

## International Investment Law

**Department:** Fudan International Summer Session 2024

<b>Course Code</b>	LAWS170001		
<b>Course Title</b>	International Investment Law		
<b>Credit</b>	2	<b>Credit Hours</b>	36+3 tutorial hours (one credit hour is 45 minutes)
<b>Course Nature</b>	<input type="checkbox"/> Specific General Education Courses <input type="checkbox"/> Core Courses <input checked="" type="checkbox"/> General Education Elective Courses <input type="checkbox"/> Basic Courses in General Discipline <input type="checkbox"/> Professional Compulsory Courses <input type="checkbox"/> Professional Elective Courses <input type="checkbox"/> Others		
<b>Course Objectives</b>	<p>Through the study of this course, students will learn the basic system and main systems of international investment law, especially the legal issues of inbound direct investment and outbound direct investment laws and regulations established in the past 44 years after the <i>Reform and Opening-Up</i> in China and the current practice, including but not limited to the new <i>Foreign Investment Law of China</i> came into effect as from January 1<sup>st</sup>, 2020 and the <i>Hainan Free Trade Port Law of China</i> came into effect as from June 10<sup>th</sup>, 2021, the “B&amp;R Initiative”, the RCEP, as well as the sub-globalization paradigm in international investment law. The course shall be instructed in “problem-oriented”, and the case study methodology shall be widely applied to attempt to fill the gaps between the theoretical research and legal practice. The course fosters students’ capabilities to analyze the law and apply the law.</p>		
<b>Course Description</b>	<p>The International Investment Law is a professional elective course for undergraduate students (junior/senior grade preferred) and postgraduates majoring in law. The course mainly includes four aspects: (1) the introduction to international investment and international investment law; (2) bilateral investment treaties and multilateral investment agreements; (3) the foreign investment law of China and its practice; (4) the outbound foreign investment law of China and its practice.</p> <p>The instructor will attempt to the interactions between international perspective and domestic perspective. From the international perspective, the instructor shall focus on the recent concluded or negotiated regional free trade agreements (RTAs, such as RCEP, CPTPP and USMCA) or international investment agreements (IIAs, such as the recently completed <i>China-EU Comprehensive Agreement on Investment of 2020</i>, <i>China-Canada BIT of 2012</i> or <i>China-Japan-Korea Triple Investment Agreement of 2012</i>). The recent RTAs and IIAs have incorporated some new issues, not only including pre-establishment treatment, non-conforming measures list, market access and the developments of investment dispute settlement, but also including “investment+” issues, such as investment and competition neutrality,</p>		

	<p>investment and labor, investment and environment, investment and climate change, investment and intellectual property protection, investment and anti-corruption, investment and distortive subsidies and etc.</p> <p>The course also attempts to think about China’s contributions and responsibilities in the new generation of international investment rules.</p> <p>The course plays an important role to build up a “bridge” between the theory and the practice. The instructor will explore the course from the problem-oriented perspective. In order to strengthen the practical value of this course, the instructor shall adopt the methodology of case study, and try to apply case law to interpret the foreign investment law system and outbound foreign investment law system of China closely in combination of case law to deepen the legal understanding.</p>
<p><b>Course Requirements:</b></p> <p>No special requirements</p>	
<p><b>Teaching Methods:</b></p> <p>The instructor explains the basic theory and main legal system of international investment law, encourage students to preview the required materials before class and discuss their responses in the class. The course encourages the interactions between the instructor and students.</p>	
<p><b>Instructor's Academic Background:</b></p> <p>The instructor is an associate professor of Fudan University Law School, specializing in international investment law and international trade law. She obtained L.L.B degree (2001), degree L.L.M (2004) and PhD.in Law degree (2009), and has been a Fulbright Visiting Scholar hosted by Columbia Law School (2018-2019) and a Fox International Fellow hosted by Yale University (2007-2008). She also serves as an arbitrator of Shanghai International Arbitration Center (also named Shanghai International Economic and Trade Arbitration Center).</p> <p>The instructor has relatively well established in the academic research field of the outbound investment law of China, and has published 4 monographs and over 50 papers in the field of China’s outbound investment, and obtained several prestigious prizes, talent awards and grants. She is good at make comparative study, and can bridge different disciplines and different types of experts to make joint study on a specific question. She has good skills and expertise in teaching, and has been awarded a lot of teaching prizes.</p> <p>Email: <a href="mailto:liangyong@fudan.edu.cn">liangyong@fudan.edu.cn</a></p> <p>Tel: 86-21-31245709</p>	

## **Course Schedule**

### **Class 1**

Orientation-Greatest Changes in the past century

What has happened to the world?

