LEAD JOURNAL

SPECIAL ISSUE
ENVIRONMENTAL LAW IN SOUTH ASIA

Environmental Concerns in Model BITs: A Comparative Study of India and Sri Lanka

by Niroshika Liyana Muhandiram and Ravneet Sandhu

Vol 19/1
2023

SOAS & IELRC

ISSN 1746-5893

LEAD Journal, 2023, Vol. 19/1, page 541 - 558
DOI: https://doi.org/10.25501/SOAS.00039444
Publication date: 28 May 2023
Original Article

Environmental Concerns in Model BITs: A Comparative Study of India and Sri Lanka

By Niroshika Liyana Muhandiram* and Ravneet Sandhu**

ABSTRACT

Investment flows pose one of the newest and greatest challenge in the pursuit of sustainable development. Developmental activities resulting from rapid industrialisation and unchecked exploitation of natural resources have come at the cost of environment, human health and labour standards. Traditionally, under investment law, there has been a binary relationship between the investors and the States. However, as a result of the rise in investor-state disputes and the lessons learned from investor-state arbitration, states have begun to revisit and reframe their Model Bilateral Investment Agreements (Model BITs) to strike a balance between the host state's regulatory authority and investment promotion Essentially such BITs include specific language not only on investment promotion but also *inter alia*, on regulatory rights of the host state to protect the environment, human health and labour law. Significantly, the Bhopal Gas tragedy of India and the controversial Colombo Port city project of Sri Lanka have intensified the need of having a balanced approach in environmental protection and investment promotion. Hence, the purpose of this paper is to critically analyse the Model BITs of India and Sri Lanka to investigate the extent to which they are able to strike appropriate balance between these two paradigms. The paper further seeks to make suggestions to create coherence between these two interests to protect the environment from further degradation.

* PhD Research Scholar, South Asian University, Lmniroshika@gmail.com
** Assistant Professor, Vivekananda Institute of Professional Studies, ravneet_sandhu15@hotmail.com

Published by LEAD Journal (www.lead-journal.org)

Introduction

BITs are the most important source of contemporary international investment law.[1] However, in view of the several examples of environmental damage resulting from such foreign investments, it becomes imperative to analyse and determine the extent and effectiveness to which such BITs address environmental concerns. A BIT is sought to create an international legal framework to provide protection and promotion for the foreign investment by the nationals of one country in the territory of another.[2] In general, BITs are negotiated based on Model BITs, with unique modifications made in accordance with the needs and circumstances of the contracting States.[3] Model BIT is a pre-drafted contract template that represents the intention of attracting investment and proposes limitations to be imposed against the same.[4] While indicating the contracting state's contractual bargaining strength, it promotes consistent and effective state practice on investment agreements.[5] By offering a template for future contracts, it also expedites the discussion process to reach a consensus on the agreement.[6] A Model BIT is typically written in an open-ended fashion to allow the parties to include their unique economic, social, or legal problems.[7] Nonetheless, it is not a 'committable' agreement for the parties and changes can be made as needed.[8] As of now there are more than 60 Model BITs drafted by different states.[9] One of the significant elements of recent Model BITs is making detailed provisions on regulatory power of the host state including environmental concerns, security concerns, labour rights etc.[10]

The first BIT was entered between Germany and Pakistan in 1959[11] and as of January 2023, there are 2221 BITs currently in force making more than two third of states at least party to one BIT.[12] However, this tendency has increased the cases filed against the host state reaching the total investor-state dispute cases reaching more than 1,100 by the end of 2022. For the last twenty years, state measures have been disputed before the international tribunals for denying permits for operating landfills,[13] prohibiting the manufacture of toxic chemicals,[14] refusing to grant a license for water extraction,[15] claims relating to oil extraction operations[16] and halting tourist projects in ecologically sensitive areas.[17] When states realised that BITs are not harmless declarations and they 'bite' state measures placing the interests of the public at danger,[18] some countries render to terminate

1 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 13; Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 605; Christoph Schreuer, 'Investments, International Protection' in Professor Rüdiger Wolfrum (ed), *Maxplanck Encyclopaedia of International Law* (OUP 2013) 559-78.

2 Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 International Lawyer 503; Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 1-10,100-104; United Nations Conference on Trade and Development (ed), *International Investment Agreements: Key Issues* (United Nations 2004); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 13.

3 Jeongho Nam, 'Model BIT: An Ideal Prototype or A Tool for Efficient Breach' (2017) 48 Georgetown Journal of International Law 1275.

4 ibid 1275.

5 ibid 1275.

6 The Model BIT of USA serves as a template for the future BITs.

7 Nam (n 3) 1275.

8 ibid 1275.

9 'Model Agreements' <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>.

10 2004 USA Model Bilateral Investment Treaty (US Model BIT).

11 'Germany-Pakistan BIT (1959)' <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959>.

12 'Most Recent IIAs' <https://investmentpolicy.unctad.org/international-investment-agreements>.

13 *Gallo v Canada*, PCA Case No. 55798 (Award, 15 September 2011); *Tecmed v Mexico*, ICSID Case No. ARB(AF)/00/2; *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award, 30 August 2000).

14 *Dow Agrosciences LLC v Canada* (25 May 2011); *Chemtura Corporation v Canada* UNCITRAL/NAFTA (Award, 2 August 2010); *S.D. Myers Inc. v Canada* (13 November 2000).

15 *Sun Belt Water Inc. v Canada* (12 October 1999).

16 *Chevron Corporation v Ecuador* PCA Case No 2009.

17 *Compañía del Desarrollo de Santa Elena v Republic of Costa Rica*, ICSID Case No. ARB/96/1 (Final Award, 17 February 2000).

18 UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' <https://unctad.org/system/files/official-document/wir2015_en.pdf> 121-63.

their BITs[19] while some countries have moved towards 'sustainable development' inter-alia, providing an explicit reference to the protection of the environment and other public policy concerns to restrain the arbitrary power of the tribunals.[20] Deputy Director General of the Department of Trade and Industry of South Africa, Mr Xavier Carim, for instance, stated that 'BITs do not adequately take into account the particular conditions found in South Africa, the complexity of socio-economic challenges, and the broad objectives of government policy of South Africa'.[21] The countries which revised their BITs have further changed their Model BITs to demonstrate their balanced approach in investment protection and regulating public welfare concerns. U.S. Model Bilateral Investment Treaty 2012, Canada Model BIT for the Promotion and Protection of Investment 2021, Model Text for the Indian Bilateral Investment Treaty of 2016, Netherland Model Investment Agreement 2019, Morocco Model Investment Agreement 2019 have attempted to follow this approach to profess the state policy in negotiating a BIT with another country.

