ISSUES OF ARBITRABILITY OF INVESTMENT DISPUTES UNDER THE LEGISLATION OF UZBEKISTAN

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I. Overview

In recent years, the states in Central Asia have been noted for their increasing pro-arbitration stance and legal steps taken towards progressive development of national legislation on foreign investments. In parallel, the number of investment cases involving states from the region have been growing in the last few years. In particular, the ICSID Caseload statistics reveal that the number of cases registered in 2021 under the ICSID Convention, in 2022 under the ICSID Convention and Additional Facility Rules was highest for Eastern Europe and Central Asia, while in 2023 the region placed second in the geographic distribution of newly-registered ICSID cases.

Meanwhile, attraction of foreign investments into the region necessitates further reformation of national legislation of the states in the region. This article sheds light on issues pertinent to arbitrability of investment disputes under the legislation of Uzbekistan.

II. Laws on foreign investments

The Uzbek Law on Investments and Investment activity (the "**Investment Law**") came into force on 27 January 2020 and unified the then-existing three laws on investment activities, foreign investments, and guarantees and measures of protection granted to foreign investors. However, along with the Investment Law, among others, there are several laws regulating foreign direct investments on the basis of the type of investment implementation. In particular, the Uzbek Law on Public-Private Partnerships (the "**Law on PPP**") governs relationships arising out of public-private partnership ("**PPP**") and concession agreements as specific forms of investment activity. The Uzbek Law on Production Sharing Agreements (the "**Law on PSA**") defines rules for conclusion, execution and termination of relationships arising out of production sharing agreements ("**PSA**"). [The Investment Law, the Law on PPP, and the Law on PSA will be referred to as Laws on foreign investments hereinafter.]

The division of the Uzbek national legislation on foreign investments is especially noteworthy. Uzbekistan plans to attract a sum of investment amounting to 70 billion USD in 2022-2026, more importantly, 14 billion of which on PPP basis alone, into its energy, transportation, health-care, education, ecology, public utilities and water management sectors.

III. Interrelations of Laws on foreign investments and international treaties to which Uzbekistan is a party

The Investment Law provides for rules of general nature and admits that forms of investment implementation may include concessions and PSAs (Article 6 of the Law). Nevertheless, Article 1 of the Investment Law rules out the application of its provisions to concessions, PPPs, and PSAs. Moreover, each of the Laws on foreign investments provide for a different dispute resolution clause which leaves them open to interpretations.

Furthermore, Article 2 of the Investment Law recognizes a prevailing authority of international treaties on investments and investment activity Uzbekistan is party to over the national legislation of Uzbekistan. Similarly, Article 2 of the Law on PPP and the Law on PSA contains a provision on the overriding authority of international treaties on PPPs or on PSAs of Uzbekistan over the national legislation.

According to the UNCTAD Policy Hub, Uzbekistan has 49 BITs and 3 treaties with investment provisions in force. A great majority of these international instruments provide for a broad and non-exhaustive list definition of investments which encompass concessions and PSAs.

Considering the provision of Article 2 of the Laws on foreign investments, following inferences may be reached.

First, international treaties, the BITs and treaties with investment provisions of Uzbekistan are applicable to all types of investments in Uzbekistan, irrespective of type of investment implementation. Hence, it may be assumed that the BITs signed by Uzbekistan overrides an arbitrary division of the national legislation on foreign investments. For the purposes of Article 2 of the of the Law on PSAs and the Law on PPPs, the BITs and treaties with investment provisions of Uzbekistan may be considered as international treaties of Uzbekistan on PPPs or PSAs.

Second, the BITs and treaties with investment provisions of Uzbekistan override the provision of the Laws on foreign investments if provisions of the international treaties are in conflict with provisions of the Laws on foreign investments.

The second inference is especially relevant for the purposes of analysis of arbitrability of investment disputes which is provided below.

