state is not obliged to extend national treatment, such as existing measures that discriminate between its domestic investors and foreign investors. See 'negative list' above.

Seat of a corporation The state in which the effective management of a corporation is located.

Soft law Rules of international conduct that are considered non-binding though they may be emerging as binding rules.

Spill over The effect, usually of economic activity such as an investment, that goes beyond the specific effects which the activity was intended to achieve. For instance, an investment may be intended to generate profit for the investor but it may also have a 'spill over' by improving the level of technical knowledge in the region in which the investment is made. Spill overs can be negative or positive.

Stabilisation clause A clause contained in an international investment agreement or investment contract whereby the host state promises not to change the rules, regulations and laws that govern an investment while the agreement or contract is in force.

State A 'stable, independent political community comprising a government exercising exclusive, sovereign jurisdiction over a given territory and population and capable of entering into international legal relations with other states' (Currie, *op. cit.*).

State espousal Action by a state to pursue (or 'espouse') the claim of its national against another state and seek a remedy, where the national has been injured by that other state.

State immunity The immunity of a state from the jurisdiction of a court located in a different state. Immunity may extend to liability for wrongful acts or for execution against its assets or both.

State sovereignty The ability of the state to exercise its powers and privileges over its territory and population without interference from other states but subject to international law.

Sub-national government Regional or local levels of government within a state. Contrasted with 'national government', which refers to the government of the state as a whole.

Subrogation The process whereby an insurer, in return for compensating the injured party for losses caused by another's actions, assumes any rights the injured party has to pursue legal claims against the other person. For instance, an IIA may contain a

subrogation provision that allows a state insurance company or other state agency that compensates an investor for an injury caused by the host state to pursue an investor–state claim against the host state to which the investor would have been entitled in relation to the act that caused the injury.

Sustainability assessment A system for determining the impact of an investment on the environment, society and social institutions, and human rights.

Sustainable development A broad concept that includes economic, cultural, political and social development as well as environmental protection; the goal(s) set by the government of a state to achieve these forms of development and protect the environment.

Transnational corporation A corporate enterprise that produces goods or delivers services in more than one state. It is a synonym for ‘multinational enterprise’ and is sometimes referred to by the abbreviation ‘TNC’ or ‘MNE’.

Treaty See ‘international agreement’ above.

Treaty shopping The process by which a person structures its business affairs in various states in order to take advantage of an international agreement whose terms are favourable to it. In the investment context, an investor may structure its investment through a legal entity it controls that is incorporated in a party state to an IIA if that would make its investment in the other party state to the IIA eligible for protection under the treaty.

Umbrella clause A clause in an international investment agreement that obliges a party state to respect obligations it has undertaken toward investors from the other party state that go beyond those obligations specifically set out in the treaty. For instance, an umbrella clause might oblige a party state to respect contractual commitments undertaken with regard to an investor even though these obligations are contractual and not based in the treaty.

UNCITRAL Arbitration Rules The general arbitration rules adopted by the United Nations Commission on International Trade Law in 1976 and most recently revised in 2010. The UNCITRAL Rules are the arbitration rules most frequently used in investor–state arbitration after the ICSID Arbitration Rules. In some IIAs, obligations benefiting from an umbrella clause may be the basis for an investor–state claim under the treaty.

Waiver The situation in which a party agrees to give up a claim to relief.