The 1958 New York Convention and the 1962 ICSID Convention
Securing the Enforcement of International Arbitration Awards
The Future of the Multilateral Investment Court

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Overview

- Historical Background
- Context
- Key principles of New York Convention 1958 (“NYC”)
- Key principles of ICSID Convention
- The Future: Multinational Investment Court?
- Q&A Sessions

Historical notes (i)

- The NYC is now by far the most significant legislative instrument on international commercial arbitration ("ICA")
- It is a universal charter for the ICA process ensuring durable and effective means for enforcing arbitration agreements and arbitral awards
- Succeeded the 1927 Geneva Protocol and Geneva Convention
- Provided for a "de-nationalized" form of ICA with both ICA process and awards detached from national law
- The NYC: a radically innovative instrument creating a comprehensive legal regime for the ICA process

Historical Notes (ii)

- The NYC is only a few pages long; its essential substance provisions are contained the five concisely-drafted Articles I through V – the standard for the signatory nations
- As the cornerstone of current ICA, it is the foundation on which the whole edifice of ICA rests, without specifically regulating the conduct of the proceedings or the process
- The essential objective of the NYC: require national courts to apply uniformity in (i) recognition of awards, (ii) recognition of the arbitration agreement and (iii) denial of court jurisdiction where a valid arbitration agreement exists
- Resounding success: 162 signatories, 153 ratifications

Foreign v. Domestic Arbitral Awards

- The NYC indicates two types of arbitral awards: foreign arbitral awards ("FAA") and domestic arbitral awards ("DAA")

- What is an FAA? (Article I para. 1):

  i. an award issued outside the jurisdiction of the enforcing party; or

  ii. an award not considered as domestic

- The NYC applies to recognition and enforcement of an FAA in enforcing States which are parties to the NYC

Key Principles

- The NYC applies to both Arbitral Awards issued by *Ad Hoc* Arbitration and Institutional Arbitration (Article I para. 2)

- Member States are obliged to recognize written arbitration agreement in which the parties undertake to submit defined legal relationship, whether contractual or not, on a subject matter capable of settlement by arbitration (Article II para. 1)

- Absolute competence of arbitration towards the court (Article II para. 3)

Recognition & Enforcement Obligation

- The courts in Contracting States are obliged to recognize and enforce FAA
- Recognition: courts give preclusive effect to the FAA to bar re-litigation; Enforcement: courts must give coercive judicial remedies to fulfill the FAA
- Both are subject to several conditions under the NYC, including:

  i. the reciprocity reservation (Article I para. 3);

  ii. the commercial nature reservation (Article I para. 3).

Refusal of Recognition & Enforcement

Grounds for refusal to recognize and enforce an FAA, upon request by the party resisting the award:

1. incapacity of the parties or invalidity of the arbitration agreement (under the law of the arbitration seat) (Article V para. 1 [a]);
2. violation of due process of law (Article V para. 1 [b]);
3. the FAA is *ultra petita* (Article V para. 1 [c];
4. the composition of the arbitral authority or the arbitration violates the parties' agreement (Article V para. [d];
5. the FAA has not yet become binding on the parties or has been set aside or suspended (Article V para [e])

Refusal of Recognition & Enforcement

Grounds for refusal to recognize and enforce arbitral awards, *ex officio*:

1. the subject matter of the dispute is not arbitrable under the laws of the enforcing State (Article 2 [a])

2. the recognition and enforcement will violate the enforcing State's public policy (Article 2 [b])

LAW No. 30 of 1999 on Arbitration and ADR

- In virtual all Contracting States, the NYC has been implemented through national legislation. The extent to which there is faithful adherence to the NYC varies. Many states have adopted the UNCITRAL Model Law

- In Indonesia, the interpretation and application of the NYC has been uneven and slow, but recently, recognition and enforcement of foreign arbitral awards has significantly risen

- Foreign arbitral awards can be enforced upon a writ of execution from the Chief of the Central Jakarta District Court

- The Court must refuse to issue a writ of execution if:

    i. the reciprocity requirement is not met;
    ii. the subject matter of the award falls outside the scope of commercial law (Article 67 [b])
    iii. the recognition and enforcement violates public policy (Article 67 [c])

International Centre for Settlement of Investment Disputes ("ICSID")

- Established by the ICSIC Convention
- Provides for Investor-State dispute settlement by way of conciliation and arbitration in accordance with ICSID Rules;
- Investor-State disputes? Investment disputes between Contracting States and nationals of other Contracting States;
- Ratified by 153 States, as per January 11, 2018

WHAT ABOUT INDONESIA?

- Ratified ICSID Convention in 1968
- Article 32 (4) of LAW NUMBER 25 of 2007 on INVESTMENTS states:

  "*A capital investment dispute between the GoI and a foreign investor shall be settled through international arbitration based upon the agreement between the parties*."

