A Host State Regulatory Right in Fair and Equitable Treatment (FET) in Bilateral Investment Treaties (BITs).

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ABSTRACT

A host state has become a victim of "fair and equitable treatment" investment standard offered to the foreign investment protection. Foreign investment dissatisfied with host state legitimate public measures affecting their investment demand FET protection alleging investment protection violation. Foreign investors strong pitching for FET standard protection subordinating every sovereign host state regulatory action is creating friction between the parties. While host state insists non-discriminatory police power inherited in FET regulation for public measures, in contrast, foreign investors demand absolute protection of foreign investment.

Emerging and developing host country were early targets of foreign investment. A capital export from developed source state to emerging and developing host state is not anymore unidirectional but bidirectional. The investment from emerging and developing economies to developed countries are in rapid increase. Earlier emerging and developing host country were in voracious attack from established source state foreign investors. These suffering host states were fighting for their sovereign rights to regulate for public protection and interests, however, no to avail. Developed source state supporting implicitly for their investor's investment protection became a victim of themselves. Rules applied to other became a loop to themselves whom they are now fighting to defend host state administrative rights for the public purpose. The absolute FET has become more fickle and in a way of balancing stage recognising outstanding and value of regulatory rights in FET.

My dissertation explores on the same line that FET protection standard for foreign investors and their investment is reciprocal to host state just and equitable regulatory public measures. Host state non-discriminatory measures are non-compensable and legitimate of sovereign rights when public protection and security demands. This adduces long believed and practiced host state necessary steps of domestic law and order. It is evidence by Modern Model BIT, in arbitration practices and even developed source states opposing absolute FET standard protection. These methods proved that predatory nature of alleging FET violations are not only harming host country but also negativity in foreign investors and their investment. The future is not about only host state rights regulatory measures but also foreign investors and their investment self-regulatory measures like corporate social responsibility.

Keywords: FET, Host State Regulatory Rights, Corporate Social Responsibility

ABBREVIATIONS

ACIA	Asian Comprehensive Investment Agreement
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CESCR	Committee on Economic, Social and Cultural Rights
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
ECT	Energy Charter Treaty
EDA	Economic Development Agreements
EEC	European Economic Community
EU	European Union
CETA	Comprehensive Economic and Trade Agreement
FCTC	Framework Convention on Tobacco Control
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTAs	Free Trade Agreements
FTC	Free Trade Commission
ICJ	International Court of Justice
ICSID	International Convention for Settlement of Investment Disputes
IIAs	International Investment Agreements
IISD	International Institute for Sustainable Development
ILC	International Law Commission
IPR	Intellectual Property Rights
MAI	Multilateral Agreement on Investment

MERCOSUR	Southern Common Market
MIGA	Multilateral Investment Guarantee Agency
MNEs	Multinational Enterprises
MSCP	Multi-Storey Car Parking
MST	Minimum Standard of Treatment
MTBE	Methyl Tertiary Butyl Ether
NAFTA	North America Free Trade Agreement
NGOs	Non-Government Organisations
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PPI	Producer Price Index
R&D	Research & Development
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

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Introduction

There are more than 3000 international investment agreements (IIAs) today.[1] The rapid expansion and proliferation of bilateral investment treaties (BITs) are proving the importance of BITs in modern global trade and foreign investments. Since the first BIT between Germany-Pakistan "for the promotion and protection of investments"[2], the pace of BITs between States has skyrocketed, albeit progressively. BITs are signed primarily between emerging/developing countries or capital-importing countries with developed states or capital-exporting countries. However, current trade and foreign investments are bi-directional.

Capital-importing countries do not have sufficient investments for sustaining development and economic growth. Only viability for the continuation of development and growth is to attract foreign investment. However, to attract foreign investments demand of secure and stable environment for investing in host state is preferred. Only bilateral investment treaties (BITs) done with host state sovereign capacity with another state can provide such legal status of protecting, securing and stabilizing foreign investment concerns. In addition, it was also the interest of capital-importing countries attracting foreign investments to stimulate and sustain growth and economy by providing the investors security he expects now and assuring its continuance over time.[3] Not only protecting and guaranteeing foreign investments security but also acceptance of international investments disputes arbitration by capital-importing countries for settlement of investment disputes show the commitment of host states to foreign investments.[4] The outcome led to an unprecedented level of signing BITs between states. This was despite efforts to conclude multilateral agreements on foreign investments, failure of states to develop definitive multilateral agreements taking the interest of all parties led to a proliferation of BITs. Therefore, states in competition to attract foreign investments opened new policy of BITs as a tool for promotion and protection of international investments.

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[1] According to Investment Policy Hub, 2283 BITs are in force out of 2929 BITs, similarly, 280 IIAs are in force out of 352 international investment agreements (IIAs). Retrieved from http://investmentpolicyhub.unctad.org/IIA .

[2] Pakistan and Federal Republic of Germany (1959): Treaty for the Promotion and Protection of Investments. Retrieved from http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf .

[3] Bronfman, Marcela K. (2005).*Fair and Equitable Treatment: An Evolving Standard* (Master Thesis).Retrieved from http://www.mpil.de/files/pdf3/15_marcela_iii1.pdf .

[4] Sornarajah, M. (2010). *The International Law on Foreign Investment (3rd Ed.).*Cambridge: Cambridge University Press.

Research Objective and Scope

Foreign investors and their investments have been using fair and equitable treatment (FET) standard for protection of their investments in host state since post-industrial period. These investors have exploited FET investment protection standard for any legitimate acts or measures of host state for public welfare and interests amounting to violations of their investments protection offered to them, which is the balance provided in BITs. While it is true that FET is the most recognised standard but also not well defined and chaotic investment protection mechanism; foreign investors are taking advantage of unsettled FET standard alleging host state for violations of FET investment protection standard. FET has become "holy grail" for foreign investors and their investments protection in the host state. On the other hand, a host state with sovereign power has rights to implement acts or measures for the protection of public interests and welfare. A host state objective measures with transparency, legitimacy and legality are not subject to FET standard violations but equally demand "fair and equal treatment" to host state for legislative action when foreign investors and their investments activities are unacceptable to it. Therefore, foreign investors and their investments initiating allegation of FET standard violations for acts or measures of host state to legitimate public interests or *ordre public* is not only against the true spirit of BIT but unjust and unfair to host state sovereign legislative power. A host state has rights and duty bound to protect its public interests and welfare guaranteed in international law to the state. Therefore, my research aims to find out:

FET investment protection standard in BIT is not meant to be absolute protection for foreign investors and their investments but on case-by-case basis; FET standard confers equal rights on host state to legitimate, regulatory measures for public interests and welfare protection. This is countenance to host state sovereign right and duty to regulate for legitimate public interests.

My thesis proposes that a host state legitimate regulatory measures are just and well-founded to regulate host state public interests and welfare. FET standard does not confer absolute protection to foreign investors and their investments only but is bound to perform responsibilities and duty to host state. When those fundamental responsibilities fail to perform, host state in the interests of protecting its public welfare does have right *for state policing power*. These are through either "*necessary*" measures, or host state right to regulate measures, or *state policing power*. To support my thesis, I have taken consideration of international laws and principles, states practicing and investments arbitration tribunal awards and contemporary development in international investment law.

The research will further try to explore host state rights and duties towards its public for the protections of environment and culture, human rights, tax, competition and so forth important to maintain *ordre public* in a legitimate way; also host sovereign state rights for its natural resources. Besides, I will examine host state duty to protect foreign investors and their investments as and when upholding state commitment to foreign investments protection.

While foreign investors and their investments are demanding stronger investments protection under FET standard scrutinizing any legitimate acts or measures of host state amounting to violations of foreign investments protection standards, host state is actively advocating for their sovereign right to regulate. In this complexity of foreign investments, foreign investments dispute resolutions tribunals plays the vital role in foreign investments standards protection and implementation through precedent but not a must for future tribunals to follow.

Finally, states are central players in international investment agreements and implementation. While developed states in the early phase of investments agreements were in favour of strong investments protection even superseding host state legitimate regulatory rights and duties to its public purpose, now there is growing a fear of strong investments protection biting to develop states even to retreat from absolute investment protection. This has led to developed source state accepting legitimate regulatory measures are leading us to more in balancing investment agreements. The tradition of capital -exporting from developed economies to emerging and developing economies have changed in the contemporary economy. Today's emerging and developing economies are capital exporting to developed economies and vice-versa. This shift in economies are creating fear in advanced economies, and a new model investment treaty or free trade agreements are done in together to balance and recognize a host state legitimate rights to regulate and a protection of foreign investors and their investments.

On the scope of research, my thesis will try to argue that host state reasonable regulatory measures have as strong foundation "like" foreign investments protection standards in the BITs. While foreign investors without any hesitation allege every kind of host state legal action amounting to indirect expropriation, is asking for stronger investors' protection rights under treaty and state duty to fulfil those obligations. In contrast, states are challenging that notion of stronger investment protection standards vigorously demanding host state *police powers* for the right to protect and implement public interests on behalf of its citizens, and it is the duty of a state to protect and implement measures for benefits of public purpose. On this thin line, state regulatory actions on one hand, and foreign investors and their investments protection on the contrary, under FET standard, will try to develop and draw conclusions what has happened, what is going on and what are the future aspects of FET standard in international investment law.

Fair and Equitable Treatment in Bilateral Investment Treaties

Fair and Equitable Treat Before Bilateral Investment Treaties

In early days of investments, there was not any particular investments protection treaty or agreement of foreign nationals in the host states but "gunboat diplomacy" was prevalent. Powerful states provide their nationals investments protection by threatening military action to host state for without adequate compensation to expropriation or arbitrary act of host state to their investments. Disputes settling through military threatening or action was not possible anymore when Convention on the Peaceful Resolution of International Disputes [5] adopted, giving chances to state-to-state arbitration of investment disputes. While investors (source) state involvement in an early stage of investment dispute was unnecessary to host state internal affairs unless host state treatment to other nationals' investment was discriminatory. It is established fact and law that international investors and their investments deserved same treatment and protection like host country nationals. Host state arbitrary treatment to foreign national's investments do give rise to "diplomatic protection" from foreign national's state. It is because of "anyone who mistreats a citizen directly offends the state." [6] The sovereign state on behalf of its nationals abroad demand protection and compensation from host state alleged to have breached the international minimum standard of protection. Also, the state has "mutual rights and duties" for "international proceeding" "of the obligations of the one to the other" for investment disputes solutions. Therefore, host state has "mutual duties" to treat aliens with an international minimum standard of protection under international law. The foreign national's state has "mutual rights" to protect and sought remedy from host state on behalf of their citizens guaranteed by an international minimum standard of protection of aliens under international law.[7] The recognition and acceptability of "mutual rights and duties" to both host state and foreign nationals state is more relevant to current BITs, albeit in the different fashion. The "diplomatic protection" of foreign nationals in host state was long before affirmed by PCIJ in *Mavrommatis Palestine Concessions Case* as:

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[5] Convention (I) for the Pacific Settlements of International Disputes (Hague I) (29 July 1899), Article 1 read "With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts *to insure the pacific settlement of international differences*."

[6] Vattel (1758) translated in Douglas. Z. (2004) .The hybrid foundations of investment treaty arbitration .British Yearbook of International Law, 74(1), 151-289.

[7] Subedi, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle.* Oxford and Oregon, Portland: Hart Publishing, 11-12.

It is an elementary principle of international that a State is entitled to protect its subjects, when injured by acts of contrary to international law committed by another State, from when they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is, in reality, asserting its rights-the right to ensure, in the person of its subjects, respects for the rules of international law. [8]

In the contemporary international investments law instead of a foreign national's source state, aliens sue host state government for BIT violations under international arbitration tribunal.

The traditional form of "diplomatic protection" is now uncommon in new BITs and IIAs. Almost all BITs and IIAs provides investment protection mechanism through investment arbitration under ICSID or UNCITRAL rules. This is not to rule out that "states can always avail them of this well-recognized tool of international law as and when it becomes necessary." [9] It is the proliferation of "diplomatic protection" that today's investor-state tribunals, ICJ and so forth are the testimony of exercising powers between state-to-state or investor-state disputes. Consequently, "whether or not there is a BIT or some other treaty between the states concerned, a home state can always invoke the principles of public international law concerning the treatment of aliens and protect its citizens, both natural and juridical, abroad." [10] This was the impetus for the foundation of the protection of foreign investors under the international law minimum standard of treatment of aliens.

The progenitors of the modern BITs were the treaties of 'friendship, commerce and navigation' (FCN) concluded by the US with its allies. [11] While FCN treaties have been from the 18th century, its effectiveness came only after World-War II when the US became the formidable power. Even though first FCN Treaty was not unique to investment and the treaty may not be the precursor of the modern BITs, but its investment provisions contain many features which are now found in a more refined way in BITs. [12] Except US-China FCN Treaty, all other US FCN treaties constitute a standard of "equitable treatment" [13] and "fair

[8] *Mavrommatis Palestine Concessions Case*, PCIJ, Series A, No. 2 (1924), 12.

[9] Subedi, 13.

[10] Seidl-Hohenveldern, I (1987). *Corporation In and Under International Law*. Hersch Lauterpacht Memorial Lectures (No. 6).

[11] Sornarajah, 180.

[12] Sornarajah, 180-181. MFN, National Treatment, Unlimited Rights of Entry and Establishment of Business are formulation derived from FCN

[13] US FCN treaties with Belgium, Luxembourg, Greece, Ireland, Israel, and Pakistan referred to standard of "equitable treatment".

and equitable treatment"[14], which represented one of the primary standards for the protection of international investments in host state in modern BITs.

"Hard Law" Approach

Several attempts have been made agreeing on the multilateral treaty but without any avail. On the "hard law", the International Trade Organisation (ITO) under Havana Charter (1948) initiated first efforts to establish foreign investment protection by host state under "just and equitable treatment." [15] On this initiative regional Economic Agreement of Bogota (EAB) in 1948 spurred safeguarding foreign investments to "equitable treatment".[16] However, both failed to materialize due to sensitive issues of sovereignty, exploitation of natural resources and internal economic policies.[17]

Similarly, doomed Multilateral Agreement on Investment (MAI) under Organisation for Economic Co-operation and Development (OECD) auspice started negotiation to reach a "broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures." [18] It was not only among OECD members but also non-OECD members who could accede.[19] While MAI preamble indicates "fair, transparent and predictable investment regimes complement and benefits the world trading system" but under General Treatment Article1.1 for investment protection demands "fair and equitable treatment." [20] However, due to fierce oppositions of politicians from developing countries and also within developed economies, in addition to civil societies, NGOs, and through mass media and internet MAI could not implement. They argued that the "MAI would threaten protection of human, labor and environmental, and least" and further degrading action that MAI will incentivize countries to lower their labor and environmental standards to attract

[14] US FCN treaties with Ethiopia, Germany, Oman, and the Netherlands referred to standard of "fair and equitable treatment".

[15] The Havana Charter 1948, Article 11(2) (a) (i) stipulates "to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another".

[16] Economic Agreement of Bogota 1948, Article 22, para 3 states "Foreign capital shall receive equitable treatment……."

[17] The US Congress never approve the Havana Charter citing internal economic issues, thus the Charter failed.

[18] Hill, William (1995).The OECD Multilateral Agreement on Investment. *UNCTAD/ITE/IIT,* 4(2).

[19] Picciotto, Sol (1998). Linkages in International Investment Regulations: The Anatomies of the Draft Multilateral Agreement on Investment. *University of Pennsylvania Journal of International Economic Law,* 19(3), 731-768.

[20] OECD Multilateral Agreement on Investment (1998).

foreign investment leading to "race to the bottom". [21] Consequently, the MAI could not muster enough support and finally initiator France withdrew it, rest is the history.

Contrasting failure of "hard law" success story, Multilateral Investment Guarantee Agency (MIGA) is a success story. It stipulates in Article 12(d), "in guaranteeing an investment, the Agency shall satisfy itself as to the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment." [22] This was not only for lowering risk for guaranteed investments but to promote investment flows to and among developing countries, including promotion of investment protection.[23]

Similarly, Lome IV is a success story in the multilateral investment agreement. The Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) with 12 EU (then EEC) members states for ten years period (1990-2000), guaranteeing fair and equitable to foreign nationals of parties to the convention.[24]

Further, Association of South East Asian Nations (ASEAN) members have twice amended ASEAN Treaty for the Promotion and Protection of Investments (1987).[25] A preamble of ASEAN Comprehensive Investment Agreement (2007) explains "comprehensive investment agreement which is forward looking, with improved features and provisions, comparable to international best practices to increase intra-ASEAN investments and to enhance ASEAN's competitiveness in attracting inward investments into ASEAN." This was further enhanced under Asian Comprehensive Investment Agreement (ACIA, 2007) protecting foreign investments in the same vein as older agreements under Article 11(1), "investments of investors of any other Member State fair and equitable treatment." [26]

Following above, Common Market for Eastern and Southern Africa (COMESA) established on 1994, now comprising 20 African states is one the pillars of African Economic Community. Article 159 of COMESA Common Investment Area, requires COMESA member States to "accord fair and equitable treatment to COMESA investors in accordance with customary international law".[27] Similarly, Colonia Protocol on Reciprocal Promotion and Protection of Investments signed by MERCOSUR member states in 1994 is expressly

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[21] Cohn, Theodore (2011). Global Political Economy: Theory and Practice (6th Ed.).

[22] Multilateral Investment Guarantee Agency (1985), Article 12(d).

[23] OECD Fair and Equitable Treatment Standard on International Investment Law (2004), 6.

[24] EU-ACP Cotonou Agreement (1990).

[25] In 1998 ASEAN members revised 1987 ASEAN Treaty. Also, in 2007 ASEAN members amended 1998 AIA Agreement.

[26] ASEAN Comprehensive Investment Agreement (2007), Article 11.

