Global Journal of Politics and Law Research
Vol.7, No.1, pp.29-41, January 2019
Published by European Centre for Research Training and Development UK (www.eajournals.org)

TOWARDS A GREENER INTERPRETATION MODEL (RULE); A CONTENTIOUS BUT (AN) UNDISGUISED APPROACH IN INVESTMENT-ENVIRONMENT DISPUTES SETTLEMENT

Ayalew Abate Bishaw* and Gong Gu (Professor)**

ABSTRACT: *This essay brings greener interpretation as contentious but undisguised strategic move in the investment and environment dispute settlement to best protect the environment and settle controversies often rise at international level on these areas. Greener interpretation, as explained, cards on this sensitive discourse table claiming itself both as an approach and rule of interpretation in investment-environment disputes. Yet it doesn't appealto a specific rule of interpretations done in the human right activists nor favorwhat had been practiced in the investment-environment disputes settlement. To do so the author used to make a brief review of scholarlyliterature and decisions, analyses the treaties and conventions relating to investor protection, environmental multilateral agreements and international rule of interpretation. Indeed this short essay doesn't touch upon every dispute raised between environment and investment,doesn't review and indicate also organs of decision making…relating to environment and investment. But these are used limited only to building arguments to show greener interpretation as contentious but undisguised and new model in investment-environment dispute.*

KEYWORDS:Environmental Multi-Lateral, Agreements, Undisguised, Contentious, Greener Interpretation

Introduction

"The essence of law lies in the spirit, not its letter, for the letter is significant only as being the external manifestation of the intention that underlies it" - Salmon[1]

'Today's rule reflects in part yesterday's deviance and…the cloth of obligation is partly cut from the pattern of non-conformity.' [2]– Sir Elihu Lauterpacht

* He is a corresponding author. He has LLB from Haramaya University in Ethiopia and LLM from Alabama University law School of USA. He has been a staff of Debre Markos University Law (www.dmu.et.edu.com) School, Ethiopia. Currently he is SJD Candidate of Zhejiang University Guanghua Law School (http://net.zju.edu.con), Hangzhou, Zhejiang Province, 310008 China in the Environmental Law Stream under the supervision of Professor Gong Gu. He can be accessed at: tsion.ayelam@yahoo.com, +8613735446506, +251918748526. He takes all the responsibility in this work.

** He is a professor of Environmental Law in Zhejiang University Guanghua Law School. He has got LLB, LLM and Doctoral Degree. He supervises LLM and SJD students. He can be accessed at gonggu@sina.com

[1] *Salmon as cited in CA. Rajkumar S. Adukia B.Com (Hons.), FCA, ACS, ACWA, LL.B, DIPR, DLL & LP, MBA, IFRS(UK) 098200 61049/09323061049 email id: rajkumarradukia@caaa.in Website: www.caaa.i."Interpretation of Statutes" page 01*

[2]*Sir Elihu Lauterpacht as cited by Irina Buga(Utrecht University) in his article "Exploring the Treaty Modifying Effect of Subsequent Practice and New Custom: The Implications of State Practice Going Beyond the Limits of*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

At this era of investment and environmental law steadily evolution[3] and/or sustainable development era, the interpretation to the environment-investment[4] dispute has really attracted great scholars' concern from different corners of the globe. Often times the modality of giving effect to the environment and investment dispute by different organs of dispute settlement like ICSID, WTO environment and trade tribunal, the ICJ environmental court has been criticized and was bone of contention from the scholars from international law, investment law, and environmental law. This was true partly because of the following attributes: the fact that there is no single environmental court/tribunal to treat environmental cases[5], most environmental regulations are done through trade measures[6], investment regulations[7] and other similar mechanisms of mainstreaming which are not adequate, the very fact of growth in number of multilateral environmental treaties that itself makes environmental treaty enforcement complex[8], the absence of consensus on the uniform application of rule of interpretation of the Vienna convention[9], the problem in claiming the prior hierarchy between international laws and many other conflicting thoughts of international law. The dominant scholastic approach, however, has more a concern to regulating the environment in the investment sentiment/scheme and has no clearly set environmental specific model of interpretation designed to settle often conflicting issues in the investment-environment dispute. This may make a greener interpretation, as claimed here, innovative, progressive and also very contentious.

