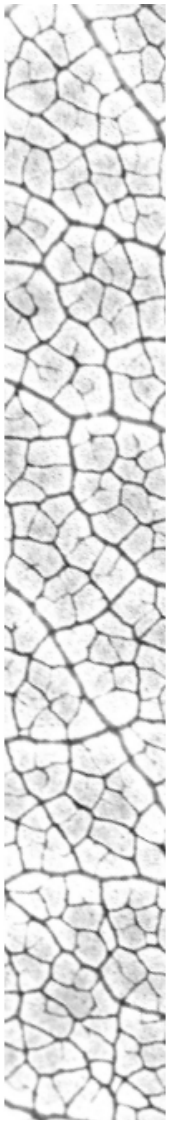

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Methods applied to resolve law conflicts between environmental requirements and commitments of investment rights

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Abstract
Paying more attention to environmental protection along with remarkable effect of investment on the environment; countries and international organizations proceeded to legislate special rules and regulations to minimize the negative reciprocal effect of investment and the environment and regulate the relations and the limits of these two domains, as well. Governments and international organizations have tried to reduce the severity and damage of environmental investment measures, as much as possible. At the same time, however, there reported no interrupts of investment in global investment and development. This increase in sensitivity has revealed the existing conflicts between environmental requirements and commitments arising from investment contracts. These conflicts are generally based on two types of principle conflicts (normative) and legitimate (legal) conflicts. The present study aims to investigate the types of conflicts and how to resolve them in different courts.

Keywords: normative conflict, legitimate or legal conflict, rules of conflict resolution, environmental requirements, specific law and general law

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INTRODUCTION

Considering the principal purpose of international investment to increase the economic growth and development of societies, as well as key role of healthy environment to prerequisite for achieving these goals; therefore, foreign investment is needed be developed to have least negative impact on the Environment, simultaneously paying attention to environmental protection by making a harmony between these two areas (Vranes 2009). Unlike international trade, international investment is based on the physical presence of the investor in the investment location. Hence, investment is naturally associated with environmental effects on the land of the investment site (Vinuales 2010). While, current international investment law protects the interests of investors rather than the interests of residents and the environment of the investment site. Conflicts between investment commitments and environmental requirements increased disputes in this area and raised many cases in different courts, to some extent to resolve conflicts and disputes created (Miles 2013).

The main objective of this study is to elaborate the relationships between international environmental law and international investment law. To this aim, examination of investment and environmental claims alleged in various international tribunals, including the International Court of Justice and the ICCID were done. On this basis, the relationship between these two areas, as well as the reasons for the conflict between the environmental requirements and the commitments arising from the rules of international investment, as well as how to resolve these conflicts, are considered.

Hereby, the main question principally asked is that how the conflict between environmental commitments and international investment flows throughout the world, what are the kinds of these conflicts, and in the conflict between an environmental commitment and a resulting commitment from international investment law, which one is more interested and how will it be resolved?

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The Types of Conflict and Resolution Methods

Environmental considerations may be presented in three ways in a foreign investment gap. The first method of design environmental considerations is the right of the parties in a dispute to cite and use all the considerations that make it appropriate to support their positions and cases. Therefore, both the host country and the investor may invoke environmental regulations and requirements to prove their claims and defend their positions. For instance, in the case of Allard V. Barbados, to support his investment, the investor cited to internal and international environmental law, as well as the Ramsar Convention on Wetlands and the Convention on Biodiversity (Miles 2013).

The second method is introduction and design by the court itself; so that, the court will consider to resolve the disagreements. In the third method, third parties interfere in a lawsuit; a third party that is not involved in the dispute will trigger the introduction of environmental considerations in a claim arising out of investment. Example of third-party intervention in claims arising from investment; Foresti V. South Africa's case involving investment in South African mines by Italian investors (Foresti et al. 2009). In this case, the court made great efforts to give the opportunity for commenting and expressing opinions to civil society groups, and even invited such groups suitable for this purpose to intervene in the subject and comment (Vinuales 2011).

