

Bilateral Investment Treaty Regime and Environmental Justice: The Indian Dilemma

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Abstract

There is an ongoing debate among scholars of international investment law on the conflict between investment protections on one hand and regulatory autonomy on the other. Many states raised the issue of shrinking policy space for legitimate policy objectives. Currently, people of the world are facing a severe environmental crisis. Right from Johannesburg, the environmental concern poses the greatest challenge to the world. Leaders of the world devised various mechanisms over the years to cope with such problems. One such device is the idea of sustainable development which strikes a balance between developmental objectives and environmental objectives. They agree that both must go hand in hand. Climate justice is another mechanism through which the leaders of the world want to achieve environmental justice.

Now crisis of international investment law basically does not strike an adequate balance among various objectives. It has failed in its effort to strike a proper balance between environmental objectives and investment protection objectives. Now the question before policy makers is how to draft an International Investment Agreements which strikes adequate balance between the two. It is also acknowledged that a customary rule of police powers is not the safest defence upon which a host state could rely to defend its measures. This paper first discusses the concept of BITs and traces the evolution and development of BITs around the world. It also introduces the global debate over regulatory freedom and the bilateral investment treaty which is going on nowadays. The second part of the paper will focus on the concept of police power doctrine in International Investment Law and the practice and regulatory autonomy of the host state to pursue legitimate policy objectives, which is an essential component of sovereignty. It also analyses the challenges and limitations of police power doctrine with respect to the environmental crisis. Third part of the paper examines the concept of environmental justice with special emphasis on SDGs and climate justice. It also shows the relationship between environmental justice and sustainable

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development on one hand and the relationship between environmental justice and climate justice on the other. The fourth part of the paper assesses the limitations of environmental regulatory measures under the police power doctrine. The fifth part finally concludes that it is not safe for the host state to rely on the police power doctrine in its defence. The decisions of the various tribunals are not consistent.

Keywords: BITs, Sustainable Development Goals, ISDS, NPM, Treatment Standard

1. INTRODUCTION

Bilateral investment treaties (BITs) often accord protection to covered-investment through various treatment standards like full protection and security clause, fair and equitable treatment clause, national treatment clause, most-favoured nation treatment clause, and the protection against expropriation clause.¹ At the same time, such treaties also contain a non-precluded measure clause which essentially provides defences to the host state's action in violation of these treatment standards. These provisions provide host state with necessary policy space which is required to pursue legitimate public policy objectives. These provisions are like the GATT Art.XX in their ambit and scope. The doctrine of police power in international law also provides certain latitude to the host state to pursue public policy objectives. It emerges from the principle of sovereign equality of states in international law.

India has signed many BITs since 1994 as part of overall strategy for liberalisation, privatisation and globalisation. India is also party to many international environmental conventions.² One of the major concerns among the states these days is how to reconcile among different international obligations. States are in a legal as well as a moral dilemma, the reason being, if they try to perform one international obligation it results into violation of another international obligation. One of the ways to avoid these conflicts is to draft the BITs with great caution and circumspection. UNCTAD has many times warned states to include sustainable development goals in their BITs. Despite this fact many states still do not put these goals in their NPM provisions. In face of increasing Investor-State Dispute settlement ISDS claim in India has terminated 77 of its BITs unilaterally after the release of new Indian Model BIT, 2016.³ The Government of India is facing an unprecedented difficulty in negotiating new BITs with their old partner. However, India has succeeded in signing new BITs with only three countries like Belarus,

¹ M. Sornarajah, *The International Law on Foreign Investment* (5th edn, CUP2021)

² Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP,2019)

³ Prabhash Ranjan, 'The Future of India's Investment Treaty Practice: An Important Parliamentary Intervention' [2022] *MJIEL* 112, 125

Brazil and is still in the process of negotiation with 37 countries or blocks.

The concept of environmental justice has undergone various changes over the years. However, consensus among world leaders has not been reached on the normative content of this controversial idea. Therefore, world leaders have adopted different devices to promote the idea of environmental justice amongst different states at different footings. Among those devices, the ideas of sustainable development and climate justice are of prime importance and India is committed to achieving both.

India along with other leaders of the world formally adopted the resolution titled “Transforming our World: The 2030 Agenda for Sustainable Development” which enunciates 17 SDGs and 169 related targets at the special UN Summit held in New York from 25 to 27 September 2015. It came into force on 1 January 2016 and the SDGs are expected to stimulate developmental actions in areas of critical importance such as ending poverty and hunger, providing healthy lives and quality education, achieving gender equality, providing modern energy, promoting sustainable economic growth, reducing inequality, among other goals by the year 2030. As a part of its overall strategy to attain these goals, particularly goal 13, (Take urgent action to combat climate change and its impacts and Ensure access to affordable) and 7 (reliable, sustainable and modern energy for all), India has adopted various policy measures for the realisation of the same. Some of which might give rise to the investment claim in the long run.

