INTRODUCTION TO INVESTMENT ARBITRATION AND INTEGRAL CHALLENGES

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INVESTMENT ARBITRATION- MEANING, SCOPE, APPLICABILITY

Over the last few years direct Arbitration has become the most sought after and preferred mechanism of dispute settlement between the host Nation and the foreign investor. This apparent shift in preferred mode of settlement of dispute from conventional court room setups and diplomatic interference is majorly owing to the fact that Arbitrations accommodates an element of liberty with respect to selection of Arbitrators. This leads to the selection of best professionals who have profound expertise in the field which ensure they enjoy full confidence of the parties.

Noteworthy that Investment Arbitration represents the interest of both host Nations and investors. Though the idea of being exposed to a claim before an international tribunal instils some inconvenience to the countries, however such investment protection caters to a long term interest of the parties. Realising the huge significance of Investment Arbitration the World Bank had conceived the ICSI D Convention[1], which is touted to be the most crucial legal document governing the nuances of investment arbitration, in its framework. The preliminary aspect envisaged in the preamble of ICSID convention stresses upon the need for economic development through international cooperation and the underlying role of private international investment therein.[2] It is significant to note that institution of an accessible investment arbitration mechanism ensures number of advantages and benefits to both the investors and the

[1] Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159 (1996); 4 ILM 532 (1965).
[2] "Considering the need for International cooperation for economic development, and the role of private international investment therein;" ICSID Convention.

host Nation. The first and foremost aspect that a potential investor seeks is the legal security and protection to his investment in the foreign territory. Efficacious access to investment arbitration ensures a smooth reach to an effective and efficient international forum as and when any dispute arises. Further, an assured access to an international arbitration platform instigates as well as boosts any country's investment climate making it an investor friendly abode which is a huge incentive to a prospective foreign investor, as has been reiterated in *Amco v. Indonesia* "*to protect investment is to protect the general interest of development and of developing countries*".[3] Another major advantage that it ensures to the host country is that it safeguards the investee countries from international or foreign litigations and political interference. Further, ICSID arbitration safeguards the host country from the probable disadvantages by explicitly restricting Contracting States from giving diplomatic protection to their nationals where the parties have submitted themselves to arbitration under the convention.[4]

Last two decades have witnessed the highest surge on the number of investment arbitration instituted by a foreign investor against the host country. Contrary to what had been envisaged investment arbitration has become the most popular means of cross-border investment dispute settlement measure. ICSID framework for investment arbitration is the most preferred framework across international community, however there are number of investment arbitration proceeding that are instituted outside the framework of ICSID which are administered by institutions like Permanent Court of Arbitration, ICC, London Court of International Arbitration and London Court of International Arbitration under the aegis of UNCITRAL Arbitration Rules.

However, lately voices have been raised against the sanctity of investment arbitration which produces chinks on the future of such arbitration. Complaints points out various shortcomings in investment arbitration framework in general. It is contended that case laws that are decided by investment tribunals lacks consistency which results in contradiction. Further, Arbitral process at times lack transparency leaving the parties in a fix. Also, it undermines and interferes with the competence of local courts.

[3] Amco v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Report 389 at para. 23.
See also Award 20 November 1984, 1 ICSID Report 413 at para. 249.
[4] Article 27 (1), ICSID Convention.

CONSENT TO JURISDICTION

As an underlying principle of any form of arbitration, investment arbitration also requires initial consent of the parties to submit to the arbitration proceedings for resolution of dispute. It is noteworthy that consent to the jurisdiction may be given in number of ways, however the common practice is to incorporate it as Arbitration Clause within the main contract or the agreement or to put a consent clause in the main agreement itself. Another effective practice to make consent is to incorporate a general consent to arbitration in the national statutes or other national instruments regulating investment and related disputes. Noteworthy that, such provisions are in nature of 'offer to consent'. Various investor friendly countries have incorporated such a provision in their domestic legal structure.[5] So now investors can communicate their consent or 'accept the offer' in writing while the provision or the statute is in force or by simply instituting an arbitration proceeding.[6] Once the offer is accepted or proceeding is instituted the legislation cannot be repealed or the resultant agreement cannot be revoked.[7]Now days consents are offered as a part of Investment Treaties itself. Bilateral Investment Treaties these days contain a separate clause as to the Investor-State Arbitration and thereby offer consent to arbitration to foreign investor. NAFTA, which the best example of the successful regional treaties and other treaties like Energy Charter Treaty have explicit provision which extends consent to investment arbitration within treaty itself.[8]

However, it is significant to note that treaties enumerating clauses with respect to investor-state arbitration varies in scope. While some treaties encapsulates all the disputes related to investments whereas others just talk of the violation of treaty itself, such as NAFTA[9] and ECT[10]. Also, there are some Bilateral Investment Treaties (BITs) that refers to the dispute regarding amount of compensation owed to the investor for expropriation.[11] Many a time consent clauses in investment treaties are made conditional which require certain procedural requirements that need to be fulfilled before proceeding with the commencement of arbitration. Further, these clauses may also come with a gestation period aimed at exploring the possibility

[5] Tradex v. Albania, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 54.
[6] Generation Ukraine v. Ukraine, Award, 16 September 2003, 10 ICSID Reports 240 at paras. 12.2, 12.3.
[7] Article 25 (1), ICSID Convention.
[8] Article 1122, NAFTA; Article 26, ECT
[9] Article 1116, NAFTA.
[10] Article 26 (1), ECT.
[11] Article 7, United Kingdom-China BIT.

