

Investment Law Syllabus Project

Vale Columbia Center on Sustainable International Investment



International Investment Law
(Materials for a single one-semester course)

I. Introduction to International Investment Law and Policy

Objectives:

- Present the historical background to the current international investment law regime, including the law of diplomatic protection
- Introduce the customary international law of state responsibility for injuries to aliens, the forerunner to the current treaty-based investment protection regime
- Examine the reasons that investment treaties have come to play a dominant role in investment protection
- Present the tension between a host's interest in retaining unfettered sovereignty and an investor's interest in achieving reassurance and predictability about the regulatory environment for the duration of its investment
- Describe the kinds of political risks investors face, particularly in emerging markets
- Discuss the ways investors can assess their risks in advance
- Present the idea of the "obsolescing bargain"
- Introduce the concept of political risk insurance as an alternative or a supplement to treaty protections and dispute settlement
- Introduce the sources of international investment law

Readings:

- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 3-14; 24-34 (Kluwer 2008).
- M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 22-30 (Cambridge, 2d ed. 2004).

- Karl P. Sauvant, *The rise of international investment, investment agreements and investment disputes*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 3-16 (Oxford 2008).
- Mahnaz Malik, *Recent Developments in International Investment Agreements and the Right of States to Regulate: 2007-2008*, at 1-12, prepared for the Second Annual Forum of Developing Country Investment Negotiators, (IISD 2008), available at http://www.iisd.org/pdf/2008/dci_recent_dev_regulate.pdf
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 15-21 (Oxford 2007).
- Wells, Louis T. and Eric S. Gleason. *Is foreign infrastructure investment still risky?* 1995 HARVARD BUSINESS REVIEW 44-56 (Sept-Oct.).
- N. STEPHAN KINSELLA AND NOAH RUBINS, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 1-6; 27-29 (Oceana 2005).
- Skim the Canadian Model BIT (2003).

Discussion Questions:

- What are the historical bases for the differences between the developed and the developing world in the matter of foreign investment law?
- Given the dissolution of the Soviet Union in 1991 and the apparent dominance of capitalism in most, though not all, countries of the world, do you think it likely that states will continue to diverge strongly in their approaches to investment law? What effect will the recent success of socialist governments in Latin America have on investment law?
- Why did states enter into treaties to protect and promote foreign investment? Is an international framework necessary to promote capital flows, or would the money go where it was needed or most useful in the absence of such an infrastructure?
- Why is international arbitration seen as an attractive method of dispute resolution for disputes regarding investment?
- Do you think the ICSID Convention mechanism is an effective means of “de-localizing” disputes?
- What are the conditions that must be satisfied for a dispute to be heard under the ICSID Convention? Why did the states which negotiated the Convention include those conditions?
- Why has the number of investment agreements risen so sharply in the latter part of the 20th Century?
- Is foreign investment insurance a better approach to protecting foreign investments than making dispute settlement available? Can both work in concert?

- 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?
- Are there certain sectors of the economy, for example the provision of utilities like electricity and water, that should be reserved to the government?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, , FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1-211; 491-622 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 1-30 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 1-75 (Oxford 2008).
- Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 818-833 (2005).
- MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES 5-33 (Eleven 2008).
- Peter Muchlinski, *Policy Issues*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3- (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 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)
- Andrew Seck, *Investing in the Former Soviet Union’s Oil Industry: The Energy Charter Treaty & Its Implications for Mitigating Political Risk*, 110 in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT & TRADE (THOMAS W. WÄLDE, ed. 1996).
- THEODORE MORAN, HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT 113-141 (Center for Global Development 2006).

II. Admission and Establishment - Attracting FDI and Maximizing its Benefits

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
- Introduce the concepts of “investor” and “investment”
- Consider the requirement of “legality” of an investment

Readings:

- THEODORE H. MORAN, HARNESING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES 6-44 (Center for Global Development 2006).
- Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT’L LAW. 875, 885-890 (1999).
- Andrea K. Bjorklund, *Improving the International Investment Law and Policy Regime: Report of the Rapporteur*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS [excerpts re distinctions between types of industries and the protections they should engender] (José E. Alvarez, Karl P. Sauvant & Kamil G. Ahmed eds., Oxford, forthcoming 2010).
- Peter Muchlinski, *Policy Issues*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 31-37 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- 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).
- *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).
- *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case ARB/03/26 (Award) (2 August 2006), ¶¶ 184-188; 205-107.

