**INTERNATIONAL LAW OF FOREIGN INVESTMENT**

**(Course: 0679)**

Professor Srilal Perera

Fall 2015

**Syllabus**:

1. **Introduction and Basic Principles**:

Review of development of the fundamental legal principles applicable to foreign investment and their relationship to the development of laws governing State Responsibility, including a preliminary inquiry into the definition of “Investment”. Overview of Course.

Reading from Volume I:

J.G. Starke, “Introduction to International Law”,

Reading from Volume II (“Cases and Materials”):

The ILC Draft Articles on State Responsibility

Mihael Hwang: “Recent Developments in Defining Investment”: FILJ Volume 25 Number 1, Spring 2010. (Please down-load separately)

(First two sessions)

1. **Determining Nationality of a Claim**:
2. The basis of nationality of a claim. The importance of determining nationality under investment claims. What factors determine the nationality of a claim? On what basis can a State assert a claim for an international wrong which affects adversely the foreign investment of a legal person of that State? Discussion of issues: (i) who is a national and on what basis can nationality be determined? (ii) Determination of applicable principles in the case of dual nationals. (iii) How are incorporated companies considered for purposes of determining nationality and therefore extension of Diplomatic Protection? (iv)How are shareholder’s rights as nationals determined?
3. The importance of determining the nationality of natural and juridical persons in investment disputes before the International Centre for Settlement of Investment Disputes (*Rationae Personae)*.

Reading from Volume II:

The International Law Commission’s Draft Articles on Diplomatic Protection and the Commentary (2006).

**Individuals**

The Nottebohm Case: Liechtenstein vs. Guatemala

A18 case: Dual Nationality Cases in the Iran-US Claims Tribunal –

Barcelona Traction Case - Summary

The Mohamadu Diallo Case

Other relevant cases:

Marvin Roy Feldman Karpa v. United Mexican States ; Ioan Micula et.al v. Romania; Hussein Soufraki v. The United Arab Emirates; Siag and Vecchi v. the Arab Republic of Egypt; Loewen v. USA (Please down load all awards independently)

**Corporations**:

The Canadian Car and Foundry Company Ltd v. Germany – German American Mixed Claims Commission

The Barcelona Light Traction, Light and Power Company Case (Belgium v. Spain) – ICJ (1970)

Elettronica Sicula S.p.A (ELSI) (USA v. Italy)(1989)

Ahamdou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) (2007)

(Next 4 sessions)

**III**. **Responsibility of the State**:

What is the State? On what basis can we determine a State’s responsibility for losses incurred by a foreign investor? What if the wrongful act is carried out by a sub-sovereign, a state owned enterprise?

Reading from Volume I:

Srilal Perera, “State Responsibility-Ascertaining the Liability of States in Foreign Investment Disputes.” The Journal of World Investment and Trade”; and

John Westberg, “International Transactions and Claims involving Government Parties,” pgs.23-32

Reading, fromVolume II:

The ILC Draft Articles on State Responsibility: Articles 1-9

Compania de Aguas del Aconquija, SA v. Argentine Republic (Tucuman Case).

Metalclad v. Mexico

Economy Forms v. Iran

Emilio Maffezini v. Spain

Jan de Nul v. Egypt

Other relevant cases which will be referred to: Salini v. Morocco; Salini v. Jordan; Noble Ventures v. Romania; Hamester v. Ghana. (Please down-load separately)

(next 3 sessions)

1. **Exhaustion of Local Remedies:**

Is there an obligation under international law to exhaust local remedies before a State can be held responsible for an internationally wrongful act? Discussion of the “Calvo Clause”.

Reading from Volume I:

C.F. Amerasinghe, “Whither the Local remedies Rule?” ICSID, Foreign Investment Law Journal, Volume 5, No.

(next two sessions)

1. **Internationally Wrongful Acts:**

What are deemed “internationally wrongful acts?” Torts, Delicts, War Crimes, Expropriation, Breaches of Treaty Obligations, Contractual Breaches. Of these, Expropriation, Contractual and Treaty breaches assume direct relevance to foreign investments.

1. **Expropriation:** What is Expropriation? Discussion of issues relating both to direct and indirect forms of expropriation. When and on what basis is a state responsible for taking of property and on what principles can a State be excused from liability for compensation for such actions?

Reading from Volume I:

C.F. Amerasinghe: “State Responsibility for Injuries to Aliens” pp.59-70,

OECD: Catherine Yannaca-Small: “Indirect Expropriation” and the “Right to Regulate” in International Investment Law”; and

John A. Westberg: “International Transactions and Claims involving Government Parties”

**B. Contractual Breaches**: Do contractual breaches by the State amount to an international wrong or engage the responsibility of the State? Under what norms can a contractual breach engage the liability of the State? The principle of *pacta sunt servada.*

Reading from Volume I:

John A. Westberg, “International Transactions and Claims involving

Government Parties”, pgs 149-181

Michael Feit, “Responsibility of the State Under International Law for the Breach of Contract Committed by a State Owned Entity.”

**C. Breaches of Treaty Obligations:** Actions other than expropriation and contractual breaches, which can be breached by States under the provisions of Bilateral Investment Treaties. For example, the *ex aequo et bono* principle and the fair and equitable provisions in bilateral investment treaties. Discussion in contrast with norms such as the State’s exercise of police powers, the right to issue regulations to secure public order and necessity, which are also included in BITs absolve States from responsibility for injuries.

Reading from Volume I

OECD: CatherineYannaca-Small: Fair and Equitable Treatment in International Investment Law

(Next 4 sessions)

1. **Compensation:**

If it is concluded that a State is responsible for wrongful acts under international law what are the standards of compensation to be applied? How is the quantum of compensation calculated?

Reading from Volume I: Judy S. Becker, “Valuing the Depletion of Natural Resources under International Law.”

John A. Westberg, “International Transactions and Claims involving Government Parties” pgs. 211-249 (Separate book);

Other Readings:

Paul D. Friedland and Eleanor Wong: Measuring Damages for the Deprivation of Income–Producing assets: ICSID Case Studies.

(Last 3 sessions)

(**Note: Additional and salient reading material relevant to the above subjects, including current case law will be referred to from time to time during the course).**