

## LITIGATION PRACTICE IN INTERNATIONAL ARBITRATION

LAWG/J 885-08-- Fall 2007

Prof. Mark Kantor

Prof. Jean Kalicki

Mondays

7:55 p.m. to 9.55 p.m.

Room 156

This course blends mock litigation experiences with class discussion of techniques, strategy and ethics in international arbitration proceedings. Students directly participate in a series of practice problems based upon proceedings brought by a foreign investor against a State before the International Centre for the Settlement of Investment Disputes (“ICSID”), including role-playing as litigators and arbitrators. This course emphasizes advocacy in connection with jurisdictional disputes, selecting and challenging arbitrators and other litigation problems that arise in the globalized environment of international investment and arbitration. There will be a number of oral assignments throughout the semester. Written assignments for the course, if any, will not be suitable for a Graduate Paper. There will not be a final examination. When students are assigned to make an oral presentation, other students will be asked to critique. The course grade will be a function of those assignments and class participation. The materials for class will consist of Parts 2.1-2.9 (ICSID) of the 2003 United Nations Conference on Trade and Development Course on Dispute Settlement in International Trade, Investment and Intellectual Property (the “UNCTAD Materials”), the 2004 U.S. Model Bilateral Investment Treaty (the “US Model BIT”) and supplemental materials. All class materials will be available at the Distribution Center. Additional copies of the UNCTAD Materials may be downloaded at <http://r0.unctad.org/disputesettlement/course.htm> .

Prof. Kantor will hold “office hours” in the cafeteria Mondays from 6:30 p.m. until 7:30 p.m. Both Prof. Kantor and Prof. Kalicki are available by email or telephone at other times. Students can contact:

Prof. Kantor at <a href="mailto:mkantor@mark-kantor.com">mkantor@mark-kantor.com</a> , (202) 544-4953	Prof. Kalicki at <a href="mailto:jean_kalicki@aporter.com">jean_kalicki@aporter.com</a> , (202) 942-6155
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NO.	DATE	ASSIGNMENT
1	September 10	<p><b>ICSID: Establishment and Organization of the Centre, Panels.</b></p> <p><u>(SKIM the following materials for this Session)</u></p> <p>Scenario</p> <p>UNCTAD Materials, Part 2.1 Overview pps. 1-21</p> <p style="padding-left: 40px;">Part 2.2 Selecting the Appropriate Forum pps. 5-12, 15-18</p> <p style="padding-left: 40px;">Part 2.7 Procedural Issues pps. 19-22</p> <p style="padding-left: 40px;">Part 2.9 Binding Force and Enforcement pps. 1-17</p> <p>ICSID Convention Arts. 25-27, 41-55, 64</p> <p>ICSID Arbitration Rules 13-16, 19-21, 29, 31-35, 38, 41, 46</p> <p>ICSID Institution Rules 1-8</p> <p>Kantor, <i>ICSID Amends Its Arbitration Rules</i> (Asian Dispute Review, forthcoming Fall 2006)</p> <p>U.S. Model BIT, Arts. 1-10, 24-34</p> <p>UNCTAD Draft Report, <i>Bilateral Investment Treaties 1995-2005: Trends in Investment Rulemaking</i> (April 2006), pp. 50-72, 80-102</p> <p><b>Complete Exercise 1</b></p> <p><b>Hand out Exercise 2</b></p>

