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The Biden Administration Approach to Investment Arbitration? Retail Multilateralism

Patrick Pearsall (Allen & Overy) · Monday, November 9th, 2020

With the results of the U.S. presidential election announced last week, international lawyers are now looking closely at how the incoming Biden Administration will handle the many challenges facing the global legal order. President-elect Biden has promised to turn away from the unilateralism that marked the Trump presidency and instead focus on multilateral reengagement.¹⁾ But what kind of multilateralism can we expect from the Biden Administration, and what does it mean for the United States and its future participation in the reform of investment arbitration?

I do not think we can assume a pre-2017 multilateral approach. On some issues, including the COVID-19 pandemic ([WHO](#)), the climate crisis ([Paris Climate Agreement](#)), and global security ([NATO](#)), we can expect what I would call “wholesale multilateralism”—that is, an approach that is focused on robust institutions designed to confront shared global challenges within a dialogue between state actors. But on trade and investment matters, including on the reform of investment arbitration, the Biden Administration is likely to adopt what I will call a “retail multilateralism” approach, which instead focuses more on the equities of the individual and how a multilateral approach can make individual lives better. Obviously, progress on the climate crisis will affect individuals too, but a wholesale multilateralism approach is focused primarily on building and nourishing a global framework as such. This blog post explains the difference between the two approaches, which are not mutually exclusive, and where we can expect the Biden Administration to land when it comes to investment arbitration.

The investment arbitration system stands on a strong multilateral foundation. Protection of foreign direct investment is necessary, and states understand its importance. One can easily situate investment arbitration within a traditional wholesale multilateral framework. Overlapping obligations and investment agreements have created a complex global web of protection for investment.²⁾ The ICSID Convention is among a handful of international agreements that have almost universal force and acceptance.³⁾ The investment arbitration system itself is defined in part by the common enforcement of valid arbitral awards.

By design, the protection of international investment reinforces adjacent wholesale multilateral principles. Geopolitically, states that trade with one another and states that share investment are less likely to engage in armed conflict. Peace and security still depend in large part on trade and investment flows. That understanding is why I chose to serve in the U.S. State Department, and it is why many states still seat their investment lawyers and trade negotiators within their foreign

ministries. While many investment treaties are bilateral, many of the obligations are common across bilateral treaties, more investment agreements are now contained within multilateral instruments, and the entirety of the system rests on shared multilateral obligations of enforcement.⁴⁾ States themselves have multiple roles within this framework (often privileging competing interests as treaty drafters, respondents, and protectors of investment).⁵⁾ Investment arbitration as understood within the United States, pre-2017, was a wholesale multilateral concept – the creation of a system for the protection of international investment consistent with the rule of law.⁶⁾

With the election of Donald Trump, America retreated into its most isolationist period since the pre-1940s, as evidenced by the reemergence of slogans like “America First.” For the past four years, the United States has not had a clear position on investment arbitration. President Trump’s so-called “America First” bilateral agenda did not fit nicely with a rule of law-based system of peaceful international dispute resolution. Similarly, the Trump Administration withdrew the United States from multilateral institutions – favoring hard American power to the exclusion of traditional alliances.

From January 2021 onward, we will witness a major shift toward multilateral reengagement.

Joe Biden devoted much of his career to building and strengthening diplomatic alliances and understands America’s place in the world through a multilateral lens. He has promised to bring America back into dialogue with multilateral institutions like the United Nations, the WHO, the Paris Climate Framework, and perhaps even the WTO. But he will not simply return to multilateralism as understood in pre-2017 notions of cosmopolitanism – before President Trump enacted the nationalist America First agenda. Rather, with trade and investment matters, a President Biden is likely to shift back toward multilateral engagement with a clear-eyed understanding about how multilateral globalism must be sensitive to the needs of individuals.

I call this new approach on trade and investment: “Retail Multilateralism.” It is an approach to multilateral reengagement that is grounded in how individuals will benefit (or not) from multilateral frameworks. One can contrast this concept with “Wholesale Multilateralism,” which characterizes the pre-2017 multilateral approach and was meant principally to strengthen the global world order and that speaks to shared challenges of all humanity. As noted, these concepts are not completely distinct, but they do mark two poles on a spectrum. Whether an approach sounds more in the “wholesale” or “retail” framing will depend on the challenge and the context.

Thus far, President-elect Biden has signaled a “retail” approach to multilateral trade and investment agreements. In other words, we can expect multilateral trade and investment negotiations in key regions where American influence has waned, but front and center in the mandate will be the direct impacts on individual people (e.g. labor, environment, skills). It’s the macro and micro all at once – retail as opposed to wholesale multilateralism.

What will this mean for investment arbitration? At its core, the investment arbitration system finds a more comfortable home within precepts of wholesale multilateralism within which it was designed. It is system of law-based dispute resolution that is meant to protect us from the pressures of destructive unilateral nationalism. It has a “wholesale” global world order spirit: no gunboats steaming into the harbor; no diplomatic retribution on behalf of national champions; no calls from angry leaders screaming into the phones of counterparts; no egregious violations of rights in service of fraudulent and corrupt motives that starve populations of much-needed investment and

wealth transfers. Investment arbitration is a system that has deeply progressive and free-market roots – similar to President-elect Biden.

