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A Comparative study of investor-state dispute settlement mechanisms: The case of China and Pakistan Φ

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Abstract

Disputes between foreign investors and host state are most complex and crucial being one is a private investor and other an independent state and the ostensible purpose of investor-state dispute settlement is to protect foreign investors from economic damages arising by the host-government policies or actions. The present work is based on the comparative study, which determined how domestic and international investment laws are involved in resolving investor-state disputes in China and Pakistan, and enlightens the latest legislative developments regarding investor-state dispute settlement mechanisms.

Keywords: Comparative study, Investor-state dispute settlement mechanism, China, Pakistan, ICSID, BITs, and FTA.

1. Introduction

International investment is a type of cross-border capital flow. Foreign investment being the major pillars of international economy parallel to cross-border trade owing to economic globalization development[1]. Global foreign direct investment is rising under the incentives of investment liberalization policy, particularly from last two decades. While doing investment in a foreign country, theinvestor is always concerned about the dispute settlement system for the investment dispute, especially where there is history of dispute between the foreign investor and the host state. A strong and effective dispute settlement mechanism of host state always encourages foreign investors to commit their investment in a more confident way. While, an effective legal dispute settlement system dueto its numerous advantages is important to develop an ideal investment climate to attract the foreign investment and should be more widely recognized and comprehensively accessible, in order to facilitate access to information for foreign investors. The lack of cognizance about dispute resolution mechanisms in the host country creates misunderstandings in the mind of foreign investor and in future can create problems between theinvestor and the state while dealing with an investor-state dispute settlement. A well-developed authorized structure for foreign direct investment(FDI) is vital in attracting the foreign investments and legal environment, in turn, ascertained by the factors like; stability of the legal circumstances which help the investor to follow the relevant regulations of local public administration, an efficient legalized system to deal with dispute resolution and transparency of regulations. An efficient and unbiased dispute settlement mechanism is always a necessary element in the investor protection in the host state. Settlement of disputes between the foreign investors and the host states is an important aspect of the legal security of overseas investments.

China is dynamically incorporating into international investment liberalization and is becoming one of the most attractive regions for foreign investment as well as penetrating its investment to other regions being the 2nd world's largest recipient of FDI after the U.S[2]. China has exposed to the world by adopting policies on domestic economic reforms, over the last three decades. Among the other policy features, one was the attraction of FDI to overcome the high capital demand along with advanced technology and management skills to China. Since1970s, after the opening up of the country to the outer world and the foreign investment, China has been formulating various kinds of laws and regulations for regulating the foreign investments in the country. In 1979,

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[1]Chen An, (2007), New Developments in International Investment Law and China's New Practice of Bilateral Investment Treaties, 11 (Shanghai, Fudan University Press).

[2] See UNCTAD, World Investment Report 2010: Investing in a Low Carbon Economy, p. 4; available at: <http://www.unctad.org/en/docs/wir2010ch1_en.pdf>. accessed on 2017-10-10

Chinese-Foreign Joint Venture Law was practiced and after that two other laws, the Chinese-Foreign Cooperative Venture and the Wholly Foreign Owned Enterprise were also passed. China due to its massive commercial opportunities, big population and vast market progressively turned into the most important and attractive destinations for FDI in the world. Meanwhile, the legal regime on foreign investment including investor-state disputes settlement was also progressively established to meet the continuously increasing demand due to the changing economic development with increased foreign investment in China.

In Pakistan Foreign Investment Protection and Promotion Act, Protection of Economic Reforms Act and Foreign Exchange Regulation Act, regulate the foreign investment in the territory. Before 1997, foreign investment was restricted only to the manufacturing sector, in 1997, Pakistan opened the fields of agriculture, social infrastructure, and services sector for foreign investment. To protect and attract foreign investment to the country, Pakistan, has signed investment treaties with more than 48 countries and treaties to avoid double taxation with 52 countries. While, the government of Pakistan has provided lot of incentives, benefits, and concessions for foreign investors through investment policy 2013. Moreover, the country has also incorporated New York Convention and International Centre for Settlement of Investment Disputes (ICSID) convention into the domestic legislation and a strong system of dispute settlement also has been developed under mentioned laws and international treaties.

2. Investor-state dispute settlement implications

Investor-state dispute settlement, integral part of foreign investment laws, through which individual companies can sue countries for alleged discriminatory practices. Investor-State dispute differs from disputes between two or more investors in the fact that one of the disputing parties is always a sovereign state. An efficient Investor-state dispute settlement system can affectively deal with different issues. Firstly, when the dispute revolves around more than the individual interest of the investor and the state entity needs to balance the public interest against the interest of the investor and the investor-state dispute may result in a political conflict in which more issues are at stake that can be seen at first glance. Secondly, when the dispute is based on the breach of an international treaty instead of a contractual obligation. This affects how a conflict is handled and the remedies that are made available. Thirdly, when a state has several levels of government and it's not always clear who is responsible for a claim put forward by the investor, seeing this can be either the central government or a sub-national entity of the state. Thus, it can be difficult for a state to react timely to a breach of treaty obligations and for the investor to identify the proper party to turn.

3. Chinese national system and Investor-State Dispute Settlement Mechanisms

Since, China is moving towards the litigations society and, classified the litigation into commercial, civil, criminal and administrative cases. The Chinese government is paying an enormous intention to disputes with foreign investors because if such disputes are not appropriately managed they will impinge on country foreign investment environment and will also affect the inflow of foreign technology. and decision-making power are getting fail either to deal with their applications or to protect their rights, etc[1]. then they may apply for administrative reconsideration.

