

International Investment Law

Department: Fudan International Summer Session

Course Code	LAWS170001		
Course Title	International Investment Law		
Credit	2	Credit Hours	36+3 tutorial hours (one credit hour is 45 minutes)
Course Nature	<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		
Course Objectives	<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 40 years after the reform and opening up in China and the current practice, the newly promulgated Foreign Investment Law of China to come into effect as from January 1st 2020, the processing China-EU BIT and RCEP as well as the interaction between foreign investment law and international treaties and agreements. The course will foster students' capabilities to analyze the law and apply the law.</p>		
Course Description	<p>The International Investment Law is an elective course for undergraduate students (junior/senior grade preferred) 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 for regulating international investment and its future development; (3) the foreign investment law of China and its practice; (4) the outbound investment law of China and its practice.</p> <p>The lecture will attempt to the interactions between international perspective and domestic perspective. From the international perspective, the lecture shall follow up the TTIP negotiations, the NAFTA renegotiations, the trends and developments of CPTPP, and as well as the RCEP, Sino-U.S. BIT (suspended), Sino-EU BIT and China-Japan-Korea FTA negotiations with the involvement of China, and concentrates on the new issues including the pre-establishment treatment, non-conforming measures list ("Negative List"), competition neutrality, environmental standards, labor protection and etc. Furthermore, the</p>		

	<p>lecture shall pay special attention to the international investment arbitration mechanism and feasibility of international court system, the “B&R Initiative” of China, the establishment of new generation of international investment rules, from the adaptor or user of existing international investment rules to the contributor or founder of the new generation of international rules.</p> <p>In order to strengthen the practical value of this course, the instructor shall adopt the methodology of case analysis, and try to use case law to interpret the foreign investment law system and outbound investment law system of China closely in combination of case law to deepen the legal understanding.</p>
<p>Course Requirements: No special requirements</p>	
<p>Teaching Methods: 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 lecture encourages the interactions between the instructor and students.</p>	
<p>Instructor's Academic Background: 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), L.L.M degree (2004) and PhD in Law (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).</p> <p>The instructor is relatively well established in the academic research field of the outbound investment law of China, and has published 3 monographs and over 30 papers in the field of China’s outbound investment, and obtained several prestigious prizes, talent awards and grants. She is good at making comparative study, and can bridge different disciplines and different types of experts to make joint study on a particular question. She has good skills and expertise in teaching, and has been awarded a lot of teaching prizes.</p>	
<p>Course Schedule: <u>Week 1</u> Class 1 Orientation 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,</p>	

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
- A brief history of outbound direct investment in China

Suggested Readings

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

World Investment Prospect 2012-2014, download from the UNCTAD website (http://unctad.org/en/PublicationsLibrary/webdiaeia2012d21_en.pdf)

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 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

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

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 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

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

Class 7

Investment Regulation in Operation Phrase: 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 Phrase: Expropriation and Nationalization

1. The Right to Expropriate
2. The Legality of the Expropriation
3. Direct and indirect 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 Phase

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
 - ICSID investment arbitration
 - Non-ICSID investment arbitration
 - The International Chamber of Commerce
 - The London Court of International Arbitration
 - The UNCITRAL Rules
 - The Iran-United States Claims Tribunal
 - The Permanent Court of Arbitration
 - Applicability of MFN Clause

3) The Latest Developments of ISDS

Required Readings

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

MIGA Convention

ICSID Convention

ICSID Additional Facility

2010' UNCITRAL Arbitration Rules

Class 9

Chinese BITs and Investment Tax Planning

1. Developments of Chinese BITs
2. Typical Chinese BITs

- 1982 Sino-Sweden BIT
 - 1986 Sino-UK BIT
 - 1998 Sino-Barbados BIT
 - 2003 Sino-Germany BIT
 - 2012 Sino-Canada BIT
3. Typical Chinese DTTs
- 1984 Sino-U.S. DTT
 - 2006 Mainland-HKSAR Tax Arrangement

Suggested Readings

Norah Gallagher, Chinese Investment Treaties, pages 28-51

Week 4

Class 10

Final Examination

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

Class 11

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.

1. National Security Review (for instance, CNOOC's bid on UNOCAL, CNOOC's acquisition on Nexen)
2. Indirect Expropriation and Police Power (for instance PingAn-Fortis Case)
3. An ISDS Case Analysis
4. The Latest Developments ISDS and China's (or Any Other Country's) Choice
5. How to Balance the Interests of Foreign Investors and Interests of the Host State in the Foreign Investment Law System
6. The "B&R" Initiative and the Construction of International Trade and Investment Rules
7. How to Prevent Commercial Risks and Non-Commercial Risks in Outbound Investment
8. The Corporate Social Responsibility of China's Outbound Investment
9. Risk Prevention and Legal Protection in Different Investment Vehicles (take one kind of investment vehicle as the example)

Class 12

Course Summary and Open Discussion

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

An oral presentation and a joint group discussion 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. Each member in the same group will share the same score. The joint group report (2000-3000 words) accounts for 15% of the total course score, and each member in the same group shares the same score.

