Sharing the Cost or Paradise Lost? Establishing a Nexus Between Compensable Expropriatory and Legitimate Regulatory Measures Affecting Foreign Investments, in Light of Environmental Protection

Joseph Giancarlo C. Agdamag[*]

---

* '15 J.D., Ateneo de Manila University School of Law. The Author is currently with the Legal Services Division of the Philippine Competition Commission. He is an Assistant Professorial Lecturer at the De La Salle University College of Business, teaching partnership and corporation law, environmental law, and taxation law. This Note is an abridged version of the Author's Juris Doctor thesis (on file with the Professional Schools Library, Ateneo de Manila University).

Cite as 62 ATENEO L.J. 831 (2018).

I. THE EMERGING DILEMMA

Men argue. Nature acts.

— Voltaire[1]

A. Background of the Study

The debate concerning the balance between developmental and environmental rights occupies a cornerstone of contemporary international law. As the use of foreign investments to catalyze economic development continues to gain popularity,[2] the conflict between these two distinct concepts becomes all the more pronounced. This is evident from the

1. VOLTAIRE, PHILOSOPHICAL DICTIONARY 281 (H.I. Woolf trans., 2010).

2. *See generally* World Bank, Foreign Direct Investment – the China story, *available at* http://www.worldbank.org/en/news/feature/2010/07/16/foreign-direct-investment-china-story (last accessed Jan. 26, 2018).

multitude of State-investor disputes involving the conflict between investment protection and environmental protection, currently pending resolution in various international courts and tribunals.[3]

Even before the advent of the 21st century, publicists have already recognized the looming divergence and gap in the law.[4] However,

3. *See, e.g.*, Clayton/Bilcon v. Government of Canada, PCA Case No. 2009-04 (Mar. 17, 2015) (involving Canadian environmental requirements, which affected the investors' plans to open a basalt quarry and a marine terminal in Nova Scotia); Mesa Power Group, LLC v. Government of Canada, PCA Case No. 2012-17 (Mar. 24, 2016) (involving a United States (US) company's challenge against a "green job" program by the government of Ontario); Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22 (Sep. 27, 2016) (involving a US-based energy company's challenge over its inability to participate in Ontario's green energy program); Lone Pine Resources, Inc. v. Government of Canada, Procedural Order No. 7, ICSID Case No. UNCT/15/2 (Sep. 14, 2017) (involving a US company's attack on Quebec's moratorium on the practice of hydraulic fracturing (also known as fracking) for natural gas); Spence International Investments, LLC et al. v. Costa Rica, Interim Award (Corrected), UNCT/13/2 (May 30, 2017) (involving a US corporation's claim for compensation for a beachfront property that the Costa Rican government intends to turn into a nature reserve); Pac Rim Cayman LLC v. Republic of El Salvador, Award, ICSID Case No. ARB/09/12 (Oct. 14, 2016) (involving El Salvador's refusal to issue a permit for a massive gold mine using water-intensive cyanide ore processing); The Renco Group, Inc. v. The Republic of Peru, Final Award, ICSID Case No. UNCT/13/1 (Nov. 9, 2016) (involving the disallowance of Peru to grant the investor an extension on the investor's commitment to clean up environmental contamination); & Adel A Hamadi Al Tamimi v. Sultanate of Oman, Award, ICSID Case No. ARB/11/33 (Nov. 3, 2015) (involving the termination of a limestone quarry investment due to environmental grounds).

4. *See, e.g.*, Martin J. Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465 (1999); HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT (1999); Daniel R. Loritz, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L. REV. 533 (2000); & Philippe Sands, Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law, *available at* http://www.oecd.org/investment/globalforum/40311090.pdf (last accessed Jan. 26, 2018).

establishing a fixed and concrete legal framework, at least on the basis of international law, to address this dilemma seems to be a convoluted endeavor given the delicacy of the two issues involved. In the end, it becomes a question of which takes precedence — the substantive norms of protecting foreign investors, or the increasingly recognized principles of environmental protection?

Compared to the centuries-old guarantees of protecting foreign property,[5] the realm of environmental protection only gained traction in the last few decades.[6] Presently, there is an upsurge of global awareness pertaining to the existence of one's obligations towards the environment.[7] Even the European Court of Human Rights (ECHR), an international court devoted for the safeguarding of human rights, has recognized that environmental protection is an "increasingly important consideration" in today's society.[8] Armed with this collective awareness, as well as by snowballing pressure from the public, many States have gradually implemented a wide array of regulations geared towards the enforcement of this right.[9]

Hence, it is not surprising that some of these regulations have unwittingly, and perhaps unwillingly, affected the vested property rights of some persons, including those of foreign investors.[10] At the outset, regulatory risks may be considered as part and parcel of the entire investment process.[11] This finds support in the settled principle under customary international law that the entry of foreign investments, as well as matters

5. Francis J. Nocholson, S.J., *The Protection of Foreign Property Under Customary International Law*, 6 B.C. L. REV. 391, 391-92 (1965).

6. *See generally* ERIC C. PONCELET, PARTNERING FOR THE ENVIRONMENT: MULTISTAKEHOLDER COLLABORATION IN A CHANGING WORLD 26-27 (2004).

7. United Nations General Assembly, *Global Awareness of Sustainable Growth Concept has Increased, But Action Lags, Assembly is Told*, Press Release, GA/9262 (June 23, 1997).

8. Fredin v. Sweden, Judgment, (1991) 13 EHRR 784, ¶ 48 (Feb. 18).

9. United Nations General Assembly, *supra* note 7.

10. *See* Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. ENVTL. L. 207, 207-09 (2006).

11. *Id.* at 215.

pertaining to its implementation and continued operation, are matters falling within the sovereign prerogative of the host State.[12]

However, international law has also traditionally imposed ample standards on safeguarding foreign investments from threats present in the host-country, especially against expropriation.[13] This obligation of the host State to protect foreign property finds more application when the investment is covered by the protective ambit of an international investment agreement, whether bilateral or multilateral, which the host State and the investor's State of origin had adopted.[14] In line with the provisions of these investment treaties, an aggrieved investor could seek compensation for any resulting devaluation of his property caused by the enactment of such regulatory environmental measure.[15] The conflict comes into full circle when the foreign investor decides to lodge a complaint in an international investment dispute tribunal in order to have his claims heard and decided.

Thus emerged the concept of environmental expropriation, which pertains to instances of indirect expropriation claims involving foreign investment, arising from the enactment of "regulatory measures aimed at protecting the environment[.]"[16]

Investment arbitrations involving a State's imposition of environmental protection measures have wide implications for both the progression of environmental governance and the growth of foreign investments. On the one hand, an award favoring the government's enactment of the regulation would mean victory for environmental protection efforts, and would

12. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 273 (3d ed. 2010).

13. Wagner, *supra* note 4, at 469-72.

14. *See generally* Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351, 365-68 (2016).

15. *See generally* Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 12-15 (2011).

16. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 43 (2005). The exact origins as to who coined the term seem to be unknown. However, some of the earlier authors who used the term include Martin J. Wagner and Andrew Newcombe. *See generally* Wagner, *supra* note 4 & Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1 (2005).

promote an investment climate agreeable for foreign investors.[17] On the other hand, an award finding expropriation and granting compensation to the investor would create regulatory chill among policymakers, and could lead to the deterioration of environmental standards marked by race-to-the-bottom implications.[18]

Hence, investment tribunals are faced with a gargantuan task. Whether they like it or not, they hold the key to future developments in the intertwined fields of environmental law and investment law. As the threats brought about by a volatile natural environment are becoming more imminent,[19] it is expected that more environmental regulations would be enacted, thus increasing the likelihood of more expropriation claims being filed in arbitral tribunals.

As it is right now, there are no fixed standards guiding arbitral tribunals in determining whether an instance of environmental expropriation is compensable or not. Although interrelated with each other, the standards used by international tribunals are diverse and involve different typologies. Further, in deciding whether to uphold an environmental measure, the tribunals merely rely on the purpose given by States, or the effects of the measure on the investment, consistent with the sole-effects doctrine or the police-powers doctrine traditionally used in determining the existence of regulatory expropriation.[20] Thus, the prevailing investment jurisprudence involving environmental regulations seem hesitant to recognize the underlying international basis for the enactment of the measure. Because of this, publicists like August Reinisch,[21] Martin J. Wagner,[22] and Thomas

17. *See generally* Anastasia Telesetsky, *A new investment deal in Asia and Africa: Land leases to foreign investors*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 568-69 (Chester Brown & Kate Miles eds., 2011).

18. *See generally* Kyla Tienhaara, *Regulatory chill and the threat of arbitration: A view from political science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, *supra* note 17, at 606-10.

19. *See, e.g.*, Gilbert Cruz, *Top 10 Environmental Disasters*, *available at* http://content.time.com/time/specials/packages/article/0,28804,1986457_1986501_1986443,00.html (last accessed Jan. 26, 2018).

20. Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation Under International Law*, 15 AUSTL. INT'L L.J. 267, 267 (2008).

21. August Reinisch stated —

> One of the central difficulties in distinguishing a regulatory measure from a regulatory expropriation lies in the identification of legitimate

Wäelde and Abba Kolo[23] have interposed the idea of using the general realm of international environmental law in achieving a consensus on distinguishing a non-compensable regulatory taking from indirect expropriation. The recognition of these propositions, in the context of the existing standards employed by arbitral tribunals, constitutes the main premise of this Note.

Ultimately, this Note brings to the fore the entangled relationship between the right of the government to impose regulatory environmental measures and the right of foreign investors to their property. And, it is

---

> purposes of regulatory measures. However, there appears to be an emerging consensus that certain types of measures are considered legitimate. In searching for such an international consensus, environmental agreements, ILO labor standards and the like may provide useful guidance.

August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 434 (Peter Muchlinsky, et al. eds., 2008).

22. Martin J. Wagner posits that

> there can be no doubt that environmental regulations are a legitimate exercise of governmental power that should not normally give rise to a government obligation to compensate for resulting economic losses. Moreover, to require compensation would be inconsistent with generally accepted international law concerning environmental protection[.]

Wagner, *supra* note 4, at 530.

23. Thomas Wäelde and Abba Kolo explain that

> the environmental obligations [of the Energy Charter Treaty] may be relied upon by an international tribunal in interpreting other provisions of the treaty ([e.g.,] the expropriation or sanctity-of-contract provisions). Since the distinction between 'normal' regulation and a compensable 'regulatory taking' is not easy and requires a balancing process, the environmental standards recogni[z]ed in a treaty are suitable to serve as factors to be taken into account in such balancing process. They help to define the legitimacy of environmental policies underlying national regulation.

Thomas Wäelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 817 (2001) (citing Thomas Wäelde, *Sustainable development and the 1994 Energy Charter Treaty: between pseudo-action and the management of environmental investment risk*, *in* INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 240-45 (Friedl Weiss, et al. eds., 1998)).

precisely this entangled relationship where an emerging legal loophole presents itself.

B. A Predicament of Catastrophic Proportions

As a response to the ubiquitous danger brought about by a volatile natural environment, many jurisdictions globally, including the Philippines, have interposed a wide array of regulations to combat this looming threat.[24] However, some of these environmental regulations have also affected some of the vested property rights of foreign investors.[25] As a result of any potential devaluation caused by this interference, a State is exposed to claims of violations of investment protection standards, especially that of expropriation.

In the event that environmental regulations interfere with foreign investments — what regime governs? Will the arbitral tribunal focus on the effects of the measure on the investment, and declare the occurrence of expropriation, and then apply the orthodox sole-effects doctrine? Or will the tribunal consider the purpose behind the enactment of the measure, and rule against the payment of compensation, in accordance with the non-traditional mixed-effects or the police-powers doctrine?

Ultimately, the primary question raised by this Note is, "does a State, in enacting environmental measures — which affect the value of a foreigner's investment — exercise its regulatory function arising from its police power, or does it exercise its power of eminent domain, thereby necessitating the payment of just compensation to the aggrieved investor?"

In answering this question, this Note advocates the view that considering a State's international obligations towards environmental protection, such environmental measures fall exclusively within the realm of police power, provided that the regulations meet certain adequate standards necessitated by investment protection. Thus, pursuant to the State's legitimate exercise of its regulatory power, the foreign investor is precluded from claiming compensation from any resulting devaluation caused to his investment; hence, the investor ultimately shares in the costs of environmental protection efforts.

---

24. *See generally* DAVID DEMORTAIN, SCIENTISTS AND THE REGULATION OF RISK: STANDARDISING CONTROL (2011).

25. *See, e.g.*, Baughen, *supra* note 10, at 224.

In the process of providing answers to this gap, other essential questions arise. First, what are these international environmental principles that could explain the exercise of a State's regulatory power? Corollary, what is the extent through which these obligations may excuse a State from the payment of just compensation in case of any interference with foreign investment? Do these international environmental principles have the corresponding normative value that would in effect make their compliance obligatory? Second, assuming that there is sufficient basis in using these international environmental principles as justification for the exercise of regulatory measures affecting foreign investment, how can these be balanced with the investor's substantive rights? Stated differently, how should environmental measures be enacted so that they are not to be violative of the traditional norms of investment protection?

Ultimately, this Note seeks to address the appropriate standards that would guide international arbitral tribunals dealing with investments in deciding expropriation claims triggered by the enactment of a regulatory environmental measure. Thus, a framework recognizing the emerging domain of environmental expropriation is proposed, such that a legitimate exercise of such does not give rise to any expropriatory claim. Based on existing standards, mechanisms will be formulated in order to strike a balance between the property rights of foreign investors, consistent with the international minimum standards, and the customarily recognized environmental obligations of States.

C. Significance of the Study

Recent developments, as evinced by the growing number of investor-State disputes relating to environmental expropriation, indicate that the conflict between foreign investments and the environment is now a real subject in international law, and is emerging to be a permanent and expanding feature of the global agenda.[26]

States are becoming increasingly aware of the threats brought about by the volatile changes in the natural environment.[27] The rise in global sea

26. Sands, *supra* note 4, at 6-10.

27. *See, e.g.*, Suzanne Goldenberg, *Climate change 'already affecting food supply' – UN*, GUARDIAN, Mar. 31, 2014, *available at* https://www.theguardian.com/environment/2014/mar/31/climate-change-food-supply-un (last accessed Jan. 26, 2018).

levels for the past few years has been alarming, to say the least.[28] The Philippines, being an archipelagic State, is one of those vulnerable to the imminent peril it brings.[29] In fact, scientific studies show that around 80% of the Philippines might submerge over the next 80 years.[30]

As such, the threat that climate change brings is considered to be "the most profound challenge ever to have confronted human social, political, and economic systems."[31] It puts the world in a beleaguered state, for "[t]he stakes are massive, the risks[,] and uncertainties severe, the economics controversial, the science besieged, the politics bitter and complicated, the psychology puzzling, the impacts devastating, the interactions with other environmental and non-environmental issues running in many directions."[32]

Among other imminent threats are the loss of biodiversity,[33] the depletion of the ozone layer,[34] and the harm caused by transboundary pollution.[35] However, it could now be argued that climate change is the most pressing issue among them all.[36] It is unlike any other environmental

28. *See generally* Laura Parker, Sea Level Rise Will Flood Hundreds of Cities in the Near Future, *available at* https://news.nationalgeographic.com/2017/07/sea-level-rise-flood-global-warming-science (last accessed Jan. 26, 2018).

29. Tony Lopez, *PH could sink this century*, MANILA TIMES, Oct. 7, 2013, *available at* http://manilatimes.net/ph-could-sink-this-century/4293,3 (last accessed Jan. 26, 2018).

30. *Id.*

31. John S. Dryzek, et al., *Climate Change and Society: Approaches and Responses*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 3 (John S. Dryzek, et al. eds., 2011).

32. *Id.*

33. *See, e.g.*, Brian Clark Howard, *World to Lose Two-Thirds of Wild Animals by 2020?*, *available at* https://news.nationalgeographic.com/2016/10/living-planet-index-world-lose-two-thirds-animals-2020-conservation-science (last accessed Jan. 26, 2018).

34. *See, e.g.*, C. Claiborne Ray, *Remember the Ozone Layer?*, N.Y. TIMES, June 20, 2016, *available at* https://www.nytimes.com/2016/06/21/science/remember-the-ozone-layer.html (last accessed Jan. 26, 2018).

35. *See* United Nations General Assembly Sixth Committee, *Harmful Effects of Transboundary Pollution Cited as Key to Proposed Law to Govern International Liability*, Press Release, GA/L/3241 (Oct. 30, 2003).

36. *See, e.g.*, Craig Welch, Carbon Emissions Had Leveled Off. Now They're Rising Again, *available at* https://news.nationalgeographic.com/2017/

problem that humanity has ever faced.[37] It is truly a "complex and diabolical policy problem," [38] of which failure to act would lead to drastic consequences that would haunt humanity until the end of time.[39]

Meanwhile, the past couple of years have also shown a remarkable increase in the amount of foreign direct investments (FDIs) coursed through the global financial system.[40] Although one essential goal of the investment process is to stimulate development and uplift the lives of the people in lesser income countries, it cannot be denied that investments also work to the detriment of other sectors it goes into contact with.[41] A bulk of these investments are being channeled into developing countries, which, ironically, bear the brunt of climate change, and other challenges caused by environmental degradation.[42]

With these heightened environmental pressures, governments around the world have been implementing a wide range of policies to combat the looming threat. It is widely recognized by international legal authorities that "governments may need to prohibit and [ ] regulate certain types of property [for the sake of protecting] the environment."[43] Thus, it is reasonable to assume that more environmental policies will be enacted. Consequently, the conflict between foreign investments and environmental regulations may further escalate, if no attempt to draw a demarcation between the two is done.

11/climate-change-carbon-emissions-rising-environment (last accessed Jan. 26, 2018).

37. Will Steffen, *A Truly Complex and Diabolical Policy Problem*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY, *supra* note 31, at 21.

38. ROSS GARNAUT, THE GARNAUT CLIMATE CHANGE REVIEW: FINAL REPORT xvii (2008).

39. *Id.* at 597.

40. *See, e.g.*, Prakash Loungani & Assaf Razin, How Beneficial Is Foreign Direct Investment for Developing Countries?, *available at* www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm (last accessed Jan. 26, 2018).

41. *Id.*

42. John Vidal, *Climate change will hit poor countries hardest, study shows*, GUARDIAN, Sep. 27, 2013, *available at* https://www.theguardian.com/global-development/2013/sep/27/climate-change-poor-countries-ipcc (last accessed Jan. 26, 2018).

43. Newcombe, *supra* note 16, at 26 (citing International Bank of Washington v. Overseas Private Investment Corporation, 11 I.L.M. 1216 (1972)).

The lack of uniformity in the rulings and standards applied by arbitral tribunals further complicate matters.[44] As will be discussed in the succeeding Sections, many investment disputes arise because of the ambiguity in these substantive standards —

> Treaty provisions lack precise definition[s] of [ ] standards and their language encompasses a potentially wide variety of [S]tate regulations that may interfere with investors' property rights. Therefore, a potential [conflict] exists when a State adopts regulatory measures interfering with foreign investments, as regulation may be deemed to violate substantive standards of treatment under investment treaties[,] and the foreign investor may demand compensation before arbitral tribunals. For instance, there is no settled approach in cases where investors allege that certain regulator[y] measures constitute a compensable form of expropriation.[45]

Most of the jurisprudential discourse on environmental expropriation are cases decided under the North American Free Trade Agreement (NAFTA).[46] This trade and investment agreement has so far produced the richest literature pertaining to the conflict between environmental regulations and foreign investments, due largely to the environmental provisions codified in the agreement.[47]

Because of the inherent convenience of resorting to investor-State dispute mechanisms in resolving investment claims, there is a perception that the increasing use of arbitration as a means to question governmental measures meant to safeguard the environment has been very alarming, such that "the provisions designed to ensure security and predictability for the investors have now created uncertainty and unpredictability for environmental [ ] regulators."[48]

---

44. Christopher R. Drahozal, *Diversity and Uniformity in International Arbitration Law*, 31 EMORY INT'L L. REV. 393, 399-400 (2016).

45. Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 824 (2011).

46. North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 32 I.L.M. 289 (ch. 1-9) & 605 (ch. 10-22) (1993) [hereinafter NAFTA].

47. *See generally* ALAN M. RUGMAN, ET AL., ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE 1-10 (1999).

48. MANN & VON MOLTKE, *supra* note 4, at 5.

In view of these concerns, it is essential to establish a legal framework that will govern a scenario involving a conflict between regulatory environmental measures and foreign investments. The proper standards have to be ascertained in order to strike a balance between the obligation to protect the environment and the rights of foreign investors. As the relationship between the two becomes more entangled, the necessity for establishing a nexus between compensable expropriatory, and legitimate regulatory measures affecting foreign investments all the more gains significance.

II. THE GROWING RECOGNITION FOR ENVIRONMENTAL PROTECTION

Nature never did betray

The heart that loved her[.]

— William Wordsworth[49]

As described in the preceding Section, the threats brought about by a volatile natural environment have spawned mounting calls for environmental sustainability.[50] The growing recognition for environmental protection has remarkably increased its prominence throughout the past decades, especially with the emergence of international environmental law as a separate and distinct field of public international law.[51] The development of this area of study hinges on the fact that "environmental issues are accompanied by a recognition that ecological interdependence does not respect national boundaries and that issues previously considered to be matters of domestic concern have international implication."[52]

This Section presents a comprehensive study of the development of this specialized field of law, both in the international and domestic setting. This will be done in three phases. The first Subsection will give a historical

49. WILLIAM WORDSWORTH, THE POETICAL WORKS OF WORDSWORTH 189 (1881).

50. *See generally* The Independent Evaluation Group, Environmental Sustainability: An Evaluation of World Bank Group Support, *available at* http://siteresources.worldbank.org/EXTENVIRONMENT/Resources/environ_eval.pdf (last accessed Jan. 26, 2018).

51. Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT'L L. 1, 26 (2011).

52. PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 3 (2003).

account of the growth of environmental law as a distinct area of study, in light of the realities happening. The second Subsection will discuss key concepts and principles, with particular focus on their normative value and crystallization into customarily binding norms.

A. The Development of Environmental Law

International environmental law has been defined as "those substantive, procedural[,] and institutional rules of international law which have as their primary objective the protection of the environment."[53] Compared to other legal fields, international environmental law is a relatively new discipline.[54] In fact, the UN Charter of 1945 [55] does not include environmental protection among its purposes and principles.[56] It was only during the 1970s that the United Nations (UN) specifically convened a body devoted to environmental matters, the UN Environment Program (UNEP).[57] The historical evolution of international environmental law spans three major "periods" or "phases"— the "'traditional era[,]' the 'modern era[,]' and the 'post-modern era[.]'"[58]

The traditional era of environmental law is the period preceding the 1972 UN Stockholm Conference on the Human Environment.[59] During this period, most of the efforts in employing measures to protect the environment were only confined to the domestic sphere.[60] Nevertheless, interstate disputes and issues relating to the environment are not necessarily new. Even before the dawn of the 20th century, cases involving nature had

53. *Id.* at 15.

54. Weiss, *supra* note 51, at 1.

55. U.N. CHARTER.

56. SANDS, *supra* note 52, at 31.

57. Daniel Bodansky, et al., *International Environmental Law: Mapping the Field*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 2 (Daniel Bodansky, et al. eds., 2008).

58. Peter H. Sand, *The Evolution of International Environmental Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 57, at 30–31.

59. *Id.* at 31.

60. Weiss, *supra* note 51, at 2–3.

already been adjudicated, with the *Bering Fur Seals Arbitration Assistance*[61] taking the lead. However, "the underlying issues were not usually conceived as 'environmental[.'] [I]nstead, they were seen as ['resource'] issues, primarily relating to the conservation of wildlife for human uses."[62]

It was only much later that States became aware of the global nature of many environmental issues that they had been facing in their own jurisdictions.[63] States sat down together to negotiate conventions concerning the protection of the marine environment from oil pollution,[64] the trading endangered species,[65] and the dumping of hazardous wastes.[66] Since then, the field has rapidly evolved. It was during this period that the prominent arbitral award known as the *Trail Smelter Arbitration*[67] was decided. The case brought to the fore the principle of transboundary harm, such that "no [S]tate has the right to use or permit the use of its territory in such a manner as to cause injury ... to the territory of another or the properties or persons therein[.]"[68] This served as a "crystalli[z]ing moment" in the field of environmental law and became influential in subsequent developments.[69]

The post-World War II period, which saw the establishment of the UN, is considered a turning point for the field. Two features characterized the period — international organizations finally began to tackle environmental issues, and the range of environmental issues addressed had widened to include a focus on the causes of pollution resulting from hazardous

61. Award between the United States and the United Kingdom Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals, 28 R.I.A.A. 263 (1893).

62. Bodansky, et al., *supra* note 57, at 2 (emphasis omitted).

63. *Id.* at 3.

64. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 1046 U.N.T.S. 138 (entered into force Aug. 30, 1975).

65. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243.

66. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signarure* Mar. 22, 1989, 1673 U.N.T.S. 126 [hereinafter Basel Convention]. *See also* ALEXANDRE KISS & DINAH SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 38 (2007).

67. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

68. *Id.* at 1965.

69. SANDS, *supra* note 52, at 30.

activities.[70] However, at this point, there was still limited recognition of the relationship between economic development and environmental protection.[71]

The advent of the modern era of environmental law dates back to 5 June 1972, the opening day of the first UN Conference on the Human Environment (UNCHE) in Stockholm,[72] which is now annually celebrated as World Environment Day.[73] The Stockholm Conference was convened "to provide [S]tates with a high-ranking, central forum for [discussing] environmental problems" and to provide options for combatting them "in a coordinated[ ] [and] effective manner."[74] Its main output was the Stockholm Declaration,[75] a document containing 26 principles, the most important of which is embodied in Principle 21, relating to the control and prevention of transboundary environmental harm.[76] This provision is considered to be an articulation of existing treaty and of customary international environmental law.[77] Principle 23 states that the development of environmental law should "consider the system of values prevailing in each country," with particular

---

70. *Id.* at 30-31.

71. *Id.* at 31.

72. *Id.* at 26.

73. United Nations, World Environment Day: driving five decades of environmental action, *available at* http://worldenvironmentday.global/en/about/world-environment-day-driving-five-decades-environmental-action (last accessed Jan. 26, 2018).

74. ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 7 (2011).

75. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf.48/14/REV 1 (June 16, 1972) [hereinafter Stockholm Declaration].

76. *Id.* princ. 21. Principle 21 provides

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id.

77. PATRCIA BIRNIE, ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 49 (2009) & KISS & SHELTON, *supra* note 66, at 36.

regard to developing countries.[78] This is in accord with the currently prevailing notion that there should be a distinction in the application of environmental norms, depending on each country's state of development — recognized as the principle of common but differentiated responsibilities.[79]

One of the most significant achievements of the Stockholm Conference was the establishment of the UNEP, the first UN institution with the primary mandate of environmental protection.[80] The UNEP has succeeded in spearheading the negotiations of no less than 48 multilateral environmental conventions and protocols since 1976.[81] On a national level, a convergence between domestic laws and treaty provisions also developed.[82] This is evident from the adoption of "environmental impact assessments[,]" a standard that started in the United States (US)[83] that eventually spread to more than 80 jurisdictions.[84] A harmony between local and international environmental laws transpired, as conventions started to borrow the concepts and language of domestic legislation.[85] Further, the call for environmental protection became more prominent, as countries that were initially reluctant with the Stockholm Declaration were now open to the ecological realities happening around them.[86]

The work done by the World Commission on Environment and Development, known as the Brundtland Commission, set the stage for the next worldwide environmental conference.[87] Following the Brundtland Report, entitled "Our Common Future," in 1987,[88] the UN General

78. Stockholm Declaration, *supra* note 75, princ. 23.

79. KISS & SHELTON, *supra* note 66, at 37.

80. Institutional and financial arrangements for environmental cooperation, G.A. Res. 27/2997, U.N. Doc. A/RES/27/2997 (Dec. 15, 1972).

81. Sand, *supra* note 58, at 34.

82. *Id.* at 37.

83. National Environmental Policy Act of 1969, 42 U.S.C § 4332 (C) (i) (2012) (U.S.).

84. Sand, *supra* note 58, at 37.

85. *Id.*

86. SANDS, *supra* note 52, at 45.

87. BEYERLIN & MARAUHN, *supra* note 74, at 12.

88. World Commission on Environment and Development, *Our Common Future*, U.N. Doc. A/42/427, Annex (Aug. 4, 1987) [hereinafter Our Common Future].

Assembly convened the UN Conference on Environment and Development (UNCED), held in Rio de Janeiro in June 1992.[89] Five documents emerged from the UNCED.[90] Three are non-binding instruments — the Rio Declaration on Environment and Development (Rio Declaration),[91] the Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (UNCED Forest Principles),[92] and Agenda 21.[93] The other two were treaties that were opened for signature — the Convention on Biological Diversity[94] and the United Nations Framework Convention on Climate Change.[95]

The Rio Declaration comprises a series of compromises between developed and developing countries discussing the "balance between [ ] environmental protection and economic development."[96] The 27 Principles it embodies are considered to have much greater legal significance than its 1972 predecessor,[97] with Principles 3 and 4, pertaining to sustainable development considered to be its heart.[98] Principle 3 provides that "[t]he

89. SANDS, *supra* note 52, at 48.

90. *Id.*

91. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (vol. I) (Aug. 12, 1992) (also known as UNCED, *Forest Principles*).

92. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/6/Rev.1 (vol. III) (Aug. 14, 1992).

93. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Agenda 21: Programme of Action for Sustainable Development*, U.N. Doc. A/CONF.151/26/Rev.1 (vol. I) (Aug. 12, 1992).

94. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79.

95. United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter United Nations Framework Convention on Climate Change].

96. SANDS, *supra* note 52, at 54 (citing Rio Declaration, *supra* note 91).

97. BIRNIE, ET AL., *supra* note 77, at 51-52.

98. SANDS, *supra* note 52, at 55.

right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[99] This is qualified by Principle 4, which says that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[100] This implies the integration of environmental considerations into the aspect of development.[101]

The post-modern era of international environmental law spans the period after the UNCED.[102] The events in Rio had a pervading impact, such that environmental protection became one of the main goals in virtually every succeeding major international convention involving multilateral cooperation. [103] The World Summit on Sustainable Development (WSSD) was convened in Johannesburg, South Africa in August 2002.[104] Its main outcome was the adoption of the Johannesburg Declaration on Sustainable Development (Johannesburg Declaration), which merely reaffirmed existing policies and principles contained in the Rio Declaration,[105] including a renewed call for sustainable development.[106] Accordingly, three interdependent and mutually reinforcing pillars of sustainable development were recognized in the Johannesburg Declaration, namely — economic development, social development, and environmental protection.[107]

---

99. Rio Declaration, *supra* note 91, princ. 3.

100. *Id.* princ. 4.

101. SANDS, *supra* note 52, at 55.

102. Sand, *supra* note 58, at 31.

103. KISS & SHELTON, *supra* note 66, at 42.

104. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sep. 4, 2002, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20 (Sep. 4, 2002).

105. Massimiliano Montini, *The Role of Legal Principles for Environmental Management*, *in* SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL MANAGEMENT: EXPERIENCES AND CASE STUDIES 22-23 (Corrado Clini, et al. eds, 2010).

106. *Id.* at 23.

107. *Johannesburg Declaration on Sustainable Development*, *supra* note 104, ¶ 5.

Calls to combat climate change were also on top of the agenda during this period.[108] Following the establishment of the Intergovernmental Panel on Climate Change in 1988,[109] the UN General Assembly stated that climate change is a common concern of mankind, and urged both the public and private sectors to collaborate with each other.[110] This is a recognition that the threat of climate change "involves a complex global set of both causal practices and felt impacts, and as such requires coherent global action[.]"[111] Thus, in 1992, the United Nations Framework Convention on Climate Change was adopted and opened for signature during the Rio Conference.[112] It defines climate change as "a change of climate, which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is, in addition to natural climate variability, observed over comparable time periods."[113] The final product reflected a compromise between two opposing demands by States — those "seeking specific targets and timetables for emissions reductions," and those seeking for a mere skeletal Convention which can serve as the backbone for future Protocols.[114]

In 1997, a Conference of Parties adopted the Kyoto Protocol,[115] which is considered a step towards the development of precise rules in mitigating anthropogenic climate change.[116] The Kyoto Protocol set quantified targets

108. Nina Hall, *The Institutionalisation of Climate Change in Global Politics*, *in* ENVIRONMENT, CLIMATE CHANGE AND INTERNATIONAL RELATIONS 64 (Gustavo Sosa-Nunez & Ed Atkins eds., 2016).

