2018 AIIB Legal Conference Report

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1 Introduction: International Organizations and the Promotion of Effective Dispute Resolution

On 5 and 6 September 2018, the Asian Infrastructure Investment Bank (AIIB) held its second annual Legal Conference at the AIIB Headquarters in Beijing, China. The Legal Conference was organized by the AIIB's Office of the General Counsel (OGC) as part of AIIB's second annual Legal Week (3–7 September 2018). The Legal Week was organized around three events: (i) the Legal Conference; (ii) the AIIB Law Lecture; and (iii) a series of internal trainings for AIIB staff. The Legal Conference and Law Lecture provided a forum to convey the AIIB's multilateral, rule-of-law-based, public service mandate to an influential and engaged external audience.

The Legal Conference brought together over 80 conference participants, drawn from more than 20 different international organizations (IOs), to examine the role of IOs in promoting effective dispute resolution. Participants also included distinguished international law practitioners and eminent academics. Contributing to the interesting and engaging panel discussions were participants from the highest levels of IOs as well as representatives of the China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Dubai International Financial Centre Dispute Resolution Authority, International Chamber of Commerce International Court of Arbitration and London Court of Arbitration.

Over two days, five panels, each chaired by a member of AIIB OGC's management team, addressed the following topics: (i) potential of dispute resolution to drive development; (ii) development of dispute resolution through international arbitration; (iii) emergence of modern procedures intended to enhance the effectiveness of dispute resolution; (iv) challenges faced by the wide range of dispute resolution facilities afforded by IOs; and (v) consequences to dispute resolution of the international legal status possessed by IOs.

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Following the panel discussions, the Legal Conference included a plenary session on IOs and the promotion of effective dispute resolution chaired by AIIB's General Counsel. At the close of the Legal Conference, Georg Nolte, Chair of the International Law Commission of the United Nations (69th Session, 2017/2018), delivered the second annual AIIB Law Lecture, entitled 'International Organizations in the Recent Work of the International Law Commission'. This report is intended to provide a summary (reflecting the Chatham House Rule) of the discussions held as part of the Legal Conference.

2 Dispute Resolution and Development

The panel discussed various commercial dispute resolution mechanisms including commercial arbitration and mediation as well as their implications for development. Effective commercial dispute resolution is critical to promoting economic development, especially in respect to emerging economies. Such mechanisms not only facilitate access to justice, they are an integral part of the investment ecosystem. Having an effective dispute resolution mechanism is a key enabler for investments. Moreover, instituting the rule of law and developing sound regulatory and judicial environment as part of the investment landscape in any country can act as a catalyst for economic development. Coupled with other legal reform initiatives undertaken by International Financial Institutions (IFIs), this has resulted in visible and positive effects on development.

Commercial dispute resolution is a 'paid for' and 'customer centric' service. In developing effective commercial dispute resolution mechanisms, the focus should be on providing a 'forum of choice' and differentiated customer service while at the same time, affording flexibility to users. There is an increasing reliance on modern technologies to establish national and international connectivity in the resolution of disputes. Remote access technology allows disputing parties to communicate with one another through virtual courtrooms in the same time and space.

The panel noted that a key element in effective dispute resolution is to nurture judicial excellence in the decision-making process. The positive impact on development brought about by promoting effective dispute resolution was demonstrated by another panel member who shared an IFI's legal reform work in the field of commercial mediation in the Central Asian region. The historical lack of efficiency and backlog of cases in the court systems of the Central Asian countries has underpinned the demand for commercial mediation. As commercial mediation is 'solutions-focused', it allows parties to agree on the

best solution most suited to their businesses by affording more control to the disputing parties.

Turning to the application of dispute resolution in IFIs, one panel member opined that the establishment of grievance mechanisms to ensure compliance with IFI safeguard policies have led to continual improvements in project operations. This has also led to increased engagement with local communities most affected by the outcome of those projects. While this presents an opportunity for development, it was pointed out that this also imposes a burden on IFI borrowers, investees and other relevant stakeholders. This posed the question of how best to realize this opportunity? At an institutional level, IFIs generally have resources to travel and interview affected communities with the assistance of local representatives. The learning that emanates from such reporting have led to the production of helpful guidance to staff and other stakeholders. However, the same cannot always be said about the capacity of IFI borrowers, their project implementing agencies and companies and there appears to be a deficit in this area. Moreover, local agencies and companies may not always meet the level of sophistication of the IFIs' safeguard policies. Given the capacity gap, there is a need to further develop and implement the grievance process on the ground level. This includes the establishment of rules, procedures and applicable timelines for these grievance mechanisms.

