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When Sustainable Development Meets International Investment: Painful Collision or Necessary Contribution?

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Abstract: International investment has increasingly been subject to controversies and debates. Never more so than when international investment law is faced with sustainable development issues, particularly in the context of international investment arbitration. Given the characteristics of international investment law regime, and in particular the nature of its dispute resolution mechanism, types of measures challenged in the tribunals and the magnitude of monetary compensations sought by investors and frequently awarded by the tribunals, sustainable development issues become notably visible and debatable. Since sustainable development became a prominent feature of major global initiatives, political agendas and social movements, international investment disputes involving sustainable development issues gain lots of international attention. This paper aims to highlight the controversies of some of the most prominent international investment arbitration cases relating to sustainable development issues.

Keywords: international investment law, sustainable development, international investment tribunal, investment disputes

JEL codes: K33, O44, Q56

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1. Introduction

Why to talk about sustainable development in the context of international investment? Mainly because international investment has increasingly been faced with sustainable development issues, to which it needs to respond. Such encounters of international investment and sustainable development became particularly visible in the context of investment disputes brought in front of

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the international investment tribunals. The characteristics of international investment dispute resolutions mechanism, types of measures being questioned at the tribunals and the size of financial compensation sought by the investors are provoking lots of debates, especially when a particular dispute raises sustainable development issues. Since sustainable development became a prominent feature of major global initiatives, political agendas and social movements, those disputes gain lots of international attention. This article aims to outline what happens when economic interests of foreign investors clash with sustainable development agenda of states and how such conflicts are being resolved by international investment tribunals. In the following section, this article introduces international investment law regime, its status and evolution, main characteristics and pathologies. It also highlights sustainable development concept. In the subsequent part of this article selected international arbitration cases are being presented in the context of sustainable development issues. Finally, the last part of this article set out concluding remarks on the subject of interaction between sustainable development concept and international investment.

2. Brief introduction to international investment law and sustainable development

International investment can simply be described as an investment made by a foreign investor in the territory of a host state. The legal framework that governs relationship between foreign investors and states is called international investment law (Sornarajah, 2010). It is a relatively new, but very dynamic and rapidly growing area of international law where states are the lawmakers. The states enter into international investment treaties among themselves. The investment treaties can be bilateral (BITs), multilateral or regional. Other international treaties, like trade or economic partnership agreements also increasingly include investment provisions, sometimes the entire chapters of these treaties are dedicated to investment.

Investment treaties create a truly global network (Guzman, 1997). According to the World Investment Report 2015, there have been 2926 BITs in place by the end of 2014 and further 9 BITs were signed by the end of 2015. UNCTAD international investment treaties database lists 361 investment treaties, other than BITs, at the end of April 2016. There are still territories in the world outside of investment treaties' reach, like Andorra, Faroe Islands or Gibraltar for example, but they are exceptional. Investment treaties are not controversial in general (Newcombe and Paradell, 2009). Their main provisions generally revolve around reciprocal guarantees to promote and

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

protect investors and investment, fair and equitable treatment, free transfer of means and promise not to expropriate. However, there is one set of provisions of those treaties, which is unique and often compared to a “silent revolution” or “new era” (Subedi, 2012). A direct treaty based right of investors to sue governments before international investment tribunals is a phenomenon, which started in 1990 and is sometimes also referred to as a paradigm shift (Weiler, 2005). An investor first used the tool of investment arbitration to protect its economic interests against a state in 1990, in case of *AAPL v Sri Lanka*, where for the first time ICSID tribunal heard a case on the complaint of investor based on a treaty breach. It was a revolutionary step, which led international investment law onto a new path, where it was now acceptable for private investors to sue sovereign governments over treaty breach, without the need for a contractual relationship between the state and the investor. It opened new possibilities and brought entirely new dimension to international investment law. A sovereign government of Sri Lanka was exposed to arbitration against a private investor with whom it did not have any contractual relationship, simply on the basis of a blanket consent to arbitration included in a very vaguely drafted international treaty. State-investor dispute resolution mechanism allows a private investor to sue foreign government for breach of the guarantees and promises stipulated in investment treaties. There is no need for a contract between a state and investor to initiate arbitration against a state. The venue for such disputes is an investment tribunal, which is a private venue, convened for the purposes of one dispute only. Parties appoint arbitrators, the proceedings are usually confidential and the decision is final with a very limited scope for an appeal. In summary, private foreign investors can question sovereign government’s decisions, actions, legislation and policies in private, confidential tribunal with no judicial review. The states are potentially liable to pay compensation to foreign investors if such actions or policies affect economic interests of investors.

The regime proved to be a very powerful tool in the hands of the investors. According to UNCTAD database, there have been 696 known investment arbitration cases by the end of April 2016. True number is unknown as there are cases the very existence of which is confidential. The potency of the regime can also be illustrated by the size of some of the awards granted by the tribunals. In three cases against Russia, involving bankruptcy of Yukos, the total awards amounted to more than US\$50bn (*Hulley Enterprises v. Russia* (US\$40bn), *Veteran Petroleum v. Russia* (US\$8.2bn), *Yukos Universal v. Russia* (US\$1.8bn)). Ecuador has lost the case against Occidental and was ordered to pay US\$1.76bn in compensation in *Occidental v. Ecuador*. Venezuela was a

respondent in the case against Mobil, where the tribunal awarded US\$1.6bn in compensation, in *Venezuela Holdings v. Venezuela*. Of all countries, Argentina faced most arbitration cases - 59. Venezuela is the second state with most cases brought against it - 36.

