

Kluwer Arbitration Blog

Global Perspectives on Teaching International Investment Arbitration: An Investment Law Teaching Philosophy for De-Colonizing the Syllabus

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As a student in Ireland, US, and Sweden, I came to learn that I was not only studying contracts, or torts, or constitutional law, but rather “contracts with Professor Hedley”, “torts with Professor O’Callaghan”, “constitutional law with O’Mahony”, and so on. Fast-forward some years later, my own students do not take the general course of international arbitration, but rather they enrol in “international arbitration with Professor Carbonneau” or “international arbitration with Professor Dautaj”. The principle of my message is that the philosophy and personality of the teacher largely reflects *what* you learn, *how* you approach the subject, and quite frankly *whether* you care about it at all. I became a big fan of the mentioned subjects largely thanks to the named individuals. For that reason, I believe that a few words about my own philosophy as a teacher should be mentioned before I proceed to the important topic of the post, namely, my efforts to grow as a scholar and human being, including by de-colonializing my investment treaty arbitration (ITA) syllabus.

Philosophy of Teaching

As we teach law, *de lege lata* (the law “as it is”), we ought not forget *de lege ferenda* (the law as it “could” or “should” be). We study and teach an evolving discipline. When teaching, it is important to remember law’s place in society at large and its purpose to serve as a vehicle for fairness and justice. Law is but one – albeit important – tool to achieve these noble virtues by redressing grievances and regulating behaviour. We must understand, as teachers and students, that law is at times complemented (for better or worse) by the market, architecture, and social norms. Thus, as scholars, we ought not forget that law at times is best studied and understood in interdisciplinary settings. Put simply, legal studies should be approached more holistically and contextually. ITA, as its own discipline, or as part of international economic law, is no anomaly. Quite the opposite: it manifests as an area of law that is perfectly suited to be analyzed and studied through an interdisciplinary lens.

As we approach our studies of ITA through the lens of interdisciplinary studies and critical thinking, we may want to reflect on the legal sources we rely on when engaging in doctrinal studies of law and when articulating legal arguments by entertaining deductions, inductions, empirical data, and so on. We must dig deeper and ask: *Why* are we actually advancing and defending a thesis and what are the theories, policy objectives, and political concerns that underpin and justify

its function and operation? *How* does it affect society at large? *What* if the law stands on a morally shaky or questionable ground?

When engaging in reflection of this kind, we must realize that legal practice and its evolution can no longer be seen through a mono-dimensional analysis. Law, in general, and international law, in particular, can only be properly understood through a multidimensional analysis. Legitimacy is earned, not granted. Put differently, the performance of a rule must be scrutinized for potential reform or even transformation, which invites exploring its interaction with other disciplines and assessing its potential effects on third-parties, communities, institutions, and countries.

Such forensic endeavours inevitably occupy much of the scholarly work in our 21st century. Academics are well equipped and positioned to think carefully and subsequently to disseminate thoughts, ideas, and speech that leads to change. It is our mission to lead change in an open and inclusive manner. Fortunately, then, the university as an institution is still regarded as one of the major pillars of civilized society. In such institution, scholars ought to be free to think and speak and should not be constrained by popular belief nor by social pressure. If I were asked to define the institution by two sentences, I would say: (1) here, great minds do not think alike, and (2) your truth should be told and scrutinized. Due to multilateralism, globalization, and liberalization, more voices are being heard – but far from enough. Lately, however, equity, diversity and inclusiveness (EDI) have been given a heightened standing and increased currency. That is an excellent evolution.

It is in this light, and with this conviction, that I write this post on the topic I know better than other topics – ITA. But, because I have always perceived teaching and learning as intertwined, I write this as much as a student as a lecturer. I also write this being mindful of the extreme privilege to have worked in many parts of the world (Ireland, Sweden, U.S., U.K., India, Kosovo, Turkey, etc.), meet with people of many walks of life, and thus ultimately come to question my own knowledge and ignorance. I have held ideological convictions from left to right and circled back to a more moderate position. Hence, I have come to approach my learning, as well as my teaching, as a constant, never-ending search for relative and contextual truth through a Socratic method. In dialogue I teach, and in dialogue I learn.

Importantly, I write extremely cautious and mindful of avoiding undercutting the utility in important global and collective efforts by misusing conceptually important ideas by treating them as either buzzwords or for own gains through moral grandstanding and virtue signalling. Such narcissistic misuse benefits no one in the long run.

