Dhaka University Law Journal, 2024, 35 (2), 191-222
DOI: https://doi.org/10.3329/dulj.v35i2.82849

Environmental Policy Space in Bangladesh's Bilateral Investment Treaties

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Abstract: *This article delves into the intricate relationship between International Investment Agreements (IIAs) and environmental policies in Bangladesh. While the government endeavors to attract increased FDI to bolster competitiveness in national market, Bangladesh struggles with the adverse impacts of climate change and environmental degradation, affecting communities across the nation. This juxtaposition underscores the pressing need to address the ongoing global debate surrounding the interplay of environment and investment, particularly in light of contemporary challenges. Recognizing the evolving nature of both the natural environment and regulatory frameworks, the article advocates for a balanced and foreseeable investment regime for foreign investors, crucial for climate-vulnerable countries like Bangladesh. To evaluate the eficacy of IIA regime in addressing these concerns, the study conducts a meticulous analysis of 30 Bilateral Investment Treaties (BITs) signed by Bangladesh. Two central inquiries guide this assessment: first, the potential impact of the BIT regime on states' regulatory space, particularly in environmental matters, and second, the necessity of revising the existing BIT regime. Employing qualitative research methodologies, the article synthesizes diverse primary and secondary sources, conducting thorough analyses of both Bangladeshi BITs and global trends in investment agreements. Findings underscore the antiquated nature of Bangladesh's current BIT regime, highlighting its potential to constrain policy space in environmental sectors. Recommendations are made for revisiting the BIT regime, aligning it with contemporary global concerns and aspirations for sustainable development.*

Keywords: FDI, Environmental policy, BIT, IIA.

1. Introduction

The international legal regime on foreign investment is arguably one of the most provocative areas of international law.[1] Provocative, in the sense that

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[1] Jose E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed, and Gabriela P. Vizcaino, *The Evolving International Investment Regime Expectations, Realities, Options: Expectations, Realities, Options* (OUP 2011)

it has attracted debates, controversies and shifts right from its emergence. Be it a property-centric idea of the North[2] for protecting the capital investors or the thrive to generate the new economic order for ensuring fairness to the South[3], the facade of International Investment Law (IIL) has been ever evolving, growing and altering patterns. What evolved as an understanding between two states for driving investment in a mutually accepted legal framework in 1959,[4] turned and twisted into an international legal framework for settlement of investment disputes. The turning decade for IIL was the 1990s,[5] also referred as the "roaring nineties"[6] by Joseph Stiglitz. Almost quadrupled[7] number of IIAs and upsurge in investment arbitrations led by private investors against states, dramatically changed the outlook of IIL.

Many interest groups including Non-Governmental Organizations (NGOs) increasingly highlighted the constraints of IIAs on human rights, environment, labor rights and other concerns of public nature.[8] A conflict between different forces emerged soon. The Multinational Corporations (MNCs), financial institutions and capital exporting states, on one hand, pushed the need for investment protection.[9] The NGOs and developing countries alternatively, professed the need to address and recognize states' regulatory space for protection of public interest.[10] A decade of disquiet, discomfort and deviance by state and other actors somehow resulted in a change of global approach to IIAs.[11] The new or revised treaties are purporting to strike somewhat of a balance of competing forces and interests, generating the need to find the "niche" in IIAs in the backdrop of the changed circumstances.

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2 Kenneth J. Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92(4) The American Journal of International Law 621

3 Kenneth J. Vandevelde, 'Sustainable Liberalism and the International Investment Regime' (1998) 19 Michigan Journal of International Law 373

4 Jose E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed, and Gabriela P. Vizcaino (n1) 627

5 M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 3

6 Joseph E Stiglitz, *The Roaring Nineties: Why We are Paying for the Greediest decade in History* (Penguin 2003)

7 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 117

8 Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interest in International Investment Law' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011)

9 ibid

10 ibid

11 Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni, *Human Rights in International Investment Law and Arbitration* (OUP 2009)

2. Bangladesh's IIA Regime

Bangladesh had entered into the IIA regime back in 1980, just within 9 years of its independence, by signing the first Bangladeshi BIT with United Kingdom. Since then, Bangladesh has been a party to 34 BITs, 25 of which are currently in force, 2 have been terminated in the meantime and the rest yet to come into effect.[12] Among the 7 Investor-State Dispute Settlement (ISDS) claims brought against Bangladesh within these four decades, only 1 has been brought under the relevant BIT with the host state of the investor.[13] In comparison to the neighboring countries,[14] the number is negligible. However, the nuances of BIT regime become significant once states' regulatory space or 'right to regulate' in matters of public interest, such as the environment, comes into play. Thus, it becomes quintessential to evaluate the current BIT regime of Bangladesh in the above background to assess how far the BITs address the changing norms of IIL.

As pointed out by Md. Abu Saleh, only 5 BITs signed by Bangladesh till now address regulation of environment by host state in some manner, 2 of them are not yet in force.[15] Thus, he rightly points out that the BIT regime of Bangladesh is vulnerable. The result of this lacuna is a narrow scope of environmental policy making. The narrower the environmental policy space, the lesser the chances of devising new and creative regulatory approaches to safeguard environment, arguably resulting in a "chilling effect". Thus, the key question to be posed is whether this situation creates a "regulatory chill" vis-à-vis constraints right to environmental regulation. The rationale of this article is not to reiterate the weaknesses of Bangladeshi BITs in the context of environmental concerns. Rather, the article assesses the impact of the subsisting BIT regime on the environmental regulatory space of Bangladesh and considers if there is an impending need to revisit the existing BITs. The ultimate goal of this article is to identify the scope of environmental regulations in Bangladeshi BITs i.e., to assess the environmental regulatory space of host state under the BIT regime in the above context, based on two key questions which are devised from two distinct approaches. First, whether there is a risk of policy space constraint in Bangladeshi BITs with regard to environmental concerns. If so, whether there is an impending need to revisit the

[12] Investment Policy Hub 'International Investment Agreements Navigator' (UNCTAD) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh?type=bits> accessed 18 July 2021

[13] Investment Policy Hub, 'Investment Dispute Settlement Navigator' (UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/207/saipem-v-bangladesh> accessed 18 July 2021

[14] 28 in India, 12 in Pakistan and 6 in Sri Lanka; See for details, Investment Dispute Settlement Navigator (UNCTAD) https://investmentpolicy.unctad.org/investment-dispute-settlement/country/198/sri-lankat accessed 18 April 2024

[15] Md. Abu Saleh, 'Bilateral Investment Treaties (BITs) Threatening Environmental Regulation of Host States: The Case Study of Bangladesh' (2018) 29 Dhaka University Law Journal 179

Bangladeshi BIT regime.

3. A Top-Down Approach to Environmental Policy and Regulations in Bangladesh

Bangladesh did not have a precise policy focus on environment right after gaining independence in 1971 but that did not make environment an absolutely negligible field of state policies.[16] Parallel with many other countries, Bangladesh corresponded to the global plea of preservation of natural environment and subsequently established the Ministry of Environment and Forests in 1989 and drafted several laws on different aspects of environmental protection.[17] Till now, Bangladesh has drafted around 200 laws which are directly, indirectly or somehow related to environment and is also a part of several international and regional treaties addressing various elements of environment protection.[18] Since independence in 1971, there has been a gradual change of the state's approach to address environment in national policies, five-year national plans and later in new laws. These approaches from a historical perspective will allow to understand the pattern of addressing 'environment' and impending challenges in Bangladesh since its independence and thereby detect the present policy and regulatory approach to environment.

3.1 Evaluation of the Five-Year Plans

The concerns for environment in Bangladesh are reflected in various degree in all the Five-Year Plans (FYP) since 1973. Just after the war of liberation, Bangladesh was looking more towards economic recovery and as such environment protection was not a major concern of the state's planning procedure. The 1st FYP (1973-1978) addressed the use of resources available in the nature through "consumption" lens and had given much attention to flood control in rural areas including flood protection embankment, drainage etc.[19] A mentionable trend in the 1st FYP was banning timber and firewood extraction and demarcating reserved forests in different parts of Chittagong Hill Tracts.[20] The 1st FYP in essence, focused more on poverty reduction, not only because it was

[16] Md. Mokarrom Hossan, 'Evolution of Environmental Policies in Bangladesh (1972-2010)' (2014) 59(1) Journal of the Asiatic Society of Bangladesh 39 <https://www.asiaticsociety.org.bd/journal/HJ2014(1)_3_%20Mokaram.pdf> accessed 5 July 2021

[17] Syeda Rizwana Hasan, 'Application and Reform Needs of the Environmental Laws in Bangladesh' (2005) 9(1) Bangladesh Journal of Law 85 <http://www.biliabd.org/article%20law/Vol-09/Syeda%20Rizwana%20Hasan.pdf> accessed 5 July 2021

[18] Tahseen Lubaba, 'An Overview of Environmental Laws of Bangladesh' The Daily Star (Dhaka, 4 June 2019) <https://www.thedailystar.net/law-our-rights/news/overview-environmental-laws-bangladesh-1753360> accessed 16 December 2023

[19] The First Five Year Plan (1973-78) 1973, pp. 73, 149

[20] ibid 118

the primary job to do in the post-war period, but also because it was realized that without reduction of poverty, it is not possible to reduce pollution vis-à-vis threat to environment.

