

Investment Law Syllabus Project

Vale Columbia Center on Sustainable International Investment



International Investment Law – Policy & Development

First Semester of a Year-Long Course in Investment Law, Policy & Dispute Settlement

I. Introduction to Investment Law and Development Theory

Objectives:

- Discuss the theories that support encouraging foreign direct investment
- Discuss the costs and benefits of foreign investment to the investor, the host country, and the investor’s home country
- Present the idea of the “obsolescing bargain”
- Introduce the sources of international investment law
- Consider the role that law plays in encouraging or discouraging the making of foreign investments
- Discuss the tensions that arise given that multinational enterprises seek to promote their own global interests while governments seek to maximize national welfare
- Identify the concerns of home countries about the foreign investments made by their nationals

Readings:

- UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES, *Foreign direct investment and development*, vol. III, pp. 143-159 (Geneva: UNCTAD, 2005).
- M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 18-30 (2d ed. 2004).
- Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT’L LAW. 875 - 890 (2000).
- 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).

- UNCTAD, UNCTAD Materials, Part 2.6 *Applicable Law* pp. 5-22 (page 14 omitted); 27-31.
- 2003 Canadian Model BIT (skim and use for reference)

Discussion Questions:

- What are the historical bases for the differences between the developed and the developing world in the matter of foreign investment law?
- Is doing business in developing countries riskier than doing it in developed countries? What factors might make it so?
- What are the factors investors should consider when considering whether or not to invest in a developing country?
- What are the reasons states are skeptical about foreign investment and foreign investors? Can you think of “good” reasons? “Bad” reasons?
- Should investors be more cautious about entering foreign markets?
- Does foreign direct investment promote economic development in lesser-developed countries? If so, is it worth the costs or trade-offs that come from permitting FDI?
- Are there certain sectors of the economy, for example the provision of utilities like electricity and water, which should be reserved to the government?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, , FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1-17 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 1-17 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 1-10 (Oxford 2008).
- Kenneth W. Hansen, *PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure*, in PRIVATISING DEVELOPMENT: TRANSNATIONAL LAW, INFRASTRUCTURE AND HUMAN RIGHTS 75 (Michael B. Likosky ed., Martinus Nijhoff 2005).
- JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 37-77 (Oxford 2010).
- Joseph M. Grieco, *Foreign Investment & Development: Theories & Evidence*, in INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL 35060 (Theodore H. Moran ed., 1986).
- *Overview*, in WORLD DEVELOPMENT REPORT 2005 at 1-15 (World Bank 2004).
- DUNNING, JOHN H. AND SARIANNA M. LUNDAN, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY (Elgar, 2d ed. 2008), pages 93-113.(

II. Maximizing the Benefits of FDI

Objectives:

- Identify the reasons that states want to attract international investment
- Identify the advantages and disadvantages of foreign investment
- Discuss the factors that make a state “successful” in attracting foreign investment

- Distinguish between different types of investment and the different kinds of guarantees a state might offer to attract them
- Identify the issues a country should consider when deciding whether or not to enter into an investment agreement
- Discuss policies, such as performance requirements, that might lead to sustainable development
- Identify and consider the factors that investors consider when deciding whether or not to invest in a particular state
- Consider when conduct should be attributed to the state

Readings:

- MORAN, THEODORE H., HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES 45-74 (Washington: Center for Global Development (2006)).
- Doh, Jonathan, Peter Rodriguez, Klaus Uhlenbruck, Jamie Collins, Lorraine Eden. *Coping with Corruption in Foreign Markets*. 17:3 ACADEMY OF MANAGEMENT EXECUTIVE 114, 119-125 (2003).
- UNCTAD, *The overall picture*, in FDI AND PERFORMANCE REQUIREMENTS: NEW EVIDENCE FROM SELECTED COUNTRIES 1-20 (Geneva: United Nations, 2003).
- Robert Pritchard, *The Contemporary Challenges of Economic Development*, in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 1-11 (Robert Pritchard ed., Kluwer 1996).
- RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 195-206 (Oxford 2008),

Discussion Questions:

- What are issues countries should consider when deciding whether to amend their laws to attract foreign investment?
- How can host countries ensure that they are attracting sustainable development?
- Should states be able to give authority to exploit natural resources to private companies, whether domestic or foreign? Should they retain the right to get the resources back?
- Should states be permitted to use performance requirements to attract investments? What are the advantages and disadvantages?
- What factors do investors consider in deciding where to invest?
- Are anti-corruption laws too utopian? Should a certain amount of corruption and bribery be accepted as the cost of doing business? The U.S. Foreign Corrupt Practices Act outlaws bribes that are given “to obtain or retain business” but permits facilitating payments, e.g., payments to officials that encourage them to do their jobs faster or to overcome bureaucratic delays. Is this a reasonable distinction?
- What are the forces that make for a concentration of research and development at home, and what are they for its location abroad?

- To what extent and why do multinational enterprises transfer technology and under what circumstances do such transfers benefit host countries?
- What is state attribution? What factors affect whether a host state is responsible for acts that injure a foreign investor?

Additional Readings/Reference:

- Oman, Charles P., *Policy Competition for Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI* (Paris: OECD Development Centre, 2000), pp. 9-22, 77-80, 113-126.
- Peter Muchlinski, *Policy Issues*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3-15 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Marie-Claire Cordonier Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 102-42 (Kluwer, Marie-Claire Cordonier Segger et al. eds. 2011).
- T. Agmon, *Who gets what: the MNE, the national state and the distributional effects of globalization*, 34:4 J. INT'L BUSINESS STUDIES, 416-27 (2003).
- Karl P. Sauvant, *Driving and Countervailing Forces: A Rebalancing of National FDI Policies*, 2008-2009 Y.B. INT'L INVESTMENT L. & POL'Y 215.
- John Dunning, *Re-evaluating the benefits of FDI*. 3(1) TRANSNATIONAL CORPORATIONS 23-51 (1994).
- UNCTAD, *Overview*, WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES XVI-XIX (Geneva: United Nations, 2003).
- Georg Kell & John Gerard Ruggie, *Global markets and social legitimacy: the case for the 'Global Compact'*, 8:3 *Transnational Corporations*, 101-20 (December 1999).
- Moran, Theodore H., Edward M. Graham and Magnus Blomstroem, eds., *Does Foreign Direct Investment Promote Development?* (Washington: IIE, 2005), pp. 375-396.
- Kenneth Hansen, *Rise and Fall of Private Investment in Public Infrastructure*, in MORAN, INTERNATIONAL POLITICAL RISK MANAGEMENT: THE BRAVE NEW WORLD 75-79 (World Bank Group 2004).
- John H. Dunning and Sarianna Lundan, *Technology and innovatory capacity: the role of firms & Technology and innovatory capacity: the role of government*, in MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 340- 413 (Edward Elgar, 2d ed. 2008).

