

## Foreign Investment: Law and Policy Seminar

Professor Alvarez

LAW-LW.10709.001

Fall 2013

## Description

This seminar addresses various legal regimes, both domestic and international, governing an area of vital international economic activity. It briefly examines relevant domestic laws, particularly within the United States, but focuses especially on the bilateral treaties, regional arrangements (such as the North American Free Trade Agreement (NAFTA)), and rules of customary international law that attempt to regulate incoming or outgoing foreign investment. We will be focusing on the type of treatment that by law ought to be accorded foreign investors that seek to establish themselves in a foreign territory or the rules that should apply to such investment once established in a host country. The seminar also introduces students to investment treaty arbitration and some of the burgeoning "caselaw" emerging as a result. International investment law, whether or not considered a distinct "regime," is fast-growing subject that involves a unique blend of public international law, international commercial arbitration and "public law" principles.

Foreign investment is subject to diffuse regulation and not a single overriding treaty or institutional regime. Not only does "foreign investment" have to be defined, but even once we know what we wish to talk about, we have no single institution, no single legal text -- compared to the General Agreement on Tariffs and Trade (GATT) in the case of trade in goods for example -- with which to structure the discussion. To complicate matters, 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 legal topics and will examine only foreign direct investment or "FDI," that is, instances involving ownership with an element of active control by a foreigner -- as when such a foreign born individual or a company based in a foreign country acquires a controlling interest in an existing U.S. company or real estate (as through a merger or acquisition) or when such a person starts up a new company in the U.S. (the latter known as "greenfield investment"). This excludes for the most part, "passive" investment such as through ownership of stock in a mutual fund.

This seminar addresses some of the prominent legal and policy issues surrounding FDI. (For a more comprehensive course on the subject, see the Foreign Investment course offered by Professors Donovan and Howse.) It addresses (1) the theoretical and policy background to investment protection treaties and investor-state dispute settlement; (2) some of the substantive legal standards that are applied in the course of investor-state arbitration; and (3) some of the emerging legitimacy concerns arising from the turn to investment protection treaties and investor-state dispute settlement. Although we will not, as a class, examine many related issues, including project finance or political risk insurance, students who decide to write an optional research paper (for additional academic credit) may choose to focus on related topics that are not the subject of class discussion and/or readings. Those students who choose to write the optional research paper must still write the weekly reaction papers (described below), however. Those choosing to write this optional research paper need to consult with the professor to agree on a suitable topic and a schedule to complete a first and final draft.

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." This is not, in short, 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. (Students interested in that topic should consider the Howse-Donovan FDI course mentioned above instead.) This course does not have a "law and economics" bent and no economics knowledge is assumed (although some might be useful background). While there is some overlap with the Howse-Donovan course, students are not barred from taking both that course and this seminar. 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. (Those who have not taken an international law course are strongly encouraged to, over the first weeks of term, read the chapters on the basic sources of international law in a basic text, such as the West nutshell on Public International Law.)

## Requirements

This is a semester long 2 credit seminar, with two hour class meetings on a weekly basis, devoted to examining assigned readings that will be assigned the week before the class meets. These readings will generally be available on the courseweb or, in rare cases, due to copyright restrictions will be available on course reserve in the law library. The class meets on Mondays, from 4:00 to 5:50 p.m.. 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, as with all seminars, 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 discussion; 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 Sundays at 4 p.m.) must not be 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 skim the reaction papers of other class members prior to class to be fully ready for discussion. They 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; "what I mean by a critique") is included in the first week's readings.) 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. That final reaction paper may be a maximum of 1000 words in length. **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 who have not yet been admitted to the course but are seriously interested should come to the first 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.

Suggested **Optional** Background Reading (available at most bookstores):

Thomas Friedman, *The Lexus and the Olive Tree* (2d ed. 2000)

William Greider, *One World, Ready or Not* (1997)

Joseph Stiglitz, *Globalization and its Discontents* (2002)

Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2006)

### **Tentative Syllabus**

Class 1: Introduction to FDI: Its Causes, Its Alleged Benefits

Class 2: Tensions with FDI and the International Legal Regime governing FDI

Class 3: National Laws on FDI

Class 4: Introduction to the U.S. Bilateral Investment Treaty (BIT)(FIRST REACTION PAPER  
Due 24 hours prior to class meeting)

Class 5: Customary International Law and FDI

Class 6: Introduction to the NAFTA's Chapter Eleven

Class 7: Non-Discriminatory Treatment

Class 8: Indirect and Direct Takings

Class 9: Fair and Equitable Treatment

Class 10: The Umbrella Clause

Class 11: Amicus and the "Public Interest"

Class 12: The Argentina Crisis and the Defense of "Necessity"

Class 13: Human Rights and Other Critiques of the Investment Regime

Class 14: The Future of the Investment Regime

## Week One Introduction

### Readings:

Skim: Laza Kekic, Global foreign direct investment: recent trends and forecasts to 2010, The Economist Intelligence Unit (on courseweb)

Skim: Kisumu, Kenya: Potential opportunities for Investors (May 2008) (on courseweb)

Robert B. Reich, "Who Is Us?" Harvard Business Review (1990)(on courseweb)

Laura D'Andrea Tyson, "They Are Not Us: Why American Ownership Still Matters," The American Prospect 37 (1991)(on library course reserve due to copyright restrictions)

Robert B. Reich, "Who Do We Think They Are?" The American Prospect 49 (1991)(on library course reserve)

Skim various advertisements and news articles from the New York Times, The Economist, the Financial Times, and Time Magazine from Nov. 1999-November 2003(see courseweb)

### Questions for Class Discussion:

The readings for this week present some basic facts about foreign direct investment (FDI). They also introduce the policy debates that incoming FDI, especially the significant wave which occurred in the 1980s and early 1990s within the United States, generated even within a rich country such as the United States. 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 FDI flows.

