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Relevance of Other Rules of International Law in Investment Arbitration: The Case of *Peteris Pildegovics and Sia North Star v. Norway*

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On the 22nd of December 2023, an ICSID tribunal rendered its award in the case of *Peteris Pildegovics and Sia North Star v. Kingdom of Norway*. The case is of particular interest insofar as it focuses on the interaction among different branches of international law, namely investment law and the law of the sea. This post discusses the relevance of other rules of international law, i.e., provisions contained in treaties other than the applicable investment agreement and/or rules of customary international law, for investor-State proceedings. In particular, it highlights whether and to what extent an arbitral tribunal can consider the rules enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) to determine a violation of an investment agreement.

Factual Background

Mr Pildegovics and his company, SIA North Star (“claimants”), were involved in a snow crab harvesting business in the Barents Sea Loop Hole and the maritime zones of the Svalbard archipelago. In those areas, Norway (“respondent”) exercises its sovereign rights in co-operation with other coastal States as prescribed by the UNCLOS. Specifically, the seabed in the Loop Hole is divided between the extended continental shelf of Norway (10.81%) and that of the Russian Federation (89.19%). Under Article 77 of UNCLOS, the two coastal States exercise their sovereign rights in respect of the Loop Hole area for the exploration and development of its natural resources, including the exclusive right to harvest sedentary species.

In 2020, the claimants instituted proceedings against Norway under the 1992 Norway-Latvia BIT claiming that the State had violated, inter alia, Article III (“equitable and reasonable treatment and protection”) and Article VI (“expropriation”). The claimants maintained that the adoption of a series of regulations in 2015 by the Norwegian Government allegedly forced the claimants to cease their snow crab harvesting business. The key issue was the decision of the Norwegian and Russian governments that snow crabs are a sedentary species within the meaning of Article 77(4) of UNCLOS. For the claimants, this decision represented a radical change of position by Norway, which they say had always treated snow crab as non-sedentary. The significance of whether snow crabs were sedentary or non-sedentary is that non-sedentary species are subject to the jurisdiction of a coastal State only within its territorial waters and EEZ (Articles 56 and 77 UNCLOS). Since

the Loop Hole falls outside the EEZs of Norway and the Russian Federation, if snow crabs were non-sedentary species, then neither State would have had exploitation rights in respect of the snow crab stock in the Loop Hole.

The Award

The tribunal first considered whether the State had breached Article III of the BIT. It held that Norway's actions cannot be regarded as improper or unwarranted. According to the tribunal, Norway's hesitation in declaring crabs as sedentary species before 2014 was understandable when one considers the circumstances of the cases, specifically the fact that snow crabs had only recently begun to appear in the Loophole area (para. 482). In light of this, the absence of any Norwegian legislation regarding the harvesting of snow crab by foreign vessels in the Norwegian sector of the Loophole before December 2015 could not, in itself, have given rise to a legitimate expectation that there would be no such legislation banning or restricting that particular activity in the future (para. 509). In addition, the tribunal held that nothing in the correspondence between the parties suggested that Norway might not restrict, or even ban, the harvesting of snow crab in the Loop Hole (paras. 527-530). Likewise, the tribunal rejected that Norway's treatment of the snow crab status was arbitrary or that it demonstrated a lack of good faith. The evidence before the tribunal showed that snow crab had generally been treated as falling within the definition of [UNCLOS](#) Article 77(4) (para. 479). Ultimately, the tribunal rejected North Sea's Loop Hole unreasonable and inequitable treatment claims under Article III of the BIT.

The tribunal then proceeded to determine whether the State had expropriated the investor. Since Norway had not granted a permit to North Star to operate in its part of the Loop Hole, the tribunal decided that Norway had not breached Article VI of the BIT. Specifically, if the claimants' business was induced to invest by assurances from the host State that such changes in the law would not be introduced, they might have had a claim. Yet, the tribunal considered that no such assurances were given in the case, thereby dismissing the claim in its entirety (paras. 594-595).

