

University of Vienna
School of Law
LL.M. in International Legal Studies
2020/21

Course Title: International Standards of Investment Protection

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I. Course Description and Objectives

This course aims at providing an overview on central topics of international investment law. It will trace the traditional approach of regulating foreign direct investments in customary international law and then focus on the present state of investor protection through a dense web of almost 3000 bilateral investment protection treaties as well as some multilateral agreements containing investment provisions such as NAFTA Chapter 11, the Energy Charter Treaty, and others.

The standards of treatment guaranteed to foreign investors in these treaties as well as under customary international law will be analyzed. This course will thus focus on substantive standards, such as fair and equitable treatment, full protection and security, most-favored-nation treatment and national treatment. Equally, the protection against expropriation will merit special attention. The growing case-law of international arbitration tribunals will serve as a background to this analysis.

II. Course Outline

This course will address the following main issue areas in a sequence of sessions throughout the entire semesters:

1. Overview - The notion of Investment
2. The Sources of International Investment Law
3. Investment Agreements
4. Expropriation
5. Treatment Standards I (Fair and Equitable Treatment, Full Protection and Security)
6. Treatment Standards II (Umbrella clauses, arbitrary and discriminatory treatment, national treatment, MFN clauses)
7. Responsibility of the Host State and Protection by the Home State

Basic Texts

There is no single basic text which students have to purchase. Instead, the required books are available in the Library of the Law School's Section of International Law and International Relations. In addition, master copies of the reading assignments according to the syllabus will be available from the LL.M. administration.

Still the following two books are highly recommended for class preparation:

A. Reinisch, *Advanced Introduction to International Investment Law* (Edward Elgar 2020).

R. Dolzer/Ch. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed., 2012).

A. Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008).

III. Required Reserve Readings

R.D. Bishop/J. Crawford/W.M. Reisman, *Foreign Investment Disputes* (Kluwer Law International, 2005).

M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), *International Investment Law* (Beck – Hart – Nomos, 2015).

P. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2nd ed., 2007).

N. Rubins/N.S. Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana Dobbs Ferry 2005).

IV. Supplementary Readings

R. Dolzer/M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995).

N. Horn (ed.), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects* (Kluwer 2004).

P. Muchlinski/F. Ortino/Ch. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (OUP 2008).

Ch. Schreuer/L. Malintoppi/A. Reinisch/A. Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed., 2009).

T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

V. Recommended Internet Sites

ICSID Convention, Regulations and Rules, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>

BITs available through a search engine at UNCTAD Website at http://www.unctadxi.org/templates/DocSearch_779.aspx

NAFTA Chapter 11, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160

UNCTAD (ed.), Issues in International Investment Agreements, available at <http://www.unctad.org/ia>.

UNCTAD Course on Dispute Settlement: ICSID: available at <http://r0.unctad.org/disputesettlement/course.htm>

Useful material may also be retrieved from the following homepages:

ICSID: <http://www.worldbank.org/icsid/>

World Bank: <http://www.worldbank.org/>

ICC: <http://www.iccwbo.org/>

ILA: www.ila-hq.org

UNCITRAL: <http://www.uncitral.org/>

EU trade page: http://europa.eu.int/comm/trade/index_en.htm

USTR: <http://www.ustr.gov/>

WTO: <http://www.wto.org/>

Investment Claims: <http://investmentclaims.com/>

International Treaty Arbitration: <http://ita.law.uvic.ca/>

NAFTA Claims: <http://naftaclaims.com/>

VI. Teaching Method

This course will be taught using a combination of lectures and class discussions. It will be based on student preparation of the course materials which will be distributed in advance. These course materials structure the entire course program in the form of review questions. Students are expected to prepare and to debate them in class as well as to contribute their own insights. In addition, students will be asked to discuss recent investment decisions in the light of the international standards in short case presentations.

VII. Assessment Method

- A. There will be a 2-hour written final examination which will be worth 50% of the final course mark.
- B. Class participation is expected. It will be worth 20% of the final course mark.
- C. Case presentation will be worth 30% of the final course mark.

1. OVERVIEW

(The concept of investment, the conflicting interests of the host State and the investor, attitudes towards foreign investment, investment and economic development, factors influencing the flow of investment, political risk and FDI, national insurance systems, OPIC, MIGA)

Required Readings:

Dolzer/Schreuer, pp. 1-15, 44-78, 87-97, 228-232.

Reinisch (ed.), pp. 9-28.

Supplementary Readings:

Bischoff/Happ, The Notion of Investment, in M. Bungenberg/J. Griebel/ S. Hobe/A. Reinisch (eds.), pp. 495-544.

Bishop/Crawford/Reisman, pp. 1-17, 491-501, 517-521, 526-530, 555-562.

Muchlinski/Ortino/Schreuer (eds.), pp. 3-48, 49-88, 227-258, 524-548.

Rubins/Kinsella, pp. xxvii-xl, 1-29, 69-113.

2. THE SOURCES OF INTERNATIONAL INVESTMENT LAW

(The customary IL of investment, guidelines and codes of conduct, resolutions, national legislation, bilateral investment treaties, multilateral agreements)

Required Readings:

Dolzer/Schreuer, pp. 15-44

Supplementary Readings:

Bishop/Crawford/Reisman pp. 47-48, 73-79, 120-127, 712-724.

Dolzer/Stevens, pp. 1-18.

Karl, On the Way to Multilateral Investment Rules—Some Recent Policy Issues, 17 ICSID Review-FILJ 293 (2002).

