

International Investment Law and Arbitration

Brief Course Outline

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Introduction

What kind of legal protection would be available to a German or a British firm investing in India or an Indian company operating in Africa or Latin America? How would legal disputes between the German firm and the Indian State or the Indian company and one of the African governments be resolved? Traditionally, foreign investors rely upon domestic laws of the host State to protect their investment and dispute resolution. However, the host State can amend domestic laws as it deems fit, which could be detrimental to foreign investors. This concern gave birth to the modern international law on foreign investment with twin objectives. First, foreign investment should be protected by imposing restraints on the host state's regulatory power. Second, providing an institutionalized framework to settle disputes between foreign investors and host states (also known as investor-state dispute settlement – ISDS) relying upon the adjudicative model of commercial arbitration.

As the pace of economic globalization intensified, characterized by an ever-increasing flow of goods and capital across borders, countries created newer international economic law (IEL) instruments to regulate the global economy. An important piece of the emerging IEL architecture is bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters. Beginning from 1959 till date, around 3000 BITs and FTA investment chapters have been signed. They are the most important source of international investment law today and complement the host State's domestic law on the issue of foreign investment. By imposing restraints on the host State's regulatory power, they bring the issue of investment protection and the State's right to regulate face-to-face.

An integral element of these treaties is the ISDS mechanism. Also known as investor-state arbitration, the ISDS mechanism empowers private foreign investors to bring treaty claims challenging the regulatory actions of sovereign States. To date foreign investors, acting under various institutionalized arbitral forums like the ICSID, have brought more than 1000 ISDS claims against States for treaty breaches. Foreign investors have challenged sovereign regulatory measures ranging from taxation measures to monetary policy and health regulations to environmental standards, as potential BIT breaches, often resulting in arbitral awards of damages worth millions of dollars. These claims have generated voluminous case law. This jurisprudence has implications not just for foreign investors and host States but also for the entire international law and arbitration community, including communities and civil society groups.

Against this background, the aims of this course are:

1. Introduce to the students the theoretical and conceptual background of international investment law including its history, origin, evolution, growth, and challenges.

2. Explore key jurisdictional issues such as the definition of investment and investor in unravelling the connection between foreign investment and host States.
3. Familiarize students with the substantive principles and standards that are found in BITs and play a critical role in defining the relationship between foreign investors and host States (i.e. expropriation, most favoured nation treatment, fair and equitable treatment, full protection and security, monetary transfer provisions, etc.) through a critical examination of investment treaty texts and arbitral case law.
4. Learn about the investment dispute settlement (i.e. the ISDS mechanism) and the institutions (ICSID, PCA, etc.) and rules that govern it, including the conceptual distinction between investment treaty arbitration and international commercial arbitration.
5. Focus on the impact that BIT substantive standards have on the host State's sovereign right to regulate in the public interest and their interactions with other regimes such as trade law and intellectual property (IP) law, both domestic and international.
6. Comprehend the challenges that the international investment law regime faces due to a backlash against investor-State arbitration and also against economic globalization.

Learning Outcomes

Students who successfully complete this course would:

1. Know the theory and practice of the key concepts of international investment law and investor-state arbitration.
2. Have a detailed understanding of the key international legal underpinnings that govern various matters of foreign investment in the host State.
3. Appreciate an important pillar of the overall IEL architecture governing the global economy.
4. Comprehend the place of international investment law within the larger and broader sphere of public international law.
5. Understand the interface between international investment law and international commercial arbitration, trade law, and IP law.
6. Complement their learning derived from other economic law courses such as trade law, corporate law, IP law, and international commercial arbitration to have a full 360-degree view of the functioning of the global economy.

Weekly Plan

Week 1 - The nature and significance of international investment – what is the meaning of investment; forms of investment; the nature of foreign investors (private investors, state investors); forms of international investment (foreign direct investment, foreign portfolio investment); what are state interests in international investment?