According to Chinese domestic legal system, the foreign-invested enterprise or foreign investor may have a choice of administrative litigation or administrative reconsideration in Investor-State dispute cases. If foreign investors feel that the particular administrative acts are disobeying their lawful interests or rights[2], imposing

[1]Article 6 of the Law on Administrative Reconsideration

[2] Such specific administrative acts may include but are not limited to decisions made by administrative organs (1) to impose on them administrative penalties such as fines, confiscation of illegal gains, orders for suspension of production or business operations, and temporary suspension or rescission of licenses; (2) to impose on them compulsory administrative measures including sealing up, seizure or freezing of property; (3) to alternate, suspend or revoke such documents as permits, licenses and qualification certificates; (4) to infringe upon their right of right of ownership in or the right to the use of natural resources. See, Article 6 of the Law on Administrative Reconsideration

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illegal duties on them, and decision-making power are getting fail either to deal with their applications or to protect their rights, etc[1]. then they may apply for administrative reconsideration.

Generally, under the Law on Administration Reconsideration, a foreign investor would be required to apply for reconsideration with a government entity at the same level or a department higher than the administrative body that has allegedly infringed upon the rights of the investor, depending on the type of administrative body that committed the act. The applicant can also state for reimbursement while applying for administrative reassessment[2]. According to law, a decision can be imposed by administrative reconsideration body, or an application can be handed over to People's Court for compulsory enforcement[3].

According to Article 9 of the Law on Administration Reconsideration, an aggrieved investor would have to file an application within 60 days from the day it learns of the administrative act, and reviewing authority must make its decision within another 60 days. If the authority finds for the aggrieved investor, it may either revoke the administrative act, or compensate the aggrieved party, or both[4].

If foreign investors are displeased with the pronouncement of administrative litigation then they may put forward dispute to China People's Court. In China, foreign organizations and foreigners, both, have same obligations and rights as Chinese organizations and citizens. A Foreign investor can only appointChinese lawyers as their agent's ad litem.Chinese courts will not pay attention to those cases which are against administrative decisions or related to national defense. Consequently, a foreign-invested enterprise may not be able to get the desired remedy through administrative litigation.

According to Chinese civil and commercial law disputes, the private parties may follow the way to settle their disputes through alternative dispute resolution like mediation, conciliation, and negotiation. Mediation, a favored back-up to consultation, is the most appreciated "first line of defense" contra the worsening of "disputes between friends" into "disputes with enemies" but quite opposite in Chinese society due to a long tradition of dislike of litigation.

Foreign investment complaint centers are also playing a pivotal role to resolve the disputes between foreign investors and both Chinese local governments and Chinese Central Government. Generally, complaint center procedures are settled within thirty days[5]. After examining a complaint, local complaint handling authorities or National Complaint Centre issue an opinion letter to the relevant authorities for the coordination or settlement of disputes.

Guangdong Complaints Centre has adopted rules for the filing of the complaint, mediation, and coordination, procedures with documents and limits of time for disputes settlement concerned with foreign investors. Administrative disputes are handled with great care and through coordination. Governmental department related case hearings are conducted by the Central Administrative Affairs Division. Discuss the Zibo Siemens case here. Zibo Siemens Vacuum Pump & Compressor Co. Ltd was established as a Chinese-foreign joint venture. "Zibo Siemens "was no more a Chinese-FEJV after its foreign counterpart acquired the shareholding of Chinese party in 1998. Zibo Siemens, while working as a joint venture, for a period of two years, had signed employment contracts with one hundred and ninety-six workers. After two years, when the employment contract was expired, nine out of 196 employees of Zibo Vacuum Pump Factory workers didn't renew their contracts and filed a dispute with the former employment company 'Zibo Siemens' to the related local governmental authority that the economic compensation calculation method was not appropriate. The local governmental authority issued an award against Zibo Siemens Co. and the company refused to accept the reward

[1]Article 6 of the Law on Administrative Reconsideration

[2]Article 29 of the Law on Administrative Reconsideration.

[3]Article 33 of the Law on Administrative Reconsideration

[4]Article 9 Any citizen, legal person or any other organization, who considers that a specific administrative act has infringed upon his or its lawful rights and interests, may file an application for administrative reconsideration within 60 days from the day when he or it knows the specific administrative act, except that the time limit prescribed in laws exceeds 60 days. If the time limit prescribed by law is delayed due to force majeure or other special reasons, the time limit shall be accounted continuously from the day when the obstacle is removed.

[5] See, The Interim Measures of the Ministry of Commerce concerning Complaints from Foreign-invested Enterprises Article 10 of the Interim Measure available at:

http://tradeinservices.mofcom.gov.cn/en/b/<accessed on 2017/1O/17>

and consult to the court. The city intermediate Court of Zibo ordered the Siemens Company to give the indemnity to workers according to the terms of contracts, while the local labor authority insisted on its own viewpoint. According to the decision of local labor authority the company would have had to pay a big amount as economic compensation to the workers and in turn, the Zibo Siemens have to face heavy economic crises as the company had already lost much during the last year. Meanwhile, on Zibo Siemens's management advice the Zibo Siemens German headquarters decided to withdraw its investment and filed a complaint at the City Complaint Centre for Foreign-Invested Enterprises. The Zibo city Municipal Government Centre leaders have decided to seriously deal with the complaint because it was related to the repute of the city's foreign investment environment. Finally, with the active participation of Zibo City Municipal Government leaders, the labor authority decision was revoked.[1]

