

**SEMINAR ON INTERNATIONAL INVESTMENT LAW****ILO-L232**

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The purpose of this seminar is to examine the law, policies, and legal issues affecting foreign investment and foreign enterprises in principal host countries, with special emphasis on the developing world and emerging markets. Particular attention is devoted to the international law affecting investment. The seminar is divided into the following principal parts:

- I. International Investment and the Multinational Investor
- II. The International Legal Framework for International Investment
- III. Bilateral Investment Treaties
- IV. Regional and Multilateral Investment Treaties.
- V. Political Risk and Protective Treaty Provisions
- VI. The National Regulatory Framework and Host Country Laws
- VII. Legal Mechanisms for Structuring and Financing Foreign Direct Investment Projects
- VIII. Foreign Portfolio Investment in Emerging Markets
- IX. Investment Disputes and Their Settlement

**Class Meetings: Thursdays, 3:20-5:20 p.m.,**

### **Readings, Class Assignments and Exercises**

The readings for the course are on the Tufts University Blackboard. ([Blackboard.Tufts.edu](http://Blackboard.Tufts.edu))

The teaching method employed in the seminar will be primarily discussion. Students are expected to do the relevant readings in advance of the class and to participate actively in class discussions and exercises.

### **Grading and Assessment**

Each student in the course has the option of either:

- (1) submitting a 30-35 page, double spaced paper (12 point font) on a relevant topic selected by the student with the approval of the instructor; or
- 2) taking a closed-book, eight-hour, self-scheduled final examination.

Students will also participate in a simulated negotiation and other exercises. **Students wishing to write a paper must select a topic no later than February 7.** A student's grade for the seminar will be based on the grade received for the paper or examination (65%), written exercises (20%) and participation in discussions (15%). **Papers must be submitted to the instructor no later than April 25, 2008.**

## READING LIST

### **PART I: FOREIGN INVESTMENT AND THE MULTINATIONAL INVESTOR** **(Classes 1 & 2: January 17 - 24)**

This seminar will begin with an examination of the nature of international investors, the reasons that they invest abroad, the types of investment transactions in which they engage, and the reasons that host countries permit and/or actively encourage foreign investment. It will also explore the role that law plays in the investment process. Among the questions to be asked are the following:

- a. What are the various meanings of the term "foreign investment"?
- b. What is the difference between direct foreign investment and portfolio foreign investment?
- c. What is the nature and magnitude of foreign investment?
- d. What strategies do investors and host countries pursue in the investment process?
- e. What are the costs and benefits of foreign investment to the investor, the host country, and the investor's home country?
- f. What effect does foreign investment have on the host country and on the investor?
- g. What are the concerns of home countries about foreign investment by their nationals and companies?
- h. What theories explain foreign investment?
- i. What is a multinational enterprise?
- j. What special legal problems do multinational enterprises raise?
- k. What role does law play in the process of making foreign investments?

After you have read the required readings, consider the hypothetical joint venture (Ruritania Refrigerator Company, Ltd.). What issues are of concern to the investors, to their home countries, and to the host country Ruritania?

#### **REQUIRED READING**

##### **1. What is investment?**

- i. Theodore H. Moran, Introduction & Synopsis, and Section 1. The Impact of FDI on Host-Country Development: The Heritage of Theory & Evidence, in *FOREIGN DIRECT INVESTMENT & DEVELOPMENT* 19–25 (1998).
- ii. World Investment Report 2006, Overview and Chapter 1.
- iii. Jeswald W. Salacuse, "Undertaking A Direct Foreign Investment," in *Streng & Salacuse, INTERNATIONAL BUSINESS PLANNING* §§ 19.01–19.03 (1998).
- iv. *Mihaly Int'l Corp v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (March 15, 2002) [[worldbank.org/icsid/cases/awards.htm](http://worldbank.org/icsid/cases/awards.htm)] (Listed no. 23 on the list of awards). See also *Mihaly* Concurring Opinion.
- v. *Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction (August 3, 2006)  
[http://worldbank.org/icsid/cases/pdf/ARB0319\\_DecisiononJurisdiction03-19.pdf](http://worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf)

## 2. Context (Globalization & General Economic Trends)

- i. Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 *THE INT'L LAWYER* 875–90 (2000).
- ii. Wolfgang Reinecke, *Globalization of Economic Activity*, in *GLOBAL PUBLIC POLICY: GOVERNANCE WITHOUT BORDERS* 11–21 (1998) [Brookings Institution].
- iii. “The investment climate, growth & poverty” (Chapter 1) in *World Development Report 2005*, at 19–35.