III. National Investment Laws & Political Risk

Objectives/goals

- Discuss ways host governments regulate foreign investment and investment generally

- Identify reasons companies are sometimes hesitant about investing in foreign markets
- Identify risks companies face when they invest in foreign markets
- Consider the role that insurance can play to minimize risk
- Discuss the obligations of governments to ensure that their laws and policies are readily accessible by foreign investors
- Consider the good and bad reasons that governments might alter their policies to the detriment of foreign investors
- Discuss whether there should be limits on governments' ability to change their policies and if so what those limits should be
- Consider whether and why there are greater concerns about foreign investment activity than about domestic investment activity, and whether those concerns are justified

Readings:

- *International Rules and Standards*, in WORLD INVESTMENT REPORT 2005, at 175-85 (World Bank 2004).
- Louis T. Wells & Eric S. Gleason. *Is foreign infrastructure investment still risky?* 1995 HARVARD BUSINESS REVIEW, Sept-Oct.: 4-12.
- M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 407-410 (Cambridge, 2d. ed. 2004).
- N. STEPHAN KINSELLA AND NOAH RUBINS, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 1-29 (2005).
- MIGA Convention, arts. 12-14.
- *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 (Award) (Aug. 30, 2000) ¶¶ 28-63; 70-101 (transparency).
- *United Mexican States v. Metalclad*, 2001 BCSC 664 (May 2, 2001), ¶¶ 66-76 (transparency).

Discussion Questions:

- Is there a link between economic development and development of the rule of law?
- What threats do multinational enterprises and foreign investment pose to the host state? To the host state's citizens?
- What are the major types of political risk?
- What strategies can investors employ to minimize risk?
- How does one allocate risk as between the host state and the foreign investor? Who should bear the greater burden? Does it matter what kind of history of government intervention in the economy the host state has?
- Is it wise for states to promise to limit their ability to effect regulatory change in order to elicit foreign investment? What are the pros and cons?
- Are foreign investors more vulnerable to domestic political change than domestic investors?
- How transparent do a host state's regulations need to be? Is there some limit to how much responsibility can be placed on the state vs. the responsibility of the investor to seek clarification of something it does not understand?

Further Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 491- 622 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 79-88 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 1-10 (Oxford 2008).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 61-64 (Kluwer 2008).
- Kenneth Hansen, *Rise and Fall of Private Investment in Public Infrastructure*, in MORAN, INTERNATIONAL POLITICAL RISK MANAGEMENT: THE BRAVE NEW WORLD 79-93 (World Bank Group 2004).
- PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 1-22 (Oceana 1997).
- 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 110-36 (Thomas W. Wälde ed., 1996).
- Robert Reich, *Who Is Us?* 1990 HARVARD BUSINESS REVIEW 53-64.
- Karl P. Sauvant, *A backlash against foreign direct investment?*, in WORLD INVESTMENT PROSPECTS TO 2010: BOOM OR BACKLASH, 71-77(Economist Intelligence Unit & Columbia University 2006)

IV. Applicable Law: National Investment Law, Concession Contracts and Investment Treaties

Objectives/goals:

- Identify the sources of international investment law
- Learn about the international law of treaty interpretation
- Distinguish between treaty-based and customary international law-based obligations
- Analyze the ways in which treaty-based and customary international law-based obligations complement and reinforce each other
- Consider the requirement that conduct be attributable to the state in order for investment treaty obligations to be triggered
- Consider the role of municipal law and how it interacts with international law
- Consider why investment treaties have come to play such an important role in the investment landscape

Readings:

- UNCTAD, UNCTAD Materials, Part 2.6 *Applicable Law* pp. 5-22 (page 14 omitted); 27-31.
- Andrew Newcombe & Lluís Paradell, *Historical Development of International Investment Treaty Law*, in *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 22-41 (Kluwer 2008).
- Sauvant, Karl P., *The rise of international investment, investment agreements and investment disputes*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 3-16 (2008).
- UNCTAD, *Key national FDI policies and international investment agreements*, WIR2003. FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 85-97 (Geneva: United Nations, 2003).
- Nigel Rawding, *Protecting Investments Under State Contracts: Some Legal and Ethical Issues*, 11(4) *ARB. INT'L* 341-45 (1995).
- Articles 31-33 of the Vienna Convention on the Law of Treaties
- Article 38 of the Statute of the International Court of Justice

Discussion Questions:

- Why do commentators recommend against choosing international law as the sole governing law for a breach of contract?
- What is a “stabilization clause”? Is it a good idea for states to agree to them in their concession agreements?
- What explains the popularity of investment treaties?
- How should the obligations in investment treaties interact with national law? Should international obligations always prevail? Should national law be interpreted to harmonize with them?
- What prompts states to enter into investment treaties? Does doing so necessarily mean signing away sovereignty?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 623-757 (Kluwer 2005).
- RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT Law* 31-37 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11* at 1131.3 – 1131.36 (Kluwer 2006; last updated 2009).
- CAMPBELL McLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 13-23 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 75-119 (Kluwer 2008).
- TAIDA BEGIC, *APPLICABLE LAW IN INTERNATIONAL INVESTMENT DISPUTES* (Eleven 2005)

- Rudolf Dolzer, *Contemporary Law of Foreign Investment: Revisiting the Status of International Law*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHRUEUER 818 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., Oxford 2009).
- Yas Banifatemi, *Applicable Law*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 191 (Katia Yannaca-Small ed., Oxford 2010).
- Jeswald Salacuse, *The Treatification of International Investment Law*, 13 LAW AND BUSINESS REVIEW OF THE AMERICAS 155-66 (2007).