The attributes as mentioned above has also great bearing with interpretation than any other

Treaty Interpretation" page 1

[3] I used this term because environment is at the top of world politics now unlike other previous times. There is no good time than now to the environmental law development and design modality of interpretation.

[4] Because of the current environmental law and environmental understanding steadily growth, environment has come to be at the top of global politics. One can see the world development agendas that give great emphasis to the environment. The G-20 meeting of September 2016 has also given utmost emphasis to green growth and green finance. Regulation of the environmental issues has also grown in sectoral laws such as in investment. While the major objective of investment agreements was protection of the investment still, however, investment schemes have included environmental provisions regulating environment. And hence the interpretation of which has attracted concerns from great legal scholars like Philip Sand but in very limited manner only.

[5]Still there is no single environmental court/tribunal that specifically settles environmental cases only

[6]One can see the GATT /WTO article xx widely known as the environmental exception. There are also many trade agreements that regulated the issue of environment. These are all trade measures applied to protect the environment.

[7]Supra note 4 and see also https://unfccc.int/resource/docs/publications/negotiators/handbook.pdf

[8]Currently there are more than five hundred thousand environmental multilateral agreements. The fact that there are ample numbers of agreement makes environmental law enforcement complex/difficult.

[9]The rule of interpretation of Vienna convention Article 31 and 32 are subjects of contention and whether we apply it to investment and environmental agreements are always issues. Above all the very wording relating to purpose and object has different implications. And for environmental cases regulated through investment agreement, when appearing to investment tribunals, the purposes clause is treated favoring the investment and not the environment.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

legal discourse. And hence it makes a discussion relating to interpretation in the investment-environment dispute commendable. Otherwise, these issues all underscore the importance of and its bearing to interpretation that this essay has a concern on. Further, the way scholars have given a concern to the development of environmental principles[10]and environmental regulation, the interpretation aspect, and green interpretation was not dictated by Scholars[11].

This essay has thus, as remarked by the first two quotations, the double objective to meet: one to bring environmental interpretation into forefront issue and the other to explain/describe greener interpretation as a contentious but undisguised approach in the environment-investment dispute.

As an illustration and perhaps as a beginner to take the initiative (bringing greener interpretation as resolution) I have shared what Philip Sands has brought in to his discussion relating to ICSID by his article/contribution: Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law[12]. But it shall be clear that this essay writer doesn't agree with the idea of environmental integration which, still according to his beliefs, has subordination to this big domain -*environment*. In fact, this essay doesn't discuss integration and another point of differences but could only describe its own approach[13].

Towards meeting the objectives, the essay is composed of three basic sections. The first section will describe interpretation and particularly greener interpretation as an approach/rule in the investment-environment dispute while the second and the third sections explain why greener interpretation is a contentious but undisguised interpretation approach/model in the investment and environment dispute respectively. These two sections are made to clarify the greener

---

[10] These big development and era of environmental principles has not come to exist without problem. Its practice has faced serious problem among other things because of its very general nature and ambiguity.

[11] Most studies have focused rather on investor-state dispute and how to give a better protection to the investor. Eventhough they focused on investment-environment dispute settlement their concern is how the arbitration could better equipped infrastructural to handle environmental cases and not with regard to interpretation. See for instance the known recent study relating to environment-investment case, Beharry, Christina L., and Melinda E. Kuritzky. "Going Green: Managing the Environment Though International Investment Arbitration." American University International Law Review 30 no. 3 (2015): 383-429. Its basic focus is on managing the environmental case in the arbitration than on its interpretation technique.

[12] In 2007 as contribution to the Liber Amicorum of Judge Thomas Menash, Philip Sand, the renowned environmental legal scholar has wrote an article entitled as: Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law. This contribution has in a very brief manner shown as development of environmental law and environmental cases with their settlement. Philip Sand has criticized in a very disciplined and informant manner the decision by ICSID over two cases: Santa Elena and Metalclad recalling the criticism addressed against GATT at earlier time (1991 and 1994). This criticism, however, still is for failure to integrate environment in both the cases that almost amounts to equate environment to other two activities such as trade and investment that I don't believe and can't equate them.

[13]Ibid, see same contribution about the two cases see.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

interpretation as can be contentious but are best approaches or rule in the investment and environment-related disputes. Points that are considered bones of contention are identified. The justifications for greener interpretation are pinpointed and analyzed.

