

Investment Law Syllabus Project

Vale Columbia Center on Sustainable International Investment



Investor-State Dispute Settlement

(Second Semester of a Year-Long Course on Investment Law and Dispute Settlement)

I. Dispute Settlement Options – Forum Selection and Consent to Arbitration

Objectives:

- Consider why arbitration is often viewed as an attractive alternative to litigation in domestic courts
- Identify the drawbacks to litigating in either home or host state courts
- Identify the advantages investor-state disputes settlement holds over state-state dispute settlement
- Identify the various sources for consent to an investment arbitration
- Review the identity of the most frequent defendants in investment cases
- Learn why investors might seek to submit claims to an investment tribunal rather than to a WTO tribunal or a NAFTA Chapter 19 tribunal
- Consider when a treaty should be deemed to have provisional application
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Readings:

- Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW – FOREIGN INVESTMENT L. J. 232, 232-41 (1995).
- M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 114-115; 413-417 (Cambridge, 2d. ed. 2004).
- Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 820-33 (2005).
- Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms – Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 63. 74-75; 83-85 (Katia Yannaca-Small ed., Oxford 2010)

- Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUDIES 631-42 (2005).
- ICSID, THE ICSID CASELOAD – STATISTICS, 8-17 (Issue 2010-2).
- *Petrobart Limited v. Kyrgyz Republic*, SCC Arb. No. 126/2003 (Award) (29 March 2005, pages 4-15; 22-24; 41-42; 60-63 (arguments about the applicability of the treaty)).

Discussion Questions:

- What are some of the drawbacks to diplomatic protection?
- What are some of the advantages of diplomatic protection?
- Treaty arbitration effectively involves an offer by a state to arbitrate unknown disputes that might arise in future, subject to certain jurisdictional limitations. What are some of the drawbacks to advance consent?
- Why might private investors seek remedies under an investment treaty rather than under a trade agreement?
- Why are money damages available as a remedy in an investment agreement but not in a trade agreement?
- What is provisional application? Why does international law have such a doctrine?
- Who are the defendants in ICSID cases?
- How do you ensure that sovereign consents to arbitrate?
- Should a state's consent to arbitrate be viewed differently in an arbitration under an investment treaties as compared to arbitration under a contract?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 317-490 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 211-229; 238-52 (Oxford, 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 117-131 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1121.9 – 1121.38; 1125.2 - 1125.13 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 45-56; 95-109 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 41-73 (Kluwer 2008).
- Osvaldo Marzorati, *Algunas Reflxiones sobre el Alcance de la Protección de las Inversiones en el marco de los Tratados firmados por Argentina*, 1 REVISTA PERUANA DE ARBITRAJE, 71-118 (Editorial Jurídica Grijley (2005)

- Jan Paulsson, *Enclaves of Justice*, TRANSNATIONAL DISPUTE MANAGEMENT (Sept. 2007).
- Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217 – 233 (Loukas A. Mistelis & Julian D.M. Lew eds., Kluwer 2006).
- Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW AND BUSINESS REVIEW OF THE AMERICAS 155-66 (Spring 2007)

II. Tribunal Jurisdiction and the Relationship of Investment Arbitration With Municipal Courts and Tribunals

- Learn about “fork-in-the-road” clauses
- Consider the potential overlap between domestic causes of action and international investment law claims
- Examine the waiver of the exhaustion-of-local-remedies rule
- Consider the relationship between choice-of-forum clauses in contracts and the referral to arbitration under an investment treaty
- Consider the advantages of international arbitration vs. national courts

Readings:

- Nigel Rawding, *Protecting Investments Under State contracts: Some Legal and Ethical Issues*, 11 ARB. INT’L 341, 341045 (1995).
- Michael Polkinghorne, *Investor-State Dispute Resoluituion Under the Energy Charter Treaty: Which Fork? Which Road?*, 19(4) MEALEY’S INTERNATIONAL ARBITRATION REPORT (2004)
- Emmanuel Gaillard, *Vivendi and Bilateral Investment Treaty Arbitration*, NEW YORK L.J. (Feb. 26, 2003).
- Mahnaz Malik, *The expanding Jurisdiction of Investment-State Tribunals* 3-15 (IISD 2007)
- *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29 January 2004), ¶¶ 92-97; 136-155.
- Compare: NAFTA art. 1121(1)(b) (no “u-turn”); U.S.-Ecuador BIT art. VI(2) & (3) (“fork-in-the-road”), II(3)(b).
- *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction)
 - *Waste Management I* (Final Award (Dismissing on Jurisdiction)) (6/2/00), ¶ 4-7, 14-31. (Dissenting Opinion (on Jurisdiction)) (6/2/00), ¶¶ 10 – 28.
 - *Waste Management II* (Award on Jurisdiction, second claim) (6/26/02), ¶ 2-3, 19-37.

