

International Investment Disputes
Law 291B
Professor Andrea K. Bjorklund

Class Hours:

Tuesdays 3:10 – 5:00
Room 2064

My contact information:

Office – Room 2081
752-5773
akbjorklund@ucdavis.edu

Office Hours

Mondays 10:00 – 12:00
Wednesdays 10:00 – 11:00
or by appointment

Course Materials:

The reader for the course is now available at the Silo. There is also a document supplement, also available at the Silo.

Course Requirements:

(1) Regular attendance and class participation are mandatory. I will be taking attendance each week, and I will be noting which students participate during discussion. In addition, the last few courses of the semester will consist of presentations of the papers you are writing for the course. These presentations should be of about 15-20 minutes, with about five minutes for questions.

Each student will be permitted to miss one class session without an excuse, except for the session during which you are presenting your paper. If additional absences are not excused, they will lower your class participation grade. Attendance and class participation will count for 25% of your grade in the course.

(2) You will also have to fulfill a writing requirement, which will count for 75% of your grade in the course. The writing requirement consists of a 20-page research paper (exclusive of footnotes) on an international investment law topic chosen in consultation with me. (You may instead write a 30-page paper, exclusive of footnotes, to meet the UCD writing requirement.) A list of potential paper topics is at the end of this paper; I would also be happy to discuss other possible topics.

Requirements for papers:

Your paper should illustrate that you have exhaustively researched the area you are addressing. In addition, you should demonstrate critical analysis, and depending on the topic, set forth your proposed solution to whatever problem you are addressing.

Papers should be double-spaced, with one-inch margins all around. Please use 12-point font. I prefer footnotes rather than endnotes. All references **MUST** be in proper blue-book form for law review articles. Failure to submit a paper in appropriate blue-book form will result in an automatic half-grade deduction (e.g. from A to A-). Please put page numbers on your paper.

Requirements for the 20-page research paper:

By the week of September 25, you should have selected a paper topic. You may submit potential topics to me via email, or you are welcome to come by to discuss your ideas with me.

The week of October 16 you should be prepared to meet with me to discuss your papers. I will designate specific hours for the meetings and pass around a sign-up sheet the week before. If those times are not convenient for you we can make an appointment for a time that is convenient. You should have an outline indicating the questions you intend to research and a tentative bibliography.

The first draft of your paper is due Monday, November 13.

Your paper grade will not be lowered because of a rough or incomplete first draft. If, however, your first draft is too sketchy for me to give meaningful comments, you may have missed your opportunity for me to provide detailed comments. In some circumstances I might be able and willing to look at more than one draft. Also, by prior arrangement I am willing to look at drafts earlier than the November 13 deadline.

The final draft of your paper is due Friday, December 22.

Final papers submitted after the December 22 deadline may be subject to a grade reduction. If you need an extension on your paper, you need to check with me ahead of time.

Syllabus

Class # 1

22 Aug. 2006

Introduction to Investor-State Arbitration

Class #2

29 Aug. 2006

Policy Issues Behind Investor-State Arbitration

Class #3
5 Sept. 2006 **Arbitral Procedure/Place of Arbitration/Arbitrator Selection**

Class #4
12 Sept. 2006 **Exhaustion of Local Remedies**

Class #5
19 Sept. 2006 **Substantive Obligations – National Treatment**

Class #6
26 Sept. 2006 **Substantive Obligations – Minimum Standard of Treatment (Denial of Justice)**

Class #7
3 October 2006 **Guest Lecturer on International Trade Law**
William A. Plourde, Jr. (UCD Law Class of 1969)

Class #8
10 October 2006 **Substantive Obligations – Minimum Standard of Treatment (Fair & Equitable Treatment)**

Class #9
17 October 2006 **Substantive Obligations – Expropriation**

Class #10
24 October 2006 **“Umbrella Clauses” and Breaches of Contract**

Class #11
31 October 2006 **Set Aside and Appeal**

Class #12 **Whose Rights? – The Issue of Amicus**
7 November 2006

Class #13 ff. **Presentations**
14 November 2006

Class #14
21 November 2006

Class #15
28 November 2006

Possible Paper topics (and you are welcome to talk to me about others)

Expropriation (e.g. effect of *Kelo v. City of New London*) – How do (or should) national and international norms interact with each other to establish criteria for takings?

Regulatory expropriation – What are measures “tantamount to” expropriation?

How has the European Court of Human Rights treated expropriation issues, and

Fair & equitable treatment – Should the fair and equitable treatment standard (and possibly other standards as well) be differentiated according to the level of development, governance capacity, and resources of host countries? How do you establish criteria for that?

Damages measurements – How should damages be measured when an international obligation is violated? Are the remedies proposed in the ILC Articles on State Responsibility Adequate?

Suits by minority shareholders – How and when should minority shareholders be able to commence cases under bilateral investment treaties?

Public rights/private rights – Private investors have standing to bring investor-State claims under bilateral investment treaties. This erosion of the distinction between public and private international law could have effects in other areas. What are those effects?

Most-favored-nation treatment – Recent cases suggest that the MFN obligation extends to procedural rights as well as substantive rights. Is this a reasonable determination and what are the ramifications of such a determination?

National treatment – is there a customary international law of national treatment (non-discrimination). If so, what is its content?

Umbrella clauses – At least a few tribunals have held that “umbrella” clauses can elevate a basic contractual dispute into claim based on international law, while a few tribunals have rejected that approach. Which is correct? What might be other explanations for the existence of an umbrella clause?

Relationship between WTO/GATT law and investment law – Should the treatment of concepts like national treatment and MFN in WTO/GATT law play a role in investment law? If so, how? What are the limits of such a concept?

In-depth analysis of a case:

- Methanex v. United States
- Metalclad v. Mexico
- Pope & Talbot v. Canada
- Loewen v. United States
- Mondev v. United States
- CME v. Czech Republic
- CMS v. Argentina
- S.D. Myers v. Canada
- UPS v. Canada
- others

Duplicative/parallel claims – The existence of BITs often means that investors can seek relief of their grievances in multiple fora. Does the existence of parallel claims, or even the possibility of making parallel claims, affect the legitimacy of investor-State dispute settlement?