

Agency Exercised by the Private Sector: Environmental Issues in Investment Projects

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Abstract: Private sector's impact on environmental issues is beyond dispute. Due to their wide geographical presence as well as their economic power, the repercussions of MNCs' activities have become a matter of utmost importance with legal and social dimensions. The sustainable development goal has long ago been correlated with the private sector's performance and cooperation.

Nowadays, Foreign Direct Investment (FDI) is considered to be the motivating power of the development process and developing countries' top priority. FDI may serve as an important tool for the financing of sustainable development and earth-system governance as long as certain parameters and standards for social responsible investing are fulfilled. Sound environmental performance of private sector's projects is absolutely necessary in order to fulfill local communities' environmental goals.

Our paper deals with private sector as an agent in earth system governance. We examine the ways authority on environmental issues has been granted to private sector as well as its influence on them. We believe that especially the undertaking of environmental measures in finance agreements is the most crucial issue arising from the relation between developing countries, private sector and Multilateral Development Banks (which usually co-finance). This relation reflects in the most obvious way private sector's major role in earth system governance.

Indeed, investment projects' implementation may have several risks for the environment. First of all, compliance with domestic and international environmental standards is crucial, especially because developing countries often try to low their environmental standards in order to attract foreign investors ("race to the bottom").

Furthermore, there is the question of the host country raising its environmental standards in order to comply with international obligations; such an action could have severe implications on foreign investment's status and affect the conventional relationship between the investor and the host country. Contract agreements may affect negatively the enforcement of domestic environmental regulation or compliance with international environmental standards in many ways.

In fact, some common clauses in the investment agreements appear to be rather opposite to environmental efforts. In our paper we wish to examine the implications of these clauses on environmental protection, especially referring to a) performance requirements, b) stabilization clauses and c) expropriation measures (or tantamount to expropriation measures). The analysis of these issues through both theoretical defense and specific investment agreements will provide us with valuable conclusions on private sector's role in earth system governance.

We conclude a) that despite of the thousands of investment agreements signed as for today, it seems that environmental protection in project finance is yet an issue to be solved and b) that private sector's involvement in earth system governance needs further elaboration in order to fulfil international accepted environmental goals.

1. Introduction

Private sector's role in a country's development process is undoubted; especially multinational corporations play a major role through the implementation of foreign direct investments (FDI). The impacts of their activities on economic growth, respect of human rights and environmental protection has become a critical issue with legal, economic, social and political dimensions. Private sector's impact on contemporary international issues is the result of both the wide geographical range of their activities and its economic power. Private sector nowadays is considered to be -along with the state- of crucial importance to a country's economic growth and social progress¹.

¹ Richard Boele, Heike Fabig, David Wheeler, 'Shell, Nigeria and the Ogoni: A study in unsustainable development. II. Corporate Social Responsibility and "Stakeholder management" versus a rights-based approach to sustainable development' (2001) 9 Sustain Dev 121, 127

Furthermore, the achievement of sustainable development has been largely related to the sound environmental performance of the private sector, as it is obvious that without its cooperation there shall be no progress in the field of environmental protection. Corporations, especially multinationals, have the know-how, the capability of developing new, clean technologies, the skilled staff and of course, the economic means to plan and implement environmental policies.

For many decades multinationals were considered as a new way of neocolonial policy exercised by the developed countries². Nowadays, FDI is recognized as the motivating power of development process and a top priority for developing countries. On the other hand, FDI has largely been accused of causing extended environmental damages in host countries; however, it may still be used as one of the most important instruments for sustainable development funding, as long as certain conditions and international environmental standards, which may lead to responsible investing, are fulfilled.

2. Private sector's authority on environmental issues

Private sector's major role in the promotion of sustainable development is evidenced in the documents of the Stockholm Conference on the Human Environment, the Rio Conference on Environmental and Development and the Johannesburg World Summit on Sustainable Development. The outcome of this long procedure is that private sector invests and funds the development of developing countries taking more and more into account the protection of the environment. Sustainable business practice is the new sound method of corporate management and administration³.

