

# Advanced International Investment Law

**Semester:** Spring semester- FS 2024

**ECTS:** 5

**Lecturer:** Dr Rodrigo Polanco

**Dates:** Tuesdays 12:15 – 14:00.

**Room:** Silva Casa Auditorium, World Trade Institute

**Audience:**

- Master of Advanced Studies of International Law and Economics (MILE) Students – Compulsory
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe - Compulsory
- Master Level students, University of Bern - Elective
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe – Elective

## Course Description

This course thoroughly examines selected international law topics governing foreign investment. It covers new developments concerning investment facilitation, investment screening, pre-establishment, establishment, and performance requirements, as well as further research that tackles whether international investment agreements (IIAs) promote foreign investment or serve other purposes. Particular emphasis is given to the relationship between IIAs and public policies, examining exceptions, carve-outs, and non-conforming measures, and the relationship with the “right to regulate” in sensitive policy areas, like sustainable development, climate change, human rights, economic sanctions, political risk, digitalisation, and taxation. This course also covers new developments in investor-state

dispute settlement mechanism (ISDS) concerning conflicts of interests, the role of third parties (and third parties funding), transparency, provisional measures, and a review of the criticisms of the international investment regime, its reform process, and possible alternatives.

Prior attendance to a course providing an introduction to international investment law is desirable but not mandatory.

## Lecturer

### Rodrigo Polanco

Rodrigo Polanco is a senior lecturer, researcher, and academic coordinator of Master Programmes at the World Trade Institute (WTI), University of Bern, and a Legal Adviser for Spanish and Portuguese-speaking jurisdictions at the Swiss Institute of Comparative Law. In addition, he is a lecturer at the University of Luzern and a visiting professor at the University of Chile, where he is also a member of the editorial board of the Journal of Economic Law (Revista de Derecho Económico).

Rodrigo holds a Bachelor's and a Master of Laws from Universidad de Chile, an LL.M. in International Legal Studies from New York University, and a Ph.D. in Law from the University of Bern.

He has published extensively as an author and editor in leading international academic publishers and international journals on investment, trade, tax, and environmental law. He co-founded the Electronic Database of Investment Treaties (EDIT).

Rodrigo coordinated the WTI/SECO Project, which supported regional competence centres for trade law and policy in Peru, South Africa, Vietnam, Indonesia, and Chile, and the SNIS Project "Diffusion of International Law: A Textual Analysis of International Investment Agreements". In addition, he served as a post-doctoral researcher at the University of Luzern ("The Governance of Big Data in Trade Agreements: Design, Diffusion and Implications – NFP 75") and as an assistant professor and director of international affairs at the University of Chile's Faculty of Law. He is a co-founder and member of the board of Fiscalía del Medio Ambiente (FIMA), a Chilean non-profit environmental organisation, serving on the editorial board of their environmental law journal (Justicia Ambiental).

## Learning Outcomes

- Gain an advanced understanding of the relationship between the special regime of protection of foreign investors and important domestic policies like those concerning the environment, sustainable development, climate change, and human rights, among others.
- Learn about advanced developments in investment law treaty-making and the reform process underway.
- Learn about advanced elements of international investment arbitration and the most recent developments in case law.

## Exams and Grades

The examination of the course will be an oral exam. The course will follow the University of Bern grading system.

## Course Overview

Class	Date	Day	Time	Hours	Lecturer	Topic
1	20. Feb.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	International Investment Agreements: Origins and Effects
2	27. Feb.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investment Facilitation
3	05. Mar.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Screening and Pre-establishment of Investments
4	12. Mar.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Establishment of Investments and Performance requirements
5	19. Mar.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Denial of Benefits, Carve-outs, and Exceptions
6	26. Mar.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	The Effects of Digitalisation on Investment Treaties
7	09. Apr.2024	Tuesday	12:15 – 14:00 hrs	2	Andrea Steingruber	Investment Law and Public Policies I: Investment Treaties and Economic Sanctions
8	16. Apr.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investment Law and Public Policies II: Sustainable Development and the Environment
9	23. Apr.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investment Law and Public Policies III: Labour and Human Rights
10	30. Apr.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investment Law and Public Policies IV: Investment Treaties and Taxation
11	7. May.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investor-State Dispute Settlement (ISDS) I: Appointment and Challenge of Arbitrators
12	14. May.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investor-State Dispute Settlement (ISDS) II: Third Parties in ISDS
13	21. May.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investor-State Dispute Settlement (ISDS) III: Provisional Measures in ISDS
14	28. May.2024	Tuesday	12:15 – 14:00 hrs	2	Rodrigo Polanco	Investor-State Dispute Settlement (ISDS) IV: Annulment, Enforcement and Compliance

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## Readings

The majority of readings are available at the following link:

[https://www.dropbox.com/sh/lcc4yk3nt2hix1a/AAC0quSBoDraDrgOnt1UQw\\_qa?dl=0](https://www.dropbox.com/sh/lcc4yk3nt2hix1a/AAC0quSBoDraDrgOnt1UQw_qa?dl=0)

When not in Dropbox, the readings are available at the WTI's library.

## SESSION 1: 20 FEBRUARY 2024

### Subject

International Investment Agreements: Origins and Effects

### Topics

- The origins of International Investment Agreements (IIAs). Basic structure and types. Bilateral investment treaties (BITs), regional, plurilateral, and multilateral investment agreements.
- Do IIAs promote foreign investment or just protect it? What's their effect on domestic governance? Are there any other reasons to have (or not) investment treaties?