What have happened to the big powers (U.S., EU and Japan) and emerging powers (“BRICS” or “BASIC” countries)?

What has happened to national security?

What have happened to international investment laws?

What has happened to international investment practice?

1. General Introduction to the International Investment Law

- The inflows and outflows of international investment
  - The geography of the inflows and outflows of international investment
  - The important concerns of the international investment law
2. The Changing Role of China in International Investment Law
- A brief history of inbound direct investment in China
  - A brief history of outbound direct investment in China

Suggested Readings

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

World Investment Report 2023, key messages, pages.x-xvi.

M. Sornarajah, The International Law on Foreign Investment, pages 1-14.

### **Class 2**

History and Nature of International Investment Law

1. The Definition of Foreign 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 71-80, 86-93.

Suggested Readings

M. Sornarajah, The International Law on Foreign Investment, pages 14-63.

### **Class 3**

Sources of the International Investment Law

1. Unilateral Laws or Regulations: From the prospective of China
2. Features and Characteristics of Recently Promulgated Foreign Investment Laws of China
  - Domestic laws of China from the prospective of host states
    - ✧ Countrywide laws and regulations
    - ✧ Pilot free trade zones regulations

- Domestic laws of China from the prospective of home states
  - ✧ Countrywide laws and regulations
  - ✧ Pilot free trade zones regulations
- 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/USMCA/CPTPP/RCEP

### 4. Other Sources

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

Required Readings

Rudolf Dolzer, Principles of International Investment Law, pages 80-85.

M. Sornarajah, The International Law on Foreign Investment, pages 103-113.

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.

2021 UN Model Double Taxation Convention between Developed and Developing Countries

2017 OECD Model Tax Convention

## **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

M. Sornarajah, *The International Law on Foreign Investment*, pages 91-102.

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)
  - Chinese Companies Listed in Other Countries (information disclosure obligations)
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 105-132.

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 Tokelès 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 Concentration of Operators
- Admission Review on National Security of Big Powers

3. National Security Review in CNOOC's bid to acquire UNOCAL/Huawei and Xiaomi's merger and acquisitions were blocked by U.S., Sweden, Australia or Romania.

4. Potential Unilateral Sanctions (Entity List of the BIS, Delisting of Chinese Companies from U.S. Securities Market)

#### Required Readings

M. Sornarajah, *The International Law on Foreign Investment*, pages 114-147, 152-171.

## **Class 7**

### Investment Regulation in Operation Phase: Investment Treatment

1. National treatment
  2. Most-favored-nation treatment
  3. Fair and equitable treatment
  4. International minimum standard 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. Investment+ issues (i.e. investment and climate change, investment and labor)

#### Required Readings

Rudolf Dolzer, *Principles of International Investment Law*, pages 174-201, 225-236.

#### 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.

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

TransCanada Corporation and TransCanada Pipelines Limited v. United States of America (I), ICSID Case No. ARB/16/21 (settled)

TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II), ICSID Case No. ARB/21/63 (pending)

Westmoreland Mining Holdings LLC v. Government of Canada, ICSID Case No. UNCT/20/3 (pending)

#### Required Readings

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
  - DFC (the former: 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
      - ICSID investment arbitration
      - Non-ICSID investment arbitration
        - The Permanent Court of Arbitration

- The Arbitration Institute of the Stockholm Chamber of Commerce
- International Chamber of Commerce International Court of Arbitration
- The London Court of International Arbitration
- Singapore International Arbitration Center
- Hong Kong International Arbitration Center
- The Iran-United States Claims Tribunal
- Ad Hoc Arbitration (i.e. established according to the UNCITRAL Rules)

• Applicability of MFN Clause

### 3) The Drawbacks of ISDS in Legal Practice

Required Readings

Rudolf Dolzer, Principles of International Investment Law, pages 249-313.