The problem of conflict of laws and the resolution of such conflicts is one of the important issues in international law. In international law, when the conflict of law rules arises between two legal principles, the priority and the superior legal rule may be determined in three stages. In the first step, despite the lack of a form hierarchy among international sources of law, the application of the terms in various sources follows certain logic. Consequently, treaties, conventions and general principles of law can be considered as the main sources; International judiciary decisions and the opinions of scholars of law (doctrine) as subordinate sources and the principle of fairness (ex aequo et bono) are considered as an alternative source. In the second step, the hierarchy of conflicting rules can be determined using the content of contradictory rules and by type of rules such as conventions (jus cogens), general international commitments (erga omnes), and fundamental norms (Article 103 of the Charter of the United Nations). In the third step, to characterize the hierarchy between conflicting rules of principles such as: Lex posterior (The new law violate the former one), Lex specialis (the specific law violate general law), the determination of the intention of the parties, as well as the specific techniques often used by the investment courts are applied (Charles and Wu 2002).

Indeed, investment courts appear to be reluctant to explicitly declare a hierarchy of environmental rules and investment, and instead resort to a number of proprietary techniques to reach a specific solution without issuing explicit hierarchical declarations. These various techniques have created a set of basic tools available to investment courts to manage and resolve conflicts and disputes between the principles of international law on investment and environmental commitments (Brown 1992). For instance, in cases that violation and aggression of terms and criteria of investment support have been made due to a commitment and an international environmental law (normative or principal conflict), or in cases where a domestic law or environmental assessment is in conflict with an international rule of law of the investment (legitimate or legal conflict). Therefore, in environmental and international disputes, two types of conflicts are presented: principal (normative) conflicts and legitimate conflicts (legal).

1) Normative (principal) conflicts and related rules to resolve

Normative conflicts occur when the host government, in accordance with an international environmental standard, is required to conduct certain behavior contrary to the country's commitment to protect investment. In other words, the normative or principal conflict occurs between the commitments arising from International environmental law and commitments arising from international investment law).

For example, in S.D. Myers v. Canada case, investor is an American recycling and waste incinerator company based in the Canadian state near the United States border. Canada has undertaken some measures to prevent the trans-boundary transmission of waste for a period of 18 months. To justify these actions, Canada relied on its commitments under the Basel Convention on the control of trans-boundary movements of hazardous wastes and the prohibition of the export of such wastes to or from non-member countries (Weiler and Paulus 1997). In return, the investor also referred to the violation from Chapter 11 of the NAFTA and more obviously violation from the national treatment clause in Article 1102 explained the relationship between the NAFTA and the Basel Convention. On this basis, the investor defend himself and concluded that Canada was not obliged to do in this manner and could have done so affect less harmful outcomes on the interests of the foreign investor. Therefore, the court, made an interpretation, coupled with a compromise, on Canadian international commitments to protect investment and environmental protection (Viñuales and Langer 2011).

In the case of SPP v. Egypt2, the court had to decide on the legitimacy of Egypt's action to cancel and revoke the licenses, as well as the closure of the site near the Pyramids of Egypt, and the investor was pursuing a plan to develop and build a tourist complex. The investor

claimed that the actions assigned to Egypt, due to a breach of its commitments to protect foreign investment in 1978, have led to the expropriation of this investment. In return, Egypt claimed that it had complied with its commitments under the UNESCO Convention on the Conservation of the World Natural and Cultural Heritage, adopted in 1975. After analyzing the arguments of the parties, the court reviewed the international commitments cited by Egypt and stated that the protection of certain places is a voluntary nature which is subject to the determination and declaration of these places by Egypt. In addition, the above commitments were only applicable from 1979, when the World Heritage Committee recorded the sites proposed by Egypt. In other words, such a commitment has been made after Egypt's actions, and these two commitments are not consistent with each other in time, and the court concluded that there was no conflict with this issue (Fauchald 2007).

Conflict Resolution Rules

The approach that applied to resolve principle conflicts can be specific or general. Specific approach focuses on the contradictions between investment commitments and environmental commitments, and generally means that they may be applicable and practical, in any potential conflict between the international commitments (Tilbury et al. 2002).

A. Specific conflict rules

In the interaction between foreign investment and environmental protection, it is sometimes observed that negotiators and politicians tend to focus on and emphasize the interaction between these two areas, especially when designing draft agreements. Certain investment and free trade agreements contain specific expressions on the relationship between international investment law and international environmental law and how to resolve the conflict between them (Fauchald 2007).

