

International Law

Academic year 2020-2021

International Investment Law

DI007 - Printemps - 6 ECTS

Tuesday 10h15 - 12h00

Course Description

When a Swiss, U.S. or Chinese firm invests abroad, especially in emerging economies, what protection does it enjoy under international law? When countries, be they developed or developing, want to attract foreign investment to build up their infrastructure, exploit natural resources or transit to a “green economy”, what kinds of treaties can they adopt without endangering their regulatory autonomy or granting too much power to foreign multinationals? This course examines the public international law on the entry and protection of foreign investment both in customary international law and treaties, in particular bilateral investment treaties (BITs), free trade agreements (FTAs including NAFTA/USMCA, CETA and CPTPP) and the Energy Charter Treaty. It provides an overview of procedures for investor-state dispute settlement (ISDS) under arbitral facilities such as ICSID, elaborates on core substantive principles of FDI screening, access and protection through an analysis of treaty provisions and the exponentially growing case law in the field, and assesses critiques of the ISDS system and ongoing treaty reform efforts. The course devotes attention also to the environmental and social issues surrounding foreign investment and sustainable development, and efforts to regulate the conduct and due diligence of multinational corporations. This is an overview course on the subject matter. No prior knowledge is required. Students in disciplines other than law are welcome.

> PROFESSOR

[Joost Pauwelyn](#)

[Office hours](#)

> ASSISTANT

[Karem Luisa Cárdenas Ynfanzón](#)

[Office hours](#)

Syllabus

INSTRUCTIONS:

1. Assigned readings and background documents are available on the course Moodle page.
2. Students MUST read all assignments before coming to class and prepare their own, specific answers to the questions listed for each session. Session questions also indicate which aspects students should focus on when doing the readings.
3. The use of computers in class will be permitted but only for note-taking and access to readings on Moodle.
4. Class participation is expected and will be included in the evaluation. All students can be called upon during class. However, for each individual session a different group or “panel” of students will be pre-assigned. The group of students “on panel” needs to be particularly well prepared and ready to engage.
5. This course is evaluated based on class participation and a written, take-home, open book exam. The exam will be handed out after the last class on 1 June via e-mail, and should be completed and sent to the Teaching Assistant by email within the set timeframe. Answers will be evaluated on the basis of legal and factual correctness, lucidity of reasoning, structure and clarity, originality, exhibited capacity by the student to think by herself/himself and overall substantive interest. Answers should refer to treaty provisions as well as relevant case law. Spotting the issues and critically analyzing them is more important than providing the “right answer” which, in this field, often (but not always!) remains elusive. Strict word limits will be imposed and scrupulously enforced (extra words will simply not be read). Further instructions about the exam will be provided throughout the course and together with the exam.
6. Active and high-quality class participation may be rewarded with a bonus of up to 0.5pt; little or no participation may be sanctioned with up to 0.5pt. Whether a bonus is given or a deduction is made – and if so to what extent – will be decided based on the Professor’s overall evaluation of the student’s class attendance and performance. When a student cannot attend class, he or she must inform the Teaching Assistant beforehand and explain the reason. Unjustified absence counts against class participation.

SELECTED BACKGROUND TEXTS (chronologically):

General Overview / Text or Case books

- A. Reinisch, *Advanced Introduction to International Investment Law* (Edward Elgar, 2020)
- Y. Radi, *Rules and Practices of International Investment Law & Arbitration* (CUP, 2020)
- Lim, Ho & Paparinskis, *International Investment Law and Arbitration* (CUP, 2018)
- C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed., 2017)
- M. Sornarajah, *The International Law on Foreign Investment* (4th ed., Cambridge University Press, 2017)
- K. Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (2nd ed., E. Elgar, 2016)
- M. Herdgen, *Principles of International Economic Law* (Oxford University Press, 2nd ed., 2016)
- R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford University Press, 2012)

- A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties, Standards of Treatment* (Wolters Kluwer, 2009)
- Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009)
- D. Bishop, J. Crawford and M. Reisman, *Foreign Investment Disputes, Cases, Materials and Commentary* (Kluwer Law, 2005)

More Detailed / Specific Background Reading

- T. Schultz & F. Ortino (eds.), *Oxford Handbook on International Arbitration* (OUP, 2020)
- M. Hahn & G. Van der Loo, [Law and Practice of the \[EU\] Common Commercial Policy, The First 10 Years After the Treaty of Lisbon](#), 2020
- J. Chaisse, L. Choukroune, S. Jusoh (eds.), *Handbook of International Investment Law and Policy* (Springer, 2019)
- N. Bernasconi-Osterwalder and M. Dietrich Bauch, *International Investment Law and Sustainable Development: Key cases from the 2010s* (IISD, 2018)
- N. Blackaby, C. Partasides, A. Redfern, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2nd ed., 2015)
- Z. Douglas, J. Pauwelyn and J. Vinuales (eds.), *The Foundations of International Investment Law: Bridging Theory into Practice*, Oxford University Press, 2014
- J. E. Alvarez, *The Public International Law Regime Governing International Investment*, Hague Academy of International Law, 2011
- C. Schreuer et al., *The ICSID Convention, A Commentary* (2nd ed., Cambridge University Press, 2009)
- C. Binder, U. Kriebaum, A. Reinisch, August (eds.), *International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009).
- P. Muchlinski, F. Ortino and C. Schreuer, *The Oxford Handbook on International Investment Law* (Oxford University Press, 2008)
- D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008)
- G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007)

Main Academic Journals in the Field of International Investment Law:

- African Journal of International Economic Law
- Arbitration International
- Asian International Arbitration Journal
- Global Arbitration Review
- ICSID Review – Foreign Investment Law Journal
- Journal of International Arbitration
- Journal of International Dispute Settlement
- Journal of International Economic Law
- Journal of World Investment & Trade