[27] Investment Agreement for the COMESA Common Investment Area (1994), Article 14.

granted "at any moment, fair and equitable treatment "and to non-MERCOSUR member states investments are protected by Article 2 (C) as "fair and equitable treatment for the investments of investors from Third States." [28]

Most importantly, NAFTA has played significance role in form and meaning of "FET". The regional trade agreement was a classic example of states participation from majority developed states (USA and Canada) to minority state (Mexico). Mexico, being developing state was preferred target of investors from USA and Canada alleging violations of FET standard on their investment protection. Earlier decisions by tribunals, on alleged violations of FET, was directed towards mostly Mexico host state. While Mexico defended "necessary measures" of the host state as a sovereign right to regulate on health, environment, public concerns and environmental issues, however, NAFTA arbitral tribunals did not heed. Consequently, when the penetration of alleged violations of FET directed towards developed states like US and Canada, these states were on the back foot. Developed source state realized FET standard is not only unidirectional but can circumvent to hunt for them who were the strong advocate for investment protection despite host state legitimate measures for public concerns. With rapid economy growth and urbanisation, Mexico was investing in USA and Canada for resources. When Mexican investors alleged FET violations, fear of being dragged by foreign investors to arbitration both the US and Canada with Mexico, three state were compelled to issue interpretative note on FET, which states that NAFTA "fair and equitable treatment" and "full protection and security" "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." [29] This chameleon character of developed states vindicates non-absolute nature of FET standard. According to Article 1105 (1) of the NAFTA (1994), "each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Whatever earlier decisions made by arbitral tribunal gave, at least interpretative note of 2003 gave future tribunals to follow direction under a rubric of a minimum standard of treatment.[30]

Like NAFTA, Energy Charter Treaty (ECT, 1995) is one the most successful regional investment agreements. ECT is a pro-investor investments protection treaty, limited to the energy sector, within European states only. The Charter provides that fair and equitable treatment shall be accorded at "all times".[31] The Treaty is considered "the most advanced

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[28] MERCOSUR was established by Treaty of Asuncion in 1991.Its full members are Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela. Chile, Colombia, Ecuador and Peru are associate members.

[29] Mann. H. The Free Trade Commission Statements of October 7, 2003, on NAFTA's Chapter 11: Never-Never Land or Real Progress? *International Institute for Sustainable Development.* Retrieved from http://www.iisd.org/pdf/2003/trade_ftc_comment_oct03.pdf .

[30] NAFTA (1994), Chapter 11, 1105(1).

[31] Energy Charter Treaty (1995), Article 10(1) states "Each Contracting Party...encourage and create stable, equitable, favourable and transparent conditions for Investors….to accord at all times to investments fair and equitable treatment."

text in terms of extensive investor protection." [32] The treaty includes the proliferation of different standard treatment from NAFTA Chapter XI, EU's Draft on Energy Directives, UK BIT's and so forth, giving much importance to agreements and arbitral awards without any regard to the customary international law.[33] While ECT is limited to the energy sector, it "derives broad significance from the fact that its parties include several states which are currently reliant on capital importation as a part of its core strategy for economic development." [34] Many states formed after USSR breakdown were part of ECT signatories. [35]

Finally, EU-Singapore Free-Trade Agreement (2002) stipulates in Article 9.4(1) preface "fair and equitable treatment". [36] Similarly, EU-Canada Comprehensive Economic and Trade Agreement 2015 on Article X.9 states "fair and equitable treatment" but with express conditionality, therefore, providing necessary, precise definition guidelines to tribunals for avoiding overly wide interpretations.[37] Further, EU-Vietnam FTA and Trans-Pacific Partnership (TPP) have just concluded. The EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiation is ongoing. These agreements will have FET standard albeit limitation, giving host state regulatory rights in pursuance of public concerns. Unlike hegemony of FET under older BITs and IIAs, the latest agreements are more cautionary on FET. Even developed economies have understood the FET can be a double-edged sword. While BITs and IIAs were done to protect capital exportation from developed economies to developing economies, due to globalization, the global economic environment is not same now as it was in initiated time. The one-way capital exportation has become two-way capital exportation, that is, capital-importing states are now fast-growing, and their surpluses are investing in the strategic importance of developed economies. This provides probable future investment disputes; hence, a precautionary is needed.

"Soft Law" Approach

On "soft law" approach, first, one is Draft Convention on Investment Abroad (1959), also known as Abs-Shawcross Draft, formulated by Hermann Abs and Lord Shawcross. The

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[32] Walde, T. (2004).Energy charter treaty-based investment arbitration - controversial issues. *The Journal of World Investment & Trade, 5*(3), 373-376.

[33] Bronfman, 617-618.

[34] Vasciannie, S. (2000). The fair and equitable treatment standard in international investment law and practice. *British Yearbook of International Law*, 70 (1), 99-164

[35] Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan are parties to ECT (1995).

[36] EU-Singapore Free Trade Agreement (2002), Article 9.4(1).

[37] Mann et. al (2014). A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA). *International Institute for Sustainable Development*. p 5.

Article 1 on Abs-Shawcross stipulates that "each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties".[38] This Draft led to OECD develop the convention for the international protection of private property through Draft Convention on the Protection of Foreign Property 1967 which played a significant role in the proliferation of FET in BITs. Even though the Draft was not opened for signature, but it "represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period." [39] The Draft Article 1(a) stipulates "Treat of Foreign Property: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties….."[40] OECD Draft Convention influenced on expanding the number of BITs between developed and developing economies, especially prominence reference to "fair and equitable treatment" standard.[41]

In addition, Draft United Nations Code of Conduct on Transnational Corporations, which is multilateral in context, both developed and developing states agreed "equitable" treatment should be provided for transnational corporations in the host state. While there is no agreed text by states Article 48 prelude,

Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]. [42]

Finally, World Bank's Guidelines on the Treatment of Foreign Direct Investment (1992), Article III(2) postulates, "each state will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines" extending FET standard of treatment accorded to stipulated in Article III(3) foreign investors in matters such as security of person and property rights, the granting of permits and licenses, the transfer of incomes and profits, and the repatriation of capital.[43] It seems World Bank Guidelines on FET was "over-arching" [44] without due regard to host state necessary measures on "unrealistic approach formulating

[38] Draft Convention on Investments Abroad (1959), Article 1.

[39] OECD, Fair and Equitable Treatment Standard on International Investment Law (2004), 4-5.

[40] Draft Convention on the Protection of Foreign Property (1967), Article 1(a).

[41] OECD, Fair and Equitable Treatment Standard on International Investment Law (2004), 1-41. Retrieved from http://www.oecd.org.ezproxy.ulapland.fi/daf/inv/investment-policy/WP-2004_3.pdf .

[42] Draft United Nations Code of Conduct on Transnational Corporations (1983), Article 48.

[43] Legal Framework for the Treatment of Foreign Investment (1992), Article III (2), III (3).

[44] OECD, Fair and Equitable Treatment Standard on International Investment Law (2004), 6.

rules of behaviour for host states mainly from the perspectives of the interests of foreign investors." [45]

The above-described Agreements, Drafts, and Guidelines proved that multilateral investment treaty is hard to negotiate as states have different interests and priorities. Only on a regional level success of investment treaty can be found. The unsuccessful efforts of the multilateral investment treaty, limited success in regional investment treaty, led to countries in search for bilateral investment treaties.[46] BITs did in "ad hoc basis, for mutual interests of the states" eventually emphasizing the importance of "bilateral solutions become necessary simply because of an absence of a consensus on multilateral norms." [47]

The Proliferation of Fair and Equitable Treatment in Bilateral Investment Treaties

"Foreign investments has been regarded as, inter alia, an engine of economic growth, a source of foreign currency income, a stimulator of the local economy, and a source of foreign skills, information and know-how" [48] assumptions developing states were welcoming foreign investors. While foreign investors were ready to invest in developing countries, host states vesting control over foreign investors with the local law was deterring foreign investors. The host state regulatory legislation rights on one hand, and international obligations demand from foreign investors on another hand, was the source of friction between parties. "In this confused state of conflicting norms, bilateral investment treaties [BITs] provided the parties with the opportunity to set out definite norms that would apply to investments made by their nationals in each other's territory." [49] It is not because of BITs "stabilized" customary international law but "knowing the confused state of the law; they entered into such treaties so that they could clarify the rules that they would apply in a case of any dispute which arose between them". [50] This was true, the essential characteristics of BITs were new, and international investment law itself was in the developmental stage. The nascent, disjunct and incoherent norms unable to meet rapid development of international foreign investments was stated by International Court of Justice in *Barcelona Traction Case*,

[45] Treves et.al (2014).Foreign *Investment, International Law and Common Concerns (Ed.).* Oxford, Routledge, 123.

[46] However, there has been recently in a surge of regional investment agreements such as EU-Vietnam, EU-Canada, EU-Singapore, TPP, and TTIP.

[47] Sornarajah, 183.

[48] Subedi, 83.

[49] Sornarajah, 184.

[50] Sornarajah, 184.

Considering the important developments of the last half-century, the growth of foreign investments and... considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane.[51]

Most of the BITs were between developed economies to emerging and developing economies; developed states were demanding protection of property from foreign investors' protection with the stable legal framework. Developing economies saw foreign investments conducive to economic development. While developed states regard the protection of foreign investments in host states as "accomplished liberalization", in contrast developing economies esteem BITs "not because they contained any norms on liberalization itself, but because of the belief that protection of foreign investment increased the flow of foreign investment". [52] Assuming this scenario there was the mushroom growth of BITs within decades.

The first BIT signed between Germany-Pakistan (1959) was starting point for the wave of BITs signed between sovereign states to be followed. The OECD Draft Convention (1967) gave fresh impetus to the expansion of BITs. As Vandevelde observes, "while fewer than four hundred BITs had been concluded in the thirty years from 1959 to 1989, during the next fifteen years some two thousand BITs would be concluded." [53] Today, there are 2928 BITs and 356 IIAs are available.[54] Further, in the same OECD Draft Convention inclusion of "fair and equitable" investment standard led to a proliferation of it in BITs and IIAs, which is now one of a primary substantive feature in international investment law. While the OECD at that time supported the narrow view and regarded the fair and equitable standard as not distinct from the international minimum standard, however, OECD in MAI took opposite and gave an expansive view.[55] It was the expansive view of FET which has faced criticism not only from developing countries but within developed states, allowing future tribunals to create new standards when the situation demands so that justice may be done for the foreign investor who suffers unfair treatment at the hands of the host state.[56]

FET standard has been included in BITs for a long time, until, under NAFTA tribunals had a chance to analyze and the highlight of every dispute under NAFTA. Later, the growth of alleged violations of FET standard on BITs have been phenomenal and the epitome

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[51] *Barcelona Traction Case* (Belgium v. Spain), 1970, ICJ 3, pp 46-47.

[52] Sornarajah, 186.

[53] Vandevelde, Kenneth (2010). *Bilateral Investment Treaty: History, Policy, and Interpretation*. Oxford University Press, 64.

[54] Investment Policy Hub (UNCTAD). Retrieved from http://investmentpolicyhub.unctad.org/IIA .

[55] Draft Convention on the Protection of Foreign Property (1967), Article 1(a) read ,Fair and Equitable Treatment shall be accorded "at all times". Francis Mann was strong proponents.

[56] Sornarajah, 349.

of every investor-state disputes. Under NAFTA, initials violations of FET was against Mexico, however when FET violations reached to US and Canada for authoritative, government regulatory rights, FET standard expansive view tone was halted. Modern Model BITs and FTAs are the prime examples of a controlled view of FET, with suggestive lists that do not constitute violations of FET on legitimate government regulatory rights.

The hosts states regard "fair and equitable treatment" is no more than the international minimum standard of treatment of aliens. However, arbitral tribunals are treating FET "ordinary meaning" with "almost equal vagueness".[57] The tribunals have interpreted "fair and equitable treatment" from the perspective of investment protection of investors without giving due regard to the whole meaning of Treaty and Preamble. While BITs object and purpose is to attract foreign investments providing adequate guarantee and protection on their investments, BITs are not totally immune from host state regulatory rights.

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations.....for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations. [58]

This is validating host state legitimate regulatory rights in social, economic, environmental and health, tax and competition issues not to be constrained by BIT investment protection completely.

Tribunals in the international investment law are independent, have no precedent doctrine and exercise its decision within applicable law. This provides tribunal flexibility in making decisions and therefore, investment arbitral awards in same conditions are found invariance. While arbitral awards have developed certain principles in the FET, however, those principles are furthermore "exists in a significant range of views".[59] Violations of legitimate expectations, due process and denial of justice are characteristics features of FET developing through investment arbitral awards.[60]

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[57] *Saluka v. Czech Republic*, 17 March, 2006, para 297.

[58] *Saluka v. Czech Republic*, para 300.

[59] Marshall, Fiona (2007). Fair and Equitable Treatment in International Investment Agreements. Retrieved from https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf .

[60] Sornarajah, 354-358.

Legitimate Expectation

Most of foreign investor's alleged BITs violation by host state has been under legitimate expectations. [61] As a general principle, reasonable expectations provides only procedural protection, requiring that an expectation created by official conduct could not be violated unless a hearing is given to the person who had that expectation.[62] Host state liability for not maintaining static law favorable to foreign investments lead to violations of legitimate expectations, which not only ridicule host state administrative rights but totally affecting host state sovereign power to legislate law when the situation demands. However, states will not permit intrusive supervision of their regulatory mechanisms by international tribunals on the pretext of inquiring into the fairness of the use of the regulation. Despite host states resistance to the intrusion of FET through tribunal's awards, tribunals' awards on legitimate expectations in FET is developing. In contrast, "states as well as other agencies have resisted the idea that liability should be imposed and the regulatory powers of the state be stymied through the creation of doctrines that have no basis in the treaty itself or in the intention of the parties" but not avail to already affected host state. [63]

The notion of legitimate expectations ensures host state provides stable legal and business environment,[64] a transparent and predictable framework for investors' business planning and investment, and "fair and equitable treatment is inseparable from stability and predictability." [65] But those lists does not ensure that no investor can reasonably expect that the circumstances prevailing at the time the investment is made to remain entirely unchanged.[66] Further, foreign investors cannot allege violations of legitimate expectations if host state has not made any representations, [67] whereas foreign investors invest relied on host state representations led to the breach of FET standard.[68]

Foreign investors, finding loopholes on FET standard is using for any loss occurred during the investment period. However, tribunals have ruled that investments loss due to investors act does not amount to violations of legitimate expectation. The tribunal in *MTD v.Chile* found that host state had breached reasonable expectations but reduced the amount of compensation to be paid by the host State. Otherwise, tribunals have been consistent that BITs are not foreign investors' investment "insurance policies against bad business

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[61] In *Enron v. Argentina,* legitimate expectations are called "basic expectations" or "reasonable and justifiable expectations", *Award 22 May 2007, para 262.*

[62] Sornarajah, 355.

[63] Sornarajah, 356.

[64] *LG&E v. Argentina,* para 124-125.

[65] *CMS v. Argentina*, ICSID Case No. ARB/01/8, 2005.

[66] *Saluka v. Czech Republic*, para 305.

[67] *Thunderbird v. Mexico*, para 163-166.

[68] *Waste Management (no. 2) v. Mexico*, 2004, para 98.

judgments"[69], rather foreign investors are "responsible for meeting the requirements of the host state's law, ignorance of the law is no excuse." [70] These tribunals awards demonstrate that FET is not in *stricto sensu* guaranteeing of damage/loss will occur to foreign investors, but also providing margin to a host state who is not responsible for strict liability for all injuries occurred to foreign investors.[71] This substantiates host state long argued practice that FET should not be used by foreign investors for investment failing merely because of law or practice that were in placed before investment were made.[72]

The above legitimate expectation characteristics of foreign investments in the host state, not to award strict liability to host state is vindication that investors reasonable expectations have to be balanced against host state legitimate regulatory rights. The FET cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.[73] Further, the breach of the obligation of "fair and equitable treatment" by the host State must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders [74] - giving a host state legitimate right subsequently to regulate domestic issues in the public interest must be taken into consideration as well.[75] Thus, the determination of a breach of FET requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the host state bonafide, legitimate regulatory interests on the other side.[76]

Due Process/Administrative Regularity

The due process/regulatory consistency is another criterion for alleged FET violations, borrowed apparently from domestic administrative law concepts of due process and a-rule-of-law. There are tribunals awards based on principles of review administrative decisions. This raises a question, whether an arbitral tribunal has authority to decide on host state regulatory power which amounts to violations of FET or not? While tribunals have used

[69] *Maffezini v. Spain*, 2000, para 64.

[70] McLachlan et.al. (2008). *International Investment Arbitration: Substantive Principles*. Oxford University Press, USA, 246.

[71] *AAPL v. Sri Lanka*, 1990, para 546.

[72] *MTD v. Chile*, 2004, para 205.

[73] *Saluka v. Czech,* 2006, para 304.

[74] *S.D. Myers v. Canada,* 2000, para 263.

[75] *Saluka v. Czech,* para 305.

[76] *Saluka v. Czech,* para 306-307.

their prerogative rights to judge whether host state administrative regularity amount to FET violations or not but in varying degrees, facing criticism.

The tribunals had held that outrageous faith and bad faith is not required but could aggravate the situation amounting to violations of the standard.[77] This led to the extra protection of foreign investments than host state nationals investment, giving a treatment of foreign investors "minimum standard" entitling to better treatment than host state nationals.[78] Further, the tribunals have held that host state commitment to treat foreign investor obligations cannot be altered citing compliance difficult or costly, nor does lack of able administration or defiant culture of compliance provides a defense.[79] Also, state assuming contractual obligations cannot later argue that host state administrative regularity does not allow, otherwise countering the right faith underlying fair and equitable treatment.[80]

While tribunal asserts that coercive or harassing action by host amount to FET violations, but "fair and equitable treatment" standard requires the host state must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.[81] This is further supplemented by host state manipulation of power for improper use other than required also lead to the breach of the standard.[82] In addition, inconsistency conduct by host state administrative regularity also amounts to breach FET standard.[83] Discrimination between nationals and foreign investors also amount to the breach of rule, unless the treaty explicitly prohibits discriminatory measures in the standard. Tribunal in *Saluka v. Czech* found that state was in violations of standard due to preferential treatment to host state bank, [84] while tribunal in *Methanex v. US* held that no reference to discrimination in the NAFTA article on fair and equitable treatment, the burden was on the investor to establish a rule of customary international law prohibiting discrimination of the type complained of.[85]

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[77] *CMS v. Argentina*, para 280.

[78] *S.D. Myers v. Canada*, para 259.

[79] *GAMI v. Mexico*, 2004, para 94.

[80] *Siemens v. Argentina*, 2007, para 308.

[81] *Saluka v. Czech,* para 308.

[82] McLachlan et. al, 242. In *Tecmed v. Mexico,* host state regulatory agency cancelled environmental permits due to political opposition than foreign investments violations of host law (para 164-166).

