PARADIGMATIC CHANGES IN THE SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES?

The panel was convened at 2:30 pm, Thursday, April 10, by its moderator, Hi-Taek Shin of Seoul National University School of Law, who introduced the panelists: Mark Clodfelter of Foley Hoag LLP; Friedrich Rosenfeld of Hanefeld Rechtsanwalte; Jeremy Sharpe of the U.S. Department of State; and Anne van Aaken of the University of St. Gallen.

Introductory Remarks by Hi-Taek Shin*

To date, investor-state arbitral tribunals have played a critical role in the development of international investment law through the interpretation and application of investment treaties in the context of specific disputes. Yet the very general nature of bilateral investment treaties (BITs), in particular those BITs concluded when few treaty-based arbitrations existed, has given arbitral tribunals substantial interpretive space. Controversial issues in internationl investment law, such as the scope and content of MFN treatment, fair and equitable treatment, and umbrella clauses are prime examples of such standards or clauses open to different interpretations by different arbitral tribunals.

The broad interpretative powers of arbitrators have aroused serious concerns from both states and investors over the uncertainty, unpredictability, and inconsistency in the outcomes of treaty-based arbitrations. Some actors even cast serious doubts on the legitimacy of the investor-state dispute settlement mechanism and its operation. It is also one of the key factors contributing to the very difficult problem of ''issue conflicts'' among arbitrators in investment treaty arbitrations.

To address the problems identified above, we have seen various efforts in recent years by state parties to implement a variety of controlling mechanisms on the interpretive power of the arbitral tribunals. These efforts may be temporally divided into two phases. In the treaty-making process before a dispute arises, *ex ante* efforts may be directed to make investment rules more detailed and specific or to include specific interpretative guidelines or mechanisms in the treaty. However, after the conclusion of the treaty, *ex post* efforts can be directed to ensure the correct interpretation of the treaty clause in the context of a specific investment dispute either by proactive submission by a non-disputing state party or by resorting to the state-to-state dispute settlement mechanism.

The questions we will explore today include: (1) What are some of these efforts? (2) How are these developments changing the interpretation and application of investment treaties? (3) What impact do they have on the power of arbitral tribunals or the content of decisions reached by such tribunals? and (4) Are these developments progressive or regressive?

The concerns of states that arbitral tribunals may produce an outcome that is inconsistent or contrary to their intent or understanding are legitimate. If states define the terms and conditions they offer to investors in sufficient detail in the treaty-making process, it will certainly guide the arbitral tribunals, investors, and their counsels, as they may be able to minimize the painful exercise of filling-the-gap in investment agreements. No matter how detailed the treaty provisions are, however, arbitral tribunals will continue to tackle the task of interpretation in accordance with the relevant interpretation rules such as those provided in the Vienna Convention on the Law of Treaties.

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With respect to *ex post* efforts, we may hear diverse views. While this approach may help to some extent, it may also further complicate the dispute settlement process if the state parties to a particular BIT are not able to agree on what the correct interpretation is. Furthermore, different views may arise on whether and to what extent arbitrators are bound by the *ex post* positions submitted by a non-disputing party while a specific dispute is pending. In reality, it is difficult to expect that a non-disputing state party will present a position adverse to the position put forward by its own investor. The tribunals will face another difficult task of interpreting such efforts under the applicable interpretative rules. A constructive discussion of these issues is imperative for the sound and progressive development of international investment law.

Do States Have a Duty to Cooperate in the Interpretation of Investment Treaties?

By Mark Clodfelter[*]

At the core of the current backlash against investor-state arbitration are the actual outcomes of investor-state proceedings which, in many instances, have been based upon unanticipated, and many would say overly broad, interpretations of investment treaties' substantive limits on state conduct and bases for arbitral jurisdiction.

These outcomes are, on issue after issue, frequently inconsistent with other decisions involving identical or similar treaty language. And by definition, this means that many of them are wrong; the same language cannot normally mean very different things.

The problem of incorrect interpretations goes to the very legitimacy of the system and has many causes, not the least of which is the absence of mechanisms for review and correction sufficient to instill accountability. But it also stems from the fact that tribunals have had to operate without much guidance from the state parties about what it was that they actually intended. Thus, the latitude enjoyed by arbitral tribunals is at the same time largely unchecked and less than fully informed concerning the parties' intent.

But the intention of the state parties is paramount in the process of treaty interpretation. As a result, there have been increased calls for states to more actively affect the interpretation of investment agreements by arbitral tribunals, including through increased resort to subsequent agreements by the state parties under Article 31(3)(a) of the Vienna Convention. That provision declares that ''any subsequent agreement between the parties regarding the interpretation of the treaty'' shall be ''taken into account.'' According to the 1966 ILC Commentary, this means that any such agreement shall be considered as ''an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.''[1]

Past such agreements have included the NAFTA Free Trade Commission's interpretation of NAFTA Article 1105, the agreement of the Netherlands and the Czech Republic on ''common positions'' in *CME v. Czech Republic*, and the Argentine and Panamanian ''interpretative declaration'' that their treaty's MFN clause was not intended to extend to dispute resolution clauses.

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[1] *Report of the International Law Commission on the Work of Its Eighteenth Session*, at 221, para. 14, UN Doc. A/CN.4/L.116, *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 172, UN Doc. A/CN.4/SER.A/1966/Add.1. (emphasis added).

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