

Kobe University, Graduate School of International Cooperation Studies  
Autumn Semester 2008

# International Investment Law

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## Objectives

This course examines international law governing foreign investment, with special emphasis on the recent explosive developments of investor-State arbitrations.

## Structure

The first part of the course consists of a series of lectures and **primarily discussions** on the basic structure and the fundamental issues of international investment law. Students are expected to do the relevant readings in advance of the class so as to participate actively in class discussions.

The second part of the course is allotted to presentations by students. A student will be assigned to one of the three teams, each of which is required to make an oral presentation on an arbitral precedent (which may be composed of several awards and/or decisions) and to submit a written case note after the end of the course (**no later than 20 February 2009**). Students are strongly encouraged to give their presentations and to write case notes in English, although the possibility of doing it in Japanese is not entirely excluded.

## Grading and Assessment

A student's grade for this course will be based on the presentation (40%), the case note (30%) and participation in discussions (30%).

## **Requirements for Oral Presentation**

A presentation should be composed of:

- introduction;
- summary of arbitral decision(s);
- commentary; and
- conclusions.

It should not exceed 30 minutes and each member of the team ought to speak. Use PowerPoint or other presentation software.

The commentary should illustrate that the students have exhaustively researched relevant topics and properly situate the decision(s) in the evolution of arbitral jurisprudence.

## **Requirements for Case Notes**

Case notes should be composed of four sections as is the oral presentation.

They should be double-spaced and in 12-point font and shall not exceed 30 pages. Footnotes should be in 10-point font and MUST conform to the *Oxford Standard for Citation of Legal Authorities*:

<http://denning.law.ox.ac.uk/published/oscola.shtml>

## **Materials**

Required readings are indicated in the programme below.

### Recommended general publications:

- Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, Oxford, Oxford Univ.Pr., 2008, xliii+433p.
- Philippe Kahn & Thomas W. Wälde, sous la direction de, *Les aspects nouveaux du droit des investissements internationaux*, Leiden, Nijhoff, 2007, xxxv+1036p. [English and French]
- Campbell McLachlan et al. eds., *International Investment Arbitration*, Oxford, Oxford Univ. Pr., 2007, 1+474p.

- Peter Muchlinski et al. eds., *The Oxford Handbook of International Investment Law*, Oxford, Oxford Univ.Pr., 2008, lxxv+1282p.
- Christopher F. Dugan et al. eds., *Investor-State Arbitration*, Oxford, Oxford Univ.Pr., 2008, 791p.
- Surya Subedi, *International Investment Law*, Oxford, Hart, 2008, 276p.
- Charles Leben, sous la direction de, *Le contentieux arbitral transnational relatif à l'investissement*, Paris, LGDJ, 2006, 396p.
- Ferhat Horchani, sous la direction de, *Où va le droit de l'investissement ?*, Paris, Pedone, 2006, 338p.

#### Recommended readings on the ICSID:

- Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge Univ.Pr., 2001, xliii+1466p.
- Sébastien Manciaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats*, Paris, Litec, 2004, xiii+727p.

#### Principal case notes:

- Emmanuel Gaillard, *La jurisprudence du CIRDI*, Paris, Pedone, 2004, vii+1105p.
- Emmanuel Gaillard, « Centre international pour le règlement des différends relatifs aux investissements (CIRDI) : Chronique des sentences arbitrales », *Journal du droit international* [once a year].
- Ibrahim Fadlallah et al., « Investissements internationaux et arbitrage », *Gazette du palais* [once a year].
- Carlo Santulli, sous la direction de, « Chronique de jurisprudence arbitrale en droit international public », *Revue de l'arbitrage* [once a year]
- Julien Fouret & Dany Khayat, « Centre international pour le règlement des différends relatifs aux investissements (CIRDI) », *Revue québécoise de droit international* [once a year]

There is no continuing series of case notes in English. Individual case notes in English often appear, however, in various periodicals such as:

- *Journal of World Investment and Trade*
- *Journal of International Arbitration*
- *Arbitration International*