USEFUL WEBSITES / NEWS SOURCES:

Official websites

***World Bank / ICSID**

<https://icsid.worldbank.org>

homepage of the International Centre for Settlement of Investment Disputes (ICSID), including links to publicly-available awards and hearings

***UNCTAD**

<http://investmentpolicyhub.unctad.org/>

UNCTAD discussion forum for investment policy related debates and developments

<https://investmentpolicy.unctad.org/investment-dispute-settlement>

UNCTAD database on investment disputes

<https://investmentpolicy.unctad.org/investment-laws>

UNCTAD database on domestic investment laws

<https://unctad.org/en/Pages/publications.aspx>

UNCTAD publications on core clauses, regular “Issue Notes” on investment disputes and policy issues

***Energy Charter Treaty**

<https://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>

list of cases and publicly available awards arising under the Energy Charter Treaty

Modernisation of the ECT: [here](#)

***UNCITRAL**

https://uncitral.un.org/en/working_groups/3/investor-state

Proposals & background on ISDS (procedural) reform

To check regularly for recent updates

<http://www.iareporter.com/>

fee-based resource containing detailed news on investment arbitration (Luke Eric Peterson)

<http://italaw.com/>

compilation of bilateral investment treaties & awards

<http://www.investmentclaims.com/>

fee-based resource on investment arbitration including arbitral awards and decisions (Oxford University Press)

Blogs & more academic discussions & reports, databases

<https://ielp.worldtradelaw.net>

international economic law and policy blog

<http://ccsi.columbia.edu>

academic outfit producing excellent background research

<http://www.investmenttreatynews.org/>

news and comment on investment arbitration (International Institute for Sustainable Development - IISD)

<https://www.cids.ch/isds-reform-library>

CIDS database on key materials on ISDS reform

<http://www.kluwarbitration.com/>

fee-based resource on international arbitration (Kluwer Law International)

<http://www.iiapp.org>

database on public law implications of international investment arbitration

<http://www.tradelab.org>

open source expert network to broaden the pool of stakeholders that have access to legal expertise on international trade and investment law

<https://jusmundi.com/en/>

fee-based resource on international investment and commercial arbitration

<http://arbitrationblog.kluwarbitration.com/>

blog featuring posts on international investment and commercial arbitration

<https://resourcecontracts.org/>

directory of petroleum and mineral contracts

<https://pitad.org/index#welcome>

regularly-updated and networked overview of investment arbitration cases

<https://www.afronomicslaw.org>

blog featuring critical posts on international economic law, including ISDS and commercial arbitration

VIDEOS:

Basic introductions to investor-state dispute settlement (mostly very critical)

[What is an Investor-State Dispute Settlement Clause?](#), Leadnow.ca, 2014 (critical, has a European focus)

[ISDS and Financial Crises](#), weed-online.org, 2014 (critical, focus on Greece, Cyprus & Argentina)

[Does ISDS Have a Place in Trade Deals such as NAFTA?](#), CIGI, 2017 (North American focus)

[ISDS: Unfair to Whom?](#), Peterson Institute, 2018 (constructive, North American focus)

[ISDS and the Energy Transition](#), Corporate Europe Observatory (scroll down to “explainer videos”; discusses Energy Charter Treaty)

Dispute specific videos / documentaries

[Trading Democracy](#), Bill Moyers, PBS, 2002 (early NAFTA Chapter 11 documentary with fascinating background to NAFTA cases such as Metalclad, Methanex, and Loewen)

[Crude](#), 2009 (documentary on Chevron v. Ecuador saga)

[Tobacco](#): Tonight With John Oliver, 2015 (ISDS & international litigation starts at min. 8)

[Paying the Price After Winning Millions from Shell](#), Bloomberg, 2016 (Shell in Nigeria & environmental harm)

[ISDS Stories: Save Rosia Montana](#), Friends of the Earth Europe, 2019 (concerns *Gabriel Resources v. Romania*)

Broader themed documentaries

[No Gold For Kalsaka](#): A Burkina Faso Community's Lost Land, Witness, 2020 (investment & land/community issues)

[Stealing Africa](#), 2012 (Glencore & Zambia copper mines, focus on investment & tax)

[Grabbing Gambela](#), 2012 (foreign investors in Ethiopian agriculture & local communities)

COURSE SCHEDULE:

Class	Topics	Readings	Questions
1 23 Feb. 10:15- 12:00	<p>* Content & goals of the course</p> <p>* Basic investment (treaty) concepts & terminology</p> <p>* History, nature, evolution and context of international investment law (IIL)</p> <p>* Economic, political & legal rationales for investment, investment restrictions, International Investment Agreements (IIAs) & Investor-State Dispute Settlement (ISDS)</p>	<p>1- Sornarajah, <i>The International Law on Foreign Investment</i>, p. 23 (as of title 1.2)-27, 30 (second para.)-31, 87-88</p> <p>2- Pauwelyn, <i>At the Edge of Chaos</i>, p. 1-4, 7 (S. II)-10, 15 (S. IV)-36</p> <p>3- Bonnitcha et al., <i>The Political Economy of the Investment Treaty Regime</i>, p. 33-37 (up to 2nd para.) and 46 (3rd para.)-49</p> <p>4- Sattorova, <i>Do Developing Countries Really Benefit from Investment Treaties?</i> IISD, p. 8-11</p> <p>5- Action Aid, <i>Mistreated</i>, 1-5</p> <p>6- World Trade Online, <i>Lighthizer on ISDS</i></p> <p>7- IISD, USMCA Curbs How Much Investors Can Sue Countries</p>	<p>- What are the main historical phases/events in the evolution of IIL?</p> <p>- How does IIL fit into/compare to international law, trade/tax law, domestic law, private v. public law?</p> <p>- Why do firms invest abroad?</p> <p>- Does FDI invariably benefit the host country's economy? What about the home country?</p> <p>- What is the link between IIAs and increased FDI?</p> <p>- Why may countries decide to restrict entry of FDI?</p> <p>- Why do developing countries conclude IIAs?</p>

