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Consequences of Recognizing Environmental Protection as an Emerging Erga Omnes Obligation in the ISDS Context

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ISDS has faced harsh criticism from environmental groups as being inimical to the protection of the environment. This post argues that environmental protection is an emerging *jus cogens* norm, and thus, an arising *erga omnes* obligation, which investment tribunals must recognize as such. Additionally, it explores the legal consequences of applying this public international law concept in the context of ISDS.

Jus Cogens Norms, Erga Omnes Obligations and Environmental Protection

Jus cogens (or peremptory) norms and *erga omnes* obligations are highly interrelated yet different concepts. One way to think about *jus cogens* is as a "super customary international law"(CIL). In this regard, Article 53 of the VCLT, *jus cogens* is a norm recognized by the international community from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law with the same character. Thus, *jus cogens* norms protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable. By contrast, the term "erga omnes obligation" was crafted by the ICJ in the *Barcelona Traction case*, and which determines that given the importance of certain rights involved, states have specifically determined obligations towards the international community as a whole (non-reciprocal).

The ICJ clarified the relationship between *jus cogens* and *erga omnes* obligations in the *Chagos Case* in 2015. In this regard, as Tladi highlights, the Court noted that (1) *jus cogens* norms produce *erga omnes* obligations; however, (2) in few cases, *erga omnes* obligations arise from non-peremptory norms (customary international law, para.63). The Court also noted that the right of self-determination – the right analyzed therein – was initially a customary international law principle, which then crystalized as a *jus cogens* norm.

While the ICJ has not yet acknowledged environmental protection as a *jus cogens* norm, it did recognize the importance of environmental protection in the *Gabcikovo-Nagymaros case*. The Court noted that environmental protection is an essential interest of the state in the sense of article 64 of the VCLT (emerging *jus cogens*). Accordingly, as an emerging *jus cogens* norm and a clear customary international law principle – evidenced in a wide variety of state practices and binding

opinio iuris acts, such as the Rio Declaration, the Paris Agreeement, and the UNFCC – environmental protection becomes an emerging *erga omnes* obligation that investment tribunal ought to recognize.

The Legal Consequences of Recognizing Environmental Protection as an Emerging Erga Omnes Obligation in Investment Arbitration

The legal effects of environmental protection as an *erga omnes* obligation in the ISDS context is an unexplored territory. Moreover, even in public international law, the effects of *erga omnes* are still unclear and ambivalent (see arts. 42, 28 of the ILC Draft Articles on State Responsibility). Yet, as outlined by Professor Tanaka, the logical consequences of erga omnes obligations are:

- The obligation not to recognize illegal situations.
- Third-party countermeasures, and
- The standing of not directly injured States in response to a breach of obligations *erga omnes.*

While these legal effects can only be extended to states for responsibility for internationally wrongful acts, it is necessary to recognize similar legal effects to parties in ISDS.

In the ISDS system, one party to the dispute- the claimant- will be a private party whose legal status differs substantially from states'. For this reason, the consequences of *erga omnes* obligations proposed by Tanaka are not extensible to commercial parties. In the paragraphs below, this post suggests different but analogous legal effects of recognizing environmental protection as an *erga omnes* obligations in the ISDS system. First, tribunals should recognize environmental protection as an exculpatory justification for states against claims of breach of treaties and hold states liable if they do not comply with this obligation. Second, due to the *erga omnes* nature of environmental protection, directly injured and not directly injured actors should also have the standing to intervene in response to a breach of these obligations.

Environmental Protection as an Exculpatory Justification for States and as an Additional Source of State Liability

If investment tribunals recognized the *erga omnes* obligation of states to protect the environment, states would be compelled not to recognize situations that infringe environmental protection laws. Thus, any action to deter environmental damage would be adequately justified and not infringing on investment treaties. In turn, States could be liable for the breach of these obligations. This line of thought has not been adopted yet in ISDS; however, substantial advances have been made in the past decade.