Discussion Questions:

- What are the pros and cons of initiating arbitration against a host state in which a foreign investor would like to continue to do business, both short-term and long-term?
- Would it make sense to re-introduce the requirement that investors exhaust local remedies prior to instituting investment disputes? What are some of the pros and cons of requiring recourse to local courts before instituting investment arbitration?
- What are the differences in the consent to arbitration found in NAFTA Article 1121 and the US-Ecuador BIT?
- Both NAFTA Article 1121 and the US-Ecuador BIT encourage disputing parties to seek resolution through conciliation or mediation. What are some of the impediments to successfully resolving disputes via those means?
- What was wrong with the claimant's waiver in *Waste Management I*?
- Why do you think the claimant filed the waiver it did? In other words, why did it not file a waiver that clearly complied with the provisions of Article 1121?
- Did you agree with Professor Hight's approach in the dissent in *Waste Management I*?
- Do you agree that a claim based in international law is always distinct from a claim based in domestic law? Does it help to focus on the breach at issue, or the measure at issue?
- Is it a problem that a claimant might seek redress both in local courts and in international arbitration for redress for the same underlying injury?
- Should the tribunal in *Waste Management II* have permitted the claimant to reinstitute arbitration?
- Should the tribunal in *Waste Management I* have barred the claimant from reinstating the dispute with an appropriate waiver? Could it have?
- If the tribunal in *Waste Management I* had said that the claimant could not move forward, would the second tribunal have been bound by that decision? Even if it was not bound, should it have even if it wasn't required to do so?
- Do you agree with the SGS/Philippines tribunal regarding its interpretation of the exclusive choice-of-forum clause in the contract? Why or why not?
- Are investment tribunals too inclined to take expansive views regarding their jurisdiction?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 317-490 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 211-229; 238-52 (Oxford, 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 117-131 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1121.9 – 1121.38; 1125.2 - 1125.13 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 45-56; 95-109 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 41-73 (Kluwer 2008).
- August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 694 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms – Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 63 (Katia Yannaca-Small ed., Oxford 2010)
- Pieter H.F. Bekker, *The Use of Non-Domestic Courts For Obtaining Domestic Relief: Jurisdictional Conflicts Between NAFTA Tribunals and U.S. Courts?*, 11(2) ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 331-342 (2005).
- Osvaldo Marzorati, *Algunas Reflxiones sobre el Alcance de la Protección de las Inversiones en el marco de los Tratados firmados por Argentina*, 1 REVISTA PERUANA DE ARBITRAJE, 71-118 (Editorial Jurídica Grijley (2005)
- Christoph Schreuer, *Traveling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 231 (2004).
- Hans Smit, *When is a Government Bound by a Contract, Including an Arbitration Clause, It Did Not Sign?*, 16 AM. REV. INT’L ARB. 323-337 (2005)

III. Arbitrators: Selection, Bias and Ethics

Objectives:

- Discuss the qualities an arbitrator in an investor-state dispute settlement case ought to have
- Consider the advantages that come with selecting one’s own adjudicator
- Consider the disadvantages that come with selecting one’s own adjudicator
- Identify appropriate ethical rules to govern the conduct of arbitrators
- Consider the appropriate source of those rules – national law, international law, non-binding codes of conduct, rules in arbitral institutions

- Consider the ethical dilemmas faced by arbitrators in investor-state dispute settlement, including whether frequent representation of a the same or similar parties (e.g. states) can or should give rise to the potential for bias

Readings:

- Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17(10) MEALEY'S INTERNATIONAL ARBITRATION REPORT 25-28 (Oct. 2002).
- Antonio Parra, *The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 105, 113-118 (Katia Yannaca-Small ed., Oxford 2010).
- Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(4) TDM (July 2008).
- Christopher R. Seppälä, *Obtaining The Right International Arbitral Tribunal: A Practitioner's View*, 22(10) MEALEY'S INTERNATIONAL ARBITRATION REPORT 26-42 (Oct. 2007).
- Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21ARB. INT'L 241-45 (2005).
- IBA Guidelines on Conflicts of Interest in International Arbitration (22 May 2004).
- *Universal Compression International Holdings, S.L.U. v. Venezuela*, ICSID ARB/10/9 (Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators) (20 May 2011), pp. 1-6; 22-33.

Discussion Questions

- What are the criteria for selecting and appointing an arbitrator in an investor-state dispute?
- Should the president of an arbitral tribunal be subject to different ethical standards than the party-appointed arbitrators?
- How is the conduct of arbitrators in investment arbitration regulated?
- What kinds of ethics rules should international arbitrators have to follow?
- Who should promulgate ethical rules for arbitrators?
- Should counsel be able to interview arbitrators prior to their appointments? If so, what limits (if any) would you place on the communications exchanged during that meeting?
- Are so-called "issue conflicts" a threat to the legitimacy of investment arbitration?
- Do "repeat appointments" give rise to the appearance of bias?
- Do the benefits of being able to choose a tribunal outweigh the disadvantages?
- What obligations must counsel follow?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1392-95 (Kluwer 2005).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 128-131 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1123.1. – 1125.16 (Kluwer 2006; last updated 2009).
- Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 694, 789 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Omar E. García-Bolívar, *Comparing Arbitrator Standards of Conduct in International Commercial/Trade/Investment Disputes*, AAA DISPUTE RESOLUTION JOURNAL 76-84 (2006).
- Catherine Rogers, *The Ethics of International Arbitrators*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (Juris, 2d ed. 2008).

Arbitral Procedure

IV. Case Management & Selecting the Place of Arbitration

Objectives:

- Discuss initial steps in the management of a case
- Learn what must be decided at the first procedural hearing
- Consider the importance of designating a place of arbitration, because in a non-ICSID case the law of the place of arbitration will govern the amount of assistance that local courts will give the arbitration and the applicable set-aside rules
- Consider the appropriate role of a tribunal secretariat in administering arbitral proceedings
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Readings:

- Charles N. Brower, *Establishing the Tribunal and Preparing for the Pre-Hearing Conference*, Paper presented to the ABA Section of International Law and Practice, Spring Meeting, April 29, 1993.
- Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, 13 ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL 85-100 (1998).
- ALAN REDFERN & MARTIN HUNGER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 283-292 (Thomson, Student Edition 2003).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 222-225 (Oxford 2008).
- Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3 (Annulment Proceeding) (Additional Opinion of

Professor JH Dalhuisen under Article 48(4) of the ICSID Convention) (10 August 2010).

