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Environmental Language in ASEAN Investment Agreements: Reserving Member States' Policy Space for Environmental Regulations?

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ENVIRONMENTAL LANGUAGE IN ASEAN INVESTMENT AGREEMENTS: RESERVING MEMBER STATES' POLICY SPACE FOR ENVIRONMENTAL REGULATIONS?

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Abstract

The Association of Southeast Asian Nations (ASEAN) has emerged as an active player in the world of investment rule-makers. In addition to an increasing number of bilateral investment treaties separately concluded by ASEAN Member States (AMS), the community has also jointly participated in various plurilateral investment agreements. Foreign investment undoubtedly played a significant role in the economic growth of AMS, but it also resulted in undesirable consequences, such as environmental deterioration. How to reconcile environmental concerns with the goal of promoting foreign investment through investment treaties remains a challenging task for AMS when developing their investment policies. This article, therefore, seeks to answer two questions: first, how the investment agreements of ASEAN have dealt with environmental concerns, and second, whether they can reserve sufficient policy space for AMS's environmental regulations. It surveys the environmental language in fifteen plurilateral investment agreements that ASEAN has concluded as a group and evaluates their effects through a comparative analysis with international treaty practices. This article argues that although ASEAN investment agreements have increasingly contained environment-related provisions, these provisions are insufficient to reserve regulatory space for AMS to adopt environmental measures. Finally, it provides some suggestions for the incorporation of environmental language in future investment agreements of ASEAN.

Key words: ASEAN, investment agreements, environmental concerns, policy space.

1. Introduction

The Association of Southeast Asian Nations (ASEAN) is considered as one of the most dynamic actors in international investment rule-makers. While ASEAN Member States (AMS) have actively participated in negotiating bilateral investment treaties (BIT), ASEAN, as a group, also joined various cross-regional plurilateral investment agreements.[2] In light of the regionalization of international investment agreements, these investment treaties represent a milestone in the evolution of ASEAN investment policy.[3]

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

[3] Julien Chaisse and Sufian Jusoh, *The ASEAN comprehensive investment agreement: The regionalisation of laws and policy on foreign investment* (Edward Elgar Publishing 2016) 36.

Implementing foreign investment policy at national levels, however, is not easy. Although foreign investment has undeniably fostered economic prosperity of AMS, foreign investment policies are criticized for not providing sufficient weight to non-economic interests such as environmental protection.[4] In the ongoing reforms in greening investment policies in ASEAN nations, it is necessary to reconsider how environmental concerns have been addressed under the international investment agreements (IIAs) of ASEAN. Despite extensive research on the incorporation of environmental language in investment treaties worldwide,[5] there has been little literature on this issue regarding ASEAN.

This article, therefore, is expected to fill the existing gap by offering an analysis of environmental language in ASEAN investment treaties. It focuses on the ASEAN Comprehensive Investment Agreement (ACIA)[6] and the plurilateral investment agreements concluded by ASEAN as a group, while those signed by one or more AMS with third parties are not within its scope. The article seeks to argue that while ASEAN investment agreements have increasingly incorporated environment provisions, these provisions are insufficient to reserve regulatory space for AMS to implement environmental measures.

In terms of terminology, two clarifications need to be made. First, this study uses the term 'investment agreements' or 'international investment agreements' (IIAs) interchangeably to refer to both agreements exclusively covering investment issues like BITs and treaties with investment provisions (TIPs). The TIPs include free trade agreements or economic partnerships with an investment chapter and treaties that only provide framework provisions for further cooperation or a mandate for future negotiations in the investment area. Second, the environmental language examined in this study includes all references to relevant environmental elements such as plants, animals, and natural resources, not just the express reference to the environment.

The article is structured as follows. Section 2 begins with an overview of ASEAN's investment agreements and emphasizes the urgent need for the IIAs to overcome the intensifying contradiction between environmental protection and the protection of foreign investors' rights. Then, Section 3 provides a detailed analysis of the environment provisions in ASEA IIAs, followed by an evaluation of their practical effectiveness in policy making at country levels. This examination demonstrates that the narrow wording of these provisions limits their scope of application in supporting the government's measures for environmental protection. Section 4 offers some alternatives of treaty language for reserving policy space for environmental regulations before conclusions and remarks (Section 5).

