

***The negative impact of foreign investment to the environment of
host country and contribution of the arbitration clause on it.
L'impact négatif de l'investissement étranger sur l'environnement
du pays d'accueil et la contribution de la clause compromissoire
sur celui-ci.***

HASSEN NAOUFEL (*)
PhD student
Faculty of Law, University of Algiers 3,
hessen.naoufel@gmail.com

BAADJI NOUREDDINE
PROFESSOR
Faculty of Law, University of Algiers 3,
Baadji.nouredine1@gmail.com

Date of send:16/03/2021

date of acceptance: 23/03/2021

date of publication: 25/01/2022

abstract:

Through this study, we will try to address one of the most sensitive topics of our time for states hosting foreign investments; it is inconceivable that modern investment contracts do not contain an arbitration clause, which is considered a weapon for the foreign investor against the host state if it subsequently finds that the investment project may harm its environment. In this study, we will describe practical cases from which neither developing nor developed countries have been handed over simply because they try to put in place some measures that would conserve the environment, the foreign investor will use the arms of the arbitration clause to claim imaginary damages. Which causes those states to reverse their decision at the expense of the cleanliness of their environment.

Keywords: *Arbitration clause; investment contracts; environmental conservation; host country.*

(*)Author Sent: HASSEN NAOUFEL

Résumé:

À travers cette étude, nous tenterons d'aborder l'un des sujets les plus sensibles de notre temps pour les États accueillant des investissements étrangers; il est inconcevable que les contrats d'investissement modernes ne contiennent pas de clause d'arbitrage, qui est considérée comme une arme pour l'investisseur étranger contre l'État d'accueil s'il constate par la suite que le projet d'investissement peut nuire à son environnement. Dans cette étude, nous décrirons des cas pratiques dont ni les pays en développement ni les pays développés n'ont été remis simplement parce qu'ils tentent de mettre en place des mesures qui préserveraient l'environnement, l'investisseur étranger utilisera la clause de l'arbitrage comme excuse pour réclamer des dommages-intérêts exagérés. Ce qui amène ces États à revenir sur leur décision au détriment de la préservation de leur environnement..

Keywords *Clause d'arbitrage; contrats d'investissement; conservation de l'environnement; pays hôte.*

Introduction :

No one can deny the positive effects of foreign investments on the national economy of the host country. Whereas, it leads to the transfer of advanced technology, the use of modern management methods, the development of the local product, the adoption of modern marketing methods, and the work to provide a renewable source of income that contributes to financing development programs in developing countries that suffer from decline the volume of domestic savings. As well as, increasing exports by facilitating the access of products to international markets, also, it is considered a source for raising the efficiency of human resources through its effective contribution to the transfer of knowledge, education and training of these resources. In addition, it has a role in raising the level of competition with local companies in a manner that leads to a reduction of monopoly and stimulates the company to improve the quality of products and services¹.

In spite of this, foreign investment has negative economic and political effects that may become very dangerous in the event of an ill-considered openness. Perhaps, the most important of these economic negative effects is the control of foreign capital over the ownership of shares and companies, which becomes under the mercy of foreign investors and the increase of speculation in a way that leads to the shaking of the financial market. Which creating crises, the collapse of the national currency, and the deterioration of the national economy. Foreign investments seek to take advantage of the possibilities, advantages and investment opportunities, and they are not hesitate to a sudden withdrawal from this market when they achieve their temporary objectives, especially if they find more attractive opportunities in other markets, which leads to collapses or crises in the financial markets of the host countries. In addition, foreign investments depend in their policies on the intensification of cheap workers that they use from outside the borders of the host country, whereas, they constitute a real burden on the state, whether from the security, economic or social aspect, while it does not work to create local job opportunities and does not train and qualify them. Foreign investments are usually characterized as short-term and temporary investments, and therefore they seek to choose the service sectors that achieve their interim goals, taking advantage of the absence of a development strategy and the weakness of laws and legislations, and do not actually contribute to the economic development of the host country. Foreign investments also contribute to strengthening the consumer tendency of the local population in order to market its products and services and with the aim of benefiting from the volume of private and government consumption spending, in order to achieve record profits within a limited period. In witness thereof, it seeks to flood the market with consumer goods, taking advantage of its purchasing power and the ability of its products to compete with national goods and products².

In addition to the economic risks, there are political risks, as practical experiences have shown that multinational companies push their governments

to direct political and military intervention in developing countries to protect their interests. Whereas, some countries used to overthrow heads of government simply to expropriate companies affiliated to them or to pressure ministers in order to obtain special privileges³.

In addition to, all these economic and political risks, there are serious effects that foreign investments may have on the national environment of the host country, which vary from pollution of ground and surface water to unpleasant odors, noise, and toxic metal and gas leaks. Practical applications have shown that the foreign investor was able to use the arbitration clause included in the investment contract as a weapon against the host country, which intervenes in order to protect its environment from the risks of these investments. As a result, the host countries found themselves towards foreign investments unable to protect its citizens who were physically and environmentally affected by these investments, which we will highlight through this research.

Importance of this topic:

The importance of this study lies in determining the negative effects of foreign investments on the environment of the host country. Whereas, these countries agree to international and bilateral agreements and conclude contracts for investments without taking into account the negative effects and do not give the necessary importance to the existence of the arbitration clause, which is considered the weighted Weigh in the contractual dispute. When the negative effects of water and climate pollution and cut trees starts and demand of human rights organizations to end the investment. The state is under pressure take a decision to unilaterally terminate the investment contract, thinking that it is the owner of the power and sovereignty and cannot be held accountable. But, it collides with a bitter reality and finds itself in front of three people who issue a decision against it fines it with fancy sums, with compound benefits linked to the implementation period, so it loses sums that it cannot bear, it and may sometimes exceed its annual budget.

