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Indirect Expropriation and the Application of Principle of Proportionality:

the Role of ICSID Tribunals

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Detication

I would like to dedicate this thesis to my late father, Dawood Lebbe

Abstract

This study is primarily devoted to explore and analyse the application of principle of proportionality as a method of investment dispute settlement particulary in indirect expropriation cases. Recently, ICSID arbitrators gradually attract application of principle of proportionality by citing European Courts of Human Right (ECHR) and its case laws, and World Trade Organization (WTO) Jurisprudence. However, there are numerous opinion among several scholars on the application of this principle by ICSID tribunals. Various tribunals and scholars have accepted that the host states could enjoy their sovereign rights in order to enhance socio-economic condition, protect environment and protect essential interest of State during state of emergency/economic crisis through adopting various regulatory measures. At the same time host states are under compulsion to fulfill their contractual commitments which were given at the entry of investment. This situation creates more difficult to the arbitrators to come to a conclusion whether regulatory measures amount to indirect taking as these regulatory measures prevent the use and enjoyment of investors' property rights. Therefore, application of proportionality is considered as a desired method of resolving two different conflicts of interest. Thus, this research tries to examine how above principle is applied by ICSID tribunals to balance different conflicts of interests in the situation of state of necessity.

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Oslo

December, 2010

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Abbreviations and Acronyms

ASEAN	Treaty of Amity and Cooperation in Southeast Asia
AF	Additional Facility
Ar.	Article
AB	Appellate Body
BITs	Bilateral Investment Treaty (ies)
Convention	ICSID Convention
DR-CAFTA	Dominican Republic-United States-Central American Free Trade Agreement
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECHR	European Convention on Human Rights
e.g	*example gratia* (Example)
EU	European Union
FET	Fair and Equitable Treatment
Ft.n	footnote
GATT	General Agreement of Trade and Tariffs
GATS	General Agreement of Trade and Service
ICJ	International Court of Justice
ICSID Center	International Center for Settlement of Investment Disputes
Ibid	*Ibidem* (the same)
ICSID	International Convention for Settlement of Investment Disputes
i.e	*id est* (that is)
ILC Draft Articles	International Law of Convention
NAFTA	North American Free Trade Agreement
NPM	Non-Precluded Measures
p., pp	page, pages

Para	Paragraph
PCIJ	Permanent Court of International Justice
Supra	Above
TEC	Treaty of European Community
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

Chapter 1: Introduction

1.1 General Overview of the Study

Arbitration is one of the fastest growing areas in international investment dispute settlement mechanism[1]. It is based on contractual agreement, which excludes the jurisdiction of domestic court[2]. It is usually less costly and more efficient than litigation through regular courts[3]. There are a number of investment tribunals such as ICJ, UNCITRAL, Iran-US Claim Tribunal and etc. to resolve investment dispute amicably. This research will analyze the role ICSID tribunals on the application of principle of proportionality. These tribunals are set up under the International Convention for the Settlement of Investment Disputes (ICSID Convention)[4] and it provides an autonomous regime for submitting investment disputes to arbitration or conciliation[5]. ICSID is part of a World Bank Group and many countries are ratified to it[6]. It is considered as most common means of international investment dispute resolution forum recognized by the bi-multilateral and regional treaties.

Generally, foreign investment contracts are mostly concluded as long-term cross-border investments, as a result, unexpected non commercial risks, politically or legally, may arise during the period of its duration[7]. To evade this fear, many bilateral and multilateral treaties

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[1] Sornarajah (2008) pp. 249-50,

[2] Dimsey (2008) p.7

[3] Schreuer (2009) p. 7

[4] *Supra* note 1 at p.. 461

[5] Lew (2004) p. 268

[6] There are currently 155 signatory States to the ICSID Convention. Of these, 144 States have also deposited their instruments of ratification, acceptance or approval of the Convention and have become ICSID Contracting States. See, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (visited on 12/09/2010)

[7] Dolzer and Schreuer (2008) p.4. They pointed out the risks in long term foreign investment contracts and how the foreign investment should be design, “a key feature in the design of such a foreign investment is to key out in advance the risks inherent in such long – term relationship, both from a business perspective and from the legal point of view, and then to identify a business

are concluded with provisions on "no" expropriation without compensation and settlement through arbitration. Since, nationalization or expropriation (directly or indirectly) of foreign property is the foremost governmental interference on foreign investment, it is considered as one of the most serious encroachments on property rights of foreign investor. Dolzer and Schreuer (2008) say that "expropriation is the most severe form of interference with property". Further, they continue that "all expectations of the investors are destroyed in case the investment is taken without adequate compensation". Even though, today States are hesitant to expropriate directly, they use a number of indirect expropriation methods which is so-called 'creeping expropriation or indirect expropriation'[8] or sometimes called general or specific governmental measures[9]. Whatever methods employed to take-over foreign asserts, ultimately foreign investor has to suffer the total loss, since the property and investor are located in the host state[10] . On the other hand, host states are under the obligation to bring many measures in order to enhance socio-economic and environmental development of the country. This is called as 'regulatory measures'. It creates more difficult to the arbitrators to come to a conclusion whether regulatory measures amount to indirect taking. In this regard, a clear conflict of interest arises between public interest and investors' right. Hence, now arbitrators gradually put their heads into applying proportionality principle while citing European Courts of Human Right (ECHR) and its case laws[11] as well as World Trade Organization (WTO) Jurisprudence for necessity requirements.[12]

Further, "Principle of proportionality" plays a major role to determine the balance between two different conflicts of interests namely public interest and individual rights. It is a

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concept an d legal structure that is suitable not only to the implementation of the project in general but also to minimize risk that may arise during the period of investment".

[8]Schreuer states that the direct expropriation has become rare. Cases involving claims for indirect expropriation through regulatory measures are much more prevalent. See http://www.univie.ac.at/intlaw/93.pdf; also see Redfern (2004) Para(s) 11-32

[9] Schreuer (2009) p. 113

[10] Weiler (2005), p. 656, he points out that "it has been generally been considered that indirect expropriation is nothing more than unfair treatment that has been caused near total loss in value to the investment in question".

[11] Stone Sweet (2010) p.15

[12] *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) Award September 5, 2008, available at http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf

procedural law rather than substantive law. According to Sweet and Mathews' (2008, p75), "it is a decision–making procedure and an analytical structure that judges employ to deal with tensions between two pleaded constitutional values or interest". This principle is not a new phenomenon in the international law and also it is a wide spread principle in the field of human rights and humanitarian law, criminal law and WTO laws. Moreover, application of proportionality principle is not left ICSID tribunals as well.

However, many scholars and academics criticize the approach of ICSID Tribunals on application of principle of proportionality. Some scholars express that the application of principle of proportionality allows judges to see the entire contextual field which enables to provide equitable judgment, as it embraces balancing[13]. Some others like Bruke-White criticizes that ICSID tribunals failed to answer for relevant issues in public law questions *i.e.* what are the basic powers of host state? and to what extent it can enjoy to regulate public interest and the state's capacity to make basic socio-economic and political choices?[14]. These questions were not addressed properly by ICSID Tribunals in recent Argentina cases. Therefore, this research tries to analyze the concept of proportionality and how ICSID tribunals are deserved balancing proportionality to investment disputes settlement.

In addition to this, most of the Argentina cases involve the necessity requirements under the relevant bilateral treaty (US- Argentina BIT) on non-precluded measures (NPM) clause and customary international law (ILC Draft Articles). In many occasions, arbitral tribunal, failed to interpret relevant treaty provision but it jumped into customary international law. Hence, this study will be focusing on effectiveness of interpretation of treaty provisions to some extent.

1.2 Statement of the Problem

An investment dispute is defined as "a dispute between a contracting party and a national or company / enterprise of the other contracting party. A claim will typically arise in relation to the allege violation of an investment agreement or investment authorization entered into between the above mentioned parties (Leathley, 2007)". One of the main objectives of the

[13] Stone Sweet (2010), p3

[14] Bruke-White, and von Staden (2010) p 285

arbitral tribunals is to find amicable settlement to investment disputes. To achieve this, it has to consider on several other factors in general international law. Thus, in *Azurix Corp. v. Argentine* [15]case Tribunal found that, when interpreting BIT it should be interpreted in accordance with the interpretation norms set forth by the Vienna Convention on the Law of Treaties, since BIT is considered as an international treaty[16].

There are several other issues emerged during this particular study. First of all, tribunals are under pressure to equalize the settlement through considering both investors' and host states' perspectives to settle the problem harmoniously in the situation of host states' regulatory measures. However, it is questionable that how far above perspectives have taken into account effectively through application of principle of proportionality. At the same time principle of proportionality becomes importance as it has treaty status[17] and it is not mere principle like others. This principle has been applied by ICSID tribunals after the *Tecmed v. The United Mexican State*[18] award and subsequent arbitral awards. Therefore, through this research, I try to seek the answers for what is meant by principle of proportionality?, whether it protects only the investors from future governmental measures?, and is it further giving assurance to the power of soverigninty.

Secondly, according to Xiuli's (2006) explanation, "the proportionality demands more than the non-discrimination treatment principle and is even regarded as an important principle included in the fair and equitable treatment principle". According to Stone Sweet and Mathews (2008, pp. 76-77), principle of proportionality consist of four tests such as

[15] Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12) Award July 14 2006. Available at, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5

[16] *Ibid* para. 307, Article 31(1), of the VCLT require that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

[17] Article 5 of the ECT provides that 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. See, Jan (2000) p. 242

[18] See, e.g., *Tecnicas Medioam Bientales Tecmed v. The United Mexican States* (Case no. ARB(AF)/00/2) Award May 29, 2003, available at, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186 . At para, 121; see also, Stone Sweet (2010) p.15 noted that, no arbitral tribunal referred to proportionality, even implicitly, before 2000.

‘legitimacy’, ‘necessity’, ‘suitability’, and ‘balancing in the strict sense’[19]. If the arbitrators satisfy these requirements, measures taken by the host state may constitutional. However, there are doubts, whether arbitrators are in a position to analyze the legality of the governmental measures through applying criteria according to the particular treaty provision such as ‘public purpose’, ‘non-discrimination’, ‘due process’ and ‘compensation’ or above mentioned four tests, or applying these two criteria simanstaniously to come to a preferable solution. Still, it is not clear how investment tribunals can justify their awards by applying these proportionality analyzing criteria in the investment dispute particularly in host states’ regulatory measures.

Thirdly, fair and equitable treatment (FET) plays a vital role to determine the compensation or remedies; even if the host state’s regulatory measures did not tantamount to indirect expropriation. Thus, Stone Sweet states his views on the function of the FET in the arbitral Tribunal as, “FETS allows arbitrators to consider a wider range of elements than would normally be plausible under the tests for expropriation or regulatory takings (indirect expropriation); and the FETS facilitates the tailoring of appropriate remedies”[20]. Both proportionality principle and FET apply broadly in the investment disputes gives more opportunity to the arbitrators to thwart host states’ measures which actually need to the development of the economy.

Finally, generally, due to the lack of case law, investment arbitrators are applying proportionality principle by citing ECHR or WTO jurisprudence. Application of proportionality principle by these regional bodies has taken other factors as well when assessing ‘necessity’ requirements such importance of social value, difficulties of implementation, margin of appreciation, good faith etc. Therefore, as part of this research, the effective function of the principle of proportionality really needs other factors, as above mentioned, should take into account when applying proportionality principle in investment dispute? Further, this study will be emphasis whether proportionality principle which belongs to jurisprudence, is applicable to investment disputes as well.

[19] However, some other scholars pointed out that proportionality principle consist three criteria to satisfy the court, see more detail, Jan, (2000) pp. 240-41; Ueda and Andenas (1998) p.3

[20] Stone Sweet (2010) p.13

1.3 Delimitation

There are many investment tribunals to settle investment disputes. However, this research is limited to the discussion of the role of ICSID Tribunals on the application of proportionality in host states' regulatory measures. This study includes the main elements of principle of proportionality with compared to other jurisdiction namely ECHR and WTO jurisprudence. Further, emphasis is given to the interpretation of Article XI of the US- Argentina BIT and Article 25 of the ILC Draft Articles. Further, for the purpose of this study I have selected cases which awarded after 2000 by the ICSID tribunal. Nevertheless, much focus has been given to necessary requirement on the situation of urgent economic crises.

