

INVESTOR-STATE DISPUTES: Relevance of Mediation

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Introduction – Foreign Investment:

Attracting foreign investment is one of the top agendas of most of the emerging economies, as a goal to advance the pace of International development.

It is generally considered that to attract foreign investment or the best guarantor of investment protection is a stable and democratic political structure, a belief in the rule of law and a transparent and independent legal system.

But foreign investors are always wary of embarking on capital-intensive projects in a particular country, fearing adverse governmental actions once their investments have been made.

International investment law usually provides for court-based dispute resolution. But in practice, courts are not an option for foreign investors, given the backlog and potential for anti-foreign bias and they feel that their best protection will come from outside of formal courtrooms.

Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investor-State dispute settlement is considered as the guarantee of the protection of investment which also generates confidence among investors before they make decisions to invest in a particular country.

The modern day BIT's not only acts as a conduit allowing regulated investment in the country, but also preserve the sovereignty and supremacy of a State in the international arena.

Dispute Resolution through BITs:

BITs can provide comfort to foreign investors as they demonstrate that the government is willing to secure their rights not just under domestic law but also international law. And they know that a government cannot unilaterally terminate the international law protections found in these BITs, while domestic law could change at a moment's notice.

BIT's provide foreign investors a strong legal recourse to arbitrate their claims against the State through various forums like UNCITRAL (United Nations Commission on International Trade), ICSID (International Center for settlement of Investment Dispute), ICC (International Chamber of Commerce) etc.

The particular claims can be raised on the basis of various standards of protection like Fair and Equitable Treatment, Full Protection and Security, Umbrella Clause, Denial of Justice, National Treatment, Expropriation, Most Favoured Nation Treatment ("MFN") being few amongst others.

The purpose of MFN standard is to prevent discrimination against the nationals of different countries and to ascertain equality of treatment regardless of nationality.

Investor-State arbitration mechanisms allow investors to pursue host states in an international forum with no assistance required from their own government. Quick and cheap (relatively), arbitration also provides investors with a choice of forum, choice of law, and choice of decision maker while promising a binding and enforceable award at the end of the process.

Arbitration, being a form of ADR, provides investors an optimal mix of flexibility and foreseeability. Without the bindings of civil procedure and courtroom rules, arbitration offers investors a modest range of options that allow them to arrange the proceedings to suit the needs of business. They can choose their own arbitrators, they can largely choose their forum, and they can often choose the rules to be applied (although most treaties specify either ICSID or UNCITRAL arbitration rules).

Criticism on Arbitration Process:

In certain Investor-State disputes, the priority of private interests of profit-making of the investor overriding the interests of the public good, has gained public attention and spurred criticism.

Investment treaty arbitration is regularly in the news. Rarely a month goes by without a headline that some MNC is owed millions, if not billions, of dollars from a government for violations of international law codified in the BITs.

The fact that some of the complaints are based on regulatory actions of governments who allegedly were acting to protect public health or environment or indigenous cultures or the economy as a whole, arbitral awards in favour of investors have invited strong disagreements on such arbitral awards and has even created distrust of the arbitral process by outside observers.

The critics point to the fact that arbitrators are not members of the local community, do not regard the State's duties to its citizens highly enough, or point to the detrimental effects of transfers of money to private individuals at the cost of the public as a whole. While such criticism is directed in part at the ADR aspects of investor-state dispute resolution, it is more fundamentally about the difference between international and national decision makers.

Critics of the system claim that Investor-State dispute arbitration processes preclude the interested public from being considered in the system due to a lack of access to them. For one thing, only investors can bring claims against the host – neither host nor the affected communities can begin an investment-dispute arbitration against a foreign investor. Moreover, given the structure of arbitration – with its reliance on agreement between the Parties in matters of choosing arbitrators and levels of transparency of proceedings – there is little room for the public to hear or be heard. Given the semi-public nature of the case, however, norms of good governance and accountability suggest that public participation also needs to be considered.

Interestingly, in many investor-state disputes, despite having a binding arbitration the award of those arbitrations are seldom enforced. According to the public knowledge there is no record or document which shows that ICSID award has been enforced by a host State. Moreover, according to ICSID convention, a State may invoke sovereign immunity and may block execution of arbitral awards.

How to Reconcile Both Requirements:

The principle of Sovereignty in international law empowers a State to govern its internal matters, free from intervention. Similarly every State is bound by the customary international law and violation of that law gives the right to the affected party to take legal action against the state which has violated that principle.

If a country needs foreign investment, then it has to find a mechanism to address investor-state disputes in a more effective and efficient way, which would send a positive signal to the investor's community. No country can afford to dispel investor-state dispute settlement mechanism completely. We will have to plan as to how to deal with the investor-state dispute settlement, considering the need of all affected parties.

Perhaps the dispute resolution process should provide for a greater role for the public to be brought into the proceedings as a third party. If the public are represented – present and able to submit claims – in any investor-State dispute settlement process, the concerns of those affected by the investment and by the regulations imposed by the government could be considered. This could provide for a more equitable solution. More importantly, it would support the transparency of the process, and therefore the ultimate award's perceived legitimacy.

A promising idea that has attracted some attention recently is to have a pre-dispute settlement mechanism in the framework of investment dispute resolution.