Recent Model BITs give the host state flexibility to provide clear guidance to the arbitral tribunals regarding how treaty provisions are to be interpreted, as opposed to BITs that are ambiguous or vaguely drafted.[22] If non-commercial public concerns including environment are incorporated in a Model BIT, it reflects the investment policy of the respective country in straightforward manner. This balanced approach of investment protection and state sovereignty does not merely facilitate treaty interpretation, but also strengthen the legitimate concerns of the public.[23]

On the other hand, establishing sufficient policy space for host states, including regulatory power on environmental concerns to mitigate the extraordinary challenges posed by climate change has become a modern way to strike appropriate balance between the investment regime and the environment.[24] This approach could be further incentivised by identifying areas such as agriculture, energy, finance, human rights, indigenous people, labour, water and public health as sectoral provisions which require specific protection and treatment.[25] Furthermore, the principle of sustainable development denotes not only environmental protection but also social and economic protection, which has become mandatory in 21st-century public policy concerns.

Concerning India and Sri Lanka, these are the two neighbouring countries that have occupied an important strategic position in the Indian Ocean. Due to their accessibility to the global market and proximity to both East and West commercial routes, foreign merchants and investors have been making investments in Sri Lanka and India since ancient times. It has been revealed that Sri Lanka should facilitate a compromise between the promotion of investments and the regulatory power of the host state through her investment agreements, which are currently more tilted towards the protection of the investors.[26] On the other hand, unlike Sri Lanka, the approach of India is progressive as her Model BIT has attempted to reconcile investment promotion with the host state's right to regulate following the modern investment treaty practices, although the scholars have ar-

[19] Venezuela terminated its BIT with Netherlands, in 2008 Ecuador denounced 9 BITs, Bolivia terminated its BIT with USA in 2012, South Africa terminated its BIT with Belgium and Luxembourg in 2012 and with Spain and Germany in 2013, termination of Russia from Energy Charter Treaty in 2009 and Indonesia declared its intention to terminate 67 BITs; Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' [2016] Global Policy <http://www.rwellhausen.com/uploads/6/9/0/0/6900193/10.1111_1758-5899.12355.pdf>; Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties' (2009) 26(6) Journal of International Arbitration 755.

[20] UNCTAD (n 18) 121-63.

[21] 'BITs "Not Decisive in Attracting Investment", says South Africa' Published in SUNS # 7446 (27 September 2012) <https://www.twn.my/title2/wto.info/2012/twninfo121001.htm>.

[22] Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) Virginia Journal of International Law 67.

[23] ibid 85.

[24] Daniel B Magraw and others, 'Model Green Investment Treaty: International Investment and Climate Change' (2019) 36(1) Journal of International Arbitration 95.

[25] ibid 95.

[26] Dilini Pathirana, 'An Overview of Sri Lanka's Bilateral Investment Treaties: Status Quo and Some Insight into Future Modifications' (2017) 7(2) Asian Journal of International Law 287.

gued that the new Model BIT of India is largely skewed in favour of the host state.[27]

In this backdrop, the purpose of this research is to critically analyse and compare the Model BITs of India and Sri Lanka to investigate to what extent they can strike an appropriate balance between environmental protection and investment promotion. Since the BITs are always influenced by the model BIT of any country, this paper has given emphasis to the Model BITs. The study points out whether Sri Lanka can learn lessons from India to develop her current investment treaty practices. In exploring this dimension, the authors have followed the doctrinal research methodology. Model BITs of India and Sri Lanka are mapped, mainly focusing on the preamble of the treaty, the expropriation clause, the most favoured nation's treatment, general the exception clause, corporate social responsibility, and environmental impact assessment. As far as the comparative analysis of these countries' Model BITs is concerned no extensive research has been carried out so far to explore the linkage between investment promotion and environmental concerns.

To address this research gap, the section 1 of the paper elaborates upon the environmental concerns in Model BITs and section 2 provides an overview of foreign investment of India and Sri Lanka. Section 3 analyses how Model BITs of both countries have incorporated environmental concerns into their Model BITs. In conclusion, the paper focuses on how Model BITs of India and Sri Lanka should be revised in order to create coherence between investment promotion and environmental protection.

Environmental Concerns in Model BITs

Many debates and concerns have surrounded the topic of foreign investment. Foreign investments have been connected to environmental degradation at three different levels, namely local, regional, and global levels, even though they are one of the main drivers of economic development and may produce economic benefit at the national level.[28] There have been many instances of foreign owned entities causing environmental damage, especially in developing countries, leading to a negative attitude towards foreign entities. The interaction that takes place between foreign investment and the environment at the local level has shown a visible negative impact upon the local environment and communities, resulting in extreme polarisation against foreign corporations.[29]

In 1993, under the North American Free Trade Agreement, Metalclad, an American landfill management firm bought a landfill site in Mexico from COTERIN, a Mexican company.[30] Due to the operation of this landfill site, the locals complained of falling sick and freshwater getting contaminated.[31] The municipal authorities stalled the operation of this landfill, leading to the investor-state conflict.[32] Similarly, TecMed, a Spanish company, purchased an existing hazardous waste landfill in Mexico, which was met with strong opposition from community and civil society groups due to its improper operation and proximity to Hermosillo's population centre.[33]

In recent *Eco Oro v Columbia* case, Eco Oro had acquired exploitation and exploration rights in Santurban paramos under a Columbian-Canadian investment agreement.[34] Paramos are rare high-altitude wetland ecosystems that serve as vital sources of freshwater and in Columbia they provide approximately 70 percent of the total freshwater while Santurban alone cater to the

[27] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) Northwestern Journal of International Law and Business 1.

[28] Kate Miles, 'Transforming Foreign Investment: Globalization, the Environment, and a Climate of Controversy' (2007) 7 Macquarie Law Journal 81.

[29] Jorge E Vinuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 12.

[30] Metalclad (n 13) 4.

[31] ibid 4.

[32] ibid 4.

[33] TecMed (n 13) 9.

[34] ICSID Case No. ARB/16/41 (Procedural Order June 1 2022).

freshwater needs of two million Columbians.[35] The extraction of gold, coal and other minerals is a major cause of pollution of soil and water in the country. To save this ecologically sensitive area, Columbia put a blanket ban upon the mining activities in the paramos.[36] Thus, Eco Oro lost the mining rights due to the massive protests by the locals and various pressure groups.[37]

When disputes increasingly arise having environmental components, a possible question that may emerge is whether principles from other areas of international law, especially environmental laws should be applied in foreign investment disputes.[38] One of the main reasons for such a question to arise is that international investment law and international environmental law have developed in 'relative autarchy'[39] which is why there have been limited interactions leading to no or lesser conflicts initially. Foreign investments share both a synergistic as well as conflicting relationship with the environment.[40] For instance, in developing countries, these may lead to sustainable development through technology transfer and financial transfer, but at the same time, these may even pose a threat to the environment, especially when states indulge in race to the bottom.[41] On the other hand, States may lower their environmental protection standards to attract foreign investment. Other states may indulge in similar practices to avoid a competitive disadvantage leading to a decline in environmental protection. The courts and tribunals are required to apprehend and scrutinise this growing synergy. States have also been hesitant to regulate the public interest in order to avoid invoking the ISDS mechanism by investors against the states. This is known as regulatory chill and Kyla Tienhaara has classified three different varieties of regulatory chill: internalisation chill, threat chill, and cross border chill.[42]