3 Dispute Resolution and International Arbitration

Arbitration is the leading forum for the resolution for international disputes. International arbitral institutions (IAIs) have gone beyond merely providing administrative and logistical support for dispute resolution to taking on a more proactive role in shaping and influencing the arbitral process. The panel discussed how IAIs are ideally suited to generate innovations as they are natural catchments for disputes and have the potential to influence how large numbers of international dispute cases are dealt with. Given that IAIs play a vital role at every stage in the lifecycle of an arbitration, they may lead and are best placed to influence the future evolution of international arbitration. The panel discussed changes to the institutional rules of IAIs that have met the needs of their users, thereby demonstrating the utility of those innovations. These innovations include emergency arbitrator provisions which allow parties to make an application to seek interim relief from an emergency arbitrator even before the composition of an arbitral tribunal. Prior to this, parties had no option but to go to national courts to seek relief. Another example is the introduction of expedited procedures that allow parties to apply for an expedited arbitration

that may be completed within six months from the date that an arbitral tribunal is constituted.

The institutional rules governing arbitral proceedings should provide reliable templates and be adaptable to the variety of disputes that may be arbitrated. To ensure robust and efficient international arbitration, it is important to establish a framework for resolving disputes through rigorous institutional rules. Having said that, the success of arbitral proceedings is attributed to the implementation and enforcement of institutional rules by the IAIs. In this respect, a key component of effective arbitration procedures is the selection, appointment and supervision of arbitrators. It is after all the arbitrators who play a pivotal role on the quality and conduct of arbitral proceedings. Consequently, users are increasingly looking towards IAIs to assist them in the appointments of arbitrators. It follows that diversity of arbitrators remains a key issue as it contributes to the independence, impartiality and excellence of the arbitral process.

Another area of discussion focused on the increasing number of disputes deriving from the Belt and Road initiative (BRI) and the trend of increasing numbers of Chinese parties in international arbitrations. Panel members noted that with an increase in Chinese parties and companies, larger Chinese companies generally have more clout to negotiate in favor of their preferred dispute settlement forums, including China and other venues in Asia which are well-known to them. Appointment procedures of IAIs should be supported by rigorous and transparent challenge procedures as this helps to ensure that the parties are given an opportunity to hold arbitrators accountable where they fall short of the standards expected of them.

4 Dispute Resolution and Procedural Innovation

International arbitral institutions have a common interest to promote international arbitration as a preferred means for the settlements of international disputes since this invariably leads to an increase of market share for all IAIs. To do so, IAIs set out to address common complaints associated with arbitration, including the perception that arbitration is often costly, takes too long, lacks transparency, suffers from cronyism and ineffective enforcement of awards and judgements, including possible court interferences. Promoting modern diversity in the arbitration profession is vastly important for the continued legitimacy of international arbitral institutions. Procedural innovations that have been proven to be successful are adopted and modified as appropriate in

other institutions. Procedural innovations in resolving disputes in the context of China, including international arbitration conducted in Hong Kong and Singapore were discussed. In this respect, the panel examined dispute resolution and the normative legal implications related to China's BRI initiative. In terms of an illustrative recent example of procedural innovation in dispute settlement, the amendment process involving the International Centre for the Settlement of Investment Disputes (ICSID) was also discussed.