- Rules 20-28, 39, ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).
- 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, *available at* <www.uncitral.org> (click on “UNCITRAL Texts & Status,” and then on “International Commercial Arbitration and Conciliation”).
- Sample Provisional Agenda, First Session of the Arbitral Tribunal, American Arbitration Association/ICDR, “Preparatory Conference Checklist” (2003).
- *Methanex Corp. v. United States*, UNCITRAL (Minutes of Order of First Procedural Meeting) (29 June 2000).
- *Methanex Corp v. United States*, UNCITRAL (Decision on the Place of Arbitration) (3 December 2000).

Discussion Questions:

- What does the typical agenda for the initial session of an arbitral tribunal look like? Should a preliminary hearing take place by conference call or in person?
- What factors should a tribunal give most weight to in determining the place of arbitration?
- What are the advantages of having an institutional secretariat administer a case?
- What kinds of assistance are appropriate for a secretariat to give? What kinds are inappropriate? Does disclosure of the role played by the secretariat negate any concerns?
- What are the disadvantages of having an institutional secretariat administer a case?
- Why is the selection of the place of arbitration so important for a non-ICSID case?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 799-831; 1505-1511395-1414 (Kluwer 2005).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 91-99; 117-37 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1120.1 – 1120.76 (Kluwer 2006; last updated 2009).
- Barton Legum, *An Overview of Procedure in an Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 91 (Katia Yannaca-Small ed., Oxford 2010).
- Antonio Parra, *The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 105 (Katia Yannaca-Small ed., Oxford 2010).

V. Issues arising during the course of the arbitration: anti-suit injunctions, provisional measures and consolidation

Objectives:

- Identify the reasons parties might seek to enjoin arbitral proceedings
 - Identify the reasons that parties might seek provisional measures
 - Consider the kinds of provisional measures that arbitral tribunals can order
 - Consider when and why similar cases should be consolidated
 - Consider why, given the consensual nature of arbitration, NAFTA removed the decision about consolidation from the parties themselves
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- Aurélia Antonietti, *ICSID And Provisional Measures: An Overview* 21(2) News from ICSID 10-13 (2005).
 - CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, *INVESTOR-STATE ARBITRATION* 101-116 (Oxford 2008).
 - ICSID Convention Art. 47
 - ICSID Arbitration Rule 39
 - NAFTA Article 1126
 - *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID ARB/05/22 (Procedural Order No. 3) (29 September 2006), paras. 109-165.
 - *Chevron & Texaco v. Ecuador*, UNCITRAL (Order for Interim Measures) (9 February 2011).
 - *Corn Products International Inc. v. Mexico; Archer Daniels Midland Company et al. v. Mexico*, UNCITRAL (Decision of the Consolidation Tribunal) (20 May 2005).

Discussion Questions:

- What types of provisional measures are parties in investment arbitrations likely to seek?
- What are the procedural and substantive requirements for obtaining provisional relief?
- What happens during the period between registration or commencement of the case and the constitution of the arbitral tribunal?
- Should investment tribunals be able to order provisional measures? How can they be enforced? What sanctions can a tribunal impose for non-observance?
- Should provisional measures decisions be deemed “orders” or “awards”? What, if any, difference does it make?
- When, if ever, should national courts be empowered to interfere with investment arbitrations?
- What factors should a court consider when deciding whether or not to interfere?
- Must tribunal honor the decisions of national courts that issue anti-suit injunctions?
- What factors should an arbitral tribunal consider when deciding whether or not to consolidate related cases?

Additional Readings/Reference:

- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 262-65 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1126.1-1126.18; 1134.1- 1134.16 (Kluwer 2006; last updated 2009).
- Konstantinos D. Kerameus, *Anti-Suit Injunctions in ICSID Arbitration*, in ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 131-144 (Emmanuel Gaillard ed., 2005).
- Katia Yannaca-Small, *Parallel Proceedings*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1008-1045 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 757-804 (Cambridge, 2d ed. 2009).
- Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67 (2002)

VI. Jurisdictional objections and Defenses (Ratione Personae, Ratione Materiae & Ratione Temporis)

Objectives:

- Learn the distinction between jurisdiction and admissibility
- Consider why states raise so many jurisdictional objections and seek to bifurcate proceedings
- Consider whether or when bifurcated proceedings are a good idea
- Identify the criteria governing who should have standing to submit an investment claim
- Identify the criteria governing the nature and type of investment required
- Examine whether a “continuing violation” can bring a breach within the ambit of an investment treaty
- Explore the contours of the “continuous nationality” rule

Readings:

- Jan Paulsson, *Jurisdiction and Admissibility*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601 (ICC Pubs. 2005).
- *Mondev Int'l Ltd. v. United States*, ICSID ARB(AF)/99/2 (Award) (11 October 2002), ¶¶ 37-40; 57-58; 66-75.
- *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID CaseNo. ARB(AF)/98/3 [NAFTA], Final Award (June 26, 2003) ¶¶ 30-41 (facts), 220-39 (continuous nationality).
- Emmanuelle Cabrol, *Pren Nreka v. Czech Republic and the Notion of Investment Under Bilateral Investment Treaties: Does “Investment” Really Mean “Every Kind of Asset”*, 2009-2010 Y.B. INT'L INVESTMENT L. & POL'Y 217-231.

