

SEMINAR ON INVESTMENT UNDER REGIONAL TRADE AGREEMENTS

LAW-953-001

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Course Objectives:

This seminar explores the interplay of economic, political and historical factors that have shaped the development of the international law on foreign investment. We will compare investment protections in various bilateral, regional and multi-lateral investment agreements and examine the growing body of jurisprudence emerging from disputes arbitrated under these agreements.

Class Meetings:

Mondays, 6:30PM - 9:30PM - Room 351. The first class will be held on June 5. A make-up class (for Memorial Day) will be held on Friday, July 14.

Reading Materials:

- (i) M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2d ed. 2004).
- (ii) Volumes I & II, and Treaty Supplement

Please check Blackboard for all assignments. If you have trouble retrieving an assignment from Blackboard, please contact Susana Castiglione, Program Coordinator. Ms. Castiglione can be reached at arbitration@wcl.american.edu or at (202) 274-4321. A copy of the reading materials will be made available in the library.

Evaluation:

Grades will be based on attendance and participation (25%) and a final exam (75%). The final exam will be on Tuesday, August 1 at 6:00PM.

TOPIC 1: INTRODUCTION: FOREIGN DIRECT INVESTMENT

This section provides an introduction to the concept of investment. We will examine the reasons why investors invest abroad, why host States permit or encourage foreign investment, and the conflicting interests of investors and host States. We also will consider the historical development of attitudes towards investment, the various actors in the field, and the sources of international law on foreign investment.

Readings:

Sornarajah, 1-30, 34-39, 50-110

TOPIC 2: STATE RESPONSIBILITY AND ATTRIBUTION

Investment treaties regulate State action. States can be held internationally responsible only for acts or omissions that are attributable to them under customary international law. This section examines the threshold question of State responsibility and attribution.

Readings:

Abby Cohen Smutny, “State Responsibility and Attribution: When Is a State Responsible for the Acts of State Enterprises? *Emilio Augustín Maffezini v. The Kingdom of Spain*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* (T. Weiler, ed. 2005)

TOPIC 3: SCOPE & COVERAGE OF INVESTMENT AGREEMENTS

The definitions of “investor” and “investment” in an investment agreement affect the scope and coverage of the agreement, and determine who has standing to bring a claim against the host State. In this section, we will compare definitions in various agreements. We will also consider issues arising from nationality requirements, and from the status of foreign investors as minority shareholders in legal entities incorporated in the host State.

Readings:

(a) overview of investment protection agreements

- (i) Sornarajah, 204-18
- (ii) NAFTA Chapter Eleven (familiarize yourself with the basic content and structure; we will consider specific provision in more detail later in the course)

(b) covered investments and investors

- (i) Sornarajah, 220-28
- (ii) Compare definitions of “investor” and “investment” in: NAFTA art. 1139; US Model BIT art. 1; Ethiopia-Malaysia BIT art 2.(a) (“made in accordance with the laws, regulations and national policies”); Sweden-Malaysia BIT art. 1(e)(i) (“approved projects”); Colonia Protocol art. 1.2; *see also* ICSID Convention art. 25(1)
- (iii) Barton Legum, *Defining Investment and Investor: Who Is Entitled to Claim?* ICSID/OECD/UNCTAD SYMPOSIUM ON MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS: A COMMON AGENDA, Paris, 12 December 2005
- (iv) *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2 [U.S.-Sri Lanka BIT], Final Award, 15 Mar. 2002 ¶¶ 31-62 & Concurring Opinion

(c) nationality requirements/continuous nationality

- (i) Anthony C. Sinclair, Nationality Requirements for Investors in ICSID Arbitration – The Award in *Soufraki v. United Arab Emirates* (12 Aug. 2004)
- (ii) *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 [NAFTA], Award, 30 Apr. 2004 ¶¶ 77-85
- (iii) *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 [Netherlands-Bolivia BIT], Decision on Respondent’s Objection to Jurisdiction, 21 Oct. 2005 ¶¶ 1-7, 50-78 (factual background), 206-64, 315-23
- (iv) *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/10 [Ukraine-Lithuania BIT] Decision on Jurisdiction, 29 Apr. 2004 ¶¶ 1-4 (background), 14-56
- (v) *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 [NAFTA], Final Award (June 26, 2003) ¶¶ 30-41 (facts), 220-39 (continuous nationality)

(d) minority shareholder standing

- (i) *Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Second Phase* (Belgium/Spain), Judgment of 5 Feb. 1970 ¶¶ 28, 30-33, 35-38, 40-41, 44-48, 50-52, 55-67, 69-71, 76-77, 79-81, 83, 88-90, 92-96, 99-101, 103
- (ii) *Gami Investments, Inc. v. United Mexican States*, UNCITRAL [NAFTA], Submission of the United States of America of 30 June 2003
- (iii) *Gami Investments, Inc. v. United Mexican States*, UNCITRAL [NAFTA], Final Award of 15 Nov. 2004 ¶¶ 12-22 (factual background), 23 (claims), 26-43 (jurisdiction and standing), 116-33 (merits: expropriation)
- (iv) *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8 [U.S.-Argentina BIT], Decision on Jurisdiction of 17 July 2003 ¶¶ 18-21 (factual background); 36-65 (minority shareholder standing)

