

THE INCLUSION OF SUSTAINABLE DEVELOPMENT INTO NEW-GENERATION FTAs – WHAT CAN BE EXPECTED IN RESERVING NATIONS' RIGHTS TO REGULATE?

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Abstract

The last decade has seen a growing trend towards the combination of sustainability, in which environmental protection is the most important, with trade in both regional and international forums. Indeed, the term “sustainable development”, which rarely appeared in “traditional” trade or investment agreements, is easy to be found in many new-generation agreements such as CP-TPP or a series of FTAs recently signed by the EU with its partners such as Canada, Singapore and Vietnam.

It has been observed that the interaction between sustainable development and trade- investment, especially via dispute settlement activities, has been intensively studied. However, as the combination of sustainability in FTA has just been promoted recently with the aim to tackle the abovementioned issue. The provisions on sustainable and environmental protection are included in the new generation FTA, i.e. CP-TPP, EU-Canada Comprehensive Economic and Trade Agreement, EU-Singapore FTA and EU-Vietnam’s FTA. These sustainability-support regulations help to confirm the right of the hosting state to set its own levels of domestic protection in the environmental and social areas as well as to build and follow its own environmental policies. However, these provisions are still general compared to the set of trade-investment rules/obligations under the trade-investment agreements.

The aim of this paper is to find out the meaning and status of the sustainability-support regulations under trade-investment agreements. It examines these provisions in light of maintaining countries’ right to protect the environment under abovementioned preferential trade-investment agreements in order to critically evaluate the effect of these rules on future measures of relevant countries to protect the environment.

Keywords: CP-TPP, EVIPA, CETA, expropriation, FET, preamble, rights to regulate, sustainable development

1. Introduction

In recent years, sustainable development, in which environmental protection is the most important, is getting more attention in international trade-investment negotiations. These concerns may arise from the improvement of environmental protection standards and the progress in management of sustainable and ecological development, along with the occurrence of many environmental incidents related to investment activities. However, when pursuing environmental policy while being bound by investment protection obligation under trade and investment agreements may lead the host country to face with a dilemma. Indeed, dispute settlement practices show many disputes between the host country and foreign investors on the ground that legal frameworks expected by the

investors are no longer guaranteed due to the pursuit of non-trade interests of the host country.¹ Therefore, in recent ten to fifteen years, a few nations began to explicitly express their interest in the issue of sustainability as one of the important objectives in Bilateral Investment Treaties (BITs) or Free Trade Agreement (FTAs), by indicating this target in the preamble or in terms of the agreement. This development underscores the balance between the economic interests of investors and the need to protect non-economic benefits of society, thereby changing the nation's rights and obligations and investors (in relevant cases). An additional common method to rebalance BITs obligations is through the use of exceptions, both general and special,² as well as the addition of a regulation on regulatory measures. General exceptions are usually designed to be applied to all obligations under a BIT while special exceptions can be found in relation with the definition of core investment protection standards such as Fair and Equitable Treatment (FET) and conditions for expropriation and indirect-expropriation.

This paper sets out to investigate the meaning and status of the sustainability-support regulations under trade-investment agreements. It examines these provisions in light of maintaining countries' right to protect the environment under a few new-generation preferential trade-investment agreements which are recently completed including The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP), EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Singapore FTA and EU-Vietnam FTA in order to critically evaluate the effect of these rules on future measures of relating countries to protect the environment. The structure of the paper, therefore, is analyzing the meaning of the appearance of "sustainable development" term in the preamble as well as in the separate chapter on trade and sustainable development of those agreements. Furthermore, the language of investment protection commitments, the including of article on regulatory measure and general exceptions in investment chapter or investment agreements will also be examined.

- 1 See a number of cases showing the complicated relationships between international investment and sustainable development, including environmental protection, socio-environmental impact assessment and renewable energy happened from 2010s such as: *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Award (Nov 30, 2017); *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (May 4, 2017); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec 14, 2012); Interim Decision on Environmental Counterclaim (Aug 11, 2015); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec 8, 2016); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (Dec 6, 2016); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (Oct 14, 2016).
- 2 Vandeveld K. J. (2013), 'Rebalancing through exceptions', *LEWIS & CLARK LAW REVIEW*, Vol. 17:2, 449-459, p. 449.

1.1. The integration of “Sustainable development” and the reservation of a nation’s right to protect environment in new-generation agreements

Traditional FTAs and BITs have rarely mentioned sustainable development or environmental protection because the main purpose of these treaties is to create favorable conditions for investment by investors of one country on the territory of the other country. Indeed, it is unsuitable to expect a clause in favor of sustainable development or environment in BITs. The term “sustainable development” began to appear in treaties in the 1980s³ but normally mentioned in environmental treaties rather than trade agreements or BITs. In terms of bilateral treaty, from 2000s, some agreements generally mentioned sustainability-related issues. Specifically, BIT Vietnam-Japan, which is in force from December 2004, has declared that the two partners will not mitigate measures to protect health and environment compared to the importance of investment promotion. This BIT has also included Article 21 to restate this point of view. Another BIT version which is worth mentioning is the 2012 U.S. Model Bilateral Investment Treaty. Many provisions in this Model connects investment encouragement with specific issues such as environmental protection, health, safety or promoting broader labor rights that reflect the clear view of government in pursuing non-commercial goals. Among those provisions, Article 12 on Investment and Environment should be mentioned:

“1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protection afforded in domestic environmental laws...

3. *The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities...*”

Moreover, this Article implies that “Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”⁴ This is a typical regulation to preserve regulatory space to pursue environmental concerns in modern BITs.

A FTA recently signed by China and Australia (ChAFTA) in 2015 provides a general exception which conserves the right to adopt or enforce

3 Sands P. and Peel J., Fabra A., MacKenzie R. (2018), *Principles of International Environmental Law* (4th ed.), Cambridge University Press, p. 217-218.

4 Article 12.5 2012 U.S. Model Bilateral Investment Treaty.

measures necessary to protect human, animal or plant life or health [Article 9.8(a)]; imposed for the protection of national treasures [Article 9.8(c)] or relating to the conservation of living or non-living exhaustible natural resources [Article 9.8(d)]. ChAFTA has also added a remarkable exclusion relating to the jurisdiction of the investment arbitrator in stating:⁵“Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section.” This regulation worth considering as it clarifies public welfare objectives and stresses that non-discriminatory measures will not be brought before an arbitration tribunal. As shown in the text of this FTA, both sides has shown their willingness to preserve the nation’s right by narrowing investment protection. It is believed that the conclusion of investment regulation in ChAFTA stems from the strong resistance against the inclusion of an ISDS clause in FTAs or investment treaties from Australia.⁶ As a result, regarding substantive rights, there is only one chance for investors of either country to invoke ISDS that is, where the host country has violated national treatment obligation.

As can be seen, there is a new trend in negotiating trade-investment treaties recently when nations show more concerns in protecting sustainable values as well as legitimate objectives. This trend can be found in different negotiations from different continents and it makes a significant change in design of traditional trade-investment treaties, which shows more balance between investment protection and a nation’s rights. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership and a series of FTAs recently signed by the EU with its partners such as Canada, Singapore and Vietnam are not out of this trend.