Class	Topics	Readings	Questions
		<p>8- Could COVID-19 kill the investment treaty, van der Merwe, Nov. 2020</p> <p>Please also watch one of the “basic introduction to ISDS” videos listed above and, if possible, one of the listed “dispute specific” or “broader themed” videos (Stealing Africa is particularly recommended)</p>	<p>- Reading the Action Aid critique of double taxation treaties (DTTs), should developing countries pay more attention to BITs or DTTs?</p> <p>- Why have ISDS between developed countries?</p> <p>- What is Lighthizer’s critique of ISDS? Does the USMCA respond to it?</p>
<p>2</p> <p>2 Mar. 10:15- 12:00</p>	<p>*Screening of FDI & national security</p> <p>*Entry & liberalization of FDI in trade & investment agreements</p> <p>*Facilitation of FDI, negotiations at the WTO</p> <p><u>Optional</u>, to understand today’s “real challenges” related to infrastructure investment (hint: little to do with what investment treaties address!): Is An Infrastructure Boom in the Works?, The Economist, Jan. 2021</p>	<p>1- Business Europe, The EU and China, p. 64-71</p> <p>2- Damjanovic & de Sadeleer, EU’s Foreign Investment Screening, Dec. 2020</p> <p>3- TikTok, Your Time is Up, Forbes, Dec. 2020 (and for Trump’s “parting shots” against investments in China see here)</p> <p>4- Huawei notifies Sweden of alleged BIT breaches, IAReporter, Jan. 2021</p> <p>5- Strategic Implications of the China-EU Investment Deal, The Diplomat, 4 Jan. 2021 (latest EU official news on the CAI here)</p> <p>6- Newcombe & Paradell, GATS, p. 140-42</p> <p>7- Market Access under CETA, read the treaty text, especially: Arts. 8.4 to 8.8, 8.14 and 8.17, Annex 8-C</p> <p>8- The Development Dimension of an Investment Facilitation Framework, Hamdani, Nov. 2020 (latest on WTO negotiations in this field, here)</p>	<p>- What factors may limit much-needed FDI from entering e.g. Africa?</p> <p>- Conversely, why are countries at times hostile to FDI (see Chinese investments into the US or EU)?</p> <p>- What is CFIUS and on what basis can it restrict FDI into the US?</p> <p>- What happened to TikTok in the US, Huawei in Sweden?</p> <p>- What is the new EU screening mechanism meant to achieve? How does it work?</p> <p>- How do GATS and CETA open up markets for FDI?</p> <p>- What does the new China-EU investment agreement cover?</p> <p>- What are “performance requirements” and why are some prohibited in e.g. CETA and the CAI?</p> <p>- What are WTO negotiators trying to achieve with “investment facilitation”?</p>
<p>3</p> <p>9 Mar. 10:15- 12:00</p>	<p>* Means and fora to settle investment disputes</p> <p>* Jurisdiction & applicable law</p>	<p>1- Why more Indian business disputes are settled elsewhere, The Economist, Dec. 2020</p> <p>2- Dolzer & Schreuer, p. 232-44, 288-93, 79-81 (first para.), 12-19</p>	<p>- What is the difference between diplomatic protection and protection under a BIT?</p> <p>- When can/must investors resort to</p>

Class	Topics	Readings	Questions
	<ul style="list-style-type: none"> * Investment contracts * Investment treaties * Domestic law & other international law * State responsibility and attribution * The nature of investors' rights (direct v. derivative) 	<p>3- Paulsson, <i>Arbitration Without Privity</i>, p. 232-36</p> <p>4- <i>AAPL v. Sri Lanka</i>, Final Award, p. 526-27, 533-34, and Dissent Asante, p. 574, 576-78 (<i>also re-read Pauwelyn, Chaos</i>, p. 42-44)</p> <p>5- Dolzer & Schreuer, p. 216-27 (attribution), for a recent example skim Ortiz v. Algeria, IAREporter summary, p. 1-4</p> <p>6- Douglas, paras. 13-19, 29-39, 65-76 (first para.), with <u>optional</u> case applications:</p> <ul style="list-style-type: none"> * <i>ADM v. Mexico</i>, Award, 26 September 2007, paras. 1-5, paras. 161-65, 168-75, 180 * <i>Corn Products v. Mexico</i>, Award, 15 Jan. 2008, paras. 161, 165-70, 176 <p><u>Legal Provisions</u></p> <ul style="list-style-type: none"> -Draft Articles on Diplomatic Protection, Arts. 1-3, 14-15 -ICSID Convention, Arts. 25(1), 26, 27 and 42(1) -NAFTA Chapter 11, Arts. 1116, 1120-22, 1131 -Energy Charter Treaty (ECT), Art. 26 -France-Argentina BIT, Art. 8 -USA-Argentina BIT, Art. VII -Sri Lanka-UK BIT, Art. 8(1) 	<p>domestic courts v. international tribunals?</p> <ul style="list-style-type: none"> - What is special about ICSID v. other international arbitration options? - What does Paulsson mean with “arbitration without privity”? - How was consent to arbitration established in <i>AAPL</i>? - What law did the <i>AAPL</i> tribunal apply? How did this square with Art. 42 of ICSID? - On what ground did Asante disagree with the majority on the question of applicable law? - What is the difference between jurisdiction & applicable law? - What legal claims can an investor bring? Are they limited to BIT claims or could they also include claims of violation of a contract, domestic law or other international treaties? - When is a state responsible for the conduct and/or contractual violations of its provinces, municipalities, state-owned enterprises? - Are BIT rights those of the investor or of the home state? Why does this matter? Do you agree with <i>ADM</i> or <i>Corn Products</i>?
<p>4</p> <p>16 Mar. 10:15- 12:00</p>	<ul style="list-style-type: none"> * Protected investments 	<p>1- Dolzer & Schreuer, p. 60-78</p> <p>2- <i>Malaysian Historical Salvors v. Malaysia</i>, Annulment, paras. 1-7, 12-23, 56-74</p> <p>3- Mabco v. Kosovo, IAREporter summary (read only sections on “investment”)</p> <p>4- <i>Poštová banka v. Greece</i>, Award, paras. 248, 250, 278,</p>	<ul style="list-style-type: none"> - Does “investment” in ICSID mean the same as “investment” in a BIT? Why or why not? - Should an investment contribute to the “development” of the host state for it to be protected?