### Compulsory Reading Material

- Berge, Tarald (2020) "Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements", *International Studies Quarterly* 64 (4), 919-928.
- Egger, Peter, Pirotte, Alain and Titi, Catharine (2023) "International Investment Agreements and Foreign Direct Investment: A Survey". *The World Economy* 46, no. 6 (2023): 1524–65. <https://doi.org/10.1111/twec.13429>.
- Guzman, Andrew (1997), "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", *Virginia Journal of International Law* 38(4) Summer 1998: 639-688.
- Poulsen, Lauge (2020) "Beyond Credible Commitments: (Investment) Treaties as Focal Points", *International Studies Quarterly* (2020) 64 (1), 26-34.

### Optional Reading Material

- Batselé, Filip (2023) "Foreign Investors of the World, Unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958–1968". *European Journal of International Law* 34, no. 2 (1 May 2023): 415–47. <https://doi.org/10.1093/ejil/chad017>.
- Bonnitcha, Jonathan, and Phillips Williams, Zoe (2024) "The Impact of Investment Treaties on Domestic Governance in Developing Countries". *Law & Policy* online 4 January 2024. <https://doi.org/10.1111/lapo.12234>.
- Gopalan, Sasidaran, Park Cyn-Young, and Rajan, Ramkishan S. (2023), "Do International Investment Agreements attract Foreign Direct Investment inflows? Revisiting the literature". *Economic Analysis and Policy* 80 (1 December 2023): 471-81. <https://doi.org/10.1016/j.eap.2023.09.002>.

- Pohl, Joachim (2018). “Societal Benefits and Costs of International Investment Agreements”. *OECD Working Papers on International Investment, 2018/01*, 19 January 2018. <https://doi.org/10.1787/e5f85c3d-en>.
- Sattorova, Mavluda (2018). *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* Oxford Portland, Oregon: Hart Publishing: 58-103.
- Tzouvala, Ntina (2020). “The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale”. In: Haskell, J., Rasulov, A. (eds) *New Voices and New Perspectives in International Economic Law. European Yearbook of International Economic Law*. Springer, Cham, pp. 37-54.
- Zarbiyev, Fuad (2023). “ ‘These are my principles. If you don’t like them, I have others’ . On justifications of foreign investment protection under international law”. *Journal of International Economic Law* 26 (3) (1 September 2023): 525-41. <https://doi.org/10.1093/jiel/jgad025>.

## SESSION 2: 27 FEBRUARY 2024

### Subject

Investment Facilitation

### Topics

- What is investment facilitation? How is investment facilitation relevant to development?
- Why is investment facilitation important for States?
- Investment facilitation programs and agencies
- Investment Facilitation for Development at the WTO

### Compulsory Reading Material

- Berger, Axel and Sebastian Gsell (2019), “How Can an International Framework for Investment Facilitation Contribute to Sustainable Development?” Briefing Paper 15/2019, <https://www.die-gdi.de/briefing-paper/article/how-can-an-international-framework-for-investment-facilitation-contribute-to-sustainable-development/>.
- Polanco, Rodrigo, and Rodríguez-Chiffelle, Cristián (2023), “Investment Facilitation at the WTO: What’s Old? What’s New? What’s Missing?” in *The Elgar Companion to the World Trade Organization*, 301-24. Edward Elgar Publishing, <https://www.elgaronline.com/edcollchap/book/9781800882867/chapter17.xml>.
- UNCTAD (2023), “Investment Facilitation in International Investment Agreements: Trends and Policy Options”, IIAs Issues Note N° 3, September 2023, <https://investmentpolicy.unctad.org/publications/1286/investment-facilitation-in-international-investment-agreements-trends-and-policy-options>.

### Optional Reading Material

- Berger, Axel, Kagan, Yardenne and Sauvant, Karl P. (2022) “Investment Facilitation for Development: A Toolkit for Policymakers”, Second edition. International Trade Centre, Geneva, Switzerland. <https://doi.org/10.2139/ssrn.3830031>.
- Calamita, N. Jansen, and Schacherer, Stefanie (2022), “Investment Facilitation for Sustainable Development within the Context of the Regional Comprehensive Economic Partnership, the ASEAN Investment Facilitation Framework and the WTO Draft Investment Facilitation Framework for Development”. Studies in Trade, Investment and Innovation. Bangkok, Thailand, 2022, <https://repository.unescap.org/bitstream/handle/20.500.12870/5188/ESCAP-2022-RP-Investment-facilitation-sustainable-development.pdf?sequence=2&isAllowed=y>

- Echandi, Roberto, and Pierre Sauvé (2020). *Investment Facilitation and Mode 3 Trade in Services: Are Current Discussions Addressing the Key Issues?* World Bank, Washington, DC, 2020. <https://doi.org/10.1596/1813-9450-9229>.
- Sauvant, Karl (2022) “Three Reasons Why a WTO Agreement on Investment Facilitation for Development Is Important” (International Economic Law and Policy Blog) <https://ielp.worldtradelaw.net/2022/11/three-reasons-why-a-wto-agreement-on-investment-facilitation-for-development-is-important-by-karl-p-.html>.
- Mann, Howard, and Martin Dietrich Brauch (2019) “Investment Facilitation for Sustainable Development: Getting It Right for Developing Countries”, Columbia FDI Perspectives N° 259 (26 August 2019), <https://www.econstor.eu/bitstream/10419/254093/1/fdi-perspectives-no259.pdf>
- UNCTAD (2017) *Investment Facilitation: A Review of Policy Practices. Follow-up to UNCTAD’s Global Action Menu for Investment Facilitation*. Geneva, Switzerland, [http://investmentpolicyhub.unctad.org/Upload/Investment-Facilitation\\_Review%20Note%203%20feb.pdf](http://investmentpolicyhub.unctad.org/Upload/Investment-Facilitation_Review%20Note%203%20feb.pdf).



