Table of Contents

Week 1 - The Sources, History, and Politics of International Investment Law

---

1. Customary International Law in Investment Law

1.1 What is Customary International Law?

Customary international law is one of the primary sources of international law, including investment law. It consists of two main elements: **state practice** (what states do and say) and **opinio juris** (the belief that such practice is legally required or permitted). In the context of international investment law, examples of state practice include official statements at the United Nations, enactment of domestic laws, or physical acts such as sending military vessels into disputed waters. The lecturer gives the example of Australia sending warships to the South China Sea; this act is Australian state practice asserting its view that the waters are international, and it is lawful for their ships to be there. China's practice, in contrast, asserts its own competing claim.

What matters is not just what states do, but *why* they do it. If a state undertakes an action because it believes international law authorizes or requires it, that belief constitutes opinio juris. For example, if Australia's Defence Minister states that warships are in international waters as of right, this is evidence of opinio juris. The two elements together, consistent practice and a sense of legal right or obligation, are necessary to establish a rule of customary international law.

- **Neutrality**: All arbitrators are required to be neutral. While some arbitrators may issue dissents that appear to favor the party that appointed them, many awards are unanimous.
- **Qualifications**: Technically, anyone can serve as an arbitrator if they are appointed. However, in practice, a small community of highly respected and knowledgeable individuals (often barristers, professors, or retired judges) hear most claims.
- **Demographics**: The system has been male-dominated, although prominent female arbitrators exist. Arbitrators are predominantly from "rich countries" (e.g., Western nations).
- **Perceived Leanings**: Some arbitrators are perceived as more "state-friendly" (e.g., Brigitte Stern), while others are seen as more "investor-friendly" (e.g., Charles Brower), influencing which party tends to appoint them.

b. Challenging Arbitrators

- **Grounds**: Arbitrators can be challenged and disqualified, typically on grounds of **personal conflict** or **issue conflict**.
    - **Personal Conflict**: Involves a prior relationship with parties or legal counsel (e.g., family ties, financial interests, even indirect ones).
    - **Issue Conflict**: Occurs when an arbitrator has previously expressed an opinion on a legal issue relevant to the case, leading to concerns that they have prejudged the matter and are not impartial.
- **Controversy of Issue Conflicts**:
    - This is a more controversial ground than personal conflicts.
    - **Arguments Against Disqualification**: Some argue that challenging arbitrators for expressing scholarly opinions would stifle academic debate about investment law and limit the pool of qualified arbitrators. It is argued that expressing an opinion is not the same as bias, and arbitrators should be able to change their minds based on new evidence. The link between past scholarly opinion and present partiality is often challenged.
    - **Arguments For Disqualification**: Maintaining the legitimacy of the system and public confidence is paramount. A "neutral objective observer" test should be applied to determine if a perceived bias exists. If an arbitrator has used exceptionally strong language (e.g., calling a legal interpretation "heretical"), it might indicate a fixed view that compromises impartiality.
    - **Comparison to Judges**: Judges typically do not express strong opinions on legal issues outside the courtroom or write textbooks while actively judging, raising questions about differing standards for arbitrators.
- **Decision-Making on Challenges**:
    - Challenges to an individual arbitrator are normally decided by the **other two arbitrators** on the tribunal.
    - **Concerns**: This raises concerns about potential social pressure within the small community of investment law practitioners, as arbitrators might be reluctant to disqualify colleagues with whom they may work again.

- If an entire tribunal is challenged, the Secretary General of ICSID typically decides. Proposals exist to expand the Secretary General's role in deciding challenges to avoid conflicts of interest among co-arbitrators.

Urbaser v Argentina

The *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic* case (ICSID Case No. ARB/07/26) is a significant example of investor-state arbitration, particularly known for its detailed challenge to an arbitrator based on his previously published scholarly views. The claimants, Urbaser and CABB, initiated arbitration against Argentina on July 20, 2007, under the Agreement on the Reciprocal Promotion and Protection of Investments between Argentina and Spain, signed in 1991.
Lengthy Tribunal Constitution Process The case experienced substantial delays even before the challenge to Professor McLachlan. The initial constitution of the tribunal was protracted due to disagreements between the parties over arbitrator appointments. For instance:

- Claimants appointed their arbitrator in December 2007 and proposed a president.
- Respondent rejected this, proposed another candidate, which claimants then objected to.
- Further rejections and counter-proposals continued through 2008 and 2009, with both parties struggling to agree on a president and even a co-arbitrator.
- The Chairman of the ICSID Administrative Council ultimately appointed Professor Andreas Bucher as President in October 2009, bringing the tribunal into full constitution.
- However, in January 2010, one of the appointed arbitrators, Sir Ian Brownlie, passed away, further suspending the proceeding and necessitating a new appointment.

