International Investment Law

Georgetown University Law Center
Spring Semester 2016

Description

International investment law consists of those international legal principles that define the obligations of states toward the investments of aliens within their territory. Like all international law, it has developed in response to the concerns of States. The goal of this seminar is to develop in the student a rather full understanding and appreciation of the important principles of international investment law that now prevail and of the issues that are currently the subjects of serious debate. The seminar aims to develop this understanding by studying the historical development of this area of the law and considering the fundamental concerns of States that have driven this development.

We will begin by considering, as a normative matter, what a state’s responsibility toward private property should be and then review the legal principles espoused by the United States and other Western countries at the beginning of the last century, when there were few independent countries interested in challenging these views. We then will consider the development of dissent from this Western consensus in Latin America and in the newly independent states of Asia and Africa that emerged following the Second World War. Our consideration of this period of discord will be followed by discussion of the so-called "Washington consensus" that developed in the 80s and 90s, some parts of which are reflected in the thousands of bilateral investment treaties that have been concluded, largely in the last 30 years. We will then focus on those investment treaties, and the many arbitral awards that have interpreted them, to identify (1) key principles of investment law on which a broad consensus has emerged and (2) difficulties that arise in applying those principles to particular situations. Finally, the seminar will consider the relationship between international investment law and efforts by states -- jointly or separately -- to promote environmental protection, labor rights, and investments that serve the long-term interests of the population of the host state. We will discuss whether these goals can be pursued effectively under the principles on which a consensus now exists, whether these principles need to change, or whether some additional principles need to evolve. We will end by discussing some of the policy issues now being debated that relate to the desirability of investor-state dispute-settlement procedures and to the contents of international investment agreements, including two now being negotiated, the Transatlantic Trade and Investment Partnership (TTIP) and the recently concluded (but not yet ratified) Trans-Pacific Partnership (TPP).

The seminar is divided into 12 units. We will discuss three units on each of our four days together, in the order in which they appear. Each student is required to write eight reaction papers of around 750 words, each addressing one of the questions that appear at the end of each unit in the syllabus. Students are free to pick the units for which they will write papers and may write on any of the questions given for that unit. Since one purpose of these papers is to ensure
that students are prepared to engage in our discussions – and that is what this seminar is, a very long discussion – papers will be due no later than 8 am of the day on which we will discuss the unit to which a paper relates. All I am looking for in these papers is evidence that the student has done the relevant reading and given it some careful thought. Grades will be based on these papers (two thirds) and class participation (on third). Finally, at least three of these papers must be submitted in connection with our first six units, which is to say, by 8 am January 23 for papers on the first three units, and by 8 am January 24 for papers on units 4-6.

Assigned Text

The assigned materials for this seminar will be available on Canvass.
Unite 1 (January 23): The Origins of International Investment Law

This class will explore fundamental notions that affect every discussion we will have this semester. The reading is important and basic. I encourage students to write one of their reaction papers for this class.

What is international law?

Brownlie, “Principles of Public International Law,” 7th ed., pp. 1-21

Treatment of aliens and their property

Minimum Standard with Respect to Property -- a philosophical question

Cicero, De Officiis, I, paras. 7-8, 20-24, 29-32; II, paras. 72-84
Coffin, “A Passion for the Possible,” pp. 31-37

Minimum Standard -- a legal question

Shea, “The Calvo Clause,” 16-21
Sornarajah, “The International Law on Foreign Investment,” 138-42
Restatement of Foreign Relations Law of the United States, §§ 165, 185

Questions/Reaction papers:

How does one’s concept of “justice” affect one’s view of property rights?

As a normative matter (that is, NOT as a legal matter), under what circumstances should it be appropriate for a state to take property from a private party, alien or domestic?

Read Root carefully. Was he concerned that states would confiscate alien-owned property through state action authorized under local law? Was he concerned that states might nationalize whole industrial sectors paying neither local owners nor alien owners any compensation? Describe what he viewed as the required minimum standard of treatment.
Unit 2 (January 23): Early Consensus

Generally
Johnson-Gimblett Article (pp. 649-67)

Pre-Second World War Disputes

The Hull Doctrine

3 G. Hackworth, Digest of International Law (655-65)

Cases (excerpts)
Chorzow Factory (paras. 40-41; 46; 61-62; 66-68; 122-43)
Norwegian Shipowners Claims (pages 309-20 (skim); 325-27; 330-49 (all can be read quickly)
Spanish Zone of Morocco (pages 157-64)
Shufeldt Claim (1652-58)

Oil nationalizations -- resource development contracts between private parties and States

Lena Goldfields
Time Magazine Article, Sept. 15, 1930
Veeder article (pages 747-53)

Sapphire v. NIOC (136-37; 140-41; 143 (para. 2); 156-59; 163-66; 168-76)

Questions/Reaction Papers:

Do the above cases accept the Hull Doctrine?