IV. Settlement of disputes under the Laws on foreign investments

The Laws on foreign investments differ in regard to the provision on a dispute settlement mechanism provided therein. Below separate analysis of each of the dispute settlement mechanism of the Laws on foreign investment is elaborated.

1. Settlement of disputes under the Investment law

The Investment Law introduced several novelties into the national legislation. In particular, Article 63 of the Law establishes a four-tier dispute resolution mechanism:

- "investment disputes *are settled* through negotiations;
- investment disputes not settled through negotiations *shall be settled* by means of mediation;
- investment disputes not settled through negotiations and by means of mediation *shall be settled* at courts of Uzbekistan;
- investment disputes not settled with the above mentioned mechanisms *may be settled* by international arbitration."

The consent of Uzbekistan to resolution of investment disputes by arbitration may only be in a written form and should be stated:

- "in an international treaty which Uzbekistan is party to and which includes a valid and proper arbitration clause (treaty-based consent); and/or
- in an agreement concluded between an investor and Uzbekistan which includes a valid and proper arbitration clause (contract-based consent)."

This four-tier dispute resolution provision poses several questions pertinent to the function of the provision and enforceability of each of the dispute settlement mechanism.

1.1 Function of the provision

It is necessary to define the function of the above-mentioned provision of the Investment Law. The formulation of the provision leaves it susceptible to different interpretations:

- whether a dispute resolution mechanism provided by BITs of Uzbekistan will override the four-tier dispute resolution mechanism stated in Article 63 of the Investment Law when the former does not impose exhaustion of local remedies; or alternatively
- whether the four-tier dispute resolution mechanism provided for in Article 63 of the Investment Law bears an imperative character, and thus international treaties have a supplementary role stipulating rules for settlement of investment disputes by international arbitration; or alternatively
- whether a foreign investor can bypass Article 63 of the Investment Law by submitting the dispute directly to international arbitration despite its mandatory character under Article 23 of the Investment law which guarantees to an investor the right to choose a more favorable provision in cases of conflict between BITs and the national legislation of Uzbekistan.

While there is a lack of precedent on investor-state disputes under the Investment Law since the Law took effect and the Uzbek judiciary has yet to interpret the function of the above-cites provision, the following points should be emphasized:

First, the analysis of the BITs provided at the UNCTAD Policy Hub reveals that a great majority of the BITs, although do encourage amicable settlement of disputes within a limited time frame, do not impose exhaustion of local remedies. Meanwhile, as a unique case, the BIT signed between Uzbekistan and UAE provides a court settlement of investment dispute within 24 months after which the dispute may be submitted to international arbitration.

Second, the provision uses a "loose" formulation in regard to settlement of investment disputes by means of international arbitration by stating "investment disputes not settled with the above mentioned mechanisms *may be settled* by international arbitration" whereas in regard to other dispute settlement mechanisms a more "tough" language has been used.

Third, the Article imposes existence of a written consent contained in international treaties or in a private agreement signed with an investor for submission of an investment dispute to international arbitration.

In light of the above, a dispute settlement body before whom an investment dispute has been brought may be tasked to determine the function of the provision and whether an investor is obliged to exhaust local remedies under the Article 63 of the Investment Law.

1.2 Settlement of disputes through negotiations

Under Article 63 of the Investment law, parties to an investment dispute should try to resolve their dispute amicably. However, investment law does not specify a period within which parties should resolve or attempt to resolve their dispute or a cooling off period. The absence of a period for negotiations may create a room for abuse. Thus, a foreign investor is advised to take one of the following actions so as to avoid lengthy and dilatory negotiations:

- to indicate a period and detailed procedure for negotiations in the investment agreement with Uzbekistan; or
- to fix the duration of period during which a foreign investor expects from Uzbekistan good-faith negotiations at service of a notice on the existence of an investment dispute if there is no investment agreement with Uzbekistan or it does not stipulate a period for good faith negotiations; or, alternatively,
- to refer to the period provided in an international treaties signed by Uzbekistan and state of the investor.