The Challenge to Professor Campbell McLachlan Professor Campbell McLachlan was appointed by the Argentine Republic on February 26, 2010, to replace the deceased arbitrator. Shortly after, on March 18, 2010, the Claimants filed a proposal to disqualify Professor McLachlan, leading to a suspension of the proceedings. The challenge was based on **"issue conflicts,"** arguing that McLachlan had expressed views in his scholarly publications that prejudged crucial legal questions in the arbitration.
Specifically, the Claimants cited McLachlan's publications on two key issues:

- **Most Favoured Nation (MFN) Clauses and Dispute Settlement:**
  - Claimants highlighted McLachlan's description of the *Maffezini v. Spain* jurisdictional decision as **"heretical"**. The *Maffezini* case allowed an investor to use an MFN clause to import a more liberal dispute settlement provision from another treaty (Chile-Spain BIT) into their own treaty (Argentina-Spain BIT), effectively circumventing a requirement to exhaust local remedies for 18 months.
  - McLachlan had stated that the reasoning of the tribunal in *Plama Consortium Ltd v. Republic of Bulgaria*, which opposed this broad application of MFN clauses to dispute settlement, was **"strongly preferred over that in Maffezini"**.
  - Claimants argued that this amounted to prejudging the jurisdiction of the *Urbaser* tribunal, as their claim was also under the Spain-Argentina BIT and involved similar MFN clause issues.
- **State of Necessity Defence:**
  - Claimants pointed to McLachlan's statements on the state of necessity defence, particularly his strong preference for the Annulment Committee's view in the *CMS v. Argentina* case.
  - He had stated that **"great weight should be given to the Committee's categorical views"** and that the *CMS* tribunal made **"manifest errors of law"** in conflating customary international law with treaty provisions regarding necessity.
  - Since Argentina was expected to invoke the state of necessity defence in the *Urbaser* case (due to the 2002 emergency measures), Claimants believed McLachlan's published opinion on this matter showed prejudgment.

Claimants argued that McLachlan lacked the **impartiality** required of an arbitrator, as his views demonstrated a preference for one litigant's position or prejudged fundamental aspects of the arbitration, thus affecting public trust and the legitimacy of the system. They believed he was **"professionally bound"** by his textbook's view.

Professor McLachlan's Response In response to the challenge, Professor McLachlan distinguished the **task of a legal scholar from that of an arbitrator**. He asserted that while scholars express views based on available legal authorities and should be prepared to reconsider them in light of new developments, an arbitrator's role is to judge the case **"fairly as between the parties and according to the applicable law"** based on specific evidence and submissions. He assured both parties that he would approach the arbitration **"unconstrained by my prior publications and without having prejudged any of the issues"**.

The Tribunal's Decision to Reject the Challenge The decision on McLachlan's disqualification was made by the other two arbitrators on the tribunal, President Professor Andreas Bucher and Mr. Pedro J. Martinez-Fraga. On August 12, 2010, they **rejected the challenge**, allowing McLachlan to remain on the tribunal.

Their reasoning included:

