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Bird's eye view of investor-state arbitration
Part III – Forums, Remedies and Costs

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Introduction

In this series of short publications, we provide a bird's eye view of the introductory aspects of investor-state arbitration. In part II, we examined the substantive protections provided to investors under international investment agreements ("**IIA**"), with examples of clauses from IIAs and claims (in the forms of reported cases). In this publication, we will consider the available forums for parties to invoke their rights, the remedies available to parties, the mechanism for enforcement of awards, and the cost allocation in investor-state arbitration.

I. Available forums for investor-state arbitration

Assuming the claimant has a tenable claim under one of the substantive protections (discussed in Part II of this publication), the next step is to consider in which dispute resolution forum the action should be commenced.

Over the past decade, a number of arbitral institutions have introduced investment arbitration rules, but the International Centre for Settlement of Investment Disputes (ICSID) remains the most commonly used forum for investor-state arbitration and is responsible for administering the majority of all international investment cases.

Below is a list of commonly used forums for investor-state arbitration.

1. Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Arbitration**");
2. Arbitration under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes. This is applicable where parties are not an ICSID Member State or a national of an ICSID Member State;
3. Ad hoc arbitration under the UNCITRAL Arbitration Rules (and administered by the Permanent Court of Arbitration);
4. Arbitration under the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (IA Rules 2017);
5. Arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC); and
6. Arbitration under the Arbitration Rules of the SCC Arbitration Institute (SCC).

A party should consider the following factors when deciding the forum of arbitration, including but not limited to: (i) whether the state in question has ratified a particular convention e.g. the ICSID Convention[1]; and (ii) the forum specified in the bilateral investment treaties ("**BITs**") or contracts between parties.

As Japan is a signatory to and has ratified the ICSID Convention since 1967, Japanese investors may bring investment disputes before international arbitral tribunals constituted under the auspices of the ICSID.[2]

To date, however, the only completed investor-state arbitration involving one of Japan's BITs is Nissan Motor Co., Ltd. v. Republic of India (PCA Case No. 2017-37), which took place in the Permanent Court of Arbitration and applied the UNCITRAL Arbitration Rules. More recently, in 2020, a Japanese investor filed a claim with the ICSID against the People's Republic of China (Macro Trading Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/20/22)) under Japan's 1988 BIT with China, although the proceedings were ultimately discontinued in 2021 without any award issued. Claims have been filed with the ICSID against Spain by two Japanese investors as well under the Energy Charter Treaty, due to energy reforms undertaken by the Spanish government affecting the

[1] Amongst other things, the ICSID Convention (and other institutional rules as abovementioned) generally govern the cost and place of proceedings, the constitution of the arbitral tribunal, as well as their powers and functions, and other procedural matters e.g. the process for instituting proceedings. In addition, the ICSID Convention also establishes the ICSID's jurisdiction (Article 25) and sets out the obligations of Contracting States to recognize an award rendered pursuant to the ICSID Convention as final and binding (Articles 53 and 54).

[2] Japan also has in force a number of BITs with a number of ICSID's member states, including but not limited to the United Arab Emirates, Saudi Arabia, the Republic of Korea, Cambodia, Viet Nam, Hong Kong, and China. In addition, Japan is also a member to several notable treaties with investment provisions (TIPs), such as the RCEP (2020), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), the Trilateral Investment Agreement between China, Japan and the Republic of Korea, and the Energy Charter Treaty (1994).

renewables sector (see Itochu v. Spain (ICSID Case No. ARB/18/25) and Mitsui v. Spain (ICSID Case No. ARB/20/47). Proceedings for both are currently ongoing.

II. Available remedies in investor-state arbitration

Investment arbitration tribunals generally have a great deal of flexibility in fashioning an appropriate remedy – although the remedy must, as far as possible, restore the situation that would have existed had the breach in question not been committed.

In practice, damages in investor-state arbitration generally aim to ensure that the aggrieved investor will be, so far as possible, restored to the position it would have been in had the breach not occurred, by giving full reparation. The standard of compensation often depends, however, on how it is defined in the relevant BIT, multilateral investment treaty ("**MITs**") or IIA. For example, Article 9 of the Japan-Vietnam BIT (2003) provides that:

> "Compensation shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier..."

While fairly commonplace for compensation to be 'equated with the fair market value' of the business or investments in BITs, the key issue is typically the choice of the valuation methodology to arrive at the 'fair market value'. In practice, the valuation methodology applied by the tribunal will often turn on the nature of the assets and the specific facts of the case.

Where the relevant BIT, MIT or IIA is silent, the tribunal may resort to relevant principles of customary international law as well to determine the measure of compensation – mainly, the principle set out by the Permanent Court of International Justice ("**PCIJ**") in the Chorzów Factory case providing that "reparation must, as far as possible, wipe all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[3]

[3] Chórzow Factory case (Merits), Germany v. Poland, Judgment of the PCIJ of 13 September 1928, PCIJ Series A. Vol 17 at 47: "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."

