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ENVIRONMENTAL CONCERNS AND DECISION MAKING IN INTERNATIONAL INVESTMENT TRIBUNALS

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Abstract

Over the past couple of decades, international trade has increased by leaps and bounds, which has inadvertently led to a rise in the litigations and disputes surrounding those international trade contracts. Rising disputes call for a legal framework for their resolution. Investment treaties usually are narrowly focused on ensuring that states provide corporations with certain standards of "treatment", or protection from certain state measures, and do not normally contain any corresponding obligations for corporations or any protections to host states from any detrimental corporate conduct. Signs of such bias have been in the open for quite some time. The developing world is slowly losing its confidence in the Investor-State arbitration regime. International investment law is designed to prevent certain government measures that challenge the contemporary global economic order, and it is not surprising that it expressly prohibits many of the developmental strategies used by countries in the past, such as the protection of domestic corporations or the nationalisation of key industries. What is more surprising is that many of the first investment treaty disputes concerned not such policies, but rather measures introduced to protect the environment. The article focuses on investment treaty disputes arising from measures taken to protect the environment.

1. INTRODUCTION

1.1 Institutional Background

Over the past couple of decades, international trade has increased by leaps and bounds, which has inadvertently led to a rise in the litigations and disputes surrounding those international trade contracts. Rising disputes call for a legal framework for their resolution. The institutional framework of investment arbitration provided under International bodies and conventions has been designed in such a way as to support the interests of transnational corporations. A bare reading of the investment treaties would openly prescribe to the blanket statement that the investment treaties are designed to protect and benefit corporations; the "promotion and protection of investments" is their stated purpose. Many agreements contain this phrase in their titles, e.g. one BIT is entitled "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments" The U.S. model investment treaty is titled "Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment",[105] Investment treaties usually are narrowly focused on ensuring that states provide corporations with certain standards of "treatment", or protection from certain state measures, and do not normally contain any corresponding obligations for corporations or

[105] United States of America, Model Bilateral Investment Treaty (2012) *available at:* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited on March 12, 2025).

any protections to host states from any detrimental corporate conduct.[106] Insofar as corporations have also acquired the right to enforce their legal entitlements in international tribunals, the investment law regime "resembles the structure of rights protection found in the bills of rights of many national jurisdictions", and critics frequently refer to investment treaties as Bills of Rights for corporations.[107]

The question is therefore not whether investment treaties protect the rights of corporations, but how far such rights extend and in what particular circumstances they can be invoked. At first glance these treaty standards do indeed seem fairly harmless, yet if these treaty standards are so clearly limited, then the issue of concern is as to why are the governments of countries which are normally not associated with consistent violations of the basic principles of the rule of law, such as Canada, which is the sixth most frequent defender in international law tribunals, are associated with frequent violations of the investment treaties.[108]

The wide scope of Investment Treaty arbitrations borders on a frightening range for every government involved, especially Third World Countries, as it derives its powers from a Bilateral Investment Treaty and other forms of treaties meant for trade. Such powers have been present from colonial times, but their usage is being truly recognized by different institutions now. A mechanism that is set to promote trade and development in Third World countries is, strangely enough, taking the opportunities away from such countries largely due to the structural development of such institutions.[109]

Signs of such bias have been in the open for quite some time. The developing world is slowly losing its confidence in the Investor-State arbitration regime. It is now being construed as a genuine threat to the sovereignty of these so-called 'Third World' economies. Unlike traditional tribunals, which are empowered to adjudicate upon the rights and liabilities of the parties arising out of a contract, these tribunals utilize indistinctive standards of international law to interfere with the policy space of the host nations.[110] For the purpose of this article, the author has limited its study to the decisions of arbitral tribunals under UNITRAL and ICSID.

