CIFILE Journal of International Law, *Journal Vol. 2, Issue. 4, Fall (2021)*

CIFILE
Canadian Institute for International Law Expertise

Print ISSN: 2563-6820
Online ISSN: 2563-3341

Examining Environmental Obligations in International Investment Law

Seyyed Ahmad Rasi

M. A in International Law, Department of South Tehran, Faculty of Law of the Payame Noor University

DOI: 10.30489/CIFJ.2021.278252.1031

ARTICLE INFO

Article history:

Received: 23 March 2021
Accepted: 24 June 2021
Online: 24 June 2021

Keywords:

International environmental law, International investment law, Obligation, corporate investments, Rules

ABSTRACT

International environmental law and international investment law are two important and fundamental disciplines of international law which play a fundamental role in human society today. In fact, one cannot live in societies without these two categories. Economic investments by companies in different countries require legislation and sometimes restrictive legislation. One of these methods is the application of environmental laws, which is often overlooked in corporate investments. Every investor should invest with respect for the environment and always base their actions on the environment in their economic calculations. Thus, this research with a descriptive-analytical method will examine the issue of environmental obligations in investments, and in this regard, the article will examine the most important international issues. Research shows that investors often waive environmental commitments, but states can minimize the breach of these environmental commitments by enacting and enforcing strict and restrictive laws and regulations.

INTRODUCTION

The development of economic activities and the increase of foreign investment have, in many cases, led to the destruction of the environment of the host government. The importance of this issue encourages all actors in the foreign investment law system to try to strike a logical balance between investor protection rights and the host government's concerns about the environment and natural resources. (Nesari and Zamani,2018, p 31) Today, attention to environmental issues and scientific discussions of investment and the environment has been neglected in many bilateral investment treaties, which mainly affect developing countries. Multilateral investment agreements have only in some cases addressed the environmental effects of investment. The North American Agreement for Environmental Cooperation, adopted in 1993, aims to assess the environmental impact of transnational trade and investment. The treaty established a commission to conduct an environmental assessment of NAFTA performance (Article 10). This commission has enabled citizens to file complaints against a member state for violating that country's environmental rights. However, this mechanism is not effective enough because the recommendations of this commission are not binding, and the convicted country can continue its behaviour by denying the violation of environmental principles. The Central American Free Trade Agreement also requires States Parties in Article 4, paragraph 17, to encourage legislation to protect the environment, to disclose, report, and monitor environmental information to the public. The European Energy Charter also includes two balanced commitments: a commitment to protect

foreign investment and a commitment to reduce environmental damage (Article 19 (1)). Have not announced an investment. (Miri lavasani, 2019, pp 76 - 77)

Government contracts, and investment in general, require the investor's legal balance to be stable with the regulatory legal need to respond to changes in values, risks, and conditions. This is the main topic of recent discussions on the "policy space," which has focused mainly on development policy but is equally applicable to environmental policies. The policy environment centred on the 2003 Global Investment Report argued that the most important future challenge for developing countries in international investment agreements was to "balance" efforts to increase current investment through advocacy. Investor and effort to protect the environment. (UNCTAD, 2003)

Therefore, with the increase in the capabilities and complexity of international investment law and international environmental law, the possibility and the possibility of supporting foreign investment as an excuse to encroach on the environment or vice versa attracted a lot of attention attracted scholars of international law. In recent years, efforts have been made to link these two important areas of international law. The most important source of international investment law right now is bilateral investment agreements and customary international law. On the other hand, international environmental law is a law that has a relatively general consensus, and various documents have been adopted in this regard.

This paper has been divided into four parts. The first part is International Investment Law. The second part, Cases and International statutes are divided into four parts: Gabčíkovo-Nagymaros Project (Hungary v Slovakia) 1977, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Statute of the River Uruguay (1975) and The 2009 San Juan River case between Costa Rica and Nicaragua. Then the third part Convention on international trade in endangered species of wild fauna and flora 1973, and finally, the fourth part Settlement of disputes in the field of investment law and international environmental law.

