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Investigation of Investor-State Arbitration (ISA) Problems in Afghanistan

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Abstract

The main purpose of this research is to explain and identify the major Investor-State arbitration problems in Afghanistan. Afghanistan's government is committed to providing legal security for the resolution of foreign investment disputes. The dispute resolution system's assessment is very important for foreign investors because they pay special attention to the dispute resolution system and consider it a criterion for their investments. This research will be the first comprehensive study about the Investor-State Arbitration problems in Afghanistan. In the writing of this research, the library method has been used. To extract reasons, laws, books, articles, and reliable scientific sources have been used. Afghanistan is a good market for foreign investment because it has good investment opportunities in different sectors. Foreign investors can choose the easiest and best mechanisms, such as arbitration in their contracts to deal with disputes. But the resolution of foreign investment through arbitration has some problems, and sometimes foreign investors are facing challenges with the settlement of their disputes through arbitration internationally and domestically in Afghanistan.

Keywords: *Arbitration; Dispute; Foreign Investment; Investigation in Afghanistan; Problems*

1. Introduction

Today, one of the most significant economic issues in the economic development of countries, especially developing countries, play a significant role in foreign investment. Therefore, these countries compete with each other to attract more foreign investment. But the important point is that foreign investors, in choosing the place for their activity, look for a place that is safe and reliable. If there is no security for their capital and property, the possibility of attracting foreign investment is greatly reduced. (Ansari Mehyari & Raesy, 2018). Foreign investment leads to the transmission of capital and technology, access to the international market, development of employment and skills, and the creation of competition (Alisan, 2006).

The number of investments made always leads to disputes. There are three types of disputes that may arise: first, the dispute between two private persons of the investment parties, the second between two states called the home state and host state, and the third among the private foreign investors and the

host states. In the first and second disputes, due to the relative equality of the parties, equality in bargaining power, and negotiation in resolving disputes, there is not much problem, but in the third type, due to the inequality of power of the parties in resolving disputes, the investor seeks a solution in this situation (Afzali, 2020). With the existence of foreign investment, the dispute resolution system is also proposed (Yannaca-Small, 2006); Why? Because judicial systems are not transparent and more efficient in settling disputes and not meeting foreign investment requirements. The government of Afghanistan, in the new conditions and structure for development, requires foreign investment; in this regard, it must also provide the legal framework. One of the issues mentioned above is to provide an appropriate dispute resolution system for resolving foreign investment disputes between the government of Afghanistan and foreign investors.

Therefore, the purpose of this research will be to explain in detail the investor-state arbitration problems in Afghanistan to find solutions with the relevant national and international documents that are acceptable to foreign investors.

2. International Problems of the Investor-State Arbitration

Traditionally, Investor-State Arbitration (ISA) has been realized as the best and preferred mechanism for resolving international investment disputes that entail various advantages. However, day by day, the disadvantages or problems of international investment arbitration are increasing, and the mistrust of the parties of the dispute is getting more; they are discussing and saying the uncertainty and inefficiency of the system. Therefore, the following are the disadvantages or problems of the current mechanism of investment arbitration:

- There is no transparency and confidentiality of the awards during the arbitration proceeding;
- Lack of the expertise of the arbitrator(s);
- Lack of independence and neutrality of arbitrators;
- Consuming a lot of time until an arbitral award is rendered and spending huge amounts of money during the proceeding.

The investment arbitration is facing the legitimacy of the crisis and risking the final capability of ISA to receive its aims. In another way, the arbitration method in investment without the essential international legitimacy can't be an effective mechanism for settling the dispute between the host state and a foreign investor. Also, there is an understanding that some of the ISA institutions such as; UNCITRAL and ICSID are "in a situation of paralysis and fail to go outside the current status (Trakman, 2012). In this section, the above-mentioned problems of ISA will be discussed in detail;

