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What If ISDS Lawsuits Were Used To Fight Climate Change?

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For many years, the battle lines over investor state dispute settlement (ISDS) have been clearly drawn. On one side, progressive groups such as environmental NGOs have criticized ISDS as a nefarious tool used by multinational corporations to undermine domestic regulation. On the other side, business groups have supported ISDS as a neutral mechanism for arbitrating disputes between foreign investors and governments. Since the earliest investment disputes were brought, these positions have not budged.

But a recent investment case has the potential to change people's views of ISDS, at least to some degree. An investment tribunal established under the Canada - Barbados bilateral investment treaty (BIT) just ruled on a claim by a Canadian investor, the main basis of which was not that the government of Barbados regulated too harshly, but rather that the government's actions to protect the environment were insufficient. This claim was rejected, but the legal standard applied may pave the way for future cases that environmentalists could help investors bring against governments who, in their view, do too little to protect the environment.

The basic facts of the case were as follows. Canadian investor Peter Allard bought land in Barbados for an eco-tourism attraction. It opened to the public in the spring of 2004. However, according to Allard, the government did not adequately protect the surrounding environment, in the following ways: mismanagement by Barbados of "a proper tidal exchange between the seawater and the water in the Sanctuary's swamp"; in 2005, a failure at a sewage treatment plant operated by the Barbados Water Authority resulted in the emergency discharge of raw sewage into the site; finally, the environmental degradation of the Sanctuary was "compounded" by the zoning reclassification of lands adjacent to the Sanctuary.

Allard's claim was that the actions and inactions of Barbados caused and/or failed to mitigate a significant degradation of the environment and the "tourist experience," obliging him to close the business, and thereby "depriving him of the entire benefit of his investment in Barbados." His specific legal claims under the BIT were that "[t]he actions and inactions of Barbados" constitute breaches of the following obligations:

(i) to accord “fair and equitable treatment in accordance with principles of International Law” (“FET”) (Article II(2)(a));

(ii) to accord “full protection and security” (“FPS”) (Article II(2)(b)); and

(iii) not to expropriate, except “for a public purpose under due process of law, in a nondiscriminatory manner and against prompt, adequate and effective compensation” (Article VIII).

The tribunal hearing the case rejected all of the claims. However, its reasoning sets out a legal standard that could be used by future complainants. For instance, in considering the “full protection and security” claim, the tribunal said this:

> *243. It is accepted by the Claimant that the obligation of the State to provide the investment with FPS is not one of strict liability, but of “due diligence” or “reasonable care.” Relevantly, and as noted in El Paso v. Argentina:*
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> *[. . .] the obligation to show “due diligence” does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is “reasonable or “due”, depends in part on the circumstances.*
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> *244. The obligation is limited to reasonable action, and a host State is not required to take any specific steps that an investor asks of it. The fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the BIT, although consideration of a host State’s international obligations may well be relevant in the application of the standard to particular circumstances.*

Note some key language in the standard cited by the tribunal: “the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury.” Also, “consideration of a host State’s international obligations may well be relevant in the application of the standard to particular circumstances.”

There are a wide range of areas of environmental protection where this standard might be applied. One particularly intriguing one is climate change. Let’s say a foreign investor purchases some property near the ocean. Over time, due to the impact of changes in the climate, it is possible that sea levels will rise, causing damage to the property. If sea levels rise and the damage occurs, and the investor can find an investment treaty or FTA investment chapter to rely on, could the investor argue that the government’s various actions and inactions on climate change violate the obligation to provide full protection and security? There are certainly many people out there who believe it is unreasonable, based on existing scientific evidence, not to take action against the risks of climate change. And there are international obligations that could be cited in support.

The chances of success for such a claim are difficult to assess. However, one can imagine that someone might bring the claim just for the sake of publicity.

Beyond the narrow issue of climate change, the potential for such a case helps illustrate that the standard view of ISDS as a corporate tool to limit government regulation is not completely accurate. It is true that companies can sue governments to challenge regulations they find too intrusive. But some of the obligations are written more broadly than that. They are not simply about regulations that are too harsh. Rather, certain international investment obligations seem to require due process and reasonableness of regulations, broad standards that can be used to challenge regulations that are deemed insufficient or inadequate. The debate over ISDS would be more productive if both sides recognized this, and considered the costs and benefits of offering enforceable obligations of this sort — only to foreign investors — under international law.

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