

International Investment Law

Semester: Fall semester- FS 2022

ECTS: 5

Lecturer: Dr Rodrigo Polanco

Dates: Tuesdays 12:00 – 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 provides an introduction to the international law governing foreign investment. We cover the essential elements of international investment agreements (IIAs), including their scope of application, standards of treatment, and protection, as developed in treaties and cases. We also examine the investor-state dispute settlement mechanism (ISDS) and traditional state-to-state dispute settlement. We finally look at insurance schemes available to investors from governments and organizations, as well as review the criticisms and reform process of the international investment regime.

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 also is 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 is co-founder of the Electronic Database of Investment Treaties (EDIT).

Rodrigo coordinated the WTI/SECO Project, which supported regional competence centers 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 co-founder and member of the board of Fiscalía del Medio Ambiente (FIMA), a Chilean non-profit environmental organisation, serving at the editorial board of their environmental law journal (Justicia Ambiental).

Learning Outcome

Gain an understanding of the special situation of foreign investors. Learn about the main principles as set out in international agreements and case law. Critically assess the movements to reform the current international investment law regime.

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

International Investment Law

Class	Date	Day	Time	Hours	Lecturer	Topic
1	20. Sep.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Introduction to Investment Treaty Making
2	27. Sep.2020	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Scope of Application I
3	04. Oct.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Scope of Application II
4	11.Oct.2022	Tuesday	12:00 – 14:00 hrs	2	Andrea Steingruber	Scope of Application III
5	18. Oct.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Relative Standards of Treatment I
6	25. Oct.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Relative Standards of Treatment II
7	01.Nov.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Absolute Standards of Treatment I
8	08. Nov.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Absolute Standards of Treatment II
9	15. Nov.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Standards of Protection I
10	22. Nov.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Standards of Protection II
11	29. Nov.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Introduction to Investor-State Dispute Settlement (ISDS) I
12	06.Dec.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Introduction to Investor-State Dispute Settlement (ISDS) II
13	13.Dec.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Criticisms to ISDS
14	20.Dec.2022	Tuesday	12:00 – 14:00 hrs	2	Rodrigo Polanco	Alternatives to ISDS
				28		

Readings

All readings are available in the following link:

https://www.dropbox.com/sh/intx6uhtll7q3gz/AABmPkAPF6ysWdprebGHq_Gfa?dl=0

SESSION 1: 20 SEPTEMBER 2022

Subject

Introduction to Investment Treaty-Making

Topics

- The different types of foreign investment, their political economy and, impact for development and relevance for investment policy and negotiation
- The different levels on international investment regulation, investment contracts, national laws, investment treaties, preferential trade agreements and multilateral treaties
- The origins of International Investment Agreements (IIAs)
- IIAs basic structure and types:
 - Bilateral investment treaties (BITs), Regional investment treaties, Plurilateral investment treaties. The missing multilateral investment agreement.
 - Facts and figures on the negotiation and application of international investment agreements (IIAs)

Compulsory Reading Material

- Alsharani, Sarah (2020), “What Should We Know About the Origins of International Investment Law?”, *International Journal of Legal Information* 48 (3), 122–131.
- Dunning, John (2000) “Assessing the costs and benefits of foreign direct investment: Some theoretical considerations”, in P. Artisien-Maksimenko (ed), *Multinationals in Eastern Europe* (Macmillan), p. 10-57.
- Nadakavukaren Schefer, Krista (3rd edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), Chapter 1, p. 1-14.

Optional Reading Material

- Berge, Tarald (2020) “Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements”, *International Studies Quarterly* 64 (4), 919-928.
- 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.
- 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.

SESSION 2: 27 SEPTEMBER 2022

Subject

Scope of Application I

Topics

- What is an “investment”?
 - Defining a “covered” investment
 - Alternative definitions
 - The Salini Test
 - The question of the “legality” of investment: Investment in accordance with host state law

Compulsory Reading Material

- Nadakavukaren Schefer, Krista (3rd edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), Chapter 3, p. 74-143.
- *Philip Morris v. Uruguay*, Decision on Jurisdiction, ICSID Case No. ARB/10/7, pp. 59-68 (2 July 2013)
- *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).
- Zwolankiewicz, Agata (2021), “The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes?”, *ITA In Review*, 3(1), pp. 4-31.

