CENTRE FOR INTERNATIONAL LAW
National University of Singapore

REPORT OF THE CONFERENCE

A New Era for IDR: Breaking the Stronghold of Arbitration

8 April 2024, Singapore

The International Dispute Resolution (IDR) Programme of the Centre for International Law (CIL), National University of Singapore (NUS), organised a Conference entitled: "A new Era for IDR: Breaking the Stronghold of Arbitration" on 8 April 2024 at the Shangri-La Hotel, Singapore. This by-invitation-only conference brought together experts of international dispute resolution and diplomacy to explore alternative and innovative ways of resolving disputes involving states. The Conference consisted of two panels of three speakers and a moderator, with time reserved for questions, comments, and discussions with the audience. An informal discussion followed each panel, where thought leaders and prominent figures in their fields shared their experience of finding innovative solutions to resolving conflicts – legal or otherwise – and weighed in on the suitability of the existing systems of international litigation, arbitration and other dispute resolution processes to handle contemporary disputes involving states with a particular focus on those interfering with the state's sovereign right to regulate such as climate change related disputes. More than 100 people attended the Conference, including high level government officials from Singapore and other countries, international dispute resolution practitioners, international academics, and members of the diplomatic community in Singapore. Details on the speakers and panels are available here on CIL's website. The discussions were subject to the Chatham House Rule.

Introduction

The objective of the Conference was to engage different fields (law, diplomacy) and legal regimes (investment, climate change) in a dialogue on the future of international dispute resolution. This dialogue was set against the backdrop of increasing dissatisfaction with existing systems of international litigation, arbitration and other tribunal processes, particularly when they concern sensitive matters that arise from the exercise of sovereign discretion.

The Conference commenced with the presentation of thought papers by Mr Toby Landau KC (Duxton Hill Chambers) and Ms Wu Ye-Min (Centre for Humanitarian Dialogue), which address themes such as the adaptability of IDR processes to address the relational context of a conflict,

and whether adversarial models of dispute settlement are equipped with the tools to capture the overall landscape of the dispute and enable sustainable, implementable, and meaningful change. These thought papers set the tone for the ensuing discussions.

Mr Landau’s paper dealt with the de/re-politicisation of international investment arbitration, based on his 2023 Alexander Lecture at the Chartered Institute of Arbitrators. He underscored the significant increase of contemporary arbitrations in which tribunals decide cases with highly political elements. The thrust of Mr Landau’s argument is that the characteristics and needs of these disputes – a “vertical” challenge against state conduct or policy of general applicability – often do not match the procedural model routinely imposed on their resolution, i.e., the Anglo-American adversarial procedure used in “horizontal” arbitrations, i.e. arbitrations between parties of a same nature (commercial parties).

In his presentation of the thought paper, Mr Landau highlighted three distinct problems arising from this mismatch between procedure and substance of contemporary investor-state disputes resolution. First is the lack of access for stakeholders. Tribunals rarely give non-disputing parties access to documentary record or hearing, nor allow them the opportunity to present submissions on issues that may impact them once the decision is rendered. Second is what he termed “arbitral tunnel vision”. According to Mr Landau, the adversarial arbitration model – as opposed to the inquisitorial model – requires the tribunal to act as a neutral umpire, waiting to be educated by evidence and submissions of each side. This renders the tribunal prone to overlooking facts which the parties fail to bring up for various reasons, drawing examples from the *P&ID v Nigeria* and *Copper Mesa v Ecuador* cases. He suggested that such an adversarial model is not a mandatory feature of arbitration rules, and yet parties and tribunals rarely depart from that tradition.

The third and last problem is polarisation of parties’ submissions. The adversarial procedure ultimately alienates the disputing parties by pitting them against each other, forcing parties to hold on to extreme positions with the hope of getting the most gain. In Mr Landau’s view, this polarisation is unhelpful to resolve disputes where the rationale underpinning a policy decision inherently involves a compromise between competing interests. In his conclusion, Mr Landau posed the question of whether the commercial arbitration model premised on the idea of de-politicisation of investor-state disputes is still acceptable in light of the growing dissatisfaction and instability. He maintained that investor-state dispute settlement needs a fundamental rethinking, i.e., towards a procedure that pays careful attention to the social and political roots of a dispute and does not scar the affected communities.