[4] Muhammad Ali Nasir, Toan Luu Duc Huynh and Huong Thi Xuan Tram, 'Role of Financial Development, Economic Growth & Foreign Direct Investment in Driving Climate Change: A case of emerging ASEAN' (2019) 242 Journal of Environmental Management 131.

[5] See, for example, Camille Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' (2017) 50 The International Lawyer 529, Kathryn Gordon and Joachim Pohl, 'Environmental concerns in international investment agreements: A survey' (*OECD,* 2011) *available at* https://www.oecd.org/investment/investment-policy/WP-2011_1.pdf, Shunta Yamaguchi, *Greening regional trade agreements on investment* (OECD 2020).

[6] ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 10 January 2010).

2. ASEAN investment agreements

a. The history from intra-region to external plurilateral agreements

The facilitation of investment flows has always been at a center of the economic integration strategy within the ASEAN. The history of IIAs within ASEAN can be traced back to 1987 when AMS signed the first Agreement for the Promotion and Protection of Investment (APPI)[7]. Stipulating intra-ASEAN investments, the APPI included fundamental principles usually found in an investment treaty, such as fair and equitable treatment (FET), protection against illegal expropriation, and most-favored-nation treatment.[8] In 1998, AMS concluded the Framework Agreement on the ASEAN Investment Area (AIA)[9] to liberalize and enhance the regional investment environment.

As a means of realizing an ASEAN single market, the ASEAN Vision 2020 declaration called for creating an ASEAN Economic Region, which considered free investment movement essential.[10] The Declaration of ASEAN Concord II reaffirmed this point by making investment policies a priority in forming the ASEAN Economic Community (AEC).[11] For the implementation of the AEC, the ACIA was concluded in 2009, replacing the APPI and AIA. It is an enhanced agreement encompassing traditional provisions on liberation, facilitation, protection, and promotion of investment as well as additional features to stimulate foreign capital flows into the region. With the goal of establishing 'a free and open investment regime in ASEAN',[12] the ACIA serves as the cornerstone of intra-region investment protection within the ASEAN.[13]

The objectives of ASEAN investment policies are to encourage investment movement within the region and, more importantly, to promote ASEAN as a global investment hub. To achieve this objective, in addition to investment treaties individually signed by AMS, ASEAN as a community has also negotiated and concluded plurilateral investment agreements with its strategic partners. As of the time of writing, ASEAN has signed twelve external IIAs, of which eleven are in force (see Annex 1 for more details).

Concerning ASEAN's external IIAs, there are two crucial factors to consider. First, there are some overlaps in the scope of these agreements. There may be more than one treaty in force to govern investment flows between the two contracting parties. For example, the most recent Regional Comprehensive Economic Partnership (RCEP)[14] concluded between ASEAN and five partners[15] co-exist with other IIAs between ASEAN and each of the partners. Second, all ASEAN external agreements are made according to the so-

[7] Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments (signed 15 December 1987, entered into force 02 August 1988)
[8] Nicolas J Calamita and Charalampos Giannakopoulos, *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options* (Edward Elgar Publishing 2022) 17.
[9] Framework Agreement on the ASEAN Investment Area (signed 7 October 1998).
[10] ASEAN Vision 2020 (adopted 15 December 1997).
[11] Declaration of ASEAN Concord II (adopted 07 October 2003).
[12] ACIA, Article 1.
[13] Calamita and Giannakopoulos, *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options* 23.
[14] Regional Comprehensive Economic Partnership (signed 15 November 2020, entered into force 01 January 2022).
[15] The contracting parties of RCEP include ASEAN Member States, Australia, China, Japan, the Republic of Korea and New Zealand.

called 'AMS as ASEAN' model. While all AMS are parties to the IIAs, but ASEAN itself is not a party as a separate international legal entity.[16] As a result, the rights and obligations of each party to these IIAs extend to every other party.[17] For instance, under the ASEAN-China Investment Agreements (2009),[18] an AMS owes obligations not only to Chinese investors but also those from other AMS. The plurilateral nature of ASEAN's external IIAs exposes AMS to the claims of investors from other AMS and non-ASEAN parties, potentially expanding their potential liability. The plurilateral nature of the external IIAs, combined with their overlapping scope, raises the risk of inconsistency and fragmentation in ASEAN's investment policies.

b. The need to address environmental concerns in ASEAN investment agreements

While foreign investment is a contributing factor to the economic growth in AMS, it also caused certain side effects, including environmental degradation. In recent years, there have been internal and external pressures on AMS to balance economic interests with the environmental value in their investment policies.

