European Journal of Humanities and Educational Advancements (EJHEA)
Available Online at: https://www.scholarzest.com
Vol. 2 No. 4, April 2021,
ISSN: 2660-5589

BASIC PECULIARITIES OF CONSIDERATION OF CASES ON INVESTMENT DISPUTES IN ECONOMIC COURTS

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Article history:

Received: March 22th 2021
Accepted: April 4th 2021
Published: April 22th 2021

Abstract:

This article is based on giving essential information about significant role of the International Court of Justice in the settlement of international investment disputes, specifically through the currently unused mechanism of the Convention on the Settlement of Investment Disputes. Also, it gives a basic overview of the most crucial legal questions related the selection of the appropriate forum for investment disputes between States and private parties.

States, especially developing states, have to choose carefully which arbitral institutions and rules they make available to investors in their investment treaties. They should evaluate the institutions' governing structures and who is behind the decision making, including in important areas such as the amendment of arbitration rules and arbitrator appointments. Where a state is not satisfied with the applicable arbitral rules and processes, it will have different degrees of influence for change depending on the target institution.

Keywords: International Court of Justice, investment, dispute, investors, arbitration, convention.

A significant branch of the efficiency of any dispute settlement system lies in its ability to avoid completely lack of convictions related the relevant forum in which a dispute is to be resolved. Thus, a duplication or multiplication of available forums for the settlement of a special dispute may lead to protracted litigation over jurisdiction before the merits of a dispute are even touched. In the case of investment disputes a whole variety of dispute settlement mechanisms is potentially available. Among them are national courts, ad hoc or institutional arbitration, ICSID conciliation or arbitration, ICSID Additional Facility conciliation or arbitration and, to some extent also, diplomatic protection possibly leading to inter-State dispute settlement forums of last resort, such as the International Court of Justice (ICJ).

Unfortunately, States are often deliberately vague in consenting to dispute settlement. It is thus quite common that national investment legislation or bilateral investment treaties (BITs), through which States can make a legal offer to consent to ICSID arbitration under Art of the ICSID Convention, contemplate domestic courts, International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) or ad hoc arbitration as alternatives to ICSID disputes settlement without making a concrete choice. The dispute settlement clauses in many BITs refer to ICSID as one of different possibilities. Some of these composite settlement clauses demand a subsequent agreement of the parties to select one of these procedures. Others contain the State's advance consent to all of them, thereby giving the parties a choice.

Parties to an investment agreement may help avoiding these uncertainties by expressly designating a specific competent forum for the settlement of their disputes. Ideally, such a choice-of-forum should form part of the important investment agreement but it may also be consisted of a subsequent agreement.

While commercial disputes between private parties are usually made before national courts or arbitral panels, disputes of an economical feature between States may fall under the jurisdiction of the International Court of Justice or other (specialized or regional) judicial dispute settlement systems. In the past, mixed disputes, i.e. disputes between States and private parties, in particular those concerning to investments, were mostly settled either before national courts or through ad hoc arbitration both of which have serious negative sides. For such disputes no suitable forum seemed to be generally available.

Most of the major arbitration institutions, such as the International Court of Arbitration of the International Chamber of Commerce (ICC) established in 1923, the London Court of International Arbitration (LCIA) set up in 1892 or the American Arbitration Association (AAA) founded in 1926, focus on international commercial arbitration, i.e. arbitration between private parties. Similar to ICSID they do not arbitrate disputes themselves but support the arbitral processes conducted under their auspices by rendering various administrative services, such as supporting lists of arbitrators or participating in the process of their appointment, calculating fees, etc.

Parties are free, however, to submit also investment disputes to these institutionally provided arbitration opportunities.

Investors are increasingly turning to investor-state arbitration to challenge a variety of government measures, including laws, regulations and administrative decisions in all economic sectors. Less than 20 years ago this form of international arbitration was rarely used to settle disputes between foreign investors and host states. Now it is used frequently, and the number of cases is increasing rapidly. It has become common for states to agree to arbitration in advance through their treaties, their domestic laws or the contracts they negotiate with foreign investors. Generally, it is left to the investor who uses and challenges a claim against a state to choose the arbitral rules from the options specified in the individual treaty. This will influence whether the arbitration will be conducted in an arbitral institution and, if so, in which one.

Treaties most simply permit the investor to bring a claim under the Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). Some treaties also let investors to take claims under other arbitration rules, including those of the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), or the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The UNCITRAL Rules, which are the second-most used rules after the ICSID Rules, are not attached to a specific institution; UNCITRAL itself does not administer disputes but only elaborates rules. Cases brought under the UNCITRAL Rules are therefore either used on an ad hoc basis or ruled by an institution like the Permanent Court of Arbitration (PCA), ICSID or the SCC. Many states, academics and civil society are voicing their discontent with investor-state arbitration and are calling for change. Problems of concern contain the lack of transparency, questions surrounding the impartiality and independence of arbitrators, the predictability and consistency of interpretation, and the high costs d, to name a few. This paper gives more information about opportunities for the reform of arbitral rules and processes, and assesses their important effect and utility.