Consider positions taken by respondent states in the first group of cases -- what principles were in dispute?

Who were the parties in the first and second groups of cases? What was the source of jurisdiction in these cases? What law was applied? Why?

The second group of cases listed above all involved contracts with a State or a State agency. Does a State’s violation of such a contract raise issues different from those raised when a State takes the property of an alien?
Unit 3 (January 23): The Post-Colonial Debate -- 1955-1981

Johnson and Gimblett article (from prior unit) pp. 667-70; 679-81

Permanent Sovereignty over Natural Resources

UNGA Res. 1803 (XVII) (1962)
Schwebel, *The Story of the UN’s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463

Declaration on the Establishment of a New International Economic Order

UNGA Res. 3201 (S-VI)

Charter of Economic Rights and Duties of States

UNGA Res. 3281 (XXIX)

**Questions/Reaction Papers:**

As of 1974, what did customary international law require of host states? What was the legal significance of the Charter of Economic Rights and Duties of States?

In 1955, a foreign oil company invested $500 million in exploration and development of an unproven offshore area in the Persian Gulf. By 1975, large oil reserves have been discovered, production has reached a very high level, and oil prices have about tripled in real terms, all working to give the company’s production rights a value of $ 3 billion. The host state unilaterally changes the terms of the company’s contract to divert a larger share of production revenue to the state, such that the company’s rights are now worth $ 1 billion. Should the company go to arbitration, who has the better case as a matter of law, the company or the host state? Who has the better case as a matter of justice?

Same example as above, and same two questions, but there is a treaty between the host state and the oil company’s state that embodies the Hull doctrine discussed last week.

General
Johnson & Gimblett article, pp. 681-85

Cases (excerpts)

LIAMCO v. Libya (pages 25-34; 56-66; 85-103; 120-52; 156-60 -- this goes quickly; focus on governing law; and comments on UN resolutions)

TOPCO v. Libya (pages 1-2; 9-14; 17-19; 32-37 -- focus on same as in LIAMCO)

Amoco International Finance Corp. v. Islamic Republic of Iran (paragraphs 28-38; 52-59; 77-78; 84-94; 112-118; 133-174; 182)

Advocacy

Initial Memorial of Amoco Iran Oil Company in AIOC v. Islamic Republic of Iran (pages 1-30; 50-73; 81-88; 126-31; 135-147; 151-54; 181-99 -- this too can go relatively quickly; it gives you an idea of how these issues were argued more than 25 years ago. This is the penultimate draft.)

Questions/reaction papers:

What was the impact of the various UN resolutions discussed last week?

Under customary international law, does a contract between a state and a foreign investor bind the state in the same way as a treaty binds a state?

What do you think of the notion of an “internationalized” contract expressed by Prof. DuPuy in TOPCO? Does it make sense? Does it reflect the state of the law?

Amoco’s lawyers state Amoco’s claim against Iran as a claim for expropriation and as a claim for breach and repudiation of Amoco’s agreement with NIOC. Why did they do this? Which theory of the case do you find more persuasive? Why?
Unit 5 (January 24): Investment-Protection Treaties

So far, we have been reading about and discussing customary international law, including its application to resource development contracts between states and foreign investors. Now we consider the effect of treaties on the rights and obligations of states and investors.

FCNs and Treaties of Amity and Economic Relations

Johnson & Gimblett article, pp. 676-79
Iran-US AER Treaty of 1955 (Arts. IV and XXI in particular)
Amoco International Finance Corp. v. Islamic Republic of Iran (Paras. 84-117)

Obligations of States Toward Investors: Key substantive issues

What is an Expropriation?