The panel noted that China has become a major market for international commercial disputes. However, China's unique and complex political and economic environment still pose challenges for the resolution of international disputes. However, there are encouraging signs that China is moving towards becoming a more arbitration-friendly jurisdiction. These include the recent publishing of several generally applicable judicial interpretations issued by China's Supreme People's Court which appear to have answered the Chinese Government's call for judicial support to its BRI policy. The judicial interpretations have been used as an effective tool to abridge perceived shortcomings under Chinese arbitration law since all other courts in China are obliged to follow the principles contained therein. The panel noted that China is a member of the New York Convention which establishes the recognition and enforcement of foreign arbitral awards in China. Consequently, these judicial interpretations have also been helpful in enforcing foreign arbitral awards since only the Supreme People's Court can 'deny' enforcement. Under Chinese law, *ad hoc* arbitrations in China are not admitted. However, Chinese courts have tested the use of free trade zones as a basis to conduct specialized arbitration. In terms of improving the enforcement of foreign awards, China has sought to establish bilateral agreements with countries along the BRI, who are not already members of the New York Convention. Where no bilateral investment treaties (BITs) are in place, China is increasingly using its judicial leverage. And China has established various BRI arbitration centers.

Despite these initiatives, few foreign companies are inclined to conduct arbitrations in China. The panel engaged in discussions on desirable future developments in China to address this issue. Chinese arbitration law, which relies heavily on judicial involvement in its arbitration procedures is long overdue for an update since its last revision was almost 23 years ago. A panel member opined that China should consider adopting the United National Commission on International Trade Law (UNCITRAL) model law as a basis for any new or amended law. More concerted efforts should be made to de-link these institutions from the Chinese Government and address the concern that Chinese arbitral institutions lack independence.

Over the years, China's BITs and FTAs have evolved to include more clearly defined investor-state dispute resolution clauses, leading to increasing jurisprudence involving China at ICSID. The BRI initiative seeks to improve connectivity along the 'Belt and Road' and harnesses the potential to accelerate economic integration among these countries. However, this will likely bring economic challenges giving rise to numerous disputes in the future. Consequently, the principles inspiring dispute resolution in the BRI should include the protection of the rights of Chinese and foreign individuals and companies on an equal footing. This will create a stable and fair business environment that is consistent with the establishment of rule of law. The panel discussed the possibility of the AIIB setting up an arbitration institution to address arbitrations in relation to BRI projects. A panel member delved into the possibility of instituting a dispute resolution venue affiliated with the AIIB in concert with BRI-region arbitration IAs as well as specialist tribunals established by China. They opined that the AIIB, as a multilateral development organization established by treaty may help to incrementally establish legal norms in the BRI, especially in respect to investor-State disputes, including the option of mediation.

Furthering the discussions on procedural innovations in dispute resolution, the panel examined the proposed amendments to ICSID procedures. The ICSID Secretariat has focused on pragmatic changes aimed at maintaining the balance between investors and States and ensuring the integrity of the investor-State dispute settlement process. The objectives of the amendment process are several. Firstly, it is to provide a range of modern dispute resolution options, including investment mediation under Additional Facility (AF) rules. Second, it seeks to modernize ICSID's rules and regulations. Third, it is intended to simplify ICSID's rules and regulations by redrafting in plain, modern, gender-neutral language. Fourth, it seeks to reduce time and cost of the parties by making electronic filings the default choice unless there are special reasons to maintain paper filings. To illustrate examples of procedural innovation, ICSID's proposed new rules allow claimants to opt to have the request to initiate proceedings substitute for their first memorial in the ICSID arbitration, thus expediting proceedings from an earlier date. Another proposed amendment stipulates that steps taken by a party after expiry of a time limit are disregarded unless the late party establishes special circumstances justifying the delay. The panel also discussed the issue of enforcement of ICSID awards. While enforcement is a key factor, it is not the only consideration. Other considerations include having a de-localized tribunal and allowing for individuals to have legal standing to take cases against the government.

5 Dispute Resolution and International Organizations

The panel discussed how IOs may be positive role models in the promotion of effective dispute resolution in the 21st century. Specifically, discussions were focused on IOs' practices and programs which have led to effective dispute resolution or amicable and alternative dispute resolution. A panel member opined that IOs should first develop concrete norms and rules to reflect their desired ethos. In crafting dispute settlement rules, there are likely to be at least two areas of tension. The first source of tension relates to the need for rules or legalistic structures versus the need for flexibility. Second, there is likely to be tension between the need for transparency and the desirability for confidentiality in the dispute settlement proceedings.

