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Environmental Provisions in ASEAN Investment Agreements: Reserving Member States' Right to Regulate Environmental Issues

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As the Association of Southeast Asian Nations (ASEAN) becomes an influential actor in international investment rule-making, this article scrutinizes the environmental provisions within ASEAN investment agreements and evaluates their adequacy in preserving ASEAN member states' (AMS) regulatory autonomy for environmental protection. Through a comprehensive survey of fifteen plurilateral investment agreements, the study conducts a comparative analysis with international treaty practices to determine the effectiveness of these provisions in reconciling environmental concerns with foreign investment promotion objectives. These findings reveal that environmental provisions in ASEAN investment agreements are often vague or narrowly tailored, limiting their ability to provide adequate regulatory space for AMS to implement necessary environmental measures. This article concludes by offering recommendations for enhancing environmental provisions in future ASEAN investment agreements to ensure a more balanced approach safeguarding both investment promotion and environmental regulation rights of AMS.

Keywords
ASEAN, Investment Agreements, Environmental Provisions, Right to Regulate, Foreign Investment

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1. Introduction

The Association of Southeast Asian Nations (ASEAN) has emerged as a dynamic force in international investment rule-making. While ASEAN member states (AMS) have actively negotiated bilateral investment treaties (BITs), they have also participated in various cross-regional investment agreements.[1] These agreements signify a critical milestone in the evolution of ASEAN investment policies amid the regionalization of international investment agreements.[2] Implementing foreign investment policies at the national level poses significant challenges. While foreign investment has undoubtedly contributed to the economic prosperity of the AMS, these policies often face criticism for neglecting non-economic interests, such as environmental protection.[3] Amid ongoing efforts to incorporate environmental considerations into ASEAN investment policies, it is imperative to re-examine how environmental concerns have been addressed in ASEAN's international investment agreements (IIAs). Despite extensive global research on the inclusion of environmental provisions in investment treaties,[4] there is a dearth of literature that specifically focuses on ASEAN countries.

This research aims to bridge this gap by analyzing environmental provisions in ASEAN investment agreements, concentrating on the ASEAN Comprehensive Investment Agreement (ACIA) and plurilateral investment agreements concluded by ASEAN as a group. This paper does not include agreements signed by individual AMS with third parties. The central argument posits that, although ASEAN investment agreements have increasingly integrated environmental provisions, these measures are insufficient for reserving regulatory space for AMS to implement environmental policies.

In terms of terminology, two clarifications must be made. First, this study employs the term "investment agreements" or "international investment agreements" (IIAs)

1 In addition to the ASEAN Comprehensive Investment Agreement (ACIA) governing intra-region investment, ASEAN also signed several investment agreements with its strategic partners, such as the ASEAN-China Investment Agreements (2009), ASEAN – Korea Investment Agreement (2009), ASEAN–India Investment Agreement (2014) and the Regional Comprehensive Economic Partnership (RCEP) (2020).

2 Julien Chaisse & Sufian Jusoh, The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment 36 (2016).

3 Muhammad Ali Nasir, et al., *Role of Financial Development, Economic Growth & Foreign Direct Investment in Driving Climate Change: A case of emerging ASEAN*, 242 J. Envtl. Mgmt. 131 (2019).

4 Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 Int'l Law. 529 (2017). *See also* Kathryn Gordon & Joachim Pohl, Environmental concerns in international investment agreements: A survey (OECD, 2011); Shunta Yamaguchi, Greening regional trade agreements on investment (OECD, 2020).

interchangeably to refer to both agreements exclusively covering investment issues such as BITs and treaties with investment provisions (TIPs). TIPs include free trade agreements or economic partnerships with an investment chapter and treaties that only provide framework provisions for further cooperation or a mandate for future negotiations in the investment area. Second, the environmental provisions examined in this study include all references to relevant environmental elements, such as plants, animals, and natural resources, and do not just express references to the environment.

The article is structured as follows. Part II provides an overview of ASEAN's investment agreements, setting the context for the discussion. Part III emphasizes the urgent need to incorporate environmental regulations within IIAs in relation to foreign investments. Part IV presents a comprehensive analysis of the environmental provisions in ASEAN IIAs, revealing the limitations imposed by their narrow scope and wording, which hinder their effectiveness in supporting government measures for environmental protection. Part V acknowledges these shortcomings and proposes an alternative treaty language to secure policy spaces for environmental regulations.