The interim Two-Year Plan (1978-1980) also did not familiarise much on the management of natural resources, rather focused more on higher economic growth.[21] The plan also focused majorly on flood and drought control.[22] In the 2nd FYP (1980-1985) more focus was put on the development of forests by restructuring the prevalent strategies, while managing the natural resources, once again, was unobserved within the objectives.[23] The 3rd FYP (1985-1990) was considerably different from the others because it focused on population control as a major objective.[24] As the availability of usable land would decline with a growing population, a progressive land use policy was prioritized.[25] Improvement of environment and public health in general was also another focus of the 3rd FYP.[26] It reflected a progressive shift of approach towards environmental protection and the 4th FYP (1990 – 1995) created a pathway towards an environment integrated approach.

The development and protection of natural environment, per se, did not receive much attention till 1990 except a few sectorial development strategies in agriculture, fishery and forestry.[27] One of the chapters of the 4th FYP titled "Environment & Sustainable Development" separately identified impending matters which impacted and will be impacting the environment in future.[28] This was particularly of significance because during the last two decades after independence, Bangladesh had experienced a massive movement of NGOs and civil societies in raising environmental concerns, particularly regarding sustainable development and spreading awareness.[29] Thus the next decade started to reflect the results of decade long environmental activism in the formal national plans and sectorial strategies. Environmental damage was identified as an obstruction to

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21 Kenneth J. Vandevelde (n2) 88

22 Md. Mokarrom Hossan (n16) 43

23 The Second Five Year Plan (1980-85) 1980, p. 41

24 The Third Five Year Plan (1985-90) 1985, p. 37

25 Md. Mokarrom Hossan (n16) 44

26 The Third Five Year Plan (1985-90) 1985, p. 194

27 M. Q. Mirza and Ainun Nishat, 'Development and Environment in Bangladesh: Past Approach, Present Concerns and Future Issues" in Q. K. Ahmed (ed), *Bangladesh: Past two decades and the current decade* (UPL 1994) 86

28 The Fourth Five Year Plan (1990-95) 1995, p. 4

29 Sheikh Kabir Uddin Haider, 'Genesis and growth of the NGOs: Issues in Bangladesh perspective' (2011) 6(11) International NGO Journal 240 <https://academicjournals.org/article/article1381913083_Haider.pdf> accessed 3 July 2020

economic development.[30] The plan also suggested integration of non-renewable energy sources such as: bio-gas plant, solar energy plants etc. for the first time and one of the strongest features of the 4th FYP was the promotion of environmental consciousness as a result of which the National Environment Policy was drafted in 1992 to assist pro-environment development.[31]

The 5th FYP (1997-2002) was significant in the light of the global call in the Rio Declaration on Environment and Development for upholding Sustainable Development (Rio Declaration) in June 1992. The 5th FYP was a push to the environment friendly development notion conceived in the previous FYP in light of the Rio Declaration. With a view to protecting and promoting natural resources and to strike a balance between development activities and a better and safe environmental surrounding for living, the plan promoted sustainable livelihood, encouraged participation of women in protection activities, harnessed environmental interventions in development projects and strengthened public and private sector to deal with environmental concerns.[32] The plan also introduced "Polluters Pay principle" and "National Environment Fund" and also provided incentives to environment-friendly ventures in form of tax rebates, tax holidays etc.[33]

The 6th FYP (2011-2015) was divided into three parts one of which includes a chapter on "Environment, Climate Change and Disaster Management for Sustainable Development". With a keen attention on sustainable development the plan focused on poverty, climate change and environment to be reflected into the budgeting.[34] The 7th FYP (2015-2019) had a thrust on an environment friendly rapid economic growth and environmentally-sustainable growth was among the four central themes of the economic growth taken from the perspective of inclusion also found in the 6th FYP.[35] Be it economic growth, power generation or agriculture, a minimum impact on environment was envisaged within different parts of the plan. Also encouraging environment friendly alternatives to infrastructures such as transport, the 7th FYP envisaged a more sustainable economy and society. The 7th FYP had reflected in many ways Bangladesh's target in achieving the Sustainable Deployment Goals (SDGs) and as a result, envisaged strategies related to natural resource management, climate change, waste management, marine and water related issues, biodiversity etc. which are integral part of the SDGs.

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30 The Fourth Five Year Plan (1997-2002) 1997

31 ibid

32 The Fifth Five Year Plan (1997-2002) 1997

33 ibid 185

34 The Sixth Five Year Plan (2011-2015) 2011

35 The Seventh Five Year Plan (2016-2020) 2015, p. 23

While reflecting similar aims and strategies in the 8th FYP (2020-2025)[36], the fundamental focus of the 8th FYP was to kick-start the first part of the implementation of Perspective Plan (PP) 2021 - 2041[37] management strategy, which envisages a "green growth"[38] strategy for Bangladesh. The overall goal of the 8th FYP rested upon the graduation of the Bangladesh from LDC list and achievement of sustainable development. However, on the verge of the past and future bearings of the global economy on the social and economic targets of Bangladesh, experts suspect that Bangladesh might need to alter its approaches to address the fast-changing socio-economic nuances.[39] Though the struggle between environment and development is ever evolving, the latest FYPs have laid keen importance in developing a pro-environment development paradigm. They clearly suggest that Bangladesh aspires to slot in to a "green development" mechanism keeping environment in equal footing, if not more, with the development goals.

3.2 Environmental Policy Making

The Stockholm Declaration[40] of 1972, the first major global conference with a distinct focus on environment espoused broad policy goals for countries.[41] Bangladesh did not attend the conference, however, in line with many LDCs and developing countries, it participated in an evolving process of environmental protection through national law making.[42] As pollution engrossed the attention of the policy makers soon after independence, the first Water Pollution Control Ordinance was promulgated in 1973 followed by Environment Pollution Control Ordinance in 1977. The concept of environmental protection through national efforts was first institutionalized with the Environmental Policy of 1992. This policy devised in the early 1990s was an aggregated result of efforts from national and international NGOs, donor agencies, consultants, civil societies etc.[43] Bangladesh

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36 The Eighth Five Year Plan (2020-2025) 2020 FYP

37 Perspective Plan of Bangladesh (2021-2041) 2020

38 ibid 203

39 Fahmida Khatun, 'Expectations from the Eighth Five Year Plan' *The Daily Star* (Dhaka, 21 December 2020) <https://www.thedailystar.net/opinion/macro-mirror/news/expectations-the-eighth-five-year-plan-2014485> accessed 7 July 2021

40 Declaration of the United Nations Conference on the Human Environment (1972)

41 Louis B. Soiin, 'The Stockholm Declaration on the Human Environment'(1973) 14(3) The Harvard International Law Journal <https://wedocs.unep.org/bitstream/handle/20.500.11822/28247/Stkhm_DcltnHE.pdf?sequence=1&isAllowed=y> accessed 10 July 2021

42 Tahrin Chowdhury, 'International Environmental Principles and It's Applicability in Legal System of Bangladesh' (LLB Dissertation, Daffodil International University, 2018) <http://dspace.daffodilvarsity.edu.bd:8080/bitstream/handle/123456789/3148/P12582%20%2827%25%29.pdf?sequence=1&isAllowed=y> accessed 11 July 2021

43 Gazi Saiful Hasan and Sheikh Ashrafur Rahman, 'Principles of International Environmental Law: Application in National Laws of Bangladesh' in B.C. Nirmal and Rajnish Kumar Singh

took a long and concrete step towards devising somewhat of a balance between environment, population growth and environmental damage through the National Conservation Strategy (NCS) and the National Environment Management Action Plan (NEMAP) of 1995. It reflected state's concerns over population growth and its impending link with environment. A number of supplementary policies were also adopted along similar timeline for advancing the newly constructed idea of sustainable development, such as: Forest Policy of 1994, Water Policy of 1999, Energy Policy of 1995 etc.

All these policies and strategies somewhat recognized the crucial need to address environmental protection and degradation in the global context. However, a major shift in approach was taken in April, 2004 by entrusting the General Economic Division of the Planning Commission to prepare a Poverty Reduction Strategy Paper (PRSP). The PRSP-I titled "National Strategy for Economic Growth, Poverty Reduction and Social Development" recognized "environment" as a major thrust and the need to take on develop strategies that rightly balance the risks of environmental degradation.[44] As a result of which, National Biodiversity Strategy and Action Plan of 2004 was put in due priority for the recovery and preservation of degraded ecosystems.[45] The consciousness regarding climate change which was initiated through the Rio Declaration culminated though the Kyoto Protocol adapted in 1997 in Conference of Parties (COP) in Japan. As a result of which, PRSP-I was revised subsequently in October, 2008 with a separate chapter on "Caring for Environment and Tackling Climate Change" in the PRSP-II.[46] In 2008, the PRSP-II was revised to meet concerns for environment friendly development with a separate chapter titled "'Environment and Development".[47] A number of new and updated policies were framed to integrate the environment friendly development goals in different national strategies, such as: Renewable Energy Policy of 2008, National Bio-safety Framework of 2010, Bangladesh Climate Change Strategy and Action Plan of 2009 etc.

