

# Latest Developments in International Investment Law and Dispute Settlement

**Root Number:** 446639

**ECTS:** 3

**Lecturers:** Roberto Echandi & Rodrigo Polanco

**Dates:** 5 – 9 July 2021

**Location:** In response to the COVID-19 pandemic and following the guidelines established by the University of Bern, all courses of the 2020 WTl Summer Academy will only be held online. This course will have live sessions on Zoom.

**Audience:**

- Government officials; Embassy staff; people working for international organisations and NGOs
- Master of Advanced Studies of International Law and Economics (MILE) Students
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe
- Students from various universities across Switzerland

## Course Description

This course will examine the latest trends in the negotiation and implementation of international investment agreements (IIAs), placing them into their political economy and public policy context, and with respect to investment dispute settlement, non-litigious investor-State conflict management, devoting particular attention to the proposals for ISDS reform and improvements as well as proposal to replace it with other alternatives, including the use of non-litigious means for addressing investor-State conflicts, and the development of standing or multilateral investment courts, following developments in the EU, Canada and UNCITRAL.

In addition to the recently developed concept and practice on non-litigious investor-State conflict management, key features of investor-state arbitration procedures will be briefly presented, describing the main phases of the investor-state arbitration process, such as consent and jurisdiction, the implications of the choice of different procedural rules (with particular focus on ICSID and UNCITRAL), available remedies and post-award remedies. It will also introduce and highlight the current developments of ISDS alternative means of dispute resolution (ADR) different to arbitration.

This course will also analyse the latest trends in the negotiation and implementation of IIAs, devoting particular attention to investment promotion and facilitation, as well as the most recent jurisprudence on investment protection. Key differences in the substance of investment protection between bilateral investment treaties (BITs) and the investment chapters of preferential trade agreements (PTAs), particularly recent mega-regional agreements such as CETA, the CPTPP, and the USMCA, will be explored.

Alternatives to regulatory fragmentation in investment law will also be addressed, including the relationship between investment and trade, as well as and economic development and prospects for multilateral rule-making in the investment field.

## Lecturers

### Roberto Echandi

Dr Roberto Echandi is a Lead Trade and Investment Specialist of the Macroeconomics, Trade and Investment Global (MTI) Practice of the World Bank Group (WBG). In addition to Global Lead for Investment Policy at the WBG, he was formerly the director of the Programme on International Investment and member of the faculty at the World Trade Institute, University of Bern, and member of the faculty at the Master's Programme on International Economic Law and Policy at the University of Barcelona. He is also a member of the Editorial Board of the Journal of International Economic Law (JIEL) as well as the Journal of World Investment and Trade (JWIT).

He has also been Ambassador of Costa Rica to the Kingdom of Belgium, Grand Duchy of Luxembourg and the European Union, and Chief Negotiator for Costa Rica for the Association Agreement between Central America and the European Union. For more than a decade he acted as Chief Negotiator for Costa Rica in numerous international negotiations on investment, trade in services and dispute settlement, among other trade-related subjects.

Dr Echandi received his LLM and undertook his doctoral studies in international trade law from the University of Michigan School of Law. He also holds an MPhil in Latin American studies from the University of Oxford and a law degree from the University of Costa Rica and a PhD in Law from the University of Bern. He has served as Adjunct Professor of Law at Georgetown University Law Center, Director-General for International Trade at the Ministry of Foreign Trade of Costa Rica, Special Adjunct Ambassador for US Trade Affairs, and legal advisor to the Appellate Body Secretariat of the WTO, and Member of the ICSID Panel of Conciliators. Roberto has published several books and articles examining investment issues, dispute settlement, trade in services and the evolution of regional economic integration in the Americas.