The postwar dominance of the investment treaty arbitration system, especially under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (otherwise known as the ICSID Convention), plausibly explains why very few investment disputes have been referred to the International Court of Justice. The direct accessibility of the investment treaty arbitration system to foreign investors obviates the need for diplomatic espousal by the States of their nationality, rendering the Court's direct inter-State adjudication useless for the settlement of these types of disputes. To some extent, however, it may also be said that the Court itself minimized its utility as a forum for settlement of international investment disputes. Its 2007 Decision on Preliminary Objections in the Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) is a crystal example of how the Court closed the door on States seeking to exercise diplomatic protection on behalf of foreign investors that are minority shareholders. To recall, in Diallo the Republic of Guinea sought to assert diplomatic protection on behalf of a Guinean national, Mr. Ahmadou Sadio Diallo, who was a minority shareholder of a company registered in Zaire (now the Democratic Republic of Congo, or DRC). Guinea asserted that Mr. Diallo incurred injury arising from his arrest, deportation, and expulsion from the DRC for supposedly "having breached public order in Zaire, especially in the economic, financial and monetary areas". As a significant goal to the jurisdiction of the Court, the DRC challenged the standing of the Republic of Guinea to exercise diplomatic protection over Mr. Diallo's claims "since its Application seeks basically to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality."

The creation of the dispute resolution system under the ICSID Convention was not demanded to antagonize or undermine the developed and authoritative system of adjudication under the International Court of Justice. By supporting for a clause compromissoire under Article 64 of the ICSID Convention, the drafters of the Convention ultimately foresaw the need for the Court's jurisdiction in specific areas that could not be addressed even within the "self-contained" arbitration system.

As basic information is given above, it is the significance of the Court in international life. It would be easy to summarize that a court which no genuinely compulsory jurisdiction and which cannot turn to any of the normal apparatus of the State (on which national courts can rely) to enforce the judgments which it gives cannot have an important role. Such a conclusion would be facile and misleading. Firstly, the Court has played an important role in settling a range of disputes which the parties have chosen, by mutual agreement, to refer to it. Secondly, even in those cases (which are a clear majority) in which the Court is controlled by only one party to a dispute, the Court's verdict has almost always been received, even if reluctantly. Thirdly, notwithstanding the relative lack of machinery for the enforcement of judgments of the Court, in practice those judgments have commonly been complied with. Fourthly, I want to focus on what I think as a special and great success on the part of the Court, albeit one that has not always been free of controversy. Between the late 1960s and early 1980s the international law of the sea underwent dramatic changes.

These factors produced a potential for various problems. In practice, however, those problems have commonly been disappeared in large part due to a series of rulings on maritime boundaries which have not only resolved the particular disputes to which they connected but also articulated a body of principles for the determination of overlapping claims which have built up into a substantial body of law. While some of the decisions in question have emanated from arbitration tribunals, by far the great contribution comes from the ten judgments of the International Court of Justice. Lastly, while no-one would argue that the International Court (or any of the other international institutions) has realized the dreams of some of those who, at Hague Peace Conferences of 1899 and 1907 saw

international adjudication as something that would stop war, it is worth noting the record of the Court in resolving disputes which had led to outbreaks of fighting…"

In conclusion, as it was mentioned that while the early jurisprudence of the Court provided for inter-State settlement of disputes increasing from the espousal of claims by aggrieved investors, the advent of the ICSID Convention has not automatically eliminated any meaningful role for the Court in international investment disputes. Rather, it is a combination of both the prevailing conservatism of States

The creation of the dispute resolution system under the ICSID Convention was not intended to antagonize or undermine the established and authoritative system of adjudication under the International Court of Justice. By providing for a clause agreement under the ICSID Convention, the drafters of the Convention ultimately foresaw the need for the Court's jurisdiction in certain areas that could not be addressed even within the "self-contained" arbitration system. Investment disputes are normally of a "mixed character", i.e. they regularly engage a State and a private party. This does not, however, exclude the possibility that they may either successively or concurrently turn into international disputes of an inter-State character. Investment disputes between a State and a private party may become inter- State disputes if the home State of the private party "espouses" the latter's claim.

In such a situation the two States are in general free to use any peaceful means of dispute settlement as contained in Art. 33 of the UN Charter, including arbitration and adjudication. Since investment disputes are usually not only "legal disputes", but also involve legal issues of a public international law nature they are likely to give increase to the jurisdiction of international courts or tribunals. Independent of a potential "espousal" of a private party's claim an investment dispute may also lead to an inter-State dispute if the State behavior required does not only influence the private investor's legal position but may be characterized as not respecting of rules of international law. This is automatically the case with regard to bi- or multilateral investment protection treaties. In fact, many BITs contain arbitration clauses for the settlement of disputes between the States parties in addition to ICSID and other arbitration between the investor and the host State.

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