109. Intergovernmental Panel on Climate Change, History, *available at* https://www.ipcc.ch/organization/organization_history.shtml (last accessed Jan. 26, 2018).

110. Protection of Global Climate for Present and Future Generations of Mankind, G.A. Res. 43/53, U.N. Doc. A/RES/43/53 (Dec. 6, 1988).

111. Dryzek, et al., *supra* note 31, at 12.

112. United Nations Framework Convention on Climate Change, Background on the UNFCCC: The international response to climate change, *available at* unfccc.int/essential_background/items/6031.php (last accessed Jan. 26, 2018).

113. United Nations Framework Convention on Climate Change, *supra* note 95, art. 1, ¶ 2.

114. SANDS, *supra* note 52, at 359.

115. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998 [hereinafter Kyoto Protocol].

116. KISS & SHELTON, *supra* note 66, at 173.

for emission limitation and reduction commitments, with a corresponding timetable.[117] The 15th Conference of Parties held in Copenhagen in 2009 was the next big event in the global fight against climate change.[118] The outcome of the conference was the disappointing "Copenhagen Accord,"[119] which set no binding targets for any State, nor any enforcement mechanism.[120] One of the more recent multilateral efforts in this regard is the historic 2015 Paris Climate Accord, a convention within the United Nations Framework Convention on Climate Change's framework which unites all of the world's nations in a single agreement on tackling climate change. [121] Among its highlights are undertakings to keep global temperatures "well below" pre-industrial-times levels; to limit the emission amount of greenhouse gases emitted by human activity to the same levels that trees, soil, and oceans can absorb naturally; and for rich countries to help poorer nations by providing climate financing to adapt to climate change and switch to renewable energy.[122]

The past decades have witnessed the remarkable progress made in the development of environmental law. There is an evident increased recognition of the multidimensional character of the environmental dilemma.[123] However, there is still a lot to be done. The main predicament lies in the constantly changing nature of the situation.[124] Environmental law

117. Kyoto Protocol, *supra* note 115, art. 2.

118. United Nations Framework Convention on Climate Change, Copenhagen Climate Change Conference — December 2009, *available at* unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php (last accessed Jan. 26, 2018).

119. *See* Suzanne Goldenberg, et al., *Low targets, goals dropped: Copenhagen ends in failure*, GUARDIAN, Dec. 19, 2009, *available at* https://www.theguardian.com/environment/2009/dec/18/copenhagen-deal (last accessed Jan. 26, 2018).

120. Dryzek, et al., *supra* note 31, at 13.

121. United Nations Framework Convention on Climate Change Twenty-first Conference of the Parties, Paris, Fr., Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

122. Helen Briggs, What is in the Paris climate agreement?, *available at* http://www.bbc.com/news/science-environment-35073297 (last accessed Jan. 26, 2018).

123. KISS & SHELTON, *supra* note 66, at 45.

124. *Id.*

and policy must grapple with uncertainty, as well as the irreversibility of the changes happening in the ecology.[125] This underscores the importance of the flexibility of laws and policies, and the need to make them adaptable to the ever-changing dynamics of nature.[126] This is consistent with the view that "international environmental law is no longer exclusively concerned with the adoption of normative standards to guide [behavior], but increasingly addresses techniques of implementation which are practical, effective, equitable[,] and acceptable to most members of the international community."[127]

B. Key Concepts and Principles of Environmental Law

The gradual development of international environmental law gave birth to defining concepts and principles, which are mostly shaped by the era from which they sprung. Some of these are culled from actual cases and events, which were eventually codified in various international agreements. These concepts serve as guides for international players in any action that has a potential to affect the environment.

However, not all of these principles constitute binding obligations. In fact, many environmental law concepts fall within the realm of "soft law," and cannot be strictly imposed.[128] A more specialized distinction views international environmental law as "a system of heterogeneous concepts grouped into three layers: a thin layer consisting of highly abstract ideals, a thicker one with less abstract concepts, and a huge one with concrete norms."[129] It has been opined that only those concepts that possess normative character have the potential to crystalize into the status of customary international law.[130] The abstract concepts of solidarity and justice, which are rooted upon ethics, provide the foundation for the more concrete and less vague environmental principles — the prevention of transboundary harm, the precautionary principle, the polluter pays principle, the principle of common but differentiated responsibilities, and sustainable

125. *Id.*

126. *Id.*

127. SANDS, *supra* note 52, at 69.

128. *See generally* ELOISE SCOTFORD, ENVIRONMENTAL PRINCIPLES AND THE EVOLUTION OF ENVIRONMENTAL LAW 70-75 (2017).

129. BEYERLIN & MARAUHN, *supra* note 74, at 34.

130. *Id.*

development.[131] The succeeding Sections will discuss these norms, their development, their implications, and their application in the conduct of States.

1. Prevention of Transboundary Harm/Transfrontier Pollution

In the past, acting under the Harmon Doctrine, every State, "due to its absolute territorial sovereignty, was free to engage in, or permit, environment-related activities within its territorial boundaries regardless of whether these activities were likely to have adverse transboundary environmental impacts."[132] It was only in 1941 that this thinking was outmoded by the landmark arbitral award in the *Trail Smelter Arbitration* case. The case, which settled an environmental utilization conflict between US and Canada,[133] held that States have no right "to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence."[134] This concept of the "no-harm rule" was codified three decades later as Principle 21 of the Stockholm Declaration, which embodies the principle of the prevention of transboundary harm —

> States have, in accordance with the Charter of the [UN] and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[135]

The Rio Declaration qualifies this precept by adding the words "and developmental," in relation to the policies that a State may ordain in pursuit of its right to exploit its resources.[136] The addition of such word, in the context of negotiations conducted between 176 States, is deemed a reflection of an "instant" change in customary international law.[137] It has been noted

131. *See generally* BEYERLIN & MARAUHN, *supra* note 74, at 31-84.

132. *Id.* at 39.

133. *Trail Smelter Arbitration*, 3 R.I.A.A at 1911.

134. *Id.* at 1965.

135. Stockholm Declaration, *supra* note 75, princ. 21.

136. Rio Declaration, *supra* note 91, princ. 2.

137. SANDS, *supra* note 52, at 54.

that this change "may even expand the scope of the responsibility not to cause environmental damage to apply to national development policies as well as national environment policies."[138]

The no-harm rule later found its way in declarations adopted by the UN and various international environmental agreements,[139] in the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, [140] and even in the jurisprudence of the International Court of Justice (ICJ).[141] In the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ remarked that "[t]he existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus on international law relating to the environment."[142] This was further reiterated in its 1997 judgment in the *Gabčíkovo-Nagymaros Project*,[143] wherein it stressed "the great significance that it attaches to respect for the environment, not only for States[,] but also for the whole of mankind."[144] Finally in the more recent case of *Pulp Mills on the River Uruguay*,[145] decided in 2010, the ICJ affirmed that "a State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[146]

---

138. *Id.* at 55.

139. BEYERLIN & MARAUHN, *supra* note 74, at 39-40.

140. International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, at 370, U.N. Doc A/56/10 (Apr. 23-June 1 & July 2-Aug. 10, 2001).

141. BEYERLIN & MARAUHN, *supra* note 74, at 39-40.

142. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241, ¶ 29 (July 8).

143. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sep. 25).

144. *Id.* at 41, ¶ 53.

145. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20).

146. *Id.* at 56, ¶ 101.

The duty to prevent transboundary harm requires due diligence, meaning that it is an obligation of conduct than that of result.[147] States must act reasonably and with good faith in regulating activities subject to its jurisdiction or control that may cause environmental harm. [148] This obligation does "not impose an absolute duty to prevent all harm, but rather requires [ ] [S]tate[s] to prohibit activities [that may] cause significant harm to the environment[.]" [149] This stems from the abuse of rights doctrine, forbidding sovereignty from being exercised in an abusive manner.[150]

The obligations associated can be classified into having both prohibitive and preventive effects.[151] Its prohibitive aspect forbids States from causing significant transboundary environmental harm.[152] This is premised on the fact that all parts of the environment are interdependent on each other and that it is impossible to remedy damages caused to the environment.[153] Meanwhile, the preventive aspect obliges States "to take adequate measures to control and regulate in advance sources of potential significant transboundary harm." [154] The obligation is a substantive one, but "complemented by certain procedural [norms]." [155] These include consultations and exchange of information with neighboring States; conducting environmental impact assessments of potential environmental harm; and instituting procedures to license or authorize hazardous activities.[156]

Because of its prohibitive and preventive steering effects, the no-harm rule can be said to possess "the normative quality of a rule rather than a principle." [157] Its wide acceptance in international treaty practice, in

147. *Id.* at 76, ¶ 185; & 77, ¶ 187.

148. KISS & SHELTON, *supra* note 66, at 91.

149. *Id.*

150. Alexandre Kiss, *Abuse of Rights*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4 (Rudolf Bernhardt ed., 1992).

151. *Id.*

152. *Id.*

153. KISS & SHELTON, *supra* note 66, at 91.

154. Günther Handl, *Transboundary Impacts*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 57, at 539.

155. BEYERLIN & MARAUHN, *supra* note 74, at 41.

156. *Id.* at 44 & KISS & SHELTON, *supra* note 66, at 91.

157. BEYERLIN & MARAUHN, *supra* note 74, at 44.

declarations of international organizations, and in jurisprudence of the ICJ and other international tribunals, made it attain the status of customary international law.[158]

2. Precautionary Principle

The precautionary principle is considered to be one of the most prominent concepts in contemporary international environmental law.[159] This principle originated from domestic law, particularly from the Swedish Environmental Protection Act of 1969, which introduced the concept of "environmentally hazardous activities[,]" such that the mere risk of an environmental hazard suffices as a basis for Swedish authorities "to take protective [actions] or [ ] even ban [hazardous] activity[.]"[160] This concept spread until it became a core environmental principle in the legal systems of several European States, eventually becoming the basis of the environmental policy of the European Union (EU).[161]

The precautionary principle made its global debut in the UN World Charter of Nature of 1982.[162] This gained prominence when it was enshrined as Principle 15 of Rio Declaration —

> In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.[163]

Currently, there are more than 50 international agreements that explicitly refer to the precautionary principle,[164] including the United Nations Framework Convention on Climate Change, where it was

158. *Id.*

159. Jonathan B. Wiener, *Precaution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 57, at 599.

160. BEYERLIN & MARAUHN, *supra* note 74, at 47.

161. *Id.* at 48 & Consolidated Version of the Treaty on the Functioning of the European Union art. 192 (2), Oct. 26, 2012, 2012 O.J. (C 326) 47.

162. World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

163. Rio Declaration, *supra* note 91, princ. 15.

164. BEYERLIN & MARAUHN, *supra* note 74, at 49.

considered a guiding principle.[165] The reference to the precautionary principle in these treaties reflects States' acceptance to the reality that lack of scientific certainty regarding potential environmental hazards should not be a reason for inaction.[166] It can be considered as a "license to act," giving States leeway to determine the action it will take in response to potential threats.[167] In the *Nuclear Tests* case[168] decided by the ICJ, two dissenting judges considered it to be an emerging feature of environmental law.[169] The principle is more directly recognized in the *Southern Bluefin Tuna* case[170] decided by the International Tribunal for the Law of the Sea, where it held that notwithstanding scientific uncertainty and the lack of conclusiveness in assessing the evidence presented by the parties, "measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration[.]"[171]

Still, international tribunals have shown reluctance in applying the precautionary principle in its entirety, due its ambiguity and the normativity of the concept.[172] This is evident from the absence of a clear and uniform definition of such precept. However, the wording of the principle in the Rio Declaration connotes that the requirement is mandatory — lack of full scientific certainty shall not be used to prevent action.[173] The only thing subject to change "is the level at which scientific evidence is sufficient to override arguments for postponing measures[.]"[174] Thus, despite lack of clarity in its meaning, there is a prevailing belief that the principle applies to situations where scientific uncertainties make it difficult for State actors to

165. United Nations Framework Convention on Climate Change, *supra* note 113, art. 3, ¶ 3.

166. BEYERLIN & MARAUHN, *supra* note 74, at 50.

167. *Id.*

168. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

169. *See generally* Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) Case, 1995 I.C.J. 288, 381-421 (Sep. 22) (J. Palmer, dissenting opinion) & *Id.* at 317-62 (J. Weeramantry, dissenting opinion).

170. Southern Bluefin Tuna (N.Z. & Austl. v. Jap.), Case Nos. 3 & 4, Order, ITLOS Rep. 1999 (Aug. 27, 1999).

171. *Id.* ¶ 80.

172. BEYERLIN & MARAUHN, *supra* note 74, at 52.

173. SANDS, *supra* note 52, at 272-73.

174. *Id.* at 273.

decide how they would act in the midst of looming environmental risks.[175] It also entails substantive and procedural obligations, like providing equal access to information on the environment; and conducting environmental impact assessments.[176]

Overall, the legal status of the precautionary principle is still evolving.[177] It cannot be stated with full conviction that it already forms part of customary international law; [178] yet, its increasing presence in more international agreements,[179] as well as sufficient evidence of State practice,[180] lends credence to the argument that it already reflects custom.

3. Polluter Pays Principle

The polluter pays principle is essentially concerned with the precept that "the costs of pollution should be borne by the person responsible for causing the pollution."[181] As embodied under Principle 16 of the Rio Declaration —

> National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[182]

The first instrument that referred to this concept was a 1972 OECD Council Recommendation, which sanctioned the polluter pays principle as a means to allocate the costs of pollution prevention in the realm of international trade and investment. [183] The principle was adopted in a

175. BEYERLIN & MARAUHN, *supra* note 74, at 53.

176. *Id.* at 54.

177. SANDS, *supra* note 52, at 279.

178. BEYERLIN & MARAUHN, *supra* note 74, at 55.

179. *Id.*

180. SANDS, *supra* note 52, at 279.

181. *Id.*

182. Rio Declaration, *supra* note 91, princ. 16.

183. Organisation for Economic Co-operation and Development, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, *available at* http://webnet.oecd.org/oecdacts/Instruments/ShowInstrumentView.aspx?InstrumentID=4 (last accessed Jan. 26, 2018). 184. International Convention on

number of agreements, including the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation [184] and the 1992 UNECE Convention on the Transboundary Effects of Industrial Accidents.[185] Both instruments consider the principle as "a general principle of international environmental law."[186]

However, there are still uncertainties regarding its application.[187] The first concern pertains to the range of its territorial applicability, given that the principle was originally designed to apply within a State's domestic sphere, which is subject to uniform environmental law as compared to a wider regional application.[188] Another apprehension stems from the steering effect it may have on private actors, because of the significant economic disincentives associated with the allocation of the costs of preventive or remedial environmental measures to the private sector polluter.[189] The methods through which the polluters should pay have been the subject of debate, and its implementation has not shown consistency in State practice.[190]

Despite these loopholes, the polluter pays principle — as stated in the Rio Declaration — possesses a normative quality of a rule rather than that of a mere principle.[191] Thus, it is a direct call to States "to ensure that in every case where the environment has been, or is going to be, polluted, the accountable person bears the costs resulting from clearing or preventing

---

Oil Pollution Preparedness, Response and Cooperation, pmbl., *opened for signature* Nov. 30, 1990, 1891 U.N.T.S. 79.185. Convention on the Transboundary Effects of Industrial Accidents, pmbl., *opened for signature* Mar. 17, 1992, 2105 U.N.T.S. 457.

184. International Convention on Oil Pollution Preparedness, Response and Cooperation, pmbl., *opened for signature* Nov. 30, 1990, 1891 U.N.T.S. 79.185. Convention on the Transboundary Effects of Industrial Accidents, pmbl., *opened for signature* Mar. 17, 1992, 2105 U.N.T.S. 457.

185. Convention on the Transboundary Effects of Industrial Accidents, pmbl., *opened for signature* Mar. 17, 1992, 2105 U.N.T.S. 457.

186. BEYERLIN & MARAUHN, *supra* note 74, at 57.

187. *Id.* at 58.

188. *Id.*

189. *Id.*

190. BIRNIE, ET AL., *supra* note 77, at 323.

191. BEYERLIN & MARAUHN, *supra* note 74, at 59.

pollution." [192] Though not yet established as a norm of customary international law, the polluter pays principle has all the prerequisites necessary for it to gain such status later on.[193]

The momentum that the concept has been gaining over the years reflects the increasing consideration being given to the relationship between environmental protection and economic development.[194] Recent attempts to intertwine the distinct concepts of these two fields may lead to a further clarification and a more exact meaning of the polluter pays principle, including the nature of the extent and coverage of the pollution control costs. [195] Nevertheless, its increasing presence in the domestic sphere, through various legislations, is reflective of its growing recognition.

4. Common but Differentiated Responsibility

In the past, international environmental treaty-making was dominated by industrialized States.[196] Early environmental agreements usually treated all contracting parties uniformly, through absolute norms.[197] It was only during the aftermath of the Stockholm Conference that things changed.[198] The resulting internalization of environmental concerns, coupled with the integration of developing countries in the global economic regime, resulted in a change in international environmental policy-making, including the participation of all countries in relevant agreements. [199] From these developments sprung the concept of a common but differentiated responsibility. Its birth takes it cue from the general principle of equity in international law, as well as from a recognition of the special needs of developing countries in applying the rules of environmental law.[200] Principle 7 of the Rio Declaration prescribes the said concept, as follows —

192. *Id.*

193. *Id.* & SANDS, *supra* note 52, at 280.

194. SANDS, *supra* note 52, at 284.

195. *Id.*

196. BEYERLIN & MARAUHN, *supra* note 52, at 61.

197. *See* Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 69, 73-76 (1990).

198. BEYERLIN & MARAUHN, *supra* note 74, at 61.

199. *Id.* at 62.

200. SANDS, *supra* note 52, at 285.

> States shall cooperate in a spirit of global partnership to conserve, protect[,] and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.
>
> The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[201]

This precept serves to crystallize provisions in earlier treaties encouraging universal participation in environmental protection. [202] Moreover, it serves as a confirmation of the differential treatment accorded to developing countries, in view of their special circumstances and needs.[203] The principles includes two interrelated elements — first, the common responsibility of States to protect the environment at national, regional, and global levels, and second, the need to take into account the different circumstances of each State, specifically in its contribution to a particular environmental problem and its ability to prevent and control the threat.[204]

Common responsibility pertains to the shared obligation of two or more States towards the protection of an environmental resource, giving due consideration to its relevant characteristics and nature, location, and historic value.[205] However, the extent and the nature of this responsibility may differ. The differentiated responsibility of States for the protection of the environment can be attributed on a broad range of factors, including special needs and circumstances, the economic realities of developing countries, and historical contributions in causing an environmental problem. [206] This difference is rooted in the reasoning that applicable standards for advanced countries may be deemed inappropriate for developing countries, because these may lead to unwarranted social costs[207] and may hamper their future

---

201. *Rio Declaration*, *supra* note 91, princ. 7.

202. SANDS, *supra* note 52, at 56.

203. Sand, *supra* note 58, at 40.

204. SANDS, *supra* note 52, at 286.

205. *Id.*

206. *Id.* at 287.

207. *See* Stockholm Declaration, *supra* note 75, princ. 23.

development.[208] Thus, there is a recognition of their environmental vulnerability, warranting special priority.[209]

Differentiated responsibility leads to varying legal obligations for States.[210] This is evident in the grace period granted to developing countries, thus allowing delays for compliance;[211] difference in reportorial requirements;[212] and the different carbon emission limits prescribed in the Kyoto Protocol, resulting in "asymmetric substantive environmental obligations of [S]tates."[213] In sum, the principle of common but differentiated responsibility is regarded more as a principle than a rule.[214] Despite lacking the generality element required for State practice, its steering effects give it a normative quality that can help it achieve the status of customary law in the future.[215] While not aimed at producing direct action, it serves as "guidance to all [S]tates for future conduct in rule-making processes as well as to shape the interpretation and application of rules already in existence."[216]

5. Sustainable Development

The emergence of the concept of sustainable development has been succinctly recalled by the ICJ in the *Gabčíkovo-Nagymaros* case —

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new

208. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

209. Rio Declaration, *supra* note 91, princ. 11 & United Nations Framework Convention on Climate Change, *supra* note 113, pmbl.

210. SANDS, *supra* note 52, at 289.

211. Montreal Protocol on Substances that Deplete the Ozone Layer, art. 5 (1), *opened for signature* Sep. 16, 1987, 1522 U.N.T.S. 3.

212. United Nations Framework Convention on Climate Change, *supra* note 113, arts. 4 & 12.

213. BEYERLIN & MARAUHN, *supra* note 74, at 68.

214. *Id.* at 70.

215. *Id.*

216. *Id.* (citing Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles, and Rules*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 57, at 437).

> scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[217]

In a nutshell, the concept of sustainable development pertains to the "close relationship between [the] environment and development." [218] Although the concept had been popping out since the 1970s, it was the Brundtland Report of 1987 which defined it as development that "[meets] the needs of the present without compromising the ability of future generations to meet their own needs."[219] Since then, sustainability has been a major theme and objective in succeeding international documents and agreements. The term has been said to connote an "abstract political value[,]" which provides the close interdependence between the policy goals of development and environmental protection. [220] This principle is concerned with two temporal dimensions — the present and the future generations, implying both the intergenerational and intragenerational responsibilities of States. [221] Thus, sustainable development is "'*a new, extended form of justice*' that '*expands our traditional concept of justice in terms of space and time*' by including 'the entire global community and future generations[,'] comprising both 'the human and nonhuman world.'"[222]

The binding effect of the principle, however, remains to be seen. In *Gabčíkovo-Nagymaros*, the question of the concept's legal quality was not addressed by the majority.[223] Nonetheless, the separate opinion of Judge

---

217. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. at 78, ¶ 140.

218. BEYERLIN & MARAUHN, *supra* note 74, at 15.

219. Our Common Future, *supra* note 88.

220. BEYERLIN & MARAUHN, *supra* note 74, at 76.

221. *Id.* at 77.

222. *Id.* (citing Klaus Bosselmann, *The Concept of Sustainable Development*, *in* ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY 84 (Klaus Bosselmann & David Paul Grinlinton eds., 2002)) (emphases supplied).

223. BEYERLIN & MARAUHN, *supra* note 74, at 79.

Christopher Weeramantry regarded sustainable development as a "principle with normative value" rather than a mere concept.[224] He recognized that it "is a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."[225] Even scholars are divided on the matter. Philippe Sands is of the position that "the concept of 'sustainable development' has entered the corpus of international customary law[.]"[226] Klaus Bosselmann, an authority in the field of environmental law, attributes a normative character to the principle of sustainability,[227] thereby having the potential to develop into a binding norm. There are others who consider it to belong to the realm of "soft law."[228] A more convenient answer puts sustainable development somewhere in between a legally binding norm and a mere political ideal, with the distinction between the two often blurred.[229]

But despite its actual legal status, it is clear that it is not an action-oriented rule, but rather a principle that serves as guides for States in their decision-making process.[230] Be that as it may, the absence of normativity cannot take away the fact that political ideals can eventually serve as catalysts in the further development of international law.[231] At any rate, sustainable development has itself given rise to other self-contained norms and concepts that have equal, or even a more prominent legal status.[232] In fact, some sustainable development concepts, like intergenerational responsibility, have been recognized in domestic jurisdictions, including the Philippines.[233]

---

224. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. at 88 (J. Weeramantry, concurring opinion).

225. *Id.* at 95.

226. SANDS, *supra* note 52, at 254.

227. Bosselmann, *supra* note 222, at 57.

228. BEYERLIN & MARAUHN, *supra* note 74, at 80 (citing Thomas A. Mensah, *Soft Law: A Fresh Look at an Old Mechanism*, 38 ENVTL. POL'Y & L. 50, 52 (2008)).

229. BEYERLIN & MARAUHN, *supra* note 74, at 81.

230. *Id.*

231. *Id.* at 82.

232. *Id.*

233. *See generally* Oposa v. Factoran, Jr., 224 SCRA 792 (1993).

III. THE LAW ON THE PROTECTION OF FOREIGN INVESTMENTS

> *Owing to the binding character of express promises and agreements, a wise and prudent Nation will carefully examine and maturely consider a treaty of commerce before concluding it, and will take care not to bind itself to anything contrary to its duties to itself and to others.*
>
> — Emmerich de Vattel[234]

Compared to environmental law, which developed fairly recently, the law governing foreign investments is the opposite. It is considered to be one of the oldest and perhaps, one of the most complex areas of international law.[235] Of the two branches of international economic law, namely trade law and investment law, it can be reasonably argued that investments has gained more eminence than trade, given that the last 40 years have exhibited that FDI has already surpassed the level of capital flows resulting from trade.[236]

This Section, devoted to the topic of foreign investments, is divided into three parts. The first part is essentially a brief introduction to the nature of foreign investments, as well as the role of investors. The second part discusses both the substantive and procedural mechanisms designed to protect foreign investors. The third part contextualizes the incorporation of these investment protection standards in Philippine law, as well as the level of participation of the country in various international investment agreements (IIAs). Ultimately, this Section seeks to establish that a special regime of protection is accorded to foreign investors, and a violation of such might trigger liability on the part of the State.

A. Nature of Foreign Investments

The concept of the term "investment" has remarkably changed as the global economic landscape developed. Contemporary treaties no longer contain the "classical formula 'property, rights[,] and interests[,]'" which were ordinarily

234. CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 3 (2011) (citing EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, BOOK II CHAPTER VIII § 28 (Charles Fenwick trans., 1916)).

235. Vadi, *supra* note 45, at 822.

236. THEODORE COHN, GLOBAL POLITICAL ECONOMY: THEORY AND PRACTICE 280 (2008).

found in traditional Freedom, Commerce and Navigation treaties.[237] Modern treaties now employ the narrower term "investment."[238] This terminology has gained acceptance, as "the phrase 'property, rights and interests' had to a considerable extent acquired a [ ] legal meaning and the term 'investment' has its origins in economic terminology and needed to be understood and defined as a legal concept when first used in investment agreements."[239]

1. Definition and Concept of Investment

Foreign investment "involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[240] The tribunal in *Salini Costruttori S.p.A and Italstrade S.p.A. v. Kingdom of Morocco*[241] enunciated an inclusive definition of investment, to wit:

(1) a significant contribution in assets, tangible or intangible, monetary or not, technology transfer, equipment transfer, etc.;

(2) a significant duration, meaning that the investment has been made to last over time;

(3) a significant amount of risk taken by the investor and remunerated by a return on the investment; and

(4) a significant contribution to the development of the host country.[242]

There are two general types of foreign investment — FDI and portfolio investment.[243] On the one hand, FDI is the process whereby residents of

237. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 60 (2012).

238. *Id.*

239. *Id.*

240. SORNARAJAH, *supra* note 12, at 8.

241. Salini Costruttori S.p.A and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4, ¶ 52 (July 23, 2001).

242. *See Salini Costruttori S.p.A and Italstrade S.p.A.*, ICSID Case No. ARB.00/4, ¶ 52.

243. SHARON BEDER, SUITING THEMSELVES: HOW CORPORATIONS DRIVE THE GLOBAL AGENDA 177 (2012).

one country (source country) acquire ownership of assets in one country (host country) for the purpose of controlling the production, distribution, and other activities of a firm.[244] FDI is a key element in international economic integration as it creates direct and long-lasting links between economies.[245] On the other hand, portfolio investment is typically represented by "a movement of money for the purpose of buying shares in a company formed or functioning in another country[, and it] could also include other security instruments through which capital is raised for ventures."[246]

The main distinction lies in the ownership and control of the investment — in FDI, the investor has full control over the assets; whereas, in portfolio investments, there is a separation between the management and control of the company, and its actual ownership.[247] The other distinction is with regard to the risk element.[248] Customary international law does not traditionally protect portfolio investment, since protection is normally given to the foreign investors' physical properties and assets directly invested, through the principles of diplomatic protection and state responsibility.[249] Further, portfolio investments can be made on any stock exchange globally, and the linkages created through these sales cannot establish a direct link to create responsibility.[250] This is not the case with direct investments, since foreigners enter the host State with its express consent.[251] But despite not

244. *See generally* IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE AND PRACTICE (2002).

245. Kevin R. Gray, *Foreign Direct Investment and Environmental Impacts – Is the Debate Over?*, 11 REV. EUR. COMP. & INT'L ENVTL. L. 306, 306 (2002). *See also* Organisation for Economic Cooperation and Development, OECD Factbook 2013: Economic, Environmental and Social Statistics: Foreign Direct Investment, *available at* http://www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/01/index.html?itemId=/content/chapter/factbook-2013-34-en (last accessed Jan. 26, 2018).

246. SORNARAJAH, *supra* note 12, at 8.

247. *Id.*

248. *Id.*

249. *Id.* at 8-9.

250. *Id.* at 9.

251. *Id.*

being protected by custom, portfolio investments can be the subject of protection when provided for in treaties.[252]

2. The Role of Investors

The development of international investment law is anchored on the promotion and protection of the activities of private foreign investors.[253] This does not necessarily result to the lack of protection granted to government-controlled entities, provided that their dealings are done in a commercial, rather than a governmental capacity.[254] Investors may be individuals (natural persons) or corporations (juridical persons).[255]

The "foreignness" of an investment depends on the nationality of the investor.[256] The case differs if the individual has dual citizenship, since nationals of the host State are generally not granted protection if they are also nationals of another State.[257]

The nationality of corporations is a different matter altogether. Different jurisdictions use various criteria to determine whether a juridical person is a national of a State.[258]

252. SORNARAJAH, *supra* note 12, at 9-10.

253. DOLZER & SCHREUER, *supra* note 237, at 44.

254. *Id.* (citing Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/4, ¶¶ 16-27 (May 24, 1999)).

255. DOLZER & SCHREUER, *supra* note 237, at 44.

256. *Id.*

257. *Id.* at 46-47. *See also* Convention on Settlement of Investment Disputes between States and Nationals of Other States, art. 25, ¶ 2 (a), *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

258. DOLZER & SCHREUER, *supra* note 237, at 47.

3. Emergence of an International Minimum Standard

In the early 1900s, there was a consensus among lawyers in Europe and the US that a minimum standard of justice in the treatment of foreigners exists.[259] This was precipitated by the emergence of a body of international law on State responsibility for the treatment of aliens, through various treaties, State practice, and decisions of international tribunals.[260] This development led to the belief of capital-exporting countries that foreign nationals and their property were entitled, under customary international law, to a minimum standard of treatment, which is deemed similar to the standards of justice and treatment accepted by civilized States.[261]

The international minimum standard was initially concerned with the status of aliens in general, applying to diverse areas as procedural rights in criminal law, rights before courts and tribunals, rights in matters of civil law, and rights in regard to property owned by a foreigner.[262] It was later on adopted by international tribunals, most notably in the 1920s in several decisions of the US-Mexico General Claims Commission.[263] These judgments serve as a testament that international minimum standard was indeed recognized, and that States should treat foreign nationals and their property in accordance with this entrenched principle.[264]

B. Investor Protection in International Law

The regime of international investment law can be classified into two interlocking pieces — the substantive protections granted to foreign investors and the remedial procedures instituted to implement those protections.[265]

259. ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 11 (2009).

260. *Id.* at 11-12.

261. *Id.* at 12.

262. *See* DOLZER & SCHREUER, *supra* note 237, at 140.

263. NEWCOMBE & PARADELL, *supra* note 259, at 14.

264. *Id.* at 15.

265. Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 262 (2010).

1. Substantive Standards

The substantive mechanisms for the protection of foreign investors have long existed both in treaties and customary international law.[266] However, as investment law developed, some of the substantive rights under these general sources of law were severely undercut by restrictive doctrines and rules on jurisdiction.[267] Most of these substantive rights are embodied in international investment treaties, both bilateral and multilateral.[268]

At its most basic level, the substantive standards embodied in IIAs define the scope of the FDI, and provide safeguards against discrimination, fair and equitable treatment, full protection and security, treatment no less favorable than required by customary international law and other commitments under an "umbrella clause."[269]

Another common provision is the guarantee against nationalization or expropriation, and the giving of just compensation in case the requisites prescribed by law are met.[270] However, the fact that these standards lack precise definitions are a huge source of conflict, especially when States enact regulations that interfere with the value of foreign investments.[271] This issue has been a common fodder for international tribunals, and as will be discussed in the succeeding Sections, becomes more complicated when related to environmental measures.

