

Event Note

Dispute Resolution in Inter-State & Investor-State Cases: The Asian Experience

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On 29 September 2015, the Singapore branch of the International Law Association (“ILA Singapore”) and the Singapore Management University’s (“SMU”) Centre for Cross-Border Commercial Law in Asia (“CEBCLA”) co-organised a seminar on inter-State and investor-State disputes, with particular focus on Asia. ILA Singapore was founded this year at the suggestion of the Honourable the Chief Justice Sundaresh Menon and is headed by the Director-General of the Attorney-General’s Chambers’ International Affairs Division, Mr Khang Chau Pang.

The seminar featured four eminent speakers: Professor Hi-Taek Shin (Seoul National University), Dr Romesh Weeramantry (Clifford Chance, Hong Kong), Mr Minn Naing Oo (Allen & Gledhill, Myanmar), and Professor Chester Brown (University of Sydney). Assistant Professor Mahdev Mohan (Founding Member, ILA Singapore; SMU) and Ms Gitta Satryani (Herbert Smith Freehills, Singapore) were co-moderators.

The event was held at the Li Ka Shing Library at SMU, and was followed by canapés and refreshments. The discussion was wide-ranging and dynamic. There were numerous questions and contributions from the audience, which included a number of distinguished practitioners and academics. Some highlights of the discussion are presented below, organised by theme rather than strict chronology.

Developments in investor-state mediation and conciliation

The panellists were invited to comment on the reported unpopularity of the International Centre for Settlement of Investment Disputes (“ICSID”) conciliation process. Fewer than ten ICSID conciliations have been conducted, in contrast to hundreds of ICSID arbitrations.

Prof. Brown observed that by the time a dispute has grown serious enough for an investor to consider invoking ICSID’s dispute resolution mechanisms, negotiations that may have been carried out between the investor and the State have broken down. Relationships between the parties are likely to be strained. Thus, even where a treaty or contract provides for conciliation (most do not),

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the parties usually prefer to file a request for arbitration, rather than to file—at the same cost—a request for conciliation, which would risk unnecessary delay pursuing a process which might end without agreement.

Prof. Shin added that fear of public criticism, including allegations of corruption, is a significant obstacle to government officials pursuing mediation or conciliation over arbitration. Mr Weeramantry responded that it might be easier to overcome these obstacles in conciliation than in mediation, because a conciliator—unlike a mediator—is empowered to propose solutions for the disputants to agree on. For a government, endorsing a solution proposed by a neutral expert could be less politically risky than putting forward its own proposal or agreeing to a proposal from an investor.

Ms Lucy Reed (Founding Member, ILA Singapore; Freshfields Bruckhaus Deringer) commented from the audience that one ICSID-specific difficulty was that ICSID conciliations are highly formal and procedure-driven, not party-driven. These are unfavourable conditions for conciliation. Ms Reed then asked the panellists a question regarding political risk: since governments are capable making risk-heavy sovereign decisions (such as the decision to wage wars), why should they be so reluctant to make the relatively less weighty decision to settle a legal dispute?

Mr Weeramantry responded that where investment disputes are concerned, government lawyers have great influence over the decision, and that they tend—like most lawyers—to be risk-averse and advise the government accordingly. Ms Satryani added that specific domestic laws are frequently an obstacle to settlement. For instance, Indonesia’s anti-corruption laws make it an offence to wrongfully cause loss to the State. Government officials who decide to settle a dispute may later find themselves prosecuted under this law.

Prof. Brown observed that in Argentina, similar laws had affected not just Argentina’s willingness to settle, but its conduct in arbitrations. Argentina had repeatedly raised the same jurisdictional objections in numerous ICSID arbitrations, despite the fact that those objections had always failed. The reason was that it would be a criminal offence in Argentina to not advance a reasonably plausible argument in service of the State’s interests.

Mr Weeramantry agreed with Prof. Brown and made some further observations based on his experience in the Iran-United States Claims Tribunal (“IUSCT”), which was formed to resolve the legal consequences of the November 1979 hostage crisis at the United States Embassy in Tehran and the subsequent freezing of Iranian assets by the US. The IUSCT’s formation was made possible by negotiations assisted by Algeria as an intermediary; to date, it has disposed of over 3,900 cases. Mr Weeramantry observed that over the decades of the IUSCT’s existence, Iran’s lawyers had grown progressively more comfortable with the proceedings and more co-operative on matters on which co-operation would not prejudice their State’s interests. He cited this as proof that mindsets could be changed even on a fundamental level, but that such change would not happen overnight.

