United Nations A/CN.9/734

General Assembly

Distr.: General
30 March 2011

Original: English

United Nations Commission on International Trade Law
Forty-fourth session
Vienna, 27 June-8 July 2011

Note by the Secretariat

Following consultations between the Secretariats of UNCITRAL and the United Nations Conference on Trade and Development (UNCTAD), a proposal has been received by the UNCITRAL secretariat from UNCTAD. Under Agenda item 7 (Arbitration and Conciliation), the Commission may wish to consider steps that may need to be taken to foster the use of mediation in the context of investor-State dispute settlements. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

V.11-81791 (E) 310311 010411

Annex

Proposal by the United Nations Conference on Trade and Development (UNCTAD)

Strengthening awareness and use of alternative dispute resolution methods in the settlement of investment disputes

Provisions on investor-State dispute settlement (ISDS) are enshrined in almost all contemporary international investment agreements (IIAs) aiming at the protection of foreign investors, whose total number exceeds 3.500.[1] ISDS provisions usually provide different forums through which foreign investors can pursue claims against a host State resulting from an investment dispute. The main option offered by those treaties is international arbitration, either administered by an institution (generally ICSID) or an ad hoc arbitration under UNCITRAL Arbitration Rules.

International arbitration has long been seen as the optimal way to address and resolve disputes between investors and States. It was meant to depoliticize investment disputes, assures adjudicative neutrality and independence, and was often perceived as a swift, cheap, flexible and familiar procedure. It further assures that awards are enforceable either directly or through the host States' domestic courts.

However, there are several disadvantages that come with international arbitration which could potentially reduce the benefits that countries intend when concluding IIAs. An important source of these disadvantages is the special nature of international investment arbitration, involving a sovereign as a defendant and challenging acts and measures taken by a sovereign State in the pursuit of public policy. Another peculiarity is that the nature of the relationship between the investor and the State involves a long-term engagement; hence a dispute resolved by international arbitration and resulting in an award of damages will generally lead to a severance of this link.

Moreover, the financial amounts at stake in investor-State disputes are often very high. Resulting from these unique attributes, the disadvantages of international investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ISDS cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a long-lasting relationship between the parties.

In recent years there has been an increasing interest in the possibility of using alternative methods for managing disputes effectively including: direct negotiation between investors and States, the use of an ombuds-office or lead government

[1] At the end of 2009, the IIA universe consisted of a total of 2,750 Bilateral Investment Treaties and 295 other IIAs. (UNCTAD, WIR 2010b, p.81.)

agencies, mediation, formalized conciliation, dispute resolution boards, early neutral evaluation, or fact-finding (UNCTAD 2010).

Given these perceived disadvantages, coupled with the realization that the amount of investor-State disputes has increased dramatically in recent years[2] (UNCTAD 2010 and *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, forthcoming), the UNCTAD secretariat has started to explore methods of alternative dispute resolution that seek to resolve existing disputes through negotiation or amicable settlement such as international conciliation or mediation.

The UNCITRAL Conciliation Rules of 1980[3] contain a set of rules to be applied by agreement of the parties, to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute. On the other hand, the UNCITRAL Model Law on International Commercial Conciliation of 2002,[4] which provides uniform rules in respect of the conciliation process, uses a broad notion of the term "conciliation" for referring to proceedings in which a third person or a panel of persons ("the conciliator") assists the parties in their attempt to reach an amicable settlement of their dispute. Conciliation, mediation and expressions of similar import are thus used unchangeably under the UNCITRAL Model Law on International Commercial Conciliation. The distinctive issue is the involvement of a third person who has not the authority to impose upon the parties a solution to the dispute.

The effective recourse to mediation or conciliation as part of investor-State dispute settlement mechanisms may improve efficiency of the dispute resolution and may have several advantages:

More flexibility. The first advantage of this alternative approach is the flexibility it may provide. Parties create their own process and work on their own agreement. They may discuss legal but also non-legal issues, and find the most convenient solution for both. As the procedure is tailored to the needs and concerns of the parties, it may be faster and less costly.

