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FOREWORD

The *Asian Institute of Alternative Dispute Resolution* (the "**Institute**") works as a platform to create a visceral awareness of alternative dispute resolution (ADR) mechanisms both regionally and globally, serving as a guide for members to enhance their knowledge on the current issues and development in the ADR field.

Along with the Institute's newsletters, we are pleased to present in this Journal a multi-lingual peer reviewed articles and highlights of legal perspectives from around the world. It would be a remiss if we do not take stock of the adverse impact caused by the Covid-19 pandemic globally. These challenging times have forced every industry to make changes to their business approach or strategy and this includes the way disputes are viewed or dealt with.

The adoption of online platforms in the dispute resolution field have resulted in many court and arbitral hearings being conducted virtually. While this has enabled the dispute resolution process to move forward and substantially eliminate the transmission of the Covid-19 virus, it remains to be seen whether the benefits of this shift to online platforms would outweigh the benefits of the traditional face-to-face meetings or hearings. This is indeed one of the exciting areas to watch out for in the coming months and which the Institute would plan to look into, in the coming publications.

For this Journal's inaugural publication, key topics covering the impact of the Covid-19 pandemic to investment treaty claims and the use of mediation in investor-state disputes represents a worthwhile read. In-step with its objective of being a multi-lingual publication, we are pleased to include two articles written in *Korean* and *Indonesian,* respectively.

In all, this Journal represents one of the Institute's efforts to reach a wider audience and acceptance for the use of ADR in resolving disputes. Its inaugural publication could not have come at a more opportune time and it is hoped that with this Journal and its subsequent publications will be a constant companion of knowledge on matters in the ADR field.

James Ding Tse Wen
Chairman
Editorial Sub-Committee

International ADR Forum

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COVID-19 MEASURES: A LOOK INTO DEFENCES IN RESPONSE TO INVESTMENT TREATY CLAIMS

Dr. Shahrizal M Zin

Abstract

As the authorities across the world are implementing measures to control the spread of Corona virus, the unintended economic repercussions are beginning to affect many sectors of industries and businesses. In view of a lethal threat posed by the global pandemic, States have introduced various emergency measures to safeguard public health and local economies from devastating consequences of the disease. Nevertheless, some of these measures are seriously prejudicial to the operation and profit of the foreign investors worldwide. Therefore, investment disputes loom large as a result of those measures intended to address Covid-19 pandemic. Against this background, the paper examines as to how State's measures will likely to give rise to the investment claims. In anticipation of the potential investor's claims, the paper highlights defences available for State from two sources, that are, the 'exception clauses' in the Bilateral Investment Treaties (BITs) and 'the *force majeure* and necessity' doctrines derived from the customary international law. The paper concludes that these defences provide State with a shield against the investor's claims.

Introduction

The Coronavirus outbreak, which was first detected in China has substantially affected individuals, corporations, businesses and national economies of many countries around the world. The rapid spread of this contagious disease has forced many countries to impose safety and public health measures notably a lockdown to almost all of the industrial and commercial activities (save for what the government defines as 'essential') and restricted movement of people to break the infectious transmission of disease. This has caused a significant impact on national as well as global economies at unprecedented level which have seen massive closure of businesses and unemployment in years to come. The adverse effect of Covid-19 on the global scale has apparently alerted the World Health Organisation (WHO) in January 2020 to declare the 'public health

emergency of international concern' which defined in the International Health Regulations 2005 as an 'extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response'. Subsequently, another WHO declaration was made on March 11, 2020 declaring Covid-19 as 'a pandemic' by pointing to the Coronavirus illness in over 110 countries around the world and the sustained risk of further global spread.

General overview on Covid-19 measures around the world

In response to Covid-19 fears, several countries have taken emergency measures to safeguard various sectors that are adversely affected by the pandemic. The effect of Coronavirus outbreak, for example, has taken a toll in the construction industry. In this regards, various measures have been adopted to address the spread of Covid-19 which undoubtedly impacted the construction industry severely. Measures such as movement control order (MCO) has caused a delay in the completion of construction works due to the closure of site, disruption to the program and manpower. Moreover, the shutdown of offices and factories have inevitably caused delay that has disrupted the procurement of specific materials or equipment.

For example, China has already issued more than 1600 *force majeure* slips to companies hit by Covid-19 to shield them from damages liabilities. This certificate exonerates companies from not performing or partial performing contractual duties by certifying they are suffering from circumstances beyond their control. India, for example, has decided to restrict exports of pharmaceutical ingredients and the medicines to ensure domestic stockpiles whereas Spain has allowed government intervention in healthcare and pharmaceutical sectors. In property and banking sector, Italian government has allowed requisition of property and suspension of payment under mortgaged loans.[1] A more desperate attempt to salvage the economy has seen the nationalisation of airline in Italy. Meanwhile,

[1] Massimo Benedetteli, Caterina Coroneo and Nicolo Minella, Could Covid-19 emergency measures give rise to investment claims? First reflections from Italy https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy 26 March 2020.

Peru's proposed emergency measure concerning suspension of toll fees collection on the country's road network could potentially result in multiple ICSID claims.[2]

In view of the above phenomenon, foreign investors could potentially claim that they are severely affected by State's emergency measures. Hence, it begs a question as to what extent the State's responses to Covid-19 outbreak likely to give rise to investment treaty claims? The answer to this question depends on several legal and factual considerations. Needless to say, it is crucial to identify the preconditions for initiation of claim and the investor's rights under the investment treaty all of which are the subjects of the following discussions.

How State's measures give rise to claims under investment treaties?
A preliminary step requires assessment whether or not the investor and the investment affected by State's measures are covered by the investment treaty. As the investment treaty arbitration is consensual, the arbitral tribunal will only exercise its jurisdiction when an investment in question is 'protected' and the investor falls within the meaning of 'protected investor' under the investment treaty.

The first precondition to initiate a claim requires the investor to establish that its investment in the host State is protected under the treaty.[3] If the investment in question is not recognized as 'protected investment' under

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[2] Cosmo Sanderson, Peru warned of potential ICSID claims over Covid-19 measures https://globalarbitrationreview.com/article/1225319/peru-warned-of-potential-icsid-claims-over-covid-19 measures 9 April 2020.

[3] See a definition of 'investment' in the UK-Malaysia BIT, signed 21 May 1981 (entered into force 21 Oct. 1988). Article 1(1)(a) provides that 'investment' means *every kind of asset* and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stock and debentures of companies or interests in the property of such companies;
(iii) claims to money or to any performance under contract having a financial value;
(iv) intellectual property rights and goodwill;
(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

the treaty, consent to arbitrate a dispute arising from the investment is not established.[4] The second precondition requires the investor to demonstrate that it qualifies as 'protected investor' under the investment treaty. Typically, the nationality requirement under the investment treaty limits the personal jurisdiction of the arbitral tribunal to investor who are nationals of a Contracting State other than respondent to the dispute.[5]

To what extent the States' measures give rise to investment treaty claims depend whether or not such measures are imposed in a manner that breach treaty substantive protections. In most of the BITs, the treaty substantive protections consist of expropriation rule, fair and equitable treatment (FET), full protection and security (FPS), most-favoured-nation treatment (MFN) and national treatment. For example, if the requisition of property is implemented on permanent basis, the investor might argue on uncompensated indirect expropriation.[6] Indirect expropriation is an act

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[4]Article 25(1) of the ICSID Convention reads as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

[5] Article 25(2) of the ICSID Convention provides that 'national of another Contracting State' means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date in which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36…; and
(b) any judicial person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration…

[6]See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) at 101 on the meaning of indirect expropriation. According to these authors, 'a claim on compensation is typically founded on State's indirect expropriation which leaves the investor's title untouched but deprives him of the possibility of utilising the investment in a meaningful way'. A question as to whether an indirect expropriation has taken place require a determination of the effect of the measure as the Tribunal in *Tecmed v Mexico*, Award, May 29, 2003, 43 ILM (2004) 133, para 115 observed that 'the measure must constitute a deprivation of the economic use

whose effect is to substantially undermine the economic value of a protected investment. The tribunal in *Spyridon Roussalis v Romania*[7] provided an outline of the different types of indirect expropriation as follows:

> … Indirect expropriation may occur when measures 'result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor' (UNCTAD Series on issues in international investment agreements, Taking of Property, 2000, p. 2)
>
> On the other hand, in order to determine whether an indirect expropriation has taken place, the determination of the effect of the measure is the key question. Acts that create impediments to business do not by themselves constitute expropriation. In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist (*Tecmed v. Mexico*, Award, May 29, 2003, 43 ILM (2004) 133, para. 115). In *Telenor*, the Tribunal decided that: '[t]he conduct complained of must be such as to have a major adverse impact on the economic value, use of enjoyment of its investment' (*Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, 64-65).
>
> Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omission that, in sum, result in a deprivation of property rights. This is frequently characterized as a 'creeping' or 'constructive' expropriation. In the *Biloune* case the arbitration panel found that a series of governmental acts and omissions which 'effectively prevented' an investor from pursuing his investment project constituted a 'constructive expropriation.' Each of these actions, viewed in isolation, may not have constituted expropriation.

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and enjoyment, as if the right related thereto such as the income or benefit had ceased to exist'.

[7] *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/01, Award, 7 December 2011 (Hanotiau, Giardina, Reisman) paras 327-329.

> But the sum of them caused an 'irreparable cessation of work on the project' (*Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability of October 27, 1989, 95 ILR 183, 209).

A non-permanent measures such as suspension of concession or restriction on export might lead the investor to argue that such measures defeat its legitimate expectation to be treated in a FET manner.[8] The tribunal in *Waste Management Inc. v. Mexico (No. 2)*[9] interpreted FET by referring to 'arbitrary, grossly unfair, unjust or idiosyncratic' conduct, adding crucially that each of these elements is to be interpreted 'flexibly'. However, the new generations of the BITs tend to employ a broad definition of FET. According to Art. 5(2)(a) of the 2012 US Model BIT, 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.[10]

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[8] In *Saluka v Czech Republic*, Partial Award, 17 March 2006, the Tribunal described the requirement of FET standard in terms of consistency, transparency and reasonableness of State's action that 'a foreign investor whose interests are protected under the treaty is entitled to expect that the host State will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).