First, the public has become more aware of the environmental issues caused by foreign investment. Several empirical studies have suggested that foreign direct investment (FDI) has contributed to the environmental pollution in AMS. [19] Environmental scandals recently discovered in FDI projects have also provoked severe criticism and opposition from the locals. The 2016 Vietnam marine life disaster caused by a Taiwan-invested steel corporation, for example, sparked a large-scale campaign against the company's continuing operation.[20] Meanwhile, there were public protests in Myanmar and Cambodia over serious concerns over the environmental risks associated with Chinese-invested energy infrastructure projects. [21] In this context, governments have been urged to enforce environmental standards to ensure foreign investors' compliance.

Second, all AMS have ratified the 2015 Paris Agreement with strong commitments to cut greenhouse gas emissions, joining the global fight against climate change. By the conclusion of the 26th Session of the Conference of the Parties (COP26) of the United Nations Framework Convention on Climate Change (UNFCCC) in 2021, eight of the ten AMS had made net-zero emission commitment. Reforming environmental laws and policies is a top priority for AMS in achieving these ambitious goals.[22]

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[16] Calamita and Giannakopoulos, *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options*, 23-24.
[17] Ibid.
[18] Agreement on investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (signed 15 August 2009, entered into force 01 January 2010).
[19] Nasir, Huynh and Tram, 'Role of Financial Development, Economic Growth & Foreign Direct Investment in Driving Climate Change: A case of emerging ASEAN', Yasmine Merican and others, 'Foreign direct investment and the pollution in five ASEAN nations' (2007) 1 International Journal of Economics and Management 245.
[20] 'Vietnam blames Formosa mill for fish kill', *Taipei Times* (July 1, 2016) <http://www.taipeitimes.com/News/front/archives/2016/07/01/2003650089> accessed 23 November 2022.
[21] 'Hundreds protest pipeline in Burma's Rakhine state', *Radio Free Asia (*April 18, 2013) <https://www.rfa.org/english/news/myanmar/pipeline-04182013175129.html>; Beth Walker, 'Protests halt Chinese-backed dam in Cambodia', *Chinadialogue.net* (March 19, 2014) <https://www.chinadialogue.net/blog/6837-Protests-haltChinese-backed-dam-in-Cambodia/en> accessed 23 November 2022.
[22] ASEAN, ASEAN State of Climate Change Report: Status and outlook of the ASEAN region Toward the ASEAN climate vision 2050 *available at* https://asean.org/wp-content/uploads/2021/10/ASCCR-e-publication-Correction_8-June.pdf.

However, if environmental regulations are changed in a way that diminish foreign investors' interests, the State may be sued by the investor before arbitration. For years, dozens of investor-state dispute settlement (ISDS) proceedings have been instituted by investors to challenge domestic environmental regulations. The disputed measures included chemical prohibitions,[23] denial of permits for waste landfills,[24] or revocation of mining authorizations.[25] Besides, there has recently been a proliferation of ISDS cases under the Energy Charter Treaty concerning the energy transition policies of Western countries towards renewable energy sources.[26] There has been worry that the obligations imposed by IIAs might restrict the state's ability to manage environmental issues, leading to the insertion of environment-related wording into the world of investment treaties. As a result, there is a rising phenomenon of including environment-related clauses in new IIAs worldwide.[27]

In this context, it is necessary for ASEAN to include environmental language in their IIAs to resolve the growing conflicts between environmental protection and the promotion of FDI, ensure sufficient policy space to implement environmental measures and keep track of current practices in IIA drafting. The following section will examine ASEAN investment agreements, including internal and external ones, to show how they have tackled environmental problems.

3. Environment-related provisions in the investment agreement of ASEAN

At the time of writing, ASEAN has concluded 15 IIAs; three govern intra-region investment, and the remaining are external plurilateral agreements between ASEAN and its partners. Out of these IIAs, nine include provisions related to the environment (see Annex 1 for more details). Deeper examination into the IIAs reveals that all treaties without environmental reference, except for the 1987 APPI, are framework agreements that only set out principles for further negotiations on investment issues. When the parties reach a detailed agreement, an environmental provision can be added. For example, while the 2005 Framework Agreement on Comprehensive Economic Cooperation between ASEAN and Korea[28] did not mention environmental concerns in relation to investment, this issue was addressed in the ASEAN – Korea Investment Agreement (2009),[29] concluded four years later.

