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Sudhanshu Roy

Good evening. Good morning. Good afternoon, wherever you are. Welcome to the session of the India ADR Week on Investment Treaty Arbitrations - Massive Claims. My name is Sudhanshu Roy. I am an attorney at Foley Hoag in Washington DC. And it is my distinguished honor to use a very experienced Panel who's going to speak about this topic. On the panel today, we have Baiju Vasani. Baiju Vasani is a Senior Fellow of the School of SOAS University of London and a fellow of the Chartered Institute of Arbitrators, who has recently joined 20 Essex Chambers as a barrister. He's also on the arbitrator panels of various arbitral institutions worldwide, including the International Centre for ICSID.

Baiju holds four degrees in law and LLB, LLM, BCL and a JD from the King's College, London, LSE, University of Oxford and Northwestern University respectively. He has spent the past two decades serving as an advocate and arbitrator in dozens of high value international arbitrations. And then we have Dr. Nudrat Piracha, Dr. Piracha is a partner in Samdani & Qureshi, a collaborating firm of Andersen Global in Pakistan. She is an alumna of the London School of Economics, having practical experience as an advocate in the areas of International Commercial Arbitration, and International Construction and Investment Disputes. She is a fellow of the Chartered Institute of Arbitrators, UK, also a country reporter for Pakistan for Kluwer law board International Transitional Arbitration.

She has worked with the infrastructure project development facility Ministry of Finance, Pakistan, and she has worked with the infrastructure project development facility of the same ministry on public private partnerships from June 2009 to January 2010. We also have Carolyn Lamm. Carolyn is a partner at White & Case and she's in fact the chair of International Arbitration of the Americas at White & Case. She is lead counsel in international arbitrations in ICSID, ICC and other flora and related with arbitration related litigation in US courts. She is an arbitrator on the ICSID list, first nominated by the United States and then by the Government of Uzbekistan. She has served in as an arbitrator ICSID proceedings SIAC, ICDR, AAA etc. She's a distinguished faculty chair White & Case LLM International Arbitration at the University of Miami School of Law.

She is the immediate past president American Bar endowment member advisory council and previous governing member and previous Governing Board of the ICCA. She's also on the Council

of American Law Institute, Counsellor for the Restatement, fourth of Foreign Relations. She is on the Advisory Committee for the restatement of International Commercial and Investment Arbitration. She was also a past president of the DC Bar Association and the American Bar Association, and she has frequently lectured on issues of international arbitration at various universities around the world. We then have , Tejas is a Partner and head of arbitration at Shardul Amarchand Mangaldas.

He specializes in International Commercial Arbitration and has an extensive experience in handling a broad range of complex high value international and domestic arbitrations across the country. He has represented multinational and Indian corporations, before High Courts, Supreme Court of India and various domestic and international commercial tribunals. He also sits as an arbitrator and is well regarded for his contribution to policy formulation across arbitration domain and has a deep understanding of issues to deliver effective solutions for his client. He was involved in the drafting of the 2015 amendments to the Indian Arbitration Act.

He's a fellow of the Chartered Institute of Arbitrators, and he's been recognised as a thought leader for arbitration by Who's Who Legal, leading lawyer in dispute resolution by Asialaw, leading individual by leading, legal 500 and ranked in Band 2 by chambers. He was amongst the ALB Asia Super 50 dispute lawyers as well. Forbes India recognised him amongst the top 100 individual lawyers in the legal power list. He's a member of the SIAC Court of Arbitration on the Governing Council of Indian Law Society is also on the ICC commission on arbitration and ADR and the Vice Chairman of society of Constitutional Law, India. Finally, we have our moderator, Mr. Keval Sheth. Keval is the founder and director of Konverj-Zeus.

He's a forensic accounting and economic damage expert. He is a Chartered Accountant with 14 years of post-qualification experience. He is a Certified Fraud Examiner and the Valuer of Securities and Financial Assets. Keval is a member of the steering committee of the young MCIA, the Chartered Institute of Arbitrators, the Institute of Chartered Accountants of India and also the Association of Certified Fraud examiners. He acts as an economic damage as expert and testifies as an expert witness in various arbitrations under the SIAC, LCI, AAA and ICC too. So, with that being said, I hand over the proceedings to Keval. Thank you.