It was just a matter of time before an investment tribunal was convened for the purposes of resolving a dispute where the economic interests of an investor clash with sustainable development policies of a state. What happens when sustainable development issues are being raised in the context of such investment disputes? As the next section of this article will illustrate, there is no certainty in this matter, neither for investors nor for states. There is no consistent approach by the tribunals and no consistent outcomes of the investment proceedings. International investment regime represents primarily economic interests of investors and has been designed with protection of investors and investment as a main objective. Sustainable development on the other hand represents public interests first of all, without focus on any specific interest group. Sustainable development merges social and environmental interests, current issues and concerns for the future generations. Given that investment arbitration tribunal is a private forum available to individual investors to protect their commercial interests, it is a controversial background for such public interest driven sustainable development issues to be debated. There is an increasing volume of investment arbitration involving various elements of sustainable development principles. However, arbitration jurisprudence is often inconsistent and contradictory, even when the cases are brought under the same treaty clause or even under the very same claim. Several controversial and high profile arbitration cases involving sustainable development issues like environmental damage, exploitation of natural resources and extortionate damages awarded to investors was rather a painful start to the relationship between sustainable development concept and international investment. There is a lack of visibility, stability in the system, predictability and perceived bias in favour of foreign investors. Neither investors nor states are able to clearly assess their risks due to lack of consistency of arbitration decisions. Commercial style arbitration for regulatory type treaty disputes, no requirement to exhaust domestic remedies and financial compensation rather than compliance as a standard remedy are among the main pathologies of the international investment law (Pauwelyn, 2000).

International investment was doing exceptionally well during the peak of neoliberal era of the roaring 1990s (Stiglitz, 2003). Protected by powerful regime of international investment law, powered by the neo liberal philosophy and Washington consensus and backed up by the World

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

Bank and the International Monetary Fund, foreign direct investment was bringing capital to all corners of the world. It was a period of an unprecedented explosion of investment treaties, arbitration cases and extraordinary economic activity that favoured expansion of capital and investment in the fervour of neo liberal philosophy. The tendencies in investment arbitration were to expand the scope of treaty application and protection of investment. The concept of corporate nationality was expanded, expropriation was broadened to include any acts that lead to depreciation in value of investment, umbrella clauses were used to make sure all investment contracts were protected and use of stabilisation clauses gave rise to legitimate expectations and claims under fair and equitable treatment standards.

And then something changed. The optimism was wearing off as the Russian and Asian crisis at the end of the twentieth century, together with the growing negative sentiment towards inflexible foreign investment protection regime signalled a shift. States' increased exposure to arbitration cases, global financial crisis and a paradigm shift towards sustainable development marked the beginning of the new millennium. The economic uncertainty, global spread of panic and fear during the time of economic crisis activated social movements, human rights groups, environmental organisations, religious claims, ethnic minorities, all of which represent global values and social aspects of human life. Increase of social interactions focused around universal cultural values together with unprecedented technological advances that facilitate communication and surpass national borders, marked a shift into new global dimension more considerate of diverse interests.

In this context, the unfettered economic growth and absolute protection of investors to the exclusion of all other interests seemed no longer sustainable. Among the issues subject to biggest controversy of international investment regime was, and still is, the scope of the domestic policy space and the right of sovereign states to regulation, including environmental measures, and also the overreaching mandate of the arbitrators in adjudicating matters involving important policy decisions made by the democratically elected legislators of the host countries.

Sustainable development became a convenient expression, signifying diversification of interests, growing environmental awareness, but perhaps also a useful concept that suits any particular advocacy and defence mechanism in the face of geo political shift and economic uncertainty. The developed states like the US, main architect of the neoliberal order, is now reasserting its sovereignty before investment tribunals in the face of expansive treaty claims. The

new generation of balanced investment treaties provide defences for measures taken in public interest, like protection of environment or labour standards. Countries and regions are considering new approaches to investment policymaking. Reacting to the growing unease with the current functioning of the global investment regime, together with today's sustainable development imperative and the evolution of the investment landscape, many countries and regions are engaged in reviewing and revising their investment policies and treaties.

3. When Sustainable Development meets International Investment at Investment Tribunal

This part of the article sets out representative examples of investment arbitration cases illustrating tension points between sustainable development concept and economic interests of the investors reasserted before international investment tribunals. The case examples are merely indicative of the main issues and by no means an exhaustive analysis of the subject. They highlight the complexity and controversy of the interaction between increasingly visible sustainable development agenda and powerful international investment protection regime.

Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica. One of the first investment arbitration cases involving sustainable development considerations was *Santa Elena v. Costa Rica*, which was decided in 2000. This dispute originated following the decree issued by Costa Rica, which extended a national park onto a property owned by the investor. The investor bought the property to develop tourist resorts and residential properties. The decree amounted to expropriation, and this in itself was not contested by the parties. The sole disputable issue in this case was the amount of compensation for expropriation. The tribunal has not analysed the nature and extent of the international legal obligation of Costa Rica to preserve the unique ecological site of Santa Elena. The tribunal took a view that “*while an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.*” (*Santa Elena v. Costa Rica*: par. 71) Expropriatory environmental measures have been treated as any other expropriatory measures and no additional weight was given to the

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

environmental elements in the case. The approach of the tribunal isolated sustainable development issues from the merits of the case. In a way, international investment law proved to be indifferent to sustainable development considerations and rejected any cross-fertilisation with international environmental laws. Costa Rica lost the case and had to pay US\$ 16 million of damages to the investor.

Metalclad v. Mexico. Another example of an early case involving sustainable development considerations is *Metalclad v. Mexico*. It is a complex case brought in 1997 by an American investor against Mexico under North American Free Trade Agreement (NAFTA). Metalclad Corporation acquired a Mexican company in order to construct and operate a transfer station and landfill of hazardous waste in Guadalcazar, San Luis Potosi. The purchase was completed in the belief that all approvals for the landfill had been obtained. Although the federal Mexican government and the state government of San Luis Potosi have granted permits to construct and operate the landfill, the municipality of Guadalcazar denied a municipal construction permit. Further, the state governor issued a decree declaring an area encompassing the landfill to be an ecological reserve for the protection of rare cactus, which precluded Metalclad from any use of the facility that it had already built. Metalclad alleged breached of minimum standard of treatment and expropriation provisions of the treaty. The tribunal awarded in favour of the investor for all claimed breaches. The tribunal found that “*the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill was improper, as was the municipality’s denial of the permit for any reason other than those related to the physical construction or defects in the site.*” (*Metalclad v. Mexico*: par. 86) This conclusion was reached on the basis of administrative inaccuracies and errors committed by Mexican authorities. The investment protection regime arms investors with a powerful tool to protect and pursue their interests. Equally, the states that allow procedural lack of transparency, unclear practice and administrative errors within their administrative agencies could compromise their sustainable development goals when faced with investment arbitration claims from investors. Investment protection regime requires states to provide investors with transparent and predictable framework. The environmental concerns raised in this case, were not considered on their merits and were not taken into consideration. Ultimately, the investor win was based on procedural breaches, lack of transparency and errors on the part of Mexican authorities. Environmental

concerns did not add any weight to respondent's case nor did it weaken investor's position. Metalclad was awarded over US\$ 16 million of damages.

Técnicas Medioambientales Tecmed v. Mexico. Similar case, *Tecmed v. Mexico*, involved a Spanish investor which, through its subsidiaries, operated hazardous industrial waste landfill in the municipality of Hermosillo in Mexico. The licence for the operation of landfill was renewed on annual basis and in 1998 such renewal was denied by the relevant environmental protection agency on several grounds, including environmental hazard reasons. The company was asked to close the operation of the landfill. Notably, Tecmed attributed such decisions on the part of Mexican authorities to political changes resulting from elections and changes to local authorities. Tecmed claimed that new authorities encouraged a movement of citizens against the landfill, which also led to confrontation with the community, even leading to blocking access to the landfill. Mexican authorities, on the other hand claimed that it exercised its discretionary power to deny the permit, but did not do it in discriminative or arbitrary way. Mexico invoked its “*police power within the highly regulated and extremely sensitive framework of environmental protection and public*” (*Tecmed v. Mexico*: par. 97). When considering whether expropriation has taken place, the tribunal raised several arguments, however, none of the environmental concerns played any part of these considerations. When referring to state's police powers, tribunal stated that it is a matter of domestic law and the tribunal's function is to “*examine whether the Resolution violates the Agreement [BIT] in light of its provisions and of international law. The Arbitral Tribunal will not review the grounds or motives of in order to determine whether it could be or was legally issued*” (*Tecmed v. Mexico*: par. 120). The tribunal further stated that, even if the actions of Mexican authorities were legitimate or lawful or in compliance with the law from the standpoint of the Mexican domestic laws, they could still violate provisions of the treaty. The tribunal excluded regulatory administrative actions from the scope of the treaty, “*even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever*” (*Tecmed v. Mexico*: par. 121). Tribunal emphasised that expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are similar to any other expropriatory measures. Where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains. The case illustrates that the

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

obligations of the states under the international investment treaties are first of all towards investors. As against the investors, the only relevant obligation of the states is to comply with the provisions of the treaties. That is all that investors are interested in and this is precisely what the treaties are meant to guarantee. Socio-political pressure in this case driven by environmental concerns of local community, that has largely contributed to the environmental decision, which in effect expropriated the property of Tecmed, does not trump the rights of the investors under the treaty. The tribunal found lack of evidence that the operation of the landfill was a real or potential threat to the environment or to the public health. Unfortunately for Mexico, the tribunal found its conduct, characterized by its ambiguity and uncertainty which are prejudicial to the investor. Tribunal awarded US\$ 5.5 million in compensation to the investor