On the first point, based on the readings and your own general knowledge, what encourages foreign businesses to locate investments in the United States? What encourages U.S. companies to invest abroad? From the point of view of a U.S. investor, what information contained in promotional literature such as the promotional literature on Kisumu do you think would be of most interest to investors? Do you think investors care much about Kenya's laws? About Kenya's treaties? Should they?

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 both Reich and Tyson were members of the same (Clinton) Administration.

What do the drafters of the Kisumu document assume are the benefits of incoming FDI to a country like Kenya? To a municipality like Kisumu?

On the third set of issues: what exactly are the alleged problems/fears generated by incoming FDI for a developed economy like that of the United States? Given the level and proportion of FDI relative to the economy of the United States, should the United States worry about it? Do you think that those who protested in Seattle (see N.Y. Times advertisements) and in D.C. (see Times article) over "globalization" would agree with the view that an open investment climate produces a "win-win" situation for all concerned? Does the backlash against the WTO and international financial institutions within some circles in the U.S. suggest reasons to be skeptical of the benefits of FDI? Are "globalization" concerns fundamentally about FDI?

If not, what are the protestors complaining about? Do you think that either the governments or the peoples of China and Cuba (see related New York Times articles) would agree with the Seattle and D.C. protestors?

## Week Two

### Tensions Over FDI and the International Investment Regime

#### Readings:

Paul Kuruk, "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," 13 Mich. J. Int'l L. 43 (1991)(on courseweb)

Summary of U.S. Bills in Congress Affecting Foreign Investment, 1993 (on courseweb)

J.E. Alvarez, Chapter one from The Public International Law Regime Governing International Investment (required book available for purchase)

On national security screening in the U.S.:

Skim: CRS Report, The Committee on Foreign Investment in the United States (CFIUS), June 12, 2013, available at:

<http://www.fas.org/sgp/crs/natsec/RL33388.pdf>

Bill Black, "U.S. Senate Hearing on Smithfield Foods Poses Challenge to CFIUS,"

Forbes, Guest Post, July 9, 2013, available at:

<http://www.forbes.com/sites/simonmontlake/2013/07/09/u-s-senate-hearing-on-smithfield-foods-poses-challenge-to-cifus/>

#### Optional Reading:

Students who might be interested in writing the optional research paper (for additional credit in this course) might want to see what other students have produced in the past. One research paper written by a Columbia student that (after considerable expansion) became a published student note is Christopher Fenton, Student Note, "U.S. Policy Towards Foreign Direct Investment Post-September 11<sup>th</sup>: Exon-Florio in the Age of Transnational Security," 41 Columbia J. Transnational L. 195 (2002).

(1) As is suggested by the Alvarez chapter as well as the list of U.S. bills proposed in the U.S. Congress in 1993, some have been concerned about the nature, direction, or scope of incoming FDI even within a rich country like the United States. From the perspective of a U.S. taxpayer and voter, would you support today any of the proposed bills considered (but not passed) by the U.S. Congress back in 1993? Do you think U.S. politicians today should support any of these initiatives?

(2) Do you think that the critique of FDI suggested by the Kuruk readings is of purely historical interest or does it still resonate with the concerns some or all developing countries ought to have today with respect to FDI? Does the Kuruk article suggest that there is something uniquely troublesome about investment contracts involving extractive natural resources such as petroleum? If you were an adviser to an African country negotiating with a powerful oil company, what would you do to avoid the problems that Kuruk raises?

(3) As the material on national security screening indicates, the United States has laws that permit the President to block any proposed merger or acquisition by a foreign investor that threatens the essential security of the United States. The President acts on the advice of the Committee on Foreign Investment in the United States (CFIUS), an

inter-agency committee that includes representatives from the U.S. Departments of Commerce, State, Treasury and Homeland Security. The CFIUS process has been revitalized after 9/11 and especially after an attempt by a company (Dubai Ports World) based in the Middle East to purchase a U.S. company responsible for security at U.S. ports. Other countries now emulate the United States and engage in “national security” screening over incoming foreign investment. Do you think such laws are necessary? How would you define the “essential security” interests of the United States? What exactly is “critical infrastructure”? Do you think the U.S. government ought to care whether a proposed investment deal involves a foreign company that has substantial foreign government ownership or control? Does the Smithfield case raise a genuine “security” issue for the United States?

(4) Quite apart from the concerns generated by FDI itself, the Alvarez readings suggest that the international legal regime that has been established to deal with FDI itself raises some legitimacy issues. Do you agree with any of the critiques of the international investment regime summarized by Alvarez? Do your views reflect your own skepticism of the value of incoming FDI (see questions 1-3) or are you troubled by the legal features of the international investment regime and not the fact that the law may facilitate or encourage incoming FDI flows? Would it be accurate to say that in countries that have entered into BITs, foreign investors get better rights at the international level than do most human rights claimants? If so, do you think that this is justified?