1.2. Investment protection commitments and their effect to the state’s right to regulate

As mentioned before, the interaction between international investment law and environmental protection becomes more tension in different directions, especially in investment dispute resolution. In general, different countries, whether a developed or developing one, need to attract foreign investment and therefore need to create an “attractive” or “friendly” investment environment by providing specific investment guarantee commitments through bilateral or multilateral investment agreements. Regulations on standards of treatment as well as expropriation are two basic commitments recognized in these agreements. Accordingly, the treatment standards set requirements for the host

5 Article 9.11(4) China-Australia FTA (2015).

6 Zhou W. (2017), ‘Chinese Investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement’ 18(2) *Melbourne Journal of International Law* 407. Retrieved from: <http://www5.austlii.edu.au/au/journals/MelbJIL/2017/18.html#Heading227> [accessed 8 November 2019].

country as follows: commitments of non-arbitrariness, non-discrimination, commitment of full protection and security, commitment of fair and equitable treatment.⁷ Nonetheless, in fact, when pursuing environmental protection policy, countries may have violated the above standards of treatment. In that case, when examined by the arbitral tribunal, the issue of concern is not the justification of the goal of the applied measure but the manner to implement such measure. Normally, if the host state does not meet the requirements of investment protection, the environmental protection is not meaningful in helping the state to avoid compensation. Given that the practice in investor-state dispute settlement shows that investment term itself and a number of investment protection obligations such as – expropriation, indirect-expropriation, Fair and Equitable Treatment – have an effect on countries' environmental policies through interpretation activity of tribunals; the negotiation of new-generation trade-investment agreements shows necessary caution in revising those investment protection commitments.

2. Sustainability-support regulation under selected new-generation FTAs

2.1. Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The comprehensive agreement among 11 countries in the Trans-Pacific region which form one of the largest trading areas in the world accounting for nearly 13.5% of global GDP⁸ was re-negotiated in 2017 after the withdrawal of the United States.⁹ This agreement has entered into force for Vietnam on January 14, 2019 and has been expected to bring positive effects to the country's economy.

The CP-TPP emphasizes the priority to promote high levels of environmental protection and sustainable development in the Preamble of the Agreement as follows:

“The Parties to this Agreement, resolving to: ... promote high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;”

In addition, Chapter 20 on Environment recognizes the priority for environmental protection goals beside promoting members' trade.

In specific, Article 20.3 on General commitments states that:

7 Dolzer R. and Schreuer C. (2012), *Principles of International Investment Law* (2nd ed.), Oxford University Press, p. 119.

8 ‘Economic impact of Canada's participation in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership’, (Feb 16, 2018). Retrieved from: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/CP-TPP-ptpgp/impact-repercussions.aspx?lang=eng> [accessed 12 June 2020].

9 CP-TPP timeline negotiation. Retrieved from: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/CP-TPP-ptpgp/timeline_negotiations-chronologie_negociations.aspx?lang=eng [accessed 12 June 2020].

“... 2. The Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.

3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection.

4. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.

5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities...

6. Without prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.”

Article 20.3 plays a central role in conserving rights to regulate of CP-TPP Members as this is the only regulation that mentions the sovereign right of Members' governments to establish and to set their own level of domestic environmental protection as well as their own environmental priorities throughout the agreement.

In term of investment protection commitment, Chapter 9 on Investment of CP-TPP contains typical regulations with traditional design of investment protection including Expropriation and Compensation [Article 9.8], Minimum Standard of Treatment [Article 9.6]. Annex 9-B of CP-TPP is a remarkable point in this agreement as it clarifies actions constituting expropriation, which include measures that “interferes with a tangible or intangible property right or property interest in an investment” [Annex 9-B(1) CP-TPP]. This Annex also provides specific legal grounds which help to determine indirect-expropriation [Annex 9-B(3)a CP-TPP]. This clarification is a new development compared with traditional BITs which are expected to support investment tribunal in examining host state measures. In addition, this Annex also excludes instances where legitimate measures can be considered as indirect expropriations as long as those actions are conducted in a non-discriminatory manner and except in rare circumstances [Annex 9-B(3)b CP-TPP]. This revision is a significant improvement in reserving policy space for member countries.

Furthermore, Article 9.16 on Investment and Environmental, Health and other Regulatory Objectives provides a legal ground for a Country Member of CP-TPP to adopt, maintain and enforce measures in order to ensure investment activity is undertaken with an appropriate caution:

“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, health or other regulatory objectives*.”

In addition, Article 9.3 CP-TPP provide a special guide for investment tribunal in the event of any inconsistency between Investment Chapter and another Chapter of CP-TPP, the other Chapter shall prevail to the extent of the inconsistency. It means that if there is a conflict between investment protection regulations and Chapter 20 on Environment, specifically Article 20.3 mentioned above, the latter will have priority. This regulation effectively solves the relationship between Chapter on Investment with other chapters of the agreement.

Besides, Chapter 29, Article 29.1 CP-TPP on General Exceptions also mentions that Article XX of GATT 1994 can be invoked in case of a violation of National Treatment. This general exception clause can also be found in the EU's FTA and will be discussed in section 3 of this study.

In general, CP-TPP shows a new approach in multilateral trade-investment negotiation in which sustainable development and regulatory rights are considered and carefully mentioned. Although the statement at the preamble may be too general to create any practical effect in interpreting Members' rights and obligations in specific circumstances, Article 20.3 Paragraph 2 and 5 can help to justify governments' environmental decisions or measures as long as those measures are not enforced in a manner affecting trade or investment between the Parties [Article 20.3 Paragraph 4].

2.2. EU's trade-investment agreements

FTAs negotiated by the EU recently can be considered as the most far-reaching ever negotiated by the EU.¹⁰ A comprehensive agreement with almost full elimination of bilateral tariffs and custom taxes, in addition to a substantial reduction of NTBs in the area of services and investment with the range covering government procurement, intellectual property rights (IPR), competition, and regulatory coherence, will create strict obligations for both sides. Thus, a determination of regulatory space for parties is crucial for designing and applying future related policies.

10 Mestral A. de (2015), 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA', 18 *Journal of International Economic Law* 641, p. 641.

With due regard to enhancing awareness of linking sustainable development with trade,¹¹ the EU has included this issue in trade negotiations with partners since the concluding of EU-Korea Free Trade Agreement in 2010.¹² This is the first time that sustainable development was included in a preferential trade agreement of EU¹³ and since that time, EU quickly brought this concern into its trade negotiations namely the EU agreements with Central-America, Colombia, Peru, Georgia, Moldova, and Ukraine. Recently FTAs signed by EU with Asean countries have also included a chapter on trade and sustainable development (EU-Singapore FTA Chapter 12, EU-Japan Economic Partnership Agreement Chapter 16). The inclusion of a separate chapter on “Trade and Sustainable Development” was intended and mentioned in the Resolution 2152 of the EU’s Parliamentary Assembly¹⁴ in 2017. It also worth mentioning that the European countries expressed concerns on this issue very early. Indeed, the “principle of sustainable development”, which was considered as having first appeared in the Preamble of the 1992 EEA Agreement,¹⁵ was included in CETA [Chapter 22 on Trade and Sustainable Development, or Chapter 24 on Trade and Environment repeats the term “sustainable development” for many times; TTIP;¹⁶ EU-Singapore FTA [EUSFTA-Chapter 12], and EVFTA [Chapter 13].

