Conflict between Protection of Investors and States' Public Interest Measures including Human Rights

-Lessons and Suggestions for Myanmar-

国際投資法における投資家保護と国家の規制権限の調整関係
―ミャンマー投資法への視座―

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Chapter I: Introduction

1.1. Research topic and issues

The topic of this research lies in a conflict between investors' rights and states' right to regulate for the public purpose. Foreign direct investment is an essential source for developing countries. In order to realise a sound environment for the smooth investment, and in order to assure a protection for the investment, various investment agreements and contracts are concluded between states. Main purposes in these agreements provisions can be summarised in the three points: protection for investors, settlement of disputes, and regulatory powers of the host states. In the provisions on the protection of investors, states must assure the foreign investors and their properties. States perform these obligations through the standards accorded to them, such as fair and equitable treatment, and strict regulations in the case of expropriation. At the same time, states have to achieve other policy objectives. Environmental protection, public health protection, cultural protection and other many social development goals are the list of basic tasks for states. In pursuing these policies, states' actions sometimes lead to legal amendments, and/or adoptions of new regulations. When a host state's regulatory actions cause an adverse effect to the investors' business, an investment dispute may arise between the host states and the investors. For example, in Mexico, Mexican government refused to grant a permit to the investor's hazardous waste landfill operation, because of which the investor could not proceed his business.[1] In another case, the investor brought a claim against Germany because a regulation concerning Atomic Energy Act caused a loss of expectations for the investor's business.[2] In Argentina, after adopting regulatory

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

[2] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, Award, ICSID Case No. ARB/09/6 (11 March 2011).

measures relating to tariffs to solve the economic crisis, the investor caused an economic loss.[3] These are the disputes brought before international investment tribunal, as a consequence of regulatory measures of the host states. In some cases, host states took regulatory measures because the investment in question caused human rights violations. This can occur especially in the investments related with public services business. For example, in the case of a poor management in the distribution of water services, the host state interfered the service and took control of the business in order to protect the health of peoples. This is the case happened in *Biwater v. Tanzania* case.[4] In this case, the host state intended to protect the right to water. Under international investment law, human rights are not paid full attention, since it is in a different legal dimension. But states do have an obligation to protect the basic human rights. States need to seek an appropriate balance between protection the investors, and protection of public interest including the human rights. In doing so, states have to avoid unnecessary investment disputes. The present thesis focuses upon the conflict between states' regulatory power for public purposes, and protection of investors, in the context of international investment law. Moreover, an analysis will be made on the importance of human rights in the context of international investment law. Besides, international investment tribunals have already dealt the conflict, the present thesis will take into account of international cases in order to discuss the issue.

1.2. Objectives for the research

The present thesis aims at finding out two main objectives. Firstly, it will explore the basic conflicts between the investors' rights and the states' rights to

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[3] *CMS Gas Transmission Co. v. The Republic of Argentina*, Award, ICSID Case No. ARB/01/8 (12 May 2005).

[4] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (24 July 2008).

regulate. Secondly, through the discussion of the topic, it will learn lessons for Myanmar. Myanmar is one of the developing states which is struggling to promote the economic development. In implementing its economic strategy, Myanmar made legal reforms by providing new regulations that are inconsistent with international standards for protection of investments. Besides, Myanmar has accepted the investor-state dispute resolution clause in the investment agreements, in order to attract investment. Myanmar does not have an experience of investment disputes before international investment tribunal. Therefore, Myanmar is in need of learning some lessons on how disputes concerning investment will arise, to what extend investors are protected under bilateral and multilateral investment agreements. As a developing state, Myanmar also need to observe other obligations such as in the area of sustainable developments. Besides, the experience of Myanmar is not mature enough in the practice of the mattes relating to the protection of the environment, the protection of the human rights. In these areas of law, Myanmar might encounter an undesirable investment dispute, due to the state's regulatory measures. Therefore, Myanmar needs special suggestions and solutions in order to observe the investors' protections and the public interest without causing disputes in future.

For both objectives, the present thesis will discuss provisions for the investor protections, and states' inherent right to regulate for public purposes. Besides, it will make an analysis of the disputes, with detailed analysis of the reasoning of the tribunals. After discussing the respective topics, it will explore some guidance and lessons for Myanmar. The present thesis will be somehow useful in drafting treaties, and can also serve a piece of suggestion in taking further steps to create a better investment regime in Myanmar.

1.3. Structure and summary of the thesis

The present thesis has five chapters. Chapter I is an overall introduction of the thesis. Chapter II will deal with an influence of the investor-state dispute

settlement provisions (ISDS clause). It will explain briefly how the investment disputes used to occur in the past. In these days, ISDS clause are being used as an effectuate tools for the investors. Chapter II will discuss how ISDS clause had an adverse effect upon host states when they pursue public interest policies.

The topic in Chapter II concerns clashes between the state regulatory power and the investor's rights. States can make rules, take necessary measures. When states exercise these regulations, they can have a negative effect upon the investor's business. That regulatory measures may trigger a dispute before international investment tribunal, since investors can bring their claims, alleging violations of their rights protected under Bilateral Investment Treaties (BITs). In the dispute, it may be the case that the host state provokes public interest to justify the measure in question. Chapter II will deal with clashes. In Chapter III, an interaction between human rights and investment will be discussed. Human rights have also close connection with international investment regime. States are responsible to protect human rights under international human rights law. Some business can affect local people of host states, such as harmful conduct or pollution. Human rights in business are especially intertwined in the public business such as distribution of drinkable water. The distribution of unsafe water to the local people can have health risk. The protective measures by the host state in order to protect human rights to water may involve investment disputes. In Chapter III, the mixture of the two legal system is taken up, and will discuss how the investment arbitrations dealt with the matter. Chapter IV will focus on how Myanmar Investment Law developed, with a brief analysis on consistencies with international investment regime. Besides, chapter IV will make an analysis if the present Myanmar's legal frame can provide a safe environment for foreign investors, in order to avoid investment disputes. And then, based on the previous discussions, a best suggestion will be made on how to protect the investment in Myanmar in the future. The present thesis will summarise the argument in the Conclusion.

Chapter II: Right to Regulate of a State under International Investment Law
- ISDS clause and state powers to regulate

Introduction

Trade and investment are important for the development of world economy. International investment agreements protect investment projects and investors, leading to global economic development. Under the international investment law, host states protect foreign direct investment and the investors. These protections are supported in a provision in bilateral investment treaties. Fair and equitable treatment, national treatment, non-expropriation, non-discrimination are typical examples in the list of substantive protection in the treaties. These help to protect the investors' rights. States are obliged to preserve these guarantees, and any actions contrary to the commitment constitute a violation.[5] In such a circumstance, investors have a right to bring a claim against the host state before international investment arbitration. The right of the investor to bring a claim against the host state is also contained in bilateral investment treaties (BITs), under an investor-state dispute resolution provision (so called ISDS clause). On the other hand, under international law, a state has an inherent power to exercise regulatory powers. The right to regulate of a states has fallen within the sovereignty in political, economic, legislative and other sectors that the state deems necessary.[6] When an investor brought a claim for his grievances due to a state's regulatory activities, the facts that a state's regulatory actions amounted to the violations of contractual obligations and the fact that the need to incur the compensation for violations are different under various reasonings of

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[5] C. L. Lim, Jean Ho and martins Paparinskis, *International Investment Law and Arbitration, Commentary, Awards and other Materials*, Cambridge University Press, 2018, p. 37.

[6] Aikaterini Titi, *The Right to Regulate in International Investment Law*, Nomos Verlagsgesellschaft, Hart Publishing, 2013,

the tribunals. For a host state, frequent claims by investors for every regulatory activity will be a kind of restrictions for preserving the public interest. This Chapter focuses upon a conflict between the right to regulate of a state and investors' protection under international investment treaties.

2.1. Investor-State Dispute Settlement clause

Investor-State Dispute Settlement clause (hereinafter "ISDS clause") is one of the legal systems to settle disputes between investors and states. ISDS clause is a regular feature in International Investment Agreements (hereinafter "IIAs").[7] Its main function lies in the settlement of disputes between investors and the host state.[8] As a result of the ISDS clause, investors have a right to bring their claim before an international arbitration, when the investor considers that the conduct of the host state is in violation of the substantive obligations under BITs, or the conduct amounts to a damage to the interest of the investors.[9] Most

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[7] United Nations Conference on Trade and Development, *Investor-State Dispute Settlement*, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2014, p. 13.

[8] Let us take two examples.

(1) In Mexico, when the Mexican government denied the application to renewal license of landfill business of the investor with the reason of the protection of the environment, the investor brought a claim in international tribunal under ISDS clauses of NAFTA treaty. It is in the case of *Metalclad Corporation v. The United Mexican States*, Award, ICDIS Case No. ARB(Af)/97/1 (30 August 2000).

(2) In another case, the Swedish investor brought a claim against the Germany under the ISDS clause of the Energy Charter Treaty because the government of the Germany decided to phase out nuclear energy. It was in the case of *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, Award, ICSID Case No. ARB/09//6 (11 March 2011).

[9] Scott Miller & Gregory N. Hicks, *Investor-State Dispute Settlement, A Reality Check*,

of the investors' claims concern protection of minimum standards,[10] fair and equitable treatment, and expropriation. Monetary compensation is a common form of remedy when the investors' claims are accepted.[11] The earliest inclusion of ISDS clause was seen in 1960s and 1970s, and the first one was in the BIT between Germany and Pakistan in 1959.[12] Before the ISDS clause was incorporated in BITs, disputes concerning foreign investment were submitted either before the International Court of Justice or before an *ad hoc* state to state arbitration.[13] Traditionally, there were two ways for the foreign investors to settle the dispute arising out of their investment: host sate's national courts[14] and the practice of espousal.[15] When the investors cannot obtain just and effective remedy before the national court of the host state, they had to rely on diplomatic

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Centre For Strategic & International Studies, 2015. p. 1.

[10] Minimum standard is the provision which is expressly provided in Article 1105 of NAFTA. It states:

> Each party shall accord to investment of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

[10] Expropriation is the worst interference process in the investment regime. When the government of the host state decided to take all the properties and assets of the investors who is running a long-term business without offering any compensation by issuing a regulation or by enacting a legislation using its prerogative authority, the process of expropriation has occurred.

[11] Miller & Hicks, *supra* note 9, p.1.

[12] *Ibid*., p. 5; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, second edition, Oxford University Press, 2012, p. 6.

[13] *Ibid*., p. 7.

[14] UNCTAD, *supra* note 7, p. 23.

[15] *Ibid*.; Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration*, Oxford University Press, 2008, p. 27.

protection of their state of nationality,[16] namely an intervention of the investors' home state into the dispute.[17] When the investor asked for the diplomatic protection, the home state espouses the claim against the host state on behalf of their investors. Under customary international law, in order to exercise diplomatic protection, it is necessary for the investor to hold its nationality both at the time of the beginning of the dispute, and prior to the espousal. It was also required that the investor has sought domestic remedies within the host country. It is not compulsory for the home state to exercise diplomatic protection, considering the diplomatic relationship with the host state.[18] Moreover, the investors cannot expect that the host state will accept the espousal claim of the home state. None of the dispute settlement mechanism could offer a satisfactory outcome for the investors. Therefore, the ISDS clause was established in order to protect the investors, and to afford the investors a safe forum for their disputes. The ISDS clause guarantees the investors to have a direct access to bring their claim before an international arbitration. The ISDS clause is now provided in many BITs, and it has become an effective venue for the investors during last two decades. Nowadays, ISDS clause has been a key feature for foreign investors. It has also been a driving force for host states to attract foreign direct investment.

Recently, there have been concerns about the function of the ISDS clause, since it is abused in many cases, which has a negative impact upon host states. The concerns began to emerge with an increasing number of disputes on the grounds of regulatory measures of the host state. In regulating the environment protection, for example, health and other sectors that require protection, states are less willing to take regulatory measures, fearing litigations before international tribunals under ISDS provisions.[19] Currently, in the

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[16] UNCTAD, *supra* note 7, p. 23.

[17] Dugan et al., *supra* note 15, p. 27.

[18] Dolzer and Schreuer, *supra* note 12, p. 232.

[19] Satwik Shekhar, 'Regulatory Chill': Taking Right to Regulate for a Spin, Working Paper,

international investment regime, the idea of reforming the international investment agreements has been discussed.[20] In modern treaties, States Parties eager to insert the provisions for the preservation of the regulatory activities with the aim of improving sustainable development goals.[21] ISDS clause was used as a tool to bring a claim against the host states before the international investment tribunals, and the ISDS clause has currently become a trigger in the international investment agreements. [22] Therefore, in the negotiation of international investment agreements, ISDS clauses will face removal or restriction as to the applicable scope.[23]

2.2. The Recognition of the Right to Regulate in International Law

Under international law, states are responsible for the development of all sectors within their territories.[24] For states, legislation and regulatory activities are the inherent powers.[25] States are responsible for taking certain measures in social welfare, public health, preservation of environment and political and economic development. The States take these measures through legislation and the regulations. In exercising these authorities, states are free to make rules and legislations in the matters of politics, economics, environmental and social

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Centre for WTO, 2016, p. 6.

[20] World Investment Report 2019, Key Messages and Overview, United Nations Conference on Trade and Development, United Nations, 2019, p.19-20.

[21] *Ibid*., pp. 20-21.

[22] *Ibid*., p. 19.

[23] *Ibid.,* p. 20. *See* more in IIA Issues Note, International Investment Agreements, United Nations, March 2019 and July 2109.

[24] Dolzer and Schreuer, *supra* note 12, p. 216.

[25] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*, Routledge Research in International Economic Law, 2016, p. 31.

welfare,[26] including the preservation of the human rights issues. This regulatory power exercising for the public interest is alternatively known as "police power".[27] This task falls within the police power of the State.

The right to regulate of a state constitutes state's sovereign authority. The sovereignty of a state consists of two vital elements; the sovereignty over its territory and jurisdictional sovereignty.[28] No state can interfere into the domestic matters of the other state, in the management of enacting laws enforcing measures and settling legal disputes within its territory.[29] The Charter of the United Nations, which is the earliest to adopt the fundamental principles[30] provided for the recognition of a state's sovereignty. It states that state's sovereignty to take necessary measures as one of the elements for the maintenance of the international peace and security. In its context, Article 1(2) of UN Charter reads;

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Moreover, the restriction for the fact that such sovereign authority shall not be interfered by any other state is provided in Article 2(7) of the Charter 1945. Article 2(7) of UN Charter reads;

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction

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[26] Titi, *supra* note 6, p.32,

[27] Catharine Titi, "Police Powers Doctrine and International" *in* Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds.), *General Principle of Law and International Investment Arbitration*, Brill Nijhoff, 2016, p. 323-324.

[28] Mouyal, *supra* note 25, p. 31.

[29] *Ibid*., p. 31.

[30] *Ibid*., p.33.

of any state or shall require the Members to submit such matters to settlement under the present Charter,

Therefore, international law confirmed that a state has a sovereign power to perform the necessary activities in order to fulfil the obligations and to protect the interests. At the same time, states are not alone in the international regime, and they coexist together with other states. The recognition of extended regulations of states to make rules over foreign corporations can be seen in the Charter of Economic Rights and Duties of States[31]. The Charter provides the promotion of the economic development of all countries. In its Article 2, the Charter states an enlargement of the sovereign power of a state to regulate relating to foreign investment. Relating to foreign investment, the Charter recognizes state's regulatory power by stating that each state has the right to manage in the matters under the local regulations and national priorities,[32] and the need to make sure foreign enterprises abide the rules and regulations of the host sate.[33]

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[31] The Charter of Economic Rights and Duties of States 1974 is one of the resolutions adopted by United Nations General Assembly.

[32] Article 2(2)(a) of the Charter of Economic Rights and Duties of States provides:

> Each State has the right: To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its matinal objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.

[33] Article 2(2)(b) of the Charter provides:

> Each State has the right to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities to comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of the host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this

These international regulations mentioned above have given the authorities to rule over all the sectors in the territory. Those regulations indicate a sovereign authority of a state. As stated above, the right to regulate is one of the performances that constitutes the sovereignty of a state. This is exercised in good faith when it is necessary to take control of the stability of the domestic chaos resulted from the economic crisis, environmental destruction or the disturbance of public health. However, this absolute right may be adjusted with competing other obligations in international law. The next section explores this balance, taking a look at general exception clauses in trade law, and seeks its applicability in the area of transnational investment.

