

THE POLITICAL ECONOMY OF INTERNATIONAL INVESTMENT LAW: HISTORY, SOVEREIGNTY, DEVELOPMENT

A course proposal by Love Rönnelid and María Marulanda Mürrle

Description

This course aims to teach students the basics of investment treaty arbitration and introduce them to techniques for studying these fields through the lens of political economy. By pairing theoretical readings of political economy with papers on substantive investment law and investment arbitration cases, the proposed course will simultaneously teach students substantive investment law, political economy analysis of law, and economic development.

Substantive investment law will continuously be explained historically and analysed through the lens of political economy. The historical approach allows studying important precursors to investment arbitration (Greenman 2018; Barton 2014) as well as the modern emergence of investment law (St John 2018; Pauwelyn 2014). By contextualizing the emergence of the regime with the ideas that has served to justify it (Röpke 1954; Plehwe 2015; Kennedy 2006; Krever), students will be introduced to tools for analyzing economic thinking in legal institutions more generally. An overarching theme of the course is the way international investment law disciplines sovereignty through property-based arguments (e.g. Perrone 2021). In this respect, the course develops Polanyian insights to the political economy of law (Polanyi 2001). It allows students to study the relationship between sovereignty and property (see e.g. Cohen 1927 and Koskenniemi 2020), with particular application to the investment-law context.

Below are some themes of political economic and central legal questions that they can be paired with:

First, the development of what constitutes an “investment” under international investment law, can usefully be discussed from the point of view of how law operates to sustain the “resource curse” (Pogge 2005). The case-law emanating from the Argentine economic crisis and Indonesian case law with respect to investment insurance (Wells and Ahmed 2007) will provide useful examples to apply this thinking.

Second, empirical studies on how FDI might affect economic growth (e.g. Bonnitche, Skovgaard Poulsen, and Waibel 2017) can serve as a useful point of departure for discussing the role of such arguments in the so-called “Salini test” on what constitutes an “investment” under the ICSID Convention with respect to economic development.

Third, influential models from development economics (Hausmann and Rodrik 2003) can illuminate how market access and prohibitions of performance requirements influence the value of foreign investment. In a similar way, close studies of the “fair and equitable treatment” (FET) standard might be used to explain why leveling up in global value chains have proven so difficult (Kaplinsky 2005).

Finally, modern approaches to green industry policy (Mazzucato 2013) also seem to stand in tension with much of the discipline imposed by investment governance, thereby constraining shifts to a net-zero economy. Such readings can be used to better understand the political economy of the many recent cases imposing costs for industry policy with respect to solar power.

Love Rönnelid will be the head teacher. He is currently a Residential Fellow at Harvard Law School. He holds a PhD in international investment law from Uppsala University focusing on the history and political economy of the field, and has taught extensively in Sweden and the U.S. Rönnelid will be joined by María Marulanda. She has participated in the representation of foreign investors and sovereign states in investment treaty arbitrations, and has assisted tribunals in investment arbitration cases. She recently translated *The Political Economy of the Investment Treaty Regime*, a leading book in the field, into Spanish. The blend of Rönnelid’s deep theoretical knowledge and Marulanda’s practical experience will enrich students’ understanding of investment law and arbitration from a political economy perspective and its relationship with economic development.

Sessions

1. Introduction: Locating the political economy in international investment arbitration

- a) Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch, "General Introduction to International Investment Law", from Bungeberg et al. (eds.), *International Investment Law* (Nomos Verlagsgesellschaft, 2015)
- b) Early modern political economy: chapter from Sophus Reinert, *Translating Empire – Emulation and the Origins of Political Economy* (Harvard University Press, 2011)
- c) Methodological approach: Carol Bacchi "Introducing the 'What's the Problem Represented to be?' approach"

2. International law, industrialization, and investment protection

- a) Investment protection in Siam and the Two Sicilies during the 19th century: excerpts from Barton, Gregory A., *Informal Empire and the Rise of One World Culture* (Palgrave Macmillan, 2014) and Davis, John A., "Palmerston and the Sicilian Sulphur Crisis of 1840: An episode in the imperialism of free trade", 3 *Risorgimento* 5 (1982).
- b) Karl Polanyi, *The Great Transformation – The Political and Economic Origins of our Time* (Beacon Press, 1944), excerpt pp. 45–80
- c) Table on industrialization and deindustrialization during the 19th century from Paul Bairoch, *Economic and World History* (Harvester Wheatsheaf, 1993), pp. 88–92, table 8.1 at p. 91

