BRUSSELS SCHOOL OF INTERNATIONAL STUDIES
KENT LAW SCHOOL
SYLLABUS 2017/2018

LW810
INTERNATIONAL LAW OF FOREIGN INVESTMENT

Time: Tuesdays, 1000-1200
Module Convenor: Professor Harm Schepel
Email: hjcs@kent.ac.uk
Office Hours: Mondays, 1400-1500

MODULE FACTS AT A GLANCE

Level: M /7
Teaching Period: Autumn Term 2017/2019
Credits: 20
ECTS Credits: 10
Learning Outcomes: On successfully completing the module, students will be able to demonstrate:
An ability to systematically evaluate the substantive, analytical, normative and empirical characteristics of international law of foreign investment as field of study and practice.
A practical understanding of how established techniques of research and enquiry are used to create and interpret knowledge in the field and an ability to critically analyse those techniques.
A critical awareness of historical and contemporary theoretical and policy problems around the world that have generated, and continue to inform, the international law of foreign investment.
Originality in the application and synthesis of the above knowledge and understanding.

INTRODUCTION

International investment law and arbitration has developed, in just a few decades, into a burgeoning field of theory and, above all, practice. It has also become one of most contested and politically salient fields of international law, especially against the backdrop of recent heated debates on the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).
The module will provide a critical introduction to the legal institutions and principles defining the field, and place the law and practice of investment law in its historical, political and economic context.

LEARNING AND TEACHING METHODS

The module will be taught in two hour blocks which will combine in different ways, depending on the topic, a lecture format and seminar format. Students are expected not just to do the mandatory reading for each class, but to develop views on the 'guiding questions' and be prepared to articulate these views in class. From time to time, students will also be asked to take the lead on seminar assignments. The purpose of this dialogic method is not to put students 'on the spot' or to police their diligence; law, however, is sometimes rightly defined as communicative practice, and passive consumption of knowledge imparted by the lecturer is decidedly not the ideal learning and teaching method.

Students should expect to spend 175 hours of private study time on the module.

ELECTRONIC SUPPORT: The Moodle page of the module is here:
https://moodle.kent.ac.uk/2017/course/view.php?id=3310

Though the students may find the contents of the page rather disappointing, they are required to check it regularly.

In light of the discursive nature of the class, recordings will not be made.

PERSONAL DEVELOPMENT

On successfully completing the module students will be able to:

1. Present relevant knowledge and understanding in the form of an integrated, reasoned argument through seminar discussion and written assessment
2. Identify and evaluate complex legal and policy problems according to their historical, political and legal context.
3. Carry out independent further research, synthesising material from a variety of sources to inform a sustained and detailed argument.
4. Ability to summarise detailed historical and conceptual material, recognising different positions that arise in the literature surveyed.
5. Appreciate, and critically analyse the implications of, the fact that legal forms arise and operate within complex historical and political conditions.
6. Develop an awareness of, and an ability to critically analyse, the economic, political and/or social implications of legal forms and remedies.

ASSESSMENT

Students will be assessed on the basis of a written essay of no more than 5,000 words, on a topic chosen upon consultation with the convenor. Students will be expected to use materials provided on the course and to undertake independent research of appropriate sources, providing a well-structured and reasoned analysis of a particular topic or topics. Students should be able to demonstrate a strong understanding of the subject matter using the theoretical tools developed on the course.

The essay is due at noon on 9 January 2018.

Number	Format (and word limit if applicable)	Submission Date	Where to submit	Mark and Feedback Returned	% of final mark
1	Essay of no more than 5000 words, including footnotes.	Noon, 9 January 2018.	Electronically to Moodle	Within three weeks	100

Essays

The following document provides guidance on how to research and write essays.
www.kent.ac.uk/brussels/handbook/styleguide.pdf
Law essays should be typed, double or 1½ line spaced and fully referenced. Essays must state the actual word count. Each Module Convenor will set a list of essay topics for the students to choose from, or may give students the opportunity to set their own essay topic after consultation and agreement of an alternative essay title.

Word Limit Policy: The policy is available in the BSIS PGT handbook. See: https://www.kent.ac.uk/brussels/handbook/pgt.pdf

Feedback: Feedback on your essay will be provided in electronic format on Grademark. All essays submitted on time will be returned to you within three weeks. It is imperative that you read and analyse the feedback given to you as this will provide an explanation of why you received a particular mark, what you did well, and what you need to work on to improve your grade.