The Interpretation [14] and its Implication in the Environment-Investment Dispute Settlement

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law[15]*. Oliver Wendell Holmes*

In this description, I have brought the realists legal pragmatism into account for two purposes. One I can't address the importance of interpretation and role of interpretation organs more than this far-reaching and big scholastic thought. This thought, as some scholars[16] attach doesn't limit itself, on common law lawyers and/courts role. It doesn't also ignore the existing laws that include treaties in our case. It doesn't also imply that there shall be no the law in advance- as the case in civil law system. By and large, however, it addresses the role of interpretation as it gives meaning to both fact and law in issue. It considers interpretation as, I can say, brain to the corpus such as the flesh and bone. Thus, whether there is an investment treaty regulating the issue of basically investment and in fact with environmental integration[17] as scholars refer, the law shall be that what the interpretation organ says so. The prophecy[18] matters to borrow this giant legal scholar's terminology.

Indeed it is with reason that I have mentioned the prophecy in the investment-environment

[14]*Interpretation means the art of finding out the true sense of an enactment (it may be treaty, statute or rule) by giving the words of the enactment their natural and ordinary meaning. It is the process of ascertaining the true meaning of the words used in a statute. The Court or the tribunal is not expected to interpret arbitrarily and therefore there have been certain principles which have evolved out of the continuous exercise. These principles are sometimes called 'rules of interpretation'. It this sense the rule in the Vienna convention article 31 and 32 are taken into consideration. Interpretation based on these two provisions is in fact common in investment-environment dispute*

[15]*Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harvard Law Review 460-61 (1897) as cited and explained by Anthony D'Amato. It can be accessed from D'Amato, Anthony, "A New (and Bettr) Interpretation of Holmes's Prediction Theory of Law" (2008). Faculty Working Papers, Paper163. htt://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163*

[16]*These scholars both from the civil law and common law countries relate this expression as referring to role of common law lawyer (common understanding).*

[17] *Environmental integration as renowned scholars such as Philip Sand has stated is holistic approach and is inline with sustainable development concept. But this author doesn't fully agree with these conceptions. This is because in situations where environment which is the domain of all other elements is treated subordinate there is no good integration. I prefer to use what shall integrate to what. Others shall rather be made integrated to the environment than environment integrated to other elements.*

[18]*Ibid 14-"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

cases. First, though there are treaties its number and ambiguous/absurd feature outweighs its quality of law. Second, the growing number of cases and the presence of different tribunals treating the case in issue have grown that brings variation in the decision. Third, there is no uniform rule of interpretation. Each of the reasons I mentioned is discussed in one way or the other in the other sections. Thus bringing one model with peremptory effect is taken a solution for all the questions and the best way is a greener interpretation as rule and interpretation modality.

What is it? Is greener interpretation the special rule of interpretation? Or does it claim to be the rule of interpretation in investment-environment dispute?

These questions simply mean otherwise whether the international rule of treaty interpretation enshrined in the Vienna convention is not adequate enough to apply in the investment-environment dispute or whether the special rule of interpretation is necessary. The answer to this question can be either yes, or no, as the essay is not sponsored to come up with the best choice than academic and as it is common in legal analyses to reach/see both a no and yes answers.

A deep look into the Vienna treaty rule of interpretations articles[19] 31 and 32 and the practice in the investment-environment dispute conveys a message that success (environmental enforcement) depends on the nature of the case and the kind of the tribunal actually treating the case[20]. To articulate about the first, from the overall understanding of the provisions one could say that it is possible to accommodate investment –environment issues and no more special rule of interpretation is necessity as greener interpretation. On the other hand, others

[19] *Article 31, GENERAL RULE OF INTERPRETATION*

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.

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.

3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

[20]*Supra note 12 and 15, The WTO tribunal was successful in treating environment disputes than ICSID.*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

may say that the issue of both investment and environment are two recent international developments with a bit conflicting rules and hence the special rule of interpretation is required. Both of the arguments could be tenable; notwithstanding that the essay writer chooses the interpretation that is greener than the other in both angles of interpretation. And hence whether it gives a comparative advantage to the environment shall be the best criteria; still, however, whether the environmental case is well-founded shall be underscored too. The investment-environmental dispute settlement tribunals, though treating one by one and cases by cases is not the scope of this essay, have similar features that I disagree with, and cause me to bring greener interpretation into the issue. These include in a brief manner: they tend to give prior effect to the investment the comparative of which is most likely unacceptable, unpredictable and lacks uniformity, doesn't reflect their environmental sentiment [21]. Thus, greener interpretation can remedy all the problems that are mentioned in this essay.

