Course Description

This seminar addresses the legal rules and policies, both domestic and international, governing an area of vital international economic activity. International investment law, whether or not considered a distinct “regime”, is a fast-growing subject that involves a unique blend of public international law, procedures drawn from commercial arbitration, and “public law” concerns.

This seminar briefly examines relevant domestic laws, particularly within the United States, but focuses especially on the international law that purports to regulate incoming and outgoing foreign investment, namely the over 3000 International Investment Agreements (IIAs) consisting of Bilateral Investment Treaties (BITs), the investment chapters of free trade agreements (FTAs) (such as Chapter 11 of the North American Free Trade Agreement (NAFTA)), and customary international law (such as the “international minimum standard” of treatment and rules demanding prompt, adequate and effective compensation upon expropriation). These sources establish the type of treatment that ought to be accorded foreign investors that seek to establish themselves in a foreign territory or that should apply to such investment once established in a host country. The seminar focuses particularly on foreign direct investment (FDI), including “greenfield” investments (consisting of new enterprises established on the territory of a host state) and mergers and acquisitions where a foreign company takes over a local enterprise. The class also introduces students to the favored tool for settling disputes between foreign investors and their host states, namely investor-state dispute settlement (ISDS) and some of the burgeoning “jurisprudence constante” emerging as a result of increasingly public arbitral awards.

Foreign investment is subject to diffuse regulation and is not governed by just one overriding treaty or institutional regime. Much of the terrain is contested. What is “foreign” about investment is as contested as whether or not something is “investment”. By contrast to trade in goods – and the World Trade Organization – this is a subject governed by no single multilateral treaty but by many in which no single judicial body, international or national, dominates. To complicate matters further, the literature on the subject, though relatively recent, is vast, and there are a number of perspectives (from sociological to historical) possible.

To make the subject more manageable and to lend coherence, this seminar will focus on only select topics. It will principally address (1) the theoretical and policy background that helps explain the emergence and evolution of IIAs and ISDS; (2) some of the substantive legal standards that are applied in the course of ISDS such as the meaning and import of “fair and equitable treatment” and “national treatment”; (3) the “legitimacy” or “rule of law” concerns arising from IIAs and ISDS; and (4) some of the policy responses to those concerns that are now emerging (such as the turn to amicus briefs, greater transparency and possibly international investment courts instead of ISDS). All of these issues will be principally addressed through role-playing. Students will often be asked to assume the role of an investor, a state official defending its laws and regulations, an arbitrator, or other stakeholders in the international investment regime (such as a human rights NGO or a third party state that is not a litigant in an
investor-state dispute but may be, for example, another state party to the IIA being addressed in an investor-state arbitration). The goal of the class is to improve the skills of prospective practitioners in this field – whether they act as adjudicators, experts, or as legal advisers in a law firm, an NGO, or a foreign ministry.

A few more words about what the class is not about. This is a class which focuses on regulation and arbitral decisions resulting from discrete investment disputes, and not the “art of the deal”. It is not a course about bargaining in international business transactions nor is it about the underlying contracts that characterize such deals. This seminar also avoids most of the procedural issues surrounding the bringing of investor-state claims. This course does not have a “law and economics” bent and no economics knowledge is assumed (although some might be useful background).

There is some overlap between the topics addressed in this seminar and those addressed in other investment arbitration courses or seminars taught at NYU. Students are not barred from taking those other courses in addition to this one. Students in this course will find that a background in international law would be useful but prior courses on public international law or arbitration are not a formal prerequisite. (But those who have not taken an international law course at any time in the past are strongly encouraged to, over the first weeks of term, become familiar with the basic sources of international law (treaty and custom) in a basic text, such as the West Nutshell book on Public International Law.)
Seminar Requirements

This is a semester long two credit seminar, with two hour class meetings on a weekly basis. Like many seminars it demands considerable reading (sometimes exceeding 100 pages a week) and requires students to have done these readings before the course meets to make class discussions meaningful. The class will be devoted to discussing these readings as a group. Readings for the course will generally be available on the courseweb or, in rare cases due to copyright restrictions, on course reserve in the law library. Readings will be posted on the course website regularly. The general topics that the professor expects to cover are enumerated below.

The class meets on Thursdays, from 3-4:50 p.m. in Furman Hall 324. The only required book (available for purchase) is a paperback, J.E. Alvarez, The Public International Law Regime Governing International Investment (2011).

Class attendance and participation are essential. If you anticipate that you will not be able to attend any sessions due to call-backs or other commitments, you are urged not to enroll in this class. As with most seminars, students should come ready to participate actively in class discussion and that includes the first class. This is not a lecture course. Starting with the fourth class meeting, all students will be required to submit weekly “reaction papers” responding to one of the questions raised in the assigned readings for that week. These reaction papers anticipate the discussion that will occur in class that week; they are not a reaction to the preceding week’s readings. Students’ reaction papers, which must be posted on the courseweb page 24 hours before the class meets (that is, by Tuesdays at 3 p.m.) must be no more than 500 words in length with the exception of the first and last reaction papers (which have a 1000 word limit). Papers submitted late will be severely penalized as the whole point of the exercise is to permit the professor and all students to use the reaction papers to prepare for class discussion the following day. Students should attempt, when possible, to read or at least skim the reaction papers of other class members prior to the class to be fully prepared for class discussion.