### Useful Websites:

- arbitral awards, decisions and orders
  - ICSID <http://icsid.worldbank.org/>
  - Investment Treaty Arbitration <http://ita.law.uvic.ca/>
- other relevant information
  - UNCTAD <http://www.unctad.org/>  
“investment and enterprise”→“Foreign Direct Investment”→“International Investment Agreements (IIA)”
  - OECD <http://www.oecd.org/daf/investment/agreements/>

英語での議論に慣れていない学生は、以下のうち少なくとも 2 冊 (できれば全て) を 1・2 週間のうちに読んでおくこと。

- ・ 崎村耕二『英語の議論によく使う表現』(創元社、1996 年)
- ・ 崎村耕二『英語論文によく使う表現』(創元社、1991 年)
- ・ 篠田義明『ネゴシエーション・会議に必要な英語表現』(日興企画、1996 年)
- ・ 篠田義明『国際会議・スピーチに必要な英語表現』(日興企画、1994 年)

### **Office Hours**

Thursday, 15h-16h, without appointment at Kanematsu 116. If you need to schedule an appointment at other times, please contact me by e-mail. I will not be available after class as I have another course to teach right after this one.

## Programme

### Part I. Fundamentals of International Investment Law

#### Introduction

2 Oct. A Brief History

- diplomatic protection
- recourse to general principles of law
- internationalisation of state contracts
- ICSID: a practical solution
- “arbitration without privity / arbitrage unilatéral”

#### Chapter 1. Substantive Rules

9 Oct. Investor & Investment

##### REQUIRED READINGS

1. 伊藤一頼「投資仲裁の対象となる投資家／投資財産の範囲とその決定要因」RIETI DP 08-J-011
2. Schreuer & Dolzer, “III. Investors and Investments”
3. Malaysian Historical Salvors v. Malaysia, ICSID ARB/05/10, Decision on Jurisdiction, 17 May 2007
4. Tokios Tokenles v Ukraine, ICSID ARB/02/18, Decision on Jurisdiction, 29 April 2004

16 Oct. Fair and Equitable Treatment

##### REQUIRED READINGS

1. 坂田雅夫「北米自由貿易協定(NAFTA)1105条の『公正にして衡平な待遇』規定をめぐる論争」同志社法学 55 卷 6 号 (2004 年)
2. 小寺彰「投資協定における『公正かつ衡平な待遇』」RIETI DP 08-J-026
3. Schreuer & Dolzer, “VII. Standards of Protection; 1. Fair and Equitable Treatment”

4. 松本加代・小寺彰「投資協定の新局面と日本 2 サルカ事件」国際商事法務 34 卷 9 号 (2006 年)
5. Saluka v the Czech Republic, Partial Award, 17 March 2006

23 Oct. Expropriation

#### REQUIRED READINGS

1. 松本加代「規制と間接収用」RIETI DP 08-J-027
2. Schreuer & Dolzer, “VI. Expropriation”
3. Biwater v Tanzania, ICSID ARB/05/22, Award of 24 July 2008

30.Oct. [No Class]

6 Nov. Observance of Commitment Clause (“Umbrella Clause”)

#### REQUIRED READINGS

1. 濱本正太郎「投資保護条約に基づく仲裁手続における投資契約違反の扱い」RIETI DP 08-J-014
2. Schreuer & Dolzer, “VII. Standards of Protection; 3. The Umbrella Clause”
3. El Paso v Argentina, ICSID ARB/03/15, Decision on Jurisdiction, 27 April 2006.

13 Nov. Most Favoured Nation Clause

#### REQUIRED READINGS

1. 西元宏治「投資協定仲裁における最恵国待遇条項の解釈適用」JCA ジャーナル 55 卷 9 号 (2008 年)
2. Schreuer & Dolzer, “VII. Standards of Protection; 9. Most-Favoured-Nation Treatment”
3. RosInvest v Russia, SCC Arb. V079/2005, Award on Jurisdiction, October 2007.