### Rodrigo Polanco

Dr Rodrigo Polanco is a Senior Researcher and Lecturer at the World Trade Institute, University of Bern, a Legal Advisor at the Swiss Institute of Comparative Law, and a

Visiting Professor at the University of Chile. He is a former Assistant Professor of International Economic Law at the University of Chile Faculty of Law, where he also served as the Director of International Affairs, and a former Lecturer and Postdoctoral Researcher at the University of Luzern (NRP 75 – The Governance of Big Data in Trade Agreements).

Before managing the Academic Coordination of WTI Advanced Master Programmes, he joined the WTI as a researcher/lecturer, and also as coordinator of the SECO Project (which supported development of Regional Competence Centres for Trade Law and Policy in Peru, South Africa, Vietnam, Indonesia and Chile) and of the SNIS Project (Diffusion of International Law: A Textual Analysis of International Investment Agreements).

He is also a published scholar and legal practitioner with experience in both the public and private sectors, specialising in economic and international law, investment law, trade law, and air and space law. Dr Polanco is one of the co-founders of the Electronic Database of Investment Treaties (EDIT), <https://edit.wti.org/document/investment-treaty/search> . He holds a Bachelor and a Master of Laws from Universidad de Chile School of Law, an LL.M. in International Legal Studies from New York University (NYU) School of Law, and a PhD from the University of Bern, Graduate School of Economic Globalisation and Integration, specialised in international investment law.

Rodrigo has been visiting professor at Universidad Externado Colombia and member of the editorial team of their Law and Economy Review (Con-Texto), and a visiting professor and research external evaluator of the Pontifical Catholic University of Peru (PUCP). He is also a co-founder of Fiscalía del Medio Ambiente (FIMA) a Chilean non-profit organisation working in public interest environmental cases, and teaching local communities and members of the judiciary on environmental law. He serves as director of their environmental law journal (Justicia Ambiental).

## Learning Objectives:

- Have a clear understanding of the conceptual differentiation between investor-State conflict management and investor-State dispute resolution and the practical implications of such distinction.

- Have a clear understanding of the network and architecture of rules governing the settlement of investment disputes at the domestic, bilateral, regional and multilateral levels.
- Know the key trends, main features and effects of dispute settlement procedures in international investment law.
- Understand specific topics in investor-State arbitration, such as the implications of the choice of different procedural rules.
- Know recent developments in investment law treaty-making, including the relationship with trade agreements as well as economic development.
- Understand the most important reforms to policy and regulations regarding investor-State dispute settlement that have been implemented or proposed as alternatives to investor-State arbitration or to improve that system.

## Exams and Grades:

- Students' knowledge will be assessed on the basis of an open book, take home exam which needs to be completed on an individual basis. The exam will consist of essay questions.
- Take home assignment made available on Thursday after class and to be submitted before Friday by 20:00.
- One question from Roberto Echandi, carries 50% weight in the final course grade.
- One question from Rodrigo Polanco, carries 50% weight in the final course grade.

## Course Overview

Date	Day	Time	Lecturer/s	Topic
5. July	Monday	Recording (sent via email)	Roberto Echandi	Understanding Foreign Direct Investment (FDI) and Development: Past, Present and Future
		15:00 - 17:00 Live Zoom session		Introduction to Investment Policy and Law: Domestic Investment Regulation, International Investment Agreements (IIAs) and Evolution in Investment Rule Making
6 July	Tuesday	Recording (sent via email)	Roberto Echandi	The Blind Side" of International Investment Law: Implementation of IIAs in Practice
		15:00 - 17:00 Live Zoom session	"	Innovations in investment treaty-making practice

<b>7 July</b>	Wednesday	10:30 – 12:30 hrs	Rodrigo Polanco	Brief examination of ISDS key elements and its main criticisms
		14:00 – 16:00 hrs	“	Improving ISDS: admissibility, role of treaty parties, role of third parties and transparency. The work of UNCITRAL Working Group III.
<b>8 July</b>	Thursday	10:30 – 12:30 hrs)	Rodrigo Polanco	Alternatives to ISDS: Diplomatic protection, state to state arbitration, regional mechanisms.
		14:00 – 16:00 hrs	“	Alternatives to ISDS: Domestic courts, contract-based arbitration, investment court system.
<b>9 July</b>	Friday	until 20:00 hrs	Take home exam	

