

# INVESTMENT TREATY LAW

LL4E7

Lent Term 2009

## Course Convenor

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## Guest Lecturer

Jan Paulsson, Freshfields Bruckhaus Deringer

## Course Objectives

The aim of the course is to introduce students to international investment law and investment treaty arbitration. The course has three components. The first examines the historical, theoretical and policy background for the use of international law and international arbitration to govern the regulatory relationships between foreign investors and states. The second examines substantive principles and standards – such as expropriation, national treatment, most-favoured-nation treatment, and fair and equitable treatment – that may apply to the investor-state relationship under investment treaties and regional trade agreements. The third examines wider issues about the fairness and functionality of investment treaty law, including the possibility of conflicting awards, the prospects of annulment and judicial review of awards, and recent challenges to the system by certain states and NGOs.

**Teaching:** 10 weekly seminars, Tuesday, 9-11 am, Lent Term, plus one revision class at the same time in Week 2 of Summer Term.

The course will be taught as a weekly seminar. Students are expected to participate fully in discussions in each seminar. Reading is divided into Primary Texts, Essential Reading and Further Reading. Each week you will be expected to have read the assigned Primary Texts and Essential Reading and to be able to discuss them in class. You are also encouraged to read items from the Further Reading, particularly before the exam.

## Reading:

### - Core Texts:

- o R Dolzer and C Schreuer, Principles of International Investment Law (Oxford, 2008)
- o G Van Harten, Investment Treaty Arbitration and Public Law (Oxford, 2006)

- Articles and cases listed on Moodle
- **Recommended Texts:**
  - C McLachlan QC, L Shore, M Weiniger, and L Mistelis, International Investment Arbitration: Substantive Principles (Oxford, 2007)
  - R D Bishop, J Crawford, M Reisman, Foreign Investment Disputes: Cases, Materials and Commentary (Kluwer, 2005)
  - C Schreuer, The ICSID Convention: A Commentary (Cambridge, 2001)

**Assessment:** The course will be assessed by a written 100% examination. The examination will be based on the assigned readings and class discussion. It is a “closed book” exam except for the provision of:

- ICSID Convention, Dolzer and Schreuer, Annex 1 (focus on Arts 25-27 and 36-55)
- NAFTA Chapter 11, Dolzer and Schreuer, Annex 3 (Arts 1101-1139 only)
- US Model BIT, Dolzer and Schreuer, Annex 7
- UK Model BIT, Dolzer and Schreuer, Annex 8
- New York Convention: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

### **COURSE OUTLINE**

1. Introduction: historical and policy background
2. Consent to arbitration, arbitral institutions and rules
3. Theoretical perspectives, applicable law and interpretation
4. Jurisdiction: personal and subject matter jurisdiction
5. Admissibility and parallel proceedings: *res judicata*, *lis pendens* and *electa una via*
6. Standards: expropriation
7. Standards: national treatment and most favoured nation treatment
8. Standards: fair and equitable treatment and full protection and security
9. Awards: annulment, challenge and enforcement
10. Fairness and future of investment treaty arbitration

## SYLLABUS

### 1. Introduction: historical and policy background of investment treaties

This seminar introduces the history of and policy behind investment treaties. Investment treaties are signed between two or more states with each state promising to give certain protections to investors of the other states. Typically, investment treaties contain two important elements. First, they contain substantive provisions which set out the standards by which each state promises to treat the investors of the other state/s. Secondly, most investment treaties contain a procedural mechanism to deal with disputes about compliance with these treatment standards. In most cases, this mechanism permits investors to bring claims directly against the host state before an international arbitral tribunal. This seminar focuses primarily on the first issue, while the next seminar focuses primarily on the second.

When it comes to standards of protection, there has traditionally been a division between capital-exporting states, which have sought extensive investor protection, and capital-importing states, which have sought greater regulatory freedom for states and correspondingly less extensive protections for investors. This seminar examines why this is the case and the way in which this divergence has influenced the development of customary international law and multilateral treaty standards. It also traces the rise of bilateral treaties (such as those based on the UK and US model BITs) and regional investment treaties (such as NAFTA), asking why states have been prepared to enter into these treaties but not a multilateral treaty. Finally, the seminar introduces some of the academic and civil society critiques of investment treaties, which is a topic that will be continued in the 2<sup>nd</sup> seminar.

In completing the reading, consider the following questions:

- **History and policy** (Van Harten, Guzman): What is an investor/investment? What investor protection rules have capital-exporting states traditionally advocated and why? What investor protection rules have capital-importing states traditionally advocated and why? What is the status of each approach as a matter of customary international law and how and why has this changed over time? Have there been negotiations over a multilateral investment treaty and what has become of these and why?
- **Bilateral and regional investment treaties** (Van Harten, Guzman, Franck, Lowe): When did states begin entering into these treaties and when did they become particularly popular? What is the profile of states likely to enter into investment treaties and how has this changed over time? Do investment treaties create equal and reciprocal rights and obligations between states? Why are developing states prepared to enter into investment treaties at all? Why are developing states prepared to enter into bilateral and regional treaties but not a multilateral investment treaty?
- **Critiques** (Van Harten, NGO in class handout): What are some of the main concerns raised by the NGO community about investment treaties? What case study does Van Harten use to illustrate his concerns about investment treaties? Do you think these concerns are justified?