Traditionally, international investment treaties, including Model BITs were silent and there was no reference to the environment, sustainable development or climate change.[43] They either addressed sustainable development in aspirational and vague terms or in nullity.[44] The BIT's limited reference to environmental protection does not obligate a state to take any environmentally protected action.[45] However, the treaty interpretation principles help a court or a tribunal broaden the scope of an existing treaty by making reference to newly developed principles of environmental law applicable between the states. Despite the prioritisation of investment in BITs, Tribunals have proven themselves capable of introducing host states' other obligations into their decisions, including both domestic and international environmental law obligations.[46]

Nevertheless, what is problematic is that, while investment law has rules defining specific legal obligations,[47] environmental law is composed more of principles[48] like sustainable development, that play more of an interpretative role.

[35] ibid 2.

[36] ibid 2.

[37] ibid 8.

[38] Philippe Sands, 'Searching for Balance: Concluding Remarks, Colloquium on Regulatory Expropriations in International Law' (2002) 11(1) New York University School of Law Environmental Law Journal 198, 204-5.

[39] Jorge E Vinuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 British Yearbook of International Law 4.

[40] Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (OUP 2012).

[41] Madhav Mallya, 'India's Race to the Bottom: Bilateral Investment Treaties and the New Draft Environmental Impact Assessment Notification' (Opinio Juris, 9 October 2020) <https://opiniojuris.org/2020/10/09/indias-race-to-the-bottom-bilateral-investment-treaties-and-the-new-draft-environmental-impact-assessment-notification/>.

[42] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) 7(2) Transnational Environmental Law 229-50. Internalisation chill is a process wherein, in lieu of impending investor-state disputes, government officials slow down the regulatory process with respect to matters that affect foreign investors. Threat chill occurs when an investor threatens to arbitrate or to exit the jurisdiction, causing the government to freeze specific regulatory measures proposed. Cross-border chill occurs when a government adopts a policy that affects a form of investment common to many jurisdictions, is easily transferable, and is highly likely to be emulated by other governments.

[43] Schill (n 22) 85.

[44] Andrea K Bjorklund, 'Sustainable Development and International Investment Law' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 38.

[45] ibid 38.

[46] ibid 38.

[47] Dolzer & Schreuer (n 1) 37-60.

[48] Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar 2013) 221.

These fixed, consistent legal rules take precedence over principles,[49]which are only used to interpret when there is doubt or ambiguity.[50] Therefore, if the States themselves decide upon the priorities of the States by making specific reference to the environment, then it would ease out the interpretations to be made by the tribunals. Hence, in order to protect the environment, it must be reflected in the BIT.

Currently, most BITs are 'asymmetrical' meaning the investors have been granted substantive rights while the host States mostly have obligations.[51] In other words, an investor would not be held liable for breach of host state's rights as no such rights exist. As the Court in the *Nagymaros-Gabcikovo* case held that a treaty is not static and is to be interpreted in context of evolving international law,[52] thus the courts are to adopt an evolutive interpretation taking into account current international law developments including newly developed principles of environmental law applicable between the states. On the other hand, having clear reference to environmental law provisions in BITs would help the courts and tribunals in interpreting the treaty as per the treaty itself proving more clarity. [53] This is in accordance with the treaty interpretation rules envisaged in the Article 31 (1) of the VCLT.[54]

Environmental concerns were included at first in the US Model BIT of 1984. There was a reference to the environment in the preamble. Subsequently, this was changed, and the US Model BIT of 2004 is the first Model BIT that incorporated environmental concerns into the substantive provisions to have a more balanced approach considering both the interests of investors and the host state.[55] The global prominence of the principle of sustainable development and the USA's experience of claims bought under NAFTA guided the USA to have its Model BIT of 2004.[56]

More recently, some Model BITs have expressly incorporated provisions related to sustainable development and the protection of the environment in their preamble and even the operative paragraphs. For instance, the Dutch Model BIT of 2019 focuses upon the ways in which investors could contribute to promoting the UN's sustainability goals.[57] The Model BIT reaffirms its commitment to sustainable development and even attempts to enhance the contribution of international trade and investment to sustainable development.[58] The concepts of sustainable development and corporate social responsibility are also mentioned in sections 2 and 3 of the model BIT, reiterating the commitment of the contracting parties towards the protection of the environment.[59] On the other hand, the 2019 Moroccan Model BIT includes contribution to sustainable development in the definition of investment itself, thus imposing an obligation upon the investors. The BLEU Model BIT expresses manifold aspects of the right to development, through the lens of sustainable development, emphasising the importance of international cooperation on achieving sustainable development, recognising its economic, social and environmental aspects as 'interdependent' and 'mutually re-enforcing'. Significantly, as well as encouraging dialogue between the contracting parties, it also encourages them to conduct a dialogue with the civil society organisations in their territories. This Model BIT

[49] ibid 221.

[50] Kate Miles, 'Soft Law Instruments in Environmental Law: Models for International Investment Law?' in Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012) 82, 87.

[51] Patrick Dumberry, 'Suggestions for Incorporating Human Rights Obligations into BITs' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends 2016) 211.

[52] Laurence Boisson de Chazournes, 'Environmental Protection and Investment Arbitration: Yin and Yang?' (2017) 10 Anuario Colombiano de Derecho Internacional 371; *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J., Judgment, 25 September 1997.

[53] Graham Mayeda, 'Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation' (2017) 18(1) Journal of World Investment and Trade 131.

[54] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, Art 31(1).

[55] US Model Bilateral Investment Treaty (US Model BIT 2004).

[56] Edward Guntrip, 'Labour Standards, the Environment and US Model BIT Practice: Where to Next?' (2011) 12(1) Journal of World Investment and Trade 101; Gilbert Gagne and Jean-Frédéric Morin, 'The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT' (2006) 9(2) Journal of International Economic Law 357.

[57] Netherlands Model Investment Agreement 2019 (Dutch Model BIT 2019).

[58] ibid Preamble.

[59] ibid ss 2 and 3.

may be viewed as a practical illustration of 'mandatory multilateralism' in international investment law concerning sustainable development.

Thus, for more clarity the environmental law obligations should be referred to in the main text of the BIT in a clear and an unambiguous language. Additionally, as Penelope Simons noted with respect to human rights obligations in investment law treaties, the language used to refer these obligations in BITs must 'create specific, well defined HR obligations applicable to corporate activity'.[60] Likewise even the environmental concerns must be referred to in similar language.