2.3. Exception Provisions under GATT/WTO rules

In the formation of international treaties, provisions for the preservation of regulatory space for States in the policy objectives are known as “safeguards provisions”.[34] They appear in various ways under titles such as “General Exceptions” or “Non-Precluded Measures”. In these provisions, the wordings and usages are cited and expressed as the exceptional conditions provided in Article XX of the General Agreement on Tariffs and Trade 1947 (hereinafter GATT) and the article XIV of the General Agreement on Trade in Services (hereinafter GATS). Some international investment treaties have dealt with exceptions since twentieth century.[35] These exceptions are adopted and modelled by World Trade Organization (hereinafter WTO) to apply in the area of investment. The intention

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subparagraph.

[34] Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs, FLASH*, The Fordham Law Archive of Scholarship and History, 2016, p. 389.

[35] Levent Sabanogullari, *General Exception Clauses in International Investment Law; The Recalibration of Investment Agreements via WTO-Based Flexibilities*, Nomos Verlagagesellschaft, 2018, p. 119.

for adopting these provisions in the international trade regime is to reduce the tariffs barriers in the cross-border trade between the states.[36] Article XX of GATT provided that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver;
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
>
> (e) relating to the products of prison labour;
>
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

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[36] *Ibid*., p. 126.

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

In the circumstances above, States can exercise their regulatory measures for the public policy objectives, when the State deems it necessary for the interest of domestic stability.

In Article XIV of GATS, exceptional clauses are provided as:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[(5)]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective(6) imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Although the exceptions in GATT and GATS are slightly different, intentions of these Articles are the same. Exemptions under GATT and GATS are provided for the prevention of arbitrary use, unjustifiable discrimination for the measures in question. These provisions are seen in Model BITs,[37] or BITs.[38] According to the World Investment Report 2014, out of 18 IIAs concluded in 2016,

[37] US Model BIT (2012), French Model BIT (2006), Australia Model BIT (2008) and German Model BIT (2008).

[38] Article 16 of Japan-Korea BIT (2002); Chapter 9, Article 8 of Australia-China BIT (1988); Article 5(3) of New Zealand-Argentina BIT (1999), and Article 8(3) of New Zealand-Hong Kong BIT (1995).

15 agreements contained general exceptions clauses for the protection of human health, human life, animal or plant life and other environmental protections.[39] Similarly, 9 agreements contained the general exception clauses for the States' right to regulate.[40]

2.3.1. Appearance of general exceptions under International Investment Agreements

Exception clauses appear both in the preamble of investment treaties or in a substantive provision. For example, in the Australia-China Free Trade Agreement (2015), the recognition of the right to regulate is provided in the preamble.[41] Some treaties use the words in GATT such as "human, animal or plant life" or "for the regulatory space of State parties when the wording of some other treaties are modelled by expressing "essential security", "maintenance of international security" or formulated from the angle of environmental protection. For example, in Article 9.8 of Australia-China Free Trade Agreement (2015), General Exceptions can be seen in the context of investment:

> 1. For the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:
>
> (a) necessary to protect human, animal or plant life or health;

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[39] UNCTAD, World Investment Report 2014, INVESTING IN THE SDGs: AN ACTION PLAN, p. 114.

[40] UNCTAD, World Investment Report 2017, INVESTMENT AND DIGITAL ECONOMY, p. 119.

[41] In the preamble of Australia-China Free Trade Agreement (2015), this reads:

> Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare;

(b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;

(c) imposed for the protection of national treasures of artistic, historic or archaeological value; or

(d) relating to the conservation of living or non-living exhaustible natural resources.

2. The Parties understand that the measures referred to in subparagraph 1(a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph 1(d) include environmental measures relating to the conservation of living or non-living exhaustible natural resources.

Similarly, Article 16 of Japan-Korea BIT (2002) provides:

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:

(a) take any measure which it considers necessary for the protection of its essential security interests;

(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;

(b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;

(c) take any measure necessary to protect human, animal or plant life or health; or

(d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine

and sufficiently serious threat is posed to one of the fundamental interests of society.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall not use such measure as a means of avoiding its obligations.

3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure:

(a) sector and sub-sector or matter;

(b) obligation or article in respect of which the measure is taken;

(c) legal source or authority of the measure; (d) succinct description of the measure;

and

(e) motivation or purpose of the measure.

4. Notwithstanding the provisions of paragraph 1 of Article 2 of this Agreement, each Contracting Party may prescribe formalities in connection with investment and business activities of investors of the other Contracting Party in its territory, provided that such formalities do not impair the substance of the rights under this Agreement.

Some treaties put exceptional provisions under “Non-Precluded Measures”. For example, in the US-Armenia BIT (1992), the right to regulate for states is inserted under the title of “Non-Precluded Measures” in Article X, provided for State Party’s right to take measure when it is necessary for the maintenance of public order including health and safety, the fulfilment of

international obligations relating to international peace and security interests and the protection of essential security within the territory.[42] In these provisions, words, objectives for regulatory measures must be consistent with the obligations in Chapter VII of UN Charter.[43] Though the words the provisions may differ, a space for regulatory measures of the state will remain.

2.4. Right to Regulate of a State and International Investment Agreements

Generally, when a host state exercises the right to regulate for these matters relating to health, environment and other intentions for the public interest, investors' rights are negatively affected. This situation happened due to the clashes of the investors' rights and the right to regulate of the state. Once state has concluded an investment treaty, the state will receive foreign investment, but it has obligations to protect the investors' rights. In most of BITs, the investors also have a legal chance for bringing their claims under the ISDS clause. Therefore, the right to regulate of a state can interfere investment treaties. In the international investment regime, state's right to regulate might cause a negative impact upon investors' rights, and this may cause violation of BITs. For example, in 2000, investor brought a claim against Mexico before the international investment tribunal for the closure of a landfill site, invoking environmental

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[42] Article X provides:

> 1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.
>
> 2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

[43] Chapter VII of the UN Charter is referred to in the US-Armenia BIT (1992).

protection.[44] There are many more cases where the investors brought their claims against host states; such as privatization policy in Poland,[45] water services policy in Tanzania,[46] monetary policy in Argentina,[47] taxation regulation in Ecuador.[48] In this way, when the state regulations cause adverse effects to the investors' business, concerns about the fear of claim from investors arise. Although state's regulatory authority is not clearly defined and not limited,[49] disputes arising from investment may occur. The typical accusations lie in the violation of investor protection provisions and expropriation. The task to determine whether the state regulatory actions constitute the violation of treaty provisions falls upon the international investment tribunals.

Though the treaties create the regulatory space for states to adopt the regulatory measures, in the treaty context, the treaty context does not contain any explanation on which type of measure to be exempted from disputes. It is a task of tribunals to decide whether a measure was done in good faith by states, or the measures are compensable or non-compensable. Thus, in determining this issue, treaty analysis is one of the basic practices for tribunals. For the interpretation of the BITs, Vienna Convention on the law of the Treaties 1969 (hereinafter VCLT) is the vital instrument in defining the meaning of the treaty

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

[45] *Eureko B.V. v. Republic of Poland*, Partial Award, Ad Hoc UNCITRAL Arbitration (19 August 2005).

[46] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (24 July 2008).

[47] *CMS Gas Transmission Company v. The Argentina Republic*, Award, ICSID Case No. ARB/01/8 (12 May 2005).

[48] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, London Court of Arbitration Administered Case No. UN 3467 (1 July 2004).

[49] Titi, *supra* note 27, p.324.

provision.[50] The provisions of the VCLT was adopted in 1969 and its provisions are applicable to all the international treaties for the interpretation of the terms and original meaning of the provisions.[51] Therefore, international investment arbitrations have relied on the VCLT for the interpretation of the actual terms of the treaties. In the case of *Siemens A. G. v Argentina*,[52] the tribunal stated that tribunal would not interpret the treaty terms liberally nor restrictively but shall interpret in accordance with the Article 31 (1) of the VCLT. The exact commentary of the tribunal was as follows,

> The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble.

Therefore, the tribunals rely on the general provisions of VCLT for the interpretations of the treaty provisions in the matters relating to expropriation, fair and equitable treatment, non-discrimination.[53]

2.5. Right to Regulate and Investors' Protection

Most of the investment disputes are brought against host states, alleging that the host state violated the obligations in the BIT. In the international investment treaties, in order to create a safe investment environment for the

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[50] Mouyal, *supra* note 25, p. 47.

[51] Article 1 of Vienna Convention of the Law of the Treaties.

[52] *Siemens A.G. v. The Argentina Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), para 81.

[53] Andrew D. Mitchell, James Munro and Tania Voon, "Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks," in *Yearbook on International Investment Law and Policy 2016-2017*, Oxford University Press, 2018, p. 6. (Available at SSRN: https://ssrn.com/abstract=3084663) (Last accessed on March 1, 2020)

foreign investors, provisions such as fair and equitable treatment, full protection and security and the guarantee for non-expropriation are the basic protections for the investors. When a host state's regulatory action interferes with the investor's business, the investor alleges that the measure in question amounts to a violation of treaty provisions.

2.5.1. Fair and Equitable Treatment and Right to Regulate

Fair and equitable treatment has been one of the issues that cause the investor to bring a claim against host states under ISDS clauses. It is one of the treatments that the host states are to protect the investors. This standard is included in many treaties as a guarantee for the investors. Most of the investment disputes that arose due to an exercise of state regulatory power, such as termination of contract,[54] non-renewal of license,[55] tax and tariffs measures[56] and other many more cases.

The principle is intended to attain the protection of the investor's reasonable and legitimate expectations.[57] The concept of fair and equitable treatment first appeared in Article 11 (2)(a)(i) of Havana Charter for an International Trade Organization 1948, which had never entered into force. After

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[54] *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002).

[55] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, (May 29, 2003).

[56] *CMS v. Argentina*, *supra* note 3.

[57] Charalampos Giannakopouls, "The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach in Permutations of Responsibility," in Photini Pazartzis, Panos Merkouris (Eds), *Permutations of Responsibility in International Law*, Brill Nijhoff, 2019, p. 15.
(Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962686) (Last accessed on March 2, 2020)

the First World War, this concept was contained as a standard in US Treaties on Friendship, Commerce and Navigation (FCN) and ASEAN Agreement of the Promotion and Protection of Investments (1987). Nowadays, the standard has been incorporated in IIAs for protecting foreign investments.

In the context of this treatment, the action of the host state should be transparent, reasonable without discrimination, arbitrariness and abusive treatment, denial of justice and the need for the protection of the legitimate expectations are contained.[58] As an example, Article 3 (1) of Netherlands Model BIT includes these facts as much as possible, which states:

> Each Contracting Party shall ensure fair and equitable treatment of the investments nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting party shall accord to such investment full physical security and protection.

The appearance of this treatment is expressed various ways. The provision is sometimes found without adding the other components. Article 3 (1) of Chinese Model BIT (2003), for example, states:

> Investments of investors of each Contracting Party, shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.

In the Article 2(1) of Germany-Botswana BIT, this treatment is not inserted as a separate provision. Article 2(1) reads:

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[58] United Nations Conference on Trade and Development, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York, Geneva, 2012, pp. x-xvi.

> Each contracting party shall in its territory promote as far as possible investments by nationals or companies of the other contracting state and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

Under this provision, fair and equitable treatment is expressed together with the other components[59] that is provided for the promotion of investment of the state parties.

Fair and equitable treatment can also be seen by combining with the other treatments. In the combination of the other treatments, it is set out under the title of the national treatment and most-favoured-nation treatment. National treatment and most-favoured-nation treatment are the prominent standards that are used in the investment treaties.[60] Therefore, when the international legal practitioners classify various aspects of fair and equitable treatment, they make a group FET by linking international law.[61] The intention of the national treatment inserting is for attaining the equal conditions, equal treatment for the foreign investors in host state.[62] As an example, in the Article 4 of the Croatia-Oman BIT (2004), under title of national treatment and most favoured nation treatment, it states as follows:

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[59] Roland Klager, *Fair and Equitable Treatment in International Law*, Cambridge University Press, 2011, p. 16.

[60] *Ibid*., pp.282-283.

[61] David Gaukrodger, *Addressing the balance of interests in investment treaties: The Limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law*, OECD Working Papers on International Investment 2017/03, p. 8; James Crawford, *Brownie's Principle of Public International Law*, Oxford University Press, 8th Edition, 2012, p.617.

[62] Klager, *supra* note 59, p. 282.

1. Each Contracting party shall apply in its territory to the investors of the other Contracting Party with repayment to their investments and activities related to investments, a treatment not less favourable than that granted to the investors of any third state.
2. Neither Contracting Party shall accord in its territory to the investors of the other Contracting Party, as regards management, maintenance, enjoyment, use or disposal of their investment, a treatment which is less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to the investors concerned.

Under this kind of national treatment provision, FET was not expressed by using the words “fair” or “equitable”. But the meaning of the treatment is still the same to provide the investor an equal treatment by the host state which must not be less accorded to the national of the host state or to the nationals of the third states. In the matter of embedding FET in the national treatment, the basic concepts between the FET and national treatment are not the same. The obligations of the national treatment that the host states have to bear is depending upon the treatment to accord to domestic investments.[63] FET is intended to attain a basic level of protection irrespective of the host state legal framework.[64] However, in both treatment, prohibition of discrimination is contained in the principle. Therefore, due to this non-discrimination treatment, both treatments can be in violation at the same time.[65]

In the protection contained in the most-favoured-nation treatment, this concept concerns in relation with not only foreign investor and domestic investor,

[63] *Ibid*., p. 285.

[64] *Ibid*., p. 285.

[65] *Ibid*., pp.285-286.

but also foreign investors and investors of the third countries.[66] Most-favoured-nation treatment invokes a more favourable substantive treatment standard.[67]

Words used in the treaty may differ, an overall meaning in the treatment is to ask for an equal treatment no less favourable than the national investor of the host state. Some treaties express all these aspects in one provision such as Article 22 of Lebanon-Hungary BIT (2002). It states:

> Investments and returns of investors of either contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Each contracting party shall refrain from impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation or such investment.

A series of government measures can lead to a breach of fair and equitable treatment. This kind of case is seen in the dispute of *Pope and Talbot Inc v. Canada*.[68] In this case, the claimant has been operating a lumber business in Canada since 1969. It manufactures and sells softwood lumber. In 1996, after U.S. and Canada entered into an agreement for the free export of softwood lumber (SLA). In 1999, the investor brought a claim against Canada for violation of the national treatment, most-favoured-nation treatment, minimum standards of treatment and expropriation under the NAFTA agreement; because Canada implemented certain obligations that was provided under SLA. According to SLA, Canada need to put the softwood lumber under the Export Control List and need to collect a fee of a permit for export to United States. For the amount of lumber export up to the level of EB, it costed no charge, but for the LEB level export, it

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[66] *Ibid*., p. 286.

[67] *Ibid*., p.287.

[68] *Pope and Talbot Inc v. The Government of Canada*, UNCITRAL, Final Merits Award (10 April 2001).

costed $50 per thousand board feet, and for the UFB level, $100 per thousand board feet. For doing so, Canada adopted Export Permit Regulations and Softwood Lumber Products Export Permit Fees Regulations. These regulations limited the issuance permits relating to the exports for the EB level and LFB level of exporters. Based on this fact, the claimant alleged that the measures breached the national treatment, most favoured treatment, minimum standard of treatment and fair and equitable treatment under NAFTA agreement. In deciding investor's allegations, the tribunal distinguished each of the measures taken by Canada. The tribunal decided that the collecting system of the government could not constitute the breach of the national treatment. It also decided that any of the regulations of the government did not constitute the discrimination against foreign investors. However, the tribunal reasoned that the export and import control amounted to the threat, but denied that reasonable request and caused to incur the unnecessary expense and disruption to investors and the forced to expend the legal fees and made to suffer the loss of reputation of the government. All these treatment upon the investors constituted the denial of fair treatment required by the NAFTA agreement. Then Canada was held liable to pay the compensation.