NO.	DATE	ASSIGNMENT
2	September 17	<p><b>Consent to Arbitrate</b></p> <p>UNCTAD Materials, Part 2.3 Consent to Arbitrate pps. 1-43  ICSID Convention Arts. 25-26, 36, 41, 70-72  ICSID Arbitration Rule 41  ICSID Institution Rules 2, 6  US Model BIT, Arts. 25-26  Treaty between the United States and the Republic of Ecuador Concerning the Encouragement and the Reciprocal Protection of Investment (1993), Article VI(2) and (3)  U.S.-Chile Free Trade Agreement, Article 10.17(2)(b) and Annex 10-E  <i>Ceskoslovenska Obchodni Banka v. Slovak Republic</i> (Case No. ARB/97/4), Decision on Jurisdiction, Paras. 49-59 (pps. 268-272)</p> <p><b>Complete Exercise 2</b></p>
3	September 26  <b>Class rescheduled from Monday to Wednesday</b>  (no Kantor)	<p><b>Parties</b></p> <p>UNCTAD Materials, Part 2.4 Requirements Ratione Personae pps. 1-28  ICSID Convention Arts. 25, 36, 41, 71-72  ICSID Arbitration Rule 41  ICSID Institution Rules 2, 6  US Model BIT, Art. 1 (definitions of “claimant” and “investor of a Party”) and Art. 24.1(a) &amp; 24.1(b) and Art. 28.4 &amp; 28.5  <i>Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela</i> (Case No. ARB/00/5), Decision on Jurisdiction, Paras. 38-144 (pps. 19-50)  <i>AMCO Asia Corp. v. Republic of Indonesia</i> (Case No. ARB/81/1), Award on Jurisdiction, 23 I.L.M. 351, pps. 1-13  <i>Vacuum Salt Products Ltd. v. Republic of Ghana</i>, Award (Case No. ARB/92/1), pps. 334-351  <i>Tokios Tokeles v. Ukraine</i> (Case No. ARB/02/18), Decision on Jurisdiction, Paras. 21-71 (pp. 8-30) and Dissenting Opinion (all)</p> <p><b>Hand out Exercise 3</b></p>
4	October 1	<p><b>Investment</b></p> <p>UNCTAD Materials Part 2.5 Requirements Ratione Materiae pps. 13-29  ICSID Convention Arts. 25, 36, 41, 71-72  US Model BIT, Art. I (definitions of “covered investment”, “investment”, “investment agreement”, “investment authorization”, “investor of a non-Party” and “investor of a Party”), Art. 2.1, Art. 24.1(a) &amp; 24.1(b) and Art. 28.4 &amp; 28.5  <i>Ceskoslovenska Obchodni Banka v. Slovak Republic</i> (Case No. ARB/97/4), Decision on Jurisdiction, Paras. 75-91 (pps. 276-283)  <i>Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka</i> (Case No. ARB/00/2), Paras. 28-61 (pps. 150-159) &amp; Suratgar Concurring Opinion Paras. 6-8 (pps. 162-164)  <i>Enron Corp. v. Argentine Republic</i> (Case No. ARB/01/3), Decision on Jurisdiction, Paras. 20-21, 34-57 (pp. 9, 14-24)  <i>Joy Mining Machinery Ltd. v. Arab Republic of Egypt</i> (Case No. ARB/03/11), Award on Jurisdiction, Paras. 15-63 (pp. 3-15)</p> <p><b>Contract vs. Treaty Claims</b></p> <p>Gaillard, ‘<i>Vivendi</i>’ and <i>Bilateral Investment Treaty Arbitration</i>, New York Law Journal, February 6, 2003  Cremades, <i>Article 52 of the Washington Convention: The Parties’ Viewpoint</i></p>

NO.	DATE	ASSIGNMENT
		<p>– <i>The Applicant’s Experience</i> (IAI-ASIL Conference Materials)  <i>SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan</i> (Case No. ARB/01/13), Paras. 133-173 (pps. 347-367)  <i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> (Case No. ARB/02/6), Paras. 92-97, 113-135, pp. 34-37, 43-52</p> <p><b>Complete Exercise 3</b></p>
5	<p>October 9</p> <p><b>Rescheduled from Monday to Tuesday because of holiday</b></p>	<p><b>Substantive Protections</b></p> <p>UNCTAD Draft Report, <i>Bilateral Investment Treaties 1995-2005: Trends in Investment Rulemaking</i> (April 2006), pp. 50-72, 80-102</p> <p><b>Most-Favored Nation Clauses: The Interplay between Substance, Procedure and Jurisdiction</b></p> <p>UNCTAD Draft Report, <i>Bilateral Investment Treaties 1995-2005: Trends in Investment Rulemaking</i> (April 2006), pp. 73-77  <i>Emilio Agustin Maffezini v. Kingdom of Spain</i>, Case No. ARB/77/7), Decision on Jurisdiction, Paras. 19, 33-64 (pp. 7-9, 13-25)  <i>Plama Consortium Ltd. v. Republic of Bulgaria</i>, Case No. ARB/03/24, Decision on Jurisdiction, 20 ICSID Rev.-FILJ 262 (2005), Paras. 183-227, pp. 320-332.</p> <p><b>Hand out Exercise 4</b></p>
6	<p>October 15</p> <p>(No Kalicki)</p>	<p><b>Applicable Law</b></p> <p>UNCTAD Materials, Part 2.6 Applicable Law pps. 1-31  ICSID Convention Arts. 42, 52(1)  US Model BIT, Art. 30  Reisman, <i>The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold</i>, 15 ICSID Review – Foreign Investment Law Review 363 (2002)  <i>Wena Hotels LTD v. Arab Republic of Egypt</i> (Case No. ARB/98/4), Decision on Annulment, Paras. 26-46 (pps. 939-942)  <i>AGIP S.p.A. v. People’s Republic of Congo</i> (Case No. ARB/77/1), Award, Paras. 68-89 (pps. 10-13)  <i>Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka</i>, Final Award, Dissenting Opinion of Samuel K.B. Asante, 30 I.L.M. 577 at pps. 44-46  <i>AMCO Asia Corp. v. Republic of Indonesia</i>, Resubmitted Case: Award, Paras. 37-40 (pps. 579-580)</p> <p><b>Complete Exercise 4</b>  <b>Hand out Exercise 5</b></p>
7	October 22	<p><b>Selection of Arbitrators and Challenges</b></p> <p>UNCTAD Materials, Part 2.7 Procedural Issues pps. 11-18  ICSID Convention Arts. 12-16, 37-40  ICSID Arbitration Rules 1-12  US Model BIT, Art. 27  IBA Guidelines on Conflicts of Interest in International Arbitration (May 22, 2004)  Baer, <i>Selecting and Challenging Arbitrators in International Commercial Arbitration</i>, International Arbitration Seminar, King &amp; Spalding (October 17, 2000)  <i>Compania de Aguas del Aconquija S.A. &amp; Vivendi Universal v. Argentine Republic</i> (Case No. ARB/97/3), Decision on the Challenge to the President</p>