Class	Topics	Readings	Questions
		<p>286-87, 316-17, 324-26, 329-50 (read with E. Stylopoulos, <i>ICSID Recent Decision on Greek PSI</i>) 5- <i>Mitchell v. DRC</i>, http://tinyurl.com/ycoxbykj (up to “Claimants alleged...”) and http://tinyurl.com/y8pbp594 (up to “Committee also criticizes...”) 6- <i>Cargill v. Mexico</i>, http://tinyurl.com/ybfhg4ea, paras. 1, 519-526</p> <p><u>Legal Provisions</u> -Vienna Convention on the Law of Treaties (VCLT), Arts. 31-32 -NAFTA Chapter 11, Art. 1139 -ECT, Art. 1(6) -France-Argentina BIT, Art. 1(1) -USA-Argentina BIT, Art. I.1(a) -CETA, Articles 8(1), 8(3) and Annex 8-B: Public Debt</p>	<p>- How would you have decided the <i>Malaysian Salvors</i> case? - Can contractual rights be “investments”? Reading <i>Mabco</i>, do you agree with the majority or dissent? - On what ground were the bonds in <i>Poštová banka</i> not considered as protected investments? - Is a cross-border sale of goods an investment? A cross-border supply of services? Is provision of a legal service an investment v. the setting up of a law firm abroad? What did the tribunal v. annulment committee say on this in <i>Mitchell v. DRC</i>? - Did Cargill Inc. (US) get compensation for lost HFCS exports from the US into Mexico or was only Cargill Mexico compensated for lost profits in Mexico?</p>
<p>5 23 Mar. 10:15- 12:00</p>	<p>* Protected investors * Jurisdiction <i>ratione temporis</i> * Consent to arbitration * Intra-EU ISDS & Achmea * Corruption & legality</p>	<p>1- Dolzer & Schreuer, p. 44-60, 36-43 2- Douglas, p. 397-400 3- <i>Azurix v. Argentina</i>, Annulment, paras. 76-82, 85-130 4- Kappes v. Guatemala, IAReporter summary (read only parts on reflective loss) 5- <i>PMI Asia v. Australia</i>, http://tinyurl.com/y9vp8ud3, up to “Illegality Objection...”; from “Dispute Arose After ...” to “Tribunal Reviews Political...” 6- FT, <i>Battle Royal Over EU’s Bilateral Investment Treaties</i> (Achmea), http://tinyurl.com/wubnm3l 7- Pauwelyn, <i>Enforcing Anti-Corruption Rules</i>, p. 247-50, 257-61 8- Charlotin, <i>Kenya Wins BIT Arbitration</i> (failure to comply with environmental legislation)</p>	<p>- When is an individual or company a “national” of a BIT contracting party for the purposes of arbitration? - What is special about the nationality rule in Art. 25 of the ICSID Convention? - Can minority shareholders claim compensation for damages caused to the company? Do you agree with Douglas’ critique? What did the Annulment Committee in <i>Azurix</i> decide? - How is “reflective loss” addressed in the CAFTA-DR treaty? Do you agree with the majority or dissent in <i>Kappes</i>?</p>

