Kluwer Arbitration Blog

# Global Perspectives on Teaching International Investment Arbitration: Teaching International Investment Arbitration in the Global North and the Global South

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Geography, culture, politics, economic conditions, and population demographics, in my view, account for very different narratives and reactions to the teaching of international investment arbitration. In the last 13 years, I have had the distinct experience of in-person and/or virtual teaching of a course and/or guest lecturing international investment arbitration in a wide range of polemical contexts in the Global South (e.g. the Philippines, China, the Association of Southeast Asian Nations Member States, Latin America, Africa), as well as in the Global North (e.g. Hawaii, Stanford, Yale, and Notre Dame in the United States, Paris, and the Hague). What stands most resonant for me out of these experiences from teaching law students, advanced graduate students, regulators, practitioners, and judges is everyone's acceptance (enthusiastic or reluctant) that international investment arbitration is still one dispute resolution tool (for better or for worse) that sometimes is appropriate to solve certain problems, but in others is actually skewed against a broadly just solution for all parties and stakeholders concerned. Notwithstanding recent years of critiques that have made it *de rigeur* for so many to rail against the many perceived or actual ills of the international investment arbitration system, the overwhelming majority of my students still see this mode of dispute settlement as a fact of international life.

**Investment Arbitration is Also About Development Outcomes**

My students are also unanimous in wanting to see this dispute settlement mechanism "work" for the constituencies that they favor — the overall public, the governments of host States as well as the governments of home States, affected communities who are themselves not actual parties to the international investment contract or investment treaty, the private sector actors who have risked and committed capital for investment activities in uncertain and unstable environments, or even a broad notion of 'rule of law' somewhere that is reified with an authoritative, legitimate, and accepted arbitral award. It has been equally interesting on my end to witness how many of my students, have a priori expectations of what the 'just outcome' of a dispute should or could be, even when they have not yet steeped themselves in the granular details of facts, issues, applicable law, and evidence. In this sense, I find it typical that both Global South and Global North students are often attuned to the inherent political economic debates that afflict the Global South and the Global North (and countries within both poles who also vary with other countries in their pole),

and both sets of students demonstrate a relative discontent with how the international investment arbitration system works for some investors and some host State governments, but does not work for other investors, other host State governments, and certainly not for non-parties to the dispute who absorb the greatest impact from investment activities: local communities.

**Students' Recurring Concerns on Investment Arbitration**

Many of the concerns raised are on issues of jurisdiction and whether consent to international investment arbitration was actually given. Why do host States give the kind of advance consent to international investment arbitration that they buid in to international investment treaties, often without calibrating mechanisms that call for sequenced dispute resolution procedures (e.g. mediation, conciliation, negotiations, mini-trials, ombudsman compliance procedures, etc.) before triggering the adversarial, all-or-nothing dispute settlement mechanism that is international investment arbitration? Why do host States often fail to build in any sunset clauses or periodic review clauses in their international investment treaties, that will ensure a sound and regular review of the effectiveness and relevance of the dispute settlement mechanism in these treaties? And one of the favorite questions I often get is: why is it that host States think international investment arbitration is THE dispute settlement mechanism for a simultaneously geopolitical, economic, cultural, and security-driven problem between a foreign investor and the host State, when parties will inevitably pursue parallel proceedings anyway (e.g. local court adjudication or administrative agency adjudication, other international proceedings) or seek to deny expeditious enforcement of arbitral awards (e.g. the multiple decades-long *Chevron v. Ecuador* is often brought up as a somewhat ghoulish example of a never-ending saga of a dispute — or multiple disputes, depending on which party you're reading.).

**Contextual, Legal, Doctrinal, and Introspective Answers**

Depending on where I am teaching, I find it striking that the responses I get in the classroom or lecture hall often hew to the stock and trade answer of the jurisdiction where I'm teaching. Students in Global North countries value the promises of legal stability and peaceful dispute settlement that international investment arbitration brings, while students in Global South countries resist the rigidity and inflexibility of the applicable international investment law to hard realities on the ground, where regulatory change is simply a fact of life given the vagaries and hardships of poverty, natural disasters, environmental protection deficits, criminality, and a whole cascade of human development challenges. These questions also start getting blended and conflated across jurisdictions, with more Global South countries (e.g. China, India, Chile, among others) themselves making their own investments in other Global South countries as well as Global North countries. My students realize that, once they extricate the granular details of a dispute from the contested narratives about capitalism, inequality, and globalization, States (whether Global North or Global South) will SIMULTANEOUSLY want to protect their investors overseas, but also want to ensure flexibility for regulatory adaptation and legislative change over investment treaty commitments once the same States become host States for investment. How to do that from the standpoint of international investment arbitration becomes a masterclass of how one can finesse international investment arbitral decision-making across and within awards, including dissecting the techniques and predispositions of arbitral reasoning. (Of course, there's also the empirical scholarship that

tries to make predictive judgments about arbitral decision-making and international investment outcomes, based on certain data points about arbitrators. That's about as scientific an exercise as trying to reduce human judgment to proxy data, as, say, algorithms that are built on fixed assumptions about human beings.)

Other students seeking mastery of international investment arbitration will focus on the procedural elements of this mode of dispute settlement — the appointment of arbitrators and the constitution of the arbitral tribunal; any provisional, interim, or emergency arbitrators; the design of fact-finding procedures and evidence-taking (including whether depositions, written interrogatories, or other modes of discovery apply); and the issuance of the arbitral award and its recognition and enforcement. My students from civil law jurisdictions often have some relative disquiet over the 'bespoke' nature of international investment arbitration and the narrow points at which judicial controls operate (e.g. judicial duties to refer to arbitration, or judicial functions pertaining to the recognition and enforcement of arbitral awards, whether ICSID awards or non-ICSID awards), whereas my students from common law jurisdictions observe that there should be more role for flexibility and the use of precedent in international investment arbitration. Students ask when it is appropriate to challenge and disqualify an arbitrator, or when it is appropriate to seek annulment (especially when it seems that this is becoming an automatic recourse for losing parties, or what the complete costs are in pursuing this form of dispute settlement process and who internalizes or externalizes those costs). Many students are increasingly concerned about interactions between human rights, climate change and environmental law, and foreign investment law.

The most important critical questions I receive from students studying the body of investment treaty arbitration jurisprudence and the changing design of international investment treaties are the ones anchored on the common recognition of what our roles as counsel, arbitrators, or legal advisers are in relation to this particular mode of dispute settlement. Once students start asking me about the threshold questions of diagnosing a dispute, how to determine the appropriate mode of dispute settlement that can resolve the dispute, defining all the stakeholders impacted by the dispute (beyond the investor-host State relationship), and what the desired just reparative outcome ought to be and how to plan an entire investment treaty arbitration to see if it will get to that desired just reparative outcome for all parties (and sometimes, even stakeholders), then I do know that we are returning to the entire *raison d'etre* for teaching a course or lecturing on international investment arbitration. This abstracted discussion requires both doctrinal mastery as well as a conscious and ethical sense of one's place in the international rule of law and a member of the 'invisible college'. While the answers we explore (both on hypothetical as well as live cases) are not always identical and often mired in heated impasses, the classroom conversations get us ever closer to why international investment arbitration has to be taught anywhere and everywhere in the Global North and the Global South. It's our first interdisciplinary and multijurisdictional laboratory to finding lasting solutions for reforming the beleaguered international investment arbitration system.

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