1.2. Environmental Concerns in International Investment Law

International investment law is designed to prevent certain government measures that challenge the contemporary global economic order, and it is not surprising that it expressly prohibits many of the developmental strategies used by countries in the past, such as the protection of domestic corporations or the nationalisation of key industries. What is more surprising is that many of the first investment treaty disputes concerned not such policies, but rather measures introduced to protect the environment.[111]

When such a tribunal is bestowed with the responsibility of adjudicating disputes involving developing nations, it owes a higher degree of deference in comparison to such disputes that involve the developed world economies.

[106] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* 268 (Cambridge University Press, Cambridge, 2009).
[107] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* 223 (Cambridge University Press, Cambridge, 2008).
[108] UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note, No 1 (April 2012), 17, *available at*: https://unctad.org/system/files/official-document/webdiaepcb2013d3_en.pdf (last visited on March 12th, 2025).
[109] Parth Shah, "Assessing the Geopolitics of Investor - State Arbitration: A TWAILian Critique from Indian Perspective" 2 *Indian Journal of Arbitration Law* 77 (2013).
[110] Schill, Stephan W., *Deference in Investment Treaty Arbitration: Re-Conceptualising the Standard of Review Through Comparative Public Law, 3rd Biennial Global Conference*. Society of International Economic Law (SIEL), (June 28, 2012) *available at:* SSRN: https://ssrn.com/abstract=2095334 (last visited on March 14th, 2025).
[111] Sanford Gaines, "Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11" 7 *International Environmental Agreements* 173 (2007); Rahim Moloo & Justin Jacinto, "Environmental and Health Regulation: Assessing Liability under Investment Treaties" 29:1 *Berkeley Journal of International Law* 2 (2011); M. Sornarajah, *The International Law on Foreign Investment* 77 (Cambridge University Press, Cambridge, 5th edn, 2010).

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Whenever any of the less developed nations adopt any alternative development policy that authorises active state intervention in the sphere of private trade, it can be safely presumed that the investors would be affected.[112]

On the face of it, this seems to be surprising because the treaties are not formally made with an intention to protect the corporations from the environmental regulations of the host nations. None would explicitly make that suggestion either. Environmental regulations are after all in no way antithetical to the contemporary global economic order.

The author is focusing on investment treaty disputes arising from measures taken to protect the environment. The same has been taken up for study for three reasons. Firstly, the focus on the environment is helpful as an illustration of the substantive rights that international investment law affords to transnational corporations.

Secondly, environmental regulations are on the boundary, if not actually beyond the boundary, of what investment law is intended to protect the corporations against. This makes it a very suitable focus for exploring precisely how far the protections afforded by investment treaties actually extend. This body of law could be institutionally strong but if the substantive rights granted by the regime are weak then the benefits offered to transnational corporations would be negligible.

Thirdly, to emphasize that in contrast to much of the academic literature on the subject this particular focus has not been chosen on the basis of a normative priority accorded to the environment per se. Much of the literature highlights a struggle between the protection of the environment and the protection of investment, and perceives the solution as involving the balancing of these two competing concerns.[113]

1.3. Literature Review

A substantial academic literature on investment arbitration and the environment has emerged since the first investment treaty disputes that seemed to implicate environmental regulations. Within this literature, most scholars now suggest that the initial response to the early disputes was "unnecessarily alarmist" and that environmental protection measures are not, in fact, actually at risk from challenges before investment tribunals.[114] With the benefit of hindsight, Alessandra Asteriti claims that investment treaty disputes in respect to environmental regulations "caught the main actors and the public unprepared and engendered fears and anxieties that revealed themselves to be either exaggerated or misplaced".[115] Sanford Gaines similarly suggests that recent history proves that "environmentalists have little ground for alarm", while Thomas Wälde & Abba Kolo conclude that "legitimate environmental regulation is unlikely to be challengeable under the investment rules of modern multilateral investment treaties, irrespective of exaggerated claims made so far for advocacy purposes in arbitral litigation and equally exacerbated anxieties expressed by NGOs".[116] While there were "early jitters" caused by the emergence of a number of controversial investment treaty challenges of environmental protection measures, as well as certain early cases where states were required to provide compensation to investors, the recent reassurances have been prompted by tribunals'

[112] Amr A. Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neo-Liberalism" 41(2) *Harvard International Law Journal* 424 (2000).

