

## The International Law Gaze: *Allard v Barbados*

### Dr. Alberto Alvarez-Jimenez, of the University of Waikato, on international investment disputes related to States' failure to enforce their environmental regulation

What does it happen if as a result, among others, of an alleged State's failure to enforce its environmental regulation, a foreign investor suffers significant losses due to the environmental deterioration provoked by the failure, argues that the failure constitutes a violation of its rights under an international investment agreement, and requests compensation from the host State? The award in *Peter A. Allard v the Government of Barbados* answers this and other related questions. (*Peter A. Allard v the Government of Barbados*, Permanent Court of Arbitration, PCA Case No 2012-06, 27 June 2016) (*Allard v Barbados*). Although the investor lost the case, there are lessons to draw for environmental authorities and for New Zealand investors abroad.

#### The Facts and Claims in *Allard v Barbados*

Mr. Allard, a Canadian citizen and philanthropist, bought 34 acres of land in the Caribbean island in 1996, 1998 and 1999. The land, called the Sanctuary, was located in the western part of 240 acres of wetland called the Graeme Hall Swamp (the Swamp) and had red and white mangroves, a forest, and a lake and pods connected to the sea by a canal. The latter had a gate at the end, the Sluice Gate, which controlled the flow of water between the ocean and the wetlands. (at [33] – [34]). The Graeme Hall Swamp had been designated as an “area for major recreational activity and/or open space” by Barbados' law in 1986. (at [35]). Barbados granted the investor permission to develop his land subject to the submission of an Environmental Management Report. It should include a comprehensive drainage plan of the swamp. (at [37]). He did it and was advised by the requesting authority that its recommendation to Barbados' Ministry of Finance was that the Report was satisfactory. (at [40]). On this basis, Allard began construction of the Sanctuary. It included migratory bird ponds, aviaries, boardwalks, observation decks, offices and a gift shop. (at [41]). The Sanctuary opened to the public in 2004. (at [42]).

Problems started earlier for Mr. Allard. In 2005, there was a failure of the Sewage Treatment plant, operated by Barbados, which led to the discharge of raw sewage into the Graeme Hall Swamp. (at [43]). Three years later, in 2008, Barbados reclassified an area situated to the north of the Sanctuary. Before, it had been for agricultural and recreational uses, but new zoning legislation had determined that it could be developed for urban housing and had an urban corridor. (at [45]). Moreover, and according to Allard, Barbados had mismanaged the Sluice Gate through its actions and omissions, had not mitigated the significant degradation of the environment of the Sanctuary thereby negatively affecting its tourist experience. Finally, in his view, Barbados had failed to enforce the Marine Pollution Control Act. (at [50] and [239]). For these reasons, Mr Allard closed the Sanctuary in March 2009. For these reasons, Allard was of the view that Barbados had violated, mainly, the fair and equitable treatment obligation, and the obligation to accord full protection and security provided for in the Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investment. (BIT). (at [51]).

Barbados rejected the claims. In its view, Allard had closed his Sanctuary for business reasons, there had not been environmental degradation from the time the first investment was made in 1996 to the closure as an ecotourism attraction in 2009 ( the relevant period), and even if a degradation took place is was caused by external causes. Lastly, Barbados argued that it had taken appropriate action for the protection of the environment in the Sanctuary. (at [52]).

## **The Tribunal's Decision in *Allard v Barbados***

### **Fair and Equitable Treatment (FET)**

The relevant provision of the BIT is Article II(2): “Each Contracting Party shall accord investments or returns of investors of the other Party: (a) a fair and equitable treatment in accordance with principles of international law.” (at [169]). Allard stated that the FET protects investors’ reasonable expectations made by the host State on which investors relied to their detriment. (at [170]). Specifically, he argued that Barbados represented to him that it would “uphold its environmental policies, particularly those that reflected a commitment to conservation and protection of the biodiversity of the Sanctuary”. (at [172]) and maintain the Sluice Gate. (at [172]). *Allard v Barbados* was not the first award dealing with such a claim. A previous decision but under a different international investment agreement, the North American Free Trade Agreement, is *Gami Investment, Inc. v. The Government of the United Mexican States*, Final Award, 15 November 2004, at [65] – [74]).

