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Australian Arbitration Week Recap: Re-assessing Australia's Bilateral Investment Treaty Practices

Nick Papadimos and Sebastian King (The Australian National University) · Thursday, October 29th, 2020

On 14 October 2020, Professor Zachary Douglas QC delivered the 19th annual Clayton Utz and University of Sydney International Arbitration Lecture as part of Australian Arbitration Week. This year's topic was a response to Australia's Department of Foreign Affairs and Trade's (DFAT) review of its bilateral investment treaties (BITs). This blog post provides an overview of the lecture's main themes; placing them in the context of a broader discussion of ISDS regime reforms.

Procedural reform

Professor Douglas began by evaluating the sparse procedural rules of investment treaty tribunals. Surprisingly, rules restricting the sheer volume of materials put before a tribunal are practically absent; so too are rules guiding the parties towards a coherent dispute. That is, parties may lay out their pleadings and evidence over thousands of pages without any requirement that their positions relate to common issues. Equally, without jointly identified issues, party-appointed experts may produce diverging reports. The consequence of this undisciplined procedure is that, at the hearing, the parties might present cases that pass each other like "ships passing in the night", thereby adding to the length and costs of a hearing.

But what lessons might we draw from this point made in the lecture? While enforcing page limits, joining common issues, and reigning in evidence may not appear glamorous, these procedural rules have the potential to enhance substantive justice. As Sir Henry Maine noted: "[s]ubstantive law has at first the look of being gradually secreted in the interstices of procedure". Hence, the first recommendation in the lecture was one of procedural change: DFAT should draft its own bespoke set of arbitration rules – ones that are specifically designed to deal with the procedural problems that arise from Australia's own treaties. By annexing these rules to a BIT, Australia and its treaty partners could bilaterally draft procedural rules to address these issues, thereby avoiding "highly political" and complicated multilateral negotiations.

Primarily, this bilateral approach would allow Australia to address its policy concerns in a proportionate manner. As Professor Chester Brown noted in the lecture: "this review is an opportunity for Australia to reconsider its BIT program, hopefully not to retreat from it, but certainly to improve it." After all, burdensome litigation costs are not unique to ISDS. In 2009, Sir

Rupert Jackson proposed significant reforms to reduce the costs of litigation in England and Wales following complaints of the prolixity of expert evidence, time-consuming procedures, and disproportionate costs.

Despite these common issues, a unique characteristic of ISDS is the disproportionate responses it receives. In the Australian context, there have been numerous "overreactions" to the ISDS regime, including a 2014 Bill to completely ban the Commonwealth from entering into ISDS agreements. Internationally, the decision by some states to withdraw from their BITs, and the EU's proposal for a multilateral investment court may reflect similar overreactions to investment arbitration. In this context, Professor Luke Nottage quotes Voltaire: "the perfect is the enemy of the good". Litigation is, and always has been, a "labour intensive process" carried out by skilled adversaries striving mightily; costs are inevitable. Perhaps, then, the lesson to be drawn from Sir Jackson's report is to be found in its objective of not devising "ways of slashing costs as an end in itself, but to make recommendations to promote access to justice at proportionate cost." Professor Douglas' first recommendation appears to resonate with this objective by facilitating a means of anchoring the pleadings and evidence to the dispute.

Decoupling investment treaty and commercial arbitration

In this part of the lecture, Professor Douglas addressed the general concern that criticisms levelled against ISDS are unfairly impacting commercial arbitration.

In particular, despite their shared procedural frameworks, commercial arbitration was said not to experience the same procedural excesses plaguing ISDS. This is, in part, due to the relationship dynamics between the parties. Whereas it is likely too late for a state and investor to repair their relationship following a dispute, commercial parties often require the continuation of mutually beneficial relationships. This imposes a certain level of discipline on their conduct during a case.

These points tie into a much wider debate about the similarities and differences between commercial arbitration and investment treaty arbitration, and the concerns of lumping each into a discussion of international arbitration more broadly. Speaking extra-judicially, Chief Justice Allsop of Australia's Federal Court noted that appreciating the differences between both can help identify potential solutions to the criticisms of commercial arbitration. The same can also arguably be said of the criticisms of investment treaty arbitration – a point exemplified in the lecture.

Professor Douglas noted that merely adding amendments to the commercial arbitration procedural regime will not solve the issues particular to ISDS. Rather, this patchwork approach simply shifts the problem. For example, the UNCITRAL Rules on Transparency sought to achieve legitimate policy aims by ensuring greater transparency for both investment treaty and commercial arbitrations. However, for investment treaty arbitrations, it has produced unfortunate and unintended results. Requests for greater transparency are almost always disputed, with skirmishes about what information should be redacted or made public simply creating arbitrations within arbitrations and increasing the costs and time of the dispute.

Applying a bespoke procedural platform to investment treaty arbitrations could provide a much-needed opportunity to sort out the procedural problems that have emerged with it. This would also have the added benefit of isolating commercial arbitration from the criticisms of ISDS, and thereby help to identify solutions to the problems unique to each.

