

Effectiveness of alternative dispute resolution in resolving investment disputes in developing countries: Analysis of ICSID cases in Indonesia and Nigeria

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Abstract

This article analyzes the impact of Alternative Dispute Resolution (ADR) on improving the investment environment in Indonesia. Indonesia seeks to enhance legal certainty and create a favorable climate for investors, both local and foreign, by incorporating Alternative Dispute Resolution (ADR) into its legal system. This will provide an efficient and non-judicial method for settling investment issues. This approach is further solidified by the state's adoption of the ICSID Convention via Law No. 5 of 1968, which provides a dependable arbitration mechanism for the resolution of disputes involving foreign investors and the state. The convergence of ADR principles and ICSID regulations not only corresponds to global benchmarks but also reflects the cultural ethos of "musyawarah mufakat" in Indonesia, which advocates for peaceful resolutions. Attracting investment, sustaining economic growth, and participating in regional and global trade frameworks are all dependent on these legal mechanisms being successful. There are far-reaching consequences for Indonesia's long-term economic development, and this research emphasizes the critical significance of legal frameworks in preserving investor trust.

Keywords: Dispute resolution, developing countries, investment, litigation

Introduction

Foreign Direct Investment (FDI) stands as a pivotal force in the economic development of emerging markets (Moosa, 2002). Countries such as Indonesia and Nigeria, along with a multitude of developing countries across Latin America, Asia, and Africa, recognize FDI as a strategic tool for development. The infusion of foreign capital, technology, and expertise not only supplements domestic savings and strengthens foreign exchange reserves but also serves as a catalyst for industrialization, productivity enhancement, and job creation, ultimately contributing to improved living standards and overall socio-economic progress (OECD, 2018).

The United Nations Conference on Trade and Development (UNCTAD) notes in its 2020 World Investment Report that the pursuit and realization of FDI benefits are not without their complexities. For instance, the global landscape of international investment is marked by a growing incidence of investment disputes. These disputes arise from the inherent intricacies of cross-border transactions, often amplified by disparities in legal systems, cultural norms, and varying levels of institutional development across nations (UNCTAD, 2020). The rise of investor-state dispute

settlement (ISDS) mechanisms, while initially intended to safeguard investor rights, has paradoxically become a source of contention, particularly in developing countries. The perceived imbalance of power between foreign investors and host states, coupled with concerns about the erosion of national sovereignty, has fueled debates surrounding the legitimacy and effectiveness of ISDS (van Harten, 2015). If an investment-related issue or challenge arises between the state and foreigners, any ensuing disputes shall be resolved through the process of arbitration.

Developing countries, in particular, face unique challenges in navigating the complexities of investment dispute resolution. One reason for this is that many developing countries are characterized by nascent or evolving and sometimes weak legal frameworks for investment, which can lead to ambiguities and inconsistencies in interpretation and application (World Bank, 2019). Furthermore, domestic legal institutions may lack the capacity and expertise to effectively adjudicate complex investment disputes, raising questions about impartiality and due process. Resource constraints often limit developing countries' ability to access and fully utilize international arbitration, which can be financially burdensome and

time-consuming. Additionally, investment disputes often become intertwined with political sensitivities, as they can have far-reaching implications for national economic policies and development strategies.

In light of these challenges, alternative dispute resolution (ADR) mechanisms are increasingly being recognized as a promising instrument for resolving investment disputes in developing countries. ADR, encompassing negotiation, mediation, and conciliation, offers a more flexible, cost-effective, and culturally sensitive approach compared to traditional litigation approaches. As noted by Allee and Tinsley (2014), ADR can foster the preservation of relationships between investors and host states, while also facilitating the achievement of mutually beneficial outcomes. The International Centre for Settlement of Investment Disputes (ICSID), established under the auspices of the World Bank, plays a crucial role with regard to the deployment of ADR mechanisms in dispute resolution, providing a neutral and specialized forum for arbitration and conciliation of investment disputes.