Fair and equitable treatment can be seen in the international investment treaties by composing separately or combining with the other standard. By linking this treatment with the right to regulate, barring the two obligations of state's obligations for the public policy and host state's duty to observe the treatment could be occur the difficulties. The vagueness of meaning of the treatment is one of the problems in the investment disputes.[69] As the treatment does not provide the definite meaning relating to the manner that means "fairness" or "equity", this may cause investment disputes in the performance of regulatory measures. The wording of this standard does not provide any guidance determine which action of the state regulatory action will fall within 'fair' and 'equitable' treatment. While

[69] United Nations Conference on Trade and Development, *supra note* 58, p.2.

operating the investment, host state' regulatory performance might lead to the frustration of legitimate expectation for the investor. Therefore, the investor's accusation upon host state's action can be due to the discrimination, legitimate expectation, denial justice and arbitrariness. For example, it is typical for investors to study and learn legal framework of the host state. Thus, most of the investment disputes arise based on the violations of fair and equitable treatment. This tension has a burden by the tribunals to divide the measures taken under the state sovereignty constitute the breach of fair and equitable treatment according to the particular case.

2.5.1.1. Denial of Justice

The term "denial of Justice" is the general notion of the state's responsibility to offer the guarantee not to harm to the foreign investors.[70] The concept of denial of justice concerns a litigation in domestic court of the host state, and it is generally understood as the domestic judiciary system must be free from miscarriage of justice, free from inappropriate, illegitimate or unfair and wrongdoing,[71] and lack of impartiality against foreign investors. It can occur in a variety of ways, especially in refusal of access to justice and the agreement to settle by way of arbitration, governmental interference and failure to executive judgement, misapplication of local laws and lack of impartiality or bias of lower officials cannot be recognized as denial of justice.[72] In the case of *Robert Azinian, Kenneth, Davitian & Ellen Baca v. Mexico*,[73] the tribunal stated that claims can be brought to international arbitration on the grounds of denial of justice if the

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[70] Crawford, *supra* note 61, p. 619.

[71] *Saipem S.p.A v The People's Republic of Bangladesh*, Award, ICSID Case No. ARB/05/7, (30 June 2009), paras 155-156.

[72] United Nations Conference on Trade and Development, *supra* note 58, p. 80.

[73] *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, Award, ICSID Case No. ARB(AF)/97/2 (1 November 1999).

court concerned refused to entertain the foreign investors case.[74] Tribunal further stated that

> A denial of justice could be asked for if the relevant court concerned refuse to try the case and the matter is subject to undue delay or the administration of justice is done inadequate way.[75]

In the case of *Jan de Nul NV and Dredging International NV v. Egypt,*[76] the tribunal dismissed the claims based on the denial of justice, from the point of exhaustion of local remedies. In the case, at the time of request of arbitration was filed, the claimant's appeal against the decision of Ismailia Court was still pending before the local appellate court in Egypt.[77] The Tribunal has not received any information a status about the decision of appeal and there was no evidence that the appellate proceeding was injustice. The tribunal stated that the requirement of local remedies did not constitute a sufficient reason to bring the claim as a denial of justice and the dispute was therefore dismissed.[78]

As seen in the above, denial of justice forms a part of fair and equitable treatment. Therefore, once a manner that constitute the denial of justice appears, the investor may bring a claim against the host state for violation of fair and equitable treatment.

2.5.1.2. Legitimate Expectation

Legitimate Exception concerns stability of host state's legal framework. Investors expect protection in the long duration of the investor's business at the

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[74] *Ibid*., para 102.

[75] *Ibid.,* para 102.

[76] *Jan de Nul N.V. Dredging International N.V v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/04/13 (6 November 2008).

[77] *Ibid*., paras. 255-261, 276.

[78] *Ibid*.

time of investment in the host state's territory[79]. Claims for violation of legitimate expectation will arise when the host state changes legal framework and it causes the loss of investor's potential benefit. In the case of *Occidental Exploration and Production Co. v. Republic of Ecuador,* [80] the Occidental Exploration and Production Company (hereinafter "OEP") provided oil services for Petroecuador, Ecuadorian State-owned corporation. OPE reimbursed for a valued added tax (hereinafter "VAT") paid on local acquisition. In 1999, according to the modified participation contract between OPE and Petroecuador, OEP became the oil exporter and was entitled to a participation formula, described as Factor X.[81] OEP applied for the refunds of VAT to the Servicio de Rentas Internas (hereinafter "SRI"), Ecuadorian tax authority, for the period of July 1999 to September 2000. The application was made under the law of "Granting Resolutions". [82] In 2001, The SRI issued Resolution 664 and refused all applications for VAT tax credits and reimbursement. In 2002, SRI abolished the Granting Resolution on the ground that previous granted credits and reimbursements were based on the mistaken application of Tax Law. Besides SRI wanted OEP to return the previously paid interest.[83] OEP, in 2002, filed an arbitration proceeding against Ecuador, alleging that the resolution adopted by SRI was in violation of fair and equitable treatment, national treatment, and amount to expropriation. The tribunal stated that the stability of legal and business environment is essential to maintain fair and equitable treatment under the

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[79] August Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, p.124; Campbell McLachlan, Laurance Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2008, p. 234.

[80] *Occidental Exploration v. Ecuador, supra* note 48.

[81] *Ibid*., paras. 28-32.

[82] *Ibid*.

[83] *Ibid.*

Preamble of the treaties.[84] The tax law was inconsistent with the new laws. The tribunal held that Ecuador had breached its treaty obligations.[85]

Therefore, changing the legal framework of the host state and causing the frustration of the investor's legitimate expectation is one of the main reasons to occur the investment disputes.

2.5.1.3. Non-Discrimination

Principle of non-discrimination is one of the elements in determining whether or not fair and equitable treatment constitutes a breach of BITs and/or IIAs.[86] A violation of fair and equitable treatment will occur if the conduct of a host country is considered to be unfair and discriminatory. Discrimination constitutes a legal basis for bringing disputes, together with the concept of fair and equitable treatment. Principle of non-discrimination is one of the basic protections for foreign investors from the arbitrary action of host state.[87] Any measures which involves discrimination is contrary to the standard to the fair and equitable treatment.[88] The typical discrimination arises out of different treatment based on nationality. If the actions or omissions of government is unreasonable without a clear purpose, the behaviours also constitute discrimination.

In the case of *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic,*[89] discrimination based on nationality was a main issue.

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[84] *Ibid*., paras 183-191.

[85] *Ibid*., para. 196.

[86] *Parkerings Compagniet A.S. v. Republic of Egypt*, Award, ICSID Arbitration Case No. ARB/05/8 (11 September 2007), para. 280.

[87] Dugan et al., *supra* note 15, p.397.

[88] *CMS v. Argentina*, *supra* note 47, para. 290.

[89] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration (Partial Award) (13 September 2001).

The claimant, CME Media Enterprise B.V., an American corporation incorporated in the Netherlands, was granted a license for television broadcasting in the Czech Republic. CME possessed 99 percent of shares in Ceska Nezavisla Televizni Spolecnost, (hereinafter "CNTS"). The Central European Development Corporation (hereinafter "CEDC"), CET 21, Czech Saving Bank were co-founder of CNTS, and they entered into a joint business for the broadcasting services.[90] In 1993, Media Council of Czech Republic granted a license to CET 21 (Czech national investors) to operate a nation-wide private television station in the Czech Republic.[91] In 1996 Media Law was modified. According to the modified law, the license holders could apply for the waiver of license conditions related to non-programming.[92] Most of license holders, including CET 21, applied for the waiver. In 1996, the Media Council, CET 21, CNTS and shareholders of CNTS agreed to change CNTS Memorandum of Association and substituted CET 21.[93] In 1999, CET 21 terminated the Service Agreement with on the ground that the non-delivery of the day-log by CNTS to CET 21.[94] Besides, CET 21 changed CNTS as service providers and replaced other service providers in the place of operator of broadcasting services. Due to CNTS's bad services, CNTS's business was commercially destroyed.[95] In the process, CME alleged that CNTS business was destroyed because of the actions and omissions of the Media Council. CME brought a claim against the Czech Republic for breach of BIT, including discrimination. The tribunal stated that "the actions of the Media Council done from 1996 to 1999 were unreasonable and caused the deprivation the investor's exclusive use of the License. It colluded the Claimant's business partner, Czech

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[90] *Ibid*., paras. 1-7.

[91] *Ibid*., para. 10.

[92] *Ibid.*, paras. 15-19.

[93] *Ibid*.

[94] *Ibid.*

[95] *Ibid*.

national, to deprive the Claimant's investment." It held that the Media Council discriminated the foreign investor.[96]

In all disputes above, the main reason that the investors brought the claims against is the violations of fair and equitable treatment. As stated above, within the meaning of fair and equitable treatment, other treatments such as national treatment, non-discrimination and denial of justice are combined. As the meaning of fair and equitable treatment does not have an exact meaning, host state's action can be a violation any of the treatment in exercising the right to regulate. For bringing a claim in the international tribunal for violations fair and equitable treatment, ISDS clause is a useful tool for the investors.

2.5.2. Full Protection and Security

The standard of full protection and security is one of the standards of treatments that the host states are to observe for the investors. Full protection and security standard are a guarantee against physical violence,[97] and it was used to appear together with the provision of fair and equitable treatment in the BITs. For example, Article 2 (2) of Hungary-Lebanon BIT (2001), states:

> Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting party. Each Contracting Party shall refrain from impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments.[98]

In the meaning of full protection and security, it contains physical protection from physical harms coming from the attacks of rioting groups, or

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[96] *Ibid*., paras. 3-25, 612.

[97] Klager, *supra* note 59, p. 292.

[98] See also Article 5 of US Model BIT, Article 2(2) of the Argentina-US BIT.

insurgents. Failure to observe full protection and security and the consequences of the destruction of the investor's business can be one of the reasons to bring a claim against the host states for the investors. In the case of *Asian Agricultural Products (AAPL) v. Sri Lanka*,[99] the dispute occurred because the claimant's shrimp farm business was damaged during the insurgency of the Sri Lanka security forces against the rebellions. The tribunal held that, the respondent state, Sri Lanka was responsible for the destruction of the claimant's physical assets and decided to pay 460,000 USD with the interest by the state. Though the violence or physical was not done by the government, failure to take action against the wrong doer by the government is considered as the violation of full protection by the host state. In the case of *Wena Hotels Limited v. Egypt*, a British investor brought a claim against Egypt for expropriation and violations of full protection and security, under the Agreement for the Promotion and Protection of Investments between United Kingdom and Arab Republic of Egypt (APPI). The dispute started between the Wena company and its joint venture company Egyptian Hotels Company (EHC), which was affiliated by the General public Sector Authority for Tourism. Due to the serious disagreements relating to the administration obligations, the persons of the EHC attacked by 150-person group with weapons. The tribunal stated that since the Egyptian authorities did not take any actions and did not prevent the seizures or to prevent for the protection of Wena Hotel's investment, the Egyptian government violated the obligations of full protection and security under the Article 2(2) of APPI. Therefore, states are obliged to support full protection for the investors in their territories. When the safety and security is interfered by government itself or the other third party, the investors has a right to bring a claim for the violation of full protection and security against the host state.

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[99] *Asian Agricultural Product Ltd (AAPL) v. Sri Lanka,* Award, ICSID Case No. ARB/87/3 (21 June 1990).

2.5.3. Expropriation

For the investors, expropriation is the greatest interference of the government with their properties, interests and benefits.[100] Expropriation is an action of taking any foreign assets within its territory. Traditionally, it is not acceptable that taking the assets of a foreign nationality, whether such taking was done for the public purpose of not.[101] When the taking is done without compensation,[102] when the outright physical seizure of the assets of the investors, and when the title of the investor's business was legally transferred, these kinds of situations are the direct expropriations.[103] Most of the business subject to expropriation are natural resources and industrial facilities.[104] Nowadays, direct expropriation is hardly seen,[105] and indirect expropriation can be gradually seen. This change happens due to the measures taken by state action aiming for the protection of the people's health, environment or the protection for the public welfare.[106] The regulatory measures of the government for the protection of the public purpose tend to have a negative effect impact upon investors. These effects are the diminishing the value of the interest of investor's business or the decreasing of the potential benefits of the investment or causing the termination of the investor's business. For example, in Tanzania, the investor's water services business ceased because the government seized and

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[100] Dolzer and Schreuer, *supra* note 12, p. 98.

[101] Organization for Economic Co-Operation and Development (OECD), *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, 2004, p.2.

[102] Dugan et al., *supra* note 15, p. 450.

[103] United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012, p.6.

[104] Dugan et al., *supra* note 15, p. 450.

[105] Dolzer and Schreuer, *supra* note 12, p. 101., Dugan et al., *supra* note 15, p. 450.

[106] OECD, *supra* note 104, p. 2.

replaced all the staffs to take control over the poor management of distribution water.[107] Again, in the case of *Tecmed v U.S.*, Mexico rejected the application of the investor for the renewal of the landfill construction, which caused the termination of the investor's business.[108] This kind of situation that caused the investor lost control upon his business or that permanently caused the deprivation of the interest due to the government's measures which is done for the public internet, becomes the indirect expropriation.[109] As a usage, indirect expropriation is used with various expressions, such as creeping expropriation, regulatory taking, *de facto* expropriation, tantamount expropriation.[110] In the current age, customary international law recognizes this kind of public interest-based expropriation as lawful or legitimate expropriation. States can indirectly expropriate if it is intended for public interest without discrimination and done with a prompt, an adequate and with the appropriate compensation.[111]

2.5.3.1. The nature of indirect expropriation provisions under the international investment agreements

In the international investment treaties concluded between states, legitimate expropriations are permitted under some restrictions. To encourage the effectuation of the public interest, states can exercise lawful expropriation under three conditions. These are, the measures adopted, or enacted regulations must be intended for the public interest and must not discriminate and should be

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[107] *Biwater v. Tanzania*, *supra* note 46.

[108] *Tecmed v. Mexico*, supra note 58.

[109] United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012, p. 7.

[110] Dugan et al., *supra note* 15, p. 450.

[111] Dolzer and Schreuer, *supra* note 12, p. 99, Mouyal, *supra* note 25, p. 75.

done with the adequate compensation.[112] As an example, Article 5 of Mexico-Spain BIT (2006) provides that:

> 1. Neither Contracting Party will expropriate or nationalize investments of investors of the either Contracting Party either directly or indirectly by means of measures equivalent to an expropriation or nationalization ("expropriation") unless it is:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law; and
>
> (d) on payment of prompt, adequate, and effective compensation.

Under this provision, the requirements for the tantamount expropriation shall be done in accordance with public purpose without discrimination under due process law with the adequate compensation. This kind of conditions can be seen in other international investment treaties such as such as Article 1110(1) of NAFTA,[113] and Article 13(1) of Energy Charter Treaty.[114]

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[112] UNCTAD, *supra* note 103, p.1.

[113] Article 1110(1) of North Free Trade America Agreement states:

> No Party may directly or indirectly nationalize or expropriation an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 11105(1);
>
> and
>
> (d) on payment of compensation in accordance paragraphs 2 through 6.

[114] Article 13(1) of the Energy Charter Treaty provides:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a

In the sense of indirect expropriation, states have no intentions to forfeiture the assets of the investors. Indirect expropriation originally stems from the government measures that adopted for the protection of the public welfare or emergency crisis. Therefore, in the Netherlands Model BIT (2019), the provision construction for the regulatory expropriation is emphasis on the government's measures. Article 12(1) provides:

> *1. Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investors of the other Contracting Party of their investments, unless the following conditions are complied with:*
>
> *a) the measure is taken in the public interest;*
>
> *b) the measure is taken under due process of law;*
>
> *c) the measure is taken in a non-discriminatory manner;*
>
> *and*
>
> *d) the measure is taken against prompt, adequate and effective compensation.*

Sometimes, the government's measure that enacted or adopted originally did not aim for public health nor environment but caused the destruction of the investor's business or assets. This kind of destruction the investment can be resulted from the consequences of the incidents from engaging war with another

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measure or measures having effect equivalent to nationalization or expropriation except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

See also Article 6 of ASEAN Agreement for the Promotion and Protection of the Investments (1987), Article 6 of New Zealand-Argentina BIT (1999) and Article 4 (1) of Chinese Model BIT.

state or from suppression of rebellions or engaging the civil war. For this matter, in some BIT, the provisions for the regulatory expropriation extend to the possible impact of the government's measures aiming to suppress the rebellion or engaging the civil war. For instance, in the Sri Lanka Model BIT, in defining the compensation, the provision inserted the impact of the government's measures that resulting from engaging war.