² Anthony Bende-Nabende, *Globalisation, FDI, Regional Integration and Sustainable development*, (Ashgate, 2002) 4.

³ Titus Moser, 'MNCs and Sustainable Business Practice: the case of the Colombian and Peruvian Petroleum Industries' (2001) 29 *World Dev* 291, 292.

A closer look into the documents of these three major summits reveals the procedures of the international efforts to include private sector in the global struggle to protect the environment.

The Stockholm Declaration's Preamble includes the first reference to private sector's role, and in specific the need for enterprises to take responsibility for the achievement of environmental goals⁴.

Rio Conference twenty years later was the beginning of the private sector's involvement in international negotiations for global environmental problems. In Rio it was the first time that representatives of the private sector participated and private sector's involvement in international efforts for sustainable development was especially underlined. Rio's Declaration does not include a direct reference to private sector's role, but it refers to the need for economic instruments as a new tool to protect the environment⁵.

Agenda 21, on the other hand, includes thorough references to private sector's role in environmental protection and sustainable development. National governments are encouraged to support industry's participation in environmental and development issues as well as to promote economic instruments and market tools⁶. Cooperation of national governments, international organizations and private sector is considered to be necessary, in order to develop criteria and methods of EIAs' implementation⁷. In addition, national

⁴ UN Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 1972) Preamble, par.7: «To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future.»

⁵ UN Conference on Environment and Development, 'The Rio Declaration on Environment and Development' (Rio de Janeiro, June 1992), Principle 16.

⁶ UN Conference on Environment and Development, 'Agenda 21' (Rio de Janeiro, June 1992) UN Doc A/CONF.151/26, par.2.21, 2.37 (e), 8.27, 8.32.

⁷ Ibid Chapter 4, par. 4.20

governments should promote environmental labeling and encourage private sector to develop and implement methods for accounting for sustainable development⁸.

Furthermore, Chapter 30, which refers in detail to the private sector, served as the basis for corporate social responsibility in environmental matters and as the beginning of the important developments in the after-Rio years. With Chapter 30, the crucial role of business and industry in a country's development was recognized, including multinational corporations, and they were called to participate in the implementation of Agenda 21's goals. Environmental management should be the private sector's top priority according to Chapter 30⁹. Enterprises are also encouraged to adopt Codes of Conduct, such as the ICC Code of Conduct¹⁰ and the chemical industry's initiative «Responsible Care»¹¹.

In Rio it was clear that the achievement of sustainable development was impossible without the private sector's cooperation.

In Johannesburg, ten years later, this statement was strengthened. Important issues, such as environmental accountability and corporate legal responsibility were discussed¹². Johannesburg's Declaration underlines private sector's duty to support the development of sustainable communities and societies¹³. In addition, it refers to the need for corporate accountability¹⁴. The Plan of Implementation (Chapter III par.18), encourages voluntary initiatives of corporate responsibility and accountability¹⁵.

⁸ 'Environmental labelling'. Ibid par. 4.21, 8.48 (b) («To develop and implement methods and rules for accounting for sustaining development»).

⁹ Ibid par. 30.3

¹⁰ 'Business Charter on Sustainable Development of the International Chamber of Commerce' (1991), <http://www.iccwbo.org/id1309/index.html>

¹¹ Agenda 21 par. 30.10

¹² At least by NGOs

¹³ World Summit on Sustainable Development, 'The Johannesburg Declaration on Sustainable Development' (Johannesburg, 4/9/2002), par. 27

¹⁴ Ibid par. 29. See also Marie-Claire Cordonier Segger, 'Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda' (2003) 12 RECIEL 295

¹⁵ World Summit on Sustainable Development 'Plan of Implementation of the World Summit on Sustainable Development' (Johannesburg 2002) par. 49, 26, 140

The need for international cooperation between NGOs, governments, private sector and international organizations was stressed in Johannesburg. The Plan of Implementation underlined the need for multi-stakeholder participation, Agenda 21's implementation and compliance with principles of accountability and transparency. In addition enterprises were invited to participate in UN's initiative "Global Compact" and to accept inspections by independent authorities.

