INVESTMENT ARBITRATION SKEPTICISM: INDIA'S APPEAL TO THE HAGUE AGAINST CAIRN ENERGY INC.

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ABSTRACT

The Paper arose from the Government of India's appeal to The Hague against an arbitral award in the favour of Cairn Energy Plc, awarded in December 2020. As the Paper argues, this is not an isolated incident whence countries from the "conventional" third-world have their misgivings against International Arbitral Awards. Therefore, the Paper scrutinizes available literature and posits two research hypotheses – to firstly find whether the skepticism is rational or unfounded. Secondly whether the Third World nations take recourse elsewhere in lieu of their skepticism and does this recourse weaken the Law of Arbitration. The Paper concludes by inferencing how the lack of enforcement of arbitral awards justifies third world countries' arbitrary recognition of arbitral awards. The Paper also analyses and provides potential solutions to strengthen enforcement of said awards, before concluding.

I. Introduction

In February 2021, India filed an appeal against the arbitral award declared by the Permanent Court of Arbitration, the Hague wherein the tribunal rejected its demand for Rs.10,247 Crores as retrospective taxes from Cairn Energy Plc, a British company. This appeal followed a similar appeal in December 2020 made by the Government of India, in Singapore, against an arbitration verdict rejecting its demands for retrospective tax to the tune of Rs.22,000 Crores from Vodafone Group Plc.[1] However, on closer scrutiny, it is found that numerous countries, which are conventionally referred to as 'third-world' countries, adopt similar strategies when International Arbitral Awards are detrimental to their claims. Third World countries have been ascertainably skeptical of International Arbitral Awards for *inter alia,* it is a preconceived notion that such arbitral awards always tend to prefer the Western nations, with skepticism and misgiving even directed to the 'western arbitrators' awarding these verdicts. The third world nations felt that the arbitral verdicts were testament to the 'western arbitrators' socio-economic and legal systems which were in complete contrast to these countries' legal system, and thus, were birthed organisations like the *Riyadh Convention* as a recourse for these nations.[2]

Engagement with this contentious skepticism is pertinent in lieu of the Covid-19 pandemic, which has further fuelled misgivings and skepticism between the developed and the developing (*read:* Third World) nations, and non-enforceable arbitral awards are highly susceptible to being subverted and challenged, an affront to the emerging field of Alternate Dispute Resolution itself.[3]

II. Research Questions

A. *Whether Third World countries' skepticism of the international investment regime is valid or unfounded.*

B. *Whether recourses devised by Third World countries in lieu of their skepticism are detrimental to the Law of Arbitration and the domain of Alternate Dispute Resolution itself.*

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[1] Indian Express, 'India files appeal against Cairn arbitration award' (*Indian Express,* 23 March 2021) <https://indianexpress.com/article/business/companies/cairn-energy-india-dispute-court-7241783/>.

[2] Kabir Dev, 'Initial Third World Skepticism to Arbitration' (*VIA Mediation Centre,* n.d.) <https://viamediationcentre.org/readnews/NzYy/INITIAL-THIRD-WORLD-SKEPTICISM-TO-ARBITRATION>

[3] Ahmed Bakry, 'The Covid-19 Crisis and Investment Arbitration: A Reflection From the Developing Countries' (*Kluwer Arbitration Blog,* 21 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/21/the-covid-19-crisis-and-investment-arbitration-a-reflection-from-the-developing-countries/>.

III. Literature Review

The foremost seminal work in the field of Third World involvement in investment arbitration was the Jan Paulsson authored, *'Third World Participation in International Investment Arbitration'*[4] wherein the author posited that there did exist a schism up until the 1970s wherein Third World were immensely distrustful of "foreign" dispute resolution. The International Arbitration community too, did not help its own cause – Contentious decisions were handed down in a capricious and high-handed manner, wherefore Third World countries repudiating these arbitral verdicts became acts of nationalism. This distrust was evident in South America in the 1955-1965 decade, leading the region to devise the "Calvo Doctrine". The Doctrine stemmed from the perception of United States and European nations as aggressors imposing decisions from abroad against financially weaker nation-states. However, Paulsson wites that the imbalance and it's perception between nations of the global North-South changed with the advent of the 1976 Arbitration Rules of the ***UNCITRAL*** *(United Commission on International Trade Law).* Within a few years of its arrival, Paulsson posits that the attitude of Third World nations had changed significantly towards Investment Arbitration, a domain which needed "to be mastered rather than complained about".[5] Paulsson demonstrated this by referring to ICC arbitration instituted by Third World countries – In the year 1986, 41% of the claimants to the ICC arbitrations were Third World countries, 50 Third World nations being represented amongst the 41%, even including nations from sub-Saharan Africa as well as the Middle East! After illustrating the willingness of Third World countries to defer to international arbitration, Paulsson moves on to determining the effectiveness of their participation, exemplifying through numerous examples how competent and neutral arbitration has led to increased satisfaction among nations of the Third World, reducing the perceptive distrust of earlier decades.