## SESSION 3: 5 MARCH 2024

### Subject

Screening and pre-establishment of investments

### Topics

- Admission, establishment, and pre-establishment of investments
- Positive and negative lists, non-conforming measures (standstill, ratchet, roll-back), future measures
- What is investment screening?
  - How do countries deal with investment screening?
  - Investment screening and national security
  - When does investment screening become discriminatory?
  - Can investment screening trigger investor-state disputes?

### Compulsory Reading Material

- European Commission (2020) “Guidance to the Member States Concerning Foreign Direct Investment and Free Movement of Capital from Third Countries, and the Protection of Europe’s Strategic Assets, Ahead of the Application of Regulation (EU) 2019/452 (FDI Screening Regulation)”, 25 March 2020. [https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158676.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf).
- Joubin-Bret, Anna (2008), “Admission and Establishment in the Context of Investment Protection”, in August Reinisch (ed.), Standards of Investment Protection (Oxford: Oxford University Press), pp. 9-28.
- Bauerle Danzman, Sarah and Meunier, Sophie (2021), “The Big Screen: Mapping the Diffusion of Foreign Investment Screening Mechanisms”, SSRN Electronic Journal <https://www.ssrn.com/abstract=3913248>.
- Tania Voon and Merriman, Dean, “Incoming: How International Investment Law Constrains Foreign Investment Screening” (2022) 24 The Journal of World Investment & Trade 75 [https://brill.com/view/journals/jwit/24/1/article-p75\\_3.xml](https://brill.com/view/journals/jwit/24/1/article-p75_3.xml)

### Optional Reading Material

- European Court of Auditors (2023) “Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public order risks effectively”. Special Report 27, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2865/885487>

- Juillard, Patrick (2000). “Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment”. *ICSID Review - Foreign Investment Law Journal* 15: 322–39.
- Schill, Stephan W (2019) “The European Unions Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization”, 46 *Legal Issues of Economic Integration* 105 <https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/46.2/LEIE2019007>.
- Voon, Tania and Merriman, Dean (2022), “Is Australia’s Foreign Investment Screening Policy Consistent with International Investment Law?”, *Melbourne Journal of International Law* Vol 23 (1): 62-113, <https://classic.austlii.edu.au/cgi-bin/download.cgi/au/journals/MelbJIL/2022/3>.

## SESSION 4: 12 MARCH 2024

### Subject

Performance requirements in investment treaties.

### Topics

- Recap: How is foreign investment established?
- Performance requirements prohibitions in IIAs.
- Agreement on Trade-Related Investment Measures (TRIMs)

### Compulsory Reading Material

- Bondy, Christophe, Genest, Alexandre, and Lee, Michael (2024), "Empirical Study: Performance Requirement Prohibitions in International Investment Agreements". Steptoe - British Institute of International and Comparative Law, January 2024. [https://www.biiicl.org/documents/172\\_steptoe-biiicl\\_empirical\\_study\\_on\\_prps\\_in\\_iias.pdf](https://www.biiicl.org/documents/172_steptoe-biiicl_empirical_study_on_prps_in_iias.pdf).
- Carmody, Chios (2003), "TRIMS and the Concept of Investment Under the WTO Agreement", *Trilateral Perspectives on International Legal Issues: Conflict and Coherence*, American Society of International Law: 341, .
- Gourgourinis, Anastasios (2023), "Domestic Investment Incentives in International Trade Law" (2023) 22 *World Trade Review*: 35-54, <https://doi.org/10.1017/S147474562200043X>

### Optional Reading Material

- Genest, Alexandre (2019). *Performance Requirement Prohibitions in International Investment Law*. Brill.
- Collins, David (2015). "Performance requirements and international investment law", in *Performance Requirements and Investment Incentives Under International Economic Law*. Edward Elgar Publishing, 2015: 113-148.
- UNCTAD (2003). *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*. New York: United Nations.

## SESSION 5: 19 MARCH 2024

### Subject

Denial of benefits, carve-outs, exceptions, and safeguards in investment law

### Topics

- Non-precluded measures (NPM) in investment law
- General exceptions in IIAs
  - Origins
  - Relationship with GATT and GATS
- Security exceptions in IIAs
  - Origins
  - Relationship with GATT and GATS
- Denial of benefits: evolution and case law
- Carve-outs or exclusions in IIAs
- Temporary safeguard measures

### Compulsory Reading Material

- Henckels, Caroline (2020). 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses'. In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, O. Oxford University Press, 2020. <https://doi.org/10.1093/oso/9780198789321.003.0020>.
- Hoffmann, Anne K. (2015), "Denial of Benefits". In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, Beck/Hart: 598–613.
- Mistelis, Loukas A. & Baltag Crina Michaela (2018) "Denial of Benefits in Investment Treaty Arbitration". Queen Mary University of London, School of Law, Legal Studies Research Paper No. 293/2018
- Pathirana, Dilini, and Mark McLaughlin (2021), "Non-Precluded Measures Clauses: Regime, Trends, and Practice". In *Handbook of International Investment Law and Policy*, edited by Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, Springer: 483–505, [https://doi.org/10.1007/978-981-13-3615-7\\_6](https://doi.org/10.1007/978-981-13-3615-7_6).