The policies and strategies devised were able to cover key development sectors and all geographical locations in Bangladesh. Environment Impact

(eds), *Contemporary Issues in International Law* (Springer 2018)

[44] General Economic Division, Planning Commission, Government People's Republic of Bangladesh 'Unlocking the Potential: National Strategy for Accelerated Poverty Reduction' (October 2005)

[45] Abul Kalam Azad, 'Integrated Coastal Zone Management in Bangladesh: A Case for People's Management' (2003) BIISS Papers No. 20 <https://www.biiss.org/journaldetail/99> accessed 11 July 2020

[46] Shahjahan Bhuiyan, 'Adapting to Climate Change in Bangladesh: Good Governance Barriers' (2015) 35(3) South Asia Research 349 <https://journals.sagepub.com/doi/10.1177/0262728015598702> accessed 10 July 2021

[47] ibid 350

Assessment (EIA) mechanism established and integrated the environmental point of view in giving clearance for industrial projects. The policies observed a shift from "consumption" based natural resources management to a sustainable and environmentally compatible use of resources.

3.3 Legal Framework

Though right to environment can indirectly be traced to laws as early as the Penal Code of 1860,[48] the major developments and reforms have taken place in the last three decades. The boom of industrialization and urbanization along with a focus on energy sector had made legal reform in the environmental sector more important than ever.[49] An effective legal framework was a significant part of the environmental policies aiming at population control and environment degradation. As the initial FYPs of Bangladesh shed light on the focus of governments particularly in the agriculture sector, the Agricultural Pesticides Ordinance, 1971 was promulgated to control the manufacture, import, distribution and use of pesticides. Later it was replaced by the Agricultural Pesticides (Amendment) Act in 1980 and the Agricultural Pesticides (Amendment) Ordinance in 1983 highlighting some aspects of public health concern. The Bangladesh Wild Life (Preservation) Order was promulgated in 1973 which mainly dealt with game animals and protected animals along. Later, in 2010, it was replaced by the Bangladesh Wildlife (Conservation and Security) Act 2012 which was adapted in consonance with international treaties and goals.[50]

The first legal instrument which laid down the protection scheme of environment within a legal framework was the Environment Conservation Act (ECA), 1995 and the Environmental Conservation Rules 1997. The ECA marked a shift of approach from 'pollution control' to 'conservation' and repealed the Pollution Control Ordinance, 1977. The Act has been amended thrice since adoption.[51] Although the ECA brought a paradigm shift in the legal safeguard to environment, many aspects of the Act have created rooms for limitation of enforcement[52], which are yet to be addressed. Another milestone legislation was the Environment Court Act 2000. However, the vagueness as to the administration

[48] Chapter XIV of the Penal Code, deals with offences relating to public health, safety etc by rendering those acts punishable which make the environment polluted and dangerous to the life of an individual.

[49] Abdullah Al Faruque, *Environmental Law: Global and Bangladesh Context* (New Warsi Book Corporation 2017)

[50] ibid 301

[51] Jose E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed, and Gabriela P. Vizcaino (n1) 92

[52] Noor Mohammad, Hasani Mohd. Ali, Zinatul Ashiqin Zainol, Jady Zaidi Hassim, Ruzian Markom and Aminurasyed Mahpop, 'Overview of the Bangladesh Environment Conservation Act 1995' (2013) 7(2) Australian Journal of Basic and Applied Sciences 156 <http://ajbasweb.com/old/ajbas/2013/February/156-174.pdf> accessed 9 July 2021

still remains a barrier to the effective implementation of the law.[53] Many other sectorial laws have also been devised which in essence espouse the principle of conservation of environment, such as: the Play-ground, Open space, Park and Natural Wetland Conservation Act 2000, the Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013 etc.

In spite of a vibrant legal and policy framework in place, the enforcement mechanism of environmental regulation in Bangladesh still remains a big challenge.[54] Evidently, among 200 countries, Bangladesh has ranked 162nd in the Environmental Performance Index (EPI) of 2020, scoring only 29 out of 100 in light of an array of sustainable indicators.[55] Previously, Bangladesh was also positioned in the "fair or limited" category in terms of enforcement and practice of laws in the Environmental Democracy Index of 2015.[56] Thus, there is an impending gap between laws on paper and in practice in the environmental legal regime in Bangladesh. Different elements of environment have been recognized in different faces of law and policy making in Bangladesh. Practically, rigorous implementation of environmental laws and regulations is challenging and at times not desirable in developing countries due to daunting social and economic challenges. However, it is submitted that, a robust legal regime backed by the idea of "right to environment", indeed creates a space for policymakers and other stakeholders to pull the boundaries of unrestricted development.

4. "Environment" at a Crossroad with International Investment Law

It is difficult to snap the change in international law over a period of time. Mainly because by nature, the events pointing to the change would be slow, scattered and tentative.[57] However, there are events, taking place around the world which will indicate a contemporary approach of states towards right to regulate in non-investment matters which will be discussed herein.

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[53] Jose E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed, and Gabriela P. Vizcaino (n1) 93

[54] Mohammad Golam Sarwar, 'Making a case for Environmental Rule of Law in Bangladesh' *The Daily Star* (Dhaka, 8 June 2021) <https://www.thedailystar.net/law-our-rights/news/making-case-environmental-rule-law-bangladesh-2106989> accessed 10 July 2021

[55] Environmental Performance Index (EPI), 'Environmental Performance Index 2020-Global metrics for the environment: Ranking country performance on sustainability issues' <https://epi.yale.edu/sites/default/files/files/BGD_EPI2020_CP.pdf> accessed 6 July 2021

[56] Jesse Worker, 'The Best and Worst Countries for Environmental Democracy' < https://environmentaldemocracyindex.org/best-and-worst-countries-environmental-democracy.html> accessed 6 July 2021

[57] Geoffrey Rippon, 'Recent Trends in International Law' (Midwinter Meeting of the International Law Section of the American Bar Association, California, January 1981) <https://scholar.smu.edu/cgi/viewcontent.cgi?article=3526&context=til) accessed 1 June 2021

4.1 Arbitral Awards

The extent to which tribunals interpret public interest considerations such as: environment, human rights etc. as an effective ground to excuse investment protection standards under IIAs is still developing.[58] During the late 1990s, a number of claims brought by investors had rung the bell within the international community of public interest. When Ethyl Corporation from USA initiated a USD 251 million claim against an environmental legislation devised by Canada under the NAFTA[59], there was a glimpse of despair that the existing and upcoming IIAs may put upon the environment and other matters of public interest.[60] However, the tribunal could not ponder over the merit of the investor's claims, vis-à-vis states regulatory space as the case was settled afterwards. However, there have been many more claims by investors subsequently, where states had to bear the costs of legislating for its own citizens on matters as significant as the environmental safeguard and protection.

Awards in favor of investors

The award in *Saar Papier Vertriebs GmbH v. Republic of Poland*[61] was an early instance of the tension between environmental protection and investment protection in host state. Claims arose out of the prohibition on importation of raw material waste paper as a result of a statutory amendment on environmental protection.[62] The issue before the arbitral tribunal was whether under the Germany-Poland BIT (1989)[63], inviting investment under a particular interpretation of the law and then changing it to make the investment economically worthless was equivalent to expropriation.[64] Tribunal relied on the principles of '*materielle enteignung*' i.e. limiting the right of property directly or indirectly without compensation and of 'good faith reliance protection' and found Poland breaching its obligations under the BIT. The key take away from this award was the reliance of investors on the regulatory structure of the state and the economic effect of the measure taken by the state.

58 Jose E. Alvarez, Karl P. Sauvant, Kamil Gerard Ahmed, and Gabriela P. Vizcaino (n1) 331

59 North American Free Trade Agreement (NAFTA) 1992

60 Michelle Sforza and Mark Vallianatos, 'NAFTA & Environmental Laws: Ethyl Corp. v. Government of Canada' (*Global Policy Forum*, April 1997) <https://archive.globalpolicy.org/socecon/envronmt/ethyl.htm> accessed 6 June 2021

61 *Saar Papier/Lutz Ingo Schaper v Poland* (1994) Italaw (UNCITRAL)

62 Investment Policy Hub, 'Investment Dispute Settlement Navigator' UNCTAD <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/4/saar-papier-v-poland-i-> accessed 6 June 2021

63 Treaty concerning the encouragement and reciprocal protection of investments (1989) 1708 UN Treaty Series 324

64 Csongor Istvan Nagy, *Investment Arbitration In Central And Eastern Europe Law And Practice* (1st edn, Edward Elger 2019) 283

The claim against states involving a "taking" of property on account of environmental measures was more discernible with the *Metalclad Corporation v. The United Mexican States*[65] arbitration before the ICSID in 1997. Metalclad was notified by the local authority in Guadalcazar, Mexico that it was unlawfully operating a waste landfill. Metalclad applied for a municipal permit which was later denied with a full closure of the constructed landfill. Metalclad approached ICSID under the NAFTA on violation of standard of treatments relating to minimum treatment standard and expropriation.[66] Tribunal observed that the municipal authority was not competent to deny permit on environmental grounds and coupled with that, the tribunal observed that the absence of clear rules and permits leading to the interference was a repudiation of FET standard promised by Mexico under the NAFTA.[67] Here again, the economic effect of the denial and closure was an important aspect of evaluating the impact of the state's behaviour.

