Failure to Take Reasonable Environmental Measures as a Breach of Investment Treaty?

Peter A Allard v The Government of Barbados, PCA Case No 2012–06, Award, 27 June 2016 (Gavan Griffith, Andrew Newcombe, Michael Reisman)

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Keywords


Arbitral tribunals constituted under investment treaties have in recent years been the most active site for the adjudication of international law disputes with an environmental or natural resources component.\(^1\) Many cases have concerned claims by an investor regarding the host state’s refusal of a permit for the investor’s project on purportedly environmental grounds,\(^2\) or

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\(^1\) See generally Jorge Viñuales, ‘Foreign Investment and the Environment in International Law: The Current State of Play’ in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar, forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661970> accessed 1 April 2017 (noting in a recent survey which is not exhaustive some 114 investor-state disputes with an environmental component, more than half of which were filed since the year 2012, and all but 12 of which were filed since the year 2000); Daniel Behn and Malcolm Langford, ‘Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration’ (2017) 18(1) JWIT 14, 17–19 (utilising a narrower definition of environmental cases, resulting in a dataset of 49 concluded cases as at 1 October 2016).

environmental regulation of products produced by an investor. The Award in *Allard v Barbados*, rendered on 27 June 2016, is striking because the Tribunal determined the merits of a claim by the investor, Mr Allard, that the host state’s failure to take reasonable environmental measures destroyed the value of his eco-tourism attraction and accordingly violated several investment treaty standards.

Ultimately, the Tribunal concluded after a thorough examination of competing expert evidence that Mr Allard had not proved that any environmental degradation had occurred in the period between his initial investment in the eco-tourism attraction and his decision to close it. Furthermore, even assuming *arguendo* damage could be shown, the Tribunal found any such damage could not be attributed to Barbados’ conduct. On the contrary, Barbados was found to have taken reasonable measures to protect the investor’s environmental sanctuary. Thus a claim for breach of the full protection and security standard, which had drawn for interpretive guidance on Barbados’ obligations under environmental treaties, was dismissed.

Overall the Award is significant in highlighting that in investment arbitration, as in other areas of international adjudication, environmental cases require tribunals to evaluate detailed and often conflicting expert evidence on scientific and technical matters, and proving environmental harm remains difficult. The Award raises the possibility that, as a matter of principle, a state could violate its investment treaty obligations through a failure to take sufficient environmental measures, although such cases are likely to remain rare. The Award also highlights that investment treaty arbitration is focused on providing a remedy for investors who have suffered damage as a result of a breach by the host state of investment treaty obligations. Furthermore, claimants with non-commercial motivations may fail to qualify as having a covered investment, depending on the definition of investments within the relevant investment treaty. Thus investment treaty arbitration is unlikely to enable environmentally conscious investors to bring claims with an *erga omnes* aspect.

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The case concerns Mr Allard’s investment in the Graeme Hall Nature Sanctuary (the Sanctuary), located within a wider area of wetlands, the Graeme Hall Swamp. Between 1996 and 1999, Mr Allard acquired the land compromising the Sanctuary with the intention of developing an eco-tourism attraction.

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3 See eg *Chemtura Corporation (formerly Crompton Corporation) v Canada*, UNCITRAL/NAFTA, Award (2 August 2010).