2. Procedural Measures

In order for this body of substantive standards to be effected, it needs an effective enforcement mechanism to support it.[272]

Under traditional international law, investors were not given direct access to international remedies to pursue claims against foreign States.[273] These individuals merely relied on diplomatic protection. Diplomatic protection is the right of a State to espouse a claim on behalf of its nationals

266. *Id.*

267. *Id.*

268. *Id.*

269. Vadi, *supra* note 45, at 823.

270. *Id.* at 823-24.

271. *Id.* at 824.

272. Mortenson, *supra* note 265, at 263.

273. *Id.*

who are injured by the wrongful conduct of another State.[274] As held by the Permanent Court of International Justice in *The Mavrommatis Palestine Concessions* case —

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights [—] its right to ensure, in the person of its subjects, respect for the rules of international law.[275]

However, with the advent of forums through which an investor may directly pursue claims against a State, diplomatic protection is not commonly resorted to anymore. [276] Furthermore, in the context of diplomatic protection, States have the sole discretion whether or not to espouse the claims of its nationals.[277] Resort to diplomatic protection thus creates serious disadvantages for the States concerned, as disputes may disrupt relations between them.[278]

Thus, modern investment treaty practice gave rise to the eminence of arbitration as a way of settling State-investor disputes. Bilateral investment treaties (BITs) themselves create a set of procedural rights for the benefit of investors, by providing them with direct access to an international arbitral tribunal.[279] In so doing, State-investor arbitration has emerged to be a standard feature in international investment treaties since the 1980s.[280] International arbitral tribunals are preferred because of their perceived independence and impartiality, as opposed to domestic courts, which are

---

274. Special Rapporteur on Diplomatic Protection, *First Report on Diplomatic Protection*, ¶ 11, Int'l Law Comm'n, U.N. Doc. A/CN.4/506 (Mar. 7, 2000).

275. *The Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 12, ¶ 21.

276. *See* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J Rep. 3, 44 (Feb. 5).

277. *Id.*

278. DOLZER & SCHREUER, *supra* note 237, at 233 (citing Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, *in* THE WORLD BANK IN A CHANGING WORLD 309 (Franziska Tschofen & Antonio R. Parra eds., 1st ed. 1991)).

279. Vadi, *supra* note 45, at 825.

280. *Id.*

often tainted with allegations of biases and inadequacy.[281] Given its popularity, the International Centre for Settlement of Investment Disputes (ICSID) is considered the traditional heart of this procedural mechanism.[282] BITs may also allow alternatives, like arbitration on an ad hoc basis under the rules of the UN Commission on International Trade Law (UNCITRAL), or other international institutions like the Stockholm Chamber of Commerce or the International Chamber of Commerce (ICC).[283]

The appeal of arbitration lies in its inherent confidentiality and effectiveness.[284] Further, awards rendered by tribunals are, in theory, readily enforceable against the property of the host State worldwide.[285] This is because of the widespread adoption of the ICSID and the New York Convention, allowing the enforcement of arbitral awards.[286] However, in the absence of an agreement to the contrary, investment disputes may also be settled through the courts of the host State.[287] This entails the application of conflict of law rules.[288] For investors, this is not an attractive remedy, as they fear a lack of impartiality from the courts of the host State, as well as domestic courts' lack of expertise to handle technical questions of international investment law.[289]

3. Philippine participation in International Investment Agreements

One way in which the Philippines promotes foreign investments is through its participation in various international investment agreements (IAAs),

281. *Id.* & NEWCOMBE & PARADELL, *supra* note 259, at 24.

282. Mortenson, *supra* note 265, at 263.

283. *Id.* at 265.

284. Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV. — FOREIGN INVESTMENT L.J. 1, 7-10 (1986).

285. Vadi, *supra* note 45, at 828-29.

286. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, *adopted* June 10, 1958, 330 U.N.T.S 3 (entered into force June 7, 1959).

287. DOLZER & SCHREUER, *supra* note 237, at 235.

288. *Id.*

289. *Id.*

including both bilateral and multilateral arrangements.[290] On a multilateral level, perhaps the most prominent arrangement that the Philippines is a party to is the Association of Southeast Asian Nations (ASEAN).[291] This finds more significance in light of the creation of the ASEAN Economic Community, forming an integrated economic system among the 10 ASEAN member-States, similar to that of the EU.[292]

Meanwhile, the Philippines is also party to several BITs.[293] Data from the UN Conference on Trade and Development (UNCTAD) shows that, as of September 2017, the Philippines has signed 38 BITs with nations from different continents, with the United Kingdom as its first bilateral investment partner in a treaty concluded in 1980.[294] A perusal of some of these BITs would show that they contain the typical investor protection mechanism embodied in majority of other BITs. These necessarily include the commitments under the minimum standards, national treatment, most-favored nation, and the guarantee against expropriation.[295]

However, it is significant to note that in the Canada-Philippine Bilateral Investment Treaty, environmental concerns were stipulated in the article pertaining to application and general exceptions.[296] The relevant provision is quoted below —

---

290. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD INVESTMENT POLICY REVIEWS: PHILIPPINES 2016 115 (2016).

291. *Id. See also* Association of Southeast Asian Nations, About ASEAN: Overview, *available at* asean.org/asean/about-asean/overview/ (last accessed Jan. 26, 2018).

292. Association of Southeast Asian Nations, ASEAN Economic Community, *available at* asean.org/asean-economic-community/ (last accessed Jan. 26, 2018) & European Union, The EU in brief, *available at* https://europa.eu/european-union/about-eu/eu-in-brief_en (last accessed Jan. 26, 2018).

293. United Nations Conference on Trade and Development Investment Policy Hub, International Investment Agreements Navigator — International Investment Agreements: Philippines, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/166 (last accessed Jan. 26, 2018).

294. *Id.*

295. *See generally* SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 112 (2014).

296. *See* Agreement between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and Reciprocal Protection

(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

(3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement.

(b) necessary to protect human, animal[,] or plant life or health; or

(c) relating to the conservation of living or non-living exhaustible natural resources.[297]

As will be explored in the succeeding Section, this provision goes to show how environmental protection can be incorporated in IIAs. This is a recognition of the vital role that the environment plays in the realm of foreign investments, and ultimately, to economic development. The incorporation of the environmental agenda in IIAs is consistent with the framework presented in the preceding Section, pertaining to the dynamic development of this field of law.

In sum, this Section presented the evolution of the protections granted to foreign investors, through different modes and international arrangements. Through the institution of various international investment agreements, the movement of capital around the world has become more and more critical. And, coupled with the constant onslaught of globalization, it is expected that the foreign investment process will continue to gain prominence, consequently highlighting the importance of these substantive norms of protection. However, with the increasing recognition also accorded to other sectors, like that of the environment, the impacts of such on the traditional norms of investment protection remains to be seen.

---

of Investments, Phil.-Can., art. XVII, Nov. 9, 1995, 2316 U.N.T.S. 687 [hereinafter Phil.-Can. Agreement].

297. Phil.-Can. Agreement, *supra* note 296, art. XVII, ¶¶ 2-3.

IV. THE INTERPLAY BETWEEN INVESTMENTS AND THE ENVIRONMENT

> *Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies.*
>
> — World Commission on Environment and Development[298]

"[D]evelopment is inevitably an environmental issue."[299] The global economic structure, as it is right now, is naturally intertwined with a plethora of essential relationships it needs to sustain its growth. For obvious reasons, its relationship with the natural environment stands out as one, if not the most crucial, of them all. Alas, this relationship also remains as one of the most complicated, and regrettably, conflict-ridden.

This is especially evident in the realm of foreign investments. On both the conceptual and practical levels, it seems impossible not to recognize the interplay between investments and the environment. This can be best illustrated with the observation that the increase in the "flow of private capital directly affects environmental protection."[300] To attract capital, States have consistently changed their regulations to become more palatable to the eyes of foreign investors.[301] A huge volume of statistical evidence suggests that environmental regulation "plays a significant role in decisions whether to locate investment[s]."[302] Nonetheless, the relationship does not stop there. In fact, the norms of environmental protection play a bigger role after the establishment of the investment in the host State. This interaction with the environment gave rise to a new phase in the development of international investment law — a phase that is still experiencing abundant changes.

---

298. Our Common Future, *supra* note 88, ch. 1, ¶ 40.

299. Alan E. Boyle, *Environment and Development: Accountability Through International Law*, 12 THIRD WORLD LEGAL STUD. 95, 95 (1993).

300. Wagner, *supra* note 4, at 469.

301. *See* Gretta Goldenman, The Environmental Implications of Foreign Direct Investments: Policy and Institutional Issues at 2, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/EMEF/EPOC/CIME(98)3/PROV&docLanguage=En (last accessed Jan. 26, 2018).

302. Gray, *supra* note 245, at 306.

This Section provides a background of the relationship between investment law and environmental law. The cause and effects of the actions of States in competing for a limited amount of foreign investments will be examined, coupled with their subsequent effects to the environment. The resulting clash between these two regimes of protection will then be discussed, in the context of the conflict between State-enacted environmental regulations with treaty-based investment protection standards. Finally, this conflict will be scrutinized in light of the more general tension between developmental and environmental rights.

A. The Competition for Limited FDIs

Today, FDIs can be considered as one of the major growth drivers of the global economic landscape. FDIs are deemed as a "panacea for economic development, bringing in necessary technology, expertise[,] and financial resources to developing countries."[303] Without a doubt, the entry of investments is advantageous, since they offer opportunities for States to liberalize trade and open their markets.[304] With the continued onslaught of a globalized economic system, FDI levels across many States continue to escalate.

1. Theories on Environmental Regulatory Competition

However, increasing levels of FDI "may have worrying impacts for a [State's] ecosystems and social development."[305] Investors have a preference for countries that have less stringent or even non-existent regulatory regimes.[306] This kind of behavior can be explained by three theories, which highlight the interplay between environmental regulation and the entry of foreign investment — pollution haven, race to the bottom, and regulatory chill.[307]

a. Pollution Haven

The pollution haven theory posits that investors prefer to locate their industries in countries where it will be cheaper and more efficient due to

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

lenient regulatory requirements.[308] By investing in less costly locations, investors exploit the comparative advantage for maximum gain.[309] Typical incentives that may induce them to invest in a particular State include favorable pre-entry conditions, licensing requirements, and post-entry conditions, like "levels of enforcement of legislation or subsequent regulation of the [industry] [where] the investor is present."[310]

The reasons behind the creation of a pollution haven may vary across States, depending on a country's situation. One striking reason is that it may pertain to an evasion of an environmental obligation, such as a free-riding on the principle of common but differentiated responsibility.[311] Additionally, FDI migration, the process of transferring FDI from one State to another, is evident in pollution-intensive industries. [312] These industries include chemicals, chlorine and pesticides, resource extraction, and heavy manufacturing — all of which face additional costs due to environmentally-related factors like occupational health and safety costs, environmental impact assessments, liability and insurance, legal fees, and public relations.[313]

b. Race to the Bottom

The race to the bottom phenomenon, which is considered a subset of the pollution haven theory, pertains to positive actions done by a State in lowering environmental standards for the purpose of bringing in foreign investment.[314] The underlying reason explaining these phenomenon hinges on two important hypotheses — first, investors, mostly multinational corporations (MNCs), prefer "to invest in countries with less restrictive standards[,]" and second, various countries "competitively undercut each other's standards in order to attract foreign direct investment."[315]

308. Gray, *supra* note 245 at 307.

309. *Id.*

310. *Id.*

311. *Id.* at 307-08.

312. *Id.* at 308.

313. Jennifer Clapp, *Foreign Direct Investment in Hazardous Factories to Developing Nations: Rethinking the Debate*, 7 ENVTL. POL. 92, 94, & 96-97.

314. Gray, *supra* note 245, at 308.

315. William W. Olney, *A race to the bottom? Employment protection and foreign direct investment*, 91 J. INT'L ECON. 191, 191 (2013).

In this scenario, above-par environmental standards impose higher costs on polluters in high-income economies.[316] Thus, to keep their competitiveness, these multinational companies — which happen to be the major polluters — relocate to low-income countries, where aside from the low labor costs, environmental regulations are also kept at a minimum.[317] This mechanism allows these businesses to minimize their operating costs, "by polluting with impunity."[318] The increase in capital outflows force governments in high-income countries to begin relaxing their own environmental standards to be at par with low-income states; however, their efforts remain futile since the poorest nations have no environmental standards at all.[319]

This triggers a race to the bottom, which is characterized by countries converging to drastic pollution levels, causing more damage to the poorest States.[320] The race to the bottom theory may be evident in export processing zones, which are established solely for foreign investors to take advantage of a special legal regime dedicated for export-oriented production.[321] The race to the bottom may also be present in the natural resources sector, where developing countries often have limited experience in regulatory practice.[322]

Nevertheless, there is a view saying that it would be unlikely for States to deliberately lower their standards and act contrary to national interests.[323]

c. Regulatory Chill

The regulatory chill concept can be characterized as a situation where countries refrain from imposing higher environmental standards because of

316. David Wheeler, *Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries*, 10 J. ENVT. & DEV. 225, 225-26.

317. *Id.* at 226.

318. *Id.*

319. *Id.*

320. *Id.*

321. *See* United Nations Conference on Trade and Development Discussion Papers, *The Dynamics of Export-Processing Zones*, at 1, U.N. Doc. UNCTAD/OSG/DP/144 (Dec. 1999) (by Wei Ge).

322. Gray, *supra* note 245, at 309.

323. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1242 (1992).

fears that they may lose a competitive edge against other States in attracting FDI.[324] This may result in environmental regulations being "stuck in the mud," and for States with little or no environmental regulation at all, this concept can be best classified as the "stuck at the bottom effect."[325] Regulatory chill may be evident in both developing and developed countries.[326] However, it is more likely in developing countries since the impact of investor migration or outsourcing production may have adverse effects on overall economic development.[327] However, among these theories, regulatory chill is the most difficult to prove, given that government inaction is almost impossible to demonstrate.[328]

2. The Conflict Between Investment Protection and Environmental Regulation

Due to the increasing nature of protection given to both the environment and foreign investments, it is inevitable that some of these standards may conflict with each other. Some of the more recent environmental regulations enacted by States have posed threats to some established substantive standards in the protection of foreign investment, most notably that of fair and equitable treatment, and the guarantee against nationalization.[329]

a. Standards of Treatment

Some environmental regulations may generate discrimination, which violates the appropriate standards of treatment embodied in IIAs and in customary law. It has been argued that "given the limited resources of environmental authorities and the challenges of implementing environmental law, some degree of 'selective enforcement' is inevitable."[330] Perhaps the most

---

324. *Id.* at 310.

325. *Id. See generally* Gareth Porter, *Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"?*, 8 J. ENVT. & DEVT. 133 (1999).

326. *See* Gray, *supra* note 245, at 310.

327. *Id.*

328. *Id.*

329. *See* KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING INVESTORS AT THE EXPENSE OF PUBLIC POLICY 154-57 (2009).

330. *Id.* at 155 (citing Konrad von Moltke, *International Investment and Sustainability: Options for Regime Formation*, *in* THE EARTHSCAN READER ON

common State action that could trigger discrimination is when higher environmental standards and cleaner technologies are required from foreign-owned operations than domestically controlled ones.[331]

Fair and equitable treatment is the most frequently used standard relied upon by investors in their arbitral disputes.[332] This is because of its inherent vagueness and ambiguity, which is designed to give arbitrators leeway in settling investment claims. [333] Because of this uncertainty, "some environmentalists have expressed concern that it could be (and perhaps has been) interpreted expansively by an arbitral tribunal to second guess health and environmental regulations."[334] The ambiguity of the standard may have serious effects on a State's ability to enact domestic laws affecting foreign investment.[335]

b. Regulatory Expropriation

Much of the controversy generated by the impact of environmental regulations on foreign investments is that some of these enactments

---

INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT 359 (Kevin P. Gallagher & Jacob Werksman eds., 2002)).

331. TIENHAARA, *supra* note 329, at 155 (citing Raymond Clémençon, *Foreign Direct Investment and Global Environmental Protection: Why Environmentalists Should Favor Multilateral Investment Rules*, 1 J. WORLD INVESTMENT 199, 208 (2000)).

332. TIENHAARA, *supra* note 329, at 156 (citing UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING 32 (2007)).

333. TIENHAARA, *supra* note 329, at 156 (citing Organisation for Economic Co-operation and Development, Fair and Equitable Treatment Standard in International Investment Law (Part of the Organisation for Economic Co-operation and Development Working Papers on International Investment 2004/03 prepared by Catherine Yannaca-Small, Legal Advisor, Investment Division, Directorate for Financial and Enterprise Affairs) at 2, *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (last accessed Jan. 26, 2018)).

334. TIENHAARA, *supra* note 329, at 156 (citing Joseph Freedman, *Implications of the NAFTA Investment Chapter for Environmental Regulation*, *in* ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS 96 (Alexander Kiss, et al. eds., 2003)).

335. TIENHAARA, *supra* note 329, at 156 (citing Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 INT'L L. & POL. 953, 964 (2005)) (emphasis omitted).

constitute a regulatory taking of alien property. In the context of international investment law, regulatory expropriation pertains to a situation where "a capital-importing [S]tate uses its regulatory power to deprive foreign investors of their property or the effective enjoyment [of such]."[336] Though customary law has long recognized the power of governments to expropriate — provided that there is just compensation — it is not yet clear what constitutes expropriatory action, and what the limits are, in the realm of foreign investment.[337]

This finds more significance in cases of governmental regulation, where a government agency asserts its sovereign right to limit the businesses operating within its borders.[338] The ambiguity becomes even more apparent when the regulations are enacted for environmental purposes. With the constant evolution of environmental law, there is an increased recognition of the environmental obligations of States. This appears to be the trajectory, given the threat brought about by climate change. Given this trend, the conflict between the environment and investment protection seems to be becoming a fixture in the dockets of dispute settlement tribunals.

One recent example is the case of *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, [339] an investment claim filed with the ICSID, which was eventually settled.[340] In the case, Vattenfall, a Swedish State-owned energy company, challenged some new regulations Germany imposed on its coal-fired power plant.[341] The more burdensome measures were enacted by the Hamburg municipal government, as a recompense for the contributions made by the power plant

336. Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT'L L. & POL'Y 275, 276 (2007). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. (e) (AM. LAW INST. 1987)).

337. Marlles, *supra* note 336, at 277.

338. *Id.* at 278.

339. Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, Request for Arbitration, ICSID Case No. ARB/09/6 (Mar. 30, 2009).

340. *See Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG*, Award, ICSID Case No. ARB/09/6 (Mar. 11, 2011).

341. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG*, Request for Arbitration, ICSID Case No. ARB/09/6, at 1-3.

to climate change.[342] Because of this, Vattenfall claimed violations of the Energy Charter Treaty and sought damages.[343] However, the proceedings were suspended and the parties eventually settled.[344]

The *Vattenfall* dispute depicts a climate-related investment dispute, which could become more common in the future.[345] However, the dispute has not yet produced a substantial impact on investment law doctrines.[346] Still, it has been opined that the settlement terms, which were very favorable to Vattenfall, seemed to create "regulatory chill."[347] However, that is just the first part of the Vattenfall-Germany dispute. In May 2012, the company again filed a request for arbitration[348] against Germany because of its parliament's decision to phase out nuclear energy by 2022, thereby affecting the operations of Vattenfall in the country.[349] Germany's decision was adopted against the backdrop of the catastrophic nuclear disaster that struck Fukushima, Japan.[350]

These situations highlight the fact that environmental crises like climate change and nuclear disasters have sparked a wide range of regulatory responses, both in the local and international spheres.[351] Regulatory

342. *Id.* at 5-6.

343. *Id.* at 14-15.

344. *See Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG*, Award, ICSID Case No. ARB/09/6 (Mar. 11, 2011), at 5.

345. Markus Gehring, et al., *Climate change and international trade and investment law, in* INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE 87-88 (Rosemary Gail Rayfuse & Shirley V. Scott eds., 2012).

346. *Id.*

347. *Id.* at 88.

348. Vattenfall AB and others v. Germany, Notice of Arbitration, ICSID Case No. ARB/12/12 (May 31, 2012).

349. Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II) at 2-3, *available at* http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf (last accessed Jan. 26, 2018).

350. *Id.* at 2.

351. Gehring, et al., *supra* note 345, at 89.

measures aimed at protecting the environment may impact the players in different ways.[352]

The conflict between environmental regulation and investment protection has been examined in several arbitral awards. However, there seems to be no clear and fixed standard guiding tribunals in the event of such dispute. Preliminarily, and before delving into the substantial aspects of these cases, consider the following standards that have been proposed —

> Is the environmental regulation proportionate and necessary for a legitimate purpose?; [I]s the law and the application of the law discriminatory?; [I]s there a breach of an agreement or investment treaty or of legitimate, investment-backed expectations?; [A]nd[,] does a reasonable adjustment of a regulation to evolving and accepted environmental standards justify certain restrictions on such expectations in the exercise of regulatory powers?[353]

B. Balancing the Interests of States and Investors

There should be a balance between the "protection of the rights of foreign investors[,]" and the "recognition of the legitimate sphere of operation of the host State[.]"[354] This is because "host States have a responsibility to govern in the interests of all those within their jurisdiction, and to promote other public objectives[.]"[355] Thus, it has been held that "[t]he right of the host State to adopt its economic policies together with the rights of investors under a system of guarantees and protection are at the very heart of this difficult balance[.]"[356]

1. Regulating the Entry of Foreign Investment

Pursuant to the sovereign rights of a State, its right to control the entry of foreign investments into its territory is unlimited.[357] Except in rights and

352. *Id.*

353. TIENHAARA, *supra* note 329, at 158 (citing Norbert Horn, *Arbitration and the Protection of Foreign Investment: Concepts and Means*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 19 (Norbert Horn & Stefan Kröll eds., 2004)).

354. MCLACHLAN, ET AL., *supra* note 234, at 21.

355. *Id.*

356. CMS Gas Transmission Company v. Republic of Argentina, Decision on Objections to Jurisdiction, 7 ICSID Rep. 492, 499, ¶ 28 (July 17, 2003).

357. SORNARAJAH, *supra* note 12, at 88.

matters that have been the subject of treaties that it is party to, the host State possesses "an absolute right of control over the entry and establishment ... of ... foreign investment[s]."[358] By voluntarily subjecting himself to the regime of the host State by entering its territory, the foreign investor must comply with all the necessary conditions for it to maintain its presence and operations.[359]

Despite the differences as to the manner and the degree of control adopted by States in regulating investments, the aim is to subject the process of foreign investments to the host State's administrative control.[360] Conditions relating to environmental protection constitute an important pillar of this regulatory framework. This is the primary way through which States ensure that growth and development, through the entry of foreign investments, do not compromise social and environmental ideals. As such, environmental impact studies are usually required to be undertaken as a prerequisite to the entry of investment.[361] A State's right to refuse an investment that has the potential to harm its environment is justifiable, provided that it is based on objective grounds.[362] However, this becomes complicated once the investment is already granted entry.[363] Although the investment is still subject to the laws of the sovereign, the host State's actions may be restrained by protectionist standards granted to foreign investors.[364]

This must also be considered through the lenses of temporal law. As early as 1972, a court has recognized that a State "has a right to cancel agreements or investments which cause significant environmental harm."[365] Yet, it must be noted that this case was decided long before the boom of investor protection standards codified in various bilateral and multilateral treaties. With the advent of IIAs, dispute settlement tribunals have placed more premium on the eminence of investor protection rather than

358. *Id.*

359. *Id.* at 89.

360. *Id.* at 93.

361. *Id.* at 109.

362. *Id.* at 111.

363. SORNARAJAH, *supra* note 12, at 111.

364. *Id.* at 110-11.

365. *Id.* at 110 (citing International Bank of Washington v. Overseas Private Investment Corporation, 11 I.L.M. 1216 (Nov. 8, 1972)).

environmental protection.[366] As to which takes precedence between these two protectionist regimes is still the subject of a heated debate.

2. Infusing the Environmental Agenda in International Investment Agreements

In the previous Section, it has been observed that there is a gradual shift in the focus of investment treaties. Newly concluded IIAs have started to incorporate matters beyond the realm of investment protection.[367] This bodes well for the recognition of other equally important State interests. However, publicist Muthucumaraswamy Sornarajah has also warned against such trend.[368]

Nevertheless, some recent IIAs have started to infuse the environmental agenda among its provisions, by containing exemptions allowing host States to protect the environment.[369] One prominent treaty that recognizes this is the North American Free Trade Agreement (NAFTA). Article 1114, Paragraph 1 thereof provides that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that the investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[370] However, the full realization of this noble provision suffered a setback in *S.D. Myers, Inc. v. Government of Canada*,[371] wherein the tribunal ruled that the nature of the provision was merely "hortatory."[372]

Despite this interpretation, States are not deterred. In fact, some model BITs of the US and Canada, both NAFTA parties, contain stronger

366. SORNARAJAH, *supra* note 12, at 110–11 (citing Metalclad Corporation v. United Mexican States, Award, 5 ICSID Rep. 209 (Aug. 30, 2000) & Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, Final Award, 39 I.L.M. 1317 (Feb. 17, 2000)).

367. SORNARAJAH, *supra* note 12, at 384.

368. *Id.* at 235.

369. *Id.* at 225.

370. NAFTA, *supra* note 46, art. 1114, ¶ 1.

371. S.D. Myers, Inc. v. Government of Canada, Partial Award, 40 I.L.M. 1408 (Nov. 13, 2000).

372. SORNARAJAH, *supra* note 12, at 226 (citing S.D. Myers, Inc. v. Government of Canada, Partial Award, 40 I.L.M. 1408 (Nov. 13, 2000)).

provisions pertaining to the exception to liability for interference with foreign investments based on environmental grounds.[373] As an example, the General Exceptions of the 2004 Canada Model BIT provides —

> (1) Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a party from adopting or enforcing measure necessary:
>
> (a) to protect human, animal[,] or plant life or health;
>
> (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
>
> (c) for the conservation of living or non-living exhaustible natural resources.[374]

This provision grants a comprehensive and specific application to a wide array of environmental concerns, thus disputing any claim that it is hortatory.[375] Another essential provision of the Canadian Model BIT is an express prohibition against the lowering of environmental standards in order to attract foreign investment.[376] It must be noted that these environmental standards are almost the same are the same as those embodied in the Philippine-Canada BIT quoted in the preceding Section.

3. The NAFTA Experience

The cases decided under Chapter 11 of the NAFTA highlight that investors often use arbitration as a weapon to forestall the efforts of governments to enact environmental regulations that may have impacts on their investment.[377] An "investment" can be any type of financial investment, shareholdings, or secured debts.[378] Meanwhile, the scope of the measures

373. SORNARAJAH, *supra* note 12, at 226.

374. *Id.* (citing Agreement Between Canada and _____ for the Promotion and Protection of Investments, 2004 Model Bilateral Investment Treaty, art. 10, *available at* http://www.naftaclaims.com/commissionfiles/Canada_Model_BIT.pdf (last accessed Jan. 26, 2018)).

375. SORNARAJAH, *supra* note 12, at 226.

376. *Id.*

377. Gray, *supra* note 245, at 310.

378. *Id.* (citing NAFTA, *supra* note 46, art. 1101, ¶ 1.

that can be challenged under the agreement includes laws adopted by national, State, provincial, or even municipal legislatures, as well as implementing regulations.[379] In a way, "all policies, requirements and practices affecting government interaction with businesses are potentially under challenge."[380] This in effect creates a regulatory chill on the enactment of new environmental regulations.[381]

Many cases under the NAFTA depict the interplay between investment protection and environmental protection. What happens is that "[a] government's ability, within the exercise of its sovereignty, to regulate the environment and natural resources is matched against governmental obligations to protect foreign investors, and provide fair and equitable treatment."[382] Furthermore, resorting to Chapter 11 of the NAFTA, which does not require the exhaustion of local remedies, puts foreign investors in a more favorable position than local investors, since the latter must appear before the national courts that may have greater familiarity with the policies and premises upon which the regulation was enacted.[383]

In fact, it has been opined that that the jurisprudence produced under the NAFTA has ushered in a new era of investor protection —

> Cases under Chapter 11 of [the] NAFTA reinforce the idea that States must now account specifically for the impacts of any measure on an investor. Some States may be wary of introducing a more restrictive regime for the purposes of environmental protection due to the potential financial liability from an investor challenge. An investor should expect some level of environmental regulation and management in response to either heightened environmental awareness or the discovery of new ecological problems, which must be internalized as a risk of the investment. Having an option to challenge a new measure allows the investor to reallocate the risk to the regulator, and perhaps engage the polluter pays principle so that the general taxpayer bears the burden.[384]

---

379. Gray, *supra* note 245, at 310.

380. *Id.* at 311.

381. *Id.* (citing ALAN M. RUGMAN, ET AL., ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE (1999)).

382. Gray, *supra* note 245, at 311.

383. *Id.*

384. *Id.* (citing Gaetan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance between Stability Change*, 29 LAW & POL'Y INT'L BUS. 451, 466 (1998)).

These NAFTA cases, as well as other arbitral awards involving expropriation claims because of the enactment of environmental regulations, will be examined in the succeeding Sections.

C. Balancing Developmental and Environmental Rights

Though not necessarily injurious at the surface, the conflict between the desire to attract more foreign investment and increasing calls for a stricter environmental regulatory regime "may lead to patterns of investment and production that are not desirable in that market conditions do not adequately allow for the internalization of social (including environmental) costs."[385] Thus, in order to address this predicament, the concept of internalizing environmental costs emerged. This implies the shifting of the cost of environmental harm from society at large to the person causing the harm.[386] This concept eventually became known as the "polluter pays principle."[387]

The choice as to whether to internalize the cost of pollution, rather than let society as a whole bear the cost of such, involves the very heart of the issue of regulatory takings.[388] Thus, in a sense, requiring States to pay just compensation in the event of an environmental regulation affecting the value of foreign investment runs against the very nature of the polluter pays principle.[389] And, as with the nature of environmental concepts, giving primacy to investor rights might also lead to the trampling of other equally important environmental obligations.

This conflict between investment protection and environmental protection seems to be an offshoot of the long-standing debate between developmental and environmental rights. Achieving such a balance has been the subject of many high-level gatherings at the international level.[390] Strides

385. Wagner, *supra* note 4, at 470 (citing J.B. Opschoor, Multilateral Agreements on Investment and the Environment (Paper prepared for the Organisation for Economic Co-operation and Development Conference on Foreign Direct Investment and Environment Presented in The Hague in 1999) at 9, *available at* http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/2076269.pdf (last accessed Jan. 26, 2018)).

386. Wagner, *supra* note 4, at 470.

387. *Id.*

388. *Id.* at 471.

389. *Id.*

390. *Id.* at 471-72.

have been made, most especially in the recognition of the concept of sustainable development and its subsequent adoption in many international instruments.[391] However, a definitive and categorical statement as to which between the two takes precedence still eludes stakeholders.

As early as the Stockholm Conference, "developing countries voiced fears that wealthy nations would condition foreign economic assistance on environmental protection or divert those funds previously dedicated to development towards environmental deterioration."[392] The Rio Declaration of 1992, nor the instruments adopted at the Johannesburg Summit in 2002 did not categorically provide an answer on how to strike a balance between development and environmental protection.[393] In fact, Principle 3 of the Rio Declaration implies that the two goals have equivalence in substance.[394] With both environmental and investment law being accorded a high degree of protection by international law, a clash often results as to which regime of protection takes precedence. The next Section provides an introduction as to the applicable laws pertaining to this type of situation.

V. THE THIN LINE BETWEEN REGULATION AND EXPROPRIATION

> *Yet the basic fact remains: every regulation represents a restriction of liberty, every regulation has a cost. That is why, like marriage ... regulation should not 'be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly*[.']
>
> — Margaret Thatcher[395]

The growing prominence of environmental protection can perhaps be considered as one of the most significant threats to the substantive protection accorded to foreign investments, mainly because regulations enacted to protect that environment can have substantial impact on the properties of

391. *See generally* Sustainable Development Knowledge Platform, Institutional Frameworks and international cooperation for Sustainable Development, *available at* https://sustainabledevelopment.un.org/topics/institutionalframeworks-international-cooperation (last accessed Jan. 26, 2018).

392. DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 68 (2011).

393. BEYERLIN & MARAUHN, *supra* note 74, at 78.

394. *Id.*

395. MARGARET THATCHER, STATECRAFT: STRATEGIES FOR A CHANGING WORLD 423 (2002).

these investors. Among the substantive standards in investment law, these environmental regulations often conflict with the standard of expropriation.

Expropriation involves a balancing of the traditionally competing interests of the State and a foreign investor. There are two types of expropriation — direct expropriation and indirect expropriation. Currently, indirect expropriation is considered the most predominant form of expropriation,[396] and is regarded as "the single most important development in [S]tate practice."[397] The terminology given to this kind of taking is varied — among others, *de facto* expropriation, creeping expropriation, or regulatory expropriation.[398]

This Section will discuss the concept of regulatory takings in three parts. First, an overview of the law of regulatory expropriation will be examined, particularly in the sphere of investment arbitration. Second, given that this is premised on the clash between the State's police power and its power of eminent domain, a discussion of the nature and elements of these will be outlined. Third, the tests on the occurrence of a regulatory taking will be presented, as applied by arbitral tribunals and domestic courts in the US and the Philippines. Ultimately, this Section aims to provide guidance as to what governmental action will amount to a regulatory taking, and whether such action necessitates the payment of compensation to the aggrieved property owner.

A. The Concept of Regulatory Expropriation

In the past, the distinction of what constitutes a taking of foreign property in international law was plain and unmistakable, but it "has now come to be befuddled with difficulty as a result of the progressive expansion of the concept of taking."[399] This is in view of the fact that certain actions of the State, although done intentionally, have interfered with the vested property rights of foreigners. Thus, the concept of indirect expropriation emerged.

Indirect expropriation can take an infinite number of forms — "it can be any action, omission[,] or measure attributable to a government that interferes with the rights flowing from the foreign owned property to an

396. Reinisch, *supra* note 21, at 409.

397. *Id.* (citing Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 65 (2002)).

398. Newcombe, *supra* note 16, at 8.

399. SORNARAJAH, *supra* note 12, at 363.

extent that the property has been functionally expropriated."[400] As defined by the UNCTAD, indirect expropriation refers to "those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture[,] or economy of a host country."[401]

Regulatory expropriation falls under the rubric of indirect expropriation. Also known by the term regulatory takings, regulatory expropriation occurs where a government measure, "[though] not on its face expropriatory, results in the deprivation of the foreign investor's property."[402]

1. Regulatory expropriation as applied to investments

In the realm of international investments, the concept of regulatory expropriation was thoroughly expounded on in *Methanex Corporation v. United States of America*[403] arbitration, in this wise —

> [A]s a matter of general international law, a non-discriminatory measure 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.[404]

Muthucumaraswamy Sornarajah opined that this formulation embraces almost every regulation, provided that it has a public purpose.[405] This is almost the same tenor of the formulation used by the tribunal in *Saluka*

400. Julie Soloway, *Environmental Expropriation under NAFTA Chapter 11: The Phantom Menace*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 133 (John J. Kirton & Virginia W. MacLaren, eds., 2002).

401. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TAKING OF PROPERTY 12 (2000) [hereinafter UNCTAD, TAKING OF PROPERTY].

402. Newcombe, *supra* note 16, at 8.

403. Methanex Corporation v. United States of America, Final Award on Jurisdiction and Merits, 44 I.L.M. 1345 (Aug. 3, 2005).

404. SORNARAJAH, *supra* note 12, at 374-75 (citing *Methanex Corporation*, 44 I.L.M., ¶ IV.D.7).

405. SORNARAJAH, *supra* note 12, at 375.

Investments, B.V. (The Netherlands) v. The Czech Republic,[406] wherein it was held that States "are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[407] Using the developments in arbitrations involving indirect expropriation claims, Andrew Newcombe and Lluís Paradell, scholars on investment treaties, proposed the following principles in determining whether a measure enacted by a State may amount to an expropriation —

> First, the form of the measures is not determinative nor is the intent of the [S]tate. Second, the claimant must establish that the measure in question results in a substantial deprivation. Third, the character of the government measures in question must be taken into account in determining whether a police powers exception applies. Fourth, the investment-backed legitimate expectations of the investors are relevant in assessing whether there has been an indirect expropriation. Finally, the indirect expropriation analysis is context and fact specific.[408]

Among these principles, the third one, pertaining to the character of the government measure, is the most controversial, given that "it remains undecided whether international law should [ ] only [consider] [ ] the economic effects of a government action, or also consider the police powers of a [ ] State in determining [the existence of] indirect expropriation[.]"[409] What is certain is that the expropriation must involve "a total or at least substantial deprivation" in the value of the foreign investor's property.[410] This deprivation may consist of either of the physical property, or of the "economic benefit," "use,"[411] or control of the investment for a significant period of time.[412] However, a mere reduction in value or decrease in

406. Saluka Investments, B.V. (The Netherlands) v. The Czech Republic, Partial Award, IIC 210 (Mar. 17, 2006).

407. *Id.* ¶ 255.

408. NEWCOMBE & PARADELL, *supra* note 259, at 341.

409. Nathanson, *supra* note 408, 874 (citing Mostafa, *supra* note 20, at 267).

410. Nathanson, *supra* note 408, at 874 (citing Ursula Kriebaum, *Partial Expropriation*, 8 J. WORLD INVESTMENT & TRADE 69, 69 (2007)).

411. Nathanson, *supra* note 408, at 874 (citing Kriebaum, *supra* note 410, at 71).

412. Nathanson, *supra* note 408, at 874 (citing Steve R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 482 (2008)).

profits[413] or even a minor "hindrance or restriction" on using the investment will not be considered as expropriatory.[414]

2. As distinguished from creeping expropriation

The concept of a regulatory taking must be distinguished from creeping expropriation. Although both are regarded as subsets of an indirect expropriation, there are some differences. Creeping expropriation is concerned with "the slow and incremental encroachment on ... the ownership rights of [a] foreign investor[s,]" which leads to a decreasing value of the investment.[415] This has been explained by the tribunal in *Generation Ukraine, Inc. v. Ukraine*,[416] as follows —

> Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.[417]

A later case, *Siemens A.G. v. The Argentine Republic*, [418] further expounded on the character and the sequence of State actions that may constitute creeping expropriation —

> By definition, creeping expropriation refers to a process, to steps, that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act.[419]

Thus, it is evident that creeping expropriation may result from a "series of acts" done by a State over an extended "period of time." The acts

413. Nathanson, *supra* note 408, at 874 (citing Kriebaum, *supra* note 410, at 69).

414. Nathanson, *supra* note 408, at 874 (citing Jason L. Gudofsky, *Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study*, 21 NW. J. INT'L L. & BUS. 243, 262 (2000)).

415. UNCTAD, TAKING OF PROPERTY, *supra* note 401, at 11.

416. Generation Ukraine, Inc. v. Ukraine, Award, 44 I.L.M. 404 (Sep. 15, 2003).

417. *Id.* ¶ 20.22.

418. Siemens A.G. v. The Argentine Republic, Award, 14 ICSID Rep. 518 (Feb. 6, 2007).

419. *Id.* at 571, ¶ 263.

involved are "gradual and cumulative."[420] Whereas, in regulatory expropriation, the taking that resulted is generally the effect of a single regulation enacted by a State in furtherance of its power to regulate public welfare.

B. The Clash Between Police Power and Eminent Domain

It is an elementary principle in constitutional law that the entirety of governmental power is lodged in the three great powers of a State, namely: police power, the power of eminent domain, and the power of taxation.[421] These inherent powers are considered the "very essence of government[,] [for] without them[,] no government can exist."[422] Given that States invariably exercises these, it is not therefore impossible that these very powers sometimes run into conflict against each other.

The concept of regulatory expropriation is regarded as a clash between two of these essential State powers — police power and eminent domain. The lines are often blurred in attempting to construct a distinction in the application of the two, more so in the application of regulations that affect the property rights of investors. As such, the questions as to how should international law distinguish between expropriation and legitimate regulation for which compensation need not be paid has always been a vexing issue.[423]

1. Police Power

Police power has been recognized under customary international law as the concept from which States derive their right to regulate.[424] This is an inherent right of sovereignty, which can be limited by treaties.[425] In a

420. W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRITISH Y.B. INT'L L. 115, 123 (2003).

421. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 101 (2009 ed.).

422. *Id.*

423. Newcombe, *supra* note 16, at 20.

424. Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities (Paper prepared for Professor John Ruggie, United Nations Special Representative to the Secretary General for Business and Human Rights in 2008) at 18, *available at* http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf (last accessed Jan. 26, 2018).

425. *Id.*

general sense, police power can refer to "all forms of domestic regulation[s] under [the] [ ] sovereign powers [of a State]."[426]

a. Nature and Requirements for Exercise

Police power is defined as "the exercise of the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society[,]"[427] within constitutional limits and has been characterized as "the most essential, insistent[,] and the least limitable of powers, extending as it does to all the great public needs."[428] By nature, police power has been held to be very broad and comprehensive.[429] Police power does not have a fixed quantity, as it can change from time to time to adapt to the changing conditions of society.[430] Thus, its exercise is a continuing one and remains to be exerted depending on the exigencies of the prevailing situation.[431]

It has been recognized that there are two indispensable requisites for the exercise of the police power to apply — first, a lawful purpose, and second, a lawful method.[432] Lawful purpose relates to the public interest or public welfare desired to be achieved by the regulation.[433] This requires that "the interests of the public generally, as distinguished from those of a particular class" justifies the interference of the State.[434] This entails that public benefit must be generated, as opposed to benefits that only cater to the interests of private individuals. The second requisite, lawful method, is akin to the standard of reasonableness.[435] It demands that the means employed by the regulation are reasonably necessary for the accomplishment of its purpose,

426. Newcombe, *supra* note 16, at 20.

427. 16A C.J.S. *Constitutional Law* § 699 (2017) (emphases omitted).

428. BERNAS, *supra* note 421, at 101 (citing Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila, 20 SCRA 849 (1967)).

429. Goltzman v. Rougeot, 122 F. Supp. 700, 703 (WD La. 1954).

430. *See* Helvering v. Davis, 301 U.S. 619, 641 (1937).

431. Kelly v. Washington, 302 U.S. 1, 10 (1937).

432. *See* Lawton, 152 U.S. at 137.

433. *See* Ichong, etc., et al. v. Hernandez, etc., and Sarmiento, 101 Phil. 1115, 1163-64 (1957).

434. Ynot v. Intermediate Appellate Court, 148 SCRA 659, 671 (1987) (citing United States v. Toribio, 15 Phil. 85, 98 (1910)).

435. *Id.*

and not unduly oppressive.[436] These two requirements are rooted in the observance of due process. Due process guards against "unreasonable, arbitrary, or capricious" government action.[437] These two-fold requisites must be met, for the absence of any may be tantamount to a violation of due process.

b. Justification for non-compensation

Police power pertains to "measures that justify [S]tate action which would otherwise amount to a compensable deprivation or appropriation of property."[438] Thus in the exercise of this power, no compensation is due for the possible effects of a regulation on the property of a person. The rationale given for this is that property rights are not absolute and are subject to inherent limitations. [439] Being "a social institution that serves social functions[,] [p]roperty cannot be used in a [manner] that [produces] [ ] serious harm [ ] to public order and morals, [ ] health[,] or [ ] environment."[440]

There are three generally recognized categories of police power regulation that justify non-compensation in the event of any interference with property rights: public order and morality, the protection of human health and the environment, and taxation.[441] The common thread in these instances is that they involve a balancing test between unjustified takings and justified takings for the public good.[442]

First, a State may be justified to take property without compensation in the valid enforcement of its laws in furtherance of public order and morality.[443] As such, property may be seized and forfeited if it arises from certain criminal activities, or the possession of such property is prohibited in

436. *Id.*

437. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980) (citing Nebbia v. New York, 291 U.S. 502, 525 (1934)).

438. Newcombe, *supra* note 16, at 20-21.

439. *Id.* at 22.

440. *Id.*

441. *Id.* at 24.

442. Nathanson, *supra* note 408, at 876.

443. Newcombe, *supra* note 16, at 24.

the State.[444] It may also be seized for non-payment of taxes, fines, or duties.[445]

Second, police power may be used to justify the enactment of regulations aimed at protecting human health and the environment.[446] Despite the number of investment disputes arbitrated in relation to the protection of such right, there seems to be no particular international expropriation law case that gives explicit guidelines on what type of risk and level of harm justifies a taking of property without compensation.[447] Case law has been more certain in the realm of health, such that property may be confiscated in the event of a dangerous epidemic.[448] However, as will be subsequently established, regulations enacted for environmental purpose — especially those affecting foreign investment — have sparked much controversy.

Finally, taxation is the third way by which States appropriate property that is not intended to be compensated.[449] It is widely recognized by international authorities that a significant tax burden may be imposed on investments.[450]

c. Police power in relation to investment law

With regard to investments, authors and publicists are of the consensus that as long as regulations are enacted in a non-discriminatory manner, regulations may not be deemed as expropriatory.[451] Thus, "[w]hile various forms of regulation may have an adverse economic impact on investments and its uses, adverse impact is not *per se* expropriatory because it does not

444. *Id.*

445. *Id.* (citing Louis Chazen (U.S.) v. United Mexican States, 4 R.I.A.A. 564 (1930)).

446. Newcombe, *supra* note 16, at 26.

447. *Id.*

448. *Id.* (citing Joined Cases C-20 & C-64/00, Booker Aquaculture Ltd. & Hydro Seafood GSP Ltd. v. The Scottish Ministers, 2003 E.C.R. I-7411).

449. Newcombe, *supra* note 16, at 28.

450. *Id.* at 28-29.

451. *Id.* at 22-23 (citing George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585, 609 (1994)).

result in a substantial deprivation of investment rights."[452] The police power doctrine is not a mere criterion weighed in the balance with other factors, but rather, "a controlling element which exempts automatically the measure from any duty of compensation."[453]

This view has found wide support, as it is reflected IIAs like the MIGA Convention, codifications like the US Third Restatement, [454] and in decisions of arbitral tribunals.[455] As early as 1989, this principle has already been adopted by the Iran-US Claims Tribunal in *Emmanuel Too v. Greater Modesto Insurance Associates and the United States of America.*[456] This case was the only claim rejected by the Tribunal on grounds of a police power regulation.[457]

This was followed in 2001 by *Lauder v. Czech Republic*, a dispute settled by a tribunal under the UNCITRAL. [458] It held that a regulation's "[d]etrimental effect on the economic value of property is not sufficient. Parties to the Treaty are not liable for economic injury that is the consequence of [*bona fide*] regulation within the accepted police powers of the State[.]"[459] This is supported by an ICSID tribunal's ruling in *Técnicas*

452. Newcombe, *supra* note 16, at 23.

453. Organisation for Economic Co-operation and Development, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law (Part of the Organisation for Economic Co-operation and Development Working Papers on International Investment 2004/04 prepared by Catherine Yannaca-Small, Legal Advisor, Investment Division, Directorate for Financial and Enterprise Affairs) at 18, *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (last accessed Jan. 26, 2018).

454. Newcombe, *supra* note 16, at 23 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 (g)).

455. Newcombe, *supra* note 16, at 23.

456. Newcombe, *supra* note 16, at 24 (citing Emmanuel Too v. Greater Modesto Insurance Associates and the United States of America, Award, 23 Iran-U.S. Cl. Trib. Rep. 379 (Dec. 29, 1989)).

457. *Emmanuel Too*, 23 Iran-U.S. Cl. Trib. Rep. at 387-88.

458. Lauder v. Czech Republic, Final Award, IIC 205 (Sep. 3, 2001).

459. *Id.* ¶ 198.

Medioambientales Tecmed, S.A. v. The United Mexican States,[460] wherein it held that such right is undisputable.[461]

More recent cases have upheld this principle. In *Saluka*, it was held that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[462] Finally, in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentina*,[463] the tribunal ruled that, "in evaluating a claim of expropriation[,] it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not confuse measures of that nature with expropriation."[464]

2. Eminent Domain

Broadly speaking, eminent domain is defined as "the right or power to take private property for public use," without the owner's consent.[465] More precisely, it is the "right of the sovereign, or of those to whom the power has been delegated, to condemn private property for public use[,] and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation."[466]

a. Nature and Definition

Correlative with the exercise of eminent domain is a State's right to expropriate property. Expropriation has been used interchangeably with confiscation and nationalization.[467] Confiscation is "the capricious taking of property by the ruler or the ruling coterie of the [S]tate for personal

460. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award, 10 ICSID Rep. 134 (May 29, 2003).

461. *Id.* ¶ 119.

462. *Saluka Investments, B.V.*, IIC 210, ¶ 255.

463. Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentina, Award, ICSID Case No. ARB/03/17 (July 30, 2010).

464. *Id.* ¶ 139.

465. 29A C.J.S. *Eminent Domain* § 1.

466. *Id.*

467. SORNARAJAH, *supra* note 12, at 364.

gain."[468] Meanwhile, nationalization refers "to a situation in which a [S]tate embarks on a wholesale taking of the property of foreigners to end their economic denomination of the economy or of sectors of the economy."[469] However, the usual connotations applicable to these terms cannot be said to apply in contemporary times. For purposes of this Note, it is best to refer to takings done by a State as "expropriation," given that "these takings are carried out for an economic or other public purpose."[470] In a recent arbitral award, the tribunal said that "the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the 'taking.'"[471]

Not only tangible property may be the subject of expropriation, since a broad range of intangible assets of economic value can be expropriated, including immaterial rights and interest, including contractual rights.[472] Throughout the years, international investment tribunals have been adopting a broader scope of property rights protected against expropriation, such that "the restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing."[473] Naturally, this covers the whole process of foreign investments.

b. Expropriation and Foreign Investments

Expropriation has been a major issue in public international law during the past century.[474] This was sparked by the Communist and Mexican nationalization measures in the 1920s, the socializations of private property in Eastern European states after World War II, and the taking of foreign

468. *Id.*

469. *Id.* at 365.

470. *Id.* at 366.

471. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 280.

472. Reinisch, *supra* note 21, at 410 (citing Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law, in* 76 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE, at 271 (1982)).

473. *Methanex Corporation*, 44 I.L.M., ¶ 17.

474. Reinisch, *supra* note 21, at 408.

investment in developing countries as a result of the decolonization process.[475] This led to a point wherein claims of nationalization or expropriation were considered the heart of foreign investors' claims against States.[476]

Today, a huge number of international law cases involve expropriation disputes, given that it has become difficult for the State concerned to return expropriated property to the aggrieved multinational company.[477] A State's right to expropriate has been considered as fundamental, such that modern investment treaties have respected and recognized this right.[478] What IIAs typically address are the conditions and consequences in the event of an expropriation, thus leaving the exercise of such right unaffected.[479]

The kind of property subject to expropriation is just as expansive as when the property expropriated is owned by a national of the State. As such, even abstract entities, like shares in companies, debts, and intellectual property are covered,[480] as well as concession rights as a consequence of contractual obligations.[481] A leading case asserted that, "[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction[.]"[482] Thus, protection from expropriation relates to a broad range of rights that are economically significant to an investor.[483]

The remedies of an aggrieved investor vary, and are primarily hinged on the existence of any agreement between the parties.[484] There are some investors who had contracts with the host State, incorporating contractual

475. *Id.*

476. *See generally* Reinisch, *supra* note 21, at 408-09.

477. MALCOLM N. SHAW, INTERNATIONAL LAW 802 (2008).

478. DOLZER & SCHREUER, *supra* note 237, at 98.

479. *Id.*

480. *See generally* SHAW, *supra* note 477, at 830.

481. *Id.* (citing Libyan American Oil Company v. Libya, 20 I.L.M. 1, 53 (June 20, 1981).

482. Amoco International Finance Corporation v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 108 (July 14, 1987).

483. *See generally* George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRITISH Y.B. INT'L L. 307 (1962).

484. MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 266-67 (2011).

protections against expropriation, including recourse to arbitration in case of a dispute.[485] Otherwise, the available modes of redress for the investor are the intervention of the home State through diplomatic protection, or the exhaustion of remedies in the courts of the host State.[486] Currently, there has been a decline in the instances of direct expropriation, pertaining to an outright taking of property, with indirect expropriation prevailing as the more dominant form.[487] This shift has led to a recognition of "an elasticity in the nature and range of expropriatory acts, and assessing this elasticity ... has become a central issue in international investment arbitration."[488]

c. Elements of Expropriation under Investment Law

It is unquestionable that expropriation of alien property is legitimate under international law. [489] However, this must meet certain established conditions.[490] Thus, in order to have a valid expropriation, four elements must concur — public purpose, payment of just compensation, compliance with due process, and an absence of arbitrary or discriminatory treatment.

i. Public Purpose

Expropriation must be for "reasons of public utility, judicial liquidation[,] and similar measures."[491] The reason for the taking must not be arbitrary and discriminatory in character. [492] This has been expanded further in the *Compañía del Desarrollo de Santa Elena, S.A.* case, wherein the Tribunal held that expropriation of foreign property is justified if done because of

485. *Id.*

486. *Id.* at 266.

487. Reinisch, *supra* note 21, at 408.

488. WAIBEL, *supra* note 484, at 266.

489. SHAW, *supra* note 477, at 828 (citing Amco Asia Corporation and Others v. Republic of Indonesia, Award, 89 I.L.R. 405, 406 (Nov. 20, 1984)).

490. SHAW, *supra* note 477, at 828.

491. SHAW, *supra* note 477, at 833 (citing *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7, at 22).

492. SHAW, *supra* note 477, at 833 (citing BP Exploration Company Ltd. v. Libyan Arab Republic, Award, 53 I.L.R. 297, 329 (Oct. 10, 1973)).

environmental reasons.[493] The requirement of public purpose necessitates a genuine interest of the public.

Furthermore, the current consensus is that the legality of taking of the property by a State under its municipal law does not affect the issue of the legality of the State's expropriatory act under international law.[494]

ii. Compensation

That expropriation requires payment of prompt, adequate, and effective compensation [495] is widely recognized as custom. [496] In fact, the compensation requirement makes the legality of the expropriation to be conditional.[497] There are various ways in determining the value of the property, but the generally accepted rule is an amount based on the fair market value of the assets expropriated.[498] However, case law has suggested that in payment of compensation, there should be a distinction as to the legality of the expropriation. As such, the Tribunal in *Amoco International Finance v. Iran*[499] held that "a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating [S]tate differ according to the legal characterization of the taking."[500]

Thus, if the taking is unlawful, there should be a "full restitution in kind or its monetary equivalent was required in order to reestablish the situation which would in all probability would have existed if the expropriation had not occurred."[501] But, if the taking is lawful, the standard to be followed is the "payment of the full value of the undertaking at the moment of

493. SHAW, *supra* note 477, at 833-34 (citing *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M. at 1317 & 1329).

494. MCLACHLAN, ET AL., *supra* note 234, at 289.

495. SHAW, *supra* note 477, at 834 (citing 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW, at 662 (1940)).

496. *Amoco International Finance Corporation*, 15 Iran-U.S. Cl. Trib. Rep. at 116.

497. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 622-23 (2003).

498. SHAW, *supra* note 477, at 835-36 & SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW 35-36 (2008).

499. *Amoco International Finance Corporation*, 15 Iran-U.S. Cl. Trib. Rep.

500. *Id.* at 246.

501. SHAW, *supra* note 477, at 837.

dispossession."[502] This implies that compensation for loss of profits is available only if the expropriation is not legal.[503]

iii. Due Process

Under international law, an absence of due process would only be present if the domestic system operates so unfairly as to preclude a legitimate settlement of a claim by an alien.[504] Hence, there would be a violation of due process when the legitimate expectations of investors are disappointed.[505] There must be a legal procedure afforded to the affected investors to give them a reasonable chance within a reasonable time to have their claims heard.[506] Absent such procedure, the due process requirement rings hollow.[507] The due process requirement is intricately related with the next element, the absence of arbitrariness or discriminatory treatment.

iv. Absence of arbitrary or discriminatory treatment

In modern investment treaty practice, the rule against arbitrariness is often combined with the prohibition of discrimination, such that these two standards often overlap.[508] It is also related with the due process element, as the *Electtronica Sicula S.p.A*[509] case held that arbitrariness "is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety[.]"[510] In *LG&E v. Argentine Republic*,[511] the

502. *Id.*

503. *Id.*

504. Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, Award, ICSID Case No. ARB (AF)/97/2, ¶ 102 (Nov. 1, 1999) & WAYNE MAPP, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981-1991 115 (1993).

505. Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 753 (2007).

506. *See* SHAW, *supra* note 477, at 835.

507. *Id.*

508. DOLZER & SCHREUER, *supra* note 237, at 191.

509. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. Rep. 15 (July 20).

510. *Id.* at 76, ¶ 128.

511. LG&E v. Argentine Republic, Decision on Liability, 46 I.L.M. 36 (Oct. 3, 2006).

Tribunal defined arbitrariness as those "measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process ... [which] would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments."[512] Commentators argue that the nature and scope of arbitrariness is so broad, such that any arbitrary action may also violate the fair and equitable treatment standard.[513]

On the other hand, discrimination can take a number of forms — race, religion, political affiliation, disability, and many more.[514] However, in the context of foreign investments, discrimination is often seen on the basis of nationality.[515] This is the reason why investment treaties have incorporated national treatment and most-favored-nation treatment as substantive standards for the protection of investors.[516] Tribunals also differ on the essence of the intent. In *LG&E*, the Tribunal ruled that "[i]n the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect."[517] However, in another dispute decided a year after, the Tribunal did not consider intent as a decisive factor in finding discrimination, but rather, the impact of the measure on the investment.[518]

Finally, "[a] finding of discrimination is [deemed] independent of a violation of domestic law."[519] As held in *Lauder*, "[f]or a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment, or can lack a provision prohibiting the discrimination of foreign investment."[520]

---

512. DOLZER & SCHREUER, *supra* note 237, at 193 (citing *LG&E*, 46 I.L.M., ¶ 158).

513. Steven Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 133 (1999).

514. *Id.*

515. *Id.*

516. *Id.*

517. *LG&E*, 46 I.L.M., ¶ 146.

518. DOLZER & SCHREUER, *supra* note 237, at 197 (citing *Siemens A.G.*, 14 ICSID Rep., ¶ 321).

519. DOLZER & SCHREUER, *supra* note 237, at 196.

520. *Lauder*, IIC 205, ¶ 220.

3. The Thin Line Separating Police Power and Eminent Domain

There is a thin line separating police power and the power of eminent of domain, such that the two are often confused and mixed up. It has been held that whenever a State enacts regulations for the purpose of protecting lives, securing the safety, peace, and welfare of the people, these fall within the ambit of its police power; thus, they do not constitute a taking under the power of eminent domain, despite the fact they may interfere with private rights without providing for compensation.[521]

However, these regulations must be reasonable since "the legislature cannot, under the guise of police power, impose unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain[.]"[522] Imposing unreasonable regulations would deprive the owner of all profitable use of his property, which are not necessarily injurious nor pernicious.[523] Thus, a Tribunal held that if public purpose automatically immunizes a measure from being expropriatory, then there would never be a compensable taking for a public purpose.[524]

Various State-enacted regulations which affect the value of foreign investments bring to the fore the question as to whether these fall under legitimate non-compensable regulations, or an indirect expropriation requiring compensation. However, international tribunals have settled these takings claims in a somewhat inconsistent manner.[525] But despite this inconsistency, a closer examination of these cases would reveal a set of

521. *See* Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198-99 (1921).

522. Hurley v. State, 143 N.W.2d 722, 726 (1966) (U.S.) (citing 29A C.J.S. Eminent Domain § 6).

523. Bountiful City v. De Luca, 77 Utah 107, 122 (1930) (U.S.).

524. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Award, ICSID Case No. ARB/97/3, ¶ 7.5.21 (Aug. 20, 2007).

525. Organisation for Economic Cooperation and Development, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law (Part of the Organisation for Economic Co-operation and Development Working Papers on International Investment 2004/04 prepared by Catherine Yannaca-Small, Legal Advisor, Investment Division, Directorate for Financial and Enterprise Affairs) at 10, *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (last accessed Jan. 26, 2018).

criteria used in determining the nature of the alleged taking.[526] These are: first, the degree of interference with the property right; second, the character of the governmental measure, including its purpose; and third, the interference of the measure with reasonable and investment-backed expectations.[527] These standards, especially those pertaining to the regulatory environmental measures, will be dealt with more closely in the next Section.

C. Determining the Existence of Regulatory Takings

Establishing a definite borderline between an indirect expropriation and a regulatory measure is an offshoot of the thin line separating a State's police power and its power of eminent domain. The precise delimitation between these two, theoretically distinct concepts is difficult to establish.[528] The search for an accurate and appropriate test to set the distinction, and the futility of such pursuit, has been succinctly expressed by the tribunal in *Saluka Investments, B.V.* —

> [I]nternational law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory powers of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable under international law.[529]

The importance of properly demarcating a balance between State and investor interests, in the context of regulatory takings, has been explained in this wise —

> [T]o the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation ... For the host State, the definition determines the scope of the State's power to

526. *Id.*

527. *Id.*

528. Reinisch, *supra* note 21, at 432.

529. *Saluka Investments, B.V.*, IIC 210, ¶ 263.

> enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due.[530]

1. Tests to determine whether a regulatory taking has occurred

In 2004, scholars already interposed their own variations as to how to resolve this predicament. Scholars have proposed a case-by-case approach, such that "the determination of when State conduct crosses the line between non-compensable regulation and compensable indirect expropriation tends to involve a balancing of several considerations."[531] However, determining the nature of a regulatory taking, and therefore its compensability, poses a predicament for States —

> If the definition is too expansive, the argument goes, it could impose potentially huge financial obligations on governments, create disincentives to enact health and safety regulations, and introduce multiple distortions and social inefficiencies. On the other hand, a definition that is too restrictive would obliterate a key investment guarantee that protects foreign investors.[532]

This quandary is reflected in the thinking of tribunals which face two sides of the debate — one side favors the ascendancy of regulation, such that "legitimate regulatory measures are outside the scope of indirect expropriation and that a too far-reaching protection against expropriation should not serve as a *de facto* substitute for investment insurance."[533] Meanwhile, the opposing view puts a premium on investment protection, such that "any substantial deprivation of value regardless of its purposes should be considered expropriatory."[534]

Today, there are two recognized tests through which courts and tribunals determine the existence of a regulatory taking: (a) the "sole-effects" doctrine, and (b) the "mixed-effects" or "police-powers" doctrine.[535]

---

530. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 99 (1995).

531. L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REV—FOREIGN INV. L.J. 293, 326-27.

532. Soloway, *supra* note 400, at 131.

533. Reinisch, *supra* note 21, at 433.

534. *Id.*

535. Nathanson, *supra* note 408, at 875.

a. Sole-Effects Doctrine

The sole-effects doctrine is considered as the orthodox approach in determining the existence of regulatory expropriation, given that this is the standard embodied in the texts of investment instruments, decisions of tribunals, and writing of jurists.[536] It has been referred to as such by Dolzer because of its sole emphasis on the *effect* of the State measure on the property of the owner.[537] With particular regard to foreign investments, the sole-effects doctrine "looks to a government action's economic effect on a foreign investor's property in determining whether indirect expropriation has occurred."[538]

Basically, the relevant factor is the effect of the governmental action, rather than its purpose or intent.[539] The test requires a tribunal to "establish a line between when a government's measure goes 'too far' and imposes too great an interference with the use and enjoyment of property."[540] In evaluating the effect of a governmental measure, tribunals will likely look into both the economic impact and duration of the measure.[541] Eminent jurist Rosalyn Higgins seems to adopt this view —

> [T]here seems to be a tendency to define 'taking' in terms not of the amount or quality of interference with those rights normally associated with property, but in terms of whether the methods were unlawful and whether compensation was paid. This is, with the greatest respect, to confuse the question of a definition with the question of a legal justification.[542]

The sole-effects doctrine, as an orthodox approach resorted to by tribunals, is best described in the *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* case decided by the Iran-US Claims Tribunal —

---

536. Newcombe, *supra* note 16, at 8.

537. Dolzer, *supra* note 397, at 79-80.

538. Nathanson, *supra* note 408, at 875 (citing Anatole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 J. ENERGY & NAT. RESOURCES L. 333, 351 (2009)).