Methanex v. United States. An opposite outcome can be illustrated by *Methanex v. United States* case. The case was brought by a Canadian company against the US for two Californian measures, a 1999 executive order and the regulations adopted in 2000, that banned the use of MTBE substance in reformulated gasoline in California, because of pollution of surface water and groundwater. Methanex claimed that these measures were adopted with the intent to discriminate against Methanex and all foreign methanol producers and to advantage domestic ethanol producers. It claimed the violation of national treatment, minimum standard of treatment and expropriation provisions of NAFTA treaty. The tribunal reflected on an issue of domestic regulation enacted for a public purpose and stated that “*as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor.*” (Methanex v. Unites States: Part IV, Chapter D, Par. 7) It moved a burden of responsibility for investment decisions on the investor by saying that “*Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.*” (Methanex v. Unites States: Part IV, Chapter D, Par. 9) The ban on environmentally harmful substance was held to be made for a public purpose, was non-discriminatory and was accomplished

with due process. The tribunal was satisfied that the relevant Californian authorities acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers. The tribunal found in favour of the US and dismissed all claims of the investor.

Biwater v. Tanzania. An interesting approach was taken by an investment tribunal in *Biwater v. Tanzania* case, involving not only sustainable development issue, but set in the context of a country in transition undergoing rapid development changes. The dispute arose out of agreements entered into by the UK investor with Tanzania for the operation and management of the Dar es Salaam water system. As the investor commenced execution of the contract, it encountered severe difficulties of financial and practical nature and requested renegotiation of the contract less than two years into ten year term of the contract. The mediation process failed and Tanzania terminated the contract with the investor for its alleged failure to fulfil its obligations. In the process, Tanzania deported investor's senior management, seized its assets and took over its business. This case is of great value to the discussion on sustainable development within international investment law. Firstly, it furthers the debate about volatile character of investment climate in developing countries and countries in transition. The tribunal noted that “*the business risks that an investor has to accept may well be greater than they would be in another investment climate and expectations of the investor*” (*Biwater v. Tanzania*: par. 376). The responsibility is on the investor to assess political economy surrounding the investment and adequately calculate the risk involved. The tribunal reinforced that “*investment agreements cannot be relied upon as a bulwark against factors that investors should know about through good business practices [...] [investors cannot] seek the protections of international investment agreements in order to avoid the commercial, contractual or regulatory consequences of their acts*” (*Biwater v. Tanzania*: par. 373). It is therefore necessary to differentiate between investment climate of developed and developing countries, to make allowances for potential instability of investment environment of countries in transition. It would not be appropriate to apply the same standards and expectations to the countries undergoing rapid developmental changes as to the developed states with well-established infrastructure and legal framework for investments. Another fundamental point of the case refers directly to sustainable development concerns. The tribunal recognised that the substantive issues of the case are of great public interest and are of concern to the wider community in Tanzania. For these reasons, the tribunal allowed *amicus curiae* submission from several interest groups, including the Lawyers’

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Centre for International Environmental Law and the International Institute for Sustainable Development, to address broad policy issues concerning sustainable development, environment, human rights and governmental policy. The tribunal decided to consider the merits of the case in the wider context of sustainable development and human rights. Remarkably, the tribunal referred directly to the Millennium Development Goals, and specifically to the target of reducing by half the number of people without proper access to potable water by 2015. Tribunal expressly concluded that access to clean water is basic human right and “*key to sustainable development*”. The tribunal relied on the *amicus curiae* submissions stating “*that human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host State.*” (Biwater v. Tanzania: par. 379) The submissions concluded that foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development “*have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law*” (Biwater v. Tanzania: par. 379). This case is a very rare example of how sustainable development principles can shape and influence implementation of international investment law and outcomes of investment disputes. The issues raised and deliberated in this case go to the heart of sustainable development concerns. Interestingly, the tribunal found Tanzania liable for treaty violations, but no damages were awarded to the investor, as its losses were due to its own failures and not due to any violations by Tanzania. This case recognised vulnerability of developing countries exposed to corporate tactics of investors trying to take advantage of the shortcomings of such countries.

Gold Reserve v. Venezuela. Sustainable development arguments are also sometimes referred to by states in highly political context, as illustrated in *Gold Reserve v. Venezuela* case. The dispute between Canadian investor and Venezuela revolved around mining rights and concessions for the extraction of gold, copper and molybdenum in Venezuela. Claims arose out of the issuance of an administrative ruling by the ministry of the environment of Venezuela declaring the nullity of certain construction permits and the subsequent termination of mining concessions. This case is an important example of how sustainable development arguments arise in political context. The investor has been active in the mining industry in Venezuela for over 20 years prior to termination of its concessions and permits. It had established practice and historically its mining activities in

