International economic law

Customs= dogane.

Customs obstacles:

1. Nondiscrimination

Customs barriers-> the domestic legislation that is applied in the moment tat the good enter the market. Behind the border measure, they are an impact on trade even they don't regulate it.

Internal taxes: taxes applied in market, etc.

WTO agreement the purpose is to increase trade and demand in the member state, the participation of participant countries in the international relations.

*Preamble: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous **arrangements directed to the substantial reduction of tariffs and other barriers to trade** and to the elimination of discriminatory treatment in international trade relations*"

The importer of a good has to pay the import tariff, price will increase for that reason, the purpose of the WTO is to prevent the price increase. The WTO purpose is to reduce the tariff but tey are not prohibited. The duty is a way to protect the master company, it is a revenue for the government, so the goal is to reduce the custom duties.

It necessary to make a distinction between:

- Ad valorem duties
- Specific duties
- Mixed duties

Traditionally duties on agricultural products are higher that the industrial ones.

- **Preferential duties**: is applied to specific countries, based on art. 1.1 GATT. Are applied at least to develop countries
- **Neither MFN, neither preferential duties**: applied on products originating from non-WTO Members (higher that MFN duties)

Difference between:

- **Bound duties**: ceiling rates according to art. II GATT 1994
- **Applied rates**: actual level of tariffs (may be lower than bound rates). The obligation is that the applied rates of duty must be applied to all the countries without discriminating between WTO members except for the preferential duty.

Italy gives a preference to France of 0% on a legal basis.

Schedules of concessions: for each member there is an annex to GATT. It is a list of products that is traded and we have an indication with a maximum duty that can be applied to the country. We have 137 schedules of concession for each member. We have one European schedule of concession negotiated by the Commission.

The obligation for each WTO member is applied by art. 2(a) GATT: *"* The **products described in … the Schedule** relating to any Member, which are the products of territories of other Members, **shall, on their importation** into the territory to which the Schedule relates …, **be exempt from ordinary customs duties in excess of those set forth and provided therein***".*

Obligation is that member can apply different duty on the same product only if they are without discrimination between WTO members.

Negotiations are very complex, art. 28 bis GATT: "Members recognize that customs duties **often** constitute serious obstacles to trade; thus **negotiations** on a **reciprocal** and mutually advantageous basis, directed to the **substantial reduction of the general level of tariffs** … and in particular to the reduction **of such high tariffs as discourage the importation even of minimum quantities**, and conducted with due regard to the objectives of this Agreement and the **varying needs of individual members**, are of great importance to the expansion of international trade. The WTO may therefore **sponsor** such negotiations from time to time

The members of GATT 1947 had nine rounds of negotiation for the schedule. The negotiations are split in two:

- Agricultural products
- Industrial products

In the negotiations they decide that on average each member should reduce the tariff of a percentage quantity.

The general level of tariff protection in the last two year has increased. The USA are acting totally against the provision of art. 2.1(a) GATT, and china reply also in violation of the provision.

Under the WTO there is **dispute settlement**: the dispute settle organ is composed one representant of all 164 members the DSB (dispute settlement body) can propose to appoint a penal to the violation. There are 13 different penal decided by 3 people of the council that present the propose of the penalty to the CDB which decision is **binding**.

The rule by which the DSB adopt the panel report says that the panel report is adopted unless by **consensus** (with no objection) the DSB decided not to adopt it. When a panel report is proposed by the DSB is always adopted.

Second level of adjudication When a report is submitted to the DSB then the parties can request a second opinion on the panel report, before the adoption, then the panel report is **notified to the appellate body for revision**. The appellate body is composed of seven judges and to work there must be three judges. Any four years we have the election of the three judges, the election is made by the positive election. USA are opposing to the selection of the DSB judges, so now we have only one judges (Chinese). In this case all the disputes are freeze because there are not enough judges.

Since 1995 we have 145 reports, even than USA boycott the dispute settlement he is submitting a lot of claiming against China.

Tariffs are established by negotiation and the level of tariff at the world level is decreasing, least developed countries have a higher level of tariff protection.

Art. 2.2 GATT: "**Nothing … shall prevent** any member from imposing at any time on the importation of any product:
(a) a **charge equivalent to an internal tax** imposed consistently with art III.2 in respect of the like domestic product;
(b) any **anti-dumping or countervailing duty** applied consistently with the provisions of Article VI;
(c) fees or other charges commensurate with the cost of services rendered".