Week 2 - The Foundations of International investment law –the background of the investment treaty movement; what are the State and investor interests in shaping international investment law; the sources of international investment law; Calvo doctrine and the emergence of an international minimum standard; challenges to the western views on international investment law; efforts to build a new international economic order; deficiencies in customary international law on foreign investment.

Week 3 - A History of International Investment Law – the treatification of international investment law; the origin and evolution of bilateral investment treaties (BITs); the function, purpose, and objectives of investment treaties; introduction to investor-State dispute settlement (ISDS); the acceleration in the signing of BITs from 1990 to 2007; the backlash against BITs and ISDS after 2007; failed attempts at negotiating a multilateral agreement on investment.

Week 4 - Investment Treaty Arbitration or ISDS – Significance of investment treaty arbitration; the nature of disputes between investors and States; ‘arbitration without privity’; consent to investment arbitration; the difference between investment treaty arbitration and international commercial arbitration; the public law aspect of investment treaty arbitration; Fork in the road clauses; ICSID versus adhoc arbitration.

Week 5 - Protected Investments and Investors – what qualifies as foreign investment eligible for protection under a BIT; the subjective meaning of protected investments; the objective meaning of protected investments; the dual meaning of protected investments;

Protected Investor – who is a protected investor - nationality based-eligibility for protection of investors; individual investors and corporate investors; ‘divisible’ investors – different investors of the same company bringing different claims for the same set of facts – abuse of process.

Week 6 - Expropriation of foreign investment – what is expropriation; the difference between lawful and unlawful expropriation; what is the difference between direct and indirect expropriation; how to distinguish between the host State’s exercise of genuine regulatory measures and expropriation; the concept of substantial deprivation, police powers and proportionality to draw a line between regulation and indirect expropriation.

Week 7 - Fair and Equitable Treatment (FET) and Full Protection and Security (FPS) – the relationship of FET and FPS with an international minimum standard of treatment; heads of a claim under FET – arbitrary and discriminatory treatment, violation of due process and lack of transparency, legitimate expectations of foreign investors; FPS and physical protection of foreign investment; new emerging treaty practice on FET and FPS.

Week 8 - Most Favoured Nation (MFN) provision in international investment law – what is the meaning of the MFN provision in international investment law’ relevance of the MFN provision in BITs; applicability of the MFN provision to substantive standards in BITs; applicability of the MFN provision to procedural provisions in BITs such as investment treaty arbitration; public policy exceptions; new emerging treaty practice on the MFN provision.

Week 9 - Defences in International Investment Law – what defences the host State can raise to defend its regulatory measures when BIT claims are brought by foreign investors; defences in obligations; defences in exceptions – non precluded measures provision (NPM); the concept of necessity in NPM provisions; the difference between treaty defence of necessity and customary international law defence of necessity given in the ILC Articles of State Responsibility.

Week 10 - Transfer of funds – monetary sovereignty, types of covered transfers, inward and outward transfers, transfers in accordance with host State law, currencies, exchange rates, delay.

Week 11 - Challenging and Enforcing ISDS Awards, and the Question of Foreign State Immunities – enforceability of ICSID and non-ICSID awards; consequences of treaty violations; implications of States not honouring the ISDS awards; attachment of assets as a means to execute the ISDS award; foreign State immunity in the attachment of assets.

Week 12 - Investor Obligations – do investment treaties impose obligations on foreign investors; should foreign investors also have obligations; can counterclaims be brought against foreign investors?

Week 13 – Revision

Select Bibliography:

- Jeswald W. Salacuse (2015), *The Law of Investment Treaties*, (OUP: Oxford).
- C L Lim, Jean Ho and Martins Paparinskis (2020), *International Investment Law and Arbitration: Commentary, Awards, and other Materials* (CUP: Cambridge).
- Rudolf Dolzer, Christoph Schreuer and Kreibaum (2022), *Principles of International Investment Law* (OUP: Oxford).
- Gus Van Harten (2007), *Investment Treaty Arbitration and Public Law* (OUP: Oxford).
- Caroline 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
- Jurgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2010) 59 *International and Comparative Law Quarterly* 325
- Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 *European Journal of International Law* 731.