## MONDAY, JULY 5, 2021

**Lecturer: Roberto Echandi**

**Morning Session:** Understanding Foreign Direct Investment (FDI) and Development: Past, Present and Future

### Topics

- Role of FDI and development: quantitative and qualitative dimension
- Introducing the investment cycle
- The different types of FDI investment, their political economy, impact for development and relevance for investment policy and regulation
- Impact of different types of FDI through history: insertion of developing countries within the world economy

**Afternoon Session:** Introduction to Investment Policy and Law: Domestic Investment Regulation, International Investment Agreements (IIAs) and Evolution in Investment Rule Making

### Topics

- The historical development of international investment law, particularly focusing on its historical origins, policy objectives and evolution.
- The different levels on international investment regulation
- Facts and figures on the negotiation of international investment agreements (IIAs) and on the escalation of investor-State arbitration

### Compulsory Reading Material

- Echandi, R. (2018), "Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements: Recent Developments in Investment Rule-making" in Yannaca-Small Katia (Ed) Arbitration Under International Investment Agreements: A Guide to Key Issues, Second Edition (OUP 2018).
- Sornarajah M, (2016), "International Investment Law as Development Law: The Obsolescence of a Fraudulent System" , in Bungenberg, M, Herrmann C, Krajewski M,& Terhechte J (Eds) 2016 European Yearbook of International Economic Law, (2016 Springer), pp. 210-230.

- Echandi, R (2016) “Be Careful with What You Wish: Saving Developing Countries from Development and the Risk of Overlooking the Importance of a Multilateral Rule-Based System on Investment in the Twenty-First Century” in Bungenberg, M, Herrmann C, Krajewski M, & Terhechte J (Eds) 2016 European Yearbook of International Economic Law, (2016 Springer), pp. 234-270
- World Bank Group (2017) Investment policy and promotion diagnostics and tools: maximizing the potential benefits of Foreign Direct Investment (FDI) for competitiveness and Development, available at: <http://documents.worldbank.org/curated/en/666341500008847215/Maximizing-the-potential-benefits-of-foreign-direct-investment-FDI-for-competitiveness-and-development>
- World Bank Group (2017) 2017/2018 Global Investment Competitiveness Report: Foreign Investor Perspectives and Policy Implications, available at: <https://openknowledge.worldbank.org/handle/10986/28493>
- International Center for Settlement of Investment Disputes (ICSID) Case Load Statistics, available at: <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>

### Suggested Readings:

- Dolzer & Schreuer Principles of International Investment Law (OUP 2012, 2nd Edition). Chapter 1.
- Newcombe & Paradell Law and Practice of Investment Treaties (Kluwer 2009) Chapter 1.
- Echandi, R (2011) “What do Developing Countries Expect from the International Investment Regime?”, in Alvarez J. & Sauvant K (Eds) (2011) The Evolving International Investment Regime: Expectations, Realities, Options, (Oxford: Oxford University Press) pp.3-21
- World Bank (2015) Impact of Investment Policy in a Changing Global Economy: A review of literature. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/22859/The0Impact0of00ew0of0the0literature.pdf?sequence=1&isAllowed=y>
- Echandi R. & Sauve P.(Eds) (2013) Prospects in International Investment Law and Policy (Cambridge: Cambridge University Press ). Part IV. “From an uneven international investment regime towards a coherent international investment system: the way forward”.
- Sauvant K. & Ortino F. (Eds) (2013), “Improving the international investment law and policy regime: Options for the future” (2013) pp. 10-25 available at <http://forin.finland.fi/public/download.aspx?ID=113259&GUID=%7B1202781B-0D9B-4E9C-9621-FCA4DA87881E%7D> .



