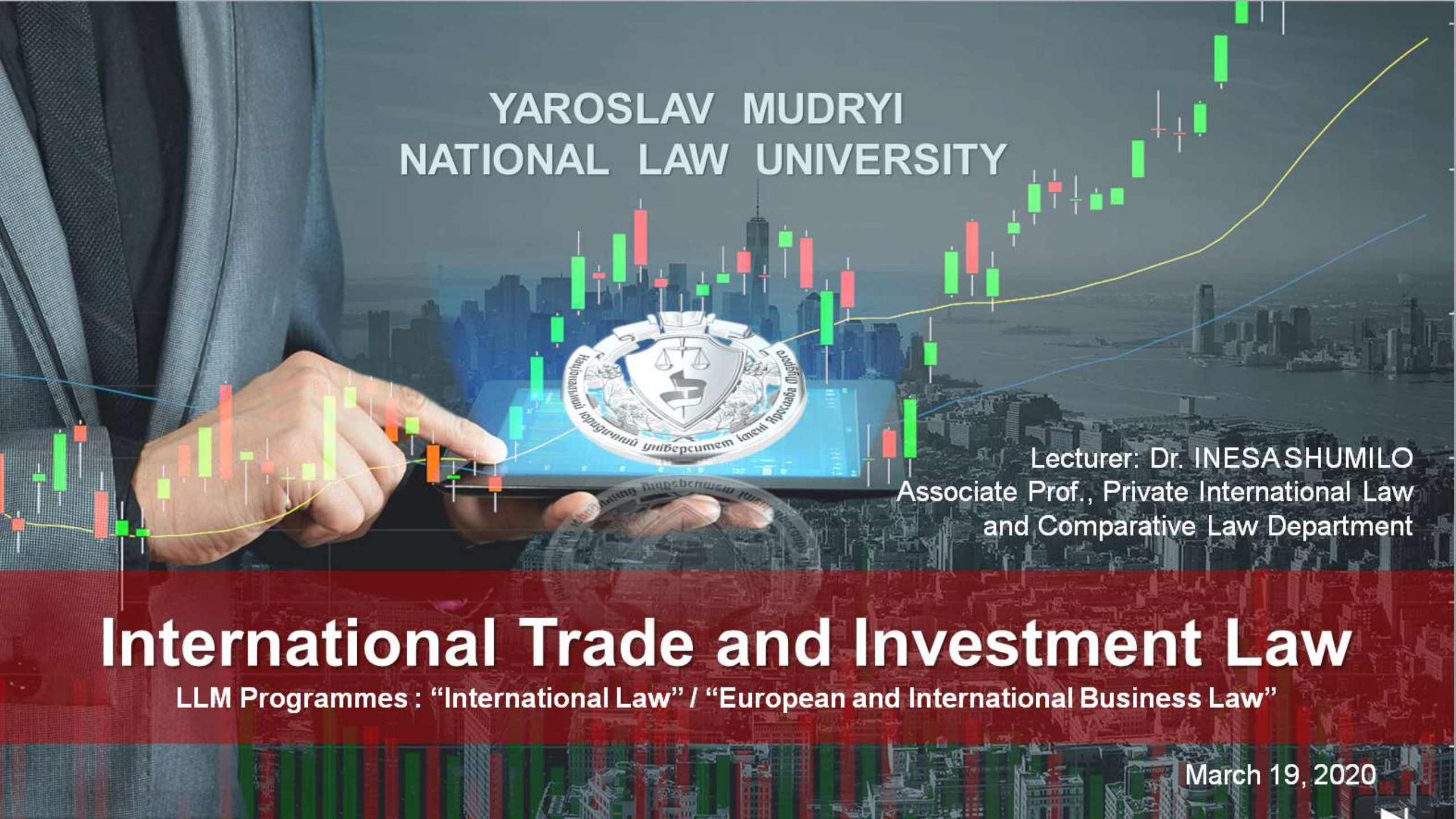

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LLM Programmes : "International Law" / "European and International Business Law"