On one side the purpose is to reduce tariff, but in some circumstances, you can apply a higher level than the one specified. The one goal is to protect the consumes oath, but the negative is that domestic products become less competitive than the foreign product, so is imposed a tax on the foreign products.

An **anti-dumping** dumping is a practice to enter new market, they apply a lower price in the foreign one than one in the domestic market. This strategy is competitive in the short term. For producer in the domestic market is negative.

Art. 2.1 ADA: "**dumping**, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, **is to be condemned** if it causes or threatens material injury to an established industry into the territory of a member or materially retards the establishment of a domestic industry".

The other country in response to dumping may arise the import duty imposed on that product. The anti-dumping duty is **applied to the company** not to the country of the company. The state to impose the duty must prove the dumping and a domestic injury for his market, **the anti-dumping duty is high that the bound rate**.

Subsidies are decided by countries to support the competitive of a company for a product. The most of the claim report in front of the DBS is about the anti-dumping and countervailing duties.

24th January

Quantitative restrictions regulation od importation of a given good, or regulation that item can be imported but up to a certain threshold. Embargo: the quota of importation is 0, and quantitative quota.

Art. 11.1 GATT: ***No prohibitions or restrictions*** *other than duties, taxes or other charges, whether* ***made effective through quotas, import or export licenses or other measures, shall be instituted or maintained*** *by any member* ***on the importation*** *of any product of the territory of any other member* ***or on the exportation*** *or sale for export of any product destined for the territory of any other member*.

Bound rate (art.2) custom duty are permitted but they have a rate: the **bound rate**.

Art.11 the modal shall in treaty mean non prohibition. The difference between institute or maintain imply retroactivity, are excluded existed quantitative restrictions or new one.

There is a list of each member custom duty applied. Qualitative restrictions may be less transparent than customs restriction. This is also why article 11 prohibited definitely qualitative restrictions.

Art. 11.2(a): Exports quotas temporarily applied to prevent or relieve **critical shortages of foodstuffs** or other products essential to the exporting contracting party.

Example of export of row material for China, for which USA claim, but China responded they claimed the limitation of export in a **discriminatory** way.

Art. 11.3: Restrictions on the importation of **agricultural products.**

We have also an agreement on Agriculture.

Art. 12-13: Import restrictions to **safeguard the balance of payments**. for the developing countries.

DISCRIMINATION WTO AGREEMENT preamble the goal must be satisfied by the elimination of **discriminatory treatment** in international trade relations. Different customs tariff applied to the same product for different countries. Tax foreign products more than similar to domestic one.

Foreign discrimination art. 1 GATT Trading parties may not be discriminated.

Internal discrimination art. 3 GATT Once a product entered the domestic market that must be considered similar to the domestic one.

Dispute arise within the WTO between the members can be claimed only by the member itself. There is no organ that has the power to settled the dispute, the state settled between themselves.

Art. 21: nothing prohibited states to impose measures in contras with article 11 in case of international tension.

Items **alike** (art. 1 GATT) the main point is are all the typologies of coffee like products and so no discrimination or are the different product and so discrimination is not prohibited. In the GATT you don't find any definition of like products, so what are the criteria that assess that products are alike? The internal tariff, the consume, the taste and the habits. The Panel specified that products are like if the respect the following **criteria**:

- Characteristics of the products
- Their end-use
- Tariff classification of other member states

Other criteria are:

- Consumers taste and habits
- Process and production methods

30th January

Art.1 sets the external part about hoe to enter the foreign products.
Art.3: the national treatment concern the internal market, when foreign products are inside the market and the purpose is to not discriminate between foreign and domestic products. **Nondiscrimination** apply to **taxation** and other provisions.

Exceptions of WTO agreement: situations where WTO members are allowed to violate the nondiscrimination. Exception more popular are the one of national security and on environment or human life. Regional trade agreement preferential tread agreement is concluded between countries situated in the same geographic area. **MERCOSUR** is a regional trade agreement. The pursue id to closer trade agreement. This trade agreements are concluded also by state of different geographic area, ex. The agreement between EU and Canada. Countries are going to pursue negotiation on preferential trade agreement, reason why the number of these agreement increased exponentially. At the beginning they were agreement between **developed countries** (north-north agreement), nowadays they are **developed and developing countries** (south-south agreement).