Keval Sheth

Thank you Sudhanshu, thank you so much for this kind introduction. Good evening. Good afternoon. And good morning to everyone. And thank you for joining us. And thank you to the panels today that we have with us. We have an excellent panel today. So, without much, you know, holding up let us start, in today's topic, which Is Investment Arbitration Treaty Arbitrations, Massive Claims. Now, let me begin with a simple statistic that I have, in 2011, the 10-year rolling average of arbitral awards was just over 50 million USD, which, boom to 125 million USD in 2015. And by 2020, this average rose to over 250 million USD. And this is always, not worth as we see it.

In the early 2000s, this kind of award would be, consider at large, but today, the sum is quite quaint in that respect. So today, the largest award, as we know, of compensation in the investment treaty arbitration is USD 40 billion awarded in **[inaudible 00:07:40]** versus Russia, right. This was the largest of several related claims arising out of the nationalization of Yukos, in which a total of USD 50 billion was awarded. There are now 50 more cases in which the tribunal has awarded compensation of over USD 100 billion, 100 million, including 8 known cases in which a tribunal has awarded more than USD 1 billion.

Now all these, you know statistics, numbers and the figures, tell us one thing the amount of claim and the awards are so massive, and they have their, own impacts in, on the claimant as well as the respondent more on the respondent. So, let's just, quickly dive into the discussions today. I'll, first request Ms. Lamm, you know, to have her point of view on two things, one, the enforceability and the practicality of the claim, and the second, about the host and the state's ability to pay such massive claims. And then we can go to Mr. Karia, on his point of view, Ms. Lamm, if you can, give us your point of view on this.

Carolyn Lamm

Yes, and what I'll address of course, with a comparative analysis of some of the claims, the largest including Yukos, but only addressing what is public because I was counsel and am counsel in, in the Yukos not in the arbitration in the enforcement proceeding and set aside proceeding. And, as well, there is a second very large claim the $18 billion claim by Al-Qarqani against Aramco in the

Kingdom of Saudi Arabia. In that claim, in particular, it was 18 billion found on the basis of an argument and according to the 5th circuit and nonexistent arbitral award, and in a nonexistent arbitral facility, basically a fraudulent award. But nonetheless, an $18 billion award that the Aramco and the state had to defend against and have prevailed to date all the way up to the Supreme Court.

So it was a seriously flawed award. And fortunately, there are enforcement proceedings or set aside proceedings where those things can be raised. The second, of course, in the Hulley Veteran and Yukos versus the Russian Federation that was a taken together a $50 billion award now worth about 57 billion challenged and set aside proceedings in the Dutch courts, because that was the Situs. Of course, at the district court level, it was set aside, then at the first level of the Court of Appeals, it was reinstated. Well, it wasn't really reinstated, but they set aside the set aside issues.

And then it went to the Dutch Supreme Court, which agreed on the ECT issues, but sent back to the Court of Appeals and Amsterdam the question of whether not there was a lack of candor with the tribunal, and the tribunal was at the outset, basically defrauded in terms of what was, who was before it, and what evidence was presented. And I recite all of this and all of the, enforcement proceedings to highlight the issue. That this is very serious for our system of arbitration, for sure to have awards that are massive, as you've denominated them here, and with some seriously flawed predicates for them.

Fortunately, either under the ICSID Convention and the annulment proceedings, or under the New York Convention, or under the UNCITRAL Model law, I'm set aside in the various national jurisdictions, these flaws can be raised. But the question I think, for us all to think seriously about is what is the say for a system of dispute resolution? And what should we be thinking about in terms of the process to assure a better process with better due process submissions or something so that you don't have a proceeding result and as the catalyst for years, have set aside and enforcement proceedings, because it's so fundamentally flawed.

Keval Sheth

Sure, thank you, Ms. Lamm. Mr. Karia, if you know if we can have your views on this space?

Tejas Karia

Sure, thanks Keval. And as we heard, the claims are going on the higher side, every time we hear of a new case, there is an upward trend, which is really concerning. As far as the amount of the claim is concerned, we have seen number of cases where the claim has gone really high, beyond the capacity of the state, to even comply with the award. In the recent study, done by British Institute of Empirical and Comparative law and Allen & Overy shows that there is an increase of almost 184% of the award amount, which is a mean amount of US dollar 315 million on an average all the investors got over a period of time.