Turning to the World Trade Organization (WTO), the panel noted that it has played a key role in inculcating effective dispute settlement mechanisms in the sphere of trade at the domestic level by offering a code of conduct for its member countries. The WTO has imposed requirements of transparency in its dispute settlement processes, including publication of its Dispute Settlement Body (DSB) and Appellate Body (AB) decisions. Decision-making at the DSB and AB is uniform, impartial and reasonable and the processes set out in these decisions are also subject to national treatment provisions. In addition, some trade agreements include provisions to ensure that there is an effective domestic obligation to establish enforcement mechanisms, for example in the Agreement on Trade-Related Aspects of Intellectual Property Rights. Moreover, the WTO system is premised on consensus decision-making. While this is a civilized and inclusive way to make decisions, it has its share of problems as resolution under such a system takes time and is power-oriented. The impending paralysis of the AB's ability to function due to refusal on the part of the United States to confirm members of the AB will threaten to usurp decision-making on trade matters from relevant stakeholders and does not bode well for the domestic dispute settlement system.

Although the World Intellectual Property Organization (WIPO) is not primarily a dispute resolution body, its work has contributed to the promotion of effective dispute resolution in the following ways. First, it has strengthened the rule of law by facilitating discussions and agreements among its member States on the common rules that govern the protection of intellectual property (IP) rights worldwide. WIPO also serves as a global policy forum for shaping international IP rules and fosters cooperation and delivers capacity building programs to enable all countries to use IP for economic social and cultural development. Second, WIPO administers global services for the protection of IP across borders by providing an alternative dispute resolution mechanism

to third parties on IP issues. By supporting the continuous development of IP law and helping to narrow the gaps in the regulatory framework to maintain the predictability and relevance of IP law, this has helped all stakeholders to know the rules and thereby prevent disputes before they arise. WIPO has also played a role in providing effective dispute resolution by establishing the WIPO Arbitration and Mediation Center (the Center). The Center provides an international, neutral and non-profit forum for parties to settle IP cases involving both domestic or cross-border disputes out-of-court. The Center offers a variety of alternative dispute resolution (ADR) options on IP disputes including arbitration, expedited arbitration, mediation and expert determinations. With over 40,000 processed cases in the settlement of internet domain name dispute resolution, it is a global leader in the resolution of Internet Corporation for Assigned Names and Numbers (ICANN)-mandated Uniform Domain Name Dispute Resolution Policy (UDRP).

The Nordic Investment Bank (NIB) enjoys an unusually low level of uptake of formal disputes despite financing and recruitment of staff outside its membership. The panel discussed lessons learned from NIB's legal structures and provisions and how this may have contributed to NIB's ability to avoid major disputes. NIB's homogenous membership and its relatively speaking small size and consensual spirit common to Northern Europe have influenced the culture of the organization. In respect to NIB's core lending activity with members, NIB generally accepts local legislation and dispute resolution in local courts. However, when the NIB finances projects outside its membership, it does so through the execution of framework agreements with the country of operation. For projects outside its membership, the NIB commonly adopts Swedish or English law as the governing law and opts for arbitration as a means of dispute resolution. The NIB aligns its practices to the capital markets for its funding activities. For administrative agreements, including contracting with suppliers for its administrative needs, NIB dispenses with the need for open public tenders for agreements, instead allowing the possibility of call for tenders directed to multiple selected parties. In its tender documents, NIB specifically reserves the right not to award to any party and incorporates provisions which make clear that NIB is an IFI possessed of privileges and immunities. Within its membership, NIB's preference for dispute resolution is the Finnish arbitration system. When contracting with international contractors, NIB generally accepts local law of the contractor as the governing law and opts for international arbitration. Where contractual disputes occur, NIB encourage contractors to reach out to its chief compliance officer as a first point of reference thereby de-escalating use of formal dispute resolution procedures.

NIB adopts the Nordic concept of ombudsman as a first point of reference for staff member-related disputes and is compliant with labor legislation of its member countries. The ombudsman plays an important and critical role as an independent and third-party advisor to disputes raised by challenger staff members and may mediate any employment related disputes. In the event of any unresolved disputes, the NIB will enter ad hoc arbitration paid for by the NIB. Consistent with the spirit of its member countries' legislation, NIB imposes a limitation for compensation for termination of contract of a ceiling of 24 months' salary and no provision for reinstatement. NIB is generally willing to engage in dialogue with challenger staff members and its experience demonstrate that a combination of cultural reasons and other legal structures and provisions have resulted in very low record of actual disputes or litigation.