2. ASEAN Investment Agreements: Intra-Region to External Plurilateral Agreements

The facilitation of investment flows has always been at the center of the economic integration strategy within the ASEAN. The history of the ASEAN IIAs can be traced back to the first Agreement for the Promotion and Protection of Investment signed on December 15, 1987 (APPI). Stipulating intra-ASEAN investments, the APPI included fundamental principles such as fair and equitable treatment (FET), protection against illegal expropriation, and most-favored-nation treatment.[5] In October 1998, the AMS concluded the Framework Agreement on the ASEAN Investment Area (AIA) to liberalize and enhance the regional investment environment.[6]

To realize an ASEAN single market, the ASEAN Vision 2020 declaration called for the creation of an ASEAN economic region, which considered the free investment movement essential.[7] The Declaration of ASEAN Concord II reaffirmed this point

5 Nicolas Calamita & Charalampos Giannakopoulos, ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options 17 (2022).

6 Framework Agreement on the ASEAN Investment Area, https://agreement.asean.org/media/download/20140119040024.pdf.

7 ASEAN Vision 2020 (Dec. 15, 1997), https://asean.org/asean-vision-2020.

by prioritizing investment policies in forming the ASEAN Economic Community (AEC).[8] In 2009, the ACIA concluded the implementation of the AEC, replacing the APPI and AIA. It is an enhanced agreement encompassing traditional provisions on the liberation, facilitation, protection, and promotion of investment, as well as additional features to stimulate foreign capital flows into the region. With the goal of establishing "a free and open investment regime in ASEAN,"[9] the ACIA serves as the cornerstone of intraregional investment protection within the ASEAN.[10]

The ASEAN investment policies aim to encourage investment movement within the region and to promote ASEAN as a global investment hub. To achieve this objective, AMS have signed individual investment treaties, while ASEAN has negotiated and concluded plurilateral investment agreements with its strategic partners. ASEAN has already signed 12 external IIAs, eleven of which are in force.

Two crucial factors concerning ASEAN's external IIAs need to be considered. First, there are some overlaps in the scope of the agreements. There may be more than one treaty in force that govern investment flows between the two contracting parties. For example, the most recent RCEP concluded between ASEAN and five partners[11] co-exists with other IIAs between ASEAN and each of the partners. Second, all ASEAN external agreements are made per the "AMS as ASEAN" model. While all AMS are parties to IIAs, ASEAN itself is not a separate international legal entity. Consequently, the rights and obligations of each party to these IIAs are extended to all other parties.[12] For instance, under the ASEAN-China Investment Agreements of 2009, an AMS owes obligations not only to Chinese investors but also to other AMS. The plurilateral nature of ASEAN's external IIAs exposes AMS to investor claims from other AMS and non-ASEAN parties, expanding their potential liabilities. The plurilateral nature of external IIAs combined with their overlapping scope increases the risk of inconsistency and fragmentation in ASEAN investment policies.

8 Declaration of ASEAN Concord II (Oct. 7, 2003), https://asean.org/speechandstatement/declaration-of-asean-concord-ii-bali-concord-ii.

9 ASEAN Comprehensive Investment Agreement 2009 art. 1 [hereinafter ACIA].

10 Calamita & Giannakopoulos, *supra* note 5, at 23.

11 The contracting parties of RCEP include ASEAN Member States, Australia, China, Japan, the Republic of Korea and New Zealand.

12 Calamita & Giannakopoulos, *supra* note 5, at 23-4.

3. Need to Incorporate Environmental Issues in ASEAN Investment Agreements

Foreign investment not only has contributed to the economic growth of the AMS but has also resulted in environmental degradation. Consequently, demand for AMS to strike a balance between their economic interests and the environmental value of their investment policies has been growing in recent years. This need to regulate environmental issues related to foreign investment arises from both internal and external pressures.

From an internal perspective, there has been increasing public awareness of environmental issues caused by foreign investment in ASEAN countries. Empirical studies show that foreign direct investment (FDI) contributes to environmental pollution in most ASEAN countries.[13] For instance, FDI has increased environmental degradation in terms of carbon dioxide emissions in five ASEAN countries such as Singapore, Thailand, Malaysia, the Philippines and Indonesia. Furthermore, recent environmental scandals related to FDI projects have caused severe criticism and opposition from the locals. For example, a Taiwan-invested steel corporation's operations caused the 2016 Vietnam marine life disaster, leading to a large-scale campaign against the company's operations.[14] There have also been public protests in Myanmar and Cambodia owing to serious concerns over the environmental risks associated with Chinese-invested energy infrastructure projects.[15] Under such pressure, the ASEAN governments are urged to enforce environmental standards to ensure foreign investors' compliance with domestic environmental laws.

