The COVID-19 Crisis and Investment Arbitration: A Reflection From the Developing Countries

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Ahmed Bakry (Egyptian Ministry of Justice)

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COVID-19: Background and Impact on Foreign Investment in the Developing Countries

As discussed on the Blog previously, the number of confirmed cases of COVID-19, the disease caused by the virus named SARS-CoV-2, continues to rise globally, as shown on this page from the WHO.

Today, the virus has already spread in Western Europe and the US (Northern Developed Hemisphere), where most of the arbitral institutions are located, most arbitrations are seated, most of the prominent international arbitrators and practitioners are living, and most of the claimant investors companies and their law firms are headquartered. The serious control measures imposed by the governments in Western Europe and the US have already affected the arbitration field. Even beyond these developed countries, governments across the world are implementing wide-ranging control measures according to their situations. The measures include travel bans, quarantines in specific locations, self-isolation, suspension of mass gatherings, and social distancing that includes working from

home. In addition, various emergency measures have been enacted on a local and national basis, which severely affect foreign investors.

Implications of the Failure to Contain the Pandemic on Developing Countries

As indicated by the WHO Director General, no doubt, the situation will be more complicated if COVID-19 spreads severely in developing countries that, unlike the developed countries, have poor health infrastructures and more-vulnerable populations. Assuming that the most-frequent respondent States are from the developing world, the implications might be more complicated if the virus is not contained in the near future, or in the alternative, is contained in the developed world and life returns to normal there, while it begins (and then continues) to spread in the less developed countries. Assuming that States adopt inadequate measures and hastily created, ill-coordinated policies giving them unlimited powers with no clear ceasing date, most likely, this will pave the way for investment claims to be brought by foreign investors.

This post focuses on the impact of the spread of COVID-19 on investment arbitration from a developing country's perspective, in light of the confusion, uncertainty, public risks, and reactive control measures caused by the unprecedented situation. In the first two sections, I will examine the current impact to reveal the potential weakness of the current system of investment arbitration in such situations. In the last section, I will envisage the future impact of the situation. Finally, I will offer some concluding remarks.

1. *Disputes Notified and not yet Registered*

Since the outbreak started and until the time of writing, several disputes were notified. Certainly, there is the possibility that investor claimants might initiate arbitration proceedings as a means to encourage amicable settlement with host States where they are dissatisfied with the status of their current investments. As noted in my earlier blog post, after the so-called Arab Spring, several investors filed various meritless claims. Today, the risk continues that investors may misuse the process and time limits of arbitral procedure in the same way.

Litigants might also invoke the current situation to justify not adhering to cooling-off periods stipulated in several BITs, which require investors to try to reach a settlement with the State before filing an arbitration. Some investors may argue that the request for settlement at the time of the outbreak was futile, due to the measures taken at that time and the unpredictability of the situation. The same will apply to BITs where exhaustion of domestic remedies is required before filing an arbitration. Some investors may argue that it was impossible to exhaust domestic remedies due to the shutdowns and the closure of national courts, and accordingly, it is pointless to adhere to this condition.

Another example may involve circumventing the fork-in-the-road provisions in BITs as a tactic to avoid the limitation of choosing only one of the agreed disputes resolution options. An investor may argue that it was impossible at the time of the outbreak to comply with the provision due to the shutdowns and closure of the national courts.

On the other hand, we also can see States refraining from cooperating in accordance with due process. For example, States may reply to dispute notices by requesting an open-ended extension for the time limits provided in some BITs, such as for selecting applicable arbitration rules or appointing the arbitrators. A State may rely on various government actions to justify delays, such as total lockdowns, curfews, or availability of government officials due to the outbreak.

A further more minor non-cooperation could arise from States insisting on receiving hard copies of any arbitration filings, such as the request of arbitration, using the current disruption of mail services in different parts of the world as a tactic for delaying the registration of the arbitration. This tactic may interact with the recent development that several arbitration institutions have announced that request for arbitration may only be filed electronically.

One cannot predict how tribunals will react to these tactics. Each tribunal is unique, and arbitrators will most likely react and behave differently depending on the facts at hand.

2. *Disputes that are On-going and Disrupted by the Outbreak*

In general, the length and level of the disruption to the ongoing disputes will

depend on when “life gets back to normal.” However, as noted above, there are fears that the spread of the virus will get more severe in the developing world after things come back to normal in the more developed world. This means that arbitration institutions, arbitrators, and law firms located in the developed countries will work normally, while respondent States presumably won’t.

Hearings: As noted above, several hearings were already/are being postponed by the arbitral tribunals, notwithstanding the attempts to minimize the disruptions by conducting hearings by video conference or otherwise. Procedurally, even, there is nothing in most arbitration rules that requires hearings to be conducted only in person. As stipulated in Rule 28(4) UNCITRAL Rules, for example, witnesses may be examined through means that do not require physical presence. Procedural hearings are usually held by video conference, no doubt about that, but for hearings on the merits, many obstacles may affect due process. These obstacles may be as simple as poor internet connection in the country of one or more of the participants, or more complex, as, for example, handling cross-examination, which is complicated to administer through video conference. For example, it is nearly impossible to ensure that the fact witness is not accompanied by someone unauthorized in the room during the hearing. Normally, persons who are authorized are those allowed to enter the hearing room where the arbitration is held. These complexities have an impact on the enforceability of an award according to Articles V(1)(b), V(1)(d), and V(2)(b) of the New York Convention of 1958 (although the New York Convention would not apply to awards rendered pursuant to the ICSID Convention).