We have seen that Yukos was referred when we have ECC versus Pakistan. These are the concerns when the larger awards are there. It puts a lot of burden on the public finances, especially for the developing countries. If you take example of ECC versus Pakistan, it was a USD 5.9 billion award to a Canadian mining company. And if we talk about the amount, it was almost the same as the GDP 2% of the GDP of Pakistan and they had a bailout package from IMF which is very similar to the same amount. So, that creates a huge burden on the state. And again, there is a discrepancy between the amount invested by the investor and the amounts, which are awarded in the compensation.

What we have seen, for example, in Crystallex versus Venezuela, the investor had spent almost around the USD 200 million, and the award was given for 645 million which is, which is quite high and the total amount which came to be awarded was 1.2 billion US dollar compensation plus interest. So, we have to also see that what is the amount which is invested by the investor and how much they're getting as a result of the award. The other aspect which we have concerning is the regulatory chilling effect on the state because just the pendency of the investor claims, we have seen that a lot of economic activities, social and environmental activities are stalled by the states just because of the apprehension of getting the huge awards against them.

So, the higher the amount, the chilling effect becomes more severe. There is a reluctance to pay, we have seen a number of cases that states are either asking for nullification in the state. And the enforceability is an issue we're talking about India, India has created an exception to the New York Convention. And in the case of Vodafone, what we saw is that the Delhi High Court confirmed that, that only the awards which are arising out of the commercial relationship as per the Indian law would be enforced as per as far as Indian Arbitration Act is concerned, which incorporates New York Convention in Part two. So, that leaves the investor to enforce the award against Indian assets outside India.

In the Green Energy case, there were multiple enforcement proceedings filed in USA, UK, Netherlands, Canada and UAE, against India. That also leaves a wide disparity that the state has to go outside their jurisdiction to fight the enforcement proceedings. when the amount of the award goes up and there is an upward trend, we have seen that the states have resisted and in the new model VIPs. And if we talk about the other cases, where we have seen that the states are putting restrictions, by excluding certain types of damages, such as punitive damages, they are prescribing limitation on the compensation that may be awarded.

For example, compensation, which will not be greater than the loss suffered by the investor and also requiring that the breach has to have a sufficient **[inaudible 00:18:18]** close nexus to the harm in addition to providing for mitigating factors in calculation of the compensation. So, these are the factors which we have to keep it in mind while entertaining the claims. But Kavel, I completely agree with you that this upward trend is concerning, and we have to see the ability of the state and enforceability of this award because this getting award is not sufficient, because we need to enforce this award also against the state and which would be sustainable for the state as well.

Keval Sheth

Sure. True. Thank you.

Carolyn Lamm

Can I make one small comment? I absolutely agree. And when you did the comparative analysis of a case like Yukos, where they invested 150 million at the outset plus hundreds of millions in bribes and ended up with a $57 billion award. That is absolutely incongruous. It's exactly what Tejas is saying.

Keval Sheth

Sure. So, this leaves us with a point, to ponder upon, how impacted are we leaving the respondent states here, especially when, arguably I would say, in most cases, the, the states are developing countries. So, from the impact on its social, economical and political scenario of the state. Mr. Vasani, if we can have your views on this, it'd be helpful.

Baiju Vasani

Thank you Keval. I think I better put on some armour, because I'm going to be in a lonely pace on this panel. I didn't know that spoken yet. So, but I have to say I fall on the other end of the spectrum from my esteemed panelists. I think first of all, I would encourage everyone to differentiate between claims and awards. Claims can be whatever the claimant says, there it is, right? That's unproven. It's simply a claim. We have to remember statistically that only about 30% of claims addicts get through to a win on the merits for the investor. Of those, the amount claimed is, again, about 30% is awarded in damages. So, let's not use claims please, as a barometer, for any concerning trend, because the claims can be whatever the claims are, it's the amounts awarded that we should form from which we should be looking at trends.

I think that's one point. Second point, what I didn't hear from my friends, and I think is very important is what is the value of the actual value of the asset taken. So in other words, 2 billion might be a lot, but 2 billion is actually a very good deal for the state, if what they took was worth 6 billion. So I think unless we established what is the actual worth of the asset taken for which the amount was awarded, I think we're somewhat saying, well, 2 billion sounds like a big number. But actually, what is the state got in return, and if it's got a big amount, for example, my understanding of the Yukos case was that the actual asset was worth a lot more, at least the tribunal found was

worth a lot more than 57 billion, because they put some, discount on to that for various things that the claimant did.

