

INTERNATIONAL INVESTMENT LAW SEMINAR
Fall 2009
Hazel Hall Room 356
Syllabus

International investment law is emerging as a distinct and important field of international law. The explosive growth of “investor-State” arbitration creates opportunities for practicing attorneys to assist in the evolution of this field, while also drawing on and contributing to international law more broadly. These arbitrations allege breaches of bilateral or multilateral investment treaties and are often resolved by tribunals constituted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank group. As a result, these arbitrations raise important questions both about the rights and obligations of international investors and about the appropriate mechanisms for resolving investment disputes. This course examines the historical foundations of investment treaty arbitration, the public international law principles which inform the interpretation of investment agreements and the jurisdictional prerequisites for establishing investment treaty claims. It goes on to consider substantive obligations contained in these agreements and the circumstances under which tribunals have found those obligations to have been breached. It closes with consideration of exceptions and defenses to these obligations under public international law and the functionality of investments agreements, as well as investor-State dispute resolution mechanism, in general. No prerequisites are required, although students will find it helpful to take previously or simultaneously other international courses, such as International Law, International Finance, or International Trade. Grades will be determined based on classroom participation (20%) and a final research paper (80%).

Primary source materials can be found in Annexes 1-8 of RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); the Appendices of CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); HeinOnline, or will be placed separately on reserve. All other materials should be available on Westlaw or through the hyperlinks provided. Students are encouraged to familiarize themselves with the websites maintained by ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet>, and the University of Victoria Faculty of Law, <http://ita.law.uvic.ca/about.htm>, on which many investor-State awards can be obtained. It is advised that students download their own copies of the following sources for ease of reference:

- ICSID Convention,
<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain>
- US Model BIT,
<http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf>

Course Schedule

Class 1: (8/26)

Historical Foundations of Investment Treaty Arbitration and the Law of Diplomatic Protection

Primary Sources:

- Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens*, 55 AM. J. INT'L L. 545 (1961) [HeinOnline]
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY (1967), [HTTP://WWW.OECD.ORG/DATAOECD/35/4/39286571.PDF](http://www.oecd.org/dataoecd/35/4/39286571.pdf)

Secondary Sources:

- CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAH, *INVESTOR-STATE ARBITRATION* (2008)
 - Chapter II: History and Limitations of the Traditional System for Resolving Investment Disputes (pp. 11-43)
- Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005)

Class 2: (9/2)

Modern Framework for Resolving Investment Disputes

Primary Sources:

- Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)
- NAFTA Chapter 11
- The Energy Charter Treaty (Excerpt)

Secondary Sources:

- Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331 (1972-II) [on reserve]
- Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW 232 (1995) [on reserve]
- Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531 (2002)

Class 3: (9/9)

Investment Agreements as Public International Law Instruments: the Role of International Law in Interpreting Treaties

Primary Sources:

- Statute of the International Court of Justice, Article 38
- Vienna Convention on the Law of Treaties, Articles 31-32
- NAFTA Article 1131
- ICSID Convention, Article 42

Secondary Sources:

- ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009)
 - Chapter 2: Applicable Substantive Law and Interpretation (pp. 75-119)

Awards:

- *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue (June 12, 2009), <http://ita.law.uvic.ca/documents/Hrvatska-Interpretation.pdf>; Individual Opinion of Jan Paulsson (June 8, 2009), <http://ita.law.uvic.ca/documents/Hrvatska-Interpretation-Paulsson.pdf>

Class 4: (9/16)

Jurisdiction of Investment Tribunals: Establishing Consent to Arbitration

Primary Sources:

- ICSID Convention, Ch. II: Jurisdiction of the Centre, arts. 25-27
- NAFTA Articles 1120-1122
- German Model BIT (2005), Article 11

Secondary Sources:

- DUGAN, WALLACE, RUBINS & SABAHI, INVESTOR-STATE ARBITRATION (2008)
 - Chapter X: Consent to Arbitral Jurisdiction (pp. 219-46)
- DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008)
 - Chapter IV: Investment Contracts (pp. 72-78)

Awards:

- *Kaiser Bauxite Co. v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence (July 6, 1975), 1 ICSID REPORTS 296 (1993) [on reserve]
- *Southern Pacific Properties v. Arab Republic of Egypt*, Decision on Jurisdiction (November 27, 1985), 3 ICSID REPORTS 112 (1995) [on reserve]
- *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), 4 ICSID REPORTS 245 (1997) [on reserve]

Class 5: (9/23)

Jurisdiction of Investment Tribunals: What Constitutes an Investment?

Primary Sources:

- UK Model BIT (2005), Article 1
- NAFTA Article 1139

Secondary Sources:

- MCLACHLAN, SHORE & WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION (2007)
 - Chapter 6: Investment (pp. 163-96)

Awards:

- *Salini Costruttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 31, 2001), 42 ILM 609 (2003)
- *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award on Jurisdiction (July 11, 1997), 37 ILM 1378 (1998)
- *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (August 6, 2004), http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf

Class 6: (9/30)

Jurisdiction of Investment Tribunals: The Problem of Nationality

Primary Sources:

- US Model BIT (2004), Article 1

Secondary Sources:

- MCLACHLAN, SHORE & WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION (2007)
 - Chapter 5: Nationality (pp. 131-62)

Awards:

- *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment of April 6, 1955, ICJ Reports 4, <http://www.icj-cij.org/docket/files/18/2674.pdf>
- *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004), http://ita.law.uvic.ca/documents/Tokios-Jurisdiction_000.pdf ; Dissenting Opinion of Prosper Weil (April 29, 2004), http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf
- *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (April 18, 2008), <http://ita.law.uvic.ca/documents/RomPetrol.pdf>