This study undertakes a comparative analysis of ICSID cases involving Indonesia and Nigeria to assess the

effectiveness of the ADR approach in resolving investment disputes within these diverse contexts. The study examines a range of factors, including the legal and regulatory frameworks, institutional capacity, and cultural norms in each country, in order to understand how these factors influence the use and effectiveness of ADR. Specifically, this research investigates whether there are commonalities or patterns in the use and effectiveness of ADR across developing countries. Another concern of the present study is understanding that lessons can be drawn from the experiences of different countries to enhance the efficacy of ADR in resolving investment disputes. By addressing these questions, this research seeks to contribute to a deeper understanding of the potential of ADR to create a more favourable investment climate in developing countries. It aims to provide valuable insights for policymakers, practitioners, and stakeholders involved in investment dispute resolution, with the aim of promoting sustainable economic development and mutually beneficial partnerships between investors and host states.

Background

Alternative Dispute Resolution (ADR) encompasses a diverse array of non-

adversarial methods for resolving disputes outside of traditional litigation approaches. ADR methods, including negotiation, mediation, conciliation, and arbitration, are underpinned by principles such as party autonomy, confidentiality, flexibility, and informality (Moore, 2003). In the context of investment disputes, ADR offers several distinct advantages compared to the traditional route of litigation. It is often more cost-effective, faster, and less adversarial, allowing parties to preserve business relationships and find mutually agreeable solutions (Lindblad, 2015).

Negotiation, which is the most informal and direct strategy of ADR, involves discussions between the disputing parties to find voluntary and mutually agreeable settlement options. It is often the first step in dispute resolution and can be highly effective when parties are willing to compromise and collaborate. The next strategy, mediation, involves the assistance of a neutral third party (the mediator) who facilitates communication and helps parties identify common ground and explore potential solutions. The mediator does not make decisions but assists the parties in reaching a voluntary agreement. Similarly, conciliation involves a neutral and impartial third party known as a conciliator. However,

unlike the mediator, the conciliator may play a more active role in proposing solutions. Conciliation is often used in situations where parties have reached an impasse in their negotiations. Lastly, **arbitration** is technically a form of adjudication; it is often considered an ADR mechanism because it is a private process chosen by the parties. It involves the submission of a dispute to a neutral third party (the arbitrator or arbitral tribunal) who renders a binding decision. Arbitration can be faster and more flexible than litigation in traditional courts.

Despite these advantages, ADR is not without its challenges. The enforcement of agreements reached through ADR can be difficult, especially in cross-border disputes. Additionally, there can be power imbalances between parties, particularly in investor-state disputes, where states may have greater resources and bargaining power. The success of ADR also depends on the willingness of parties to participate in good faith and the availability of skilled mediators or conciliators (Menkel-Meadow, 2013). Recognizing this challenge, the International Centre for Settlement of Investment Disputes (ICSID) was established under the Convention on the Settlement of Investment Disputes

between States and Nationals of Other States (the ICSID Convention) in 1966. The primary objective of the Convention was to provide a neutral and depoliticized forum for resolving investment disputes through conciliation and arbitration, thus offering a balance between investor protection and state sovereignty (Schreuer, 2009). ICSID's creation was driven by the need to promote investor confidence, offer neutrality and impartiality, facilitate amicable solutions, and enhance legal certainty. By providing a reliable and predictable mechanism for resolving disputes, ICSID aims to encourage foreign investment, particularly in developing countries. The independent status and the established rules of ICSID aim to ensure fair and unbiased dispute resolution processes. Furthermore, the emphasis on conciliation and mediation is meant to promote mutually agreeable resolutions and preserve relationships between investors and states. The ICSID Convention and its accompanying rules provided a clear legal framework for investment dispute resolution, which helps to reduce uncertainty and risk for both investors and states.

In addition to its traditional role in arbitration, ICSID has taken significant steps towards promoting and facilitating

the use of ADR in investment disputes. The ICSID Additional Facility Rules, adopted in 1978, extended the ICSID's dispute resolution services to cases where one party is not an ICSID contracting state, thus broadening its reach and making its services more accessible (Reinisch, 2008). Furthermore, ICSID has developed various resources to support ADR, including guidance notes, model clauses, and training programmes for mediators and conciliators (ICSID, 2018). These efforts aim to raise awareness about the benefits of ADR and equip practitioners with the skills and knowledge necessary to effectively administer these mechanisms.