Ms Wu’s paper examined the geopolitics and stakeholder interests in IDR. She expanded the focus of IDR beyond adjudication or arbitration, venturing into mediation and negotiation. In Ms Wu’s presentation, she elaborated on the five guiding principles in her thought paper, which are aimed at producing outcomes of dispute settlement that are more durable and implementable by the parties.

The first principle that Ms Wu shared is “How does IDR for this dispute fit into the overall resolution of the broader diverging interests or conflict at play?” Here, she zoomed in on the adaptability of IDR processes to work together in sync, describing arbitration as one such

adaptive process that cannot operate in silo; doing otherwise may give rise to a perceived disadvantage or unfairness for interested parties with no access to arbitration, thereby exacerbating the conflict. The second principle is “What IDR approach best enables sustainable, implementable, and meaningful change to this specific dispute?” This principle, she emphasised, calls for engagement with various stakeholder interests – echoing Mr Landau’s presentation – to arrive at facts and outcomes in a manner that builds ownership among the parties.

Thirdly, Ms Wu asked “How are we applying the principle of ‘do no harm’?” This principle, she explained, is a form of professional ethic that requires thorough analysis of our processes and whether the outcome will cause further harm. For example, in the resolution of disputes involving natural resources, care must be taken for a settlement agreement not to create unintended consequences to the environment or vulnerable populations. The fourth guiding principle concerns “How can flexibility be built into the IDR process to creatively adapt as needed and foster buy-in for the outcomes?” Ms Wu highlighted that the design of an IDR process should ensure that disputants and other stakeholders understand the terms of the eventual agreement reached. Lastly, the fifth guiding principle raised the question, “And then what?” – to identify next steps in the IDR process. In Ms Wu’s view, the chance of long-term success is significantly lessened if the relevant actors do not ask this question from the start and think through the impact of the IDR process.

Panel 1 – In Search of New IDR Options in Disputes Involving States: Lessons from the Past, Alternatives for the Future

The perceived dissatisfaction with the current IDR system for ethical and efficiency reasons has spurred debates on the reform or replacement of arbitration as the dominant IDR process. Various proposals are being considered at the Working Group III on Investor-State Dispute Settlement (ISDS) reform under the auspices of the UN Committee on International Trade Law (UNCITRAL), ranging from minor tweaks – e.g., developing rules surrounding the conduct of arbitrators and other procedural innovations – to more ambitious ideas such as replacing investment arbitration with a permanent court as put forward by the European Union (EU). Other non-binding procedures such mediation, conciliation, or fact-finding were often cited in reform discussions as promising alternatives to arbitration or adjudication of inter-state and investor-state disputes, but they remain severely underutilized despite being available for a long time.

This panel interrogated the intrinsic limitations and external challenges facing arbitration or adjudication which complicate attempts to end disputes or prevent their recurrence. At the same time, this panel reviewed the proposed alternatives and questioned whether it is feasible or desirable to have complementary processes running in parallel. It was common ground among the panellists that certain issues may not easily be solved through legal means, even though they fall in large parts under the jurisdiction of courts or tribunals and/or are deemed justiciable, ranging from disputes emanating from particular historic injustices, festering diplomatic tensions, and the like. The panellists also acknowledged the difficulties in leveraging alternative processes, especially in ISDS. These difficulties include the lack of

political will, path dependency on the part of lawyers and state officials, as well as the short-term gains that may accrue to users from maintaining the current ISDS system.