March 19, 2020

Yaroslav Mudryi National Law University /LLM / Associate Prof. Inesa Shumilo / Kharkiv, Ukraine / March, 2020

International Trade and Investment Law / LLM 2019-2020 NLU
Module II: International Investment Law

Topic 6. NATURE, EVOLUTION AND SOURCES OF INTERNATIONAL INVESTMENT LAW

Yaroslav Mudryi National Law University /LLM / Associate Prof. Inesa Shumilo / Kharkiv, Ukraine / March, 2020

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Yaroslav Mudryi National Law University /LLM / Associate Prof. Inesa Shumilo / Kharkiv, Ukraine / March, 2020

1.1. INTRODUCTION : the relevance

Replace the preface …

*The coronavirus crisis is first and foremost a public health threat, but it is also, and increasingly, **an economic threat**. The so-called "Covid-19" shock will trigger a recession in some countries and a deceleration of global annual growth **to below 2.5 per cent** often taken as the recessionary threshold for the world economy.*

The resulting hit to global income compared with what forecasters had been projecting for 2020 will be around the trillion-dollar mark; the bigger question is could it be worse?

International investment is so important because it makes economic globalization and the growth and jobs it brings possible. Investment provides the finance needed to build value chains that stretch across the planet. It facilitates the trade that allows goods and services to be moved to where they are needed.

International investment also helps domestic economies to grow too, both directly by giving local firms the means to expand in home and export markets, as well as indirectly through access to the investors' expertise, experience and networks.

The 2019 OECD Ministerial is exploring the importance of investment not only to sustain growth but also to address inequalities, encourage innovation, help the transition towards low-carbon economies, and finance the UN's Sustainable Development Goals (SDGs). As Dutch Prime Minister Mark Rutte put it,

"Our priorities are three 'I's: Investment, Investment and Investment!".

https://unctad.org/en/PublicationsLibrary/diaeinf2020d2_en.pdf

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1.2. INTRODUCTION : Module II content

- **The Module II concerns the relationship between foreign investors and host country governments under international law.**
- **The main focus of the Module II is on the protection of foreign investor rights against exercise of government authority, but the responsibility of foreign investors is also dealt with.**
- **We`ll be pay attention to the history, development and basic architecture of international investment law, as well as the main rules and standards of its substantive law. Currently more than 1000 known arbitral cases have been raised under bilateral and multilateral investment treaties. It has made the field of international investment law into a vibrant legal industry where most international law firms in the great arbitration centers of the world have separate departments specializing in such cases.**
- **The aim of the Module II is to develop an understanding of the nature and function of the various legal instruments, mechanisms and processes constituting international investment law, as well as the key issues of the substantive law.**

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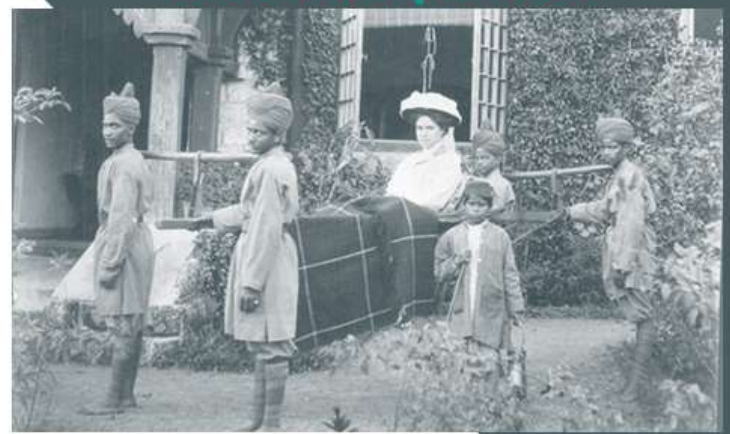
2.1. Historical evolution of foreign investment protection law : the colonial period

- The history of foreign investment in Europe can be traced to early times. There is no doubt that such investment existed in Asia, the Middle East, Africa and other parts of the world

- In the eighteenth and nineteenth centuries, investment was largely made in the context of colonial expansion. Such investment did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave ufficient protection for the investments which went into the colonies. **In this context, the need for an international law on foreign investment was minimal**

- Within the imperial system, the protection of investments flowing from the imperial state was ensured by the imperial parliament and the imperial courts.

