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ČÍNSKÉ OBAVY O ŽIVOTNÍ PROSTŘEDÍ: ANALÝZA ENVIRONMENTÁLNÍCH DOLOŽEK V DOHODÁCH NA OCHRANU INVESTIC

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CHINESE GREEN CONCERN: ANALYSIS OF ENVIRONMENTAL PROVISIONS IN INVESTMENT TREATIES

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V Praze dne ……. …….

Lenka Řehořová

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LIST OF ABBREVIATIONS

A.D.	anno domini (in the year of our Lord Latin)
ad.	to (Latin)
Art.	Article (singular)
Arts.	Articles (plural)
BIT	bilateral investment treaty
BITs	bilateral investment treaties
CCICED	China Council for International Cooperation on Environment and Development
CIETAC	China International Economic and Trade Arbitration Commission
Co.	Company
CSR	corporate social responsibility
e.g.	exempli gratia (Latin); for example
ECHR	European Court of Human Rights
ECT	Energy Charter Treaty
EPs	Environmental provisions
European Convention	European Convention on Human Rights
FCN Treaties	Friendship, Commerce, and Navigation Treaties
FDI	Foreign Direct Investment/Foreign Direct Investments
FDI Law	new Foreign Investment Law of People's Republic of China
GATS	General Agreement on Tariffs in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GFRC	Global Forum on Responsible Conduct
i.e.	id est (Latin); that is
IAs	investment agreements
IIAs	International investment agreements
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IEC	International Energy Charter
IGOs	intergovernmental organizations
IIAs	International Investment Agreements
IISD	International Institute for Sustainable Development
IISD	International Institute for Sustainable Development

ILC	International Law Commission
ILC Articles	ILC Articles on Responsibility of States for Internationally Wrongful Acts
ILO	International Labour Organization
inter alia	among other
ISDS	investor-state dispute settlement
Ltd.	Limited
MFN	most favoured nation
MIGA	Multilateral Investment Guarantee Agency
mn.	million
MOFCOM	Ministry of Commerce of the People's Republic of China
NAFTA	North American Free Trade Agreement
NEPL	New Environmental Protection Law of the People's Republic of China
NGOs	non-governmental organizations
OECD	Organisation for Economic Co-operation and Development
para.	paragraph
PCIJ	Permanent Court of International Justice
PPP	public-private-partnerships
PRC	People's Republic of China
REL	Renewable Energy Law of the People's Republic of China
TIT	trilateral investment treaty
tn.	trillion
TPT	third-party treatment
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	UN Conference on Human Environment
UNPRI	United Nations Principles for Responsible Investment
US	United States / American (adj.)
USA	United States of America (noun)
USD	United States Dollar
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VIE	Variable Interest Entities
WHO	World Health Organization
WTO	World Trade Organization

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INTRODUCTION

The influence of the People's Republic of China on the global economy is significant and world can expect its further growth with all its positives and negatives. Chinese remarkable economic reforms lasting almost half of century have mostly been driven by the energy acquired from coal mining sector. Unfortunately, the long-term neglect of environmental protection in the territory of China and beyond have earned China a sad primacy. Dominating the rankings of the world's largest polluters for most of the twentieth century, China sacrificed its healthy environment at the altar of rapid economic growth.

The gross underestimation of aggravating environmental situation led to the absence of strict regulatory environmental standards. The long-lasting practice of the state demanding from investors none or very little considerateness to the environmental issues boosted the economic growth of the country. Investing into China became more profitable for the foreign investors because further investment into environmentally friendly conduct of business remained solely voluntary. As a result, low environmental standards adopted by multinational corporations only worsen the already serious damage caused to the Chinese environment.

The need for change became imminent. The international community and the Chinese population, especially the young generation, begun to increasingly perceive the need for better environmental protection as a burning issue. Public debate seeking fast and efficient solution has soon translated into several political and legislative actions. Over the last decade, China has issued numerous laws and ordinances addressing the domestic environmental regulation. However, the question remains whether and to what extent the mirroring of the "*greenification*" process can be observed in Chinese bilateral investment treaties and what is the actual role of the environmental provisions in the "*greenification*" trend. As such, the overall purpose of this thesis is to conduct a complex analysis of the genesis and existence of the newly rising concept of the environmental provisions. A particular emphasis will be put on the People's Republic of

China attempting to implement the concept of sustainable development into its investment regime.

Content-wise, the first chapter of this thesis addresses the core problem of the environmental provisions – the colliding nature of the efforts to implement the environmental regulations into the foreign direct investing. The following chapters deal with the sources of environmental regulation in international investment law and principal actors in the field, attempting to systematically capture and analyse the theoretical legal base necessary to fully understand the concept of the environmental provisions.

The thesis further proceeds with analysis of the material and formal sources of the Chinese domestic environmental and foreign investment regulation, which prompted the processes of proliferation and so-called *greenization* of the Chinese BITs. Finally, the thesis deals with the chapters devoted to deep examination of the environmental provisions used in bilateral investment treaties, where China represents one of the parties, and presents their subsequent comparative analysis with other bilateral investment treaties, including those of the world's leading environmentally-friendly countries.

INTERMEZZO: HISTORICAL EXCURSION INTO DEVELOPMENT OF THE REGULATION OF GLOBAL ENVIRONMENTAL CONCERNS, AND THE DEVELOPMENT OF FOREIGN DIRECT INVESTMENTS

In order to be able to critically asses the usefulness and usability of the environmental protection in international trade, it is first necessary to look in the past and to review the historical development of environmental protection in the global trade, including its causations.

The growth of the quality of living of the mankind has collected its tax through deterioration of the environment. The major turning point occurred at the times of Industrial Revolution when the human labour had been replaced by machines, which ultimately resulted in industrialization of the world. On the one hand, mankind had learned how to utilize energy, which led to rise of living standards and unprecedented population growth, on the other hand, the use of fossil fuels and utilization of steamrolls had left its indelible footprint on the Earth's environment. The full environmental impacts of the Industrial Revolution would not be fully realized until the 1800s.[1]

Moreover, in the mid-1700s the world population grew by about 57 % to 700 mn. By the 1800, even despite the Black Plague epidemics, the population reached one billion – the amount, which doubled to two billion by the year 1927 only. Exponential growth followed, rising the world population by incredible 400 % in the 20th and early 21st centuries. Nowadays, the population counts nearly 7.5 bn. and continues to grow, despite the negative side effects on nature and rather limited natural resources the planet offers.[2]

The revolutionary inventions of the Industrial Revolution and Post-Industrial Revolution eras, such as railroad, steamboat or telegraph, have accelerated the process

[1] MCLAMB, E.: The Ecological Impact of the Industrial Revolution. News and Information for Planet Earth. 18 September 2011. To be found at <http://www.ecology.com/2011/09/18/ecological-impact-industrial-revolution/>. Accessed on 12 April 2017.

[2] The real time population counter. To be found at: <http://www.worldometers.info/world-population/>. Accessed on 12 April 2017.

of globalization. Following up on the long-distance trade of the colonist powers, the world commercial markets began to emerge. The two world wars in the first half of the 20th century, nevertheless, slowed down the vivid development of most of the areas of the international trade. Following the efforts to rebuild the post-war international economic system, the Bretton-Wood Conference[3] aimed to liberalize world trade in goods, services, and capital, and has served as a basis for current policies of the World Trade Organization.[4] The Bretton-Wood concept was based on the empirical findings that more liberalization leads to general prosperity. It opened doors to the globalization, which reignited the development of international trade greatly.

The newly developed Bretton-Wood system faced the criticism that it benefits its creators – the powerful states, and mainly the USA – over the Third World countries. The criticism culminated in 1970s by adoption of UN Resolution introducing the New International Economic Order.[5] The Resolution, and particularly its section VIII entitled "Assistance in the exercise of permanent sovereignty of States over natural resources", put emphasis on the principle of sovereignty, especially on sovereign right of the state to control and regulate foreign investors and their investments, and the sovereign rights over natural wealth and resources of the state.[6]

Even this state-centred theory, according to which only states dispose of legal personality, has slowly begun to be abandoned. States are no longer the sole subjects of the international law. Some of the newly emerged subjects even possess the legal personality in the past only reserved to the states as the original subjects. Diplomatic protection carried out by the negotiations on the state level is replaced by a primarily treaty based-system with advent of bilateral investment treaties.[7] Investors have been provided the right to hold action against the host state and the tribunals were firstly entitled to decide, whether the state-made regulation is permissible or whether it

[3] United Nations Monetary and Financial Conference, also known as the Bretton Woods Conference. Held in Bretton Woods, New Hampshire, United States in 1943-1944.
[4] ROZEHNALOVÁ et al..: Právo světové obchodní organizace a další kapitoly z mezinárodního ekonomického práva. Masarykova univerzita – FRP. Brno. 2010.
[5] UN Resolution A/RES/S-6/3202 adopted by the General Assembly: Programme of Action on the Establishment on a New International Economic Order. To be found at: < http://www.un-documents.net/s6r3202.htm>.
[6] MUCHLINSKI, P.T.: Policy Issues. Transnational Dispute Management. Vol.2, Issue 5 (2005). p. 9.
[7] The historically first BIT was concluded in 1959 between Germany and Pakistan.

constituted an expropriation, which needs to be compensated. Hand in hand with the globalization, the role of the states in international law has disaggregated and has partially been replaced by the parts of these states.[8]

Whilst the omnipresent globalization has been mostly beneficial for the development of the international trade, at the same time, it inherently implies the need to combat the environmental challenges –originating as unintended by-products of the exponentially growing population and its needs – effectively and jointly on a higher, global level. Environmentally most problematic areas include air and water pollution, forests and wildlife, hazardous waste, or use of agricultural pollutants. Given the extent and nature of the environmental issues, these cannot be resolved solely by means of national regulation.

The science-based idea of regarding the biosphere as a fragile unit, a vulnerable system indigent of legal protection had not been widely accepted until the 1960s. In 1962, Rachel Carson was the first to globally raise awareness of environmental issues linked with recent developments, more specifically in connection with the chemical industry processes. Alerting that resources of the Earth should not be taken for granted, her book Silent Spring[9] *stirred the biggest discussion in the modern era and ultimately spurred revolutionary changes in the environmental legislation.*

So far, the international environmental law had been fragmented in private actions whose primary objective was to protect the use and enjoyment of land, labelled as "good neighbourliness" ("bon voisinage" or "Nachbarschaftsrecht") based on characteristically reciprocal nature.[10] *During the so-called traditional era, the international natural resource management was regulated through bilateral and regional regulatory agreements between the states. Initial environmental policies have emerged since the middle of the nineteenth century.*

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[8] SLAUGHTER, A.-M.: The Accountability of Government Networks. Indiana Journal of Global Legal Studies, Issue 8, No. 347. (2000-2001).
[9] CARSON, R.: The Silent Spring. (1 ed.) Mariner Books, 2002.
[10] SUBEDI, S. P.: International Investment Law, Reconciling Policy and Principle Hart Publishing: Portland, 2008. p.1

Around the 1960s, however, the society began to recognize environmentalism, defined as "a value system that seeks to redefine humankind's relationship to nature," [11] and began to search for the "state of global equilibrium", the notion antecedent to the "sustainable development". The former is defined as a "model output that represents a world system that is sustainable without sudden and uncontrolled collapse and capable of satisfying the basic material requirements of all of its people."[12] Redefining the human relationship to the nature, the objective of environmental law is to ultimately change the system of resources, using incentives to shift from those that induce unsustainable development to those that induce environmentally sustainable development.

*The traditional era turned into the modern era around 1970s. In 1972, the United Nations hosted a UN Conference on the Human Environment ("**Stockholm Conference**"), where a Declaration containing 26 principles concerning the environment and development was agreed upon. The first day of the conference, 5 June 1972, is still annually recognized and celebrated as the World Environment Day. The benefit of the conference was not, however, one of production of any instant particular treaty law. Instead, the United Nations Environment Programme ("**UNEP**") effectively initiated the negotiations of 48 multilateral conventions and protocols in reaction to the conference.[13] The conference introduced the all-embracing concept of the "biosphere". Furthermore, it approached holistically rather than sectorially the seas, the atmosphere, the outer space, non-renewable resources, or biogenetic diversity, giving basis to hundreds of international environmental instruments and non-binding agreements to be signed in following years. Albeit their variation as to their subject matters, most often the implementation mechanism includes instruments like information exchange, research, monitoring, and efforts to meet specific targets.[14]*

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[11] TARLOCK, A. D.: History of Environmental Law. Ibid.
[12] Finn, Donovan (2009). Our Uncertain Future: Can Good Planning Create Sustainable Communities? Ph.D. dissertation. University of Illinois at Urbana-Champaign. pp. 3-8.
[13] SAND, P.H.: The History and Origin of International Environmental Law. 2015. p. xiv
[14] OECD, International Investment Law: Understanding Concepts and Taking Innovations. (2008). p. 139. To be found at: <.
[14] OECD, International Investment Law: Understanding Concepts and Taking Innovations. (2008). p. 139. To be found at: <http://www.oecd.org/daf/inv/investment-policy/40471550.pdf>. Accessed on 14 February 2017.

Another important conference took place beginning in 1983 as the World Commission on Environment and Development (Brundtland Commission) with a mission to unite the countries in order to pursue sustainable development together. Its final document known as the "Brundtland Report"[15] (1989) or "Our Common Future" became an important milestone for anchoring the, up to now volatile, term of "sustainable development". The number of multilateral environmental agreements more than doubled compared to the traditional era.

*Given the developments and public attention, since the 1980s, the environmental law entered the post-modern era as a fully-recognized sub-area of the international law. In the words of Jack de Larosière, former head of the European Bank for Reconstruction and Development and of the International Monetary Fund: "In a globalized world, the dangers are also global – those of air pollution, epidemics, competitive devaluations, etc. This world therefore requires rules and effective supervision that applies to the strong as well as the weak. This is the challenge of the 21st century."[16] Particularly in the case of the environment, Larosière's words were verified scientifically, as it has been attested that the air pollution impacts the world climate as a whole. In China, the country who is the leading producer of greenhouse gases in the world, the air pollution levels are 100 times higher than is the limit set by the United Nation's World Health Organization ("**WHO**").[17] The recent findings published in Nature Communications showed that Asian air pollution rises six miles above the land into the upper atmosphere. There it affects the cloud formation and storm intensity, which further influence the global air circulations.[18] The regional pollution is thus capable of influencing the weather patterns not only in the Asian region but also worldwide.*

The relationship between the environment and global trade came to fore in the 1990s, and continues to be in the centre of the worldwide attention ever since.[19]

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[15] UN General Assembly: A/RES/44/228 (22 December 1989)

[16] LAROSIÈRE, J. de, «Implications de la mondialisation », in Rapport moral sur l'argent dans le monde. 1997. L'éthique financière face à la mondialisation, Montchrestien, 1997, p. 36.

[17] The official website of the World Health Organization. To be found at: < http://www.who.int/indoorair/health_impacts/databases_china/en/>. Accessed on 3 February 2017.

[18] WANG, Y. et al.: Asian pollution climatically modulates mid-latitude cyclones following hierarchical modelling and observational analysis. Nature Communications.Vol. 5, No. 3098 (2014). To be retrieved at: < https://www.nature.com/articles/ncomms4098>. Accessed on 11 November 2016.

[19] DAMOHORSKÝ M., ŠTURMA, P., ONDŘEJ J. & et al.: Mezinárodní právo životního prostředí. II. část (zvláštní). Mělník: Eva Rozkotová – IFEC, 2004.

1. RECONCILIATION OF ENVIRONMENTAL PROTECTION AND FOREIGN DIRECT INVESTMENTS

International environmental law is defined as a legal system dealing with environmental issues affecting numerous states. In contrast, international investment law is a set of rules governing the transfer of tangible or intangible assets from one country to another for the purpose of their use in the home state to generate further wealth.[20] Whilst the former system operates on the idea of regulation, the latter is primarily guided by the idea of trade liberalization.

The reconciliation of environmental protection and foreign investing is therefore rather problematic, as the objects of international environmental law and international investment law are inherently in collision.

1.1 Ideological Background

From the history of both the international environmental law and the international investment law[21] it is clear how important role has been played by globalisation in the developments of both legal areas. Although it seems that a process of increasing world-wide economic integration is under way, it is open to speculations how wide and how far it develops.[22]

In order to shed some light on the possible scenarios, Held and McGrew[23] have developed three typified representatives of the theories of globalisation.[24] First, there are the *hyper-globalists*, who "*stress the displacement of national economies by transnational production, trade and financial networks, operating in an increasingly liberal global marker order*."[25] Second, the *sceptics*, who doubt whether there is any real recent increase of international economic activity. And finally, the

[20] SORNARAJAH, M.: The International Law on Foreign Investment (3rd ed.). Cambridge University Press: Cambridge, 2010. p. 8.
[21] See the Intermezzo section, p. 3 et al.
[22] MUCHLINSKI, P.T.: Policy Issues. Transnational Dispute Management. Vol.2, Issue 5 (2005). p. 9.
[23] David Held holds appointment as Professor of Politics and International Relations at Durham University, UK. Anthony G. McGrew is Professor of International Relations at the University of Southampton, UK.
[24] HELD, D., MCGREW, A., et al.: Global Transformations: Politics, Economics and Culture. Stanford: Stanford University Press, 1999.
[25] MUCHLINSKI, P.T.: Policy Issues. Ibid. p. 9.

transformationalists, who argue that globalisation is unprecedented and gives rise to fundamental restructuring of powers in the world.[26]

Should we apply these three major stances on globalisation on the international investment law, the position of *hyperglobalism* is represented by those who support the full liberalisation of investment barriers. The aim of hyperglobalists is to achieve more open and competitive business environment for foreign investors, regulated only by an invisible hand of market free of any regulation and by application of the state-of-the art protection for investors in international investment agreements ("**IIAs**"). This perspective is present in the policy of NAFTA countries and in the policy preferences of multinational enterprises.[27]

On the other hand, the application of the *scepticism* would be represented by those who would prefer to retain the highest degree possible of state discretion in international investment agreements. The sceptical position is evident for example in discussions of the WTO Working Group on Trade and Investment.[28]

Finally, there is a *transformationalist* position, which can be deduced from the work of UNCTAD. Advocating the *aurea mediocritas* between two aforementioned positions, the UNCTAD accepts the reality of globalisation. Furthermore, it perceives the foreign direct investments ("**FDI**") as generally beneficial to all the national economies, including those of developing countries, in light of which it supports strengthening the investor protection. In the same time UNCTAD bears in mind that reconsideration of the regulatory consequences is necessary, therefore the liberalized approach of IIAs may have to be mitigated by the need to preserve certain national policy space within the territories of the sovereign states.[29,30]

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[26] BRYANE, M.: Theorising the Politics and Globalisation: A Critique of Held et al.'s "Transformationalism". Journal of Economic and Social Research, Vol 4, Issue 2. pp. 3-17. (2003).
[27] MUCHLINSKI, P.T.: Policy Issues. Ibid. p. 10.
[28] Ibid.
[29] Ibid.
[30] UNCTAD: World Investment Report 2003. United Nations: New York and Geneva, 2003. pp. 161-163.

1.2 UNCTAD Position on FDI Regulation in Developing Countries

The global legal order is not capable of achieving consensus among all the countries on their policy positions. Few sovereign countries, mostly those influenced by the Calvo doctrine, strive to preserve a strong degree of national policy space with regulative power.[31,32] However, the current majority approach to FDI is said to be rather biased in favour of liberal tendencies. Those require the states to attract foreign investments with the favourable investment policy environment and their subsequent protection. As the tribunal in *Amco v. Indonesia* pointed out, "*to protect investment is to protect the general interest of development and of developing countries.*"[33]

A similarly liberal view of the matter was taken by China. In recent decades, China has significantly lowered policy barriers in order to bring in new capital and increase competition with aim to boost the productivity growth and to accelerate the technological progress.[34] Nowadays, despite having the second-largest economy of the world, China remains a developing country due to its low per capita income.[35]

The Chinese approach to investment is fairly in line with the recommendation of the UNCTAD for the developing host countries, since UNCTAD suggests that an open approach to inward investment with reasonable policies is a key to reap the full benefits from the FDI.[36] It is important to note that on one side, there is a foreign investor in the legitimate expectation to enjoy its investment in stable, transparent, and predictable investment policy environment. On the other, there is a similarly legitimate interest of the host state to preserve a certain degree of national policy space for the well-being of its nationals. The host state is hence required to struck a delicate balance between the

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[31] CALVO, C.: Le droit international théoretique et pratique (V. ed.). Rousseau: Paris, 1896 (VI). p. 231. Available at: <http://www.archive.org/>. Accessed on 11 November 2016.
[32] PAUL, A.: Law and Practise of Investment Treaties – Standards of Treatment. p. 13.
[33] Amco v. Indonesia (Decision on Jurisdiction), 1 ICSID Reports 400.
[34] NEWFARMER, R. for The World Bank, International Trade Department: Trade Note – From Singapore to Cancun: Investment. 29 May 2003. To be found at: < http://documents.worldbank.org/curated/en/941511468780323014/pdf/269200Trade0Note02.pdf>. Accessed on 11 November 2016.
[35] The official website of The World Bank. To be found at: < http://www.worldbank.org/en/country/china/overview>. Accessed on 11 November 2016.
[36] MUCHLINSKI, P.T.: Policy Issues. Ibid. p. 10.

obligation to protect the investors and their investment under the respective provisions of the IIAs, and at the same time to pursue its desired policy goals.[37]

As Muchlinski[38] concludes on the UNCTAD work: "*the challenge is to develop the law in the manner that ensures the fullest possible benefits from development and application of economic policy.*"[39] One of the instruments capable of facilitating the reconciliation of the two objectives are so-called environmental provisions in bilateral investment treaties, allowing the state to pursue sustainable development objectives, while most of the other provisions in bilateral investment treaties, provide the investor and its investment with sufficient protection (*see Chapter 5*).

[37] UNCTAD: World Investment Report 2003. Ibid.
[38] Professor Peter Muchlinski is a renowned scholar, affiliated with the University of London.
[39] MUCHLINSKI, P.T.: Policy Issues. Ibid. p. 13.

2. SOURCES OF ENVIRONMENTAL PROTECTION IN FOREIGN DIRECT INVESTMENTS

Environmental issues directly or indirectly impinge upon every aspect of legal regulation, the regulation of the FDI included. As a consequence, and given the fact that international community is more and more interested in finding ways to articulate the FDI in the light of sustainable development, an increasingly important area of the law arose.[40]

2.1 The System of the Sources

This section deals with the so called *hard law* sources (*see Section 2.2 for soft law sources*), which govern the regulation of environmental protection in the international investment law. The following system of international law sources encompasses: general sources pursuant to Art. 38 of the ICJ Statue (*2.1.1*), unilateral legal acts (*2.1.2*), certain decisions of the international organizations (*2.1.3*), and agreements concluded between the states and the investors (*2.1.4*).

2.1.1. General Sources of the International Law - Art. 38 of the ICJ Statute

Just like all general international law, both the international environmental law and the international investment law are contained in specific outer forms. Annexed to the Charter of the United Nations,[41] of which it forms an integral part, the Statute of the International Court of Justice ("**ICJ Statute**") in its Art. 38 enumerates the various international law sources, generally accepted by the states.

Article 38(1)(2) of the ICJ Statute includes (exhaustively):

a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
b. *international custom, as evidence of a general practice accepted as law;*
c. *the general principles of law recognized by civilized nations;*

[40] CURRIE, J. H.: International Law: Doctrine, Practice, and Theory. Toronto. Irwin Law, 2007.
[41] UN: Charter of the United Nations. San Francisco 1945. To be found at: < https://treaties.un.org/doc/publication/ctc/uncharter.pdf >. Accessed on 8 February 2017.

d. *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law; and*
e. *the power of the Court to decide a case ex aequo et bono, if the parties agree*.[42]

De iure there is no formal hierarchy established between the sources listed in the Art. 38 of the ICJ Statute. They would however be *de facto* regarded in successive order by the court.[43]

Both treaties and customs are primary sources of the international law, they complement and interact with each other. Even though – as it has been already stated above – the international conventions are regarded as superior, formally, they have an equal validity, which poses a theoretical problem in cases of a conflict between the treaty and the custom. Minor differences can be reconciled by special techniques of interpretation and ascertainment. To resolve substantial conflicts, the rule *lex posterior derogat priori* (*most recent law prevails over an inconsistent earlier law*) shall be applied, provided that the two rules share the same subject-matter. This principle can be, however, particularly problematic for customs, as it requires to determine the exact moment of the formation of a rule. Another solution can be found in the principle *lex specialis derogat legi generali*, according to which the more special rule prevails over the general rule.

The general principles of law recognized by civilized nations represent a problematic area as to their classification. Although there is no clear consensus, they are usually regarded as the primary sources of the international law alongside with treaties and customs.

There is no dispute over the classification of the judicial decisions, teachings of the most highly qualified publicists of the various nations and the power of courts to render decisions and awards *ex aequo et bono*, which are all recognized as auxiliary sources of international law. As such, they have only a subsidiary meaning for the determination of rules of law.

[42] Art. 38 of the Statute of the Permanent Court of International Justice
[43] ZIMMERMANN, A., TOMUSCHAT C., OELLERS-FRAHM, K.: The Statute of the International Court of Justice: A Commentary. Oxford University Press: Oxford, 2006. p. 266.

Ad. Art. 38(1)(a) of the ICJ Statute: International Conventions

International conventions are classified as a primary source of law and they are of outmost importance. They can have various names, such as international treaties, international agreements, covenants, or for example pacts.

The Vienna Convention on the Law of Treaties ("**VCLT**") is the main international instrument which defines the international treaty and governs how the treaties are concluded, amended, operated and terminated. The Art. 2 of the VCLT defines a treaty as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation,*" limiting, however, the scope of this definition "*for the purposes of the present Convention*."[44] Although it is now beyond question that Arts. 31 - 33 of the VCLT concerning the interpretation of treaties, are regarded as the customary law, the rest of the convention has not been yet confirmed as stating customary law.[45] That is partially a reason why there is another definition of the *treaty* in the customary law. Pursuant to the ICJ, "*where rules are codified in a treaty, customary law continues to occupy a parallel field on the same subject matter*".[46] The customary law definition of a treaty is similar to that of VCLT, however it differs it its broadness. While the VCLT definition is limited to the treaties between the states, in contrast, the customary law definition can also include conventions concluded between other entities. Moreover, the VCLT is only limited to the written treaties, whist the customary law allows to include also oral treaties.

In terms of number of parties concluding the treaty, the treaties can take form of either (**a**) multilateral (global or regional) treaty or (**b**) bilateral treaty.

a) Multilateral Treaties

In the area of the international investment law, multilateral treaties are rather rare. Although China has signed various multilateral treaties regulating its environmental policy, there are only few of them with impacts on global trade and

[44] Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969.
[45] GARDINER, R.: Treaty Interpretation (Second Edition). New York: Oxford University Press, 2015.
[46] Ibid.

foreign investment. The specifics of those treaties are that they primarily serve as an instrument to liberalize the trade; the aim being in contrast to regulative protection of the environment.

After the Second World War, there was an effort to create an International Trade Organization, whose charter rules would have been crucial for foreign investment. But the attempts failed due to the differences between the states. The efforts to formulate a multilateral treaty on foreign investment of the Abs-Shawcross Convention supported by the International Chamber of Commerce were also left abandoned as it was not accepted by the developing states.[47] Nevertheless, in 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), a procedural multilateral treaty to which China is a party, was concluded. The success was followed by the Convention Establishing the Multilateral Investment Guarantee Agency in 1985 (the Soul Convention), also with China as a signatory; the General Agreement on Tariffs and Trades (GATT; now WTO) in 1994, which was signed by China only in 2001, when China became a WTO member state; and recently the International Energy Charter signed by China in 2015.

1) WTO, GATT, and GATS

Having held the status of observer preparing its economy for entry for many years, China became a member of the World Trade Organization on 11 December 2001. Hong Kong and Taiwan were both admitted to the WTO separately from mainland China.

Given the liberalist nature of the WTO, the relation between the liberalization of trade and the protection of the environment represents a problematic process of permanent search for equilibrium between two seemingly conflicting interests.[48,49] Thereby, any environmentally-friendly regulation is generally considered undesirable, imposing restrictions to the invisible hand of market, and is compared to the interest calling for regulation.

[47] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid. pp. 79-80
[48] KISS, A.; BEURIER, J.-P.: Droit International de l'environnement (2.éd.) Pedone: Paris, 2000, p. 355.
[49] MONTINI, M.: The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment, in: FRANCIONI, F.(ed.): Environment, Human Rights and International Trade. Hart Publishing: Oxford, 2001. p. 135.

Once the WTO was created on 1 January 1995, the Preamble of the Marrakesh Agreement Establishing the World Trade Organization provided that the parties to the agreement recognize that "*their relations in the field of trade and economic endeavour should be conducted […] while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*"[50]

In 1994, Ministerial Decision on Trade and Environment created the WTO's Committee on Trade and Environment with the aim to identify and understand the relationship between trade and the environment in order to promote sustainable development, to enhance positive interaction between trade and environment, ensuring compliance with the objectives of Agenda 21 and the Rio Declaration and ensuring supervision over environmental measures relating to trade.[51,52]

On the other hand, the is no agreement on trade aspects of environmental measures between the multilateral trade agreements in the WTO system. The general exceptions provided in Article XX of the GATT and Article XIV of the GATS remain the sole legal basis for the application of pro-environmental restrictive measures, although the terms *environmen*t, *environmental* or *sustainable development* are not explicitly mentioned therein.

Article XX (b) and (g) of the GATT justify certain WTO-inconsistent measures by stating that the measures shall not be: *"[…] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health [or] relating to the conservation of*

[50] The Preamble to the Marrakesh Agreement Establishing the World Trade Organization. To be found at: <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm>. Accessed on 23 March 2017.

[51] The official website of the WTO. To be found at: < https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm >. Accessed on 23 March 2017.

[52] SANDS, P. J. et al.: Principles of International Environmental Law. (2rd Ed.). Cambridge University Press: Cambridge, 2012. p. 951

exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[53]

The provision according to Art. XX (g) of the GATT granting the exception with regard to the conservation of exhaustible natural resources is known as an "*environmental exception*" *stricto sensu* in the WTO law.

Similar-worded exceptions are to be found in the General Agreement of Trade in Services in Art. XIV(c) of the GATS, which also exempt measures "*necessary to protect human, animal or plant life or health*."

The WTO law jurisprudence has only resolved nine cases, which stemmed from the application of the GATT exception, which itself confirms that the threshold to satisfy a multi-tier test, which leads to the exception, is high.[54]

Currently, other exceptions of similar wording as the exception in the WTO trade law begun to be increasingly often included into the bilateral investment treaties (*see Chapter 7.3*).

2) MIGA

By signing and ratifying the Soul Convention as early as in 1988, China has become a member of the Multilateral Investment Guarantee Agency ("**MIGA**"). MIGA is a World Bank Group member with the objective to help support economic growth, reduce poverty and improve people's lives through promoting "*developmentally sound*" foreign direct investment into developing countries with "*high social and environmental standards*".[55] In its most recent strategy for fiscal years 2015-2017, MIGA stresses environment and socials standards as some of its strategic values: "*Private investors are increasingly realizing the value-added to be gained from pursuing best practices in environmental, social and integrity standards, both in terms of corporate governance, and because of the benefits for broader risk management. Thorough environmental, social and integrity due diligence is conducted by MIGA's*

[53] Art. XX(b)(g) of the GATT. To be found at: < https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf >. Accessed on 23 March 2017.

[54] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Journal of International Economic Law, No. 18. p. 522.

[55] The official website of MIGA. To be found at: < https://www.miga.org/who-we-are >. Accessed on 23 March 2017.

specialists to ensure that investments the Agency supports meet an established set of WBG performance standards. By requiring clients to meet these, MIGA helps elevate the standards of their clients' operations, as well as maximize the broader contribution towards more sustainable development. Also, by supporting infrastructure projects that apply newer technologies, including renewable sources of energy, MIGA is supporting development that is environmentally sustainable."[56]

3) ICSID

China is also a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) establishing the International Centre for Settlement of Investment Disputes ("**ICSID**") in 1966. ICSID is an institution of the World Bank Group, which provides the international investors with its dispute resolution and conciliation service. All the ICSID contracting states are required to recognize and enforce arbitral awards issued thereby.