If governments' violations of investor protection agreements are spurred by citizen groups who are unhappy with the investor or the investment, the use of dispute-avoidance techniques might be a viable tool to reach a resolution of a conflict before it became a matter for formal rule application. Mediation between communities and foreign investors might, for example, could be a promising way to avoid the need for arbitration in the first place.

Relevance of Mediation:

Here, we need to highlight the distinction between “position-based” process and “interest-based” process.

Control of the outcome, or the power to settle rest with the parties during negotiation, mediation and conciliation. By contrast, “adjudicative” processes, such as litigation, arbitration and adjudication, rely on the judge, arbitrator or adjudicator having the power to impose a decision.

In international arena, where common law and civil law systems exist, adjudication becomes a particularly complex issue. Dispute resolution on an international level

requires a flexible forum, which can accommodate the principles of all parties concerned and where the culture and traditions of the parties are taken care of. This is possible only in a mediation process.

Moreover, investment law also applies to relationships – to agreements between an investor and a government who are each hoping to profit mutually. The public has an interest in this relationship – an interest that it will be of long-lasting benefit to all affected.

By ensuring that the parties understand each other's motivations and concerns and those of the community in which the investment will be placed, a mediator could guide the formation of the relationship so as to prevent the parties from agreeing to fulfil obligations that hold the promise of disappointment in the first place. Integrating the public's concerns at the beginning, too, promises more sustainable investments, and therefore more successful ones. The considerations would have to extend beyond the purely legal ones, of course, incorporating the political and legal context. This is not an easy task, but it is of great – and growing – importance.

Challenges:

In spite of the obvious advantages, the biggest drawback of mediation in cross border or international disputes is often considered as the question of enforceability of the settlement reached through mediation. Users remain cautious about mediation's effectiveness in the absence of an international legal framework to regulate issues such as the admissibility of mediation evidence and the enforceability of foreign mediated settlements.

International arbitration has been chartered as a formal dispute resolution process for a much longer period of time; it has established sophisticated procedures and is accompanied by a significant body of case law. International arbitration enjoys the benefits of a well-developed international legal framework largely based on two instruments: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and UNCITRAL Model Law on International Commercial Arbitration. The New York Convention has 146 signatories and, as a result, foreign arbitral awards are recognised and *prima facie* enforceable in many domestic courts.

In the absence of an equivalent regulatory regime, foreign mediated settlements are not able to enjoy the same level of foreign recognition and enforceability.

Recognizing the value of mediation in international trade, a Model Law has been made on International Commercial Conciliation by the UNCITRAL.

The UNCITRAL's Working Group II (Arbitration and Conciliation) is also considering the proposal for a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, on the same footing as arbitral awards.

But for the time being in international platform, for giving enforceability to mediated settlement agreements, after the matter is settled, the terms are made into an arbitral award on agreed terms, so that the award gets international recognition and enjoy the benefits of arbitration's enforceability regime.

But it is interesting to note that in investor-state dispute, despite having a binding arbitration, the awards of those arbitrations are seldom enforced. There is no record or document which shows that ICSID award has been enforced by a host State. Moreover, according to ICSID convention, a State may invoke sovereign immunity and may block execution of arbitral awards.

Therefore the major drawback of mediation is not exactly the issue of enforcement.

The real drawback is the issue of lack of proper professionalism of mediation and the lack of awareness about the process. There is a need for internationally recognised mediator accreditation system, codes of professional conduct and disciplinary processes.

Looking Forward:

Organisations like the International Mediation Institute (IMI) at the Hague, Netherlands, has made some bold measures like its Mediator Certification Process, Code of Professional Conduct for Mediators and Professional Conduct Assessment Process. This has added value to the quality and transparency of conflict management, thereby facilitating consistent, credible, and ultimately more satisfactory outcomes to those who desire it most – the Parties or the Users of mediation.

Now in the Asia Pacific region, such accreditation and Code of Conduct are being adopted by organisations like the Asian Mediation Association (AMA) and the Singapore International Mediation Institute (SIMI).

Here it is also relevant to note the voting made by Users or Business groups and Legal Advisors at the "Convention on Shaping the Future of International Dispute Resolution" on 29th October 2014 at London, where over 150 delegates from over 20 countries in North America, Europe, Asia, Australasia, the Middle East and Africa participated.

- Over three quarters of users think mediation should be used as early as possible in a dispute's life cycle.
- Almost all users (92%) wish that mediators, conciliators and arbitrators should be certified and held accountable to transparent standards of conduct set and applied by professional bodies.
- Three quarters of all delegates, with broad agreement in all stakeholder groups, believed that there should be an Investor-State dispute resolution clause in all international investment treaties, which provides for mediation.

With such heavy demand for mediation at international level by business community and investors and given the accelerated pace of professionalisation of mediation in countries around the world, the writing on the wall is very clear – it is only a matter of time for mediation to become one of the most accepted process of dispute resolution in investor-state disputes.

(This paper was presented by the author at the 3rd Asia-Pacific ADR Conference conducted jointly by the UNCITRAL, Ministry of Justice Republic of Korea and the Korean Commercial Arbitration Board at Seoul, Republic of Korea on 17-18 November 2014.)

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