

Georgetown University Law Center

Investor State Arbitration Seminar

Professors: Don Wallace Jr., Christopher Dugan, and Borzu Sabahi

Reading: Dugan, Wallace, Rubins, Sabahi, *Investor State Arbitration* (Oxford University Press 2008)

CLASS SYLLABUS

Session	Lectures
1	<p>Introduction <i>Lecture/Discussion:</i> History of Investment-Related Dispute Resolution</p> <p>Reading: Chapters 1 and 2</p> <p>Chapter I Introduction</p> <p>A. Introduction</p> <p>B. The Importance of Investment Flows For Capital Importers and Exporters</p> <p>C. The Purpose of Investment Protection</p> <p>Chapter II History and Limitations of the Traditional System for Resolving Investment Disputes</p> <p>a) Harms Suffered by Foreign Investors</p> <p>b) Barriers to Recovery By Foreign Investors</p> <p>(1) Barriers In Host Country Courts</p> <p>(a) Local Bias</p> <p>(b) State Immunity</p> <p>(c) Inefficient Local Courts</p> <p>(d) Calvo Doctrine</p> <p>(2) Barriers in Foreign Investor’s Home Courts</p> <p>(a) Jurisdiction</p> <p>(b) Foreign Sovereign Immunity</p> <p>(c) Act of State Doctrine</p> <p>(d) Choice of Law</p> <p>(3) Political Barriers: The New International Economic Order</p> <p>c) Traditional Remedies for Foreign Investors</p> <p>(1) Gunboat Diplomacy</p> <p>(2) Diplomatic Espousal</p> <p>(a) Practice of Espousal</p> <p>(b) The Limitations of Espousal</p> <p>(i) Exhaustion of Local Remedies</p>

	<p style="text-align: center;">(ii) Nationality of the Investor</p> <p>d) Some Early Investment Protection Regimes</p> <ol style="list-style-type: none"> (1) Jay Treaty (1794) (2) Ad Hoc Arbitration (3) Bi-National Claims Commissions (4) Friendship, Commerce, and Navigation Treaties (5) Lump Sum Settlement Agreements (6) Investment Guarantee Programs (7) The Algiers Accords <p>e) Limitations of Historic Dispute Settlement Processes</p>
2	<p><i>Lecture/Discussion:</i> The Modern System of Investment Arbitration, Commonly Used Procedural Rules, Procedural Law</p> <p>Reading: Chapters 3, 4 and 5; skim provisions of the U.S. – Argentina BIT</p> <p>Chapter III The Modern System Of Investor-State Arbitration</p> <p>A. Origins</p> <p>B. ICSID and Its Central Role in the New System of Investor-State Arbitration</p> <p>C. Bilateral Investment Treaties</p> <p>D. Multilateral Investment Treaties</p> <ol style="list-style-type: none"> 1. Lomé Conventions 2. North American Free Trade Agreement (NAFTA) 3. Energy Charter Treaty 4. Mercosur 5. ASEAN 6. Free Trade Area of the Americas 7. DR-CAFTA 8. Multilateral Agreement on Investment (“MAI”) <p>f) National Investment Legislations</p> <p>IV Commonly Used Procedural Rules</p> <p>A. Introduction</p> <p>B. ICSID Rules</p> <p>C. Stockholm Chamber of Commerce (SCC) Rules</p> <p>D. International Chamber of Commerce (ICC) Rules</p> <p>E. UNCITRAL Rules</p> <p>F. Comparison of the ICSID and UNCITRAL Rules</p> <ol style="list-style-type: none"> 1. ICSID Convention Requirements and the ICSID Screening Role

	<ol style="list-style-type: none"> 2. Place of the Arbitration 3. Language of Arbitration 4. Appointment of Tribunal 5. Governing Law 6. Cost and Speed 7. Interim Measures 8. Challenge of Award and Enforcement 9. Multi-Party Investment Arbitration -- Consolidation <p>V Procedural Law Applicable in Investor-State Arbitration</p> <ol style="list-style-type: none"> A. Choice of Procedural Law of Arbitration B. Mandatory Procedural Law of the Forum C. Procedural Law Applicable under the ICSID Convention
3	<p><i>Lecture/Discussion: The Course of an Investment Arbitration</i></p> <p>Reading: Chapter 7</p> <p>VII The Course of an Investment Arbitration</p> <ol style="list-style-type: none"> a. Introduction b. Waiting Periods c. Required Exhaustion of Local Remedies d. Notice of Claim and Request for Arbitration <ol style="list-style-type: none"> (1) Notice of Claim (2) Request for Arbitration (3) “Registration” or Approval by Arbitral Institution (4) Default of a Party (5) Composition of Tribunal <ol style="list-style-type: none"> (a) Appointment of Arbitrators (b) Situs of Arbitration (c) Language of Arbitration (6) Initial Session of the Tribunal (7) Arbitrator-Ordered Interim Relief <ol style="list-style-type: none"> (a) The Legal Framework (b) Effect of ICSID Recommendation (c) Review of Investment Arbitration Case Law (d) Interim Measures in Other Contexts (e) Timing (8) Jurisdictional Phase (9) Merits Phase <ol style="list-style-type: none"> (a) Briefing (b) Counterclaims

