The Balance between Foreign Investment Protection and Environmental Protection in Myanmar

MOE Thuzar Oo

要　旨

本稿では、ミャンマー投資法をはじめとするミャンマー国内法が環境保護と投資促進を両立させるために必要な改革がどのようなものかを検討する。環境保護を理由とする国内措置が、二国間投資協定によって与えられる投資家保護を損ねることがあることは、従来から指摘されている。そこで本稿はミャンマー投資法・環境関連法における投資家保護の基準について、ASEAN（東南アジア諸国連合）加盟国であるインドネシア国内法との比較や、国際投資仲裁廷における判断を手がかりに、環境保護と投資受入の促進のため、投資家保護について今後のあるべき法改正も含めた検討を行った。

Keywords: Foreign Investment Protection, Environmental Protection, Myanmar

1. Introduction

International Investment Law focuses on three main categories in protecting the public interest: the protection of the environment, the protection of human rights, and the discouragement of certain illegal activities (e.g., corruption).[1] The protection of the public interest involves ensuring that international investment does not cause harm to the environment in a way that indirectly adversely affects people.[2]

The interface between international investment law and international environmental law has, by now, been developed so that the environmental resources of the host state are protected from the negative effects of environment-related investment activities. At the international level, the current challenge is to achieve a balance between domestic, regional, and global interests, and between the legitimate interests of economic actors and legitimate environmental interests.[3] Therefore, this article examines whether international investment principles are sufficient to protect the competing rights of investors and the public under the current legal framework in Myanmar. The article considers how the nature of environmental protection affects the international law for investment protection in Myanmar.

The richness of the natural resources of Myanmar has been the main factor in attracting foreign investors to invest in extractive industries. Myanmar relies greatly on its natural resources to improve its economy, and most of its foreign direct investment (FDI) is directed towards extractive industries. Myanmar is making wide-ranging reforms to improve the monetary and fiscal benefits of trade and foreign investment, primarily in the extractive industries. An important share of foreign investment projects in Myanmar is likely to be based on extractive industries that exploit the nation's large-scale natural resources.

Recent FDI in Myanmar has been concentrated in the oil, gas, hydropower, and mining sectors,[4] most of which have adverse environmental and social impacts. The new government in Myanmar continues to take steps to exploit the energy resources by increasing foreign investment in the energy sector.[5] In general, mining, oil, and gas operations by transnational corporations (TNCs) may have negative effects on the environment. As foreign investment in extractive industries increases, so does the need to protect the nation's environment. Overexploitation of natural resources has led to widespread environmental degradation in Myanmar, such as deforestation, degradation of biodiversity and the land, and depletion of water resources.[6]

Consequently, domestic needs for environmental protection have been emerging in Myanmar. In the absence of effective environmental regulations and natural resource management, environmental degradation and resource depletion are increasing rapidly. On the other hand, environmental regulations conflict with investment protection provisions under Myanmar's investment law and investment treaties. This conflict

can lead to foreign investors filing investor–state disputes (ISDs) before international investment arbitral tribunals. In this regard, Myanmar needs to conduct the first-ever study of the relationship between investment protection and the country's environmental protection. Myanmar needs to prepare for potential ISDs since foreign investment in the environmental sectors in Myanmar has been increasing. Under the current investment legislation, foreign investors can start an international investment arbitration. Myanmar may need to act as a respondent under the investor–state dispute settlement (ISDS) system if an investor thinks that the state's measures to protect the environment breach the investment protection measures.

In Myanmar, environment-related investment is limited to receive specific protection from investment laws and investment treaties. Myanmar's current system is not ready to resolve conflicts between investment protection and environmental protection. Myanmar needs to bring in more environmental protection measures under its international commitments to prevent the adverse effects of environment-related investment. When it does this, foreign investment protection provisions under Myanmar's investment legislation may be affected. A balance is needed between investment protection and environmental protection.

This paper aims to provide information relating to the balance between investment protection and environmental protection in international investment law and Myanmar law. It also makes suggestions for how Myanmar can provide the necessary protection for foreign investments as well as the country's environment. The article will analyse whether the current legal framework in Myanmar can strike a balance between investment protection and environmental protection.

The article will first examine the current legal framework for investment protection in Myanmar (Chapter 2). The purpose of this chapter is to assess the current legal instruments and institutions in Myanmar that are relevant to the protection of investment and investors' responsibilities. The chapter will also examine Myanmar's current stance towards the provisions in international investment agreements (IIAs) relating to environmental protection. It will then point out the need for investment legislation in Myanmar to cover environment-related investment activities. The chapter will also consider how Myanmar should prepare for potential ISDs in international investment tribunals by studying the experiences of one of the member countries of the Association of Southeast Asian Nations (ASEAN).

Myanmar also needs to review its current legal framework for environmental legislation as it relates to foreign investment activities (Chapter 3). Chapter 3 will examine environmental protection provisions in national and international environmental legislation. International arbitration cases dealing with the conflicts between investment protection and the protection of the environment will be studied in this chapter. Finally, the

article identifies the key challenges, and makes some suggestions for legal reforms in Myanmar that will strike a balance between investment protection and environmental protection (Chapter 4).

2. Legal Framework for Investment Protection in Myanmar

The chapter argues that the investment protection provisions under the Myanmar Investment Law (MIL) and Myanmar's Bilateral Investment Treaties (BITs) and Regional Investment Treaties (RITs) are not sufficient to address the changing aspects of environmental protection in Myanmar. The chapter will review the foreign investment protection provisions of the MIL and other relevant legislation in Myanmar. It will then give an analysis of investment protection provisions under the IIAs to which Myanmar is a party and Myanmar's current BITs. Each section of the chapter will underline how the investment protection provisions under the current investment legislation relate to environmental protection issues. In doing this, the chapter will study international practice in this field. Since Myanmar is a member of ASEAN, the practices of Indonesia, which is also a member of ASEAN, will be studied in this chapter as a comparison.

2.1. Investment protection provisions under Myanmar's investment legislation

Myanmar has enacted legislation and brought in policies and procedures that aim to improve foreign investment and protect the public interest. According to the Constitution, the Union must strive to improve the living standards of the people and the development of the investment.[7] Concerning the protection of the public interest, the Union must protect and conserve the natural environment.[8] Every citizen has to assist the Union in carrying out the preservation and safeguarding of the cultural heritage, conserving the environment, striving for the development of human resources, and protecting and preserving public property.[9]

Recently, the Myanmar government has brought in some reforms to reduce the political and legal risks of the foreign investment regime. According to surveys carried out in 2012, foreign investors are worried about investment facilitation, investor protection, and the legal system in Myanmar.[10] To gain the trust of investors, the Myanmar government has reviewed its investment law and policy. In 2016, the Myanmar government laid down an economic policy[11] and announced that it would formulate specific policies to increase foreign investment. Consequently, the new MIL has enacted in 2016.[12] The MIL replaced the Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013.[13] The MIL is the dominant legislative framework that aims to protect the rights and ensure the performance of the duties, of investors.

Many other investment-related laws have also been enacted in Myanmar. Current laws applying to

investment activities include the Myanmar Forest Law 2018, the Conservation of Biodiversity and Protected Areas Law 2018, the Myanmar Companies Law 2017, the Competition Law 2017, the Arbitration Law 2016, the Law Amending Myanmar Mines Law 2015, the Employment and Skill Development Law 2013, and the Environmental Conservation Law 2012. For entities doing business in Myanmar under the existing laws, the government has strengthened the applicable environmental and social standards under the provisions of the Environmental Conservation Law 2012.

The new MIL has been given special importance by the government of Myanmar, which intends to keep pace with the economic growth of neighbouring ASEAN countries.[14] Among the ASEAN countries, Indonesia is a key member and is a country rich in natural resources. The extraction of natural resources, through activities such as mining, has attracted much of Indonesia's foreign investment.[15] The development of a legal regime for foreign investment in Indonesia has been moving forward. Since 1998, Indonesia has liberalized its legal regime on foreign investment in both its national and its international regimes. Its legislation on foreign investment mainly focuses on foreign investment protection. Indonesia has concluded numerous BITs with countries around the world to give greater guarantees of the protection of foreign investment.[16] Among the respondents to ISDS claims against ASEAN states,[17] Indonesia has been a respondent in six major international investment disputes brought under international arbitration.[18] Some of these cases were related to the revocation of investment permits for reasons related to the environmental protection of the state. As a member of ASEAN and a country that is rich in natural resources, Myanmar should learn from Indonesia's experience under the national and international legal regimes for foreign investment protection and environmental protection.

In Myanmar, the MIL covers both domestic and foreign investment, following the recommendations of the OECD policy framework for investment.[19] The objectives of the MIL are to protect foreign investment and develop responsible investment that does not cause harm to the natural environment or the social environment.[20] In Indonesia, Chapter II of the Investment Law[21] sets out both principles and objectives. One of these principles is that the implementation of capital investment must be based on the principles of consideration for the environment.[22] Again, as one of the criteria, investment facilities may be given to investors who preserve the living environment.[23]

In Myanmar, the MIL requires the protection of investors and of the public interest, including the environmental protection of the state. Even though the MIL does not explain the term "public interest", the term "contrary to national interest or public policy" is defined as follows: "contrary to national interest or public

policy means the harmful impact on the natural environment in state-owned land, water or atmosphere, the public, and the national cultural heritage".[24] Thus, the protection of the environment plays a significant role in the protection of the public interest in Myanmar.