[9] *Waste Management Inc. v. Mexico (No. 2)*, ICSID Case No. ARB(AF)00/3, Award, 30 April 2004, paras 98-99.

[10] This is reflected, for example, in the Trans-Pacific Partnership Agreement, 24 February 2016, Art. 9.6(2)(a). In a more recent BIT such as EU-Canada Comprehensive Economic Trade Agreement (CETA) 29 February 2016, the notion of FET has been confined only to the above-mentioned forms of specific ill-treatment and to do so in express terms. Art. 8.10(2) of CETA provides that 'A party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measure constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article'. See also the India Model BIT 2016 which makes no mention of 'fair and equitable treatment' in Art. 3(1), but states that 'Each party shall not subject Investment of Investors of the other Party to Measures which

Alternatively, the investor could also assert a breach of FPS when the governmental regulatory acts interrupt the legal stability surrounding its business. A classic example of FPS rule was illustrated in *AAPL v Sri Lanka* case[11] which involved an allegation of a FPS violation due to the failure to protect the Hong Kong investor's shrimp farm from action taken by the Sri Lankan armed forces against rebel forces. The tribunal observed at paras 48-49 that 'one well-established aspect of the international standard of treatment that States must use "due diligence'' to prevent wrongful injuries to the person or property of aliens within their territory'. Nevertheless, it bears noting that the guarantee of FPS is not absolute. In other words, it is not a 'warranty' that the investor's property will suffer no disturbance or interference.[12]

The standard of FPS requires the host State to exercise 'due diligence' to protect the foreign investment as are reasonable under the circumstances. A number of tribunals have recognised that the scope of FPS is not limited to 'physical security' but also extend to 'legal protection' against infringement of investor's rights.[13]

A breach of national treatment may be invoked on discriminatory[14] ground when the government provides assistance to domestic investor without the

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constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment'.

[11] *Asian Agriculture Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, 27 June 1990.

[12] See also *Channel Tunnel Group and Another v. UK Secretary for Transport and Another*, Partial Award, 30 January, 2007, PCA and *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

[13] See *Elettronica Sicula SpA (ELSI) (US v Italy)* ICJ Reports (1989) 15; *CME v Czech Republic*, Partial Award, 13 September 2001; *Lauder v Czech Republic*, Award, 3 September 2001; *Azurix v Argentina*, Award, 14 July 2006; *Siemens v Argentina*, Award, 6 February 2007; *Vivendi v Argentina*, Award, 20 August 2007 and *Sempra v Argentina*, Award, 28 September 2007.

[14]The Tribunal in *Lauder v Czech Republic,* Award, 3 September 2001observed that 'discrimination can only occur when the measure against foreign investment and against domestic investment are of a different nature, and the former is treated less favourably than the latter.' In *Saluka v Czech Republic,* Partial Award, 17 March 2006, the Tribunal made in clear that 'discrimination'

same being made available to the foreign investor.[15] On the other hand, if State fails to comply with its contractual obligation, it may trigger a breach of 'umbrella clause' where the investor might assimilate a breach of contract to a breach of the treaty itself.[16] In short, the investor may rely on the alleged violation of its protected interests under the treaty concerning the right to compensation for direct/indirect expropriation, the right to FET, the right to FPS and the right to national treatment as a basis for its claims. The following discussions highlight several ways which allow State to respond to the investor's claims based on the available defences under the BITs and customary international law.

Defences under the BITs and customary international law

A considerable number of investment treaties contain 'exception clauses'. These clauses exclude measures taken by the Contracting States in the fulfilment of their obligations relating to a variety of public interests. Some of those clauses expressly exclude measures to protect public health from application of the relevant treaty. Put differently, these exception clauses allow State to impose treaty-inconsistent measures without being held accountable for its action as long as the measures in question are not unjustifiably discriminatory. For example, Article 28.3(2)(b) of the Canada-EU Trade Agreement (CETA) 2016 contain exceptions allowing states to 'take measures aimed at protecting human life or health,' as long as they are not arbitrary or discriminatory, 'without implying a breach of international law'. Article 9.11(4) of the China-Australia Free Trade Agreement 2015 goes further, providing that non-discriminatory measures

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requires not just different in treatment, but difference 'without reasonable justification'.

[15]Dolzer and Schreuer, above n. 6, at 198 on the purpose of 'national treatment':

> A reliance on a breach of national treatment would justify the investor's claim provided that the host State fails to accord 'treatment no less favourable' to foreign investor than that which it accords to its own investor. The purpose of national treatment is to oblige a host State to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.

[16]An 'umbrella clause' is a provision in an investment treaty that guarantees the observance of obligations assumed by the host State towards the investor. See *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004; *Noble Venture v Romania*, Award, 12 October 2005 and *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003.

implemented for 'legitimate public welfare objectives… shall not be subject of a claim'.

Similar treaty language also appears in the recent BITs, for example, in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[17] Paragraph 9 of the CPTPP Preamble encompasses:

> The Parties to this Agreement, resolving to:
> Recognise their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

Article 9.16: Investment and environmental, health and other regulatory objectives:

> Nothing in this Chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

In addition, Article 6.3 of the Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador[18] provides that 'nothing in this Chapter shall be construed to prevent a party from imposing, maintaining or enforcing measures…necessary to protect human, animal or plant life or health'. Further, Article 15.1 of Hong Kong-Chile BIT provides that 'nothing in this Agreement shall be construed to

[17] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which followed the Trans-Pacific Partnership Agreement (TPP12) after the withdrawal of the United States, was signed on 8 Mar. 2018 in Santiago, Chile by 11 participating countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

[18] See Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador, signed 25 June 2018.

prevent party from adopting, maintaining or enforcing measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its area is undertaken in a manner sensitive to environmental, health or other regulatory objectives'.[19]

In short, all these new generation of BITs provide explicit provisions which recognize the right of State to regulate in areas related to public health objectives. Therefore, the exception clauses serve as a legitimate defence for State to shield against the investor's claims. Even without these exceptions under the BITs, State may still rely on the defences available under the customary international law albeit a high threshold set out by the tribunals.

It is widely accepted that the 2001 International Law Commission Draft Articles on State Responsibility (the ILC Draft Articles) reflect the customary international law. The ICL Draft Articles provide a number of circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The relevant defences that State may invoke consist of *force majeure* (Article 23),[20] distress (Article 24)[21] and necessity (Article 25).[22] It

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[19] Hong Kong-Chile BIT, signed 18 Nov. 2016 (entered into force 14 Jul. 2019).
[20]Article 23:
(1) the wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure* that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
(2) Paragraph 1 does not apply if:
(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
(b) the State has assumed the risk of that situation occurring.

[21]Article 24:
(1) the wrongfulness of an act of the State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
(2) Paragraph 1 does not apply if:
(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
(b) the act in question is likely to create a comparable or greater peril.

[22]Article 25:

bears noting that these defences provide a shield against an otherwise well-founded claim for the breach of international obligation.

One may anticipate that State would invoke a *force majeure* defence in a situation that makes it impossible to perform an obligation. A situation of *force majeure* only arises where three elements are met, that are, (i) the act in question must be brought about by an irresistible force or an unforeseen event; (ii) which beyond the control of State concerned and (iii) which makes it materially impossible in the circumstance to perform the obligation.[23] However, a defence on *force majeure* will not succeed if the State concerned merely find that a performance of its obligation become more difficult or burdensome due to political or economic crisis.[24] Thus, State might justify its measures by pointing out to Covid-19 as unforeseen event which beyond their control that cause a non-performance of obligations.

The term necessity is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligations of lesser weight or urgency.[25] In *CMS v Argentina*,[26] Argentina argued that the devaluation of the peso, which

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(1) Necessity may not be invoked by a State as a ground of precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
  (b) does not seriously impair an essential interest of the State or States towards which the obligation exists or of the international community as a whole.

(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  (a) the international obligation in question excludes the possibility of invoking necessity; or
  (b) the State has contributed to the situation of necessity.

[23] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) at 170.

[24] See *Rainbow Warrior Arbitration (France/New Zealand)*, R.I.A.A, Vol XX, 217 (1990) at 253.

[25] Crawford, above n 15, at 178.

[26] *CMS V Argentina, Award, 12 May 2005.*

damaged US investment, was a 'necessary measure' taken in response to an economic crisis, and precluded Argentina's liability for a breach of its treaty obligations by virtue of Article XI of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (US-Argentina BIT).[27] The tribunal assessed Argentina's defence of necessity with reference to the conditions for a state of necessity to accrue under customary international law, as codified in Article 25 of the ILC Draft Articles. The Tribunal found that two requirements of a finding of necessity were not met because the measures taken by Argentina were not 'the only way' to cope with the situation and Argentina itself 'had contributed' to the situation.

In contrast, the Tribunal in *LG&E v Argentina*[28] took a different view in which the plea of necessity was accepted for a limited period. In *LG&E*, the claimant had bought stakes in three Argentinian gas transportation and gas distribution companies, and the claim arose in similar circumstances as the claim in *CMS* due to Argentina's 'pesoisation' policy. The tribunal held at para 162 as follows:

> While Claimants have alleged Argentina's political motivation to use foreign investors in the public utility sector as an excuse to justify the economic mistakes committed in the country, Argentina has explained that the Government's motivation was its desire to avoid its full economic collapse. To this end, it entered into agreements with the licensees in 2001, in addition to other actions taken. Bering in mind the Tribunal's analysis, characterizing the measures as not arbitrary does not mean that such measures are characterised as fair and equitable or regarded as not having affected the stability of the legal framework under which gas transportation companies in Argentina operated. On the contrary, this means that Argentina faced severe economic and social hardships from 2001 onwards and had to react to the circumstances prevailing at the time. Even

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[27] Signed 14 November 1991, entered into force 20 October 1994. Art. XI provides that 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the Protection of its own essential security interests'.

