RESTRUCTURING INTERNATIONAL INVESTMENT ARBITRATION IN SYNERGY WITH ENVIRONMENTAL LAW: TOWARDS GREEN INVESTMENT

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ABSTRACT

The relational dynamics between investment arbitration and environmental law have been a subject of discussions among the legal fraternity incessantly. The absence of precedential value in International Investment Arbitrations (hereinafter referred to as 'IIA') and umbrella defence mechanisms creates a vulnerable situation for host states pertaining to environmental concerns. Deliberations in this regard have been initiated with *Methanex* v. *USA* and *Myers* v. *Canada.* Researchers endeavour to analyse counterclaims in arbitration decisions in *Roussalis* v. *Romania*, *Burlington* v. *Ecuador*, and *Perenco* v. *Ecuador*. The fear of regulatory chill wherein the developing countries restrain from using regulatory measures for its citizens due to the fear of incurring heavy compensation liabilities against large powerful MNCs also creates a risk in the efficient balancing of seemingly bipolar environmental and investment concerns. The wide gap now in existence, in balancing investment agreements with environmental concerns requires IIAs to be restructured in ways that environmental jurisprudence can be incorporated in public policy concerns through instrumental IIA clauses.

Keywords*: International Investment Arbitration, Environment Law, Bilateral Investment Treaties, Green Investment*

I. Introduction

THE INTERPLAY between Investment Arbitration and the environment had been a subject matter of widespread debates and discussions over many years. International Investment is

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indispensable for the development of any country as well as for sustaining economic growth but when there is a dispute between the investors and the host state, the ambit of investment arbitration comes into play which operates as a mechanism ensuring transparency and efficiency in addressing investment disputes between the host state and the investors. This mechanism of dispute settlement is handled by independent and qualified investors in accordance with the mutually agreed terms in an investment agreement generally in the form of Bilateral Investment Treaties (BIT), Free Trade Agreements, or Energy Charter Treaties. Sometimes other instruments may also be used for the purpose such as domestic laws of the host state or the mutually agreed independent investment agreement between the host state and the investor. In order to promote the ambit of free trade, the developing countries are always found at the receiving end, forced to compromise the principles of sustainable development giving due emphasis to environmental protection along with economic development. The debate centred around this area is often focused on the aspect as to whether a country can improve its environmental standards through Investor State Dispute Settlement mechanisms specifically designed to cater to this aspect.[1]

The Charter of Economic Rights and Duties of States, 1974 pertinently lays down that the state has "full permanent sovereignty, including possession, use, and disposal, overall its wealth and natural resources".[2] Environmental law instils its foot into legitimate state concerns and public policy responses directed to these concerns. Thus, environmental laws are closely integrated with the country's laws. They are very well respected and enforced regularly by the country's legal mechanism. International investment agreements on the other hand are based on the internationally accepted standards according to the International Centre for Settlement of Investment Disputes (*hereinafter* 'ICSID') directives or according to the often 'mutually compromised' standards agreed upon by the foreign investors and the host states and to whom the tilt is greater is often disputed. Environment law and Investment law can be categorized as two branches that have conflicting perspectives regarding the sovereign state's claim over natural resources. The international environmental law perspective focuses on the equitable sharing of resources, the investment arbitration perspective focuses on the relinquishment of certain sovereign rights through Bilateral Investment Treaties (BITs) and investment

[1] Rudolf Dolzerand and Christoph Schreuer, *Principles of International Investment Law-Nature, Evolution, and Context of International Investment Law* (Oxford Publications, London, 2008).
[2] UN General Assembly, *Charter of the Economic Rights and Duties of States*, GA Res 3281(XXIX), GAOR, UN Doc A/Res/39/163 (December 12, 1974), *available at*: https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf (last visited on Nov. 1, 2021).

agreements attracting FDI. It is a recent trend as seen in Columbia's Model BIT, 2017 which specifically incorporates a reaffirmation to uphold investment and policy measures in accordance with the Environmental standards.[3] A redesigned BIT that specifically orchestrates its clauses to integrate both environment and investment concerns could be more of an initiation stage for the future global environmental standards included in treaties.

From recent instances, it could be said that non-commercial issues have also become an essential part of investment arbitration in implementation as well as development stages. The point which the researchers would like to put for through the paper is that if investment tribunals permit the states to bring counterclaims against investors regarding environmental aspects, it would encourage the investors to follow environmental standards and norms.[4]

II. Analysing the legal perspective

Tracing the History

The disputes have mainly happened when the environmental policies of the government have negatively impacted the economic aspects of the investor. In these cases, there exists a situation of direct conflict between the government policies and investor requirements with regard to assets.