MIGA Convention

ICSID Convention

2022' ICSID Arbitration Rules

2021' UNCITRAL Arbitration Rules

## **Class 9**

Chinese BITs and Investment Tax Planning

1. Developments of Chinese BITs
2. Typical Chinese BITs
  - 1982 China-Sweden BIT
  - 1986 China-UK BIT
  - 1998 China-Barbados BIT
  - 2003 China-Germany BIT
  - 2012 China-Canada BIT
  - 2015 China-Turkey BIT
3. Typical Chinese DTTs
  - 1984 China-U.S. DTT
  - 2006 Mainland-HKSAR Tax Arrangement

Suggested Readings

Norah Gallagher, Chinese Investment Treaties, pages 28-51

## **Class 10**

Investor-State Dispute Settlement Reforms

1. Unbalanced ISDS
  - "Legitimacy Crisis" and Current Situation
  - Historical Thoughts of Drafting ISDS System
  - Fragmented IIAs (fixed provisions but changing facts)
  - Autonomy of the ISDS Tribunal
  - Clear host governments and hided investors
2. Existing ISDS Reform Models (Commercialization Approach/Judicialization Approach/Politicization Approach)



- Improved ISDS Model (CPTPP/USMCA)
- ICS Model (EU-Canada FTAs)
- ISDS Abandoned Model (India-Brazil Investment Cooperation)
- Seesaw Model (Australia)
- High Inclusiveness Model (China)

### 3. Mediation

- 2019 Singapore Mediation Convention

• Interactions between international mediation rules and domestic laws related to acknowledgement and enforcement of settlement agreements

- 4. “One-Hub” Dispute Settlement Center or Diversified Dispute Resolution Mechanism

## **Class 11**

Typical China-Related Cases

### 1. Typical Cases and Key Issues

- AsiaPhos and Norwest v. China (BIT’s coverage on dispute arising out of the amount of compensation concerning expropriation or nationalization, Concluded, February 16<sup>th</sup>, 2023)

- PingAn v. Belgium (BIT application during the transition period, indirect expropriation exception, Concluded)

- BUCG v. Yemen (SOEs, MFN in dispute settlement, Settled)

- Heilongjiang et al v. Mongolia (restricted coverage for ISDS, MFN in dispute settlement, Concluded)

- Ekran v. China (government taking land using right in advance, Settled)

- Ansung v. China (time limit, Concluded)

- Zhongshan Fucheng v. Nigeria (the first winning case of Chinese investor and moral damages claims by legal person investor, Concluded)

- Hela v. China (fork-in-the road in dispute settlement, Pending)

- Tza Yam Shum v. Peru (whether a Hong Kong permanent resident constitutes a qualified investor? Concluded)

- Sanum v. Laos (whether a legal entity established in Macao constitutes a qualified investor? Concluded)

### 2. Important Accidents

- Cacocola’s Bid on Huiyuan in 2008 (operator concentration review in *Anti-Monopoly Law of China*)

- Yonghui’s Bid on Zhongbai in 2019 (national security review)

- Forced Division on Tiktok in 2020 (data security, national security concerns)

- Forced Remove Didi Apps in 2021 (information security, data security and etc.)

## **Class 12**

Final Examination

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

**The design of class discussion or exercise, practice, experience and so on:**

Group discussions are required. All of 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. Students are free to organize groups and to identify their topics.

**Grading & Evaluation:**

1. Attendance (30%)

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 highly recommended.

2. Assignment (30%, including oral presentation, case analysis, discussion, etc.)

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. Students are free to organize groups and to identify their topics. Each member in the same group will share the same score.

3. Final examination (40%)

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

4. Additional Score (no more than 3%)

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

**Teaching Materials & References:**

English Monographs and Textbooks (Electronic versions will be provided by the instructor)

1. M. Sornarajah. **The International Law on Foreign Investment [M]. Cambridge: Cambridge University Press, 2021.**

2. Rudolf Dolzer, Christoph Schreuer. **Principles of International Investment Law [M]. Oxford: Oxford University Press, 2022.**

3. Kenneth J. Vandeveld. **Bilateral Investment Treaties: History, Policy and Interpretation [M]. New York: Oxford University Press, 2010.**

Chinese Monographs and Textbooks (Hard copies are available in Fudan libraries)

1. 余劲松. **国际投资法[M]. 北京: 法律出版社, 2022.**

2. 梁咏. **中国投资者海外能源投资法律保障与风险防范[M].北京: 法律出版社, 2017.**

Journals and Serial Publications (Electronic versions will be provided by the instructor)

1. UNCTAD. **World Investment Report [R]. New York and Geneva: United Nations. (2019—2023),** <http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>.