The use of mediation and conciliation within an arbitral proceeding can be introduced at any stage, even while an arbitration procedure is ongoing, depending on the parties consent and can be terminated as soon as the parties show their unwillingness to continue with the negotiations.

Less cost and time consuming. Mediation and conciliation are also faster, less expensive and less time and resources consuming. The increase of the speed of the dispute resolution causes decreasing on costs. However, mediation/conciliation could also be considered as a waste of time and funds if it is not conducted successfully nor an amicable settlement achieved.

Possibility to find a satisfactory and amicable settlement. Parties negotiate their own settlement with the facilitation of a neutral. The outcome reached and the results are more satisfactory than in the case of an imposed solution.

---

[2] At the end of 2010, there were a total of 390 known disputes. (UNCTAD 2011, p. 2.)

[3] Resolution 35/52 of 4 December 1980 adopted by the General Assembly.

[4] Adopted by UNCITRAL on 24 June 2002 and contained as annex of the General Assembly resolution 57/18 of 19 November 2002.

This permits investors and States to continue their working relationship, while simultaneously improving good governance and States' regulatory practices (UNCTAD 2010).

Parties make effective use of the "cooling-off" or amicable settlement period included in IIAs, usually a limited time frame for consultation that in practice has been used by parties with various degrees of success and analysed in different manners by arbitral tribunals (UNCTAD 2010).

Parties do not waive their right to resort to other forms of dispute resolution. Mediation/conciliation take place without prejudice to the right of the parties seeking an adjudicative method for dispute resolution.

Mediation/conciliation are confidential. Mediators/Conciliators cannot disclose — not even through discovery or compulsory process — any information concerning the mediation unless it is agreed by the parties.

Good governance. Finally, alternative approaches can improve good governance and other regulatory practices of States.

Nevertheless, there are also challenges to the use of alternative approaches. Mediation/conciliation are generally not binding to the parties. This may discourage parties to use mediation/conciliation and be viewed by parties as a waste of time and costs rather than a value-added in the settlement of the dispute. However, mediation/conciliation within an arbitral proceeding has the advantage that the settlement reached by the parties is embodied in the award and therefore, it becomes binding and enforceable.

Another problem is that parties often lack familiarity and experience with the rationale, the background and techniques involved in mediation/conciliation. In addition, alternative approaches may not be suitable for all types of investment disputes. States with their unique attributes as parties to a dispute may face specific difficulties in using alternative approaches effectively. For example, their flexibility in finding compromise solutions is limited by the boundaries established through existing laws and regulations. Similarly, government officials may not be given the necessary authority and powers to use alternative approaches effectively.

Overall, mediation/conciliation as alternative approaches to international arbitration under investment treaties can offer a promising alternative to the settlement of investment disputes through international arbitration, and hence various actors should be encouraged to give these methods further consideration. It is therefore suggested to join efforts between the UNCITRAL and UNCTAD secretariats to create awareness among the community of States, investors, legal practitioners, arbitration and international organizations about mediation/conciliation as an alternative approach to investor-State dispute resolution that would complement sustainable and responsible investment that works for development.

References

United Nations Conference on Trade and Development (UNCTAD) (2011). *IIA Issues Note No. 1 (2011)*: Latest Developments in Investor-State. Available at http://www.unctad.org/en/docs//webdiaeia20113_en.pdf.

_____(Forthcoming). *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, unedited version.

_____(2010). *Investor-State Disputes: Prevention and Alternatives to Arbitration* (New York and Geneva: United Nations), United Nations Publication, Sales No. E.10.II.D.11. Available at: http://www.unctad.org/en/docs/diaeia200911_en.pdf.

_____(2010 b). *World Investment Report 2010. Investing in a Low-carbon Economy* (New York and Geneva: United Nations), United Nations Publication, Sales No. E.10.II.D.2. Available at: http://www.unctad.org/en/docs/wir2010_en.pdf.

_____(2009). *IIA Monitor No. 3 (2009): Recent developments in international investment agreements (2008-June 2009)*. Available at: http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.