However, following upon and referring to Paulsson's prescient work, Michael Waibel, Asha Kaushal *et al* in '*The Backlash against Investment Arbitration: Perceptions and Reality'*[6] posit that although international investment arbitration has seen an accelerated growth, its foundations remain fragile. They quote Paulsson, "A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to

[4] Jan Paulsson, 'Third World Participation in International Investment Arbitration' [1987] 2(1) Foreign Investment Law Journal 19-65
[5] Ibid, 20
[6] Michael Waibel, Asha Kaushal, et al., 'The Backlash against Investment Arbitration: Perceptions and Reality' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010)

generate a backlash." Their book itself, stems from indications in International Law about the discomfiture experienced in Investment Arbitration against national policies. The authors themselves find inherent inconsistencies in international investment arbitration to question the legitimacy of the said arbitral regime, namely – The *ad hoc* tribunals lack consistency of judgments and verdicts, which is detrimental to the aim of a predictable international arbitral regime; claims that investment arbitration regime is entirely unbiased towards capital exploring states are not totally unfounded; and most importantly, the regime is used as a tool to resolve public disputes through commercial dispute resolution. A concern the authors point out, is the inadequate and minimal representation of developing countries amongst the panel of arbitrators. Another noteworthy concern highlighted by the authors is the lack of transparency within the decisions and procedures of international tribunes of arbitration by referring to an article of the *New York Times* – "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned, and environmental regulations challenged."[7]

Taking-off from Michael Waibel and Asha Kaushal's work, Louis Wells in *'Backlash to Investment Arbitration: Three Causes'*[8] details three extremely vital causes to account for the growing resentment in the developing international nations against investment arbitration. He contends that the 3 foremost causes for the resentment in developing nations against the investment arbitration regime are – The inconsistent verdicts rendered by the arbitration panel, the rigid viewing of contracts taken by the panels and lastly, panels are negligent of corruption or incompetency whence the contracts were initially concluded and agreed. Firstly, Wells describes how arbitral verdicts are vagarious, changing from arbitration panel to the other, and the standards for monetary awards unchanging every time. He argues that this inconsistency is caused by the lack of 'detailed legislation' as the existing investment arbitration regime is wholly legislated simply by ***BITs*** *(Bilateral Investment Treaties)* and ***RTAs*** *(Regional Trade Agreements).* The second cause is the most vital to the growing resentment, as according to Wells, it is the source for the 3rd cause of resentment too. Wells argues that contrary to the core fundamentals of Contract Law, arbitrators in investment dispute between corporates-host

[7] Ibid, 1

[8] Louis T. Wells, 'Part IV Chapter 14: Backlash to Investment Arbitration: Three Causes' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 341-352

states are not malleable even to fundamental change of circumstances, leading to Governments of host states suffering from financial crises to entirely repudiate the verdicts. Lastly, the third cause stems from the second cause as the Third World nations, characterised by corruption-affable governments, are harmed due to the rigid contractual interpretations of the arbitrators, which consequentially leads to the perception of arbitral verdicts being anti-Third World.

The recourses Third World nations take in lieu of their skepticism are well-documented by Luke Peterson in *'Out of Order'*[9]. The most notable example was the case of Bolivia, which in 2007 decided to recuse from the World Bank's ***ICSID*** as it alleged that investor companies were threatening to go to the *ICSID* whence the Bolivian government, in accordance with its sovereign duties, simply wanted to reclaim and nationalize its gas and oil resources. Venezuela, Ecuador and Nicaragua wished to follow suit and it laid bare the investor companies' abuse of these arbitral institutions as investor-friendly dispute resolution havens. However, Peterson cautions that such recourses and withdrawals are mostly futile as withdrawal from a certain dispute resolution institution cannot alter the numerous treaties under which nations are bound to honour investment arbitration in case of disputes. Now, as withdrawal from these aforementioned treaties is a cumbersome and entirely complex procedure, even nations of the conventional Global North have begun carefully drafting their treaties to ensure that the State's regulatory hands are not tied by arbitration panels and investor companies' threats. Peterson lists Norway, the United States as well as the United Kingdom as prominent examples of nations of the Global North devising their treaty templates to recourse from the web of international investment arbitration. Peterson piece then shifts focus from the developing countries ***(***read: ***Third World)*** to demonstrate the growing resentment amongst industrialised nations against the contemporary investment arbitration regime.