Common causes of investment disputes in developing economies

The landscape of investment disputes in developing countries is complex and dynamic, and shaped by a combination of legal, political, economic, and social forces. While foreign direct investment (FDI) is a critical catalyst for economic growth and development in these nations, the inherent complexities of cross-border transactions, coupled with diverse legal systems, cultural norms, and varying levels of institutional capacity, can lead to a broad spectrum of disputes (UNCTAD, 2020).

A significant source of investment disputes in developing countries stems from **contractual breaches**. These breaches can occur due to actions or inactions by either the investor or the host state, highlighting the importance of robust legal frameworks for contract enforcement. Investors may fail to adhere to environmental or labour standards stipulated in agreements, while host states may violate guarantees regarding the stability of the legal and regulatory environment. The frequency of such disputes underscores the need for clear, comprehensive, and enforceable contracts in the FDI context (UNCTAD, 2020). For example, in the case of *Global Gas and Refinery Limited and Shell Petroleum Development Company of Nigeria Ltd. v. The Federal Republic of Nigeria* (2011), the tribunal found that Nigeria breached a gas supply and purchase agreement, leading to a significant award of damages in favour of the companies.

Expropriation, the taking of foreign-owned property by a host state, is another contentious issue in international investment law. The fear of expropriation can deter foreign investors and negatively impact FDI inflows, making it imperative for developing countries to establish clear and transparent legal frameworks that protect investor rights and ensure fair

compensation in cases of legitimate expropriation. An example of such tensions arose in Nigeria in the 1970s with the nationalization of the oil industry, which led to protracted legal battles between foreign oil companies and the Nigerian government (Akintola, 2018). In another notable example of the complexities surrounding expropriation, the case of *ConocoPhillips v. Venezuela* (2018) stands out. ConocoPhillips, a U.S. oil company, initiated arbitration against Venezuela under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) following the nationalization of its oil assets in the country. ConocoPhillips contended that Venezuela's actions constituted unlawful expropriation and violated the bilateral investment treaty between the Netherlands and Venezuela. The tribunal ultimately ruled in favour of ConocoPhillips, awarding over \$8 billion in damages. This landmark decision underscores the significant financial risks associated with expropriation and the potential for ICSID arbitration to provide substantial relief to investors in such cases.

Investment treaties often include provisions requiring fair and equitable treatment (FET) for foreign investors. However, the broad and open-ended

nature of the FET standard can lead to disputes when investors perceive state actions as violating their legitimate expectations or undermining the fundamental fairness of the investment relationship (Dolzer & Schreuer, 2012). Striking a balance between protecting investor rights and preserving regulatory autonomy is a delicate challenge for developing countries. In *Companhia de Águas do Brasil, S.A., Vivendi Universal, S.A., and Suez, Sociedad General de Aguas de Barcelona, S.A. v. The Argentine Republic* (2007), the tribunal ruled in favour of the investors, citing violations of fair and equitable treatment and expropriation provisions in a dispute concerning water and sewage concessions.

The imperative for developing countries to **maintain stable and predictable legal and regulatory frameworks** is further underscored by the *Enel Green Power S.p.A. and Enel Brasil Participações Ltda. v. Federative Republic of Brazil* (2020) case. This dispute arose from regulatory changes implemented by Brazil that significantly altered the financial incentives for renewable energy projects. Enel, an Italian energy company, argued that these changes undermined the economic viability of its investments and constituted a violation of its legitimate

expectations under the Italy-Brazil Bilateral Investment Treaty. The ICSID tribunal agreed with Enel, concluding that Brazil's actions were discriminatory and violated the fair and equitable treatment standard. This case highlights the potential for regulatory changes, even those made with legitimate policy goals in mind, to trigger costly and complex investment disputes if not carefully implemented with due consideration for existing investments and international obligations.

