



CONTESTATION OF *ENVIRONMENT* WITH INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM IN BILATERAL INVESTMENT TREATIES OF ASIAN REGION

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ABSTRACT

The traditional development of investment treaties are largely based on model developed across region and most of them are able to reflect the notion of investor-state dispute settlement mechanism (ISDS). The ISDS is considered as integral part of any investment treaties and hence mostly are seen in south Asian bilateral investment treaties also. The issues of conflict with investor- and host state may be for multiple reasons and environment is becoming one. The way environment was sidelined for years and years as subject matters of protection in the investment treaties, today it is compelling both the investor and host stake to take care during and aftermath the protection of environment issues. The way classical bilateral investment treaties were used to draft has inherent low interest to protect the environmental concerns. The less attention to these aspects in the treaties were also not well reflected in the dispute settlement mechanism. The preamble also saying the concerns on the protection of environment as subject matter of investment treaties. This expression of environment in the investment treaties are not similar and hence has multiple way of protection regime. The perambulatory

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expression in BIT and TIP also shows host state interest towards protection of environment considering and making proper balance with the right of investor's and their interest. The TIP is not merely designed to talk about the investment issues rather the investment is considered as one component among others. This paper has analyzed the BIT of South Asian regions limiting to South Asian Association for Regional Cooperation (SAARC) region in protection of environment and the issues relating to dispute settlement.

Key Words: Environment, Bilateral, Investment, Asian, Longitudinal.

INTRODUCTION

Considering the potentialities of Asian nations in terms of natural resources, human resources, safety, and security from the perspectives of investors, the first BIT was signed in 1959 with Pakistan and Germany 50 years ago, there are already more than 2676 BITs worldwide¹ and BITs have multiplied at an extraordinary pace.² The linguistic expression in the 1959's Treaty is more of negative in various aspects of investment agreement as seen today, one of integral part of modern bilateral investment treaties. For example, no reference to environmental aspects, social investment aspects or corporate social responsibility, no reference to sustainable development or other aspects of investment agreement.³ It is widely agreed that IIAs are not primarily designed to facilitate and promote sustainable development.⁴

Since, this BIT was considered as beginning of establishing the relationship between state and investor's, the more compliance to domestic regime of host state was taken for granted and the political economy of state was always taken into consideration for the investment purposes.⁵

¹ Z. Yuejiao, *The Asian Approach to Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment*, 24(2) *ICSID review* 400-408 (2009).

² J.W. Yackee, *Conceptual difficulties in the empirical study of bilateral investment treaties*, 33 *Brook. J. Int'l L.* 405 (2007).

³ M. Vander Stichele and S. Van Bennekom, *Investment agreements and Corporate Social Responsibility (CSR): contradictions, incentives and policy options*, 1 SOMO Discussion paper (November, 2005).

⁴ J. A. Vanduzer, *Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?*, in Hindelang S. and Krajewski, M., (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* 143 (Oxford, Oxford University Press, 2016).

⁵ J. Bonnitcha, L.N.S. Poulsen and M. Waibel, *The political economy of the investment treaty regime* (Oxford University Press, 2017).

Even, the investment objectives of this agreement is seen as differently drafted than the modern investment agreement. The large number of first generation of investment agreement has no reference to ‘sustainable development objectives’ as subject of protection or preservation. The lack of explicit or implicit recognition of it as part of any expression either in preamble, definition and substantive section of agreement has pushed back for well-established jurisprudence relating to sustainable development and investment agreement.⁶ Indeed, making sustainable development-oriented IIAs has become a recent trend in global IIA-making. As observed by the United Nations Conference on Trade and Development (UNCTAD), IIAs concluded in 2017 have shown a clear sustainable development orientation, as these IIAs not only include a larger number of provisions explicitly referring to sustainable development issues, but many also incorporate general exceptions.⁷

As a significant proliferation of BITs, there has been a regular proliferation of international arbitration claims⁸ in which investors seek to recover money damages from the states hosting their investments for alleged violations of international law.⁹ This proliferation has urged establishing international institutions facilitating the process of settlement of the dispute in the investment. The possibilities of dispute between host and investor

For decades, investment arbitration has regularly dealt with environmental issues including:

1. Bans on chemicals/products and mining techniques;
2. Denial/revocation/suspension of permits/authorizations for mining
3. Waste landfills and projects on cultural/natural heritage sites;
4. Oil contamination;
5. Expropriation for reserves;
6. Cost increases following environment impact assessments; among others.

⁶ X. Fuentes, International law-making in the field of sustainable development: The unequal competition between development and the environment, 2 *International Environmental Agreements* 109-133(2002).

⁷ IIA Issue Note, Issue I UNCTAD, Recent Developments in the International Investment Regime 5 (2018), (Aug. 24, 2024, 08:28 AM), http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf.

⁸ A. Reinisch, The Proliferation of International Dispute Settlement Mechanisms: the Threat of Fragmentation vs. The Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration. In *International Law between Universalism and Fragmentation* 107-126 (Brill Nijhoff, 2008).

⁹ INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW, UNCTAD Series on International Investment Policies for Development (2005), (June 5, 2021, 08:00 AM), https://unctad.org/system/files/official-document/iteit20054_en.pdf.

has created a legal mechanism referring as Investor-State Dispute Settlement (ISDS) more commonly used in Bilateral Investment Treaties (BITs) grant investors the right to arbitration in the event of alleged violations under such agreements.¹⁰ IIAs provide investors with the right to directly litigate with a State, whereas in other dispute settlement mechanisms such as the World Trade Organization (WTO), litigation is strictly inter-State.¹¹ The World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"), the frequent forum of choice in BIT-based arbitration clauses, decided just twenty-six international investment disputes as of 1990; by 2007 ICSID tribunals had decided over 130 such cases, with over 120 additional cases still pending.¹² Each investment treaty is different, but there are similarities among almost all of them.

