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# SIAC Congress Recap: The Multi-Million Dollar Question – Will the Pandemic and Governments' Response to it Lead to a Spike in Investor-State Arbitrations?

Trina Tan (Omni Law LLC) · Sunday, September 12th, 2021 · YSIAC

The 2021 SIAC Congress held virtually on 10 September 2021 drew arbitration aspirants and practitioners from all over the globe, and sought to grapple with the key challenges of the day within the realm of arbitration. The second panel session, on "*The Multi-Dollar Question: Will the Pandemic and Governments' Responses to it Lead to a Spike in Investor-State Arbitrations?"*, delved into the vexing question of the potential impact of the COVID-19 pandemic on investor-state arbitrations.

The panel was moderated by Mr Luke Sobota (SIAC Board of Directors, Three Crowns LLP) and comprised a diverse range of voices: Ms Shwetha Bidhuri (SIAC), Dr Tai-Heng Cheng (Sidley Austin LLP), Professor Manjiao Chi (UIBE Law School, China), Mr Greg Harman (BRG), Professor Hi-Taek Shin (KCAB International, Twenty Essex Chambers) and Professor. Dr. Guido Santiago Tawil (SIAC Court of Arbitration, Independent Arbitrator).

**Claims**

Mr Sobota opened the session with a discussion on the impact of the COVID-19 pandemic on the types of potential claims that may be brought against states.

Dr Cheng observed that the typology of claims might be as follows: (1) bad faith actions by governments to use the pandemic to target foreign investors, (2) measures taken in good faith to combat the pandemic, but which are disproportionate, and (3) measures taken in good faith to combat the pandemic, which are implemented well and fairly. Dr Cheng noted that the second category would be complex, as it would bring into collision the "old" view of investor-state arbitration, which recognised the state's freedom to enact legitimacy policy subject to compensation being provided to injured investors, and a more sympathetic view to governments arising from an understanding that it may be unfair to require compensation from developing nations which cannot afford it.

Ms Bidhuri noted that the impact of the pandemic on the number of investor-state arbitrations would take time to unfold and would depend on the success of early cases. On the flipside, Dr Cheng observed that sympathy for governments taking up public policy measures to combat

national crises may increase in line with ESG (Environmental, Social and Governance) rising as a global macro-trend. A one-off investor with fewer reputational concerns may have the appetite to commence an investor-state arbitration, whereas a large multinational company invested in ESG may have to grapple with public relations concerns if it files a claim.

**Defences**

Turning to the various types of defences that may be advanced, Ms Bidhuri observed that it may not be easy for states to make out the defence of necessity or defences under treaties that do not have specific exceptions for public order or public health. Professor Chi took the audience through the broad defences that a state may employ in such investor-state arbitrations, namely: (a) force majeure, and (b) investment treaty-specific exceptions. He cautioned that even if COVID-19 could be argued as an unforeseen or irresistible event, this assessment may change as states become more accustomed to the situation, and this may affect their ability to meet the high threshold of force majeure.

**The principle of proportionality**

Naturally, the topic turned to the various counterarguments that investors may employ to rebut the defences put up by states. Professor Chi observed that proportionality would be a major argument, and this would depend heavily on the state, the kind of measures taken, and the intensity of those measures. Professor Tawil observed that, in all crises, there will be an incentive for states to concentrate power, and the means by which this is done can be assessed only on a case-by-case basis. Professor Shin observed that there may be a change in perspective or general consensus on social and community values, which may also affect the assessment of proportionality.

All in all, the panelists shared the view that in the case of the COVID-19 pandemic, it must be appreciated that this is a global pandemic affecting all nations, and a balancing approach must be taken.

**Damages**

Mr Harman, given his expertise in valuation, was asked about the assessment of damages in claims brought against pandemic-related measures. He noted that the pandemic has unlikely changed the fundamental principles governing the measure of damages, which aims to put the innocent party back in the same position it would have been had the wrong not been done, but additional complexity may arise in identifying the appropriate counterfactual as this requires consideration of what a proportionate response would have been.