539. *See generally* Dolzer, *supra* note 397, at 79-90.

540. TIENHAARA, *supra* note 329, at 127 (citing Gudofsky, *supra* note 414, at 259-60).

541. TIENHAARA, *supra* note 329, at 127.

542. Higgins, *supra* note 472, at 328.

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[543]

A more recent case that reflected this principle is found in *Metalclad Corporation*, decided in 2000, which applied the provisions of an IIA.[544]

Even ICSID tribunals have recognized this doctrine, reflective of its customary international law nature.[545] The tribunal in *Santa Elena* opined that "[t]here is ample authority for the proposition that a property has been expropriated when the effect of the measure taken by the [S]tates has been to deprive the owner of the title, possession[,] or access to the benefit and economic use of his property."[546] Finally, the *Tecmed* case solidifies this approach, thus — "The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects."[547]

b. Mixed-Effects / Police-Powers Doctrine

The other test is the "mixed-effects" doctrine — also referred to as "police-powers" doctrine — which consists of the sole-effects doctrine plus an additional factor.[548] This additional factor is the *police power* of the State, which is used in determining whether an act affecting the foreign investment is justified, thus precluding the payment of compensation to the investor.[549] As elucidated earlier, the main categories that might justify non-

543. Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 224-25 (June 22, 1984).

544. Metalclad Corporation v. United Mexican States, Award, 5 ICSID Rep. 209, ¶ 103 (Aug. 30, 2000).

545. *See generally* Nathanson, *supra* note 408, at 877.

546. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 77.

547. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 116.

548. Nathanson, *supra* note 408, at 876.

549. *Id.* (citing Boute, *supra* note 567, at 354-55).

compensation are public order and morality, protection of human health and the environment, and taxation. Thus, what transpires is a balancing test between unjustified takings and justified takings for the welfare of the public.[550] The range of regulatory interferences that can be justified under police powers has been discussed in *Marvin Roy Feldman Karpa v. United Mexican States*,[551] decided under the NAFTA —

> [T]he ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others have been considered to be expropriatory actions. At the same time, *governments must be free to act in the broader public interest through protection of the environment*, new or modified tax regimes, the granting or withdrawal of subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[552]

This mixed-effects doctrine was also applied by the Tribunal in the *Methanex Corporation* case, also decided under the NAFTA.[553] However, the approach in *Methanex Corporation* was considered too broad, such that investment protection completely took a backseat.[554] Thus, some tribunals also consider factors like the purpose of the measure or the existence of legitimate expectations, instead of solely relying on the effects of the interference.[555] This is evident in *Tecmed*, where the tribunal also espoused the proportionality test espoused by the ECHR.[556]

The use of tribunals of these two different tests suggests the complexity of drawing a definite delineation between a regulatory taking and a taking

---

550. Nathanson, *supra* note 408, at 876.

551. Marvin Roy Feldman Karpa v. United Mexican States, Award, 42 I.L.M. 625 (Dec. 16, 2002).

552. *Id.* ¶ 103 (emphasis supplied).

553. *See generally* Ursula Kriebaum, *Regulatory Taking: Balancing the Interests of the Investor and the State*, 8 J. WORLD INVESTMENT & TRADE 717 (2007).

554. *Id.*

555. *Id.*

556. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 122.

which necessitates expropriation.[557] Because of this difficulty, commentators and arbitral tribunals are of the view that determining such can only be achieved on a case-to-case basis.[558]

2. Applying domestic standards

The concept of regulatory taking emerged in domestic legal systems way before it was recognized as an issue under international law. As such, many States have already shaped their own laws and guidelines in the event of such. However, it is argued "that the definition of regulatory expropriation should be a matter of international consensus and '[c]onsequently, it should not be assumed that the principles developed by any particular municipal or regional legal systems, for example, the [US] and the EU, can be automatically applied on a global basis.'"[559] Thus, despite the advancements made by tribunals in coming up with standards in determining non-compensable regulatory takings, this issue will remain controversial for some time given that the criteria for a definitive identification of such takings remains elusive.[560]

a. United States — As Applied in Pennsylvania Coal Co.

The US recognized the concept of regulatory takings in the landmark case *Pennsylvania Coal Co. v. Mahon*.[561] Here, the US Supreme Court recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking[,]" and thus require compensation.[562] There are three recognized factors used in determining whether a governmental regulation has gone too far.[563] The first factor considered is the "the nature of the governmental action."[564] Thus, compensation is automatically required if there is a physical invasion or permanent

557. TIENHAARA, *supra* note 329, at 128 (citing Fortier & Drymer, *supra* note 531, at 314).

558. *Id.*

559. TIENHAARA, *supra* note 329, at 126 (citing Katharina A. Byrne, *Regulatory Expropriation and State Intent*, 38 CAN. Y.B. INT'L L. 89, 118 (2001)).

560. SORNARAJAH, *supra* note 12, at 375.

561. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

562. *Id.* at 415.

563. Loritz, *supra* note 4, at 542 (citing Wagner, *supra* note 4, at 503).

564. Loritz, *supra* note 4, at 542 (citing *Pennsylvania Coal Co.*, 260 U.S at 643).

appropriation of the property.[565] However, lesser types of interferences, including regulation, normally do not necessitate the payment of compensation.[566]

Secondly, "the severity of the ... economic impact" [567] of the governmental action is considered. A regulation is only considered expropriatory if it "denies all economically beneficial or productive use of the property."[568] A mere diminution in the value of the property is held to be insufficient to be regarded as a taking.[569]

Finally, the degree as to how the regulation interferes with the person's reasonable investment-backed options is examined.[570] It is the Court's view that a property already subject to extensive regulation has "no reasonable expectation that new or changed regulations will not affect the property's value."[571]

From the foregoing discussions, it can be deduced that tribunals do not merely rely on a single factor in determining the existence of a taking. They usually employ a lot of methods, and give focus on several factors — all depending on the unique circumstances of each case. Finally, the lack of common and uniform standard is also evident in the way it decides claims involving environmental measures, as seen in the subsequent section.

565. Loritz, *supra* note 4, at 542 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

566. Loritz, *supra* note 4, at 542.

567. *Id.* (citing Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for South Cal., 508 U.S. 602, 645 (1993)).

568. Loritz, *supra* note 4, at 542 (citing *Lucas*, 505 U.S. at 1015-19).

569. Loritz, *supra* note 4, at 542 (citing *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 645).

570. *Id.*

571. Loritz, *supra* note 4, at 542-43 (citing *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 645).

VI. THE DOMAIN OF ENVIRONMENTAL EXPROPRIATION IN THE CONTEXT OF INTERNATIONAL ARBITRAL AWARDS

Earth provides enough to satisfy every man's needs, but not every man's greed.

— Mahatma Gandhi[572]

Currently, environmental regulation poses one of the most difficult dilemmas in setting a proper delimitation between compensable expropriatory and legitimate regulatory measures.[573] As such, tribunals are faced with the predicament of either upholding the regulation as within the bounds of a State's police power, or finding the measure as expropriatory, therefore requiring the payment of compensation to the aggrieved investor. This ultimately results in the clash of two regimes of protection under international law — the traditional norms of protection granted to foreign investors, and the increasingly recognized domain of environmental protection.

This Section finally addresses this emerging conflict. This involves an analysis of the standards that the tribunals used in determining the regulatory or expropriatory character of the assailed governmental action. But before these cases, the NAFTA — particularly its environmental provisions — will be first examined, given that majority of State-investor claims involving the issue of environmental expropriation was decided under it.

A. The Environmental Agenda in the NAFTA

Among the various IIAs, the NAFTA can be considered as the most developed system that intertwines investments with the environment. As such, it has been regarded as "one of the most environmentally sensitive trade and investment agreements."[574] In fact, its preamble commits the State parties to attain the treaty's goals "in a manner consistent with environmental protection and conservation;" it calls on States to "[promote] sustainable development" and to "[strengthen] the development and enforcement of environmental laws and regulations."[575]

572. 10 PYARELAL NAYYAR, MAHATMA GANDHI: THE LAST PHASE, at 552 (1958).

573. Reinisch, *supra* note 21, at 436.

574. Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. ENVTL. L. 207, 216 (2006).

575. NAFTA, *supra* note 46, pmbl.

In particular, Chapter 11 of the NAFTA has spawned many cases arising from claims of expropriation due to enactment of environmental regulations. Basically, Chapter 11 pertains to the substantive protections given to foreign investment, like basic nondiscrimination trade principles, international norms for treatment of investors, due process, and a guarantee of compensation for any government expropriation of foreign investment.[576] It also prescribes procedural safeguards, specifically a system of binding arbitration for resolving any dispute between an investor and a State party.[577] The cases under Chapter 11 mostly interpose the application of its famed Article 1110, which is the provision regarding expropriation —

> Article 1110. Expropriation and Compensation
>
> (1) No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment [ ], except—
>
> (a) *for a public purpose*;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and [A]rticle 1105 (1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 to 6.
>
> (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.[578]

A reading of the provision would reveal that expropriation is not *per se* prohibited. What it forbids is a direct or indirect nationalization or

576. Sanford E. Gaines, NAFTA Chapter 11 as a Challenge to Environmental Law Making: One View from the United States, *available at* www.envireform.utoronto.ca/pdf/Conference/Gaines.pdf (last accessed Jan. 26, 2018).

577. *Id.*

578. NAFTA, *supra* note 46, art. 1110 (emphasis supplied).

expropriation that does not comply with the requirements stated therein.[579] This protection is considered broad in scope, as "it takes aim at government behavior beyond traditional expropriatory acts such as governmental occupation of an investor's property, or forced transfer of title."[580] The protection granted by this provision covers "any law, regulation, procedure, requirement[,] or practice."[581] To understand the cases, this must be read in relation to the NAFTA's Article 1114, entitled "Environmental Measures" —

> Article 1114. Environmental Measures
>
> (1) Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining[,] or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety[,] or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion[,] or retention in its territory of an investment of the investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[582]

Article 1114 is touted as one of NAFTA's "green" provisions and was "included as an explicit reservation of a sovereign right, already implicit, for laws or policies of general application controlling or regulating or restricting investments so as to preserve or protect the environment."[583] The phrase "otherwise consistent with this Chapter" in the said article is of critical importance, given that Chapter 11 case law involves claims that the government environmental measures were inconsistent with the substantive investor protection provisions of the NAFTA.[584] Furthermore, Article 2101

579. *See* NAFTA, *supra* note 46, art. 1110.

580. Marlles, *supra* note 336, at 279.

581. *Id.* at 279-80 (citing NAFTA, *supra* note 46, art. 201 (1)).

582. NAFTA, *supra* note 46, art. 1114.

583. Gaines, *supra* note 576, at 4 (citing NAFTA, *supra* note 46, art. 1114).

584. *Id.*

of the NAFTA incorporates the general exceptions to the General Agreement on Tariffs and Trades (GATT) —

> Article XX. General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures —
>
> ...
>
> (2) necessary to protect human, animal[,] or plant life or health;
>
> ...
>
> (7) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[585]

The NAFTA itself provides that this exception includes environmental measures under Article XX (b), and both living and non-living natural resources fall within Article XX (g).[586] In addition to this, the State parties also adopted the North American Agreement on Environmental Cooperation (NAAEC),[587] which is known as the "environmental side agreement" to NAFTA.[588] Its purpose was to "foster the protection and improvement of the environment ... for the well-being of present and future generations."[589]

Taken together, these provisions prove that "any interpretation or application of [the] NAFTA's investment provisions must take into account the importance that the Parties placed on preventing the agreement from interfering with environmental protection."[590] However, the divergent ways

585. General Agreement on Tariffs and Trade, art. XX (b) & (g), Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

586. *See* NAFTA, *supra* note 46, art. 2101 (1).

587. North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, U.S.-Can.-Mex., Sep. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

588. Wagner, *supra* note 4, at 479 (citing NAAEC, *supra* note 587).

589. Wagner, *supra* note 4, at 479-80 (citing NAAEC, *supra* note 587, art. 1).

590. Wagner, *supra* note 4, at 480.

through which the tribunals decide the NAFTA Chapter 11 cases would reveal that "[n]o attempt was made in ... [the] NAFTA itself[ ] to address directly the problem of how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and 'regulatory takings' requiring compensation."[591] Thus, it has been left to the tribunals to decide which regulatory actions should be categorized as expropriation.[592]

B. Investment Claims Involving Environmental Expropriation

The following discussion outlines the different investor-State disputes under the NAFTA's Chapter 11 involving the conflict between investment protection and environmental protection. To provide a wider perspective on the conflict between the two, some cases from other IIAs are also discussed. It is important to note that the diverging views and the absence of a clear pattern may be due to the fact that decisions under Chapter 11 of the NAFTA have no *stare decisis*.[593] However, in deciding claims, a NAFTA arbitral tribunal may seek recourse in past NAFTA decisions, or by other tribunals,[594] or according to principles of international law.[595]

The cases below only cover those that have surpassed the jurisdictional phase, and where a final award based on the merits was issued. Notably, there are other expropriation claims involving environmental measures which were eventually settled by the State and the investor.[596] These were

591 Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 54 (2003).

592. *Id.* at 55.

593. Howard Mann & Julie A. Soloway, Untangling the Expropriation and Regulation Relationship: Is There a Way Forward? (Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade on March 31, 2002) at 4, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/untangle-e.pdf (last accessed Jan. 26, 2018).

594. *Id.*

595. NAFTA, *supra* note 46, art. 1131 (1).

596. *See, e.g.*, Ethyl Corporation v. Government of Canada, Award on Jurisdiction, 38 I.L.M. 708 (June 24, 1998) & Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru, Award on Jurisdiction, ICSID Case No. ARB/03/4 (Feb. 7, 2005).

not considered in the overall analysis. The cases are grouped into two classifications: (1) cases which ruled in favor of the investor, thereby giving rise to a claim of expropriation and (2) cases which ruled in favor of the State, thereby upholding the enactment of the environmental measure questioned.

1. Ruled in favor of expropriation

Despite the seeming bias of the NAFTA in favor of environmental protection, some publicists have posited that Article 1110 itself is an express and strong guarantee against expropriation. Howard Mann and Konrad von Moltke, prominent champions of sustainable development, argue that "the article provides no exceptions for 'police powers' of the States, requiring an expropriating host State to pay compensation to foreign investors regardless of whether a regulatory expropriation occurred as the result of a regulation protecting 'the environment, human health, public welfare[,] or community interests.'"[597] Despite this criticism, only one NAFTA arbitral case has resulted in an indirect expropriation award, *Metalclad Corporation*, decided in the NAFTA's early years.[598] This case, together with other arbitral cases, which trumped the environmental regulation in favor of investor protection, are discussed below.

a. Metalclad Corporation v. United Mexican States

The *Metalclad Corporation* case is considered to be the first NAFTA Chapter 11 dispute to be decided on the merits, and possibly the most controversial of any investor-State dispute ever concluded.[599] The dispute, which was decided under the ICSID, remains to be the strongest pro-investor interpretation of Article 1110 that any NAFTA tribunal has rendered.[600] The

597. Nathanson, *supra* note 408, at 881 (citing Howard Mann & Konrad von Moltke, Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11 (Background Paper to the ILSD Tri-National Policy Workshops Mexico City: March 13; Ottawa March 18; Washington: April 11) at 15, *available at* www.iisd.org/pdf/2003/investment_ilsd_background_en.pdf (last accessed Jan. 26, 2018)).

598. Nathanson, *supra* note 408, at 882.

599. TIENHAARA, *supra* note 329, at 193.

600. *See generally* Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 19, 37-41 (2002).

case revolves around the construction of a hazardous-waste landfill on a land that Metalclad purchased from the Mexican state of San Luis Potosi.[601] However, the American corporation was denied the needed municipal construction permits because of environmental concerns and opposition from the community.[602] Thus, the investor filed a claim against Mexico, alleging violations of substantive investment protections, including expropriation.[603]

i. Facts

In 1993, Ecosistemas Nacionales, a Mexican corporation owned by a subsidiary of the US-based Metalclad Corporation, purchased a Mexican company which had existing permits from Mexico's environmental authority, the National Ecological Institute to construct and operate a hazardous waste transfer station in the municipality of Guadalcazar, located in the state of San Luis Potosi.[604] Metalclad planned to convert the facility into a toxic waste processing plant and landfill, leading it to spend over $22 million for such.[605] Before the project commenced, Metalclad was told that engaging in such business in Mexico is highly regulated, given the facility's known history of water contamination.[606] The federal government granted the corporation the necessary permits, assuring it that the federal government, and not the municipal government, had the sole authority to issue the said permits.[607] Still, the federal government advised the company to acquire a permit from the locality in order to foster good relations.[608] Notably, during the arbitration phase, it was claimed by the federal government that a municipal permit was indeed necessary.[609]

---

601. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 2 & 28.

602. *Id.* ¶ 50.

603. *Id.* ¶ 6.

604. *Id.* ¶¶ 1 & 2.

605. Wagner, *supra* note 4, at 488 (citing Joel Millman, *Metalclad Suit Is First Against Mexico Under NAFTA Foreign Investment Rules*, WALL ST. J., Oct. 14, 1997, at A2).

606. Wagner, *supra* note 4, at 488.

607. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 33 & 41.

608. *Id.* ¶ 41.

609. *Id.*

However, the application for a municipal permit was denied by the Governor of San Luis Potosi, because of the environmental hazard posed by the facility to the surrounding communities.[610] The municipality then received an injunction prohibiting Metalclad from further operating the waste facility, which served as the breaking point for the corporation to file arbitration proceedings.[611]

Metalclad formally filed a claim with the ICSID against the Mexican government alleging violations of NAFTA Chapter 11.[612] The suit requested for a $90 million in compensation, based on a claim of expropriation, a breach of the minimum standard/fair and equitable treatment, a breach of the national treatment, a breach of most-favored-nation treatment, and use of prohibited performance requirements.[613] Metalclad alleged that the taking was not for a public purpose, but rather, one that has been for a "political purpose" and for "personal gain."[614] It also decried the taking for being discriminatory and without regard for due process.[615] Mexico disputed the claims of Metalclad, anchoring on its position that it was always clear that the company would have to acquire all the necessary permits and local approval for the project.[616] Mexico argued that "[a] finding of expropriation ... would lead to an unprecedented result[, considering that the investor knew of the risks of doing business] in a highly regulated filed, where public opposition to its project was known[.]"[617]

ii. Outcome

In its controversial award dated 30 August 2000, the Tribunal ruled that expropriation had occurred, and ordered Mexico to pay compensation based

610. Wagner, *supra* note 4, at 489.

611. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 56 & 58.

612. *Id.* ¶ 1.

613. TIENHAARA, *supra* note 329, at 195-96.

614. *Id.* at 196.

615. *Id.* at 196-97.

616. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 1 & 53.

617. TIENHAARA, *supra* note 329, at 198 (citing *Metalclad Corporation*, Respondent's Counter-Memorial, ¶ 905 (May 22, 1998), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw7809.pdf (last accessed Jan. 26, 2018).

on the fair market value of Metalclad's investment in the project.[618] This in anchored on findings that the municipality is devoid of any authority to issue permits; that Metalclad relied on the representations by the federal government that a municipal permit is no longer needed; and that the lack of timeliness and orderliness in the municipality's processing of the permit constituted an "indirect expropriation."[619]

It ruled that there was a violation of Article 1105 pertaining to the observance of minimum standards and fair and equitable treatment, in view of the absence of "transparency" in the treatment of the investor.[620] Accordingly, transparency denotes connotes that "all relevant legal requirements for the purpose of initiating, completing[,] and successfully operating investments made, or intended to be made ... should be capable of being readily known to all affected investors of another Party[, such that] [t]here should be no room for doubt or uncertainty on such matters."[621] The failure on the part of Mexico to properly communicate the accurate rule as to the requirement of a municipal permit amounted to violation of the transparency required under the NAFTA.[622]

This violation of Article 1105 in connection with transparency has a direct relation to the Tribunal's finding of expropriation.[623] However, it must be noted that the Tribunal did not give the Ecological Decree a "controlling importance" in the determination of such, implying that the standards for expropriation were already present.[624] In determining the existence of indirect expropriation, the tribunal described the procedure it followed —

> [E]xpropriation under [the] NAFTA includes not only open, deliberate[,] and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property[,] which has the effect of depriving the owner, in whole or in significant part, of the use or

618. *Id.* ¶¶ 104 & 122.

619. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 106 & 107.

620. *Id.* ¶¶ 99-101.

621. *Id.* ¶ 76.

622. *Id.* ¶¶ 88 & 101.

623. TIENHAARA, *supra* note 329, at 199.

624. *Metalclad Corporation*, 5 ICSID Rep., ¶ 69.

> reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[625]

Justin R. Marlles, an expert in international investment law and policy, broke down the elements of this definition on three interrelated factors: "(1) interference with use[;] (2) interference with reasonable investor expectations[;] and (3) diminuition in value of the investment."[626]

Mexico questioned the judgment in the Supreme Court of British Columbia, the seat of the arbitration, alleging that the Tribunal acted in excess of its jurisdiction by applying transparency provisions, which are beyond the scope of the NAFTA's investment chapter.[627] The Court sustained Mexico's position, but concurred with the Tribunal's findings that expropriation indeed occurred.[628] Mexico and Metalclad eventually reached a settlement for an undisclosed amount.[629]

iii. Analysis

The *Metalclad Corporation* decision is considered controversial for a variety of reasons, including "the size of the award (almost $17 million) [and] the requirement of compensation [regardless of] the legitimate environmental regulation" which prevented the operation of the waste facility,[630]and the complete reliance on the sole-effects doctrine.[631] As stated, the finding of expropriation was interpreted in light of three distinct, yet inseparable elements. As regards the first element, which is interference with use, Marlles explained that —

> According to the tribunal, the actions of San Louis Potosi 'barr[ed] forever the operation of the landfill.' The tribunal's emphasis on Metalclad's use of the investment, rather than on the traditional question of control of the

625. *Id.* ¶ 103.

626. Marlles, *supra* note 336, at 281 (emphasis omitted).

627. TIENHAARA, *supra* note 329, at 200.

628. *Id.* at 200-01.

629. *Id.* at 201.

630. Nathanson, *supra* note 408, at 883 (citing Gonzalo Guzman-Carrasco, *Indirect Expropriation in U.S. Free Trade Agreements: From The U.S. Trade Act of 2002 and Beyond*, 4 INT'L L. — REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 273, 283-84)).

631. Nathanson, *supra* note 408, at 883 (citing Mann & von Moltke, *supra* note 597, at 17).

> investment (which relates back to notions of physical possession), is an essential departure from older ideas of expropriation. It is important at this juncture to distinguish 'use' of an investment and 'control' of an investment as two separate concepts. 'Control' is '[t]he direct or indirect power to direct the management and policies of a person or entity' and is closely tied to the ownership, possession, and holding title to a physical asset. The question of use is a different matter altogether, as 'use' is the 'application or enjoyment of something.' A foreign investor may control his or her asset but may not have a legal right, due to government regulation, to put it to its intended use ... Tribunals relying on the use concept of expropriation are more likely to find government action to be regulatory expropriation than tribunals relying on the control concept of expropriation, although the two concepts are not mutually exclusive.[632]

Based on this explanation, it follows that a regulation that interferes with the use of investment may be tantamount to a regulatory taking; but a regulation that interferes with the control of such alien property may not be qualified to be taken as expropriation. Hence, interference with use is considered to be more extreme than that of control. Thus, if an environmental regulation results in the interference with the use of the investment, a prima facie finding of taking may rise, provided that the two other conditions are met.

The second element, interference with reasonable investor expectations, could be traced to the Tribunal findings that there was total deprivation in the value of Metalclad's investment.[633] The primary use upon which the company based its decision to invest was inexistent anymore following the denial of the permit and the subsequent land conversion order of the governor. Furthermore, the Tribunal placed emphasis on the representations made by the federal government, since a huge part of the expectations of the investor could be attributed to their statements, which they led Metalclad to believe.[634]

Finally, the diminution in the value of the investment is implied in the Tribunal's statement that the actions undertaken by the Mexican authorities "negate[d] the possibility of any meaningful return on Metalclad's investment," leading to the conclusion that the corporation "completely lost

---

632. Marlles, *supra* note 336, at 281-82 (citing *Metalclad Corporation*, 5 ICSID Rep., ¶ 109 & BLACK'S LAW DICTIONARY 353 & 1577 (8th ed. 2004)) (emphasis omitted).

633. Marlles, *supra* note 336, at 282.

634. *Id.*

its investment."[635] Nevertheless, the Tribunal was uncertain "as to whether a complete deprivation of value was a necessary condition of regulatory expropriation, or was simply a sufficient condition."[636]

b. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States

The *Tecmed* dispute is similar in many respects to *Metalclad Corporation*, especially as to the operation of a hazardous waste facility.[637] However, it was not brought under the NAFTA, but rather under a BIT between Spain and Mexico (Spain-Mexico BIT). [638] Tecmed lodged a claim of expropriation, discrimination, and a violation of treatment standards against Mexico after it was denied a renewal of its operating permit. [639] The Tribunal ruled in favor of Tecmed and ordered Mexico to compensate the investor.[640]

i. Facts

In 1996, the Municipality of Hermosillo auctioned a hazardous waste landfill located in Sonora, Mexico.[641] The bid was eventually won by Técnicas Medioambientales, S.A. de C.V. (Tecmed), a company incorporated under Mexican law, but owned by a Spanish parent corporation, with its subsidiary, Cyntrar, managing the operations of the landfill.[642] To reflect the change in ownership, Tecmed requested for a new license, which was supported by the municipality.[643] The license was granted, but instead of changing the name, the license issued was not indefinite unlike before, and had to be renewed annually.[644]

635. *Id.* at 282-83 (citing *Metalclad Corporation*, 5 ICSID Rep., ¶ 113).

636. Marlles, *supra* note 336, at 283.

637. TIENHAARA, *supra* note 329, at 201.

638. Agreement between the Spanish Kingdom and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Spain-Mex., June 22, 1995, IC-BT 754.

639. *See Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶¶ 35-51.

640. *Id.* ¶ 201.

641. *Id.* ¶ 35.

642. *Id.* ¶¶ 35, 75, & 150.

643. *Id.* ¶ 38.

644. *Id.*

In November 1998, a Resolution was issued denying Cytrar's application for a renewal of its permit and ordering a submission of a closure program for the landfill.[645] The Resolution cited the following grounds: (1) the disposal of unauthorized biological and infectious wastes; (2) the volume of waste at the site already exceeded the prescribed limits; and (3) the landfill became a transfer center, designed for storing hazardous wastes to be disposed outside the landfill.[646]

Because of the denial of permit, Tecmed filed with the ICSID a request for arbitration based on the Spain-Mexico BIT.[647] Tecmed alleged violations of fair and equitable treatment, most-favored-nation treatment, national treatment, and expropriation.[648] It sought damages, compensation for the harm caused on its reputation, and the granting of permits to operate the landfill until the end of its useful life.[649] Regarding discrimination, Tecmed alleged that its bid on the landfill was not limited to the land and the site's physical facilities, but also intangible assets like that of the existing operation permits.[650] Mexico disputed this, saying that the bid award does not include intangible assets like permits and licenses, as it was clear to the company that it needs to procure these authorizations needed to operate the landfill.[651] Tecmed argued that the non-renewal amounted to violations of treatment standards, arguing that Mexico yielded to domestic pressure, and that another foreign investor had been granted a permit of unlimited duration for a similar landfill.[652]

ii. Outcome

The Tribunal issued its Award on 29 May 2003, with a finding that Mexico violated the expropriation and fair and equitable treatment standards embodied in the Spain-Mexico BIT.[653] The tribunal adopted a two-part test

645. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 99.

646. *Id.*

647. TIENHAARA, *supra* note 329, at 203.

648. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 93.

649. *Id.* ¶ 184.

650. *Id.* ¶ 40.

651. *Id.* ¶ 47.

652. *Id.* ¶ 43.

653. TIENHAARA, *supra* note 329, at 206.

in determining the existence of expropriation.[654] First, it examined whether Tecmed had been "radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto [—] such as the income or benefits related to the Landfill or its exploitation [—] had ceased to exist."[655] In determining the existence of expropriation, the tribunal observed the measure's economic effects on the investor's property —

> [T]he measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if ... the economic value of the use, enjoyment[,] or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.[656]

Thus, this first step of the Tribunal seemed to be an endorsement of the sole-effects test. This may be implied when it stated that "the effects of the actions or behavior under analysis are not irrelevant to determine whether the action or behavior is an expropriation,"[657] and that "[t]he government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures[.]"[658]

Second, the Tribunal went beyond the effects and analyzed the purpose of the measure. [659] It anchored its explanation on the doctrine of proportionality — "There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[660] The Tribunal found such factor lacking, as it ruled that the Resolution was not enacted in furtherance of environmental protection, but rather, political expediency resulting from immense public pressure.[661] It cited the lack of evidence pointing to the hazardous environmental effects caused by the waste site.[662]

---

654. *Id.*

655. *Id.* (citing *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 115).

656. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 116.

657. *Id.* ¶ 115.

658. *Id.* ¶ 116.

659. TIENHAARA, *supra* note 329, at 207.

660. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep.. 134, ¶ 122.

661. *Id.* ¶ 127.

662. *Id.* ¶ 144.

The Tribunal equated the violation of the fair and equitable treatment standard to "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[663] It emphasized the need for State actions to be free from ambiguity or confusion, and the importance of transparency.[664] The Tribunal dismissed the claims of violations of a "guarantee of full protection and security" and of national treatment on the lack of evidence.[665] It awarded monetary damages to Tecmed, but not the restitution of the investor's permit to operate.[666]

iii. Analysis

In ruling the presence of expropriation, the *Tecmed* Tribunal heavily relied on the loss of economic value of the investment, through the use of the sole-effects test. This was also the doctrine relied upon by the *Metalclad Corporation* Tribunal in determining the existence of expropriation, thus strengthening the foundations of its use, at least in the NAFTA debacle. The second test used, which is proportionality, also seems to affirm the use of the standard earlier used in investment claims under the ECHR.

While the Tribunal addressed the exercise of a State's police powers, it did not subscribe to its rationale. It ratiocinated that, notwithstanding the legitimate compliance of a measure with domestic law, it does not necessarily follow that the measure is in conformity with international law.[667] The Tribunal even rejected the argument that measures involving environmental protection will merit a justification for the regulatory action —

> [W]e find no principle stating that regulatory administrative actions are [per se] excluded from the scope of the Agreement, even if they are beneficial to society as a whole — *such as environmental protection* —[ ] particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or

663. *Id.* ¶ 154.

664. *Id.*

665. *Id.*¶ 177.

666. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 197.

667. *Id.* ¶¶ 119 & 120.

> commercial use of its investment without receiving any compensation whatsoever.[668]

This express rejection of the environmental protection reasoning as a justification for expropriation is stated in more explicit terms in the next case considered, *Santa Elena.*

c. Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica

Compared to *Metalclad Corporation* and *Tecmed*, the *Santa Elena* dispute is different such that the claim involved was a *direct* expropriation of the foreign investor's property for the purpose of environmental protection.[669] The issues revolve around the appropriate level of compensation and the factors to be considered in computing such.[670] The ICSID Tribunal eventually ruled out the public purpose element in the calculation of the compensation to be paid by Costa Rica.[671]

i. Facts

Compañia del Desarollo de Santa Elena (CDSE), a company where majority of the shareholders are American citizens, owns a property located in the Costa Rican province of Guanacaste.[672] It intended to develop large portions of the property as a tourist resort and residential community.[673] However, in 1978, the Costa Rican government issued an expropriation decree covering the said property in order to expand a national park located adjacent to CDSE's property, for the purpose of preserving the biodiversity therein.[674] CDSE did not contest the motive behind the expropriation, but objected to the amount of compensation to be paid. Costa Rica initially offered a sum of $1.9 million, but was then raised to $6.4 million after CDSE vehemently objected to the low amount.[675] The investor still rejected the revision; thus,

668. *Id.* ¶ 121 (emphasis supplied).

669. TIENHAARA, *supra* note 329, at 189.

670. *Id.*

671. *Id.* at 192-93 (citing *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶¶ 71-72).

672. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶¶ 15-16.

673. *Id.* ¶ 16.

674. *Id.* ¶ 17-18.

