

**INTERNATIONAL TRADE AND INVESTMENT
DISPUTE SETTLEMENT**

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Note that course materials and updates on the subject will be posted regularly at
<http://www.elearning.qmul.ac.uk> and/or
<http://www.elearning.qmul.ac.uk/webct/entryPageIns.doweбct>

A Course Description

The legal environment for international trade and foreign investment has changed dramatically over the last twenty years since the end of the Cold War. International trade and investment dispute resolution, in particular through international arbitration and other non-judicial dispute settlement mechanisms, has become increasingly common. Foreign investors are much more willing to pursue a claim of, e.g., alleged expropriation or discriminatory behaviour by a host State. Further, public international law principles must also be considered once a state is involved. Principles of state responsibility, expropriation and acts tantamount to expropriation, what comprises fair and just compensation, immunity from suit and immunity from execution. These public international law principles overlap somewhat uncomfortably with the commercial interests of foreign investors. Developments in investment arbitration and trade dispute resolution have been rapid in recent years. It is now crucial that academics and legal practitioners are aware of the complex international legal elements involved in the resolution of investment and trade disputes.

This is a unique course combining International Trade and International Investment Treaty Disputes and is attractive to students interested in public international law and international arbitration.

B Course content

- Introduction: International trade and investment disputes out of court
- Regulatory and institutional framework
- Basic principles of dispute settlement with reference to trade and investment
- ICSID
- Bilateral Investment Treaties

- Energy Charter Treaty
- World Trade Organisation Dispute Settlement
- NAFTA Dispute Settlement
- Trade and investment disputes in *ad hoc* arbitration, ICJ and other tribunals
- Enforcement of decisions and awards
- Grey zone between substance - procedure / public - private international law
- Case studies – substantive foreign investment protection

C Course delivery

The course will be taught in weekly two-hour sessions during term (taught Wednesdays from 16:00 to 18:00 at 67-69 Lincoln's Inn Fields.

Teaching will vary between interactive lectures encouraging student participation, traditional lectures, case studies, and seminars. Student presentations may also be required. Small group teaching may be offered if the class size exceeds 30 students. Some guest lectures may also be arranged to allow students to interact with key persons in major international organisations.

D Aims

The aim of the course is to highlight the changing legal regime and for the students to be able to identify the rights an investor may have in a given circumstance and to be aware of any relevant public international law principles. The second aim is to focus on the *sui juris* trade dispute settlement within the World Trade Organisation and NAFTA which is a corollary of the autonomous law of international trade generated by WTO and NAFTA respectively. The students should:

- Understand the overlap between public international law, international economic law and international investment disputes.
- Be aware of the history (and its effect today) of the investment regime including the use of stabilisation clauses in certain host-State contracts
- Be aware of the evolution of international trade law regulation and the establishment of specific dispute settlement mechanisms
- Be able to advise on the various, often overlapping, options now available to an investor to commence arbitration against a State, even if no direct contract has been entered into between the two parties. Investors are no longer exclusively limited to rights provided by an investor Host State contract, they can now look to the extensive BIT protections and multilateral investment treaties which provide alternative recourses.
- Be able to identify the most favourable options available to an aggrieved investor which will vary depending on the exact form and content of the BIT or multilateral treaty at issue in the case.
- In addition, they will be aware that many countries have implemented foreign investment laws which also provide an investor with minimum standards of protection under international law.
- Be able to identify the types of trade disputes subject to the WTO dispute settlement mechanism, as well as its institutions and procedures, and understand the basic principles developed in GATT/WTO jurisprudence.

E Career Aspect

The aim of this course is for lawyers to be able to identify the various investment dispute resolution options available to a foreign investor and to be familiar with the WTO dispute settlement mechanisms thereby understanding all major theoretical and

practical issues and providing full advice to the client on options available to resolve a dispute.

Alternatively if acting or working for a State, students will be able to advise on the risks and perils of entering into a large number of bilateral investment treaties. They will understand the implications of entering into bilateral and multilateral investment treaties. For example, it will create a stable investment regime and encourage more foreign investment while at the same time being aware of its obligations that will arise under those treaties. They will understand when the protections in the treaties may be relevant in light of actions taken by a particular state entity.