1.4 Literature Review and Relevant Concepts

There are a number of books and articles written in the field of international investment law, investment arbitration and principle of proportionality**.** *The ICSID Convention: A Commentary* (Christoph H. Schreuer, 2009) can be mentioned as one of the most relevant literatures to this subject area. The author has well analyzed the ICSID convention by section by section. He has given an extensive knowledge on the jurisdiction of the ICSID tribunal in the light of Article 25 of the ICSID convention. Particularly, he has analyzed the wording of Article 25 of the Convention; with well described cases. Author has an analytical view on how the general measures that taken by host state could be a direct cause for a dispute out of an investment (paras, 106-112). Further, he states that 'in order to be "arising directly", disputes must have distinctive features linking them to the investment that are not shared by disputes unrelated to investments' (p. 104). In addition, this book contains vast knowledge on how to access to the ICSID tribunal, as well as, if the absence of contracting states to the Convention, how to access Additional Facility to settle the dispute amicably (paras, 202- 210).

The '*Principle of international Investment Law'* (Dolzer and Schereuer, 2008) is mainly on International investment Law and arbitration practice is also another important literature related to the present study. This study mainly explains the distinguish feature of direct and indirect expropriation. It says that direct expropriations have become rare today. Further, authors state that 'states are reluctant to jeopardize their investment climate by taking the

drastic and conspicuous step of an open taking of foreign property. As a result of this, indirect expropriation has gained an importance (P.92)'. Wisely, when drafting bi-multilateral treaties the contracting parties include all types of taking. In this regard, to further clarify the circumstances authors have discussed many bilateral treaty models, arbitral decision and academic writings. Furthermore, they have reviewed the standard of treatment. The fair and equitable treatment standard is meant as a rule of international law and is not determined by the laws of the host state. As a result, the FET standard may be violated even if the foreign investors receive the same treatment as investors of the host state's nationality (p.123). In addition to this, it encloses a clear picture of various investment arbitrations.

The *'Proportionality Balancing and Global Constitution'* (Stone Sweet, and Mathews, J., 2008) traces the rich history of the Principle of Proportionality. Authors state that Principle of Proportionality was originated in German and now spread across Europe and Commonwealth system (p75). Proportionality principle analyzes whether right has been infringed by the governmental measures thus authors include four steps, each involving a test (pp 76, 77). They have identified the different views of proportionally principle and they have developed a theoretical explanation for why judges would find proportionality analysis attractively.

The International Law on Foreign Investment (Sornarah, 2008) is another important literature which focuses on extensive knowledge on various parts of international investment law. Generally, this book includes the definition of different terms of 'taking' with historical perspective. Most importantly it covers the almost all situations of taking of foreign property and taking in violation of foreign investment agreement. Author further express his view on expropriation, and says that obvious situation of indirect taking of physical asserts could amount to expropriation. Thus, he has identified and categorized the circumstance that the governmental measures or regulation could be arise amount to taking (p358). Furthermore, this book contains enough knowledge on the differencing norms and views of the capital-exporting states and capital-importing states on determination of level of compensation.

The Function of the Proportionality Principle in EU law (Harbo Tor-Inge, 2010) brings a wider knowledge on principle of proportionality with relevant theories. Author has well

developed arguments on proportionality principle as a general principle of EU law (p.159). Further, Harbo has found reasons why courts apply principles of law and states that by referring to a principle of law can imply that decision making is made more efficiently, and also it can limit the scope of arguments (pp.160-61). In addition to this, author has developed his arguments by quoting several schools of theories such as Alexy's, Darwkin, and Hart theory. Furthermore, this article discusses the proportionality analysis based on horizontal and vertical dimension.

The Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations (2010) by Bruke-White and von Staden, is one of interesting article which focused the reasons of importance on application of public law issues into private investor – State arbitration. Authors further state, that the application of numerous standards of reviews such as 'least alternative requirement', the 'only means' requirement, 'margin of appreciation' and 'good faith', are confusing (p.325). And also, they have express that they were not agreeing with Stone Sweet finding on principle of proportionality which helps balancing different conflict of interest.

The Resolution of International Investment Disputes (Dimsey, 2008) illustrates the history of investment dispute resolution. This includes a number of reasons why foreign investors prefer international arbitration to settle disputes (pp. 7/9). When author talks about the ICSID convention, he says that even though ICSID provides an effective dispute resolution and its framework covered by the ICSID Convention, individual relationship, including the resolution of disputes, are regulated by various other instruments such as BIT (p.13).

1.5 Research Questions and Objectives of the Study

There are some main researches questions arise when doing this particular study;

1. How the applications of proportionality undermine the state soverigninty?
2. What is the limit of the jurisdiction of ICSID tribunal, what are the powers that arbitrate have and how they utilize to achieve the balance between private rights and public benefit?

Objectives of the Research

This study mainly has four main objectives and they are as follows;

- ❖ Describe the form of state inference of investor's property rights and evaluate whether regulatory measures tantamount to regulatory expropriation
- ❖ To analyze the jurisdictional requirements to invoke ICSID jurisdiction to settle investment disputes amicably.
- ❖ To identify the meaning, scope and application of principle of proportionality and fair and equitable treatment in the light of investment agreements/treaties.
- ❖ To examine how ICSID tribunals are applied above principles to balance different conflicts of interests in the situation of state of necessity.

1.6 Significance of the Study

There are many reasons for me to select this research study. First of all, being a law lecturer in investment law I have a long time interest to do my Masters in this area. Secondly ICSID tribunals widely invoked as a dispute settlement mechanism in many bi-multilateral treaties and many developed and developing states are ratified to it. Further, proportionality principle is a new and important area in the ICSID tribunals and attracts many scholars and academics to conduct further research. Finally, being a Sri Lankan academic I hope that this study will promote further understanding of the subject area and could contribute for the future research of the country.

1.7 Research Methodology and Data Source

Since this research is mainly on ICSID tribunals, the necessary data and information for this research is mainly collected through secondary sources. Number of published articles, books, journals, decided cases and international treaties have been used and analyzed to conduct this research study. In addition, many internet articles and web sites also referred for this work.

The major analytical method of the study is descriptive and qualitative.

1.8 Structure of the Thesis

For the depth study on selected area this thesis is divided in to five chapters. Chapter one is on ‘General Introduction’ and provides a general overview to the entire thesis including the statement of the problem, literature review, methodology, objectives of the thesis etc.

The second chapter is on ‘Forms of Indirect Expropriation’ and define the definition of various types of taking. Further, this chapter discusses mainly how host state governmental measures could interfere on property rights of foreign investor. In addition, this chapter also analyzes how governmental measures could be amount to indirect expropriation in the light of cases where ICSID tribunal awarded.

Chapter three mainly discusses on the ‘The Scope and Objectives of the Principle of Proportionality and FET’. Here, I am going to focus mainly on the elements included in the proportionality principle. Further, I have developed the arguments based on GATT Article XX on general exception and discussed how doctrine of margin of appreciation suits the principle of proportionality.

The next chapter, chapter four identifies ‘the Role of ICSID on the Application of Principle of Proportionality’ and discusses the development of these tribunals on the application of principle of proportionality and FET. Further, this also examines how this principle is applied when host state needs changes to the urgent situation like economic crisis, protection of environment and socio-economic development.

The final chapter, chapter five carries the ‘Conclusion’ to this research and focuses the ideas, if any, for the future development.

Chapter 2: Forms of Host State Interference

This Chapter specially focuses on the clarification of different terminology used in taking of alien property and difference between direct and indirect expropriation in the light of academics, scholars' explanation and decision of ICSID cases. Thus, I have traced the history some extent. Particularly, I have discussed how regulatory measure can be identified as regulatory expropriation.

2.1 Defining the Definition of Expropriation

2.1.1 Confiscation, Nationalization, Expropriation

Taking of foreign property has a long history. Before tracing the definition of expropriation, it is better to have a quick overview of different terminology used in taking of foreign property.

Confiscation: In early days, there was no guarantee for the security of foreign personals as well as foreign properties located in different states as it was depended on the hands of rulers. In modern time, although guarantees are given for the protection and security of foreign investment, it is not fully implemented as it depends on many factors i.e. political and legal stability, security, good investment environment, etc. Historically, taking of alien property was a common practice. Alien properties were taken by a ruler or ruling coterie for personal benefit without compensation and it is identified as confiscation. After the decolonization, due to the raise of nationalist sentiment, many foreign industries were nationalized in large scale[21].

Nationalization: Nationalization and confiscation are two different concepts. Sornarajah (2008, pp 349-50) defines the term 'nationalization' as; "Nationalization referred to a situation in which a state embarks on a wholesale taking of property of foreigners to end their economic domination of the economy or sectors of the economy". The purpose of nationalization is to expel the aliens by taking over the ownership of property and not

[21] See, Sornarajah (2008) p. 349; Ratner (2008) p.477

purpose of personal gain. Thus, Domain defines nationalization as; "impersonal taking of the economic structure in full or in part for the nation's benefit, with or without compensation"[22].

In the situation of taking of foreign property, level of compensation[23] is playing a vital role in determining its validity. There are different perspectives to determine the compensation. Capital-exporting countries are, mostly developed States, expecting 'prompt, adequate, and effective compensation'[24]. It is meant 'full compensation'. On the other hand capital-importing states are mostly developing States and obliged to pay 'adequate compensation'[25]. It is doubt whether full compensation is ever paid in the situation of nationalization, even if contracting parties or States agree to full compensation through investment treaties. If States refuse to pay compensation or paying inadequate compensation nationalization resembles confiscation[26].

Expropriation: Expropriation[27] of foreign asserts also has confirmed one of the major interference of property rights. Subsequently, next question to be answer is that, what is meant by expropriation and how it's differ from confiscation and nationalization. Obvisiouly, expropriation vary from confiscation since taking were took place for personal benefit. Similarly, expropriation is differing from nationalization according to Dolzer and Steven quote below[28];

"In general, expropriation applies to individual measures taken for a public purpose while nationalization involves large-scale taking on the basis of an executive or legislative act for the purpose of transferring property or interest into public domain".

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[22] Domain (1948, vol.8) p.1125

[23]See, Ratne (2008) p.478

[24] The formula of 'prompt, adequate and effective compensation' was first used by Secretary of State Cordell Hull during the Mexican expropriations and generally referred to in literature as the 'Hull Formula'.

[25] See, For more clarification, Sornarajah (2008) pp. 437 -38; Reinisch (2008) p.176; In generally, Cassese (2005) pp 523-25;

[26] See, s*upra* note 22

[27] See, Dolzer, Stevens., ICSID, (1995) p. 95 ,Bilateral Investment treaties, The term "expropriation" also referred as "dispossession", "taking", "deprivation" and "privation".

[28] *Ibid*, *ft.note* 263 at p.98; Domke (1961) p. 588)

This statement clearly clarifies differentiate between expropriation and nationalization. It is crucial to note that expropriation is one of the discriminatory measures targeting a single company. Similarly, Sornarajah, (2008) describes expropriation as, 'targeting of a specific business, will be the more usual form of governmental interference with which the law has to be concern'. Consequently, host state is in the position to prove the legality of expropriation. To prove legality of expropriation certain requirement should be fulfilled[29]. Dolzer and Schreuer (2008, p 91) expose four requirements to justify the legality of expropriation. Firstly, the measures taken by host state should be a 'public purpose'. General term of public purpose might be wide enough to cover number of host state's measures. Prudently, when drafting treaties contracting parties include clauses to narrow the scope of public purpose[30]. It is accepted norm in international law that the purpose should be a genuine/*bonafide* public purpose[31] and must be exercised in good faith.

Secondly, the measures must not be arbitrary or discriminatory. The non-discriminatory treatment depends on national treatment and most favored treatment. Host state has to pay more attention on above treatments when formulating and implementing of regulatory measures which affect foreign nationals or property. Non- discriminatory treatment of foreigners has been rooted in investment contracts and treaties.