From an external perspective, ASEAN countries have been making stronger commitments to strengthen their environmental protection policies and laws in the context of the global fight against climate change. All ASEAN countries ratified the 2015 Paris Agreement with a strong commitment to cut greenhouse gas emissions.[16] Eight of the ten ASEAN countries have made net-zero emission commitments by

13 Nasir, *supra* note 3. *See also* Yasmine Merican, et al., *Foreign direct investment and the pollution in five ASEAN nations*, 1 Int'l J. Econ. & Mgmt. 245 (2007).

14 *See Vietnam Blames Formosa Mill for Fish Kill*, Taipei Times (July 1, 2016), http://www.taipeitimes.com/News/front/archives/2016/07/01/2003650089.

15 *See Hundreds Protest Pipeline in Burma's Rakhine State*, Radio Free Asia (Apr. 18, 2013), https://www.rfa.org/english/news/myanmar/pipeline-04182013175129.html; Beth Walker, *Protests halt Chinese-backed dam in Cambodia*, China Dialogue (Mar. 19, 2014), https://www.chinadialogue.net/blog/6837-Protests-haltChinese-backed-dam-in-Cambodia/en.

16 ASEAN State of Climate Change Report: Status and Outlook of the ASEAN Region toward the ASEAN Climate Vision 2050, https://asean.org/wp-content/uploads/2021/10/ASCCR-e-publication-Correction_8-June.pdf.

the end of the 26th Session of the Conference of the Parties (COP26) of the United Nations Framework Convention on Climate Change (UNFCCC) in 2021. Reforming environmental laws and policies is a top priority for these countries to achieve their ambitious goals.[17]

However, if environmental regulations change in a way that diminishes foreign investors' interests, investors may sue the state before arbitration. For years, investors have instituted dozens of investor-state dispute settlement (ISDS) proceedings to challenge domestic environmental regulations, including chemical prohibitions,[18] denial of permits for waste landfills,[19] and the revocation of mining authorization.[20] These cases were brought not only to developing countries, but also to developed countries. Recently, there has been a proliferation of ISDS cases under the Energy Charter Treaty concerning the energy-transition policies of western countries towards renewable energy sources.[21] As a result, there have been concerns that the obligations imposed by IIAs might restrict the state's ability to manage environmental issues, leading to the insertion of environment-related wording into the investment treaties. Consequently, environmental clauses have been increasingly included in new IIAs worldwide.[22]

Given these circumstances, it is imperative that ASEAN incorporates environmental provisions into its IIAs. This would enable it to address emerging conflicts between environmental conservation and FDI promotion. Such inclusion of environmental provisions is also essential to safeguard the State's sovereignty to enforce environmental regulations within its jurisdiction, and to keep abreast of the latest practices in IIA drafting. The subsequent section will scrutinize ASEAN investment agreements to delineate their approaches to addressing environmental issues.

17 *Id.* at 4.

18 Methanex Corporation v. United States of America, UNCITRAL (2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [hereinafter Methanex case].

19 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

20 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf.

21 Ana Mercedes López-Rodríguez, *The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU*, 8 Transnat'l Envtl. L. 289 (2019).

22 Martini, *supra* note 4; Gordon & Pohl, *supra* note 4; Yamaguchi, *supra* note 4.

4. Types of Environmental Provisions in ASEAN Investment Agreements

ASEAN had already concluded 15 IIAs: three govern intra-region investments and the remaining are external plurilateral agreements between ASEAN and its partners. Nine of these IIAs include provisions related to the environment (see Annex 1 for more details). A deeper examination of the IIAs reveals that all treaties without environmental references, except the 1987 APPI, are framework agreements that only set out principles for further negotiations on investment issues. When the parties reach a detailed agreement, environmental provisions can be added. For example, although the 2005 Framework Agreement on Comprehensive Economic Cooperation between ASEAN and Korea did not mention environmental concerns in relation to investment, this issue was addressed in Article 20 of the 2009 ASEAN-Korea Investment Agreement.