3. Early investment arbitration

- a) Kathryn Greenman: "Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels" 31 *Leiden Journal of International Law* 617 (2018)
- b) Case study: Venezuelan claims commission case

4. The struggle over internationalization and ICSID

- a) Taylor St John: excerpts from *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018)
- b) Case study: *Texaco Arbitration*
- c) The underlying thinking: Wilhelm Röpke, "Economic order and international law" 86 *Recueil des cours de l'Académie de droit international de La Haye* 203 (1954)

5. Justifications for the BIT boom: good governance, rule of law, and orthodox economics

- a) Lauge N. Skovgaard Poulsen, excerpt from *Bounded Rationality and Economic Diplomacy – The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015)

b) David Kennedy, “The ‘Rule of Law,’ Political Choices, and Development” in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development – A Critical Appraisal* (Cambridge University Press, 2006), pp. 95–150

7. The emergence of arbitration without privity

a) Case study: *AAPL v. Sri Lanka*

b) Joost Pauwelyn, “At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed”, 29 *ICSID Review – Foreign Investment Law Journal* 372 (2014)

c) Jan Paulsson, “Arbitration Without Privity”, 10 *ICSID Review – Foreign Investment Law Journal* 232 (1995)

8. Successful use of FDI for economic development

a) Robert Wade, the chapter “Management of Foreign Trade and Investment” from *Governing the Market – Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press 1990)

b) Ha-Joon Chang, “Regulation of Foreign Investment in Historical Perspective”, 16 *The European Journal of Development Research* 687 (2004)

9. Indirect expropriation and the sovereignty-property nexus

a) Morris Cohen, “Property and Sovereignty”, 13 *Cornell Law Review* 8 (1927)

b) Katia Yannaca-Small, “Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?” from *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2nd ed. 2018)

c) Case study: *Tecmed* arbitration

10. Investment insurance and the debt curse

a) Thomas Pogge, “Recognized and Violated by International Law: The Human Rights of the Global Poor”, 18 *Leiden Journal of International Law* 717 (2005)

b) Louis T. Wells, and Rafiq Ahmed, excerpt from *Making Foreign Investment Safe: Property Rights and National Sovereignty* (Oxford University Press, 2007)

c) Case study: *The Dabhol Arbitration*

11. The definition of investment and developmental impact of FDI

a) Case studies: *Salini* and *Malaysian Historical Salvors*

- b) David A. R. Williams and Simon Foote, “Recent developments in the approach to identifying an ‘investment’ pursuant to Article 25(1) of the ICSID Convention”, pp. 42–64 in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011)
- c) Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, chapter 6 from *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

12. The current core standard: FET

- a) Case studies: the *Saluka v. Czech Republic* and *LG&E v. Argentina*
- b) Marc Jacobs and Stephen Schill, “Fair and equitable treatment: Content, practice, method” in Marc Bungenberg et al. (eds.) *International Investment Law* (C.H. Beck, Hart, Nomos, 2015)

13. How to regulate FDI for economic development?

- a) Guoqiang Long, “China’s policies on FDI: Review and Evaluation”, pp. 315–36 in Theodore H. Moran, Edward M. Graham and Magnus Blomström, *Does Foreign Investment Promote Development?* (Institute for International Economics, Center for Global Development, 2005)
- b) Michele Di Maio, “Industrial Policies in Developing Countries: History and Perspectives”, pp. 107–137 in Mario Cimoli, Giovanni Dosi and Joseph Stiglitz (eds.), *Industrial Policy for Development: The Political Economy of Capabilities Accumulation* (Oxford University Press, 2009)

14. The staying power of the investment regime

- a) Federico M. Lavopa, Lucas E. Barreiros, and M. Victoria Bruno, “How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties”, 17 *Journal of International Economic Law* 869 (2013)
- b) Tania Voon, Andrew Mitchell and James Munro, “Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights”, 29(2) *ICSID Review* 451 (2014)

15. Present-day development economics and investment arbitration

- a) Ricardo Hausmann and Dani Rodrik, “Economic development as self-discovery”, 72 *Journal of Development Economics* 603 (2003)
- b) Raphael Kapinsky, “The Global Dispersion of Production – Three Key Sectors”, pp. 122–159 from *Globalization, Poverty and Inequality - Between a Rock and a Hard Place* (Polity Press, 2005)

16: Final exercise: Navigating economic development under the investment regime

This exercise will ask the students to evaluate the developmental impact of the investment regime for a country of their choice

Bibliography

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- Krever, Tor, "The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model", 52 *Harvard International Law Journal* 288 (2011)
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