

International Investment Law

<i>Course Code:</i>	<i>LAWS 170001</i>
<i>Course Title:</i>	<i>International Investment Law</i>
<i>Credit:</i>	<i>2</i>
<i>Instructor Name:</i>	<i>LIANG Yong</i>
<i>E-Mail:</i>	<i>liangyong@fudan.edu.cn</i>

Course Description

The objective of the course is to introduce the fundamental system and main principles, particularly the legal systems and the practice related to inbound investment and outbound investment of China after the Reform and Opening Up in 1978 especially after China's accession to the WTO, as well as the interactions among foreign investment laws, other domestic laws, and international investment agreements. The course will address the following topics: a brief overview of the history and source of underlying international investment law, the primary substantive principles and standards which serve to protect investors and investments under international investment agreements, such as most-favored-nation treatment, national treatment, fair and equitable treatment, expropriation and nationalization, investment insurance and dispute settlement as well as wider issues relating to the criticisms of the investment treaty arbitration system.

Course Schedule

Week 1 (July 17-July 21)

Class 1

Orientation by Yong Liang

Introduction

1. General Introduction to the International Investment Law

Michael W. Reisman, “Foreign Investment, Economic Development and National Sovereignty”, Keynote delivered in Seoul on April 13, 2007.

Video from United Nations Audiovisual Library of International Law, (http://legal.un.org/avl/ls/Reisman_IEL.html)

2. The Changing Role of China in International Investment Law
 - A brief history of inbound direct investment in China—Especially for the changes in foreign investment law of China
 - A brief history of outbound direct investment in China

Required Readings

Norah Gallagher, Chinese Investment Treaties, pages 1-14.

World Investment Report 2017, download from the UNCTAD website.

Class 2

History and Nature of International Investment Law

1. The Definition of Foreign Investment (Foreign Direct Investment/Portfolio Investment)
2. The Basic Legal Relationship among Investors, Host States and Home States
3. The History and Evolution of International Investment Law
4. The Nature of International Investment Law

The Shaping Factors in International Investment

1. The Historical Setting: State Responsibility for Injuries to Aliens
2. Risks in Foreign Investment

Required Readings

Rudolf Dolzer, Principles of International Investment Law, pages 1-11, 19-27

Suggested Readings

M. Sornarajah, The International Law on Foreign Investment, pages 1-28, 33-47, 69-79.

Class 3

Sources of the International Investment Law

1. Unilateral Laws or Regulations: From the prospective of China
 - Domestic laws of China from the prospective of host states

- Domestic laws of China from the prospective of home states

2. Bilateral Treaties

- Bilateral investment treaties
- Mainland-Hong Kong CEPA/Mainland-Macau CEPA/Mainland-Taiwan ECFA
- Double Taxation Treaties
- Mainland-Hong Kong Arrangement for Taxes on Income/Mainland-Macau Agreement for Taxes on Income

3. Multilateral Agreements

- Global agreements
ICSID Convention/MIGA Convention/TRIMS/GATS/TRIPS/SCM
- Sectoral and Regional agreements
Energy Charter Treaty/EU/NAFTA/ASEAN/APEC
Topics in TPP/TTIP/RCEP

4. Other Sources

- Customary international law
- General Principles of law
- Judicial decisions

Required Readings

Rudolf Dolzer, Principles of International Investment Law, pages 12-19

M. Sornarajah, The International Law on Foreign Investment, pages 79-97

Suggested Readings

Salacuse and Sullivan, “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain”, Harvard International Law Journal, Vol. 46, 2005, pp.67-130.

Week 2 (July 24-July 28)

Class 4

Main Forms and Risks of Foreign Investment in China

1. Main Forms of Foreign Investment in China
2. Main Risks of Foreign Investment in China

- Main risks in admission and establishment phase
 - Main risks in operation phase
 - Main risks in divesting phase
- Open Discussion on Main Risks of Foreign Investment in China
Investment

1. The Definition of Investment
2. New Forms of Investment
 - State property for commercial purposes
 - Sovereign wealth funds

Open Discussion on Criteria of Investment and its Development

Required Readings

IMF: Balance of Payment Manual (5th edition), IMF, 1992.

