Ready for Integrating with Human Rights Law? Revisiting Public Interest Consideration in International Investment Law

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I. Introduction

Although the barrier of capital flows has been alleviated by most countries in the economic world, several states are also paying great attention to how to regulate foreign investment to protect public interest, which is prominently shown in their adjustments of investment policies, particularly during the crisis of COVID-19. Japan has passed the bill on renewing investment regulations aiming at protecting its core industries, including medical equipment industries which have great relevance with public health.[1] EU also announced their new framework for the screening of foreign direct investment ("FDI") to help Europe defend its strategic interests, such as national security and public order.[2] Apart from the developed countries, a few developing countries also realized the importance of preserving national security or public order. India, for one, decided to amend FDI rules to draw a careful line between economic openness and national security.[3] So did China, officially putting foreign investment law into effect in 2019. On the one hand, policymakers have been widely conscious of their due responsibility in investment policies to protect national security[4] and public order.[5] On the other hand, such public interest-related regulations in host states have been frequently filed by investors as a breach of investment protection in the Investor-State Disputes Settlement (ISDS), which actually brings some obstacles for the states to regulate in the public interest.

Why would this be the case? International investment arbitration was built on the commercial arbitration model, which possesses the qualities of private law. States and investors, as two interested parties of the arbitration, are different from two private parties, either entities or individuals in commercial arbitration. It is not rare for more public-related issues to get involved with the disputes between states and investors, but the question is whether investment arbitration based on private law could be employed to deal with public-related issues? The legitimacy crisis of international investment law arises from this question.[6] On the premise that international investment law should play a much more important role in building a legal framework for public international economic order, significant effort has been made to balance regulatory powers and investment obligations. First, the treaty provisions connected with regulatory powers have been explored extensively, particularly on exceptions in investment treaties.[7] Second, as for the practice of the ISDS, the standard of review and the deference exercised by investment tribunals approach in decision-making[8] have been examined on the one hand, and a comparative methodology has been used to discuss the WTO dispute settlement and ISDS on the other.[9] Third, in seeking sustainable development, the value adjustment approach in international economic law has been explored.[10] These approaches are carried out in the new round of negotiating international investment agreements (IIAs) with merits or flaws in some way, in which public interest is considered as "policy objectives". However, with the condition developed, public interest is no longer solely considered as legitimate objectives to justify the conduct of the states, but as legal norms enshrined with broader and supranational meanings, such as human rights. Thus, two important factors being ignored by the academic circle are becoming prevalent: (i) the integration between public interest and human rights and (ii) the responsibility of investors to protect human rights. Bearing this in mind, this paper demonstrates two of the symbolic characteristics of public interest developed in academia: policy objectives and human rights. More importantly, this paper also argues that in order to solve the asymmetries in IIAs, integrating human rights into public interest can play a more vital role than public interest merely being regarded as policy objectives. This study employs mixed methodologies, with a focus on doctrinal research. First, the treaty provisions and case law will be revisited to explore the legitimate objective role of public interest in the current approach to expanding regulatory powers in a comparative way, both in the systems of WTO law and international investment law. Second, doctrinal methods will be used to elaborate on the other roles of human rights. This paper will provide some human rights obligations to support states' regulations in the public interest on the one hand and explore that investors should be subject to their own responsibility to protect human rights. Moreover, by envisaging the most complex in international investment law, this paper also concludes the current challenges in integrating human rights into IIAs with the aim of expecting future reform strategies on this theme, which remains to be explored.

The remainder of this paper proceeds as follows. Part 2 compares the public interest-relevant provisions and cases in WTO law and international investment agreements, and then from the point of differences between these two systems, commentary will be focused on the insufficiencies of the reform strategies in international investment law. Out of space constraints, only the typical exceptional provisions[11] will be discussed, and in terms of cases, several points such as the proportionality test, value of public interest, and standard of review will be discussed. Part 3 will demonstrate the human rights violation (might be) committed by investors in order to explain the rationale for human rights integration, and then turn to how human rights integration can be beneficial to the asymmetrical system of IIAs, and finally, it analyzes the measures taken to integrate international human rights law with international investment law from the perspectives of investors, states, third parties, and tribunals.

II. Investment Law vs. WTO Law: public interest as policy objective

1. Preliminary remarks

It is not as frequently that we could see the notion of 'public interest' in international law as it appears in domestic law. In the domain of domestic law, public interest is always regarded as the welfare and the good to the population, which governments make public policies for, and a national court considers when determining the appropriateness of some judgments.[12] Under contemporary international law, public interest is always regarded as an interest beyond economic interest, and sometimes contrary to economic interest. Identifying the priority of various interests seems implausible because every branch of international law is independent from the others and has its own self-contained regime; nevertheless, there is no such mechanism to reconcile every branch together.[13] The prominent feature of conflicting interests is presented in international economic law, mainly in international trade law and international investment law. WTO agreements, as the most widely accepted trade law regulations, are intended to ensure that trade capital flows as smoothly, predictably, and freely as possible, which could be deemed as the core value of WTO agreements. This is the same in the field of investment law, where promoting capital flows and protecting legitimate rights for investors are the core of IIAs. On the other hand, the states are entitled to perform their obligations to preserve the rights of their citizens, which is underestimated or overlooked in IIAs. Therefore, under the framework of investor priority, how to balance public interest and individual interest is becoming an arguable issue.