Muchlinski/Ortino/Schreuer (eds), pp. 119-153.

Rubins/Kinsella, pp. 191-200.

Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, in 269 Recueil des Cours 255 (1997).

Spiermann, Investment Arbitration: Applicable Law, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 1373-1390.

3. INVESTMENT AGREEMENTS

(The nature of State/investor contracts, from concessions to development agreements, internationalization, applicable law, stabilization, arbitration)

Required Readings:

Dolzer/Schreuer, pp. 79-85

Supplementary Readings:

Bishop/Crawford/Reisman, pp. 213-215, 227-230, 255-256, 267-268, 295-299, 303-304, 308, 311-313.

Kreindler, The Law Applicable to International Investment Disputes, in Horn N. (ed), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects*, 401-424 (Kluwer, 2004).

Muchlinski/ Ortino/Schreuer (eds), pp. 89-118.

Rubins/Kinsella, pp. 31-67.

Simma/Pulkowski, International Investment Agreements and the General Body of Rules of Public International Law, in M. Bungenberg/J. Griebel/ S. Hobe/A. Reinisch (eds.), pp. 361-371.

4. EXPROPRIATION

(Permissibility of expropriation, the requirements for legal expropriations, indirect expropriation)

Required Readings:

Reinisch, pp. 4-41.

Dolzer/Schreuer, pp. 98-126

Reinisch (ed.), pp. 151-170, 171-204.

Supplementary Readings:

Bishop/Crawford/Reisman, pp. 837-843, 851-853, 864-867, 877-878, 895-898, 1119-1122.

Dolzer/Stevens, pp. 97-117.

Kriebaum, Expropriation, in M. Bungenberg/J. Griebel/ S. Hobe/A. Reinisch (eds.), pp. 959-1030.

Muchlinski/Ortino/Schreuer, pp. 407-458.

Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review-FILJ (2005), 1-57.

Reisman and Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BYIL (2003), 115-150.

Rubins/Kinsella, pp. 153-188, 200-212.

Yannaca-Small, "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law*, in OECD (ed.), *International Investment Law. A Changing Landscape* (2005), pp. 43-72.

5. STANDARDS OF TREATMENT I

(The regulatory framework for FDI, standards of protection, fair and equitable treatment, full protection and security, international minimum standard)

Required Readings:

Reinisch, pp. 42-73.

Dolzer/Schreuer, pp. 130-166.

Reinisch (ed), pp. 111-130, 131-150.

Supplementary Readings:

Bishop/Crawford/Reisman pp. 1007-1071.

Dolzer/Stevens, pp. 58-85.

Jacob/Schill, *Fair and Equitable Treatment: Content, Practice, Method*, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 700-763.

Lorz, *Protection and Security (Including the NAFTA Approach)*, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 764-789.

Muchlinski/Ortino/Schreuer (eds), pp. 259-304.

Rubins/Kinsella, pp. 212-244.

Schöbener, *Outlook on the Developments in Public International Law and the Law Relating to Aliens*, in M. Bungenberg/J. Griebel/ S. Hobe/A. Reinisch (eds.), pp. 66-79, 700-789.

Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 *The Journal of World Investment and Trade* 357 (2005).

Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BYIL 99 (1999).

Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, in OECD (ed.), *International Investment Law. A Changing Landscape* (2005), pp. 73-125.

6. STANDARDS OF TREATMENT II

(Umbrella clauses, arbitrary and discriminatory treatment, national treatment, MFN clauses)

Required Readings:

Reinisch, pp. 74-98.

Dolzer/Schreuer, pp. 166-216.

Reinisch (ed), pp. 30-58, 59-86, 87-110.

Supplementary Readings:

Kriebaum, Arbitrary/Unreasonable or Discriminatory Measures, in M. Bungenberg/J. Griebel/ S. Hobe/A. Reinisch (eds.), pp. 790-806.
Muchlinski/Ortino/Schreuer (eds), pp. 363-406.

Reinisch, Most Favoured Nation Treatment, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 807-845.

Reinisch, National Treatment, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 846-869.

Schreuer, Travelling the Bit Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 *The Journal of World Investment and Trade* 231 (2004).

Sinclair, Umbrella Clause, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 887-958.

Teitelbaum, Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses, 22 *Journal of Int'l Arbitration* 225 (2005).

Wälde, The "Umbrella" Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases, 6 *Journal of World Investment & Trade* 183 (2005).

7. RESPONSIBILITY OF THE HOST STATE AND PROTECTION BY THE INVESTOR'S HOME STATE

(Responsibility for illegal acts, attribution, circumstances precluding wrongfulness, diplomatic protection, nationality of corporations, the Calvo doctrine)

Required Readings:

Dolzer/Schreuer, pp. 216-227.

Supplementary Readings:

Binder, Circumstances Precluding Wrongfulness, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 442-480.

Bishop/Crawford/Reisman pp. 759-776, 799-824, 1203-1213.

Crawford/Olleson, The Application of the Rules of State Responsibility, in M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), pp. 411-441.

Muchlinski/Ortino/Schreuer (eds), pp. 549-583.

Orrego Vicuña, Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement, 15 ICSID Review-FILJ 340 (2000).

Perera, State Responsibility—Ascertaining the Liability of States in Foreign Investment Disputes, 6 The Journal of World Investment and Trade 499 (2005).

Rubins/Kinsella, pp. 115-140.

Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 The Law and Practice of International Courts and Tribunals 1 (2005).

Wisner and Gallus, Nationality Requirements in Investor-State Arbitration, 5 The Journal of World Investment and Trade 927 (2004).