### **A. Primary Texts**

- NAFTA, Chapter 11, Section A (skim read)
- US Model BIT, Arts 1-6 (skim read)
- UK Model BIT, Arts 1-5 (skim read)

### **B. Essential Reading**

- G Van Harten, Investment Treaty Arbitration and Public Law (2006), Chs 1-2
- A Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties”, 38 Virginia J. Int’l L. 639 (1998) (theorising why developing states sign bilateral but not multilateral investment treaties) – Moodle
- S Franck, “Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law”, 19 Pacific McGeorge Global Bus. & Dev. L.J. 337 (2007) (focus on pages 338-340, 345-54, whether investment protections encourage foreign direct investment) – Moodle

### **C. Further Reading**

- R Dolzer and C Schreuer, Principles of International Investment Law (2008), Ch 1
- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), Chs 1 and 2
- V Lowe, Changing Dimensions of International Investment Law, Oxford Legal Studies Research Paper No. 4/2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=970727](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970727) (good general background on the history and current status of the field; look at pages 34-52 concerning whether investment treaties increase foreign investment and the changing nature of states signing BITs) – Moodle
- UNCTAD, World Investment Report 2003 (United Nations, 2003), ch. 3, 4 and 5, available at UNCTAD [www.unctad.org/en/docs/wir2003\\_en.pdf](http://www.unctad.org/en/docs/wir2003_en.pdf) – Moodle
- UNCTAD Series on Issues in International Investment Agreements, available at [www.unctad.org/Templates/Page.asp?intItemID=2322&lang=1](http://www.unctad.org/Templates/Page.asp?intItemID=2322&lang=1) – Moodle

## **2. Consent to arbitration, arbitral institutions and rules**

This seminar examines the most important procedural development contained in most investment treaties: investors being permitted to bring arbitration claims directly against states. Traditionally, investors had two options for resolving disputes with a host state, neither of which were satisfactory: they could bring a claim in the local courts of the host state or they could seek international diplomatic protection from their home state. By contrast, many investment treaties allow investors to bring claims directly against host states before international arbitral tribunals, without having to rely on a contract between the investor and the state. This seminar explores how states consent to such arbitration and why this is controversial. It also introduces the two main forms of international arbitration: institutional (e.g., ICSID) and non institutional (e.g., UNCITRAL). As the majority of investment treaty disputes are heard under the ICSID Convention, the seminar looks at some of the basic requirements of ICSID jurisdiction.

Picking up on the academic and civil society critiques of investment treaties from the 1<sup>st</sup> seminar, we then look at empirical evaluations of investment treaty disputes.

In completing the reading, consider the following questions:

- **Investor-state disputes and arbitration without privity** (UNCTAD, Paulsson, Van Harten): What options exist for bringing investment disputes before national courts and what are the advantages and disadvantages of this approach? When may a state exercise diplomatic protection and what are the advantages and disadvantages of this approach? What are the advantages and disadvantages of allowing investors to bring claims directly against states before the international arbitral tribunals? How can a state consent to investment arbitration? Why does Paulsson describe investment treaties as creating arbitration without privity? How does this approach differ to states entering commercial contracts which include arbitration clauses (Paulsson, Van Harten)?
- **ICSID** (UNCTAD): What is the difference between institutional and non institutional arbitration? When and why was ICSID negotiated? What is the difference between the ICSID Convention and the ICSID Additional Facility Rules? Does being a party to the ICSID Convention equate to consenting to arbitration? Does ICSID include substantive treatment standards? What is the relationship between bringing an ICSID case and exhausting local remedies and seeking diplomatic protection?
- **Empirical evaluation of disputes** (Franck): Which states are investors most likely to come from and which states are they most likely to sue? Are investor claimants or developing states more likely to win? What damages are claimed and what damages are awarded?

#### A. Primary Texts

- ICSID Convention, Arts 25-27
- NAFTA, Chapter 11, Section B
- US Model BIT, Arts 24-26
- UK Model BIT, Art 8

#### B. Essential Reading

- UNCTAD, Course on Dispute Settlement, ICSID Part 2.2 (selecting an appropriate forum), available at [http://www.unctad.org/en/docs/edmmisc232add1\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add1_en.pdf) – Moodle
- UNCTAD, Course on Dispute Settlement, ICSID Part 2.3 (consent), available at [http://www.unctad.org/en/docs/edmmisc232add2\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add2_en.pdf) – Moodle
- J Paulsson, “Arbitration Without Privity”, 10 ICSID Review – Foreign Investment L.J. 232 (1995) – Moodle
- S Franck, “Empirically evaluating claims about investment treaty arbitration”, 86 North Carolina L. Rev. 1 (2007) (focus on Introduction (pages 3-7) and Part IV.A-E (pages 24-35 and 44-66) – Moodle

#### C. Further Reading

- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), Ch 3
- G Van Harten, Investment Treaty Arbitration and Public Law (2006), Ch 5
- B Legum, “The Innovation of Investor-State Arbitration Under NAFTA”, 43 Harvard Int. L.J. 531 (2002) – Moodle
- G Horlick and A Marti, “NAFTA Chapter 11B: A Private Right of Action to Enforce Market Access Through Investments”, 14 J. Int’l Arb. 43 (1997) – Moodle
- A Afilalo, “Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Chapter” 34 NYU J. Int’l L. & Pol. 1 (2001) – Moodle

### 3. Theoretical underpinnings, applicable law and interpretation

This seminar examines to what extent investment treaty arbitration is a form of public international law, international commercial arbitration and/or public law. Investment treaty arbitration is often thought of as a subset of public international law or as a species of international commercial arbitration, but it has important differences to both. This seminar examines the applicable law in investment treaty arbitration, which is commonly a combination of public international law and national law. The seminar also considers the interpretation of investment treaties and how this may be influenced by our understanding of investment treaty arbitration as a form of public international law, international commercial arbitration, investor rights regime or public law. We then explore the controversial case study of the interpretation of fair and equitable treatment issued by the NAFTA states.

