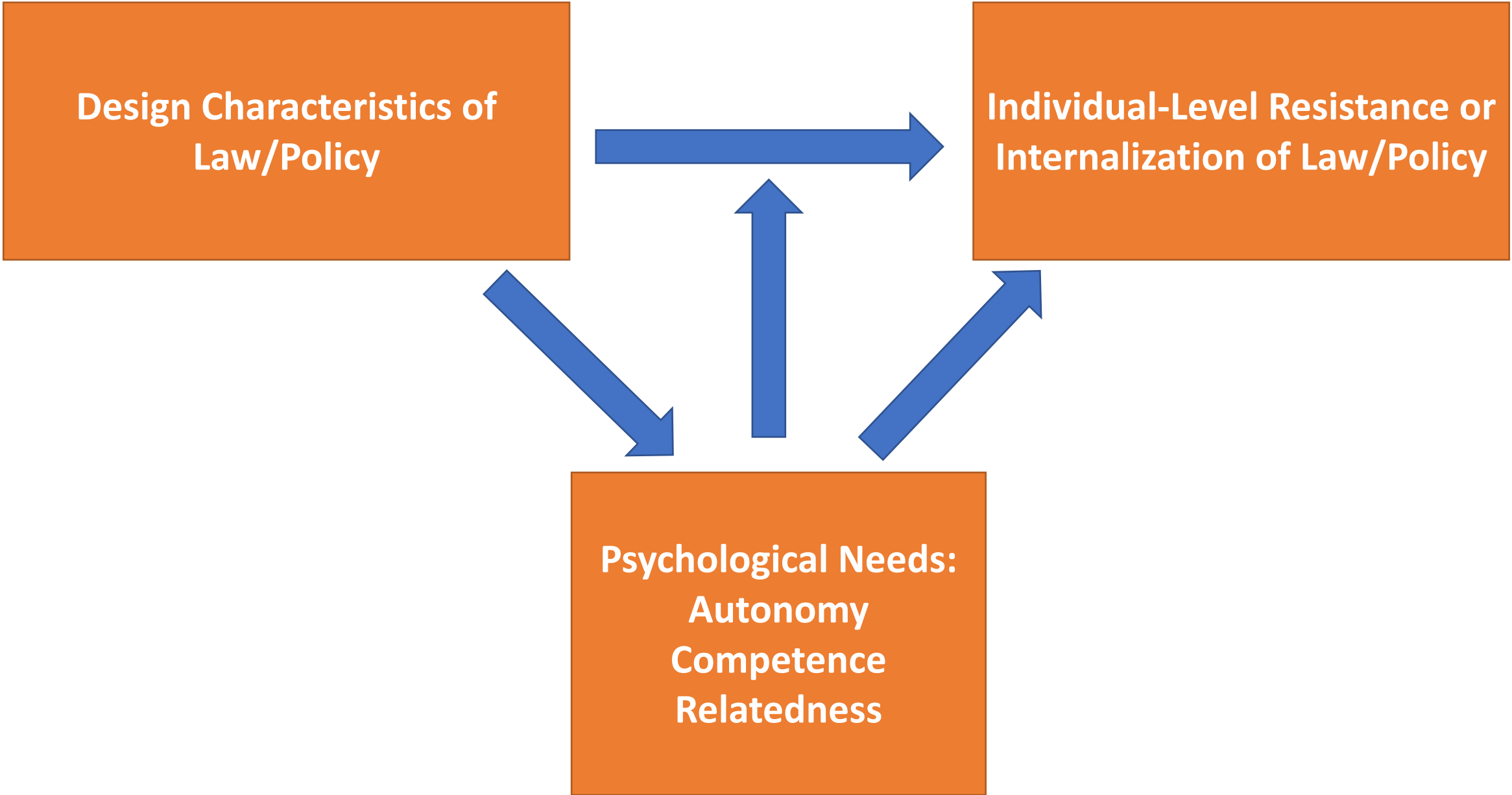


Self-Determination Theory (SDT) and the Origins of the Backlash to International Investment Law in Latin America

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SDT AND PSYCHOLOGICAL NEEDS

- Basic psychological needs include
 - Autonomy, competence, and relatedness
- Needs are universal, not culture-specific
- Satisfaction of needs leads to
 - Well-being, vitality, healthy functioning, development
- Thwarting of needs leads to
 - Diminution in human functioning, defensiveness, search for need substitutes, violence, some prejudices, and some psychopathologies
- Resistance to control emerges from need thwarting