Environmental law obligations could also be referred to by adding a reference clause to certain environmental law treaties the way NAFTA has added that in case of any inconsistency between certain environmental law treaty texts and NAFTA, the former would prevail.[61] Certain environmental law principles, like Polluter Pays Principle,[62] Preventive Action Principle,[63] Precautionary Principle[64] and Common but Differentiated Responsibility Principle,[65] that are applicable upon majority of the States have also been referred to in BITs.

Apart from this an effective enforcement mechanism must be envisaged in the ISDS indicating how the environmental law obligations imposed upon corporations can be enforced before an arbitral tribunal. Thus, the BIT must clearly authorise the Tribunal to exercise its jurisdiction regarding matters involving environmental law violations committed by corporations. This can be done by adding clear hands doctrine, offsetting of damages and counter claims.[66]

[60] Penelope C Simons, 'Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes' (2004) 59(1) Industrial Relations 101.

[61] North American Free Trade Agreement (NAFTA) 1 January 1994, Art. 104.

[62] Rio Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26/Rev. 1 (Vol. I), Annex II (1992).

[63] ibid.

[64] ibid.

[65] ibid.

[66] Kate Miles, 'Transforming Foreign Investment: Globalisation, the Environment, and a Climate of Controversy' (2007) 7 Macquarie Law Journal 81.

An overview to Investment: India and Sri Lanka

Sri Lanka

Sri Lanka signed her first BIT with Germany in 1963, but subsequently, it was terminated, and a new BIT was signed in 2000.[67] By the end of August 2021, Sri Lanka marked her BITs with 28 countries[68] but BITs signed with Kuwait, Vietnam, and Iran have not yet come into force.[69] With the impact of the liberalised economic strategy put in place in 1977, 14 of the 28 BITs were signed between 1980 and 1985, demonstrating the country's extraordinary desire to join into BITs. The adoption year of the treaty is not stated in the model BIT of Sri Lanka, which is available on the UNCTAD website.[70] Moreover, unlike other countries, the BITs in Sri Lanka have been placed in a higher position by the supreme law of the land, the Constitution. As per Article 157, foreign investments agreements are conferred the constitutional guarantee, and neither a written law nor an administrative or executive action can be taken except in the interest of national security.[71] However, the first ever investor-state claim was brought against Sri Lanka, *Asian Agricultural Products Ltd. v Sri Lanka*.[72] By January 2023, two disputes were

[67] Treaty between the Federal Republic of Germany and Ceylon for the Promotion and Reciprocal Protection of Investments 1963 adopted 8 November 1963, enforced 7 December 1966, Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments adopted 7 February 2000 enforced 16 January 2004.

[68] Australia, Belgium-Luxembourg Economic Union, China, Czech Republic, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Iran, Japan, Korea, Kuwait, Malaysia, Netherlands, Norway, Pakistan, Romania, Singapore, Sweden, Switzerland, Thailand, United Kingdom, United States of America and Vietnam <http://investmentpolicyhub.unctad.org/IIA/CountryBits/198>.

[69] ibid.

[70] ibid.

[71] Article 157 of Democratic Socialist Republic of Sri Lanka (The Constitution).

[72] (1990) ICSID Case NO, ARB/00/2.

resolved in favour of investors[73] and two claims were succeeded in favour of state as the criteria of jurisdiction were unable to be satisfied.[74]

The Colombo Port City project is controversial since its inception, mainly because of its negative impact on the environment. As environmentalists have pointed out, sand mining, rock extraction and land reclamation from the sea of the project area have contributed to global warming, surface water pollution, decreasing water quality, large-scale disturbance of hydro, geological and marine systems, reduced ecological/hydrological connectivity, soil erosion and groundwater pollution and depletion.[75] Similarly, the Norocholai power plant and the Hambontota port city project have been heavily chastised for failing to identify and mitigate environmental risks associated with their design, implementation, and operation processes.[76] Heavy carbon emissions caused by Norocholai power plant is able to cause chronic diseases in humans and all these projects are claimed to damage environmentally sensitive surroundings by destroying wildlife habitats and marine resources.[77]

India

Since independence, India, like many other countries, followed a protectionist regime focusing on trade surpluses and only after 47 years of independence India signed its first ever BIT with the UK in 1994. Just a decade had passed since the Bhopal Gas tragedy, one of the world's worst industrial disasters but still India did not reserve its right to take measures to prevent another Bhopal-type disaster. It was only in 2001, when India signed a BIT with Kuwait, that India included provisions that excluded investor claims for losses resulting from health or environmental regulation.[78] Though India has not brought any international environmental law dispute against a foreign investor yet there have been instances of environmental degradation in sectors that attract foreign investment. For instance, the coal mining industry, especially the coal projects found in the Damodar Valley have witnessed widespread deforestation, cutting off freshwater supplies to local communities, increased health hazards to local villages, coal fires and have even disturbed wildlife migratory corridors used by elephants and tigers.[79]

As a response to the increasing number of ISDS claims being brought against India, especially in the aftermath of the White Industries case, India adopted a new Model BIT in 2015. This was subsequently changed, and a revised Model BIT was introduced in 2016. The purpose of this Model BIT is to balance investment protection with host State's right to regulate.[80]

Model BITs of India and Sri Lanka and Environmental Concerns

States have been increasingly interested in revising their investment treaties to include more provisions addressing environmental concerns and sustainable development.[81] These changes have been made at the multilateral, bilateral and even domestic level. States like India, Colombia, Indonesia, Egypt, and Norway have drafted

[73] *Deutsche Bank AG v Sri Lanka* (2012) ICSID Case No ARB/09/02.

[74] *Mihaly International Corporation v Sri Lanka* (2002) (ICSID Case No ARB/00/2); *Eyre and Montrose Developments v Sri Lanka*(2016) ICSID Case No ARB/16/25.

[75] Hemantha Withanage, 'Environmental Damage of the Colombo Port City Project' <http://hemanthawithanage.blogspot.com/2018/01/hemantha-withanage-executive-director.html>.

[76] Ganeshan Wignaraja and others, 'Chinese Investment and the BRI in Sri Lanka' (Chatham House 2020) <https://www.chathamhouse.org/2020/03/chinese-investment-and-bri-sri-lanka-0/2-labour-and-environment>.

[77] ibid.

[78] Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment 2001.

[79] Romesh Weeramantry and Montse Ferrer, 'Going Green? The Evolution of Environmental Provisions in India's Investment Treaties' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 313.

[80] Model Text for the Indian Model Bilateral Investment Treaty (Indian Model BIT 2016), Preamble.

[81] Andreas R Ziegler, 'Special Issue: Towards Better BITs? Making International Investment Law Responsive to Sustainable Development Objectives' (2014) 15(5-6) Journal of World Investment and Trade 803.

comparatively more sustainable-development friendly BITs. In this section, the authors intend to analyse the Model BITs of Sri Lanka and India reflecting upon selected provisions.

