Georgetown University Law Center
Spring Semester 2017

International Trade and Investment Litigation and Strategy
LAWG-673-08

Course Syllabus

This course focuses on international trade and investment dispute resolution and the differences, similarities, and intersection between the two systems. It is taught by practitioners and is intended principally for students who see themselves as future trade or investment practitioners (in private practice or government). The primary focus of the seminar is on procedural and strategic issues, and not on the substantive law (although the latter will be addressed in a succinct manner to ensure everyone is up to speed).

Students will learn about the law, policy, and practice of international trade and investor-state dispute settlement (ISDS). The seminar will review key procedural and jurisdictional issues, as well as practical and strategic considerations that practitioners face, and will offer opportunities to practice written and oral argument and to discuss and learn about current “hot topics” in international dispute settlement and litigation (e.g., last year we discussed TTIP and TPP). The course will also provide a comparative analysis of World Trade Organization (WTO) and ISDS mechanisms and strategies, how they work together, how they differ, and how they can be used in the most strategically effective way.

Guest speakers (including government officials, arbitrators, or staff from relevant international organizations) may be invited, and the group may work on a case study.
General Topics:

The following general topics will be covered during the semester:

1. General legal framework, background, and history
   a. Overview of the multilateral trading system
   b. Overview of investment treaty protections—in BITs, multilateral investment agreements, and investment chapters in regional trade agreements—and investor-State arbitration

2. Overview of dispute resolution mechanisms
   a. WTO dispute settlement mechanism
      i. Panel
      ii. Appellate Body
   b. Investor-State Dispute Resolution
      i. ICSID Convention and Arbitration Rules
      ii. ICSID Additional Facility Rules
      iii. Provisions in bilateral and multilateral agreements (e.g., NAFTA, Energy Charter Treaty, specific BITs, etc.)

3. Procedure and case management
   a. pre-litigation preparation, formal initiation of a dispute, constitution of panels and tribunals
   b. discretionary procedural issues, evidentiary issues
   c. jurisdictional and other preliminary objections
   d. written pleadings (WTO submissions and arbitration memorials)
   e. conduct of substantive meetings/hearings
   f. use of outside counsel
   g. use of witnesses and experts
   h. WTO panel and Appellate Body reports; international investment tribunal awards

4. Trade and investment dispute strategies
   a. Pre-litigation strategy
   b. Domestic political aspects
   c. Foreign policy aspects
   d. Economic and commercial interests and considerations
   e. Disputes and negotiations

5. Remedies and compliance
   a. Recourse to WTO reports and awards
   b. Implementation and enforcement of WTO decisions and investment awards
   c. Investor-State remedies
   d. Records of compliance
A more detailed tentative schedule of topics to be covered in each class is attached as Annex A.

The Seminar will meet every Thursday from 5:45 PM to 7:45 PM, in Room 220 of the McDonough Building, except as provided below.

**Grading:**

- Class participation (incl. case study) ----------------------------- 30%
- Memorandum on a specific topic:
  - Draft ------------------------------------------- 15%
  - Final ------------------------------------------ 35%
- Oral presentation of memorandum ----------------------------- 20%

**Class Participation:**

Each student is expected to come prepared and actively participate in class discussions. Students are also expected to participate actively during in-class discussions and exercises and may be asked to work in teams with other students. **Class attendance and participation will be a significant part of the overall grade (30%).**

**Memorandum:**

Each student will prepare and submit a concise memorandum (10-page limit, double-spaced, 12pt font), which will account for approximately one half of the overall grade. Students will be provided a list of topics to be addressed in these memos comparing the trade and investment perspectives on the assigned topic. Two students will be assigned per topic, each developing and advocating for a different position in relation to that topic. These memoranda will be an opportunity for students to demonstrate their knowledge of issues discussed in class as well as to practice persuasive writing. Students will prepare and submit draft memoranda to the professors, who will review and give individual guidance to the students. The students will be graded on the basis of both the draft (15%) and final (35%) memoranda. (If a student is assigned to or selects a topic that will not be addressed until later in the semester, the professors are available to meet with that student to give general guidance on the topic to be addressed in the memo.)

**Oral Presentation:**

Student will present their topics orally to the class. Presentations will last ten minutes, to be followed by questions from and further discussions with the class and the professors. The oral presentation is a brief but important opportunity to practice oral advocacy skills and should be treated as an oral argument. Students will be expected to read all of the other students’ papers
so that all may be actively engaged in the discussion; participation in commenting on other students’ presentations will be factored into the class participation component of the grade.