Thirdly, procedure of expropriation must follow principle of due process[32]. Finally, expropriation measures must be accompanied by compensation. Further, Dolzer and Schreuer state that these requirements should be fulfilled cumulatively. Even though, the host states meet these requirements, it is doubtful whether it should pay compensation. Many scholars say that taking is whether lawful or unlawful, compensation is essential. In contrast to this, *Feldmen v. Mexico*[33] in 2002 the Tribunal states as follows;

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[29] See also, Reinisch (2008)

[30] See. e.g Newcombe and Paradell, (2009) p.369, Art. V(1), Costa Rica-UK (1982) specifically narrow the scope of permissible public purposes: 'the public purpose must be related to the internal needs' of the state

[31] *See, ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Awarded October 6, 2006, para, 432.

[32] *Ibid*, para 435, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.

[33] *Marvin Feldman v Mexic*o, Case No. ARB(AF)/99/1, award 16 December 2002

> *"[…] governments must be free to act in the broader public interest through protection of the environment, new or modified tax régimes, the granting or withdrawal of government subsidies, reductions or increases of in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this"*[34]

In recent award by ICSID tribunal *Santa Elena S.A. v. Republic of Costa Rica*[35] decided differently and held States are in obligation to pay compensation even if severe environmental harm;

> "*Expropriatory environmental measures – no matter how laudable and how beneficial to society as a whole-are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains*"[36].

2.1.2 Property Rights as a Human Right

Cassese (2005, P.120) states that international law has given high priority to protect the person and the property of foreigners and further says that the "National and international courts have held that the foreigner may not be subject to arbitrary treatment and particular may not deprived of their property without fair compensation, they may not be subjected to military conscription". Further, according to his statement, there is no doubt that the property rights are understood as one of the human rights. Ar.1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms define the protection of property in such a way; "Every natural person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except I the

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[34] *Ibid* para 103

[35] See, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica ICSID Case No. ARB/96/1*, awarded February 17, 2000,

[36] *Ibid* para 72

public interest and subject to the conditions provided for by law and by the general principles of international law"[37].

In addition to this, Vecuna (2003) express that the "[…] protection of private property is a vital element of the broader issue of protection of human rights'. Even if, international law confers that a sovereign state has sovereignty on regulating its economy in order to enhance of welfare of its nation"[38]. At the same time, it requires to oblige international minimum standard treatment on foreigners[39]. Basically, International law principles provide a sovereign State to enjoy their sovereign right to regulate its domestic affairs. On the other hand, this exercise of such right is not unlimited and must have its boundaries. Hence, when a State enters into a bilateral investment treaty and provides number of investment protection guarantees, later on this BIT becomes *supranational* law and bound by it, and the investment-protection obligations it undertook therein must be honored rather than be ignored by a later argument of the State's right to regulate[40]. Similarly, Newcombe and Paradell's (2009, p.329) state that, "International expropriation law mediates between two general principles of international law. One is that states exercise permanent sovereignty over their territories and natural resources. And the second is that states must respect the acquired rights of foreigners"

Now, it is a well developed principle in international law that the host states cannot take foreign properties without any compensation. Violating international obligations which recognized by the principle of international law may lead to international responsibility[41]. Ar. 31 (1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that, *"*the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Further, this was discussed in *LG*

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[37] See, Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms -March 20, 1952

[38] See also, Dolzer and Schreuer., (2008) p.89

[39] See, *ibid*, p.89; Sornarajah (2008) pp. 318-19

[40] *Supra* note 23, p. 423

[41]Article 31 (1) of the ILC Draft Articles ; see also, Tschanz and Viñuales., (2009) p.731; Hobér, (2008, 25), author explains in his study that, 'there is yet another aspect of public international law which is crucially important in investment arbitration, i.e., the law of state responsibility'.

&E v. Argentina[42] case as, "it is well established in international law that the most important consequence of the committing of wrongful act is the obligation for State to make reparation for the injury caused by that act"[43]. In this case tribunal agreed with Claimants that the appropriate standard for reparation under international law is 'full' reparation as set out by the PCIJ in the *Factory at Chorzow* case and Article 31 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts[44].

2.2 Direct and Indirect Expropriation

Once a foreign investor enters into a host state he and his assets are subject to laws of the host state. Hence, host state may bring amendments to the existing laws or economical reforms in order to enhance welfare of the people as a whole which derives from its State obligation.

In the case of developing countries, in order to attract more inflow of investment they enact laws and regulations, or alter existing laws relating to liberalization of trade and give guarantees to protect foreign investment rather than expropriate[45]. Foreign investment is also one of the very important components for the economic development of developing countries. As a result, host states are reluctant to expropriate directly and create a bad publicity among international world. Thus, host state may bring number of measures which can cause serious negative impact on foreign investor, even though foreign investor having his ownership.

It is necessary to know the differences between direct and indirect expropriation. As mentioned above, direct expropriation means; host states directly seize the tangible or intangible property of foreign individuals by means of administrative or legislative

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[42] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, July 25, 2007)

[43] *Ibid*, para 29

[44] *Ibid* para 31

[45] See, e.g, Article 5 of the Law of the people's Republic of China on Foreign-Capital Enterprises, http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51034; Article 157 of the 1978 Constitution of Sri Lanka Available at, http://www.priu.gov.lk/Cons/1978Constitution/Chapter_20_Amd.html

action[46]. On the other hand, without making any harm to the ownership of the property[47] or the investors, host state try to interfere in investors' activities through its own motion or by agents, is can define as indirect expropriation[48]. Dolzer and Schreuer (2008, p. 92) make clear distinction between direct and indirect expropriation, *"*the differences between a direct or formal expropriation and indirect expropriation turns on whether the legal title of the owner is affected by the measure in question".

Ultimately, in the situations of direct and indirect of foreign investment are brought to the control of host state. Sornarajah[49] in his study, has usefully categorized form of host State interference other then direct expropriation, such as, forced sales of property, forced sales of shares, indigenization measures, taking over management control over the investment, including others to take over the property physically, failure to provide protection, administrative decisions which cancel licences and permit necessary, exorbitant taxation, expulsion of the foreign investor contrary to international law, acts of harassment such as freezing of bank accounts or promoting strikes, lockouts and labour shortages. Likewise, in *PSEG v Turkey*[50] case tribunal by citing *Pope and Talbot* case that indirect expropriation can take many forms and says as, "there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving company of its property or control in total or part"[51].

Consequently, host states measures are considered utmost important to determine the direct or indirect expropriation. This statement is further confirmed by Dolzer and Filix (2003, p. 156) and they say that, "one prominent aspect of questions of indirect expropriation is the

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[46] See, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1 Decision on Liability (October 03, 2006), para 187

[47] *Ibid* para, 188, Ownership or enjoyment can be said to be "neutralized" where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment (by citing, *Pope & Talbot Inc. v. Canada*, Interim Award, 100 (26 June 2000)

[48] See, Newcombe and Paradel (2009) p. 332

[49] See, Sornarajah, (2008) p.358 ; Reisman and Sloane (2004) p.124

[50] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award January 19, 2007

[51] *Ibid* para 278

role, if any, that the purpose and circumstance of a particular governmental action can play in the legal assessment of whether expropriation has occurred". Mostly, bi-multilateral treaties and investment contracts include a term on expropriation to include all type of direct and indirect expropriation. For an example, Article 1110 of NAFTA [52] "includes not only open, deliberate and acknowledge taking of property, such as outright seizure or formal or obligatory transfer of the title in favour of the host state, but also cover or incidental interference with the use of property which has the effect of depriving owner, on whole or in significant part, of the use or reasonably to-be-expected economic benefit or property even if not necessarily to the obvious benefit of the host state"[53].

Generally, all these classifications of governmental regulatory measures may not lead to indirect expropriations. It is based on case by case analysis. Investors are in struggle to persuade the tribunal those regulatory measures tantamount to indirect expropriation. In this regard, investor's legitimate expectation plays a key role. Hence, host states are in a position to respect the existence of legitimate expectation of investor. Because, at the entry of investment, legal framework provided by the host state including minimum standard of treatment, stabilization clause will be an important source of legitimate expectation on the part of the investor. On the other hand, investors should be expecting some foreseeable events in its long duration. Therefore, it cannot argue that every change in the laws of host state affecting foreign property will violate legitimate expectation[54]. In many cases tribunal has taken into account of legitimate expectation of the investor as an important element to determine whether indirect expropriation has arisen. For instance *Tecmed v. Mexican* case the tribunal states;

> *"[...], the claimant had legitimate reasons to believe that the operation of the Landfill would extend over the long term. [...] the claimant expectation was that of a long term investment relaying on the recovery of its investment*

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[52] See. e.g. Article 1110 of NAFTA provides that "No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measures tantamount to nationalization or expropriation such an investment (''expropriation"), except: (a).for public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation'.

[53]See, *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award August 30, 2000 para, 103

[54] Dolzer and Schreuer (2008). P 105

and the estimated return through the operation of the landfill during its entire useful life"[55]

It is important to note that deprivation of enjoyment of property rights of the investor is the central point to determine whether indirect expropriation has occurred. In *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*[56]case tribunal held, "when measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation'. As a matter of fact, the investor is deprived by such measures of parts of the value of his investment"[57]. Similarly, Article 10 (3) (a), of the Draft Convention on International Responsibility of States for Injuries to Aliens provides, "any such unreasonable interference with use, enjoyment, or disposal of property as to justify an interference that the owner there of will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference"[58]. In the *Antoine Goetz and others v. Republic of Burundi*[59] tribunal decided that the withdrawal of the certificate of free zone constituted a measure tantamount to expropriation, defined in Article 4 of the BIT as a "measure depriving of or restricting property rights."[60] In contrast, *PSEG v. Republic of Turkey* case tribunal says that, "[…] none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation. Although, measures tantamount to expropriation may well make the question of ownership irrelevant"[61]

However, due to the act of host state, negative effect of on an investment cannot automatically be considered expropriation. Therefore, it is well established principle that

[55] See *supra* note 18, at para 149

[56]*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/99/6)*Awarded, April 12, 2002

[57] *Ibid* para 107

[58] See also, Weiner (2004) p.167

[59] *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3) Award, February 10, 1999

[60] *Ibid,* Introductory Note, p. 455

[61] See *supra* note 48, para 279

an expropriation to occur, it is necessary for the investor to be deprived in whole or significant part of the property or effective control of its investment or for its investment to be deprived in whole or significant parts its value.[62]

2.3 Regulatory Measures v. Regulatory Expropriation

Mostly, host states are developing countries and they are under responsibility to develop many public interests. Enhancing welfare of people such as health, education, transport, safety etc. is one of its primary objectives. On the other hand developed states try to regulate market behaviors through its legislation such as antitrust, consumer protection, securities, environmental protection, planning and land use[63]. Consequently, they have to bring number of regulatory measures, generally or specifically, which may bring changes to the foreign investment considerably, by it-self or as part of the general economy[64]. Therefore, to decide whether regulatory measures of the host state lead to an indirect expropriation, is based on the effect of the measures upon the economic benefit, value and control over the investment[65]. These measures are sometimes identify as tantamount to expropriation[66] and may called as 'indirect expropriation', 'creeping expropriation'[67], 'constructive expropriation' or '*de facto* expropriation'[68]. As a result of this, investors may claim that indirect expropriation has arisen due to host state's measures. Obviously, it cannot be argued that all the measures will be tantamount to indirect expropriation. Some kind of measures really need effective function of government and these can be justifiable under the arbitration tribunal. Customary international law also recognized that States have

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[62] See, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (ICSID Case No. ARB/07/22) Award September23, 2010, Para. 14.3.1

[63] See, Sornarajah, (2008) p.357

[64] See, Dolzer, (2003) p.66);

[65] Dolzer and Schreuer (2008) p.101

[66] See, Dolzer and Bloch (2003) [citing S.D. Myres Inc v. Canada, partial Award, 121 I.L.R 72, 123, Para 285, ft.note 14 at 68], "considering the phrase "tantamount to expropriation", the Tribunal stressed the "tantamount" was to be equated with "equivalent" and that their required that "the real interests involved and the purpose and effect of the government measures rather than "technical of facial consideration" be decisive in this context".