The bilateral investment treaties and provisions of regional trade agreements provide the basis of legal claims between state and investors by laying down the state's prerogative to arbitrate.[5] So, in most cases, the analysis of the text of investment agreements is the best alternative to decide between foreign investment and environmental concerns regarding natural resources. A close observation of the international investment treaties would reveal the fact that most of the BITs don't contain environmental concerns. However, such references could often be found in Free trade agreements.[6] Environment concerns in BITs became more prevalent after the 1980s.[7]

[3] Columbia Model BIT 2017, *available at*: https://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx (last visited on Aug. 22, 2021).
[4] Kate Parlett & Sara Ewad, "Protection of the Environment in Investment Arbitration – A Double-Edged Sword" *Kluwer Arbitration Blog,* 2017, *available at:* http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ (last visited on Aug. 22, 2021).
[5] *Daimler Fin. Servs. AG* v. *Argentine Republic*, ICSID Case No. ARB/05/1.
[6] Christina L. Beharry & Melinda E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration" 30 *American University International Law Review* 383 (2015).
[7] *Ibid.*

It shall, however, be noted that the implications of the same rely precisely on the countries and the custom and context of the incorporated provision.[8]

Such provisions reflect three main themes starting with the recognition of environment protection as a treaty objective, progressing through the rights of states in regulating environment matters, and ensuring the duty of each state to enforce and promote environment protection measures.[9] Another common area where one can find the references of environment protection is in the preamble of various treaties. An apt example of this could be found in the preamble of the 2012 US Model Bilateral Investment Treaty which laid down the objective of the treaty as: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment."[10]

The preamble of the treaties becomes relevant in the backdrop of article 31 (1) (2) of the Vienna Convention on the Law of Treaties (*hereinafter* 'VCLT') which states that it provides background on the objective and purposes of the treaty.[11] Apart from the aforementioned two categories of provisions incorporated, the third scenario deals with the right of the contracting parties to deal with environmental concerns. The scope of these provisions differs widely and often faces the requirement to be rephrased, both with exceptions and inclusions of significant issues of environmental concerns to be held at par within the treaty backdrop. For instance, article 20 of GATT (General Agreements on Tariffs and Trade) apart from dealing specifically with "human, animal, or plant life or health", is also concerned with "exhaustible natural resources"[12] or "protection of national treasures of artistic, historical or archaeological value".[13]

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[8] *Ibid.*

[9] Kathryn Gordon, Joachim Pohl, *et.al.*, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey", *OECD Working Papers on International Investment* 2014, *available at*: https://www.oecd-ilibrary.org/docserver/5jz0xvgx1zlt-en.pdf?expires=1583731287&id=id&accname=guest&checksum=F8D3DD92BB4A80562076E9A929783574 (last visited on Nov. 1, 2021).

[10] U.S. Model Bilateral Investment Treaty, Treaty Between the Government of The United States of America and The Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 2012, *available at*: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited on Nov. 1, 2021).

[11] Vienna Convention on the Law of Treaties 1969, art. 31(2), *available at*: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (last visited on Nov. 1, 2021); Anthony Aust, *Modern Treaty Law and Practice* 336 (Cambridge University Press, United Kingdom, 2000); Richard Gardiner, *Treaty Interpretation* 186 (Oxford University Press, London, 2nd edition, 2008).

[12] Bilateral Investment Treaty Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, 2004, art. 18(e), *available at*: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1755/download (last visited on Nov. 1, 2021).

[13] Agreement Between Japan and the Republic of Peru for the Liberalization, Promotion, and Protection of Investment, art. 19(1)(f), *available at*: https://www.mofa.go.jp/region/latin/peru/agree0811.pdf (last visited on Nov. 1, 2021).

Jurisprudential analysis

The reasonableness of measures for environment protection had always been analysed by the tribunals by focusing on various key issues. In the case of *S.D Myers Inc* v. *Canada*[14], the export of the compound polychlorinated biphenyl was designed to benefit the hazardous waste disposal industry.[15] The measure was however held to violate Canada's obligations under the North American Free Trade Agreement under the aspect of nationality-based discrimination.[16] In the case of *Tecnicas Medioambientales Tecmed S.A.* v. *United Mexican States*[17], the court examined whether the Mexican government's decision to not renew the permit to operate a landfill to the company due to environmental concerns is a reasonable decision or not. However, the tribunal, in this case, refused to accept the claims of the government and said that the refusal to grant permit is disproportionate considering the economic loss incurred upon the investor. From this, the approaches of the tribunal on a case-to-case basis varies from each other.