	<ul style="list-style-type: none"> (c) Host State Defenses (d) Witness Statements and Other Evidence (e) U.S. Procedures and Third-Party Evidence-Taking (f) Third Party Amicus Curiae Submissions (10) Damages Phase (11) Hearings (12) Post-Hearing Briefs (13) Award (14) Enforcement and Challenge of Award
4	<p><i>Lecture/Discussion:</i> The Sources of Substantive Law and Standards of Investment Protection – Consolidation of Claims</p> <p>Reading: Chapters 9 & 8</p> <p>Chapter IX Governing Law in Investment Disputes</p> <ul style="list-style-type: none"> A. Introduction B. Rules Chosen by the Parties C. Investment Treaties and Their Interpretation\ D. Host State Law E. Public International Law <p>Chapter VIII Consolidation Under Relevant Arbitration Rules or Treaties</p> <ul style="list-style-type: none"> a) ICSID b) UNCITRAL c) NAFTA Art. 1126 d) Multilateral Agreement on Investment (MAI) e) International Chamber of Commerce Rules <ul style="list-style-type: none"> (1) Consolidation by Courts (2) Ramifications for Enforcement of Award
5	<p><i>Lecture/Discussion:</i> Concepts of Investor and Investment</p> <p>Reading: Chapters 11 and 12</p> <p>Chapter XI The Concept of “Investment”</p> <ul style="list-style-type: none"> a) Changing Definition of “Investment”: The Historical Perspective b) Definitions of Investment in Investment Protection Instruments <ul style="list-style-type: none"> (1) Definitions of Investment in Investment Treaties (2) Definition of Investment in National Investment Laws

	<ul style="list-style-type: none">c) Definition of Investment and Its Implications for the Jurisdiction of Arbitral Tribunals under the Washington Convention<ul style="list-style-type: none">(1) <i>Travaux Preparatoire</i> of the Washington Convention Regarding the Notion of Investment under Article 25(2) Dual Jurisdictional Requirements for Submitting a Case under the Washington Convention and an Investment Treaty or Law(3) Survey of Jurisdictional Decisions under Washington Convention Based on the Type of Investment(4) Characteristics of Investment under Article 25 of Washington Convention<ul style="list-style-type: none">(a) Duration of an Activity(b) Regularity of Profit and Return(c) Assumption of Risk by Both Parties(d) Commitment Should Be Substantial(e) Contribution to Economic Development of Host Stated) Concept of Unity of Investment Under the Washington Conventione) Concept of Investment and Its Implications for the Jurisdiction of Arbitral Tribunals under Arbitral Rules other than the Washington Conventionf) Pre-Investment Protection <p>Chapter XII The Nationality of the Investor</p> <ul style="list-style-type: none">a) Nationality of Natural Persons under Customary International Law: Effective Nationality Principleb) Qualified “Investors” under Investment Treaties and the Washington Convention<ul style="list-style-type: none">(1) Natural Persons<ul style="list-style-type: none">(a) Investment Treaty and Washington Convention Provisions(b) Applicable Law(c) Status of Dual Nationals under the Washington Convention and Other Arbitral Rules(2) Legal Persons and Corporations<ul style="list-style-type: none">(a) Treaty Provisions(b) Customary Law on Nationality of Corporations and Shareholder’s Standing(c) Washington Convention(3) Shareholders Standing under Investment Treaties and the Washington Convention<ul style="list-style-type: none">(a) Minority and Non-Controlling Shareholders<ul style="list-style-type: none">(i) <i>Standing under Investment Treaties</i>(ii) <i>Standing under the Washington Convention</i>
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	<ul style="list-style-type: none"> (iii) <i>Damages Due Minority Shareholders</i> (b) Indirect Shareholders Controlling an Entity Incorporated in the Host State – Case Study <ul style="list-style-type: none"> (i) <i>Amco v. Indonesia</i> (ii) <i>Tokios v. Ukraine</i> (iii) <i>CME Cases</i> (iv) <i>Waste Management v. Mexico</i> (v) <i>Aguas del Tunari v. Bolivia</i> (vi) <i>Aucon v. Venezuela</i> (vii) <i>Saluka v. Czech Republic</i> (viii) An Unusual Case: When A Tribunal Pierced the Veil but Denied Jurisdiction: <i>Loewen v. United States</i> c) Change of National Identity <ul style="list-style-type: none"> (1) Continuous Nationality Rule under Customary International Law (2) Change of Nationality and Jurisdiction of Arbitral Tribunals under Investment Treaties (3) Change of Nationality and Jurisdiction of Arbitral Tribunals under the Washington Convention
6	<p><i>Lecture/Discussion: Consent to Arbitration</i></p> <p>Reading: Chapter 10</p> <p>Chapter X Consent to Arbitral Jurisdiction</p> <ul style="list-style-type: none"> A. Introduction B. Fundamental Concepts Relating to Consent <ul style="list-style-type: none"> 1. Methods of Providing Consent to Arbitrate 2. Methods of Accepting the Government’s Offer to Arbitrate 3. Forms of Consent 4. Irrevocability of Consent 5. Limitations on Consent Clauses C. Arbitration Clauses in Investment Contracts D. National Investment Legislation E. Investment Protection Treaties as Consent to Arbitration F. Investment Arbitration Based on <i>Compromis</i>
7	<p><i>Lecture/Discussion: Minimum Standard of Treatment</i></p> <p>Reading: Chapter 17</p> <p>Chapter XVII ‘Fair and Equitable Treatment’ and ‘Full Protection and Security’</p>