SDT AND INTERNALIZATION OF LEGAL RULES AND INSTITUTIONS

- Extrinsic motivation
 - motivations for behavior whose purpose is instrumental or not for “its own sake.”
 - Originate externally (coercion, social pressures, social norms, and efforts to persuade)
 - Originate internally (shame, embarrassment, implementation of values)
- Individuals can integrate extrinsic motivation into the self
- Internalization
 - “extent to which individuals have taken in a social prescription or proscription and integrated it—that is, adopted and transformed the externally conveyed regulation into true self-regulation.” (Deci & Ryan, 2017)
- Continuum of internalization
 - Active defiance, external motivation, introjection, identification, integration
- Need satisfaction is necessary for integration

APPLICATION OF SDT TO LAW AND PUBLIC POLICY

- The “process of enacting laws, policies, and government services...the decision-making, application, and enforcement of those guidelines and procedures” as well as “the content of the laws and policies and the perceived benefits, harms, and fairness of their impacts” as important for need satisfaction and internalization (Deci & Ryan, 2017)
- The “ways in which governments design, promote, and enforce mandates and regulations can all affect how well the laws are internalized” (Deci & Ryan, 2017)

SDT AND RESEARCH IN INTERNATIONAL RELATIONS

- Behavioral revolution in political science and international relations
- Psychological studies regarding international law and institutions have not been as common as other fields of political science and IR
- SDT has been applied to international human rights law
 - (Goodman & Jinks, 2013)
- SDT has also been applied to environmental governance
 - (DeCaro, 2015; DeCaro, 2017; DeCaro, 2013)
- Large existing gap in literature for application of SDT to international investment law

DIPLOMATIC PROTECTION

- International minimum standard for treatment of foreigners and foreign property
- Right of states to intervene on behalf of nationals
- Sometimes intervention took form of blockade or military action
- Europe and United States took many of these actions in defense of their nationals against Latin American governments

CALVO DOCTRINE

Three Principles of Calvo Doctrine (Shea, 1955)

1. States have right to freedom from interference by other states in disputes with foreign investors.
2. Foreign investors cannot possess more rights than national investors.
3. Foreign investors may only resolve disputes with host states before local authorities

Calvo Clause

- Inclusion of Calvo principles in contracts, laws, and constitutions
- Often requires foreign investors to renounce diplomatic protection in disputes with host state

BILATERAL INVESTMENT TREATIES (BITS)

- Subscribed between states, but with ramifications for private individuals and organizations
- Protection against uncompensated expropriation
- National treatment
- Most-favored nation treatment
- Fair and equitable treatment
- Right to convert local currencies and repatriate profits
- Right to submit disputes with government to international arbitration
- Content varies and has changed over time
- Similar provisions sometimes found in trade agreements

PERSISTENCE OF CALVO DOCTRINE

- Latin America's unanimous rejection of ICSID Convention, 1964
- Latin America's promotion of NIEO at UNGA in 1970s
- Claims of "demise" or "death" of Calvo Doctrine
 - Hiatus of resistance from 1995-2004
- Claims of return of Calvo Doctrine
 - After 2006, claims of "backlash" against international investment law
 - Claims of "resurgence," "reassertion of control," and "revival" of Calvo Doctrine

PAUSE IN RESISTANCE: 1990s to mid-2000s

- Competition for capital (Elkins, et. al, 2006)
- Changing ideas (Kaushal, 2009)
- IMF conditionality (Yue Ma, 2016)
- Coercion (Salacuse, 1990)
- Structure of the international system (Burke White, 2015)

CURRENT FORMS OF RESISTANCE

- Argentina, Colombia, Bolivia, Brazil, Ecuador, and Venezuela have challenged constitutionality of their own BITs
- Argentina, Bolivia, Ecuador, Mexico, and Peru have either terminated or renegotiated many of their BITs
- Brazil never joined ICSID, and Bolivia, Ecuador, and Venezuela withdrew their membership
- Many Latin American states have created their own Model BITs, with more favorable provisions than those of United States and Europe
- Brazil's Cooperation and Facilitation Investment Agreements (CFIAs)
- Attempts to create regional ISDS forum and Model BIT

NEGATIVE EXPERIENCE WITH INTERNATIONAL ARBITRATION

- High cost and lengthy duration of proceedings
 - (García Bolívar, 2009)
- Exorbitance of arbitral awards against states
 - (Yackee, 2008)
- Unanticipated expansion of legal commitments
 - (Sornarajah, 2015)
- Indeterminacy and incoherency of arbitral decisions
 - (Franck, 2004)

LOSS OF CONTROL

- Unanticipated expansion of legal commitments
 - (Sornarajah, 2015)
- Reduction in national sovereignty
 - (Alvarez & Topalian, 2013)
- Reduction in national regulatory authority
 - (Montt, 2009)
- Reduction in democracy
 - (Choudhury, 2008)

