INTERNATIONAL INVESTMENT AGREEMENT AND ENVIRONMENT PROTECTION: A CRITICAL ANALYSIS

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Introduction

The growing concern on law on international investment has been one of the main emerging component in the international economic law since last few decades. One may easily conclude that the cornerstone of the international legal system is the Bilateral Investment Treaties. The development of Bilateral Investment Treaties can be said to have been done out of some emergency situations that can be traced back to the early 60s and 70s century. By that time, some ideological and political conflicts arose against developed and some of the developing countries with respect to the investment and its related issues. The most obvious solution would have been to bring developed countries and developing countries alike at the negotiation table and bring them to negotiate out all their differences, including their differences on investment.[1] An attempt was taken at the 1976 Paris Conference in order to bring about some negotiations that had also been a historic compromise between North and South. But the attempt ultimately got failed; as no multilateral agreement could possibly be reached at that point of time. Hence, the developed countries resorted to the next best solution and that best next solution was to strengthen networks through BITs to reach at a best possible stage to reconcile the disputes concerning the investment. BIT is a legally binding agreement between two countries that establishes reciprocal protection and promotion of investment in both countries.

The treaties primarily deals with substantive and procedural rules related to admission, treatment and protection of foreign investment. The United Nations Conference on Trade and Development (UNCTAD) defines BITs as "Agreements between two countries for the reciprocal encouragement, promotion and protection of investment in each other's territories

[1] Professor Patrick Juillard, Bilateral Investment Treaties In The Context of Investment Law, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, (2001), Dubrovnik, Croatia, available at:www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf ,accessed on January 05, 2018.

companies based in either country. The countries signing BITs commit themselves to follow specific standards on the treatment of foreign investment within their jurisdiction. If there is a breach of such commitments, BITs provide expansive procedure for the resolution of disputes. It is fair to say that the BITs have emerged as the primary source of international investment law to protect and promote cross-border investment flows

At present there are more than 3000 BITs in existence globally, with the great majority having being concluded since 1990. Almost every country in the world has signed at least one BIT. But besides the proliferation of the bilateral investment treaties, a potential conflict between the legitimate interest of the foreign investors in the host country and the safeguards that has been framed by the government to implement the environmental and other human rights related policies has also been reached at the top.

Furthermore, investment protection in the context of the environmental protection and regulation has been a frequent source of controversy and state-investor disputes. Moreover, environmental protection is generally guaranteed by domestic law, whereas it appears that on the international law level, investors do not and in fact could not have any environmental obligations or if they have, can they easily avoid that?

The public interest environmental protection thus, has legal relevance only as a domestic public interest of the host state and consequently is superseded by the BIT international laws rights of the investor. "*International investment agreements define various commitments on investment protection but also shed light on how these commitments are to be integrated with other public policy objectives*" the following statement will form a substantial part of the research work.

Generally, the problem facing phase gets started since the inception of the investment treaty wherein the clauses pertaining to the language referring to environmental concern is rare in BITs.

At the outset, the researchers would be much inclined towards analysing and laid emphasis upon the principles related to the international environmental law and their respective role in dealing with the environmental issues that are inter-mingled with the investment.

Hypothesis

- Bilateral Investment Treaties while securing the foreign investments fail to give due consideration to the environment protection.
- Bilateral Investment Treaties fail to enforce obligations on the home states to protect environment in the host states.

Research Questions

- Why environmental protection is usually subordinated to investment protection in securing foreign investment by the host state?
- Whether legal priority of international environmental law over domestic environmental law is justifiable?
- To what extent, due consideration is given to the environmental protection in international investment treaty?
- Role of Indian BIT 2015 in securing the mandate related to the environment protection
- Whether regulatory measures made by the host states keeping in mind the environment protection, lead to have an adverse impact on foreign investment?

Scope of the study

The present study is limited to the analysis of the international investment treaties concerning environmental issues. This paper is getting involved into the study of international investment agreements as a general overview, not confined to a particular field i.e. Bilateral Investment Treaty and Multilateral Investment Agreement. Furthermore, the study will also reveal the attempts taken by the existing conventions pertaining to the environment.