**Important dates:**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
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<tbody>
<tr>
<td>February 9, 2016</td>
<td>Selection of topics for the memorandum</td>
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<tr>
<td>March 8, 2016</td>
<td>Deadline for submission of the draft memorandum</td>
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<tr>
<td>April 11</td>
<td>Deadline for submission of final memorandum</td>
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<tr>
<td>April 13/20/27</td>
<td>Oral presentations of memorandum</td>
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</tbody>
</table>

The above dates are tentative and subject to change.

**Course materials and resources:**

- This Syllabus and its Annexes
- Reading assignments
- Materials distributed in class from time to time for this seminar

Reading assignments will be posted on Canvas. The reading materials will be focused and practical and avoid, whenever possible, long and abstract theoretical discussions. The emphasis will be on relevant treaty text (e.g., DSU, WTO covered agreements, ICSID Convention, ICSID Arbitration Rules, BITs, and other international investment agreements) as applied and interpreted by WTO panels, the Appellate Body, and international investment tribunals. A general reference bibliography is attached as [Annex B](#) and should be consulted by students, particularly those not yet familiar with one or both fields of law.

The in-class discussion of the relevant procedural rules and applicable substantive law will be based, whenever possible, on actual WTO panel or Appellate Body reports and awards by international investment tribunals. Students will be expected to read specific passages from
these reports and awards, and in so doing will become familiar with some of the most important decisions that have shaped WTO law and the investor-State arbitration system.

Handouts, revisions to this syllabus, and other pertinent documents will generally be posted on Canvas. Please check it often for new postings. If you do end up missing a class, please check with your fellow students to make sure you are aware of any hand-outs and obtain copies.

Other useful websites for the seminar:

- GULC Community site with link to Courseware site for this Seminar and its Course Materials: https://www.law.georgetown.edu/system/login.cfm (password will be supplied at the first seminar session).
- ICSID official website (http://icsid.worldbank.org/ICSID/Index.jsp)
- WTO official website (www.wto.org)
- World Trade Law Net (www.worldtradelaw.net/)
- UNCTAD case database (http://www.unctad.org/iia-dbcases/cases.aspx)
- UNCTAD project on dispute settlement (http://r0.unctad.org/disputesettlement/index.htm)
- NAFTA claims (http://www.naftaclaims.com/disputes.htm)
- Investment Claims (http://investmentclaims.com)
- Investment Treaty Arbitration (http://ita.law.uvic.ca)
ANNEX A

SPRING 2017 TENTATIVE CLASS SCHEDULE

(Subject to revisions)
<table>
<thead>
<tr>
<th>Date</th>
<th>Topic</th>
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<tbody>
<tr>
<td>January 19</td>
<td><strong>General Introduction</strong></td>
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<tr>
<td></td>
<td>A. General introduction to the course</td>
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<tr>
<td></td>
<td>• Introductions (professors and students)</td>
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<td></td>
<td>• General introduction to the seminar; main topics, themes and</td>
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<td>requirements</td>
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<td></td>
<td>• Structure of the course</td>
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<td></td>
<td>B. General Introduction to the WTO</td>
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<td></td>
<td>• Overview of the World Trade Organization: Marrakesh Agreement</td>
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<td></td>
<td>Establishing the WTO and its Annexes</td>
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<td></td>
<td>• Basic overview of substantive protections</td>
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<td></td>
<td>• Dispute settlement before the WTO: the GATT years</td>
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<td></td>
<td>• General introduction to the WTO dispute settlement system: the</td>
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<td></td>
<td>DSU and its contribution to the multilateral trading system</td>
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<td></td>
<td>C. General Introduction to investor-State dispute settlement (ISDS)</td>
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<td></td>
<td>• Overview of investor and investment protections under international investment agreements</td>
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<td></td>
<td>• Origins of investment law: diplomatic protection, the Washington Convention of 1965 and international investment agreements (IIsAs)</td>
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<td></td>
<td>• The International Centre for Settlement of Investment Disputes (ICSID)</td>
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<td></td>
<td>D. Comparing the WTO dispute settlement and ISDS (and WTO rules and</td>
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<td></td>
<td>BITs)</td>
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<td></td>
<td>• Differences and similarities between WTO dispute settlement and</td>
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<td>investor-State arbitration and what to do with them in practice</td>
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<tr>
<td></td>
<td>(broad brush)</td>
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<tr>
<td>January 26</td>
<td>No Class because of New York LLM Job Fair</td>
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</table>
WTO Dispute Settlement, and Initiation of a WTO Dispute Settlement Process