Article 12 of MIGA Convention

Article 21 of United Nations Convention on Jurisdictional Immunities of State and Their Property

Suggested Readings

Norah Gallagher, Chinese Investment Treaties, pages 14-28

Class 5

Investment (Continued)

1. Criteria for Investment in International Investment Dispute Settlement Practice
2. Criteria for Investment in Existing Laws and Regulations of China

Investor

1. The Definition of Investors
2. Special Investors of China
 - SOE (state-owned enterprises)
 - SWF (sovereign wealth funds)
3. Nationality of Investors (Natural Person/Judicial Person)
4. Nationality Planning
5. Criteria for Investors in International Investment Dispute Settlement

6. Criteria for Investors in Existing Laws and Regulations of China

Open Discussion on the Special Investors of China (SOE and SWF)

Required Readings

Rudolf Dolzer, *Principles of International Investment Law*, pages 44-60

Suggested Readings

Fedax v. Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997.

CSOB v. Slovak, ICSID Case No. ARB/97/4, Decision on the Tribunal on Objections to Jurisdiction, May 24, 1999

Salini v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001

Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, August 6, 2004

Amco Asia Corp. and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983

Société Quest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction, August 1, 1984

Tokios Tokelës v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004; Dissenting Opinion Attached to the Decision of Jurisdiction, April 29, 2004

The Loewen Group Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB (AF)/98/3(NAFTA), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001.

Class 6

Investment Regulation in Admission and Establishment Phase

1. Introduction to Investment Regulation in Admission and Establishment Phase

- Guarantees against expropriation
- Guarantees relating to dispute settlement
- Tax and non-tax incentives to foreign investors
- Screening of foreign investment entry
- Requirements of local coloration
- Capitalization requirements
- Requirements relating to local equity

- Other requirements
2. China's Controls in Admission and Establishment Phase
 - Admission Review on Industry
 - Admission Review on Anti-Monopoly
 - Admission Review on National Security
 3. National Security Review in CNOOC's bid to acquire UNOCAL

Required Readings

M. Sornarajah, *The International Law on Foreign Investment*, pages 97-116

Provisions on Guiding Direction of Foreign Investment (2002), download from the website (http://english.gov.cn/laws/2005-07/25/content_16873.htm)

Catalogue for the Guidance of Foreign Investment Industries (2011), download from the website
<http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml>

Anti-monopoly Law of the People's Republic of China (2008), download from the website
http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm

Week 3 (July 31-August 4)

Class 7

Investment Regulation in Operation Phase: Investment Treatment

1. National treatment
 - 1) pre-establishment national treatment (non-conforming measures)
 - 2) post-establishment national treatment
2. Most-favored-nation treatment
3. Fair and equitable treatment
4. Minimum international law treatment
5. New developments of investment treatment in investment dispute settlement
 - New developments in most-favored-nation treatment
 - New developments in fair and equitable treatment

Investment Regulation in Operation Phase: Expropriation and Nationalization

1. The Right to Expropriate
2. The Legality of the Expropriation
3. Direct and indirect expropriation
4. Exclusions of expropriation

Required Readings

Rudolf Dolzer, *Principles of International Investment Law*, pages 98-126, 130-160, 198-212

Suggested Readings

Norah Gallagher, *Chinese Investment Treaties*, pages 105-202

Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, 2008

Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Unofficial English Translation), January 25, 2000.

Siemens v. Argentina, ICSID Case No. ARB/02/8, Award, February 6, 2007

Salini v. Jordan, ICSID Case No. ARB/02/13, Award, January 31, 2006

Plama v. Bulgaria, ICSID Case No. ARB/03/24, Jurisdiction, February 8, 2005

Mondev v. U.S.A., ICSID Case No. ARB (AF)/99/2, Award, October 11, 2002

Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, Unofficial English Translation, May 29, 2003

Waste Management v. Mexico, ICSID Case No. ARB (AF)/98/2, Final Award, April 30, 2004

CMS v. Argentina, ICSID Case No. ARB/01/8, Final Award, May 12, 2005.

Norway v. U.S.A., Permanent Court of Justice (1922)

Metalclad v. Mexico, ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000.

Compañía v. Costa Rica, ICSID Case No. ARB/96/1, Award, February 17, 2000

CMS v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005

Rudolf Dolzer, *Indirect Expropriation: New Development?* *New York University Environmental Law Journal*, Vol. 11, 2002-2003, pp.64-93.