- **Legal Basis:** They relied on Articles 57 and 14(1) of the ICSID Convention, which require arbitrators to possess **"high moral character and recognized competence"** and to **"exercise independent judgment,"** with a **"manifest lack"** of these qualities being a ground for disqualification. They interpreted "independent judgment" and "impartiality" (from the Spanish text of the Convention) as equivalent.
- **Nature of Opinion vs. Bias:** The tribunal stated that simply expressing an opinion, even if relevant to an arbitration, is **not sufficient** for disqualification. They emphasized that no human being is absolutely impartial, and the requirement is the ability to evaluate a case's merits without relying on unrelated factors.
- **Stifling Debate:** Upholding such challenges based on scholarly opinions would **"stifle debate about investment law"** and lead to the disqualification of many experienced arbitrators, potentially **"paralyzing the ICSID arbitral process"**. The tribunal noted that academic activity, including expressing opinions, is part of the system.
- **Trust in McLachlan's Statement:** They had **"no reason whatsoever not to trust"** McLachlan's assurance that he would approach the task unconstrained by prior publications. They also noted that an academic's ability to change their opinion is a key quality.
- **Specificity of Opinions:** They found McLachlan's opinions on necessity to be an analysis of international law rather than a prejudgment of the specific facts of the *Urbaser* case. While his MFN analysis was more "case driven," it remained at a general level of legal interpretation and did not preclude an in-depth analysis of the specific MFN clause in *Urbaser*.
- **Precedent (Limited):** The tribunal referenced other ICSID decisions, such as *Suez/Vivendi v. Argentine Republic*, which stated that a judge's or arbitrator's prior determination of law or fact in one case does not mean they cannot impartially decide another case.

Implications and Broader Context

- **Collegiality:** The decision highlights a potential dynamic where arbitrators, part of a small community of practitioners, might be reluctant to disqualify a colleague due to personal relationships or a desire to preserve their own position in future cases.
- **System Design:** The McLachlan challenge sparked debate about whether arbitrators, unlike judges who generally don't publish scholarly views on active legal issues, should be allowed to express strong opinions that could later come before them. This relates to the legitimacy of the system where parties choose arbitrators, and their autonomy is prioritized.
- **Duration of Arbitration:** Despite the aim for arbitration to be faster than domestic courts, the *Urbaser* case itself, taking nearly **10 years** (from filing in July 2007 to the final decision in December 2016), illustrated that this is not always the case. A significant portion of this time (2.5 years) was spent just constituting the tribunal, and another 4-5 months resolving the McLachlan challenge, before even addressing the substantive jurisdictional questions. This questions the "faster" advantage often attributed to investor-state arbitration.

Week 3 – Scope of Operation - Investor-Investment

I. Who is an 'Investor' and Can Claim Under an Investment Treaty?

To claim under an investment treaty, a claimant must be an **investor of one BIT state with an investment in the other BIT state** (the host state). This allows for **diagonal claims**, such as a UK investor suing India under the UK-India BIT. The claimant must be an ostensibly private entity, not the state itself, though it can be a state-owned company.

A. Nationals (Individuals/Citizens)

1. **Definition**: An "investor" typically includes "nationals". A national is defined as a **physical person** (a human) who is a **citizen under the domestic law** of one of the contracting parties.
    - **Determination**: Usually straightforward (e.g., by looking at a passport). However, complex categories of citizenship (e.g., Overseas Citizen of India, UK territories like Bermuda) require reference to the specific domestic law to determine if full rights of nationality apply.
    - **Application of Domestic Law**: International tribunals, composed of international law experts, may face challenges applying unfamiliar domestic laws, potentially relying on translations and expert evidence.
2. **Genuine Connections to Claimed Nationality**:
    - **Customary International Law (CIL)**: Requires **genuine connections** to the claimed nationality. The *Nottebohm* case established that a person must show where their "genuine kind of home connections" are (e.g., residence, family, property, time spent, economic activities).
    - **BITs**: In general, **BITs do not require genuine connections**; mere citizenship (e.g., confirmed by a passport) is usually sufficient. This is largely a **formalistic approach**.
3. **Dual Citizens**:
    - **Claim Against a Third State**: A dual citizen can typically claim against a third state using either of their nationalities, provided a relevant treaty exists.
    - **Claim Against One's Own State**:
        - **At ICSID**: The ICSID Convention, Article 25(2)(a), **explicitly prohibits** dual citizens from claiming against one of their own home states, deeming it "not international enough".
        - **Outside ICSID (e.g., UNCITRAL arbitration)**: The position is **unclear**. Some tribunals may apply the CIL "dominant and effective nationality" test, as seen in the *Armas v Venezuela* case, where the Swiss Federal Tribunal affirmed that the claimant's Venezuelan nationality was dominant based on the "centre of his economic activities". This suggests a possibility of suing one's own state if the *other* nationality is dominant. However, *Armas v Venezuela* is just one case, and there is no binding precedent in international law, leading to different approaches by different tribunals.