According to the ICSID database, China has only been involved as Claimant in the arbitration under ICSID once so far, in the Case *No. ARB/12/29 Ping An Life Insurance Company of China, Limited and Ping An Insurance Group Company of China, Limited* as Claimants against *Kingdom of Belgium* as Respondent.[57] The claim relied on two bilateral investment treaties concluded between Belgium-Luxembourg Economic Union and China (1986 and 2009) and concerned the loss of the Chinese shareholders of a global banking and insurance group, regulated by Belgian, Dutch and Luxembourg authorities. In attempt to offset the liquidity loss after the financial crisis, the Belgian regulators opted for the restructuring, which effectively nationalized the Belgian subsidiary of the group and resulted in a dilution of the Chinese shareholders' interest. The measures, moreover, did not fulfil the purpose and therefore, in 2009, Belgium sold the Belgian subsidiary to BNP Paribas, which caused significant loss to the

[56] The World Bank: Miga Strategic Directions FY15-17. To be found at: < https://www.miga.org/documents/miga_fy15-17_strategy.pdf>. Accessed on 23 March 2017.

[57] Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium. ICSID Case No. ARB/12/29. For further information see: <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

shareholders. The case was dismissed on jurisdictional grounds on 30 April 2015.[58]

Being in position of Respondent, a claim has been brought against China twice – firstly by Ansung Housing Co., Ltd. (BIT China – Korea)[59] and secondly by Ekran Berhad (1995 BIT China – Israel and 1998 BIT Malaysia – China).[60]

China has not yet been a party to an ICSID arbitration concerning environmental issues. However, several cases submitted to the ICSID involve disputes arising from the international environmental law. The most common issues are whether the environmental legislation by a host state constitutes a form of expropriation or whether the host state is obliged to pay full compensation where a takeover occurred for environmental reasons.

4) Energy Charter Treaty/International Energy Charter

Energy Charter Treaty is the first regional multilateral treaty containing substantive rules on foreign investment.[61] The genesis of the Energy Charter Treaty ("**ECT**") can be tracked back to the end of the Cold War. Russia and its neighbouring states found themselves in need of major inward investments in their rich energy resources, whilst the states in western Europe were driven by their strategic interest to diversify their energy sources.[62] In December 1991, a non-binding political declaration of principles governing the cooperation on the energy market, known as the European Energy Charter, was signed in Hague. However, it was not until seven years later, in April 1998, when the declaration transformed into the legally binding ECT and together with the Protocol on Energy Efficiency and Related Environmental Aspects came into effect. The ECT provisions include: (i) investment protection provisions, (ii) trade provisions consistent with WTO practice, (iii) the undertaking to facilitate non-

[58] For further information, please see: <https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf>

[59] Ansung Housing Co., Ltd. v. People's Republic of China. ICSID Case No. ARB/14/25. Available from: < https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/25>.

[60] Ekran Berhad v. People's Republic of China. ICSID Case No. ARB/11/15. Available from: < https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/11/15>.

[61] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Oxford University Press: Oxford, 2008. p. 27.

[62] SUSSMAN, E.: The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development. Transnational Dispute Management. Vol. 6, Issue 1 (March 2009). p.2

discriminatory transit of energy, (iv) dispute resolution mechanism and (v) energy efficiency and environmental provisions that oblige the signatories to formulate a clear policy aiming to improve the energy efficiency and reducing the energy cycle's negative impacts on the environment.[63] Although China is not a signatory to the ECT, as it does not fulfil the criterion of regional pertinence, it holds the status of observer since 2001.[64]

Recently, Chinese government introduced the *One Belt, One Road* policy. An ambitious project involving over 65 countries stretching from China to Europe, Africa, and Latin America, it attempts to resurrect the traditional business cooperation of the Tang Dynasty (618-906 A.D.), famously known as the Silk Road. The new policy specifically accentuates the volatile energy sector. China has bilateral investment treaties signed with only 38 countries out of the 65 bordering the *One Belt, One Road*, which leaves its investments in at least 27 countries unsecured and exposed to a vast range of political and legal risks, including the unlimited expropriation of their investment.[65]

In May 2015, China also signed the International Energy Charter ("**IEC**"), which is a non-binding political declaration with the objective of strengthening energy cooperation in search of better balance between energy security, economic development, and environmental protection. As signing of the IEC represents the first step towards accession to the legally binding rebuilt Energy Charter Treaty and given the newly established Chinese *One Belt, One Road* policy, it is predicted that China will seek to become a signatory of the ECT *pro futuro*.[66]

B) Bilateral Investment Treaties as the International Investment Agreements

The term International Investment Agreements refers to a type of international treaty relating to the cross-border investments. There are three main types of the IIAs: bilateral investment treaties, preferential trade and investment agreements and international taxation agreements/double taxation treaties. The most prominent and

[63] Ibid.
[64] The official website of the Energy Charter. To be found at: <http://www.energycharter.org/who-we-are/members-observers/>. Accessed on 28 March 2017.
[65] NAGELL, L.: The Silk Road Initiative: Leading China Towards Energy Charter Treaty Membership? Enerpo Journal (March 2016). Available from: < https://enerpojournal.com/2016/03/17/the-silk-road-initiative-leading-china-towards-energy-charter-treaty-membership/>. Accessed on 28 March 2017.
[66] Ibid.

commonly used expression of investment cooperation between the states are the bilateral investment treaties. Although few trilateral investment treaties based on the same concept also exist, these are rather rare and share similar characteristic to the bilateral investment treaties.

a) Introduction to Bilateral Investment Treaties

For better understanding of the EPs as the provision included in the bilateral investment treaties, it is necessary to first determine their concept and content.

Bilateral Investment Treaties (singular as "**BIT**", plural as "**BITs**") are defined as a reciprocal agreement concluded between two countries regarding promotion and protection of investments made by investors from the other country. The concept of BITs is based on the principle of reciprocity between the parties, despite the fact that in most of the cases BITs *de facto* ensures a one-sided flow of capital.[67]

BITs have historically developed from the *Friendship, Commerce, and Navigation Treaties* ("**FCN Treaties**"), also known as *Amity, Commerce, and Navigations Treaties,* which usually operated on the basis of the most favoured nation clause ("**MFN**") and that were initially used for natural persons, later followed by legal persons, from the 19th century until 1966.[68]

In 1959, the very first BIT was concluded between Pakistan and West Germany. After the debacle in the Second World War, the West Germany was driven by the need to better protect its foreign investments to compensate for its losses.[69] Former colonial powers have followed the trend in an effort to protect their outward investments based in developing and newly emerging markets.[70] Most of the countries, China included, have quickly understood the need for foreign capital inflows, which in the turn of millennium launched the avalanche of BIT signings over the world. Nowadays,

[67] BALAŠ, V., ŠTURMA, P.: Kurs mezinárodního ekonomického práva, C. H. Beck. 1997, p. 196.
[68] ŠTURMA, P., BALAŠ, V.: Ochrana mezinárodních investic v kontextu obecného mezinárodního práva. Ibid. p. 7
[69] SALACUSE, J. W.: The Law of Investment Treaties, ibid, p. 91.
[70] Ibid. p. 92.

an impressive amount of 2960 BITs in total have been concluded, of which 2369 BITs are currently in force.[71]

b) Content of Bilateral Investment Treaties

BITs share similar structure, they may however vary as to their content.[72] The most common provisions to be usually found in BITs are: (i) the definitions of the investor and the investment, (ii) provisions on expropriation, (iii) dispute settlement clauses, (iv) the standards of protection, and many other provisions such as the umbrella clause, provisions on the protection against expropriation, provisions on the transfer of funds, treaty duration, amendment and termination, etc.[73] Recently, environmental provisions have also been included into the BITs (*see Chapter 5*).

- Definitions of the Investor and the Investment

Definitions of the investor and the investment are essential part of any bilateral investment agreement. Where a foreign investment and investor are in the "protected investment" category, they fall under the jurisdiction of the arbitration panel and provide the investor with a more effective way of recovering his potential claims. The definition of the investor is analysed in *section 3.3.* The investment regimes need to define their scope also *ratione materiae*. In FCN Treaties, the investment was defined vaguely as *property, rights, and interest*. Nowadays, the investment protection under the treaties is based on a narrower concept of determining economic instruments, involving features such as (i) transfer of funds, (ii) a long-term project, (iii) the purpose of regular income, (iv) participation of the person transferring the funds in the management of the project, and (v) an element of business risk.[74]

First of all, the investments "*must be made in accordance with the laws and regulations of the said party*."[75] In *Salini case*,[76] the tribunal specified that the inclusion

[71] The official statistics of UNCTAD. Available from: < http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 and http://investmentpolicyhub.unctad.org/IIA>. Accessed on 29 April 2017.
[72] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid. p. 81
[73] ŠTURMA, P., BALAŠ, V.: Protection of International Investment in the Context of General International Law, 2012. Ibid. p. 9
[74] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Oxford University Press: Oxford, 2008. p. 60.
[75] MCLACHLAN, C., SHORE, L., WEINIGER, M: International Investment Arbitration. Oxford University Press: Oxford, 2007. p. 181.

of such provision serves to ensure the legality of the investment in the territory of the home state and *a contrario* forbids the protection to the investments, which do not abide by the domestic law. Therefore, a typical definition of investment must consider investment itself under the domestic law. At the same time, international law must ensure that there is no misuse of its own laws by the state and consequent damage to the investor by denying him the protection under the status of the investment.[77] In the potential arbitration dispute, the court must determine whether in the domestic law the substantive rights giving rise to the alleged investment exist, what is the extent of those rights and whom they serve. Furthermore, the court must determine whether the aforementioned rights in rem constitute foreign investment as defined in the investment agreement, which is already a question of the interpretation of international law.[78] This duality of the regulation was reflected, inter alia, in the case *Nagel v. Czech Republic*,[79] in which the court referred to the agreement itself and, at the same time, to the domestic law of the Czech Republic regarding the formulation of the investment and of the investment contribution. The *status quo* of the legal regulation in BIT and the domestic law of the state is also the reason, why there is no investment definition under the ICSID Convention.

As an example of the investment definition in a bilateral investment treaty, the Art. 1 of the Czech-China BIT defines the investment as:

> "*every kind of asset invested in connection with economic activities by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particularly, though not exclusively, includes:*
>
> *(a) movable and immovable property and other property rights such as mortgages, pledges and liens;*

[76] Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco. ICSID Case No. ARB/00/4. Decision on Jurisdiction. (31 July 2001).
[77] DOUGLAS, Z.: The Hybrid Foundations of Investment Treaty Arbitration. In MCLACHLAN, C., SHORE, L., WEINIGER, M: International Investment Arbitration. Oxford University Press: Oxford, 2007. p. 182.
[78] Ibid. p. 182.
[79] William Nagel v. The Czech Republic. SCC Case No. 049/2002. Award on Merits. (9 September 2003).

(b) shares, debentures, stocks or any other form of participation in a company;

(c) claims to money or to any other performance having an economic value associated with an investment;

(d) intellectual property rights which mean trade-marks, patents, industry designs, technical processes, know-how, trade secrets, trade names and good-will associated with an investment;

(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Any change in the form in which assets are invested does not affect their character as investments."[80]

In the case of the Czech-China BIT and many other BITs, to which China is a party,[81] the Czech Republic and China opted for a broad asset-based definition of the investment. The term *asset-based* simply highlights the use of the precise form of the assets that are contributed to the host state through the investment and which are legally approved or formally registered under the law of the host state.[82] In contrast, countries may resort to take use of the enterprise-based definition model into the BIT, which only limits the BIT-covered investments to the investments related to the ownership or control of an enterprise. The enterprise-based investment definition is often used by developing countries who are attempting to restrict the scope of *investment.*[83]

To give another example, the ECT offers even broader definition of the investment, stretching its protection to uncommonly many kinds of assets. The Article 1(6) of the ECT states:

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[80] Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments. To be found at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/725>. Accessed on 1 April 2017.

[81] e.g. China-Germany BIT, China-Netherlands BIT, China-Finland BIT, China-South Korea BIT, etc.

[82] QI, H.: The Definition of Investment and its Development.: for the Reference of the Future BIT between China and Canada. To be found at: < https://ssl.editionsthemis.com/uploaded/revue/article/16397_45-3%20Qi.pdf>. Accessed on 1 April 2017. p. 553.

[83] Ibid.

"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the ""Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

[UNDERSTANDING With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of

any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's 15 Final Act of the European Energy Charter Conference, Understanding 2. 20 (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.]

[DECLARATION With respect to Article 1(6)

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).] "[84]

The UNCTAD has concluded that "*while the broad and open-ended asset-based definition has remained wide-spread in BITs focusing on investment protection, newer agreements have used techniques for narrowing the scope of the definition*."[85]

- Expropriation

Historically, expropriation is in conflict with the general principles of the law common to civilized nations, namely the *principle of protection of private property* and the *principle of respect for acquired rights*. Any interference, such as expropriation, was understood to be an unlawful behaviour and established a secondary repayment obligation of the state.[86] Nowadays, due to pressures from non-Western states and following the nationalization waves after the First World War, the international

[84] Energy Charter Treaty. To be found at: < http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_charter_en.pdf>. Accessed on 1. April 2017.
[85] UNCTAD: Series on Issues in International Investment Agreements II. (2011). pp. xi-xii.
[86] BALAŠ, V., ŠTURMA, P.: Kurz mezinárodního ekonomického práva. Ibid. p. 200.

community mitigated this concept. Consistent with the *principle of territorial sovereignty*, such state measures affecting foreign investment is not contrary to the international law, if it fulfils four basic conditions. Firstly, the measure taken by a state must not be discriminatory or arbitrary. Secondly, the measure taken by a state must serve a public purpose, *e.g.* the public health and right of its nationals to environment adequate for their health and well-being. Thirdly, some treaties requires the expropriation follows principles of due process. Under customary international law, the term encompasses the minimum standards and fair and equitable treatment.[87] Finally, the compensation for such measure must be provided in accordance with the Hull formula*, i.e.* the compensation must be prompt, adequate and effective.[88]

In this regard, the Czech-China BIT in its Art. 4 addresses all four elements:

> *"Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out:*
>
> *(a) under domestic due process of law;*
>
> *(b) on a non-discriminatory basis;*
>
> *(c) against compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a prevailing commercial rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely transferable in a freely convertible currency."*[89]

The BITs often address the conditions and consequences of the expropriation, such as imposing obligation on the state to fully compensate the investor for the damage

[87] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 91.
[88] BALAŠ, V., ŠTURMA, P.: Kurz mezinárodního ekonomického práva. Ibid. p. 201.
[89] Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments. To be found at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/725>. Accessed on 1 April 2017.

caused by the expropriation.[90] The expropriations can also be divided into two main typologies: direct and indirect expropriation. Recently, the direct expropriation as nationalization is becoming slowly replaced by more common indirect expropriation, which can use different other wording as ""*creeping*", "*de facto*" *expropriation, or measures* "*tantamount*" *to expropriation*."[91] The majority of the BITs addresses both types. This is also the case of the aforementioned Czech-China BIT, which addresses the prohibition of both the direct ("*expropriation*" and "*nationalisation*") and indirect ("*measures having effect equivalent to nationalization or expropriation*") expropriation.

For the purposes of this thesis, it is, however, necessary to point out that not all the measures resulting in depriving the investor of its property can be regarded as expropriation. As Brownlie[92] states: "*state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation."*[93] The recent controversies over resolution of environmental protection and measures resulting to expropriation, the condition of the measure being taken by a state in public purpose is worthy to be elaborated upon. The public interest concept finds its theoretical base in the principle of sovereignty of the state. Although there is no satisfying official definition, the notion of public interest can be defined reactively, being to opposition to investor or private interest. If an exception of public interest concern is included into the BIT, then it is conceivable for the state to freely enact environmental legislation, which may potentially result in expropriation of the foreign investment. When successfully invoking the exception, state avoids to pay damage but still remains under the obligation to pay compensation for expropriating alien's property.[94] The balancing of the public interest of a state and private interest of an investor is mostly effectively done through the application of principle of proportionality. This analysis requires the tribunal to firstly find, whether the measure giving effect to the interest is capable of achieving its purported objective. Second step

[90] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 89.
[91] OECD: "Indirect Expropriation" and the "Right to Regulate" in International Investment Law". OECD Working Papers on International Investment. OECD Publishing: 2004/04. To be found at: <http://dx.doi.org/10.1787/780155872321>. Accessed on 1 April 2017. p. 4.
[92] Sir Ian Brownlie was a renowned professor at LSE and Oxford specializing in international law .
[93] BROWNLIE, I.: Public International Law. (6th Ed.) Oxford University Press: Oxford, 2003. p. 509.
[94] COLLINS, D.: An Introduction to International Investment Law. Cambridge University Press: The Netherlands, 2016. p. 280.

is to determine whether the measure is necessary in analysing whether an equally effective but less interfering measure could not be used instead. The last step is to decide whether the effects of the measure are not excessive in comparison with the competing right or interest of the investor.[95] This method was used also in *Tecmed v. Mexico*,[96] where the tribunal weighted the two colliding interests and based on its findings issued the award in favour of investor. The tribunal supported its decision with explanation that the environmental harms caused by the investor were not sufficient to warrant the non-renewal of the license by the host state.[97]

On the other hand, for example in *Metalclad case*, which was held under NAFTA's Chapter 11, the tribunal held that state's regulatory measures did amount to expropriation.[98] According to tribunal, in the case at hand it was clear that the state measures undoubtedly resulted in Metalclad losing value of its investment. Being subject to criticism, the validity of the right of state to regulate to protect environment and public health, has been played down in this case.

Nevertheless, the public interest exception is increasingly argued in the international investment law.

- Dispute Settlement Clause

Bilateral investment treaties usually also have a provision allowing the injured party to recourse to investor-state dispute settlement mechanism ("**ISDS**") to seek justice at an international arbitration tribunal. Although there are numerous options, the most popular is to resort either to the World's Bank International Centre for Settlement of Investment Dispute, or recourse to arbitration under the UNCITRAL Rules.[99] The awards issued by that institution are then binding and can impose obligations such as reimbursement, repossession or restitution.[100]

The Czech-China BIT provides in Art. 8(1) thereof the parties with the obligation to attempt to resolve their dispute by consultation through diplomatic channel

[95] Ibid.
[96] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States. ICSID Case No. ARB (AF)/00/2. (2003)
[97] COLLINS, D.: An Introduction to International Investment Law. Ibid.
[98] Metalclad Corporation v. The United Mexican States. ICSID Case No. ARB(AF)/97/1. (30 August 2000).
[99] SANDS, P. J. et al.: Principles of International Environmental Law. (2rd Ed.). Cambridge University Press: Cambridge, 2012. p. 1062.
[100] BĚLOHLÁVEK, A.: Ochrana přímých zahraničních investic v Evropské unii. Ibid. pp. 20-21

within the first six months of the conflict. Should a dispute not be settled by consultation, the parties can submit their request to an *ad hoc* arbitral tribunal, comprising of three arbitrators. The subsequent award is final and binding on both parties. Each party bears the costs of its representation in the proceeding, as well as the costs of the arbitrator it has appointed. The costs of jointly-constituted chairman are borne in equal parts by the parties.[101]

- The Standards of Protection

BIT contains the commitment of the state to treat the investor in accordance with internationally recognized rules of treatment. The concept of a treatment is regarded as a set of rules of international and national law that determines the international investment regime from the moment of its establishment to the moment of its liquidation.[102] In this context, the concept of an international standard is regarded differently from the perspective of developed European and North American countries and differently from the perspective of developing countries, which often deny the very existence of the international standard of treatment of the investment. The theory of the Western states clearly envisages the existence of a standard of both the fair and equal treatment. Firstly, the fair treatment is intended to ensure compliance with the host state's national law regime in accordance with the principles of international law. Secondly, the equal treatment seeks to strike a balance between the interests of the investor, its home state and the host state that has accepted the investment.[103]

Another usual part of a BIT is also a prohibition of the host state to discriminate against foreign investors in order to promote the domestic or most-favoured-nation clause aiming to create equal conditions for all participating foreign investors. By theory, the implementation of the national regime is recommended in cases, where investments are made within countries that are at a similar level of the economic development and both of the countries share similar legal systems and the values they are established on. When providing the national treatment, the state must regulate all the

[101] Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments. To be found at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/725>. Accessed on 1 April 2017. Art. 8 therein.
[102] BALAŠ, V., ŠTURMA, P.: Kurz mezinárodního ekonomického práva. Ibid. p. 193.
[103] BALAŠ, V., ŠTURMA, P.: Kurz mezinárodního ekonomického práva. Ibid. p. 193.

subjects equally without unjustified differences and must *inter alia* strike the balance between the public interest and the interest of the individual. International law does not exclude a preferential or a special regime, being a regime that benefits from an advantage given to a state based on certain criteria. However, according to traditional international law, the foreign investor may be put into an advantage over the domestic investor in case that the national standard does not meet the minimum international standard. Such an advantage would not be – as opposed to favouring domestic investors at the expense of foreign investors – treated as a discrimination.[104]

Although being subject to numerous exceptions, the Czech-China BIT in its Art. 3(1) and (2) explicitly mentions the fair and equitable standard and sets the framework of national and most-favoured-nation treatment, stating:

> *"1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable.*
>
> *2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable."*[105]

BITs may also contain numerous other standards of protection. The Full Protection and Security standard, which obliges the state to take active measures to protect the investments or investors from adverse effects produced by the host state, its organs or even the third parties, is one example. Another is the Umbrella Clause: as its name suggests, provides the investor with a protective function by extending a BIT protection over contractual undertakings. By this provision, the investor is protected "*against any*

[104] BALAŠ, V., ŠTURMA, P.: Kurz mezinárodního ekonomického práva. Ibid. p. 194.
[105] Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments. To be found at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/725>. Accessed on 1 April 2017.

interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or not such interference amounts to expropriation." [106] The most important practical aspect is that the investor avoids the dispute resolution under the domestic courts of a host state and *vice versa*. Another provision often used, as it is in the interest of both parties to the BITs, involves legal rules governing the resolution of extraordinary events and periods of economic and social disorder, such as Necessity or Force Majeure provision. The Preservation of Rights clause follows the objective "*to improve the investment climate and not to derogate from such rights of the investor that are granted in other treaties or in the domestic legislation of the host country.*"[107] Other commonly used provisions prohibits Arbitrary or Discriminatory Measures taken towards the investment. Finally, the breach of investor's legitimate expectations can be invoked for example in cases, when investor relied on pre-existing environmental standards under national laws.

Bilateral investment treaties do not have a steady concept. The provisions, which are inserted into them, succumb to newly introduced trends, differing from each other in accordance with the negotiating power of the parties. Although the countries failed to reach a consensus on globally uniform content, the BITs share the same objective of providing both parties with substantive guarantees both within and beyond international and national law.[108,109]

Ad. Art. 38(1)(b) of the ICJ Statute - International Custom

Another primary source of the international law is an international custom. Customs are as old as humanity, and although there have always been attempts replace them by more sophisticated legal mechanisms, for example by treaties, they have

[106] MANN, F. A.: British Treaties for the Promotion and Protection of Investments. British Yearbook of International Law. Vol. 52, No. 241. p. 246.
[107] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 172.
[108] BĚLOHLÁVEK A.: Ochrana přímých zahraničních investic v Evropské unii, p. 22
[109] The author hereby reworked her Bachelor's thesis titled "Umbrella clause" as a Means of Investors Protection, chapter "Bilateral Investment Treaties", which is for the purposes of this sub-section significantly extended and altered.

remained important as one of the leading sources of the international environmental and international investment legal norms.[110]

From the theoretical point of view, an international custom is a combination of two essential elements: *usus longaevus* (a material element; general, consistent and repetitive practice of states) and *opinio juris/opinio juris sive necessitatis* (a subjective element; legal belief that such practice is legally binding within the international community).

Both elements have extensively been elaborated in the *North Sea Continental Shelf* cases[111] by the ICJ. In order to have potential to form a new rule of international law, the court stated that the practice of the states must be *general*. The ICJ also stated that:

> "*it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included states whose interests were specifically affected."*[112]

The state practice might give rise to a new rule even though it does not last for a *considerable period of time*. If, therefore, an element of *usus longaevus* is not present, there is still a chance for the rule to emerge, should there be at least an internationally recognized belief that such rule should exist. Albeit rare in occurrence, this form of customary rule is referred to as an *instant custom.* Moreover, according to Art. 38 (1)(b) of the ICJ Statute, customary international law is generally defined as international law, which has been generated from a "*general practice, accepted as law.*" The process of developing rules of customary law is time-consuming as it requires the evidence of consistent state practice. Some authors, however, suggest that the law can be based not only on uniformities of state behaviour but also on regularities of state behaviour, advocating the approach which allows the customary international law to emerge even

[110] SCHLUTTER, B.: Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad. hoc Criminal Tribunals for Rwanda and Yugoslavia. Martinus Nijhoff Publishers: Leiden/Boston, 2010.
[111] North Sea Continental Shelf (Germany v Denmark). Judgment on Merits, (1969).
[112] North Sea Continental Shelf cases (1969). ICJ Reports 98. In SANDS, P.: Principles of International Environmental Law (2 ed.). Cambridge University Press: Cambridge, 2003. p. 145.

though the states do not fully comply with the particular norm.[113] As it has been resumed by the ICJ's practice in the *Nuclear Tests case*[114] and *Gabčíkovo-Nagymaros Project case,*[115] it is to be noted that also failure of a state to act can constitute a state practice. A tolerant approach of the states towards certain level of environmental degradation provides evidence that those states accept such level of pollution and activities and regard them as being compatible with the international law.[116]

Moving to the subjective element of the custom, *opinio juris sive necessitatis*, the ICJ ruled:

> "[*n*]*ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many intentional acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."*[117]

Should any state consistently lack of *opinio juris* to the customary rule, the customary rule creates obligations for all the states except the one, which took a position of a *persistent objector* to the rule.

In the international investment law, customs also represent an important source of law. Their prominent role is to fill the gaps in existing treaty law and to serve as an

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[113] BODANSKY, D.: Customary (and Not So Customary) International Environmental Law. Global Legal Studies. Vol. 3:105. p. 105.
[114] Nuclear Tests (New Zealand v France). Judgment on Admissibility. ICJ Rep. 457, ICGJ 137 (1974). See also SANDS, P.: Year in Review: International Court of Justice. Yearbook of International Environmental Law: 531,6 (1995).
[115] Gabčíkovo-Nagymaros Project (Hungary v. Slovakia). Judgment on Merits, ICJ GL No. 92 (1997).
[116] SANDS, P.: Principles of International Environmental Law (2nd ed.). Cambridge University Press: Cambridge, 2003.
[117] North Sea Continental Shelf cases (1969). ICJ Reports 3. p. 44. In SANDS, P.: Principles of International Environmental Law (2nd ed.). Cambridge University Press: Cambridge, 2003. p. 146.

interpretative tool for treaties to be interpreted in the light of that customary law.[118] There are few customs in this field, which are regarded by the international community as obligatory. One of the most important ones is that should state take over an investor's property within its regulatory powers, there must be a payment of compensation, even though there is no agreement over the manner of its calculation.[119] This customary rules directly relates to the regulatory powers of the state, which are exercised in the public interest. Their objective is often to protect the healthy environment of the state's nationals.

Ad. Art. 38(1)(c) of the ICJ Statute: General Principles

International environmental law is governed by numerous principles. Among the most important are the principle of sovereignty over natural resources, principle of co-operation, principle of preventive action and precautionary principle, sustainable development, polluters-pays principle and many others.

Although the positivist legal scholars only recognize treaties and customs as the only significant sources, the general principles of law have a limited scope of the role in the international law as well. The general principles are mostly relied upon when gaps need to be filled, but in the international investment law, many claims have also been based on general principles. For example, claiming payment of full compensation upon expropriation of foreign property is often supported by arguments such as unjust enrichment, acquired rights, or equity; all being the general principles of law.[120] They are characterised by high degree of subjectivity, therefore they must be evaluated carefully by the tribunals. This, however, does not prevent their frequent occurrence in the jurisprudence. With closer look, there is an evident bias towards shaping the law in a way, which increases the investor protection rather than the interests of the states.[121]

[118] HIRSH, M.: Sources of International Investment Law in Bjorklund, A.K., Reinisch, A.: International Investment Law and Soft Law. Edward Elgar: Cheltenham/Northampton, 2012.
[119] SORNARAJAH, M.: The International Law on Foreign Investment (3rd ed.). Ibid. p. 82.
[120] Ibid, p. 85.
[121] Ibid, p. 86.

One of the most invoked principles at the tribunals is the principle of good faith. The principle of good faith is broad and of universal character.[122] But the principle can also be reflected in different forms across jurisdictions. In considerations of the principle of good faith in the international environmental issues, the President of the Tribunal in *Fur Seal Arbitration* noted that the abuse of right, in the sense of exercising the right for the sole purpose of causing injury to another, is prohibited.[123] Moreover, in *Trail Smelter* case, the tribunal stated that in exercise of rights, a proper balance must be struck between a state's rights and obligations and a "*recognition of the interdependence of a person's rights and obligations*."[124]

The good faith principle is widely used and therefore it is not as much contested as some other principles. According to Sornarajah,[125] the principles, which are based on subjective selection, will be increasingly subjected to scrutiny and rejection in favour of other sources of law such as treaties and customs.[126]

Ad. Art. 38(1)(d) of the ICJ Statute: Judicial Decisions and the Teachings

a) Teachings

Starting with the teachings, the ICJ recognizes the work of the most highly qualified publicists as a subsidiary means for the determination of rules of law. The ICJ does not jurisdictionally limit the subjects of the provision; the publicists pursuant to this article can be the international law academics and practitioners across all the jurisdictions.

In its early times, the international law case law was only cited through the work of the publicists such as Grotius or Pufendorf.[127] The commentary on the ICJ Statute

[122] BORN, G.: International Commercial Arbitration (2ed.). Kluwer Law International: Netherlands, 2012. p. 1476

[123] Fur Seal Arbitration (Great Britain v. United States) (1893) in Reports of International Arbitral Awards: Vol. XXVIII, pp. 263.276. Available at: < http://legal.un.org/riaa/cases/vol_xxviii/263-276.pdf >. Accessed on 14 March 2017.

[124] CHENG, B.: General Principles in SANDS, P.: Principles of International Environmental Law (2nd ed.). Cambridge University Press: Cambridge, 2003.

[125] Muthucumaraswamy Sornarajah is a well-recognized legal academic with the significant publishing history and a professor of law at the National University of Singapore.

[126] SORNARAJAH, M.: The International Law on Foreign Investment (3rd ed.). Ibid. pp. 86-87.

[127] ZIMMERMAN, at al.: The Statute of the International Court of Justice: Commentary (2nd Ed.). Oxford University Press: Oxford, 2013. p. 868.

implies that there is an inverse relationship between the sources enumerated in Art. 38(1)(d) of the ICJ Statute, which historically justifies their equal placement. The commentary states: *"…the weight of legal doctrine, so eminently influential in laying the foundations of International law, decreases with the growth of judicial activity…."* and continues with the explanation of historic status quo of 1945, when only a paucity of international courts existed, therefore the doctrine weighted more heavily.[128]

b) Judicial decisions

As for the judicial decisions defined in the Art. 38(1)(d) of the ICJ Statute, it is firstly to be noted that this source is subject to the provisions of Art. 59 thereof stating: *"[t]he decision of the Court has no binding force except between the parties and in respect of that particular case*."

ba) Permanent Court of International Justice / International Court of Justice

The decisions of the ICJ and its predecessor Permanent Court of International Justice ("**PCIJ**") have had a significant impact on the development of both the international environmental law and the international investment law. One of the most important decisions is the *Chorzow Factory* case,[129] which set basic rules for any compensation sought for the taking of the foreign investment. Moreover, there is *Barcelona Traction case*[130] with *Diallo v. Congo*,[131] both concerning the corporate nationality of the company and diplomatic protection of its shareholders, and likewise the *Nottenböhm* case,[132] which was dealing with the determination of the nationality of the natural persons.