Grievance mechanisms as an alternative means of resolving or preventing disputes

The panellists were invited to discuss the benefits and challenges of non-litigious grievance mechanisms, which provide avenues for investors to have their concerns addressed by the state at an earlier stage. Mr Minn noted that the grievance mechanism incorporated into Myanmar's recent draft Investment Law appears to have been a compromise between investors (including the International Finance Corporation) and the Myanmar government. A domestic grievance mechanism, aimed at resolving problems before they escalate into legal disputes, was seen as a way to make the proposal more palatable. With this less adversarial option in place, the Myanmar government might eventually be persuaded to permit nationals of treaty parties to have recourse to investor-State dispute settlement; the draft law containing that proposal is currently tabled before Parliament.

Prof. Locknie Hsu (Founding Member, ILA Singapore, SMU), speaking from the audience, asked the panellists to comment on the role and remit of the Office of the Foreign Investment Ombudsman in serving as or complementing a grievance mechanism for foreign investors in Korea.

Prof. Shin opined that the ombudsman's office had been highly successful overall. Crucial to that success was the substantial independence of the ombudsman's office from the Korean government; although appointed by the government, the organisation is headed by professors from private universities rather than by career bureaucrats. Investors therefore trust that their grievances will be dealt with impartially. One potential disadvantage, however, is that the ombudsman's office is limited in its power to resolve disputes directly.

Mr Minn added that an ombudsman's office had been considered in Myanmar as well, but that it had not been favoured due to concerns relating to funding, organisational structure, and the difficulty of finding suitable persons to head such an organisation.

Cultural differences in attitudes toward investor-State arbitration

The panellists were invited to share their thoughts on how 'culture' had affected investor-State arbitration ("ISA") in Asia. Prof. Shin observed that Korean investors are no longer dispute-shy, citing a number of proceedings commenced by Korean investors this year. The same is true of Chinese investors. Prof. Shin attributed this change in attitude to Korea and China's increased outbound investments from these two countries, which had given rise to disputes over the years involving Korean and Chinese investors. In Korea, there was an additional factor: the presence of many US-trained in-house counsel who view such proceedings as routine.

Ast/Prof. Mohan asked whether attitudes towards arbitration differ between various Northeast Asian countries. Prof. Shin suggested that an investor seeking a settlement might be wise to negotiate first if operating in Korea, but file for arbitration at his earliest convenience if operating in China.

Mr Minn made the tongue-in-cheek observation that the Myanmar government's culture is to hope the dispute goes away. To have a dispute taken seriously by the government, an investor generally has to first commence proceedings to demonstrate the seriousness of its intent.

Mr Weeramantry noted an interesting change in the attitudes of Chinese state entities to proactively using ISA options contained in BITs. Officials used to dismiss such options, viewing their use as requiring higher-level authorisation. Recently, however, the organisational culture appears to have changed, such that the decision to use such options could be made promptly. This was an encouraging sign for the future of ISA in Asia.

Ast/Prof. Mohan and Ms Satryani followed up with questions regarding Singapore's role in the continuing development of ISA in Asia. Mr Minn commented that Asian states placed a great deal of trust in the neutrality and expertise of Singapore's arbitration community, as demonstrated by a recent arbitration, held in Singapore, in which both the investor and the state of Myanmar were represented by Singaporean firms before a panel consisting of Singapore-based arbitrators. Mr Minn opined that Singapore's reputation and importance as an Asian arbitration hub is likely to grow further.

Inter-state disputes and reparations in Asia: whither an MH17 tribunal?

The panellists were asked to comment on the options available in Asia for resolving disputes arising out of armed conflict or other attacks, such as the downing of Malaysia Airlines flight MH17 in territory controlled by Ukrainian separatists in July 2014. The moderators highlighted two possible models:

- a) A commission or tribunal such as the United Nations Compensation Commission ("UNCC") (which dealt with claims arising out of Iraq's invasion of Kuwait in 1990–1991), the IUSCT, or the Eritrea–Ethiopia Claims Commission (which dealt with claims arising from the armed conflict between Eritrea and Ethiopia in May 1998).
- b) *Ad hoc* arrangements such as those made for the trial of the terrorists who bombed Pan Am Flight 103 in December 1988, causing it to crash into a residential area of Lockerbie, Scotland. Following the convictions of the accused persons in a special sitting of the Scottish High Court of Justiciary in the Netherlands, the government of Libya paid compensation to the families of the victims, although it maintained that it had not ordered the attack.

