

**INTERNATIONAL INVESTMENT LAW AND ARBITRATION****Columbia Law School  
Spring 2010**

Thursdays, 6:20 p.m. – 8:10 p.m. (Room TBA)

Two credits

**Course Description**

This seminar addresses both the substantive and procedural legal aspects of international investment. The course examines the international regulation, through bilateral investment treaties (BITs) and otherwise, of foreign direct investment or “FDI” —i.e., inward and outward investment involving ownership subject to active control by a foreign investor as opposed to “passive” investment (as through stock ownership)—, in combination with the phenomenon of investment arbitration as the predominant instrument to settle disputes between private investors and host States under specialized treaty and other regimes (particularly, the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) and the NAFTA’s Investment Chapter 11). ICSID arbitration is booming, with over 120 cases pending. Having replaced litigation as the preferred mechanism for settling investment disputes, the advent of investment arbitration, which provides private investors with one-tier binding redress against host States, is a watershed development in international public law adjudication.

The interaction between practice and academics, between Common Law and Civil Law, and between Private and Public International Law, is particularly acute in the field of international investment law and arbitration, making it especially suitable for comparative study.

Considerable attention will be given to the type of treatment that by international law ought to be accorded foreign investors once established in a country—i.e., the “regulation” of foreign direct investment—constituting the substantive law of international investment. In this context, fundamental legal concepts such as expropriation and the standard of fair & equitable treatment will be examined.

With regard to procedural law, the seminar examines the modern concept of investment arbitration by studying aspects of the law of Evidence, Procedure, Damages, Ethics, and Jurisprudence, as applied to investment protection. The focus will be on the compulsory arbitration of investor-State disputes, including the initiation and organization of an investment arbitration, the appointment and role of the party-appointed arbitrators and the presiding arbitrator, jurisdictional issues and defenses, the role of arbitral institutions, provisional relief, procedure and proof, the role of expert witnesses, the conduct of hearings, advocacy, transparency and the role of NGOs/Amicae, the tribunal’s deliberations and award, and the enforcement and annulment of investment awards.

The dual aim of this seminar is to educate students about the comparative complexities of the law and procedure of foreign investment and arbitration as a hybrid form of dispute resolution, and to prepare them for the actual conduct of an investment arbitration by focusing on the ins and outs of settling disputes arising out of a foreign investment through arbitration as opposed to litigation, from the initiation of the case through the enforcement of the award.

Various case studies from practice will be analyzed in class. There will be visiting lectures on the subject over lunch time periods on occasion that participating students are expected to attend. (There may be one fewer regular class meeting because of students' attendance at these lunch presentations).

This seminar does not deal with litigation of disputes arising out of international business transactions before national courts. It also is not a course about foreign investment and public policy (compare the seminar on that topic taught by Karl Sauvant). The course does not examine the World Trade Organization (WTO), which relates to trade in goods. No economics knowledge is assumed or required. This seminar may serve as a general introduction to international arbitration.

**Class No.      Topic**

### **Introduction**

(January 14, 2010:)

- Class 1:
- Introduction and course overview
  - Defining the concept of foreign direct investment or “FDI”
  - Overview of legal regimes governing the regulation of investment: Domestic laws, bilateral treaties, regional arrangements, and customary international law

### **FDI and Investment Arbitration: Legal Regimes**

(January 21, 2010:)

- Class 2:
- Legal regimes governing the regulation of investment: Domestic laws, bilateral treaties, regional arrangements, and customary international law
  - The NAFTA’s Investment Chapter
  - The Energy Charter Treaty (ECT)

(January 28, 2010:)

- Class 3:
- Overview of international forums for resolving investment disputes
  - Consent (I): Contractual investment arbitration
  - Key clauses in investment contracts and their enforcement

(February 4, 2010:)

- Class 4:
- Consent (II): Investment arbitration under treaties and investment laws
  - Key provisions in investment treaties and laws and their enforcement
  - The World Bank (ICSID) arbitration mechanism; meeting the key requirements of “national” and “investment”

### **The Decision-makers**

(February 11, 2010:)

- Class 5:
- The institution of an investment arbitration
  - Forum selection
  - Constitution of the arbitral tribunal
  - Party-appointed arbitrators and the presiding arbitrator
  - Criteria for selecting and appointing investor-State arbitrators
  - Qualifications, ethics, professional responsibility, and challenges

### **Proceedings & Causes of Action**

(February 18, 2010:)

- Class 6:
- Investment arbitration procedure: Case management
  - Preliminary/preparatory hearing or conference

- Provisional relief for investors
- Bifurcated proceedings
- Written proceedings

(February 25, 2010)

- Class 7:
- Governing law: Domestic laws, treaties, customary international law
  - Jurisdictional objections and defenses

**Class No.      Topic**

(March 4, 2010:)

- Class 8:            - Remedies: Types of claims (contract-based and treaty-based)  
                      - Expropriation: Concept, forms, and applicable law

(March 25, 2010:)

- Class 9:            - The standard of fair and equitable treatment  
                      - Non-discriminatory treatment  
                      - Other causes of action in investment arbitration

(April 1, 2010:)

- Class 10:           - Proof, discovery, and evidence in investment arbitration  
                      - Role of fact and expert witnesses in investment arbitration  
                      - Oral proceedings (hearing) in investment arbitration  
                      - Reparations recoverable by foreign investors in international law  
                      - Standard of compensation  
                      - Quantum of damages (valuation)

**Transparency; Awards & Post-Award Remedies**

(April 8, 2010:)

- Class 11:           - Tensions over FDI and investment arbitration mechanisms  
                      - Transparency and the role of NGOs; *Amicus Curiae* participation  
                      - Form of Award  
                      - The development of a body of international economic law  
                      - Jurisprudence: The role of precedent in investment arbitration  
                      - Inconsistent arbitral awards

(April 15, 2010:)

- Class 12:           - Revision and interpretation of investment awards  
                      - Challenge of investment awards; Annulment  
                      - The New York and Washington Conventions and the  
                      recognition and enforcement of investment awards

(April 21, 2010:)

- Class 13:           - Enforcement and execution of investment awards  
                      - Sovereign immunity and the enforcement of investment awards  
                      - The future of investment regulation  
                      - Course review; Q&A  
                      - Exam-related information