Class	Topics	Readings	Questions
		<p><u>Legal Provisions</u> -ILC Draft Articles on Diplomatic Protection (2006), Articles 5, 9, 10 & 11 -ICSID Convention, Arts. 25(1), (2) and (3); 71 and 72 -NAFTA Chapter 11, Arts. 1101, 1117, and 1139; compare to Arts. 1.5, 14.1 and 14.2 USMCA -ECT, Arts. 1(7), 17(1), 26(7) -France-Argentina BIT, Art. 1(2) and 13. -USA-Argentina BIT, Arts. I.1(b) and (c), I.2 and XIV</p>	<p>- What is the jurisdiction <i>ratione temporis</i> of investment tribunals? - What did the CJEU decide in <i>Achmea</i>? What does it mean for intra-EU ISDS? How did the EU member states react? - When an investor obtained a concession contract through corruption, can/should it still be protected under a BIT? What is the relevant legal basis? - Should violations of domestic law remove treaty protection from an investment?</p>
<p>6 30 Mar. 10:15- 12:00</p>	<p>* Expropriation</p>	<p>1- Dolzer & Schreuer, p. 98-129 2- <i>Santa Elena</i>, case summary 3- <i>Metalclad v. Mexico</i>, case summary, p. 1-4; Award, paras. 102-112 4- <i>PMI v. Uruguay</i>, paras. 180, 191-192, 235, 255-6, 271-7, 280-4, 287, 289-295, 300-307 5- <i>Yukos v. Russia</i>, Award, paras. 1578-84 (read with Brauch, <i>Yukos</i> newsletter, 1-2) 6- <i>Teinver v. Argentina</i>, paras. 928-9, 941-4, 949-53, 966-70, 1007-11, 1034-40, 1047, 1053, 1061, 1063-4, 1066, 1068-9, 1071, 1075, 1079-81, 1088 (first 2 sentences only)-89, 1092, 1098, 1100, 1112, 1114, 1115 7- Canada's submission in Eco Oro v. Colombia, paras. 4-11</p> <p>Compare: -1997 Dutch Model BIT, Art. 6 to 2019 Model, Art. 12; -CPTPP, Art. 9.7, Annex 9-B -EU Public Consultation on ISDS, Questions 4 & 5 -2016 EU-Vietnam FTA, Expropriation Annex</p> <p><u>Legal Provisions</u> -NAFTA, Art. 1110 -ECT, Art. 13 -France-Argentina BIT, Art. 5.3</p>	<p>- Do countries have a right to expropriate? How is this right limited? - What is the difference between direct, indirect & creeping expropriation? - When does an act amount to “expropriation”? What is the difference between <i>Santa Elena</i>, <i>Metalclad</i> and <i>PMI</i>? Can IP be expropriated? Can contractual rights be expropriated? - When/why should a government compensate for burdens imposed through regulation? - What are the remedies for unlawful v. lawful expropriation? - Why is the date of expropriation important? - Was there expropriation in the <i>PMI</i> case? Why, why not? - What about the <i>Yukos</i> case? Was there a proper basis to find expropriation? - In <i>Teinver</i>, why did it matter to find direct v. indirect v. creeping</p>

Class	Topics	Readings	Questions
		-US-Argentina BIT, Art. IV.1 and 2 -US Model BIT, Art. 6 and Annex B -European Convention on Human Rights, Protocol I, Article 1	expropriation? What was the date of valuation used by the tribunal v. claimants? Why did it matter? Did the tribunal attach any consequences to the expropriation being “unlawful”?
EASTER BREAK			
7 13 Apr. 10:15- 12:00	* Fair and Equitable Treatment (FET) * Full protection and security * Access to justice, fair procedure and denial of justice <u>To get a flavor of ISDS hearings, watch: <i>Vattenfall v. Germany</i>, ICSID/ECT case, Public Hearing, Day 1, 1 of 4, min. 3.20 to 5.20, and 3 of 4, min. 13.30-15.20</u>	1- Dolzer & Schreuer, p. 130-41 (skim p. 142-60 if you have time), 160-6, 178-82 2- <i>Glamis Gold v. USA</i> , ITN case summary 3- <i>Bilcon v. Canada</i> , Case Fact; Award, paras. 588-603; compare with IAREporter, <i>Mesa v. Canada</i> on significance of <i>Bilcon</i> (FET part), 10 Aug. 2015, http://tinyurl.com/opowomq 4- <i>PMI v. Uruguay</i> , paras. 308-310, 316, 319-324, 389, 409-410, 419-420, 426-7, 430 5- <i>Charanne v. Spain</i> , paras. 486-496, 499, 503, 515, 517-522, 539 6- <i>Eiser v. Spain</i> , paras. 362-6, 369, 371, 374-380, 382, 387, 389, 418 7- <i>Stadtwerke v. Spain</i> , summary, http://tinyurl.com/rowcymo , read intro & para. under “Claimants had no reasonable expectation of regulatory stability” 8- <i>Vattenfall v. Germany</i> , German Constitutional Court summary, http://tinyurl.com/y7x6rugy (with a Nov. 2020 update here) 9- Pain, Cairn Energy v. India , read only “Essential Facts” & “FET Standard” sections 10- Read carefully: Arts. 8.9 and 8.10 CETA; Art. 9.6 and Annex 9-A of CPTPP	- What is the relation between FET and customary international law? - When does treatment violate FET? - Compare <i>Glamis</i> to <i>Bilcon</i> ; was Canada’s behavior that much more “egregious” than that of the US? - When does a change in regulation breach FET according to <i>PMI v. Charanne v. Eiser</i> ? - What is the role of “legitimate expectations” under FET? Is the somewhat stricter approach in <i>Eiser</i> limited to the ECT? - Is <i>Eiser</i> decided differently than <i>Charanne</i> purely based on the measures challenged? How do <i>Eiser</i> and <i>Stadtwerke</i> compare? - How would you decide <i>Vattenfall</i> ? What were the “legitimate expectations” there and should they lead to FET breach, full compensation? - On what grounds was India found to violate FET in <i>Cairn</i> ? What was the role of legitimate expectations there? - In CETA and CPTPP, what is left of FET? How