In completing the reading, consider the following questions:

- **Theoretical underpinnings** (Van Harten, Douglas): What are the characteristics of public international law? What are the characteristics of international commercial arbitration? Why does Van Harten argue that investment treaty arbitration should be understood as distinct from public international law and international commercial arbitration? Why does he argue that investment treaty arbitration represents a form of public law? Do you agree with his analysis?
- **Applicable law:** What rule does ICSID adopt regarding the applicable law? Do the states that enter into investment treaties have the right to determine the applicable law? What happens if they do not make a choice of law? If the states choose domestic laws, will the international law have any application? What applicable law has been chosen in the US Model BIT and NAFTA?
- **Interpretation** (Van Harten, Dolzer/Schreuer): What are the general rules for interpreting treaties set out in the Vienna Convention on the Law of Treaties and how do these apply in investment treaty arbitration? How do the interpretative approaches identified by Van Harten (analogy to public international law, analogy to international commercial arbitration, investor rights regime and public law) impact upon interpretation? What is the NAFTA Free Trade Commission and how have NAFTA tribunals responded to its interpretations (compare *Pope & Talbot*, *Mondev* and *ADF*)? Would you recommend that all BITs contain an equivalent to the FTC?

#### A. Primary Texts

- Vienna Convention on the Law of Treaties, Arts 31-32, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)
- NAFTA, Arts 1131, 2001 and 2202, available at <http://www.sice.oas.org/Trade/NAFTA/NAFTATCE.ASP>
- US Model BIT, Arts 30-31

## B. Essential Reading

- G Van Harten, *Investment Treaty Arbitration and Public Law* (2006), Chs 3 and 6
- R Dolzer and C Schreuer, *Principles of International Investment Law* (2008), Ch 2 (pages 31-38)
- NAFTA Free Trade Commission, Interpretation of Certain Chapter 11 Provisions (31 July 2001), available at DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en> (principle 2) – Moodle
- *Pope & Talbot v Canada*, Damages (31 May 2002), available at [http://ita.law.uvic.ca/documents/AwardonDamages2002\\_05\\_31\\_Pope\\_001.pdf](http://ita.law.uvic.ca/documents/AwardonDamages2002_05_31_Pope_001.pdf) (discussing interpretation by FTC, paras 8-24, 43-69) – Moodle
- *Mondev International Ltd v USA*, Award (11 October 2002), available at <http://ita.law.uvic.ca/documents/Mondev-Final.pdf> (discussing interpretation by FTC, paras 93-125) – Moodle
- *ADF Group Inc. v United States of America*, Award (9 January 2003), available at [http://ita.law.uvic.ca/documents/ADF-award\\_000.pdf](http://ita.law.uvic.ca/documents/ADF-award_000.pdf) (discussing interpretation by FTC, paras 175-192) – Moodle

## C. Further Reading

- UNCTAD, Course on Dispute Settlement, ICSID Part 2.6 (applicable law), available at [http://www.unctad.org/en/docs/edmmisc232add5\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add5_en.pdf) – Moodle
- Z Douglas, “The Hybrid Foundations of Investment Treaty Arbitration” (2003) 74 BYBIL 151 (focus on pages 152-84) – Moodle

## 4. Jurisdiction: personal and subject matter jurisdiction

This seminar focuses on personal and subject matter jurisdiction for tribunals hearing investment treaty claims, particularly those under the ICSID Convention. Most investment treaty claims are brought by investors from home State A against host State B on the basis of an investment treaty between States A and B. In order for a tribunal to have jurisdiction, it must find that the investor is a “national” of State A (personal jurisdiction) and that the claim relates to an “investment” in State B (subject matter jurisdiction). This seminar explores the relevant tests for “nationality” of individuals (natural persons) and companies (juridical persons) and for “investments” under the ICSID Convention and certain Model BITs.

In completing the reading, consider the following questions:

- **Relationship between ICSID and BITs/MITs:** What is the relationship between the jurisdictional tests set out in ICSID and those in investment treaties? If the case is brought under the ICSID Convention, can investment treaties narrow or expand the jurisdiction set out in the Convention?
- **Personal Jurisdiction - Nationality:** What are the tests for determining whether an individual investor is a national of another contracting state under ICSID and investment treaties? What are the tests for determining whether a company investor is a national of another contracting state under ICSID and investment treaties? When can domestic companies be treated as foreign nationals? What are the advantages and disadvantages of adopting a formal legal test (e.g., the majorities in *Tokios* and *AdT*) versus a contextual, factual test (e.g., the dissents in *Tokios* and *AdT*)? Is structuring or restructuring corporate nationality to take advantage of favourable BITs legal and/or ethical?

- **Subject Matter Jurisdiction - Investment:** What are the tests for determining whether the claim relates to an investment under ICSID and investment treaties? Have tribunals taken a broad or narrow approach to the definition of investment (*Fedax*)? When will tribunals find that a claim does not relate to an investment (*Joy Mining*)? What is the rationale for protecting investments but not sales of goods?