### Optional Reading Material

- Behlman, Jordan (2014) "Out on a Rim: Pacific Rim's Venture into CAFTA's Denial of Benefits Clause". *University of Miami Inter-American Law Review* 45 Student Notes/Comments: 397-424, <http://repository.law.miami.edu/umialr/vol45/iss2/7>

- Brew, Robert (2019), “Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection”. *Canterbury Law Review* 25: 205–42.
- Henckels, Caroline (2020). ‘Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law’. *International & Comparative Law Quarterly* 69, no. 3 (July 2020): 557–84. <https://doi.org/10.1017/S0020589320000135>.
- Liubashenko, Viacheslav (2018), “Treatment of Foreign Investments during Armed Conflicts: The Regimes”, 1 *Journal of Conflict and Security Law* 24: 145-69. <https://doi.org/10.1093/jcsl/kry031>.
- Mantilla Blanco, Sebastián, and Alexander Pehl (2020). *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review*. Cham, 2020.
- Sabanogullari, Levent (2018). *General Exception Clauses in International Investment Law: The Recalibration of Investment Agreements via WTO-Based Flexibilities*. 1st edition. Successful Dispute Resolution Volume 7. Baden-Baden: Nomos Verlagsgesellschaft, 2018.
- Ünüvar, Güneş (2023), “A Tale of Policy Carve-Outs and General Exceptions: Eco Oro v. Colombia as a Case Study”, *Journal of International Dispute Settlement* 14 (4), December 2023: 517–533, <https://doi.org/10.1093/jnlids/idad017>
- Wagner, Kilian (2024), “Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law?” *Austrian Review of International and European Law Online* 26 (1): 77–117. <https://doi.org/10.1163/15736512-02601004>.

## SESSION 6: 26 MARCH 2024

### Subject

The Effects of Digitalisation on Investment Treaties

### Topics

- Do investment treaties deal with the increased digital economy and technological advancements?
- What are the possible implications on investor-state dispute resolution?: the first investor-state dispute settlement cases about data.
- Effects of digitalisation in IIAs scope of application and standards of protection

### Compulsory Reading Material

- Chaisse, Julien, and Bauer, Cristen (2019), “Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration”. *Vanderbilt Journal of Entertainment & Technology Law* 21, no. 3 (1 March 2019): 549.
- Horváth, Enikő, and Klinkmüller, Severin (2019). ‘The Concept of “Investment” in the Digital Economy: The Case of Social Media Companies’. *The Journal of World Investment & Trade* 20(4) (27 August 2019): 577–617. <https://doi.org/10.1163/22119000-12340143>.
- Polanco, Rodrigo (2023). ‘The Impact of Digitalization on International Investment Law: Are Investment Treaties Analogue or Digital?’ *German Law Journal* 24, no. 3 (April 2023): 574–88. <https://doi.org/10.1017/glj.2023.30>.

### Optional Reading Material

- Ginsburg, Robert (2019), “Investor-State Dispute Settlement in the Digital Economy: The Case for Structured Proportionality”. *Northwestern Journal of International Law & Business* 39(2) (1 January 2019): 171-200.
- Prieto Muñoz, José Gustavo (2020). ““Crypto-Investment” in International Economic Law: A First Sketch”. *Global Jurist* 20, no. 2 (1 July 2020). <https://doi.org/10.1515/gj-2020-0031>.
- Zhang, Sheng (2020). ‘Protection of Cross-Border Data Flows Under International Investment Law’. In *Handbook of International Investment Law and Policy*, edited by Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, Springer: 1–23, [https://doi.org/10.1007/978-981-13-5744-2\\_126-1](https://doi.org/10.1007/978-981-13-5744-2_126-1).
- Zhang, Qianwen, and Andrew Mitchell (2022). ‘Data Localization and the National Treatment Obligation in International Investment Treaties’. *World Trade Review*, 21(4): 391–410. <https://doi.org/10.1017/S1474745621000549>.

## SESSION 7: 9 APRIL 2024

### Subject

Investment Law and Public Policies I: Investment Treaties and Economic Sanctions

### Topics

- Introduction to sanctions and (international) economic sanctions: the concept of “sanction” and overview of types of sanctions and their origin.
- Differences with WTO law?
- Possible breaches of international investment law standards: national treatment, MFN clause, expropriation, full protection and security (FPS)
- Possible justifications for breaches?: the security exception, non-precluded-measures clauses, customary international law (law of countermeasures), international public policy, and jus cogens.

### Compulsory Reading Material

- Choukroune, Leïla, and Nedumpara, James J. (2021) “Economic Sanctions” in *International Economic Law: Text, Cases and Materials*. Cambridge University Press: 753-760.
- De Brabandere, Eric, and Holloway, David (2017), “Sanctions and International Arbitration”. In *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing: 304-29.
- Van Aaken, Anne (2016), International investment law and decentralized targeted sanctions: an uneasy relationship, Columbia FDI Perspectives No. 164, <https://www.econstor.eu/bitstream/10419/253998/1/fdi-perspectives-no164.pdf>
- Zrilič, Jure (2019) *The Protection of Foreign Investment in Times of Armed Conflict*. Oxford University Press, Ch. 5: 133-161.