Gordan Blanke and Soraya Corm-Bakhos propound specifically upon the legal strategies nations of the ***MENA*** *(Middle East and North Africa)* employ to enforce/not enforce international arbitral verdicts in *'The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region'*[10]. They contend that as *MENA* countries operate under Civil Law, nations of the region rely on their respective civil procedure codes to enforce foreign arbitral verdicts, which provides them with leeway while enforcing verdicts detrimental

[9] Luke Eric Peterson, 'Part IV Chapter 20: Out of Order' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 483-488

[10] Gordon Blanke and Soraya Corm-Bakhos, 'The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region' [2017] 83(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 71-81

to their claims. The authors mention how although a few *MENA* nations have codified their arbitration laws by basing it on the *UNCITRAL* model (Egypt, Tunisia, even Saudi Arabia), a majority of the region's nations including Kuwait, Qatar, Iraq and even the UAE still rely upon arbitration clauses in their civil procedure codes whilst enforcing foreign arbitration awards. A unique recourse sought is *MENA* countries resorting to becoming parties to multi-party regional instruments of enforcement, which has led to the creation of institutions like the *GCC Convention* or the *Riyadh Convention.* Furthermore, the *MENA* region has empowered its courts to review verdicts which run contrary to these nations' public policy, by granting the courts *ex officio* powers. *In summa*, Blanke and Corm-Bakhos' piece is important to illustrate the recourses and tactics deployed by Third World nations of the *MENA* to maintain their sovereign powers in light of the growing clout of investment arbitration.

IV. Investment Arbitration Skepticism – Author's Take

A. Inferences/Analysis:-

i. **The Logic of the Skepticism:** On the balance of available literature, it can be reasonably inferred that the skepticism of Third World countries is not entirely irrational and unfounded. Albeit Jan Paulsson's piece, authored in 1987 does enunciate that investment arbitration was on the upward trajectory, subsequent authors and their pieces denounce this trajectory. Authors as late as 2010 are alleging that the current investment arbitration regime is creating and exacerbating causes of a potential backlash. And the skepticism has begun creeping amongst nations of the Global North as well, for the primacy of governmental sovereignty cannot be held at gunpoint by investor companies and their threats to file claims at arbitral tribunals. Even Paulsson can be reiterated to this effect – "Future prospects for this development in international arbitration may …depend on the degree of sophistication shown by arbitrators when called upon to pass judgment on governmental actions…A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash".[11] This quote sums the sensitive and vulnerable position international investment arbitration is situated in.

[11] Jan Paulsson, 'Third World Participation in International Investment Arbitration' [1987] 2(1) Foreign Investment Law Journal 19-65

ii. **The potential of the Recourses taken by Third World nations:** It is inferable that the recourses Third World nations take are almost entirely futile. As evident from Peterson's piece, countries are bound by numerous treaties to promote and protect international investment and withdrawing from one arbitral institution does not guarantee that the Third World nation would not get hauled up at another arbitral institution. Similarly, the tactics deployed by investor companies to benefit from a highly corporate-friendly investment arbitration regime[12] ensure that the only recourse available to the Third World nations is standardising the template of their treaties. Contemporarily, the recourses available to nations, irrespective of Third World countries, cannot harm or cause troubles to the existing investment arbitration regime, as the corporate-exploring nations as well as their investor companies are always biasedly favoured. This leads to a situation wherein all existing treaties nullify any potential recourses Third World nations wish to take, and the only possible solution is the termination of treaty after its time-period ends, as then the Third World nations can re-draw these treaties more favourably.

iii. **The current Investment Arbitration Regime is an affront to the principles of Alternative Dispute Resolution:** The contemporary arbitration regime as illustrated by numerous authors and scholars, has essentially begun to mirror the conventional long-drawn court processes that the Alternative Dispute Resolution movement had sought to replace. When threatened by the investor companies to approach the *ICSID*, Bolivia decided to withdraw entirely from the institution because irrespective of legality of the government of Bolivia's actions to reclaim its fields of natural resources, the arbitration process itself is very costly and long-drawn. Therefore, countries facing financial crises are averse to becoming parties to such conflicts before international arbitral tribunals as they believe it to be a futile cause, a conflict already lost before the investor-friendly tribunals.

iv. **The question of legitimacy:** Several commentators, even *Bruno Simma* of the ICJ, propound that "that the Hague institutions might be endangered by a loss of trust"[13].