[113] Charles Brower, "NAFTA's Investment Chapter: Initial Thoughts about Second Generation Rights" 37 *Vanderbilt Journal of Transnational Law* 1553 (2003) *available at:* https://digitalcommons.wayne.edu/lawfrp/405/ (last visited March 15th 2025).

[114] Madeline Stone, "NAFTA Article 1110: Environmental Friend or Foe?" 15 *The Georgetown International Environmental Law Review*, 788 (2002-2003).

[115] Alessandra Asteriti, "Metalclad, Methanex and Chemtura: 10 Years of Environmental Issues in NAFTA Investment Arbitrations" 9:3 *Transnational Dispute Management* 21 (2012) *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021180 (last visited on March 15th 2025).

[116] Gaines, "Environmental Policy Implications of Investor-State Arbitration"50 *International and Comparative Law Quarterly* 171 (2001) ; Thomas Wälde & Abba Kolo, "Environmental Regulation, Investment Protection and Regulatory Taking in International Law" 50 *International and Comparative Law Quarterly* 814 (2001).

rejection of corporate claims in a number of more recent high profile cases. The history of international investment law is therefore normally presented as one of the rise and fall of concerns about the risk posed to environmental regulations.

2. INVESTMENT DISPUTES AND ENVIRONMENTAL CONCERNS

The first investment dispute with respect to the environment was launched under NAFTA by Ethyl Corporation, a producer of a fuel additive known as MMT, against Canada in response to its introduction of the Manganese-Based Fuel Additives Act in 1996.[117]

Ethyl's successful recourse to investment arbitration was followed by three more cases concluded in 2000 – 2003 in which investors successfully challenged environmental measures taken by governments. Metalclad and Tecmed had both invested in hazardous waste treatment facilities in Mexico, but found their investments jeopardized by environmental protests that had emerged at least partly in response to the corporations' own conduct (the decision not to remediate unlawful pollution by previous owners of the facility in the case of Metalclad, and violations of environmental regulations in the case of Tecmed).[118]

After years of what was described as "arbitral warfare", the tribunal dismissed the case and commentators quickly labelled the U.S. victory "a major win for the environmental community" and "the harbinger of a new era" in investment arbitration.[119] Some scholars have suggested that the tribunal's decision to finally dismiss Methanex' claims "alone goes a long way toward justifying the conclusion that investment arbitrations are not putting at risk the right to regulate", while the International Institute for Sustainable Development praised the award for its "crystal-clear statement that non-discriminatory regulations in the public interest (such as environmental laws) will almost never be considered expropriation".[120]

The largest known environmental claim ever made – a USD 57 billion claim (three times the country's GDP) by an oil company against Costa Rica's decision to withdraw rights to oil exploitation – was deemed inadmissible because the investment contract did not allow for arbitration, and the Central American Free Trade Agreement had not yet entered into force.[121]

It is sometimes implied that in the wake of the environmentally friendly awards in Methanex v. USA, Glamis Gold v. USA and Chemtura v. Canada, the risk to the environment has diminished, and that these awards have superseded the previous investor-friendly awards. For instance, M. Sornarajah claims that in comparison to the decision in Santa Elena v. Costa Rica, the decision in Methanex in respect to expropriation "does change the law in the area significantly".[122] However, in 2012 the tribunal in Unglaube v. Costa Rica repeated verbatim the original interpretation of the law on expropriation in Santa Elena case, and proved that the original investor-friendly interpretation had not been consigned to history.[123] Similarly, while Tecmed v. Mexico and Metalclad v. Mexico are often considered high points of investment protection, the investor-friendly principles espoused by the tribunals continue to be cited in more recent awards.[124]