Discussion Questions:

- 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?
- Why have investment treaties limited the ability of States to impose “performance requirements” on aspiring investors? Should some use of performance requirements be permitted?

- Is there a link between economic development and development of the rule of law?
- How can host countries ensure that they are attracting sustainable development?
- 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 ought to be the scope of a transparency obligation? Are there greater hurdles to abiding by such an obligation in a federal state, such as the United States, than in a unitary state with a strong central government?
- Was the *Metalclad* tribunal right to find a transparency obligation under Article 1105 NAFTA, which requires parties to afford fair and equitable treatment in accordance with international law to investments in their territories? Was Mr. Justice Tysoe right to overturn the tribunal in this regard?
- What is the appropriate balance of responsibility between foreign investors and host states? Should *Metalclad* have tried to harder to get every possible permit, regardless what federal government officials said was necessary?
- Is the illegality of an investment sufficient to deprive a tribunal of jurisdiction? What if the state (or a state official) colludes in the illegality?

Additional Readings/Reference:

- RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT* Law 79-88 (Oxford 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, *INVESTOR-STATE ARBITRATION* 1-10 (Oxford 2008).
- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 61-64 (Kluwer 2008).
- Charles P. Oman, *Policy Competition for Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI* pp. 9-22, 77-80, 113-126 (OECD Development Centre, 2000).
- 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 M. LUNDAN, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* 93-113 (Edward Elgar, 2d ed. 2008).
- T. Agmon, *Who gets what: the MNE, the national state and the distributional effects of globalization* 34 *J. INT’L BUS. STUD.* 416 (2003).

- John H. Dunning, *The evolving world scenario*, in WHAT'S NEXT? STRATEGIC VIEWS ON FOREIGN DIRECT INVESTMENT 12-17 (Samuel Passow & Magnus Runnbeck eds., ISA, 2005).
- Akira Kotera, *Regulatory Transparency*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 617 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

III. Applicable Law and Treaty Interpretation

Objectives:

- 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 role of municipal law and how it interacts with international law

Readings:

- UNCTAD, UNCTAD Materials, Part 2.6 *Applicable Law* pp. 5-22 (page 14 omitted); 27-31.
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 91-99, 201-217 (Oxford 2008).
- W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold: Essays in Honor of Ibrahim F.I. Shihata*, 15:2 ICSID REVIEW FOREIGN INVESTMENT L. . 362, 366-74 (Fall 2000).
- *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (Award) (18 August 2008) pages 46-49.
- *Wena Hotel Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, (Decision on Annulment) (5 February 2002), ¶¶ 15-16 (facts); ¶¶ 26-46.
- Articles 42, 52(1) ICSID Convention.
- NAFTA Article 1131.
- 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:

- Is ICSID Art. 42 an adequate forum selection clause? What does the phrase “such rules of international law as may be applicable” mean?
- If Article 42 does not apply, what conflict of laws rules should international tribunals use?

- Why are tribunals barred from bringing a finding of *non liquet*?
- Some have observed that tribunals have seemed determined to find a pathway for international law (rather than municipal law) to play a role in the tribunal's determination of the appropriate outcome of any disputes. Do you think that is true? What are some of the pathways they have used to have international law apply to a dispute? Why might they wish to do so?
- Why is it viewed as undesirable to regard a contract as a self-contained agreement?
- 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?
- Why was Professor Reisman so unhappy with Lord Asquith of Bishopstone, the arbitrator who decided the Abu Dhabi case? Would you have had confidence in Lord Asquith's ability to ascertain and apply Islamic law?
- How do you tell the difference between a "lacuna" in the law and a decision not to regulate a certain matter or a decision to regulate it in a different way?
- How would you re-write the choice-of-law clause in the contract between the parties in *Duke Energy v. Ecuador* to make it clearer? Or is it clear enough as is?
- Application of the proper law is important, since a failure to do so could lead to annulment under the ICSID Convention or the set-aside or refusal to enforce an award. Is it fair to expect arbitrators to know what law to apply in the absence of clearer direction? Look at Art. 39 of the *Wena Hotels* decision. Would this give future arbitrators an idea of the best way to resolve an applicable law issue? Does this do a disservice to the parties, who usually want their awards to be enforceable after they have gone to the time and effort of arbitrating?

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)
- Antonio Parra, *Applicable Law in Investor State Disputes*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 1* (Arthur Rovine ed., Martinus Nijhoff 2008).
- 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).
- MONIQUE SASSON, *SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION* (Wolters Kluwer 2010).