As for EU’s investment agreement, in order to understand regulations and their context, it is worth observing the point of view of the EU on investment protection and Investor-State Dispute Settlement. According to the EU, investment protection provisions, including investor-state dispute settlement, need to be improved focusing on “finding a better balance between right of states to regulate and the need to protect investors” as well as reforming the investment arbitration system itself. This balancing can be reached by applying a two-pronged approach including (i) clarifying and improving investment

11 See further in European Commission (11 July 2017), ‘Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)’, *Non-paper of the Commission services*. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf [accessed 26 April 2019].

12 Cuyvers L. (August 2014), ‘The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries: Perspectives for ASEAN?’, *ResearchGate*. Retrieved from: https://www.researchgate.net/publication/264696827_The_Sustainable_Development_Clauses_in_Free_Trade_Agreements_of_the_EU_with_Asian_Countries_Perspectives_for_ASEAN [accessed 25 April 2019].

13 ‘Trade and Sustainable Development chapters in EU Free Trade Agreements (FTAs)’, *supra* note 11.

14 Parliamentary Assembly (2017), ‘Resolution 2152 - “New Generation” Trade Agreements and Their Implications for Social Rights, Public Health and Sustainable Development’ 2. Retrieved from: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23489> [accessed 30 June 2019].

15 Agreement on the European Economic Area 1992 (2 May 1992). See Sands P. and Peel J., Fabra A., MacKenzie R. (2018), *supra* note 3, p 218.

16 Although the negotiation has been interrupted, the EU indeed proposed provisions on sustainable development with the United States under Part 3 relating to Trade rules by protecting the environment. See EU (14 July 2016), ‘Text of The Transatlantic Trade Investment Partnership’, *Trade - European Commission*. Retrieved from: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [accessed 30 June 2019].

protection rules (right to regulate, ‘indirect-expropriation’, ‘fair and equitable treatment’) and (ii) improving the operation of dispute settlement system.¹⁷ Therefore, for the EU, there are two targets in its investment policy reform. First, investment protection rules have to be “clearly defined and do not leave room for interpretative ambiguity”, especially where it concerns the state’s right to regulate for public policy objectives.¹⁸ Second, it is also important to design a certain framework for the arbitrators in an investor-to-state proceeding, which would apply specific rules contained in an investment agreement.¹⁹ The above mentioned policy is emphasized by the EU to be applied to investment protection provisions included in EU agreements, in which the clarification of two key provisions including “indirect expropriation” and “fair and equitable treatment” will be focused.²⁰

The following part will analyze how EU’s concerns be regulated in selective agreements including CETA, EUSFTA and EVFTA.

2.2.1. CETA

The negotiation of CETA started from 2009 and the agreement has provisionally entered into force on 21 September 2017.²¹ Although there are differences in the designs of CETA, EUSFTA and EVFTA as a result of the discussion among EU’s Members,²² the EU’s approach regarding sustainable development and reserving regulatory space in those agreements is quite unified. The scope of sustainable development under EU trade agreements and trade preference programs for both developed and developing countries consists of economic development, social development and environmental protection. The aim to protect environment is announced from the beginning of the agreements and confirmed in different later chapters. Most relevant statements in the preamble are as followed:

“Recognising that the provisions of this Agreement *preserve the right of the Parties to regulate* within their territories and the Parties’ flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public

17 European Commission (November 2013), ‘Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet’. Retrieved from: http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf [accessed 30 June 2019].

18 *Ibid.*, p. 6.

19 *Ibid.*

20 *Ibid.*, p. 7.

21 European Commission, ‘Overview of FTA and other trade negotiations’. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf [accessed 12 June 2020].

22 In specific, CETA is a FTA with Investment chapter included while the free trade agreements between the EU and Member States with Vietnam and with Singapore were split into free trade agreements and an investment protection agreements. See Zahradil J. (16 November 2018), ‘Draft Recommendation on the proposal for a Council decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam’, *European Parliament- Committee on International Trade*. Retrieved from: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-629.564&format=PDF&language=EN&secondRef=01> [accessed 17 April 2019].

morals and the promotion and protection of cultural diversity; ...

Reaffirming their commitment to *promote sustainable development* and the development of international trade in such a way as to contribute to sustainable development...”

Follow the above mentioned announcement, the primary objective of chapter on trade and sustainable development in the EU’ FTAs is to promote sustainable development, notably by fostering the contribution of trade and investment related aspects of labor and environmental issues [Article 22.1 CETA].

In addition to Chapter 22 on Trade and Sustainable Development CETA, Chapter 24 on Trade and Environment has provided an important regulation for the parties to reserve it right to protect the environment. Especially, the wording of Article 24.3 shows the priority of environment protection over trade improvement. It also gives a ground for the host state to change their law or policy that is sensitive to the environment.

Beside trade related regulations, Chapter 8 on Investment should also be examined. Investment protection is included in CETA text at Chapter 8. This Chapter on Investment presents the Canadian Model FIPA’s approach,²³ which allows governments to challenge frivolous and legally unfounded claims.²⁴ Besides, a government can also challenge the jurisdiction of a tribunal. In fact, Chapter on Investment of CETA is considered to be a result of Canada’s experience in relation to investor-state claims under NAFTA Chapter 11.²⁵

The most important revision can be found in the wording of most all definitions of investment protection commitments including fair and equitable treatment and full protection and security and the concept of expropriation. For instance, Article 8.10 of CETA’s Investment chapter provide a “very significant limitative”²⁶ definition of fair and equitable treatment with a clear list of actions. Such regulation will help limit the chance for divergent interpretation of substantive standards of the investment tribunal. In addition, definition of expropriation and indirect expropriation, which in many cases be the “dead-point” of governments in practising it sovereignty right to protect environment, has also been carefully restricted in Annex8-A of CETA on expropriation. This regulation has an appropriate contribution to the international investment law as it provides a clear definition of expropriation and indirect expropriation with specific instructions for judicial tribunal in identifying measures that constitute expropriation and indirect expropriation.

23 Mestral A. de (2015), *supra* note 10, p. 641-654.

24 “Article 8.32.1: The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.”

25 See further in Mestral A. de (2015), *supra* note 10.

26 *Ibid.*

This is a development in compared with CP-TPP' approach. Notably, for further reserving parties' rights to follow legitimate objectives, Annex 8-A of CETA emphasizes that:

"3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."

Above mentioned regulation will be essential for member countries to escape from compensation obligation which usually be applied when host countries' measure is considered as expropriation or indirect expropriation under investment-state dispute literature. Under CETA, such measures aim for protecting health, safety and the environment without "severe impact" will not constitute indirect expropriation. The consideration of the impact caused by a measure definitely depends on the tribunal's evaluation, however, such exclusion is a necessary caution as once being considered as expropriation or indirect expropriation, a compensation is a must. This happens because whether it is direct or indirect expropriation, international law makes no distinction when it comes to paying compensation.²⁷ Indeed, most BITs require a payment of compensation in case the host country conducts expropriation or actions tantamount to expropriation toward the investor's property.²⁸ Therefore, with this regulation, Canada and the EU have effectively limited the chance to be challenged by investors under such circumstances.

In terms of regulatory measures, CETA includes a clear statement to ensure it retained carve-outs for country members to pursue public policy objectives. Article 8.9 on Investment and regulatory measures is quoted as below:

"1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment...

2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section

..."

