Investor-State Arbitration and the Rule of Law

ICCA 2016 Congress Roadshow
Johannesburg, 28 July 2015

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OVERVIEW

1. Brief Introduction to the PCA
2. Investor-State Arbitration
3. The Rule of Law
4. Linking Investment Arbitration to the Rule of Law
1. The Permanent Court of Arbitration

At the Peace Palace, in The Hague, the Netherlands

… and in Ebène, Mauritius
2. Investor-State Arbitration

• A claim by a foreign investor against a host state

• Need state consent to this process (usually through a treaty)

• Treaties intended for mutual benefit

• Common protections:
  – expropriation
  – fair & equitable treatment
  – most-favored nation treatment
  – full protection and security
Mauritius-South Africa BIT

ARTICLE 7

Settlement of Disputes between an Investor and a Contracting Party

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.
2. Investor-State Arbitration
Current PCA Docket: 92 registry cases

- Investor-State arbitrations: 56 cases
- State-State arbitrations: 5 cases
- Arbitration under contracts involving at least one State or State entity or IGO: 29 cases
- Other: 2 cases
2. Investor-State Arbitration
Growth in Investment Treaty Arbitrations

Figure 3 - Known investors-State dispute settlement cases, annual and cumulative, 1987–2014

Source: UNCTAD, investor-State dispute settlement database.
Abbreviation: ICSID, International Centre for Settlement of Investment Disputes.
2. Investor-State Arbitration

Substantive Protections

- **Fair and equitable treatment**
  - Mauritius-SA BIT, Art. 3(1)

- **Full protection and security**
  - Mauritius-SA BIT, Art. 3(1)

- **No unreasonable or discriminatory measures**
  - Mauritius-SA BIT, Art. 3(1)

- **Most favoured nation treatment and national treatment**
  - Mauritius-SA BIT, Art. 3(2), 3(3)

- **Compensation for damage caused by war, revolution, etc.**
  - Mauritius-SA BIT, Art. 4

- **No expropriation without prompt, adequate and effective compensation**
  - Mauritius-SA BIT, Art. 5

- **Transfer of investments and returns**
  - Mauritius-SA BIT, Art. 6
ARTICLE 3

Treatment of Investments

1. Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.
ARTICLE 5

Expropriation

1. Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Interest at a normal commercial rate shall be paid for undue delay in paying such compensation.
2. Investor-State Arbitration

The Future

• The “Grand Bargain” that underlies investment arbitration
  – States will give away certain sovereign prerogatives to regulate economic activity within their territory in exchange for the promise of further investment in the future
  – Premise: foreign investors having assurance of arbitration will be more willing to invest in host State (insulates against political risk)

• The “Backlash” against investment arbitration
  – Investment arbitration perceived as inherently unfair and biased towards protecting investors at expense of legitimate Host State regulation
  – BITs said to correlate only weakly with increased foreign investment (disputed)
  – Ecuador and Bolivia have recently withdrawn from ICSID
  – BUT: statistics suggest Host States win over 50% of ICSID cases
  – PCA and ICSID caseload continue to climb
UN definition of the Rule of Law:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

(Source: http://www.unrol.org/article.aspx?article_id=3)
3. The Rule of Law
Lord Bingham’s Eight Principles

1. the law should be accessible, clear and predictable;
2. matters are to be decided by law and not normally by discretion;
3. there is equality before the law;
4. power should be exercised lawfully, fairly and reasonably;
5. human rights are to be protected;
6. disputes are to be resolved without undue cost and delay;
7. trials should be fair;
8. the State should comply with its obligations arising under international as well as national law.

Lord Bingham (1933-2010)
4. Linking Investment Arbitration to the Rule of Law

**Investor-State Dispute Settlement Mechanism**
- Enforcement of defined rights and obligations
- Examines compatibility of public powers
- States and investors placed on equal footing
- Enforcement of arbitral award

**Substantive Rights provided by Investment Treaties**
- Extends protection, certainty and promotes equality
4. Linking Investment Arbitration to the Rule of Law

Discussion to be continued in Mauritius...

ICCA 2016
XXIIIrd Congress
MAURITIUS
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