[67] See, Reisman and Sloane (2004) p.124

[68] However, these different terminologies that refer to expropriation do not have clear definition. See, *Tecmed, S.A. v. United Mexican States*, see *supra* note 18, p114.

a right to regulate commercial and business activities within its territory[69]. Further, arbitral tribunals also held that State has the right to adopt measures having a social or general welfare purpose[70]. At the same time it has a duty to prevent the worsening of the situation and could not simply leave events to follow their own course, therefore, "it is quite evident that measures had to adopted to offset the unfolding crisis"[71].

In addition to this, tribunal is observed by *The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States* in *AES v. Republic of Hungary*, "a state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory […]."[72]. Although, in *AES v. Argentina* case Tribunal did not accept the arguments put forwarded by respondent that the measures taken were general bearing aimed at restoring the economy and were not specifically related to or targeted Claimant's investment and the dispute did not arise directly out of an investment[73]. In this case tribunal said that,

> *"[…] as* ***a sovereign State****, the Argentina Republic* ***had a right its economic policies****; but this does not mean that the* ***foreign investors under a system of guarantee and protection*** *could be deprived of their respective rights under the instruments providing them with these guarantees and protection […].Under this provision, directness has to do with the relationship between the dispute and the investment rather than between measures and investment"*[74] (emphasis added).

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[69] Mostafa (2008) p.267

[70] *ibid* Para 195

[71] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* (ICSID Case No. ARB/01/3) paras 306-308)

[72] Mostafa (2008) p 196; *AES v. Hungary award, Supra* note 62, Para 14:3:4, it was concluded that the effects of reintroduction of the Price Degrees do not amount to an expropriation

[73] *AES Corporation v. Argentina Republic (Case No. ARB/02/*17) cited in Schreuer (2009, p.113 at 134)

[74] *Ibid* paras 57,60

Further, Tribunal has accepted that the sovereign States have rights regarding their economy. On the other hand, it has some other contractual commitments with foreign investors through its binding agreements, or bi-multilateral treaties. It may grant a number of incentives or may include stabilization clause[75] when parties have chosen applicable law as host state's law, which says that subsequent changes of laws will not affect the particular investment. Consequently, foreign investors are subject to a kind of special law; it is neither host state's law nor home state's law. In *CMS Gas Transmission Company v. Argentine Republic*[76] case Tribunal concludes that it does not have jurisdiction to examine host state's measures of general economic policy and it cannot pass judgment on whether they are right or wrong. Arbitral tribunal does not have power to interfere in domestic issues. But it has jurisdiction to examine whether specific measures affecting the Claimant investment or measures of general economic policy is having a direct violation of legally binding commitments which made to the investor in treaties, legislation or contracts[77].

It is very essential to note that how far governmental measures deprive property rights of investors according to their respective treaty provisions. If those host states regulatory measures affects so, regulatory measures turn into regulatory expropriation. Thus, in *Tecmed S.A. v. Mexico*, case Tribunal said that,

> *"[[...] investor] was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the [property] or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance"*[78].

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[75] More explanation see, Begic (2005) pp. 84-98)

[76] *CMS Gas Transmission Company v. Argentine Republic* ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003.

[77] *Ibid*, Para. 33

[78] See *Azurix Corp. v. Argentine* award, *supra* note 18, para. 115

In *Azurix Corp. v. Argentine*[79] case tribunal point out by citing *S.D. Myers case*, public purpose is an helpful criterion to distinguish the measures which state is liable; "Parties [to the BIT] are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State". Further, for more clarification tribunal has referred Judge R. Higgins explanation, he tries to find answer for the difference between expropriation and regulation based on public purpose;

> *"Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking would need to be 'for a public purpose' (in the sense of in general, rather than for a private interest). And just compensation would be due. At the same time, interferences with property for economic and financial regulatory purposes are tolerated to a significant extent*[80]*."*

It is crucial to note, excessive power of host states on measures may constitute expropriation. Normally, existence of regulatory actions or measures of the government will not be eliminated from the definition of expropriation. Most instances, government argues that the measures taken by it, even if it contains negative impact to the investor, for public purpose which is no compensable taking. In this situation, Arbitral Tribunal will be taken into account on all negative impacts caused by the measures or actions and to determine the characteristic of expropriation, whether such measures are proportion to the protected public purpose and investor's right/ protection which are agreed to grand under investment treaty. Thus, negative impacts of the measures have played a key role to determine the proportional. Therefore, how Tribunal can examine the governmental measures tantamount to indirect expropriation; has gained significant now. Thus, arbitrators invoke general principles of international law to interpret investment treaty provisions regarding expropriation. Generally, BITs do not define clearly what constitute an expropriation and they include an express term "expropriation" and add "any other

[79] See *supra* note 15, para 310

[80] *Ibid* para 310,(by citing, Judge R. Higgins, The Taking of Property by the State: Recent Developments in International Law, Recueil des Caurs. Vol III(1982),p 331)

action that has equivalent effects". They do not express which measures or actions would constitute acts "tantamount to expropriation". Therefore the Tribunal should have to look to international law in determining the relevant criteria for evaluating the claim[81].On this point Schill (2009, p.10) states that the "general principle of international law can also be used in order to elucidate complex questions involving the interpretation of broadly formulated substantive standers of treatments such as fair and equitable treatment or the concept of indirect expropriation or as a basis to develop solutions for procedural issues that investment tribunal face". In this view, application of Principle of Proportionality and FET are played a significant part in determining the regulatory measures.

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[81] See, *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID, Case No. ARB/98/4, award December 8 (2000) at para 18

Chapter III: The Scope and the Objective of Principle of Proportionality and FET

This chapter identifies the elements of principle of proportionality and compare with legality of indirect expropriation. Most importantly, this chapter tries to draw the link between proportionality principle and investment law and also emphasis comparative thinking of other jurisdictions.

3.1. The Concept of Principle of Propoionality

Principle of proportionality is not a new phenomenon in the international Law. This principle has emerged as a tool in balancing of two different conflicts of interest in many legal orders and systems[82]. To the effective function of this principle tribunals reluctant to give priority to any other interests. This is recognized as 'general principle' of international law[83]. Unwritten German origin[84] proportionality principle is older than the German constitution. It was initially applied in the late nineteenth century by the administrative courts of German to police measures that encroached upon individual's liberty or properties[85]. Because of its practicability and flexibility, proportionality principle is now widely spread[86] in the field of human rights law, humanitarian law, criminal law and in the

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[82] See, Andenas and Zleptnig, (2007) p.337

[83] *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects* states 'the court has derived various general principles of law from the legal systems of one or more member States: principle of proportionality itself substantially from German Law; the principle of respect for legitimate expectations perhaps from French and German Law; the right to a hearing (*audi alteram partem*) from several system including notably English Law [cited by the Opinion of Warner AG in case 17/74 *Transoceam Marine Paint v. Commision* (1974) ECR 1063, supra note 5 at p. 2]; Harbo (2010) pp. 158–185,

[84] Stone Sweet and Mathews (2008) p.75; *The Principle of Proportionality in the Laws of Europe* (1999) p. 44, author states that, 'Proportionality is an unwritten constitutional principle which plays an important role in the case law of the German Constitutional Court'.

[85] Grimm (2007) p.384

[86] See, Gunn (2005), available at, http://www.law.emory.edu/fileadmin/journals/eilr/19/19.2/Gunn.pdf

field of international trade through WTO laws[87]. Recently, principle of proportionality has been applied in challenging governmental measures in the indirect expropriation cases. Principle of Proportionality has been grown up by judges and is considered as a preferable procedure for resolving disputes between two different rights claims[88]which involve a right of individual person and general public interest.

Principle of proportionality is a political maxim which means whatever actions taken by a government should not exceed the necessary to achieve the objective of the government[89]. Also it is an important device for judges to check the regulatory measures of the government. However, several scholars define the meaning of principle of proportionality in numerous ways[90]. Some says that the proportionality principle does not have any substantial meaning other than merely a balancing tool[91] while some others say judges use this principle only to manipulate their decision[92]. According to Xuili's (2006) arguments, even though, principle of proportionality is considered as a neutral concept, by applying this principle, the context of State soverigninty has weakened and right of private property has strengthened. Further, author argues that its application in investment arbitration has led to protecting the right of private property significantly and encroaching upon regulatory discretion of the host country stealthily. Schurler also has quoted the well known American judge Antonin Scalia in his study, who states that "the proportionality principle is an invitation for judges to impose their own substantive values". Further, Xuili express that Scalia does not believe that the law offer criteria to allow a court to determine whether a decision taken by the national authorities are proportionate[93]. However, mostly agree

[87] Bossche, (2008) p.283

[88] Stone Sweet and Mathews (2008) p.75;

[89] Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Proportionality_(political_maxim) Visited on 20.10.2010

[90] Harbo express his views on this point that; 'the different interpretation of the principle goes beyond the assessment of facts and norms in the concrete case. Thus, in the literature on the proportionality principle it is common to suggest that the principle is interpreted differently according to what areas it is utilized in'. See, Harbo(2010) p. 172

[91] *Ibid* p.166

[92] See also, Stone Sweet and Mathews (2008)

[93]Schurler (2008) p.231, (by citing *Harmelin v. Michigan* 501 U.S 957 pp985-9990). Further he indicates the Scalia' views that he finds it important that the judge is bound by the express wording of the law.

with that the proportionality principle maintains to preserve individual rights as well as public interest by analyzing governmental measures[94].

Harbo (2010, p.171) noted in his study that the 'ECJ applies the proportionality principle when it balances legislative and administrative measures against private interests, individual rights and fundamental freedoms'. Thus, Yoram Dinstein (2005, p. 352) express his views on the principle of proportionality in a such a way that "an administrative decision is lawful only if the means used to achieve its objective is of proper extent. It focuses on the relationship between the objective and the means used to achieve it". Similarly, ECJ applies proportionality principle, as a rationality test, more concretely, the principle implies that the testing of a legislative (or administrative) measure or means is appropriate (suitable) and necessary in order to reach or achieve a given goal or objective[95].

According to Engle 'proportionality (means end testing) with balancing (cost benefit analysis) or with examining the relationship between the value of the right invaded and the extent of the invasion of that right'[96]. Finally, to draw a conclusion by analyzing these explanations, this principle requires some relationship between means and ends. Therefore, means chosen by the administration or legislation authorities should be suitable. At the same time it is necessary to achieve a lawful end and most importantly there are not any or less alternative measures or should not be more restrictive than necessary.

Basically, principle of proportionality reviews whether regulatory measure is excessive and arbitration tribunal analyses whether it breaches balance between investor rights and public interests According to public choice theory, it is essential to identify intention of political officers as well, because, their decision mostly subject to a short-term objectives and it is doubt whether actual public benefits were there. Therefore, judicial review is necessary to

[94] Proportionality taken-for-granted quality is an outcome of a social process that, like any social process, can and should be examined empirically, see *supra* note 88 ,p 77

[95] Harbo(2010) p. 165

[96] Engle (2009) p. 8

ensure that their actions are not differed from protectionism, or shady means to deprive the private sector of its property rights, or malicious and fictitious exercises of power[97].

Before trace the role of ICSID tribunal on the application of above principle it is significant to note which elements that proportionality principle has contain.

3.1.1 Proportionality Standard Criteria & Criteria for Legality of Regulatory Measures

Principle of proportionality's definition itself brings three separate criteria to satisfy administrative or legislative measures. In other way, proportionality is testing the measures which qualify certain criteria. Thus, Andenas and Zleptnig wrote, "Proportionality is commonly referred to as a legal *principle*. It can also be described as *test or standard*, but its legal character is one of a principle"[98]. According to European context, measure should be appropriate or suitable, measure must be necessary and measure must be *proportionate* to the objective (sometimes identified as "proportionate *stricto sensu*")[99]. On this point Stone Sweet and Mathews are suggesting four steps. Thus, they include "legitimacy" as First step which refers that the judge confirms the government is constitutionally authorized to take such a measures[100]. It is an important criterion to go ahead with the governmental measures is depended on its legitimacy thus it is kept in first in above four criteria. If the purpose of the government's measure is not a constitutionally legitimate one, then it violates a higher norm (the right being pleaded)[101]. When it compared with the principles of legality of expropriation, as I mentioned above there should be a genuine public purpose in order to qualify lawful expropriation. One can argue that the governmental measure is constitutionally legitimate when there is a genuine public purpose.