In a similar timeline, another famous arbitration came before the ICSID deciding against the state in a similar status quo. In *S. D. Myers, Inc. v. Government of Canada*[68], the Canadian government banned exporting PCB waste to the USA for treatment by SDMI. When the tribunal found that the prohibition was intended mainly to facilitate Canadian PCB disposal industry, it concluded that Canada had violated standard of treatment pertaining to minimumtreatment standard and national treatment under NAFTA.[69] In this award, the deciding factor was the malicious intention of the state party which was against the principles undertaken under the NAFTA.

In the early 2000s, investors from Spain and Malaysia moved before ICSID under the Mexico - Spain BIT (1995) and Chile - Malaysia BIT (1992) respectively. In *Técnicas Medioambientales Tecmed v. United Mexican States*[70] claimant's non-renewal of license to run a waste landfill acquired earlier was regarded as expropriation and denial of FET standard. The tribunal found that the claimant's investment showed intention of long-term investment by the investor and the non-renewal of license was indirect expropriation in "effect". Again, in

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65 *Metalclad Corporation v The United Mexican States* (2001) 5 ICSID Reports 209 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/17/metalclad-v-mexico> accessed 16 June 2021

66 ibid

67 Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL, 2008) 143 <https://www.semanticscholar.org/paper/Damages-in-International-Investment-Law-Ripinsky Williams/06787a415cbeea355667e9850719b9a7140d9f2e> accessed 16 June 2021

68 (2000) 40 ILM 1408 <https://www.italaw.com/cases/969> accessed 15 June 2021

69 Charles H. Brower II, 'S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc., [2004] F.C. 38' 98(2) The American Journal of International Law 339

70 (2004) 43 ILM 133 <https://www.italaw.com/cases/1087> accessed 10 June 2021

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile[71] claims arose out when investor was denied a zoning modification required for claimant's project in Chile. It was observed by the tribunal that, Chile, by signing the contract and assuring the investor, created strong expectations that the project would be implemented in the specified proposed location.[72] Thus, Chile had violated its fair and equitable treatment obligation.

Awards in favor of state

The claim in *Emilio Agustín Maffezini v. Kingdom of Spain*[73], which concerned among others the justifiability of environmental impact assessment report, which was otherwise significant for its decision on jurisdiction, was dismissed by ICSID tribunal in favour of the state in early 2000. In another claim in the famous *Methanex Corporation v. United States of America*[74] before the investment tribunal under the NAFTA, Methanex Corporation based in Canada claimed that they were denied FET standard due to an embargo on the use or sale of MTBE, a type of gasoline additive in California. The claim was rejected by the tribunal observing that state had no malign pretext underlying the measures'.[75] Hence, in this revolutionary decision, tribunal took into account states independent and *bonafide* assessment of its water resources on the basis of scientific evidences will the sole view to protecting the environmental interest of the citizens of California.

In 2007, in *Parkerings-Compagniet AS v. Republic of Lithuania*[76] under the Lithuania - Norway BIT (1992)[77], investor claimed that Lithuania had violated its FET standard failing to preserve a steady and foreseeable legal structure and as such, exasperated claimant's legitimate expectations. The tribunal dismissed the claim stating that the BIT had no provision or interpretive clause not to change the regulatory environment in host state and also there was no provision as to stabilization. The tribunal went further and stated that in place of the expectation of no change in law, the more reasonable expectation is the likeliness to change in

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71 (2007) 12 ICSID Reports 6 < https://www.italaw.com/cases/717> accessed 10 June 2021

72 Ian Laird, 'MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile - Recent Developments in the Fair and Equitable Treatment Standard' (2004) 4 Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=289#citation> accessed 17 June 2021

73 (2000) 5 ICSID Reports 396 <https://www.italaw.com/cases/641> accessed 11 May 2021

74 (2005) 44 ILM 1345 <https://www.italaw.com/cases/683> accessed 19 June 2021

75 ibid, para 20

76 (2007) ICSID Case No. ARB/05/8 <https://www.italaw.com/cases/812> accessed 19 June 2021

77 Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments 1992 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1917/download> accessed 11 May 2021

the backdrop of an ever growing societal and economic circumstances.[78]

Another interesting growth of the said method was adapted in *Plama Consortium Limited v. Republic of Bulgaria*[79]. The dispute arose under the provisions of the Energy Charter Treaty (1994) and the Bulgaria - Cyprus BIT (1987). The tribunal rejected investor's claim against the amendment to environmental law by the state and observed that in absence of harm or substantive damage of the investment or curbing investor's right to exploit its investment or its economic benefit due to state measure in way of amendments, it is not possible for claimants to establish the claim of expropriation against the state.[80] Similarly, the tribunal *in Glamis Gold Ltd. v. United States of America*[81] rejected investor's claim of violation of minimum standard treatment under the NAFTA and interpreted the minimum standard treatment in a narrower way than the tribunals in the Metalclad or the S. D. Mayers award.[82] This case was of the very few which purported to outline the impact of a regulatory measure in order to assess expropriation. Citing the test in the Tecmed award, the tribunal assessed whether the regulatory measure drastically disregarded the investor from the economic use and enjoyment of its investment or it just generated disappointing profit-loss margin.[83] In this case, due to absence of the former, the claim was not entertained unlike in the Tecmed decision.

The shift in approaching regulatory measures of states by tribunals since last part of 1990s and during the 2000s was more visible and structured by the end of 2010. For example, in the claim against Canada by American corporation Chemtura in *Crompton (Chemtura) Corp. v. Government of Canada*[84] investor claimed that banning of the agro-chemical lindane by PMRA of Canada keeping in mind the chemical's effects on health and environment violated different provision under the NAFTA. In a similar approach taken in the Methanex award, the tribunal stated that the ban was not undertaken in bad faith or in breach of due process standards.[85] PMRA's review was based on scientific considerations in

[78] ibid, para 335

[79] (2008) 13 ICSID Reports, 272 <https://www.italaw.com/cases/857> accessed 19 June 2021

[80] Jonathan Hamilton, 'Plama Consortium Limited v. Republic of Bulgaria – the Best and Most Surprising Award of 2008' (*Kluwer Arbitration Blog*, 11 February 2009) <http://arbitrationblog.kluwerarbitration.com/2009/02/11/plama-consortium-limited-v-republic-of-bulgaria-the-best-and-most-surprising-award-of-2008/> accessed 25 June 2021

[81] (2009) IIC 380 <https://www.italaw.com/cases/487> accessed 25 June 2021

[82] Stephan W. Schill, 'Glamis Gold, Ltd. v. United States' (2017) 104(17) American Journal of International Law 253

[83] ibid

[84] (2010) ICGJ 464 (PCA 2010) <https://www.italaw.com/cases/249> accessed 28 June 2021

[85] Cris Best, 'Chemtura v. Canada: The Federal Government Successfully Defends NAFTA Claim Resulting from Pesticide Ban' (*theCourt.ca*, 8 September 2010) <http://www.thecourt.ca/

pursuance of its mandate and with respect to Canada's international obligations.

A closer look in to the awards, especially on the rationales of the decisions open up a box that comprises of elements of - investor's protection such as safeguard against expropriation, FET standard etc., states regulatory autonomy and environment. That means, although the tribunals have taken shifting approaches which were hardly intersected, there is still a checklist for determining when and why regulatory measures or decisions taken by states pretexts states' obligations under the BITs. For example, from an investor's perspective the variables are economic impact on the investment, the scope of right to use or enjoy the investment, due diligence and the intention or motive of the state measure etc. Again, from the State's perspective, the variables are the impending environmental effect, the end goal and necessity of the measure, due process and absence of arbitrariness, transparency etc. Though it is difficult to ascertain which of the factors will be the key players a per the specific circumstances of the cases, however, it is submitted that, the tribunals will take a case-by-case approach in the backdrop of the changing nature of treaty language, as well as specific provisions of the treaties catering to states' regulatory autonomy in terms of environment. Outright rejection of investor's claim or curving of states power is neither doable nor desirable.

4.2 Contemporary Discourse on Environmental Regulation in IIAs

It is quite clear from the above discussion that there were elements of instability in the IIL jurisprudence mostly during the 1990s which transformed into a prolonged tension. Soon enough, there were strong movements leveraging international law to make big MNCs liable for human rights, environmental and labour abuses.[86] These actions for a long span of time geared up states regulatory right to interfere in circumstances involving issues of grave public interest, such as environment. Since then, majority of the new BITs started to address environment in some means. For example, The USA Model BIT of 2004 provided that:[87]

> *"each Party shall strive to ensure that it does not waive or otherwise derogate from [its environmental laws] in a manner that weakens or reduces the protections afforded in those laws, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory"*

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chemtura-v-canada-the-federal-government-successfully-defends-nafta-claim-resulting-from-pesticide-ban/> accessed 28 June 2021

[86] Hung-Gay Fung, *Socially Responsible Investment in a Global Environment* (Edward Elger 2010)

[87] The United States of America Model BIT Concerning the Encouragement and Reciprocal Protection of Investment 2004, art. 12(1)

However, subsequently states opted for a more direct and concert approach to environment within the agreement. For example, the revised USA Model BIT of 2012 added an additional commitment not to "*fail to effectively enforce*" environment laws.[88] A new clause was added, affirming that the parties recognize that their respective environmental laws and policies and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.[89] This approach resulted in a paradigm shift of the impending tension between states' environmental commitments and investment commitments both under national and international law and indicated that these obligations are not exclusive of one another. In the next decade, new BITs substantially strengthened the parties' commitments to environmental protection in several ways, examined from fourteen latest BITs spanning from 2018 to 2020. There are two rationales behind choosing these fourteen BITs. First, these are the latest BITs signed by the countries from 2018 to 2020 and second, these are publicly available and accessible documents.