IV. 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 SABAH, 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).

V. 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 “Frankenstein” 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 SABAH, 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).

VI. 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 THE INTERNATIONAL LAWYER 87, 87-94; 100-06 (2005).
- 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 SABAH, 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 Kinneare, *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).

VII. Investment and . . . labor, the environment, human rights

Objectives:

- Introduce the principle of corporate social responsibility
- Explore the asymmetric nature of investment treaties, which impose obligations on states but do not impose similar obligations on investors
- Consider the role of NGOs and other non-disputing parties in investment arbitrations
- Examine the relationship between investment obligations and other human rights obligations
- Examine the effect that the inclusion of stabilization clauses in investment contracts has on a host state's ability to regulate to protect its population
- 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:

- Zadek, *The Path to Corporate Responsibility*, HARVARD BUSINESS REVIEW 125 (December 2004).
- Luke Eric Peterson, *Miner's claim against South Africa moves forward slowly*, 1:13 INVESTMENT ARB. REP. (22 Oct. 2008).
- Charles H. Brower, II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in 1 YB. ON INT'L INVESTMENT LAW & POLICY 347, 347-56; 365-78 (2008/2009) (focus on text, not footnotes).
- Andrea Shemberg, *Stabilization Clauses and Human Rights*, Research Project Conducted for International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights (11 March 2008), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf), pp. 4-16; 32-41.
- Glamis Gold Ltd. v. United States of America, UNCITRAL (Award) (8 June 2009), ¶¶ 10-26.
- Glamis Gold Ltd. v. United States of America, UNCITRAL (Non disputing party supplemental submission) (16 October 2006).
- Konrad von Moltke, IISD, A MODEL INTERNATIONAL INVESTMENT AGREEMENT FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT (2004), articles 11-24.

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?
- What do you think of the European mining companies’ claims against South Africa? Should the BEE policies of the South African government have priority over South Africa’s investment obligation, assuming the two policies are seen as irretrievably conflicting? Does it make a difference to your answer to know that it was the Mandela government who signed South Africa’s bilateral investment treaties?
- 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?
- You learned about the police powers exception in the class on expropriation. Is that another route that a state might use to justify its regulating in order to protect human rights and/or the environment?
- A senior U.S. State Department Attorney has argued that investment treaties are in the “public interest.” Is he right?
- Does consideration of the “public interest” in investment arbitration necessarily re-politicize disputes? Do you think investment disputes were ever successfully de-politicized to begin with?
- Which of the pathways to consideration of the public interest do you think are the most likely to be effective?
- The *Glamis Gold* case involved a mining dispute in an area near ground sacred to the Quechan Indians. I gave you the executive summary of the award (some 361 pages long!). Did you think that the tribunal adequately considered the public interest in its decision?
- Should a tribunal necessarily consider “public interest” issues if it is able to dispose of claims on other grounds?

- What are the issues of public interest identified by the Quechan Indians? Could such issues or positions ever be adequately represented by another sovereign entity, such as the U.S. government?
- Does the amicus submission of the Quechan Indians explain where in NAFTA Chapter 11 its submission regarding international law on sacred sites and cultural property fits? In other words, does it describe the pathways via which the tribunal would have the authority to consider its submissions?
- What would you describe as the strengths of the excerpts from the IISD Model BIT? The weaknesses?
- What factors in the IISD Agreement might make it easier for states to attract investment? What factors might make it harder?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 286-302 (Kluwer 2005).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1114.4 – 1114.13 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 21-23; (Oxford 2007).
- Gill & Reilly, *The Tenuous Hold of China Inc. in Africa*, THE WASHINGTON QUARTERLY 37, 37-39; 45-49 (Summer 2007).
- Koenig-Archibugi, *Transnational Corporations and Public Accountability*, GOVERNMENT & OPPOSITION 234, 246-259 (Spring 2004).
- Ursula Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, in THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD, 165 (August Reinisch & Ursula Kriebaum eds., Eleven 2007).
- OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (June 2000).
- Peter Muchlinski, *Corporate Social Responsibility*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- INTERNATIONAL INVESTMENT DISPUTES AND THE PROTECTION OF THE ENVIRONMENT (Permanent Court of Arbitration ed., Kluwer 2000).

