Arbitral Decision-Making: An Issue of Consistency and a Response to Bias

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Consistent decision-making has been an ongoing concern in the way arbitrators approach the issue of treaty shopping and indirect expropriation. The article of Ozlem Susler and Therese Wilson, ***"Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making"*** ,[fn]Published in CIArb's Academic Journal: International Journal of Arbitration, Mediation and Dispute Management.[/fn] explores two of the apparent concerns of western liberal democracies regarding investor state dispute settlement provisions in investment treaties and trade agreements. Both of these concerns were highlighted in the arbitration in *Philip Morris Asia Ltd v Commonwealth of Australia* wherein Philip Morris Asia challenged Australia's Tobacco Plain Packaging Act 2011 as amounting to, amongst other things, indirect expropriation or a breach of the fair and equitable treatment (FET) standard. The case, therefore, highlighted the possibility of treaty shopping by an investor to secure the protection of an investment treaty, as well as the possibility of challenging State regulation on the basis of indirect expropriation or breach of the FET standard.

As the decision in *Phillip Morris v Australia*[fn]*Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia* (Award on Jurisdiction and Admissibility, Permanent Court of Arbitration, Case No.2012-12, 17 December 2015).[/fn] demonstrates, tribunals will not entertain jurisdiction to hear a claim where there has been an abuse of process in the form of treaty shopping which was undertaken at a time where the dispute was foreseeable. The clear message for investors following the decision in *Philip Morris v Australia* is that investors must structure their investment to make use of protections offered in a particular treaty at the time of entering the investment, rather than when a dispute is foreseeable.

The host state's response to abusive treaty shopping might be to amend existing BITs or to terminate existing BITs. Some countries have moved towards terminating BITs with other countries—a radical move which can undermine the whole fabric of the foreign investment framework that has been developed to date. For example, Australia attempted to ban investor state arbitration, presenting a Bill in 2014 with a view to protecting Australian laws. An alternative approach is to improve the function of ISDS from the perspective of states, for example by addressing the issues discussed in this paper—including through a consistent investment court mechanism

Additionally, recently negotiated agreements such as the TPP reconceptualised as the CPTPP, and the proposed TTIP, have tended to include "carve-out" provisions, preserving state rights to regulate in the public interest, for example with regard to the environment and public health. Explicit

preservation of the right to regulate, with regard to a range of public policy objectives, is a notable feature of the CETA. However, concerns might remain about how consistently such provisions might be interpreted or how consistently approaches to abuse of process might be applied by arbitral tribunals. A permanent and central investment court may allay those concerns.

A different factor influencing consistent decision-making is the issue of bias. Stepan Puchkov, in his article ***"Subconscious Bias as a Factor Influencing Arbitral Decision-Making"*** ,[fn]Published in CIArb's Academic Journal: International Journal of Arbitration, Mediation and Dispute Management.[/fn] explores the "black box" of the human mind which has been explored less than many people would guess and much less than it deserves. Even scientists specialising in this sphere have very limited knowledge about how thoughts are processed and how decisions are made. One of the means to obtaining an insight into this deep and mysterious process is the observation of repeating patterns of irrational behaviour that many people often follow. The process is two-way: on the one hand, the fact of human irrationality makes it possible to construct thought "road-maps", on the other hand, an understanding of thinking processes allows us to predict and to some extent to avoid irrationality.

Rational decision-making is crucial for the functioning of many aspects of human society including dispute resolution. The progress made from trial by battle to international arbitration cannot be overestimated, but even the latter is not completely free from non-legal influences. Subconscious biases are among them. The good news is that such biases are predictable and as such can in principle be avoided.

Puchkov explores the most influential theories dealing with the concealed thought processes and their implications for arbitral decision-making. One of the most important known features of the human mind for decision-making is the processing of information by two different systems rather than by one. Departing from the results of previous research, they distinguished between the "automatic and largely unconscious" System 1 and the deliberative and analytical System 2. Subconscious influences are not apparent to a person but can nevertheless result in irrational although predictable decisions

As an example, the *CME v Czech Republic* and *Lauder v Czech Republic* cases are based on essentially the same factual and legal background but, nevertheless, the tribunals' decisions are vastly different. Subconscious biases might have to a certain extent conditioned the discrepancies in the outcomes. One can fairly easily imagine a situation where a judge or an arbitrator sympathises with one party's case in general as a "big question" but cannot accept arguments underpinning "small issues" and thus has no option other than to dismiss the claim altogether (despite not feeling inclined to do so). In such cases, it must be helpful for a party to state its arguments broadly, in a way that would allow the decision-maker to exercise some degree of interpretation.

The issues of consistency and bias in arbitral decision-making cannot be underestimated. They have given rise to criticisms regarding the legitimacy and transparency of arbitration as a dispute resolution process for resolving disputes involving public and private interests. Elucidating the arbitral decision-making process can be the much needed reply to such criticisms proving the effectiveness of arbitration as an alternative to domestic courts.

Both articles are published in CIArb's Academic Journal: International Journal of Arbitration, Mediation and Dispute Management. After 8 years under the Editorship of Mr Michael O'Reilly, Professor Stavros Brekoulakis has taken over as the Editor in Chief of the CIArb's Academic Journal (the International Journal of Arbitration, Mediation and Dispute Management). He will be supported by associate editors Dr Mary Mitsi, Dr Ahmed El Far and Sabina Adascalitei, and an Editorial Board of distinguished international arbitration practitioners and academics from a wide range of jurisdictions and legal backgrounds. The Journal is the oldest academic journal dedicated to the field of arbitration and

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