The core provision of TFEU is the article 28.1: *The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the **prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect**, and the adoption of a common customs tariff in their relations with third countries*.

According to **art. 24 of GATT** Italy must apply the same treatment to a EU member and non EU country treatment of **most favorable country**. States are justify not to comply to MFN if the create an agreement or a free trade area.
Art. 24.4: *WTO Members recognize the **desirability of** increasing freedom of trade by the development, through voluntary agreements, of **closer integration** between the economies of the countries parties to such agreements. They also recognize that the purpose of a custom union or of a free trade area should be **to facilitate trade** between the constituent territories and **not to raise barriers to the trade of other Members with such territories***. Closed integration new integration flows. Once it is established it may replace trade flows that occurred before.

How to minimize trade diversion **art. 24.5**: *Accordingly, the provisions of this Agreement shall not prevent, as between the territories of the Members, the formation of a CU or a FTA, provided that*… we have a customs union with turkey such that the foreign trade of turkey is align with the commercial policy of EU. The EU applied quantity restriction on importation of textile coming from India and turkey can applied the same regulation. Then India presented a claim on quantity restriction base on discrimination against art 11. But turkey defended saying that yes, it is prohibited but they made a privileged agreement with Italy.

The condition of the appellate body to validate the defense:

- First, the party claiming the benefit of this defense must demonstrate that the measure at issue is introduced upon the formation of a CU/FTA that **fully meets the requirements of paras. 5 and 8 of art. XXIV**.
- Second, that party must demonstrate that the formation of that CU/FTA would be prevented if it were not allowed to introduce the measure at issue.

Art. 24.8: (i) *Duties and other restrictive regulations of commerce are eliminated with respect to **substantially all the trade between the territories of the union**, and* (ii*) Substantially the same duties and other regulations of commerce are applied by each member of the union to the trade of the territories not included in the union*.

Art 24.5: *the **duties** and other regulations of commerce **imposed** at the institution of such union **in respect of trade with Members not parties to such union shall not on the whole be higher** or more restrictive **than the general incidence of the duties** and other regulations of commerce **applicable** in the constituent **territories prior to the formation of such union***.

Art. 24 is the legal bases to conclude all the 303 agreements, the caselaw on this article is very limited, however we have some other exception, art. 20 and 21, that provide some basis to prove the inconsistency of these agreements.

EXCEPTIONS IN WTO:

There are four classes of exceptions:

1. **General exceptions** of art. 20 and 24: nothing in thus agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

b) necessary to protect human, animal or plant life or health;

g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Art. 20 and this idea of balance in trade liberalization can be found in other international agreement. The exception of article 20 are limited, conditional and balancing the approach in the interpretation. Limited simply means that there is a list of situations which can justify the violation of WTO situations. It is conditional because we need to look at the conditions provided by that article. Exceptions not necessarily must be interpreted in a restrictive way. During the interpretation must be considered the factual and the illegal context.

The two-tier test a test based on two phases, taken from an appellate body, the measure not only come under one or another of the exceptions, it must also satisfy the requirement of art. 20. The measure adopted must be **necessary** to protect human, animal or plant life or health. We don't have necessary measures but only measures related to that topics. Examples of health measures: Thailand cigarettes it banished the import of foreign cigarettes to safeguard human health. Thailand Is violates art. 11 because it is imposing quantitative restriction.

2. Security exceptions of art. 21
3. Economic development exceptions
4. Regional integration exceptions of art. 24

31st January

The order of assessment is first to verify whether the measure is compatible with conditions of art. 20, then if it is it should also respect the opening clause.

We need to answer the question is it an health measure (art. 20b)? Is it a necessary measure?

Necessary measure based on a case by case assessment, but here the assessment is more legal than factual. A measure is necessary to protect a given value if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which the state could reasonably be expected to employ to achieve its health policy objectives.
Thailand in the case of cigarettes didn't pass the necessity test, the Panel made a sort of comparative assessment analysis observing what the other country do in the same circumstances. Thailand could find alternative valid solution to the total abolition. Thailand could simply adopt a ban on the advertisement on cigarettes and that would not be incompatible with WTO obligations.