In the case of *Glamis Gold, Ltd.* v. *United States*[18], the challenge was regarding Canada's mandatory landfilling which the tribunal did not consider. An entirely different approach was taken in the case of *Chemtura Corp.* v. *Canada*[19] where the court declined to consider if the chemical involved in production poses a threat to human health and environment. In another case of *Urbaser* v. *Argentina*[20], the tribunal held that the investor is bound by the international human rights obligations concerning water.

It is quite clear that the environment concerns were raised in the tribunals by the claimants and respondents alike in many cases. But there is a limited number of cases wherein the claims are analysed comprehensively by the court. This is because the tribunals often find themselves placed in a dilemma wherein they have to decide the claims as well entertain counter claims overcoming the jurisdictional challenges that are existing in the current scenario.

The decisions of the courts in this regard have never been uniform and this poses a threat to environment and sustainable development goals.

[14] *S.D. Myers Incorporated* v. *Canada*, Order, 2004 FC 38, (2004) 244 FTR 161, IIC 252 (2004).
[15] *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, Dec. 7, 2011.
[16] *Ibid.*
[17] *Tecnicas Medioambientales Tecmed S.A.* v. *United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), 19 ICSID Rev. FlLJ 158 (2004).
[18] *Glamis Gold, Ltd.* v. *United States*, UNCITRAL June 8, 2009.
[19] *Chemtura Corporation* v. *Canada*, Award, IIC 451 (2010).
[20] *Urbaser* v. *The Argentine Republic*, ICSID Case No. ARB/07/26.

III. Counterclaims in Investment Arbitrations

When International Investment Agreements are concluded, generally the states and investors agree to a certain set of conditions elaborated in the IIA itself. However, the basis of IIA remains the facilitation of investment, therefore pre-dominantly focusing on one thing that is the ability of the investor to sue the host state without having to reach out to the host state or its courts, or even to include the investor's state. This independent mechanism has ensured that the investors feel protected, also leading to the formation of the asymmetrical nature of IIAs. However, the state must also have a balancing mechanism to put up its claims against the all-powerful investors at times. Counter-claim is more like a counter-balance to the arena of investment arbitration, allowing host state to present their stakes in an investment dispute. Counter claims are often seen as a mechanism used to regulate the relationship between investor's rights and the regulatory as well as the sovereign power of the states. The tribunals have always found difficulty in entertaining counter-claims because of the fact that these treaties are inherently asymmetrical in nature.[21] In the case of *Roussalis* v. *Romania*[22], the court did not entertain the counterclaim of the respondent as there was no consent on the part of the investor. The rationale of the court was that counterclaims fall outside the purview of the tribunal's jurisdiction and what could be made applicable is the language specifically laid down in the bilateral investment treaty.[23]

Other than the jurisdictional claims another problem regarding the application of counterclaims was that it should have a close and factual connection with the primary claims that were raised in the case. In the case of *Burlington* v. *Ecuador*[24] and *Perenco* v. *Ecuador*[25], counterclaims were raised by Ecuador regarding the breach of environmental law by investors polluting soil and groundwater. The tribunals however held that Ecuador was curtailing the investor to benefit from the investment. But it did recognise the fact that Burlington and Ecuador had a role to play in the deterioration of the Ecuadorian Amazon. The tribunal also made the following observations:

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[21] *Hesham T. M. Al Warraq* v. *Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014.
[22] *Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (Feb. 7, 2017).
[23] *Ibid.*
[24] *Perenco Ecuador Ltd.* v. *The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (Aug. 11, 2015).
[25] Engobo Emesh, Akua Aboah, *et.al.*, "Towards a Coherent Framework for Achieving Environmental Sustainability in Investment Decisions: Reflections on Rio +20 and Judicial Conference" 221 (2012-2013).

