

Symposium on Decoding Maldives' Foreign Investment and Arbitration Law Regime: Examining ICSID as a Maldivian Solution

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The Maldives is an island nation having around 5,40,000 people and dispersed across 185 islands. The country has been a development success enjoying robust growth coupled with considerable development of the country's infrastructure and connectivity. It has also provided high-quality and affordable public services for its people, resulting in impressive health and education indicators, with a literacy rate approaching 100% and a life expectancy of over 78 years. Tourism is the main driver of economic growth, fiscal revenues, and foreign exchange earnings for the country. The country's lucrative tourism sector attracts a good amount of investment, particularly in the form of Foreign Direct Investment (FDI). It is reported that the Maldives is one of the top five Small Island Developing States (SIDS) host economies for FDI. It has continued to attract millions of dollars each year, with the record showing an average net inflow of FDI representing 11% of national Gross Domestic Products (GDP) between 2013 and 2020. This inflow is considerably higher than many peer jurisdictions such as Fiji (7%), Mauritius (3%), Sri Lanka (1%), and Seychelles (10%).

Although Maldives has been a large investment hub for foreign investors, the country is running behind in having a robust and uniform dispute settlement mechanism to resolve investment disputes; something which is inevitable for an economy like Maldives. The country has acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) and signed the Convention on International Settlement Agreements Resulting from Mediation (2018). However, these steps are in themselves insufficient to reap the desired outcomes for the economy. While the 1959 Convention talks about recognition and enforcement of foreign arbitral awards, the 2018 Convention applies to international settlement agreements resulting from mediation. In effect, therefore, both the agreements have little to do with dispute settlements that provide a uniform forum to the investors and the State.

Maldives has also been party to numerous investment related disputes, in many of them at the receiving end. In 2018, Maldives paid a compensation of \$270 million to GMR for the cancellation of the airport development contract by the Maldivian government. In 2019, the country faced a claim of over \$123 million against its sustainable island project. Only last year, the Singapore International Arbitration Centre (SIAC) ordered that the \$130 million lagoon project, which Maldives wanted to halt against the Prime Capital Maldives Pvt Ltd., could proceed without further delay.

There seem to be two major reasons why Maldives is facing difficulty in handling its investment disputes. First is the uncertainty which Maldivian politics has projected to the world outside. Due to the continued political crisis, many investors have faced a slow-building crisis of their own for years, as the Chinese enterprises have gained increasing economic and political influence over the country. The experience of India's GMR Infrastructure Limited may be a case in point- where GMR suffered loss due to unexplainable policy shift by the Maldivian authority on the Airport Development Charge (ADC).

The second reason springs from the nature of the Maldivian legal regime. The legal system in the country does not refer to any preferred mode of dispute settlement. As a consequence, every investment agreement has been referred to a different dispute settlement body. In other words, the Maldivian legal regime is facing challenges due to the fragmentation of jurisdiction in its dispute settlement process. This not only creates a huge challenge for Maldives to fight multiple arbitrations in different jurisdictions and be subject to different laws, but also suggests the weaknesses of its legal system, especially in terms of protecting the foreign investors.

Could Maldives take a simpler path to settle its disputes? To answer this question, we need to first understand the nature of the Maldivian legal regime, especially its foreign investment aspect.

Maldives does not have an investment treaty regime except the UAE-Maldives Bilateral Investment Treaty (BIT). The principal legislation for foreign investment in the country is the Foreign Investment Law (No. 25/79). Section 3 of the Act provides that all foreign nationals investing in tourism shall sign an agreement with the Ministry of Tourism. Similarly, those investing in other sectors shall sign an agreement with the Ministry of Trade and Industries. Additionally, the agreement has to itself specify the terms, conditions, and the manner of implementation of the investment scheme. Similarly speaking, Section 15 of the Law gives the option to the parties to decide the manner in which any disagreement needs to be resolved. Nowhere it mentions the method of dispute settlement. It, in fact, states that in the event of disagreement on any matter with regard to the investment made under the law, and on failure to reach an agreement by discussion between the parties concerned, the matter in dispute shall be dealt with in accordance with an agreement between the parties.

Maldives enacted its Arbitration Act (Law No. 10 of 2013) in July 2013, largely modeled on the UNCITRAL Model Law. According to its section 4 (a), a non-ICSID investment arbitration seated in the Maldives would be subject to the jurisdiction under the Act. The Act recognizes foreign arbitral awards under section 72. However, here again, it skips from mentioning the local mechanism to settle a dispute.

The question remains – what could Maldives do to fill in these gaps? One thing is clear – that the country must restructure its dispute settlement regime to reap the fruits of its economy. But then, in what manner? Could the membership of the International Centre for Settlement of Investment Dispute (ICSID Convention) aid the Maldivian economy?

We argue that becoming a member of the ICSID has its own advantages and disadvantages. However, the benefits most clearly outweigh the pitfalls as far as the Maldivian economy is concerned.

The ICSID Convention is one of the most widely accepted platforms for international settlement of investment disputes. More than 160 countries have signed the Convention, of which 155 countries have already ratified and accepted its application. Initially, the ICSID Convention did not attract much attention, particularly from the developing economies. Its criticism mainly revolved around three points:

- i. the heavy cost of litigation;
- ii. the lack of transparency in the proceedings; and,
- iii. the absence of an appeal process, alongside a limited annulment procedure.

