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

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<th>Class</th>
<th>Date</th>
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<th>Lecturer</th>
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<td>1</td>
<td>20. Feb.2024</td>
<td>Tuesday</td>
<td>12:15 – 14:00 hrs</td>
<td>2</td>
<td>Rodrigo Polanco</td>
<td>International Investment Agreements: Origins and Effects</td>
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<td>2</td>
<td>27. Feb.2024</td>
<td>Tuesday</td>
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<td>Rodrigo Polanco</td>
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<td>05. Mar.2024</td>
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<td>Rodrigo Polanco</td>
<td>Screening and Pre-establishment of Investments</td>
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<td>12. Mar.2024</td>
<td>Tuesday</td>
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<td>Rodrigo Polanco</td>
<td>Establishment of Investments and Performance requirements</td>
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<td>Rodrigo Polanco</td>
<td>Denial of Benefits, Carve-outs, and Exceptions</td>
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<td>Rodrigo Polanco</td>
<td>The Effects of Digitalisation on Investment Treaties</td>
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<td>09. Apr.2024</td>
<td>Tuesday</td>
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<td>Andrea Steingruber</td>
<td>Investment Law and Public Policies I: Investment Treaties and Economic Sanctions</td>
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<td>16. Apr.2024</td>
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<td>Rodrigo Polanco</td>
<td>Investment Law and Public Policies II: Sustainable Development and the Environment</td>
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<td>23. Apr.2024</td>
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<td>Rodrigo Polanco</td>
<td>Investment Law and Public Policies III: Labour and Human Rights</td>
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<td>30. Apr.2024</td>
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<td>Rodrigo Polanco</td>
<td>Investment Law and Public Policies IV: Investment Treaties and Taxation</td>
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<td>07. May.2024</td>
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<td>Investor-State Dispute Settlement (ISDS) I: Appointment and Challenge of Arbitrators</td>
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<td>14. May.2024</td>
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<td>Investor-State Dispute Settlement (ISDS) II: Third Parties in ISDS</td>
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<td>13</td>
<td>21. May.2024</td>
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<td>Rodrigo Polanco</td>
<td>Investor-State Dispute Settlement (ISDS) III: Provisional Measures in ISDS</td>
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<td>14</td>
<td>28. May.2024</td>
<td>Tuesday</td>
<td>12:15 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Investor-State Dispute Settlement (ISDS) IV: Annulment, Enforcement and Compliance</td>
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Readings
The majority of readings are available at the following link:

https://www.dropbox.com/sh/lcc4yk3nt2hx1a/AAC0quSB0DraDrqOnt1UQw_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

Optional Reading Material


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

Optional Reading Material


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


Optional Reading Material


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
- Gourgourinis, Anastasios (2023), “Domestic Investment Incentives in International Trade Law” (2023) 22 World Trade Review: 35-54, [https://doi.org/10.1017/S147474562200043X](https://doi.org/10.1017/S147474562200043X)

Optional Reading Material
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

Optional Reading Material


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

Optional Reading Material
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

Optional Reading Material
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

Optional Reading Material


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

Optional Reading Material


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

Optional Reading Material

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

Optional Reading Material
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

Optional Reading Material


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

Optional Reading Material
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

Optional Reading Material