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 WTI 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 LLM. / 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

<table>
<thead>
<tr>
<th>Date</th>
<th>Day</th>
<th>Time</th>
<th>Lecturer/s</th>
<th>Topic</th>
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<tbody>
<tr>
<td>5. July</td>
<td>Monday</td>
<td>Recording (sent via email)</td>
<td>Roberto Echandi</td>
<td>Understanding Foreign Direct Investment (FDI) and Development: Past, Present and Future</td>
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<td></td>
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<td>15:00 - 17:00 Live Zoom session</td>
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<td>Introduction to Investment Policy and Law: Domestic Investment Regulation, International Investment Agreements (IIAs) and Evolution in Investment Rule Making</td>
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<tr>
<td>6 July</td>
<td>Tuesday</td>
<td>Recording (sent via email)</td>
<td>Roberto Echandi</td>
<td>The Blind Side” of International Investment Law: Implementation of IIAs in Practice</td>
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<td></td>
<td></td>
<td>15:00 - 17:00 Live Zoom session</td>
<td></td>
<td>Innovations in investment treaty-making practice</td>
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<tr>
<td>Date</td>
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<td>7 July</td>
<td>Wednesday</td>
<td>10:30 – 12:30 hrs</td>
<td>Rodrigo Polanco</td>
<td>Brief examination of ISDS key elements and its main criticisms</td>
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<td>14:00 – 16:00 hrs</td>
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<td>Improving ISDS: admissibility, role of treaty parties, role of third parties and transparency. The work of UNCITRAL Working Group III.</td>
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<tr>
<td>8 July</td>
<td>Thursday</td>
<td>10:30 – 12:30 hrs</td>
<td>Rodrigo Polanco</td>
<td>Alternatives to ISDS: Diplomatic protection, state to state arbitration, regional mechanisms.</td>
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<td>14:00 – 16:00 hrs</td>
<td></td>
<td>Alternatives to ISDS: Domestic courts, contract-based arbitration, investment court system.</td>
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<tr>
<td>9 July</td>
<td>Friday</td>
<td>until 20:00 hrs</td>
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<td>Take home exam</td>
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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


Suggested Readings:


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
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%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
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
- 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


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

Optional Reading Material
- Gazzini, Tarcisio (2021) “Beyond Protection: The Role of the Home State in Modern Investment Treaties”, in Public Actors in International Investment Law


FRIDAY, JULY 9, 2021

Take-home assessment