The development of environment concerns in the bilateral investment treaties has also been equally seen in the Asian regions specifically in the SAARC region. The way SAARC members have concluded and terminated the bilateral investment treaties seems well expression of protection of environment in the preamble as well as specific clauses are seen in the treaty provision. The common interest of SAARC members towards the protection of environment in the investment treaties are also well endorsed in multiple places in the treaty provision with due recognition and concerns. The first appearances in the sample of such preamble language is in three 1994 BITs signed by the United States. A number of other countries later included such language in their preambles, including China, Finland, Germany, Japan, Korea, the Netherlands, Sweden, Switzerland, and the US.¹³ This expression was also seen in other regional investment treaties and also in treaties with investment provisions in the agreement. The differing nature of treaties with

¹⁰ Abbott, R., Erixon, F. and Ferracane, M.F., 2014. Demystifying investor-state dispute settlement (ISDS).

¹¹ S. Narayanan, 117 *Dispute settlement understanding of the WTO: Need for improvement and clarification*, Working Paper (2003).

¹² ICSID was established by multilateral treaty in the 1960s as a specialized forum to decide disputes between host states and investors. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. Information on the ICSID docket (June 5, 2021, 08:00 AM), <http://icsid.worldbank.org/ICSID/Index.jsp>.

¹³ OECD, OECD Working Papers on International Investment (2001).

investment provisions has also reflected the notion of protection and preservice of environmental concerns in the agreement. The expression of language may differ and also priorities of protection is different in such investment agreement.

Most common substantive provisions in the bilateral investment treaties are the scope of application of treaties, conditions for the entry of foreign investment, general standards of treatment, monetary transfer, operational conditions of the investment, and protection against dispossession, compensation for losses from armed conflict or internal disorder and settlement of disputes.¹⁴ Since BITs are negotiated between states, they are free to decide and incorporate their terms and conditions but generally move around the mentioned subjects as considered part of the customary nature of investment law.¹⁵ While it is premature at this point of time to conclude that making sustainable development-oriented IIAs has become a global trend, it is natural for Asia-Pacific countries, including least developed countries (LDCs) and landlocked developing countries (LLDCs), to take note of this emerging trend in IIA making.¹⁶

GENERAL REFERENCES TO ENVIRONMENTAL CONCERNS IN PREAMBLES AND ARTICLES

There are at least 175 treaty-based ISDS cases, closed or pending, that are tied to environmental measures.¹⁷ Many of those cases challenge measures that regulate polluting activities or protect the environment.¹⁸ These include claims related to the termination of mining concessions due to environmental concerns,¹⁹. Over the past few years, environment-

¹⁴ J.W. Salacuse, BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries, *The International Lawyer* 655-675 (1990).

¹⁵ S.W. Schill, From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom, *12 German Law Journal* 5 (2011).

¹⁶ Paul Baker, Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements, ESCAP and ARTNeT (2018), (June 5, 2021, 08:00 AM), <https://artnet.unescap.org/publications/books-reports/handbook-negotiating-sustainable-development-provisions-preferential>.

¹⁷ According to data published by the UN Conference on Trade and Development (UNCTAD), about 15 percent of all 1,190 known ISDS cases based on investment agreements are related to environmental protection, and the numbers could be higher as many cases are kept confidential; UNCTAD, "Treaty-based Investor-State Dispute Settlement Cases and Climate Action (2022).

¹⁸ UNCTAD, Treaty-based Investor-State Dispute Settlement Cases and Climate Action (2022).

¹⁹ *Skubenko and others vs. North Macedonia Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets and others vs. Republic of North Macedonia* (ICSID Case No. ARB/19/9).

related disputes have surged as Western States engaged in energy transition – with the revocation/alteration of incentives/tariff regimes for renewable energies; the phasing-out of nuclear and coal-fired power plants; and bans on oil, gas and shale-gas projects. More generally, claims have also arisen out of environmental and social impact assessment (ESIA) processes, particularly those concluding that an exploitation license or permit should be denied, halting an investment project deemed to have unacceptable environmental or social impacts, or whose impacts cannot be mitigated.²⁰ The growing trends of ISDS on environmental issues has also compelled the substantive protection of these issues as part of their treaty obligation. The way host state are challenging the action of investor under the environmental clauses will have both positive and negative impact on the trends of FDI through investment treaties in long run. The Asian region is still not much in touch with the issues of environment at ISDS framework as compare to other parts of the world. The subject of environment as part of preamble as well as in Treaty clause are reflected in the next sub-chapters.

Nepal's Bilateral Investment Treaties and Environment

Nepal has signed BIT with France to secure the investment and protection of each other investors and also agreed to make a possible dual contribution for sake of dragging more investors.²¹ This treaty is in force. The treaty with France has also mentioned the dispute settlement clauses between state and state as well as state and investor of each other's territories.²² Both the parties have not mentioned any expression of accepted language in the preamble to protect or show any preferences or priorities to environmental concerns. Even, the respective parties failed to agree on any clauses as part of treaty provision to deal with the issues of environment. The perambulatory expression on Nepal's first bilateral investment treaty with France is silent hence it shows reluctance to protect environment as subject of concern of both the government.²³

²⁰ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited vs. Republic of Kenya (ICSID Case No. ARB/15/29)*.

²¹ France- Nepal Bilateral Investment Treaties, 1983.

²² *Ibid.*

²³ *Ibid.*

The bilateral treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the encouragement and reciprocal protection of investment is another remarkable achievement to promote and bring more investment in each other's territories. The BIT with the Federal Republic of Germany has aimed to create favorable conditions for investments by nationals and companies, encouraging and contractual protection for investment and stimulate private sectors initiative to increase the prosperity of each other.²⁴ This treaty contains fourteen articles along with the protocol. The protocol has made several additions to different articles of the treaty for making the treaty provision more contextually applicable. This treaty is in force.