To make it very clear thus greener interpretation right now (within the framework of Vienna treaty) may not be a rule but approach that gives more effect to the environment than investment. Nevertheless, it claims to be a rule too and in fact undisguised rule, in the treaty interpretation[22] of investment-environmental disputes despite the existence of these rules of interpretation[23]. Therefore greener interpretation as described above both as an approach and rule gives prime (prior) importance to the environment than investment on any investment-environment dispute for acceptable and common reasons.

It in effect plays, among other things, the following functions: one it balances the natural imbalance of sole doctrine interpretation effect, second it gives effect to the principle of sovereignty of state to administer its own internal environmental affairs (that gives answer to public interest concern of host states), third ensure investors environmental responsibility and gives opportunity to take caution about their environmental responsibility ex-ante, fourth it gives effect to the legitimacy conflict between investment and environmental laws, last it ensures predictability and uniformity of decisions despite the existence of various tribunal treating investment-environmental cases. These in sum/aggregate gives effect to the sustainable development and green economic growth model which is a new path of global development as discussed and decided by the G-20 countries holistic understanding. Each of these points is discussed in a bit detail manner in the section that deals with greener interpretation as an undisguised approach.

Why Contentious?

In this section, I have described how greener interpretation approach is contentious? The greener interpretation approach that I have brought about into this short essay is contentious, if

[21] *See the discussion section about undisguised approach, all are well described there.*

[22] *Treaty interpretation is the activity through which international tribunals give meaning to a treaty in the context of a particular case or fact pattern. Interpreting legal texts is what courts do. International tribunals are no exception*

[23] *If the rule of interpretation is considered unresponsive to the environmental issues because of its general nature and mostly ambiguous feature, greener interpretation claims itself to be special rule of interpretation.*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

not very contentious for the following basic reasons.

Greener interpretation, epistemological confusion

The first may begin from the terminology itself. The word 'greener' that I have used purposefully here has a bit touching effect in that so many could understand that "er" promotes environmental extremism. But this is just a matter of emphasis and in fact is not without reason. The basic reasons are related to its undisguisedness and are discussed in the other section.[24]

Greener as a complex comparative model or extremist model

The issue of environment, though grows steadily, there is no time for its independent growth[25]. A number of conferences and agendas can be mentioned as an example here like agenda 2 and sustainable development meetings of Johannesburg. The fact that there is no binding environmental treaty until today is also manifestation and hence the proponents of the above idea are potential contestants.

This usage really underscores the environmental favored king of move and interpretation. It negates the development trend that the world had used to protect the environment until now.

It questions the modality of interpretation used in the environmental cases in all horizons. Be it the WTO, ICSID, UN…all used the tantamount interpretation and I refer to it as *environmental subordinate interpretation.*

Greener Interpretation as negates sustainable development model

Third may be most related to the above one but opposes sustainability-may be for most the agreed model of development but for me, it is confusing as some stated it and model for environmental abuse.

Greener interpretation as the backing up procedural environmental tool-environmental justice arbiters

This model, unlike others, chooses to work on interpretation level which in fact backbite ones understanding of the law. It stands from the premise as interpretation gives life to the law. It considers and gives very regard to the interpreting organs as ultimate arbiters of environmental dispute interpretation. As per this model, the arbitration organs are not going to be limited by the BIT or another instrument that parties have brought about into their litigation. They can interpret and give decision favoring to the environment.

To conclude this approach doesn't have any intention of comparing the environment with any other entity. For this model, every conduct has to be rather assessed to its environmental impact, not environment as subordinate but as the domain of every subset[26]. This model doesn't restrict

[24]*See the section that deals with "why undisguised approach"*

[25]*Both the theoretical and practical environmental issues have been raised and praised as side issue of economic development and there is no time for its independent existence. All developments in this regard were I can say to mainstream environment in to development aspect especially in economics development such as trade, investment etc.*

[26]*This model as explained above confirms environment as domain of everything. See the definition of environment*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

arbitrators to the treaty between state and investors. They can question the very rule of law and interpret green. The pre-operation and post-operation don't account them to favor investment. And hence this model can be contested as an extremist model, comparative model, and anti-sustainable model.