Possible Implications

In the case at hand, the tribunal was called to consider whether and to what extent it could rule on the application and interpretation of "other rules of international law" than those related to investment protection. While the tribunal clearly stated that it cannot rule on other substantial aspects of treaties other than the BIT, it noted that it can consider – if it is necessary to do so – other relevant international treaties, as well as other rules of customary international law, to determine if there has been a breach of the BIT. Taking a rather cautious approach, the tribunal held that relevance of a particular treaty provision cannot be safely generalized. Therefore, that issue must be examined in the context of the specific facts and allegations presented (para. 449).

1. UNCLOS

Firstly, the tribunal was called to determine whether it can consider UNCLOS provisions to determine whether there has been a breach of the BIT. In an exercise of cross-fertilization, the

tribunal recalled case law from UNCLOS tribunals (see, e.g., [here](#), paras. 213-221, [here](#), paras. 148-178) which held that, in determining maritime entitlements between two States, they might not rule on the sovereignty over the land territory from which maritime entitlements are claimed to derive. That did not, however, prevent the tribunal from determining whether the claimants had made an investment which meets the requirements of the BIT (para. 295).

The Tribunal then turned to the application of Article 77 of UNCLOS by Norway. The tribunal agreed with the respondent that whether the snow crab is a sedentary species is a matter of law. While the tribunal was not called upon to decide whether the snow crab is a sedentary species within the definition provided for in Article 77(4), its task was to determine whether the application of such provision by Norway had breached the BIT. To determine this issue, the tribunal considered the objectives of Article 77 and concluded that its purpose is to exclude other vessels from harvesting snow crab on its continental shelf, thereby reserving this resource for the domestic fishing industry. Consequently, the Tribunal found that there was nothing wrong with the methods Norway employed to exercise its sovereign rights under UNCLOS (paras. 479-483). The willingness of the tribunal to consider UNCLOS provisions to determine whether there was a violation of the BIT may be seen as an example of systemic integration among different regimes of international law under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). In this author's opinion, considering UNCLOS provisions – when applicable – in investment proceedings related to maritime areas may have considerable implications, especially if one considers environmental claims. In this regard, one may wonder to what extent UNCLOS environmental provisions may be used to prevent States' liability in future investor-State disputes, particularly [PART XII of the Convention](#).

2. Monetary Gold principle

Secondly, the tribunal was called to reflect on the application of the Monetary Gold principle, as [outlined](#) by the International Court of Justice (ICJ), in investment arbitration. Recalling the case law of the ICJ in *East Timor* and *Nauru*, among others, the tribunal held that the Monetary Gold principle is applicable only when the rights and obligations of the third State constitute the very subject matter of the dispute before it. Therefore, the tribunal found that in the case at hand, the Monetary Gold principle limited its ability to deal with certain aspects of the claimants' case but not others, such as those related to the alleged unlawful conduct of the Russian Federation (paras. 297-300). Although the tribunal did not analyze at large the implications of the principle, its approach underscored the relevance of this general principle of international law for investment arbitration.

3. Double-MFN Claim

Thirdly, the tribunal was tasked with deciding whether other relevant international obligations in force between Norway and Latvia may be considered through an MFN clause to ascertain a violation of the BIT. The respondent denied the claimants had authority to support what it called a double-MFN argument, i.e., the use of an MFN clause in the BIT to invoke a broader MFN clause in another treaty, which in turn would allow the claimants to rely on more favorable provisions in a third treaty, namely Article 300 UNCLOS concerning the obligation of states to act in good faith

and with due regard to the rights of other states (para. 441). Interestingly, the tribunal did not deny the possibility to invoke this double-MFN argument. While in the case the tribunal dismissed the claim being not persuaded that there was a Russian investor's investment in Norway which was treated more favorably than North Star's investment (paras. 539-545), the question remains whether similar arguments will be employed in future disputes.

Conclusion

The Tribunal's decision highlights the increasing trend to consider rules of international law other than those related to investment protection in ISDS proceedings. Relying mostly on Article 31(3)(c) of the VCLT, the Tribunal's decision clearly underscored that international investment law has to be applied and interpreted in light of the broader framework of public international law. In this regard, the Tribunal's willingness to take into account States' obligations under UNCLOS provisions may well serve as an authoritative precedent for future investment claims.

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