2. ICSID. **The ICSID Caseload [R] (2019-2023),** <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>.

3. Ministry of Commerce of the P. R. China, National Bureau of Statistics, State Administration of Foreign Exchange. **Statistical Bulletin of China's Outward Foreign Direct Investment (2019-2022).** 商务部, 国家统计局, 国家外汇管理局. **对外直接投资统计公报[R]. 北京: 商务部, 国家统计局, 国家**

外汇管理局. (2019-2022)

Other Resources and References (Electronic versions will be provided by the instructor)

1. *2019 Foreign Investment Law of the People's Republic of China of 2019*, came into effect from January 1<sup>st</sup>, 2020 (2019年《中华人民共和国外商投资法》，自2020年1月1日起施行)
2. *2021 Hainan Free Trade Port Law of the People's Republic of China*, came into effect from June 10<sup>th</sup>, 2021 (2021年《中华人民共和国海南自由贸易港法》，自2021年6月10日起施行)
3. *2021 Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Edition)* Issued by the National Development and Reform Commission and the Ministry of Commerce, came into effect from January 1<sup>st</sup>, 2022 (2021年国家发展改革委、商务部《外商投资准入特别管理措施(负面清单)(2021年版)》，自2022年1月1日起施行)
4. *2021 Special Administrative Measures for Foreign Investment Access in the Pilot Free Trade Zone (Negative List) (2021 Edition)*, came into effect from January 1<sup>st</sup>, 2022 (2021年国家发展改革委、商务部《自由贸易试验区外商投资准入特别管理措施(负面清单)(2021年版)》，自2022年1月1日起施行)
5. *2022 The Catalogue of Industries for Encouraged Foreign Investment (2022 Edition)*, came into effect from January 1<sup>st</sup>, 2023 (2022年国家发展改革委、商务部《鼓励外商投资产业目录(2022年版)》，自2023年1月1日起施行)
6. *2021 Anti-Foreign Sanctions Law of the People's Republic of China*, came into effect from June 10<sup>th</sup>, 2021 (2021年《中华人民共和国反外国制裁法》，自2021年6月10日起施行)
7. *2021 Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures*, came into effect from January 9<sup>th</sup>, 2021 (2021年商务部《阻断外国法律与措施不当域外适用办法》，自2021年1月9日起施行)
8. *1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965年《关于解决国家与他国国民之间投资争端公约》)
9. *1985 Convention Establishing the Multilateral Investment Guarantee Agency* (1985年《多边投资担保机构公约》)
10. *2020 Regional Comprehensive Economic Partnership* (2020年《区域全面经济伙伴关系协定》)
11. *2012 U.S. Model BIT* (2012年美国双边投资协定范本)
12. *2018 U.S.-Mexico-Canada Agreement (USMCA, 2018年《美墨加协定》)*
13. *2018 Comprehensive and Progressive Trans-Pacific Partnership (CPTPP, 2018年《全面与进步的跨太平洋伙伴关系协定》)*
14. *TTIP Draft of 2015* (2015年《跨大西洋贸易与投资伙伴协议》草案)、*EU-Canada FTA of 2016* (2016年欧盟—加拿大自由贸易协定)、*EU-Vietnam FTA of 2016* (2016年中国—越南自由贸易协定)
15. *China-Canada BIT of 2012*(2012年中国—加拿大双边投资协定)、*China-Korea FTA of 2015* (2015年中国—韩国自由贸易协定)、*China-Australia FTA of 2015* (2015年中国—澳大利亚自由贸易协定)
16. *Completed China-EU Comprehensive Agreement on Investment*(已完成的中国—欧盟全面投资协定文本)

Related Websites

<http://www.mofcom.gov.cn>

<http://www.unctad.org>

<http://www.miga.org>

<http://icsid.worldbank.org>

<http://www.wto.org>

<http://www.state.gov/e/eb/ifd/bit/117402.htm> (U.S. Department of State)

<http://www.italaw.com>