In the brasil case there are more flexible conditions about the necessity measures. The idea of necessity evolves in the legal contest. The approach to the necessity test means that the more flexible is the more discrete the appellate body process these conditions. Dispute settlement body, Panel and appellate body

interpret these texts. There is an evolution also in giving a meaning in the interpretation of a text; a limitation of this procedure are the rules imposed by international law. International law and treaty are made by states, there could be a conflict between states and judges who interpret the treaties.

First phase of the two-tier test: **art.20(g)** refers to measure relating to the conservation of exhaustible natural resources id such measures are made effective in conjunction with restrictions on domestic production or consumption.

US-Shrimp case the way o fishing shrimps was dangerous to turtles, and in order to protect a measure of natural resources (turtles) introduced a methodology safer for turtles and not in contrast with USA. Shrimp can be consider falling in article 20(g).

Preambles usually are not binding for states but are often used by judges to the interpretation of the text.

The text about shrimps is more flexible and the measure is connected to the conservation of exhaustible resources.

Measures can be **partial**. We have different conditions depending what is the exception invoked by states.

Second part of the two-tier test: the **Chapeau** such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.. Chapeau of art. 20 is an expression of the principle of **good faith**. Good faith is a well debated contest and it is strictly related to the concept of **abuse** of good faith. We don't have a universal definition of good faith because it can interpreted only case by case.

6th February

EU-Mercosur the conclusion of the agreement between of EU and Ukrainian contribute to the tension between Ukraine and Russia. The agreement was signed on June 2019, now they are in the phase of refine the legal test and myust be ratified by Eu and each country of Mercosur. Every state has a decisive role in the decision take for the agreement between all this state.

The agreement consents the easy enter of the products. There is an exchange of elaborate products to Mercosur, but also of intellectual properties. This new trade agreement regard environment, labor law and sustainable development. The agreement permit to stop a product of which you don't know the production. Its time to liberalize and open the markets, because we are against protectionism. It is a great time for Mercosur to start growing and improving the commerce.

Impact on Latin-American integration: "*The entry of Latin America. into the community of nations is one of the most important facts in the history of civilization. It resulted not only in widening the field occupied by International Law but also in radically modifying its character. (...) In this new community of states, problems of International Law sui generis and problems distinctively American arose*". (Alvarez)
There are four economics blocks in Latin-America because geography matters, political matters and economic factors, because they have different products and partners.

Mercosur is started in 1991 official, but something started before because when some dictatorship were destroying the country competing between themselves. Argentina and Brazil are the most productive state of the country. From 2013 Mercosur is little paralyze, but at the end of dictatorship decide to reduce the tariff and to join other countries embracing liberalism to create a **common market**. In 1909 with the first crises the Mercosur stopped and in the twenties, they started rethinking the idea of Mercosur. Mercosur started to work in parliament, it was more than the economic issues until the 2010 when the Mercosur

stopped again. They established an external tariff model that was the same also for the states themselves and that was full of exceptions.
At the same time there was another model the UNASUR project, but its idea was not based on the economic integration but was more political because they want to compete with the Europe but they started competing with Mercosur. There was a division inside the country and there was a strong reaction from countries that stated to compete between themselves.

Mercosur: group of 5 countries in which Venezuela enter in 2005 and suspended in 2015 because Paraguay was against its entrance, but when they decided about the entering of Venezuela Paraguay was suspended. Chile, Peru and all the costs they are all **associated** to the Mercosur beneficing all the agreement.

Ushuaia Protocol Democracy is a value of this block, and if the member doesn't respect it they will be suspended, as happened to Venezuela and Paraguay. This protocol describe the legal basis of the all agreement.

In 2005 was created a parliament starting to develop the project of Mercosur. There is a parliament, a tribunal but they depend on the diplomacy and intergovernmental basis of the states. Was a really important change to have built a **dispute settlement system**. It is a very traditional method of resolution of disputes, this tribunal wasn't necessary for the integration problem, because they create a permanent review court. Judges are important element of every integration system and they have a judicial system that respect the needs of the country.

It is stated that the state can chose between the WTO system and the Mercosur dispute settlement, but when you choose you can't change your mind.

The agreement between EU and Mercosur means a **moment of changing**. Two important vale must be stressed for this agreement: democracy and human rights.