Three Prerequisites for a dispute to be settled by ICSID Arbitration:

- The Parties' Consent
- The Dispute concerns an Investment
- The Parties had capcity to consent

1st Prerequisite: THE PARTIES' CONSENT

- Article 25 (1):

  "*The jurisdiction of the Centre shall extend to any legal dispute arising directly of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*"

2ND Prerequisite: INVESTMENT DISPUTE

- Article 25 (1):

  "*The jurisdiction of the Centre shall extend to any legal dispute arising directly of an investment…*"

- The term '*investment*' not defined by the Convention so as not to limit the scope of investment

- The definition of investment can be found in national legislation of each Contracting State

3RD Prerequisite: THE CAPACITY OF THE PARTIES

Parties which can refer their disputes to ICSID:

- Contracting States (or any constituent subdivision or agency as such State so designates); and

- National of another Contracting State (either natural or juridical person);

- Or juridical person which had the same nationality as the Contracting State party to the dispute (*host State*)

POWERS and FUNCTIONS of the ARBITRATION TRIBUNAL

- The Tribunal shall decide on its own competence (Article 41 para. 1)

- Any objection by any party on the Tribunal's jurisdiction shall be dealt by the Tribunal, either as preliminary question or together with the merit of dispute (Article 41 para. 2)

WHAT LAW DOES the TRIBUNAL APPLY?

Article 42

- The rules of law as may be agreed by the parties; or
- In the absence of such law, the law of the host State (including its rules on the conflict of laws); and
- International law (as maybe applicable)
- The Tribunal may decide *ex aequo et bono,* but only if the parties so agree

RECOURSE AGAINST ICSID AWARDS:

- Interpretation (Article 50)
- Revision (Article 51)
- Annulment (Article 52)

INDONESIA

- **Indonesia as the Respondent in 7 cases (between 2004 – 2016), 5 under ICSID Rules and 2 under UNCITRAL Rules** (*source*:http://investmentpolicyhub.unctad.org/ISDS/CountryCases/97?partyRole=2)

- **Most recent case: Oleovast Pte. Ltd. (Singapore) v. GoI (2016)**

- **Article 66 (e) of Law No. 30 of 1999:**

"*International arbitration awards involving Indonesia as a party in the dispute can only be executed upon execution order from the Supreme Court of Indonesia, which delegates the power to the District Court of Central Jakarta*"

New Development: Termination of BITs - Indonesia

- What is a BIT?
  - An agreement between two states establishing the terms, conditions and protections for investments by one party in the territory of the other
  - Investors from the contracting states may rely on the protective terms of the BIT without entering into a further contractual relationship with the host state

Context: Termination of BITs – Indonesia

- March 2014: GoI announced it would not renew its BIT with the Netherlands, and its intention not to extend other existing BITs

- Since then, BITs that Indonesia has now terminated include

France – 29 April 2015
Malaysia – 20 June 2015
Italy – 25 June 2015
Turkey – 7 January 2016
Vietnam – 7 January 2016
Hungary – 14 February 2016
India – 7 April 2016
Switzerland – 9 April 2016
Singapore – 20 June 2016
Argentina – 19 October 2016*

*The Indonesia-Argentina BIT was the only one to be terminated by consent Indonesia denounced all other BITs unilaterally

The Future: Multilateral Investment Court?

International Investment Agreements (IIAs) in force as of December 2016	
Bilateral Investment Treaty (BIT)	2,957
Treaty with Investment Protection (TIP) (eg: ASEAN Comprehensive Investment Agreement (ACIA)	367
TOTAL: 3,324 Treaties	

Recalibrating International Investment Policy	
TERMINATION OF BITs	19 IIAs were terminated globally between 2016 and 2017
RE-EVALUATION of Treaty Networks	United States, Presidential Executive Order Addressing Trade Agreement Violations and Abuses, 29 April 2017
MEGA-REGIONAL AGREEMENTS	USA withdraws from Trans Pacific Partnership and indicates review of the North American Free Trade Agreement (NAFTA)
RATIFICATION PROCESSES increasingly complex	Questions concerning the legitimacy of IIAs concluded between the EU, Canada, Singapore and Vietnam. ISSUE: do these agreements fall under the competence of the EU, or require individual ratification by member states?

Context: Investor-State Dispute Settlement

- One key reason behind Indonesia's decision to terminate these BITs has been its concern over the Investor State Dispute Settlement (ISDS) provisions under these agreements

- Criticism of ISDS under the BIT system:

  Decision Makers
  - Insufficient guarantees of independence and impartiality

  Decision-making process
  - Lack of Consistency
  - Length and Cost
  - Lack of Appropriate Control Mechanisms
  - Lack of transparency

Context: Proposals for Reform

- Recent EU free-trade agreements such as
  - EU-Canada Comprehensive Economic and Trade Agreement (CETA) and
  - EU-Vietnam Agreement

  have already replaced traditional ISDS provisions with transparent and accountable bilateral investment court systems

- The EU initiated proposals in 2014 for a permanent investment court to replace the current ISDS system