The Tribunal in *Allard v Barbados* (the Tribunal) determined that a violation of Article II(2) in these circumstances required three conditions. (i) There was a specific representation by Barbados; (ii) Allard relied on it when making its investment; and (iii) Allard’s reliance was reasonable. (at [194]).

According to the Tribunal, the key conceptual issues were whether the State’s terms and context of its statements “support the expression of an intention to create an obligation for the State” (at [199]); and whether the investor was reasonable in relying on the statements. (at [199]). The threshold is certainly high.

Allard argued that the representation has taken place, first, in the 1986 National Physical Development Plan of 1986 (the 1986 Plan) where Barbados expressed its “intention to protect areas of special vegetation including ... Graeme Hall (Swamp).” and where it designated the latter as an area for major recreational activity. (at [200]). The Tribunal disagreed. The Plan was an expression of general policy and there was no indication that the protection of the area would always be achieved through the said designation. (at [200]). Nor was there any specific comment to the investor that the 1986 Plan would not be changed in relation to the environmental protection of the Graeme Hall Swamp. (at [200]).

The Tribunal proceeded with the assessment of a statement made to the investor by the Deputy Prime Minister of Foreign Affairs and Tourism in a personal meeting in 1996. (at [204]). The only evidence of the statement was a letter sent by Allard to the official, where the former expressed: “I am comforted

by your emphatic assurances that yourself personally and the government of Barbados wish the project to continue under the auspices of private enterprise ... I appreciate your ... comments that we will be allowed to carry out this (project) without unreasonable restrictions imposed on us other than in the general context of our main themes of preservation, rehabilitation and sustainability.” (at [204].footnote 346). The Tribunal declared, as one of the reasons to reject the argument, that the statement was not specific enough to create a legitimate expectation.

Allard did not raise an issue that could have strengthened the value of his letter: there was no evidence of a reply by the Deputy Minister. Could the fact that the official did not controvert Allard’s communication mean that the official agreed with his understanding of what had been said in the meeting? In public international law there is concept, acquiescence, that exceptionally plays a role on the adjudication of inter-State disputes. One of its expressions is silence. The International Court of Justice has stated in this regard that “[S]ilence may also speak, but only if the conduct of the other State calls for a response”. (*Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008. At [120] – [121]). It is worth noting that neither the investor nor the Tribunal frame the Deputy Minister’s lack of response as an element that could be part of a representation to the investor. The letter did not call for any response by Barbados. However, the interactions between acquiescence and reasonable expectations should not be dismissed. A representation to an investor might result from a single act but also from a set of actions and omission by the host State, as the award in *Bilcon v Canada* reveals. (*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Government of Canada*, Award on Jurisdiction and Liability, 17 March 2015, at [447] – [449]). A similar letter going without an answer in a more varied context of actions and inactions might be perceived differently by an investment tribunal.

Allard also sought to prove that statements made in 2003 by another high ranking official constituted a specific representation. The Tribunal rejected the argument when it noted that the official had always made clear that the issue in question was beyond his scope of authority. (see *Allard v Barbados* at [207]). Representation made by external consultants hired by Barbados were also not taken into consideration either, since - the Tribunal rightly expressed - external consultants are not organs of States exercising public authority. (at [206]). A limited room for a potential representation was left, though, open: the event in which the State represents to the investor that it will follow the external consultant’s recommendations. No representation of this nature was made by Barbados. (at [206]).

The Tribunal concluded that Barbados had not created any expectation regarding the environmental protection of the Sanctuary (at [208]). Likewise, the Tribunal did not find any evidence in the sense that Barbados had made representations to the investor that it would operate the Sluice Gate in a way that would protect “the interests of Mr Allard in the management of the Sanctuary” (at [213]).