The priority hierarchy in the norms of international law

The *greener interpretation* claims environmental law to take the prior hierarchy over investment law unlike the very foundation of most interpretations and most scholars thought[27]. It is quite clear that there is no apparent hierarchy between two international laws. But this doesn't mean that in cases of conflict or inconsistency there is no need of interpretation, or there is no inconsistency between two international norms. Because the occurrence of inconsistency, ambiguity, and gap, is a normal legal phenomenon, that gives the opportunity to arbitrators or judiciary to involve in interpretation to give life to the law itself. And hence the greener interpretation favors environmental issues to take advantage of the arbiter interpretation provided the environmental claim is well founded whether or not the bilateral treaty and the investors' protection convention states otherwise. This is because as I stated in the other sections environmental damages are irreparable and the damage affects the general public and ecologic interest, the cost of rehabilitation may exceed the total investment we could accrue and may amount prohibitive too. And therefore as the approach ever adopted by the ICSID favors the investment and investors bringing the issue of greener interpretation obviously conflicts and is contentious.

Sovereignty; the power of host states to environmental regulation and dispute resolution

Greener interpretation underscores the power of States to enact post-agreement environmental laws (regulations) and regulate environmental issues unlike the investor's protection law of investment[28]. As a result, it is very clear that the power of sovereignty to enact law and the investors' protection law will conflict and would be a source of contention. The investor's protection law considers States making of environmental law as green protectionism. But so far as the very intention of the State is to improve the environmental quality, maybe after

given in the introduction section. It begins stating that environment includes both the human and physical entity existed. And hence everything is element. The part of work that affects the domain in any case shall not be acceptable. But any activities that may disturb the element without affecting the domain as whole are tolerable. One can relate this into deductive and inductive reasoning too.

[27] Most scholars including Philip Sand propose that there shall not be priori hierarchy between norms of international law such as environment and investment law in this context. Philip Sand has chosen integrated approach. But while discussing integrated approach in deed he refer that the environmental norms shall be fully considered in the investment disputes which otherwise indicate that environmental norms shall prevail.The environmental objectives, now, has come to the top of legal and political agendas.

[28] The IIA restricts the power of states to enact environmental law under the guise of indirect expropriation and green protectionism. But the approach I want the ICSID to rather deeply investigate and favor or give the benefit of doubt to the environmental than restricting States power of law making.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

monitoring, the State shall be given credit rather. Environmental problems are not anteed manageable and hence once the State or its agency reaches its devastating impact because of the investment to enact a law to regulate its environment is inherent right.

Greener Interpretation as Undisguised Approach; Why, and How?

In this section, I elaborate the reason de'etrates of greener interpretation as undisguised interpretation. As described above in the introduction greener interpretation is an undisguised model of interpretation that ICSID shall follow in environment-investment dispute. Why? The reasons or justifications are as follows.

The Change in the Current Global Economic Growth Trend and Environmental Understanding

Since recently the world populations including the government[29] and private actors[30]have come to a level of environmental understanding[31] and a new economic model greener growth has emerged[32]. These trends justify greener interpretation to be employed in the environment-investment disputes as an undisguised model. The environmental understanding has invariably grown among the world community that in fact contributes a lot to the green economic development model and to the environmental law development[33]. To un-favor, the green approach will be erroneous and negates the top policy objective of the world community. Today,

---

[29]*As described in the UNDP 2011 report* ***"towards green economy"*** *Mounting evidence suggests that transitioning to a green economy has sound economic and social justification. There is a strong case emerging for a redoubling of efforts by both governments as well as the private sector to engage in such an economic transformation. For governments, this would include leveling the playing field for greener products by phasing out antiquated subsidies, reforming policies and providing new incentives, strengthening market infrastructure and market-based mechanisms, redirecting public investment, and greening public procurement. For the private sector, this would involve understanding and sizing the true opportunity represented by green economy transitions across a number of key sectors, and responding to policy reforms and price signals through higher levels of financing and investment*

[30] *Ibid, the private sector beyond made a party in the environmental financing has come to take the responsibility to the environment through corporate social and environmental responsibility scheme. See also the next discussion on corporate responsibility.*

[31]*As reported in United Nations Environment Program, 2011several concurrent crises have unfolded during the last decade: climate, biodiversity, fuel, food, water, and more recently, in the global financial system. Accelerating carbon emissions indicate a mounting threat of climate change, with potentially disastrous human consequences*

[32] *UNEP defies a green economy as one that results in "improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities" (UNEP 2010).*

[33] *Philippe Sands, Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law [Contribution to the Liber Amicorum of Judge Thomas Menash – 2007] page 3 and 5. One shall also presuppose that there is growth in environmental understanding that predates environmental law development.*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

as we can also see from the G-20 meeting held here in Hangzhou, environment and green growth, has been a big agenda. Especially the green finance proposal developed by China was its result and the implication is quite environmental and clear than investment.

