Investment Arbitration and Environmental Protection: A Double-Edged Sword

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Recently, Joseph Stiglitz, a Nobel Prize-winning economist and Columbia University professor, warned about the dangers of TPP (Trans-Pacific Partnership). "We know we're going to need regulations to restrict the emissions of carbon," Stiglitz said. "But under these provisions, corporations can sue the government, including the American government, by the way, so it's all the governments in the TPP can be sued for the loss of profits as a result of the regulations that restrict their ability to emit carbon emissions that lead to global warming."

Stiglitz echoes the often-heard but so far unproven "regulatory chill"-argument that has been touted loudly by anti-ISDS groups. The argument being that States would avoid adopt measures for the protection of the environment, health or other public goods because of possible investment arbitration claims by affected foreign investors. However, so far no evidence has been shown, which proves that a State has decided not to adopt a measure because of the fear of a claim for damages. On the contrary, a recent example shows that the "regulatory chill"-argument is only of theoretical nature and unconvincing.

In the recently initiated investment arbitration case by Canadian mining company Gabriel Resources against Romania, the Romanian government refused to issue the environmental permit required to start exploitation of a controversial mining project which uses cyanide to extract precious metals. The threat of a USD 4 billion claim against Romania by Gabriel Resources, which indeed has now materialized in an ICSID procedure, apparently did not impress Romania to change its mind. It is fair to say that a potential claim of USD 4 billion must be considered a significant amount of money for a country like Romania, nonetheless, the "regulatory-chill"-argument did not play a role.

Turning back to TTP, it should be noted that Annex 9-B TPP regarding indirect expropriation contains the following provision:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."

Accordingly, measures adopted for the protection of the environment, such as for example for the reduction of CO2 emissions, cannot – in principle – be considered to constitute "indirect" expropriation, which makes an ISDS claim under TPP practically useless. Hence, the fear of Prof.

Stiglitz is unfounded.

Instead of fearing that ISDS could undermine existing environmental protection legislation or prevent the adoption of new measures, ISDS could actually be used as an effective tool to enforce environmental protection provisions in case a State fails to effectively enforce them. This line of argument is not new, but has been put forward regularly by Annette Magnusson, the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

Indeed, the massive haze that has been caused by fires, which are set to burn forests in order to create land for palm oil crops, and has been massively affecting several neighbouring countries of Indonesia could be the next test case. Reportedly, this practice, which takes place every year, seems to have been condoned by Indonesia and the respective provincial governments. If that is indeed the case, this would constitute a breach of Indonesia's international treaty obligations relating to both environmental protection and investment protection.

Firstly, Indonesia has ratified several international environmental treaties such as most recently the ASEAN Transboundary Haze Pollution Agreement of 2002.
Art. 3 formulates the following principles:

1. The Parties have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other States or of areas beyond the limits of national jurisdiction.
2. The Parties shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated.
3. The Parties should take precautionary measures to anticipate, prevent and monitor tranboundary haze pollution as a result of land and/or forest fires which should be mitigated, to minimise its adverse effects. Where there are threats of serious or irreversible damage from transboundary haze pollution, even without full scientific certainty, precautionary measures shall be taken by Parties concerned.

Article 4 imposes the following general obligations:
In pursuing the objective of this Agreement, the Parties shall:

1. Co-operate in developing and implementing measures to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, and to control sources of fires, including by the identification of fires, development of monitoring, assessment and early warning systems, exchange of information and technology, and the provision of mutual assistance.
2. When the transboundary haze pollution originates from within their territories, respond promptly to a request for relevant information or consultations sought by a State or States that are or may be affected by such transboundary haze pollution, with a view to minimising the consequences of the transboundary haze pollution.
3. Take legislative, administrative and/or other measures to implement their obligations under this Agreement.

It seems that Indonesia has neither prevented the fires and the resulting haze, nor has it responded to these fires in a promptly and effective manner with a view of minimizing their negative effects. Thus, prima facie, Indonesia seems to have been breaching these obligations.

Secondly, Indonesia could also be violating relevant investment agreements, which it has concluded with its neighbouring countries. Most of these treaties impose the obligation on the Contracting Parties to provide for “full protection and security”.

For example, the ASEAN Investment Treaty, which entered into force in 2012 for Indonesia, contains the “full protection and security”-standard. The provision adds that “full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.” Also, the Indonesia-Thailand BIT of 1998 provides for “full protection and security”, whereas the Indonesia-Singapore BIT of 2006 contains an arguably more limited standard by providing only for “adequate physical security and protection”.

Arguably, the “full protection and security”-standard encompasses the obligation that the host state exercises sufficient “due diligence” to protect the investor’s physical assets and persons. It is not difficult to argue that this obligation also includes that the host state takes all necessary steps to prevent or effectively mitigate damages caused by egregious pollution.

This line of argument is in fact currently tested in an ISDS case, which has been brought by Peter Allard, a Canadian owner of an eco-tourist facility in Barbados against Barbados for an alleged breach of the “full protection and security” provision of the Canada-Barbados BIT. Allard claims that Barbados breached its treaty obligations by failing to enforce its domestic environmental laws, which he alleges led to the environment being spoilt and a loss of tourist revenues at his eco-resort.

Considering the fact that – unfortunately – many States around the world fail to effectively implement applicable environmental legislation – be it international or domestic -, causing not only damages to the environment and the health of their citizens but also to the property of foreign investors, ISDS claims could turn out to be a very effective tool to compel States to take the necessary steps to prevent environmental damages.

Seen from this perspective, anti-ISDS critics in general and environmental NGOs in particular should seriously reconsider their position and start acknowledging that effective ISDS procedures can actually be a useful tool in enhancing the actual implementation of and compliance with environmental obligations.

Indeed, this is yet another argument – next to the well-known and generally accepted – arguments that investment treaties and ISDS promote the Rule of Law, legal certainty and the flow of FDIs – for including easily accessible, effective and fair ISDS rules in all trade and investment agreements.