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[23] *Methanex Corporation v. United States of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

[24] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

[25] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015). See, further , Magali Garin Respaut, 'Environmental Issues in ISDS' 2022) *available at* https://jusmundi.com/en/document/publication/en-environmental-issues-in-isds

[26] Ana Mercedes López-Rodríguez, 'The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU' (2019) 8 Transnational Environmental Law 279, 283. See, for example, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34.

[27] Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting', Gordon and Pohl, 'Environmental concerns in international investment agreements: A survey'20 November 2022, Yamaguchi, *Greening regional trade agreements on investment*.

[28] Framework Agreement between ASEAN and the Republic of Korea (signed 13 December 2005, entered into force 01 July 2006).

[29] Agreement on investment of the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (signed 02 June 2009, entered into force 01 September 2009), Article 20.

Environmental language first appeared in the 1998 AIA as a general exception clause. Since then, the environment provisions in ASEAN investment agreements have evolved and become more diverse, which can be divided into four main categories as follows:

(i) general exception clause (nine treaties)

(ii) provisions precluding non-discriminatory regulation as a basis for claims of indirect expropriation (five treaties)

(iii) exceptions to national treatment (one treaty)

(iv) expert reports on environmental issues requested by investment arbitration (one treaty).[30]

It is also noteworthy that the simultaneous use of more than one environmental reference category in an IIA is common. For example, ASEAN – India Investment Agreement (2014)[31] referred to environmental issues in three separate provisions: general exceptions (Article 21), exceptions to national treatment (Article 3.5) and clauses precluding non-discriminatory regulation as a basis for indirect expropriation claims (Article 8.9). Each group of environment-related provisions will be examined in detail as follows.

a. General exception clause

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

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

This provision primarily mirrors Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO). Besides, instead of adopting similar language, some IIAs directly incorporate the provisions of GATT or GATS as part of the IIAs. For instance, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA (2009) states that concerning the investment chapter, "Article XIV of

[30] Author's compilation based on full text of IIAs in the UNCTAD database, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/groupings/15/asean-association-of-south-east-asian-nations-

[31] Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (signed 12 November 2014, not in force).

GATS including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis"*.[32]

The general exception clause in ASEA investment agreements often contains two parts. The first, often called the chapeau, sets out conditions for adopting exceptional measures (not discriminatorily, arbitrarily, or creating disguised restrictions on investors or their investments). The second part provides a closed list of exceptional policy purposes, such as protecting human, animal, plant life, or exhaustible natural resources.

This provision seems to be a clear expression of the states' intentions to ensure that obligations under the IIAs do not impede the pursuit of public policy. The language borrowed from the WTO agreements can also make it somewhat easier to be negotiated and accepted by contracting parties as they are familiar with the provisions. Further, if the exceptions are invoked in ISDS disputes, investment tribunals may refer to a rich set of WTO decisions on general exceptions as a complementing tool of interpretation.

On the other hand, the incorporation of GATT or GAST general exceptions into IIAs raises several problems, mainly because of their failure to address the particularities of international investment law. As convincingly demonstrated by several scholars, if a measure meets the conditions under the general exception clause, that is to be non-discriminatory, not arbitrarily applied, and not creating a disguised restriction on foreign investors and their investments, then it would not violate the treatment principles in the IIA.[33] As a result, the invocation of the exception clause would not provide an adequate defense for states in dispute settlement. Moreover, the exception clause offers little guidance on the issue of compensation in cases where the host State expropriates foreign investment for environmental purposes – one of the most common claims in ISDS.[34] While this provision permits states to implement a measure for environmental purposes, the question remains as to whether it would completely exempt states from compensating investors if such a measure amounts to expropriation. Unlike the WTO state-state dispute settlement mechanism, where monetary compensation is generally unavailable, damages are the most frequently sought remedy in ISDS. Thus, without further clarification, it is doubtful if the general exception clauses in the IIAs of ASEAN can have a practical impact.

b. Precluding non-discriminatory regulation as a basis for claims of indirect expropriation

According to an OECD survey, indirect expropriation is among the top three reasons to establish states' responsibilities for treaty violations in environment-related investment disputes.[35] In international investment law, indirect expropriation often concerns measures with a similar impact in expropriation or deprivation of investor property by the government's interference in the use of that property, even if its legal title remains unchanged. It is distinguished from direct expropriation, which often refers to orders of nationalization or