VIII. 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).

IX. Dispute Settlement/Consent/Prerequisites/Arbitrator Selection

Objectives:

- Consider why arbitration is often viewed as an attractive alternative to litigation in domestic courts
- Identify the drawbacks to litigating in either home or host state courts
- Identify the advantages investor-state dispute settlement holds over state-state dispute settlement
- Identify the various sources for consent to an investment arbitration
- Learn about “fork-in-the-road” clauses
- Consider the potential overlap between domestic causes of action and international investment law claims
- Examine the waiver of the exhaustion-of-local-remedies rule
- Review the identity of the most frequent defendants in investment cases
- Discuss the qualities an arbitrator in an investor-state dispute settlement case ought to have
- Consider the ethical dilemmas faced by arbitrators in investor-state dispute settlement

Readings:

- August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 694, 694-702 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 *VA. J. INT'L L.* 809, 820-25 (2005).
- Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 217 – 233 (Loukas A. Mistelis & Julian D.M. Lew eds., Kluwer 2006).
- Emmanuel Gaillard, *Vivendi and Bilateral Investment Treaty Arbitration*, *NEW YORK L.J.* (Feb. 26, 2003).

- Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17(10) MEALEY'S INTERNATIONAL ARBITRATION REPORT 25-28 (Oct. 2002).
- Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(4) TDM (July 2008).
- ICSID, THE ICSID CASELOAD – STATISTICS (Issue 2010-2), pp. 8-17.
- INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, PRIVATE RIGHTS/PUBLIC PROBLEMS 15-20 (2001).
- Compare: NAFTA art. 1121(1)(b) (no "u-turn"); U.S.-Ecuador BIT art. VI(2) & (3) ("fork-in-the-road"), II(3)(b).
- *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction)
 - *Waste Management I*
(Final Award (Dismissing on Jurisdiction)) (6/2/00), ¶¶ 4-7, 14-31.
(Dissenting Opinion (on Jurisdiction)) (6/2/00), ¶¶ 10 – 28.
 - *Waste Management II*
(Award on Jurisdiction, second claim) (6/26/02), ¶¶ 2-3, 19-37.

Discussion Questions:

- What are some of the drawbacks to diplomatic protection?
- What are some of the advantages of diplomatic protection?
- Treaty arbitration effectively involves an offer by a state to arbitrate unknown disputes that might arise in future, subject to certain jurisdictional limitations. What are some of the drawbacks to advance consent?
- Would it make sense to re-introduce the requirement that investors exhaust local remedies prior to instituting investment disputes? What are some of the pros and cons of requiring recourse to local courts before instituting investment arbitration?
- What are the differences in the consent to arbitration found in NAFTA Article 1121 and the US-Ecuador BIT?
- Both NAFTA Article 1121 and the US-Ecuador BIT encourage disputing parties to seek resolution through conciliation or mediation. What are some of the impediments to successfully resolving disputes via those means?
- What was wrong with the claimant's waiver in *Waste Management I*?
- Why do you think the claimant filed the waiver it did? In other words, why did it not file a waiver that clearly complied with the provisions of Article 1121?

- Did you agree with Professor Highet’s approach in the dissent in *Waste Management I*?
- Do you agree that a claim based in international law is always distinct from a claim based in domestic law? Does it help to focus on the breach at issue, or the measure at issue?
- Is it a problem that a claimant might seek redress both in local courts and in international arbitration for redress for the same underlying injury?
- Should the tribunal in *Waste Management II* have permitted the claimant to reinstitute arbitration?
- Should the tribunal in *Waste Management I* have barred the claimant from reinstating the dispute with an appropriate waiver? Could it have?
- If the tribunal in *Waste Management I* had said that the claimant could not move forward, would the second tribunal have been bound by that decision? Even if it was not bound, should it have even if it wasn’t required to do so?
- What kinds of qualities should an arbitrator in an international investment dispute have?
- What kinds of ethics rules should international arbitrators have to follow?
- Are so-called “issue conflicts” a threat to the legitimacy of investment arbitration?

Exercise: Ask students to identify the qualities they would like to see in an arbitrator for a particular dispute, such as *Waste Management* or *Glamis Gold*. Ask them to research likely candidates through publicly available sources, and present their candidates to the class.

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 317-490 (Kluwer 2005).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT Law 211-229; 238-52 (Oxford, 2008).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 117-131 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1121.9 – 1121.38; 1125.2 - 1125.13 (Kluwer 2006; last updated 2009).
- CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 45-56; 95-109 (Oxford 2007).

