

International Investment Law LLM

2010

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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:

R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008)

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/ia

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

OTHER USEFUL TEXTBOOKS:

*M Sornarajah, *The International Law on Foreign Investment* (2d edition, Cambridge University Press, 2004)

P Muchlinski, *Multinational Enterprises and the Law* (2d edition, Oxford U Press, 2007)

S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, 2008)

* recommended

SEMINARS:

1. Introduction to Foreign Direct Investment: Trends, Rationals and the Historical and Political Context

Schreuer: Ch 1, 3,
Sornarajah: Ch 1, 2

K Vandeveld, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis Journal of International Law and Policy 157

World Investment Report 2009: Overview and Chapter 1
<www.unctad.org/en/docs/wir2009_en.pdf>

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

T Lothian and K Pistor, 'Local Institutions, Foreign Investment and Alternative Development: Some Views From Practice' (2003) 42 Columbia Journal of Transnational Law 101

C Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 University of Pennsylvania Journal of International Law 725

W Shan, 'From "North South Divide" to "Public Private Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2007) 27 Northwestern Journal of International Law and Business 631

R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law and Policy 953

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

L Dhooge, 'A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations' (2006-07) 13 U.C. Davis Journal of International Law and Policy

C Shaw, 'Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act' (2002) 54 Stanford Law Review 1359

W O'Brien, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66 Modern Law Review 491

A Sabater, 'Extraterritorial Jurisdiction in Civil, Commercial, and Investment Matters' (2007-08) 14 ILSA Journal of International & Competition Law 461

A Johnston, 'Interim Injunctions and International Jurisdiction' (2008) 27 Civil Justice Quarterly 433-444

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
J Salacuse & N Sullivan, 'Do BITs Really Work? An Evaluation of BITs and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67
A Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Columbia Journal of Transnational Law 123
E Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?' (2008-09) 34 Brooklyn Journal of International Law 303
J Salacuse, 'The Treatification of International Investment Law' (2007) 13 Law and Business Review of the Americas 155

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

'Most Favoured Nation Treatment in International Investment Law' OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment, 2004/2

D Wallace and D Bailey, 'The Inevitability of National Treatment of Foreign Direct Investment With Increasingly Few and Narrow Exceptions' (1998) 31 Cornell International Law Journal 615

S Vesel, 'Clearing the Path Through a Tangled Jurisprudence: Most-Favored Nation in Bilateral Investment Treaties' (2007) 32 Yale Journal of International Law 125

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

‘The Fair and Equitable Treatment Standard in International Investment Law’ OECD Directorate for Financial and Enterprise Affairs, Working Papers On International Investment, 2004/3

R Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties’ (2005) 39 International Law 87

J Wong, ‘Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes’ (2006) 14 George Mason Law Review 135

S Schill, ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’ (2009) 18 Minnesota Journal of International Law 1

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

'Indirect Expropriation and the Right to Regulate in International Investment Law' OECD Directorate for Financial and Enterprise Affairs, Working Papers On International Investment 2004/4

M Abdala, 'Key Damage Compensation Issues in Oil and Gas International Arbitration Cases' (2009) 24 American University International Law Review 539

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

J Marlles, 'Public Purpose, Private Losses, Regulatory Expropriation and Environmental Regulation in International Investment Law' (2006-07) 16 Journal of Transnational Law and Policy 275

D Collins, 'Reliance Based Remedies at ICSID' (2009) 29 Northwestern Journal of International Law and Business 101-122

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)

A Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2008) 113 Penn State Law Review 1269

S Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435

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

L Nottage & K Miles, 'Back to the Future for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' (2009) 26:1 Journal of International Arbitration 25

O Chung, 'The Lopsided International Investment Law Regime and Its Effect On the Future of Investor-State Arbitration' (2007) 47 Virginia Journal of International Law 953

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?

9. International Investment Arbitration: ICSID

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

K Supnik, 'Making Amends: Amending The ICSID Convention To Reconcile Competing Interests In International Investment Law' (2009) 59 Duke Law Journal 343

A Leeks, 'The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 U of Toronto Faculty of Law Review 1

D Sedlak, 'ICSID's Resurgence in International Investment Law: Can the Momentum Hold?' (2004) 23 Penn State International Law Review 147

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?

10. Public Interest Issues: Environment, Labour, Human Rights and Culture
Sornarajah Ch 4

‘Declaration on International Investment and Multinational Enterprises’ OECD
‘Draft United Nations Code of Conduct on Transnational Enterprises’ United Nations Conference on Trade and Development

D Collins, ‘A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period’ (2010) Connecticut Journal of International Law [forthcoming]

W Burke White and A Von Staden, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2007-08) 48 Virginia Journal of International Law 307

G Mantilla, ‘Emerging Human Rights Norms for Transnational Corporations’ (2009) 15 Global Governance 279

F Francioni, ‘Access To Justice, Denial of Justice and International Investment Law’ (2009) 20 European Journal of International Law 729

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?