[28] *LG&E v Argentina, Decision on Liability, 3 October 2006.*

> though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration. This is particularly reflected in the PPI adjustment which, before deciding on their postponement, Argentina negotiated with the investors. The Tribunal concludes that the charges imposed by Argentina to Claimants' investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law.

Both the *CMS* and *LG&E* decisions assumed that the situation in Argentina affected within the meaning of Article 25. Unlike *CMS*, the Tribunal in *LG&E* found that the measure adopted by Argentina had been the 'only means' available and moreover, Argentina 'had not substantially contributed' to the state of emergency. However, the successful plea of emergency does not waive State from its obligation to resume performance after the situation of emergency cease to exist. Save for the damage suffered during the period of necessity that the investor would have to bear, State could be held liable for those measures it had adopted before and after the occurrence of the state of necessity.[29] Nevertheless, State may not find it convenient due to a high threshold to demonstrate necessity as seen in many cases where the tribunals find that State fails to satisfy the stringent criteria, particularly the 'only way' and 'non-contribution' elements'.[30]

In addition to the above defences, it is not difficult to anticipate that State may also rely on a defence arising from 'police power doctrine'. The issue of State's exercising police power was at the heart of the tribunal's award in *Phillip Morris v Uruguay*.[31] In that case, the dispute concerns allegations by the claimants that, through several tobacco-control measures regulating the tobacco industry, the respondent violated the BIT in its treatment of the

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[29] *LG&E v Argentina, Decision on Liability, 3 October 2006, paras 260-6.*

[30] See *Total SA v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010; *EDF International and Others v Argentina*, ICSID Case No. ARB/03/23, Award 11 June 2012; *Hocktief AG v Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014; *Bernhard Friedrich Arnd Rudiger von Pezold and Others v Zimbabwe*, ICSID Case No. Arb/10/15, Award 28 July 2015 and *Urbaser SA and Other v Argentina*, ICSID Case No. Arb/07/26, Award, 8 December 2016.

[31] *Phillip Morris v Uruguay,* ICSID Case No. ARB/10/7, Award 8 July 2016.

trademarks associated with cigarettes brands in which the claimants had invested. The measures included the Government's adoption of a single requirement precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family and the increase in the size of graphic warnings. The tribunal at paras 289-291 found that:

> In the Claimants' view, the State's exercise of police powers does not constitute a defense against expropriation or exclude the requirement of compensation. The Claimants add that there is no room under Article 5(1) or otherwise in the BIT for carving out an exemption based on the police powers of the State.
>
> The Tribunal disagrees. As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of '[a]ny relevant rules of international law applicable to the relations between the parties,' a reference 'which includes…customary international law.' This directs the Tribunal to refer to the rules of customary international law as they have evolved.
>
> Protecting public health has since long been recognized as an essential manifestation of the State's police power, as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments 'for reasons of public security and order, public health and morality.'

Further, the tribunal concluded that 'the State's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic danger to an investor'.[32] Therefore, relying on the police power

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[32]The Tribunal in *Phillip Morris v Uruguay,* ICSID Case No. ARB/10/7, Award 8 July 2016, para 399 observed that:

> The Tribunal agrees with the Respondent that the margin of appreciation is not limited to the context of ECHR but applies equally to claims arising under BITs, at least in context such as public health. The responsibility for public measures rests with the government and investment tribunals

doctrine, State could argue that the measures imposed stem from its sovereign power to regulate for the benefit of public order or health. States will also be likely to assert that the tribunals should pay great deference to governmental assessment of national needs.[33] In the light of the foregoing, the tribunals should be slow to intervene State's measures in time of crisis.

Conclusion

It is not far-fetched to anticipate that there will be a number of investment treaty claims post Covid-19 pandemic due to various measures imposed by States. As of now, it is safe to say that the best line of defences would still be the exception clauses if the treaty between the host State and the investor's home State contain those clauses. In the absence of exception clauses, the customary international law defence of *force majeure* and police power doctrine will also be viable for State to shield against the investor's claim. In order to overcome a stringent test of necessity, perhaps State should refer to the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) case law which specifically dealt with the concept of necessity in the context of economic measures rather than relying on the customary international law definition of necessity in Article 25 that may be inappropriate for investment arbitration.

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should pay great deference to governmental judgments of national needs in matters such as the protection of public health.

[33] In *Continental v Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, the Tribunal was asked to determine whether Argentina's measures actually sought to protect essential security interests or the public order. It was held that 'this objective assessment must contain a significant "margin of appreciation" for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantaged of hindsight.' Also see a different view adopted by the Tribunal in *Bernhard Friedrich Arnd Rudiger von Pezold and Others v Zimbabwe*, ICSID Case No. Arb/10/15, Award 28 July 2015.The Tribunal declined to apply 'the margin of appreciation' doctrine unless expressly embedded in the treaty. According to the Tribunal, the doctrine had neither found much support in international investment law nor achieved customary status.

About the Author

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A CONCEPT PAPER:

THE TIME FOR INVESTOR STATE MEDIATION HAS COME

Wolf von Kumberg

In 2017 Malik Dahlan and I wrote an article[1] on the need for investor state mediation, considering the criticism that the investor state dispute system (ISDS) faced from many quarters. We postulated the following:

> *This paper argues that the current criticisms of Investor-State Dispute Settlement ("ISDS") are ill-informed and attempts at reforming the system are misguided. The definition of ISDS itself has been, for a long time, limited to investment quasi-judicial bodies or at best arbitration. Analysis of the roots of the ever-growing backlash reveals that the main causes for concern are politically negotiated investment treaties, an inherently biased system, lack of transparency, and inconsistent decision-making. Examination of the core reasons behind these complaints leads to the conclusion that the EU Commission's solution to reform ISDS through a permanent court raises more issues and will throw ISDS into disarray. A better approach is to accept the premise that the current system needs improvement. However, accepting this premise requires regulating disputes themselves, rather than simply regulating the resolution of cases, and establishing standards when unable to regulate these. The regulation of disputes would allow the work already begun by UNCITRAL through its notes on transparency to continue. This study will review how introducing mediation to regulate the process of Investor State Disputes ("ISD") can improve and indeed complement the procedural gap evident in the current ISDS system.*

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[1] INVESTOR-STATE DISPUTE SETTLEMENT RECONCEPTIONALIZED: *REGULATION OF DISPUTES, STANDARDS AND MEDIATION* M. R. Dahlan, *Professor of International Law and Public Policy,* Queen Mary University of London Wolf von Kumberg, Registrar of the International Dispute Registry. Vol. 18: 467, 2017] *Investor-State Dispute Settlement Reconceptualized PEPPERDINE* DISPUTE RESOLUTION LAW JOURNAL

In particular, while considering more recent investment regimes, it will use the current effort by the Energy Charter Treaty Secretariat to facilitate mediation within the Treaty as an example of how this can be done.

The World is now a different place from that of 2017. It has witnessed global supply chains being broken, energy market collapse, with extremely limited travel and transportation being possible, with industries closed, mass unemployment, legal obligations in disarray and international trade at a standstill.

The effect of COVID-19 hindering global cooperation is in fact to accelerate a situation that had already begun as far back as the 2008 financial crisis. This started the scramble by States to begin the process of looking, in that case at international finance and the institutions behind it, with great suspicion. The drive for Foreign Direct Investment (FDI) and all the benefits it could bring a State, began to be countered with the exposure that States faced if not only an investment, but the whole financial system supporting the global trade system, began to go wrong. This sentiment was further enhanced by the election of Donald Trump and his rampant nationalism and questioning of the post-World War II international order and its Bretton Woods institutions. A trade war with China, necessary or unnecessary, added to the reversal of international trade trends. Suddenly multi-national companies faced tensions if they were seen to be making foreign investments, at the expense of employees in their own home country or Region. What is more concerning, is the challenges to a conceptional phenomenon "international supply chains" disruption and reshoring, a concept that will change dramatically how global trade investment will be governed.

The International Monetary Fund (IMF) estimates that almost three-quarters of the increase in trade between 1993 and 2013 was due to the growth of **supply chains.** With trade rising fivefold in those 20 years, the supply chains helped power global economic expansion. As significantly, they were an important source of disinflation. Before Covid-19 hit, the Bank for International Settlements estimated that global inflation would have been about one percentage point higher were it not for the supply-chain enabled efficiencies of global production. As part of a growing backlash

against globalization in general, and China in particular, nations are threatening to bring their offshore investments back home.

Yes globalization was criticized for exploiting workers in developing countries, for accelerating the rate of climate change, for increasing discrepancies between rich and poor within countries, for allowing the West to maintain its dominance in technological innovation and know how, while sending low cost jobs to developing countries. All of this has credence, but globalization has without doubt provided more jobs, higher incomes, better education, better health, and perhaps better governance to large portions of the World, where the picture was very different 70 years ago. One must also ask, what the alternative would have been if this had not occurred after the devastation brought by World War II.

What will this new trend mean for globalization and international trade in the post Covid-19 world and what will the impact be on ISDS? Perhaps more to the point of this Paper, will the current pushback on globalization and its institutions provide a catalyst for the development of investor-State mediation.

With the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation") in New York in August 2019, mediation has been given new credibility as an international process for the resolution of disputes. To understand that in the context of investor State disputes one must first look at what has been happening in the way of encouraging the use of mediation generally as a tool of international relations and diplomacy. In the past, mediation simply was not often contemplated in the context of investor state disputes settlement (ISDS). It had its own unique dispute resolution system that had grown out of Investment Treaties negotiated between individual States (bilateral investment treaties or BITS) or on a multi-lateral basis between larger groups international organization of States such as NAFTA.
Previously, these agreements contemplated that *international arbitration* would be used to finally resolve disputes between investors and states. *International mediation* was not even mentioned or contemplated to have a role in these disputes. ICSID, the body of the World Bank responsible for trade disputes had arbitration rules and in addition, a set of conciliation rules. The conciliation rules were not however, a form of mediation, but

rather a tribunal that heard the dispute and then rendered a non-binding opinion. Most parties never used conciliation and moved directly to arbitration. The cooling off period provided for in BITs (usually 3 to 6 months) was not used to try to find a resolution to the dispute, but rather to prepare for the arbitration.