A. Introduction to WTO dispute settlement
   - WTO basic legal instruments:
     - Marrakesh Agreement Establishing the WTO
     - GATT 1994 and 1947
     - Other “covered agreements”
   - Sources of Law

B. Initiation of a WTO dispute settlement process: legal and strategic considerations
   - Preparations by Claimant: coordination between the authorities and the private sector
   - Information gathering
   - Alternative methods of dispute settlement (formal and informal)
   - Origins of a dispute: identification of the “measure”

C. Initiation of a WTO dispute settlement process: consultations, panel establishment, and panel selection; other preliminary issues
   - Initiation of a dispute: formal consultations, including involvement of additional parties
   - Preliminary steps by Respondent
   - Request for establishment of a WTO panel; establishment by the DSB; selection of the Panel
   - Other preliminary issues (transparency, scheduling, etc.)
Session 3  
(February 9)

[Note: Sessions 2 and 3 will be scheduled as 3-hour sessions and may cover some additional topics. The objective is to help students get up to speed quickly and to have more time for class discussion, guest speakers, a case study, etc. in later sessions.]

Introduction to the investor-State legal framework and initiation of an investor-State arbitration

A. Introduction to the investor-State legal framework
   - Basic legal instruments: International Investment Agreements (IIAs)
   - Core obligations of IIAs
   - Sources of Law

B. Initiation of an investor-State arbitration: legal and strategic considerations
   - Core obligations under IIAs
   - Procedural and jurisdictional requirements
     - ICISD Convention, Article 25
     - International Investment Agreements
   - Notice of Intent
   - Request for Arbitration
   - Registration of claims by the Secretary-General
   - Constitution of the tribunal
   - Schedule of pleadings
<table>
<thead>
<tr>
<th>Session 4 (February 16)</th>
<th>WTO panel proceedings and jurisdiction</th>
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<tbody>
<tr>
<td></td>
<td>• Terms of reference of a panel; Preliminary Ruling Requests</td>
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<td></td>
<td>• Working procedures and schedule of proceedings</td>
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<td>• Disputing parties, third parties, and amici curiae</td>
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<td></td>
<td>• Burden of proof and evidence issues generally</td>
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<td></td>
<td>• The use of economic experts, affidavits, and other forms of (witness) testimony</td>
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<td></td>
<td>• Preparing written submissions</td>
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<td></td>
<td>• Substantive meetings of the panel with the parties</td>
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<td>• Questions from the panel and from the parties</td>
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<td>• Means of interpretation/the Vienna Convention and the OED</td>
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<tr>
<th>Session 5 (March 2)</th>
<th>Preliminary objections to investor-State arbitration</th>
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<tbody>
<tr>
<td></td>
<td>• Types of jurisdictional objections:</td>
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<tr>
<td></td>
<td>– ratione materiae</td>
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<td></td>
<td>– ratione personae</td>
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<td></td>
<td>– ratione temporis</td>
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<tr>
<td></td>
<td>• Other types of preliminary objections: procedural and admissibility objections</td>
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<td>• Burden of proof</td>
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<td></td>
<td>• Procedure for raising and deciding preliminary objections and other procedural issues (e.g., bifurcation of proceedings)</td>
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<td></td>
<td>• Provisional measures</td>
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| March 8                | Deadline for Draft Papers |
| Session 6 (March 9) | Jurisdiction and merits phase of investment arbitration  
|---------------------|---------------------------------------------------------------  
|                     | • Working procedures  
|                     | • Waging procedural battles  
|                     | • Building an evidentiary record on the merits and for damages  
|                     | • Preparing briefs  
|                     | • Damages, valuation experts  
|                     | • Expert reports  
|                     | • Conduct of hearings  
|                     |   • Opening statements  
|                     |   • Examination of witnesses and experts  
|                     |   • Closing statements  
|                     | Invited Speaker: TBD  