Venezuela were not subject to major controversies. The revocation order by Venezuelan authorities referred to “*fundamental duty of the Venezuelan State to guarantee the protection of the environment and populations confronted with situations that constitute a threat to, make vulnerable, or risk the people’s physical integrity, as well as involve imminent damage to the environment*”. It also referred to the public administration ability “*to review and correct its administrative actions, including the revocation of administrative acts*” (Gold Reserve v. Venezuela: par. 593). As the grounds for the revocation, the order referred to the state of emergency declared in the area of the Imataca Forest Reserve, “*as the mining activities in Bolivar State had altered the environment [...] thus having affected the nearby populations, indigenous communities, and the rest of the collective*”. It then referred to the “*serious environmental deterioration of the rivers, soil, flora, fauna and biodiversity in general, caused by the uncontrolled mining activities performed by the large number of miners present in the area*” (Gold Reserve v. Venezuela: par. 594). Venezuela evoked sustainable development goals to support its decision to terminate concessions by claiming that its actions were in fact “*the exercise of the State’s policy to promote only environmentally sustainable mining in the Imataca Forest Reserve, out of bona fide concern of the impact of Claimant’s mining activities*” (Gold Reserve v. Venezuela: par. 655). The investor on the other hand claimed that such grounds for revocation were in fact, “*a series of arbitrary, capricious, non-transparent, pretextual and abusive measures undertaken in furtherance of the evolving political agenda of the Chávez Administration*” (Gold Reserve v. Venezuela: par. 542). Raising of environmental issues was claimed to be motivated by the specific political agenda of the Chávez administration “*to remove North American investment in the gold sector and replace it with more politically desirable alternatives*” (Gold Reserve v. Venezuela: par. 592). The actions by Venezuela were not claimed to be taken out of concerns for environmental and social issues, but were allegedly due to change in the policy regarding mineral exploitation in Venezuela. Various political statements of government officials and president Chávez himself were quoted to support the view that the government would favour national interest over foreign companies in the mining sector and that government’s intention was to seize control over the resources exploitation to “*save and appropriate*” what was deemed due to the Venezuelan nation. The tribunal did acknowledge state’s responsibility to preserve environment and protect local communities against adverse effects of mining industry. However, this did not exempt Venezuela from complying with its obligations towards international investors. The tribunal held that the political statements made by various

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

government officials including President Chávez “*no longer expressed environmental concerns, but rather the political objective to recover gold mines to the State*” (Gold Reserve v. Venezuela: par. 322). The tribunal held that the revocation decision was driven by the change of policy regarding mining development and was in serious violation of the standard of a fair, transparent and consistent behaviour due by the state. The case is an example of how sustainable development is being appropriated to support political agenda. Once a state accepts international investment regime and allows foreign investors into its territories, any subsequent changes in policy have to take into account state’s commitments towards foreign investors. Calling upon sustainable development goals to justify political decisions does not override the obligations of the states under investment treaties to which the states have signed up.

There are few pending cases awaiting further development, which might bring important advancement to sustainable development debate in the context of international investment.

Chevron v. Ecuador. It is a unique case, an ongoing long term legal battle in different forums, involving Chevron/Texaco oil company, state of Ecuador and indigenous communities of Amazonia in Ecuador. Arbitral proceedings under international investment regime are only a part of the broader picture of this dispute. All parties to the dispute, Chevron/Texaco, state of Ecuador and Ecuadorian plaintiffs, have been involved in an ongoing dispute revolving around environmental damage caused by Chevron in the course of its oil operation in Ecuadorian Amazon. Ecuador has been seeking reparations of environmental damage. In addition, Ecuadorian plaintiffs, indigenous Amazonian communities, have been seeking damages for harm caused by oil spills and other hazardous consequences of oil operation of Chevron. After years of unprecedented legal warfare, Ecuadorian court ruled in favour of Ecuadorian citizens and awarded US\$9.4 billion in damages against Chevron/Texaco, as well as punitive damages of US\$8.6 billion. Concurrently with the proceedings taking place in Ecuadorian court, Chevron filed a claim in the Permanent Court of Arbitration under US – Ecuador BIT . The tribunal held that Ecuador has breached the treaty through the undue delay of the proceedings of the Ecuadorian courts and is liable for the damages, which the investment tribunal swiftly awarded against Ecuador. In subsequent arbitral proceedings, still pending, Chevron is challenging the judgment of Ecuadorian court awarding damages to Ecuadorian plaintiffs and is seeking that the tribunal declares Chevron not responsible for satisfying the judgment, because it had been fully released from all claims in accordance with the earlier settlement agreements with Ecuador. It further pleads with the tribunal declares that

enforcement of the judgment within or outside of Ecuador would be inconsistent with Ecuador's obligations under the settlement agreements, the BIT and international law in general. Chevron also claims that the judgment is null as a matter of international law and not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or outside of Ecuador. Astonishingly, Chevron also seeks declaration from the tribunal that any enforcement of the judgment would place Ecuador in violation of its international law obligations and that it violates international public policy and natural justice, and, as a matter of international comity and public policy and that the judgment should not be recognized and enforced. What is unique in this case is that the arbitration proceedings directly impact the rights of non-parties to the arbitration, Ecuadorian plaintiffs that hold a judgment against Chevron from Ecuadorian court. Chevron does not directly seek damages from Ecuador for the losses, but is seeking relief aimed at nullifying judgment from Ecuadorian court awarded in favour of non-party to the proceedings. The case raised lots of controversies, countless backlash campaigns, negative commentaries and millions spent in lawyers' fees on both sides. What started as a dispute over who should be responsible for cleaning up the Amazonian jungle and who is liable for the harm caused to local communities by oil operations, it has become complicated, questionable legal warfare process involving several legal forums and multiple proceedings. In addition, the Ecuadorian plaintiffs filed a petition for precautionary measures with the Inter-American Commission on Human Rights explaining the various ways in which relief requested by the Chevron under arbitration proceedings would violate the human rights of the Ecuadorian citizens. The role of arbitration tribunal in this set of circumstances is a testing one and very controversial. The merits of the dispute brought before the investment tribunal are far removed from the original sustainable development issues of the case and rests on creative legal arguments, broad requests for relief and procedural issues.