Indirect Takings

RosInvestCo v. Russia (Merits) (pp. 78-93; 193-240)

Questions/Reaction Papers

Is the Rosinvestco decision correct? Was the Tribunal acting like a Russian tax appellate court? Just what is the essence of a taking for which a State must pay compensation?
Unit 6 (January 24): Obligations of States Toward Investors: Key substantive issues (continued)

Fair and Equitable Treatment and the Minimum Standard

NAFTA FTC Notice of Interpretation


REED & 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. 2007). (Whole article -- it’s short)

*CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB 01/8 (Final Award) (12 May 2005) ¶¶ 266-284 (fair & equitable treatment).

*Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Final Award) (26 June 2003) ¶¶ 30- 123 (facts; skim if you like, but they are interesting) 124-37.

U.S. Constitutional Law – “Takings” Under the Fifth Amendment


**Question:**

What is the effect of the NAFTA Parties Notice of Interpretation?

**Questions/Reaction Paper:**

In what ways are claims for denial of fair and equitable treatment and indirect expropriation similar and different?

Is there a notion of fair and equitable treatment implicit in U.S. Fifth Amendment taking law?
Unit 7 (February 6): Modern BITs -- A Paradigm Shift -- The Empowerment of the
investor -- Jurisdiction

Most of the cases discussed thus far either were state-to-state disputes or disputes
between an investor and a state in which the jurisdiction of a tribunal was founded on a special
agreement between the investor’s state and the host state the purpose of which was to permit
resolution of a class of disputes that already had arisen. The Iran-US Claims tribunal is the
leading example of a tribunal established to deal with a class of existing disputes between
investors and a host State. What makes BITs different is that, in them, the signatory states agree
in advance that they will submit disputes between the state and investors to binding arbitration.
It will not come as a surprise that most investment disputes under BITs begin with the resolution
of a dispute over jurisdiction -- a type of dispute rarely seen before.

Johnson & Gimblett article, pp. 685-90
US Model BIT (Arts. 1(investor & investment), 4-6, 23, 24)
Vienna Convention (Arts. 31, 32)
ICSID Convention (Arts. 25-27, 52, 53)

Issues:

What is an investment Under ICSID? Under a BIT?

Salini v. Morrocco (paras. 1-10; 36-58)

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) (read entire article; it’s
not long).

Substantive jurisdiction -- Narrow dispute-resolution clauses

Renta 4 v. Russia (Award on Jurisdiction: pages 1-29)
RosInvestCo v. Russia (Award on Jurisdiction: Paragraphs 23-26 [relevant
treaty language], paras. 76-123)

MFN and Jurisdiction

Cole & Agrawal, Warwick University Law School Research Paper 2010-19,
“When Is a Forum ‘More Favourable’? The Use of MFN Causes To
Found an Investment Arbitration Tribunal’s Jurisdiction,” (read only Part
5; this paper, bizarrely, has no page numbers; the relevant pages
accompany notes 102-149)

Renta 4 (Brower dissent)

Questions/Reaction Papers:
Why should it matter whether an investment that qualifies under the relevant BIT also meets the requirements of the ICSID Convention? What purpose is served by a separate ICSID requirement?

Who is right on MFN and jurisdiction, the tribunals in *Plama* and its progeny or Brower in his *Renta 4* dissent?

Who is right on the construction of the jurisdictional clauses in Russian treaties, the *Rosinvestco* Tribunal or the Tribunal in *Renta 4*?
Unit 8 (February 6): More on Jurisdiction, and Dispute Settlement Without a Tribunal -- Espousal and Diplomatic Protection

Before BITs and the Iran-US Claims Tribunal, most investment disputes were resolved -- if at all -- diplomatically, through state-to-state negotiations. This week, we will consider just how that means of dispute settlement has worked, and the legal issues that it presents.

Temporal Jurisdiction

_Tecmed v. Mexico_, paragraphs 35-71

Personal Jurisdiction -- Nationality


Espousal of Claims

Gantz, _The Marcona Settlement_, 71 Am. J. Int’l L. 474

Lump Sum Settlements and Asset Freezes

Johnson & Gimblett article, pp. 673-76.

Questions for Discussion:

Under what circumstances would a State espouse the claim of one of its nationals against a State with which it had a BIT that provided for arbitration of investment disputes?

What principles of international investment law apply in cases of diplomatic protection?