General language in preambles

The preamble of any treaty often outlines the goal and object of that specific investment. It recognises that the promotion of investment can be achieved, *inter alia*, without relaxing environmental measures. Reference to environmental concerns or sustainable development in the preamble does not create any right or obligation between the parties; it only appears hortatory and inspirational in nature.[82] Preambles have been divided into two categories by UNCTAD: traditional preambles, in which contracting states prioritise protecting investments, and non-traditional preambles, in which contracting states prioritise protecting public interest.[83]

Concerning Sri Lanka, the preamble of Model BIT would be categorised as a traditional preamble as it does not have any reference to the environment or the principle of Sustainable development.[84] It reflects merely the investor-friendly climate of the country, stipulating the desire to create favourable conditions for greater investment and recognising that the protected investments will be conducive to stimulating and increasing business initiatives.[85] In consequence, it mirrors the flexible and conducive environment within Sri Lanka towards the foreign investors.

The Preamble in the Indian Model BIT, in comparison, is progressive and would be categorised as a non-traditional preamble as it recognises that the promotion and protection of investments will be conducive to the promotion of sustainable development.[86] Additionally, it upholds the parties' territorial regulatory rights in accordance with their respective laws and policy objectives.[87] The Brazil-India BIT of 2020, which was signed after the new Model BIT of India, also makes a reference to sustainable development in its preamble.[88]

Although the preamble does not create any legal obligation, it may allow the tribunals to consider these environmental concerns when interpreting the substantive provisions of the BIT. Therefore, both Sri Lanka and India can learn from even more progressive BITs of other countries, for example, the Dutch Model BIT of 2019, which reaffirms the state's commitment to sustainable development and enhances the contribution of international trade and investment to sustainable development. It also focuses upon achieving 'the objectives of the treaty without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives', including the protection of the environment.

SPECIFIC TREATY PROVISIONS

Expropriation clause

Another well-known method of reconciling the tension between regulatory power and investment promotion is the explicit identification of environmental concerns that narrow the scope of expropriation.[89] Most of the disputes arising out of BITs involve violation of expropriation

[82] Christina L Beharry and Melinda E Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30(3) American University International Law Review 383.

[83] United States- Uruguay BIT of 2005; Republic of Korea-Trinidad & Tobago BIT of 2002.

[84] Sri Lanka Model BIT, Preamble.

[85] ibid.

[86] Indian Model BIT 2016, Preamble.

[87] ibid.

[88] Brazil-India Investment Cooperation and Facilitation Treaty (2020); Canada 2021 Foreign Investment Promotion and Protection Agreement (FIPA) (2021 Model FIPA), Preamble.

[89] K Gordon and J Phol, 'Environmental Concerns in International Investment Agreements: A Survey' (2001) OECD Working Paper No. 2011/01; Prabhash Ranjan, 'Non-precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation (2012) 2(1) Asian Journal of International Law 21.

clause of the BIT.[90] [91] This clause has been constantly challenged by foreign investors.[92] It is a substantive provision that primarily protects the investors by 'protecting' their investments from government regulatory measures unless certain conditions are met.[93] According to the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, expropriation means 'an interference that the owner will not be able to use, enjoy or dispose of the property. ...'.[94] Both direct and indirect expropriation are referred to as expropriation. Depriving an investment of its legal title or control over its property is known as direct expropriation and it can result through nationalisation, confiscation, requisition or acquisition.[95] Direct expropriation is much less common today than indirect expropriation.[96] However, determining indirect expropriation is difficult as it deprives a substantial benefit of the investment while retaining legal title to the property.[97]

In Sri Lanka, Article 6.2 of the Model BIT forbids both direct and indirect expropriation, whereas the subsequent section or paragraph specifies various requirements must be completed in order to establish whether expropriation is permissible or not.[98] Expropriatory state measures are legal if the measures are taken in the public interest against prompt and effective compensation. The Model BIT, however, offers no detailed guidance on how to identify the host state's indirect expropriatory conduct, and neither does it specify the environment as an exemption to non-compensatory laws. Since the expropriation clause includes 'effects of which would be tantamount to expropriation or nationalisation' it is evident that most arbitral practices apply the 'sole effect test', in which the effects of a measure on the investment are evaluated rather than the intent of the measure.[99] In the *Chemtura Case*,[100] the tribunal has used both the economic and legal effects of the state measure on investment to determine the substantial deprivation examining each situation in light of its own circumstances.[101] The expropriation provision of the Sri Lankan Model BIT has no explicit link with the environment, and there is no explicit limitation for the expropriation based on environment. Instead of securing some regulatory power of the host state to uplift the protection of the environment, the existing Model BIT of Sri Lanka protects only the interests of the investors regarding expropriation.

Considering this, it is reasonable to doubt Sri Lanka's ability to use police power test to justify their bona fide state measures when there is no explicit exclusion of such non-discriminatory, public welfare-oriented state measures that followed the due process of law from expropriation. Even under customary international law, the state has a legitimate right to regulate and exercise its police power and it is important not to confuse exercising such right with expropri-

[90] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009).

[91] Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) Journal of International Economic Law 1049; M Sornarajah, 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration' in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 283-7.

[92] Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20(1) ICSID Review - Foreign Investment Law Journal 1; Dolzer and Schreuer (n 1) 13, Steven Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *American Journal of International Law* 526-7.

[93] Ratner, ibid 526-7.

[94] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens of 1961, Article 10(3).

[95] Andrew Paul Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 323; *AGW Group LTD v The Argentine Republic*, Decision on liability 30 July 2010, para 132

[96] Dolzer and Schreuer (n 1) 13, Further, Salacuse view that seizing foreign property openly will attract negative publicity and are likely to damage state's reputation as a site for foreign investments. Hence, it can argue that indirect expropriation is not much prevalent today.

[97] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit' (2008) 41 Vanderbilt Journal of Transnational Law 792-7; Gus Van Harten and others, 'Public Statement on the International Investment Regime' (31 August 2010) <https://www.bilaterals.org/IMG/pdf/Public_Statement.pdf> 90-3; Newcombe (n 94) 1, Dolzer and Schreuer (n 1) 92; Salacuse, *The Law of Investment Treaties* (n 2) 1; *Enron Corporation v Argentina*, ICSID Case No. ARB/01/3 (Award 22 May 2007) para 244.

[98] This argument is made based on the analysis of the authors.

[99] *Encana Corporation v Ecuador* 45 ILM 655 (2006) para173,177. *Revere Copper & Brass, Inc v Overseas Private Investment Corporation* (1978) 56 ILR 258; *Marvin Roy Feldman Karpa v United Mexican States* (Feldman v Mexico) (ICSID Case No. ARB(AF)/99/1) para 100; *AWG Group v Argentina* (UNICITRAL)1976, at 166; *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8.