## 3. Theoretical Framework

- i. Joseph M. Grieco, *Foreign Investment & Development: Theories & Evidence*, in Theodore H. Moran, ed., *INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL* 35–60 (1986).

## 4. Developing Country Challenges

- i. “Confronting the Underlying Challenges” (Chapter 2) in *World Development Report 2005*, at 36–55.

## 5. A Practical Framework

- i. David N. Goldsweig, “Hypothetical Joint Venture: Ruritanian Refrigerator Company, Ltd.”, in Goldsweig and Cummings, eds., *International Joint Ventures : A Practical Approach to Working with Foreign Investors in the U.S. and Abroad* 3-4 (1990).

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## **PART II: THE INTERNATIONAL LEGAL FRAMEWORK FOR FOREIGN INVESTMENT**

### **(Class 3: January 31)**

This section will examine the rules, principles and institutions of public international law that affect direct foreign investment. Among the questions to be considered are the following:

- a. What are the sources of international law? What are the sources of international investment law?
- b. What other laws govern international investments?
- c. In theory, how does international law affect investment?
- d. In practice, how might it affect the proposed Ruritanian Refrigerator Company?
- e. What methods are available to settle international investment disputes?
- f. How do the views of Industrialized and Developing countries differ with respect to the nature and content of international investment law?
- g. How might the nature and sources of international investment law evolve in the future?
- h. To what extent do international legal rules and institutions actually influence the flow of international investment?

### **REQUIRED READING**

## 1. Basic International Law Frameworks

- i. Article 38 of the Statutes of the International Court of Justice.  
<http://www.icj-cij.org>
- ii. David J. Bederman, *INTERNATIONAL LAW FRAMEWORKS* (Part One – Sources & Methods of International Law) (2<sup>nd</sup> ed., 2006) 1–49.

## 2. Overview

- i. “International rules & standards” (Chapter 9) in World Development Report 2005, at 175–85.
- ii. “International Agreements to Improve Investment and Competition for Development” (Chapter 4) in Global Economic Prospects 2003, at 117–33.
- iii. Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2004, 2<sup>nd</sup> ed.) 1–30.
- iv. V. V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, in *INT’L & COMP. L.Q.* 747 (1998)
- v. § 712, Restatement (3d) of the Foreign Relations Law of the United States.
- vi. **General Assembly Resolution 3201**: Declaration on the Establishment of a New International Economic Order.
- vii. **Iran-US Claims Tribunal**: Case Concerning the American International Group, Inc./American Life Insurance Company & the Islamic Republic of Iran/Central Insurance of Iran, 23 ILM 1–23(1984).

## 3. International Investment Agreements

- i. Andreas F. Loewenfeld, *Investment Agreements & International Law*, 42 *COLUM. J. TRANSNAT’L L.* 123 (2003).
- ii. *United States of America v. Italy* (Case concerning *Elletronica Sicula spa (ELSI)*), Judgment of International Court of Justice, 20 July 1989.
- iii. Jeswald W. Salacuse, “The Treatification of International Investment Law,” 13 *Law and Business Review of the Americas* 155-66 (Spring 2007).

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## PART III: BILATERAL INVESTMENT TREATIES

### (Classes 4 & 5: February 7 and 21)

Treaties, both bilateral and multilateral, have increasingly become a basic source of international investment law. In this section of the course we examine bilateral investment treaties, which now number over 2500.

- a. Why have treaties grown in importance as a source of international investment law?
- b. What advantages do treaties have over customary law and general principles of law in the field of international investment?
- c. What disadvantages have bilateral investment treaties entailed?

- d. What are the principal issues treated by bilateral investment treaties (BITS)?
- e. What advice would you give to developing countries considering entering into BITS?