It is perfectly clear that the abovementioned documents have no legally binding force. However, it is accepted that they constitute a global consensus as they reflect the opinion of the majority of the international community.

3. Private sector's environmental tools and policies

The increase of foreign direct investments and the global need for environmental protection have redefined private sector's role in the development process and have stressed the need for incorporating the environmental parameter in its financing activities. But in what way could an enterprise be enforced to promote the environmental goal? The issue of enforcement is critical, as in open markets there is no place for a strict governmental regulatory framework. Therefore, new tools and incentives were developed by both the private sector and international organizations, such as the Codes of Conducts.

Undoubtedly all countries, developed and developing, try to attract FDI, especially by adopting a friendly to investments regulatory framework. However, threats to environmental protection by the implementation of investment projects are very serious. One of the major threats is the project's compliance with domestic and international environmental standards. There are two points of view regarding this issue: part of the theory supports that to attract FDI the host country lowers its environmental standards¹⁶; others support that developing countries should head to liberal economy without compromising on environmental issues.

¹⁶ «Race to the bottom» and «pollution havens» theories, Wallace-Bruce Nii Lante, 'Global Investments and Environmental Protection: The Battle Lines Are Yet to Emerge!' (2002) 49 NILR 195, 205

Same problems arise when the host country wishes to modify its environmental regulation in order to comply with international obligations and this modification has an impact on the investment. It then becomes an issue of treatment of the foreign investment which further complicates the conventional relation between the investor and the host country.

In the next paragraphs we are trying to elaborate more on these issues.

4. Investment agreements

Environmental protection measures in investment agreements is perhaps one of the most critical issues arising from the relationship between the private sector, developing countries, multilateral development banks and the environment. This relationship reflects in the most obvious way the confrontation of economic growth and environmental protection, of private persons rights' protection and public interest's protection, of developed and less developed countries.

Foreign Direct Investment (FDI) is a type of transnational movement of capital which is nowadays considered as the motivating wheel of developing countries' development process. The Johannesburg Plan of Implementation underlines that developed countries should facilitate foreign investments in order to promote sustainable development¹⁷. Host countries anticipate positive impacts of investment agreements,

¹⁷ World Summit on Sustainable Development 'Plan of Implementation of the World Summit on Sustainable Development' (2002), Chapter X (Means of Implementation) par. 84:

“Facilitate greater flows of foreign direct investment so as to support the sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment, with particular actions to:

(a) Create the necessary domestic and international conditions to facilitate significant increases in the flow of foreign direct investment to developing countries, in particular the least developed countries, which is critical to sustainable development, particularly foreign direct investment flows for infrastructure development and other priority areas in developing countries to supplement the domestic resources mobilized by them;

(b) Encourage foreign direct investment in developing countries and countries with economies in transition through export credits that could be instrumental to sustainable development.”

mainly the transfer of new, clean technologies and higher than domestic environmental standards. On the other hand, investment agreements signed by developing countries may have negative impact on compliance with domestic legislation and international environmental agreements or may discourage them from undertaking additional environmental measures and raising domestic standards in the future.

International rules and standards for FDI are being developed through a rather complicated process which includes dialogue between the private sector, host countries, home countries and international financial organizations - when they participate in the project. As a result of this process, the rules and standards which govern the foreign investment originate from domestic law, international law and agreements signed between investors and host countries. In specific, sources of law for FDI are domestic law and national laws for investments, bilateral investment treaties (BITs), any applicable multilateral agreements for investments (such as NAFTA and the Energy Charter) and finally, the standards and practices applied by multilateral development banks (in case of co-financing).

The agreement signed by the investor and the host country includes special conditions of treatment and protection of the investment, which reflect international business practices. Despite of the thousands of investment agreements signed as for today the settlement of environmental issues remains unsolved. Moreover, some of the most common clauses in investment agreements seem to be in contradiction in terms of environmental protection. These clauses are a) the prohibition of imposing performance requirements on the investment, b) the stabilization clauses and c) the prohibition of measures which lead to expropriation or tantamount expropriation of the investment.

a. Performance requirements

Host countries' request that the investor complies with specific performance standards is directly related to their requests for transfer of new technologies. Host countries wish foreign investments to carry new, clean technologies, to be implemented according to international standards for waste management, to include a plan of

prevention and action in case of industrial accident and to perform in accordance with international environmental standards.