So actually, if one accepts that the Russian state took the assets and nationalize them unlawfully, then actually they got assets worth a lot more, had they bought them in for less because they bought them in the open market. I also think we have to establish between those cases where you're looking at regulation in the sense of, for climate change for health, where the investor is, let's say an unfortunate bystander to something that is a legitimate policy of the state versus those cases where you have outright and blatant nationalization for policy reasons. So, they're just talked about Venezuela, but Venezuela was a left-wing government that decided without any lawful excuse to simply expropriate sways of the domestic economy.

So, I have very little sympathy for a state that does that, and then says, well, now I have to pay 2 billion. well, you should have thought about that before you breached international law. So that's my first pillar Kavel that I think we need to put a flag in the sand. The second thing I think is well, a lot of these cases have or would have had underlying contracts in any event, right, a concession agreement, or contracts with estate. For me, the damages would have been the same or similar had this been a contract dispute. So I don't think anything per se, the fact that this is a treaty violation, as opposed to a contract violation, one still would have done a DCF, one still would have valued the asset had one found a breach of the contract.

So I think, again, one needs to say, well pointing the finger at treaties, and saying, well contract is the answer, that wouldn't have changed for me the damages assessment necessarily. Another point that I think we need to bear in mind is that, you know, these are for breaches of international law. Now, for the most part, they would also be breaches of customary international law, so not necessarily just the lex specialis BIT and the multilateral treaty, and we have customary international law that is then been in some sense embodied in Bilateral Investment Treaties, to act as a deterrent and a guide to nation states to act in accordance with international law.

So in a way, the fact that we have these awards it you know, a chilling effect can also be a positive in the sense that it makes a state think, is this something I'm doing in accordance with international law? And if it's not, then I think we as a global system don't want them to undertake that particular act. So what would we have if we didn't have this system? Well, you would either have no

investment at all right? Because you don't have any treaties. Okay, I can't be sued for the seemingly large amounts. But then would people really invest in the country possibly, how would they do it? Definitely on different terms, right.

So if I've got an investment where I don't have investor state protection, maybe I got political risk insurance that would also add a big premium to my investment which would then reflect in the deal I would strike and whether I would go into a particular country at all. We also have to remember that the state has years, and certainly months and months to negotiate, to compromise, to talk to the investor to change course, because what we are talking about here is not the threat of a claim, but the actual claim where it founds, that the state breached the treaty, right. And in that instance, the state had the opportunity to turn around and act according to international law.

Finally, I would say that these treaties, I agree that the older treaties have been subject to some misinterpretation, some abuse, some rather loose interpretation. But again, these treaties are between states, the investors are simply third-party beneficiaries of a state-to-state system. And if states want to change it, rather than, you know, sort of these general attacks on the sizes of planes, for example, they could, but often they don't go for things like transparency, or to renegotiate the treaties to tighten them, and to make them into a system of law that both attracts investment but at the same time, avoids any unjust or unfair awards. And here, I would agree with my colleagues that I think if an award is unjust or unfair, compared to the act compared to the value there I would think that we absolutely want to make sure that the system is one that works for everybody.

Keval Sheth

Sure, thank you, Dr. Piracha, please.

Dr. Nudrat Piracha

Thank you Keval. First of all, it is a pleasure to be amongst this distinguished panel and all of you are attending the India, ADR Week. Now, as far as my views are having served for the states, the investors and member of the enrollment committee, I would want to bring a different or a unique perspective to the discussion, which I think is something that is often missed in the discussions.

First of all, I do think every case has to be seen on its own merits. And usually, the discussion that we find it is distinguishing between the interests of the state and the investor, or it is distinguishing between how the developed states are treated versus the underdeveloped states when it comes to quantification.

The perspective why want to bring to the table is that we need to distinguish between the government and the state in this discussion. I think a fundamental onset presumption in international law and these investment disputes is that the government is working for the benefit of the state. Developing countries, that is not the case, many of these governments are not working to the benefit of the people. These countries sometimes have successive corrupt regimes, right, and all the cases that Pakistan has had so far in ICSID. It is public knowledge that all of them had a component where corruption was alleged as a defense.

In all these cases, Pakistan ended up settling except the exception is agility, where payment was made to Pakistan rather than the other way around in the settlement. In all other cases Pakistan settled and it paid monies to the investor, even in the Tethyan case we have had a settlement. Now, the irony is from Pakistan's point of view, the award was too much. And from the investor's point of view, the award was too little, the assets were more precious than the award that was rendered. Now, if you look at one aspect that was mentioned by my colleague earlier, of course, if this award was ever to be enforced, even the IMF bailout that we negotiated was around $6 billion, and this award is nearly $6 billion.