Class 7: (10/7)

Substantive Obligations: Umbrella Clauses and the Problem of Contract Breaches

Primary Sources:

- 1994 U.S.-Romania BIT, Article II, 2(c)
- UK Model BIT (2005), Article 2

Secondary Sources:

- DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008)
 - Chapter IV: Standards of Protection (pp. 153-62)
- Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JOURNAL OF WORLD INVESTMENT AND TRADE 231 (2004) [on reserve]

Awards:

- *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (August 6, 2003), 42 ILM 1290 (2003)
- *SGS v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (January 29, 2004), http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf; Separate Declaration of Antonio Crivellaro, http://ita.law.uvic.ca/documents/SGSvPhil-declaration_000.pdf ICSID Reports 518 (2005)
- *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award (October 12, 2005), <http://ita.law.uvic.ca/documents/Noble.pdf>
- *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007), <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>

Class 8: (10/14)

Substantive Obligations: National Treatment

Primary Sources:

- NAFTA Article 1102

Secondary Sources:

- UNCTAD (United Nations Conference on Trade and Development), Series on Issues in International Investment Agreements, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV), Sections I & II <http://www.unctad.org/en/docs/psiteiid11v4.en.pdf>
- Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102 Am. J. Int'l L. 48 (2008)

Awards:

- *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL, Phase 2 Merits Award (April 10, 2001), http://ita.law.uvic.ca/documents/Award_Merits2001_04_10_Pope_001.pdf
- *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits (August 3, 2005), <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>

Class 9: (10/21)

Substantive Obligations: Most-Favored-Nation Treatment

Primary Sources:

- Argentina-Spain BIT, Article IV
- Bulgaria-Cyprus BIT, Article 3
- Malaysia-Chile BIT, Article 3(1)

Secondary Sources:

- OECD, Directorate for Financial and Enterprise Affairs, *Most-Favored-Nation Treatment in International Investment Law*, Working Papers on International Investment, Working Paper No. 2004/2 (2004), <http://www.oecd.org/dataoecd/21/37/33773085.pdf>
- Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 J. Int'l Arb. 225 (2005)

Awards:

- *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (January 25, 2000), http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf
- *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005), <http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>
- *MTD Equity v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), http://ita.law.uvic.ca/documents/MTD-Award_000.pdf

Class 10: (10/28)

Substantive Obligations: Fair and Equitable Treatment and the International Minimum Standard

Primary Sources:

- NAFTA Article 1105(1)
- Spain-Mexico BIT 4(1)

Secondary Sources:

- NEWCOMBE & PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009)
 - Chapter 6: Minimum Standards of Treatment (pp. 235-53, 255-98)

Awards:

- *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID ARB(AF)/00/2, Award (May 29, 2003), http://ita.law.uvic.ca/documents/Tecnicas_001.pdf
- *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Award (June 8, 2009), <http://www.state.gov/documents/organization/125798.pdf>

Class 11: (11/4)

Substantive Obligations: Expropriation

Primary Sources:

- NAFTA Article 1110
- US Model BIT (2004), Annex B

Secondary Sources:

- DUGAN, WALLACE, RUBINS & SABAHI, INVESTOR-STATE ARBITRATION (2008)
 - Chapter XVI: Expropriation (pp. 429-89)

Awards:

- *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000), http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Metalclad/laudo/laudo_ingles.pdf
- *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003), http://ita.law.uvic.ca/documents/GenerationUkraine_000.pdf
- *Encana Corp. v. Republic of Ecuador*, LCIA/UNCITRAL Case No. UN3481, Award (February 3, 2006), <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>; Partial Dissenting Opinion of Horacio Grigera Naón, <http://ita.law.uvic.ca/documents/EncanaPartialDissentEnglish.pdf>

Class 12: (11/11) Exceptions and Defenses

Primary Sources:

- U.S.-Argentina BIT (2004), Article XI

Secondary Sources:

- NEWCOMBE & PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009)
 - Chapter 10: Exceptions and Defenses (pp. 481-528)
- A. Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, 8 *JOURNAL OF WORLD INVESTMENT & TRADE* 191 (2007) [on reserve]

Awards:

- *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf ; Annulment Decision (September 25, 2007), <http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf>
- *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007), http://ita.law.uvic.ca/documents/LGEEnglish_006.pdf

Class 13: (11/18) Improving the System of Investor-State Dispute Settlement

Primary Sources:

- US Model BIT (2004)
- ICSID Convention, Articles 50-52

Secondary Sources:

- OECD, Directorate for Financial and Enterprise Affairs, *Improving the System of Investor-State Dispute Settlement: An Overview*, Working Papers on International Investment, Working Paper No. 2006/1 (2006), <http://www.oecd.org/dataoecd/3/59/36052284.pdf>

- Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future?* 12 U.C. DAVIS J. INT'L L. & POL'Y 47 (2005)

Awards:

- *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (September 13, 2001), <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>
- *Lauder v. Czech Republic*, UNCITRAL, Final Award (September 3, 2002), <http://ita.law.uvic.ca/documents/LauderAward.pdf>
- *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award on Merits (December 8, 2000), 41 ILM 896 (2002), Decision on Annulment, 41 ILM 933 (February 5, 2002), 41 ILM 933 (2002), Decision on Application for Interpretation of Award (October 31, 2005), <http://ita.law.uvic.ca/documents/WenaInterpretationDecision.pdf>

Class 14: (12/2) Do International Investment Agreements Achieve Their Stated Objectives?

- REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, 1 ICSID Reports 23-33 (1993) [on reserve]
- Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005)
- Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration As A Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006)