	<ul style="list-style-type: none"> A. The Relationship of the ‘Fair and Equitable Treatment’ and ‘Full Protection and Security’ to Customary International Law B. Fair and Equitable Treatment <ul style="list-style-type: none"> (1) History of “Fair and Equitable Treatment” (2) The Definition of “Fair and Equitable” Treatment <ul style="list-style-type: none"> (a) Arbitrary Treatment (b) Legitimate or Reasonable Expectations and Stability (c) Transparency (d) State Coercion of Foreign Investors (e) Denial of Justice C. Full Protection and Security <ul style="list-style-type: none"> (1) Historical Development of the Standard (2) Modern Investment Treaties and the Content of the Standard
8	<p><i>Lecture/Discussion:</i> Discrimination, National Treatment, MFN</p> <p>Reading: Chapter 15</p> <p>Chapter XV Discrimination</p> <ul style="list-style-type: none"> a. National Treatment <ul style="list-style-type: none"> i. Introduction ii. Application of the National Treatment Standard <ul style="list-style-type: none"> a) Relevant Class of Comparators: “Like Circumstances” b) Relevant Standard of Treatment: No Less Favorably c) Proof of Discriminatory Intent Based on Nationality b. Most-favored Nations Treatment (MFN) <ul style="list-style-type: none"> i. Introduction ii. Scope and Interpretation of MFN Clauses iii. Application of MFN Clauses to Substantive and Procedural Rights <ul style="list-style-type: none"> a) Procedural Rights b) Substantive Rights c. Discriminatory Impairment
9	<p><i>Lecture/Discussion:</i> Umbrella Clauses, Exhaustion of Local Remedies, Fork in the Roads</p> <p>Reading: Chapters 18, 13, 14</p>