In terms of investment protection, the MIL adopts internationally accepted practices as mentioned in the ASEAN Comprehensive Investment Agreement (ACIA).[25] Regarding the substantive treatment of investors, the MIL offers national treatment (NT),[26] most favoured nation treatment (MFN),[27] and fair and equitable treatment (FET).[28] Also, in Indonesia, Chapter II of Indonesia's investment law provides for equal treatment for all investors, regardless of their country of origin, who undertake investment activities in Indonesia under the prevailing laws and regulations.[29] Again, under the title of "Rights of the Investors", Article 14 of the law provides: "Each investor is entitled to the certainty of rights, law and protection; transparent information on the business sectors being operated; rights to service; and all facilities under prevailing laws and regulations".

Both the Indonesian investment law and the MIL provide that investors have investment protection in their territories. It is necessary to examine how this treatment can be efficiently applied in settling conflicts between investment protection and environmental protection. For this article, only the FET will be considered, since this provision is frequently raised by foreign investors in environment-related investment disputes. Other treatments such as NT and MFN will be examined in a forthcoming dissertation.

While the MIL provides for the protection of investments, investors, on the other side, have certain positive obligations to protect the environment. The concept of responsible investment is an essential aspect of ensuring a balance between investor protection and the public interest. The MIL aims to develop responsible investments that do not cause harm to the natural environment or the social environment, in the interests of the Union and its citizens.[30] Investors have to abide by the applicable laws, rules, procedures, and best standards practised internationally in relation to their investment, so as not to cause damage, pollution, or loss to the natural and social environment or damage to the cultural heritage.[31] Regarding the responsibility for the protection of the environment, the investor must obtain, in advance, a permit or an endorsement of the commission for those investments for which prior approval is needed under the Environmental Conservation Law and the Environmental Impact Assessment (EIA) procedures.[32] The Myanmar Investment Rules also instruct the Myanmar Investment Commission (MIC)[33] to consider whether investors have demonstrated a commitment to responsible investment. The investment rules explicitly mention the environment-related provisions. For a project that is likely to have a large impact on the environment and the local community, the

investor must submit a proposal to the MIC.[34] The MIC may issue a permit to the investor involved in the investment.[35] If an investor has violated environmental protection standards, the MIC should not grant it a permit. The MIC must revoke the permit if it is known that a prohibited investment is being made.[36] In the case of investment activities that may have a significant impact on the environment and national interests of the Union, the MIC must obtain the approval of parliament before issuing a permit.[37]

Regarding responsible investment in Indonesia, each investor is obliged to implement the principles of good corporate governance, and to meet its corporate social obligations.[38] In addition, investors that manage renewable natural resources must allocate funds progressively for the preservation of the area to attain the environmental standards required by the prevailing laws and regulations.[39]

Recently, environment-related Corporate Social Responsibility (CSR) provisions have been more frequently incorporated into both investment treaties and trade agreements. For instance, Chile–US FTA contains articles within its Environment Chapter entitled "Principles of Corporate Stewardship":

> *Recognizing the substantial benefits brought by international trade and investment as well as the opportunity for enterprises to implement policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives, each Party should encourage enterprises operating within its territory or jurisdiction to voluntarily incorporate sound principles of corporate stewardship in their internal policies, such as those principles or agreements that have been endorsed by both Parties.*[40]

Similarly, Article 32 (CSR) of Norway's Model BIT 2007 requires the Parties to:

> *agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multilateral Enterprises and to participate in the United Nations Global Compact.*

Generally, corporate entities are encouraged to apply CSR and states are obliged to encourage the adoption of CSR standards. Under the OECD Guidelines for Multilateral Enterprises, corporations are encouraged to maintain an environmental management system that includes monitoring impacts, adopting effective technologies, and providing environmental education to employees and customers.[41]

In Myanmar, the MIL does not use the term "corporate governance", which is mentioned in Indonesia's investment law, but it still imposes obligations on investors including obligations in respect of environmental protection. Myanmar companies and foreign companies established under the Myanmar Companies Law 2018 are required to undertake responsible investment that does not cause harm to the natural environment or the social environment. Besides, CSR provisions can be found in current BITs such as the

Singapore–Myanmar BIT, the Korea–Myanmar BIT, and the Japan–Myanmar BIT.[42] Early BITs have no such provisions. To strike a balance between investment protection and public interest protection, Myanmar BITs should contain more CSR provisions that follow the OECD Guidelines for responsible investment.

In Indonesia's national legal regime for investment, the recent Investment Law 2007 and numerous relevant laws have been enacted to provide favourable treatment for foreign investment. Under the recent positive changes in investment policy, Indonesia has opened more sectors to foreign investment.[43] In Indonesia, some foreign investment is targeted at the mining sector. In order to prevent negative effects on the environment of the country, Indonesia has enacted many environmental laws, including mining laws. However, because of the severe environmental degradation that has occurred in the mining sector, the government has imposed environmental and mining obligations upon foreign investors.[44] In this regard, conflicts between environmental protection and investment protection have occurred in the mining sector, and several mining companies have lodged ISDS claims against Indonesia. Under the current Indonesian BITs, investors have the right to bring investor–state disputes to international arbitration. Indonesia has signed 67 BITs with countries around the world.[45]

Indonesia has been a respondent in at least six major investment disputes brought before international arbitration, and it has lost in most of them. As a result of the financial and reputational consequences, Indonesia cancelled 22 BITs in 2016.[46] However, as a member of ICSID and the ACIA, Indonesia is still obliged to agree to ICSID arbitration.[47] Myanmar has been involved in only one ISDS case[48] arising from the 1987 ASEAN Investment Agreement, which has now been replaced by the ACIA.

However, there have so far been no ISDS cases against Myanmar that involve environmental concerns. Since Myanmar and Indonesia have similar conditions for their natural resources extraction sectors, Indonesia's experience will be helpful for Myanmar. Myanmar is required to prepare for potential ISDS cases under the dispute settlement provisions of the MIL and its current BITs.

Among the six major investment disputes faced by Indonesia, *Churchill Mining v. Indonesia*[49] was related to conflicts between investment protection and environmental protection in the mining sector. The case concerned claims arising out of the unilateral revocation by the government of mining licences in which the claimants held an interest. In this case, the claimants argued that Indonesia had breached its obligations under the Indonesia–UK BIT including the obligation to give FET (breach of legitimate expectations) and to give protection against expropriation, and that the investors had carried out due diligence.

In 2008, the British company Churchill Mining PLC invested, in the name of Ridlatama Group, in

Indonesia's mining sector. The Group planned to conduct the East Kutai Coal Project (EKCP) jointly with Indonesian companies. The Group obtained coal mining concessions from the local government in Kalimantan to provide mining services in an area of about 35,000 hectares.

Various environmental laws, including specific mining laws, were enacted in Indonesia to protect the environment and communities. Indonesia promulgated Law No. 4 of 2009 concerning the Mining of Mineral and Coal, together with the implementing regulations No. 23 of 2009. This law adopted a new system of licensing and abolished the previous licensing regime (para. 31 of the decision on jurisdiction). In the management of minerals and coal mining, the provincial government had the authority to issue and revoke permits.[50]

In 2010, the local government revoked four of the coal mining licences of the Group because (1) the Ridlatama companies were operating without permission from the Ministry of Forestry; (2) the Ridlatama licences were allegedly forged; and (3) the Ridlatama licences overlapped with other permit areas (para. 35 of the decision on jurisdiction). The main reason was that the concession covered protected forest areas, which required approval from the Ministry of Forestry. The Financial Auditor Body pointed out that the four coal mining licences were illegal because they had not been registered, and it raised the issue that there were indications of forgery (para. 524).

In response to the revocation of the mining licences, the Group filed four lawsuits before the local courts, requesting the annulment of the administrative decisions of the local government. The claimants alleged that they had obtained the licences lawfully through their partnership with a local group of companies, and therefore that the revocations were illegal. The court rejected the claims and ruled in favour of the government. After having lost the cases in the Indonesian courts, the claimants filed requests for an ICSID arbitration, based on the Indonesia–UK BIT. The claimants alleged that Indonesia had violated the legitimate expectations component of the principle of FET by annulling the mining licences (para. 224). They alleged that the revocation of the various mining licences by the local government constituted a failure of the Indonesian government to provide foreign investment protection.

During the arbitration, Indonesia disputed the validity of the mining licences at issue. Indonesia raised allegations of forgery and argued that some of the licences on which the claimants relied had been forged by the claimants themselves and by the claimants' Indonesian partner. The claimants, on the other hand, alleged that they had acted in good faith. Indonesia alleged that the claimant's lack of due diligence contradicted any claim based on legitimate expectations (para. 171).

According to the Indonesia–UK BIT, investments by nationals or companies of either Contracting Party must at all times be accorded fair and equitable treatment in the territory of the other Contracting Party (Article 3 (2)). Again, investments of nationals or companies of either Contracting Party must not be nationalized, expropriated, or subjected to measures having an effect equivalent to nationalization or expropriation in the territory of the other Contracting Party, except for a public purpose related to the internal needs of the expropriating party and the subject to compensation (Article 5 (1)).