India also ratified its 2015 Paris agreement on 2 October 2016 and undertook many environmental obligations. These commitments include, decarbonising its economy and keeping global temperature increase “well below” 2 degrees Celsius and to pursue efforts to limit it to 1.5 degrees Celsius by 2030. The cabinet approval of the national green hydrogen mission is a step in this direction. India in order to boost its renewable energy sector has permitted Foreign Direct Investment (FDI) up to 100% through automatic route. At the same time, to smoothen this transition, India — as agreed at COP27— plans to phase down around 81 coal-fired power plants by 2026. However, there is a catch. This laudable objective of decarbonising the economy may face certain challenges under BIT. BIT allows foreign investors to bring claim directly against the sovereign states for the violation of one or more provisions of such treaties. In Europe, specifically, such claims have been brought against some countries like the Netherlands. In 2019, the Netherlands adopted a law prohibiting the use of coal for power generation, aiming at a complete phase out by 2030. In a recently decided case, *Rockhopper v. Italy*⁴, a British oil firm challenged the decision of the Italian government to ban oil

⁴ *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* [2022] ICSID Case No. ARB/17/14, Final Award (23 August 2022).

exploration and production within 12 nautical miles owing to environmental and local communities concerns, and was awarded 190 million euro in compensation.⁵

Given this background, this paper focuses on the impact of these regulatory measures on the rights of foreign investors under different Indian BITs signed post new Model BIT, 2016. Supposing that these measures result in investment claims, more particularly for the regulatory taking, can a state rely upon the doctrine of police power available under general international law. Paper further examines recently concluded Indian BITs with the central question in mind that whether these investment treaties contain sustainable development goals in their NPM provision and if not, whether India could rely on the police power doctrine in the wake of future ISDS claims. Therefore, formulation of these NPM provisions is crucial for the regulatory autonomy of India as a host state. Draftsman has to strike proper balance amongst various conflict of interests of host state and foreign investors. India's commitment towards sustainable developmental goals might trigger ISDS claim in future due to defective formulation of these provisions in its BITS.

The present study is divided tentatively into five parts. The first part introduces the concept of BITs and traces the evolution and development of BITS around the world. It also introduces the global ongoing debate over regulatory freedom and the bilateral investment treaty. The second part of the paper focuses on the concept of police power doctrine in International Investment Law and the practice and regulatory autonomy of the host state to pursue legitimate policy objectives, which is an essential component of sovereignty. It also analyses the challenges and limits of police power doctrine with respect to the environmental crisis. The third part of the paper examines the concept of environmental justice with special emphasis on SDGs and climate justice. It also shows the relationship between environmental justice and sustainable development on one hand and the relationship between environmental justice and climate justice on the other. The fourth part of the paper assesses the limitations of environmental regulatory measures under the police power doctrine. The fifth part finally concludes that it is not safe for the host state to rely on the police power doctrine in its defence. It reiterates that the decisions of the various tribunals are not consistent.

2. THE EVOLUTION AND DEVELOPMENT OF BITS AROUND THE WORLD

2.1. Meaning and Scope

Since the end of the World War II, countries have been negotiating investment

⁵ Prabhash Ranjan and Pushkar Anand, 'Challenges await India in decarbonising its economy' (*Hindustan Times*, 30 January 2023) <<https://www.hindustantimes.com/opinion/challenges-await-india-in-decarbonising-its-economy-101675002518916.html>> accessed 16 August 2023

treaties to establish a global regime for investment. Investment treaties, often referred to as International Investment Agreements (IIAs), are essentially instruments of the law of nations with the help of which a host state makes promises with the other states regarding the treatment of investors and investments from the respective states. It also decides on the procedure regarding execution and enforcement of those promises. As their names suggest, one of the primary goals of investment treaties is to promote and protect investment.⁶

There are three types of international investment treaties. These are (1) bilateral investment treaties (BITs); (2) bilateral economic treaties with investment chapters; and (3) other regional trade agreements with investment chapters involving more than two countries. Bilateral Investment Treaties (BITs) are basically agreements/treaties between two countries which seek to protect investments made by investors of both countries.⁷ BITs protect investments by limiting the host state's regulatory behaviour and preventing undue interference with the rights of foreign investors.⁸ These limitations include barring host states from taking investments without just compensation and following due process unless they are in the public interest; requiring host countries to offer fair and equitable treatment (FET) to foreign investment and to refrain from discriminating against it; and allowing profits to be repatriated subject to conditions agreed upon by the two countries. In addition, Bilateral Investment Treaties define what constitutes an 'investment' and who qualifies as an 'investor'.⁹ This suggests that BITs only protect those investors and their investments which fall under the definitions of a particular BIT. Today, bilateral investment treaties (BITs) constitute the most significant source of international investment law.

Individual investors have rights under BITs to file cases to settle investment disputes against the host state's sovereign regulatory actions that violate the BIT for monetary compensation. This is referred to as investor-state dispute settlement (ISDS). The ISDS clause in BITs coexists with the State-State Dispute Settlement (SSDS) provisions, which allow contracting parties, i.e. states, to sue each other over the treaty's interpretation or implementation. The mandates of the ISDS and the SSDS are not the same. While ISDS is focused on settling investment disputes between foreign investors and host countries, SSDS is concerned with the interpretation and application of the treaty.¹⁰ Most BITs contain ISDS clauses

⁶ Jeswald W. Salacuse, *The Law of Investment Treaties* (1st edn, OUP, 2015)

⁷ Ibid.