- ANDREW NEWCOMBE & LLUIS PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 41-73 (Kluwer 2008).
- Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms – Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 63 (Katia Yannaca-Small ed., Oxford 2010)
- Jan Paulsson, *Arbitration Without Privity*, 10 *ICSID REVIEW – FOREIGN INVESTMENT L. J.* 232 (1995).
- Pieter H.F. Bekker, *The Use of Non-Domestic Courts For Obtaining Domestic Relief: Jurisdictional Conflicts Between NAFTA Tribunals and U.S. Courts?*, 11(2) *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 331-342 (2005).
- Osvaldo Marzorati, *Algunas Reflxiones sobre el Alcance de la Protección de las Inversiones en el marco de los Tratados firmados por Argentina*, 1 *REVISTA PERUANA DE ARBITRAJE*, 71-118 (Editorial Jurídica Grijley (2005)
- Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (June 2001), available at <http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf>.
- Christoph Schreuer, *Traveling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 *J. WORLD INVESTMENT & TRADE* 231 (2004).

X. 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 SABAHI, 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 (Katia Yannaca-Small ed., Oxford 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)

XI. Consent & Jurisdiction *Ratione Materiae* & *Ratione Temporis*

Objectives:

- Learn the distinction between jurisdiction and admissibility
- 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
- Examine whether a “continuing violation” can bring a breach within the ambit of an investment treaty

Readings:

- Jan Paulsson, *Jurisdiction and Admissibility*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601 (ICC Pubs. 2005).
- UNCTAD, UNCTAD MATERIALS, Part 2.5, *Requirements Ratione Materiae*, pp. 13-25.
- *Salini Costruttori 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.
- *Mondev Int'l Ltd. v. United States*, ICSID ARB(AF)/99/2 (Award) (11 October 2002), ¶¶ 37-40; 57-58; 66-75.
- ICSID Convention, Arts. 25, 36, 41, 71-72.
- Compare definitions of “investor” and “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:

- How can a tribunal tell the difference between an objection to admissibility and an objection to jurisdiction?

- What are the advantages to hearing objections to jurisdiction and admissibility separately from the merits of the case? What are the disadvantages?
- Why is dispute settlement under the ICSID Convention limited to those who have made an investment?
- How should investment under the ICSID Convention be construed – broadly or narrowly?
- 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 is a “continuing wrongful act”? If a state is responsible only for conduct that it engages in after a treaty enters into force, how much of the wrongfulness has to occur *after* a treaty has entered into force?
- Along those lines, the *Mondev* tribunal (para 70) says that “events or conduct prior to the entry into force of an obligation for the respondent state may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.” How is that previous conduct relevant?
- What effect should the decision about a continuing wrongful act have on a damages calculation? In other words, should the injury occurring before a treaty enters into force be excluded from the damages calculation?

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 SABAHI, *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).

XII. Jurisdiction *Ratione Personae* & Third-Party Participation

Objectives:

- Discuss restrictions on the identity of the claimants in investment arbitrations
- Discuss the appropriate contours of the continuous nationality rule
- Consider what attributes distinguish a “sham” or “mailbox” corporation from an investor with standing
- Consider the requirement that conduct be attributable to the state in order for investment treaty obligations to be triggered
- Identify the circumstances (if any) under which *amici* should be allowed to participate in investment arbitrations
- Consider whether transparency provisions that permit *amici* to participate need to be amended further to ensure access to party pleadings and memorials

Readings:

- UNCTAD, UNCTAD MATERIALS, Part 2.4, *Requirements Ratione Personae* pp. 5-25 (pages 6, 12 and 18 omitted).
- ICSID Convention, Arts. 25, 36, 41, 71-72.
- *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.
- *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case ARB(AF)/98/3 (Final Award) (26 June 2003) ¶¶ 30-41 (facts), ¶¶ 220-39 (continuous nationality).

- *Gami Investments, Inc. v. United Mexican States*, UNCITRAL (Final Award) (15 Nov. 2004) ¶¶ 12-22 (factual background), 23 (claims), 26-33 (jurisdiction and standing).
- RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 195-205 (Oxford 2008).
- Mark Kantor, *ICSID Amends Its Arbitration Rules*, 3:5 *TRANSNATIONAL DISPUTE MANAGEMENT* (December 2006) pp. 1-3.
- *Methanex v. United States*, UNCITRAL (Decision of the Tribunal . . . on Amicus Curiae) (15 January 2001).
- *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Procedural Order No. 5), (2 February 2007).

