

DISPUTE RESOLUTION AND DEVELOPMENT

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Summary

Dispute resolution in connection with the modern world of development law is as variegated and complex as the concept of development itself. It is no longer limited to disputes about expropriation or the cancellation of concessions or development agreements. It includes both disputes between governments and between international organizations and governments as well as between governments and individuals.

A wide range of tribunals can become involved in these controversies although there continue to be situations in which no remedy is available due to such doctrines as sovereign immunity.

Representing parties involved in these controversies is a challenging and difficult task that requires flexibility and imagination.

1. Introduction

According to tradition the topic of dispute resolution in development would largely be about controversies involving foreign direct investment in developing countries. And that is still the major focus despite the fact that the topic logically would include other disputes including those between governments about policies by one government that have an impact on development in another, as well as controversies strictly internal to the developing country. In the first category one would include disputes about the performance by a company in regard to a contract to improve or expand the infrastructure of a country (or conversely the failure of the country to perform its part of the bargain). In the second category one would find disputes between a developed and a developing state about who should bear the burden of reducing emissions that contribute to global warming. It would also include disputes between the International Monetary Fund and a state about the terms of “conditionality” imposed upon the state in connection with its seeking IMF assistance. Or it might be a dispute between environmentalists and industrialists about the side effects of a dam project being financed by the World Bank. In general, disputes in the second category are handled at a political/diplomatic level and not with procedures we think of as Alternative Dispute Resolution (ADR). For example, issues about the distribution of the burdens of a campaign to mitigate global warming as between developed and developing countries were negotiated in the conference at Rio de Janeiro. But a question about the conflict between the dolphin-friendly policies of a tuna importing country and the economics of the fishing practices of a developing country might come before the World Trade Organization. Thus the emphasis in this article will be on private to state controversies, with some attention to intergovernmental disputes.

This article will also exclude controversies that are internal within developing countries, that is, between private parties or between the government and private parties, even though they arise out of the state’s development policies. It will also exclude routine economic transactions even though they have some impact on a state’s development and will focus on transactions that are intended to promote the nation’s economic growth as by improving its infrastructure, that is, developing its capital assets.

Although it is asserted that there is a right to development under international law, it is impossible to find concrete recognition of such a general claim by the states which would be treated as subject to a duty to assist development. In particular it is hard to find recognition firm enough to support formal dispute resolution on that basis. Instead, there is a whole array of rules which are intended to support development such as the WTO rules providing for preferences for imports from developing countries, rules about lending by the World Bank and so forth. There are also cases in which development needs have placed limits on rules that are otherwise generally applicable such as those calling for security of property interests and contract rights. There is also a certain amount of “soft law” relating to development such as guidelines emanating from the OECD, UNCTAD or the UN General Assembly which can be drawn upon in interpreting legal or contractual provisions and may contribute to customary international law. It is these disparate rules that create the materials upon which these dispute resolution mechanisms we here consider operate.

After a historical introduction this article will consider in turn each of the major venues

which represent possible resorts for dispute resolution. There will then be a review of the different bodies of law which might be made applicable. Then there will be a review of important procedural elements of development dispute resolution. This article attempts to provide a broad overview of this many-faceted subject that should be useful even for lawyers who are active in some corner of the international economic field. There are lawyers who deal with problems of the petroleum industry, lawyers who are familiar with the drafting and administration of construction contracts and lawyers who deal regularly with loans to developing countries. There are also lawyers who specialize in practice before international tribunals. But it is hard to imagine a lawyer who is familiar with all aspects of law and development. Accordingly, the article dispenses with much of the detail and documentation that characterize (and sometimes disfigure) writing for specialized lawyers.

2. History

The nineteenth century saw the initiation of a series of what we would now call dispute resolution episodes involving development questions. These arose out of actions by states, chiefly in Latin America, we would now describe as developing. They involved taking of the property of foreign investors or cancellation of claimed contract obligations, such as bonds denominated in external currencies, towards them. The home countries of investors developed the habit of entering the controversy on their nationals' behalf, sometimes resorting to the use of force to back their contentions. A classic case was the European intervention in Mexico that brought Emperor Maximilian briefly to the throne. As a matter of substance the investor countries took the position that customary international law had developed a rule that a state could not take the property of foreigners without providing compensation that was prompt, adequate and effective. For Americans this was termed the "Hull Rule", after the Secretary of State who vigorously championed the rule against the objections of revolutionary Mexico. A state also had a duty to observe the engagements it had entered into with foreign investors in agreements then generally termed "concession agreements", a term that became unpopular as developing nations became more assertive of their equal sovereignty. There was consistent resistance to this view, particularly in Latin America. That resistance gained strength when Communist regimes came to power in Russia and other countries. As new states entered the world community as a result of de-colonization after 1945 they aligned themselves with the South American position. That movement reached a peak with the oil crisis of 1973 which gave a sense of empowerment to resource-rich developing countries. This resulted in a series of resolutions by the United Nations General Assembly, notably the Charter of Economic Rights and Responsibilities which repudiated the pro-investor rule. The 1980s and 1990s have seen more efforts to accommodate the doctrines and interests of capital importing and capital exporting countries. The proliferation of bilateral investment treaties and the near success of an attempt to agree on a multilateral investment agreement testify to a softening of confrontations.