Pac Rim v. El Salvador. This is an interesting pending case where country's vision for sustainable development is being questioned by foreign investor. Pac Rim dispute involves two different visions of the development of a state of El Salvador. The investor is suing El Salvador for its refusal to issue necessary mining licenses for Pacific Rim's El Dorado gold mining project in northern El Salvador due to alleged environmental concerns including the company's use of certain chemicals in the extraction process. The investor claims El Salvador's arbitrary and discriminatory conduct, lack of transparency, and unfair and inequitable treatment in failing to grant a mining exploitation

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

concession and in demanding various environmental permits following discovery of valuable deposits of gold and silver under exploration licenses granted to the investor. El Salvador allowed investor to proceed with the exploration phase of the project and subsequently denied the company the right to proceed to the exploitation phase. Consequently, the investor claims that by failing to act once the company has successfully completed the exploration phase and complied with all of the legal requirements to obtain an exploitation concession, El Salvador destroyed its investment. Interestingly, the investor, which is an oil company, raised sustainable development arguments by claiming its commitment to sustainable development of El Salvador “*as an environmentally and socially responsible mining company, Pac Rim was and is committed to providing long term, sustainable benefits to the communities in which it operates*” (Pac Rim v. El Salvador: Pac Rim Memorial, par. 141). In support, it lists a number of initiatives supporting sustainable development of El Salvador, including funding health services, environmental education programmes, recycling programme in the region, removal of tons of refuse from the local river system, planting trees, hydrogeological studies to locate new sources of ground water for local communities and drilling water wells to provide clean water for local residents. In addition, Pac Rim argues that the decisions to refuse relevant permits were politically motivated and not based on merits of its application. Several statements from president Saca indicated that the government was not favouring mining activities for the sake of political expedience. In response El Salvador evokes its responsibility to protect its people and environment, including specific provisions of its constitution, which imposes a duty on the state to protect its natural resources, as well as diversity and integrity of environment to ensure sustainable development . It emphasises the principle of prevention and precaution when managing environmental concerns. More so, El Salvador acknowledges “*it does not have recent experience with metallic mining*” and it had realised “*it had lacked capacity necessary to open country up for metallic mineral exploitation*” (Pac Rim v. El Salvador: El Salvador Counter Memorial, par. 204). It is not equipped to effectively assume strong environmental policy regarding mining activity due to lack of expertise, personnel and budget. Especially, the state is mostly concerned with poor water recourses for the country, which has of one of the highest population density in Latin America. Locating mining activities in the area of the most important water supply for the country could bring high risk of contamination. The relevant authorities expressed legitimate concerns that they are not able to evaluate, permit and monitor metallic mining in order to safeguard local population and environment. They referred to earlier limited mining activity of

which they were only beginning to understand the extent of the unmitigated harm. The project is also subject to significant negative social pressure based on the view that mining “*has historically not only failed to generate development but has also significantly impacted the environment through poor practices*” (Pac Rim v. El Salvador: El Salvador Counter Memorial, par. 240). In summary, El Salvador does not consider itself ready to accept mining activities, due to lack of common vision for the development of the industry in El Salvador, lack of strong water policy and water protection measures, gaps in environmental and mining legislation and inadequate enforcement processes. In taking precautionary approach, El Salvador decided to suspend all mining activities in the country until adequate strengthening of institutions, legislation and other policies. It justifies its steps in order to ensure that mining industry can make a “*meaningful contribution to sustainable development of the country*” (Pac Rim v. El Salvador: El Salvador Counter Memorial, par. 254). In the government’s view, until those changes are made, environmental protection cannot be ensured and there is no social license to allow mining. The case is still pending, but it already generated unprecedented attention. It remains to be seen what tribunal will make of sustainable development arguments put forward by the parties and whether they will be at all relevant to the merits of the case. It is an interesting case where the state pleads for space to take responsible approach to sustainable development of the country. Whether by taking this approach it violated protection granted to investor under investment treaty, it is for the tribunal to decide. It is worth noting, that the fate of this case and, in a way, the path of future development of El Salvador with regard to mining industry, will be decided by three arbitrators, none of which has any association with the country and majority of which come from the developed first world countries. The investor is requesting US\$ 340 million in compensation and El Salvador claims that the investor does not have any claim and the case should be dismissed.