CHANGING IDEAS

- Acceptance of structural modes of development led to hostility toward foreign investors and toward international investment law in 20th century (Yackee, 2005)
- Influence of neoliberal ideas in 1990s caused resistance to wane (Sornarajah, 2015)
- Shift away from neoliberalism in 2000s due to confluence of economic and financial crises caused a resurgence in resistance and economic nationalism (Yackee, 2005; Sornarajah, 2015)

LOCAL BUSINESS OPPOSITION

- Local firms resent competing with firms with more robust rights (Kennedy, 2003)
- Local firms resent “two-tier” system of justice, providing foreign investors with more robust rights (Ryan, 2008)
- Can lead to backlash or resistance to international investment law (Ryan, 2008)

GAP IN LITERATURE

- The origins of international investment law in general (Miles, 2017)
- The legal evolution and acceptance of the Calvo Doctrine (Shea, 1955)
- The history of resistance to international investment law (Sornarajah, 2015)
- Even Latin American jurists and legal scholars refer to the origins of the Calvo Doctrine in 1868
 - Exceptions: Griffith Dawson, 1987; Montt 2009
- No studies (as far as I know) of how the Calvo Doctrine was promulgated, accepted, and internalized

SIGNIFICANCE OF STUDY

- Corrects the historical record
- Sheds light on the reasons the Calvo Doctrine has endured
- The Calvo Doctrine represents the origins of resistance to international investment law, and understanding its origins and evolution is useful for reform efforts
- The Calvo Doctrine contributed to the regional and national strategic cultures of the Latin American states, and therefore shapes Latin America's economic engagement with the US and the world
- The Calvo Doctrine originated in Latin America, but was later adopted by many Asian and African countries following de-colonization



EARLY FOREIGN INTERVENTIONS IN LATIN AMERICA



Forging Resistance: The Birth of the Calvo Doctrine and Calvo Clause

Andrés Bello



Andrés Bello and the Non-Intervention Principle

“From the Independence and sovereignty of nations follows that no nation is permitted to dictate to another its form of government, religion, or the form of administration that it should adopt; nor call it to account for that which happens between its citizens, or between its government and subjects”

Bello, 1832

Andrés Bello and the Equality of States Principle

- “because all men are created equal, so are conglomerates of men that compose the universal society. The weakest republic enjoys the same rights and is subject to the same obligations as is the most powerful empire.”
- Each state “has the faculty to impose upon aliens all of the restrictions that it considers convenient,” and the “jurisdictional acts of one nation upon aliens that reside within her borders, if they are according to her laws, should be respected by other nations.”
- “states cannot exercise their jurisdiction outside of their own territory. Foreign states do not have the right to institute tribunals nor other judicial fora of any kind in another state without the state’s consent.”

Bello, 1832

Andrés Bello and the National Treatment Standard

- “...once we set foot in foreign territory, we take upon ourselves the obligation to conform to the laws of the state, that under this precise condition, provides us refuge, and permits our participation in the wealth of the civil society in whose bosom we enter. The nation to which we belong has no reason to complain regarding the same rule that she observes with other nations, and for the utmost purpose of maintaining peace among all. The citizen who possesses property and, particularly, real estate, in a foreign country, subjects himself, with respect to the use and transmission of these properties, to the laws of the country within which they are found.... and therefore, to the rules that it has established for the administration of justice” Bello

Carlos Calvo and the Principle of Non-Intervention

- “the origin and cause of all of these interventions is found in the version of international law that the intervening States want to sustain, which is the same that the States that are intervened upon want to break.”
- “...no matter how much we try to identify some reason to justify these interventions by European States in those of America, the truth is, we find none...They cannot be represented in international law as a justified precedent, but rather, as acts resulting from a great abuse of strength, essentially perturbing in their means and effects, and worthy, therefore, of the most high censure.”

Calvo 1868

Internalizing Resistance: The Diffusion and Institutionalization of the Calvo Doctrine

- Andrés Bello and Instruction in International Law
- Andrés Bello's Treatise on International Law
- Calvo's Treatise on International Law
- Calvo Clauses and International Contracts
- The Calvo Clause and Latin American Constitutions
- Paris, France: Focal Point for the Socialization of Latin American Diplomats

Paris and the Calvo Doctrine

“The Latin American exiles and diplomats in Paris viewed colonial expansionism with great suspicion or rejection, first that of the United States in Central America in the 1850s and later with the Spanish military occupation of Santo Domingo in 1861, followed by [British involvement in] the naval war with Peru in 1865. Even more worrying were the imperial policies of Napoleon III [of France] which had their most violent expression in the invasion and occupation of a large part of the territory of Mexico in 1862 by the French army. In a few words, within this small but significant group of Latin American diplomats in Paris at mid-century...a profound discussion ensued regarding the history and future destiny of the nations of Hispanic and Luso America...it truly was a club of diplomats.”

Carlos Marichal

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THANK YOU!