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Environmental Impact Statements and Public Participation in International Investment Law

by David Collins*

1. Introduction

Environmental impact statements are institutionalized decision processes relating to the environmental effects from large scale projects. Foreign direct investment activities, characterized by the foreign management and control of a commercial enterprise taking place in another state, often raise environmental concerns, especially where investment projects take place in developing states. An important method of ensuring that the negative effects of such investment activities do not harm the host state and its citizens is to seek input from the local communities. Public participation in governmental decision-making relating to the environment (as with other areas) is seen as enshrining state action with legitimacy. It also fulfils the right to participate in the democratic process, which has been linked to human rights generally.¹ Additionally and perhaps obviously, involvement of non-state actors such as citizen groups and NGOs may uncover information that had been missed by the decision-making body.

Foster and Epps have observed the need for public participation in the management of health related risks in the sphere of international trade law because of

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¹ J Ebbesson, 'Public Participation' in D Bodansky, J Brunnee and E Hey eds. *The Oxford Handbook of International Environmental Law* (Oxford U Press, 2007) at 686. See e.g. Art 14 of the European Convention on Human Rights and also C Doyle, 'Indigenous Peoples and the Millennium Development Goals – 'Sacrificial Lambs' or 'Equal Beneficiaries' 13(1) International J of Human Rights 44 (2009)

the role of subjectivity in the perception of risks.² Similarly, community attitudes towards a particular investment project may reflect willingness to tolerate greater risks, or equally a stronger aversion to them than may be indicated by more empirical assessments of danger. This possibility is demonstrated by the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures, which defers to national approach to risk when setting health standards. Accordingly, Craik notes that most domestic environmental impact assessments include some form of public participation.³ Unfortunately this trend is not duplicated in the sphere of international investment law where the environmental effects of commercial activities can be particularly acute, as in the extractive industries, and local citizen's interests strongly affected in a much more intrusive manner. Unlike trade which merely concerns with the importation of foreign goods, foreign direct investment involves the physical presence of foreign infrastructure in the local territory. Exacerbating this problem is the theory that multinational enterprises are attracted to regions where environmental regulations are lax because lower standards represent a significant cost reduction.⁴

The need for greater public participation in international investment law must be viewed in light of the characterization of international investment law as a sphere of public law, rooted in the interaction of states through commitments made in Bilateral Investment Treaties ('BIT's').⁵ Kentin charges that those individuals which

² C.E. Foster, 'Public Opinion and the Interpretation of the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures' 11 JIEL 427; T Epps, 'Reconciling Public Opinion and WTO Rules Under the SPS Agreement' 7:2 World Trade Review (2008) at 359

³ N Craik, *International Law of Environmental Impact Statements* (Cambridge U Press, 2008) at 31. For example the EU Directive on Environmental Impact Assessment 2003/35/EC Art 3

⁴ This theory has been challenged by many: E.g. A Harrison, "Do Polluters Head Overseas: Testing the Pollution Haven Hypothesis" Gianni Foundation of Agricultural Economics, UC Davis, 2002; J.M. Grether, "Globalization and Dirty Industries: Do Pollution Havens Matter?" CEPR Discussion Paper No. 932, June 2003; WTO, Trade and Environment 1-8 (Special Study No. 4 1999); A Abinmanyu "Impact of Free Trade on Industrial Pollution: Do Pollution Havens Exist?" ASEAN Economic Bulletin, Institute of Southeast Asian Studies, 1996.

⁵ See generally M Sornarajah, *The International Law on Foreign Investment*, 2nd ed. (Cambridge, 2004) and D Schneiderman, *Constitutionalizing Economic Globalization*, (Cambridge, 2008)

may be most affected in their immediate environment by foreign investment projects are often neglected in international investment regulation, for example in investment treaties. Negotiation of the rules governing foreign investment typically takes place on a federal or national level and it is purely dependant on host country policies as to whether local stakeholders are involved at all. Very often this is not the case as placing environmental obligations on investors may act as a deterrent to foreign investment, which as suggested above may have chosen a particular jurisdiction because of its weaker regulatory regime.⁶

More lenient regulatory requirements in developing states have led to what may be described as the three-state problem of international investment law.⁷ In 2008 foreign direct investment outflows from the developing world were at \$253 billion and emerging economies; such as the BRIC states (Brazil, Russia, India and China) contributed a significant portion of this figure. Such investments are increasingly channelled to projects in the developing world because of the natural resource endowments and lower costs of these regions (so-called south-south investment).⁸ Facing regulatory competition with each other, states in the developing world seek to attract further investment by lowering standards, such as those associated with environmental protection. Foreign investors, increasingly from emerging economies will, in theory, seize upon this to pollute. In the interest of safeguarding the global environment, the more ecologically conscious states of the developed world attempt to impose their more stringent standards on these transactions. As we shall see, to a

⁶ E Kentin, 'Sustainable Development in International Dispute Settlement: The ICSID and NAFTA Experience' in N Schrijver and F Weiss eds *International Law for Sustainable Development: Principles and Practice* (Martinus Nijhoff, Lieden, 2004) at 313

⁷ D Collins, 'A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period' (2010) 25:1 Connecticut Journal of International Law 1-35

⁸ Total foreign direct investment flows into the developing world reached their highest level ever in 2008 at \$500 billion US: World Investment Report 2008

<http://www.unctad.org/en/docs/wir2008_en.pdf> (last accessed March 2010)

degree this is reflected in some the investment credit finance policies and, to a lesser extent, various BITs. Further regulation in this area is warranted.

This article will begin by illustrating existing international treaties that provide for public participation in environmental assessment procedures. Part Three will consider environmental assessment procedures implemented by the World Bank as a condition of its financing of investment projects. Part Four will look briefly at these requirements as instigated by two of the key regional development banks. Environmental assessment requirements of private sector financiers will not be examined in detail.⁹ Parts Five and Six will consider environmental assessment initiatives relating to international investment originating from the Organization for Economic Cooperation and Development and the United Nations Commission on International Trade Law. Part Seven will explore the extent to which public participation in environmental assessment is reflected in BITs and Part 8 will suggest how BITs could advance a mandatory public component of environmental assessment in foreign direct investment without violating National Treatment principles.