### Optional Reading Material

- Ahn, Taejoon (2018), “The Applicability of Economic Sanctions to the Merits in International Arbitration Proceedings: With a Focus on the Dynamics between Public International Law Principles, Private International Law Rules and International Arbitration Theories”, 18 *Pepperdine Dispute Resolution Law Journal*: 299-323.
- Bakos, Alexandros-Cătălin & Duggal, Kabir (2023), “Economic sanctions in International Investment Arbitration”, *Jus Mundi*, 9 June 2023, <https://jusmundi.com/en/document/publication/en-economic-sanctions-in-international-investment-arbitration>

- Beess und Chrostin, Jessica (2016), “Unilateral and Multilateral Sanctions in Investment Treaty Arbitration”, *Proceedings of the Annual Meeting* (American Society of International Law), Vol. 110 (30 March 30 – 2 April 2016): 207-209.
- Bogdanova, Iryna. *Unilateral Sanctions in International Law and the Enforcement of Human Rights. The Impact of the Principle of Common Concern of Humankind*. World Trade Institute Advanced Studies: Vol. 9. Leiden; Boston: Brill Nijhof: 31-173, <https://boris.unibe.ch/173691/>.



## SESSION 8: 16 APRIL 2024

### Subject

Investment Law and Public Policies II: Sustainable Development and the Environment

### Topics

- The “right to regulate”.
- How has the shift towards green/impact/ responsible investments impacted modern International Investment Agreements?
- What is the Energy Charter Treaty? And how does it relate to Investor-State arbitration?
- ISDS and environmental issues: climate change and renewable energies as case studies.

### Compulsory Reading Material

1. Balcerzak, Filip (2023) “Renewable Energy Arbitration – Quo Vadis?: Implications of the Spanish Saga for International Investment Law”. In *Renewable Energy Arbitration – Quo Vadis?* Brill Nijhoff, 2023, pp. 437-452, <https://brill.com/display/title/61784>.
2. Fermeglia, M., C. Higham, J. Setzer, and K. Silverman-Roati (2014) “Mapping Climate-Related Investment Arbitrations”, 21(1) *Transnational Dispute Management (TDM)*, February 2024, <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=2008>.
3. Sierra-Camargo, Jimena, and Suárez-Ricaurte, Federico (2023) “The Right to Regulate”. In *Rethinking Investment Law*, David Schneiderman and Gus Van Harten, eds. Oxford University Press: 180-198, <https://doi.org/10.1093/oso/9780192871084.003.0009>.
4. Zagel, Gudrun Monika (2020) “Achieving Sustainable Development Objectives in International Investment Law” in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Singapore) [http://link.springer.com/10.1007/978-981-13-5744-2\\_57-1](http://link.springer.com/10.1007/978-981-13-5744-2_57-1).

### Optional Reading Material

1. Baltag, Crina, Riddhi Joshi, and Kabir Duggal (2023) “Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?” 38 (2) *ICSID Review - Foreign Investment Law Journal*: 381-421. <https://doi.org/10.1093/icsidreview/siac031>.
2. Cercel, Liana (2023) “Climate Change and International Investment Law: What Are the Challenges and Uncertainties?” Arbitration practitioners’ reflections’ at the 8th EFILA Annual Conference”, Kluwer Arbitration Blog, 2023, <https://arbitrationblog.kluwerarbitration.com/2023/05/02/climate-change-and->

[international-investment-law-what-are-the-challenges-and-uncertainties-arbitration-practitioners-reflections-at-the-8th-efila-annual-conference/](#)

3. Gagliani, Gabriele (2015) “The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible”. 43 (4) *Denver Journal of International Law & Policy* 43 (1 January 2015): 559-558. <https://digitalcommons.du.edu/djilp/vol43/iss4/10>.
4. Giannakopoulos, Charalampos (2019), “The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach”. In *Permutations of Responsibility in International Law*, 148–84. Brill Nijhoff, 2019. [https://doi.org/10.1163/9789004390485\\_009](https://doi.org/10.1163/9789004390485_009).
5. Marzal, Toni (2023) “Polluter Doesn’t Pay: The Rockhopper v Italy Award”. *EJIL: Talk!* (blog), 19 January 2023. <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>.
6. Polanco, Rodrigo, de Sépibus, Joëlle and Holzer, Kateryna (2017) “TTIP and Climate Change: How Real Are Race to the Bottom Concerns?” *Carbon & Climate Law Review (CCLR)* 11, no. 3 (3 October 2017): 206–22.
7. Tienhaara, Kyla, Thrasher, Rachel, Simmons, B. Alexander, and Gallagher Kevin P., “Investor-State Disputes Threaten the Global Green Energy Transition”. *Science* 376, no. 6594 (13 May 2022): 701–3. <https://doi.org/10.1126/science.abo4637>.
8. Titi, Catharine (2022) *The Right to Regulate in International Investment Law (Revisited)*. Moscow, International and Comparative Law Research Center, <https://papers.ssrn.com/abstract=4058447>.
9. Zagel, Gudrun (2023) “Reform of International Investment Agreements and Sustainable Development: Contrasting the EU and Global South Approaches’ in Michelle Egan and others (eds), *Contestation and Polarization in Global Governance*, Edward Elgar Publishing 2023: 357-377, <https://www.elgaronline.com/view/book/9781800887268/book-part-9781800887268-28.xml>.
10. UNCTAD (2023) “Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition”, *IIA Issues Note 2* (August 2023). <https://investmentpolicy.unctad.org/publications/1285/trends-in-the-investment-treaty-regime-and-a-reform-toolbox-for-the-energy-transition>.