Reaction Papers:

States are not obliged to espouse the claims of their nationals; it is proper for unrelated diplomatic considerations to be taken into account. Would you expect the United States to espouse the claims of Americans if their property were taken by the Russian government? (There is no BIT between the US and Russia.) Would it matter if it were the claim of a major US company for the loss of a $10 billion asset or the claim of a family for the loss of paintings worth $10 million?
A Mexican company wholly owned by a Mexican national was pursuing a claim in Mexican courts against the Mexican Government for an uncompensated taking at the time NAFTA came into force, Chapter 11 of which contains typical investor-protection provisions and a right of investors to bring arbitrations against host states. Immediately after NAFTA came into force, the Mexican owner immigrated to the United States and formed a Delaware corporation, to which he sold all of his shares in the Mexican corporation at fair value. Two years later, the Delaware corporation brought a claim against Mexico under NAFTA for expropriation and denial of fair and equitable treatment, based not on the pre-NAFTA expropriation, but on the post-NAFTA failure of the Mexican courts to resolve the Mexican company’s long-pending claim. Would an ICSID tribunal have jurisdiction? [This one is a challenge, raising issues from this class and the prior class.]
Unit 9 (February 6): Enforcement of Awards and Damages


*ADC v. Hungary* ICSID Case No. ARB/03/16 (Award of the Tribunal) (2 October 2006), pp. 89-103.

Articles 53-55, ICSID Convention.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention), Arts. IV and V.


Memorandum on “Hot Oil” Cases

Questions/Reaction Papers:

Should one account for the expected future profits of a foreign-owned enterprise differently if that enterprise is: expropriated; denied fair and equitable treatment by being denied an environmental discharge permit to which it was entitled; has its headquarters building taken for government use?

In the latter case, is the claim for expropriation of the building or for denying the investor fair-and-equitable treatment? Does it matter if the building was owned by the foreign investor or by a local company owned by the foreign investor?

Describe a strategy for collecting an ICSID award against a State for expropriation of a gold mine concession contract. Assume that gold from the mine is sold in international commerce. Assume further that the new owner of the mine, a state-owned corporation, has assets in the United States and throughout Europe.
Unit 10 (February 7): State Responsibility and Unusual Circumstances

US Model BIT (2012), Art. 18


CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (Award) (12 May 2005), ¶¶ 334-52

CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), ¶¶ 101-50

LG&E v. Argentina, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), ¶¶ 201-14; 226-66

**Questions/Reaction Papers:**

Should a financial crisis on the Argentine or any scale excuse a State from responsibility for takings of alien-owned property or default on debts held by aliens?

Some have said that having an award against Argentina is likes being an unsecured creditor in a bankruptcy. Should there be an international bankruptcy process that would allow creditors of a State to receive at least some compensation and relieve the State of further obligations?

Do national-security concerns ever justify uncompensated takings or denials of fair-and-equitable treatment, as opposed to restricting the types of foreign investment allowed at the outset?
Unit 11 (February 7): Protection of Foreign Investment and Environmental, Labor, and Human-Rights Protections


Zadek, The Path to Corporate Responsibility, HARVARD BUSINESS REVIEW, 125 (December 2004) (This is a short piece, so read it all).


North American Free Trade Agreement:

NAFTA Environmental Side Agreement, http://www.sice.oas.org/trade/nafta/Env-9141.asp#Art5


Questions/Reaction Papers:

Does a commercial enterprise have any responsibility beyond doing its best to earn a profit for its owners and complying with all applicable laws?

Why should States environmental-protection and/or labor-rights provisions in free trade agreements? Why should they want them in BITs? Do capital-importing and capital-exporting states have different interests in this regard?

Should FTAs or BITs contain dispute-resolution provisions that allow nationals, enterprises or NGOs of the parties to initiate dispute-resolution proceedings much as investors can initiate such proceedings under the typical BIT?
Unit 12 (February 7): The Current Debate over Investor-State Dispute Resolution


Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are fueling the Investment Arbitration Boom*, Corporate Europe Observatory and the Transnational Institute, November 2012 (Executive Summary only)


O. Thomas Johnson, *The Deal with BITs: What the Parties Thought They Would Get, What They Thought They Were Giving Up to Get It, and What They Got* (to be published) (read the whole article, it is not long)

**Questions/Reaction Papers:**

Write an opinion piece suitable for publication in the Washington Post that responds to Senator Warren. Agree or disagree with her as you deem appropriate.

Suggest three changes to the Model US BIT (Unit 7 materials) that would helpfully respond to what you view as the most important criticisms of investment treaties and compulsory investor-state dispute resolution.