Private actors environmental responsibility/involvement/ corporate socio-environmental responsibility

As can be inferred from the current international legal development trend, private investors or corporations are becoming the subject of social and environmental liability following a long period of irresponsibleness. The concept of corporate responsibility grows with the increasing impact of private investment on the social and environment and natural resource degradation. Private environmental financing has also come into involvement which relatively new concept. This all implies that environment and green development has been set as the topmost agenda of the world. The environment is not more the government and environmentalist agenda and the dispute resolution

The Sole Effect Doctrine and Green Protectionism

The sole effect doctrine can be understood to refer the situation in which the dispute resolution organ is established to settle investment disputes and empowered to see environment-investment disputes too according to the investment law. The perspectives all will reflect investment and rare to see the environment. Accordingly, the model by ICSID reflects the same thing. WTO environment dispute settlement committee and others are also same. They are not principally established to see environmental cases. Thus, whenever the center is established for one purpose but is at the same time given authority to see another thing together, the phenomenon reflected can show the sole effect doctrine.

Accordingly, the model that ICSID has adopted to settle the investment-environment dispute was criticized as reflecting only investors' right in its decision-the sole effect doctrine. It is principally investment dispute settlement center and often treats cases (investment-environment disputing cases) from investment perspective only. However, in the greener interpretation model both the investment and environment are supposed to be equally treated and in situations where there are problems greener interpretation shall prevail. This, in fact, doesn't necessarily reflect as the environmental litigant always wins the case. The greener interpretation, in fact, may support rather the investor depending on the nature of the particular case. The investor side of the argument may prevail. It is not as fixed to favor always to the environment which may amount also to environmental (green) protectionism. But the approach advocates greener interpretation in situations of uncertainty and when the consequence to the environment is pretty clear[34].

It gives/recognizes the power of the State to make its own law- the Principle of State Sovereignty

[34] *See the above section relating to greener interpretation. The fact that the arbiter gives better credit to the environmental argument in such a way guarantees or gives effect to the enforcement of environmental principles enshrined in the multilateral environmental agreements.*

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

It is clear that in State- investor relationship the kind of relationship created is less State to State relation. The investor, be it a natural or legal person, has gone to the host state no in its sovereign status. It can in no case claims sovereignty. Thus even though taking the dispute to independent arbitration has a meaningful contribution to impartiality, still, however, it is against the sovereign right of states to treat the case/dispute created in its own territory. Especially bringing the case to this arbitration when the state declares law has clear implication of interference. The state has the right to administer its own resource and hence considering one's state law invalid amounts violation. Thus unlike such interpretation by the ICSID, greener interpretation gives effect to the law of the state justifying the environmental importance and exercise of sovereignty and treat the investors' right only relating to compensation. The investor shall not benefit from his argument in flaw that contravenes states right of making its own law[35]. The sovereign right of international actors-state amounts to the regulatory functioning and shall not be considered as if against the investment protection law or treaty.

The environment can't be evaluated in terms of money/no economical estimation as in investment

Most of the time environmental damages are serious, imminent and irreversible. Even though it may be reversed the cost of rehabilitation may make it prohibitive. Thus the two areas are not comparable. You can't in any cases compare lose with the extinction of species including human beings. This kind of perspective shall extend to the interpreting organs. This implies that depending on the type of damage including the future/potential damage, there shall be always special favor to the dispute settlement organs to see the environment-related cases. The reserved right of the environmental argument. Thus by greener interpretation I mean the two important things shall not be treated equal let alone treating the environment within the ambit of investment. This argument is indeed supported by the two international environment-related frameworks. Accordingly t*he United Nations Framework Convention on Climate Change proclaims: "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [regulatory] measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."*[36] Similarly, the 1992 Rio Declaration states, *"Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*[37]Besides, the nature of risk and its urgency shall also be taken into account. Otherwise, the profit of investment may outstrip the resource and environment of the host state may result in vain.

