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The End of Boilerplate Investment Treaties (BITs)

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, May 20th, 2009

"A systemic underestimation of the risks associated with bilateral investment treaties".

That's how Alvaro Galindo put it.

Dr. Galindo, is the Ecuadorian lawyer charged with coordinating that country's defence of a bevy of international arbitration claims. Last week, speaking in his private capacity, he told a conference of the British Institute for International and Comparative Law (BIICL) that developing countries often failed to grasp many of the real-world impacts of international investment treaties.

However, he made clear – as did a succession of other panelists – that record numbers of states are becoming acquainted with these impacts now. Not surprisingly, governments are re-thinking, re-designing and re-negotiating investment treaties at a growing clip.

Other speakers at the BIICL event gave some sense of how treaty texts are going off in all directions: as countries adopt their own preferred tweaks and modifications to earlier templates.

When states go back to the drawing board, it's not a matter of locking the two sides in a room for an afternoon – and then repairing to the bar a few hours later to toast their success.

As a recent series of reports in my newsletter make clear: re-negotiations (in this case between Canada and various European partners) can be protracted exercises.

Indeed, as disputes and jurisprudence proliferates, not everyone agrees as to the lessons that should be drawn from this body of experience.

In the case of three re-negotiated investment treaties between Canada, Latvia, Romania and the Czech Republic, the new EU members laboured for half a decade to revise their existing treaties with Canada, so as to accommodate certain concerns of the European Commission, as well as various lessons internalized by each of the state-parties.

The parties hardly lacked for real-world arbitral experience; by my back-of-the envelope calculations, the Czech Republic, Latvia, Romania and Canada have been involved in about 1 in 6 of the 300 odd treaty-based claims that are a matter of public record.

After a half-decade's toil, the three re-negotiated treaties signed by the three new EU members with Canada differed in marked respects from one text to the next – particularly when it came to

the exclusions or exemptions made in each pact.

This latest re-negotiation exercise only serves to remind us that, as governments go back to the drawing board in increasing numbers, we are seeing international investment treaties that are ever more complex – and diverse – as a result.

Indeed, as of this writing, a further three EU member-states (Poland, Slovak Republic and Hungary) are still in discussions with Canada, with different concerns and issues holding up each of these re-negotiations.

The days of boilerplate investment treaties are long gone.

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