NO.	DATE	ASSIGNMENT
		of the Committee  <b>Complete Exercise 5</b>
8	October 29	<b>Evidence</b>  UNCTAD Materials, Part 2.7 Procedural Issues p. 22 ICSID Convention Arts. 43-44 ICSID Arbitration Rules 21, 32-38 US Model BIT, Arts. 28.2, 28.3 & 28.7 and 32 IBA Rules on the Taking of Evidence in International Commercial Arbitration Elsing & Townsend, <i>Bridging the Common Law – Civil Law Divide in Arbitration</i> , 18 Arb. Int. 59 (2002)  <b>Hand out Exercise 6</b>
9	November 7  <b>Class rescheduled from Monday to Wednesday</b>	<b>Evidence</b>  (continued)  <b>Complete Exercise 6; Hand Out Exercise 7</b>
10	November 12	<b>Opening Statements; Arbitration Hearing</b>  UNCTAD Materials, Part 2.7 Procedural Issues pps. 21-22 ICSID Convention Art. 44 ICSID Arbitration Rules 29-32, 35, 38-41 US Model BIT, Art. 28.2 and 29 Statement of Defense, <i>Methanex v. United States of America</i> Procedural Order No. 1, <i>Glamis Gold Ltd. v. United States of America</i> <i>S.A.R.L. Benvenuti et Bonfant v. People’s Republic of The Congo</i> , Award, 21 I.L.M. 740 at pps. 4-9  <b>Complete Exercise 7</b>
11	November 19	<b>Provisional Measures</b>  UNCTAD Materials, Part 2.7 Procedural Issues pps. 27-28 ICSID Convention Art. 47 ICSID Arbitration Rule 39 US Model BIT, Art. 28.8 <i>Emilio Agustín Maffezini v. Kingdom of Spain</i> (Case No. ARB/97/7), Procedural Order No. 2 <i>Casado v. Republic of Chile</i> (Case No. ARB/98/2), Decision on the Request for Provisional Measures, Paras. 1-27, 78-89 (pages 377-382, 394-397) <i>Vacuum Salt Products Ltd. v. Republic of Ghana</i> (Case No. ARB/92/1) Decision No. 3 on Request for Recommendation of Provisional Measures <i>Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited</i> (Case No. ARB/98/8), Decision on the Respondent’s Request for Provisional Measures  <b>Hand Out Exercise 8</b>
12	November 26	<b>The Award</b>  UNCTAD Materials, Part 2.7 Procedural Issues pps. 29-33 Part 2.8 Post-Award Remedies and Procedures pps. 5-

		<p>12  ICSID Convention Arts. 48-51  ICSID Arbitration Rules 16(1), 46-49  US Model BIT, Art. 34  <i>Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica</i> (Case No. ARB/96/1), Rectification of Award, 15 ICSID Review – Foreign Investment Law Review 206 (2000)  <i>Emilio Agustín Maffezini v. Kingdom of Spain</i> (Case No. ARB/97/7), Rectification of the Award, 16 ICSID Review – Foreign Investment Law Review 1 (2001)  <i>Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia</i>, (Case No. ARB/99/2), Decision on Claimants’ Request for Supplementary Decisions and Rectification</p> <p><b>Complete Exercise 8; Hand out Exercise 9</b></p>
13	December 3	<p><b>Annulment; Impact of Annulment on Subsequent Proceedings</b></p> <p>UNCTAD Materials, Part 2.8 Post-Award remedies and Procedures pps. 13-33  ICSID Convention Arts. 52-53  ICSID Arbitration Rules 50-55  US Model BIT, Art. 34.6(a) and Annex D  Schwartz, <i>Article 52 of the Washington Convention: The Parties’ Viewpoint – The Applicant’s Experience (Finality at What Cost)</i> (IAI-ASIL Conference Materials)  C. Schreuer, <i>Three Generations of ICSID Annulment Proceedings</i>, in ANNULMENT OF ICSID AWARDS (2004) (chart)  <i>Compañía de Aguas del Aconquija S.A. &amp; Vivendi Universal v. Argentine Republic</i> (Case No. ARB/97/3), Decision on Annulment, Paras. 61-70 (pps. 1149-1150)  Re-read <i>Wena Hotels LTD v. Arab Republic of Egypt</i>, supra.  <i>AMCO Asia Corp. v. Republic of Indonesia</i>, Resubmitted Case: Decision on Jurisdiction, 27 I.L.M. 1281 at pps. 3-24  <i>Klockner Industrie – Anlagen GmbH v. Republic of Cameroon</i> (Case No. ARB/81/2), Decision on Annulment, Paras. 57-82 (pps. 117-126)</p> <p>End of course</p> <p><b>Complete Exercise 9</b></p>