For example, the BIT signed between Uzbekistan and Bahrain stipulates a period of six months for consultations from the date of request for settlement. Hence, an investor from Bahrain may refer to this period contained in the BIT if there is no investment agreement signed between the investor and Uzbekistan or it does not stipulate a period for good faith negotiations.

1.3 Mediation of investment disputes

Pursuant to Article 63, if the parties to an investment dispute fail to settle the dispute through negotiations, such a dispute shall be resolved through mediation. Uzbekistan adopted the Law on Mediation which allows parties to settle their dispute through mediation before its submission to court or international arbitration in accordance with an agreement to mediate. However, the requirement to mediate investment disputes may turn obsolete.

First, Uzbekistan is not yet a party to any legal instrument on the recognition and enforcement of a mediation award at international level such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").

Second, the Code of Economic Procedure of Uzbekistan (the "CEP") of Uzbekistan does not provide for provisions on recognition and enforcement of mediation settlement agreements.

Thus, even if it is mandatory for parties to an investment dispute to mediate their dispute, a mediation settlement agreement may turn out unenforceable, eventually.

1.4 Settlement of Disputes by Court

Under Article 63, parties to an investment dispute are required to submit their investment dispute to Uzbek court if negotiations and mediation between the investor and Uzbekistan or its governmental bodies fail. The Investment Law does not establish jurisdiction of courts that can hear investment disputes. The jurisdiction of Uzbek courts are provided by procedural codes of Uzbekistan.

The EPC and the Code of Administrative Procedure (the "CAP") establish jurisdiction for economic and administrative courts over investment disputes.

In particular, Article 30-1 of the CEP provides for an exhaustive list of investment disputes that may be heard by economic courts of Uzbekistan:

- "disputes related to conclusion, amendment and termination of an investment agreement;
- disputes on invalidation of an investment agreement;
- disputes related to execution of an investment agreement;
- disputes related to fulfillment by an investor of tax, customs, social, environmental and other obligations arising from an investment agreement;
- disputes related to reclamation of property (vindication) provided to an investor under an investment agreement, or the recovery of penalties and (or) losses under such an investment agreement".

It is noteworthy that under Article 30-1 of the EPC, qualification of a dispute as an investment dispute requires existence of an investment agreement, and all other disputes with participation of an investor is regarded as "disputes related to investment activity of an investor".

On the contrary, under Article 63 of the Investment Law an investment dispute is defined as a dispute related to foreign investments arising from investment activity of a foreign investor in Uzbekistan. Thus, under the Investment law, an investment dispute does not require existence of an investment agreement signed between a foreign investor and Uzbekistan or its governmental bodies.

In spite of the above differences in the definition of investment dispute provided by the Investment Law and the CAP, claims of foreign investors, whether there is an investment agreement or not, may be heard by respective economic courts of Uzbekistan.

Under Article 27-1 of the CAP, investment disputes are defined as disputes between investors and administrative authorities over actions or omissions of the latter related to compliance with the terms of an investment agreement. Similarly, as seen above, classification of disputes as investment disputes requires existence of an investment agreement under the CAP, and under the CAP all other disputes are referred to as investment related to investment activity of an investor.

In spite of the above differences in the definition of investment dispute provided by the Investment Law and the CAP, claims of foreign investors, whether there is an investment agreement or not, may be heard by respective administrative courts of Uzbekistan.

1.5 Exclusive jurisdiction of economic courts of Uzbekistan

The CEP provides for cases when economic courts of Uzbekistan hold exclusive jurisdiction over disputes. In particular, under Article 240 of the CEP, economic courts exclusively adjudicate the following disputes with participation of a foreign party:

- in relation to property owned by Uzbekistan, including disputes related to the denationalization and privatization of the state property and the seizure of property for public needs; and/or
- disputes over immovable property or the rights to it, if such property is located on the territory of Uzbekistan.