- Pierre Lalive, *Some objections to Jurisdiction in Investor-State Arbitration*, PROCÈS-VERBAUX DE L'ICCA (May 2002), available at <http://tinyurl.com/3g99b68>.

Discussion Questions:

- What steps should a tribunal take if an investor does not comply with the requirements of the host state laws on investment?
- How would you describe, in simple terms, the difference between jurisdiction and admissibility?
- What is a “continuing wrongful act”? If a state is responsible only for conduct that it engages in after a treaty enters into force, how much of the wrongfulness has to occur *after* a treaty has entered into force?
- Along those lines, the *Mondev* tribunal (para 70) says that “events or conduct prior to the entry into force of an obligation for the respondent state may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.” How is that previous conduct relevant?
- What effect should the decision about a continuing wrongful act have on a damages calculation? In other words, should the injury occurring before a treaty enters into force be excluded from the damages calculation?

Further readings/reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 1414- 1416 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT Law* 38-71 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, *INVESTOR-STATE ARBITRATION* 247-345 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11*, commentary on chapters 1116, 1117 & 1139 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 131-196 (Oxford 2007).
- Audley Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 932 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008)
- DOLZER, *The Notion of Investment in Recent Practice*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* (Charnovitz, Steger and Van den Bossche, eds. 2005).
- Julian Davis Mortenson, *The Meaning of “Investment”*: *ICSID’s Travaux and the Domain of International Investment Law* 51 *HARV. INT’L L. J.* 257 (2010).

- David A.R. Williams, *Jurisdiction and Admissibility*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 868 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Robert Aguirre Luzi & Ben Love, *Individual Nationality in Investment Treaty Arbitration*, in *Investment Treaty Law: Current Issues III*, 183 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds. 2009).
- Devashish Krishan, *A Notion of ICSID Investment*, in INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (Todd J. Grierson-Weiler ed. 2008).
- NICK GALLUS, THE TEMPORAL SCOPE OF INVESTMENT PROTECTION TREATIES (BIICL 2008).
- Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1273-86 (2009).

VII. Applicable Law

Objectives:

- Consider the role of the tribunal in determining the law applicable to the dispute
- Examine the interaction between municipal and international law
- Consider the dual role of states as the authors of international law and as defendants under it
- Examine the NAFTA approach to interpreting treaty obligations
- Consider the role that applicable law can play in annulment or set aside of an award
- Analyze whether international arbitral awards should be treated as a kind of *de facto* precedent

Readings:

- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 91-99, 201-217 (Oxford 2008).
- W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold: Essays in Honor of Ibrahim F.I. Shihata*, 15:2 ICSID REVIEW FOREIGN INVESTMENT L. . 362, 366-74 (Fall 2000).
- *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (Award) (18 August 2008) pages 46-49.
- *AES Summit Generation Ltd. v. Hungary*, ICSID Case ARB/07/22 (Award) (Sept. 23, 2010), paras. 7.6.1 – 7.6.12.
- *Wena Hotel Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, (Decision on Annulment) (5 February 2002), ¶¶ 15-16 (facts); ¶¶ 26-46.
- Anthea Roberts, *Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States*, 104 AM. J. INT'L L. 179, 215 - 224 (2010).

- *Andrea K. Bjorklund, Investment Treaty Arbitral Decisions as Jurisprudence* Constante, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 265, 266-74 (Hart, Colin Picker et al. eds. 2008).
- Articles 42, 52(1) ICSID Convention.
- NAFTA Articles 1131, 1138.
- Statute of the International Court of Justice Article 1138

Discussion Questions:

- Is ICSID Art. 42 an adequate forum selection clause? Is NAFTA Article 1131(1) adequate? What does the phrase “such rules of international law as may be applicable” mean?
- If there is no applicable law clause, what conflict of laws rules should investment tribunals use?
- Some have observed that tribunals have seemed determined to find a pathway for international law (rather than municipal law) to play a role in the tribunal’s determination of the appropriate outcome of any disputes. Do you think that is true? What are some of the pathways they have used to have international law apply to a dispute? Why might they wish to do so?
- How do you tell the difference between a “lacuna” in the law and a decision not to regulate a certain matter or a decision to regulate it in a different way?
- How would you re-write the choice-of-law clause in the contract between the parties in *Duke Energy v. Ecuador* to make it clearer? Or is it clear enough as is?
- Application of the proper law is important, since a failure to do so could lead to annulment under the ICSID Convention or the set-aside or refusal to enforce an award. Is it fair to expect arbitrators to know what law to apply in the absence of clearer direction? Look at paragraph 39 of the *Wena Hotels* decision. Would this give future arbitrators an idea of the best way to resolve an applicable law issue? Does this do a disservice to the parties, who usually want their awards to be enforceable after they have gone to the time and effort of arbitrating?
- Is including a clause like Article 1131(2) in an investment treaty a good idea? What are the pros and cons?
- How can states be prevented from abusing their ability to make and change law at the same time as they are meant to be subject to it?
- Why does international law generally treat case law as, at best, a subordinate source of international law?
- Should tribunal follow the practice expressed in existing “case law”? What are the pros and cons?