His Majesty's Government of Nepal has made further progress to promote and secure the investment with the Government of the Republic of Mauritius. This treaty is signed but not in force. The treaty with the Republic of Mauritius is for the promotion and reciprocal protection of investment on each other's territories.²⁵ The reciprocal is generally understood as on equal and in the mutual way of understanding with each other.²⁶ This BIT has also contained a similar purpose as reflected in the preamble of BIT with Germany. It recognized the necessity of creating a favorable environment for greater flow of investments and also promote and reciprocal protection of investment and lend greater stimulation to the development of business initiatives for increasing the prosperity of both Contracting Parties.²⁷

Nepal has made further progress by signing an agreement between the government of the United Kingdom of Great Britain and Northern Ireland and His Majesty's Government of Nepal for the promotion and protection of investments. This treaty is also in force. This agreement was also signed for creating favorable conditions for greater investment

²⁴ Preamble of treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the encouragement and reciprocal protection of investment, 1986.

²⁵ Agreement between the Government of the Republic of Mauritius and His Majesty's Government of Nepal, 1999.

²⁶ Jose Luis Siqueiros, *Bilateral treaties on the Reciprocal Protection of Foreign Investment*, (California Western School of Law, 1994).

²⁷ Preamble of Agreement between the Government of the Republic of Mauritius and His Majesty's Government of Nepal, 1999.

by national and companies of the one state in the territory of other and vice-versa. The agreement further states to recognize and encourage and enhance reciprocal protection based on an international investment agreement.²⁸ There are altogether fourteen articles consisting the issues like definitions, promotion and protection of investment, national treatment and most-favored-nation provisions, compensation for losses, expropriation, repatriation of investment and return, exceptions, reference to the international center for settlement of investment disputes, the dispute between the contracting parties, subrogation, application of other rules, territorial exceptions, entry into force and duration and termination.

Nepal has able to protect the issues of environment as part of their substantive obligation and has also imposed the due obligation to the investor. The way these investment treaties are drafted and negotiated are well reflection of ongoing discourse on environment and development. Nepal in terms of negotiating the investment treaties are very few and hence mostly not seen dispute against host state or investor a violation of environmental obligation. Recent, Nepal has faced the issues of ISDS in telecom sector under the Nepal-UK BIT not on the issues of environment. The government is able to provide protection to environmental issues in different clauses as part of their mutual bilateral obligation. The expression are seen very convincing but still lacks the strong legislative support for the promotion and protection of environmental issues. The ISDS with environment are not seen in case of Nepal's investment treaties.

Bangladesh Bilateral Investment Treaties and Environmental Concern

The People's Republic of Bangladesh witnessing a significant number of bilateral investment treaties since 1980's for the promotion and protection of investment and investor's right in Parties territories and also bringing more FDI in territory.²⁹ The BIT concluded with Bangladesh also shows a comparative level of maturity in terms of protecting the due interest and concerns of the Contracting Parties. As of record on *UNCTAD Investment Hub* policy, there are 31 BIT³⁰ concluded by government of

²⁸ Nepal-UK Bilateral Investment Treaty, 1993.

²⁹ M. B. Hossain, A. L. B. Yeon, and Aziz, A. S. B. A., Screening of Foreign Investments and the Bilateral Investment Treaties of Bangladesh, 3(2) *Society & Sustainability* 37–53 (2021).

³⁰ *Ibid.*

Bangladesh, out of it, in 29, Bangladesh purposes to sign BIT while in 2 other state has purpose Bangladesh³¹ to conclude BIT based on mutual understanding and also relies on principle of reciprocity in investment and protection of such investment and investor's right. Out of total BIT, 24 are in force, 5 are signed not yet in force and 2 are already terminated. Roughly, Bangladesh has concluded every New Year with new BIT with State with comparative progressive framework.

The survey witnessed the highest number of BIT was concluded in year of 2000 with Austria, Switzerland and Uzbekistan. Despite of this impressive number of BIT in Bangladesh, only 2 BIT is able to reflect the perambulatory expression of protection of environment. The Treaty with Cambodia reads as.....*relaxing health, safety and environmental measures of general application*.....³². The term ' environmental measures' reflect wider range of issues in relation to investment concerning the subject matters of environment, their protection and promotion. Similarly, the Treaty has separate clause for the recognition and protection of environment and public health. The Treaty clause has imposed obligation to investor's to meet their investment objectives without relaxing health, safety and environmental measures as part of general application.³³ The investment objective must go hand in hand with proper consideration and protection of environmental concerns.

The Treaty with Turkey has also mentioned the issues of environmental protection as expression in the preamble. The language expressed in this Treaty is similar with Cambodian BIT, like the investment objective can be achieved without relaxing health, safety and environmental measures.....³⁴ Furthermore, the Treaty has separate Article for the protection of public health and environment read as, A Contracting Party shall not waive or otherwise derogate from its national public health and environmental policies.....³⁵ and further under the general exception clause, the concerns of environments are reflected. As part of it, the

³¹ *Cambodia-Bangladesh BIT, 2014 and Austria-Bangladesh BIT, 2000.*

³² *Preamble of Cambodia- Bangladesh BIT, 2014.*

³³ *Art. 4 of the Cambodia- Bangladesh BIT, 2014.*

³⁴ *Preamble of Bangladesh-Turkey BIT, 2012.*

³⁵ *Art.4 of Bangladesh-Turkey BIT, 2012.*

Contracting Parties are permitted to adopt, maintain or enforce any non-discriminatory measures designed and applied for the protection of human, animal or plant life or health or the environments.³⁶ Out of 31, BIT in Bangladesh only 2 have expression of environmental protections or concerns in the preamble (*expressed in blue color*). The lack of perambulatory expression in larger number of bilateral investment treaties shows the unwillingness of parties to deal with the subject matters. The new generation of bilateral investment treaties have expressed the language of environmental protection as part of preamble as well as part of different clauses. The government has signed further 4 treaties³⁷ with investment provision for the promotion, protection and liberalization of investment opportunities in each other jurisdictions. The *Asia Pacific Trade Agreement (APTA)* is also silent on the issues of environmental protection rather this multilateral investment agreement has agreed to liberalized trade in the Contracting region. The *SAFTA* and *OIC* has provision in relation to environmental protection in preamble as well as part of the Agreement while the *Bangladesh- EC Cooperation Agreement* has provision for protection and promotion of environment in the preamble which reads as,