Objectives

- To study the extent of protection given to the environment in international investment treaties.
- To study the conflict between international investment agreements and the environment protection.
- To analyse the impact of regulatory measures of host states related to the environment protection over foreign investment.
- To examine the status of the clause with respect to environment protection in international investment treaties.

Research Methodology

The research methodology that is being opted for this paper would primarily be doctrinal and analytical in nature. The data for the completion of this research work would be taken from the primary sources on environment protection such as law commission report, NAFTA convention, RIO declaration and various BITs and the secondary sources would include various online articles, data collected by existing study.

Chapterization

1. Principles of International Environmental Law

2. General references to environmental concerns in International investment treaties
3. Environmental matters and investor-state dispute settlement: Arbitration Phase
4. Environment protection and Model BIT India, 2015
5. International Investment Agreements and Environment Protection: Data Analysis
6. Conclusion

Chapter 1

Principles of International Environmental Law

The following are the major principles in the International Environmental Law for the protection of environment. Those principles comprises of:

1. The Polluter Pays Principle

It is the tendency of common people to understand the environment- the ground, the atmosphere and the oceans- as an enormous receptacle for the disposal of waste. But it is quite obvious that the environments ability to absorb all such waste is much more limited than we as a human being expect. Hence, such prevalent attitude would lead to rigorous threats to environment, which would persist to generations to come. Therefore, to tackle such problem by a quite pragmatic economic approach, this principle first introduced by the OECD (Organisation for Economic Cooperation and Development) in 1972.

The polluter pays principle requires the person responsible for the pollution to bear its costs. The rationale behind this principle is to protect environment by making the polluter internalize the environmental costs economically: if I have to pay for something, I instantly become aware of the scarcity of resources.[2]

In the context of international investment treaty, every treaty must specifically provide an effective clause which will obliged the investor i.e. the home state to take precautionary measures in order to protect the environment and if any default is made in this context, exemplary penalty must be levelled on the defaulting party, so that the harm caused to the environment may be reimbursed.

2. The Principle of Preventive Action

Being an outflow of Principle 2 of the Rio Declaration- confirming a State sovereignty over its natural resources- the principle of preventive action, however, seeks to minimize

[2]Kulick A, Global Public Interest in International Investment Law (Cambridge University Press 2012), 226.

environmental damage as an objective in itself rather than as a mere consequence of sovereignty. According to the ICJ in the *Gabcikovo-Nagymaros case*[3]*:*

In the field of environmental protection, vigilance and prevention are required on account of the often irreversible inherent in the very mechanism of reparation of this type of damage.[4]

The preventive principle requires State to take action at an early stage or if possible before the actual occurrence of damage. Instead of taking only reactive steps to repair an environmental crisis under the principle of preventive action, States are required to take active measures in advance or well before the damage has actually occurred. Thus, this principle puts a mandate on the State to take action against measures harmful to the environment, at first sight. The principle of preventive action is enshrined in or endorsed by a plethora of international environmental treaties, covering subjects' areas ranging from the extinction of species of flora and fauna to biodiversity and air pollution and dangerous anthropogenic interference with the climate system. Despite such widespread recognition in international legal instruments, the principle has not yet achieved the status of customary international law.[5]

This principle can be termed as the cardinal principle for the environment protection. Each party to the treaty must take all preventive action to protect the surrounding in which they are operating.

3. The Precautionary Principle

This principle has its roots in a famous maxim that reads as- "*Prevention is better than cure"*, which requires the state to foresee the probable environmental harm before its getting too late or it goes out of the control of the state. Having its origins in domestic legal instruments in 1970s, most notably in West Germany, the precautionary principle, in a nutshell, requires states to takes measures to protect the environment in case of evidence of serious environmental damage, even in absence of scientific certainty. Moreover, this principle was also recognise by the Rio Declaration on Environment and Development held in year 1992. Principle 15 Rio Declaration read as follows:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

[3] Gabcikovo Nagymaros Project, Hungary v. Slovakia, ICJ GL No. 92, (1997).
[4] Supra note 2, p.227.
[5] Ibid, p.228.

The aim of this principle is to provide guidance in case of uncertainty but its purpose is to protect the environment by barring the invocation of scientific uncertainty as a pretext to continue an environmentally dangerous practice.