II. Public Participation in International Environmental Law

A right of participation in decision-making relating to environmental matters was enshrined in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).¹⁰ The Convention provides that signatory states must take all necessary legislative, regulatory and judicial steps to ensure that the public is able to exercise its right to public participation in environmental decision-making. Citizens have the right

⁹ See further, B. J. Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (OUP: 2008)

¹⁰ 38(3) ILM 517-533 (1999)

to readily-accessible information regarding environmental decisions. The public should be made aware of the nature of the activity and its potential environmental impacts and be given a reasonable opportunity to engage in effective participation in the decision-making process, which involves timely notifications of meetings and the right to submit comments. Parties are required to take the results of the public participation into account as far as possible. Since it entered into force in 2001, the Aarhus Convention has been ratified by only 40 states. The United States and Russia, two leading sources and targets of investment, are not signatories. While commentators have noted that Aarhus implies regulatory constraints in relation to investment,¹¹ this highly-celebrated, human rights-based approach to public participation in environmental matters appears to have had little influence on the standards of public participation observed in international investment law.

The second major international instrument establishing a role for public participation in environmental matters is the Rio Declaration on Environment and Development¹² produced in 1992 by the United Nations Conference on Environment and Development. Principle 10 of the Declaration states that environmental issues are best handled through participation of all parties that may be concerned, which requires access to information and the opportunity to participate in decision-making processes. Principle 17 of the Declaration, which requires environmental impact assessments, is seen as one of the primary mechanisms by which Principle 10 can be achieved.¹³ While influential, this document offers less than the Aarhus Convention, as its principles are typically viewed in international law as providing guidance rather

¹¹ M Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' <http://www.allacademic.com/meta/p414056_index.html> (last accessed March 2010) at 6. Mason records numerous examples of states failing to fulfil Aarhus disclosure commitments as determined by the Aarhus Compliance Committee, at 16.

¹² 31 ILM 874 (1992)

¹³ Craik above note 3 at 80

than binding commitments.¹⁴ Unfortunately this also appears to be the case for most of the terms of investment credit agencies, as we shall see below.

While few instances of foreign direct investment would be of sufficient magnitude to affect areas beyond the local environment, the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) could be relevant for investments resulting in transboundary environmental harms, such as those emitting high levels of airborne pollution. This Convention, which was adopted in 1991, requires that environmental impact assessments be conducted by states which may have caused pollution that crosses international borders. The treaty also contains extensive provisions for public participation.¹⁵ Again, while the relevance of this instrument is limited for the purpose of regulating foreign investment activities, Espoo is seen to embody a continuing trend towards transnationalism in environmental law.¹⁶ This ideology underpins the need to establish rules at the national level of host states for limiting environmental damage in international investment law.

Lastly, the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities¹⁷ requires that state parties provide any states likely to be affected by an environmentally hazardous activity with relevant information regarding the risk involved and the harm which might result, however it there is no requirement that it be provided to affected citizens themselves, ignoring the obvious disjunction between a government and its people.¹⁸ The obligation to inform affected citizens would presumably fall on the relevant state itself

¹⁴ P Sands, *Principles of International Environmental Law*, (Cambridge U Press) at 232-233

¹⁵ Eg Art II.2

¹⁶ Craik above note 3 at 146

¹⁷ Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, ILC 58th Session (A/61/10)

¹⁸ Principle 5

as a feature of its domestic law, rather than an as consequence of its international treaty commitments. Still, Foster urges that this ICL instrument is indicative of the important role of subjectivity in the management of risk, especially the treaty's concept of disseminating information in an "appropriate" manner, which is viewed as a preferably alternative to the logic of cost benefit analysis.¹⁹ Subjectivity in risk assessment necessitates some form of stakeholder participation in advance of the establishment of a potentially environmentally hazardous project.

In light of the above, the International Court of Justice recently stated that environmental impact assessment has gained so much acceptance in international law that it may now be seen as a requirement under general international law in situations where an activity may have an adverse environmental effect that crosses borders. International investment activities may fit this model in the sense that the polluting investor has a legal connection to a jurisdiction other than that in which it is operating and causing harm. Interestingly, the ICJ was unwilling to find an obligation on the part of a state to consult with affected parties, despite the recognized emphasis on public consultation in international treaty law.²⁰ It is noteworthy that an ICSID tribunal also declared that environmental impact assessment was increasingly viewed as a component of international law.²¹

From the above it is evident that there is precedent in international treaty law for public participation in the assessment of environmental risks. While it would be difficult to claim that public participation in environmental impact assessment should be viewed as a normative principle in international law because of the limited adoption of these treaties as well as inconsistent state practice (as we shall see below), this process could be seen as *lex ferenda* and as such should apply to the investment

¹⁹ Foster above note 2 at 439-440

²⁰ Pulp Mills on the River Uruguay (Uruguay v Argentina) (Judgment 20 April 2010)

²¹ Maffezini v Spain ICSID Case no. ARB 97/7 at [64]

activities of multinationals operating in developing states. Indeed as we shall now see, international development bank guidelines have contemplated public participation in environmental assessment for the investment projects they fund. Such projects are financed through development agencies because they are intended to benefit the developing world, where environmental risks are arguably the most acute due to more vulnerable communities and weaker governance. Development banks extending finance credit for investments have been praised for their unusually high level of engagement with non-state actors in environmental decision-making.²² As observed cogently by Sands,²³ the central issue with these organizations is the extent to which investment credit is made available to projects which may be environmentally harmful and what mechanisms are available to identify and cope with such risks.

III. The World Bank Group

The most important of the development banks is the International Bank for Reconstruction and Development, better known as the World Bank Group, which is an international institution that provides leveraged loans for poorer countries for programs aimed at poverty reduction. Its role in investment in developing states is important in that it both provides insurance for private foreign investors operating within these regions as well as capital for private investors located in the states themselves. The World Bank was among the first financiers to introduce environmental impact assessment and public consultation procedures in project financing.²⁴ Environmental assessment procedures for the World Bank Group's most significant institutions will now be considered.