On June 12, 2018 Canada and Moldova signed a BIT with progressive aspirations and inclusive goals.[90] Environmental concerns have been reflected in two provisions of the Canada-Moldova BIT (2018). Firstly, through Article 15 titled 'Health, Safety and Environmental Measures' which unswervingly encourages parties not to relax, derogate from or waive any domestic measures pertaining to health, safety and environment.[91] Secondly, in the Annexure, a non-discriminatory measure of a party taken in good faith "*that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation*".[92] That means, state measures taken in pursuance of above public objectives are regarded as exception to indirect expropriation subject to non-discrimination and good faith on part of the host state. The Cambodia-Turkey BIT (2018) signed on 21 October, 2018[93]

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88 The United States of America Model BIT Concerning the Encouragement And Reciprocal Protection of Investment 2012, art 12(2)

89 ibid, art. 12(1)

90 Editorial, 'Canada and Moldova sign agreement to promote foreign investment, trade' (Devdiscourse, 13 June 2018) <https://www.devdiscourse.com/article/agency-wire/23493-canada-and-moldova-sign-agreement-to-promote-foreign-investment-trade> accessed 19 June 2021

91 Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments 2018 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5806/download> accessed 18 June 2021

92 ibid

93 Agreement Between the Government of the Republic of Turkey and the Government of the Kingdom of Cambodia on Reciprocal Promotion and Protection of Investments 2018 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5833/download> accessed 18 June 2021

included environmental protection in three approaches. Firstly, the Preamble to the agreement shapes parties' intention that the objective under the impending agreement '*can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights'*. Secondly, as per Article 4 of the agreement state measures related to 'the protection of human, animal or plant life or health, or the environment' and 'to the conservation of living or non-living exhaustible natural resources' are included within the 'General Exception' to the agreement[94]. Lastly, taking a similar approach as the Canada-Moldova BIT (2018), environmental measures have been specified as not to constitute indirect expropriation.[95]

In the Hungary- Cabo Verde BIT (2019)[96] signed in the earlier part of 2019 parties took a four-way approach to address environmental protection. First, in the preamble the agreement rests on the parties a pledge that the '*investment is consistent with the protection of health, safety and the environment'*. Secondly, in Article 2 titled *investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards*'.[97] Thirdly, in Article 3 titled 'Investment and regulatory measures' the parties agree that nothing under the article and the agreement shall '*affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity*'.[98] Lastly, a similar approach as to indirect expropriation has been taken by specifying environment protection as an exception.[99] States' right to regulate as assumed separately under this agreement, has been recognized within the preamble to the Australia-Uruguay BIT (2019).[100] Also, nonIdiscriminatory regulatory measures for public purpose such as environment, have been specified as exception to indirect expropriation.[101]

In a similar approach as Hungary-Cabo Verde BIT (2019), Korea-Uzbekistan

[94] ibid, art. 4

[95] ibid, art. 5

[96] Agreement Between the Government of Hungary and the Government of Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5916/download> accessed 18 June 2021

[97] ibid, art. 2

[98] ibid, art. 3

[99] ibid, art. 4

[100] Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5853/download> accessed 18 June 2021

[101] ibid, annex B

BIT (2019)[102] postulates similar positive aspiration as to consistency of investment with the domestic environmental obligations.[103] Also similar to the Cambodia-Turkey BIT (2018), the agreement postulates environmental measures both as a general exception to the agreement and specifically to indirect expropriation.[104] The India-Kirgizstan BIT (2019)[105] in a similar trend recognizes state measures pertaining to environmental objectives and to protect and conserve environment as exceptions to expropriation and to the agreement in general. In Article 12 of the agreement recognizes Corporate Social Responsibility (CSR) on part of the states and articulates that, '*Investors and their enterprises operating within its territory of each Party shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.*'[106]

In the later part of 2019, the Myanmar-Singapore BIT (2019) reaffirmed the right to regulate and introduce measures relating to environment in the preamble to the agreement.[107] In addition, the parties agreed that, '*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations*', making environmental regulation an exception to indirect expropriation.[108] The first investment agreement signed in 2020, the Japan-Morocco BIT (2020) reflected the trend of addressing environmental regulation through preamble to the agreement and strappingly recognized that the objective of the agreement can be fulfilled without any derogation of environmental measures.[109] In Article 19 titled 'Health, Safety and

[102] Agreement Between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6007/download> accessed 18 June 2021

[103] ibid, preamble

[104] ibid, art. 17

[105] Bilateral Investment Treaty Between the Government of the Kyrgyz Republic and the Government of the Republic of India 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download> accessed 18 June 2021

[106] ibid, art. 12

[107] Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6006/download> accessed 18 June 2021

[108] ibid, preamble

[109] Agreement between the Kingdom of Morocco and Japan for Promotion and Protection of Investment 2020 <https://investmentpolicy.unctad.org/international-investment-agreements/

Environmental Measures and Labour Standards', the parties partake a negative obligation to '*refrain from encouraging investments by investors of the other Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards*.'[110] Signed in the very same month, the Mexico-Hong Kong BIT (2020) also upheld states' right to environmental regulations and negative obligation not to compromise with environmental objectives, addressing it separately in Article 12 titled 'Investment and Environmental, Health or other Regulatory Objectives'.[111] Additionally, it also recognizes state measures, regulation etc. fulfilling such objectives as exception to indirect expropriation, subject to non-discrimination.[112]

Similar pledges and environmental obligations as put in the form of exception to expropriation, CSR and general exception in the India-Kirgizstan BIT (2019) have been incorporated in the Brazil-India BIT (2020).[113] However, the later contains as additional separate provision on Investment and Environment, Labor Affairs and Health in Article 22. The article recognizes right of host states to regulate to achieve environmental objectives at one hand. On the other, it creates negative obligations on the parties, not to derogate from or compromise with standards of environmental law. In the latest BIT of the twelve BITs discussed here, Israel- BIT (2020) signed on 20 October, 2020 reflects the key notions that has been discussed so far. For example, the states' right to regulate and pledge as to no derogation or compromise or relaxation of environmental measures and standards have been recognized in the preamble to the agreement.[114] Moreover, environmental measures have also been recognized as an exception to the agreement and to indirect expropriation respectively under separate provisions.[115] Within the span of 2018 to 2020, the Hong Kong-UAE BIT (2019) and the Ukraine-Qatar BIT (2018) do not address in any form, the environmental standards or objectives of environmental protection or environmental regulations. However, the Hong

treaty-files/5908/download> accessed 18 June 2021

[110] ibid, art. 19

[111] Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments 2020 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6129/download> accessed 18 June 2021

[112] ibid, art. 7

[113] Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India (2020) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download> accessed 19 June 2021

[114] Agreement between the Government of the State of Israel and the Government of the United Arab Emirates on Promotion and Protection of Investments 2020 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download> accessed 19 June 2021

[115] ibid, art. 14

Kong- UAE BIT (2019) recognizes states' right '*to protect legitimate public interest provided that such measures comply with the customary international law minimum standard of treatment of aliens.*'[116] On the basis of the thirteen BITs entered into by 27 countries around the world within 2018 to 2020, the trends and practices of how "environment" has been incorporated as a concern in BITs are discussed hereby.

Exception to Expropriation

Among the 13 BITs, all the BITs contain a separate provision on expropriation and among the 11 BITs which recognizes environmental mechanism, 10 BITs address 'environment' within the provision related to expropriation. Among these 10 BITs, 8 BITs contemplate environment with regard to indirect expropriation. The practice suggests that, state measures that are devised to achieve public interest such as safeguarding environment, human rights etc. will not fall within the ambit of expropriation, i.e. they are exception to expropriation. To be an exception, the agreements have devised different thresholds. For example:

- ⇨ Good faith (Canada-Moldova)
- ⇨ Non-discriminatory measure (Turkey-Cambodia)
- ⇨ Designed to protect legitimate public welfare/interest objectives (India-Kirgizstan)
- ⇨ Proportionate to the purpose (Hungary-Cabo Verde)

Thus, there is an acceptable practice among countries to include environmental measures as an exception to expropriation under the newly signed agreements. However, the only BIT which does not contain such exception to expropriation, i.e. the Japan-Morocco BIT, addresses expropriation for a public purpose, with due process and in a non-discriminatory manner, but with the conditions of prompt, adequate and effective compensation.

General Exception

Among the 11 BITs, 5 BITs have incorporated environmental concerns within the ambit of general exceptions to the agreement. The exception generally covers states' adoption, maintenance or enforcement of environmental protective or legal measures. However, the exceptional measures are warranted by conditions such as: disguised restriction on international trade or investment, absence of arbitrariness,

[116] Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5865/download> accessed 18 June 2021

absence of unjustifiable discrimination etc. Such a clause conceives a wider and more inclusive nature of exception than the exception to expropriation generally.

