

# Managing the Dispute Resolution Process in the Energy and Mining Sectors

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**Abstract**— This paper examines two major aspects of the law and policy relating to the international legal system on international investment. The first concerns the objectives and rationale of the international instruments, namely, investment treaties that apply to and underpin international investment law. The aim of such a discourse is to determine if there is a need to reevaluate the need for a continued support for the present approach that seemingly protects and favours the interests of investors over those of the host States. The focus then shifts to the dispute settlement mechanisms that are available to parties in the energy and mining industries embroiled in disputes. As the options are aplenty, this paper will endeavour to highlight the characteristics of the plethora of options. Such an exercise is undertaken with a view of enabling the parties to make an informed judgment as to which process would be best suited to safeguard their interests. In this respect, this paper strongly advocates the reappraisal of the current trend and preference for the alternative dispute resolution process of arbitration over litigation in National Courts. The (re)emergence of International Commercial Courts is significant and it is argued that parties should seriously consider these fora as their preferred choice for the settlement of investment disputes.

**Keywords**—*Dispute resolution, energy, mining, investment disputes*

## I. INTRODUCTION

The energy and mining sectors are inextricably associated with foreign investments. In the sphere of law and policy, the topic of foreign investments is in turn intricately linked to a host of international legal instruments. These international instruments, or to be more precise, investment treaties, come in various forms. An investment treaty may be one that arises between two States, namely a Bilateral Investment Treaty or one in which multiple States are parties, that is, a Multilateral Investment Treaty. In the context of our deliberation, the Convention on the Settlement of Investment Disputes between States and National of Other States<sup>1</sup> and The Energy Charter Treaty<sup>2</sup> are of significance to us. From the geographical point of view, the ASEAN Comprehensive Investment Agreement<sup>3</sup> should also be of interest to us. Other forms of investment treaties include Investment Guarantee Agreements and Free Trade Agreements. These treaties constitute an important

component of the entire international legal system on international investment.

It is trite that the international treaties that relate to foreign investments serve the overriding objective of protecting foreign investors. In this regard, this paper will first begin by making an attempt to comprehend the rationale for the slant in putting the interests of the investors over that of the States where the investments are undertaken. The question that arises is whether such a stance is justified and ought to be maintained.

Another crucial constituent of the international legal system on international investment is the concept of dispute settlement. In this respect, this paper will venture to deliberate on the available processes or mechanisms for the settlement of disputes that are connected to the energy and mining sectors. While the traditional dispute resolution process of litigation before National Courts is an option that is available to a supposed aggrieved investor, the alternative disputes resolution process of arbitration continues to be the dispute resolution mode of choice in international investment disputes. Within arbitration, there are further options.

The alternative disputes resolution process of arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals or Other States, that is, ICSID Arbitration, is the most common provided for under Bilateral Investment Treaties. The alternative would be non-ICSID Arbitration<sup>4</sup>. The concept of party autonomy permits parties to opt for an alternative dispute resolution process such as arbitration over litigation. However, it will be pointed out that National Courts cannot entirely be sidelined and will continue to play a role in the dispute resolution process. If such an argument is indeed valid, the proposition that arbitration enjoys an edge over litigation is not entirely accurate. Henceforth, it may be time for parties to international investment to take stock of their current practices and it is suggested here that perhaps parties should begin considering International Commercial Courts as a viable option for the settlement of investment disputes.

<sup>1</sup> Entered into force on October 14, 1966.

<sup>2</sup> Entered into force on April 16, 1998.

<sup>3</sup> Entered into force on March 29, 2012.

<sup>4</sup> These would include ad hoc arbitration under the UNCITRAL Arbitration Rules, arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce and arbitration under the Rules of Arbitration of the International Chamber of Commerce.

## II. DISCUSSION

### A. *The Underlying Aim of International Investment Law*

It cannot be denied that promoting and attracting investments are crucial for the economic development of any country[1]. By and large, countries seeking to attract investments are developing countries. These countries are often referred to as investment importing countries or host States. On the other hand, we have the investment exporting countries. These are usually the developed countries and the incentive for these developed countries to promote investment is to assist their nationals[2]. The proliferation of international treaties that relate to foreign investment can be attributed to the desire by both developed and developing countries to secure a stable environment for international investment[2].

As noted, investment treaties invariably favour foreign investors over the States where the investments are undertaken. The question for consideration is whether the current state of affairs is warranted. What were the factors that could have influenced such an outcome?