In some treaties, further explanations are provided in the annex of BITs/IIAs. The explanations are expressed for a better understanding between the states on the specific factors to determine whether an action constitutes indirect expropriation. For example, in Article 6 of the US Model BIT (2012), the formal provision for the expropriation by giving space for the public interest was provided which provided that neither Party can expropriate except for the public purpose.[115] In light of this, Annex B of the Treaty explains specific factors to decide whether an action fall within indirect expropriation. The specific conditions must be based on economic impact of the government action, the extent of government action for the interference upon the investor's business and the character of the government's action.[116] Similarly, in the investment chapter of

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[115] Article 6 of US Model BIT provides:

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, and effective compensation;
>
> and
>
> (d) in accordance with due process of law and Minimum Standard of Treatment.

[116] Annex B of US Model BIT provides:

> 4. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitute an indirect expropriation, requires a case -by-case,

the China-New Zealand FTA (2008), Annex 13 lays down certain conditions on which the action in question constitutes indirect expropriation in the meaning of Article 145 of the BIT. In defining the indirect expropriation, the Annex 13 provides:

(1) when the state's deprivation caused the severe affect upon the investor's property and that severance occurred for an indefinite period,

(2) when the state's action is not subjected to the public purpose.

According to the China-New Zealand BIT, if any action of State, which is done by breaching any binding written statement in the treaty or contract, cause the affect upon the legal document or licence, that action shall be deemed to constitute the deprivation of property.

2.5.3.2. Public Purpose

In the matter of public purpose, the measures or the reasons of the host states actions must be subject to legitimate welfare, and free from private gain.[117] Public purpose objective is to be considered upon the conditions that the

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facts-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse defect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;

and

(iii) the character of the government action.

[117] UNCTAD, *supra* note 103, p. 29.

expropriated measures were taken.[118] Necessity for the public interest is the part of States.[119] In adopting regulatory measures, that measures shall be in accordance with not only domestic regulations, but also with the international fundamental international rules.[120]

Relating to taking regulatory measures for various reasons for the public interest, when the investor's business was affected, states refused that their actions are amounted to expropriation and refuse to pay compensation for the affected investment.[121]

2.5.3.3. Compensation

Compensation is one of the conditions laid down in international investment treaties. In these agreements, the compensation for damage caused stipulate that the compensation must be adequate, prompt and effective. Compensation must also be equal to the value of the investment and shall be paid before the actual date of the expropriation was in forced. As an example, Article of 6 (2) of the US Model BIT (2012) provides: The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier;

and

(d) be fully realizable and freely transferable.

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[118] *Ibid.,* p. 31.

[119] *Ibid*., pp. 31-32.

[120] UNCTAD, *supra* note 103, p. 36.

[121] UNCTAD, *supra* note 103, p. 12.

In order to determine whether a regulatory measure can be subject to compensation is vested to tribunals. In the view of the tribunals, not all the regulatory measures amount to expropriation.

In some disputes, tribunal stated that the regulatory measures taken for the awareness for human health and the environment was valid and did not constitute an expropriation.[122] Some tribunals noted that if a regulatory measure is taken in good faith and done by non-discrimination, states are not liable to pay compensation. Such reasoning can be seen in the case of *Saluka v. Czech*.[123] Therefore, in order to determine compensation due to the regulatory measures, state practice as well as international tribunals' awards will be seeked.[124] Thus, in some treaties, in determining a justifiable compensation, standards to take into consideration are listed in the provisions. For example, this kind of provisions can

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[122] *Chemtura Corporation (Formerly Crompton Corporation) v. Government of Canada*, Award, Ad Hoc Arbitration under UNCITRAL Rules (August 2, 2010), para 266.

[123] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Awards, Arbitration under the UNCITRAL Rules (March 17, 2006), paras. 255, 262.

It stated that "sit is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

[124] Mouyal, *supra* note 25, p. 159., Crawford, *supra* note 61, p.623.

be seen in the Article 7 (c) of Italy-Argentina BIT (1990)[125] and Article 5 (3) of Mexico-Spain BIT (1995).[126]

For example, in the case of *Cia del Desarollo de Santa Elena SA v. Costa Rica*,[127] the tribunal stated:

> in expropriation for the reason of public interest, it should not be affected the responsible of compensation to be paid for such expropriation, no matter such expropriation is beneficial to society.[128]

2.6. Case Study

In the case of *Metalclad Corporation v. Mexico*,[129] a U.S. company, Metalclad Corporation entered into an agreement to operate a business in the area of Mexican Municipality of Guadalcazar, located in the Mexican State of San Luis Potosi (hereinafter "SLP"), to purchase COTERIN and to build a hazardous

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[125] Article 7 (c) of Italy-Argentina BIT provides:

> The compensation shall be equivalent to the actual market value of the investment immediately before the expropriation or nationalization decision was announced or became public and shall be determined in accordance with internationally accepted technical standards.

[126] Article V (3) of Mexico-Spain BIT provides:

> The affected investor will have the right, in accordance with the law of the Contracting Party that performs the expropriation, to the prompt review of its case by the judicial authority or other competent authority that is independent of said Contracting Party in order to determine whether the expropriation and valuation of its investment have been adopted in accordance with the principles established in this Article.

[127] *Compania Del Desarrollo De Santa Elena, S.A. v. The Republic of Costa Rica*, Final Award, ICSID Case No. ARB/96/1 (17 February 2000).

[128] *Ibid*., para. 72.

[129] *Metalclad v. Mexico*, *supra* note 44.

waste landfill. In order to operate its business, the government of SLP issued a permit. However, the Governor of SLP and the Municipality prevented the operation of the claimant, due to the absence of a municipal construction permit.[130] After negotiations, Metalclad applied for a permit and continued its operation. Metalclad's application was rejected, and its hazardous waste landfill operation was barred by an injunction.[131] Besides, the Governor declared the landfill area as a protected natural area.[132] Metalclad filed an arbitration proceeding against Mexico for violation of minimum standard of treatment, and the claimant insisted the measure in question constitutes expropriation and the violation of minimum standard of the NAFTA.[133] The tribunal applied the standards above and held that the Ecological preservation decree of the Governor had an effect of barring the operation of landfill forever.[134] It held that action was a tantamount to expropriation.[135]

In this case, the denial of license was done by the Municipality of Mexico with the consideration of the environmental impact, and it was denied due to the opposition of the local people under the right to regulate of a state. However, the tribunal reasoned that these reasons were not shown any matter associated with the physical defects of the investor's landfill business. It stated that the permit was denied without consideration. Besides the action of the Mexico government failed to ensure the transparent and caused the termination of the investment. Therefore, the tribunal concluded that the host state violated the treaty obligation to give treatment fairly and equitably.

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[130] *Ibid*., paras. 28-40.

[131] *Ibid*., paras. 42-50.

[132] *Ibid*., para. 59.

[133] *Ibid*., para. 58-59.

[134] *Ibid.,* paras. 109-111.

[135] *Ibid*.

In *Tecnicas Medioambientales Tecmed S.A. v Mexico*,[136] the main issue was whether a regulatory measure of the government caused a deprivation of investor's interest. Tecnicas Medioambientales Tecmed, S.A. (hereinafter "Tecmed") is a Spanish company which was awarded in the audition for sale of property and other assets relating to "Cytrar", a controlled landfill of dangerous industrial waste in 1996. In order to run the awarded business, it was required to renew the license every five years in order to continue the landfill. When Tecmed applied for the renewal of the license, National Ecology Institute of Mexico (INE) rejected the application.[137] Tecmed filed a claim before investment arbitration, where the claimant insisted that the refusal of the application by Mexican authorities constituted an expropriation without any compensation.[138] In response to the claimant, Mexico rebutted that the denial of the application for license was necessary in a highly regulated sector linked to public interest.[139] It further argued that it was competent to make a decision to renew an expired license and their conduct did not constitute the expropriation.[140] The tribunal held that the state measures constituted a *de facto* expropriation, if such measure affected the economic value, enjoyment or disposition of the assets or rights of the investor.[141] The tribunal further stated that it will not review the background reasons or motives of the measure adopted by the host state in order to determine whether it was legally legitimate.[142]

It is the same with the case *Metalclad,* the dispute was related with the non-renewal permit for landfill business. In this dispute, the Municipalities of

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[136] *Tecmed S.A. v. Mexico, supra* note 55.

[137] *Ibid*., paras. 35-39.

[138] *Ibid.,* paras. 40-41.

[139] *Ibid*., para. 46-47.

[140] *Ibid*.

[141] *Ibid*., paras. 115-116.

[142] *Ibid.,* para. 120.

Mexican government rejected the renewal of license for the environmental protection. The tribunal stated that the authorities did not make the transparent and clear warning for the investors and failed to relocate in advanced the investor's business to another place. The tribunal reasoned since the measure of the Mexican government about the renewal of license was not acted in good faith and caused the closing site of the investor's business, it was amount to expropriation and the violation of fair and equitable.

The tribunal's line of reasoning changed in the case of *Methanex Corporation v. United States*.[143] In this case, unlike the cases above, the tribunal examined the grounds of the measure taken by the host state. In this case, the claimant, Methanex Corporation was incorporated under the laws of Alberta, Canada. It produced and transported menthol, the main element of MTBE (methyl tertiary-butyl ether). The claimant filed a claim against United States for an order to ban the MTBE in 1999 in California region. The claimant insisted that the measure in question amounts to substantive expropriation. The Tribunal stated that under general international law, a non-discriminatory measure which was adopted for a public purpose and adopted in accordance with due process is not expropriation and compensable.[144] The tribunal held that California's measure for bun the MTBE aimed at public purpose and was non-discriminatory and consistent with die process.[145]

In the case of *CMS Gas Transmission Company v. Argentina*,[146] the Tribunal held that the state action in question did not constitute expropriation, because the investor did not lose his control upon business. The dispute arose out of economic reforms regulations in Argentina. The claimant, Transportadora

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

[144] *Ibid*, Part IV, Chapter D, para. 7, p. 4.

[145] *Ibid*., Part IV, Chapter D, para. 15, p. 7.

[146] *CMS v. Argentina*, *supra* note 47.

de Gas del Norte (hereinafter "TGN") was an enterprise that run gas business in Argentina, and an U.S. Company CMS Gas Transmission Company (hereinafter "CMS") possessed 30 per cent of shares of TGN. Argentine Government granted TGN a right to pay the tariffs calculated in US Dollars. In 1991, in the process of economic reform, Argentine Government issued the Currency Convertibility Law, and Decree.[147] Under new laws, the tariffs will be calculated in dollars and would be adjusted in accordance with the United States Producer Price Rate Index (US PPI).[148] Because of the serious economic crisis, Argentina Government called for the meeting with gas companies.[149] During the meetings, the companies agreed to a temporary deferral suspension for tariffs adjustment with an agreement of income lost caused by the deferral will be gradually recovered.[150] But the government did not implement the agreement, and TGN's application for the tariff adjustment was refused. In 2002, the Emergency Law was promulgated, and 1991 Convertibility Law was abolished, with the termination of the adjustment of tariffs according to US PPI. The redenomination in peso at a rate of one peso to a dollar and the devaluation of Peso caused a negative effect on the business of TGN.[151] In the arbitration, it was CMS that filed the claim. It claimed that the regulations adopted by the Argentine government was equal to expropriation and constitute violation of fair and equitable treatment clause in the BIT. In response to the claim of claimant, Argentine Government contended that none of the measures did not amount to expropriation, because none of the Government's measures interfered in the claimant's business, including its full control on TGN. The Tribunal ruled that Argentina did not breach the Article IV (1) of the Treaty

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147 *Ibid*., paras. 53-61.

148 *Ibid*.

149 *Ibid*.

150 *Ibid*.

151 *Ibid*. paras. 62-66.

which provided the restrictions for the expropriation,[152] since the claimant did not lose its control over TGN.

In some cases, involving public interest issues, the tribunals only considered if the measure in question could cause deprivation the investor's intertest, without examining the aim of the measure. During the consideration of the issue, tribunals examined the case, based on three standards. These standards are: (1) whether the investors' rights have been affected, (2) whether the whole business of the investor has been damaged, and (3) whether the value of the investor's business has been significantly diminished.[153]

2.7. Brief summary

Under the various international regulations like the UN Charter and GATT, States have a sovereign right to rule over all the matters relating to public policy. When this right interferes with investors' rights under international investment agreements, the right to regulate for States can be restricted. As the tribunals' way of reasonings are different in accordance with each of the case, the decisions cannot be assumed as the fixed answer for the State's actions even though it is obviously done for the public purpose. How the answer or the decisions of tribunals resulted, states shall have a warning whenever they need to implement a policy for public purpose. Therefore, it can be said that investor state dispute resolution provisions have restricted the right to regulate of a State.

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[152] *Ibid*., para. 264.

[153] Dugan et al., *supra* note 15, p. 455.

Chapter III: Human Rights in International Investment Arbitration: Applicability of Human Rights in International Investment Regime

Introduction

While international investment law is a part of general international law, it is often said that international investment law is in contradiction with general international law. A relationship between international human rights law and international investment law has always been questioned. Under international investment law, state obligations lie in the protection of assets of the individual investor,[154] in other words states are required to treat the investors in fair and equitable manner, and accord them a legitimate expectation. For human rights protection, a violation of human rights can happen while operating a business. Human rights violation can happen against the investor as an aggrieved person. In this kind, the investor brought a claim against the host state for violation of human right. For example, in the case of *Toto v. Lebanon*,[155] the investor brought a claim against the Lebanese government for not rendering justice by Lebanese judicial system. In that case, the investor's allegation did not contain a violation of human rights, but the investor referred to Article 14(1) of the International Covenant on Civil and Political Rights (hereinafter ICCPR), which guarantees a right to fair trial before the courts and tribunals. Similar claims can be seen in

[154] Mouyal, *supra* note 25, p .98.

[155] *Toto Construzioni Generali S. P. A. v. Republic of Lebanon*, Award, ICSID Case No. ARB/07/12 (June 7, 2012).

cases, such as *Biloune v. Ghana,*[156] *Chevron v. Ecuador*,[157] and *Grand River Enterprises v. U.S*.[158]

The second kind of human rights violation results from an adverse effect of the investment within the host state. In this case the investor is the claimant in the dispute, but it is also a human rights violator. This kind of investment dispute mostly arise from water-related business. It is well known that some developing states cannot provide water services, and they tend to privatise the water and sanitation service business, through foreign investment. During the water services operation, however, disputes may happen due to a poor management of the investor, or due to an abrupt increase of water price. Face with such difficulties, the host state may resort to regulatory measures in order to tackle with these difficulties, especially in an emergency situation. Again, in Argentina, the investor brought a claim against the government because the its emergency measures caused the investor's water and sanitation business, which led to insolvency. In the present chapter, the main issue will focus upon a relationship between human rights and international investment law, especially in the water-related sector.

3.1. Human Rights in International Law

Human rights are generally defined as an inherent right of a person.[159] Every person is entitled to enjoy the social, political, civil and cultural rights

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[156] Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Ad hoc tribunal (UNCITRAL rules) (27 October 1989).

[157] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

[158] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011.

[159] UN Office of the High Commissioner for Human Rights (OHCHR), *Human Rights: A Basic Handbook for UN Staff*, United Nations Staff College Project, p. 2 (Available at:

without distinction between sex, race, religion and colour.[160] Human rights are universal, inalienable, indivisible, interrelated and interdependent.[161] The concept of human rights appeared from the League of Covenant in 1919.[162] After the World War II, in order to maintain international peace and security, the General Assembly adopted the Universal Declaration of Human Rights (hereinafter UDHR). In the declaration, fundamental human rights principles are provided for the recognition of the inherent dignity and the equal and inalienable rights of all human beings with freedom, security and peace.[163] The UDHR contains 30 Articles, and they all are applicable to all persons. The UDHR states that everyone has right to life, liberty and security, the right to be recognized as a person, and all the people must be free from torture and inhuman treatment. It also provides that everyone has a right to the protection of law, right to freedom of movement and resident, right to a nationality and right to have a family. Besides, everyone has a freedom of religion, right to take part in their political process, right to work, equal wages, right to a well-being of living standard, right to education and right to take part in the cultural life. These are the fundamental principles.