Class	Topics	Readings	Questions
		<u>Legal Provisions</u> -NAFTA, Article 1105 -ECT, Article 10.1 -France-Argentina BIT, Arts. 3 and 5.1 -US-Argentina BIT, Preamble and Article II.2	does this compare to the ECT's FET clause? Would <i>Bilcon</i> and/or <i>Eiser</i> still prevail under the FET clause in CETA, CPTPP?
TBD	<i>Optional:</i> - Review session with the Teaching Assistant		
8 20 Apr. 10:15- 12:00	Discrimination, i.e.: * Arbitrary or discriminatory measures * National treatment * Most-favored nation treatment	1- Dolzer & Schreuer, p. 191-97 2- DiMascio & Pauwelyn, p. 48-51, 69 (last para.)-79 (first para.) 3- <i>UPS v. Canada</i> , case summary; Award paras. 173-81 4- <i>Parkerings v. Lithuania</i> , case summary; Award paras. 362-80, 390-92 5- <i>Bilcon v. Canada</i> , Summary on National Treatment; IAREporter, <i>Mesa v. Canada</i> on significance of <i>Bilcon</i> (National Treatment part), 10 Aug. 2015, http://tinyurl.com/opowomq 6- IISD, <i>MFN in Investment Treaties</i> , 1-19 (up to 4.5), 21-25 7- ILC, Final Report, Study Group MFN, paras. 163-174 8- <i>Guris v. Syria</i> , IAREporter summary , read only intro & headings "War-losses provision does not exclude..." up to "For a majority, general MFN clause applies..." 9- <i>Menzies v. Senegal</i> , paras. 131-136, 140-1, 143 10- Compare: -1997 Dutch Model BIT, Art. 3.2, 4, 7 -CETA, Art. 8.7, esp. para. 4 -CPTPP, Arts. 9.4 & 9.5 -2015 India Model BIT, Art. 4 <u>Legal Provisions</u> -NAFTA, Article 1102, 1103 & 1108, -ECT, Article 10.1 & 10.3 -USA-Argentina BIT, Article II.2	- What is the difference between national treatment in investment v. trade law? Should WTO law guide investment tribunals? - What elements must be shown for there to be a breach of national treatment? - When are investors "in like circumstances"? Why was this not the case in <i>UPS</i> and <i>Parkerings</i> ? - Why was NT found to be violated in <i>Bilcon</i> ? Why do NAFTA parties in <i>Mesa</i> disagree with <i>Bilcon</i> on NT? - What benefits in outside/reference treaties can be claimed under an MFN clause in a (base) BIT? If so, what is the consequence? - Is/should there be a difference between "importing" better dispute settlement v. better substantive provisions? (compare <i>Guris</i> to <i>Menzies</i> in this respect) - What are the absolute limits of MFN? Can MFN expand the scope of the base treaty (<i>ratione temporis, personae, materiae</i>)? - In what ways does CETA Art. 8.7

Class	Topics	Readings	Questions
		-Belgium Luxembourg/USSR BIT (1989), Arts. 2 and 10	considerably limit MFN protection?
<p>9</p> <p>27 Apr. 10:15- 12:00</p>	<p>* Transfer of funds</p> <p>* Stabilization & freezing clauses</p> <p>* Umbrella clause</p>	<p>1- Dolzer & Schreuer, p. 212-15, 82-86</p> <p>2- <i>Continental v. Argentina</i>, Award, paras. 237-45</p> <p>3- JKX v. Ukraine, IAREporter summary, read only intro, background and section “Capital controls breached the BIT’s free-transfer clause”</p> <p>4- Gazzini, <i>Freezing Clauses</i>, p. 1-2</p> <p>5- Sasson, <i>Treaty v. Contract Claims & Umbrella Clauses</i>, S.6.03 (p. 213-220), S.6.05 (p. 225-230), S.6.06 (p. 233-235), S.6.07 (p. 235-239)</p> <p>6- <i>EDF v. Argentina</i>, Award, paras. 50, 68-71, 921-23, 928-32, 938-41</p> <p>7- <i>PMI v. Uruguay</i>, paras. 467-474, 478-482</p> <p>8- Compare:</p> <p>-1997 Dutch Model BIT, Arts. 3.3-5, 5</p> <p>-2008 Colombia Model BIT, Art. V</p> <p>-Canada-China BIT, Arts. 20.2(a) & 33(3)</p> <p><u>Legal Provisions</u></p> <p>-ECT, Articles 10(1) and 26 (3)(c)</p> <p>-US-Argentina BIT (1991), Article II(2)(c)</p> <p>-UK Model BIT (2006), Article 28(2)</p>	<p>- Do investors have a right to transfer funds in and out of the host country? What are possible limits?</p> <p>- On what grounds did <i>Continental</i> reject a claim of breach of the BIT’s transfer clause? How was the situation in <i>JKX</i> different?</p> <p>- What are the pros and cons of freezing clauses?</p> <p>- When is breach of contract also a breach of international law/a BIT?</p> <p>- If a contract has an exclusive jurisdiction clause referring only to domestic courts, can a BIT claim with reference to the contract (or a contract claim via an umbrella clause) still be made?</p> <p>- What is the consequence of an umbrella clause for contract claims? Which of the “four schools” do you find more convincing?</p> <p>- In <i>EDF</i>, was MFN able to import an umbrella clause from an outside treaty? Did it matter that the parties to the concession were not the exact same as the parties to the arbitration?</p>
<p>10</p> <p>4 May 10:15- 12:00</p>	<p>* Exceptions and defenses</p> <p>Consider also: Call for ISDS Moratorium during COVID Crisis and Response, CCSI May 2020</p>	<p>1- Newcombe & Paradell, p. 481-499 (up to “III. ...”); 505 (as of “IV...”) – 523 (skim as background to understand cases below)</p> <p>2- <i>Impregilo v. Argentina</i>, Award, paras. 336-60.</p> <p>3- IAREporter, <i>Argentina Liable for Mistreatment, but Majority</i></p>	<p>- Does “necessity” under customary international law continue to apply to BITs? To the WTO treaty?</p> <p>- What are the conditions under Art. XI “necessity” in the US-Argentina BIT?</p>