[128] Ibid.
[129] Chorzow Factory case (Germany v. Poland). PCIJ. Judgment on Merits. Series A, No. 17. (1928).
[130] Barcelona Traction, Light and Power Company Limited (Belgium v. Spain). ICJ. Judgement on Merits, second phase. ICJ GL, No. 50. (1970).
[131] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). ICJ. Judgement, Preliminary Objections. ICJ Reports 2008 and 2010.
[132] Nottenbohm case (Liechtenstein v. Guatemala). ICJ. Preliminary Objection. ICJ 1, No. 18. (1955).

bb) European Court of Human Rights

Also the human right courts decide on investment disputes related to environment. First, it is important to note that human rights are rather rarely invoked in investment arbitrations for two reasons: firstly, the human rights protection tends to usually provide lower standards than the standards under the investment treaties, and secondly because most of the foreign investors are juridical persons, nevertheless the human rights typically protect natural persons. The exception is European Convention on Human Rights (the "**European Convention**"), which stretches its protection also over the property of juridical persons.[133]

The European Court of Human Rights ("**ECHR**") ruled on several occasions that a state is positively obliged to regulate the economic activities within its territory in a manner which avoids violating the human rights.

Firstly, it rules in the case *López Ostra v. Spain*,[134] where the Art. 8 of the European Convention – *Respect for the home and private life* – was successfully invoked. In July 1988, alongside the estate of Mrs. Gregoria López Ostra, a sewage treatment plant was built. The operation of the sanitation plant contaminated her house with smell and caused her health problems. The city of Lorca evacuated the inhabitants living in the vicinity of the treatment plant and ordered a partial cease of operations, but the situation did not improve, and it even led to Mrs. López Ostra's health problems. To protect her fundamental rights, Mrs. López Ostra filed an administrative suit to the local court, emphasizing the illegal interference to her dwelling and the harm to her mental and physical integrity. The court rejected the petition. Mrs. López Ostra continued to fail even before the Supreme Court and subsequently the Constitutional Court. Before the European Court of Human Rights in Strasbourg, Mrs. López Ostra argued breach of both Articles 8 and 3 of the ECHR. The court upheld the claimant when it declared a violation of Article 8 (not Article 3). The Court stated that: *"... it is necessary to take*

[133] DUPUY, P.-M., FRANCIONI, F., PETERSMANN, E.-U. et al.: Human Rights in International Investment Law and Arbitration. Oxford University Press: Oxford, 2009. p. 88.
[134] López Ostra v. Spain. European Court of Human Rights. Application No. 16798/90. 9 December 1994.

into account the fair balance that must be preserved between the competing interests of the individual and society as a whole."[135]

Bearing similarities to *López Ostra v. Spain*, also in *Guerra and Others v. Italy*[136] the ECHR ruled that the state is in the breach of the European Convention. The state failed to prevent a business from emitting environmental pollution, affecting state's citizens.[137]

bc) The international tribunals, ICSID

The investor-state arbitration can resort to the great variability of arbitral tribunals, which use different arbitral rules. The parties often resort to arbitration under UNCITRAL Arbitration Rules,[138] to arbitration under CIETAC Arbitration Rules[139] in case of China, or to arbitration under the International Centre for Settlement of Investment Disputes, which provides the international community with great number of arbitral awards, which may serve as a base for the construction of the international law norms. ICSID often deals with the cases of expropriations and environmental protection.

As Viñuales noted that the claims addressing the environmental concerns are increasingly common in investment arbitration. Whilst only nine investment claims have been brought to the tribunals until 1990, the number has risen in the last decade to more than 40 investment claims.[140]

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[135] Ibid.

[136] Guerra and Others v. Italy. European Court of Human Rights. Reports of Judgments and Decisions 1998- I, No. 64. 19 February 1998. para 58.

[137] PETERSON L.E., GRAY K. E.: International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. (April 2003). To be found at: < https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf>. Accessed on 27 February 2017. p. 22.

[138] United Nations Commission on International Trade Law: UNCITRAL Arbitration Rules. Available at: < http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>. Accessed on 23 March 2017.

[139] China International Economic and Trade Arbitration Commission: CIETAC Arbitration Rules. Available at: < http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>. Accessed on 23 March 2017.

[140] Professor Jorge Viñuales, Professor of Law and environmental policy at University of Cambridge in DIEPEVEEN, R., LEVASHOVA, Y., LAMBOOY, T.: Bridging the Gap between International Investment Law and the Environment. Ibid.

For instance, in *Santa Elena* case,[141] the ICSID decided upon the compensation due to the investor, Compañía del Desarrollo de Santa Elena, S.A., a Costa Rican-based company owned by US Nationals. Back in 1970, the investor bought a plot of 30 km Costa Rican coast line with mountains, and forests, known as Santa Elena, with the aim to develop a leisure facility there. The company initiated the preparations of plans, designs and undertook several analyses. The Government of Costa Rica, however, issued a decree expropriating Santa Elena. The aim of the decree was to incorporate the land into Santa Rosa National park, thus preserve some of the rare species settled there. The act naturally prevented the investor from further development of the land. As a compensation, Costa Rica offered investor an amount of USD 1,900,000. The investor did not challenge the expropriation itself however it objected against the amount of compensation, demanding an amount of USD 6,400,000.

The dispute lasted for over twenty years and only the political pressure made by USA made Costa Rica agree with turning the matter to ICSID in 1995. During the proceedings neither party argued against the expropriation itself. The tribunal only dealt with the amount of the compensation due. At first, it decided that the valuation of the property, and subsequently the amount of the compensation itself, should be valuated as of the year of the expropriation, not as of the year of the decision. This way the tribunal concluded that the amount of compensation equals to USD 4,150,000. It however did not accompany its conclusion with further explanation as to how it was evaluated. Nevertheless, the ICSID ruled that in case of expropriation it is fair to use compound interest, in this case USD 11,850,000.

Santa Elena case became a cornerstone of investor argumentation in cases of regulatory expropriation, which – even though in public interest and beneficial to environment – the tribunal regarded just as any other expropriation.

This arbitration is hence subject to strong criticism "*for the failure of an ICSID tribunal to consider the environmental purpose underlying an expropriation of land by the government of Costa Rica, when it calculated the level of compensation owing to an*

[141] Santa Elena case. Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica. ICSID Case No ARB/96/1. 2000.

investor."[142] As a consequence of such an onerous compensation, pursuing legitimate objectives even in public interest can become too luxurious especially for poorer states. Those will prefer not take any effective measure protecting their environment over taking such potentially expensive risk.[143]

In *Tecmed* case,[144] a Spanish company Tecmed invested to run a hazardous industrial waste landfill in Mexico in 1996. However, in 1998, the Mexican local authorities refused to renew its annual license. Tecmed regarded it as an arbitrary decision, which led it to lose its investment in its Mexican subsidiary, therefore it filed a suit against Mexico for alleged expropriation of its investment.

The ICSID ruled in favour of Tecmed, agreeing that a failure by Mexican authorities to renew a permit for a toxic waste facility indeed resulted in expropriation. However, the tribunal rejected an amount of compensation calculated by Tecmed based on discounted cash flow analysis. Instead it used actual expenses inflicted on Tecmed throughout existence of the investment, plus the profit lost due to the expropriation. As such, it concluded that the damages shall amount to USD 5,5 mn. (with a 6% compound interest as the date of expropriation) instead of USD 52 million, originally required by Tecmed.

Vivendi case[145] featured a French company, Vivendi, and its Argentinean affiliate, Compañía de Aguas, as the investor that entered into concession agreement with Tucuman province in Argentina, in order to provide water and sewerage services. In 1996, the investor brought a dispute claiming that it has been systematically harassed by state pursuing renegotiation of terms of the concession. The investor stressed out that the state authorities threatened him, tried to convince consumers not to pay the water bills, publicly accused the investor that its products represent a risk of grave disease,

[142] Philippe Sands in PETERSON, L.E, GRAY, K.R.: International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. IISD: 2005. To be found at: < https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf>. Accessed on 14 March 2017.
[143] Ibid.
[144] Tecmed case. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States. ICSID Case No. ARB (AF)/00/2. (2003)
[145] Vivendi case. Compañía de Aguas del Aconquija S.A. and. Vivendi Universal S.A. v. Argentine Republic. ICSID case No. ARB/97/3. 2007.

and even imposed unilaterally modified tariffs in contrary to the terms of original concession.

The court found violations of fair and equitable treatment standard under the Argentina – France BIT. Moreover, it ruled that the actions of the state had effects similar to expropriation as they have devastated the investment. In tribunal's view, the investor has a right to expect that the government shall act accordingly to the concession, especially that it shall not maltreat the investor in order to pursue renegotiation of the agreement (breach of legitimate expectation of the investor).

Another example of the ICSID practice in this area is the *Perenco* case.[146] Perenco – a Bahamas-seated company indirectly controlled by a French national – invested in Ecuador oil business. When political changes occurred, the Republic of Ecuador adopted a new law imposing a 99 % windfall levy on foreign oil revenues. Moreover, the investor's operations were taken over by Ecuador national oil company Petroecuador. Perenco therefore filled a request for alleged expropriation of its investment in Ecuador.

During the arbitration, Ecuador raised an environmental counterclaim, countering that Perenco´s operation significantly inflicted the state environment. As Ecuador argued, its Constitution of 2008 gives the state a right to impose 99% tax in order to full remedy the contamination caused by hydrocarbon mining operations.

ICSID initially refused such argumentation. Beginning with finding that Ecuadorian actions were a case of indirect expropriation, it added on the counterclaim that nothing prevents the state from issuing separate regulation imposing stricter environmental standards for the operators, and the Constitution itself is not a substitute for such regulation. In despite of this, on 11 August 2015, the tribunal upheld the environmental counterclaim, stating: "*that a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields. All of this is beyond any*

[146] Perenco case. Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6. (2008).

serious dispute and the Tribunal enters into this phase of the proceeding mindful of the fundamental imperatives of the protection of the environment in Ecuador."[147]

In conclusion, the judicial decisions and the teachings of the most highly qualified publicists of the various nations serve as a valuable subsidiary source of the international law, being particularly useful for the purposes of interpretation.

Ad. Art. 38(2) of the ICJ Statute: the judicial power to decide a case ex aequo et bono

The Statute of the International Court of Justice provides in Art. 38(2) that the Court may in appropriate circumstances and under the joint agreement of the parties decide the ad hoc case *ex aequo et bono*. The expression states that the court does not base its reasoning on the legal principles but simply tries to reach a fair compromise with the consent of the parties. Such a decision or award is then rendered not "within the law" (*infra legem* or *intra legem*), but "beside" or even "against the law" (*praeter legem* or *contra legem*).

Given the principle of party autonomy, the parties to a contract may opt for their dispute being decided *ex aequo et bono*. First, it is important to draw the line between the recourse to equity and to the power of courts to decide the cases *ex aequo et bono*. Although the translation of a Latin phrase *ex aequo et bono* is "fair and good", which can be almost identical to an English term "equity", there is a critical difference. ICJ understands *equity* as "*objective values of justice*" in opposition to *ex aequo et bono* as the subjective ad hoc justice.[148] Moreover, whilst the courts are required to "*always have regard to equity infra legem, that is that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes",*[149] the decisions *ex aequo et bono* pursuant to Art. 38(2) of ICJ Statute require a special consent of the parties. In the *Continental Shelf* case (1985),[150] the ICJ found that "equity" is an emanation of justice. Equity as a source of international law finds its concretization in

[147] Ibid. Interim Decision on the Environmental Counterclaim. para. 34.
[148] WEIL, M. P.: Equity in the jurisprudentce of the ICJ. Ibid pp.126ff.
[149] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras). ICJ Reports, p. 567, para. 28 et seq. 2007.
[150] Continental Shelf case (Libyan Arab Jamajiriya v. Malta). ICJ. 1985.

the equitable principles – *e.g.* pacta sunt servanda, principle of good faith, or principle of full compensation. Hence, every judgement shall be equitable and interpreted within the equity, and such an interpretation shall take precedence over other interpretative means, provided that the result still remains within the limits of the applicable positive law.[151]

The distinction however poses the greatest problems to the international courts and tribunals and their limits of the powers. The International Court of Justice has based series of its decisions mainly dealing with the delimitation of maritime boundaries[152] on the use of equity or equitable principles, having to emphasize in each of the cases that the decisions were not based *ex aequo et bono*, since there was lack of the consent of the parties to do so.[153]

The concept of fair decisions nevertheless opens up a space for use in relation to the protection of environmental issues as a moral interest in protection of the population. Such a judicial discretion may be invoked to protect the party's interest, which is not otherwise protected by a legal right. As preserving the environment is in public interest, the courts may, subjected to parties' consent, resort to invoking the *ex aequo et bono* in relation to environment upon their judicial discretion.[154]

2.1.2. Unilateral Legal Acts

Unilateral legal acts are the manifestation of will of one party to assume obligation under international law.[155] The famous *Nuclear Tests* case[156] created a new rule of the international law. In 1970s, Australia and New Zealand demanded at the ICJ that France ceased the nuclear testing in the South Pacific at the ICJ. Nevertheless, before the ICJ could issue its decision, France itself announced that the tests have been completed and moved for the dismissal of the application. Based on the case, the ICJ

[151] WEIL, M. P.: Equity in the jurisprudence of the ICJ. Ibid. pp. 124-126.
[152] ICJ 1969, 1982, 1984, 1985, 1986
[153] TÓTH, F. L.: Fair Weather: Equity Concerns in Climate Change. Earthscan: London, 1999.
[154] TRAKMAN, L.: Ex Aequo et Bono: Demystifying an Ancient Concept. Chicago Journal of International Law: Vol. 8, No. 2, Art. 11. (2008). Available at: < http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1669&context=cjil >. Accessed on 12 March 2017.
[155] CHARPENTIER, J.: Engagements unilatéraux et engagements conventionnels: différences et convergences in Theory of International Law at the Threshold of the 21 Century. Essays in Honour of Krzysztof Skubiszewski. Edited by Jerzy Makarczyk, 367–380. The Hague: Kluwer Law International, 1996.
[156] Nuclear Test Case (Australia & New Zealand v. France). ICJ 253, 457. (1974).

admitted that the declaration made through unilateral acts may have the effect of creating legal obligations.

Although the unilateral legal acts are not common in the area of international investment law, some authors argue that even national investment codes can, upon certain conditions, be regarded as potential sources of international investment law.[157] In the aim to attract foreign investors, this is a growing trend in developing countries. By making unilateral undertaking in its domestic investment law the state can create international obligation;[158] for example involving a consent to arbitration. Although such practice has been contested by the arbitral tribunal (*e.g.* in *CEMEX v. Venezuela* based on the unclear intention of the state to arbitrate[159]), as long as there is no ambiguity over the state intention to arbitrate, the national codes *per se* are capable of creating obligations between the state and foreign investors.

2.1.3. Decisions of International Organizations

The decisions of international organizations may serve as a source of international hard law provided that the states in constituent treaty of the organizations conferred powers to it to make binding decisions on the states. This is subject to compliance and any possible limitations set forth in the authorizing treaty.[160] Although such decisions made for example by UN Security Council are binding, enforceable, and as such, of considerable importance to the international community, given their specific nature, they can hardly be regarded as "*an independent technique of law-making, thus a 'source' in our terminology."*[161]

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[157] See MBENGUE, M.M.: Consent to Arbitration Through National Investment Legislation. Investment Treaty News. (2012). To be found at: <https://www.iisd.org/itn/2012/07/19/consent-to-arbitration-through-national-investment-legislation/>. Accessed on 14 March 2017.

[158] Mobil Corporation (Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela). ICSID Case ARB/07/27. Decision on Jurisdiction. 10 June, 2010, para. 85.

[159] CEMEX v. Venezuela (CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela). ICSID case No. ARB/08/15. Decision on Jurisdiction. 30 December 2010.

[160] THIRLWAY, H.: The Sources of International Law. Oxford University Press: Oxford, 2014. p. 22.

[161] Ibid. See also: CHINKIN, C.: The Making of International Law. Oxford University Press: Oxford, 2007. pp. 114 and 229-233.

2.1.4. Agreements between States and International Enterprises

Turning to the last category of agreements of sources of hard law in the international law, attention should be also devoted to the discussions over the status of the agreements concluded between states and international enterprises ("**investment agreements**" or "**IAs**"). IAs seem to possess a certain portion of purpose-built international legal personality. As such, it is true that international legal community ascribe the investment agreements between states and international enterprises a degree of international legal personality. On the other hand, in the *Anglo-Iranian Oil Co.* case,[162] the ICJ refused to see the company's concession contract as a treaty between the United Kingdom and Iran for purposes of the term *treaties and conventions* in the Iranian declaration of acceptance of jurisdiction.[163] In conclusion, there are serious doubts whether to regard those agreements as a source of international law, therefore those agreements shall rather be seen as a source of *obligation*, limiting their scope within the *pacta sunt servanda* principle solely on the parties to the IAs.[164]

In the international investment law, investment agreements are concluded between the host state and the international enterprise. By form, an international enterprise is a natural or legal person disposing of the capital intended to be invested in the host state. Historically, the IAs have evolved over the twentieth century from the long-term concessions to exploration and extraction of oil and natural gas. Nowadays, joint ventures and public-private partnerships are the most important results of investment agreements.[165]

A breach of the IAs does not itself fall within the scope of the international law. Consequently, neither party is entitled to contractual protection under international customary law. In *Serbian Loans* case, the ICJ ruled that "*[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.*"[166] As for the concessions, it was held that it is

[162] Anglo-Iranian Oil Co. Case (United Kingdom v. Iran). ICJ Rep 93. Judgement on Jurisdiction. 22 July 1952.
[163] THIRLWAY, H.: The Sources of International Law. Ibid.
[164] Ibid. p. 23.
[165] ŠTURMA, P., BALAŠ, V.: Ochrana mezinárodních investic v kontextu obecného mezinárodního práva. Ibid. p. 26.
[166] Serbian Loans Case. (French Republic v. Kingdom of the Serbs, Croats and Slovenes). PCIJ Reports. Series A, No. 20. (1929). p. 41.

"*unquestionable in light of traditional international law*" that concession agreements are governed by the domestic law of the host state.[167] Any disputes over the breach of the investment agreement would therefore be resolved within the jurisdiction of the national general courts of the host state. The exception is provided by the concept of internationalization of the investment agreement, which elevates any breach of the investment agreement onto the breach of the bilateral investment treaty concluded between the domestic state of investor and the host state.

2.1 The binary division: soft law and hard law differentiation

The differentiation between the terms of *soft law* and *hard law* is of a great importance in international law. Even though there is no consensus over the two definitions, most of the scholars use a binding nature as the criterion of differentiation.[168]

2.1.1. Justification of the Binary Division

The schools of thoughts in law differ in their view of the binary division and the relevance it bears. According to the legal positivists, the law shall be binding by its very nature, therefore they tend to reject the phenomenon of soft law in favour of hard law.[169] This is in opposition to the constructivists, who downplay the importance of the binding nature of the agreement. Focusing on the gap between the law-in- books and law-in- action, they see the whole concept of binary division as illusory, while the important factor is whether and how the state varies in terms of its impact on behaviour.[170] For constructivists, the soft law instruments, whether originating from international organizations, states, non-governmental organizations or industry, represent the pre-normative "noise" capable of spawning more socially and

[167] DICKSTEIN, M.: Revitalizing the International Law Governing Concession Agreements. Berkeley Journal of International Law. Vol. 6, Issue 1 (1988) in GARCIA-AMADOR: The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation. 12 Lawyer of the Americas. Issue 1, No. 19. (1980). p. 55.

[168] SCHAFFER, G. C.; POLLACK, M. A.: Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance. Minnesota Law Review. 94:706. To be found at <http://www.minnesotalawreview.org/wp-content/uploads/2011/08/ShafferPollack_MLR.pdf > pp. 712 et seq.

[169] See e.g. KLABBERS, J.: The Redundancy of Soft Law, 65 NORDIC J. INT'L L. 167, 168 (1996): Law cannot be "more or less binding."

[170] SCHAFFER, G. C.; POLLACK, M. A.: Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance. Ibid. p. 713.

environmentally responsible conduct.[171] The rational institutionalists believe, in contrast, that in the international affairs the "*binding agreement is a misleading hyperbole,*" even though they also rush to add that the use of wording such as "binding commitments" matters as it entails certain level of seriousness in the agreements between the parties.[172] While deciding which form is more appropriate, the rational institutionalists would evaluate factors as certainty of state interest, transaction costs of bargaining, indication of credibility of state commitment, or desire for flexibility.[173]

An interesting description of distinctive features of the concept of hard law is that hard law "*refers to legally binding obligations that are precise (or can be made precise through adjudications or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law*".[174] Of all the areas of international law, the international trade law – despite some of its soft norms – comes closest to this definition by its content. International environmental law, however, is a soft and hard law mixture, for which it is characteristic that in addition to compulsory norms there is a large number of documents of recommendatory nature.

2.1.2. The Soft Law Phenomenon

Soft law documents are neither binding nor enforceable and they usually take the form of recommendations, declarations, etc.[175] What is, then, the purpose of relying on quasi-legal instruments that are consistently contested for their lack of binding force and are operating only as the instrument of a recommendatory nature? The answer is their flexibility. Soft law is immediately applicable to the areas where the relevant subjects could not find the consensus needed in order to conclude an international convention. Seen as a flexible option to set a route to legal commitment faster than in case of customary international law, while avoiding the definitiveness of the binding

[171] BKORKLUND, A. K.; REINISCH, A.: International Investment Law and Soft Law. Cheltenham: Edward Elgar Publishing Limited, 2012. p.96.
[172] See e.g. LIPSON, Ch.: Why Are Some International Agreements Informal? 45 INT'L ORG. 495, 508 (1991).
[173] SCHAFFER, G. C.; POLLACK, M. A.: Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance. Ibid. p. 723.
[174] ABBOTT, K. W.; SNIDAL, D.: Hard and Soft Law in International Governance, 54 INT'L ORG. 421, 421 (2000).
[175] DAMOHORSKÝ, M. et al.: Právo životního prostředí (3. vydání). Ibid. p. 114.

treaty,[176] soft law is well capable of reflecting the changing nature of international environmental problems with the range of newly acceding actors, principles, and the forms the law might take.

Moreover, given its convenient nature providing the soft law sources with potential to morph into hard law once the rule approves, such international non-binding arrangement can serve as an incentive to conclusion of a contract, or a part of the soft law can be later turned into legal custom. That is why soft law can be jovially defined as "*the trouble maker because it is either not yet or not only law.*"[177]

Through a soft law instrument the state may commit itself to fight against challenges such as climate change and environmental issues but still leaves the doors open should it need to pursue its economic or social objectives. This advantage justifies the increasingly popular usage of the soft law sources in the area of both the environmental and international economic law. Both encompass the various legal instruments ranging from the Resolutions or Declarations of the UN General Assembly, the action plans, the codes of conduct, recommendations, standards, drafts as former attempts to codify the law (such as the OECD projects in the 1960s[178] and 1990s[179]) to other normative provisions contained in non-binding texts.[180,181]

2.1.3. *Key Sustainable Development Documents in the Form of Soft Law*

Although there are various international environmental law instruments, which partially impacting the international trade, the reconciliation between the two areas of law is best addressed within the norms addressing the sustainable development.

Since 1992, the United Nations held three international conferences on sustainable development with the aim to reconcile economic and environmental goals of

[176] BOYLE, A: "Some Reflections on the Relationship of Treaties and Soft Law", International and Comparative Law Quarterly, 1999, vol. 48, n° 4, p. 901-913.
[177] DUPUY, P.-M.: Soft Law and the International Law of the Environment. Michigan Journal of International Law. Vol. 12:420. To be found at: < http://www.fd.unl.pt/docentes_docs/ma/CG_MA_3966.pdf>
[178] Resolution of the OECD Council 7 ILM 117. Draft Convention on the Protection of Foreign Property. 12 October 1967.
[179] OECD DAFFE/MAI (98)7/REV1. Multilateral Agreement on Investment (MAI) negotiations. The Multilateral Agreement on Investment: Draft Consolidated Text 22 April 1998.
[180] ABBOTT, K., DUNCAN, S.: "Hard and Soft Law in International Governance." International Organization 54 (2000): pp. 421–456.
[181] SHELTON, D.: Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System. Oxford: Oxford University Press, 2000.

the global community. In addition to their diplomatic function consisting of coordination of the sustainable development objectives of the UN member countries, the conferences were also a source of some important soft law documents.

- *UN Conference on Environment and Development – Earth Summit 1992*

The concept of sustainable development finds its formal origin in the *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)*, submitted and approved by the UN General Assembly in winter 1989.[182] At the follow-up conference – *The Earth Summit* – in Rio de Janeiro, Brazil in 1992, the 172 participating governments agreed on the need to rethink the economic development and to restrict the destruction of irreplaceable natural resources and pollution of the planet. The conference resulted in consensus of the international community on several important legal principles of the international environmental law. One of the most essential ones was the Principle 4 of the *Rio Declaration on Environment and Development*[183] providing that: "*in order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.*"[184]

The *Agenda 21* soon followed as a non-binding comprehensive plan of action, and one of the pillars of the UN sustainable development concept, which holistically approaches four main areas: (I) *Social and Economic Dimensions* with special impact on combating poverty and promoting health, *(II) Conservation and Management of Resources of Development,* (III) *Strengthening the Role of Major Groups*, such as NGOs, women and youth, businessmen, workers etc. in society, and suggested (IV) *Means of Implementation.* The para 2(3) thereof remarks that the international economy should create a "*supportive international climate for achieving environment and development goals,*" and this spirit is mirrored into Chapter 20 and Chapter 21, where some other aspects of reconciling the international economic law and environmental law are addressed. [185] In contrast, following conferences draw attention

[182] Res. UN General Assembly: A/RES/44/228 (22nd December 1989). Ibid.
[183] UN: Rio Declaration on Environment and Development. To be found at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. Accessed on 6 March 2017.
[184] Available at official UN websites: <http://www.un.org/geninfo/bp/enviro.html>
[185] UN: Agenda 21. (1992). To be found at: < https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>. Accessed on 6 March 2017.

to the absence of addressing the likewise important energy or transportation problematics.

Agenda 21 was intended to be implemented at international, regional and local levels. In accordance with the principle of subsidiarity in Chapter 28 of the *Agenda 21*, China honoured its recommendation to involve the local government into the implementation of the programme and in 1992, it developed a National Agenda 21 - White Paper on China's Population, Environment and Development in the 21st Century.[186]

- *The UN International Conference on Financing for Development*

The UN International Conference on Financing for Development (Monterrey Conference) took place in 2002 in Monterrey, Mexico. The most important outcome of the conference was Monterrey Consensus, which highlighted the need to mobilize FDI in attempt to eradicate poverty, achieve sustained economic growth and sustainable development.

The Monterrey Consensus was updated twice: firstly, in 2008 in Doha (Qatar), and secondly just recently, in 2015 in Addis Abeba (Ethiopia).[187]

- *World Summit on Sustainable Development – Earth Summit 2002 (Rio+10)*

Taking place in Johannesburg, South Africa from 26 August 2002 to 4 September 2002, the objective of this summit was to assess the progress achieved by the international community after implementing the conclusions of the 1992 Rio de Janeiro Earth Summit. Being held 10 years after UNCED, the conference was also informally nicknamed "Rio +10".

The trade and financing in respect to the sustainable development were among the most controversial topics. The two main outcomes of the conference were the Johannesburg Declaration and the Plan of Implementation. The para. 27 of the *Plan of Implementation of the World Summit on Sustainable Development* states that "*the*

[186] The official website of the UN: Institutional Aspects of Sustainable Development in China. To be found at: < http://www.un.org/esa/agenda21/natlinfo/countr/china/inst.htm>. Accessed on 15 February 2017.

[187] CORDONIER SEGGER, M.-C., NEWCOMBE, A.: Sustainable Development in World Investment Law. Global Trade Law Series, Vol. 30. Kluwer Law International; Kluwer Law International 2011. p. 116.

private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies." Para 29 thereof further notes that: "*there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment.*"[188]

In contrast to some of the UNCED's documents, the *Johannesburg Declaration* is a purely political document devoid of any normative content, even in the form of soft law. Its importance lies only in confirming the common political will of governments to achieve sustainable development goals.

- *UN Conference on Sustainable Development – Earth Summit 2012 (Rio+20)*

The third international conference was held on 13 – 23 June 2012 and its venue returned to its roots in Rio de Janeiro, Brazil. Gathering the world's leaders and fifty thousand concerned individuals from major societal groups, mostly from business and academia, the conference was another milestone in pursuing the sustainable development goals. The conference proposed the form of the future sustainable development: transformative, equitable, and above all universal, hence applicable to all countries including the developing and the developed ones as it requires the joint responsible management of the Earth's life support systems and ecosystems.

The primary outcome of the conference was a non-binding document *The Future We Want*, in which the participating 192 governments reaffirmed their sustainable development commitment.

- *The 2030 Agenda for Sustainable Development*

On 25 September 2015, UN General Assembly adopted Resolution A/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* (the **"2030 Agenda**").[189] Attempting to achieve sustainable development in three dimensions – economic, social and environmental – its aim is to stimulate actions leading to full

[188] UN: Plan of Implementation of the WSSD. To be found at: < http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf >. Accessed 25 September 2015.

[189] UN General Assembly: Resolution A/70/1 Transforming our world: the 2030 Agenda for Sustainable Development. 25 September 2015. To be found at: < http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E >. Accessed on 2 March 2017.

implementation of the 2030 Agenda by 2030. The 2030 Agenda contains seventeen non-binding Sustainable Development Goals, which came into force on 1 January 2016. With regard to investment, the countries are *inter alia* obliged to increase investment in agricultural research, to enhance agricultural productive capacity in developing countries, to facilitate access to clean energy research and technology or to promote investment in clean energy technology.[190]

Following the sustainable development goals, China has recently announced that its 12th National People's Congress has already implemented this "*development concept featuring innovative, coordinated, green, open, and shared development*" into the 13th Five-Year Plan (2016-2010), linking the 2030 Agenda with domestic mid-and long-term green development strategies.[191]

[190] Ibid. pp. 16 and 19.
[191] UN Department of Economic and Social Affairs: Sustainable Development Knowledge Platform. To be found at: <https://sustainabledevelopment.un.org/memberstates/china>. Accessed on 3 March 2017.

3. PRINCIPAL ACTORS OF ENVIRONMENTAL PROTECTION IN FOREIGN DIRECT INVESTMENTS

The following chapter deals with the subjects and quasi-subjects involved in the process related to policy issues in foreign investing; collectively referred to as the principal *actors* in the FDI process related to the environmental protection.

Until the twentieth century, the actors of the foreign investing had only encompassed the states and the investor. When a conflict arose, the investor had to resort to the concept of the diplomatic protection for the dispute to be resolved. Over the twentieth century, the focus of the law shifted from protecting the single individuals and their groups to protecting the investing process itself.[192] The system changed in many ways. The foreign investor is newly provided with a certain standard of treatment by the host state, and moreover, certain direct treaty-based dispute settlement rights of the state have been extended to investors. Furthermore, various other influential participants crystalized in the FDI process. In addition to state and the investor, whose position in the international law is undergoing hesitant changes, other actors emerge. Firstly, the non-governmental organizations ("**NGOs**") influence the FDI process bringing along the new term of so-called *civil society* involvement. Civil society is defined as: "*the space for uncoerced human association and also the set of relational networks – formed for the sake of family, faith, interest and ideology – that fill this space.*"[193] And secondly, the intergovernmental organizations ("**IGOs**") should also be mentioned as they set forward the development of international standards and procedures.

3.1. Concept of the Diplomatic Protection

It was not until recently when the foreign investing foresaw a tripartite of actors: firstly, a home state as the state of origin of the investor, secondly, the investor itself, and thirdly, a host state being the state where the investment had been placed by the investor.

Natural and legal persons were deemed not capable of holding legal rights and obligations in the international law. As states were the sole subjects of the international

[192] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid. p. 60
[193] WALZER, M.: Toward a Global Civil Society. (2nd ed.). Berghan Books: Rhode Island, 1998. p. 7.

law disposing of legal personality, any issues relating to the treatment of aliens and their property were settled exclusively within the concept of diplomatic protection. It was the home state of the investor who had the *locus standi* in the dispute instead of investor. As such, the injured investor was forced to fully rely on the help of the home state, dependent on its will and capabilities in order to be defended against the host state. After transferring the investor rights to its home state, the infringement of the investor property would have constituted a breach committed by a host state against the home state, elevating the breach to international law level. The home state would be entitled to proceed with the international claim for compensation, being subject to its own will.