#### A. Primary Texts

- ICSID Convention, Arts 25(1) and (2)
- NAFTA, Annex 201.1
- US Model BIT, Arts 1 and 2
- UK Model BIT, Art 1

#### B. Essential Reading

- R Dolzer and C Schreuer, Principles of International Investment Law (2008), Chs 2 (pages 31-38) and 3
- *Tokios Tokelès v Ukraine*, Jurisdiction (29 April 2004), available at [http://ita.law.uvic.ca/documents/Tokios-Jurisdiction\\_000.pdf](http://ita.law.uvic.ca/documents/Tokios-Jurisdiction_000.pdf) (focus on the examination of the requirement of foreign nationality, paras 1-4, 14-71) and dissent, available at [http://ita.law.uvic.ca/documents/tokios-dissenting\\_opinion\\_000.pdf](http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf) – Moodle
- *Fedax NV v Republic of Venezuela*, Jurisdiction (11 July 1997), available at <http://ita.law.uvic.ca/documents/Fedax-1997-Last.pdf> (focus on definition of investment) – Moodle

#### C. Further Reading

- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), Chs 5 (nationality) and 6 (investment)
- UNCTAD, Course on Dispute Settlement, ICSID Part 2.4 (personal jurisdiction over investors), available at [http://www.unctad.org/en/docs/edmmisc232add3\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add3_en.pdf) – Moodle
- UNCTAD, Course on Dispute Settlement, ICSID Part 2.5 (subject matter jurisdiction over investments), available at [http://www.unctad.org/en/docs/edmmisc232add4\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add4_en.pdf) – Moodle
- C Schreuer, The ICSID Convention: A Commentary (2001), Art 25
- *Agua del Trunari SA v Bolivia*, Jurisdiction (21 October 2005), available at [http://ita.law.uvic.ca/documents/Agua-del-Tunari-jurisdiction-eng\\_000.pdf](http://ita.law.uvic.ca/documents/Agua-del-Tunari-jurisdiction-eng_000.pdf) (focus on the examination of corporate reorganization) – Moodle
- *Joy Mining v Egypt*, Jurisdiction (6 August 2004), available at [http://ita.law.uvic.ca/documents/JoyMining\\_Egypt.pdf](http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf) (focus on the examination of investment, paras 1, 15-26, 31-63) – Moodle
- *Loewen v United States of America*, Award (26 June 2003), available at <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf> (focus on the requirement of continuous foreign nationality, paras 1-10, 220-242) – Moodle
- *Mondev International Ltd v USA*, Award (11 October 2002), available at <http://ita.law.uvic.ca/documents/Mondev-Final.pdf> (focus on temporal jurisdiction, paras 41-83) – Moodle

#### 5. Admissibility and parallel proceedings: *res judicata*, *lis pendens* and *electa una via*

This seminar examines the admissibility of multiple proceedings before domestic courts and international tribunals. We begin by exploring the meaning of, and rationale behind, three key concepts: *res judicata*, *lis pendens* and *electa una via* (fork in the road and waiver). The seminar then examines the way in which these issues arise in investment treaty arbitration, asking when proceedings in one forum will justify refusing to hear a claim in another forum. We explore the difference between contract claims before national courts and treaty claims before international tribunals. The seminar then examines some of the problems of parallel proceedings through the prism of a famous set of cases, *Lauder v Czech Republic* and *CME v Czech Republic*, where two tribunals reached opposite conclusions on the same set of facts. This leads to questions about whether there should be a system for appealing conflicting investment treaty awards.

In completing the reading, consider the following questions:

- **Core concepts:** What do the terms *res judicata* and *lis pendens* mean? What is the justification for these rules and how do they differ from each other? What is the difference between a fork in the road provision and a waiver provision? Why are multiple claims likely in investment arbitration? What rules does the ICSID Convention provide about the exclusivity of ICSID arbitration?
- **Treaty vs contract claims:** What is the difference between a treaty claim and a contract claim? If an investor has signed an agreement with a state that provides for the exclusive jurisdiction of the host state's courts, what impact will that have on the investor bringing an investment treaty claim before an international tribunal? Is this result satisfactory?
- **Parallel proceedings and appellate review (*Lauder* and *CME v Czech Republic*):** What was the relationship between *Lauder* and *CME* and why were two claims brought? Do multiple claims serve the interests of investors or states? Should either tribunal have refused to hear the case and, if so, on what basis? Should the Svea court have attempted to reconcile the decisions? Do you think that the conflicting decisions in *Lauder* and *CME* undermine the legitimacy of investment treaty arbitration? What possibilities exist for avoiding or minimizing such conflicts?

#### A. Primary Texts

- ICSID Convention, Art 26
- NAFTA, Art 1121
- US Model BIT, Art 26

#### B. Essential Reading

- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), Ch 4 (focus on paras 4.01-4.37, 4.52-4.92)
- S Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 *Fordham L. Rev.* 1521 (2005), focus on pages 1558-1568 (summary on *Lauder* and *CME* cases) – Moodle
- *Lauder v Czech Republic*, Award (3 September 2001), available at <http://ita.law.uvic.ca/documents/LauderAward.pdf> (focus on admissibility objections, paras 153-91) – Moodle
- *CME cases*, Svea Court of Appeals, Sweden, Judicial Challenge (15 May 2003), available at [http://ita.law.uvic.ca/documents/CME2003-SveaCourtOfAppeal\\_000.pdf](http://ita.law.uvic.ca/documents/CME2003-SveaCourtOfAppeal_000.pdf) (focus on *lis pendens* and *res judicata*, pages 2, 95-98) – Moodle

### C. Further Reading

- *CAA and Vivendi v Argentina*, Annulment Decision (3 July 2002), available at [http://ita.law.uvic.ca/documents/vivendi\\_annulEN.pdf](http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf) (focus on paras 1-2, 93-115) – Moodle
- *CME Czech Republic BV v Czech Republic*, Partial Award (13 September 2001), available at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf> (focus on admissibility objection, para 419) – Moodle
- Appeals Mechanism in International Investment Disputes (K Sauvant ed., Oxford, 2008), Chs 15 (Legum) and 16 (Paulsson)
- C Schreuer, *The ICSID Convention: A Commentary* (2001), Art 26

### 6. Standards: expropriation

We now turn to consider the main substantive protections provided by most BITs, starting with expropriation. International law does not prevent a state from directly or indirectly expropriating foreign investments, but such expropriation is legal only if it is for a public purpose, is non-discriminatory, accords with due process and is accompanied by prompt, adequate and effective compensation. This seminar focuses on the tests for direct and indirect expropriation: direct expropriation involves a taking or transfer of ownership rights, whereas indirect expropriation involves actions that have the effect of substantially depriving the investor of the benefits of ownership. We then use case studies to examine how these tests are applied to various facts, focussing on tribunals struggling to draw the line between lawful government regulation (particularly for concerns such as the environment) and compensable expropriation.

