Overview of Dispute Resolution Mechanisms in International Treaties

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International Treaties and Dispute Settlement Mechanisms

- International treaties (bilateral or multilateral) may provide for various forms of dispute settlement mechanisms:
    - Establishment of permanent, *ad hoc* tribunals or special dispute resolution process
    - Establishment of jurisdiction of international courts or tribunals
    - Consent to arbitration
    - Negotiation
- The nature of a treaty may determine the nature of dispute resolution mechanism.
- It is, however, possible that a treaty may not provide any dispute resolution mechanism.
- In case of bilateral investment treaties dealing with investor state dispute resolution process, they often create "arbitration without privity".

Relevant Issues

- Significance of consent to international adjudication and jurisdiction.
- Distinction between jurisdiction and admissibility.
- The choice of law process in international adjudication.
- Institutional character of international courts and tribunals.
- Distiction between challenge, recognition and enforcement, and appeal of decisions.
- The interrelationship between international arbitral tribunals and municipal courts.

Jurisdiction

- Consent is the basis of jurisdiction
- Consent to the membership of an organization v. consent to adjudication.
- Unlike in case of Rome Statute and WTO, consent to the membership of an organization do not necessarily mean consent to adjudication. (Example, The ICJ, ICSID, ITLOS)
- Jurisdiction of the ICJ.

Jurisdiction v. Admissibility

- Competence of a court or tribunal v. limitation in the cause of action (case)
- "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal" *Hochtief Aktiengesellschaft* v. *Argentine Republic,* ICSID Case No ARB/07/31
- Admissibility (maturity of dispute, nationality of claims, exhaustion of local remedy, contract claims as opposed to treaty claims, negotiation prior to formal dispute resolution, question of beneficial ownership of the claimant etc.)

The Choice of Law

- Characterization of legal issue/question

- Law applicable to substance, jurisdiction and admissibility, arbitrability, arbitration clause, procedure, capacity of parties.

- The doctrine of municipal laws as facts before international courts and tribunals

- International public policy

- Problems of treaty interpretation before international courts and tribunals

- Choice of law problems in investment treaty arbitration

Institutional character of international courts and tribunals

- Constitution of international courts and tribunals.

- Independence of international courts and tribunals.

- Access to international courts and tribunals: cost, expertise, familiarity, historical and philosophical legal background etc.

- Concerns of fairness and biasness.

- Growing call for Investor-State Dispute Settlement to end. Argument is it favors corporate bodies and investors and are undemocratic and non-transparent.

Challenge, Recognition and Enforcement, and Appeal of Decisions

- Limitation in challenge, recognition and enforcement, and appeal.
- International arbitration (ICSID v. Non-ICSID (New York Convention 1958))
- International Arbitral Tribunals and Municipal courts

Nepal's Experience

- Government entities have been regularly engaged in international arbitration.
- The government itself was engaged in ICSID arbitration in Axiata Case.
- Jurisdiction on the basis of derivative claim by shareholders.
- There is a growing principle and practical case against the traditional argument that ISDS is actually fair and therefore essential to attract foreign investment. This issue however has to be very carefully considered in our case after looking into our unique position.
- Credibility, independence and competence of municipal courts continues to remain significant.
- Challenges of parallel proceedings.

Thank You!