The tribunal considered that Indonesia had to provide sufficient evidence to sustain its allegations (para. 238). Based on the evidence, the tribunal assessed that there was no evidence that there had been any official application for a licence for the project, and that, out of the 34 documents, others were not registered. Indonesia disputed the authenticity of the 34 documents including four main survey licences, four exploration licences, and other ancillary documents (para. 108). The tribunal found that four main survey licences namely PR RTM, PT RTP, PT INP, and PT IR were not authentic (paras. 353 and 359). Finally, the tribunal decided that the 34 disputed documents were not authentic and unauthorized (para. 557 (2)). The tribunal indicated that investment tribunals require investors to exercise a reasonable level of due diligence, especially when investing in risky business environments (para. 506). The tribunal then found that "a fraudulent scheme permeated the claimants' investments in the EKCP" (para. 507). The tribunal concluded that claims arising from rights based on fraud or forgery are inadmissible as a "matter of international public policy" (para. 508). The tribunal held that the claimants had not acted with due diligence but, instead, had been negligent when they had inquired into the processes through which their Indonesian partners had secured the mining licences (paras. 517–527). Such a lack of diligence barred the protection under the FET and expropriation provisions of the Indonesia–UK BIT.

In its final award, the tribunal determined that the claims were effectively "based on documents forged to implement a fraud aimed at obtaining mining rights" and that all the claims were inadmissible (para. 528). The Indonesian government was successful in proving that 34 of the documents submitted by the claimants were false documents. The tribunal indicated that it was likely that the local business partner of the claimants was the source of the fraudulent conduct, but that the claimants had failed to exercise sufficient due diligence in carrying out their investment. The ICSID annulment panel agreed with the Indonesian government's argument. The tribunal found that the claimants had not met their obligation to oversee their local partners and oversee the licensing process (para. 163, the decision on annulment). The ICSID ruling reaffirmed the fact that the Indonesian government had not committed any violation.

This case is one of the international investment arbitration claims filed by foreign mining companies

against the Indonesian government. In this case, the claimants relied on the investment protection provisions of the applicable BIT, to contest the rejection of the mining licence or to combat the new mining regulation. The government's new stance towards FDI and BITs can be seen as an attempt to balance its conflicting tasks in seeking to protect the environment as well as the rights of foreign investors. In Indonesia, Chapter II of Indonesia's investment law provides equal treatment for all investors, regardless of their country of origin, who undertake investment activity in Indonesia under the prevailing laws and regulations.[51] We can learn from the case that investors need to exercise sufficient due diligence if they are to obtain protection under the FET standard. Even though the FET provisions under the Indonesia–UK BIT and the Indonesian Investment Law were not explained in detail, the tribunal considered that the concept of due diligence was critical in interpreting the FET standard. From this case analysis, we can learn that, as a developing country with abundant natural resources, Indonesia made laws and regulations to strike a balance between investment protection and environmental protection. The arbitration tribunal applied the existing legal jurisprudence of Indonesia and affirmed a balance between protection of the public interest and investment protection.

One lesson learned from analysing this case is that foreign investors can file ISDS cases based on the applicable BIT to challenge the rejection of a licence under the environmental legislation of the host state. Under BITs, foreign investors have a legal mechanism, international investment arbitration, by which they can contest the enforcement of environmental legislation. Since the extraction sectors are similar in Myanmar and Indonesia, Myanmar has to be prepared for potential ISDS cases in international tribunals. Currently, in Myanmar, foreign investors have the right to refer disputes with state entities to dispute settlement.[52] If foreign investors wish to claim damages arising from a breach of the investment protection standards relating to an environment-related investment, they may offer to bring the case before international arbitration as provided in the relevant investment treaty.[53]

Another lesson learned is that a state's regulatory reforms for the protection of the environment may affect investment protection standards such as FET under BITs. As discussed above, Indonesia enacted specific new mining laws and regulations to protect the environment and local communities. This new system for scrutinizing mining licences brought the previous licensing regime to an end. In this regard, the investors alleged that the revocation was illegal, and that Indonesia had violated the principle of FET. The case shows that the Indonesian government did provide fair and equal treatment for foreign investors. However, the investor's lack of due diligence did not allow it to claim the protections under the FET standard of the applicable BIT. In the case of Myanmar, regarding FET, investors have the right to obtain relevant information on any

measures or decisions that have a significant impact on the investor and their direct investment, the right to due process under the law, and the right to appeal on similar measures, including any change to the terms and conditions under any licence, permit or endorsement granted by the government to investor for their direct investment.[54] It can be seen that the FET provision under the MIL is wider than the provisions under Indonesian investment law. The FET provision under the MIL gives a detailed explanation of the rights of investors. However, regarding FET, Myanmar needs to analyse the FET and expropriation provisions under its current BITs and IIAs (Section 2.2 of this paper) and investment disputes involving environmental issues (Section 3.2). After analysing FET and expropriation in Chapters 2 and 3, this paper will make some suggestions for the modification of these provisions in the conclusion (Chapter 4).

Another lesson learned comes from the fact that the authority to grant mining licences has been conferred on the local governments in Indonesia. In Myanmar, local governments have not received the authority to revoke mining licences. However, the relevant ministries have the authority to issue permits according to the existing laws and regulations. For instance, the Ministry of Natural Resources and Environmental Conservation (MNREC) can, with the consent of the Union government, grant a permit to carry out mining operations.[55] If the holder of the permit fails to comply with any orders or directives, or contravenes any of the terms of the permit, the person issuing the permit may pass any administrative order including cancelling the permit.[56] Again, under Forest Law 2018, the MNREC may grant a permit for extraction of forest produce on a commercial scale for three years.[57] If a person who has obtained permission to extract forest produce violates any condition of the permit, the person granting permission to extract forest produce may cancel the permit.[58]

Since Myanmar has been making legal reforms to its environmental legislation, future legal reforms must be consistent with the investment legislation, but some regulations enacted by the relevant ministries and local governments for the protection of the environment may go against the provisions of investment protection such as FET.

The above-mentioned lessons for Myanmar should be taken into consideration when solving potential disputes with TNCs regarding their environmental performance in extractive industries in Myanmar. These lessons will be also useful in seeking a balance between the protection of the environment and the protection of the rights of foreign investors in Myanmar.

In summary, Section 2.1 highlights the fact that both Indonesia and the MIL identify the preservation of the living environment as one of the criteria for allowing investment. The Myanmar government

is committed to promoting investment with a positive impact on the environment under the MIL and relevant laws and regulations.

In the context of the obligations of the investors, even though the phrase CSR is not used in the MIL, Chapter XVI of the MIL, headed “Responsibilities of Investors”, includes obligations for the protection of the environment. However, in the case of the management of renewable natural resources, the responsibility of investors to allocate funds for the preservation of the environment is not stated in the MIL. Myanmar needs to lay down more comprehensive CSR provisions in line with the OECD guidelines. Some suggestions for CSR provisions will be made in Chapter 4.

By studying the *Churchill Mining* case, Myanmar can learn some valuable lessons in preparation for striking a balance between investment protection and environmental protection. One other lesson learned from analysing this case is that foreign investors could file ISDS cases to challenge the revocation of a licence under the environmental legislation of Myanmar. As a result of the legal reforms to Myanmar’s investment legislation, foreign investors have a legal mechanism, international investment arbitration, through which they can contest the enforcement of environmental legislation. As investment business activities in extractive industries usually have a substantial impact on the environment, Myanmar should take into consideration the state’s regulatory reforms for the protection of the environment. These reforms may affect investment protection standards such as FET under the applicable BIT. The discussions in this session will be used in support of the suggestions made for how Myanmar can balance the protection of the environment against the protection of foreign investment.

2.2. Investment protection provisions under Myanmar’s current BITs and IIAs

Investment treaties that seek to protect foreign investment against governmental acts and arrangements are important for increasing foreign investment.[59] From the standpoint of capital-exporting countries, BITs and FTAs offer protection from actions by the host state that breach the foreign investors’ rights contained therein. From the viewpoint of capital-importing countries, BITs and FTAs create incentives to invest in their countries.[60] The focus of BITs and FTAs that include foreign investment dispute settlement is the protection and promotion of foreign investment. On the other hand, these mechanisms may have an impact on the ability of the state to adopt certain environmental measures. If the state implements environmental measures under its international environmental obligations, the protection against expropriation and other prohibited acts under the investment treaties may be affected.

The ACIA, to which Myanmar is a party, reflects not only investment protection but also environmental protection. The ACIA carves out from the treaty measures that are necessary to protect morals or to protect human, animal, or plant health.[61] Also, Myanmar is a party to other IIAs[62] signed as part of its membership in ASEAN that have provisions equivalent to those in BITs. Recently, Myanmar has been engaged in rule-taking in investment treaty negotiations.[63] Currently, Myanmar has the second smallest treaty network of all the ASEAN countries.[64] Myanmar has concluded thirteen BITs – with Singapore (2019), Korea (2014), Israel (2014), Japan (2013), the USA (2013), Indonesia (2013), India (2008), Thailand (2008), China (2001), Laos (2003),[65] Kuwait (2008), Vietnam (2000),[66] and the Philippines (1998).[67] In comparison with the BITs of other developing countries, Myanmar's BITs are highly inconsistent.[68] A slight difference in the phrasing of the investment protection clauses from one BIT to another can lead to significant interpretative differences.[69] Regarding investment protection, core investment protection standards such as those relating to FET and expropriation in Myanmar's current BITs and the ACIA have to be discussed in connection with the protection of the environment.

