Kluwer Arbitration Blog

Teaching International Investment Arbitration: Global Perspectives

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Kluwer Arbitration Blog is pleased to launch with this post an occasional series offering global perspectives on approaches to teaching international investment arbitration. The aim of the series is to illuminate the various choices that teachers must make when determining the substance, aims and approach they will adopt to teaching this topic, and the challenges commonly encountered with teaching courses on investment law and arbitration at both the undergraduate and postgraduate levels. This introductory post serves to introduce the series, including to explain the intentions underpinning it, and to offer some questions and a framework to guide the discussion that will follow. This post will be followed by others, with the focus of the first few posts in the series – to follow in future weeks – briefly introduced below.

The Challenges of Teaching Investment Law and Arbitration

Teachers of international investment arbitration face numerous choices before they walk into the classroom. What topics should be included in such courses? What temporal outlook should be adopted? What should the course aim to do, and who should it be pitched to? What classroom activities should be included, and what course resources should underlie them? Of course, many of these choices will be constrained by practical considerations: it is near impossible, for example, to do justice to such a rich and diverse field in the space of the usual teaching term or semester. Perhaps more so than in other areas of law, however, designing an investment arbitration course demands that the teacher reflect upon the scope, boundaries, and blind-spots associated with this area of law and in this sense pedagogy mixes closely with the teacher's own perspectives (and biases) in relation to the field as a whole.

The Substance of International Investment Arbitration Courses

A first key question that may arise for a teacher of international investment law is what exactly 'international investment law' or 'international investment arbitration' is. Should the course focus principally on investment treaties, or also encompass foreign investment laws and investment contracts? Does the course encompass institutional and procedural features, including for example the role of the International Centre for Settlement of Investment Disputes (ICSID) or procedural

rules adopted by international organisations like the United Nations Commission on International Trade Law (UNCITRAL)? Should the course encompass also questions around the enforcement of international investment arbitration awards or settlements, including by taking into view the New York Convention and/or Singapore Convention, or even domestic judicial practice and policy in relation to those instruments? In that sense, is the course a course of public international law, a course in transnational or private international law, a course in policy, politics and governance, or something else entirely?

Connected to these questions is the choice between focussing on substantive elements associated with investment arbitration (for example, the contents of obligations imposed upon States) and the procedural features of this form of dispute settlement. Some teachers elect to cover both elements in the same course, dedicating several weeks to the obligations included in investment treaties and other instruments, a number dedicated to thinking through the jurisdictional requirements associated with filing investment claims, and several other weeks focussed on the procedural elements of investment arbitration. Other teachers elect to split these components, such as to offer two courses: one focussed on the substantive law of investment treaties and other instruments, and another focussed upon arbitration under such instruments including associated jurisdictional and procedural issues.

Another question that arises in considering the substance of a course on investment arbitration is the question of what balance should be struck between doctrinal approaches on the one hand, and more critical approaches on the other. Whereas some teachers focus squarely on elaborating the contents of the various obligations typically undertaken by States in investment treaties, or the various jurisdictional requirements associated with investment arbitration claims, others focus on elaborating the sustained critique and backlash associated with investor-State dispute settlement (ISDS), and the various reform or termination activities undertaken by States and international organisations as a result. This choice is made difficult due to the intermixed nature of these options: it is difficult to understand the criticisms without first understanding the field's doctrinal contours and practical operation, and it is equally hard to introduce legal obligations and jurisdictional requirements without explaining their origins in, or impact on, the critique and backlash associated with this area of law.

Thinking about Outlook: Past, Present and Future

Connected to the above is the choice between past, contemporary and future-oriented perspectives on investment arbitration. Does the teacher begin the course by sketching the development of the field of international investment law – including to highlight its problematic colonial links and contestations associated, for example, with the new international economic order? When focussing on the historical development of this body of law, how should this story be told and whose voices and perspectives should be centred? Alternatively (or as well), does the teacher situate the course squarely in the present, focussing on how investors and States go about filing and defending investment claims and enforcing subsequent awards? Or should the course be more future-oriented, reflecting the fact that the field is undergoing sustained reforms that may have enduring impacts on the character of investment law and arbitration into the future? Given such reform, does the teacher owe their students a more forward-looking and future-proof introduction to investment law, that targets what this body of law might look like – or even should look like – in the years to come? Relatedly, should the focus be on the reforms currently being debated in various settings, or instead

on its future possibilities, taking into account the very existence of the field or of approaches that could (or should) emerge in the future?

Questions of Aims, Audience and Approach

The answer to many of these questions will depend in part upon what the teacher perceives as the aims of their course, and which audience they pitch it to. Are they training future international investment lawyers and arbitrators? Are they training future State officials who may be engaged in the negotiation of investment treaties, or the defence of investment treaty claims? Are they targeting students with more generalised interests, for example those interested in combining an interest in economics, history, philosophy or politics with their legal studies? Is the course to be focussed on developing student knowledge of this area of law, or instead (or as well) dedicated to equipping students with the skills and competencies necessary to engage in the practice of it?

The answers to these questions may in part depend on the teacher's own identity. Many global investment arbitration courses are taught by those actively engaged in practising in the field, and such teachers might be expected to adopt particularly practically-focussed approaches to teaching this area of law. What do we gain and lose by such approaches, and what biases might they create in the next generations to engage with this body of law?

These questions of audience and substance link in turn to questions associated with pedagogical approach. Should the teacher adopt a Socratic or discussion-based approach to teaching the topic? Should they engage instead with problem-based scenarios? Or should the course be oriented instead towards developing (and assessing) theoretical or policy-based understandings of this area of law? What possibilities and limitations does the mode of teaching impose, and how do (and should) in?person and online modes of delivery impact these choices?

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The above only captures some of the many considerations that influence how international investment treaty arbitration is taught, and what is taught when engaging with this field. It also poses more questions than answers in the hopes that the above will elicit further reflections on the theme of teaching international investment arbitration amongst our global readership. The posts that follow will offer diverse perspectives in relation to the above themes and others, including different regional perspectives and approaches to balancing between these various challenges and considerations. Next week, the series will continue with a post Professor Diane A. Desierto (University of Notre Dame). Reflecting on her experiences of teaching in-person and virtual course in a range of different States, Professor Desierto highlights core commonalities and differences in both the interests in, and reactions to, this field of law amongst her students. This will be followed, on 31 January, by a post by Professor Emilia Onyema (SOAS, University of London) which reflects on the core pedagogical principles that have influenced the design and delivery of a course on investment law and arbitration which seeks to centre diverse and critical perspectives. On 19 February, Ylli Dautaj (Penn State Law / Durham University) engages the role of teaching philosophy in designing investment law courses, including to consider how such courses might be designed to address the goals of decolonising the syllabus. We have several other thought-provoking posts on these and other topics in the pipeline for later in February and beyond, and look forward to continuing in an ongoing conversation with our contributors and readers about these

important themes.

To see our full series of posts on Teaching International Investment Arbitration, click here.

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