Investment Arbitration and Environment Protection: A Critical Look?

Introduction

Increased interactions between environment and investment law regimes, has led to a perception of augmented cooperation between the two. However, in practice, the two regimes often end up transgressing into one another's sphere, thereby creating a fertile environment for disputes. While environmental claims have considerably increased as the subject matter of investment arbitrations, so has concerns about investment arbitration favouring investments over environment. One of the primary reasons associated with the said concern is the rigid approach of tribunals, while hearing environmental claims.

It is against this backdrop, that the first part of this essay focusses on environmental claims, both under and outside the scope of the Energy Charter Treaty ('ECT'), with the aim of supporting the contention that generally, tribunals hearing environmental claims have prioritised investments as against environment. On the other hand, the second part of this essay seeks to address the modernisation process of the ECT, and whether it is capable of bringing about the shift needed to protect the environment.

Part I: Environmental Claims in Investment Arbitration

The ECT is concerned with energy related cross-border investments, and is considered to be a useful tool in attracting foreign investments. Investors are allowed to opt for the forum for bringing their claims against the host states, before national courts/tribunals,

pre-determined mode of dispute resolution or by arbitration as provided by the ECT [**Article 26, ECT**]. While a majority of claims are resolved through arbitration, this has, unintentionally, paved the way for concerns that arbitration proceedings have favoured investments over the environment.

Tribunals Favouring Investments

On the flipside, provisions contained in the ECT, *prima facie* suggests that environment protection was intended to be one of the focal points. However, awards rendered in environmental claims indicate that investments have ben prioritised over environment. For instance, the reasoning of the tribunal in *Blasun SA, Jean-Pierre Lecorcier & Michael Stein v. Italian Republic* [ICSID CASE No: ARB/14/3] normalises the position that investors do not have any responsibility towards the environment in relation to their investments, and the contracting states and not investors, are responsible for taking the necessary steps. The tribunal was partially right in suggesting that contracting states are under an obligation to initiate the steps for energy transition and prevention of environmental degradation. However, by adopting a rigid approach, the tribunal may have disregarded international principles of good faith and environment protection which should be considered in addition to the applicable rules.

However, the problem of rigidity cannot be accorded to claims arising out of ECT alone, which can be discerned from the award rendered in *Rusoro Mining v. Venezuela* [ICSID Case No: ARB(AF)/12/5]. Venezuela's case concerned irresponsible mining on the claimant-investor's behalf, which had made it nearly impossible to have prospective mining projects in the concerned vicinity. While the tribunal affirmed that there has been improper mining, they refused to entertain the claim for want of jurisdiction. The

rationale behind such an approach was that even though the case of irresponsible mining was satisfactorily made out, the tribunal's jurisdiction was confined within the four corners of the treaty. As irresponsible mining was not addressed in the treaty, the tribunal could not admit counterclaims arising out of the same for want of jurisdiction.

While *Rusro* and *Blasun* may be unrelated, it does represent how tribunals have overlooked environmental concern and principles of international law while deciding environmental claims. As pointed out by the report titled, "The ECT, Climate Change and Clean Energy Transition", published by Climate Change Counsel, tribunals have no direct precedent concerning investor's challenges to state policies to phase out fossil-fuel based energy. This problem can be partially attributed to the fact that even under environmental law, it is the state parties who are required to establish domestic regulations and legislations for protection environment. However, even when host states have tried to enact legislations aimed at environment protection, it has been met with a series of investor claims, thereby discouraging genuine environmental reforms.

Possibilities Moving Forward

While on one hand tribunals have decided to adopt a narrow approach, which has led them towards favouring investments, on the other hand it is possible within the four corners of international law to adopt a more favourable approach. To begin with tribunals should consider environmental claims from the lens of contemporary development and needs. This approach has in fact been discussed by one of the tribunals hearing an environmental claim under the ECT in *Liman Caspian Oil BV & NCL Dutch Investment BV v. Republic of Kazakhstan* [ICSID Case No: ARB/07/14]. The tribunal observed that

it was prudent as well as necessary to take the aid of Article 31, Vienna Convention on Law of Treaties, 1969 ('VCLT'). This approach, as correctly put forth by the tribunal, would further the principle of good faith in light of preambular provisions of the ECT. Adopting this approach, at least in ECT related arbitrations could have led to a different outcome in *Blasun*, where the tribunal refused to interpret investor's obligation to comply with principles of international environmental law in good faith.

However, certain tribunals have adopted the *Liman* approach, as for instance in *Urbaser S.A. & Consorcio de Aguas Bilbao Biskaia v. Argentine Republic* [ICSID Case No: ARB/07/26]. In the said case, the tribunal came to the conclusion that an investor is bound by principles of international law and obligations arising out of the same. The argument that an environmental right to water was not included or mentioned in the Bilateral Investment Treaty between Spain and Argentina was held to be "not conclusive". The same understanding and interpretation has found support in *David R. Aven & Others v. The Republic of Costa Rica* [ICSID Case No: UNCT/15/3], where the tribunal affirmed the position of the *Urbaser* award and observed that host states have legitimate interests in protecting their environment. Having said that the tribunal affirmed that the investor will not be immune from international environment law for the mere reasons that the host state has not enacted the same into their domestic legislations.