Transfer of technology to developing countries has long been a matter of dispute in the north-south dialogue. Host country's requirements regarding the performance of the investment according to international environmental standards are usually overridden due to negotiation reasons and attraction of foreign investments. However, the prohibition of performance requirements in the investment agreement may obstruct the host country's sustainable development. In our view this practice is contrary to Rio and Johannesburg's documents which underline private sector's responsibility to promote sustainable development and act according to international environmental principles and standards.

b. Stabilization Clauses

Investment agreements usually include stabilization clauses in order to deter the host country from taking future measures which may affect the investment's performance¹⁸. As regards environmental measures the stabilization clauses may deter the host country from raising its environmental standards or even participating in regional and international environmental treaties. The host country by adopting new environmental regulation may be called for violating the investment agreement (breach of contract) and be obliged to pay for any damages. Its other option is to exclude the investment from future regulatory measures.

¹⁸ «Regulatory chill», Kevin R. Gray, 'Foreign direct investment and environmental impacts: Is the debate over?' (2002) 11 RECIEL 306, 311

Undoubtedly stabilization clauses provide security to investors¹⁹ who often invest in countries with political instability, inefficient national infrastructure and high levels of corruption. On the other hand, it has been said that stabilization clauses constrain the sovereign country's right to apply its regulatory authority²⁰. As regards the environmental protection, although stabilization clauses are very common in investment agreements, they are contrary to state's sovereignty over its natural resources and its right to use these sources according to its development needs and policies.

Furthermore, it is obvious that stabilization clauses constrain the achievement of the international goal of sustainable development, since they deter the host country from taking stricter environmental measures or adopting international standards which may affect negatively the investment. In addition, the major issue arising from environmental protection and investment's interrelation is which part will bear the costs from additional environmental measures. Stabilization clauses transfer economic costs to the local communities (i.e the taxes which are going to be paid by the citizens in order for a compensation to be paid or any pollution to be managed), a practice which violates the polluter-pays-principle. At this point, the Energy Charter may well serve as an example for investment agreements, and especially Art.19 according to which the polluter bears the cost of any pollution, domestic or international²¹.

Especially as regards environmental protection, where new scientific evidence on future threats is being released every day, it is very important that state's will to raise its environmental standards and participate in international environmental treaties is promoted and supported.

¹⁹ See for instance, a) Art. 7.2 (vi) of the "Host Government Agreement between and among the Government of the Azerbaijan Republic and the State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea) Ltd., Statoil BTC Caspian AS, Ramco Hazar Energy Limited, Turkiye Petrolleri a.o., Unocal BTC Pipeline Ltd., Itochu oil exploration (Azerbaijan) inc., Delta Hess (BTC) limited", October 17, 2000

b) Art. 7.2 (vi) of the "Host Government greement between and among the Government of Georgia and [the MEP Participants]", as amended and restated 28 April 2000.

²⁰ *Nii Lante* (n. 16), 208

²¹ <http://www.encharter.org/index.php?id=7>, art. 19. However, the use of «should» instead of «shall» should be noted here.