From the investor's point of view, the diplomatic protection is highly inefficient. For the successful asserting of the diplomatic protection, it is necessary that the following three conditions are met: (i) the injured natural or legal person must be national of the state whose protection seeks; (ii) the injured party had to first exhausted domestic remedies; and finally (iii) the injured natural or legal person must fulfil the "*clean hand requirement*," meaning that the person did not violate law, nor was unreasonably imprudent. Even upon the fulfilment of the conditions, the investor did not have guarantee that state would defend it, as it is not its duty, but only a possibility. Furthermore, even if the state decided to agree, by accepting, the investor loses control over the claim and the state pursues the claim as its own.[194]

Although the diplomatic protection still remains to be a possible means of dispute resolution when encountering investment dispute, the later development of international trade caused that in most of the cases the diplomatic protection will be partially replaced by more efficient mechanisms, such as the dispute resolution mechanism under the ICSID. In its Article 27, the ICSID Convention explicitly excludes the contracting states from the possibility to offer their nationals diplomatic protection. The Art. 27 of the ICSID Convention reads:

> "*(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting*

[194] SALACUSE, J. W.: The Law of Investment Treaties. Ibid, str. 93.

State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."[195]

As the protection of the investors and their property became a priority for the states with capital-importing orientation of economy, the states accepted the obligation to observe certain standard of treatment towards investors. The first BIT, which referred to the resolution of the potential conflicts via the ICSID mechanism, was negotiated in 1968 between the Netherlands and Indonesia.[196] One of its most important advantages was to allow the investor, who deems its investment being unlawfully disadvantaged, to seek justice against the government of the host state directly before the arbitral tribunal. By such BIT, the states also extend their treaty-based dispute settlement rights to investors granting the treaty-based rights of action against the host state.[197]

Nowadays, given the latest development, most of the scholars agree that individuals dispose of derivative international legal personality of a marginal character.[198]

3.2. Sovereign States

States are the principal subjects of the international law. Being the only original subject thereof, states dispose of full legal personality in international relations.

3.2.1. *Schizophrenic Role of the State in the FDI*

Although both the investor and the state generally have an interest in pursuing cross-border investments, the secondary interests of both the actors are not always consistent and are even opposing. The investor usually follows simple purpose to

[195] Convention on the Settlement of Investment Disputes between States and Nationals of Other States. To be found at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>. Accessed on 1 April 2017.
[196] SALACUSE, J. W.: The Law of Investment Treaties. Ibid, str. 94
[197] MUCHLINSKI, P.T.: Policy Issues, p. 4
[198] ONDŘEJ, J.: Základy mezinárodního práva. Karolinum - nakladatelství Univerzity Karlovy: Praha 1998, p. 33.

business profit maximization. The role of the state, in contrast, tends to be more complex and self-contradictory (*see Chapter 1*).

On one hand, states are generally interested in attracting the investment in order to boost its economy, and for that purpose they need to create internationally valid norms of foreign investment protection. The processes of economic globalisation and liberalisation led to efforts of especially multinational enterprises to unify some aspects of the national economies across the world. This is also the case of China, which recently put enormous effort to create investor friendly environment in order to attract the foreign investments into the country.

On the other hand, the states face delicate and challenging task to design the balanced overall policy framework for foreign investment, as they are also bound to protect their economy and the well-being of its nationals – the environment included – through the domestic laws and regulations. It can be said that by concluding BIT, the states give away great part of its sovereignty, with the effect of eliminating its right and obligation stemming from both the customary and conventional international law to regulate in public interest.[199,200] Any regulation, which has in effect the lowering of the value of the foreign investment, may be in the potential dispute between the state and the investor considered an indirect expropriation with a compensation due. This was for example the case of *Metaclad*,[201] whose award has been strongly criticized for a lack of considerateness for the public purpose regulation. The realization of tied hands prompted collective harsh awakening of many states, which resulted in numerous terminations of existing BITs and refraining from entering into new ones. As examples can serve termination of Venezuela-Netherlands BIT by Venezuela in 2008; series of terminations initiated by South Africa with Germany, Switzerland and the Netherlands; another series of terminations initiated by Ecuador with Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic, and Uruguay; or even the

[199] ZIEGLER, A.: Special Issue: Toward Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives. The Journal of World Investment & Trade 15, pp. 803-808 (2014). To be found at: < https://serval.unil.ch/resource/serval:BIB_AE241EE02396.P001/REF>. Accessed on 23 April 2017. p. 804.

[200] SUBEDI, S. P.: International Investment Law, Reconciling Policy and Principle (2nd Ed.) Hart Publishing: Portland, 2012. p. 160.

[201] Metalclad Corporation v. The United Mexican States. ICSID Case No. ARB(AF)/97/1. (30 August 2000).

Indonesia-Netherlands BIT has been terminated just recently to the date of 30 June 2015.[202]

3.2.2. ***Principle of Sovereignty of the State and its Expressions***

States are sovereign and independent of the power of other states. Professors Šturma and Čepelka[203] note that "*only the territorial sovereign exercises a territorial monopoly over all the population and things in its territory, that is, all legislative, executive and judicial power, and thus has a monopoly in these areas, which excludes from this activity [...] any other state.*"[204]

As Sornarajah adds, one of the manifestations of the principle of sovereignty is the right of the state to control, regulate and even exclude the entry of foreign investment.[205] This idea stems from the customary international law, under which no state is obligated to admit foreign investment in its territory, either generally or in any particular segment of its economy.[206]

This right is *per se* unlimited. In Methanex case,[207] the NAFTA Chapter Eleven arbitration resolved under the UNCITRAL Rules, the tribunal weighed the regulatory powers of a state against the minimum standard of protection under NAFTA. The Claimant based its allegations on Art. 1102 of NAFTA Chapter Eleven by claiming that the state measures aimed to deny it and other foreign methanol producer the same standard of treatment that is accorded to the domestic producers. The tribunal supported the view of the state as Respondent to Methanex. It ruled:

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[202] PETERSON, L.E.: Venezuela Surprises the Netherlands with Termination Notice for BIT; Treaty Has Been Used by Many Investors to "Route" Investments into Venezuela'. IA Reporter. (16 May 2008). CREAMER'S MEDIA'S ENGINEERING NEWS: SA Proceeds with Termination of Bilateral Investment Treaties. (21 October 2013). To be found at: < www.engineeringnews.co.za/article/sa-proceeds-with -termination-of-bilateral-investment-treaties-2013-10-21>. GLOBAL ARBITRATION REVIEW: Ecuador Terminates BITs with Eight LatAm States. (5 November 2008). To be found at: < http://globalarbitrationreview.com/news/article/14919/ecuador-terminates-bits-eight-latam-states/>. In ZIEGLER, A.: Special Issue: Toward Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives. Ibid. and in <http://investmentpolicyhub.unctad.org/>. Accessed on 23 April 2017.

[203] Professors Čestmír Čepelka and Pavel Šturma are both renowned professors of International Law at Charles University, Czech Republic.

[204] ČEPELKA, Č., ŠTURMA, P.: Mezinárodní právo veřejné. C. H. Beck: Praha, 2008. p. 204.

[205] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 88

[206] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 7.

[207] Methanex Corporation v. United States of America, UNCITRAL.

> *"as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to then putative foreign investor contemplating investment that the government would refrain from such regulation."*[208]

In the tribunal's view, the expropriation cannot be determined solely by using the general test, but for an environmental measure to constitute indirect expropriation, also a "*specific commitments*" of the host state are needed. In this case, a uniquely high level of environmental protection in California was taken into account. As they had the effect of *de facto* raising the threshold for indirect expropriation, the regulatory measures of the state did not reach it; hence, they were legitimate.

If a potential host state does not conclude any treaty, based on its sovereignty, it can decide whether it admits a foreign investment. If it does, the admitted investor can only rely on the protection in the form of minimum standard under customary law.[209] The different situation arises, when a state gives away certain rights by a treaty.[210] Entering into a regional or bilateral treaty with another state has the effect that a host state can no longer deny the entry to any investor from the contracting country, unless it shows that such investment is not covered by the treaty.

Moreover, the treaty or new environmental policies adopted by the government can for instance have effect to adopt stricter controls of pollution, limiting discharge of chemicals into the environment, or limiting the level of emission of harmful substances into the atmosphere, etc.[211] The non-adherence by the host state would result in violation of the treaty and would give the investors right to defend their rights against the host state. The exception might apply in circumstances of necessity, under which, if proven, the treaty rights of the foreign investor might be suspended.[212] After the

[208] Ibid., part IV, ch D, para 7.
[209] ROOT, E: The Basis of Protection to Citizens Residing Abroad. 4 AJIL, pp. 517-528. (1910). In DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 7.
[210] Ibid.
[211] SUBEDI, S. P.: International Investment Law, Reconciling Policy and Principle. Ibid. p. 160.
[212] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 88

investment had been made, the exception may be invoked based on the Denial of Benefits clause, which gives a state right to refuse to protect investor or investment if it turns out that they are owned or controlled by a third-party state.

It is thus important for a potential host state to weigh the economic, financial and other benefits of attracting the foreign capital against the consequences of future obligations it would undertake under the treaty prior to the conclusion of the treaty, already during the evaluating period. On one hand, it is empirically evidenced that an increase in foreign investment in one state directly correlates with the number of newly concluded treaties.[213] This result prompts state to conclude more treaties. However, on the other hand, by accepting international standards included therein, the state sovereignty even over a purely internal matter, as the protection of environment, appears to be partially mitigated.

Entering into a treaty or a contract in attempt to transfer part of its obligations, however, does not deprive state of its obligations to protect the public interest. Under both customary and conventional international law, especially international human rights commitments, the state is bound to take measures designed to protect the environment and well-being of its nationals.[214,215] *International Covenant on Economic, Social, and Cultural Rights* in its Art. 11 thereof recognizes "*the right of everyone to an adequate standard of living […] and the continuous improvement of living conditions.*"[216] This approach is supported by the jurisprudence of European Court of Human Rights reminding that "*environmental protection should be taken into consideration by Governments acting within their margin of appreciation and by the Court in its review of that margin*."[217]

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[213] NEUMAYER, E., SPESS, L.: Do Bilateral Investment Treaties Increase FDI to Developing Countries? 33 World Development 1567. (2005).
[214] SUBEDI, S. P.: International Investment Law, Reconciling Policy and Principle (2nd Ed.) Hart Publishing: Portland, 2012. p. 160.
[215] PETERSON L.E., GRAY K. E.: International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. (April 2003). To be found at: < https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf>. Accessed on 27 February 2017. p. 16
[216] International Covenant on Economic, Social, and Cultural Rights. (1966). To be found at < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. Accessed on 5 April 2017.
[217] European Court of Human Rights: Hatton & Others v. The United Kingdom. ECHR 8. (8 Jul 2003).

Also, ICSID case law grant the human rights great portion of attention. In *Azurix v. Argentina*,[218] the tribunal dealt with a dispute about water quality and pipeline pressure case, where Azurix, a company operating water and sewage systems under the concession in Argentina, claimed indirect expropriation of its investment. Argentina defended by pointing out that when there is "*a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of service provider*."[219] The tribunal, however, awarded Azurix only a partial compensation, ruling that on one hand Azurix was indeed affected by the country's administrative actions, but on the other the company has reserved the right to control as well as the shares of the company.

The similar conclusion has been reached in *CMS v. Argentina*, the country pleaded that is currently undergoing severe economic and social crisis, which affected human rights of its nationals. In Argentina's view, no investment treaty should be given precedence over human rights of its nationals having constitutional standing, as it would be "*in violation of such constitutionally recognized rights.*"[220] The tribunal held that "*there is no question of affecting fundamental human rights,"* admitting that it has been considering the possible collision.[221]

The tribunal took a slightly different approach in *Sempra v. Argentina* by noting that it sees the real issue at question "*whether the […] survival of the State [was] imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation*." [222, 223] Even this ruling indicates that the final responsibility for collapse resulting in human rights violation should be placed on the state, not the investor, and the state must do its best to protect its nationals.

[218] Azurix v. Argentina, ICSID case No. ARB/01/12. Award. 14 July 2006.
[219] Ibid. Para 254.
[220] CMS Gas Transmission Co v. Argentina, ICSID case No. ARB/01/08. Award. 12 May 2005. Para 114.
[221] Ibid. Para 121.
[222] DUPUY, P.-M., FRANCIONI, F., PETERSMANN, E.-U. et al.: Human Rights in International Investment Law and Arbitration. Oxford University Press: Oxford, 2009. p. 90.
[223] Sempra Energy International v. Argentina. ICSID case No. ARB/02/16. Award. 28 September 2007. para 332.

Consequently, in cases involving public service, such as water distribution, even though the state concludes a contract with investor, which may appear to have in effect transferring part of its duties on a foreign investor, it remains the state itself, which will be held responsible for non-compliance with the international law in cases of failure to provide the nationals with clean water. A right to water access is protected under the human rights legislation. In other words, in cases of privatization of public services, the state does not relieve itself from obligation to fulfil the corresponding human rights or environmental obligations towards its nationals by transferring it to the foreign investor.[224]

3.2.3. ***State Responsibility***

The norms regulating the responsibility of the state stem from the customary international law. It is however necessary to first differentiate the terms *state responsibility* and *state liability* because even though the two terms sometimes overlap each other, they are not synonyms. Whilst the responsibility arises as a consequence of the breach of an international obligation, the liability arises from injurious consequences of lawful activities.

The discussion over the differentiation of the two terms revolves back to the *Trail Smelter* case,[225] where the tribunal had to deal with the consequences of the polluting activities of a Canadian corporation in the state of Washington, USA. The final award set a new rule of law, claiming that it is the responsibility of a state to at all times observe its duties to protect other states against harmful acts by individuals within its jurisdiction.[226] Also the Art. 1 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts[227] (the "**ILC Articles**"), drafted sixty years later, supports this view and sets basic principle that an internationally wrongful act by a state entails the international responsibility of that state.

[224] BALAŠ, V.: Interface between Human Rights Protection and Investment Protection. In ŠTURMA et al.: Studies in International Law. Univerzita Karlova v Praze: Praha, 2011. p. 150.
[225] Trail Smelter Arbitration (United States v. Canada). 3 U.N. Rep. International Arbitral Awards 1905 (1941).
[226] Ibid.
[227] Draft Articles on Responsibility od States for Internationally Wrongful Acts, with commentaries. Adopted in 2001 by International Law Commission.

Kiss [228] and Shelton [229] remarked that the *Trail Smelter* case opened for "*discussion responsibility and liability in environmental law but left open the question of whether a state executing due diligence would be liable if transfrontier harm results despite the State's best efforts – whether there would be strict liability.*"[230] As the tribunal did not provide any guide to distinguish the threshold, the issue is whether the state would be liable only on fault-based conduct for reckless or negligent behaviour in opposition to the strict liability. Kiss and Shelton assume that the "*legal consequences of environmental harm cover both the state responsibility for violation of international law and liability for harm caused by activities allowed by state. The latter is strict or absolute liability*."[231] In the environmental field, it is still problematic to invoke the state responsibility, as it requires two conditions to be met: firstly, breach of international obligation, and secondly, the act that constituted breach must have been contributable to the state. Consequently, because the state responsibility may only be invoked out of illegal acts, it is leaving the – even sever – environmental damage unpunishable, as long as it is produced in line with the law.

Moreover, as for the issue of attribution of the responsibility, the states shall bear consequences also for the actions made by their organs or authorities. In many developing countries, the control over the areas of trade, which the multinational corporations seek to enter, is exercised within the state agencies or entities.[232] Any failure of those, resulting in devaluation or expropriation of the foreign investment, is accountable to the state itself.

As set out in Art. 4 of the ILC Articles, the states are responsible for their organs at all levels and regardless of the position of the organ in its administrative

[228] Alexandre-Charles Kiss was a Hungarian professor and international law expert affiliated with Paris Institut of Political Studies.
[229] Dinah L. Shelton is an American professor and international law expert at The George Washington University.
[230] KISS, A., SHELTON, D.: Strict Liability in International Environmental Law. GWU Legal Studies Research Paper No. 345. To be found at: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010478>. Accessed 15 April 2017.
[231] KISS, A., SHELTON, D.: International Environmental Law (2ed.). Transnational Publishers Inc.: U.S., 2000. p. 606 in KRALJ, L.: State Responsibility and the Environment.
[232] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 60

organization.[233] The customary international law principle has been followed by various investment tribunals and applied to the relationship of states and foreign investors. The example of application can be found in *CMS v. Argentina*, where the ICSID Tribunal states: "*[…] it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State Responsibility adopted by the International Law Commission is abundantly clear on this point.*[234]

The rule exemptions can be, however, made by virtue of specific reservations made in accordance with Art. 19 of Vienna Convention on the Law of Treaties.

3.3. Investor

3.3.1. Definition of the Investor

Defining the investor is one of the key elements determining the scope of application of rights and obligations under international investment agreements.[235] In other words, the investment agreement only applies to investments made by investors who qualify for coverage under the relevant provisions of the investment treaty. Foreign investors usually seek legal protection, clarity, and stability for their investments.[236] From the perspective of a host state as a capital importing country, the definition identifies the investors, whom the host state plans to attract, by providing them *inter alia* the legal protection under the treaty.[237] To be attractive for foreign investors, the definitions of the investor tend to be rather broad.

Generally speaking, foreign investor is represented by a natural or legal person of one country who invests a financial funds or capital into another as an investment.[238] It is absolutely crucial for all the parties to have the terms *investor* and *investment* carefully defined in the relevant treaty because investors and investments encompassed under the treaty are then entitled to enjoy the protection thereunder. The scope of

[233] SCHREUER, C.: Investments, International Protection. Para 96 et seq. To be found at: <http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf>.Accessed on 4 April 2017.
[234] MS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8. Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003. Para 108. - See more at: http://www.italaw.com/cases/288#sthash.NlIlqJAP.dpuf
[235] OECD: Definition of Investor and Investment in International Investment Agreements. p. 9.
[236] Reconciling investment in the Energy Sector, p.26
[237] Ibid.
[238] SALACUSE, J. W.: The Law of Investment Treaties. Ibid. p. 33.

rationae personae directly depends on the definition of the investor pursuant to the investment agreements. Taking an example of the BIT, under the Czech-Chinese BIT (2007), the *Art. 1 Definitions* therein defines the investor broadly as:

> *"(a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;*
>
> *(b) legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of-either Contracting Party and have their seats in that Contracting Party whether they are profitable or non-profitable and whether their liability is limited or not."*[239]

The similarly broad definition is used in the ICSID Convention, whose Art. 25 also limits the jurisdiction of the ICSID to:

> "*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."*[240]

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[239] Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments. To be found at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/725>. Accessed on 1 April 2017.

[240] Convention on the Settlement of Investment Disputes between States and Nationals of Other States. To be found at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>. Accessed on 1 April 2017.

The broadest definition is however contained in the ECT, which strengthens its protection also over a wide range of potentially investable individuals and entities who are not nationals to the ECT contracting party, provided that such investor has at least a permanent residence in the ECT signatory state or is organized in accordance with the laws of the ECT signatory state. The Art. 1(7) of the ECT defines the investors covered by the treaty as follows:

> "*(a) with respect to a Contracting Party:*
>
> *(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;*
>
> *(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;*
>
> *(b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party."*[241]

Even short comparative analysis shows that the broadly-defined investors can be entities in different forms, ranging from private companies or multinational corporations to even state corporations or sovereign wealth funds. The latter is currently frequently used in case of China, which put its surplus capital for making investment in developed countries into several sovereign wealth funds.[242] This shows that the government-controlled entities are not precluded from the investment protection as long as they act in commercial rather than in governmental capacity.[243]

The foreignness of the investor depends on the nationality of the investor. It is in contrast irrelevant, whether the investment as the capital is of foreign origin as well.[244] Hence the substantive standards in the treaty will only apply to the investor who are the

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[241] Energy Charter Treaty. To be found at: < http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_charter_en.pdf>. Accessed on 1. April 2017.

[242] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 68

[243] DOLZER, R., SCHREUER, C.: Principles of International Investment Law. Ibid. p. 46.

[244] Tradex v. Albania. Award on Merits. 5 ICSID Reports 70, paras 108-111. (29 April 1999). Olguín v. Paraguay. Award on Merits. 6 ICSID Reports 164, para 66 (26 July 2001. Tokios Tokelés v. Ukraine. Decision on Jurisdiction. 20 ICSID Review-FILJ 205 (29 April 2004).

respective nationals, in other words investor must prove it has the nationality of one of the state parties to the relevant BIT or other international convention such as ECT or ICSID Convention. Furthermore, the jurisdiction of any international tribunal is determined also by the investor's nationality therefore failure to prove the relevant nationality of the claimant precludes the tribunal to rule on merits of the case.

3.3.2. Obligations of Investing Multinational Corporations as Non-State Actors under the International Investment Law

The multinational corporation are relatively new phenomenon of the last decades, yet they are dominant actor on the international economic scene, enjoying an increasing importance.[245] With their immense financial recourses and power they are competing with and sometimes even trumping the states. They are capable of scuttling the economy of weak host state just by relocating its subsidiaries to different state, potentially capable of influencing the political course of a country. Moreover, multinational corporations often have their home state standing behind them and it has been already evidenced that their lobby is also powerful as they are able to influence their home state to maintain favourable stances towards investments or to inflict the uncooperative state with the economic penalisation.[246]

Still, their role in the international law is limited and they remain incapable of bearing rights and duties under the international law.[247] The normative dimension of state-centrism is nevertheless challenged already as the recognition of their responsibility is slowly emerging.[248] Society creates pressure on the transnational corporations in order to make them admit their accountability for the actions in areas like human rights, bribery control, or environmental protection (*see sub-section 3.3.3*). The scholars are proposing the solutions that would *de lege ferenda* impose international legal obligations onto corporations,[249] arguing that the factual change of a role of non-state actors in the international law should be mirrored in the imposition of international obligations directly onto non-state actors.[250] One of the reasons is, as De

[245] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 61.
[246] Ibid.
[247] MUCHLINSKI, P.: Multinational Corporations and the Law (2ed.). Oxford University Press: Oxford, 2008.
[248] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 62.
[249] Ibid.
[250] Ibid.

Schutter points out, that the corporations "*may generally be said to benefit from complete impunity when they commit human rights violations abroad*" because "*the international law is classically addressed to states*."[251] Similar concerns have been raised with respect to environmental protection.

It is predicted by certain authors that the current regime will soon be transformed into – if not even replaced by – more effective framework in this regard.[252] As private sector possesses capital and resources, it has become abundantly clear that the public sector will not be able to fully financially support the movement from a brown (high-carbon) to a green (low-carbon) economy. Therefore, a considerable regulatory change is needed.[253]

For an investor, the compliance with the regulatory measures usually represents additional and unwanted costs. As such, the environmental standards of the host state can influence the profitability and attractiveness of the investment greatly.[254]

The state of the environment depends to large extent on how active role the state plays in taking care of the public health of its nationals. This is done through setting the environmental standards for investors. Those standards may take various forms: control of the water pollution level, restrictions on emissions of harmful substances into the atmosphere, or waste management related restrictions. The newly adopted environmental standards might be also a result of a new international treaty requiring the host state to comply with certain provisions of the international treaty.

By theory, the foreign investor and its property are subject to those laws and regulations of the host state once they voluntarily make entry into it. By entering, they submit themselves to the state's sovereignty.[255] Before acquiring the permission for entry of the foreign investment, the investor may be required by law to make environmental impact studies and present them to state. This allows state to evaluate the

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[251] SCHUTTER de, O.: The Accountability of Multinationals for Human Rights Violations of European Law in Alston, P: Non-State Actors and Human Rights. Oxford: Oxford University Press, 2005. pp. 227-230.

[252] ALSTON, P.: The 'Not-a-cat' Syndrome: Can the Human Rights Regime Accommodate Non-State Actors in ALSTON, P.: Non-State Actors and Human Rights Oxford: Oxford University Press, 2005. p. 6.

[253] DIEPEVEEN, R., LEVASHOVA, Y., LAMBOOY, T.: Bridging the Gap between International Investment Law and the Environment. Utrecht Journal of International and European Law: Issue 30, No. 78. (2014). pp.145–160. To be found at: <http://doi.org/10.5334/ujiel.cj>. Accessed on 23 April 2017.

[254] SUBEDI, S. P.: International Investment Law, Reconciling Policy and Principle, p. 160

[255] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 88

effects of the potential investment prior to entry and in case the studies show that the investment represent harm to the state environment it can deny entry to the investor. This process is in the line with the public interest of the nationals of the state and the natural interest in good environment.

However, even in case that the state take passive role in regarding the national-level environmental protection, there is a possibility that investor will implement the environmental standards nevertheless due to its good will or a civil society pressure.

3.3.3. ***Corporate Social Responsibility***

Corporate Social Responsibility ("**CSR**") is defined as the "*idea that a company should be interested in and willing to help society and the environment as well as be concerned about the products and profits it makes.*"[256] As the definition suggests, the two main focuses of the theory are the environmental degradation and human rights violations.

Notwithstanding the CSR as a soft law phenomenon has not yet crystallized into a rule of customary international law,[257]it is gaining an increasing importance. It is already influential to the state-investor relations, creating expectations of those actors to behave in certain manner and to influence their decisions. In order to regulate its rapid progression, there are even calls for conclusion of a multilateral treaty on Corporate Social Responsibility.

The trend of proliferation of bilateral and regional treaties resulted in the boost of international trade. Although there are entirely positive aspects of investing as incoming capital or newly created jobs, the large corporations, usually profiting from cross-border investments, are subject to severe criticism for only being interested in the profit at the expense of global poverty or environmental degradation.[258]

This has formed numerous civil society groups with main activity consisting in creating political pressure on the investors. The civil society pressure is strong and stable enough to make the corporations to voluntarily spend amounts to improve their

[256] Definition is taken from the Cambridge Business English Dictionary. Cambridge University Press. 2017.
[257] BKORKLUND, A. K.; REINISCH, A.: International Investment Law and Soft Law. Cheltenham: Edward Elgar Publishing Limited, 2012. p. 96.
[258] SORNARAJAH, M.: The International Law on Foreign Investment. p.143.

public image. In order to avoid the widespread criticism, the large corporations nowadays find themselves in the need to apply social and ethical standards to their businesses.[259]

In the same time, the *Global Forum on Responsible Conduc*t ("**GFRC**") under OECD explicitly states: *"all actors – not only enterprises – have a responsibility for building a healthy business environment. Governments cannot abdicate their responsibility for protecting internationally recognised fundamental rights and ensuring good governance, fair regulations, and transparency. Labour and civil society have to engage constructively to ensure accountability and provide a voice for the most disadvantaged. Demonstrating a can-do attitude is a must for moving forward."*[260]

The GFRC Summary Report thus reminds that to pursue the sustainable development objectives is a challenge not only for corporations but rather a joint challenge of all the actors.

3.4. Non-Governmental Organizations

In addition to the states and the investors, there are other actors that influence the development of rules by articulation of environmental aspirational standards of conduct in the area of environmental policy making. NGOs have been increasingly active in the regulation of environmental aspects of businesses usually in accordance with the public interest and civil society's demands. NGOs increasingly perform roles originally assigned to state agencies.[261] Their activities range from controlling the market and collecting the information, suggesting improvements, monitoring corporate environmental excesses and criticizing them if found, creating public pressure on companies to adjust them or even placing burning issues on the domestic and international political agenda. Although they lack legal personality in the international law, their involvement in both the international organizations and the individual nations

[259] LINDGREEN, A. - SWAEN, V.: Corporate Social Responsibility. International Journal of Management Reviews. Issue 12, No. 1. (2010)
[260] OECD: Global Forum on Responsible Conduct. To be found at: < http://mneguidelines.oecd.org/global-forum/2013GFRBC_SummaryReport.pdf >. Accessed on 2 April 2017.
[261] TARLOCK, D.: The Role of Non-Governmental Organizations in the Development of International Environmental Law. p.69

has been hailed as meaningful and positive as they fill a void in domestic and international environmental competencies.[262]

In China, public awareness of environmental protection has historically been rather weak.[263] During the initial stages of economic reforms, the attention of the society has been turned to different issues such as poverty. The growing pollution has not been in the centre of the attention of the society therefore there were no calls for creation of the environmental NGOs neither. At the Olympic Games in 1992, the Chinese officials failed to answer the question if there were any environmental NGOs in China. In reaction, the first NGO has promptly been established in 1994, soon after. It was named Academy for Green Culture (nowadays known as Friends of Nature) and it was affiliated to the non-governmental Academy for Chinese Culture. By 2001, the number of environmental NGOs reached 2,000 and nowadays there are over 3,500 such NGOs in China. Unfortunately, most of the Chinese social organizations operate in a legal grey zone in order to avoid the onerous requirements of legal registration or compliance with the strict funding regulations.[264] In reaction to the problem, the administrative body of China's State Council recently adopted two regulating laws, strengthening the ex-post regulation of the NGOs. Firstly, the new "Charity Law", effective from 1 September 2016, which sets regulations for domestic NGOs (also dubbed as "social organizations" in China), and as of 1 January 2017, the second new legislation known as the "Foreign NGO Law" aiming to regulate overseas organization that operate in China.[265]

The new restrictive legislation is subject to criticism as it substantially restricts the conditions for operation of the NGOs. The critics claim that the social services that NGOs and other civil society organizations and individuals provide are perceived as threats to the state as they are allegedly "endangering the national security and violating public morality," often as a result of vast information disclosure. As Yu Keping, a famous scholar and civil society expert, fittingly remarked, "*the actual space for civil*

[262] TARLOCK, D.: The Role of Non-Governmental Organizations in the Development of International Environmental Law. p.64
[263] http://china.org.cn/english/2002/Jul/36833.htm
[264] http://china.org.cn/english/2002/Jul/36833.htm
[265] The official website of a non-profit public policy organization Brookings. To be found at: < https://www.brookings.edu/blog/up-front/2016/12/15/the-state-of-ngos-in-china-today/>. Accessed on 20 April 2017.

society organizations is much larger than the institutional space allowed by formal laws and regulations."[266]

3.5. Intergovernmental Organizations

Intergovernmental Organizations (IGOs) derive their existence from the existence of the sovereign states. IGOs are based on the consent of the states accepting the membership in order to fulfil a predefined common purpose. IGOs are established by a ratified treaty or charter concluded by the state representatives. One of the main difference from the NGOs is that the IGOs, disposing of an international legal personality, may also have a quasi-legislative power allowing them to pursue the development of substantive international rules and procedures within their scopes. Finding a consensus on certain issues of international investment law between the member-states is often difficult, which is projected in frequent failures in relation to the adoption of international rules. However, IGOs like OECD[267], ILO[268], UN Sub-Commission on Human Rights, UNCTAD[269] or the World Bank's ICSID[270] play increasingly important roles especially in monitoring the issues globally, carrying out the analyses and their evaluation, development of respective norms or investor-state dispute settlement.[271]

Due to their quasi-legislative power, IGOs often aspire to fill the gap in the regulatory order by proposing voluntary codes of conduct to the international companies. Their aim is to redefine market considerations and bring the attention to the implementation of sustainable development into practice. Having a soft law nature, the codes are often subject to criticism for being toothless when it comes to dealing with their breaches by their signatories. However, spurring the public debate on related issues, they serve important roles in the development of new concepts and principles.

Moreover, their function is also to serve as a demonstration of investors' good will to abide by them. When integrating those codes into the IIAs, they place the obligations therein on both the state parties and the foreign investors.

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[266] The official website of The International Centre for Not-for-Profit-Law. To be found at: <http://www.icnl.org/research/monitor/china.html>. Accessed on 20 April 2017.
[267] The Organization for Economic Co-operation and Development
[268] The International Labour Organization
[269] The United Nations Conference on Trade and Development
[270] The International Centre for Settlement of Investment Disputes – World Bank
[271] MUCHLINSKI, P.T.: Policy Issues. Ibid. p. 6.

- **UN Principles for Responsible Investment**

United Nations Principles for Responsible Investment ("**UNPRI**") is a normative code for corporate conduct applicable to institutional investors. This code was formulated in 2006 by the UN Global Compact and UNEP Finance Initiative. Gradually more than 1700 signatories joined, many of them being the major financial institutions responsible for control over US $59 trillion of assets under management as of April 2015, a 29% year-on-year increase.[272] The UNPRI's mission states: "*We believe that an economically efficient, sustainable global financial system is a necessity for long-term value creation. Such a system will reward long-term, responsible investment and benefit the environment and society as a whole.*"[273]

In order to fulfil its objectives, the UNPRI consists of six principles reflecting the increasing relevance of environmental, social, and corporate governance for investment practice and decision-making policies. The investors publicly commit themselves to adopt and implement them. Although UNPRI is contributing to the implementation of sustainable development considerations and normalizing the consideration of social and environmental factors in investment related processes, it also faces criticism for the lack of capacity to bring those well-meant changes in effect. UNPRI is primarily upbraided for the lack of its capacity to require its signatories to provide formal reports or quotas on their implementation progress or for not putting enough pressure on its signatories so they would be forced to reconsider the corporate social responsibility or sustainable development factors as the decisive ones in their investment strategies.[274]

Interesting fact is that while there are more than 1700 signatories to date, only seven of them are from China.