[12] Luke Eric Peterson, 'Part IV Chapter 20: Out of Order' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 488

[13] Bruno Simma, "Closing Plenary" [2017] 111 Proceedings of the Annual Meeting (American Society of International Law) 330-333

His remarks coincide with various other scholars, who detail how the consequences of the current investment arbitration regime include a serious lack of accountability, shrinkage of the domestic sphere of policy for governments and a concerning deficit of transparency. As mentioned by Michael Waibel, Asha Kaushal, *et al*[14], the lack of diversification in the panellists of the arbitration tribunal confirm the doubts of skeptics' of the Third World nations that these tribunals and panels are institutionally biased against them, providing fuel to the fire of legitimacy of the investment arbitration regime.

v. **Pro-Investors and Anti-Governmental Investment Arbitration:** As inferable from Louis Wells piece, the arbitral verdicts are inconsistent and vagarious whence determining monetary reliefs to the investor companies. However, it is also inferable that the rigid view of contracts that the arbitral panels tend to take, are an affront even to the core principles of Contract Law such as *Force Majeure.* The countries which have to face the double-edged sword of a financial crises on the one hand and compulsory commercial obligations on the other, are never respited by the arbitral verdicts because such equitable verdicts would be abreast of the contractual obligations the countries are supposedly 'enmeshed' in. Furthermore, a contention raised by whole host of scholars, hits at the arbitral verdicts infringing upon the sovereign powers of states to perform their governmental functions, summarised aptly by Michael Waibel, Asha Kaushal, *et al* – "the regime imprudently uses private commercial dispute resolution tools to resolve public disputes."[15]

B. Solutions:-

i. **The creation of more Multilateral Agreements:** As evident from the *MENA* example and their birthing of the *GCC Convention* and the *Riyadh Convention*, Third World nations must coalesce and create new multi-party agreements to help in the enforcement of contentious arbitral verdicts. As the *MENA* example illustrates, third world countries which are skeptical of verdicts delivered by panellists of a different legal and socio-economic system should come together for enforcement. This solution can be backed

[14] Michael Waibel, Asha Kaushal, et al., 'The Backlash against Investment Arbitration: Perceptions and Reality' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010)
[15] Ibid

even when allegations of corruption are rife in BITs, yet the arbitral verdict favours the investors. In such a situation, countries lacking the financial wherewithal can fall back upon members of such multilateral agreements.

ii. **Appellate Process:** The most crucial reason to account for the inconsistencies of the investment arbitration regime, is the lack of a superior appellate authority as well as the increasing number of arbitration tribunals. This leads to a situation wherein the existing tribunals possess no accountability, and thus, are wrongly empowered to hand out verdicts with a concerning lack of transparency as well as consideration of a nation's circumstances. Similarly, the mushrooming of numerous tribunals ensures that for similar factual circumstances, two different tribunals may adjudge differently, vitiation of an equitable arbitration regime. Another potential solution herein is International Organizations like the United Nations, World Trade Organization and UNCITRAL *et al* regulating and codifying the previously held-arbitral verdicts to ensure consistency for nations, thereby reducing the aspersions of biasness by arbitral tribunals.

iii. **Symmetry[16]:** A solution posited by Louis Wells entails that contracts for mining and petroleum "have long included arbitration provisions to cover disputes. They have (been) typically granted to either party"[17]. Similarly, akin to such contracts, the right to file claims in investment arbitration must be proffered to the States as well, wherein conventionally, such rights have been granted to investor companies solely. However, Wells points out that this solution although legally vital, is unfeasible, as Third World countries and other developing countries would always lack bargaining power compared to the corporate-exploring developed nations.

V. Conclusion

In summa, it is found that the first Hypotheses posited by the author wherein the Third World nations are skeptical of the international investment arbitration regime is answered in the affirmative, as numerous scholars point to the systemic flaws inherent in the existing regime, which are manifestly biased towards developing nations, a majority of which are Third World

[16] Louis T. Wells, 'Part IV Chapter 14: Backlash to Investment Arbitration: Three Causes' in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 341-352
[17] Ibid.

nations as well. This biasness on part of international arbitration institutions makes the Third World nations skeptical of such organizations. This imbalance is visible in the second Hypotheses as well, which is answered in the negative, that is, States which recourse from the investment arbitration regime do not have the capacity to detriment the existing regime, as they are also hampered by their weaker bargaining powers compared to the richer, developed nations.

The Author of this paper opines that it was extremely pertinent to engage with this subject, because notwithstanding India's appeal against Cairn Energy Plc, the Covid-19 pandemic is bound to further fuel this skepticism amongst Third World nations in light of the growing inequality imposed by the pandemic on nations' economies. As most of the nations are battling financial crises, it would be imprudent of the investment arbitration regime to impose commercial obligations upon them. This Author further presciently opines that contentious verdicts are bound to follow the ravages of the pandemic, and if the contemporary investment arbitration regime does not mend its operations, the whole institution of the international investment arbitration would be liable for a worldwide economic crisis.