Environmental provisions first appeared in the 1998 AIA as general exceptional clauses. Since then, the environmental provisions in ASEAN investment agreements have evolved and become more diverse. They can be divided into four main categories as follows:

1. general exception clause (nine treaties);
2. provisions, precluding non-discriminatory regulation as a basis for claims of indirect expropriation (five treaties);
3. exceptions to national treatment (one treaty); and
4. expert reports on environmental issues requested by investment arbitration (one treaty).

It is also noteworthy that the simultaneous use of more than one environmental reference category in an IIA is common. For example, the ASEAN–India investment agreement of 2014 refers to environmental issues in three separate provisions: general exceptions (Article 21); exceptions to national treatment (Article 3.5); and clauses precluding nondiscriminatory regulation as the basis for indirect expropriation claims (Article 8.9). Each type of environmental provision was examined in detail as follows.

A. General Exception Clause

General exception clauses are the most commonly used environmental provisions in ASEAN investment agreements. A typical example is Article 16 of the 2009 ASEAN-China Investment Agreement. It addresses several environmental elements as follows:

> 1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, their investors, or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments made by investors of any Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: […] b) necessary to protect human, animal, or plant life or health; […] f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

This provision primarily mirrors Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO). In addition, instead of adopting a similar language, some IIAs directly incorporate the provisions of the GATT or GATS as part of their IIAs. For instance, the Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) 2009 states that concerning the investment chapter, "Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis.*"[23]

The general exception clauses in ASEA investment agreements often consist of two parts. One, often called the Chapeau, sets out the conditions for adopting exceptional measures (not discriminatorily, arbitrarily, or by creating disguised restrictions on investors or their investments). The other part provides a closed list of exceptional policy purposes, such as protecting human, animal, and plant life or exhaustible natural resources.[24] This provision seems to be a clear expression of States' intentions to ensure that obligations under IIAs do not impede the pursuit of public policy. The language borrowed from the WTO agreements can also make it somewhat easier for contracting parties to negotiate and accept, as they are familiar with the provisions. Furthermore, if exceptions are invoked in ISDS disputes, investment tribunals may refer to a rich set of the WTO decisions on general exceptions as a complementary tool of interpretation.[25]

However, if incorporating general exceptions of the GATT or GATS into IIAs, it raises several problems, mainly because of their failure to address the particularities of international investment laws. As convincingly demonstrated by several scholars, if a measure meets the conditions under the general exception clause, that is, to be

23 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, art. 1, ¶ 2 [hereinafter AANZFTA].

24 Chaisse & Jusoh, *supra* note 2, at 143.

25 Alessandra Asteriti, *Waiting for the Environmentalists: Environmental Language in Investment Treaties*, *in* International Investment Law and Its Others 136-8 (Rainer Hofmann & Christian Tams eds., 2012).

non-discriminatory, not arbitrarily applied, and not create a disguised restriction on foreign investors and their investments, it would then not violate the treatment principles in the IIA.[26] As a result, the invocation of the exception clause does not provide an adequate defense for states in dispute settlements. Moreover, the exception clause offers little guidance on compensation in cases where the host state expropriates foreign investment for environmental purposes, one of the most common claims in the ISDS.[27]

While this provision permits States to implement a measure for environmental purposes, the question remains whether it would completely exempt States from compensating investors if such a measure amounted to expropriation. Unlike the WTO state-state dispute settlement mechanism, in which monetary compensation is generally unavailable, damages are the most frequently sought remedy in the ISDS. Thus, without further clarification, it is doubtful whether the general exception clauses in the ASEAN IIAs have a practical impact.

B. Precluding Non-Discriminatory Regulation as a Basis for Claims of Indirect Expropriation

According to an OECD survey, indirect expropriation is among the top three reasons for establishing state responsibilities due to treaty violations in environment-related investment disputes.[28] In international investment law, indirect expropriation often concerns measures with a similar impact on the expropriation or deprivation of investor property through government interference in the use of that property, even if its legal title remains unchanged. It is distinguished from direct expropriation, which often refers to orders of nationalization or the transfer of investors' property to the state or an appointed third party.[29]

Given the proliferation of compensation claims for indirect expropriation from foreign investors affected by states' environmental measures, the latter attempted to exclude non-discriminatory environmental regulations from being considered indirect expropriation.[30] This provision has increasingly appeared in the ASEAN IIAs. For example, under the AANZFTA, the Annex on Expropriation and Compensation

26 Andrew Paul Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 505 (2009).

27 Martini, *supra* note 4, at 580.

28 Yamaguchi, *supra* note 4, at 29.

29 OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, (OECD Working Papers on International Investment, No. 2004/04), https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.

