BILATERAL INVESTMENT TREATISE (BITS) & BILATERAL ARBITRATION TREATISE (BATS): AN ANALYSIS OF THE TWO REGIME

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INTRODUCTION

One of the most well-known individuals in the world for international commercial arbitration, Gary Born, has introduced a very novel proposal to the arbitration table. He recommended adopting the concept of bilateral treaties—known as "Bilateral Arbitration Treaties"—into the framework of international commercial arbitration in a recent series of presentations titled "BITs, BATs, and BUTs: Reflections on International Arbitration" (BATs). His plan calls for two governments to enter into a bilateral agreement that would legally mandate international commercial arbitration (ICA) as the default dispute resolution method for any commercial disputes involving corporate entities from these two states. These BATs would operate in an "opt-out" manner, allowing the parties to negotiate against the operation of the treaty if they so choose. He envisions a minimalistic framework provided within the text of the treaty that is optimally limited to the choice of Arbitral Institution Rules, which would then naturally become a part of the treaty itself, similar to an ordinary arbitration agreement. The Arbitral Institution Rules (preferably the UNCITRAL Rules), in his opinion, are self-sufficient for dealing with the "uncertainties" of the process of international commercial arbitration – the seat, the choice of law, the arbitral tribunal et al. Given that multinational entities across the globe are increasingly choosing ICA as the favoured mode of dispute resolution in international business contracts, this proposal will, in all probability, gain traction over time. Recently, a model BAT was even released for public comment.[1]

[1] Gary Born and Wilmer Cutler Pickering Hake and Dorr LLP, 'Model Bilateral Arbitration Treaty Released for Public Comment' (Kluwer Arbitration Blog, 13 March 2015) http://kluwerarbitrationblog.com/blog/2015/03/13/model-bilateral-arbitration-treaty-released-for-public-comment/

Consent in Investment Arbitration and Bits

Investment arbitration, like other types of arbitration, is frequently founded on the investor's and the host state's permission. There are several oddities, nevertheless, that demand notice. In investment arbitration, permission can be given in one of three ways.

1. A standard consent provision in a contract between the parties. To make the creation of consent clauses easier, ICSID has created Model Clauses.[2] (contract based investment arbitration)

2. A clause in the host State's national legislation. The first time a unilateral arbitration provision was upheld was in the *SPP v. Egypt case*[3]. Egypt's foreign investment statute, which featured an "open invitation to arbitrate," contained Egypt's assent to ICSID arbitration.

3. An agreement between the investor's nation and the host nation. The majority of BITs include provisions that provide arbitration as a means of resolving disputes. Asian Agricultural Products Ltd (AAPL) v. Sri Lanka[4] a case brought under the investor-state arbitration clause of the Sri Lanka-UK BIT, was the first to recognise and uphold treaty-based consent. This is referred to as "arbitration without privity" by Jan Paulsson.[5]

AN ANALYSIS OF MODEL TEXT OF THE 'BILATERAL ARBITRATION TREATY'

Gary Born has proposed that the states enter into a Bilateral Arbitration Treaty (BAT) establishing arbitration as the default mechanism to resolve disputes arising from any "international commercial dispute" between citizens or entities located in the territory of each contracting state, drawing on the concept of BITs and the manifestation of consent ('constructive consent'). However, the parties will have the option to choose national courts over arbitration if they so want.

The Model BAT's concept of "International Commercial Dispute" is based on the UNCITRAL Model Law on International Commercial Arbitration's interpretation of the term "commercial"

[2] ICSID Model Clauses available at https://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm
[3] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3
[4] Asian Agricultural Products Ltd (AAPL) v. Sri Lanka ICSID Case No. ARB/87/3
[5] A Supra 1

in Article I (1), note 2.[6] Consumer conflicts, job or labour problems, domestic issues, child custody and marital disputes, as well as inheritance disputes, have all been specifically left out of the term. This rule would also apply to claims based on torts connected to a business relationship.

The definition of "Enterprise" in the treaty establishes the boundaries of its applicability. It refers to any legal or juridical entity created or organised for profit, including corporations, companies, partnerships, limited liability partnerships, trusts, sole proprietorships, joint ventures, associations, or other similar entities, whether owned by private individuals, businesses owned by the government or the private sector, or by state or federal bodies or entities. This term was taken directly from the U.S. Model BIT of 2012. It should be highlighted that the model definition does not include people or natural persons. The States are free to decide how to handle this.

The Model BAT Text uses the UNCITRAL Arbitration Rules, which were initially approved in 1976 and then modified in 2010 and 2013. The States are, however, allowed to enact additional institutional arbitration norms.

