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ICCA Sydney: Arbitration Challenged Part I: Reforming Substantive Obligations in Investment Treaties and Conditions of Access to Investment Arbitration

Brecht Valcke (King & Wood Mallesons) · Tuesday, April 17th, 2018 · King & Wood Mallesons

The panel on Arbitration Challenged Part I: Reforming Substantive Obligations in Investment Treaties and Conditions of Access to Investment Arbitration, at ICCA Sydney 2018 Conference, was moderated by *Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes (Canada)* and had contributions from speakers *Christophe Bondy, Cooley LLP (Canada); Max Bonnell, White & Case (Australia); Mélida Hodgson, Foley Hoag LLP New York (United States); Won Kidane, Seattle University School of Law (United States);* and *Whenhua Shan, Xi'an Jiaotong University (China).*

The panel discussed whether specific substantive obligations in investment treaties need reform or at least could be benefited from an evolution. This question springs from some of the criticisms that are expressed about investment treaties, such as:

– interpretation of investment treaties are too expansive and too pro-State;
– a lack of consistency in jurisprudence; or
– poor drafting of 1st and 2nd generation investment treaties.

The substantive obligations addressed by the panel included: the definition of investment, the fair & equitable treatment standard (FET), the concept of expropriation, the most favoured nation clause (MFN), and investment treaties imposing obligations on the investor.

Investments

As a part of assessing whether tribunals have jurisdiction a 'double-door' approach is taken in assessing the definition of "investment". First, whether the definition of "investment" under the investment treaty under which the dispute is brought applies; secondly, whether the definition of "investment" under the investment arbitration rules applies.

"Investment" in investment treaties is usually based on an asset approach. Most tribunals apply the Salini-test, however, not in a consistent fashion.

The interpretation of "investment" should be based on the ordinary meaning of the word and in general includes the characteristics of an input of capital, the assumption of a profit or gain, and the adoption of risk.

Fair & Equitable Treatment (FET)

FET in investment treaties is the idea of a minimum standard of treatment of investors, disciplined by State practice. The panel identified a conflict between the standard as considered:

– by the States when drafting investment treaties, being a minimum standard based on such customary international law notions as the denial of justice,
– where the jurisprudence has linked FET to concepts such as legitimate expectations, reasonableness or proportionality. This has triggered State practices to react to the tribunal decisions on FET.

Some possible reactions identified by the panel include:

1. terminating investment treaties;
2. eliminating the reference to FET in investment treaties but including a reference to minimum standard concepts such as reasonableness or proportionality;
3. redrafting investment treaties so that FET is defined as a minimum standard treatment;
4. defining FET and restricting the tribunals right to interpret the concept; or t
5. maintaining the existing notion of FET under the motivation that a new concept of FET may bring with it unknown problems of its own.

Expropriation

The concept of expropriation evolved from direct expropriation to also include indirect expropriation (e.g. contractual rights). Over the years, a wider interpretation developed of what constitutes expropriation, triggering questions of whether refusing to grant an environmental permit could be construed as expropriation. Nowadays, more and more exceptions are accepted for the States to regulate such areas as health (pharmaceuticals, vaccines, medical devices), public health or regulating tobacco. The panel questioned whether extremely low or extremely high damages awarded in a dispute between State and investor could be considered an expropriation.

Most Favoured Nation (MFN)

Remarkably, States infrequently turn their mind to the concept of MFN when drafting investment treaties and its application by tribunals is seldom challenged.

However, the concept that an investor can rely on any substantive protection offered by the State in any of its other third party investment treaties exposes the State to potential obligations it may never intended to undertake when it negotiated the investment treaty under which the State is now sued.

Some States, such as India, therefore have excluded MFN clauses or international arbitration clauses from their more recent treaties. Newer treaties such as CETA and JEPA also limit the application of MFN.

The argument against the application of MFN is that a State cannot be drawn into an arbitration it did not consent to, where it nonetheless common for tribunals to rely on MFN to allow arbitration to go ahead.

It is therefore crucial that States address the application or exclusion of MFN in their treaty

negotiations expressly. More and more States exchange position papers expressing the State's view on whether MFN should or should not apply.

Treaty obligations on investors

Recently, investment treaties may also impose obligations on the investor (e.g. in the areas of environmental protection, labour laws and anti-bribery).

The panel questioned whether imposing obligations on investors under investment treaties erodes the protection of the investor, which is the main reason investment treaties came into existence, i.e. to replace "gunboat" diplomacy.

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