

**Should Environmental Regulations be
Exempt from the Expropriation Clause
in the China's BITs?**

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.Introduction

A. International Investment Treaty

Purposes of International Investment Treaty

- **Establish Investor-State Dispute Arbitration**
- **Provide Protection against Expropriation**
- **Establish Treatment Standard:**
 - **1.Fair and Equitable Treatment**
 - **2.Most Favored Nation Treatment**
 - **3.National Treatment**
 - **4.Non-Discrimination**
 - **5.Full Protection and Security**

Sources of International Investment Treaty

- **Bilateral Investment Treaty (BIT)**
- **Investment Chapter in Free Trade Agreement (FTA)**
- **Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)**

B. Practice of NAFTA Chapter 11: Investors' Benefits v. Public Interests

- **Metalclad Co. v. United Mexico States**
 - **Case No. ARB(AF)/97/1**

What is Metalclad's Allegation?

- **Mexico, through its local government, interfered with its development and operation of a hazardous waste landfill.**
- **Mexican government's conduct has violated Chapter 11 under NAFTA.**

Key Points of Facts

- **May 1993 , local government of Mexico granted Metalclad a state land use permit to construct the landfill.**
- **Metalclad began to construct the landfill.**

Key Points of Facts

- **May 1994, federal government of Mexico denied that local government's agreement or support had ever been obtained, as the result of an environmental audit of the site.**

Key Points of Facts

- **Sep.23,1997, the Local Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus.**
- **The Natural Area encompasses the area of the landfill.**



The Tribunal's Decision

- **Mexico does not provide a transparent, clear and predictable legal framework.**
- **Mexico violates the Art. 1110 of NAFTA: Expropriation Clause.**

Award

- **Mexico loses and pays to Metalclad the amount of \$16,685,000.00.**

. Situation in China

- **Over 110 BITs**
- **China's Reservation in ICSID Convention:**
 - *“the Chinese Government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization.”*

. Situation in China

- 1980-2000, Old Generation BITs: the procedural requirements have been **rigid.**
- 2000-, New Generation BITs: **Unconditional Consent**
- Netherlands, Germany

New Problem Arising

- **Protection of Foreign Investors' Interest**



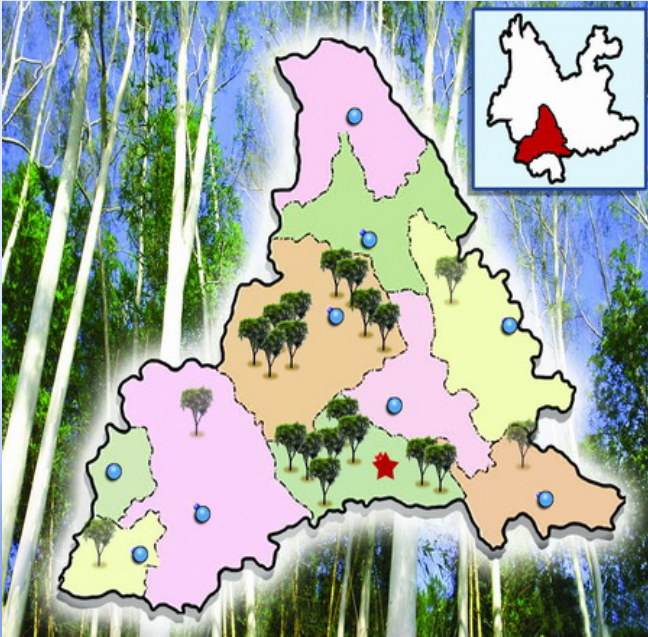
- **Regulatory Authority of Host Countries**

- **Investment Liberalization**



- **Public Health, Environmental Protection**

Asia Pulp & Paper Co.,Ltd, (APP) in China



- M&A Agreement between APP and a company owned by Local Government
- UNESCO World Heritage List

The Disaster of Eucalyptus in South China

- **Harmful Characteristics** of Eucalyptus:
- Demanding more nutrients and water
- Become the enemy of the local vegetation
- Destroy the balance between the soil and water.

Relic of Grand Fir of 300 Years Old was cut down



Should China compensate APP?

- APP's expected-interest has been damaged, whether **China** should compensate APP according to certain BIT's **Expropriation Clause** similar to Article 1110 under NAFTA?

Is There Any Resolution?

- **How to draw a line between necessary protection of the foreign investors' benefit and the environmental protection of host country?**

. Conclusion

- **More opennness in the proceedings**
- **Clearer statutory definitions**
- **More procedural safeguards**