- The European Commission and Canadian Government are currently collaborating to develop proposals for a Multilateral Investment Court (MIC)

Context: Proposals for Reform (cont'd)

Proposed features - the MIC would:

- Have a first instance tribunal
- Have an appeal tribunal
- Have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards,
- Have a dedicated secretariat
- Be a permanent body
- Work transparently
- Rule on disputes arising out of future and existing investment treaties
- Only apply where an investment treaty already explicitly allows an investor to bring a dispute against a State
- Not create new possibilities for an investor to bring a dispute against a state
- Provide effective enforcement
- Be open to all interested countries to join

Overview: Multilateral Investment Court

- Discussions currently remain at exploratory stages. The EU and Canada co-hosted two days of discussions with third parties in Geneva, December 2016

- EU launched public consultation thereafter, which was open until mid-March 2017

Overview: Multilateral Investment Court

- Differences as compared to the Current ISDS System:
  - Removal of unilateral nomination of tribunal members
  - Tenures and qualification of adjudicators
  - Objective appointment of adjudicators (disputing parties may not choose their judges)
  - Appeals court
  - Timeliness in the resolution of investment disputes
  - Improved transparency

Overview: Multilateral Investment Court

- Court or Arbitral Tribunal?

COURT	ARBITRAL TRIBUNAL
Disputing parties have no role in the appointment of adjudicators	Recourse to dispute resolution based on investor-State agreement
Panel of judges has no control over the disputes that are assigned to them	Application of existing arbitration rules including UNCITRAL Transparency Rules
Panel composed of tenured members where adjudicators are appointed for a specific term	Reliance on existing rules on enforcement of arbitral awards contained in the ICSID and New York Conventions

Challenges to Implementation

- Interaction with existing treaty law
- Transition from current ISDS system to the new court
- Timeliness of the hearing of disputes
- State-based resistance
- Enforcement

Challenges: Transition

- Transition from the current ISDS system to a multilateral instrument could perhaps be facilitated through the application of an Opt-in Convention

- However: this raises significant questions in itself, particularly:
  - Treaty-law issues including compatibility with: EU law; existing IIAs; relationship with the ICSID Convention

- Application in practice
  - Should there be mechanisms to ensure flexibility: reservations and declarations?

- Considering there are currently over 3,000 IIAs in place, it is not clear how or when transition from existing ISDS to arbitration under a MIC could be effected

Challenges: State resistance

- No consensus on the viability of a permanent ICS as yet

IN FAVOUR	OPPOSED
The European Union	United States
Majority of EU States	Japan
Canada	China
Majority – Latin American countries	Singapore
	South Korea
South Africa	New Zealand
	Australia

Challenges: Enforcement

- The characterisation of an MIC system as either a court or arbitral tribunal bears significant implications for enforcement
- There is no uniform international regime for the enforcement of judgments of international courts
- If decisions could not be deemed arbitral in nature because of the MIC system's court-like features, chances of enforcement would be significantly reduced

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Challenges: Enforcement (cont'd)

If decisions of an MIC are characterised to be arbitral in nature, one option for enforcement of an MIC award could be:

- To incorporate a special enforcement regime under the Statute of the MIC that creates an obligation on the Contracting State to recognise MIC awards as binding

  For instance, by incorporating a provision in the MIC statute similar to that under Article 54 of the ICSID Convention, which states:

  "Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of that State …"

Challenges: Enforcement (cont'd)

- In Indonesia, such an enforcement regime could potentially fall within the scope of the 2007 Investment Law:

  - Art 32(4):

    A capital investment dispute between the GoI and a foreign investor shall be settled through international arbitration based upon agreement between the parties

- Indonesia has also ratified the Washington Convention: arbitration through ICSID, and the ASEAN Comprehensive Investment Agreement (ACIA), which provide options for dispute resolution through international arbitration bodies

Alternatives? Stick with the ICSID?

- Adoption of an appellate facility under the ICSID protocol
  - ICSID began the process of updating and modernising its rules and regulations in October 2016. it has indicated that it will review the possibility of including an appellate facility

- Rely on application of the UNCITRAL transparency rules

- Creation of an international appellate body

Conclusions

- The International Investment Regime is undergoing ongoing change characterised by many states withdrawing from or reassessing their participation in BITs and other IIAs
- There is significant need for reform of the current ISDS systems
- The Multilateral Investment Court system presents many advantages: stronger guarantees over the impartiality, consistency, and transparency of decisions
- However, there are also major challenges: questions over design, (lack-of) compatibility with EU Treaty law, difficulty in assimilating the new system with existing IIAs, lack of international consensus
- Creation of a permanent appellate body for disputes under IIAs may be a viable compromise. However, if CJEU determines ICS to be incompatible with its jurisdiction over EU law, decisions of such an appellate body would also need to include a mechanism for referral to CJEU in regard to matters of EU law

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Questions & Answers

Thank You

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