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 definitely expected.

2. Assignment (30%, including oral presentation and the summary)

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.

The joint group report (**2,000~3,000 words count in English**) accounts for 10% of the total course score, and each member in the same group shares 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 5%)

Substantially exceeding expectation performance (no more than 5%).

There will be no make-up test.

Teaching Materials & References:

English Monographs and Textbooks

1. M. Sornarajah. The International Law on Foreign Investment [M]. Cambridge: Cambridge University Press, 2010.
2. Lisa E. Sachs, Lise J. Johnson, Jesse Coleman: Yearbook on International Investment Law & Policy 2017 [M]. Oxford: Oxford University Press, 2019
3. Andrea Gattini, Attila Tanzi, Filippo. General Principles of Law and International Investment Arbitration [M]. Leiden and Boston: Brill Nijhoff, 2018.
4. Federica Paddeu. Justification and Excuse in International Law: Concept and Theory of General Defences [M]. Cambridge: Cambridge University Press, 2018.
5. Rudolf Dolzer, Christoph Schreuer. Principles of International Investment Law [M]. Oxford: Oxford University Press, 2012.
6. Roberto Echandi, Pierre Sauvé. Prospects in International Investment Law and Policy [M]. Cambridge: Cambridge University Press, 2013.
7. Kenneth J. Vandavelde. Bilateral Investment Treaties: History, Policy and Interpretation [M]. New York: Oxford University Press, 2010.
8. Norah Gallagher, Wenhua Shan. Chinese Investment Treaties: Policies and Practice

[M]. Oxford: Oxford University Press, 2009.

Chinese Monographs and Textbooks

1. 余劲松, 周成新. 国际投资法[M]. 北京: 法律出版社, 2014.
2. 王贵国. 国际投资法[M]. 北京: 法律出版社, 2008.
3. 陈安, 蔡从燕. 国际投资法的新发展与中国双边投资条约的新实践[M]. 上海: 复旦大学出版社, 2007.
4. 梁咏. 中国投资者海外投资法律保障与风险防范[M]. 北京: 法律出版社, 2010.

Journals and Serial Publications

1. 陈安. 国际经济法论丛 [J]. 北京: 法律出版社.
2. Alberto Alvarez-Jimenez: "The Political Economy of Crises and the International Law of Necessity after the Great Recession", in Andrea K. Bjorklund (ed): Yearbook on International Investment Law & Policy (2013-2014), New York: Oxford University Press, 2015, pp.473-505.
3. UNCTAD. World Investment Report [A]. New York and Geneva: United Nations. (2004—2019), 网址: <http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>.
4. UNCTAD. Investment Policy Monitor [A]. New York and Geneva: United Nations, (updated to December 2017), 网址: <http://unctad.org/en/pages/publications/Investment-Policy-Monitor.aspx>
5. UNCTAD. The Protection of National Security in IIAs[R]. United Nations, 2009.
6. UNCTAD. Investor-State Dispute Settlement[R]. New York and Geneva: United Nations, 2014.
7. 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. (2005-2018)

Other Resources and References

1. 2019年《中华人民共和国外商投资法》(Foreign Investment Law of the People's Republic of China of 2019, effective from January 1st, 2020)
2. 《关于解决国家与他国国民之间投资争端公约》(Convention on the Settlement of Investment Disputes Between States and Nationals of Other States)
3. 《多边投资担保机构公约》(Convention Establishing the Multilateral Investment Guarantee Agency)
4. 《与贸易有关的投资措施协定》(The Agreement on Trade-Related Investment Measures)
5. 《中国—东盟全面经济合作框架协议投资协议》(China-ASEAN Investment Agreement)
6. 2012年美国双边投资协定范本 (2012 U.S. Model BIT)
7. 《全面与进步的跨太平洋伙伴关系协定》(Comprehensive and Progressive Trans-Pacific Partnership)
8. 2015年《跨大西洋贸易与投资伙伴协议》草案 (TTIP Draft of 2015) 2016年欧

盟—加拿大自由贸易协定 (EU-Canada FTA of 2016)、2016 年中国—越南自由贸易协定 (EU-Vietnam FTA of 2016)

9. 2012 年中国—加拿大双边投资协定、2015 年中国—韩国自由贸易协定、2015 年中国—澳大利亚自由贸易协定 (China-Canada BIT of 2012, China-Korea FTA of 2015 and China-Australia FTA of 2015)

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>