

The Fluid nature of water rights and investment arbitration

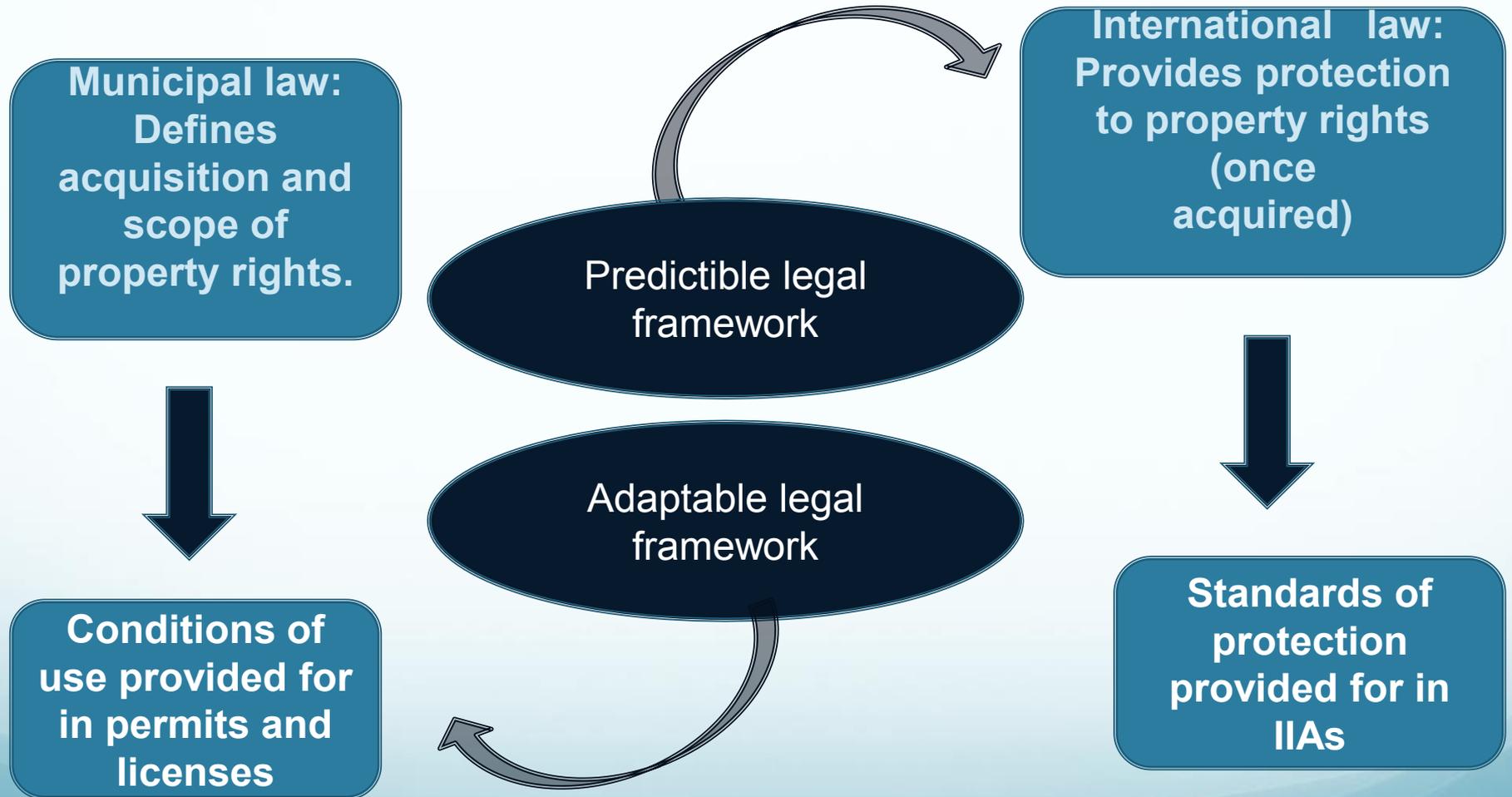
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International Investment Law: What is it?

- Agreement between two states under which they agree to protect each other's investors
- Standards of treatment:
 - National treatment
 - Most-favoured nation treatment
 - Full protection and security
 - Fair and equitable treatment
 - **No-expropriation without compensation**
 - Direct or indirect expropriation
- Dispute settlement mechanism: investor – (host) state

Investor's property rights and their protection



The language of property rights

Ownership

No individual ownership in water resources (res commune)



Prior appropriation rights

Riparian rights



Licences, permits, concessions

contractual rights?

An assessment of expropriation in investment arbitration

Assessing the Jurisdiction of the Tribunal (First stage)

- Is there a *property right in water*? If, so. What is its *nature*?
- Does the property rights constitute an Investment (under the IIA)?

Quantitative Analysis of the Regulatory Measure (Second Stage- Merits)

- The Level of Deprivation: The economic impact of the regulatory measure on the investment

Qualitative Analysis of the Nature of the Regulatory Measure (Third Stage-Merits)

- Public purpose
- Non-discrimination
- Due process
- Legitimate expectations
- Proportionality

Bayview Irrigation District et al v Mexico, Award (ICSID Additional Facility)

- The Tribunal **does not accept** that the Claimants own water in Mexico, in the sense of **the ownership of personal property rights in the physical waters of rivers** flowing in Mexican territory (para. 114)
- One owns the water in a bottle of mineral water, as one owns a can of paint. If another person takes it without permission, that is theft of one's property. But the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo / Rio Grande does not 'own', does not 'possess property rights in', a particular volume of water ... (para. 116)
- Furthermore, it is plain that under the Mexican Constitution and Mexican law, the Claimants could have no such property rights in water in Mexican rivers. (para. 118)

Construction of property rights

Looking at the **domestic law** of the host state:

Peruvian Water Act – priority:

- First: human consumption, basic use of water from any source, by mechanical means which does not require a licence and is limited to the satisfaction of basic human needs;
- Second: water services supply
- Third: productive use

Mexico's General Law of National Assets (Article 16) concessions do not create ownership rights (*derechos reales*) but simply grant a right of use and exploitation, without prejudice to third parties, and subject to conditions imposed by law and by the concession. (Bayview Irrigation D. v Mexico)

Domestic law as shaped by **international law**: 'special regard being given to the requirements of vital human needs.' (Article 10 Un Watercourses Convention)

Balancing adaptable and rigid legal frameworks