6 Dispute Resolution and International Legal Status

The panel examined the intersection between international legal status and dispute resolution in the context of immunities of IOs and their role in fostering legitimacy in dispute resolution. Discussions regarding reconciling the tension between immunity and accountability focused on individual tort victims who are harmed by the operations of an IO but have no contractual relationship with that IO. Should immunity of IOs be contingent on the availability of alternative accountability mechanisms? Questions on this issue were raised from two angles, firstly, how can IOs maximize the likelihood that national courts will uphold their immunities in the event of a challenge under national law? Second, from a public international law perspective, what are the relevant rights and duties of IOs before such courts?

The panel discussed the reasons that some IOs established alternative accountability mechanisms to resolve disputes. The possible sources for such an obligation include the following. Firstly, an IO's charter may require that such a mechanism is established. Second, such an obligation may stem from a separate treaty requiring the IO to develop alternative mechanisms. Third, the IO may be obliged to do so under customary international law (CIL). However, it remains a contested issue whether CIL binds IOs and if CIL requires IOs to create alternative mechanisms. In this respect, questions were raised on whether concepts in the human rights field, such as the right to an effective remedy apply and if they do, what is required of IOs as compared with States. On the issue of IOs' contribution towards making CIL, the work of the International Law Commission suggests that the practice of IOs contributes to the formation of CIL in certain cases.

Another panel member shared the experience of litigation faced by an IFI in Switzerland as a case study. The IFI enjoyed immunity from jurisdiction, except in respect of civil and commercial counterparties arising from banking or financial transactions and possessed immunity from execution, including on its assets and the assets of its member states. Such immunities were conferred in the IFI's constituent documents and headquarters agreement with Switzerland. Nonetheless, the IFI faced various judicial and administrative proceedings in Switzerland and elsewhere which were initiated by third-party hedge funds claiming that they had enforceable claims as hold-out creditors against one of the IFI's member States. The creditors' claims were premised on seeking to enforce a monetary award against an amount due to them by that member State. Despite seeking the assistance of the Swiss Ministry of Foreign Affairs (MFA), the proceedings against the IFI were not lifted. To avoid the perception that engaging directly with the Swiss courts amounted to a waiver of its immunities, the IFI submitted its objections to the Basel supervisory authority. The Basel supervisory authority agreed that such claims were illegal but found that the courts may still be competent if there was no alternative dispute settlement mechanism available through the organization's headquarters agreement or through the IFI itself.

The creditors made the following arguments during their appeal to the Swiss Supreme Court. Firstly, the creditors argued that the IFI's immunities were abused by that member State party. Second, they argued that, as creditors of that member State, they were entitled to benefit from an independent judicial review and enforcement of their claim. Specifically, they claimed that they were denied their right to a fair trial. Interestingly, the creditors had no personal claims against the IFI and were not creditors of the IFI which may avail themselves of alternative dispute mechanisms put in place by the IFI. Specifically, the IFI has obligations under its constituent documents to initiate dispute resolution mechanisms to certain affected parties, including its own employees through the establishment of an administrative tribunal and its service providers, other commercial counterparties and shareholders through binding arbitration. However, there is no such obligation to third parties, including concerned creditors. The Swiss Supreme Court decision confirmed the IFI's immunities and confirmed that the IFI has absolute immunity in respect of all actions connected to its mandate. The court also found that national courts are not competent to review the activities of IOs, and such review constitutes an abuse of law. Finally drawing from the European Court of Human Rights, the court ruled that any such limitation must be proportionate. In this case, recourse to the host State's administrative authorities was available as a remedy under the IFI's headquarters agreement and the IFI was obliged to cooperate with Swiss authorities. The Swiss Government, through the Swiss

MFA, confirmed that there was no obligation for the IFI to put in place an alternative accountability mechanism for third parties. Although the creditors subsequently started process for discovery proceedings in the United States, a non-member State, the US courts quashed this motion for lack of jurisdiction. In some cases, such as this one, there is no possibility to offer up an alternative accountability mechanism, and if the lawsuit had been successful, it would have defeated the independence of the IFI by facilitating a back-door means of debt collection against its member States.