The case of *CMS Gas Transmission Company v. The Argentine Republic* (2005) demonstrates that ICSID tribunals also consider the rights of host states to regulate their economies, particularly during times of crisis. In this case, CMS Gas, a U.S. company, had invested in Argentina's natural gas transportation sector. Following Argentina's economic crisis in 2001, the government implemented emergency measures that froze tariffs and converted them from U.S. dollars to pesos, significantly impacting CMS Gas's profitability. CMS Gas claimed that Argentina's actions violated the fair and equitable treatment standard and the expropriation provisions of the U.S.-Argentina Bilateral Investment Treaty. However, the ICSID tribunal ruled in favour of Argentina,

finding that the country's emergency measures were a justifiable response to the economic crisis and did not constitute a treaty violation.

In *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria* (2020), two U.S. companies alleged that Nigeria had expropriated their oil mining leases and discriminated against them, seeking over USD 1.5 billion in damages. However, the ICSID tribunal dismissed all claims, ruling that Nigeria's actions were legitimate regulatory measures and did not breach the Nigeria-US Bilateral Investment Treaty. This outcome underscores the potential for host states to successfully defend against investor claims, even in complex cases involving expropriation and discrimination allegations, and emphasizes the importance of clear and well-drafted investment treaties. The rise of resource nationalism, for instance, can lead to conflicts over ownership, control, and benefit-sharing from natural resources (Kearney, 2015).

In addition to these common drivers, developing countries grapple with additional challenges that can exacerbate investment disputes. Environmental concerns are also increasingly becoming a concern in FDI disputes, with

disagreements arising over environmental regulations and alleged environmental damage (van Harten, 2014). Corruption, lack of transparency, labour rights violations, and tax disputes further complicate the investment landscape in many developing nations. Understanding these complex dynamics, including specific examples like those from Indonesia, Nigeria, and other developing countries, is crucial for crafting effective dispute resolution mechanisms and fostering a stable investment climate that benefits both investors and host states.

Literature review

The existing literature on ADR in investment disputes is extensive and diverse, offering various perspectives on its effectiveness and challenges. Numerous studies have explored the success rates and outcomes of ADR in resolving investment disputes, often comparing them with traditional forms of arbitration (Allee & Tinsley, 2014; Lindblad, 2015). The findings often highlight ADR's potential for faster and more cost-effective resolutions, particularly when compared to the often lengthy and expensive process of international arbitration. However, the success of ADR is contingent upon various factors, including the willingness of parties to engage in good-faith

negotiations, the skill and impartiality of the mediator/conciliator, and the existence of a supportive legal and institutional framework.

In the context of developing countries, studies have examined the particular difficulties and possibilities that ADR offers. Wälde (2015), for example, stresses that ADR processes must be culturally sensitive, as cultural norms and values can greatly affect negotiation dynamics and the potential for amicable solutions. Additionally, he identifies capacity building and institutional support as vital for successful ADR implementation in developing countries. This encompasses training mediators and conciliators, educating stakeholders about ADR, and incorporating ADR into existing legal structures.

The role of ICSID in facilitating ADR has also been a subject of scholarly inquiry. Reinisch (2008) highlights the significance of ICSID's Additional Facility Rules in extending the ICDID's dispute resolution services to cases where one party is not an ICSID Contracting State, thereby increasing the accessibility of ICSID's resources for developing countries. Other studies have also tried to examine ICSID's efforts to promote ADR, such as its guidance notes, model clauses,

and training programmes (ICSID, 2018). These initiatives are seen as positive steps towards fostering a culture of ADR in investment dispute resolution.

However, ICSID has recently faced challenges regarding the non-recognition of its awards and decisions by states, similar to other facilities. This could be attributed to perceived shortcomings in its rules or a lack of continuous, widespread consultation with signatories to the Convention to further strengthen its processes. This issue of non-recognition began with Argentina, which initially refused to comply with awards rendered against it, although it later agreed to settle five awards. In *Goetz v. Burundi*, Burundi defaulted on the payment of awards, leading to a second case. In *Petrobart v. Kyrgyz Republic*, the Kyrgyz Republic has refused to pay the award rendered against it since 2005. Additionally, in *Micula v. Romania*, the European Commission blocked Romania from paying the award, citing concerns that it might constitute illegal state aid under European Union law.