The presentations focused primarily on the strengths and values of IDR processes, whether they satisfactorily address the challenges highlighted in the thought papers or are otherwise amenable to reform. One panellist expressed scepticism towards the claim that judges are necessarily better at understanding the wider social and political impacts of the dispute compared to private arbitrators, noting that courts also infrequently sidestep political questions and limit themselves to the application of legal norms and rules. Nevertheless, the clarification of the law by a permanent court carries more authority than the decision of arbitrators appointed on an *ad hoc* basis. Judges may have more reasons to be sensitive to the wider political ramifications of these disputes in their deliberations.

As discussed in this panel, the lack of predictability in the jurisprudence of investment arbitration may be one of the incentives for investors/creditors to hold out and pursue arbitration with the hope of a potential windfall, which undermines any ongoing negotiation process between the state and other creditors. A permanent court, on the other hand, is naturally pulled towards reconciling inconsistencies in its jurisprudence and may thus remedy the shortcomings of investment arbitration. In addition, a judicial decision drafted with an eye on the parties’ interests and needs may pave way for a political solution to the dispute, even if it does little to clarify the law. This view was later echoed by a participant who, in their intervention, mentioned the example of the International Court of Justice (ICJ)’s advisory opinion on Kosovo’s declaration of independence, in which the ICJ offered a less-than-clear legal answer but led to political talks and understanding between Serbia and Kosovo.

Other panellists were more sanguine about the role of arbitration in ISDS, while still appreciative of the high value proposition of other mechanisms that aim for early prevention or amicable settlement of disputes, such as mediation, conciliation, fact-finding, and national focal points or ombudspersons. It was recalled that there is greater preference among states for incremental reforms to arbitration instead of doing away with it completely. Positive outcomes of Working Group III were mentioned, including the UNCITRAL code of conduct for arbitrators in international investment disputes that seeks to address the perception of conflict of interests arising from certain practices such as double hatting (i.e., where arbitrators concurrently act as counsel or expert witness in identical or related cases).

This panel also discussed alternatives to countervail the prominence of the adversarial arbitration model. In one of the presentations, one panellist advocated for the greater use of mediation, either on its own or in tandem with adjudication, highlighting its suitability for disputes in which parties seek to maintain long-term relationships. The possibility of incorporating inquisitorial elements into the adversarial arbitration model was equally welcomed, while the modality of such incorporation remains an open question. To meaningfully influence the behaviour of users, these alternatives may require a redrafting of the investment treaties or arbitration rules, e.g., to mandate a genuine attempt at mediation before investors turn to arbitration or adjudication.

The rest of the audience also offered their thoughts and comments, prompting discussions on the legitimate role of lawyers in addressing social justice issues, the extent to which procedural reform can fix societal crises, as well as the need to think about new ethics and functions of IDR, pursuant to which arbitrators should exercise greater due diligence in individual disputes and pay more attention to the changing landscape of international investment law, e.g., the shifting orientation towards investment facilitation in recent treaties.

Fireside Chat – Negotiating Intractable conflicts

This session, designed as an informal interview of Her Excellency Julia Gillard, 27th Prime Minister of Australia, and Mr Jonathan Powell, Chief of Staff under British Prime Minister Tony Blair, focused on the experiences and lessons learned by the interviewees in mediating disputes and handling delicate negotiations as a representative of their respective governments. The interviewer asked questions relating to the importance of personality of the mediator or the leader of the negotiation, the necessary state of mind when coming to the negotiating table, and how to build momentum in the negotiation and identify the right timing to bring in other stakeholders.

The interviewees shared their own stories when they were put in very delicate and precarious negotiations and where the prospect of a consensus or resolution looked rather bleak. They stressed the importance of prior preparation and having a clear strategy about how to frame and close the negotiations, i.e., to constantly think about how to sell the outcome to the media and domestic political audience. The interviewees also talked about investing time and energy in winning the counterparty’s trust as a crucial component in any negotiation – an example is the decision to travel to the other side’s location as a sign of goodwill, especially when personal security cannot be guaranteed. Another often overlooked aspect of negotiations, according to the interviewees, is the exercise of active listening, which runs counter to the desire of many government representatives to produce quick and visible results and scoring points in debates.