Class	Topics	Readings	Questions
		<p><i>Sees no Treaty Breaches</i>, 30 Mar. 2011, http://tinyurl.com/pgud4va (compare to JKX v. Ukraine, IAReporter summary, read only section “State of necessity ...”) 4- <i>India Telecom Cases</i>, summary, read intro p. 1, p. 3-4 (section on essential security) 5- IISD, <i>Merits & Limitations of General Exceptions Clauses</i>, http://tinyurl.com/y83f6kap 6- <i>Bear Creek v. Peru</i>, http://tinyurl.com/ya953uty, only read intro & last sections titled “Police Powers...” and “General Exceptions...” 7- Canada’s submission in Eco Oro v. Colombia, paras. 12-23 8- <i>Antaris v. Czech Republic</i>, paras. 250-252 (tax exception) 9- <i>Stadtwerke v. Spain</i>, summary, http://tinyurl.com/rowcymo, read para. under “ECT tax carve-out ...” 10- Compare: -CETA, Art. 28.3 -Canada-China BIT, Arts. 8, 14, 16, 33, 34, Annex B.8 (<i>also read</i> 20.2(a) & 33(3)) -Dutch Model BIT 2019, Art. 2.4 (subsidy withdrawal) -India Model BIT, 2015, Art. 2.4</p> <p><u>Legal Provisions</u> -ECT, Arts. 12 & 14, -US-Argentina BIT, Arts. IV.3 and XI, -ILC Draft Articles, Arts. 20 - 27</p>	<p>- How does Art. XI differ from Art. 25 ILC Articles? - If BITs are there to reduce the cost of capital for host states through “hand-tying” so as to avoid mistakes of the past, is a broad “necessity” defense counter-productive? - How do the India cases compare to the Argentina cases? What is the difference between the <i>DT</i> and the <i>CC/Devas</i> case? - Should BITs include general public policy exceptions à la GATT Art. XX? What is the advantage and possible risk of doing so? -What lessons does <i>Bear Creek</i> hold in this respect & how is Canada’s position in <i>Eco Oro</i> different from <i>Bear Creek</i>? - What do you think of the CETA/India Model BIT list of exceptions? Do general exceptions in CETA apply to expropriation/FET? Should they, given the precedents of <i>PMI</i>, <i>Eiser</i>, <i>Vattenfall</i>? - On what basis did <i>Antaris</i> reject application of the tax carve-out? Compare to <i>Stadtwerke</i>.</p>
<p>11 11 May 10:15- 12:00</p>	<p>* Counterclaims against investors * Investor obligations in investment treaties * Due diligence obligations on multinational corporations under domestic law</p>	<p>1- Tan & Chong, Future of Environmental Counterclaims, p. 176-197 (up to S. 3.2) 2- <i>Urbaser v. Argentina</i>, paras. 1110, 1146, 1150-5, 1193-9, 1205-7 3- Baltag, From investment promotion & protection, to investment regulation, Dec. 2020</p>	<p>- Can host states bring claims or counter-claims against foreign investors under ICSID? - What are the main stumbling blocks for counterclaims under ICSID? Compare <i>Burlington</i> to <i>Perenco</i>? - What was the legal basis for the counterclaim</p>

Class	Topics	Readings	Questions
		<p>4- Business and Human Rights Resource Centre, <i>Parent Company Liability for Extraterritorial Abuse</i>, https://tinyurl.com/ybsgnppy</p> <p>5- Friedman, Corporate Liability Design for Human Rights Abuses, p. 1-4, 17-18, 20-32</p> <p>6- Read at least one of the 3 country reports below: ** Hogan Lovells, <i>France's Due Diligence Law 2017</i>, https://www.hlregulation.com/2018/03/29/10436/ ** Volterra, Increased Business and Human Rights Risks for Companies in the Netherlands, Sept. 2020 ** Swissinfo, Responsible Business Initiative Rejected at the Ballot Box, Nov. 2020 (for a video on the proposal, see Deloitte, here)</p> <p>7- Ratner, Intro on Symposium on Business & Human Rights, June 2020 (latest on Draft UN Treaty on Business & Human Rights here)</p> <p><u>Optional</u>: OECD paper on <i>Business Responsibilities & Investment Treaties</i>, 2020 http://tinyurl.com/vlu7tcc</p> <p>Compare: -1997 Dutch Model BIT, Arts. 1(a), 2 to 2019 Dutch Model BIT, Art. 2 -CPTPP, Art. 9.14 -2012 SADC Model BIT, Arts. 10.1-10.3 with commentary -2015 India Model BIT, Arts. 11, 12 - 2015 Burkina Faso – Canada BIT, Arts. 15, 16 and 21.1 - Brazil Model Agreement CFI, Arts. 14-16 and 24.1 to 24.3</p>	<p>against <i>Urbaser</i>? For the tribunal, can international (human rights) law be invoked against companies?</p> <p>- Should BITs impose not only investor rights but also investor obligations? What are the other options to make foreign investors “socially responsible” or actively contribute to sustainability?</p> <p>- What are the hurdles when suing a parent company in the domestic courts of the home state?</p> <p>- According to Friedman, what is the difference between harm and act-based liability, and why may the former be optimal?</p> <p>- What do the French, Dutch and Swiss due diligence laws try to achieve? What legal avenues are used?</p> <p>- What would the UN “legally binding treaty” add? What are the key debates there?</p>
<p>12 18 May 10:15- 12:00</p>	<p>Procedural matters, i.e.: * Stages in ICSID proceedings</p>	<p>1- Dolzer & Schreuer, p. 278-88 2- CEO, <i>Profiting from injustice</i>, p. 7-9 3- ICSID Arbitration Proceedings (Chart)</p>	<p>- What are the different stages (written and oral) in arbitration proceedings?</p>