CONSIDERING the importance attached by the Community and Bangladesh to the promotion of balanced demographic growth, to the eradication of poverty, to the protection of the environment and to the sustainable use of natural resources, and recognising the link between the environment and development,³⁸

DESIROUS of creating favourable conditions for a substantial development and diversification of trade between the Community and Bangladesh,³⁹

The Agreement with EC has strong foundation for the protection and cooperation in the field of environment. The Parties undertake to

³⁶ Art.5 (1) (a) of *Bangladesh-Turkey BIT, 2012*.

³⁷ *APTA Investment Agreement, 2009; SAFTA, 2004; Bangladesh-EC Cooperation Agreement, 2000 and OIC Investment Agreement, 1981.*

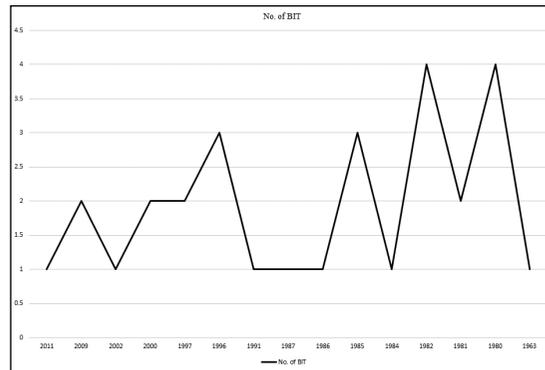
³⁸ Preamble of *Bangladesh- EC Cooperation Agreement, 2000.*

³⁹ Preamble of *Bangladesh- EC Cooperation Agreement, 2000.*

cooperate in the environmental field with the aim of enhancing the prospects for achieving sustainable economic growth and social development, placing a high priority on respect for the natural environment.⁴⁰ The priority are given by both the party for the protection and promotion of issues in relation to the environment as under obligations. There are series of activities agreed between two parties in the name of environmental cooperation.

Srilanka Bilateral Investment Treaties and Environmental Concern

An investor is permitted under framework of bilateral investment treaties to sue against the host state as seen violation of treaty clauses. Sri Lanka was asked to stand based on BIT violation at international arbitration twice.⁴¹ In the case of *AAPL vs. Sri Lanka*⁴² and in *Deutsche Bank AG vs. Sri Lanka*⁴³; *KLS Energy vs. Sri Lanka*⁴⁴, *Eyre and Montrose Developments vs. Sri Lanka*⁴⁵, *Mihaly vs. Sri Lanka*⁴⁶ in entire journey of BIT in country. A potential reason to drag inward FDI has made to think a potential benefit attached with such bilateral investment agreement. The rapid changes across model of BIT is compelling to think about the new model or version of BIT with new norms and values. The developing countries have liberalized their economy for bringing the FDI as narrated source of national development and economy. Sri Lanka liberalized its economy in 1977 and made a shift



⁴⁰ Art.5 of the *Bangladesh- EC Cooperation Agreement, 2000*.

⁴¹ D. Pathirana, An Overview of Sri Lanka's Bilateral Investment Treaties: Status Quo and Some Insights into Future Modifications, 7(2) *Asian Journal of International Law* 287-318 (2017).

⁴² *Asian Agricultural Products Ltd. vs. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

⁴³ *Deutsche Bank AG vs. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2.

⁴⁴ *KLS Energy Lanka Sdn. Bhd. vs. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/18/39).

⁴⁵ *Raymond Charles Eyre and Montrose Developments (Private) Limited vs. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/16/25).

⁴⁶ *Mihaly International Corporation vs. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2).

from its original status of an agriculture-based economy to a more market-oriented industrial and services economy. The Board of Investment (BOI) of Sri Lanka, the government arm whose mandate focuses on attracting and facilitating FDI inflow, was established in 1978. Its mandate includes encouraging FDI inflows into Sri Lanka by creating a conducive environment for investment, and negotiating Bilateral Investment Treaties (BITs) with economies that have favorable economic and investment ties jointly with the Ministry of Foreign Affairs.⁴⁷

Since entering into the first BIT with the Government of Germany on 8th of November 1963, to-date, Sri Lanka has signed 29 BITs, of which 24 are in force, 3 are already terminated and 2 are only signed not in force yet. The high number of BITs, which was signed during the 1980s, can be explained by the changes in Sri Lanka's economy that took place after 1977.⁴⁸ Sri Lanka has requested in 6 BIT to other nations while in 23 BIT, the other State has requested the Sri Lankan authorities to conclude the BIT for the promotion and protection of investor's right and interest in each other jurisdiction and largely found based on reciprocal relations. The domestic liberal policy is very significant to drag inward FDI in any developing nations so rapid changes were seen in the year of 1977 in Sri Lanka and subsequent result can be seen in 1980's, witnessing highest number of BIT. The major 6 treaties with the investment provisions in Sri Lanka has also concerns to promote and protect the issues of investment in each other jurisdictions.⁴⁹ Out of 6 Treaty with investment provisions, only 5 are in force and 1 is signed, not yet in force.⁵⁰

The reluctance of contracting parties in showing respect, protecting and promoting environmental issues in the investment agreement is also seen in the Sri Lankan bilateral investment treaties. The Contracting parties have not shown any preferences or included even a single word

⁴⁷ Malalgoda C P & P N Samaraweera, The Experience of Sri Lanka with International Investment Treaties, (July 23, 2024, 06:40 PM), https://www.southcentre.int/wp-content/uploads/2016/12/IPB7_The-Experience-of-Sri-Lanka-with-International-Investment-Treaties_EN.pdf.