Materials and Methods

1. International Investment Law

Foreign investment law is a branch of international trade law that discusses the rules and regulations of direct or indirect investment in a foreign country. (Seyfi ardebili, & Fathinejad, 2013, p 6) The most important source of international investment law at present is bilateral investment agreements, international arbitration and customary law, and customary international law. On the other hand, international environmental law is a law that has a relative consensus, and various international instruments have been ratified in this regard. The United Nations has institutionalized these two branches of international law in the United Nations through its formation UNCTAD[1] and its formation UNEP.[2] These two branches of law have inevitably found relations with each other.

Mutual protection of the environment and investment in each other and the connection between the two with the concept of sustainable development have been emphasized in many documents. Article 16 of the Rio Declaration, for example, refers to the need to increase the cost of pollution from activities at the international level and to the environment by taking economic measures and incurring costs by the polluter and emphasizes that there should be no inconvenience to make an investment. In industrialized countries, environmental problems are generally related to industrialization and technological development. To this end, these countries should strive to reduce the gap between themselves and developing countries, or the twelfth principle of the Declaration states that according to the specific conditions and needs of developing countries and the potential costs of including the relevant measures. To protect the environment in their

[1] . United Nations Conference on Trade and Development

[2] . United Nations Environment Programme

economic development plan and due to the need to provide more international technical and financial assistance to these countries, according to their request to achieve the above goal, the necessary resources must be provided. (Miri lavasani, 2019, pp 80 - 81)

In this regard, we can also refer to the Association Agreement (common market of South American countries). While the Association Agreement does not specifically address environmental issues, the preamble to the Convention makes an important reference to the environment, with the aim of expanding domestic markets by merging with the Convention to preserve the optimal use of available resources. It has introduced the environment and the improvement of physical communication and coordination in macroeconomic policies and ensures complementarity between different sectors of the economy based on the principles of gradual flexibility and balance. (Jalali, 2018, p 48)

2. Cases and International Treaties

The International Court of Justice has a key role to play in dealing with international cases. In the field of environmental issues, this court has initiated a procedure by issuing its verdicts, which is pursued by environmental critics today. Although environmental rules are among the soft laws, and they still do not have the necessary durability and consistency against large investments of governments, but nevertheless, the emergence and attention to the gradual attention of these (environmental) commitments provide the necessary ground for development. It provides for intergovernmental and international agreements and related statutes.

1.2.Gabčíkovo-Nagymaros Project (Hungary v Slovakia) 1977

In the Gabcikovo - Nagymaros case between Hungary and Slovakia, the International Court of Justice instructed the two governments to consider the principle of sustainable development. In addition, both sides emphasized that this principle was present in the present case. The court said in the lawsuit: ((In the past, humans have been in constant contact with nature for economic reasons, etc. In the past, this was done regardless of its effects on the environment. Due to new scientific insights and growing awareness of the dangers that threaten humanity, both present and future, and resulting from an environmental intervention, new norms and standards are being developed, and many regulations are being enacted over two decades. New standards must be taken into account and not only when governments start new activities but also when they want to reform and continue their past activities, within the framework of an economic development program that is compatible with Implement environmental protection, which is precisely the concept of sustainable development.)) (Miri lavasani, 2019, p 82)

In this case, the Court stated that Hungary has the right to be concerned about its natural environment as a fundamental benefit affected by the Gabchikovo Negimarus project (investment).

The Court notes that since the adoption of the 1977 Convention (the Treaty on the Implementation of the Project between Hungary and Czechoslovakia), new mandatory rules of environmental law have emerged, and the parties must implement the Treaty in accordance with these new norms. When implementing it, the parties should also consider the new mandatory rules when implementing their contractual obligations regarding the water quality of the Danube River and the protection of nature. (Case Concerning Gabcikovo - Nagymaros Project, 1997)

In this case, the Court first considers the natural environment as part of the fundamental interests of a country, also speaks of the developed rules and new norms of environmental law regarding the implementation of the 1977 Treaty, and states that the implementation of the Treaty must Be done according to the rules, Third, the Court refers in its 1996 advisory opinion on the legitimacy of nuclear weapons in support of its view that environmental interests may lead to the fundamental interests of a country. In other words, the general commitment of governments to respect and

protection of the environment, like the environment, is fundamental. As a result, it can be concluded that the Court has a customary route for environmental protection.