[83] In *MTD v. Chile,* one government agency encouraged investor project while another rejected, amounting to violation of FET protection standard.

[84] *Saluka v. Czech*, para 408-416.

[85] *Methanex v. US*, Part IV, Chapter C, para 14–19.

Transparency

While transparency is the first issue to be considered by the tribunal, its scope has been unclear. In *Tecmed v. Mexico* [86] and *Metalclad v. Mexico*[87], tribunals stated that transparency is the main thrust for foreign investors to investment when host state rules, regulations, policies, administrative practices and directives are in transparent and free from ambiguity. In contrast, a tribunal in *Parkerings v. Lithuania* rejected the notion of transparency citing changing in "political environment" that is, a state in transition position itself cannot guarantee in the future legal framework will not be amended.[88]

Not all failures by host state demand strict liability. Tribunals are recognizing host state complexity, and had accepted that non-performance was balanced against the authorities' attempts to achieve the objectives of the concession.[89] Further, the failure to fulfil the objectives of administrative regulations without more does not necessarily violate international law. A failure to satisfy requirements of national law does not necessarily violate international law. Proof of a good-faith effort by the State to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal and regulatory requirements. The record as a whole – not isolated events – determines whether there has been a breach of international law.[90] Consequently, "something more" than simple illegality or lack of authority under the State's national law is required for the violation of international law. [91]

Denial of Justice

Denial of justice amounts to the breach of FET to foreign investors' investment. However, the due process requirement is higher for a judicial decision than for an administrative decision.[92] While the customary law of state responsibility recognized that the actions of the judicial organs of the state could engage the state in liability if they so exceeded the norms of proper judicial conduct or showed such prejudice as would shock the conscience of the outside world and also inordinate judicial impropriety was required to engage the liability of the state in the conduct of its judicial organs.[93] In *Loewen v. US*,

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[86] *Tecmed v. Mexico,* 2003, para 154.

[87] *Metalclad v. Mexico*, 2000, para 176. Transparency reasoning by tribunal was annulled by Supreme Court of British Columbia citing its scope was outside of NAFTA Chapter 11.

[88] *Parkerings v. Lithuania*, para 342-345.

[89] *GAMI v.Mexico*, para 96.

[90] *GAMI v.Mexico*, para 97.

[91] *ADF v. US*, 2003, para 190.

[92] *Thunderbird v. Mexico*, para 200.

[93] Sornarajah, 357.

manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.[94] The tribunal reminded those arbitration proceedings for denial of justice in order is not for to seek international review of national court decisions as though the arbitral tribunal were an appellate body.[95] The breach of denial of justice is not the misapplication of a rule of law but the violation of the rule of law that engages state responsibility.[96] Hence, a denial of justice may be found if the courts refuse to entertain a suit, if they subject it to undue delay, if they administer justice in a seriously inadequate way, or if they clearly and maliciously misapply the law. [97] Also, a denial of justice is, what matters is the system of justice and not any individual decision in the course of proceedings - the system must have been tried and have failed. This means that, in a case where the conduct of the court system is at issue, the notion of exhaustion of local remedies becomes a substantive requirement and not only a procedural prerequisite to an international claim.[98]

"Do Not Do Unto Others What Others Do Unto You"

The developed economies were primary sources of capital-exporting to developing economies. Foreign investors, fearful of host state historical record of violating investor's properties demand their investments to be strongly protected. Host state having no choice but succumbed to investors demand to lead a stronger protection of foreign investments. This was wished of both foreign investors and developed economies. However, developing economies were against strong foreign investments protection, wanting government regulatory leverage to domestic issues. When host state regulatory acts on environmental, health, tax, social and economic issues, cultural rights and so forth are issued affecting both host state nationals and foreign investors and their investments, foreign investors were eagerly litigating to host state for violations of protected investments standards, mostly FET. This was regular manipulative trend both by foreign investors and their state to host state.

However, as the world economies globalized, the flow of capital was not unidirectional, but bidirectional that is capital-exporting states became capital importing and vice-versa. While developed states were strongly emphasizing on BITs protection of foreign investment in host state but once these advanced states became targets of foreign investment arbitration source states realised the need of space for sovereign regulation for certain areas of public concern.[99] There was also the strong wave of negativity from legislatures and with

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[94] *Loewen v. US*, 2003, para 132.

[95] *Mondev v. US* 2002, para 126.

[96] *ELSI case*, 1989.

[97] *Mondev v. US*, para 126.

[98] *Waste Management v. Mexico*, para 97.

[99] Sornarajah, 222.

the government. In NAFTA, cases arising from regulatory taking such as *S.D Myers v.Canada*,[100] *Pope and Talbot v.Canada*,[101] *Methanex v. US,*[102] *Ethyl v. Canada* [103]and so forth litigate host state administrative rights under NAFTA Chapter violations. The investors' litigation against developed state regulatory measures did not shake the only foundation of strong investor's property protection but also retreatment of developed economies from absolute protection, giving host state regulatory rights momentum. Today US, Canada, EU and others model BITs are based on host state policing power. Those safeguard provisions are intended to preserve at least a degree of regulatory space in a more effective way to preserve regulatory space is to confine the protection of the treaty only to those investments which conform to the regulatory regime of the host state achieving objectives of economic development which is trend now in investment treaties which are moving towards balancing the interest in investment protection with the interest of the state in preserving its public interest.[104]

The host state regulatory power to take actions for municipal issues arises from the principles of sovereignty and the territoriality principle. This has become customary international law, giving host state a clear right to regulate commercial and business activities within their territory. Emphasis on the host state's sovereignty supports the argument that the investor should not expect compensation for a measure of general application taken in the exercise of functions that are considered part of government's power to regulate the general welfare.[105]

"Necessary" Clause on State Regulatory Right

Hunters (developed states) became hunted (by emerging and developing states) on their own trap of strong investment protection; developed states have no choice but to back down. The voices of absolute investment protection came to realize that host state "necessary" measures of bonafide and non-discriminatory to domestic pressing issues were fair and equitable when issues arise. Fearful of being trapped on its own creation, the backlash from source state national politicians for prohibiting sovereign rights of implementing legislation affecting in general concerns and to some extent pressure from activists, developed states have changed in a practice of long-arm of FET standard investment

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[100] *S.D. Myers v. Canada*, on regulations relating to the processing of hazardous waste.

[101] *Pope & Talbot v. Canada*, on Canadian timber regulation.

[102] *Methanex v. US*, on regulation of substances that were regarded as environmentally unsafe.

[103] *Ethyl v. Canada*, on regulation of substances that were regarded as environmentally unsafe.

[104] Sornarajah, 223.

[105] Dolzer et. al (2012). Principles of International Investment Law (2nd ed.), 120.

protection. While the efforts are laudable but still honing margin of appreciation to investment arbitration is regrettable.

The wind of change on FET standard can be demonstrated from states Modern Model BIT, arbitration tribunal awards, and investment agreements between states. States have realized homogenous FET protection is a detriment to domestic policies to the host state. Subsequently, host state municipal law for public measures is not only to protect, but alleged investment protection violations are dealt on a case-by-case approach.

Arbitration tribunals need to consider certain factors before determining host state legislative measures constitutes to indirect expropriation. Both USA and Canada BIT models of 2004 in Annex B.4.a and B.13 (1) respectively read as follows:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

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

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

(iii) The character of the government action.

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation. [106]

Similarly, ASEAN Comprehensive Investment Agreement (2009) takes more precautionary measures. Annex 2 describes considerations need to be taken by tribunals as,

(a) the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;

(b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

(c) The character of the government action, including, it's objective and whether the action is disproportionate to the public purpose (...).

[106] US Model BIT (2004); Canadian Foreign Investment protection Agreement (2004).

Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b). [107]

In similar but thoroughly, determining whether indirect expropriation has occurred or not, EU-Canada Comprehensive Economic and Trade Agreement (CETA, 2014) Annex X.11 postulates:

The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) The economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

(b) The duration of the measure or series of measures by a Party;

(c) The extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and

(d) The character of the measure or series of measures, notably their object, context and intent.

For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations. [108]

The EU-Canada CETA in minutiae clarifies what constitutes indirect expropriation. Based on three factors, the first test is when property attributes are substantially deprived. Second, a detailed step-by-step analysis to determine whether an indirect expropriation has taken place and clarifying that the sole fact that a measure increases costs for investors does not give rise in itself to a finding of expropriation. The third test is legitimate public policy measures taken to protect health, safety or the environment does not constitute indirect

[107] Nikiema. S. (2012). Best practices indirect expropriation. *International Institute for Sustainable Development.*

[108] Egger et. al. (2012). BITs Bite: An anatomy of the impact of bilateral investment treaties on multinational firms. *The Scandinavian Journal of Economics*, 114(4), 1240-1266.

expropriation, except in the rare cases where they are manifestly excessive in light of their objective. [109]

In particular to determine whether indirect expropriation measures have been implemented during host state policing, EU-Canada CETA defines characteristics in Annex X.11 of indirect expropriation such as economic impact, the investor legitimate expectation and the character of measure. Further, a "non-discriminatory measures . . . to protect legitimate public welfare objectives, such as health, safety and the environment" should be taken into consideration. These non-discriminatory measures will in principle not be compensable because they cannot be viewed as indirect expropriation. However, certain measures manifestly excessive than purpose and intent of legitimate state regulatory power lead to indirect expropriation. The use of carve-out phrase "except in rare circumstances" in CETA without definition, leaving to tribunals to decide, is undermining the character of state regulatory power.[110] Therefore, this development in source state behaviour regarding FET contrasting to old belief of absolute protection for foreign investment in international investment agreements justify host legitimate state rights to regulate for the public purpose without any compensation.

Right to Protect the Public Health

The inclusion of public health in BITs show the public policy of host state to protection and promotion of public welfare. The adage of "health is wealth" motto carries significant in any host state. Investments are not only meant for development and growth in the cost of sound public health of host state but also to protect and promote the healthy population. The proliferation of NGOs, environmental awareness associations and international NGOs have made investments not easy like before. Strict health and environment protection regulations and implementation before and after investments are mandatory in developed economies and to extend strict in rules but not strongly implemented in developing and emerging host states. After investments, investors dissatisfied with state new standards and regulations on public health from host state alleges the violation of FET standard amounting to indirect expropriation. The dilemma for host state - on one hand to protect and promote public health, on the contrary, to fulfil investors according to BIT, is not only confusing but can create severe fiscal problems and damage to public health and welfare in general. Even though the distinction between regulatory measures and FET/indirect expropriation is in the thin line, has been more blurred and chaos due to arbitral awards and jurisprudence. This dividing legal opinion has given rise to "*sole-effect doctrine* and *police-power doctrine*".[111] The former focuses on compensatory paid to investments due to negative

[109] Mann et. al (2014). A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA*). International Institute for Sustainable Development*. p 5

[110] Mann et. al.

[111] Vadi, 75.

impacts of regulation even though unintended, whereas latter doctrine accepts general state regulation adopted in bonafide and non-discriminatory to protect health, environment, human rights, labor law and taxation, which need not be compensated. [112]

It should be noted that state regulation adopted without discriminatory, with legitimate objective protecting public health, environment, and human and labor rights, and so forth in the public interest should not be considered "indirect expropriation." However, measures implemented discriminately and incoherently, affecting international investments amounts to "indirect expropriation", which should be dealt case-by-case, on fact-based inquiry.

Novartis v India [113]

The *Novartis v. India* (2013) was high-profile, internationally sensualized case of intellectual property rights (IPR) patentability vs. public health concerns, relating to access to medicine. Novartis, who has applied a patent for Glivec (imatinib mesylate), a cancer treatment drug, had patent been rejected. First, the Indian Patent Office rejected Novartis' patent application for Glivec under Section 3(d) of the Indian Patents Act, stating that the drug was a modification of an existing substance, imatinib, and therefore represented a case of 'evergreening'.[114] However, in developed economies "very minor modifications" to an original patent drug will give rise to a new patent drug, per se started from In re Brana (1995), supporting practices known as "evergreening."[115]

Before 2005, India didn't allow product patents for pharmaceuticals inventions giving India generic drug manufacturers liberally producing foreign patents medicines at fractional cost. The majority population of India is without health insurance, and their income hardly fulfils basic needs, let medicinal alone costs. The policy of Indian government was to manufacture generic drugs freely and provide cheap medicine to public health. After implementation of TRIPS Agreement in 2005, India patent law was amended to comply with TRIPS, giving full protection and rights to patentable products.

Section 3(d) India Patents Act state stipulates:

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[112] Vadi, Valentina (2013). Public Health in International Investment Law and Arbitration. Routledge, New York, 102.

[113] *Novartis v. Union of India and Others*, 2013, Supreme Court of India. Retrieved from http://supremecourtofindia.nic.in/outtoday/patent.pdf . (herein after *Novartis v. India*)

[114] Roderick et. al (2012).India patent laws under pressure. *Lancet*, 380(9846).

[115] Abbott .F (2013, April 04). *The judgment in Novartis v. India: what the Supreme Court of India said*. Retrieved from http://www.ip-watch.org/2013/04/04/the-judgment-in-novartis-v-india-what-the-supreme-court-of-india-said/ .

the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. [116]

The term "efficacy" was central to the interpretation of patentability of Glivec patent. This was uncertain and unknown territory for Novartis because neither definition nor meaning of "efficacy "was defined, but open left to court for interpretation. However, Supreme Court of India reminded of its "duty to uphold the rights granted … an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but many developing and under-developed countries, dependent on generic drugs from India."[117]

The Court in its judgement decided that Glivec is neither new nor show "significant enhancement of known efficacy" improving in its therapeutic effect or curative property as compared to the old form in order to secure a patent but in fact marketing an older form of the drug and not the new beta crystalline version (of Glivec), thus unpatentability. The judgement was lauded by public health advocates and patients seeing it as a good precedent for drug affordability in developing countries in general. This case highlights "political mobilisations" for access to medicine for all.[118]

The host state *police power doctrine* gives the state a margin of appreciation on balancing economic development with public health on one hand, on the other hand, India commitment to global trade but former taking the precedence. Therefore, Supreme Court decisions proving that monopoly pricing of drugs not only hinders economic development but also denies millions of people from life-saving drugs. To sum up, India is respecting its global obligations concerning intellectual property laws while ensuring that domestic needs are respected by interpreting its legal obligations in a way that is commensurate with domestic preferences and needs putting social justice over commercial interests and also helps India's own domestic industry.[119]

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[116] India Patents Act, The Patents (Amendment Act), 2005, No. 15 of 2005.

[117] *Novartis vs. India.*

[118] Lofgren, Hans (2013, April 26). *Novartis vs. the government of India: patents and public health.* Retrieved from http://www.eastasiaforum.org/2013/04/26/novartis-vs-the-government-of-india-patents-and-public-health/

[119] Gabble et. al (2014). To Patent or Not to Patent? The Case of Novartis' Cancer Drug Glivec in India. *Globalization and Health*, 10(1).

Philip Morris v Australia [120]

Tobacco Plain Packaging (TPP) is a comprehensive range of tobacco control measures to reduce the rate of smoking in Australia and is an investment in the long-term health of Australians, tobacco products being preventable and controllable of smoking death and disease. Even though Australian government is regulating and acting on behalf of "legitimate public health measure" on state policing power, Philips Morris Asia (PMA) alleges breach of fair and equitable treatment (FET) standard and deprived of full protection and security under Article 2(2) of Australia-Hong Kong for the Promotion and Protection of Investments (PPI).[121] The government denies it.

The *TPP Act* imposes significant restrictions upon the colour, shape and finish of retail packaging for tobacco products which is superimposed upon pre-existing regulatory requirements for health warnings and safety and information standards applied to tobacco products and their packaging. The goals are to the improvement of public health by discouraging people from taking up smoking, encouraging people to give up smoking, discouraging people from relapsing if they have given it up, and reducing people's exposure to smoke from tobacco products.[122] The *Act* covers both domestic and international investments on tobacco products business in Australia.

Before Phillips Morris Asia brought the investor-state dispute to arbitration, the claimant filed by Philips Morris Asian to the High Court of Australia for the TPP Act affected an acquisition of their intellectual property rights and goodwill on other than just terms, contrary to s 51(xxxi) of the Constitution.[123] s51 (xxxi) of the *Commonwealth of Australia Constitution Act* states:

The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws. [124]

The Court concluded that the TPP Act is not a law by which the Commonwealth acquires any "interest in property, however, slight or insubstantial it may be." The TPP Act is not a law with respect to the acquisition of property. It is therefore not necessary to consider

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[120] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PCA 2012-12, UNCITRAL Arbitration Rules 2010. (herein after *Philip Morris v. Australia*)

[121] Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (1993).

[122] *British America Tobacco Australasia v. The Commonwealth of Australia*; Tobacco Plain packaging Act 2011.

[123] *British America Tobacco Australasia v. The Commonwealth of Australia.*

[124] Commonwealth of Australia Constitution Act- Sect 51. Retrieved from http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html.

the Commonwealth's attempt to articulate a principle which would set legislation affecting an acquisition of property otherwise than on just terms beyond the reach of s 51(xxxi) on the ground that the legislation is a reasonable regulation of some activity for the "greater good of society." [125] With local remedy exhaustion, disputation for investor-state arbitration was claimed on Australia-Hong Kong PPI, on which arbitration of dispute is ongoing but tribunal rejected claimant claims citing jurisdictional issue .

Philips Morris Asia alleged that through TPP legislation Australia violates the BIT, substantially depriving PMA of the real value of investments, treating investments unfairly and inequitably, unreasonably impairing full use and enjoyment of investments, failing to provide full security and protection for the investments, and breaching its obligations under other international obligations under Article 2(2) of Australia-Hong Kong PPI.[126] PMA seeks an order that the Australian Government suspend enforcement of the legislation and compensate PMA for loss suffered through compliance with the legislation, or compensate PMA for loss incurred as a result of the enactment and continued the application of the legislation.[127]

The Australian Government is defending PMA allegations from two fronts- first, TPP legislation is Australian Government continuation of long-standing regulation and control of the manufacture and sale of tobacco in Australia.[128] The ratification of World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) obliges Australian Government to implement convention on national law. The objective of FCTC on Article 3 states,

(.....) to protect present and future generations from the devastating health, social, environmental and economic consequences (.....) Providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke. [129]

According to international law, "international conventions" has primacy over international custom, general principles of law and so forth.[130] Hence, Australian Government has international obligations and state policing rights stating in proceeding:

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[125] *British America Tobacco Australasia v. The Commonwealth of Australia.*

[126] Schneiderman, D. (2010). Investing in democracy? Political process and international investment law. *The University of Toronto Law Journal*, 60(4).

