

Chapter 9

Australia's Investment Treaty Program and Investor-State Arbitration

Mark Mangan

I Introduction

Foreign investments are naturally subject to a variety of risks: civil unrest, government instability, the forced nationalisation of assets, arbitrary or discriminatory conduct at the hands of the host state, to name a few. The advent of investment treaties, however, has provided a means by which exposure to these risks can be controlled.

Investment treaties provide investors with guarantees against unfair or inequitable treatment and the expropriation of assets without full compensation, as well as entitling investors to be treated no less favourably than domestic or other foreign investors, to transfer capital, labour and equipment without hindrance, and to police protection. While many of these substantive protections reflect long-standing customary international law, the great innovation with investment treaties is that they typically grant investors the right to have them enforced directly through recourse to international arbitration.

The threat of a foreign investor bringing a claim against a host state which would be determined by independent and specialist arbitrators applying international law and sitting in a neutral location has proven to be an effective means of encouraging states to treat foreign investments fairly and, should they stray from the ideal, a reliable means for investors to secure a suitable remedy.

This chapter begins with a brief overview of the history of investment treaties (Part II). The substantive rights granted to investors under Australia's investment treaties are then explored, with the spotlight focused particularly on how Australia's investment treaty program has evolved in recent years in response to developments in investment treaty jurisprudence (Part III). The manner in which an investment treaty's substantive guarantees can be vindicated through international arbitration is then addressed (Part IV). After a brief word on the enforcement of investment treaty awards (Part V), the chapter concludes with a look at how investors unsatisfied with the current breadth of Australia's investment treaty program can structure their

This is a preview. Not all pages are shown.