V. Who is a foreign investor?

- Consider why only “foreign” investors are entitled to the protection of investment treaties
- Discuss why dual nationals are excluded from the protection of the ICSID Convention
- Consider whether minority investors should qualify for protection by investment treaties
- Consider what attributes distinguish a “sham” or “mailbox” corporation from an investor with standing

Readings:

- UNCTAD, UNCTAD MATERIALS, Part 2.4, *Requirements Ratione Personae* pp. 5-25 (pages 6, 12 and 18 omitted).
- ICSID Convention, Art. 25
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 195-205 (Oxford 2008).
- *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20 (Sweden/Romania BIT) (Decision on Jurisdiction and Admissibility) (24 September 2008), paras. 83-106.
- *Tokios Tokelès v. Ukraine*, ICSID Case ARB/02/10 (Decision on Jurisdiction) (29 Apr. 2004) ¶¶ 1-4 (background), 14-41 & (Dissenting Opinion of Proper Weil) ¶¶ 10-24.
- *Gami Investments, Inc. v. United Mexican States*, UNCITRAL (Final Award) (15 Nov. 2004) ¶¶ 12-22 (factual background), 23 (claims), 26-33 (jurisdiction and standing).

Discussion Questions:

- What is the “positive” nationality requirement under the ICSID Convention? What is the “negative” nationality requirement?
- Why does the ICSID Convention preclude persons with dual nationality from submitting a claim under the ICSID Convention?

- Why does Art. 25(2)(b) of the ICSID Convention permit foreign-controlled corporations to be deemed investors of the state from which the control is exercised? What effect does this have on the payment of damages?
- How and when should a tribunal “pierce the corporate veil” to determine whether a foreign entity is a sham corporation set up for purposes of taking advantage of the BIT? Does it matter whether the sham entity is set up before or after a dispute arises, or before or after the dispute is seen on the horizon?
- Should indirect or minority shareholders be permitted to submit claims? Is granting them standing consistent with the requirement that there be an investment in order to support a tribunal’s jurisdiction?
- Should all treaties contain “denial of benefits” clauses? How broadly should those clauses reach?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 799-831 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 46-59 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 291-346 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1116.4 – 1116.27; 1120.62a-69 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 131-162 (Oxford 2007).
- Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 51 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Robert Aguirre Luzi & Ben Love, *Individual Nationality in Investment Treaty Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, 183 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds. 2009).

VI. What is an investment?

Objectives:

- Consider what constitutes an “investment” under a treaty
- Discuss whether the ICSID Convention imposes an extra requirement as to what constitutes an investment
- Consider what criteria a tribunal should use to determine whether there is an “investment” for purposes of the ICSID Convention

- Discuss why, or whether, a treaty needs to contain a definition of investment
- Distinguish between subjective and objective approaches to the definition of investment
- Consider the requirement of “legality” of an investment

Readings:

- UNCTAD, UNCTAD MATERIALS, Part 2.5, *Requirements Ratione Materiae*, pp. 13-25.
- Mahnaz Malik, *Definition of Investment Under International Treaties*, in IISD, BEST PRACTICES SERIES 8-15 (Aug. 2009).
- M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 7-9 (Cambridge, 2d. ed. 2004).
- *Salini Construttori S.p.A v. Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction) (23 July 2001).
- *Biwater Gauff Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award) (24 July 2008), ¶¶ 307-322.
- *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case ARB/03/26 (Award) (2 August 2006), ¶¶ 184-188; 205-107.
- ICSID Convention Art. 25.
- Compare definitions of “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”); and ICSID Convention art. 25(1).

Discussion Questions:

- Why is dispute settlement under the ICSID Convention limited to those who have made an investment?
- How should investment under the ICSID Convention be interpreted?
- Should the secretary-general of ICSID make that determination in the first instance, or should it be left to the arbitral tribunal?
- Why is the definition of investment in the U.S. Model BIT so broad?
- What effect does the requirement in the Malaysia – Ethiopia BIT – that investments be made in accordance with applicable law (art. 2(a)) – have on jurisdiction?
- Should the tribunal in *Biwater Gauff* have followed the *Salini* test? Did it give good reasons for not doing so?
- Should tribunals rely on past arbitral decisions when they are deciding cases? What are the benefits of this approach? What are the drawbacks?
- What steps should a tribunal take if an investor does not comply with the requirements of the host state laws on investment?
- What role should national law play in determining whether an investment qualifies for the protection of an investment treaty? What if the state (or a state official) colludes in the illegality?

Additional Readings/Reference:

- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 38-45; 60-71 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 247-289 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1116.28 – 1116.32; 1139.22 – 1139.31 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 163-196 (Oxford 2007).
- DOLZER, *The Notion of Investment in Recent Practice*, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO (Charnovitz, Steger and Van den Bossche, eds. 2005).
- Emmanuelle Cabrol, Pren Nreka v. Czech Republic, *The notion of investment under bilateral investment treaties: Does investment really mean “every kind of asset”?* 2 Y.B. INT’L INVESTMENT L. & POL’Y (2009-2010) (forthcoming 2010).
- Julian Davis Mortenson, *The Meaning of “Investment”*: ICSID’s Travaux and the Domain of International Investment Law 51 HARV. INT’L L. J. 257 (2010).
- David A.R. Williams, *Jurisdiction and Admissibility*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 868 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

VII. Expropriation

Objectives:

