I. Course Description

Over forty-seven years after entry into force of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (or “ICSID Convention”), the field of investment treaty arbitration remains revolutionary. By introducing the concept of a private right of action against States for a breach of an international obligation, the investment treaty system challenges traditional concepts of the sovereignty of States. The ICSID Convention has succeeded in empowering foreign nationals to allege claims without diplomatic espousal and to obtain judgments directly against States.

Despite this innovative approach, international investment law remains moored to its foundations in public international law (“PIL”). The principles of liability and compensation which enable investment treaty arbitrations derive from the traditions of customary international law and the jurisprudence of the International Court of Justice (“ICJ”).

The authority of investment treaty tribunals to bind Sovereign States with respect to investors and their investments derives from the fundamental sources of PIL. International investment agreements, including bilateral investment treaties and free trade agreements, are treaties recognized as a principal source of international law under the Statute of the International Court of Justice (“ICJ Statute”). The customary rules of treaty interpretation, as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (“Vienna Convention”), are also considered to be the common and general practice of Investor-State tribunals. The temporal scope of these treaties and the disputes that are heard by arbitral tribunals are usually governed by the principle of non-retroactivity codified under Article 28 of the Vienna Convention and refined and articulated in the jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice (“PCIJ”).

The substantive obligations—including inter alia national treatment, most-favored-nation treatment, fair and equitable treatment, full protection and security, expropriation and compensation, and free transfers—arose and took shape against the background of PIL practice, including cases of the ICJ and the PCIJ. Furthermore, the principles of State responsibility applied by arbitrators in Investor-State cases are those drafted by the International Law Commission (“ILC”) of the United Nations as applied and developed by the ICJ.
Investment treaty arbitration tribunals also look to ICJ jurisprudence to determine procedural issues and the recourse available to investors or Sovereign States to resolve such issues. Indeed, the drafters of the ICSID Convention closely considered certain provisions of the ICJ Statute, when developing provisions on interpretation and revision of judgments. Similarly, the PCIJ and the ICJ have delivered judgments which to this day are considered landmarks for determining the quantum or compensation to which an investor is entitled to after a tribunal finds that a State is liable for violations of international law.

Thus, although the Investor-State system represents a step away from the traditional State-to-State remedies of PIL, any understanding of this system requires and is bolstered by familiarity with the ICJ and the principles which guide its jurisprudence.

II. Course Objective

This seminar will lay out the basic principles of international investment treaty arbitration by analyzing and studying the underlying rules and principles of PIL as addressed in the landmark PCIJ and ICJ decisions that influence Investor-State arbitration. For structural purposes, the curriculum and calendar of the seminar will follow the basic structure of an ICSID proceeding (i.e., registration of a request for arbitration under Articles 25 and 36 of the ICSID Convention, preliminary objections under Rule 41(5) of the ICSID Rules of Arbitration, provisional measures, jurisdiction, merits, and quantum).

The objective of the seminar is to provide students interested in investment treaty arbitration and/or PIL with a solid grounding in the landmark judgments of the ICJ and other relevant PIL instruments (including the ILC’s 2001 Articles on State Responsibility) which together provide the foundation for the rules and principles which guide investment treaty arbitration.

See http://apps.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=2375

III. Class schedule and venue

This is a two-hour weekly seminar scheduled for Thursdays from 5:45 to 7:45 PM in the Spring 2016 term. The class will meet at Hotung 6006.

IV. Course Structure and Syllabus:

Each session will generally follow the following structure:

a. Review of relevant facts and issues of selected case(s) of PIL or relevant elements of a PIL instrument embodying customary law;

b. Discussion of the direct impact of the selected cases or instruments of PIL; and

The syllabus and reading materials for each session are posted in Canvas.

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<th>Date</th>
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| Jan. 21 | 1. Introductory Class  
- Introduction of the syllabus  
- Relevance of the course for students with PIL background and for those with commercial arbitration or other background  
- Influence of PIL in investment arbitration law. |
- Article 31 & 32 (means of interpretation).  
- Article 18 (object and purpose) |
| Feb. 4  | 3. Attribution and State Responsibility — *ILC Articles on State Responsibility*  
- Attribution — Sub-federal agencies, state companies, etc.  
- Other relevant parts of ILC Articles on State Responsibility |
| Feb. 11 | 4. Investor & Investment  
- *The Barcelona Traction, Light and Power Company, Limited Case* (Second Phase) (Belgium v. Spain), ICJ, 5 February 1970  
| Feb. 18 | No class (due to Monday schedule on Thursday) |
| Feb. 25 | 5. Jurisdiction  
- Jurisdiction *Rationae Temporis* — *Anglo-Iranian Oil Co. Case* (United Kingdom V. Iran) Preliminary Objection Judgment, ICJ, 22 July 1952  
- Jurisdictional Standards — *Oil Platforms* (Islamic Republic of Iran v. United States of America) Dissenting Opinion, ICJ, 6 November 2003 |
| March 3 | 6. Non-Discrimination and National Treatment  
- *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, PCIJ, Series A/B, No. 44, 4 February 1932; and *German Settlers in Poland*, Advisory Opinion, PCIJ, Series B, No. 6, 10 September 1923. |
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<td>March 10</td>
<td>No class — Spring Break</td>
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| March 17 | 7. Most-Favoured-Nation ("MFN") Treatment  
- The historical development of the MFN clause  
- The public international law discussion of the MFN clause (The Ambatielos claim, RIAA (Vol. XII, pp. 83-156))  
- The jurisprudence as developed by investor-state tribunals: (i) on procedural matters; and (ii) on substantive matters. |
| March 24 | 8. Fair and Equitable Treatment  
- *Elettronica Sicula SpA (ELSI) (United States v Italy)* [1989] ICJ Rep 15 |
| March 31 | 9. Full Protection and Security  
- *Neer v Mexico* (Mexico General Claim Commission, Opinion, 15 October 1926, 4 RIAA (1926) 60, 21 AJIL (1927) 5550; and *Elettronica Sicula SpA (ELSI) (United States v Italy)* [1989] ICJ Rep 15 |
| April 7 | 10. The Law of Expropriation  
- The genesis in Public International Law: *The Lena Gold Fish* case and *Certain German Interest in Polish Upper Silesia* case.  
V. Grading

There will be a take-home exam at the end of the course. Substantive class participation during the sessions, as well as one 5 to 10 minute presentation by each student may also influence the final grade.

VI. Exam Information

Take-home exam:

- Amount of time that students may work on the exam: 24 hours
- Start of the exam’s availability: May 5, 2016 at 8:30am
- End of the exam’s availability: May 12, 2016 by 6:30pm

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