[32] Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 10 January 2010) Article 1 (2), Chapter 15.
[33] Andrew Paul Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (Kluwer Law International BV 2009) 505.
[34] Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' 580.
[35] Yamaguchi, *Greening regional trade agreements on investment*, 29.

transfer of investors' property to the state or an appointed third party.[36] Given the proliferation of compensation claims for indirect expropriation from foreign investors affected by states' environmental measures, the latter has attempted to exclude non-discriminatory environmental regulations from being considered indirect expropriation.[37] This provision has increasingly appeared in recent ASEAN IIAs. Under the AANZFTA (2009), for example, the Annex on Expropriation and Compensation stipulates:

> Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b) [indirect expropriation].[38]

A similar provision can also be found in the Annex on Expropriation under the RCEP. This provision reflects current practices in international investment treaty drafting with a view to clarify the criteria for distinguishing indirect expropriation from non-compensable environmental regulation in response to inconsistency in interpreting and applying expropriation provisions by investment tribunals. [39]

c. Exceptions to national treatment

National treatment (NT) is a fundamental principle in IIAs. In general, it requires the host state to provide foreign investors and their investments no less favorable treatment than that accorded to domestic ones. Concerning environmental issues, one of the ASEAN investment agreements allows states' environmental protection measures to be considered an exception to NT. The ASEAN - India Investment Agreement (2014), Article 3.5 states:

> Extension of financial assistance or measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of health, safety, the environment shall not be considered as a violation of this Article.

This provision can be used to justify government environmental policies that would otherwise breach NT obligations, such as a state-funded program to subsidize domestic investments in green sectors. In treaty practices, however, this language is quite rare.[40] The arbitral practice has also shown that violations of NT have seldom been found in ISDS disputes concerning environmental measures.[41] Therefore, while the NT exceptions may reserve states' policy space in some instances, they would have limited practical applicability.

d. Expert reports on environmental issues requested by investment arbitration

In ISDS disputes involving the environment, tribunals are often asked to deal with technical issues that may fall outside their legal expertise. In many cases, investment tribunals must consult with impartial experts who

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[36] OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, *OECD Working Papers on International Investment*, 2004/04 (OECD Publishing 2004) *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf.
[37] Danni Liang, 'Environmental concerns and China's international investment agreements', *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019) 365.
[38] AANZFTA (2009), the Annex on Expropriation and Compensation, para. 4.
[39] Yamaguchi, *Greening regional trade agreements on investment* 14.
[40] Gordon and Pohl, 'Environmental concerns in international investment agreements: A survey' 19,
[41] Yamaguchi, *Greening regional trade agreements on investment*, 26.

can help them have a precise understanding of the technical aspects of the case. Therefore, the provisions for the appointment of experts by tribunals in environment-related disputes have been included in several IIAs[42]. Among ASEAN investment agreements, ACIA is the only one that provides for this type of language, stating:

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

This provision confirms investment tribunals' power, upon request of the parties, to appoint their own experts to assist them in determining environmental issues. In the past, investors and states have relied on expert reports to demonstrate, for instance, how investment activities have contaminated soil and water[43] or how foreign investment could pose environmental risks that justify the state's responding measures.[44] Nevertheless, tribunals have faced significant challenges in making decisions based on party-appointed experts because they often offer testimony that is as favorable to their appointing party as feasible.[45] This frustrating problem has been pointed out by the tribunal in *Perenco v. Ecuador* when "each [party-appointed expert] was attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation."[46] In this context, the provisions permitting tribunals to appoint their independent experts may offer tribunals a solution to this issue.[47]

4. Reserving policy space for environmental measures under ASEAN investment agreements: suggestions for a comprehensive approach

As demonstrated in the preceding section, environmental concerns have been raised quite early in the negotiation and conclusion of IIAs by AMS. Most ASEAN investment agreements included environment-related provisions fairly consistently, utilizing four types of provisions. The most common provisions are general exception clauses and provisions excluding non-discriminatory regulation from the scope of indirect expropriation claims, respectively. In contrast, the other provisions, namely exceptions to NT and experts' environmental reports in investment arbitration, appear only once. These provisions are incorporated in both intra-region investment treaties and external treaties, illustrating a pretty uniform approach of ASEAN in

[42] Ibid 15. See, for example, the North American Free Trade Agreement, Chapter 11, Article 1133; the United States-Mexico-Canada Agreement (USMCA), Article 14.D.11, the United States - Chile Free Trade Agreement (2004), Article 10.23.

