Kluwer Arbitration Blog

Environmental Considerations in Investment Arbitration: A Report of a 'Topical Issues in ISDS' Seminar

Maria Fanou (Assistant Editor) · Wednesday, May 22nd, 2019

The CERSA (CNRS, University Paris II Panthéon-Assas) organized its fourth event in a series of seminars on selected topics in international investment law and ISDS. On 28 March 2019, a distinguished panel of practitioners and academics gathered in Paris to exchange views on 'Environmental Considerations in Investment Arbitration'. The discussion was moderated by Catharine Titi (CERSA) and brought together as panelists Attila M. Tanzi (University of Bologna, 3VB Chambers), Aniruddha Rajput (ILC), Gloria Alvarez (University of Aberdeen), Raymundo Tullio Treves (IMPRS-SDR) and Amelia Keene (Three Crowns). This note offers a brief account of the main topics discussed.

General Introduction

The discussion kicked off with an introduction by Attila Tanzi who painted a broad-brush picture of the background pertaining to environmental concerns in ISDS. Environmental concerns bear directly on the current debate over the balancing between the protection of investors' rights and the regulatory power of host States, as well as on investment in different respects, including energy-related investment. The latter appears more susceptible to encroach on environmental protection and on the so-called *greened human rights* (e.g. right of access to food/water). For the identification of the contents of such environment-related human rights, a reference to sources of law that previously one would not think of (e.g. ESCR Committee's General Comments, the landmark IACHR Advisory Opinion on the Environment and Human Rights) may be necessary.

Tanzi further provided a summary overview of three inter-related developments: jurisprudential, normative and institutional (e.g. the admissibility of *amici curiae* briefs and counterclaims). With regard to jurisprudential developments, he discussed whether environmental protection as a justification for State measures differs from other public purposes. He noted that FET and FPS are key in addressing environmental concerns in ISDS. A significant number of awards find for the State on expropriation and for the applicant on FET and/or FPS seemingly in a balancing attempt. Although an investor might invoke State negligence in protecting the environment (e.g. *Allard v. Barbados*), typically, an investor claims that the host State has breached a number of treaty obligations and the State, in its defense, justifies the

measures it took as a means to accommodate environmental concerns. In that context, the dismissive approach adopted in *Santa Elena v. Costa Rica* and the emphatic attention to environmental concerns in *Aven v. Costa Rica* were juxtaposed. Although the *Aven* tribunal applied a treaty (DR-CAFTA) expressly attentive to regulatory powers for environmental protection, the juxtaposition reveals the formidable developments that have taken place in international investment arbitration. Considering that the different approaches by tribunals also result from the differences in the applicable investment treaty, Tanzi pondered on how environmental considerations can be integrated into older treaties silent on the matter. In response, he referred to Art. 31 VCLT as a legal technique.

Lessons from the Indian Model BIT

Aniruddha Rajput discussed lessons from the Indian Model BIT (2015), which is a representative example of the shift of treaty practice. As compared to other model BITs which contained no reference to the environment, the latter is now expressly included and needs to be taken into account when deciding investment disputes. Rajput highlighted that the Indian Model BIT is only a model, we do not know what will come out when it is taken out to be negotiated with India's trade partners. However, he anticipated that India is unlikely to completely depart from it, since it represents a solid policy consideration. The new Indian Model BIT includes for the first time a reference to "sustainable" development. An effort to protect the State's regulatory power is also clear. Indicatively, there is no reference to FET but there is a definition of expropriation (Art. 5.3) followed by a clarification that a non-discriminatory regulation cannot be deemed as expropriation (Art. 5.5). These provisions allow extensive regulatory space for India to undertake regulations for environment protection. Since domestic law is one of the applicable laws in investment arbitration, the domestic legal framework on environment protection is relevant. There is a large body of jurisprudence developed by the Indian courts and particularly the Supreme Court. The recently created Green Tribunal is dedicated to decide environmental matters and is quite active. Although the decisions rendered by these judicial bodies may become the subject matter of challenges, they are contributing towards the applicable law, since India has a common law legal system. India has already concluded a BIT with Cambodia on the basis of the Model BIT and is using it as a basis for its negotiations with the EU.