2.1 Confidentiality and Lack of Transparency

There is an incredible connection between confidentiality and transparency. While the former has historically been used to choose arbitration in dispute resolution, the lack of transparency in all stages and the awards is one of the foreign investors' essential concerns. Confidentiality in commercial and investment arbitration has been justified because of the protection of the private interest. However, in international investment arbitration, the host states' public interest can also be considered, so the acceptance and validity of arbitration awards can be essential parts of the dispute resolution system. (Yannaca-Small, 2005). For this reason, the lack of awards' confidentiality and transparency during proceedings prevents the improvement of a relevant and consistent legal doctrine that can increase the ability of the performance of the tribunal and the quality of its argument in the award (Franck, 2008). If the treatment of cases is similar to the same method, the understanding of justice will be developed, increasing the dispute resolution system's legitimacy. Besides, main transparency may reduce the

indeterminacy faced by host states and foreign investors when deciding on their investment or governmental policy, respectively.

In arbitration proceedings, some cases are settled confidentially, the openness of proceedings, the transparency of the documents, and more responsibility of arbitrator(s) for their decisions (Muchlinski, 2010). And claim that "without considering how the law is enforced and access to arbitral awards making those decisions, there will be little justified belief (Franck, 2008). ICSID has been accused of unfairly denying public access, overlooking stakeholder dialogue, and resisting the institutionalization of procedural and administrative practices for promoting transparency. And another problem is that under the proceedings of ICISD arbitration, the disputing parties are interested in settling their dispute in private hearings, and the arbitral awards must not be published unless the parties of dispute have agreed (ICSID, 1965). This issue focuses on the ISA on matters of public interest and has put pressure on the public and parties that assert the ending of that action and the publication of awards (Yannaca-Small, 2005).

Finally, investment arbitral awards can have significant results, for example, the States can consider arbitral awards during the preparation of their national budget or their future investment objectives. Hence, the public interest in the outcome of foreign investment disputes is justified and understandable. This explanation is one of the transparency requirements, despite considering the publishing on protecting confidential information related to an investor's private business or governmental data (Yannaca-Small, 2005).

2.2 Expertise of the Arbitrators

One of the other discussions about the mechanism of the settlement of the dispute through arbitration is the knowledge and expertise of the arbitrator(s). In the arbitration mechanism, parties choose the arbitrators, who tend to be specialized in the commercial law or investment law fields but may have little or no specialization in the fields of public international law. This can lead not to paying more attention because of the eventual general outcomes of the arbitral award. Therefore, one of the main objections is that investment arbitrators don't have expertise in comprehensive State policies such as national security, laws, and regulations regarding the protection of the national market, health, environment, or labor sections. On the contrary, the disputing parties pay more attention to interpreting IIAs provisions using the word's simple meaning, disregarding a key element that public interest is in the State's policy (Trakman, 2012). Nevertheless, and has given the kind of issues that investment arbitrators must deal with, for example, In the time of making decisions regarding the justice of nationalization or expropriation, the arbitrators should have good knowledge and expertise in international investment law issues, and also should have good judgment abilities (Trakman, 2012).

Consequently, the simplest and most effective method to increase the international investment law's efficiency and consistency is to ensure that the tribunal members must have related knowledge and expertise concerning the ongoing dispute (Appleton, 2013).

2.3 Impartiality and Independence

One of the basic expectations of each party to a dispute is that the persons deciding the dispute shall be impartial and independent. Whether they are judges or party-selected arbitrators makes little difference in this regard, and the plaintiff and defendant's expectations are the same. (Rubins & Lauterburg, 2010). Impartiality and independence are different, but they have interrelated qualifications in settling disputes, and each arbitrator must have those (Rubins & Lauterburg, 2010).

Conflict of interest generally refers to a fact or circumstance in which a party who is in a position to decide on a case has a material interest that is either in actual conflict with the party making the decision or participating in making that decision or can be reasonably inferred in the circumstances. That interest could arise out of a relationship in which that arbitrator or other party is involved, and that goes to

the arbitrator's independence, or it can arise by the behavior or other courses of conduct involving that arbitrator and that relate to that arbitrator's impartiality (Trakman, 2007).

