Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law

Locknie Hsu

1 Introduction

Criticisms of the investor-State dispute settlement system stemming from a large number of bilateral investment treaties are well documented. Such criticisms are directed at the process, the outcomes and the players. These include a lack of consistency in legal reasoning among tribunals, the lack of an appellate mechanism, issues relating to selection and choice of arbitrators, costs and the fact that tribunals can make determinations affecting matters of public interest. The current disenchantment that exists over investor-State arbitrations is palpable. Such dissatisfaction over these arbitral processes should not be underestimated. In a recent speech, the Chief Justice of Singapore gave a timely warning to the arbitral community against taking dissatisfaction over international arbitrations too lightly:

Some have suggested that because there is no viable alternative to arbitration for the resolution of international disputes, there is no need to be concerned. The three biggest mistakes that we as a community can make would be to:

a. underestimate the disenchantment of our consumers;
b. overestimate our own value to them; and
c. ignore the power of human ingenuity.²

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In his speech, the Chief Justice cited examples of problems such as costs of arbitration and, in the context of investor-State arbitration, the emerging problem of third-party funding facilitating the prosecution of such arbitrations, while taxpayers bear the costs should a complainant succeed. Indeed, on a more general note, there is scope for improvement of investor-State dispute settlement (ISDS) as a whole.

This chapter addresses issues in the formative process of investment treaty obligations that can create potential for expensive ISDS down the road, and suggests some ideas to promote certainty for both investors and States in a more balanced way. The article examines three areas in formulating treaty negotiations leading to investment obligations: first, the negotiation process itself; second, the role of ADR in ISDS; and finally, risk allocation and limitation treaty devices. In analyzing these three areas, some analogous notions that exist in commercial transactions and in WTO treaty law and practices are referred to, where these may offer lessons for ISDS. Some recommendations—some surely controversial—have been made in this chapter in order to provoke further thought, debate and action.

2 Importance of the Formative Aspect

In a recent article, one writer questioned whether it was desirable to closely connect trade and investment rules in single treaties (as many preference trade agreements, or PTAs, are doing). While recognizing that such an approach presents negotiating advantages, the writer pointed out that it has implications on, *inter alia*, the scope of ‘investments’ covered by such a treaty.

This chapter agrees with this observation. In fact, the rapid proliferation of PTAs containing both trade and investment liberalization obligations promotes an expansion not only of the scope of covered investments, but potentially also of the scope of liability and, accordingly, the potential for disputes. While more traditional bilateral investment treaties (BITs) focus primarily

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3 Id. at p. 8.
5 Early treaties took the form of Friendship, Commerce and Navigations (FCN) treaties. By the 1950s, BITs more resembling the BITs of today began to appear: see Campbell McLachlan QC, Lauren Shore & Matthew Weiniger, *International Investment Arbitration—Substantive Principles*, Ch. 2, at p. 26, OXFORD UNIV. PRESS (2008); and Jeswald W. Salacuse, *The History...*