[35] *The right of making law and administer the state is the pillar sovereign states right that cannot be violated through mode of interpretation. The arbitration or any adjudication organ shall not in any case derogate such a right and shall not be given such a right too.*

[36] *I have found the two quotations cited by Cass R. Sunstein in his article "Two Conceptions of Irreversible Environmental Harm, the Law School the University of Chicago May 2008 page 2-3*

[37] Ibid

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

The set and subset or what is the domain argument

The greener interpretation model as I have referred takes this mathematical argument to unleash its undisguisedness. This argument implies that investment is the subset of the environment. And hence the environment is the domain of all things. The question thus must not be whether the particular environment claim affects investment but whether only it is well founded. If one sticks to the first question, it is clear that what is first to be treated is the investment treaty and not the environmental general principles either at international or state level which gives subordinate value to the environment. If one takes the first issue she follows the green interpretation approach. Whether a particular investment treaty covers or well regulates the environmental issue shall not be a factor to impair environment so much so that either the national government or the international environmental law have a solution to same. You are not out of the domain to decide with a particular focus on single bilateral investment agreement impairing the environment. The risk/impact is not subset specific.

Concluding Remarks and Recommendation

The essay basically attempts to answer two questions in this relatively new perspective and framework, greener interpretation: why greener interpretation, as an approach, is contentious and why on the other hand it is undisguised to investment-environment dispute. Indeed, in the meanwhile, some pertinent factors for indoctrinating the approach are identified and explained. To start from the first question the greener interpretation model is considered to be contentious for reasons including epistemological reason, comparative extremism, negate sustainable development, claims prior hierarchy and promote absolute sovereignty. Nevertheless, it is the undisguised approach in the investment-environmental dispute settlement as it gives effect for those many interacting and conflicting issues because of the change in the current development and environmental trend and reasons mentioned including corporate environmental responsibility, sole effect doctrine, nature of environmental problems, and the supremacy of states to regulate their own affair. The fact that it doesn't disregard investment but attempt to solve the environmental sided criticism against investment-environment dispute arbiters can make this approach special one.

Therefore, as per this analysis, greener interpretation shall be adapted as either an approach or rule of interpretation by the investment-environment dispute settlement organs as a concrete step to ensure the environmental protection/regulation by investment schemes.

References

Books

Åsa Romson and Acta Universitatis Stockholmiensis (2012), *Environmental Policy Space and International Investment Law,* Department of Law, Stockholm University ISBN 978-91-86071-89-9 ISSN 0562-2840, Publisher: Acta Universitatis Stockholmiensis, Stockholm.

UNEP（2007），*Multilateral Environmental Agreement Negotiator's Handbook* Second Edition

Articles

Christina J. Banfild（2014）*The Importance of Interpretation: How the Language of the Constitution Allows for Differing Opinions*, *University of Tennessee - Knoxville*, cbanfil@utk.edu

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)

David Gaukrodger and Kathryn Gordon (2013) Investor-State Dispute Settlement: A Scoping Paper for The Investment Policy Community

Duncan Brack, March (2001) International Environmental Dispute, International forums for non-compliance and dispute settlement in environment-related cases, Prepared for Department of Environment, Transport, and the Regions

Xian Guoming, Zhang Cheng, ZhangYangui, GeShunqi& James X. Zhan， The interface between foreign direct investment and the environment: The Case of China， 1999 Occasional paper no. 3

Jorge E. Viñuales (September 2015) International Investment Law and Natural Resource Governance

Basak Cali (2015) treaty interpretation, 21 specialized rules of treaty interpretation Oxford University Press

Buga (Utrecht University) *2008 "Exploring the Treaty Modifying Effect of Subsequent Practice and New Custom: The Implications of State Practice Going Beyond the Limits of Treaty Interpretation"*

Philippe Sands*(2007)Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*

Websites

https://unfccc.int/resource/docs/publications/negotiator/handbook

Treaty interpretation, 21 specialized rules of treaty interpretation (Basak Cali)

*www.caaa.i*nterpretationofstatutes

Dissertation papers

Alessandra Asteriti (2011), GREENING INVESTMENT LAW, Submitted in fulfillment of the requirements for the degree of Ph.D. Faculty of Business, Law and Social Science University of Glasgow

Treaty /laws

Vienna Convention on the Law of Treaties (With Annex) Concluded At Vienna on 23 May 1969.

Print ISSN: 2053-6321(Print), Online ISSN: 2053-6593(Online)