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International Investment and Environment Safeguards: An Analytical Study

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Abstract:*Environmental mishap...! 'Notwithstanding the existence of an inbuilt pillar of arbitration, Nations' economy has always been given much heed at the cost of its own ecological balance or the environmental utility', would be a considerable hypothesis for the present study that is to be tested in the following research with the help of various legal, jurisprudential and institutional framework. In the backdrop of environmental regulation, the international investment has attracted frequent disputes which in turn pave a way ahead resorting to arbitration proceedings. Bearing these contrasting contemplations, present study would analyse the role of international arbitration for reconciling the emerging confrontations between the interests of foreign investors (international investment) and the public policies of the host country (quality of environment and ecological balance). The study is centric towards the emerging trends of Alternate dispute resolution in the era of globalization and liberalization. The present study would focus on examining the existing arbitration mechanisms for resolution of disputes concerning inter-state environmental confrontations. The paper would study the same bearing the perspective of international agreements. PCA being a forum for dispute resolution concerning natural resources and environmental issues under bilateral & multilateral treaties would also be taken into deliberations of this ongoing study.*

Keywords: International Investment,

I. INTRODUCTION

BITs, multilateral investment treaties, etc are the realistic instances of International agreements. Such agreements have been emerged as a potential solution to remove the long-awaited uncertainty and ambiguity in the application of soft law. International investment has deeply wedged its roots in an embarking era of liberalization and globalization. With this developing phase of international businesses and dealings, potential confrontations and disputes are not left apart. The elements of globalization and liberalization have brought with it a spark to propagate the spirit of promoting cross-border investment as the former besides motivating, has opened up all the gateways to invest in those economies which are experiencing a chronic hike in its growth or which are still awaited in the developing phase. But such chronology is desperately encircled with several inevitable conflicting interests from investor's point of view as well as from host state's point of view; Inter alia human rights and environmental issues are the predominating contradictories. Intellectual aspect of resolving the same would lie in finding a middle way to keep both sides at ease. Hence,

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this could be brought into practicality by entrusting an institution so as to make a viable effort to reach at an amicable conclusion.

In a general parlance, Bilateral Investment Treaties are the resemblance of their own set rules and standards governing the business conduct in host state. This would rather create an environment where in the capital exporting state has its implied domination in such dealings and the capital importing state has a subordinate SAY in the framing of rules governing the conduct of investment business. Consequently, vicinities of capital importing states are been put at the surge of nature-exhaustion by the hands of capital exporting state jeopardizing the environmental safeguards of host state.

II. Rolling Cradle of Globalization vis-s-vis Public Disclosure of Arbitration

The forerunner cart of globalization brought with it the lubricated wheels of liberalization which has successfully paved the way ahead for flourishing the economy with the pool of foreign investments which in turn widened the opportunities for the developing nations to enormously take part in the global trade making it capable to compete with other nations. Following the emergence of IIAs, the era of globalization also gave birth to numerous instances of potential conflicts between the parties to IIAs wherein they resort to the third party under the guise of Arbitration. All such phenomenon in the recent trends of global trade needs a transparency in the dealings between the parties to the investment and the aftermath of all disputes related to the investment treaty so as to strengthen the credit and confidence of the people as well as to attract more investment opportunities. While it is rather much difficult to find the treaties available in the printed format; but UNCTAD would substantially be the last resort which could profoundly be considered as the compiled room for the collection of all record of treaties which has gathered all such treaties via govt. sites worldwide. A drastic view prevailed in the global world if investment in host as well home states is passionately interested in making the public disclosure of their entered IIAs with a view to encourage their investment communication which would impliedly facilitate their investment promotion; but the situation is different for public disclosure of Arbitration Awards. The motive behind such stagnant pattern followed by the countries is to avoid any kind of adverse impact of insecurity in the hearts of potential foreign investors to invest in that particular country wherein the instances of investment disputes are on up-surging rate. The greater the number of disputes between the parties, the lower the credit of investors in favor of such host country. The foremost principle behind such norm is that the decisions of arbitral tribunal have been publicly disclosed only in case wherein parties agree to do so, otherwise not. It also depends on the prevailing practices of the governing entities responsible for the regulation of arbitration patterns. Those governing entities are ICSID, PCA, ICC and others.