[117] *Ethyl Corporation v. Government of Canada* (*Notice of Arbitration*) [2001] UNCITRAL Ad Hoc Arbitration *available at :* https://www.italaw.com/cases/409 (last visited on March 15th 2023).
[118] *Metalclad Corporation v. The United Mexican States (Award)* [2000] ICSID Case No. ARB(AF)/97/1; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (Award) [2003] ICSID Case No. ARB(AF)/00/ *available at https://icsid.worldbank.org/cases/case-database* (last visited on March 15th 2023).
[119] Todd Weiler, "Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter 11?" 6 *Journal of World Investment and Trade*, 903-904 (2005).
[120] Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?' Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-Organised by ICSID, OECD and UNCTAD (12 December 2005) 2, *available at*: https://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf (last visited on March 15th 2025).
[121] Giugi Carminati, "Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?" *8 UC Davis Business Law Journal* 217 (2007- 2008).
[122] M. Sornarajah, "A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment" 6 *International Environmental Agreements* 343 (2006).
[123] *Unglaube v. Costa Rica (Award)* [2012] ICSID Case No. ARB/09/20 para. 217.
[124] Stephan Schill, *The Multilateralization of International Investment Law* 336 (Cambridge: Cambridge University Press, 2009).

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VOLUME 3 AND ISSUE I OF 2025
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This paper is an attempt to reject the argument that there has historically been a linear development of the decisions in investment disputes from being more investor-friendly to being environmentally (state) friendly.

In 2011, in a small court in Ecuador's Amazon jungle, a judge ordered the American oil giant Chevron to pay US$9 billion (AU$12 billion) in damages for pollution in the region caused by drilling activities in the 1970s and 1980s. The company quickly denounced the landmark ruling as illegitimate. More than a year before the final ruling had been issued, Chevron had already taken steps to initiate an investor–state dispute against the Government of Ecuador under the terms of a United States–Ecuador bilateral investment treaty (BIT). The company sought to avoid paying the $9 billion by convincing an international tribunal that the courts of Ecuador are corrupt and that the government is ultimately responsible for any environmental damage and associated health issues experienced by local residents.[125]

As the above examples demonstrate, what is notable is the particular nature of disputes that have emerged. Rather than solely involving straightforward incidences of nationalisation or breach of contract, modern investor–state disputes often revolve around public policy measures and implicate sensitive issues such as health and environmental protection. How did such matters become the purview of unelected ad hoc panels whose expertise lies in the realm of commercial law? The answer is not immediately evident. It could be argued that states themselves are the ones responsible.

The considerable procedural costs associated with arbitration, as well as the risk of having to pay large awards, have led some scholars to suggest that the mere threat of an investor–state dispute could chill the development of regulation in the public interest.[126]

The tension between the law on foreign investment and environmental concerns of host states has been increasingly recognised. There are circumstances where a host state's environmental measures result in the restriction of foreign investors' interests and a dispute between the affected investor and the host state reaches investment treaty arbitration. In such 'environment-investment' conflicts, there has been a tendency among arbitral tribunals to prioritise investors' interests over environmental concerns of host states. This article tries to bring to the fore the existing imbalance between the need for protection of foreign investment and environmental protection in investment treaty arbitration by focusing on the decided case laws in an attempt to force conversations amongst nations and international organisations so as to give an impetus to paving the way for redressing this imbalance.

3. LANDMARK DECISIONS RELATING TO ENVIRONMENTAL CONCERNS

3.1. The Dabhol Arbitration

Dabhol Power Project was a $ 2.8 billion project involving the construction of natural gas-powered electricity plants. The project remained controversial since its inception due to the lack of transparency gas-fired power plant, raising environmental concerns and non-compliance with the standard bidding process of the energy sector.[127]

Despite this, the project was approved, but even when it was underway, the opposition was persistent. The steps taken by the government authorities to curb those protests are tantamount to gross violations of Human Rights, like excessive use of force, arbitrary detentions and infringement of the right to livelihood. The public opinion on the policies of the then government was substantially reflected in the State elections of 1995.