Nevertheless, President-elect Biden has not embraced investment arbitration within a “wholesale multilateralism” framework. While he was in favor of many parts of the TPP,⁷⁾ the NAFTA and its successor the USMCA,⁸⁾ and the cause of normalizing trade with China,⁹⁾ he approached the agreements and negotiations with a “retail multilateralism” focus. He was concerned about how these multilateral relationships would advance progressive ideals that impact the individual, through provisions on labor, the environment, and skills training.¹⁰⁾ He is likely to approach the major investment arbitration questions of the coming years – whether the United States will rejoin the CPTPP, how we approach trade and investment policy in North America or with China –through the same lens, by considering first how participation will impact real people on a local level. Perhaps this is in keeping with how CPTPP Parties see the relationship too. “Comprehensive and Progressive,” the two words added to the title of the Trans Pacific Partnership when the United States withdrew, themselves signal a kind of macro / micro retail multilateralism – both comprehensive and progressive – positive impacts on the individual through a multilateral approach.

It is not yet clear what a “retail multilateralism” would mean for investment arbitration. On one hand, we can expect the Biden Administration to have a genuine desire to be part of multilateral frameworks—and the investment protection system itself, as well large regional trade agreements and even the proposed “investment court,” are all strong multilateral institutions. At the same time, we should not expect pre-2017 conceptions of cosmopolitan wholesale multilateralism on trade and investment matters. The question that will need to be answered with satisfaction for Biden Administration policymakers will be: “how does investment arbitration help individual people?” Thus far, President-elect Biden has not been persuaded there is a satisfactory answer to this question, noting:

“I oppose the ability of private corporations to attack labor, health, and environmental policies through the Investor-State Dispute Settlement (ISDS) process and I oppose the inclusion of such provisions in future trade agreements.”¹¹⁾

We will learn soon how (or whether) this idea of “retail multilateralism” will take shape and whether it will provide comfort to the Biden Administration that investment arbitration is worth keeping. Until we have greater clarity on key positions at the USTR, the State Department, and in the National Economic Council, we just won’t know what kind of reengagement we will see and how that will impact a different investment arbitration system.

It’s been a long, isolating four years for the United States. 2021 will be different. I am reminded of the great Korean poet’s Midang’s famous line from *Beside a Chrysanthemum*:

last night’s frost came down
to bid your yellow petals bloom, perhaps,

The “perhaps” is so devastating, and yet, so hopeful.

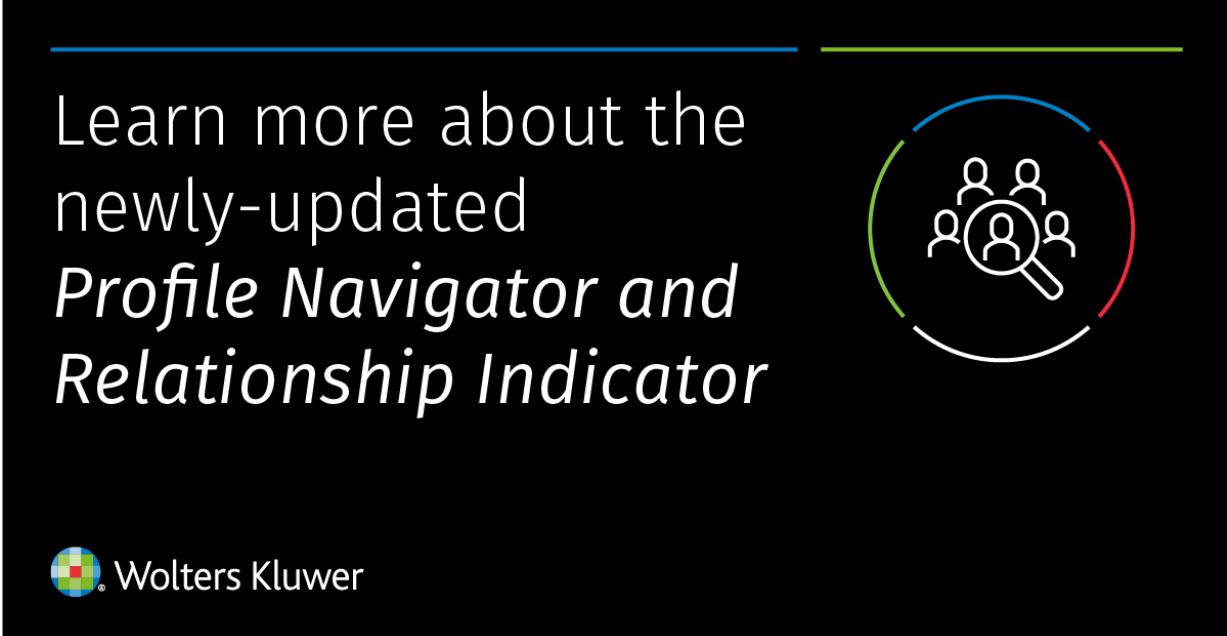
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