The importance and flexibility of Complaint Centre system is evident from the above case irrespective of any negative impact on their performance. So, the complaint centers have also their important role in order to attract the foreign investment. Therefore, most parties are advised to settle their disputes well before the litigation stage in order to promote efficiency, effectiveness, and overall satisfaction

3.1 China and International Mechanism for Settling Investor-state disputes

China's dispute resolution mechanism between investor and states include those provided in bilateral and multilateral treaties. Historically, foreign investors who were deprived of their property had to rely on their own government willing to make requests on their behalf and had to spend more time and money grueling local relief measures[2]. Such settlement mechanism has been changed since bilateral investment treaties (BITs) was introduced to protect investors. According to a report on settlement of dispute stipulations in the international investment treaty, 93% of the sample BITs contain term on investor vs state dispute settlement.

The disputes between investors and host states could be resolved under the first generation of China BITs through an administrative level approach of reviewing the host state jurisdiction that accepted the foreign investor to invest in the country. In addition, after the authorized subsistence of the expropriation through the government could the foreign investor start the settlement amount of compensation under the relevant BITs The first international arbitration used by China was the BIT signed between China and Germany in 1983 as a way for resolving investor-host disputes[3], but the applicability of the BIT was limited within local remedies rather than broadly accepted international arbitration and only the dispute United Nations Commission on International Trade Law (UNCITRAL)[4].

The new generation BITs of China is now offering more effective protection against political risks due to unnecessary state interference with foreign investors. These modifications have been submitted and establish an elementary change in foreign policy of the country. With this, the Chinese approach to international investment agreements has emerged and the third generation of Chinese BITs has progressed. These treaties aim to find a better balance between the rights of investors and host countries.[5]

Inclusive activities for using the ICSID mechanism in China's recent Free Trade Agreement (FTA). Although China was not included in Investor Dispute Resolution in its Free Trade Agreement or Free Trade Agreement in Nature, it deals with ASEAN, Chile, Macao, and Hong Kong. It has gained unlimited decorum with Pakistan to control investors' conflicts on the ICSID forum. Article 54 of the China-Pakistan Free Trade Agreement provides that an investor may lodge legal disputes regarding an investment in the State's territory to ICSID.

In 1993, the government of China accredits the convention and the ICSID convention came into force for China on February 6, 1993. In the pronouncement to ICSID, the government of China would only contemplate

[1] See, Article 11 of the Interim Measures. Available at :http://tradeinservices.mofcom.gov.cn/en/b/2006-09-01/11293.shtml,,accessed on 2017/10/25

[2]Kim M. Rooney, ICSID and BIT Arbitrations and China, Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2007, Volume 24 Issue 6) pp. 689 – 712, 691.

[3]Li Bei, "On the perfection of the international arbitration mechanism to 'investor host' disputes of Sino- foreign BITs",

[4]See Protocol of China- France BIT (1984).

[5]See e.g. BITs signed with Mexico (2008), Colombia (2008), Canada (2012), the trilateral investment treaty signed between China, Korea and Japan (2012) and the PTIAs with New Zealand (2008), Peru (2009) and ASEAN (2009).

ICSID's jurisdiction over the compensatory results from nationalization and expropriation[1]. In 1998, China signed BIT with Barbados, which allowed investors to submit to ICSID arbitration[2]. Similar provisions has also been established in further eventual BITs, as signed with other countries like BITs with Netherlands (2001)[3], Germany (2003) and Finland (2004).[4] While, most of the foreign investors probably not use ICSID to resolve their disputes with the Chinese government, as foreign investors know that maintaining good relationships with government will ensure their investment success in China and lack of trust about the award enforcement is the other reason that foreign investors not approaching the ICSID.

According to Chinese legal system, arbitral awards related to dispute from contractual and non-contractual economic legal relationship can be accepted and enforced but there is no domestic people's republic of China (PRC) legislation that specifically implements the recognition and enforcement of arbitral awards under the ICSID convention. However, if a party brought an ICSID award to the PRC, it would likely invoke Article 269 of the Civil Procedural Law. [5] China has no law permitting enforcement of arbitral awards against countryproperty. This will also prevent local courts from connecting state assets to enforce an ICSID award. In thissituation, foreign investors are intimidated from opposing any arbitration contrary to PRC because even if they win the case, the arbitration award cannot be enforced.

4. Pakistan and Domestic Mechanism of investor-state Dispute Resolution

Pakistan has a well-defined investor state dispute settlement mechanism and country's legal system is supplemented by specific legislation. Independent judiciary is enshrined in constitution with equal rights to access the law courts for all domestic and foreign investors. Civil courts have the legal authority to deal with the business or investment related disputes through normal process. Additionally, Government also encourages the conciliation, mediation and arbitration as alternative mechanisms for dispute settlement. The Arbitration Act 1940, deal wth theinvestor-state proceedings and arbitration is required to be conducted in accordance with the provisions of this act (Arbitration Act 1940); formerly passed by the British Parliament in 1940. While, provisional High Courts can may make such rules as are consistent with the Arbitration Act 1940 and the provisions of the Arbitration Act 1940 is binding upon the Federal and the Provincial Governments of Pakistan. Arbitrations covered under the Arbitration Act 1940 in Pakistan are; the arbitration through the intervention of the court; when the suit of the parties is pending before the court of law, the arbitration through the intervention of the court; when parties apply before the court of law for arbitration and there is no suit pending between the contracting parties and the arbitration without the intervention of the court of law; which is purely processed in accordance with the will and wishes of the contracting parties of the arbitration agreement (1940).