One of the first treaties which include such an expression should refer to the NAFTA North American Free Trade Agreement. Article 104 of NAFTA states that in case of any conflict between this Agreement and the specific trade commitments contained in:

(A) International Trade Convention on Endangered Species of Wild Fauna and Flora (CITES)

(B) Montreal Protocol on Ozone Depleting Substances

(C) Basel Convention on the Control of the Trans-boundary Movement of Hazardous Wastes and Their Disposal

(D) Agreements as set out in Attachment 104/1.

Such commitments have to be dominant, and especially where there is the possibility of choosing between the two alternatives, the alternative with least conflict with such commitments have to be chosen. The Court in the Case of S.D Myers V. Canada's regarding the relationship between the Basel Convention and the NAFTA noted that the NAFTA providers and regulators explicitly emphasized that, in case of any conflict, prior environmental treaties would govern NAFA specific rules. Article 104 stipulates that the Basel Convention will be dominant if it is approved by NAFTA members. But that does not mean that Canada can use this as a justification for the violation of a NAFTA article. Because where one party has the opportunity to choose between the two alternatives in accordance with the commitments of the Convention, it should choose an option that has the least conflict with the provisions of the NAFTA (Weiler 2002). In addition, the NAFTA treaty, especially in its introduction, includes many other issues regarding the relationship between international investment law and international environmental law and the interaction between them. The mentioned treaty seeks to support and protect the environment and natural resources with the aim of promoting and enhancing sustainable development, and strengthening and enforcing environmental regulations. NAFTA members also tried to conclude an additional environmental agreement aimed to focus on environmental cooperation and participation (Vinuales 2010). Among other agreements dealing with the conflict between International Investment law and International Environmental Law is Clause (C) of Article 72 from the agreement between the signing CAREFORUM signatory states and the EC (Economic Partnership Agreement, 2008) member which states that investors should not implement their investment plans in a way that ignores international labor or environmental commitments arising from agreements that the EC member states and CAREFORUM signatory states accepted them and they will be members. Of course, this article is less explicit than Article 104 of NAFTA because it does not specify the documents and environmental commitments that govern the commitments of the parties in the field of economic activities and investment.

Another example of attention to solving the conflict between investment rights and environmental commitments can be seen in the bilateral investment agreement between Belgium and Luxemburg. Paragraph 3 of Article 5 of this agreement state that the contracting parties reaffirm and confirm their commitments under the international agreements and treaties of the environment, and they must ensure that such commitments are fully respected, identified and implemented by their internal law (Economic Partnership Agreement 2008).

In addition, this is seeable in some US Free Trade Agreements. Such as the free trade agreements between the United States and Australia, Chile, Morocco, Oman, Peru and Singapore, all emphasized the importance of respecting environmental commitments.

Therefore, in some cases, courts, conflicts between international environmental law and international investment law can be resolved using these specific rules specified in the treaty or agreement itself. But sometimes this is not possible, and courts need to resort to the general rules of conflict resolution to resolve existing conflicts (Hailbronner 1995).

B. The general rules of conflict

In international public law, several different approaches are used to resolve conflicts between two or more international commitments, which include:

1. Attention to the relations between the sources of international law:

In international law there is no hierarchical structure among form sources. However, the use of principles and rules derived from various sources of international law follows a certain logic and reasoning. Thus, treaties, conventions and general legal principles are considered among the sources of international law as the main sources, and international judicial decisions and doctrine are also used as subordinate sources. Also, the principle of fairness if the parties are agreed can be used as an alternative source. Therefore, in the event of a conflict between a treaty-based rule and a rule of law, it seems unlikely that conflict will be resolved in favor of a judicial process (Akehurst 1974-1975).

2. Attention to the hierarchy of rules and norms (supra law)

In international law there is a hierarchy between different principles and rules. So that a rule may be lower than another in terms of ranking and hierarchy, and thus, in the event of a conflict between these two types of rule, it is certain that the prevailing rule is dominant. Regarding environmental regulations some people believe that many international environmental rules are among the prerequisites of jus (cogens), but this is not a proven claim, and there is not enough evidence to support this claim (Kornicker 1998-1999). In the Gabcikovo-Nagymaros lawsuit between Hungary and Czechoslovakia, the first intersection of international investment law and environmental law, ICJ, contrary to the above claim, voted to continue the project and did not acted to Hungarian claims of damaging the project to the Danube River Environment, and voted for Hungary's conviction due to the unilateral suspension of the project and the need to pay damages to Czechoslovakia.