Accordingly, it was necessary to research the subject to find ways to control this equation.

The Problematic:

Through this research, we try to move away from jurisprudential theorizing and study the practical cases and arbitration issues that have affected the global environmental system under the demand of protecting investments, in which the arbitration clause has contributed substantially. Therefore, the problem of research is limited to how the host country protects its environment while preserving contractual obligations in the field of foreign investments with the existence of an arbitration clause.

Target:

Based on this problem, it is estimated to search for possible solutions in front of the host country that lies between the hammer of protecting its environment and the anvil of fulfilling its obligations and contracting with the presence of the arbitration clause. Based on the practical data of the issues that will be studied, a set of proposals can be drawn up to address the defects and preserve balances.

Curriculum:

This study is based on the descriptive and analytical approach through a description of the course of contemporary cases in which the arbitration judiciary has been ruled and then analyzed to find the gaps that must be resolved until we reach the required results.

Plan :

The study was divided into two basic topics, the first of which is the negative impact of foreign investments on the environment of the host country, which we divided into two themes, the first is a Turkish case with (Eurogold) Company, and the second is Canada's case with (Lone Pine Resources). The second topic is the contribution of the arbitration clause to the negative impact of investment on the environment of the host country. It is divided into two themes, the first of which is the case of (Vattenfall) company against Germany and the second we have allocated it to a group of recent cases

related to damage to foreign investment in the environment and the contributions of the arbitration clause in that.

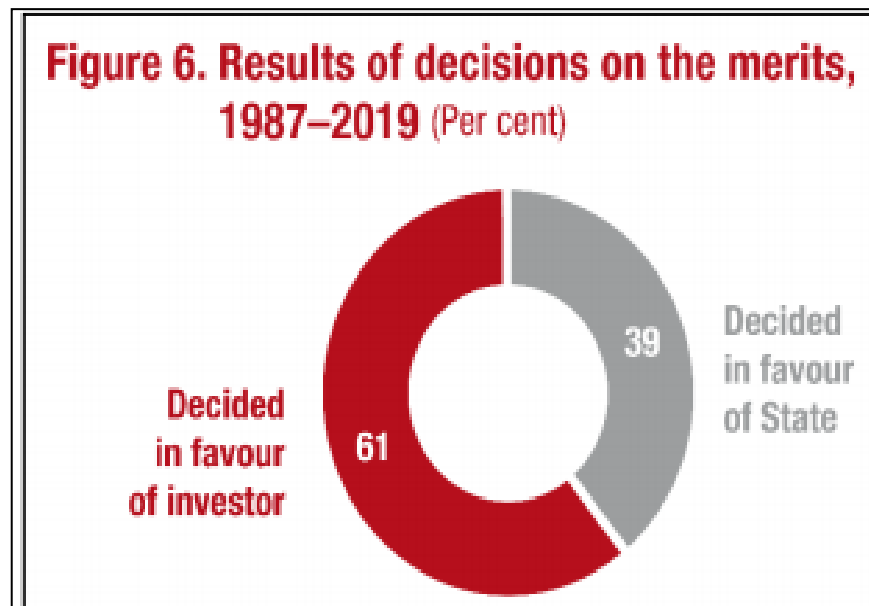
The First Topic : The Negative Impact of Foreign Investments on the Environment of the Host Country

Despite the benefit, that foreign investment brings to the host countries in general, but it has negative effects on the host country, which leads to the consequence of reducing the benefit of the investment or its absence if these risks are great, especially on the environment of the country. Therefore, all of the countries that allowed foreign investors to establish industrial and commercial projects on their lands under the umbrella of encouraging investment international agreements (such as the (GATT) Agreement, the (NAFTA) Agreement, the World Trade Organization (WTO) and the Washington Agreement of the year 1965). On the other hand, bilateral agreements (whose number exceeded 3,200 Convention)⁴, which had a negative impact on the pollution of its environment. These countries found themselves faced two options : either to preserve the environment, which requires them to give up the contracts they had concluded with foreign investors in exchange for paying compensation to them, or to allow the environment to be polluted and the spread of diseases. Therefore, they do not interfere to protect the environment by enacting national legislation that preserves the environment, thus generating an environment Devastating to the lives of the residents of a place to invest from many fatal diseases and many deaths⁵.

In the event that countries refuse to succumb to the negative effects of investment, they find themselves before the arbitration courts, as they are required to pay imaginary compensation. According to the latest statistics of the United Nations Conference on Trade and Development regarding the number of cases filed by investors against countries, according to the growth rate, we find that 25% of the cases filed against developed countries, while 75% of the total cases were filed against developing countries⁶, In addition,

61% of the cases filed were ruled in favor of the foreign investor, while 39% were in favor of countries, according to the same report according to the following chart:

Figure 1 : the result of the provisions according to the beneficiary (the state and the foreign investor)

