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Bird's eye view of investor-state arbitration

Part I

Introduction

In 2020, a Hong-Kong based investor commenced the first-ever investor-state arbitration against Japan in relation to renewable energy subsidy reforms that Japan introduced following the Fukushima nuclear disaster in 2011. Fast forward to the present day and Japan has successfully defended itself with the tribunal rejecting the investor's claims against Japan.

In addition to the big victory as the respondent state, there are at least six known investor-state arbitrations commenced by Japanese investors against states such as China, Spain and India.[1] While most of these are either settled or pending, one of them, namely JGC Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/15/27), was decided in favour of the Japanese investor.[2]

Similar to Japan, the growing trend of investor-state arbitration can be seen throughout the world. In January 2023, the International Centre for Settlement of Investment Disputes ("**ICSID**"), the principal forum for investor-state arbitration, published its caseload statistics as of December 31, 2022. The report illustrates that as of December

[1] https://investmentpolicy.unctad.org/investment-dispute-settlement/country/105/japan/respondent
[2] https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/638/jgc-v-spain

31, 2022, ICSID had registered 910 cases under the ICSID Convention and Additional Facility Rules with 41 cases being registered in 2022.[3]

In this series of short publications, we will provide a bird's eye view of the introductory aspects of investor-state arbitration. This publication will focus on the source of investor's right to arbitrate, the scope of "investor" and "investment" in the international investment treaties and common pre-conditions for investor-state arbitration. In the next publication, we will address the substantive grounds relied on by investors, the dispute resolution forums and the remedies available to investors.

Investor-state arbitration

Investor-state arbitration is a dispute resolution mechanism that allows foreign investors to bring claims against host states for alleged violations of their treaty-protected rights. These disputes are typically resolved through international arbitration, a private process in which the parties agree to appoint one or more arbitrators to hear their case and issue a binding decision.

The process of investor-state arbitration typically begins when an investor files a claim against a host state, alleging a breach of a treaty obligation or other legal right.

Source of investor's right to arbitrate

An investor's right to bring a claim against a foreign country arises from one or more of the following:

- A bilateral investment treaty ("**BIT**") between two countries for the promotion and protection of private investments made by nationals of each other's countries such as the Japan-China BIT;
- Multilateral investment treaty ("**MIT**") made between several countries containing investment protection provisions such as the Energy Charter Treaty;
- An investment law of the host-country;
- An investment contract between the investor and the host-country.

As per the ICSID report, at least sixty percent of its registered cases were brought pursuant to a BIT, which makes BITs the most common international investment

[3] https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf

agreement ("**IIA**"). When it comes to protection of investments, MITs usually contain similar provisions to BITs.

Scope of "investor" and "investment"

As a starting point, investors should check whether they fall within the definition of an "investor" in the IIA. Generally, persons and entities are both considered as investors. For a person, the scope of an "investor" usually covers "nationals" and "citizens" of a contracting party and for an entity to qualify as an "investor", many IIAs require the entity to be constituted under the applicable laws of a contracting party. It is important to look out for more onerous requirements as some IIAs may require the investor's headquarters to be located in the home state or that the investor must carry out "substantial business activities" in the host state. For example, the Myanmar-Singapore BIT allows the host-state to deny the benefits of the treaty to an investor if the "enterprise is owned or controlled by persons of a non-Party, or of the denying Party, and has no substantive business operations in the territory of the other Party". If a Singapore registered entity, which is wholly owned by a mother company registered in Japan, brings a claim against Myanmar, Myanmar would have grounds to argue that the claim should be dismissed on a jurisdictional ground. In this scenario, the Japan based mother company may consider bringing the claim against Myanmar under the Japan-Myanmar BIT as the definition of investment is broad enough to cover indirect investment in Myanmar made through a subsidiary.

"Investment" is usually defined broadly in the IIAs to include every kind of asset owned or controlled by an investor followed by an exhaustive or non-exhaustive list of assets. The assets typically include tangible assets such as land, buildings and machinery, as well as intangible assets such as shares, stocks, bonds, intellectual property rights, rights under contract and claims to money. Having said that, investors are expected to carefully review to check if there are any assets which are excluded from the scope of "investment".

Pre-conditions for investor-state arbitration

Before marching onto arbitration, investors should check whether there are any pre-conditions that need to be considered or satisfied. Some common pre-conditions as well as examples are set out below.

- "Cooling off" provision: In order to promote good faith negotiations, some IIAs require that the investor attempt to resolve the dispute amicably within a certain

period of time before commencement of arbitration (e.g. the Japan-Vietnam BIT 2003 below). Some treaties may not specify the length of the cooling-off period, in which case the investor, with advice from legal counsel, would have to make a judgement call on what is considered a reasonable period of time.

Japan-Vietnam BIT (2003)

"If any investment dispute cannot be settled through such consultation within three months from the date on which the investor requested the consultation in writing, the investment dispute shall at the request of the investor concerned be submitted to either...(1) conciliation or arbitration..."

- Local remedies: Some IIAs require the investors to exhaust all remedies under the host country's domestic law before resorting to the dispute resolution mechanism under the IIA, while others expressly allow the investor to bring a dispute under the IIA before local courts. We should add that most of Japan's IIAs do not contain an exhaustion of local remedies clause however Japan is party to the Japan-Korea-China MIT, under which the host-country may require the investor to go through the domestic administrative review procedure, which should not exceed four months.

Japan-Korea-China MIT (2012)

"When the disputing investor submits a written request for consultation to the disputing Contracting Party under paragraph 2, the disputing Contracting Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration set out in paragraph 3."

- "Fork-in-road" clauses: Some IIAs provide that the investor must choose which forum to pursue its claims and do not impose a requirement to choose a particular avenue. Once the choice is made, it is final, and the investor cannot pursue other avenues (e.g. the Japan-Myanmar BIT (2013)). So, if the investor chooses to bring arbitration proceedings, it will not be able to pursue a course of action before the host country's local courts. It is not surprising that "fork-in-road" clauses have raised complex legal questions and often led to commencement of parallel proceedings. In Occidental v. The Republic of Ecuador, Ecuador argued that the USA-Ecuador BIT contained a "fork-in-road" provision which prevented the claimant-investor from bringing an investment treaty claim due to it already having brought a claim before the local courts. In dismissing the state host's

argument, the tribunal found that, although both the claims had the same objective and parties, the causes of action underlying the claims were distinct.

Japan-Myanmar BIT (2013)

"In the event that an investment dispute has been submitted for resolution under one of the arbitrations set forth in paragraph 4, the same investment dispute shall not be submitted for resolution under courts of justice, administrative tribunals or agencies or any other binding dispute settlement mechanism established under the laws and regulations of the disputing Party."

After ensuring that there are no barriers to commencement of arbitration, the focus would be on the substantive grounds of the arbitration, which will be covered in the next publication, along with the dispute resolution forums and available reliefs.

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