> Proper environmental stewardship has assumed great importance in today's world. The Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law. The Tribunal further recognizes that a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities

If counter claims should be used to further the goals of sustainable and eco-friendly development in the nearer future, then steps should be incorporated to lay down explicit provisions in the BITs and agreements so that the tribunals can per se take such claims. In the absence of such provisions, the courts would have to ponder on the jurisdictional claims too. This could ensure that the investors would invariably be held responsible for the environmental damage it causes to the host state. Such a development would help the developing states also to further economic development without compromising on their environmental aspects.[26]

For instance, article 47 of the ICSID Convention specifies counterclaims. The other arbitration rules such as the International Chamber of Commerce Rules, London Court of International Arbitration Rules, and the United Nations Agreement on International Trade Law Rules of 2010 also give the option of seeking counterclaims to respondents.[27]

IV. Challenges before the Tribunals

The bipolarisation of International Investment Agreements under Bilateral Investment Treaties has created a major setback to the goal of the international community advocating the integration of sustainability with development. The rift is ever-widening given the plethora of cases where the host states and investors remain ignorant of the risk potential posed by raising environmental concerns in an investment dispute.

[26] Jesse Coleman & Kanika Gupta, India's Revised Model BIT: Two Steps Forward, One Step Back?, *Investment Claims* (September 10, 2017), *available at:* https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1111&context=sustainable_investment_staffpubs. (last visited on Nov. 1, 2021).

[27] Rule 40(1) of the ICSID Arbitration Rules; Art. 5 of the ICC Rules; Art. 4 of the UNCITRAL Rules 2010; Art. 2 of the LCIA Rules; Arts. 4.1(b) and 25.2 of the SIAC Investment Arbitration Rules 2017.

The first major issue is the inconsistency of tribunals in adjudicating the 'legitimacy' of claims related to environmental concerns in the absence of any acceptable precedents standard in international investment arbitrations. Also, this points out to the fact that the gravity of environment concerns advocated by the host state to the tribunal may be easily dwarfed in-front of an economic claim by an investor in an investment dispute as happened in *Santa Elena* v. *Costa Rica*[28]. The land development investment project was in this case, expropriated by the Costa Rican government under the premises of international obligation to save the wildlife and habitat of the region for environmental concerns. The dispute arose as to the amount of compensation paid in relation to the expropriation.

It was consequently held by the tribunal, with utter disregard to environmental concerns that the compensation payable would be the same irrespective of the international environmental obligation being a cause for expropriation. The analysis of the above case in conjugation with *Peter A. Allard* v. *Government of Barbados*[29] will perhaps complete the picture. Allard in this case was the investor who acquired estate property in Barbados under Canada-Barbados BIT for the purposes of eco-tourism as a sanctuary. With the later failure of the South-Coast Development Plant and the Government's lax attitude in closing the sluice gate resulted in drastic environmental degradation of the nearby areas to the sanctuary, Allard initiated arbitration proceedings under Canada-Barbados BIT under breach of FET (Fair and Equitable Treatment), FPS (Full Protection and Security) clauses and expropriation. The tribunal, however, refused to draw any nexus to the closing of sanctuary and the government's failure to protect and regulate the environment, further refusing to recognize any cross-jurisdictional issues.

Metaclad v. *Mexico*[30] was another dispute where Metaclad initiated investment proceedings against Mexico under minimum standards of treatment and expropriation, winning the case ultimately against state regulatory action for environmental concerns. The irony of legitimate expectation in an investment treaty against the regulatory action by the host state as raised by investors for claiming awards could be conversely applied against the investor too. Shouldn't environmental concerns of the host state not be a similar legitimate claim against the investors who engage in environmentally hazardous investments?

[28] *Compañía del Desarrollo de Santa Elena SA* v. *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000).
[29] *Peter A. Allard* v. *The Government of Barbados* (PCA Case No. 2012-06).
[30] *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1.

In the same dimension is how state action loses grounds of legitimacy when even after recognising crucial environmental concerns in line with international obligations to save the environment, the tribunals cannot help but consider such cases to be simply mundane issues of fact and law to be decided for between the parties. This was the case of *Marion Unglaube* v. *Costa Rica*[31].

Almost always clauses of Expropriation, Fair and Equitable Treatment, Most Favoured Nations, Full Protection and Security are used by investors to initiate arbitral proceedings against host states with regard to BIT violations. However, to see a change in this trend, if we look at the case of *Methanex* v. *U.S.A*[32]., we find how tribunals actually considered the concern of the host state to phase out MTBE a legitimate ground for state action and denied to ensue expropriation charges against host state regulatory action.

Similar is the case of *Mesa Power Group LLC* v. *Canada*[33] wherein the state actually won the case wherein a FIT (Feed in Tariff) Programme was challenged by Mesa to be discriminatory as the programme required certain specific domestic component parts as its regulatory provisions for Ontario Electric System, a renewable energy initiative.