As can be seen, Article 8.9.1 CETA indicates that the right to regulate could

27 Subedi S. P. (2018), *International Investment Law- Reconciling Policy And Principle*, Hart Publishing, p. 125.

28 Lan H. N. T. (2018), 'Disputes Related to Indirect-Expropriation in Environmental Management – Experiences to Prevent the Risks of Investor-State Disputes for Viet Nam', in Dung T. V., and Lan H. N. T. (editors), *Investor-State dispute settlement: Legal issues and practice in the context of integration*, Ho Chi Minh city National University Publishing, p. 126.

be interpreted to cover a wide variety of actions taken in furtherance of not only environmental protection, but sustainable development as well.²⁹ Paragraph 2 of this provision definitely excludes the chance which an investor can challenge a public-policy-support measures or the policy changing notwithstanding those action may lead to negative effects on an investment or interferes with an investor's expectations, including its expectations of profits. This is a sufficient limitation to investor's right because the change in environmental policy has been considered as a violation of FET obligation in connection with investor's legitimate expectation in dispute resolution practice.³⁰

Along with above-mentioned suggestion, an Investment Tribunal System (ITS), as an important part of investment protection, is another significant innovation suggested by the EU with its partners including the Transatlantic Trade Investment Partnership (TTIP)³¹ the free trade agreement with Canada (Comprehensive Economic and Trade Agreement-CETA),³² Mexico,³³ Singapore, and Vietnam. Although ITS is beyond the scope of this paper, examining characteristics of this system may help understand how this innovation supports the promotion of right to regulate under investment agreement. According to the EU, in addition to fixing vague investment protection rules, a clear set of dispute settlement procedure that ensures a fair process and transparency should also be provided.³⁴ The ICS is expected to fix widely acknowledged ISDS's problems, which attracted much discussion in international community in recent years as it highlights diverse ways to address those weaknesses. Notably, a few of provisions relating to this ITS are expected to support nations' decisions such as:

- Regulation limiting the jurisdiction of tribunal system case of *fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process* [paragraph 2 Article 3.27 EVIPA].³⁵

29 Hush E. (2018), 'Where No Man Has Gone before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements Student Notes', *Columbia Journal of Environmental Law* 93.

30 See *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (2003).

31 European Commission (12 November 2015), 'Press Release - Why the New EU Proposal for an Investment Court System in TTIP Is Beneficial to Both States and Investors'. Retrieved from: http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed 17 April 2019]. The negotiations on TTIP were launched in 2013 and ended without conclusion in 2016. See also the European Council decision of April 15, 2019. Retrieved from: <http://ec.europa.eu/trade/policy/in-focus/ttip/> [accessed 17 April 2019].

32 European Commission – Trade (29 February 2016), 'CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement'. Retrieved from: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468> [accessed 17 April 2019].

33 European Commission (21 April 2018), 'EU and Mexico Reach New Agreement on Trade'. Retrieved from: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1830> [accessed 17 April 2019].

34 European Commission (11 July 2017), *supra* note 11.

35 Article 3.24 EVIPA: "2. For greater certainty, a claimant shall not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process."

– Regulation on the consideration of relevant domestic law as applicable law in disputing activity of the Tribunal and the Appellate Tribunal [Paragraph 2 and 3 Article 3.42 EVIPA].³⁶

However, as this reform to investor-state dispute settlement is also a new feature to the EU Member States themselves, the ITS is agreed to be out of the scope of provisional application of CETA, which means that this part will only be implemented once all EU Member States conclude their national ratification procedures.³⁷ The situation was similar with the agreement between EU and other two partners: Vietnam and Singapore. If this ITS and its mechanism is organized and operated in the near future, an investment court, which is not based on *ad hoc* tribunal as traditional investor-state dispute settlement mechanism,³⁸ may limit cases when investor can challenge a state's measure. This improvement may also reduce concerns regarding investor-support approach using by traditional arbitral tribunals in previous investment disputes.³⁹

Another important regulation of CETA is Article 28.3(2) on general exceptions which shows that both sides are entitled to enact measures as long as “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination” and if to do so is to protect

36 Article 3.42 EVIPA:

“2. When rendering its decisions, the Tribunal and the Appeal Tribunal shall apply the provisions of Chapter 2 (Investment Protection) and other provisions of this Agreement, as applicable, as well as other rules or principles of international law applicable between the Parties, and take into consideration, as matter of fact, any relevant domestic law of the disputing Party.

3. For greater certainty, the Tribunal and the Appeal Tribunal shall be bound by the interpretation given to the domestic law by the courts or authorities which are competent to interpret the relevant domestic law, and any meaning given to the relevant domestic law made by the Tribunal and the Appeal Tribunal shall not be binding upon the courts and the authorities of either Party. The Tribunal and the Appeal Tribunal does not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic laws and regulations of the disputing Party.”

37 European Commission (15 February 2017), Press release ‘CETA – a Trade Deal That Sets a New Standard for Global Trade’. Retrieved from: http://europa.eu/rapid/press-release_MEMO-17-271_en.htm [accessed 16 April 2019]. In CETA, the two partners only reach the agreement to cooperate in establishing of a multilateral investment tribunal and appellate mechanism at Article 8.29: “The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.”

38 *Ibid.*

39 A few investor-state dispute settlements in recent years have shown this trend such as *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7); *TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America* (ICSID Case No. ARB/16/21); *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2); *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12); *Bilcon of Delaware et al v. Government of Canada* (PCA Case No. 2009-04). Older cases can be named as: *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1); or *Técnicas Medioambientales Tecmed v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1).

public security, maintain public order; or protect human, animal or plant life or health. As a result, CETA's provisions do not prevent members to change or apply any policies necessary to protect public interest.

2.2.2. *EU-Singapore Trade-Investment Agreement*

Negotiation of the EU with Singapore was launched in 2010 as a result of a decision of EU Member States in December 2009 to pursue FTA negotiations with ASEAN countries in a bilateral format.⁴⁰ The EU-Singapore FTA (EUSFTA) has entered into force on 21 November 2019 while the EU-Singapore Investment Protection Agreement (EUSIPA) still needs to be ratified by all EU's Member States.

Similar to CETA and EVFTA, EUSFTA had also set the objective of sustainable development, with the emphasized on environmental protection, next to economic, trade and investment development at the Preamble. Besides, the Agreement has prepared one chapter on Trade and Sustainable Development which set in detail rules on encouraging trade or investment without weakening domestic environmental law [Article 12.1.3]. This paragraph however stresses that "environmental and labour standards should not be used for protectionist trade purposes."

One of the most important articles designed to preserve right to regulate of both parties is Article 12.2 on Right to Regulate and Levels of Protection. This provision has similar wording with Article 24.3 CP-TPP in protecting parties' right "to establish its own levels of environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly,..."

In the case of the EUSIPA, sustainable development has appeared in the preamble as an important objective with the same format of the Preamble of EUSFTA. Besides, in this agreement, environmental protection aim is placed equally with investment promotion at the preamble, which cannot be found in traditional BITs. The parties also reaffirm their commitment to the principles of sustainable development and transparency as reflected in the EUSFTA.

In this agreement, Article 2.6 Expropriation provides a typical expropriation clause with the commitment of not taking a measure tantamount to nationalization or expropriation except when all conditions are complied with. This regulation follows previous IIAs and BITs approach in determining a legal expropriation by four elements, including: (i) for a public purpose; (ii) under due process of law; (iii) on a non-discriminatory basis; and (iv) upon adequate and effective compensation. This language indicates that even if a legal expropriation is imposed, it will not set the host state free from the obligation of providing a sufficient compensation.