After as a first step for the UDHR, the UN General Assembly adopted other international covenants and other conventions for the specific protection of the genocide, racial discrimination, torture, women, children and persons with disability.[164] In 1966, the General Assembly adopted two Covenants: the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). The ICESCR

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https://www.refworld.org/docid/483eac7b2.html) (last accessed on 2 March 2010) .

[160] *Ibid*.

[161] *Ibid*.

[162] Crawford, *supra* note 61, p.635.

[163] UDHR, Preamble.

[164] Crawford, *supra* note 61, p. 638.

contains 31 Articles and provides various rights related to a right of self-determination and right to enjoy the economic, social and cultural development, right to work, fair wages, right to social security, right to an adequate standard of living including clothing, housing, right to the enjoyment of the highest attainable standard physical and mental health, right to education, and right to enjoy in the benefits of the scientific progress. In the ICCPR, it contains 53 Articles and the ICCPR affirmed that everyone has a right to enjoy civil and political rights, right to life and survival, right to liberty, freedom of religion and association.

3.2. International Human rights and International Investment Law

Although human rights principles are part of international law, the implementation of these basic principles for the individuals cannot be done by the international law.[165] Because the individuals are not the subjects of the international law, and only the respective states can rule the people in their respective territory.[166] Therefore, a performance of human rights protections is vested to states. In implementing these detailed human rights provisions, these fundamental rights are to be protected by law.[167] The obligations to enact law, adopt rules for the protection of these rights are explicitly conferred upon the states by the provisions contained in ICCPR and ICESCR.

States shall respect and promote the realisation of the right of self-determination.[168] Besides, State Parties shall ensure all the citizens to enjoy all the rights without discrimination.[169] The State Parties shall adopt or enact the necessary measures, laws, regulations for the encouragement the full enjoyment

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[165] Malcolm N. Shaw QC, *International Law*, Sixth Edition, Cambridge University Press, p. 268.

[166] *Ibid*.

[167] ICCPR, Article 6(1).

[168] ICESCR, Article 1.

[169] ICESCR, Article 2.

of the citizens. The obligations are explicitly expressed not only in the UDHR, also in the respective international covenants or conventions.

These obligations are inherently conferred in the Article 1(3), Article 2 and 3 of the ICCPR and Article 3 of ICESCR. And the implementation for this concept is linked with the concept with the sovereignty of a state and its responsibility.

Every human being is entitled to enjoy his or her human rights, without distinction as to race, sex, religion, or national or other status.[170] Generally, the obligation to protect human rights falls upon states. The duty to fulfil human rights obligations means that a state needs not only to protect its citizens, but also to ensure that the rights of individuals of other states who are not its citizens, for example foreign investors, are protected. This concept is emphasized in Article 2 of the ICCPR.[171] In discharging the obligations provided in Article 2 of the ICCPR, states need to ensure that individuals are protected from violations by the state's agents and from acts committed by private persons.[172] If there is a violation of

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[170] UN Office of the High Commissioner for Human Rights (OHCHR), *supra* note 159*,* p.2.

[171] Article 2(1) of International Covenant on Civil and Political Rights provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status. (2) Where not already provided for by exercising legislative or other measures, each Sates Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

[172] Human Rights Committee, General Comment No. 31(80), *The natural of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc., CCPR/C/21/Rev.1/Add.13 (26 May 2004).

the rights provided in Article 2 of the ICCPR, whether this occurs through the action or the omission of the state, the state needs to ensure the effective remedy provided in Article 2(3) of the ICCPR.

The United Nations Human Rights Committee has stated that this primary obligation to ensure the enjoyment of human rights and to adopt the necessary measures to protect human rights falls upon states. It states:[173]

> Article 2, Paragraph 1, obligations are binding on the States (Parties) and do not have a direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.

Article 2 of the ICCPR proceeds to emphasize that each state party can adopt any legislation or measures as may be necessary to give effect to the rights recognized in the Covenant. In performing the obligations necessary to protect human rights, international human rights law allows a state to give the special attention for the protection of the right of health of the citizens. For example, Article 12 of the ICESCR provides that states can take necessary steps in respect of child health, to prevent or control epidemics or diseases and to give medical treatment in the event of sickness.[174] As well as prescribing states' obligations,

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[173] *Ibid*., para 8.

[174] Article 12 of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 12 contains the obligation to respect the other state parties' human rights, and to prevent third parties from violating human rights in other countries.[175] Therefore, according to provisions of several committees of human rights conventions, it can be seen that the protection of human rights obligations are important to all parties.

3.2.1. Human rights and international investment agreements

Although foreign direct investment is the main source for the rapid development of a state, there are some circumstances in which foreign direct investment can interfere public benefit of the host state. Some investment disputes before international arbitral tribunals have occurred because of violations of human rights. Among these, disputes based on human rights may arise because of the attitude of the host state.

As human rights are in a separate branch of international law, human rights issues are not taken very seriously in the context of international investment law. Human rights issues are addressed neither in the North America Free Trade Agreement (NAFTA), nor in the Energy Charter Treaty (ECT).[176] Only a very few

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2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[175] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc., E/C.12/2000/4 (11 August 2000), para 39.

[176] Eric De Brabandere, 'Human Rights and International Investment Law', in Markus Krajewski and Rhea Hoffmann (eds.), *Research Handbook on Foreign Direct Investment*, Edward Elgar (Forthcoming), reprinted in Grotius Centre Working Paper 2018/75-HRL,

treaties, such as SADC Model Bilateral Investment Treaty,[177] Article 15(1), provide for human rights.[178] Therefore, international arbitral tribunals have recognized international human rights laws and tried to draw a fair balance between protection of investors' rights and human rights. This can be seen in the following three aspects. First, a reference to human rights in investment arbitrations may be seen in the preamble. In the preamble of some investment treaties, after the goals of the encouragement and protection of investment, issues of health, safety, and the environment are the secondary goals for the business corporations of the state parties. In these treaties, state parties to the treaty agree to respect internationally recognized workers' rights. For example, these provisions can be seen in the US-Bolivia BIT (1998), the US-Ecuador BIT (1993), the US-Armenia BIT (1992), and the US-Albania BIT (1995). Moreover**,** the preamble of SADC Model Bilateral Investment Treaty states that the state parties to the treaty will recognize the sustainable development of the state parties, economic growth, the transfer of technology and the furtherance of

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Leiden Law School Research Paper. Available at SSRN: https://ssrn.com/abstract=3149387 (last accessed on 6 December 2018); Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration," in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration,* Oxford University Press, 2009, p. 84.

[177] Southern African Development Community Model Bilateral Investment Treaty Template.

[178] Article 15(1) of the SADC Model BIT provides:

> Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

human rights and human development.[179] These provisions aim to promote investment and the rights of investors that do not contradict with human rights and other public interests.

Secondly, a reference to human rights in investment treaties can be found in choice of law clauses.[180] Normally, parties to these treaties agree that the applicable law may be domestic law or international law.[181] When state parties choose international law as an applicable law in investment disputes, this might allow human rights issues to enter the investment disputes. This kind of a choice of law clause can be seen in, for instance, Article 9 of the Chinese Model BIT,[182]

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[179] In the preamble of SADC Model Bilateral Investment Treaty Template provides:

> States parties to the Treaty agree to recognize the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development.

[180] Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration," in Pierre-Marie, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, pp. 84-85.

[181] Dolzer and Schreuer, *supra* note 12, p. 288.

[182] Article 9 of the Chinese Model BIT provides:

> (3) The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.
>
> (4) The arbitration award shall be final and binding upon parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.

Article 1131 of NAFTA,[183] and Article 26(6) of ECT.[184] Besides, the International Centre for Settlement of Investment Disputes (ICSID) Convention has a provision that international law should be applied as the governing law by the tribunal when the parties have not agreed on the choice of law. Article 42 (1) of the ICSID Convention provides that the applicable law shall be the law chosen by the parties to the dispute, and that, when there is no such agreement between the parties, the tribunal shall apply the applicable rules of international law.[185] In this matter, international law as an applicable law refers to the general principles of international law.[186]

Thirdly, human rights protection can also be found in the context of obligatory clauses in BITs. These clauses can be found in the definition section, or in the promotion and acceptance of investment section of the treaty. These clauses provide that the admission and operation of investment must be performed in conformity with the legislation of the host state. An illustration is Article 1 of Italy-Argentina BIT (1990).[187] In Article 2 of the BIT between the Philippines and the

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[183] Article 1131 of the North American Free Trade Agreement provides:

> A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[184] Article 26(6) of the Energy Charter Treaty provides:

> A tribunal established under paragraph (4) shall decide in dispute in accordance with this Treaty and application rules and principles of international law.

[185] Article 42 (1) of the ICSID Convention provides that:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including) its rules on the conflict of laws) and such rules of international law as may be applicable.

[186] Reiner and Schreuer, *supra* note 176, p. 85.

[187] Article 1 of the Italy-Argentina BIT provides:

> For the purpose of this Agreement: (1) “Investment” means, in accordance with the

Belgo-Luxemburg Economic Union (1998), state parties agree to promote and admit investments in accordance with the constitution, laws and regulations of the host state.[188] These provisions preserve a sovereign rights of the host state to regulate.[189] Therefore, under these clauses, investors must comply with the national laws and regulations, including regulations in relation to the public interest, during the period of their investment. Since the words "in accordance with host state's laws" prevents an illegal operation in the territory of the host state, investors may lose certain protections originally granted under the treaty. On the basis of these provisions, tribunals can develop a concept of "illegal investment" in investment disputes.[190] In this way, applicable law clauses and "in accordance with host state's laws" clauses will be a means by which a tribunal can take into consideration human rights issues and other public interest issues in an investment arbitration. In the case of *Phoenix Action v Czech Republic*,[191]

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host country laws and irrespective of the selected legal form or any other related laws, any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in conformity with the laws and regulations of the latter.

[188] Article 2 of the Republic of the Philippines and The Belgo-Luxemburg Economic Union provides:

Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its Constitution, laws and regulations. Such investments shall be accorded fair and equitable treatment.

[189] Tullio Treves, Francesco Seatzu and SelineTrevisaunt (eds.), *Foreign Investment, International Law and Common Concerns*, Routledge, 2014, p. 148.

[190] *Ibid*.

[191] *Phoenix Action, LTD. v. The Czech Republic*, Award, ICSID Case No. ARB/06/5 (April 15, 2009).

the tribunal stated that “the fact that an investment is in violation of the laws of the host state can be a denial of jurisdiction.”[192] The tribunal further stated:

> The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.[193]

Disputes concerning transnational investment usually arise out of measures taken by a host state. They normally concern discrimination, fair and equitable treatment, and negative impacts on investments, such as expropriation. In some cases, human rights issues mingle with investment issues: such as in cases concerning the right to water,[194] cultural rights,[195] and the right to health.[196] It may be the case, for example, that state measures to protect health through the water supply interfere with a business that is supplying water and with investments made for the business.

According to the discussions of the Commission on Human Security,[197] human security includes the protection of citizens from environmental pollution,

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[192] *Ibid.,* para. 102.

[193] *Ibid.,* para. 106.

[194] *Biwater v. United Republic of Tanzania*, *supra* note 46.

[195] *Glamis Gold, Ltd. v. The United States of America*, Award, Award on UNCITRAL Arbitration (8 June 2009).

In this case, while the claimant was operating a mining project, the U.S government adopted several measures with the reason to protect the environment. The claimant claimed against the measures of US government was amount to expropriation.

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

[197] Commission on Human Security, *Human Security Now*, (2003), (Available at http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf) (last accessed on 6 December 2018).

transnational terrorism, and infectious diseases.[198] The Commission states that human security is also concerned with illness and health.[199] The discussion continues, by referring to the 1993 Vienna Declaration of Human and saying that, as human rights are concerned with the interdependence of the human rights of all people, those rights have to be maintained comprehensively: through civil and political, and economic and social.[200] Respecting human rights is at the core of the protecting of human security, and human security and the respect of human rights are mutually reinforcing.[201] According to this discussion, when the lives or the security of the citizens of a state are seriously affected, this concerns human rights. Disputes arising out of this situation become investment disputes involving human rights issues, leading to a contradiction between the protection of investor rights and the protection of human rights.

3.3. Right to Water: International Regulations for the Right to Water

Introduction

Human Rights violations can occur in the water business, since the quality water directly affect health of individuals. Water is an essential element for the daily needs of all people. Water plays an important role, needless to say, for drinking, eating, preservation of health and maintenance of environment. With the growth of world population, water consumption has been increasing. The need for the water supply and sanitation services led to a new kind of business for the investors.[202] Due to scare budget, lack of technology and knowledge, some of developing countries have privatized water supply and sanitation

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[198] *Ibid*., p. 6.

[199] *Ibid*.

[200] *Ibid*., p. 10.

[201] *Ibid*.

[202] Julien Chaisse (ed.), *Charting the Water Regulatory Future: Issues, Challenges and Directions*, Edward Elgar Publishing Limited, 2017, p.77.

services.[203] The water services business are operated under privatization contracts and the duty of the investors is to distribute the fresh and safe water to the local people of host states. As water has a close relationship with human health, once mismanagement in business occurs, risk to human rights will arise.

The very first reference to water resources management and the availability of prompt and adequate water supply can be seen in the United Nations Conference on Water in 1977, at Mar del Plata, Argentina. The main discussion of the Conference was for the various aspects of water management to increase water use and to promote the preparedness in order to avoid the water crisis.[204] In 2010, UN General Assembly adopted a resolution named "The human right to water and sanitation".[205] In its resolution, the expressions relating to water are indicated as if the right to water is recognized as human rights, for example, "human rights to safe and clean drinking water and sanitation." But the expressions mentioned in the declarations and resolutions are not legally binding on the member states like the UN related treaties or conventions.[206] Although the right to water is not directly recognised as a right under international human rights norms, the right to water is indirectly recognized in other international conventions. For example, in the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) 1979, the right to water is provided as a fundamental right for women. In Article 14 (2) (h) of CEDAW, it provided that State Parties shall take all the appropriate measures to eliminate discrimination against women in rural area and shall ensure a women to enjoy the adequate living conditions, particularly in relation to housing, sanitation,

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[203] *Ibid*., pp. 6, 77.

[204] *Ibid.*

[205] UNGA resolution, The human right to water and sanitation, UN Doc, A/RES/64/292 (3 August 2010).

[206] Pierre Thielborger, *The Right(s) to Water: The Multi-Level governance of a Unique Human Right*, Springer-Verlag Berlin Heidelberg, 2014, p. 3.

electricity and water supply, transport and communications. Besides, in the Article 24 (2) (c) of the Convention on the Rights of the Child (hereinafter CRC) 1989, the right to water is provided as the right of access to a child's health. Under this provision, State Parties shall perform the full implementation of child's rights and shall take the appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water. These two Conventions stated the right to water as a basic need of women and children for attaining the fundamental human rights. Although the right to water is not explicitly recognized as human rights, water has been indirectly stated as a person's fundamental human right. To emphasize this right, General comment 15 states the right to water.[207] It provides that it is the primary obligations for stats to be ensure and to observe for the fulfilment of safe and clean drinking water and sanitation by adopting the necessary rules and regulations, laws and policies.[208] In observing these tasks, states shall take all the necessary steps to protect water. The General comment provides the way to perform for states to fulfil the obligations; to respect, to protect and to fulfil.[209] For respecting this right, the state should not interference the right to water of a person and protect the interference by others coming from various ways, such as the disturbance from engaging war, or unlawful treatment by third parties or from poor governance.[210] In protecting the right to water, states should protect from third parties' disturbance such as corporations or individuals. States shall adopt necessary measures and accurate regulations[211] in order not to obstructs the accessibility of water for the people. In fulfilling the obligations for the right to water, state shall

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[207] CESCR, General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant), UN Doc, E/C.12/2002/11 (20 January 2003).

[208] *Ibid.,* para. 17.

[209] *Ibid*., para. 20.

[210] *Ibid*., paras. 20-21.