30 Danni Liang, *Environmental concerns and China's international investment agreements*, *in* Research Handbook on Environment and Investment Law 365 (2019).

stipulates: "[n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b) [indirect expropriation]."[31]

A similar provision can be found in the Annex on Expropriation under the RCEP. This provision reflects current practices in international investment treaty drafting to clarify the criteria for distinguishing indirect expropriation from non-compensable environmental regulations in response to inconsistencies in interpreting and applying expropriation provisions by investment tribunals.[32]

C. Exceptions to National Treatment

National treatment (NT) is a fundamental principle of the IIAs. In general, it requires the host state to provide foreign investors and their investments no less favorably than those accorded to domestic investors. Concerning environmental issues, one ASEAN investment agreement allows states' environmental protection measures to be considered exceptions to the NT. Article 3.5 of the ASEAN-India Investment Agreement (2014), states that: "extension of financial assistance or measures taken by a Party in favor of its investors and their investments in pursuit of legitimate public purpose including the protection of health, safety, the environment shall not be considered as a violation of this Article." This provision can be used to justify government environmental policies that would otherwise breach NT obligations, such as state-funded programs that subsidize domestic investments in the green sector. However, this language is rarely used in treaty practice.[33] Arbitral practice has also shown that violations of NT are seldom found in ISDS disputes concerning environmental measures.[34] Therefore, although NT exceptions may reserve state policy space in some instances, they would have limited practical applicability.

D. Expert Reports on Environmental Issues Requested by Investment Arbitration

In ISDS involving the environment, tribunals are often asked to address technical issues that may be outside of their legal expertise. In many cases, investment tribunals must consult impartial experts to gain a precise understanding of the technical aspects of the case. Therefore, provisions for the appointment of experts by tribunals

31 AANZFTA, Annex on Expropriation and Compensation, ¶ 4.

32 Yamaguchi, *supra* note 4, at 14.

33 Gordon & Pohl, *supra* note 4, at 19.

34 Yamaguchi, *supra* note 4, at 26.

in environment-related disputes have been included in several IIAs.[35] Among ASEAN investment agreements, the ACIA is the only one that provides for this type of language:

Without prejudice to the appointment of other kinds of experts authorized by the applicable arbitration rules, the tribunal, at the request of the disputing parties, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, public health, safety, or other scientific matters raised by a disputing party in a proceeding subject to such terms and conditions as the disputing parties may agree.[36]

This provision confirms the investment tribunals' power upon the request of the parties to appoint their own experts to assist them in identifying environmental issues. In the past, investors and states relied on expert reports to demonstrate, for instance, how investment activities had contaminated soil and water,[37] or how foreign investment could pose environmental risks that justify the state's response measures.[38] Nevertheless, tribunals have faced significant challenges in making decisions based on party-appointed experts because they often offer testimony that is as favorable to their appointing party as feasible.[39] This frustrating problem has been pointed out by the tribunal in *Perenco v. Ecuador* when "each [party-appointed expert] was attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation."[40] In this context, provisions permitting tribunals to appoint independent experts may offer them a solution to this issue.[41]

This part has demonstrated that environmental concerns were raised quite early in the negotiation and conclusion of IIAs by the AMS. A summary of environmental provisions in ASEAN's investment agreements can be found in Annex 1. It shows that

35 *Id.* at 15. *See, e.g.*, North American Free Trade Agreement, art. 1133; United States-Mexico-Canada Agreement (USMCA), art. 14.D.11; United States - Chile Free Trade Agreement, art. 10.23.

36 ACIA, art. 38.

37 Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award, ¶¶ 56-61 (June 27, 2016); Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Interim Decision on Environmental Counterclaim, ¶¶ 41-42 (Aug. 11, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf. [hereinafter Perenco]

38 The Renco Group, Inc. v. Republic of Peru [I], ICSID Case No. UNCT/13/1, Claimant's Supplemental Opposition to Peru's Preliminary 10.20(4) Objection, ¶ 66 (July 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw6303.pdf.

39 Brooks Daly & Fiona Poon, *11 Technical and Legal Experts in International Investment Disputes*, *in* Litigating International Investment Disputes 335 (2014).