Students should, of course, bring a hard copy of their own reaction paper to class (the better to defend their views). (A sample reaction paper written by a former student, along with a helpful explanation (written by another professor who asks for a similar paper; entitled “what I mean by a critique”) is included in the first week’s readings folder.) The final reaction paper, the only one that is to be submitted after the relevant class meets, is due on the first day of exam period for this fall term.

The ten reaction papers submitted over the course of the semester as well as weekly class participation will be the basis of a student’s final grade. Students are encouraged to come at least once during the professor’s office hours (which will be posted for weekly sign ups outside the professor’s office in Vanderbilt 325) at any time during the semester to discuss their reaction papers.

Students who have not yet been admitted to the course but who are seriously interested should come to the first scheduled class as in the past a high number of students have exercised their option to add/drop and most students who want to be registered have eventually been able to do so. Persistence pays off.
Optional (One Credit) Research Paper

Registered students in the class have the option of writing, in addition to the reaction papers required for the course, an optional research paper on any topic related to the subject matter of the course, for an additional (third) academic credit.

Topics for these papers can address subjects covered in the course or those that are not, such as different guarantees covered in IIAs or the prospect of annulments of arbitral awards. Students seeking to write optional research need to consult with the professor to be sure that both student and instructor agree on a suitable topic and on a proposed schedule for completing the first and final draft. (This should be done no later than the 4th class meeting of the course.) These optional research papers tend to be no more than 10-15,000 words including footnotes. For an example of such a paper written by a former student in the course see Christopher Fenton, Student Note, “U.S. Policy Towards Foreign Direct Investment Post-September 11th: Exon-Florio in the Age of Transnational Security,” 41 Columbia J. Transnational L. 195 (2002). (As will be evident, that published student note was a considerably expanded version of the original shorter paper written for this class.) Those looking for possible current topics on which to write a research paper may consider getting ideas from, for example, the occasional short Perspectives issued by Columbia’s Center on Sustainable Development, at http://ccsi.columbia.edu/publications/columbia-fdi-perspectives.

Suggested Optional Background Reading (available at most bookstores):

Thomas Friedman, The Lexus and the Olive Tree (2d ed. 2000) (also on library reserve)

Other books on course reserve in the Law Library that may be of interest:

Dolzer and Schreuer, Principles of International Investment Law (2nd ed. 2012)
Marans et al, Manual of Foreign Investment in the United States (3rd ed. 2004 with pocket updates through Dec. 2013. This is an ebook available through Westlaw. The third edition, updated Dec. 2013, is available at https://julius.law.nyu.edu/record=b1973244~S0 (click inside the box that says “Online Access Provided by WestlawNext…” and then log in with your Westlaw password).
Jan Paulsson, Denial of Justice in International Law (2005)
Karl Sauvant and Lisa Sachs, The Effect of Treaties on Foreign Investment (OUP 2009)
Stephan Schill, The Multilateralization of International Investment Law (CUP 2009)
M. Sornarajah, The International Law on Foreign Investment (3d ed. 2010)
**Tentative Syllabus**

Class 1: Introduction to “Foreign Direct Investment” (FDI): Its Causes, Its Alleged Benefits

Class 2: How did we get here? The Evolving International Investment Regime

Class 3: An introduction to national laws on FDI

Class 4: Learning to read and apply Bilateral Investment Treaties (BITs) (FIRST REACTION PAPER Due 24 hours prior to class meeting)

Class 5: Other international law obligations governing FDI

Class 6: Introducing the NAFTA’s Chapter Eleven

Class 7: Non-Discriminatory or National Treatment and the Alleged Connections to WTO law

Class 8: Expropriations and Regulatory Takings

Class 9: Fair and Equitable Treatment

Class 10: The Argentina Crisis and the Defense of “Necessity”

Class 11: Transparency, Amicus, and the “Public Interest”


Class 13: Criticisms and “Re-balancing” IIAs in Response

Class 14: Beyond ISDS?
Week One
Introduction: Accounting for FDI flows

Readings:


Robert B. Reich, “Who Do We Think They Are?” The American Prospect 49 (1991) (on courseweb)


Optional Reading for those interested in the investment chapter of the TPP:
(Note that despite the U.S. withdrawal from TPP negotiations, those negotiations are apparently continuing among the other 10 TPP countries.)

Optional Reading for those interested in economic analysis:

Questions for Class Discussion:
The readings for this week present some basic facts about foreign investment. They also introduce the policy debates that incoming foreign investment periodically poses even for an advanced economy such as the United States – from the Clinton Administration facing a significant wave of FDI in early 1990s to today’s Trump Administration facing a strong Chinese wave of FDI today.