The impact would be significant for a state like Pakistan. But if you look at the other side that is not discussed, the Tethyan or the Reko Diq Mine, as we call them, it is the fourth largest gold reserves in Pakistan, in the world. Right. In Pakistan there have been debates about the interests of the federal, the interests of the province of Balochistan, where these mines are located. And this project has been locked up because of the interest of stakeholders who were looking at their own interests. Now this project alone if it was properly developed, it can pay off all the loans that Pakistan has. Yet this project had been locked up, I could not go to the extent of saying that the end justifies the means.

But this project had it been unlocked, had there not been this threat of offending $6 billion award against Pakistan if this award, this project was ever constructed and now there is a settlement to

construct this project, it would result in benefits not only for the people of Balochistan, the stakeholders or at the moment, the Federal province of Balochistan, everyone is going to benefit from this project, which would not have been unlocked otherwise. So we need to keep in mind that these, these awards, these sometimes end up benefiting the state, who should I think be the beneficiary of the system. When you look at the interests of the government, it needs to be aligned with the government, with the interests of the state. And in many of these developments, developing countries, I feel that the interests of the government is not aligned with that of the states.

So, if we look at the political ramifications of this award, Pakistan has decided to opt out of the Bilateral Investment Treaties. But is it eventually going to serve the benefits of the state, maybe a particular government. But in the long run, I think international law what it does is it gives you standards that states need to live up to. And these standards help these states, even the developing states to grow into something better, and to develop in the long run. So, while we are looking at the interests of the government in taking my years, which are very short sighted, my question would be using these awards, which some of them I would not agree with, but using these awards, should we undermine the system as a whole to benefit the government at the detriment of the state? So I will leave you with that question.

Keval Sheth

Sure. Thank you, thank you so much, we can clearly see the two different schools of thoughts. Right. And that is what this may, it makes this topic very interesting. So moving on, there's a different, you know, not a line of thought, which says that, in many of the cases, you know, the arbitral jurisprudence on the compensation has been inconsistent, arguably, so especially in terms of, the circumstances, which it, is appropriate to calculate the compensation based on the investments, the expected future income, the second the quality of evidence needed to back up the projections that underpin the future income calculations of compensation, like the DCF method. And the third, the way that tribunal accounts, for risk to an investments project income stream across the different, your entire lifecycle. So, I would, quickly go to Ms. Lamm, for her views on this.

Carolyn Lamm

Yes, I know, and I know, there have been some criticisms as a result of alleged inconsistencies. But exactly, as Dr. Piracha said, each case is decided on its own, I don't know that we can look to the investment cases to discern an absolute cookie cutter approach to the quantification of harm. It is the exercise of the tribunal's discretion in light of the various factors. And in each instance, you have different arguments by the parties as to the nature of the harm, different arguments as to the applicable law and what it provides for, different experts submitted and proof and evidence of the damage or the harm imposed.

And given that kind of a constellation within which a tribunal is making a decision, it's nearly impossible to say anything other than the case must be decided on its own merits. And I think the most important elements really must be causation. And many times I find tribunals overlook the nexus between the alleged wrong and the alleged harm. And then the numerical quantification of what that is, but it's a very important aspect and you know why I think that you can't approach any of this by saying, oh, it's entirely the international standard, because once you get beyond the treaty interpretation, you do have to look at economics, you do have to look at accounting. And you have to look at some aspects of national law that hopefully do meet the international standard, but you can't ignore just because it's an International Treaty case, the whole state law.

So it's a constellation of things that should inform any quantification. And Baiju pointed out at the outset about the value of the asset taken for many times there is a great disparity in terms of views as to the value of the asset taken if anyone admits a taking. And I would just note in the Yukos case that he mentioned, it was pursuant to a privatisation decree that provided if there was any collusion or corruption, it was void ab initio. So in a in a national law situation like that, why should people who invested the minimum come out with 57 billion, it's breathtaking. Anyway, might just.

Keval Sheth

Sure. Thank you so much. Although, these debates are technical, they can be hundreds of millions of dollars at stake in tribunal's choice of one approach over another. For example, a choice between the different valuation methods in, Bear Creek v. Peru made the difference between the

USD 500 million in compensation claimed by the investor and USD 80 million as compensation awarded by the tribunal, in Tethyan Copper versus Pakistan, the tribunal confronted, essentially the same question as to the appropriate valuation technique and sided with the investor, resulting in a 4 billion plus interest about it, the mention about from a legal perspective, can this be more streamlined and given the right perspective? Mr. Karia, if you can, enlighten us with that, please?