2.2.1. Fair and equitable treatment (FET)

Most IIAs and BITs provide for FET for foreign investments. The FET provision of investment treaties is the provision most commonly invoked by foreign investors in investor–state arbitrations. Myanmar's current BITs all contain provisions requiring the host state to treat foreign investment fairly and equitably. Myanmar's early BITs do not clarify the phrase "fair and equitable", and the FET provision is not linked to international law. However, the Japan–Myanmar BIT 2013 mentions "treatment according to international law, including fair and equitable treatment".[70] This implies that the FET standard of the BIT is a requirement of international law. The recent Singapore–Myanmar BIT refers to "treatment in accordance with the customary international law minimum standard of treatment of aliens[71] including the fair and equitable treatment".[72] It also clarifies that the obligation to provide FET includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process.[73] The ACIA also links the FET standard to international law. It clarifies that the FET standard "requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process".[74]

Regarding FET, it should be noted that some Myanmar BITs have wider and more precise provisions than the provisions of the MIL.[75] Myanmar has a few BITs with the home states of foreign investors. In this regard, if a foreign investor from a country without a BIT files a case against the state in the local court, the

application of the FET standard under the MIL may not be construed as widely as it would be construed under the BITs. For instance, if the MIC revokes the permission of an investor because of violations of environmental regulations, the investor may argue that the state has violated the investment protection and breached the FET standard.

As discussed in Section 2.1, in the *Churchill Mining* case the investor's lack of due diligence in relation to its request for mining licences meant that it could not claim protection under the FET standard of the Indonesia–UK BIT. We have seen that the FET provision under the MIL has a detailed explanation of the rights of investors. However, regarding FET, Myanmar needs to study international investment disputes in which there were environmental concerns. In some cases, international tribunals have tried to give a more specific meaning to the FET standard by formulating a general definition or description. In this connection, Myanmar needs to study international practice and the tribunals' consideration of the FET standard in connection with environmental legislation. Case analysis will be presented in the next chapter (in Section 3.2).

2.2.2. Expropriation

Expropriation of a foreign investor's property without adequate compensation is the most severe form of interference, because all expectations of the investor are demolished.[76] The requirements for lawful expropriation are a public purpose, non-discrimination, and prompt, adequate, and effective compensation.[77] For instance, the ACIA holds that a host state "shall not expropriate or nationalize a covered investment either directly or through measures equivalent to expropriation or nationalization except for a public purpose, in a non-discriminatory manner, on payment of […] compensation and in accordance with due process of the law".[78] The annexes of the ACIA clarify that non-discriminatory regulatory measures designed to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.[79] All of Myanmar's BITs contain provisions dealing with the expropriation of foreign investment. However, except for the BITs with Singapore and Korea, none of Myanmar's BITs clarify what is meant by "direct expropriation" or "indirect expropriation". For greater clarity, Myanmar's BITs should contain consistent provisions in this matter.

In addition, the MIL and the Myanmar Investment Rule issued in 2017[80] provide legal guarantees that investors will have access to information and protection against direct and indirect expropriation, and access to compensation. The regulations also guarantee access to due process if changes in regulations affect an investor's business. The government guarantees that it will not nationalize any investment carried out in

accordance with the law. The Union must not nationalize economic enterprises.[81]

The government guarantees that it will not take any measures that expropriate or indirectly expropriate or are likely to result in the termination of investment, except under the following conditions: (a) the measure is necessary for the public interest; (b) the measure is applied in a non-discriminatory manner; (c) the measure is taken in accordance with applicable laws; and (d) there is a prompt, fair and adequate payment of compensation.[82] Under Indonesia's investment law, the government must not undertake any nationalization action or take over the ownership rights of any investor, except by law. In the event of nationalization, the government will grant compensation based on the market value.[83] However, the law does not contain the same exceptions as those provided under the MIL.

In the legal framework of investment protection, the investment legislation in both Indonesia and Myanmar guarantees that the property of investors will not be expropriated except under certain conditions. The provisions regarding expropriation and compensation under the MIL are more compatible with the provisions of Article 14 of the ACIA. Nonetheless, Myanmar still needs to explore the connection between the application of this guarantee and environmental issues in practice. The FET standard and protection against expropriation provisions are generally raised in ISDS cases. In a number of cases, tribunals have considered expropriation provisions, which are often invoked by investors, in relation to public purpose, non-discrimination, and compensation issues. In this respect, Myanmar needs to study international practice and the way tribunals have considered expropriation in connection with environmental protection concerns and compensation issues. Case analysis will be made in the next chapter (in Section 3.2).

2.3. Conclusion

This chapter highlights the fact that Myanmar has investment protection provisions in its national legislation and its IIAs. To promote responsible investment and to maintain an environmental management system, Myanmar should encourage the adoption of CSR standards, according to the OECD Guidelines for Multilateral Enterprises, in both its national laws and its investment treaties.

To strike a balance between investment protection and environmental protection, more precise and wider investment protection standards, such as FET and expropriation provisions, should be contained in the investment legislation. The new MIL and some Myanmar BITs still require their FET and expropriation provisions, which are the provisions relied on most often by foreign investors in ISDS cases, to be updated. Myanmar also needs to ensure greater consistency between its investment treaty provisions and its national

investment legislation.

As the number of investment projects in extractive industries has been increasing in Myanmar, Myanmar should take into consideration the state's regulatory reforms for the protection of the environment. Some regulations enacted by the relevant ministries and local governments for the protection of the environment may be in conflict with the investment protection standards. Since Myanmar has been carrying out legal reforms of both its investment and its environmental legislation, future legal reforms should not conflict with investment protection standards. Moreover, Myanmar needs to ensure that environmental protection is not compromised in the application of the investment protection provisions. Therefore, the next chapter will examine whether environmental protection measures brought in under national and international commitments restrict the application of the foreign investment protection standards. Some relevant international cases on environment-related investment will also be discussed in the next chapter.

3. Legal Framework for Environmental Protection in Myanmar

This chapter examines the current legal framework on environmental protection in Myanmar and how this is related to investment protection. The chapter also aims to highlight the barriers that exist when striking a balance between investment protection and the protection of the environment.

3.1. Environmental protection under national and international environmental legislation

In recent years, the over-exploitation of minerals and the over-utilization of soils and water in Myanmar has led to environmental degradation. Environmental concerns in Myanmar include loss of forest resources, water contamination, land degradation, climate change, biodiversity depletion, and waste management.[84] As a result of the release of waste chemicals in the extraction sector, soil, water, and air pollution occur. This severely affects the environment, local people, and animals. In order to prevent this pollution, different nations and states have implemented various laws and policies for environmental protection. The environmental protection laws and policies implemented by governments often affect the protections given to environment-related investment activities.

3.1.1. Environmental protection under national environmental legislation

Myanmar's national legal reform process also involves updating and enforcing environmental policy and legislation. At the national level, Myanmar has been promulgating and amending its internal

legislation and administrative measures in order to protect the environment and promote environmental management. Regarding the legal framework for the protection of the environment in Myanmar, the government must protect and conserve the natural environment according to Article 45 of the Constitution of the Republic of the Union of Myanmar, 2008. Moreover, under Article 390 (b), every citizen has a duty to assist the Union in carrying out the preservation and safeguarding of the cultural heritage, conserving the environment, and striving for the development of human resources. This signifies a greater commitment of Myanmar to responsible environmental management.

Again, under its economic policy, the Myanmar government has been making efforts to protect the environment and conserve its cultural heritage. The recent National Environmental Policy of Myanmar (2019) establishes national environmental policy principles for guiding environmental protection and sustainable development, and for bringing environmental considerations into the mainstream in all policies, laws, regulations, plans, strategies, programmes, and projects in Myanmar.

Myanmar's main legislation related to the environment consists of the Environmental Conservation Law 2012 (ECL), the Environmental Conservation Rule 2014, the Environmental Impact Assessment Rules 2015, and Myanmar Agenda 21, 1997. In addition, Myanmar has enacted various laws related to the environment in different sectors, such as the mining sector,[85] the agriculture and irrigation sector, the culture sector,[86] the forestry sector,[87] the health sector, the hotel and tourism sector, the industrial sector,[88] the livestock and fisheries sector, and the national planning and economic development sector. The Penal Code also contains penalties for offences affecting public health and the environment.

In Myanmar, the MNREC is the main institution dealing with environmental protection matters. The ECL[89] states the duties and powers of the MNREC. The Environmental Conservation Department (ECD) guides investors who are implementing investment projects and have undertaken a full EIA. Investors have to comply with Myanmar's evolving environmental regulations.[90]

In Myanmar, the exploitation of mineral and other natural resources is dominated by foreign investors. The extraction of oil, gas, and energy, the extraction of jade and other precious stones, and the exploration for minerals in the mining sector provide great opportunities for foreign investors with technical resources and know-how. The extractive industry is subject to environmental regulation by the state under the mining policy and relevant laws such as the Law Amending the Mines Law 2015 and the Myanmar Gemstone Law 2019. Myanmar needs to consider this policy space to harness investment to serve sustainable environmental approaches.