In completing the reading, consider the following questions:

- **Definitions:** What is the test for direct expropriation? What is the test for indirect expropriation? Is there a difference between indirect expropriation, measures equivalent to or tantamount to expropriation, and creeping expropriation? What degree or duration of interference is required to establish expropriation? Is indirect expropriation determined by the government's subjective intention in passing the measure, or the objective effect of the measure on the investor?
- ***Metalclad*:** What test did the Tribunal establish for expropriation and was it broad or narrow? On what basis or bases did the Tribunal find that Mexico had expropriated Metalclad's investment? Did the Tribunal give adequate consideration to Mexico's environmental concerns? What did the Canadian court say about the Tribunal's test for and findings on expropriation?
- ***Saluka/Feldman*:** What does the *Feldman* Tribunal say about the distinction between indirect expropriation, measures tantamount to expropriation and creeping expropriation? What does the *Feldman* Tribunal view as the fundamental question about expropriation (legitimate regulation versus compensable expropriation)? What test does the *Saluka* Tribunal set down about police powers versus compensable expropriation?
- **Rationale:** What is the rationale for paying compensation for diminished values that result from regulatory action (Been/Beauvais)? Consider the arguments of cost-internalization, fairness, insurance and encouraging investment. Is it fair for foreign investors to be protected by international law if domestic investors are not similarly protected under national law?

### A. Primary Texts

- NAFTA Chapter 11, Art 1110
- US Model BIT, Arts 6 and 12, Annexes A and B

### B. Essential Reading

- R Dolzer and C Schreuer, *Principles of International Investment Law* (2008), Ch 6
- *Metalclad Corporation v United Mexican States*, Merits (30 August 2000), available at <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf> (focus on expropriation, paras 1-6, 28-63, 102-112 and 131) – Moodle
- *United Mexican States v Metalclad Corporation*, Judicial Challenge (2 May 2001), available at <http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf> (focus on paras 24-38, 57-105) – Moodle
- *Saluka Investments BV v The Czech Republic*, Award (17 March 2006) available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf> (focus on distinction between police powers and compensable expropriation, paras 253-65) – Moodle
- *Feldman v Mexico*, Award (16 December 2002), available at [http://ita.law.uvic.ca/documents/feldman\\_mexico-award-english.pdf](http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf) (focus on expropriation, paras 1, 6-23 and 89-111) – Moodle

### C. Further reading

- C McLachlan *et al*, *International Investment Arbitration: Substantive Principles* (2007), Ch 8
- V Been and J Beauvais, “The Global Fifth Amendment: NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine”, 78 NYU Law Rev. 30 (2003) (focus on pages 87-128) – Moodle
- G Van Harten, *Investment Treaty Arbitration and Public Law* (2006), Ch 4
- *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, Award (29 May 2003), available at [http://ita.law.uvic.ca/documents/Tecnicas\\_001.pdf](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf) (focus on the examination of expropriation, paras 95-151 (particularly 113-32)) – Moodle
- *SD Myers Inc v Government of Canada*, Award (13 November 2000), available at [http://ita.law.uvic.ca/documents/PartialAward\\_Myers\\_000.pdf](http://ita.law.uvic.ca/documents/PartialAward_Myers_000.pdf) (focus on the examination of expropriation, paras 279-88) – Moodle

## 7. Standards: national treatment and most favoured nation treatment

This seminar focuses on the contingent treatment standards of national treatment and most favoured nation treatment. These standards are contingent because they require an examination of the treatment of a foreign investor compared to (1) domestic investors in like circumstances (national treatment) and (2) other foreign investors (most favoured nation treatment). The national treatment provision requires identification of domestic investors in like circumstances, consideration of whether the foreign investor has been treated less favourably than these investors, and an analysis of whether this differentiation can be justified. The most favoured nation provision allows investors under one investment treaty to rely on more favourable treatment in other investment treaties by the same state, though it is controversial whether this applies to substantive obligations only or also to dispute settlement provisions.

In completing the reading, consider the following questions:

- **Contingent vs Non-Contingent Standards:** What is the difference between treatment standards that are contingent and non-contingent? Are the following treatment standards contingent or non-contingent: national treatment, most favoured nation treatment, fair and equitable treatment, and full protection and security? What is the relationship between finding a breach of a contingent standard and finding a breach of a non-contingent standard?
- **National Treatment:** What steps are required to find a violation of the national treatment standard? What does the phrase “like circumstances” mean and how have different tribunals applied it (*SD Myers, Feldman, ADF*)? Is differential treatment accorded to foreign and domestic investors judged according to the intention of the measure and/or the actual effects of the measure (*SD Myers, Feldman, ADF*)? Will a violation of national treatment be found if the differential treatment can be justified on rational grounds and how do such justifications relate to the test for likeness (*SD Myers, Pope & Talbot, Feldman*)? Does national treatment involve a comparison with the average national or the best treated national?
- **Most Favoured Nation Treatment:** How does a basic most favoured nation provision operate? What is an example of an uncontroversial application of a most favoured nation clause? What is an example of a controversial application of a most favoured nation clause? Do you prefer the reasoning in *Maffezini* (applying the clause to a dispute settlement provision) or *Plama* (refusing to apply the clause to a dispute settlement provision)? Do the public policy exceptions identified in *Maffezini* provide rational exceptions to the general rule identified by the Tribunal or do they undermine the existence of that general rule? Is it possible to rationally reconcile the decisions in *Maffezini* and *Plama*?

