



South Asian University
Faculty of Legal Studies

LLM
Monsoon Semester 3 in 2017
Course Information

Part I

Course Title:	International Investment Law from South Asian Perspective
Course Code:	LW033
Course instructor:	Dr Prabhash Ranjan, prabhash.ranjan@sau.ac.in
Course Duration:	One Semester
Credit Units:	4 (MSE/TPW/ESE)
Medium of Instruction:	English
Prerequisites:	Nil
Precursors:	Nil
Equivalent Courses:	N/A

Part II

The endeavor of the course is to study in detail those aspects of public international law that relate to foreign investment. This course aims to provide an overview of central topics of international investment law. It will outline the traditional approach of regulating foreign direct investments in customary international law (CIL) and then focus on the present state of investment protection through a dense web of more than 3000 Bilateral Investment Treaties (BITs). The course will focus on the key jurisdictional, substantive and procedural aspects of investment treaty protection. It will also endeavour to critically evaluate these aspects. The major focus of the course is to examine whether the rules of international investment law reconcile the protection of foreign investment with the host State's right to regulate. The course will also endeavour to look at the investment treaty practice of all South Asian countries.

Aims

The aims of this course are:

- To give adequate exposure to students about the core principles of the international law of foreign investment from the perspective of South Asia.
- To enable students familiarize with the foreign investment disputes between investors and sovereign States;
- To develop their critical faculties by evaluating the policy arguments behind the formation of BITs.
- To make the students understand the importance of regulating foreign investment;
- To develop their analytical faculties by identifying and resolving legal arguments and policy debates surrounding international investment law and the regulatory discretion of the sovereign states.

Objectives

By the end of the course, students should

- Understand the importance of international investment as an important regulatory tool in international economic law;
- Demonstrate a detailed understanding of the elements of BITs and the policy considerations underlying the formation of such treaties;
- Appreciate the South Asian perspective on international investment law.
- Demonstrate a detailed understanding of various aspects of investment treaties and their linkage with investor protection and the regulatory discretion of the sovereign countries; and
- Appreciate the conflicts between formation of BITs and policy-making ability of sovereign countries.

The course instructor expects a high degree of student participation in all classes/seminars.

Evaluation:

Mid Semester Exam (three hours): 40 marks

End Semester Exam (three hours): 40 marks

Response Paper (Each Student will be given a journal paper to read and write a critical comment on the paper of 2000 words (inclusive of footnotes): 15 marks

Class Participation¹ (to be judged throughout the semester in all classes): 5 marks

Module 1: The Nature and Significance of International Investment (WEEK 1)

- What is the meaning of Investment
- What is the nature of International Investment – foreign direct investment, portfolio investment,
- What is the nature of Investors
- What are State Interests in Foreign Investment

Readings:

- J Salacuse (2010), *The Law of Investment Treaties*, (OUP: Oxford), 18-36
- K Vandevelde (2010) *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP: New York), 93-107.

Module 2: – Introduction to International Investment Law (WEEKS 2 and 3)

- Historical background to the current international investment law regime, including the law of diplomatic protection
- Customary international law of state responsibility for injuries to aliens.
- New International Economic Order (NIEO)
- Origin of Bilateral Investment Treaties (BITs) and their dominant role in investment protection
- Drawing distinction between investment treaty arbitration and international commercial arbitration
- What are the sources of international investment law
- BITs and Regulatory Challenge – the tensions between investment protection and host country's regulatory power and sovereignty.
- Role of BITs in stimulating foreign investment

¹ Class Participation means the ability with which students are able to participate in class discussions and answer questions posed to them. This should not be confused with one-off or once in a while class presentation/s. Class participation means that students will have to enrich the discussions by reading the material provided before each class and reflect on it critically during the teaching process.

- Retrospective application of BITs
- Introduction to Investor-State Dispute Settlement.