²² Ebbesson above note 1 at 683

²³ Sands above note 14 at 1057

²⁴ Richardson, above note 9 at 6. This was the consequence of efforts by many NGOs during the 1980s.

i) Multilateral Investment Guarantee Agency ('MIGA')'s Environmental Assessment Policy

MIGA is a branch of the World Bank Group which provides financial insurance against non-commercial risks that could affect investments in developing states. It also provides technical assistance to improve investment opportunities in these countries as well as a dispute mediation service. It is particularly concerned with providing insurance for infrastructure related projects. Such insurance is required because of the often highly volatile political regimes and lack of a sound legal framework for redress of grievances in these countries. MIGA has issued more than US\$21 billion in guarantees to investors since its inception in 1988²⁵. The investments which it supports must meet various requirements, one of which is its environmental assessment of investment projects.

MIGA's Environmental Assessment Policy forms part of Annex B of the agency's Operational Regulations²⁶. The policy requires that all projects which receive MIGA funding (guarantees) must engage in an environmental assessment, the precise scope of which will depend on the "nature, scale and environmental impact of the proposed project."²⁷ Project applicants are required to prepare their own assessments, unless they are a minority partner in the project. The assessment takes into account "variations in project and country conditions" and the host country's "overall policy framework and national legislation."²⁸ When reviewing the environmental assessment as submitted, MIGA may require public consultation and

²⁵ www.miga.org (last accessed April 2010)

²⁶ www.miga.org/documents/operations-regulations.pdf (last accessed April 2010)

²⁷ *Ibid.* at [2]

²⁸ *Ibid.* at [3]

disclosure.²⁹ Public consultation and disclosure is required for all Category A (the most environmentally risky) projects as a component of the environmental assessment. Contact with locally affected groups, including non-governmental organizations, should be initiated as soon as possible after the guarantee is sought.³⁰ Such consultations must be “meaningful” and as such MIGA requires that any information transmitted to the public must be done in a timely manner and in a language that is understood.³¹

ii) International Finance Corporation (‘IFC’)’s Environmental and Social Review Procedures

The IFC is also part of the World Bank Group and its purpose is to foster sustainable economic growth in developing states by financing private sector loans for specific projects such as highways, dams, factories and other large scale activities that may have ecological impacts. Generally the IFC helps private companies located in emerging economies acquire capital and improve their governance. Unlike MIGA it is not an insurance scheme against risk in unstable countries, but rather a source of financing that might be unavailable in the normal commercial sphere because of the perceived risk inherent in companies located in the developing world.

Encouragingly, the IFC imposes environmental assessment standards on the projects which it funds. This is done through its Environmental and Social Review Procedures (‘EFSR’)³². The IFC’s EFSR apply to the full range of investment activities that the agency supports: direct lending to private corporations, lending to intermediaries, as well as structured finance products such as guarantees and

²⁹ Ibid. at [5]

³⁰ Ibid. at [9]

³¹ Ibid. at [10]

³² [www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ESRP2009/\\$FILE/ESRP2009.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ESRP2009/$FILE/ESRP2009.pdf) (14 August 2009) (last accessed April 2010)

securitizations.³³ Unlike the MIGA's environmental requirements, the IFC's procedures are framed in such a way that they validate various stages of an investment project – rather than simply the concluding stage. It appears as though the procedures help achieve compliance with IFC guidelines, rather than strictly speaking acting as a screen against projects that are not sufficiently environmentally sound. The IFC typically intervenes after a project is conceived, and often after a site is chosen, but early enough so its modifications are not overly burdensome.³⁴ This approach is reflected in the use of the word “client” rather than “applicant” – to a degree the IFC is intent on treating its users as the functional commercial entities that they aspire to be.

The IFC's policy regarding environmental assessment is well detailed, with a specific time line and individualized roles for all parties concerned. A key component of the IFC's Review Procedures is Stakeholder Identification and Analysis, which involves the assessment of the environmental impact of the project on local households and communities. This process should involve some form of public consultation, although the precise method of achieving this is not specified, other than the fact that it should be “free”, (which means at no cost to the public participants and was not coerced), and that it be “informed”, (which means that it must be presented in understandable language).³⁵ In addition to consultations, the IFC identifies a need to achieve Broad Community Support for the project which is defined as “a collective expression by the affected communities, through individuals and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project.”³⁶ The

³³ Ibid. at [8]

³⁴ Ibid. at [8]

³⁵ Ibid. at p 35-36

³⁶ Ibid. at p 31

affected communities are a subset of a broader group of project stakeholders located within the project's area of influence, in the region, host country, or elsewhere.³⁷ Public consultation and broad community support will be required as condition of financing only in situations where there is a significant adverse impact on an affected community or if indigenous people are involved.³⁸ In order to assess whether such consultation has occurred, the IFC will consider whether affected communities have been engaged in identifying potential environmental impacts and assessing the consequences of these impacts on their lives. The IFC will also examine whether the affected communities have provided input into proposed mitigation measures. The extent to which impacts have been fully disclosed to affected groups, such as the nature and scale of the project, is of key importance, as is the requirement that such consultations be "understandable and meaningful."³⁹ Again, this may mean that the responses elicited are not coerced through threat or reward and that they are delivered in an understandable language – or perhaps orally. Evidence that good faith consultations with the public have occurred will include one-to-one interviews and documentation of agreements with leaders of communities or households, as well as records of contact with vulnerable groups.⁴⁰

The need for public consultation is further seen in the IFC's preparation of an Environmental and Social Review Summary, a publicly available document which is intended to be understood by members of the local community. This document will identify how a project was reviewed and the rationale for IFC deciding to invest. It includes a description of the main social and environmental risks and impacts of the

³⁷ Ibid. at p 31

³⁸ At 31. On the need to consult with Indigenous peoples on environmental matters see, Richardson above note 9 at 463-465

³⁹ Ibid at p 35

⁴⁰ Ibid at 37

project, as well as the key measures identified to mitigate those risks and impacts.⁴¹ Various other documents produced throughout the process are made available to the public. The Review Procedures state that the “IFC will also take into account the project context including the development benefits of the investment project as well as public policy and the local, regional and national political considerations.”⁴² Public participation is evidently an important component of environmental assessment for IFC and this should be viewed as a major achievement in the sphere of investment law and environmental law generally.