The precautionary principle may also serve in the interest of the investors protecting them, if applied, from future, stricter environmental measures. Apart from the introduction of the precautionary principle in investment agreements, another solution would be the -under conditions- exclusion of environmental regulation from stabilization clauses or the inclusion of covenants which permit the introduction of new environmental regulation. In order to deter abuse by host countries, it may be required that additional environmental measures shall constitute necessary and reasonable standards which comply with international environmental law, international standards and international organizations' policies. Besides, in the Methanex Case, the company did not question California State's right to take measures in order to protect public interest, but supported that the measures taken were beyond what was necessary to protect any legitimate public interest²². It is understood that any additional measures for environmental protection must be taken according to the non-discrimination principle.

c. Expropriation for environmental purposes

Host country's decision to expropriate the investment for environmental purposes or take measures which are creeping expropriation is one of the major threats that the foreign investor might face with many repercussions – one of which is the issue of compensation²³. Both the facts that investment agreements usually do not include measures for environmental protection and that investors may bring action against the host country in international tribunals, deter the host country from implementing new environmental regulation. Because in that case the host country may be found liable to the foreign investor and be forced to pay compensations. The lack of a definition in

²² Methanex Corporation and the USA, Statement of Claim, 3 December 1999, par. 33vi <http://naftaclaims.com/Disputes/USA/Methanex/MethanexStatementOfClaim.pdf>. (“The measure taken by the Governor... goes far beyond what is necessary to protect any legitimate public interest”).

²³ It has been said that in case the host country acts in favor of public interest and with no discrimination, the investor may lose his right for due compensation., *Nii Lante* (n. 16) 213

bilateral and regional investment agreements of which actions exactly constitute expropriation complicates even more this issue²⁴.

The state's will to sign an international environmental agreement is also affected. The agreement may impose additional obligations and new, non-favorable conditions for the investment which may be considered as creeping expropriation. In this case the investment is directly threatened, as the host country may claim that it will have to comply with new obligations arising from its participation in an international agreement. States are obliged to ensure compliance with their international obligations and are responsible for any damages to private persons²⁵. Thus, states are held in the difficult position of having to protect investments and investor's legal interests and of ensuring protection of public interest and compliance with their international obligations.

Judge Weeramantry, in *Gabčíkovo-Nagymaros* case, analyzed in the most interesting way the erga omnes obligations in inter partes disputes. According to the Judge, the Court is called to decide on the parties' dispute, while in the meantime, since it regards irreversible environmental damages, the issue of erga omnes obligations emerges. According to the Judge environmental disputes can no longer concern only the parties' interests, when the erga omnes issues are of great importance. And the Judge continues underlining that we have come to an age where international law should protect the interests of the whole humanity even in inter partes disputes²⁶. Sadly, arbitration tribunals which undertake cases of investment disputes have still a long way to go to adopt this opinion.

Prohibition of expropriation is recalled under three conditions, a) when public interest purposes are concerned, b) when it is based on the principle of non-

²⁴ See for instance, Art. 7.2 (v) of the "Host Government Agreement between and among the Government of the Republic of Turkey and [the MEP Participants]", Appendix 2, as attached to and made part of the Intergovernmental Agreement dated 18 November 1999.

²⁵ "Where and international agreement requires, for example, that certain limits be placed upon emissions of a particular substance, the state would be responsible for any activity that exceeded the limit, even if it were carried out by a private party, since the state had undertaken a binding commitment" Malcolm N. Shaw, *International Law* (Cambridge University Press, 2003) 768

²⁶ *Gabčíkovo-Nagymaros*, Separate Opinion of Vice-President Weeramantry, p.113, 114, <http://www.icj-cij.org/docket/files/92/7383.pdf>

discrimination, and c) when due process is followed. If these conditions are fulfilled, expropriation of foreign investment is permitted with the obligation for the host country to compensate the investor²⁷. The first question is whether environmental protection may constitute a public interest purpose. Our opinion is that it may. Environmental protection is interrelated with public health's protection as well as with the right to a healthy environment and the promotion of sustainable development. It is also related with international peace and security and human security. It is a public good, which is protected by most national constitutions. Thus, the interrelation between environment and public interest should be examined, based on a case by case approach, especially in cases of threats to public health or threats of conflict. Besides, in the Santa Elena v. Costa Rica Case the Tribunal ruled that expropriation is permitted by international law for public interest purposes and that one of them may be expropriation for environmental purposes²⁸.

The second question is whether expropriation for environmental purposes cancels investor's right to compensation. State's right to expropriate foreign investments for environmental purposes is recognized by international law²⁹, as long as certain requirements are fulfilled, one of which, as already said, is due compensation. State's obligation to fulfill this requirement has long been recognized by case law independently from the reason of expropriation.