European will push for the protection of the environment, but someone contest this agreement saying that it allows them also to do damage it.

7th February

There are four section of exceptions: regional exception art. 24 GATT, general, security and developing country exception.

Art. 20: divided into two part. When a member state invokes art. 20 the appealed body assess whether the exception fall within one of the situations listed from letter a to g. if the measure pass the first part of the test is must also pass the **Chapeau** that is the expression of the general principle of law: good faith treaty shall be interpreted and applies in good faith.

Brazil provided for a ban on import of tires, but this ban on import on liters of tires but not for Mercosur members. This is a discriminatory behavior. The appealed body stated that this measure wasn't compatible to art. 20.

Article 21 GATT: national security exception *Nothing in this Agreement shall be construed*

(a) to require any contracting party to furnish any information the disclosure of which it ***considers contrary to its essential security interests****; or*

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under ***the United Nations Charter for the maintenance of international peace and security***.

We are dealing with the state national security system, until April 2019 was never interpreted and applied in practice, in principle it could justify any WTO obligation about national security interest. Apparently, we have very self-judging conditions, but we need some objective elements, the only objective condition seems the one under comma c). the only institution which can **authorize the use of force** is the security council of UN. As with general exceptions also for this article the provisions have been broaden connecting to other treaties.

Judges, panels and appealed bodies have limited power they can interpret treaties, also in an evolutionary way (ex. Shrimps). States and only states make law; states are not always interested in skipping the WTO law through exceptions. The political, military crisis in the world affected also economy and the WO settlement system questioning the application of art. 21.

Russia: annexed Crimea Russia restricted traffic of goods from Ukraine to Kazakhstan and Kyrgyz. Russian invoked art. 21 the action claiming that it was to secure its borders. The panel considered this formulation don't refer to the text and condition of art. 21.

Art. 21 refers and is based against the potestative condition, because it is based on security and predictability of the multilateral trading system. The panel in the case of Russia refers to the dictionary to give words a meaning and was a situation of crisis not because Russia said it, but because the Panel consider it likewise.

Essential security interests are determined by the states, but the panel precise that the determination of situation is not completely free. The article 21 refers to the **necessity** of protecting the security interests.

Necessity of the measures: principle of good faith surrounded everything in art.21. here we don't have condition, limitation and an opening close (Chapeau) as in art. 20, it is more **discretional**.

13th February

Derogation is available to underdeveloped countries and specific countries.

In 1964 GATT members stated the Trade and development; in 1970 this system was adopted as derogation of WTO members, the key moment in this evolution of the developing countries is 1979 because the countries adopted the **decision on differential and more favorable treatment**.

The final aim is facilitate access to marker to the developing countries **The paragraph 3** of the enabling clause states: Any differential and more favourable treatment provided under this clause: *a)* shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

EC tariff preference: the generalized system of preference was enacted in 1970 as a temporary obligation. It is allowed by the enabling clause by a permanent derogation for developing countries, but it must respect some restrictions.

Non-discriminatory in paragraph 3: identical treatment is available to all similarly situated GSP beneficiaries, which are the ones that have the developed, financial and trade needs. So it is possible to discriminate for developing countries, but only certain conditions as all the other exceptions.

International investment law directs regards individuals, called investor. It is experiencing a long evolution, bigger also that the trade law. The scope is Safeguarding **foreign investments** against interference by the host State and protecting Host State's interests, "The task of international investment law is *to find an appropriate balance between these potentially conflicting interests*".

Foreign invested must be protected e must granted international protection, international investment law provides right for investors and obligation for host states. Key point promoting host states interest and development, important is to find a balance between these two interests: protecting investors and host state's interest.

International Investment Law is a fragmented system, it is based mostly on bilateral treaties. We have a very much established system of arbitration. **Diplomatic protection** is the most important feature od international investment law.

Tensions between developed and developing States as to the existence of an ***"International Minimum Standard of Treatment"*** 60/70s – Apex of the Tension: The claim that its citizens were not given an international standard of treatment became a pretext for intervention by the United States in the affairs of Latin American states. Consequently, Latin American states have steadfastly denied the existence of a rule that mandated a minimum standard of treatment for aliens.