⁸ Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012); Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (KLI BV, 2009)

⁹ Ibid.

¹⁰ A. Roberts, 'State to State Investment Treaty Arbitration: A Hybrid Theory of Independent Rights and Shared Interpretative Authority' (2014) 55 *Harv Intl L.J.* 1.



that allow foreign investors to file claims against the host state even before local remedies have been exhausted.¹¹ These ISDS clauses provide foreign investors with written consent to arbitration in the vast majority of BITs.

The ISDS mechanism under BITs assures that states may be held responsible for their use of public power by a third party, namely an international tribunal with authority to assess the host state's actions —whether executive, judicial, or legislative¹².

2.2. Evolution and Development

Although the roots of the modern treaty rules on foreign investment protection can be traced back to 1796, when the United States (US) and France signed the first Friendship, Commerce, and Navigation treaty. The era of current investment treaties began in 1959, when Germany and Pakistan signed a Bilateral Investment Treaty that came into effect in 1962¹³. According to Salacuse, Germany took this move because it had lost all of its foreign investment as a result of the World War II humiliation and hence desired to engage in bilateral treaties regulating and protecting foreign investment.¹⁴ Moreover, numerous European nations felt it necessary to safeguard their citizens' investments in their former political colonies, which began attaining political independence in the 1950s and 1960s.¹⁵ Countries were also compelled to engage in BITs due to gaps in customary international law on foreign investment.¹⁶ As Salacuse points out, customary international law provided no guidance on foreign investors' right to make monetary transfers from a host country.¹⁷ Similarly, while customary international law mandated the payment of compensation in the event of the nationalisation of foreign investment, the particular principles governing how this compensation should be calculated was yet to be determined.¹⁸ Bilateral Investment Treaties were designed to spell out the laws on these matters so that any uncertainties on foreign investment protection under international law could be resolved.

The global number of BITs has constantly expanded, from 500 in the 1990s to more than 2200 by the end of February 2022. The increase in the number of disputes between host states and investors, and BITs is directly proportional

¹¹ Dolzer and Schreuer (n 9) 265. Also see *Helnan International Hotels A/S v. Arab Republic of Egypt*, CSID Case No ARB/05/19, Decision on Annulment, 14 June 2010, paras 43-57; *Generation Ukraine, Inc v. Ukraine*, 1CSID Case No. ARB/00/9, Award, 16 September 2003, para 13.4.

¹² Andreas Kulick., *Global Public Interest in International Investment Law* (CUP 2012) 93; See also, S.W. SCHILL, *Multilateralization Of International Investment Law* (CUP 2009)

¹³ Dolzer and Schreuer (n 9) 1

¹⁴ Salacuse (n 7) 101

¹⁵ Ibid; Also see R Mann, *British Treaties for the Promotion and Protection of Investments* (52 BYIL 1981) 241

¹⁶ Ibid 85.

¹⁷ Ibid.

¹⁸ Ibid.

as evident from the data published by UNCTAD which clearly shows that the number of investment treaty disputes have gone up from approximately 50 in 1996 to 1104 in October 2021.¹⁹

2.3. The Global Debate On Bilateral Investment Treaties and Regulatory Freedom

A country has sovereign right to regulate stems from its authority over its own territory and yet, BITs oblige governments to utilise this sovereign right in accordance with their commitments to protect foreign investors. This brings BITs and the regulatory autonomy of the host country face to face. One might think about the interrelationship between BITs and the regulatory power of the host nation in a variety of ways. For example, one could argue that BITs cause a 'regulatory chill' in the host country.²⁰ According to this reasoning, the host nation does not exercise its regulatory autonomy because it believes that its measures may breach the BIT, exposing it to a claim from the investor, resulting in a "chilling effect".²¹ This hypothesis will be tested by looking into arbitral awards where the host nation had restrained itself from exerting its regulatory authority because it believed the regulation in question would violate the BIT. This idea has been contested on the grounds that host-state authorities are frequently unaware of BITs and the nature of investment disputes likely to sprout from them.²² It was observed that identifying these conflict creating circumstances is not easy "because they need counter-factual evidence concerning the regulations that would have existed if the putative chilling had not occurred".²³ It is also argued that when confronted with legal action by foreign investors under the BIT, the host states go back on their words even after adopting regulatory measures which they consider to be in consonance with the BIT. Tienhaara argues for the regulatory chill theory, using examples from NAFTA and Costa Rica.²⁴ The 'regulatory chill' theory is predicated on the idea that regulators in host countries are well aware of BITs and the kind of challenges that can be filed against them under such international treaties. This assumption, however, is debatable, particularly in the case of underdeveloped nations, where officials are unfamiliar with BITs.²⁵

¹⁹ UNCTAD, 'International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed 19 April 2023

²⁰ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors At The Expense of Public Policy* (CUP 2009) 262

²¹ JM Bonnitich, C Brown, K Miles, 'Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections' in C Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011)

²² J Coe and N. Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (eds), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

²³ Eric Neumayer, *Greening Trade and Investment* (Earthscan 2001) 78

²⁴ Tienhaara (n 21) 617, 626

²⁵ L. Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality* (PhD Thesis: London School of Economics 2011).