⁴⁰ See further in European Commission, *supra* note 21.

However, Annex 1 of this agreement provide a similar set of rules, though with a slight change in the text (paragraph 2(b) in Annex 8-A of CETA was cut out of the Singapore agreement) with CETA including definition of expropriation and indirect expropriation, instruction to determine those measures and an exception in case of legitimate public policy. The remaining regulation of the EU-Singapore Investment Agreement is allocated for the establishment of an ITS as mentioned in CETA.

In EUSIPA provision on Regulatory Measures has exactly the same format with Article 8.9 CETA which affirm country members' right to regulate within their territories to achieve legitimate policy objectives with special stressed that a measure applied "in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation." [Article 2.2 EUSIPA]

EU-Singapore investment agreement does not include a general exception for a number of investment protection obligations like the design of CETA but these exceptions is separated and included in specific obligation such as paragraph 3 Article 2.3 on National Treatment.

2.2.3. EU-Vietnam Trade-Investment Agreement

The EU and Vietnam trade and investment agreements were signed on 30 June 2019. On February 2020 the European Parliament gave it consent to both agreements.⁴¹ Following that, Vietnam National Assembly have just ratified both agreements on June 2020.⁴² The EVFTA is, therefore, expected to come into force in August 2020 while EVIPA need to be further retified by all EU's Members.

As for the EVFTA, "sustainable development" has been repeatedly mentioned through the Agreement starting from the Preamble.⁴³ The word "sustainable" has later been affirmed in Chapter 7 on non-tariff barriers to trade and investment in renewable energy generation. In this chapter, the two parties declare the objectives of promoting, developing and increasing the generation of energy from renewable and sustainable sources, particularly through facilitating trade and investment. [Article 7.1]. The scope of this chapter covers measures which affect trade and investment between the Parties related to the generation of energy from renewable and sustainable sources [Article 7.3]

⁴¹ *Ibid.*

⁴² '100% đại biểu Quốc hội biểu quyết thông qua Hiệp định EVFTA' ('100% Vietnam lawmaking National Assembly vote to ratify EVFTA', (8 June 2020). Retrieved from: http://evfta.moit.gov.vn/default.aspx?page=news&do=detail&category_id=13caec66-a1f8-4b9c-9066-b25657f4d36d&id=2597fff4-0eed-45f1-8ea6-d74375be70dc [accessed 12 June 2020].

⁴³ The term "principles of sustainable development" is also repeated in the Preamble of EVIPA.

In addition, Chapter 12 on intellectual property has also encouraged a more sustainable and inclusive economy for both sides [Article 12.1]. More precisely, Vietnam and EU have expressed a strong and unified viewpoint on a chapter on Trade and Sustainable Development to promote sustainable development by fostering the contribution of trade and investment related aspects of labor and environmental issues. [Article 13.1.1]

In this chapter, parties affirm their commitment to pursue sustainable development, which consists of economic development, social development and environmental protection [Article 13.1.3]. Because Article 13.2 explicitly reserves the right of the parties to regulate, this regulation will be the main basis for interpreting obligations under the Agreement. In other words, the agreement conserves the members' rights to establish suitable levels of protection in the area of labour and environment in a manner consistent with the commitments under ILO and Multilateral Environmental Agreements (MEAs). Additionally, declaration on refusing to lower the levels of protection in environmental or labour areas are also noted. [Article 13.3]. However, Article 13.4 provides a complement which is usually found in investment agreements⁴⁴ and preferential trade agreement,⁴⁵ that is to not apply environmental and labour laws "in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade." This regulation has the same wording with Article 12.2 EUSFTA.

Regarding Investment agreement, similar to EVFTA and EUSFTA or EUSIPA, the Preamble of EVIPA has also stated the approach of sustainability support, with the focus on environmental and labour protection, which has been mentioned many times in EU's documents.⁴⁶

With respect to investment protection commitments, the regulation of expropriation and indirect-expropriation in EU-Vietnam Investment Agreement [Article 2.7 and Annex 4] is similar with Article 8.10 and *Annex 8-A of CETA*. In fact, Article 2.7 on Expropriation of EVIPA has the same format with Article 2.6 EUSIPA. Remarkably, paragraph 3 and footnote 1 Article 2.7 suggests that in case of direct expropriation relating to land, Vietnam government has to provide a payment of compensation. In addition, as mentioned by paragraph 5 Article 2.7 the valuation of the investment shall

44 For instance, Article 2.3 BIT Vietnam-Estonia (entry into force 2012), Article 3.4 BIT Vietnam-Switzerland (entry into force 1992), Article 4.1 BIT Switzerland-Tunisia (entry into force 2014).

45 Article XX General Agreement on Tariff and Trade 1994 is an example.

46 European Parliament (6 April 2011), 'Resolution on the future European international investment policy', (2010/2203(INI)). Retrieved from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN> [accessed 30 June 2019]. See also, European Commission (14 Oct 2015), Communication on 'Trade for All: Towards a More Responsible Trade and Investment Policy'. Retrieved from: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-497-EN-F1-1.PDF> [accessed 30 June 2019].

be evaluated by a judicial or other independent authority of the host country.

In terms of the definition of expropriation, Annex 4 EVIPA provides a definition with a slight change in compare with CETA. Paragraph 3 of EVIPA Annex 4 include a clarification which make the regulation has a smaller scope in compared with CETA's provision. Besides, sub-section (c) in paragraph 2 CETA's Annex cannot be found in EVIPA's Annex although this Annex 4 has also emphasized that measures in general which are conducted non-discriminatory to protect legitimate public policy objectives will not be considered as indirect expropriation. In fact, the requirement to eliminate the chance for regulatory measures to be considered as indirect expropriation is consistently stated in different documents of the European Commission.⁴⁷

Similar to other agreements of EU, EVIPA also includes a provision on regulatory measure to protect legitimate rights of the host countries. In specific, paragraph 1 Article 2.2 EVFTA generally conserves rights to regulate of both sides while paragraph 2 explicitly emphasize that investment protection obligations do not set the obligation of not changing legal and regulatory framework for the host country. Besides, Article 4.6 on General exceptions under EVIPA is texted as a special exception stating that this regulation is an escape from National Treatment and Most-Favoured-Nation Treatment obligations. With due regard of sustainability and environmental protection, this article includes, among others, measures that applied to protect "human, animal or plant life or health" or to conserve "exhaustible natural resources". In addition, Annex 2 of this Agreement has noted an important exemption for Vietnam on national treatment in reserving natural resources which is in conformity with sustainable objectives such as: oil and gas, mineral and natural resources exploration, prospecting and exploitation; forestry and hunting.

3. Evaluation

Infact, all mentioned language aiming to reserving the host country's policy right in CP-TPP and the EU's FTAs has been listed in an 2011 OECD report in which arrange 7-part typology:⁴⁸

- (1) Stating environmental concerns of the parties to the treaty in preambles
- (2) Reserving policy space for environmental regulation for the entire treaty;
- (3) Reserving policy space for environmental regulation for more specific, limited subject matters (performance requirements and national treatment);

47 For instance, see European Commission, Public consultation on modalities for investment protection and ISDS in TTIP, European Commision, 'Public Consultation on Modalities for Investment Protection and ISDS in TTIP'. Retrieved from: <https://www.eesc.europa.eu/resources/docs/20140630---di-response-to-isds-consultation---958716827340818114.pdf> [accessed 30 June 2019].