[127] Schneiderman, D. (2010). Investing in democracy? Political process and international investment law. *The University of Toronto Law Journal*, 60(4).

[128] *Philips Morris Asia Limited v. Australia.* Australia Response to the Notice of Arbitration, 21 December 2011.

[129] WHO Framework Convention on Tobacco Control (FCTC).

[130] Statue of the Court- International Court of Justice, Article 38.

The plain packaging legislation forms part of a comprehensive government strategy to reduce smoking rates in Australia (....) is a significant burden both on productivity and on Australia's health care system. The implementation of these measures is a legitimate exercise of the Australian Government's regulatory powers to protect the health of its citizens. [131]

On the second front, the Australian Government's procedural objections regarding PMA allegations for violations of BIT standard. PMA's purported 'investment'- the acquisition of shares in PM Australia has not been admitted in accordance with the requirements of the Treaty, which provides that an 'investment' must be 'admitted by [Australia] subject to its law and investment policies applicable from time to time.' The Australian Government arguing that PMA's application for admission contained 'false and misleading' assertions that the true purpose of PMA's investment was to place PMA in a position where it could bring the claim once the legislation had been enacted. Further, Australian government argued that PMA's claim either falls outside the scope of the Treaty because it relates to a pre-existing dispute or amounts to 'an abuse of right' because PMA cannot restructure its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute i.e. "treaty shopping" that an investor cannot buy into a dispute by making an investment at the time when a dispute is either existing or highly probable (Philip Morris Asia only acquired its shares in the Australian company 10 months after the government had announced it would implement plain packaging). In addition, the government asserted that neither the shares in PML nor PML's assets constitute 'investments' for the treaty. Both PM Australia and PML are Australian incorporated companies, adding PMA shares on PM Australia are eligible for investment protection of treaty, still PMA does not have any ownership rights in respect of the relevant intellectual property rights, nor is it a party to relevant licence agreements.[132]

The tribunal preliminarily decided on substantial and merits of Australian Government procedural objections that case should be bifurcated, J.Libermann calling "substantial chances of success" for Australia. Supporting Libermann, Mike Daube said if Australia won, even on "jurisdictional grounds," it would inspire confidence in other countries.[133] Subsequently, arbitral tribunal rejected claimant case citing jurisdictional issue

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[131] *Philips Morris Asia Limited v. Australia*. Australia Response to the Notice of Arbitration, 21 December 2011.Retrieved from https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf

[132] *Philips Morris Asia Limited v. Australia* .Procedural Order No. 08-Regarding Bifurcation of the Procedure; McCabe Centre for Law and Cancer [web blog post]. Retrieved from http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge .

[133] Corderoy, Amy (2014, July 3). Australia wins first battle in plain packaging trade disputes. *The Sydney Morning Herald.* Retrieved from http://www.smh.com.au/national/australia-wins-first-battle-in-plain-packaging-trade-dispute-20140702-zst8d.html#ixzz3lElBv7mu.

to hear.[134] This validates host state commitments to protect municipal health measures and give fresh stimulus for other country to follow in protecting public health.

Right to Protect the Environment

Methanex v. US [135]

Methanex v. US is a historical and significant case in investor-state dispute settlements. Done under Chapter 11 of NAFTA through ICSID arbitration, the tribunal found that non-discriminatory measures implemented on public environmental laws do not constitute expropriation. The state shall have legitimate public policing for protecting the environment without violating investor's investments, reminding that measures implemented in public interests affecting investor's interests do not always constitute indirect expropriation.[136]

Methanex, a Canada incorporated corporation doing business on methanol. Methanol, a key component in MTBE (methyl tertiary butyl ether), used for increasing oxygen content and act as an octane enhancer in unleaded gasoline. The state of California in 1999 announced banning MTBE additives from 2002 as a source for polluting water surface and groundwater posing a significant risk to human health and safety, and the environment. Methanex argued that banned on methanol was to favour domestic producers. Further, Methanex claimed that California should have used alternative approaches to mitigating environmental risks. Under Chapter 11 of NAFTA, Methanex proceed to investment arbitration under ICSID's UNCITRAL rules seeking financial compensation from US government for planned ban amounting tantamount to unfair and unequitable to the plaintiff. [137]

NAFTA Chapter 11 was to protect foreign investors (US and Canada) from (Mexico) government arbitrary takings or discrimination. In 1990s Mexico was developing economies, foreign investors' trepidation of Mexico state constraints in investment were alleviated through the protection and security the Chapter 11 provided. To put it underlyingly, Chapter 11 is analogous to the right of developed states (US and Canada) to bring claims and force a judicial review of an alleged arbitrary and capricious government action.[138] The "one-edged-

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[134] Hurst, Daniel (2015, December 18). Australia wins international legal battle with Philip Morris over plain packaging. Retrieved from http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging .

[135] *Methanex v. US*, ICSID case, 3 August, 2005.

[136] *Methanex v. US*, ICSID case, 3 August, 2005, Part IV, Chapter D, page 4,para 7.

[137] *Methanex v. US.*

[138] Dougherty, K. (2007).*Methanex v. United States*: The realignment of NAFTA Chapter 11 with environmental regulation. *Northwestern Journal of International Law and Business*, 27(3), 735-754.

sword" became "double-edged- sword", hard to digest for US and Canada. Earlier BITs were favouring capital-exporting states, but same BITs now can be circumvented by developing economies investors to developed states government for implementing regulatory measures affecting investors' interests. On another hand, Chapter 11 of NAFTA had substantive, and procedural deficiencies are taking advantage by investors against legitimate environmental measures. Further, to rub salt in wound secretive proceeding, textual ambiguity, broad interpretation, lack of binding precedent and so forth all tilt to only in favour of investors.[139] This is where *Methanex v. US* case is the landmark in many ways which changes view from absolute protection to allowing host state to implement necessary measures when need for public purpose.

For the first time, the tribunal allowed *amicus curiae* submissions. Following NAFTA Free Trade Commission (FTC) supporting submissions from non- disputing party participation, both International Institute for Sustainable Development (IISD) and Earth Justice participated as *amicus curiae*, citing public interest in the matter of law.[140] Second, transparency was another criticism subject in investment arbitration. Since most of the disputes involve host government, opaque and confidential proceeding nature of arbitration in public discontent were high. However, *Methanex v. US* case allowed observers to the final hearing in a limited way opening the door for others to follow.[141] Third, in *Methanex case* tribunal opted for the traditional approach to international law on expropriation. That said, measures adopted by government in legitimate environmental measures do not constitute seizure stipulating,

As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government…..[142]

Therefore, proving that regulation taken on public policing with bonafide intention according to due process is non-expropriatory. However, host state *ab initio* commitment determines whether a measure is tantamount to expropriation or indirect expropriation. The unfulfillment by host state promised before investment for foreign investors is liable to host state government creating problems in regulating measures. [143]

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[139] Dougherty, K. (2007).*Methanex v. United States*: The realignment of NAFTA Chapter 11 with environmental regulation. *Northwestern Journal of International Law and Business*, 27(3), 735-754.

[140] Mann. H. The Free Trade Commission Statements of October 7, 2003, on NAFTA's Chapter 11: Never-Never Land or Real Progress? *International Institute for Sustainable Development.* Retrieved from http://www.iisd.org/pdf/2003/trade_ftc_comment_oct03.pdf .

[141] *Methanex v. US.* Methanex Background-IISD. It is said that in oral hearing US government was defending *Methanex case* as legitimate "environmental measures" instead of "public health measures". Retrieved from http://www.iisd.org/investment/dispute/methanex_background.asp .

[142] *Methanex v. US.*

[143] Methanex Background-IISD. Retrieved from

Methanex case in international investment law is "seminal part of the evolution" of international investment law.[144] The tribunal allowed *amicus curiae* submissions from non-disputed party, to open hearing to public (but in limited way), and opening road for host state *police power* provided measures legislated are non-discriminatory, has followed due process and compensated adequately.

Glamis Gold v US [145]

Glamis, a Canadian incorporated company in the mining business, sought permission to develop mine site in California for three open pits, using the inefficient and deleterious cyanide heap leach process. The mining site was protected under Federal law but not to California state law. Since the inception, Glamis Gold mining was in controversy. First of all, all three open pits mining site has to be "backfill", a company was ready not to fill completely third open-pits. Second, the planned project site has significant importance to a Native Population for ceremonial and educational purposes. Even though for planned mining protected land was for "limited use" within the area but would be subject to regulations "to protect the scenic, scientific, and environmental values of the public lands ... against undue impairment, and to assure against the pollution of the streams and waters….." [146]

Glamis Gold initiated arbitration for disputes under Chapter 11 of NAFTA, even though new regulations neither dispose nor preclude development of *Glamis Gold* property, instead assuming a loss of profits, even before permits process were available, alleging violations of FET as per Article 1105 NAFTA.

The case is an exemplary, following FTC 2003 guidance, participation, and submissions from non- disputed parties as *amicus curiae* were allowed, and maintaining transparency and building confidence in the public and stakeholders.[147]

The claimant argued that the duty to accord fair and equitable treatment and the minimum standard of treatment are "dynamic standard" and FET has evolved from *Neer*

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http://www.iisd.org/investment/dispute/methanex_background.asp.

[144] Mann. Howard (2005). The final decision in *Methanex v. United States*: Some new wine in some new bottles. *International Institute of Sustainable Development*. Retrieved from http://www.iisd.org/pdf/2005/commentary_methanex.pdf .

[145] *Glamis Gold v. USA*, ICSID Case, Award of 9 June 2009.

[146] Ryan, Margaret (2011*).* Glamis Gold, Ltd. v The United States and The Fair and Equitable Treatment Standard. *McGill Law Journal,* 56(4), 919-957.

[147] *Glamis Gold v. USA,* Decision on Application and Submission by Quechan Indian Nation.

formulation.[148] However, the tribunal following FTC Note followed that the customary MST was synonymous with any autonomous treaty standard for FET found in BITs stating:

Claimant agrees that there is a difference between the autonomous and customary international law standards and that the standard articulated in NAFTA Article 1105 is the customary international law minimum standard of treatment of aliens, but it argues that the two sources of law, at this point, require the same conduct of states. Claimant thus asserts that this dispute between "customary international law" and "international law" is unnecessary, as "BIT jurisprudence has converged with customary international law in this area.[149]

While *Glamis Gold* further argued that the current content of the FET obligation encompassed two particular duties to the protection of an investor's legitimate expectations and the protection against arbitrary measures "a foreign investor expects its host State to act consistently, free from ambiguity and 'totally transparently' in its relations with the investor." [150]

Defending evolving MST on FET as customary international law, the US argued that international tribunal decision does not constitute state practice, insisting that "a rule only crystallizes into customary international law over time through a general and consistent practice of States that is adhered to form a sense of legal obligation", therefore, US argued that burden of proof lies to the Claimant to prove that MST on FET is customary international law, and the US violated the Article 1105 of NAFTA. [151]

The tribunal decided with US government concluding that MST on FET of Article 1105 of NAFTA has not been breached, strictly adopting FTC Note of Interpretation that the standard was intended to reflect the customary international law standard on a treatment of aliens and was not an autonomous standard that incorporated elements outside of the customary international law. Even though adopting *Neer Case* [152] the Tribunal shows some flexibility, that *Neer Case* standard when applied with current sentiments and to current situations, may find shocking and egregious events not considered to reach this level in the past.[153] Elaborating FET standard for violations of Article 1105 of the NAFTA, the tribunal postulated that,

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[148] *Glamis Gold v. USA*, para 547-548.

[149] *Glamis Gold v. USA*, para 551.

[150] *Glamis Gold v. USA*, para 570-573.

[151] *Glamis Gold v. USA*, para 567.

[152] "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".

[153] *Glamis Gold v. USA*, para 613.

requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105…….the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations. [154]

The Tribunal found that since the US has not made any objective commitment to induce investments, breach of FET was not found. Accepting the US assertions that government regulation measures were legitimate, the tribunal further added:

governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless……harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties. [155]

Therefore, the tribunal accepted host state regulatory measures, as "claimant was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining."[156]

Parkerings v Lithuania [157]

Parkerings a sole partner for the "organization, maintenance, development and enforcement" of the public parking system in the areas of the City of Vilnius, Lithuania, initiated ICSID action for the violation of Norway-Lithuania BIT for breaching negotiation, performance, and termination of the agreement. The Claimant argued that Lithuania violated BIT obligations under to grant the investment equitable and reasonable treatment.[158] Also, *Parkerings* contended that the Tribunal had jurisdiction under ICSID for dispute settlements guaranteed under Norway-Lithuania BIT. Since the claimant company was incorporated under Norwegian laws, any disputes arising "in connection with" covered investments have jurisdiction under ICSID Tribunal.[159]

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[154] *Glamis Gold v. USA*, para 627.

[155] *Glamis Gold v. USA*, para 804-805.

[156] Ryan, Margaret Clare (2011). *Glamis Gold, Ltd. v The United States* and the fair and equitable treatment standard. *McGill Law Journal*, 56(4), 919-958.

[157] *Parkerings v. Lithuania,* ICSID Case No. ARB/05/8, Award, of 11 September 2007.

[158] *Parkerings v. Lithuania*, para 197.

[159] *Parkerings v. Lithuania*, para 235-236.

The plaintiff argued that "equitable and reasonable treatment" is different and stricter from "fair and equitable treatment." However, the tribunal rejected the claim interpreting both as "identical" because Norway-Lithuania BIT did not intend to give a different protection to their investors other than the protection granted by the "fair and equitable" standard.[160] Similarly, the investor claimed that Lithuania failed to maintain stable and predictable legal framework, and to act transparently for legitimate expectations.[161] However, the tribunal decided after evaluating alleges that host state has not made any explicit guaranty or implicit representation "that the investor took into account in making the investment" when investments expectations are not protected under international law. [162] The tribunal analysis emphasized that sovereign legislative power is "state's undeniable right and privilege to exercise" "to enact, modify or cancel a law at its own discretion" which investor has "no [thing] objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment".[163] Also, the tribunal noted that "any businessman or investor knows that laws will evolve over time" which "an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."[164] Further, tribunal taking evidence into consideration stated that the host state had not given "any explicit or implicit promise that the legal framework of the agreement would remain unchanged".[165] Therefore, the agreement signed between the municipality and the investor "does not contain a provision stabilizing the legal regime applicable to the Agreement, but contains a provision exempting the City from responsibility for actions taken by the Lithuanian Government".[166] The tribunal as well as supporting Lithuanian government, the municipal government was in transition position, being part of Soviet Union to a candidate for the European Union. Since, *acquis communautaire* (the EU standards and rules) are a precondition for the membership of the EU predictable "legislative changes, far from being unpredictable, were, in fact, to be regarded as likely" consequently, "no expectation that the laws would remain unchanged was legitimate".[167]

The tribunal FET conclusion from *Parkering*s suggests that investors themselves are responsible for assessing host state political and legal framework predictability, and investors should be contractually be protected from host state perceived and real risks. As a result, the

[160] *Parkerings v. Lithuania*, para 271-278.

[161] *Parkerings v. Lithuania*, para 321-322.

[162] *Parkerings v. Lithuania*, para 331.

[163] *Parkerings v. Lithuania*, para 332.

[164] *Parkerings v. Lithuania*, para 332-333.

[165] *Parkerings v. Lithuania*, para 334.

[166] *Parkerings v. Lithuania*, para 324.

[167] *Parkerings v. Lithuania*, para 335.

investors should exercise due diligence for its legitimate expectation when host state was on the stage of political and economic transition from being part of the Soviet Union to the membership of the EU. A host state is not liable for "every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law",[168] stating *Saluka case*, "[t]he Treaty cannot be interpreted so as to penalise each and every breach by the Government of the Rules or regulations [.....]".

In *Parkerings case*, host state has state regulatory right under most favourable nation (MFN) obligation. The claimant argued that host state had treated two investors (Parkering *AS and Pinus Proprius)* investments in "like circumstances" differently. The tribunal defined "like circumstances" the competitor investors "must be in the same economic or business sector" and a host state "less favourable treatment is acceptable if a state's legitimate objective justifies such different treatment in relation to the specificity of the investment".[169]

The tribunal refusing *Parkerings* " like circumstances" to accept both competitor investments were in same economic or business sector stating that host state right to regulate for cultural and environmental protection do not amount to MFN violations. In particular, tribunal notes that:

[Parkerings] MSCP project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive. Indeed, the record shows that the opposition raised against the BP projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the [Parkerings] project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, [Parkerings] MSCP in Gedimino was not similar with the MSCP constructed by Pinus Proprius.[170]

The above international investment cases law proved that environmental concerns (with respect to historical, cultural and archaeological importance) raised in investment projects, treated unlike when circumstances are different, do not amount to violations of MFN in regard to fair and equitable treatment.[171] Consequently, host state *police power* for maintaining and protecting the environment and cultural heritage do not always amount to FET violations but shows host state vulnerability on delicate balancing.

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[168] *Parkerings v. Lithuania*, para 344.

[169] *Parkerings v. Lithuania*, para 371.

[170] *Parkerings v. Lithuania*, para 392.

[171] *Parkerings v. Lithuania,* para 410.

Right to Protect Human Rights

Biwater Gauff v Tanzania [172]

Biwater Gauff, invoking the UK-Tanzania BIT provision filed ICSID proceeding for violations of fair and equitable treatment regarding contractual contention. The dispute aroused from the agreement of disputing parties (Tanzania and Biwater Gauff) on the operation and management of drinking water and sewerage system in Dar-es-Salaam. When *Biwater Gauff* was unable to fulfil agreed required performance according to agreements, Tanzania government terminated the contract, deporting investment company management and seizing the assets of investors, in consequence of that violating Tanzania obligations under the UK-Tanzania BIT to foreign investments. It should be noted that when this dispute arose, Tanzania was 26th poorest country in the world and providing clean drinking water and management of sewerage system is "entwined to development sustainable imperatives and the fulfilment of basic, human rights obligations" [173] of the host state.