[211] *Ibid*., paras. 23-24.

perform this task by promoting the water sector, provide the necessary facilities and encourage the educational works for offering knowledge in using water. In encouraging the right to water, the applicability of water is mainly kinds; availability, quality and the accessibility.[212]

All these obligations to fulfil are conferred upon states. Thus, states are absolutely the management relating to acquire the adequate fresh and safe water for the people. When the water services are privatized, although it is the investor who operates the water services for people, the actual responsible for the distribution of safe and clean water is upon the government of a state. In doing investment of water services, the business operation is performed under the investment business, the provisions that are specially provided for taking responsible for water services.

Only in very few investment or trade treaties, the provisions for rights and responsibilities relating to water is provided. For example, Article 1.9 of Comprehensive Economic and Trade Agreement (CETA) concluded between the European and Canada, provided for the rights and responsibilities relating to water. It provides:

> 1. The Parties recognise that water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product. Therefore, only Chapter Twenty-Two (Trade and Sustainable Development) and Twenty-Four (Trade and Environment) apply to such water.
>
> 2. Each Party has the right to protect and preserve its natural water resources. Nothing in this Agreement obliges a Party to permit the commercial use of water for any purpose, including its withdrawal, extraction or diversion for export in bulk.
>
> 3. If a party permits the commercial use of a specific water source, it shall do so in a manner consistent with this Agreement.

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[212] *Ibid*., para. 12.

This provision is provided that all the member states will have the obligations to protect water resources and offer the enjoyment of water resources.

3.3.1. Case Study

Protecting the human rights is the task which is concerning all the parties and all the people. In the international investment regime, in preserving human rights obligations, there are some conflicts between the non-state actors and the state which is the most responsible for the protection of human rights. Arbitral tribunals who are implementing the provisions of international instruments, have to afford to have a fair and balanced result. Accepting the amicus petition, reviewing the provisions of international human rights organizations are the significant support of the tribunals for the space of human rights in international investment regime.

The dispute had occurred in Bolivia between the Bolivia government and the *San Francisco Company Aguas del Tunari.*[213] Bolivian government signed a forty-year-long contract with an enterprise, San Francisco Company Aguas del Tunari, for the distribution of water supply in the third largest city Cochabamba in 1999. In 2000, widespread of public riots happened due to an increased water tax (more than 50 % than before). Bolivian government had to declare the state emergency, and had to cancel the above-mentioned contract. Besides, the company was forced to leave from Bolivia. The investor brought a claim in 2001 against Bolivia pursuant to the ICSID Convention. The claimant alleged that Bolivian government breached obligations under the Netherlands- Bolivia BIT, with obligations for compensation.[214] In 2006, with the request of the respondent State, the proceeding was discontinued, and the dispute was settled between the

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[213] *Aguas Del Tunari, S.A., v. Republic of Bolivia,* ICSID Case No. ARB/02/3.

[214] *Ibid.,* Decision on Respondent's Objections to Jurisdiction, p. 456.

parties. Public riots had mainly occurred for the water tax that had increased with the advance notice.

We can see another dispute related to water: the case of *Azurix v. Argentina*.[215] This case tells us connections of the fair and equitable treatment and full protection and security. Besides, the government's failure to oblige its duty for the availability of clean drinking water. In 1999, an US company Azurix Buenos Aires S.A. concluded an agreement with Argentine Government. The agreement concerned distribution of the water services and the treatment and the disposal of sewerage in Buenos Aires. During the operation of the business, the Province government denied for permitting the expenses (about $11 million) that Azurix had cost for the water infrastructure during the previous government.[216] Though the claimant tried to get a loan from overseas private investment corporation, the chance for a loan was rejected that led to expense by the claimant's company itself.[217] Moreover, the Province government did not fulfil its obligation to permit a full recovery of Canon payment 438,555,554 Argentina Peso to the claimant company.[218] Besides, the claimant was prevented from increasing bill with the concern of the public crisis for the presidential race.[219] These omissions caused claimant's company to be the deprivation of the business interests and to file for bankruptcy.[220] Besides, during the algae outbreak in water that resulted water cloudy and hazy and even could cause the infectious disease, the Province not only failed to perform the Algae Removal

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[215] *Azurix Corp v. The Argentine Republic,* Award, ICSID Case No. ARB/01/12, (14 July 2006).

[216] Ibid., para 162.

[217] *Ibid*., para 163.

[218] *Ibid*., para 41.

[219] *Ibid*., para 83.

[220] *Ibid*., para 43.

Works,[221] but also persuaded the local people not to pay water tax and ordered the company to discount water tax. After having so many difficulties for two years, Azurix requested a termination of the Concession Agreement and the government of the Province rejected the termination of the Concession.[222] When the Azurix filed for the bankruptcy, the government terminated the Concession by alleging for the non-fulfilment of the business. And then the Azurix company brought a claim against the Argentina government for compensation in ICSID tribunal with the allegation for the violations of fair and equitable treatment, full protection and security and expropriation provided in the United States-Argentina BIT.

The allegations are based on the actions and omissions on the part of Argentina, relating to non-application of the tariff agreed in the Concession, non-completion of the certain works of the authorities of the Province and the failure to support for the financial recovery obligations.[223] The claimants alleged that the actions by the Province government in relation to adding the non-existence provisions in the Concession amounted to the denial to provide the information, and delay to assist verified information, which constituted the violations of fair and equitable treatment and full protection and security.[224] The claimant further stated that the obligations to preserve fair and equitable treatment is the maintenance of the stability of the investment.[225] In the case, the respondent state defended that it had never breached the contractual provision.[226] Argentina contended that the state was not responsible for violation of fair and equitable treatment because all the actions and measures done by Province government

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[221] *Ibid*., para 124.

[222] *Ibid*., para 244.

[223] *Ibid.,* para. 43.

[224] *Ibid.,* para. 330.

[225] *Ibid.,* para. 324.

[226] *Ibid.,* para. 303.

was not against the applicable legislation, rules and regulations.[227] In the tribunal's reasoning, the government authorities has refused the notice of the termination of concession notice sent by the claimant[228] and made the repetitive callings upon the claimant for non-payment of water bill,[229] and the respondent State failed to provide full secure investment environment to the investor.[230] The tribunal held that the respondent State violated the state obligations of fair and equitable treatment and the full protection and security.[231] For the allegations of the expropriation, the claimant alleged that the refusal of the right to recover fully Canon payment, the interference of the claimant's enjoyment of the expected economic interest were amount to creeping expropriation.[232] The respondent State denied that the Province's measures were not amount to expropriation and a single effect of each measure cannot constitute the expropriation[233] and all the actions of the Province government was done under the provision of the Concession contract.[234] the tribunal held that the actions of the state did not amount to expropriation.[235] Although the management of the business was affected due to the measures taken by the Province, the claimant did not lose his ownership in the business..[236] In this case, it can be seen in the tribunal's reasoning for the connection between the fair and equitable treatment and full protection and security. After reasoning upon the several facts, the tribunal

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[227] *Ibid.,* para. 337.

[228] *Ibid.,* para. 374.

[229] *Ibid.,* para. 375.

[230] *Ibid.,* paras. 406-408.

[231] *Ibid.,* para. 377, 408.

[232] *Ibid.,* para. 277.

[233] *Ibid.,* para. 295.

[234] *Ibid.,* para. 278.

[235] *Ibid.,* paras 321-322.

[236] *Ibid.,* paras 321-322.

expressed its belief upon the interrelation of two standards by saying that "it was persuaded of the interrelationship of fair and equitable treatment and responsible to preserve full protection and security", and failing to observe fair and equitable treatment is was amount to the violations of full protection and security.[237] For the obligations relating to the task of safe drinking water, the Province government totally neglected for taking steps to have kept water safe and clean. In this regard, government itself was the one who violates the right to water for the citizens. The tribunal made a comment in the award that the actions of total disregard of the Province government caused the water civil crisis than the resolution of the Algae outbreak instead.

The third dispute can be seen in the case of *Biwater v. Tanzania.*[238]This case concerns Tanzania's performance to take steps to protect the right to water from the threat for citizens, due to a poor management of the investor's water service business. A joint venture of the United Kingdom company, Biwater International Limited and the Germany corporation, HP Gauff Ingenieure GmbH, signed a ten-year contract with the Tanzanian government in February 2003.[239] It contained operation of water distribution, maintenance of sewerage system, and collection of tax, under conditions that the claimant had to give the monthly payment to the government.[240] Due to poor management on billing systems and the other serious financial problems, the claimant company collected far less water tariff than the expected income, so the claimant could not pay the exact amount of tariff to the government.[241] This was continued until 2004. The claimant's failure to fulfil the contractual obligations to distribute clean water

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[237] *Ibid.,* para. 408.

[238] *Biwater v. Tanzania*, *supra* note 46.

[239] *Ibid*., para 6.

[240] *Ibid*., para 8.

[241] *Ibid*., paras. 16, 163.

caused significant risk to health.[242] In May 2005, the government announced that the Lease Contract was terminated, and the government ordered the staffs to transfer to the new department, which means to take all the management of the claimant business.[243] The claimant's right for the entitlement of VAT relief was also cancelled.[244] In the end, the claimant owed 3.4 billion in Tanzanian currency for all the unpaid tax and rental fees.[245] For all these happenings, the claimant company brought a claim by alleging for the violations of fair and equitable treatment and expropriation under UK-Tanzania BIT.[246] The respondent state defended that due to the claimant's failure to give the rental fee and tax, to operate the contractual obligations, the government had to exercise its regulatory power according to the contract provisions.[247] The host state further stated that its action was done for the necessity of the continuation of services,[248] and as there were no deprivation of the valuable rights.[249] The respondent state further claimed that the claimant's non-performance upon the water supply services has been threatening to gain the budget amount that is necessary to do the repaired works for water and sanitation services.[250] Because the claimant did not pay for the essential goods and services necessary to treat the raw water clean from the river, the government needed to remove the claimant's management upon the

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[242] *Ibid.,* paras 377, 387, 429.

[243] *Ibid.,* para. 212.

[244] *Ibid.,* para. 218.

[245] *Ibid.,* para. 227.

[246] *Ibid.,* para. 354.

[247] *Ibid.,* paras. 422, 424.

[248] *Ibid.,* para. 428.

[249] *Ibid.,* para. 422.

[250] *Ibid.,* para. 434.

water service business.[251] Therefore, the state's actions and measures did not establish the expropriation.[252]

The tribunal held that the actions relating to the claimant's interest, disturbance of the contractual process amounted to the expropriation.[253] In defending full protection and security, the respondent state contended that full protection and security is a duty to act by due diligence and the government's actions intended to protect the basic needs of the citizens, that did not constitute the violations of full protection and security.[254] For the fair and equitable treatment, the respondent state, the claimant's business was at risks since the beginning and all his management were leading to a failure.[255] Therefore, the claimant's extent to enjoy this treatment under the lease Contract was in critical.[256] As in overall decision, the tribunal decided that the actions of the Tanzanian government in conducting the rejection of VAT certificate, the seizure of the claimant's office and the public announcement for the termination of claimant's water supply business constituted the violations of fair and equitable treatment, full protection and security and established the expropriation.[257] In this case, the investor of the water supply service could not manage to make a progress to for upgrading the water and sanitation business. And the investor failed to cooperate with the government by paying for essential goods and services to the Tanzanian government that is needed to treat the water from the rivers before distribution.

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[251] *Ibid.,* paras. 434-435.

[252] *Ibid.*

[253] *Ibid.,* para. 500.

[254] *Ibid.,* para. 723.

[255] *Ibid.,* para. 568.

[256] *Ibid.,* para. 569.

[257] *Ibid.,* para. 814.

These disputes show that the disputes can arise from various forms in the water services business. In the first dispute in Bolivia, the main problem was the water price. The citizens are so interested about the water tax before releasing the official announcement. After announcing the water tax amount, the price was not affordable for the citizens. The water price should be fixed by taking into consideration the individual income of the citizens. When water price causes the frustration to the consumers, the unsuccessful water supply business would be end by arising the public riots.

In the *Azurix* case, the authorities themselves violated the right to water by neglecting the Algae outbreak. Besides, the authorities made the public confused by inviting not to pay the water tax to the investor. This action was an interference to the business, and an abuse of rights. In the last case *Biwater,* poor management of the investor was a total threat to the health. Tanzanian government took necessary steps to save the bad situation by watching the investors' business and the accuracy of the management. Tanzanian government acted for the protection of the right was in accordance with the international regulations adopted for the protection of the right to water.

The very recent case, *Urbaser v. Argentina*,[258] has been one of the cases in which the tribunal has given an effort to take into consideration for the space of human rights protection. The claimant, the shareholder of AGBA, Urbaser S. and Consorcio de Aguas Bilbao, Bilbao Biskaia Ur Partzuergoa, was granted an investment concession by the Argentinian government to operate water and sewage services in the province of Buenos Aires in 1999 and early in 2000.[259] The claimant's concessionaire project was to be performed in region B (Zone 2), one of the poorest areas. From 1998 to 2000, Argentina's economic condition

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[258] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentina Republic*, Award, ICSID Case No. ARB/07/26 (December 8, 2016).

[259] *Ibid.,* paras. 34, 63.

deteriorated seriously.[260] The economic breakdown had consequences not only at the economic level but also at the social and institutional level.[261] During the economic crisis, the shortage of drinking water and poor sanitation were major problems, widespread disease, and especially affecting young children.[262] After passing several emergency laws and regulations, including Regulations for Drinking Water and Sewerage Services and Regulations for the concession of Sanitation Services under Provincial Jurisdiction,[263] the Argentinian government declared that AGBA's concession had terminated in July 2006.[264] The termination of the concession caused financial loss, and led to insolvency. The claimant then brought a claim against Argentina, alleging that Argentina had violated Articles III, Article IV and Article V of the Spain - Argentina BIT.[265] Article III of the BIT contained an obligation to protect foreign investments, and a prohibition against adopting unjustified or discriminatory measures. Article IV contained an obligation to afford fair and equitable treatment to the investment. Article V expressed that any illegal and discriminatory expropriation of foreign investment must be avoided and imposed an obligation to give compensation for such expropriation. The dispute was registered with ICSID in October 2007[266] and the first proceeding started in December 2009.[267] In this dispute, the tribunal revealed its broad reasoning about human rights issues. According to the tribunal's decision, counterclaims by a host state can be brought against investors,

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[260] *Ibid*., para. 71.

[261] *Ibid*.

[262] *Ibid*., para. 68.

[263] *Ibid.,* para. 53.

[264] *Ibid*., para. 34.

[265] *Ibid*.

[266] *Ibid*., para. 2.

[267] *Ibid*., para. 12.

and the responsibility to protect human rights lies not only upon host state but also upon investors.

During the proceedings, in May 2013, the respondent state filed a counterclaim against the investor under Rule 40 of the ICSID arbitration rules.[268] The respondent stated that the investor had also violated human rights, because the claimant had failed to fulfil its obligations under international law in relation to operating a business for running water services.[269] The claimant objected that there was no provision for a counterclaim under the procedural rules.[270] The respondent could have raised the counter-claim earlier, but had been silent since the termination of the concession.[271] Besides, the allegation in the counterclaim was based on the alleged failure of the investment in dispute, and did not explain how the claimant had infringed general principles and human rights. Therefore, in the claimant's view, the respondent's counterclaim was absolutely groundless.[272]

To reach its concrete findings in this matter, the tribunal relied upon the dispute settlement provisions of the Spain-Argentina BIT. According to Article

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[268] Arbitration Rule 40 of the ICSID Convention provides:

> (1) Except as the parties otherwise agree, a party may present an incident or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incident or additional claim shall be resented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

[269] *Urbaser v. Argentina*, *supra* note 258, para. 21.

[270] *Ibid*., paras. 1110-1115.

[271] *Ibid.*

[272] *Ibid.*

X(1) of the BIT,[273] a dispute between parties was to be settled in an amicable way as far as possible.[274] It was only when the parties could not settle their dispute in an amicable way that the dispute could be submitted by either party to the arbitral tribunal, under Article X(2).[275] It was to be considered that the words "either party" in Article X(2) indicated both the investors and the host state.[276] This meant that both parties to the dispute were entitled to bring a claim. The consent given by the claimant covered all disputes connected to the investment within the meaning of the BIT.[277] The tribunal further pointed out that a long period of silence did not have any legal effect in relation to a counterclaim.[278] The tribunal concluded that Article X of the BIT allowed for the possibility of submitting a claim or a counterclaim in international arbitration, and that it had the jurisdiction to accept the respondent's counterclaim as admissible and to be examined on its merits.[279]

The tribunal continued by commenting that non-state parties such as corporations, investors, and companies, are responsible for the protection of

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[273] Article X of the Spain-Argentina BIT provides:

> (1) Disputing arising between a Party and another Party in connection with investment within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.

