Environmental Protection under Bilateral Investment Treaties

By:

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1. A brief historical background to Bilateral Investment Treaties

In the 18th and 19th Century foreign investments were intricately intertwined with colonization.[1] Because there was overlap between capitals exporting and importing countries under an integrated legal system of colonization, the need to have a separate legal regime for protection of foreign investors was not pressing. In those non-colonized countries, protections were extended in the form of diplomacy. Whenever this failed, covert and overt use of power or force were employed.[2] However, in the aftermath of colonization this option was not visible at best and impossible at worst, especially with the coming into effect of the United Nations Charter, which prohibits use of force.[3] This situation compelled capital exporting countries to look into a comprehensive multilateral investment agreement. Nevertheless, such multilateral agreement was never realized partly because of opposition by developing.[4] Therefore, the only option left was concluding bilateral investment agreements (hereinafter referred as BITs).

2. Environmental provisions under BITs

From the perspective of developing countries, the main purpose of BITs is to attract FDI[5] whereas from capital sending perspective it is an effective tool to secure investment protection.[6] However, in recent times, in some BITs environmental protection is considered as one of the policy justifications behind BITs. For instance, under the preamble[7] of the USA Model BIT, the protection of health, safety and the environment is identified as one of its objectives. Currently, there is intense competition between and among states, especially developing countries, to attract FDI. This in turn makes them to enter into a race-to-the-bottom by providing a huge concession one of which is by weakening environmental regulations to attract the scarce resource available to foreign investors. In recognizing this, some BITs obliged contracting parties not to provide any waiver or derogation from environmental regulation.[8] National treatment is one of the cornerstone of any BIT.[9] The main purpose behind this standard of treatment is to create a plain field between foreign investors and domestic investors.[10] However, in some BITs, any discriminatory measure a state takes to enhance environmental protection will not be considered as the violation of this principle. Thus, foreign investors would not be expected to object to financial assistance or support that a government extend to its investor to enhance environmental objectives.[11] Investors have contested measures to protect environment as indirect expropriation.[12] Recognizing this, in some BITs it is indicated that any measure by the host state with the view to enhance environmental protection shall constitute neither direct nor indirect expropriation.[13] In some recent treties, this trend has been counteracted with provisions to the effect that any measure taken to protect and conserve the environment including all living and non-living natural resources considered as an exception.[14] The South African Developmental Community (SADC) Model BIT also requires any investment before being established to conduct environmental and social impact assessment which should be in line with international finance corporation’s performance standards.[15] Moreover, it provides that the assessment should be public and accessible to local communities and for any party potentially affected by the investment.[16] Quite interestingly, Investment for Sustainable Development(IISD) Model Agreement states that both the investor, to their investment and the host state should adopt the principle of precaution[17] for

their environmental impact assessment.[18]

3. **Environmental cases under international arbitration tribunal**[19]

One of the cases which involves BIT and the environment *Techical Medioambientales Tecmed*, *S.A v The United Mexican State*.[20] In this case, the claimant won a bid in Mexico to access land and other assets to operate a hazardous waste landfill in one of the provinces in Mexico, Hermosillo. However, the government of Mexico refused to renew its license by invoking environmental concerns. The Arbitral Tribunal after reading Article 5(1) of the BIT between Spain and Mexico[21] cumulative with Article 31 of the Vienna Convention on the Law of Treaty, concluded that if any regulatory measure affects the economic interests of investors' it will tantamount to violation even if such regulation are beneficial to society as a whole.[22] The Tribunal by cross refer to previous decision held that:[23] Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains. (my underline) Although the Tribunal in a case between *Compania Del Desarollo De Santa Elena* v *The Republic of Costa Rica*,[24]acknowledged the fact that taking of any measure for environmental protection mayt constitute a public purpose, it held that it does not affect either the nature or the measure of the compensation due for investors. The Tribunal in this case made it clear that "the purpose of protecting the environment for which the property was taken does not alter the legal character -…. the international source of obligation to protect the environment makes no difference."[25](underline supplied) Although there are instances whereby the Tribunal give recogniztion for environmental concerns of the host state[26], generally Arbitral Tribunals are very consistent and investor friendly in their decisions. They even deliberately refuse to extend other rules of interpretation which might jeopardize investors' rights. For instance, in a case between *Metalclad Corporation v. The United Mexican States*[27] the Tribunal held a host State's refusal to grant permits on the part of government by invoking environmental concerns was inappropriate since environment does not fall under the exceptions. The Tribunal in this case could possibily apply the

dynamic rule of interpretation which state that any law should be interpreted in line with the current context and dynamic.[28] It seems those arbitrators only concerned about the investment and trade impacts and implications of BITs than environment. This leads one author, after examining main cases, to conclude that “they[the arbitartors] do not indicate any particular sensitivity to environmental considerations.”[29]