It has been said that expropriation for environmental purposes should cancel investor's right to compensation. It is an ethical view of the problem, as the host country and its citizens are called to pay for their compliance with international environmental obligations. The most critical argument for not paying due compensation to the investor is that this obligation runs contrary to international efforts for sustainable development as

²⁷ i.e. Art. 1110 NAFTA

²⁸ *Compania de Desarrollo de Santa Elena SA v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1, February 17 2000) par.71

²⁹ *Texaco Overseas Petroleum et al. v. Libyan Arab Republic*, International Arbitral Award, Jan. 19, 1977, 17 I.L.M. 1 (1978) par. 59. In this case state's right to expropriate was considered to be an expression of its sovereignty.

More on the legality of expropriation under international law in *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1).

it deters the host country from taking additional environmental measures and entering international environmental agreements. In such case, we believe that firstly, state's will to comply with international standards and principles must be checked and secondly, the source of state's obligation must also be examined. However, the arbitration tribunal was clear on that stating that even when expropriation takes place for environmental purposes investor's right to compensation remains still independently from the source of the environmental obligation³⁰.

In regional investment agreements (i.e. NAFTA) there have been some efforts to solve this problem. NAFTA's preamble refers to the promotion of sustainable development; thus one might expect that the polluter-pays-principle and the precautionary principle have special treatment. Besides, according to Vienna Convention conventions must be interpreted in the light of their context including their preamble³¹. Therefore, the interpretation of NAFTA's clauses should be in accordance with these two principles which are fundamental to sustainable development.

However both principles as well as the goal of sustainable development are superseded by arbitration tribunals. One of the major cases regarding expropriation for environmental purposes is the Metalclad Case³². It's quite interesting that in this case the company's argument to claim compensation was that the local government had no jurisdiction to expropriate the investment, since it was approved by the federal government and two independent EIAs have already been elaborated. The company claimed that it was not environmental protection the motive of the local government, since the two EIAs have already been implemented³³. ICSID ruled that there is violation of NAFTA's art.1105 for fair and equal treatment of the investment and that the local government's refusal to agree on the construction of a disposal unit is creeping

³⁰ *Compania de Desarrollo de Santa Elena SA v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1, February 17 2000) par.71

³¹ Art. 31 par. 2 of the Vienna Convention on the Law of Treaties 1969, United Nations, Treaty Series, vol. 1155, p.331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

³² International Centre for Settlement of Investment Disputes, Case No.ARB(AF)/97/1 Between Metalclad Corporation and The United Mexican States, Award, August 30 2000, <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf>

³³ *Nii Lante* (n.16) 219

expropriation. ICSID avoided supporting its rule on the basis of Mexico's environmental law. It just highlighted that this law could compose action tantamount to expropriation but without daring a correlation of expropriation and new, national environmental regulation³⁴.

NAFTA's art. 1114 according to which "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" is doubtful whether it constitutes an exception in the right's investor to compensation or justifies additional environmental measures as long as due compensation is provided³⁵. The second paragraph according to which "a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor" does not clear things either. In addition, North American Agreement on Environmental Cooperation recognizes in art. 3 the right of the parties to implement their own standards of environmental protection and to adopt or modify their environmental regulation and policies. Obviously, all these clauses for the protection of the environment were not enough to convince the court that it was legal environmental regulation implemented by a sovereign state.