But, in addition, the Tribunal proceeded to assess whether Allard had effectively relied on any of the representations when making the decision to invest in Barbados. The Tribunal stated that he had invested in the island irrespective of any representation by Barbados (at [222]). It concluded: “Mr

Allard's investment was (not) conditional ... on any general expressions of positive environmental policy" (at [223]).

The Tribunal, though, made two clarifications: (i) An investor who has already made an investment can still claim violation of legitimate expectations when the host State subsequently makes specific representations to the investor and the latter makes additional investments in reliance of the posterior representations. Damages can be claimed only regarding the later in time investment. (at [218]). (ii) The investor has to offer evidence of the reliance, an issue Allard disregarded. (at [221]).

### **Full Protection and Security (FPS)**

This obligation is provided for in Article II(2) of the BIT: "Each Party shall accord investment or returns of investors of the other Contracting Party: ... (b) full protection and security." Allard deemed that Barbados had violated this obligation by not protecting the Sanctuary from environmental damage despite the notices he had sent to the relevant authorities, by his offer of economic support to repair the Sluice Gate, and by failing to enforce environmental law, in particular, the Marine Pollution Control Act, and. (at [232]).

The Tribunal stated that FPS did not impose an obligation of strict liability but on due diligence or reasonable care, and did not imply that the host State should take the actions that investors request. (at [243] – [243]). The Tribunal found that Barbados carried out reasonable actions to protect the environmental aspects of the Sanctuary (at [242]). Among them were the creation of the Graeme Hall Stewardship Committee in 2003 to investigate and coordinate the government's actions in the Swamp. The Committee promptly reacted to the spill in 2005, ensured that land development applications took into account the protection of the environment at the Swamp and precluded the establishment of polluters in its vicinity.(at [245] – [246]). In addition, the Tribunal found that putting in place a solution to the lack of operation of the Sluice Gate, which was also due to some physical changes in the surrounding beach, was not an easy matter for Barbados. (at [247] - [249]).

The Tribunal proceeded with the claim that the failure to enforce the Marine Pollution Control Act against the sources of contamination of the Sanctuary constituted a violation of the FPS obligation. The Act provided for that "releasing any pollutant into the environment in excess of applicable standards" was a criminal offence. (at [251]). The claim was equally rejected: the investor did not identify the sources of pollution that constituted offences and did not submit evidence of having requested Barbados to enforce its legislation. (at [252]).

The Tribunal's assessment of the latter claim is worth some elaboration. It is in the present author's view a wise approach. A request for enforcement by an investor, properly worded, could put the environmental authorities on notice of the need to respond and to eventually prevent or reduce damages to the investor. Future international litigation might likely be avoided for the benefit of all. It is, on the other hand, efficient to charge the investor with the burden of requesting the enforcement since the latter might be in a good position to detect the existence of the pollution and of its causes. To be sure, if no action is taken, the investor's claim under this circumstance is stronger: the State

was given the opportunity to act by the investor, and continued unjustified inaction might well fall under the confines of the FPT or FET clauses in the applicable BIT. The word “unjustified” is also relevant. To be sure, States should be able to explain the reasons for the lack of enforcement after it has been requested by the investor. If there is a reasonable justification, the lack of enforcement would not be regarded as a violation of the FPS.

### **The Existence of Environmental Deterioration**

Foreign investors whose investments’ success depends on certain environmental conditions should learn some lessons from the facts and their assessment in *Allard v Barbados*. In effect, in litigation due to the alleged failure to enforce environmental regulation or to carry out other actions by the host State, evidence of the environmental deterioration is central for the claiming investor. If there is none, no damage can be claimed to exist even if the failure to enforce is proven.

Demonstrating the decline requires to set a term of comparison and dates for the comparison. The Tribunal said in this regards: “The relevant period of the alleged environmental degradation for consideration is from the Claimant’s initial investment in Barbados in 1996 ... to the closure of the Sanctuary as an ecotourism attraction in 2009 ...” (the relevant period) (at [85]).