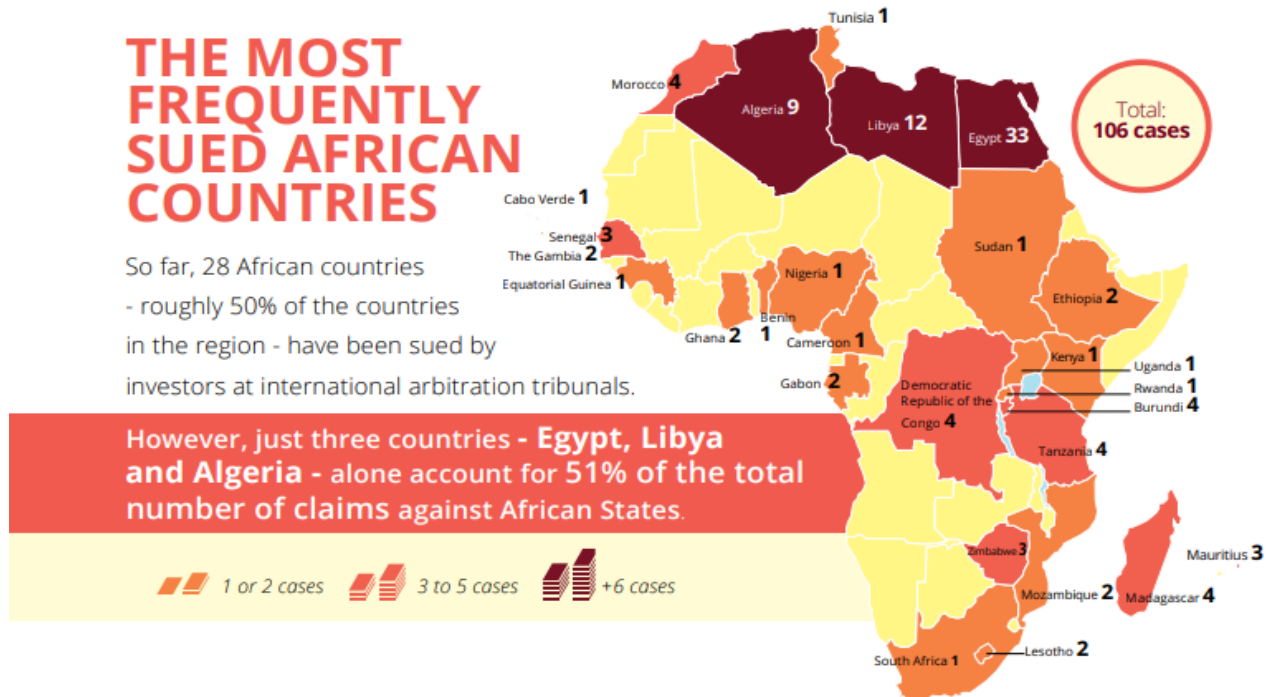


Source : Report of the United Nations Conference on Trade and Development on issues of dispute settlement between investors and states for the year 2019⁷.

However, what should be noted in this regard is that the United States of America is a party to 50 investment agreements out of more than 3000 and has faced only 13 of the dispute settlement system cases through arbitration and has never lost one⁸.

On the other hand, Africa was the most affected by investment-related arbitration cases, as the report issued by the Trans-International Institute in Amsterdam in October 2019, which stated that African countries were exposed to 106 declared arbitration cases based on investment agreements. That were arbitrated in favor of investors in 64% of the cases that ended either by decision of the court or a settlement between the parties. Below is a diagram showing that :

Figure No. 2 : A diagram showing the number of arbitration cases that African countries have been subjected to.



Source : Report of the Transnational Institute in Amsterdam in October 2019⁹. Egypt, the country that has experienced the highest number of claims, has so far been ordered or agreed to pay investors USD 2.1 billion. Next in terms of magnitude of awards is Libya, with an amount of USD 1.4 billion and then Algeria with USD 920 million. These amounts are, however, in fact likely to be much higher than the stated figures above, since information on amounts is only available in a small proportion of cases., and the following is a figure showing that :

Figure No. 3 : A Graph showing the largest amounts of money paid by African countries.

Source: Report of the Transnational Institute in Amsterdam in October 2019¹⁰.

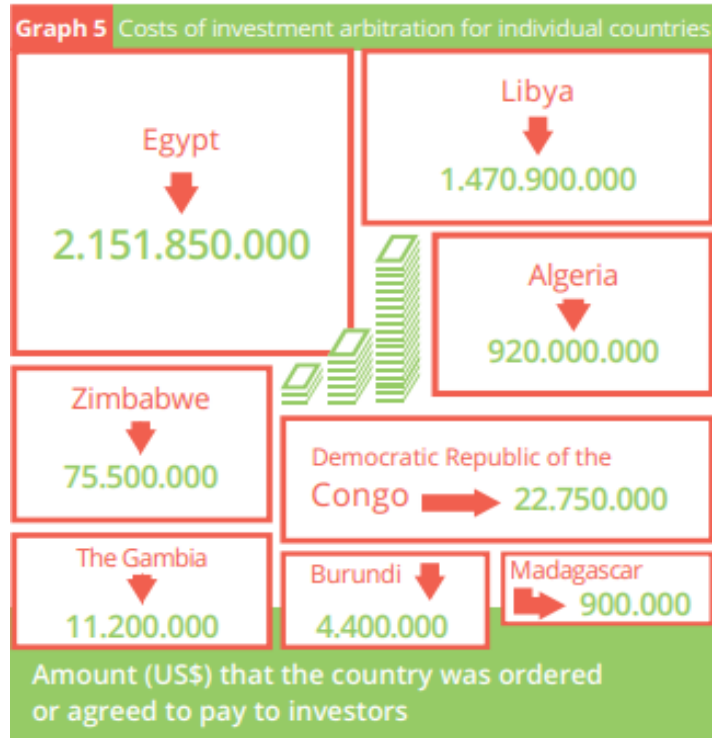
African States have been ordered (by the arbitrators) or agreed (as a result of a settlement) to pay investors USD 4.6 billion. The amounts paid in one third of the cases remain unknown, so this number is likely to, in fact, be much higher. However, this figure alone is equivalent to

almost three times the GDP of The Gambia or twice the GDP of the Central African Republic in 2018. It is also equivalent to the entire amount of development aid received by Ethiopia in 2018.