Windstream v. Canada. On the other hand, Canada, being a first world developed country has faced a dispute similar to Pac Rim case. Canada has been a respondent to a recent case involving wind energy programme. US investor Windstream sued Canadian government for placing a moratorium on the development of offshore wind projects in Ontario without notice or consultation with the investor. Windstream applied for approval of 100-turbine offshore wind energy generation facility in Lake Ontario, one of the Great Lakes, in response to government initiatives encouraging research and development in alternative energy. However, Canada claimed that there was no large offshore wind generation facility operating anywhere in the world and “*there remains a significant*

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

amount of uncertainty regarding the effects of such projects on human health, safety and the environment". Due to this uncertainty "Ontario has yet to develop a comprehensive regulatory framework for the approval of offshore wind energy projects. In particular, requirements related to the construction, operation and decommissioning of such projects have never been fully developed." (Windstream v., Canada: par. 4) Canada further claimed that Windstream was aware of the undeveloped state of this regulatory environment when applying for the contract and was informed to manage the related regulatory risk. Canada chose to take a precautionary approach and develop regulatory framework before allowing any offshore wind energy facilities to be built. Canada asserted that Windstream claims were "nothing more than an inappropriate attempt by the Claimant to shift the regulatory and business risks associated with the development of WWIS' proposed project to the Government of Canada." (Windstream v., Canada: par. 7) The case has been resolved in favour of the investor. Although the tribunal reached the conclusion that no expropriation took place, the tribunal was of a view that the investor found itself in regulatory and contractual limbo for years following the imposition of the moratorium as a result of acts and omissions of the Government of Ontario, which is in breach of the treaty. Canada was ordered to pay nearly US\$20 million in damages to Windstream.

Peter Allard v. Barbados. And finally, it is worth mentioning a unique case of *Allard v. Barbados*. This interesting case is a rare example of when an investor, who in this case is a retired attorney, businessman and philanthropist, raises sustainable development arguments against a host state. The Canadian investor claimed that the government of Barbados violated its obligations by refusing to enforce its own environmental laws. Mr Allard had invested in purchase of land, consisting of natural wetlands, green spaces and the last significant mangrove forest and migratory bird habitat in Barbados with a view to develop a world class eco-tourism sanctuary. In the notice of arbitration, the investor emphasises its several contribution efforts to support sustainable development of Barbados, including performing environmental studies, restoring the natural environment, training and employing administrative staff, technical staff and educators and providing tourism and educational services to both Barbadian residents and foreign tourists. The dispute arose out of alleged actions and omissions of Barbados that have caused or permitted environmental damage to the sanctuary, destroying the value of the investment. Among the alleged violations, the investor lists repeated discharged of raw sewage by water authorities, failure to maintain drainage structure, failure to counteract poachers and changes to development plan revoking environmental buffers to

investor's property. Consequently, the investor contended that Barbados indirectly expropriated its investment, failed to provide his investment full protection and security and fair and equitable treatment in accordance with the Canada-Barbados BIT. The case is indeed a unique case where an investor holds a state accountable for sustainable development failures. The tribunal established that the decision of the investor to cease operating the sanctuary as an ecotourism attraction did not arise out of any relevant degradation of the environment and that the investor failed to establish any loss or damage to its investment attributable to any actions or inactions of Barbados. The tribunal concluded that the investor could not establish there was a legitimate expectation that Barbados would take any specific steps with regard to the environmental protection of the sanctuary. Given that such legitimate expectation did not arise from any of the statements by Barbados, the tribunal did not proceed to address Barbados' international obligations arising from its environmental treaties to confirm or reinforce the legitimacy of the investor's expectations, which means that international environmental obligations of a state serve only to support specific legitimate expectation of an investor, and do not stand on their own to create state's obligations on which investor can rely in investment arbitration. The fact that Barbados is a party to international environmental conventions did not change the standards under the investment treaty. The tribunal went on to describe the investor to have been of visionary disposition in respect of its eco project, however such good intentions do not directly translate to establishing a backstop to shift responsibility under the terms of the investor treaty to the state. It is unclear from the award, whether the tribunal would potentially be prepared to include an obligation of a state to protect foreign investments against environmental damage. The claims of the investor have been dismissed and the tribunal concluded the case in favour of Barbados.

4. Conclusions

As illustrated above, there is no single answer to the question of what happens when international investment faces sustainable development issues. Sustainable development certainly contributes to increased activity in the field of international investment law. Without the doubt, sustainable development issues are behind an increasing number of arbitration cases. They surface in arbitration, provoke discussion, contribute to the body of arbitral jurisprudence and help to develop this dynamic area of law. With the increasing environmental urgency in many parts of the world, together with rapidly developing regulatory frameworks of the developed and the developing

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

states, the interests of the investors are bound to clash with sustainable development policy agenda of many states. Investment arbitration system has proven to be a very effective tool for protection of economic interests of the investor, a tool which the investors will reach for and utilize to pursue their investment objectives. Whilst the importance of sustainable development is not being questioned by anybody, it has to be questioned whether international investment tribunal is the most appropriate venue to deliberate and decide sustainable development issues. Nevertheless, the reality is that arbitration tribunals are increasingly faced with those issues and they do need to respond to them. Unfortunately, the responses of the tribunals have not been consistent. There has been absence of any agreed standards or criteria of arbitral review of sustainable development matters in the context of investment disputes. Lack of consistency seems to characterise the system of international investment arbitration in general. Sustainable development is still only an additional consideration, which parties evoking it hope will add weight to their claims. Unless sustainable development law enters normative framework of international investment law through treaty drafting and integration efforts with complimentary sustainable development related legal norms of domestic and international application, it will remain a limited influence on the international investment law. The legal status of sustainable development within the international investment law is still uncertain and doubtful. With the proliferation of sustainable development initiatives globally, its status is far from becoming clearer. Its meaning is spilling over onto new areas, new understandings and in effect, it is watering down. It is a dynamic process, work in progress. Some elements of sustainable development are gaining acceptance in investment disputes. Overall however, the picture is far from sharply focused. The international investment law exists side by side with a large number of other bodies of international law, which are diverse and continuously expanding. International investment law is also subject to multiple dispute settlement mechanisms, variety of adjudicative bodies and other applicable rules. The hierarchy between those various layers of legal rules is not fully established. All elements of this broader international legal system interact with each other and are subject to constant adjustments and developments. In case of the international investment law, this fluidity is even more predominant since it is an uncodified legal system without one single authority or one set of universally applied rules. Sustainable development is just one of many elements with which international investment interacts, clashes with, brushes against and connects with.