Tejas Karia

Yes, definitely. Because what I feel is that every we had our colleague saying that every case has to be dealt with on its own facts, but the consistency helps because consistency brings certainty and also brings in a value to determine the case with the standard, which there would be some predictability and what helps is that there are various moving parts in the whole process of Investment Treaty Arbitration, because I would think that it would be different than your commercial arbitration to some extent, because there is a state involved and the considerations are quite different.

So, when it comes to the principles of quantification, we need to see that which method should be adopted, because as you rightly pointed out, depending on the method, which is adopted, the outcome can be quite different, whether to have the income-based approach or the market-based approach, you have the asset-based approach also. So depending on the facts, the tribunal has to decide, but if the facts are similar, and in most of the cases, we see that there is a similarity of the facts, then this consistency across the different tribunals would really help in determining the outcome, because, what would happen is that, then the states would not be able to judge what would be the outcome, unless and until they know what is the adopt the methodology, which will be adopted by the tribunal.

There is another view which is possible is that the inconsistency is the inherent feature of investment arbitration, because the tribunal has no duty to decide in an accurate, sincere, and transparent manner. But the majority view is that there should be consistency in terms of the interpretation in terms of adaptability of various methodologies, and especially the quantification of the damages or the compensation which can be given even in fact, UN Working Group also is looking into this whole aspect of consistency. And what we have seen is that there are different aspects, which the tribunals have to look into.

One is the valuation dates, as is very important because what would be the determinative factor is that what is the date on which the evaluation is being done, or whether the damages for an unlawful expropriation should be calculated, according to the FMV or the reparation standards, because, again, the outcome could be drastically different. The varied approaches on question of causation, as we heard, also is very important, because whether a supervening event should be understood as a breaking a chain of possession between the host states breach of investment treaty and a loss suffered by the investor is a very big question, which every tribunal has to answer.

Again, the interest part is also very important, because what kind of Interest is calculated? Is it compound? Is it simple? Also, the burden of proof, because every time you apply different burden of proof in assessing different elements of the damages claim also plays a very important aspect. So there are a lot of challenges which every tribunal faces. But at the end of the day, we need to see that if we can develop some consistency, again, it's an international law and in the tribunals have to decide taking into consideration various factors. But it would really help if we had some consistent methods and a soft law, which can be adopted internationally, which would then be a guiding factor for determining the damages which can be awarded by the champions.

Keval Sheth

Sure. Thank you, Mr. Karia. Now, the problem in recent arbitral practices, tribunals growing willingness, to grant large amounts of, compensation for state interference with planned investments that were never actually built. In such cases, be a vast discrepancy between the amount of money actually invested by the investor, and the amount obtained in the compensation, Tethyan versus **[inaudible 00:42:06]** Pakistan. **[inaudible 00:42:07]** an investor was awarded USD 5 billion, 4 billion plus interest for Pakistan failure to grant the necessary approvals for the investor to build and operate on mine, even though the mine was never built.

The tribunal, based in compensation on its estimation of the income, the investment would have, earned over its 50-year operating cycle, if it had been built. This award is large, almost as large as International Monetary Fund's bailout already agreed earlier, with the intention of saving the Pakistan economy from collapse, the possibility of large payouts of compensation, particularly for

interference of with planned investments that are never actually built also risk the encouraging serious corruption.

This is because the possibility of large awards of compensation increases the potential layer, payoffs of an unscrupulous investor to enter into corrupt investment contracts with the host state, even if the investor never intends to perform the contract, what's your view on the valuation of claims? And what is your take as an arbitrator? If we can, go to Dr. Piracha first.

Dr. Nudrat Piracha

Thank you for that question. I think in international law, they do exist standards, and there are checks and balances, if the tribunal stay loyal to them. We will not be seeing the mess that we see in some of these cases and Tethyan case I think is exemplary in going against those established norms, in calculation of damages, it has been the practice of ICSID tribunals that speculative damages should not be awarded. It has been the practice of ICSID tribunals that the investments which have not left the boardroom, and for which there was no track record of profitability for that particular project. A large number of ICSID tribunals have refused to use the DCF method in those cases.