## REQUIRED READING

### 1. Background, History & Effectiveness

- i. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work?: An Evaluation of BITS & Their Grand Bargain* 46 HARVARD INTERNATIONAL LAW JOURNAL 67 (Issue no. 1,2005).
- ii. The United States draft model BIT of 2004:  
[http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf)
- iii. Treaty Between US and Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (2005)  
[http://www.ustr.gov/assets/Trade\\_Agreements/BIT/Uruguay/asset\\_upload\\_file748\\_9005.pdf](http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf)  
When analyzing the Treaty, please, also read closely Annex C (Submission of a Claim To Arbitration), Annex B (Expropriation), and Annex A (Customary International Law)
- iv. For an authoritative collection of international investment agreements, see UNCTAD Compendium of International Investment Instruments at [http://www.unctadxi.org/templates/DocSearch\\_780.aspx](http://www.unctadxi.org/templates/DocSearch_780.aspx)

### 2. Issues

- i. **BITS & Development Policy:** Luke Eric Peterson, IISD, *BITS & Development Policy-making* (2004).
- ii. **BITS as Basis for Arbitration:** *Asian Agricultural Products Limited v. Sri Lanka* (ICSID Case No ARB/87/3) (June 27, 1990), reprinted in 6 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 526 (1991).  
<http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf>  
**Review:** *Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction (August 3, 2006)  
[http://worldbank.org/icsid/cases/pdf/ARB0319\\_DecisiononJurisdiction03-19.pdf](http://worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf)
- iii. **The Need For A New Model?** Konrad von Moltke, IISD, *A Model International Investment Agreement for the Promotion of Sustainable Development* (2004).

### Exercise: Simulated negotiation of a BIT

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## **PART IV: REGIONAL AND MULTILATERAL TREATIES** **(Class 6: February 28)**

In addition to BITS, countries have also entered into various regional and multilateral treaties affecting investment.

- a. How do you evaluate the various multilateral treaties that have emerged in the field of investment?
- b. How do they differ from BITS?
- c. Why have multilateral treaties been slower to emerge than have BITS?

### **REQUIRED READING**

#### **1. Regional investment treaties & BITs Generally**

Cosbey, et al., IISD “Investment & Sustainable Development: A Guide to the Use & Potential of International Investment Agreements” 3–19 (2004).

#### **2. NAFTA**

##### **i. Introduction to the Issues**

1. Text of North American Free Trade Agreement Chapter 11.
2. Guillermo Aguilar Alvarez, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365 (2003).
3. International Trade Strategies Pty, Ltd., *NAFTA Chapter 11 Issues & Opportunities: Research Paper on NAFTA Chapter 11 and its use for illuminating debate on investment provisions in an Australia-US FTA* (2002).

##### **ii. Positive Perspectives**

1. Raymond MacDermott, *NAFTA & Foreign Direct Investment*.
2. NAFTA Secretariat, *NAFTA: A Decade of Strengthening a Dynamic Relationship* (7 pages) (2004) .

##### **iii. Negative Perspectives**

1. Lyuba Zarsky & Kevin P. Gallagher, IRC Americas Program Policy Brief, *NAFTA, Foreign Direct Investment, & Sustainable Industrial Development in Mexico* (2004).
2. Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* 1–16 (2001).
3. New York Attorney-General Eliot Spitzer Letter to Senators Schumer & Clinton, re: Concerns about NAFTA Chapter 11.

#### iv. NAFTA Arbitration

1. Todd Weiler, *NAFTA Investment Arbitration & the Growth of Int'l Economic Law*, 2.0 INT'L BAR ASSOC. 158 (2002).

#### 2. NAFTA jurisprudence:

NAFTA, ARTICLE 1105: FAIR AND EQUITABLE TREATMENT ⇒ *International Thunderbird Gaming Corporation v. The United Mexican States* (January 26, 2006). <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf>

NAFTA, ARTICLE 1110: EXPROPRIATION ⇒ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1. Read paragraphs 102-112 at <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf>

3. Mark Drajem & Christopher Donville, *Methanex Says California additive ban illegal under NAFTA rules*, BLOOMBERG (Jun. 7, 2004) (2–3 pages), available at <http://www.globalexchange.org/campaigns/ftaa/1997.html.pdf>

#### 3. NAFTA & National Courts.

i. NAFTA, ARTICLE 1105 and DENIAL OF JUSTICE ⇒ *The Loewen Group, Inc. v. United States* (ICSID Case No. ARB(AF)/98/3), Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence & Jurisdiction (Jan. 5, 2001). (24 pages – but after reading facts, readers can skip down to page 8, “Claims”)

ii. NAFTA does not provide for an appellate process in Chapter 11 cases. Proceedings in the courts of British Columbia and the United States were nonetheless initiated to set aside some arbitral awards. While you read the cases, please, think about: (1) What legal authority underlies the courts power to adjudicate such petitions? (2) How, if at all, did the British Columbia Supreme Court modify the award? (3) Of what significance, if any, are those modifications? (4) Of what significance is the role of domestic courts on international investment dispute resolution process when they exercise the power of review of international arbitral awards?