While the extent to which the pandemic complicates the damages assessment will be case-specific, Mr Harman considered that there may be added complications with factors such as the valuation date and the valuation method. While the discounted cash flow (DCF) method is often used, one big issue is the level of certainty at which cash flow can be forecasted, and the pandemic has increased the level of uncertainty even for stable businesses. Another complication is the need to

distinguish between the impact of the pandemic itself, and the impact of the illegal act. There is also a further question of whether the DCF method can fully capture the risk of such “Black Swan” events.

**Future trends in ISDS**

Mr Sobota queried Professor Shin on whether the COVID-19 pandemic has impacted the deliberations of the UNCITRAL Working Group III on reforms to Investor-State Dispute Settlement (ISDS). Professor Shin noted that the impact of COVID-19 would be more severe in both absolute and relative terms for developing nations as opposed to developed nations. The ability of developing nations to defend ISDS claims and to make payment would result in a significant strain on their ability to fight the pandemic, and could inflame sensitivities between foreign investors and populist governments. While the current Working Group III discussions relate mainly to procedural reforms, there are calls for reform of substantive protection standards to tilt the balance in favour of the host state, such as by introducing temporary moratoria on claims arising from pandemic-related measures.

**Mediation**

Mr Sobota then directed the panel to the topic of alternative dispute resolution, such as mediation, and whether the COVID-19 pandemic would make parties more amenable to it. The panelists offered varying perspectives. Professor Shin observed that large multinational companies may have an incentive to mediate if they are concerned about public reaction on a global level. Dr Cheng offered the example of a company whose factory has been requisitioned for the production of masks. In such a case, the company might be attracted to a mediated outcome where it is compensated for the fair services of the factory or given new contracts for the manufacture of more masks. On the other hand, Professor Tawil’s view was that states would likely want to defend themselves instead of mediating, due to their internal regulations or concerns with mediating specific claims against the backdrop of a whole host of other similar claims.

**Enforcement**

The last topic of the session dealt with enforcement difficulties that may be faced by investors. Dr Cheng, Professor Tawil and Ms Bidhuri raised concerns about the differing standards of review in the enforcement or setting aside of arbitral awards, particularly in non-ICSID cases. Professor Shin observed that one measure available for investors is to obtain security from respondent nations in precarious financial positions. However, such measures need to be approached with caution as they may inflame sentiments against ISDS.

**Closing remarks**

In closing remarks, the panelists reaffirmed their views that the resolution of pandemic-related

disputes will require a case-specific approach. Mr Sobota raised the issue of supply chain disruptions, where losses suffered by an investor may arise as a result of COVID-19 measures implemented in more than one state. Both Dr Cheng and Ms Bidhuri observed that this could create complications in establishing the causative link between the loss and quantifying the damages. Professor Shin noted that such cases could become trade disputes under the World Trade Organisation, with Dr Cheng adding that a private company may fund a dispute using the state as a proxy.

Finally, Mr Sobota asked the panelists whether they considered the current legal or procedural framework well-equipped to deal with the pandemic, or whether the pandemic has exposed gaps in the present framework. Professor Shin thought that the current ISDS framework may take too much time to resolve disputes, and one suggestion could be a special global commission to deal with COVID-related investor-state claims which can resolve such disputes within a specific timeframe. Ms Bidhuri thought that joint interpretative statements could be useful in assisting tribunals in the application of the law.

**Conclusion**

The session was an enlivening discussion on the various ways in which the pandemic may affect investor-state arbitration. The panelists were percipient in identifying the complications that the COVID-19 pandemic may present at each stage of an investor-state arbitration, and in advocating a sensitised approach to addressing these complications. It is perhaps only fitting that the session ended with the panelists expressing a measuredly optimistic view that international investment law, as a dynamic and ever-changing body of rules, will adapt to meet the demands of its time.

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