Essays are seen by three markers: two internal, one external. Dissertations are marked by two internal examiners and read by an external examiner.
Both Kent Law School and the School of Politics and International Relations use the categorical marking scale as set out in the Credit Framework Annex 6: Marking and the standard categories of marks, which are: Pass 50-59%;
Merit 60-69%; Distinction 70% and above.
Details on the Assessment Criteria used by each school can be found below:
• Law - http://www.kent.ac.uk/brussels/handbook/aclaw.pdf
Please note that all marks remain subject to change until confirmed by the Board of Examiners.

How/where to submit: All students are required to submit ONE typewritten electronic copy to Moodle, of each piece of coursework by 12 noon on the day of the deadline. No email notice will be sent to the student to remind them of this deadline.

SUBMISSION OF COURSEWORK

All coursework must be submitted in electronic format (either a 'word' or 'pdf' document) to Moodle, by 12 noon on the day of the deadline set by the module convenor, and as stipulated in the module outline.

Please note that coursework submitted after the deadline will not be marked. Seminar Leaders and Module Convenors are not permitted to grant extensions. An extension will only be permitted if a concession is obtained from the Concessions Committee. The Concessions Committee will only consider a concession if written documentation of medical grounds or personal crisis is provided. Technical reasons such as computer or printer failure and transport problems are not sufficient grounds for concessions. If you would like more information on how to apply for an extension, please contact ukboffice@kent.ac.uk . Alternatively, you can find this information on our handbook: https://www.kent.ac.uk/brussels/handbook/pgt.pdf

FAILURE TO SUBMIT COURSEWORK OR ATTEND EXAMS

Students are expected to submit the coursework and attend the exams required for their specific modules. Students who fail to attend exams or submit coursework will be awarded a mark of '0' for the relevant piece of work/exam. It is therefore important that you speak with our Student Record Administrator regarding any missed coursework/assessments as soon as is possible, so that they can advise you on how to proceed.

ACADEMIC DISCIPLINE

The procedures on academic discipline are outlined in annex 10 to the credit framework (please see the link below for more information)

https://www.kent.ac.uk/teaching/qa/credit-framework/creditinfoannex10.html

The following paragraphs outline and highlight some of the most common types of breaches of academic discipline (plagiarism, duplication of material and conspiring with others) and provide additional school specific information on plagiarism. This list is **not an exhaustive list of academic offences** and you should **familiarise yourself with all relevant rules.**

WHAT IS PLAGIARISM?

Common to all forms of plagiarism is that you intentionally or unintentionally present someone else's arguments, information or words as your own. **You plagiarise**, for example, if: 1) You **copy** sentences or parts thereof **verbatim** from any source **without quotation marks**, thereby suggesting that the copied words are your own when they are not. 2) You **paraphrase** sentences or paragraphs very **closely**. 3) You **use** arguments, information or verbatim quotes from a source **without** acknowledging the source by providing **a reference every time** you use information, arguments or verbatim quotes from that source. Anything written or said by someone else is a **source**, including articles, books, lectures, lecture notes, web pages, dictionaries, speeches, interviews, radio and TV programmes, other students' essays, etc.

Just to make it absolutely clear:

- Every time you use a quote (i.e. you copy sentences or parts thereof verbatim) you have to use quotation marks **and** provide a reference, including the page number.
- Every time you state an argument or information from a source in your own words you have to provide a reference.

WHAT IS DUPLICATION OF MATERIAL?

Duplication of material is a lesser known academic offence which nevertheless carries the same penalties as plagiarism. Duplication of material refers to the submission for assessment of any work or substantial parts thereof that you have previously submitted for assessment at the University of Kent or elsewhere without acknowledging that you are doing so.
If you work on your assignments together with other students, there is a risk that your submission may at least in parts be very similar to the work submitted by the students you worked with. Our plagiarism detection software will detect any such overlaps and report them as plagiarism, thus requiring us to take disciplinary action. Therefore, if you work with others, please check your work for possible similarities and overlaps so that you, and we, can be confident that the assignment you submit is the result of your work and not the work of others.

WHAT IS CONSPIRING WITH OTHERS?

Section 2.3 of Annex 10 to the credit framework specifies the following academic offence: 'Conspiring with others to reproduce the work of others, including knowingly permitting work to be copied by another student'. To highlight an often unappreciated aspect of this type of academic offence it is important to stress that to knowingly allow someone to copy your work (e.g. essay, report etc.) is an offence just as it is an offence to copy someone else's work. Therefore, making your essay or other assignments available to someone else means that you may be penalised if your essay is copied from/by someone else.