2.2. Pulp Mills on the River Uruguay (Argentina v. Uruguay)

The dispute between Argentina and Uruguay concerns a project to build pulp mills along the Uruguay River. This river is part of the common border between the two countries. The Argentine government considers Uruguay's action contrary to the obligations of the bilateral treaty governing the river and pollutes the river, air, and living environment of its citizens. Binding, in this case, the parties failed to reach an agreement. As a result, in April 2006, Argentina filed a lawsuit against Uruguay in court. By claiming that Uruguay has violated the obligations set out in the 1975 Bilateral Treaty (known as the Uruguay River Charter). (Zarei and others, 2017, p 207)

In this case, the International Court of Justice assesses Uruguay's performance in relation to the operation of a paper mill along the Uruguay River and provides principles on the relationship between investment law and environmental law. Although the two investing companies in Uruguay were subsidiaries of Spanish and Finnish companies, they were registered in Uruguay and were considered Uruguayan companies under international law. Therefore, although it is not possible to talk about international investment law in this opinion, the proposed principles regarding domestic investment can generally be generalized to foreign investment based on national behaviour. (Ziae,2015,p 199 - 200)

According to Article 1 of the Uruguay River Charter of 1975, States must work to achieve the protection of the environment and the management of shared resources in the river and to take steps in this direction by passing regulations in this commission and the necessary rules and actions by both parties. In this regard, the Court considers that, on the one hand, in order to achieve and achieve reasonable and appropriate uses, a balance must be struck between the right of both parties to the reasonable use of the river for economic and commercial purposes, and on the other hand, a commitment to protect against damages. The environment is derived from these activities. It is necessary to determine such a balance in the various provisions of the 1975 Statute (Articles 27, 36 and 41), which specify the rights and obligations of both parties. The Court also notes that Article 27 reflects the different interests of the littoral states in the use of common natural resources, as well as the need to balance this use and protect the river in line with the goal of sustainable development. (Mousavi and Mousavifar, 2016, p 596)

2.3. The 2009 San Juan River case between Costa Rica and Nicaragua

Another case that can be discussed is the ruling of the International Court of Justice between Costa Rica and Nicaragua on sailing on the San Juan River and some related rights on July 13, 2009. Relying on private individuals, the Court has ruled that the fishery of the inhabitants of the Costa Rican coast of the San Juan River is a customary right to recognize the rule of customary international law. (Costa Rica v. Nicaragua,2009, p 110)

Regarding the practice of local residents and regional customs related to this case, the ruling of the International Court of Justice of July 13, 2009, is significant: Residents of the Costa Rican coast of the San Juan River (should) have the right to travel in and out of the river for the necessities of daily life that require rapid transportation. Costa Rica should offer the right to navigate the San Juan River with official ships used only in special circumstances to provide basic services to coastal residents where fast (and timely) transportation is a prerequisite for meeting basic needs. Provide. In the case of fishing for the livelihood of the locals (which had become a local custom for the locals for many years), the court found that fishing by Costa Rican residents of the San Juan River for subsistence purposes is respected by Nicaragua as a customary right.

According to this ruling, it can be concluded that the economic activities and investments of the indigenous

peoples around this river for livelihood have been accompanied by the Court's disregard for the environment. At the same time, this vote should have taken into account the environmental and environmental commitments of the Costa Rican government.

3. Convention on international trade in endangered species of wild fauna and flora 1973

The subject of this convention is the prohibition of trade in endangered plant and animal species, which seems to have established useful mechanisms for the protection of endangered species. (Rasi,2020, p 63)

In fact, this Convention is a binding and enforceable international treaty of an ecological nature that has been laid with its unique mechanism for the protection and conservation of endangered species of animals and plants through its control of cross-border trade (international investment). The treaty is based on a regulatory system and includes a system for issuing permits or approvals in order to regulate international trade in wildlife.

The Convention uses three annexed lists that classify animal and plant species based on the degree to which their status is endangered, as well as the role of global trade control in reducing potential risks. In the text of the Convention, after mentioning the rules and regulations governing trade in the species listed in each of the Annexes, it shall name the cases that were excluded from the scope of the above-mentioned regulations and are subject to legal exemptions. As a result, licensing is required for the international trade of species listed in the Annexes to the Convention. The licensing system is the main task of this convention, but member states can enforce stronger national laws than the convention, such as a total ban on trade.