Five years ago, we started our efforts in the critical energy apace by assisting the Energy Charter Treaty (ECT) Secretariat, a grouping of 54 States which establishes a multilateral framework for cross-border cooperation in the energy sector, look at how mediation could be introduced to its Rules. The Rules provided for arbitration to resolve disputes with investors and had a reference to conciliation, without any specific process. The Secretariat was interested in filling in the gaps by providing for the possibility of mediation. We worked on a mediation guide, which would provide the member States with an outline of the mediation process and how it might be used in investor state disputes. The Guide on Investment Mediation was published on the 19th of July 2016. It was recognized that the Guide alone was not enough.

States have largely not mediated, because of the lack of an internal framework, through which the mediation process could be carried out. Issues such as authority to settle, transparency vs confidentiality, responsibility, liability for taking decisions, and state budgets were all a factor. As a result, The Secretariat then went on to review with the member States a model framework that could be adopted within state structures, through which these issues could be dealt with. This Model Instrument on Management of Investment Disputes was published on the 23rd of December 2018 and has been adopted in the interim by several Member States.

In addition to the ECT, we have also been working with International Mediation Institute of The Hauge (IMI), International Centre for Settlement of Investment Disputes (ICSID) and the Centre for Effective Dispute Resolution (CEDR) to develop IS mediation awareness programs and training for mediators and States. It was recognized that without this training the knowledge required for States to mediate these disputes, would not exist. In addition, to give the process credibility a cadre of mediators, who not only understood mediation, but also ISDS had to be trained. Since 2017, several annual IS mediator training courses have

been held and mediators capable of handling these cases are now prepared.

Even more important for the acceptance of mediation in these disputes is the fact that ICSID, the organization through which most of these disputes are heard, has given its full support to the development effort. This culminated with ICSID publishing its own IS mediation rules. This has given the initiative credibility with both investors, their counsel and States and was a strong step forward to making mediation part of the ISDS process.

In fact, there have already been several important investor state disputes where mediation has now been used. The most recent reported case (as many are not reported), was that of the Dominican Republic and Oldebrecht that was mediated this January by well-known international mediator Mrs. Mercedes Tarrazón. The matter was mediated under the ICC mediation rules and led to a settlement agreement between the parties.

To understand the significance of ISDS mediation, on the development of investor-State mediation one need only look at the Preamble of the Singapore Convention. It states:

> *Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,
>
> *Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,
> *Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,
>
> *Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social, and economic systems would contribute to the development of harmonious international economic relations

States by signing and ratifying the Convention have recognized the use of mediation as a legitimate public policy instrument for resolving cross border disputes. This gives mediation legal credibility and certainty as a dispute resolution mechanism that can be used as part of the dispute resolution toolkit. Once States have acknowledged this for commercial disputes generally, it is difficult for them to take the position that it does not apply to the State itself or its agencies when dealing with investors.

If we take the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as an example, very few States have excluded the application of the Convention to arbitrations involving States or their agencies. In fact, one of the reasons international arbitration became popular and an acceptable dispute resolution tool, was that arbitral awards can also be enforced against States under the New York Convention. This example provides the blueprint for the enforcement of mediated settlements against States as well. It is not so much enforcement that is important, as most States when they actually agree to a Settlement will abide by its terms, but the recognition by States through the Singapore Convention that mediation is an acceptable means of resolving disputes.

Given the unprecedented crises the world is currently facing, the imperative to employ mediation in an investor State context has only grown. Arbitration, as a mechanism for resolving these disputes has limitations. Some recent developments help to emphasis this further. The Columbia Centre on Sustainable Investment has called for a moratorium on all arbitration claims by private corporations against governments using international investment treaties. On the 5th of May 2020, a large number of EU Member States signed an agreement for the termination of Intra-EU bilateral investment treaties. This implements the March 2018 European Court of Justice judgement (*Achmea* Case), where the Court found that Investor-State arbitration clauses in intra-EU bilateral investment treaties are incompatible with the EU Treaties.

In December of last year, a Colloquium called for by Harvard University, brought together key stakeholders in the IS mediation international community with negotiation scholars to Harvard to define the obstacles to mediating investor-State disputes and put forth a path for potential options to overcome them. The Colloquium also resulted in the establishment of a

Working Group and newly published Report set a path to move the process forward. Key insights set out in the Report are:

- It is important to view mediation as *assisted negotiation*. Losing sight of this can cause misunderstandings about what mediation is trying to accomplish, and what its place should be in the ISDS system. The need for 'assistance' in negotiations creates a desire on both sides to obtain help, voluntarily, from a *neutral* party. Identifying this neutral party in various scenarios is one of the major challenges facing mediation processes within ISDS.

- Careful mapping of stakeholders and their interests in each type of dispute can enable us to identify areas of common ground, as well as helping to find linkages to parties outside of the central dispute that could act as a bridge between the main conflicting parties.

- Transparency as a goal in ISDS creates certain problems. While desirable from a normative perspective, it can hinder efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that can lead to posturing and unproductive dialogue.

- There is also a clear benefit to political actors in relying on processes that are legally binding (as in arbitration). Political actors may prefer to engage in a formalized dispute with a designated arbitrator because even where the outcome is not in their favor, they can shift the blame for said outcome onto the 'higher powers' that made the ruling. By contrast, they are more directly responsible for the outcome of any agreement reached via mediation between the two parties. So, there is potentially a lack of incentive for governments to adopt and political actors to enter into mediation processes.

- For companies that are multifaceted and conduct a variety of types of business in different countries, bringing a formal arbitration claim can be counterproductive. For these types of businesses, it may be more prudent to accept even egregious violations by host states because a public confrontation with the government is likely to lead to negative repercussions in their future transactions with this state.

In some ways, then, companies can face pressure to accept a state's infringements upon formal arrangements in the current ISDS system.

- There are two major obstacles to the more effective implementation of mediation in ISDS: (1) a lack of awareness of mediation as an alternative to arbitration, and (2) the lack of a formal, legal framework to support mediation and mediated settlements.

- A potential challenge to wider implementation of mediation in ISDS is the divergence in *rule by law* vs. *rule of law* from state to state. Mechanisms that are put in place to institutionalize mediation as a viable alternative must be sensitive to differences in the way that power is distributed (and decisions are made) in various cultures.

- There are three primary approaches to dispute resolution: (1) Power-based (e.g. labor strikes), (2) Rights-based (e.g. courts, arbitration), and (3) Interest-based (this is where mediation can be most effective: by appealing to the sides' interest in finding a mutually beneficial resolution).

- The idea of "mediation" perhaps needs to be framed in a different manner. The term "mediation" can evoke a sense of a formalized system of dispute resolution that may bring in the confrontational aspects of arbitration and legal proceedings. The challenge lies in creating informal systems that can take effect *prior* to the crystallization of a more formal dispute. The ideal *timing* of mediation along the timeline of a conflict's development is thus a central question.

- A significant challenge of our time is the growing rhetoric, particularly in politics, that the "system" writ large (ISDS included) is corrupt. This is likely to taint any alternative systems that are proposed, including mediation. We must therefore consider how to reverse this rhetorical trend and regain the trust that is necessary to legitimize any dispute settlement or mediation system.

- While the conventional wisdom is that law firms are opposed to mediation, in recent years several international firms have

developed models to make a profit from mediated settlements. Lawyers may not be the obstacle they were once perceived to be.

A follow-up Forum on IS Mediation will be held at the British Institute for International and Comparative Law (BIICL) this Autumn, which recently published a report on the urgent need for "Breathing Space" for disputes arising out of international commercial activity. The forum will focus on working with States to ensure appropriate frameworks exist to permit mediation to take place.

All this activity is very timely given that Foreign Direct Investment (FDI) is already taking a big hit as a result of COVID-19 and global trade retrenching and will most certainly get worse. States now have to do all that is possible to create a friendly investment climate. One key element is having a perceived transparent and fair system for resolving investor disputes. Clearly, early dispute resolution, rather than arbitration will play a role in this. Some States have already implemented ombudsperson programs and in addition, have a stated policy of mediating disputes as a prerequisite to arbitration. In essence, this is much in line with our premise that disputes have to be regulated, meaning that there is a process in place that gives scope for resolution through various steps along the way.

COVID-19 has created a situation in which many investment agreements will not be able to be performed strictly in accordance with their terms. This could be on the investor's part, but also on the part of the State, which suddenly has seen its budgetary commitments dramatically altered. Tellingly, the Colombia Initiative's call for a moratorium addresses this particular issue head on.[2]

This will not be the only call for such suspensions of ISDS, as States struggle to realign many types of commitments due to budget constraints.

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[2] A PERMANENT RESTRICTION on all arbitration claims related to government measures targeting health, economic, and social dimensions of the pandemic and its effects. These investor-state cases (often referred to as "ISDS" cases) empower foreign private companies to challenge government actions that affect narrow corporate interests, and often result in large pay-outs, sometimes of billions of dollars, to these companies for alleged lost profits. These suits pose an immediate danger to the ability of developing nations, and the global community, to confront the COVID-19 challenge

This is precisely where mediation can play a vital role, in helping the investor and the State to restructure their respective legal commitments and in many cases permit the investment to continue in a different form or bring it to an end on agreed terms. Arbitration cannot provide these remedies, and in any event, enforcing an arbitral award against a State that cannot or seeks to avoid payment because of the Crisis, hardly makes good business sense.

The narrative is clear. States now must do all that is possible to create a climate of investment facilitation and compromise. One key element is having a perceived transparent, compromise oriented, and fair system for resolving investor tensions and disputes. Clearly, early dispute avoidance and regulation, rather than adversarial engagement will play a role in this. The time for mediation to become an integral tool of investor State dispute resolution is now.