40 Perenco, *supra* note 37, ¶ 587.

41 Judith Levine & Nicola Peart, *Procedural issues and innovations in environment-related investor-State disputes*, *in* Research Handbook on Environment and Investment Law 225 (2019).

most ASEAN investment agreements consistently include environmental provisions using four types of provisions. The most common provisions are general exception clauses and provisions that exclude nondiscriminatory regulations from the scope of indirect expropriation claims. In contrast, the other provisions, namely, exceptions to NT and experts' environmental reports in investment arbitration, appear only once. These provisions are incorporated into both intra-region investment treaties and external treaties, illustrating ASEAN's fairly uniform approach to addressing environmental concerns in its investment policies.

5. Reserving State's Right to Regulate Environmental Issues under ASEAN Investment Agreements

In ASEAN investment agreements, the inclusion of environmental provisions raises questions about their sufficiency in preserving the AMS's regulatory autonomy for environmental protection. This part will identify the shortcomings of existing provisions that, despite their diversity, frequently display ambiguous or narrow scopes and fail to offer a cohesive principle for reconciling environmental and investment interests. The analysis suggests alternative strategies for enhancing environmental clauses in the future ASEAN investment agreements, such as incorporating environmental references into the preamble and implementing provisions to strengthen the state's right to regulate environmental matters.

A. Lack of an Overarching Principle

Although environmental references are present in ASEAN investment agreements, their effectiveness in preserving AMS regulatory autonomy in executing domestic environmental measures has been questioned. These references are limited in scope and fail to provide an overarching clause protecting the state's power to regulate the potential environmental impacts arising from foreign investments.

One may argue that the general exception clause included in most ASEAN IIAs provides a legal basis for retaining the state's right to implement domestic environmental regulations. Nevertheless, its wording, modeled on the corresponding provisions of the WTO agreements, has inherent limitations in serving this function. Chapeau sets a high standard to invoke exceptions, which apply only to non-discriminatory measures that are neither adopted arbitrarily nor used as disguised restrictions on investment. These conditions are so high that if an environmental

measure satisfies all the conditions, it is unlikely to violate the principles of treatment in the IIA.[42] This limits the applicability of the general exception clause when defending host states against investment arbitration. Moreover, the exhaustive list of exceptions employed in the provision only covers measures to protect animal or plant life and conserve exhaustible natural resources, which are specific elements of the environment, but cannot represent this evolutionary concept. Due to such restrictions, general exception clauses may be interpreted as being against states' interests by narrowing the flexibility in regulating domestic issues that states can enjoy under legal doctrines developed in ISDS case law, such as the police power doctrine. [43]

Apart from general exceptions, other environmental provisions in the ASEAN IIAs address environmental issues in relation to a specific treaty provision, such as indirect expropriation or the NT principle. However, case law has demonstrated that environmental measures taken by host states may allegedly breach various IIA provisions, with the principle of fair and equitable treatment (FET) being most commonly invoked.[44] A prime example is *Tecmed v. Mexico,* where the claimant alleged that the denial of a permit extension for their waste disposal landfill by Mexican authorities due to its detrimental impact on the environment frustrated their legitimate expectations and constituted a breach of FET under the Mexico-Spain BIT.[45]

This study casts doubt on the effectiveness of the environmental provisions in ASEAN investment agreements in preserving the state's regulatory space for implementing environmental measures. However, these provisions are limited to specific aspects, rendering them insufficient to offer a comprehensive solution. While foreign investors may invoke various provisions under IIAs to challenge the host state's environmental measures, the lack of defense in such cases places the state in a disadvantaged position. To address these concerns, the next section will suggest several ways in which ASEAN can enhance the effectiveness of its environmental provisions in future IIAs.

B. Reference to Environmental Protection in the Treaty Preamble

42 Martini, *supra* note 4, at 577-8.

43 Camille Martini, *Avoiding the planned obsolescence of modern international investment agreements: can general exception mechanisms be improved, and how*, 59 BCL Rev. 2883 (2018). The police power doctrine confers an inherent right upon a State to regulate in safeguarding public interest. Where a state exercises this power to enact bona fide non-discriminatory regulations in accordance with due process, foreign investors cannot claim for compensation even if their investment was negatively affected by the regulations (Methanex case. *See supra* note 16, ¶ 7; Saluka v. Czech Republic, ¶ 262 (UNCITRAL 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

44 Yamaguchi, *supra* note 4, at 26.

45 Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 58 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

The first is to utilize a preambular reference to emphasize the significance of the environment in achieving IIAs' overall objectives. This is one of the most common practices for making environmental references in IIAs, particularly those concluded by China, Japan, Korea, the Netherlands, and the US.[46] For example, the 2012 US Model Bilateral Investment Treaty (BIT) in the preamble stresses the parties' desire to "achieve these objectives [of the BIT] in a manner consistent with the protection of health, safety, and the environment."[47] Some Preambles refer to environmental protection in relation to sustainable development. Typical wording can be found in the United States-Mexico-Canada Agreement (USMCA):

> PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices.