- Distinguish between lawful and unlawful expropriations
- Identify the factors that help tribunal determine whether a partial taking has amounted to an expropriation
- Distinguish between regulatory acts that fall short of a taking and those that effect a compensable expropriation
- Consider the appropriate role of the doctrine of “legitimate expectations” in determining whether or not there has been a taking
- Consider the appropriate measure of compensation in the event of a lawful rather than an unlawful taking
- Identify the types of acts that should be considered “police powers” and therefore not compensable expropriations
- Consider the wisdom of a government’s embarking on a program of privatization of key industries

Readings:

- Louis Sohn & Richard Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, Art 10, pp. 203-218 (Taking and Deprivation of Use or Enjoyment of Property) (1974).
- L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It*, 19 ICSID REV. – FOREIGN INVESTMENT L. J. 293 – 319 (2004)
- THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT 141-150 (Institute for International Economics 1998)
- *Methanex Corp. v. United States of America*, UNCITRAL, (Final Award) (3 Aug. 2005), Part II, Chapter D, 3-12; Part IV, Chapter D.
- *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Award) (12 May 2005), ¶¶ 53-82 (facts) ¶¶ 252-265.
- Luke Peterson, *Occidental Files BIT claim against Ecuador at ICSID INVESTMENT TREATY NEWS* (18 May 2006).
- Martin Arostegui, *Venezuelan nationalization continuing*, THE WASHINGTON TIMES (12 May 2009).
- Compare NAFTA art. 1110 & U.S. Model BIT art. 6, Annexes A & B.

Discussion Questions:

- What are the differences between NAFTA Article 1110 and the expropriation provision in the 2004 U.S. Model BIT? Are they an improvement?
- What criteria should be used to tell the difference between a regulatory action that does not give rise to expropriation and one that does? Is government intent important?
- If it is, how do you ascertain government intent? Who in the government needs to have the intent?
- Should every expropriation give rise to a duty to compensate, or only those that do not involve public purposes?
- Should the measure of compensation differ if the purpose of the expropriation is to effectuate a public purpose, or if the expropriation is wrongful? In other words, should claimants have the ability to claim different measure of damages (and tribunal the authority to award different measures of damages) depending on the kind of expropriation?
- Are some public purposes permissible, whereas others are not? Anything the government does could be said to be in furtherance of a public purpose; are there limits on that? Should the limits be decided by an arbitral tribunal?
- Should an owner be compensated if he or she is deprived of the "reasonably-to-be-expected" economic use of his or her property? How flexible must the owner be in trying to adapt to new regulatory circumstances?
- Are there certain acts, such as the targeting of individual investors, that should presumptively give rise to a finding of illegal expropriation?
- What is the "sole effect" doctrine? Is it a useful way of looking at expropriation doctrine?

- Do investors have a right to a market? Can regulation that removes all economic value from a given market give rise to an expropriation?
- *Methanex* involves a situation where government regulation - the Clean Air Act - actually created the market for MTBE. Should that make a difference in deciding whether or not government regulation can eliminate a market without paying compensation?
- What role, if any, should proximate cause play in assessing whether or not a claimant has been injured? In *Methanex* the claimant was a producer of methanol, a feedstock used to produce MTBE, rather than a producer of MTBE itself. Should that make a difference in the outcome of the case?
- There has been a recent spate of nationalizations in Latin America, and there are threats of more. Are these reasonable uses of government authority? If there have been warnings, but claimants continue to invest, can claimants prevail on a claim that their legitimate expectations did not include an expropriation?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 837-946; 1109-1132 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 89-118 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 429-489 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1110.8 – 1110.58 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 265-313 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 321-398 (Kluwer 2008).
- Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REVIEW – FOREIGN INVESTMENT L. J. 1 (2005).
- G.C. Christie, *What Constitutes a Taking of Property Under International Law?* 38 BRIT. YB. INT'L L. 307 (1963).
- Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. WORLD INVESTMENT & TRADE 717 (2007).
- Anne K. Hoffmann, *Indirect Expropriation*, in STANDARDS OF INVESTMENT PROTECTION 151 (August Reinisch ed., Oxford, 2008).
- August Reinisch, *Expropriation*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

VIII. Performance Requirements and Currency Transfer Provisions

Objectives:

- Identify the provisions in investment treaties that limit a state's ability to impose performance requirements
- Discuss why investors do not like performance requirements
- Discuss why states might want to impose performance requirements
- Identify major types of performance requirements
- Consider the importance of currency repatriation to investors

Readings:

- Abba Kolo & Thomas W. Wälde, *Capital Transfer Restrictions under Modern Investment Treaties*, in STANDARDS OF INVESTMENT PROTECTION 205-217 (Oxford, August Reinisch ed. 2008).
- Nagesh Kumar, *Use and Effectiveness of Performance Requirements: What Can Be Learnt from the Experiences of Developed and Developing Countries?*, in THE DEVELOPMENT DIMENSION OF FDI: POLICY AND RULE-MAKING PERSPECTIVES 59-78 (UNCTAD 2003).
- Bart Legum, *Understanding Performance Requirement Prohibitions in Investment Treaties*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION, 53-64 (Arthur Rovine ed., 2008).
- *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas v. Mexico*, ICSID (W. Bank) ARB/AF/04/05 (Award) (21 November 2007), paras. 57-84 (facts); 214-227 (decision on performance requirements).
- *ADF Group Inc. v. United States*, ICSID (W. Bank) ARB(AF)/00/1, Award) (9 Jan. 2003), paras. 44-59 (facts); paras. 81-88; 159 (performance requirements).
- NAFTA Articles 1106 & 1109

Discussion Questions:

- Why do investors dislike performance requirements?
- Are some performance requirements desirable? Some less desirable? How do you tell a "good" performance requirement from a "bad" one?
- Are the definitions of performance requirements in investment treaties too broad?
- Would you advocate restoring states' abilities to impose certain performance requirements in future investment treaties?
- Is it reasonable for countries without robust intellectual property protections to impose technology transfer requirements?
- Should states limit their ability to respond to balance-of-payments problems by guaranteeing currency transfer capabilities?
- Do you agree with the ADM tribunal about Mexico's imposition of performance requirements?
- Is the U.S. Buy America Act a desirable performance requirement? Why or why not?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 588-597; 1104-1109(Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 191-94 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1106.1 – 1106.20 (Kluwer 2006; last updated 2009).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 399-430 (Kluwer 2008).
- Friedl Weiss, *Trade and Investment*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 199-204 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Abba Kolo & Thomas W. Wälde, *Capital Transfer Restrictions under Modern Investment Treaties*, in STANDARDS OF INVESTMENT PROTECTION 205-243 (Oxford, August Reinisch ed. 2008).
- Giergio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251 (1997).