A critical aspect of the literature on ICSID's ADR mechanisms is the balance between protecting investor rights and respecting state sovereignty. Scholars such as Muchlinski (2018) argue that

while ICSID provides a valuable platform for resolving disputes, there is often a disproportionate emphasis on investor protection at the expense of state regulatory autonomy. This imbalance can be particularly problematic for developing countries that may need to prioritize public policy objectives over investor interests. Muchlinski (2018) also calls for structural and procedural reforms to enhance the effectiveness of ICSID's ADR mechanisms. Pauwelyn and Alschner (2014) suggest that reforms should focus on increasing transparency, improving accountability, and ensuring a more equitable balance between investor and state interests. Examining case studies such as Indonesia's Churchill Mining PLC and Nigeria's Shell Nigeria Ultra Deep Limited, Muchlinski (2018) reveals both the successes and shortcomings in ICSID's ADR processes. Sornarajah (2017) and Muchlinski (2018) highlight the complexities and challenges involved in these cases, from enforcement issues to political and economic ramifications. These case studies underscore the need for context-specific adaptations and reforms to address the unique challenges faced by developing countries. While the existing literature provides valuable insights into ADR and ICSID's role, there remain gaps in our understanding of these mechanisms in the context of

developing countries. For instance, there is a need for more empirical research on the actual outcomes of ADR in investment disputes involving developing countries. Additionally, further analysis is needed to examine the interplay between ADR and other dispute resolution mechanisms, such as arbitration, and how they can be used in a complementary manner to achieve optimal outcomes.

Case studies

The following case studies illustrate the practical application of ADR principles within the ICSID framework, showcasing both the potential and the complexities of resolving investment disputes in developing countries.

a) *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (2012/2016). This case arose from the revocation of mining licenses in Indonesia, highlighting the risks inherent in resource extraction investments in developing countries. The tribunal dismissed Churchill Mining's claims due to forgery and fraud, underscoring the importance of thorough due diligence and transparent practices. While ADR was not explicitly utilized in this case, the tribunal's adherence to procedural fairness aligns with ADR principles. This case demonstrates the importance of due

diligence and transparency in investment ventures, particularly in the extractive sector. The tribunal's dismissal of Churchill Mining's claims due to forgery and fraud highlights the need for investors to conduct thorough investigations and adhere to high ethical standards in their dealings. For Indonesia, this case reinforces the importance of maintaining a robust legal framework that can effectively address fraudulent activities and protect the country's resources. The case also underscores the potential risks associated with resource nationalism, as the government's decision to revoke the mining licenses was partly driven by a desire to assert greater control over its natural resources. Legal scholars like Sornarajah (2017) criticized the tribunal's decision, arguing that it overly favoured the Indonesian government and failed to adequately consider the investor's legitimate concerns and expectations. The Indonesian government welcomed the decision as a vindication of its right to regulate its mining sector and protect national interests. This case spanned four years.

b) *Karaha Bodas Company LLC v. The Republic of Indonesia* (2001). This case stemmed from the Indonesian government's termination of a power plant project due to the Asian financial

crisis. The tribunal ruled in favour of the American power company, awarding damages for the violation of the fair and equitable treatment clause. This case demonstrates the potential for ICSID arbitration to provide recourse for investors and highlights the importance of legal certainty and investor protection. This case exemplifies the challenges faced by developing countries in balancing the need for foreign investment with the protection of public interests during economic crises. The Indonesian government's termination of the power plant project due to the Asian financial crisis was a legitimate exercise of its regulatory authority, but it also raised concerns about legal certainty and investor protection. The tribunal's decision to award damages to Karaha Bodas Company LLC for the violation of the fair and equitable treatment clause demonstrates the importance of upholding international legal standards and ensuring that investors are not unfairly penalized for events beyond their control. The tribunal's decision was seen as a landmark ruling, affirming the principle of fair and equitable treatment for foreign investors. While the Indonesian government initially expressed disappointment with the outcome, it ultimately complied with the award, demonstrating its commitment to

upholding international law. This case took three years to resolve.

