ILO L232

SEMINAR ON INTERNATIONAL INVESTMENT LAW

Spring 2018

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The Fletcher School of Law and Diplomacy

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Course Description:

The purpose of this seminar is to examine the law, policies, and legal issues affecting foreign investment and foreign enterprises in principal host countries, with special emphasis on the developing world and emerging markets. It examines the role of law in 1) undertaking foreign investments and investment projects; 2) managing and protecting foreign investments once made; and 3) settling investment disputes among investors and between investors and host governments. The seminar structure is based on the notion that any international investment is shaped and influenced by three legal frameworks: 1) the national legal framework of both the host county and the investor’s home country; 2) the contractual legal framework, including agreements between investors and host governments, as well as agreements among investors and their associates; and 3) the international legal framework consisting of international treaties, customary law, and general principles of law. Particular attention is devoted to the international law affecting investment; however, relevant parts of the national and contractual legal frameworks for investments will also be considered.

The seminar is divided into the following principal parts:

I. International Investment, the Multinational Investor, and the Law
II. The Relationship of Law to International Investment
III. The National Legal Framework: Host Country Laws and Regulations
IV. The Contractual Legal Framework: Legal Mechanisms for Structuring and Financing International Investments
V. Political Risk and Legal and Contractual Instability
VI. The International Legal Framework for International Investment
VII. The ‘Treatification’ of International Investment Law
VIII. The Content of Investment Treaties.
IX. Treaty Standards of Treatment
X. Investment Disputes and Their Settlement
**Class Meetings:** Tuesdays, 3:20-5:20 p.m.

**Office Hours:** Tuesdays from 10 am to noon, or by appointment.

**Readings, Class Assignments and Exercises**

The basic text for the course is Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013). The paperback edition of this book is available at the Tufts University Bookstore. Other readings, consisting of judicial and arbitral decisions, relevant articles and reports, excerpts from legislation and treaties, and problems for class discussion, are on the Tufts University Canvas site (https://canvas.tufts.edu).

The teaching method employed in the seminar will be primarily discussion. Students are expected to do the relevant readings before class and to participate actively in class discussions and exercises. Toward this end, students are encouraged to form study groups to discuss the readings and undertake assignments.

Students will also be required to complete three team assignments during the semester: 1) a briefing on the applicable investment law of a specific country; 2) a simulated negotiation of a bilateral investment treaty between two countries, Agraria and Industrialia; and 3) a class presentation on specific treaty provisions based on investor-state arbitration decisions.

**Grading and Assessment**

Each student in the course has the option of either:

1) Taking a closed-book, eight-hour, self-scheduled final examination.

2) Submitting a 30-page, double spaced paper (12 point font, 1 inch margins) on a relevant topic selected by the student with the approval of the instructor; or

Students wishing to write a paper must submit a written statement of the topic selected to the instructor no later than February 23. A student’s grade for the seminar will be based on the grade received on the examination or the paper (65%), written exercises (20%) and participation in discussions (15%). Papers must be submitted to the instructor no later than April 26, 2015.

**Useful Websites**

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

1. Database of International Investment Agreements (IIA Navigator)  

2. Investment Treaty Arbitration (a collection of investment awards and decisions)  
   http://ita.law.uvic.ca/
3. ICSID- International Centre for Settlement of Investment Disputes (cases, ICSID Convention, rules, etc.) https://icsid.worldbank.org/en/

4. MIGA – FDI and Political Risk
   https://www.miga.org/Pages/Resources/Reports/WorldInvestmentAndPoliticalRisk.asp

5. World Bank Group, Investing Across Borders (national laws and regulations on FDI)
   http://iab.worldbank.org/

6. Investment news (published by the International Institute for Sustainable Development)
   http://www.iisd.org/topic/investment

7. Global Investment Trends Monitor (UNCTAD)

READING LIST

Part I: International Investment, the Multinational Investor, and the Law
(Class 1: January 26)

This seminar will begin with an examination of the nature of international investors, the reasons that they invest abroad, the types of investment transactions in which they engage, and the reasons that host countries permit and/or actively encourage foreign investment. It will also explore the role that law plays in the investment process. Among the questions to be asked are the following:

a. What are the various meanings of the term “foreign investment”?

b. What is the difference between direct foreign investment and portfolio foreign investment?

c. What is the nature and magnitude of foreign investment?

d. What strategies do investors and host countries pursue in the investment process?

e. What are the costs and benefits of foreign investment to the investor, the host country, and the investor’s home country?

f. What effect does foreign investment have on the host country and on the investor?

g. What are the concerns of home countries about foreign investment by their nationals and companies?

h. What theories explain foreign investment?

i. How does law influence international investment?
j. What is a multinational enterprise?
k. What special legal problems do multinational enterprises raise?
l. What role does law play in the process of making foreign investments?

**Required Reading**


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


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**Part II: The Relationship of Law to International Investment**

(Class 2: February 2)

This part of the seminar explores the role that law plays in the investment process and the various forms that law takes.


*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) and The Argentine Republic (Respondent)* ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **read pages 10 – 44 only**.