The sums that the host countries were forced to invest to defend as compensation to the foreign investor came as a result of the state being forced to terminate the contract for one reason or another, seeking to achieve the public interest. However, among the most prominent reasons that call for those countries to terminate the investment contract by unilateral will is the negative impact of investment on the environment of the host country. We will review two cases that were subject to major environmental threats as a result of investment contracts, the first of which is Turkey's case with the (Eurogold) company, and the second is Canada's case with the (Lone Pine Resources) company as follows :

First Theme : Turkey's case with the (Eurogold) company

This issue has become a matter of public opinion in Turkey, where citizens, with the support of human rights organizations, have resorted to the national



judiciary in order to annul the contract that caused great environmental pollution and the details of the case as follows :

Eurogold, which was established in partnership with Germany and Australia, obtained a mining license from the Turkish authorities on 16 / 08 / 1989, in order to dig a gold mine. In 1996, 2,500 olive and pine trees were cut down. On 15 / 11 / 1996, the villagers crossed the Izmir-Ganakkale road in front of traffic, but their attempt was not enough to cancel the mine. The gold mine was opened in 2000. The mine operates using toxic cyanide through a technique that named "pile filtering", which leaves behind giant pools of contaminated water after gold is removed from crushed rocks that have been removed from the mine. These pools of dilute cyanide killed thousands of migratory birds that drink from them. Leakage from these ponds also threatens the groundwater and water supply for the local population. In addition, other byproducts of the process form, including mineral deposits such as mercury, lead, and antimony that are associated with a variety of human diseases, particularly fetal abnormalities.

The issue became a matter of public opinion, and it was resorted to judge, so the first rule was issued, stating that there were no health and environmental defects in the construction and operation of the mine. Then they filed an appeal in the Izmir Administrative Court, and at the end of the judicial process, which lasted 4 years, a final rule was issued stating that the Eurogold Mine violates the principle stipulated in Article 17 of the Turkish Constitution. Which states that "Everyone has the right to life and the right to protect him and develop his physical existence, and spiritual". In addition, Article 56 which states" Every person has the right to live in a healthy and decent environment, "and upon which the mine was closed.

The company warned in a special statement in response to the council's decision that hundreds of Turkish companies supporting the mining network are under threat and that more than 380 people who were already working on the project in only Bergama will stop working. Turkey will also lose, according to Erougold's plan, within eight years, more than 2.5 million tons

of milled gold ore, and the company requested compensation of USD 300 million.

As a result, the company was allowed to operate the mine in May 2001, and the extraction started using 657 kilograms of cyanide per day to obtain 10 kilograms of gold despite the council's decision¹¹.

This case shows that the fear of the huge compensation demanded by Erougold has forced the Turkish government not to terminate the contract with this company. As a result, the company continued to produce gold and silver using the toxic substance cyanide, thus generating a devastating environment, many fatal diseases and many deaths.

Second Theme : Canada's case with the (Lone Pine Resources)

In this case, the public opinion also moved to reduce pollution resulting from the production of shale gas, Canada was forced to terminate the contract despite the compensation it may pay, and the details of the case as follows :

In 2006, the American Lone Pine Company obtained a license from the Canadian government to engage in the activity of exploration and production of oil, natural gas and shale gas in Quebec and the northwestern provinces. Through a technique known as hydraulic fracturing (a technique through which rocks are cracked by compressed means, which makes natural gas oil and shale flow more freely). Where Quebec sits on a huge reserve of shale gas, estimated at 181 trillion cubic feet, as Canada produced in May 2010 approximately 5.4 million cubic feet of gas.

After that, public pressure appeared on Quebec to stop the extraction of shale gas, which is a pollutant of groundwater sources and wastes water greatly to extract shale gas, contributes to environmental pollution, and inflicts health problems for individuals as one of the causes of cancer. This prompted Quebec to prepare an extractive environmental study on the development of hydrocarbons in the downstream marine basin and the northwestern bay of St. Lawrence. Which concluded that this environment is not conducive to hydrocarbon development activities, with risks to the human and biophysical environment associated with shale gas development activities that include

hydraulic fracturing. (The study found that hydraulic fracturing technology could have significant impacts on neighboring communities. For example, the process can emit unpleasant odors strong enough to cause complaints within 600 meters of the fracturing platform. In addition, work can generate enough noise to disturb people who live within 4 kilometers, and these industrial activities can have consequences for the quality of the environment, especially on the quality of surface and groundwater). Based on these data, a law was issued on 13 / 06 / 2011 to limit oil and gas activities, according to which all exploration licenses in the St. Lawrence River, were canceled¹².

Accordingly, the Lone Pine Resources license was canceled, and accordingly the latter filed a lawsuit requesting that it be granted compensation estimated at USD 119 million, on the grounds that canceling the river's license violates Canada's obligations under NAFTA (North American Free Trade Agreements)¹³, especially Chapter Eleven therein. Article 1105 (American investors are granted treatment in accordance with international law in a manner that guarantees fair and equitable treatment and full protection and security). Article 1110 (it is prohibited to confiscate American investors' investments without public interest, without legal procedures, and without paying any compensation). It is considered that the issuance of this law is an arbitrary and unfair measure based on political foundations and not on actual environmental grounds. It also claims that this measure violates the legitimate expectations it had when it decided to invest in Quebec, and it has already spent millions of dollars and a lot of time and human resources in Quebec to obtain permits and approvals from the Quebec government for oil and gas exploration¹⁴.

The case is currently on the agenda of the International Center for Arbitration for Settlement of Investment Disputes (ICSID) cases. According to the latest data, on 21 / 09 / 2020, the arbitration court was reconstituted according to the UNCITRAL Arbitration Rules and Chapter 11 of the North American Free Trade Agreement after the death of one of the arbitrators. Currently its members are; Albert Jan Van Den Berg (Dutch) as President,

David R. Hay (Canadian) appointed by the Plaintiff, Brigitte Stern (French) appointed by the Defendant¹⁵.