The states undoubtedly expose themselves to risks when granting protection to investors under the treaties. They introduce a regime, which does not form part of domestic law and which has its own independent standing in international law. It is up to the host state to ensure an appropriate standard of environmental protection under domestic law and competent conduct of administration authorities, as the investors have an effective recourse route available. Signing of an investment treaty by a state means, in effect, allowing in a powerful regime, which could be problematic, especially for states with underdeveloped regulatory framework and disorganised administrative infrastructure.

Understanding this perspective on international investment law and the place and the role of sustainable development within it is the key to a constructive and informed discourse about the future of both international investment law and sustainable development agenda.

Literature

- Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award 27 June 1990.
- Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No. ARB/05/22, Award 24 July 2008.
- Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, PCA Case No. 34877, Partial Award on the merits 30 March 2010, Final Award 31 August 2011.
- Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award 17 February 2000.
- Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award 22 September 2014.
- Guzman, A. (1997). Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law* 38: 639.
- Hulley Enterprises Ltd. v. Russian Federation, PCA Case No. AA 226, Final Award 18 July 2014.
- Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000.
- Methanex v. United States, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.
- Newcombe, A.; Paradell, L. (2009). *Law and Practice of Investment Treaties*. Kluwer Law International.
- North American Free Trade Agreement between Canada, The United States and Mexico signed on 17 December 1992 and entered into force on 1 January 1994.
- Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II), ICSID Case No. ARB/06/11, Award 5 October 2012.
- Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Pac Rim Cayman Llc's Memorial on the Merits and Quantum, 29 March 2013; The Republic of El Salvador Counter Memorial on the Merits, 10 January 2014
- Pauwelyn, J. (2000). At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can Be Reformed. *ICSID Review – Foreign Investment Law Journal* 29: 372-418.
- Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06.
- Sornarajah, M. (2010). *The International Law on Foreign Investment*, Cambridge University Press.
- Stiglitz, J. (2003) *The Roaring Nineties: A New History of the World's Most Prosperous Decade*. New York: Norton.
- Subedi, S. (2012). *International Investment Law: Reconciling Policy and Principle*. Oxford: Hart Publishing.
- Tecnicas Medioambientales Tecmed, S. A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award 29 May 2003.
- United Nations. Conference on Trade and Development. (2015). *World Investment Report 2015: Reforming International Investment Governance*. New York: United Nations. Available at: http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf. Accessed on 27 June 2017.

WHEN SUSTAINABLE DEVELOPMENT MEETS INTERNATIONAL INVESTMENT:
PAINFUL COLLISION OR NECESSARY CONTRIBUTION?

- Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award 9 October 2014.
- Veteran Petroleum Limited v. The Russian Federation, PCA Case No. AA 228, Final Award 18 July 2014.
- Weiler, T. (2005). *International Law and Arbitration Leading Cases from the ICSID, NAFTA and Bilateral Treaties and Customary International Law*. London, England: Cameron May.
- Windstream Energy LLC v. The Government of Canada, Canada's Response to the Notice of Arbitration (Amended), 5 December 2013.
- Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award 18 July 2014.

Kiedy zrównoważony rozwój napotyka międzynarodowe inwestycje: Bolesna kolizja czy konieczny wkład?

Streszczenie

Inwestycje międzynarodowe są coraz częściej przedmiotem kontrowersji i debat. W szczególności wówczas, gdy międzynarodowe prawo inwestycyjne stoi w obliczu kwestii zrównoważonego rozwoju, zwłaszcza w kontekście międzynarodowego arbitrażu inwestycyjnego. Biorąc pod uwagę charakter międzynarodowego prawa inwestycyjnego, a szczególnie charakter mechanizmu rozstrzygania sporów, rodzajów środków zaskarżonych do trybunałów oraz wielkości rekompensat pieniężnych wnioskowanych przez inwestorów i często przyznawanych przez trybunały, kwestie zrównoważonego rozwoju stają się wyraźnie widoczne i sporne. Ponieważ zrównoważony rozwój stał się ważnym elementem głównych inicjatyw globalnych, programów politycznych i ruchów społecznych, międzynarodowe spory inwestycyjne dotyczące kwestii zrównoważonego rozwoju zyskują wiele uwagi na całym świecie. Niniejszy artykuł ma na celu zwrócenie uwagi na niektóre z najbardziej znanych i kontrowersyjnych międzynarodowych spraw arbitrażu inwestycyjnego dotyczących kwestii zrównoważonego rozwoju.

Słowa kluczowe: międzynarodowe prawo inwestycyjne, zrównoważony rozwój, międzynarodowy trybunał inwestycyjny, arbitraż inwestycyjny