Reducing uncertainty in applying substantive investment treaty protections

On substantive ISDS reforms, Professor Douglas highlighted a concern about the inconsistent application of investment treaty protections by tribunal members and the conventional techniques used by governments to address these concerns to date. One technique has been to link the standards explicitly to the minimum standard of treatment under customary international law. Another has been to raise the threshold for international responsibility through nuances in treaty language (such as a "fundamental" breach of due process, "manifest" arbitrariness or "targeted" discrimination). However, these approaches have done little to counter wayward interpretations of investment protection standards. For example, in *Bilcon v Canada*, both techniques appeared in the language of the applicable treaty and FET test applied by the tribunal; yet, its members arrived at wildly divergent results.

Those same concerns were also identified (and are still to be considered) as part of UNCITRAL Working Group III. The Working Group is looking at a range of options in addressing uncertain or inconsistent interpretations, including an ISDS appellate body mechanism and a permanent body of full-time adjudicators. Earlier this year, the Working Group also requested preparatory work be undertaken on using existing interpretative tools to aid treaty interpretation to inform its review. Although a range of interpretative tools is available to parties to assist in clarifying treaty obligations (e.g. joint interpretive agreements), these tools can only go so far, and are not substitutes for where substantive reforms are necessary through treaty amendments.

In seeking to address similar uncertainty or inconsistency concerns, Professor Douglas identified a more fundamental problem: unduly expansive or narrow interpretations of investment protection standards stemming from the unstructured reasoning adopted by tribunals. Without a structure to follow, the ideological positions of arbitrators serving on a tribunal can unduly influence the tribunal's determination of international responsibility under investment treaty protections. In that context, he considered a new, structured approach to treaty drafting is required.

Such an approach, however, was not said to necessitate the re-imagination of investment protection standards. Rather, Professor Douglas recommended drawing on comparative law sources to inform the structure of analysis that a tribunal would follow when applying the investment protection obligations. This approach would eliminate the inconsistent application of domestic principles to treaties in circumstances where the tribunal's application radically differs from how the principle is applied in that state. For instance, the concept of legitimate expectations is rooted in domestic administrative law but incoherently provides contractual remedies in ISDS.

This recommendation is timely, as a recent study has found that increasing the flexibility or precision of an international investment agreement does not mitigate the risk of attracting ISDS claims. For instance, general public policy exceptions may appear revolutionary, but have little effect where it counts in the reasoning of the arbitrators. Accordingly, by resorting to tried-and-tested domestic principles to inform a roadmap for tribunals to follow, this recommendation is aimed at introducing structure and certainty to the ISDS regime by starting at the arbitration stage.

Conclusion

DFAT's review process is one of many: UNCITRAL's Working Group III; ICSID's working papers; and the EU's investment courts are all indicative of a shared intention to seek to rid investment arbitration of its problems. Almost one decade on from the start of the Philip Morris dispute, Australia appears to be keeping an open mind on the future of its BIT program. Among the various reform proposals, Professor Douglas' lecture provides a timely and pragmatic approach to addressing Australia's ISDS policy concerns.

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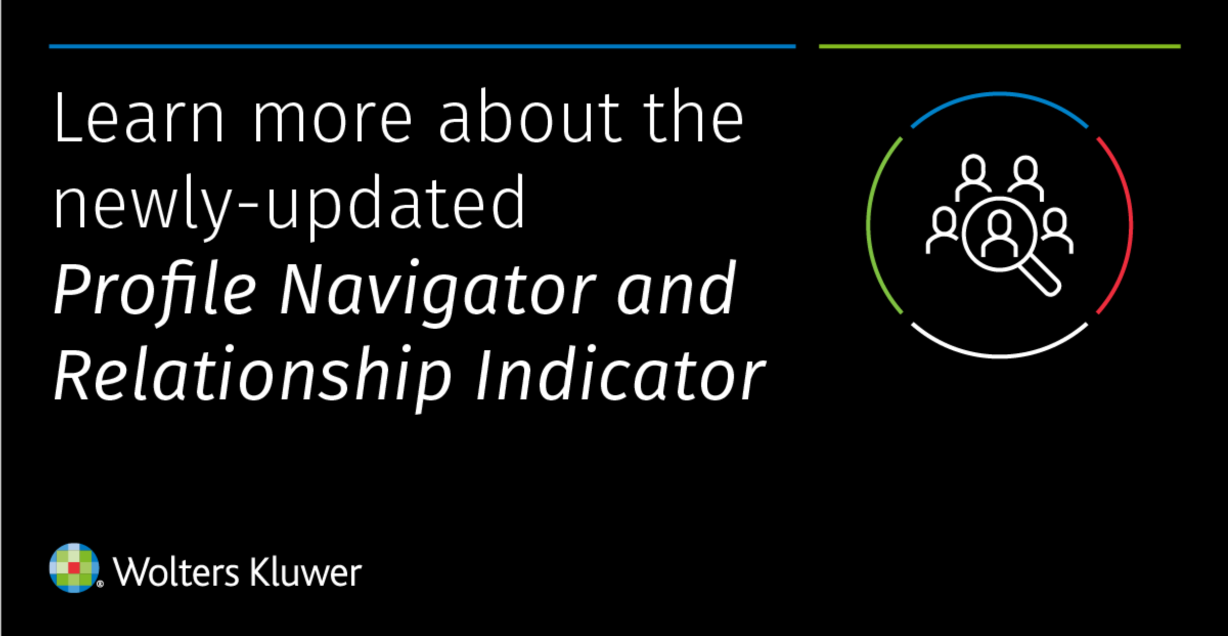

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