Among the successful negotiations in which they were personally involved, they observed that success – narrowly defined as getting both sides to agree – can be attributed to the inclusiveness of the process, where everyone potentially affected by the outcome is at the table; the readiness of both sides to negotiate, perhaps owing to a long-enough stalemate and when the status quo was mutually hurting; and the belief that an agreement is possible, coupled with the leader’s courage to take political risks. However, the interviewees also cautioned against losing sight on the implementation of the agreement: parties need to make sure that other shareholders potentially affected by the content of the agreement were consulted and given the opportunity to shape the outcome. For example, in relation to conflict situations, it is important to listen to the victims and minority groups and build their trust. It is also important for the negotiators to think about the expectations of these stakeholders that cannot possibly be met by the process and how to earn their understanding and cooperation.

Others in the audience contributed to the discussion through their questions, including the essential elements to address during agenda-setting, the role of technical experts and the risk

of legalisation of the process, as well as the interaction between diplomatic means and judicial processes in settling multi-cultural and multi-party disputes. The participants also commented on the need for reliable institutions that can facilitate access of stakeholders and bring the right persons or leaders to the negotiating table.

Panel 2 – A Closer Look: IDR Put to the Test in Environmental Issues

The receptivity of investor-state arbitrators towards climate change and environmental concerns underlying states' regulation of business activities has been questioned in many fronts and became one of the thorniest issues in ISDS. Opponents of the system have insisted, with empirical evidence, that the mere risk of facing ISDS claims can create a chilling effect on many states' decision to roll out sustainable policies, notwithstanding the inclusion of the state's "right to regulate" in most investment agreements. The EU and its Member States have taken steps to exit the Energy Charter Treaty – the most frequently invoked investment agreement in ISDS – to remove obstacles in the EU's strategy for just transition.

Against this backdrop, the second panel of the Conference explored the possible improvements in the system and the availability of other forums to resolve disputes arising from states' environmental policies, such as domestic courts as well as the mechanism enshrined in the Paris Agreement. This panel discussed whether the misgivings about the suitability of arbitration in determining environmental issues is justified, given the design of the process that limits public participation and transparency, and the lack of detailed substantive principles (including investor's obligations) or robust case law at the arbitrators' disposal to ensure a balanced and nuanced decision on environmental issues.

The panellists talked about the pressing need for rapid mitigation, adaptation and carbon removals and how regulatory flexibility is essential to meet the obligations under the Paris Agreement. Yet, states have faced arbitration claims brought by various kinds of energy investors – by fossils fuels companies after a phase-out policy, or by renewables companies owing to changes in the incentives scheme. This ended up diverting much-needed public funds to pay compensation or settlement for investors, which could be catastrophic for states struggling to meet the basic needs of their own population. While arbitrators applying international law are obliged to interpret investment protection guarantees in line with the respondent state's obligation under Paris Agreement, this interpretative possibility does not imply a hierarchy between obligations. One panellist remarked that arbitrators need to interpret investment treaties in an evolutionary manner so as not to impose unreasonable burden on the state's compliance with the Paris Agreement. This also implies the need for synergy between investment tribunals and the Agreement's implementation and compliance committee.

The panellists then turned to the various climate litigations that reviewed companies' greenhouse gas emission levels across the globe, and highlighted how this phenomenon evidenced a growing trust in domestic courts and a push-back against the idea that courts should not adjudicate on disputes over (foreign) investors' rights. Several panellists also opined on the reason why domestic courts and investment tribunals invariably reach different conclusions when it comes to balancing environmental protection and commercial interests.

One panellist pointed out how courts in many legal systems have developed a robust definition of the right to property and the principles governing the interaction between property and environment, such as the doctrine of public trust over natural resources. This limits the government’s ability to award investors the freedom to use, extract, and exploit resources, especially if the whole process is shielded from public participation.

