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2024 PAW: In Search of the Right Balance: The interplay between Human Rights, ESG, Civil Society and Investment Arbitration

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On Monday 18 March 2024, ESSEC Business School and EFILA co-organized a panel discussion within the framework of the Paris Arbitration Week ("PAW") 2024, discussing the interactions between Human Rights, Environmental, Societal and Governance ("ESG"), Civil Society and investment arbitration.

The event was hosted by Prof. Veronika Korom (ESSEC) and the panel consisted of Grégoire Bertrou (Partner at Willkie Farr & Gallagher LLP), Prof. Rose Rameau (Professor of Law at GA University College of Law in the US, ICC Court Member and a PCA Court Member), Suzanne Spears (Founder & Principal PAXUS LLP), Szabolcs Nagy (Trade and Investment Expert of the Permanent Representation of Hungary to the EU) and was moderated by Prof. Nikos Lavranos (Secretary General of EFILA).

Accepting the New Reality

The panel discussion was split in two rounds.

The first round focused on the current developments regarding the interactions between human rights, climate change, ESG and investment treaty law and domestic law.

Szabolcs Nagy kicked off the first round of the panel discussion by explaining the EU's approach towards promoting and enhancing the importance of human rights and ESG, simultaneously to fostering economic development, as an integral part of its trade and investment treaty policy.

He highlighted that the EU is reaffirming the already existing obligations, which the EU and its member states have entered into, such as the Paris Agreement, Human Rights treaties as well as various ESG and Corporate Social Responsibility ("CSR") codes of conduct. In addition, the EU is exporting this body of law by integrating it in its recent free trade and investment agreements such as CETA, EU-Singapore FTA and EU-Vietnam FTA, as well as the recently published model clauses for member states' BITs with third states. Similar provisions have also been included in the modernized ECT text, which however remains pending.

Moreover, both CETA and the model clauses contain a number of clarifications, such as for example an explicit provision on the right to regulate and the obligation to implement the Paris Agreement obligations as part of the states' public policy objectives.

These efforts are aimed to creating a global level playing field by exporting these higher standards abroad. However, at the same time, he noted that these new agreements have yet to enter into force, thus their impact remains unclear so far.

Gregoire Bertrou turned towards the domestic level and provided an overview of recent developments in France, in particular the "duty of vigilance law" which was introduced in 2017. This law effectively provides a tool for civil society groups to force companies to implement their human rights, climate change, ESG etc. obligations. He referred to several cases before French courts which have been brought by civil society groups against French companies (Total Energies, BNP, Yves Rocher) for their alleged violation of the "duty of vigilance law".

Reference was also made to the climate change cases before the European Court of Human Rights, which are still pending.

The trend seems clear, namely, States are raising the bar and are imposing increasingly higher obligations on companies, which, however, also carry a higher risk of domestic litigation.

He highlighted the increasing importance of the domestic law level for the actual implementation and enforcement of all the new ESG and human rights obligations contained in investment treaties.

While this is all understandable from the point of view of enhancing the compliance of companies, he also noted that there is the danger of overreach, in particular for States that still need to attract foreign direct investments to stimulate economic and social development.

Therefore, he emphasized the need to find the right balance between the protection of these important public policy goods and promoting and attracting FDI to foster economic development and increase the standard of living.

Prof. Rameau brought an African perspective to the discussion by elaborating on the recent investment treaty developments in Africa. In particular, she referred to the Pan African Investment Code, the African Continental Free Trade Area Agreement, and its Investment Protocol.

She stressed the fact that for the first time all African States were brought together and drafted these instruments by themselves. In other words, these are the first investment treaty instruments written by Africans for Africans. These instruments contain substantive protection standards which are significantly lower than those compared to the current investment treaties which African countries have concluded which has been criticized by many European companies and governments. Nonetheless, she stressed the point that they contain important innovations with regard to CSR rules, climate change and the Rule of Law. She also referred to the recently signed EU-Angola Sustainable Investment Facilitation Agreement, which has a different approach by focusing on dispute prevention and investment facilitation rather than investment protection and arbitration.