Further Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 623-757 (Kluwer 2005).
- RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 31-37 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1131.3 – 1131.36 (Kluwer 2006; last updated 2009).
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- Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Yas Banifatemi, *Applicable Law*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 191 (Katia Yannaca-Small ed., Oxford 2010).
- Parra, *Applicable Law in Investor State Disputes*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 3 (Arthur Rovine ed. 2007).
- MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION (Wolters Kluwer 2010).

VIII. Evidence and Advocacy in Investment Arbitration

Objectives:

- Consider what a claimant must do to prove its case
- Discuss what rules of evidence should apply in an investment arbitration
- Consider the source of those rules
- Discuss the role of the expert in investment arbitration
- Consider the pros and cons of limiting the submission of evidence
- Compare the differences in evidence gathering and pleading in civil and common law jurisdictions
- Consider how those differences will likely affect an investment arbitration

Readings:

- Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int'l Law. 47-58 (1994).
- John Wolf & Kelly Pretoroti, *Written Witness Statements – A Practical Bridge of the Cultural Divide*, AAA DISPUTE RESOLUTION J. 82-88 (May-July 2007).
- Sarah François-Poncet, *Practical Pointers for Preparing Witnesses for Testimony in International Arbitrations*, Paper presented at the 17th Annual Workshop of the Institute for Transnational Arbitration, June 15, 2006, pp. 1-4.
- Anthony C. Sinclair, *Differences in the Approach to Witness Evidence Between the Civil and Common Law Traditions*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 23-48 (Juris, Doak Bishop & Edward G. Kehoe eds. 2010).
- Bernard Hanotiau, *The Conduct of the Hearings*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION, Chapter 16 (2d ed., Lawrence W. Newman and Richard D. Hill, eds. 2008).
- Guido Santiago Tawil, *Attacking the Credibility of Witnesses and Experts*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 451-64 (Juris, Doak Bishop & Edward G. Kehoe eds. 2010).
- Articles 43-46, ICSID Convention
- Rules 29-38, ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)
- International Bar Association's (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999).

Discussion Questions:

- What rules of evidence apply in an international arbitration? Who should choose those rules?
- Should the rules of evidence reflect the background of the parties? Of the arbitrators? Of the counsel?
- Do you agree with Judge Brower, an eminent arbitrator and Judge on the Iran-U.S. Claims Tribunal, that international tribunals are inherently poorly equipped for the fact-finding task?
- How big a role should speed and efficiency play in arbitrators' decisions about document production?
- What dangers, if any are there in limiting the evidence that can be produced before the hearing?
- What are effective ways to cross examine witnesses and experts?
- Is the approach to evidence in international arbitration a hybrid system between the common law and civil law systems?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1418-1504 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 257-62 (Oxford 2008).

- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 153-183(Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1120.14 – 1120.76 (Kluwer 2006; last updated 2009).
- THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (2d ed., Lawrence W. Newman and Richard D. Hill, eds. 2008).
- THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (Juris, Doak Bishop & Edward G. Kehoe eds. 2010).
- Karl-Heinz Böckstiegel, *Presenting Evidence in International Arbitration*, 16 ICSID REV. – FOREIGN INVESTMENT L.J. 1 (2001).
- Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003).

IX. Confidentiality and third party participation

Objectives:

- Consider the public interest inherent in investment arbitration and the effect (if any) that it should have on the confidentiality of disputes
- Discuss the advantages and disadvantages of transparency
- Consider whether publicity about a dispute might have a negative effect on the possibility of a negotiated solution (settlement)
- Identify the circumstances (if any) under which *amici* should be allowed to participate in investment arbitrations
- Identify the kinds of help *amici* could give to investment tribunals
- Consider the disadvantages of *amicus* participation
- Consider whether transparency provisions that permit *amici* to participate need to be amended further to ensure access to party pleadings and memorials

Readings:

- Mark Kantor, *ICSID Amends Its Arbitration Rules*, 3(5) TDM December 2006.
- Andrew de Lotbinière & Ank Santens, *ICSID Tribunals Apply New Rules On Amicus Curiae*, 22(2) MEALEY'S INTERNATIONAL ARBITRATION REPORT 69-80 (2007).
- Andrea K. Bjorklund, *The Promise and Peril of Precedent: The Case of Amici Curiae*, ASA Bulletin Special Series No. 34, at 165, 180-87 (Anne K. Hoffmann ed. May 2010).
- *Methanex v. United States*, UNCITRAL (Decision of the Tribunal . . . on Amicus Curiae) (15 January 2001).
- *Aguas del Tunari v. Republic of Bolivia*, ICSID Case No. ARB/02/03 (Letter from the President of the Tribunal) (29 January 2003)
- *Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/03/19 (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005).

- *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Procedural Order No. 5) (2 February 2007).
- ICSID Convention Arbitration Rules 37(2) & 48(4).
- J. Sutcliffe & A.M. Sabater, *UNCITRAL Arbitration: New Rules on Transparency?*, 6:1 TRANSNAT'L DISPUTE MGMT (March 2009).

