Mass Claims in Investment Arbitration- The Need of the Hour

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Mass claims proceedings have become increasingly important in the current dispute resolution scenario prevailing in the world. In international law, the role mass claims proceedings play is beyond dispute. Tribunals such as the Iran-US Claims Tribunal & United Nations Compensation Commission (UNCC) have certainly highlighted the importance which has been played by mass claims tribunals. Although these international mass claims processes are established to consider the legal claims which result from significant historical events and they mostly constitute large-scale reparation programs for victims of armed conflicts. What makes these claims commissions a great success is that they are able to provide access to justice for individuals who otherwise simply cannot afford to obtain a high standard legal representation. Perhaps a leaf can be taken from the success of the international mass claims commission for the usage of similar aspects in international investment arbitration.

Currently, we are witnessing something extraordinary in investment arbitration, which is the arrival of the average man before ICSID proceedings. It is widely regarded that investment arbitration can be a long drawn out and expensive affair. Studies have even showed that the average claim may cost in the region of US$9,743,000 (*Counting the costs of investment treaty arbitration*, Global Arbitration Review Online News, 24th March, 2014). This is where mass claims can play a major role. It has to be noted that the methods which are followed by the international mass claims are different from the mass claims in investment arbitration. In international mass claims commissions such as the IRAN-US Claims Tribunals, case by case arbitration is conducted and each claim is treated as a separate one (JR Crook, '*Mass Claims Processes: Lessons Learned Over Twenty-Five Years'*, in International Bureau of the Permanent of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes : Innovative Responses to Unique Challenges* (2006) 41,44). This approach which is followed by the international mass claim commissions won't be practical for application in mass claims proceedings in investment arbitration, as there are often a massive number of claimants who wants speedy justice. As a result of this, in investment arbitration the mass claims are consolidated into a single case.

The residual power that is given under Article 44 of the ICSID convention has a major role to play in the development of the mass claims proceedings in investment arbitration. It opens the doors for the tribunal to have some space for itself whilst taking decisions. According to Article 44,

> "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any

rules agreed by the parties, the Tribunal shall decide the question".

In the case of *Abaclat v. The Argentine Republic* (*Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011)), a divided tribunal came to the conclusion that it had the jurisdiction to deal with a mass claim which was brought by 60,000 bondholders. The case arose as a result of a sovereign debt default by Argentina. The tribunal held that the case was admissible under the ICSID Rules (Rule 19) and the ICSID Convention (Art 44) and that it was consistent with their spirit to seek to establish a procedure to deal with claims collectively. This conclusion was reached even though the BIT on which the claim was based did not mention collective proceedings. The tribunal considered the silence of the ICSID framework not as a prohibition of mass proceedings (paras 517-19). The tribunal, rightly, realized that the rejection of the rights of the bondholders would be an unacceptable denial of justice to the claimants (paras 517-19). In the case of *Abaclat* there was a strong dissenting opinion by Georges Abi-Saab against collective proceedings. But in the case of *Giovanni Alemanni v. The Argentine Republic* (*Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov 17, 2014)), the tribunal was unanimously in favor of allowing the proceedings to continue. This was a case which was also brought under the Italy-Argentina BIT, and it is the latest in the line of mass claim proceedings in investment arbitration, and, perhaps not surprisingly, it also includes a case of sovereign debt default. With regard to the question whether the collective proceedings were compatible with the ICSID Convention, the tribunal came to the conclusion that the compatibility was indeed present and that it was not rational to impose an implied limitation on the scope of the ICSID Convention so as to prohibit multiple claimants from bringing in a single dispute (paras 323-325).

Investment arbitration has been rightly classified by Van Harten and Martin Loughlin (G Van Harten and M Loughlin, *'Investment Treaty Arbitration as a Species of Global Administrative Law'* (2006) 17 EJIL 121) as a 'comprehensive form of administrative law'. It can be said to be entering a quasi-constitutional realm. In such a scenario, the role which is played by the arbitrators is to be highlighted greatly, they have the power to decide how the future of mass claims arbitration is going to be like.

It has been argued by Sant'Ambrogio and Zimmerman that class action suits have the advantage of allowing agencies to avoid duplicate efforts to resolve common issues. Instead, the agency is able to resolve the issues in one swoop, thus giving the agency "the first bite at solving categories of common problems that otherwise may never receive a hearing in federal court or—worse yet—reach federal court without counsel capable of developing a factual record that describes the system-wide harm." (Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992 (2012) at 2053). I completely agree with this statement and I am of the opinion that mass claims in investment arbitration has a similar role to play, thus enabling the arrival of the average man before ICSID proceedings. The ICSID regime also appeals greatly to an investor due to the slick recovery process which is provided by it.

It has been agreed by the experts that the type and amount of large scale legal injuries will continue to expand in the coming years. This would require the need for mechanisms which can handle group claims on a national and international basis (S.I Strong, *Class Arbitration Outside the United States : Reading the Tea Leaves*, in Dossier VII: Arbitration and Multiparty Contracts 183, 198 (Bernard Hanotiau & Eric A. Schwarts eds. 2010)). Currently, due to upcoming issues such as sovereign debt restructuring, situations where investors will come in heavy conflict with states are likely to occur. In a tight financial scenario, there is every chance that a state might just choose to leave the ICSID system, as opposed to being subject to fiscal austerity. This is why the ICSID regime should strive to arrive on a consensus as regards the mass claims against a state. Doing so would enable to obtain decisions which are more consistent. As I pleaded once before, consistency in investment arbitration

would enable to gain the trust of states and investors. The ICSID/BITs system has already seen countries such as Bolivia, Ecuador and Venezuela dropping out. It wouldn’t be advisable to add further countries to the list due to an unclear situation, which is sure to have a major impact on investment arbitration in the future.