

Short guidance to examiners in JUS5851 International Investment Law

The course in International Investment Law consisted of 11 lectures that covered such topics as nature, history, and key components of the investment law regime; expropriation; fair and equitable treatment and full protection and security; issues of state responsibility, non-discrimination: national treatment and most favoured nation treatment; investment arbitration: framework and key concepts; investment treaty arbitration: jurisdiction and enforcement; investor-state contracts; contract claims vs treaty claims; challenges, legitimacy concerns, human rights, and environmental concerns.

The mandatory reading list includes K. Nadakavukaren Schefer, *International investment law: text, cases and materials* (3rd edition, Edward Elgar Publishing 2020) (except sections 2.1-2.2 and chapter 7. Total number of pages approx. 600 pages (including excerpts)

More information on the course content and learning outcome can be found here
<https://www.uio.no/studier/emner/jus/jus/JUS5851/>

Formal requirements. This is a home exam and students have 24 hours to draft their answers with maximum of 3000 words. Footnotes should be included in the word count of the main text. Not included in this count: front page (with name and title etc.), summary, table of contents and references/bibliography (if relevant for the paper). Students are given a notice on the subject page that assignments/papers with text exceeding the word limit will not be accepted.

Content. The exam questions are based on a scenario where an imaginary state considers drafting a model bilateral investment treaty and is concerned with striking a balance between protecting own interests and offering foreign investors an attractive level of protection. Students are asked to provide short advice on eight questions. The questions test students' knowledge and analytical skills throughout the course, from the concept of investment to dispute resolution provisions and environmental concerns. In addition, some questions enable students to show their creativity.

There is no single answer to each question, and students have the freedom to structure their answer as they find fit. The most important is that they demonstrate understanding of the subject and skills for critical analysis. What follows below are some relevant moments that may give a proper starting point for examiners in their assessment. As always, the quality of the discussion/drøftelse is decisive here.

1) How could the concept of investment be shaped?

The concept of investment can be shaped somewhat restrictively to ensure that the local laws are observed and by excluding protection to investments that do not comply with local laws, requirements on sustainability, human rights, etc. The state may also wish to exclude certain types of investments or investments in specific fields. It is difficult to argue that the state is interested in having an unrestricted concept of investment, and those students who do not limit the concept of investment must have a good justification for this.

2) Should the Draft Articles on State Responsibility be explicitly mentioned in a bilateral investment treaty?

This is a control question, particularly in times of AI. Here it is expected that students demonstrate an understanding that the Draft Articles represent customary international law and that, regardless of being a part of a bilateral treaty or not, they will be most likely applicable. The lecture on the subject paid particular attention to articles 1-3.

3) Should fair and equitable treatment be restricted? If so, how?

In answering this question, we expect that students demonstrate familiarity with the question that fair and equitable treatment is one of the most criticised standards of investment protection, particularly because of its impact on the state's right to regulate. There could be various suggestions on how fair and equitable treatment could be restricted; one of the suggestions may go to limit fair and equitable treatment to the minimum protection under customary international law.

4) *Should an umbrella clause be included?*

The modern generation of bilateral investment treaties includes fewer umbrella clauses. Students may wish to problematise the reasons for this and name a desire to have more predictability in the scope of protection that bilateral investment treaties offer. It is not decisive if the students answer in negative or positive here. The most important is that they show their understanding of umbrella clause and controversial case law connected with it.

5) *Should exhaustion of local remedies be introduced?*

Unlike for the European Court of Human Rights, exhaustion of local remedies is not a common requirement for bilateral investment treaties/investment treaty arbitration. Nevertheless, states might be willing to have it to ensure that an entire state apparatus is tried before a foreign investor receives a right to sue the state in investment arbitration. For foreign investors inclusion of exhaustion of local remedies might be problematic as it will push them to try the case through all instances of the judicial system. It is expected that students show an understanding of the attractiveness of inclusion of the requirement on the exhaustion of local remedies for states and discouraging features for foreign investors. Some students may engage into a historical discussion of the Calvo doctrine and its relevance for nowadays, they shall get some additional points for this.

6) *What are the risks of including MFN-clause?*

During the lectures, we discussed that MFN-clause may have substantive and (depending on the wording and interpretation) procedural consequences. The risk thus associated with MFN-clause is that provision of other bilateral investment treaties may find its application through MFN-clause. For a state with no bilateral investment treaties, this risk is minimal, but it should be aware of the potential consequences of its inclusion, and students are expected to address this risk.

7) *How could environmental concerns be best met in a bilateral investment treaty?*

This question encourages creativity. Students may choose to suggest that environmental concerns are included in the preamble of the bilateral investment treaty, the definition of investment, and substantive standards so that the protection of investments is subjected to compliance with environmental regulation. Some students may also suggest a treaty provision enabling states to file counterclaims based on environmental regulation. Students may also suggest some other and more nuanced solutions. This question allows students to show creativity and understanding of the importance of environmental regulation for foreign investments.

8) *Evaluate pro et contra for having arbitration, domestic courts, or (future) international court as dispute resolution mechanism between a foreign investor and a state in a bilateral investment treaty.*

This last question invites students to engage in comparative exercises. While there could be many ways of structuring an answer, students are expected to name depoliticisation and neutrality as an advantage for international arbitration and consistency and predictability of jurisprudence (along with neutrality) as an advantage for an international court. It is likely that students will negatively assess domestic courts as a dispute resolution body for investor-State disputes. Still, some may argue that for

countries where the judiciary has a long tradition of independence and trust, domestic courts might be an option, noting the importance of neutrality, which is easier to achieve with arbitration and international courts.

General observations.

Normal criteria for censorship naturally apply here - including independence, originality, and clarity. It can happen that a candidate delivers very different performances on each question. This can lead to challenges in grading. It becomes particularly difficult if some questions have to be assessed as failing while the rest is satisfactory. The examiner must then make an overall assessment based on the overall impression of the candidate's knowledge.

Oslo, 12 April 2023

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