It should be noted further that in 2004 The IFC implemented the Extractive Industries Review, a series of assessments conducted around the world which acknowledged the extensive role that the World Bank plays in supporting extractive industries in the developing world and the potential damaging effect such projects can have. The report concluded that while the IFC would continue to provide financial assistance to extractive projects, the IFC must improve the clarity, accessibility and implementation of its environmental assessments required in relation to these activities. A key feature of these modifications is increased community participation in relation to support for extractive industry projects.⁴³ The review also, somewhat vaguely, states the need for “increased efforts on project appraisal, consultation, disclosure, and value added projects”.⁴⁴

Although it is outside the focus of this article to consider private financing for investment projects, it should be mentioned that the IFC played a large part in the promulgation of the Equator Principles, developed also by NGOs such as the World

⁴¹ Ibid at 5.

⁴² Ibid 33. This statement is in reference to extractive industry projects – but similar language appears for projects in general, e.g. at p 40. ‘Strategic Context’.

⁴³ Ibid [23]

⁴⁴ Ibid [51]

Wildlife Fund and the Friends of the Earth, as well as private banks.⁴⁵ Finalized in June 2003 and revised in July 2006 the Equator Principles are standards by which social and environmental impacts in private project financing are assessed.⁴⁶ The more than 50 financial institutions that are signatories to the principles promise to provide loans only to borrowers who conform to the principles. Principle 5 states that borrowers must have consulted with “affected local communities in a structured and culturally appropriate manner.” Moreover, a strategic environmental assessment report must be made publicly available in a local language for a reasonable period to allow for public comment, and there must be a grievance procedure regarding any social environmental concerns arising from the project.⁴⁷ While a more detailed examination of private sector guidelines is beyond the scope of this article, it should be noted that Richardson has lamented that many private sector financiers can escape their Equator commitments by acting indirectly through financial intermediaries and that in practice banks rarely enforce Equator covenants in loan agreements.⁴⁸

iii) The World Bank Inspection Panel

Lastly some mention should be made of the World Bank Inspection Panel, which is an internal dispute settlement body established to consider whether the process leading to a possible contract between the bank and a borrower follows the bank’s operational policies for environmental assessment with project-affected groups, as noted above. Affected groups of persons may submit a complaint for failure of the bank (not of the borrower itself) to comply with its own policies concerning financing an investment

⁴⁵ Richardson above note 9 at 411.

⁴⁶ www.equator-principles.com (last accessed March 2010)

⁴⁷ Ibid. Principles 7 and 6.

⁴⁸ Richardson above note 9 at 413 and 420.

project.⁴⁹ The Inspection Panel process is a second layer of assessment which incorporates public participation that is built into the pre-establishment evaluation of the environmental impact of the investment project. It should be noted that this process has been criticized for being of an administrative nature only rather than a more open, transparent feature of public international law.⁵⁰

IV. Regional Development Banks

In addition to the World Bank Group's efforts to foster investments in development-related projects, there are a number of regional development banks which have the same purpose and which have identified environmental assessment as a key condition for financing.

i) The European Bank for Reconstruction and Development ('EBRD')

The EBRD provides project financing for banks, industries and businesses from Europe to Central Asia. The EBRD's 2008 Environmental and Social Policy and Performance Requirements⁵¹ outline the environmental standards applicable to each investment and describe the way in which each project will be appraised and monitored. All EBRD-financed projects undergo environmental appraisal which is integrated into the EBRD's overall project appraisal, including the assessment of financial risks. The extent of the appraisal will be linked to the nature and scale of the project, and commensurate with the level of environmental impacts. It is the

⁴⁹ IBRD res No. 39-10 and IBRD res IDA 93-6, www.worldbank.org (last accessed March 2010)

⁵⁰ R Sarkar, 'Exercising Quasi-Judicial Review Through a World Bank Appellate Body' in C Picker, I Bunn and D Arner eds., *International Economic Law: The State and Future of the Discipline* (Hart, Portland, 2008) at 301

⁵¹ www.ebrd.com/about/policies/enviro/policy/2008policy.pdf (approved 12 May 2008) (last accessed April 2010)

responsibility of the client to ensure that the required due diligence studies, information disclosure and stakeholder engagement are carried out in accordance with the EBRD's performance requirements, and submitted to the EBRD for review as part of its own appraisal.⁵² The EBRD also requires meaningful consultations with stakeholders and in some circumstances may engage in its own such consultations.⁵³

ii) Asian Development Bank ('ADB')

The ADB extends loans to developing country members for development related projects and also facilitates public and private investment for development projects. Established in 1966, the bank is based in Manila and composed of 67 Member countries, including 44 developing countries from the region. The Public Consultation Policy of the ADB requires that the ADB itself must proactively share information and seek feedback from stakeholders as well as respond to information requests.⁵⁴ This is reflected in the ADB's Environmental Assessment Guidelines which contains exhaustive requirements for reporting on the environmental impacts of the development projects which have received funding. In particular, environmental impact reports must describe how the public has been involved in the assessment of the environmental effects of the project and include summaries of comments received from community leaders as well as samples of materials used to augment public awareness, such as press releases.⁵⁵ It should be noted, however, that while the an assessment of the impact of an investment project on indigenous peoples is required

⁵² Ibid. C.14

⁵³ Ibid. C.25

⁵⁴ The Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information Art I.3, www.adb.org/Documents/Policies/PCP/PCP-R-Paper.pdf (last accessed April 2010)

⁵⁵ Content and Format, Environmental Impact Assessment, Table 3, www.adb.org/documents/Guidelines/Environmental_Assessment/Content_Format_Environmental_Assessment.pdf (last accessed April 2010)

by the Asian Development Bank, there is no requirement of these peoples' free and informed consent to the investment project.⁵⁶

V. The Organization for Economic Cooperation and Development ('OECD')

The OECD is a forum of 30 developed states which creates policy regarding economic and social issues and contributes to developing policy that may advance the interests of non-member states (developing countries). It maintains several policies relating to environmental assessment in foreign investment.

i) OECD Report on Environmental Compliance

Its report on Ensuring Environmental Compliance: Trends and Good Practices⁵⁷ was created through a comparison of environmental assessment methodology of several Member states, as such it is seen as a policy framework for environmental assessment that could be of use to many states. Generally it identifies good practices and compliance monitoring in the context of various regulatory cultures and outlines trends which have emerged across different systems with respect to environmental assessment.