The ICSID arbitration apparently seems to be a costly process. In such an instance the other structured option for the settlement of investment disputes for the developing countries seems to be the United Nations Commission on International Trade Law (UNCITRAL) arbitration. Interestingly, the alleged high cost of ICSID arbitration when compared to UNCITRAL arbitration appears to be a misconception. Although, arbitration under the ICSID mechanism requires payment for both the arbitral tribunal and arbitral institution, nevertheless, most empirical assessments of the total cost of ICSID and UNCITRAL investment arbitration do not show that ICSID arbitration proceedings are more expensive. According to a recent assessment, the average cost of investment arbitration under the ICSID tribunal was USD 1.04 Million, and the average cost of investment under the UNCITRAL tribunal was higher at USD 1.38 million. ICSID arbitration has a fixed rate of USD 42,000 per year (USD 21,000 per party) for the Secretariat's extensive services and specialized staff supporting each case; and a capped rate of USD 3,000 per day or USD 375 per hour for arbitrators' fees. It is reported that the rate is lower than the rates applied in non-ICSID administered UNCITRAL arbitration, for example, which have no cap and are usually two or three times higher than the ICSID rate. Therefore, one-sided criticism regarding the cost of ICSID arbitration is not substantiated by the empirical fact at hand.

The arbitrators appointed for ICSID and UNCITRAL investment disputes represent a pool of individuals who have often been criticized as a small, secret, clubby and homogeneous group. Therefore, the concern is built around transparency.

Transparency in international investment arbitration refers to the extent to which the public can access arbitral proceedings and information pertaining to those proceedings. As far as transparency in ICSID arbitration is concerned, the ICSID rules provide a comparatively lower degree of transparency in relation to the public disclosure of documents and non-party access to the proceeding than the UNCITRAL rules. But the UNCITRAL rules can only deliver its more robust transparency policy if parties have opted for its application. On the other hand, ICSID's rules apply to the parties by default, therefore, ensuring a minimum level of transparency.

Additionally, ICSID arbitration mechanism works on a party-led and consent-based approach. Rule 63 of ICSID Rules on Transparency gives the parties the option to consent for publication of Award or the final decision in a post-award remedy proceeding. If neither party objects to the publication of the document within 60 days after its issuance, consent to publish is deemed to have been given, and it is made available on the ICSID website.

ICSID was amongst the first arbitral institutions to adopt rules governing access to documents, open hearings, and non-disputing party participation. Therefore, the ICSID Arbitration Rules (Rules of 2022) give an option to the parties to decide the level of confidentiality or transparency in ICSID arbitration depending on the agreement of the parties or any applicable provisions in the instrument of consent. Absent these, the ICSID Rules on Transparency will apply in a proceeding. Rules of 2022, gives investors and State sufficient flexibility to determine the level of transparency in the investment arbitration.

Another challenge to the ICSID arbitration award is that it is not appealable. In other words, there is only one award in an ICSID case, and it is the Tribunal's last decision that disposes of the case. However, Article 52 gives the parties to the dispute the right to apply for the annulment of the award to the Secretary General, saying that the tribunal –

- i. was not properly constituted;
- ii. manifestly exceeded its power;
- iii. entailed corruption on account of its member(s);
- iv. made a serious departure from the fundamental rules of procedure;
- v. failed to state the reason for the award.

As it is evident, the grounds for the annulment of awards are stressed upon to ensure the integrity of the arbitration process, rather than the merits of the tribunal's findings of law or of fact.

The absence of an appeal mechanism does not in any way seem to be discriminatory in nature or favoring any particular party to the dispute. The essence of an arbitral proceeding ultimately lies in time-bound award declaration and its implementation so that the parties to a dispute can enjoy the dividend of the arbitral proceeding, and nothing more.

In brief, the abovementioned criticism regarding the expensive cost of litigation of ICSID arbitration is empirically unfounded. As regards the issue of transparency, the ICSID mechanism provides sufficient space to the parties to determine the level of transparency. In the absence of any agreement between parties to the dispute it mandatorily requires the minimum level of transparency to be followed. The absence of an appellate mechanism, as mentioned above, does not in itself seem to be discriminatory against either party to the dispute.

Having said all this, the ICSID procedure does suffer from a lack of consistency and contradiction in arbitral awards, particularly concerning the interpretations of the fair and equitable treatment standard. Another example could be the lack of uniform standard

for awarding the damages. As a result, the tribunal is free to choose its own valuation method, which often leads to the use of various methodologies and contradictory decisions. Keeping due note of these criticisms, one should weigh the advantages and the disadvantages which the ICSID mechanism brings on the table.

It has been more than five decades since the ICSID Convention. During this period, its rules have gone through many changes in order to make it more suitable for the parties. In terms of performance, as of March 2021, ICSID has administered 799 cases under the ICSID Arbitration Rules, of which 280 are pending, and 519 are concluded. On the other side, it has also served as the one-stop solution for investor-state dispute settlement in the arbitral proceedings. Moreover, all the above-mentioned peer economies (Fiji, Mauritius, Sri Lanka, and Seychelles), are signatories of the ICSID Convention. Similarly, all the countries of the South Asian Association for Regional Cooperation (SAARC), except India, Bhutan and Maldives, are signatories of the ICSID Convention.

It has been observed that Foreign Direct Investment (FDI) from developed countries appears to be more responsive to the existence of investment protection. Therefore, it is not advisable for the Maldivian economy, which is heavily dependent upon the FDI and foreign investors, to sit idle on the investor-state dispute. Solid investment protection not only boosts the confidence of investors and ensures consistency in dispute settlement, but also helps the country to diversify its investor base for investment in another sector in the country's economy. Hence, the ICSID Convention would be a better option for the Maldivian economy to deal not only with the fragmentation of dispute settlement proceedings but also in diversifying its investment bases.

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