⇒ *United Mexican States v. Metalclad* (2001 BCSC 664) British Columbia Supreme Court, May 2, 2001 <http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf>

⇒ *International Thunderbird Gaming Corporation v. United Mexican States*, Judgment of the US District Court for the District of Columbia on petition to set aside award, 14 February 2007.

<http://ita.law.uvic.ca/documents/Thunderbird-setaside.pdf>

#### 4. The Energy Charter Treaty

i. Craig S. Bamberger, “An Overview of the Energy Charter Treaty,” in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE* (THOMAS W. WALDE, ed. 1996), at 1–36.

- ii. For the text of the Energy Charter Treaty and related documents Visit: [www.encharter.org](http://www.encharter.org)
- iii. *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, February 8, 2005, ICSID Case no. ARB/03/24 (Energy Charter Treaty).  
<http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>
- iv. *Petrobart Limited v. Kyrgyz Republic*, Award, March 29, 2005, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty).  
[http://ita.law.uvic.ca/documents/petrobart\\_kyrgyz.pdf](http://ita.law.uvic.ca/documents/petrobart_kyrgyz.pdf)

## 5. OECD Multilateral Agreement on Investment

- i. Charan Devereaux & Michael Watkins, *A Virtual Defeat: Stalling the Multilateral Agreement on Investment*, Cambridge: J.F. Kennedy School of Government Case Program (39 pages).
- ii. Cosbey, et al., IISD, *Investment & Sustainable Development: A Guide to the Use & Potential of International Investment Agreements* 21–26 (2004).

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## **PART V: POLITICAL RISK AND PROTECTIVE TREATY PROVISIONS** **(Classes # 7 & 8: March 6 and 13)**

From the investor's point of view, the purpose of investment treaties is to protect against political risk.

- a. What are the specific political risks that treaties seek to protect against?
- b. What specific provisions seek to protect against risk and how to they work?

### **REQUIRED READING**

#### **1. Risk Generally**

- i. Andrew Seck, "Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty & Its Implications for Mitigating Political Risk," in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE* (THOMAS W. WALDE, ed. 1996), at 110–36.
- ii. N.Kinsella and N.Rubins, *International Investment, Political Risk and Dispute Resolution* (2005). Read Chapter I "Political risk" (1-31)  
Book is located at the Ginn Stacks (K3830.R83 2005)

#### **2. Full Protection and Security**

- i. Obligation to provide physical protection
  - o Review: *Asian Agricultural Products Limited v. Sri Lanka* (ICSID Case No ARB/87/3) (June 27, 1990), *reprinted in* 6 ICSID Review – Foreign Investment

Law Journal 526 paras. 1–86 (majority opinion), pages 628–53 (dissent) (1991)  
<http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf>

- *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case ARB/93/1) 1–3, 27–45 (Feb. 21, 1997).  
<http://ita.law.uvic.ca/documents/AmericanManufacturing.pdf>

ii. Obligation to provide ‘protection and security’ in a wider sense (beyond strictly physical protection):

- *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, UNCITRAL case. Read paragraph 613 at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>
- *Siemens v. Argentina*, Award, 6 February 2007, ICSID Case No. ARB/02/8. Read paragraph §303 at <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>
- *Azurix v. Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12. Read paragraph 408 at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>

### 3. Fair and Equitable Treatment

- i. Rudolf Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties,” 39 *The International Lawyer* 87-106 (2005).
- ii. Review: *International Thunderbird Gaming Corporation v. The United Mexican States* (January 26, 2006). [http://www.iisd.org/pdf/2006/itn\\_award.pdf](http://www.iisd.org/pdf/2006/itn_award.pdf)
- iii. Excerpts from cases interpreting the “fair and equitable standard”.

### 4. Non-Arbitrary & Non-Discriminatory Treatment

- i. *Genin v. Estonia* (ICSID Case No. ARB/99/2) (June 25, 2001).  
<http://ita.law.uvic.ca/documents/Genin-Award.pdf>

### 5. MFN Treatment

- i. Directorate for Financial & Enterprise Affairs, OECD, *Most-Favoured-Nation Treatment in International Investment Law* (Working Papers on Int’l Investment, 2004) available at <http://www.oecd.org/dataoecd/21/37/33773085.pdf>
- ii. *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction 14–25 (Jan. 25, 2000).  
[http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_001.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf)

### 6. Expropriation

- i. Howard Mann, “The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles” (International Institute for Sustainable Development, August 2005). (Note: Students interested in the lengthy award and supporting decisions in this important case should consult [http://www.naftaclaims.com/disputes\\_us6htm](http://www.naftaclaims.com/disputes_us6htm).)