⁴⁸ *Ibid.*

⁴⁹ Singapore-Sri Lanka FTA, 2018; APTA Investment Agreement, 2009; BIMSTEC Framework Agreement, 2004; SAFTA, 2004; US-Sri Lanka TIFA, 2002 and EC-Sri Lanka Cooperation Agreement, 1994.

⁵⁰ This data is surveyed on the date of accomplishment of article.

relating to environment in 29 BIT and even in few places under 6 treaties with investment provisions. The BIT lacks any perambulatory expression for the protection, promotion and preservation of the environment or issues relating to the environment. If the term, “extract or exploit natural resources” has connotation with the environment then more than fifty per cent of BIT has such expression under the chapter of investment in Sri Lanka’s investment agreement. This expression of ‘exploit or extract natural resources’ are a model phrases adopted in those investment agreement. The wider coverage of environment or the inherent interest of host state and contracting parties towards it, may be the sole reasons for none expressions of it in such treaty provisions. This expression towards natural resources are seen in 19 bilateral investment agreement of Sri Lanka which further requires qualification to interpret linking with the subject matters of environment.

The treaty with investment provision has also strong reluctance towards the issues of environment protection and promotion of it. The APTA Agreement on PROMOTION, PROTECTION AND LIBERALIZATION OF INVESTMENT IN APTA PARTICIPATING STATES⁵¹ has also no perambulatory expression towards the environmental issues. The similar trends are seen under the chapter on definition of investment “to *extract or exploit the natural resources*”.⁵² The BIMST-EC Agreement has similar expression with APTA read as “...*protection of its national security or the protection of articles of artistic, historic and archaeological value, or such other measures which it deems necessary for the protection of public morals, or for the protection of human, animal or plant life, health and conservation of exhaustible natural resources*”.⁵³ SAFTA is also silent on environment issues and contain similar expression in Article as like other TIPs. The TRADE AND INVESTMENT FRAMEWORK AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA⁵⁴ has expression in preamble

⁵¹ FRAMEWORK AGREEMENT ON THE PROMOTION, PROTECTION AND LIBERALIZATION OF INVESTMENT IN APTA PARTICIPATING STATES ASIA-PACIFIC TRADE AGREEMENT.

⁵² Ibid, Art.2 (a) (vi).

⁵³ Art.8 of BIMST-EC Free Trade Area, 2004.

⁵⁴ US-Sri Lanka TIFA, 2002.

towards the issues of sustainable development which reads as “Reaffirming our commitment in the Doha Declaration that expansion of trade and investment and the ‘*promotion of sustainable development*’ and ‘*protection of the environment*’ can and must be mutually supportive” and lastly COOPERATION AGREEMENT between the European Community and the Democratic Socialist Republic of Sri Lanka on partnership and development⁵⁵ has also perambulatory expression towards the environment which reads as.. CONSIDERING the importance attached by the Community and Sri Lanka to the ‘*protection of the environment*’ on a global and on a local level and to the sustainable use of natural resources recognizing the linkage between the ‘environment and development’. As compare to *BIT* in Sri Lanka, the *TIP* have shown greater interest on the subject matters of environment and significant per cent has also kept as part of their agreement in separate clause for the promotion and protection of investment considering the need of environment. The *TIP* with *EC* has shown a need to make proper balance between the environment and development as needs of 21st century.

Pakistan Bilateral Investment Treaties and Environmental Concern

Sooner the independence with British colony, Pakistan had made a history of signing the first ever bilateral investment treaty in 1959 with Germany.⁵⁶ The purpose of this Treaty was to bring inward FDI to promote and protect the investor’s right in each other jurisdiction but due to rising in ISDS cases against the host nations by foreign firms or companies on commercial business, the termination rate of BIT is also high in Pakistan. According to the Board of Investment (BOI), under Section 9(m) of the *Board of Investment Ordinance 2001*, the BOI is mandated to negotiate and finalize agreements for promotion and protection of investments/ bilateral investment treaties with other countries. To date, Pakistan has concluded 53 BITs with 48 countries.⁵⁷ Out of these all BIT, 16 are signed, 32 are in force 5 are terminated and other are in process of

⁵⁵ EC- Sri Lanka Cooperation Agreement, 1994.

⁵⁶ The Express Tribune, (Dec. 7, 2022, 08: 07 AM), <https://tribune.com.pk/story/2313937/pakistan-to-terminate-23-bilateral-investment-treaties>.

⁵⁷ UN Trade and Development, (Dec. 7, 2022, 08: 07 AM), <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan>.

termination or denunciation by the parties concerned. Pakistan has also witnessed heavy flow of case against the State by foreign companies as violation of norms and principles of bilateral investment agreement. Most of these cases are on few principles of *Most-Favorable nation*, *National Treatment* and *expropriation*. The cost associated with such international arbitration is also non-manageable hence the Republic of Pakistan is in journey of terminating most of the bilateral investment treaties with the foreign states.

The perambulatory expression in Pakistan's BIT about the promotion, protection and preservation is almost zero except in one treaty whereby the Party has agreed to show their respect to environment and also agreed to enforce dual equal obligation towards it. The language of treaty as referred in Preamble reads as, *Convinced that these objectives can be achieved without relaxing health, safety and environment measures of general application as well as internationally recognized labor rights*.⁵⁸ Even under the general exception clause of the agreement, both the parties have agreed to construe to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures: a) designed and applied for the protection of human, animal or plant life or health, or the environment; and b) related to the conservation of living or non-living exhaustible natural resources.⁵⁹ Similarly, treaty has also provision in relation to expropriation and compensation and parties are permitted to adopt '*Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation*'.⁶⁰ The lack of dedication or commitment despite of having 53 numbers of BIT in Pakistan towards the environment shows unwillingness of the party concerned on it. The phrase like *...exploit, extract of natural resources are seen as general trends on most of the Treaty provision under the chapter of definition clause*.⁶¹

⁵⁸ Pakistan –Turkey BIT, 2012.