Discussion Questions:

- Does the public interest in arbitration justify a diminution in the confidentiality that normally accompanies private commercial arbitration?
- How much public access is desirable? Information about the existence of a dispute? Access to an award once it is rendered? Access to pleadings and/or memorials? Access to hearings?
- Is there a fairness problem if the *amici* all seem likely to support one side in the arbitration?
- Should any aspiring *amicus* be able to participate, or should an *amicus* have to meet certain criteria?
- Can *amici* effectively participate in proceedings if they don't have access to key documents?
- Who should pay the costs of *amicus* participation?
- To what extent must arbitrators pay attention to the *amicus* submissions?
- Do ICSID's rules changes go far enough? They make some steps towards transparency, but is it good enough for the public to have guaranteed access only to the reasoning in an award, rather than to the award itself or to any of the pleadings and memorials submitted by the parties in the arbitration?
- How does the principle of transparency relate to the idea of settlement of disputes? Is transparency likely to make it easier or harder to settle cases?

Additional Reading/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 1440-43; 1505-1514 (Kluwer 2005).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, *INVESTOR-STATE ARBITRATION* 166-77 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA* CHAPTER 11, at 1120.62a-69; Appendices 1-3 (Notes of Interpretation on Access to Documents and Minimum Standard of Treatment in Accordance with International Law (July 31, 2001)); Appendices 34 (Statement of the Free Trade Commission on Non-Disputing Party Participation (October 7, 2003)) (Kluwer 2006; last updated 2009).

- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 57-65 (Oxford 2007). joachim Delaney & Daniel B. Magraw, *Procedural Transparency*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 721 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES* 129 (Katia Yannaca-Small ed., Oxford 2010).
- Margrete Stevens, *Confidentiality Revisited*, 17(1) *NEWS FROM ICSID* 8-10 (2000).
- Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration*, in 6 *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 97-118 (2007).

X. Damages and Costs

Objectives:

- Describe the principles supporting the award of damages under international law
- Consider whether a country engaging in an unlawful expropriation should pay more in damages than one engaging in a lawful expropriation
- Identify the kinds of conduct that could give rise to an award of moral damages
- Assess whether investors have the possibility of “double dipping” – recovering more than the amount to which they are entitled
- Consider the question of attorneys’ fees and costs. Should the loser pay costs? Attorneys’ fees?
- Identify the criteria that should govern the award of fees and costs

Readings:

- William W. Park, III, *Framing the Case on Quantum*, 2:4 *WORLD ARBITRATION & MEDIATION REV.* 59-65 (2008).
- *ADC v. Hungary* ICSID Case No. ARB/03/16 (Award of the Tribunal) (2 October 2006), pp. 89-103.
- Lou Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded Karaha Bodas Company in Indonesia*, 19 *ARB. INT’L* 471 (2003).
- Borzu Sabahi, *Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of Desert Line v. Yemen*, in *A LIBER AMICORUM: THOMAS WÄLDE* 253-264 (Jacques Werner & Arif Hyder Ali eds., Cameron May 2009).
- Bernard Hanotiau, *The Parties’ Costs of Arbitration*, in *EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION* 213 (ICC Services Publications 2006).
- *Methanex Corp. v. United States*, UNCITRAL (Final Award) (3 August 2005), Part V, pp. 1 – 5.

Discussion Questions:

- The *Chorzów Factory* case is usually cited as the basis for any damages/reparations calculation. It says that the injured party should be placed in the position it would have occupied but for the breach. Yet at customary international law it seemed that claimants could get something akin to reliance damages for a “lawful taking,” (the amounts they had put into the enterprise), while they would get something closer to expectation damages in the event of an unlawful taking (the amounts they had put in to the enterprise + lost profits). Why did BITs adopt the same measure for an unlawful taking as compensation for a “lawful” taking?
- Should claimants under BITs get more damages for an “illegal” expropriation than they do for a legal expropriation? Isn’t the economic damage the same in each case?
- What kinds of losses (if any) should a claimant have to prove to sustain a claim for greater damages for an “illegal” expropriation?
- The tribunal in *ADC v. Hungary* said the BIT described recovery only for a lawful taking, and that customary international law thus filled in the gaps to provide the measure for an illegal expropriation. This meant that they measured the value of the concession on the date of the award, rather than on the date of the taking (the traditional place for measurement in expropriation cases). Were they justified in doing this?
- Should the state that engages in the unlawful act take on the risk that an investment will appreciate after the taking, and thus pay more if it happens to do so?
- Fair market value is usually calculated on a discounted cash flow basis that assesses the entire value of a company as of the date of expropriation. It involves assessing the likely profits of an enterprise for several years into the future. Is this inherently too speculative to support an award for damages? Does the answer differ depending on the kind of business. For example, some enterprises, like those in the oil or natural gas business, might reasonably expect to make a profit due to demand for their products, whereas continued demand for other commodities might be more speculative.
- One of the motives behind increasing the amount of damages for an unlawful as opposed to a lawful expropriation seems to be deterrence of such acts. Do you think such deterrence is likely to be successful?
- Is there a punitive component behind awarding greater damages for an unlawful expropriation? What about an award of moral damages?
- Should a violation of international law alone, without any economic or tangible injury, suffice to support an award of money damages?
- What kinds of injury should support an award for moral damages?
- Should corporations be permitted to ask for moral damages for injury to their employees? Does it matter whether the employee is a CEO or is in a less exalted position? Should the employees be able to make a claim themselves?
- Should a losing party have to pay the costs of an arbitration? Should it also have to pay attorneys’ fees? What criteria should govern these decisions?