Readings:

- Dolzer, Rudolf and C. Schreuer (2012). *Principles of International Investment Law* (Oxford University Press: Oxford: 2nd edition), 1-36; 235-242; 254-268.
- J Salacuse (2010), *The Law of Investment Treaties*, (OUP: Oxford), 37-77
- G Van Harten (2007) *Investment Treaty Arbitration and Public Law* (OUP: Oxford).
- K Vandeveld (2000). 'The Economics of Bilateral Investment Treaties' 41 *Harvard International Law Journal*, 469-502.
- K Vandeveld (2010) *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP: New York), 108-120.
- Prabhash Ranjan and Deepak Raju, 'Bilateral Investment Treaties and Indian Judiciary' (with Deepak Raju as the second author), 46 (4) **THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW** (2014), 809-847
- Prabhash Ranjan, 'India and Bilateral Investment Treaties – A Changing Landscape', 29 (2) **ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL** (Oxford University Press) (2014) 419-450.

Module 3 – Definition of Investment (WEEKs 4 and 5)

- What is the significance of the definition of investment in an IIA;
- Broad asset based definition v. narrow asset based definition of investment;
- What are the advantages and limitations of a broad asset based definition of investment; are 'changes in the nature of investment' and 'reinvestment' also 'investment' for the purposes of an IIA;
- Is FII also a part of definition of foreign investment; what are the limitations of having FII in the definition of investment in an IIA;
- What kind of treaty exceptions can be created within an IIA to limit the broad asset based definition of investment.
- Is an Arbitral award an investment under the BIT? – special reference to the case involving Bangladesh – *Saipem Spa v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07 (Decision on Jurisdiction)
- Comparing the definition of investment amongst the South Asian BITs

Readings:

Compulsory Readings:

- R Dolzer and C. Schreuer (2012). *Principles of International Investment Law* (Oxford University Press: Oxford), 60-71.

Additional Readings:

- UNCTAD (2007). 'Investor-State Dispute Settlement and Impact on Investment Rule Making' (United Nations: New York and Geneva), 22-29.
- UNCTAD (2000). 'International Investment Agreements: Flexibility for Development' (United Nations: New York and Geneva), 69-81.
- M Sornarajah (2004). 'The International Law on Foreign Investment' (Cambridge University Press: 2nd edition: Cambridge), 7-18, 220-228.

Important Cases

- *Fedax v. Venezuela*, 37 ILM 1378 (1998)
- *Salini v Morocco, Decision on Jurisdiction*, 23 July 2001, 6 ICSID Reports 400;
- *Malaysian Historical Slavors v Malaysia, Decision on Annulment*, 16 April 2009.
- *Saipem Spa v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07 (Decision on Jurisdiction)
- *White Industries Australia Limited v Republic of India*, Final Award UNCITRAL (30 November 2011).
- *Petrobart Limited v Kyrgyzstan* (Award) SCC Case No 126/2003 (29 March 2005);
- *AMTO LLC v Ukraine* (Final Award), SCC Case No 080/2005 (26 March 2008)

Module 4 – Most Favoured Nation (MFN) Treatment (WEEKS 6 and 7)

- What is the MFN treatment principle in BITs;
- What is the economic significance or rationale behind the MFN clause in BITs;
- How is the MFN principle in BITs different from the MFN principle enshrined in the trade agreements like the General Agreement on Tariffs and Trade (GATT) and the WTO treaty; treaty shopping and the MFN rule;
- Treaty shopping and the MFN rule in the procedural and substantive issues in the IIAs; what are the treaty based exceptions in the IIA – significance of the 'like circumstances' clause in the IIAs;
- How different or similar are the MFN provisions in the BITs of South Asian Countries

Readings:

Compulsory Readings

- Stephan Schill, *Multilateralization of International Investment Law* (Cambridge University Press, Cambridge/New York, 2009), 139-196.
- Dolzer, Rudolf and C. Schreuer (2012). *Principles of International Investment Law* (Oxford University Press: Oxford), 60-78.

Additional Readings:

- A C Smutny and L A Steven, 'The MFN Clause: What are its Limits?' in K Yannaca-Small (ed) *Arbitration Under International Investment Agreements* (Oxford University Press, Oxford/New York, 2010), 351-382.