And that in case I think, is exceptional on two accounts first, it was the very first time that the tribunal has used what they call the Modern, DCF methodology, which has never been used by an ICSID tribunal for calculation of damages. And in that what they did was they have discounted the risks, those risks, a bystander would think, or the exact thing which were speculative. If the tribunals were able to discount the speculation in the damages that are being claimed, we are looking at a menace that we will not be able to control. In that case, in particular, you're quite right that total investment of the investor was 200 million, the project never moved beyond the feasibility study.

And they walked away with an award of $6 million, nearly had it been the principles that have been adopted by except tribunals in the past, we would not have the same results. Similarly, the interpretation that was placed on some of the writings of the jurists, the jurists have, since then, express their view that the tribunals findings was not in accordance with what they had actually written. So I think just by staying loyal to the principles that are already out there, and what

international law standards are they, the tribunals can avoid a lot of difficulties that they have brought themselves into.

Keval Sheth

Sure, Mr. Vasani, as an arbitrator, what would be your take on this?

Baiju Vasani

I cross swords with two panelists. And now I'll cross swords with another. I think one has to start by differentiating between what is the asset on which you are conducting a DCF. If it is a business like a hotel, or a factory or a new idea, I'm coming up with a new IP, I can understand that you want history of operations, you want some proof of operability, you want some proof that this particular person can run that operation. And that in and of itself leads to speculation which may make DCF inappropriate. Where DCF has been applied and here is where I disagree with Nudrat. I think there is a pathway which has been shown by ICSID tribunal's where one is applying DCF on resources, or proven regulation.

In other words, you've got a guaranteed off taker market by the state, right, the state buys electricity or whatever from to guarantee contract. But let's talk about resources, we have resource and that is oil, gas, metals and minerals, particularly gold, because gold has a guaranteed market, right? You can sell gold to UBS in Switzerland 100% guarantee they buy it, other metals, less sold but still, you're talking about resources in the ground. Now, what that then depends on is a very different body for speculation versus the factory or the business or the IP that I'm talking about. When you've got resources in the ground, what you're trying to show is, how much can you prove that they exist? One and two, that you can get them out and make money on them.

Now, for the most part, you don't actually have to start necessarily drilling, it helps, right you. It helps that you've got a feasibility study, it helps you've done seismic reports, it helps that you've done exploratory boreholes, it helps that you have actually in your pilot project sold some of the resources. But as one goes across that spectrum, in resources, you do get to a point where it is relatively clear that a DCF would be appropriate in order to value that particular asset. And I would also say on the appropriateness of DCF or resources. That is how even our exploration properties,

right where the state believes, usually through things that were done in the 60s and 70s for example, in Soviet times or in or in previous governments. Those are also valued as between purchases as by DCF.

So I don't think one can say to tribunal, how you applying DCF to a field for the oil, right? When that's exactly how those things are. So in other words, if I weren't, if I wasn't claiming for damages for that field, but I was buying it from the state, we would do a DCF that's how we would value the field. So, I'm not sure how you can talk to, go to the tribunal and say DCF is inappropriate for that type of project. Now, there are even cases where resources are so inherently speculative that DCF is inappropriate, but I really do think that one has to differentiate. How is it done in practice? So if I was going to buy that Tethyan mine, we would use a DCF just to buy it and so I don't know why then inappropriate to do damages by it. That's my first thing.

My second point this has been said a few times the idea that one has to marry the amount spent and the amount claimed, now I'm not saying one doesn't have to look at that there is always you know, you look at the Delta and maybe your skepticism can be put into a prism using that. But I don't think that should be, could be a hard and fast rule as to the appropriateness of damages. For example, again, I'll go to resources and oil and gas, if the government gives me a field to explore, and I get very lucky, and I spend 10 million drilling a hole and I strike the biggest oil field the world has ever seen, and I've spent a million, that field is worth a billion. So, you can't tell me what I'm sorry, you only spent a million. No, but I found an oilfield worth a billion.

So if there is a plausible explanation to explain the Delta, between the amount spent and the map claim, then I think that there is nothing wrong with the amount spent versus mapping, and particularly in resources, which is a speculative venture in the sense of people are most likely going to lose their money. People who go and drill for oil and for gold lose money every day, because they drill and it's dry, they drill, there's no gold or the gold is so far in the ground or so that the grade is not good enough to get it out the ground, they lose their money all the time. But when they strike it, they strike it rich paid, they call it paid, striking it rich, because there's an element of gambling in the concept.