This is especially true for countries with little or no experience defending their regulatory actions in the ITA. In other words, if foreign investors have previously challenged a nation's policies under BITs, regulators in that country may begin to internalise BITs in their regulatory power. Even this, however, is dependent on a number of conditions, including whether regulators in underdeveloped nations have the necessary internal technological competence.

'BIT disputes' is another way of thinking about the link between BITs and regulatory authority. According to this interpretation, the host nation applies its regulatory power, uninformed of the consequences of BITs, which the foreign investor challenges under the ITA. As a result, the ITA tribunal will interpret the relevant BIT to determine whether the host country's regulatory measure is valid or not. This will also mean that the way in which the BIT's various clauses are interpreted will finally decide the applicability of the regulatory measures of the host states. As a result, the attention will shift to how the BIT's provisions are framed and whether these provisions strike a balance between investor protection and regulatory power. If an ITA tribunal finds that the host state's regulatory measure is unlawful, the host state will be required to compensate the foreign investor. Paying damages to a foreign investor will drive up the cost of regulation, thereby discouraging the host nation from enacting similar restrictions in the future. The tribunal will not concern itself with the quashing of the host state's regulatory measure; even then the host state will not be willing to carry on with those regulatory measures which are inconsistent with international law, as this could harm the host country's reputation as an appealing investment destination. Furthermore, keeping such a regulatory measure in place may encourage additional foreign investors to challenge it.

In other words, according to this conception, the link between BITs and the regulatory power of the host nation should be seen in terms of the possibility of disputes to be made against the host country for breaching BITs. As a result, the focus here is on gaining a better grasp of the BITs that a particular country has signed.

3. DOCTRINE OF POLICE POWER IN INTERNATIONAL INVESTMENT LAW AND PRACTICE

Regulatory autonomy is an essential attribute of sovereignty. Every State has the right to regulate its social, political and economic affairs as an attribute of sovereignty; at the same time, the state gives away a part of its regulatory autonomy by making commitments under a treaty. This right to regulate public interest is recognised in international law as the doctrine of police power. When a state takes regulatory measures to pursue legitimate policy objectives like environmental measures, public health measures, taxation measures etc., it sometimes affects

the economic interest of the domestic as well as foreign investors. A regulatory measure within the legitimate exercise of the State's police power does not tantamount to indirect expropriation even if it may considerably affect foreign investment.²⁶

This doctrine of police power is invariably used in international investment law, especially with respect to indirect expropriation, by the states to justify the non-payment of compensation. Many of the ISDS tribunals upheld the doctrine of police power in international investment law while deciding the question pertaining to indirect expropriation, while many other ISDS tribunals expressed doubt over this doctrine. One of the earliest cases decided by the investment tribunal was *Feldman v. Mexico*,²⁷ in which the issue was whether the imposition of certain taxes on the exportation of cigarettes by the claimants amounts to expropriation or not. The Tribunal, in this case, said:

[G]overnments must be free to act in the broader context of public interest through the protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.²⁸

The Tribunal, in this case, stated that as regards the most important public objectives are concerned, the government should be free to act in that broader public interest. This case sowed the seeds of what in international investment law has been known as the doctrine of police power. The most appropriate articulation or significant pronouncement of the police power doctrine in international investment law was made in a case decided in *Methanex v. USA*²⁹ in 2004. This was in the context of public health measures the US Government adopted to achieve specific public health objectives. In this case, the Tribunal held:

²⁶ James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (4thedn, OUP 2019). Ian Brownlie said: "State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation".

²⁷ *Marvin Feldman v. Mexico* [2002] ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

²⁸ *Ibid.* 103.

²⁹ *Methanex Corporation v. United States of America*, NAFTA, Final Award (Aug. 3, 2005). <<https://jsumundi.com/fr/document/decision/en-methanex-corporation-v-united-states-of-america-final-award-of-the-tribunal-on-jurisdiction-and-merits-wednesday-3rd-august-2005>> accessed 3rd April 2023



[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.³⁰

Methanex tribunal categorically said that the key test for deciding whether a measure constitutes an expropriation or valid non-compensable regulation depends on being taken for a public purpose and through a law backed by due process and non-discriminatory principles. So, according to Methanex tribunal, if the above-stated requirement is fulfilled or satisfied, then those regulatory measures will not amount to expropriation. The only exception to this provision is if the host state commits not to enact such regulatory measures. This differs from the earlier stance that a regulatory measure that constitutes a taking is deemed compensable expropriation, and the existence of a public purpose, for example, merely serves to reduce the amount of compensation. This difference is crucial in preserving the host state's regulatory freedom.

