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Are Environmental and Investment Protection Mutually Exclusive? Report of the ITA-ALARB Americas Workshop

Sarah Rouach (Quinn Emanuel Urquhart & Sullivan) · Monday, October 31st, 2022

This year's ITA-ALARB Americas Workshop took place in early September and focused on the intersection between domestic environmental protections and international investment law. The workshop was co-chaired by Gabriela Álvarez Ávila (Partner, DLA Piper) and Miguel López Forastier (Partner, Covington & Burling).

The aim of the workshop was to address, from the perspective of states and foreign investors, the following questions: (*i*) What happens when the state's interest in environmental protection results in governmental measures which collide with the legitimate interests of foreign investors? (*ii*) Are environmental regulations *per se* carved out from investor protections? (*iii*) To what extent can states be held accountable if their environmental regulations breach investment protections?

The workshop began with welcoming remarks by Tom Sikora (ITA Chair and Senior Counsel, Exxon Mobil Corporation) and Claus von Wobeser (ALARB President and Partner, Von Wobeser y Sierra). Mr. von Wobeser introduced the session stating that environmental protection concerns everybody today. Or as panelist Bernardo de la Garza put it, "*the world finally comes to understand that we are heating up the planet*" and the tension between environmental and investment protection should fade away. There is a general concern for making sure that investments in general will not hurt the environment and the new generations want to see investments that prioritize social and environmental interests.

Mr. von Wobeser indicated that several bilateral investment treaties ("BITs") and investment chapters in free trade agreements ("FTAs") now contain specific provisions regulating environmental issues and their relationship with investors. In most cases, these provisions aim to secure the state's regulatory prerogatives and expressly recognize the rights of states to adopt and enforce legitimate environmental measures.

What have we learned from recent investment cases in which environmental issues were at the center stage?

Sebastian Wuschka (Luther) moderated the panel composed by John A. Terry (Tory's), Abby Cohen Smutny (White & Case), and Ana María Ordóñez (National Legal Defense Agency of Colombia).

Mr. Terry began the conversation by referencing two specific cases that illustrate the importance of the fair and equitable treatment ("FET") standard in connection with environmental regulations: *Infinito Gold Ltd. v. Costa Rica* and *Eco Oro v. Colombia.* In *Infinito Gold,* Costa Rica issued a series of regulations and court decisions that provided contradictory messages to the investor and failed to provide a steady and predictable environment. In *Eco Oro,* Colombia's delimitation of high-altitude wetlands, where a significant portion of the investor's mining operation was to be conducted, amounted to a breach of the Colombia-Canada FTA. In addition to discussing FET, Mr. Terry also identified certain challenges concerning the filing of counterclaims under the state's domestic law, including that BITs often provide that the law of the arbitration is comprised by the treaty provisions and public international law.

Subsequently, Ms. Cohen Smutny referenced the *Santa Elena v. Costa Rica* arbitration, where the tribunal held that protecting the environment is a valid public purpose for interfering with private properties. However, Ms. Cohen Smutny clarified that any such interference would need to comply with the protections afforded to foreign investors under international law and should be analyzed on a case-by-case basis. For instance, in the referenced *Infinito Gold* case, the applicable treaty provided that:

> "[n]*othing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*." (*see* para. 770)

To apply such provisions, investment tribunals must address complex interpretative issues, including: (*i*) Is this type of language a carve out from the treaty? (*ii*) Does this provision mean that environmental measures are not to be checked against the protections made available for investments? Or (*iii*) does this provision provide a special legal regime when it comes to environmental measures?

According to Ms. Cohen Smutny, not all of these provisions are necessarily phrased as exclusions or carve outs. In fact, a number of investment tribunals have consistently found that these provisions do not exclude environmental measures from the treaty's protective scope. Rather, the exceptions might be construed as a limitation to the remedies available to parties claiming a breach in relation to environmental measures. In essence, BITs and FTAs should not be interpreted as constraining the state's environmental prerogatives. However, if these environmental measures – which are attributable to the state– breach international standards of protection, the state will be forced to compensate the investor.

Finally, Ms. Ordoñez addressed certain concerns generated by the ongoing *Eco Oro* case, namely the non-disputing party submissions and the joint interpretation of the minimum standard of treatment ("MST") clause contained in the Colombia-Canada FTA. According to Ms. Ordoñez, the proposition that states can take environmental measures while still being liable to foreign investors as a result of those measures eliminates the practical effect of the environmental exceptions contained in certain modern treaties. To conclude, she stressed that counterclaims may be a proper tool to strike a balance between guaranteeing investors' rights to seek redress for treaty breaches and holding them accountable for their actions during the course of the investment.

What are the challenges ahead from both a policy perspective and investment protections?

Attila Massimiliano Tanzi (Associate Member,?3VB Chambers,) moderated this panel, composed by Mairée Uran-Bidegain?(Ministry of Foreign Affairs of Chile), Bernardo de la Garza (Independent Consultor), and Mónica Jiménez?(Chief Strategy, Sustainability and Legal Officer, GeoPark).

At the outset, Ms. Uran-Bidegain indicated that in her opinion any apparent tension between environmental and investment protections is starting to fade. Among other reasons, because Latin American countries are incorporating in their BITs and FTAs explicit provisions seeking to ensure that environmental concerns are appropriately considered. In addition, she referenced a change in the world's economic paradigm, making corporations and their owners accountable for any impact on the environment. To conclude, Ms. Uran-Bidegain opined that public demands on sustainable and inclusive developments will slowly be translated into new treaty provisions.

