Kluwer Arbitration Blog

Global Perspectives on Teaching International Investment Arbitration: Dealing with Analogies in International Investment Law and Arbitration Courses

Yannick Radi (UCLouvain) · Thursday, March 16th, 2023

In the past 20 years, alongside my legal practice, I have taught international investment law and arbitration (IILA) in a number of capacities and through various formats: as the author of a textbook (*Rules and Practices of International Investment Law and Arbitration*) and of a MOOC, in practice-oriented trainings for professionals, or in masters programs.

This post builds on this experience to discuss a key challenge in the teaching of IILA courses: analogies. For that purpose, it starts with some preliminary remarks on the diversity that characterises IILA courses (**1**). It then proceeds by introducing the reasons which explain why analogies are so preeminent in IILA (**2**) and by proposing a two-step methodology designed to enable students to master those analogies (**3**).

1. Diversity in IILA courses

In addition to the diverse analogical landscape in IILA, it is worth discussing for the purpose of this post the diversity displayed by the audiences in our classrooms.

Heterogenous audiences

I have always designed my teaching of IILA by reference to the specifics of my audiences. Such a focus is of course fundamental in any communicative action. But this holds particularly true in the teaching of an international law discipline, like IILA. In this respect, two perspectives appear relevant to me: a 'macro-geographical' perspective and a 'micro-*intuitu personae*' perspective.

From a 'macro-geographical' perspective, on which continent and in which country one teaches IILA is certainly a parameter to be taken into account. Indeed, the perception of the field by students as well as their (initial) views can vary accordingly. However, geographical heterogeneity should nowadays not be overestimated. Indeed, one witnesses a worldwide convergence of views about IILA, as illustrated by the criticism formulated across all the continents against investor-state arbitration.

A 'micro-*intuitu personae*' perspective, which focuses on the background of each of our students,

is in my view key for IILA courses. Indeed, those who sit in our classrooms often come from different horizons and have very different profiles. This diversity has many sources among which legal culture and education are paramount. Designing a syllabus and teaching an IILA course requires taking on board this diversity. A syllabus cannot be a rigid template used in various courses, it must be a tailor-made support for each of them.

A diverse analogical landscape

Taking into account the specifics of the audiences is all the more necessary as IILA itself displays diversity. In this respect, it is fair to say that it is a system in search for its identity. This quest is most visible in the various analogies which are relied upon in arbitral practice and in the literature. Think of the use of domestic law analogies, be they rooted in public law and tort law, or in civil law and common law. Think also of the use of international law analogies, be they commercial, private or public international law analogies. Looking at arbitral practice and the literature more closely, the analogical landscape appears to be even more diverse as each of these analogies itself displays diversity. This is well illustrated by the public international law (PIL) analogy which encompasses analogies with general PIL, international human rights law or WTO law. Looking at this landscape even more closely, diversity appears even more diverse! Within the 'box' of the general PIL analogy for instance, the debate about the application of the law of state responsibility to investor-state arbitration provides a topical example of this reality.

In such an epistemic context, where both the audience and the object of analysis are diverse, it is the duty of the instructor to connect both, to enable anyone to work with the paradigms, principles and rules which are applied by analogies in IILA. Doing so allows students to get a sound understanding of IILA as those analogies have a direct impact on the interpretation of both substantive and procedural rules. It also gives them the possibility to make sense of the epistemic forces at play within the field. But, first and foremost, it equips them with the theoretical and practical tools to develop their own views on those matters.

Before discussing how to enable students to master those analogies, it is first warranted to introduce the reasons which explain why they are so preeminent in IILA.

2. Why Analogies in IILA?

Analogies are central in legal reasoning. They enable us to deal with uncertain situations by connecting them to situations already experienced in the past and that are deemed to be comparable. There is much to be said about the process through which this connection is made. This holds true for instance as regards the evaluative component inherent to comparative legal reasoning and the methodological considerations that it raises. There is no room to address those issues here. Let's focus instead on *systemic hybridity* and *legal indeterminacy* which are certainly the two main reasons that explain why analogies are relied upon heavily in this field. More precisely, hybridity in IILA has so to speak '*ratione materiae*' and '*ratione personae'* dimensions, the interaction between both amplifying this hybridity. Each of these three reasons is discussed in turn.

'Ratione materiae' hybridity

This form of hybridity pertains to the legal features and components of the system. It has

characterised IILA since its genesis in the late 19th century. At that time, it was connected to both PIL, as illustrated notably by the minimum standard of treatment, and to a 'transnational' legal order; think for instance of the *lex mercatoria*. Nowadays, even though the treatification of the field has more firmly attached IILA to PIL, it remains characterised by hybridity, especially as regards investor-state arbitration. In this respect, it is noteworthy that the system makes progress in its quest for its identity. This is well illustrated by the new traits displayed by arbitral proceedings, particularly at ICSID, which reinforce the autonomy of investor-state arbitration from commercial and inter-state arbitration.