Similarly, it was also recognised by another ISDS tribunal in *Saluka v. Czech Republic*. The Tribunal, in this case, held that “[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare”.³¹ Salukav tribunal, in a way reiterates police power rule that the earlier tribunals have laid down.

Recently ICSID tribunal in *Philip Morris v. Uruguay*,³² affirmed the rule laid down by the Methanex tribunal. In this case, the issue involves adopting various regulatory measures by the Uruguay government pertaining to preserving public health. The Tribunal said:

[A]s indicated by earlier investment treaty decisions, for a State's action in the exercise of regulatory powers not to constitute indirect expropriation, the action must comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for protecting the public welfare and must be non-discriminatory and proportionate. In the Tribunal's view, the SPR and the 80/80 Regulation satisfy these conditions.³³

³⁰ Ibid Part IV-Chapter D-Page 4.

³¹ *Salukav Investments BV v. Czech Republic* [2006] Partial Award 255 (Perm. Ct. Arb. 2006).

³² *Philip Morris SARL, Philip Morris Products S.A. and AbalHermanos S.A. v. Oriental Republic of Uruguay*, [2016] ICSID Case No. ARB/10/7, Award (July 8, 2016).

³³ Ibid 305.

In another recent decision, the Tribunal reaffirmed the rule laid down in Salukav case and established that expropriation does not occur when a bona fide non-discriminatory action is approved through due process for the general welfare.³⁴

4. ENVIRONMENTAL JUSTICE AND SDGs

Human race is on the verge of a deep and frightening abyss concerning the environment. The ecosystem has been on the losing end in this race of development whether it be with regard to extinction of species or the destruction of planet's climate. The uninhibited activities in the name of economic development which results in irreversible ecological harm has brought about a new geologic era of "Anthropocene".³⁵ It has catastrophic implications on the regenerative capacity of our life giving mother-nature. The fact is that every person or every state is not equally liable for the resultant annihilation of the environment. Many fragments of society have even chosen to lead a very sustainable lifestyle. But the sad conundrum still remains that those who contributed the least to environmental degradation are the hardest hit when it comes to being exposed to the resultant harm. This phenomenon is one of the components of environmental injustice. Many 'environmental' problems are, by their very nature, problems of injustice.³⁶

4.1. Environmental Justice

The concept of environmental justice opens discourse about the analysis of competing benefits and burdens of environment and its equitable distribution³⁷, the recognition of suffering individuals and communities on the basis of political and cultural factors^{38,39} and the procedures to be followed in order to bring forth a methodology for participatory mechanisms.⁴⁰ Environmental justice actions are expansive and inclusive, so in the same way its definition should also be broad enough to encompass within itself, a wide spectrum of justice so as to not only include individual complaints based distribution but also include within its ambit peaceful community survival.⁴¹ Schlosberg defined environmental justice by basing it on four notions. Firstly, fair distribution of resources of environment and liability for its harm; secondly, gaining individual and community recognition thereby asserting self-respect and autonomy; thirdly, the existence of deliberative and democratic participation; and fourthly, the construction of capabilities among

³⁴ *WNC Factoring Ltd.V. The Czech Republic*, Award (PCAtrib 2017) <<http://www.italaw.com/sites/default/files/case-documents/italaw8533.pdf>> accessed 12 November 2022

³⁵ P. J. Crutzen, 'Geology of Mankind – The Anthropocene' (2002) 415 *Nature* 23.

³⁶ Sharachchandra Lele, 'Sustainable Development Goal 6: watering down justice concerns' (2017) 4.4 *Wiley Interdisciplinary Reviews: Water* e1224.

³⁷ Michael Walzer, *Spheres of Justice* (University of California Press, 1983) 6.

³⁸ Peter Taylor, *Respect for Nature* (Princeton University Press 1986).

³⁹ Iris Young, *Justice and the Politics of Difference* (Princeton University Press 1990).

⁴⁰ David Schlosberg, *Defining Environmental Justice* (Oxford University Press 2007) 25-29

⁴¹ *Ibid* 5



individuals, groups and non-human parts of nature.⁴²

Environmental justice scholars and activists have tried to formulate a four dimensional definition of environmental justice which inculcates within itself distributive justice, procedural justice, corrective justice, and social justice.⁴³ The distributive justice aspect necessitates the need of fair appropriation among the nations of the positive as well as negative impact of economic activities on the environment.⁴⁴ Procedural justice strengthens the democratic ideals of decision-making, i.e., transparency, accountability, and participation in decision-making processes.⁴⁵ Corrective justice imposes an obligation on the governments to make compensation for the violation of rights of people and also impose prohibition on harmful activities.⁴⁶ Social justice emphasises that the relationship between environmental issues and social and economic justice is so intricate that it is impossible to isolate one from the other.⁴⁷ Hence it goes without saying that environmental injustice cannot be studied and perfected in isolation without making allowances for various determinants like economic disparity and exploitation, race and gender subordination, marginalisation of weaker sections like children, elderly, immigrants, and persons with disabilities, dispossession of indigenous peoples from their natural habitat, and the domination of the Global South by the Global North.