[43] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award (27 June, 2016), paras 56-61, *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Perenco v. Ecuador*), ICSID Case No. ARB/08/6, Interim Decision on Environmental Counterclaim (11 August 2015), paras. 41-2.

[44] *The Renco Group, Inc. v. Republic of Peru [I],* ICSID Case No. UNCT/13/1, Claimant's Supplemental Opposition to Peru's Preliminary 10.20(4) Objection (30 July 2015), para.66.

[45] Brooks W Daly and Fiona Poon, '11 Technical and Legal Experts in International Investment Disputes', *Litigating International Investment Disputes* (Brill Nijhoff 2014) 335.

[46] ICSID Case No. ARB/08/6, Interim Decision on Environmental Counterclaim (11 August 2015), para. 587.

[47] Judith Levine and Nicola Peart, 'Procedural issues and innovations in environment-related investor-State disputes', *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019) 225.

addressing environmental concerns in its investment policies.

Despite the existence of environmental references in ASEAN investment agreements, their effectiveness in reserving the regulatory room for AMS to implement domestic environmental measures is questionable. They focus only on some limited aspects of environmental issues. The general exception clause sounds very broad; nevertheless, its wording, modeled on the corresponding provisions of the WTO agreements, has inherent limitations. First, they only apply to non-discriminatory measures that are neither adopted arbitrarily nor used as a disguised restriction on investment – adequate conditions that do not require any further limitation on the substantive scope of an exception.[48] Second, the exhaustive list of exceptions employed in the provision only covers measures to protect animal or plant life and to conserve exhaustible natural resources, which are some specific elements of the environment but cannot represent this evolutionary concept. In fact, due to such restrictions, general exception clauses may be interpreted against states' interests by narrowing the regulatory flexibility states can enjoy under legal doctrines developed in ISDS case law, such as the police power doctrine.[49]

Apart from the general exceptions, other environment provisions in the IIAs of ASEAN seek to address environmental issues in relation to a specific treaty provision, such as indirect expropriation or the NT principle.

Meanwhile, a case law analysis has shown that the host states' environmental measures might be alleged to breach various IIA provisions, including FET and expropriation.[50] Accordingly, the current practice of ASEAN fails to provide a comprehensive approach to reserving AMS policy space to regulate environmental matters. The next part will evaluate several ways by which ASEAN can enhance the effectiveness of environmental language in their future IIAs.

a. Reference to environmental protection in the treaty preamble

The first option is to utilize a preambular reference to emphasize the significance of the environment in achieving IIAs' overall objectives. It is one of the most common practices in making environmental references in IIAs, particularly those concluded by China, Japan, Korea, the Netherlands, and the US.[51] For example, the 2012 US Model Bilateral Investment Treaty (BIT), in the preambles, stresses the parties' desire to 'achieve these objectives [of the BIT] in a manner consistent with the protection of health, safety, and the environment.'[52] Some preambles refer to environmental protection in connection with the concept of sustainable development. Typical wording can be seen in the United States-Mexico-Canada Agreement (USMCA):

[48] Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' 577-8.
[49] Ibid 579.
[50] Yamaguchi, *Greening regional trade agreements on investment* 26.
[51] Gordon and Pohl, 'Environmental concerns in international investment agreements: A survey' 12.
[52] 2012 U.S. Model Bilateral Investment Treaty *available at* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

> 'PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices'.[53]

According to the Vienna Convention on the Law of Treaties, preambles perform an interpretative function as forming the context of a specific clause.[54] While preambles do not entail the parties' obligations, their interpretative function should not be overlooked. As recognized by many investment tribunals, preambles could be useful to their interpretation of vague provisions under IIAs.[55] In this sense, the preambular reference to the environment could aid arbitrators in applying IIA's ambiguous clauses in environment-related disputes. Some critics expressed skepticism over the practical effect of preambular environmental references on arbitral decisions.[56] Admittedly, the environmental language in the preamble alone may have little impact on the outcome of the dispute. If accompanied by other environment-related substantive provisions, it is, however, likely to result in a change in how tribunals interpret these clauses, which give adequate weight to the state's legitimate purpose to protect the environment.

