

Latest Developments in International Investment Law and Dispute Settlement

Semester: Fall semester - HS 2020

Root Number: 446639

ECTS: 3

Lecturers: Roberto Echandi & Georgios Petrochilos

Dates: 13 - 17 July 2020

Time: Monday – Thursday 9:00 – 16:00 / Friday: Take-home assessment

Location: In response to the COVID-19 pandemic and following the guidelines established by the University of Bern, all courses of the 2020 WTI Summer Academy will only be held online. This course will have live sessions on Zoom.

Audience:

- Government officials; Embassy staff; people working for international organisations and NGOs
- Master of Advanced Studies of International Law and Economics (MILE) Students
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe
- Students from various universities across Switzerland

Course Description

This course will examine the latest trends in the negotiation and implementation of international investment agreements (IIAs), placing them into their political economy and public policy context, and with respect to investment dispute settlement, non-litigious investor-State conflict management, devoting particular attention to the most recent jurisprudence in investor-state arbitration and proposals for ISDS reform, including the use of non-litigious means for addressing investor-State conflicts, developments of standing or multilateral investment courts, following developments in the EU, Canada and UNCITRAL, as well as proposals for improving ISDS or replacing it with alternative means.

In addition to the recently developed concept and practice on non-litigious investor-State conflict management, key features of investor-state arbitration procedures will be explored, exploring the main phases of the investor-state arbitration process, such as consent and jurisdiction, the implications of the choice of different procedural rules (with particular focus on ICSID and UNCITRAL), available remedies and post-award remedies. It will also introduce and highlight the current developments of ISDS alternative means of dispute resolution (ADR) different to arbitration.

This course will also analyse the latest trends in the negotiation and implementation of IIAs, devoting particular attention to investment promotion and facilitation, as well as the most recent jurisprudence on investment protection. Key differences in the substance of investment protection between bilateral investment treaties (BITs) and the investment chapters of preferential trade agreements, particularly recent mega-regional agreements such as CETA, the CPTPP, and the USMCA, will be explored.

Alternatives to regulatory fragmentation in investment law will also be addressed, including the relationship between investment and trade, as well as and economic development and prospects for multilateral rule-making in the investment field.

Lecturers

Roberto Echandi

Roberto Echandi is a Lead Trade and Investment Specialist of the Macroeconomics, Trade and Investment Global (MTI) Practice of the World Bank Group (WBG). In

in addition to Global Lead for Investment Policy at the WBG, he was formerly the director of the Programme on International Investment and member of the faculty at the World Trade Institute, University of Bern, and member of the faculty at the Master's Programme on International Economic Law and Policy at the University of Barcelona. He is also a member of the Editorial Board of the Journal of International Economic Law (JIEL) as well as the Journal of World Investment and Trade (JWIT).

He has also been Ambassador of Costa Rica to the Kingdom of Belgium, Grand Duchy of Luxembourg and the European Union, and Chief Negotiator for Costa Rica for the Association Agreement between Central America and the European Union. For more than a decade he acted as Chief Negotiator for Costa Rica in numerous international negotiations on investment, trade in services and dispute settlement, among other trade-related subjects.

He received his LLM and undertook his doctoral studies in international trade law from the University of Michigan School Of Law. He also holds an MPhil in Latin American studies from the University of Oxford and a law degree from the University of Costa Rica. He has served as Adjunct Professor of Law at Georgetown University Law Center, Director-General for International Trade at the Ministry of Foreign Trade of Costa Rica, Special Adjunct Ambassador for US Trade Affairs, and legal advisor to the Appellate Body Secretariat of the WTO, and Member of the ICSID Panel of Conciliators. Roberto has published several books and articles examining investment issues, dispute settlement, trade in services and the evolution of regional economic integration in the Americas.

Georgios Petrochilos

Georgios Petrochilos is Partner at Three Crowns, Paris. Formerly the head of the Paris arbitration team of a leading international firm and of that firm's public international law group, Georgios has a broad practice covering inter-state, investment, and commercial disputes. He has represented States, international organizations, and private parties in more than 70 disputes, including the largest maritime delimitation case to date in the International Court of Justice (Peru v Chile), the ground-breaking "Black Economic Empowerment" case before ICSID (Foresti and ors. v South Africa), and some of the most critical cases in the European energy industry in the past decade. He is an Avocat (France) and an Advocate of the Supreme Court (Greece), and registered with the Law Society of England & Wales.