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[97] Xuili (2006) p.

[98] Andenas and Zleptnig, (2007) P. 378

[99] Gunn defines the criteria of principle of proportionality according to the most widely accepted explanations of proportionality in the European context, a proportionate "measure," such as a statute or an administrative decision, must satisfy three separate criteria such as suitability, necessity and *proportionate* to the objective, see, Gunn (2005) p. 467); see also, Harbo(2010) p. 172; Schueler (2008) p.232; Bossche (2008) p.285; Jan (2000) p. 240

[100] Stone Sweet and Mathews (2008) p.76

[101] *Ibid*

The second step, "suitability", requires that the measures must be appropriate to protect the interest in question and presuppose a degree of causal relationship between the measure and the objective pursued[102]. Simply, the measure must suite the objective and this test avoids unsuitable measures which lead to arbitrary or discriminatory. One who can argue simply the measure is not suitable at all to objective of public interest. Hence, suitability of measures depends on case by case analysis. In the given situation, arbitrators in a position to evaluate suitability of measures from an *ex ante* perspective (the moment when the measures was enacted) or an *ex post* perspective (the moment when the measure is analyzed by the court).[103]

The third step is "necessity". It means that the measures has taken foremost important to achieve the objective and to confirm that there is no other less restrictive alternative is available to accomplished the same end[104]. In ECHR jurisprudence, 'Strasbourg organs require Member States to adopt the measure which is the least burdensome on an individual person's rights but is equally capable of achieving the same legitimate objective'[105] . According to the UNO, a state of necessity depends on the simultaneous existence of three circumstances, such as, firstly; a danger to the survival of the State, and not for its interest, is necessary; secondly, that the danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it[106]. The admissibility of necessity leads to an idea that the state of necessity is to prevent from risk of suffering certain damages. It means how States could protect from unavoidable emergency situation.

Normally, arbitral tribunal analyzes of necessity accordance with Article 25 of the ILC Draft Articles on State Responsibility on Wrongful Acts. It requires first, that the act must be the only means available to the State in order to protect an interest (see below 4.2). It

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[102] Jan (2009) p. 243

[103] Andenas and Zleptnig, (2007) p.388

[104] Gunn (2005) p.467

[105] Takahashi (2001) p.16

[106] Cited in *LG&E* award, supra note 46, para 247

also important to note, the principle of necessity will not apply if there is any casual link between the conduct of the State and the situation of necessity[107].

The measures has taken by the host state is suitable, and at the same time necessary to achieve the objective than there is no room for discriminatory treatment. Therefore, proportionality application requires non discriminatory treatment (see below 3.2).

The last step is "proportionate *stricto sensu*". In this last step it is to prove the measures must not be excessive or disproportionate with regard to the pursued objective[108]. It must follow due process of law when measures are taken by government. If the investor incurred higher disadvantage due to the excessive of measures, even if the measures necessary to aim pursued objectives, may still consider disproportionate[109]. It is required implicitly measures must not excessive and at the same time compensation should be providd. Most immortally, when assessing these requirements, each and every principle should be given equal weight. However, it is doubtful whether ICSID tribunal has followed these criteria concurrently and effectively to achieve real sense of proportionality principle [110](will be discussed in detail in Chapter IV).

3.1.2 World Trade Organization (WTO)

Andaneas and Zlepting (2007. p.374) pinpoint that, "WTO agreement provide for a more sophisticated way of balancing, taking account of the individual circumstances at stake, and the competing rights and interest involved". WTO agreements[111] provide explicitly general exception provisions which allow Member States to enforce measures *necessary* to protect public morals, human, animal or plant life or health[112] . This includes tow-tier test,

[107] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 Decision on the Application for Annulment of the Argentine Republic (July 30, 2010) para 387

[108] Andenas and Zleptnig, (2007) p.338

[109] *Ibid* p.392

[110] See, Stone Sweet (2010) p. 18, says, "Instead, tribunals invoked proportionality timidly, and they did not follow a step-by-step procedure. As important, they declined to provide the kind of scholastic exposition, or doctrinal justification, which a self-conscious doctrinal move toward proportionality might have generated".

[111] Article XX of the GATT and XIV of the GATS

[112] See Article XX ((a) and (b) of the GATT

one is to qualify the necessity requirement of provisional jurisdiction listed in paragraphs (a) to (j) and under the Chapeau/introductory clause of the Article XX. Bossche (2008, pp, 287-88) states, by Citing *US – Gasoline*, to provisionally justified under Article XX(b) that it should succeed two-tier test, the measure is designed for the *stated purpose* and the measure is *necessary* to fulfill that policy objective. Author further says that the necessary requirement so problematic than requirement of stated purpose.

Necessary requirements depend on case by case analysis, thus, each Member States has to determine what level of protection they need, In the *Asbestos case*[113] the AB held that "it is undisputed that WTO Members have right to determine the level of protection of health that they consider appropriate in given situation. French has determined, and the panel accepted."[114] In this case Appellate Body clarified the meaning formulated in *Thailand - Cigarettes*[115] *and US - Gasoline*[116] that there is "no alternative to the measures at issue that the Member could *reasonably* be expected to employ"[117], therefore, alternative measures is only excluded if there is a 'reasonably available' alternative measure. This approach has been applied in the ICSID tribunal in *Continantal Casualty*[118] case, while in *Enron*[119] case, tribunal observed the 'only way' available test. These two tests are more differential than others[120] will be discussed more detail below.

Furthermore, these requirements resembling the proportionality test such as *suitability* and *necessity*. The third step of the proportionality principle on proportionate *stricto sensu* has been developed by GATT and WTO panel on the evaluation of range of standard review. In this regard they analyze whether taken measures are inconsistent or less inconsistent

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[113] *EC- Asbastos*, Appellate Body Report adopted 5 April 2001

[114] See, Bossche (2008), p626 ; see also

[115] *Thailand – Cigarettes,* GATT Panel Report, adopted 7 November 1990

[116] US – Gasoline, Penal Report adopted 20 May 1996

[117] See *supra* note 115, p 625

[118] See *supra* note 12

[119] See *supra* note 71

[120] For extensive knowledge see Bruke-White and von Staden (2010, pp) ; Bossche (2008, pp 616-633)

with WTO agreement. *United States – Section 337*[121] case described the applicable standard for evaluating whether a measure is 'necessary' under Article XX (d) as follows:

> *"[...] in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measure reasonably available it, that which entails the least degree of inconsistency with other GATT provisions".*[122]

It is also to note that a measure is not ' "indispensable", may nevertheless "necessary" within the meaning of Article XX (d), in every case a process of weighing and balancing involves.[123] Therefore, WTO dispute settlement goes one more steps to evaluate standards of review based on concept of proportionality principle.

According to these findings, it is very vital to note that ICSID tribunal has referred to the principle of proportionally based on WTO jurisprudence. In *continental casualty* tribunal has cited many WTO cases to determine whether a measure is necessary. Thus, Tribunal referred "*EC Tyres* (7.104), summing up the Appellant Body case law in *Korea- Beef* (para 164), EC-*Asbestos case* (para 172), *US-Gambling* (para 306), *Dominican Republic-Cigarettes* (para 70) within this weighing and balancing of those various factors, the WTO case law stresses the assessment of the importance of interests or values furthered by challenged measure"[124].

For above discussed reasons, to identify the role of WTO case law also very significant in the evaluation of scope and requirements of necessary in investment disputes cases.

3.1.3 Doctrine of Margin of Appreciation and Principle of Proportionality

Doctrine of Margin of appreciation derived from European Court of Human Rights (ECtHR)[125]. This doctrine has a close connection with the principle of proportionality. It can say that the principle of proportionality and margin of appreciation are two sides of a

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[121] The panel report *United States- section 337*

[122] *Ibid* para 5.26

[123] *Korea –frozen Beef*, adopted January 10, 2001, DSR 2001:1,5 para 164, also cited in the *Continental Casualty* case, supra note 12, para 194

[124] See *ft. note* 294 at 86 of the *Continental Casualty* case

[125] Shany (2006) p

same coin. In European Context, margin of appreciation is allowed, in certain degree, measure of discretion to the Member State in accordance with their own national situations and conditions[126]. In contrast, proportionality principle has been regarded to restrain the power of State authorities. On the other word, the principle of proportionality should be deployed as a device to ascertain whether national authorities have overstepped their margin of appreciation[127]. Accordingly, margin of appreciation does not prevent judicial review, but it limits the scope of tribunals' inspection on governmental measures.

Margin of appreciation allow national authority to enjoy discretion to adopt measures relating to public/national interest. Therefore, each individual States know what their government actually need to particular situation. Thus, States' authorities are in better position to determine regarding their legitimate public need than international tribunals. Margin of appreciation more suites in investment dispute also. Because, investment tribunals agreed that the host states has sovereign right to regulate its economy. However, Bruke-White and von Staden (2010, p.324) state different view on this point, they say that "the least restrictive alternative, the margin of appreciation, and good faith review are distinct and independent standard with separate jurisprudential approaches to balance competing rights and interest". Further, authors continue that "attempts to meld two or more of these approaches into a single standard of review are dangerous because of the distinct balancing mechanism each standard employs".

3.2 The Link between Principle of Proportionality & Investment Law

It is notable that varieties of clauses on standard of treatments are enclosed in international investment contracts and treaties such as FET, full protection, treatment no less favorable then that required by international law, national treatment, most favored treatment, and giving guarantees not to engage in non-discriminatory treatment or measures with restrict the operation, maintenance, expansion or disposition of investment. Without doubt, all-most all the bi-multilateral treaties have included these treatments in order to protect and promote foreign investment. Proportionality principle also fundamentally based on non-discriminatory treatment. It assess whether governmental measures control the use and

[126] Takahashi (2001) p

[127] *Ibid*, p. 14

enjoyment of the property rights of investor. Consequently, when analyzing principle of proportionality in the face of investment, it includes the non-discriminatory treatment principle and the FET principle[128]. Therefore, there is a place to include investment law into application of proportionality principle.

Further, as mentioned above there are some criteria to the application of proportionality principle, which should be applied cumulatively. This will be more appropriate to other legal issues such as humanitarian law, human rights law and even WTO laws, which has separate harmonized body of laws or treaties, which bind all the contracting parties. But investment law does not contain a multilateral treaty which binds all the contracting party irrespective of their nationality. Once investment disputes brought before ICSID tribunal, it has to confirm ICSID jurisdiction by assessing ICSID Convention as well as relevant treaty (bi/multi) or contract. Consequently, it cannot say that all the criteria of proportionality principle will be applied cumulatively, it is depend on case by case analyse and relevant treaty provisions. Mostly, tribunals discussed whether necessity requirements were satisfied accordance with relevant treaty provision and Customary International law (see 4.2).

Generally, there are some explicit exceptions which allow States to enforce measures regarding unexceptional circumstance i.e. threats to internal and external security, economic crisis, terrorism, public health emergencies or a natural disaster. For instance, Article 30 of the Treaty of European Union[129] provide Member States to elude from liability by adopting measures pertaining to justifiable grounds "[…] on the protection of health and life of humans, animals or plants. This provision is similar to GATT Article XX general exception. Likewise, bilateral treaties also contain a non-precluded measures (NPM) clause which contracting parties are allowed to take measures essential to public interest. Thus Bruke-White and von Staden, (2010, p.302) state that the "Article XX and XXI of the GATT provide states with defenses very similar to those found in the NPM clause of various BITs". Therefore, host states regulatory measures can be justifiable when it take in urgent circumstances, under NPM clause. US- Argentina BIT also contains a

[128] Xiuli (2006) p. 236

[129] Copy of Treaty of European Union available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF (visited on 22/11/2010)

similar provision (Article XI). In this regard, Aaker (2009, p 523) express that the, Argentina's invocation of state necessity in the BIT and customary international law, due to its economic crisis in 2000/2001 was not accepted by the majority of the tribunals. The reason behind this general exception clause is to avoid or minimize risks due to unforeseen external shocks, hence, arbitral tribunals should give due consideration when interpreting these clauses is very essential.

