

# **International Investment, Development, and the Law**

**Spring 2014**

Visiting Professor Jeswald W. Salacuse

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Class Hours: Thursday and Friday, 9:50-11:50 a.m.

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## **Description**

This course is designed to introduce first-year students to important concepts and issues in foreign and international law relating to international investment. International investment is an increasingly powerful force for economic growth and development throughout the world.

While economic forces are the essential drivers of international investment, they are not the only factors that influence it. Legal rules and institutions also affect international investment flows. Law determines whether and how investments may be made in a particular country, the nature of the respective rights of investors and host country governments, the means by which governments and investors may adjust their legal relationships to changing circumstances, and the processes they may use to resolve their investment disputes. Lawyers therefore play key roles in the undertaking, management and protection of international investments.

The rules applicable to international investments are derived from three basic legal frameworks: 1) national laws, both of the host country and the investor's home country; 2) contracts, whether between investors and host governments or among investors; and 3) international law, consisting of applicable treaties, customs, and general legal principles developed by states. These three legal frameworks form the basic structure for the course syllabus.

## **Materials**

The basic text for the course is Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013). Other readings will consist of judicial and arbitral decisions, relevant articles and reports, excerpts from legislation and treaties, and problems for class discussion. These supplementary materials are available on the HLS course website and will be compiled in course packets which are available in segments periodically through the Copy Center. In most cases, this syllabus also provides direct on-line links to supplementary readings.

## **Useful Websites**

A few useful websites hold important data bases relating to the laws governing international investments. They include:

1. Investment Instruments on Line (a collection of investment treaty texts)  
[http://www.unctadxi.org/templates/docsearch\\_779.aspx](http://www.unctadxi.org/templates/docsearch_779.aspx)
2. Investment Treaty Arbitration (a collection of investment arbitration awards and decisions)  
<http://ita.law.uvic.ca/>
3. ICSID- International Centre for Settlement of Investment Disputes (cases, ICSID Convention, rules, etc.) <http://icsid.worldbank.org/ICSID/Index.jsp>
4. Foreign Direct Investment Promotion Center (agency of MIGA)  
<https://www.fdipromotion.com/index.cfm?pageID=2>
5. World Bank Group, Investing Across Borders (national laws and regulations on FDI)  
<http://iab.worldbank.org/>
6. Vale Columbia Center on Sustainable International Development  
<http://www.vcc.columbia.edu/>
7. Investment Treaty News (published by the International Institute for Sustainable Development) <http://www.iisd.org/itn/>

## **Examination**

The examination for this course will be an eight-hour, take-home exam. It is tentatively scheduled for Friday, May 9, between 8:30 am and 4:30 pm..

## **Office Hours**

I will hold regular office hours on Wednesday afternoons from 3:00 to 4:30. A signup sheet is posted outside the door of my office. You may also schedule appointments by contacting me by email. If my regular office hours are not possible, a meeting can be scheduled at a mutually convenient time.

## **SYLLABUS**

The basic outline and structure of the course is as follows:

### **Part I: Introduction to International Investment and Applicable Law**

The first part of the course provides an introductory overview of the subject. It will examine the nature of international investment, the various forms that it takes, 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 its development?
- g. What are the concerns of home countries about foreign investment by their nationals and companies?
- h. What theories explain foreign investment?
- i. How does law influence international investment? What is the nature of the various legal frameworks affecting international investment?
- j. What is a multinational enterprise?
- k. What special legal problems do multinational enterprises raise?
- l. What role does law play in the process of making foreign investments?

### **Class 1: (January 30) The Nature and Significance of International Investment and Investors**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 1, pp. 3-23.

Bangladesh *Economist* advertisement, January 1-7, 2011.

*Mihaly Int'l Corp v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (March 15, 2002). See also *Mihaly* Concurring Opinion. Available at <http://italaw.com/sites/default/files/case-documents/ita0532.pdf>

*Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3 (Canada/Costa Rica BIT) (May 19, 2010). Available at <http://italaw.com/sites/default/files/case-documents/ita0031.pdf>

### **Class 2: (January 31) The Relationship between Law and International Investment**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 2, pp. 24-35.

The World Bank, "The Investment Climate, Growth & Poverty" (Chapter 1) in *A Better Investment Climate for Everyone* (World Development Report 2005), at 19–35. Available at [http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327693758977/03\\_WDR\\_PO1\\_Ch01.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327693758977/03_WDR_PO1_Ch01.pdf)

*The Case of the Democratic Republic of Agraria*

### **Class no.3 (February 6) The Three Legal Frameworks for International Investment: National, Contractual, and International**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 3, pp.35-48.