- ii. Restatement of the Law, Third, Foreign Relations Law of the United States, Read §712. Also review *Metalclad Corporation v. Mexico* [See text in section 2(v), Class 6 of February 28]

### 7. Umbrella clause

i. Ch.Schreuer, “*Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road*”, 5 *The Journal of World Investment & Trade* 231-256 (2004).

ii. The umbrella clause was not found to operate so as to make the contract claims justiciable under international law (i.e. did not have the effect of elevating the contract claims to treaty claims)

*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Swiss Confederation/Pakistan BIT). Read paragraphs 146-174 at

[http://ita.law.uvic.ca/documents/SGSvPakistan-decision\\_000.pdf](http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf)

iii. The umbrella clause was found to make the contract claims justiciable under international law.

*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6. (Swiss Confederation/Republic of the Philippines BIT). Read paragraphs 113-128 at [http://ita.law.uvic.ca/documents/SGSvPhil-final\\_001.pdf](http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf)

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## **PART VI: THE NATIONAL REGULATORY FRAMEWORK**

**(Class 9: March 27)**

This section will examine host country laws that both encourage and regulate foreign investment. Among the questions to be considered are the following:

- a. What are the functions of host country investment laws?
- b. How do they seek to achieve their ends?
- c. What is the theory or theories on which they are based?
- d. Refer to the *Case of the Democratic Republic of Agraria*. How should Agraria go about preparing its investment code? What provisions should its code contain?
- e. Should the United States adopt legislation to control investment by foreigners in the United States?
- f. How do host countries promote foreign investment?
- g. What policies and laws should host countries adopt to retain investments that are made?

### **REQUIRED READING**

1. Jeswald W. Salacuse, “*Undertaking A Direct Foreign Investment*”, from Streng & Salacuse, International Business Planning s.19.07-19.08, 19.11-19.14. (1998).
2. Regulation & Taxation (Chapter 5) in *World Development Report 2005*, at 95–114.

3. Jeswald Salacuse, *Direct Foreign Investment & the Law of Developing Countries*, 15 ICSID REVIEW – Foreign Investment Law Journal 382 (2000).
4. Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment & Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101 (2003)
5. *Basic elements for foreign investment. legislation in the New Independent States*, 16 ICSD Review–Foreign Investment Law 1 (2001) 67-106
6. See website of the Foreign Direct Investment Promotion Center at <http://www.f DIPROMOTION.COM>

**Exercise: Writing an Investment Code for Agraria.**

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**PART VII: LEGAL MECHANISMS FOR STRUCTURING AND FINANCING FOREIGN DIRECT INVESTMENT**

**(Class 10: April 3)**

This section will examine the establishment of the enterprise and the rules that affect the way in which it is organized and financed. To a large extent, these rules are contractual in nature and are determined through a process of negotiation between the parties and between the investors and the government. Among the questions to be considered are:

- a. How does law affect the structure of a foreign investment project?
- b. What legal forms are available to structure foreign investment projects?
- c. Why does it matter what structure the parties use?
- d. Why did the organizers of the Ruritanian Refrigerator Company choose to organize it the way they did?
- e. How does law influence the privatization process?
- f. What do B.O.T.'s and debt-to-equity conversions have in common?

**REQUIRED READING**

**1. Structuring Foreign Direct Investment Transactions**

N.Kinsella and N.Rubins, *International Investment, Political Risk and Dispute Resolution* (2005). Read Chapter II “Structuring Transactions to Minimize Political Risks” (31-69). The book is located at the Ginn Stacks (K3830.R83 2005)

**2. Case Studies**

- i. David Goldsweig, “Hypothetical Joint Venture: Ruritanian Refrigerator Company, Ltd.,” *in* *International Joint Ventures* 3–27.
- ii. Chad-Cameroon Pipeline case
  1. Chad-Cameroon Pipeline, Assorted articles
  2. BENJAMIN C. ESTY, *THE CHAD-CAMEROON PETROLEUM DEVELOPMENT & PIPELINE PROJECT (A) & (B)*, Cambridge: J.F. Kennedy School of Government Case Program, 1998.

### 3. Project Finance

BENJAMIN C. ESTY & IRINA L. CHRISTOV, AN OVERVIEW OF PROJECT FINANCE – 2001 UPDATE, Cambridge: J.F. Kennedy School of Government Case Program, 2002.