Is Investment Arbitration a Place for Energy Justice? The Latin American Experience

Gloria Alvarez expressed her concerns about climate change, a topic that becomes more and more recurring in the context of investment arbitration. She highlighted the evidentiary challenges that the issue presents and argued that we are facing an energy revolution with technological, economic, and industrial challenges to overcome. This energy revolution is differently manifested; while Latin America is liberalizing their energy markets by welcoming more FDI, it is also creating more clarity on environmental protection. In contrast, Europe has already passed this liberalization process (e.g. AES Summit v Hungary) and more recently has witnessed dramatic changes in the financial schemes supporting various renewable energy sources. This energy revolution also comprises an energy transition which requires

long-term structural changes in current energy systems. An emerging problem in international investment law (IIL) is the absence of normative inclusion of obligations relating to the protection of third-party rights (including environmental rights) and quantitative obligations concerning greenhouse emissions. More concretely, Alvarez advocated that IIL needs to integrate the climate change regime into current economic models in a clearer way. There is, of course, no easy or quick way to achieve such integration. In this respect, some initiatives were discussed, such as the IBA Presidential Task Force on Climate Change Justice and Human Rights, as the first awakening point, as well as UN Guiding Principles on Business and Human Rights.

Lessons Learnt from Selected Case-Law

Raymundo Tullio Treves drew lessons from recent case law. As stressed at the outset, investment protection is what the name says; protection of investment. Hence, enforcement of environmental laws was not part of the original purposes. However, States are taking measures to enforce environmental obligations. Inevitably, such actions impact investments, and investors see environmental measures as triggering BIT claims. In parallel, environmental considerations are also being increasingly used by States as defenses. Depending on the applicable BIT, non-compliance with environmental regulations may deprive the investment of protection. In other cases, there might be a general exception for environmental regulation similar to the one found in CAFTA. Treves raised several points on the complex issue of counterclaims. Allowing counterclaims entails a balancing exercise, whereby the tribunal has to take into consideration the efficiency of the proceeding and judicial economy. 'Old-generation' BITs do not explicitly address counterclaims. However, both UNCITRAL Rules (Art. 21) and the ICSID Convention (Art. 46) explicitly refer to counterclaims. Two requirements arise therefrom: first, the tribunal must have jurisdiction on the counterclaim; and second, the counterclaim should be closely connected to the claim.

The "close connection" has been viewed not only as a factual connection but also as a requirement for the claim and the counterclaim to arise from the same legal framework. This complicates the possibility of a counterclaim. With regard to jurisdiction, various tribunals have moved from a textual analysis of the treaty. An example is the decision by the majority of the tribunal in *Roussalis v. Romania*, interpreting the Greece-Romania BIT (Art. 9). The tribunal found no jurisdiction over counterclaims on the basis of the BIT, which referred exclusively to disputes regarding obligations of the host-state. Professor Reisman issued a declaration in that case drawing consequences from the choice of ICSID in the arbitration clause: the fact that the parties agreed to use ICSID means that they also agreed to bringing counterclaims. Another example discussed was the Spain-Argentina BIT (Art. 10(1)). The tribunal in *Urbaser v Argentina* interpreted this provision "in good faith" to conclude that it covers all disputes concerning the investment, including State counterclaims and investors' obligations towards the State. Such obligations are to be found in international law, including human rights law. *Aven v. Costa Rica* was also discussed.

Overall, it is doubtful whether counterclaims are viable options for States to obtain damages for environmental harm. There are three possible ways forward: 1) obtaining the agreement of the investors/claimants (e.g. *Perenco v. Ecuador*, *Burlington*

Resources v. Ecuador); 2) finding a norm of international environmental law which is directly actionable against the investor; or 3) having language in the BIT which directly imposes such an obligation on investors.

Time for a (Climate) Change in Investment Arbitration?

Amelia Keene observed that it is extremely rare to find any reference to climate change in investment awards. This observation motivated Keene to ponder on why this is the case and whether we should expect more references. She found it striking that despite the number of cases we see in the renewable energy sector, no award makes reference to State obligations under the Paris Agreement or other climate change obligations as a part of its reasoning. Keene then discussed national treatment. One factor to be taken into account under national treatment is the legal and regulatory regime. She suggested that the relevant international law regime might also need to be taken into account in determining whether or not there is a comparator. In a different context, in the *UPS v Canada*, UPS (a Korean company) argued that Canada Post is a comparator in like circumstances, because both provide post services, but Canada Posts were given more favourable treatment. The tribunal rejected this argument and, interestingly, referred to the 'international postal regime' which makes a distinction between domestic postal services and courier companies. Such reasoning could be transposed into environmental cases, and arguably lead to taking cognizance of a State's international climate change obligations.

Concluding Remarks

Overall, the insightful presentations made it an animated and highly informative seminar. As a takeaway, it is nowadays clear that an investment dispute touches upon interests beyond those of the parties involved. Hence, environmental considerations, along with human rights, once viewed as extraneous factors, have recently become increasingly relevant in investment arbitration cases, being invoked by both States and investors.

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