The case about the increase of disputes before panels of ICSID, WTO or ad hoc arbitration tribunal need not be repeated; the numbers speak for themselves.

F Course Assessment

Examination will be by three hour written examination. An optional 5,000 words essay will be offered to be supervised by the teachers of the course

G Course materials

Extensive handouts and a primary sources compilation will be prepared by the lecturers. A course website has been designed where students can access materials using a password. The site can be accessed via <http://www.elearning.qmul.ac.uk>. You will be allowed access after you have formally registered for the course.

H Text books

There are several books which could serve as the recommended readings for the course. The most relevant books for investment arbitration are:

- ** R DOAK BISHOP, JAMES CRAWFORD AND W MICHAEL REISMAN, *Foreign Investment Disputes- Cases, Materials and Commentary* (Kluwer Law International, 2005) – a brand new excellent book, available to students at a special rate!
- * TODD WEILER (ED), *International Investment Law and Arbitration – Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) – an excellent collection of essays accompanied by a CD-ROM containing leading cases, *available to students at a special rate!*
- * CAMPBELL MACLACHLAN, LAURENCE SHORE AND MATTHEW WEINIGER, *International Investment Arbitration* (OUP 2007) – a brand new excellent book from summer 2008 in paperback.
- RUDOLF DOLZER & CHRISTOPH SCHREUER, *Principles of International Investment Law* (Oxford 2008) – a very good account.

Other useful titles include:

- * JULIAN D M LEW, LOUKAS A MISTELIS, STEFAN M KRÖLL, *Comparative International Commercial Arbitration* (Kluwer, 2003) – a general reference book for arbitration issues
- J MERRILLS, *International Dispute Settlement* (Cambridge UP, 4th ed, 2005) – another good text for a part of the course
- * PETER MUCHLINSKI FEDERICO ORTINO & CHRISTOPH SCHREUER (EDS), *Oxford Handbook of International Investment Law* (Oxford 2008) – a comprehensive coverage
- D PALMETER & P C MAVROIDIS, *Dispute Settlement in the World Trade Organization – Practice and Procedure* (2nd edition 2003) – a good text for WTO Dispute Settlement
- AUGUST REINISCH (ed), *Standards of Investment Protection* (Oxford 2008)

- * C H SCHREUER, *The ICSID Convention: A Commentary* (Cambridge UP and ICSID, 2001) – a significant reference book on ICSID
- M SORNARAJAH, *The International Law on Foreign Investment*, (Cambridge UP, 2nd ed, 2004) – another good text for a part of the course
- PETER VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge 2008)
- See also all relevant chapters at <http://ro.unctad.org/disputesettlement/course.htm>
- of high quality and relevance and accessible free of charge.

**INTERNATIONAL TRADE AND INVESTMENT
DISPUTE SETTLEMENT
PROVISIONAL TIMETABLE**

No	Date	Topic / Seminar Issues	Who
		1st TERM: 29 September – 12 December 2008	
1	01 Oct 08	Introduction to the subject matter and the course	LM/NG
2	08 Oct 08	Regulatory and Institutional Framework	LM
3	15 Oct 08	Basic Principles of Dispute Settlement – Applicable Law	NG
4	22 Oct 08	ICSID I – Overview and Jurisdiction I – Consent	NG
5	29 Oct 08	ICSID II: Jurisdiction II – <i>Ratione materiae et personae</i>	LM
6	05 Nov 08	ICSID Jurisdiction – continued	LM
7	12 Nov 08	ICSID IV: Procedural Issues	NG
8	19 Nov 08	ICSID V: Awards and Challenges / Enforcement	NG
9	26 Nov 08	BIT I	LM
10	03 Dec 08	BIT II (including case presentations)	LM/NG
11	10 Dec 08	ICSID case discussion followed by Xmas drinks	LM/NG
		2nd TERM: 5 January – 20 March 2009	
12	07 Jan 09	WTO I	JG
13	14 Jan 09	WTO II	JG
14	21 Jan 09	WTO III	JG
15	28 Jan 09	WTO IV	JG
16	04 Feb 09	NAFTA I	NG
17	11 Feb 09	NAFTA II	NG
18	18 Feb 09	NAFTA III – Case Presentations	NG
19	25 Feb 09	Energy Charter Treaty I	NG
20	04 Mar 09	Energy Charter Treaty II / Oil Disputes	NG/LM
21	11 Mar 09	ICSID Cases – Updates and Presentations	NG/LM
22	18 Mar 09	Revision Class	LM/NG