Putting this in perspective to another case of *Windstream Energy LLC* v. *Canada*[34], we find another situation where the state practically halted an investment project on the precincts of scientific studies of the effects of energy projects on the surrounding ecosystem. Arbitration proceedings were initiated on the pretext that the project was no longer left economically viable due to state regulatory action which amounted to expropriation. The state lost the arbitration but not on the grounds of expropriation but due to the breach of the fair and equitable treatment clause of North American Free Trade Agreement due to lack of follow-up and delays in a scientific assessment.

In *Chemtura* v. *Canada*[35] dispute, the phase-out of a product already banned by several countries, Lindane was initiated by Canada, later challenged by Chemtura on every possible ground of expropriation, MFN, FET, FPS, and the minimum standard of treatment. However, recognizing the ban on Lindane and the phase-out initiated by Canada on the same lines, the

[31] *Marion Unglaube* v. *Republic of Costa Rica*, ICSID Case No. ARB/08/1.
[32] *Methanex Corporation* v. *United States* (2005) 44 ILM 1345.
[33] *Mesa Power Group* v. *Canada*, Award, PCA Case No 2012-17, IIC 776 (2016.
[34] *Windstream Energy LLC* v. *Canada*, Award, PCA Case No 2013-22, IIC 896 (2016).
[35] *Supra* note 19 at 6.

tribunal did not hold the state guilty and held that no substantial deprivation of property had taken place to lead to expropriation.

Undeniable is the fact that when tribunals lead on to determine the standards of conduct in compliance with international legal standards, it becomes an imperative question as to whether is it the host state to determine the question of the appropriateness of sovereign regulatory measures or is it up to the tribunal to determine which alternative form of regulatory compliance norm would be more effective means of public policy in synergy with international legal standards while determining an arbitral award. The fear of regulatory chill is evident in such cases where the risk of complying with environmental concerns and international environmental obligation may as well be in detriment to the national interest, considering the possibility of claims by investors in an arbitral proceeding. The situation can be well conceived in reality through *S.D Myers* v. *Canada*[36] dispute.

Investment arbitration and sustainable development machinery are still two seemingly parallel lines that hardly seem to intersect. The goals of sustainable development seem far-fetched given the fact that the financial resources to achieve effective sustainability are mostly channelled through investment projects.[37] The risk of BITs falling within the trap of various investor claims is further because of the broad provisions circumscribing investment projects which are later often used by investors to initiate arbitration.[38] The clauses may even extend beyond the domestic law boundaries and sometimes even break through sovereignty in situations of weak regulatory mechanisms and poor enforcement in environment-related matters. Many countries such as India have formed a revised BIT model (like Model BIT 2015) which has for the first time introduced sustainability and tried to provide a broader regulatory ground of action to the government in order to address environmental concerns. It is here that we recognize the need to have a broad line of consensus to revisit and restructure investment arbitration in synergy with addressing environmental concerns.

A predictable framework mechanism to deal with environmental concerns in relation to International Investment Agreements is thus the need of the hour[39].

[36] *Supra* note 14 at 2.
[37] OECD, *Fostering Investment in Infrastructure, Lessons learned from OECD Investment Policy Reviews,* (January 2015), *available at*: https://www.oecd.org/daf/inv/investment-policy/Fostering-Investment-in-Infrastructure.pdf (last visited on May 5, 2021).
[38] Yaraslau Kryvoi, "Counter-claims in Investment State Arbitration" 321 *Minnesota Journal of International Law* 218 (2012).
[39] *Supra* note 25.

V. Extending Scope of Investment Agreements to a Multi-Stakeholder Approach

Before we understand International Investment Arbitration solely from the perspective of Investor-State perspective, it is important to appreciate the growing state-state perspective to Investment Arbitration as has been a recent global trend, increasingly substituting ISDS with SSDS.[40] The players are not restricted in an investment arbitration agreement and thus, in fact constantly changing. Thus, it is implicit to discuss that there may be a situation where the social cost of investment becomes more important than interest-based or profit-based or risk-based assessment. At this juncture, we must understand what incorporates this social cost. Let us take for instance the environmental impact assessment policy we currently have for any developmental project. It certainly recognizes the need for a 'public hearing' as an important and indispensable component of project assessment.[41] Thus, the important dimension will of course include the component of public hearing and the component of government regulations specifically designed to incorporate and implement on-ground environmental protection regulations. This regulation will include a variety of other aspects such as the respect for human rights and labour laws, something which the Netherlands Model BIT specifically incorporates.[42] This might be one way the upcoming BITs may consider while they try to synchronize the investments and environment. The Dutch government has published the final version of the Dutch Model BIT in 2019. It replaced the 2004 model and sorted out the shortcomings. It introduced several elements and provided a stricter definition for 'investment'. The party autonomy aspect was also removed in the new model.[43]