[1]See https://icsid.worldbank.org/ICSID/FrontServletaccessed date 2017/10/23

[2]See, Article 8 of the Agreement on the Encouragement and Reciprocal Protection of Investments between China and Barbados (20 July 1998); available at: <http://www.asianlii.org/cn/legis/cen/laws/abtgotprocatgobctearpoi1447>.acessed date2017/10/25

[3]Article 10(3) of the China-Netherlands BIT provides: "If the dispute [between an investor and the host State] has not been settled amicably within a period of six months, from the date either party to the dispute requested amicable settlement, each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to: a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or b) an ad hoc arbitral tribunal, unless otherwise agreed upon by the parties to the dispute, to be established under The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." Text Available at: <http://www.unctad.org/sections/dite/iia/docs/bits/china_netherlands.pdf>.accessed date 2017/10/16

[4]Article 9(2) of the China-Finland BIT (2004) provides: "If the dispute has not been settled within three months, from the date at which it was raised in writing, the dispute may, at the choice of the investor, be submitted: ... (b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965."

[5]See article 269 of PR civil procedure law; If an award made by a foreign arbitration agency requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to execution has its domicile or where its property is located. The people's court shall deal with the matter in accordance with the relevant provisions of the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity.

According to domestic courts mechanism for settlement of investor state dispute, if an investor avails the administrative remedies but is not satisfied by the administrative decision, the investor can approach the high court of the province which has territorial jurisdiction over the subject matter. An investor having adispute with the Government can also go directly to the court and can file a lawsuit against the government in the District court where the subject matter is situated or where the cause of action arises[1]. While, against the decision of the district court a foreign investor as similar to Pakistani investor has right of appeal before the High Court of the province and if still aggrieved by the decision of High Court a further appeal can be filed before the Supreme Court of Pakistan (SCP) under the provisions of the constitution of the Islamic Republic of Pakistan.[2]Pakistani higher court procedure in cases involving foreign investor and the government dispute can be well understand by the HUB Power Co. vs Water and Power Development Authority (Wapda) case.

An entity of Pakistani Government, the Wapda, and a foreign company (Hubco) had concluded a Power Purchase Agreement (PPA) that included a foreign arbitration clause, to be conducted in London in accordance with the international Chamber of Commerce (ICC) Rules. Hubco requested the provisional (Sindh) High Court to refer the matter to arbitration under the arbitration clause in PPA. In defense, Wapda leveled allegations of corruption against the foreign party and some of its own officials and accused them of conniving together to procure an amendment in the PPA, which had unduly favored Hubco. It is important to note that the parties had agreed that English law would govern the dispute arising out of PPA.

Sindh high court (SHC) observed that one of the questions before it was to determine whether the dispute between parties was covered under the definition of dispute provided by the arbitration clause. The court noted that according to both English and Pakistani law, dispute between parties would be referred to arbitration according to the terms of the arbitration clause, unless

1. The very existence of an arbitration agreement is challenged; and/or

2. It can be shown that the foreign arbitration would be *forum nonconvenience.*

Sindh High Court (SHC) of Pakistan found that the parties were free to proceed with foreign arbitration in accordance with the arbitration clause in the Power Purchase Agreement. In the court's opinion, the existence of the arbitration agreement was based on the validity of the main agreement (PPA) which contains the arbitration clause. The court then discussed the allegations of corruption leveled against Wapda officials and whether this fact gives rise to questions of public policy.

The Sindh High Court concluded; *"That no question of public policy arose and PPA was a valid agreement, and allegations of corruption had not been substantiated with sufficient evidence. In the court's opinion, therefore, since no question of public policy arose, the parties were bound to proceed in accordance with their arbitration agreement.*[3] *Respecting the question of foreign arbitration as forum nonconveniens, the court observed that the issue becomes insignificant as, under the ICC Rules (Article 14), parties could request the ICC to conduct the arbitration proceedings in Pakistan."*[4]

On appeal against decision of the Sindh High Court, a five-member bench of the Supreme Court of Pakistan first determined that the only question before it was, whether the nature of dispute and questions of corruption in terms of legal incompetence, fraud, mala fide and illegalities raised by one of the parties precluded resolution of the dispute through international arbitration as a matter of public policy.[5] The judges comprising the SCP bench then divided on their final finding. A minority of the judges first recalled that in accordance with established principles of severability of arbitration clause from the main agreement, allegations of invalidity or being void ab initio of the main agreement did not invalidate the arbitration clause and dispute arising from main agreement could legitimately be referred to arbitration.[6] The minority judgment also relied on Island Textile case

[1] Civil procedure code of Pakistan 1908

[2] Article 203 of the Constitution of the Islamic Republic of Pakistan 1973

[3]The court, somewhat surprisingly, compared the question of public policy with misdemeanors provided by Section 19 of the Contract Act, which renders a contract voidable when consent is caused by coercion, fraud or misrepresentation

[4]Hub Power Co. v. Wapda (1999 CLC Karachi 1320).