III. Regulatory Confrontations and Treaty Interpretation

Since the era from 1980s to 2000s witnessed the increasing number of international investment treaties; it is worthwhile to note that traditional treaties have not been concerned about the environmental safeguard and the quality of ecological balance, North American Free Trade Agreement (NAFTA) has eminently been considered as the first topical investment treaties

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amalgamated into the free trade agreement which initiated an eye opener approach towards being compassionate for maintaining the quality of ecological balance.

The prominent conflicts between the investor's claims to freely carrying on his business invested in, and the interest of host states to defending its rulings justifying the restrictions on such projects, are part and parcel of every investment agreement. But the issue arises as to the prevalence of which factor over the other? How such conflicts of norm could appropriately be solved out? The probable way ahead could be figured out by referring the Vienna Convention on Law of Treaties in 1969. The latter has suggested the numerous appropriate rules toreconcile the issue of treaty interpretation which are also applied by the arbitration tribunals in the disputes concerning IIAs.

IV. References in IIAs as to Environmental Concern: A Survey

The researcher has taken for the reference of present study, a survey (secondary source) of 48 countries which depicts that 8.2% of the whole survey or in other words, 113 IIAs have been embraced the practice of including environmental languages of one or the other kinds. The data which is represented below shows the inclusion of such environmental concerns in those treaties which had been signed during 1959-2010 as they are referred to in the sample. China- Singapore BIT was the first instance of inserting such environmental clause; afterwards the said practice held its pace at a very slow rate till the end of 1990s. "Then, the proportion of newly concluded IIAs that contain environmental language began to increase moderately, and, from about 2002 onwards, steeply (dotted line, right scale), reaching a peak in 2008, when 89% of newly concluded treaties contain references to environmental concerns."

Figure 1: Prevalence of environmental language in IIAs

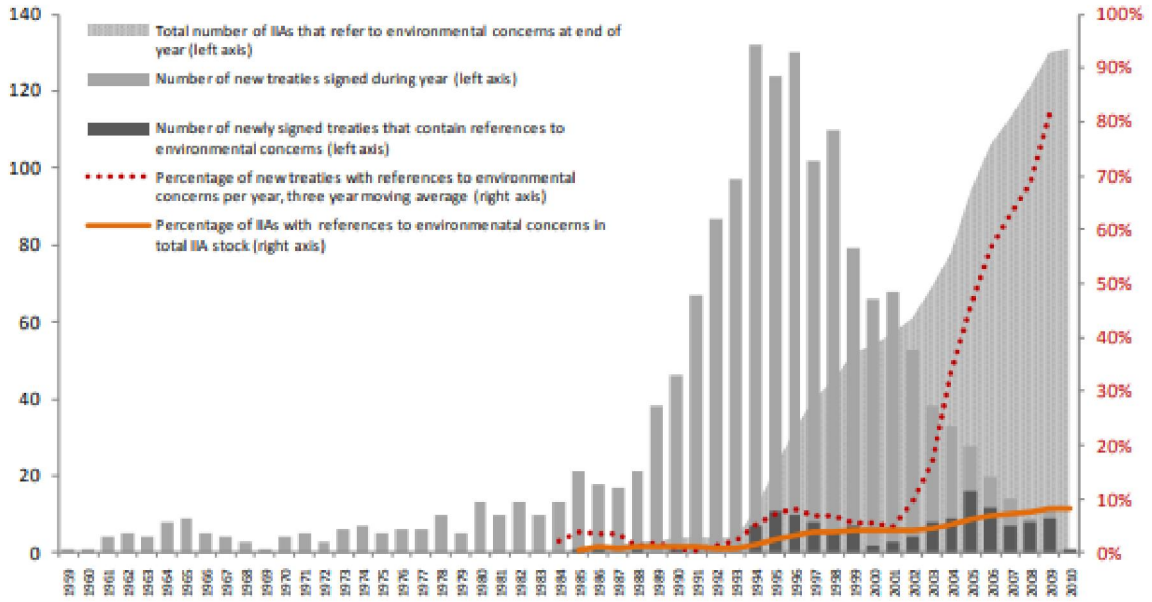

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Table 1: MA references to environmental concerns: Country summary