Other forms of relief, such as restitution, satisfaction, and/or contractual remedies e.g. specific performance or damages for a breach of contract may also be awarded, although such reliefs are fairly uncommon in practice and are again limited by the relevant BIT, MIT or IIA.

III. Enforcement of awards

The enforcement of investor-state arbitration awards falls into two main categories: (i) first, the enforcement of awards made under the ICSID Convention ("**ICSID Awards**"), and (ii) the enforcement of awards not made under the ICSID Convention ("**non-ICSID Awards**"). In general, non-ICSID Awards can be enforced in national courts pursuant to the New York Convention (where applicable) or the national law of the forum in which enforcement is sought (where the New York Convention does not apply, e.g., because the relevant state is a non-signatory).

Recognition and Enforcement of ICSID Awards

The recognition and enforcement of ICSID Awards is governed by the ICSID Convention. All State parties to the ICSID Convention are obliged to automatically recognise an ICSID Award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[4]

ICSID Awards are also not subject to any appeal or any other remedy (save for those provided in the ICSID Convention) – a key advantage of instituting proceedings under the ICSID Rules. The binding force and finality of ICSID Awards is plainly borne out by the language of Article 53(1) of the ICSID Convention, which provides that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[5] In other words, the courts of Contracting States are excluded from playing any role in the review or setting aside of ICSID Awards.

Recognition and Enforcement of non-ICSID Awards

By contrast, the recognition and enforcement of non-ICSID Awards are typically governed by the laws of the State where enforcement or setting aside proceedings are brought. Recognition and enforcement will be subject to the New York Convention where (i) the State where enforcement is sought; and (ii) the seat of the arbitration are

[4] Article 54(1) of the ICSID Convention.
[5] Article 53(1) of the ICSID Convention.

both Contracting States.[6]

Contracting States are obliged to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the jurisdiction where enforcement proceedings are brought (Article III of the New York Convention). Recognition and enforcement of non-ICSID Awards may be refused only on the prescribed grounds under Article V of the New York Convention, e.g. where an award is contrary to public policy.[7]

The public policy ground, however, is of narrow scope and pitched at a high threshold. Under Singapore law, for example, the prevailing approach is that the public policy objection must involve either "exceptional circumstances which would justify the court in refusing to enforce the award" or be a violation of "the most basic notions of morality and justice".[8] In pro-arbitration jurisdictions like Singapore[9], awards are also rarely set aside unless it can be clearly shown on the facts that one of the prescribed grounds under Article V of the New York Convention have been made out.

IV. Allocation of costs in investor-state arbitration

Cost allocation under ICSID Arbitration is left to the discretion of the arbitral tribunal

An ICSID tribunal has a broad discretion to allocate costs[10], as the ICSID Convention does not provide a default standard for cost allocation. In the absence of agreement between parties, the tribunal shall assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom those expenses shall be paid.[11]

Notwithstanding, ICSID tribunals have increasingly appeared to follow UNCITRAL tribunals in adopting a "costs follow the event" approach, i.e., the losing party pays the costs of the arbitration and legal costs to the winning party.[12]

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6 This refers to States which are signatories to the New York Convention.
7 See, in particular, Article V(2)(b) of the New York Convention, which states that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country."
8 *AJU v AJT* [2011] 4 SLR 739 at [38], citing *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [40] and [75].
9 The Singapore Courts have consistently maintained and confirmed the policy of minimal curial intervention since the Singapore Court of Appeal's decision in Tjong Very Sumito v Antig Investments Pte Ltd [2009] 4 SLR(R) 732, where it was explained at [28] that party autonomy is the "cornerstone underlying judicial non-intervention in arbitration".
10 For the avoidance of doubt, this includes legal and arbitration costs.
11 ICSID Arbitration Rules, Rule 61(2).
12 Based on an empirical study conducted by the British Institute of International and Comparative Law on Costs, Damages and Duration in Investor-State Arbitration.

Cost allocation under non-ICSID Arbitration – costs follow the procedural laws of the seat or applicable rules of arbitration

In certain investment arbitrations not commenced under the ICSID Convention, parties may agree to a procedural law to govern arbitral proceedings. Otherwise, the procedural law of the seat may apply.

Some arbitration rules provide a default standard for cost allocation, although these rules typically give the tribunal some discretion to allocate costs depending on or as appropriate under the circumstances of the case.

V. Conclusion

This therefore concludes our examination of the introductory aspects of investor-state arbitration in this publication series. In Part I, we looked at the source of an investor's right to arbitrate and the preconditions it may have to fulfil, as well as the scope of "investor" and "investment". In Part II, we considered in closer detail the typical substantive protections afforded to investors under the IIAs. Finally, to sum it up, we examined forums under which an investor may potentially initiate proceedings, and the reliefs and costs awarded in investor-state arbitration in this Part III.

As investor-state arbitration continues to be a highly dynamic and complex area of law, we will continue to keep a close eye on future developments and share our fresh insights as appropriate.

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