of exploring friendly settlement between the parties. There are instances where an investment treaty incorporates a provision which requires the foreign investor to seek a remedy in host country's domestic judicial setup before initiating international arbitration. This is resorted to by the countries who are concerned about their image within international fraternity. Therefore, by accepting the 'offer of consent' to arbitration the parties subject themselves to the conditions and restrictions enumerated in the treaty. Incorporation of different conditions and limitations in different treaties has led to an inconsistent arbitration regime with no established pattern of framework. However, the existence of Most Favoured Nation principle and the subsequent related clause to that effect in the treaties has up to an extent tried to ensure uniformity but such provisions are never given full force as there is no sufficient enforcement regime. Though some tribunals own their own apply the tenets of MFN principle to the provisions dealing with dispute settlement[12] on the basis of common practice, however others have maintained the stringency culminating into unequal treatment under different treaties.[13]

WITHDRAWAL FROM INVESTMENT ARBITRATION

Recently a trend has been manifested in practices of some countries or particularly the Latin American Countries to elope from their obligation or restrict their exposure to investment arbitration. One of the most common practises is to exercise their right to denounce ICSID Convention.[14] Noteworthy that Article 71 of ICSID Convention[15] enumerates a provision of denunciation by giving a six months' prior notice. However, the basic principle remains intact that rights and obligations resulted from consent to ICSID's jurisdiction before the acceptance of denunciation notice shall remain unaffected.[16]Hence, a consent once given cannot be revoked unilaterally.[17]Further, it is significant to note that an offer of consent which is incorporated the in legislation itself or the Bilateral Investment Treaty is accepted by the

[12] Maffezini v. Spain, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396 at paras. 38-64. See also, Siemens v. Argentina, Gas Natural v. Argentina.
[13] Telenor v. Hungary, Award, 13 September 2006, paras. 90-100. See also, Wintershall v. Argentina, Salini v. Jordan.
[14] On May 2, 2007, the World Bank received a notice of denunciation of the Convention from the Republic of Bolivia.
[15] "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice."
[16] Article 72, ICSID Convention.
[17] Article 25 (1), ICSID Convention.

foreign investor either by way of written acceptance or institution of proceedings then in that case even the denunciation of the Convention will not affect the jurisdiction. Therefore, a non-acceptance of consent by a foreign investor by the time of denunciation notice will make him ineligible for enjoying the benefits under the convention. As a prudent investor it is suggested not to wait for the triggering event which leads filing of request for Arbitration and should accept the inbuilt arbitration offer under legislation upfront which consequently ensures the benefits and protections to a foreign investor under ICSID Convention even when the host country goes on to denounce the convention later on.

It has been noted that even in the instances when host countries manages to escape the tentacles of ICSID Convention they find a hard time in escaping from the reach of other investment arbitration avenues. In recent times Bilateral Investment Treaties along with providing for ICSID Convention also incorporates other forms of arbitration such as ad hoc arbitration under the aegis of UNCITRAL Rules and Additional Facility arbitration. Noteworthy that Additional Facility arbitration is only available when either the country of investor or the host country is a party to ICSID Convention however parties are free to avail other arbitration avenues irrespective of their status with respect to UNCITRAL.

Countries at times indicate beforehand that they seek to assume powers with respect to terminate or amend BITs to which they are parties and this in turn helps them reducing their exposure risk to investment arbitration. Countries fail to understand that as a primary rule of Law of Treaties any denunciation or termination in a treaty has to be in consonance with the provision of treaty or else with the consent of parties.[18] Any amendment or change in the treaty requires agreement of the parties to the amendment.[19]

The strategy of warding of claims by terminating or making a favourable amendment in the BIT is not an effective strategy even if it is with the agreement of the parties. The strategy may have limited effectiveness as far as likeminded states are concerned who may adopt this strategy for serving their respective purposes. However as far as investment arbitration is concerned the countries from where the investment is originating doesn't have any cause or perceived benefit in agreeing to a blatant limitation to the protection of their nationals.

[18] Article 54, Vienna Convention on the Law of Treaties.
[19] Article 39, Vienna Convention on the Law of Treaties.

Bilateral Investment Treaties for typically provide for termination after 10 years by giving a 12 months' notice in advance. However, the investment made during the period would still be covered of another 10-20 years depending on the Treaty.[20] Therefore, it is apparent that states jade of investment arbitration would eliminate their respective obligation under the treaty over the period of time. In this backdrop it would be very difficult to fetch quick and decisive results. Besides, hampering with procedural protection of the foreign investor would severely affect the the host countries investment climate and make it vulnerable to the litigation proceedings before the opportunity expires.

Investment Arbitration in its present form doesn't necessarily ensure its successful future prospects and that there are number of realistic ways that could reform or abandon this dispute settlement mechanism altogether. In case the countries reach to a broad consensus with respect to the fact that investment arbitration does no longer serve their respective interests then it can very well be replaced by other dispute settlement mechanism that exist. Further, terminating or amending the BIT by consent of the parties is another way that has been discussed earlier. However, the most wholesome and effective way would be to frame a multilateral treaty which would replace the existing dispute settlement provisions in the prevailing Bilateral Investment Treaties and other Regional Treaties.[21]

It is significant to note that although investors in the current system have been accommodated with substantial procedural rights, the ultimate control still vests with the States. For now the investors and their respective counsels are touted to be the dominating forces in the current international investment arbitration regime at the same times States possess an equal driving force to reform the system completely. Though withdrawal from investment arbitration unilaterally by individual State would be difficult, however a conjunctive effort to terminate or reform the current regime remains a distinct possibility in long run.

[20] See: Article 13 of Chinese Model BIT, 2003; Article 12 of French Model BIT, 2006; Article 22 of US Model BIT, 2004.
[21] Article 59, Vienna Convention on the Laws of Treaties.