The component of Corporate Responsibility and Civil Society Role may also be indispensable with the new regulations in place, which although are currently soft laws but do have the capacity to be major pillars of ensuring human rights and environmental considerations in businesses and corporate practices, one of them being the Working Group on Business and

[40] Nathalie Bernasconi-Osterwalder, "State–State Dispute Settlement in Investment Treaties" *International Institute for Sustainable Development* 1 (October, 2014).
[41] Public hearing in arbitration hearings can be distinctly found in Trans-Pacific Partnership agreed upon between the USA and Australia, Brunei, Austria, Canada, Chile, Japan, Malaysia, New Zealand, Peru and Vietnam, A right to public access in investor-state arbitral proceedings, *available at*: http://arbitrationblog.kluwerarbitration.com/2015/12/09/a-right-of-public-access-to-investor-state-arbitral-proceedings/ (last visited on May 5, 2021).
[42] The 2019 Dutch Model BIT: Its remarkable traits and impact on FDI, *available at*: http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/ (last visited on Nov. 3, 2021).
[43] *Ibid.*

Human Rights[44]. It will be interesting to see how these recent changes work in conjunction when the pressure groups play a responsible role as well to ensure accountability.

The complications start when these new found multi-stakeholder approach needs to be incorporated in an International Investment Agreement. Issues to consider range from what clauses must be incorporated in investment agreements and what clauses can be omitted by the nations to protect their national laws or public policy frameworks to ensure sustainability. The point is when the nations incorporate a set of principles in the preamble of their Model Agreement, they must necessarily support it with necessary changes in the terms and conditions that determine expropriations and the standards that determine the Full Protections and Security of investments along with the comparative standards of Fair and Equitable Treatment clause. The risk profile of intended investment will have to be balanced with the profitability and this risk and return equation of assets involved in an investment agreement will have to incorporate the much neglected and scarcely considered' social and environmental cost' of a project. This new found cost will only find substance once we hold the multi-stakeholder approach to evaluate the market value of an investment asset and its adjoining property, which may perhaps be a natural reservoir of resources.

Varying interests and concerns of this approach will require a multi-dimensional understanding of the scope and ambit of Investments and the Agreements which facilitate the, thus, with the changing global practices and continuously omitted investment clauses such as the MFN, FET, FPS and indirect expropriations along with the umbrella clauses, the road to a multi-stakeholder approach becomes more and more challenging to address concerns least considered as concerns such as the environment.

VI. Restructuring International Investment Arbitration

It perhaps is difficult to ascertain the paradoxical situation as to how sustainability has been confused with economic growth when it comes to the Rio+20 Declaration using 'sustained economic growth' interchangeably with sustainable development[45]. Also, not to forget the very narrow scope to bring in the 'alien' concept of investment in the domain of environmental concerns in just a single principle shows how Rio+20 has been a disappointing failure in this

[44] OHCHR, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, United Nations Human Rights, *available at*: https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx (last visited on Nov. 3, 2021).
[45] *Id*., at 235.

regard[46]. To understand what could possibly be a way forward, let us look backward to the failed attempt to create a Multilateral Investment Agreement (MIA) to address the environmental concerns of investment laws. Based on a three-point pillar mechanism, MIA made an attempt to move in line with Agenda 21 (using natural resource base for socio-economic development for sustainable development in conjugation with environmental concerns) and Rio +20 declaration[47]. In this respect both the polluter pays principle and the precautionary principles were used in derivative form to integrate investment with the environment in BITs doing away with the vague provisions of sustainable development in NAFTA[48].

Looking at the possibility of creating an IIA similar to MIA advocating a situation of no compromise with the obvious and crucial environmental concerns could be confronted with the same questions as did the NAFTA article 1114(2)[49] which advocated that host states, when it comes to investment concerns, must not lower their bars to attract investments in contravention to their public policy objectives. The questions were raised as to the truly 'green nature' of such 'not lowering of standards' in absence of any reasonable grounds and specific mention of such recognized standards of state action in this regard. The important questions are: Whether not lowering of standards is a viable alternative for developing countries already burdened with financial constraints and whether even if they do exercise their sovereign regulatory functions in this regard, will they be strong enough to advocate the said grounds in investment agreements through ineffective compliance standards. Perhaps 'not lowering standards' in conjunction with the commercial viability of a project holds better ground to address this concern.