#### A. Primary Texts

- NAFTA, Arts 1102, 1103 and 1104
- US Model BIT, Arts 3 and 4
- UK Model BIT, Art 3

#### B. Essential Reading

- R Dolzer and C Schreuer, Principles of International Investment Law (2008), Ch 7, Parts 8 and 9 (national treatment, most favoured nation treatment) and Ch 10, Part (2)(g) (pages 253-57, most favoured nation treatment)
- *SD Myers Inc v Government of Canada*, Award (13 November 2000), available at [http://ita.law.uvic.ca/documents/PartialAward\\_Myers\\_000.pdf](http://ita.law.uvic.ca/documents/PartialAward_Myers_000.pdf) (focus on the examination of national treatment, paras 1-4, 88-128, 161-62, 193-95, 238-257) – Moodle
- *Feldman v Mexico*, Award (16 December 2002), available at [http://ita.law.uvic.ca/documents/feldman\\_mexico-award-english.pdf](http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf) (focus on the examination of national treatment, paras 154-88) – Moodle
- *Maffezini v Kingdom of Spain*, Jurisdiction (25 January 2000), available at [http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_001.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf) (focus on the examination of most favoured nation treatment, paras 1, 19, 38-64) – Moodle
- *Plama Consortium Ltd v Republic of Bulgaria*, Jurisdiction (2005), available at <http://ita.law.uvic.ca/documents/plamavbulgaria.pdf> (focus on the examination of most favoured nation treatment, paras 183-227) – Moodle

### C. Further Reading

- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), ch 7, pages 199-212, 251-257 (treatment of investors)
- *Pope & Talbot Inc v Canada*, Award (10 April 2001), available at [http://ita.law.uvic.ca/documents/Award\\_Merits2001\\_04\\_10\\_Pope\\_001.pdf](http://ita.law.uvic.ca/documents/Award_Merits2001_04_10_Pope_001.pdf) (focus on the examination of national treatment, paras 18-29, 73-104 (particularly 75-79)) – Moodle
- *Pope & Talbot v Canada*, Damages (31 May 2002), available at [http://ita.law.uvic.ca/documents/AwardonDamages2002\\_05\\_31\\_Pope\\_001.pdf](http://ita.law.uvic.ca/documents/AwardonDamages2002_05_31_Pope_001.pdf) (consider argument about the relationship between most favoured nation treatment and fair and equitable treatment, paras 1-16) – Moodle
- *ADF Group Inc. v United States of America*, Award (9 January 2003), available at [http://ita.law.uvic.ca/documents/ADF-award\\_000.pdf](http://ita.law.uvic.ca/documents/ADF-award_000.pdf) (focus on the examination of national treatment, paras 1, 44-55, 147-158) – Moodle

### 8. Standards: fair and equitable treatment and full protection and security

This seminar focuses on the non-contingent treatment standards of fair and equitable treatment and full protection and security. These standards are non-contingent because they require an examination of the treatment of a foreign investor compared to an objective standard of treatment, rather than a comparison of how the investor has been treated compared with other domestic and foreign investors. The fair and equitable treatment obligation is important and relatively open-ended, dealing with denial of justice in court proceedings and decisions, and unfair and inequitable administrative decision making. The requirement to provide full protection and security refers to the obligation of states to exercise due diligence in order to protect investors and their property from damage by state officials or others.

In completing the reading, consider the following questions:

- **Relationship of Non-Contingent Standards:** How does the fair and equitable treatment standard relate to (1) the minimum treatment obligation under customary international law and (2) violations of other treaty provisions, particularly national treatment (*Pope & Talbot*, *Metalclad*, FTC interpretation, Thomas)? What role have academics played in the development of this standard (Thomas)? Is it fair for foreign investors to be protected under international law if domestic investors do not get equivalent protection?
- **Fair and Equitable Treatment:** Fair and equitable treatment deals with (1) denials of justice by domestic courts and (2) unfair and inequitable treatment in administrative decision making.
  1. Denial of justice: When dealing with these claims, are Tribunals functioning as courts of appeal (*Mondev*, *Loewen*)? Is it necessary to exhaust domestic remedies in order to make a claim for denial of justice under a fair and equitable treatment provision (*Loewen*)? What do you think of the outcome of and analysis in *Loewen*?
  2. Administrative decisions: What does the obligation to protect an investor's legitimate expectations mean in practice (*Tecmed*, *Metalclad*)? How do Tribunal's balance an investor's expectations against a state's right to regulate (*Saluka*)? What are the requirements of due process (*Tecmed*, *Metalclad*)?
- **Full Protection and Security:** What obligations are imposed on states under this provision (*AAPL*)? Does a state need to participate in initial wrongdoing to become liable (*AAPL*,

*AMT, Wena*)? Does the provision create a strict liability standard for any harm to investments (*AAPL*)?