[5]See the minority view of the judgement pronounced by Justice Per M. Bashir Jehangiri in Hub

Power Co. v. Wapda (2000 PLD Supreme Court 841), para.16

[6]SCP in Hub Power Co. v. Wapda (2000 PLD Supreme Court 841), paras.31–32 and 36.

where it has been held that the questions of fraud and/or misrepresentation in respect of the main contract cannot preclude the enforcement of its arbitration clause. This line of reasoning, which upheld the impugned decision of SHC, could not persuade the majority of judges comprising the Hubco bench. The majority judgment found that the enforcement of arbitration agreements was precluded due to the involvement of questions of public policy arising from the allegations of fraud, legal incompetence and mala fide leveled against parties.

The majority judgment observed: *"If the agreement prima facie had been obtained through fraud or bribe would it not then be sufficient to take it out of the pale of the arbitrability as distinguished from a commercial dispute raised under a valid agreement".*[1]

This dictum at least confirms that the primary concern for Hubco bench while enforcing a foreign arbitration agreement was neither costs involved nor probable inconvenience caused to the parties. The primary concern was the element of corruption, fraud, and bribery involved in the parties' transaction that made the court to declare the entire agreement unenforceable because it was opposed to public policy.

4.1 Pakistan and International Mechanism of investor-state Dispute Resolution

Being the part of protective investment regime, arbitration is a channel for dispute settlement by the international investor[2]. In Pakistan, international arbitration processes has been excessively practiced for the disputes resolution between host states and foreign investors. Moreover, when a multilateral or international regime is absent,[3] normally arbitration processes are incorporated in bilateral investment treaties (BITs), which provide protection for foreign investors, and promote foreign investment. The first BIT was signed in 1959 by Germany and Pakistan,[4] the treaty regime to remain calm over the last fifty years;Pakistan concluded 47 BITs (up to 2016) [5]and according to Pakistan BITs regimen the investor have the right to approach to ICSID for settlement of dispute.

In addition, Pakistan has signed the convention on Settlement of Investment Disputes between a state and foreign investor in 1965(Washington Convention). International Arbitration Act (AIID) was recognized under the Pakistan Arbitration Act, adopted by parliament approval. On April 28, 2011, Pakistani parliament issued a regulation regarding the implementation of International Convention on Settlement of Investment Disputes between States and Nationals of Other States. The international investment disputes (the "Act"),[6] has been as "a great step forward" to create confidence of foreign investors.

The Pakistani legal system related to recognition and enforcement of arbitral awards provide confident to foreign investors to have their disputes with Pakistan settled by ICSID. The international investment disputes(AIID Act, 2011-Section 3) authorizes a person looking for acknowledgment and implication of an arbitral award given by the ICSID for the arbitral award registration as a proof of any prescribed matter in the local high court.

An arbitral award registered under AIID Act (section 3) is acted toward as a judgment made by a High Court could be conducted in the same way as its own judgments. On the other hand, against the government, the

[111]Hub Power Co. v. Wapda (2000 PLD Supreme Court 841)

[2]See generally UNCTAD, Trends in international investment agreements (IIA): an over view (Sales No. E.99.II.D.23).

[3]There are only guidelines on the subject. See World Bank Guidelines on the Treatment of Foreign Direct Investment (1992). The negotiations towards a potential Multilateral Agreement on Investment (the MAI Negotiating Text, dated February 14, 1998) at the Organization for Economic Cooperation and Development have now ceased without any agreement being concluded.

[4] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959,available at: http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef accessed on 2017/10/20

[5] Pakistan investment policy hub available at:http://investmentpolicyhub.unctad.org/IIA/CountryBits/160,accessed on 2016710/20

[6]Pakistani government has promulgated an ordinance implementing the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States available at:

http://www.mjlalegal.com/uploads/1/7/8/7/17874169/pakistan_chapter_-_arbitration_world_-2012.pdf,accessed on 2017/10/15

enforcement of any award may be turned down by the court on the basis of which judgment of a local court might not implement it.

The AIID Act precisely excludes the local courts for the application of the Arbitration Act provisions to proceeding covered by the Washington Convention. However, the AIID Act does not prohibit local courts from acquiring disputes and matters covered by the Washington Convention. Similarly, provision is not present in the AIID Act which obliges local courts to enforce the lawsuit against them under the Washington Convention.

The federal government is empowered by AIID Act to make the rules about arbitral awards registration, issued pursuant to the Washington Convention and the standards of proof there under. The federal government, so far not established any rules regarding this aspect. It is needless to add that this whole issue is surrounded by ambiguity as there is no inclination by the federal government for issuing any such rules.

Additionally, no provision included by the AIID Act for the judicial assistance of local courts for gathering evidence for arbitration proceeding of ICSID. Likewise, the AIID Act not provide any provision for the empowerment of the local courts for protection orders, meanwhile sale or guardianship of any goods that form part of the issue of an ICSID arbitration or to order the protection, inspection, or detention of anything or property that forms part of the issue of an ICSID arbitration.

5. Comparison of China and Pakistan Investor-State Dispute Settlement Mechanisms

This section will enlighten how Chinese and Pakistani laws and regulations deal with the various aspects of Investor-State Dispute Settlement Mechanisms especially in the context of ICSID Awards implementation, involvement in investment arbitration, practice of the rule of law, judicial review, treatment standards, consistent and stable government policies and, official's attitude and duration of dispute resolution.

