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Common structures of investment law in an age of increasingly complex treaty-making

by

Stephan Schill and Marc Jacob*

Although international investment agreements (IIAs) continue to mushroom, it is widely assumed that international investment law can be analyzed as a single legal regime. This allows addressing legal questions relating to foreign investment in a systematic fashion and enables placing investment law in the context of global governance. It also allows description of the evolution of this regime as a whole. This is usually done along one-directional trajectories, from shorter and unrefined investment treaties to more elaborate models that rebalance investor rights and public interests. We challenge this one-directional perception and argue that the IIA landscape is becoming increasingly multifaceted and complex. This casts doubt on the idea of a uniform regime and raises the question how states and investors can navigate through the increasingly complex IIA thicket.

A review of IIAs concluded over the past three years reveals the growing complexity of investment treaty-making and raises the question of what common structures underpin the disparate treaty landscape:¹

- *First*, not all recent IIAs move from traditional “lean” (European-style) IIAs to recalibrated “balanced” (North American-style) treaties. Several states, developed and developing, still conclude terse and unembellished IIAs, as if debates about rebalancing had never taken place.
- *Second*, investment rules are increasingly integrated into preferential trade and investment agreements (PTIAs). This leads to the permeation of trade law-inspired rules and thought, and challenges the conception of investment law as an independent

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¹ See Stephan Schill and Marc Jacob, “Trends in international investment agreements, 2010-2011” in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2011-2012* (New York: OUP, 2013), pp. 141-179, available at: http://www.vcc.columbia.edu/files/vale/content/Investment_Yearbook_2011-2012_chapter_3.pdf.

discipline. Moreover, PTIA investment chapters themselves are not negotiated on the basis of globally uniform model texts, but follow very different approaches.

- *Third*, the geography of international investment law is rapidly changing. Apart from more South-South investment cooperation, we are witnessing increased treaty-making by Asian countries like China, India, Japan, and the Republic of Korea. Although there is no general “Asian” approach, this may influence our understanding as to who the trend-setting actors are in the field.
- *Finally*, there is a marked drift toward stronger regionalism and institutionalization, with organizations such as ASEAN and the supranational EU serving both as platforms for investment protection and as new actors in investment treaty-making.

These developments raise salient, but not yet fully addressed, questions as to the relationships between old and new agreements, PTIAs and investment protection treaties, regional and bilateral arrangements, and supranational and international legal norms and frameworks. These developments also suggest the existence of different strategies and philosophies pursued by different actors and herald the emergence of a more pluralistic and complex IIA universe. Chiefly, can international investment law still be considered a unified field, especially when a truly multilateral investment treaty is not a project states at large seem to be interested in pursuing at present?

In our view, several centripetal forces counteract the centrifugal tendencies regarding the drafting of new IIAs mentioned above. This allows one to appreciate common structures that hold international investment law together as a viable sub-discipline of international law and that enable meaningful interaction between different treaty-makers and users:

- *First*, even the increasingly complex IIA landscape is based on recurrent principles of investment protection, liberalization and cooperation. These principles can be adapted and tailored to the ever-developing needs of the contracting parties, but they create an overarching system of international law principles devoted to a context-specific endeavor.
- *Second*, investor-state arbitration has an important function in holding the field together, even though arbitral jurisprudence is not always entirely consistent. Spearheaded by a group of elite arbitrators, investor-state arbitration can work toward generating a *jurisprudence constante* and creating convergence rather than faction. Moreover, it allows for evolution and synthesis by crystallizing opinions that can either be rejected or reproduced.
- *Third*, the embedding of IIAs and investor-state arbitration in general public international law and within multilateral institutional settings, through organizations such as ICSID or (albeit to very different degrees) UNCITRAL, ensures that the basic structures underpinning the conclusion and interpretation of IIAs remain multilateral.
- *Finally*, scholarly analysis and doctrinal reconstruction of IIAs and of arbitral jurisprudence strings the field together despite the increasing intricacy and divergence in the substance of IIAs.

While efforts at harmonizing investment law against the will of states need to be avoided, these elements ensure the unity of the IIA regime without the need to conclude a formal multilateral investment treaty. Unity, in this view, does not mean strict uniformity, but rather the existence of a common framework of thinking, just as societies governed by the rule of law can agree to disagree. IIAs thus can meet the desire for tailor-made solutions without giving up the idea that there is a multilateral space of engagement for international investment relations, be it in the context of policy-making or dispute settlement. For these reasons, efforts to think about national and international investment policy in global and systemic terms and attempts to offer a toolbox for states with which to implement and adjust policies to individual needs, as done recently by UNCTAD's *Investment Policy Framework for Sustainable Development*,² should be welcomed. They are a step toward helping to manage the complexity of IIA-making.

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² See UNCTAD, investment policy hub, "Investment policy framework for sustainable development," available at: <http://investmentpolicyhub.unctad.org/Views/Public/IndexIPFSD.aspx>.