Reisman & Sloane (excerpts), *Indirect Expropriation and Its Valuation in the BIT Generation: The British Year Book of International Law*, Vol. 74, 2003, pp.115-150

Class 8

Investment Regulation in Divesting Phrase

1. Liquidation

2. Investment Insurance

- MIGA
- OPIC
- China Export & Credit Insurance Corporation

3. Investment Dispute Settlement Mechanism

- General Introduction to Investment Dispute Settlement

1) State-State Disputes

2) Investor-State Dispute

- Diplomatic Protection

- Judicial Settlement

- Arbitration

1) ICSID investment arbitration

2) Non-ICSID investment arbitration

- a) The International Chamber of Commerce
- b) The London Court of International Arbitration
- c) The UNCITRAL Rules
- d) The Iran-United States Claims Tribunal
- e) The Permanent Court of Arbitration

3) Applicability of MFN Clause

Required Readings

Rudolf Dolzer, Principles of International Investment Law, pages 232-244

MIGA Convention

ICSID Convention

ICSID Additional Facility

1976' UNCITRAL Arbitration Rules/2010' UNCITRAL Arbitration Rules

Class 9

Chinese BITs and Investment Tax Planning

1. Chinese BIT Programme

2. Typical Chinese BITs
 - 1982 China-Sweden BIT
 - 1986 China-UK BIT
 - 1998 China-Barbados BIT
 - 2003 China-Germany BIT
 - 2006 China-Russia BIT
 - 2012 China-Canada BIT
3. China-US BIT Negotiation
 - Practice of Chinese BITs
 - Practice of U.S. BITs
 - Important concerns in BIT negotiations
4. Investment Tax Planning

Suggested Readings

Norah Gallagher, *Chinese Investment Treaties*, pages 28-51

Week 4 (August 7-August 11)

Class 10

Case Analysis and Oral Presentation

The students will be divided into several groups. A list of suggested topics will be provided by the professor by the end of the second week. The topics shall be focused on the cases of Chinese investors or Chinese government involved in the international investment dispute mechanism.

1. National Security Review: CNOOC's bid on UNOCAL in 2005 / CNOOC's acquisition on Nexen in 2012
2. Indirect Expropriation and Police Power: *Tza Yap Shum v. Peru*
3. Application of Successive BITs: *PingAn v. Belgium*
4. Application of China's BITs on HKSAR/Macao SAR: *Tza Yap Shum v. Peru* and *Sanum v. Laos*
5. Extension of MFN to Dispute Settlement: *Ekran v. China*
6. Investment Dispute Settlement: How to protect the investments of Chinese investors?

Class 11

Final Examination

A written exam (two hours, open-book) is based on questions from specific topics from the course and reading materials.

Class 12

Course Summary and Open Discussion

Grading

Grading will be based on (i) Attendance, (ii) oral presentation; (iii) group report; (iv) final examination; (v) additional score, weighted as follows:

1. Attendance (15%)

Attendance is part of the course. Students are required to join in all of classes and are required to ask for leave in advance if they have due reasons which conflict with the course schedule. Careful preparation and reading of all materials in advance of class is definitely expected.

2. Oral Presentation (15%)

The students will be divided into several groups. A list of suggested topics will be provided by the professor by the second week. Students are free to organize groups and to identify their topics. Each member in the same group will share the same score.

3. Group Report (20%)

The joint group report (4000-6000 words) accounts for 20% of the total course score, and each member in the same group shares the same score.

4. Final examination (50%)

A written exam (two hours) is based on questions from specific topics from the course and reading materials.

5. Additional Score (no more than 3%)

Substantially exceeding expectation performance (no more than 3%).

Assigned Textbook and Reference Books

Assigned Textbook

Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edition), Oxford University Press, 2012.

Reference Books

M. Sornarajah, The International Law on Foreign Investmen, Cambridge University Press, 2010.

Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice*, Oxford University Press, 2009.

Jeswald W. Salacuse. *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* [M]. Oxford: Oxford University Press, 2013.

Ioana Tudor. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* [M]. Oxford University Press, 2008.

R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes* Kluwer Law International, 2005.

Kenneth J. Vandavelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford University Press, 2010.

Lutz-Christian Wolff, *China Outbound Investments: A Guide to Law and Practice*, CCH Hongkong Limited, 2011.

Other Reading Materials

UNCTAD. *World Investment Report* [A]. New York and Geneva: United Nations. (2004—2016) ,
<http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>

UNCTAD. *Investment Policy Monitor* [A]. New York and Geneva: United Nations, (updated as of January 2016) ,
<http://unctad.org/en/pages/publications/Investment-Policy-Monitor.aspx>

Websites

The website of Ministry of Commerce of China, <http://www.mofcom.gov.cn>

The website of UNCTAD, <http://www.unctad.org>

The website of MIGA, <http://www.miga.org>

The website of ICSID, <http://icsid.worldbank.org>

The website of WTO, <http://www.wto.org>

The website of State Council of U.S., <http://www.state.gov/e/eb/afd/bit/117402.htm>
(U.S. Department of State)

- plus other materials as indicated above, most of which are available online.