In Myanmar, the Union government has centralized the ownership and ultimate control of all natural resources and is responsible for enacting laws to supervise the extraction and utilization of these resources.[91] Regional or state governments have the authority to enact laws and regulations under section 118 and Schedule Two of the Constitution.[92] Again, self-administered divisions and self-administered zones have been allotted legislative power including the power over the preservation of the natural environment in accordance with the law promulgated by the Union.[93]

As discussed, in the *Churchill Mining* case the Indonesian local government revoked the investor's mining licence in order to protect the forest area within its territory, following the recommendation of the Ministry of Forestry. In Myanmar, even the local government has not been given the authority to revoke mining licences, while relevant ministries have the authority to issue permits under the existing laws and regulations. For instance, the MNREC can grant a permit to carry out mining operations.[94] If the holder of the permit fails to comply with the rules and regulations, the person issuing the permit may cancel it.[95] Under Chapter XIII of the ECL, anyone who operates a business without the required permit under the existing laws is liable to criminal and civil proceedings.

As mentioned in Chapter 2, investors need an investment permit to work in the sectors specified under the MIL and the investment rules. The MIC has the authority to issue and revoke such permits. However, foreign investors in the extractive industries have to abide by the rules and regulations promulgated by the relevant ministries and the regional or state governments in which their investment projects have been established. In Myanmar, local people and civil societies often demand better regulation of the natural resources extraction sector in a region or state. With the purpose of protecting the environment and regional development, there may be opposition to investment projects from communities. Depending on the natural resources, cultural heritage, and other relevant matters of the regions or states, the rules and regulations vary. For example, safety standards under environmental regulations may not be harmonized across the country. This variable nature of environmental protection measures may affect investment protection under the MIL and BITs. In Myanmar, investors have to consider such legal requirements for the protection of the environment. The varied laws and regulations of the host state may be one of the barriers to ensuring there is a balance between investment protection and environmental protection in Myanmar. By complying with the national and local environmental regulatory framework, investors can support Myanmar in promoting more responsible investment.

3.1.2. Environmental protection under international environmental legislation

Multilateral Environmental Agreements (MEAs) are mechanisms for increasing foreign investment in areas of environmental need.[96] International environmental conventions attempt to encourage foreign investment as a way of reaching their environmental objectives. At the international level, Myanmar has signed, ratified, and acceded to various MEAs to control pollution and other environmental damage in collaboration with other countries. The National Environmental Policy also recognizes and integrates Myanmar's commitments made in these MEAs. National environmental interests must be given thorough consideration before international or regional treaties are signed, and international investment treaties must recognize Myanmar's evolving environmental governance, honour previously ratified agreements, and utilize the most environmentally sustainable methods.[97]

Myanmar is a signatory to, and an active participant in, the major MEAs such as the Convention on Biological Diversity, the Kyoto Protocol to the Convention on Climate Change (UNFCCC), the Convention for the Protection of the World Culture and Natural Heritage, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and the Stockholm Convention on Persistent Organic Pollutants (POPs). In compliance with the commitments given in the MEAs, national laws have been promulgated in Myanmar. The Protection of Biodiversity and Protected Area Law 2018, the Industrial Use Explosive Substances Law 2018, the Law Amending the Mines Law 2015, and The Environmental Conservation Law 2012 and Rules (2014) are some of the important laws for protecting the environment and developing environmental management.

As the sectors for environment-related business grow, there may be more MEAs in the future. Accordingly, national legislation must be consistent with such MEAs. New environmental regulatory measures may affect investors' legitimate expectations under the FET standard contained in the MIL and BITs. It is to be noted that if there is a conflict between the MIL and an international treaty or agreement adopted by the Union, the provisions contained in the latter will prevail.[98]

Foreign investors who intend to do business in Myanmar have to take into consideration the MEAs to which Myanmar is party and the relevant national environmental laws. States have to ensure that they provide relevant information on any measures or decisions, including environment-related legislation, to investors.[99] States have to provide a transparent and predictable legal framework for investors. Amending national legislation so that it complies with international commitments may be a barrier to finding a balance between investment protection and the protection of the environment.

If an investment is adversely affected by environmental laws and regulations, this may result in a conflict with the BIT obligations. In the hope of attracting foreign investment, and in the search for economic development, states have been concluding IIAs and FTAs that include investment-related provisions. As stated in Chapter 2, at present there are eleven BITs in force in Myanmar. While there are benefits to signing such investment treaties, Myanmar needs to recognize that they could harm the state's responsibility to protect the environment. Benefiting from the provisions of these treaties, investors can challenge the environmental protection measures applicable in a state. Investors in the mining and extractive industries are the most frequent users of ISDS.[100] For example, several mining companies lodged ISDS claims against Indonesia when it enacted a new mining law. Consequently, Indonesia has been revising its investment treaty policies.

Currently, Myanmar depends on the exploitation and export of natural resources as a driver for economic development, and the Myanmar government influences the extractive industries. As Myanmar is a country in transition, outdated laws and policies have to be reformed. Myanmar has to make efforts in the future to restrict the negative environmental impacts of investment and to re-regulate its natural resources more effectively. Such efforts could be challenged by foreign investors through ISDS systems. Therefore, Myanmar needs to take into consideration the provisions of its BITs and RITs, and the potential conflicts between investment protection and environmental protection measures.

Recent investment treaties have been providing general exception clauses to safeguard the government's space to introduce policies to protect the public interest, including environmental protection policies. Well-drafted exceptions clauses can help ensure that governments are not held liable for legitimate public policy measures that affect foreign investors. The exception clauses in investment treaties are derived from the General Agreement on Tariffs and Trade (GATT), Article XX, General Exceptions. According to Andrew Newcombe, it may be appropriate to apply GATT Article XX in the investment context since investment is likely to have a great impact on the environment.[101]

Article 17 of the ACIA creates three general exceptions for a range of measures, including measures necessary to protect public morals or to maintain public order, measures necessary to protect the life and health of humans, animals or plants, and measures relating to the conservation of exhaustible natural resources. For a host state to benefit from these exceptions, it would need to show that the measure in question does not amount to arbitrary or unjustifiable discrimination against investors of any other Member State.[102] According to the provision, the host state can adopt or enforce measures that are necessary to protect the life or health of humans, animals or plants.

In the case of Myanmar, the Japan–Myanmar BIT[103] and the Singapore–Myanmar BIT[104] contain general exception provisions that are broadly similar to the ACIA. Sections 89 (a-h) of the MIL implies that measures necessary to protect the life or health of humans, animals or plants, and measures relating to the preservation of natural resources, cannot be construed as unfair measures adopted by the government. The general exceptions clauses under the Singapore–Myanmar BIT contain similar provisions to the MIL.[105] However, early BITs agreed by Myanmar, such as the China–Myanmar BIT, the India–Myanmar BIT, and the Korea–Myanmar BIT, do not contain such provisions. Since China, India, and Korea are among the largest investors in Myanmar, Myanmar needs to consider the inclusion of general exceptions clauses in such BITs.

If drafted carefully, general exception provisions can address some of the concerns about the impact of investment treaties on legitimate laws and policies designed to protect the environment. Myanmar should include a general exception clause in every BIT. If this was done, the barriers to striking a balance between investment protection and environmental protection could be reduced. However, it is important to note that the existence of exceptions clauses does not reduce the need to consider the other provisions of an investment treaty. Besides, there is no prevailing definition of what is meant by the general exceptions in the current BITs. If the investment protection standards are violated, it is not clear whether this can be justified by the exception clauses. For example, measures for the promotion of public health or the protection of the environment may conflict with the goal of investment protection under a BIT.

3.2. Case study on investment disputes involving environmental issues

The case study aims to assess how a conflict between investment protection and environmental protection is considered by an international investment arbitration tribunal. From this case study, Myanmar can learn about a conflict between an investor and a state relating to environmental concerns. Myanmar can use this case study when considering the legal requirements for its investment and environmental legal frameworks.

3.2.1. *Glamis Gold v. U.S.*[106]

This case was brought by a large Canadian-owned mining company, Glamis Gold, against the US government. Glamis owned mining rights in land in the south-eastern California Desert Conservation Area (para. 31). The area was designated as a site of special cultural concern. Californian legislation prohibited both state agencies and private parties operating on public property from using the land in a manner that would cause severe or irreparable damage to any Native American sanctified cemetery, religious or ceremonial site, or sacred

shrine (para. 82). California had also brought in new regulatory measures, which included requirements for backfilling and grading for mining operations around Native American sacred sites (para. 166). The purpose of these measures was to protect the sacred sites from the adverse environmental effects of the proposed mining operations (para. 174).

When Glamis sought approval for a mining project to extract gold from an area close to the cultural site, the project was ultimately not approved. Glamis challenged the measures, contending that they were arbitrary and discriminatory, and were designed to block the project rather than genuinely to address environmental and cultural concerns associated with mining activities generally. Glamis claimed that the US had unfairly targeted the area in which Glamis was working, had refused Glamis a transparent and predictable legal framework within which to operate (paras. 568-574), and was arbitrary in the way that it protected cultural resources and prevented possible contributions to environmental degradation (paras. 687,789 and 803).