⁵⁹ Art.5 (1) (a) (b) of Pakistan –Turkey BIT, 2012.

⁶⁰ Art.6 (2) of Pakistan –Turkey BIT, 2012.

⁶¹ Art.5 (1)(a)(b) of Pakistan –Turkey BIT, 2012.

The *Republic of Pakistan* has signed seven major treaties and out of it, six are in force⁶² with investment provisions for mutual benefit of investor's in each other jurisdictions and also promote investment based on reciprocal relations. The *China-Pakistan FTA* has provision in preamble regarding the protection and promotion of environment read as,⁶³

Recognizing that this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation;

Similarly, the *FTA* also has included the concerns of investment in the definition clause of the agreement which read as, business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, *extract or exploit natural resources*.⁶⁴ This expression is also found in most of *BIT* and treaty with investment provisions in other countries also. Also, the *Pakistan-USA TIFA* has perambulatory expression of environmental protection and language read as,

Reaffirming the commitment in the Doha Declaration that expansion of trade and investment and the promotion of 'sustainable development and protection of the environment' can and must be mutually supportive⁶⁵

Similarly, *EC - Pakistan Cooperation Agreement* has a remarkable provision, adopting the changes in environmental policies around world and such reflection are seen in the Preamble of Agreement which read as,

CONSIDERING the importance attached by the Community and Pakistan to the promotion of balanced demographic growth, to the eradication of poverty, to the protection of the

⁶² Malaysia - Pakistan CEPA, 2007; China - Pakistan FTA, 2006; ECO Investment Agreement, 2005; SAFTA, 2004; Pakistan - US TIFA, 2003; EC - Pakistan Cooperation Agreement, 2001 and OIC Investment Agreement, 1981.

⁶³ China - Pakistan FTA, 2006.

⁶⁴ Art.46 (1) (e) of China - Pakistan FTA, 2006.

⁶⁵ Pakistan-USA TIFA, 2003.

environment and to the sustainable use of natural resources, and recognizing the link between the environment and development,

DESIROUS of creating favourable conditions for a substantial development and diversification of trade between the Community and Pakistan and enhancing cooperation in commercial, economic, investment, science and technology and cultural fields,

The Contracting party has also given a separate article for the environmental cooperation in each other jurisdictions.⁶⁶ The willingness of the party towards the environment are strongly seen from the agreed obligation in the Treaty clauses. Both the nation has obligated to take necessary measures to provide full protection with proper balance with the environmental concerns and need of investor's and host state. There are series of operative program for this purpose in the Agreement to preserve or materialize the notion and aspirations of the environment in each other jurisdictions. Hence, comparatively Pakistan has given some wider space in the preamble as well as in part of Treaty provision towards the environment protection and promotions.

INDIA BILATERAL INVESTMENT TREATIES AND ENVIRONMENTAL CONCERN

The proliferation of IIAs in India is comparatively higher than any other nation in the region. India had been one of the largest nation signing the BIT with the other nation for the promotion and protection of investor's interest and rights in each other jurisdictions. India signed a number of International Investment Agreements (IIAs) and by 2020 it had one of the largest investment treaty arrangements in the world, having signed 86 bilateral investment treaties (BITs) and 13 other IIAs an also is making a record of terminating the BIT. Out of 86 BIT, 76 have already been terminated and the highest number of termination, 50 are seen in year of 2017. The 7 BIT Treaty are in force while 3 are signed not yet in force. The new BITs have to be renegotiated using a template provided

⁶⁶ Art.5 of the Pakistan-USA TIFA, 2003.

by a new Model Treaty by the Indian government. The large number of investor's claim against the India in foreign arbitral forum has compelled to rethink the perspective towards the bilateral investment treaties. More than fifty per cent of the treaty are already terminated and some are in process of re-negotiation. The significant number of BIT are terminated unilaterally denounced by the government of India fulfilling all procedural requirement.

India has made perambulatory expression towards the protection of environment as well as in the *Article* called Corporate Social Responsibility. Comparatively, in the region, India has positive attitude towards the issues of environmental protection. The expression in significant number of existing BIT with such language shows the willingness of the parties towards the environmental protection. The word, sustainable development and protection of environment has become part of such larger bilateral investment treaties. Since India has adopted a new model of BIT for coming or is in process of terminating most of the Treaties signed unilaterally, the concerns can be seen less for such protection. A new model has an element of such language for the parties concerned. The Treaty with Brazil reads as*Recognizing that.....promotion of sustainable development, including poverty reduction.*⁶⁷ The Treaty has further arrangement towards the protection and promotion of environment. The investors and investment need to contribute to the sustainable development of the Host State and the local community....⁶⁸ this is new approach imposing legal obligation towards societies to the corporate. The investor need to consider the issues of environment while investing in the host state.

Similarly, the Kyrgyz government has also shown perambulatory expression towards the protection and promotion of environmental concerns. The issue of sustainable development ⁶⁹ is seen as expressed in the preamble of the Treaty. The newer generation of BIT has given respect and honor to the expression of 'sustainable development' in the Preamble

⁶⁷ Preamble of Brazil-India BIT, 2020.

⁶⁸ Art.12 of Corporate Social Responsibility.

⁶⁹ Preamble of India- Kyrgyzstan BIT, 2019.

as well as in the Treaty clauses. The similar obligation is imposed on investors and their investment towards the environment of the Host State.⁷⁰ The perambulatory expression of promotion of ‘sustainable development’ also can be seen in Treaty with Belarus which reads as ‘*Recognizing.....the development of economic cooperation between investors and Host state and to the promotion of sustainable development....*’⁷¹ The Treaty has further provision for the promotion and protection of environment under the social responsibility clause.⁷² Some of the BIT has not perambulatory expression towards environment but has incorporated in the Treaty clause such as BIT with UAE, has expression in the Article.⁷³ India has signed 15 Treaty with investment provisions for the promotion and protection of investment in Member countries. Some of the Treaty has provision in relation to the protection and promotion of the environment.