Non-binding agreements that provide for normative guidelines give neither the means nor any form of effective standards to deal with legitimate environmental concerns. Agreed there are reasons to consider that strict regulatory mechanism towards environmental concerns may

[46] *Ibid*.
[47] John Wickham, "Towards a green multilateral investment framework: NAFTA and the search for models" 12 *Georgetown International Environmental Law Review* 617-646 (2000).
[48] *Id.,* at 620.
[49] NAFTA: Foreign Trade Information System, *available at*: http://www.sice.oas.org/trade/nafta/chap-111.asp (last visited on Nov. 1, 2021).

> Art. 1114(2) Environmental Measures- "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement".

sometimes indeed be counter-productive to both investor's viability in pursuing the project and host state's benefits derived therefrom. Also, the fact that revising all older BITs to make them 'green' would also be completely undesirable exercise; we need to understand that a case-by-case standard of visiting environmental concerns in every investment decision will definitely not be in furtherance with our objective towards 'green investments'.

One way of finding a way forward is to use article 31 of VCLT enlisting general rule of interpretation as an instrument, particularly including within "good faith' in International Investments Agreements (IIAs). Moving a direction forward in synergising, there must be an attempt to incorporate investment agreements that include environmental concerns in their operative part. The expropriation clause is notoriously used in major investment disputes to initiate proceedings and the tribunal's decisions in numerous cases in this regard has clearly shown that investment arbitration is directed towards protecting the interests of investors, irrespective of the kind of investment made and the reason attached to the specific expropriation. In the recent BITs undertaken, environment has become a part of important exception to treaty clauses[50], sometimes even surfacing as important sub-components of the treaty in an attempt to synergise investment to environmental aspects[51]. With a lack of precedents standards in investment arbitration and a more case by case basis approach, the BIT components should be such that domestic laws find a place while negotiating an investment agreement, giving more level playing field for host states, thus addressing policy challenges. These exceptions may as well protect the host state from claims such as the standards of treatment under Fair and Equitable Treatment clauses by providing a regulatory space for the host state such that the standards of comparison fall in line with the expected framework for addressing public policy concerns in relation to a specific investment without creating a rift of implementation by using a similar framework in another BIT to form a ground for claim. The issues of sovereignty of the host state while also addressing trans-boundary harm to environmental concerns should be an important incorporation of any further BIT as this will directly address the domestic laws in compliance to which further IIAs will be initiated. The issues of transparency must also be addressed concerning the fact that any investment project development should comply with specific environmental standards in relation to the investment

[50] Viz. Switzerland-Mexico BIT and Belgium-Luxembourg Economic Union - Mozambique BIT; Chazournes, Laurence, Environmental Protection and Investment Arbitration: Yin and Yang? *Anuario Colombiano de Derecho Internacional* 10 (2017) 381.

[51] As has been in case of FITs wherein foreign investment has been incorporated in green energy projects to create a possible synergy like in case of *Windstream Energy LLC* v. *Canada.*

and an Environmental Impact Assessment (EIA) Report submission prior to the initiation of investment projects will ensure this compliance.

At this juncture, it is important to also look back at the way arbitration tribunals have been handling environmental concerns of host states when it comes to claims raised by the investors against such public policy initiations. As noted above, 'expropriation' clauses are generally used as a means to bring in these claims with regard to assets that were forcefully 'nationalised' creating a need for 'adequate compensation'. The fault lies in the way ISDS has become a tool against the environmental regulations rather than acting as a shield for it. The conundrum, however, is the fact that how do we balance the ISDS mechanism in such a way that the host state may be able to protect its legitimate environmental concerns and the investors also do not lose grounds for holding their investments in the pretext of false and subversive public policy claims. This is an important and difficult impasse and a generalized mechanism may not be the solution. However, what we realize at this juncture is that it is perhaps the time that International Arbitration Courts and Tribunals realize that investments need to comply with certain standards which would have no negative implications over the environment, no longer considering the environmental issues as 'less weighty' that other considerations such as Free and Equitable Treatment and Most Favoured Nations. In other words, the researchers believe that expanding the ambit and weight of 'sovereign responsibility' will go a long way in protecting our investments.[52]