The case accentuates a host state has to give consideration need to human rights and sustainable development while privatizing and commodifying natural resources which are essential entitlements to poorest peoples.[174] The committee on CESCR under Article 11(1) defines "including" water as "the human right to water entitles everyone to sufficient, safe, acceptable, physically acceptable and affordable water for personal and domestic uses".[175] In addition, the tribunal allowed participation of five *amici* non-disputed parties for submission which were "NGOs with specialised interests and expertise in human rights, environmental and good governance issues locally in Tanzania. They approach problems in this case with interests, expertise, and perspectives that have been demonstrated to differ materially from those of the two contending parties, and as such have provided a useful contribution to these proceedings".[176] Further, tribunal emphasized the importance of *amici* "useful [ness]",

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

[173] According the IMF World Economic Outlook Database (2009 ed.); Aldson, F. (2010). Biwater v Tanzania: Do corporations have human rights and sustainable development obligations stemming from private sector involvement in natural resource provision? *Environmental Liability*.

[174] Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003). **http://www1.umn.edu/humanrts/gencomm/escgencom15.htm** .

[175] Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003). **http://www1.umn.edu/humanrts/gencomm/escgencom15.htm** .

[176] *Biwater Gauff v. Tanzania* ,para 359

making clear that *amici*'s "submissions [had] informed the [tribunal's] analysis of [the] claims".[177]

There some questions were raised for tribunal allowing participation of *amici* despite protest from the claimant. However, it should be noted the gravity of situation was grave because Biwater *Gauff* "acts and omissions caused its investment to fail and that investors in the water sector have a heightened level of responsibility because the success of a business venture in this area has a direct impact on the achievement of an essential human right - the right to clean and safe water".[178] When claimant failed in delivering basic human rights obligations, did investor own failure investment act allowed tribunal take into account human rights obligations?

Even though tribunal declared there was the violation of fair and equitable treatment and another investment protection, however, no monetary damages was awarded to the claimant because any losses investor has suffered was own claimant failures act while performing the contract. It is particularly difficult to point out why Tribunal did not award any monetary damages, but some analogies can be derived from tribunal decision, implicitly, if not explicitly.

The tribunal recognized the importance of information and submissions from all relevant standpoints before resolving case was significant, highlighting "public interest" of arbitration stating *Methanex v. US* statement that,

there is an undoubtedly public interest in this arbitration…This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm. [179]

The tribunal accepting and referring *amici* proved that taking direct observation of public concern and interest on investor-state dispute, normalization of non-party participation, ensuring relevant public interest issues of human rights and sustainable development when necessary, promoting transparency and accountability of government and

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[177] *Biwater Gauff v. Tanzania*, para 392; Johnson et. al.(Ed.). International Investment Law and Sustainable Development: Key cases from 2000–2010. Retrieved from : http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf

[178] Biwater-Tanzania Arbitration, Accessed on Aug 15, 2015. Retrieved from http://business-humanrights.org/en/biwater-tanzania-arbitration .

[179] *Methanex Corporation v. United States of America*, ICSID Case of 3 Aug 2005. Decision on Petition from Third Parties, para 49. Retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0529.pdfs .

investor, and enhancing perceived legitimacy of the system,[180] can only ensures legitimacy of arbitration. The (limited) openness and transparency of arbitration are very essences of the necessary collar in the right direction for future development of non-disputing third party participation and importance of their submission. The *amici* submission fairly stated that,

the right to water and to pursue sustainable development goals, so fundamental to developing countries, should be understood to increase the standards of responsibilities of investors in the water sector……..When investors choose to enter into this sector, they encumber themselves with responsibilities linked to the achievement of essential human rights [181]

in consequence of asserting "tribunal has both the authority and the responsibility to enquire into whether these responsibilities have been fulfilled, and to consider the legal consequences if they have not been fulfilled",[182] therefore additional obligations relate[d] to legal human rights duties and sustainable development issues and that reaching a rightful judgment on this investment necessitates a full consideration of these duties.[183]

The tribunal consideration of human rights relevance through *amici* submissions under Rule 37(2) of ICSID is notable. In *Aguas et al. v. Argentina* the tribunal emphasized of human rights and public interest issues, which *Biwater Gauff* tribunal draw parallel, noting,

....the factor that gives this case particular public interest is that the investment dispute centers on the water distribution and sewage systems of a large….. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. [184]

The inclusion of above statement undeniably proved that tribunal in *Biwater Gauff* had interested in investors' human rights obligations and public interests due to critical nature of drinking water and sewerage system for host state nationals.

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[180] Johnson et. al. (Ed.). International Investment Law and Sustainable Development: Key cases from 2000–2010. Retrieved from: http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf .

[181] *Biwater Gauff v. Tanzania*, Amicus Curiae Submission (26 March 2007), para 11. Retrieved from http://www.iisd.org/pdf/2007/investment_amicus_final_march_2007.pdf .

[182] *Biwater Gauff v. Tanzania*, Amicus Curiae Submission of 26 March 2007, para 11. Retrieved from http://www.iisd.org/pdf/2007/investment_amicus_final_march_2007.pdf.

[183] Aldson, F. (2010). Biwater v Tanzania: Do corporations have human rights and sustainable development obligations stemming from private sector involvement in natural resource provision? *Environmental Liability*. Retrieved from: http://www.academia.edu/306487/Biwater_v_Tanzania_Do_corporations_have_human_rights_and_sustainable_development_obligations_stemming_from_private_sector_involvement_in_natural_resource_provision .

[184] *Suez et. al. v. Argentina*, para 3.

While the tribunal meagre reference to *amici* submission could not conclude not to award any monetary damage to the claimant, however, minimal in reference, tribunal attention to *amici* submission proved valuable in tribunal's award. Even though tribunal acumen includes full descriptions from procedural background to *amici* submission to comprehensive arguments forwarded by *amici*,[185] tribunal consideration on award to refer to only short paragraph[186] is "reflect [ion] [of] a narrow framing of the dispute in strictly investment law terms, without consideration of the wider law and policy context…. reflect[ing] the one-dimensional weighting of duties and responsibilities that defines the BIT". [187]

Although tribunal judgement can be considered the win-win situation for parties, tribunal's exclusion of *amici* submission argument in judgment for unrecognition of human rights and sustainable development was plausible. Instead, the tribunal accepted *Biwater Gauff* poor performance at the time of expropriation which led to government termination of a contract. The tribunal reasoned not awarding damages because of *Biwater Gauff* having a 'fair market value of expropriation being nil, and a failure to prove causation[188] instead of the claimant failed to observe "due diligence, pacta sunt servanda, and good faith."[189] While tribunal failed to recognize MNEs obligations and responsibility to host state public services, international law concomitant to MNEs for respecting human rights duties and responsibility is undergoing gradual change, noting that,

Long-standing doctrinal arguments over whether corporations could be "subjects" of international law, which impeded….the attribution of direct legal responsibility to corporations, are yielding to new realities. Corporations increasingly are recognized as "participants" at the international level, with the capacity to bear some rights and duties under international law. As noted, they have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution… [Which]...makes it more difficult to maintain that corporations should be entirely exempt from responsibility in other areas of international law. [190]

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[185] *Biwater Gauff v. Tanzania*, para 370-392.

[186] *Biwater Gauff v. Tanzania*, para 392: ".....the Arbitral Tribunal has found the Amici's observations useful. Their submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the Amici's submissions are returned to in that context."

[187] *Biwater Gauff v. Tanzania, para* 797-798.

[188] *Biwater Gauff v. Tanzania*, para 797-798.

[189] *Biwater Gauff v. Tanzania, para* 374. The broad principle *amici* emphasized as third non-disputing party.

[190] Human Rights Council (2007). 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts'. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, para 20.Retrieved from http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf .

Tanzanian government responded that taking over *Biwater Gauff* properties facilities do not constitute expropriation because the claimant has " created real threat to public health and welfare" [191] unable to provide "continuity of water supply and sewerage service" which is fundamental human rights need. The government further argued that "any measures…necessary" taken for the continuity and smooth transition of management in public interests is allowed under "margin of appreciation" of international law.[192] It is well-known fact and accepted, under acute, and emergency situation host state has right to deference to protecting public interests and public welfare. However, tribunal rejecting level of deferential, stick to strict requirement to adhere contractual obligations, notwithstanding broader obligations and responsibility to public interests, not visioning host state has human rights obligations to deliver drinking water to every citizen.[193] The short-sighted vision of tribunal is not only avoiding MNEs obligations and responsibility towards host state but encouraging them since every act of host state even for legitimate public purpose amount to gross violations of international investment standards.

Suez et. al v Argentina [194]

Among much investors-state dispute arising from Argentine financial crisis from early 2000s, *Suez et. al v Argentina* is one of them. Argentina government following movement of privatization era, awarded *Suez et. al v. Argentina* 30 years concession to manage drinking water supply and sewage system for Buenos Aires. As financial crisis grappled Argentina, disagreements between government and investors arose on water prices whether to freeze or increase. The government implemented controlling measures forcing concession to investors on the agreement, and unwilling to raise tariff for water and sewage system alleging dire economic condition of host state. Further, government cancelled concession offered to investors and transferred investors water and sewage system alleging technical failure to a state entity.[195] The claimant, by action of government, commenced arbitration proceeding alleging violations of Argentina BITs obligation with Spain, France, and the UK. The claimant argued that host state breached "guarantees" against the direct and indirect expropriation of their investments to accord their investments full protection and security and to grant their investments fair and equitable treatment. [196]

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[191] *Biwater Gauff v. Tanzania*, para 436.

[192] *Biwater Gauff v. Tanzania* para 428.

[193] Johnson et. al; *Biwater Gauff v. Tanzania*.

[194] *Suez, Sociedad general de Aguas de Barcelona, S.A., and Vivendi Universal S.A (Suez et. al.) v. The Argentine Republic*, ICSID Case ARB 03/19, Decision on Liability of 30 July, 2010. (herein after *Suez et al. v. Argentina*)

[195] *Suez et. al. v. Argentina,* para 10-21.

[196] *Suez et. al. v. Argentina,* para 127.

Argentina argued that "even if certain of its actions" breached investors BIT protection provisions, government measures acted for legitimate public affairs absolved host state from liability " by virtue of the defence of necessity under customary international law". [197] Implementing Articles 25 of International Law Commission's (ILC) on the Responsibility of States for Internationally Wrongful Acts(2001) Argentina stated "Necessity….[was] only way for the State to safeguard an essential interest against a grave and imminent peril….[which did] not seriously impair an essential interest of the State or States towards which the obligation exists". During financial crisis, household income was in sharp declining from US$7000 to US$3500,[198] which will be suicidal act to increase tariffs according to investors wish. Unlike *LG&E v. Argentina* [199] which allowed "defence of necessity," tribunal instead found Argentina obligations "subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally… [even] Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive." [200] The tribunal decision to host state to observe both treaty obligations and public interests in dire economic crisis is both dilemmatic and confounding, a difficult path to follow parallel in such grave situation.

While Argentina argued, among other things, water is important,

to the life and health of the population….water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present cases than in cases involving other commodities and services", "in order to safeguard the human right to water of the inhabitants of the country". [201]

The tribunal following other cases allowed presenting *amici curiae* submissions as non-disputed third-party. Water, essential to human life, is an integral part of human rights. *Amici* submitted that,

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[197] *Suez et. al. v. Argentina,* para 249.

[198] Burke-White et.al (2006). Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties. *Second Biennial Conference of the European Society of International Law*, 48(2), 309-409.

[199] "The essential interests of the Argentine State were threatened... [Argentina] faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In these circumstances an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed." *LG&E v. Argentina, para* 257.

[200] *Suez et al. v. Argentina,* para 262.

[201] *Suez et. al. v. Argentina,* para 252.

Human rights law recognizes the right to water and its close linkages with other human rights, including the right to life, health, housing, and an adequate standard of living. Human rights law..... required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law. Since human rights law provides a rationale for the crisis measures, [amici] argue that this Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question. [202]

While arbitral tribunal at *Suez et. al* recognized "right of the population to water", but claimant rejecting host state assertion was whether Argentina breached its legal commitments under the BITs and that human rights law is irrelevant to that determination of investment standards. [203]

The tribunal asserted that Argentina BITs with contracting states have "broader goals than merely granting specific levels of protection to individual investors". BITs were not only for "the protection and promotion of foreign investment" but "seeking to further economic cooperation between them". In addition, "the contracting states pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development."[204] While tribunal recognized water and sewage services were "vital to health and well-being" of Buenos Aires citizens, Argentina adopting "only way" essential interests measures subsequently violate the treaty rights of the claimants' investments to fair and equitable treatment is inconvincible.[205] Consequently, rejecting Argentina and *amici curiae* submission that "Argentina's human rights obligations to assure its population the right to water somehow [does not] trumps its obligations under the BITs and that the existence of the human right to water also [does not] implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. Therefore, host state obliged to take both international obligations simultaneously. [206]

The tribunal, on the one hand acknowledged Argentina obligations for right to water to public welfare, on the other hand demanded equally fulfil BITs obligations for claimant despite serious economic crises, proved tribunal approached the issue from the perspective of "a conflict of norms" as a source of assessment of "necessity" claim.[207] However, critics rejecting it, decry it as "superficial discussion and dismissal of it as a defence is

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[202] *Suez et. al. v. Argentina,* para 256.

[203] *Suez et. al. v. Argentina,* para 255.

[204] *Suez et. al. v. Argentina,* para 218.

[205] *Suez et al. v. Argentina*, para 260.

[206] *Suez et. al. v. Argentina,* para 262.

[207] Brabandere, Eric De (2014). *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*. Cambridge University Press, 146.

regrettable".[208] Nonetheless, "host states have generally raised the issue of state regulatory freedom to pursue public interests or human rights concerns as a defence in numerous investment treaty arbitrations [for] alleged breaches of different treaty standards…. [including] FET standard, ultimately the success (or failure) of these defences turned on arbitration tribunals' interpretation of the IIA standards involved"[209] which is positive impetus for future investment disputes.

Right to Pursue Social and Economic Objectives

LG & E v Argentina [210]

The economic and financial crisis of the late 1990s and early 2000s led to Argentina government implement many regulatory measures necessary for protecting host state from failure and chaotic conditions. However, such actions have consequential effects on foreign investors and their investments. Unhappy with government measures for restricting foreign investors exercising their rights, many investors followed investor-state dispute mechanism guaranteed under BITs with source states. *LG & E v. Argentina* is one of them. Unlike other investors dispute cases where tribunals have focused on protection of investors and their investments only, this tribunal had accepted government regulatory rights as "necessary" when dire economic and social, financial, political and existence of country is in question accepting "when a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion".[211]

LG&E, an American company invested capital heavily on gas distribution, which Argentina government has created legal framework to attract foreign investors providing different benefits such as the calculation of tariffs for gas distribution in U.S. dollars before conversion into pesos, semi-annual adjustments of tariffs according to the changes in the U.S. Producer Price Index ("PPI"), the commitment that tariffs were to provide an income sufficient to cover all costs and a reasonable rate of return, and that there would be no price freeze applicable to the tariff system without compensation.[212] However, during severe economic and financial crisis host state has to implement many regulatory measures like abolishing PPI measures, restricting bank withdrawals and prohibiting any transfer of money

[208] Meshel, Tamar (2015). Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond. *The Journal of International Dispute Settlement*, 6(2), 15.

[209] Desierto, Diane (2015). Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment. Oxford University Press, 311.

[210] *LG & E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006.

[211] *LG & E v. Argentina*, para 238.

[212] *LG & E v. Argentina*, para 51-53.

abroad, abrogating the convertibility of pesos to the U.S. dollars and the right to calculate tariffs in dollars.[213]

The claimant alleged violations of protected investments standards rights conferred to investors and their investments seeking relief according to US-Argentina BIT which host state had breached the fair and equitable treatment standard, taken arbitrary and discriminatory measures, indirectly expropriated their investments without observance of due process and violated the "umbrella clause". The host state denied violations of investment treaty because "circumstances warrant application of the state of necessity defense, thus exempting [Argentina] from liability for any Treaty violations." [214]

The tribunal, accepted the state respondent plea of "necessity" in limited, from a particular period frame, of whole economic and financial crisis, was the first tribunal to accept under "necessary" measures. Article XI of US-Argentina BIT stipulates,

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

The tribunal invoked two criteria for the fulfilments of Article XI derogations. First of all, it analysed whether the conditions that existed in Argentina entitled it to invoke the protections included in Article XI. And second, it determined whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the BIT. [215]

The tribunal, accepted state "necessity" of defence for limited time than longer period (till present) which Argentina has argued to enact measures to maintain public order and protect its essential security interests emphasizing that, " emergency periods should be only strictly exceptional and should be applied exclusively when faced with extraordinary circumstances." [216]

The tribunal, further declared "a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the government to lead" "called for immediate, decisive action to restore civil order and stop the economic decline" which is a derogation right of Article XI.[217] While rejecting the claimant notion that Article XI is only applicable

[213] *LG & E v. Argentina*, para 54-71.

[214] *LG & E v. Argentina*, para 72-75.

[215] *LG & E v. Argentina*, para 204-205.

[216] *LG & E v. Argentina*, para 228.

[217] *LG & E v. Argentina*, para 238.

in circumstances amounting to military action and war, "when a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion." [218] Further, the tribunal asserted that when "a state has no choice but to act" to maintain public order or protect its essential security interests in a legitimate way for protecting its social and economic system is non-discriminatory and non-compensable. [219] Therefore, tribunal observed that "the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action", [220] finding that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.[221]

When the claimant sought compensation during implementation period of regulatory measures under Article 27 of the Draft Articles on State Responsibility, the Tribunal opined that the article at issue does not specifically refer to the compensation for one or all the losses incurred by an investor as a result of the measures adopted by a state during a state of necessity.[222] As a consequence, "the tribunal considers that Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the state, and therefore, the state is exempted from liability." However, such exemption on liability is for limited period until uncertainty for any violation of its obligations under the international law, and host state reassume liability immediately.[223]

The case is precedent and unique in many ways. While tribunal recognized host state "necessity" of defence for limited period of severe economic crisis, its jurisdictional victory has significant implications for proliferation to future tribunals. Secondly, host state cannot solely derogate under "necessary" plea but has to fulfil certain requirements before "necessary" defence is applied, only in acute, dire situations of national security threats or economic crisis of unproportioned, for, for limited period, but responsible for other time immediately after that. Thirdly, the effects of economic and financial, social, political and national security threats have direct implications for fundamental human rights like right to live, basic subsistence, peaceful living environment, good mental health and so forth. When state is in dire and emergency situation, state implementation of regulatory measures of non-discrimination shouldn't be taken as violations for investments standard protection. A state guarantee of investors and their investments protection in host state should have equally host state regulatory measures rights for *ordre public*.