The document outlines the main elements of a compliance assurance system for environmental standards. Although the document is not specifically aimed at compliance in the context of foreign direct investment, investment issues are clearly contemplated. One of this policy's aims is to create a predictable investment climate based on the rule of law, thereby stimulating economic development and innovation

⁵⁶ Richardson above note 9 at 465

⁵⁷ Conference Report, 17-18 November 2008, www.oecd.org/dataoecd/19/44/41829282.pdf (last accessed April 2010)

and enhancing markets for environmental goods and services.⁵⁸ It refers extensively to the need for host states to offer financial incentives such as tax relief and subsidies for investing companies to exceed environmental standards when engaging in foreign direct investment. Generally this document offers useful guidance on environmental assessment generally.

Much of the recommendations in this document are lacking in clarity. One of the key policies identified from this document is the need to increase stakeholder participation through enhanced transparency and consultation. It notes major advancements in the dissemination of environmental impact information to the public in the Netherlands and in the U.S.⁵⁹ The main aspects of this augmented openness include transparency of the permit process, disclosure of compliance monitoring and enforcement information, and performance accountability of the government agencies themselves that are involved.⁶⁰ Such practices may also be necessary to adhere with the Fair and Equitable Treatment Principle seen in many investment treaties.⁶¹ The report observes that citizen groups play a major role in shaping and implementing environmental enforcement in a number of the studied states. This is not consultation in the sense of a mandatory stage in the approval of a project, but rather proactive collection and publication of data by citizens on environmental quality and compliance.⁶² Such information could be extremely helpful to regulatory bodies when assessing the more subjective component of environmental risks.

The OECD's Development Assistance Committee instigates the concept of Strategic Environmental Assessment ('SEA') through its Good Practice Guidance for

⁵⁸ Ibid. at p 17

⁵⁹ Ibid at p 15

⁶⁰ Ibid at p 33

⁶¹ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, 2008) at 133

⁶² OECD Conference Report on Environmental Compliance above note 57 at p 32

Development Co-operation⁶³ which was developed in response to continued requests for guidance on how to implement environmental assessment in conjunction with development aid. Although designed for the purpose of extending development aid to developing states, this document addresses the potential utility of SEA to attract foreign direct investment for the purpose of public infrastructure.⁶⁴ While developed in the context of donor-based aid, typically from development agencies, this document can be used to evaluate profit-motivated capital injections from the private sector. The rationale for integrating SEA with an investment project is that this process identifies how the projects are affected by external factors, which involves recording any existing environmental issues. This will allow potential cumulative impacts to be identified such that the technologies that are being used can be optimized. The SEA methodology facilitates the planning of infrastructure projects to be integrated with environmental planning at an early stage through a participatory process. This will allow “stakeholders at all levels” (not identified further) to consider the project and discuss environmental (as well as social and cultural) needs and constraints.⁶⁵ Failure to use SEA is often depicted as carrying important financial costs, rather than exclusively environmental ones; for example the guide notes that costs involved “might consist of unbudgeted time and resources in handling disputes with local communities or mitigation of avoidable harm through pollution. In extreme cases, it may be necessary to relocate or redesign facilities.”⁶⁶

ii) OECD Guidelines on Multinational Corporations

⁶³ www.oecd.org/dataoecd/4/21/37353858.pdf (2006) (last accessed April 2010)

⁶⁴ Ibid at p 18.

⁶⁵ Ibid at 87

⁶⁶ Ibid at 45.

The OECD Guidelines on Multinational Corporations⁶⁷ attempts to encourage positive contributions that multinational enterprises can make to economic and social progress as well as minimize any problems that their activities can cause through their operations, particularly in host states that lack comprehensive regulatory standards or the capacity to enforce. One of the central policies in the guidelines is that multinational corporations must contribute to economic progress with a view to achieving sustainable development.⁶⁸ Although the guidelines are not binding, they should be viewed as instructive and numerous scholars, notably Muchlinski, have advocated that they inform treaty obligations of home and host states in matters relating to foreign direct investment.⁶⁹

The Guidelines contemplate environmental assessment as a component of corporate responsibility. This involves the maintaining of a system of environmental management through the collection of information regarding environmental impacts and regular monitoring.⁷⁰ The Guidelines further recommend that corporations engaging in international investment should engage in high quality levels of disclosure relating to the effects of their activities. This includes reporting of environmental issues where they exist.⁷¹ In particular, public consultations should encompass the provision to the public (as well as the multinational's employees) with adequate and timely information on the potential environmental impacts of the corporation's activities. This includes reporting on progress in improving environmental performance and engaging in adequate and timely communication and consultation with the communities directly affected by the environmental policies of

⁶⁷ www.oecd.org/dataoecd/56/36/1922428.pdf (2008) (last accessed April 2010)

⁶⁸ Ibid art II.1

⁶⁹ P. Muchlinski, *Multinational Enterprises and the Law* 2d ed (OUP, 2007) at 475

⁷⁰ OECD Guidelines on Multinational Corporations above note 67 Art V.1, Art V.7

⁷¹ Ibid. art III.2

the investor and by their implementation.⁷² There is no clarification as to what adequate means in this context, but it may be similar to “meaningful” in the sense that the information is conveyed in a language that is understood and feedback provided by communities is not coerced. Lastly the guidelines encourage multinationals “to contribute to the development of environmentally meaningful public policy by means of partnerships or initiatives that will enhance environmental awareness and protection.”⁷³ This may contemplate an expanded form of public consultation.