## TUESDAY, JULY 6, 2021

**Lecturer:** Roberto Echandi

**Morning Session:** “The Blind Side” of International Investment Law: Implementation of IIAs in Practice

### Topics:

- The importance of long-term retention of FDI for development and the rationale of IIAs
- Understanding the political risks arising out of government conduct
- Correlation of political risks affecting FDI in practice and key investment protection clauses in IIAs
- Political economy of investor-State conflict
- Escalation of investor-State conflict into legal disputes
- Lessons on implementation of IIAs to foster greater retention and expansion of FDI and increase investors' confidence

### Compulsory Reading Material

- Echandi, R. & Gonstead M, (2017), “Investor State Conflict Management” in Cottier T & Nadakavukaren Schefer K, (Eds) Elgar Encyclopedia of International Economic Law (EE 2017), pp.335-338
- Echandi, R. (2014) Investor-State Conflict Management: A Preliminary Sketch, 11 Transnational Dispute Management, available at: <https://www.transnational-dispute-management.com/article.asp?key=2083>
- World Bank Group (2017) 2017/2018 Global Investment Competitiveness Report: Foreign Investor Perspectives and Policy Implications, available at: <https://openknowledge.worldbank.org/handle/10986/28493>
- Echandi R (2013), “Complementing Investor-State Dispute Resolution: A conceptual framework for Investor-State Conflict Management” in Echandi R.& Sauvé P.(Eds) (2013), Prospects for International Investment Law and Policy (Cambridge: Cambridge University Press)

**Afternoon Session:** Innovations in investment treaty-making practice**Topics:**

- Defining and limiting the scope of investment protections
- The links between investment and economic development (e.g. right to regulate, corporate social responsibility, not lowering environmental or labour standards).
- A Multilateral Agreement on Investment Facilitation?

**Compulsory Reading Material**

- Review Articles 12 and 25, Text of the Model Indian Bilateral Investment Treaty  
[https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)
- Review Articles 15 and 25, Brazil – Guyana BIT (2018),  
<https://investmentpolicyhub.unctad.org/Download/TreatyFile/5763>
- Review Article 9, Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments  
<http://investmentpolicyhub.unctad.org/Download/TreatyFile/4814>

**Suggested Reading Material**

- Dressler, Andreas. “Investment Facilitation: A Practical Perspective.” E15 Investment Theme Think Piece, May 2018, 12.
- Bogliolo Piancastelli de Siqueira, Ada. “What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?” E15 Investment Theme Think Piece, June 2018.
- Titi, Catharine. “The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties.” E15 Initiative (blog). Accessed February 4, 2019. <http://e15initiative.org/publications/the-evolution-of-substantive-investment-protections-in-recent-trade-and-investment-treaties/>.

**WEDNESDAY, JULY 7, 2021**

**Lecturer:** Rodrigo Polanco

**Subject:** Criticisms to Investor-State Dispute Settlement (ISDS)

**Topics**

- Brief examination of ISDS:
  - Consent to arbitration and its requirements.
  - Establishment of the tribunal
  - Jurisdiction *ratione materiae* and *ratione personae*
  - Differences between ICSID and UNCITRAL (and others) rules of arbitration
  - Award: Annulment and setting aside
- Legitimacy issues
- Procedural issues
- Improving Investor-State Arbitration:
  - Admissibility: Limiting investor access to ISDS
  - Role of treaty parties: Binding interpretations and Non-Disputing Party Submissions
  - Role of third parties: *Amicus Curiae*
  - Transparency: ICSID and UNCITRAL Reforms
- UNCITRAL Working Group III Process

**Compulsory Reading Material**

- Cheng (2020) "The Search for Order within Chaos in the Evolution of ISDS", *ICSID Review - Foreign Investment Law Journal*, Volume 35, Issue 1-2, Winter/Spring 2020, pp. 1–19.
- UNCTAD (2013) *Reform of Investor-State Dispute Settlement: In search of a Roadmap*, IIA Issue Note N° 2, June.
- UNCITRAL (2019) *Possible reform of investor-State dispute settlement (ISDS)*, Note by the Secretariat.