M. FOUZUL KABIR KHAN & ROBERT J. PARRA, “What is Project Finance,” Chapter 1 *in* FINANCING LARGE PROJECTS: USING PROJECT FINANCE TECHNIQUES & PRACTICES 3–37 (2003).

KHAN & PARRA, “Project Agreements,” Chapter 5 *in* FINANCING LARGE PROJECTS 205–53.

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## **PART VIII: PORTFOLIO INVESTMENT IN DEVELOPING COUNTRIES**

**(Class # 11, April 12)**

A relatively new phenomenon in many developing countries is portfolio investment, particularly by foreigners.

1. What special problems does this phenomenon pose for investors and for host countries?
2. How important is a legal and regulatory framework to the functioning of stock markets in developing countries?
3. What should such a legal framework consist of?

### **REQUIRED READING**

1. Bernard Black, *The Legal and Institutional Preconditions for Strong Securities Markets* 48 UCLA L. REV. 781 (2001)
2. Troy Paredes, *The Importance of Corporate Law: Some Thoughts on Developing Equity Markets in Developing Countries* 19 Global Business and Development Law Journal 401-409 (2007).
3. The Case of the India Fund: *Prospectus of the India Fund*

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## **PART IX: INTERNATIONAL INVESTMENT DISPUTES AND THEIR SETTLEMENT**

**(Class #12 & 13, April 13 and 26).**

What causes investment disputes? What methods are available to resolve them? How effective are the available methods? What policy implications do such disputes have beyond the parties immediately involved?

### **REQUIRED READING**

#### **1. International Investment Arbitration**

### **i. Investment Arbitration Generally**

1. UNCTAD, *International Investment Disputes on the Rise* (Occasional Note, 29 November 2004).
2. Charles Brower, *The Coming Crisis in the Global Adjudication System*, 13 WORLD ARB. & MEDIATION REP. 270 (2002),
3. Barton Legum, "Trends & Challenges in Investor-State Arbitration," *Arbitration International*, 2003

### **ii. International Centre for Settlement of Investment Disputes (ICSID)**

1. Andrés Rigo Sureda, *ICSID: An Overview*, 13 WORLD ARB. & MEDIATION REP. 166 (2002).
2. William D. Rogers, "The Emergence of the International Centre for the Settlement of Disputes as the Most Significant Forum for the Submission of Bilateral Investment Treaty Disputes," Presentation to the IADB Conference (Oct. 26–27, 2000).
3. David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the momentum hold?*, 23 PENN ST. INT'L L. REV. 147 (2004).
4. ICSID Convention: see <http://icsid.worldbank.org/ICSID/FrontServlet>
5. ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration Discussion Paper (2004).

### **iii. Jurisdiction**

1. *Tradex Hellas S.A. v. Republic of Albania*, Decision on Jurisdiction (ICSID Case No. ARB/94/2) (Dec. 24, 1996), *reprinted in* ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 161.
2. *Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction (August 3, 2006) [http://worldbank.org/icsid/cases/pdf/ARB0319\\_DecisiononJurisdiction03-19.pdf](http://worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf)

## **2. The Three Prerequisites of ICSID Competence: *Ratione Materiae*, *Ratione Personae*, & *Ratione Voluntatis***

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2. William W. Park, *The Contours of Arbitral Jurisdiction: Who Decides What?*, INT'L ARBITRATION NEWS 2–10 (Summer 2003) .
3. *Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Order In Response to Petition for Transparency and

Participation as *Amicus Curiae* (May 19, 2005).  
<http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf>

### 3. International Mediation and Conciliation

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2. Thomas W. Wälde, *Pro-Active Mediation of International Business & Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management* (2003), available at [www.aci-adr.com/pdf/articles/TW-Mediation-Notice.PDF](http://www.aci-adr.com/pdf/articles/TW-Mediation-Notice.PDF).

### 4. Renegotiation

1. Jeswald W. Salacuse, “Renegotiating Existing Transactions,” (Chapter 16) in *THE GLOBAL NEGOTIATOR: MAKING, MANAGING & MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY* 229–55 (2003).
2. Klaus P. Berger, *Renegotiation & Adaptation of International Investment Contracts: The Role of Contract Drafters & Arbitrators*, 36 *VANDERBILT J. TRANSNAT’L L.* 1347 (2003) (34 pages).

**Exercise: Simulation of the Resolution of an Investor-State dispute.**

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THE END OF THE COURSE  
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