Glamis argued that the authorities had no discretion to refuse the plan: rather, a long-standing interpretation of the National Historic Preservation Act of 1966 (NHPA) had the effect of allowing the investor to be granted permission. In this regard, the claimant alleged, among other things, a breach of the FET standard under NAFTA Article 1105 (paras. 633 and 636). Again, Glamis focused on the US government's cultural review of the investor's mining project. After the review, the project had been declared culturally significant, with the result that it was subject to more burdensome regulations. The claimant alleged that there were various procedural deficiencies in the review process, and argued that it violated the arbitrariness, transparency, and due process elements of the NAFTA Article 1105 standard (paras. 645-650).

The respondent contended that the refusal of the plan was in accordance with the World Heritage Convention (UNESCO 1972 Convention) ratified by the United States and incorporated into the NHPA. It recognized that the destruction of any cultural site impoverishes "the heritage of all the nations of the world" (para. 84). The cultural review process had been carried out under Section 106 of the NHPA and it included a reasonable and appropriate survey given the vast area of land (para. 633).

The tribunal considered whether the environmental measures adopted amounted to unfair treatment or were tantamount to expropriation, in violation of Articles 1105 and 1110 of NAFTA. The tribunal considered the interpretation of the FET standard and the host state's defence that relied on national environmental law. NAFTA tribunals have accepted the Free Trade Commission's (FTC) interpretation,[107] which states that Article 1105 (1) reflects the customary international law minimum standard and does not require treatment in addition to or beyond that which is required by customary international law. According to Article 1105 (1) of NAFTA,

which reflects the minimum standard of customary international law,

> *each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

In this case, the tribunal confined its finding to Article 1105 of the NAFTA and remarked that its view did not extend to other treaty clauses referring to FET (paras. 606-610). Applying the standard of customary international law, the tribunal concluded that the obligation to afford FET would be violated only by an act that was:

> *sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;" or the creation by the State of objective expectations to induce investment and the subsequent repudiation of those expectations* (para. 627).

The tribunal noted that the respondent had submitted evidence that the decisions were reached based upon "Section 106-mandated cultural studies" (para. 781). The tribunal considered that this appeared to raise a presumption that the review did not breach Article 1105. The tribunal considered that the claimant had not proved that these processes, and the decisions based upon them, were either arbitrary or manifestly lacking in reason (para. 781). The tribunal ruled that California's measures did not violate Article 1105. Concerning the cultural and environmental reasons behind the measures, the tribunal found that Glamis had not proved that the objective of the measures was not rationally related to the measures themselves (paras. 803 and 818). The case indicates that states have a responsibility to ensure a transparent and predictable framework for investors' business planning and investment under the FET standard, but that the FET standard does not require anything beyond that which is required by the minimum standards of customary international law.

From this case, we can learn that the Myanmar government has a responsibility to ensure that there is a transparent and predictable framework for investors' business planning and investment in order to meet the FET standard. Even though the Myanmar government has the right to intervene in foreign investment transactions to protect the environment, the state's measures must not create a level of unpredictability in the regulatory regime. As discussed in Sections 2.1 and 2.2, the FET standard is required under Myanmar's legal framework for investment.[108] However, the FET wording under section 48 of the MIL and the early BITs does not mention the relationship with international law. The current Singapore–Myanmar BIT does include these

provisions. Under Article 3 of the Singapore–Myanmar BIT, the minimum standards of customary international law for the treatment of aliens refer to all customary international law that protects the economic rights and interests of aliens.

By studying this case, it can be seen that the interpretation of the FET standard by a tribunal is an important factor when considering conflicts between investment protection and environmental protection. The tribunal looked at the FET standard by linking it to the customary international law minimum standard. We can conclude that the FET standard in the MIL and Myanmar's early BITs must be modified by connecting it to the international customary law minimum standard. In this regard, some suggestions for the modification of the FET wording will be discussed in Chapter 4.

3.2.2. *Santa Elena v. Costa Rica*[109]

A Costa Rican corporation under the name *Compania Del Desarrollo De Santa Elena* was established in Costa Rica in 1970 to operate a tourist resort and residential community in Costa Rica's Guanacaste Province. The majority of the shareholders were US citizens (para.16). The area had a rich variety of plant and animal life, as well as a tropical dry forest that was home to a dazzling diversity of flora and fauna and located next to the Santa Rosa National Park (paras. 15-18).

On 5 May 1978, Costa Rica issued an expropriation decree with compensation for the territory of Santa Elena. The property was expropriated so that it could be added to the area of the Santa Rosa National Park to conserve flora and fauna, including jaguars, pumas, and sea turtles. The government considered that the project development proposed by the investors would be in conflict with the environmental protection of the area (paras. 17-18). Although it had no objection to the expropriation, Santa Elena disputed the price fixed by the state (para. 19). For nearly twenty years, the investor and the host state were involved in intensive legal proceedings before the courts of Costa Rica, interspersed with periods of inactivity (para. 20).

On 15 May 1995, the investor (the claimant) filed a request for arbitration. The main purpose of the arbitration was to determine how much the host state (the respondent) had to pay to the claimant in compensation for the expropriation of the property (para. 28). There was no dispute between parties that the expropriation was legal. The parties also agreed that the appropriate standard of compensation was the fair market value of the property (para 70). The dispute concerned the appropriate method for calculating the fair market value and the date on which this value was to be calculated. The claimant wished to apply Costa Rican law, which would assess the value of the expropriated property at the time the compensation was paid.[110]

The respondent argued that the expropriation decree was issued to meet legitimate environmental objectives. Regarding the method or date for calculating the amount of compensation, the respondent favoured the application of international law, which would assess the value of the expropriated property at the time of expropriation.[111] The respondent stated that if the level of compensation was too high, this would be an impediment for developing states including Costa Rica.[112] The respondent stated that the Guanacaste Conservation Area had been listed as a World Heritage Site in 1999,[113] and alleged that the expropriation was carried out to fulfil its international commitments under different MEAs, including the World Heritage Convention.

To determine the amount of compensation to be paid to the investor for the expropriation of its property in Costa Rica, an ICSID tribunal applied the Costa Rica–US BIT. The tribunal noted that the parties were not in dispute that the purpose of the expropriation, the protection of the biodiversity of the state, was lawful (para. 71). Regarding the amount of compensation to be paid, the tribunal relied on the principle of full compensation at fair market value as the appropriate standard of compensation (para. 70). The tribunal accepted that the expropriation date was 5 May 1978. The tribunal considered that the claimant was entitled to the full present value of the compensation that it should have received at the time of the expropriation (para. 101). The tribunal considered that international law would be applied in the absence of an explicit agreement on which law would govern the dispute. However, the tribunal did not accept that the standard of compensation could be affected by environmental concerns. In considering the duty of compensation, the tribunal said:

> *While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference (para. 71).*
>
> *Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take to implement its policies: where the property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains (para. 72).*

The case illustrates the level of compensation to be paid for the lawful expropriation of foreign investment property with the purpose of protecting the biodiversity of the state. Regarding the method or date

of calculating the amount of compensation, the tribunal accepted that international law, which assesses the value of expropriated property at the time of expropriation, should be applied. Also, the tribunal pointed out that the obligation to pay compensation remained since the environmental protection measures did not affect the nature of the expropriation.[114] When assessing the expropriation claim, the tribunal rejected any evidence submitted by the respondent as to its international obligations to preserve the environment. The tribunal declined to consider the host state's obligations under international non-investment law.[115] The host state's obligations to protect public interest concerns in such areas as preserving the natural diversity of flora and fauna did not change its duty to pay compensation.[116]

From this case study, it can be learned that the host state's obligation to pay compensation remained since the environmental protection measures did not affect the nature of the expropriation. In Myanmar, the amount of compensation for expropriation is based on a fair consideration of the public interest as well as the interests of the private investor.[117] As Myanmar has also been a member of the World Heritage Convention since 1994, environmental protection measures may be brought in under the relevant domestic laws (e.g., the Protection and Preservation of Cultural Heritage Regions Law 1998). In some way, these measures may interfere with foreign investments and the measures may be tantamount to expropriation. However, it should be noted that if the state expropriates the property of an investor with the purpose of protecting the environment, the obligation to pay compensation remains. Environmental protection measures may still give rise to compensation. Under the MIL, the amount of compensation is based on the fair market value at the time of the expropriation of the investment.[118] Myanmar's domestic investment law recognizes the application of international law, which assesses the value of the expropriated property at the time of the expropriation. This is consistent with the ACIA and Myanmar's current BITs. However, the MIL does not mention the interest in the calculation of the amount of compensation. Under the ACIA, the compensation includes an appropriate interest in accordance with the laws and regulations of the member state making the expropriation.[119] In this regard, the MIL and Myanmar's investment rules should have precise provisions relating to the determination of interest when calculating the amount of compensation.

3.3. Conclusion

This chapter investigates issues concerning environmental protection provisions under the national and international legal frameworks in Myanmar. It considers some limitations that need to be taken into account when striking a balance between environmental protection and investment protection.

The chapter discusses the various laws and regulations of Myanmar, under national and international environmental legislation, that may create barriers to finding a balance between investment protection and environmental protection. Myanmar has to ensure consistency between the provisions of international treaties and national environmental regulations. By complying with the national and local environmental regulatory framework, investors can help Myanmar to promote more responsible investment.