- How should one tell whether the attorneys' fees charged in an arbitration are reasonable? Can that be done objectively, or is there necessarily a subjective component?
- Should arbitrators have to decide early on in the proceedings who will bear the costs of the arbitration in the event of loss?
- Is there a reason to treat attorneys' fees separately from the costs of the arbitration, and perhaps a better reason to require the losing party to pay the costs, but not the fees, or at least not all of the fees?

Additional Readings/Reference:

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- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 563-625 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1135.3 -1135.43 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 315-349 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 377-398 (Kluwer 2008).
- W. Michael Reisman & Rob Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 (2003).
- CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1076-1180 (Cambridge 2001).
- Alan S. Alexandroff & Ian A Laird, *Compliance and Enforcement*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- SERGEY RIPINSKY WITH KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (BIICL 2008).
- MARK KANTOR, VALUATION FOR ARBITRATION (Kluwer 2008).
- Richard Kreindler, *Final Ruling on Costs: Loser Pays All?*, ASA BULLETIN, Special Series No. 26 (July 2006).

XI. Control Mechanisms

Objectives:

- Evaluate the annulment process under the ICSID Convention
- Consider the difference between annulment and appeal
- Discuss the means for setting aside awards under the New York Convention
- Compare the grounds that permit annulment to the grounds for set-aside under the New York Convention

- Consider whether the grounds for annulment under the ICSID Convention grant enough leeway to ad hoc committees to annul awards
- Consider whether as a claimant you are better off with an ICSID Convention award or a New York Convention award for set aside or annulment purposes
- Assess the importance of the place of arbitration in a non-ICSID case

Readings:

- UNCTAD Materials, Part 2.8 *Post-Award Remedies and Procedures* pp. 13-33 (pages 16 and 30 omitted) .
- Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17-42 (Emmanuel Gaillard & Yas Banifatemi, eds. 2004).
- Irmgard Marboe, *Introductory Note to Sempra Energy Int'l v. Argentine Republic (ICSID)*, 49 INT'L LEGAL MATERIALS 1441-43 (2010).
- Articles 52-55, ICSID Convention.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V, available at www.uncitral.org/English/texts/arbitration/NY-conv.htm.
- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision (25 September 2007), ¶¶ 41-57, 68-76, 81-85, 89-100, 119-136, 144-150, 154-15.
- *The Republic of Ecuador v. Occidental Exploration & Production Company*, Judgment of the U.K. Court of Appeal (Civil Division), July 4, 2007, 22(7) MEALEY'S International Arbitration Report A1-A6 (July 2007).

Discussion Questions

- What is the distinction between annulment and appeal?
- Have ICSID tribunal consistently honoured that distinction?
- Did the *CMS Annulment Committee* abide by the standard of review?
- Why did the drafters of the ICSID Convention choose annulment rather than appeal?
- Why does the New York Convention permit only very limited review of arbitral awards?
- Should annulment committees have greater powers than the ability only to annul or uphold a decision? Would it be desirable from an efficiency standpoint for the annulment committee to substitute appropriate reasoning if it believes a tribunal has gone wrong?
- Are the powers of an annulment tribunal, or a set-aside court, strong enough to ensure the legitimacy of arbitration?
- Is it an adequate safeguard for the integrity of arbitral proceedings to have the place of arbitration review the award? Once a set-aside court has upheld an award, should an enforcement court be obliged to honour that decision?

- If you are unhappy with an arbitral decision, would you rather have an ICSID Convention award or a New York Convention award?

Additional Reading/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1542-1613 (Kluwer 2005).
- RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 277-287 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 627-673 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1136.8 – 1136.39 (Kluwer 2006; last updated 2009).
- CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 890-1095 (Cambridge, 2d ed. 2009).
- Vladimír Balaš, Review of Awards, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1125 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Katia Yannaca-Small, *Annulment of ICSID Awards: Limited Scope But Is There Potential?*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 603 (Katia Yannaca-Small ed., Oxford 2010).
- Kaj Hobér & Nils Eliasson, *Review of Investment Treaty Awards by Municipal Courts*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 635 (Katia Yannaca-Small ed., Oxford 2010).
- W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L. J. 739 (1990).
- David D. Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, 7 ICSID Rev. – Foreign Investment L. J. 21 (1992).

XII. Enforcement of Awards and Sovereign Immunity

Objectives:

- Understand the scheme for enforcement of arbitral awards under the ICSID Convention
- Assess the obligations of the states party to the ICSID Convention
- Assess the obligation of the states party to the New York Convention
- Understand the scheme for enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Arbitral Awards
- Assess the threat that sovereign immunity for execution of awards poses to the function of the investor-state arbitration regime

Reading:

- UNCTAD Materials, Part 2.9 *Binding Force and Enforcement* pp. 1, 5-16.
- Stanimir Alexandrov, Enforcement of ICSID Awards, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 322, 329-37 (Christina Binder et al. eds 2009) pages 329-337.
- Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitration Awards: The Re-Politicization of International Investment Disputes?*, 21 AM. REV. INT'L ARB. 211, 211-214;229-241 (2010).
- Articles 53-55, ICSID Convention.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards V (1958), available at www.uncitral.org/English/texts/arbitration/NY-conv.htm.
- Alexander Yanos, Daina Bray & Cassandra Marshall, *Getting The Money: When Can A Sovereign's Assets Be Attached Before A Judgment Has Been Obtained On A Successful Arbitral Award?* 21(8) MEALEY'S INTERNATIONAL ARBITRATION REPORT 46-51 (2006).
- Claudia Annacker & Robert T. Creig, *State Immunity and Arbitration*, 15(2) ICC COURT OF ARBITRATION BULLETIN, Special Supplement 70-78 (2004).
- Timothy Nelson & Julie Bédard, *The President's Plane is Missing*, IFLR 51 (August 2008).
- *S.A.R.L. Benvenuti et Bonfant v. Government of the People's Republic of Congo*, judgment of June 26, 1981, Cour d'appel Paris, 20 I.L.M. 883-886 (1981).
- *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8 (Letter from U.S. Department of State) (1 May 2008).
- *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8 (Argentina's Response to U.S. Department of State Letter) (2 June 2008).