675. *Id.* ¶¶ 17 & 19.

a long and protracted domestic court battle ensued.[676] The dispute reached the Costa Rican Supreme Court, but the company lost every battle.[677] Thus, it filed a Request for Arbitration with the ICSID.[678]

The claim does not concern the wisdom behind the expropriation, but rather the appropriate amount of compensation. The parties agreed that this should be based on the property's fair market value, but there was a disagreement as to which law should apply in the computation of such.[679] CDSE wants to reckon it at the time the compensation is paid, based on Costa Rican law; while the government relied on international law standards, which is the time when the property is expropriated.[680] Costa Rica also posited that if the tribunal eventually ruled on the applicability of Costa Rican law, then the environmental legislation beginning 1978 "would significantly restrict, if not prohibit outright, the commercial development of Santa Elena."[681] Costa Rica also invoked its international obligations to protect the environment, contained in several treaties and conventions.[682] It argued that setting a steep compensation would discourage States, particularly developing nations, from adopting environmental objectives.[683]

ii. Outcome

In its Final Award dated 17 February 2000, the Tribunal sustained the view of the Costa Rican government, saying that expropriation occurred on the day the expropriation decree took effect.[684] It ruled that "[t]he expropriated property is to be evaluated as of the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless."[685] It was at this point that the investor's ownership was blighted, such that the property could no longer be used for the

676. TIENHAARA, *supra* note 329, at 190.

677. *Id.*

678. *Id.* ¶ 16.

679. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 4.

680. *Id.* ¶¶ 35 & 37.

681. *Id.* ¶ 35.

682. TIENHAARA, *supra* note 329, at 191-92.

683. *Id.* at 192.

684. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 77.

685. *Id.* ¶ 78.

developmental purpose for which it was originally acquired.[686] The Tribunal calculated the value of the property midway of the values set by the opposing parties, as it ordered Costa Rican to pay the investor an amount of $16 million.[687]

Despite favoring the position of Costa Rica as to when to reckon the setting of the property's fair market value, the Tribunal did not consider the environmental grounds invoked by the government to lower the amount awarded. It said that

> [w]hile an expropriation or taking for environmental reasons may be classified as a taking for public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. *The international source of the obligation to protect the environment makes no difference.*[688]

It was also the *Santa Elena* Tribunal that pronounced the oft-cited reasoning used as a basis for saying that environmental protection — despite its nobility and magnanimity — does not qualify as sufficient justification to merit non-compensation in the event of expropriation of any property —

> Expropriatory environmental measures [—] no matter how laudable and beneficial to society as a whole [—] are, in this respect, similar to any other expropriatory measures that a [S]tate may take in order to implement its policies [—] *where property is expropriated, even for environmental purposes, whether domestic or international, the [S]tate's obligation to pay compensation remains.*[689]

2. Ruled in favor of the environmental regulation

Most of the recent NAFTA cases seem to follow a pattern sustaining the validity of the environmental regulation and ruling out the occurrence of an expropriation. However, the standards used by the tribunals vary, depending on the particular circumstances of each case.

a. S.D. Myers, Inc. v. Government of Canada

686. *Id.* ¶ 81.

687. *Id.* ¶ 107.

688. *Id.* ¶ 71 (emphasis supplied).

689. *Id.* ¶ 72 (emphasis supplied).

The *S.D. Myers, Inc.* case was decided in the same year as *Metalclad Corporation,* and although both cases pertained to regulatory expropriation in the context of an environmental measure, the two yielded opposing results. Here, S.D. Myers, a corporation based in the US engaged in the disposal of polychlorinated biphenyl (PCB) wastes, filed a claim against Canada due to losses arising from a 16-month Canadian ban on the export of PCBs to the US.[690] The UNCITRAL Tribunal ruled out the existence of indirect expropriation, but awarded compensation to the company on the basis of national treatment and minimum standard treatment violations.[691]

i. Facts

PCBs are hazardous and toxic substances that have been the subject of intense regulation in Canada and US since the 1970s.[692] In 1990, Canada enacted legislation which effectively banned the export of PCB to other States, other than the US.[693] Exports of such to the US were allowed only with the prior approval of the US Environmental Protection Agency (EPA), and on the condition that such will not result in unreasonable risk to human health or to the environment.[694]

In the early 1990s, S.D. Myers, Inc. began concerted lobbying efforts to acquire permission from the US EPA to import PCBs and PCB waste from Canada.[695] It was only in October 1995 that the company became successful in its efforts and was granted "enforcement discretion" to import the substance.[696] However on November 1995, the Canadian Minister of the Environment signed an Interim Order that amended its PCB export regulations, which ultimately led to banning the export of PCBs and PCB waste from Canada.[697] The purpose of the Order was "to ensure that Canadian PCB Wastes are managed in an environmentally sound manner in Canada and to prevent any possible significant danger to the environment or

690. *S.D. Myers, Inc.*, 40 I.L.M., ¶¶ 1, 93, 127, & 144.

691. *Id.* ¶¶ 130, 134, 288, & 318.

692. TIENHAARA, *supra* note 329, at 209.

693. *Id.* at 210 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 100).

694. TIENHAARA, *supra* note 329, at 210.

695. *S.D. Myers, Inc.*, 40 I.L.M., ¶¶ 113-14.

696. *Id.* ¶ 118.

697. TIENHAARA, *supra* note 329, at 212 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 123).

to human life or health."[698] The Interim Order was then converted into a Final Order, with the Minister saying that the ban would remain in place until Canada was assured that the PCB wastes exported to the US would be treated appropriately.[699] Canada's ban was also influenced by its ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. [700] The US also signed the Convention, but was yet to ratify it.[701]

In March 1996, the US issued new regulations pertaining to the import of PCB wastes, and "[a]fter reviewing the regulations, Canada rescinded its ban," thereby allowing again the "export[ ] of PCB wastes 'for treatment and destruction but not for landfilling,' [starting] in February 1997."[702] Unfortunately, the border was closed again due to a case filed by an environmental non-governmental organization in a US Court of Appeals, which then overturned the new import regulations.[703] It held that what should be followed is an application for individual exemptions, on a case-to-case basis.[704]

S.D. Myers, Inc. filed a notice of arbitration under NAFTA Chapter 11, claiming $20 million in damages, claiming violations of national treatment, minimum standard, performance requirements, and expropriation.[705] The claim was anchored mostly on the Interim Order that Canada issued banning PCB exports.[706] With regard to national treatment, S.D. Myers argued that the Interim Order discriminated against US waste disposal operators and favored domestic companies, specifically its Canadian competitor, Chem-Security.[707] Canada disagreed, interposing that the ban merely put in place a

698. *Id.*

699. TIENHAARA, *supra* note 329, at 212

700. *See* Basel Convention, *supra* note 66.

701. TIENHAARA, *supra* note 329, at 210.

702. Wagner, *supra* note 4, at 499.

703. *See* Sierra Club v. United States Environmental Protection Agency, 118 F.3d 1324, 1327 (1997) (U.S.).

704. *Id.*

705. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 12.

706. *Id.* ¶ 130.

707. TIENHAARA, *supra* note 329, at 213 (citing *S.D. Myers, Inc.*, Statement of Claim, at 11 (Oct. 30, 1998), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8491.pdf (last accessed Jan. 26, 2018)).

uniform regulatory regime under which all companies were treated equally.[708] As regards minimum standard, S.D. Myers claimed that the Interim Order was promulgated in a discriminatory and unfair manner that partakes of denial of justice, since there were no consultations made with the company or with the US government.[709] Canada countered that given the urgency of the situation, it had to act in haste, and neither does it have an obligation to conduct a consultation.[710]

The claim on a violation of performance requirements gave rise to the environmental measure argument with S.D. Myers, Inc. claiming that the Interim Order essentially required it to dispose of PCB waste in Canada which resulted in a performance requirement for PCB disposal operators to accord preference to Canadian goods and services.[711] Canada disputed this, arguing that an export ban is not among the prohibited performance requirements under the NAFTA, and that, in any event, the exception would apply since the measure is vital to protect human life or health, and the environment.[712] Thus, S.D. Myers, Inc. interposed that Canada had indirectly expropriated its investment without paying just compensation.[713] Canada rebutted this by saying that, notwithstanding the Interim Order, S.D. Myers' subsidiary in Canada had continued its operations, and that no evidence was adduced showing any loss or damage on the part of the claimant.[714]

---

708. TIENHAARA, *supra* note 329, at 213 (citing *S.D. Myers, Inc.*, Respondent's Counter-Memorial, at 81 (Oct. 5, 1999), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8495.pdf (last accessed Jan. 26, 2018)).

709. TIENHAARA, *supra* note 329, at 213-14 (citing *S.D. Myers, Inc.*, Memorial of the Investor (Initial Phase), at 51-57 (July 20, 1999), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8494.pdf (last accessed Jan. 26, 2018)).

710. TIENHAARA, *supra* note 329, at 214 (citing *S.D. Myers, Inc.*, Respondent's Counter-Memorial, *supra* note 708, at 89-90).

711. TIENHAARA, *supra* note 329, at 214 (citing *S.D. Myers, Inc.*, Memorial of the Investor (Initial Phase), *supra* note 709, at 62-66).

712. TIENHAARA, *supra* note 329, at 214.

713. TIENHAARA, *supra* note 329, at 215 (citing *S.D. Myers, Inc.*, Memorial of the Investor (Initial Phase), *supra* note 709, at 74-75).

714. TIENHAARA, *supra* note 329, at 215 (citing *S.D. Myers, Inc.*, Respondent's Counter-Memorial, *supra* note 708, at 105).

ii. Outcome

In its First Partial Award the tribunal found that Canada breached the provisions on national treatment and minimum standards, but not the prohibitions on expropriation and performance requirements.[715] It classified the Interim Order and the Final Order as "regulatory acts," and as such, distinct from the concept of expropriation. [716] The dismissal of the expropriation claim was based on its pronouncement that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility."[717]

This statement was a "broad departure" from the ruling in *Metalclad Corporation*, which held that expropriatory acts under the NAFTA included "incidental interference" with the use of an investment which diminishes its economic benefit.[718] The *Metalclad Corporation* award was issued three months prior to that of the *S.D. Myers, Inc.* case. One key factor relied upon by the tribunal in ruling out expropriation was the "temporary" nature of the ban. It emphasized the element of the *length of time* that involves expropriation claims, to wit —

> [A]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.[719]

With regard to the environmental justification used for the enactment of the PCB measure, the tribunal held that there was "no legitimate environmental reason for introducing the ban." [720] It noted that the environmental objective of ensuring constant domestic capacity to dispose of PCBs and PCB wastes was legitimate, but "could have been achieved by other measures."[721] The tribunal also discounted Canada's invocation of the

715. *See S.D. Myers, Inc.*, 40 I.L.M., ¶¶ 322-323.

716. *Id.* ¶ 281.

717. *Id.*

718. Marlles, *supra* note 336, at 284 (citing *Metalclad Corporation*, 5 ICSID Rep., ¶ 103).

719. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 283.

720. TIENHAARA, *supra* note 329, at 216 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 195).

721. *Id.*

Basel Convention, saying that the cross-border movements of hazardous waste between the two States remain.[722] It ruled that "where a [S]tate can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is more consistent with open trade."[723] But despite this statement, the tribunal recognized the inherent right of States to enact environmental protection measures, acknowledging that "States have the right to establish high levels of environmental protection and they are not obliged to compromise their standards merely to satisfy the political or economic interests of other [S]tates."[724] Nevertheless, it advocated for a balance between environmental protection and economic development, as these two concepts "can and should be mutually exclusive."[725]

iii. Analysis

One importance of the decision in *S.D. Myers, Inc.* was the addition of a temporal element to the determination of the existence of indirect expropriation. Thus in order to be compensable, the deprivation must be of a lengthy duration.[726] Marlles explains that —

> [t]he [T]ribunal's discussion of expropriation in terms of 'the ability of an owner to make use' of an investment reinforces the *Metalclad* [*Corporation*] tribunal's definition of expropriation ('interference with the use of property'), particularly its focus in the context of regulatory expropriation on use of an investment over that of control. More importantly, the *S.D. Myers* [*Inc.*] award adds a temporal element to the use prong of the *Metalclad* [*Corporation*] test for expropriation when it states that '[i]n this case the closure of the border was temporary[.]'[727]

Thus, a regulation that merely affects investment for a limited time may not give rise to a claim of expropriation. The temporary deprivation must yield to the greater interests of the State in enacting the regulation.

---

722. TIENHAARA, *supra* note 329, at 216-17 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 215).

723. TIENHAARA, *supra* note 329, at 217 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 221) (emphasis omitted).

724. TIENHAARA, *supra* note 329, at 217 (citing *S.D. Myers, Inc.*, 40 I.L.M., ¶ 220).

725. *Id.*

726. Nathanson, *supra* note 408, at 884.

727. Marlles, *supra* note 336, at 285 (citing *Metalclad Corporation*, 5 ICSID Rep., ¶ 105) (emphases omitted).

Moreover, the Award strengthens the argument that regulatory takings are not compensable. It recognized the inherent right of States to enact measures within its jurisdiction. It also emphasized the importance of enacting environmental protection measures and that States need not lower their standards just to appease the foreign investors. It is optimistic in ruling that a balance between development and environment is possible.

b. Methanex Corporation v. United States of America

The *Methanex Corporation* award, decided under UNCITRAL rules, is regarded as an important chapter in clarifying the regulatory expropriation jurisprudence under the NAFTA.[728] Methanex Corporation is a Canada-based company producing methanol, which is used as an ingredient for the gasoline additive Methyl Tertiary Butyl Ether (MTBE).[729] Following a study that MTBE was a significant source of water pollution, the state of California banned its use.[730] A claim was filed against the US for expropriation and violations of treatment standards, which the tribunal dismissed.[731]

i. Facts

As early as the 1980s, studies were conducted in the US to identify ways to reformulate gasoline, through certain additives, as a means of improving air quality.[732] MTBE was the additive of choice in California and was thus imported by the state.[733] Subsequent technological improvements significantly reduced the emission of new cars, rendering the use of MTBEs obsolete.[734] It was also discovered that MTBEs posed environmental risks, specifically groundwater contamination.[735] In light of these findings, the Governor of California signed into law an order mandating the gradual

728. *See generally* Marlles, *supra* note 336, at 290-92.

729. *Methanex Corporation*, 44 I.L.M., ¶ I.1.

730. TIENHAARA, *supra* note 329, at 221.

731. *Id.*

732. *Methanex Corporation*, 44 I.L.M., ¶ III.A.4.

733. TIENHAARA, *supra* note 329, at 221-22.

734. TIENHAARA, *supra* note 329, at 222.

735. *Id.*

phase out of MTBE and commissioning of alternative gasoline additives like ethanol.[736]

Methanex Corporation, the majority supplier of methanol in California, filed an arbitration claim against the US, claiming that California failed to accord it a minimum standard of treatment, discriminated the company on the basis of nationality, and that the actions by the state constituted a measure tantamount to expropriation of Methanex's share in the California and US gasoline oxygenate markets. [737] It added that the measures contributed to the continued idling of one of its US plants and resulted in the drop of its share price.[738] It was seeking a compensation amounting to $970 million.[739] The US interposed that there was no legally significant connection between the assailed measures and Methanex or its investments.[740] It contended that the Californian ban on MTBE was not directed on Methanex given that it produces methanol and not the prohibited additive.[741] The measure merely had an incidental impact on the investment.[742]

Methanex likewise assailed the environmental agenda behind the measure.[743] It said that MTBE is safe and any environmental problem associated with its use is caused by leaking underground gasoline tanks.[744]

ii. Outcome

The tribunal ruled in favor of the US, and dismissed all of Methanex's claims.[745] Discriminatory treatment and national treatment violations were ruled out, as the tribunal acknowledged the legitimate environmental and health concerns behind the measures.[746] With regard to expropriation, the

736. *Methanex Corporation*, 44 I.L.M., ¶¶ II.D.14 & II.D.16

737. *Id.* ¶¶ I.1 & II.D.20.

738. *Id.* ¶ II.D.31.

739. *Id.* ¶ I.1.

740. *Id.* ¶ II.E.34.

741. *Id.* ¶ II.F.16.

742. *Methanex Corporation*, 44 I.L.M., ¶ II.F.16.

743. TIENHAARA, *supra* note 329, at 228.

744. *Id.*

745. *Methanex Corporation*, 44 I.L.M., ¶ IV.F.6.

746. *Id.* ¶ III.A.102.

tribunal utilized the mixed-effects test or the police-power doctrine, such that —

> [A]s 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 that the government would refrain from such regulation.[747]

However, Methanex also went to the issue of jurisdiction. It ruled that there was no legally significant connection between the Californian regulations and the investments of Methanex.[748] Thus, despite ruling that Methanex had failed to substantiate the merits of its claims, the tribunal held that it had no jurisdiction over the said claims, leading its dismissal.[749]

iii. Analysis

The *Methanex Corporation* ruling pertaining to expropriation is significant, as it was a departure from several established doctrines. First, the tribunal followed the mixed-effects or police-powers doctrine in determining the existence of a regulatory taking.[750] On the basis of such, it ruled that the ban on MTBE does not amount to expropriation, in the absence of discriminatory intent and the presence of a legitimate public purpose — traced to environmental and health reasons.[751] This is a departure from the sole-effects doctrine applied by the *Metalclad Corporation* tribunal five years ago.[752]

It also highlights he public purpose justification for regulatory expropriations. It directly contradicts an earlier NAFTA arbitral case, *Marvin Roy Feldman Karpa,* where the Tribunal held that in "a finding of expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory, and in accordance with due process of law and Article 1105[ ](1)."[753] Thus, *Methanex Corporation* seems to have abandoned

747. *Id.* ¶ IV.D.7.

748. *Id.* ¶ IV.E.18.

749. *Id.* ¶ IV.E.22.

750. Nathanson, *supra* note 408, at 884.

751. *See Methanex Corporation*, 44 I.L.M., ¶ III.A.102.

752. *See generally* Nathanson, *supra* note 408, at 883-85.

753. *Marvin Roy Feldman Karpa*, 42 I.L.M., ¶ 98.

the requirement of compensation under NAFTA Article 1110 (d) in the event of a regulatory expropriation.[754] *Methanex Corporation* was decided two years after that of the ruling in *Marvin Roy Feldman Karpa.* Third, it is significant to note that *Methanex Corporation* used the "control" concept of expropriation, rather than the "use" concept relied upon in *Metalclad Corporation.*[755]

The last point is not a departure, but an affirmation of doctrines laid out in earlier arbitral awards. The Tribunal's definition of expropriation as regards a State's specific commitments to an investor bolsters the elements of investor expectations as a partial ground for sustaining a claim of indirect expropriation.[756] Thus, this serves as a special exception to the general "rule of no compensation" in regulatory takings, if the investor can prove its reliance on specific government commitments.[757] However, the leeway for such is qualified by the *specificity* of the government commitment, thus agreeing with the "definitive, unambiguous[,] and repeated" commitment requirement enunciated in *Marvin Roy Feldman Karpa.*[758]

c. Glamis Gold, Ltd. v. United States

Glamis Gold, Ltd. v. United States of America[759] is a recent controversial dispute involving a Canadian mining company seeking compensation for a Californian measure requiring backfilling and restoration of open-pit mines near Native American sacred sites.[760] The claimant, Glamis Gold Ltd., argued that the regulation amounted to expropriation and a denial of fair and equitable treatment.[761] The tribunal denied the claims of the investor and ruled in favor of the US.[762]

754. Marlles, *supra* note 336, at 291.

755. *Id.* at 290-91.

756. Nathanson, *supra* note 408, at 885.

757. Marlles, *supra* note 336, at 291 (citing *Methanex Corporation*, 44 I.L.M., ¶ IV.D.8).

758. Marlles, *supra* note 336, at 291.

759. Glamis Gold, Ltd. v. United States of America, Award, 48 I.L.M. 1039 (June 8, 2009).

760. *Id.* ¶¶ 1 & 10.

761. *Id.* ¶ 1.

762. *Id.* ¶¶ 830 & 834-838.

i. Facts

In 1987, Glamis Gold acquired a total of 187 mining claims on federal public lands located in the Imperial Valley of California.[763] Through open-pit mining techniques, it planned to mine gold and silver from three large open-pits during the projected 19-year lifespan.[764] Before its commenced operations, Glamis was required to undergo several environmental impact assessments before the Bureau of Land Management, the agency responsible for the administering mining claims on federal land.[765] The Imperial Project attracted controversy since its inception, particularly because of its location near designated Native lands, known as the "Indian Pass."[766] Furthermore, the area of the proposed mine was "adjacent to two formally designated wilderness areas, critical habitat for the federally-listed desert tortoise and an area designated as a place of critical environmental concern for Native American cultural values."[767]

After a six-year review of the project, the Bureau of Land Management recommended the no-action alternative, meaning that there would be no development of the mine.[768] The Interior Secretary then denied the proposed plan of operations for the Imperial Project reasoning that the project may cause "undue impairment" and "unnecessary or undue degradation" of public land resources.[769] However, following a change in administration, the Secretary's decision was rescinded and a new process for the project was considered.[770] Thus, the State of California began to take steps to mitigate the project's potential impacts.[771] Senate Bill 22 was passed stipulating that the Californian government may not approve the reclamation plan for surface mining operations located within one mile of any Native American sacred site or an area of special concern, unless the

763. *Id.* ¶ 32.

764. *Id.* ¶ 33.

765. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 99.

766. Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56 MCGILL L.J. 919, 923 (2011).

767. TIENHAARA, *supra* note 329, at 233-34.

768. *Id.* at 234.

769. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 154.

770. *Id.* ¶ 157.

771. TIENHAARA, *supra* note 329, at 234.

reclamation plan provided for the backfilling of excavation and re-grading of the site.[772]

Because of the measure, Glamis requested for arbitration under NAFTA's Chapter 11, alleging expropriation and a violation of fair and equitable treatment standards.[773] With regard to the expropriation claim, Glamis argued that Senate Bill 22 has an expropriatory purpose, given that the backfilling requirements are mandatory, resulting in the complete destruction of the company's investment.[774]

ii. Outcome

The award, dated 8 June 2009, denied both claims of the investor.[775] The expropriation claim was dismissed on the ground that its mining right was never rendered substantially without value by the governmental actions.[776] In fact, the tribunal made certain adjustments to the valuation methodology of Glamis, which resulted in the finding that the post-backfilling valuation of the project should be in excess of $20 million.[777] In view of this significantly positive valuation, the first factor in any expropriation analysis is not met — such that the complained measures "did not cause a sufficient economic impact to the [ ] [p]roject" to warrant an expropriation claim.[778]

The Tribunal acknowledged the existing US jurisprudence on regulatory takings, particularly the *Penn Central Transp. Co.* case.[779] However, it diverged from the standards used in these cases by stating that the "'severity of the economic impact and the duration of the impact' is a 'foundational threshold inquiry[,]'" is to be conducted before considering the character of the government action taken.[780] Thus in determining the

772. Ryan, *supra* note 766, at 924 (citing *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 175).

773. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 1.

774. TIENHAARA, *supra* note 329, at 235.

775. *Glamis Gold*, 48 I.L.M., ¶ 14.

776. *Id.*

777. *Id.* ¶ 17.

778. *Id.*

779. Jordan C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, 33 FORDHAM INT'L L.J. 101, 129 (2009) (citing *Glamis Gold*, 48 I.L.M., ¶ 356).

780. *Id.*

occurrence of expropriation, the tribunal primarily relied on the impact of the measure on the economic value of the investment.[781] Mere restrictions on the property rights do not constitute a taking, as it needs to be determined if the investor was radically deprived of the economical use and enjoyment of his investments, as if his rights thereto had ceased to exist.[782]

The *Glamis Gold Ltd.* decision is significant as the "takings approach [applied] gives governments [the] confidence to regulate without fear of having to compensate [the] investors" affected by the measures; it pushes all the more the environmental agenda, because of its support for environmental planning and protection.[783]

d. Chemtura Corporation v. Government of Canada

Chemtura Corporation v. Government of Canada,[784] a fairly recent arbitration involving expropriation due to the enactment of an environmental measure, was a claim against Canada by Chemtura Corporation, a manufacturer of an agricultural pesticide, lindane.[785] The chemical was eventually banned by the Canadian government, which challenged the measure in a domestic court.[786] Claims of unfair, discriminatory, and expropriatory treatment were dismissed, as the regulatory process implementing the ban was fair and reasonable.[787]

i. Facts

Lindane is a pesticide that is used on canola.[788] As a result of the risks associated with its use, various States have been restricting its use over the past decades.[789] In March 1998, the US EPA announced the impending ban

781. *Id.* at 129-30 (citing *Lucas*, 505 U.S. at 1018 & John D. Echeverria, *Making Sense of Penn Central*, 23 J. ENVTL. L. 171, 178 (2005)).

782. *Glamis Gold*, 48 I.L.M., ¶ 357.

783. Kahn, *supra* note 779, at 134.

784. Chemtura Corporation v. Government of Canada, Award, IIC 451 (Aug. 2, 2010).

785. *Id.* ¶¶ 14, 23, & 92.

786. *Id.* ¶¶ 138, 152, & 162.

787. *Id.* ¶¶ 257-267.

788. *Id.* ¶ 7.

789. *Id.* ¶ 8.

on importing lindane-treated canola seed from Canada.[790] Chemtura Corporation was one of the companies who will be affected by the measure.[791] Chemtura, as well as other registrants of canola seed protectants proceeded to voluntarily remove canola from the registered uses of lindane-containing products, subject to certain conditions.[792] Some conditions were not met, hence Chemtura proceeded with a request to reinstate canola use in its lindane labels.[793] However, Canada's Pest Management Regulatory Agency determined that termination of lindane products was warranted and could be effected through the suspension of registrations.[794] In the US, a final order was also issued cancelling the registration of pesticide products containing lindane.[795] Because of these development, Chemtura filed a request for arbitration, claiming that Canada had breached its obligations under the minimum standard of treatment, most favored nation, and expropriation clauses.[796] The expropriation claim was based on the cancellation of its lindane registrations, including its use for canola.[797] Canada retorted that there was no expropriation since there was no substantial deprivation, and in any event, its act was a valid and non-compensable exercise of police powers.[798]

ii. Outcome

The tribunal ruled in favor of Canada in its award, dated 2 August 2010, ruling out the presence of unfair and discriminatory treatment as there was no showing of bad faith or disingenuous conduct on the part of the State.[799] The claims regarding a violation of fair and equitable treatment and most favored nation standards were also rejected, as Chemtura failed to substantiate these.[800]

---

790. *Chemtura Corporation*, IIC 451, ¶ 13.

791. *Id.* ¶ 14.

792. *Id.* ¶ 16.

793. *Id.* ¶ 26.

794. *Id.* ¶¶ 30–34.

795. *Id.* ¶ 49.

796. *Chemtura Corporation*, IIC 451, ¶ 92.

797. *Id.* ¶ 93.

798. *Id.* ¶ 97.

799. *Id.* ¶¶ 138, 152, & 162.

800. *Id.* ¶ 233.

In deciding the expropriation claim, the contentious issue was the existence of "substantial deprivation," which the tribunal treated as "a fact-sensitive exercise to be conducted in the light of the circumstances of each case."[801] The beauty in this approach is that "they cannot be conducted on the basis of rigid binary rules."[802] It added that "it would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be 'substantial' as such [*modus operandi*] may not always be appropriate."[803] The tribunal rejected the expropriation claim on the basis of evidence showing that the sales from the lindane products were merely a small part of the overall sales of the company, at all relevant times.[804] From this finding, the interference of the measures on Chemtura's property cannot be regarded as substantial.[805] Furthermore, it also considered the valid exercise of police powers, in furtherance of protecting human health and the environment .[806]

3. Synthesis of the arbitral awards

The following tables summarize the cases dissected. It is evident that there is no single, fixed standard applied by tribunals in deciding cases involving the conflict of environmental regulations with foreign investment. However, it is noteworthy to consider the following observations.

First, the trend in the outcome of the cases suggests that there is a movement towards upholding the environmental regulations, thus recognizing the police powers of a State. This is a remarkable achievement, as tribunals are going beyond the ambit of the traditional norms of investment protection. Instead, an argument could be posited that this trend reflects the developments in international environmental law.

Second, the cases which resulted in the award of compensation for the aggrieved investor relied primarily on the *sole-effects test* in determining the existence of expropriation. This was applied in the context of the interference created by the measure on the foreign investor's property. The exception to this is the *Santa Elena* case, which involved direct

801. *Id.* ¶ 249.

802. *Chemtura Corporation*, IIC 451, ¶ 249.

803. *Id.*

804. *Id.* ¶ 263.

805. *Id.*

806. *Id.* ¶ 266 (emphasis supplied).

expropriation. Thus, in a finding of indirect expropriation because of an environmental measure, the sole-effects test is likely to be applied.

Third, the test relied upon by tribunals that ruled out any expropriatory measure is the *police-powers doctrine*, as succinctly applied in the *Methanex Corporation* and *Chemtura Corporation* cases. Notably, these are the more recent cases, which both recognized the inherent right of State to regulate environmental matters.

Fourth, the tribunals which ruled that the environmental measure at issue was not expropriatory also considered other factors in dismissing the claims of the investor. As such, *S.D. Myers, Inc.* focused on lasting effects and temporality; *Glamis Gold, Ltd.* considered the economic impact; and *Chemtura Corporation* concentrated on substantial deprivation. Meanwhile, cases finding expropriation considered other factors — reasonable investor expectations was emphasized in *Metalclad*; and proportionality was highlighted in *Tecmed*.

Fifth, the environmental regulations in question do not merely involve positive acts by States, e.g., the imposition of more stringent environmental measures. Rather, most of the assailed measures are in the character of bans and prohibitions.

Sixth, most of the investment claims do not merely involve a claim of expropriation, but also include other investment protection standards like minimum standard, fair and equitable treatment, and national treatment. In fact, some cases were decided in relation to these claims. Hence, it would be best not only to merely consider the interference created by the measure on the investor's property, but also the character and nature of such measure.

Finally, the cases should be examined in the context of the investment treaty relied upon. As discussed earlier, the NAFTA has provisions pertaining to the environment. Although not expressly stated in the text of the decisions, the tribunals could have relied on these pro-environment provisions in deciding the claims. Among the NAFTA cases examined, only *Metalclad Corporation* resulted in a ruling which viewed the environmental measure as expropriatory.

Case & Year Decided	Standards
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (2000)	Total disregard of the environmental factor as a justification for the taking.[807]
Metalclad Corporation v. United Mexican States (2000)	Applied the sole-effects test in the context of three elements: (1) interference with use, (2) interference with reasonable expectations, and (3) diminution of the investment's value.[808]
S.D. Myers, Inc. v. Government of Canada (2002)	Lasting effects — consider the temporal element of the measure.[809]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (2003)	Relied on the sole-effects test and the doctrine of proportionality.[810]
Methanex Corporation v. United States of America (2005)	Applied the police-powers doctrine. No payment of compensation required in the event of a regulatory expropriation.[811]
Glamis Gold, Ltd. v. United States of America (2009)	Economic impact test — whether there was a radical deprivation of the economic use and enjoyment of the investments.[812]
Chemtura Corporation v. Government of Canada (2010)	Substantial deprivation test — applied on a case to case basis; recognized the environmental measure based on the police-powers test.[813]

807. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶¶ 68-74.

808. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 72 & 102-112.

809. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 283.

810. *Técnicas Medioambientales Tecmed, S.A.*, 10 ISCID Rep., ¶¶ 122 & 133.

811. *Methanex Corporation*, 44 I.L.M., ¶¶ III.A.102, IV.D.7, & IV.F.6.

812. *Glamis Gold, Ltd.*, 48 I.L.M., ¶¶ 364, 366, & 479.

813. *Chemtura Corporation*, IIC 451, ¶ 254.

Case & Year Decided	Findings
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (2000)	Direct expropriation[814]
Metalclad Corporation v. United Mexican States (2000)	Expropriation & violation of minimum standard[815]
S.D. Myers, Inc. v. Government of Canada (2002)	No expropriation, but violated NAFTA & minimum standard[816]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (2003)	Expropriation & violation of minimum standard[817]
Methanex Corporation v. United States of America (2005)	Dismissed all claims[818]
Glamis Gold, Ltd. v. United States of America (2009)	Dismissed all claims.[819]
Chemtura Corporation v. Government of Canada (2010)	Dismissed all claims[820]

814. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 72.

815. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 74-112.