The chapter also discusses how environment-related provisions under IIAs, such as general exceptions clauses, play a role in striking a balance between investment protection and environmental protection. Myanmar needs to consider the inclusion of general exceptions clauses in all its BITs. If this was done, the barriers to striking a balance between investment protection and environmental protection could be reduced.

From the case studies, we learn that the Myanmar government must ensure a transparent and predictable framework for investors' business planning and investment under the FET standard. However, the FET standard is no higher than the minimum standards of customary international law. The FET standard in the MIL and Myanmar's early BITs must be modified to connect them with the customary international law minimum standard.

Moreover, the case study highlights that environmental protection measures under national and international commitments do not affect the nature of expropriation. The obligation to pay compensation according to the expropriation provision remains. In calculating the amount of compensation for expropriation, the provisions under the MIL and Myanmar's investment rules must be revised to match the ACIA and Myanmar's current BITs.

4. Conclusion

FDI in Myanmar is, nowadays, directed towards industries for extracting natural resources, which severely affect the environment, local people, and animals. While attracting investment is important for the state's economic development, the protection of the environment plays the same role. Therefore, Myanmar needs to take steps to balance investment protection and the protection of the environment in the country.

This concluding chapter summarizes the key challenges and makes some suggestions for how Myanmar can strike a balance between investment protection and the protection of the environment. As discussed in the previous chapters, Myanmar needs to reform its legal framework for both investment and

environmental legislation.

Regarding investment legislation, investment protection standards will first be discussed. We have seen that the FET and expropriation provisions under the MIL and Myanmar's early BITs need to be modified to give clarification. As discussed in Chapters 2 and 3, the FET provisions under the MIL and the early BITs do not link up with international law. However, current BITs such as the Singapore–Myanmar BIT clarify the FET obligations by relating them to the minimum standard of treatment under customary international law. Likewise, the tribunal in *Glamis Gold v. U.S.* considered that the minimum standard is connected with the FET standard. To reduce the likelihood of controversies between investment protection and environmental protection, the MIL and future BITs should provide as follows:

> *The Government guarantees to investors fair and equitable treatment under the customary international law minimum standard for the treatment of aliens. The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. For greater certainty, the obligation to provide "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by this standard and does not create additional substantive rights. The customary international law minimum standard for the treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.*

Concerning expropriation, the MIL provides legal guarantees and protection against direct or indirect expropriation except under four stated conditions. As discussed in Section 2.2.2, the provisions regarding direct or indirect expropriation under the MIL are compatible with the ACIA. However, Myanmar's early BITs do not clarify these expressions. For more clarification, Myanmar's BITs should have consistent provisions in this matter. For instance, Annex II of the Singapore–Myanmar BIT clarifies the term expropriation for two situations. The first situation is "direct expropriation", which means *"where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure".* The second situation is "indirect expropriation", which means *"where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure".* Myanmar's early BITs should follow the explanation in the Singapore–Myanmar BIT.

Also, as discussed in Section 3.2.2, compensation for expropriation is a critical issue in international investment cases. However, the MIL does not specifically mention the interest in the calculation of the amount

of compensation. Regarding compensation, Article 6 (2) of the Singapore–Myanmar BIT provides: *"The compensation shall include interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment"*. Myanmar should include similar provisions under the section entitled "Expropriation" in the MIL, to make it consistent with the ACIA and current BITs.

It appears that the MIL and some BITs contain obligations on investors to promote responsible investment and to maintain an environmental management system in Myanmar. However, Myanmar is still required to encourage the adoption of CSR standards according to the OECD Guidelines for Multilateral Enterprises in both the MIL and its BITs. For instance, Indonesia's Investment Law provides: *"each investor is obliged to implement the principles of good corporate governance, and to meet corporate social obligations"*. Again, Norway's Model BIT requires the parties *"to agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multilateral Enterprises and to participate in the United Nations Global Compact"*. To strike a balance between investment protection and environmental protection, the MIL and Myanmar's BITs should contain similar CSR provisions.

Concerning environmental legislation, Section 3.1.2 discusses the significance of general exception provisions. These provisions can address some of the concerns about the impact of investment treaties on laws and policies designed to protect the environment. The chapter shows that the MIL and some current BITs contain general exception provisions that are broadly similar to the ACIA. However, Myanmar needs to consider the inclusion of more precise general exception provisions in the MIL and all BITs. The chapter explains that the ACIA and the Singapore–Myanmar BIT contain a separate exception clause related to the protection of national treasures of artistic, historic, or archaeological value. Also, the conservation of exhaustible natural resources is provided as a separate exception. Since Myanmar is a country that is rich in natural resources and cultural heritage, the MIL and all BITs should contain similar separate exception provisions under the title of general exceptions.

Regarding environmental legislation, varying national legislation in order to comply with international commitments may be a barrier to striking a balance between investment protection and environmental protection. New environmental regulatory measures to ensure compliance with future MEAs may affect investors' legitimate expectations under the FET standard contained in the MIL and the BITs. Myanmar needs to be much more careful about its commitments under MEAs and IIAs. Myanmar also needs to take into consideration the varying nature of the environmental laws and regulations that are enacted by relevant ministries and local governments. Myanmar is obliged to adopt environmental protection measures

that are as consistent as possible with investment protection.

This article notes that Myanmar's current BITs are very inconsistent with each other, and that Myanmar has been a rule-taker in investment treaty negotiations. Myanmar needs to ensure greater consistency between investment treaty provisions and its national investment legislation. Myanmar needs to be able to play the role of rule-maker in concluding future investment treaties. Furthermore, as mentioned above, some of Myanmar's current BITs overlap with ASEAN IIAs that Myanmar has signed. For instance, Myanmar has concluded BITs with ASEAN member countries such as Indonesia, the Philippines, Singapore, Thailand, and Vietnam that are also members of the ACIA. Myanmar thus needs to consider the termination of overlapping BITs, to reduce its risk of being subjected to investment claims.

Additionally, Myanmar's investment legislation should refer to environmental principles and other legal requirements for environmental protection. Myanmar has to ensure that it has a transparent and predictable legal framework for investors in both investment legislation and environmental legislation. The harmonizing of economic policy and environmental governance in Myanmar will strike a balance between the protection of foreign investment and the protection of the environment in Myanmar.

Endnotes

[1] ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 225 (CUP, 2012).
[2] Alison Giest, *Interpreting Public Interest Provisions in International Investment Treaties,* 18 CHICAGO JOURNAL OF INTERNATIONAL LAW 321-352 (2017).
[3] PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 926 (CUP 4th ed., 2018).
[4] Yearly Approved Amount of Foreign investment (by sector) for the fiscal year 2018-2019. https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/yearly_sector_6.pdf
[5] For instance, there are 53 onshore and 51 offshore oil and gas operations in Myanmar which are active in nearly every state and region. Win Maw, Deputy Director-General of Ministry of Energy, Presentation at the 32nd JCCP International Symposium, Tokyo: The Current Status and Future Vision of Oil and Gas Sector in Myanmar (January 2014).
[6] UNDP Myanmar, Annual Report 2015.
[7] Article 36 (c) of the Constitution of the Union of Myanmar, 2008.
[8] Article 45 of the Constitution of the Union of Myanmar, 2008.
[9] Article 390 of the Constitution of the Union of Myanmar, 2008.
[10] Sufian Jusoh, Myanmar's Investor–State Dispute Settlement Experience and Investor Grievance Mechanism, in Carlos Esplugues, eds., FOREIGN INVESTMENT AND INVESTMENT ARBITRATION IN ASIA 205-226, at 207 (Intersentia, 2019).
[11] Economic Policy of the Union of Myanmar, 29 July 2016.
[12] Myanmar Investment Law, Pyidaungsu Hluttaw Law No. 40/2016, 18 October 2016.
[13] The Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013 do not have investment protection provisions that are consistent with international standards.
[14] Myanmar became a member of ASEAN on 23 July 1997.
[15] Huala Adolf, *Indonesia, Foreign Investment and Investment Arbitration*, in Carlos Esplugues, eds., FOREIGN INVESTMENT AND INVESTMENT ARBITRATION IN ASIA 101-123, at102 (Intersentia, 2019).
[16] Id. at 106-107.
[17] ASEAN member states had attracted a total of 33 known ISDS claims as of 28 February 2017. Luke Nottage, Julien Chaisse and Sakda Thanitcul, *International Investment Treaties and Arbitration Across Asia: A Bird's Eye View*, in Julien Chaisse & Luke Nottage, eds., INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 3-56, at 31(Brill Nijhoff, 2018).

