

Settlement of investment disputes and the ICSID convention: An Ethiopian Experience

BY

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1. Introduction

Many people question me why I am interested in the perplexing issue of settlement disputes. The first spark for this paper came from annual conference I attended at the Ethiopian Economics association and the course that I took in international commercial arbitration conducted by DLA piper in collaboration with the faculty of Law, Addis Ababa University. At the conference different research paper were presented but the one that arrested my attention was that of foreign direct investment (FDI). It was reported, though developing countries have become willing to offer numerous financial and non financial privilege o multinational corporation (MNCs) to attract FDI, investment flow was not as desired by the government of developing countries. In the years between 1989-2000, two regions Asia and Latin America and the Caribbean captured 95.2% of FDI, Africa 7.5 % of the Pacific region 4.8% and Ethiopian's share it was confirmed to be much less than less than 0.5%.

The failure to attract more foreign investors could be lack of conducive political and legal environment among the legion other factors. From my reading of texts pertaining to investment. I discovered the prevalence legal lacuna relating to resolution of investment; I discovered the prevalence of legal lacuna relating to resolution of investment disputes at international level in the case of Ethiopia .I tried to find if there is an international center to solve this type of problem. The international center for settlement of investment Dispute (ICSID) at Washington and the permanent court Arbitration (PCA) at The Hague happened to be the ones long established to undertake such a responsibility. ICSID in particular happened to be the forum extensively used by host and home states to resolve dispute arising from investments, Ethiopian signed the ICSID Convention in 1965 to

make use of the forum, as yet, she has not ratified the convention present no lawyers or legal scholars have adequate knowledge of the conversation let alone apply it.

It has been reported on several occasions that foreign investors lack the confidence in the fairness, impartiality and competence of the judicial system of host states. Thus, they prefer to settle their disputes at international forum instead of opting to submit their cases to national tribunals of host states. On the other hand, host states like Ethiopia neither have the willingness to be adjudicated at international forum for myriad reasons-financial difficulties, lack of experience to handle investment disputes at international forums, variation of language and problems of geographic distance and so on. Above all host states consider as relinquishing their right of sovereignty if they consent to submit to forums like ICSID.

Latin American countries, which used to advocate for the Calvo Doctrine as well as Asian countries like Vietnam and china, which used to shun FDI in the past have today opened up their doors to FDI. African countries like Tanzania that used to propagate the policy of “self reliance” have now changed their policy and created legal regimes that attract FDI. They have all signed and ratified the ICSID convention and the flow of investment has tremendously increased. Because of this, China ,Brazil, India, Russia and Indonesia are today some of the leading investment recipient countries in the world.

As a lawyer, I presumed, the judicial system of Ethiopia lacking the capacity to cope with the complexity of present day investment disputes might have affected the flow of FDI to Ethiopia. Added this, the fact that Ethiopia has not ratified the convention, it seems that discouraged potential investors to risk investing in Ethiopia as earnestly.

Efforts underway in the resolution of investment disputes

No matter how conducive the atmosphere the atmosphere is for investment occurrence of dispute is inevitable at one point in time. Different countries apply different mechanisms to resolve the disputes stemming from investment. The World Bank (WB) is one of the

international organizations playing the major role in facilitating investment of capital for productive purposes and describes the promotion of foreign investment as so of its chief objective .As a financial intermediary between its capital importing and capital exporting members, the bank has an institutional interest in promoting the settlement of investment disputes. An unresolved investment dispute involving one of its borrowing members can jeopardize the eventually might affect the bank's own access to capital markets. The settlement of investment disputes in smooth and orderly manner can assist the bank in its borrowing and therefore, in its lending operation.

Resorting to the bank or its president (exercising the power to appoint arbitration within the context of ICSID convention and disputes relating to investment where one of the parties is not a member of ICSID has proved to be a cost effective and highly efficient means of settling international arbitration, the expense involved for the parties have been minimal/Through this procedure, parties have benefited a lot from the vast experience at the bank and diversity of its staff both which facilitated the reaching of satisfactory settlement in a relatively short period of time.

2. Background of ICSIS

Though the bank and its president have taken prominent position in the settlement of investment disputes, eruption of disputes in connection with investment was not brought to a halt. The president then decided to transfer the role of the bank in settlement of investment disputes to some other international body. Accordingly, the ICSID convention was formulated for settlement of investment disputes between states and nationals of other states.

