

# 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

### International Investment Law

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

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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

- Nadakavukaren Schefer, Krista (3<sup>rd</sup> edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), Chapter 1, p. 1-14.
- UNCTAD, IIA Issues Note No. 1 (July 2020), *The Changing IIA Landscape: New Treaties And Recent Policy Developments*,  
<https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf>

### Optional Reading Material

- Berge, Tarald (2020) "Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements", *International Studies Quarterly* (2020) 00, 1–10.
- 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.
- 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, 26–34

## SESSION 2: SEPTEMBER 22, 2020

### Subject

Scope of Application I

### Topics

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

### Compulsory Reading Material

- Nadakavukaren Schefer, Krista (3<sup>rd</sup> 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).

### 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: 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).
- Nadakavukaren Schefer, Krista (3<sup>rd</sup> 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)

### Optional Reading Material

- 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
- *National Gas v. Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014)
- 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: 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)
- Hepburn, Jarrod. "Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration Vs. Russia", *Investment Arbitration Reporter* 9 November 2017.

### Optional 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.
- 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
- 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.

## 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

- 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.
- *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.



## 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

- *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, 807–45. München, Germany : Oxford, United Kingdom : Baden-Baden, 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.

## 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 15<sup>th</sup>
- *Harry Roberts (U.S.A.) v. United Mexican States* (1926), November 2<sup>nd</sup>
- Haeri, Hussein (2014) “A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law: The Gillis Wetter Prize.” *Arbitration International* 27, no. 1 (March 1, 2011), 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.

## 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 21<sup>st</sup> (excerpts)*
- Nadakavukaren Schefer, Krista (3<sup>rd</sup> edition, 2020), *International Investment Law. Text, Cases and Materials*, (Edward Elgar), Chapter 5, p. 384-463.
- *Philip Morris v. Uruguay (2016) Award July 8<sup>th</sup> (excerpts)*

### Optional Reading Material

- *Baghat v. Egypt (2019) Final Award, December 23<sup>rd</sup> (excerpts)*
- 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: 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

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

#### Optional Reading Material

- *ADC v. Hungary* (2006) Award, October 2<sup>nd</sup> (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.
- *Olin v. Libya* (2018) Final Award, May 25<sup>th</sup> (excerpts)
- UNCTAD, *Expropriation: a Sequel* (2012) UNCTAD Series on Issues in International Investment Agreements II

## 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

- Nadakavukaren Schefer, Krista (3<sup>rd</sup> edition, 2020), *International Investment Law. Text, Cases and Materials* (Edward Elgar), Chapter 7, pp. 661-691.
- *SGS v. Philippines (2004)* Decision of the Tribunal on Objections to Jurisdiction, January 29<sup>th</sup>
- *von Pezold and others v. Zimbabwe (2015)* Award, July 28<sup>th</sup> (excerpts)

### 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), pages 987-1006, May.
- 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. doi:10.1017/CBO9781139108843.009
- Newcombe Andrew and Paradell Lluís, (2009) *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International), Chapter 8, p. 398-417.

## SESSION 11: NOVEMBER 24, 2020

### 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

- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (2005) Decision on Jurisdiction, November 14<sup>th</sup>.
- ICSID, The ICSID Caseload – Statistics (Issue 2020-1), <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%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., Bonnitcha, 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: DECEMBER 1, 2020

### 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

- Nadakavukaren Schefer, K (2016), *International Investment Law. Text, Cases and Materials* (Edward Elgar, 2nd edition), pp. 428-590.
- *Philip Morris Asia Limited v. The Commonwealth of Australia* (2015) Award on Jurisdiction and Admissibility, December 17<sup>th</sup>, paras. 535-588.
- *Wena Hotels Ltd. v. Arab Republic of Egypt* (2002) Decision on Annulment, February 5<sup>th</sup>.

### Optional Reading Material

- Alschner, Wolfgang (2020) “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 10<sup>th</sup>
- 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: 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.
- UNCITRAL (2014) Rules on Transparency in Treaty-based investor-State Arbitration.

### 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.
- Roberts, Anthea (2010) "Power and Persuasion in Investment Treaty Interpretation." *American Journal of International Law* 104, no. 2, pp. 179–225.
- 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: 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

- 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

- 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.
- Kaufmann-Kohler, Gabrielle & Potestà, Michele (2020) "The Path to Reform of ISDS: What Role for National Courts?", in *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options*, *European Yearbook of International Economic Law* (Marc Bungenberg et al. eds) Springer International Publishing, pp. 87–102.
- Polanco, Rodrigo (2019) "Home State Role in ISDS Together with the Host State", in *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?*, Cambridge University Press, pp. 89-166.
- Yackee, Jason Webb, "Do We Really Need BITs - Toward a Return to Contract in International Investment Law", 3 *Asian J. WTO & Int'l Health L & Pol'y* 121 (2008).