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Advancing climate-change goals: From reactive to proactive systemic integration

by
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Countries are bound by certain commitments toward foreign investors. They are typically included in international investment agreements (IIAs) entered into between states, mostly in the 1990s and 2000s. It is often argued that IIAs restrict countries' regulatory policy space by requiring a certain level of stability and predictability in the legal framework for the benefit of investors. Yet, international environmental agreements compel countries to make drastic regulatory changes that could potentially damage the investors they sought to attract and protect through IIAs. For example, article 4(2) of the Paris Agreement requires signatories to pursue domestic mitigation measures to reach environmental goals, leaving the determination and implementation of such measures to the countries themselves. Most IIAs do not provide for any clear wording that would resolve the clash between state responsibility to pursue their regulatory reforms and to protect foreign investment and investors. This conflict increases the likelihood of investor-state dispute-settlement (ISDS) claims and may slow down climate-change mitigation efforts.

As argued by Rachel Thrasher, the best solution would be to reform IIAs to allow states to meet climate-change commitments (e.g., by differentiating the protection accorded to low-emission and high-emission investments), or to quickly terminate all treaties. However, the termination of IIAs may not immediately allow countries to freely regulate in the environmental space due, inter alia, to sunset clauses and possible procedural obstacles resulting from Articles 65-68 of the Vienna Convention on the Law of Treaties (VCLT). Moreover, the adoption of new IIAs would be an arduous and time-consuming task, as is currently the case with the reform of the Energy Charter Treaty. Therefore, tribunals that are engaged in such disputes will for now have to grapple with the existing framework and its shortcomings.

To avoid compensating investors for breaches only on the basis of commitments existing in IIAs, tribunals should move toward a broader reading of these treaties, taking into account general international law. Considering international investment law as an aspect of general international law could eliminate (or at least ameliorate) the conflict between countries' international environmental

commitments and IIAs. Investment tribunals (e.g., *Urbaser and CABB v. Argentina*, *Tulip Real Estate v. Turkey*, *Al Warraq v. Indonesia*) have already confirmed that IIAs should not be interpreted in a vacuum, but rather in harmony with international law. Under Article 42 of the ICSID Convention, tribunals could apply international law to the treaty obligation of a state while deciding on a claim. Moreover, Article 31(3)(c) of the VCLT provides that international treaties—which include IIAs—should be interpreted in line with "any relevant rules of international law applicable in the relations between States", the so-called "systemic integration" principle. This principle could, therefore, enable the application of general international law rules for interpreting substantive obligations of IIAs without defining a hierarchy and establishing a concurrent approach. Alternatively, countries may consider agreeing on more specific conflict rules to prevent (or help resolve) conflicts between international agreements and IIAs that provide for incompatible international obligations.

Tribunals should therefore consider applying evolving approaches to IIL, instead of the *lex lata*, to actualize or contemporize IIAs' obligations in practice. Moreover, tribunals should acknowledge and enforce countries' commitments under other international treaties and, accordingly, interpret IIAs in light of the intent of the respondent state. Undoubtedly, this approach could hinder the protection of investors' legitimate expectations in relation to the regulatory framework concerning the environment. Therefore, countries could consider setting up appropriate and alternative compensation mechanisms for investors in these circumstances.

Moreover, governments can make the following efforts to promote this approach:

- Negotiate a single opt-in multilateral convention, applicable to pre-existing IIAs, to introduce common international rules to harmonize IIAs with countries' other international environmental commitments. Such a convention should also include an option for other countries to join at a later stage. This solution may avoid (or reduce) the difficulty of renegotiating thousands of IIAs.
- Eliminate uncertainties by adopting mutually binding statements to provide for an authentic interpretation of existing IIAs.
- Clarify that IIA provisions (e.g., fair and equitable treatment, full protection and security, the international minimum standard of treatment) should be interpreted in accordance with an evolving international law framework, so that tribunals can take into account agreements, practice and customary international law when assessing disputed concepts.

The challenges of climate-change regulations and rising ISDS claims call for investment tribunals to take decisions that enable countries to honor their environmental and climate-change commitments without having to face hundreds of claims. Tribunals are critical for the process of treaty interpretation, and the relevance that arbitrators attach to the VCLT is key in this process. A broad approach can lead to a new international investment law regime that addresses international obligations without terminating existing IIAs. This would spur initial actions for the modernization and smooth adoption of existing IIAs and avoid the fragmentation of the international investment law regime caused by sunset clauses and resistance to treaty termination by some countries.

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