## SESSION 9: 23 APRIL 2024

### Subject

Investment Law and Public Policies III: Labour and Human Rights

### Topics

- The relationship between human rights and investment protection
- Labour Rights and ISDS
- Indigenous communities and ISDS
- Investor obligations in investment treaties

### Compulsory Reading Material

- Broude, Tomer, and Henckels, Caroline (2021) “Not All Rights Are Created Equal: A Loss–Gain Frame of Investor Rights and Human Rights”. *Leiden Journal of International Law* 34, no. 1 (March 2021): 93–108. <https://doi.org/10.1017/S092215652000062X>.
- De Brabandere, Eric (2019) “Human Rights and International Investment Law”. In *Research Handbook on Foreign Direct Investment*, Markus Krajewski and Rhea Tamara Hoffmann (eds) Edward Elgar Publishing, 2019: 619-45, <https://www.elgaronline.com/edcollchap/edcoll/9781785369841/9781785369841.00031.xml>.
- Krajewski, Markus (2020) “A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application”. *Business and Human Rights Journal* 5, no. 1 (January 2020): 105–29. <https://doi.org/10.1017/bhj.2019.29>.
- Vandeveld, Kenneth J. (2013) “Rebalancing through Exceptions Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights”. *Lewis & Clark Law Review* 17, no. 2 (2013): 449–60.

### Optional Reading Material

1. Bueno, Nicolas, Yilmaz Vastardis, Anil and Ngueuleu Djeuga, Isidore (2023) “Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses”. 24 (2) *The Journal of World Investment & Trade* 24 (20 January 2023): 179–216. <https://doi.org/10.1163/22119000-12340278>.
2. Claros, Roberto (2019) “Striking a Balance between the Protection of Foreign Investment and the Safeguard of Cultural Heritage in International Investment Agreements: Can General Exceptions Make a Difference?”. In *Intergenerational Equity*, Thomas Cottier, Shaheez Lalani, and Clarence Siziba, eds., Brill Nijhoff: 192–207. [https://doi.org/10.1163/9789004388000\\_014](https://doi.org/10.1163/9789004388000_014).
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4. Gantz, David A., Reetz, C. Ryan, Aguilar-Alvarez, Guillermo and Paulsson, Jan (2011), "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements" 42 *The University of Miami Inter-American Law Review*: 297-366 <http://www.jstor.org/stable/41307719>
5. Dumberry, Patrick, and Gabrielle Dumas-Aubin (2012) "When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration". 13 (3) *The Journal of World Investment & Trade* (1 January 2012): 349–72, <https://doi.org/10.1163/221190012X637763>
6. Polanco Lazo, Rodrigo, and Rodrigo Mella (2018) "Investment Arbitration and Human Rights Cases in Latin America". In *Research Handbook on Human Rights and Investment*, edited by Yannick Radi, Edward Elgar: 41–92, <https://www.elgaronline.com/view/edcoll/9781782549116/9781782549116.00010.xml>.

## SESSION 10: 30 APRIL 2024

### Subject

Investment Law and Public Policies IV: Investment Treaties and Taxation

### Topics

- Taxation measures and investment treaties
- Taxation and expropriation
- Taxation and non-discrimination

### Compulsory Reading Material

- Chaisse, Julien, and Kirkwood, Jamieson (2021) “Foreign Investors vs. National Tax Measures: Assessing the Role of International Investment Agreements”. In *Taxation, International Cooperation and the 2030 Sustainable Development Agenda*, edited by Irma Johanna Mosquera Valderrama, Dries Lesage, and Wouter Lips, United Nations University Series on Regionalism. Cham: Springer International Publishing: 149–69, [https://doi.org/10.1007/978-3-030-64857-2\\_8](https://doi.org/10.1007/978-3-030-64857-2_8).
- Gildemeister, Arno (2015) “Investment Law and Taxation”. In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, Beck/Hart: 1677–91
- Ranjan, Prabhash (2023) “Investor-State Dispute Settlement and Tax Matters: Limitations on State’s Sovereign Right to Tax”. 31(1) *Asia Pacific Law Review* (2 January 2023): 219–34. <https://doi.org/10.1080/10192557.2022.2102588>.
- UNCTAD (2023) “The Global Minimum Tax and Investment Treaties: Exploring Policy Options”, *IIA Issues Note 4* (November 2023), [https://unctad.org/system/files/official-document/diaepcbinf2023d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2023d7_en.pdf).

### Optional Reading Material

- Crevon-Tarassova, Anna, Garcia-Elorrio, Francisco and Rajan, Asha (2022) “Taxation-Related ISDS”. In *The Guide to Energy Arbitrations*, edited by J William Rowley WC, Doak Bishop, and Gordon E Kaiser, 5th ed., Global Arbitration Review: 19–31, <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/taxation-related-ids>.
- Kuźniacki, Błażej (2023), “Pillar 2 and International Investment Agreements: ‘QDMTT Payable’ Seals an Internationally Wrongful Act”, Tax Notes, 9 October 2023. <https://www.taxnotes.com/special-reports/oecd-pillar-2-global-minimum-tax/pillar->

[2-and-international-investment-agreements-qdmtt-payable-seals-internationally-wrongful-act/2023/10/06/7hdg1.](#)