5.1 ICSID Awards

In China, there is no domestic legislation that specificallyimplementstheobligations under the ICSID convention. However, if a party brought an ICSID award to China, it would likely invoke Article 269 of the Civil Procedural Law, which provides thus, "If an award made by foreign arbitration agency requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to execution as its domicile or where its property is located. The people's court shall deal with the matter in accordance with the relevant provision of the international treaties concluded or acceded to the People's Republic of China or on the principle of reciprocity." The current situation in China, the unsettled state of the doctrine on treaty implementation means that even provisions such as Articles 269 and 238 of the Civil Procedure Law (CPL) do not guarantee that PRC courts will enforce ICSID awards.

Courts in China have shown that enforcing an arbitration agreement can be a difficult procedure. An example hereof is the decision of an Intermediate Court of Chengdu City in the *PepsiCo. Judgment*. The Court refused recognition and enforcement of the arbitral award issued by the Stockholm Chamber of Commerce (SCC) because PepsiCo. Failed to comply with the pre-arbitration consultation requirements[1]. Whereas, the Supreme People's Court (SPC) decision in the *Heavy Metal case* also shows enforcement of arbitral awards can be difficult in PRC. In this case, the SPC denied the enforcement of a foreign-related award on the ground that the contract in dispute was said to relate to a subject matter that was against national sentiments and contrary to the social and public interests of PRC.[2]

In comparison to the Pakistan, China's domestic legal regime for the execution of ICSID awards is far cry. The process of recognition and enforcement of arbitral awards settled by ICSID has always a sign of confident for foreign investors as according to international investment disputes (AIID Act, 2011-Section 3) authorized focal person look after all the matters in the local high court.While, the enforcement of ICSID Awards in England and Wales are obliged to recognize and enforce an economic award granted under the ICSID Convention "as if it were a final judgment of a court of that State" (Article 54 of the ICSID Convention,

[1] PepsiCo,Inc.v.sichuan pepsi cola.Ltd,(2005)chengdu Ming Chu Zi Di no91(decided Apr.30,2008)(Chengdu intermediate peopl's court,china);pepsi co investment(china)co,Ltd.v.sichuan yunlv development industrial co(2006)cheng ming chu zi di no 36 (Chengdu intermediate people'scourt,china)for discussion ,see Nadia Darwazeh&FrivenYeoh,Recognition and enforcement of award under new York convention .

[2] Ta No. 35, SPC ruling 1997. Referred to in: Moser, Michael J., *Managing Business Disputes in Today's China: Dueling with Dragons*, Alphenaan de Rijn: Kluwer Law International

paragraph 1). This international commitment has been incorporated into national law in the United Kingdom by virtue of the International Investment Disputes Act in 1966 (the law)[1] and in Pakistan's International Investment Dispute Act 2011. It is important that the court has no discretion to refuse to recognize (i.e, register) or enforce an ICSID award if all formal procedural requirements for registration are met.

5.2 Involvement in Investment Arbitration

Disputes and their resolution are to a great extent shaped by cultural influences. Investor-state disputes involve, as per definition, parties from different cultural backgrounds. The institutionalization of international investor-state arbitration is conducted to ignore cultural differences between parties. Arbitration always guided by objective of law and decided upon by an independent arbitrator. The key purpose of arbitration is to conduct a predictable and objective dispute settlement mechanism; fitting the prevalent dispute settlement preference mostly of Western investors.[2]

China has practiced very cautious approach towards international arbitration and, in general prefer the mediation as choice method, on the contrary to adjudicative strategy of dispute resolution, arbitration and litigation are also provoked the role of the law in country. Since 2006, the Chinese central government has tried to impose mediation instead of litigation in the course of national policy to maintain "social harmony"[3]. Government interference in the judiciary has caused citizens to seek out non-judicial dispute settlement method like mediation. Chinese society has a long tradition of the aversion of litigation and has been introduced in a top-down matter that did not protect the individual needs of citizens where the law was not a tool to protect all people; rather it protected those in power. Government of China has taken a positivist approach to law. China has been governed mostly by public law regimes in which law is an instrument of social control, applied by authorities in an arbitrary manner[4].

However, in Pakistan, Islam being the territory religion and the injunctions of Islam as laid down in the Holy Quran and Sunnah are assigned to be the supreme law and source of guidance for legislation and for policy-making by the government.[5]Islam not only recognizes but also resolves to settle the dispute through arbitration in the pre-Islamic society of Arabia; the disputes which were not settled through negotiations between the parties were settled through the arbitration. Holy Prophet Muhammad (peace be upon him) continued this tradition and has done many examples as arbitrator and the Holy Quran guides the process. Therefore, the arbitration is in the country's psyche.

Moreover, Pakistan has been signed world first ever BIT in 1959, and never reluctant to accept arbitration related to investor-state disputes. Pakistan has received anumber of compensation claims from investors over the past years, most notable cases includeSGS[6] and Bayindir Insaat[7], who sued Pakistan at ICSID, others include Karkey[8], Tethyan[1], and Agility[2].

[1]See Article 2(1) of the Act. The Act applies to England & Wales, Scotland and Northern Ireland (Articles 7 and 8), and has been extended by Statutory Instrument to Guernsey (SI No. 1199 dated 26 July 1968), Jersey (SI No. 572 dated 23 May 1979), Bermuda, the British Virgin Islands, the Falkland Islands and their dependencies, Gibraltar, Islands of Alderney, Island or Sark, Monserrat, Anguillan, St Helena and its dependencies and the Turks and Caicos Islands (SI No. 159 dated 10 February 1967). In the Isle of Man, the State's international obligations are incorporated into domestic law by virtue of the Arbitration (International Investment Disputes) Act 1983 (an Act of Tynwald).