Recommendations regarding disclosure focus on two areas: conventional reporting of the corporation’s financial statements and aspects of corporate governance, including such things as the remuneration of its officers; and secondly, fields in which reporting standards are still emerging, such as social and environmental risk reporting. Corporations must be transparent in both of these and responsive to the public’s demand for information.⁷⁴ The OECD encourages corporations to cooperate with NGOs and intergovernmental organizations to develop reporting standards that enhance the enterprise’s ability to communicate how their activities affect the environment.⁷⁵ Adequate disclosure may also involve establishing availability of information in electronic or other non-printed format in recognition of the fact that many poorer communities may suffer environmental damage due to the corporation’s activities.⁷⁶ The Guidelines state that disclosure requirements are not expected to place unreasonable administrative or cost burdens on enterprises, nor are they expected to disclose commercially sensitive information that might undermine their competitive position.⁷⁷

⁷² Ibid. art V.2

⁷³ Ibid. art V.8

⁷⁴ Ibid. art III.14 and III.12

⁷⁵ Ibid. art III.15

⁷⁶ Ibid. art III.17

⁷⁷ Ibid. art III.18

This last statement is important in that onerous host state requirements in this regard could potentially amount to expropriation and entitle the corporation to compensation. Such was the nature of the claim made by the investor in *Maffezini v Spain* regarding mandatory environmental assessment procedures that involved public consultation, although it was rejected by the tribunal because of the clear requirement for such processes under the law of the host state.⁷⁸ The allegation of onerous environmental assessment procedures was made recently by Clayton/Bilcon company against Canada and the province of Nova Scotia for its mandatory environmental impact assessment procedures for a quarry project.⁷⁹

VI. United Nations Commission on International Trade Law ('UNCITRAL')

UNCITRAL is a branch of the UN which was established in 1966 to promote the progressive harmonization and unification of international trade law. It is most commonly associated with its system of arbitration rules. UNCITRAL has also offered guidance with respect to environmental assessment that could well be applied to the investment context. Its Legislative Guide on Privately Financed Infrastructure Projects⁸⁰ is a document intended to encourage domestic legislators to consider environmental impacts when drafting laws governing private institutions that lend for the purposes of infrastructure projects. These guidelines were adopted by UNCITRAL in June 2000 and are aimed at achieving a balance between facilitating private investment and addressing public interest concerns of the host country such as the environment. The Guide suggests that when instigating requests for proposals for public infrastructure projects, project specifications must consider conformity with the

⁷⁸ Above note 21 at [71]

⁷⁹ *Clayton/Bilcon v Government of Canada* (NAFTA, 30 Jan 2009) [matter ongoing]

⁸⁰ www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf (adopted 29 June 2000) (last accessed April 2010) ('The Guide')

host state's environmental regulations.⁸¹ The Guide also notes that international financial institutions are paying increasing attention to the environmental impact of projects and their long-term sustainability⁸² – meaning that if external funding in the way of loans is sought then environmental controls must be maintained to satisfy these creditors. Environmental impact analysis is explicitly recommended as a means of ensuring the success of a privately funded project.⁸³ The Guide notes that in some countries, public participation in the preliminary assessment of a project's environmental impact has been 'useful' which appears to envision good business practice rather than a moralistic requirement of consent from those who may be harmed.⁸⁴ Given that developing states are the target of foreign investment from the private sector this should be regarded as a highly important document and indeed a key feature of UNCITRAL's work.

7. Environmental Protection in Bilateral Investment Treaties (BITs) and Regional Trade Agreements

One of the most significant means by which environmental assessment involving mandatory of public input could be imposed upon foreign investment is through BITs. This is particularly the case where the multinational investor does not seek funding from a third party, such as the entities described above, or from private banks. Sands cautions that while BITs increasingly reflect international environmental rules, they have also, perhaps unintentionally prompted many states to reduce their

⁸¹ Ibid art III Recommendation 20.b

⁸² The Guide above note 80 at [74]

⁸³ Ibid at [34]

⁸⁴ Ibid at [34]

environmental standards in order to attract foreign investment.⁸⁵ There are now more than 2000 BITs aimed at increasing the flow of foreign direct investment between states by providing a stable, predictable legal regime and guarantees against expropriation. A number of investment treaties recognize the rights of states to adopt certain measures designed to ensure that investment activity is undertaken in a manner sensitive to environmental concerns, but there is little evidence that these treaties actively require or even encourage environmental assessment of investment activities prior to their engagement, let alone public participation in this process. Some of these treaties contain obligations relating to the observance of local environmental laws and investor liability for environmental transgressions that have already occurred – not details on potential environmental impacts of planned investment projects.

Chapter 19 of the Free Trade Agreement between Chile and the US⁸⁶ outlines a general need to ensure environmental protection in conjunction with trade and investment activities, however there is no requirement of an environmental impact statement as a prelude to permitting entry or establishment of a foreign investment. The agreement does establish the Environmental Affairs Council between the state parties and is charged with seeking “appropriate activities” for public participation.⁸⁷ No further elaboration is provided regarding this concept although examples of cooperative activities to promote the development of environmental standards are listed and include: exchanging professionals, technicians, and specialists, study visits, organizing joint conferences, seminars, workshops, meetings, training sessions, and outreach and education programs.⁸⁸ Parties are also required to respond favourably to

⁸⁵ Sands, above note 14 at 1057

⁸⁶ US Chile Free Trade Agreement, 42 ILM 1026 (2003)

⁸⁷ Ibid. art 19.4.3

⁸⁸ Ibid. Annex 19.3.4

requests for consultations by persons or organizations in its territory.⁸⁹ There is a further requirement for parties to take into account “public comments and recommendations regarding cooperative environmental activities.” Consultations between the parties themselves concerning environmental issues may be supplemented by advice or assistance from “any person or body” deemed appropriate to fully examine the issue.⁹⁰ This may contemplate wider public participation but it appears to be restricted to situations in which a dispute has arisen between the parties, not a means of identifying environmental risks at an early stage of the investment project’s development.