3.3 Fair and Equitable Treatment

Fair and equitable treatment[130] is one of the most powerful rights of foreign investor which investment tribunal often discuss in investment dispute cases. FET was first found in Havana Charter for International Trade Organization of 1948[131]. Foreign investment, involves more than two nations; trust and confidence are the basic elements. Therefore, to build up commercial relationship and to achieve real development, contracts should be energetic for certain period. Without doubt, FET and principle of proportionality are developed together with investment contracts and treaties. Some scholars say that application of proportionality principle into FET is also somehow limiting host state's conduct. Thus, Schill (2009, p.23) says that, "Although integrating proportionality into the principle of FET allows, to a certain extent, for a substantive control of host state conduct". Further, he mentions that, "the proportionality requirement also clarifies that FET is not an inflexible standard, but allows for the balancing of the interest of host states and foreign investors". Therefore, principle of proportionality and FET are intended to balancing two different conflicts of interest.

FET is considered as backbone to the all bi-multilateral investments treaties. This was repeated in CMS v Argentina award and state that "there can be no doubt that a stable legal and business environment is an essential element of fair and equitable treatment"[132].

[130] Stone Sweet (2010) p. 62, he says that using the FETS in this way pushes tribunals toward balancing. Balancing pushes arbitrators towards proportionality. Tribunals find balancing attractive because of its scope and flexibility – it allows arbitrators to "see" the entire contextual field and to narrow or expand their intervention as required.

[131] See, Dolzeer, and Schreuer (2008 p.120)

[132] CMS case, *supra* note 76 Para 274,

Predictability and stability and consistency of the host State's legal framework has associated with FET[133].

FET can appear in two different ways, one is that it creates an autonomous, treaty based standards, and another is accordance with international law. The United States, France and the United Kingdom prefer the latter one[134]. According to Dolzer and Schreuer, the FET is considered as a rule of international law, therefore, it cannot determine under the host state laws. The FET standard may be violated even if the investor receives the same treatment as national of the host state receives[135]. Similarly, in *Tecmed* case tribunal understood that the FET was resulting from an autonomous interpretation, the text of Article 4(1) of the agreement according to its ordinary meaning (Article 31 (1) VCLT) or from international law and the good faith principle[136]. Likewise, Judge Schwebel defined FET as "fair and equitable treatment is a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality"[137]. In *MTD Chile* [138]case Tribunal observed that the ordinary meaning of the terms "fair" and "equitable" should mean "just", "even-handed", 'unbiased", 'legitimate"

There is a growing debate whether FET reflect the International law minimum standard of treatment which derives from customary international law. In *Enron* case tribunal stated that FET standard in the context of the BIT may be more precise than the customary international law minimum standard, and it could require a treatment additional to, or beyond that of, customary law[139]. In the Enron annulment case, Committee expressed FET in the BIT is not necessarily the same as the customary law minimum standard[140].

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[133] Kingsbury and Schill (2009) p.10

[134] Dolzer (2005) p 961

[135] Dolzer and Schreuer (2008) p.123

[136] Tecmed case supra note 18, para 155

[137] Cited in *MTD Equity Sdn, Bhd, and MTD Chile S,A v Republic of Chile* Case No. ARB/01/7, Award My 25, 2004, para 109

[138] *Ibid* para 113 also cited in LG& E case, *supra* note 46, para, 126

[139] *Enron* award, *supra* note 71, para 258

[140] *Enron Annulment* award, *supra* note 108, para 304

Generally, in expropriation cases, it is difficult to establish that the expropriation has occurred without direct taking of property. Arbitral tribunals continuously address that the measures taken by host state must ensure transparency in the functioning of the public authorities and the lack of predictable framework for investment contrary to legitimate expectation of the investor and commitments made by the host state are considered as breaches of FET[141]. Consequently, investment Tribunals has to determine whether host state's measures violate the FET. According to Redferen (2004, paras11-25) the standard may need to examine "the impact of the measures on the reasonable investment – backed expectations of the investor; and whether the state is attempting to avoid investment – backed expectations that state created or reinforced through its own acts". Further, investor's behavior also should taken into account when analyzing FET standard, sometime, investor's conduct may induced to host state to act such a way. Thus, Sornarajah states in his study that the "[…] it is necessary to look into whether the claimant also was at fault and whether the respondent's conduct was a reaction to that fault". Further, he says margin of appreciation has been discussed in the context of expropriation, necessity and fair and equitable standard. In addition, he also noted that there is an increasing acceptance that the examination of the measures taken by state should not be assessed too finely[142].

[141]Redferen and Hunte (2004) paras 11-25; see supra note 18, para 154; *West management v. United Mexican Status* (ICSID case No. ARB(AF)/00/3, award June 2, 2000, para 98; MTD Chile case 114

[142] See, Sornarajah (2010), p.467

Chapter IV: Role of ICSID Tribunals on Application of Proportionality

This chapter mainly focuses the jurisdiction scope of the ICSID tribunals and how it attempts to balance between two different rights claims by applying principle of proportionality**.**

4.1 Nature of ICSID Tribunal

Normally, international responsibility and obligations are incurred when States become parties to an instrument of international law by signing and ratifying in accordance with their applicable domestic laws. Thus, many countries became party to the ICSID Convention by ratifying it.

Today many bilateral, multilateral and regional treaties are concluded between States due to the growth of international economy across boundaries and specially these treaties contain itself the mechanism of dispute settlement, is the unique feature of these treaties. Thus, mostly investors would prefer to elect arbitration pursuant to the ICSID rules[143]. Until June 30, 2010, ICSID has registered 319 cases under ICSID Convention and Additional Facility Rules[144]. ICSID Centre was established by the ICSID Convention[145] was concluded in 1965 under the auspices of the World Bank and is entered into force in 1966[146]. ICSID is a public international organization and also is an institutional system of international arbitration that is specifically designed for investment disputes[147]. The Convention mainly promotes and protects private foreign investment though providing favorable investment climate. It is clearly mentioned in the preamble to the ICSID

[143] Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement, see ICSID website, available at, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home

[144] The ICSID caseload- Statistics (Isues 2010 -2) http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English12 (Visited on 3/11/2010)

[145] Copy of ICSID convention available at ICSID Website, see supra note 142

[146] Dimsey (2008) p.10

[147] *Ibid*

convention that the “Considering the need for international cooperation for economic development, and the role of private investment therein”

Further, ICSID provides procedural framework for the disputes settlement rather than develop substantive rules for the protection of private foreign investment. The Procedural rules have provided by the ICSID Convention, Regulations and Rules and ICSID Additional Facility Rules[148]. The substantive rules will be applied according to the agreement of the parties. If such applicable law fails to state, according to Article 42 of the convention, tribunal will apply the law of host state and applicable rules of international law[149]. Article 42 (1), reads as follows:

> “*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”*. (Emphasis added)

Article 42 reflects that arbitral tribunal is an autonomous forum which provides to parties to choose an applicable law. To invoke this neutral forum of ICSID arbitration, the host state and the contracting party of another the State should be signatory to the ICSID Convention. In the absence of such agreement investment dispute can be referred to ICSID Additional Facility pursuant to the ICSID Additional Facility Rules. It is to note here that proceedings under the AF are not governed by ICSID Convention[150].

It is utmost important to define the jurisdiction of the ICSID tribunals, thus Article 25 of the Convention clearly provides the certain jurisdiction requirements. Article 25, itself consists of four decisive factors. These factors have to be fulfilled by the claimant if he wants to choose ICSID Tribunal. Article 25 reads as follows,

> *“The jurisdiction of the center shall extend to any* ***legal dispute arising directly out of an investment****, between a* ***Contracting State*** *[...] and a national of*

[148] See supra note 102

[149] Schreuer (2009) p. 5

[150] However, certain provisions of the Administrative and Financial Regulations of ICSID apply mutatis mutandis in respect of proceedings under the AF, in Accordance with Article 5 of the AF Rules. See, ICSID Website

another Contracting State, which the parties to the dispute ***consent in writing*** *to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally"* (Emphasis added).

According to this Article, if an investor wants to challenge the host states acts or measures, he has to accomplish four jurisdictional requirements. Firstly, the dispute should be a *legal* dispute and should arise *directly*. On this point, host state's measures or action should have direct cause to particular investment in order to invoke ICSID jurisdiction. Measures may be a general or specific nature which might affect the foreign investment as well as domestic industries. Therefore, there is a room for host states to argue that the dispute could not arise directly from an investment in related to general economic measures. But, practice of arbitral tribunal is different. They do not analyse whether measures are in general or specific nature, but analyze how far investor's right has infringed. This statement more evidenced by the recent awards of ICSID tribunals. Tribunals did not accept the arguments which put forwarded by Argentina, that the general nature of its measures were not affect on particular investment and those measures were designed to serve welfare of the people[151](also see below Part 4.2).

Secondly, dispute should arise *"………..out of an investment"*, although existence of investment is a central element to the Convention, it does not give any definition to the term 'investment' or even not express what constitute an investment[152]. But, numbers of attempts were made to define investment, none of these were adopted. Therefore, the concept of investment may differ case to case, and it is left to parties to decide what they wanted to bring to the ICSID tribunal to resolve.

Thirdly, parties should be contracting parties; it is another vital factor to invoke ICSID jurisdiction. Lastly, consent should be in writing. Consent of parties to the settlement is the cornerstone of the jurisdiction of the Center[153]. Convention does not require that the consent of both parties should be given in a single instrument[154]. Therefore, it is clear

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[151] Schreuer (2009), p.112, *CMS v. Argentina, AES v. Argentina, Continental Casualty v. Argentina*

[152] Schreuer, 2009, para 113 at 114

[153] Report of the Executive Directors on the Convention, dated August , 1964, para 24

[154] *Ibid*

consent need neither be made by use of particular wording nor in uniform instrument[155]. Contracting parties may give their consent to ICSID jurisdiction through BIT or multilateral treaties, invest contracts between the investor and the host state, and investment laws of the host state[156]. Thus, ICSID arbitral jurisdiction should be tested through two different sets of legal requirements. First, BIT jurisdiction should be met and second, ICSID Convention jurisdiction should be met. Both sets of requirements perform a sort of double filter in order to confirm ICSID jurisdiction[157].

Once its consent is given, it cannot withdraw unilaterally from ICSID procedure[158]. *Alcoa Minerals of Jamaica.INC v. Government of Jamaica*[159] is one of the first cases aroused under the convention[160] regarding to the unilateral withdraw of ICSID jurisdiction. In this case tribunal held that the consent to the ICSID jurisdiction was signed by the parties, when consent existed at the time the case was registered with ICSID. The notification of the reservation filed by Jamaica did not affect the prior consent[161]. Facts of this case as follows;

> *United States and Jamaica became party to the ICSID Convention in 1966. At the time, according to Article 25 (4) of the Convention, Jamaica did not notify ICSID of any class or classes of dispute which Jamaica would not consider submitting to the jurisdiction of the Center. However, Jamaica notified ICSID that the investment dispute at 'any time arising' which involved natural resources would not be submitted to ICSID arbitration, shortly before enactment of the Bauxite (Production Levy) . On this basis Jamaica argued thereby it was ousted of jurisdiction*[162].

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[155] Dimsay (2008) p.

[156] Basis of Consent invoked to establish ICSID jurisdiction in registered cases as follows, 63% -BIT, 22%- Investment contract, 5%- Investment law of the Host state, 4%/- NAFTA, 4% -ECT, 1%- ASEAN, 1%/- DR -CAFTA. see, *supra* note

[157] Vinuesa (2002),p.504,

[158] However, according to Article 36(3) of the convention, secretary-General can refuse to register the dispute if it is manifestly outside the jurisdiction of the Center. See, Baker(1999) p54

[159]*Alcoa Minerals of Jamaica.INC v. Government of Jamaica* Case no. ARB/74/2) Decision on Jurisdiction, July 1975

[160] See John (1976), p. 92

[161] See Baker (1999) p. 74

[162] See John (1976), p.95

Another exceptional feature of ICSID tribunal's award is binding nature[163]. It differs from other commercial arbitrations which required enforcement by a court judgment[164]. However, according to Article 52 of the Convention, the party against which award is rendered, believe that there is a procedural injustice arises, than that party can request for an annulment[165]. It is to note, in annulment proceedings under Convention, an *ad hoc* committee is not a court of appeal to consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52 (1)[166].