Second Topic : The Contribution of the Arbitration Clause to the Negative Impact of Investment on the Environment of the Host Country

There is no doubt that the existence of the arbitration clause is considered an effective weapon that the foreign investor declares in confronting the host country that wants to preserve the environment in many practical cases the investor bargains with the condition of arbitration and when any dispute resorts to file a fictional compensation lawsuit with the arbitration courts. Some jurists even said, "These cases revealed that the foreign investor is now contracting with his eye on Exceed, meaning that he is betting on the emergence of the dispute and the profitability of arbitration rather than focusing on contributing to the development plan"¹⁶, Addition to that, the arbitration system allows ordinary people to decide on the cases of the nation and sovereign states, as the Spanish arbitrator Fernandez Armisto says the following : "When I wake up at night and think about arbitration, I am surprised usually because sovereign states have already agreed to arbitration in the field of investment. Three individuals are given the authority to review all government procedures, all court decisions, and all laws and regulations issued by Parliament, without any restriction or action from the appeal procedures"¹⁷.

In fact, it is perplexing that arbitrators ignore the basic principles of states such as the principle of "respecting national legislation," "respecting judicial rulings issued by the highest local courts," "protecting human rights," and "preserving the environment." The one-way investor protection path did not contribute to establishing a culture of cooperation between investors and states, but rather fueled a fierce trend towards litigation and generated an increasing number of arbitration decisions that outweigh interest in human rights and environmental preservation¹⁸.

In the following, we cite a case in which the foreign investor proclaim the arbitration clause, and the host country was forced to abandon its decisions regarding environmental preservation in exchange for not filing a compensation lawsuit before the arbitration courts.

First Theme : the case of (Vattenfall) company against Germany

Although Germany is a developed country and an economic power, it also suffered from investments that negatively affected its environment, and a human chain of more than 1,200 people moved to stop the contract. The details of the case date back to 2004, when the Swedish company Vattenfall announced (a multinational company owned by the Swedish government with several investments outside Sweden. The company is working to generate energy in Denmark, Finland, Germany, the Netherlands and the United Kingdom, the name of the company in Swedish is "Waterfall", which is an abbreviation of its original name Royal Waterfall Board) announced its plan to build a coal-fired power plant in the German region of Hamburg. The project has caused great controversy, and many environmental and political universities have allied themselves against the establishment of the plant, considering that it will be much larger than required to meet Hamburg's energy needs and will inflict unnecessarily devastating losses on the environment. As there is a variety of alternatives that are smaller and more environmentally friendly, and in October 2007, about 1,200 citizens signed an environmental card regarding their objection to the power plant.

Despite public opposition, the city of Hamburg agreed to a temporary contract with Vattenfall in 2007 to build the station, which included some environmental restrictions in terms of the plant's impact on the water in the River Elbe by allowing Vattenfall to proceed with some aspects of the construction. Final approval was granted in September 2008. Additional restrictions included the impact of the power plant on the Elbe River in terms of water volume, temperature and oxygen content.

In April 2009, Vattenfall International Arbitration Company resorted to the ICSID Center against the German state, demanding compensation amounting to 1.4 billion euros due to the environmental ban imposed on power stations operating on burning coal, based on the provisions of the Energy Charter Treaty¹⁹, (Which is a multilateral agreement that was signed in December 1994, come into force on 16 / 04 / 1998. It created a multilateral framework for cooperation in the field of energy in the long term among its members. Currently, there are 57 countries whose signed on the agreement, which officially includes European countries as well as one international organization is the European Union). Which stipulates that the foreign investor must be treated as a treatment that is no less favorable to investors in the host countries and his treatment is no less favorable than the treatment of investors in other countries and that compensation for him for expropriation. In addition, to deal with it at all times in a "fair and equitable" manner. Disputes that arise between investors and the states parties under this treaty can be referred to arbitration.

In March 2011, a ruling was issued for the amicable settlement of the dispute, after the German government agreed to ease restrictions on protecting rivers and local wildlife. Since 2012, Vattenfall has been charged Germany again, seeking compensation in the amount of USD 4.3 billion in addition to interest for lost profits from two nuclear reactors, after Germany's gradual withdrawal from nuclear power after the Fukushima disaster²⁰.

As Germany suffers from great pressure internally, a coalition of environmental protection organizations, renewable energy unions and a number of German youth and religious influences organized a large demonstration against investment in the use of nuclear energy in April 2010. As nearly 120,000 demonstrators formed a 120-kilometer-long human chain between the Bronsbüttel, Brockdorff and Kromel reactors in northern Germany. Ten thousand demonstrators surrounded the oldest German reactor in the town of Pebbles in the state of Hesse, which was operational in 1994.

This came two days before the twenty-fourth anniversary of the Chernobyl reactor disaster in Ukraine. The demonstrators need the German government's plan to postpone the closure of nearly 17 nuclear reactors by 2020, a decision taken by the government in the year 2000. They demanded the enactment of a law that defines the timeframe for shutting down nuclear reactors in the country and dispensing with nuclear energy completely. Vattenfall demanded compensation of 4.3 million euros from Germany for the damages caused by the German government's decision to dismantle nuclear reactors in Germany by 2022, some of which the Swedish company owns²¹.

if Germany, which is a developed country and a global economic power, is among the countries most preserving human rights and the environment, and has yielded in to this system for fear of exaggerated compensation and has eased the environmental restrictions imposed to follow, so what about developing countries that are politically and economically weak?

Many of the worst cases of environmental damage occur in countries under the control of oppressive authoritarian regimes, where the affected communities have no way to hold governments accountable for their actions. In Nigeria, for example, where oil exports amount to 90% of foreign exchange, the military governor General / Sani Abacha sacrificed the health of entire villages to absorb multinational companies such as Royal / Dutch Shell. Responding to the protests with violence, the Abacha regime sparked international outrage (despite the lack of economic sanctions) when it executed the writer / activist / SARO WIWA, Nobel Peace Prize nominee, and eight other leaders of the Ogoni people. SARO WIWA and his colleagues were accused of documenting the toxic leaks and the military crackdown that continues to destroy their oil-rich homeland in the Niger Delta.