Information dissemination is of absolute necessity while undertaking investments and a global standard of viable information dissemination in this regard will be of great value in exploring the realm of investment. How we achieve this necessary pre-condition to facilitate future green investments will to a great extent depend on the way we deal with the present opaque form 'information secrecy' when it comes to declaring the kind of investment agreements a nation has undertaken and any further implications it may uphold for the nation, in specific regard, the terms and policy considerations that go into an arbitration agreement.[53] Even with a lot of deliberations in this regard, the secrecy of investment arbitrations have often been a matter of debate and a problem that doesn't seem to end even with the ICSID, 2006 procedural reforms which, could not create much of a difference in the global investment realm in regard to

[52] Bastein Drut, "Sovereign Bonds and Socially Responsible Investments" 92 *Journal of Business Ethics* 131 (2010).
[53] Emilie M. Hafner Burrton, David G Victor, "Secrecy in International Investment Arbitration: An Empirical Analysis" 7 *Journal of International Dispute Settlement* 161 (2016).

achieving greater transparency.[54] What considerations go into making an amicable settlement are determining factors when we look back at the 'history of Environmental clauses in investment agreements' that we have discussed above. These considerations and secret settlements can have a fundamental impact when it comes to important and determining investments *vis-à-vis* environmental concerns. The implications on public policy, are thus, immense in such a situation. Thus, the initial impasse is to reach a certain level of transparency in ISDS mechanisms with specific procedural considerations in the ISDS mechanism itself.

VII. Conclusion

Lack of explicit provisions in the agreements has led to non-uniformity in international investment agreements. The tribunals often find it difficult to strike a balance between legitimate environmental concerns and economic viability of investments thus creating a situation of an obvious rift between the bipolar regimes of investments and environmental concerns. The jurisprudence of counterclaims in investment arbitration is also in a grey area right now because of the conflicting positions taken by courts in different cases. The problem is there is always a case-by-case analysis of environmental concerns in absence of any accepted standards in the form of regulatory operative clauses in IIAs. As we have learned that the endeavour to create a multilateral investment agreement utilizing the existing NAFTA principles and OECD guidelines has led to an impractical model culminating in a failure. The idea of systematic integration of investment and environment is therefore not a viable one as almost always environmental protection fails to be integrated substantially.

While it seems unlikely that a model multilateral investment framework could be manufactured as an instrument to synergize investment and environment concerns, there are certain aspects wherein integration is possible like including exceptional clauses and incorporating environmental concerns in the operative sections of agreements. Both transparency and non-compromising standards could be some pillars that would prevent legitimate environmental concerns to be addressed as 'mundane issues of fact and law' by tribunals.

Investment projects in the renewable energy realm have shown the possibility of creating viable green investments by incorporating FIT (Feed in Tariffs) in investment agreements,

[54] Sergio Puig, The Social Cost of Secrecy in International Investment Arbitration, *Kluwer Arbitration Blog*, (November 18, 2015), *available at*: http://arbitrationblog.kluwerarbitration.com/2015/11/18/the-social-cost-of-secrecy-in-international-investment-arbitration/ (last visited on Nov. 11, 2021).

empowering investors to commercially exploit such investments; also giving the host states premises to exercise regulatory provisions addressing public policy concerns in this aspect. It has been observed that sometimes, even when a dispute under ISDS machinery rests in favour of the host state, the litigation costs are so immense that the benefits derived from winning the claim for regulatory purposes are far surpassed by the costs incurred. Thus, the setup balancing structure in conflict clauses can play an instrumental role in this aspect, edging out the gaps in investment-environment conflict. Possibly, this can also address the aspect of regulatory chill.

It is crucial to develop a baseline of international standards of environmental protection within the regulatory domain in consideration of the problems faced by developing countries since we have learned that they are more susceptible to regulatory chill, given the need to compromise with international standards. Unless a system of reference incorporating risk factors associated to most vulnerable domains in developing countries is not developed, the risk of environmental degradation with every new BIT based investment project will never be completely addressed as these are the standards which will ultimately measure the authenticity of any claim or counter-claim by the host states. Article 1131 of NAFTA[55] in this aspect shows how interpretation made by tribunals with reference to dispute resolution may be restricted on such international standards which correspond to this baseline approach.

Sometimes the answer to legitimate expectation must not only come from the point of view of investors who engage in environmentally detrimental projects but also from the host states which have the right to expect foreign investment projects that work in synergy with the public policy domain's sensitive realms *viz*. environment and sustainability.

[55] *Supra* note 10. Deals with governing law under clause (1) and (2) having a binding effect on tribunals.