Therefore, the ICSID has always been considered to be more of a "court" than an "arbitral body" in the classics sense[167]

There are many reasons for why arbitration does not generate precedent[168]. Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term it should develop a *jurisprudence constanet* in relation to annulment proceedings[169] . The tribunal agrees with the view expressed by the Argentine republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances[170]. *Saipem Spa v. Bangladesh*[171], in this

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[163] Article 53 of ICSID Convention provides that the award shall be binding on the parties and shall not subject to appeal or to any other remedy except those provided for in this Convention.

[164] Enforcement of these awards is govern by the New York Convention Recognition and Enforcement of Foreign Arbitral Award, 1958

[165] The *ad hoc* committee have decided to reject Argentina's Application for Annulment of Second Award, which it sought on all five grounds set out in Article 52(1), see, Compañiá *de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (August 10, 2010); *M.C.I. power Group L.C and New Turbine INC. v. Republic of Ecuador,* ICSID Case No ARB/03/6, Decision on Annulment, October 19, 2009

[166] *Enron Annulment* Award, *supra note 108,* Para 63

[167] Stone Sweet (2010) p. 8

[168] Weidemaier (2010), p.1904

[169] Enron Annulment award, para 66

[170] *Enron Award, supra note71,p*ara 25

[171] *Saipem S.p.A v. People's republic of Bangladesh*, ICSID Case No. ARB/05/07, decision on Jurisdiction and Recommendations on Provisional measure March 21, 2007, Para 67

case Tribunal noted, although tribunal is not bound by previous decisions, it must pay due consideration to earlier decisions of international tribunals[172]. According to these explanations, there is no explicit requirement that ICSID Tribunals bound by previous case law. However, considerable extent has given to earlier cases; for instance, *Tecmed* case has been quoted in several subsequent cases[173]. In that way, create a *de facto* doctrine of precedent.

4.2 New Trend of ICSID Tribunals; after *Tecmad v Mexico* and subsequent cases

Analyzes of proportionality principle also somehow became importance in the resolution of investment disputes which brought before ICSID tribunals. *Tecmed SA V Mexico* case is the starting point of proportionality analysis. Thereafter tribunal has discussed and applied proportionality principle in number of cases. This process had emerged largely during the Argentina economic crises and number of claims which claimed by investors brought before ICSID arbitration, such as, *CMS v Argentina(2005), LG&E v Argentina(2006), Sampra v Argentina (2007), Continental Casualty v Argentina (2008), Enron v. Argentina (2007)* and annulment decisions in respective of *CMS* and *Enro*n in 2010. In these cases, Argentina pleaded the 'necessity' defense according to provisions of the BIT[174] and customary international law.

In *Tecmed* case, dispute involved between *Tecmed SA,* a company incorporated in Spain and United Mexican State (Mexico)[175]. The dispute concerned Mexico's denial to renew license pursuant to operation of hazardous waste Landfill through its resolution dated November 25, 1998 (Resolution). The claim was based on the BIT (Spain-Mexico BIT) for alleged violations by Mexico of the BIT provisions regarding expropriation, FET and full protection and security. Denial of permit of license can deprive them from any economical value. It could be *de facto* indirect expropriation. Respondent states that the Resolution was a regularity measure issued in compliance with the State's police power within the

[172] *Ibid* para 67

[173] Enron Annulment Award, supra note 108, para 309

[174] Stone Sweet (2010), p.

[175] See *supra* note 18

highly regulated and extremely sensitive framework of environmental protection and public health. Thus, Respondent alleges that the Resolution is a legitimate action of the State which does not amount to an expropriation under international law[176]. Further, community's opposition and aggressive also had happened in different times[177].

In this case, the tribunal observed that the regulatory measures could be enclosed comparable characteristic of indirect expropriation when there was lack of proportionality between the measures and the right of investor which bound to protect through investment laws or treaties. Arbitral tribunal analyzed the proportionality principle based on ECHR cases and states as follows;

> *' [..] the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality'.*[178]

According to tribunal's analyses, investor's expectation plays a central role in the expropriation analysis. In this case, I feel that the tribunal has given equal weight to each and every elements of proportionality principle rather, it observed whether measures proportional to investors rights. Thus, Weiler found that "the *Tecmed* proportionality rule is analogous to the approach of WTO penal in applying the health exception to liability contained in Ar. XX (g) of the GATT. […] the burden of proof shifts to the respondent opportunity to demonstrate that the disputed measures was narrowly suit a compelling public interest"[179].

In 2001-2002 a financial crisis erupted in Argentina and this can be considered as one of the worst ever worldwide economic crisis. To overcome this situation Argentina has adopted a number of measures which severely affected foreign investments.

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[176] *Ibid* 97

[177] *Ibid* 108

[178] *Ibid*

[179] Weiler (2005) *ft. note* 273 at 665

In recent Argentina cases *CMS, LE&G, Enron* and *Sempra* involved US Corporations and Argentina pursuant to the U.S - Argentine BIT. in LG&E case Argentina pleads its defense as a “state of necessity”, available under Argentine law, treaty in Articles XI and IV (3) as well as customary international law[180] and Tribunal applied less restrictive approach to assess the Argentina’s financial crisis. In this respect, Argentina argued that the Article XI of the US-Argentina BIT included a non-precluded measures (NPM) clause, which permits parties to take necessary actions to protect essential security interest. And it further argues this is a *self-judging* provision, that it is for the State to make a good faith determination as to what measures are necessary for the maintenance of public order, or the protection of its essential security interests[181]. However, based on the evidence before tribunal, it decided and concluded that the provision is not self-judging[182]. Tribunal failed to take into account NPM clause when interpreting the necessary requirements. Rather, Tribunals were depended on customary law requirements of necessity to analyse and requested Argentina to show that the actions it took were the ‘only way’ available[183]. But in LE & G, *Continental Casualty* case tribunals took different approach to the NPM clause and gave considerable deference to Argentina’s determination that its actions were necessary to protect essential security interest and maintain public order[184].

In this case Tribunal relied on some extent to the principle of proportionality and it refers as follows: “With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed”[185]. However, arbitrators did not develop their findings according to the proportionality principle. The concept of proportionality principle also deserve by the Respondent in *CMS v. Argentina*, argued that the measures adopted were reasonable and

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[180] *LG&E* Award, *supr*a note 46,para 201

[181] Ibid 208; CMS Award 332-335

[182] Sornarajah (2010) p. 460, Bruke-White and Staden (2010) p.297-99

[183] Bruke-White, and Staden (2010) p.297-99

[184] *Ibid* p 299

[185] *LG&E* Award, *supra* 195

proportional to the objective pursued[186]. In these case Tribunals analyses the requirements of necessity which put forwarded by Argentina in the light of US-Argentina BIT and Customary international law.

After analyzing Argentina's economic crisis LG&E Tribunal found that Argentina is excused under Article XI from liability for any breaches of the treaty between December 2001 and 26 April 2003[187]. But Tribunal did not engage in serious proportionality analysis to the Argentine response to the crisis[188]. However, in these cases much discussed the measures have taken by Argentina whether it necessary to the present crisis. Tribunals did not focus whether those measures were suitable to achieve desired objectives.

Further, in LG&E case, Tribunal also discussed the "state of necessity" or "state of emergency". Thus, Tribunal concluded by satisfying the Articles XI of the US – Argentina BIT and Ar. 25 of the ILC Draft Article, Argentina exclude from its liability vis-à-vis the damage caused as a result of the measures adopted to response to the severe crises[189]. In contrast, in *Enron* case tribunal found that the requirements of this provision was not satisfied; particularly the measures adopted by Argentina were not the "only way" available to Argentina to achieve the result. Therefore, Argentina had itself contributed to the state of necessity[190]. Further, Tribunal asserted that it did not have duty to find alternative measures that Argentina should have adopted. In this regard Tribunal did not apply Ar. 25 (1) (a) of the ILC Articles, but applied an expert opinion on an economic issue. Thus, the Annulment Committee found that this was amounts to failure to apply the applicable law[191].

Further, it stated that Tribunal did not address a number of issues that are essential to the question of whether the 'only way" requirement was met. Such, (i) question concerning the legal definition of the expression "only way" in Ar. 25(1) (a) of the ILC Articles. The Committee found several interpretations; one potential interpretation is its literal meaning

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186 *CMS* Award, *supra* note 76, para 288

187 *LG&E* Award, *supra* ,para 229

188 Stone Sweet (2010) p. 22

189 *LG&E* Para 259, see also *Continental Casualty* Award, supra note 12, para 234

190 *Enron* Award, supra note 71, paras 303-309

191 Enron Annulment Award, *supra* note 108, para 377

that Argentina has no other measures to adopt to address the economic crisis[192]. Another possible interpretation is, there must be no alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law[193] . The Committee further states that the principle of necessity will only be precluded if there is an alternative that would not involve a breach of international law or which would involve a less grave breach of international law[194]. (ii) Effectiveness of alternative measures, for instance, State might have two alternative measures in order to safeguard an essential interest. From these two measures, one measure is more appropriate and more effective, at the same time it would be inconsistent with obligations of the State under international law. The second measure is less appropriate and less effective but not inconsistent. If the State adopted the former measure, would be precluded from invoking the principle of necessity, on the basis that there was an alternative available? Otherwise, could the State claim that the measure taken was the "only way" that stood a very high chance of being very effective?[195] (iii) Who makes the decision whether there is a relevant alternative, and in accordance with what test? In these three questions Tribunal (in *Enron* case) did not address second and third questions. Furthermore, *Enron* Annulment Committee stated that it was not to provide answer for these question but it was necessary for the Tribunal, either expressly or silently, to decide or assume the answer in order to apply the "only way" provision of Ar. 25 (1) (a) to the facts of this case[196].

In this *Enron* Annulment award, Committee found several other issues which were not address properly by the *Enron* tribunal. For instance, tribunal held that Argentina "contributed to the situation of necessity' within the meaning of Ar. 25(2)(b) of the ILC Articles, Annulment Committee state that Enron Tribunal did not adopt literal interpretation when interpret Ar. 25 (2)(b) and it say that the conduct of a State contributing to a situation of necessity for purpose of above Ar. of the ILC must be

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[192] *Ibid* 369

[193] *Ibid 370*

[194] *Ibid* 370

[195] *Ibid* 371

[196] *Ibid* 373

conduct constituting some sort of “fault” on the part of the State[197]. Along with other issue, Committee has annulled that the Tribunal’s decision on Argentina is precluded from relaying on principle of necessity under customary international law[198].

In *Continental Casualty* award tribunal explicitly adopted the WTO’s least restrictive alternative approach, thus, it moves from the “no other means available” standard. In this regard Tribunal stated that the text of Article XI derives from the parallel model clause of the US FNC treaties and these treaties in turn reflect the formulation of Art. XX of the GATT 1947. Therefore, it found referring to the GATT and WTO case law were more appropriate, rather than to refer customary international law to dealt with concept and requirements of necessity[199].

In this case, Tribunal has reviewed standard of application according to the criteria of the principle of proportionality and applied cumulatively. In this way, Tribunal assessed whether measure contributed to the realization of their legitimacy aims under Ar. XI of the BIT, thus it applied “suitability test” whether measure choose and did make a decisive contribution to the end[200]. Next, Tribunal analyzed “necessity test” by applying standard of review such as Argentina had reasonably available alternative, less in conflict or more complaint with its international obligation. Tribunal has examined all relevant Argentina’s measures to evaluate whether Argentina has a “reasonably available alternatives”[201]. Hence, tribunal developed its argument by comparing the Argentina’s policies between “pre-emptive” policies and measure at issue and found that possibility of reasonability available alternative considered too tenuous and rendered these measures unnecessary under Ar. XI. Thus it applied last step of proportionality principle criteria[202].

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[197] *Ibid* 388

[198] *Ibid* 395

[199] *Continantal Casualty* Award, para 192

[200] *Ibid* 196 - 197

[201] *Ibid* 198-230

[202] *Ibid* 231- 233

4.3 Balancing different conflicts of interest

The real sense of principle of proportionality is to find a balance between two different right claims, thus tribunal apply proportionality because of its scope and flexibility allows arbitrators to see entire contractual field[203]. However, it is doubtful how far ICSID tribunals have utilized this balancing principle effectively.