[125] Peter Drahos, *Regulatory Theory: Foundations and applications* 675 (ANU Press, 2017).
[126] Kyla Tienhaara, "*Investor–state dispute settlement*" 675-692 (ANU Press 2017) *available at* Stable URL: https://www.jstor.org/stable/j.ctt1q1crtm.51 (last visited on March 18th 2025).
[127] Preeti Kundra, "*Looking Beyond the Dabhol Debacle:Examining its Causes and Undertaking its Lessons*" 41 *V and J. Transnat'l L.* 907 (2008).

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VOLUME 3 AND ISSUE I OF 2025
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As a result of all such developments, four international arbitrations were initiated against

Indian governmental entities. Out of these four claims, the only publicly available award was made in the ICC Arbitration instituted by Bechtel under the SHA and all the other proceedings were terminated after a settlement was negotiated between the governments and the other parties to the dispute. The tribunal stated that the foreign investment was made upon the confidence of the 'assurances' provided by the government entities in India. The tribunal made no mention of the economic shortcomings of the project or any of the other substantial ancillary concerns, as a result of which the project was always surrounded by a cobweb of controversies. The manner in which the facts were construed enabled the Tribunal to exercise jurisdiction over the regulatory sphere of the Maharashtrian Government. The Tribunal was ineffective in applying due standards of deference. Given the nature and consequences of the project, the decision of the new government was legitimate. The closure of the project was, in fact, one of the prime reasons for their elections.

3.2. S.D. Myers v. Canada.

The case was instituted on the grounds of discrimination. S.D. Myers is an Ohio-based corporation involved in the disposal of hazardous waste, including PCB waste. Due to the risk to human health and the environment, the production of PCBs has been prohibited in both the USA and Canada for several decades, and more recently, under international environmental treaties, but an existing stock of PCBs is still in use.[128]

S.D. Myers brought the case to international arbitration, and the investment tribunal subsequently decided that Canada's 'interim ban' had breached the national treatment standard and that Canada had to compensate S.D. Myers for its lost profits during a 15-month period from November 1995 until the interim ban was lifted in February 1997.[129]

Within the investment law literature, the S.D. Myers case is often presented as a classic instance of an environmental justification being used as a 'Trojan horse' for the introduction of a protectionist measure.[130]

The tribunal concluded that this objective "could have been achieved by other measures" and that "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade".[131]

It is an interesting example of how an investment tribunal has assessed the illegitimacy of a measure that the state in question maintained was taken to protect the environment. Canada had maintained that S.D. Myers was not in 'like circumstances' with the Canadian competitor; only S.D. Myers would be engaged in cross-border trade of PCBs, and it is this practice that would have environmental implications. The tribunal at various points in the award acknowledges these concerns and did not contest that Canada should have acted to address them, but found Canada at fault for not having chosen the policy option that was least restrictive for the foreign investor.[132]

The decision that an environmental measure has to be not just reasonable in light of the environmental objective, but the measure to affect the investor least, as well as its lack of appreciation for the time needed to consider policy options required of a new situation, both suggest that states may have to walk a very fine line in their adoption of policies that affect foreign investors if they are to escape an investment treaty challenge.

[128] *S.D. Myers v. Canada* (First Partial Award) [2000] UNCITRAL Ad Hoc Arbitration para. 98-101.

[129] *S.D. Myers, Inc. v. Government of Canada*, (Second Partial Award) [2002] UNCITRAL Ad Hoc Arbitration.

[130] Gaines, Sanford, "Environmental policy implications of investor-state arbitration under NAFTA Chapter 11" 7 *International Environmental Agreements*171-201 (2007).

[131] *Ibid.*

[132] *Supra 24* para. 255.

3.3. Santa Elena v. Costa Rica

The case arose from a 1978 expropriation decree of land adjacent to a national park on which the foreign investor had planned to develop a tourist resort.[133] The tribunal that was eventually instituted in the case accepted the legitimacy of the underlying environmental purpose and also explicitly refrains from taking a position on which party is at fault for the long delay in resolving the issue of compensation.[134]

While Costa Rica accepted that fair market value compensation was required, it had submitted detailed evidence on the environmental importance of the expropriation and its obligations under international environmental law – presumably on the expectation that this would reduce the compensation required – but the tribunal here explicitly rejected the relevance of environmental considerations for the measure of compensation.[135] This is indeed in line with the language of most investment treaties.