Bernardo de la Garza pointed out that in Mexico the Constitution was amended in 2013 to allow private investment in the energy sector, which included both the electric power and oil industries. This reform basically set a roadmap for Mexico's energy transition and its implementation is, and will continue to be, crucial for Mexico and the region. Mr. de la Garza added that, even though Mexico has criticized the international investment protection system, he does not anticipate that Mexico will withdraw from any of its investment treaties or from investment arbitration mechanisms.

To finalize the panel, Mónica Jiménez provided a corporate perspective. She delineated Colombia's current situation regarding environmental and investment protections, in which the new government intends to enact further regulations aimed at accelerating climate change transitions in Colombia, by decreasing investments in exploration and fracking, among other measures. Companies will now have to see how these proposals are reflected in local law and how they might impact their investments.

Rule of law presentation: Latin America as the crucible for developing a customary international law on state responsibility to aliens

Elena Mereminskaya (ITA Americas Initiative Chair and Partner at Wagemann Abogados & Ingenieros), introduced the workshop's Rule of Law Latin America Presentation in celebration of the 75th Anniversary of the Center for American and International Law. The presentation was delivered by Santiago Montt (COO at Los Andes Coper Ltd.).

Mr. Montt started by laying out "e-ras" of challenges in protection of foreign investors in Latin America throughout history. During the 19th and early 20th century, the states faced Full Protection and Security ("FPS") challenges; in the 20th century, states faced expropriation challenges; and, in the 21st century, states faced and continue to face FET challenges. Mr. Montt argued that Latin America has contributed to the development of public international law, especially to develop customary international law on state responsibility to aliens. These contributions to public international law included the prohibition of self-help, national treatment as a general rule, the doctrine of exhaustion of legal remedies as an exception for the protection of

aliens, among others.

Young Lawyers Roundtable: Extract or not to extract? Legitimate expectations and environmental protections in Latin America

Karina Sauma (Young ITA) and Sebastian Briceño (ALARB) moderated the workshop's final panel, composed by Daniela Páez (Associate Attorney, Hebert Smith Freehills), Diego Rueda (Senior Associate, Freshfields Bruckhaus Deringer), and Sylvia Sámano (Associate Attorney, Hogan Lovells).

Ms. Sámano provided a definition of "*legitimate expectations*" according to which states are required to maintain a certain degree of stability in the regulatory framework, which is relied upon by investors when making investments. She emphasized that "expectations" should not be deemed a subjective concept and that they should be restricted: only expectations that are legitimate may be protected under bilateral investment treaties and customary international law. In recent years, some BITs have included a clear reference to legitimate expectations. For instance, CETA makes a reference to legitimate expectations in the FET clause. To conclude, Ms. Sámano noted that in *Charanne v. Spain*, the tribunal found that Spain's policy changes regarding the exploitation of photovoltaic plants were justified and did not violate the treaty in question. Specifically, the tribunal held that when Spain decided to promote investments in photovoltaic energies and Charanne invested in Spain, certain circumstances were unforeseeable and Spain's legislative changes alone did not constitute a violation of Charanne's legitimate expectations.

Mr. Rueda then took the floor and opined that there is no inherent contradiction between environmental protections and legitimate expectations. Moreover, he considered that: (*i*) investors do not generally argue that the legal framework cannot change, but request that the state respects the rights generated with the investment; and (*ii*) investors do not generally seek to bypass environmental regulations, but request compensation assuming that their project will not go forward. For instance, in the *Eco Oro* case, the investor's claim concerned expropriation and breach of FET, but it was solely requesting compensation, since it had already renounced to its concession during the course of the arbitration. The one case in which the apparent tension could exist is the ongoing *Greenland Minerals* case, where the investor publicly announced that it seeks to proceed with its mining project and requested the tribunal to order Denmark to allow the mine's operation to continue.

To conclude the panel, Ms. Páez discussed legitimate expectations in cases in the tourism sector. One such case is *Aven and othes v. Costa Rica*, which discussed legitimate expectations with regard to a tourism project in Costa Rica. In that case, the tribunal interpreted the CAFTA-DR based on a provision that subordinated the investor's rights to the rights of the state to ensure the investments were carried on "*in a manner sensitive to environmental concerns.*" Based on this provision, the Tribunal concluded that the state did not have an absolute right to implement environmental regulations—it was subject to principles of due process that must be exercised in a fair and non-discriminatory fashion. Regarding the protection of communities, Ms. Páez mentioned the recent filing of amicus briefs by five NGOs before Colombia's Constitutional Court, advocating for indigenous communities' rights in relation to the arbitrations commenced by Glencore and Anglo-American against Colombia.

Ms. Páez also answered a question from the audience regarding the State's international obligation to consult indigenous people affected by investment projects. She distinguished this situation and noted that, in these cases, States may be sued before the Inter-American Court of Human Rights under the applicable international instrument. However, the organs of the Inter-American System of Human Rights lack competence and jurisdiction to hear direct claims against individuals and foreign investors. In these situations, the State has the obligation to enforce the indigenous communities' rights pursuant to local and international law, as applicable.

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