Although various human rights treaties do not expressly recognise environmental justice as a human right, yet, the demand for environmental justice is still advocated through the language of human rights. Keeping at par with these demands, national and international tribunals have conceded that environmental degradation violates various existing human rights, including the right to life, health, food, and water; the procedural rights to information, participation, and access to justice; the collective rights of Indigenous peoples to their ancestral lands and resources; and the right to a healthy environment which has already been inculcated in the National laws by the legislatures of most of the States.⁴⁸ In order to achieve environmental justice it is imperative to recognise, protect and punish transgressions against environmental human rights.

⁴² Ibid.

⁴³ R. R. Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 *Environmental Law Reporter* 10681

⁴⁴ D. French, 'Sustainable Development and the Instinctive Imperative of Justice in the Global Order' in D. French (ed.), *Global Justice and Sustainable Development* (Leiden 2010) 8

⁴⁵ R.R. Kuehn (n 9) 10688.

⁴⁶ Ibid. 10693–10698

⁴⁷ C. G. Gonzalez, 'An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2011) 32 *University of Pennsylvania Journal of International Law* 728.

⁴⁸ L. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Oxford University Press, 2016)

The sustainable development goals (SDGs) have the potential to lead environmental justices and injustices.⁴⁹ The SDGs are highly relevant to environmental and social justice, and vice versa.⁵⁰

4.2. Environmental Justice to SDG

The right to development was promoted by the Global South as a manifestation of their right to self-determination.⁵¹ Before the adoption of the SDGs in 2015, there was no juncture where right to development and sustainable development could converge, as there was a lack of system which could harmonise them with each other.⁵²

Sustainable development has emerged as the guiding principle for environmental management⁵³ and a potential alternative to the prevalent paradigm of economic development.⁵⁴ Defined as “development that meets the needs of the present without compromising the ability of future generations to meet their needs,”⁵⁵ the concept, initially, required a balance between two pillars: economic growth and environmental protection.⁵⁶ A third pillar, social development, was added in the World Summit for Social Development 1995.⁵⁷ The Johannesburg Declaration 2002 on Sustainable Development⁵⁸ affirmed “collective responsibility to advance and strengthen the Interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels.”⁵⁹

Sustainable development encompasses the integration of economic development, environmental sustainability, and social inclusion. The environment is basic to

⁴⁹ Mary Menton and others, ‘Environmental justice and the SDGs: from synergies to gaps and contradictions’ (2020) 15 Sustainability Science 1621

⁵⁰ Ibid. 1626

⁵¹ See K. Mickelson, ‘The Stockholm Conference and the Creation of the South–North Divide in International Environmental Law,’ in S. Alam, S. Atapattu, C. G. Gonzalez, and J. Razzaque (eds.) *International Environmental Law and the Global South* (Cambridge University Press 2015) 109

⁵² UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, Oct. 21, 2015, UN Doc. A/RES/70/1

⁵³ D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy* 5th edn, (Sunderland, UK: Foundation Press, 2015) 114

⁵⁴ UN World Commission on Environment and Development, *Our Common Future, Report of the World Commission on Environment and Development* (Oxford University Press, 1987)

⁵⁵ Ibid. 43

⁵⁶ Ibid.

⁵⁷ UN, Report of the World Summit for Social Development, Copenhagen, Mar. 6–12, 1995, UN Doc. A/CONF.166/9 [Copenhagen Declaration].

⁵⁸ UN World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, Sept. 4, 2002, UN Doc. A/CONF.199/20.

⁵⁹ Ibid. para. 5.

any sustainable development approach.⁶⁰ The State's sovereign right to exploit their own natural resources is not absolute and the rights must be exercised in accordance with legal principles, taking into consideration the potential negative consequences on both human rights and the environment.⁶¹

Considering the indispensable role of ecosystem services in sustaining both human society and the economy, it is imperative that environmental conservation serves as the fundamental basis for all developmental endeavours.⁶²

India, the world's third largest energy consumer and fifth largest economy, finds itself in a contentious position under the classification of 'developing countries', as specifically evident in negotiations regarding promises to mitigate climate change.⁶³

In 2015, India formally submitted its first set of international climate commitments, known as its Nationally Determined Contribution (NDC), to the United Nations. The 2015 NDC comprised eight goals; three of these have quantitative targets upto 2030 namely, cumulative electric power installed capacity from non-fossil sources to reach 40%; reduce the emissions intensity of GDP by 33 to 35 percent compared to 2005 levels and creation of additional carbon sink of 2.5 to 3 billion tonnes of CO₂ equivalent through additional forest and tree cover. India at COP26 pledged to zero out its greenhouse gas emissions by the year 2070.

In 2022, India formally submitted its second set of international climate commitments to the United Nations which include two primary targets for 2030. One is to reduce emissions per unit of gross domestic product, or GDP, by 45%, relative to the year 2005. The other is to increase "non-fossil" electricity — solar, wind, nuclear and hydro-power — to half of the country's electricity capacity. It also formally stated the goal of net zero by 2070.