[2]Ginsburg et al. 2006, p. 508

[3]Minzer 2011, p. 930.

[4]Pryles 2006, p. 9-10.

[5] PAK. CONST., art. 2.

[6]SGS v. Pakistan, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan

(ICSID Case No. ARB/01/13)

[7]Bayindir v. Pakistan, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan

(ICSID Case No. ARB/03/29)

[8]Karkey Karadeniz v. Pakistan, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan

(ICSID Case No. ARB/13/1)

5.3 Practice of the Rule of law

Investment arbitration is similar to administrative or constitutional adjudication and is used when the host country's adjudication is deficient. International arbitration is a tool for "democratic responsibility and participation, orderly state administration, protection of investor rights and other interests". At the same time, the international arbitration system is intended to compensate for the failure of national courts in certain countries and to seek to provide the rule of law, so that the country's legal system protects the rights of the international investors in the host country. Countries like China, believe that foreign investors should resolve any problem they have with the government through the national court system as practiced in countries where a well-developed system of rule of law has—as in developed countries.[3]

China's administrative law has found stronger when compared to Pakistan. Chinese domestic law protects foreign investor rights and interests and also try to develop their rule of law, so that foreign investors not to approach to international forums for settlement of disputes. While Pakistan needs to practice the rule of law to provide astrong legal environment to the foreign investors and should endeavor to improve its local mechanism of dispute resolution and also use the ideas and capabilities of the rule of law to measure the quality of leading officials enables us to achieve a cognition transformation of the orientation of the evaluation of the rule of law[4]and make it trustworthy to foreign investors and build up a stable legal environment to attract more FDI.

5.4 Judicial Review

The function of judicial review is to act as "a check against excess power in derogation of private right "yet it cannot supervise all administrative adjudication for it exist to check, not supplement them. Investor-state disputes are concerned with particular enactments of the Government rather than the general application of laws.

Limiting the power of judicial review to a particular administrative act is a definite aspect of Chinese law. However, there are several issues with this mechanism, including the courts having limited judicial review power due to their lack of power in relation to reviewing abstract acts[5], and the limits a party can encounter such as only being allowed to challenge specific acts that infringe their legitimate rights and interests, leaving other important rights excluded.

However, the concept of judicial review in investor-state disputes concerned is developed in Pakistan as in countries like US, England and India. In Pakistan, the development of judicial review of administrative action has followed that model of Britain and USA. There has been no marked opposition to the administrative process but it has been accepted as imminent of national planning and growth of the welfare state.

5.5 Treatment Standards

China is unwilling to accept an investor-state settlement of dispute through ICSID. Although it approved the ICSID Convention in 1993 and began to accept the ICSID jurisdiction in the growing number of BITs and has only ICSID registered an arbitration application on 12 February 2007, which was concerned in the treaty in which one party was from China[6]. As an effective tool of settling disputes with foreign investors, international arbitration practice in China has been gradually adopted. The provisions of the agreement include full protection and safety, fair and equitable treatment, umbrella clause, minimum standards of treatment etc. However, the Government of China has put some condition for ratification of the ICSID Convention that limits the jurisdiction of the ICSID dispute restrict the amount of compensation for expropriation and nationalization. Such limits

[1]Tethyan Copper v. Pakistan,Tethyan, Copper Company Pty Limited v. Islamic Republic of Pakistan

(ICSID Case No. ARB/12/1)

[2]Agility v. Pakistan, Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan

(ICSID Case No. ARB/11/8)

[3]TTIP, Investor–State Dispute Settlement and the Rule of Law. By Peter H. Chase

[4] Qian Hongdao & Wang Zhaoxia., (2017), Transforming the Evaluation of the Rule of Law in China, Social Sciences in China, 38:1, 85-105.

[5] Wang Guiguo, (2011) Chinese Mechanisms for Resolving Investor-State Disputes. Jindal Journal of International Affairs Vol. 1, ISSUE 1, p204-233.

[6] See, Tza Yap Shum v. Republic of Peru, supra, note 53.

could raise the conflict of jurisdiction within ICSID, creating a great barrier for Chinese and foreign investors to access ICSID.

While, Pakistan signed its first BIT with Germany on December 1, 1959. Since inking of Germany and Pakistan BIT, Countries around the world have signed thousands of BITs. German and Pakistan BIT served as a model for subsequent BITs, although recent BITs includes many new and updated provisions resulting from changing practice for promotion and protection of FDI. Pakistani BITs do not reveal a uniform practice on standards of treatment accorded to both investors and their investments. Almost all BITs use different language in the standard of treatment provisions although all of them, in one way or the other, according to Fair and Equitable Treatment (FET), National Treatment (NT)[1], Most Favorite Nation (MFN) and full protection and security to investments. Only 2 BITs, with the U.K. and Japan, extend the MFN treatment to dispute resolution provisions, whereas BIT with Tajikistan specially excludes the application of MFN to dispute resolution provisions. Only 13 BITs extend the standards of treatment to both investments and investors and 39 BITs provide some sort of exceptions to the MFN treatment. However, Pakistan has variegated practice respecting the standards of treatment provisions compare to China and, uniform standards of treatment clause need to design for future BITs.

5.6 Consistent and Stable Government Policies and Official's Attitude

An efficient local government always attracts overseas GDP while inconsistency and instability in policies by the Government constantly affect the flow of FDI to the country. No matter how much incentives are provided to foreign investors, those cannot be fruitful unless and until policies of the Government are stabilized and become consistent. The views of government officials in the dispute with foreign investors will reflect this effort, as it can be seen as an environment for foreign investment in the country is not so good.