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[218] *LG & E v. Argentina*, para 238.

[219] *LG & E v. Argentina*, para 239.

[220] *LG & E v. Argentina*, para 254.

[221] *LG & E v. Argentina*, para 258.

[222] *LG & E v. Argentina*, para 260.

[223] *LG & E v. Argentina*, para 261.

A BIT is not meant only for protection and guarantee of investor's rights, but host state had certain rights to regulate in non-discriminate, transparent, fair and equally for "economic development," "economic cooperation" and "well-beings" is sovereign regulatory rights.[224] This case raised the question for future tribunals for consideration of "necessity" defence which earlier tribunals were unequivocally rejecting it, further chaoting, already confused tribunals on whether to accept it or not.

Continental Casualty v Argentina [225]

Argentina early 2000s economic crises brought several claims against host state for violations of BITs. During 1990s Argentina was in full swing mood for state-run entities to privatize, hordes of foreign investors utilizing opportunities rushed to investments. *Continental Casualty*, an insurance company, was one of them, whose portfolio assets denomination was pegged to Argentina pesos, convertible to one-to-one to US dollars. However, due to the host state major economic crisis of the early 2000s was not only economic scale but in political and social crisis also affecting foreign investors' investments. To manage crises, Argentina government adopted measures and regulations of "pesification" of all dollar denominated financial instruments, indebtedness, and contracts, among other things, restriction on transfers out of its territory. Those conduct and acts of government amount to suffer from losses to investors' investments, subsequently host state bearing alleged violations of Argentina-US BIT (1991). *Continental Casualty* claimed compensation for violations under fair and equitable treatment, and full protection or security, umbrella clause, transferring investors without any delay and, compensation for acts of expropriation.[226]

Argentina countered that "Emergency Law" is only "the institutional framework for a situation already existing" financial system to bring to normality by a "regulatory consequence intended to cure through realistic measures the existing state of necessity". It was "necessity" Argentina argued that "the state faced a terminal situation and had forcibly to change the economic plan of the country as a result of the devaluation of the local currency. The crisis became an emergency situation when it turned into an institutional, social and economic collapse of unprecedented seriousness and depth in the country's history." [227] "The

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[224] US-Argentina Reciprocal Encouragement and Protection of Investment (1991). Preamble: para 2, 4 and 5. Retrieved from: http://bilaterals.org/IMG/html/US-AR_BIT.html.

[225] *Continental Casualty Company v. The Argentina Republic*, Case No. ARB/03/9 ICSID, Award of 5 September 2008. (herein after *Continental Casualty v. Argentina*)

[226] *Continental Casualty v. Argentina,* para 18-22.

[227] *Continental Casualty v. Argentina,* para 53.

social situation was dreadful" affecting the economic, the social, the political and the institutional aspects of host state.[228]

As a result, the tribunal rejected all claimant accusation but one, the breach for the fair and equitable treatment obligation of Art. II (2) (a) concerning the restructuring of the "LETEs" due to "pesification", the claimant claimed for alleged violations under Argentina-US BIT.[229]

The tribunal applying under Article XI of US-Argentina BIT which states,

This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests.[230]

The tribunal applying ordinary meaning under Article 31 of VCLT indicated "that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary….either "for the maintenance of the public order" or for "the protection of essential security interests" of the party adopting such measures." [231]

While the customary international law defence of necessity regulated under Article 25 of ILC is not same as addressed by Article XI of Argentina-USA BIT. The former "defence of necessity by a State is explained by the fact that it can be invoked in any context against any international obligation" while latter is "a specific provision limiting the general investment protection obligations bilaterally agreed by the Contracting Parties". [232] The tribunal added that linking between both types of measures, "provid[ing] flexibility in the application of international obligations, recognizing that necessity to protect national interests of a paramount importance may justify setting aside or suspending an obligation, or preventing liability from its breach", viewing Article XI "as a specific bilateral regulation of necessity for purposes of the BIT". [233] Although tribunal recognised party's disagreement over the application of Article XI relating to application, among other things, i) whether early 2000s Argentina economic crisis qualify under Art. XI for "maintenance of public order" or protection of "essential security interests ii) whether the invocation of Art. XI is "self-judging", and iii) whether the measures challenged were "necessary" in order to maintain the

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[228] *Continental Casualty v. Argentina,* para 53.

[229] *Continental Casualty v. Argentina,* para 304-305.

[230] US-Argentina BIT (1994).Annex A. Article XI. Retrieved from http://www.iilj.org/research/documents/IF2010-3.Annexes.pdf.

[231] *Continental Casualty v. Argentina,* para 164.

[232] *Continental Casualty v. Argentina,* para 167.

[233] *Continental Casualty v. Argentina,* para 168. The tribunal gave primacy to *Argentina-US BIT* (2001) Article XI than under Article 25 of ILC.

Argentina public order and protect the essential security interests of Argentina that were at stake.[234]

The tribunal held that "maintenance of public order" threatened by actual or potential insurrections, riots and violent disturbances of the peace for "public peace" "actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society….. to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties".[235] Therefore, public regulatory measures to cope with and aim at removing these difficulties, do fall within the application under Art. XI."[236] Further, tribunal found that "essential security interests" in "international law is not blind to the requirement that states should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order."[237] Therefore, "necessity" is guaranteed in public domain for protecting public interests such as health and safety, safeguarding the environment, ordering the political, social and economic interests, and preserving the state and its people in time of emergency which does not violate investments protection standards.

Notwithstanding, tribunal added, "a crisis that brought about the sudden and chaotic abandonment of the cardinal tenet of the country's economic life" declaring a "public emergency" in "economic, financial, exchange, social and administrative matters" is "powerful evidence of its gravity." [238] In such desperate and challenging situation, tribunal added "the protection of essential security interests recognized by Art. XI does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred before responsible national authorities may have recourse to its protection."[239] Therefore, "there is no point in having such protection if there is nothing left to protect."[240] As a result, government regulatory right for "ensuring internal security in the face of a severe economic crisis with social, political and public order implications" for maintaining "public order and essential security interest [is]objectively capable of being covered under Art. XI."[241] The

[234] *Continental Casualty v. Argentina,* para 169.

[235] *Continental Casualty v. Argentina,* para 174.

[236] *Continental Casualty v. Argentina,* para 174.

[237] *Continental Casualty v. Argentina,* para 175.

[238] *Continental Casualty v. Argentina,* para 180.

[239] *Continental Casualty v. Argentina,* para 180.

[240] *Continental Casualty v. Argentina,* para 180.

[241] *Continental Casualty v. Argentina,* para 181.

tribunal views that "objective assessment must contain a significant margin of appreciation for the state applying the particular measure." [242]

To surprise everyone tribunal used "necessary" test under Article XI of BIT was formulated under Article XX of GATT and its case law.[243] While borrowing from international trade law into international investment law is not unholy, but tribunal was in better position to interpret and formulate from within international investment law sources and development.

Regulatory Measures Under State Contracts or Investment Treaties

Regulatory Measures Under State Contracts

Before the first emergence of Germany-Pakistan (1959) BIT, investors investment were protected by contractual structures of protection that was negotiated with host state at the time of entry of the investment. The notion of state contract was to protect investors' investments with contractual techniques of protecting the terms of the contract and the investments that flow from the contract is protected by devices that are built into the contract. The idea was host state law (municipal law) was insufficient to protect investments but some "other mechanism" was needed to protect investment, namely- foreign investment arbitration. While foreign investors lack personality under international law but foreign investors "cloak under the veil" [244] have sufficient power to manipulate the lower order of law.[245] In addition, for investor's benefits under foreign investments arbitration system had a substantial compliance mechanism enforcing arbitral awards in domestic's courts. As a result, with "colonial and monetary powers" mentality invoking international law or supranational law system through above strategies were implemented to give legitimacy to the contractual scheme.[246]

Foreign investments done under state commitments, agreements and promised not to take foreign investors property for a period have significance in the law. Those promises,

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[242] *Continental Casualty v. Argentina,* para 181.

[243] *Continental Casualty v. Argentina,* para 191-195.

[244] Sornarajah (2010), "Foreign investors without personality recognition under international law, active from colonial times as source of power, *cloak their activities under veil* of lack personality, even without responsibility, was positivist international lawyers ancillary outcome."

[245] General principle of laws, judicial decisions and the writings of highly qualified publicists are lower order law according to International Court of Justice.

[246] Sornarajah, 276-277.

agreements, and commits are "akin to treaties" and their violation is unlawful.[247] Any breaches of contractual rights demand compensation which arbitral tribunals provide remedies, still modern day echo for a counterbalance of state power to interfere with contractual commitments. While international law is a law between states, it is a fiction by individuals and conglomeration of individuals against a host state for the power of international relations, led to a development of proper techniques still used in both state contracts and state treaties.[248] The fact is that capital-exporting states governments (developed economy) did not give any explicit support, but foreign investors and their advisors with the assistance of weak sources like teachings of highly qualified publicists and arbitral awards created a system against capital-importing States (poor and developing countries), which capital-importing states were unable to counter leading proliferation to other arbitral tribunals. [249]

It is an underlying fact that a lack of "state action" does not amount to an expropriation or other breaches of international law. When the state exercises its governmental authority, acting in its sovereign rather than the commercial capacity to directly interfere with or terminate the contract such conduct might give rise to state liability for breach of customary international law for violations of commitments or concession, stabilisation or umbrella clause.[250] However, a state regulatory measures done for the general public purpose do not amount to violations what state thinks so but not in reality. Foreign investors alleging state untenable with state contracts demands compensation for their damages of "legitimate expectation," the state vigorously contesting it. Host state firm belief on "the position of most states on the legal consequences of such measures has traditionally been that international law does not hold a state liable for harms done to the private parties to investor-state contracts, if the state's interference with the contract was a result of a change in the law of general applicability", which international tribunal have accepted. [251]

"A contract is subject to governing law, and if that law is the law of the host state, then the host state retains the power to change that law" reflecting and protecting governments' traditional rights to regulatory power within their borders.[252] It was recognised that a mere breach of contract to which a state was party did not, *per se*, engage the state in responsibility. [253] However, it was not the same.

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[247] Sornarajah, 278.

[248] Sornarajah, 278.

[249] Sornarajah, 279.

[250] Volkov et. al (2013). Investor-State Contracts, Host State 'Commitments' and The Myth of Stability in International Law. *Vale Columbia Center on Sustainable International Investment*, 23(3), 366-367.
[251] Volkov et. al , 368.

[252] Volkov et. al, 369.

[253] Sornarajah, 280.

Foreign investors, unable to use their national government military power unacceptable after formation of United Nations Organisation, led to "develop principles which would ensure that contractual claims could be enforced through supranational means".[254] These include stabilization clauses, which seek to preserve the law of the host country as it applies to the investment at the time the state contract is concluded, and which ensures that the future changes to the legislation of the host country are inapplicable to the foreign investment contract inferring that the foreign investment contract was not subject to the domestic law of the host state. Similarly, choice of law clauses may refer to a supranational system of law, such as transnational law, general principles of law or even international law, thereby putting the contract beyond the host country's law which is party autonomy. Also, forum selection or arbitration clauses which have the effect of allowing an investor to submit disputes arising under the contract to an international tribunal usually constituted outside the territory of the host country a neutral forum, to the external system.[255] While these "clauses" are in *stricto sensu* non-negotiable, however, renegotiation and review were done in "good faith" both by host state and foreign investors with a change of the circumstances with the parties consent is acceptable in many agreements and treaties. [256]

Theory of Internationalisation

"The removal of the foreign investment transaction from the sphere of the host state's law and its subjection to a stable, supranational system is seen as essential for the protection of foreign investment under the theory of internationalisation."[257] In practice, a state contract cannot be fully internationalised like a treaty as the former involves many matters which are to be dealt with by the law of the host state, especially the aspects falling within the domain of the *loi de police* or mandatory public law rules of the host state.[258] This difference creates seeds for conflicts. On one hand, foreign investors are intended to neutralise a state authority and sovereign power, while state being a party to a contract with a foreign investor and at the same time being a subject of international law, being scrutinised by the standards of international law is unacceptable.[259]

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[254] Sornarajah, 280.

[255] Sornarajah, 282-286; UNCTAD (2004) State contracts. UNCTAD Series on issues in international investment agreements, 26-27.

[256] "...be *negotiated and implemented in good faith*... such contracts... long-term ones, *review or renegotiation clauses* should normally be included." Draft United Nations Code of Conduct on Transnational Corporations (1983), para 11.

[257] Sornarajah, 289.

[258] Maniruzzaman, A. International arbitrator and mandatory public law rules in the context of state contracts: an overview. *Journal of International Arbitration*, (1990) 7(3), 53.

[259] Maniruzzaman, A. Review of Alvik Ivar's "Contracting with Sovereignty: State Contracts and International Arbitration", ed. Banking and Finance Law Review, 28(2), 2011, 3.

It is well known from earlier arbitral cases [260] that law of host state should be applied when private international law during undertakings of concession agreements occurred. The concession agreements did especially in oil and gas exploration which do not have any particular law. The arbitrators construed "analogical reasoning" with their weak resources supporting foreign investors, in the absence of any relevant principles in the domestic law, general principles of law should be applied to the lacunae.[261] While most of foreign investments were from capital-exporting states (developed states) to capital importing states (emerging and developing states) as economic development agreements (EDA) because transfers of wealth to developing countries were beneficial to these countries whose altruistic nature of economic development demands foreign investment protection through international law, which is not case for developed states.[262] This caveat of differential treatment- host state law for foreign investments in developed states and international law for foreign investments in developing states, shows the absurdity and biased of the arbitral tribunal. This "monist and dualist" character of the arbitral tribunal is not only confusing but questioning the legitimacy of arbitral tribunal awards.[263]

Foreign investors view state contracts in strict and narrowly, which state are refusing it. State being responsible for its public and fundamentally sovereign power breached done in government capacity should be considered with public policy sensitivity surrounding the process of governmental contracting with private parties.[264] The internationalization of state contract "is no body of international law on the subject of state contracts".[265] This led to advocating *pacta sunt servanda*, in an absolute manner as devised by foreign investors. Host state argued that a mere breach of contract is not responsible for invoking state responsibility but "something extra" is needed;[266] only delictual act of host state to foreign investors demand international law.[267] Despite host state questioning the traditional view of *a sanctity of contract*, arbitral tribunals have not attempted in an impartial manner but in a manner that is designed to promote the interests of investment protection to the detriment of the benefit of the host state.[268]

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[260] *Abu Dhabi arbitration*, *Aramco arbitration* and *Serbian Loan cases*.

[261] Sornarajah, 290-291.

[262] Sornarajah, 291-292.

[263] Maniruzzaman, A. (2001). State contracts in contemporary international law: monist vs dualist controversies. *EJIL.*

[264] UNCTAD (2004).State contracts. UNCTAD Series on issues in international investment agreements, 10.

[265] Sornarajah, 292.

[266] "*Promises*" or "*commitments*" offered by government to investors and their investments are often to long-term investments.

[267] Maniruzzaman, A. Review of Alvik Ivar's *"Contracting with Sovereignty: State Contracts and International Arbitration*", ed. Banking and Finance Law Review, 28(2), 2011, 76.

[268] Sornarajah, 293.

Administrative Contract

Host states are defending with the analogy that state contracts and private contracts are different, the former one is akin to administrative contracts, more like *contract administratif*, and however, tribunals have rejected the notion. The idea that a contract made by a state is defeasible in the public interest is demonstrably common to all legal systems, and obligations arising from administrative contracts were defeasible in the public interest.[269] Before tribunals were selectivity of using "public defence", now universally recognised as defeasible in the public interest and that no illegality can be attached to its breach by the state provided it can demonstrate a public purpose for the violation. [270] The notion of *sanctity of contract* is taken from laws applicable to private contracts, whereas foreign investment agreements are public contracts concluded with a state or a state agency vested with a monopoly so that it can promote the interests of the public and the state through trade and industry, on the defeasibility of state contracts in the public interest is a notion that is common to all legal systems.[271]

The theory of internationalisation of state contract has failed, a law is not static but progressive. International law has taken in devising doctrines which seek to confer protection on the environmental protection, economic development and human rights of the developing state. Even if international law does indeed apply to state contracts, it is evident that any state contract which conflicts with any fundamental norm of international law will be invalid. The notion of the immutability of contracts will conflict with both *ius cogens* and emerging principles of environmental and developmental law, be invalid.[272] The UN Charter Article 103 read as "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under *the present Charter shall prevail*."[273] This is a further demonstration that host state domestic obligations to its nationals carries more significance than rights of foreign investments when those measures are necessary and critical for functioning of a public host system.

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[269] Sornarajah, 293.

[270] Sornarajah, 293.

[271] Sornarajah, 296.

[272] Sornarajah, 296-297.

[273] Charter of the United Nations. Chapter XVI: Miscellaneous Provisions: Article 103, (*emphasis added).*

Regulatory Measures Under Investment Treaties

One purpose of IIAs has been to bring about settled norms as between the parties to deal with a conflict. State contracts and the conflict of doctrines associated with them may be seen as a core purpose of making investment treaties.[274] For a treaty-based dispute, there must be a violation of the rights created in the foreign investor by the treaty against the host state. The rights must be against a state or a state entity for the claim to be made in an investment arbitration. Otherwise, a tribunal cannot have jurisdiction under an investment treaty which involves measures taken by a state affecting a foreign investor.[275] So, to be a treaty-based violation, the claim is brought against a state entity exercising public functions that can be attributed to the state for there to be a breach of the treaty rights of the foreign investor.[276]

A treaty-based dispute has arbitration jurisdiction only when four conditions are met. Developed by *Phoenix v. Czech* case - *ratione materiae*, *ratione personae*, *ratione voluntatis* and *ratione temporis*.[277] First two are strict conditions to be met for the jurisdiction of a tribunal. Economic development is the essence of every contract-based or treaty-based investment. [278] Host state believes that foreign investments promote economic development to the locals, conceding their sovereignty power to arbitration. Surrendering sovereignty for economic development is an only possible indication of an objective meaning of the term "investment".[279] In fact, investment treaties uniformly refer to economic development as the purpose of the agreements, postulating inherent limitation in the investment agreements to the effect that protection is confined to investments that promote economic development.[280] However, this is not always a case.