- Prabhash Ranjan (2015), Most Favoured Nation Treatment Principle in Indian Bilateral Investment Treaties: A Case for Reform, 55(1) Indian Journal of International Law, 39-64.

Cases

- *Maffezini v. Spain*, ICSID Case No. ARB/97/7. Decision on Jurisdiction, 25 January 2000, 16 ICSID Rev-FILJ 212 (2001).
 - *Camuzzi International S.A. v. The Argentine Republic*, ICISD Case No ARB/03/02 available at http://www.iisd.org/pdf/2005/investment_investd_camuzzi.pdf.
 - *Siemens AG v. Argentina*, 44 ILM 138 (2005).
 - *Plama Consortium Limited v. Bulgaria*, 44 ILM 721 (2005).
 - *TECMED v. Mexico*, 23 ILM 133 (2004).
- White Industries Australia Limited v Republic of India*, Final Award UNCITRAL (30 November 2011).

Module 5 - Fair and Equitable Treatment in BITs (WEEKS 8 AND 9)

- What is the significance of the fair and equitable treatment principle in the IIAs?
- What constitutes fair and equitable treatment?
- What is international minimum standard and what is its relationship with fair and equitable treatment
- The arbitral jurisprudence on fair and equitable treatment;
- Legitimate expectations as an integral part of the fair and equitable treatment provision
- The treaty based exceptions to the fair and equitable treatment principle.
- Fair and Equitable treatment provision in South Asian BITs.

Readings:

Compulsory Readings

- J Salacuse (2010), *The Law of Investment Treaties*, (OUP: Oxford), 218-243
- Dolzer, Rudolf and C. Schreuer (2012). *Principles of International Investment Law* (Oxford University Press: Oxford), 130-160.
- M Potesta (2013), Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 28 ICSID Review, 88

Additional Readings:

- R Klager (2011) *Fair and Equitable Treatment in International Investment Law* (CUP: Cambridge).

Cases:

- *CMS Gas Transmission Co v Argentina*, ICISD Case No ARB/01/8;
 - *Enron Corporation v Argentina*, ICSID Case No ARB/01/3;
 - *Enron Creditors Recovery Corp v Argentina* ICSID Case No ARB/01/3 (Annulment Proceeding);
 - *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16;
 - *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16 (Annulment Proceedings);
 - *LG&E Energy Corporation v Argentina*, ICISD Case No ARB/02/1;
 - *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9.
- Methanex v United States* (Final Award), UNCITRAL-NAFTA, 3 August 2005

Module 6 - Expropriation (WEEKS 10 and 11)

- Expropriation as a principle in international law;
- How is expropriation under international investment law different from expropriation in national law?
- What constitutes expropriation in international investment law;
- How is regulatory taking different from direct taking; when does expropriation become lawful; what are the linkages between expropriation and regulatory discretion;
- Where to draw the line between regulation and expropriation; is the effect of the action important to determine expropriation or is it the intent behind the measure that is important in determining expropriation;
- What kind of treaty exceptions exist for expropriation;
- What is the relationship between expropriation and regulatory discretion;
- Can Court Actions constitute expropriation? With special reference to *Saipem v Bangladesh*.
- Do South Asian BITs recognise distinctions between expropriation and regulation in their BITs?

Readings

Compulsory Readings:

- J Salacuse (2010), *The Law of Investment Treaties*, (OUP: Oxford), 285-327.
- R Dolzer and C. Schreuer (2012). *Principles of International Investment Law* (Oxford University Press: Oxford), 98-130.
- C Gibson (2010). A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation, 25 *American University International Law Review*, 358.
- B Kingsbury & S Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality', in S Schill (ed), *International Investment Law and Comparative Public Law* (2010) 75
- C Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 *Journal of International Economic Law* 223
- Prabhash Ranjan (2014), Using Public Law Concept of Proportionality to Balance

Investment Protection with Regulation in International Investment Law: A Critical Appraisal, 3 Cambridge Journal of International and Comparative Law, 853.