As an *erga omnes* obligation, any measure by states that furthers environmental protection that is applied in a non-discriminatory manner should serve as an exculpatory justification to exempt states from liability. Accordingly, several treaties have inserted language that allows them to regulate environmental matters. For instance, the Netherlands Model BIT reaffirms the investors' duty to comply with domestic laws, including environmental regulations. Similarly, the 2021 Singapore-Indonesia BIT includes a carve-out provision in Article 11 that reaffirms the state's right to regulate to achieve environmental protection without this constituting a treaty breach,

including the modification of laws that might adversely affect an investor. Likewise, Article 13 of the Nigeria – Morocco BIT allows host states to regulate and enforce environmental laws without this constituting a treaty breach. Finally, articles 400 and 401 of the TCA Agreement contain strong declarations of the parties to target climate change and recognize the prevalence of international climate protection as an *erga omnes* obligation.

There are a few examples of tribunals nearly acknowledging environmental protection as an *erga omnes* obligation in case law. For instance, as a source of state liability, in *Peter A. Allard v. Barbados*, the claimant sued the state of Barbados due to its failure to comply with environmental laws and climate change obligations. While the claimant was unsuccessful, the Tribunal acknowledged that a host State's international obligations might be relevant in applying environmental standards to particular circumstances.

Similarly, as an exculpatory justification, in a pending case, *Gabriel Resources v. Romania*, one of the critical discussions of the case is whether the protected investment falls within the carve-out provision of Article XVII(2) of the Romania- Canada BIT, which affords the host state a wide margin to enforce environmental measures. If the investment falls within the carve-out clause and the measure is applied in a non-discriminatory manner, there would be no breach of Romania's obligations under the BIT. This deferential treatment of the state would be the first-time environmental concerns take precedence over the investor interests and would serve as an implicit recognition of the *erga omnes* obligation of states to protect the environment.

Mandatory Third-Party Intervention of Directly Affected Groups and Not Directly Affected Groups in Response to a Breach of Erga Omnes Obligations.

There have been several criticisms around the ineptitude of ISDS to include the voices of those who have been directly affected by environmental damage. Furthermore, as evidenced in *Chevron*, States do not have standing to raise claims regarding investor misconduct or violation of third-party rights. For this reason, affected parties must directly intervene in ISDS. These concerns are being addressed in the ISDS reform process at the UNCITRAL Working Group III as well as in EU Law trade agreements.

According to UNCITRAL, at first, *amicus curiae* submission seemed a viable solution for the inclusion of interested third parties in ISDS. However, since *Methanex*, tribunals have highlighted the limited scope of *amicus curiae*. Moreover, as evidenced in *United Parcel Service of America*, *amicus curiae* submissions remain at the entire discretion of the tribunal, yet this is not a right of affected parties, hence, not granting affected parties meaningful participation. The proposed solution by the group has been to give parties intervention, joinder, interpleader and dismissal rights, very similar to the ones in the US Federal Rules of Civil Procedure.

For its part, EU law has addressed the participation of affected parties differently. Chapter 7 of the TCA, is entirely devoted to environmental matters and one of the critical advances is the participation of civil society in environmental disputes. The treaty provides for domestic advisory groups (DAGs) that monitor compliance and implementation and advise on civil society matters, such as environmental protection (arts. 12 and 13). Additionally, chapter 9, on dispute resolution, provides for extensive consultation to DAGs when panels of experts and arbitration solve environmental disputes.

Finally, regarding the participation of not directly affected parties, derived from the emerging *erga omnes* obligation to protect the environment, not only directly affected parties are interested in the protection of the environment but also the international community as a whole. For this reason, NGOs, international organizations, scholars, and different civil society groups must also be allowed to participate in ISDS proceedings. In this case, despite the criticism to *amicus curiae* submissions, they seem accurate to give a voice to not directly affected parties.

Conclusion

There is still much to be discussed on the *erga omnes* obligation of states to protect the environment. While the consequences explored in this post are limited to the ISDS context, they are not unique; several other implications can be drawn from this concept. As in *Urbaser*, a question that remains unexplored is whether Tribunals can hold private actors directly accountable for violating *erga omnes* obligations in ISDS (para. 1212). Although the rules of state responsibility do not apply to former, as the term "*erga omnes*" suggests, these obligations are non-reciprocal, and they are owed by everyone – even corporations – to the international community as a whole.

This entry was posted on Tuesday, August 31st, 2021 at 8:12 am and is filed under Climate change, Customary international law, Dispute Settlement, Environment, ICSID Arbitration, International Investment Law, International Law, Uncategorized
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