Our Concept Proposal is therefore the following:

1. That States seeking to attract FDI implement an internal framework for permitting mediation along the lines of the ECT Model Instrument;

2. That training in mediation awareness be implemented so that key officials are familiar with the mediation process and their own internal framework;

3. That States adopt a regulated approach to dispute resolution with investors, permitting for structured negotiation through a neutral, such as an ombudsperson;

4. Given that ICSID is now promulgating its mediation rules, that mediation become a prerequisite, before arbitration can be commenced in ISDS matters, or at least implemented in parallel to arbitration proceedings;

5. That even where a dispute is arbitrated through to award, that mediation be available, if needed, to provide a framework for implementation of the award.

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About the Author

Wolf is a Fellow of AIADR. He has over 30 years of international legal, compliance, conflict management and business experience. He served as Legal Director and Assistant General Counsel to Northrop Grumman Corporation out of its London office, as legal and commercial director for Sperry Marine Limited, out of its London office, as EMEA Legal Director for Litton Industries Inc., in Zurich, Switzerland and as Canadian VP Legal for Litton Canada Limited out of its Toronto office. Wolf has unique knowledge related to global business and investment, the legal environment, compliance, regulatory and cultural issues associated therewith. He is a Fellow of the Chartered Institute of Arbitrators (CIArb), a CEDR qualified mediator and serves on the Boards of both the American Arbitration Association (AAA) and CEDR. He is also a co- founder with Malik Dahlan, of the International Dispute Registry (IDR), which works on ADR capacity building projects worldwide. Wolf now spends his time as a full-time conflict resolver, as mediator, arbitrator and dispute board member at Int-Arb Arbitrators and Mediators with offices in London and Washington DC.

MANDATORY SHAREHOLDER ARBITRATION: FUTURE PROSPECTS FOR LITIGATION MANAGEMENT IN INDIA

Divyansh Nayar and Lakshya Sharma[1]

Introduction

Corporations, across the world, have prioritized litigation management due to the increasing costs and time litigation demands. In this backdrop arbitration has emerged as the new normal, which is now trending in securities disputes as well. One of the many ways to achieve this is by introducing mandatory shareholder arbitration (hereinafter "MSA"), which has been given preference by companies as it provides various advantages over other forms of dispute resolution options such as engagement with shareholders, speedy resolution, effective cost modules and expertise in judgement. In addition to this, the individual nature of arbitration ensures more engagement of shareholders which can lead to settlements in big numbers on individual basis.

High costs of securities class-action suits, inadequate compensation and ineffective deterrence are few aspects because of which companies are driving towards MSA. From the company's perspective, MSA will ensure that fewer disputes arise where there has been no wrongdoing and misconduct on part of the company. From the shareholders perspective, MSA would protect the rights of small investors and will bring in more transparency in the corporations functioning and management.

The first part of the article aims at analyzing the validity of MSA in India with respect to the Arbitration and Conciliation Act 1996 (hereinafter "Arbitration Act"), Companies Act 2013 (hereinafter "Companies Act") and Securities and Exchange Board of India Act 1992 (hereinafter "SEBI Act"). In the second part, authors cover the implementational aspects of

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[1]Divyansh Nayar, 5th year student, National Law University Odisha. Lakshya Sharma, 4th year student, National Law University Odisha.

mandatory shareholder clauses and then finally in the third part the authors talk about the feasibility of MSA over class-action suits.

Mandatory Shareholder Arbitration through the lens of Arbitration Act, 1996

After the Supreme Court's decision in *Bharat Aluminium Co*[2] *[BALCO]*, India has seen a paradigm shift from hard core litigation to pro-arbitration. This cemented arbitration as a preferable mode of disputes resolution which now further necessitates for a mandatory arbitration clause in shareholder agreements.

The Indian Arbitration Law i.e, the Arbitration and Conciliation Act 1996, governs such clauses, if any, in the shareholder agreements. As per Section 7 of the Arbitration Act[3], an arbitration agreement is any agreement by "*the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*". The conditions provided herein are unlikely to bar any commercial relationship, however the same mandates that the whole process should be consensual in nature.

The Apex Court in *Afcons Infrastructure ltd v. Cherian Varkey Construction Company Pvt*[4] categorically laid down that the parties can only be referred to the Arbitration if done consensually. The word "mandatory" in the Mandatory Shareholder Arbitration leaves impression that such clauses in the shareholder agreements might do away with the necessity of consent which is the heart and soul of the arbitration process. However, this quintessential facet of the arbitration is not compromised here in any manner.

At the time of proposal being brought in for the deliberations and the subsequently voting before the shareholders, the ones who give nod or

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[2] *Bharat Aluminium Co v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552.*

[3] Section 7, Arbitration and Conciliation Act, 1996.

[4] *Afcons Infrastructure ltd v. Cherian Varkey Construction Company Pvt, (2010) 8 SCC 24.*

agree to the idea of arbitrating their disputes shall votes in positive. Whereas the ones who wish to disagree shall be given a way out by either transferring their shares or to acquiesce to the agreement regardless. The provision arising out of the MSA agreement shall form part of the public discourse and documents of the company and therefore all they will be apprised with the shifts or so as to say to be kept in loop. In furtherance of the same, the shareholders possess requisite foresight with regards to such provisions, they can make informed choices based on this knowledge at the time of buying or purchasing shares and will only agree if they are willing to get the disputes arbitrated.

Section 8 of the Arbitration Act[5], provides for the power to refer parties to arbitration where there is an arbitration agreement. It further explains that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration.[6] Additionally, disputes concerning with the corporate law are resolved by a separate mechanism comprising of tribunals established under the Companies Act. However, National Company Law Appellate Tribunal in *Richa Kar* case[7], cleared the position and opined that since such tribunals are quasi-judicial in nature and by virtue of same the disputes are to be referred to arbitration under Section 8 of the Arbitration Act.[8]

By placing reliance on the abovementioned premises, it could be said that the Arbitration Act doesn't pose, in any manner, any hurdles to the process of mandatory arbitration for the Shareholders.

Interplay between Indian Corporate Laws and Mandatory Shareholder Arbitration

Indian corporate laws can have possible ramifications over MSA in India. Primarily, the two branches of Indian Corporate Law i.e, *Companies Act,2013* and *Securities and Exchange Board of India Act,1992 ("SEBI*

[5] Section 8, Arbitration and Conciliation Act 1996.
[6] Section 8(1), Arbitration and Conciliation Act, 1996.
[7] *Richa Kar v. Actoserba Active Wholesale Pvt. Ltd, (*2019) SCC OnLine NCLAT 2.
[8] Section 8, Arbitration and Conciliation Act, 1996.

Act") can come in conflict with the MSA at few junctures. In this chapter the authors delve deeper into the possible conflicts.

Conflict with Companies Act,2013

There exists a rich practice of incorporating the agreement in relation to MSA either into the Articles of Association (hereinafter "AoA") of the company or entering into individual private agreements with the shareholders. The process of inducting such agreements in AoA are quite common and efficient.

As provided under Section 6 of the Companies Act[9], in case of any conflict between the provisions of AoA and the provisions of the Act, the latter shall prevail over the former. The general principle lies here is that the provisions of Act shall have an overriding effect on the AoA of the company. Further, the Act lays down guidelines to approach the National Company Law Tribunal (NCLT) for redressals pertaining to the shareholder grievances.

The moot question which stems here is that *who will prevail over whom*, whether the matter can be referred to arbitration or the arbitral proceedings shall be abstained due to the overriding jurisdiction of NCLT as provided under the Act.

To resolve this riddle, it is pertinent to revisit the seminal decision of SC in the *Booz Allen & Hamilton Inc v SBI Home Finance Limited & Ors* [10]. As per the ruling of Booz Allen, the apex court laid down a standard test to determine which matters will be referred to arbitration or not. It further bifurcated the matters into two broad heads; firstly, the matters affecting public at large i.e., affecting *in rem rights,* such matters are non-arbitrable in nature and can only be adjudicated by the public courts and secondly, the matters affecting private parties or interests' i.e, affecting *in personam rights,* only these matters can be referred to arbitration.

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[9] Section 6, Indian Companies Act, 2013.
[10] *Booz Allen & Hamilton Inc v SBI Home Finance Limited & Ors* (2011) 5 SCC 532.

However, the Bombay High Court in *Rakesh Malhotra*[11], opined that reliefs sought under Section 241 of the Companies Act are only *in rem* in nature and hence non-arbitrable. The decision received backlashes as it failed to consider that even under Section 241, a contractual breach could arise and since such breaches affect *in personam* rights, hence arbitrable in nature. It further postulated that only in the cases of winding up[12] or some specific cases of oppression and mismanagement, arbitration won't be permitted. At last, it is to be noted that the as per Section 8 of the Arbitration Act, a cause of action cannot be split up to be adjudicated further.

Conflict with SEBI Act,1992

SEBI Act regulates the securities market which directly impacts the economy of the country. It renders public functions by safeguarding the interests of investors or shareholders form the prevailing malpractices and reposit their confidence in the Investment Sector.

In the case of *Kingfisher Airlines*[13], the Bombay High Court held that it is a contrary to public policy to refer the matter to arbitration if there exists a legislation which sets out the rights and obligations, and reserves the adjudication with one specific authority, which in our case is SEBI. However, the SEBI through its circular[14] laid down rules and guidelines for resolving the investor disputes through arbitration. Further, SEBI bye-laws provide for a dispute resolution mechanism between the company and investors through arbitration[15]. It can be said that the SEBI Act doesn't impose any restriction on MSA

In conclusion, it is to be noted that the disputes affecting *in personam* rights are explicitly made arbitrable by the Securities laws and rules. Additionally, both the Company law and the Securities law clear the

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[11] *Rakesh Malhotra v. Rajinder Malhotra* (2015) 2 CompLJ 288 (Bom).
[12] *Haryana Telecom Limited vs Sterlite Industries* (*India*) *Ltd* (1999) 122 PLR 116.
[13] *Kingfisher Airlines Limited vs Residing At A-702*, Writ Petition no. 2585 OF 2012 (Bom).
[14] SEBI circular "Arbitration mechanism in stock exchanges" circulars no: CIR/MRD/ICC/29/2013, September 26, 2013.
[15] The Securities and Exchange Board of India (SEBI) Model Bye Laws, Chapter 15, "*Arbitration, Dispute Resolution and Conciliation*".

position with regards to the master shareholder arbitration and further sets out that only rights affecting *in persona* are arbitrable.