Maldives Bilateral Investment Treaties and Environmental Concern

Maldives in relation to conclusion of bilateral investment treaties is very less as in compared to any other nation of region. The government of Maldives had concluded only one BIT with United Arab Emirates in 2017 but yet not in force. Since, the text of the agreement is not available on investment hub policy of UNCTAD to review the concerns of environmental issues in the agreement. The Maldivian laws on foreign investment, 1979 has also not mentioned in any clauses or in preamble about the issues of environmental protection. The law has set major liabilities of host states and investors as accordance with the agreement as well as based on this substantive laws for the investment in territories of Maldives.

The government of Maldives has concluded 3 specific agreement⁷⁴ with investment provisions for promotion and protection of investment and investor’s right in each other jurisdictions/territories. The trade agreement with US aims to enhance the trade, cooperation and to strengthen economic cooperation between parties and has given recognition

⁷⁰ Art.12 of India- Kyrgyzstan BIT, 2019.

⁷¹ Preamble of Belarus-India BIT, 2018.

⁷² Art.12 of Belarus-India BIT, 2018.

⁷³ Art. 4 (3) of Protection of Investment, India-UAE BIT, 2018.

⁷⁴ Maldives-US TIFA, 2009); SAFTA, 2004 and OIC Investment Agreement, 1981.

to importance of protecting and preserving the environment, further expressing desire to ensure trade and environmental policies mutually supportive to sustainable development.⁷⁵ The perambulatory expression to environment is a progressive framework of this Maldives- US agreement. Furthermore, the Parties has agreed to extendcooperation in regards to protection of environment...⁷⁶ This agreement is in force.

Similarly, as party to *OIC* Investment Agreement, the perambulatory expression like...optimum utilization of resources...may contain the intention of protecting and preserving the environmental resources. This depends on rules of interpretation or scope of this phrase in the preamble. This agreement has not mentioned any explicit language of environment protection in any Articles. Furtherance, SAFTA Agreement also doesn't spell anything in relation to the environmental protection while discussing the issues of investment or extending their economic or other agreed cooperation. Under the clause of general exceptions,⁷⁷ the state party are not prevent to take action for adoption measures for the *protection of human, animal, or plant life and health;*⁷⁸ and *articles of artistic, historic and archaeological value.*⁷⁹ Hence, the government of Maldives has shown reluctance with the issues of environment protection in their investment agreement.

Afghanistan Bilateral Investment Treaties and Environmental Concern

The inception of bilateral investment treaty in Afghanistan is not old as in compared to other members of SAARC region. It started in 2004 concluding Afghanistan-Turkey BIT for the promotion and greater economic cooperation by respecting each other investors based on mutual agreed principles and reciprocal relations.⁸⁰ The Republic of Turkey has shown interest to make investment in agreed areas in the territory of it

⁷⁵ Preamble of Maldives-US TIFA, 2009.

⁷⁶ Art.3 of Maldives-US TIFA, 2009.

⁷⁷ Art.14 of Agreement on South Asian Free Trade Area (SAFTA).

⁷⁸ Art.14 (b) (ii) of Agreement on South Asian Free Trade Area (SAFTA).

⁷⁹ Art.14 (b) (iii) of Agreement on South Asian Free Trade Area (SAFTA).

⁸⁰ Preamble of Agreement between The Republic of Turkey and The Transitional Islamic State of Afghanistan concerning the Reciprocal Promotion and Protection of Investments, 2004.

and vice-versa. Out of 4 BIT with Afghanistan, only 3 are in force and latest signed with Azerbaijan in 2017 is not in forced.⁸¹

The protection of environment and sustainable development as new norm of modern BIT (4th Generation of BIT)

The mapping of investment opportunities in Afghanistan is also high and is potential to bring FDI in an unexpected manner. The internal unstable policies are pushing back for not able to drag FDI in different sectors. The expression of environmental protection is only seen in BIT with Azerbaijan.

The perambulatory expression is like, desiring to reciprocally promote and protect foreign investments consistently with the pursuance of the sustainable development goals, and the combating of climate change⁸² and further....investment in manner consistent with the protection of health, safety and the *environment and the promotion of sustainable development*. The direct expression to protect environment was seen in last paragraph of the preamble in the BIT. The expression of sustainable development is also linked with the due protection of environment. Due to rapid changes in global policy towards the environment and climate, the latest BIT is able to show respect to such change as in preamble. The signatories state has to enforce the expression of environment protection at time of dealing with the investment issues in each other territories hence the preamble is seen as internal part of any agreement as importance as compared to any other clauses of such agreement.⁸³ The 2017 BIT is seen as progressive as in compared to other BIT of Afghanistan towards respect and protection of environment as part of treaty provisions.

The BIT with Azerbaijan also express the regulatory right of host state to take any action.....for *protection of environment*, provided that such measures are not applied.....in arbitral of unjustified discrimination.⁸⁴ It further states that the measures taken by a Contracting Party to

⁸¹ The detail of BIT can be seen from Investment Policy Hub of UNCTAD.

⁸² 5th Para of Preamble of Afghanistan- Turkey BIT, 2004.

⁸³ M.H. Hulme, Preambles in treaty interpretation, 164 (5) *University of Pennsylvania Law Review* 1281-1343 (2016).

⁸⁴ Art. 5 of Afghanistan- Azerbaijan BIT, 2017.

protect....*environment*, public health, safety do not constitute “indirect expropriation”.⁸⁵ The BIT has expressed the concerns of environment in preamble as well as part of agreement under Article 5 and 6. The notion of sustainable development is seen as in latest model of bilateral investment treaty and most of the current BIT do reflect this development. The BIT with Azerbaijan is also a well reflection of this global development for protection of environment and climate issues. The state has also give authority to make necessary arrangement for protecting their environment with misappropriation, expropriation and also restricting investment. The latest BIT of Afghanistan has shown such pledge towards environment.