5. ASSESSING THE LIMITS OF ENVIRONMENTAL REGULATORY MEASURE UNDER THE POLICE POWER DOCTRINE

In the light of the above rulings, it is now established that there is a police power doctrine in international investment law and practice; however, the next question is whether there is any limitation on this power under international investment law. In other words, if regulatory measures adopted in pursuance of international environmental commitments/obligations affect the economic value

⁶⁰ Dawe and K. Ryan, "The Faulty Three-Legged-Stool Model of Sustainable Development" (2003) 17 Conservation Biology 1459.

⁶¹ P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd edn, Oxford: Oxford University Press, 2009) 115

⁶² D. Hunter (n 19) 8

⁶³ J Dreze & A Sen, *India: Development and participation* (2nd edn, Oxford: Oxford University Press, 2002)

of the investment, will it amount to expropriation or non-compensable legitimate regulation? According to prevailing jurisprudence on the topic, it is well settled that a bona fide non-discriminatory regulation adopted by the State following due process will not amount to expropriation even if it affects the investment of a foreign investor.

The doctrine of police powers mainly invokes in matters concerning the protection of the environment, health and safety. However, the criteria to meet the essential requirement of police power doctrine is very high. In many decisions, as quoted above, the tribunals have elaborated on the conditions for the application of the doctrine but ultimately concluded that they were not met in the instant case. Right from the beginning, the application of the doctrine was problematic. Tribunals did not apply the doctrine consistently and that is why there is no consistency amongst the different ISDS tribunals. The ICSID tribunal in *Santa Elena v. Costa Rica*, where dispute arose out of expropriation of landed property by the host state in order to conserve its biodiversity, firmly maintained that:

[E]xpropriatory environmental measures — no matters how laudable and beneficial to the society as a whole — are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state obligation to pay compensation remains.⁶⁴

This position was also vigorously maintained in *Metalclad v. Mexico*⁶⁵. Without mentioning the police powers of the state, tribunals reaffirmed the “sole effect doctrine”. According to this doctrine, “if a governmental measure effectively deprives the owner of control over his property or substantially affects its commercial value, compensation is required even if the state may purport to have adopted the measure in the exercise of its police powers.”⁶⁶

Again in *Chemtura v. Canada*⁶⁷, where the claim arose out of the ban imposed upon the claimant company which was manufacturing Lindane (an agricultural pesticide), the tribunal concluded that:

⁶⁴ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* [2000] ICSID Case No. ARB/96/1, Final Award (17 February 2000) Para. 72.

⁶⁵ *Metalclad Corporation v. The United Mexican States* [2000] ICSID Case No. ARB(AF)/97/1, Final Award (30 August 2000). Paras. 85, 89, 103, 106-107 and 111.

⁶⁶ Viejo Heiskanen, ‘The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation’ (2003) 3 Int’l L.F. D. Int’l 176, 177

⁶⁷ *Chemtura Corporation v. Government of Canada* [2010] UNCITRAL Final Award (2 August 2010) <www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf> accessed on 12 Sep. 23.

[I]rrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. ... [T]he PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.⁶⁸

In other words, tribunals consider that the exercise of the State's police powers precludes not only the obligation to pay compensation but disqualifies the measure concerned as expropriation. This case has firmly established doctrine of police power in the jurisprudence of international investment law. However, as argued by Alain Pellet, the beneficial impact of the doctrine must not be overestimated due to the following reasons: (a) it is of no use for dealing with several aspects of deprivation of property; (b) the absolute thesis according to which a taking of property decided under the regulatory power of the State is not an expropriation with the consequence, that in all cases no compensation is due is hardly tenable; and (c) for the time being the conditions for the application of the doctrine unfortunately remain uncertain.⁶⁹

As discussed in the second part of the paper, the *Philip Morris* case read one more condition for the application of the doctrine of police power in international investment law and practice. As per the tribunal the measure adopted, the State must be proportionate to benefit sought to be achieved by such measures. The existence or extent of this doctrine is still unclear, especially when the applicable investment treaty does not specifically address this principle.

6. ENVIRONMENTAL CONCERNS IN NPM PROVISIONS

Non-Precluded Measures (NPM) in a BIT provides the regulatory autonomy to the host state to pursue legitimate public policy objectives. It is also known as a general exception clause which generally starts with words like 'nothing in this agreement precludes the host state...'. It gives flexibility to the parties of the treaty to deviate from the substantive obligation in certain circumstances. Given the debate on the conflict between investment protection and the host state's right to regulate, the NPM clause in BITs is a useful device that allows the host state to adopt measures for the fulfilment of non-investment objectives without attracting

⁶⁸ Ibid.265-266

⁶⁹ Alain Pellet, 'Police Powers or the State's Right to Regulate' in Meg Kinnear (eds), *Building International Investment Law – The First 50 Years of ICSID* (Kluwer Law International, 2016) 630

any liability under international investment law.⁷⁰ A NPM provision has two main elements: first, the permissible objectives, and second, the nexus requirement. Permissible objectives include those objectives mentioned in the NPM clause for which the host state can deviate from its treaty obligations. Nexus requirements means the objectives sought to be achieved through the measures in question must have direct nexus with the permissible objectives otherwise it would be considered violation of the substantive provisions of the treaty.⁷¹