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**Part III: The National Legal Framework: Host Country Laws And Regulations**

(Classes 3 and 4: February 9-16)

This section will examine host country laws that both encourage and regulate foreign investment. Among the questions to be considered are the following:

a. What are the functions of host country investment laws?

b. How do they seek to achieve their ends?

c. What is the theory or theories on which they are based?
d. Refer to the *Case of the Democratic Republic of Agraria*. How should Agraria go about preparing its investment code? What provisions should its code contain?

e. How do host countries promote foreign investment?

f. What policies and laws should host countries adopt to retain investments that are made?

g. Privatization has been an important means of encouraging foreign investment. What is privatization? What are the legal means by which it is accomplished? In this regard, consider the elements of the legal framework that Argentina established to privatize the water and sewage system of Buenos Aires, as set out in the case of *Suez et al v. Argentina*.

**Required Reading**


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

*Drafting an Investment Code for Agraria.*

**Exercise: Brief the FDI Law of a Country.** Working in teams, students will prepare a two-page outline of the principal features, issues, and problems presented by the foreign investment laws of particular countries. Each team should also be prepared to make a brief oral presentation to the class on their findings.

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**Part IV: The Contractual Framework: Legal Mechanisms For Structuring International Investments** (Class 5: February 23)

This section will examine the establishment of the enterprise and the rules that affect the way in which it is organized and financed. To a large extent, these rules are contractual in nature and are determined through a process of negotiation between the parties and between the investors and the government. Among the questions to be considered are:

a. How does law affect the structure of a foreign investment project?

b. What legal forms are available to structure foreign investment projects?

c. Why does it matter what structure the parties use?

d. Why did the organizers of the Ruritanian Refrigerator Company choose to organize it the way they did?
e. How does law influence the privatization process?

**Required Reading**


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


**MEDLEE: In Pursuit of a Healthy Joint Venture**

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**Part V: Political Risk and Legal and Contractual Instability**

(Class 6: March 1)


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


Kenneth Hanson et al. “The Dabhol Power Project Settlement: What Happened? And How” infrastructurejournal.com Available at [http://www.chadbourne.com/files/Publication/a5a1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf](http://www.chadbourne.com/files/Publication/a5a1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf)

Salacuse, Jeswald W., *The Three Laws of International Investment*, Chapter 12,
Part VI: The International Legal Framework For International Investment  
(Class 7: March 8)

This section will examine the rules, principles and institutions of public international law that affect direct foreign investment. Among the questions to be considered are the following:

a. What are the sources of international law? What are the sources of international investment law?

b. What other laws govern international investments?

c. In theory, how does international law affect investment?

d. In practice, how might it affect the proposed Ruritanian Refrigerator Company?

e. What methods are available to settle international investment disputes?

f. How do the views of industrialized and developing countries differ with respect to the nature and content of international investment law?

g. How might the nature and sources of international investment law evolve in the future?

h. To what extent do international legal rules and institutions actually influence the flow of international investment?

Required Reading


United States of America v. Italy (Case concerning Elletronica Sicula spa (ELSI)), Judgment of International Court of Justice, 20 July 1989.


General Assembly Resolution 3201: Declaration on the Establishment of a New International Economic Order.

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Part VII: The “Treatification” of International Investment Law. (Class 8: March 15)

Treaties, both bilateral and multilateral, have increasingly become a basic source of international investment law. In this section of the course, we examine that process, a process that one might call the “treatification of international investment law.” Some questions to consider:

a. Why have treaties grown in importance as a source of international investment law?
b. What advantages do treaties have over customary law and general principles of law in the field of international investment?
c. What disadvantages have bilateral investment treaties entailed?
d. What are the principal issues treated by bilateral investment treaties (BITs)?
e. What advice would you give to developing countries considering entering into BITs?

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


Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19), Decision on Jurisdiction (August 3, 2006).

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

Exercise: Simulated negotiation of a BIT: Working in teams, students will negotiate a bilateral investment treaty between two countries, Agraria and Industrialia.

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SPRING BREAK (March 18-28)

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Part VIII: The Content of Investment Treaties
(Class 9: March 29)

a. What exactly do investment treaties provide?
b. How do specifically do investment treaties purport to “protect” and “promote”
investment?

(c) How do bilateral investment treaties differ from free trade agreements with investment provisions?

**Required Reading**


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**Part IX: Treaty Standards of Investment Treatment (Classes 10, & 11): April 5-12**

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

B. **Expropriation**: *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1. Read paragraphs 102-112.


E. **Most-Favored-Nation Treatment**: *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction14–25(Jan. 25, 2000).


H. **Exceptions, Modifications and Terminations:** LG&E Energy Corp. v. Argentine Republic, ICSID CASE ARB/02/1 (Decision on Liability) (3 October 2006).

**Student Presentations:** Teams of students will be assigned to analyze and evaluate specific treaty standards and make presentations of their findings to the class.

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**Part X: International Investment Disputes And Their Settlement**
*(Classes 12 & 13: April 19-26)*

This section examines the nature, causes and methods for the resolution of investment disputes. The following questions are considered:

a. What causes investment disputes?
b. What methods are available to resolve them?
c. How effective are the available methods?
d. What policy implications do such disputes have beyond the parties immediately involved?
e. To what extent may alternative dispute resolution (ADR) be applied to settle investment disputes?
f. What remedies are available to settle investment disputes? How should compensation be determined?

**Required Reading**


*The Acme Chemical Company Problem*


Philip Morris Asia Limited v. Australia, Notice of Arbitration.