Below, I will outline *what* “de-colonizing” the syllabus means to me and *how* I have worked to achieve that aim in my ITA syllabus.

I want the reader to perceive this short post as an invitation to conduct a dialogue through the comments section below.

De-Colonizing the Syllabus

A syllabus should include at least information on *what* is valued in the course (course description and content); *what* information and skills are important to know (learning outcomes); *which*

peoples' voices are important to listen to (reading list); *which* forms of learning are effective (method of teaching—e.g., problem-based learning, Socratic, lecturing, etc.); *what* role the student plays; and *who* is the source of knowledge in the classroom; etc.

The element of de-colonialization in this context means that the syllabus should be divested from furthering and entrenching only the interests and ideologies of the ex-colonial states. It means that other countries and communities (e.g., indigenous communities) should be heard, with the purpose of doing fairness, justice, and redressing historical grievances. There is an active awareness and streamlined effort to erase and diminish imperialistic elements that are put in place through force and coercion – or at least, to discuss why it is perceived that way. We must work to include diverse mental representations about a subject and its operations when learning about and teaching it. We must spend more time in our selection of content, carefully think about the strategies we use to teach, construct an open and inclusive environment where people from various backgrounds can engage, and rethink what we measure as important to score high grades.

De-Colonizing the Teaching of ITA

ITA, as taught, has three major components to it: (1) jurisdictional aspects (e.g., what is an “investor” and what is an “investment”), (2) material aspects (international investment law, e.g., guarantees against indirect expropriation and for fair and equitable treatment), and (3) procedural aspects (the arbitration process). One could add a fourth component that precedes the three mentioned, namely, (4) history and origins (the evolution of international investment law, as well as investor-state dispute settlement).

What should you think about as you decide to teach these four components? More specifically, what should you consider when drafting your ITA syllabus? I have personally done a couple of things, which I want to share as recommendations below (a non-exhaustive list):

- Rethink the content that is taught and include reading materials from a more diverse pool of authors (e.g., TWAIL scholarship).
- Rethink the learning outcomes (e.g., instead of knowing only the application of the fair and equitable treatment standard, the student may learn how a particular interpretation could lead to systemic injustices).
- Consider educational and cultural background of the students when choosing the method of teaching (e.g., using more problem-based learning and Socratic method to facilitate dialogue and inclusiveness may prove helpful).
- Elevate the role of “history and origins” to a more prominent standing in the course (e.g., by discussing the Bretton Woods system and hence the IMF, World bank, Washington Consensus, and the small role of developing and least developed states in building our global institutions, etc.).
- Elevate the discussion on the Calvo doctrine, international minimum standard, the call for “permanent sovereignty over natural resources”, the “new international economic order”, etc.
- Focus on colonialism and neo-imperialism, as a stand-alone topic to cover but also through the interpretation and application of substantive protections.
- Elevate the discussion of “sovereignty” and “deference”.
- Focus on “legitimacy concerns” and the “backlash movement”.
- Elevate the discussion on the “right to regulate”.

- Focus on regime interaction (e.g., environmental law, human rights, labor standards, etc.).
- Focus on sustainable development.
- Focus on investor obligations and state counterclaims.
- Focus on the cases states have lost, the status of the state, regime changes, and the consequences on the losing state and its citizenry.
- Focus on the market for good and bad (e.g., political risk insurance, corporate social responsibility, vulture funds, etc.).
- Focus on procedural fairness (e.g., increased transparency, amicus curiae, etc.).
- Elevate a discussion on indigenous groups adversely affected by foreign direct investment.

Does this mean that international investment law or ITA is racist or a vehicle for oppression? No, I do not believe that it does. Does it mean that Western society has largely been influential – at times forcefully so – in shaping international law? It is most likely the case. Does that mean that international law and its procedural vehicles are wrong and should be abolished in its current way, shape, and forms? I do not necessarily believe so. Does it mean that transborder commerce, trade, and investment may not be played out on a level playing field? Unfortunately, that is most likely the case, even though ITA is meant to level the playing field and lead to economic development for all. It is here that we want to reform so as to perfect an already relatively workable system. That change comes from within and the university has an important role to play here. One instrumental feature is by educating students, another is by disseminating ideas. Reforming the syllabus by de-colonializing it can lead to positive change by educating a better-equipped cohort of future professionals.

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