International Investment Law

Semester: Fall semester- FS 2023

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**

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<th>Class</th>
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<th>Day</th>
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<th>Hours</th>
<th>Lecturer</th>
<th>Topic</th>
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<tr>
<td>1</td>
<td>19. Sep.2023</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>
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<td>Scope of Application I</td>
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<td>03. Oct.2023</td>
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<td>Scope of Application II</td>
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<td>Andrea Steingruber</td>
<td>Scope of Application III</td>
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<td>Tuesday</td>
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<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/lcc4yk3nt2hjx1a/AAC0quSBoDraDrqOnt1UQw_qa?dl=0
SESSION 1: 19 SEPTEMBER 2023

Subject
Introduction to International Investment Law

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

Optional Reading Material


SESSION 2: 26 SEPTEMBER 2023

Subject
Scope of Application I

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

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: 3 OCTOBER 2023

Subject
Scope of Application II

Topics
• Who is an “Investor”
  o Determining the nationality of natural persons
  o Determining the nationality of legal persons
  o 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
• 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: 10 OCTOBER 2023

Subject
Scope of Application III

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

Compulsory Reading Material

Optional Reading Material
- *Pac Rim v. El Salvador*, Decision on the Respondent’s Jurisdictional Objections dated 1 June 2012 (excerpts)
SESSION 5: 17 OCTOBER 2023

Subject
Relative Standards of Treatment I

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

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

Optional Reading Material
SESSION 6: 24 OCTOBER 2023

Subject
Relative Standards of Treatment II

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

Compulsory Reading Material
• 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)

Optional Reading Material
SESSION 7: 31 October 2023

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
- Harry Roberts (U.S.A.) v. United Mexican States (1926), November 2nd
- L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926), October 15th

Optional Reading Material
SESSION 8: 7 NOVEMBER 2023

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
- Philip Morris v. Uruguay (2016) Award July 8th (excerpts)

Optional Reading Material
SESSION 9: 14 NOVEMBER 2023

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).

Optional Reading Material
- ADC v. Hungary (2006) Award, October 2nd (pp. 69-81)
SESSION 10: 21 NOVEMBER 2023

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
- Rusoro Mining v. Venezuela (2016), Award dated 22 August 2016 (excerpts).

Optional Reading Material
SESSION 11: 28 NOVEMBER 2023

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
  o Differences between ICSID and UNCITRAL (and others) rules of arbitration
  o Treaty claims v. contract claims (and umbrella clauses)
  o Impact of MFN clauses

Compulsory Reading Material
• ICSID, The ICSID Caseload – Statistics (Issue 2022-2),
• UNCTAD, IIA Issues Note No. 2 (July 2020), Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019,

Optional Reading Material
SESSION 12: 5 DECEMBER 2023

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
  Treaty Arbitration—Strategy and Choices”. In Litigating International Investment
• 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
  Don’t Die”, The Law & Practice of International Courts and Tribunals, 18(3), 345-368.
• Batifort, Simon, and Larkin, Andrew (2022) “The Meaning of Silence in Investment
  https://doi.org/10.1093/icsidreview/siac022.
• Koepp, 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
• Kozmenko, Anna & Dulska, Anastasiea (2020) “Swiss Supreme Court refuses to vacate
  Energy Charter Treaty award in Czech photovoltaic case”, Practical Law UK, August 10th
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
- Franck, Susan (2023) “Reforming World Bank Dispute Resolution: ICSID in Context”. Michigan Journal of International Law, no. 44.3 (2023): 349. [https://doi.org/10.36642/mjil.44.3.reforming](https://doi.org/10.36642/mjil.44.3.reforming).
SESSION 14: 19 DECEMBER 2023

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
• 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.
