



Jura Novit Curia Principle as a Basis of Environmentalization of the ICSID

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Abstract

The evolution of modern international adjudicatory methods and the adoption of alternative legal mechanisms for the resolution of international disputes, such as arbitration, have endowed adjudicatory bodies with greater flexibility, innovation, and agility. While this flexibility appears justifiable and legitimate on a surface-level evaluation, a deeper examination reveals potential challenges. On one hand, investors may avoid raising environmental considerations to escape liability for environmental harm. On the other hand, host states may, in pursuit of economic development and to attract foreign investment, refrain from emphasizing environmental concerns during dispute settlement procedures. In such circumstances, arbitral tribunals must expand their jurisdictional scope by applying the principle of *Jura novit curia* (the court knows the law) to uncover the truth and apply appropriate laws. The theoretical basis of this principle in international arbitration rests on four major schools of thought: contractual, judicial, independent, and hybrid theories. The contractual theory emphasizes the primacy of party autonomy, while the judicial theory challenges the passive role of arbitrators. The hybrid theory seeks to strike a balance between these two approaches, whereas the independent theory views arbitration as a self-contained mechanism, distinct from domestic and international legal systems. Strict adherence to any of these theories could lead to significant issues. For instance, under the contractual theory, arbitral tribunals may prioritize the parties' agreement over substantive truth. This could result in tribunals ignoring evidence of deviation from the truth to avoid the risks of annulment or jurisdictional overreach. Such mechanical application of procedural rules could undermine the tribunal's obligation to uncover the truth, particularly when disputes involve environmental concerns. This issue becomes especially significant in cases where the disputed matter entails environmental dimensions. In such situations, it is imperative for dispute resolution bodies, particularly the International Centre for Settlement of Investment Disputes (ICSID), to strengthen and maintain their oversight of environmental considerations during both the pre-award and post-award stages of investment arbitration. In the context of bilateral or multilateral investment treaties, environmental concerns and preventive measures often receive insufficient attention or are merely addressed as general principles. This gap



creates an environment conducive to the violation of environmental rights and the infliction of environmental harm. It is therefore essential to consider the basis for applying this principle within the framework of the ICSID Convention. The second sentence of Article 42(1) of the Convention implicitly reflects the principle of *Jura novit curia*. In essence, this provision symbolizes a blend of flexibility and certainty: flexibility is achieved by granting the parties maximum autonomy in selecting the applicable law (as stated in the first sentence), while certainty is ensured by obligating the tribunal to identify and apply the appropriate law even in the absence of such a choice (as outlined in the second sentence). When an arbitral tribunal is confronted with a claim involving environmental issues, its initial task is to ascertain the facts within the framework of relevant legal instruments, such as investment treaties, investment agreements between the host state and the investor, and the governing law chosen by the parties. At this stage, it may become evident that neither the contractual provisions nor the treaty terms relied upon by the parties specify clear environmental standards. Additionally, the parties may deliberately avoid invoking regulations related to environmental protection. This study seeks to guide arbitral tribunals and adjudicatory bodies in bridging the gap between the parties' intentions and the consideration of environmental concerns. It advocates for the development of a "green arbitration" approach within ICSID proceedings, where tribunals adopt a proactive stance in assessing and addressing environmental issues. By reinforcing the application of the *Jura novit curia* doctrine, arbitral tribunals can enhance their jurisdictional mandate, particularly in ICSID disputes, thereby ensuring both procedural and substantive protection of environmental rights. This approach would also bolster the role of arbitration as a legal institution. To promote a proactive approach, ICSID, as a reputable forum for resolving investment disputes, possesses the capacity to make decisions and develop precedents on this issue. This objective can be achieved through two avenues. The first approach involves reflecting the decisions of arbitral tribunals operating under ICSID in the form of issued arbitral awards. As evidenced in the award issued in the case of *RSM Production Corporation v. Grenada*, the ICSID Annulment Committee, when examining whether the principle of *Jura novit curia* is discretionary or mandatory, referred to precedents such as the *Fisheries Jurisdiction and Military and Paramilitary Activities* cases decided by the International Court of Justice. The Committee considered itself obligated to apply the said principle. Subsequently, in the case of *Enron Corporation v. Argentina*, the ICSID Annulment Committee annulled the arbitral award due to the tribunal's failure to invoke the principle of *Jura novit curia*. This further reflects ICSID's efforts to establish precedent in favor of applying this principle. The second approach entails incorporating broader jurisdictional powers for arbitrators within the ICSID Arbitration Rules and Regulations (2022) or including such powers in arbitration agreements at the time of their conclusion. Achieving the latter approach requires time and a heightened awareness among international law stakeholders of the importance of environmental protection and its preservation.

Keywords: *Jura Novit*, Environment, ICSID, Investment, Arbitration.



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