Consistency with State Objectives

This approach is a more precautionary approach to environment addressed by many states in their latest BITs. This is a twofold approach which includes first, a pledge that all the obligations taken under the agreement is consistent with the protection of environment, governments' legitimate aims with regard to such objectives and existing standards of environmental protection. The other approach is a negative obligation to bar relaxation or waiver any existing state measures of general application pertaining to environment. Among the 11 BITs, 4 BITs contain such precautionary approach as part of the preamble to the agreement or through separate provisions. Such provisions are discussed in the next part.

Independent Provisions as to Environment & Investment

Another approach taken by the new generation of BITs to address environmental concerns is to provide separate provision addressing environmental measures and investment protection. These independent provisions may take different approaches. For example, some recognizes states' right to adopt, maintain or enforce regulatory measures sensitive to environment or other public objectives not inconsistent with the investment objectives (Morocco-Hong Kong). Some provisions include the obligation to be consistent with existing environmental standards and practices (Brazil-India) or not to waive or relax any provisions or measures or standards relating to environment in host states (Japan-Morocco). These approaches are taken all together or in lieu of one to another in 5 BITs among the 11 BITs. These measures help largely to strike a balance between investment and non-investment concerns of states.

Corporate Social Responsibility (CSR)

Interestingly, among the 11 BITs, only the 2 BITs signed by India with Kyrgyzstan and Brazil respectively, contain separate provision on CSR creating obligation upon corporations and entities entering host states. This provision encourages investors to adopt a high degree of socially responsible practices pertaining to different sectors including environment. However, in terms of dispute settlement, these provisions do not create an obligation, i.e. remain self-responsibility or voluntary on companies and corporations.[117]

The IIAs around the world are evolving with regard to substantive provisions catering for the surfacing risks and interests of states. Till 2015, at least 45

[117] Laurence Dubin, 'Corporate Social Responsibility Clauses in Investment Treaties' (IISD, 21 December 2018) <https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/> accessed 18 June 2021

countries and four regional integration organizations have been reviewing or have revisited their model BITs.[118] The potential for claims under these treaties is going to be a reality for some time to come. However, a September 2022 UNCTAD study[119] revealed 175 ISDS cases involving environmental measures. Previously, tribunals like in *Saluka v. Czech Republic*[120] have emphasized balancing investors' legitimate expectations with States' regulatory autonomy, while cases such as *Eco Oro v. Colombia*[121] upheld environmental measures under police powers, demonstrating that regulation in public interest may not amount to expropriation. However, awards like *Santa Elena v. Costa Rica*,[122] requiring compensation even for environmental measures, highlight the challenges posed by IIAs lacking explicit regulatory provisions. Recognizing these complexities, modern IIAs are increasingly incorporating language that expressly protects States' regulatory rights and enables counterclaims, addressing asymmetry in ISDS.[123] For instance, the Morocco-Nigeria BIT allows environmental obligations to serve as a basis for counterclaims, as seen in cases like *Perenco v. Ecuador*,[124] where investors were held accountable for environmental harm. Furthermore, treaty formulations such as non-precluded measures clauses and references to international environmental commitments signal a convergence toward balancing investor protections with sustainable development. While efforts like the Paris Agreement could influence future treaty designs, IIAs remain underutilized in addressing urgent global challenges like climate change and biodiversity conservation. In the next chapter, the BIT regime of Bangladesh will be evaluated in terms of the latest practice of drafting BITs around the world.

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[118] Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law* (OUP 2016)

[119] UNCTAD, 'Treaty-Based Investor–State Dispute Settlement Cases and Climate Action' (2022) 4 IIA Issue Note 1 < https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf> accessed 16 December 2024

[120] Saluka Investments B.V. v. The Czech Republic (2004) UNCITRAL < https://www.italaw.com/cases/961>

[121] ICSID Case No. ARB/16/41 < https://www.italaw.com/cases/6320> accessed 16 December 2024

[122] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (2000) ICSID Case No. ARB/96/1 <https://www.italaw.com/cases/3413> accessed 16 December 2024

[123] Alison Macdonald KC, Peter Webster and Mubarak Waseem, 'Climate Change, International Investment Law and Arbitration' (*Essex Court Chambers*, 7 March 2023) < https://essexcourt.com/publication/climate-change-international-investment-law-and-arbitration-week-4-series-2/> accessed 16 December 2024

[124] Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (2019) ICSID Case No. ARB/08/6 <https://www.italaw.com/cases/819> accessed 16 December 2024

5. Bangladeshi BITs and Environmental Regulation: In Search of The Achilles' Hill

Though the development of environmental principles in different parts of the world have more or less followed a similar pattern, now or then, there are some special features of environmental law from a developing country perspective,[125] which need to be addressed in the context of international investment law. First, developing countries, to a great extent depend on foreign investments, for both exploitation of natural resources and large scale productivity.[126] On the other hand, people who are more vulnerable to environmental degradation live in developing countries.[127] Again, there are often a number of structural limitations prevalent in developing countries such as inexperienced administration, limited and underpaid staffs, overlapping jurisdictions of authorities, corruption etc. and these loopholes have contributed to general and plain regulations, prohibitions and sanction.[128]The interplay between these realities makes the environment-investment debate more subtle and critical in the context of developing countries like Bangladesh.

5.1 General Implication

In order to assess whether the environmental regulatory framework in Bangladesh is in risk of regulatory constraint, it is required to assess the BIT framework in Bangladesh. In order to determine the general applicability of BITs, there is a three-dimensional questioner-based approach which is as follows:

Is there a wide definition of "Investment"?

To understand the general scope of applicability, the definition of "Investment" in BITs play an imperative role because definition outlines the borderline of a country's exposure to IDSD claims.[129] While defining "investment" the common trait of most BITs around the world especially the older BITs is to provide a broad, open ended and asset-based dentition.[130]. Among the 25 BITs in force; 24 BITs offer

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[125] Ellen Hey, 'Justice and fairness in global water law' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 351

[126] OECD, *Development Co-operation Report* (2014) Chapter 5 <https://www.oecd-ilibrary.org/docserver/dcr-2014-9-en.pdf?expires=1625912833&id=id&accname=guest&checksum=F72C16A663460A1E67AA05B753AA6367> accessed 2 July 2020

[127] Stanko Pelc and Miha Koderman, *Nature, Tourism And Ethnicity As Drivers Of (De) Marginalization: Insights To Marginality From Perspective Of Sustainability And Development* (Springer 2018)

[128] Francisco Alpízar, 'Essays on Environmental Policy-Making in Development Countries: Applications to Costa Rica' (PhD Thesis, Gothenburg University 2002)

[129] Prabhash Ranjan, 'Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion' (2009) 26(2) Journal of International Arbitration 217

[130] ibid 218

a wide, open ended, asset-based definition of "investment". The Bangladesh-USA BIT (1986)[131] and the Bangladesh-Romania BIT (1987)[132] define "investment" as in a broad context, not entirely grounding on the asset. Many countries are pulling away from incorporating such a broad definition of investment mainly due to extension of such wide definitions in ISDS arbitrations.[133] This is also relevant for Bangladesh, as the tribunal in *Saipem S.p.A. v. Bangladesh* (2009)[134] relied on the phrase "any kind of property" found in Article 1 of the Bangladesh-Italy BIT (1990)[135] to bring the operation at issue within the ambit of property protected by the BIT. Thus, almost all the BITs of Bangladesh define "investment" broadly, in a far and wide manner and as such state actions are more prone to be hit by investment protection under the BITs.

Another important aspect of the definition of "investment" in BITs is that investment must be made 'in accordance with the laws and regulations of the other Contracting Party' or likewise. Among the 25 BITs, only 12 BITs contain reference to laws and regulations of contracting parties. This is important for two reasons. Firstly, such reference to laws of host states may be interpreted to include environmental laws as well.[136] Secondly, in absence of such reference, tribunals may entertain claims of investors even where business activities are evidently unlawful. The latter is significant in cases concerning violation of environmental regulation particularly in developing countries. Through a progressive interpretation of this provision, illegal activities can be kept outside the ambit of BIT protection, even if the domestic enforcement of a country is

[131] Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment (1986) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download> accessed 16 July 2021

[132] Agreement between the Government of the People's Republic of Bangladesh and the Government of the socialist Republic of Romania on the mutual promotion and guarantee of investments of capital (1987) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5129/download> accessed 17 July 2021

[133] Filip Milošević, 'Notion of Investment in BITs: Definition of Investment in BITs Concluded by the Republic of Serbia and Possible Solutions to Narrowing Down the Definition of Investment' (MLB thesis, Bucerius Law School 2013) <http://www.gbv.de/dms/buls/780158229.pdf> accessed 17 July 2021

[134] (2009) 17 ICSID Reports, 344 <https://www.italaw.com/cases/951> accessed 17 July 2021

[135] Agreement between the Government of the Republic of Italy and The Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments (1990) art. 1 <https://investmentpolicy.unctad.org/international-investment-agreements/ treaty-files/268/download> accessed 16 July 2021

[136] Catherine Yannaca-Small and Lahra Liberti, 'Definition of Investor and Investment in International Investment Agreements' in OECD (ed), *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) <https://web.law.columbia.edu/sites/default/files/microsites/centerforinternationalarbitration/laa_2015_alonso_2___definition_of_investor_and_investment_in_internaional_investment_agreements.pdf> accessed 16 July 2021

weak. Thus, in terms of mapping the general applicability of BITs, Bangladesh offers an extensive opportunity of making a claim to almost any actor who easily qualifies as an investor.