- **The Equator Principles**

Another example of a voluntary code setting the specific procedures related to project financing, hence creating the risk management framework, are the Equator Principles. Proposed by the World's Bank International Finance Corporation in

[272] Official UNPRI website. To be found at: https://www.unpri.org/page/signatory-base-aum-hits-59-trillion. Accessed 2 April 2017.
[273] Ibid.
[274] BKORKLUND, A. K.; REINISCH, A.: International Investment Law and Soft Law. Cheltenham: Edward Elgar Publishing Limited, 2012. p. 104.

cooperation with private investment banking houses, they respond to the long-lasting criticism of the civil society and the NGOs. Their objective is to compel the private equity sector to engage in more responsible funding of socially and environmentally problematic projects.

The Equator Principles were intended to become the industry standard for assessment processes of project financing. To date, 89 financial institutions in 37 countries have officially adopted the Equator Principles.[275] China is represented therein by two signatory banks: Industrial Bank Co., Ltd., and Bank of Jiangsu.[276]

In the view of the NGOs, the key measure success of success of the Equator Principles is how they are and will continue to be implemented by each of the signatory financial institutions. With the specific focus on commitment to sustainability, the NGOs see it as a rather limited change in current business practices.

- **The Collevecchio Declaration on Financial Services**

NGOs also specifically points out the commitments of banks to measure the environmental and social impacts of their portfolios made through the Collevecchio Declaration on Financial Services.[277] Created by a coalition of NGOs in 2003 with the aim of achieving the sustainable finance, the Collevecchio Declaration *inter alia* prevents the banks from unjustly benefiting from their power at the expense of communities and the environment, for example by charging indebted countries high risk premiums during financial crises thus blocking progress towards equity and sustainability.[278] In respect to sustainability, the financial institutions should also fully integrate the consideration of ecological limits, social equity and economic justice into corporate strategies and commit to do no harm by preventing or at least minimizing the environmentally detrimental impacts of their operations.[279]

[275] The Official website of the Equator Principles. To be found at: < http://www.equator-principles.com/index.php/about-ep>. Accessed on 2 April 2017.
[276] The Official website of the Equator Principles. To be found at: < http://www.equator-principles.com/index.php/members-reporting>. Accessed on 2 April 2017.
[277] https://www.globalpolicy.org/component/content/article/213/45635.html
[278]http://www.banktrack.org/download/collevechio_declaration/030401_collevecchio_declaration_with_signatories.pdf
[279] Ibid.

4. CHINESE GREEN CONCERN: CURRENT ENVIRONMENTAL CHALLENGES IN CHINA

China is currently facing severe environmental damage, an unwanted by-product of the unprecedented industrial growth of last few decades, which transformed a poverty-stricken nation into a global growth engine.

Realizing that causing further damage to native ecosystems may result in irreversible consequences, China has pledged to accelerate its effort to combat the pollution. The country has already replaced and revised its environmental legislation, strengthened its enforcement, and now it plans to attract foreign investors. The lure will be an ample opportunity to co-invest with the government into eliminating the sources of pollution, into lowering the emission per unit of output, or into increasing the clean energy contribution.

So far, the intended strategy has been successful. The predictions show, that if China continues its efforts, it may soon turn from the biggest polluter into the eco-friendly economy, and possibly even into the environmental leader of the world.[280,281]

4.1. The Rise of the Chinese Economy and the FDI

Chinese remarkable economic reforms begun in December 1978 with the objective of achieving the market transition and to open the door to foreign businesses aiming to set up in China. For that reason, the newly announced policy is often called the *Open-Door Policy*. The inflow of the foreign investors, who introduced new technologies and new corporate governance trends, has undoubtedly contributed to the development of the Chinese economy. Being newly exposed to the international market competition, the companies on the domestic market were forced to adapt themselves to the new rules, which significantly accelerated the transformation from centrally planned economy to a socialist market economy.

[280] Greenpeace: Clean Air Action Plan: The Way Forward. (2016). To be found at: < http://www.greenpeace.org/eastasia/Global/eastasia/publications/reports/climate-energy/2016/Clean%20Air%20Action%20Plan,%20The%20way%20forward.pdf>. Accessed on 3 March 2017.

[281] LYNAS, M. (Alliance for Science, Cornell University): Trump's climate policies put China in charge of our future. CNN (March 2017). To be found at: < http://edition.cnn.com/2017/03/28/opinions/trump-is-leaving-climate-change-all-to-china-opinion/index.html>. Accessed on 30 March 2017.

The Chinese transition to the market-oriented economy undertook a different path from the other market transformations of the twentieth century. Whilst the countries of the former Soviet Union took a path of a democratization followed by an economic liberalization, China launched economic reforms and transition to market-oriented economy without democratization, allowing liberalization only incrementally. Moreover, whilst the Czech Republic and Russia took a path of voucher mass privatization, China delayed privatization until relatively recently, and Hungary and Poland avoided privatization completely.[282]

From the economic point of view, the result of these economic reforms was, and still is, rather impressive. China managed to extricate itself from the influence of Maoist economic development strategy. From 1978, it succeeded to more than quadruple the gross domestic product ("**GDP**", USD 178.283 bn. in 1978) by 1996 ($ 863.746 bn.), to multiply it tenfold by 2004 (USD 1.955 tn.) and sixty-seven-fold by 2015 (USD 11.955 tn.).[283,284]

The growth of the economy is projected to the area of foreign direct investment. The countries of developing Asia are generally considered increasingly successful in foreign investing. In 2016, the region jointly welcomed foreign direct investments inflows in the total amount surpassing half a trillion US dollars.[285] Four host economies, however, seem to prevail and jointly attract more than three quarters of the aforementioned investments flowing into developing Asia: China, Hong Kong, Singapore, and India.[286] When comparing the two top-ranked countries of the region, China and India, India falls far behind China with its FDI inflows of USD 44 bn. and outflows of USD 7,5 bn. leaving China and Hong Kong the regional champions.[287] In 2015, Chinese inward FDI represented more than USD 135 bn. and China jointly with Hong Kong, having focused mainly on equity investment, even managed to

[282] QIAN, Y.: The Process of China's Market Transition (1978 – 1998): The Evolutionary, Historical, and Comparative Perspectives. p. 1.
[283] YAO, S.: Economic growth, income inequality and poverty under economic reforms. The Journal of Development Studies, Vo. 35, Issue 6. 1999.
[284] The World Bank data: Available from: < http://data.worldbank.org/country/china?view=chart> . Accessed on 4 April 2017.
[285] UN: World Investment Report 2016. Ibid.p. 45
[286] Ibid.
[287] The official website of UNCTAD. Available from: < http://unctad.org/sections/dite_dir/docs/wir2016/wir16_fs_cn_en.pdf>. Ibid.

increase the total inflows to USD 175 bn. in 2015.[288] Having lost its position as the world's largest FDI recipient in 2016, China currently ranks third after the United States and Hong Kong according to 2016 UNCTAD World Investment Report. In comparison, in 2015, the outward FDI reached more than USD 127 bn. in China.[289]

Despite China playing an increasingly important role within the global economy and already possessing the second largest economy in the world, it remains labelled as a developing country due to its low per capita income. The remarkable economic ascendance followed by a continuing integration into the global economy brought on Chinese population of 1,357 bn. many challenges as well.[290,291] Apart from severe environmental damage, China is still fighting issues such as rapid urbanization, poverty in rural areas, high inequality, corruption, or aging of the population.

4.2. Material Sources of Law: Current Environmental Concerns in China

Chinese economy is heavily dependent on inputs of natural resources and raw materials. China is a large energy consumer as its amount of energy per unit of GDP is one of the highest in the world. The country also consumes 41-61% of the world's cement, coal, steel, aluminium, or copper, and therefore its industry and investments are highly dependent on the aforementioned commodities. The energy- and resources-intensive growth model together with neglect of the environmental policy regulation over the past decades resulted in China generating more pollution than any other country in the world.[292] According to Energy Information Administration, China has

[288] According to World Investment Report 2015, the increase has partially originated in a major corporate restructuring of Cheung Kong Holdings and Hutchison Whampoa of a family of a well-known Hong Kong's magnate Li Ka-shing. Sir Li Ka-shing is a Chinese inventor, philantropist, and business magnate. He serves as the Chairman of the Board of Cheung Kong Holdings and Hutchison Whampoa Limited. His estimated net worth is $31.8 bn. in October 2016 according to Bloomberg. [Bloomberg's website. Accessed 31 October 2016. Available from: <http://www.bloomberg.com/profiles/people/1415913-ka-shing-li>]

[289] The official website of UNCTAD. Available from: < http://unctad.org/sections/dite_dir/docs/wir2016/wir16_fs_cn_en.pdf>. Accessed on 17 April 2017.

[290] National Bureau of Statistics of China

[291] Official website of World Bank. To be found at: http://www.worldbank.org/en/country/china/overview. Accessed on 14 April 2017.

[292] ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. p. 24. To be found at: < http://www.goldmansachs.com/our-

outranked any other country as it produces total carbon dioxide emissions from the consumption of energy of 9,377 million metric tons.[293] Moreover, about 60% of the groundwater in China is unfit for human consumption and 12mn tons of grain are contaminated annually by heavy metals.

Pan Yue, the former Deputy Minister of the State Environmental Protection Administration (now Ministry of Environmental Protection), claims that the main reason behind the continuing deterioration of the environment is a national policy system mistakenly judging the regions solely by their economic development and not taking into account other possible criteria of evaluation, such as compliance with the environmental limits.[294] The unbearable environmental situation in the country is severely affecting the biophysical environment and human health. According to the experts, the three most-pressing environmental problems include the air pollution and water and soil contamination.[295] Recently, the issue of waste management came to the fore with the rapid development of online retail shopping.

Starting with the air, China was responsible for 27% of overall global emissions in 2014. Being currently the largest emitter of the greenhouse gases, having overtaken the USA in 2007, Chinese air continues to deteriorate. Studies show that the major sources of air pollution in the cities are motor vehicles, industrial production, coal, and dust. The major pollutants outside the cities are sulfur dioxide, nitrix oxide, nitrogen dioxide, and dust, which are emitted in connection with the operation of electricity generation and production of industrial material.[296]

Over 2013, there were 35.9 haze days on average and the number of cities with unhealthy or hazardous air quality equalled 67 among 74 monitored cities.[297] This being

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thinking/pages/interconnected-markets-folder/chinas-environment/report.pdf>. Accessed on 3 March 2017.

[293] The official website of EIA. To be found at: < https://www.eia.gov/ >. Accessed on 3 March 2017.

[294] VERMANDER, B.: Corporate Social Responsibility in China: A Vision, an Assessment and a Blueprint. Singapore: World Scientific Publishing Co.Ptc.Ltd. (2014)

[295] ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 3.

[296] Ibid.

[297] Ministry of Environmental Protection of China: Annual Environmental Conditions Bulletin of China. 2013.

the worst result in last 50 years, only 4% of the cities reached the national standards of the Air Quality Index, the urban air quality measuring system.[298] Using the world standards proves the problem being even bigger. Pursuant to the study conducted by Asian Development Banks, in 2012, a mere 1% of China's five hundred largest cities were able to fulfil the World Health Organization's air quality standards.[299]

Beijing experienced a smog and haze severe enough to earn a nickname *airpocalypse* in January 2013. The air was filled with hazardous articles in concentration 40 times higher than is the level deemed safe by the standards of the World Health Organization. Understanding the severity of the situation, China has established an emergency alert system to warn the residents when a severe situation occurs. In the terms of the new emergency alert system, in December 2015, Beijing experienced the very first, and so far the only one, issuance of a red flag alert for heavy air pollution. The measure automatically required schools to close, outdoor construction and factory manufacturing were halted. In Beijing government also implemented a staggered vehicle ban under which only the vehicles with the even-numbered registration plates were allowed to operate one day, switching to the odd-numbered the other day.[300] In reaction, the Asian Development Bank approved a USD 300 mil. loan to help Chinese government combat critical pollution levels in Beijing city and its surrounding area. The curiosity is that the severe situation is turning profitable for few enterprising minds. Except from private investments into environmental sector, business with cans of fresh air has become a brand new and profitable way of doing business in China, attractive both for the domestic and the foreign entrepreneurs.[301]

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[298] ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 27.

[299] Council on Foreign Relations. XU, B; ALBERT E.: China's Environmental Crisis. Last updated in 2016. To be accessed at: http://www.cfr.org/china/chinas-environmental-crisis/p12608. Accessed on 12 March 2017.

[300] The official website of the Beijing Government. To be found at: http://www.ebeijing.gov.cn/BeijingInformation/BeijingNewsUpdate/t1328407.htm. Accessed on 12 February 2017.

[301] See media - CNN source: http://edition.cnn.com/2016/02/08/world/fresh-air-britain-china-bottles/; The Telegraph: http://www.telegraph.co.uk/news/worldnews/asia/china/12051354/Chinese-buy-up-bottles-of-fresh-air-from-Canada.html , or MailOnline: http://www.dailymail.co.uk/news/article-2271690/Bottled-AIR-Chinese-multimillionaire-sells-EIGHT-MILLION-cans-fresh-air-TEN-DAYS-pollution-levels-climb-record-high.html . All accessed on 27 April 2017.

Second great environmental issue in China is water contamination. The economic development has created substantial pressure on country's water resources through the increase in industrialization, urbanization and agriculture development. Similar to the case of air, water pollution is currently a cause of vivid public concern often resulting in social unrest. There is, however, a good cause for concern. According to Ministry of Land and Resources of the People's Republic of China, in 2013, 60% of groundwater exceeded level IV of pollution on a scale used by China within a range between I to V. Worryingly, in the water-scarce northern China, about 65% of drinking water comes from groundwater.

The worst and perhaps the most dangerous issue, as it had been significantly underestimated, is soil pollution. The first official statistics on contamination of soil were only released in April 2014 and showed that 16 % of Chinese land is polluted beyond acceptable standards and 19.4 % of the arable land is badly contaminated by heavy metals (such as cadmium, mercury, arsenic, lead, and chromium) and organic pollutants (such as PAHs and petroleum hydrocarbons).[302] Before 2014, no official survey had been conducted in this respect. As a consequence of numerous food scandals, the demand for organic, safe, and clean food rises. The Ministry of Environmental Protection estimates that heavy metals as products of soil contamination together with the water pollution affect 12 mn. tons of grain in China every year, adding that the amount would suffice to feed 24 mn. people – a number equal to the population of the whole Australia.[303]

Lately, with the rapid development of the Chinese e-commerce, there were rising calls for implementation of a national system to regulate the waste management, especially for the regulation of packaging of goods purchased online. After opening a parcel, most individuals throw the plastic coverage into trash bins without classifying it. As the plastic material remains not distinguished from other rubbish, it is disposed of by traditional methods of waste management, such as sanitary landfill or incineration. As

[302] ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 8.
[303] ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 9.

the deputy head of the Qingdao Research Centre of the Beijing Institute of Graphic Communication, Zhu Lei, points out, in 2015 the total of 20.67 bn. delivery parcels were discarded, buried or burned.[304] This practice represents a heavy burden to the environment, as it pollutes the land and some of the burning packages may even leak carbon dioxide or several kinds of toxic gases (as for example methane), which aggravate the greenhouse effect.[305] It is therefore at utmost importance to build a green logistics system in China.

The interest in current Chinese environmental issues transcends the Chinese borders and attracts great attention not only in China but also world-wide. The history of pollution in developed economies such as US, Japan or the UK fortunately shows that if the appropriate measures are taken in time, even severe pollution is curable.[306]

4.3. Formal Sources of Law: Chinese Green Legislative Revolution

The Chinese government has formally begun with the first environmental regulation even before the economic reforms of 1978, back in the 1950s and the 1960s. The regulation concerned the issues of water and soil conservation, the drinking water, and the forestry.[307] The first national conference on environmental protection was held in 1973. The revised Criminal Law of People's Republic of China addressing the "*Crimes of damaging environmental and resource protection*" of 1979 was an important breakthrough as it represented the first piece of legislation concerned with environmental crime in China.[308] China has incorporated its environmental concerns, even into the Art. 26 of the Constitution, stating: "*the State protects environment and natural resource and prevents and eliminates pollution and other hazards to the public.*"[309] The Environmental Protection Law of the People's Republic of China was promulgated in 1989, and it is still effective, albeit many times amended. Until the end

[304] http://www.chinadaily.com.cn/china/2016-04/09/content_24393971.htm
[305] SHEN, S.: Research on Waste Management in Cities in China. Inheritance & Innovation, Vol. 20 (2011), pp. 78-79.
[306] Zhu J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 58.
[307] LESTER, R., SILK, M.A.: Environmental law in the People's Republic of China. New York: Quorum Books, SEPA (1998).
[308] SEPA: Report on the state of environment in China, 1997. Beijing (1998).
[309] ZHENG, S.: Environmental regulatory and policy framework in China: an overview. Journal of Environmental Sciences. Vol. 13, No. 1 (2001). p. 123.

of the millennium, China has issued six other environmental protection laws, nine resource conversation laws and twenty-eight administrative regulations.[310] Despite the early existence of a relatively comprehensive environmental regulatory and policy framework, the environment continued to deteriorate.[311] The factors at fault might have been the effectiveness of the foresaid policies – the lack of information for target groups together with the lack of compliance monitoring and controls, the effectiveness of their enforcement, or, as the critics say, the leniency of the corrupted officials.[312,313] Another significant reason is the inefficiency to comply with the laws in a matter of basic economics. It often costs more to abide by the complex legal requirements than to maximize the profit and then to pay the fine for violating the law.

Nowadays, the environmental pollution reached the state serious enough to become a major factor behind social instability in China; even overshadowing other causes of mass disturbances, such as labour disputes, petition, land acquisition, urban demolition or conflicts between authorities and people.[314] In order to appease the most pressing public concern, the country's representatives were forced to react and – in the words of the president Xi Jinping – to effectively "*declare the war*" on the environmental pollution.[315] The central government announced the environment and sustainable development as one of the leading issues in the China's 13th Five-Year Plan (2016-2020).

As the previous attempts of government-led investments into environmental protection were not efficient, this time government had to shift its role from the investor to a real regulator. From the legal perspective, it (*i*) introduced several new environmental laws and regulations and reinforced other laws, which were already existing, (*ii*) including the energy sector. From the business perspective, (*iii*) the

[310] ZHANG, S.: Environmental regulatory and policy framework in China: an overview. Journal of Environmental Sciences. Vol. 13, No. 1. (2001). pp. 124.
[311] See section 1.2 of this thesis.
[312] Zhang, S.: Environmental regulatory and policy framework in China: an overview. Journal of Environmental Sciences. Vol. 13, No. 1. (2001). pp. 127.
[313] DIARRA, G.; MARCHAND, S.: Environmental Compliance, Corruption and Governance: Theory and Evidence on Forest Stock in Developing Countries. CERDI, Etudes et Documents, E 2011.01. (2011). To be found at: < http://cerdi.org/uploads/ed/2011/2011.01.pdf>. Accessed on 22 April 2017.
[314] Goldman Sachs Report (ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 8.
[315] Xinhua Insight: China Declares Was Against Pollution. Xinhua (2014). To be found at: < news.xinhuanet.com/english/special/2014-03/05/c_133163557.htm>. Accessed on 22 April 2017.

government opened up the environmental and energy sector to attract private investors creating new ample investment opportunities.

i. Environmental Regulation

The Constitution of the People's Republic of China

To begin with the Constitution of the People's Republic of China ("**Constitution**"), in its amended and currently effective Preamble, praises the former achievement of increasing the agricultural production. The country announces to "*persevere in reform and opening to the outside world*" and "*to self-reliantly modernize the country's industry* [and] *agriculture*".[316]

Moreover, Article 26 of the Constitution states: "*[t]he state protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests*."[317] Although the Constitution provides for state protecting the environment, it does not provide individuals with an explicit right to an unpolluted environment. In case a right for clean environment would develop through legislation, administrative or judicial decision, the individuals affected by undue factory pollution would not need to prove damage in order to obtain immediate relief under the Chinese law.[318]

The Environmental Protection Law

Another piece of the national legislation, the Environmental Protection Law was first promulgated in 1989, has been revised, and newly entered into force as amended on 1 January 2015. The objective of the new Environmental Protection Law of the People's Republic of China (the "**NEPL**") is determined in the Art. 1 of the NEPL, providing: "*This [l]aw is formulated for the purpose of protecting and improving*

[316] The Preamble of the Constitution of the People's Republic of China. To be found at:< http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372962.htm>. Accessed on 12 March 2017.
[317] The Constitution of the People's Republic of China. To be found at: < http://en.people.cn/constitution/constitution.html>. Accessed on 12 March 2017.
[318] COHEN, J.A.: China's Changing Constitution. North-Western Journal of International Law & Business, Vol. 1, Issue 1 (1979). To be found at: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1045&context=njilb. Accessed on 12 March 2017.

environment, preventing and controlling pollution and other public hazards, safeguarding public health, promoting ecological civilization improvement and facilitating sustainable economic and social sustainable development. "[319] The NEPL assures that the environmental protection considerations are incorporated in socioeconomic development plans.

The novelized law includes many important additions and revision in comparison to its predecessor. It mainly reflects the governmental effort to ensure the compliance of the subjects by rising the consequences for violating environmental laws. In this regard, it introduces a daily penalty for the environmental regulation breaches.

Secondly, it expands the scope of projects, which are subjected to environmental impact assessment conducted by local government officials, to whose performance the polluter's assessment is linked. Under Article 68 of the NEPL, the government officials may now be subjected to severe penalties as demotions, dismissals, and criminal prosecution should they commit unlawful act, such as granting an unlawful permit or approving EIA document or covering up violations.[320]

Thirdly, with NEPL coming into force, its Art. 58 of the NEPL assures that the non-governmental organizations are actively legitimated to bring a lawsuit against the polluter in public interest. The conditions upon which the public interest lawsuit can be addressed, are that the NGO is registered with the civil affairs department or above the municipal level (1), and that it has been focused on environmental issues for at least five consecutive years (2). It is estimated that the two limitations will reduce the number of the NGOs with the possibility to file a lawsuit against the polluter to approximately three hundred. The lawsuit may only be filed against the polluters, and not the authority which fails to properly enforce the law. Also, the lawsuit can only be brought by the NGOs, and not the individuals.[321]

Fourthly, the NEPL provides protection for whistleblowers reporting the non-compliance with the environmental legislation. In order to both encourage public involvement in monitoring the corporations and controlling the work of the regulatory

[319] Art. 1 of the NEPL. To be retrieved from >https://hk.lexiscn.com/en<. Accessed 5 November 2016.
[320] FALK R., WEE J.: Morrison & Foerster Study on China's New Environmental Protection Law. (2014). To be found at: <https://media2.mofo.com/documents/140930chinasnewenvironmentalprotectionlaw.pdf?utm_source=mondaq&utm_medium=syndication&utm_campaign=view-original>. Accessed on 12 March 2016. p.2
[321] Ibid. p. 3.

officials, the Art. 57 of the NEPL states that any report and information of a whistleblower must be kept confidential.

The Air Ten

By full name The Air Pollution Action Plan, abbreviated as the Air Ten, is a key measure with overall target to reduce PM10 (particulate matter 10 micrometers or less in diameter) density for prefecture level cities and above, and PM2.5 (particulate matter 1.5 micrometers or less in diameter) density by 25% for Beijing-Tianjin-Hebei area, by 20% for Yangtze River Delta area, and by 15% in Pearl River Delta area.[322] Adopted by the State Council in September 2013, it defines ten air pollution prevention and control measures:

No.	Key measures
1	- enhancing overall treatment and reducing discharges of multiple pollutants - rectify small coal-firing boilers and accelerate construction of desulphurization, denitration and dust removal projects in key sectors - control of flying dust and cooking fume pollution from the catering services - eliminating yellow label vehicles and old vehicles, promoting public transport, new energy vehicles and upgrading the quality of fuel oil
2	- adjusting and optimizing industrial structure and promoting upgrade of economic transition. - keeping a firm grip on newly added production capacity in high energy consumption and high emission industries - accelerating elimination of backward production capacity - resolutely putting an end to illegal projects under construction in industries with serious overcapacity
3	- speeding up technological reform of enterprises - improving the capability of scientific innovation - boosting the development of circular economy, fostering the environmental industry and promoting innovative development and industrialization of major environmental equipment and products

[322] The Official Website of the Ministry of Environmental Protection of China. To be found at: < http://english.mep.gov.cn/News_service/infocus/201309/t20130924_260707.htm>. Accessed on 22 April 2017.

4	- quickening the step to adjust energy structure and increasing the supply of clean energy (By 2017, consumption of coal will fall to below 65% in terms of total energy consumption. Beijing-Tianjin-Hebei Province, the Yangtze River Delta and the Pearl River Delta will try to achieve negative growth of total coal consumption)
5	- setting strict environmental access to investment projects - raising the threshold, optimize industrial pattern - setting strict limit to high energy consumption and high pollution projects in ecological fragile or sensitive areas
6	- giving play to the role of market mechanism and improving environmental economic policy. - the central government has set up special funds to implement the policy of reward for subsidy - improving policies on pricing and taxation and encourage private funds to participate in air pollution control
7	- improving legal system - ensuring strict supervision and management by law - the national department will release the ranking of air quality of key cities regularly and establish mandatory environmental information disclosure system on companies causing heavy pollution - improving environmental supervision capability - enhance environmental law enforcement
8	- establishing regional coordination mechanism - making overall arrangement for regional environmental treatment - Beijing-Tianjin-Hebei Province and the Yangtze River Delta will establish regional coordination mechanism for air pollution control - the State Council will sign target responsibility letters with all provincial governments, conduct annual examination and strictly enforce accountability system
9	- establishing monitoring, early warning and emergency response system - formulating, improving and invoking emergency response plan timely to properly meet the challenge of heavy air pollution
10	- clarifying the responsibilities of all parties - encouraging public participation to jointly improve air quality

Source: The official website of the MEP China[323]

As China Council for International Cooperation on Environment and Development ("**CCICED**") points out, given the severity of the problem, it is unrealistic to expect the problem to be solved overnight.[324] On the other hand, the NGOs such as Greenpeace monitoring the progress made between years of 2013 and 2016 claim that the China's effort to combat air pollution "*has achieved an impressive improvement in average air quality in the country in the past few years – although pollution levels remain alarmingly high.*"[325]

The Water Ten

Two years after the issuance of the Air Ten the State Council continues with its efforts to improve the environmental situation tacking the water pollution. The Water Pollution Control Action Plan was released in April 2015. The plan requires that 70% of the water in China's seven major watersheds and 93% of the drinking water sources in prefecture-level cities meet the acceptable standards by 2020.[326] By 2030, the respective percentages should rise up to 75% and 95%. The so called "black and odorous water bodies" in the prefecture-level cities should be reduced to less than 10% by the end of 2020, and by 2030 the polluted water bodies should be eliminated.[327,328]

No.	Key measures
1	- controlling the discharge of pollutants - emission reduction measures will aim to tackle pollution caused by industries, urban

[323] The official website of the Ministry of Environmental Protection of China. To be found at: < http://english.mep.gov.cn/News_service/infocus/201309/t20130924_260707.htm>. Accessed on 22 April 2017.

[324] China Council for International Cooperation on Environment and Development (CCICED): Performance Evaluation on the Action Plan of Air Pollution Prevention and Control and Regional Coordination Mechanism – CCICED Special Policy Study Report. (2014). To be found at: < http://english.sepa.gov.cn/Events/Special_Topics/AGM_1/AGM2014/download/201605/P020160524201836641095.pdf>.

[325] Greenpeace: Clean Air Action Plan: The Way Forward. (2016). To be found at: < http://www.greenpeace.org/eastasia/Global/eastasia/publications/reports/climate-energy/2016/Clean%20Air%20Action%20Plan,%20The%20way%20forward.pdf>. Accessed on 3 March 2017.

[326] Goldman Sachs Report (Zhu J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 54).

[327] Ibid.

[328] The official website of the State Council of the People's Republic of China, To be found at: < http://english.gov.cn/policies/latest_releases/2015/04/16/content_281475090170164.htm>. Accessed on 12 March 2017.

	living, agriculture and the rural sector, and ships and ports
2	- further boosting of the economic restructuring and upgrading - use of the industrial and reclaimed water and seawater for promotion of cyclic development
3	- measures will aim to continue saving and protecting water resources - implementation of the strict management system of water resources so as to control the overall use of water, improve water-use efficiency, and protect the ecological flows of key rivers
4	- improvement of the scientific and technological support - promotion of the advanced technologies - regulating of the environmental protection - accelerating the development of the environmental protection service industry by the authorities
5	- taking use of a role of the market - efforts of the authorities to step up water price reform, improve taxation policies, facilitate diversified investment and establish an incentive mechanism that promotes water environment treatment
6	- improvement of the relevant law enforcement and supervision (law enforcement and supervision will be stricter, and environmental violations and illegal construction projects will be severely punished)
7	- further strengthening of the management of water environment - stricter control of the amount of pollutants and various environmental risks by the authorities - authorization to discharge pollutants, whenever appropriate
8	- efforts to ensure the safety of aquatic ecosystem, including ensuring the safety of drinking water sources, treating underground water pollution and pollution in major river basins, and strengthening the protection of water bodies and the ocean environment - elimination of the foul water in urban built-up areas by the end of 2017
9	- differentiated, clarified and implemented responsibilities of the related parties - local governments should be more responsible for the protection of the water environment - pollutant discharge units should be made accountable - the central government will control the implementation of the action plan in different basins, regions and sea areas every year

10	- improvement of the public participation and community supervision - regular publishing of the list of cities and provinces that have the best and worst water environment by the government

Source: The official website of the State Council of People's Republic of China[329]

The Soil Ten

The Soil Pollution Prevention and Control Action Plan, abbreviated as The Soil Ten, has been released by the State Council in May 2016. It follows the two action plans released in 2013 and in 2015, targeting the air pollution and water pollution, respectively. The Soil Ten mainly aims to improve the soil quality and to ensure the safe production of agricultural products. According to the Soil Ten, by the end of 2016, the local governments were due to finalise detailed work plan and submit it to the group of Ministries that developed the plan. Following the work plan, the national-level soil environmental quality monitoring points and monitoring networks will be established by the end of 2017. The Soil Ten further anticipates that it would stop worsening the soil pollution by 2020 and subsequently make improvements to the polluted soil by 2030. The national action plan also provides tasks for achieving soil pollution prevention as forming a virtuous cycle in the ecosystem by 2050.[330]

No.	Key measures
1	- developing a soil pollution survey on the current state of soil quality to be conducted every 10 years - establishment of a soil quality monitoring network through monitoring points with total coverage in all counties, cities and areas by the end of 2020 - improving the digital database of environmental information relating to soil
2	- promotion of the legislation for the prevention of soil contamination - establishment of the comprehensive regulatory and standards systems by 2020 - development of a system of standards, enhancing the monitoring and supervision, and monitoring the content of heavy metals, such as cadmium, mercury, arsenic, lead and

[329] The official website of the State Council of the People's Republic of China, To be found at: < http://english.gov.cn/policies/latest_releases/2015/04/16/content_281475090170164.htm>. Accessed on 12 March 2017.

