

UCI Center on Globalization, Law and Society (GLAS)

March 20, 2015 Workshop

International Trade & Investment Law: Comparisons, Empirical Studies, New Technologies, Public Policy

The conference will be held at the Law School, Room 3500H

9.00. Welcoming Remarks, GLAS Director, Professor Gregory Shaffer

Session 1: 9.15-10.15: Michael Fakhri (Oregon) (Commentator Gregory Shaffer, UCI)

Moving Away from Linkage Debates Towards a Comparative Approach

There currently is an exciting debate in the Journal of International Economic Law, especially in the book review section, over the very nature of international economic law. I use my forthcoming review of Kate Miles's new book, *The Origins of International Investment Law* (CUP 2013), to engage with this debate over the theoretical and methodological contours of international economic law.

It is common to compare ideas and doctrines in international trade law with those of international investment law. This comparison arises for several reasons. Doctrinally, both fields are premised on notions of non-discrimination. Historically, there have been several attempts to combine the two fields within the same multilateral treaty and institution. Economically, both affect the global flow of goods, services, and capital. And practically, NAFTA is a working example of a treaty that successfully combines the two fields.

One could also focus on the differences – investment lawyers and trade lawyers tend to be different social groups, common doctrines do not mean exactly the same thing in the respective fields, and ideas do not necessarily flow with ease between the two fields.

I suggest that each field has an even more fundamental difference in terms of their respective legal rationalities that makes them extremely difficult to compare. Many rightfully suggest that for international trade law it may be more illuminating to draw on fields such as administrative law, international standards, and regulatory theory. I want to also add that we may better understand and enrich investment law if we compare it to fields that explicitly address questions of space and ownership such as property and international environmental law.

Broadly, I look to other fields not in the common terms of the “linkage” debate but more in comparative terms, or what some have called “comparative international law”. Thus, I want to raise the debate of how we compare different fields in more normative terms – What fields should be compared? What are the stakes of some comparisons versus others?

Session 2. 10.15-11.15: Wolfgang Alschner (PhD Candidate, visiting at Stanford) (Commentator Sergio Puig)

Empirically investigating the evolution and current state of the BIT universe

While the international investment law literature abounds, there is little empirical scholarship systematically investigating the trends and structures underlying the bilateral investment treaty universe. Indeed, assessing close to 3000 bilateral investment treaties (BITs) long seemed practically impossible or prohibitively costly. Advances in data science, however, today allow us to treat text as data, which makes the analysis of even vast bodies of agreements possible. Applying text as data tools to the BIT universe, this paper finds that investment treaties involved in three waves of innovation, all originating in North America. In the process investment treaties turned from short and simple agreements focusing exclusively on investment protection to increasingly complex and comprehensive instruments that treat investment in its broader policy context alongside trade, finance and non-economic concerns. The rift between agreements affected by this innovation and those still rooted in a short and simple treaty model accounts for most of the variation in the BIT universe. In addition, national treaty networks of developed countries display important idiosyncratic elements. These elements tend to disappear, however, as treaties converge towards the North American treaty model. Hence, the Americanization of the BIT universe is thus the single most decisive trend in investment treaty making since the invention of the BIT.

Coffee: 11.15-11.30

Session 3: 11.30-12.30: Sergio Puig (Arizona) (with Emilie M. Hafner-Burton, & David G. Victor) (Commentator Chris Whytock, UCI)

Against International Settlement? Secrecy, Adjudication & the Transformation of International Law

Three decades ago Owen Fiss published a landmark article, *Against Settlement*, which argued that the rising popularity of pre-trial settlement and Alternative Dispute Resolution (ADR) was an unwelcome trend because it sacrificed the public benefits of transparent, complete adjudication for the private benefits of dispute settlement. In this Article, we propose that international law is on the cusp of its very own settlement crisis. As international governance is taking on increasingly more difficult and demanding topics, firms and governments have radically expanded their use of international courts and tribunals to resolve complex legal disputes. In their effort to become more legitimate and effective, these bodies have adopted a wide array of reforms aimed at promoting transparency and a more 'judicialized' process of adjudication. However, using a unique dataset on all investor-state arbitrations under the World Bank's International Centre for Settlement of Investment Disputes (ICSID), we show that those reforms are, in part, failing because parties have found ways to use pre-judgment or 'out-of-court' settlement to hide procedural and substantive outcomes. We demonstrate that cases involving highly

