The Interaction Between Environmental Protection and International Investment Law

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Emissions of pollutants into the air, the use of chemicals that endanger human health and wildlife, and the impact of natural resource extraction on biodiversity are key environmental concerns that have raised significant social awareness leading to the regulation of economic activities worldwide.

International law in the field of investment has evolved with little consideration for environmental protection. In fact, international investment law safeguards investors who invest in a foreign country, the host State, and these investors have the right to bring claims before an arbitral tribunal to report breaches committed by the State, based on various national and international instruments such as contracts, domestic laws, or investment treaties whether bilateral (BIT) or multilateral. In contrast, international environmental law consists of regulations and commitments designed to ensure that States protect the non-economic interests related to environmental issues. However, the distinction between these two legal fields has become blurred as environmental concerns have gained greater prominence, making the intersection between environmental protection and international investment law not only undeniable but central. This raises questions about how international investment arbitration should address contemporary environmental challenges. The integration of environmental protection is reflected not only in investment treaties but also in arbitral awards.

• Environmental Protection Provisions in Investment Treaties

While 'first-generation' BITs initially were created before environmental concerns were integrated into international investment law, some treaties have since incorporated them. Some treaties exclude environmental concerns from the jurisdiction of arbitral tribunals. For instance, the **2013 Benin-Canada BIT** (Article 23) states:

"An investor of a Contracting Party may submit to arbitration under this Chapter a claim that: (a) the respondent Contracting Party has breached an obligation under Chapter II, other than an obligation under [...] Article 15 (Health, Safety and Environmental Measures) [...]."

Similarly, the **2014 Colombia-France BIT** (Article 15-2) excludes disputes related to environmental measures from arbitration:

"This article shall apply to disputes between a Contracting Party and an investor of the other contracting party concerning an alleged breach of an obligation under this agreement, except for articles 3 (Admission and Promotion), 10.2 (measures related to the environment and labour rights), when the investor has suffered damage as a result of the infringement."

More recent BITs include environmental provisions, demonstrating a growing recognition of the need to align economic development with environmental preservation. For instance, the **2025 Japan-Zambia BIT** (Article 21) prohibits lowering environmental standards to attract investments:

"Each Contracting Party recognises that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of investments in its Territory by investors of the other Contracting Party and of a non-Contracting Party."

Similarly, the **2025 New Zealand-United Arab Emirates BIT** (Article 13) affirms the State's right to adopt, maintain, or strengthen environmental measures, provided that

"such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties (…)."

This implies that environment protection has gained prominence in the field of international investment law. Beyond the growing inclusion of environmental provisions in BITs, environmental concerns are central to arbitration proceedings due to the nature of the activities involved in many investment disputes. On the one hand, foreign investments, to which the host State has obligations, often involve activities like resource extraction, which can have substantial environmental impacts. On the other hand, the protection of the environment can serve as a public interest objective that States use to justify measures against foreign investors based on the 'right to regulate' principle incorporated in some recent investment treaties and holding significant importance in the work of UNCITRAL Working Group III. States that create investment instruments are the primary actors responsible for ensuring a framework that takes environmental concerns into account. It should be mentioned that, in the context of the OECD, efforts are underway to align investment treaties with the climate goals of the Paris Agreement **(See OECD website HERE)**.

In addition to the increasing inclusion of environmental concerns in investment treaties, these interactions are also evident in the awards of investment arbitration tribunals.

• Investment Disputes Involving Environmental Concerns

Numerous disputes have arisen in which host States have imposed restrictions on foreign investors' rights through environmental protection measures, leading to arbitration proceedings where investors claim violations of investment protection standards. To take just a few examples, in the UNCITRAL case ***Glamis Gold, Ltd. v. United States of America*** *(Award dated June 8, 2009)*, the investor filed a claim against the U.S. over environmental regulations in California that affected its mining project. In the ICSID case ***Gold Reserve v. Venezuela*** *(Award dated September 22, 2014)*, an investor brought multiple claims against Venezuela following the revocation of a mining permit due to its impact on a forest reserve. Also, in the ICSID case ***Eco Oro Minerals Corp. v. Colombia*** *(Award dated September 9, 2021)*, the Canadian company filed a claim against Colombia in 2016, arguing that the prohibition of mining activities in a wetland ecosystem in the Andes Mountains impacted the investor's investment.

In cases like these, arbitral tribunals must strike a careful balance between investors' rights under investment treaties and the host State's right to protect the environment. This process requires a nuanced analysis that considers both the relevant national legislation and international law, including environmental and investment law. It must be conducted within the framework of interpreting the treaty standards the claimant alleges were violated, based on the factual and scientific evidence presented in the case. Arbitral tribunals can apply general principles of international law, such as proportionality and good faith, which can help align international investment law more closely with public international law.

As environmental concerns increasingly arise in investment arbitration cases, clarifying how arbitrators will address these issues becomes ever more important. Investors seek protection for their investments and assurance of expected economic returns, while States aim to safeguard the public interest. However, States' actions in the service of the public interest cannot simultaneously violate their international obligations. The inherent tension between economic development and ecological preservation continues to be a significant challenge. This evolving landscape calls for a reevaluation of both procedural and substantive aspects of investment arbitration. An example of efforts to adapt arbitral procedures can be found in the 2019 Hague Rules on Business and Human Rights Arbitration. It is worth mentioning that reconciling the interests of investors and States with the need to protect the environment requires consistent and coherent solutions. Arbitrators should therefore consider previous rulings in similar cases, although they are not bound by them. While arbitrators are not necessarily experts specialized in environmental matters, nothing prevents them from taking these concerns into account when addressing jurisdiction and/or liability in their awards.

While some of these challenges are not unique to the integration of environmental protection into investment law, the convergence of these fields is essential, not only for more sustainable economic development but also for the survival of investment arbitration in the face of its legitimacy crisis.