The North American Free Trade Agreement (‘NAFTA’)'s environmental side agreement, the North American Agreement on Environmental Cooperation⁹¹ is aimed at assessing the environmental impacts of cross border trade and investment and explicitly mentions the importance of public participation in its preamble as well as in its core objectives.⁹² The agreement contemplates public participation by providing private access to remedies for interested persons through the North American Commission for Environmental Cooperation, a body with a mandate to conduct ongoing *ex post* environmental assessment of NAFTA.⁹³ The citizen complaint process enables citizens to trigger official investigations into a Member state’s failure to enforce its own environmental laws, a remarkable accomplishment in the field of citizen input in environmental compliance. Unfortunately this process has been criticized for lacking effectiveness because of the inability of the Commission, upon receiving citizen complaints, to make binding legal determinations, in which case the

⁸⁹ US Chile Free Trade Agreement above note 86 art 19.5.2

⁹⁰ Ibid. art 17.10.4

⁹¹ 32 ILM 1480 (1994)

⁹² Ibid. art I h)

⁹³ Ibid art VI

allegedly offending state can merely deny non-compliance to escape sanction.⁹⁴ While this mechanism does establish a role for private citizens in the enforcement of environmental regulations, it does not constitute full citizen participation in as much as it does not permit those who may be affected by environmental harms to have their viewpoints heard by the relevant regulatory bodies before a project has begun.

Article 17.4 of Central American Free Trade Agreement⁹⁵ ('CAFTA') requires parties to encourage the establishment of voluntary guidelines for environmental performance and the sharing of information with the public for the purpose of environmental audits, reporting and monitoring. Partnerships are encouraged between businesses, local communities, NGOs, governments and scientific agencies; however there is no mention of participation with citizen groups. CAFTA also contains identical provisions to those seen in the US Chile BIT relating to the Environmental Affairs Council and its emphasis on public consultations.⁹⁶

The European Energy Charter⁹⁷ ('ECT') contains extensive obligations relating to the protection of foreign investments and creates an obligation of minimizing environmental damage.⁹⁸ Parties are required to promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects.⁹⁹ But discretion is granted to each party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the

⁹⁴ T Yang, 'The Effectiveness of the NAFTA Side Agreement's Citizen Submission Process: A Case Study of the Metales y Derivados Matter' 76:2 University of Colorado Law Review 443

⁹⁵ 43 ILM 514 (2004)

⁹⁶ Art 17.5, 17.6

⁹⁷ 34 ILM 373 (1995)

⁹⁸ Ibid art 19.1

⁹⁹ Ibid art 19.1.i

authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed¹⁰⁰

The Australia – US Free Trade Agreement¹⁰¹, which will clearly have no impact on the developing world, makes provision for public participation as a feature of the enforcement of environmental laws that may be transgressed by investment projects. Environmental laws must be transparent and publicly available.¹⁰² Furthermore article 19.5.3 relating to dispute settlement states: “Each Party shall provide an opportunity for its public, which may include national advisory committees, to provide views, recommendations, or advice on matters related to the implementation of this Chapter, and shall make available such views, recommendations, or advice to the other Party and, as appropriate, to the public in accordance with its law.” There is also provision for public consultation: “Each Party shall take into account, as appropriate, public comments and recommendations it receives regarding these ongoing cooperative environmental activities.”¹⁰³ While this is positive from a standpoint of requiring investors to engage stakeholder groups, again there is nothing on environmental assessment procedures to determine risks in advance of a project’s entrance or establishment in the host state.

Finally, the Model International Agreement on Investment for Sustainable Development, created by the International Institute for Sustainable Development¹⁰⁴, requires that investors comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments as specified by the laws of the host state or the laws of the home state, whichever is the more rigorous.¹⁰⁵

¹⁰⁰ Ibid art 13

¹⁰¹ 43 ILM 1248 (2004)

¹⁰² Ibid art 19.3

¹⁰³ Ibid. art 19.6.2

¹⁰⁴ www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (last accessed March 2010)

¹⁰⁵ Ibid art 12A

This requirement would appear to violate National Treatment obligations under Article 5 of the Agreement as it could subject foreign investments to more onerous environmental regulations (i.e. those of their home state) than that of domestic investors. Still, the requisite environmental assessment is explicitly a pre-establishment requirement, whereas the National Treatment obligation appears not to be engaged until the post-establishment phase in that it speaks of “management, conduct, operation and expansion” of the investment. Under Article 12C of the Model Agreement, the environmental impact statement must be made public and accessible in the local community and to affected interests in the host state. Interestingly, 12D the Model Agreement also requires that investors and host state authorities apply the highly risk-averse Precautionary Principle to their environmental impact assessment. This standard is very onerous from a compliance perspective and is not seen in any of the other guidelines examined.

It must be noted there are no provisions for mandatory environmental assessment as a pre-condition of investment establishment in the BITs of any of Brazil, Russia, India or China, the most advanced of the emerging economies. This omission suggests that there is a significant potential for environmental hazards as a consequence of investment activities both in these states, or by multinationals from these states, when operating in regions with similarly weak regulatory regimes.

8. Achieving Environmental Impact Statements with Public Participation Through BITs

Dolzer and Schreuer note that an extension of the conventional subject matter of BITs into spheres of environmental and social concern will be a necessary component of

future discussions into the usefulness of BITs as facilitators of investment flows.¹⁰⁶ The inclusion of mandatory public participation in environmental assessment into BITs may be the most effective means of screening projects for environmental risks, although precisely how this could be achieved is uncertain. Public participation in environmental assessment of investment projects could be structured as a condition of entry into a host state and accordingly take the form of a simple pre-establishment requirement of the parties to a BIT as an obligation of both the home state of the investor and of the host state. As such, in order for the requirement to be enforced against the investor, the host state could refuse entry to those investors that failed to engage in the proper consultative environmental assessments. This should not transgress any National Treatment obligations, as this treatment is typically extended to the establishment phase of an investment only, although some treaties such as NAFTA extend National Treatment to the pre-establishment stage.