regulated industries in politically complex contexts are likely to remain secret because there are strong private incentives to keep the messy details of settlements away from the public eye. Furthermore, we show that cases brought by highly litigious claimants and by countries that have lost in the past are likely to yield secret settlements. Litigious firms are using arbitration to force settlements and maintain a reputation for swagger; countries that tend to lose accede to settlements out of fear of earning an even worse reputation from additional losses. In each of these domains, private interests for settlement undermine the broader public interest in a more transparent system of adjudication—exactly the same argument Fiss made three decades ago. We outline the need for reforms so that arbitral institutions can preserve some of the particular benefits of confidentiality that parties need when resolving disputes while also assuring more oversight of settlements. The ethos of international law has prized settlement, regardless of form. That must change as the reach of areas like international investment law expands rapidly to include topics that implicate public functions far beyond what the architects of these tribunals ever imagined. More oversight and transparency, we argue, will also allow for a more consistent, coherent and legitimate corpus of investment law.

Lunch: 12.30-1.30

Session 4: 1.30-2.30: Michelle Ratton Sanchez Badin (FGV Sao Paulo, Brazil, visiting at Irvine) (Commentator Anupam Chander)

The Role of Law in the Brazilian Approach to South-South Trade and Investment Relations: The Case of Angola

South-South trade and investment relations have grown considerably over the past years. Embedded in South-South cooperation discourses, this increase in economic transactions has been seen as a positive advancement towards the development of Southern countries' economies, especially in what concerns a reduction of their dependence on central economies. However, what is not yet clear is the role of law in this process. How are Southern and developing economies legally stimulating and increasing their economic ties? What are the main regulatory tools used by those countries? To what extent are they different from those that coordinated North-South relations in the last century? Who are the main actors and promoters advocating such legal approaches? This paper takes the case of Angola and Brazil relations to draw on these analyses. Brazil is the 4th largest importer of products from Angola, behind the EU, the US and China. In addition, Angola has become attractive to foreign investors (Brazilians included) in the following sectors: oil, civil construction, agriculture, fishery, food, tourism, and real estate. A number of Brazilian public institutions have been involved in the promotion of trade and investment, as well as the financing of such flows, towards Angola. Angolan institutions are also increasingly cooperating with Brazilian governmental institutions, and promoting internal reforms in order to attract foreign trade and investment from Brazil. We use empirical research methods, including analysis of aggregated data, primary and secondary documents, and interviews with government representatives and the business community.

Session 5: 2.30-3.30: Anupam Chander (UC Davis) (Commentator Michael Fakhri)

Robots, the Internet of Things and the Future of Trade

Will the Internet of Things and robots falter at national borders? If the Internet of Things offers eyes and ears and robots add arms and legs, both these revolutionary technologies often depend on brains and memories located far away. This is the nature of the remote sensor/server architecture utilized by both the Internet of Things and cloud robotics. Thus, both the Internet of Things and robots rely on the free flow of information across national borders. But this global free flow of data is increasingly at risk to claims that such flows jeopardize privacy and security. Increasingly, national laws restrict the transfer of information outside the home country. A Dropcam, a Fitbit, and a Nest thermometer all depend on the flow of data to the home country of their creators. The Internet of Things and cloud robotics may thus find themselves foiled by national borders, victim to a new privacy-based non-tariff barrier to trade.

Can international trade law, which after all seeks to liberalize trade in both goods and services, help stave off attempts to erect border barriers to this new type of trade? The smart objects of the 21st century consist of both goods and information services, and thus are subject to multiple means of government protectionism, but also trade liberalization. This paper is the first effort to locate and analyze the Internet of Things and modern robotics within the international trade framework.

Coffee: 3.30-3.45

Session 6: 3.45-4.45: Anastasia Telesetsky (Idaho) (Commentator Michele Ratton Sanchez)

Are There Barriers to Port States Implementing Trade Related Measures in Order to End Illegal, Unreported, and Unregulated Fishing?

This paper focuses on the use of domestic trade related measures to further international efforts to end Illegal, Unreported, and Unregulated (IUU) Fishing. In 2009, State Parties to the FAO negotiated the Port State Measures Agreement (PSMA) which a number of leading fishing States have joined. The U.S. Senate has given Advice and Consent to the executive to adopt the treaty and Congress has been working on various approaches to designing domestic implementing legislation. This paper argues that while the PSMA was not designed as a trade treaty, it should be implemented as a trade treaty to empower States to close markets to fish products that are proven or suspected to be IUU fish. The paper suggests that States who adopt trade-related legislation as part of their domestic adoption of the PSMA will not be subject to legal trade actions because of past international practice in accepting market closures to reduce IUU fishing activity and exceptions in the GATT.