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From a Backlash Against Investment Arbitration to a Backlash by Investment Arbitrators?

Wolfgang Alschner (University of Ottawa) · Monday, July 4th, 2022 · Institute for Transnational Arbitration (ITA)

States have spent the last decade and a half rebalancing the design of their international investment agreements (IIAs). In their new-generation IIAs, states have clarified core protective standards, omitted controversial clauses, and inserted new carve-outs and general exceptions. These reformed treaties, it was hoped, would provide investment tribunals with "new analytical devices for adjudicating disputes involving competing policy objectives" and alleviate concerns over the undue restraints earlier IIAs had placed on states' right to regulate.

These new-generation IIAs are now beginning to be litigated and the first series of awards under them suggests that the hopes they raised have been disappointed. Instead, new treaties have produced old outcomes.

Last year's *Eco Oro v. Colombia* award marked the preliminary climax of this worrying trend. In a majority opinion, the tribunal, having found that Colombia's partial withdrawal of a mining concession vis-à-vis a Canadian mining company fell below the minimum standard of treatment enshrined in Article 805 of the Canada-Colombia FTA, had to make sense of that treaty's novel general public policy exception in Article 2201(3). Colombia had asserted that this clause would justify a possible violation of the FTA given that its measures were necessary to preserve the Páramo de Santurbán wetland conservation area and that no compensation would therefore be due. Controversially, the tribunal majority construed the treaty's public policy carve-out as a "permission" rather than an exception. It found that even if its conditions were met, the clause could not justify a prior violation and compensation must be paid. The tribunal thereby not only departed starkly from jurisprudence in neighboring trade law dealing with almost identical exception language. It also, in the words of one commentator, declared general policy exceptions – one of the hallmarks of most reformed IIAs – "to be effectively irrelevant in investment arbitration."

The *Eco Oro* decision is not the only recent award that dulls the effect of new-generation IIAs. As I discuss in my book, Investment Arbitration and State-Driven Reform: New Treaties Old Outcomes, across the board, recent investment tribunals have rolled back state-driven treaty design change. Controversial clauses phased out in recent treaties are brought back via most-favored nation treatment. Existing customary international law flexibilities are summoned to displace more for-reaching exceptions. More precise language in core protective standards is circumvented by applying old precent rather than state-of-the-art clarifications. In short, new-generation IIAs are

read like old-generation IIAs.

If much of the state-driven IIA reform of the past decade was prompted by a "backlash against investment arbitration", then the dialectics of investment law have entered a new phase. This new era is marked by a "backlash by investment arbitrators" as tribunals roll back state-driven change through controversial interpretations in distinct disputes.

Contracting states vs tribunals: Who decides how treaty gaps should be filled?

Part of what we are seeing is a competition over norm-development. For decades, it was up to investment tribunals to make sense of the vague and open-textured language of first-generation investment treaties. As tribunals seized this "quasi-legislative power", they became the chief engine for investment law's normative development. Understandably, tribunals grew used to this extensive gap-filling authority.

However, with the advent of a new generation of IIAs, contracting states have taken it upon themselves to fill the gaps that earlier treaties left open. Sometimes, they have contracted on prior arbitral interpretations. More often, though, contracting states have purposefully departed from judicial precedent, corrected perceived arbitral misinterpretations and inserted new clauses or omitted old ones. These treaty design innovations have placed states and tribunals at loggerheads. States are pushing for change while tribunals are pushing for continuity. With gap-filling strategies thus diverging, the question of who decides comes to the fore. Who has the ultimate authority to decide how to fill normative gaps in investment arbitration and to shape the normative trajectory of IIAs?

While legal dogma may provide clear-cut answers to this question, on the ground, the jury is still out. Judged by the recent wave of decisions under new-generation IIAs, investment tribunals have shown little willingness to defer to the choices and changes made by states. In the above discussed *Eco Oro* award, for example, the tribunal openly disagreed with the concordant submissions of the contracting state parties, Canada and Colombia, on the interpretation of the general public policy exception. As tribunals eschew deference in the face of state-driven change and continue to stick to their own gap-filling preferences, their views clash with the position taken by contracting states in new-generation IIAs.

What yields? José Alvarez asked over a decade ago that "if … international investment law is driven by the jurisprudence produced by investment arbitrators, does that jurisprudence provide a firewall to protect foreign investors against [treaty] trends in favor of 're-balancing'?" The preliminary answer to his question seems: yes. Reformed treaties have produced interpretations that mirror those of unreformed treaties. Tribunals, not states, have had the last word on gap-filling.

That is a problem, however, because it calls into question the effectiveness of state-driven IIA reform. For a long time, new IIAs with their clarifications and exceptions were the poster child that decision-makers pointed to when questioned about concerns over investment arbitration. The sense was, "we know there is a problem of imbalanced old treaties but look to these new agreements: we are fixing it!" This promise and expectation of change makes it so devastating that new treaties continue to produce old interpretive outcomes. Far from alleviating legitimacy concerns around IIAs, new treaties and their lacking impact are poised to exacerbate them.

Where next: Procedure or Substance?

If we accept that treaty design reform has, up to now, been more failure than success, then what can and what should states do to effectively realize the much-needed rebalancing of the IIA regime?

Some states seek fortune in procedural change. Changing the arbitrators, they reason, is the way to break through the arbitral firewall. A standing multilateral court with adjudicators trained in public international law may indeed change the dynamics between lawmakers and judicial gapfillers and produce more interpretive deference to contracting states in adjudication. However, despite its promise, it is bound to fail in remedying the underlying substantive problem that ultimately causes new treaties to be interpreted like old ones.

The investment regime's normative center of gravity still lies with old, outdated, and unreformed treaties. The vast majority of investment arbitration claims are filed under them. Today's negotiators, litigators, and arbitrators have been socialized through these early treaties and the case law rendered thereunder. Via precedent, arguments on custom, and MFN, these old IIAs still affect every new investment dispute including under new generation treaties. In short, it takes more than procedural reform to escape the gravitational pull of these old-generation IIA and to achieve the interpretive reset that states have begun to aim for in their new-generation treaties.

What is ultimately needed is a bulk reform of IIAs in substance and procedure. Instead of old, outdated, and unreformed treaties, recent, modern and reformed IIAs should be the collective reference point. And rather than reading new treaties like old ones, old treaties should be read in light of new ones. The neighboring tax regime demonstrates how an ambitious updating of an entire treaty regime can work. Thousands of bilateral tax treaties are routinely interpreted in light of current best practices. Where interpretation was deemed insufficient, a multilateral reform convention, the 2018 Multilateral Instrument, updated and upgraded old tax treaties based on state-of-the-art clauses.

Change and state-driven reform is possible also in the investment law context. But it takes more than new treaties or new adjudication to achieve it.

The views outlined in this post draw on Wolfgang Alschner, Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes. Oxford, New York: Oxford University Press, 2022.

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