[18] Martina Francesca Ferracane, *Investor-State Dispute Settlement (ISDS) Cases in the Asia-Pacific Region – The Record*, in Julien Chaisse, Tomoko Ishikawa, Sufian Jusoh, eds., ASIA'S CHANGING INTERNATIONAL INVESTMENT REGIME: SUSTAINABILITY, REGIONALIZATION, AND ARBITRATION 229-242, at 241 (Springer, 2017).
[19] OECD Investment Policy Review: Myanmar, OECD (2014).
[20] Article 3 of MIL.
[21] Indonesian Law No. 25 of 2007 on Capital Investment (Investment Law).
[22] Article 3 (1) (h) of the Indonesian Investment Law.
[23] Article 18 of the Indonesian Investment Law.
[24] Article 2 (e) of the Notification No. 643/2018 of the Supreme Court of the Union of Myanmar.
[25] Myanmar is a member of the ACIA: this was declared in 2009 and came into force in 2012.
[26] Section 47 (a) of MIL.
[27] Section 47 (b) of MIL.
[28] Section 48 of MIL.
[29] Article 6 (1) of the Indonesian Investment Law.
[30] Section 3 (a) of MIL.
[31] Section 65 (g) of MIL.
[32] Section 65 (q) of MIL and Article 190 of Myanmar Investment Rules.
[33] MIC was formed under Chapter IV of MIL.
[34] Section 36(c) of MIL.
[35] Section 25 (c) of MIL and Article 50 of Myanmar Investment Rules.
[36] Article 16 (c) of Myanmar Investment Rules. Under section 41 of MIL, prohibited investments include investment activities that may bring or cause hazardous or poisonous waste into the Union or may cause an enormous harmful impact on the natural environment and ecosystem.
[37] Section 46 of MIL.
[38] Article 15 of the Indonesian Investment Law.
[39] Article 17 of the Indonesian Investment Law.
[40] United States–Chile Free Trade Agreement, June 6, 2003, Article 19.10.
[41] OECD Guidelines for Multilateral Enterprises 43-44 (OECD Publishing, 2011).
[42] For instance, under Article 27 of the Singapore–Myanmar BIT, Article 8 of the Korea–Myanmar BIT, and Article 8 of the Japan–Myanmar BIT, "Transparency" provides that the countries must give information about the laws, regulations, administrative rulings, and international agreements pertaining to investment activities.
[43] Adolf, *supra* note 15, 15 at 106.
[44] Tineke Lambooy, Iman Prihandono, and Nural Barizah, *Foreign Direct Investment in the Mining Industry in Indonesia: Disputes Concerning Environmental Degradation and Pollution*, *in* Yulia Levashova, Tineke Elisabeth Lambooy, I. F. Dekker, eds., BRIDGING THE GAP BETWEEN INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT 383-440, at 384 (Eleven International Publishing, 2016).
[45] Adolf, *supra* note 15, at 106.
[46] Id. at 107.
[47] Id. at 115.
[48] *Yaung Chi Oo Trading Pte Ltd., v. Government of the Union of Myanmar,* ASEAN I.D. Case NO. ARB/01/1, Award (31 March 2003)
[49] *Churchill Mining Plc. And Planet Mining Pty Ltd., v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award (6 December 2016)
[50] Article 7 and 163 (2) of Mineral and Coal Mining Law 2009.
[51] Article 6 (1) of the Indonesian Investment Law.
[52] Chapter XIX of MIL. If an investment dispute cannot be settled amicably, it shall be settled in the competent court or the arbitral tribunal under the applicable laws (section 84 (a) of MIL). In line with its investment objectives, the MIL has provided arbitration-friendly jurisdiction. Myanmar Arbitration law 2016 allows both domestic arbitration and international arbitration (section 3 (h) and (i) of Arbitration Law).
[53] Myanmar became a member of the New York Convention in 2013. Myanmar is not a member of the ICSID Convention.
[54] Section 48 of MIL.
[55] Section 7 of the Law Amending the Myanmar Mines Law 2015.
[56] Section 8 of the Myanmar Mines Law 1994.
[57] Section 19 of the Forest Law 2018.
[58] Section 34 (c) of the Forest Law 2018.
[59] SANDS & PEEL, *supra* note 3, at 900.
[60] RALPH H. FOLSOM, FOREIGN INVESTMENT LAW INCLUDING INVESTOR-STATE ARBITRATIONS IN A NUTSHELL 355 (West Academic Publishing 2nd ed., 2019).
[61] Article 17 of ACIA.
[62] ASEAN-China Agreement on Investment, the ASEAN India Agreement on Investment, the ASEAN-Korea Agreement on Investment, the ASEAN-Australia-New Zealand Free Trade Agreement, and the ASEAN-Hong Kong China SAR Investment Agreement.

[63] Jonathan Bonnitcha, *International Investment Arbitration in Myanmar: Bounded Rationality, but Not as We Know It*, in Julien Chaisse & Luke Nottage, eds., INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 335-360, at 355 (Brill Nijhoff 2018).
[64] Myanmar has the second smallest treaty network of all ASEAN Countries.
[65] The BIT with Laos was terminated.
[66] The BIT with Vietnam was never ratified.
[67] https://www.dica.gov.mm/en/investment-agreements
[68] Bonnitcha, *supra* note 63.
[69] LORETTA MALINTOPPI & CHARIS TAN, INVESTMENT PROTECTION IN SOUTHEAST ASIA: A COUNTRY-BY-COUNTRY GUIDE ON ARBITRATION LAWS AND BILATERAL INVESTMENT TREATIES 235 (Brill Nijoff, 2017).
[70] Article 4 of Japan–Myanmar BIT.
[71] The customary international law minimum standard of treatment of aliens refers to all customary international law that protects the economic rights and interests of aliens.
[72] Article 3 of Singapore–Myanmar BIT.
[73] Id.
[74] Article 11 (2) of ACIA.
[75] Section 48 of MIL.
[76] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 98 (OUP 2nd ed. 2012).
[77] Id. at 99.
[78] Article 14 (1) of ACIA.
[79] Annex 2, para (4) of ACIA.
[80] Myanmar Investment Rules, Notification No. 35/2017, The Ministry of Planning and Finance, 30 March 2017.
[81] Article 36 (d) of the Constitution of the Union of Myanmar, 2008.
[82] Section 52 of MIL.
[83] Article 7 of the Indonesian Investment Law.
[84] D.A. Raitzer, J.N.G. Samson, and K.Y. Nam, *Achieving Environmental Sustainability in Myanmar*, ADB Economics Working Paper Series No. 467, December 2015, p. 4.
[85] The Law Amending the Myanmar Mines Law 2015 and the Myanmar Mines Law 1994.
[86] Protection and Preservation of Cultural Heritage Regions Law, which was enacted in 1998, revised in 2009 and supplemented in 2011 with regulations.
[87] Myanmar Forest Law 2018.
[88] Industrial Use Explosive Substances Law 2018.
[89] The Pyidaungsu Hluttaw Law No. 9/2012.
[90] In 2016, Myanmar passed new Environmental Quality Standards (EQS), Environmental Impact Assessment (EIA), and Social Impact Assessment (SIA) procedures.
[91] Article 37, 96, and Schedule One: Union Legislative List of the Constitution of the Union of Myanmar 2008.
[92] For instance, medium and small-scale electric power production and distribution under Energy, Electricity, Mining, and Forestry Sector.
[93] Article 196 and Schedule Three of the Constitution of the Union of Myanmar 2008.
[94] Section 7 of the Law Amending the Myanmar Mines Law 2015.
[95] Section 8 of the Myanmar Mines Law 1994.
[96] SANDS & PEEL, *supra* note 3, at 900.
[97] Principle 23 of National Environmental Policy 2019.
[98] Section 91 of MIL.
[99] See section 48 (a) of MIL.
[100] For instance, *Glamis Gold v. US, Churchill Mining v. Indonesia.*
[101] Andrew Newcombe, *General Exceptions in International Investment Agreements, in* Marie-Claire Cordonier Segger, Markus W Gehring, Andrew Newcombe, eds., SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355-370, at 361 (Kluwer, 2011).
[102] Article 17 (1) of ACIA.
[103] Article 19 of Japan–Myanmar BIT.
[104] Article 29 of Singapore–Myanmar BIT.
[105] Article 29 (a) and (e) of Singapore–Myanmar BIT.
[106] *Glamis Gold, Ltd v. the United States of America*, UNCITRAL, Award (8 June 2009)
[107] FTC note of interpretation of 31 July 2001.
[108] Section 48 of MIL.
[109] *Compania Del Desarrollo De Santa Elena, S.A. v. The Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award (17 February 2000)
[110] KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY 164 (CUP, 2009).
[111] Id.
[112] SANDS & PEEL, *supra* note 3, at 914.

[113] Charles N. Brower & Eckhard R. Hellbeck, *The Implications of National and International Obligations for Foreign Investment Protection Standards, Including Valuation: A Report for the Front Lines*, in THE INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION, INTERNATIONAL INVESTMENTS AND PROTECTION OF THE ENVIRONMENT: THE ROLE OF DISPUTE RESOLUTION MECHANISMS 19-28, at 25 (Kluwer, 2000).
[114] DOLZER & SCHREUER, *supra* note 76, at 122.
[115] *Santa Elena v. Costa Rica*, para 32. M. Hirsch, *Interactions Between Investment and Non-Investment Obligations*, *in* P. Muchlinski, F. Ortino and C. Schreuer, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 154-181, at 169 (OUP, 2008).
[116] KULICK, *supra,* note 1, at 236.
[117] Section 53 of MIL.
[118] Section 53 of MIL.
[119] Article 14 (3) of ACIA.

主指導教員（渡辺豊教授）、副指導教員（吉田正之教授・田巻帝子教授）