WHAT ARE THE PENALTIES?

The penalties can be severe. They include marks of zero for individual coursework and de-registration from university for serious or repeat offences. Additionally, offences may be noted in your student record.

For more information on plagiarism (and referencing) please see The Politics and International Relations Student Guide: https://moodle.kent.ac.uk/2016/course/view.php?id=3209
and the University's policy on academic discipline (Annex 10 to the Credit Framework) which can be found at: http://www.kent.ac.uk/teaching/qa/credit-framework/creditinfoannex10.html

MODULE READING

A note on sources: The general Kent Library Search page (https://www.kent.ac.uk/library/) if fine for most purposes. However, the integration with specialised legal databases (Westlaw, Heinonline, and others) is far from perfect. Should you not be able to find something, go to 'lawlinks'

(https://www.kent.ac.uk/library/subjects/lawlinks/) and through to the Electronic Law Library (https://www.kent.ac.uk/library/subjects/lawlinks/electronic-law-library.html) which provides direct access to the various databases we subscribe to. Especially for US law journals, Westlaw (near the top) and Heinonline (near the bottom) are the places to go.

A. Mandatory Reading

Mandatory readings are listed below in the week-by-week outline. The choice of different readings is guided by different considerations, and students are encouraged to take a critical view of all of them.

B. Recommended Reading

Useful introductory texts to many of the themes discussed in this class are:

David Collins, *An Introduction to International Investment Law* (CUP 2017)
M. Sornarajah, *The International law on Foreign Investment* (4th ed., CUP 2017).
Surya P. Subedi, *International Investment Law- Reconciling Policy and Principle* (3d ed., Hart 2016).

Other important introductory texts include:

Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration- Substantive Principles* (2nd ed., OUP 2017)
Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* (2nd ed., OUP 2012)
Jeswald Salacuse, *The Three Laws of International Investment- National, Contractual and International Frameworks for Foreign Capital* (OUP 2013)

Foundational monographs and collections include:

C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (CUP 2012).
Z. Douglas, J. Pauwelyn and J. Viñuales (eds.), *The Foundations of International Investment Law- Bringing Theory into Practice* (OUP 2014)
M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment*, (CUP 2015)

C. Resources

The most convenient and complete place to find arbitration awards is www.italaw.com. The search function is a little clunky, but as long as you know what you're looking for you'll find it here.

UNCTAD's investment policy hub has been built up to include excellent 'navigators' for both Treaties and agreements and dispute settlement:
http://investmentpolicyhub.unctad.org/

WEEKLY TOPICS AND READINGS

Please note that this a *provisional* plan, providing a general outline of the course. In the nature of these things, the topics might change order, required reading may be modified, presentation materials will be added, and there may well have to be some juggling with dates.

Week 1 (26 September): Introduction and Administration

Outline: The introductory lecture will provide an overview of Investment Law and Arbitration, the course, the seminars and the examination.

Reading: https://www.buzzfeed.com/globalsupercourt

Week 2 (3 October): The Origins and Emergence of International Investment Law

Outline: This class discusses two foundational moments in the development of international investment law.

Reading: Francisco Orrego Vicuña, 'Of Contracts and Treaties in the Global Market', (2004) 8 *Max Planck Yearbook of United Nations Law* 341.
http://www.mpil.de/files/pdf1/mpunyb_orrego_8.pdf
Julien Cantegreil, 'The Audacity of the *Texaco/Calasiatic* Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law', (2011) 22 *European Journal of International Law* 441.
Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in Z. Douglas, J. Pauwelyn and J. Viñuales (eds.), *The Foundations of International Investment Law- Bringing Theory into Practice* (OUP 2014), 11.

Case: *AAPL v Sri Lanka*, ICSID Case ARB/87/3, Final award, 27 June 1990.

Some Guiding Questions: What is (the the significance of) the historical context of both decisions? Is 'globalization' a plausible explanation for the emergence of investment law? Blind evolution? Which interests drive or constrain the development?

Week 3 (10 October): The Political Economy of Investment Law

Outline: In this class, we discuss the rationale(s) underlying investment law, and some empirical evidence supporting them (or not).

Reading: Andrew Guzman, Zachary Elkins, and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000', (2006) 60 International Organization 811.
Lauge Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties', (2014) 58 *International Studies Quarterly* 1.
Jonathan Bonnitcha, 'Foreign Investment, Development and Governance', (2016) 7 *Journal of International Dispute Settlement* 31.
Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties', (2014) 66 *World Politics* 47.