Discussions centered around the importance of fostering legitimacy to promote the effectiveness of ADR regimes. Legitimacy generally refers to the right to rule. In the dispute resolution context, this refers to the right to issue decisions and awards and secure compliance which is content independent. Parties accept and comply with the rulings regardless of whether the outcome is favorable or adverse to their interests. Legitimacy comprises both normative legitimacy, namely whether the institution should have the right to rule and sociological legitimacy, namely whether the institution is believed to have the right to rule. Ensuring legitimacy increases compliance with rulings made under ADR regimes and promotes consistent participation and use of dispute settlement systems. While IOs are typically seen as neutral bodies, there is a need to ensure the dispute settlement processes they administer maintain procedural consistency by ensuring that they operate in a depolitized framework, especially in cases involving controversial and sensitive subject matter.

To illustrate the boundaries of legitimacy, a panel member examined whether the lack of explicit language in the World Bank's Articles of Agreement (Articles) affected the legitimacy in the establishment of ICSID. This discussion was particularly helpful as a precedent to guide other institutions seeking to set up judicial institutions for resolving investment disputes to avoid questions over its legitimacy. To do so, the panelist analyzed the World Bank's Articles and doctrines of interpreting the constituent documents of IOs. On the issue of legal and procedural legitimacy of ICSID's establishment, the World Bank justified its involvement in ICSID's creation largely on the grounds of the implied powers doctrine; the World Bank's Articles were interpreted widely enough to encompass the promotion of private investment in its development mandate.

7 Conclusion

Effective dispute resolution is critical to the promotion of development because it facilitates access to justice and is a key enabler and catalyst for economic growth. To this end, IOs have an important role to play in promoting

effective dispute resolution, including in the nurturing of judicial excellence in the decision-making process and investing in legal reform initiatives to assist countries to develop sound legal frameworks and train legal professionals.

IOs can be role models for the promotion of effective dispute resolution, and they can do so by leading by example. They may adopt exemplary rules and practices in their own dispute resolution mechanisms, such as upholding access to justice, fairness, transparency and due process. They can also encourage related stakeholders to adhere to similar exemplary values and promote the goals of inclusiveness in non-adversarial dispute resolution as well as dispute avoidance or prevention. They also have the technological means to promote the values and goals of effective dispute resolution mechanisms and can do so by sharing their own best practices globally and encouraging other IOs to utilize best practices in dispute resolution.

IOs have a role to play in fostering legitimacy in dispute resolution. They may do so by reconciling the tension between immunity and accountability. This may be done by establishing alternative accountability mechanisms and clarifying that they are subject to international law to dispel misperceptions before national courts that they are above the law. In addition, IOs involved in the resolution of dispute resolution may also play an important role to promote legitimacy by embodying and endorsing key values like procedural justice, neutrality, independence and democratic participation in their work. This will foster both normative and sociological legitimacy and may lead to greater legitimacy and effectiveness in dispute settlement regimes.

IAIs are an integral part of the dispute resolution landscape. Given their significant role at every stage of the arbitral process, they may lead when it comes to procedural innovation. They are, indeed, best placed to influence the future evolution of international arbitration. Whether framed as competition or collaboration, it is abundantly clear that there is much to gain from IAIs working together and collaborating to maintain competitive incentives to ensure that international arbitration remains an effective and cost-efficient means of dispute settlement. This is amply demonstrated by procedural innovations which have been proven to be successful in one IAI being adopted and modified as appropriate in other IAI. With the introduction of the BRI and China increasingly becoming a major market for international commercial disputes, the Chinese courts have also sought to become a more arbitration-friendly jurisdiction with procedural innovations such as the publishing of generally applicable judicial interpretations issued by China's Supreme People's Court. In addition, this has also raised the possibility of instituting a more multilateral dispute resolution process, possibly affiliated with the AIIB to resolve investment disputes involving projects emanating from the BRI.