48 Gordon K. and Pohl J. , 'Environmental Concerns in International Investment Agreements: A Survey, OECD Working Papers on International Investment, No. 2011/1, OECD Investment Division'. Retrieved from: www.oecd.org/daf/investment/workingpapers [accessed 30 June 2019].

(4) Containing provisions that clarify the understanding of the parties that non-discriminatory environmental regulation does not constitute indirect expropriation;

(5) Refusing to lower environmental standards for the purpose of attracting investment;

(6) Environmental matters and investor-state dispute settlement;

(7) Including the commitment to promote environmental protection and cooperation of members.

It means that there was not much development in combining sustainable development aims into modern trade-investment agreements. This approach seems to be privilege broad⁴⁹ and including uncertain clauses. This part will evaluate the potential effect which may bring by these provisions.

3.1. The inclusion of “sustainable development” and environmental protection in new-generation trade agreements

Sustainable development has been mentioned as one of the core value which the EU has prepared to spread out⁵⁰ via different trade cooperation with its partners. Regarding the scope of “sustainable development” under EU’s FTAs including CETA, EUSFTA and EVFTA, despite a slight change in design,⁵¹ all three agreements determine sustainable development in connection with labour and environmental management.

It is necessary to clarify what effect can be expected from this mention of “sustainable development” in the preamble of those treaties. In general, although the preamble does not create or limit obligations in the treaty directly,⁵² it plays a vital role in guiding the interpretation of the overall treaty. This rule is guided by Article 31.1 of the Vienna Convention which required that: Treaties must be interpreted “in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in light of its object and purpose.” (Emphasis added) This article is referred by many Arbitral tribunals as regards the

49 Viñuales J. E. (2012), *Foreign Investment and the Environment in International Law*, Cambridge University Press, p. 16.

50 European Commission (14 Oct 2015), *supra* note 46.

51 In CETA, labour and environment protections are separately regulated from chapter on sustainable development while in EVFTA and EU-Singapore FTA both issues are included in chapter on sustainable development.

52 Some scholars suppose that the Preamble’s sole function is to set and limit the contextual space of the Agreement an therefore not to have actual binding authority. See Muchlinski P., ‘Negotiating New Generational International Investment Agreements: New Sustainable Development Oriented Initiatives’ in Hindelang S. and Krajewski M. (eds.) (2016), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* Oxford University Press, p. 46. See also Anthony J., Simons P. and Mayeda G. (2012), ‘Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators’, *Paper prepared for the Commonwealth Secretariat*, p. 46.

interpretation of IIAs such as: *Tokios Tokeles v. Ukraine*,⁵³ *Noble Ventures v. Romania*,⁵⁴ *Sempra Energy Int'l v. Argentina*.⁵⁵ It also worth mentioned that the preamble have been reffered in practice to interpretative gaps in the treaty by some tribunals.⁵⁶ Therefore, the preamble plays as a balancing tool for host states which helps secure regulatory space and prevent investor-state tribunals from giving investment protection guarantees an overly broad interpretation.⁵⁷ Vienna Convention Article 31.2(a) also further explain the term “context” in Article 31.1 with a specific reference to the role of preamble and annexes for the purpose of interpretation of a treaty as followed: “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:...”. The including of the term “sustainable development”, therefore, imposes an obligation on the arbitral tribunal to clarify it in the relevant context.

The next step should be clarifying what relevance agreements includes within the meaning of “sustainable development” and “environmental protection”. In general, environmental protection fall under the scope of sustainable development. “The New Delhi Declaration of Principles of International Law Relating to Sustainable Development” mentioned seven Sustainable Development Principles including:⁵⁸

1. The duty of states to ensure sustainable use of natural resources;
2. The principle of equity and the eradication of poverty;
3. The principle of common but differentiated responsibilities;

53 *Tokios Tokels v. Ukraine* [2004], ICSID Case No. ARB/02/18 50, Decision on Jurisdiction (Apr 29, 2004), para. 27.

54 *Noble Ventures, Inc v. Romania* [2005], ICSID Case No. ARB/01/11, Award (Oct 5, 2005), paras 50, 55.

55 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sep 28, 2007), para 381; *Sempra Energy Int'l v. Argentina* [2007], ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (June 29, 2010), para 188. Read more discussion on treaty interpretation in investment arbitration in Schreuer C. (Brill 2010), 'Diversity And Harmonization Of Treaty Interpretation In Investment Arbitration' in Merkouris P., Elias O. and Fitzmaurice M. (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*.

56 Muchlinski P. (2016), 'Negotiating New Generation International Investment Agreements New Sustainable Development Oriented Initiatives', *Shifting Paradigms in International Investment Law-More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press. Retrieved from: <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198738428.001.0001/acprof-9780198738428-chapter-3> [accessed 27 September 2019].”plainCitation”:”Peter Muchlinski, ‘Negotiating New Generation International Investment Agreements New Sustainable Development Oriented Initiatives’, *Shifting Paradigms in International Investment Law-More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016 See the case *Siemens A. G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6).

57 Prislán V. and Zandvliet R., ‘Labor Provisions in International Investment Agreements: Prospects for Sustainable Development’ in Andrea K. Bjorklund ed., *Yearbook on International Investment Law & Policy 2012-2013*, 357-413 (2014), p. 385.

58 Free University, Amsterdam (2002), ‘ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development’, 49 *Netherlands International Law Review* 299.

4. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of public participation and access to information and justice;
6. The principle of good governance;
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

In a document adopted on 25 September 2015 by the United Nations General Assembly titled “Transforming Our World: the 2030 Agenda for Sustainable Development”,⁵⁹ a wide range of sustainable development concerns are identified including the economic, social and environmental dimensions which confirmed in EU’s agreements in several chapters. Emily Hush supposed that the arrangement of “sustainable development” in connection with “international trade” in the Recital 9 in the Preamble of CETA⁶⁰ implied that “under CETA, sustainable development is not subordinate to trade and investment. Rather, the latter must be pursued in such a way as to further the goal of sustainable development.”⁶¹ In connection with later chapter on trade and environment, especially Article 22.1.3, it should be understood that the Parties’ environmental obligations are central to any interpretation of their commitments to sustainable development.⁶² This confirmation might not be completed because of the lack of conditions to verify, especially the approach of the arbitral tribunals in accordance with sustainability, however, it is undeniable that the environmental protection has been integrated effectively in the preamble of EU’s agreements, and other parts of the treaties as well, and this choice send a clear message and provide greater guidance to the arbitral tribunal. Comparing with the CP-TPP, environmental protection regulations in CP-TPP are limited in both the Preamble and Article 20.3. This appearance, as a policy goal rather than a specific obligation, shows not much change in compared with previous FTA versions. Indeed, both the Preamble and Article 20.3 are too general and have much declarative characteristic and therefore they have been prepared to only provide very first ground for future legitimate decisions of CP-TPP’s Members.

As regards EU’s trade and investment agreements, it can be seen that the Parties’ negotiation continue to be in the context of IIA reformation process⁶³

59 United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’. Retrieved from: <https://undocs.org/A/RES/70/1> [accessed 16 April 2019].