Implementation and Incorporation of Mandatory Shareholder Arbitration Clauses

If companies are successful in implementing mandatory arbitration clauses in their by-laws either through the documents at the time of incorporation or by shareholder approved amendments, this could attract a lot of investors. The fundamental issue with regards to enforceability of mandatory clauses is based on the argument that arbitration must be deemed enforceable based on the principles of contract law. In order to enforce arbitration agreements, the company must establish that the proceedings "have a contractual basis and that shareholders are not deprived of the protections of litigation". Corporate by-laws are the contract between the company and the shareholders, and it is based on an assumption that parties have agreed to the terms before signing it.[16]

Incorporation of the mandatory shareholder clause could be done in three ways i.e. (i) by including it in the company's certificate of incorporation (ii) by including it in the Articles of Association which could be done at the initial stage or through a subsequent amendment and (iii) negotiation between the company and shareholders on individual basis.[17] The third method would not be a feasible option in the Indian context as it would defeat the purpose of arbitration and individual contracting would increase the transactional cost and negotiations with each shareholder would affect the dispute resolution process.

Further, mandatory shareholder clauses are not based on "all-or-nothing" concept i.e. mandatory shareholder clauses may designate certain claims for arbitration and leave other issues open for litigation[18]. Therefore,

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[16] Ann M. Lipton, "*Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws"*, CLS BLUE SKY BLOG (Mar. 18, 2015).

[17] Garry D. Hartlieb, *Enforceability of Mandatory Arbitration Clauses for Sharehold er-Corporation Disputes"* 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 131 (2014).

[18] Christopher R. Drahozal & Erin O'Hara O'Connor, "*Unbundling Procedure: Carve-Outs From Arbitration Clauses*", 66 FLA. L. REV. 1945, 1950 (2014).

implementation of the mandatory arbitration clauses through company by-laws and charters would effectively create a binding contract between the company and the shareholders. It must be ensured that these MSA clauses are inserted in good faith so that small investors and corporations are not at the receiving end[19]. Thus, permissibility of mandatory arbitration clauses in company-shareholder disputes is slowly developing within the Indian setup and an expansive use of such clauses still remains possible.

Mandatory Shareholder Arbitration [MSA] v. Class-Action Suits [CAS]

MSA can provide a more efficient outcome for the investors and for the companies. The legislator's intent behind bringing in class-action suits in India through the Companies Act,2013 was not fulfilled as till date not a single class action claim has been filed. With a lot of uncertainty amongst the investors with regards to litigation, MSA could be an attractive prospect to look at. MSA would mutually benefit both the shareholders as well as the corporations in terms of financial gains and corporate wrongdoings. Some of the key aspects that needs to be considered while opting for MSA over class-action suits are:

1. **Resurgence of IPO's:** Initial Public Offerings (IPO's) have been a great tool for corporations to expand their business and gain capital. However, a recent study in the United States suggest that less companies are opting for IPO's and one of the major reasons was class action securities litigation[20]. More companies are opting to remain privately held and not go for IPO's. MSA would ensure that litigation risks are eliminated at various levels and that would in turn help create a more appealing market for the companies while undertaking IPO's.[21]

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[19] Kevin M. LaCroix, "*Can Investors Be Required to Arbitrate Their Claims?"*, THE D&O DIARY (Jan. 19, 2012).

[20] U.S. DEP'T OF TREASURY, "a financial system that creates economic opportunities", 33 (2017).

[21] Paul Weitzel, "*The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws"*, 2013 BYU L. REV. 65, 68 (2013).

2. **Increased share value:** Increase in the value of shares is another advantage to the shareholders with the introduction of MSA. It has been noticed that class action suits may adversely affect the price of the shares owned by the shareholders as the litigation might fluctuate the market prices of the shares held. The benefits that the company earns by cost reduction by not opting for litigation can be directly beneficial for the investors. The nominal gains that the shareholders would earn by eliminating litigation would be passed back to them in form of increased value of shares.

3. **Mitigating corporate misconduct:** Another important aspect with regards to MSA clauses is that it can in a way keep a check on corporate practices and actions. The deterrent effect does not go away with the courts i.e. even if a particular dispute does not reach the court the companies may be held liable through the mandatory arbitration by the shareholders. Further, in a class action suit the shareholders have to suffer an indirect cut as the litigation cost is paid by company's assets and through insurance policies.

4. **Cost reduction:** Reduction in cost is a major benefit attached along with MSA. Transactional and procedural costs directly get reduced in an arbitration setting along with additional advantage of reduced liability costs. Future settlement prospects between the parties also increases in arbitration as outcomes are more predictable which increases efficiency between the parties involved.

5. **Significant recoveries:** Another key aspect that needs to be considered is with regards to the reward and recovery amount which the small investors get from class action suits.[22] Potential plaintiffs with smaller claims are the ones suffering from class action lawsuits as there is no consistency between the proposed shareholders compensation and the actual recoveries that reach the investors.[23]

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[22] Julie Steinberg, "*Do Class Actions Benefit Investors? They May Check Misbehavior, But They Often Don't Compensate for Losses*, WALL ST. J., (2014).

[23] Barbara Black, "*Arbitration of Investors' Claims Against Issuers: An Idea Whose Time has Come?"*, 75 LAW & CONTEMP. PROBS. 107, 110 (2012).

6. **Appropriate decision makers:** Arbitration is more likely to improve the quality of disposition especially with regards to securities disputes. Most of the times companies opting for litigation fear that their matter would be heard by judges who lack experience and are unfamiliar with the core securities issue in hand. This issue can be dealt by the companies by appointing expert arbitrators who would bring more consistency in decision making.

Class action suits tend to correct a particular wrong and accordingly allocate money in form of compensation to the party that has suffered from that wrong. [24] But the major issue is that due to litigation costs the shareholders do not receive significant recoveries. On the other hand, arbitration as a process ensures that it addresses the wrong committed and prevents similar future wrongs. Therefore, even arbitration can achieve similar outcomes as litigation along with more efficiency and less expenses.

Conclusion

As discussed previously, class actions suits couldn't serve the intended purpose for which it was introduced. The drawbacks outweigh the advantages and hence an alternative in the form of MSA becomes the need of hour. The practice of incorporating such mandatory provisions in the shareholders agreement are quite common in west and serve the interest of the investors effectively. Such provision comes with number of benefits to the investors or shareholders in specific, involving resurgence of IPOs, steep in share value, assuaging corporate misconduct, reducing transactional and procedural, resolving disputes economically and enhancing the decision making.

Since, India has undergone significant shifts to get itself addressed as land of pro-arbitration, these practices are to be adopted to hold true to such claims. Additionally, the implementation of master shareholders arbitration clauses is done via bye-laws of the company either at the time of

[24] Willard T. Carleton et al., "*Securities Class Action Lawsuits: A Descriptive Study*", 38 ARIZ. L. REV. 491, 496 (1996).

incorporation or through shareholders approved amendments. As far as the induction of such clauses are concerned, the same can be done either by putting in AoA, or the Bye-Laws, or the individual private agreement with the shareholders.

Further, MSA is not in contradiction with either the Indian Arbitration Law or the Indian Corporate Law, rather they pave path for such provisions to get executed hassle free. However, the authors are of the opinion that there are few suggestions to make MSA more conducive or to make it in tune with the Indian tune.

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공익목적 사업에서 투자조약중재 역할의 불확실성

Soo-Hyun Lee

투자조약중재(investment treaty arbitration, ITA)는 국제투자협정(international investment agreement, IIA)의 잠재적 위반 사안을 두고 민간 주체(투자자)와 정부(소재국) 간 분쟁 해결을 위해 설립된 제도이다. 다음과 같은 두 가지 판정이 투자조약중재를 통해 이루어진다. 첫째, 관련 분쟁을 해결하고 양자간투자협정(bilateral investment treaty, BIT)과 같은 협정위반에 대해 보상금 지급을 결정한다. 둘째, 분쟁이 발생한 협정이나 계약 조항이 차후 중재사건에서 어떻게 해석될 수 있는지 결정한다. 의무적 사항은 아니지만 투자조약중재 판정 시 일관성과 예측 가능성을 높이기 위해 보통 이전의 판례가 참조된다. 투자조약중재는 오로지 법적 문제를 해결하기 위한 제도이지만, 지속가능한 개발과 같은 공익 사안과 관련된 분쟁의 경우 이러한 법적 객관성이 유지되기 어렵다.

이는 국제투자법에 관한 핵심 논쟁을 야기한다. 지속가능한 개발과 같은 공익 관련 분쟁에서 누가 결정을 내려야 하는가? 한 쪽에는 법학자와 전문가 국제 패널로 구성된 제 3 자 중재판정부가 존재한다. 그러나 이러한 전문가들은 분쟁 당사국의 정책 요구와 사회경제적 맥락을 제대로 이해하지 못한다는 비판을 받아왔다. 다른 한쪽에는 투자유치국 내 사법체계가 있다. 사법체계를 이용하는 방식은 당사국의 공공정책목표에는 보다 잘 부합될 수 있지만 부정부패와 같은 제도적 문제가 발생할 수 있다.