We will also arrange six one-hour seminar sessions focusing on substantive protection (e.g. expropriation, fair and equitable treatment, MFN, full protection and security) to be led by LM, NG and CB

Key: LM: Loukas Mistelis; NG: Norah Gallagher; JG: Joanna Gomula. CB: Crina Baltag

THEMATIC COURSE OUTLINE

1 Introduction: International trade and investment disputes out of court

- Historical introduction
- What are the alternatives?
- Investors' concerns v sovereign immunity
- Emergence of international trade (economic) law

2 Regulatory and institutional framework

- International instruments
- International organisations
- Importance of *ad hoc* arbitration
- UNCITRAL Arbitration Rules
- Emergence of case law – reports of decisions and awards

3 Basic principles of dispute settlement with reference to trade and investment

- Why out-of-state-court settlement
- ADR opportunities
- Arbitration and *quasi*-arbitration
- Flexible procedure
- Expertise
- Neutrality
- Enforceability
- Available remedies

4 Applicable law issues

- Multiplicity of sources
 - Public and private international law sources
 - International practice
 - Customary law
 - Soft law
- Redundancy of conflict of laws?
- International treaties and their interpretation
- Policy issues

5. International Centre for Settlement of Investment Disputes

- Historic Overview
 - Convention on the Settlement of Investment Disputes between the States and Nationals of Other States (Washington Convention 1965)
 - Administrative Counsel
 - Secretariat
 - ICSID Arbitration Rules and Procedure
 - Additional Facility Rules 1978
 - 2002 Reforms
- ICSID as Appointing Authority
 - Secretary General can appoint arbitrators in *ad hoc* arbitrations
- Conciliation
 - Available option – only three cases to-date

6-7. ICSID - Jurisdiction – Article 25 Washington Convention

- Any legal dispute
- Arising directly out of an investment
- Between a contracting state and a national of another contracting state
- Consent of parties is paramount
- Time and method of consent left to party autonomy
- Traditional consent found in investment contract
- More recently, found in foreign investment laws, BITs and multilateral treaties

8. ICSID - Procedure

- Commencement of Arbitration – Article 36 Washington Convention
- ICSID reviews requests for arbitration (not manifestly outside its jurisdiction)
- Selection of Arbitrators
- Provisional Measures
- Appeal procedures

9. ICSID Awards

- Final and binding
- Enforceable under Washington Convention
- Interpretation, Revision and
- Annulment

10 Bilateral Investment Treaties

- Historic Overview
 - Based on 19th Century Friendship, Commerce and Navigation treaties
 - First Modern BIT, 1959 Germany/Pakistan
- Protections provided
 - Varies depending on negotiations
 - Typically – most favoured nation
 - Fair and equitable treatment
 - Protection and security
 - Expropriation of investments protected by BIT must be compensated
- Dispute Resolution provisions
 - Over 1000 BITs provide for ICSID arbitration
 - *Ad hoc* arbitration
 - PCA
- Provide stability and security for foreign investors
- Create a favourable environment to encourage foreign investment

11 Energy Charter Treaty

- Historic Overview
 - European Energy Charter 1991
 - ECT influenced by the Uruguay GATT negotiations
 - ECT signed 1994 in force 16 April 1998
 - Deals with investment, trade, transit and dispute resolution
- Provides (new) protection for investors in the energy sector
- Arbitration Options
 - ICSID
 - UNCITRAL
 - Stockholm Chamber of Commerce
- Investor State disputes