4. Conclusion and the way forward

Although developing countries are very eager to attract FDI through BITs, for most parts, they deliberately water down the environmental concerns. However, recently we have witnessed the incorporation of environmental standards and provisions in BITs. This ambitious effort however is usually frustrated by decisions of international arbitration tribunals. To curve this, the writer of this piece recommends the following measures:

1. Establish separate international environmental court: - for varity reasons the existing international dispute settlement mechanisms, especially arbitration, are not fit for environmental disputes. They either for lack of expertise or do not understand the typical nature and sensitivity of environmental issues, and therefore interpret BITs without regard to environmental issues.
2. Provide an ouster clause in BITs: - one of the possible way to minimize the wrong interpretation of environmental provisions in BITs by arbitration tribunals is by designating national courts with jurisdiction to decide cases involving the environment in the investment context and ousting arbitrators from having authority to decide such cases. As per the doctrine of the margin of appreciation[30], national courts are in a much better position than an international tribunal to decide environmental issues.
3. Insert compensatory clause: - the existing environmental provisions in BITs are toothless. To cure this, there should be a clear provision which compel investors to compensate for any environmental damage they may cause in relate to their investment activities.
4. Post-investment provisions: - in most BITs, there is a provision which requires an environmental impact assessment before the investment taking place.[31] However, BITs should also adopt a follow-up mechanism by way of reporting compliance and subjecting investors to maintain an

environmental management system.

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[1] M. Sornarajah The international law on foreign investment 3rd ed. (2010) Cambridge University Press at 208.

[2] As above.

[3] Article 2(4) of the UN Charter.

[4] Developed nations were of the opinion that there is customary international law governing treatment of aliens whereas developing countries believe there is no such standard and It's up to every state to treat the investor as per its domestic law.

[5] A.R. Johnson, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa," 59 Emroy Law Journal at 919 (2010)

[6] T Allee and C Peinhardt, "Evaluating three explanation for the design of bilateral investment Treaties," 6:1 Word Politics at 58 (2014)

[7] Although the preamble is not binding, it serve as an indicate the context of the agreement and is relevant for interpretation purpose see Sornarajah (n 1) at 190.

[8] For instance, Article 12(2) of the USA model BIT.

[9] Its any obligation which entitles each contracting party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than it accord to its own inventors. See OECD Draft Consolidated Investment Law.

[10] R Al-Louzi A Coherence review of investment protection under bilateral investment treaties and free trade agreement (2015) 12 Manchester Journal of International Economic Law at 279.

[11] For instance Article 4(5) of Indian Model BIT.

[12] Expropriation is compulsory taking of property which can be either direct or indirect see AB Hammond Expropriation(1955) 3 Proceedings of the

Australasian Institute of Mining Law at 18.

[13] This is recognized under Article 5(4), Annex 2(4)of Asia Comprehensive Investment Agreement and Annex B 4(b) of the Indian and USA Model BIT.

[14] Article 16.1(v) of the Indian Model BIT.

[15] Article 13(1) of SADC Model BIT.

[16] Article 13(3) of SADC Model BIT.

[17] As per Principle 15 of Rio-Declaration it means despite the absence of scientific evidence, the state should postponed a project the potential impact of which is a serious threat or irreversible damage the environment.

[18] Article 12(d) of IISD Model International Agreement on Investment for sustainable development.

[19] I only pick some of the cases which I think exhibit the biasness of arbitrators to investors at the cost of environment.

[20] ICSID Case No. ARB(AF/0012)between Techical Medioambientales Tecmed, S.A v The United Mexican State. The full decision is available at https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf(accessed 1 December 2019).

[21] Article 5(1) state that 'Nationalization, expropriation or any other measure of similar effects ….which may be adopted by the authorities of a Contracting Party against investments in its territory made by investors from the other Contracting Party…(my emphasis). This provision is taken from the Tribunal decision at 20.

[22] As Above Para. 121.

[23] As Above.

[24] ICSID Case No. ARB/96/1 Compania Del Desarollo De Santa Elena v The Republic of Costa Rica. The full decision of the Tribual is available at https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf(accessed 1 December 2019).

[25] As above Para. 71.

[26] This is the case between Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/05(Decision on reconsideration and award) The full version of this decision is available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C300/DC9892_En.pdf (accessed 16 December 2019)

[27] ICSID Case No. ARB (AF)/97/1 Metaleid Corporation v The United Mexican States. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 2 December 2019).

[28] As Above Para 86.

[29] P Sands Litigating Environmental dispute: courts, Tribunal and the progressive development of international environmental law(2008) Global Forum on International Investment at 10.

[30] For more information on this please see K Henrad, A critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to the Rights of a Traditional Way of Life and a Healthy Enviroment: A call for an alternative model of International Supervision(2012) 4 The Yearbook of Polar Law.

[31] For instance Article 10.6(ix) of the Indian Model BIT

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