Some Guiding Questions: Why do we have a spaghetti bowl of bilateral treaties and not a multilateral regime? How does colonialism fit into the theory and practice of investment law? Neoliberalism? How would you explain the move towards investment protection between developing countries (South-South BITs?) Between developed countries (North-North BITs?).

Week 4 (17 October): Jurisdictional Issues I: Protected 'investments' and protected 'investors'.

Outline: This is the first of two classes in which we discuss threshold issues of jurisdiction. In this class, we discuss two areas of controversy: the limits on the notion of 'investment' (especially whether only investments that somehow contribute to the development of the host state should qualify for protection), and issues surrounding corporate nationality (especially whether protection should be afforded to companies without any serious economic ties to the home state).

Reading: Julian Davis Morteson, 'The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law', (2010) 51 *Harvard International Law Journal* 257.

Cases: *Abaclat v Argentina*, ICSID Case ARB/07/05, Decision on Jurisdiction and Admissibility, 4 August 2011 (focus on paras 333-387, and on Part III of Abi-Saab's Dissent).
Deutsche Bank v Sri Lanka, ICSID Case 09/02, Award, 31 October 2012, (focus on paras 283-312, and on paras. 6-75 of Khan's dissent.)

Reading: Tania Voon, Andrew Mitchell and James Munro, 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration', (2014) 5 *Journal of International Dispute Settlement* 41.

Seminar assignments:

Consider *Alasdair Ross Anderson and others v Costa Rica*, ICSID Case ARB(AF)/07/03, Award, 19 May 2010, on the subject of illegal investments under the national law of the host state. Would it matter if the national prohibition at issue were not 'reasonable', 'legitimate,' or 'lawful' under international law?
Consider *Postova Bank v Greece*, ICSID Case ARB/13/8, Award of 9 April 2015, paras 228-359. Are you convinced by the Tribunal's efforts to distinguish the relevant BIT from the one in *Abaclat*?
Consider this from *Mobil v Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June 2010, para 204: "As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes." Discuss.

Week 5 (24 October): Jurisdictional Issues II: Umbrella clauses and MFN clauses

Outline: This class will cover two more controversial jurisdictional issues. The 'umbrella clause' found in many- but not all- BITs bring up questions of the distinction between a State's breach of contractual obligations and Treaty obligations. The application of the MFN clause to dispute settlement mechanisms can be seen as a means of effectively 'multilateralizing' the investment law regime.

Reading: Thomas Wälde, 'The "Umbrella" (or Sanctity of Contract/Pacta sunt servanda) Clause in Investment Arbitration', Ms 2004, available here: http://www.biicl.org/files/946_thomas_walde_presentation.pdf
James Crawford, 'Treaty and Contract in Investment Arbitration', (2008) 24 *Arbitration International* 351.

Cases: *Burlington v Ecuador*, ARB/08/05, Decision on Liability, 14 December 2012, paras 208-234, and Orrego-Vicuña's dissent, *passim*.

Reading: Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails', (2011) 2 *Journal of International Dispute Settlement* 97.
Stephan Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a basis of Jurisdiction- A Reply to Zachary Douglas', (2011) 2 *Journal of International Dispute Settlement* 353.

Seminar assignments:

Consider *Siemens v Argentina*, ICSID Case ARB/02/8, Award, 6 February 2007, para 253: "It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action." Is the distinction between acts *iure imperii* and *iure gestionis* an appropriate solution for the conundrum of the umbrella clause?

Consider *RosInvest v Russia*, Award on Jurisdiction, October 2007, paras 131-132: (describing the 'very character and intention' of MFN clauses that 'protection not

accepted on one treaty is widened by transferring the protection from another treaty', and noting that, 'if this is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses.') Discuss.

Week 6 (31 October): Standards of protection I: Expropriation

Outline: Traditionally the most important of all standards of protection, the prohibition of expropriation-without-compensation has lost most of its significance as regards direct seizures of property. The doctrine has been extended, however, to so-called 'creeping' and/or 'regulatory' expropriations.

Reading: Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', (2012) 15 *Journal of International Economic Law* 223.

Cases: European Court of Human Rights, *Yukos v Russia*, Application 14902/04, Judgment of 20 September 2011, available on http://hudoc.echr.coe.int/. Focus on paras 552-666.
Hulley Enterprises v Russia, PCA Case AA 226, Award of 18 July 2014, paras. 1528-1593.