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?
- Can *amici* effectively participate in proceedings if they don’t have access to key documents?
- Is there a fairness problem if the *amici* all seem likely to support one side in the arbitration?
- Who should pay the costs of *amicus* participation?
- To what extent must arbitrators pay attention to the *amicus* submissions?
- Do ICSID’s rules changes go far enough? They make some steps towards transparency, but is it good enough for the public to have guaranteed access only to

the reasoning in an award, rather than to the award itself or to any of the pleadings and memorials submitted by the parties in the arbitration?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 799-831; 1505-1514 (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).
- Maurice Mendelson, *Runaway Train: The Continuous Nationality Rule from the Panavezys-Saldutiskis Railway Case to Loewen*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 97 (Todd Weiler ed., Cameron May 2005)
- Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 129 (Katia Yannaca-Small ed., Oxford 2010).
- Andrew de Lotbinière & Ank Santens, *ICSID Tribunals Apply New Rules On Amicus Curiae*, 22(2) MEALEY'S INTERNATIONAL ARBITRATION REPORT 69-80 (2007).

XIII. Damages and Costs

Objectives:

- Describe the principles supporting the award of damages under international law
- Consider whether a country engaging in an unlawful expropriation should pay more in damages than one engaging in a lawful expropriation
- Identify the kinds of conduct that could give rise to an award of moral damages
- Assess whether investors have the possibility of “double dipping” – recovering more than the amount to which they are entitled

- Consider the question of attorneys' fees and costs. Should the loser pay costs? Attorneys' fees?
- Identify the criteria that should govern the award of fees and costs

Readings:

- William W. Park, III, *Framing the Case on Quantum*, 2:4 WORLD ARBITRATION & MEDIATION REV. 59-65 (2008).
- *ADC v. Hungary* ICSID Case No. ARB/03/16 (Award of the Tribunal) (2 October 2006), pp. 89-103.
- Lou Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded Karaha Bodas Company in Indonesia*, 19 ARB. INT'L 471 (2003).
- Borzu Sabahi, *Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of Desert Line v. Yemen*, in A LIBER AMICORUM: THOMAS WÄLDE 253-264 (Jacques Werner & Arif Hyder Ali eds., Cameron May 2009).
- Bernard Hanotiau, *The Parties' Costs of Arbitration*, in EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (ICC Services Publications 2006).
- *Methanex Corp. v. United States*, UNCITRAL (Final Award) (3 August 2005), Part V, pp. 1 – 5.

Discussion Questions:

- The *Chorzów Factory* case is usually cited as the basis for any damages/reparations calculation. It says that the injured party should be placed in the position it would have occupied but for the breach. Yet at customary international law it seemed that claimants could get something akin to reliance damages for a "lawful taking," (the amounts they had put into the enterprise), while they would get something closer to expectation damages in the event of an unlawful taking (the amounts they had put in to the enterprise + lost profits). Why did BITs adopt the same measure for an unlawful taking as compensation for a "lawful" taking?
- Should claimants under BITs get more damages for an "illegal" expropriation than they do for a legal expropriation? Isn't the economic damage the same in each case?
- What kinds of losses (if any) should a claimant have to prove to sustain a claim for greater damages for an "illegal" expropriation?
- The tribunal in *ADC v. Hungary* said the BIT described recovery only for a lawful taking, and that customary international law thus filled in the gaps to provide the measure for an illegal expropriation. This meant that they measured the value of the concession on the date of the award, rather than on the date of the taking (the traditional place for measurement in expropriation cases). Were they justified in doing this?

- Should the state that engages in the unlawful act take on the risk that an investment will appreciate after the taking, and thus pay more if it happens to do so?
- Fair market value is usually calculated on a discounted cash flow basis that assesses the entire value of a company as of the date of expropriation. It involves assessing the likely profits of an enterprise for several years into the future. Is this inherently too speculative to support an award for damages? Does the answer differ depending on the kind of business. For example, some enterprises, like those in the oil or natural gas business, might reasonably expect to make a profit due to demand for their products, whereas continued demand for other commodities might be more speculative.
- One of the motives behind increasing the amount of damages for an unlawful as opposed to a lawful expropriation, seems to be deterrence of such acts. Do you think such deterrence is likely to be successful?
- Is there a punitive component behind awarding greater damages for an unlawful expropriation? What about an award of moral damages?
- Should a violation of international law alone, without any economic or tangible injury, suffice to support an award of money damages?
- What kinds of injury should support an award for moral damages?
- Should corporations be permitted to ask for moral damages for injury to their employees? Does it matter whether the employee is a CEO or is in a less exalted position? Should the employees be able to make a claim themselves?
- Should a losing party have to pay the costs of an arbitration? Should it also have to pay attorneys' fees? What criteria should govern these decisions?
- How should one tell whether the attorneys' fees charged in an arbitration are reasonable? Can that be done objectively, or is there necessarily a subjective component?
- Should arbitrators have to decide early on in the proceedings who will bear the costs of the arbitration in the event of loss?
- Is there a reason to treat attorneys' fees separately from the costs of the arbitration, and perhaps a better reason to require the losing party to pay the costs, but not the fees, or at least not all of the fees?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1245-1390 (Kluwer 2005).

- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 563-625 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1135.3 -1135.43 (Kluwer 2006; last updated 2009).
- CAMPBELL McLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 315-349 (Oxford 2007).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 377-398 (Kluwer 2008).
- W. Michael Reisman & Rob Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 (2003).
- CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1076-1180 (Cambridge 2001).
- Alan S. Alexandroff & Ian A Laird, *Compliance and Enforcement*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- SERGEY RIPINSKY WITH KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (BIICL 2008).
- MARK KANTOR, VALUATION FOR ARBITRATION (Kluwer 2008).
- Richard Kreindler, *Final Ruling on Costs: Loser Pays All?*, ASA BULLETIN, Special Series No. 26 (July 2006).

XIV. Control Mechanisms and Enforcement of Arbitral Awards

Objectives:

- Evaluate the annulment process under the ICSID Convention
- Discuss the means for setting aside awards under the New York Convention
- Understand the scheme for enforcement of arbitral awards under the ICSID Convention
- Understand the scheme for enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Arbitral Awards
- Assess the threat that sovereign immunity for execution of awards poses to the function of the investor-state arbitration regime
- Understand the importance of the place of arbitration in a non-ICSID case

Readings:

- UNCTAD Materials, Part 2.8 *Post-Award Remedies and Procedures* pp. 13-33 (pages 16 and 30 omitted).
- Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17-42 (Emmanuel Gaillard & Yas Banifatemi eds., Juris 2004).
- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Decision) (25 September 2007), ¶¶ 41-57, 68-76, 81-85, 89-100, 119-136, 144-150, 154-15.

- *The Republic of Ecuador v. Occidental Exploration & Production Company*, Judgment of the U.K. Court of Appeal (Civil Division), July 4, 2007, ¶¶ 1-4; 16-40.
- Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: LIBER AMICORUM CHRISTOPH SCHREUER 302-309; 314-16; 321 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., Oxford 2009).
- Timothy Nelson & Julie Bédard, *The President's Plane is Missing*, IFLR 51 (August 2008).
- Articles 52-55, ICSID Convention.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V, available at www.uncitral.org/English/texts/arbitration/NY-conv.htm.

Discussion Questions:

- What is the distinction between annulment and appeal?
- Have ICSID tribunal consistently honoured that distinction?
- Did the *CMS Annulment Committee* abide by the standard of review?
- Should annulment committees have greater powers than the ability only to annul or uphold a decision? Would it be desirable from an efficiency standpoint for the annulment committee to substitute appropriate reasoning if it believes a tribunal has gone wrong?
- What is the difference between set-aside and enforcement of an award? Should they be governed by the same legal principles?
- Is it an adequate safeguard for the integrity of arbitral proceedings to have the place of arbitration review the award? Once a set-aside court has upheld an award, should an enforcement court be obliged to honour that decision?
- Should states have immunity from execution of their property? Given what you know about the purpose of the BIT regime, is that an Achilles' heel in the system?
- Why would states not pay awards? Are there good reasons for that? Bad reasons for that?
- What options are there for an investor with an award that is not getting paid? Can you think of avenues that an investor should pursue?
- Are there other ways state parties to BITs might ensure the enforcement of awards rendered under the treaties? Does involving them risk re-politicization of the investor-state system?

Additional Readings/Reference:

- R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1515-1652 (Kluwer 2005).
- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 627-714 (Oxford 2008).
- MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1136.8 – 1136.39 (Kluwer 2006; last updated 2009).
- CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 890-1185 (Cambridge, 2d. ed. 2009).
- Alan S. Alexandroff & Ian A Laird, *Compliance and Enforcement*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- August Reinisch, *Enforcement of Investment Awards*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 671 (Katia Yannaca-Small ed., Oxford 2010).
- Claudia Annacker & Robert T. Creig, *State Immunity and Arbitration*, 15(2) ICC COURT OF ARBITRATION BULLETIN, Special Supplement 70-78 (2004).
- Stanimir Alexandrov, *Enforcement of ICSID Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 322 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., Oxford 2009).