c) *Global Gas and Refinery Limited and Shell Petroleum Development Company of Nigeria Ltd. v. The Federal Republic of Nigeria* (2011). This complex case, revolving around a gas supply and purchase agreement, highlights the challenges of maintaining stable contractual relationships in the volatile energy sector. The tribunal found that Nigeria breached the agreement and awarded damages to the companies, which underscores ICSID's critical role in resolving intricate commercial disputes and upholding contractual sanctity. This case highlights the complexities of contractual disputes in the energy sector, particularly in developing countries with evolving regulatory frameworks. The tribunal's conclusion that Nigeria breached the gas supply and purchase agreement underscores the need for clear and stable contractual terms, as well as effective dispute resolution mechanisms to address potential breaches. The case also raises questions about the role of state-owned enterprises in investment disputes, as the Nigerian National Petroleum Corporation (NNPC) was a party to the agreement. This case lasted four years. The tribunal's decision was seen as a victory for the investors, as it

affirmed the sanctity of contracts and awarded substantial damages for the breach of the gas supply agreement. The Nigerian government, while initially resistant, eventually complied with the award, recognizing the importance of maintaining investor confidence.

d) *Interocean Oil Development Company and InterOcean Oil Exploration Company v. Federal Republic of Nigeria* (2020). This case, which was focused on an oil exploration and production contract, further illustrates the challenges of the energy sector in Nigeria. The tribunal's decision in favour of the investors and the substantial damages awarded to them serve as a potent reminder of the need for a predictable and stable legal framework to attract and retain foreign investment. However, this case also demonstrates the potential for successful defence by the host state, as Nigeria was able to refute the claims of expropriation and discrimination, highlighting the importance of clear and well-drafted investment treaties. This case took seven years to conclude. The tribunal's dismissal of all claims against Nigeria was seen as a significant victory for the government, demonstrating its ability to defend its regulatory actions and protect national interests. The decision also highlighted the importance of clear and well-drafted

investment treaties in preventing frivolous claims.

Taken together, these case studies illustrate the diverse range of investment disputes that can arise in developing countries and the potential for ADR mechanisms within the ICSID framework to provide effective and contextually sensitive solutions. They also underscore the importance of clear legal frameworks, strong institutional capacity, and cultural sensitivity in achieving successful outcomes.

Cultural norms, on the other hand, play a pivotal role in shaping the landscape of ADR in Indonesia and Nigeria. In Indonesia, the cultural emphasis on harmony, indirect communication, and face-saving necessitates a nuanced approach to dispute resolution. Mediators must be adept at reading between the lines, fostering an environment where parties feel safe to express concerns without direct confrontation. The focus should be on finding common ground and preserving relationships, aligning with the Indonesian concept of "musyawarah," or consensus-building. This is evident in the Churchill Mining case, where the tribunal emphasized the importance of procedural fairness and due process, aligning with the Indonesian own cultural value of maintaining harmonious relationships.

In contrast, Nigerian culture, while diverse, often values respect for elders and community consensus. Communication tends to be more direct, but the involvement of respected community figures can be instrumental in building trust and facilitating dialogue. ADR processes in Nigeria should be transparent and inclusive, allowing all stakeholders to voice their concerns and contribute to a solution that resonates with the community. This is reflected in the Global Gas case, where the tribunal acknowledged the importance of upholding contractual sanctity, a value deeply rooted in Nigerian legal and cultural traditions.

Understanding and adapting to these cultural nuances is not merely a matter of politeness; it is a strategic imperative for the successful resolution of investment disputes. By tailoring ADR processes to align with cultural values, parties are more likely to engage in good faith, leading to more sustainable and mutually satisfactory outcomes. As noted by LeBaron (2003), the sensitivity of culture is not just about avoiding faux pas; it's about understanding the underlying values and assumptions that drive behavior. In the context of ADR, this understanding can be the difference between a successful resolution and a protracted conflict.

The effectiveness of ADR in resolving investment disputes is fundamentally linked to the legal and regulatory frameworks governing such disputes and the institutional capacity of the countries involved. In both Indonesia and Nigeria, the legal landscape for foreign investment is complex and evolving, often leading to ambiguities that can exacerbate disputes.