**Optional Reading Material**

- Alschner, Wolfgang (2020) "Correctness of Investment Awards: Why Wrong Decisions Don't Die", *The Law & Practice of International Courts and Tribunals*, 18(3), 345-368.

- Giorgetti, Chiara, Ratner, Steven, Dunoff, Jeffrey, Hamamoto, Shotaro, Nottage, Luke, Schill, Stephan W., and Waibel, Michael. (2020). Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options, *The Journal of World Investment & Trade*, 21 (2-3), pp. 441-474.
- Henckels, Caroline (2016) "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP." *Journal of International Economic Law* 19, no. 1 (March): 27–50.
- Langford, Malcolm, Behn, Daniel & Lie, Runar Hilleren (2017) "The Revolving Door in International Investment Arbitration", *Journal of International Economic Law*, Volume 20, Issue 2, June 2017, Pages 301–332.
- Polonskaya, Ksenia (2020) "Metanarratives as a Trap: Critique of Investor–State Arbitration Reform", *Journal of International Economic Law*, Volume 23, Issue 4, December 2020, pages 949-971.
- Van Harten, Gus (2012). Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration. *Osgoode Hall Law Journal*, 50(1), 211-268.

**THURSDAY, JULY 8, 2021**

**Lecturer:** Rodrigo Polanco

**Morning Session:** Alternatives to Investor-State Dispute Settlement

**Topics:**

- Diplomatic protection/espousal and investments disputes
- State-to-State Arbitration in investment disputes
- Contract-based investment arbitration
- The use of regional mechanisms
- The role of domestic courts in investment disputes
- Investment Court System

**Compulsory Reading Material**

- Council of the European Union, "Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes", 12981/17, ADD 1 DCL 1, FDI 25 WTO229 (20 March 2018).
- Hepburn, Jarrod, Pappas, Martins, Poulsen, Lauge N Skovgaard, and Waibel, Michael (2020), "Investment Law before Arbitration", *Journal of International Economic Law*, Volume 23, Issue 4, December 2020, Pages 929–947.
- Polanco, Rodrigo (2019) "Current and Future Roles of Diplomatic Protection in Investment Disputes", in *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?*, Cambridge University Press, pp. 89-166.

**Optional Reading Material**

- Boisson de Chazournes, Laurence (2019) "The Blurring of the Line Between Contract-Based and Treaty-Based Investment Arbitration", *ITA in Review* Vol. 1, Issue 2, pp. 98-105, Institute for Transnational Arbitration.
- Bungenberg, Marc & Reinisch, August (2020) "Design and Implementation of a Two-Tiered MIC", in *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Law, Special Issue, Second Edition (Marc Bungenberg et al. eds), pp. 29-115, Springer International Publishing.
- Gazzini, Tarcisio (2021) "Beyond Protection: The Role of the Home State in Modern Investment Treaties", in *Public Actors in International Investment Law*

(Catharine Titi, ed.), Special Issue of the European Yearbook of International Economic Law, pp. 19-36, Springer International Publishing.

- Kaufmann-Kohler, Gabrielle & Potestà, Michele (2020) "Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future", in *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Gabrielle Kaufmann-Kohler and Michele Potestà, eds), pp. 7-29, Springer International Publishing.
- Lenk, Hannes (2020) "The EU Investment Court System and Its Resemblance to the WTO Appellate Body". In *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (S. Gáspár-Szilágyi, D. Behn, & M. Langford, eds.), Studies on International Courts and Tribunals, pp. 62-91, Cambridge University Press.
- Yackee, Jason Webb, (2008) "Do We Really Need BITs - Toward a Return to Contract in International Investment Law", 3 *Asian Journal of WTO and International Health Law and Policy*, pp. 121-146.

**FRIDAY, JULY 9, 2021**

Take-home assessment