b. Provisions to strengthen the right to regulate environmental matters

The provisions that reserve policy space for environmental regulations have been increasingly incorporated in recent IIAs.[57] Under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.16: Investment and Environmental, Health and other Regulatory Objectives provides that:

> 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, health or other regulatory objectives.[58]

One commentator criticized the right to regulate clauses as political declarations rather than legal provisions because they merely acknowledge the state's right to implement measures 'otherwise consistent' with the IIAs. They did not offer arbitral tribunals any guidance in determining the environmental protection arguments against the treaty protection accorded to investors, nor did they address the potential conflict between the host state's domestic environmental regulations and its obligations under the relevant IIAs.[59]

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[53] Agreement between the United States of America, the United Mexican States and Canada (signed 10 December 2018, entered into force 1 July 2020)
[54] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) Article 31.2.
[55] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (27 August 2009), para. 290; *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Award (July 14, 2006) para. 1307.
[56] Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' 565.
[57] Gordon and Pohl, 'Environmental concerns in international investment agreements: A survey' 14.
[58] Similar wording is adopted by the 2012 US Model BIT, Article 12.5 and also the USMCA, Article 14.16.
[59] Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting'.

The author, however, disagrees with this view. In addition to treaty practices, the state's right to regulate is also illustrated by recent arbitral awards concerning environmental issues. In *Perenco v Ecuador*, for instance, the tribunal upheld the state's discretion to regulate environmental issues in its territory, stating:

> a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields.[60]

As explained by the tribunal, this statement was made in light that environmental protection policies are becoming more important in the world today.[61] It, therefore, shows that investment tribunals have become more open-minded to the state's right to regulate environmental matters.[62] Further, while traditional right-to-regulate clauses may have certain limitations, some variations have been developed to strengthen its legal significance. The 2019 Model BIT of Belgium- Luxembourg Economic Union, for instance, directly clarifies the potential tension between an environmental regulation under the domestic legal framework and the state's obligation under IIAs as follows:

> Nothing in this Agreement shall in any way be construed as limiting the right of the Contracting Parties or any of their competent authorities to adopt, maintain and enforce measures, apply prohibitions or restrictions of any kind or take any other action directed to pursue legitimate policy objectives, such as the protection of public health, environment and public morals, the promotion of security and safety; the achievement of the sustainable development goals […]'.[63]

Using another version, the Investment Protection Agreement between the EU and Vietnam links the right to regulate to the right to modify or adopt environmental laws and regulations, stating:

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.
2. For greater certainty, this Chapter [on investment protection] shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.[64]

The state's right to regulate should be respected and bolstered by IIAs' provisions to guarantee that the commitment to investment protection does not weaken AMS's ability to adopt environmental protection measures. These provisions can provide guidance for ASEAN in the negotiation of their future IIAs. This language enables a state to select the levels of environmental regulations to be deemed appropriate under its national framework, therefore matching the typical characteristics of ASEAN, where the diversity of Members is widely recognized.

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[60] *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on Environmental Counterclaim, para. 34.
[61] Ibid, para. 33.
[62] Liang, 'Environmental concerns and China's international investment agreements' 376.
[63] Model BIT of Belgium- Luxembourg Economic Union (adopted 28 March 2019) *available at* https://edit.wti.org/app.php/document/show/54fd8446-5eea-4381-80d4-afdf772727ac
[64] EU-Vietnam Investment Protection Agreement (signed 30 June 2019, not in force).

5. Conclusion

In this paper, an analysis of environmental language in ASEAN investment agreements reveals that these agreements have incorporated four categories of environment-related provisions in a relatively uniform fashion. The environmental language under ASEAN's investment agreements includes general exception clauses, provisions precluding non-discriminatory regulation as a basis for indirect expropriation claims, and exceptions to NT and environmental reports in ISDS arbitration. It is, however, still a collection of narrowly drafted single provisions directed at some specific aspects of environment-investment concerns. In the absence of an overarching principal clause, it may be insufficient to retain regulatory room for AMS in response to the urgent need to limit the adverse impact of foreign investments on the environment and redirect capital flows to support a greener economy.