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- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 675-714 (Oxford 2008).
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- CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1096-1185 (Cambridge, 2d ed. 2009).
- Alan S. Alexandroff & Ian A Laird, *Compliance and Enforcement*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

- August Reinisch, *Enforcement of Investment Awards*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES* 671 (Katia Yannaca-Small ed., Oxford 2010).
- Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 302 (Christina Binder et al. eds 2009).

XIII. Redesigning Investor-State Dispute Settlement?

Objectives:

- Discuss the main challenges to the investor-state dispute settlement system
- Assess the effectiveness of the system in terms of increasing foreign direct investment
- Assess the effectiveness of the system in terms of furthering the international rule of law
- Consider alternatives to the current system of investor-state dispute settlement

Readings:

- Konrad von Moltke, IISD, *A MODEL INTERNATIONAL INVESTMENT AGREEMENT FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT* (2004), articles 11-24.
- Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT'L L. J.* 67, 111-115 (2005).
- Jack J. Coe, *Conciliation and the Role of Third-Party Neutrals in Investor-State Disputes* in *ENFORCEMENT OF AWARDS* (Doak Bishop ed. 2008).
- Andrea K. Bjorklund, *Rapporteur's Report: Improving the International Investment Law and Policy System*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS*, 213, 225-245 (Oxford, José E. Alvarez et al. eds 2011).
- UNCTAD, *INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION* 22-39 (2010).
- Sarah Anderson, *Clash on Investment: Global Trade and an Opportunity for Civil Society* (Institute for Policy Studies, November 2009).

Discussion Questions:

- Do you agree with Jes Salacuse and Nicholas Sullivan that BITs have contributed in a positive way to the formation of customary international law?
- Would replacing investor-state dispute settlement with state-state dispute settlement be a step backwards? What are the benefits of such an approach? What are the drawbacks?
- Could the Institute for Policy Studies' concerns be satisfied with the creation of a multilateral treaty that imposes obligations on foreign investors, like the IISD model treaty we looked at several classes ago?

- Could a multilateral, multifaceted agreement diminish the polarization among users and critics of the system by bringing together the corporate interests who want to preserve the protections they have succeeded in getting while alleviating the concerns of civil society?
- By arguing against investor-state dispute settlement, are representatives of civil society missing an opportunity to hold corporations accountable for abuses?

Further reading/reference:

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XIV. The Legitimacy Critique – Perceptions and Reality in International Investment Law

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- GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 175-184 (Oxford 2007).
- Andrea K. Bjorklund, *Rapporteur's Report: Improving the International Investment Law and Policy System*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS*, 213, 213-225 (Oxford, José E. Alvarez et al. eds 2011).
- Stanimir Alexandrov, *On the Perceived Inconsistency in Investor-State Jurisprudence*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS*, at 60-69 (Oxford, José E. Alvarez et al. eds 2011).
- Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 231-39 (Karl P. Sauvant, ed.) (2008).
- Selwyn Seidel, *Investing in International Arbitration Claims – Burford Group*, Iberian Lawyer (Jan. 4, 2011), available at <http://www.iberianlawyer.com/dispute-resolution/2269-investing-in-international-arbitration-claims->.
- Victoria Martin de la Torre, *European Parliament calls for a progressive EU investment policy* (April 6, 2011), available at

http://www.socialistsanddemocrats.eu/gpes/public/detail.htm?id=135593§ion=NER&category=NEWS&request_locale=EN

Discussion Questions:

- Is it appropriate or desirable to give private arbitrators the jurisdiction to issue binding rulings on the legality of sovereign acts and to award public funds? Is this problem especially acute when the respondent is a developing state?
- Who wins most investment arbitrations?
- How do you measure victory in an investment arbitration (or in any dispute settlement procedure)? If the investor gets part of what it seeks, is that a victory?
- Many people have suggested the establishment of an appellate mechanism for investment arbitration. Do you think such an innovation is necessary? Feasible?
- What purpose would the appellate body serve? Would it correct errors in individual cases? Create a more coherent body of law? Add legitimacy to the system? Help to avoid ethical conflicts (assuming one had a standing body of arbitrators exclusively devoted to the appellate body)? Can you think of others?
- What are the disadvantages of an appellate body?
- What would the ideal appellate mechanism look like? Would you have an appellate body exclusive to each treaty, or one which had the authority to hear all investment disputes?
- What standard of review should such an appellate body employ?
- Is third-party funding appropriate for investment arbitration? What are the pros and cons?

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- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 701-714 (Oxford 2008).
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- Andrea J. Menaker, *What the Explosion of Investor-State Arbitrations May Portend for the Future of BITs*, in THE FUTURE OF INVESTMENT ARBITRATION 157 (Catherine Rogers & Roger Alford eds., Oxford 2009).
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