(e) relationship between measure and investment

Methanex Corp. v. United States of America, UNCITRAL [NAFTA], First Partial Award of Aug. 7, 2002 ¶¶ 22-38, 44-71 (skim facts: focus on the product produced by Methanex versus the application of the California regulations), 127-47

(f) investment agreements and authorizations, “umbrella” clauses, contractual forum selection clauses

- (i) Compare NAFTA art. 1116(1) & U.S. Model BIT art. 24.1

(ii) *North American Dredging Co. of Texas (U.S.A.) v. United Mexican States*, 4 RIAA 26 (1926)

(iii) *Compañía de Aguas del Aconquija S.A. & Vivendi Universal [formerly Compagnie Générale des Eaux] v. Argentine Republic*, ICSID Case No. ARB/97/3 [France-Argentina BIT], Award of 12 Nov. 2000, pages 1-3 (introduction & summary), ¶¶ 24-43, 53-55 (facts and legal positions of the parties; jurisdiction), 77-82 (merits)

(iv) *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 [France-Argentina BIT], Decision on Annulment of 3 July 2002 ¶¶ 60, 72-80 (jurisdiction), 93-115 (merits)

(v) *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 [Swiss-Pakistan BIT], Decision on Jurisdiction of 6 Aug. 2003 ¶¶ 1-6, 10-18 (background), 43-74 (Pakistan's objection to jurisdiction), 83-110 (SGS's response), 146-74 (tribunal findings)

(vi) *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 Jan. 2004 ¶¶ 12-25, 35-43 (the dispute), 50-56, 64-67 (arguments of the parties), 113-64

TOPIC 4: EXPROPRIATION

One of the most important substantive protections accorded to foreign investments by investment protection agreements is the prohibition on expropriation without compensation. In this section, we will examine the expropriation provision in the U.S. Model BIT and survey the developing arbitral jurisprudence on expropriation, focusing on the elusive distinction between non-compensable regulation and expropriation.

Readings:

(i) Compare NAFTA art. 1110 & U.S. Model BIT art. 6, Annexes A & B

(ii) G.C. Christie, What Constitutes a Taking of Property Under International Law? 38 BRIT. YB. INT'L L. 307 (1963)

(iii) W. Michael Reisman & Robert D. Sloane, Indirect Expropriation and Its Valuation in the BIT Generation, 74 BRIT. YB. INT'L L. 115 (2003)

(iv) *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 [Spain-Mexico BIT], Award of 29 May 2003 ¶¶ 35-51 (facts & arguments of the parties), 95-151 (expropriation)

(v) *Methanex Corp. v. United States of America*, UNCITRAL [NAFTA], Final Award of 3 Aug. 2005, Part IV, Chapter D

TOPIC 5: NATIONAL TREATMENT, MOST-FAVORED-NATION TREATMENT, AND PERFORMANCE REQUIREMENTS

Investment agreements typically require that a foreign investor and its investment be treated no less favorably than domestic investors and investments in like circumstances,

or than foreign investors and investments from third countries. In this section, we consider some of issues arising from these prohibitions on discriminatory treatment.

Readings:

- (i) Sornarajah, 233-35, 319-28
- (ii) *S.D. Myers, Inc. v. Canada*, UNCITRAL [NAFTA], Partial Award of 13 Nov. 2000 ¶¶ 88-128 (facts), 130-33, 145-95, 238-56
- (iii) *Methanex Corp. v. United States of America*, UNCITRAL [NAFTA], Final Award of 3 Aug. 2005, Part IV, Chapter B
- (iv) *Pope & Talbot Inc. v. Canada*, UNCITRAL [NAFTA], Award on the Merits of 10 Apr. 2001 ¶¶ 18-29 (facts), 73-104 (in like circumstances)
- (v) *Marvin Feldman v. Mexico*, Case No. ARB(AF)/99/1 [NAFTA], Award of 16 Dec. 2002 ¶¶ 1, 6-23 (facts), 154-88 (national treatment)
- (vi) *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case. No. UN 3467 [U.S.-Ecuador BIT], Final Award of 1 July 2004 ¶¶ 1-6, 25-35 (facts), 167-179 (national treatment)
- (vii) OECD Working Paper – “Most-Favoured-Nation Treatment in International Investment Law” (29 Sept. 2004)

TOPIC 6: THE MINIMUM STANDARD OF TREATMENT: FAIR & EQUITABLE TREATMENT, DENIAL OF JUSTICE, FULL PROTECTION AND SECURITY

Perhaps no subject matter divides scholars and practitioners in the area of foreign investment law more than the scope and content of the “fair and equitable treatment” standard. In this section, we will review the historical roots of that standard, compare the articulation of that standard in various investment agreements and consider interpretations by tribunals. We will also study the international delicts of denial of justice and full protection and security.

