Investor-State Disputes and ADR

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ADR in the settlement of investor-state disputes has a great and largely untapped potential. Investor-state disputes differ from disputes between private parties in several respects. Firstly, the motives driving the parties and the interests pursued by them tend to diverge from each other. One of the parties, the State, is managed by actors which operate and need to succeed in system quite different from the business world driven by profit maximization. Political leaders will see the outcome of an ISD resolution in relation to its impact on votes and how such outcome can be spun in order to maximise voters' support or minimize the damage in the polls. An ADR instead of the unpredictable verdict of arbiters increases their possibility to shape and spin the outcome. Secondly, an arbitration against a State from the investor's perspective will amount in most cases to a termination of his business activities in the markets of that State, irrespective of the outcome (arbitration as the 'nuclear option'). Given the State's possibilities to influence domestic public opinion, an ADR leading to an amicable settlement may in many cases the better option for the investor. At the same time, international investors tend to be more effective in mobilizing opinion on an international level, from international organizations to international financial institutions (IFIs), which are of significant importance for the domestic actors. International institutions tend to favour negotiated solutions to a dispute, as it ensures continuation of their leverage which is lost in arbitration.

The specifics of investor-state disputes not only make a strong case for more and more serious ADR, they also influence how such ADR should be organized and conducted. In this respect, the experience of the Vienna-based Energy Community, an international organization based on a public law Treaty, is interesting. Being called upon in many cases to mediate ISD by both parties shying the risks and consequences of arbitration, the Energy Community Secretariat institutionalized that practice by creating a Dispute Resolution and Negotiation Center at the end of 2016. Combining technical and political expertise with the independence and standing of an international organization and respected negotiation facilitators, the Center has been successful in mediating several high-profile ISD cases in Eastern and South Eastern Europe. In contrast to public organizations such as the Energy Community which consider amicable dispute resolution as a public service, private practice including the legal profession have been rather slow in adapting to the characteristics of investor-state dispute resolution and tapping into the potential of counseling parties in such procedures.

Against that background, the participants at the table considered that the current legitimacy crisis of investment arbitration is a possible reason to accord to ADR a more prominent role in investor-state disputes. This entailed a debate on the advantages of ADR over investment arbitration. It was pointed out that mediation allows for a holistic approach to a dispute by taking account of the legal aspects as well as of the public policy aspects of a dispute. Mediation has the advantage of allowing all such considerations to come into play without any technical constraints (e.g. their formulation as counterclaims) and to offer a forum ideal for multi-party disputes. One participant noted that mediation can offer possible ways of circumventing the difficulties attached to the enforcement of arbitral awards against states, e.g. by negotiating an independent bank or IFI guarantee into a settlement agreement.

To promote the use of ADR, participants agreed that the next generation of bilateral investment treaties (BITs) should be broadened and also include dispute resolution clauses which pay more careful attention to pre-arbitration mechanisms, for instance by providing for mediation by an internationally respected mediator. The pros and cons of drafting guidelines for ADR in investor-state disputes were also discussed.

While recognizing the potential of investor-state ADR, some participants shared experience whereby states sometimes are unwilling to settle their dispute out of court, for fear of being critisized afterwards. Public policy decision, once taken in a given country, may be hard to negotiate on. The German decision to phase out its nuclear power generation may serve as an example. Moreover, a government engaged in mediation will have to justify the outcome in parliament. The opposition may portray the government's willingness to settle as a sign of weakness or even suspect it of corruption. In such cases, an international organization mediating according to transparent procedures can provide the legitimacy needed by states and investors alike to "defend" the outcome towards their respective stakeholders. It was noted that, due to their fragile nature, mediated agreements are susceptible to break down when discussed in public. The level of transparency should therefore be agreed upon by the parties to the dispute at the outset of the mediation process. A possibility mentioned by a participant was to involve the political opposition as well as civil society and IFIs in the mediation process, making it more difficult for it to object to the negotiated solution at a later stage. It was also noted, however, that a mediation process needs to be resulted-oriented and allow for an environment of trust, which sets certain limits to its full transparency and democratization.

Another aspect is the preparedness of the actors in a dispute for ADR. While this seems to be generally low among counsel, national and international actors as well as business leaders seems to be increasingly ready to invest in their negotiation and facilitation skills. The Energy Community recently offered a negotiation training to high level officials in all its Member States. In one prominent case, the quality of dispute settlement was significantly enhanced by sending the ministers representing to the Harvard Law School's negotiation training prior to the actual mediation.

The discussion allows to draw a few conclusions on the use of ADR in investment protection law. All participants agreed that the current system of international investment law can and must be improved. ADR may offer one possible way of tackling the current legitimacy crisis of the investment protection system. When drafting the dispute settlement provisions of BITs, mediation and other means of ADR should be viewed as serious alternatives to the settlement of disputes by arbitration or by an investment court. In consideration of the difficulties for states to engage in mediation, the choice of mediators assumes particular importance. BITs could refer disputes to a pre-selected public mediator trusted by the parties. As entities created by, but independent from states, international organizations can play a key role here. Of course, mediation is not the only remedy to the legitimacy crisis. It may well be necessary to define with more precision the scope of the substantive standards of protection and to create alternative procedural mechanisms, including the admissibility of counterclaims and an investment court system (ICS).

There was broad agreement that ADR can and should complement ISD arbitration, especially given rising tendencies of protectionism. The participants also agreed that what is called for is reform, not the abolishment of investment protection law. The latest trend in this debate, investor-state dispute settlement by a public international judicial body, has always formed part of the international checks and balances system in which governments and parliaments can be held accountable for their actions under the rule of law. Classical investment arbitration, on the other hand, seems to be in the defense currently. ADR, in particular if it docks in to international organizations, can open a space between the two poles of resolving disputes by adjudicating. One of the challenges in the future will

be to design the appropriate procedural rules (eg in the framework of UNCITRAL) and to smartly link the mediation to the subsequent arbitration process. Smartness in this sense also includes new approaches for how to make ADR an interesting business model for the legal community.