In Indonesia, the legal framework for investment is primarily based on Law No. 25 of 2007 on Investment. While this law provides for investor protection and dispute resolution mechanisms, its implementation has been inconsistent, leading to uncertainty and potential for disputes (Wälde, 2015). The Indonesian government's decision to limit the jurisdiction of ICSID in 2012, as exemplified in the Churchill Mining case, further illustrates the tension between investor protection and state sovereignty. This move, while aimed at protecting national interests, has raised concerns among foreign investors about legal certainty and predictability.

Similarly, Nigeria's legal framework for investment is complex, with multiple laws and regulations governing different sectors and activities. The Nigerian Investment Promotion Commission Act and the Petroleum Industry Act are key

pieces of legislation, but their interpretation and application can be inconsistent, which is a breeding ground for disputes. The Global Gas case, for example, highlights the importance of clear and stable contractual terms in the volatile energy sector, while the Interocean Oil case underscores the need for well-drafted investment treaties to prevent frivolous claims.

Institutional capacity is another critical factor in the effectiveness of ADR. In both Indonesia and Nigeria, domestic courts and institutions often lack the expertise and resources to handle complex investment disputes effectively. This can lead to delays, inconsistencies, and fear of bias, hindering the use of ADR. As highlighted by Wälde (2015), capacity building in developing countries is essential for the successful implementation of ADR. This includes training judges, arbitrators, and mediators, as well as strengthening the infrastructure for dispute resolution.

To enhance the effectiveness of ADR in both countries, it is imperative to strengthen legal frameworks, clarify ambiguities, and invest in institutional capacity building. This includes providing training for judges, arbitrators, and mediators, establishing specialized dispute resolution centres, and promoting

awareness of ADR among stakeholders. Additionally, efforts to harmonize domestic laws with international standards and treaties can foster a more predictable and stable investment environment.

By addressing these legal and institutional challenges, Indonesia and Nigeria can create a more conducive environment for ADR, thereby attracting more foreign investment and fostering sustainable economic development.

The case studies presented above offer valuable insights into the complexities and nuances of investment dispute resolution in developing countries. They highlight the diverse range of disputes that can arise from contractual breaches, expropriation, regulatory changes and issues related to fair and equitable treatment. The cases also demonstrate the potential for ADR mechanisms, particularly those facilitated by ICSID, to provide effective and contextually sensitive solutions.

In the Indonesian cases, we see the importance of due diligence and transparency for investors, as well as the need for robust legal frameworks to protect both investor rights and national interests. The Churchill Mining case, for instance, serves as a cautionary tale

about the risks of inadequate due diligence, while the Karaha Bodas case demonstrates the importance of upholding international legal standards and ensuring fair treatment for investors, even in times of economic crisis. The tribunal's decision in the Karaha Bodas case was seen as a landmark ruling, affirming the principle of fair and equitable treatment for foreign investors. While the Indonesian government initially expressed disappointment with the outcome, it ultimately complied with the award, demonstrating its commitment to upholding international law.

The Nigerian cases highlight the challenges of maintaining stable contractual relationships in the volatile energy sector, as well as the importance of clear and well-drafted investment treaties. The Global Gas case, for example, underscores the need for effective dispute resolution mechanisms to address contractual breaches, while the Interocean Oil case demonstrates the potential for host states to successfully defend against investor claims when their actions are legitimate and in accordance with international law. The tribunal's decision in Interocean Oil was seen as a significant victory for the Nigerian government, demonstrating its ability to defend its regulatory actions and protect

national interests. The decision also highlighted the importance of clear and well-drafted investment treaties in preventing frivolous claims.

The cases from Argentina and Brazil further illustrate the complexities of balancing national policy objectives with investor protection. The *Companhia de Águas do Brasil* case emphasizes the importance of legal certainty and investor protection in infrastructure projects, while the Enel Green Power case highlights the potential for regulatory changes to trigger costly disputes if not carefully implemented. In *Companhia de Águas do Brasil*, the tribunal ruled in favour of the investors, citing violations of fair and equitable treatment and expropriation provisions in a dispute concerning water and sewage concessions. In contrast, in *the CMS Gas*