| March 12-19 | Spring Break  

| Session 7 (March 23) | WTO Appellate Review  
|---------------------|---------------------------------------------------------------  
|                     | • Nature of WTO Appellate Review  
|                     | • WTO Appellate Body  
|                     | • Working Procedures for Appellate Review  
|                     | • Scope of review  
|                     | • Strategic considerations  
|                     | • What does a hearing look like?  
|                     | Case Study (hand-out of case study to class. Students should review and come prepared to discuss during the April 9 session.)
| Session 8  
(March 30) | Remedies |
<table>
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<tr>
<td></td>
<td><strong>A. Investment Arbitration</strong></td>
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<tr>
<td></td>
<td>• Draft Articles on State Responsibility</td>
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<td></td>
<td>• Other sources of law</td>
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<td></td>
<td><strong>B. WTO Dispute Settlement</strong></td>
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<td></td>
<td>• Adoption, implementation, and enforcement of DSB recommendations</td>
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<td></td>
<td>• Arbitration and compliance review</td>
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<td>• Retaliation</td>
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<td>• The role of politics</td>
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<td><strong>Invited Speaker: TBD</strong></td>
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| Session 9  
(April 6) | Discussion of Case Study |
|-------------|--------------------------|

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<tr>
<th>April 11</th>
<th><strong>Deadline for Final Papers</strong></th>
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| Session XX (April 13) | Day before Easter Break. Normally no class but possible make-up session date (as needed) |
| Session 10  
(April 20) | Special Topics/Guest Speaker |
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<tr>
<td>Topic(s) TBD but could include:</td>
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<tr>
<td>• Deeper dive on remedies/awards in WTO and investor-state: how effective are the two regimes and what, if anything, needs to change?</td>
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<td>• The role of politics in investment and trade disputes: how parties may use political strategies as part of their case</td>
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<td>• The role of negotiations as part of a trade and investment dispute strategy</td>
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<tr>
<td>• The EU’s proposed Investment Court system, the future of Transatlantic Trade and Investment Partnership (TTIP) negotiations</td>
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<td>• Convergence of trade and investment negotiations and agreements</td>
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<tr>
<td>• What’s next for trade and investment enforcement and negotiations in the new Trump Administration?</td>
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| Session 11  
(April 27) | Oral Presentations by Students |
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<td>[Note: This class may be longer than the normal 2-hour sessions]</td>
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<tr>
<td>• Oral presentations by students; class discussion</td>
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<tr>
<td>• The professors and students will draw some basic conclusions as to how the investor-State and trade systems relate, how they overlap (or not), and how they are and can be used</td>
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</table>

| Make-up Session  
(TBD) | As needed |
ANNEX B

General Reference Bibliography

General

- Statute of the International Court of Justice, Article 38.
- Draft Articles on Diplomatic Protection (with commentaries), adopted by the ILC at its 58th session, in 2006 (A/61/10)

WTO

- Treaties:
- Official website of the WTO: http://www.wto.org/ (excellent resource)
- Understanding the WTO (WTO publication)
- WTO panel and Appellate Body reports and case summaries: World Trade Law Net (www.worldtradelaw.net/)

WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2004)


UNCTAD Course on Dispute Settlement:

- WTO: Overview
- WTO: Panels
- WTO: Appellate Review
- WTO: Implementation and Enforcement
- WTO: GATT 1994


Investor-State arbitration

- Treaties:

- BIT databases:

- Case databases:
• ICSID:  
  http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases

• UNCTAD:  http://www.unctad.org/iia-dbcases/cases.aspx

• Investment Treaty Arbitration: http://ita.law.uvic.ca/

• Investment Claims:  
  http://www.investmentclaims.com/subscriber_awards_by_investor

• NAFTA Claims: http://www.naftaclaims.com/

➢ UNCTAD Course on Dispute Settlement:
  • ICSID
  • ICSID: Consent to Arbitration
  • ICSID: Selecting the Appropriate Forum
  • ICSID: Procedural Issues
  • ICSID: Requirements Ratione Materiae
  • ICSID: Requirements Ratione Personae
  • ICSID: Post-Award Remedies and Procedures
  • ICSID: Binding Force and Enforcement
  • Regional Approaches: NAFTA

➢ Other UNCTAD publications concerning International Investment Agreements (IIAs):
  • Scope and Definition (2011)
  • Most-Favored-Nation treatment (2011)
  • International Investment Agreements: Key Issues (2004)
  • Fair and equitable treatment (1999)
  • National Treatment (1994)
  • Latest Developments in Investor–State Dispute Settlement, (2011)
  • Investor–State Dispute Settlement and Impact on Investment Rulemaking (2007)

➢ Lucy Reed, Jan Paulson, Nigel Blackaby, Guide To ICSID Arbitration (2004)