4. Settlement of disputes in the field of investment law and international environmental law

Today, more and more environmental considerations are being addressed in trade-investment agreements. Introduction The NAFTA Convention explicitly addresses the need to adopt “measures in a manner consistent with the protection and preservation of the environment” in order to promote sustainable development as well as to strengthen the development and implementation of environmental laws and regulations. NAFTA Introduction became the basis of the Court's argument in the “Myers v. Canada Case.”

Like many international agreements, the North American Free Trade Agreement (NAFTA) requires direct or indirect compensation for foreign investment. In an unprecedented move, companies have used this support to challenge government-sponsored actions if necessary to protect the environment and human health. As NAFTA makes clear, granting companies the right to seek redress implies the economic impact of environmental regulation has a serious impact on the ability and willingness of governments to enforce such regulation. Governments that do so run the risk of fines by compensating for valuable natural resources to defend the regulations against compensation if they fail. In addition, such punishment may be high enough that a government will not be able to maintain the order it deems necessary. To prevent the situation from getting worse, the provisions on which these claims are based have taken the model of trying to expand investment protection in the region, using the US Free Trade Agreement (FTAA) and the Multilateral Investment Agreement (MAI) adapted. (WAGNER,1999, pp 466-467)

In fact, it should be noted that international law does not oblige governments to provide compensation for the impact of international investment in the environment. If governments must be able to protect the environment, such a requirement is necessary. It can be argued that both international law and US law recognize the government's right to protect the environment without having to compensate for the impact of such regulations on investment. As a result, under NAFTA regulations, environmental measures should not normally create a right to compensation.

Also, the WTO Dispute Settlement Body also has jurisdiction over environmental issues, as Article 2 of its Statute requires the Review Board to interpret GATT and other existing agreements in accordance with general international law. (Ziae,2015,p 204)

It can be argued that references to environmental goals and the broad idea of sustainable development are insufficient, especially if we consider the multiple issues raised by NGOs as environmental concerns and by WTO member states as political issues. It is classified, it is deeply influenced by social values and ecological ethics. If we consider the possible consequences of current or future trade and environmental disputes in the WTO dispute settlement system and the challenges of the general idea of the political space in a decentralized legal regime as a matter of global sovereignty, this question is meaningless or insignificant. It does not matter.

The debate on trade and the environment has not been the only issue of extensive negotiations within the framework of the multilateral trade system, as in the Doha talks on environmental goods and services, agriculture and access to the non-agricultural market. Extensive discussions have taken place in the Trade and Environment Committee and in the TBT[3], in which the Trade and Technical Barriers have raised multiple non-tariff barriers rooted in environmental issues by member states. (Malakpour and others, 2013, p 71)

Conclusion

The main goal of international investment is to increase the development, welfare, and economic growth of countries, and given that a healthy environment is a necessary condition to achieve these goals; Therefore, foreign investment must be such that it has the least negative impact on the environment, and at the same time as efforts to grow foreign investment, environmental protection must be considered and there must be compatibility and coordination between them. Investors are pursuing their own financial and private interests, but environmentalists are pursuing the biological and collective interests of the world. What is certain is that in the interaction between international investment law and international environmental law, it is international environmental law that has been oppressed and has not received as much protection as an investment. The growth of investment and international trade and its effects on the environment have attracted global attention. Global concerns about environmental degradation have prompted the international community to work to improve living standards and protect the environment. These people believe that economic growth without strong environmental regulations is the cause of the destruction of the environment and the loss of world resources. The growth of foreign investment in the absence of high environmental standards increases pollution from production and consumption. Therefore, it is in this direction that environmental agreements become important and, in some cases, become the subject of lawsuits between governments or companies. Some international documents consider the observance of environmental principles as a condition for the entry of foreign capital into the country. Some post-capital documents provide an overview of the investment so that it can be loaned out if it complies with international environmental principles (such as MIGA[4]), and any post-capital documents provide a step-by-step guide to the investment. It is better to protect the environment as a precondition for the entry of a foreign investor than to have such a requirement after the entry of capital.

In accordance with international law, domestic legislators have sought to encourage increased competition between host investment countries to comply with environmental regulations through various means, such as pollution prevention; Meanwhile, developing countries, which initially sought to attract foreign investment by lowering the required environmental standards, for example by reducing the

[3] . Technical barriers to trade

[4] . Multilateral Investment Guarantee Agency

rate of fines for violating environmental laws, are trying to increase their commitment.