[330] The official website of the NGO China Water Risk. To be found at: <http://chinawaterrisk.org/notices/new-soil-ten-plan-to-safeguard-chinas-food-safety-healthy-living-environment/>. Accessed on 20 April 2017.

	chromium, as well as cycloalkanes, petroleum, ether and similar organic pollutants - focusing on the supervision of ferrous metal or extraction, ferrous metal smelting, petroleum drilling and similar industries
3	- implementing of the management of farmland - protection of the security of the agricultural environment by dividing contaminated farmlands into three classes based on the degree of contamination, while enlarging the scope of protection, promoting safe utilization, implementing management controls, and enhancing management of the soil environment of forests, grasslands and garden areas
4	- prevention of the risks to residential environments through construction management requirements and publication of technical specifications for soil surveys at construction sites by the end of 2016 - clarification of the management measures for use by classification, and gradual generating of the catalogues of contaminated sites for development and utilization - implementation of the supervisory responsibility, and making access to sites more rigorous
5	- protection of the uncontaminated soil - promoting of the responsible urbanization and development of towns, as well as the restructuring of industry and dismantling of redundant production - aiming to move or close down existing facilities that cause serious soil pollution
6	- supervision over the pollution sources, particularly related to agricultural contamination from industry and mining activities
7	- implementing the regional pollution remediation and restoration measures - drafting of the rules for the assessment of remediation and restoration results by the end of 2017
8	- increasing the research and development - promotion of the growth of the environmental protection industry - enhancing the research into the prevention of soil pollution - expanding the efforts to promote appropriate technology - further development of the remediation and restoration industry
9	- constructing a system for soil remediation that includes establishing preliminary integrated prevention zones for soil contamination in Taizhou City (Zhejiang Province), Huangshi City (Hubei Province), Changde City (Hunan Province), Shaoguan City (Guangdong Province), Hechi City (Guangxi Zhuang Autonomous Region) and Tongren City (Guizhou Province) before the end of 2016

10	- improvement of the auditing of goals and determining the responsibility. - the State Council and various provincial governments will sanction a letter of responsibility with goals for the remediation of soil pollution before the end of 2016

Source: The official website of the State Council of People's Republic of China[331]

The National Directory of Hazardous Waste

Released in addition to the *Soil Ten*, which also encourages recycling of electronics, plastic, and packaging waste, the *National Directory of Hazardous Waste* has been implemented in August 2016. Being a revision of a previous version of the directory from 2008, it is divided into three parts.

First deals with the management of medical wastes. Second part is an amendment to the explanations for the determination of the properties of the mixture of hazardous wastes with other solid wastes, and the wastes from treated hazardous wastes. The directory newly adds 117 types of hazardous waste on the list, newly counting with 479 types of hazardous waste in total, reclassified under 46 categories. The new types were added based on research results, waste identification and responses to requests for opinions.

Third part covers the exempted hazardous wastes and their classification.[332] The addition of an exemption list raises the management efficiency and reduces the overall environmental risks in the course of management. The directory newly lists sixteen types of hazardous waste, which are exempt from the waste management. Nine types present an acceptable environmental risk. The example would be waste circuit boards in vehicles, which were exempt for their specific nature. Should they satisfy requirements for being waterproof, leak-proof and without discharge, they can be transported without special measures as other than hazardous waste. The remaining seven types are exempt in the relevant standards. Here, the example is the flying ash

[331] The official website of the State Council of the People's Republic of China. To be found at: <http://www.gov.cn/zhengce/content/2016-05/31/content_5078377.htm>. Accessed on 12 March 2017.

[332] The official website of the Ministry of Environmental Protection of the People's Republic of China. To be found at: http://english.sepa.gov.cn/Resources/Policies/Policy_Intepretation/201606/t20160629_356435.shtml . Accessed on 12 March 2017.

from incinerated household trash. Should it satisfy acceptance criteria, it can be buried in a landfill for household trash.[333]

ii. Energy Regulation

The Renewable Energy Law of the People's Republic of China

China also actively transforms the energy sector. As it has been already elaborated, China is the largest greenhouse gas emitter in the world due to its heavy dependence on fossil fuels. Luckily, the country is rich in renewable resources, such as hydro, solar or wind energy, therefore China should be able to integrate renewable energy into Chinese energy mix.[334]

On 1 April 2010, an amendment to the *Renewable Energy Law of the People's Republic of China* ("**REL**") came into effect.[335] The REL serves as a framework for renewable energy development in China. Pursuant to Art. 1 of the REL, its main objective is to promote the renewable energy, to diversify energy supplies and improve energy structure, to strengthen the energy security, and to protect the environment with regard to the sustainable development.[336] The law further provides that the state shall give priority to the development and utilization of renewable energy, while promoting the establishment and development of the respective market, encouraging the economic subjects in the development and utilization of renewable energy and protecting their legitimate rights and interests.[337] In Art. 2 of the REL, the law defines the renewable energy as non-fossil energies, for example wind energy, solar energy, hydroenergy, bioenergy, geothermal energy, and ocean energy.[338]

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[333] The official website of Ramboll Foundation (The Ramboll Environ): The regulatory information on Chinese environment. (October 2016). To be found at: <http://download.ramboll-environ.com/environcorp/ChinaUpdate_October2016%20-%20English.pdf>. Accessed on 20 April 2017.

[334] HUA, Y., OLIPHANT, M., HU, E.J.: Development of renewable energy in Australia and China: A comparison of policies and status. Renewable Energy: Vol.85, January 2016. pp. 1044-1051.

[335] Ministry of Commerce: Renewable Energy Law of the People's Republic of China. Adopted on February 28, 2005, amended by the Decision of the 12th Meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on December 26, 2009. To be found at: < http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432160.shtml >. Accessed on 20 April 2017.

[336] Ibid.

[337] Ibid., Art.4 of the REL.

[338] Ibid., Art. 2 of the REL.

Comparing the amended version with the formerly-effective one, one of the most important changes concerns the implementation of the law. The amended REL includes the enhancement of mandatory connection and purchase policy and streamlining renewable energy fund. What is more, the new REL strengthens the governmental oversight of the planning and implementation of the renewable energy of the provincial and local governments.

iii. Foreign Investment Regulation

Following the objective to decrease the country's pollution, the Chinese government strives to attract more foreign investments into the sectors of industries as clean production, high technology, use of renewable energies, environmental protection, or recycling. The government encourages the impact of investments through offering the investors concessions, government purchases, and joint ventures to investors. The public-private-partnerships ("**PPP**") and third-party treatment ("**TPT**"), which have already successfully been used by Chinese government in the past, are promising the government to increase the investments by creating a multiplier effect for governmental spending into systematic mitigation of the environmental pollution.[339,340]

The cross-border investment law system in China is divided into three levels of law: firstly, the Constitutional provisions, secondly the national laws and regulations and thirdly, the sub-national regulations. Starting with the Constitution, in its currently effective version as amended in 2004, its Preamble provides that China carries out an independent foreign policy "*in developing diplomatic relations and economic and cultural exchanges with other countries."*[341] A specific provision concerning the foreign investment is provided under the Art. 18 of the Constitution, which states:

> "*The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and*

[339] Goldman Sachs Report (ZHU J. et al: Goldman Sachs – China's Environment: Big Issues, accelerating effort, ample opportunities. Ibid. p. 11.).
[340] THIEROT H.; Dominguez, C.: International Institute for Sustainable Development: Public-private-partnerships in China: On 2014 as a landmark year with past and future challenges. (April 2015). To be found at: < https://www.iisd.org/sites/default/files/publications/public-private-partnerships-china.pdf >. Accessed on 12 March 2017.
[341] The Preamble of the Constitution of the People's Republic of China. To be found at:< http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372962.htm>. Accessed on 12 March 2017.

to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the provisions of the laws of the People's Republic of China.

All foreign enterprises, other foreign economic organizations as well as Chinese-foreign joint ventures within Chinese territory shall abide by the laws of the People's Republic of China. Their lawful rights and interests are protected by the laws of the People's Republic of China."[342]

On the constitutional level, Law on Legislation also provided certain level of guarantee for the foreign investors by stating in its Art. 7 that the expropriation of non-state-owned properties must be laid down in the form of law. However, in the last amendment, the provision was deleted. The former version would have been more favourable for the foreign investors as any expropriation could only has be formulated by the National People's Congress or its Standing Committee.[343,344]

On 3 September 2016, the National People's Congress as the highest legislative authority in China, adopted the new Foreign Investment Law (the "**FDI Law**") with the aim of setting more welcoming regulation for the reception of the inward foreign investments.

According to the former regulation, the foreign investment law in China has been dispersed into four different laws, regulating the separate entities: *Law of the PRC on Chinese-Foreign Equity Joint Ventures*; *Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Venture Enterprises*; *Law of the People's Republic of China on Wholly-Foreign Owned Enterprises*; and *Law of the People's Republic of China on the Protection of Investments of Taiwan Compatriots* ("**Former FDI Laws System**"). Former FDI Laws System, laid down back in the 1980s, provided that the material corporate matters shall fall within the jurisdiction of Ministry of Commerce of the People's Republic of China ("**MOFCOM**") and thereby require the prior approval by the MOFCOM in the case of any wholly-foreign-owned subsidiary or Chinese-

[342] The Constitution of the People's Republic of China. To be found at:< http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm>. Accessed on 12 March 2017.
[343] Legislation Law of the People's Republic of China (Order of the President No.31). To be found at: <>
[344] SHAN, W.: The Legal Framework of EU-China Investment Relations: A Critical Appraisal. Hart Publishing: Portland, 2005.

foreign joint ventures in China. Consequently, the foreign investors were due to apply to the MOFCOM for the establishment of the foreign-investment enterprise, or any subsequent material alteration. This could be the change of equity ownership, change of business scope, consolidation, split, or even extension of the business terms.[345]

The new regulation under the Chapter 5 of the FDI Law replaces the prior governmental approval on case-by-case basis with the information reporting regime. Pursuant to the Arts. 85 and 89 of the FDI Law, the foreign investors are allowed to establish or change the investment first, and only report the change to the supervisory body *ex post*. The reports must be accompanied by annual periodic reports. Instead of seeking the prior approval of the administrative authority, the foreign investors are nowadays not limited to resort directly to the authority in charge of the registration of the enterprise, which substantially accelerates and facilitates the process. This, however, developed a new burden to foreign investors, who will have to pay attention to compliance at all times by themselves, as there is no longer an authority to review and approve their activity in advance.[346]

Moreover, the former FDI Laws System was seen as problematic and confusing by the foreign investors, as it created special business entities only reserved for foreign investors. The problems arose especially in the terms of liability for debts of the entity. Since the equity joint venture was formed as a legal person, it shielded the investors from individual liability. On the contrary, cooperative joint ventures could have also adopt the form of entity without legal personality, which could expose investors to civil, *i.e.* joint and separate, liability.

The newly adopted FDI Law subordinates all the entities formed by the foreign investment to the standard legislation applicable to business entities in China, opting for a national treatment for foreign investments. Consequently, the FDI Law not only represents an advantage to the former system, as it integrates the four laws in one piece

[345] ZHANG, J.: Significant Changes to PRC Foreign Investment Law. Corporate/M&A Alert (September 2016). To be found at: < http://www.klgates.com/significant-changes-to-prc-foreign-investment-laws-09-26-2016/>. Accessed on 8 March 2017.

[346] YANG L., HUANG, S.: The pros and cons of China's new Foreign Investment Law. FDI Intelligence (2016). To be found at:

of legislation, but it also abolishes the double standard and secures the application of uniform rules to all foreign invested entities.

What is more, the FDI Law is only limited to the investment, which pose no danger to national economy, security, or other interests, which inherently opens doors for great regulative space for government, *i.e*. State Council, to promulgate and release the nationwide list of prohibited and restricted industries. Such industries would consequently fall out of scope of applicability of the FDI Law, and would hence be reserved to the Chinese nationals only or would require the applicant to apply for prior market entry licensing. The formerly effective *Catalogue for Guidance of Foreign Investment Industries* (Order of the National Development and Reform Commission and the Ministry of Commerce No. 22, promulgated on 10 March 2015) provided three categories of investment based on their significance in the Chinese economy, being: (i) encouraged, (ii) restricted, or (iii) prohibited. The Art. 22 of the FDI Law clearly anticipates the adoption of the *Catalogue of Special Management Measures*, however, the legislation has not been adopted yet. Instead, as a temporary arrangement, the National Development and Reform Commission of China and the MOFCOM were empowered to release a *Bulletin 22/2016*, issued on 8 October 2016, together with the *Interim Measures on Record-filing and Management of Establishment and Amendment of Foreign-invested Enterprises*, which set the scope for the management measures. The hesitation of the State Council to issue the nationwide Catalogue of Special Management Measures in time may be explained by the ongoing negotiations of the Chinese government with the United States of America and the European Union about the scope of the future bilateral investment treaties, which might require China to open its market even further.[347,348]

Furthermore, the FDI Law introduces a standard of *actual control.* The government is now empowered to examine who is the ultimate decision-maker and ultimate beneficiary of an investment. Based on the piercing of corporate veil, the

[347] The official website of the European Commission (2016). To be found: < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435 >. Accessed on 8 March 2017.
[348] Thomson Reuters Practical Law (2016). To be found at: <https://uk.practicallaw.thomsonreuters.com/w-003-9184?__lrTS=20170430215552290&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >. Accessed on 8 March 2017.

government will proceed to decide whether the investment is foreign or domestic, thus whether the FDI Law applies to it. This measure will pose a problem for *Variable Interest Entities* ("**VIE**"), which are fairly common in China.[349] By definition, the VIE structure is *"an entity that an investor has a controlling interest in, but this controlling interest is not based on a majority of voting rights*." [350]
So far, the VIE arrangements allowed the foreign investors to bypass the system and to enter restricted markets free of investment restrictions. The new regulation under the FDI Law, nevertheless, precludes this practice. Should the government find out that the company is ultimately controlled by, or ultimately beneficial to, a foreign investor, then such a company falls within the restrictions under the new piece of legislation and need to obtain a license so they can operate on the restricted market.

[349] <http://www.fdiintelligence.com/Locations/Asia-Pacific/China/The-pros-and-cons-of-China-s-new-Foreign-Investment-Law?ct=true>. Accessed on 8 March 2017.
[350] The Financial Accounting Standard Board definition. To be found at: <www.fasb.com>. Accessed on 8 March 2017.

5. DEFINING THE "ENVIRONMENTAL PROVISION"

5.1. Pioneering the Sustainable Development Goals in IIAs

The reconciliation of the investment and environmental protection has been a long-lasting source of controversy resulting in numerous investor-state disputes (*see sub-sections 2.1.1 and 3.2.2*). As OECD notes, despite nearly all OECD and non-OECD governments having committed for the sustainable development goals, the most of them do not use IIAs as a mechanism to achieve these objectives.[351] Instead, the countries initialize the domestic policy changes in law, instruments, and processes, and cooperate among each other on the international level.[352]

The reason might be that the bilateral investment treaties may seem as an unsuitable form for addressing the environmental challenges due to their pro-liberation tendencies, as it has been elaborated in the previous chapters. Given the colliding objects of the international investment law and the international environmental law, it is preferred to address the environmental issues in specialized international treaties and other instruments.[353] The critics also note that inserting the provisions on the environmental concerns into the BITs poses real danger to the development of the international environmental law, as it substantially shrinks the policy space for addressing the environmental protection.[354] Furthermore, in line with what have been concluded in the previous chapters, it has been observed that in the investor-state arbitration practices, the arbitrators "*tend to accept 'the supremacy of international law', thus public interest the host states might legitimately pursue and enforce by way of its domestic laws, including environmental protection, is likely to be superseded in*

[351] OECD, International Investment Law: Understanding Concepts and Tracking Innovations. (2008). pp. 138-139. To be found at: < http://www.oecd.org/daf/inv/investment-policy/40471550.pdf>. Accessed on 16 April 2017.
[352] Ibid.
[353] WALDE, T. W.: International Disciplines on National Environmental Regulation: With Particular Focus on Multilateral Investment Treaties. In THE NTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION: International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms. Kluwer Law International: Netherlands, 1993. p. 40.
[354] ROMSON, A.: International Investment Law and the Environment in SEGGER M.C., GEHRING, M.W. and NEWCOMBE, A.: Sustainable Development in World Investment Law. The Kluwer Law International: 2011.

case it conflicts with an investor."[355] In spite of all of this, increasing number of states include the environmental regulation in their BITs.

5.2. Environmental Provisions in IIAs

The international investment law community is under increasing pressure to turn trend of *greenization* into the international investment agreements, and thus filling the legal gap existing between investment and environmental law.[356] As these two fields are increasingly interacting, it has become abundantly clear that their reconciliation must be effectively addressed, balancing both the public and private interests. Addressing the environmental provisions in IIAs, especially in BITs, is a relatively recent innovation, but it could turn to be effective instrument to project the sustainable development goals into foreign investing.

Environmental provisions ("**EPs**") are not yet defined in the international investment law. The term collectively refers to the "*BIT provisions, either in the form of standalone clauses or a component thereof, that are primarily aiming at addressing environmental concerns*."[357] The EPs may come under the terms such as: *sustainable development, plants and animal, ecological system or natural resource,* therefore the EPs do not even need to use word *environment* or *environmental*.[358]

The International Institute for Sustainable Development ("**IISD**") proposes the *Model International Agreement on Investment for Sustainable Development* ("**IISD Model BIT**"). The IISD Model BIT suggests to adjust or include the provisions of IIAs in objective to promote sustainable development, such as Art. 13 (Environmental and Social Impact Assessment), Art. 14 (Environmental Management and Improvement), Article 15 (Minimum Standards for Human Rights, Environment and Labour) and Article 16 (Corporate Governance Standards), Article 20 (Right of States to Regulate),

[355] KULICK, A.: Global Public Interest in International Investment Law. Cambridge University Press: Cambridge, 2012. p. 51 in CHI, M.: The 'Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Journal of International Economic Law. Vol. 18. (2015). pp. 511–542.

[356] DIEPEVEEN, R., LEVASHOVA, Y., LAMBOOY, T.: Bridging the Gap between International Investment Law and the Environment. Utrecht Journal of International and European Law: Issue 30, No. 78. (2014). pp.145–160. To be found at: <http://doi.org/10.5334/ujiel.cj>. Accessed on 23 April 2017.

[357] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Journal of International Economic Law, No. 18. pp. 511-542. (2015). p. 513.

[358] Ibid.

etc.[359] Not even OECD stand behind in advocating the inclusion of the sustainable development provisions into the IIAs.[360] Furthermore, in 2015, the UNCTAD has introduced its *2015 Investment Policy Framework for Sustainable Development* providing with set of *Core Principles for Investment Policymaking* guidelines in national and international investment policy making.[361] The so-called *"New Generation" of Investment Policies* addresses the need to ensure that investment supports sustainable development objectives as one of its key policy and a global strategic challenge.[362] As one the ways to achieve the objectives, UNCTAD proposes addressing sustainable development challenges through provisions in IIAs. On the top of that, the view of *making international investment law better responsive to sustainable development objectives* is also supported by scholars.[363]

Interestingly, even though the uniform definition on the institute is absent, the incorporation of the EPs has become a common practice in newly concluded IIAs.[364] The OECD indicates that the very first BIT which addressed the sustainable development goal, was concluded between China and Singapore back in 1985. The language of its Art. 11 *"Prohibitions and Restrictions"* read:

> "*[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants*".[365]

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[359] The official website of the International Institute for Sustainable Development. MANN, H. et al.: IISD Model International Agreement on Investment for Sustainable Development. (April 2005). To be found at: < https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>. Accessed on 23 April 2017. p. 12.

[360] OECD: Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey. To be found at: <http://www.oecd.org/investment/investment-policy/WP-2014_01.pdf >. Accessed on 23 April 2017.

[361] UNCTAD: 2015 Investment Policy Framework for Sustainable Development. (2015). To be found at: <http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>. Accessed on 23 April 2017.

[362] Ibid. p. 18.

[363] e.g. ZIEGLER, A.: Special Issue: Toward Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives. The Journal of World Investment & Trade 15, pp. 803-808 (2014). To be found at: < https://serval.unil.ch/resource/serval:BIB_AE241EE02396.P001/REF>. Accessed on 23 April 2017.

[364] DIEPEVEEN, R., LEVASHOVA, Y., LAMBOOY, T.: Bridging the Gap between International Investment Law and the Environment. Ibid.

[365] Article 11 of the China-Singapore BIT.

Since then, a growing number of countries incorporate environmental provisions into their BITs.

5.3. Typologies of the Environmental Provisions in IIA's

The IIAs can address the sustainable development objective by several means. In order to operationalize sustainable development objectives, UNCTAD proposes three main categories of solutions: (1) adjusting the common provisions in an environmental-friendlier way, (2) adding new elements and clauses into the IIAs, and (3) introducing special and differential treatment:

1) Adjustment of existing/common provisions to make them more sustainable-development-friendly. The suitable clauses safeguard policy space and/or limit state liability:
    - Hortatory language in Preamble, such as: *Attracting responsible foreign investment that fosters sustainable development is one of the key objectives of the treaty.*
    - Clarification in Expropriation by specifying that non-discriminatory good faith regulations pursuing public objectives do not constitute indirect expropriation.
    - Clarification in FET by including exhaustive list of state obligations.
    - Qualifications/Limitations by introducing the limitations period to prohibit recourse to ISDS when certain period of time has passed since the event giving rise to the claim. ISDS may also prevent abuse of law when denying ISDS access to investors engaging in treaty-shopping or nationality planning through empty shell companies.
    - Reservations/carve-outs, by other name country-specific reservations to national or most-favoured-nation treatment or pre-establishment obligations, which carve out policy measures, areas or sectors.
    - Exclusions from coverage excluding portfolio, short-term or speculative investments from treaty coverage.

- Exceptions for domestic regulatory measures in aim to follow legitimate public policy objectives.
- Omission of FET standard or umbrella clause.

2) Adding new provisions or paragraphs with the aim to balance investor rights and responsibilities, promoting responsible investments and strengthen home-country support:
    - Requirement forcing investor to comply with host state laws at both the entry and post-entry stage of an investment.
    - Encouragement to investors to comply with universal principles or to observe applicable CSR standards.
    - Institutional set-up under which State parties cooperate to for example review the functioning of the IIA or issue interpretations of IIA clauses.
    - Call for cooperation between the Parties to promote observance of applicable CSR standards.
    - Encouragement to offer incentives for sustainable-development-friendly outward investment, additionally with investor compliance with applicable CSR standards.
    - Technical assistance provisions to facilitate the implementation of the IIA and to maximize its sustainable development impact, including through capacity building on investment promotion and facilitation.

3) Introducing Special and Differential Treatment in order to calibrate the level of both existing and new obligations to the less developed country's level of development:
    - Pre-establishment commitments that cover fewer economic activities.
    - Reservations, carving out sensitive development related areas, issues or measures.
    - Inclusion of best endeavour commitments, such as FET or national treatment commitments that are not legally binding.

- Asymmetric implementation timetables, such as phase-in of obligations, including pre-establishment, national or most-favourite-nation treatment, performance requirements, transfer of funds and transparency.

Source: UNCTAD[366]

The treaty drafters are invited to choose their "best-fit" combination in order to pursue sustainable development objectives in the BIT. Taking example from UNCTAD, a country aiming t*o preserve its regulatory space for issuance of public health policies "can opt for (i) excluding public health policies from the scope of specific provisions (e.g. national treatment); (ii) scheduling reservations (for national treatment or the prohibition of performance requirements) for specific (existing and/or future) public health policies; (iii) including public health as a legitimate policy objective in the IIA's general exceptions; or (iv) referring to the protection of public health in the preamble of the agreement."*[367]

[366] Freely transcribed from UNCTAD INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT. To be found at: <http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>. Accessed on 9 May 2017. p. 85.

[367] UNCTAD: Investment Policy Framework for Sustainable Development. (2015). To be found at: < http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>. Accessed on 14 February 2017. p. 87.

6. CHINESE APPROACH TOWARDS ENVIRONMENTALLY RESPONSIBLE INVESTING

Pursuing the sustainable development objective, China has not only reviewed its domestic legislation, but also proliferated its bilateral investment regime. The very first BIT the country has concluded was in 1982 with Sweden. Providing the investors with the minimal protections, it only contained nine articles and it did not provide the investor with the national treatment.[368] According to UNCTAD, to date, the status of Chinese BITs is as follows: 110 BITs and one trilateral investment treaty concluded between China, Japan and Korea ("**TIT**") concluded and currently in force, 21 BITs signed and 14 BITs terminated.[369] (*Note: BITs and TIT for the purposes of this thesis are collectively referred to as "***BITs**")

As a reaction to the growth of its economy, China managed to conclude increasing number of BITs with the more sophisticated investor protection. Both the urge to attract more capital and also the undergoing environmental crisis in China prompted the country to review its domestic and international foreign investment regime. Over last decades, China has not only stipulated the investors high level of formal protection in the BITs but also created more investor-friendly environment for the inward foreign investors (*see Chapter 4.3)*. OECD reports that for the first time in history, China has established the private property rights, which are granted equality to state and collective property rights.[370]

However, the poor management of the sustainable development goals has also accompanied Chinese rapidly growing outward direct investment. The country has especially earned wide criticism for environmental damage caused in ecologically

[368] MARUYAMA, W.H., STOEL, J.T., ROSENBERG, C.B.: Negotiating the U.S. – China Bilateral Investment Treaty: Investment Issues and Opportunities in the Twenty-First Century. Transnational Dispute Management. Vol.7, Issue 4. December 2010. p. 1.

[369] UNCTAD. To be found at: >. Accessed on 14 February 2017. http://investmentpolicyhub.unctad.org/IIA/CountryBits/42?lien_externe_oui=Continue>. Accessed on 14 February 2017.

[370] OECD Investment Policy Reviews: China 2008. Encouraging Responsible Business Conduct in China. To be found at: < https://www.oecd.org/investment/investmentfordevelopment/41792733.pdf>. Accessed on 14 April 2017. p. 23

vulnerable regions in numerous African countries.[371] According to International Institute for Sustainable Development reports,[372] the Chinese investment indeed contribute to the economic development of the host states including creation of new infrastructure, increasing market competition or employing the local people. However, China has also been criticised to have left negative environmental footprint in the host countries, showing disregard to conservation laws, due environmental impact assessments conducted by their companies overseas, or even engaging itself into illegal logging activities or alleged illegal exploitations in Africa's natural assets.[373,374]

The problems are severe. Driven by urge to avoid reputational harm, the first state-owned enterprises and commercial companies already begun to improve their environmental protection and management. As the China's pro-investor efforts continue, it can be predicted that Chinese trend to increase the number of concluded BITs containing EPs will continue as well.

So far, China has not concluded any free trade agreements with incorporated EPs. However, a progress is apparent in BITs. The following empirical study shows an apparent increase in use of EPs in recent BITs pursuing the Chinese urge to *greenize* its BITs.

[371] TAYLOR, I.: China's Environmental Footprint in Africa. The China Dialogue (2 February 2007). To be found at: < https://www.chinadialogue.net/article/741-China-s-environmental-footprint-in-Africa>. Accessed on 23 April 2017.
[372] The official website of the International Institute for Sustainable Development. IISD Report: Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature. To be found at: < http://www.iisd.org/sites/default/files/publications/sustainability-impacts-chinese-outward-direct-investment-literature-review.pdf>. Accessed on 23 April 2017.
[373] TAYLOR, I.: China's Environmental Footprint in Africa. Ibid.
[374] The official website of the International Institute for Sustainable Development. IISD Report: Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature. Ibid. p. vii.

7. TYPES OF EPs USED IN CHINESE INVESTMENT TREATIES

The following analysis of Environmental Provisions emerging in Chinese BITs can be divided into four main categories: (**7.1**) non-operational EPs, (**7.2**) substantive EPs, (**7.3**) EPs through exceptions, and finally (**7.4**) procedural EPs. [375]

What is more, in order to better demonstrate the development and its directions, the present EPs will be compared to the EPs in the following BITs:

(i) the IISD Model BIT, proposed by the International Institute for Sustainable Development, which is expected to be the most environmentally-friendly model;

(ii) the 2010 US Model BIT[376] and the 2004 Canadian Model BIT (FIPA),[377] which represents the BITs of two leading environmentally-friendly economies; and

(iii) the 2006 Czech-China BIT, representing a standard BIT.

7.1. Non-Operational Environmental Provisions

The non-operational environmental provisions are to be found in preambles. Preamble to the BIT sets the main objectives of the treaty, reveals the ratio of the drafters as well as the leading values the treaty has been drafted on. Preamble is a non-operational provision, meaning that it does not confer any rights or obligations to the parties of a treaty. On the other hand, the preamble is often relied upon when it comes to the interpretation of the treaty. The Vienna Convention on the Law of Treaties explicitly considers preamble being an integral part of the text of the treaty. [378]

The Art. 31(1) and (2) of the VCLT *General Rule of Interpretation* reads:

"1. *A treaty shall 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 the light of its object and purpose.*

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[375] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. pp. 511-540.

[376] 2010 US Model Bilateral Investment Treaty. To be found at: < https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf >. Last accessed on 1 May 2017.

[377] 2004 Canadian Model Bilateral Investment Treaty. To be found at: <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>. Last accessed on 1 May 2017.

[378] VILLIGER, M.E.: Commentary on the 1969 Convention on the Law of the Tretaties. Martinus Nujhoff Publishers: The Haague, 2009. p. 43 et seq.

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[379]

Concerning the sustainable development objective, preambles can easily adopt the pro-environmental language, as well as recently increasingly popular labour issues or anti-corruption provisions. However, most of the governments focus their efforts on pursuing different objectives via the BITs.

Still according to OECD, with regard to the environmental protection, including a short text on sustainable development is the most common approach.[380] In this regard, the Czech-China BIT is below the average as it does not address any environmental protection in its Preamble at all. In contrast, both the US and Canadian Model Treaties included rather lengthy environmental provisions into their BITs. The US Model Treaty desires to achieve the objectives of a treaty "*in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."*[381] The Canadian Model BIT limits itself to generally state that the "*promotion and the protection of investments of investors of one Party in the territory of the other Party will conducive […] to the promotion of sustainable development.*"[382]

As expected, the most pro-environmental approach is provided under the exemplary IISD Model BIT. From its hortatory language is evident the strong pro-environmental orientation of the treaty. The IISD Model Treaty's Preamble that reads:

[379] 1969 Vienna Convention on the Law of Treaties, Art. 31 thereof.
[380] OECD: International Investment Agreements: A survey on Environmental, Labour and Anto-corruption Issues. Ibid. p. 1.
[381] US Model Treaty. Ibid. Preamble.
[382] Canada Model Treaty. Ibid. Premble.

"The Government of … and the Government of ..,
[…]

Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties;

Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right;

Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;

Have agreed as follows: …"[383]

Should a country decide to only incorporate pro-environmental language into the preamble to its BIT and omits the rest of the provisions, such a solution offers a broad range of environmentally-related relationships, which may arise under or in connection to it.[384] What is more, drafting a BIT allows also for including this language not only in preamble but include it in the main body of the agreement or in the annexes thereto. The

[383] The official website of the International Institute for Sustainable Development. MANN, H. et al.: IISD Model International Agreement on Investment for Sustainable Development. (April 2005). To be found at: < https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>. Accessed on 25 April 2017.

[384] OECD: International Investment Agreements: A survey on Environmental, Labour and Anto-corruption Issues. Ibid. p. 145.

language which is often addressed under the preamble usually provides with wording of a *right to regulate* or it is seeking *not to lower standards*.[385]

In Chinese bilateral investment treaties, the pro-environmental language is present in six BITs.[386] The China-Guyana BIT and the China-Trinidad and Tobago BIT both incorporate the non-operational EPs in their preambles. The China-Canada BIT, the China-Uzbekistan BIT and China-Tanzania BIT lower the standard to pursuing sustainable development objectives instead of environmental ones. And finally, the only trilateral investment treaty (China-Japan-Korea TIT) mentions the need for environmental protection but also addresses the corporate social responsibility in FDI.[387]

7.2. Substantive Environmental Provisions

Although there are numerous substantive provisions in BIT, the major ways to address the EPs in Chinese BITs is through the standard of Fair and Equitable Treatment ("**FET**") and the institute of Expropriation.

7.2.1. Fair and Equitable Treatment Standard

The obligation to accord Fair and Equitable Treatment Standard (*see Chapter 2.1.1*) is present in many BITs and often relied upon by the foreign investors. As the term of FET is still considered rather vague, it opens up to different interpretations, ranging between regarding FET as an obligation to accord minimum standard of treatment, or higher standard.[388]

The first approach is taken by the IISD Model BIT, which even conveyed the FET standard under its *Art. 7: Minimum international standards*. Not to left any doubts about the threshold of the standard, the BIT explicitly stresses that the FET standard does not create any additional substantive rights on the top of the minimum standard of treatment. As the FET standard has become the most important standard in the investor-state dispute resolution,[389] it is of no surprise that it is used also in the US Model BIT as

[385] Ibid.
[386] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 515.
[387] Ibid.
[388] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid. p. 204.
[389] SCHREUER, C.: Fair and Equitable Treatment in Arbitral Practice. Journal of World Investment and Trade. Issue 6, No. 3. (2005). p. 357.

well as Canadian Model BIT. Similarly, as in the case of IISD Model BIT, the relevant provisions read that each party shall accord to investors or their investments fair and equitable treatment, and both of the BITs lock the possible interpretation within the threshold of the minimum standard of treatment, and not beyond.