[274] *Urbaser v. Argentina*, *supra* note 258, para. 1143.

[275] *Ibid*.

[276] *Ibid.* Article X (2) of the Spain-Argentina BIT provides:

> Where a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the Party in whose territory the investment was made.

[277] *Urbaser v. Argentina*, *supra* note 258, para. 1147.

[278] *Ibid*., para. 1150.

[279] *Ibid*., paras. 1153-1155.

human rights under international human rights law. It also disclosed that it reached its view by relying on the rules provided by human rights bodies**.** What the claimant objected to in the counterclaim of the respondent was that the Spain-Argentina BIT does not impose any obligations upon the investor.[280] Besides, the claimant believed that only states are responsible for satisfying the human right of access to water, and that this is not the concern of private corporations.[281] In the tribunal's view, corporate social responsibility is embedded as a standard for individual investors under international law. [282] Under this standard, commitments to respect human rights are already included.[283] Companies are not immune from being subject to international law. [284] In this respect, the decision of whether or not non-state actors are obliged to bear these international obligations is to be made on the basis and the context of the specific activities of the corporation.[285] The tribunal referred to Article 25(1) and 30 of the Universal Declaration of Human Rights (UDHR) and to Article 5(1) of ICESCR. Article 25(1) of the UDHR provides a right to an adequate standard of living for all human beings, and Article 30 provides that the provisions of the UDHR cannot be destroyed by any activity or any performance. The tribunal then commented that the obligations in respect of human dignity and adequate living conditions for all human are obligations falling upon all parts, public and private and that these principles are not to be engaged in activity aimed at destroying such rights.[286] However the tribunal confirmed in the award that the obligation to fulfil the human

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[280] *Ibid*., paras. 1182.

[281] *Ibid*., para. 1193.

[282] *Ibid*., para. 1195.

[283] *Ibid.*

[284] *Ibid.*

[285] *Ibid*., paras. 1195-1196.

[286] *Ibid*., para. 1199.

right to water is imposed upon states.[287] The tribunal stated that, if these obligations are to be imposed upon non-state actors like companies or investors, a contract or a similar relationship of civil or commercial law is required.[288] These are just comments that the tribunal made in the award. For the counterclaim brought by the respondent state, the tribunal reasoned that the mere fact that human rights obligations are relevant for an investor under international law was not enough to impose those obligations on the claimant's company, AGBA and its shareholders.[289] The concession contract itself did not have the effect of imposing the obligations arising out of international law on the investors.[290] Moreover, the tribunal pointed out that the respondent had not stated any legal ground for any individual's rights for the alleged violation of the human right to water, and did not suggest in the counterclaim that the alleged obligation to fulfil the human right was the responsibility of the investors under international law. Based on these failures on the part of the respondent, the tribunal dismissed the respondent's counterclaim. Although the tribunal dismissed the counterclaim of the respondent state, *Urbaser* case is one of the remarkable cases that the tribunal did not fail to take into consideration about the human rights.

3.3.2. *Amicus Curiae* involvement

In decisions of investment disputes, especially in the context of the public interest, tribunals are willing to take into consideration of a non-parties to the dispute, so-called *amicus curiae*.[291] An *amicus curiae* in an investment arbitration is a social organization, with a strong interest in the subject-matter of

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[287] *Ibid*., para. 1201.

[288] *Ibid.*

[289] *Ibid*., para. 1212.

[290] *Ibid.*

[291] Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration," in Dupuy, et. al., supra note 176, p.90.

the dispute, mostly in matters of public health or water supply services.[292] The Latin phrase *amicus curiae* means "friend of the court", and submissions by *amicus* are made with the permission of the tribunal. There are various relevant provisions in the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, and also in the ICSID Convention. The provision that empowers a tribunal to allow submissions by an *amicus curiae* is contained, for example, in Article 15 of the UNCITRAL rules.[293] The provision does not directly allow for the involvement of an *amicus curiae*, and submissions are permitted when the tribunal considers it to be appropriate for the public interest. In addition, the tribunal's permission is granted under the principle that submissions of non-disputant parties should be permitted if this would increase the equality of the parties to the dispute.

The case of *Methanex Corp v United States*, under Chapter 11 of the NAFTA and UNCITRAL arbitration rules, was the first one in which the tribunal decided to allow *amicus curiae* submissions.[294] During the proceedings, the International Institute for Sustainable Development requested permission to submit an *amicus* brief to the tribunal. The request stated that the case might have an effect upon the government's legislative measures to protect the environment and human health, and that the participation as *amicus curiae* would create an equilibrium between the government's authority to make environmental regulations and the investor's property rights.[295] The claimant filed an objection,

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[292] Dugan et al., *supra* note 15, p.707.

[293] Article 15 (1) of the UNCITRAL Arbitration Rules provides:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

[294] Dugan *et al*., *supra* note 15, p.168.

[295] *Methanex v. United States*, *supra* note 143, paras. 7-8.

arguing that the tribunal could not allow a party to participate the proceedings without the consent of the parties, and that there were no precedents or rules for the tribunal to allow such submissions under the UNCITRAL rules.[296] The tribunal stated that Article 15(1) of the UNCITRAL rules gave it a broad discretion to the tribunal, and that its purpose was equality and fairness for the parties to the dispute.[297] It further stated that allowing submissions from a person other than the parties to the dispute was not the same as adding a new party to the dispute.[298] The tribunal concluded that it might be appropriate to allow *amicus* submissions, because allowing *amicus* submissions fell within its procedural power and also within the scope of Article 15(1) of the UNCITRAL rules.[299]

Another provision that empowers a tribunal to allow the submissions of an *amicus curiae* can be seen in Article 37(2) of the ICSID Convention.[300]

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[296] *Ibid*., para. 13.

[297] *Ibid*., para. 26.

[298] *Ibid*., para. 30.

[299] *Ibid*., paras. 31, 52.

[300] Article 37(2) of Rules and Procedure for Arbitration Proceedings (Arbitration Rules) provides:

> After consulting both parties, the Tribunal may allow a person or entry that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a futual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;

This provision came into force in 2006, and it can be directly applied in disputes submitted after the date of entry into force of the latest amendment. The case of *Biwater Gauff v. Tanzania*[301] was the one which applied the provision.[302] In the petition made in *amicus* brief, the petitioners stated that the investor's failure to fulfil the obligations of distribution of water to the civilians of the host state created the significant risks to human health.[303] Before the introduction of this provision, tribunals had to rely on Article 44 of the ICSID Convention in order to allow *amicus curiae* submissions.[304] In the case of *Aguas Provinciales de Santa Fe S.A., et al. v. Argentina*,[305] the tribunal accepted the *amicus* submission

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(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

[301] *Biwater v. Tanzania*, *supra* note 46.

[302] *Ibid*., Petition for Amicus Curiae Status (November 27, 2006), p. 10.

[303] *Ibid*., para 377.

[304] Article 44 of the ICSID Convention provides:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

[305] *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Baecelona S.A and InterAguas Servicious Intergrales del Agua S.A. v. The Argentina Republic,* Order in Response to a Petition for Participation as *Amicus Auriae*, ICSID Case No. ARB/03/17 (March 17, 2006).

in a reason that it can exercise the power of the Article 44 of ICSID Convention.[306] This Article allows *amicus curiae* submissions from non-parties in appropriate cases.[307]

All international institutions and organizations have taken steps to give proper space to issue of human rights under international investment arbitration. Following a recent investment dispute: the case of *Urbaser v. Argentina*,[308] it is possible to see another opportunity to take human rights issues into account in investment disputes, through the right of the host state to bring a counter-claim against the investor. The case illustrates in the next subsection a relationship between human rights protection and investment, so the point will be dealt with in more depth.

3.4. Brief summary

As discussed above, human rights protection is one of the most important issues in the context of international investment arbitration. However, it is also sure that the investors do have a responsibility to protect human rights. According to the tribunal award, it is hard to say that tribunals are willing to preserve and give some space for human rights. Therefore, in order avoid disputes related to human rights in the context of investment, States need to prepare for in advance legal systems and social systems that do not affect human rights, even though the investors' business.

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306 *Ibid.,* paras. 15-16.

307 *Ibid.*

308 *Urbaser v. Argentina*, *supra* note 258.

For the detailed case commentary, *see*, Edward Guntrip, "*Urbaser v Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration," *EJIL: Taik!*, February 10, 2017, available at https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/ (last accessed on 9 December 2018).

Chapter VI: Foreign Investment in Myanmar

Introduction

The government of Myanmar announced its economic policy on 19 July 2016.[309] The announcement contained its policy to strengthen public financial management, extension of extractive industries, privatisation of state-owned enterprises, preparation of infrastructure policy, and promotion of the agriculture and livestock sectors. With the end of the military government,[310] and new government in 2010,[311] Myanmar government made many reforms. In response to this, Myanmar government adopt new regulations in the environmental protection,[312] including projects of rural water supply. Besides, in the reforming of the economic development, the protection of environmental concept was in cooperation with the provisions with the environmental provisions. This activity seems because, Myanmar has an awareness the negative impact upon the environment and the sustainable development that can occur along with the acceptance of the foreign investment. This chapter focus on the improvements Myanmar legal frameworks relating to investment regime.

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[309] Myanmar, Urban Development and Water Sector Assessment, Strategy, and Road Map, Asia Development Bank, 2013, p.2.

[310] Military government took all the management of the State due to the political crisis around 1960. After occurring the political that arose again in 1988, the military government ruled the State from 1988 to1997 under the name of the “State Law and Order Restoration Council” (SLORC). After assuming the political situations was stable, the head of the military government continued to rule the State under the name of “State Peace and Development Council” (SPDC) from 1997 to 2010.

[311] President U Thein Sein government (Ruled from 2010 to 2015).

[312] For example, Myanmar promulgated Environment and Climate Change Law 2019, the Environmental Conservation Law 2012, The Prevention of Hazard from Chemical and Related Substances Law, 2013. The Conservation of Water Resources and River Rules 2013.

4.1. Brief History of Investment Legislation in Myanmar

In the history of Myanmar investment regime, Myanmar enacted the investment law for three times. In 1988, Union of Myanmar Foreign Investment Law (hereinafter UMFIL 1988), firstly promulgated the investment regulation, under the Military government regime.[313] In the UMFIL, the main characteristics lied in the expressions such as: right to enjoy the appropriate business interests, right to take back all the assets of the investors after the business contract expires. These privileges are expressed as the introductory statement prior to the other legal provisions in UMFIL 1988. As for the attraction of investors, the UMFIL 1988 offered exemptions and guarantees for nationalisation and the right to the foreign capital. Apart from the tax exemptions and reliefs relating to tax and the guarantee of nationalization, there were not many incentives for the foreign investors in UMFIL 1988. Due to political problems, closed door policy and international sanctions, foreign investment sectors and did not develop at that time. After 1992, Myanmar started to focus on economic growth after seeing the economic growth of neighbouring states such as Taiwan, Singapore and Malaysia. Then, it tried to extend its economic area by joining corporation or organization in the Asian region, such as GMS (Greater Mekong Sub-region of economic corporation).[314] In 1997, Myanmar became a member of ASEAN, and it also became a member of Ayeyarwady-Chai Phraya Mekong Economic Cooperation Strategy (ACMECS) in 2003.[315] These organizations had objectives of regional development. After general election in 2010, President U Thein Sein

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[313] THE Union of Myanmar Foreign Investment Law, The State Law and Order Restoration Council Law No. 10/88, 30 November 1988.

[314] Yusuke Takagi, Veerayooth Kanchoochat and Tetsushi Sonobe (eds.), *The Developmental State Building, The Politics of Emerging Economics*, The Springer, 2019, p. 139.

[315] *Ibid.,* p. 140.

took office. His government made many political, social, economic reforms, and other administrative reforms in every sector.[316] In attempting to make reforms, President U Thein Sein released political prisoners, and tried to make reconciliation with opposing political parties.[317] Besides, his government's reforms included invitation of foreign investors, reduction of tax, reduction of trade barriers, permission of license for any registered trader and other reforms.[318] In response to these reforms, the United States and European states lifted their economic sanctions.[319] In 2012, Myanmar enacted new investment law, Foreign Investment Law (hereinafter FIL 2012).[320] The FIL had its objectives of production of the minerals, creation of jobs, and development of high-technology and infrastructure, and energy. In the FIL 2012, some new provisions are added. They are: permission of land use, dispute resolution and the penalties for the breach of law. Under the FIL 2012, foreign investors are granted a permission of land use up to initial fifty years, and as an extension, the next ten years will be permitted according to the type of the investment. The dispute resolution in the investment was newly added. Under the provision, when the investment dispute occurred, the dispute will be settled in in an amicable way and the applicable method will be prescribed in the contract. In the case that the applicable method for the settlement of disputes was not prescribed in the investment contract, the dispute will be settled in accordance with domestic law. Though the dispute resolution system was prescribed in the law, a proper legal framework and the practices to support for the settlement did not develop in

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316 OECD Investment Policy Reviews: Myanmar 2014, Executive Summary, p. 24.

317 Bertelsmann Stiftung, *BIT 2018 Country Report-Myanmar*, Gutersloh: Bertelsmann Stiftung, 2018, p. 5.

318 The Report Myanmar 2018, Oxford Business group, 5th Anniversary Special edition, 2018, p. 176-177.

319 *Ibid*.; Bertelsmann, *supra* note 317, p. 5.

320 Foreign Investment Law, Pyidaungsu Hluttaw Law No. 21/2012, 2 November 2012.

Myanmar. Besides, in the FIL 2012, the investor protection standards, the subsequent compensation for the nationalization still lacked in the regulation. These provisions are necessary for the guarantees, since this can make the investors believe that they have a safe investment surrounding in the host country. These investor protection provisions are provided in the new investment law in 2016.

In 2016, Myanmar Investment Law 2016 (hereinafter MIL 2016) was enacted, instead of FIL 2012.[321] Under the FIL 2012, the applicable law for doing investment law between the national investors and the foreign investors was different. Another different regulation, Myanmar Citizens Investment Law, was applicable for the Myanmar national investors. After the MIL 2016, all the investors, both national investors and foreign investors, will be subject to the same rule, the MIL 2016.[322]

The first regulation for the foreign investment was provided in 1988, the second regulation was in 2012. In the UMFIL 1988, the term 'investment' was not defined. The definition of the investment was seen in the FIL 2012, in its Article 1(l). Under the provision, in the term of investment, it included all the assets of the investor, moveable or immoveable including possessing shares, stocks or a certificate of loan and a right of intellectual property including the right of mortgage. Under the MIL 2016, in addition to the meaning of the investment, clauses to show the meaning of 'direct investment' and the meaning of 'foreign investment' were added. According to the MIL 2016, in the meaning of the investment, it includes any assets owned by the investors as displayed in the FIL 2012. Besides, in the term 'investment', it also contains revenue-sharing contract, management and the certain rights related to property, the rights granted by the relevant law investment related tools, machinery, equipment and spare parts. When the UMFIL 1988 and the FIL 2012 was promulgated, the objectives were

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[321] Myanmar Citizen Investment Law, Pyidaungsu Hluttaw Law No. 18/2013.29 July 2013.

[322] Article 1(p) and Section 101 of Myanmar Investment Law 2016.

intended for the job creation, the development of infrastructure and the high technology. In the MIL 2016, in addition to the technology development and the job opportunity, the objectives of the promulgation contain the protection of natural environment and social environment and investor protection. This indicates that Myanmar made a progress in its investment history.

4.2. Progress of Myanmar's Investment Regulations

The MIL 2016 contains 26 chapters and 103 Sections. The added sections in it include treatment for the investors, responsibilities of the investors, and the indirect expropriation. Besides, the indirect expropriation with the compensation will be applied in Myanmar investment regime for the interest of the citizens.