While Tribunals in *Blasun* and *Rusro* have taken a stringent approach, the position taken in *Liman*, *Urbaser* and *David R. Aven*, suggests that it is possible to harmonise the provisions of a treaty with principles of international environment law, keeping in mind the preambular provisions of both the documents. This would not only aid host states to bring in environmental reforms, but may also serve as persuasive precedents for ECT tribunals handling similar environmental claims.

Part II: The ECT Modernisation

Having discussed the possible approach for tribunals hearing prospective environmental claims, it is pertinent to understand the modernisation process of the ECT and what changes it might bring, if any. While the final modernised text of the ECT is yet to be confirmed towards the end of 2022, certain suggestions, prospective amendments, new additions etc have been made public. While the modernisation is being carried out on a larger scale, for the sake of brevity the essay will focus on two aspects i.e., preambular provisions and definitions on one hand and the possible role of amicus curiae on the other.

Preamble and Definitions under the ECT

To begin with, the present version of the ECT does have preambular provisions concerning environment protection under paragraphs 13 to 15. While the preambular provisions of the ECT have addressed instances such as efficient exploration; recalling other treaties and protocols concerning climate chance and; recognising immediate measures for environment protection [Preamble, ECT], it has failed to make express mention to international principle of good faith. While it is acknowledged that the international principle of good faith is an unsaid rule in international law, absence of express mention was used by the investor in *Blasun* to argue that the same could not be invoked to bind them to obligations arising out of international law. Surprisingly, no amendment or suggestion has been proposed or discussed in relation to the preamble of the modernised ECT.

However, the Definitions section under Article I of the ECT has undergone certain changes, to begin with, the understanding of the expression "Charter". Prior to the proposed modernisation the expression, "Charter" was limited to the European Energy Charter ('EEC') signed at the Hague in 1991. However, the modernised draft ECT suggests that the expression now includes the International Energy Charter ('IEC'), signed in 2015. This is a welcome move as firstly, the tribunals hearing environmental claims will be facilitated to analyse the dispute from the broader lenses of environment protection, sustainable development and energy transition, which may not have been feasible when the definition made reference to just the EEC. Secondly and more importantly, the inclusion of IEC will mitigate the risks of any fallout between investors and host states as in comparison to the EEC, the IEC has a global outlook with contracting states setting out normative canons in a foreseeable future.

Amicus Curiae in Environmental Claims

While applications for Amicus Curiae in ECT related disputes have been scarce, that too in relation to jurisdictional concerns, the purpose here is to understand what considerations is the tribunal guided by while admitting or denying to admit a non-signatory third party. The prevalent test in admitting or denying such applications, has been the test of significant interest, where the party requesting to join the proceedings is required to show their understanding of the dispute at hand; how it affects their interest, if any and; whether their understanding of the issue in question can be of any assistance to the tribunal. However, in determining whether to admit a third party as amicus curiae,

the tribunal generally has broad discretion. However, a clear rationale is found in Methanex Corporation v. USA [NAFTA Award August 3, 2005], where inhabitants of a contaminated zone were allowed to file amicus briefs regarding the extent of damage to potable water and obligation of state to provide clean drinking water under international law.

While there has been no intervention, on behalf of inhabitants or indigenous groups in any ECT arbitration so far, that itself should not discourage the tribunals from considering any prospective applications. The ECT in itself does not need any amendments or express mention regarding involvement of amicus curiae, as the applicable rules for ECT related arbitrations already allow the same. However, at the same time it is incumbent on the tribunals hearing environmental claims arising out of the ECT to try and lay down certain standards and/or tests for allowing amicus curiae applications. This approach is ideal keeping in mind that tribunals may continue to follow the erroneous approach of *Blasun* and *Rusro* where investors may potentially get away on the reasoning that the host state does not have environmental regulations. If implemented, this approach would allow tribunals to consider a third side, keeping in mind the rights of everyone involved, and not just the investor and the state.

Conclusion

The ECT modernisation process seems to have ended on a positive note, however the same cannot be confirmed unless the final draft is approved in November 2022. In the interim, it is important to understand the missing link, that is the role amicus curiae could play in resolving complex environmental claims arising out of the ECT. While tribunals may be mindful and apprehensive about amicus briefs filed with malicious intent, that

should not stop the tribunals from coming up with ways to resolve environmental claims while considering every element involved. It is against this backdrop that the commission should consider the involvement of amicus curiae consisting of civil societies, indigenous groups, inhabitants etc. for the purpose of providing inputs to the tribunal should the need arise. This approach can also be formalised by the tribunals, where the opinion or perspective based on evidence of affected groups could be considered. This will not just allow investment arbitration to strike the right balance between protection of investments and environment, but will allow them to consider the position of vulnerable groups by allowing them to participate in the proceedings, on being satisfied.