Thus, in the above-mentioned cases, a foreign party is prevented from submitting a dispute to international arbitration, and is bound to submit an investment dispute to Uzbek courts.

1.6 Settlement of disputes by international arbitration[1]

As a last recourse, Article 63 of the Investment Law provides for settlement of disputes by means of international arbitration. However, there are at least two preliminary conditions to submit an investment dispute to international arbitration.

First, the dispute is not settled yet.

Second, there is a written consent of Uzbekistan stated in an international treaty of Uzbekistan or an investment agreement signed between a foreign investor and Uzbekistan.

The first condition alone raises several concerns. In particular, the Uzbek judiciary has yet to interpret when the dispute brought by a foreign investor at Uzbek courts will be considered as not settled.

[1] Uzbekistan is party to the New York Convention, and the ICSID Convention.

Second, whether a foreign investor not happy with the award of first instance has to exhaust all instances of appeal and/or review which may render the settlement procedure dilatory.

Lastly, whether a foreign investor not happy with an award of Uzbek court can submit the dispute to international arbitration contrary to the principle of finality of awards or *res judicata*.

In regard to the second condition, in 2006 the Constitutional Court of Uzbekistan, interpreting a dispute settlement clause provided by the then-in-force investment law, stated that possibility to arbitrate an investment dispute is not in itself considered as a consent of Uzbekistan to international arbitration under international treaties to which Uzbekistan is a party.

Moreover, the analysis of the BITs of Uzbekistan provided at the UNCTAD Policy Hub reveals that not all of the BITs contains a written consent of Uzbekistan, the BIT signed between Egypt and Uzbekistan does not contain a clause on investor-state dispute settlement:

No	BITs with a written consent of states	BITs without a written consent of states
1	Austria-Uzbekistan BIT	Belorussia-Uzbekistan BIT
2	Azerbaijan-Uzbekistan BIT	Bulgaria-Uzbekistan BIT
3	Bahrain-Uzbekistan BIT	China-Uzbekistan BIT
4	Bangladesh-Uzbekistan BIT	Czech Republic-Uzbekistan BIT
5	Belgium-Luxemburg-Uzbekistan BIT	Finland-Uzbekistan BIT
6	Greece-Uzbekistan BIT	France-Uzbekistan BIT
7	Indonesia-Uzbekistan BIT	Georgia-Uzbekistan BIT
8	Japan-Uzbekistan BIT	Germany-Uzbekistan BIT
9	Kazakhstan-Uzbekistan BIT	Hungary-Uzbekistan BIT
10	South Korea-Uzbekistan BIT	Iran-Uzbekistan BIT
11	Kuwait-Uzbekistan BIT	Israel-Uzbekistan BIT
12	Kyrgyzstan-Uzbekistan BIT	Lithuania-Uzbekistan BIT
13	Latvia-Uzbekistan BIT	Malaysia-Uzbekistan BIT
14	Moldova-Uzbekistan BIT	Oman-Uzbekistan BIT
15	Netherlands-Uzbekistan BIT	Pakistan-Uzbekistan BIT
16	Slovenia-Uzbekistan BIT	Portugal-Uzbekistan BIT
17	Sweden-Uzbekistan BIT	Romania-Uzbekistan BIT
18	Switzerland-Uzbekistan BIT	Russia-Uzbekistan BIT
19	UAE-Uzbekistan BIT	Saudi Arabia-Uzbekistan BIT
20		Singapore-Uzbekistan BIT
21		Slovakia-Uzbekistan BIT
22		Spain-Uzbekistan BIT
23		Tajikistan-Uzbekistan BIT
24		Turkiye-Uzbekistan BIT
25		UK-Uzbekistan BIT
26		Ukraine-Uzbekistan BIT
27		Vietnam-Uzbekistan BIT

The above cited analysis leads several conclusions.

