

Course instructor: **Velimir Živković**, PhD (LSE), MJur (Oxon); Research Fellow, KFG ‘International Rule of Law – Rise or Decline?’, Humboldt-Universität zu Berlin, Berlin.

Syllabus

1. Course Description

- a. Title of the Course: **Reconciling International Investment Law with Public Policy Goals**
- b. Pre-requisites
- c. Course Type (compulsory, elective, optional) The course is optional.
- d. Abstract

International investment law is increasingly seen as one of the most powerful regimes of international law in terms of its actual and potential impact on the regulatory autonomy of States. States around the world are concurrently bound by various international and national legal obligations, and often aim to pursue different public policy objectives. These relate to development, securing human rights, protecting the environment, and many others. On the other hand, the investment law regime singularly focuses on protecting foreign investors and their investments. Measures that States aim to pursue in public interest might nevertheless cause potential conflict with investment protection standards. As a result, powerful dispute settlement can be used by the eligible investors, resulting in potentially budget-crippling damages that can dissuade the States from important objectives. Such conflict is unwelcome, but by no means inevitable. It is the aim of this course to examine the most important areas of actual or potential conflict, and discuss the ways in which it is possible to reconcile the different rights and interests in order to preserve the possibility for the State to act for the benefit of its population.

2. Learning Objectives

Objectives mastering the discipline

The first objective is for the students to get a further and deeper overview of both the features and functioning of international investment law and of its interplay with public policy issues. This should provide a good basis for understanding the existing reform processes in investment law, legitimacy critiques, and of the constantly expanding jurisprudence of investment law.

The second objective is a more detailed look into particular areas of tension, namely the relationship between international investment law and the broad corpus of human rights, environment and health. This should allow to get a fuller picture of specific issues and concrete cases that have shaped the jurisprudence of international investment law, and to provide a setting for a comprehensive debate on how reconciliation of different interests is possible.

Student competencies generated as a result of mastering the discipline.

As a result of mastering the discipline, the student must:

- Know the more advanced aspects of international investment law, its substantive protections, dispute settlement mechanisms, and broad fields of interplay with other public policy goals;
- Have a more specific knowledge of how particular issues – human rights, environment, and health, have been dealt with in investment law jurisprudence, investment treaties, and reform proposals;

- Ideally obtain skills and competencies for further academic research and/or practical work in the field of international investment law.

3. Course Plan

Unit 1. Introduction to reconciling international investment law and public policy

Why is there even an issue of investment law and public policy clashing? This introductory class is focused on examining the critical substantive and procedural features of international investment law that can lead to conflicts with public policy goals. The aim is to provide an overview of the broader patterns that exist in treaty-making and investment jurisprudence when it comes to protecting public interests, and thereby set the foundation for examining specific subject-matter areas in the units that follow.

Unit 2. International investment law and civil and political human rights

How does international investment law intersect with what is usually known as ‘first generation’ of human rights, rights whose securing is almost universally seen as a critical public interest? This class takes a look at the ways in which investment law and arbitration can provide a benefit or hindrance to pursuing the rights such as fair trial, non-discrimination and equality, and freedom of speech. By examining the theoretical foundations of substantive investment protection, as well as their realization in arbitral practice, the aim is to show that reconciling the different spheres of law might here be a perhaps easier task than elsewhere.

Unit 3. International investment law and social and economic human rights

Can the States pursue the enhancement of social and economic wellbeing of their populations without clashing with investment protections? This unit deals with a far more controversial topic of States enacting measures that aim to foster (e.g.) economic and/or sustainable development, but can result in impacting the profitability of foreign investments. The aim is to explore the ways in which the tribunals have struggled to secure a balance between competing rights, often expressly adopting the doctrine of proportionality, as well as to see the ways in which newer investment treaties aim to provide the room for pursuing social and economic goals.