Georgios has published extensively on international law and international arbitration, including the well-known monograph *Procedural Law in International Arbitration*, and he is the co-author, with Jan Paulsson, of a commentary on the UNCITRAL Arbitration Rules. Georgios represents a Member State at UNCITRAL since 2007; is a visiting professor at the University of Fribourg in Switzerland; and the current rapporteur of the International Law Association International Arbitration Committee. He holds graduate degrees, including a doctorate, from Oxford, as well as degrees from Strasbourg and Athens. His working languages are English, French, and Greek.

Learning Objectives:

- Have a clear understanding of the conceptual differentiation between investor-State conflict management and investor-State dispute resolution and the practical implications of such distinction.
- Have a clear understanding of the network and architecture of rules governing the settlement of investment disputes at the domestic, bilateral, regional and multilateral levels.
- Know the key trends, main features and effects of dispute settlement procedures in international investment law.
- Understand specific topics in investor-State arbitration, such as the implications of the choice of different procedural rules.
- Know recent developments in investment law treaty-making, including the relationship with trade agreements as well as economic development.
- Understand the most important reforms to policy and regulations regarding investor-State dispute settlement that have been implemented or proposed as alternatives to investor-State arbitration or to improve that system.

Exams and Grades:

- Students' knowledge will be assessed on the basis of an open book, take home exam which needs to be completed on an individual basis. The exam will consist of essay questions.
- Take home assignment made available on Thursday after class and to be submitted before Friday by 20:00.
- One question from Roberto Echandi, carries 50% weight in the final course grade.
- One question from Georgios Petrochilos, carries 50% weight in the final course grade.

Course Overview

| Date | Day | Time | Lecturer/s | Topic |
|-----------------|-----------|-------------|----------------------|---|
| 13. July | Monday | 9:00 12:00 | Georgios Petrochilos | Introduction to the Investor-State Arbitration Process |
| | | 14:00 16:00 | " | Introduction to the Investor-State Arbitration Process |
| 14 July | Tuesday | 9:00 12:00 | Georgios Petrochilos | Award and Post-Award Remedies |
| | | 14:00 16:00 | " | Practical exercise examining the process of an investor-State arbitration |
| 15 July | Wednesday | 9:00 12:00 | Roberto Echandi | Understanding Foreign Direct Investment (FDI) and Development: Past, Present and Future |
| | | 14:00 16:00 | " | Introduction to Investment Policy and Law: Domestic Investment Regulation, International Investment Agreements (IIAs) and Evolution in Investment Rule Making |
| 16 July | Thursday | 9:00 12:00 | Roberto Echandi | The "Blind Side" of International Investment Law: Implementation of IIAs in Practice |
| | | 14:00 16:00 | " | Innovations in investment treaty-making practice |
| 17 July | Friday | | | Take-home assignment |

MONDAY, JULY 13, 2020

Lecturer: Georgios Petrochilos

Subject: Introduction to the Investor-State Arbitration Process

Topics:

- General structure of investment treaties
- Initiating an investor-State arbitration: initial case assessment, request for arbitration and choice of procedural rules
- Constitution of the arbitral tribunal
- Independence and impartiality
- Challenges of arbitrators
- Organization of the procedure
- Splitting issues for separate determination: bifurcation or trifurcation
- Issues of jurisdiction and admissibility
- Evidentiary issues
- The arbitral proceedings: written and oral submissions
- Provisional Measures
- Applicable law in investment disputes
- Non-disputing party participation and transparency
- Intra-EU BITs
- The proposed bilateral or multilateral investment court(s)

| Primary Sources | |
|------------------------|--|
| 1. | ICSID Convention and Rules (2006) |
| 2. | UNCITRAL Arbitration Rules with UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) |
| 3. | SCC Arbitration Rules (2017) |
| 4. | UN Convention on Transparency in Treaty-based Investor-State Arbitration (2015) |
| 5. | IBA Guidelines on Conflicts of Interest in International Arbitration (2014) |
| 6. | IBA Rules on the Taking of Evidence in International Arbitration (2010) |
| 7. | Germany-Pakistan BIT (1959) |
| 8. | Norway Model BIT (2015) |
| 9. | Energy Charter Treaty (1994) |
| 10. | NAFTA (Investment Chapter) (1994) |