IX. Relative Standards of Protection

Objectives:

- Identify the components of the standard of national treatment
- Understand the importance of identifying the comparator
- Assess the importance of the requirement that the comparators be in “like circumstances”
- Consider the relevance of WTO jurisprudence to the investment context
- Evaluate whether “most-favoured-nation” treatment operates to bring in more favourable dispute settlement options as well as more favourable substantive treatment
- Evaluate the “exceptions” to MFN proposed by the *Maffezini* tribunal

Readings:

National Treatment

- Peter Clark, *National Treatment under GATT and NAFTA: A Discussion Comment*, 1:3 TRANSNATIONAL DISPUTE MANAGEMENT (July 2004).
- Andrea K. Bjorklund, *National Treatment*, in STANDARDS OF TREATMENT 29, 29-36 (August Reinisch ed. , Oxford, 2008).

- *Methanex Corp. v. United States of America*, UNCITRAL (Final Award) (3 Aug. 2005), Part IV, Chapter B.
- *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case. No. UN 3467 (Final Award) (1 July 2004) ¶¶ 1-6, 25-35 (facts), 167-179.
- *Gami Investments Inc. v. Mexico*, UNCITRAL, (Final Award) (15 November 2004) ¶¶ 12-22 (facts) ¶¶ 111-115.
- NAFTA Article 1102

Most-Favoured-Nation Treatment

- Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, NEW YORK LAW JOURNAL (2 June 2005).
- Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 JOURNAL OF INTERNATIONAL ARBITRATION 225, 232-237 (2005).
- *Maffezini v. Spain* (ICSID Case No. ARB/97/7), (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000), pages 14-25.
- *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction) (8 February 2005) ¶¶183-227.
- Argentina – Spain BIT, Article IV.
- Bulgaria – Cyprus BIT, Article 3.

Discussion Questions:

National Treatment

- Peter Clark says confidently that under NAFTA Chapter 11 a host state must give investors from other NAFTA countries the “best” treatment given any domestic investors (and foreign investments are due the best treatment given any domestic investments). What does this mean? Does this mean equality of competitive opportunity, or does it mean more than that?
- Following on to that question, does resolving this question involve deciding what constitutes “treatment”? For example, if a government is putting out a project for tender, does the national treatment obligation mean that all bidders in the tender process must be treated fairly and equally (so that the treatment is in fact the tendering process), or does it mean that the foreign bidders covered by an investment treaty must be given the contract, or a piece of the contract (so that the treatment is the award of the contract)?
- The national treatment obligation requires that national treatment be afforded covered foreign investors “in like circumstances” with domestic investors. Thus, a lot hinges on the like circumstances determination – if a foreign investor is not in like circumstances with the allegedly favored domestic investor, then there simply is no claim. How should a tribunal go about deciding who is in like circumstances with whom? Must the investors compete in the same economic sector?
- In *Occidental v. Ecuador*, the tribunal treated all exporters of goods as being in like circumstances? Was the tribunal justified in doing this?

- It is well accepted that national treatment extends to both *de jure* and *de facto* claims of discrimination. Most cases are in fact *de facto* cases. Must even those cases carry with them assumptions about an INTENT to treat foreign investors badly? Or is a disparate impact enough to sustain a claim?
- Is burden shifting – requiring that a claimant make a prima facie case of a national treatment violation, and then shifting the burden to the defending state to offer a non-discriminatory reason for the difference in treatment – a reasonable approach to a national treatment case?
- Parts of the recent bail-out legislation in the United States (and in the U.K., for that matter) have been criticized as too protectionist. Is it too utopian to expect nations NOT to favor their own?

Most-Favored-Nation Treatment

- The most-favored-nation obligation requires that a state treat a covered foreign investor as favorably as it treats other foreign investors. This can apply to substantive treatment given by states, such as opportunities to invest in a previously closed economic sector. As we see in the reading, it appears that it can apply to the dispute resolution provisions in another investment treaty that are deemed “more favorable.” How do you tell what is more favorable? If the claimant asks for it, does that mean it is more favorable in the claimant’s judgment, and that is all that matters?
- The *Maffezini* case put the applicability of MFN to dispute settlement on the map. How would you view the importance of the 18-month period during which an investor need to resort to local courts? Is it merely a procedural burden? Should MFN help claimants take advantage of other treaties that lack such a requirement?
- In paragraph 63 of the *Maffezini* decision, the tribunal listed a number of possible exceptions to its rule. Read them carefully. Where did the tribunal find them? Do you think they can be very readily applied in practice?
- Can the differences between *Maffezini* and *Plama* be explained by treaty language?
- Does the *Maffezini*-type interpretation of MFN give foreign investors the opportunity to cobble together “Frankenstein-like” treaties that no state ever negotiated? Or should states know what they are getting into by virtue of having included an MFN clause in their treaty? Might your answer to this question change if the treaty was negotiated pre- or post- *Maffezini*?
- One suggestion for dealing with the *Maffezini* situation is to treat MFN as applicable to dispute settlement, but to require that an investor take the whole of the “more favorable” treaty. Is this a reasonable response to the “Frankenstien” problem?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1087-1102; 1133-1165 (Kluwer 2005).

- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 178-190 (Oxford 2008)
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 397-427 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 251-257; 262-263 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 147-232 (Kluwer 2008).
- Susan D. Franck, *International Decisions: Occidental Exploration and Production Co. v. Ecuador*, 99 AM. J. INT'L L. 675 (2005).
- Panel Discussion, *Is Discriminatory Intent Relevant?*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 315 (T.J. Grierson Weiler ed., Juris 2008).
- UNCTAD, NATIONAL TREATMENT, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).
- Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Provision in Investment Arbitration*, in INVESTMENT TREATY LAW, CURRENT ISSUES III, at 241 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).
- STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 121-196 (Cambridge 2009).

X. Absolute Standards of Protection – International Minimum Standard, Fair & Equitable Treatment & Full Protection and Security

Objectives:

- Learn what factors distinguish the international minimum standard from fair and equitable treatment
- Consider what level of government conduct is required by the international minimum standard today
- Discuss the advantages of the NAFTA Interpretation Process
- Discuss the disadvantages of the NAFTA Interpretation Process
- Identify the factors that should guide a fair & equitable treatment analysis
- Study the scope of the full protection and security standard

Readings:

- Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties* 39 INT'L LAW. 87, 87-94; 100-06 (2005).
- Christoph Schreuer, *Fair and Equitable Treatment*, BIICL, Investment Treaty Forum, 2:5 TRANSNATIONAL DISPUTE MANAGEMENT (November 2005).

- *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Award) (8 June 2009) ¶¶ 10-15 (facts); 598-626.
- *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL (Award) (31 March 2010) ¶¶ 26-43 (facts); ¶¶ 182-233.
- Compare NAFTA art. 1105(1) & U.S. Model BIT arts. 5.1-5.3.
- NAFTA FTC Notice of Interpretation.
- Giuditta Cordero Moss, *Full Protection & Security*, in STANDARDS OF INVESTMENT PROTECTION 131, 138-150 (August Reinisch ed., Oxford 2008).
- *Wena Hotels Ltd. v. Egypt*, ICSID Case ARB/98/4 (Award) (8 December 2000), ¶¶ 15-69; 80-95.

Discussion Questions:

- The international minimum standard of treatment is an absolute standard that sets a baseline below which treatment cannot fall and still comport with international standards of minimal due process and fairness. Fair & equitable treatment, on the other hand, is not a “relative” standard in the sense of national treatment or MFN, but does seem to leave room for assessing the treatment accord by reference to the development standard in the host country. Should a tribunal’s assessment of a country’s culpability for a violation of fair and equitable treatment depend on the development standard of the host country?
- The language of article 1105 says that the states party shall accord treatment in accordance with international law, including fair and equitable treatment and full protection and security, to investments of investors. What about investors themselves? Why would NAFTA limit the language of Article 1105 in that way?
- The NAFTA Free Trade Commission received a lot of criticism for issuing its Note of Interpretation on the meaning of Article 1105 NAFTA, especially because the standard was at issue in several pending cases. Should the Note have been considered an amendment, rather than an interpretation? What result if it had been?
- What are the pros and cons of issuing notes of interpretation?
- Why does Article 5(2) of the U.S. Model BIT use the language “for greater certainty”? Is it helpful to have the clarification in the annex to the Model BIT? Is the language in Art 5(2) and the annex to the model BIT better or worse than the language in NAFTA Art. 1105? Why?
- Does the free-standing fair and equitable treatment obligation give too much discretion to arbitrators?
- In the early 2000s, some would have said that fair & equitable treatment and the international minimum standard had merged, given higher expectations of host state practice in the present day. Does the *Glamis* Award foreclose that argument?
- Is the *Glamis Gold* interpretation of fair & equitable treatment too limiting? Would any claimant be able to meet that standard? Do you think the claimants in *Wena Hotels* met that standard? In *Merrill & Ring*?
- Should the full protection & security standard be confined to providing physical protection and security?

- If the obligation to provide full protection & security means more than providing physical protection, what does the fair & equitable treatment obligation require?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 953-976; 1007-1071 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 119-152 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 491-539 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 1105.5 – 1105.52 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 226-250 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 233-319 (Kluwer 2008).
- Lucy Reed & Daina Bray, *Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 13 (Arthur Rovine ed., Martinus Nijhoff 2008).
- Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in INVESTMENT TREATY LAW, CURRENT ISSUES III, at 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).
- Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair & Equitable Treatment Standard*, 55 INT'L & COMP. L. Q. 527 (2006).
- UNCTAD, FAIR & EQUITABLE TREATMENT, UNCTAD/ITE/IIT/11 (Vol. III) (1999).
- Todd Grierson-Weiler & Ian A. Laird, *Standards Of Treatment*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 261 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- H.E. Zeitler, *The Guarantee of 'Full Protection and Security' in Investment Treaties Regarding Harm Caused by Private Actors*, 3 STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 1 (2005).

XI. Contract Disputes and Treaty Disputes/“Umbrella” Clauses

Objectives:

- Distinguish between treaty-based claims and contract-based claims
- Learn about “umbrella clauses”
- Consider what the purpose or effect of an umbrella clause should be

- Consider how much deference a tribunal should give to an earlier tribunal decision on the same legal issue
- Assess differences in treaty language in light of principles of treaty interpretation
- Consider the effect of umbrella clauses on the law applicable to the arbitration
- Discuss the availability of counterclaims in contract claims and in treaty claims
- Consider the relationship between treaty claims and contract claims; if an investor prevails on the latter, should it also prevail on the former?

Readings:

- Nigel Rawding, *Protecting Investments Under State Contracts: Some Legal and Ethical Issues*, 11(4) ARB. INT'L 341-45 (1995).
- Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the SGS Cases Considered*, in *International Investment Law and Arbitration* 325-46 (Todd Weiler ed., Cameron May 2005) (2005).
- Thomas W. Wälde, *The “Umbrella Clause in Investment Arbitration -- A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVESTMENT & TRADE 183 (2005); available at 1:4 Transnational Dispute Management (October 2004), pp. 1-4; 15-28.
- Anne K. Hoffmann, *Counterclaims by the respondent state in investment arbitrations*, SCHIEDSVZ 2006, Heft 6, at 317.
- *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction) (6 August 2003) ¶¶ 133-73.
- *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29 January 2004), ¶¶ 92-97; 113-135.
- *El Paso Energy Int'l Co. v. Argentina*, ICSID Case ARB/03/15 (Decision on Jurisdiction) (27 April 2006), ¶¶ 63-88.