The chief reason for the existing slant that puts the interests of the investors over that of the States where the investments are undertaken may be traced to a series of historical events beginning in the late 1960s. Countries that were former colonies and have achieved independence “embarked upon extensive expropriation policies which involve at foreign held investment – i.e. investment owned by nationals of the former colonial powers [2]”. As noted by Professor Patrick Julliard:

These policies did not conform to the precepts of what developed countries alleged to be settled international law, and namely to what they claimed to be compensation standards – if for no other reason than developing countries could not possibly conform to these standards[2].

The result of such a serious disagreement gravely contributed to the deterioration of the investment climate between developed and developing countries and there was a realization that to allow such an unfavourable climate to endure would not serve the interests of either party. Discussions and talks ensued between these parties and what we see today, that is, the current state of affairs that exist within the international legal framework on international investment is the outcome achieved as a result of an evolution of the struggle between the developing and developed states<sup>5</sup>.

The resultant question that arises is whether the present stance is justified and ought to be maintained. It cannot be denied that foreign investments may be undermined or hampered by an unconscionable or improper state action or inaction by a host State, or to put it bluntly, a plainly wrongful conduct by an investment importing country. Hence the justification for the current preferential law and policy. These investors are more often than not nationals of developed countries or corporations that are more powerful than countries. These investors are no ordinary consumers or people. This begs the question of whether the law and policy

that favour and protect investors through the creation and imposition of substantive obligations in investment treaties on investment importing countries are warranted or necessary.

### B. *The Substantive Obligations in Investment Treaties*

Some of the substantive obligations imposed on host States that have found their way into investment treaties include the following:

- Fair and equitable treatment;
- Full protection and security;
- National treatment;
- Most favoured nation treatment; and
- Prohibition against expropriation.

The responsibility on the part of a host State to ensure that investments are accorded fair and equitable treatment is premised upon the minimum standard of treatment of aliens in customary international law<sup>6</sup>. Likewise, the duty to provide full protection and security also has its roots in customary international law<sup>7</sup>.

The national treatment obligation requires foreign investments to be accorded treatment which is not less favourable than that which is accorded to investments of the host States’ own nationals<sup>8</sup>. The most favoured nation treatment is closely associated with the national treatment obligation. While the latter obligation requires foreign investments to be accorded treatment which is not less favourable than that which is accorded to investments of the host States’ own nationals, the former requires foreign investments to be accorded treatment which is not less favourable than that which is accorded to a third-party foreign investor<sup>9</sup>.

The prohibition against expropriation is a provision which is present in almost every investment treaty. It should be underscored that that such a prohibition is not couched absolute terms. A breach of such an obligation may be justified on a number of grounds<sup>10</sup>. However, principles of due process must be adhered to and there must be payment of appropriate compensation.

In addition to the above, there is a range of remedies that an aggrieved investor may seek from a decision making body, namely a tribunal or court<sup>11</sup>.

<sup>6</sup> Cases that have dealt with such a responsibility include *Tenicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case no ARB (AF)00/2 (Award) May 29, 2003 and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case no ARB 01/7 (Award) May 25, 2004.

<sup>7</sup> Cases that have dealt with such a duty include *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case no ARB/04/246 (Award) June 27, 1990 and *American Manufacturing & Trading Inc v Republic of Zaire*, ICSID Case no ARB/93/1 (Award) February 21, 1977.

<sup>8</sup> For a discussion of the scope of such an obligation, see for example, *SD Myers Inc v Canada*, Partial Award November 13, 2000, 8 ICSID Reports 18 and *Feldman v Mexico*, Award December 16, 2002, ICSID Reports 341.

<sup>9</sup> A case on point would be *Bayindir Insaat Turizam Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID case no ARB/03/29.

<sup>10</sup> These include expropriation for a public purpose and the expropriation in a non-discriminatory manner.

<sup>11</sup> The remedies may be pecuniary or non-pecuniary in nature.

<sup>5</sup> These developments were ably and succinctly elucidated by Professor Patrick Julliard in a paper entitled, “Bilateral Investment Treaties in the Context of Investment Law”, supra note 2.

It is only fair that there should be a remedy for any wrongful act. However, the concern is whether these obligations that have been imposed on host States are too onerous. The disquiet is that any remedial step(s) to be undertaken by an investment importing state has direct bearings on the people of that country.

Sorawit Limparangsri was made the following point when he noted that the impact of investment treaty arbitration:

... is likely to be much greater than ordinary commercial arbitration ... No matter what will be the outcome of the disputes, the public in general will feel the consequences in one way or another. It may mean a disruption of public services that benefit the general public. It may mean the discontinuance of some policy that governments adopt for public purposes or health and well-being. It may also mean vanishing of public funds that is used to pay or reimburse the aggrieved investors[3].

In the same vein, an article in the Economist entitled "The Arbitration Game", is worthy of contemplation.