The convention was signed in 1965 but ratified by 20 states in 1966. As of Nov, 2008 a total of 155 states have signed it but 143 have ratified it. Ethiopia is one of those 12 countries, which has signed but not ratified the convention. Bolivia on the contrary has renounced its membership to the convention just recently. Switzerland but not being a member of the WB have signed and ratified the convention.

Features of ICSID

- The convention suspends the right of diplomatic protection that states traditionally are allowed to exercise to protect the right and interest of their citizens. Its desire is to depoliticize investment disputes and promote an atmosphere of mutual confidence between states and foreign investors favorable to increasing the flow of recourse (investment) to developing countries.
- Each state is free to join ICSID convention. Signing and ratifying the ICSID convention do not create an obligation to use the ICSID forum. States have also the right to make some cases non-arbitrate and notify the center to that effect.
- The rules applicable to ICSID proceedings are relatively flexible compared to other conventions. This is evident when seen from the point of view of number of arbitrator and their selection.
- The ICSID award could be executed against the assets of the states party to the dispute.
- The convention empowers the foreign investors himself to institute proceeding against the host state.
- It provides for enforcement of the award by deeming the award a having the force of high court of each state to the convention.
- A losing party to dispute in most of the time volunteers to execute the judgment of the center with the hope that it doesn't strain its relationship with the WB. ICSID being an affiliate of the WB, refusing to execute the judgment of the center could jeopardize the chance to get a loans easily as those states which show cooperation.
- The place of arbitration can be any place convenient to the contracting state parties other than such places, which ICSID has made prior arrangements.
- The convention does not oblige the investor to exhaust domestic remedies before restoring to ICSID forum.

- Disputing parties may make choice of applicable laws and even opt to resolve their disputes by the use of ad hoc arbitral tribunal other than the center.
- A party dissatisfied by the award by the arbitral tribunal may seek review addresses to the Secretary General of ICSID.

Signing of Bilateral Investment Treaties (BITs)

Bilateral investment treaties are signed between sovereign states with the shared belief that they will result in uninterrupted in flow of FDI. Hoping to attract a steady stream of FDI, states surrender the exercise of their inherent sovereign rights of statehood. Unfortunately many of the capital exporting (home states) are not highly enthusiastic to investment in countries like that of ours which has not ratified ICSID Convention. Of course countries like Canada, Brazil and Malaysia too have not even signed the ICSIDC. Ethiopia by no means can claim competitive in factors that attract FDI with countries like Canada, Brazil or Malaysia.

Germany signed BITs with several non-European countries after 1959 with the firm believe that she would attract FDI. Ethiopia too has signed BITs with 13 countries. She signed her first BITs are signed between different states but they have not served as a guarantee for the smooth flow of FDI.

Though, Ethiopia has started signing BITs with countries having more historical and economic connection than others, she has not managed to attract FDI as desired for different reasons.

3. Conclusion

The contribution of FDI to the national economy of a country is positively perceived nowadays. Very few people still doubt that FDI provides access to capital, technology and know-how to host states. In the past, several countries, including Ethiopia and Latin America uniformly stayed away from the ICSID convention. The picture has changed since the 1990s. Most countries in Latin America have now ratified the convention, but important countries including Brazil and Mexico still have not signed the convention. From North America, a member of the G7, Canada, is also not a member of ICSID convention. It took around 10 years for member solution to investment disputes. The first case was decided in 1974. The slow start should not obscure ICSID's considerable importance as institution of this kind must go a maturing stage.

Now the number of registered cases at ICSID has made tremendous increase even though the writer could not find a single investment case in which Ethiopia is either a Claimant or Respondent at the center. It is believed adherences to the convention by country would provide additional inducement and simulate a large flow of prevent international investment into the territories of the host country which is a primary purpose of the convention. Compared to ad hoc arbitration, the ICSID convention offers considerable advantages. It offers a system for disputes settlement that contains not only rules of procedure but also institutional support for the conduct for proceeding. It assures the non-frustration of proceeding and provide for an award's recognition and enforcement. Under ICSID convention proceeding may be initiated by an individual investor as a claimant. The possibility of going to investment decision. From he point of view of the host stste, opting to settle disputes by arbitration by itself improves its investment climate and is likely to attract more international investments. In addition, by consenting to ICSID arbitration, it also guards itself against diplomatic protection by the home state of the investor.