Country	Number of treaties included in the sample	Number of treaties that refer to environmental concerns	Percentage of treaties that refer to environmental concerns	First occurrence in a BIT in the sample
Austria	47	0	0%	--
Argentina	45	1	2%	1999
Australia	24	5	21%	1999
Belgium/ Luxembourg	84	17	20%	2004
Brazil	8	0	0%	--
Canada	30	23	83%	1990
Chile	56	6	11%	1996
China	72	6	8%	1985
Czech Republic	65	4	6%	1990
Denmark	39	0	0%	--
Egypt	73	1	1%	1996
Estonia	15	0	0%	--
Finland	50	13	26%	2000
France	92	0	0%	--
Germany	122	1	1%	2006
Greece	38	0	0%	--
Hungary	56	1	2%	1995
Iceland	3	0	0%	--
India	28	4	14%	1996
Indonesia	45	1	2%	2007
Ireland	1	0	0%	--
Israel	12	0	0%	--
Italy	46	0	0%	--
Japan	23	14	61%	2002
Korea	83	3	5%	1996
Latvia	27	1	4%	2009
Lithuania	29	0	0%	--
Malaysia	34	1	3%	2005
Mexico	25	8	32%	1995
Morocco	58	1	2%	2004
Netherlands	96	6	6%	1999
New	4	3	75%	1988

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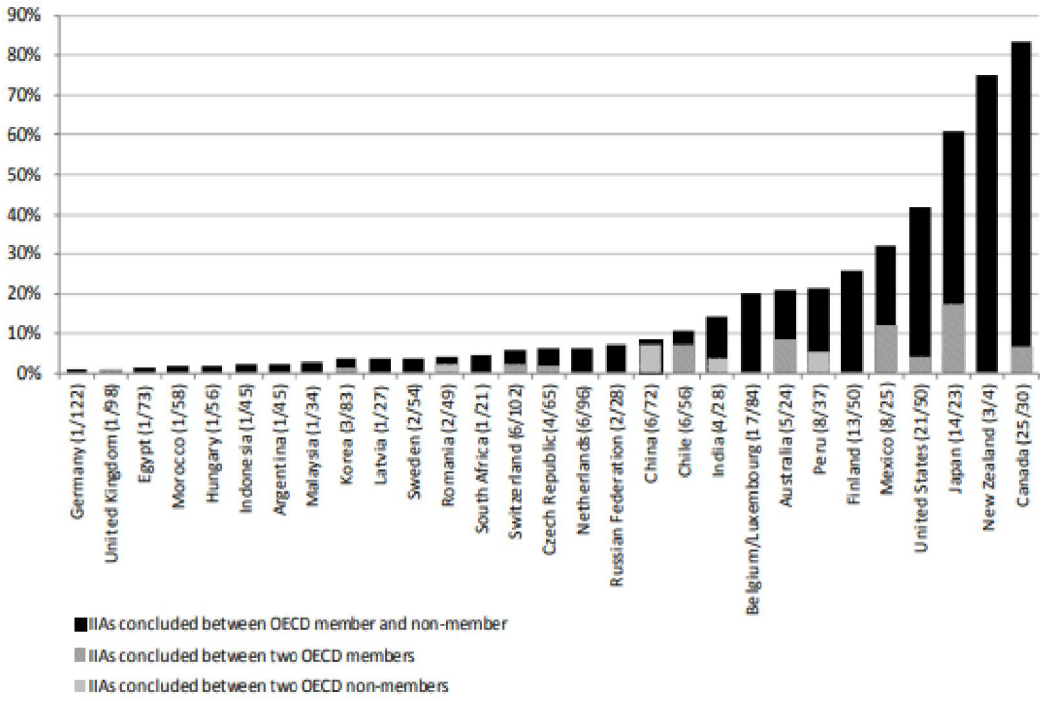
Zealand				
Norway	15	0	0%	--
Peru	37	8	22%	2005
Poland	33	0	0%	--
Portugal	44	0	0%	--
Romania	49	2	4%	1996
Russian Federation	28	2	7%	1995
Saudi Arabia	8	0	0%	--
Slovakia	25	0	0%	--
Slovenia	18	0	0%	--
South Africa	21	1	5%	1995
Spain	59	0	0%	--
Sweden	54	2	4%	1995
Switzerland	101	5	5%	1994
Turkey	62	0	0%	--
United Kingdom	91	1	1%	2006
United States	44	15	34%	1994