Though these two principles i.e. preventive action principle and precautionary principle, seems to be similar but there exists a thin line of difference as they serve different purpose. The preventive principle requires states to prevent foreseeable environmental harm, whereas the precautionary principle seeks to prevent environmental degradation by disallowing states to invoke scientific uncertainty as justification for inaction thus the former requires action in case harm is certain; the latter seeks to prevent harm where there is scientific uncertainty. [6]

4. The Common but differentiated responsibility

This principle emphasizes on striking a balance between both the parties to the treaty of investment. The common but differentiated responsibility principles seeks to reconcile both principles: States have common (equality) but differentiated responsibilities (equity).

Accordingly, Principle 7 of Rio Declaration states:

"States shall cooperate in spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. In view of the differentiated contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledged the responsibility that they bear in the international pursuit to sustainable development in view of the pressures that society place on the global environment and of the technologies and financial resources they command." [7]

There are two discernible elements inherent in the principle:

I. That states shall have common responsibility of protecting the environment at national, regional and global level.

II. That the differing circumstances of each states have to be taken into account, regarding both the state's contribution to a particular environmental threat and its ability to prevent, reduce and control it. [8]

This principle carves out that there should be equality among both the parties to the treaty regarding their responsibility towards the environmental protection and ensuring that while enforcing and executing the treaty, each party must equally take due care and precaution to

[6] Ibid, p-229.
[7] The RIO Declaration on Environment (1992), available at: www.unesco.org/education/pdf/RIO_E.PDF, accessed on January 07, 2018.
[8] Supra note 2, p-231.

protect and upheld the environment and it should not be the responsibility of only the home state to ensure that the investment does not lead to environmental degradation.

Chapter 2

General reference to environmental concerns in International investment treaties

States have an obligation to take certain measures designed to protect the environment under both customary and conventional international law. If a State takes a regulatory measures to protect the environment or to control the pollution, these will be deemed valid measures even if they have a detrimental impact on foreign investors. New international treaty may introduce new international standards and obligations requiring the States party to them to enact laws and take other administrative measures to implement the provisions of such treaties.

Businesses, whether local or foreign- owned or- controlled, may be required to abide by such measures. Compliance with such measures involves additional costs and such costs may undermine the profitability of foreign company doing business in the country concerned. For instance, owing to obligations imposed by new international environmental treaties or to new environmental policies adopted by the government concerned, a host state may adopt stricter standards for the control of pollution, the discharge of chemicals into the environment, and the level of emission of harmful substances into the atmosphere, etc.

International environmental law is more progressive in holding non-state actors liable for environmental harm. In accordance with the 'polluter pays' principle, and array of international treaties places liability directly upon polluters, including corporations. Although this environmental treaties are designed to impose obligations on private parties through intermediary of the state, certain of this treaties go out of the way to impose obligations directly on non-state actors. For instance, as early as 1992 the World Charter for Nature imposed direct obligations on private actors with regard to the protection of nature and natural resources and the need to conserve these resources and exploit them in sustainable manner. The charter declares that-

Man can alter nature and exhaust natural resource by his actions or its consequences and, therefore, must fully recognised the urgency of maintaining the quality and stability of nature

and of conserving natural resources.[9]Besides the World Charter for Nature, the following are the various attempts have been made for the environmental protection.

Organisation for Economic Cooperation and Development (OECD)[10]

The OECD guidelines of 2000 contained provisions recommending that MNEs abide by the environmental standards of host state. Some main categories of environmental provisions in IIAs have been identified by the OECD report as follows:-

1. General language in preambles that mentions environmental concerns and establishes protection of the environment as a concern of the parties to the treaty.
2. Reserving policy space for the environmental regulation in the entire treaty.
3. Reserving policy for the environmental regulation for more specific and limited subject matter.
4. Provisions that clarify the undertaking of the parties that non-discriminatory environmental regulation does not constitute indirect expropriation.
5. Provisions that discourage the loosening of environmental regulation for the purpose of attracting investment.
6. Provisions related to the recourse to environmental experts by arbitration tribunals.
7. Provisions that encourage strengthening of environmental regulation and cooperation.