David J. Bederman, *International Law Framework* (3<sup>rd</sup> ed.), Chapters 2 and 3, pp.13-41.

Vienna Convention on the Law of Treaties (VCLT), Articles 1-64. Available at [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

*Kehinde v. Registrar of Companies* [1979] 3 The Law Reports of Nigeria (LRN) 213.

#### **Part II: National Legal Frameworks**

The second part of the course examines the nature of a country's national laws affecting international investment, including the factors that influence national policies and laws on international investment, particularly governmental ideologies, popular attitudes, and accepted economic models of national development. It also explores state controls on the entry and exit of capital, national regulation of foreign investment, and the problem of legal and regulatory instability. Regardless of legal tradition and economic history, national regulatory systems are fundamentally influenced by two, often competing imperatives: the need to encourage the inflow of foreign capital and the need to control it once it has entered the country. The precise balance that the national legal framework strikes between these two imperatives varies from country to country and also changes over time. Among the questions to be considered are the following:

- a. What forces shape national laws governing international investment?
- b. Countries often seek foreign capital in pursuit of "development." What is the meaning of "development"? How have definitions of development changed over time?
- c. What are the functions and goals of a country's investment laws? How do they seek to achieve their ends?
- d. What is the theory or theories on which investment laws are based?
- e. 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? What other parts of the legal system are important in the pursuit of foreign capital?
- f. How and why do countries control the inflow of foreign capital? How does the United States control the investment of foreign capital in its territory?

- g. How and why do countries control the outflow of capital? How does the United States control the US investors and investments outside of its territory?
- h. Privatization has been an important means of encouraging foreign investment. What is privatization? What are the legal means by which it is accomplished? In this regard, consider the elements of the legal framework that Argentina established to privatize the water and sewage system of Buenos Aires, as set out in the case of *Suez et al v. Argentina*.
- i. In the last few decades, many countries have sought to develop securities markets. What policy goals have they sought to achieve through securities markets? What role has law and regulation played in the development of stock markets?.

#### **Class no.4 (February 7) Factors Shaping National Legal Frameworks for International Investment**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 4, pp. 51-74.

Dam, Kenneth, W. "Land, Law, and Economic Development," John M. Olin Law & Economics Working Paper No. 472, University of Chicago, January 2006. Available [http://www.brookings.edu/~media/research/files/papers/2006/1/01trade%20dam/200601dam\\_2.pdf](http://www.brookings.edu/~media/research/files/papers/2006/1/01trade%20dam/200601dam_2.pdf)

Food and Agricultural Organization, "From Land Grab to Win-Win," *FAO: Economic and Social Perspectives*, Policy Brief No. 4, June 2009.

#### **Class no. 5 (February 13) National Regulation Over the Entry and Exit of Capital**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 5, pp. 75-88.

*Hood Corporation v. The Islamic Republic of Iran et. al.*, (Iran Award 142- 100, 1984) 7 Iran-US Claims Tribunal Reporter 36.

#### **Class no. 6 (February 14) National Regulation of International Investment**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 5, pp. 88-136.

*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **read pages 10 – 34 only. (paras. 26-97)**. Available at <http://italaw.com/sites/default/files/case-documents/ita0826.pdf>

#### **Class no.7 (February 20) The Challenges of Legal and Political Change**

Salacuse, Jeswald W. *The Three Laws of International Investment*, Chapter 7, pp.137-155.

Tinoco Case: *Arbitration between Great Britain and Costa Rica* (Award of October 18, 1923), 18 *American Journal of International Law* 147-174 (1924).

### **Part III: Contractual Framework for International Investment**

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 host government. Among the questions to be considered are:

- a. How does law affect the structure of a foreign investment?
- b. What legal forms are available to structure foreign investment projects and enterprises?
- 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?

#### **Class no. 8 (February 21): The Nature and Functions of the Contractual Framework**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 8, pp. 159-170.

*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **read pages 34 – 44 only.** (paras. 98-124)

#### **Class no. 9 (February 27): The Negotiation of Investment Contracts and Arrangements**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 9, pp. 171-203.

*MEDLEE: In Pursuit of a Healthy Joint Venture*

#### **Class no. 10 (February 28): The Nature and Content of International Investment Contracts: Joint Ventures**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 10, pp.204-219.

David Goldsweig, “Hypothetical Joint Venture: Ruritanian Refrigerator Company, Ltd.,” in *International Joint Ventures* 3–27.

**Class no. 11 (March 6): The Nature and Content of International Investment Contracts: Joint Ventures, International Project Finance, and International Loans**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 10, pp.219-244.

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).