Optional Reading Material

- Reed, Lucy F. & Jonathan E. Davis. “Who Is the Protected Investor?” In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 614–37. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart, 2015.
- *Romak v. Uzbekistan*, PCA Case NO. AA280, UNCITRAL, Award of 26 November 2009.
- UNCTAD, *Scope and Definition*. UNCTAD Series on Issues in International Investment Agreements II. New York; Geneva: United Nations, 2011, pp. 13-20; 72-98.
- *White Industries v. India*, UNCITRAL, Final Award (30 November 2011)

SESSION 3: 4 OCTOBER 2022

Subject

Scope of Application II

Topics

- Who is an “Investor”
 - Determining the nationality of natural persons
 - Determining the nationality of legal persons
 - The State as investor

Compulsory Reading Material

- *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award (7 July 2004).
- Nadakavukaren Schefer, Krista (3rd edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), p. 145-205.
- *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, pp. 1-30 (29 April 2004)
- Vijayvergia, Chitransh (2021), “Dual Nationality of a Private Investor in Investment Treaty Arbitration: A Potential Barrier to the Exercise of Jurisdiction Ratione Personae?”, *ICSID Review - Foreign Investment Law Journal*, 36 (1), Winter 2021, pp. 150 - 170.

Optional Reading Material

- Di Pietro, Domenico & Cheung, Kevin (2021), “The Definition of Investor in Investment Treaty Arbitration”, In: Chaisse, J., Choukroune, L., Jusoh, S. (eds) *Handbook of International Investment Law and Policy*. Springer, Singapore, pp. 45-70.
- McLaughlin, Mark (2020) “Defining a State-Owned Enterprise in International Investment Agreements”, *ICSID Review - Foreign Investment Law Journal*, Volume 34, Issue 3, Fall 2019, Pages 595–625
- UNCTAD, *Scope and Definition*. UNCTAD Series on Issues in International Investment Agreements II. New York; Geneva: United Nations, 2011, pp. 7-12; 21-71.
- *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15 (11 April 2007) Dissent by Prof. Orrego Vicuña (pp. 62-69).

SESSION 4: 11 OCTOBER 2022

Subject

Scope of Application III

Topics

- Application in time
- Geographical application
- Denial of Benefits

Compulsory Reading Material

- Hoffmann, Anne K. (2015) "Denial of Benefits." In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 598–613. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.
- Knahr, Christina (2015) "The Territorial Nexus between an Investment and the Host State." In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 590–97. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.
- Rubins, Noah & Love, Ben (2015) "Ratione Temporis." In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 481–94. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.

Optional Reading Material

- Hepburn, Jarrod. "Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration Vs. Russia", Investment Arbitration Reporter 9 November 2017.
- 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
- *Pac Rim v. El Salvador*, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (excerpts)
- Odysseas G. Repousis (2015), "On Territoriality and International Investment Law: Applying China's Investment Treaties To Hong Kong And Macao", Michigan Journal of International Law 37(1), pp. 113-190.

SESSION 5: 18 OCTOBER 2022

Subject

Relative Standards of Treatment I

Topics

- Relative standards of treatment:
 - Non-Discrimination
 - National treatment (NT)

Compulsory Reading Material

- Reinisch, August, & Schreuer, Christoph (2020), “National Treatment”, in *International Protection of Investments: The Substantive Standards*, Cambridge University Press pp. 587-679.
- *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability dated 17 March 2015 (excerpts)

Optional Reading Material

- Bjorklund Andrea, (2010) “The National Treatment Obligation” in Yannaca-Small K. (ed), *Arbitration Under International Investment Agreements: A Guide to Key Issues* (Oxford: Oxford University Press), pp. 411-444.
- Collins, David A. (2013). *National treatment in emerging market investment treaties*. London: The City Law School of City University London.
- Newcombe Andrew & Paradell Lluís, (2009) *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International), pp. 147-191.
- Reinisch, August (2015) “National Treatment.” In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 846–69. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.
- Sarzo, Matteo (2018), “The National Treatment Obligation”. In *General Principles of Law and International Investment Arbitration*, Leiden, The Netherlands: Brill | Nijhoff, Ch. 16, pp. 378-395.