In past decades, China's economic growth has been called "Gross domestic product-gallop,"[2] which means that continued Gross domestic product growth is the main economic goal of the Chinese government. With such a policy, the performance of government officials is largely assessed by their skills to increase Gross domestic product. Foreign investors also play an important role in this assessment. Foreign investment over the past two decades or more has contributed significantly to China's gross domestic Product growth.

However, the situation in Pakistan is worst and it has been a usual practice that new forming governments show theleast interest and initiate policies concerning their own pursuits. Such a situation forces, foreign investor to withdraw from long-term projects. Therefore, in order to secure the confidence of foreigninvestors, the policies of the governments need to be stabilized which can ensure security for the valuable investment.[3]

5.7 Duration of Dispute Resolution

Article 270 of the Chinese Code of Civil Procedure provides that time-limits do not apply to civil cases involving foreign investment. According to the Rules of Arbitration of CIETAC 2012, the Arbitral Tribunal shall issue an arbitration award in ordinary proceedings within six months (in foreign cases) from the date of formation of the Arbitration Tribunal. In summary procedure cases, the Arbitral Tribunal shall issue its decision within three months of the date of formation of the arbitral tribunal. In national arbitration, the arbitral tribunal shall render an award within four months of the date of formation of the arbitral tribunal. At the request of the Tribunal and with the consent of the Secretary-General of CIETAC, the duration of the award may be extended.

However, the History of cases in courts of Pakistan shows that courts have independently announced their decision even against the home Government. But unfortunately, due to lacunas in Code of Civil Procedure 1908, litigation takes a long time in order to come towards an end. Even enforcement of an arbitral award takes much time in its enforcement.

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[1] UNCTAD, 'National Treatment', UNCTAD Series on Issues in International Investment Agreements (New York and Geneva, United Nations, 1999), p. 1.

[2] See, Mei Wang and Xu Lin, "China: Towards Results-Based Strategic Planning", in Sourcebook on Emerging

Good Practice in Managing for Development Results, 2nd edition, May 2007; available at:

<http://www.mfdr.org/sourcebook/2ndEdition/3-1ChinaRBP.pdf>.accessed on 2017/10/20

[3] A. Khan 'Importance of foreign direct investment' available at http://jang.com.pk/thenews/dec2008-weekly/busrev-22-12-2008/p7.htm accessed on 2017/10 /18

South Asia is the slowest region in the enforcement of arbitral awards by the courts, according to the recent reports of the World Bank. In Sri Lanka and Pakistan, enforcement of arbitration awards takes more than two years[1]. This delay in litigation or otherwise in the enforcement of award creates doubts in the minds of foreign investors and consequently, the investors hesitate to make an investment in such a country. So, to improve the foreigner investor confidence and investment, Pakistan have to follow the Chinese's court procedures being the emerging leader in attracting foreign investment after the US.

6. Conclusion

This paper has comprehesively indulged in a comparative analysis of Chinese and Pakistani investor-state dispute settlement mechanisms and focused on, how both countries rules and regulations deal with the investor-state disputes at national and international forums by adopting the comparative analysis as a research methodology. By thoroughly exploring some of the available related literature and case studies from both countries, this study has identified some distinctive feature of handling dispute settlement mechanismsrelated to foreign investor and state. It also has been discussed that how Chinese and Pakistani policy and law makerscould practice to attract more foreign investment to the country by protection investor's fundamental rights and adopting an optimal way for settling investment disputes between foreign investors and host states, by granting the disputing parties increased control over the arbitral process and by ensuring enforceability of the awards.

Over the past decade, China has established itself as the top recipient of FDI and attempts have made to make modernize its legal system with comprehensive provisions regarding dispute settlement mechanism for investment disputes. China found reluctant to accept the litigation and always prefer to friendly negotiation, as per Chinese international investment law concern and, found extremely cautious and limited to the use of international arbitration to build the amount of compensation for expropriation. As compared to Pakistan, domestic system of China has obstacles in the enforcementof investor vs state arbitration awards because there is no law that allows arbitration (including the ICSID award) against the state property. Based on these circumstances, foreign investors are disappointed with an arbitration decision made against China, even if they win arbitration, the arbitration award cannot be enforced.

As per Pakistani investor-state dispute settlement laws concerned, they provide a strong protection to the foreign investments but due to the multiplicity of Laws and Regulations, Investor may get confused. To avoid this confusion Pakistan needs to draw clear laws and also strengthen its procedures based on institutional framework in order to provide an inexpensive, fair and expeditious local mechanism of dispute resolutions to enhance the foreigner investor trust.

Both China and Pakistan should endeavor to improve their local mechanisms of dispute resolution and make them trustworthy for foreign investors and build up a stable legal environment. For example, in order to provide a state of internationalprotection to the foreign investors while working in the host state, country's domestic courts can practice directly and frequently by applying BITs. This practice will not only protect interests of foreign investors in a better and more effective way but also be helpful in the maintenance of the jurisdiction of sovereign states and other major public interests. Only the existence of an object oriented, reliable and transparent mechanism of local dispute resolution can reduce the need to the restoration to international dispute settlement mechanism.

The suggestions and recommendations made based on the present comparative study of investor-state dispute settlement mechanisms of China and Pakistan may beneficial for policy makers of both countries.

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