Readings:

(a) MST/fair & equitable treatment

- (i) Compare NAFTA art. 1105(1) & U.S. Model BIT arts. 5.1-5.3
- (ii) Sornarajah, 315-19; 328-43
- (iii) OECD Working Paper on Fair and Equitable Treatment in International Investment Law (Sept. 2004)
- (iv) *International Thunderbird Gaming Corp. v. United Mexican States*, UNCTRAL [NAFTA], Final Award of 26 Jan. 2006 ¶¶ 41-84 (facts); 192-200 (minimum standard of treatment)

(v) *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB 01/8, [U.S.-Argentina BIT], Final Award of 12 May 2005 ¶¶ 53-83 (skim facts), 266-284 (fair & equitable treatment)

(b) denial of justice

(i) *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 [NAFTA], Award 11 Oct. 2002 ¶¶ 37-40 (facts), 126-57 (denial of justice)

(ii) *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 [NAFTA], Final Award of 26 June 2003 ¶¶ 124-37, 142-71, 207-17

(c) full protection and security

American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1 [U.S.-Zaire BIT], Award of 21 Feb. 1997 ¶¶ 3.03 -3.06 (background), 6.01 - 6.11 (full protection and security)

TOPIC 7: DISPUTE RESOLUTION

A dispute resolution mechanism is a common feature of BITs and other investment protection agreements. In this section, we will examine some of the key features of such mechanisms, and consider how those mechanisms have evolved under the “new generation” of investment agreements.

Readings:

(a) general

Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, HARV. INT'L L.J. (2002)

(b) place of arbitration

ADF Group Inc. v. United States of America, Procedural Order No. 2 Concerning Place of Arbitration, ICSID Case No. ARB(AF)/00/1

(c) time limitations

Mondev Int'l Ltd. v. United States of America, 42 I.L.M. 85 ¶¶ 37-48 (facts), 51-52, 57 - 75, 87

(d) waiver of local remedies

(i) Compare: NAFTA art. 1121(1)(b) (no “u-turn”); U.S.-Ecuador BIT art. VI(2) & (3) (“fork-in-the-road”), II(3)(b)

(ii) Dodge, William S., Waiver of Right to Initiate or Continue Other Legal Proceedings - Effect of Pursuing Municipal Law Claims in Municipal Court (*Waste Management, Inc. v. Mexico*), 95 AJIL 186-92 (2001)

(iii) *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, Final Award, LCIA Case. No. UN 3467 [U.S.-Ecuador BIT]. Award of 1 July 2004 ¶¶ 38-63

(e) arbitrator selection and challenges

Barton Legum, *Arbitrator Selection and Challenges in Investor-State Arbitration*, AMERICAN ARBITRATION ASSOCIATION-INTERNATIONAL DISPUTE RESOLUTION CENTER AND BAKER & MCKENZIE, SEMINAR ON OVERCOMING CHALLENGES TO EFFECTIVE INTERNATIONAL ARBITRATION, New York, New York, Oct. 14, 2003

(f) confidentiality and third party participation

(i) Andrea J. Menaker, Benefiting from Experience: Developments in the United States' Most Recent Investment Agreement, 12 U.C. DAVIS J. INT'L L. & POL'Y 121 (2005)

(ii) *Aguas Argentinas et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* pf 19 May 2005

(g) appellate mechanism

David A. Gantz, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges, EXPRESSO PREPRINT SERIES (2005)
<http://law.bepress.com/cgi/viewcontent.cgi?article=3890&context=expresso>

(h) consolidation

OECD Paper on Consolidation (forthcoming)

Free On-line Resources:

BITs & investment agreements

- **UNCTAD compilation of BITS:** http://www.unctadxi.org/templates/DocSearch_779.aspx
- **2004 U.S. Model BIT:** http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

BIT & investment agreement decisions

- **ICSID online decisions:** <http://www.worldbank.org/icsid/cases/awards.htm>
- **U.S. State Department NAFTA website:** <http://www.state.gov/s/l/c3439.htm>
- **Investmentclaims.com:** <http://72.14.203.104/search?q=cache:hJwvvejSys8J:www.investmentclaims.com/oa1.html+%22ARB/97/6%22&hl=en&gl=us&ct=clnk&cd=3>
- **Investment Treaty Arbitration (“ITA”):** <http://ita.law.uvic.ca>

International law cases

- **CQ Press:** <http://www.cqpress.com/cs/rochester/appxB.htm>
- **Edmond Montgomery Publications:** <http://www.emp.ca/intlaw7/cases.html>