Is there unlimited MFN treatment?

The basic understanding of MFN can be summed up as a treatment accorded by granting state to beneficiary state, not less favorable than the treatment extended by the granting state to a third state.[137] The discussion of MFN clause in context of environmental regulation is twofold. First, it is important to understand the nature MFN clause, i.e. whether it only applies to post-establishment phase of investment and does not apply to the pre-establishment phase, or whether it applies to both. The policy implication of this dissection is that an MFN clause that only extends to post-establishment period provides a stronger safeguard to host states right to regulate foreign investment.[138] Among 25 BITs in question, 24 BITs have MFN clause that extends only to post-establishment phase of investment. This means, in case of investments that exist from before, the domestic framework will apply solely. Just in case of investments governed under the Bangladesh-UAE BIT (2011)[139], MFN treatment standards of BIT will apply to both pre and post establishment period.

The approach that is important to discuss is the specification of MFN clause. The debate over importation of specific regulation or conduct and importation of treaty provision is still a grey area in international investment jurisprudence.[140] However, to ensure environmental policy space in BITs it is essential to contemplate the effects of such substantive or procedural 'import". Among the 25 BITs of Bangladesh, 22 BITs contain some sort of exception to the MFN clause either within the clause or separately[141].For example, treatment under FTAs or

[137] International Law Commission, 'Draft Articles on Most Favoured Nation Clause 1978 with Commentaries' (1978) 2 Yearbook of International Law Commission 24

[138] Tanjina Sharmin, *Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries* (Springer 2020) 50

[139] Agreement Between the Government of United Arab Emirates and the Government of the People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investment (2011) <https://investmentpolicy.unctad.org/international-investmentagreements/treaty-files/276/download> accessed 16 July 2021

[140] OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (2004) OECD Working Papers on International Investment <http://dx.doi.org/10.1787/518757021651> accessed 16 July 2021

[141] Agreement of the Promotion and Reciprocal Protection of Investments between the Government of the Socialist Republic of Vietnam and the Government of the People's Republic of Bangladesh (2005) art. 4 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5131/download> accessed 16 July 2021

Custom Unions[142], double taxation avoidance treaties[143] etc. Only 4 of the 25 BITs contain unconditional MFN clauses. Again, the Bangladesh-Singapore BIT (2004)[144] explicitly keeps taxation matters outside the ambit of MFN clause and the Bangladesh-UAE BIT (2011) exempts all judicial and substantial matters outside the ambit of MFN clause.

Thus, on the face of it, majority of Bangladeshi BITs do not offer unconditional MFN. However, this does not ensure optimum protection of environmental regulation. For example, if a newly devised BIT contains a reform pertaining to environmental regulation, somewhat restricting treaty standards, this restrictive provision can be surpassed by investors, taking resort to the different treatment of same standard that was offered under the older BITs. This, as per Fauchald, is a major limitation of MFN clause with regard to environmental regulation.[145] Thus, this will limit Bangladesh from enforcing the desired environmental regulatory clauses against investors even if they exist in new BITs.

Is there an "Umbrella clause"?

Many IIAs and BITs around the world contain the notorious umbrella clause. It requires host state to abide by any obligation it may have entered into with regard to all investment. The superficial result of this clause is elevation of contractual obligations to breach of international investment law.[146] Though, there are hundreds of debates over the niche factor that uplifts contractual obligations

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[142] Agreement between the Government of Republic of India And The Government Of People's Republic Of Bangladesh For The Promotion And Protection Of Investments (2009) art. 4 https://investmentpolicy.unctad.org/internationalinvestment-agreements/treaty-files/265/download accessed 16 July 2021

[143] Agreement between the Government of the People's Republic of Bangladesh and the Government of the Democratic People's Republic of Korea on the Promotion and Reciprocal Protection of Investments (1999) art. 3(3) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/270/download> accessed 16 July 2021

[144] Agreement between the Government of Republic of Singapore and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (2004) art. 3(3) <https://investmentpolicy.unctad.org/internationalinvestment-agreements/treaty-files/4885/download> accessed 16 July 2021

[145] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) European Journal of International Law 301 <https://academic.oup.com/ejil/article/19/2/301/407756> accessed 16 July 2021

[146] Jarrod Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason Law Review 137 <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1171&context=facultyarticles#:~:text=An%20example%20of%20an%20umbrella,G%C3%A9n%C3%A9ral%20de%20Surveillance%20S.%20A.%20v> accessed 16 July 2021

to international obligations and there are various modes if interpretation[147], this is not the key focus of this chapter. What actually matters in case of environmental regulation, is its presence in BITs. For example, any disagreement over a contract between a state party and a foreign investor is referred to a dispute settlement mechanism agreed by the parties within the ambit of the contract. However, presence of an umbrella clause, arguably allows the investor to resort to ISDS mechanism within corresponding BIT as the breach in question can be addressed under the BIT mechanism due to spillover effect of the umbrella clause. Among 25 BITs of Bangladesh 10 BITs contain an umbrella clause. This widens the scope for many investors involved in a commercial transaction including environmental aspect to initiate ISDS mechanisms.

This is particularly concerning for Bangladesh, as the energy, power, and textile sectors, key areas attracting significant FDI are also central to sustainable development, energy transition, and climate change. A combined study of the definition of investment, the scope of the MFN clause, and the presence of umbrella clauses in Bangladeshi BITs reveals an increased risk of constrained policy space. This poses challenges for developing and implementing effective environmental regulations within the framework of these BITs. In this context, international investment law currently faces harsh criticisms for protecting fossil fuel investments, often clashing with climate goals like the Paris Agreement.[148] For example, in *Grenada Private Power v. Grenada*,[149] Grenada's effort to transition to renewable energy was thwarted when arbitration upheld the fossil fuel provider's monopoly, limiting Grenada's climate policies. Such cases highlight concerns that ISDS may deter States from implementing energy reforms. However, investment treaties can also attract renewable energy funding by providing stability for investors, as clean energy projects rely on secure, long-term frameworks. This dual role highlights the system's potential to either hinder or support global energy transitions, underscoring the critical importance of precise and forward-looking treaty language in new agreements, particularly for climate-vulnerable states like Bangladesh.

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[147] CatherineYannaca-Small, 'Interpretation of the Umbrella Clause in InvestmentAgreements'(2006) OECD Working Papers on International Investment <http://dx.doi.org/10.1787/415453814578> accessed 16 July 2021

[148] Stefan Newton, 'New Directions in International Investment Law: Towards Energy Transition' (Kluwer Arbitration Blog, 24 May 2022) <https://arbitrationblog.kluwerarbitration.com/2022/05/24/new-directions-in-international-investment-law-towards-energy-transition/> accessed 16 December 2024

[149] Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada (2020) ICSID Case No. ARB/17/13 < https://www.italaw.com/sites/default/files/case-documents/italaw11347.pdf> accessed 16 December 2024

5.2 Application in terms of Specific Provisions

The next step of determining applicability of BITs is to assess whether the regulatory space constraints created by the general application of BITs can be mitigated by application of specific treaty provisions, Thus, the applicability provisions on ISDS mechanism and Expropriation are discussed hereby.

ISDS Mechanism in Bangladeshi BITs: Spillover Effect?

The shift of the investment law regime from the protection of capital exporting countries through multilateral frameworks such as OECD Draft Convention for the Protection of Foreign Property, 1967[150] has evolved to a great extent in last few decades. One of the core reasons of this paradigm shift was the increasing number of disputes challenging state actions and the apprehended risk of regulatory interference as discussed is the previous chapters. There is some sort of dispute settlement mechanism in almost every IIAs and this provides the investors a country-neutral mechanism to settle their grievances. In this part, three phases of the ISDS mechanism in Bangladeshi BITs will be examined to determine whether the risk of ISDS claims have a spillover effect on states regulatory power.

Relation to local legal review

IIAs usually contemplate that investors may take recourse to international arbitration without strict recourse to local remedies.[151] However, local review plays a vital role while establishing a coherence of environmental law standards, alongside rule of law in environmental claims. Among the 25 Bangladeshi BITs, only 2 BITs namely, the Bangladesh-UAE BIT (2011) and the Bangladesh-Iran BIT (2001)[152] requires exhaustion of local remedies before moving to international arbitration. The Bangladesh-Korea BIT (1999)[153] allows ISDS to be settled only within the legal framework of the host state. The Bangladesh-Germany BIT (1981)[154], the Bangladesh-Republic of Korea BIT (1986) and the Bangladesh-Romania BIT (1987) do not offer any provision as to ISDS mechanism. Except

[150] Kyla Tienhaara, *The Expropriation of Environmental Governance* (CUP 2009)

[151] Dolzer and Scheruer, *Principles of international investment law* (Oxford 2012) 65

[152] Agreement on Reciprocal Promotion and Protection of Investment between the Government of People's Republic of Bangladesh and the Government of Islamic Republic of Iran (2001), art. 12 <https://investmentpolicy.unctad.org/international-investmentagreements/treaty-files/267/download> accessed 17 July 2021

[153] Agreement between the Government the People's Republic of Bangladesh and the Government of the Democratic People's Republic of (1999), art. 7 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5128/download> accessed 17 July 2021

[154] Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments (1981) <https://investmentpolicy.unctad.org/international-investmentagreements/treaty-files/264/download> accessed 17 July 2021

these 6 BITs, rest of the 19 BITs either offer local remedy as an option alongside international arbitration mechanisms or do not refer to local remedies at all. The cohesion of national and international remedies is of great significance for the environmental policy space for two reasons. First, as pointed by Konrad von Moltke, effective national remedy fosters a strong national institution.[155] Secondly, this allows international arbitration mechanisms to be used as "safety valves"[156] and not as outright substitute of national remedy.