- State/State Disputes
- Awards

12 World Trade Organisation Dispute Settlement

- Evolution of the WTO dispute settlement system:
 - from GATT 1947 to the DSU
- Scope of WTO dispute settlement and basic concepts
 - nullification and impairment
 - violation, non-violation and situation complaints

13 WTO Dispute Settlement - Institutional structure and procedure

- DSB
- Panels
- Appellate Body

14 WTO Dispute Settlement - Implementation and remedies

15 Emerging jurisdictional issues

- legal interest
- burden of proof
- standard of review
- judicial economy

16 Overview of types of disputes settled within the WTO with emphasis on special rules and procedures (2 sessions)

17 NAFTA Dispute Settlement

- Historic Overview
- Chapter Eleven
 - Arbitration Options
 - ICSID
 - Additional Facility Rules and
 - UNCITRAL Arbitration
- Jurisdiction
- Protections Provided
 - National Treatment – Article 1102
 - Most Favoured Nation – Article 1103
 - Minimum Standard of Treatment – Article 1105
- NAFTA Commission Statement on Article 1105, 31 July 2001
 - Expropriation and Compensation – Article 1110
 - Environmental Measure – Article 1114
- Procedure
 - Chapter Eleven B
 - Arbitration Rules
 - Document production and privilege
- *Amicus* Briefs
 - Third party application in NAFTA arbitrations
- Expropriation/Indirect Expropriation
- Awards
 - Final and binding on the parties
- Appeals

- Subject to applicable law and arbitration rules

17 Trade and investment disputes in *ad hoc* arbitration, ICJ and other tribunals

- The International Court of Justice
- The Law of the Sea Tribunal and the dispute settlement procedures under the Part XV, United Nations Convention on the Law of the Sea 1982
- The Permanent Court of Arbitration
- Ad hoc arbitration
- Mixed International Arbitration

18 Enforcement of decisions and awards

- Relations between national courts and international courts and tribunals
 - Stay of proceedings pending arbitration
 - Confirmation and review of awards
- procedural safeguards
- grounds for annulment.
- Recognition and enforcement of awards
 - New York Convention, 1958
 - Grounds for refusing recognition and enforcement.
 - Other ways of enforcing decisions and awards

19 Grey zone between substance and procedure / public and private international law

- Privatisation of public international law
- International or private and commercial law
- Regulation v deregulation
- Interplay of substance and procedure
- Role for conflict of laws rules?

20 Case studies

- Overview of recent cases and discussion of topical issues with use of simulation games and role plays.

NOTE: Not all topics listed will necessarily be covered in lectures as the lectures will also introduce topical issues and recently reported awards, but students may elect to write essays on any aspect of the course. The examination will focus on topics actually lectured on.

SEMINAR SESSION 1
Introduction to the Subject Matter and to the Course
1 October 2008

Topics covered / Learning objectives

- Ambit of the course
 - Notion of international trade dispute
 - Notion of international investment dispute
- Historical introduction
- What are the alternatives?
- Investors' concerns v sovereign immunity
- Emergence of international trade (economic) law
- Our approach

Examples of disputes which will be discussed in this course:

- Dispute between a multi-national corporation investing in a developing state and the developing state
- Dispute between funeral directors who decide not to invest in another country, and their dispute with the foreign company involves somehow the host State
- Disputes about broadcasting license
- Boundary disputes between states

Reading

- Collier and Lowe, Chapters 1 (pp 1-5, 10-16)
- Sir Robert Jennings, "Reflections on the Term Dispute", in Ronald St John MacDonald, *Essays in Honour of Wang Tieya* (Martinus Nijhoff / Kluwer Law International 1994) 401 (public international perspective)