In S.D. Myers case, Canada claimed environmental reasons mentioning its obligation to comply with the Basel Convention³⁶. The court ruled that Canada's measures aimed at protecting Canadian companies of waste management³⁷. In specific it

³⁴ *Metalclad* (n. 32) par. 112

³⁵ Simon Baughen, 'Investor rights and environmental obligations: reconciling the irreconcilable?' (2001) 13 JEL 199

³⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (signed 22 March 1989) <http://www.basel.int/text/documents.html>

³⁷ Canada prohibited exports of PCB waste. The claimant (S.D. Myers Company) claimed that there was a violation of national treatment obligation, as well as of performance requirements' prohibition and that this violation is creeping expropriation. Canada claimed that the Basel Convention prevails of every obligation coming from NAFTA's Chapter 11. The Court ruled that the US have not ratified this convention; but "even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed

ruled that when a contracting party may succeed in reaching the desired level of environmental protection with other ways and methods, equally effective and reasonable, then it is obliged to adopt the alternative most consistent with open trade³⁸. In its judgment the Court ruled that NAFTA's art. 104, according to which obligations coming from the Basel Convention, the Montreal Protocol and the CITES prevail over the rest of NAFTA's clauses including Chapter's 11 clauses, was not applicable. Once again environmental issues were ignored. The court also avoided to rule over the issue of the host country's obligation to compensate (or not) the investor when measures taken in order to comply with international environmental agreements are concerned.

5. Conclusions

Private sector's decisions and actions are based on profit, even when social policies are concerned. Over the last decades multinational corporations have often faced severe criticism for their impact on developing countries' development process and the environmental aggravation caused by many of their projects. Adoption of environmental measures and policies according to international standards may help the company to acquire "green reputation" attracting new consumers, employees and investors. Besides, it helps the company to lower its legal responsibility as well as the investment risks regarding the fulfillment of environmental criteria. It is accepted that the most important threats that a company might face are boycotts and downtrends along with additional cost to comply with future, stricter environmental regulation.

Private sector's turn to Sustainable Responsible Investing raises certain issues for business, such as compliance with Global Compact and incorporation of environmental and social criteria in investment practices. Lawyers are extremely concerned by the new

that Canada would have been able to use it to justify the breach of a specific NAFTA provision because...*where a party has a choice among equally effective and reasonably available alternatives for complying...with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent... with the NAFTA*».

S.D. Myers Inc. and Government of Canada, Partial Award, November 13 2000, <http://naftalaw.org/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf>, par.215

³⁸ Ibid par. 221

developments especially as regards the binding force of private sector's initiatives and practices as well as the possibility of a uniform international framework which will regulate corporations' responsible environmental activity based on current practices and policies. Further issues are then raised such as the legitimacy of such a framework and the development of control mechanisms³⁹. The codification of private sector's environmental standards and practices into an international convention for corporate social responsibility has been proposed several times⁴⁰. However, private sector's will is for the moment far from such a development; moreover, an international convention on CSR requires states' consent to bind their corporations.

It is said that corporations will survive only if they act in compliance with social standards and values⁴¹. As regards the environmental performance of the private sector, this opinion reflects the need for the local community to benefit from private sector's activities and for the goal of sustainable development to be promoted⁴². Social legitimacy is partly achieved if the private sector implements environmental policies and management in compliance with international environmental standards, participates in international partnerships, permits the active participation of local stakeholders in environmental decision-making and generally undertakes environmental protection measures according to domestic and international law and to the society's benefit.

Despite the proliferation of investment agreements over the last years, it seems that environmental protection in project finance remains unexplored and that private sector's involvement in earth system governance needs further elaboration in order to fulfil international accepted environmental goals. However, private sector is more and more involved in planning, implementing and monitoring of international environmental

³⁹ It is said that legitimacy may result from the recognition of this framework by governments and civil society, *Cordonier Segger Marie-Claire* (n. 14) 295

⁴⁰ *Ibid*

⁴¹ Julia Clarke, E. E. (Liz) Walley, 'Saints and Sinners: the environmental stance of multinationals in Eastern and Western Europe' (1998) 8 *Eur Env* 202. "Legitimacy theory", p. 204.

⁴² Social legitimacy is considered to be a major threat for some companies, i.e. for Shell, which took a number of measures to comply with social and environmental demands, since there were many boycotts of its products, Levy David L., Kolk Ans, 'Winds of Change: Corporate Strategy, Climate Change and Oil Multinationals' (2001) 19 *EMJ* 501, 504

law. Investment agreements offer the framework in which private sector's involvement in environmental protection may be further developed and promoted.

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