First, when a BIT signed between Uzbekistan and the state of foreign investor does not contain a written consent, a foreign investor is recommended to ensure that there is an investment agreement signed with Uzbekistan, and it contains a written consent of Uzbekistan to submit potential investment disputes to international arbitration.

Second, in cases when there is no investment agreement signed between a foreign investor and Uzbekistan, and the BIT signed between Uzbekistan and the state of the foreign investor does not include a written consent of Uzbekistan, it may not be feasible to submit disputes to international arbitration. In this case, a foreign investor may be bound to submit an investment dispute to Uzbek courts.

V. Settlement of disputes under the Law on PPP

The Law on PPP, contrary to the Investment Law, does not stipulate a dispute settlement clause. Instead, Article 40 of the Law on PPP states that disputes arising from PPPs are resolved in the manner provided by the Uzbek legislation.

The Uzbek legislation, in turn, does not preclude parties from choosing international arbitration as a dispute settlement mechanism. This leads to several inferences. In particular, parties are able to submit disputes arising from PPP agreements to international arbitration under PPP agreements. Additionally, under the Law on PPPs, a consent of Uzbekistan for submission of disputes to international arbitration is not required, thus it may be feasible for a foreign investor to a PPP to bring a treaty-based claim under a BIT signed by Uzbekistan irrespective of the fact that whether the BIT contains an express written consent or not.

VI. Settlement of disputes under the Law on PSAs

The Law on PSA differs from the Investment Law and the Law on PPP in respect to a dispute settlement clause contained therein. According to Article 28 of the Law on PSA, "disputes between the state and an investor related to the PSA agreement are resolved in accordance with the terms of the agreement in court, including the international arbitration court."

The above-cited provision of Article 28 of the Law on PSA may be interpreted as allowing direct submission of disputes to international arbitration provided that a PSA agreement does not impose exhaustion of administrative and/or judicial remedies. Similarly, under the Law on PSA, a consent of Uzbekistan for submission of disputes to international arbitration is not required, thus it may be feasible for a foreign investor to a PSA agreement to bring a treaty-based claim under a BIT signed by Uzbekistan irrespective of the fact that whether the BIT contains an express written consent or not.

VII. Concluding remarks

Investors, first of all, expect well-defined legislative acts which stipulate investment-related provisions. The arbitrary division of the investment laws does not allow for the Uzbek legislation to act as an exhaustive framework and leaves it susceptible to interpretations. In this regard, it is recommended to take the following actions to further develop the national legislation of Uzbekistan:

2.1 Unification of the Law on foreign investments

The Investment Law, the Law on PPP, and the Law on PSA should be unified into a single law with investment-related provisions. The arbitrary division of the national legislation of Uzbekistan on investments and the exclusion of applicability of the Investment Law to PPPs and PSAs leads to interpretations with respect to several matters some of which are: whether PPP and PSA agreements are considered as investment agreements; whether disputes arising from PPP and PSA agreements are considered as investment disputes; if disputes arising from PPP and PSA agreements are considered as investment disputes, only disputes arising out of agreements bearing the name of "investment agreement" should exhaust three-step dispute settlement mechanism under the Investment Law prior to being submitted to international arbitration whereas disputes arising from PPPs and PSAs may be subject to international arbitration without negotiations, mediation and court settlement under the respective laws.

2.2 Revision of the dispute settlement clause under the Investment Law

It is a common practice in investment arbitration to have a cooling off period or a timeframe for good faith negotiations to settle an investment dispute. However, the four-tier dispute settlement mechanism provided by the Investment Law may not work for the benefit of foreign investors for the above-provided reasons. Therefore, the dispute settlement mechanism provided by the Investment Law should be revised allowing a foreign investor to choose a more favourable option for settlement of the dispute. Foreign investors should have an option to submit the dispute to Uzbek courts or to international arbitration in cases when arbitration of the dispute is possible under the Uzbek law and international treaties of Uzbekistan.