[100] *Chemtura Corporation* (n 14).

[101] ibid 247-249.

ation.[102] In *Methanex v United States* it was held that,

> *as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation*[103]

However, the police power test does not justify all bona fide regulations adopted for public objectives.[104] Significantly, since there is no firm textual basis in the Sri Lankan Model BIT to invoke the police power test, non-discriminatory state measures taken for public interest must be compensated as there is an explicit reference to lawful expropriation. Public purpose is mentioned as a criterion to determine lawful expropriation and not the expropriation. Consequently, it is difficult to distinguish between exercising police power of the State and lawful expropriatory actions of the government.[105]

Unlike Sri Lanka, the Model BIT of India has followed this modern approach. Article 5.1 of the Indian Model BIT prohibits nationalisation or expropriation either directly or through measures having an effect equivalent to expropriation, 'except for reasons of public purpose'.[106] Unlike the 2003 Model BIT it prescribes for 'sole effects tests' combined with the 'substantial deprivation test' to determine indirect expropriation.[107] But article 5.3 (b) on the other hand mandates the tribunal 'to determine whether there is "effect equivalent to expropriation" mandates an ISDS tribunal to adopt a case-by-case, fact based inquiry, taking into account a number of factors, including the economic impact of the measures; duration; character of the measures like their object and intent; and whether there has been a breach of a prior written commitment to the investor'.[108] Thus it makes a reference to sole effects test and also to the proportionality test by introducing character, object and intent. Nonetheless, this provision leads to subjectivity as it places a great level of discretion in the hands of the ISDS tribunal.[109] The Tribunal would weigh and balance the benefits of these measures with the effect on foreign investment[110] which would result in either the foreign investment winning over the host state's regulatory power or vice versa.[111]Article 5.5 prescribes for the police powers doctrine as it calls for 'non-discriminatory regulatory measures or the awards of the judicial bodies of a host state that are designed and applied to protect legitimate public interest or public purpose objectives such as health, safety, and the environment shall not constitute expropriation'.[112]

This formulation is very close to the language used by the *Methanex* tribunal in its pronouncement of the doctrine of police powers where it held that '...a non-discriminatory regulation for a public purpose, which is enacted in accordance

[102] *Methanex Corp. v USA* (Final Award, 3 August 2005, 44 ILM 1343) para. 410; The American Law Institute Restatement (Third) of the Foreign Relations Law of the United States also states that '... a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the police power of States, if it is not discriminatory...'; Andrew Newcombe, *Law and Practice of Investment Treaties Standards of Treatment* (Kluwer Law International, 2009). *Saluka Investments B.V. v The Czech Republic* (Partial Award 17 March 2006) 262.

[103] *Methanex Corp. v USA* (UNCITRAL Final Award 3 August 2005, 44 ILM 1343) Part IV- Chapter D Article 1110 NAFTA) para 7; *Revere Copper & Brass, Inc. v Overseas Private Invest. Corp.*, 56 ILR 258; *El Paso Energy International Company v The Argentine Republic* ICSID Case No. ARB/0315 (Award 31 October 2011) Para 240.

[104] ADC v Hungary, ICSID Case No. ARB/03/16,2 October 2006, para 423.

[105] *Saluka Investments* (n 102) Para 264.

[106] Indian Model BIT 2016, Article 5.1.

[107] ibid Article 5.3 a (ii).

[108] Prabhash Ranjan, I*ndia and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019).

[109] Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19(1) Journal of International Economic Law 27.

[110] Xiuli Han, 'The Application of the Principle of Proportionality in Tecmed v Mexico' (2007) 6(3) *Chinese Journal of International Law* 635.

[111] Prabhash Ranjan, 'Using Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Reappraisal' (2014) 3(3) Cambridge Journal of International and Comparative Law 853.

[112] Indian Model BIT 2016, Article 5.5.

with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory…' Thus even an overtly excessive or disproportionate regulatory measure will not amount to expropriation if it 'satisfies the bare minimum threshold of being non-discriminatory and aiming to fulfil some public welfare measure'.[113] As a result, the expropriation clause in the Indian Model BIT does not limit the arbitral discretion, which could put the investor in a difficult situation.[114] On the other hand with the effect of Article 5.5, the expropriation provision is more tilted towards protecting the rights of the host state, meaning if the state measure is able to satisfy the minimum criteria of being non-discriminatory and has the purpose of achieving some public policy concerns it is satisfied as non-expropriatory.[115]

Unlike India, the USA Model BIT of 2012 is precise in determining the expropriation and it does not confuse the indirect expropriation with legal expropriation. Further, it explicitly excludes environmental concern from indirect expropriation in rare circumstances[116] making the host state more compliance with maintaining non-discrimination in pursuit of legitimate public welfare concerns, including the environment.

General Exception Clause

Some BITs include 'specific exceptions' so that the host countries have the regulatory power 'to deal with threats to important national interests'.[117] But, at the same time the investors are at the risk of unjustified invocation of such exceptions.[118] Exceptions are specific reasons that would leave little leeway for the expression of environmental concerns in foreign investment law, as shown by the restrictive trade panel practice in relation to Article XX of the GATT.[119] This clause is important because it tries to protect the interests of the host state by excluding specific transactions, people, or circumstances from the applicability of the obligations in an investment agreement. Different terms in different treaties are used to refer to this section in BITs, such as the general exception or environmental concerns or beneficiaries of the protective norms as human, animal, plant life, or health or as sustainable development or environmental protection or right to regulate.

Regardless of whether a state measure violates other BIT clauses, it would be legal if it fell within the definition of this exception clause.[120] The effectiveness of this provision has been further strengthened in some BITs that specify the nexus between the state measure and the policy objective. For instance, the phrase 'as *it considers appropriate to*' in Article 9 of the Rwanda-Arab BIT has self-judging nature and does not as strict as the phrase 'as it considers'. It gives policy space for the host state to decide the limitations and legitimise its state measures that regulate the environment. Extending this flexibility further, Article 12(6) of the US Model BIT has provided the procedure for any party to consult the other party regarding any matter relating to the exception clause. This provides an opportunity for the parties to negotiate their differences in a flexible manner.

However, the arbitrators have mostly seen these exceptions based on GATT article XX as problematic and have construed them narrowly. For instance, in *SD Myers v Canada* the tribunal ruled in favour of the investor despite there being a visible environmental risk due to use of chemicals that were subject to ban. The Tribunal ruled that Canada's prohibition on chemical exports could not be justified since it appeared to be implemented to preserve the domestic chemical industry, even if the NAFTA investment chapter had general exclusions similar to those in Article XX.[121] However, in *Methanex v USA*, the Tribunal determined that the US's ban on

[113] Montt (n 90) 216-22.