Johannesburg Plan of Implementation of the World Summit on Sustainable Development (Earth Summit 2002):

It states in:-

1. *Paragraph 27* that 'the private sectors, including both large and small company has a duty to contribute to the evolution of equitable and sustainable communities and societies'.

2. *Paragraph 29* that, 'there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment'.

The Draft Code of Conduct on Transnational Corporations

[9] Surya P Subedi, "International Investment Law Reconciling Policy and Principle, (2008) Heart publishing, USA, p 165.

[10] Organisation for Economic Cooperation and Development (OECD), available at: www.oecd.org/about/, accessed on January 14, 2018.

This code which is prepared by the UN Commission on Trans-national Corporations and submitted to ECOSOC in 1990 contains some interesting proposals that is concerned with environmental protection provides in its paragraph 41 and 43 respectively as follows:-

41. Trans-national Corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard their relevant international standards. Transnational corporations should, in performing their activities take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.

43. Trans-national Corporations should be responsible to request form government of the countries in which they operate and be prepared where appropriate to cooperate with international organisations in their efforts to develop and promote national and international standards for the protection of environment.

North American Free Trade Agreement (NAFTA)

Article 104: Relation to Environmental and Conservation Agreements

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979,

b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,

c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or

d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.[11]

Chapter 3

Environmental matters and investor-state dispute settlement: Arbitration Phase

1. Santa Elena v. Costa Rica[12]

Facts:*CompaniadelDesarrollo de Santa Elena (CDSE)* (complainant) purchased a property in one of the province of Costa Rica of which the majority shares were held by the US nationals in order to develop large portions as a tourist resort and residential community. The land which was purchased by the complainant was consist of over 30 kilometres Pacific Coastline as well as numerous rivers, valleys, springs, forest and mountains. The said property in addition to its geographical and geological features was a home to a dazzling variety of flora and fauna, many of which were indigenous to the region and to the tropical dry forest habitat for which it was recognised.

However, the government of Costa Rica on 5.5.1978 issued a decree declaring a expropriation of the Santa Elena property. The reason for issuing such decree that the said land was of such significance as it was enriched with the flora and fauna of great, scientific, recreational, educational and tourism value as well as the beaches attached to the said property was a home for the sea turtles. Hence, in order to meet these objectives, government wanted to acquire the property belonging to the complainant. Though, the complainant did not object the expropriation as such, however it did contest the amount of compensation attributed by the Costa Rica company.

The main issue in this case was the amount of compensation for the expropriation of the said property as the amount of compensation attributed by the respondent was US$ 1,900,000 while the compensation claimed by the complainant was US$6,400,000.

Held: the tribunal gave the priority to the environmental protection by affirming the acquisition of the said property. However it also held that the public purpose does not affect the duty to pay the compensation and as such allowed a reasonable compensation. The reason given by the tribunal behind the award was that the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate

[11]North American Free Trade Agreement (NAFTA), Available at: www.italaw.com/sites/default/files/laws/italaw6187%2814%29.pdf, accessed on January 13, 2018.
[12]Compania del Desarraollo de Santa Elena, SA v. Costa Rica (ICSID Case no. ARB/96/1), Award, February 18, 2000.

compensation must be paid. The international source for the obligation to protect the environment makes no difference.

2. Metalclad v. Mexico[13]

Facts: The federal government of Mexico in 1993, granted COTERIN, a Mexican company, a permit to construct and operate a transfer station for hazardous wastes however the dispute arose when Metalclad, a US Corporation of Delaware purchased COTERIN including all its licenses.

The allegations of Metalclad was that immediately after it had purchased COTERIN, local government where the transfer station and land fill were supposed to be located., started a campaign to denounce and prevent the operations of the land-fill by giving the reason that the region where that land-fill was situated was a natural area for the protection of the cactus. As such Metalclad contended the violation of NAFTA articles- 1105 (fair and equitable treatment) & 1110 (measures tantamount to expropriation).

Held: the tribunal found that the municipality's actions were attributable to Mexico and thus that it had violated both the fair and equitable treatment and indirect expropriation clauses of NAFTA.