816. *S.D. Myers, Inc.*, 40 I.L.M., ¶¶ 288 & 325.

817. *Técnicas Medioambientales Tecmed, S.A.*, 10 ISCID Rep., ¶¶ 151 & 174.

818. *Methanex Corporation*, 44 I.L.M., ¶ IV.F.6.

819. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 830.

820. *Chemtura Corporation*, IIC 451, ¶ 267.

Case & Year Decided	Governmental Measure
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (2000)	Expropriation of property to expand a National Park[821]
Metalclad Corporation v. United Mexican States (2000)	Non-issuance of operating permit[822]
S.D. Myers, Inc. v. Government of Canada (2002)	Ban on PCB exporting[823]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (2003)	Non-renewal of operating permit[824]
Methanex Corporation v. United States of America (2005)	Ban on MTBE (gasoline additive)[825]
Glamis Gold, Ltd. v. United States of America (2009)	Backfilling requirements for open-pit mines[826]
Chemtura Corporation v. Government of Canada (2010)	Banning the use of the pesticide[827]

821. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 18.

822. *Metalclad Corporation*, 5 ICSID Rep., ¶ 50.

823. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 100.

824. *Técnicas Medioambientales Tecmed, S.A.*, 10 ISCID Rep., ¶ 42.

825. *Methanex Corporation*, 44 I.L.M., ¶ I.1.

826. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 16.

827. *Chemtura Corporation*, IIC 451, ¶ 253.

Case & Year Decided	Environmental Issue
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (2000)	Preservation of biodiversity[828]
Metalclad Corporation v. United Mexican States (2000)	Hazardous waste landfill[829]
S.D. Myers, Inc. v. Government of Canada (2002)	PCB (a hazardous waste product)[830]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (2003)	Hazardous waste landfill[831]
Methanex Corporation v. United States of America (2005)	MTBE causing water pollution[832]
Glamis Gold, Ltd. v. United States of America (2009)	Biodiversity, water pollution[833]
Chemtura Corporation v. Government of Canada (2010)	Lindane (a harmful pesticide)[834]

828. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 18.

829. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 37-34.

830. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 104.

831. *Técnicas Medioambientales Tecmed, S.A.*, 10 ISCID Rep., ¶¶ 35 & 44.

832. *Methanex Corporation*, 44 I.L.M., ¶¶ III.A.31 & III.A.84.

833. *Glamis Gold, Ltd.*, 48 I.L.M., ¶¶ 398, 405, & 410.

834. *Chemtura Corporation*, IIC 451, ¶ 6.

Case & Year Decided	IIA
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica (2000)	None
Metalclad Corporation v. United Mexican States (2000)	NAFTA[835]
S.D. Myers, Inc. v. Government of Canada (2002)	NAFTA[836]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (2003)	Spain-Mexico BIT[837]
Methanex Corporation v. United States of America (2005)	NAFTA[838]
Glamis Gold, Ltd. v. United States of America (2009)	NAFTA[839]
Chemtura Corporation v. Government of Canada (2010)	NAFTA[840]

835. *Metalclad Corporation*, 5 ICSID Rep., ¶¶ 74–112.

836. *S.D. Myers, Inc.*, 40 I.L.M., ¶¶ 196–200.

837. *Técnicas Medioambientales Tecmed, S.A.*, 10 ISCID Rep., ¶ 4.

838. *Methanex Corporation*, 44 I.L.M., ¶ I.2.

839. *Glamis Gold, Ltd.*, 48 I.L.M., ¶ 1.

840. *Chemtura Corporation*, IIC 451, ¶ 51.

VII. TOWARDS A REINFORCEMENT OF THE POLICE-POWERS DOCTRINE IN ARBITRATING ENVIRONMENTAL EXPROPRIATION DISPUTES

> *The progressive evolution of the right to a clean environment as a human right and as a norm incorporating higher values may lead to an inflexible right for the [S]tate to interfere in order to protect the environment and to regard this interference as not amounting to a taking which is not compensable.*
>
> — Muthucumaraswamy Sornarajah [841]

To recall, the primary issue endeavored to be addressed by this Note is whether a State, in enacting environmental measures, which thereby affects the value of a foreigner's investment, is exercising its regulatory function, as a consequence of its police power, or its power of eminent domain, thereby necessitating the payment of just compensation.

In answer to this question, the Author advances the view that in light of a State's international obligations towards environmental protection, which finds basis under customary international law, such environmental measures fall exclusively within the realm of police power, provided that these meet the adequate standards necessitated by investor protection. Regulatory environmental measures must be considered at a threshold that does not give rise to compensation in case of any devaluation of foreign investment.

As earlier discussed, there are two recognized tests through which courts and tribunals determine the existence of a regulatory taking — the orthodox sole-effects doctrine, and the non-traditional mixed-effects or the police-powers doctrine. Consistent with the view espoused by the more recent arbitral awards, this Note espouses the latter test, and advocates for an expansion of its scope. In order to establish the eminence of police-powers approach in determining the existence of a regulatory taking in relation to environmental regulation, this Section will primarily anchor its analysis on the conventional notion of police power under domestic law. Particularly, this will be discussed in the context of the two elements needed for a proper exercise of police power.

For a regulatory environmental measure affecting the value of foreign investment not to be considered as expropriatory, there must be a concurrence of both lawful purpose and lawful method. The first element, that of lawful purpose, is undeniable, considering the environmental obligations of States which already crystallized into customary international law. In order to meet the second element of lawful method, essential

841. SORNARAJAH, *supra* note 12, at 110.

standards must be observed by the State in enacting the regulation, using as a guide the standards applied by arbitral tribunals in deciding such cases. Ultimately, this Section seeks to reinforce the broadening of the police-powers doctrine in order to justify the non-payment of compensation in the event that a State adopts a legitimate measure enacted for the protection of the environment.

A. Lawful Purpose: Recognizing the International Environmental Obligations of States

International environmental law has progressed in an active and dynamic manner, instead of being a merely static area of study. Its development is the fastest among the modern fields of law, reflecting its adaptation to the pace of the changes happening to nature itself. As such, key principles of environmental law, which were used to be neglected in the past, have now ripened into customarily binding obligations — a violation of which will give rise to an international violation on the part of a State. Thus, it is posited that a State is acting within the bounds of its international obligations — and not merely on the unilateral exercise of its sovereign powers — when it enacts regulatory environmental measures. Any conflict created by the measure with the use of property, including that belonging to foreign investors, should yield to magnanimous goal of protecting the environment. This provides the *lawful purpose* for the legitimate exercise of the *police-powers* doctrine.

When an investment dispute is lodged in a tribunal questioning an environmental measure affecting foreign investment, the tribunal should examine the lawful purpose behind such measure in such a way that it takes into account a State's obligations in accordance with *customary international environmental law*. Whether the State is party to these treaties embodying these principles, the legitimate exercise of the environmental measure should be recognized nonetheless, if there are customary principles necessitating the enactment of the measure.

In explaining — as well as expanding — the lawful purpose behind environmental regulations of this kind, a two-level argument is presented. *First*, incorporating other principles of international law, including environmental norms, in deciding investment disputes is a recognized feature of investment treaty interpretation and investment dispute resolution. *Second*, a State, pursuant to its international environmental obligations, can enact measures affecting foreign investments without the risk of having expropriatory intent and without paying compensation for such lawful interference.

1. The legitimacy of incorporating environmental norms in investment arbitration

In order to lay down the foundations for the main argument, it is essential to first address potential setbacks in attempting to incorporate environmental obligations in the context of investment disputes. To forestall any such predicament, a two-tiered basis is presented. Investment disputes allow the application of other rules of international law pursuant to — *first*, the relevant or pertinent investment agreement in question, or *in any event*, the general rules of interpretation contained in the Vienna Convention on the Law of Treaties (VCLT).

First, investment disputes are primarily decided based on the investment treaty applicable. However, investment treaties, by themselves, do not suffice, as IIAs do not operate in a vacuum, and as such require a scrutiny of other principles and branches of international law in order to fully flesh out their meaning.[842] In fact, many investment major IIAs, including the NAFTA, contain provisions to this effect. Further, procedural mechanisms like the ICSID require tribunals "to decide disputes in accordance with the applicable 'rules of international law.'"[843]

In any event, and despite the absence of such a provision, a general rule of interpretation mandated by the VCLT states that a treaty should be interpreted in light of any "relevant rules of international law applicable in the relations between the parties."[844] Thus, when interpreting the obligations of a host State under an investment treaty, it is generally permissible to consider other treaties, rules of customary nature, or general principles of law.[845] In support of this argument, Sands had remarked that "those charged with interpreting and applying treaties on the protection of foreign investment need to take into account the values that are reflected in norms that have arisen outside the context of the investment treaty which

842. Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 4 (2011).

843. *Id.* (citing ICSID Convention, *supra* note 257, art. 42).

844. Moloo & Jacinto, *supra* note 842, at 5 (citing Vienna Convention on the Law of Treaties, art. 31, *opened for signature* May 23, 1969, 115 U.N.T.S. 331).

845. Moloo & Jacinto, *supra* note 842, at 5 (citing MCLACHLAN, ET AL., *supra* note 234, at 290).

they are applying."[846] Thus for all intents and purposes, it follows that in considering the liability of a State under an investment agreement, it is proper to look into its other commitments — which necessarily includes environmental obligations — both under treaties and those recognized under custom.

2. The Legal Basis — Customary international environmental obligations as legitimate purpose for the regulation

Having established that other norms of international law, beyond the confines of an investment treaty, are applicable in the event of an investor-State dispute, it becomes proper to adduce that a State's international environmental obligations must be considered in the arbitration of any potential expropriation claim. These obligations include not just those embodied under the environmental treaties that a State is a party to, but also those principles that have already crystallized into the status of custom, which was discussed earlier in this Note. These include: (a) the precautionary principle; (b) the prevention of transboundary harm; (c) the polluter pays principle; (d) the principle of common but differentiated responsibility; and (e) sustainable development. It is postulated that based on these principles alone, which already ripened into customarily binding norms, a State could justify the lawful purpose behind the enactment of the environmental measure at issue.

a. Precaution — Acting on the basis of necessity

The strongest argument that a State may interpose in defense of an environmental measure, which comes into conflict with investment, is based on the *precautionary principle*. This concept has been at the forefront of the environmental agenda, and is currently codified as Principle 15 of the Rio Declaration, and contained in more than 50 international environmental agreements — a strong indication of its status as custom.

Acting on the basis of precaution could be related on the basis of necessity, specifically on the necessity of protecting the natural environment. No less than the ICJ, in the case of the *Gabčíkovo-Nagymaros Project*, declared that the natural environment is undeniably an essential interest, which merits protection by the State.[847] In view of the protection that must be accorded

846. Moloo & Jacinto, *supra* note 842, at 5 (citing Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL. L.J. 198, 202 (2002)).

847. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. at 41-42, ¶ 53-54.

the environment, a State is then acting within the bounds of its power, and its legal and moral obligations, in enacting measures to protect it. This is all the more crucial when a State's action is prompted by a legitimate scientific basis showing the necessity of the measure undertaken. The presence of scientific findings were evident in the cases of *Methanex Corporation*, *Glamis Gold, Ltd.*, and *Chemtura Corporation*, in which the tribunals dismissed the expropriation claims — partly in view of the genuine environmental threats sought to be prevented by the measures questioned. This is in contrast with *Tecmed*, where scientific findings were conducted showing that there was no significant environmental threat posed by the landfill. Yet, the State still revoked the operating permit, leading to a finding of expropriation.

However, the conduct of a scientific study is not entirely necessary, as evinced in *S.D. Myers, Inc.* There, the government merely relied on an international convention as the basis for imposing a ban on the transboundary movement of waste.[848] In reality, using scientific findings as basis for an environmental measure would put countries in an onerous situation when they intend to protect human health or the environment.[849] Given that a full-blown scientific inquiry normally takes time to be concluded, making such studies a strict requirement that must be complied with could cause more harm than good. This puts States in a quandary, especially in the event of a grave and imminent peril necessitating fast and urgent State action. This situation requires the application of the precautionary principle. States must be given enough leeway to ensure that the environmental threat is contained, lest it cause irreversible damage to the State and its citizens. Ensuring the welfare of the people logically takes precedence than the protection of an investor's economic property.

A State's exercise of precaution is more unavoidable, when coupled with the grave threat posed by climate change. This has been recognized as a guiding principle of the landmark United Nations Framework Convention on Climate Change. Notwithstanding the absence of a scientific study, the lack of scientific certainty as regards a potential environmental hazard should not be the basis for State inaction.[850] When immediate action is needed to be undertaken to avert an imminent peril, States should respond accordingly as the circumstances warrant. As worded in the Rio Declaration, the

848. Moloo & Jacinto, *supra* note 842, at 32.

849. *Id.*

850. BEYERLIN & MARAUHN, *supra* note 74, at 50.

conduct of scientific studies is not at all mandatory, and should not be used to prevent action.

Since an essential procedural corollary of this principle is the shifting of the burden of proof,[851] a foreign investor claiming expropriation as a result of an environmental measure enacted on the basis of precaution has the burden of proving that his investment does not pose a significant threat to the natural environment of the host State. The claimants in *Methanex Corporation* and *Chemtura Corporation* failed to overcome this burden. Shifting the burden of proof creates a disincentive for the investor, but an incentive for society; since to overcome such proof, it is essential that it conducts its activities in an environmentally sound manner.

In the recent *Arbitration Regarding the Iron Rhine Railway*, [852] the Permanent Court of Arbitration — with no less than Rosalyn Higgins and Bruno Simma sitting as arbitrators — ruled that the "duty to prevent, or at least mitigate, such harm ... has now become a general principle of international law [and that it] applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties."[853] Thus, notwithstanding the obligations embodied in IIAs, a State must act accordingly in order to prevent potential harm that may be caused in line with such treaty provisions. Finally, a State acting on the basis of precaution could be regarded as acting not merely on the basis of self-interest, but also on the basis of protecting the interests of the investor. Such environmental measure may work to mitigate the impact of any damage caused by the investment. As aptly worded by an international tribunal, "measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration[.]"[854]

Ultimately, invoking the precautionary principle seems to be a fool-proof justification explaining the public purpose behind an environmental measure. Whether a scientific inquiry on the investment was conducted or not, States can easily validate the exercise of such power, in view of the inherent necessity to protect the natural environment. The sole exception to the application of the principle would be when the foreign investor has

851. *Id.* at 54.

852 Arbitration Regarding the Iron Rhine Railway (Belg. v. Neth.), Award, 27 R.I.A.A. 35 (2005).

853. *Id.* at 66-67, ¶ 59.

854. *Southern Bluefin Tuna*, 1999 ITLOS Rep., ¶ 80.

successfully overcome the burden that its activities do not constitute significant environmental threats.

b. Preventing harmful transboundary impacts of investment

Like the precautionary principle, the doctrine on the prevention of transboundary harm is embodied in numerous environmental agreements and is regarded as a customary principle of international law. Having been recognized in the *Trail Smelter Arbitration*[855] and codified in the Stockholm Declaration,[856] its mainstream emergence was earlier than the precautionary principle. As applied to an investment dispute involving environmental measures, it follows that a State is responsible in ensuring that the foreign investments within its territory do not cause harm or damage to the territories of other States. Any activity conducted within its territory which causes damage to the natural environment of other States may give rise to an internationally wrongful act, as depicted in the *Trail Smelter Arbitration.*

Pursuant to a State's sovereign rights, it can impose legitimate environmental measures, if in its judgment, the activities of foreign investors within its territory could pose a threat to another State. This position finds support in the ruling of the ICJ in the *Pulp Mills on the River Uruguay* case, where it held that a State is "obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[857] This was applied in *S.D. Myers, Inc.*, where the transboundary movement of wastes were discontinued because of their toxic effects, not just to the natural environment of Canada, but also that of the US. Although not expressly recognized by the tribunal, this in effect, was an implied application of the principle. This is notwithstanding the fact that US environmental authorities also heavily regulated such products. This may be ultimately related to the principle of precaution, as preventing transboundary harm is an obligation of conduct than that of result.[858] Hence, if a State has a reasonable belief that the activities of a foreign investor within its jurisdiction will cause harmful transboundary effects, then it is obligated to take actions to mitigate, or even proscribe the conduct of these activities.

---

855. *See generally Trail Smelter Arbitration*, 3 R.I.A.A.

856. Stockholm Declaration, *supra* note 75, pmbl, ¶ 6.

857. *Pulp Mills on the River Uruguay*, 2010 I.C.J. Rep., ¶ 101.

858. *Id.* ¶ 187.

Going beyond a purely environmental perspective, an argument could be raised that instead of risking a dispute with another State because of the transboundary impacts of a foreign investment, a State may prefer instead to risk having an investor raise violations of investment protection standards. This is because a State-to-State dispute, which gives rise to an internationally wrongful act, is more damaging on a political level and could ruin bilateral relations between the two States — thus costlier in the long run. Whereas, an investment dispute, although having negative impacts on its own, generally connotes just an economic damage rather than that of a political one. Hence, a balancing of State interests may come into play. Finally, although a State is given wide latitude in determining which kinds of investment could produce damaging transboundary effects, this is by no means a plenary one. In enacting regulations affecting foreign investment, States must still consider scientific findings, or in their absence, the measure enacted must be reasonable so as to justify its effect on the foreign investment.

c. Polluter Pays — As a share of investors in environmental efforts

It seems to be unquestionable a person who damages something he does not own must pay compensation, or at least give reparation or restitution to the rightful owner of the property. This is the premise upon which the polluter pays principle is based — the costs of pollution should be borne by the person responsible for causing the pollution. As worded in the Rio Declaration, this principle entails the "internalization of environmental costs,"[859] which implies shifting the cost of environmental harm from society at large to the person causing the harm.[860] This principle of internalizing the cost of pollution has been said to cut right through the very heart of the existence of indirect expropriation.[861] It follows that when a State is ordered to pay compensation to a foreign investor due to the enactment of a regulatory environmental measure, the finding of expropriation makes the polluter pays principle superfluous. In the words of the US Supreme Court, such a situation "is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of [S]tate power in the public interest.[862]

859. Rio Declaration, *supra* note 91, princ. 16.

860. Wagner, *supra* note 4, at 470.

861. *Id.* at 271.

862. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

Admittedly, such situation is iniquitous and would create an atmosphere of regulatory chill. This is because instead of the investor paying for the costs of the damage he caused, the cost is passed on to everyone, even to those persons who take environmental responsibilities seriously. This is contrary to the ultimate objective desired to be achieved by these environmental protection mechanisms. What will happen then is the exact opposite — a case where the State is the one paying compensation to the polluter. Arguably, this is what transpired in *S.D. Myers* and *Metalclad,* where the State was made to pay the investor because of the environmental measure's alleged interference with use of the foreign investor's property. In addition, the regulatory chill fostered by such will make States hesitant in enacting environmental measures — even if there is a legitimate and scientific basis for doing so — because of fears that it would be adjudged as expropriatory. As such, to get rid of any potential chilling effect, the polluter pays principle necessitates that States be free to implement regulatory environmental measures without having to worry about compensation claims.[863]

The more prudent view is to let the investors carry the cost of any regulatory environmental measure enacted, as a way of getting them to share and do their role in environmental protection efforts. It is logical to posit that a chunk of these foreign investments are responsible for pollution and damages caused to the natural environment. Thus, to serve as a recompense for these impairments, the erring investors should be made to bear the costs of their own blunders. This is consistent with the dynamic progression of environmental law, where views are emerging to the effect that parastatal entities like multinational corporations, must render their just share in environmental conservation efforts.[864]

Despite the award of compensation to the investor in the said cases, it seems that the tribunals seem to have applied the polluter pays principle — albeit in a restrained manner — as evinced by the amount awarded. For instance in *Metalclad Corporation*, the tribunal upheld the occurrence of expropriation; however, the amount of damages awarded to the investor was substantially lower than what was being claimed. In a way, this restrained attitude in awarding high amounts of damages[865] may be deemed as the just

863. Wagner, *supra* note 4, at 528-29.

864. SANDS, *supra* note 52, at 116-17.

865. Esther Kentin, *Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience, in* INTERNATIONAL LAW AND

share of the investor in environmental protection efforts. The table below provides a comparison between the damages sought by the investor and the actual amount damages paid to it (or required to be paid to the State), in the cases discussed.

Dispute	Damages Sought	Damages Awarded
Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica	$41,200,000[866]	$16,000,000[867]
Metalclad Corporation v. United Mexican States	$90,000,000[868]	$16,685,000[869]
S.D. Myers, Inc. v. Government of Canada	$53,000,000[870]	$850,000 (CAN)[871]
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States	$52,000,000[872]	$5,533,017.12[873]
Methanex Corporation v. United States of America	$970,000,000[874]	None; Claimant to pay $4,060,962.97 as legal costs[875]
Glamis Gold, Ltd. v. United States of America	$50,000,000[876]	None; Claimant to pay 2/3 of total arbitration

SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE 336 (Nico J. Schrijver & Friedl Weiss, eds., 2004).

866. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 29.

867. *Id.* ¶ 107.

868. *Metalclad Corporation*, 5 ICSID Rep., ¶ 114.

869. *Id.* ¶ 131.

870. *S.D. Myers, Inc.*, Final Award, 8 ICSID Rep. 172, ¶ 17 (Dec. 30, 2002).

871. *Id.* ¶¶ 53-54.

872. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 186.

873. *Id.* ¶ 201.

874. *Methanex Corporation*, 44 I.L.M., ¶ I.1.

875. *Id.* ¶ VI.1.

876. *Glamis Gold Ltd.*, 48 I.L.M., ¶ 17.

		costs[877]
Chemtura Corporation v. Government of Canada	$78,593,520[878]	None; Claimant to bear the cost of arbitration fixed at $688,219; Claimant to pay Canada's legal cost fixed at $2,889,233.80 (CAN)[879]

As can be gleaned, in the instances where expropriation was found to occur and the claimant was awarded compensation, the amount of the damages was significantly lower than that of the amount claimed. A possible reason for this is that the amount pegged by the claimants may be bloated and overestimated, whereas the tribunal adopted a more reasonable and modest valuation method. Although arguable, the low amount of damages awarded may be a reflection of investors being made to share in the costs of protecting the environment, albeit in a limited way. On the other hand, those disputes that ruled out expropriation did not award compensation to the claimants, and it was even the claimants who were ordered to bear the costs of the arbitration and the respondent State's legal costs. This clearly manifests the polluter pays principle, wherein the effects of the regulation on the investor's property were cast aside in favor of environmental governance. The fact that the investor was made to pay the costs of the dispute, though a common feature of arbitration, also bodes well for governments.

To summarize, awarding compensation to a foreign investor based on a devaluation of his investment due to a legitimate environmental measure would lead to the absurdity and sheer futility of engaging responsibility under the polluter pays principle. Hence, to give justice and to fully achieve the rationale of this long-established environmental rule,[880] it is just proper to let the investor share the costs of environmental protection, instead of letting society at large carry the burden.

877. *Id.* ¶ 837.

878. *Chemtura Corporation*, IIC 451, ¶ 95.

879. *Id.* ¶¶ V.e & V.f.

880. BEYERLIN & MARAUHN, *supra* note 74, at 59.

d. Common but Differentiated Responsibility — Applying equity

The precept of common but differentiated responsibility is an environmental law application of equity, a general principle of international law.[881] As worded in the Rio Declaration, this principle concedes that States have different contributions to environmental degradation, and as such, their responsibility should consider their respective technologies and financial resources.[882] It further gained significance when it was endorsed in the United Nations Framework Convention on Climate Change, a legally binding instrument, and its Kyoto Protocol. This connotes that States have the common responsibility to protect the environment, especially through the enactment of regulatory measures; however the extent of the responsibility, and possibly the liability that the measures would have on the value of foreign investments, must take into account the particular circumstances of a State.

To date, the principle has not been invoked yet by any tribunal resolving a State-State or State-investor dispute. Further, there seem to be no acknowledgment of the principle in any agreement concerning investment protection — given that an objective of investment protection is to make the obligations of States uniform, despite different levels of development.[883] However, there is a view that the tribunal in *Santa Elena* acknowledged this issue — albeit in an implicit manner. As evident from the table above, the damage awarded to the investor was less than half what it was claiming. The tribunal "granted compensation in an amount that, on the one hand, would not 'break' Costa Rica ... and, on the other hand, would not so far disappoint [the investor's] expectations as to cause it to seek annulment of the Award."[884]

Although the legal status of this principle has not yet solidified into a legally binding norm, the fact that this precept is based on equity may be enough basis for its application. In a number of international cases, courts

881. SANDS, *supra* note 52, at 285. *See also* SUMUDU ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 386-87 (2006).

882. *See Rio Declaration*, *supra* note 91, prin. 7.

883. TIENHAARA, *supra* note 329, at 256.

884. *Id.* (citing Charles N. Brower & Jarrod Wong, *General Valuation Principles: The Case of Santa Elena*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 774 (Todd Weiler ed., 2005)).

have generally regarded equity as a general principle of law, which the parties and tribunals may rely upon.[885] Thus, a tribunal is bound to "balance up the various considerations which it regards as relevant in order to produce an equitable result."[886] A tribunal may then apply the principle of common but differentiated responsibility, in relation to equity, as a way of recognizing the relative economic position of developing countries, as well as their vulnerability to the threats of a volatile natural environment. Doing so would protect these States from potentially damaging investment suits with immensely steep claims of damages. This does not necessarily mean that every suit must be decided in favor of the defenseless State, but rather, their particular circumstances must at least be taken into consideration in deciding the occurrence of expropriation, and in the event thereof, in fixing the amount of compensation to be paid by the State.

As regards the environmental measure actually imposed, this principle can be utilized in determining the extent of the regulation's proportionality. Given that States have differentiated environmental responsibilities depending on its own unique situation, the degree to which the measure affected the value of the investor's property may be juxtaposed with this standard. To illustrate, a vulnerable State, which faces an imminent environmental harm, must have the propensity to enact stricter measures; whereas a State in normal circumstances must prove with sufficiency and certainty the basis for enacting a measure affecting foreign investment.

Though the principle applies in interstate relations, it could be argued on a practical level that this may be applicable on the level of the State and the investor. This is pronounced when the foreign investor affected is relatively in a good economic standing, compared to the economic or financial conditions of the host State. Concededly, such an approach would raise question of investor protection treatment standards. In order to rebut such an argument, referring back to the polluter pays principle may provide justification for such treatment.

e. Sustainable development — Responsible stewardship of investors

Among the environmental principles discussed in this Note, sustainable development seems to be the most abstract, yet its scope can be regarded as

885. *See* Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 73 & 77 (June 28). *See also* The Indo-Pakistan Western Boundary (Rann of Kutch), 17 R.I.A.A. 1 (1968).

886. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, at 60 (Feb. 24).

the most expansive. In spite of constant debate as to its legal status, it has been regarded as forming part of customary international law,[887] and was considered by an ICJ separate opinion to be a "principle with normative value."[888] As sustainable development is generally concerned with balancing developmental and environmental rights, it cannot be denied that rise of foreign investments is intricately related in this equation. As discussed earlier, there are opposing views. On the one hand, investments can bridge the economic gap in developing countries, and could even be a catalyst for sustaining environmental protection efforts. On the other hand, the competition among States for limited investments has resulted in a *race to the bottom*, which adversely leads to the worsening of environmental conditions.

Though contentious, tribunals can incorporate the concept of sustainable development in deciding investment claims, especially when they involve the enactment of regulations designed to protect the environment. The decisions in *Methanex Corporation*, *Glamis Gold, Ltd.*, and *Chemtura Corporation* — even though not expressly naming the concept — may be argued to support such a position. The measures questioned in these cases were meant to safeguard the environment, and by holding that paying compensation is not warranted, even if the measures affected the value of foreign investments, in a way, there was an implicit recognition of the rights of States to preserve the ecological balance.

The objectives of the measures vary, but naturally, these measures were enacted to safeguard the environment, not just for the benefit of the State and its citizens, but also for the succeeding generations of its citizenry. Thus, applying sustainable development reinforces the application of the *police-powers doctrine* in deciding the occurrence of a regulatory taking. By looking at the overall purpose of the measure — apart from just examining the effects, as espoused by the sole-effect doctrine — a State is granted more leeway in enacting measures, which in its belief, will contribute to conservation efforts. Being an "extended form of justice" that intertwines the present and future generations, development in a sustainable manner is then an obligation of States and investors alike.

887. SANDS, *supra* note 52, at 254.

888. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. at 88 (J. Weeramantry, concurring opinion).

B. Lawful Method: Standards to be used in Determining Legitimacy of Measure

After laying down the basis for the lawful purpose behind environmental measures in the event of a regulatory taking, the lawful method behind such implementation will then be analyzed. It must be noted that despite the position taken by this Note in favor of non-compensation in the event of a regulatory environmental measures, the interests and rights of the investor must not hang on the balance. An arbitrary exercise of a State's regulatory powers in furtherance of environmental protection, instead of helping the pro-environment agenda, would likely be more detrimental. As such, there must be sufficient guidelines for States in enacting an environmental measure. Complying and meeting these investment protection standards infuses the lawful method for the legitimate exercise of the police-powers doctrine.

Noteworthy is the fact that no specific and fixed standard has been relied upon by arbitral tribunals in deciding regulatory taking disputes. Furthermore, the standards proposed by publicists also vary in scope. Thus, the standards proposed below are fleshed out in the context of the rulings of tribunals, as well as the considered opinions of publicists. These investment protection standards, which tribunals used in relation with the police-powers doctrine, will lend credence to the immediate goal of justifying the measure enacted. In the end, the primacy of environmental protection is advocated, while at the same time maintaining compliance with the minimum standards of investment protection.

In explaining the lawful method that must accompany a regulatory environmental measure, three standards must be met. First, the measure must comply with the international minimum standards and ensure non-discriminatory treatment. Second, the measure must be reasonable and proportional to the aim sought to be achieved. Third, the measure must not create a substantial interference in the economic value of the investment, so as to amount to a total deprivation of the investor's property.

1. Compliance with the international minimum standards

Given that investment protection against expropriation falls under the general rubric of the customarily accepted international minimum standards, it is postulated that a State relying on a police powers justification for non-compensation in the event of a regulation affecting foreign property should

adhere to these standards.[889] Corollary to this is the observance of fair and equitable treatment, as tribunals normally consider the two jointly in assessing investment claims.

The scope and meaning of the international minimum standard recognized under customary international law is disputable.[890] However, one of the more adopted criteria is the one used by the tribunal in *Waste Management, Inc. v. United Mexican States*,[891] which harmonized the standards set in earlier cases like *S.D. Myers, Inc.*,[892] *Mondev International, Ltd. v. United States of America*,[893] *ADF Group, Inc. v. United States of America*,[894] and *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* [895] —

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust[,] or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety [—] as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and [candor] in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. ... Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.[896]

---

889. Newcombe, *supra* note 16, at 29.

890. *Id.*

891. Waste Management, Inc. v. United Mexican States, Award, 11 ICSID Rep. 361 (Apr. 30, 2004).

892. *S.D. Myers, Inc.*, 40 I.L.M., ¶ 283.

893. Mondev International, Ltd. v. United States of America, Award, 42 I.L.M. 85 (Oct. 11, 2002).

894. ADF Group, Inc. v. United States of America, Award, ICSID Case No. ARB (AF)/00/1 (Jan. 9, 2003).

895. Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award, 42 I.L.M. 811 (June 26, 2003).

896. *Waste Management, Inc.*, 11 ICSID Rep. at 386, ¶¶ 98 & 99 (citing *S.D. Myers, Inc.*, 40 I.L.M.; *Mondev International, Ltd.*, 42 I.L.M.; *ADF Group, Inc.*, ICSID Case No. ARB (AF)/00/1; & *Loewen Group, Inc. and Raymond L. Loewen*, 42 I.L.M.).

Breaking down this pronouncement, three important considerations stand out — First, the measure must not be discriminatory, arbitrary and must comply with due process; second, the treatment accorded must be examined in the context of the reasonable expectations of the investor. Finally, there is no fixed and hardline rule as to what constitutes a violation of the minimum standards, as this must be adapt to the particular circumstances of each case.

a. Nondiscriminatory and nonarbitrary

First, in complying with the minimum standards, an environmental measure must be nondiscriminatory and nonarbitrary. Ensuring that a measure is nonarbitrary connotes that it must not be exercised in a whimsical and despotic manner so as to deprive the investor of his right to due process. In the context of expropriation claims, the due process requirement entails the grant of substantive legal procedures, which "must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."[897] Hence, allegations of arbitrariness are avoided if the regulation is enacted with due process, and the investor is apprised of the circumstances regarding the issuance of the measure.