The panellists were asked to comment on the feasibility of establishing a commission or tribunal along the lines of option (a) in the event of an intra-Asian or Asia-related dispute, especially in view of the failure (due to Russia's veto) of the proposal for an international tribunal concerning MH17 which Malaysia, Australia and others had proposed to the UN Security Council ("UNSC").

Offering her view from the audience, Ms Reed commented that such a tribunal or commission was not implausible given the overall trend towards resolving international disputes through standing tribunals as opposed to *ad hoc* dispute resolution methods. However, members of such a tribunal would need to be members of the international community with high standing (for example, diplomats with immense experience and seniority) to lend legitimacy to the tribunal's operations.

Mr Weeramantry opined that it was necessary to draw a distinction between tribunals such as the IUSCT and mass claims bodies such as the UNCC. The IUSCT was formed by agreement between the

US and Iran with Algeria acting as a go-between, while the formation of the UNCC was directed by the UNSC. Part of the formation of the IUSCT was setting aside funds from Iran, held in escrow, to facilitate efficient and secure enforcement of awards made by the tribunal. Each investor-State dispute before the IUSCT was treated as a discrete set of proceedings, thus generating a large body of arbitration jurisprudence (in addition to its jurisprudence on the inter-State disputes, some of which are still ongoing).

In contrast, Mr Weeramantry observed, the UNCC had been created solely to determine the eligibility and quantum of claims against Iraq, the liability of which had been pre-determined by the UNSC. As a mass claims body, the UNCC has heard about 2.7 million claims, approximately 1.5 million of which have been successful. Due to the sheer volume of the claims, it has been not possible to treat each of them as a full-scale arbitration, as with the IUSCT. Consequently, it has not been possible or appropriate for the UNCC to generate any real jurisprudence.

Prof. Brown noted that although the proposal for an international tribunal on MH17 had failed before the UNSC, Australia and other affected States may yet succeed in setting up an *ad hoc* tribunal outside the auspices of the UN, possibly modelled on the Lockerbie trial. However, the Lockerbie trial was only possible because of the identification of specific suspects and the eventual co-operation of Libya in giving those suspects up for trial. Prof. Brown expressed doubt at the feasibility of such a solution in the context of MH17 and Russia's stance on Ukraine.

Transboundary pollution

The panellists were invited to comment on possible legal solutions to the recurring problem of the haze in Southeast Asia. The consensus among the panellists and moderators was that given the existing legal framework, hard law solutions could only achieve so much.

With regard to domestic claims, Ms Satryani noted that because the allocation of concession areas to specific companies was alleged to be a state secret by Indonesia, it would be difficult for private claimants to gather sufficient evidence to prove their claims. On the issue of penalties for environmental offences, Prof. Brown observed that in Australia, the real deterrent factor was not the statutory penalty, but the reputational risk that follows when a listed company is prosecuted.

Ast/Prof. Mohan asked what cause of action may be brought by an aggrieved investor if the Indonesian government is identified as having caused, contributed to or failed to suppress forest fires or haze pollution. Prof. Brown noted that corporate social responsibility clauses, such as those incorporated into some modern BITs, were largely untested and inherently unsuited to generating hard law obligations. Ms Loretta Malintoppi (Founding Member, ILA Singapore; Eversheds), speaking from the audience, commented that a claim for transboundary harm, such as that in the *Trail Smelter* arbitration, would stand on firmer ground. However, that would be an inter-State matter and may go unresolved because—unlike in the case of an investor-State dispute arising out of a BIT—both disputing States would have to voluntarily accept the jurisdiction of the International Court of Justice or other tribunal.

Some panellists and audience members took the view that inter-State mediation was a more promising prospect, but recognised that this would require buy-in from Indonesia and the appointment of a suitably independent and globally respected mediator of high standing, such as a former UN Secretary-General. Ms Reed, commenting from the audience, suggested that the States concerned might wish to look beyond the obligation or 'stick' framework and instead consider how to create an incentive or 'carrot' structure which could persuade companies and states to act in an environmentally responsible way.

About the International Law Association

Founded in 1873, the International Law Association (ILA) is dedicated to the study, clarification and development of international law, both public and private, as well as furthering understanding and respect for international law. Its membership comprises institutions and persons from legal practice, academia, government and the judiciary, as well as experts from sectors such as commerce, industry and finance.

The ILA operates through its regional or national branches, which contribute to the work of the ILA by participating in its study groups and committees. The ILA has more than 50 regional or national branches around the world. The [Singapore Branch](#) of the ILA was launched on 27 August 2015 at the Supreme Court.

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