Calvo doctrine essence of the position of developing countries, he developed the idea of protecting the interests, he states three different elements:

1. foreign nationals are entitled to no better treatment than host state nationals
2. the rights of foreign nationals are governed by host state law
3. host state courts have exclusive jurisdiction over disputes involving foreign nationals

The twin pillars of the Calvo Doctrine are the absolute equality of foreigners with nationals and the principle of non-intervention.

One Example of Practical Implications of the Disagreements over the International Minimum Standards: particular implication is the standard pf compensation for expropriation. According to Mexico general social reforms imposed no international obligation to provide immediate compensation, as foreigners were only entitled to the same treatment as Mexican citizens.

The development of IIAs was primarily a response to the ***uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property.***

14th February

Investors don't have direct power with respect to the host states, but only on the home states. The prohibition of the **use of force** is a fundamental and non-exceptionable principle of international law, there are peaceful means of dispute settlement.

IIL starts to develop as individual from international law between developed and developing countries but in few times started a tension between them, the core of the tension was based on the uncertainty that have to rules foreign countries. Foreign investors has to be treated as the domestic one, but one implication of this measure was especially the dispute settlement. Developing countries argued that foreign countries should be treat according to international law **DISCRIMINATION**.

If you sign a **treaty** you define the rule of foreign investments, treaties are usually concluded by developing and developed countries. These treaties are called BIT: bilateral treaties agreement, previously was called treaty of friendship. States started to use treaty to overcome the uncertainty on consumers international law about investments. These treaties are formulated all in a very similar way.

1° Treaty of Friendship, Commerce and Navigation

1959: Bilateral Investment Treaties (BITs) Germany/Pakistan

The treaty provided the **state vs. state dispute settlement**. Remain the idea of diplomatic protection. The first BIT that provide the dispute settlement **investor vs. state** was defined in 1969 between Chad and Italy. As is possible to see they are all agreement between developed and developing countries.

1965 ICSID Convention: provide services for an arbitration center. In case of expropriation the amount of the compensation must be settled in front of an arbitral tribunal selected by the principles stated by the ICSID Convention.

BOOM of BITs. Reasons:

1. increased political commitment by governments in both developed and developing states to economic liberalism and the freer international flow of goods, services and investment
2. lack of developing state alternatives to Foreign Direct Investment (controlling ownership in one country by an entity based in another country).

Case rule is often quoted by other arbitral tribunals, it happens that the same arbitrators decides different agreement or dispute.

International Investment Agreement is under attack for different reasons:

- IIAs as neo-imperialist regime designed to protect multinational capital, or a form of global economic constitutionalism that subverts democratic decision making
- investment liberalization and treatment standards are too wide and indeterminate, and their interpretation has been too expansive and pro-investment only investors can bring a state in front of an arbitrational tribunal.
- investor-state arbitration is an inappropriate mechanism for what are public regulatory disputes refers to investment affecting public interests.
- asymmetry of obligations in IIAs refer to the nature of international treaty agreements, they are designated to protect investments, not host interests.

This new approach was base on the procedure of the dispute settlement about investment law, no more arbitration but a permanent tribunal, important to notice that it not yet enforced.

US-Argentina BIT: **Definition of investment** it has a practical impact on the jurisdiction of the tribunal.
"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
(iii) a claim to money or a claim to performance having economic value and directly related to an investment;
(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavour, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

Investment according to this definition is everything but in defining it we define the **scope of the investment treaty**. In this case we can extend the definition of investment.

Sometimes recent treaty incorporated what has been stated by tribunals, as in the case of the definition of investments by CETA.

Art. 25 ICSID Convention: *"The jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State ... and a national of another Contacting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*

ICSID tribunals have adopted the **double-barreled** approach, based on two different kind of assessment:

1. whether there is an "investment" under Article 25(1) of the ICSID Convention
2. Whether there is an "investment" under the relevant investment agreement

Two approaches in defined the art 25: 1. the **objective** with the Salini test. It sets of criteria/hallmarks to impose limits on the boundaries of "investments" arbitrable under the ICSID Convention (*name of investor* vs. *the host state*). 2. The **subject approach** any transaction may be included or excluded from the meaning of investment by the parties' consent (the "subjectivist" approach), included in an investment agreement.

Fraport v. The Philippines *In bilateral investment treaties which incorporate an ICSID arbitration option, the word "investment" is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a **lex specialis** with respect to Article 25 of the Washington Convention.* Lex specialis prevails on article 25.