International Investment Law LLM
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Each two hour seminar will consist of an hour long lecture followed by an hour long tutorial discussion.

REQUIRED TEXTBOOK and OTHER SOURCES:


Journal articles are available on-line on either Westlaw or Hein On-Line

ICSID materials are available on-line at www.worldbank.org/ICSID

Bilateral Investment Treaties are available on the UNCTAD website under International Investment Instruments: www.unctad.org/iiia

Organization of Economic Cooperation and Development materials available at www.oecd.org

OTHER USEFUL TEXTBOOKS:


* recommended

SEMINARS:

1. Introduction to Foreign Direct Investment: Trends, Rationals and the Historical and Political Context
   Schreuer: Ch 1, 3,
   Sornarajah: Ch 1, 2
Discussion Questions:
1. What are the various meanings of the term ‘foreign investment’?
2. What is the difference between direct foreign investment and portfolio investment?
3. What is the nature and extent of international investment?
4. What types of strategies do investors in foreign states undertake?
5. What are the advantages and disadvantages of foreign investment to the investor, the host country and the home country?
6. What legal problems are faced by multinational corporations?
7. What role does international law play in international investment?
8. To what degree has the recent economic recession affected trends in foreign direct investment?

2. Controls of Multinational Corporations by the Host State
Schreuer: Ch 5, 8
Sornarajah: Ch 3


Discussion Questions:
1. What are the functions of host state investment laws?
2. How do host states seek to achieve their aims?
3. What is the theory or theories on which investment laws are based?
4. How should the approach towards investments laws differ between developed and developing states?
5. What considerations should influence whether a state adopts legislation to control investment by foreigners?
6. How do host countries promote foreign investment?
7. What policies and laws should host countries adopt to retain investments that are made? Might there be any negative repercussions of such laws?

8. In what non-regulatory activities could host states engage to encourage foreign direct investment?

3. The Liability of Multinational Corporations and Home State Measures
Sornarajah: Ch 4

Council Regulation EC 44/2001
Lubbe v Cape plc [2000] 1 WLR 1545


Discussion Questions:
1. What considerations will home state courts implement when deciding to take jurisdiction over an extraterritorial claim?
2. How is nationality established for the purposes of litigating claims against foreign corporations?
3. What types of claims are brought against multinational corporations in the domestic courts?
4. Are domestic civil courts well-equipped to adjudicate claims of this nature?
5. What other legal problems must a court consider after deciding to take jurisdiction over an extraterritorial claim?
6. How can investors protect themselves against extraterritorial claims?
7. In what way should legislation regarding extraterritorial be modified to balance the interests of claimants and investors?
8. What are the alternatives to suing a multinational corporation in a domestic court in order to achieve legal redress?

4. Bilateral Investment Treaties, Regional Trade Agreements and Multilateralism (MIGA and WTO)
Schreuer: Ch 2, 9
Sornarajah: Ch 5, 6

United States Draft Model BIT <www.bilaterals.org>

V Mosoti, ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught In
Between?’ (2005-06) 26 Northwestern Journal of International Law and Business 95

Discussion Questions:
1. Why do states choose to enter into Bilateral Investment Treaties?
2. Why have treaties grown in importance as a source of international investment law?
3. What are the specific political risks that BITs aim to protect against?
4. What disadvantages are entailed by a BIT and what advice would you give to a state considering entering into a BIT?
5. Why has a multilateral approach to the regulation of international investment failed?
6. What other sources of law affect international investment other than BITs?
7. How might the nature and sources of international investment law evolve in the future?
8. What advice would you give to developing countries considering entering into BITs?

5. National Treatment and Most Favoured Nation Standards
Schreuer: Ch 4, 7
Sornarajah: Ch 5

Maffezini v Spain (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction


Discussion Questions:
1. What is meant by a National Treatment standard and how does this requirement affect host state sovereignty?
2. What exceptions are typically maintained for National Treatment?
3. What is the Most Favoured Nation standard and what exceptions might typically apply to it in the context of a BIT?
4. What is meant by the term “better than national treatment” and why might a host state accord this to an investor?
5. How are investments compared for the purposes of assessing compliance with the Most Favoured Nation and National Treatment standards?
6. What is the difference between the European and North American models of the Most Favoured Nation standards?
7. How does the ejusdem generis principle apply to the Most Favoured Nation concept in a treaty?
8. Do the National Treatment and Most Favoured Nation concepts exist outside of investment treaties?