Therefore, there are also concerns that arbitrators are not perceived to be neutral in their adjudication. While there are opportunities to challenge arbitrators who lack impartiality or independence, there are nonetheless continuing reasons for parties' negative perceptions of the fairness and integrity of the dispute resolution process. For example, there may be problems with an arbitrator's "issue conflicts," where the same person serves as arbitrator and counsel in two separate cases with related legal issues and can create legal authority as an arbitrator that may be of benefit to a client in his or her role as a consultant. Similarly, arbitrators may act as non-neutrals or advocates; there is also the possibility of "toxic" arbitrators who may disrupt or delay proceedings to one party's advantage (Franck, 2008). For the same reason, some experts and scholars suggested enacting strict regulations to manage the selection process of the arbitrators of international investment (Muchlinski, 2010). According to article 14(1) of the ICSID Convention, "the arbitrator(s) should have high moral character, and they must do their judgment independently." Neither the Persian nor the English versions of the ICSID Convention have any explanation about the arbitrator's impartiality.

In the end, independence is one of the significant indicators of procedural justice and a special deciding process, which makes powerful the legitimacy of the system. Concerning arbitrators' independence, it is often thought that foreign investment disputes involve a lot of money; they also have political interests that may guide partiality. Especially, two main factors that make mistrust to that extent are as follows: (1) the selecting process of the arbitrators must be considered that the disputing parties will appoint the two arbitrators and the third one will be chosen by the agreement of both parties, it is not easy to trust the independence and neutrality of the arbitrators, (2) and the political institutions may have probable interference during the process of arbitration (Mackenzie, & Sands, 2003). Therefore, the lack of independence and impartiality of arbitrators in resolving foreign investment cases can be considered a significant problem.

2.4 Time and Cost

Settling disputes through arbitration may take several years and cost more than litigation or other forms of dispute resolution methods. Even investors that have successfully claimed under-investment suggest that investment arbitration is "too slow, too costly, and too indeterminate (Franck, 2008). Therefore, arbitration was thought one of the best and quick mechanisms to settle disputes, and recently proved to be otherwise. The minimum time to receive the final and binding arbitral award and its enforcement has significantly increased. The parties to the dispute use various sources to this extent, from resorting to interim measures to the beginning of the process's cancellation. Therefore, the average time for the final settlement of a dispute with a final award differs from 3 to 4 years, without considering any difference from litigating before the host state's domestic courts (UNCTAD, 2010). Some establish the average longer times, between 7 to 9 years, and will cost millions of dollars before getting a positive outcome (Lvesque, 2013). As we discussed in detail about the settling of foreign investment disputes through arbitration, the arbitration procedure may not be as quick and cheap as people think, especially when there is a panel of arbitrators (Arthur, 2008).

Therefore, the time of the resolution of disputes through arbitration must be specified in the relevant conventions and domestic laws of countries to avoid wasting too much time and a lot of money.

3.Domestic Problems of Investor-State Arbitration

Foreign investment requires a desirable legal framework for resolving disputes. Before investing in any country, investors study and assess the political, economic, and legal security of that country. These studies form the basis of their final decision. It is natural that, first of all, the applicable laws and

arbitration mechanism of the settlement of disputes should be studied, which is somehow effective in the matter because the role of laws and regulations and the resolution system in foreign investment is so important that even some undesirable political background can be adjusted by creating an appropriate legal framework that is realistically reflecting the mechanism and flow of investment, and minimize the risks. In the following of this section, the major domestic problems of investor-state arbitration will be discussed;

3.1 Modification and Multiple Additions in the Laws

One of the severe damages in the Afghanistan legislative system is the numerous modification and multiple additions made after adopting the law or a legislative decree. This completely disrupts the coherence of the law. Because some laws can be found that have been amended several times, even it is difficult for a lawyer to encompass these amendments fully, such as LMARs and Mineral Law; these laws were amended and added multiple additions several times (Sultani, 2019). Because Afghanistan is one of the countries where legislation is not based on systemic thinking, it is enacted on an *ad hoc* basis. Governments legislate based on their wishes and pursue a specific purpose. When the law fails to meet its goals, they quickly change or amend the law (Nikzad, 2021).