4.2.1. Standards of Treatment

The first obvious improvement in the MIL 2016 is the inclusion of the provisions for the foreign investors. The treatment of fair and equitable treatment, guarantee for non-expropriation are the typical provisions in BITs. In the BITs that Myanmar has concluded with Asian countries, the provisions of fair and equitable treatment has been included even before the MIL 2016. The BITs provided these standards, for example, in China-Myanmar BIT (2001),[323] India-Myanmar BIT (2008), [324] Japan-Myanmar BIT (2013), [325] and Philippines-Myanmar BIT (1998).[326] In Myanmar legislation, the MIL 2016 was the first one that dealt with treatment for investors. In Section 47, all the foreign investors will be treated fairly and equitably that is no less favourable than Myanmar citizens and the investors

[323] Article 3 (1) of the People's Republic of China and the Union of Myanmar (2001).

[324] Article 4 and 5 of the Republic of the India and the Republic of Union of Myanmar.

[325] Article 2, 3 and 4 of Japan and the Republic of the Union of Myanmar BIT.

[326] Article 2, 3 and 4 of the Republic of the India and the Republic of Union of Myanmar.

of other states in the matters of expansion, establishment, acquisition, operation and other dispositions of the investments.[327] However, these equal treatments for the foreign investor has been limited, subject to the interest of small and medium enterprises of local investors. Relating to capacity building, exemptions and reliefs for the locations, fair and equitable treatment will not be applicable in comparison with the Myanmar citizen investors and small and medium enterprises owners.[328] Therefore, fair and equitable treatment is not fully applied in all situations for foreign investors in Myanmar.

Along with fair and equitable treatment, it is important to emphasise a connection with full protection and security. It is only fair and equitable treatment that is provided in Myanmar's legislation. The MIL 2016 did not provide full protection and security. Full protection and security can be seen together with fair and equitable treatment in the international investment agreements. This can be seen, in the BITs that Myanmar concluded, in Article 14 of Japan-Myanmar BIT (2013)[329] and Article 3 of the Singapore-Myanmar BIT (2019). Full protection and security will be necessary due to the civil crisis, civil war, public riot or demonstration around the investor's business.

Moreover, not all the investments are made in the capital cities. In the attraction of the investment plan, there are some specific investment zones that

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[327] Section 47 (a) of Myanmar Investment Law.

[328] Section 76 of Myanmar Investment law.

[329] Article 14 of Japan and the Republic of the Union of Myanmar BIT provides:

> Each Contracting Party shall accord to investors of the other Contracting Party that have suffered loss or damage relating to their investments in the Area of the former Contracting Party due to armed conflict or a state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the Area of that former Contracting Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favorable than that which it accords to its own investors or to investors of a non-Contracting Party, whichever is most favorable to the investors of the other Contracting Party.

are specially designed for regional development such as Thilawa Special Economic Zone, Dawei Special Economic Zone and Kyauk Phyu Economic Zone. Depending the chosen business, some investments conducted in these zones have to be operated in the border line area of Myanmar territory and the border line of the other neighbouring Countries. In the above zones, Thilaw SEZ is located in Yangon, Dawei SEZ is located in Taninthayi Region, southern part of Myanmar, and Kyauk Phyu SEZ is located in the western part of Myanmar. Myanmar itself is a State which frequently engaging civil war the rebellions. Therefore, it is very important for the host state to assure investors for the long-term safety of the investment. Under international investment regime, full protection and security protection is one of the guarantees by the host states.

4.2.2. Indirect expropriation

Another newly added feature in the MIL 2016 concerns indirect expropriation, together with compensation. In the former legislations on investment, they guaranteed only for non-expropriation of the investments. In the MIL 2016, the new legislation restricts expropriation, subject to necessary conditions. When the expropriation in question concerns interest of the citizens in non-discriminatory manner, as far as it was conducted in accordance with the applicable laws, the expropriation may be justified, subject to compensation. Therefore, the assets of the foreign investor might face expropriation in Myanmar for the interest of citizens. The MIL 2016 provides the way of calculating the compensation for expropriation. They are:

- in accordance with fair consideration of public interest and of the interest of the investors,
- based on the reasons and the purpose of the expropriation,
- based on the fair market value of the investment,
- based on the duration and the profit acquired by the investor within the period of the investment.[330]

[330] Section 53 of MIL 2016.

Under this provision, dispute can happen during the calculation of the compensation. In other words, dispute might occur due to a disagreement upon the amount of compensation.

4.2.3. Responsibility of Investors

Unlike previous legislations, the MIL 2016 provides a responsibility of investors in Myanmar. and some matter, the investors are obliged to pay compensation for causing the loss.[331] Under the MIL 2016, the investor will have to respect culture, customs, and traditions of the ethnic groups.[332] All the investors are obliged to observe existing laws, official terms and conditions and all the other necessary regulations for operating a business under a permit or under a license.[333] Besides, investors shall make sure that they do not cause damage pollution the environment and the reduce the value of the natural, social environment and the cultural heritage.[334] The investors shall make compensation for the loss or the damage of the environment and the socio-economic losses that result from their activities. When the investor's business caused damage to the natural environment and the socioeconomic by operation of the oil and gas extraction which is not related with the permissible business.[335] This kind of the provisions intended to protect human rights, destruction of environment and the other possible dangers in society**.** This standard is so called corporate social responsibility (CSR) as an obligation for investors.[336] The creation of CSR is another attempt to reserve the policy space for the protection of the adverse

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[331] Chapter XVI of MIL 2016.

[332] Section 65 (a) of MIL 2016.

[333] Section 65 (c), (d) of MIL 2016.

[334] Section 65 (g) of MIL 2016.

[335] Section 65 (o) of MIL 2016.

[336] Andrea K. Bjorklund (ed), Yearbook on International Investment Law and Policy 2013-2014, Oxford University Press, 2015, p. 433.

effects of investments under the international investment regime.[337] In today's BITs, CSR provisions are inserted for investors to take responsibility for the investment that can harm the environment and possible violations of human rights.[338] The international organization such as Organization for Economic Co-operation and Development (OECD) has also encouraged and has adopted the guidelines for the practice of corporate responsibility for ensuring the improvement of the economic, social and environmental welfare.[339] The insertion of the responsibility of the investors in MIL 2016 could be said as a progress.

4.3. Investment-Dispute Settlement

Most of international investment disputes are settled under international arbitral tribunals. The typical organ for dispute-settlement is the International Centre for Settlement of Investment Disputes (ICSID). ICSID has its own dispute resolution principles to settle the investment disputes. Thus, in Myanmar, settling the investment by way of arbitration is one of the attempts of Myanmar government. In order to settle the commercial disputes in accordance with the international standards, Myanmar Government has enacted the Arbitration Law 2016.[340] The provisions of Myanmar Arbitration Law 2016 will be applicable for any commercial disputes. Myanmar has signed and has ratified the New York Convention.[341] As a member of the New York Convention, any arbitral awards in

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[337] Titi, *supra* note 6, p. 60.

[338] OECD Guidelines and Other Corporate Responsibility Instruments, Working Paper on International Investment 2001/05.

[339] See more OECD Guidelines 2004 and OECD Guidelines for Multinational Enterprises, 2011 Edition.

[340] The Arbitration Law, Union Hluttaw No. 5/ 2016. (5 January 2016).

[341] United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 1958 for recognizing and enforcing the foreign arbitral awards of International Commercial Arbitration.

which Myanmar was awarded as a party to the dispute, can be enforced under the provisions of the Convention in Myanmar. Therefore, Myanmar Arbitration Law is applicable for the settlement of the investment disputes when the relevant parties decided to settle the investment disputes before Arbitral tribunal.

Under the MIL 2016, Chapter 19 provides the way to settle investment disputes. Under the provisions stipulated in Chapter 19, a dispute cannot settle by way of Arbitration directly. According to Section 83 of the MIL 2016, when an investment dispute has occurred, both parties shall settle the dispute firstly in an amicable way. Only when the parties cannot settle the dispute amicably, the dispute shall be settled as the way that the investors and host state (Myanmar) have agreed.[342] Section 83 provides that:

> Before any investment dispute between the investor and the Union or between the investors is brought to any court or arbitral tribunal, all disputing parties shall use due attempts to settle the disputes amicably.

Therefore, the settlement of disputes in an amicable is the compulsory step.

Currently, Myanmar has tried any investment or commercial dispute within Myanmar. As the practical exercise of the Myanmar regulations are not much accurate, for the investors who want to choose the different dispute settlement forum according to their nationalities when the dispute has arisen. The Myanmar has been a member of Association of Southeast Asian Nations (ASEAN), ratified on 23 July 1997. Besides, Myanmar is a party to the ASEAN Comprehensive Investment Agreement (ACIA) which intends to make an independent investment environment.[343] In the transaction of ACIA, the dispute settlement option has contained for the Member States where a dispute has arisen.[344] The options can be chosen the dispute settlement forum of ICSID

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[342] Section 84 of MIL 2016.

[343] Loretta Malintoppi and Charis Tan (eds.), *Investment Protection in Southeast Asia: A Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties*, Brill Nijhoff, 2017, p. 243.

[344] *Ibid*., p. 244.

Convention, UNCITRAL Arbitrations Rules or the regional centres for arbitration in ASEAN.[345] For the ICSID Convention, though Myanmar has not yet a member of ICSID, the dispute, in which Myanmar contains as a disputant party, can be settled by the ICSID Additional Facility Rules which are provided for non-member state.[346] Therefore, under MIL 2016 and current Myanmar Arbitration Law and Myanmar Arbitration Law 2016, domestic dispute resolution system is not stipulated as compulsory, every investors can choose the international arbitration.

4.4. Human Rights Institution in Myanmar

Since the Military government in 1962, Myanmar had received criticisms in the issue of human rights. Since 2011, along with the reforms of new government, the activities in human rights began in Myanmar. As a first move for human rights, the Myanmar National Human Rights Commission (hereinafter MNHCR) was established in September 2011.[347] The official regulation for the MNHRC was provided in 2014.[348] According to the regulation, the objective of the MNHRC lies in a safeguard of fundamental rights in the Constitution. It also intended for the creation of community in which human rights are respected and protected as prescribed in the Universal Declaration of Human Rights.[349] In this regulation, the MNHRC has duties to the promote public awareness of the human rights, and inquiries and investigations of human rights violations.[350] The MNHRC investigates human rights violations within the business in a recent

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[345] *Ibid*.

[346] *Ibid*., p. 245.

[347] Myanmar National Human Rights Commission, A Report to the United National Committee on the Elimination of Discrimination Against Women, June 2016. para. 1.

[348] Myanmar National Human Right Commission Law, the Pyidaungsu Hluttaw Law No. 21/2014, 28 March 2014.

[349] Section 3 of the Myanmar Human Rights Commission Law.

[350] Section 22 (a) of MNHRC Law.

human rights abuses within the business.[351] There are suggestions for the MNHRC to upgrade the Commission in order to be consistent with international standards.[352] In meeting with the international standards, the MNHRC shall need to follow the principles provided in the Status of National Institutions (The Paris Principles).[353]

4.5. Potential Problems in Investment Disputes

Before investing in a state, an inquiry of legal frameworks of the host state will be the initial tasks for investors. All the investors wish safe investment environment under the stability of the legal frameworks. Most of the investment disputes occurred because the legal framework changes, newly issued measures that nearly completely change the existing the investment related regulations. For the host states, all these changes are necessarily considered to be done under various reasons, such as for the settlement of economic crisis or for the protection of environment or for the prevention of human rights violations or other public purpose. The stability of legal framework of the host state, and less regulations

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[351] "National Human Rights Commission to Investigate LGBT Suicide," available at: https://www.irrawaddy.com/news/burma/national-human-rights-commission-investigate-lgbt-suicide.html (last accessed on 5 January 2020); "Myanmar Rights Commission to Probe Fishery Slave Claims," available at: https://www.irrawaddy.com/news/burma/myanmar-rights-commission-probe-fishery-slave-claims.html (Last accessed on 5 January 2020).

[352] Marco Bunte (Author), Southeast Asia's Human Rights Crisis: When Illiberal States meet weak National Human Rights Commissions, April 2019, p. 36. (Available in https://www.researchgate.net/publication/332751947_Human_Right_Issues_Southeast_Asia's_Human_Rights_Crisis_When_Illiberal_States_meet_weak_National_Human_Rights_Commissions).

[353] The Paris Principles was adopted by the General Assembly of United Nations under the Resolution 48/134 of 20 December 1993.

can be the best solution for preventing the investment disputes. Besides, the stability of the political matters such as civil war or disagreements in acquiring the state management authority will also be necessary to avoid the disputes. Myanmar needs to prepare for a stable legal framework both for Myanmar investment regime and for the other public purpose regulations.

As a developing state, Myanmar is in the very primitive stage in making rules settling disputes with foreign investors. Civil war that engaged within the state frequently,[354] inexperienced of settling possible side effects of investment under the imperfect legal frameworks, they can be undesirable investment disputes. First of all, Myanmar needs some amendments for provisions such as full protection and security provision, so that it can gain trust from the foreign investors and other related regulations as well. Secondly, Myanmar shall need to stipulate environment protection and protection of human rights violations, so that the citizens would not receive an adverse effect of the investment. Thirdly, Myanmar shall carefully exercise the right to regulate while several investments are operating with Myanmar territory. Where, unavoidably, Myanmar government has to exercise the right to regulate that might cause the affect the investment, the prior negotiations having discussions with the investors should be managed in advance. By managing the above methods, Myanmar government can manage the occurrence of the investment disputes.

4.6. Brief summary

It is obvious that Myanmar has been trying its legal frameworks to be consistent with the international standards. For Myanmar Investment regime, there are both progress and weakness in the investment regulations. Public interest provisions, the standards of treatment for investors have made a progress. For dispute settlement system, it is only a starting point in Myanmar.

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[354] https://www.asiatimes.com/2019/08/article/why-war-will-never-end-in-myanmar/ (Last accessed on 29. 2. 2020)

To create a reliable Arbitration forum under then national law, Myanmar judicial systems needs many experiences and practice. For the potential indirect expropriation, Besides, the activities of the human rights institution are needed to be upgraded so that it can perform accurately the protection of human rights violations during the investment business.

Chapter V: Conclusion

The topic about the public interest has been paid more and more attention between states under international investment regime. The concept that not only the host states, but also the investors are partly responsible for the protection of the environment and human rights violations is gradually accepted. Therefore, the international organizations such as OECD released the guidelines for corporate social responsibilities. The attitude of the corporate social responsibility has been developed within the international investment regime. As long as the investors protection provisions such as fair and equitable, full protection and security are provided in the international investment treaties, investment dispute will occur. Because, within the concept of fair and equitable treatment, there are other treatment and standards are organized such as discrimination, denial of justice and legitimate expectation. Performing the states's obligations for public interest, the actions of host government can easily arise the investment disputes. through these standards. To date, investment tribunals are not completely favoured the public interest issues or human rights issues in the investment disputes. Although the tribunals permit the third-party participation of Amicus Curiae or the participation of non-governmental organizations for public interest including human rights are not much helpful. Because investors' rights under the investment treaties cannot be completely neglected for the reasons of public interest and human rights. Adversely thinking, favouring too much upon the right to regulate for reasons of public interest might cause the suppression of the investors. And there might also be the abuse of state's right to regulate the concept of public interests is too powerful within state parties. Therefore, the right to regulate of a state for public interest and the investor rights should be operating in a parallel way. In order to restrict the frequent use of ISDS clause, sharing the responsibility of the business by the investors is the best solution to avoid from occurring the investment disputes. For Myanmar, inserting the provisions of the responsibilities of the investors could be said wise in MIL 2019. The experience

of Myanmar in handling the investment that can have an impact upon environment and settling as defendant state is too weak. Therefore, Myanmar should avoid the investment disputes as much as possible. In doing so, the attitude of Myanmar should less focus upon the public interest. This does not mean to reduce the regulations for the public interest regulations. The suggestion is that Myanmar should avoid the exercise of the right to regulate for public interest. Moreover, Myanmar should give more attention in political stability so that civil unrest or civil war would not harm the assets of the investors. Because, in preventing the possible investment disputes, providing the treatment for the investors in the legal frameworks is not sufficient, the stability of state is vital reason to prevent the disputes.

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