- Power was the final arbiter of foreign investment disputes in this early period. The use of force to settle investment disputes outside the colonial context was a frequent occurrence.



2.2. Historical evolution of foreign investment protection law : the post-colonial period

It is convenient to divide the post-war developments into four periods in order to trace the developments which took place:

- The period immediately following the ending of colonialism witnessed hostility and antagonism towards foreign investment generated by nationalist fervour. The result was a wave of nationalisations of foreign property.
- The second period was a period of rationalisation undertaken by the state. There was a divergence between the attitude a state may take at the international level through the articulation of the package of norms associated with the New International Economic Order and what it may take at the domestic level.
- The third period took pragmatism in this area even further. There had been significant shifts in the international economic scene.
- The fourth period saw the prevailing fervour for economic neo-liberalism

3.1. Public and Private International Investment Law

to the issue of the nature …

Legal scholars have historically distinguished between public and private along three classical axes:

- ❑ the first is the distinction between public and private actors;
- ❑ the second, between public law and private law;
- ❑ the third, between public international law and private international law

What kinds of public/private dilemmas have actually arisen in investor-state disputes, and why should we care about them?

Three Examples of Public / Private Clashes

See below

source: Public and Private in International Investment Law: An Integrated Systems Approach
https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0042-6571
Julie A. Maupin - Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law

3.1.1. A Private Concession in Public Infrastructure Services

In 1993, Argentina privatized the water distribution and wastewater treatment services for the city of Buenos Aires, an area comprising some eight million inhabitants. A consortium of European companies bid upon and won the 30-year concession contract . Unfortunately, by 2000, Argentina began to experience serious financial difficulties …

Suez et al. v. Argentina

Argentina defended the suit on the grounds that it had acted out of economic necessity and a duty to protect its population and that it had no reasonable alternative under the circumstances. Several human rights organizations and consumer advocacy groups filed a joint amicus brief urging the tribunal to take into account Argentina's international legal obligations - under several human rights treaties - to ensure uninterrupted access to safe drinking water.

The investors claimed that Argentina had, by its emergency measures, expropriated their investment, subjected it to unfair and inequitable treatment, and failed to provide it with full protection and security as required under the treaties. They sought compensation for the full market value of the investment as it stood prior to Argentina's abrogation of the dollar-peso convertibility law, to include 23 years' worth of lost profits calculated at the investment's pre-crisis profitability level

In an award on liability issued in 2010, the majority of the arbitral tribunal found that Argentina had violated the treaties' fair and equitable treatment standard by frustrating the investors' legitimate expectations concerning the investment.

3.1.2. Private Financing of Public Debt

After Argentina defaulted on some $100 billion in external debt in December of 2001, eight major Italian banks formed an association to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina." This association declined to participate in the debt restructuring deal that wasoffered by Argentina and accepted by the majority of its creditors in 2005.
The claim was brought by the Italian association under the Italy-Argentina bilateral investment treaty on behalf of 180,000 Italian holders of defunct Argentine bonds.

But in August of 2011, a majority of the arbitral tribunal held that it had jurisdiction to entertain the mass action by the remaining 60,000 claimants and that it would proceed to hear the merits of the dispute.

Argentina strongly objected to the registration of the dispute, arguing that sovereign bonds sold on international exchanges are not foreign direct investments for purposes of the ICSID Convention and that the Argentina-Italy bilateral investment treaty did not contemplate the possibility of
mass arbitration claims.