It may also be possible to structure a BIT commitment to require the home state of the investor to ensure that its investors complied with the procedural requirements through the extra-territorial applicability of the home state's own environmental laws. It is widely assumed that there is a duty on the part of home states to ensure that its multinationals operate abroad in a manner that does not harm the environment of the host state.¹⁰⁷ However, home-state based enforcement would necessitate that the home state have the legal capability to control the environmentally harmful extra-territorial activities of its corporate citizens. This could be achieved through connections of nationality of the corporation in the home state, even if the acts themselves are done abroad with no effect at home. A home state's failure to do so could in turn result in allegations of breach of state responsibility under

¹⁰⁶ Dolzer and Schreuer above note 61 at 25

¹⁰⁷ Sornarajah, above note 5 ch 4

international law. However this doctrine is usually linked to actions of state organs, rather than private entities such as multinationals.¹⁰⁸

Another means by which pre-establishment environmental assessment incorporating stakeholder participation could be ensured would be to structure this process as an aspect of regulatory transparency generally. Environmental consultation processes could underlie transparency provisions within a BIT, or even as part of a more general instrument for international commercial activities, including investment as well as perhaps trade and competition. Requirements of full transparency and disclosure in government regulation are a key feature of the World Trade Organization's Agreement on Government Procurement as well as the Trade Related Aspect of Intellectual Property Agreement. Such an approach is fitting because of the characterization of public consultations in environmental assessment as a process rather than as a substantive obligation with a specific content.

Lastly, a public participation requirement could be ensured through a BIT by a provision therein denying the foreign investor the right to bring a claim under the relevant treaty's dispute settlement clause should the environmental assessment procedure be incomplete. Thus an investor that failed to fulfil the proper environmental impact assessment as outlined in the treaty would be estopped from claiming, for example, breach of the BIT due to expropriation by the host state. Investors will therefore be compelled to engage in the necessary environmental impact procedures in order to retain the availability of dispute settlement. With this method, participatory environmental assessment would not be a mandatory precondition of investor entry into the host state, but rather a means of accessing

¹⁰⁸ Sornarajah *ibid* at 188. This is also reflected in Art 11 of the International Law Commission's Draft Articles on State Responsibility. http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last accessed March 2010)

certain additional advantageous features of the treaty arrangement. There would be no pre-establishment National Treatment violation (such as the one contained in NAFTA) because domestic investors would not be able to use international arbitration to settle disputes with their own governments.

Mindful that home states may have little legal capacity or desire to control their corporations' activities abroad (as may be the case with BRICs), host states that are at risk of ignoring environmental assessment processes in order to attract foreign direct investment could be compelled to insist upon these processes through a "Safe Haven" type clause in the relevant BIT. Such a clause would state that mandatory full environmental impact assessment process with stakeholder consultation would not amount to regulatory expropriation, provided that the requirement was not imposed in a discriminatory or arbitrary fashion. As noted above there is a potential that an onerous assessment procedure could undermine the profitability of an enterprise, just as there is a potential that an investor could claim (illegitimately) that this process was unfair in order to ground a claim of expropriation. By insulating the host state from this type of claim, host states would be more willing to require foreign investors to complete the environmental assessment process. As BIT practice began to include such clauses, developing states would no longer need to compete with each other for the lowest environmental standards. This could represent a potential solution to the three state problem discussed earlier.

It may be that the best way to ensure the participation of affected citizen groups in environmentally hazardous investment projects is to look beyond the sphere of international investment law as enshrined in various bilateral instruments and instead into the domain of human rights, such as those which are enforceable by

citizens through fora such as regional human rights tribunals. A full discussion of this possibility is beyond the scope of this article.¹⁰⁹

9. Conclusion

Many foreign investment projects undertaken in the developing world raise serious environmental risks and the views of affected citizens should be sought as a component of environmental assessment before these investments are established and harm ensues. This is particularly the case where investments originate from states that do not have an advanced tradition of environmental protection, such as the emerging economies. The investment credit agency policies discussed above show a positive tendency to require environmental assessment, often with public consultation, as a pre-condition of financing. In order to properly scrutinize the environmental risks of foreign investment beyond financing stage, similar requirements must feature in BITs and cover the pre-establishment phase of an investment (before environmental hazards occur) not simply at the stage of dispute settlement. Access to international dispute settlement and transparency requirements may permit the imposition of mandatory environmental assessment at the pre-establishment phase even where this might transgress a more broad National Treatment commitment.

The need for public participation in international investment law underpins the necessity of proceduralism in international law generally. The participatory issues discussed herein could equally be applied to cultural, human rights or other public interest concerns that face citizens. As Craik comments, “transnationalism” recognizes that there are limits to the capacity of the state to represent divergent

¹⁰⁹ See e.g. Doyle, above note 1; M Fitzmaurice and J Marshall, ‘The Human Right to a Clean Environment – Phantom or Reality?’ 76 *Nordic J of International L* 103 (2007) and JS Glazebrook, ‘Human Rights and the Environment’ 40 *Victoria U of Wellington L R* 293 (2009)

interests, accordingly many attempts to ensure appropriate representation of such interests will manifest themselves in rules of participation.¹¹⁰ While substantive environmental protections may never be achieved, as witnessed by the failures of the Kyoto Protocol and the recent impasse of the Copenhagen Conference, a process-oriented approach may accomplish limited satisfaction among affected groups. Still, as Richardson observes, consultation is different from consent,¹¹¹ and any attempt to mandate the approval of citizens for investment projects, rather than merely disseminate information to them and receive their comments, will be a far more difficult endeavour. While this might not achieve the ideal level of self-determination so vital to communities around the world, it should operate as a minimum form of environmental oversight that does not unduly threaten the liberalization of investment flows that is in the economic interests of all.

¹¹⁰ Craik above note 3 at 259-260

¹¹¹ Richardson above note 9 at 506