이에 따라 국제투자법상 불확실성에 대한 문제가 발생한다. 먼저 확실성이 무엇인가를 질문해보아야 한다. 사법제도를 다룰 때 체제가 법을 집행하는 방식의 확실성을 이해하는 것은 중요하며 이는 국제투자법에도 마찬가지로 적용된다. 투자자의 경우 법률 해석의 일관성과 예측 가능성이 부족한 국가에서 투자에 대한 확신이 줄어들 수 있다. 국제투자법의 의사결정과정은 불확실성을 통한 다양한 이해관계자의 참여를 환영한다. 그러나 이러한 불확실한 참여는 장기적인 해결책이 될 수 없으며 이들의 참여방법과 참여의 영향을 확인하는 데 있어 확실성이 보장되어야 한다. 국제투자법은 다양한 행위자에 대한 유의미한 포용에서 이점을 얻을 수 있다. 민간 주체 및 재원이 지속가능한 개발 목표 달성에서 제 역할을 수행하기 위해서는 이러한 유의미한 포용이 반드시 필요하다. 이에 대한 해결책으로 투자조약중재가 활용되어 왔지만 특히 개도국 수출과 관련해 여러 부정적인 결과를 낳기도 했다.

동시에 투자조약중재는 지속가능한 개발과 같은 사안이 국제투자법의 관습 및 원칙과 상호작용하는 방식처럼 규범적이거나 실질적인 질문에 의도적으로 대답하지 않는다. 이러한 고의적인 불확실성은 엄밀히 보아 소송이나 법적 영역에 포함되지 않는 문제가 개별 상황에 따라 결정되어야 한다는 논리로 뒷받침된다. 그러나 이러한 접근 방식은 국제투자법에서 지속가능한 개발과 같은 주요 문제가 다뤄지는 방식에서 높은 불확실성을 초래한다. 이러한 문제들은 중재 대상에서 제외되거나 사안이 인정될 경우에도 차후 판정에 대한 논쟁이 심화된다.

이에 대한 해결책은 기업의 사회적 책임 개념에서 찾아볼 수 있다. 해결방안은 두 가지 방법으로 모색될 수 있다. 첫 번째는 기업지배구조 및

스튜어드십 코드와 같은 자체적 규제를 통한 방법이다. 민간부문의 지속 가능한 사업 관행을 장려하고 투자조약중재와 같은 법정지에서 모범관행을 인정하는 방식을 통해 자체적 규제가 제도화될 수 있다. 또 다른 방법은 투자가 및 주주행동주의와 같이 기업 의사결정에서 지분을 통해 영향력을 행사하는 주주 거버넌스의 활용이다.

지속 가능한 비즈니스 평가는 1987 년 세계환경개발위원회(World Commission for Environment and Development, WCED) 브룬트란트위원회보고서(Brundtland Commission Report)에서 파생한 세대 간 개념인 "트리플 바텀 라인"에서 부각된다. 트리플 바텀라인(Triple Bottom Line)은 기업 및 기업-정부 간 관계가 미래세대의 경제·사회·환경적 선택을 제한하지 않도록 압력을 가한다.[1] 이는 지속 가능한 가치창출이라는 개념을 통해 수익성과 지속 가능성 간의 균형을 맞추려는 시도이다.[2] 기업이 지속 가능한 가치를 추구할 수 있는 방법은 개별 기업행동에만 국한되지 않으며 "기존의 자본예산과 관련된 지나치게 단기적인 논리나 종래의 R&D와 연관된 과도하게 장기적인 논리"로 요약될 수 없다.[3] 오히려 지속 가능한 가치창출은 (1) 폐기물 감소 및 오염 방지 (2) 공급망부터 제품 처분에 이르는 수명주기 관리 (3) 지속 가능하고 혁신적인 기술도입 및 개발 (4) 시장화 과정에서 포괄성과 같은 사안을 다루는 과정이다.[4] 이는 하나 이상의 바텀라인과 연관된 기업 운영에서 지속 가능성 영향을 평가하고 지속 가능한 사업모델에 어느 정도 관여할 수 있음을 뜻한다.

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[1] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (CapStone Press) 20.
[2] Stuart L Hart and Mark B Milstein, 'Creating Sustainable Value' (2003) 17 Academy of Management Executive 56, 57.
[3] ibid 65.
[4] ibid 60.

지속 가능한 비즈니스 모델의 원형을 수용함으로써 기업은 지속 가능한 가치창출 방안과 범위, 이를 달성하는 과정에서 이해당사자와 구축하려는 적법성과 같은 경계를 명확히 설정할 수 있다. 이는 투자유치국에서 외국기업의 법인체 설립 시 투자자가 국가 및 당국자 등 이해당사자에 갖는 정당한 기대를 분명히 한다. 동시에 이해당사자는 지역사회 복지에 있어 투자자와 기업의 지속 가능한 기여 방식에 명확한 기대를 가질 수 있다. 이러한 측면은 지속 가능한 비즈니스 모델의 수용이 국제 투자 승인 과정에서 중요한 절차가 될 수 있도록 한다.

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TANTANGAN MENJADI ARBITER WANITA

Dr. Emmy Latifah

Selama beberapa dekade terakhir, popularitas lembaga arbitrase ini semakin meningkat, bukan hanya karena sifatnya yang rahasia (*confidential*), namun juga karena para pihak diberi kewenangan untuk memilih arbiter yang akan menyelesaikan sengketa yang ditimbul diantara para pihak. Dengan kewenangan ini, maka para pihak dapat memilih arbiter yang memiliki spesialisasi keilmuan yang sesuai dengan bidang sengketa yang akan diselesaikannya. Konsekuensinya, popularitas lembaga arbitrase dan juga arbiternya semakin hari semakin meningkat.

Namun demikian, popularitas lembaga arbitrase tidak berbanding lurus dengan popularitas arbiter wanita. Selama beberapa dekade terakhir, jumlah mahasiswa wanita yang menempuh pendidikan di fakultas hukum di dunia ini rata-rata hampir sama besar dengan jumlah mahasiswa pria yang menempuh pendidikan di fakultas yang sama. Begitu pula ketika mereka telah lulus dan menjadi praktisi hukum seperti pengacara misalnya. Namun kondisi ini tidak terjadi di semua level karena pada lembaga arbitrase internasional, jumlah arbiter wanita jauh lebih kecil dibanding dengan arbiter pria. Terlebih pula, arbiter wanita jarang kemungkinannya untuk mendapatkan "kasus-kasus besar".

Beberapa lembaga arbitrase internasional merilis data statistik mengenai komposisi arbiter pria dan wanita. Pada tahun 2013, hanya ada 43 arbiter wanita dari total jumlah 372 arbiter yang ada di *London Court of International Arbitration* (LCIA). Ini berarti bahwa prosentase jumlah arbiter wanita hanya sekitar 11,5%. *The International Chamber of Commerce* (ICC) mencatat bahwa pada tahun 2015, presentase jumlah arbiter wanita hanya sekitar 10% dari semua penunjukan dari para pihak yang bersengketa dan konfirmasi. Pada tahun yang sama, di *Singapore International Arbitration Center* (SIAC), terdapat 25% penunjukan arbiter wanita. Data statistik ini menunjukkan ketidakseimbangan gender yang relatif tajam pada lembaga arbitrase internasional dan menyisakan porsi

yang kecil bagi penunjukan arbiter wanita pada kasus-kasus yang ditangani lembaga arbitrase.

Teori Maskulinitas Hukum

Beberapa penelitian dan publikasi terbaru dalam pengembangan psikologi telah melacak implikasi perbedaan gender dalam pengembangan psikologis untuk kepribadian, perkembangan moral, membesarkan anak, dan struktur institusi sosial. Wanita menganggap diri mereka sendiri harus selalu terkoneksi dan selalu berhubungan dengan orang lain. Sementara, pria melihat diri mereka sebagai individu yang diidentifikasi secara terpisah. Dalam pandangan Dinnerstein dan Chodorow, perbedaan-perbedaan ini merupakan hasil dari sistem pengasuhan anak yang mereka terima sejak kecil. Pengamatan dan hipotesis ini mengarah pada kesimpulan bahwa wanita cenderung melihat diri mereka sebagai orang yang berafiliasi dan terkait dengan orang lain, sedangkan pria lebih cenderung melihat diri mereka sebagai individu yang terpisah dan berbeda dari yang lain. Sebagai akibatnya, peran anak perempuan dan wanita dewasa tidak dideskripsikan secara jelas, sementara peran pria terdeskripsikan secara jelas dalam sistem sosial.

Gilligan telah melakukan pengamatan dan menyimpulkan bahwa perkembangan psikologis manusia telah dipusatkan pada pria, termasuk hukum juga didasarkan pada nilai dan perilaku pria. Praktik sosial, politik dan intelektual yang merupakan “hukum” selama bertahun-tahun dilakukan hampir secara eksklusif oleh laki-laki. Mengingat bahwa perempuan sudah lama dikecualikan dari praktik hukum, maka tidak mengejutkan bila sifat-sifat yang terkait dengan perempuan tidak banyak dihargai oleh hukum. Selain itu, “kemaskulinan” hukum digunakan sebagai dasar pembenaran untuk mengecualikan wanita dari praktik hukum. Sementara jumlah wanita dalam hukum telah meningkat pesat.

Faktor penyebab “*gender gap*” dalam lembaga arbitrase internasional

Jika diteliti secara mendalam, faktor utama mengapa lembaga arbitrase internasional kekurangan arbiter wanita adalah karena adanya “kebocoran pipa” (*pipeline-leak*) sebagaimana dikemukakan oleh Caroline dos Santos. Jalur pipa di sini harus dipahami sebagai suatu sistem pengkaderan yang solid, sistematis, dan berjenjang yang mana tujuan dari pengkaderan ini

nantinya adalah menghasilkan arbiter-arbiter wanita yang tangguh. Sistem pengkaderan seyogyanya dimulai dari jenjang pendidikan hukum, pengalaman, dan tergabungnya para arbiter wanita ini ke dalam suatu komunitas (*bar association*). Yang menjadi inti persoalan dalam konteks ini adalah bahwa pada kenyataanya, arbiter yang ditunjuk untuk menangani kasus-kasus internasional besar adalah para pengacara dari firma hukum yang besar, terkenal, atau paling tidak, arbiter ini merupakan mantan hakim (baik hakim agung maupun hakim pada pengadilan tinggi).