The timing of the decision could not have been more momentous. With the Eurozone in full crisis-management mode and the Greek debt restructuring process already underway,

disgruntled investors the world over began to consider whether it might be possible to bring similar mass claims against Greece …

3.1.3. Private Property in Public Health Hazards

In November of 2011, the Australian parliament approved the Tobacco Plain Packaging Act. The Act attempts to "reduc[e] the attractiveness and appeal of tobacco products to consumers“ by "prohibit[ing] the use of trade marks, symbols, graphics or images on or in relation to tobacco products and packaging . . . ."

Argentina defended the suit on the grounds that it had acted out of economic necessity and a duty to protect its population and that it had no reasonable alternative under the circumstances. Several human rights organizations and consumer advocacy groups filed a joint amicus brief urging the tribunal to take into account Argentina's international legal obligations - under several human rights treaties - to ensure uninterrupted access to safe drinking water.

PHILIP MORRIS
Philip Morris v. Australia

In its notice of arbitration, Philip Morris has alleged that Australia's prohibition on the display of tobacco-related trademarks has expropriated the value of its shares by "destroy[ing] the commercial value of the [company's] intellectual property and goodwill" 90 and "undermin[ing] the economic rationale of the investments . . . .“

By way of remedy, the company asks the arbitral tribunal to order Australia to suspend the enforcement of the plain packaging legislation 92 or, in the alternative, to pay Philip Morris compensatory damages for the lost value of its investment

Despite the eye-popping numbers and troubling questions - or perhaps because of them - the regulatory chill hypothesis has been hotly debated within the investment arbitration community.

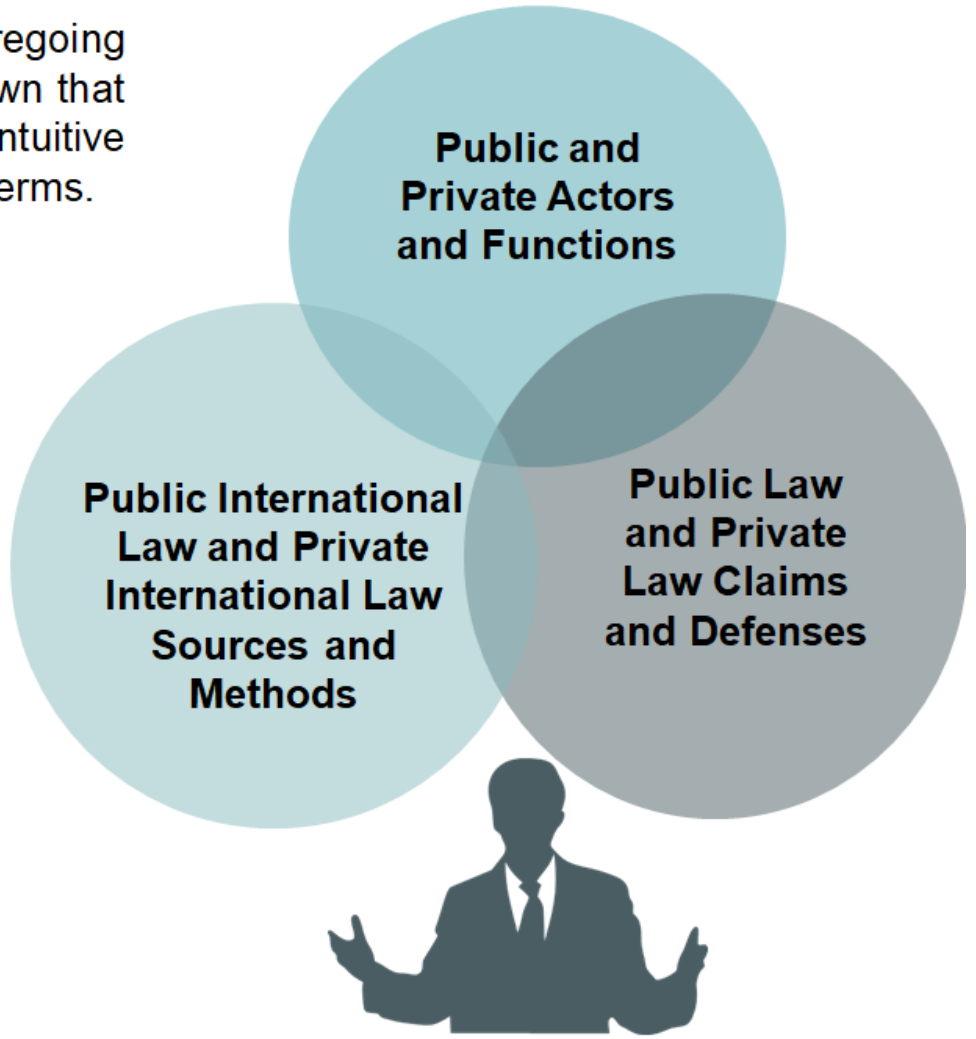
For now, what is not subject to debate is this: in the present Philip Morris dispute, three privately appointed, non-Australian arbitrators will decide what price Australia must pay, if any, for its most recent effort to reduce the public health scourge of cigarette smoking