Therefore, numerous amendments and additions to the laws, in a consensual manner, can challenge the system of settling foreign investment disputes through arbitration in Afghanistan (Sultani, 2019). For example, when a foreign investor wants to invest in the mining sector in Afghanistan, he signs an agreement with the Afghanistan government under existing mining law that their problem will be settled through arbitration in the event of arising a dispute. The new Afghanistan government wants to enact a new law and change all the contract conditions, saying that contracts made before this law came into force in the mining sector are invalid. Therefore, in such a situation, the investment parties will face a challenge in resolving their probable disputes.

Therefore, the laws of Afghanistan should be stable, and some necessary amendments and changes should be made by passing the time and requirements, not according to the wishes of governments because the age of governments is short, but laws are made for a long time.

3.2 Inefficiency in Resolving Disputes

It can say that disputes in investment contracts are normal but not desirable because it causes a lot of problems for both parties. If it is taken to the judicial courts, it will double its problems. In particular, international lawsuits and disputes referred to a foreign court, these problems due to a foreign language and the diversity of laws and different legal systems of countries make the outcome of the lawsuit unpredictable. Therefore, the method of settling commercial and investment disputes is essential for investors (Guldozian, 2007). If efficient, the investment dispute resolution system can be mentioned as a factor in attracting foreign investment. But if this system is inefficient in settling investment disputes, it can be one of the major problems of ISA.

Resolution of investment and commercial disputes in the shortest possible time, at the lowest cost, and confidential manner is one of the essential concerns of capital owners and commercial companies; Afghanistan lawmakers consider "judicial settlement" and "settlement of disputes through arbitration" to settle foreign investment disputes. To achieve these goals, referring the disputes to arbitration and other dispute resolution methods, such as resolving the disputes by selecting the arbitrator instead of directing the conflicts to court, is a perfect solution. But this is not the end of the matter, and improper control and poor management of disputes can be a big problem in achieving these goals and cause high costs, waste of too much time, and loss of business reputation (Stanekzai& Naseh, 2021).

If, in the past, settled most of the disputes through the judiciary. Today, its extent has decreased. In international investment and commercial disputes, more than in other disputes, recourse to the courts

has become more and more limited, and even in many contracts, the parties state that in the event of a dispute, neither party has the right to go to national court and the dispute, must be settled through other mechanisms such as arbitration. This is especially true for foreign investment disputes. On the other hand, excessive formality in national courts, observance of rules and regulations related to the pre-trial stage, holding numerous meetings, repeated notifications to the parties of the dispute, and gathering of evidence, are all these measures that prolong the proceedings. And it is one of the main disadvantages that conflict with foreign investment law.

The settlement of disputes through domestic courts is more expensive, uncertain, and inefficient; in Afghanistan (Afghanistan Ministry of Commerce and Industries, 2016). On the other hand, lack of necessary expertise, high density, and volume of lawsuits in the courts, the existence of widespread corruption in the courts, the fact of very high court costs in different stages of proceedings, interfering of officials in Judicial proceedings, and being many stages of proceedings are another significant problem, that hinders foreign investors from settling their disputes through domestic courts. Therefore, they refer their foreign investment disputes to arbitration. But resolving foreign investment disputes through arbitration also has many problems because arbitration is a new phenomenon in Afghanistan's legal system. The lack of a well-equipped center with international experts in the field of international investment law can be a big challenge.