#### **A. Primary Texts**

- NAFTA, Art 1105
- US Model BIT, Art 5 and Annex A
- UK Model BIT, Art 2

#### **B. Essential Reading**

- R Dolzer and C Schreuer, Principles of International Investment Law (2008), Ch 7, Parts 1, 2 and 4 (fair and equitable treatment, full protection and security, denial of Justice)
- *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, Award (29 May 2003), available at [http://ita.law.uvic.ca/documents/Tecnicas\\_001.pdf](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf) (focus on fair and equitable treatment, paras 152-74) – Moodle
- *Metalclad Corporation v United Mexican States*, Merits (30 August 2000), available at <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf> (focus on fair and equitable treatment, paras 74-101) – Moodle
- *United Mexican States v Metalclad Corporation*, Judicial Challenge (2 May 2001), available at <http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf> (focus on paras 27-30, 57-76) – Moodle
- *Mondev International Ltd v USA*, Award (11 October 2002), available at <http://ita.law.uvic.ca/documents/Mondev-Final.pdf> (focus on the examination of the merits review for denial of justice, paras 93-159) – Moodle

#### **C. Further Reading**

- C McLachlan *et al*, International Investment Arbitration: Substantive Principles (2007), ch 7, pages 212-50 (treatment of investors)
- J Thomas, “Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators” 17 ICSID Rev. 21 (2002) – Moodle
- *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, Award (26 June 2003), available at <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf> (focus on the examination of procedural fairness and exhaustion of local remedies, paras 1-10, 39-217) – Moodle
- *American Manufacturing and Trading Inc v Republic of Zaire*, Award (1997), available at <http://ita.law.uvic.ca/documents/AmericanManufacturing.pdf> (focus on the examination of full protection and security, paras 6.01-6.24) – Moodle
- *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Award (1990), available at <http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf> (focus on the examination of full protection and security, paras 26-86, particularly 43-86) – Moodle
- *Wena Hotels Ltd v Republic of Egypt*, Award (2000), available at <http://ita.law.uvic.ca/documents/Wena-2000-Final.pdf> (focus on the examination of full protection and security, paras 1, 15-95) – Moodle
- J Paulsson, *Denial of Justice in International Law* (Cambridge, 2005)

#### **9. Awards: annulment, recognition and enforcement**

This seminar focuses on what happens to awards after they are issued. What happens if the losing party wants to challenge the award? And how does the winning party enforce the award? The

answers to these questions vary between ICSID and non-ICSID awards. Under the ICSID Convention, parties are not allowed to challenge awards before national courts but the system does have an annulment procedure. Awards are also enforceable the same way as final court judgments, without domestic courts having an opportunity to review the award. For non-ICSID awards, the courts at the seat of the arbitration and at the place of enforcement have certain powers to review the awards, though they do not function as courts of appeal.

In completing the reading, consider the following questions:

- **ICSID Awards:** What is the procedure for seeking annulment? What is the difference between an annulment procedure and an appeal (*CMS v Argentina*)? What are the bases on which a party may seek an annulment (*CMS v Argentina*)? Can awards be annulled in part (*CMS v Argentina*)? What happens if an award is annulled? If an award is not annulled, how is it enforced? What powers do national courts have to review such awards?
- **Non-ICSID Awards:** What is the process for seeking review of non-ICSID awards? Which courts may review such awards and why? On what bases may a party seek to have an award set aside or not enforced (UNCITRAL Model Rules and New York Convention)? What standard do courts adopt in reviewing non-ICSID Awards and how was it applied in *Metalclad*? Is this standard appropriate or is it too exacting (Tollefson), too permissive (Brower II) or a form of dialectical review (Ahdieh)?
- **General questions:** Is it appropriate for courts to have limited or no power to review investment treaty awards? How is the answer to this question influenced by the characterization of investment treaty arbitration as a form of public international law, international commercial arbitration or public law? Are decisions of annulment committees any more legitimate than the decisions of the arbitral tribunal? Should there be a proper system for appealing investment awards?

#### A. Primary Texts

- ICSID Convention, Arts 53-55
- New York Convention: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) (focus on Arts I-V) – Moodle
- UNCITRAL Model Law: Model Law on International Commercial Arbitration, 21 June 1985, available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (focus on Arts 34-36) – Moodle
- NAFTA, Arts 1130 and 1136

#### B. Essential Reading

- R Dolzer and C Schreuer, *Principles of International Investment Law* (2008), Ch 10 (Settling Investment Disputes, parts 2(m) and (n), pages 277-90)
- *CMS v Argentina*, Annulment Decision (25 September 2007) available at <http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf> (focus on paras 1-2, 30-40, 41-56 (general guidance about annulment), 68-76, 81-85, 89-100 and 119-36) – Moodle
- *United Mexican States v Metalclad Corporation*, Judicial Challenge (2 May 2001), available at <http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf> (focus on paras 1 and 39-56, and re-read 57-105 from earlier weeks) – Moodle