- Morris, Danielle, Kryvoi, Yarik, Winter-Barker, Sam and Savaş, Tunç (2024), “Empirical Study: Tax-Related Measures in Investor-State Arbitration”, 25 January 2024. <https://www.wilmerhale.com/insights/publications/20240125-tax-related-measures-in-investor-state-arbitration>.
- Qureshi, Asif H (2015), “Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation” 10(1) *Asian Journal of WTO & International Health Law and Policy* (1 March 2015): 193-222, <https://ssrn.com/abstract=2600132>

## SESSION 11: 7 MAY 2024

### Subject

Investor-State Dispute Settlement (ISDS) I: Appointment and Challenge of Arbitrators

### Topics

- What is the state of diversity in international investment agreements? Female v Male arbitrators/ North v South representation.
- Investment arbitrators/judges' code of conduct
- Conflict of interests: international guidelines concerning double hatting and revolving doors.

### Compulsory Reading Material

- Bjorklund, Andrea K., Behn, Daniel, Franck, Susan D., Giorgetti, Chiara, Kidane, Won, de Nanteuil, Arnaud, and Onyema, Emilia (2020) "The Diversity Deficit in International Investment Arbitration", 21 *The Journal of World Investment & Trade* no. 2–3 (22 June 2020): 410–40, <https://doi.org/10.1163/22119000-12340177>
- Schacherer, Stefanie (2018) "Independence and Impartiality of Arbitrators: A Rule of Law Analysis". Research Collection Yong Pung How School Of Law, 1 January 2018, 1–30, [https://ink.library.smu.edu.sg/sol\\_research/3949/](https://ink.library.smu.edu.sg/sol_research/3949/)
- UNCITRAL (2023), Code of Conduct for Arbitrators in International Investment Dispute Resolution (Advanced Copy, October 2023), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral\\_code\\_of\\_conduct\\_for\\_arbitrators\\_advance\\_copy\\_pUBL.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_code_of_conduct_for_arbitrators_advance_copy_pUBL.pdf)

### Optional Reading Material

- Brown, Colin M., and Koumadoraki, Niki (2020), "Ethical Concerns in Investor-State Dispute Settlement: Seeking a Permanent Solution". 7(2) *BCDR International Arbitration Review* (1 December 2020). <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\BCDR\BCDR2020021.pdf>.
- Fach Gómez, Katia (2019) "The Duty of Disclosure and Conflicts of Interest in Investment Arbitration Disputes". In *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas*, by Katia Fach Gómez, Springer International Publishing: 79-121, [https://doi.org/10.1007/978-3-319-98128-4\\_3](https://doi.org/10.1007/978-3-319-98128-4_3).

- Kaufmann-Kohler, Gabrielle and Potestà, Michele (2017) “The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards” CIDS Supplemental Report, 15 November 2017, <http://dx.doi.org/10.2139/ssrn.3457310>
- 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.
- Polanco, Rodrigo, and Desilvestro Valentino (2018) “Does an Arbitrator’s Background Influence the Outcome of an Investor-State Arbitration?” 17(1) *The Law & Practice of International Courts and Tribunals* 17, (27 June 2018): 18-48. <https://doi.org/10.1163/15718034-12341366>.
- Van Harten, Gus (2012). Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration. *Osgoode Hall Law Journal*, 50(1), 211-268.



## SESSION 12: 14 MAY 2024

### Subject

Investor-State Dispute Settlement (ISDS) II: Third Parties in ISDS

### Topics

- Role of third parties:
  - Amicus Curiae
  - Non-Disputing Party Submissions
- What is third-party financing?
- What are the limitations to third-party financing? Disclosure
- What is the impact of Third-party interference in an arbitral proceeding? (Case study- ECT and the European Commission)
- What is the legal and regulatory framework of Third-Party Financing?

### Compulsory Reading Material

- Leary, Thomas (2017) “Non-Disputing Parties and Human Rights in Investor-State Arbitration”. *The Journal of World Investment & Trade* 18, no. 5–6 (6 December 2017): 1062–72. <https://doi.org/10.1163/22119000-12340082>.
- Lavranos, Nikos, Lath, Adhiraj, and Varma, Reet (2023), “The Meltdown of the Energy Charter Treaty (ECT): How the ECT was ruined by the EU and its Member States”, *SchiedsVZ* 1/2023: 38-45, <https://www.nl-investmentconsulting.com/wp-content/uploads/2023/10/Lavranos-Lath-Varma-Aufsatz-Heft-1-2023.pdf>
- Yu, Chen (2020) “Amicus Curiae Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation”. 35 *ICSID Review - Foreign Investment Law Journal* N° 1–2 (1 May 2020): 223–35. <https://doi.org/10.1093/icsidreview/siaa025>.

### Optional Reading Material

- Cate, Alicia (2021) “Non-Disputing State Party Participation in Investor-State Arbitration under CAFTA-DR”. *Kluwer Arbitration Blog*, 1 July 2011. <http://kluwerarbitrationblog.com/blog/2011/07/01/non-disputing-state-party-participation-in-investor-state-arbitration-under-cafta-dr/>.
- Kayalı, Didem (2023) “Third-Party Funding in Investment Arbitration: How to Define and Disclose It”, 38(1) *ICSID Review - Foreign Investment Law Journal*, Winter 2023: 113–139, <https://doi.org/10.1093/icsidreview/siac013>
- Bench Nieuwveld, Lisa and Sahani, Victoria Shannon (2017) “Introduction to Third-Party Funding”, in *Third-Party Funding in International Arbitration*, 2nd edition (Kluwer Law International: 1-20).