Suzanne Spears started her presentation by taking a step back to the year 2010 when she had already observed that the biggest challenge facing the investment law regime was how to strike a balance between investment protection and protection of society and the environment. She

highlighted that the criticism of investor-State arbitration back then focused on arbitral awards that had interpreted treaty provisions expansively and led States to worry that they had relinquished too much policy space in signing investment treaties. Some States, including the US and Canada, had already revised their treaties in an effort to address this tension and save the regime from the legitimacy crisis it was facing. The climate crisis has opened another chapter in this crisis.

She noted that tribunals generally possess the authority and in fact have an obligation to apply and take into account relevant rules of international human rights, environmental and climate law when adjudicating investment disputes, even in the absence of new generation treaty provisions. She pointed out that this isn't consistently observed, however, attributing the issue not to deficiencies in the treaties themselves, but rather to the arguments made by the parties and arbitral tribunals not giving States' other international obligations proper weight. Tribunals should take advantage of opportunities to construe investment treaty provisions in line with contemporary needs, particularly by respecting the scope of the police powers doctrine and essential interests doctrine, and when assessing reasonable conduct and expectations of States and investors.

Saving the Modernized ECT?

The second round of the panel discussion focused on the ECT, and the current chaos created by the withdrawal of several EU member states from the treaty and the announced withdrawal of the EU from the ECT.

Suzanne Spears highlighted that protecting the right to regulate was one of the topics covered during the effort to modernize the ECT, which began in 2017. By the time States were to vote on the revised text in November 2022, cases such as *RWE/UNIPER* and *Rockhopper* had caused great consternation among States and some observers about whether arbitrators would be able to find the right balance between the need to reduce fossil fuel production in line with the goals of the Paris Agreement and the protection of investments as guaranteed by the ECT.

The modernized ECT text includes a flexibility mechanism that allows States to exclude certain types of investments and expressly addresses the right to regulate, sustainable development and the scope of investment protection standards such as FET and indirect expropriation. However, critics say that even the modernized text, and specifically the prospect that fossil fuels investors could be awarded actual and lost future profits if they are affected by climate mitigation measures, would have a chilling effect on States' efforts to meet their commitments under the Paris Agreement.

In the context of the current withdrawal movements of several EU member states and the EU, Gregoire Bertrou referred to the issue of the 20-year sunset clause contained in the ECT, which in his view has not yet been addressed properly. He argued that exiting the ECT without providing a proper solution was arguably more counterproductive than signing up to the modernized ECT text.

Prof. Rameau also underlined the need for sustainable FDI and investment retention, in particular in Africa.

Finally, Szabolcs Nagy highlighted the problems that negotiators of the Member States and the EU are facing in finding a legally sound solution for the withdrawal from the ECT without violating the Rule of Law.

He also highlighted the fact that the ECT is not the right tool for enforcing the Paris Agreement. If that was intended, then an enforcement treaty under the Paris Agreement should be envisaged instead.

In any event, currently various compromise texts are discussed, which would somehow allow those member states which want to sign the modernized ECT text to do so, while giving other member states the freedom to leave the ECT. Also, some kind of inter-se agreement between the EU member states might be needed in order to clearly exclude any intra-EU ECT disputes for the future. However, there is ambiguity regarding whether Member States that have already withdrawn from the ECT could participate in such an agreement.

He also noted that even if all EU member states and the EU were to withdraw from the ECT, numerous BITs would still remain in force, safeguarding investments in fossil fuels. Consequently, departing from the ECT may not effectively resolve the issues at hand.

In sum, the main take away of this rich panel discussion was that the right balance must be found. While the climate crisis requires bold steps from States, they cannot lose sight of the rights of investors who are needed for making the energy transition happen.

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