We will focus on three basic issues: (1) the causes of foreign investment flows; (2) the alleged “benefits” that result from incoming foreign investment; and (3) the perceived detriments and consequential reactions to incoming investment. Addressing these questions is essential to understanding the rules, national and international, that countries have devised to handle investment flows.
On the first point, note from the UNCTAD data that state-owned MNEs continue to have a growing role, including with respect to “greenfield” investments and that new national laws governing foreign investment vary greatly (and no longer point only in the direction of making things easier for transnational capital flows with some 1/5 of new laws imposing restrictions on incoming FDI). The UNCTAD Report also indicates that the universe of (ever more complex) IIAs continues to rise (to some 3324 treaties), amidst lots of proposals for reforming existing old treaties. But note that even as international and national laws governing FDI are becoming more varied, the countries that receive and send out the greatest number of foreign investors have remained fairly constant over time. Indeed, as is suggested by Figures 4 and 6 in the UNCTAD Report, many of the countries that are the leading exporters of capital are also leading recipients of foreign capital.

Based on your own general knowledge, what accounts for some of these facts, e.g., what makes countries like the U.S. and China leading recipients of FDI? What are investors looking for in the U.S. or in China? What encourages U.S. or Chinese companies to invest abroad? What might impede or discourage a U.S. business from investing abroad, including in China?

On the second set of issues, start with the distinct points of view of Reich and Tyson. What is “foreign” about foreign investment? What exactly differentiates Reich from Tyson? Do they differ on the benefits foreign investment brings to the United States? Do they differ on the types of government policies that the U.S. should adopt with respect to foreign investors? Keep in mind that at the time they wrote these articles both Reich and Tyson were members of the same (Clinton) Administration. What do you think about the proposal to insist on “true reciprocity” with respect to investment flows? Why do you think that so far the U.S. has mostly avoided reciprocity based FDI policies?

If you were an adviser to the Trump Administration today what view would you take on these topics? Would you, for example, encourage the Administration to resist future multilateral treaties (like the TPP that Trump withdrew from on his third day in office) that are designed to encourage transnational capital flows like the NAFTA while still concluding bilateral treaties (known as BITs) that do the same? (Note that neither of these types of IIAs insist on reciprocity.)

On the third set of issues: Note that according to UNCTAD, the U.S. remains the top country for both FDI inflows and outflows (with incoming FDI exceeding outflows). The leading foreign investors in the U.S. are Western Europeans (8 of which account for 80% of all of its FDI inflows). But as the following article from Forbes indicates, Chinese investors lead the pack in terms of investing in U.S. real estate (particularly in places like NYC, see http://www.iilj.org/publications/1887/). What do you think are the problems/fears generated by incoming FDI for a developed economy like that of the United States where FDI flows remain a low percentage of the overall economy? Should the United States worry about either the inflows or outflows of FDI? What potential threats do Chinese investors in particular pose to U.S. interests?
Week Two
How Did We Get Here? The Evolving International Investment Regime

Readings:
O. Thomas Johnson, Jr. and Jonathan Gimblett, “From Gunboats to BITs: The Evolution of Modern International Investment Law” (Chapter One from Alvarez, International Investment Law) (on courseweb)
J.E. Alvarez, Chapter One from The Public International Law Regime Governing International Investment (required book available for purchase)

Questions for Class Discussion:

The Kuruk piece describes one way that rules are established to govern foreign investment: negotiate contracts between host countries and investors. What does the Kuruk piece suggest are the downsides to that approach? Do you think that those downsides are limited to poor countries like Ghana or limited to investments dealing with natural resources such as oil? Are the “lessons” that Kuruk draws still relevant today? What other constraints exist on using the vehicle of contract to govern FDI rules?

Johnson-Gimblett’s essay suggests another vehicle that remains in use on occasion to resolve disputes arising from foreign investment: diplomatic espousal between the host state of a foreign investor and the home country of the investor. What are the advantages and disadvantages of that approach? Why did that approach come to be displaced (at least sometimes) by Treaties of Friendship, Commerce and Navigation and later by bilateral investment treaties (BITs)? What exactly did BITs supply that FCNs did not? Does this historical account suggest that the international investment regime predominately reflects the views and preferences of Western wealthy states?

The contemporary international investment regime, described by Alvarez, offers considerable benefits to foreign investors but is subject to considerable critiques. From the standpoint of an investor (or a lawyer for one), what are the pros and cons of the current regime’s reliance on thousands of treaties and investor-state dispute settlement? From the point of view of a lawyer for a host state to foreign investors, what are the pros and cons of the international investment regime? IIAs and ISDS differ from both the WTO and regional human rights courts. What accounts for the differences? Which of the criticisms of IIAs/ISDS are so serious that they merit fundamental change in how foreign investors are treated or where their disputes with host states ought to be resolved?