The exception in this regard is Czech-China BIT. In its Art. 2(2), it includes the FET standard by stating: "*Investments of the investors of either Contracting Party shall at all times be accorded fair and equitable treatment and enjoy full protection and security in the territory of the other Contracting Party."* However, it never mentions the interpretative limitations of the standard. Such wording opens the forum for different interpretations and possible disputes in search of the clarity of the term.

The IISD Model BIT, however, in comparison with the other three compared BITs contain a special postscript, adding that the obligation of according to investors of their investment fair and equitable treatment in accordance with customary international law "*shall be understood to be consistent with the obligation of host states, in particular under Article 19 of this Agreement."*[390] The *Art. 19* thereof*: Procedural fairness* explicitly ensures the host state its right to regulate in order to pursue its objectives, as long as it is consistent with the administrative, legislative, and judicial fairness, *e.g*. in such cases the investor must be timely notified about the host state's intent.[391]

In Chinese BITs, there is only one BIT, which has adopted the EP into the FET standard, and that is the China-Madagascar BIT.[392] Its Art. 3(2) provides that the measures of safety, health, and environmental protection: "*shall not be regarded as obstacles.*"[393]

7.2.2. Expropriation

A provision on expropriation protects foreign investor from dispossession or confiscation of their property by the host state (*see Chapter 2.1.1B*). Expropriation comes in various different forms; the most common are nationalization, physical

[390] IISD Model Treaty. Ibid. Art. 7 (A).
[391] IISD Model Treaty. Ibid. Art. 19.
[392] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 517.
[393] Art 3(2) of the China-Masagascar BIT.

occupations, transfers of property, forced sales, creation of state monopolies, or government acquisition of the investor's management or control rights over the investment.[394]

The environmental regulatory expropriation has been a source of great controversy in both the investor-state dispute resolution and doctrines. As has been elaborated in *Chapter 2.1.1*, the tribunals face real challenge when reconciling the expropriation protection under the BIT and state regulatory measures, which have contradictory objectives. Balaš[395] points out that the core of the problem lies in the use of vague formulations and unclear terminology accompanying the regulatory practice.[396] As such, he regards the conflict as partially fictive, because it is the basic duty of the state to protect and balance both the interests of the investor and the citizens, and should it fail to fulfil its basic duty, the consequence is to pay investor the compensation.[397]

Balaš's opinion is supported by jurisprudence. In *Suez and Vivendi v. Argentine*, the tribunal ruled on reconciliation of contradictory natures of a human right – which in case at hand was in a form of a right to access to water – and the investor right under the investment treaty. ICSID noted that: "*Argentina is subject to both international obligations, i.e. human rights and [investment] treaty obligations and must respect both of them equally. […] Argentina's human rights obligations and its investment treaties obligations are not inconsistent, contradictory or mutually exclusive*."[398] This ruling is consistent with the customary rules on treaty interpretations codified in VCLT stating that should different rules share same subject matter, as far as possible, such rules should be interpreted in a way that they give rise to compatible obligations.[399]

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[394] NEWCOMBE, A.: Regulatory Expropriation. Ibid. p. 104.
[395] Vladimír Balaš is the Associate Professor and International Law expert at the Charles University in Prague, Czech Republic.
[396] BALAŠ, V.: Interface between Human Rights Protection and Investment Protection. Ibid. p. 147.
[397] Ibid.
[398] *Suez Vivendi* case. Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19. (2010).
[399] DIEPEVEEN, R., LEVASHOVA, Y., LAMBOOY, T.: Bridging the Gap between International Investment Law and the Environment. Ibid.

Turning to the examples of the legal regulations of expropriation, the IISD Model BIT accompanies the general provisions on prohibit of both direct and indirect expropriations with a special pro-environmental provision. In its Art. 8 (I), the IISD Model BIT states:

> "*Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article*."[400]

By introducing such wording, the governments clarify the distinction between indirect expropriation and state regulation with aim to pursue *legitimate public welfare objectives* as environmental protection. As such, the expropriation clause has no potential to pose constraints on the regulatory capacity of the host state.

The US Model BIT does not include any EP into the Expropriation clause (Art. 6 of the US Model BIT) in the main body of the BIT text. Instead, it conveys the possible environmental protection under the Annex B. In its part B.4(b) devoted to Expropriation, it provides a clarification and an extension to *indirect expropriation* under Art. 6 of the US Model BIT by stating that:

> *"[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."*[401]

Similarly, the Canada Model BIT adds to its general provisions on expropriation few provisions under the Annex B.13(1)(c) thereof, which notes:

> *"[e]xcept in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare*

[400] The IISD Model BIT. Ibid. Art. 8 (I).
[401] Art. 6 of the US Model BIT.

objectives, such as health, safety and the environment, do not constitute indirect expropriation."[402]

Both the US and Canada Model BITs thus only allow the non-discriminatory measures of a party under the condition of *rare circumstances*.

The Czech-China BIT neither provides with EPs in expropriation clause under its Art. 4 in a main text, nor elsewhere (*e.g.* in annexes), when addressing its effects.

The Chinese BITs addressing the EPs in their expropriation clauses can be divided into two main categories: (i) the BITs, which includes EPs expressly, (ii) and the BITs that do so implicitly, by not mentioning the environmental or sustainable developments objectives in their wording.

The first category is represented by the triad of BITs: China-Uzbekistan BIT, China-Colombia BIT, China-Tanzania BIT, which includes the express reference to environmental protection into the expropriation clause in the main text. Moreover, the China-Canada BIT succumbs into this category as well, although it – similarly as in the case of Canada Model BIT – places the EP not into the main text but into its annex devoted to indirect expropriation. In contrast, the second category encompasses the China-India BIT and China-Japan-Korea TIT that both allow the state to take regulatory measures "*for public interest purposes.*"[403,404]

7.3. Environmental Provisions through Exceptions

The exceptions are a category of BIT provision that strengthens the right to regulate and that ensure that the investing remains within the host country's development strategies.[405] The exceptions aim to address public interest, national security policies, protection of life, preservation of cultures, or regulation of

[402] Annex B.13(1)(c) of the Canada Model BIT.
[403] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 517.
[404] The Protocol of the China-India BIT and Art. 2(c) the Protocol, the China-Japan-Korea TIT
[405] UNCTAD: Investment Policy Framework for Sustainable Development. Ibid. p. 3.

economy.[406] Having a function of selective rebalancing of the duties, they protect a country from *overcommitting*[407] itself to the detriment of its development.

The systems of exceptions in the BITs can be divided into two main categories: firstly, the BITs, which find their base in the WTO system of exceptions *(see Chapter 2.1.1),* and secondly, the standalone exception clauses in the BITs.

The international trade law and the international investment law are nowadays two separate but interacting legal fields. In the international investment law, there is, however, a strong tendency to copy the language of the WTO exceptions into the BITs. This is the practice exercised mostly by the North American countries – Canada, for instance, incorporated the GATT-based exceptions in 20 BITs out of its 28 BITs currently in force.[408] Naturally, also Canadian Model BIT mirrors its preferred tendencies. Its Art. 10 *General Exceptions* provides with a long list of GATT-based exceptions, which *e.g.* exempt measures that would protect human, animal or plant life or health, that aims to conservation of living or non-living exhaustible natural resources, etc. On the top of that, there is also a standalone exception clause in the Art. 11 *Health, Safety and Environmental Measures*, stating that:

> *"[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."*[409]

[406] VANDEVELDE, K. J.: Rebalancing through Exceptions. Lewis and Clark Law Review. Vol. 17, No. 2. 2013. p. 450.
[407] UNCTAD: Investment Policy Framework for Sustainable Development. Ibid. p. 9.
[408] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 537.
[409] Art. 11 of the Canadian Model BIT.

Using similar wording as the standalone clause of the Canadian Model BIT, also the IISD Model BIT in its Article 20: *Maintenance of environmental and other standards* recognizes the encouragement of investment by relaxing the domestic public health or environmental measures (*inter alia*) as "*inappropriate*".[410]

The US Model BIT does not stand behind as it incorporated into the Art. 12(5) the standalone provision on environment, stating that:

> "[*n]othing 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."*[411]

In contrast, the Czech-China BIT did not incorporate any exception EP.

The Chinese BITs, however, begun with the *greenization* in this regard, as three of their BITs have recently incorporated a standalone clause into their text.[412] None of the Chinese BITs, on the other, has joined a standalone protection clause with the general exceptions, as it was for example in the case of Canada.

Firstly, the China-Mauritius BIT disposes of a very broad exemption, stretching the limitation over wide range of environmental measures. In its Art. 11 *Clause of Prohibitions and Restrictions,* the BIT provides that the provisions herein "*shall not in any way the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to ... the protection of its environment."*[413] Secondly, there is an EP encompassed in the China-Tanzania BIT, which provides a reasonably slightly lowered standard than it was in the case of the first example. Its Art. 10 *Health, Safety and Environmental Measures* provides that the environmental measures shall not be applied in an arbitrary or unjustifiable manner, or shall not constitute a disguised restriction on international investment. Moreover, the provision proceeds that "*nothing in this Agreement shall be construed to prevent a*

[410] Art. 20 of the IISD Model BIT.
[411] Art. 12(5) of the US Model BIT.
[412] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 521.
[413] Art. 11 of the China-Mauritius BIT.

Contracting Party from adopting or maintaining environmental measures necessary to protect human, animal or plant life or health."[414] Thirdly, the China-Japan-Korea TIT, which is in its Art. 23 *Environmental Measures* stating that the parties: "*recognize that it is inappropriate to encourage investment* [...] *by relaxing its environmental measures."* The China-Japan-Korea TIT represents a lowest, but still reasonable standard to the two abovementioned BITs.[415,416]

7.4. Procedural Environmental Provisions

The last typology of the EPs emerging in the BITs mentioned are the procedural EPs. The procedural EPs allow the parties to incorporate certain procedural rules that would be later followed should a dispute arise between the parties. Although they might seem unnecessary, as the procedural issues are addressed by the arbitration rules, the EPs are based on the respect to the joint will of the parties, which is a cornerstone of the arbitration, and within the arbitration rule framework, their advantage lies in enhancing the legitimacy and effectivity of the ISDS system.[417] The procedural EPs are designed to also introduce improvement into the process, such as limitations to establishment of the arbitral panel or in cases when the parties agree on higher level of transparency by allowing the public access to arbitration documents.[418]

The IISD Model BIT proposes numerous mechanisms eligible to pursue the environmental goals through the procedural EPs. The 14 relevant provisions are placed under the Annex A of the treaty and encompass *e.g.* consultation and negotiation, transparency, expert reports but also detailed provisions on advancing of the procedural stages, such as submission of a claim to arbitrator, their selection, awards, or appellate process.[419]

Turning to the US Model BIT, the implications for the sustainable development and environment as evidenced thereunder are: the introduction of the clause of expert

[414] Art. 10 of the China-Tanzania BIT.
[415] Art. 23 of the China-Japan-Korea TIT.
[416] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 522.
[417] UNCTAD: Investment Policy Framework for Sustainable Development. (2015). To be found at: < http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>. Accessed on 14 February 2017. p. 107.
[418] Ibid.
[419] Annex A of the IISD Model Treaty.

reports (Art. 32 of the US Model BIT), the enhancing of transparency (Art. 11 of the US Model BIT) and the clause of consultations (Art. 12(6) of the US Model BIT).
The latest mentioned, placed under the Art. 12: *Investment and Environment*, reads:

> *"[a] Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavour to reach a mutually satisfactory resolution."*[420]

The Canada Model BIT also comes with the encouragement of the parties to *"request consultations with the other [p]arty and the two [p]arties shall consult with a view to avoiding [the] encouragement"*[421] of the investment of an investor to the detriment of the environment. In Art. 42 of the BIT, furthermore, Canada similarly to the US Model BIT proposes the Tribunal to appoint, at the request of any disputing party or in its own initiative (unless the party disputes it) the Expert reporting on "*any factual issue concerning environment*".[422]

As for the Czech-China BIT, although does not explicitly provide with the recourse to consultation relating to the environment or sustainable development, as is it the case of the previous BITs, its Article 12 does broadly provide for consultations to be held "*on any matter concerning […] application and implementation of the agreement*."[423] If extensively interpreted, under this Article the consultation can be held also in relation to the environmental concerns.

In the Chinese BITs, the procedural EPs are represented by a sole BIT concluded between China and Canada.[424] In its Art. 18, it suggests the parties to recourse to consultations should the investment protection happen to encouraged to the detriment of the environment. For addressing the environmental concerns, the parties may initiate the

[420] Art. 12(6) of the US Model BIT.
[421] Art. 11 of the Canada Model BIT.
[422] Art. 42 of the Canada Model BIT.
[423] Art. 12 of the Czech-China BIT.
[424] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 524.

consultations already at the stage of policy-making, or later when a dispute arises.[425] Moreover, the consultations are capable to restrict the tribunal's interpretative power, as the parties may jointly issue the binding interpretation of the BIT during the consultation meetings.[426]

[425] Art. 18 of the China-Canada BIT.
[426] Ibid.

8. EVALUATION OF THE EPs IN CHINESE BITS

The overall number of EPs incorporated into the Chinese bilateral investment treaties is eighteen, being dispersed among only ten different treaties. That is less than 10% of the overall currently effective 104 BITs, where China represents one of the parties.[427]

It is obvious that incorporation of the EPs into the BITs depends on the interest of both parties negotiating a BIT, although the exceptional situation may arise when one party possesses substantially greater negotiating power than the other one. Bearing this in mind, the analysis of the distribution of the EPs in Chinese BITs reveals that the most of the EPs – four of them – are incorporated in the China-Canada BIT. The four incorporated EPs concerns hortatory language in preamble, provision on expropriation, general exception clause, and consultations.

The high number of incorporated BITs is not surprising as Canada is one the leading environmentally-friendly countries in the world. Canada has currently 28 BITs in force, and it has successfully implemented the EPs into 24 of them. The four remaining exceptions are the BITs, which have been negotiated back in early 1990s.[428] Taking a deeper look into Canada Model BIT – where the assessment of counter-party's objectives and negotiating power is not needed – shows that Canada itself would implement an EP six times: into the Preamble, concerning performance requirement, general exceptions, Health, Safety and Environmental Measures, expert reports and finally into clause on expropriation.

The US Model BIT proposes similar result as it would implement an EP five times – into Preamble, performance requirement, investment and environment, expert reports, and finally into the expropriation clause.

The scarcity of the environmental provisions in the BITs of a majority of the countries is unfortunately rather common. One of the reasons might be that the parties

[427] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 526
[428] Ibid.

involved in the negotiations of the treaties, as well as the tribunals deciding on the fate of the parties thereunder, rarely specialize in sustainable development, which requires to cross-sectionally analyse issues of environmental protection, international business, and human rights.[429] Moreover, as it has been already explained, the IIAs are from their very nature not a suitable forum for addressing the sustainable development goals.

The quantity and concentration of the BITs are nevertheless not the sole factors to be taken into account when evaluating a country's stance in pursuing sustainable development in the IIAs. The measure of quality, such as the position of the EP within the BIT structure, needs to be addressed, too.

The substantive provisions and the exceptions are regarded as the strong clauses in the BIT structure.[430] The former analysis encompassed two substantive provisions – FET standard and expropriation clause – and three types of exceptions, being clause of general exceptions, prohibition and restrictions, and environmental measures. According to professor Chi,[431] the substantive provisions should not be overestimated as they only can be applied to "*justify BIT-inconsistent environmental measure*." [432] Newcombe adds that, for their importance and character, the "*substantive rules governing the scope of expropriation must be defined with greater clarity*." [433] In contrast, the "weakest" provision is included in the preamble. Being a non-operative clause, it mainly serves for the interpretative purposes and it does not convey any rights or obligations to the parties. The one remaining type is the procedural provision type. Provision ensuring consultation is the only representative of this category among the Chinese BITs with the environmental provisions. Having an indirect role, the

[429]MAYEDA, G.: 'Chapter 22: Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries', in CORDONIER SEGGER, M.-C. et al: Sustainable Development in World Investment Law. Global Trade Law Series, Vol. 30. Kluwer Law International; Kluwer Law International 2011. p. 541.
[430] UNCTAD: Investment Policy Framework for Sustainable Development. Ibid. p. 88.
[431] Manjiao Chi is a professor in Xiamen University, China.
[432] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid. p. 528.
[433] NEWCOMBE, A.: Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid? University of Toronto, thesis. p. 88

procedural provisions are only applied in the ISDS proceedings and they do not exert substantive impacts on environmental protection.[434]

As for the future, the question remains if, and if so, how many EPs will be contained in the US-China BIT that is currently under negotiations. Although the important negotiations took already more than two decades, recently, they have intensified. Both the US Model BIT language and statement of the US negotiators have indicated that the environmental protection may become a root for controversy as the USA may seek to ensure that the final BIT will contain adequate environmental guarantees.[435] However, the recent turnover in Chinese environmental policy hints that controversies other than environment may play more dominant role during the rest of the negotiations.

[434] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Ibid.
[435] MARUYAMA, W.H. et al.: Negotiating the U.S.-China BIT: Investment Issues and Opportunities in the Twenty-First Century. TDM: vol. 7, issue 4. 2010.

CONCLUSION

In relation to the economic progress, China has undergone almost a miraculous transformation over the past few decades. Nowadays, the country embarks on an equally ravishing journey in relation to the ecologic progress. The process of *greenification* of China was not intended to be only limited to the adjustment of its domestic legislation. Another part of the Chinese development strategy was to incorporate sustainable development objectives into the country's investment policy. Nowadays, China is in the process of proliferating and reviewing the IIAs, and its efforts to *greenify* the BITs are already noticeable. The most visible aspect is the growing number of environmental provisions occurring in the recent Chinese bilateral investment treaties.

The global historical development shows that for states it is necessary to first reach a certain level of development before being able to extend their considerations onto noble objectives as sustainable development. It is thus of no surprise that by analysing and evaluating the EPs in BITs, Canada and the United States of America confirmed their positions of the world green leaders. In contrast, the Czech-China BIT assessment – where almost none of the provisions contained an EP – shows that in 2006, at the time of the conclusion of the BIT, neither the Czech Republic, nor China had the environmental progress as their negotiating priority.

In the case of China, however, the priorities have changed with the offset of the new environmental policy. Although the country is just at the beginning of its efforts, it successfully incorporated already eighteen environmental provisions into ten different bilateral investment treaties. The general effect of these provisions is to balance the established bias in favour of investor, should investor's actions be to the detriment of the environment. The concrete impact of EPs in practice hence ranges from facilitating the defence of the states in cases of expropriation in public interest, lowering the effectivity of the FET protection, if investor harms the environment, or for example, of rendering the dispute resolution of the environment-related conflicts more effective by introducing a duty of consultation once the conflict arises.

It is to be reminded that in this respect China is one of the pioneering countries, as the environmental provisions in the BITs are still not very common. Although China is still being considered a developing state, succumbing to the practice of incorporating EPs into the BITs puts it on an equal environmental-friendly footing with the world's most developed countries. Still, there is much more to be done. In its further efforts to effectively incorporate environmental provisions into its BITs, China can easily inspire itself from the provisions of IISD Model treaty, which has demonstrated the feasibility of harmonization between the investor protection and the sustainable development.

To conclude, fostering sustainable development goals in the international investment is a challenging, yet rewarding idea. The progressive environmental degradation suggests that the international investment legal framework will soon be forced to react and adapt itself in order to be able to more actively advance the green development objectives. As it has been already mentioned, one of the many problems is that current investment regime imposes inherent limitation to pursue economic objectives instead of the environmental ones. This global bias towards strong liberalisation of trade and investment does not provide the state with much space for environmental regulation in their sovereign territory.

The change consisting in rebalancing the investment framework towards greater discretion of the states in matters of environmental protection is, however, complicated *per se*. The current state of the regulation is fragmented and dispersed between several legal fields. As such, the states functioning in the current *status quo* may encounter troubles when negotiating the BITs in the light of sustainable development objectives. As full understanding of the problematics requires holistic approach, the cross–practice experts in environmental policy and regulation, human rights, FDI, and even behavioural economy will have to necessarily be invited to the table. The obvious lack of those cross-practice experts suggests that it is necessary to enhance public debate to promote the understanding of the idea of incorporating sustainable development goals into the BITs, and to tailor the education and training of the professionals accordingly.

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RÉSUMÉ

ÚVOD

Předkládaná práce se zabývá analýzou environmentálních ustanovení ("**EPs**") v bilaterálním investičních dohodách ("**BITs**"), a to zejména ve vztahu k Číně a její nedávné environmentálně legislativní revoluci, která reagovala na dramatické zhoršení kvality tamního životního prostředí. Součástí práce je také analýza celkového operativního rámce EPs, jejich geneze, rozbor, použití a následná komparativní analýza EPs v čínských a některých jiných vybraných bilaterálních investičních dohodách, zakončená zhodnocením efektivity fungování environmentálních doložek.

Hlavní tezí práce je zda – a pokud ano, tak do jaké míry – se trend *greenification* (*pozn. slovo je odvozeno z anglického výrazu pro zelenou barvu „green" a je běžně používáno v anglické odborné literatuře*) čínského vnitrostátního legislativního rámce promítá také do bilaterálních investičních dohod, které Čína uzavírá na podporu a ochranu zahraničního investování s ostatními zeměmi. Druhou zkoumanou tezí je, zda jsou environmentální doložky vůbec způsobilé k tomu, aby byly efektivním nástrojem nápravy životního prostředí v mezinárodním investičním právu.

INHERENTNÍ STŘET OBJEKTŮ PRÁVNÍ ÚPRAVY ENVIRONMENTÁLNÍ OCHRANY V MEZINÁRODNÍM INVESTIČNÍM PRÁVU

Tato problematika stojí na zdánlivém střetu dvou na první pohled protichůdných zájmů: zájmu na podporu investování spočívajícím v liberalizaci investičního režimu a globálního zájmu na kvalitní životní prostředí, který je uskutečňován regulativními zásahy státu na svém území. Tento střet je ovšem spíše jenom fiktivní, protože v konečném důsledku je to stát, který má povinnost vyvážit zájmy investora i svých občanů, a stejně tak je to stát, který za své případné selhání v tomto ohledu nese odpovědnost. V judikátu Mezinárodního střediska pro řešení sporu z investic ("**ICSID**") *Suez Vivendi* se tribunál vyjádřil ke střetu lidskoprávních závazků státu v podobě práva přístupu občanů k vodě a závazků státu z investičních smluv jako o „*obligacích, které*

nejsou nekonzistentní, protichůdné ani vzájemně se vylučující.“ [436] To ale v žádném případě neznamená, že uvádění těchto obligací v soulad pro stát není problematické.

Obě tyto oblasti mají ale také své podobnosti. Jednou z nich je důležitost, jakou v jejich vývoji hrála globalizace. S rozvojem mezinárodní obchodní spolupráce po zavedení Brettonwoodského systému přišel také rozvoj přímých zahraničních investic (“**FDI**“) a potřeby jejich ochrany. Mezitím narůstající povědomost o zhoršujícím se stavu životního prostředí odstartovala několik klíčových environmentálně právních konferencí, z nichž nejvýznamnější jsou Stockholmská konference (Konference OSN o životním prostředí člověka; 1972) a Světová komise OSN pro životní prostředí a rozvoj, která v roce 1987 vydala studii Naše společná budoucnost (Our Common Future). Jejím největším přínosem studie bylo etablování pojmu zásady trvale udržitelného rozvoje jako „*takového rozvoje, který naplňuje potřeby přítomných generací, aniž by ohrozil schopnost budoucích generací naplňovat potřeby své*.“ [437] Uvědomění si potřeby společného globálního postupu v otázce ochrany životního prostředí odstartovalo éru uzavírání mezinárodních dohod o ochraně životního prostředí.

Akceptování reality globalizace je zřejmé z práce Konference OSN o obchodu a rozvoji (“**UNCTAD**“), která se snaží zefektivnit funkční prostředí pro FDI mimo jiné tím, že podporuje ochranu investic a investorů. Na druhé straně je tato snaha o liberalizaci zahraničního investování zjemňována uvědoměním si potřeby ponechat státu prostor pro regulaci, mj. také regulaci ochrany životního prostředí ve veřejném zájmu. Stojí tu tedy ve zdánlivém střetu legitimní očekávání investora užívat plody své investice ve stabilním, transparentním a předvídatelném právním prostředí státu přijímajícího investici a stejně tak legitimní zájem suverénního státu zachovat si své regulační pravomoci na svém suverénním území. Tyto zájmy jsou ovšem za použití vhodných nástrojů sladitelné. Jedním z těchto nástrojů jsou právě environmentální doložky v BITs, které jsou způsobilé k tomu umožnit státům implementovat do svého

[436] *Suez Vivendi* case. Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19. (2010).
[437] Naše společná budoucnost: Světová komise pro životní prostředí a rozvoj. z anglického originálu Our Common Future. Přeložil Pavel Korčák. (1. vyd.). Academia: Praha, 1991.

investičního režimu zásadu trvale udržitelného rozvoje za zachování dostatečné ochrany investorům a jejich investicím v bilaterálních investičních dohodách.

PRAMENY PRÁVNÍ ÚPRAVY ENVIRONMENTÁLNÍ OCHRANY V FDI

Jak mezinárodní právo ochrany životního prostředí, tak mezinárodní investiční právo jsou obsaženy v určitých vnějších právních formách. Prameny práva se dají dle své závaznosti rozdělit na tzv. *soft law* (doporučující) a *hard law* (závazné). Prameny práva ve formě *soft law* jsou v environmentálním právu velmi využívané pro svou flexibilitu a nezávaznost. *Soft law* je okamžitě aplikovatelné v oblastech, kde by se konsensus pro závaznou smlouvu hledal jen těžko. Na druhé straně, pokud se dané pravidlo osvědčí, tak se dá přetvořit v *hard law*, ať už ve formě mezinárodní úmluvy nebo zvyklosti. Nejrelevantnějšími *soft law* dokumenty pro oblast trvale udržitelného rozvoje jsou např. již zmíněná Naše společná budoucnost, Agenda 21 nebo Konsensus z Monterrey, který explicitně zdůraznil potřebu přiblížení FDI zásadám trvale udržitelného rozvoje.

Systém hard law pramenů mezinárodního práva tvoří:

(i) obecné prameny mezinárodního práva dle čl. 38 Statutu Mezinárodního soudního dvora ("**Statut MSD**"). Čl. 38 (1)(2) Statutu MSD vymezuje prameny mezinárodního práva jako:
   - mezinárodní úmluvy, ať obecné či partikulární, stanovící pravidla výslovně uznaná státy ve sporu:
     - multilaterální/regionální (např. GATT, GATS, ICSID, Energetická charta, aj.)
     - bilaterální investiční dohody
   - mezinárodní obyčej, jakožto důkaz obecné praxe uznávané za právo;
   - obecné zásady právní uznávané civilizovanými národy (př. princip dobré víry);
   - soudní rozhodnutí a učení nejkvalifikovanějších znalců veřejného práva různých národů jakožto podpůrný prostředek k určování právních pravidel (zpracované případy např. López Ostra v. Španělsko, Santa Elena, Tecmed, Vivendi, Perenco, aj.);

- pravomoc soudu rozhodovat ex aequo et bono, jestliže s tím strany souhlasí.

(ii) jednostranné právní akty států (např. případy, kdy stát upraví domácí legislativu s otevřeným souhlasem s rozhodčím řízením);

(iii) některá rozhodnutí mezinárodních organizací; a

(iv) investiční dohody mezi zahraničním investorem a státem (např. partnerství veřejného a soukromého sektoru – public-private partnership).

Pro plné pochopení environmentálních doložek je zejména třeba si také nejprve důkladněji vymezit bilaterální investiční dohody a jejich obsah. BIT je dvojstranná dohoda uzavřená mezi dvěma státy, která se týká podpory a ochrany investic zahraničních investorů smluvní země. BIT jsou vystavěny na recipročním základě, přestože většinou zajišťují jednostranný tok kapitálu z jedné země do druhé. Na počátku roku 2017 bylo dle UNCTAD celosvětově uzavřeno 2960 BITs, z nichž je účinných 2369 BITs.[438] Ačkoliv bilaterální investiční smlouvy většinou sdílí podobnou strukturu, jejich ustanovení se často liší. Nejčastější ustanovení, která se v BITs vyskytují, jsou např. definice investora a investice, ustanovení o vyvlastnění, ustanovení o řešení sporu z investic nebo standardy ochrany investora jako ochrana jeho legitimních očekávání, standard spravedlivého a rovného zacházení. Jedním z ustanovení, které se v BITs začíná čím dal častěji vyskytovat, je environmentální doložka (*viz Kapitola 5*).

AKTÉŘI ENVIRONMENTÁLNÍ OCHRANY V FDI

Historicky byla přiznávána mezinárodněprávní subjektivita pouze suverénním státům. Postupem času ale došlo k přesunu marginální části této subjektivity či jen některých práv nebo povinností subjektu na další aktéry, quasi-subjekty. Historický systém ochrany zahraničních investic předvídal pouze tripartitu aktérů: investora, jeho domovský stát a stát, na jehož území se investice ukládá. Neboť jen státy disponovali právní subjektivitou, v případě sporu se investor musel uchýlit k politickému právnímu institutu diplomatické ochrany, který ovšem byl pro investory značně neefektivní. Pozdější vývoj mezinárodních investic zapříčinil, že diplomatická ochrana byla ve

[438] The official statistics of UNCTAD. Available from: < http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 and http://investmentpolicyhub.unctad.org/IIA>. Accessed on 29 April 2017.

většině případů nahrazena efektivnějšími mechanismy pro řešení sporů, například řešením sporů v rámci Mezinárodního střediska pro řešení sporů z investic ICSID, které možnost uchýlení se k diplomatické ochraně explicitně vylučuje.[439]

Stát

Suverénní státy jsou hlavními a jedinými originálními subjekty mezinárodního práva. Státy disponují plnou subjektivitou. V mezinárodním investičním právu je ale jejich role – zvlášť v porovnání s rolí investorů, kteří většinou sledují čistě maximalizaci zisku – komplikovaná a ze své podstaty schizofrenní. Na jedné straně je pro státní ekonomiku výhodné atrahovat zahraniční investory, a čili i jejich kapitál; na straně druhé ale státy čelí složitému úkolu vhodně vyvážit ochranu poskytovanou investorům a svým občanům v podobě ochrany před možnými negativními důsledky investice (*viz Kapitola 1*). Proto je nutné, aby stát pečlivě zvážil ekonomické, finanční a jiné benefity plynoucí z přijímané zahraniční investice proti důsledkům budoucích závazků ještě před podepsáním bilaterální investiční dohody.

Jednou z manifestací principu suverenity je také právo státu kontrolovat, regulovat nebo přímo vyloučit vstup zahraniční investice na své území.[440] Z hlediska mezinárodněprávní teorie se uzavřením bilaterální investiční dohody stát dobrovolně vzdává části své suverenity spočívající v právu a zároveň povinnosti provádět na svém území regulace ve veřejném zájmu. Tato povinnost státu svědčí na základě lidskoprávních dokumentů, jako je např. čl. 11 Mezinárodního paktu o ekonomických, sociálních a kulturních právech, který explicitně přiznává všem fyzickým osobám „*právo na adekvátní životní standard […] a soustavné zlepšování životních podmínek*.“[441] Jak bylo přitom rozhodnuto v případu *Azurix v. Argentina*, tak „*konflikt mezi BIT a lidskými právy musí být vždy vyřešen ve prospěch lidských práv, protože veřejný zájem […] musí mít přednost před soukromým zájmem [investora]*.[442] V případu *López Ostra v. Španělsko*[443] přiznal Evropský soud pro lidská práva ženě nárok na

[439] Čl. 27 ICSID dohody.
[440] SORNARAJAH, M.: The International Law on Foreign Investment. Ibid, p. 88
[441] Mezinárodní pakt o hospodářských, sociálních a kulturních právech. (1966). Přístupný z < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. Článek 11.
[442] Azurix v. Argentina, ICSID case No. ARB/01/12. Award. 14 July 2006. para. 254.
[443] López Ostra v. Spain. ESLP, č. 16798/90. 9 prosinec 1994.

kompenzaci od státu pro porušení čl. 8 Úmluvy o ochraně lidských práv a základních svobod tím, že stát povolil postavení koželužny v blízkosti ženina bydliště, což ji dlouhodobě obtěžovalo pachem, a dokonce jí to způsobilo i zdravotní komplikace. Je tedy zřejmé, že stát nemá jen právo, ale také povinnost regulace ve veřejném zájmu.