Prabhash Ranjan and Pushkar Anand (2016) 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal' (with Pushkar Anand as the second author) in Leila Choukroune (ed) JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW (SPRINGER), 127-151

Additional Readings

- UNCTAD (2000). *'Taking of Property'*, IIA Issue Paper Series (United Nations: New York and Geneva).
- Waelde Thomas and Abba Kolo (2001). 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law, 50 *International and Comparative Law Quarterly*, 811-848.
- Dolzer, Rudolf (2002-2003). 'Indirect Expropriations: New Developments?' 11 *New York University Environmental Law Journal*, 64-93.
- Been, Vicki (2002-2003). 'Does an International Regulatory Takings Doctrine Make Sense', 11 *New York University Environmental Law Journal*, 30-143.
- Fortier, L. Yves and Stephen L. Drymer, (2004). 'Indirect Expropriation in the Law of International Investment: I know It When I See It, or Caveat Investor' 19 *ICSID Review-Foreign Investment Law Journal*, 293-327.

Cases

- *SD Myers v. Canada*, 40 ILM 1408 (2001).
- *Metalclad v. Mexico* ICSID Case No ARB (AF)/97/1 available on www.naftaclaims.com or 40 ILM 36 (2001).
- *Santa Elena SA v. Costa Rica*, ICSID Case No. ARB/96/1 Award 17 February 2000 available at www.worldbank.org/icsid/cases/santaelena_award.pdf or 15 ICSID Rev-FILJ 169 (2000).
- *Methanex v United States* (Final Award), UNCITRAL-NAFTA, 3 August 2005
- *TECMED v Mexico*, Award, 29 May 2003, 10 ICSID Reports 134.
- *ADC Affiliate Ltd v Republic of Hungary*, ICSID Case No ARB/03/16, 2 October 2006
- *El Paso v Argentina*, ICSID Case No. ARB/03/15, 31 October 2011
- *Total SA v Argentina*, ICSID Case No. ARB/04/01, 27 December 2010.
- *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, 8 July 2016

Module 7 - Non Precluded Measures in International Investment Law (WEEKS 12 and 13)

- What are the general exception clauses in BITs;
- What is the significance of having such clauses in BITs;
- How have these clauses been interpreted various investment treaty arbitration tribunals.

- How is the treaty defence of necessity different from the defence of necessity in customary international law;
- What is the meaning of essential security interest clause in BITs
- Do South Asian BITs contain non precluded measures provision?
- Will non precluded measures provision in South Asian BITs help in preserving the regulatory power of host states?

Readings

- J Salacuse (2010), *The Law of Investment Treaties*, (OUP: Oxford), 340-348.
- W Burke-White and A Von Staden, “Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties” (2008) 48 *Virginia Journal of International Law* 314.
- J Kurtz, “Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis” (2010) 59 *International and Comparative Law Quarterly* 325.
- Prabhash Ranjan (2012), ‘Non Precluded Measures in Indian International Investment Agreements and India’s Regulatory Power as a Host Nation’, 2 (1) *Asian Journal of International Law*, 21-58.
- Prabhash Ranjan, ‘Protecting Security Interests in International Investment Law’ in Mary Footer, Julia Schmidt and Nigel D White (eds) *Security and International Law* (Hart Publishing: Oxford: 2016), 273-300.
- Amit Kumar Sinha, Non Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries, *Asian Journal of International Law* available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=10296625&fulltextType=RA&fileId=S2044251316000023>

Cases:

- *CMS Gas Transmission Co v Argentina*, ICISD Case No ARB/01/8;
- *Enron Corporation v Argentina*, ICSID Case No ARB/01/3;
- *Enron Creditors Recovery Corp v Argentina* ICSID Case No ARB/01/3 (Annulment Proceeding);
- *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16;
- *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16 (Annulment Proceedings);
- *LG&E Energy Corporation v Argentina*, ICISD Case No ARB/02/1;
- *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9.
- *El Paso v Argentina*, ICSID Case No. ARB/03/15, 31 October 2011