3. Paying attention to the degree of precision and clarity of various rules and norms (specific law)

In this approach, the degree of clarity and specificity of a principle in comparison with other principles and rules is used in the same circumstances. Under this principle of specific law, the general law is redrawn. To justify, based on a simple logic, a specific rule is usually better and more precisely adapted to existing conditions than a general rule that is relevant to a wide range. However, the determination of the amount of appropriation or generality of a rule can be hardly possible. For example, Article 15 of the Biodiversity Convention provides complex preconditions for genetic resources. Paragraph1 of this article authorizes the decision on access to genetic resources to national governments and it is subject to domestic law. Paragraph 5 of this article also states that access to genetic resources should be subject to prior notice and agreement. A member of the consortium is the supplier of those resources, unless the member state has determined another procedure. This principle may conflict with criteria of investment support in a bilateral investment agreement (such as a fair and equitable treatment of foreign investors). Like when an investor, with the consent and satisfaction of the government, has established a laboratory in a developing country, but suddenly his license is canceled without sufficient information in this regard. In such a situation, achieving suitable solution based on the rule of law may be difficult and impossible (Vinuales 2011).

4. Priority between different rules and norms based on time factor (later rule)

This approach is recognized in international law as: the law of enactment redraws the former law, so that the new law replaces the previous law. Of course, this approach, as stipulated in the Vienna Convention of 1969 Vienna (Article 30), as well as by the International Commission on Subrogation, is subject to three considerations. Firstly, time of two conflicting laws or treaties are different. Secondly, the parties and the members of both laws and treaties are the same, and finally, both conflicting laws and treaties are the same in terms of the subject (Vinuales 2010).

2) Legitimate conflicts (legal) and rules for their settlement

Contrary to the principle conflicts, legitimate conflicts arise when a commitment or principle arising from international investment law conflicts with a commitment or environmental assessment arising from the domestic laws of a country. In other words, the conflict between a commitment of international investment law and a domestic environmental law commitment occurs (Viñuales and Langer 2011).

In case of Glamis v. in the United States, the court stated that despite the expectations of some civil society groups, the creation and issuance of a declaration and an explanation for the emphasis on environmental issues does not seem to be necessary. During the trial, third parties (amici curiae) as well as The United States relied on both domestic and federal rules (federal and California), and international rules for protecting the environment and culture, as well. However, the court, ignoring the claims of the claimant, merely considered domestic laws and complied with international law. It does not pay attention to the principles and rules of the interior as well as the evaluations and rules in Chapter 11 of NAFTA.

Also, in the case of CDSE v. Costa Rica, in addition to international environmental regulations, it has invoked domestic environmental rules and practices to justify its measures of confiscation and expropriation of investor assets.

Rules of conflict resolution

In order to solve legitimate conflicts, as in the case of principle conflicts, there are usually two types of conflict resolution rules. The first part and the second part are the specific rules and the general rules, respectively.

A. Specific rules of conflict

In principle, free trade agreements are more likely to address environmental issues than bilateral investment treaties. Freedoms of trade agreements, which include environmental issues, are addressed in three ways to the internal (national) environmental legislation.

- First, verifying the right of nations to accept and adopt environmental regulations and rules
- Second, stating that declining the level of environmental regulations in order to attract foreign investment is inaccurate and unauthorized.
- Third, paying attention to specific or general environmental exceptions (in relation to certain investment support criteria such as expropriation or executive clauses) (Schoenbaum 1991).

One of the first examples of environmental considerations entrance in commercial and investment treaties is the North American Free Trade Agreement (NAFTA) (Weiler 2002). Chapter 11 of NAFTA includes two types of environmental conditions and criteria described above. NAFTA 1114 states that:

1--- Nothing in this chapter should be interpreted so that prohibit a member to adopt, maintain, or implement an assessment and prevention consistent with Chapter 11 of NAFTA for the purpose of adequately obliged investment activity in its territory to comply with Environments principle.

2---- The parties verified that the reduction of environmental, health and safety measures and assessments in order to attract more investment is inaccurate and unauthorized. Therefore, a member should not reduce and discount considerations and assessments to encourage and attract foreign investment.

This approach has been reinforced by the mechanisms established in the NAFTA Nuclear Environmental Agreement (NAAEC)[1] which pays particular attention to the implementation of environmental measures and assessments. The agreement allows individuals to sue member States for not complying with their environmental laws. Also, in 1106 NAFTA, attention has been paid to environmental considerations in terms of executive terms and issues such as the transfer of technology.