XV. Assessing the Effectiveness of BITS and Predicting the Future

Objectives:

- Discuss the main challenges to the investor-state dispute settlement system
- Assess the effectiveness of the system in terms of increasing foreign direct investment
- Assess the effectiveness of the system in terms of furthering the international rule of law
- Consider whether the establishment of an appellate mechanism is desirable, notwithstanding practical hurdles to implementation
- Consider the drawbacks to establishing an appellate mechanism
- Outline what provisions future investment agreements ought to include or exclude
- Consider what effect MNEs from emerging markets will have on the international investment system

Readings:

- Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 111-115 (2005).
- Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, COLUMBIA FDI PERSPECTIVES (15 June 2009).

- L.A. Ahee & Rory E. Walck, *ICSID Arbitration in 2009*, TRANSNAT'L DISPUTE MANAGEMENT (Provisional Issue, January 2010).
- Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231 (Karl P. Sauvant ed., Oxford 2008).
- Sauvant, Karl P, *The Rise of TNCs from emerging markets: the issues*, in THE RISE OF TRANSNATIONAL CORPORATIONS FROM EMERGING MARKETS: THREAT OR OPPORTUNITY? (Karl P. Sauvant et al. eds 2008).
- GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 175-184 (Oxford 2007).
- Sarah Anderson, *Clash on Investment: Global Trade and an Opportunity for Civil Society* (Institute for Policy Studies, November 2009).

Discussion Questions:

- Are you surprised to learn that governments win a bit more than investors?
- Notwithstanding apparent dissatisfaction with the investment arbitration system, case filings seem to be staying at relatively consistent levels. Is this because the options are even worse? Is it the triumph of hope over experience?
- Many people have suggested the establishment of an appellate mechanism for investment arbitration. Do you think such an innovation is necessary? Feasible?
- What purpose would the appellate body serve? Would it correct errors in individual cases? Create a more coherent body of law? Add legitimacy to the system? Help to avoid ethical conflicts (assuming one had a standing body of arbitrators exclusively devoted to the appellate body)? Can you think of others?
- What are the disadvantages of an appellate body?
- What would the ideal appellate mechanism look like? Would you have an appellate body exclusive to each treaty, or one which had the authority to hear all investment disputes?
- What standard of review should such an appellate body employ?
- Would it be better to have a multilateral investment agreement? What are the pros and cons of such an approach?
- How does the principle of transparency relate to the idea of settlement of disputes? Would transparency make it easier or harder to settle cases?
- Do you agree with Jes Salacuse and Nicholas Sullivan that BITs have contributed in a positive way to the formation of customary international law?

- Would replacing investor-state dispute settlement with state-state dispute settlement be a step backwards? What are the benefits of such an approach? What are the drawbacks?
- Could the Institute for Policy Studies' concerns be satisfied with the creation of a multilateral treaty that imposes obligations on foreign investors, like the IISD model treaty we looked at several classes ago?
- Could a multilateral, multifaceted agreement diminish the polarization among users and critics of the system by bringing together the corporate interests who want to preserve the protections they have succeeded in getting while alleviating the concerns of civil society?
- By arguing against investor-state dispute settlement, are representatives of civil society missing an opportunity to hold corporations accountable for abuses?

Additional Readings/Reference:

- CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 701-714 (Oxford 2008).
- ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES 57-63 (Kluwer 2008).
- Andrea J. Menaker, *What the Explosion of Investor-State Arbitrations May Portend for the Future of BITs*, in THE FUTURE OF INVESTMENT ARBITRATION 157 (Catherine Rogers & Roger Alford eds., Oxford 2009).
- Charles H. Brower II, *Reflections on the Road Ahead: Living With Decentralization in Investment Treaty Arbitration*, in THE FUTURE OF INVESTMENT ARBITRATION 339 (Catherine Rogers & Roger Alford eds., Oxford 2009).
- José E. Alvarez, *Implications for the Future of International Investment Law*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 29 (Karl P. Sauvant ed., Oxford 2008).
- August Reinisch, *The Future of Investment Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: LIBER AMICORUM CHRISTOPH SCHREUER 894 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., Oxford 2009).