

The Makings of the Modern Investor-State Dispute Settlement Provision: the Case-Study of Singapore

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Introduction

- What is ISDS?

Dispute settlement proceedings brought by a foreign investor against the government of the host State of its investment

- Arbitration, conciliation, negotiation, mediation etc.
- Investor is granted the capacity to invoke **the consent** to international arbitration **offered by States** in the ISDS provision of their international investment agreement or IIA.
- Other forms in which consent appears?

Introduction

- Distinguishing factor?: Nature and governing law of the obligations the investor alleges have been breached.
- In proceedings arising from an IIA, law governing the dispute may not be limited to treaty law and public international law.
- It may entail questions of interpretation and effect of the host State's municipal law.
- Developments in the consent to arbitrate or ISDS provision reflect the struggle to strike a balance between allowing an independent third-party to adjudicate this kind of dispute while respecting the sovereignty and integrity of domestic regulatory power.

Content of Consent and the ISDS provision

- First, no sovereign State can be compelled to submit to international dispute settlement without its consent.
- This was the issue that the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* sought to address.
- Second, and in this convention, mere ratification of ICSID or any similar arbitration convention or rules does not oblige State-parties to submit the dispute to ICSID. It requires a **separate expression of consent**.

Content of Consent and the ISDS provision

- Third, following from the two preceding points and in the context of an IIA, **the content of the consent** is left to the autonomy of the State-parties.
- Whether this autonomy is exercised by prescribing detailed requirements for the tribunal's decision-making power, or by reference to another instrument such as the ICSID Convention or arbitral rules, it turns on sovereign choice.
- Finally, it is significant that the consent appears in an instrument of public international law whose primary purpose is to codify substantive rules of treatment against which the host State's actions taken under municipal law will be judged.

Singapore 1st Generation IIAs: the UK Model

- Introduction of ISDS and adoption of the UK Model
- The first IIA Singapore entered into which included an ISDS provision, however, was with the Netherlands in 1973.

*“The Contracting Party in the territory of which nationals of the other Contracting Party **make or intend to make investments**, shall, **after the** exhaustion of all local administrative and judicial remedies, agree to any demand on the part of such nationals to submit, for arbitration or conciliation, to the Centre established by the [ICSID Convention], any disputes **that may arise in connection with the investments.**”*

Singapore 1st Generation IIAs: the UK Model

- Compare this to the IIA Singapore concluded with the UK 2 years later :

“Reference to [ICSID]

*(1) Each Contracting Party hereby consents to submit to [ICSID]...any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment...A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arising the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with **Article 25(2)(b)** of the Convention be treated for the purposes of the Convention as a company of the other...*

(2) Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless:

*(a) the **Secretary-General of the Centre**...decides that the dispute is not within the jurisdiction of the Centre...[.]”*

Singapore 1st Generation IIAs: the UK Model

- Whether the reference is to the ICSID Convention or a set of arbitral rules, there tends to be significant room for State-parties' expression of autonomy or discretion.
- Coupled with the nature of the ISDS provision as encompassing the State-parties' consent, when they otherwise are not compelled to submit to ISDS under international law, this reflects the scope of autonomy at play in ISDS.
- In the ICSID Convention, other areas in which the discretion or agreement of State-parties is relevant: class of disputes they agree to submit to ICSID, the constitution of the tribunal, applicable law and rules of procedure etc.
- What is significant about the 'UK model' adopted was that a considerable extent of the State-parties' exercise of autonomy remains delegated to the choices made by Contracting Parties of the ICSID Convention and Arbitration Rules.

Singapore 2nd Generation IIAs: Flexibility at the Risk of Delegation and Uncertainty

- In the 1980s and 1990s, Singapore concluded 11 IIAs, including one amongst its ASEAN trading partners (the ASEAN Agreement on the Promotion and Protection of Investments).
- In terms of ISDS, it moved from whether to provide to how to provide for ISDS.
- Evolution in the profiles of its negotiating counterparties (Asia-Pacific and Middle Eastern countries) meant that there were different approaches towards ISDS to contend with, and the fact that a number of trading counterparts were not existing parties to the ICSID Convention.

Singapore 2nd Generation IIAs: Flexibility at the Risk of Delegation and Uncertainty

1. Combination of judicial and a choice of arbitral venues, such as ICSID, UNCITRAL or *ad hoc*.
2. Choice of proceeding before ICSID or UNCITRAL, with little elaboration except that “[p]arties to the dispute may agree in writing to modify [the UNCITRAL Rules]”
3. Choice of arbitral proceedings before ICSID, UNCITRAL or X, or in the event that parties cannot agree, specifies procedure for *ad hoc* arbitral proceedings.
4. No choice, only ICSID or UNCITRAL.

Singapore 2nd Generation IIAs: Flexibility at the Risk of Delegation and Uncertainty

- Permutations of forums and instruments to govern proceedings opens the door to **differing answers to the same questions**.

Example of applicable law

Article 42 ICSID: If the parties have not agreed on the “rules of law that should govern”, tribunal shall apply the law of the Contracting State party to the dispute (including its conflicts rules) and such rules of international law as may be applicable.

Article 33 UNCITRAL (1976): In the absence of parties’ agreement, apply the law determined by the conflict of law rules which it considers applicable and “[i]n all cases, [it] shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

Singapore 3rd Generation IIAs: Prescription and Detail

- Influence of the NAFTA Agreement, Section B of Chapter 11 of which represents a largely self-contained ISDS mechanism.
- Influence keenly felt in the 2003 Singapore-US FTA. This carried over to more than 20 IIAs concluded since.
- What does it amount to? Considerable detail and prescription, addressing issues such as conditions-precedent to consent of State-parties, interim measures, experts reports.
- Furthermore, have begun to respond to the inconsistency occasioned by offering alternative forums by providing the instrument shall govern to the extent modified by the IIA.

Singapore 3rd Generation IIAs: Prescription and Detail

- Considering this in the context of the applicable law, and returning to the premise of the paper:
- 3rd generation IIAs tend to specifically identify the source of obligations the investor may submit as allegedly having been breached, and unlike 1st and 2nd generation IIAs, specifically provides an ‘applicable law’ provision.
- ‘Applicable law’ tends to be limited to questions of treaty interpretation and, to the extent relevant, “applicable rules of international law”.
- Returning to the relevance of municipal law in the tribunal’ decision-making, what has been provided to assist in ensuring a sound interpretation and application of its content?

Thank You!

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