Another case, Unglaube v. Costa Rica[136], is very similar to the Santa Elena case. The dispute stemmed from another expropriation of beachfront property, and the tribunal goes to great lengths to acknowledge what it clearly deems a laudable decision to protect "one of the world's most important nesting sites for the highly endangered leatherback turtle".[137]

Both of the above cases concerned relatively small tourism developments, and Costa Rica did not struggle with payment of the awards and is sufficiently concerned about environmental protection (upon which its tourism industry relies) to also be willing to pay the price. However, in other circumstances this legal provision can have a considerable impact on the possibility of states to expropriate property for environmental purposes, and it is surprising that even environmentally inclined civil society organizations like the International Institute for Sustainable Development so readily accepts the law in this respect.[138]

The above two Costa Rican cases show that disputes in respect to direct expropriations continue to arise, but today companies are far more likely to challenge what are variously described as 'indirect expropriations', 'measures tantamount to expropriation, or 'regulatory takings'. The law in respect to direct expropriations is fairly clear, but the law in respect to indirect expropriations is, to cite a prominent arbitrator, on the contrary "clearly ambiguous".[139] This difficulty stems in part from the fact that the definition of 'property' that can be expropriated is, to cite another prominent arbitrator and one of the main negotiators of NAFTA, "enormously broad"[140]

3.4. Metalclad v. Mexico.

The tribunal in Metalclad maintained that expropriation includes not only "deliberate and acknowledged takings of property" but also "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be- expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[141] Two government measures were deemed to have individually violated the expropriation provision: the municipality's decision to deny a construction permit for the hazardous waste landfill, and the decision to make the entire area into an ecological preserve for rare species of cacti.

[133] *Santa Elena v. Costa Rica* (*Final Award*) [2000] UNCITRAL Ad Hoc Arbitration.
[134] *Supra* 49 at para. 20.
[135] Jorge Viñuales, "Foreign Investment and the Environment in International Law: An Ambiguous Relationship" 80 British Yearbook of International Law 55 (2010).
[136] *Unglaube v. Costa Rica* (*Award*) [2012] ICSID Case No. ARB/09/20 para. 217.
[137] *Ibid*, para. 163.
[138] *Supra* 19, para. 87.
[139] Yves Fortier & Stephen Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor" 19:2 *ICSID Review* 326 (2004).
[140] Daniel Price, "Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?" 26 *Canada-United States Law Journal* 109 (2000).
[141] *Metalclad v. Mexico* (Award) [2000]ICSID Case No. ARB(AF)/97/1para. 103.

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4. GROUNDS OF DECISION-MAKING IN INTERNATIONAL TRIBUNALS:

AN ANALYSIS

When it comes to the myriad grounds on which the arbitration tribunals have been approached, the indirect expropriation provision was initially the one that had raised most concerns in respect to the effect on environmental regulations, and particular concerns had been raised that a 'sole effects' interpretation thereof would be adopted in Methanex v. USA or Chemtura v. Canada, two cases that both concerned the prohibition of certain toxic or environmentally hazardous substances. Here the regulations prohibiting the substances in question did indeed wipe out the companies' investments in those substances, and according to the 'sole effects' approach the prohibitions would consequently have amounted to expropriations. To cite the International Institute for Sustainable Development, the expropriation clause would thereby turn "the 'polluter pays' principle of environmental management, established by the OECD in 1972, into a 'pay the polluter' principle". [142]

The second approach is the 'police powers' approach. That the right to regulate is within a state's 'police powers' is recognized also by the 'sole effects' doctrine, but within that approach a legitimate regulation is precisely one that involves only a lesser interference with foreign companies' profits. In contrast, scholars and arbitrators who adopt the 'police powers' approach contend that some regulatory measures are carved out from the definition of expropriation irrespective of the effect on the investment.