In relation to NAFTA 1105, referring to the provision's, objects and purpose, the tribunal inferred a transparency element as alluded to in article 102(1) of NAFTA. Hence, it was stated that the contradictory conduct of the federal government on the one hand and the municipal government on the other, including the Ecological Decree, was inconsistent with the fair and equitable treatment standard. Refraining from considering any natural environmental or administrative competence regulations and laws, according to the tribunal Metalclad additionally suffered an indirect taking, for the Ecological Decree de-facto- though not expressly- did not allow for any possibility of continuing to operate the landfill.

Chapter-4

Environment protection and Model BIT India, 2015

[13] Metalclad Corporation v. United Mexican States (ICSID Case no. ARB (AF)/97/1), Award, August 30, 2000.

India's bilateral investment treaty program is a part of a larger trade and investment agenda of the Indian government to boost investor confidence and increase investment flows into and out of the country. India's first BIT was with the United Kingdom in the year 1994. Till 2015, India has signed 83 BITs of which around 74 are in force. However, since it's entering into first BIT in 1994 to the end of 2010, BIT in India has failed to attract investment. As such, in order to rejuvenate its foreign investment, India reviewed its model 2003 investment treaty had come up with Model 2015 Investment treaty.[14]

As far as protection of environment is concerned in Model 2015 BIT, the third paragraph of the preamble seeks to "align the objectives of investment with sustainable development an inclusive growth of the parties". In the 2015 Model, article 8.1 of chapter 3 (Investor, Investment and Home State Obligations) provides concern for the environment protection -

Article-8.1 reads as follows-"The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State".

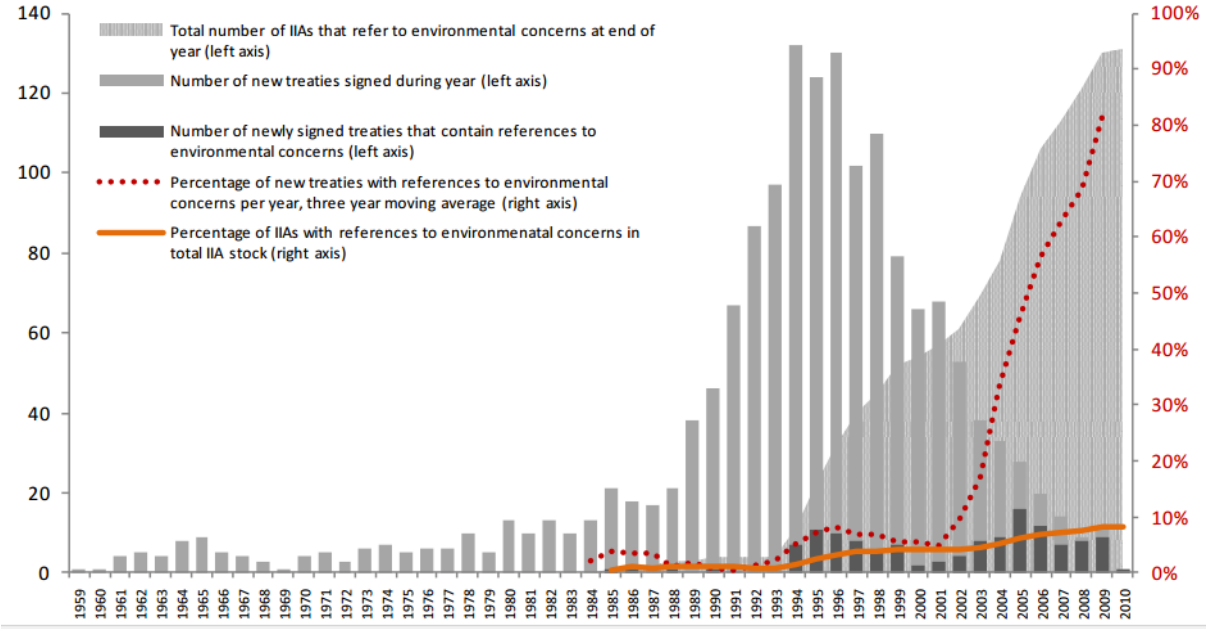
The terms 'sustainable development' and 'inclusive growth' has been used only in article 8.1. However, it does not laid down, at any stage, that what 'inclusive growth' or 'sustainable development' entails nor does it impose any related independent obligations on the investor. The terms used in article 8.1 have no substantive value. Though, there is a provision in the present Model BIT Treaty, 2015 but it neither obliges nor impose any substantive responsibility on investor.

