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Starting anew in international investment law

by

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The legitimacy of investment arbitration becomes increasingly questioned, with liberal states like Australia moving away from the regime. Defenders seek to ensure the survival of this regime of asymmetric investment protection, using a variety of techniques. The conservation of the gains of property protection has resulted in novel arguments relating to the existence of a global administrative law and standards of global governance.¹ These arguments seek to preserve an approach associated with the failure of market fundamentalism and global economic crises. As long as the inequity contained in regulatory restraints of the system affected only the powerless states, it operated with vigor; but with powerful states feeling the effects of regulatory restraints of investment treaties, there has been movement away from the earlier premises of the established regime.

The idea that international investment agreements (IIAs) had brought about a standard of governance began to recede when the United States, the proponent of strong standards of investment protection, began to retreat, in its own model treaty, by providing that regulatory expropriations are not compensable “except in rare circumstances;”² the fair and equitable standard is nothing more than the customary international minimum standard; national security preclusion is a matter for subjective assessment; and measures taken to promote health and welfare of society are justifiable. The US policy and its newer treaty provisions (e.g. in the US-Peru Trade Promotion Agreement) states that the standards of protection are the same in domestic law as well as in its treaties; this is an espousal of the consistently rejected Calvo doctrine. The US Model Treaty (2012) confirms these trends.³ The uncertainties

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¹ See generally, Stephan Schill, ed., *International Investment Law and Comparative Public Law* (New York: OUP, 2010).

² 2004 US Model BIT, annex B, section 4(b), available at: <http://www.state.gov/documents/organization/117601.pdf>.

³ The text is at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

introduced into US treaties have made the outcome of arbitration less predictable for foreign investors.

These developments are beginning to be replicated in the treaty practices of other states. In this context of change, it is futile to argue that the old neo-liberal system of investment protection can be kept alive through constitutional or public law principles. When the US and Canada, two states sharing a language and culture, cannot agree on the domestic public law standards of property, it would be futile to search for a common universal standard of public law on a subject that attracts many ideological, cultural and even religious divisions. International law must not, as in the past, become the means by which hegemonic states impose principles on the basis of a pretense such as a higher standard of civilization or better standards of governance.

It is best to start anew in the context of the developments that have taken place, such as the recognition of competing interests of the sustainable use of resources, the pursuance of social interest in the health and welfare of communities, human rights considerations in the conduct of business, and corporate social responsibility. The existing regime suffers from inconsistent awards, allegations of bias against the limited number of arbitrators who are called upon and the efforts of law firms to develop strategies of litigation that states hardly contemplated when negotiating investment treaties.

A truly justice-centered regime that shows concern for the interests of the poor is better than a regime that is geared to promote the narrow interests of the rich. The new regime should not restrict the regulatory space of governments to take measures for the advancement of its people, their environmental and human rights interests and their economic development. A regime must be constructed that gives rights to foreign investors while respecting the needs of the people of the host state of which the foreign investor has, by consent, become a part. The past, prior to the neo-liberal approach, had solutions. In fact, the early treaty regime was in itself such a solution. It could be improved, with states retaining greater control over the interpretation of treaties rather than abdicating that function to arbitrators. There were contractual solutions that, due to greater access to information, can be more transparent than before. Diplomatic protection still remains a possibility. A system of dispute settlement with adequate controls over the interpretation of treaties by the state parties and manned by designated government lawyers could be devised to deal with egregious instances of denial of justice to foreign investors by domestic courts. Foreign investors may be given standing to plead before such a system through a nominated body of lawyers. Contract-based systems in which the rights of foreign investors could be specified are preferable. The parties could then negotiate their own protection subject to rules of transparency and devise their own methods of dispute settlement, subject to constraints in local laws and to the primacy of local courts to first deal with the dispute.

The Osgood Hall Public Statement on International Investment Law makes a good beginning for this venture.⁴

⁴ Public statement on the international investment regime, available at: <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>.

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