If you wanted to convince the public that international trade agreements are a way to give multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as "investor-state dispute settlement", or ICSID[4].

The above scathing criticisms were made in the context of investment dispute settlement in general and the dispute resolution method of arbitration in particular. Admittedly, dispute settlement is an integral aspect of the overall scheme of international investment law and policy.

### C. Towards a Fair, Effective and Efficient Resolution of Disputes

An important pillar of the international legal system on investment is the scheme for dispute settlement. For example, both the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and The Energy Charter Treaty contain provisions that expressly deal with dispute settlement. This is testimony of the importance placed by the international community on this aspect of the law. In the case of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the provisions are found in Chapter III and Chapter IV of the Convention<sup>12</sup> and as for The Energy Charter Treaty, the provisions can be traced to Part V of the Treaty.

### D. Arbitration as the Mechanism of Choice

The alternative dispute resolution process of arbitration features very prominently in almost every investment treaty. As noted in the opening paragraph of this paper, dispute settlement through arbitration can be categorized into ICSID arbitration and non-ICSID arbitration. The former is administered by the International Centre for the Settlement of Investment Disputes while there is no dedicated institution associate with the dispute resolution process under the latter scheme. One of the prerequisites for an ICSID arbitration to take place is a written consent to submit the dispute to ICSID and this may be derived from legislation, a contract or an investment treaty.

Policy-makers, investors and States respondent to arbitral proceedings should be mindful of the factors associated with ICSID arbitration and non-ICSID arbitration. An appreciation of these factors is essential when investors are faced with a choice of deciding between the permitted arbitration options.

Jurisdiction, the finality and enforceability of awards, confidentiality and costs are some of the key factors that should be taken into account[5]. Foremost among the "risks" connected to ICSID arbitration include the issue of the resources required to proceed with the arbitration and the issue of confidentiality and transparency.

As for the finality and enforceability of awards, the key differences are summed up in a recent article entitled "Enforcement of ICSID and Non-ICSID Arbitration Awards and the Enforcement Environment in BRICS". In that article, the learned author wrote as follows:

... The finality standard dictates that an award or its interpretation, revision and annulment resulting from the ICSID mechanism cannot be subjected to any appeal or other challenges save those recognized within the framework of the Convention. Contracting states of ICSID have the obligation to recognize and enforce the ICSID awards on a similar footing with the final judgement of their courts. However, on the question of execution of an investment award, the ICSID Convention recognizes a greater role for the domestic laws.

... The ICSID Convention leaves the execution of the award to be governed by the domestic laws applicable to the execution of the judgements in the concerned member states. Moreover, the obligation of recognition and enforcement prescribed by the ICSID Convention is also explicitly subjected to the national laws of the member state governing sovereign immunity of states from execution.

Although, ICSID Convention recognizes the role of domestic laws at the execution stage, the scope of challenging the execution of an ICSID award is more limited in comparison with the awards governed by the New York Convention....

In comparison with the ICSID Convention, the scope of the obligation to recognize and enforce seems to be subjected to more exclusions under New York Convention....

The New York Convention recognizes two sets of grounds under which an application for recognition

<sup>12</sup> Chapter III deals with Conciliation while Chapter IV deals with Arbitration.

and enforcement of awards can be refused. The first set of grounds mainly pertains to certain defects in the arbitration agreement or procedural shortcomings in the arbitration proceedings or factors affecting the enforceability of the award....

The second set of grounds pertains to the question of arbitrability of the dispute and public policy concern, ... . The seven different grounds of refusal discussed so far obviously shows that challenges facing recognition and enforcement sought under the New York Convention are greater than those arising under the ICSID Convention[6].

Do the above confirm in any affirmative way that the dispute settlement process for international investment by way of arbitration is fair, effective and efficient? Before we answer this question, it may be apt that we seek to understand why investors in general avoid National Courts.

#### E. The Preference for Arbitration over Litigation

The underlying reasons why businesses and parties to a commercial disputes prefer arbitration over litigation are easily comprehensible and these include factors such as (i) neutrality and fairness; (ii) the binding nature of the award; (iii) the flexibility and adaptability of the arbitral process; (iv) confidentiality; and (v) subject matter expertise on the part of the arbitrators. Besides highlighting these virtues of arbitration, proponents of arbitration further cast misgivings and qualms about the civil litigation process in National Courts and the perceived weaknesses of litigation include factors such as (i) delay; (ii) costs; (iii) neutrality and flexibility; and (iv) the non-finality of judgments and the ease of enforcement when compared to arbitral awards. In the case of an investment dispute involving a foreign investor, the desire to avoid the National Court of the host State is seen as all the more crucial.