Takahashi (2001, p.14) expresses that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interest of society. This means that a fair or reasonable balance must be attained between two countervailing interests. Further, the measures adopted by host states do not only pursue a legitimate objective but it also must maintain a fair balance between the demands of the general community and the requirements of the protection of the private individual's fundamental rights

. To achieve this objective ICSID Tribunals also have adopted various requirement criteria based on different jurisprudence. According to above mentioned cases, ICSID tribunals have applied proportionality in numerous ways. However, *Enron* Annulment case, the Committee placed three questions to determine the requirements of "only way" according to ILC Draft Article. Thus, it reflects Tribunals are in a position to carefully scrutinize the host states' measures especially when they have taken to protect essential interest of the public. Therefore, in these cases Tribunals suggested that during urgent situations, crisis, need or social emergencies should be weighed against the deprivation of the use and enjoyment of the claimants' investment. In this regard, the host state's measure must be evaluated based on benefit of the measure, value and control of investors' right.

Balancing in the different interest is somehow difficult task. Tribunals has to examine the whole scenario of the investment and it also very important to evaluate the loss that of investor has undergone due to State measures or actions, and to determine whether compensation is required or not. This is further confirmed by the statement of Stone Sweet (2010, p 3) who explains as "more generally, balancing provides flexibility, enabling judges to adapt decisions to facts ([]), and to fashion equitable judgments, reducing the losses of the loser as much as possible". Proportionality embraces balancing.

[203] Stone Sweet (2010)

In *LE&G* case Tribunal anyhow tries to balance and it held that the Argentina was excused from liability in certain period.

Chapter 5: Conclusion

The main aim of this research is to identify whether application of principle of proportionality is one of the preferred methods of balancing between two different conflicts of interests in investment dispute settlement process. Recently, ICSID Tribunals applied principle of proportionality to challenge host states' regulatory measures which has gained importance now.

Initially, foreign investment contracts are mostly concluded as a long-term cross border investment and modern investment treaties are tailored to face unexpected non commercial risks. Host states' interference is one of the main perils in peaceful investment journey. Generally, investment contract are made between State and a national/company/enterprise of the other State. As part of the State duty it has to bring a number of measures in accordance with changing circumstances. Some of these are not identified as direct or indirect means of interference of property right of the investor. Deprivation of enjoyment of property rights of investor is the central factor to determine whether indirect expropriation has occurred. ICSID Tribunals have generally accepted that the host states have right to regulate its economy through number of measures and obvisiouly in some instance they have accepted that they do not have power to examine the host states' measures whether they right or wrong. However, it requires that host states should respect the existence of legitimate expectation of the investors.

Further, host state has obligation not to violate specific commitments which were given by at the entry of foreign investment through its bi-multilateral treaties i.e. minimum standard of treatment, FET, security, special incentives, non discriminatory treatment etc. Investors also should be expected some foreseeable events during its long duration of investment. Thus, Investment treaties should be formulated prudently and risks could be allocated advancelly by express wording. Normally, investment treaties contain a clause which explicitly expresses the state of emergency/state of necessity and how state reacts or response to those situations. Commonly, investment treaties are contained a non-precluded clause which limit the applicability of investor protections under the treaty in exceptional situation. ICSID tribunal should give alive to this clause and investor has to bear

consequences of host state measures related to protection of essential interest of the State. In *CMS, Enron Sempra* awards tribunals found that the NPM clause was inapplicable. Further, in *LG&E* award tribunal found that the clause was properly invoke and Argentina's liability precluded for specified period of the crisis.

Furthermore, proportionality principle also considered as an important device for judges to check the regulatory measures of the governments. It can be said that proportionality principle as the suitable principle to apply in investment disputes. Because, it involves two different conflicts of interest i.e. public interest and individual rights. ICSID tribunals applied this principle based on other jurisdiction such as ECHR and WTO. Significantly, these different jurisdictions in certain level allow Member States to adopt measures pertaining to safeguard its essential interests. When ICSID tribunals interpret treaty provision, tribunals have given importance to other laws which dealt with necessity requirements i.e. customary international law and WTO standard of review rather giving importance to NPM provision. Therefore, the application of the principle of proportionality in its more rigorous forms might be criticized on the ground that goes beyond the judicial function.

In addition, ICSID Tribunals has followed principle of proportionality on numerous jurisdictions i.e. in *Tecmed* case tribunal applied the proportionality principle based on ECHR case law. In *Enro*n Case Tribunal has applied "the only way for the State to safeguard an essential interest against a grave and imminent peril" requirement based on Ar. 25 of the ILC Draft Articles, while *Continental Causality* case Tribunal assessed "reasonably available alternative measures" based on WTO law. Therefore, in ICSID Tribunal does not have a clear picture of principle of proportionality on which standard of review should it follow?. Applying different approaches of standard of review may lead to more confusion as stated by Bruke-White and Staden. Therefore, it needs some flexible approach, and cannot be defined definite rule since it is depended on case by case analysis.

Along this way, judges apply general principles of international law to interpret treaty provisions on the standard of treatments to find a justifiable solution. Commonly, investment contracts include rights and duties of contracting parties. At the same time it prevents from unjust enrichment by one party of the contract and secure acquired rights of investor.

Finally, it can be said that principle of proportionality is one of the appropriate principles to apply in investment disputes as stated by Stone Sweet. Tribunal must apply this principle to balance two different rights claims as it has to protect the loser of one side. According to my observation, investment disputes involve State and private party. Two different sets of legal norms (State-sovereign right on enact, alter, and abolish laws, and regulations; and investor-property rights including use and enjoyment) arise along with disputes that ICSID tribunal should be given equal weight when settling disputes. Therefore, I assume that ICSID tribunal still lack on fundamental balancing of values and interest between contracting parties.

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Appendix -1.

US – Argentina BIT – Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment- November 14, 1991

TREATY BETWEEN

UNITED STATES OF AMERICA AND

THE ARGENTINE REPUBLIC

CONCERNING THE RECIPROCAL ENCOURAGEMENT

AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

The United States of America and the Argentine Republic, hereinafter referred to as the Parties;

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

b) "company" of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned;

c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capita gain; royalty payment; management, technical assistance or other fee; or returns in kind;

e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.

f) "territory" means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

2. Each Party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, or nationals of such Party, control such company and the company has no substantial business activities in the territory of the other Party, or (b) the company is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.

c) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Argentine Republic under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of that Party's binding obligations that derive from full membership in a regional customs union or free trade area, whether such an arrangement is designated as a customs union, free trade area, common market or otherwise.

ARTICLE III

This Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments made in its territory by nationals or companies of the other Party or with the conduct of associated activities, provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE IV

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of

national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE V

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

ARTICLE VI

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

ARTICLE VII

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL): or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

ARTICLE VIII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Permanent Court of Arbitration.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties.

ARTICLE IX

The provisions of Article VII and VIII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the

United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE X

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE XI

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.

ARTICLE XII

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article IV;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(l)(a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XIII

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XIV

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the fourteenth day of November, 1991, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE ARGENTINE REPUBLIC:

PROTOCOL

1. During dispute settlement proceedings pursuant to Article VII, a party may be required to produce evidence of ownership or control consistent with Article I(l)(a).

2. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

air transportation; ocean and coastal shipping; banking; insurance; energy and power production; custom house brokers; ownership and operation of broadcast or common carrier radio and television stations; ownership of real property; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources

3. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment with respect to certain programs involving government grants, loans, and insurance.

4. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national and most favored nation treatment in the following sectors, with respect to which treatment will be based on reciprocity:

mining on the public domain; maritime services and maritime-related services; primary dealership in United States government securities.

5. With reference to Article II, paragraph 1, the Argentine Republic reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

real estate in the Border Areas; air transportation; shipbuilding; nuclear energy centers; uranium mining; insurance; mining; fishing.

6. The Parties understand that, with respect to rights reserved in Article XI of the Treaty, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations.

7. The Parties acknowledge and agree that, to the extent of any conflict or inconsistency between the terms of this Treaty, and the terms of the Treaty of Friendship, Commerce, and Navigation between the Parties, entered into force December 20, 1854 (the "FCN Treaty-), the terms of this Treaty shall supersede the terms of the FCN Treaty, and shall control the resolution of such conflict.

8. The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of this Treaty.

9. Notwithstanding Article II(5) and in accordance with the terms of this paragraph, the Government of the Argentine Republic may maintain, but not intensify, existing performance requirements in the automotive industry. The Government of the Argentine Republic shall exert best efforts to eliminate all such requirements within the shortest possible period, and shall ensure their elimination within eight years of the date of the entry into force of this Treaty. The Government of the Argentine Republic shall further ensure that such performance requirements are applied in a manner which does not place existing investments at a competitive disadvantage against new entrants in this industry. The Parties shall consult at the request of either on any matter concerning the implementation of these undertakings. For the purposes of this paragraph, "existing" means extant at the time of signature of this Treaty.

10. The Parties note that the Argentine Republic has had and may have in the future a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Argentine Republic through the purchase of debt at a discount.

The Parties agree that the rights provided in Article V, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, remain or may be, as such rights would apply to that part of an investment financed through a debt-equity conversion, modified by the terms of any debt-equity conversion agreement between a national or company of the United States and the Government of the Argentine Republic, or any agency or instrumentality thereof.

The transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Argentine Republic or any third country, whichever is more favorable.

11. The Parties note with satisfaction that the Argentine Republic is engaged in a process of privatization of various industries, including public utilities. They agree that they will undertake their best efforts, including through consultations, to avoid any misinterpretation regarding the scope of Article II(5) that would adversely affect this privatization process.

Embassy of the United States of America

Buenos Aires, August 24, 1992

No. 453

Mr. Minister:

I have the honor to refer to the Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, with Protocol signed at Washington, November 14, 1991 ("The Treaty").

During the negotiation of the Treaty, the Government of the United States of America and the Government of the Argentine Republic discussed the inclusion in Section 5 of the Protocol to the Treaty of the Argentine Mining Sector. Based on those discussions and subsequent discussions regarding this matter, I wish to propose the deletion of the term "Mining" from the list of sectors in Section 5 of the Protocol.

If the foregoing is acceptable to your Government, I have the honor to propose that this note, together with your reply to that effect shall constitute an agreement between the two Governments amending the Treaty, which shall be subject to ratification.

Accept, Mr. Minister, the renewed assurances of my highest consideration.

Dr. Guido Di Tella,

Minister of Foreign Affairs and Worship,

Buenos Aires.

DEPARTMENT OF STATE
OFFICE OF LANGUAGE SERVICES
Translating Division

LS No. 140114

LM

SPA/ENG

Minister of Foreign Relations and Worship

Buenos Aires, November 6, 1992

Mr. Ambassador:

I have the honor to address you with regard to your note dated August 24, 1992, which reads as follows:

[The Spanish translation of Ambassador Todman's note of August 24, 1992, agrees in all substantive respects with the original English text.]

In that regard I wish to state that my Government agrees with the terms of the transcribed note and, therefore, I have the honor to inform you that the aforesaid note and this reply constitute an agreement between out two Governments that will enter into force open the exchange of instruments of ratification.

Accept, Sir, the assurances of my highest consideration.

[Signature]

His Excellency

Terence Todman,

Ambassador of the United States of America,

Buenos Aires, Argentina

Appendix -2.

Draft Articles on Responsibility of States for Internationally Wrongful Acts – November 01, 2001

Responsibility of States for Internationally Wrongful Acts

2001

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001,* vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

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2005

Responsibility of States for Internationally Wrongful Acts

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article l
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) Is attributable to the State under international law; and

(*b*) Constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III
BREACH OF AN INTERNATIONAL OBLIGATION

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) The coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The State has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33
Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II
REPARATION FOR INJURY

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35
Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) That State individually; or

(*b*) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or
(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) The injured State has validly waived the claim;

(*b*) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) Is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II
COUNTERMEASURES

Article 49
Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between it and the responsible State;

(*b*) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased; and

(*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56
Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

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