The 'police powers' approach, where adopted by a tribunal, clearly restricts the extent to which a company can seek compensation for costly environmental regulations. However, even this approach presents certain hurdles for states engaging in environmental protection. A key feature of the 'police powers' approach is the emphasis on the nature of the regulation and the regulatory process – the regulation needs to be non-discriminatory, taken for a public purpose, and in accordance with due process.

Within the investment law literature, the tribunals in these two cases are widely praised for their sensitivity to environmental concerns, and scholars commend the arbitrators for their "*capacity […] for reasoned and informed analysis of technical and scientific issues*".[143]

Finally, the third approach is the 'proportionality' approach. To cite Fortier and Drymer, this approach involves "weighing both the purpose and effect of a measure in a sort of regulation/expropriation balance".[144]As such, "[t]he higher the purpose of a measure and the greater its practical benefit to the public welfare, the greater is the level of investment interference that must be demonstrated in order to tip the scales toward a characterisation of the measure as an expropriation".[145] To assess proportionality, the tribunal commenced its analysis with an assessment of the public purpose behind the measure.

5. CONCLUSION

After a detailed analysis of the existing literature and the landmark decisions involving environmental concerns versus the interests of the investors, it can be reasonably said that, when it comes to the decision-making by the tribunals, two questions are likely to become especially important in this respect. Firstly, when it comes to the environmental measures introduced, what level of scientific certainty is required? While it is implausible that tribunals will demand full certainty, the question is how strong the science will have to be. The answer to it seems that investment tribunals will be less impressed by environmental measures

[142] *Methanex Corporation v. United States of America* (*Petitioner's Final Submissions by the International Institute for Sustainable Development*) [2000] UNCITRAL Ad Hoc Arbitration para. 17.

[143] *Supra* 7, p. 196.
[144] *Supra* 38.
[145] *Ibid.*

introduced in the absence of such a scientific assessment.

Secondly, when it comes to the application of the 'police powers' approach, the two cases where the 'police powers' approach to expropriation have been applied are both ones where the tribunals were clearly sympathetic to the regulatory measures under consideration.

While the 'police powers' approach therefore clearly allows more scope for the introduction of new environmental regulations than the 'sole effects' doctrine, it includes potentially restrictive criteria that will continue to enable corporations to challenge environmental measures as expropriatory.

A notable feature of the above arguments is that each refers to the investor as an 'individual' who should not have to make 'a special sacrifice' for the interests of the wider community.[146] Of course, the 'individual' in most investment treaty disputes is a company, and very often one of the world's largest transnational corporations whose revenues exceed the GDPs of the countries in which they operate. Once this is recognized, the claim that large corporations should not have to make a 'special sacrifice' to support the environmental interests of the wider community becomes a much more questionable proposition. Indeed, under the 'polluter pays' principle it might be reasonable to make the corporation in question bear the special sacrifice of adhering to environmental regulations designed to prevent the undesirable consequences of their operations.

In a globalised world, ISDS cases may also be initiated in one jurisdiction by investors hoping to deter the development of policies in other jurisdictions. This may, in part, explain Philip Morris's disputes with Uruguay and Australia over plain packaging of cigarettes—that is, the company may be hoping that the threat of arbitration will deter the development of similar labelling policies in other countries.

Developing countries have, by and large, been most affected by ISDS and have also reacted the most strongly against it. BITs have been unilaterally terminated by Venezuela, Bolivia, Ecuador and South Africa. It has also been reported that Indonesia is considering terminating all of its BITs. In 2015, India released a model BIT that is a radical departure from traditional agreements, and is particularly notable for its exclusion of any reference to 'fair and equitable treatment'.

[146] Orrego Vicuña, "Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual Under International Law in a Global Society" *5*(3) *International Law FORUM du droit International* 188-197 available at https://doi.org/10.1163/138890303322398387 (last visited on March 22nd 2025).