Similarly, a State must ensure that the measure does not result in discriminatory treatment. Discrimination can be manifested in several forms, but normally, it happens on the basis of nationality. In addition to a breach of fair and equitable treatment standards, discrimination may raise allegations of national treatment violations. As such, the environmental measure must be applied uniformly to all investors reasonably affected, whether they are foreigners or nationals of the State. A distinction is possible, if and only when the legitimate cause or purpose of enacting the measure is to restrain or regulate an act that only the foreign investor is engaged in. Otherwise, there may be a selective application of the measure, which may be tantamount to discrimination.

An allegation of this nature was present in *S.D. Myers, Inc.*, wherein expropriation was ruled out, yet the tribunal held that there was a violation of the applicable norms of national treatment and minimum standards. This dispute shows that a tribunal may free a State from any claim of expropriation because of an environmentally motivated measure, but because

897. *ADC Affiliate Limited and ADC & ADMC Management Limited*, ICSID Case No. ARB/03/16, ¶ 435.

of the manner upon which the ban was applied to the foreign investor, violations of other investment protection standards were found and the respondent State was made to indemnify the investor. Thus, notwithstanding the recognition of police powers justification for enacting an environmental measure, a State is not entirely free from liability, as it may still be held liable if the measure constitutes a violation of treatment standards.

b. Reasonable investor expectations

Second, ensuring minimum standards is intricately connected with an investor's reasonable expectations. Given that investments are typically based on certain assumptions and beliefs, investor expectations are premised on "the issue of unexpected change with an excessive detrimental impact on the foreign investment's prior calculation[.]"[898] A change in the regulatory landscape of the host State may disappoint the initial expectations of the investor, leading to claims for reparation. This was relied upon by the *Santa Elena* tribunal in setting the amount of compensation to be paid to the investor, as when the property could no longer "be used for the development purposes for which it was originally acquired."[899] However, this was clarified in *Metalclad Corporation*, where it was explained that investor expectations are only relevant in determining the extent of regulatory expropriation where officials of the State made specific representations to the foreign investor.[900]

Thus, in the context of enacting environmental regulations which cause devaluation to foreign investment, investor expectations may be considered only when there is a representation made on the part of the host State. A reasonable belief held only by the investor, without any form of assurance of non-intervention from the State, may not be considered if there was really interference in the property. This is a reasonable analysis, given that every investment is usually associated with a certain degree of risk. The investor may not predict with complete certainty the trajectory that the investment will take. In effect, this is a risk to be borne by the investor, as a consequence of making an investment.

898. Wälde & Kolo, *supra* note 23, at 819.

899. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 81.

900. Marlles, *supra* note 336, at 302 (citing *Metalclad Corporation*, 5 ICSID Rep., ¶ 89 & *Marvin Roy Feldman Karpa*, 42 I.L.M., ¶¶ 148-149).

However, this risk may be negated if the State made actual representations to investor, to the effect that it made certain promises or warranties, which may or may not be stipulated as actual obligations. In the event that a breach of these representations happen, a claim may be pursued by the aggrieved investor. This is evident in *S.D. Myers, Inc.* where the tribunal awarded compensation since the investor did not have a reasonable expectation that the export of PCBs would be banned. Conversely, in *Methanex Corporation*, the existence of a highly-regulated environment, together with the absence of "specific commitments" made to the investor that the regulatory regime would not change led the tribunal to conclude that the company did not have legitimate investor expectations.[901]

Nevertheless, the mere presence of legitimate investor expectations cannot be treated as an absolute guarantee that compensation must be paid. Despite the existence of reasonable investor expectations — including those that pertain to the State's regulatory regime — claims may still be overcome in the name of the general welfare, especially when the regulation pertains to environmental protection efforts.

c. Flexibility in applying the standards

Finally, in determining compliance with international minimum standards, a certain degree of flexibility must be employed. The determination as to the applicability of these standards must remain flexible, and must be judged on case-to-case basis. There might be instances where an environmental measure was made to apply only to a specific foreign investor, but there might be circumstances which could justify a distinction. As such, in the cases of *Methanex Corporation*, *Glamis Gold Ltd.*, and *Chemtura Corporation*, aside from junking the expropriation claims, the tribunals also dismissed the alleged violation of the minimum standard. The decisions are based on the fact that the claimants failed to substantiate the alleged violation.

2. Ensuring reasonableness and proportionality

The second criteria in complying with the lawful method element of an exercise of a legitimate environmental regulation is ensuring reasonableness and proportionality of the measure. These are two distinct standards themselves, which are interrelated by the fact that they necessitate an assessment of the character and purpose of the environmental regulation. Determining the reasonableness of the regulation may require an inquiry

901. TIENHAARA, *supra* note 329, at 251.

into its nature and character. Assessing its nature is essential in determining its validity, and whether its effects on the investments is expropriatory or not. This naturally involves an assessment of the risk desired to be averted by the regulation. In this regard, it is valuable to consider Wagner's proposition as to how tribunals should assess the scientific basis behind the measure. Wagner proposes that

> an arbitral tribunal considering an expropriation claim arising out of a purported environmental measure should limit its inquiry to determining the science underlying the risk determination has the minimal attributes of scientific inquiry [—] that is, whether the evidence of risk has been derived through the application of legitimate scientific methods and procedures, and is probative of a potential for adverse effects. That is true even if the evidence is controversial or inconclusive. Once an arbitral tribunal has confirmed that the evidence is scientific and probative, it should accept the legitimate environmental basis for the measure.[902]

Thus, an assessment into the character of the environmental measure is in order. The mere fact that an environmental regulation is enacted to safeguard the environment creates a prima facie presumption that the measure was legitimate and was necessitated by a genuine desire to avert environmental harm. This, by itself, makes it exempt from the compensation requirement, for being a clear exercise of police powers. However, as the objective of a measure may be easy for governments to allege, the tribunal must therefore look into the character of the measure, and assess whether the measure has a legitimate purpose of protecting the environment.

After assessing whether an environmental risk is really involved, it must then be determined whether the measure is sufficient to prevent the harm from happening. This is where proportionality comes in. As explained by the *Tecmed* tribunal — "There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by an expropriatory measure."[903] In a way, the proportionality standards brings to the fore the necessity of enacting the measure. As such it must be asked, whether there is a rational connection between the risk identified and the measure imposed.

Such an assessment must first be based on scientific findings. However, as discussed earlier, scientific is not entirely necessary, in view of the need to take precautionary measures in particularly urgent situations. Hence a degree

902. Newcombe, *supra* note 16, at 25 (citing Wagner, *supra* note 4, at 534-35).

903. *Técnicas Medioambientales Tecmed, S.A.*, 10 ICSID Rep., ¶ 122.

of subjectivity is also factored in. If a government was faced with a predicament of having several choices, it could be argued that the measure enacted must be the best one which can sufficiently mitigate the impacts of the risk, and not merely a choice that will affect lesser property rights. Again, this involves a balancing of interests, and each case must be judged on a case-to-case basis.

Given the threats posed by a volatile natural environment, it is postulated that the proportionality standard must not be fixed too high so as to render the measure expropriatory. Tribunals must consider and put premium on the necessity of protecting the environment. It must only be when a measure is enacted so despotically that the balance should tilt in favor of the investor. States should be given a wide latitude to assess factors which may be deemed risks to the environment, and they should be granted a discretion in deciding which course of action to take, and ultimately what to regulate.

3. No substantial deprivation in economic value

Finally, for an environmental measure affecting foreign investment to be considered non-expropriatory, there must be no substantial deprivation in the foreign investment's economic value. Concededly, the enactment of any government regulation, whether environmental or not, will create an interference on property rights. However, the mere fact that there was interference *per se* does not necessarily follow that the owner must be compensated for whatever effect the measure has on the property. For a measure to be regarded as an expropriation, there must be "substantial loss of control or value[,]" or severe economic impact on the investment.[904] As to what amounts to a substantial impact on the investment's economic value must be judged by the tribunal according to the merits of each case.

It must be noted that as earlier discussed, the substantial deprivation standard is the one employed by tribunals applying the sole-effects test, just like in *Metalclad Corporation* and *Tecmed*. Hence using this standard might not be in accord with the position being advocated by this Note. However, to give a comprehensive view, the standard will be broken down and analyzed in consideration of environmental regulation. Two factors will be considered, i.e., loss of control or use, and temporality.

904. UNCTAD, TAKING OF PROPERTY, *supra* note 401, at 41.

a. Loss of control or use

An analysis of an investor's loss of control or use of the investment is useful in determining whether expropriation exists. However, the distinction between the two — including the importance of the distinction — has not been thoroughly addressed by arbitral tribunals. For instances, in *Santa Elena*, the standard for substantial deprivation was set too high, such that expropriation was found based on a complete loss of control over the investment, rendering the property practically useless—without the tribunal explaining the difference between control and use. This seems to suggest that a partial deprivation of control would not constitute an expropriatory measure, which is in contrast to the *Marvin Roy Feldman Karpa* ruling that a substantial but less than total deprivation may still constitute expropriation.[905] However, it must be noted that *Marvin Roy Feldman Karpa* did not involve an environmental measure, as opposed to *Glamis Gold Ltd.* and *Chemtura Corporation*, which both assail an environmental measure. In *Glamis Gold Ltd.*, the tribunal ruled out expropriation on the basis of the economic impact test. Accordingly, a measure will only be considered expropriatory if there was a radical deprivation of the economic use and enjoyment of the investments. Meanwhile in *Chemtura Corporation*, the tribunal relied on the substantial deprivation test in upholding the regulatory impact of the measure. There, the tribunal expressly recognized the police power of the State in enacting an environmental measure.

This Note advances the more recent rulings applied in *Glamis Gold Ltd.* and *Chemtura Corporation*. A State's power to protect and safeguard the environment must be recognized, including its prerogative to enact regulatory measures, which may affect foreign investment. Any effect on the value of the foreign investment must yield to the general welfare purpose of the regulation. An aggrieved investor may only successfully assert an expropriation claim if there was a substantial deprivation on the economic use of his property. This position is supported by *Pope & Talbot, Inc. v. Canada*, an earlier NAFTA case also involving an environmental measure, wherein it was held that in order to constitute expropriation, the assailed measure must be of a certain "magnitude or severity[.]" [906] Thus, a substantial deprivation only happens when the regulation has totally wiped

905. Marlles, *supra* note 336, at 298 (citing *Marvin Roy Feldman Karpa*, 42 I.L.M., ¶ 152).

906. Pope & Talbot, Inc. v. The Government of Canada, Interim Award, IIC 192, ¶ 96 (Mar. 5, 2002).

out the value of an investment.[907] Nevertheless, the fact remains that what constitutes such must be judged on a case-to-case approach.

b. Lasting effects test

An important factor used in determining the extent of the deprivation on the investor's property is the temporality element. This is measured by looking at the duration of time the measure has affected the investor's property. Citing the earlier *Tippetts, Abbett, McCarthy, Stratton* case, this element was recognized in *Santa Elena*, where the tribunal declared that a deprivation must be more than "merely ephemeral."[908] This was also the tenor of the decision in *S.D. Myers, Inc.*, where the tribunal applied the measure's lasting effects in order to determine the degree of interference with the investment. Having found that the ban imposed was merely temporary, the tribunal dismissed the investor's claim of expropriation. Thus, for an environmental regulation to amount to substantial deprivation, it must be permanent in nature and must have lasting effects on the investment. If the measure is imposed only for a limited period, then substantial deprivation cannot be claimed, since it is likely that the economic value of the investment still subsists.

C. A Postscript: Resolving Potential Conflicts Between Foreign Investments and the Environment in the Philippine Setting

The proactive stance taken by the Philippine government, especially by the judiciary, in protecting and safeguarding the people's right to a healthful and balanced ecology poses a big predicament in the realm of foreign investment protection in the country. For the past years, the Philippines has been enacting various laws and regulations meant to safeguard such right. This pro-environment regulatory atmosphere is further complemented by the liberal approach applied by the courts towards environmental protection, more so with the promulgation of special rules and remedies implemented in furtherance of this constitutionally enshrined right.

In particular, the writs of *kalikasan* and continuing *mandamus* may be considered as huge risks for foreign investments. Although not *per se* regulatory and are merely issued by courts, these writs have the potential of affecting the operations of foreign investors, thereby affecting the value of

907. *Id.* ¶ 102.

908. *Compañía del Desarrollo de Santa Elena, S.A.*, 39 I.L.M., ¶ 77 (citing *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. at 226).

their properties. Together with a barrage of other environmental measures enacted on a national and local level, these may cause a volatile investment climate in the country, given the likelihood of the balance tilting in favor of environmental protection rather than investment protection.

On a legal standpoint, this view is consistent with the reinforcement of the police-powers doctrine in the event of a conflict between a regulatory environmental measure and foreign investment. Thus, when an environmental measure is questioned by a foreign investor in domestic courts for being expropriatory, it is posited that the State's exercise of its police powers will be recognized and an occurrence of expropriation will likely be ruled out. Such a generalization is proper, more so if examined based on the traditional requisites of police power earlier discussed, in the context of investment disputes.

Primarily, the lawful purpose is evident. In accordance with the claims made earlier, a State's international environmental obligations could be the basis for the proper exercise of its regulatory powers. This, without a doubt, holds water in the Philippine context given the incorporation of certain environmental principles in domestic law. The precautionary principle is expressly recognized in the Supreme Court's Rules of Procedure for Environmental Cases,[909] the Climate Change Act,[910] and in some recent jurisprudence.[911] References have also been made to the principle of common but differentiated responsibilities and sustainable development, which is the mother concept of the principle of intergenerational responsibility recognized by the Supreme Court as early as the 1990s. These bolster the argument that the State can enact environmental measures affecting the value of foreign investment, even in the absence of scientific uncertainty as to the effects of such investment. This position finds stronger application when the measure involved is motivated by the desire to deter climate change, given that the Climate Change Act is the first Philippine law

909. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC (Apr. 13, 2010).

910. An Act Mainstreaming Climate Change Into Government Policy Formulations, Establishing the Framework Strategy and Program on Climate Change, Creating for this Purpose the Climate Change Commission, and for Other Purposes [Climate Change Act of 2009], Republic Act No. 9729 (2009) (as amended).

911. *See, e.g.*, International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), 776 SCRA 434 (2015).

to fully subscribe to the this policy, and even enjoins the business sector from doing acts that could hamper efforts to combat the looming threat and all its ill effects.

Admittedly, much of these are abstract concepts, and the issue of whether these principles may be sources of legally enforceable rights is arguable at best. However, it is postulated that these principles are a subset of the constitutionally guaranteed right of the people to a balance and healthful ecology; most especially, these concepts are domestic applications of customarily binding environmental obligations, which the Philippines must sufficiently comply with, lest it risk the triggering of State responsibility. Thus, the lawful purpose element may be satisfactorily proven and invoked.

As regards the lawful method element, the same standards espoused earlier should also be employed, as far as determining the effect on the value of a foreign investor's property is concerned. It must be noted that the standards adopted by international investment dispute tribunals, in deciding regulatory taking claims, reflect the doctrines in earlier domestic cases like *Pennsylvania Coal Co.*, which the Philippines expressly recognized in *Laguio, Jr.* Though like international investment tribunals, domestic courts relying on such would likely not apply everything, but rather only specific standards that may be applicable depending on the particular circumstances of each case.

Currently, there is no known investment dispute between the Philippines and a foreign investor arising from an expropriation claim due to an enactment of an environmental regulatory measure. If at all, most disputes involving investors are contained in the domestic level. However, the industries most likely to be affected involve those in the mining and energy sectors, given the scope of their activities that might have adverse impact on the environment. Further, in the event of conflict with foreign investment, domestic courts will likely uphold the validity of the State's exercise of its environmental regulatory powers, in accordance with the compliance with environmental standards provision in the Foreign Investments Act.

Overall, it is asserted that the Philippines has a wide gamut of strong and enforceable environmental laws that could potentially come into conflict with foreign investments. If in the future, an expropriation claim against the country is lodged with an international arbitral tribunal, it is probable that the tribunal will recognize the State's international environmental obligations as the public purpose element behind the regulatory measure, given the strong foundations of these obligations incorporated into Philippine law. What then remains to be seen is the measure's compliance with the lawful method element, which the tribunal applies depending on

the particular circumstances of each case. Consequently, even in the context of the Philippines, there is basis for the position for the reinforcement of the police-powers doctrine, thus upholding the primacy of the environmental measure over the devaluation of foreign investment.

VIII. CONCLUSION AND RECOMMENDATIONS

> *Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty prevent, or at least mitigate such harm.*
>
> — The Arbitral Tribunal in the *Arbitration Regarding the Iron Rhine Railway*[912]

A. Conclusion

Contemporary developments in the various fields of international law reflect that there is no fixed and hardline rule which solely governs a particular legal system. As elucidated in this Note, the traditional norms granting protection to foreign investments should not be entirely rigid, so as to allow flexibility in areas where deviation is necessitated by a force bigger than the law itself. Consequently, the noble cause of environmental protection allows a State to enact regulations affecting foreign investments, without necessarily transporting the act to the regime of expropriation, where the payment of just compensation is required. Consistent with the reinforcement of the police-powers doctrine advocated by the Author, foreign investment should then yield to the enactment of the regulatory environmental measure, provided that the standards prescribed are duly complied with. In deciding investment disputes involving environmental expropriation claims, arbitral tribunals should consider the two elements required for the proper exercise of police power — the concurrence of lawful purpose and lawful method.

In the enactment of a legitimate environmental measure, the lawful purpose element is considered complied with, in view of certain concepts and principles of international environmental law that have already crystallized into normative obligations recognized under customary international law. These norms include the precautionary principle, the prevention of transboundary harm, the polluter pays principle, the precept of common but differentiated responsibilities, and the principle of sustainable development. Adherence to these principles constitutes as enough basis for

912. *Arbitration Regarding the Iron Rhine Railway*, 27 R.I.A.A, ¶ 59.

the lawful purpose element behind the enactment of every environmental measure. This highlights the underlying reality that environmental protection is an obligation owed by each and every one. The compensation, which should have been paid to the foreign investor as a way of reimbursement for his potential loss, could be regarded as his just and equitable share in the protection of the environment. Despite the varying results reached by international tribunals when deciding cases involving such conflict, these cases must be harmonized in view of the growing recognition of an *erga omnes* obligation in protecting the planet.

However, this also opens an avenue for abuse, whereby States, in the guise of protecting the environment, are merely enacting environmental protection measures to intimidate foreign investors. This could be for self-serving purposes, which would constitute an affront to the traditional forms of protections granted to foreign investments. Thus, compliance with the standards espoused under the lawful method element is necessitated. In determining whether an environmental measure would fall under the rubric of regulation or of expropriation, the following are the amalgamation of standards prescribed by investment tribunals — compliance with international minimum standards, reasonability and proportionality, and the absence of substantial deprivation in the investment's economic value. The reasonable expectations of an investor are considered part of the minimum standards. Hence, tribunals must consider whether a representation was made by a State before the claimant made the investment. Nevertheless, strict adherence to these standards must not be entirely rigid so as to defeat the purpose upon which the measure was enacted. In line with the prevailing view of tribunals, compliance with these substantive norms are judged on a case to case basis, depending on the intricacies of any given situation.

A successful invocation of these principles and standards reinforces the "broadening of the police powers" doctrine. Ultimately then, a State enacting an environmental measure affecting the value of foreign investment, does not give rise to a compensable regulatory taking, but is merely acting within the scope of its regulatory powers.

Aside from the reinforcement of the police-powers doctrine, the findings in this Note further prove that existing legal principles need not be static, as they must adapt to the ever-changing dynamics of the times. As such, the traditional norms of investment protection must yield — or at least give due recognition — to the threats imposed by a volatile natural environment. The inevitable intertwine of the traditional norms of investment law into the emerging field of environmental law remains to be

inevitable, given that international law is a dynamic — not static — decision-making process.[913] In the end, the conflict between these two regimes of protection still involves the balancing of the competing interests of international environmental law and foreign investment law.

B. Recommendations

After addressing the legal issues and objectives sought to be answered by this study, the following points are hereby recommended —

First, the Author advocates for the renegotiation, or at the very least, a rewording, of existing investment treaties — both bilateral and multilateral — so as to further incorporate environmental protection standards, and to fortify some loosely-worded investment protection norms. Admittedly, this two-pronged approach is an attempt to balance these two competing norms since a solely pro-environment or a solely pro-investment treaty, favorable only to one side, would not pass the scrutiny of those parties and sectors adversely affected. What is more acceptable is that investment treaties be more receptive to the environmental agenda, at the same time not expressly revoking nor diminishing the traditional protective norms accorded to foreign investors.

1. Incorporation of environmental protection standards

As regards the further incorporation of environmental protection standards, references will be made to the environmental provisions embodied in the NAFTA, given its pioneer status in balancing environmental rights in an IIA. These could be then emulated by other IIAs in order to provide a wider scope of environmental protection for investments across the globe. The following proposals listed hereunder should be considered.

a. Preamble

The adoption of the environmental agenda in investment agreements can be most easily done through its insertion in the preamble of the treaty. Generally, statements in the preamble are regarded as the treaty's guiding principles, which could guide State-parties and investors alike in pursuing their investment programs. More importantly, the preamble may be of great help to arbitral tribunals in interpreting the terms and purpose of the parties.

913. *See generally* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39-55 (1995).

A preambular statement could contain provisions to the effect that the natural environment is an important consideration in the process of foreign investment. The following preambular statements in the NAFTA are worthy of being replicated in other IIAs —

> [Undertake] each of the preceding in a manner consistent with environmental protection and conservation;
>
> ...
>
> [Promote] sustainable development; [and,]
>
> [Strengthen] the development and enforcement of environmental laws and regulations.[914]

b. Consistency Provisions

Consistency provisions are "statements which reiterate that governments are not prevented from adopting or enforcing environmental regulations which are [otherwise consistent] with the rest of the agreement."[915] The adoption of this provision in an IIA implies that the host State may adopt environmental regulations even if these affect foreign investment. In a way, this seems to be an implicit recognition of the State's police powers. The NAFTA has a separate article pertaining to *Environmental Measures*, the first half of which embodies a consistency provision, in this wise — "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining[,] or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[916]

Such a provision may embolden States to take steps to protect the environment in case of an imminent threat, since a potential expropriation claim may be forestalled by a provision allowing it to regulate. This may also help lessen occurrences of regulatory chill.

914. NAFTA, *supra* note 46, pmbl., paras. 12, 14, & 15.

915. TIENHAARA, *supra* note 329, at 340 (emphasis omitted).

916. NAFTA, *supra* note 46, art. 1114 (1).

c. Pollution Haven Provisions

Pollution haven provisions refer to "statements discouraging countries from lowering environmental standards to attract investment."[917] The other half of the NAFTA's environmental measures provision is an example, to wit —

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety[,] or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[918]

Having this kind of provision in an IIA will deter States from lowering their own environmental standards just to attract foreign investment, thus avoiding implications of pollution haven or race to the bottom. This reinforces a State's commitment to its international environmental obligations and recognizes the primacy that must be accorded to environmental protection.

d. General Exceptions

To complement the consistency and pollution haven provisions, it is proposed that current and future IIAs contain general exceptions which allow States to adopt measures necessary to protect or to avert any harm to the environment. This is also evident in the NAFTA, through its incorporation of the general exceptions to the GATT, allowing the enforcement of measures "necessary to protect human, animal[,] or plant life or health."[919] Such provisions on exceptions may safeguard States from investor claims, provided that the measure is not arbitrary or discriminatory.

e. Adoption of a Protocol or a Side Agreement

In addition to actual environmental provisions incorporated in the main text of the IIA, the parties may also negotiate for the adoption of a separate protocol or side agreement which solely focuses on the environmental

---

917. TIENHAARA, *supra* note 329, at 340.

918. NAFTA, *supra* note 46, art. 1114 (2).

919. GATT, *supra* note 585, art. XX (b).

implications of the investment. An example is the NAAEC, which is known as the "environmental side agreement" of the NAFTA.[920] To fully support environmental protection efforts, these protocols or side agreements may stipulate that in case of conflict between investment protection and environmental protection, the latter should take precedence.

Renegotiating for a new breed of pro-environment investment agreements may lead to lesser conflicts between States and the environment. This will allow States to enact legitimate environmental regulations more freely, while the investor may concede to the State's exercise of such power, given the said provisions. As the NAFTA experience illustrates, the arbitral awards decided under the said treaty heavily leaned in favor of environmental protection. Hence, cases decided by other tribunals may also be swayed in this direction if these environmental provisions are incorporated in other international investment agreements.

2. Fortification of existing investment standards

As regards the fortification of existing investment standards, the following points deserve consideration and should be revisited.

a. Definition of Indirect Expropriation

As it is right now, existing IIAs do not have one uniform definition of what constitutes indirect expropriation.[921] Even a tribunal recognized that BITs generally do not define as such, and they "do[ ] not establish which measures, actions[,] or conduct would constitute acts 'tantamount to expropriation.'"[922] This creates an ambiguity for tribunals in deciding which governmental acts are to be considered expropriatory. Although certain tests are employed by tribunals, these may not be enough to have a stable investment dispute resolution regime. As such, it is proposed that the definition of what constitutes expropriation be worded in a way that defines the particular acts constituting expropriation. At the very least, specific standards should be specified in determining what degree of interference with investments may be regarded as expropriatory.

920. Wagner, *supra* note 4, at 479 (citing NAAEC, *supra* note 587).

921. Suzy H. Nikièma, Best Practices: Indirect Expropriation at 1, *available at* http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf (last accessed Jan. 26, 2018).

922. *LG&E*, 46 I.L.M., ¶ 185.

b. Identifying Legitimate Police Power Measures

In order to provide more clarity for investors and host States, IIAs should specifically pinpoint what kind of police power measure could be enacted by the State, which would not result to a payment of compensation in case of a devaluation of foreign investment. Consistent with the views espoused by this Note, it should be provided that a legitimate environmental measure aimed to protect the environment is considered as a valid exercise of police power, and thus should not give rise to expropriation claims. The scope of what constitutes a legitimate or bona fide environmental measure should be worded in broad terms, in order to grant a State considerable leeway in determining what action to take — in line with the environmental principles earlier discussed.

Renegotiating or changing the terms of treaties to take into account environmental protection is possible. In fact, this might be the potential direction to be treaded by future investment treaties.[923] The explanatory note of Norway in incorporating environmental protection in some of its existing treaties may be instructive in this regard —

> In order to conduct a satisfactory environmental protection policy, it is of decisive importance that national authorities have a right to employ effective instruments relevant to meet the needs dictated by environmental problems at any given time. Freedom of action and flexibility in the use of instruments are important over time. For the [g]overnment, it has therefore been a primary consideration to ensure that investment agreements are drafted in such a way that they do not limit the freedom of action of the environmental protection authorities in providing national instruments for protection of the external environment.[924]

Given that the renegotiation or amendment of these treaties may be an ideal undertaking requiring considerable amount of time, in the interim, arbitral tribunals presented with disputes involving investments and the environment must adopt a uniform position in deciding such cases. Pending the emergence of a new breed of investment treaties already incorporating environmental safeguards, the various arbitral tribunals can skew their case law towards an increased recognition of a State's right to regulate the environment, even at the expense of foreign investments. This is in line with the main thrust of this Note, which is reinforcement of the police-powers

923. SORNARAJAH, *supra* note 12, at 226–27.

924. *Id.* at 227.

doctrine. Hence, investment tribunals must consider the lawful purpose and lawful method elements earlier expounded on.

3. Adapting to the changing dynamics

In order for the Philippines to adapt to the changing dynamics of the relationship between foreign investments and the environment, the Author advocates for the following.

a. Future investment treaties

In addition to amending the terms of existing treaties, the Philippines should exercise reasonable foresight in ensuring that future investment treaties, whether bilateral or multilateral, contain the environmental considerations earlier proposed. This is in line not just with its international environmental obligations, but also with the environmental mandates enshrined in the Constitution and existing laws. If the existing Canada-Philippine BIT is to be an indication, the Philippines is currently in the right track, given environmental considerations stipulated in the said treaty. This can be then replicated in the country's other BITs.

b. Philippine Model BIT

As of yet, the Philippines does not have a model bilateral investment treaty. However, given the recent surge in investor interest in the Philippines, a formulation of such model BIT may be possible in the short to medium term. If so, environmental considerations should also be incorporated in any forthcoming Philippine model BIT, in order to ensure a stable environmental regulatory regime.

c. Amendment to the Foreign Investments Act

Although the FIA already requires foreign investors to "comply with *existing* rules and regulations to protect and conserve the environment,"[925] such wording only pertains to currently existing regulations. The provision does not seem to be prospective, so as to anticipate any future legislation to be enacted in view of the imminent ecological realities happening. Thus, to preempt any future conflict that the Philippines may be embroiled in

925. An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for Other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042, § 11 (1991) (emphasis supplied).

because of the enactment of an environmental measure affecting foreign investment, the following amendment is proposed —

> [Section] 11. *Compliance with Environmental Standards.* [—] All industrial enterprises, regardless of nationality of ownership shall comply with existing rules and regulations to protect and conserve the environment and meet applicable environmental standards. *This is without prejudice to any future legislation or regulation that would be enacted, that the State considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*[926]

The emphasized provision is the amendment advanced by the Author. This is culled from the consistency provisions found in existing IIAs. Furthermore, the *Declaration of Policy* of the Foreign Investments Act (FIA) can also be amended so as to acknowledge the need to protect the environment as a recognized State policy.[927] Given that the FIA is the primary investment law in the country, such an amendment would an acceptance of the need to balance the interests of promoting foreign investment with environmental protection.

d. Amendment to the Omnibus Investments Code

Although the Philippines does not yet have its own model BIT, the current Omnibus Investments Code[928] contains the basic rights and guarantees accorded by the State to foreign investors. One of these is the guarantee against expropriation.[929] To safeguard the State from any expropriation claim that may arise in the future, an exception to this clause may be added, so as to regard investment devaluations due to the enactment of legitimate environmental measures as non-expropriatory and therefore not subject to the payment of just compensation. The wording of this proposed exception is similar to the proposed exceptions in investment agreements.

In addition to a recognition of the constitutional right of the people to a balanced and healthful ecology, these recommendations for the Philippines are meant to address, or even to prevent, any potential expropriation claim that may be lodged against it in its pursuit of protecting the environment.

---

926. *Id.* The proposed amendments are in italics.

927. *Id.* § 2.

928. The Omnibus Investments Code of 1987 [OMN. INVESTMENTS CODE], Executive Order No. 226 (1987).

929. *Id.* art. 38 (d).

These find more relevance, given the risks imposed by a volatile natural environment to an archipelagic State like the Philippines.

In closing, it should be reiterated that what this Note tried to accomplish is a legal framework that would guide international arbitral tribunals in the event of an investment dispute due to environmental protection. Despite the conflicting norms of protection accorded to foreign investments and the environment, maintaining a balance is still possible. By infusing environmental considerations in investment agreements, a stable investment climate is fostered, as these already anticipate a State's prerogative in enacting measures to protect the environment. Moreover, it has been said that "bilateral and multilateral investment may be the most judicious and effective way to prevent States from deliberately disregarding their commitments to environmental protection (in order to lure investors) by providing the legal bases to challenge governments who do this."[930]

Ultimately, this Note established a reinforcement of the police-powers doctrine in the context of regulatory taking due to ecological concerns. The international environmental obligations of States are recognized to constitute a lawful purpose behind such measures, and is only tempered by the proper application of the minimum standards aptly applied by arbitral tribunals in deciding environmental expropriation disputes. As succinctly stated by an international court, "economic development is to be reconciled with the protection of the environment, and in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded."[931]

With a properly demarcated philosophy in handling investment and environmental conflicts, every party stands to gain. The government will be able to guarantee the right to a healthy environment of its citizenry. Though admittedly, foreign investors stand to suffer an initial loss, such is only temporary. Their loss is tempered by the fact that that the loss is another investment in itself — an investment made for a more sustainable future — meant to be enjoyed by the generations to come.

930. Gray, *supra* note 245, at 313.

931. *Arbitration Regarding the Iron Rhine Railway*, 27 R.I.A.A, ¶ 221.