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|--------------------------|--|
| 11. | Example of a BIT with Notes for Interpretation (2016) |
| Secondary Sources | |
| 1. | Chapter 5: General Structure of Investment Treaties J. Salacuse, <i>The Law of Investment Treaties</i> (2 nd ed., 2015) |
| 2. | Chapter 5: An Overview of Procedure in an Investment Treaty Arbitration (Bart Legum) in K Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2 nd ed., 2018) |
| 3. | Chapter 8: Challenges of Arbitrators in Investment Arbitration (Loretta Malintoppi and Alvin Yap) in K Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2 nd ed., 2018) |
| 4. | Chapter 24: Interim Relief in Investment Treaty Arbitration (Gabrielle Kaufmann-Kohler et al.) in K Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2 nd ed., 2018) |
| 5. | Chapter 5: The Splitting of Issues for Separate Determination (Bifurcation or Trifurcation) J. Commission and R. Moloo, <i>Procedural Issues in International Investment Arbitration</i> (2018) |
| 6. | Chapter 6: Non-Disputing Party Participation and Transparency J. Commission and R. Moloo, <i>Procedural Issues in International Investment Arbitration</i> (2018) |
| 7. | Chapter 7: Evidentiary Issues J. Commission and R. Moloo, <i>Procedural Issues in International Investment Arbitration</i> (2018) |
| 8. | VIII: Governing Law in Investment Disputes B. Sabahi, N. Rubins and D. Wallace, Jr., <i>Investor-State Arbitration</i> (2 nd ed., 2019) |
| 9. | OECD Consultation Paper on Appointing Authorities and Selection of Arbitrators (2018) <i>(Further Reading)</i> |
| 10. | OECD Working Paper on Investment Treaties and Shareholder Claims (2014) <i>(Further Reading)</i> |

TUESDAY, JULY 14, 2020

Lecturer: Georgios Petrochilos

Morning Session: Award and Post-Award Remedies

Topics:

- Award
- Costs
- Recognition and enforcement of awards
- Post-award remedies in investment arbitration: annulment of awards in the ICSID context and review of non-ICSID awards by national courts.
- Execution of investment awards and sovereign immunity considerations.

| Primary Sources | |
|--------------------------|---|
| 1. | New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) |
| 2. | UNCITRAL Model Law on International Commercial Arbitration (1994) |
| Secondary Sources | |
| 1. | Chapter 27: Annulment of ICSID Awards – Is it Enough or Is Appeal around the Corner? (Katia Yannaca-Small) in K Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2 nd ed., 2018) |
| 2. | Chapter 28: Review of non-ICSID Awards by National Courts (Kaj Hobér and N. Eliasson) in K Yannaca-Small (ed.), <i>Arbitration Under International Investment Agreements: A Guide to the Key Issues</i> (2 nd ed., 2018) |
| 3. | UNCTAD IIA Issues Note on Reforming Investment Dispute Settlement (2019) (Further Reading) |

Afternoon Session: Practical exercise examining the process of an investor-State arbitration

WEDNESDAY, JULY 15, 2020

Lecturer: Roberto Echandi

Morning Session: Understanding Foreign Direct Investment (FDI) and Development: Past, Present and Future

Topics

- Principles of IPRs: Intro, Sources, Forms
- Role of FDI and development: quantitative and qualitative dimension
- Introducing the investment cycle
- The different types of FDI investment, their political economy, impact for development and relevance for investment policy and regulation
- Impact of different types of FDI through history: insertion of developing countries within the world economy

Afternoon Session: Introduction to Investment Policy and Law: Domestic Investment Regulation, International Investment Agreements (IIAs) and Evolution in Investment Rule Making

Topics

- The historical development of international investment law, particularly focusing on its historical origins, policy objectives and evolution.
- The different levels on international investment regulation
- Facts and figures on the negotiation of international investment agreements (IIAs) and on the escalation of investor-State arbitration

Compulsory Reading Material

- Echandi, R. (2018), "Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements: Recent Developments in Investment Rule-making" in Yannaca-Small Katia (Ed) *Arbitration Under International Investment Agreements: A Guide to Key Issues*, Second Edition (OUP 2018).
- Sornarajah M, (2016), "International Investment Law as Development Law: The Obsolescence of a Fraudulent System" , in Bungenberg, M, Herrmann C,

Krajewski M, & Terhechte J (Eds) 2016 European Yearbook of International Economic Law, (2016 Springer), pp. 210-230.