According to the Vienna Convention on the Law of Treaties, preambles perform their interpretative function by forming the context of a specific clause.[48] Although preambles do not entail parties' obligations, their interpretative functions should not be overlooked. As many investment tribunals recognize, preambles could be useful in interpreting vague provisions under IIAs.[49] In this sense, the preambular reference to the environment could aid arbitrators in applying the IIA's ambiguous clauses to environment-related disputes. Some critics have expressed skepticism about the practical effects of preambular environmental references on arbitral decisions.[50] Admittedly, the environmental language in the preamble alone may have had little impact on the outcome of the dispute. However, if accompanied by other substantive environmental provisions, it is likely to result in a change in how tribunals interpret these clauses, which give adequate weight to the state's legitimate purpose to protect the environment.[51]

C. Provisions Strengthening States' Right to Regulate Environmental Matters

46 Gordon & Pohl, *supra* note 4, at 12.

47 2012 U.S. Model Bilateral Investment Treaty, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

48 Vienna Convention on the Law of Treaties, art. 31.2, May 23, 1969, 1155 U.N.T.S. 331.

49 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 290 (Aug. 27, 2009); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 1307 (July 14, 2006).

50 Martini, *supra* note 4, at 565.

51 Asteriti, *supra* note 25, at 14.

Provisions reserving policy space for environmental regulations have been increasingly incorporated into recent IIAs.[52] Article 9.16 (Investment and Environmental, Health and other Regulatory Objectives) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP): provide the following:

> Nothing this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.[53]

Camille Martini critically evaluated the right to regulate clauses as political declarations rather than legal provisions because they merely acknowledge the state's right to implement measures "otherwise consistent" with the IIAs. He stated that the regulatory clauses failed to offer arbitral tribunals any guidance in determining environmental protection arguments against treaty protection accorded to investors, nor did they address the potential conflict between the host state's domestic environmental regulations and its obligations under relevant IIAs.[54]

However, the author disagrees with him. In addition to treaty practices, the State's right to regulate has been illustrated by recent arbitral awards concerning environmental issues. In *Perenco v. Ecuador*, for instance, the tribunal upheld the state's discretion to regulate environmental issues in its territory, 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."[55] As explained by the tribunal, this statement was made in light of environmental protection policies becoming increasingly important worldwide today.[56] Therefore, investment tribunals have become more open minded regarding the state's right to regulate environmental matters.[57] Although traditional right-to-regulate clauses have certain limitations, some variations have been developed to strengthen their legal significance. The 2019 Model BIT of the Belgium-Luxembourg Economic Union, for instance, directly clarifies the potential tension between

52 Gordon & Pohl, *supra* note 4, at 14.

53 Similar wording is adopted by the 2012 US Model BIT, art. 12.5 and USMCA, art. 14.16.

54 Martini, *supra* note 4.

55 Perenco, *supra* note 37, ¶ 34.

56 *Id*. ¶ 33.

57 Liang, *supra* note 30, at 376.

environmental regulation under the domestic legal framework and the state's obligation under IIAs as follows:

> Nothing in this Agreement shall in any way be construed as limiting the right of the Contracting Parties or any of their competent authorities to adopt, maintain, and enforce measures; apply prohibitions or restrictions of any kind or take any other action directed to pursue legitimate policy objectives, such as the protection of public health, environment, and public morals, the promotion of security and safety; the achievement of the sustainable development goals […]'.[58]

Using another version, the 2019 Investment Protection Agreement between the EU and Vietnam (EVIPA) links the right to regulate to the right to modify or adopt environmental laws and regulations. Article 2.2 of the EVIPA provides the following:

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.

2. For greater certainty, this Chapter [on investment protection] shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or investors' expectations of profits.

The state's right to regulate should be respected and bolstered in investment treaty provisions to guarantee that commitment to investment protection does not weaken the AMS's ability to adopt environmental protection measures. This language enables a state to select the levels of environmental regulations deemed appropriate under its national framework, thereby matching the typical characteristics of ASEAN, where the diversity of members is widely recognized.