The discussion on this topic is highly technical in the award and it is not necessary to enter into much detail here. It suffices to say that the investor identified four main criteria that illustrated the environmental degradation of the Swamp. The first was the quality of its water. Measures of this quality took place, with different scopes, in 1986, 1987, 1993, from 2001 – 2003, and the investor did it for the first time in 2010, this is one year after the closure of the attraction. Other studies carried out by Barbados covered 2006 – 2015. (at [90]). As can be seen, there was no evidence regarding the environmental condition of the Swamp in 1996 and there was no much about it in 2009. The comparison was also difficult because the quality of the water had an inter-annual variation. For these reasons, the Tribunal concluded that although the quality of water had indeed declined from 1986 to 2015, the investor had failed to demonstrate that the deterioration took place during the relevant period, 1996 – 2009. (at [102]).

Allard also argued that Barbados’ inaction had led to a reduction in the health of the mangroves due to the deterioration of the quality of the water. There was no evidence indicating that the mangroves were in danger of extinction when the investor closed the Sanctuary, said the Tribunal. (at [115]).

A third criterion was the diversity and health of fish. The evidence submitted by the investor used different methodologies, therefore the results were not comparable, and was not fully related to the relevant period. The Tribunal concluded that the investor had not proven the environmental deterioration in question. (at [122]).

A fourth criterion was the diversity and numbers of birds. The evidence submitted by the investor was based on the records kept by an investor’s employee, who walked through the Sanctuary during the

years 2005 – 2009. The records covered only half of the year and at least once just three months. Comparison was then difficult and, in addition, the tribunal found his evidence unreliable. (at [129]-[130]).

The Tribunal determined that Allard had not even demonstrated the existence of an environmental degradation in the Swamp. (at [139]). It is worth mentioning that not every level of deterioration was sufficient. He had also to prove that the level was of such degree that it had led to his decision to close the Sanctuary. He fell short. (at [139]).

This conclusion would have been enough for the Tribunal to dismiss the claims: no degradation = no damage to the investor. However, the Tribunal proceeded with an evaluation of the role of Barbados' inactions regarding the operation of the Sluice Gate as a cause of the deterioration of the environment in the Swamp. The topic is worth an exploration here, because this discussion can take place in other investment disputes related to the environment.

Allard claimed, as was said, that the mismanagement of the Sluice Gate had contributed to the degradation of the Sanctuary. (at [152]). The Gate was the only overland way in which saline waters entered the waters of the Sanctuary. (at [155]). The fact that the gate was not operating, the investor argued, had prevented the sea waters from entering the Sanctuary and from producing a favourable effect on its waters. (at [152]). The Tribunal found that this was not actually the only way: subsurface water coming from the sea also played an important role in keeping the quality of the water in the Sanctuary. (at [158] – [161]). The conclusion then was that the mismanagement of the Sluice Gate could not be a cause of the reduction of the salinity of the water, even if the latter had been proven. (at [164]). The point to highlight is that the conditions of certain environmental phenomenon might have a variety of causes, some are due to human intervention in the form of States' actions or inactions, and others that are produced by nature. Investors should be aware of this complexity: lack of the proper State action does not mean that environmental degradation will necessarily ensue.

### **The Morals in *Allard v Barbados***

There are morals for foreign investors in industries that depend on the preservation of a certain environmental *status quo*. Few fully prepare themselves years in advance for litigation against host States, and Allard is one example. However, something akin to “environmental due diligence” should be performed. Investors should identify the environmental factors that are relevant to the success of their investment and have a precise and scientific measurement of their conditions at the time the investment is made, and during the investment. They should also have a clear scientific information about the state of the environmental degradation based on the same methodologies at the time the investment is no longer viable. By doing this, foreign investors, first, can offer evidence of the existence and extent of an environmental degradation during the relevant period, to use the term used by the Tribunal. This evidence can be contested by the respondent State, since the same phenomena might be assessed differently based on the use of diverse scientific methods and data. But this is part and parcel of litigation involving scientific matters. Finally, investors unsatisfied with the level of enforcement of environmental laws should not remain passive and, instead, actively ask for the given enforcement by the host State.