Secara statistik, jumlah wanita yang berkarier sebagai pengacara maupun sebagai hakim sangat kecil jika dibandingkan dengan pria. Sebagai contoh di Inggris. Berdasarkan data dari *the European Commission for the Efficiency of Justice* (CEPEJ), hakim pria merupakan mayoritas dan menguasai pengadilan di Inggris. Selain itu, jumlah wanita yang berkarier sebagai pengacara dan menduduki posisi penting di firma hukum terkemuka di Inggris juga sangat sedikit. Bahkan, pada periode tahun 2015-2016, 67.3% dari 17,335 mahasiswa tingkat sarjana di fakultas hukum adalah wanita. Namun dari jumlah tersebut, yang kemudian berprofesi sebagai pengacara hanya 18.8%. Keadaan tersebut memperburuk tantangan yang dihadapi arbiter wanita untuk masuk ke "dunia pria". Oleh sebab itu, sistem kaderisasi yang solid, sistematis, dan berjenjang menjadi salah satu solusi memecahkan persoalan ini.

Selanjutnya, faktor lain yang menyebabkan kurangnya jumlah arbiter wanita adalah tidak adanya transparansi dalam penunjukan arbiter di lembaga arbitrase. Hal ini dilatarbelakangi oleh sifat arbitrase yang *confidential*, yang secara tidak langsung berdampak pada tidak transparannya proses penunjukan arbiter. Hal ini menimbulkan kesulitan tersendiri untuk mendapatkan informasi tentang siapa yang dipilih sebagai arbiter dalam menyelesaikan kasus tertentu. Apakah ia arbiter wanita atau arbiter pria. Lebih jauh, dampak dari tidak transparannya penunjukan arbiter menjadikan kualitas dari arbiter juga dipertanyakan. Bahkan seringkali, kualitas arbiter hanya diukur dari visibilitas mereka di panggung internasional. Kondisi ini menghasilkan kumpulan "arbiter elit" pria karena seringnya mereka ditunjuk oleh para pihak dalam menyelesaikan perkara-perkara internasional.

Namun demikian, visibilitas di panggung internasional tidak serta-merta menjadikan seorang arbiter menjadi ahli dalam semua bidang hukum. Dengan kata lain, arbiter yang terkenal dan sering ditunjuk untuk menyelesaikan sengketa konstruksi misalnya, mungkin ia memang benar-benar memiliki pengetahuan dan pengalaman yang mendalam dalam bidang hukum konstruksi. Namun, ia tidak serta merta menjadi spesialis dalam bidang minyak dan gas, yang mana mereka mungkin sering juga ditunjuk karena faktor visibilitas tadi. Meskipun tidak perlu dipertanyakan lagi bahwa semakin sering seorang arbiter ditunjuk, semakin banyak pula pengalaman prosedural yang mereka peroleh.

Faktor selanjutnya yang menyebabkan lembaga arbitrase kekurangan arbiter wanita adalah faktor bias kognitif (*cognitive bias*). Dalam bukunya "*Thinking, Fast and Slow*" yang diterbitkan pada tahun 2011, peraih Nobel, Daniel Kahneman, menyajikan dikotomi antara kedua sistem pikiran. Sistem pertama adalah sistem otomatis, tanpa usaha yang keras, sistem ini akan beroperasi dengan cepat dan memungkinkan kita memahami dunia di sekitar kita. Sementara sistem kedua adalah sistem yang digunakan untuk melakukan aktivitas mental dan penalaran secara sadar. Sistem kedua ini adalah sistem yang bergantung pada sistem pertama. Akibatnya, keputusan yang dihasilkan oleh sistem kedua bersifat bias karena sistem kedua bergantung pada saran, intuisi dan perasaan yang ditransmisikan oleh Sistem Pertama. Sistem kedua cenderung mengadopsi dan bertindak berdasarkan saran, intuisi, dan perasaan itu, dengan sedikit atau tanpa modifikasi. Dengan kata lain, manusia akan terus-menerus menggunakan "jalan pintas mental" yang dapat menghasilkan keputusan yang tidak logis dan memilih pilihan irasional.

Sistem kedua kemungkinan akan dipengaruhi oleh bias kognitif, khususnya stereotip gender atau bias *in-group*, yang diinduksi oleh sistem pertama. Misalnya, bias stereotip akan membuat orang berasumsi bahwa orang-orang dari kelompok tertentu (misalnya dari kelompok gender tertentu atau kewarganegaraan tertentu) secara otomatis akan memiliki kompetensi tertentu (misalnya diasumsikan bahwa laki-laki cenderung lebih mampu menjadi pemimpin dari pada perempuan). Bias dalam kelompok, juga biasa disebut "bias yang serupa dengan saya", dapat mendorong pihak

untuk mempromosikan seseorang yang lebih mirip dengan mereka daripada yang berbeda.

Mengatasi bias kognitif yang mungkin tidak disadari merupakan tugas yang paling sulit untuk dilakukan dalam rangka meningkatkan keragaman (*diversity*), terutama karena hal itu mungkin timbul dari niat baik, misalnya karena tidak ingin menempatkan seorang wanita dalam posisi di mana dia akan dikelilingi oleh co-arbiter pria, pihak yang bersengketa juga pria, dan pengacara pihak juga pria, dan dalam bidang yang secara tradisional terkait pria. Bias kognitif sebenarnya alami. Namun dalam banyak hal, hal ini dapat menjadi penghalang bagi wanita untuk berkembang. Oleh sebab itu, menjadi sangat penting untuk mencegah bias di setiap bidang, termasuk arbitrase.
Lucy Greenwood, dalam karyanya yang berjudul "*Could Blind Appointments Open Our Eyes to the Lack of Diversity in International Arbitration*?" telah menyarankan gagasan tentang penggunaan metode "*blind appointment*" untuk menghindari bias kognitif dalam memilih majelis arbiter. Meski begitu, pertanyaan mendasarnya sebenarnya adalah apakah identitas arbiter secara realistis dapat disembunyikan. Hal ini karena seorang arbiter terkenal dapat dengan mudah diidentifikasi, bahkan apabila pemilihannya menggunakan metode "*blind appointment*" sekalipun karena banyaknya publikasi yang ia telah publikasikan, banyaknya asosiasi yang ia ikuti, serta banyaknya pengalaman yang telah ia miliki.

Faktor lain yang tidak kalah penting yang menjadi penyebab minimnya jumlah arbiter wanita adalah ketiadaan mentor dan hambatan dari diri sendiri. Tidak banyaknya arbiter wanita yang mencapai kesuksesan dan dianggap sebagai "*role model*" yang menyebabkan kurangnya minat wanita yang ingin mencoba profesi ini. Karena hanya ada segelintir wanita yang terlihat di arena ini, maka para wanita muda yang awalnya menggeluti profesi arbiter sebagai pilihan kariernya cenderung mengubah pilihan di tengah jalan. Selain itu, faktor penghalang dari diri wanita itu sendiri yaitu kurangnya rasa percaya diri akan kemampuan dan keterampilan yang dimilikinya, menjadi lingkaran setan yang nampak tiada berujung. Wanita merasa mereka berada di jalan buntu disebabkan karena adanya keragu-raguan bahwa mereka memiliki kapasitas untuk berhasil dan oleh karena itu, mereka berhenti sebelum memulai karena tidak ada

wanita lain yang tampaknya berhasil mencapai puncak di bidang ini (*role model*). Lingkaran setan ini hanya bisa diatasi dengan munculnya mentor wanita. Segera setelah beberapa wanita memasuki dunia arbitrase ini dan memberikan contoh, siklus negatif ini secara perlahan akan terputus. Wanita muda akan diminta untuk lebih percaya pada kompetensi mereka, sehingga meningkatkan kepercayaan pada diri mereka.

Arti penting keragaman (*diversity*) dalam lembaga arbitrase internasional

Periode tahun 2016, the International Chamber of Commerce (ICC) mendaftar sejumlah kasus yang diajukan kepadanya yang melibatkan kurang lebih 3.000 pihak yang bersengketa, dan 15% dari pihak tersebut berasal dari negara-negara Amerika Latin, Korea Selatan, Nigeria, dan Turki. Kondisi ini menggambarkan pula peningkatan kebutuhan akan keragaman (*diversity*) atas para arbiter yang menangani sengketa.

Benjamin Franklin menyatakan bahwa: "*if everyone is thinking alike, then nobody is thinking*". Gagasan di balik kutipan terkenal ini jika dikontekskan dengan isu arbiter wanita adalah bahwa komposisi majelis arbiter yang variatif akan menanamkan perspektif dan sudut pandang yang berbeda, argumen baru dan cara berpikir yang baru pula. Dampaknya akan terlihat pada kualitas putusan arbitrase. Homogenitas majelis arbiter dapat menghalangi tercapainya putusan yang berkeadilan. Keseragaman cara berpikir cenderung mengarah pada keseragaman hasil. Sistem peradilan yang adil mensyaratkan bahwa setiap warga negara dapat menemukan kepentingan mereka direfleksikan oleh pengadilan yang dapat menegakkan keputusannya. Jika hal ini gagal, seluruh sistem runtuh dan kepercayaan masyarakat pada lembaga pengadilan akan hancur berantakan.

Selain itu, kurangnya keragaman dapat menyebabkan pengabaian fakta-fakta penting atau bahkan gagal untuk memahami secara jelas sudut pandang salah satu pihak. Tindakan nyata harus diambil untuk mencegah hal ini terjadi. Di Swiss, misalnya, masalah seperti itu sudah dipertimbangkan. Oleh karena itu, *Code de Procédure Pénale Suisse* menyatakan bahwa hakim yang bertanggung jawab atas kasus-kasus tertentu harus berjenis kelamin sama dengan korban (misalnya untuk

pelecehan seksual dan kasus kriminal yang berkaitan dengan integritas seksual). Hal ini dimaksudkan untuk memastikan bahwa dari perspektif korban, tidak ada masalah yang diabaikan. Selain itu, hal ini juga menjamin bahwa sudut pandang korban diwakili dan dipahami dengan baik oleh pengadilan.

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