'Ratione personae' hybridity

'*Ratione personae'* hybridity relates to the IILA espistemic community, especially to arbitrators, counsels and academics. Among many features, the diverse legal background and culture that those stakeholders display are key as they influence the analogies they use. Of course, one should avoid oversimplifying the epistemic landscape and legal practice in the field. Notably, a number of those stakeholders have, themselves, a diverse background, rooted in different legal orders or disciplines. Also, it is noteworthy that the capacity in which they act impacts on the way they rely on their background and on analogies. In other words, the use of analogies is not only a matter of knowledge, but it is also one of interest and value. All this leads IILA stakeholders to focus on different specific features of the system or to construe the same features differently. And this has concrete practical consequences. Think for instance of (state) consent. Its heterogeneous conception among arbitrators contributes no doubt to explain the conflicting views they have expressed about pre-conditions to arbitration and the MFN clause. More generally, those diverse backgrounds, interests and values generate diverging epistemic forces which reinforce the '*ratione materiae*' hybridity of IILA. This is most visible in the conflicting streams displayed by arbitral practice as for the interpretation of treaty provisions.

Legal indeterminacy

This is where legal indeterminacy, which has for a long time been typical of treaty practice, comes into play. To deal with this indeterminacy, notably when rules of interpretation fail to deliver a clear meaning, those stakeholders often rely by analogy on general paradigms or specific rules that they deem relevant, be it for functional or strategic reasons. The conception and application by arbitral tribunals of the FET standard – especially in relation to legitimate expectations – illustrates this very well.

How then working with analogies in IILA courses?

3. Working with Analogies in the Teaching of IILA: A Two-Step Methodology

Lalive once said that the main duty of the international arbitrator is to be open to other cultures. This certainly holds true also for the instructors of IILA. Even if we all enter the classroom with our own background, it is no doubt our duty to be that open-minded. Adopting such a mindset is the primary requirement to enable our students to make sense and use of the analogies relied on in the field. More fundamentally, our role as instructors is to help students to develop their own views, not to preach ours. To reach that objective, I deem it necessary to adopt a two-step methodology.

First Step: Making Sense of Analogies

As a first step, it is first of all necessary to make students acquainted with the diverse IILA analogical landscape sketched above. This requires to adapt the teaching to the background of those sitting in our classrooms in order to fill out the 'knowledge-gaps', remembering that students often have different needs in this respect. Each academic year, I assist for instance those students who struggle to grasp parts of arbitral awards because they lack (a sufficient) knowledge of the law of state responsibility. Albeit obvious, this step is no less fundamental as otherwise many students get lost in translation. Those analogies and their understanding by students are the building blocks on which to build the teaching of IILA *per se*.

This first step is time-consuming, but in a classroom like elsewhere, time is of the essence. This requires a selection to be made to circumscribe the '*ratione materiae*' scope of the issues covered in the course, the degree of selectivity depending of course on its length. How this selection is made calls for proper thinking. Among others, important considerations and questions to be addressed are: In which program (content, level) is the course taught? What other courses form part of the curriculum? What is the overall profile of the audience?

But proper thinking upstream of classes is not enough; flexibility during is also paramount. Indeed, requests for explanation which pop up in the classroom sometimes lead us to enter into territories uncharted in the syllabus and to situations where time flies. In those situations, 'live choices' must be made. During classes, like ahead of them, we should then not forget that the transfer of knowledge is a collective endeavor. Referring students to the relevant sources contributes to reach the objective assigned to the first step of the methodology here proposed.

Second Step: Making Use of Analogies

Once analogies are known and understood by students, then comes the time for the second step: (legal) reasoning. Again, instructors are not preachers. Our role is to help students to develop their own views and the arguments in support thereof. Here as well, the background of students is to be taken into account. Beyond the shyness that students may display, some of them are simply not used to being asked their views. For those students in particular, instructors should create an atmosphere of dialogue in their classrooms. For that purpose, I believe it is paramount to: encourage the debate between the group and oneself and between students themselves; promote the open-minded listening of classmates and the respect for other viewpoints; and think together with students along their train of thoughts to help them identify their strenghts and weaknesses. This also takes time, but this is crucial. In the end, our main contribution to the training of law students is not so much the transfer of knowledge, but instead the practice of legal reasoning and argumentation.

Leading students to develop their own views is obviously a challenge for instructors, in particular in short courses and trainings. That being said, when endeavouring to rise to the challenge, we should keep in mind that our classrooms are just antechambers. Attending an IILA module is only the first step in a long career dedicated to international arbitration. If we manage to make our students aware of the importance to reflect upon the IILA diversity for practice and academic-oriented purposes, if we manage to equip them with the knowledge and tools to reach that objective, I do believe that we pave the way for successful careers and that we perform our role in the system.

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

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, March 16th, 2023 at 8:58 am and is filed under Teaching International Investment Arbitration Series
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.