Risk of abuse

It is of no doubt that ISDS mechanisms within IIAs put the investors in a strong footing in host states. This has some repercussions for developing countries like Bangladesh who are thriving as a growing economy. As already discussed in part one, Bangladesh has a keen interest on attracting more FDI, more so, in the global context. Thus, a restrictive ISDS approach poses two issues for Bangladesh, one is the risk of losing foreign investors and the other is the risk of facing international arbitration involving heavy economic costs. Thus, a coupling effect of these two issues in the context of an unclear environmental regulatory space within BITs, will persuade any host state to settle the matter. There are many examples of settling ISDS cases involving environment after some redress had been provided by host state. This alarmingly means that, investors have an edge in persuading states to change the environmental decisions in a way that caters to their needs. Thus, in this context of an impending risk of abuse of ISDS provisions, it is necessary to evaluate whether ISDS mechanism in BITs have any safeguard against abuse.

The Bangladesh-USA BIT (1986), the Bangladesh-India BIT (2009)[157] and the Bangladesh-Uzbekistan BIT (2000)[158] contain "essential security" clause which exempts state liability in some circumstances from the investor's claim. Though the language of these clauses mostly refer to "essential" or "emergency" circumstances, as Rumana Islam argues, the language of the provision rather intended to cover broader aspect of state's regulatory measures and hence the invocation of the clause will depend on how state addressed the specific

[155] Asa Romson, *Environmental Policy Space and International Investment Law* (Acta Universitatis Stockholmiensis)

156 ibid

[157] Agreement between the Government of Republic of India and the Government of People's Republic of Bangladesh for the Promotion and Protection of Investments 2009 <https://investmentpolicy.unctad.org/internationalinvestment-agreements/treaty-files/265/download> accessed 17 July 2021

[158] Agreement Between the Government the People's Republic of Bangladesh and the Government of the Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments 2000 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/279/download> accessed 17 July 2021

circumstance with the regulatory measure in question.[159] In this context, the right to regulate and more precisely states' environmental policy space largely depends on the mitigation of the risks culminating from ISDS process, through transparent and precise language and provision within BITs.

Provision on Expropriation: Bull's Eye for Investors?

The first and foremost question to ask when "expropriation" under BITs comes into discussion in the context of environmental regulation is whether the provision is limited to the "right to regulate" doctrine. This discussion is penitent due to a lot of reasons. First, in almost all the claims from investors in the investment arbitrations discussed in the previous chapter, investors claimed that the state measure resulted in expropriation. Among the 6 awards which came in favor of the investors, 2 awards found that the state measure pertained to indirect expropriation. The draconian use of this provision is well reflected in the latest treaties. Among the 11 treaties having some provision related to environment, 10 BITs recognize environmental measures as exception to expropriation, either direct or indirect. Surprisingly, among 25 Bangladeshi BITs, 23 BITs included provision on expropriation but only the Bangladesh-Turkey BIT (2012) contains an exception to such provision.

The second question related more to the compensation due to expropriation. More all less all traditional BITs incorporate the payment of 'prompt, adequate and effective' compensation developed on the Hull Formula.[160] Accordingly, all Bangladeshi BITs except Bangladesh-Germany BIT (1981), Bangladesh-Iran BIT (2001) and Bangladesh-Switzerland BIT (2000) which do not contain any provision on expropriation, necessitate compensation even for measures to prevent any harm of public nature. Thus, from the aspect of expropriation and compensation, it is observed that the provision on expropriation does not mitigate the risks of environmental policy space constraint, rather it may turn a bull's eye for investors for challenging state measures.

6. An Outdated BIT Regime: Possibility of "Regulatory chill"?

Firstly, there might be a fear of facing ISDS claims and incurring huge cost irrespective of the awards in the minds of regulators. Coupled with the outdated notions of investment protection in BITs, this may deter policy makers from addressing imminent environmental issues by laws or order. On the other hand, there is also a possibility that Bangladesh, as a state policy will prioritize the

[159] Rumana Islam, 'Proportionality as a Tool for Balancing Competing Interests in Investment Disputes: Fair and Equitable Treatment (FET) Standard in Context' (2013) 1 Jahangirnagar University Journal of Law 119-139

[160] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011)

interest of investors in order to establish itself firmly as pro-investment. In this case, there is still a regulatory chill, but that does not necessarily flow from the BITs. It is difficult to deduce the actual case without a thorough understanding of the intention of the policy makers. That is why, this paper took a different approach and posed the question that whether there is a risk that the Bangladeshi BITs can create a regulatory chill and constraint environmental regulation. The answer is a simple yes.

The general application of the BITs poses a threat to environmental regulations and there are no scope of mitigating the threats through specific provisions in the BITs. In a global context, Bangladeshi BITs are outdated and does not address the latest trends in BIT drafting. Thus, in the context of an environmental regulatory framework that needs further deliberation, Bangladeshi BITs pose a threat of limiting states "right to regulate". This brings the discussion to the next question, whether Bangladesh needs to revise its BIT regime. This discussion is pertinent in two aspects. First of all, in the context of economic development, the U-shaped Kuznets curve is considered which says that pollution or environmental damage will increase with income and then when income reaches at a point, pollution will start decreasing.[161] Thus, if Bangladesh prioritizes FDI and economic growth over environment, supposedly Bangladesh will wait for a while before revising its BIT regime and putting itself as a reformist. But as observe from previous discussion, Bangladesh is also envisaging a green and sustainable development model which will promote development activities consistent with environmental protection.

In this regard, Jonas Ebbesson rightly pointed in the context of modern state that, there is always a political connotation to environmental law.[162] However, to achieve this, the government is yet to address a lot of arenas from a regulatory perspective, for example, regulation of renewable energy. Thus, once government opts for that, there comes the unforeseen pressure from investors and MNCs coupled with the uncertainty of application of BITs. Thus, it is submitted that, a revised BIT regime will bring certainty to the overall environmental policy space for Bangladesh. A sudden thrust of reform like India[163] is not required or suggested or desired. Rather, a one-by-one approach to revisit and review the existing BITs in force will allows Bangladesh somewhat balance its regulatory space within BITs which in time, will act as a gravitational pull towards the aspiration of achieving harmonized green development.

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[161] Anshuman Gupta and Narendra N. Dalei, *Energy, Environment and Globalization: Recent Trends, Opportunities and Challenges in India* (Springer 2020)

[162] Jonas Ebbesson, 'The rule of law in governance of complex socio-ecological changes' (2010) 20 Global Environmental Change 414

[163] Justin Rowlatt, 'Why India wiped out 86% of its cash overnight' (BBC News, 14 November 2016) <https://www.bbc.com/news/world-asia-india-37974423> accessed 16 July 2021

7. Conclusion

This article begins by examining the environmental regulatory framework of Bangladesh to assess its alignment with the country's development aspirations. It then evaluates Bangladesh's Bilateral Investment Treaty (BIT) regime within a global context. While the complexities of international environmental law have created varied impacts of the global International Investment Agreement (IIA) regime on developed and developing nations, the overarching tendency of these treaties to limit states' regulatory autonomy undermines the de facto sovereignty of developing countries, restricting their ability to govern themselves effectively. The article specifically investigates whether Bangladesh's BIT regime hampers the government's right to regulate environmental matters. The findings reveal that most Bangladeshi BITs are outdated, either in terms of their content or the time of their adoption. The lack of a uniform dispute resolution mechanism and the absence of precedents for amicable dispute settlements discourage proactive state approaches to environmental regulation. The study underscores the urgent need for reform and modernization within the BIT regime. It also highlights why, despite the pressing need for reform, such changes might not be an immediate policy priority for Bangladesh in light of the ongoing global economic recession. Nevertheless, reform is crucial to achieving sustainable and harmonized development. A parallel evaluation of Bangladesh's policies in the investment and environmental sectors underscores that the country cannot afford to sideline either in the context of its development goals and the challenges posed by climate change. Ultimately, the article seeks to address whether these two seemingly conflicting norms, development and environmental protection, can coexist. The conclusion is that reforming the BIT regime is essential. A gradual, carefully considered approach to reform offers a pathway where development objectives and environmental protection can align. While the outcome of such reforms cannot be guaranteed due to the inherent uncertainties of international investment law, the effort remains indispensable for fostering balanced and sustainable growth.