Discussion Questions:

- It seems there are two types of “umbrella” clauses: one is a general statement that a particular treaty covers all disputes relating to investment, while the second is a more specific clause that says a state “shall abide by its obligations.” Should these provisions be read to produce equivalent effect?
- Emmanuel Gaillard says that an umbrella clause can be read one of three ways: (1) it means essentially nothing; it is a reiteration of the state’s desire to abide by its obligations; (2) it elevates a breach of contract into a breach of a treaty; the investment tribunal can hear the claim; (3) the treaty language elevates a breach of contract to a breach of treaty, but tribunal should not exercise that jurisdiction if the contract itself contains a forum-selection clause; in such a case the investment tribunal would not hear any dispute until after the first forum had finished. Is one of these more convincing than the others?
- Thomas Wälde offered a fourth theory: that an umbrella clause was meant to protect an investor against unfair governmental action – acts taken by the government in its position as sovereign state – rather than against unfair commercial action – breaches

- of contract taken by the government as a commercial actor. Is this a more convincing explanation of the clause? How do you tell the difference between these two?
- A cardinal principle of treaty interpretation is that of *effet utile* – that clauses should be interpreted so as to give them some meaning. Does the *SGS v. Pakistan* tribunal’s approach give some reasonable effect to Article 11 of the BIT?
 - If one follows the route of the *SGS v. Philippines* tribunal and an investor first goes to the forum provided for in the contract, to what extent should the investment treaty tribunal be bound by (or give deference to) the decision of that first tribunal?
 - If an investor and a state have a dispute resolution clause in their contract, does this mean the investor has waived his rights under the BIT? If so, should that be permitted?
 - If an umbrella clause “elevates” a plain breach of contract to the level of a treaty obligation, what law is applicable to deciding the breach of any contract? The law chosen by the parties in their contract? The law of the host state? International law?
 - Does the placement of the umbrella clause make a difference in interpreting it? The *SGS v. Pakistan* tribunal noted that Art. 11 was not near the other substantive provisions of the applicable BIT, and therefore was better viewed as something other than a “first order” obligation.
 - The *SGS v. Pakistan* and *SGS v. Philippines* decisions are often viewed as conflicting. They are not the only tribunals to have come to opposing views on what seem like the same legal questions. Is this phenomenon bad for investment arbitration? Does it harm its legitimacy?
 - After the *SGS* cases were concluded, Switzerland sent a letter to the ICSID Secretariat about its intent in entering BITs. It asked why the tribunal did not inquire about the State’s view in trying to ascertain the intent of the Parties, and stated that Switzerland advocated a broad interpretation of the treaty. Should the Tribunal have asked Switzerland (and Pakistan and the Philippines) its views? If so, what effect should it have given them? What are the pros and cons of this approach?
 - Should tribunal interpreting umbrella clauses be concerned about multiple *fora* with duplicative mandates? All tribunals accept that the same conduct can give rise to different violations in different legal orders. What about double recovery? Is that a concern?
 - Ought a state to be able to file a counterclaim in an investment treaty case? Does it matter whether or not there is an umbrella clause?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 213-313; 831-36 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 72-78 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 541-562 (Oxford 2008).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 92-103; 109-117 (Oxford 2007).

- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 437-479 (Kluwer 2008).
- Katia Yannaca-Small, *What about this “Umbrella Clause”?*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 479 (Oxford, Katia Yannaca-Small ed. 2010)
- Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 *ARB. INT’L* 411 (2004).
- Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 323 (Katia Yannaca-Small ed., Oxford 2010)

XII. Necessity, Countermeasures, and Essential Security Interests

Objectives/goals:

- Introduce defences states can raise to investment claims and the concept of circumstances precluding wrongfulness
- Discuss the essential security clauses found in investment treaties, the customary international law defence of necessity, and the appropriate relation between them
- Assess whether the customary international law principle of necessity is useful in the context of investor-state arbitration, or whether its provisions are so stringent that they could never be satisfied
- Consider whether the successful invocation of a circumstance precluding wrongfulness prevents the award of damages
- Discuss whether individual claimants have rights independent of states
- Consider whether, if individuals do have direct rights, states are therefore precluded from arguing they were justified in taking countermeasures
- Consider the self-judging nature of treaty exceptions

Readings:

- Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 459; 460-64; 507-16 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, 59 *INT’L & COMP. L. Q.* 325, 359-71 (2010).
- José Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 1 *YB INT’L INVESTMENT L & POLICY* 379, 449-460 (2009).
- Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 *BRIT. Y.B. INT’L L.* 264, 331-345 (2008).

- CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), ¶¶ 101-50
- *National Grid PLC v. Argentina*, UNCITRAL (Award) (3 Nov. 2008), ¶¶ 250-262.
- LG&E v. Argentina, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), ¶¶ 201-14; 226-66
- Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case ARB(AF)/04/06 (Award) (21 November 2007), ¶¶ 168-180
- *Corn Products Int'l v. Mexico*, ICSID Case ARB(AF)/04/01 (Decision on Responsibility) (15 January 2008), ¶¶ 161-192.