6. Fair and Equitable Treatment, Full Protection and Security and Umbrella Clauses
Schreuer: Ch 4, 7
Sornarajah: Ch 7

Pantechniki S.A. Contractors & Engineers v Republic of Albania ICSID Case No. ARB/07/21


Discussion Questions:
1. What are the specific political risks that investment treaties seek to protect against?
2. What specific provisions in BITs attempt to protect against investment risks and how do they work?
3. To what extent should a host state be responsible for protecting investors against civil disturbances?
4. Should the full protection and security obligation be linked to the host state’s resources?
5. What are umbrella clauses and should they be enforceable?
6. Is there consistency in the understanding and application of the fair and equitable treatment standard?
7. Is the fair and equitable treatment standard linked to customary international law or is it an autonomous concept?
8. Under what circumstances might an investor allege that the fair and equitable treatment standard had been breached?

7. Expropriation and Standards of Compensation
Schreuer: Ch 6
Sornarajah: Ch 8, 9, 10

Methanex v United States, Award, 44 ILM (2005) 1345


S Subedi, ‘The Challenge of Reconciling the Competing Principles of Within the Law of Foreign Investment With Special Reference to the Term “Expropriation”’ (2006) 40 International Law 121

Discussion Questions:
1. What is the difference between direct and indirect expropriation?
2. What is creeping expropriation?
3. How is compensation calculated for expropriation?
4. By what methods are assets evaluated for the purposes of establishing compensation?
5. What is the difference between damnum emergens and lucrum cessans in the establishment of monetary damages?
6. What is the Hull formula and should it be used in international investment law?
7. When will government takings be viewed as a legitimate exercise of authority?
8. What types of investment property are capable of being expropriated?

8. International Investment Arbitration: the ICJ, the Iran-US Claims Tribunal and UNCITRAL
Schreuer: Ch 10

United States of America v Italy (ELSI Case) ICJ (20 July 1989)

C Brower, ‘Is Arbitration a Threat or Boon to the Legitimacy of International Investment Law?’ (2009) 9 Chicago Journal of International Law 471

Discussion Questions:
1. What causes investment disputes?
2. What methods are available to resolve them?
3. How effective are available methods?
4. What policy implications do such disputes have beyond the parties immediately involved?
5. What is the legal significance of the Iran US Claims Tribunal?
6. Are UNCITRAL rules well suited to settle international investment disputes?
7. Is arbitration sufficiently inclusive to deal with all of the issues raised in international investment disputes?
8. Is there a coherent body of “case law” in international investment law? To what extent would a standing appellate body contribute to this?


Schreuer: Ch 10

Metalclad Corporation v United Mexican States ICSID Case No. ARB(AF)97/1 ICSID Convention Arts 25-27, 41-47, 53-55


Discussion Questions:
1. Who may use ICSID to settle a dispute?
2. How is an ICSID tribunal constituted?
3. What rules govern the proceedings in an ICSID hearing?
4. What were the claims of the parties in *Metalclad*? What laws does the tribunal use to reach a decision and how are losses assessed?
5. To what extent can ICSID awards be viewed as precedents? What are the advantages and disadvantages of this situation?
6. What is the “fork in the road” issue?
7. Is there an appeals mechanism from ICSID decisions?
8. What remedial powers does an ICSID tribunal possess?

Sornarajah Ch 4

‘Declaration on International Investment and Multinational Enterprises’ OECD


Discussion Questions:
1. To what extent does international investment law take into account the interests of citizens in host states?
2. Why might a host state be disinterested in the welfare of its own citizens when seeking to attract foreign direct investment?
3. How might human rights issues be addressed in international investment law?
4. How can environmental protection be ensured in conjunction with foreign investment activities?
5. Should multinationals have a duty to maintain adequate working conditions and how can this be achieved?
6. How can international investment arbitration be more sensitive to public interest issues?
7. Is international investment law biased in favour of multinational corporations at the expense of states?
8. What may be meant by the concept of “constitutionalizing” states through investment law? How can this process be controlled?