SESSION 6: 25 OCTOBER 2022

Subject

Relative Standards of Treatment II

Topics

- Relative standards of treatment: Most-Favoured Nation Treatment
 - Substantive and procedural Issues
 - Admission, establishment, and pre-establishment

Compulsory Reading Material

- 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.
- *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction dated 25 January 2000 (p. 14-25)
- *MTD v. Chile*, Award dated 25 May 2004 (p. 30-32, 65-74)
- Reinisch, August (2015) “Most-Favoured Nation Treatment.” In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, pp. 807–45, Germany: Beck/Hart.

Optional Reading Material

- Acconci, Pia (2008) “Most-Favoured Nation Treatment” in Muchlinski P, Ortino F, Schreuer C. (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press), pp. 363-406
- Banifatemi, Yas (2009) “The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration,” in *Investment Treaty Law: Current Issues III* (A. Bjorklund, I. Laird, S. Ripinsky eds., BIICL), p. 241-273
- Cohen Smutny, Abby & Steven, Lee (2010) “The MFN Clause: What are its Limits?” in Yannaca-Small K. (ed), *Arbitration Under International Investment Agreements: A Guide to Key Issues* (Oxford: Oxford University Press), pp. 351-381.
- Newcombe Andrew & Paradell Lluís, (2009) *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International), pp. 192-232.
- Tawil, Guido Santiago (2009), “Most Favoured Nation Clauses And Jurisdictional Clauses In Investment Treaty Arbitration”, in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press), pp. 9-30.

SESSION 7: 1 NOVEMBER 2022

Subject

Absolute Standards of Treatment I

Topics

- Conceptualization of absolute standards of protection: minimum standard of treatment, fair and equitable treatment and full protection and security.
- The minimum standard of treatment, origins and relationship with fair and equitable treatment and full protection and security standards.

Compulsory Reading Material

- *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926), October 15th
- *Harry Roberts (U.S.A.) v. United Mexican States* (1926), November 2nd
- Haeri, Hussein (2011) “A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law” *Arbitration International* 27(1), pp. 27-46.

Optional Reading Material

- Alvik, Ivar (2020) “The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy”, *European Journal of International Law*, Volume 31, Issue 1, February 2020, Pages 289–312.
- Anghie, Anthony (2007), *Imperialism, Sovereignty and the Making of International Law* (2007) Cambridge University Press, pp. 196-244.
- Johnson Jr., O. Thomas & Gimblett, Jonathan (2012) “From Gunboats to BITs: Evolution of Modern International Investment Law” (2012) *Yearbook on International Investment Law & Policy* 2010-2011 649.
- Newcombe Andrew & Paradell Lluís, (2009) *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International), pp. 233-253.
- Jan Paulsson & Georgios Petrochilos (2007), “Neer-ly Mised?”, *ICSID Review - Foreign Investment Law Journal*, 22 (2), Fall 2007, pp. 242–257.

SESSION 8: 8 NOVEMBER 2022

Subject

Absolute Standards of Treatment II

Topics

- Fair and equitable treatment and full protection and security standards.
- Application of fair and equitable treatment and full protection and security standards in practice and new developments on investment treaty-making.

Compulsory Reading Material

- *Ampal-American and others v. Egypt (2017) Decision on Liability and Heads of Loss, February 21st (excerpts)*
- Nadakavukaren Schefer, Krista (3rd edition, 2020), *International Investment Law. Text, Cases and Materials*, (Edward Elgar), Chapter 5, p. 384-463.
- *Philip Morris v. Uruguay (2016) Award July 8th (excerpts)*

Optional Reading Material

- Dolzer, Rudolf & Schreuer, Christoph (2012), *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press). Chapter VII (Standards of Protection) p. 130-165.
- Dumberry, Patrick (2016), "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?", 8 *Journal of International Dispute Settlement*, 2016, 155-178.
- Potestà, Michele, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", *ICSID Review – Foreign Investment Law Journal*, Vol. 28, No. 1 (2013), pp. 88–122.
- Yannaca-Small, Katia, (2010) "Fair and Equitable Treatment Standard" in Yannaca-Small K. (Ed), *Arbitration Under International Investment Agreements: A Guide to Key Issues* (Oxford: Oxford University Press), pp. 385-410.