Gradually the practice developed of referring these matters of controversy between the first world and the third world. to arbitration, generally before a panel appointed to resolve either a particular claim or a series of claims involving a state and the citizens of another. Conspicuous examples were the commissions that disposed of claims arising out of upheavals in Venezuela (1880s), Mexico (from 1912) and, still incomplete, the

Iranian revolution (1970s).

Although this seemed to be more peaceful and more neutral than simple political pressure this arbitration process generated lasting feelings of resentment on the part of countries that were respondents before such tribunals. It was felt that such procedures denigrated national independence and that the personnel of such tribunals tended to be tilted in pro-investor directions. In Latin America there was widespread support for the Calvo Doctrine that precluded investors from resorting to their home countries in such disputes and limited foreigners' claims to a right of national treatment, i.e., equality with the rights of citizens. Inclusion in investment agreements of Calvo Clauses expressing such limitations became quite general. Latin American states also supported the Drago doctrine precluding the use of force in the context of contract questions, a doctrine that was embodied in one of the agreements that emerged from the Hague peace conference of 1907. These nineteenth century experiences contributed to the growth of international arbitration but they caused lingering suspicion of non-national dispute resolution in developing countries, particularly in Latin America.

3. Venues for Dispute Resolution

3.1. The International Court of Justice

One might expect that premier institution of dispute resolution at the international level, the International Court of Justice, to play a central role in our topic. In fact there are institutional obstacles that regularly prevent this from being the case. We find that there is really only one case that more or less fulfills our criteria. In *Eletronica Sicula S.pA (ELSI) United States v. Italy*, the USA was championing a claim of its corporation, Raytheon, against Italy. To be sure, Italy is not a developing country but the project in question was located in Sicily, a region which Italy itself favors in economic terms because its development lags so far behind the rest of the country. Raytheon's efforts to manufacture electronic components in Palermo ended in financial disaster and it was determined to liquidate its Italian subsidiary. The ensuing bankruptcy proceedings encountered interference by Italian government authorities and proved disappointing to Raytheon. After exhausting its appeals within the Italian legal system Raytheon sought the aid of the USA, which began proceedings against Italy in the World Court, relying on provisions of the Treaty of Friendship, Commerce and Navigation between the two countries. It claimed that Italy had interfered with Raytheon's right, guaranteed by treaty, to control its subsidiary but did not prevail on the merits. The case illustrates a number of aspects that make the World Court unattractive for the settlement of disputes of this category. The Court had jurisdiction only due to the chance that there was a treaty between USA and Italy that consented to such jurisdiction. The claimant had to deal with questions of exhaustion of remedies and had to permit government lawyers to take charge of presentation of the case.

3.2. The International Centre for the Settlement of Investment Disputes

ICSID plays a central role in the disposition of disputes between private parties and developing countries. That is hardly surprising given the fact that it was specially designed to meet that requirement. Established under the aegis of the International Bank for Reconstruction and Development in 1966, ICSID is available in cases where the

government involved has (a) consented to the jurisdiction of ICSID in general and (b) has consented by contract or by general legislation to jurisdiction with regard to the particular claimant. The agreement avoids some of the traditional principles of foreign investment adjudication. It is open to individuals and firms without regard to the espousal of their claims by their home governments. In fact parties are not free to involve their home state in pending disputes and have to remain content with ICSID remedies.

As of 2003, 129 cases had been brought before ICSID and 63 were pending. There was a brief period in the 1980s when the controversial action of ICSID in referring two cases that had been decided by three member panels to another ad hoc committee for further review shook the confidence of some in the ICSID process. That has not happened again and the steady flow of cases to ICSID seems to indicate that many parties repose confidence in the institution. While ICSID provides for conciliation as well as adjudication in fact only two cases have been processed as conciliation. The subject matter of the controversies brought before ICSID varies widely and differs from the old subject matter of cases in which the investor charges expropriation by the government and the government defends its actions as being justified or as not being expropriation at all. There are cases in which the origin is clearly the government's dissatisfaction with the work being done by the foreign contractor. That dissatisfaction may or may not have been justifiable. Sometimes it is rather simply a matter of a government, usually in dire financial straits, not meeting its obligations under the agreement.

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