[114] Vinuales (n 29) 12.

[115] ibid.

[116] 2012 U.S. Model Bilateral Investment Treaty (US Model BIT), Annex B; Dutch Model BIT, Article 12.8.

[117] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2015).

[118] ibid.

[119] Stefan Zleptnig, *Non-Economic Objectives in WTO Law* (Kluwer 2010); 2021 Model FIPA, Article 22.

[120] Salacuse (n 117) 377; Dolzer and Schreur (n 1) 13; Ranjan (n 108) 197-207.

[121] *S.D. Myers Inc.* (n 14).

the use of a chemical was implemented to prevent serious contamination of large volumes of surface and ground water and was done in the citizens' best interests.[122] In recent case of *Eco Oro v Columbia*, the tribunal held that even if the treaty language with respect to general exceptions is similar to that of GATT Article XX still the tribunal can give it a wider interpretation for the protection of environment.[123]

In Sri Lanka, Article 4 of the Model BIT deals with general exception clause. Treaty provisions are exempted from treatments given by the customs union, economic union, Free trade agreement or regional economic integration agreement or any agreement that designed to form or extend such a union or area or regional integration agreement or double taxation agreement with a third country. However, it has neither references to 'essential security exception' nor to public policy exception for the protection of environment, health, water supply, labour standards etc. Instead it provides compensation for losses as a result of war-related activities.

In contrast, the general exceptions are listed in Article 32 of the Indian Model BIT. These exceptions apply to 'measures of general applicability applied on a non-discriminatory basis that are necessary'[124] under circumstances such as to 'protect and conserve the environment'.[125] As per footnote 6 in Model BIT it is the Tribunal that would consider whether a measure is 'necessary' while taking into account whether there was no less restrictive alternative measure reasonably available to a party. The meaning of the term 'necessary' has been drawn from the WTO's jurisprudence wherein 'a two-tier test' was developed to determine what the term necessary means in GATT Article XX. The Indian-Model BIT has adopted the second part of the two-tier test, part one of which involves the weighing and balancing different factors like the importance of the regulatory value pursued, the contribution made by the challenge measure to the regulatory value and the restrictive effect of the measure on international trade. Part two on the other hand assumes that the measure is prima facie necessary and analyses the measure undertaken vis-à-vis with least trade restrictive measure reasonably available to the importing country. As a result, it eliminates the need for the tribunal to make any kind of subjective judgments and is more likely to support the host state's concerns.

Most Favoured Nations Treatment (MFN)

MFN is another important safeguard that allow investors to import favourable protection from host State's third-party BIT.[126] This provision encourages investment by creating a level playing field for investors and the host state is able to draw in more investors, giving it a competitive edge over other economic systems.[127] Nonetheless, if the environmental concerns are incorporated in the general exception clause of the BIT, the MFN clause of the same BIT cannot circumvent such explicit restrictions as a result of that the application of the MFN provision would be restricted into that explicit reference.[128] However, according to some tribunals, the investor can bypass even such environment-related exception if there is a more investor-favourable exceptional clause in another BIT.[129] This 'cherry picking' or 'treaty shopping' nature of MFN clause undermines the individual treaty bargains and sidling the main treaty.[130] This represents a drawback of the MFN principle in general.

With reference to Sri Lanka, the Model BIT, contains MFN principle similar to the language that 'Each party treat investment in its territory on a

[122] *Methanex Corp.* (n 102).

[123] *Eco Oro* (n 34).

[124] Sri Lanka Model BIT, Article 32.1.

[125] ibid.

[126] Stephan Schil, *The Multilateralization of International Investment Law* (CUP 2009) 39-64; Prabash Ranjan, 'Most Favored Nation Provision in Indian Bilateral Investment Treaties-A Case for Reform' (2015) 55(1) Indian Journal of International Law 39-64; Asa Romson, *Environmental Policy Space and International Investment Law* (Stockholm University 2012) 77.

[127] Schil ibid 141-42; OECD 'Most Favored Nation Treatment in International Investment Law' (2004) UNCTAD 2010b.

[128] Romson (n 126) 8; *ADF v United States* (January 9 2003) para 76-87.

[129] Romson (n 126) 78; *CMS Gas Transmission Company v The Republic of Argentina* ICSID Case No. ARB/01/8

[130] Schil (n 126) 151-160; Ranjan (n 126); Romson (n 126) 78-80.

basis no less favorable than that accorded to investments of investors of any third country..'.[131]

One of the key features of the MFN clause in the Sri Lankan Model BIT is that it only applies to the investment's post-establishment phase and not its pre-establishment phase. Therefore, at the stage of entry or admission, Sri Lanka has a policy space to treat foreign investments differently. In other words, if an investment project is determined to have a negative impact on Sri Lanka's environment during the pre-establishment phase, it can be controlled without giving rise to an ISDS claim. The host state is bound by broad substantive terms that allow for the restriction of its environmental policy space when the MFN clause is designed broadly and without any exceptions.126[132] Further, there is no reference to the environment as a ground to exempt the MFN principle. Available exceptions have been limited to the customs union, economic union, free trade agreement or regional economic integration agreement or any agreement that is designed to form or extend such a union or area or regional integration agreement or a double taxation agreement with a third country. However, these exceptions, in fact, ensure the interests of other contracting party than Sri Lanka as both the BIMSTEC and SAFTA (which are regional agreements of which Sri Lanka is a part of) do not contain effective provisions on investment. Therefore, this clause prevents mostly Sri Lankan investors in such contracting parties from invoking preferential treatment based on customs union or the FTA contracted by them.

India takes a different approach than Sri Lanka. In order to ensure non-repetition of the White Industries situation, the Indian Model BIT of 2016 does not contain an MFN provision. Consequently, this could result exploitation of the investors in the host state. Instead of doing away with the MFN clause, India should have restricted its scope of application in the BIT itself so that investors do not abuse it.

Principle of Corporate Social Responsibility (CSR)

'CSR is known as a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders'.[133] Increasingly, provisions on CSR are being added into model BITs by various countries to protect society and the environment from harm by companies by imposing an obligation upon them.[134] This provision enables the host state to differentiate between foreign investors based on the nature of the investment and its size and effect.[135] The Colombian Model BIT(2017), for example, imposes voluntary responsibility on foreign investors to incorporate and practice the OECD Guidelines for Multinational Enterprises. Further adding to the environmental protection aspect, the Colombian Model BIT in order to ensure adherence to the environmental law has even added a 'denial of benefits' clause wherein an investor may be denied treaty protection altogether if they have 'caused serious environmental damage in the territory of the host party'.[136]

CSR, however, is not included in the Sri Lankan BIT. The Indian Model BIT, on the other hand, being a new generation model, includes a clause on CSR that requires investors and their businesses 'to voluntarily incorporate internationally recognised standards of corporate social responsibility in their policies and internal policies', including guidelines that address issues like labour, the environment, human rights, community relations, and anti-corruption.[137] This particular clause would encourage foreign investors to support various social causes in their

[131] Model BIT of Sri Lanka, Article 3.1.