60 “Reaffirming their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;”

61 Emily Hush (2018), *supra* note 29.

62 *Ibid.*

63 See Chi M. (2018), ‘Sustainable Development Provisions in Investment Treaties’, *United Nations- Economic and Social Commission for Asia and the Pacific*, p. 17.

taking place across continents from Africa, Asia, Europe, Latin America, to North America by including the principle of sustainable development “which as a normative rule of international investment law has yet to be firmly rooted.”⁶⁴ A number of recital included in this Preamble describes shared concern of Parties on economical development in the connection with sustainable development. Although the efficiency of the including of sustainable objectives in the Preamble of IIAs still encounter the skepticism of scholars⁶⁵ this reform initially created the basis to consider “sustainability” and “environmental protection” on the same platform as investment protection at investor-state tribunals.⁶⁶

3.2. *The change in drafting investment protection commitments*

Although CP-TPP is initially paying more attention to the protection of sustainable values as stated in the agreement, it is still difficult to determine how these provisions will be applied in practice. Comparing with EU’s agreements, provisions on investment protection in the CP-TPP have no modification in compared with traditional investment agreements except the addition of a provision on regulatory objectives. [Article 9.16]. This proves that the concern on environmental protection and the preservation of national sovereignty related to this issue is not the first priority in a multilateral trade-investment agreements such as CP-TPP. The most important provision which may help reserve regulatory rights of host state is Annex 9-B (3)b. This provision provides an exclusion for measures which protect public welfare objectives to be considered as indirect-expropriation. There might be a fear that language of Annex 9-B (3)b only sets indirect-expropriation but not direct-expropriation out of the scope of the provision; therefore, the risk of compensation obligation has not been eliminated. However, because a direct-expropriation or nationalisation today is not popular, the chance for this scenario to be happened is not quite high.

Although including an annex to clarify indirect-expropriation, compared with EU FTAs, CP-TPP provides not much guidance to the arbitrator for interpreting these term.⁶⁷ The EU’s investment protection agreements, in contrast, have some innovations which can be expected to provide a

64 Kim J. (2017), ‘Balancing Regulatory Interests through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements’, 50 *George Washington International Law Review* 289.

65 *Ibid.*

66 Infact, many Arbitral Tribunals examined the preamble to help support their considerations. See *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug 3, 2004), para. 81; *SGS Societe Generale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan 29, 2004), para. 116.

67 Chochorelou M. and Berdud C. E. (2018), ‘Sustainable Development in New Generation FTAs: Could Arbitrators Further the Principle through ISDS?’, 27 *Review of European, Comparative & International Environmental Law*.

sufficient policy space for the Members, especially in drafting the definition of investment protection commitments. Indeed, the definition of expropriation and indirect-expropriation has been drafted with a necessary consideration. One of the most significant exclusion relating to indirect expropriation is set in Annex 8-A of CETA, and Annex 4 of EVIPA as well, as non-discriminatory measures that are designed and applied “to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.” This language, as has been analyzed in CP-TPP case, can provide a valuable protection for host state. The reason why this vital clarification is not included in EUSIPA is unclear.

As can be seen, CP-TPP has handled the requirement of balancing between investment protection with sustainable development requirements by providing different provisions arranged throughout the agreement. EU’s investment agreements have a different design which place more precise limitations on investor rights⁶⁸ as well as provide more specific language in determining expropriation and indirect-expropriation and therefore limit the chance those private sectors to challenge regulatory decision-making process of a host state. However, specific provisions as well as clear exceptions in both CP-TPP and EU’s agreements are expected to be easier to be invoked by disputing parties. They will also effectively contribute to provide a unified interpretation and to increase predictability in dispute resolution.

3.3. The including of regulatory measures

Article on regulatory measures in EVIPA has the same design with CETA [Article 8.9], EU-Singapore Investment Agreement [Article 2.2], TTIP draft [Article 2 Section II] under regulation on “Investment and Regulatory Measures.” Because of the different in cooperation scope, the 2017 EU-Japan Economic Partnership Agreement has expressed this policy in a less direct way [Section General Provisions, Article 8.1 Scope, Paragraph 2]. Despite that difference, the EU has shown a consistent policy in preserving regulatory space under treaties negotiated with its partners. Obviously, the EU as a strong economy⁶⁹ has its own power in spreading out its policy through bilateral negotiations with its trading partners.⁷⁰

These regulations precisely set out areas falling under the scope of legitimate policy objectives in which including public health and environmental protection. However, one should be noticed that the drafting of Article 2.2 EVIPA is rather seen in the Preamble of modern trade or/

68 Emily H. (2018), *supra* note 29.

69 The EU is the world’s largest exporter and importer of goods and services, the largest foreign direct investor. See European Commission (2015), ‘Trade for All: Towards a More Responsible Trade and Investment Policy’. p 7.

70 European Commission (November 2013), *supra* note 17, p. 3. See also European Parliament (6 April 2011), *supra* note 2.

and investment agreements, for example the preamble of the China-Australia FTA;⁷¹ or the preamble in the EU-Canada Comprehensive Economic and Trade Agreement:⁷²

As can be seen, the wording of Article 2.2 EVIPA is much simpler than the Preamble of CETA. It should be also noticed that, preserving regulatory space is declared in both the preamble and substantive provision [Article 8.9] of CETA while in EVIPA, it is only stated in an independent provision. This difference in drafting can be explained by following clues.

Firstly, the scope of CETA as a trade-investment agreement is wider than EVIPA, therefore, the statement regarding regulatory authority placed at the preamble is intended to provide the general agreed context covering all fields of the agreement. This caution may stem from negotiators' concerns that the Agreement may limit their future policy space, especially in the context of civil society organizations have growing influence on the FTAs/IAs negotiation process.⁷³

There seem to be more caution in the language of CETA's Preamble rather than EVIPA. It is worth observing that, for either Canada or the EU, the risk of being challenged by an investor of the other party is higher than the case of Vietnam as in the EU-Vietnam relationship, where Vietnam is a capital-importer. This means that Vietnam – the host state has obligations of investor protection leading to a chance to be brought before an investor-state tribunal but not the EU.⁷⁴ Although this draft of EVIPA may also be resulted from the imbalance in negotiation position between Vietnam and the EU as Vietnam simply expects more economic benefit from the EU than vice versa, it does not exclude the possibility that it is the EU's intention to apply different policies to different economies.

71 “Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare”

72 “Recognising that the provisions of this Agreement *preserve the right* of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment,...

Recognising that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, *without undermining the right of the Parties to regulate in the public interest within their territories*; Reaffirming their commitment to promote *sustainable development* and the development of international trade in such a way as to contribute to *sustainable development* in its economic, social and environmental dimensions;” (Emphasize added.)

73 See further on the rising role of civil societies in treaty negotiation in Gallagher P. (17 March 2016), ‘TTIP: Big Business and US to Have Major Say in EU Trade Deals, Leak Reveals’, *Independent*. Retrieved from: <https://www.independent.co.uk/news/business/news/ttip-big-business-and-us-to-have-major-say-in-eu-trade-deals-leak-reveals-a6937141.html> [accessed 30 June 2019]; Human Right Watch (10 January 2019), ‘EU: Postpone Vote on Vietnam Free Trade Agreement’. Retrieved from: <https://www.hrw.org/news/2019/01/10/eu-postpone-vote-vietnam-free-trade-agreement> [accessed 30 June 2019].