Na druhé straně regulace, která vyústí ve snížení hodnoty investice, může být v případném sporu mezi státem a investorem považována za nepřímé vyvlastnění hodné kompenzace, jako tomu bylo např. v případu *Metaclad,*[444] na jehož tribunál se snesla vlna kritiky za nedostatek zohlednění potřeby státu regulovat ve veřejném zájmu. Z uvedeného důvodu došlo od roku 2008 k sérii vypovězení bilaterálních investičních dohod.[445] Naopak v případu *Methanex*[446] soud rozhodl, že nediskriminační regulace ve veřejném zájmu, která splňuje požadavky řádného a spravedlivého procesu, ačkoliv poškodila investici, není považována za diskriminaci, pokud vláda nedala investorovi specifický závazek, že k regulaci nedojde.[447]

Investor

Zahraniční investor je fyzická nebo právnická osoba jedné země, která investuje finanční fond nebo kapitál do jiné země za účelem uskutečnění investice.[448] Pro přiznání benefitu ochrany poskytované bilaterální investiční smlouvou ale tato obecná definice neobstojí, proto je klíčové si investora nejprve přesně definovat. Pokud stát vymezí definici investora a investice v BIT široce, pak je tato země pro investora atraktivní, neboť mu s největší pravděpodobností BIT poskytne potenciální ochranu. Krátká komparativní analýza definice investora v investičních smlouvách (Česko-čínská BIT, Dohoda ICSID, Energetická charta) ukazuje, že aby státy přitáhly zahraniční

444 Metalclad Corporation v. The United Mexican States. ICSID Case No. ARB(AF)/97/1. (30 August 2000).

445 Venezuela-Netherlands BIT by Venezuela in 2008; series of terminations initiated by South Africa with Germany, Switzerland and the Netherlands; another series of terminations initiated by Ecuador with Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic, and Uruguay; or even the Indonesia-Netherlands BIT has been terminated just recently to the date of 30 June 2015

446 Methanex Corporation v. United States of America, UNCITRAL.

447 Ibid., part IV, ch D, para 7.

448 SALACUSE, J. W.: The Law of Investment Treaties. Ibid. p. 33.

kapitál, definují investora obecně široce. Nejširší definici investice obsahuje Energetická charta.

Zahraničním investorem je často multinárodní korporace, která – přestože je relativně novým fenoménem posledních pár dekád – nabývá v mezinárodním obchodu na důležitosti. Tyto korporace zpravidla disponují obrovskými finančními zdroji a velkým vlivem. Z hlediska mezinárodního práva mají ovšem pouze marginální subjektivitu. Tlaky na to, aby došlo k faktické změně role korporací jako nestátních aktérů v mezinárodním právu a jejich odpovědnosti sílí. Předmětem kritiky je, že ačkoliv disponují rozsáhlými právy (např. ochrana v rámci BIT), jejich povinnosti jsou minimální. V důsledku toho společnost vyvíjí tlak na tyto korporace, aby je přinutila přijmout odpovědnost za jejich škodné aktivity v oblastech lidských práv, úplatnictví nebo environmentální problematiky.

V systému, v němž absentuje striktní povinnost, má investor, jehož hlavním cílem je maximalizace zisku, jen malou motivaci k tomu vynaložit dodatečné náklady k ochraně životního prostředí. Společenský tlak ale v posledních letech vyústil ve vzestup myšlenky společenské odpovědnosti firem, jež nutí investory zohlednit do svých operací také environmentální hlediska. Ačkoliv je princip společenské odpovědnosti firem již velmi rozšířený, ještě se nedá považovat za obyčejové právo. Některé hlasy ovšem již mluví o uzavření multilaterální dohody o společenské odpovědnosti firem.

Nevládní a mezivládní organizace

Kromě tradiční tripartity aktérů v mezinárodním právu vykrystalizovali také další aktéři. Jsou jimi nevládní a mezivládní organizace. Aktivity nevládních organizací spočívají v kontrolování a hodnocení trhu, sběru informací nebo např. monitorování excesů společností v oblasti životního prostředí. Ačkoliv jim nebyla přiznána subjektivita, na trh mají zpravidla pozitivní vliv. V Číně v posledních dekádách došlo k nárůstu počtu nevládních organizací, dle odhadů jich působí na čínském trhu až 3.500. V reakci na snahy čínské vlády je regulovat většina z nich operuje v tzv. šedé právní zóně.

Mezivládní organizace oproti tomu odvozují svou existenci od suverénních států. Vznikají konsensem orgánů státu, které se sdružují za určitým předem vymezeným cílem. Významnými mezivládními organizacemi jsou např. ICSID, Konference OSN o obchodu a rozvoji ("**UNCTAD**"), Organizace pro hospodářskou spolupráci a rozvoj ("**OECD**"), aj.

ČÍNSKÉ OBAVY O ŽIVOTNÍ PROSTŘEDÍ

Čína aktuálně čelí vážným environmentálním problémům, které jsou nechtěným vedlejším produktem bezprecedenčního industriálního růstu posledních desetiletí. Reformy započaly v prosinci 1978, kdy se Čína odklonila od centrálního plánování a soběstačnosti, a nastolila tzv. politiku otevřených dveří (Open-Door policy) a přechod na tržní hospodářství. Cílem reforem bylo transformovat chudobou zmítaný národ v ekonomickou velmoc, a z čistě ekonomického hlediska svůj cíl splnily. Už v období od 1978 do 1996 Čína zčtyřnásobila svůj hrubý domácí produkt, do roku 2004 jej zdesetinásobila ($1,955 bil.), a v roce 2015 dokonce zdvacetisedminásobila ($ 11,955 bil.). Růst ekonomicky s sebou přinesl i nárůst investic. V roce 2015 odpovídal příliv přímých zahraničních investic ("**FDI**") Číny a Hong Kongu neuvěřitelným $ 175 mld. Ačkoliv podle UNCTAD do roku 2016 Čína ztratila vedoucí pozici světové jedničky v objemu přijímaných FDI ve prospěch USA a Hong Kongu, stále se řadí na třetím místě. FDI plynoucí z Číny oproti tomu v roce 2015 dosáhly $ 127 mld. Navzdory tomu, že Čína hraje ve světové ekonomice stále důležitější roli a již disponuje druhou nejsilnější ekonomikou světa, zůstává označována jako rozvojová země kvůli nízkému průměrného ročnímu příjmu *per capita*.

Materiální prameny práva

Čínská ekonomika je silně závislá na přírodních zdrojích a surovinách. Země spotřebuje 41-61 % světového cementu, uhlí, oceli, hliníku nebo mědi. Čína je také velký spotřebitel energie. Model růstu ekonomiky náročné na energii a na využívání zdrojů společně se zanedbáváním environmentální politiky vedly k tomu, že čínské životní prostředí se začalo rapidně zhoršovat. Pan Yue, bývalý náměstek Ministra pro Správu ochranu životního prostředí státu (*State Environmental Protection*

Administration; nyní Ministerstvo ochrany životního prostředí), tvrdí, že hlavním důvodem pokračujícího zhoršování životního prostředí je špatně nastavený systém národní politiky, který chybně evaluuje regiony výhradně na základě jejich hospodářského rozvoje. Zohlednit by se přitom měla také další kritéria, jako je dodržování environmentálních limitů.

Nesnesitelná environmentální situace v zemi výrazně ovlivňuje biofyzikální prostředí a lidské zdraví. Podle odborníků jsou tři nejpalčivější problémy v oblasti životního prostředí znečištění ovzduší a kontaminace vody a půdy. Podle některých zdrojů Čína dokonce překonala v celkových emisí oxidu uhličitého ve výši 9,377 milionu tun jako důsledku energeticky náročné ekonomiky všechny ostatní země.[449] Asi 60 % podzemních vod v Číně je nevhodných pro lidskou spotřebu a 12 milionů tun obilí je ročně kontaminováno těžkými kovy. V poslední době v souvislosti s rozvojem online nákupů a zasílatelství se do popředí dostává také otázka nakládání s odpady. V současné době se znečištění životního prostředí dostalo do stavu, který byl natolik závažný, že se stal hlavním hybatelem sociální nestability v Číně; dokonce zastínil i jiné příčiny masových nepokojů, jako jsou pracovní spory, vyvlastňování půdy vládou, demolice měst nebo konflikty mezi lidmi a státními orgány. Aby se uklidnily nejnaléhavější veřejné obavy, byli zástupci země nuceni reagovat a – slovy prezidenta Xi Jinpinga – "prohlásit válku" znečištění životního prostředí. Centrální vláda problematiku životního prostředí a udržitelného rozvoje prohlásila za jeden z pilířů své 13. pětiletky (2016-2020).

Formální prameny práva

Formálně vzato s regulací ochrany životního prostředí Čína začala už na přelomu padesátých a šedesátých let dvacátého století. První regulace se týkala problematiky znečištění vody a půdy, problematiky pitné vody a lesnictví. V roce 1979 Čína revidovala trestní zákoník a vložila do něj skutkovou podstatu trestného činu poškození životního prostředí. Životní prostředí je dokonce objektem ochrany v čl. 26 čínské Ústavy, který stanoví: „*Stát chrání své životní prostředí a přírodní zdroje a*

[449] The official website of Energy Information Administration. To be found at: < https://www.eia.gov/ >. Accessed on 3 March 2017.

zabraňuje a odstraňuje znečištění a další veřejná nebezpečí.“ Zákon o environmentální ochraně z roku 1989 existuje v novelizované podobě doposud. Do konce milénia Čína vydala šest dalších environmentálních zákonů, devět zákonů regulujících způsob využívání přírodních zdrojů a dvacet osm administrativních předpisů. I přes relativně brzkou existenci poměrně komplexního politicko-regulačního environmentálního rámce se životní prostředí dále zhoršovalo. Faktory na vině jsou především minimální donucovací systémy, nedostatečná kontrola dodržování předpisů a monitoring a také, jak říkají kritici, shovívavost zkorumpovaných úředníků. Dalším významným důvodem je fakt, že systém je nastaven tak, že neřízení se regulacemi je pro korporaci mnohdy finančně výhodnější. Dodržování náročných právních a ekonomických mechanismů je pro společnost často dražší, než soustředění se na maximalizaci zisku a následné zaplacení pokuty za porušení zákona.

Se započetím 13. Pětiletky vládní úsilí o zlepšení environmentální situace výrazně vzrostlo. Vláda (*i*) zavedla několik nových předpisů o životním prostředí a posílila další, které již existovaly, (*ii*) včetně předpisů týkajících se energetického sektoru. Z hlediska podnikání (*iii*) se vláda snaží přilákat soukromé investory do sektoru životního prostředí a energetiky, a vytvořit tak nové rozsáhlé investiční příležitosti.

(i) *Environmentální regulace*

Ústava čínské lidové republiky (“**Ústava**”)

- Ve své Preambuli země oznamuje svůj záměr „*vytrvat v reformě*“ a „*modernizovat průmysl a zemědělství*“. Navíc čl. 26 Ústavy uvádí "*stát chrání a zlepšuje životní prostředí a ekologické prostředí a zabraňuje a řídí znečištění a další veřejné nebezpečí. Stát organizuje a podporuje zalesňování a ochranu lesů*."
- Ačkoli Ústava stanoví stav ochrany životního prostředí, neposkytuje jednotlivcům explicitní právo na neznečištěné prostředí. V opačném případě by podle čínského práva jednotlivci postižení např. neoprávněným továrním znečištěním nemuseli prokazovat škodu, aby získali okamžitou náhradu újmy.

Zákon o ochraně životního prostředí ("**NEPL**")

- Cílem zákona je, jak je vymezeno v čl. 1 NEPL, „*chránit a zlepšovat životní prostředí, předcházet znečištění a další veřejná nebezpečí a kontrolovat je, ochrana veřejného zdraví, podpora ekologické obce a podpora sociálního trvale udržitelného rozvoje.*“ NEPL také předpokládá začleňování úvah o ochraně životního prostředí do plánů sociálně-ekonomického rozvoje.

Vzdušné desatero (The Air Ten)

- Vzdušné desatero je akční plán vydaný Státní radou v září 2013. Směřuje k redukci polétavého prachu v ovzduší a celkovému zlepšení tristní kvality ovzduší v zemi. Nevládní organizace Greenpeace již krátce po implementaci akčního plánu v období od 2013 do 2016 zaznamenala „*výrazné zlepšení průměrné kvality ovzduší v zemi – i když úroveň znečištění stále zůstává alarmující*.“[450]

Vodní desatero (The Water Ten)

- Dva roky po vydání Vzdušného desatera, v dubnu 2015, Státní rada vydala jeho obdobu zabývající se znečištěním vody. Plán vyžaduje, aby již do roku 2020 70 % vody v sedmi hlavních povodích Číny a 93 % zdrojů pitné vody ve městech v prefektuře splnilo přijatelné normy. Do roku 2030 by příslušné procentní podíly měly vzrůst až na 75 % a 95 %. Tamní fenomén, tzv. "černé a zapáchající vodní útvary" v městech v prefektuře by měly být do konce roku 2020 sníženy na méně než 10% a do roku 2030 by měly být tyto znečištěné vodní útvary odstraněny úplně.

Půdní desatero (The Soil Ten)

- Akční plán prevence a omezování znečištění půdy byl vydán Státní radou v květnu roku 2016 a zaměřuje se hlavně na zlepšení kvality půdy a zajištění bezpečné produkce zemědělských produktů. Podle Půdního desatera měly místní vlády do konce roku 2016 za úkol dokončit podrobný pracovní plán a předložit jej relevantním ministerstvům. Předpis

[450] Greenpeace: Clean Air Action Plan: The Way Forward. (2016). To be found at: < http://www.greenpeace.org/eastasia/Global/eastasia/publications/reports/climate-energy/2016/Clean%20Air%20Action%20Plan,%20The%20way%20forward.pdf>. Accessed on 3 March 2017.

předpokládá, že do roku 2020 ustane probíhající zhoršování znečištění půdy a od roku 2030 bude docházet ke zlepšení. Národním akční plán rovněž stanovuje úkoly pro dosažení prevence znečištění půdy až do roku 2050.

Národní směrnice o nakládání s nebezpečnými odpady ("Národní směrnice")

- Stejně jako Půdní desatero Národní směrnice, vydaná v srpnu roku 2016, podporuje recyklaci elektroniky, plastů a odpadů z obalů. Zavádí také Národní katalog nebezpečných obalů.

(ii) *Regulace energetiky*

Čína také aktivně transformuje energetický sektor. Čína je největší emitor skleníkových plynů na světě kvůli své silné závislosti na fosilních palivech. Naštěstí je země bohatá na obnovitelné zdroje, jako je vodní, solární nebo větrná energie, proto by měla být schopna integrovat obnovitelnou energii do čínského energetického mixu. K 1. dubnu 2010 byl vydán Zákon o obnovitelné energii. Obnovitelnou energii zákon vymezuje negativně, jako energii pocházející z nefosilních paliv, i pozitivně, jako větrnou energii, solární energii, hydroenergii, bioenergii, geotermální energii a energii využívající síly oceánu. Čl. 1 zákona o obnovitelné energii vymezuje cíl právní úpravy jako podporu obnovitelné energie, diverzifikaci dodávek energie a zlepšení energetické struktury, posílení energetické bezpečnosti a ochranu životního prostředí s ohledem na trvale udržitelný rozvoj.

(iii) *Regulace zahraničních investic*

V souvislosti se snahou snížit znečištění životního prostředí v zemi se čínská vláda snaží přitáhnout více FDI do sektorů průmyslu a služeb jako jsou *tzv.* clean production, high-tech, využívání obnovitelných zdroj energie nebo recyklace. Vláda podporuje investice tím, že nabízí investorům koncese, vládní nákupy a společné podniky (joint ventures). Veřejně-soukromá partnerství ("**PPP**") a nabídka zvláštních režimů zacházení, které čínská vláda již v minulosti úspěšně využila, slibují vládě zvýšit objem investic tím, že vytvoří multiplikační efekt pro vládní úsilí systematicky zmírňovat znečištění životního prostředí.

Preambule Ústavy stanoví, že Čína provádí nezávislou zahraniční politiku „*rozvíjením diplomatických vztahů a hospodářských a kulturních výměn s ostatními zeměmi.“* Čl. 18 Ústavy dále stanoví, že je umožněno zahraničním fyzickým i právnickým osobám investovat do Číny a vstupovat do různých forem hospodářské spolupráce s čínskými korporacemi a ekonomickými organizacemi v souladu s ustanoveními zákonů Čínské lidové republiky, které tito investoři musí dodržovat a které také chrání investorům jejich zákonná práva a zájmy.

Dne 3. září 2016 Národní lidový kongres (*pozn. nejvyšší legislativní autorita v zemi*) vydal Zákon o zahraničních investicích („**FDI zákon**“), který kompletně mění zavedený roztříštěný systém právní úpravy zahraničních investic. Nejvýraznější změnou je kromě sjednocení kodifikace (a tedy zajištění aplikace stejných pravidel pro všechny formy podnikání) výrazné usnadnění povolovacího procesu dříve spočívajícím v získání povolení od Ministerstva obchodu ještě před provedením investice, dnes stojící pouze na bázi reportování investorem *ex post*. FDI zákon také zajišťuje investorům národní standard zacházení. Na druhé straně, FDI zákon se vztahuje pouze na investice, které nepředstavují nebezpečí pro národní ekonomii, bezpečnost nebo jiné zájmy státu, což sekundárně vede k rozšíření regulativních pravomocí Státní rady, která národní seznam zakázaných a omezených odvětví vydává a upravuje ve své diskreci. Mimo to FDI zákon zavádí tzv. *actual control standard*, který vychází z doktríny *piercing the corporate veil* spočívající v prolomení majetkové samostatnosti právnické osoby. Vláda bude nově disponovat pravomocí s konečnou platností stanovit, kdo je konečným beneficiářem investice a kdo má v korporaci rozhodující pravomoci, a tím určit, zda se jedná o zahraničního či domácího investora, tedy zda se na něj ustanovení FDI zákona vůbec vztahují.

DEFINOVÁNÍ ENVIRONMENTÁLNÍ DOLOŽKY

Přiblížení environmentální a investiční ochrany je dlouhodobým zdrojem kontroverze, která vedla k mnoha sporům mezi investory a státy. Jak zdůrazňuje OECD, i přes to, že téměř všechny vlády OECD a OECD se zavázaly k podpoře cílů trvale

udržitelného rozvoje, většina z nich nepoužívá mezinárodní investiční dohody ("**IIAs**") jako mechanismus k dosažení těchto cílů. Jedním z důvodů je zřejmá rozporuplnost primárních objektů ochrany v IIAs s regulativními zásahy státu potřebnými k dosažení cílů trvale udržitelného rozvoje. Namísto toho tak v mnoha případech země iniciují změny vnitrostátních politik v právních předpisech, nástrojích a procesech a spolupracují mezi sebou na mezinárodní úrovni.

I přesto vzrůstá počet států, které do svých IIAs cíle trvale udržitelného rozvoje vkládají. Právě tzv. environmentální doložky jsou ustanovení, která slouží k promítání environmentálních cílů do bilaterálních investičních dohod. Ačkoliv zatím nejsou v mezinárodním investičním právu definována, tento termín kolektivně odkazuje na „*ustanovení v BITs ve formě samostatných doložek nebo jejich složek, které se primárně zaměřují na řešení otázek týkajících se životního prostředí*."[451] EPs nemusí explicitně obsahovat slovo „environmentální" a mohou vyskytovat i pod takovými pojmy jako: udržitelný rozvoj, rostliny a živočichové, ekologický systém nebo přírodní zdroje.

Jak je zřejmé z výše uvedeného, EPs se můžou vyskytovat buď ve formě samostatně stojícího ustanovení, nebo se přidružit k již existujícímu ustanovení bilaterální investiční dohody, a pouze jej tím obohatit o environmentální cíle. Neboť se jedná o relativně nově vznikající a jen opatrně se rozvíjející fenomén, je až na výjimky předmětem zkoumání mezinárodních institucí jako je Organizace pro Evropskou hospodářskou spolupráci a rozvoj nebo Konference OSN o obchodu a rozvoji.

Prvními státy, které inkorporovaly EPs do svých BITs, jsou Čína společně se Singapurem. Čl. 11 čínsko-singapurské BIT z roku 1985 stanoví, že „*[u]stanovení této dohody nijak neomezují právo jedné ze smluvních stran uplatňovat zákazy nebo omezení jakéhokoli druhu nebo podniknout jakákoli jiná opatření směřující k ochraně svých základních bezpečnostních zájmů nebo k ochraně [v]eřejného zdraví nebo prevence*

[451] CHI, M.: The "Greenization" of Chinese Bits: An Empirical Study on the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. Journal of International Economic Law, No. 18. pp. 511-542. (2015). p. 513.

nemocí a škůdců u zvířat nebo rostlin."[452] Od té doby EPs začaly pravidelně do svých BIT vkládat i ostatní země, mezi jinými jsou to např. Kanada nebo Spojené státy americké.

UNCTAD ve své studii[453] navrhuje tři hlavní kategorie způsobů, jak uvést cíle trvale udržitelného rozvoje do praxe. Rozděluje tak typologie environmentálních ustanovení do třech hlavních skupin: (1) přizpůsobení společných ustanovení způsobem šetrnějším k životnímu prostředí, (2) přidání nových prvků a ustanovení do IIA a (3) zavedení zvláštních a odlišného zacházení. Je pak na konkrétní zemi, aby si při draftování bilaterální investiční dohody zvolila své priority a prosadila je u partnerské země.

ČÍNSKÝ PŘÍSTUP K ENVIRONMENTÁLNĚ ZODPOVĚDNÉMU INVESTOVÁNÍ

Čína si v posledních několika dekádách prošla v mnoha ohledech působivým ekonomickým rozvojem, jehož stinnou stránkou byla ovšem narůstající a v poslední době neúnosná degradace tamního životního prostředí (*viz Kapitola 4*). Domácí i vnější kritika *statu quo* vyvinula tlak, který vyústil v komplexní legislativní změny v environmentální oblasti. Druhou oblastí, do které se změny promítly, je investiční rámec, neboť Čína začala svou zelenou politiku vnášet také do bilaterálních investičních dohod skrz ustanovení na ochranu životního prostředí.

V reakci na nárůst ekonomiky se podařilo v posledních desetiletích Číně uzavřít rostoucí počet BITs, což mj. souvisí také se zavedením sofistikovanější ochrany investorů a investic v rámci BITs. Podle UNCTAD je dosavadní stav čínských BIT následující: v současné době je platně uzavřeno 110 BITs a jedna trilaterální investiční smlouva uzavřená mezi Čínou, Japonskem a Koreou (dále jen "**TIT**"), 21 BITs je podepsaných a 14 BITs bylo již vypovězeno (*Pozn. BIT a TIT pro účely této práce jsou kolektivně označovány jako* "**BIT**s").

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[452] Čl. 11 Dohody o podpoře a ochraně investic mezi Singapurem a Čínou. 21. listopadu 1985.

[453] UNCTAD: 2015 Investment Policy Framework for Sustainable Development. (2015). To be found at: <http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>. Accessed on 23 April 2017.

Dá se tedy shrnout, že lze u Číny pozorovat zlepšení nejen v kvantitě, ale také v kvalitě BITs.

TYPY ENVIRONMENTÁLNÍCH USTANOVENÍ V ČÍNSKÝCH BITS

V dnešní době má Čína uzavřených již deset BITs, které obsahují celkem osmnáct EPs. Tato EPs se dají rozdělit na čtyři hlavní skupiny:

(i) neoperativní environmentální ustanovení, která tvoří součást preambule a deklarují společné cíle obou zemí podporovat a chránit investice v souladu se zásadou udržitelného rozvoje;
(ii) hmotná environmentální ustanovení, která se projevují zejména v institutech (nepřímého) vyvlastnění a standardu spravedlivého a rovného zacházení;
(iii) environmentální ustanovení skrz výjimky formulacemi zpravidla podobnými těm, které používá GATT a GATS; a
(iv) procedurální environmentální ustanovení.

Tato EPs jsou v analýze současně porovnávána s EPs v následujících BITs:

a) IISD model BIT, která je návrhem Mezinárodního institutu pro trvale udržitelný rozvoj, a u níž je předpoklad, že se tak jedná o model, který je nejvíce šetrný k životnímu prostředí;
b) 2010 US model BIT a 2004 Kanadský model BIT (FIPA), které obě představují bilaterální investiční dohody dvou předních ekonomik šetrných k životnímu prostředí; s
c) česko-čínská BIT z roku 2006, představující standardní BIT.

(*Pozn. kompletní analýza viz str. 106 – 118 této práce*)

ZHODNOCENÍ

Celkový počet EP zahrnutých do čínských dvoustranných investičních smluv je osmnáct a jsou rozděleny mezi pouhých deset různých smluv. To je méně než 10 % z celkového počtu aktuálně účinných 104 BIT, v nichž Čína představuje jednu ze smluvních stran. Je zřejmé, že začlenění environmentálního ustanovení do BIT závisí na zájmu obou stran vyjednávání (jen výjimečně může nastat situace, kdy jedna strana disponuje podstatně větší vyjednávací sílou než její smluvní partner).

S ohledem na tuto skutečnost a předpokládaje, že na inkorporaci environmentálních ustanovení do BIT měly v tomto případě zájem obě strany, není překvapivé odhalení, že největší počet EP mezi všemi čínskými BITs -– čtyři z nich – jsou začleněny do BIT mezi Čínou a Kanadou. Tyto čtyři environmentální ustanovení představují použití slavnostního jazyka v preambuli, ustanovení o vyvlastnění, ustanovení o obecných výjimkách a zavedení konzultací při řešení konfliktu s environmentální povahou.

Celosvětový historický vývoj ukazuje, že pro státy je nezbytné nejdříve dosáhnout určité úrovně hospodářského vývoje předtím, než budou schopny rozšířit své ekonomické úvahy o ušlechtilé cíle jako je environmentální politika. Není tedy překvapením, že výsledky této analýzy také ukázaly, že modelové BIT Spojených států amerických a Kanady environmentální ustanovení obsahují a hojně využívají. Dle očekávání má ovšem nejlépe propracovanou environmentální problematiku IISD Model BIT, která je na zásadě trvale udržitelného rozvoje účelově vystavena. Naopak česko-čínská BIT environmentální doložky vůbec – až na jednu výjimku, která je použitelná jako EP, přestože ochranu životního prostředí explicitně neadresuje – neinkorporovala. To mimo jiné značí, že před rokem 2006, kdy se tato BIT vyjednávala, neměla ani Česká republika, ale ani Čínská lidová republika environmentální zájmy jako svou prioritu.

ZÁVĚR

Ve vztahu k hospodářskému pokroku Čína za posledních několik desetiletí prošla téměř zázračnou transformací. V současné době se země vydává na cestu pokroku ekologického. V odpovědi na první část v Úvodu nastíněné teze je třeba říci, že trend *greenification* Číny se neomezuje pouze na přizpůsobení jejích vnitrostátních právních předpisů, ale naopak počítá také se začleněním cílů udržitelného rozvoje do investiční politiky země. V současné době je Čína v procesu rozšiřování a revize IIAs a její úsilí o ekologizaci BITs je sice v počátcích, ale již znatelné. Nejviditelnějším aspektem je rostoucí počet environmentálních ustanovení, která se objevují v nedávných čínských dvoustranných investičních smlouvách.

V odpovědi na druhou část teze je nutno podotknout, že objekty mezinárodního investičního práva a environmentálního práva jsou ze své podstaty v inherentním konfliktu a jejich vybalancování je pro stát složité. Inkorporování environmentální doložky do BIT ale k nápravě stavu životního prostředí v daném státě s vyšší či nižší mírou efektivity povede. Obecným účinkem těchto ustanovení je vyvážit všeobecně etablovanou zaujatost investičního prostředí ve prospěch investora pro případ, že by investorovy aktivity byly na úkor životního prostředí státu. Konkrétní dopad inkorporování EP v praxi se podle svého druhu pohybuje od usnadnění ochrany států před kompenzací v případech vyvlastnění ve veřejném zájmu, snížení prahu ochrany standardu spravedlivého a rovného zacházení, pokud investor poškozuje životní prostředí, až například ke zefektivnění řešení sporů v oblasti životního prostředí tím, že je stranám zavedena konzultační povinnost.

Celkový kvantitativní nedostatek EPs v bilaterálních investičních dohodách států je bohužel mezi státy poměrně běžný. Jedním z důvodů může být to, že strany zapojené do vyjednávání smluv, stejně jako tribunály, které rozhodují o osudu stran sporu, se zřídka kdy specializují na trvale udržitelný rozvoj v investicích, což vyžaduje náročnou průřezovou expertízu problematiky ochrany životního prostředí, FDI i lidských práv. Kromě toho, jak již bylo vysvětleno, IIAs nejsou ze své podstaty vhodným fórem pro adresování cílů trvale udržitelného rozvoje. V případě, že by se ale státy, vč. např. Číny, rozhodly další environmentální ochranu do bilaterálních investičních dohod inkorporovat, tak by se mohly snadno inspirovat v ustanoveních IISD Model BIT.

Abstrakt

Cílem diplomové práce je podat komplexní analýzu nově vznikajícího konceptu environmentálních ustanovení v bilaterálních investičních dohodách, a to zejména ve vztahu k Číně a jejímu zhoršujícímu se stavu životního prostředí. Práce je rozdělena do osmi kapitol. První kapitola se zabývá základním problémem environmentálních doložek, tedy střetem dvou na první pohled protichůdných zájmů, jimiž jsou zájem na podporu volného investování a veřejný zájem na ochranu životního prostředí. Následující dvě kapitoly vymezují právní rámec, v němž environmentální doložky fungují, a také jeho hlavní aktéry. Čtvrtá kapitola se zaobírá analýzou materiálních a formálních pramenů čínského vnitrostátního environmentálního a investičního práva, k jejichž úpravě došlo v reakci na dramaticky se zhoršující životní prostředí v zemi a jež vyústily v rozhojnění a tzv. *greenization* čínských bilaterálních investičních dohod. Pátá kapitola navazuje analýzou environmentálních doložek, jejich genezí, terminologickým vymezením a představením jejich typologií. Šestá kapitola je věnována rozboru postoje Číny k environmentálně zodpovědnému investování. V sedmé kapitole jsou zevrubně vyloženy jednotlivé typy environmentálních doložek, které jsou inkorporovány v čínských bilaterálních investičních dohodách. Tato kapitola je také doplněna komparativní analýzou čínských environmentálních ustanovení ve srovnání s jinými environmentálními doložkami vybraných států, včetně těch, které jsou považovány za světové environmentální lídry. Závěrečná osmá kapitola zhodnocuje kvantitu a kvalitu environmentálních ustanovení v čínských bilaterálních investičních dohodách a závěrem pak dochází ke shrnutí jejich přínosu a efektivity jako nástroje nápravy životního prostředí v mezinárodním investičním právu.

Klíčová slova

environmentální doložky, trendy v mezinárodním investičním právu, čínské bilaterální investiční dohody

Abstract

The purpose of this thesis is to offer a complex analysis of newly rising concept of the environmental provisions, with a particular emphasis on China and its deteriorating state of environment. The thesis is composed of eight chapters. The first chapter deals with the core problem of the environmental provisions, that is the colliding nature of the efforts to implement the environmental regulation in the international investment law. The following two chapters address the legal framework of the environmental provisions and the main actors in the field. Chapter four is concerned with the analysis of the material and formal sources of Chinese domestic environmental and investment law, which has been amended recently in reaction to the dramatically deteriorating environment in the country and which prompted the proliferation and *greenization* of the Chinese bilateral investment treaties. Chapter five proceeds with the analysis of the environmental provisions, their genesis, terminological delimitation and introduction of their typologies. The sixth chapter is dedicated to the analysis of the approach of China towards environmentally responsible investing. Chapter seven proceeds with detailed explanation of the particular types of the environmental provisions, which have been incorporated into the Chinese bilateral investment treaties. This chapter is also enriched by the comparative analysis of the Chinese environmental provisions with other environmental provisions of chosen states, including those who are regarded as the world environmental leaders. The final eight chapter evaluates the quantity and quality of the environmental provisions in the Chinese bilateral investment treaties, and the conclusion then summarizes their contribution and effectivity as an instrument of the environmental remediation in the international investment law.

Key words

environmental provisions, trends in international investment law, Chinese bilateral investment treaties