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Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment

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Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment

Kluwer Arbitration Blog

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Our planet faces unprecedented threats, including irreversible global warming, loss in biodiversity, and water pollution and water scarcity. The impacts of these environmental crises also threaten human rights and exacerbate inequality. Slowing these worsening environmental trends - and addressing the impacts of environmental change on populations - will require cumulative policy responses at the national and international level.

Alarmingly, alongside global efforts to protect the environment from mounting risks, including those caused by large-scale investments, investor-state dispute settlement (ISDS) claims and awards are quietly undermining environmental conservation, governance, rights and justice. This blog highlights several areas of environmental protection and environmental justice that have been impacted by ISDS cases, including in particular measures related to climate action, protection of water resources, environmental impact assessments, and communities' rights to representation and access to justice.

Implications for Climate Action

The international scientific community's assessment that the world needs to strand 80% of proven fossil fuel reserves and transition to zero-carbon energy systems in order to avoid the most disastrous consequences of global warming has enormous implications for global investments. While trillions of dollars of new investments are required to meet growing demands for clean energy, significant existing investments in fossil fuel extraction, transmission and processing have to be urgently phased out. In line with their commitments, individual countries are increasingly adopting a range of policy tools to shift energy generation and transmission and to phase out fossil fuel resources.

Many such measures will impact the profitability (and in some cases, viability) of investments related to carbon-intensive energy, the types of economic impacts that have triggered ISDS claims. Indeed, we've already started seeing the first cases. In 2015, following years of delay, the United States government rejected TransCanada's construction permit to build the Keystone XL Pipeline; President Obama announced that the pipeline would undercut governmental efforts to make the United States a leader in climate action. In response, TransCanada filed a \$15billion claim, seeking compensation for future lost profits it allegedly expected to earn from development and operation of new fossil fuel infrastructure. Ultimately, TransCanada suspended the case after President Trump was elected and approved the resubmitted permit application.

In 2015, the new provincial government of Alberta, Canada announced its Climate Leadership Plan, including compensation for the early closure and eventual phase out of coal-fired power plants by 2030. In response, Westmoreland, whose mine supplied coal to the majority of phased-out operations, alleged that Alberta's compensation for the coal-fired power plants but not for the coal mines breached Canada's obligations under NAFTA, claiming \$357 million in damages.

Lama Energy Group brought another claim under the Canada-Czech Republic BIT, alleging that the Government of Alberta was unduly delaying approvals for their oil sands project, in light of the Government's environmental concerns. The policies that triggered these actions, however, were subsequently reversed; after the election of conservative Premier Jason Kenney in June 2019, Lama received regulatory approval for its project despite pushback from First Nations groups who claim the activities will put sacred lands and drinking water at risk.

Most recently, in response to the Dutch government's announcement in 2018 that

it would shut down all coal-fired power plants by 2030, Uniper, the owner and operator of one of the country's largest power plants, threatened arbitration under the Energy Charter Treaty if the legislation is passed into law. Uniper's calculated bet is that the threat of arbitration will again reverse the necessary policy.

As cities, states and countries continue to adopt policies to address the mounting climate crisis, the threat of additional ISDS cases that will delay or deter – or cause governments to reverse – such measures mounts. For many governments and government officials, the threat of litigation from investors may be too politically or financially costly to fight.

Implications for Clean Water

Treaty protections, as they have been interpreted by investment tribunals, have also allowed investors to challenge governments' ability to protect water resources from contamination. Romania, pressured also by environmental groups, did not issue necessary environmental permits for Gabriel Resources' Rosia Montana gold and silver mine, in part for fear of cyanide pollution, particularly given recent memory of the cyanide spill and subsequent environmental disaster in 2000, for which the European Court of Human Rights found Romania liable for failing to conduct an adequate EIA. Gabriel Resources filed a claim for \$4.4 billion in damages, contending that non-issuance of the environmental permit breached treaty protections.

On the other side of the Atlantic Ocean, Lone Pine, which holds permits for petroleum and natural gas exploration in the Utica basin in Canada, claimed \$100 million from Canada for a Quebec moratorium on fracking below the St. Lawrence River, in response to concerns about the impacts of fracking and other development activities on the water source. In Colombia, a series of cases amounting to almost \$1 billion were brought against the country after the Colombia Constitutional Court ordered the prohibition of mining activities in the Páramos (wetland) regions in 2016, in order to preserve an important source of the country's water supply.