Transmission Company case, the tribunal ruled in favour of Argentina, finding that the country's emergency measures were a justifiable response to the economic crisis and did not constitute a treaty violation. These case studies collectively demonstrate that ADR can be a valuable tool for resolving investment disputes in developing countries. However, the success of ADR is not guaranteed, and its outcomes can vary significantly

depending on the specific circumstances of each case. Factors such as the nature of the dispute, the willingness of parties to engage in good-faith negotiations, the skill and impartiality of the mediator/conciliator, and the legal and institutional framework of the host country all play a crucial role in determining the effectiveness of ADR. While ADR offers a promising alternative to resolving investment disputes in developing countries, its success is contingent upon a multitude of factors. By understanding these factors and tailoring ADR processes to the specific context of each dispute, it is possible to achieve mutually beneficial outcomes that promote sustainable economic development and foster a positive investment climate.

Commonalities and patterns in ADR use and effectiveness

Examining various case studies reveals several common themes in the use and effectiveness of Alternative Dispute Resolution (ADR) in investment disputes. A key trend observed is the growing acceptance of ADR as a practical alternative to traditional litigation. This is evident from the increasing number of cases submitted to the International Centre for Settlement of Investment Disputes (ICSID) for conciliation and

mediation, as well as the inclusion of ADR clauses in investment treaties.

The effectiveness of ADR is closely tied to the clarity of the legal frameworks governing investments. Well-drafted investment treaties, contracts, and domestic laws create a solid foundation for ADR processes, which would enhance the likelihood of successful outcomes. Robust institutional capacity, including the expertise of the host state's courts and the availability of trained mediators and arbitrators, is also paramount, as it would enhance the legitimacy of ADR processes and lead to more sustainable results.

As discussed previously, cultural sensitivity is another key factor influencing ADR dynamics. Understanding and adapting to cultural norms and values is essential for building trust, facilitating communication, and achieving mutually acceptable solutions. Moreover, ADR mechanisms offer flexibility, allowing parties to tailor the process to their specific needs. This flexibility is particularly beneficial in complex investment disputes where a standardized approach may not be suitable.

Factors contributing to ADR success or failure

Several factors determine the success or failure of ADR in investment disputes. A pivotal factor is the willingness of both the investor and the host state to engage in good-faith negotiations. A commitment to finding a mutually acceptable solution and a willingness to compromise are essential. The skill and impartiality of the mediator or conciliator are also crucial. These professionals must facilitate communication, build trust, and guide the parties towards resolution with their expertise and cultural sensitivity. Clear and enforceable agreements are necessary to ensure compliance with the terms of the ADR outcome. This requires a thorough understanding of the legal framework and the availability of enforcement mechanisms. Additionally, ADR processes should be conducted in a timely manner to avoid unnecessary delays and costs, which requires efficient case management and a commitment from both parties to move the process forward.

Implications for the broader debate on ADR in investment disputes

The findings of this study highlight ADR's potential to provide effective and contextually sensitive solutions in developing countries. They underscore the

importance of adapting ADR processes to the specific cultural and institutional contexts of each country. The need for clear legal frameworks and a strong institutional capacity to support ADR is emphasized. Lastly, ADR is suggested as a valuable tool for promoting sustainable economic development and fostering mutually beneficial partnerships between investors and host states.

Recommendations for policymakers, practitioners, and stakeholders

Several recommendations should be considered to enhance the effectiveness of ADR in developing countries. First, strengthening legal frameworks is crucial. Second, developing clear, comprehensive, and enforceable legal frameworks for investment that explicitly recognize and support ADR is essential. Third, institutional capacity should be strengthened, which involves investing in training programmes for judges, arbitrators, mediators, and conciliators,

establishing specialized dispute resolution centres, and providing resources for their effective operation. Fourth, promoting cultural sensitivity among ADR practitioners is vital. Raising awareness about cultural sensitivity and providing training on adapting ADR processes to different cultural contexts can significantly improve outcomes. Fifth, encouraging early engagement in ADR processes can also increase the likelihood of success. Lastly, regularly monitoring and evaluating the effectiveness of ADR mechanisms are necessary to identify areas for improvement and ensure they meet the needs of both investors and host states. In sum, implementing these recommendations can create a more conducive environment for ADR in developing countries. This can attract more foreign investment, foster sustainable economic development, and build stronger relationships between investors and host states.

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