Most arbitral institutions have the capacity to conduct virtual meetings so the spread of the virus would not hinder or prevent arbitrators from conducting their meetings. For example, as recently posted on the ICSID page, in 2019, 60% of the 200 hearings organized by ICSID were held by video conference. Yet, could a party object, arguing that they prefer an in-person hearing for presentation of their witnesses, in order to make cross-examination more effective and for the tribunal to properly deduce their credibility?

To answer these questions, I examined several procedural orders from on-going and recent investment arbitrations to analyze how tribunals are dealing with the issue of video-conferencing. While in most cases tribunals accept proceeding through video-conferencing, other tribunals expressly mention their preference that witnesses appear in person, except in exceptional circumstances for justified

reasons at the discretion of the tribunal.[fn]LDA v. India, PCA Case No. 2014-26, Award 11/9/2018, Para 69; Pawlowski and Project Sever v. Czech Republic, ICSID Case No. ARB/17/11, Procedural Order No. 1.[/fn]

Written Procedures: Due to the current situation, some parties might ask for an open-ended extension of time for their filing deadlines for responsive memorials. Some of the cases during the so-called Arab Spring may illustrate the impact of such requests. In one of the cases, the State requested the suspension of the procedural calendar due to political unrest, but the request was denied. However, the second request for suspension was granted due to the escalation of the political unrest.[fn]Ampal-American Israel Corporation and Others v. Egypt, ICSID Case No. ARB/12/11, Award on Jurisdiction, Paras 39 and 40.[/fn] It remains unclear how tribunals will react to this motion, considering that most of the lawyers and experts who are involved are located in Europe and the US. In my opinion such requests will be accepted by most of the tribunals, but might have a negative impact for the requesting party in future cost allocations. So far, it is expected that arbitral tribunals would react towards postponing or suspending the proceedings, in light of counsel's inability to work full capacity at this time. Accordingly, we can expect time extension and delay in resolution of many ongoing arbitration proceedings.

Enforcement: New applications for annulment of ICSID awards may be impacted as well due to the exceptional nature of the stay of enforcement, as States may successfully demonstrate that the spread of a pandemic is a circumstance beyond the inherent or normal effects of an adverse award in accordance with Article 52(5) ICSID Convention and Rule 54 ICSID Rules. Developing States that are suffering from the ravages of a global pandemic may have good grounds for being granted a stay of award.

Enforcement proceedings for non-ICSID awards may be affected as well due to the partial or total closure of some national courts. Some national courts have reduced the capacity of their work to essential litigations. In some jurisdictions, the recognition, enforcement, and setting aside of foreign arbitral awards are not considered essential litigations. It remains unclear how States will react to such situations if parties are not exempted from their obligation to comply with time limits.

3. *Post COVID-19 Disputes (beyond the immediate effect)*

Due to the spread of the virus and related global shortages, it is expected that various contentious disputes will be on the rise due to party default. The breadth of resulting claims and underlying measures claimed cannot be predicted, but many claims will relate to FET and indirect expropriation. I assume that some States may have difficulty to argue that they did not substantially contribute to the situation and below I discuss the most relevant defenses to epidemics.

- **BIT Exceptions and the National Security Concept:** Under several BITs, States are able to argue that they are entitled to take the necessary measures to protect the health of their citizens or public order. However, the State must prove that these measures were applied reasonably on a non-discriminatory basis and in a timely manner. According to the Investment Policy Hub, there are 163 in-force BITs with health exceptions identified. Most of the State signatories are European, Asian, and African states. As contemplated by UNCTAD in 2009, the evolving concept of national security also implies that new threats may arise in the future that are unknown today.
- **The Doctrine of Police Powers:** Some States may argue that the measures were introduced as part of a larger international scheme of controlling the spread of the virus and were a valid exercise of police powers for the protection of public health.[fn]Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, Paras 305, 306, 307.[/fn]
- **Human Rights and Corporate Social Responsibility:** According to Article 12(2C) of the International Covenant on Economic, Social and Cultural Rights, States should achieve the full realization of the prevention, termination, and control of epidemics, endemics, occupational and other diseases. States may argue that the measures taken were based on human rights and their obligations according to the Covenant. It can also be argued that the right to health is an essential human right which is not only the responsibility of States but also a responsibility binding on individuals and, consequently, companies as well. States may also argue that companies are bound by these principles according to the Declaration of Multinational Enterprises and Social Policy, which acknowledges that the rules contained in the Universal Declaration of Human Rights and the corresponding international covenants are applicable to corporations.

States will most probably invoke the law of responsibility of states in relevance to their efforts to stop the spread of the virus. As noted in a recent blog post there are three available defenses according to the ILC Articles on State Responsibility. Even if one of the defenses was accepted, it could not relieve the State from compensating the claimant for damages according to Article 27 ILC, which in relevant part provides for compensation for any material loss caused by a covered act.

Conclusion

The crucial need and use of new technologies for arbitration proceedings and settlements is growing (even before this pandemic came into existence). New technologies will most likely replace physical meetings, while ensuring accurate and adequate face-to-face interactions between parties, witnesses, and arbitrators.

Will we see the drafting of notices, submissions, correspondence, pleadings, statements, and applications—which are traditionally document-only tasks—made electronic? Time will tell if this will pose a difficult task for certain parties.

I assume that arbitral institutions may have realized by now the need for introducing regulations in similar unprecedented situations, such as allowing for special suspension provisions to be available for the secretariat of the institution in similar circumstances.

In my opinion, amicable settlements will be the only winner after these unprecedented events. Investment damages will not be healed easily, and the arbitration process will be more complicated because it is highly unpredictable how tribunals will react to the current situation.

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The Kluwer Arbitration Blog is closely following the impact of COVID-19 on the international arbitration community, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.