NPM provisions or general exception clause is mentioned in Article 32 of the Indian Model BIT, 2016. This Article contains general exceptions with a long list of permissible objectives, which includes protection of public morals;⁷² maintenance of public order;⁷³ *protection of human, animal or plant life or health*;⁷⁴ *protection and conservation of the environment*;⁷⁵ to ensure compliance with domestic laws that are not inconsistent with the provisions of the treaty.⁷⁶ The inclusion of so many permissible objectives will provide India with much needed sufficient policy space. Another interesting aspect of the general exception clause is that it contains ‘necessary’ as the only nexus requirement for all the above mentioned permissible objectives. The text for the 2016 Indian Model BIT also clarified in its footnote 6, that in considering whether a measure is necessary, the tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to the country or not. It requires balancing or proportionality test which requires balancing different factors like the importance of the regulatory value pursued, the contribution made by the challenged measure to the regulatory value and the restrictive effect of the measure on the investment. In this sense, it will help in reducing arbitral discretion.

Upon analysis, it becomes clear that if India adopts any measures in order to achieve various commitments that have been undertaken under different international environmental law, India would defend her measures under the NPM clause. It would be better if India specifically mentions the climate goals as well as SDGs in their long list of permissible objectives. In *RAKIA v. India*⁷⁷ disputes stem from certain actions of the Government of Andhra Pradesh that allegedly have adverse impact on RAKIA’s investment in India. The Andhra Pradesh Government has rescinded contract with RAKIA due to stiff opposition from the tribal groups of

⁷⁰ Prabhash Ranjan (n 3) 1979

⁷¹ Ibid. 198

⁷² Indian Model BIT, 2016, art 32.1 (i)

⁷³ Ibid.

⁷⁴ Ibid. Article 32.1(ii).

⁷⁵ Ibid. Article 32.1(iv).

⁷⁶ Ibid. Article 32.1(iii).

⁷⁷ *Ras-Al-Khaimah Investment Authority (RAKIA) v. Republic of India*, [2022] UNCITRAL, PCA, Final Award.

Jerrela bauxite deposits. Basically the said bauxite deposits fall entirely within the area of reserve forest and notified tribal area. However, this particular case was based on India-UAE BIT (2013) which did not provide for the express permissible objectives (protection and conservation of environment) under its NPM clause. Due to this reason the AP government did not mention environmental purposes for annulling the contract. But after 2016, the Indian Model BIT problem has been sorted out by mentioning a long list of permissible objectives under NPM provisions. Now, India has secured a much needed policy space through elaborate list of subjects in its NPM clause.

7. CONCLUSION

The environmental crisis has put both states and international investors in an untenable position. Many corporations have collaborated with governments to mitigate the climate's human cost significantly, while others have filed claims against the host states. Reliance on the doctrine of police power is not free from doubt, the reason being some tribunals did not subject this doctrine to substantial deprivation test while the others subjected this doctrine to various other tests like proportionality. *Philip Morris* tribunal, which subjected police power doctrine to the proportionality test, basically favours investment protection over regulatory autonomy. This proportionality test has its origin in human rights jurisprudence. This test was propounded in order to strike a balance between the impacts of regulation on human rights. Its use in the investment treaty regime is questionable. When states adopt regulation and especially environmental regulation, it is always for achieving its most sacrosanct public welfare objective. If such regulation is bona fide and non-discriminatory, it should not be considered expropriation, even if it indirectly affects the economic value of the foreign investment.

The proportionality test or substantial deprivation test basically weighs the impact of the measure with the public purpose objectives sought to be achieved by the measure. However, it is a challenging task to ascertain the benefit of the measure in economic terms. Applying the proportionality test would defeat the very purpose of attracting more and more foreign investment for achieving sustainable development. Simultaneously, arbitral tribunals failed to articulate a commonly accepted notion of measures which qualify as a police power doctrine. So, it is difficult to anticipate in advance which measure will fall under police power doctrine and which measure will not.

States like India adopt various measures in order to achieve various goals under 'The 2030 Agenda for Sustainable Development' and under the 'Paris Agreements on climate' that may fall under the police power doctrine, provided such measures must be adopted bona fide, non-discriminately following due process. India has

already shown its intent by adopting the new model BIT in 2016 without subjecting its police power to the proportionality test or substantial deprivation test. This intention is further strengthened by signing Joint Interpretative Notes (JIN) with countries like Bangladesh and Columbia as a part of their respective BIT. Both JINs contain the following notes as a part of the expropriation provision:

[L]egislative, executive, regulatory, administrative or judicial measures or actions of general applicability that are designed or applied to further a Contracting Party's public policy objectives shall not constitute expropriation. These public policy objectives include, but are not limited to:

- a) protection or improvement of natural resources and the environment;
- b) protection and improvement of human, animal or plant life or health . . .

When India is faced with an investment treaty, these notes will provide a guide to the investment tribunal while interpreting police power doctrine.