Source: SSRN Electronic Journal (2011)

Figure 2: Proportion of IIAs with environmental language In a given country's IIA population



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V. Abuse of Legal Procedures by Investors: A Menace

The stringent sword of international arbitration has been a determinate proof of strengthening the regime of IIAs for safeguarding the interests of foreign investors. Resorting to the shield of international arbitration, foreign investors are considered to be in a dominating position to influence the policy framework of capital importing states. For countries which are wandering optimistically for alluring more investment by foreign investors or those who are stagnantly being tangled in developing state, the toolkit of international arbitration may imply potential risks factors; among others, Harm to reputation and increased Cost-oriented approach of arbitration are the primary one.

First, Harm to Reputation is repugnantly been highlighted as the most fearful issue for the growing economies as increasing cases of IIAs arbitration might adversely affect new opportunities for foreign investment. Second, High Cost Factor involved in the IIAs arbitration process signifies the escalating expenses besides paying compensation in satisfying claim of investors which is a matter of great concern for the weak economies.

Impliedly, developing states find themselves under a pressurized push to take back the allegations made against deleterious acts of foreign investors impacting the quality of ecological balance of host country or they even come to their toes to try their best for reconciling the disputed claim even if there is no breach from their end of IIAs provisions. Consequently, these settlements would undoubtedly be termed as constraining or degrading the environmental policy space of the capital importing state. On the other hand, this would lead the succeeding returns in persuading host state to alter their environmental policies in a way favourable to their (investors) interests.

VI. Extent of Arbitration' Role in Environment Safeguarding: A Case Study

Does the IIA arbitration system have appropriate safeguards against abuse of power by the foreign investors? To deeply examine the real aspect of the said question, the researcher is much inclined towards discussing some relevant case laws which bear greater significance in judging the role of investor-host state-dispute settlement mechanism i.e. Arbitration and which would have the potential tendency to put worthy safeguards against the threat of abuse by foreign investors.

VII. Conclusion

After a detailed analysis, the researcher has reached on a conclusion that the hypotheses of the present study has not been resulted positively as the mechanism of dispute settlement which is known under the name of arbitration has been striving profoundly to cope up with the emerging issues with regard to confrontation of investor's interest with that of host state's public policy. Slow but it's been progressing. Arbitration system evidently provides the better safeguards for decreasing the chances of risks of abuse of power by the foreign investors. Besides there are putting forward some of the worthy recommendations which would be considered as much significant for any further policy framework.

First, effective measures must be put in place so as to keep the cost of arbitration at a fixed minimum grade which would in turn settle down all the standards for prospective arbitration.

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Second, there must be the compliance balance between the interest of foreign investor and the interest of host state. Host states must honour the merit of IIAs while safeguarding their own interest pertaining to its regional public policies.

Third, host states must be given wide space to effectively negotiate in designing the international investment agreement and to put the clause for safeguarding their environment without any pressure from the side of foreign investor and stay protected from the arbitrariness of regulator.

Fourth, the spirit of investors must be committed towards the enhancement of environmental governance of the host state as the investor are using the resources of host state so it must be the primary obligation of their only to protect their vicinity with a view to deepen its roots for long lasting. Therefore, the framework of CSR is no longer been the dead paper.

Fifth, sustainable development must be the guiding principle for the interpretation of IIAs. The former must be considered as the overarching target to achieve the predetermined goal of the treaty.

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