6. Conclusion

The analysis of environmental provisions in ASEAN investment agreements reveals a relatively uniform incorporation of the four categories of environmental provisions.

58 Model BIT of Belgium- Luxembourg Economic Union, art. 1, ¶ 2, https://edit.wti.org/app.php/document/show/54fd8446-5eea-4381-80d4-afdf772727ac.

These provisions encompass general exception clauses precluding nondiscriminatory regulation as a basis for indirect expropriation claims, exceptions to NT, and environmental reports in investor-state arbitration. However, these narrowly drafted individual provisions only address specific aspects of environment-investment concerns without an overarching principal clause, rendering them inadequate for preserving the regulatory space for AMS to respond to the urgent need to minimize the negative environmental impact of foreign investments and channel capital towards a greener economy.

Therefore, this research recommends that ASEAN countries adopt relevant international practices to reconcile environmental protection with foreign investors' rights in their IIAs for a more comprehensive approach as follows. First, incorporating a reference in the preambles emphasizing the importance of environmental protection to the treaty's objectives can serve as a practical interpretative tool for arbitration when resolving environment-related disputes. Second, a right-to-regulate clause was advocated to ensure that IIA commitments do not hinder the AMS's legitimate power to enforce domestic environmental regulations.

In conclusion, the growing concern over the environment-investment nexus in ASEAN countries presents a genuine challenge for investment rule makers. Although the increasing inclusion of environmental provisions in the ASEAN investment agreements reflects the significance of environmental values in the region's investment policies, their effectiveness remains uncertain. As the AMS becomes more vulnerable to environment-related investment claims, these provisions warrant critical reevaluation. Thus, it is crucial for the AMS to consider contemporary international treaty practices to redesign its IIAs towards sustainable investment strategies.

Annex 1: Types of Environmental Provisions in ASEAN Investment Agreements[59]

No	Investment Agreements	Status	Inclusion of Environment provisions			
			Precluding non-discriminatory regulation as a basis for claims of indirect expropriation	General exception clause	Exceptions to NT	Experts reports on environment issues requested by investment arbitration
1	RCEP (2020)	In force	Annex 10B, ¶ 4	Art. 17.12	X	X
2	ASEAN - Hong Kong, China SAR Investment Agreement (2017)	In force	Annex 2, ¶ 4	Art. 9	X	X
3	ASEAN - India Investment Agreement (2014)	Signed	Art. 8, ¶ 9	Art. 21	Art. 3, ¶ 4	X
4	ASEAN - China Investment Agreement (2009)	In force	X	Art. 16	X	X
5	ASEAN - Korea Investment Agreement (2009)	In force	X	Art. 20	X	X
6	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANFTA) (2009)	In force	Annex on Expropriation and Compensation, ¶ 4	Chapter 15, art. 1, ¶ 2	X	X

59 Compiled by the author based on full text of IIAs in the UNCTAD database, https://investmentpolicy.unctad.org/international-investment-agreements/groupings/15/asean-association-of-south-east-asian-nations-.

No	Investment Agreements	Status	Inclusion of Environment provisions			
			Precluding non-discriminatory regulation as a basis for claims of indirect expropriation	General exception clause	Exceptions to NT	Experts reports on environment issues requested by investment arbitration
7	ASEAN Comprehensive Investment Agreement (2009)	In force	Annex 2, ¶ 4	Art. 17	X	Art. 38
8	ASEAN – Japan Comprehensive Economic Partnership Agreement (2008)	In force	X	X	X	X
9	ASEAN – US Trade and Investment Framework Agreement (2006)	In force	X	X	X	X
10	ASEAN - Korea Framework Agreement (2005)	In force	X	X	X	X
11	ASEAN - India Framework Agreement (2003)	In force	X	Art. 10	X	X
12	ASEAN - China Framework Agreement (2002)	In force	X	Art. 10	X	X
13	Framework Agreement on the ASEAN Investment Area (AIA)	Terminated	X	Art.13	X	X

No	Investment Agreements	Status	Inclusion of Environment provisions			
			Precluding non-discriminatory regulation as a basis for claims of indirect expropriation	General exception clause	Exceptions to NT	Experts reports on environment issues requested by investment arbitration
14	ASEAN Investment Agreement (1987)	Terminated	X	X	X	X
15	ASEAN - EU Cooperation Agreement (1980)	In force	X	X	X	X

X: Not included

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