### C. Further reading

- UNCTAD, Course on Dispute Settlement, ICSID Part 2.8 (post-award remedies and procedures), available at [http://www.unctad.org/en/docs/edmmisc232add7\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add7_en.pdf) (focus on annulment) – Moodle
- UNCTAD, Course on Dispute Settlement, ICSID Part 2.9 (binding force and enforcement), available at [http://www.unctad.org/en/docs/edmmisc232add8\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add8_en.pdf) – Moodle
- *CAA and Vivendi v Argentina*, Annulment decision (3 July 2002), available at [http://ita.law.uvic.ca/documents/vivendi\\_annulEN.pdf](http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf) (focus on paras 1-2, 9-12, 61-70 (general guidance about annulment), 86-87, 93-115) – Moodle
- *Republic of Ecuador v Occidental Exploration and Production Company*, Judicial Challenge (29 April 2005), available at <http://ita.law.uvic.ca/documents/OxyEcuadorcourtopinion.pdf> – Moodle
- *Republic of Ecuador v Occidental Exploration and Production Company*, Judicial Challenge (9 September 2005), <http://ita.law.uvic.ca/documents/Ecuador-FinalCAJudgment.doc> – Moodle
- *United Mexican States v Marvin Roy Feldman Karpa*, Judicial Challenge (3 December 2003), available at <http://ita.law.uvic.ca/documents/FeldmanONCourt2.pdf> – Moodle
- *Attorney General of Canada v S.D. Myers, Inc*, Judicial Challenge (13 January 2004), available at <http://ita.law.uvic.ca/documents/ReasonsforOrder.pdf> – Moodle
- C Tollefson, “*Metalclad v United Mexican States* Revisited: Judicial Oversight of NAFTA’s Chapter Eleven Investor-State Claim Process” 11 *Minnesota J. Global Trade* 183 (2002) (focus on the nature and standard of judicial review, Parts III and IV.A) – Moodle
- C Brower II, “Investor-State Disputes Under NAFTA: The Empire Strikes Back” (2001) 40 *Colum. J. Transnat’l L.* 43 (focus on Parts I, IV, V and VI) – Moodle
- R Ahdieh, “Between Dialogue and Decree: International Review of National Courts,” 79 *NYU L. Rev.* 2029 (2004) – Moodle
- C Schreuer, *The ICSID Convention: A Commentary* (2001), Arts 53-55

### 10. The fairness and future of investment treaty law

This seminar focuses on some of the critiques of the fairness of investment treaty protection as well as possibilities for future reform. Anderson and Grusky provide an NGO perspective, arguing that investment treaty protection unfairly protects powerful investors at the expense of communities in developing states. Van Harten provides an academic perspective, arguing that investment arbitration is not sufficiently open and accountable for a system of public law adjudication. We revisit Franck’s empirical assessment of many claims about investment treaty arbitration, including whether most claims are brought by investors from developed states against developing states and whether investor claimants or developing states are more likely to win. We also consider some of the amendments to the ICSID Rules and recent actions by a number of states to limit ICSID jurisdiction.

In completing the reading, consider the following questions:

- **NGO critique** (Anderson and Grusky, Franck): What are the most controversial aspects of investor-state dispute resolution? How do the revenues of claimant investors compare to the GDP of defending states? Which states are investors most likely to come from and which states are they most likely to sue? Are investor claimants or developing states more likely to win? What damages are claimed and what damages are awarded?

- **Public law critique** (Van Harten, ICSID amendments): What are Van Harten's four critiques of investment arbitration? Given the last seminar, do you agree with Van Harten's accountability argument? What steps has ICSID taken to address the criticisms about openness and are these sufficient? What suggestions have been made for improving coherence? Are arbitrators systemically biased in favour of investors, either in fact or in appearances (Van Harten, Franck)?
- **Recent developments:** What steps have Venezuela, Nicaragua and Bolivia taken against ICSID jurisdiction? What steps has Ecuador taken? Do you expect other states to follow their lead? Can and should anything be done to address their concerns?

#### A. Essential Reading

- G Van Harten, Investment Treaty Arbitration and Public Law (2006), Ch 7
- S Franck, "Empirically evaluating claims about investment treaty arbitration", 86 North Carolina L. Rev. 1 (2007) (focus on Introduction (pages 3-7) and Part IV.A-E (pages 24-35 and 44-66) – Moodle (re-read from week 2)
- S Anderson & S Grusky, "Food & Water Watch, Challenging Corporate Investor Rule: how the world bank's investment court, free trade agreements, and bilateral investment treaties have unleashed a new era of corporate power and what to do about it" (2007), available at <http://www.ipsdc.org/reports/070430-challengingcorporateinvestorrule.pdf> – Moodle
- Amendments to the ICSID Rules and Regulations, described at [http://www.whitecase.com/files/Publication/e6da84a5-e1a8-462a-89e3-147a369efdb8/Presentation/PublicationAttachment/232b4eb2-3248-48f9-aca5-16652b545fd8/article\\_Icsid\\_Amends\\_its\\_Arbitration\\_Rules.pdf](http://www.whitecase.com/files/Publication/e6da84a5-e1a8-462a-89e3-147a369efdb8/Presentation/PublicationAttachment/232b4eb2-3248-48f9-aca5-16652b545fd8/article_Icsid_Amends_its_Arbitration_Rules.pdf) – Moodle

#### B. Further Reading

- C McLachlan, "Commentary: The Broader Context" 18 Arb. Int'l 339 (2002) – Moodle
- ICSID Secretariat Discussion Paper, Possible Improvements of the Legal Framework for ICSID Arbitration, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14\\_1.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf) – Moodle
- J Coe, Jr, "Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected, Themes, Issues and Methods, 36 Vand. J. Transnat'l L. 1381 (2003) – Moodle
- Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions, May 2007, available at [http://www.bilaterals.org/article.php3?id\\_article=8221](http://www.bilaterals.org/article.php3?id_article=8221) – Moodle
- Threats to withdraw from Bank's investment tribunal, July 2007, available at <http://www.brettonwoodsproject.org/art-554233> – Moodle
- Ecuador Attempts to Withdraw Consent to ICSID Jurisdiction for Natural Resources Disputes, Latin American Law & Business Report, January 2008, available at [http://www.skadden.com/content%5CPublications%5CPublications1377\\_0.pdf](http://www.skadden.com/content%5CPublications%5CPublications1377_0.pdf) – Moodle
- US Model BIT, Arts 10, 11 and 29