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Climate Change in Investor State Arbitration: Ideas on Application Ex Officio and Transnational Public Policy

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Climate change is a serious threat to humankind. The sources of the problem are many, requiring a multidimensional approach to find practical and viable solutions. In the last several years, awareness of the issue has been addressed in the public domain, by international community, and civil society. This publicity has resulted in States taking concrete actions at domestic level; the Intergovernmental Panel on Climate Change publishing critical and important reports; and the work of Laudato Si providing even a moral framework in the justification for concrete solutions.

In this context, the Paris Agreement of December 2015 ("PA") is of significant importance because it demonstrates the political will that was lacking in previous negotiations. For the first time an international agreement with the commitment to strengthen the global response to the threat of climate change in the context of sustainable development and in conjunction with efforts to eradicate poverty is reached. The primary goals of the PA are to (i) hold the increase in global average temperature below 2°C above pre-industrial level; (ii) increase the ability to adapt to adverse impact of climate change and foster climate resilience and low greenhouse gas emissions; and (iii) make finance flows towards low greenhouse gas emissions and climate resilient development.

The agreement includes mitigation, adaptation, means of implementation, and technical provisions. Among the main differences with previous agreements, the PA requires all the parties to make efforts to respond to climate change *without* distinguishing between developed and developing countries (art. 3); requires States to report the actions taken, support provided and received (art. 13); establishes a technical expert review (art. 13.11); and institutes a periodic assessment of the progress of the PA. By 2023, the first global stocktake to inform parties of the progress made shall take place and then every five years thereafter (art. 14). Moreover, not all the provisions are binding (e.g. art. 5). Some are vague in nature and their mandatory effect will depend on the interpretation given to the language.

As indicated in a previous post, investment arbitration will play a key role in shaping the climate change regime and filling in the enforcement lacuna. However, arbitration is a creature of consent, and in investment arbitration, the limits of consent are much stricter than in commercial arbitration. With this in mind, the question to be posed is,

considering the threat posed by climate change, would it be possible for arbitrators in investor-state disputes to apply this climate change regime *ex officio* (as discussed on corruption cases)? Could it be applied through transnational public policy?

Suppose a first scenario where an investor-state dispute arises and the PA is binding on at least the Respondent State but the parties haven't specifically raised the application of the climate change regime. In the face of issues that clearly need to be analyzed in light of the new climate change regime, arbitrators could apply it *ex officio* as part of international law, through references contained in the treaty, or as incorporated into the domestic law of the State.

Moreover, in the new wave of BITs and FTAs, it is likely to find clauses supporting environmental measures, promoting FDI in environmental goods and services, carve-outs, and requirements not to derogate existing environmental norms to foster investment (see IBA report). In this scenario, climate change regime could be brought to complement the provision in the BIT and interpret the international obligations of the State.

A more difficult question arises in a scenario in which the PA is not binding on the State. The principles and norms contained in the PA and UNFCC could still be applied through transnational public policy ("TP"). TP is defined as "principles and rules that are *so vitally important to the world community* that any contravention of them by unilateral action or agreement cannot have legal force" (Fox). In other words, it is the *common core* of the international public policy of many States and is triggered when there is a breach of a *fundamental interest of the international community*. Among some matters that could have this status are peace and security, economic, social, and cultural development, and *respect for nature* (Hoffmeister & Kleinlein).

Yet, there is controversy around the concept of TP. The first issue that arises is whether TP truly exists. Although some authors are doubtful for different reasons (e.g. hesitating on the hierarchy of international law or the non-recognition of TP by customary international law), others fully agree with TP's existence, stating that the principles it embodies are common to the juridical order of civilized societies. A second issue is to identify the sources of TP. Possible sources include the fundamental principles of natural law, universal justice, *jus cogens*, the general principles of morality accepted by civilized nations, international custom, arbitral precedent and the spirit of international treaties (Hunter & Conde e Silva). Other scholars, such as Kessedjian, reduce the sources to the principles on corporate social responsibility.

A third issue to consider is whether TP plays an important role on investor-state arbitration and whether arbitrators should apply it *ex officio*. Investment law is based on customary international law and investment treaties (Dolzer & Schreuer). Thinking on the applicable law, there will be an interplay between international and domestic law. In this context, TP plays a critical role. TP could be applied through the applicable law clause by the reference to the rules of international law or by any other reference in the BIT, e.g. exception clauses based on public policy. Regarding the application *ex officio*, Hunter & Conde e Silva argue that where the substantive law of the treaty is international law, "the arbitral tribunal not only can, but should, consider these issues when rendering its award."

Going back to climate change, there are binding and emerging legal principles arising out of the regime. The International Law Association ("ILA") drafted a document prior to the PA that reflected the most fundamental legal principles that should guide States in their attempts to develop and operate an effective legal regime on climate change. Those principles, namely sustainable development, equity, common but differentiated responsibilities, mitigation and adaptation measures, and international cooperation, are incorporated in the PA.

These principles are found in the sources of TP previously mentioned. They have been addressed on international conventions, domestic regulations, transnational working groups on corporate social responsibility, etc. In addition, domestic judicial decisions on climate litigation have increased (see Sabin Center) and references to general principles have been made. It is worth noting the case *Urgenda Foundation v. Netherlands* (2015), where the Hague District Court ruled that the Netherlands needed to limit greenhouse gas emissions for reasons other than statutory ones. The Court found that the State has a duty of care to prevent catastrophic climate change and to mitigate as quickly as possible, making reference to core principles related to climate change and environment at the international, regional, and domestic level without directly applying them. This decision illustrates that general principles have an important role because they could be applied in conjunction with private law obligations and constitutional rights to shape climate regime and the States' obligations towards the system.

Moreover, in *Ashgar Leghari v. Pakistan* (2015), the Appellate Court stated that the delay of the State in implementing the Climate Change Framework affected the fundamental rights of citizens. The Court mentioned constitutional and international principles, such as sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine, to direct the government to take further action on climate change.

At the international level, courts of general jurisdiction (e.g. ICJ) have neither addressed issues on climate change nor relied or shed much light on public policy (except some judges on particular opinions). On the other hand, Courts of limited jurisdiction or investor-state tribunals have referred to public policy on their awards (e.g. *Methanex* Final Award, Part IV.C, ¶24, *World Duty Free* Final Award ¶188) and acknowledged the existence of climate change but in a limited context. For instance, in *Indus Waters Kishenganga Arbitration* the arbitrators acknowledged the climate change issue (¶117), and in its partial award, they ruled that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law (¶452). In addition, there are investment arbitrations arising from the Kyoto Protocol, but confidential, and WTO Panels might also address any case related to this topic.

To conclude, climate change is a threat and arbitration could play a key role in this era. The best way to apply the regime is by ratifying and extending the signature of PA to all the States. However, the main norms and principles contained in PA could be considered as part of TP, and therefore, applied *ex officio* in investment arbitration cases. The issue here is that since it is not clear and there is not a unanimous consensus on the existence and enforceability of TP, it would be better to leave it as a

last resource.

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