Acceptance of environmental requirements as a precondition for lending to transnational corporations in developing countries sees its benefit in enacting easy rules for the presence of foreign investors. In addition to the environmental assessment mechanisms available in some international organizations, encouraging financial and monetary organizations to adopt codes of conduct by transnational corporations as a precondition for obtaining loans and assistance can be more effective in protecting the environment more fundamentally.

Some international documents consider the observance of environmental principles as a condition for the inflow of foreign capital into the country, and some documents, after the inflow of capital, make a general assessment of the investment so that it may be attached to the loan if it is in accordance with international environmental principles. Gird (such as MIGA) and some documents assess the environment step by step after the capital inflow. Article 18 of the Stockholm Declaration emphasizes the exclusion of technology in the field of environmental protection. UNCTAD has also introduced three methods for reducing pollution caused by the activities of transnational corporations: the provision of quality services and goods and the quality of poultry. The latest technological achievements. The use of clean technologies, although it can lead to an increase in the cost of goods if this requirement is done within the framework of the principle of national conduct, will not be contrary to the international obligations of the government.

Therefore, the states have agreed to ensure the conservation of nature, environment, and biological diversity, which is not only a mandate but mandatory on the part of all the nations to ensure that environmental protection is the priority and the rest of all others should not come in the way of it.

References

1. Case Concerning Gabcikovo - Nagymaros Project (Hungary/ Slovakia). 25 September 1997. Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice (ICJ). Available at: www.icj-cij.org .
2. Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). 22 November 2013. Request presented by Costa Rica and Nicaragua for the indication of provisional measures, International Court of Justice (ICJ). Available at:

   www. icj-cij.org.
3. Dabiri, Farhad and Azadbakht, Bita (2011), Investigating the implementation mechanisms of the CITES agreement in the Iranian legal system with the aim of protecting endangered species, Journal of Environmental Sciences and Technology, Volume 12, Issue 4 - Serial , Winter, Pages 60-69
4. Dabiri, Farhad, Zare, Ali, Panahi, Mostafa, Malakpour, Milad (2013), Settlement of environmental disputes from the world trade with the context of WTO settlement mechanism, Human and Environment Journal, Volume 11, Issue 26, Summer, Pages 63-81
5. ICJ Judgment, Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009
6. Jalali, Mahmoud (2018), The relationship between free trade and environmental protection in international law, Comparative Law Researches, Volume 22, Issue 3, Fall
7. Miri lavasani, S (2019), Environmental obligations of foreign investors, Knowledge of Law and Finance Magazine, Volume 1, Issue 3, Spring
8. Mousavi, Seyyed Fazllolah, Mousavifar, Seyyed Hossein(2016), Legal dispute about environmental issues between Argentina and Uruguay (2010); clarifying some aspects and matters, public law studies, Volume 45, Issue 4 - Serial Number 4, Winter, Pages 589-608
9. Nesari, El & Zamani, Gh (2018), Environmental expropriation in foreign investment arbitration proceedings, Comparative Law Researches, Volume 22, Issue 4, Fall
10. Rasi, Seyyed Ahmad(2020), International Polar Law, Tehran, Miaade Andisheh Publications, First edition

11. Seyfi Ardebili, D & Fathinejad, Sh (2013), Foreign Investment Law, Tehran, Jd Publication
12. UNCTAD (2003), World Investment Report 2003: FDI Policies for Development: National and International Perspectives, at xvii
13. WAGNER, J. MARTIN(1999), ((International Investment, Expropriation and Environmental Protection)) GOLDEN GATE UNIVERSITY LAW REVIEW Vol. 29, pp 466 and 467
14. Zarei, Sahar, Poorhashemi, Seyed – Abbas, Pournouri, Mansour (2017), Development of international environmental law in the light of International judicial judgements and precedents, Journal of environmental science and technology, Volume 19, Issue 3 - Serial Number 74 , Autumn, Pages 195-216
15. Ziae, Seyd yaser (2015), Status of Environmental Obligations in International Investment Law, Public Law, Volume 15, Issue 42 - Serial Number 42, winter, Pages 191-224