4. Recommendations

- It appears Ethiopia has not recognized the advantage of international arbitration particularly the ICSID forum. Many of the techniques applied by the center are novel ones when compared to the hitherto forum of dispute resolution. It is believed the institutional support and the effectiveness of the execution of the award of the center among its member states would encourage the flow of FDI in the territory of the host country. However, many countries still retain a defeatist view. They believe that international arbitration favors foreign investors. The experiences over the past 2 years have shown that even poor countries are able to use the process successfully. Countries like Madagascar, Guinea, Gabon, Congo, Senegal, Liberia etc from Africa, and Jamaica from the Caribbean have defended themselves at the center repeatedly. They have now acquired adequate experience in handling investment dispute at international judicial forum. Foreign investors have developed confidence that in the event of dispute, the law of their choice would prevail in these countries. That could be one reason why the level of FDI flow in these countries remained much higher than that of Ethiopia can not give it a try to settle investment disputes at an international forum if the above cited Africa and Caribbean countries are able to do so. Hence, it is high time that Ethiopia give due consideration to ratify the ICSID convention.
- The competence of developing countries to manage dispute of this nature and the cost of defending such claims may appear daunting for a poor country like Ethiopia. Nevertheless, the fact the total cost of the ICSID secretariat is covered by the WB and the other institutional support the WB render to the center, I believe, would make the cost modest or not expensive. If parties to the dispute fix strict time table for pleading and answer and adhere to the schedule, the cost would also not be worrisome. What really matters is the ability, to effectively manage the case not the cost as such. By submitting to ICSID disputing parties particularly, Ethiopia would benefit from the specialized service the center is bestowed with setting of investment disputes.
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- The fear that the arbitration lacks well trained and experienced lawyers that could leads to inferior quality of justice won't be a point of concern as parties or the secretary general appoints arbitrators who are well qualified and experienced in handling investment disputes. In fact a better quality of justice can be obtained as the arbitrators specialized in the sector.

Amending ICSID Annulment procedure

Ethiopia's reluctance to ratify the convention could be attributed to the initially unattractive annulment procedure of ICSID. The annulment procedure of ICSID needs some amendment. The current practice has provide time consuming. As indicated earlier, the case between AMCO V. Indonesia, for instance, took over ten years to be terminated. In like manner, the case between Klockner industries V. Cameron last for 9 years, thus, the need to establish an appeal procedure where a party disappointed can make a dingle request of review and the decision of the appellate body stand binding and not appealable any more.

- ❖ The secretary general of ICSID is empowered to reject a request made by claimant on grounds set under Art 36 of the convention and Art.2 (2) institution rule. But this can be abused. The convention doses not carry a mechanism to control such kind of abuse of authority. Hence, the needs to put in place a regulatory provision to check upon the possible abuse of power by the secretary general in this regard.
- ❖ Until now, the absence of huge investment that can make impact in the national economy did not compel Ethiopia to ratify the time to ratify the convention so that foreign inventors develop the confidence and invest more than before. Ratifying the convention does not by itself create the obligation to use the forum.
- ❖ ICSID awards have high degree of authority for enforcement. The world Bank itself would exercise moral persuasion Hence, it would be politically suicide for a poor country like Ethiopia to disregard an ICSID award when a

central tenet of her investment law is that disputes are to be settled in the neutral international forum. In the event of enforcement, I would like to recommend the enforcement be made at any place where the property of the debtors is found not only in the host country or the country which is signatory to the NY convention.

- ❖ Cost and expense shall be borne by the losing party to the arbitration instead of each party bearing its costs and expense. This I am sure would discourage parties who initiate unfounded cases against investors.
- ❖ The judicial system of Ethiopia seems lacking the capacity to cope with the complexity of investment disputes and more affecting the image of Ethiopia in the eye of potential foreign investors. Hence, the need to expedite the legal reform project, train legal profession in the area of international arbitration and let judicial organs operate independent of influence of political parties or governmental interference. Improving the legal environment could boost confidence of foreign investors and also serve as legal security in the event of dispute.
- ❖ There is a trend of resistance from some developed countries and MNCs to the establishment of any mechanism of supervision or monitoring to compliance or dispute settlement mechanism. These bodies do not want to see codes carrying sanctions coming into effect. This is a contradiction with their initial stand. Now they prefer to deal with each state separately. This way, they know that they can benefit more than submitting to forums applying multilateral treaty rules. Ethiopia shall make effort to challenge such kind of approach of the developed countries and MNCs to protect her interest.

Establishing Addis Ababa as a Permanent center of International Arbitration

A national strategy to encourage investment flow into Ethiopia must build on the positive elements. The fact that Addis Ababa is presently a capital city hosting the head quarter of the AU, the ECA and many other international organizations creates a positive image to establish Addis Ababa as the permanent center for international arbitration for East and

southern Africa now that Cairo is serving as the center for international arbitration for north Africa and the meditation countrie