Chapter 5

International Investment Agreements and Environment Protection: Data Analysis

This chapter will examine the data regarding the International Investment Treaties in order to figure out the actual scenario pertaining to reference of environment in it.

[14] "Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty" (Government of India 2015) report <http:// lawcommissionofindia.nic.in/reports/Report260.pdf> accessed on January 16, 2018.



Source- OECD Working Papers on International Investment 2011/01

In the above figure, the figures on the left axis represent the number of treaties that had been entered into in a particular year. The figures on the y-axis represents years in which International Investment agreements were entered. To analyse the language referring to environmental concerns, data has been taken from year 1959 to 2010. The figures on the right axis represent the percentage of new treaties that contain references to environmental concerns in a particular year.

The above figure shows that the prevalence of environmental language in the treaty sample is low, but growing. The survey shows that 133 IIAs, or 8.2% of the sample, contain environmental language of one kind or another. Following the first occurrence of environmental language in the 1985 China-Singapore BIT, the use of such language continued to be very rare until about the mid-1990s. Then, the proportion of newly concluded IIAs that contain environmental language began to increase moderately, and, from about 2002 onwards, steeply (dotted line, right scale), reaching a peak in 2008, when 89% of newly concluded treaties contain references to environmental concerns. This high percentage partly reflects the larger proportion of FTAs with investment chapters signed in 2008. It should also be noted, however, that the treaty sample in recent years is not complete because of lags in including treaties in online databases. The finding that recent treaties are much more likely to include such language may not prove to be robust once additional treaties are added to the sample.

Despite the observed increase, the stock of BITs that contain environmental language remains relatively small (solid grey area, left scale). [15]

IIAs References to Environmental Concerns: Country Summary

Sr. No.	Country	Number of Treaties included in the Sample	Numbers of Treaties referred to environmental concern	Percentage of Treaties that refer to environmental concern	First occurrence in a BIT in the sample
1	Argentina	45	1	2%	1999
2	Australia	24	5	21%	1999
3	Austria	47	0	0%	-
4	Belgium	84	17	20%	2004
5	Brazil	8	0	0%	-
6	Canada	30	25	83%	1990
7	Chile	56	6	11%	1996
8	China	72	6	8%	1985
9	Czech Republic	65	4	6%	1990
10	Denmark	39	0	0%	-
11	Egypt	73	1	1%	1996
12	Estonia	15	0	0%	-
13	Finland	50	13	26%	2000
14	France	92	0	0%	-
15	Germany	122	1	1%	2006
16	Greece	38	0	0%	-
17	Hungary	56	1	2%	1995
18	Iceland	3	0	0%	-
19	India	28	4	14%	1996
20	Indonesia	45	1	2%	2007

[15] Gordon, K. and J. Pohl (2011), "Environmental Concerns in International Investment Agreements: A Survey", OECD Working Papers on International Investment, 2011/01, OECD Publishing. http://dx.doi.org/10.1787/5kg9mq7scrjh-en

21	Ireland	1	0	0%	-
22	Israel	12	0	0%	-
23	Italy	46	0	0%	-
24	Japan	23	14	61%	2002
25	Korea	83	3	5%	1996
26	Latvia	27	1	4%	2009
27	Lithuania	29	0	0%	-
28	Malaysia	34	1	3%	2005
29	Mexico	25	8	32%	1995
30	Morocco	58	1	2%	2004
31	Netherland	96	6	6%	1999
32	New Zealand	4	3	75%	1988
33	Norway	15	0	0%	-
34	Peru	37	8	22%	2005
35	Poland	33	0	0%	-
36	Portugal	44	0	0%	-
37	Romania	49	2	4%	1996
38	Russian Federation	28	2	7%	1995
39	Saudi Arabia	8	0	0%	-
40	Slovakia	25	0	0%	-
41	Slovenia	18	0	0%	-
42	South Africa	21	1	5%	1995
43	Spain	59	0	0%	-
44	Sweden	54	2	4%	1995
45	Switzerland	101	5	5%	1994
46	Turkey	62	0	0%	-
47	United kingdom	98	1	1%	2006
48	United States	44	15	34%	1994