Unit 4. International investment law and the environment

How does the investment protection square with the efforts to preserve the environment? As environment and climate change concerns take center stage in global affairs, the investment protection regime needs to find the ways to cope with State efforts to promote environmental protection, but also to look at the ways in which foreign investors can be held to account in cases of environmental damage. This class will explore the critical awards in this area, as well as broader efforts to reconcile protection and public policy in this sphere.

Unit 5. International investment law and health

Promoting and protecting the health of their populations is without a doubt a critical task of modern States. Yet, the increasing intertwining of health issues with commercial products and potentially protected rights can create serious challenges. Foreign investors, protected by international investment law, can in particular oppose efforts aimed at their intellectual property and which can be of key importance to secure particular health-oriented policy goals. By taking a specific look at the recently controversial areas of tobacco product packaging, and intellectual

property issues related to medications, the aim of this class is to explore the existing debates and conceive of the ways in which a proper balance can again be struck.

Unit 6. Conclusion – bringing the threads together

What does the future hold? After briefly reviewing the ground covered in previous units, the aim of this class is to bring the issues together for a complete picture. Equally importantly, the goal is to examine the current reform processes in investment law with a particular perspective concerning the relationship with public policy goals. Exciting and turbulent times await this particular regime of international law, and understanding one of the key reasons for discontent – autonomy concerning public policies and interest – is also necessary to understand and evaluate future developments.

4. Reading List

Required

- Caroline Henckels, ‘Should Investment Treaties Contain Public Policy Exceptions?’ (2018) 59 Boston College Law Review 2825, available at: <https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/11>
- Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’ (2011) 60 ICLQ 573, available at: <https://epub.ub.uni-muenchen.de/23165/1/simma.pdf>
- Markus Krajewski, ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice’ (April 2018), available at: <https://ssrn.com/abstract=3133529>
- Rahim Moloo and Justin Jacinto, ‘Environmental and Health Regulation: Assessing Liability Under Investment Treaties’ (2011) 29 Berkeley Journal of International Law 1, available at: <https://doi.org/10.15779/Z38V35V>
- Jorge Viñuales, ‘Foreign investment and the environment in international law: The current state of play’ C-EENRG Working Papers, March 2016, available at: <https://repository.graduateinstitute.ch/record/294734/files/C-EENRG%20Working%20Papers%2C%202016-1.%20Vinuales.pdf>
- Vivian Rocha Gabriel and Alebe Mesquita, ‘Repackaging Intellectual Property Protection in International Investment Law: Lessons from the Phillip Morris v. Uruguay Case’ (2018) 49 Georgetown Journal of International Law 1117, available at: <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/12/GT-GJIL180040-1.pdf>

Optional

- Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

- Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009).
- Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012).
- Jorge Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012).
- Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2012).
- Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).
- Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos 2014).
- Yannick Radi (eds), *Research Handbook on Human Rights and Investment* (Elgar 2018).

5. Grading System

The final control is made in the form of a 4,000 essay written by the student on one of the pertinent topics discussed during the course, with the selection of the topic to be determined in agreement with the course instructor.

The final score on a 10-point scale consists of the resulting score, obtained by the formula of the average weighted, taking into account the weights introduced:

Attendance and creative activity at the seminars – 0.5
Final essay - 0.5

Thus, the final grade is determined by the formula:
 $O^{\text{result.}} = (0.5 \times O^{\text{act.}}) + (0.5 \times O^{\text{essay.}})$

6. Methods of Instruction

The course is taught in the form of seminars led by the course instructor. It is divided into 6 units. Each unit includes individual work in reading the relevant materials, coupled with instructor's presentation at the seminar and a necessary interactive discussion with all participants. Each unit consists of 4 contact hours, for a total of 24 contact hours.

7. Special Equipment and Software Support (if required)

Classrooms for lectures on the discipline provide for the use and demonstration of thematic illustrations corresponding to the program of the discipline, consisting of:

- multimedia projector with remote control.