Hence, it is suggested that ASEAN countries should draw relevant experiences from current international practices in reconciling environmental protection and foreign investors' rights under its IIAs for a more comprehensive approach. First, a reference in the preambles can emphasize the significant role of environmental protection to the treaty's objectives. It can also serve as a practical, interpretative tool to ensure the state's environmental goals will be appropriately recognized by arbitrations in determining environment-related disputes. Second, a right-to-regulate clause is recommended to ensure that the commitments under IIAs do not impede the legitimate power of AMS to implement their domestic environmental regulations.

In summary, the growing concern over the environment-investment nexus in ASEAN countries has posed a real challenge to the investment rule markers. In spite of the growing inclusion of environmental language in ASEAN IIAs, which affirm the importance of environmental values in AMS investment policies, their effectiveness remains uncertain. As ASEAN Member States have become more vulnerable to environment-related investment claims, these provisions deserve a critical reevaluation. Therefore, it is essential for AMS to consider modern international treaty practices in order to redesign their IIAs in the direction of a sustainable investment strategy.

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Annex 1. Environment-related provisions in investment agreements of ASEAN

No.	Title of agreement	Short title	Parties	Status	Date of signature	Date of entry into force	Inclusion of Environment-related provisions			
							Precluding non-discriminatory regulation as a basis for claims of indirect expropriation	General exception clause	Exceptions to NT	Experts reports on environment issues requested by investment arbitration
1	Regional Comprehensive Economic Partnership (2020)	RCEP (2020)	ASEAN; Australia; China; Japan; Korea, Republic of; New Zealand	In force	15/11/2020	01/01/2022	x	x	-	-
2	Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations	ASEAN - Hong Kong, China SAR Investment Agreement (2017)	ASEAN (Association of South-East Asian Nations); Hong Kong, China SAR;	In force	12/11/2017	17/06/2019	x	x	-	-

3	Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India	ASEAN - India Investment Agreement (2014)	ASEAN (Association of South-East Asian Nations); India;	Signed	12/11/2014		x	x	x	-
4	Agreement on investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations	ASEAN - China Investment Agreement (2009)	ASEAN (Association of South-East Asian Nations); China;	In force	15/08/2009	01/01/2010	-	x	-	-
5	The ASEAN-Republic of Korea Investment Agreement	ASEAN - Korea Investment Agreement (2009)	ASEAN (Association of South-East Asian Nations); Korea, Republic of;	In force	02/06/2009	01/09/2009	-	x	-	-

6	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area	AANZFTA (2009)	ASEAN (Association of South-East Asian Nations); Australia; New Zealand;	In force	27/02/2009	10/01/2010	x	x	-	-
7	ASEAN Comprehensive Investment Agreement	ASEAN Comprehensive Investment Agreement (2009)	ASEAN (Association of South-East Asian Nations);	In force	26/02/2009	24/02/2012	x	x	-	x
8	Free Trade Agreement between ASEAN and Japan	ASEAN - Japan EPA (2008)	ASEAN (Association of South-East Asian Nations); Japan;	In force	28/03/2008	01/12/2008	-	-	-	-
9	Trade and Investment Framework Agreement between the United States and ASEAN	ASEAN - US TIFA (2006)	ASEAN (Association of South-East Asian Nations); United States of America;	In force	25/08/2006	25/08/2006	-	-	-	-
10	Framework Agreement between ASEAN and the Republic of Korea	ASEAN - Korea Framework Agreement (2005)	ASEAN (Association of South-East Asian Nations); Korea, Republic of;	In force	13/12/2005	01/07/2006	-	-	-	-
11	Framework Agreement between ASEAN and the Republic of India	ASEAN - India Framework Agreement (2003)	ASEAN (Association of South-East Asian Nations); India;	In force	08/10/2003	01/07/2004	-	x	-	-

12	Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China	ASEAN - China Framework Agreement (2002)	ASEAN (Association of South-East Asian Nations); China;	In force	04/11/2002	01/07/2003	-	x	-	-
13	Framework Agreement on the ASEAN Investment Area	AIA (1998)					-	x	-	-
14	ASEAN Agreement for the Promotion and Protection of Investments	ASEAN Investment Agreement (1987)	ASEAN (Association of South-East Asian Nations);	Terminated	15/12/1987	02/08/1988	-	-	-	-
15	Cooperation Agreement between Member Countries of ASEAN and European Community	ASEAN - EU Cooperation Agreement (1980)	ASEAN (Association of South-East Asian Nations); EU (European Union);	In force	07/03/1980	01/10/1980	-	-	-	-

Source: Author's compilation

Note: 'x' means having reference