Furthermore, under domestic law, investors are subject to obligations and can be held liable for lack of due diligence in relation to environmental damage, whereas investment treaty rarely imposes duties on investors and only permit minimal review of their conduct by investment tribunals. This limited analysis of the investor’s behaviour, coupled with the lack of transparency of the process, only eroded the public’s confidence in the arbitral process and the legitimacy of the outcome. It was suggested that states include in their investment agreements the obligation to exhaust local remedies as a precondition to arbitration, which would enable a dispute to reach local courts and have the contentious facts publicly heard, before they are decided by an arbitral tribunal.

Town Hall Meeting

This last session opened the opportunity for speakers and participants to interact and give feedback on the topics and proposals discussed throughout the Conference. The big question raised in this session was whether there is a realistic possibility for change. Various issues standing in the way of change were identified, including the privileged status of investment treaties in international law with a survival clause which ensures applicability of investment protection guarantees for years after a treaty is terminated; too much judicialisation of international affairs, particularly in matters that could and should have been settled diplomatically; the compartmentalisation of different legal regimes with very limited interaction between them; the inherent difficulty in selecting the right person to lead an IDR process; and arbitrators’ paranoia of being challenged by the parties for their perceived activism.

The speakers then discussed the reforms that need to be addressed, primarily in ISDS. It was recommended that arbitrators will benefit from a clearer mandate to take more initiatives and adopt an inquisitorial approach to dispute settlement, including the practice of limiting oral hearing to only specific questions and denying excessive requests for document production. Other participants questioned whether light tweaks to the treaties or procedural rules are enough to change the prevailing adversarial tradition, and whether preparedness of the arbitrator is the real problem as opposed to paranoia; they suggested instead to think about creating novel procedures which create less risk of polarisation between the parties.

On substantive reforms, many participants remain sceptical about methods of interpretation as provided in the Vienna Convention on the Law Treaties – e.g., technique of systemic integration or issuance of joint interpretive statement – as the solution to bring climate change concerns into ISDS, as arbitrators might understandably be reluctant to interpret an investment treaty in ways that effectively limit the express guarantees provided therein. It was suggested that, besides having a new system of dispute settlement, states should also consider carving out classes of assets that should not be granted treaty protection, such as

investments in carbon-intensive sectors. Another participant also came in defence of investment treaties as perhaps the only legal instrument that can protect foreign investments in unregulated markets, such as carbon credits.

Conference Closing – Conclusion

Closing comments were provided by Ambassador Tommy Koh, Deputy Attorney General Lionel Yee and Solicitor General Daphne Hong. The closing presentations highlighted that the key challenge facing IDR processes in this era of geopolitical tension and polarisation is the ability of decision-makers to adapt their mindset and show greater ownership of the legitimacy of their decisions, not just for the disputing parties but also the broader stakeholders. This challenge is much more pronounced in ISDS, where different arbitrators are appointed on an ad hoc basis in a plurality of cases, making it nearly impossible for change to be generated uniformly if one only relies on soft tools and gentle persuasion.

Institutionalisation of the IDR process remains an important and contentious topic; there is no clear evidence that a court will necessarily be more objective and exercise less discretion in interpreting investment protection guarantees than a panel of arbitrators. What is apparent is that the current system’s resistance to the changing political landscape, especially when it comes to public participation and climate change and environmental matters, will only result in their obsolescence. Ultimately, the burden of reform – both procedural and substantive – and the implementation thereof lies on the states. Unless states are uniform in their commitment to align economic activities and capital flows with the fight against climate change, productive and meaningful change in the IDR process may not be forthcoming.

Finally, it was highlighted that non-contentious dispute settlement mechanisms remain a valuable tool to resolving differences and ensuring continuing relationships, although this fact may not be self-evident in the context of investor-state disputes where they are rarely used. Legal advisers are thus responsible to educate themselves as well as inform the parties they are representing about the availability of these mechanisms and institutions. States also need to adopt strategies to nudge investors towards their greater use, such as by including mandatory mediation or compulsory conciliation provisions in their agreements as well as expanding the list of experts suitable for the task.

This Report was prepared by Daniel Pakpahan, Research Associate at CIL and rapporteur for the Conference.