Implications for Environmental Decision-making

Environmental impact assessments are a widely accepted and relied upon feature of licensing processes, to inform governments and other stakeholders of anticipated environmental impacts from projects seeking approval; EIAs are intended to guide decision making, including the gateway decision of whether or not to approve a proposed project and then whether and how to influence its design. While domestic institutions have pathways for challenging determinations made on the basis of an EIA, investors have used ISDS to bypass, or challenge the outcomes of, those domestic processes.

Bilcon, an American mining company, sought to develop a mining and marine terminal project in Canada, and was required to obtain various approvals from provincial and federal authorities. An expert panel assembled as part of the EIA to provide a non-binding opinion on whether or not the project should proceed recommended that the project be rejected in light of its anticipated impacts, including that the project was inconsistent with “core community values.” Nova Scotia and the federal government then rejected the project, stating that the mining project was likely to cause negative environmental impacts contrary to the Canadian Environmental Assessment Act. Bilcon filed a treaty claim, and the tribunal ruled in Bilcon’s favor, finding that the “advisory panel’s consideration of ‘core community values’ went beyond the panel’s duty to consider impacts on the ‘human environment,’” in violation of the NAFTA.

When Canada challenged the award in Canadian Federal Court, the presiding judge acknowledged that the decision raises “significant policy concerns,” including “its effects on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment process, and the potential ‘chill’ in the environmental assessment process that could result from the majority’s decision,” but stated that the Federal Court had a very limited scope to review the tribunal’s determination.

Implications for Representation

The extraordinary rights that ISDS confers on investors comes at an even greater cost to the rights of other stakeholders, including domestic citizens that are impacted by the investments. In Ecuador, Copper Mesa’s exploration concession

faced great opposition from the community, partly due to concerns of environmental impacts, and a lack of awareness regarding those impacts. Copper Mesa's response violated basic standards of decent corporate conduct, including hiring a private security force, which fired pepper spray and live rounds into crowds of protesters. In response to the escalating conflict at the mine site, Ecuador eventually revoked Copper Mesa's concession, citing Copper Mesa's failure to consult the community.

In light of Copper Mesa's egregiously irresponsible and aggressive response to the community, a group of citizens sued Copper Mesa and the Toronto Stock Exchange in Canadian courts, but the case was dismissed for lack of jurisdiction (notably, the case was also challenged domestically and through the National Contact Point [NCP] process). Copper Mesa, however, successfully sued Ecuador before an arbitration tribunal, which found in Copper Mesa's favor. The tribunal indicated that Ecuador's failure had been in siding with its own citizens and responding to the escalating domestic crisis, and ordered Ecuador to pay \$19 million to the company.

More recently, in Armenia, local communities protested the Amulsar Gold Project owned by Lydian International, because of concerns over the mine's environmental impacts on nearby lakes, mineral springs and agricultural land. Lydian threatened arbitration against Armenia after the project was temporarily shut-down due to protests. As in so many cases, the threat of arbitration seemed sufficient to change the government's mind; in August 2019, Prime Minister Pashinyan announced that mining could proceed, saying that the project posed no environmental threat.

Conclusion

In large part because of the growing number of cases that have successfully challenged public interest measures and awarded substantial damages to investors, governments and especially their citizens are starting to question the legitimacy of ISDS and its suitability for today's governance challenges. Research also suggests that in addition to undermining or discouraging important regulatory measures, the procedural and substantive aspects of ISDS can also exacerbate inequality and undermine the rule of law.

While not all investor claims are successful, it is clear that investors are bringing cases, often with the encouragement of law firms, in order to alter regulatory

outcomes or to increase the cost of regulation. Even the claim itself, before any damages are awarded, has resulted in regulatory chill.

Investment governance has a critical role to play in shaping investment flows, and their contributions to and impacts on sustainable development. Enough ISDS cases have illustrated the tremendous risks of putting enforceable investor protections at the heart of investment governance. Global investment governance needs to be redesigned for the 21st century, with people and the planet at the core.