3.2.The Integrated Systems Approach

☑ The ***Suez, Abaclat, and Phihp Morris*** case studies and the foregoing discussion of international investment law's structural peculiarities have shown that the stakes are high in this game. They have also revealed an undeniable, intuitive appeal behind the impulse to discuss the regime's makeup in public/private terms.

Dr. Julie A. Maupin :
To ponder whether the international investment regime is a
transnational public governance regime or
a private dispute settlement system
is to ask the wrong question.

"International investment law is at once neither and both of these things. They are two sides of the same coin, and each shapes and defines the other. The better question, therefore, is to consider how the investment regime and its many decision-makers should go about handling the inevitable conflicts of rights, interests, and values that must arise within a complex regime that serves and impacts upon so many diverse stakeholders"



Would you agree? Discussion …

4. Sources of International Investment Law

TREATIES	CUSTOM	GENERAL PRINCIPLES OF LAW	JUDICIAL DECISIONS	SHCOLARY WRITINGS	SOFT LAW
MULTILATERAL TREATIES	Diplomacy Protection	***non-liquet*** situations Art.38(1)(c) of the ICJ statute	subsidiary source	"Teachings of the most highly qualified publicists of the various nations" constitute the last source of international law mentioned in *Article 38(1)(d) of the ICJ Statute*, and it is referred to as a subsidiary means for the determination of international legal rules.	Non-binding resolutions of the UN General Assembly
WTO – NAFTA - ASEAN etc.		Wide-ranging character	"… investment tribunals are likely to follow accretion of rulings on the same subject matter *(in similar circumstances)* and develop *jurisprudence constante* to enhance stability and predictability in this sphere"		International Bar Association Rules on the Taking of Evidence in International Arbitration
The Abs–Shawcross Convention (Draft)	The Emergency of the Minimum Standard	Transposability to International Law			Guidelines on Conflicts of Interests in International Arbitration
BILATERAL TREATIES		Recognized in states' municipal legal systems ***foro domestico***			
Alongside over 2,700	Calvo Doctrine				