74 See further on the consideration of the EU regarding a consistent approach with respect to regulatory flexibility applied for developed partners and developing partners in Titi C. (2015), ‘International Investment Law and the European Union: Towards a New Generation of International Investment Agreements’, 26 *European Journal of International Law* 639, p. 654.

Nevertheless, despite the absence in the Preamble, a substantive provision aiming to preserve regulatory space as Article 2.2 in EVIPA still ensures a legally enforceable right. To emphasize, paragraph 2, Article 2.2 declares the limitation of obligations to ensure stability in the host state's legal framework as well as refuses to be responsible for any decline in profit or investor's expectation of profit. This clarification is designed to make sure that companies cannot be compensated just because their profits have been reduced through the effects of regulations enacted for a public policy objective.⁷⁵ With this regulation, the Parties attempt to solve a "crucial dilemma of how to draw the line between an indirect expropriation and a non-compensable regulation taken in the public interest."⁷⁶ As the EU's approach is underscored in paragraph 2 Article 2.2 EVIPA, it can be understood that the right to regulate is confirmed as a basic underlying principle under EU's investment agreements.⁷⁷

As can be seen, changes in negotiating right to regulate in trade-investment agreements are fragmented, therefore, the assessment of their effects on the general purpose of ensuring country members' regulatory power in new-generation FTAs is not easy to be precise and comprehensive.

3.4. The inclusion of general exceptions

Provision on general exception can be found in both CPTPP and the EU's FTA with little difference. This general exception is considered to learn from WTO Jurisprudence as it has the wording of General Agreement on Tariffs and Trade (GATT) Article XX or the General Agreement on Trade in Services (GATS) Article: XIV with modifications to better fit investment agreement context. This practice is popular among later investment treaties such as Article 15 of the Colombia-Japan BIT or Article XIV ASEAN-China Investment Agreement (2009).⁷⁸ General exceptions is evaluated as better support the benefit of both parties of an IIA in compared with reservations.⁷⁹

Although some researchers might suggest that the absence of definition of "general exceptions" in the EU's FTAs make it open to broad interpretation,⁸⁰ the text with a so-called "self-judging" language⁸¹ used to be attached different meaning by countries,⁸² is unlikely to help ensure well

75 European Commission (November 2013), *supra* note 17, p. 8.

76 Titi C. (2015), *supra* note 74, p. 656.

77 European Commission (14 Oct 2015), *supra* note 46.

78 Kim J. (2017), *supra* note 64.

79 Anthony J., Simons P. and Mayeda G. (2012), *supra* note 52, p. 117.

80 Chochorelou M. and Berdud C. E. (2018), *supra* note 67.

81 Kim J. (2017), *supra* note 64, p. 451.

82 This controversial was illustrated by the understanding of different countries in different circumstances. The argument of Argentina, as a defense against the claims arising out of its financial crisis, was that a state's invocation of the exception was subject to an obligation of good faith, while the United States supposed that a state's invocation of the exception renders the dispute nonjusticiable. See more in *ibid*, p. 454.

applying in practice. In addition, with little jurisprudence in the field of investment treaties, it is less clear to what extent these general exceptions may substantially contribute to conserving state's regulatory space. In order to evaluate this, it might be useful to refer to jurisprudence adopted by the WTO's Appellate body; however, it is also not sure whether arbitral tribunals have employed the same approach. Not to mention that the general exceptions in EU FTAs are only applied to a limited sections of investment chapter.⁸³ Therefore, the effect may bring by this regulation in an investment agreement is quite limited.

In this context, it is noteworthy to mention Canada view presented in a non-disputing party submission in *Eco Oro Minerals v. Colombia*⁸⁴ which proposes that "general exceptions is designed to operate as a final "safely net" to protect State's regulatory power in pursuit of the specific legitimate objectives covered by the exceptions.⁸⁵ In addition, it emphasized that Parties' intention was never to limit the scope of legitimate policy objectives that States can pursue.⁸⁶ The Canada's submission also proposed that an annex (on a substantive norm such as expropriation) provides a clear guidance for the arbitrator⁸⁷ to evaluate a specific action. A critical opinion might suggest that an interpretation in a non-disputing party submission tends to support the respondent State and therefore should not be regarded. However, Canada's explanation shows a clear intention of a party in FTA negotiation which rarely be expressed to public. This submission may support the understanding of the wording of FTA signed by Canada and others. More important, it provides a constructive approach for arbitral tribunals in interpreting the general exception and policy space within investment agreements as the discussion on the operating of those exceptions are ongoing among scholars and practitioners.

4. Concluding remarks

In negotiating and implementing BITs and FTAs, countries are facing with challenges arising from the conflict between rights to be protected of foreign investors and sustainable development goals. Therefore, the harmonization between the goal of attracting foreign investment, by protecting investment, and at the same time protecting environment has long been one of the considerable concerns in international investment

83 Chochorelou M. and Berdud C. E. (2018), *supra* note 67.

84 *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), 2016. Canada role in this case is the home country.

85 *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No ARB/16/41), Non-disputing party Submission of Canada, 27 Feb 2020, para. 20.

86 *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No ARB/16/41), Non-disputing party Submission of Canada, 27 Feb 2020, para. 23.

87 *Ibid*, p. 9.

law, mainly in FTAs, investment agreements, and in the Investment Tribunal Award. The transformation of recently signed trade-investment agreements is showing a new trend while explicitly containing rights of the host country to take effective measures for environmental protection as well as other sustainable development aims. As for CP-TPP, despite significant development in the scope and topics put under negotiation, with its rigidity as a tool for trade liberalization, it seems that the aim of encouraging sustainable development as well as conserving policy space is not the first priority of negotiating members in compared with trade and investment. The EU's approach in negotiating trade-investment agreements, however, has been agreed and welcomed among its trade partners. Therefore, this idea has been clearly presented by providing "detailed and explicit exemptions and positive measures"⁸⁸ in its recently signed treaties. The including of these exemptions may be expected to limit the uncertainty characteristic of sustainable development provisions in IIAs. Infact, the IIAs usually imposes principled regulation and therefore it is rarely be drafted in detailed. The lack of explicit regulation which is easily applied may reduce the protective effectiveness of these regulations. New-generation FTAs may choose to fix this weakness by adding exception, exemption and exlanation to investment protection clauses. However, as showed by the literature, there is no unified understanding regarding these innovation, therefore, it, again, depends on the invesment tribunals' approaches which lead to an unclear scenario.

In conclusion, comparing with traditional BITs and preferential trade agreements, sustainable development as well as the aim to preserve legitimate rights of the host state in CP-TPP and EU's agreements is more concerned and is effectively presents via specific regulations. This suggests that sustainability and environmental protection in this century takes priority over other factors in nation's policy and in different trade-investment forum around the world. Indeed, negotiating new-generation preferential trade agreements and investment protection agreements demonstrates much efforts in promoting sustainable development and in revising trade/investment provisions in compared with traditional agreements. However, as the relationship between investment and sustainable development is not straightforward,⁸⁹ these modifications need to be further examined via different interaction context, especially in the practice of interpretation authority of international trade-investment tribunals in the context that the new investment tribunal system and its operation are still not determined. ●

88 Mestral A. de (2015), *supra* note 10, p. 653.

89 Anthony J., Simons P. and Mayeda G. (2012), *supra* note 52, p. 26.

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