According to Article 4, the Permanent Court of Arbitration's Secretary-General will be responsible for appointing arbitrators. Unless the Permanent Court of Arbitration's Secretary-General determines that three arbitrators are necessary under unusual circumstances, there will only be one arbitrator. This differs from the UNCITRAL Arbitration Rules, which provide that there should be three arbitrators by default. Within 18 months after its formation, the arbitral tribunal is required to provide a binding decision. This commitment, however, is one of "best endeavours." This achieves the ideal balance between the requirement to establish a deadline in theory and the challenge of establishing a rigid deadline that applies to all forms of conflicts. A comparison of the efforts a reasonable person of the same sort would have made in identical circumstances should be used to judge if this responsibility of best efforts was not met.[7]

One of the most important lessons learned from Investment Arbitration is of confidentiality.

[6] UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
[7] Duarte Gorjão Henriqueson , Bilateral Arbitration Treaties: A Few “Bits” More And No “Buts” Within The Portuguese Jurisdiction available at http://kluwerarbitrationblog.com/2014/04/14/bilateral-arbitration-treaties-a-few-bits-more-and-no-buts-within-the-portuguese-jurisdiction/

A model procedural rule on confidentiality in international arbitration has long been favoured by many. Among them, Michael Hwang[8] has been the most outspoken. In *Giovanna A Beccara and Others v. The Argentine Republic (2010),* a tribunal composed of *Pierre Tercier, Georges Abi – Saab, and Albert Jan Van den Berg* decided that unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the questions of confidentiality in ICSID Arbitrations should be decided on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, the endeavour should be to try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

The Model BAT has tried to overcome this problem by providing that absent contrary agreement between the Enterprises party to the dispute, the arbitrations conducted pursuant to the Treaty shall be confidential. This obligation includes the following materials-

1. All materials submitted in or created for the purpose of the arbitration;
2. All documents produced by another Enterprise in the arbitration, not otherwise in the public domain;
3. All awards, orders and other communications in the arbitration.

This duty of confidentiality is subject to the following exceptions-

1. legal duty;
2. To protect or pursue a legal right;
3. To enforce or challenge an award in bona fide legal proceedings before a Court or arbitral tribunal.

These exceptions are based on the LCIA and SIAC rules and reflect the international practice[9].

Enforcement of Arbitral Awards

By subjecting them to the New York Convention on Recognition and Execution of Foreign Arbitral Awards, Article 6 ensures the recognition and enforcement of awards rendered in

[8] "CONFIDENTIALITY OF ARBITRATION" LCIA INDIA NEWSLETTER (VOLUME 2, ISSUE 1, 2013)
[9] Ali Shipping Corporation v Shipyard Trogir [1997] EWCA Civ 3054)

accordance with the convention[10] The courts of the States parties to the Treaty are required by Article 6(1) to accept awards as final and binding and to enforce them in line with the Treaty. The New York Convention's Article III served as a model for this. Similar to Article III of the New York Convention, Article 6(2) states that no state shall impose on the recognition or enforcement of Arbitral Awards made pursuant to the Treaty materially more onerous requirements or higher fees or charges than applicable to New York Conventions or national court judgments[11]. The additional clauses are quite similar to those found in the New York Convention as well. Article V of the New York Convention is also the foundation for the reasons for rejection of recognition and enforcement.

CONCLUSION

It goes without saying that the concept of a bilateral arbitration treaty is unconventional and undermines the established principles of arbitration. It is unquestionably a concept that should not be abandoned, though. The mere fact that a daring or audacious invention violates established legal principles should not make one apprehensive of embracing it. One such instance is the accomplishment of BITs. It forced us to re-evaluate our core presumptions on the operation of international law. Law should not be inflexible or fixed since that would go against its essence. Although Born's proposal raises some theological issues, the arbitration community should make an effort to get over them because our main goal is to increase access to justice. A bilateral arbitration agreement would undoubtedly strengthen the global justice delivery system, particularly in India where there is a huge case backlog.

By specifying the monetary worth of the disputes that would be covered by the BAT, it is claimed that the state can go one step further and restrict the BAT's application. But for the time being, we don't need to worry about this.

It goes without saying that the concept of a bilateral arbitration treaty is unconventional and defies the established principles of arbitration. However, it is definitely not a concept that needs to be abandoned right now. The mere fact that an unconventional and daring invention violates established legal principles should not make one apprehensive of embracing it.

[10] See generally S. Malhotra, "ICSID Additional Facility (A Primer"), available at: http://wp.me/p55imx-1f
[11] Supra 11

References

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4. *G. Born, "BITS, Bats And Buts: Relections on International Dispute Resolution", (Young Arbitration Review Edition 13 April 2014.*
5. *Sarthak Malhotra, "BITS of BATs: Relections on Investor State Dispute Settlement".*
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