Kenneth Hanson et al. “The Dabhol Power Project Settlement: What Happened? And How” *infrastructurejournal.com* Available at [http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol\\_InfrastructureJournal12\\_2005.pdf](http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf)

**Class no 12: (March 7): Political Risk Insurance**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 11, pp. 245-273.

*Bechtel Enterprises International (Bermuda) Ltd; BEn Dabhol Holdings, Ltd;and Capital India Power Mauritius against Overseas Private Investment Corporation*, Award, September 3, 2003. Available at [http://www.opic.gov/sites/default/files/docs/2294171\\_1.pdf](http://www.opic.gov/sites/default/files/docs/2294171_1.pdf)

*Request for Arbitration between the Government of the United States of America and the Government of India*, November 4, 2004. Available at <http://www.opic.gov/sites/default/files/docs/GOI110804.pdf>

**Classes no. 13 and 14 (March 13-14): Contractual Stability, Instability, and Renegotiation**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 12, pp. 274-302.

*ENCO*. (Discussion Case)

*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **review pages 10 – 22 only.** (paras. 26-57)

**Spring Break**

## **Part IV: The International Legal Framework for International Investment**

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 Ruritania 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?

### **Class no. 15 (March 27): The International Law of Investment**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 13, pp. 305-330.

Article 38, Statute of the International Court of Justice. Available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&#CHAPTER_II)

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).

### **Class no. 16 (March 28): The Foundations of International Investment Law**

*Case Concerning the Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity/Merits, Permanent Court of International Justice, September 13, 1928, 1928 PCIJ (ser. A) No. 17, 1-51 available at [http://www.icj-cij.org/pcij/serie\\_A/A\\_17/54\\_Usine\\_de\\_Chorzow\\_Fond\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf)

International Law Commission, *Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001), Articles 1-3, 28-39. Available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)



**Class no. 17 (April 3): The “Treatification” of International Investment Law**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 14, pp. 331-360.

*United States of America v. Italy* (Case concerning Ellettronica Sicula spa (ELSI)), Judgment of the International Court of Justice, 20 July 1989. Available at <http://www.icj-cij.org/docket/files/76/6707.pdf>

*U.S. Model BIT 2012*,  
<http://www.state.gov/documents/organization/188371.pdf>

**Class no. 18 (April 4): The Negotiation, Interpretation, and Application of Investment Treaties**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 14, pp.360-363.

Salacuse, Jeswald W., *The Law of Investment Treaties* 139-157.

The Case of the Democratic Republic of Agraria.

The Vienna Convention on the Law of Treaties, arts. 26-38. Available at [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

**Class no. 19 (April 10): The General Content of Investment Treaties**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 15, pp.364-377.

Tokios Tokelés v. Ukraine, ICSID Case No Arb/02/18 (Decision on Jurisdiction) (April 29, 2004). Available at <http://italaw.com/sites/default/files/case-documents/ita0866.pdf>

**Class no. 20 (April 11): Investment Promotion, Admission, and Establishment**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 15, pp. 378-383

Review: *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3 (Canada/Costa Rica BIT) (May 19, 2010).

*Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal of the European Union [ENG] 26.10.2012,C326/47, Articles 45-66, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>

*European Commission v. Hellenic Republic*, European Court of Justice, Judgment of 8 November 2012, (Case C-244/11), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0244:EN:HTML>

### **Class no. 21 (April 17): Standards of Investment Treatment**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 15, pp.383-397

*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, read pages 25-85.

### **Class no. 22 (April 18): Standards of Investment Treatment and Exceptions**

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 15, pp.398-401.

*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Jurisdiction, August 3, 2006, read especially para.52-68. Available at <http://italaw.com/sites/default/files/case-documents/ita0819.pdf>

*LG&E Energy Corp. v. Argentine Republic*, ICSID CASE ARB/02/1 (Decision on Liability) (3 October 2006). Available at <http://italaw.com/sites/default/files/case-documents/ita0460.pdf>

### **Class no. 23 (April 24): Treaty Breaches, Damages, and Investment Dispute Settlement**

**Review:** International Law Commission, *Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001), Articles 1-3, 28-39.

*LG&E Energy Corp. v. Argentine Republic*, ICSID CASE ARB/02/1 (Award) (July 25, 2007). Available at <http://italaw.com/sites/default/files/case-documents/ita0462.pdf>

*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). Available at <http://italaw.com/sites/default/files/case-documents/ita1034.pdf>

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) Available at <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>

**Class no. 24 (April 26): Investment Dispute Settlement and Conclusion of Course**

Jeswald W. Salacuse, *The Law of Investment Treaties*, Chapter 15 “Investment Treaty Dispute Settlement” pp. 353-392 (2010).

The Acme Chemical Company Problem