Second Theme : Recent Cases Related to Damage to Foreign Investment in the Environment

ALFRED MORRIS DE ZAYAS, independent expert on establishing a democratic and equitable international order to the United Nations Human Rights Council at its thirtieth session, which dealt with the negative effects of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international system, with a focus on their effects on the international system. Democratic government. Including, enjoyment of civil, cultural, economic, political, social and environmental rights. The report mentioned a group of cases that dealt with investment disputes that arose as a result of the direct impact of investment on the environment of the host country, and below we briefly list some of them²².

- On 14 / 04 / 1997, the American company Ethyl Canada Inc. (a corporation in Virginia with a branch in Canada) filed a complaint claiming that the Canadian law prohibiting the import of MMT that is added to gasoline violates Canada's obligations to demand compensation of USD 200 million. On 25 / 04 / 1997 Canadian Parliament passed the Manganese-Based Fuel Additives Act. The law was passed in response to environmental concerns focusing on vehicle emissions and the potential toxic effects of airborne manganese from vehicle exhausts, and the possibility that continued use of MMT in Canadian gasoline could reduce warranty coverage for new vehicles. It could frustrate efforts to harmonize Canadian fuel technology and emissions standards. Instead of Canada defending its decision, it withdrew the ban despite the consequent health risks²³.

- in METALCLAD case v. Mexico, the company pleaded against Mexico for refusing to allow it to build a landfill that would contaminate the Mexican water supply (the site was contaminated with 55,000 barrels, of which 20,000 tons were toxic and explosive waste). The arbitrators awarded Metal Clad USD 16.79 million in compensation for losses incurred due to the ban²⁴.

Among the best environmentally destructive investment cases was what the Chevron Corporation and Texaco Petroleum Corporation (an American multinational company, headquartered in California, USA, operating in more than 180 countries around the world) in Ecuador from 1964 to 1992. Where

it was directly responsible for At least 71 million liters of oil waste and 64 million liters of crude oil leaked into an area of more than a million hectares in the Ecuadorian Amazon, which caused serious environmental damage and led to a deterioration in the quality of life of citizens in local communities. In total, 80 thousand tons of toxic waste has been poured into the Amazon forests, polluting the fresh water resources that are essential for the local population and leading to sudden deaths, many cancerous diseases and other chronic diseases that have killed the people who live in that region, especially children, women and the elderly²⁵.

In 2007, the inhabitants of the Amazon forest filed a lawsuit against Chevron, demanding compensation of USD 9 billion, and in 2009, an Ecuadorian court imposed a fine of USD 9 billion for the environmental damage caused by its activities. However, the company refused to pay the fine and resorted to UNCITRAL to demand compensation for the lost profits, and the case is still pending²⁶.

In the case of OCCIDENTAL PETROLEUM CORPORATION v. Ecuador for the purpose of exploration and exploitation of hydrocarbons in a part of the Ecuadorian Amazon. Where the partnership contract contained an arbitration clause and a clause not to sell the company's shares, and after the company sold a group of its shares, the Ecuadorian government terminated the contract and confiscated the ownership of land and oil equipment, which is the apparent reason. The background to the decision to cancel the contract is what the company caused from environmental damage, and Ecuador had suffered Previous from pollution left by Texaco and Chevron. The arbitration court recognized that Occidental had violated the law and should have requested prior authorization from the Ecuadorian authorities as stipulated in the contract. The court concluded that Occidental had violated the government contract and violated Ecuadorian law. However, it held that Ecuador did not suffer financially and therefore the practice the government's legal right to terminate the contract is not commensurate with the damage it suffered, and the case ended with an arbitration award to pay

Occidental USD 1.76 billion to become USD 2.4 billion if the benefits were added to it. It is the largest amount awarded by an ICSID court. This amount is what workers spend on healthcare every year for more than seven million Ecuadorians, nearly half of the population. This amount represents 16% of the country's external debt, or 11% of all goods exported annually. The combined annual income of the poorest 20% of Ecuador's population is approximately 3 million people²⁷. It is noticeable that Ecuador had the right, according to Ecuadorian law, to cancel the license. Nevertheless, the arbitration committee fined the Ecuadorian government, and it had the right, according to Ecuadorian law, to cancel the license. Nevertheless, the arbitration panel fined the Ecuadorian government an imaginary amount, in a ruling that asked a lot of ink, and it not only had an impact on Ecuador, but also affected the entire global investment scene and the arbitration system as a state means of resolving investment disputes²⁸.

Conclusion :

The number of bilateral agreements around the world has exceeded 3,200, and most of these treaties were signed by states in the late 1980s and early 1990s. Before the start of the current explosion of investor exaggerated claims under these agreements in the late 1990s and early 2000s. Most of its provisions provide for foreign investors, legal protection, including the right to "fair and equitable treatment" and "full protection and security" and "freedom to transfer means" and "the right not to be confiscated directly or indirectly without obtaining full compensation." Some of these principles are in vague terms, which gave the arbitrators wide discretionary power in their interpretation and application, and consequently, most of the judgments were issued in favor of the foreign investor.

Accordingly, it is necessary to review and revise the existing bilateral investment treaties and free trade agreements, which are treaties and agreements that were never intended to turn into restrictions for states. Then considering reforming the system of settling disputes between investors and

states, whereby the protective measures taken by the state that expose its citizens to an environmental risk due to the unforeseen effects of investing can be considered justified under the principle of force majeure.

Objectively speaking, the bodies to settle disputes between investors and states cannot exempt investment companies from their responsibilities of compensating for the damage they cause as a result of polluting the environment of the host country, as there are great opportunities for companies and investors to achieve legitimate profits, taking into account global environmental standards.