Bhutan Bilateral Investment Treaties and Environmental Concern

Bhutan shares very significant position in Asian region in terms of geopolitics and contribution in the field of building cultural civilization of region. The investment opportunity in Bhutan is also comparatively higher than any region in few allotted areas considering the natural beauty and geographical location of the country. The bilateral relation with other members of SAARC region is also comparatively smooth and Bhutan is able to maintain and has also respected the fundamental principles of UN charter while dealing with the foreign policy matters. The *UNCTAD Investment Hub* doesn't show any bilateral investment where Bhutan either as a sponsor of treaty or party to treaty for bringing the foreign investment on different sectors.

The Foreign Direct Investment Policy (2019) of Bhutan is commendable from the schedule aspect as it covers a comprehensive list of activities which were not there in the previous policy of 2012.⁸⁶ The inclusion of small-scale industry under FDI is expected to bring about economic benefits to investors to test but the larger reluctance is seen due to lack of bilateral investment treaties with potential investor in the region. Bhutan also lacks stable domestic policies in relation to bringing FDI or extending hands to sign BIT considering the impact of BIT on nation like Bhutan. The absence of a devoted Investment Promotion Agency (IPA),

⁸⁵ Art. 6 of Afghanistan- Azerbaijan BIT, 2017.

⁸⁶ See at <https://www.moea.gov.bt/wp-content/uploads/2017/10/1.-IOS-Main-Report.pdf>

the FDI Division under Department of Industry has been carrying out its role.⁸⁷ This division need to make comprehensive study on possible long term impact of BIT on Bhutanese economy, industry and social life. The comparative advantage of signing the BIT with other nation should be prime responsibility of FDI division.⁸⁸ Since there is no specific availability of BIT with Bhutan, the issues of environmental concerns are not well seen or addressed.

The Kingdom of Bhutan has concluded multilateral form of trade agreement with other SAARC member's states for bringing investment in different sectors together. The Agreement on South Asian Free Trade Area (SAFTA) is committed to strengthen intra-SAARC economic cooperation for maximizing member's state potentialities based on equality, independence and territorial integrity. Although, this Agreement also doesn't spell anything in relation to the environmental protection while discussing the issues of investment or extending their economic or other agreed cooperation. Under the clause of general exceptions,⁸⁹ the state party are not prevent to take action for adoption measures for the *protection of human, animal, or plant life and health;*⁹⁰ and *articles of artistic, historic and archaeological value.*⁹¹ This expression can be linked with environmental protection and preservice. Another agreement considering the possible investment based on multilateral framework in Bhutan is BIMST-EC Free Trade Area but this also lacks perambulatory expression for protection of environment as subject matters of member states. The similar expression is seen under general exceptions clause⁹² for the.....*protection of articles of artistic, historic, and archaeological value.....for the promotion of human, animal or plant life, health and conservation of exhaustible natural resources.*⁹³ This is negative approach of investment where the investor are not excluded from investment. The expression like “conservation of exhaustible natural resources” are directly linked with the protection of environment but further explanation is needed.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Art.14 of Agreement on South Asian Free Trade Area (SAFTA).

⁹⁰ Art.14 (b) (ii) of Agreement on South Asian Free Trade Area (SAFTA).

⁹¹ Art.14 (b) (iii) of Agreement on South Asian Free Trade Area (SAFTA).

⁹² Art.8 of BIMST-EC Free Trade Area.

⁹³ Article 8 of BIMST-EC Free Trade Area.

KEY FINDINGS

The ISDS are seen as one of the major development in terms of protecting the rights of host state and also imposing the obligation to investor over the environmental issues. The growing nature of ISDS on environment issues are also compelling the investor to comply with multiple obligation arising out of any investment treaties towards the host state as well as to the environment. The expression of environment in many treaties are not built in same way hence the observation and protection are not uniformly build. The expression of environment in the preamble as well as on some other parts of the obligation in the treaty is compelling for the well observation of it. These are some observation based on the interaction of environment in the ISDS forum.

- The bilateral investment treaty lacking the strong commitment for the protection and promotion of environment in any section of the treaty has also compelled to low rate of ISDS issues on it at the international forum. The state are regulating through their domestic enactment for the conduct of investor as comply or not comply with the domestic laws for the protection of environment. Most of the issues at the ISDS are on nature of host state and their obligation towards the investor for the protection and promotion of right of different issues at the environmental issues.
- The Investor and Host state have not shown any responses in most of the BIT as well as in the Treaty with Investment provisions towards the issues of environment. The term 'sustainable development' can be seen rarely in few Treaties concluded in recent as reflection of global concerns on the environmental issues. The ISDS has also faced the problem with the interpretation of few terms as part of the treaty provision. This has also supported the growth of trends on environmental disputes in the issues of investment agreement. The language like 'exploit-extract-natural resources' can be traced in the chapter of definition of the Treaty agreement and these are seen as part of multiple folded interpretation.
- The promotion and protection of investment chapters also occasionally reflects the issues of public health, environment and labor rights as

part of their Treaty provisions. Some of the latest BIT has provision for extending the cooperation and coordination as ‘program of action’ in the environmental sectors. The Treaty clause has listed actions required at course of investment to protection of environment, making proper balance between environment and investment.

CONCLUSION

The issues of environment are very pertinent in the international investment governance hence the state have started negotiating with the investor on multiple liabilities of investor’s on host state environment. The way resistance are seen from the investor are also becoming the subject of discourse in the investment treaties. The ISDS framework has also compelled to party to investment for the changes required in classical way of protection to the interest of all parties concerning to the environment and investment. The way investor are interacting with the liabilities under the clauses of environmental protection are also somewhere reason for the growth of tendencies of ISDS on environmental issues. Hence, there is need to have strong protection regime for both the environment and also investor’s interest and host state liabilities.

□