Non-discriminatory measures related to human rights protection, public health and safety, anti-trust, consumer protection, environmental protection, land planning and securities

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[274] UNCTAD (2004) State contracts. UNCTAD Series on issues in international investment agreements, 6.

[275] Sornarajah, 307

[276] Sornarajah, 307.

[277] *Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award of 19 April 2009, para 54.*

[278] Most of contemporary BITs preamble constitute "economic development", "sustainable development" and "a state right to regulate for public purpose". For example, US Model BIT preamble postulates, "Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the *economic development* of the Parties"; similarly, EU-Canada CETA preamble read ".....to promote *sustainable development* and the development of international trade in such a way as to contribute to sustainable development in its *economic, social and environmental* dimensions".

[279] *Mr. Patrick Mitchell v. the Democratic Republic of Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award of 1 November 2006), para 31.

[280] Sornarajah, 314.

are non-compensable takings which is well recognised, that the interference on the basis of such legislation does not constitute compensable taking in situations in which public harm has already resulted or is anticipated, since they are regarded as essential to the efficient functioning of the host state.[281] A similar statement supporting host state regulatory measures asserts that,

...state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation. [282]

A host state as sovereign does have the regulatory power to regulate in the public interests and public purpose. But foreign investors deem them at hurting profitability or value of investments. It is in general public welfare and broader public goals, government's willingness and ability to introduce, monitor, and enforce measures that regulate private conduct is within "margin of appreciation" of host state regulatory power. But tribunal's awards are overriding domestic and public interests for strong investments protection.[283]

While tribunals have accepted "commitments" or "assurances" given by host state in the form of stability of host state legal framework for investments would constitute detriments to foreign investors when promised legal framework is changed. Similarly, tribunals have also confirmed host state regulatory defending that foreign investors "legitimate expectation" can only be accepted when host state has given "specific commitment to the investor"[284] or "on affirmative governmental representation",[285] unless not to indemnify or change regulatory framework. This is an especially common way to attract foreign investor in developing economies states. On the other hand, developed economies States have an advanced legal system, host state regulatory measures are rarely challenged, even challenged they have never lost to foreign investors of emerging economies

[281] Sornarajah, 374.

[282] Brownlie, I. (2003). Principles of Public International Law. Oxford University Press, 509.

[283] Volkov et. al (2013). Investor-State Contracts, Host State 'Commitments' and The Myth of Stability in International Law. *Vale Columbia Center on Sustainable International Investment*, 23(3).

[284] *EDF International S.A., SAUR International S.A. and Leon Participaciones v. Argentina, ICSID Case No. ARB/03/23, Award of 11 June 2012, para 360.* In respondent's view "legitimate expectations do not demand that the host state refrain from modifying its legislation unless there has been an assumption of specific commitment to the investor".

[285] *Electrabel v. Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para7.76.*

.[286] This differential treatment on the regulatory framework of host states has delivered variations of awards even if in same condition or standard.[287]

As long as tribunals recognized host state sovereign right to regulatory measures sans any specific "commitments" or "assurances," the intention of arbitral tribunals towards developing countries as host state has been questioning. Foreign investors assumed any change in regulatory framework even for public purpose as "indirect expropriation" violating their state contracts or BIT standard protection. This is where both foreign investors and arbitral tribunals are misusing it for their only benefits. In *EDF v. Romania*, for instance, the tribunal explicitly acknowledged that an investor "may not rely on a bilateral investment treaty as a kind of insurance against the risk of any changes in the host State's legal and economic framework . . . except where specific promises or representations are made by the State."[288] Similarly, the tribunal in *Parkerings v. Lithuania* stated that,

A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time." [289]

It's noteworthy that tribunals have recognized the importance of public law. But tribunals are only noting the importance of public law, but their abrogation to private interests shows weakness and intention of tribunals. Also, tribunal prioritizing rudimentary sources of law for awards are not only making difficulties of reconciling public law and private interests but also facing themselves criticism and whole arbitration system.

The broad rule that governments should compensate investors for changes in the general regulatory framework that impact their expectations and profitability as well as the narrower interpretation that governments are only liable to compensate for regulatory change that is inconsistent with a "specific commitment" given by a state to an investor, both privilege private rights over governmental regulatory freedom in a way that is inconsistent with [municipal law].[290] The municipal law takes the narrower view on host state regulatory measures impacting foreign investors. Host state is not liable for foreign investors to economic harms suffered as a result of the general organizational change; however, host state

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[286] In NAFTA, most of NAFTA violations were against Mexican state. However, in some occasion NAFTA investment protection standard violations were against US and Canada like *Glamis Gold Ltd. v US, Methanex Corp. v. US, UPS v. Canada, Ethyl v. Canada.*

[287] Both Sempra *v. Argentina* and *Enron v. Argentina* arbitral tribunals have rejected host state "necessity" defence notion but tribunals in *LG&E v. Argentina* and *Suez et. al. v. Argentina* have accepted "necessity" defence of Argentina early 2000s economic crisis.

[288] *EDF v. Romania*, CSID Case No. ARB/05/13, Award of 8 October 2009, para 217.

[289] *Parkerings v. Lithuania*, para 332.

[290] *Parkerings v. Lithuania*, para 332.

has to compensate an investor for losses sustained as a result of widespread regulatory changes that impact a contractual, "specific commitments" or "assurances". [291]

Tribunals have recognized that only severe government action will lead to compensation for indirect expropriation. Tribunals had often refused to require compensation when the governmental action did not remove all or most of the property's economic value substantially. Regulation may constitute expropriation when it substantially impairs the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. "Mere restrictions on the property rights do not constitute takings." [292] But the duration of the regulation is another criteria to be reckoned for indirect expropriation. During Argentina severe economic crisis of the early 2000s, the government adopted measures affecting US dollar denominated to pesos, the tribunal in *LG&E* found that "such measures did not deprive the investors of the right to enjoy their investment" of the claimant. Further, tribunal added, "the effect of the Argentine State's actions has not been permanent on the value of the Claimant's' shares', and Claimants' investment has not ceased to exist."[293] Besides, the economic impact is another measure determining whether a regulatory measure affects an indirect expropriation. While the outcome, in any case, may be affected by the specific wording of the particular treaty provision, arbitral tribunals have the flexibility to determine to choose- "*sole effect doctrine*" or "*police powers*". However, the majority of arbitration awards has accepted "sole effect doctrine" giving priority to investment protection even overriding *ius cogens*, proving arbitral partiality. [294]

Arbitrations have evidenced that they view investment treaties and, more specifically, the FET obligation, as implicitly creating a new category of investor rights that the investors would not have received under the contract-based/treaty-based or any "specific commitments" or "assurances" of the legal framework governing those instruments. Thus "new legal consequences" of "FET" obligation attached to a state contractual or "commitments" or "assurances" relationships between investors and states, retroactively changing the rights and duties of *status quos*. The proliferation of arbitral tribunals own interpretation to economic rights of foreign investors is overriding host state private property rights. [295]

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[291] Yannaca-Small in ""Indirect Expropriation" and the "Right to Regulate" in international investment law " has identified three criteria for non-compensable expropriation-i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.10.

[292] Yannaca-Small, C. (2004). ""Indirect Expropriation" and the "Right to Regulate" in international investment law" ". *OECD Working Papers on International Investment 2004/04. OECD Publishing*. In *S.D. Myers Inc. v. Government of Canada* "expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference". 10-11.

[293] *LG&E v. Argentina*, para 200.

[294] However, all case against US government "police power" for regulation has been failed in NAFTA case.

[295] Volkov et. al (2013). Investor-State Contracts, Host State 'Commitments' and The Myth of Stability in International Law. *Vale Columbia Center on Sustainable International Investment*, 23(3).

Arbiters have wide discretion to interpret, following weak sources, are alarming host states. Tribunals are not bounded by precedent, free to accept or reject it, and are insulated from formal or informal checks, due to New York Convention [296] and ICSID Convention[297]. While host government is consistent in using BIT interpretation, tribunals are not guaranteed to follow, nor can the state set tribunals back on the correct path.[298] However, tribunals following progressive nature of law can fix. In the words of Johnson and Volkov,

"investment treaties—as they are being used by investors and applied by some tribunals—are not merely instruments to protect foreign investors against outrageous and discriminatory conduct by host states, but to expand the rights that investors have, and to do so in a way that shifts the risk of regulatory change from the investor to the government." [299]

Therefore, investment arbitration tribunal bore responsibility in some capacity overriding host state necessary measures with strong foreign investment protection. If arbitration tribunal has right to protect foreign investment, it also has the responsibility to protect and balance host state objectives correcting wrong path tribunals have followed.

Foreign Direct Investment-A Double-Edged Sword to Host State

States are competing to be host state for attracting foreign direct investments. Those are achieved mostly either through host state liberal, flexible and trade-off rules and regulations, bilateral investments treaties and regional agreements/pacts. While there is hoard to attract FDI competitively, empirical evidence showed that relationship between FDI and economic growth is inconclusive.[300] This is not to discourage importance of foreign international investments in host states, but nature of economic growth and development is

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[296] United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).Article I state "This Convention shall apply to the recognition and enforcement of arbitral awards…."http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[297] ICSID Convention, Regulations and Rules (2006), 41(1) read "The Tribunal shall be the judge of its own competence", and Article 43(1) states "...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." Retrieved from https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf .

[298] Arbitration tribunals in *CMS Gas, Enron,* and *Sempra* rejected Argentina's "necessity" defence. However, in *LG&E* and *Continental tribunals* accepted "necessity" as defence in same crisis. There was incoherent arbitral awards in same regulatory measures.

[299] Volkov et. al (2013). Investor-State Contracts, Host State 'Commitments' and The Myth of Stability in International Law. *Vale Columbia Center on Sustainable International Investment*, 23(3).

[300] Fortanier, F. (2007). Foreign direct investment and host country economic growth: Does the investor's country of origin play a role? *Transnational Corporations*, 16(2), 41-76.

affected by different factors of source state that is largely dependent upon characteristics of host states respective to developed states, emerging states and developing states.

There has been the perception in host states that foreign direct investments will bring effects, notably positive. However, it is not always same, with benefits there are also negatives effects to hosting state. While benefits brought by FDI to host state's economy is burdenless to host state government in short-term, completely ignoring long-term effects is counter-productive to host state in a long run. Then those FDI already controversial and having negative impacts from the beginning are troublesome for a long time to host state in every term. This positive/adverse effects of FDI in the short/long run is creating love/hate relationship with foreign investments. This is not to blame only foreign investors and their investments for host state borne catastrophe, but host state itself bears responsible to many extents for their irresponsible acts or deeds to attract foreign investment for short-term gain only.

Positive Effects of FDI to Host State

Spillover Effects

An FDI to host state effects both vertically and horizontally. Noticing more benefits of FDI to host statement than harm (which is not true) World Bank reported,

"FDI brings with it considerable benefits: technology transfer, management know-how, and export marketing access. Many developing countries will need to be more effective in attracting FDI flows if they are to close the technology gap with high-income countries, upgrade managerial skills, and develop their export markets." [301]

States began to follow policy of attracting foreign investments thinking overnight economic growth and development. In fact, after World Bank statement there was floods of signing BITs and Regional Agreements for attracting foreign investments are accounted. Host states, believing potential FDI "spillovers" benefits and success are bringing to the local economy, compete for each other to attract foreign investments. It is a popular perception in the host state that MNEs have well-funded capital, extensive knowledge on R&D, high-level managerial skills and so forth, any FDI spillover effects on the economy are positive. While empirical evidence shows that FDI spillover is not effective as presumed benefits, but to some extent, it brings positivity to host state. MNEs are in host state when cost-benefits provided by the local economy is greater than MNEs source state. Host state assumes MNEs provide spillover on market competition, technology and management skills, human capital and product development capabilities between multinational and local firms which are true to some extent but not a hard fact. In fact, MNEs want the stronger protection of technology and its imitation, conditional on high-skilled managerial mobility and host state favourable

[301] World Bank, 1993. P.1.

environment for capital investments. Only benefits FDI spillover brings to the local economy is to local suppliers in vertical externality to MNEs needed for efficient supply chain management for overseas. The hearsay of FDI spillover to improve the productivity of domestic firms and thereby stimulate economic growth is not fully corroborated.[302] However, through diffusion of FDI spillover in technology, competition, skilled management, R&D and so forth in conjunction with foreign investments only host state can have positive benefits, but all depends on upon how far MNEs are willing to share or co-operate, is a million dollar question.

Employment

The most famous and familiar assumption of FDI on host state is employment opportunities. True in a sense that for MNEs in host state local workforce and human capital are required. It has been said that better the MNEs business when a local human workforce is used, as they are familiar with the local business environment. Now, it is the question of whether MNEs investments are for localhost state consumption or for exporting to source state or other states. If the FDIs are in emerging and developed economies, it's for local consumption; FDI in developing economies should not be for domestic consumption as most of the people do not have buying capacities, but to export in source state or other states. Exporting gives host state earning vital foreign currencies and opportunities for new business. But for developed and emerging economies, since their consumption is local, MNEs have chances of maximizing profits, loss of host state balance of payments.

MNEs have resources and capacity to use local resources and human capital for employments. Host state with skilled human capital has more to gain in management skills, R&D, technology and utilisation of local resources than those lacking skilled human capital. Developed and emerging economies have skilled human capital, but developing countries are lacking it. In developing economies MNEs are using cheap local human capital and local resources for maximisation of profits. While mostly MNEs paid are better than local firms pay, MNEs are shrewd not to spillover management skills, skilled managerial position, technological and labour movements easily. In short-term, employment spillover has positive benefits for economic growth and development, uplifting lifestyle and health and so forth, but in a long run when host state economy too dependent upon MNEs established for exporting to source state or other states are vulnerable when their economy is stagnant or any disturbances like an economic and financial crisis. If the MNEs were investing for using local natural resources, the host state is in more vulnerable due to lack of institutionalized rules and regulations and regulatory bodies to regulate competition, health and environmental effects from MNEs to locality.

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[302] Blalock et. al (2003). Technology from foreign direct investment and welfare gains through the supply chain. 1-42.

The employment effects from MNEs to both host state and source state is an important parameter. There is a general fear that when developed source state looks out for foreign investments, there is the possibility of job loss in source state. Depending upon the nature of foreign investments, employment affected either on host state or source state can only be deduced. MNEs todays are in the interest of consolidation. Merger & Acquisition gives MNEs their interested portfolio but since there is a duplication of employment that is overlapping of employment, in long run M&A creates job redundancy to host state economy. Most of the vertical FDI is done on price competitiveness when host state human capital or natural resources are cheaper than source state. Due to benefits of price competitiveness, MNEs have chances for market expanding, producing more employment for host state but the demand for skilled human capital from source state. In contrast, horizontal FDI brings employment redundancy in source state as MNEs production activities are transferred to host state but production activities to both host state and source state give rise to the demand for human capital.[303] This leads us that MNEs practice for employment in unbalanced and unsustainable. Cheap human capital and natural resources are preferential for their FDI. The MNEs practice of in search of cheap human capital and natural resources are creating social disorder in long-term to host state, and is in continuous search for another second host state for foreign investments.

Transactional Cost

MNEs are established in host state when transactions cost is cheap.[304] A host state with high transactions cost is detrimental to attract FDI. When host state institutional frameworks are in good shape, transactions cost became less and cheap. In developed economies, host state institutional framework is well-developed. Rules and regulations are progressive. Regulatory bodies are created for specific transactions. Even they have specialised body to attract FDI. Hence, developed economies host state are easy for foreign investments transactions, attracting hordes of FDI. Even most of the developed countries do not have BITs between them and have very limited negative lists for FDI. This proved that developed economies have matured, transparent, well-established institutional framework related to attracting FDI. In contrast, emerging and developing economies lack proper rules and regulations, regulating bodies and other foreign investments related specification.

Stronger bureaucracy and lack of institutional framework drag foreign investments. These increases in transactional cost especially financial and time period. When transactional costs are a burdensome environment for foreign investments is unsupportive and hampering

[303] Johnson, Andreas. Host Country Effects of Foreign Direct Investment: The Case of Developing and Transition Economies. Diss. Jonkoping University, 2005. (2016, January1), 27-28.

[304] Johnson, Andreas. Host Country Effects of Foreign Direct Investment: The Case of Developing and Transition Economies. Diss. Jonkoping University, 2005. (2016, January1), 28.

FDI flow in the host state. Therefore, efficient, effective and progressive government regulations are needed for smooth functioning of transactional cost to foreign investment.

Institutional Framework

A host state attracting FDI to its locality need to give careful consideration. Environment, land, water, availability of human capital and natural resources, foreign currencies exchange, international accounting practice, tax, regulating bodies and FDI areas host state are allowing are parameters for FDI. Any dereliction of rules and regulations from host state in the name of attracting FDI creates problems in the long run. Tax holidays, duty exemptions and subsidized industrial infrastructure are the loss in revenue for host state.[305] When man-made mishaps or catastrophe occurred due to host state flexible regulations, host state bears the most burns. So, not to happen such mishaps or failures, the high institutional framework in host state is needed. Sadly, emerging and developing economies lacks such institutional framework infrastructure.

When host state requires such institutional framework to attract FDI, the institutional framework is the right time to establish. A proper, functioning institutional framework of host state attracts more FDI since it reduces transactions costs. The lessening of the bureaucratic process means more open door to foreign investments; that's why most of the host state has specialized FDI agency. Availability of strong institutional framework in the initial phase of FDI give a chance to host state to scrutinize viability of foreign investments, later reduce to collateral damage to host state regarding health and environmental protection, labor protection, cultural, social and economic. Further, host state has the chance to improve institutional framework due to MNEs production/manufacturing activities affecting host state economy. Besides, most of the MNEs are from developed economies which are anti-corruption to host state government due to severe punishment from source state.[306] To eliminate from any fines or punishments, or even from the backlash of public relations, MNEs played a significant role in creating the strong institutional framework to a host state.

Negative Effects of FDI to Host State

The theory of "one size does not fit at all" is still relevant in FDI. Yes, FDI brings overall change in developed economies as they have the capacity to regulate foreign investments. Strong institutional framework, governing bodies, protection of public health and environment, effective labor regulations, transparent tax and economy policies, and host

[305] Blalock et. al (2003). Technology from foreign direct investment and welfare gains through the supply chain. 1-42 (2).