Indeed, arbitration processes in the investor-state dispute settlement system have led to disturbance in the international system, and the world will one day admit that settling investor-state disputes through the current arbitration system is a wrong experience.

Results :

- Countries directed to attract foreign investment and created all means to bring in foreign capital by providing guarantees and tax incentives without careful study of investment contracts.*
- These countries hosting foreign investment agreed to include the arbitration clause imposed by most of the investing companies without awareness of the future impact.*
- Foreign investment had an impure negative impact that was later evidenced by the conclusion of the contract with the beginning of the investment activity, especially in the field of extractive industries, which had a significant negative impact on the environment of the host country.*
- After the damage to their environment, the host countries dealt unilaterally by terminating the contract and confiscating the investment project, relying on the privileges of the public authority.*
- Once the contract is terminated, the foreign investor resorts to arbitration courts that have issued judgments at a rate of 61% in favor of the foreign*

investor with compensations that were previously in millions of dollars and are now billions of dollars.

- The state finds itself faced with two issues, either to pay an imaginary compensation, or not to prejudice the investment despite the negative impacts on the environment.*
- Most of the countries waive the standards for preserving the environment in exchange for not paying large financial compensation to the investor who was the cause of polluting the environment through the investment project.*
- Unconsidered investment causes catastrophic environmental damage that affects several generations of the local population and leads to many dangerous and intractable diseases.*

Proposals :

In order to avoid these problems occurring to countries as a result of investment through the foreign investor's reliance on the arbitration clause to undermine their authority to protect their environment, we propose a set of recommendations as follows :

- States must be careful when concluding bilateral agreements or trade and investment agreements that these agreements do not undermine their ability to protect their environment. Take immediate steps to revise second investment treaties and free trade agreements with negative impacts on the environment with the inclusion of a clause stipulating the payment of compensation for environmental, health and other damages. .*
- The "current" arbitration system as a means of resolving investment disputes should be excluded in all bilateral and state investment agreements, with the matter being allocated to national courts or to regional or international instigation courts that are explicitly committed to recognizing the right of states to protect their environment.*
- Countries that being victim to arbitration decisions that violate their right to protect their environment should unite and put in place joint measures to*

refuse the implementation of arbitration awards that do not take this right into consideration.

- UNCITRAL, as the principal legal body in the United Nations system, should work on preparing an international agreement to frame the arbitration process on which the arbitrators rely during the issuance of their judgment, with a limit for compensation amounts that are in line with immediate and not future damage.

margins:

1 MUHAMMAD KHASIR AL-JIBOURI (MUHAMMAD), Foreign Investment Guarantees, Al-Halabi Human Rights Publications, Beirut, 2017, pages 34-36.

2 AHMED MAJEED AL-HOURI (ABDEL SATTAR), Legal Protection of Foreign Investments, New University House, Alexandria, 2013, pages 56-58.

3 HERTZ (TORINA), Silent Dominance - Global Capitalism and the Death of Democracy, translated by SIDQI HATTAB, The World of Knowledge, Cairo, 2007, pp. 128-77.

4 The United Nations Conference on Trade and Development website at the following link (reviewed on 09 / 10 / 2020 at 18 : 25) :

[https : / / investmentpolicy.unctad.org / international-investment-agreements](https://investmentpolicy.unctad.org/international-investment-agreements)

5 HASSAN JASSIM (AMIR) AND YUNUS SALIH (THANOON), Implications for Resorting to Commercial Arbitration in Investment Contract Disputes between Foreign Companies and the Host State of Investment, Tikrit University of Law Journal, Iraq, Volume 5, Issue 19, 2013, Pages 70-69.

6 Report of the United Nations Conference on Trade and Development on Investor-State Dispute Resolution Issues for the year 2019, page 3, the report can be found through the following link (reviewed on 17 / 10 / 2020 at 18 : 25) :

[https : / / unctad.org / system / files / official-document / diaepcbinf2020d6.pdf](https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf)

7 Report of the United Nations Conference on Trade and Development on Investor-State Dispute Resolution Issues for the year 2019, page 5.

8 An article published by GEOFFREY ZIANTES on 26 / 02 / 2015 titled "Questions and Answers in Investor-State Dispute Resolution", available via the following link (reviewed on 17 / 10 / 2020 at 18 : 30) :

[https : / / obamawhitehouse.archives.gov / blog / 2015 / 02 / 26 / investor-state-dispute-settlement-isds-questions-and-answers](https://obamawhitehouse.archives.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers)

9 The report of the Transnational Institute in Amsterdam in October 2019 entitled " in numbers : Impacts of investment arbitration against African states - The impact of

arbitration in investment disputes on African countries", page 3, available at the following link : (reviewed on 15 / 01 / 2020 at 18 : 30) :

https://www.tni.org/files/publication-downloads/isds_africa_arabisch_1010.pdf

10 The report of the Transnational Institute in Amsterdam in October 2019 entitled " in numbers : Impacts of investment arbitration against African states - The impact of arbitration in investment disputes on African countries", page 6.

11 Case's Details :

MUHAMMAD AL-SHENNAWY (WALID), Constitutional Protection of Environmental Rights - A Comparative Study - Dar Al Fikr and Law for Publishing and Distribution, Mansoura, Egypt, Issue 1, 2013, page 97.

AYKUT ÇOBAN, International Arbitration, Sovereignty and Environmental Protection : The Turkish Case, Proceedings of the 2001 Berlin Conference on the Human Dimensions of Global Environmental change "Global Environmental Change and the Nation State", Potsdam, Potsdam Institute for Climate Impact Research, p. 219-220.