Class	Topics	Readings	Questions
	<ul style="list-style-type: none"> * Appointment of arbitrators * Conflicts of interest * Transparency * Duration * Cost 	<p>4- <i>Biwater Gauff v. Tanzania</i>, Minutes of the First Session</p> <p>5- Pauwelyn, <i>WTO Panelists Are From Mars, ICSID Arbitrators Are From Venus</i>, introduction (p. 1-5) and conclusion (p. 39-45)</p> <p>6- IISD, <i>Challenging Arbitrators</i> (chart)</p> <p>7- <i>Blue Bank v. Venezuela</i>, Disqualification Decision, paras. 22-25, 55-71</p> <p>8- Kaj Hober disqualification in Spain energy cases, compare FREIF v. KS Invest summaries</p> <p>9- McLachlan, Shore & Weiniger, Costs, p. 456-8</p> <p><u>Legal Provisions</u></p> <ul style="list-style-type: none"> -ICSID Convention, Arts. 36-51, 56-58 -ICSID Institution Rules -ICSID Arbitration Rules -UNCITRAL Arbitration Rules -Mauritius Convention on Transparency 	<ul style="list-style-type: none"> - Who appoints arbitrators? What if parties want to block the procedure? - How does ICSID compare to the WTO in the types of adjudicators appointed? - How does the system deal with conflicts of interest? Should Mr. Hober be disqualified in the energy cases mentioned? - Who ends up paying the costs of arbitration? Do you agree that for the loser to pay all costs would be the best default solution?
<p>13</p> <p>25 May 10:15- 12:00</p>	<ul style="list-style-type: none"> * Damages and compensation * Remedies other than damages * Interest * Challenge and review of awards * Recognition, enforcement and execution of awards 	<p>1- Friedman, <i>Damages Principles</i>, http://tinyurl.com/yc2xpz6 (and for a critical review, skim IISD, Compensation under Investment Treaties, Dec. 2020)</p> <p>2- <i>Yukos v. Russia</i>, Final Award, paras. 1607-15, 1619-21, 1625, 1627-28, 1630-32 (on Contributory Fault)</p> <p>3- Brauch, <i>Yukos</i> newsletter, p. 5-6</p> <p>4- McLachlan, Shore & Weiniger, Interests, p. 453-456</p> <p>5- Teinver, paras. 1099-1100, 1109-1116; interests: paras. 1117-1129; costs: 1130-1146</p> <p>6- Email of third party funder</p> <p>7- Dolzer & Schreuer, challenge & review, p. 300-12</p> <p>8- Eiser v. Spain annulment, IAREporter summary</p> <p>9- Reuters, Seized Argentine Naval Ship, 9 Jan. 2013,</p> <p>10- IAREporter, Argentina Settles More Awards, 2018</p>	<ul style="list-style-type: none"> - What remedies can be obtained when a tribunal finds a breach of a BIT? Can tribunals call for restitution or specific performance? - What damages can be recovered? What about lost profits? Moral damages? - Which of the different methods to value a company do you consider most appropriate? How precisely does a DCF calculation work? - What if there is some contribution also by the investor? - Is interest due on a damage award? At what rate? Running as of when, until when? - How/where can ICSID awards be reviewed as compared to other investor-state awards e.g.

Class	Topics	Readings	Questions
		<u>Legal Provisions</u> -ECT, Art. 13 -Arts. 28-39 of the ILC's Draft Articles -NAFTA, Arts. 1110, 1135 -ICSID Convention, Art. 54 (1) -ICSID Convention, Arts. 52-55 -New York Convention, Arts. I-V	ICSID Additional Facility awards, ICC awards, etc.? - On what grounds can an ICSID annulment committee annul an award? - How does state immunity affect the enforcement and execution of arbitral awards?
TBD	<i>Optional:</i> - Review session with the Teaching Assistant		
14 1 Jun. 10:15-12:00	Investment treaty reform * Reform efforts at ICSID, UNCITRAL, UNCTAD, ECT, EU, USMCA ... * Substantive treaty reform * EU Proposal for an Investment Court * Possible Appellate Review Mechanism * Advisory Centre for Developing Countries * Protection of SMEs * Alternatives to ISDS (domestic courts, state-to-state DS, prevention & mediation, political risk insurance etc.)	1- Pauwelyn, <i>At the Edge of Chaos</i> , Section VI (p. 36-44) 2- UNCTAD's Reform Accelerator , 2020 p. 9-28 (substantive reform) 3- Ortino, Taming the Chaos , Dec. 2020 4- UNCITRAL Working Group III, latest issues & reports (procedural reform) 5- CEO, <i>The One Treaty That Rules Them All</i> , p. 77-89 (focus on ECT) 6- EU Proposal for an Investment Court, http://tinyurl.com/ybweyaqh 7- EUObserver, <i>Seven Sins of EU's ICS</i> , http://tinyurl.com/y9q35ybx 8- Schwebel Critique of ICS, http://tinyurl.com/y9wt6ywa 9- Legum, <i>Appellate Mechanism for Investment Arbitration</i> , TDM Jan. 2014 10- Swieder, <i>An Advisory Center on IIL for Developing Countries</i> (for more on this idea, see Sauvart, 2019, here) 11- Weber, <i>Open Doors for SMEs in ISDS</i> ; read also Articles 8.19.3, 8.23.5, 8.27.9, 8.30 and 8.39.5 & 6 of CETA	-Based on <i>At the Edge of Chaos</i> , what makes reform of IIL easier v. more difficult? - Reading UNCTAD's and UNCITRAL's reform efforts, pick one substantive and one procedural reform that you consider most urgent & formulate your own concrete view/proposal on each -How to make IIL more "developing country friendly", supportive of sustainable development? -What is happening at UNCTAD, ICSID, UNICITRAL, ECT? Does the forum of reform matter? - Do you agree with the EU proposal to establish an "Investment Court"? - What are the reasons for, respectively, EUObserver and Judge Schwebel to object to the EU's proposal? - Do you agree that an appellate review mechanism is needed in ISDS? - What do you think of CETA rules in respect of

Class	Topics	Readings	Questions
			SMEs? Are they sufficient? - What system or rules could be set up to facilitate developing countries or small investors getting the required legal help or fair access to ISDS?