[132] Romson (n) 77.

[133] United Nation's Industrial Development Organization(UNIDO) <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr>.

[134] 2012 SADC Model Bilateral Investment Treaty (2012 SADC Model BIT), Article 15.2; Colombia Model BIT (2017), Investors Social Responsibility; Netherlands Model BIT (2019), Article 7; Moroccan Model BIT (2019), Article 20.

[135] Thomas Lahey, 'Using Bilateral Investment Treaties to Promote Corporate Social Responsibility and Stimulate Sustainable Development' (2019) 15 Rutgers Business Law Review.

[136] Colombian Model BIT (2017) 'Denial of Benefits'.

[137] Indian Model BIT (2016) Article 12.

host state.[138] The Sri Lankan Model may incorporate a clause on corporate social responsibility, and the Indian Model BIT can borrow the 'Denial of Benefits' clause from the Colombian Model BIT to make it more environment centric and consider a breach of environmental obligations as a direct and independent cause of action and a ground to deny investor treaty protections.[139]

Environmental Impact Assessment

EIA is a tool used by States to determine the likely environmental impact of an industrial activity.[140] Due to its incessant usage by the states, the ICJ has recognised it as 'a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact'.[141]

However, this assessment process can bring about a conflict between the interest of the investors and those of the host State.53[142] This conflict can arise between the interests of the investor and the proposed EIA if there is discrimination against foreign investments.[143] Therefore leading to a claim under national treatment or between and amongst investors from different countries giving rise to a claim under MFN clause.[144] In cases where there is no domestic EIA system in place and it is introduced or the host state wishes to improve an already existing EIA system, there is a fear of violating the provisions of a BIT. Thus, regulatory change can lead to this violation if the host State makes the parameters of its EIA system more stringent.[145] Investors can bring about a claim against the host State alleging that the investors in the past were treated differently as the EIA process was smoother then. Thus, the new EIA process may be challenged as a denial of fairness by investors. These changes could also constitute a form of expropriation.[146]

As far as India and Sri Lanka are concerned both the States have not incorporated a provision of EIA in their respective Model BITs, however both States have a domestic policy of conducting EIA before the commencement of an industrial activity. This is a big shortcoming of the Indian Model BIT as it is a new generation Model BIT, especially when compared with other modern model BITs. For instance, the SADC Model BIT of 2012 imposes an obligation upon the investors to conduct an environmental and social impact assessment as per the laws of the Host State, Home State or the International Finance Corporation, whichever is more rigorous in relation to the Investment in question.[147] Similarly, the pan African investment code 2017 requires both the investors and the host state to conduct environmental impact assessments.[148] Though the Dutch Model BIT does not have a specific provision on EIA but it provides for the same as part of its provisions on corporate social responsibility.[149]

[138] Ashutosh Ray, 'Unveiled: Indian Model BIT' (*Kluwer Arbitration Blog*, 18 January 2016) <http://arbitrationblog.kluwerarbitration.com/2016/01/18/unveiled-indian-model-bit/>.

[139] Colombian Model BIT (n 136).

[140] As per International Association for Impact Assessment, environmental impact assessment is defined as 'the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made'.

[141] *Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment [2010] ICJ Rep 14, 83.

[142] Mayeda (n) 141.

[143] *Clayton and Bilcon of Delaware Inc. v Government of Canada*, PCA Case No. 2009-04 (Award on Jurisdiction and Liability 17 March 2015).

[144] *Metalclad* (n 13) 4.

[145] *Mining Watch Canada v Canada* [2010] N.R. TBEd. JA.008.

[146] Mayeda (n 53) 141.

[147] SADC Model BIT (2012) Article 13.

[148] Pan African Investment Code, Article 37.

[149] Dutch Model BIT (2019) Article 7.3.

Conclusion

The modern practice of investment treaties recognised integrating environmental concerns into the text of the Model BIT as a possible way to strike an appropriate balance between investment promotion and environmental protection. Such Model BITs reflect the state policy on foreign investment in a rational manner while preserving policy space for the host state to legitimise its public interest concerns. Since the investment treaty becomes the primary source in an investment dispute, if the treaty provisions are precisely drafted concerning the rights of both, the host state and investors, the tribunal will be able to maintain a sense of coherence between them.

The textual formation of the Sri Lankan Model BIT suggests that promotion of investment prevails over the regulatory power of Sri Lanka as a host state which is the opposite to the Model BIT of India. Although India's Model BIT is progressive comparing with Sri Lanka's, it tilts more towards to protect the interests of the host state than balancing the interests of both investors and the host state. In other words, concerning the preamble, Indian Model BIT is progressive and following the India's approach Sri Lanka can revisit and redraft her Model BIT. However, the MFN clause needs to be added to the Indian Model BIT that has been done away with in order to avoid the post white industries setback wherein the foreign investors borrowed beneficial substantive and procedural provisions from third country BITs. This exclusion may lead to discriminatory treatment of the investors by the host State. Thus, a watered-down version of the MFN clause needs to be added to the BIT by limiting its scope to import of environmental provisions. If environmental concerns were included as an exception to treaty provisions of Sri Lanka, it would be easy for Sri Lanka to invoke preferential treatments. On the other hand, the Indian Model BIT lists out the exceptions applied on a non-discriminatory basis that are 'necessary' to protect and conserve the environment which Sri Lanka can incorporate.

Both the model texts need to learn a lesson from the Moroccan Model BIT of 2019 to follow a balanced approach to incorporate the concept of environmental impact assessment in their respective models which has been recognised as a general principle of international law by the ICJ. This clause would make it necessary for investments being made in and by both the States to be scrutinised from an environmental point of view even prior to the commencement of the projects so that environmental concerns can be taken into account. Reformation of the text of the treaty by incorporating environmental concerns to Model BITs would change the outcome of future disputes of future investment treaties.

LEAD Journal is a peer-reviewed journal which publishes - on lead-journal.org - articles, case notes and documents of interest to professionals, practitioners, researchers, students and policy-makers in the field of international and regional environmental law and domestic environmental laws of developing countries. It emphasises a comparative approach to the study of environmental law and is the only journal in the field to carry a North-South focus. It is unique in providing perspectives from both developed and developing countries. Bearing in mind the principles of "sustainable development", LEAD Journal also solicits writings which incorporate related concerns, such as human rights and trade, in the study of environmental management, thus adopting a contextual approach to the examination of environmental issues. LEAD Journal encourages scholarship which combine theoretical and practical approaches to the study of environmental law and practice.

SOAS IELRC
LEAD Journal: Law, Environment and Development Centre, SOAS University of London