Discussion Questions:

- To raise a defense of necessity at customary international law, a state cannot have contributed to the situation of emergency. This was one of the hurdles that Argentina had a hard time overcoming in its plea of economic distress. Does this requirement mean that necessity should not be available in claims of economic distress? Or should the requirement be interpreted with some lee-way to at least theoretically permit a claim to move forward?
- The defense of “necessity” under customary international law is seen as very stringent. Is it too stringent to be of any practical use?
- How would you interpret the requirement that a measure be the “only means” available to respond to a sudden and imminent crisis?
- Should the treaty provision that nothing in the treaty prevents a state from taking acts in accordance with its essential security interests be read as incorporating the customary international law of necessity, or as a separate standard? If it is separate, what is the standard? How do you measure what is necessary?
- Should the state of necessity be available to excuse an investment treaty violation due to economic emergency, when arguably investment treaties exist precisely to provide protection in that context?
- Should states make treaty exceptions “self-judging”?
- Are self-judging treaty exceptions still subject to principles of “good faith”?
- What effect should a successful necessity defense have? Should it exculpate the state from any monetary liability? Should there be only partial exculpation?
- Does your answer to the previous question change if the defense is found as a treaty standard independent from customary international law?
- If the treaty standard is separate from customary international law, how does one assess whether measures are “necessary”?
- Who has the better of the argument – the *ADM* or the *Corn Products* tribunal – about the availability to Mexico of the countermeasures defence?
- If the countermeasures defence is not available to states because investors have private rights under the treaties, does this mean the necessity defence is not available either?
- Is it problematic that tribunals in the Argentine cases have come to different conclusions (it seems) with respect to both the facts and the law?

- Is it problematic that tribunals in the HFCS cases have come to different conclusions with respect to the law?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 1171-1244 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 166-171 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11*, at 1138.5 – 1138.12 (Kluwer 2006; last updated 2009).
- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 481-528 (Kluwer 2008).
- Andrea K. Bjorklund, *Economic Security Defenses in International Investment Law*, 1 *INTERNATIONAL INVESTMENT LAW & POLICY YEARBOOK* 479 (2009).
- Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *BRIT. Y.B. INT'L L.* 151 (2003)
- Andrea K. Bjorklund, *Private Rights v. Public International Law: Why Competition Among International Courts and Tribunals Is Not Working*, 59 *HASTINGS L. J.* 241 (2007).

XIII. Corporate Social Responsibility

Objectives/goals

- Introduce the principle of corporate social responsibility
- Identify the obligations that corporations currently owe to host states and the citizens of those states
- Consider the obligations that foreign investors *ought* to owe to host states
- Explore the asymmetric nature of investment treaties, which impose obligations on states but do not impose similar obligations on investors
- Discuss the ways that investment treaties could be amended to impose responsibilities, as well as rights, on investors and to ensure that tribunals are able to consider the relationship between investment obligations and other international law obligations
- Identify pathways in existing treaties and international investment law that permit states to regulate to protect human and labor rights and the environment

Readings:

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- Henderson, David, *Misguided virtue: false notions of corporate social responsibility* (New Zealand Business Round Table, 2001), pp. 134-48.

Discussion Questions:

- Simon Zadek's article identifies five stages of organizational learning with respect to corporate social responsibility. At which stage(s) do you think the obstacles to overcome are the most difficult? What stages are the most important?
- What do you think of Zadek's chart on "issue maturity" ?
- Are there important issues that you would identify now as falling somewhere within the four stages?
- How should corporations think about their duty to their shareholders (including maximizing profits) and their duty to society?
- Professor Brower's article identifies obstacles and pathways to the consideration of "public interest" issues by investment treaty tribunals. How does one define "public interest"?
- Does Vienna Convention Article 31(3)(c) offer an adequate pathway to systemic integration? Or is the Model BIT approach (exemplified in the IISD Model BIT) better?

Additional Readings/Reference:

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- Gill & Reilly, *The Tenuous Hold of China Inc. in Africa*, THE WASHINGTON QUARTERLY 37, 37-39; 45-49 (Summer 2007).
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XIV. The Future of the Foreign Investment Law Regime?

Objectives:

- Identify likely changes in the regulation of investment law in coming years
- Assess the likely results of those changes and their likely impact on foreign investment
- Consider whether foreign investment protection is necessary to promote foreign investment
- Assess whether an increase in foreign investment is desirable
- Consider the likely impact on the foreign investment regime of increasing numbers of multinational enterprises from emerging markets
- Consider the ramifications of the EU's assertion of competence in the area of investment
- Examine the United States' apparent move away from robust investor protection

Readings:

- Economist Intelligence Unit and Columbia Program on International Investment, *Executive Summary*, in WORLD INVESTMENT PROSPECTS TO 2011, 6-14 (Economist Intelligence Unit 2007).
- Edward M. Graham, *Will emerging markets change their attitude toward an international investment regime?*, in THE RISE OF TNCs FROM EMERGING MARKETS: THREAT OR OPPORTUNITY? (Chapter 14) (Cheltenham, U.K: Edward Elgar, in Karl P. Sauvant with Kristin Mendoza and Irmak Ince eds. *forthcoming*).
- Daniel Drezner, *The outsourcing bogeyman*, 83 FOREIGN AFFAIRS, 22-34 (May/June 2004).
- Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, 2010 EUR. Y.B. INT'L ECON. L. 123, 135-51.
- C.E. Brillembourg, *Summary of Department of State and the Office of the U.S. Trade Representative's Public meeting Regarding the U.S. Model BIT Review*, TRANSNAT'L DISPUTE MGMT (Provisional Issue, August 2009).

- M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 259-68 (Cambridge, 2d ed. 2004).
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- Public Statement on the International Investment Regime (August 31, 2010), *available at* http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf
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Discussion Questions:

- Who are likely to be the most important actors in revising or refining the international investment regime? Traditional players, such as Germany and the United States, or newer entrants, such as the European Union and China?
- Should countries attempt to increase foreign direct investment? What are the costs and benefits?
- The United States has long been a proponent of strong investor protections. What explains the retrenchment in U.S. policy?
- Why did Ecuador denounce ICSID? How important is that for the investment law regime?
- What is the effect of Ecuador's renunciation of ICSID?
- Why has China liberalized its approach to foreign investment?
- Why has the European Union asserted competence over investment?
- What is likely to happen to intra-EU BITs?
- What is likely to happen to extra-EU BITs?
- Could the entry into the field of the European Union revitalize the prospect of a multilateral agreement on investment?

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