The grounds advanced to justify the proposition that arbitration has an edge over litigation are mostly valid. However, the scenario changes when one realizes that judicial control is an integral aspect in any arbitral process.

#### F. The Omnipresence of Judicial Control over International Arbitral Proceedings

Despite the continuing preference for arbitration over litigation, particularly in the field of international investment, the reality is that the very nature of the arbitral process requires judicial assistance. We need the backing of National Courts to support the enforcement of awards. When such matters reach the National Courts, the parties will be left with no choice but to "litigate" their disputes<sup>13</sup>.

If National Courts or litigation cannot be avoided all together, is there a third alternative?

#### G. International Commercial Courts as the Third Alternative?

What are international Commercial Courts and do they even exist? Where do they stand in the overall transnational dispute resolution system? Will these Courts be able to add

value to the dispute settlement structure that involves parties from the energy and mining sectors?

In relation to the first question raised, to all intents and purposes, the London Commercial Court that has existed for over a century is an International Commercial Court. However International Commercial Courts have come into the limelight and to some extent, gained prominence, in the last two decades. The Dubai International Financial Centre Courts<sup>14</sup> and the Qatar International Court were established in 2008 and 2009 respectively. 2015 marked the establishment of the Singapore International Commercial Court. The French, the Australians and the Chinese are considering having their own International Commercial Courts.

The answers to the second and third questions may be attained through an appraisal of the how the Singapore International Commercial Court operates. Since international commercial arbitration has its limitations, International Commercial Courts present themselves as a further alternative dispute resolution mechanism to the former. The Singapore International Commercial Court is a division of the Singapore High Court and part of the Supreme Court of Singapore. It deals with transnational commercial disputes[7]. More importantly, it offers a middle ground for parties whose disputes are better suited for international commercial arbitration, but who still desire some of the benefits that domestic litigation offers over international commercial arbitration.

One attractive feature of International Commercial Courts is their ability to contribute to the convergence and harmonization of international commercial law. The argument advanced to support the proposition that there is a need for a further alternative to the existing alternative dispute resolution processes is premised on the fact that alternative dispute resolution processes, such as arbitration, was intended to be an "ad hoc, consensual, convenient and confidential method of resolving disputes" and will not, at least on its own, drive global commerce forward by harmonising substantive commercial laws, practices and ethics[8]. Thus an opportunity exists to develop regional/world commercial jurisprudence. If these fora become the preferred choice of practitioners and parties in the energy and mining industries, an indigenous jurisprudence relating to energy and mining can be developed.

As noted, parties in investment disputes avoid National Courts for a variety of reasons and more often than not, these reasons are valid. Primarily, the element of trust deficit is overwhelming. Statistics from the London Commercial Court show that the trust deficit is not only towards the legal system of another country but also to the parties' own legal

<sup>13</sup> It is granted that "litigate" in this regard does not involve relitigating the entire dispute on its merits but what is meant here is the ventilation of specific issues and questions.

<sup>14</sup> In 2004, the Courts of the Dubai International Financial Centre (DIFC Courts) were established to provide support to the Dubai International Financial Centre (DIFC), which is an autonomous financial centre that aspired to become a fully-fledged regional capital market to service the United Arab Emirates and the Gulf region generally. The DIFC Courts are international in the sense that the adjudicative panel comprises international judges and the rules and procedures of the DIFC Courts have largely been drawn from overseas, principally from England and Wales. The DIFC Courts are also international to the extent that the DIFC itself was conceived as an international zone, constituted for the specific purpose of creating a financial market for multi-national companies. However, the jurisdiction of the DIFC Courts is still confined to the DIFC region, and its reach is domestic in that sense.



system. Here, it is argued that an International Commercial Court such as the Singapore International Commercial Court has the ability to overcome the trust deficit or perception of bias towards National Courts – with its efficiency and pool of international jurist.

Related to the issue of efficiency is the fact that the Singapore International Commercial Court, though in its infancy, has demonstrated its competence and efficiency by incorporating all the positive features of both arbitration and litigation in the handling of cases before it.

Finally, International Commercial Courts generally have a proven record and international reputation. There is every reason that they will continue to support international commerce and international investment.

### III. CONCLUSION

Individual parties in the Energy and Mining sectors may not have much of a say with regard to or influence the decision over which dispute settlement mechanism chosen in multilateral investment treaties. The end result is dictated by those with greater bargaining power and the consensus reached by the international community. Be that as it may, in Bilateral Investment Treaties, the bargaining power of the parties may be greater to some extent. Besides BITs, appropriate dispute resolution clauses that would best suit the interests of the investors or host States should be carefully thought through and included into international investment agreements between the contracting parties. This will safeguard the interests of the parties when the situation calls for the management of the dispute settlement process.

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