And that means that one doesn't necessarily spend a billion to get 1.2 billion, if they wanted 5% return, they'd stick their money in the bank. Right? If they want, they're looking for an IRR of

multiples, to do an FDI in a very difficult venture in a very difficult country. And so, again, I don't see this concept necessarily being a hard and fast rule.

Keval Sheth

Sure, I, know this has been a very interesting discussion come debate, I would say in some sense, and, as we come to the last section, where so, if I were to ask what can be done as a change, at least from a point of view of awarding the righteous amount of claim as compensation. You know, from a quantification point of view, I would start to think, can there be a revisit on how to claim, how the claim needs to be calculated or even how a claim can be tapped, If it can be?

Can a tribunal consider whether the host state has obtained any benefit from allowing the investment to proceed. And then, breaching its obligations under the investment treaty. If yes, the compensation would be capped, at whichever amount is lower between the host states gain and the investors expenditure in making the investment. And if no, then no compensation would be own, so, some lines of thoughts there, if we can, close the, the topic with Ms. Lamm first and then, Dr. Piracha. So, you're in.

Carolyn Lamm

It is an important point, I'm sorry, the primary source of the applicable law is the Investment Treaty. In the absence of any provision in the treaty, of course, tribunals apply customary international law, general principles of law, but only to the extent that the treaty is silent. So, your, if you don't have a provision, you ensures our factory where you're wiping out all the consequences of the illegal act, and tribunals have incredible discretion. States have the power to set valuation standards, that they would like to have the tribunals apply. And they can do that by negotiating or renegotiating their treaties or agreeing to interpretive statements.

And at times, we see that the Vienna Convention of course, allows that and you can, so you could have interpreted provisions statement, further defining and in fact, I note that India's model bid from 2015 and Article 26.3 and footnote four, in fact, does just that, and it does it in an excellent way in terms of defining what the monetary damage shall not be greater than, what should be offset against that damage, etc. So, I do think that is an approach that is well within the grasp of

the existing treaties of the states and in both the host state and the capital exporting state takes action.

Keval Sheth

Sure. Dr. Piracha please.

Dr. Nudrat Piracha

Thank you. So, I would agree with that they do ICSID standards. There is guidance in international law the treaties are invariably providing for what the state's desire. I think with an amendment or whether reform is actually required is with this conduct. And I know many of the financial experts are now going to disagree with me. But I think there is a need to regulate the conduct of the experts, many of these experts appearing as independent experts, or actually people who are arguing on behalf of the party. And there have been instances where tribunals have openly criticized conduct of the financial experts like Navigant, one of the cases that I did in a commercial arbitration. We had names like Ernst and Young, arguing that the valuation of the claims was less than $60,000. And we were claiming $6 million.

And we eventually won on that argument, should there not be repercussions for big names, like those who argue, just to make that argument in favor of a party, they, I feel should be, maybe, to cater for the discrepancy in the level of the expertise of these experts that some of the more influent companies bring, as opposed to the developing countries. Maybe it should be just one expert appointed by the tribunal or the center, who is actually independent. And when you read the Tethyan, award, 1,000-page award, I think it is astounding the number of times the tribunal highlights that financial expert for appearing for Pakistan had failed to address something that was critical.

And even during the transcript, and during the hearing, the expert failed to answer many of the critical questions. So maybe if there was just one expert appointed by the tribunal or the center that might not only reduce the costs but overcome the issue of the discrepancy in the financial experts that appear from both sides.

Keval Sheth

So interesting. So, I would like to end this discussion. And leave a thought for everyone who's, listening and, to ponder upon and especially the arbitrators, is that, while, let's say we apply the DCF, I mean, there are various thoughts that we heard today, let's say we apply DCF, but is there anything that binds the tribunal to not go with the DCF discounting part? What I mean is leave aside the discounting and the claim, if it, is stretched across 20 year or 30 year or 50-year period, that what it does is the award would say, the look, the state, you need to pay the investor.

But you can, do that in a, in a staggered manner, what it will help is and why it will help is not, pinching the pockets of the States right now as a claim is something that, it's just a commercial thought that, I wanted to leave everyone with, so with that, I would end this session and with a great thanks to all of you to be, on the panel today, and, sharing your, insights. Wonderful to have you all, thank you so much for this.

Dr. Nudrat Piracha

Thank you.

Carolyn Lamm

Thank you.

Tejas Karia

Thank you.