12 Details of the study on the damages of hydraulic fracturing technology. (reviewed on 10 / 10 / 2020 at 17 : 00) :

<https://montrealgazette.com/news/quebec/fracking-provides-few-benefits-to-quebec-environmental-review-says>

13 The special report related to Chapter 11 of the NAFTA Agreement in February 2005, issued by Public Citizen's Global Trade Watch at the following link : (reviewed on 10 / 10 / 2020 at 17 : 20) :

https://www.citizen.org/wp-content/uploads/naftareport_final.pdf

14 Refer case details (reviewed on 10 / 10 / 2020 at 17 : 00) :

<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng>

15 Latest updates on the case on the official website of the ICSID Center, (reviewed on 10 / 10 / 2020 at 17 : 00) :

<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/15/2>

16 AL-ASHAAL (ABDULLAH), Egypt International Commercial Arbitration Disputes, AL-TOBJI Foundation, Cairo, Issue 1, 2004-2005, page 115.

17 The commentary in George Monbiot's article entitled "The Transatlantic Trade Deal is a Direct Attack on Democracy" published on the website of the Guardian newspaper, at the following link : (reviewed on 10 / 10 / 2020 at 19 : 00) :

<https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>

18 The report of the "European Center for Constitutional and Human Rights" under the title "Human rights are not applicable in international investment arbitration provisions" in the following link : (reviewed on 10 / 10 / 2020 at 19 : 30) :

[https : / / www.ecchr.eu / fileadmin / Kommentare_Konferenzberichte>Weiteres / Kommentar ICSID tribunal - Human Rights Inapplicable.pdf](https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte>Weiteres/Kommentar ICSID tribunal - Human Rights Inapplicable.pdf)

19 The International Energy Charter, refer the following link : (reviewed on 16 / 10 / 2020 at 16 : 00) :

[https : / / www.energycharter.org / fileadmin / DocumentsMedia / Legal / ECTC-en.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf)

20 Award of case No. (ICSID CASE No. ARB / 09 / 6) on the following link : (reviewed on 17 / 10 / 2020 at 9 : 00) :

[https : / / www.italaw.com / sites / default / files / case-documents / ita0890.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0890.pdf)

Also,

NATHALIE BERNASCONI, Background paper on Vattenfall v. Germany arbitration, International Institute for Sustainable Development, July 2009, available at (reviewed on 17 / 10 / 2020 at 09 : 30) :

[https : / / www.iisd.org / sites / default / files / publications / background_vattenfall_vs_germany.pdf](https://www.iisd.org/sites/default/files/publications/background_vattenfall_vs_germany.pdf)

Also, Case details on ICSID website (reviewed on 17 / 10 / 2020 at 09 : 50) :

[https : / / investmentpolicy.unctad.org / investment-dispute-settlement / cases / 329 / vattenfall-v-germany-i-](https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i-)

21 The report published by the DW news site on 25 / 04 / 2010 at the following link : (reviewed on 17 / 10 / 2020 at 18 : 00) :

[https : / / p.dw.com / p / N5pJ](https://p.dw.com/p/N5pJ)

Also, the report published on the Swedish Radio website (reviewed on 17/10/2020 at 18:20): [https : / / sverigesradio.se / artikel / 5994067](https://sverigesradio.se/artikel/5994067)

22 Report of ALFRED MORRIS DE ZAYAS, independent expert on establishing a democratic and equitable international order to the United Nations Human Rights Council at its thirtieth session, on 14 / 07 / 2015 on the following link : (reviewed on 17 / 10 / 2020 at 18 : 35) :

[https : / / undocs.org / pdf?symbol=ar / A / HRC / 30 / 44](https://undocs.org/pdf?symbol=ar/A/HRC/30/44)

23 Case details of Ethyl Corporation v. Government of Canada, on the following link : (reviewed on 17 / 10 / 2020 at 18 : 40) :

[https : / / www.international.gc.ca / trade-agreements-accords-commerciaux / topics-domaines / disp-diff / ethyl.aspx?lang=eng](https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng)

Also, Award in case on the following link : (reviewed on 17 / 10 / 2020 at 18 : 45) :

[https : / / www.international.gc.ca / trade-agreements-accords-commerciaux / assets / pdfs / disp-diff / ethyl-08.pdf](https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf)

24 Case details of METALCLAD v. MEXICO, on the following link : (reviewed on 17 / 10 / 2020 at 18 : 50) :

<https://www.iisd.org/itn/2018/10/18/metalclad-v-mexico/>

Also, Award (case No. ARB (AF) / 97 / 1) on the following link : (reviewed on 17 / 10 / 2020 at 18 : 45) :

<https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>

25 The comment of the Ecuadorian ambassador to the State of Qatar, Mr. "QABALAN ABI SAAB", on his hosting of the seminars committee at the College of Arts and Sciences at Qatar University on 07 / 04 / 2014, reviewed on the following link : (reviewed on 19 / 10 / 2020 at 19 : 50) :

<https://shrq.me/pmxas>

26 Chevron Corporation and Texaco Petroleum Corporation v. Ecuador Case details, on the following link : (reviewed on 21 / 10 / 2020 at 06 : 30) :

<https://www.italaw.com/cases/257>

27 World Bank statistics about Ecuador for the year 2012, the latest statistics can be reviewed through the following link : (reviewed on 13 / 10 / 2020 at 07 : 00) :

<https://data.worldbank.org/country/ecuador>

28 Award (case No. ARB / 06 / 11) on the following link : (reviewed on 14 / 10 / 2020 at 07 : 00) :

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC2672_En.pdf

Also, a memorandum prepared by Ben Beachy and Lori Wallach, on 21 / 11 / 2012, highlighting the risks of the investor and state regime in the Ecuador and Occidental case, (reviewed on 15 / 10 / 2020 at 07 : 05) :

<https://www.citizen.org/wp-content/uploads/oxy-v-ecuador-memo.pdf>

Case details on ICSID (reviewed on 14 / 10 / 2020 at 07 : 10) :

<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/06/11>