	<p>Chapter VIII Umbrella Clauses</p> <ul style="list-style-type: none"> a) Introduction b) Historical Background and Various Formulations of Umbrella Clauses c) Arbitral Decisions Involving Umbrella Clauses d) Conclusion <p>Chapter XIII Exhaustion of Local Remedies</p> <ul style="list-style-type: none"> a) Exhaustion of Local Remedies under Customary International Law b) Exhaustion of Local Remedies in Investment Treaty Arbitration c) Exhaustion of Local Remedies and the <i>Loewen</i> Case <p>Chapter XIV Election of Forum: National Courts and Contract Arbitrations</p> <ul style="list-style-type: none"> A. National Courts and Treaty Arbitration <ul style="list-style-type: none"> (1) “Fork in the Road” and Waiver: Treaty Texts <ul style="list-style-type: none"> a) “True” Fork in the Road Provisions b) Waiver Provisions (2) The Policy behind Fork in the Road and Waiver Provisions (3) Choice of Forum with Respect to “Disputes” (4) Choice of Forum with Respect to “Measures” b. Investment Treaties and Contractual Forum Selection Clauses
10	<p><i>Lecture/Discussion:</i> Expropriation</p> <p>Reading: Chapter 16</p> <p>Chapter XVI Expropriation</p> <ul style="list-style-type: none"> a) Historical Overview of Expropriation <ul style="list-style-type: none"> 1. Introduction 2. Pre-World War II Period 3. Post World War II Period until Present b) Investments and Property Protected Against Expropriation c) The Role of Investment Treaties and Investment Insurance Regimes d) The Problem of Indirect or Regulatory Expropriation <ul style="list-style-type: none"> 1. The Effect of Government Measures 2. The Intent, Purpose, Nature, or Character of the Governmental Act or Measure

	<ul style="list-style-type: none"> 3. Legitimate Reliance on Government Representations 4. Duration of Effect of Act or Measure 5. Domestic Remedies Sought 6. Transfer of the Investment to the Government or to Third Parties 7. Other Factors <p>e) Case Study: <i>Metalclad v. Mexico</i></p> <p>f) The Current U.S. Approach to Indirect or Regulatory Expropriation</p>
11	<p><i>Lecture/Discussion: Damages</i></p> <p>Reading: Chapter 19</p> <p>Chapter XIX Damages, Compensation, and Non-Pecuniary Remedies</p> <ul style="list-style-type: none"> A. Introduction B. The Function of Reparation: Wiping Out All the Consequences of an Illegal Act C. Non-Pecuniary Remedies: Restitution and Specific Performance D. Standard of Compensation E. Valuation F. Valuation of Enterprises or Projects that Have not Become Profitable G. Compensation for Breach of Contract H. Factors Limiting the Amount of Compensation <ul style="list-style-type: none"> 1. Causation 2. Contributory Fault 3. Obligation to Mitigate Losses I. Role of Equity J. Awarding Interest <ul style="list-style-type: none"> 1. Overview 2. Compound or Simple Interest? K. Arbitration Costs and Attorneys' Fees <ul style="list-style-type: none"> 1. Introduction 2. Survey of Some Investment Arbitration Awards Rendered under the UNCITRAL Rules 3. Survey of Some Investment Arbitration Awards Rendered under the ICSID Rules 4. Calculation of Government Legal Fees
12	<p><i>Lecture/Discussion: Enforcement of Arbitral Awards, Annulment and Vacatur</i></p> <p>Reading: Chapters 21, 20</p> <p>Chapter XXI Enforcement of Awards</p> <p>a) Confirmation</p>

	<ul style="list-style-type: none"> b) Enforcement of Awards under the New York Convention c) Execution in Investment Arbitrations d) Sovereign Immunity and the Washington Convention e) Conclusion <p>Chapter XX Annulment and Set Aside</p> <ul style="list-style-type: none"> a) ICSID Annulment b) Challenge to Non-ICSID Investment Arbitration Awards <ul style="list-style-type: none"> (1) The Standard of Judicial Review (2) Grounds for Setting Aside Relevant to Investment Arbitration <ul style="list-style-type: none"> (a) Excess of Authority (b) Non-Arbitrability (c) Public Policy (d) Procedural Irregularity (e) “Manifest Disregard of the Law” and Other “Substantive” Grounds c) Waiver of Objections d) Agreements to Narrow the Grounds for Annulment e) The Effect of Annulled Investment Arbitration Awards f) Case Studies of Non-ICSID Challenge Proceedings <ul style="list-style-type: none"> (1) <i>Metalclad v. United Mexican States</i> (2) <i>CME v. Czech Republic</i> (3) <i>S.D. Myers v. Canada</i>
13	<p><i>Lecture/Discussion:</i> Future of Investment Arbitration -- Policy Challenges/Appellate Procedure</p> <p>Reading: Chapter 22</p> <p>Chapter XXII The Future of International Investment Arbitration</p> <ul style="list-style-type: none"> A. Trends in the Conclusion and Amendment of Investment Treaties B. Trends in the Development of Substantive and Procedural Provisions of Investment Treaties <ul style="list-style-type: none"> 1. Confidentiality in Investor-State Arbitration 2. Amicus Curiae Briefs in Investor-State Arbitration C. Future Jurisprudence of Investment Protection: Possible Problems and Solutions