INVESTMENT ARBITRATION AND ENVIRONMENTAL PROTECTION: A CRITICAL LOOK?

Environmental protection is, without a doubt, a pivotal aspect of current International Law. Consequently, it also impacts the development of Investment Law. The question is no longer whether Investment Arbitration will address ecological protection —*since it has done so*— but rather how it should handle this issue in future cases.

The purpose of this article is to analyze the development of environmental protection in investment arbitration by referring to recent model treaties and past arbitral tribunals' decisions. Based on this analysis, this article aims to propose three courses of action to encourage ecological protection in future treaties and proceedings.

I. STATUS QUO: CURRENT ENVIRONMENTAL PROTECTION UNDER INVESTMENT ARBITRATION

Until the past years, Investment Arbitration seemed solely like a private dispute resolution mechanism. Therefore, even if it involved States as parties, it was not considered the ideal forum to raise public interest issues. On the one hand, claimants' appeared not to have standing —*at least in these proceedings*— concerning diffuse rights such as access to a healthy ecosystem. On the other hand, one could think that States were not entitled to raise investors' breaches of environmental provisions.

This perspective is changing: International Investment Law is adopting an ecologial approach. It should not be surprising. As the years go by, the consecution of Emission Reduction goals seems to be very optimistic, to say the least. Therefore, we should not

blame a State for attempting to become greener (even if it affects conventional energy investments). Likewise, we should not allow States to relax its current ecological domestic measures (so they should be forced to maintain the current protection status for green energy).

Based on this new approach, the alleged "regulatory chill,"; *i.e.*, States refraining from regulating environmental matters to avoid investors' claims, seems to be disappearing. Over the past decades, some Bilateral Investment Treaties (BIT) have included references to the nature in their object and purpose. Some others incorporate provisions on corporate social responsibility by incorporating soft laws and guidelines.

Further, recent model BITs expressly address the green aspect of foreign investment. For instance, the 2015 Indian Model BIT explicitly refers to the States' right to regulate environmental matters. The 2021 Canadian Model BIT contains a similar provision, but it goes even further: it also refrains the States from relaxing domestic ecological measures to attract investments. This double aspect is also present in the 2019 Moroccan Model BIT; which, additionally, indicates that the assets must contribute to sustainable development to be considered an investment.

Despite these provisions in model BITs, we should analyze how have they been construed in Investment Arbtration proceedigs. Before, we tended to associate environmental protection with a Respondent's defense in an investment arbitration proceeding: the State has the right to regulate on these matters, which renders the investor's claim groundless.

Although this possibility is the first scenario regarding Investment Arbitration and protection of the nature, some other variants have emerged: the second scenario relates to

an investor alleging that the Stated failed to comply with its environmental obligations. The third one is that a State could argue, as a counterclaim, that the investor breached the applicable domestic laws on ecological protection.

These three scenarios have already happened, confirming that environmental protection is emerging in investment arbitration proceedings.

First, in *Eco Oro Minerals v. Colombia*, the State withdrew the claimant's mining permits, leading to an investment arbitration proceeding. While the arbitral tribunal held that the claimant had the right to be paid for compensation, it expressly acknowledged that Colombia had the right to regulate ecology.

Second, in *Allen v. Barbados*, the claimant argued that Barbados failed to enforce the Marine Pollution Act to the detriment of his investments in an eco-touristic site, causing environmental damages. These damages, in turn, amounted to a breach of the Fair and Equitable Treatment principle and the Full Protection and Security principle, which resulted in expropriation.

Although it was not disputed that Barbados did fail to enforce this act, the tribunal held that this conduct did not amount to a breach of the Full Protection and Security principles. Nonetheless, the arbitral tribunal ruled that States could —*under certain circumstances*— be under an obligation to protect investments against environmental damage.

Third, in *Aven v. Costa Rica*, the arbitral tribunal determined that the treaty imposed affirmative ecological obligations upon investors; hence, it admitted a counterclaim since it was also subject to international law obligations in light of the green provisions of the treaty. Further, in *Burlington Resources v. Ecuador*, the arbitral tribunal accepted and

awarded a counterclaim based on the claimant's breach of the Ecuadorian environmental regulation regime.

Analyzing the rationale behind these awards is beyond the scope of this article. However, they allow us to conclude that concerning investment arbitration proceedings: ***(i)*** the State has the right to regulate ecological matters; ***(ii)*** investors can argue the State's failure to comply with its environmental obligations; and ***(iii)*** claimants must comply with the State statutory regulations on protection of the nature.

This progress will undoubtedly ameliorate the ecological aspect of investment arbitration by encouraging a two-fold course of action. First, States will no longer be reluctant to become greener. Second, investors will conduct thorough work to comply with environmental regulations to avoid future counterclaims.

Despite the above considerations, we must question whether investment arbitration should apply a more ecological perspective for subsequent proceedings, particularly considering that the International Court of Justice noted in 1997 —*in the Gabcikovo-Nagymaros case*— that environmental protection is an essential interest of the State. Based on this ruling, some scholars have even considered environmental protection emerging as an *ius cogens* norm. Consequently, Investment Law should not turn a blind eye to it.

However, an apology for a sustainable approach to Investment Arbitration should not amount to a transformation to the core nature of Investor-State dispute settlement. Hence, the State must compensate if it intends to implement environmental regulations in a discriminatory manner; *i.e*., the investors should remain protected. Similarly, an arbitral proceeding should not turn into an administrative incident to revise the investors' compliance with domestic law.