SESSION 9: 15 NOVEMBER 2022

Subject

Standards of Protection I

Topics

Expropriation and strife

- Direct expropriation
- Indirect Expropriation (including regulatory takings and creeping expropriation)
- Conditions for lawful expropriation
- Compensation for expropriation
- Compensation for strife

Compulsory Reading Material

- Eduardo Hay and Cordell Hull, Prompt, Adequate, and Effective Payment (1938).
- *Mike Campbell et al. v. Zimbabwe*, SADC Tribunal, Case No. 2/2007, Judgment, esp. pp. 41-55 (28 November 2008).
- Nadakavukaren Schefer, K (3rd edition, 2020), International Investment Law. Text, Cases and Materials (Edward Elgar), Chapter 4, pp. 207-337.
- *Tidewater v. Venezuela* (2015) Award, March 13th, pp. 31-49.

Optional Reading Material

- *ADC v. Hungary* (2006) Award, October 2nd (pp. 69-81)
- Fortier, L. Yves & Drymer, Stephen L (2005) "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *Asia Pacific Law Review*, 13:1, 79-110
- Henckels, Caroline (2012), "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration", *Journal of International Economic Law*, Volume 15, Issue 1, March 2012, Pages 223–255.
- UNCTAD, *Expropriation: a Sequel* (2012) UNCTAD Series on Issues in International Investment Agreements II.

SESSION 10: 22 NOVEMBER 2022

Subject

Standards of Protection II

Topics

- The scope and types of transfer rights. Permissible restrictions and exceptions to transfer obligations
- Political risk insurance and subrogation
- Entry and sojourn of personnel
- Transparency
- Umbrella clauses

Compulsory Reading Material

- Nadakavukaren Schefer, Krista (3rd edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), Chapter 7, pp. 661-691.
- *Rusoro Mining v. Venezuela (2016)*, Award dated 22 August 2016 (excerpts).
- *SGS v. Philippines (2004)* Decision of the Tribunal on Objections to Jurisdiction, January 29th

Optional Reading Material

- Arel-Bundock, Vincent & Peinhardt, Clint & Pond, Amy (2020) "Political Risk Insurance: A New Firm-level Data Set," *Journal of Conflict Resolution, Peace Science Society (International)*, vol. 64(5), May 2020, pp. 987-1006.
- Kher, Priyanka (2020), Policy Options to Mitigate Political Risk and Attract FDI, In Focus, Finance, Competitive & Innovation – Investment Climate, World Bank.
- Lee, Jaemin (2015), "Putting a Square Peg into a Round Hole? Assessment of the "Umbrella Clause" from the Perspective of Public International Law", *Chinese Journal of International Law*, Volume 14, Issue 2, 1 June 2015, Pages 341–373.
- Maupin, Julie (2013) "Transparency in International Investment Law: The Good, the Bad and the Murky", in *Transparency in International Law* (Andrea Bianchi & Anne Peters, Eds.), Cambridge: Cambridge University Press, pp. 142-171.
- Newcombe Andrew and Paradell Lluís, (2009) *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International), Chapter 8, p. 398-417.

SESSION 11: 29 NOVEMBER 2022

Subject

Introduction to Investor-State Dispute Settlement (ISDS) I

Topics

- Investment treaty arbitration: facts and figures
- The rise of ISDS claims (claimants, respondents, types of claims, arbitrators, economic sectors, procedural rules and institutions, costs, duration)
- Different kinds of ISDS clauses
 - Differences between ICSID and UNCITRAL (and others) rules of arbitration
 - Treaty claims v. contract claims (and umbrella clauses)
 - Impact of MFN clauses

Compulsory Reading Material

- ICSID, The ICSID Caseload – Statistics (Issue 2022-2), [https://icsid.worldbank.org/sites/default/files/publications/The ICSID Caseload Statistics 2022-2 ENG.pdf](https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%202022-2%20ENG.pdf)
- UNCTAD, IIA Issues Note No. 2 (July 2020), *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>

Optional Reading Material

- Álvarez Zárate, J., Baltag, C., Behn, D., Bonnitza, J., De Luca, A., Hestermeyer, H., Langford, M., Mistelis, L., López Rodríguez, C., Shaffer, G., & Weber, S. (2020). “Duration of Investor-State Dispute Settlement Proceedings”, *The Journal of World Investment & Trade*, 21(2-3), 300-33.
- Bottini, G., Titi, C., Pérez Aznar, F., Chaisse, J., Jovanovic, M., & Puigdemont Sola, O. (2020) “Excessive Costs and Recoverability of Costs Awards in Investment Arbitration”, *The Journal of World Investment & Trade*, 21(2-3), 251-299
- Douglas, Zachary (2003) “The Hybrid Foundations of Investment Treaty Arbitration”, *British Yearbook of International Law*, Volume 74, Issue 1, pp. 151–289.
- World Bank Group (2019), *Retention and Expansion of Foreign Direct Investment, Political Risk and Policy Responses*, Summary of Research Findings and Policy Implications.