3.3 Recognition and Enforcement of Foreign Arbitral Awards

Commercial Arbitration Law was adopted in 2007. This law, which is inspired by the UNCITRAL Arbitration Model Law, deals with the rules for the resolution of disputes arising from economic activities through arbitration. Recognition of international awards in the investment and commercial Sector is the product of disputes between investment companies or individuals convicted abroad accepted by Afghanistan's domestic laws. The process of recognizing the awards is sent to the competent court through the Ministry of Foreign Affairs and after its acceptance by the relevant court it must be submitted to the General Department of Law (GDL) or Huquq department, it is enforceable under the Law on the Manner of the Acquisition of Rights (LMARs). Article 27 of this law states; The huquq department has access to the rights according to the following documents; Formal deeds that are provided, recorded, and issued by different departments of the government according to the laws & regulations and should be free from forgery, An ordinary deed, if the respondent consents to the same and has no protest concerning it, Final orders of the competent court, Final and binding order of the court that has been issued by the court of other country and confirmed by the Embassies of Afghanistan, and other related deeds which are issued and considered authentic based on the explicitness of the provision of this law (Law on the Manner of Acquisition of Rights, 2020)

As it was seen, there is no place in the reasoned context of the law and the necessary articles for the enforcement of foreign awards within the framework of domestic laws. Occurring disputes in investment contracts are normal, but domestic laws should recognize any provision for the enforcement of foreign arbitral awards. Considering the need that is felt in this regard, this article should be amended immediately, because based on the made considerations, it can be a serious problem and a major obstacle in the way of foreign investment in the non-enforcement and recognition of foreign awards.

And also, execution of the arbitral award in Afghanistan can prove to be a difficult process, if in situations where the other party or property is in insecure areas outside the control of the central government and the courts, or the party to the dispute is an influential person with financial, political or legal influence, can be another problem. Therefore, due to the problems mentioned above in international and domestically investor-state arbitration, handling foreign investment disputes faces challenges through arbitration.

Conclusion

This research discussed the investor-state arbitration problems in Afghanistan. The foreign investment made always leads to disputes, the dispute between two private persons of the investment parties, the dispute between two States, and the dispute between the private foreign investor and the host state.

The Afghanistan legal system is a suitable platform for foreign investment because it has good investment opportunities in the mining, agriculture, energy, industrial, construction, technology, and health sectors. However, considering the issues discussed in this research, the domestic problems in the settlement of foreign investment disputes through arbitration are; Modification and multiple additions in the laws, lack of systemic thinking in the laws, the inefficiency of the dispute resolution system, and lack of a reasoned legal basis in recognition and enforcement of International Center for Settlement of Investment Dispute (ICISD) arbitral award. Besides domestic problems, also there are some fundamental international problems in investor-state arbitration, such as the lack of 100% confidentiality and transparency in the proceeding of the cases, lack of expertise of arbitrators, lack of impartiality and independence of arbitrators in handling cases and sometimes being time-consuming dispute settlement and the costly process of the handling of cases. Therefore, to resolve the problems mentioned above, relatively strict rules should be established for resolving investor-state arbitration so that issues such as; Confidentiality, impartiality, independence, and time management should be considered.

Recommendations

It is considering the issues that were discussed as investor-state arbitration problems in Afghanistan. The following suggestions are provided to eliminate the obstacles and problems in the time of settling foreign investment disputes through arbitration in Afghanistan.

- In the current situation, the government of Afghanistan should take serious measures to attract more foreign investment and, for this purpose, must expand Bilateral Investment Treaties (BITs) or Multilateral Investment Treaties (MITs) with different countries for mutual investments.
- Afghanistan government must Enact new laws or amend the existing law (private investment law) that have been responsive to meet foreign investment requirements.
- Instead of modification and multiple additions to the laws, the government of Afghanistan should use other countries' experiences in the field of legislation or use the model laws prepared by some institutions like UNCITRAL to prevent further amendments and additions to the regulations.
- Article 27 of the Law on the Manner of the Acquisition of Rights (LMARs) must be amended immediately to facilitate a reasoned legal framework to enforce foreign arbitral awards in Afghanistan. Because this article didn’t point out anything about the enforcement of foreign arbitral awards.
- Some necessary measures must be taken to ensure the transparency and confidentiality of the arbitration process because most foreign investors criticize that the process of settling disputes related to their foreign investment does not remain confidential through arbitration.
- There is no set time to deal with investment disputes in the ICSID regime, so there should be a set time to deal with the investment parties' problems to avoid wasting too much time and a lot of money.

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