II. A GREENER APPROACH TOWARDS INVESTMENT ARBITRATION?

This article proposes three courses of action that States, investors, and arbitral tribunals should promote to ensure that Investment law continues and enhances its sustainability. Although these have already been used and accepted, it has only been in a handful of BITs and proceedings. Therefore, adopting them as state of the art in Investment Law is necessary.

A. Incorporating Specialized Rules for environmental proceedings

It is not sufficient that new model BITs incorporate ecological aspects in their objective and purpose. It is neither enough to expressly incorporate the right to regulate or a prohibition to relax existing regulations nor to define investments as assets that contribute to sustainable development. While these are steps forward, it would be convenient for model BITs and arbitral institutions to incorporate, at least by reference, a specialized set of rules on environmental matters.

For instance, parties to an investment treaty could agree upon submitting ecological matters to the "PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" (PCA ENVIRONMENTAL RULES). Even if these measures already exist, parties rarely use them; hence, the necessity of their diffusion. By these means, the arbitral tribunal would have broad powers to appoint environmental experts or grant interim measures to prevent serious ecological harm. Similarly, the Moroccan Model BIT allows the arbitral tribunal to appoint experts when necessary.

The second approach refers to the conduct of arbitral proceedings. The possibility of filing *amicus curiae* briefs in investment arbitration is not new, although it is not

widespread. Regarding an environmental approach, non-disputing parties' briefs should be encouraged, and arbitral tribunals should analyze them and reason their suitability and applicability.

Given the collective impact of an award ruling on potential breaches to the environmental regulations (whether from the State or the investor), arbitral tribunals should also consider non-parties' points of view.

This consideration should not be limited to accepting more *amicus curiae* briefs — *which would be progress in itself*. On the contrary, arbitral tribunals should grant non-disputing parties access to the arbitral record (when necessary) and do not impose a page limit on the brief. Further, the arbitral tribunals should analyze the merits of these briefs and address them in the final award. Otherwise, the collective concern for protection of the nature would be merely illusory.

The final approach concerns the arbitral tribunal's power when assessing the case's merits. As discussed *supra*, arbitral tribunals have allowed and awarded counterclaims. However, arbitral tribunals could have additional powers to ensure environmental protection.

For example, arbitral tribunals could evaluate investors' compliance with ecological regulations regardless of whether the respondent raised this argument as a defense or a counterclaim. This proposal, however, does not imply that arbitral tribunals could take sides and allocate liability where it has not been an issue in the proceeding.

This suggestion rather intends for an arbitral tribunal to consider the claimant's compliance with mental provisions when determining the quantum of the award. For instance, the Indian Model BIT provides for the arbitral tribunal's powers to reduce the

amount of damages based on mitigating factors such as the claimants' harm to the environment.

III. POTENTIAL CRITIQUES

Specific critiques may arise against these proposals. First, one may question whether additional rules are necessary. There are already several sets of rules applicable to investment arbitration. Modern treaties often refer to two or more available procedural rules. Therefore, modifying current BITs to incorporate additional rules may be convenient. Particularly considering that the most renowned applicable rules already contain provisions that may be useful to protect the environment, such as the possibility to recommend provisional measures.

However, semantics are of importance. While an arbitral tribunal may "recommend" provisional measures under the ICSID Rules, those measures can even be an interim award under the PCA Environmental Rules. Therefore, it is convenient for this incorporation to ensure adequarete ecological protection.

Second, one could argue that an *amicus curiae* brief is unnecessary to resolve an investment dispute. Moreover, granting access to non-disputing parties to the case record could be especially controversial. Nonetheless, the collective impact of environmental matters is undeniable: people will necessarily resent any decision concerning their milieu.

Hence, even if a tribunal may not require non-disputing parties' briefs to assess the relevant facts of the case, it should be recommendable to listen to their arguments and evaluate them. By these means, Investment Arbitration would ensure the public participation on ecological matters, without transforming arbitral proceedings into a *vox*

populi forum, and still decide the merits of the case, based on the applicable international law.

Third, one could contest the tribunal's right to consider contributory fault issues such as environmental harm, when determining the amount of compensation to which an investor is entitled, would amount to *sua sponte* decisions. Nevertheless, *arguendo* that this is the case, scholars have held that such kind of arguments are permitted in arbitration.

However, as long as the applicable BIT or set of rules allows it, analyzing the facts existing in the record and determining that an investor harmed the environment remains a *da mihi factum, dabo tibi ius* issue. In this issue, arbitral tribunals can do their modest part —*by simply taking an ESG perspective*— contributing to protection of the nature.

IV. CONCLUSIONS

Investment Arbitration has progressed to contribute to environmental protection. Nonetheless, there is still a long path toward adequate ecological protection. The first steps that practitioners (States, investors, counsel, and arbitrators) can perform are various:

First, investment treaties could incorporate specific rules for proceedings on matters related to protection of the nature. Second, concerned non-disputing parties should have a voice during environmental investment proceedings. Third, arbitral tribunals should consider the claimants' compliance with ecological laws when determining the quantum of the compensation. None of these measures significantly alter Investment Arbitration's nature, but they undoubtedly contribute to a greener world.

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