SESSION 12: 6 DECEMBER 2022

Subject

Introduction to Investor-State Dispute Settlement (ISDS) II

Topics

- Consent to arbitration and its limits
 - Waiting period, exhaustion of local remedies, fork in the road, no U-turn
 - Complying with requirements provided in the treaty.
- Jurisdiction *ratione materiae*
 - “legal dispute” arising “directly” from an “investment”
- Jurisdiction *ratione personae*
 - “Contracting State” and “National of another Contracting State (individuals and Juridical persons)”
- Award: Annulment and setting aside

Compulsory Reading Material

- Legum, Barton, & Crevon, Anna (2014), “An Outline of Procedure in an Investment Treaty Arbitration—Strategy and Choices”. In *Litigating International Investment Disputes*. Leiden, The Netherlands: Brill | Nijhoff, vol. 8, pp. 1-18.
- Shaw, Gary J. (2022), “The 2022 ICSID Rules: A Leap Toward Greater Transparency in ICSID Arbitration”, *ICSID Review - Foreign Investment Law Journal*, 2022, <https://doi.org/10.1093/icsidreview/siac016>

Optional Reading Material

- Alschner, Wolfgang (2019) “Correctness of Investment Awards: Why Wrong Decisions Don’t Die”, *The Law & Practice of International Courts and Tribunals*, 18(3), 345-368.
- Kozmenko, Anna & Dulcka, Anastasiia (2020) “Swiss Supreme Court refuses to vacate Energy Charter Treaty award in Czech photovoltaic case”, *Practical Law UK*, August 10th
- Sasson, Monique (2015) “Investment Arbitration: Procedure”, In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 1288-1372. München, Germany: Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.
- Waibel, Michael (2015) “Investment Arbitration: Jurisdiction and Admissibility”, In *International Investment Law: A Handbook*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch, 1212-87. München, Germany : Oxford, United Kingdom : Baden-Baden, Germany: Beck/Hart.

SESSION 13: 13 DECEMBER 2022

Subject

Criticisms to Investor-State Dispute Settlement (ISDS)

Topics

- Legitimacy issues
- Procedural issues
- Improving Investor-State Arbitration:
 - Admissibility: Limiting investor access to ISDS
 - Role of third parties: Amicus Curiae and Non-Disputing Party Submissions
 - Transparency: ICSID and UNCITRAL Reforms

Compulsory Reading Material

- Alvarez, José E (2021), “ISDS Reform: The Long View”, *ICSID Review - Foreign Investment Law Journal*, Volume 36, Issue 2, Spring 2021, pp. 253-277.
- 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

- 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, pp. 949–971.
- Roberts, Anthea (2010) “Power and Persuasion in Investment Treaty Interpretation.” *American Journal of International Law* 104, no. 2, pp. 179–225.
- UNCITRAL (2014) Rules on Transparency in Treaty-based investor-State Arbitration.
- 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 14: 20 DECEMBER 2022

Subject

Alternatives to Investor-State Dispute Settlement

Topics

- Prevention and management of investment disputes
- 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

- Echandi, Roberto (2013), *Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management*, in *Prospects in International Investment Law and Policy*, (Roberto Echandi and Pierre Sauvé, eds. Cambridge: Cambridge University Press), pp. 270-305.
- 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)

Optional Reading Material

- Bonnitcha, Jonathan, & Williams, Zoe (2022), "Investment Dispute Prevention and Management Agencies. Toward a more informed policy discussion" (International Institute for Sustainable Development (IISD), 28 January 2022), <https://www.iisd.org/publications/investment-dispute-prevention-and-management-agencies>).
- Bungenberg, Marc & Reinisch, August (2018) "From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement", *European Yearbook of International Law*, Special Issue.
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