Source: OECD Working Papers on International Investment 2011/01

- Above table shows that out of 48 countries, 18 countries have never mentioned in their treaties the reference related to the environmental concerns.
- Among all, 18 countries provides for language referring to the environmental concern only between 1-10 percent out of the total number of their treaties entered.
- Three countries out of all 48, provides language referring to the concerns over environmental protection ranging between 11-20 percent out of the total number of all the treaties entered by them.
- Three countries out of all, shows their concern to environmental protection between 21-30 percent of the total number of treaties entered.
- Only two countries out of all the 48 countries that put the language referring to the environmental concern between 31-40 percent of their total number of treaties.
- Only 3 countries have made reference to environmental protection in their treaties ranging from 60-90 percent of all the international investment treaties entered into by them.
- No country has provided a 100 percent concern for the environment protection in their international investment treaties.

Conclusion

Today's regime of developing countries is inclined towards receiving progressive investments from different foreign countries in order to build up and bring their economy at par with developed countries. The primary objective behind entering into Bilateral Investment is to protect and promote foreign investment, yet substantial importance should be given to the environment protection as well. Having said this, the practical scenario does not witness this pre-requisite in the treaty. Developed countries are keen to invest their fund at such places where they could find much liberalised norms to sustain. Hence, it becomes the tendency of parties to the treaty to give preference to the investment protection instead of showing concern to environmental protection in the host state. Because the main motive of the home states is to exploit the resources of the host states while even the host state also following the identical footprints, giving an implied impressions of promoting their (host state) economic growth by encouraging more and more investment from foreign countries by attracting foreign investors with the scheme of liberalised policy norms in the host state.

The lingering misconception might prevails in the minds of the foreign investors about the fact that the environmental and social considerations adversely affect the financial performances of the enterprises that would add to the cost of the company which may include a portion for contributing towards CSR, erecting treatment plants for disposal of wastes of the company, etc. Therefore, this should not be taken as in the concrete form; because as per the existing study in this field, some companies have responded positively to the concerns over the degradation of the environment by enacting environmental policies, implementing environmental management systems, and reporting on environmental issues relevant to the company.

The contributing researchers have observed the extent of protection given to the environment by inserting the clauses referring to the environmental concern in international investment treaties. Thus, the conclusion of this observation shows that there are rare involvement of clauses referring to environmental concerns in the International Investment Treaties that in turn would lead to much degradation of environment of the host state.

In order to deal with another controversy i.e. "whether giving legal priority to the international environmental law over the domestic environmental law should be justified or not?", the contributing researchers have observed that in the event of any damage by any company, actual sufferers are the inhabitants of that locality in the host state. The impact of such damage would adversely affect the nationals of the host state which has no correlation with the extra territorial subjects outside the host state.

Globally, much emphasis is being laid down on upholding the governing measures taken by the government of the host state. This can be witnessed through the observation of the arbitral tribunal in Saluka Investments Case, wherein it acknowledged that circumstances do change in the host states and they would be expected to respond to the changing circumstances by adopting regulatory measures. Moreover, in para 305 the tribunal stated that-

"No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to, determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."[16]

As explained earlier in Chapter third that globally there have been various regulatory and governing mechanisms whose primary emphasis is on paving the way for the foreign investor to streamline their transactions in compliance with the governing policies of the host states.

[16] Saluka Investments BV v. Czech Republic, available at: www.italaw.com/cases/961, accessed on January 16, 2018.

But oftentimes, the host countries by themselves undermine the strength and mandate of the enabling clauses for the protection of environment by putting clauses like Article 8.2 of Model BIT India, 2015.[17] It is evident that by inserting Article 8.1, India is striving towards safeguarding its domestic laws for enhancing the contribution of the investment to inclusive growth and sustainable development. But on the other hand, by inserting Article 8.2, it lowering down the effect of this emphatic clause.

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[17]Article- 8.2 The Parties agree that this Chapter prescribes the minimum obligations for Investors and their Investments for responsible business conduct.

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