- Echandi, R (2016) "Be Careful with What You Wish: Saving Developing Countries from Development and the Risk of Overlooking the Importance of a Multilateral Rule-Based System on Investment in the Twenty-First Century" in Bungenberg, M, Herrmann C, Krajewski M, & Terhechte J (Eds) 2016 European Yearbook of International Economic Law, (2016 Springer), pp. 234-270
- World Bank Group (2017) Investment policy and promotion diagnostics and tools: maximizing the potential benefits of Foreign Direct Investment (FDI) for competitiveness and Development, available at: <http://documents.worldbank.org/curated/en/666341500008847215/Maximizing-the-potential-benefits-of-foreign-direct-investment-FDI-for-competitiveness-and-development>
- World Bank Group (2017) 2017/2018 Global Investment Competitiveness Report: Foreign Investor Perspectives and Policy Implications, available at: <https://openknowledge.worldbank.org/handle/10986/28493>
- International Center for Settlement of Investment Disputes (ICSID) Case Load Statistics, available at: <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>

Suggested Readings:

- Dolzer & Schreuer Principles of International Investment Law (OUP 2012, 2nd Edition). Chapter 1.
- Newcombe & Paradell Law and Practice of Investment Treaties (Kluwer 2009) Chapter 1.
- Echandi, R (2011) "What do Developing Countries Expect from the International Investment Regime?", in Alvarez J. & Sauvant K (Eds) (2011) The Evolving International Investment Regime: Expectations, Realities, Options, (Oxford: Oxford University Press) pp.3-21
- World Bank (2015) Impact of Investment Policy in a Changing Global Economy: A review of literature. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/22859/The0Impact0of00ew0of0the0literature.pdf?sequence=1&isAllowed=y>
- Echandi R. & Sauve P.(Eds) (2013) Prospects in International Investment Law and Policy (Cambridge: Cambridge University Press). Part IV. "From an uneven international investment regime towards a coherent international investment system: the way forward".
- Sauvant K. & Ortino F. (Eds) (2013), "Improving the international investment law and policy regime: Options for the future" (2013) pp. 10-25 available at

<http://formin.finland.fi/public/download.aspx?ID=113259&GUID=%7B1202781B-0D9B-4E9C-9621-FCA4DA87881E%7D>

THURSDAY, JULY 16, 2020

Lecturer: Roberto Echandi

Morning Session: “The Blind Side” of International Investment Law: Implementation of IIAs in Practice

Topics:

- The importance of long-term retention of FDI for development and the rationale of IIAs
- Understanding the political risks arising out of government conduct
- Correlation of political risks affecting FDI in practice and key investment protection clauses in IIAs
- Political economy of investor-State conflict
- Escalation of investor-State conflict into legal disputes
- Lessons on implementation of IIAs to foster greater retention and expansion of FDI and increase investors' confidence

Compulsory Reading Material

- Echandi, R. & Gonstead M, (2017), “Investor State Conflict Management” in Cottier T & Nadakavukaren Schefer K, (Eds) Elgar Encyclopedia of International Economic Law (EE 2017), pp.335-338
- Echandi, R. (2014) Investor-State Conflict Management: A Preliminary Sketch, 11 Transnational Dispute Management, available at: <https://www.transnational-dispute-management.com/article.asp?key=2083>
- World Bank Group (2017) 2017/2018 Global Investment Competitiveness Report: Foreign Investor Perspectives and Policy Implications, available at: <https://openknowledge.worldbank.org/handle/10986/28493>
- Echandi R (2013), “Complementing Investor-State Dispute Resolution: A conceptual framework for Investor-State Conflict Management” in Echandi R.& Sauvé P.(Eds) (2013), Prospects for International Investment Law and Policy (Cambridge: Cambridge University Press)

Afternoon Session: Innovations in investment treaty-making practice**Topics:**

- Defining and limiting the scope of investment protections
- The links between investment and economic development (e.g. right to regulate, corporate social responsibility, not lowering environmental or labour standards).
- A Multilateral Agreement on Investment Facilitation?

Compulsory Reading Material

- Review Articles 12 and 25, Text of the Model Indian Bilateral Investment Treaty
https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf
- Review Articles 15 and 25, Brazil – Guyana BIT (2018),
<https://investmentpolicyhub.unctad.org/Download/TreatyFile/5763>
- Review Article 9, Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments
<http://investmentpolicyhub.unctad.org/Download/TreatyFile/4814>

Suggested Reading Material

- Dressler, Andreas. "Investment Facilitation: A Practical Perspective." E15 Investment Theme Think Piece, May 2018, 12.
- Bogliolo Piancastelli de Siqueira, Ada. "What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?" E15 Investment Theme Think Piece, June 2018.
- Titi, Catharine. "The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties." E15 Initiative (blog). Accessed February 4, 2019. <http://e15initiative.org/publications/the-evolution-of-substantive-investment-protections-in-recent-trade-and-investment-treaties/>.

FRIDAY, JULY 17, 2020

Take-home assessment