International Investment Law

**Semester:** Fall semester- FS 2020

**ECTS:** 5

**Lecturer:** Dr Rodrigo Polanco

**Dates:** Tuesdays 12:00 – 14:00.

**Format:** Blended learning (in-person / online)

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

**Virtual Room** (Zoom): https://zoom.us/j/95302947960?pwd=cG85TnZaZm9Bd0lTN2RNNW1zZzJLdz09
Meeting ID: 953 0294 7960
Passcode: 226138

**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 is a lecture course designed to give an introduction to the international law governing foreign direct investment. We will cover the basic elements of the protection of foreign property from expropriation and unfair treatment as developed in treaties and cases. We will also examine the dispute settlement mechanism of the ICSID in addition to traditional
state-to-state dispute settlement. We will also take a look at insurance schemes available to investors from governments and organizations, as well as reviewing the remaining barriers to transboundary investment activities.

**Lecturer**

Rodrigo Polanco

Rodrigo 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).

Rodrigo is also a published scholar and legal practitioner with experience in both the public and private sectors. He specialises in economic and international law, investment law, trade law, and air and space law. 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 is a 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 environmental organisation.

**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

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<thead>
<tr>
<th>Class</th>
<th>Date</th>
<th>Day</th>
<th>Time</th>
<th>Hours</th>
<th>Lecturer</th>
<th>Topic</th>
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<tr>
<td>1</td>
<td>15. Sep.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
<td>2</td>
<td>Rodrigo Polanco</td>
<td>Introduction to Investment Treaty Making</td>
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<td>2</td>
<td>22. Sep.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
<td>2</td>
<td>Rodrigo Polanco</td>
<td>Scope of Application I</td>
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<td>3</td>
<td>29. Sep.2020</td>
<td>Tuesday</td>
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<td>Rodrigo Polanco</td>
<td>Scope of Application II</td>
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<td>06. Oct.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Andrea Steingruber</td>
<td>Scope of Application III</td>
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<td>13. Oct.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
<td>2</td>
<td>Andrea Steingruber</td>
<td>Relative Standards of Treatment I</td>
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<td>6</td>
<td>20. Oct.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Relative Standards of Treatment II</td>
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<td>7</td>
<td>27. Oct.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Absolute Standards of Treatment I</td>
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<td>8</td>
<td>03. Nov.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Absolute Standards of Treatment II</td>
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<td>10. Nov.2020</td>
<td>Tuesday</td>
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<td>Standards of Protection I</td>
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<td>10</td>
<td>17. Nov.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Introduction to Investor-State Dispute Settlement (ISDS) I</td>
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<td>24. Nov.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
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<td>Rodrigo Polanco</td>
<td>Introduction to Investor-State Dispute Settlement (ISDS) II</td>
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<td>01. Dec.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
<td>2</td>
<td>Rodrigo Polanco</td>
<td>Criticisms to ISDS</td>
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<td>08.12.2020</td>
<td>Tuesday</td>
<td>12:00 – 14:00 hrs</td>
<td>2</td>
<td>Rodrigo Polanco</td>
<td>Alternatives to ISDS</td>
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Readings

All readings are available in the following link:

https://www.dropbox.com/sh/j9blpf57iq67hmj/AADXefcQpHb-2N5cPginEpZMa?dl=0
SESSION 1: SEPTEMBER 15, 2020

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
- International Investment Agreements (IIAs): basic structure and types:
  - Bilateral investment treaties (BITs)
  - Regional investment treaties
  - Plurilateral investment treaties
  - The mystery of the missing multilateral investment agreement
  - Facts and figures on the negotiation and application of international investment agreements (IIAs)

Compulsory Reading Material

Optional Reading Material
SESSION 2: SEPTEMBER 22, 2020

Subject
Scope of Application I

Topics
• What is an “investment”?
  o The Salini Test
  o Alternative definitions
  o Defining a “covered” investment
  o The question of the “legality” of an investment: Investment in accordance with host state law
  o Admission, establishment, and pre-establishment

Compulsory Reading Material
• 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).

Optional Reading Material
• Romak v. Uzbekistan, PCA Case NO. AA280, UNCITRAL, Award of 26 November 2009.
• White Industries v. India, UNCITRAL, Final Award (30 November 2011)
SESSION 3: SEPTEMBER 29, 2020

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).
- Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, pp. 1-30 (29 April 2004)

Optional Reading Material
- National Gas v. Egypt, ICSID Case No. ARB/11/7, Award (3 April 2014)
- 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: OCTOBER 6, 2020

Subject
Scope of Application III

Topics
- Application in time
- Geographical application
- Denial of Benefits

Compulsory Reading Material
- Pac Rim v. El Salvador, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (excerpts)

Optional Reading Material
SESSION 5: OCTOBER 13, 2020

Subject
Relative Standards of Treatment I

Topics
- Relative standards of treatment:
  - Non-Discrimination
  - National treatment (NT)
  - Complexities in negotiation and application
  - Recent case law regarding NT

Compulsory Reading Material
- Clayton/Bilcon v. Canada, Award on Jurisdiction and Liability dated 17 March 2015 (excerpts)

Optional Reading Material
SESSION 6: OCTOBER 20, 2020

Subject
Relative Standards of Treatment II

Topics
- Relative standards of treatment:
  - Most-Favoured Nation Treatment
  - Substantive Issues
  - Procedural Issues
  - Recent case law regarding MFN

Compulsory Reading Material
- *MTD v. Chile*, Award dated 25 May 2004 (p. 30-32, 65-74)

Optional Reading Material
SESSION 7: OCTOBER 27, 2020

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

Optional Reading Material
SESSION 8: NOVEMBER 3, 2020

Subject
Absolute Standards of Treatment II

Topics
• Fair and equitable treatment and full protection and security standards.
• Complexities in the negotiation and application of fair and equitable treatment and full protection and security standards.

Compulsory Reading Material
• Ampal-American and others v. Egypt (2017) Decision on Liability and Heads of Loss, February 21st (excerpts)
• Philip Morris v. Uruguay (2016) Award July 8th (excerpts)

Optional Reading Material
• Baghat v. Egypt (2019) Final Award, December 23rd (excerpts)
SESSION 9: NOVEMBER 10, 2020

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

Optional Reading Material
- *ADC* v. *Hungary* (2006) Award, October 2nd (pp. 69-81)
SESSION 10: NOVEMBER 17, 2020

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

Optional Reading Material
SESSION 11: NOVEMBER 24, 2020

Subject
Introduction to Investor-State Dispute Settlement (ISDS)

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

Optional Reading Material
SESSION 12: DECEMBER 1, 2020

Subject
Introduction to Investor-State Dispute Settlement (ISDS) II

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

Compulsory Reading Material

Optional Reading Material
SESSION 13: DECEMBER 8, 2020

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
- 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
SESSION 14: DECEMBER 15, 2020

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
- 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