Awards and Court Case

- *Legality of the Use of Force (Serbia & Montenegro v Belgium)*, 1999 ICJ Rep = <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm> ; see also dissenting opinion Vice President Weeramantry: http://www.icj-cij.org/icjwww/idocket/iybe/iybeorders/iybe_iorder_19990602_opinions/iybe_iorder_19990602_Weeramantry.htm (meaning of dispute)
- *Compañía de Aguas del Aconquija SA and Vivendi v Argentina*, 41 ILM 1135 (2002), http://www.worldbank.org/icsid/cases/ada_AwardoftheTribunal.pdf (paras 62 et seq) and <http://www.worldbank.org/icsid/cases/9deci-e.pdf> (distinction between contractual dispute and treaty dispute)
- Start reading *CME v Czech Republic* and *Lauder v Czech Republic*. They can be found at <http://www.cetv-net.com/> or at http://www.mfcr.cz/index_en.php

Attempt to answer the following self-study questions:

1. What is an "international dispute"?
2. What are the differences, if any, between a dispute, a difference and a conflict?
3. Is there a link between the nature of the dispute and the selection of forum?

Regulatory and Institutional Framework 1 and 8 October 2008

Topics covered / Learning objectives

At the end of the topic you should

- Be familiar with the regulatory and institutional framework relating to international trade and investment dispute settlement (ITIDS)
- Have a basic introduction to all the major ITIDS institutions, in particular, ICSID, WTO, NAFTA and ECT
- Have a basic introduction to relevant regulatory sources, international treaties, bilateral treaties, arbitration rules
- Identify the various mechanisms used for ITIDS, such as arbitration, hybrid arbitration, adjudication, conciliation etc

Topic outline:

- Regulatory Web
 - International instruments
 - National laws
 - Institutional Web
 - International organisations
- Importance of *ad hoc* arbitration
- UNCITRAL Arbitration Rules
- Emergence of case law – reports of decisions and awards

Lecture and study notes:

1. There are institutions which particularly deal with international and investment disputes. However, such “jurisdiction” is not exclusive. In addition to the institutional choices parties may refer their disputes to *ad hoc* arbitration or international conciliation or even to traditional international commercial arbitration.
2. UNCITRAL Arbitration Rules have contributed to the establishment of international arbitration standards as they have been adopted by hybrid and public international arbitrations
3. International treaties, either bilateral or multilateral, created an international framework, occasionally territorially limited, for the protection of foreign investment or for the facilitation of trade.
4. The involvement of states makes sovereignty a potential obstacle in the use of arbitration. However, as far as jurisdiction is concerned, this is no longer a significant problem.
5. An important development is that many institutions publish their awards/decisions.

Required Reading

- * Bishop, Crawford and Reisman, Chapter 4
- Collier and Lowe, Chapters 1 (pp 5-16) and 2 (pp 19-44)
- Peruse the contents of Merrills for the various available options available to parties for the settlement of disputes

Further reading:

Articles

- Andrea Kupfer Schneider, “Getting Along the Evolution of Dispute Resolution Regimes in International Trade Law Organizations”, 20 *Mich J Int'l L* 697-773 (1999)
- Amr A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism”, 41 *Harv Int'l L J* 419-468 (2000)
- Thomas Buergenthal, “Proliferation of International Courts and Tribunals: Is it Good or Bad?” 14 *Leiden J Int'l L* 267 (2001)

Websites:

Familiarise yourselves with the following major websites relating to this module:

- <http://www.worldbank.org/icsid>
- <http://www.worldbank.org/icsid/treaties/treaties.htm>
- http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- <http://www.ustr.gov/regions/whemisphere/nafta.shtml>
- <http://www.sice.oas.org/trade/nafta/naftatce.asp>
- <http://www.mercosur.org.uy/>
- <http://www.naftalaw.org/>
- <http://www.encharter.org/index.jsp>

After you have completed your reading, attempt to answer the following self-study questions:

1. What is the impact of the emergence of international economic (trade) law on the creation of a framework of international trade disputes? What is the particular role of WTO?
2. Do you think that all modern developments in the area of international trade and investment adequately address the concerns of developing countries?
3. While many of the disputes are governed by public international law, exclusively or in part, most mechanisms are private and similar to international commercial arbitration. Do you consider that to be a problem?
4. What is the relevance of judicial (e.g. ICJ) and non-arbitral (e.g. mediation) dispute resolution mechanisms in the settlement of international trade and investment disputes?