- Polanco, Rodrigo (2019) “Non-Disputing State Party Interventions”. In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* Cambridge University Press: 167-194.
- Brekoulakis, Stavros and Catherine Rogers, ‘Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy’, Academic Forum on ISDS Concept Paper 2019/11, 31 July 2019.
- Xuan Shao, Disrupt the Gambler’s Nirvana: Security for Costs in Investment Arbitration Supported by Third-Party Funding, *Journal of International Dispute Settlement*, Volume 12, Issue 3, September 2021, Pages 427–447, <https://doi.org/10.1093/jnlids/idab019>

## SESSION 13: 21 MAY 2024

### Subject

Investor-State Dispute Settlement (ISDS) III: Provisional Measures in ISDS

### Topics

- Types of provisional measures
- Provisional measures vs. emergency arbitration
- Conditions to grant provisional measures

### Compulsory Reading Material

- Goldberg, David, Kryvoi, Yarik and Philippov, Ivan (2023) *Empirical Study: Provisional Measures in Investor-State Arbitration*. British Institute of International and Comparative Law / White&Case. London, [https://www.biicl.org/documents/157\\_provisional-measures-in-investorstate-arbitration-2023.pdf](https://www.biicl.org/documents/157_provisional-measures-in-investorstate-arbitration-2023.pdf).
- Sarooshi, Dan (2013) "Provisional Measures and Investment Treaty Arbitration". 29 (3) *Arbitration International* (1 September 2013): 361–80. <https://doi.org/10.1093/arbitration/29.3.361>.

### Optional Reading Material

- Born, Gary (2021) "Provisional Relief in International Arbitration". In *International Commercial Arbitration*, 3<sup>rd</sup> edition, Kluwer Law International: 2601-2758, [https://doi.org/10.1163/9789004502222\\_019](https://doi.org/10.1163/9789004502222_019).
- Le Bars, Benoit, and Shiroor, Tejas (2017) "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement". 6(1) *Indian Journal of Arbitration Law* 6: 24–42.
- Malintoppi, Loretta (2009) "Provisional Measures In Recent Icsid Proceedings: What Parties Request And What Tribunals Order" in Christina Binder and others (eds), *International Investment Law for the 21st Century*, Oxford University Press: 157-184, <https://academic.oup.com/book/43020/chapter/361382998>
- McRae, Donald (2022) "State Responsibility and Compliance with Provisional Measures under ICSID". 37 (1-2) *ICSID Review - Foreign Investment Law Journal* (1 June 2022): 232-46. <https://doi.org/10.1093/icsidreview/siac004>.
- Sinclair, Anthony C., and Repousis, Odysseas G. (2017) "An Overview of Provisional Measures in ICSID Proceedings". 32 (2) *ICSID Review - Foreign Investment Law Journal* (1 May 2017): 431-46. <https://doi.org/10.1093/icsidreview/six004>.

## SESSION 14: 28 MAY 2024

### Subject

Investor-State Dispute Settlement (ISDS) IV: Annulment, Enforcement and Compliance

### Topics

- What are the grounds for annulling or setting aside an arbitral award? Analysis of selected cases at ICSID and before national courts.
- How do you enforce an award under the ICSID or New York conventions?
- Compliance with investment awards

### Compulsory Reading Material

- Koepf, Johannes, Kryvoi, Yarik, and Biggs, Jack (2021) *Annulment in ICSID Arbitration*. London: The British Institute of International and Comparative Law (BIICL) and Baker Botts LLP, 2021, [https://www.biicl.org/documents/10899\\_annulment-in-icsid-arbitration190821.pdf](https://www.biicl.org/documents/10899_annulment-in-icsid-arbitration190821.pdf)
- Kozmenko, Anna & Dulská, Anastasiia (2020) “Swiss Supreme Court refuses to vacate Energy Charter Treaty award in Czech photovoltaic case”, *Practical Law UK*, 10 August 2020.
- Lavranos, Nikos (2023), Report on Compliance with Investment Treaty Arbitration Awards, Issue 2, October 2023, <https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf>

### Optional Reading Material

- Rajput, Aniruddha (2022), “Non-Compliance with Investment Arbitration Awards and State Responsibility” 37 *ICSID Review - Foreign Investment Law Journal* 247 <https://academic.oup.com/icsidreview/article/37/1-2/247/6611712>
- Van Aaken, Anne, “Control Mechanisms in International Investment Law” in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) <<https://academic.oup.com/book/11796/chapter/160874791>> accessed 28 November 2023.
- Gaillard, Emmanuel, and Ilija Mitrev Penushliski. “State Compliance with Investment Awards”. *ICSID Review - Foreign Investment Law Journal* 35, no. 3 (1 October 2020): 540–94. <https://doi.org/10.1093/icsidreview/siaa034>.
- Hirsch, Moshe (2017) “Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach”. 19(3) *Journal of*

*International Economic Law* (1 Septembre 2016): 681-706.  
<https://doi.org/10.1093/jiel/jgw057>.

- Lavranos, Nikos. 'States Comply Less With Investment Treaty Arbitration Awards: Insights From a 2023 Report on Compliance'. Kluwer Arbitration Blog, 26 November 2023. <https://arbitrationblog.kluwerarbitration.com/2023/11/26/states-comply-less-with-investment-treaty-arbitration-awards-insights-from-a-2023-report-on-compliance/>.