Seminar assignment:
In *Quasar v Russia*, SCC 24/2007, Award, 20 July 2012, paras. 21-23, an explanation is offered for the difference in assessment of Russia's actions in human rights law and investment law. Discuss.

Week 7 (7 November): Standards of protection II: Fair and Equitable Treatment

Outline: The obligation to afford foreign investors "fair and equitable treatment" has become the main battleground on the proper limits of international investment law. It is easy to see why.

Reading: Vandevelde, 'A Unified Theory of Fair and Equitable Treatment', (2010) 43 *New York University Journal of International Law and Politics* 43.

Case: *Clayton v Canada*, PCA Case 2009-04, Award on Jurisdiction and Liability, 17 March 2015, focus on paras. 427-604.

Seminar assignments:

The Israeli Supreme Court recently struck down as unconstitutional a Government decision promising Noble Energy a 'stable regulatory environment' for its off-shore winning of gas. A summary can be found here:
http://elyon1.court.gov.il/files_eng/15/740/043/t63/15043740.t63.pdf

a) Relate the judgment to the doctrine of 'legitimate expectations' in international investment law;
b) Assess the potential international responsibility of Israel for the Supreme Court's judgment.

Go back to *Clayton*, and assess the reasoning on IMS, customary international law, and NAFTA up until paragraph 436.

Week 8 (14 November): Reading week, no class.

Week 9 (21 November): Defenses: Necessity, Countermeasures.

Outline: This week we will discuss two customary international law defenses, that of 'necessity' and that of countermeasures. The first was mounted by Argentina in a string of cases brought in the wake of the devaluation of the peso during the economic crisis at the turn of the century; the second was put forward by Mexico in the context of a long-running dispute over sweeteners with the US.

Reading: Martins Paparinskis, 'Circumstances Precluding Wrongfulness in International Investment Law', (2016) 31 *ICSID Review* 484.

Seminar assignments:

Compare and contrast the approaches in *CMS v Argentina*, ICSID Case ARB/01/8, Award, 12 May 2005, paras. 315-394, and *Continental Casualty v Argentina*, ICSID Case ARB/03/9, Award, 5 September 2008, paras. 160-199. It may be instructive to consult the *Ad hoc* Committee's Decision on Annulment in *CMS v Argentina*, 25 September 2007, paras. 119-136.

Compare and contrast *Archer Daniels Midland v Mexico*, ICSID Case ARB(AF)/04/5, Award, 21 November 2007, paras. 160-236, and *Corn Products International v Mexico*, ICSID Case ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, paras. 161-192. It may be instructive to consult Loewenfeld's Separate Opinion in the latter case.

Week 10 (28 November): Investment Arbitration and its Malcontents

Outline: Part of the legitimacy problem of the investment law regime lies in arbitration itself. We will discuss some of the issues involved, focusing on the analysis from 'insiders'.

Reading: Langford, Behn and Lie, 'The Revolving Door in International Arbitration', (2017) 20 *Journal of International Economic Law* 301.
Gaillard, 'Sociology of International Arbitration', (2015) 31 *Arbitration International* 1.
Michaels, 'Dreaming law without a state: scholarship on autonomous international arbitration as utopian literature', (2013) 1 *London Review of International Law* 35.

Seminar assignment:
Consider the following debate:
Paulsson, 'Moral hazard in international dispute resolution', (2010) 25 *ICSID Review* 339.
Brower and Rosenberg, 'The Death of the Two-Headed Nightingale- Why the Paulsson-Van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded', (2013) 29 *Arbitration International* 7.
Van den Berg, 'Charles Brower's problem with 100 per cent- dissenting opinions by party-appointed arbitrators in investment arbitration', (2015) 31 *Arbitration International* 381.

Week 11 (5 December): Critique and Reform

Outline: Criticism of the investment law regime- and policy responses to it- can be divided in two main strands: one sees to the blurring of traditional notions of capital-exporting states and capital-importing states. The other has to do with the differences between *ad hoc* arbitration and judicial dispute settlement.

Reading: Brower, '"We have met the enemy and he is US!" Is the industrialized North "Going South" on investor-state arbitration?', (2015) 31 *Arbitration International* 19.
Schwebel, 'The outlook for the continued vitality- or lack thereof, of investor-State arbitration', (2016) 32 *Arbitration International* 1.
Sornarajah, 'On fighting for global justice: the role of a Third World international lawyer', (2016) 37 *Third World Quarterly* 1972.

Seminar assignment:
Consider the European Commission's proposal for an investment court.http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf
http://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en

Week 12 (13 December) Consultations on papers.