Another example of the treaties that describe the relationship between the international investment law and the domestic law of the member states on the environment is the Energy Charter (ECT), which has addressed this issue in its article 19. Among the bilateral investment agreements, some also have an explicit statement about the relationship between foreign investment and environmental protection, such as the bilateral investment agreement between the United States and Canada, and the bilateral investment agreement between Belgium and Luxembourg, or Belgium and the Netherlands. Consequently, arbitral tribunals can, resolve the conflict between the commitments arising from international investment law and the commitments arising from internal environmental assessments and regulations by using the principles stated in each treaty (Vinuales 2011).

B. The general rules of conflict

There are different approaches to resolving legitimate conflicts (legal). The most important of these approaches are:

1. Conflict of domestic laws

A legitimate or legal conflict may arise between principles and rules derived from different internal systems or within a different legal system (for example, within the divisions or within a federal state, such as the United States). There are two methods to resolve such conflicts and determine the rule of law. One is the use of methods of private international law, or the conflict of laws. Principally, arbitration laws are to some extent directed to courts of arbitration, discretion and freedom of action in the use and selection of rules and principles of laws Conflict and courts can resolve the existing conflict on the basis of these rules.

The second method is to select the law or dominant rule on the basis of a hierarchical order, for example, by prioritizing the principle of public order or other superior rules. Generally, the courts of arbitration in these cases also have the freedom to act considerably in deciding whether the public order of a Host state or other governments can be governed and enforceable or Not.

2. The rules of the relationship between domestic law and international law

In international law, there is a general rule that, in the event of a conflict between international law and domestic law, international courts and tribunals usually give precedence to international law (Sornarajah 2004).

A good example of the relationship between international law and domestic law in the field of investment and the environment is the judgment of the

[1] North American Agreement on Environmental Cooperation, of 17 December 1992, 32 ILM 1519 (entered into force on 1 January 1994)('NAAEC')

ICSID Court in the S.P.P. In this case, the investor claimed that because of a violation of domestic law and an investment agreement in 1974, the government was confiscated and expropriated. The parties also disagreed with the law applicable to the lawsuit. The droid (the Egyptian government) argued that the parties tacitly agreed on the application of the Egyptian law in the event of a dispute. Thus, according to the first paragraph of Article 42 of the ICCID, the rule of Egypt must be dominant. The reader also argued that the rules of international law can be applied merely to the extent that it is entered and accepted in Egypt's law, and it is done in the context of the UNESCO World Heritage Convention.

The claimant also argued that there was no implied agreement on the dominant rule. As a result, according to the second paragraph of Article 42 of the Charter of the United Nations, Article 42 of the International Covenant on Civil and Commercial Rights is applicable. Eventually, the court declared that when domestic law is ambiguous or international law is violated by the use of the exclusive domestic law, the court is required to enforce the proper rules of international law in accordance with article 42 of the ICCID (Marlles 2007).

CONCLUSION

Awareness on the importance of the environment and the measures taken by environmental groups has exposed conflicts between environmental commitments and the flow of international investment, worldwide; So that numerous claims have been made in this area around the world. In general, the best way to reduce environmental damage and, at the same time, not to hinder the flow of international investment, is whether each country, either the investor country or the host country, must first invest in its domestic law and grant it. The licensing of investors should be subject to environmental assessments and, secondly, in bilateral or multilateral investment agreements, countries must pay attention and respect to the principles of environmental compliance in the treaty, and provide any kind of support from the investor such as lending or tax breaks Customs have to be subject to compliance with environmental commitments by investing.

However, in principle, there may be two types of conflicts, between an international investment commitment and a commitment to environmental rights. One is a normative conflict, and another is a legal conflict, but the way of solving each one is different. An examination of the disputes and claims filed so far suggests that, in the area of investment disputes, the basic conflicts over legal conflicts have so far been less frequent. In other words, it's less likely that a state to violate its investment support commitments invokes an international environmental commitment and often in these cases it refers to an internal environmental regulation. Claims studies also showed that courts and arbitration courts essentially refused to declare explicitly and issued a clear statement on the priority and hierarchy of commitments arising from investment and the environment, and more often, claims based on the nature of the dispute and according to the rules conflict resolution is resolved.

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