[306] Johnson, Andreas. Host Country Effects of Foreign Direct Investment: The Case of Developing and Transition Economies. Diss. Jonkoping University, 2005. (2016, January1), 29.

state open-arm policy welcome to FDI in every area with limited negative lists(except national strategic or security) are characteristics of developed economies. Further, their rules and regulations on regulatory matters to public measures is uncompromising. However, this is just opposite in the case of the most of emerging and developing economies. Since these economies are in race-to-the-bottom attracting FDI, lenient regulatory measures, and lax enforcement are the common approach to attract FDI. When such big loophole is already available in host state regulatory measures, negative effects of FDI is certain to follow-up.

While there are arguments that despite the lack of regulatory measures and lax enforcement, FDI brings positive changes than negative ones. Over, most of the MNEs are driven by profit motto, "corners-cutting" for maximization of the benefits cannot be denied. It is those corners-cutting that has created catastrophe and degradation to host state. More, when even in source state MNEs are not behind to take full advantage of lax laws and regulations for own benefits, it is certain that MNEs FDI will hamper emerging and developing host state whose institutional system are in grave deficiencies or state provide favourable treatment to foreign investments overriding FDI law.

Environmental and Cultural Impacts

FDI can bring negative impacts to the environment and cultural importance. Land, drinking water, industrial water, forests, air and so forth are components of environments. Even cultural aspects are attached to people for their identity and beliefs. Damaging and degrading environment and culture importance can have adverse effects not only immediate effects to the locality but also for a long time. FDI in emerging and developing host states are for manufacturing or production activities. These activities need land, water, forests and so forth for smooth functioning. Lack of strong institutional framework for regulating and overseeing MNEs activities leads to environmental disaster to happen. Earlier in this thesis, I have supported host state rights for controlling environmental measures. This is why host state space right for environmental and cultural regulatory measures cannot deny.

MNEs are in emerging and developing host state for the windfall of cheap transactions costs. Host state lack of the robust institutional framework is unable to implement to strict rules and regulations on foreign investments which are in upper hand to manipulate. When the abundance of natural resources and cheap human capital are available, MNEs are in full swing to take advantage of that. For quick profits to their FDI, causality to environmental catastrophe and cultural damage by MNEs activities cannot be denied. [307]

International Human Rights Violations

International human rights violations by MNEs have more chances in emerging and developing host states. Foreign investments infringing on human capital, working conditions,

[307] Bhopal Gas Tragedy killed more than 2000 people and Oil Spill in Niger Delta of Nigeria has created serious environmental disaster.

health, safety and security, collective bargaining and association, workplace abuses, child labor, adequate wages, social insurance rights and so forth constitutes human rights violations. Host state not having the high institutional framework and lax enforcement are more prone to occurring such violations. But it should also be self-responsibility for MNEs to respect international human rights and obligations in morality or a social corporate responsibility form.

MNEs having a strong financial position and well-skilled human capital have the capacity to change and improve host state institutional framework by pressuring government or involving itself. Further, many internationally recognized NGOs and intergovernmental human rights organisations are in existence, getting their help in adhering international human rights for foreign investment is a positive development for MNEs. Also, NGOs now are more active and powerful player in international human rights implementation, so they are ready to co-operate for human rights inclusions and implementation. Besides, NGOs are playing an important role in "lifting corporate veil" and "naming and shaming" MNEs for dereliction of human rights and obligations.

Trade-Off /A-Race-to-the-Bottom

Trade-off / a-race-to-the-bottom is the most common way of attracting FDI in emerging and developing states. Even developed states are not immune from it through generous corporate taxation. This shows host state character of unwarranted flexibility to attract foreign investments despite knowing difficulties and other problems arising later. The trade-off is mostly in forms of tax holidays, tax subsidization, lax environmental and health measures, and human rights violations, social and economic imbalance, lack of competition and so forth. These incentives are offered either host state relaxing rules or regulations, or through favourable new rules to attract FDI, overriding old rules incompatible to attracting new foreign investments. Since MNEs are "forum shopping" according to their needs and demands, states are under pressure to relax rules to attract foreign investments through different means. This gives the sense of immense power MNEs hold in the international economy.

While trade-off FDI offers host state in short-term benefits, but in a long run, it is troublesome. Most of BITs and FTAs have the protection of foreign investments if disputes arise through investment arbitration, and MNEs are exploiting it in their favours through different protection standards. A continuation of government providing favourable treatment to foreign investments might change, creating more problems in near future. Since foreign investments were attracted providing beneficial treatment with lax regulations, MNEs long run impacts on the national economy, environment, health and safety and respecting human rights by MNEs will be questionable. If MNEs from the beginning have the capacity to bargain in their favour, the question is how much direct/indirect control they will exert on host state once FDI is invested. Host state should not discount the social and economic impact of FDI. The jotting and exit of MNEs should not be taken lightly whose effects in social, economic and political dimension are grave and bears consequences by host state

eventually. This raises the serious question on the intention of MNEs in emerging and developing host state. So, the trade-off of foreign investments for short-term gain is worthing but unsustainable and unhealthy for host state in long-term damaging national integrity and dignity of sovereignty. The just laws favourable to FDI has more harm to host state than it could gain vialiability.

Conclusion

The proliferation and penetration of fair and equitable treatment standard in international investment law for any alleged violation of protected rights assigned to foreign investments by host nation are faces of modern investments agreements. Unlike old arbitration disputes about direct expropriation, present investments disputes are resulting from indirect expropriation, or "creeping expropriation". While host the state has full regulatory rights and duties to protect not only fundamental functions of custody, security and protection but to intervene in the economy through control in a variety of ways. [308] Foreign investors and their investments fear of host state measures affecting investments are countering host state legitimate regulation rights through investment disputes arbitration. It is not uncommon, as most of the investment agreements provide investment dispute resolution arbitral tribunal. The inconsistence practice of arbitral tribunals is creating confusion in both parties. These incoherent decisions of arbitral tribunals are also questioning their legitimacy of functioning and decision making. The tribunals' heterogeneous decisions under same circumstances have raised more questions than solutions recently. [309] The vagueness in decisions of arbitral tribunals is something to do with the interpretation of FET standard. Tribunals have differing meaning on FET level to whether the minimum standard of customary international law or more than the minimum standard of customary international law. It is easy for a tribunal to decide on investment agreements referring to a minimum standard of customary international law but difficulties arises when in plain term FET is included, giving rise to inconsistent tribunals practice. The dumping of unclear and unsettled investment protection standard to the arbitral tribunal is giving a fishy decision, mostly not acceptable to the host state. Tribunals are not bound by precedent and having discretion to decide are doing in a narrow frame of old, traditional investment agreement instead of a holistic approach.

It is true that most of the BITs were done for investment protection when hostile host states (mostly South-American states) seizing or expropriating foreign investors and their

[308] UNCTAD (2012). Expropriation: UNCTAD Series on Issues in International Investment Agreements II. Retrieved from http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf , 79.

[309] Under same circumstances of financial and economy crisis of Argentina, tribunals on *CMS Gas*, *Enron* and *Sempra* deny "necessity" measures, in contrast, both *LG&E* and *Continental Casualty* tribunals accepted "necessity" as defense mechanism in host state.

investments. Time has changed, the business and global economy and economics have changed, the perception on investment has changed, but tribunals with the same mentality are using old, strong investment protection system jeopardizing modern public interests and concerns. Governments are pressurized from its citizens, NGOs, and social activism for not giving due consideration to effects of foreign investments to public health, environment, economy, labour and human rights are now thinking twice before investments admission. Foreign investors and their investment are demanding strong protection of their investment from regulatory, but host state exercising regulatory power is manifest of host state statutory right adopting new rules and regulations or enforcing existing rules.[310]

Host state legitimate necessary rights are not new but pressed under the primacy of investments protection. The tribunals' decisions are emphasizing stable investments protection from early investments disputes as precedent, even though not binding to current tribunals, have led to a proliferation of strong FET for investment protection. However, from early time issue of the host state regulatory rights have been recognized for the public interest, but not constituting indirect expropriation. MIGA, having 181 countries as membership, has recognized that host state non-discriminatory actions for general public interests for regulating economies do not amount to any compensation measures.[311] This is vindicated by modern investment treaties having measures taken on non-discriminatory manner for legitimate public interests override the alleged violations assumed by the foreign investors and their investments.[312] It demonstrates bona-fide public interests measures are legitimate and non-discriminatory to violating indirect expropriation. Not only in BITs but other investments agreements, exception general rules can be found giving host state space for administrative rights. [313] Most of the general exception rules are modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). This is not meant for the host state to implement freely measures injuring arbitrarily or unfairly foreign investments but host state should uphold accepted international investment law and norms for legitimate public regulating. Listing of only positive host state measures is short coming when unlisted public interests arise, so adopting "hybrid "approaches to BITs non-discriminatory for indirect expropriation

[310] UNCTAD (2012). Expropriation: UNCTAD Series on Issues in International Investment Agreements II. Retrieved from http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf , 79.

[311] Multilateral Investment Guarantee Agency, 1985, Article 11(a) (ii).

[312] Morocco-United States FTA (2004), Canada-Jordan BIT (2009), Belgium/Luxembourg-Colombia BIT (2009), India-Latvia BIT (2010), Colombia-the United Kingdom BIT (2010), Canada-Peru BIT (2006).

[313] Malaysia-New Zealand FTA (2009, Article 17.1(1)), Peru-Singapore FTA (2008, Article 18.1(2)), ASEAN-China Investment Agreement (2009, Article 16(1)), India- Republic of Korea Comprehensive Economic Partnership Agreement (CEPA) (2009, Article 10.18(1)).

measures and general exception of investment agreements lead to a progressive-balanced solution. [314]

Indeed, host state regulatory right is inevitable in a modern economy. This has been long recognized in international law for non-compensating host state regulatory measures as an expression of the *police powers* of the state.[315] Unlike traditional host state measures of security and protection, modern economy demands dynamic and functional regulation. The globalization of the economy has penetrated every aspect of host state functioning. The host state cannot remain idle when public interests are threatened or damaged but has responsibility and duty to protect and balance functional system of the host state. Rather, these regulatory functions should be considered as a sovereign right of the host state, and there could be no right in international law to compensation or diplomatic protection in respect of such interference, such regulatory takings contemplate essential to the efficient functioning of the host state public measures. [316] A modern economy is not isolated, but complex web and interchange of public interest. Public health and protection, environmental regulations, labour conditions, tax administration, anti-competitive behaviour and monopoly markets, social and economic conditions, cultural heritage protection and so forth are host state duty to regulate and protect for peaceful utilization and enjoyment. Any disruption or damage will have bad consequences not only host state but also in foreign investors and their investments in moral, ethical and economic terms.

Host state is not bound by only domestic regulating measures but has international obligations to implement being the active part of international treaties or conventions in domestic law. Failing to implement in host state domestic level raises not the only question of intention and responsibility but also international duty to affirm common good and values. Host state domestic level failure leads to the disarray of international treaties or conventions, jeopardising States relations of stability and predictability. Hence, international law is not for only regulating but avoiding disputes,[317] however, this is not the case here. International investments law lacks agreed investment treaties or conventions but thousands of BITs and regional agreements. The lack of *jus cogens* in international investment law is not only creating disputes in implementation law but also conflicts in investment standard. However, lacking of *jus cogens* is not creating a void of investment law, but other international treaties or conventions are fulfilling those voids. On my thesis, I have tried to assert that FET standard for investors and their investments is not absolute protection but FET standard should be "fair and equal" to host state regulatory measures. The host country is not obliged

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[314] UNCTAD (2012). Expropriation: UNCTAD Series on Issues in International Investment Agreements II. Retrieved from http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf, 90.

[315] UNCTAD (2012). Expropriation: UNCTAD Series on Issues in International Investment Agreements II. Retrieved from http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf, 78.

[316] Sornarajah, M. (2004). International Law on Foreign Investment (2nd Ed.). Cambridge University Press, NY, 357.

[317] Stratton, Jane (2009). International Law. *Hot Topics*, 69, 1-33.

to implement every investor and their investment demand for fear of investments litigation, but as a sovereign, host state has right to regulate public interests and welfare measures in non-discriminatory, non-arbitrary and non-compensatory for a legitimate purpose.

Host state as a crusader to its public interests, international law has granted "*police powers*" for "*necessary*" measures to protect when the situation arises. These *police powers* are in different forms for the host state to implement deemed important for smooth functioning of the state, not only in traditional issues but when modern economy demands too. In my thesis, public health, environment and culture, host state economy and human rights are vital for state regulating measures which need fair and equitable treatment for smoothing functioning. Alleging violations of every acts or measure of host state for the legitimate purpose is not only injustice but also misleading of IIAs intention, which should be done in a bonafide manner. All those cases I have listed for supporting and proving my research give impetus for host state action on bonafide nature is non-discriminatory and non-compensable. Right to regulate by host state for public welfare objectives are further encouraged by modern state practice of "clarity" or "certainty" statement in "*police powers*" or "exception" rule in investments agreements.

On the other hand, host state claims to legitimate rights to regulate for a public purpose is a contrast to MNEs "insular corporate social responsibility" to minimize disputes and misunderstanding.[318] MNEs blaming host state for public interests regulatory measures to violations of investments protection standard given to foreign investors and their investments are clear vagrant of corporate behaviour for social responsibility and duty. MNEs cannot stay ideally blaming host state for investments protection standards violations, but themselves be active and "self-control" on their activities whether in the form of corporate social responsibility or enterprises responsibility respecting fundamental values and responsibilities. At least, there has been initiation in "soft law" approach. The legitimate host state regulatory measures for order public is not only hosting state rights but MNEs bear duties and responsibility to check/balance from on their sides too. Host state fighting for regulating environmental damage control, health and safety measures, observation of human rights, anti-competitive behaviour, social and economic impacts and so forth are a corporate responsibility to its stakeholders in modern economy legally or morally. While MNEs are business- oriented, it's contribute to economic, environmental and social progress and respect the internationally recognised human rights to (or "intending to") achieving sustainable development cannot be neglected.[319] Further, in international regime, there has been efforts through "soft law" approach to regulating and implement responsible business practices by MNEs in the host state. OECD Guidelines (2011) discourage MNEs from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other

[318] Terms such as Corporate Responsibility, Corporate Citizenship, Social Responsibility, Corporate Code and Conduct, Corporate Fundamental Responsibilities, and Corporate Environmental and Social Responsibility are also commonly intermixed and used to reflect CSR concepts.

[319] OECD Guidelines for Multinational Enterprises, 2011. II General Policies A.(1)(2)

issues [further to] support and uphold good corporate governance principles and develop and apply good corporate governance practices". Further, it has the mechanism for monitoring corporate behaviour and investigating corporate abuses.[320] Similarly, UN Global Compact (1999) encourages corporate sustainability and meeting fundamental responsibilities in the areas of human rights, labour, environment, and anti-corruption. [321] Though legally non-binding, these soft approach measures persuade MNEs at least moral obligations to bear responsibility and self-constrained business activities not harming host state.

However, there has been efforts going on by states, they are not just spectators, but responsible for protection and preservation of its nationals interests and sovereignty rights rigidly. BITs are one of them. While symbolic representation for MNEs corporate social responsibility and its consequences to host state for its activities are found in a preamble, but states are maturing it into more articulated form. Canada-Peru FTA recognises ground-breaking references of CSR both in a preamble and an article, but in legally non-binding or aspirational form (should encourage). [322] Similarly, recently concluded regional EU-Canada CETA preamble stipulates "to respect internationally recognized standards and principles of" CSR is found in CETA preamble, it is anecdotal not to find CSR in articulated form. [323] This is whether intentional omission or unwanted rule omission of the important standard by developed regional states are putting more burden on themselves, a caveat to respect, promote and implement fundamental responsibilities on MNEs. Especially, EU being a leader in CSR, deletion of such cardinal standard is questioning the CETA legitimacy to public welfare and objectives of the agreement. However, legally binding protection of labor and environment (+health and safety) chapters do not suffice to mandate of CSR in EU-Canada CETA. In contrast, Trans-Pacific Partnership [324] preamble does not have any reference to CSR but encourages "to voluntarily incorporate" CSR into their internal policies under investment chapter, which is weaker in legality and subject of interpretation, is a positive forward development of recognizing CSR in more articulated.[325] While TPP is mainly targeted to states from Pacific region of different stages from developing to emerging to developed states comprising more than 40% of world trade, an inclusion of crucial CSR as articulated shows relevant of it in the modern investment agreement and commitment of

[320] OECD Guidelines for Multinational Enterprises, 2011. II General Policies A.(1)(2)

[321] The ten principles of UN global compact. (2016, January 26). Retrieved from https://www.unglobalcompact.org/what-is-gc/mission/principles.

[322] Canada-Peru FTA (2008) *preamble* encourages "to respect internationally recognized corporate social responsibility standards and principles and pursue best practices" and in *Article 810* encourages "to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies".

[323] Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), 2015. See Preamble.

[324] TPP was signed in 2015, is in ratifying process by member states mainly from Pacific Region comprising - Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

[325] Trans Pacific Partnership, 2015. Chapter 9, Investment, Article 9(16): Corporate Social Responsibility.

member states. While not strongly binding and subjective to interpretation, CSR in the article give a strong injunction to duty and responsibilities of MNEs to host state for its activities.

MNEs, opposing and accusing host states of violations of protected investments standards for foreign investments despite measures are implemented for legitimate public welfare and objectives juxtapose intention of them. On one hand, the state of origin voluntarily encourages MNEs to apply and implement best practices and responsibilities in the host state, when those implementations are failed host states are on a binding footing to implement measures for a public purpose. A measure acted for objectivity and legitimate in character due to failed implementation by MNEs do not amount to violations of foreign investments protection standards. When MNEs are respecting and applying fundamental responsibilities not only for stockholders happiness but also giving consideration to stakeholders, failure on MNEs implementation have a direct effect on host state and host state objective means, do not amount to violations of foreign investment protection standards. Therefore, host state's legitimate measures for public interests is vindication that measures implemented to protect foreign investments through FET investment standard provides equal responsibilities on host state as equal rights provided to foreign investments, to control and regulate anti-activities affecting host state and its nationals.

It is interesting to see in future how MNEs CSR affects host state regulatory measures. States through international investments agreements have shown that MNEs bear responsibilities and duties to host state for voluntary implementation of internationally recognized standards. Can CSR constrained and self-control MNEs from monopoly act to more sincere and responsible activities in host state to near future. To some extent, MNEs have voluntarily accepted but still not customary law, which needs to be further research and analysis through MNEs perspectives.

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