There are also some morals for host States: lack of enforcement of environmental legislation adversely affecting foreign investors might not easily reach the level that brings about state responsibility under the FET. Absent a specific and unequivocal commitment to enforce the legislation, the threshold of the actions and statements from which such commitment can be inferred is high.

However, overconfidence in the approach taken in *Allard v Barbados* might not be entirely wise. Investment tribunals still can declare the existence of representations from a varied set of actions from different officials and different points in time, even though at no moment was there a clear and unequivocal representation to the investor. Canada learned this lesson in *Bilcon v Canada* in connection with an environmental project. (*Bilcon v Canada*, at [447] – [449]). It then makes a lot of sense for States to narrow this risk. Provisions such as 9.6.4 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership do just that. It sets forth in connection with the FET obligation: “For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”

Lack of enforcement as a violation of FPS clauses is slightly different: it depends, among other factors, on whether or not the investor has asked for the enforcement. If it does not, the lack of enforcement will not easily prompt State responsibility. If the investor has, on the contrary, asked for the enforcement, the situation is dissimilar and other facts will determine the existence of a potential violation of the FPS obligation. This obligation is complied with when a host State takes reasonable measures. Thus, if it has carried out some enforcement of its environmental regulation, not necessarily to the level required by the investor, the risk of violation diminishes. To be sure, the absence of any enforcement despite the investor’s request will require a justification to prevent a violation of the FPS. Obviously, even this absence is not in itself dispositive: the investor will still need to prove that the omission is a cause of the environmental degradation that adversely affected the investment.

### **In A Nutshell**

The odds of investment litigation in which the lack of enforcement of environmental legislation by the host State is an important component are not in the foreign investors’ favour. Those who have not carried out environmental due diligence at the time of the investment, during, and at the end face an uphill battle to prove the environmental degradation. But even if they have, the usual texts of FET and FPS obligations, if interpreted as in *Allard v Barbados*, do not augur much for claimant investors.

This is, obviously, not to suggest that such general approach creates incentives for the lack of enforcement of this regulation, or that States should not carry out such enforcement. The point is narrower: States do not face a high risk of compensating foreign investors in these circumstances. Exceptions may, though, exist.

### **Addendum: The Issue of Costs**

Unless you are a party, international investment awards are not like novels in the sense that you will read them until the last line. With the former you do not have to: you know the end of the “story” progressively. Sometimes, though, it pays off to go up to the final page. *Allard v Barbados* is one of those cases. The facts and the Tribunal’s decision on costs are worth highlighting and investors should take note of it.

Article 40 of the Rules of the United Nations Commission on International Trade Law (UNCITRAL) sets forth the general rule regarding the allocation of costs of arbitration: “the costs ... shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”

Barbados mounted a formidable legal defence against Allard. The Tribunal showed “mercy” for the philanthropic investor and made a moderate application of the foregoing provision. Indeed, Allard’s damage claim was for US\$29 million (at [48]), and his legal costs were US\$940.000. Barbados’ legal costs were US\$5.2 million, almost 20% of the claim. Allard’s legal team was two lead counsel and 1 legal clerk. Barbados’ was 6 lead counsel and 10 other lawyers. (at [283]). To allocate costs, the Tribunal recalled and agreed with the award in *Libananco v. Turkey*: “A party with a deep pocket may have its own justification for heavy spending, but it cannot expect to be reimbursed for all its expenditure as a matter of course simply because it is ultimately the prevailing party”. (at [306]). On this basis, the Tribunal capped Barbados’ recoverable professional costs at less than half: US\$2.25 million. (at [313]).

“There is no little enemy” is the message to investors considering litigation against host States.