## Chapter 2. Selected Issues of State Responsibility

20 Nov. Attribution and Compensation

### REQUIRED READINGS

1. 西村弓「投資紛争における行為の国家への帰属」RIETI DP 08-J-
2. 玉田大「投資協定仲裁における補償賠償判断の類型」RIETI DP 08-J-013
3. Schreuer & Dolzer, “VIII. State Responsibility and Attribution” and “X. Settling Investment Disputes; 2. Investor v State Disputes; (k) Damages and Compensation”
4. Noble Ventures v Romania, ICSID ARB/01/11, Award, 12 October 2005.

27 Nov. State of Necessity

### REQUIRED READINGS

1. 山田卓平「最近の ICSID 仲裁事例における緊急避難をめぐる判断」国際法外交雑誌 106 巻 3 号 (2007 年)
2. Schreuer & Dolzer, “VII. Standards of Protection; 5. Emergency, Necessity, Armed Conflicts, and *Force Majeure*”
3. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 25 (incl. commentary), *Reports of the International Law Commission*, UN Doc. A/56/10.
4. LG&E v Argentina, ICSID ARB/02/1, Award, 25 July 2007.

### Chapter 3. Procedural Rules

#### 4 Dec. ICSID Annulment Procedure

##### REQUIRED READINGS

1. 河野真理子 [投資紛争解決国際センターにおける仲裁判断のコントロール] 国際法外交雑誌 97 卷 1 号 (1998 年)
2. Schreuer & Dolzer, “VIII. State Responsibility and Attribution” and “X. Settling Investment Disputes; 2. Investor v State Disputes; (m) Challenge and Review of Decisions; bb. Annulment under the ICSID Convention”
3. Patrick Mitchell, ICSID ARB/99/7, Decision on the Application for the Annulment of the Award, 1 November 2006.
4. CMS v Argentina, ICSID ARB/01/8
  - Decision on Objections to Jurisdiction, 17 July 2003.
  - Award, 12 May 2005
  - Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006
  - Decision of the ad hoc Committee on the Application for the Annulment of the Argentine Republic, 25 September 2007

#### 11 Dec. [No Class: rescheduling possible]

#### 18 Dec. Enforcement of Awards

##### REQUIRED READINGS

1. 柏木昇「外国仲裁判断の承認・執行」高桑昭ほか編『国際民事訴訟法（財産法関係）』（青林書院、2002 年）
2. 松井章浩「仲裁判断執行手続における国際法上の執行免除」立命館法学 2005 年 5 号
3. Schreuer & Dolzer, “VIII. State Responsibility and Attribution” and “X. Settling Investment Disputes; 2. Investor v State Disputes; (m) Challenge and Review of Decisions and (n) Enforcement of Awards”



4. Siemens v Argentina, ICSID ARB/02/8
  - US Submission regarding Arts. 53 and 54, ICSID Convention, 1 May 2008.
  - Argentina's Response to US Department of State Letter, 2 June 2008.

#### **Chapter 4. Investment Law in a Broader Context**

8 Jan. Role of Precedents

##### REQUIRED READINGS

1. Christoph Schreuer & Matthew Weiniger, "A Doctrine of Precedent?", *in* Oxford Handbook
2. Mohamed Shahabudeen, *Precedent in the World Court*, Cambridge, Cambridge Univ.Pr., 1996, pp. 67-96: "7 Possibility of Judge-made International Law"

15 Jan. Legitimacy in Question

##### REQUIRED READINGS

1. M. Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration", *in* Karl P. Sauvant ed., *Appeals Mechanism in International Investment Disputes*, Oxford Univ.Pr., 2008, pp. 39-79.
2. David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge, Cambridge Univ.Pr., 2008, pp. 69-108: "3 Investment Rules in Action".

## **Part II. Case Study**

22 Jan. Case study 1: Duke v. Ecuador, ICSID ARB/04/19

- Award of 18 August 2008

29 Jan. Case study 2: Continental Casualty, ICSID ARB/03/9

- Decision on Jurisdiction, 22 February 2006

- Award, 5 September 2008

5 Feb. Case study 3: Plama v. Bulgaria, ICSID ARB/03/24

- Decision on Jurisdiction, 5 February 2005

- Order on Provisional Measures, 6 September 2005

- Award, 27 August 2008