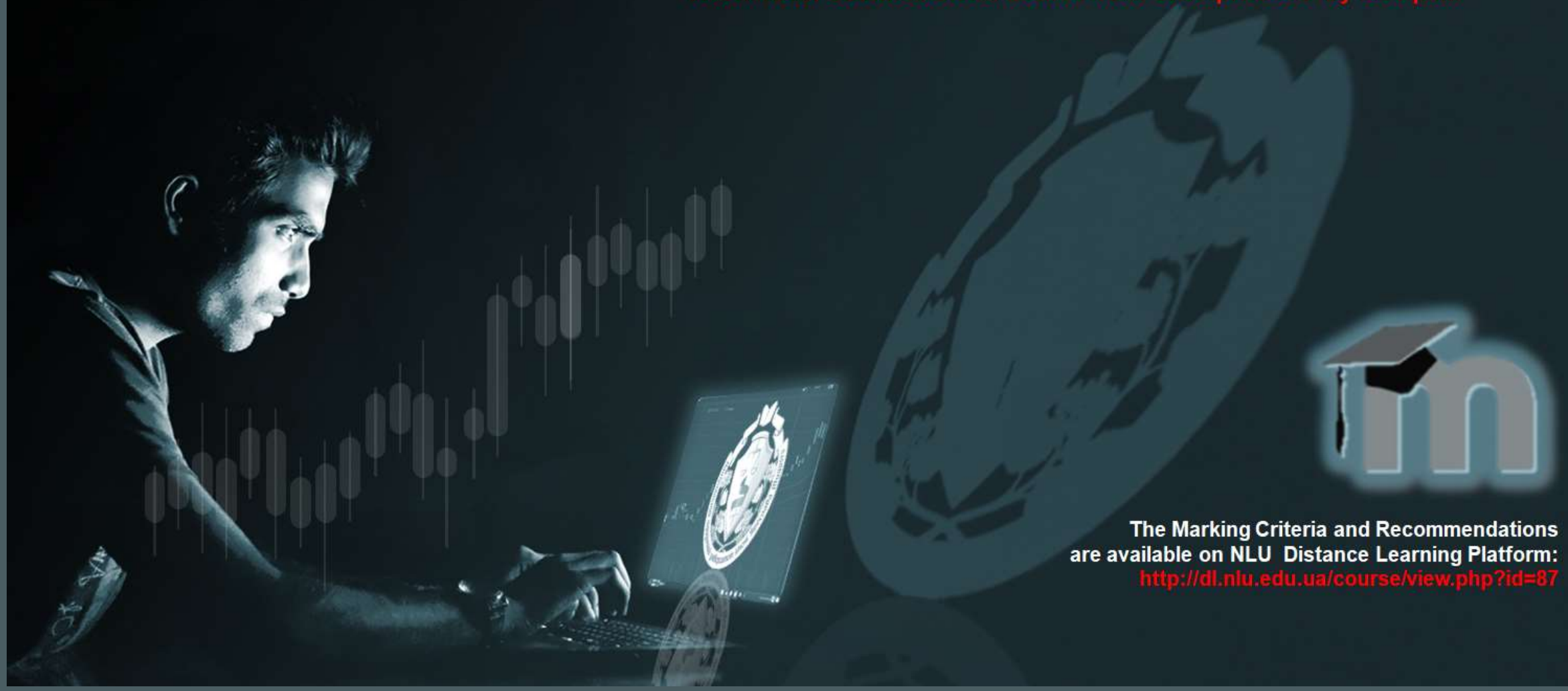
The article is available on NLU Distance Learning Platform :

Moshe Hirsch. SOURCES OF INTERNATIONAL INVESTMENT LAW. Maria Von Hofmannsthal Chair in International Law, Faculty of Law & Department of International Relations, Hebrew University of Jerusalem

We kindly remind :

As well as the examination at the end of Semester B, students will be required to submit WTO Law written coursework - essay or case presentation

The date for submission for coursework 3rd April 2020 by 5.00 p.m.



The Marking Criteria and Recommendations are available on NLU Distance Learning Platform:
http://dl.nlu.edu.ua/course/view.php?id=87

NB: QUARANTINE

On March 12th, following the instructions of the Government of Ukraine and the Ministry of Ministry of Education and Science of Ukraine on prevention of the new coronavirus (COVID-19) **from March 12th to April 3rd inclusive, the contact study process at Yaroslav Mudryi National Law University was suspend**

But for students the study process is not interrupted and will be conducted remotely during the period. **International Trade and Investment Law** classes will be as scheduled, using NLU's Moodle virtual learning environment. The sessions will use interactive tools, live broadcasts of the sessions, online chats, and other virtual environments. Study materials is

available on NLU Distance Learning Platform :

http://dl.nlu.edu.ua

Students who have questions about organizing remote study process in the virtual environment, can contact by email:
i.a.shumilo@nlu.edu.ua