



MASTER OF LAWS

Course Code: LAW631

Course Title: Foreign Investment Law in Asia

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PRE-REQUISITE/CO-REQUISITE/MUTUALLY EXCLUSIVE COURSE(S)

None

COURSE SPECIALISATION

N.A.

Grading Basis

Graded

COURSE UNIT

1 CU

FIRST OFFERING TERM

Academic Year: AY2015/2016

Academic Term: Term I

COURSE DESCRIPTION

As the pace of globalization increases, so do the number and types of transactions across national borders. One such transaction is foreign investment which is important to both capital exporting countries as well as to host countries. The subject of the course concerns the legal obligations of the host state to honor its commitments to foreign investors. Such obligations could derive from customary international law as well as treaty law. Arguments asserting that investors owe obligations, by virtue of their status as investors, to the host country will also be examined.

A knowledge of foreign investment law is obviously important to advisors of both the foreign investor and the host government.

When persons invest in foreign countries, they have to consider not only commercial risks but also political risks. The level of political risk may be so high that a potential investor may be deterred from investing. The law of foreign investment is concerned primarily with the legal protection that is provided to foreign investors. A knowledge of foreign investment law is an important, and sometimes indispensable, for various stakeholders in the foreign investment community. For the primary actors - the investor, the host government, and a local joint venture partner - a clear understanding of these principles allows these participants to intelligently craft a foreign investment plan. Entities whose support of the proposed foreign investment venture, such as banks, suppliers, and customers, would also need to be assured that the political risk has been reduced by situating the proposed venture in the framework of applicable foreign investment law.

LEARNING OBJECTIVES

By the end of this course, participants will be able to:

- Review and analyze foreign investment proposals from the standpoint of foreign investment law
- Provide preliminary advice on whether the host state has breached legal obligations in any situation arising during the post-investment phase

PRE-REQUISITE/ CO-REQUISITE/ MUTUALLY EXCLUSIVE COURSE(S)

None

RECOMMENDED TEXT AND READINGS

The course will be taught in seminar style using primary materials such as treaties between Singapore and other countries as well as treaties among other Asian countries, as well as investment disputes resulting in published arbitral awards. These materials are online and students would be expected to print the relevant material, as designated by the instructor, for use in class.

Reference Treatises (latest editions)

1. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law.
2. M. Sornarajah, The International Law of Foreign Investment.

3. Jeswald W. Salacuse, *The Law of Investment Treaties*.
4. Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration – Substantive Principles*.
5. Zachary Douglas, *The Foundations of International Investment Law: Bringing Theory into Practice*.
6. Jeswald W. Salacuse, *The Three Law of International Investment: National, Contractual, and International Frameworks for Foreign Capital*.
7. M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment*.
8. R. Doak Bishop, *Foreign Investment Disputes: Cases, Materials, and Commentary*.

ASSESSMENT METHOD

Class Participation: 15%
Class Presentation: 15%
Short Individual Paper: 20%
Final Examination (Open Book) 50%

INSTRUCTIONAL METHODS AND EXPECTATIONS

Instruction will consist of a mixture of a lecture (power point presentation) and the seminar method. First, the bedrock principles of a particular topic (sometimes accompanied by a mind-map handout) will be enunciated. Thereafter, the class will participate in analyzing a selected treaty provision or arbitral award in order to better understand the principles being discussed.

Class Participation: Class participation is fundamental part of SMU's pedagogy. Everyone is expected to read the assigned treaty provision, arbitral award, case or articles assigned for classroom discussions. Creative thinking and peer learning is expected through open sharing from real work situations.

Grading criteria is not solely based on the frequency of participation but quality of meaningful inputs.

Important: Academic Integrity

All acts of academic dishonesty (including, but not limited to, plagiarism, cheating, fabrication, facilitation of acts of academic dishonesty by others, unauthorized possession of exam questions, or tampering with the academic work of other students) are serious offences.

All work (whether oral or written) submitted for purposes of assessment must be the student's own work. Penalties for violation of the policy range from zero marks for the component assessment to expulsion, depending on the nature of the offence.

When in doubt, students should consult the instructors of the course. Details on the SMU Code of Academic Integrity may be accessed at <http://www.smuscd.org/resources.html>

COURSE SCHEDULE

Session	Description	Readings
1	Introduction: The place of foreign investment law in international economic law, foreign investment law as evolved in customary international law on state responsibility for injuries to aliens, exhaustion of local remedies rule, the Calvo Clause, Principles of State Responsibility and Attribution principles, State Immunity, and the current position with bilateral investment agreements ("BITs") and investment protection chapters in free trade agreements ("FTAs").	
2	Continuation of discussion of foundational concepts from Session 1 and an examination of definitions of key concepts in BITs and FTAs. For an investor to claim protection under investment protection treaties, the investor must show that it qualifies for protection under the applicable treaty. Definitions such as the meaning of "investment", "investor", "national" and the "gateway provision" found in many BITs concluded by Singapore.	
3	Contingent Standards: Most Favored Nation and National Treatment standards. Investors may require the host state to treat them with the same benefits given to investors from a third state or the benefits given to the host state nationals if certain conditions are satisfied. These concepts are most prominently found in the GATT and have been used in investment protection agreements. The conditions necessary for the standard of "like circumstances" shall be discussed in detail.	
4	Fair & Equitable Standard ("FET") - I It is a rare investment complaint that does not include a claim by the investor that the host state has breached the FET obligation. Scores of cases have attempted to lay down criteria for determining the reach of the FET standard. Some of the treaties have explicitly sought to confine the reach of FET provision to the customary international standard of minimum protection standard while others have not done so. In this session, the provisions of treaties that restrict the reach of the FET obligation and the content of the customary international law standard will be examined.	
5	Fair & Equitable Standard ("FET") - II In this session, the cases upholding a more expansive interpretation of the FET obligation will be discussed. An attempt will be made to categorize the range of circumstances that arise in disputes involving the FET obligation, and how arbitral tribunals have attempted to obtain a balance between the right of the host state to enact and implement laws and regulations as a legitimate exercise of its sovereign powers and the right of an investor to have its legitimate expectations be respected.	
6	Full Protection & Security Obligation Prohibited Performance Obligations Free Transfer of Capital and Dividends	
7	Revision of Key Concepts: Vienna Convention on the Law of Treaties. Principles of State Responsibility	

	<p>State Immunity Law Customary International Law and Foreign Investment Law Treaty Concepts: "Investment" "Investor" "FET" "MFN & NT"</p>	
8	<p>Expropriation - I Historically, expropriation of an investor's property was the usual cause of triggering diplomatic protection by the home state. Investment treaties carry over this protection. In this session, we will consider what constitutes "expropriation" including "indirect expropriation" and the conditions under which expropriation will be legal.</p>	
9	<p>Expropriation II In this session, selected cases illustrating the principles relating to expropriation and the principles of determining the compensation will be examined.</p>	
10	<p>Dispute Settlement I ICSID and UNCITRAL Arbitration Jurisdiction Questions Annulment of ICSID Arbitration Awards and Setting Aside/Declining Enforcement of Arbitral Awards</p>	