In the subsequent paragraphs, the different approaches employed by WTO law and international investment law will be demonstrated in a comparative way. Two problems will be discussed in each commentary. First, for the treaty-makers, although they are fully aware that it is necessary to keep the regulatory powers of the states in IIAs, their intentions and outcomes are not coherent and consistent in the public interest provisions. Second, for the adjudicators, whereas proportionality analysis is applied to balance the competing interest to some extent, a coherent approach to examine the value of public interest has not yet been established.

2. Public interest-related provisions and clauses

(i) WTO law

Under Annex 1A, at the preamble of agreements on agriculture[14], sanitary and phytosanitary measures[15], technical barriers to trade[16], measures that are necessary to protect human, animal, or plant life or health, or protect the environment are emphasized on the one hand, and such measures should be subject to the requirement not to constitute a means of arbitrary or unjustifiable discrimination on the other. Notably, at the preamble of the Agriculture Agreement, the notion of "non-trade concerns" is used to represent all the factors that might cause the "possible negative effects" on the reform of developing countries, including food security and environmental protection. This explanation means that not only should trade concerns be highlighted, but non-trade concerns, which might result in negative effects on the local society, should also be considered.

Except for the preamble, GATT 1944 Article XX and XXI, GATS Article XIV, and XIVbis also serve as exceptions to exclude public interest-related concerns out of the obligations for states to facilitate trade with WTO member states. Unlike GATT XX and GATS XIV, which are general exceptions, GATT XXI and GATS XIVbis (the "security exceptions") are less stringently ruled in their application, due to lack of chapeau and expression for opening clause, such as 'necessary' or 'relating to' in the subparagraphs. Second, the scope of both exceptions is different; the latter is applied mainly for essential security interests with particular circumstances[17], such as war, emergency, and fissionable materials that might damage the world's peace. Adversely, the former focuses on public morals, health and life, national treasures, and natural resources. Thirdly, the jurisdiction of a panel on the invocation of general exceptions and security exceptions is also controversial, as the panel had established that GATT XX (general exception) is not a positive rule for obligations itself, and the party who invokes it is placed with the burden to justify its invocation, and the panel would not examine it unless it is invoked.[18] However, for security exceptions, whether the panel has the jurisdiction to evaluate the measure taken pursuant to GATT XXI has been argued before, and some interprets it as "self-judging" to be immune from scrutiny by a WTO dispute settlement panel, though the panel rejected such contention.[19]

(ii) Investment law

Unlike the WTO agreement, international investment law is mainly constituted on the basis of bilateral treaties. These treaties are negotiated between countries to protect investors' rights. The states are imposed with the obligations to protect such rights, on the one hand, and play a role in performing its duty on preserving public interest and national security for the citizens, on the other. Thus, to keep policy space for states to regulate in the public interest, public interest-related considerations can be discovered in some of the investment treaties through several different means.

First, public interest-related statements appear in the preamble of investment treaties. In the latest bilateral treaty between Brazil and India[20], the parties recognized the promotion of sustainable development, such as poverty reduction. In the treaty of Morocco and Japan[21], investment objectives can be achieved without relaxing health, safety, and environmental measures of general application. Much earlier, in the CETA between Canada and the EU,[22] it is more explicit that this agreement preserves the right of parties to achieve legitimate policy objectives, such as public health, safety, and the environment. Second, public interest could act as a limit to the application of substantive obligations, especially in the context of protection provisions such as the prohibition of expropriation. For instance, in the BIT between the Czech Republic and Netherlands,[23] Article 5 prescribes the obligations on direct or indirect expropriation, and measures pursuing the objective of public interest are excluded from constituting such expropriation. Similarly, in the BIT between Switzerland and Uruguay,[24] “public benefit” is served as an exception in the expropriation clause. Third, public interest exceptions are shown as independent clauses in the treaties, in which they play a role in limiting the general scope of the application of a treaty. In the BIT between Japan and Morocco, Article 21, named as general and security exceptions, which is apparently modeled on the general and security exceptions of the WTO agreement, is constituted by two parts: the chapeau and the subparagraphs. Furthermore, some exceptions are not exactly similar to the general or security exceptions of WTO law; for instance, in the investment promotion act between Mauritius and Egypt,[25] Article 13, as a security exception, is prescribed with regard to protection of essential security interests, public health, and others.

(iii) Commentary

To resolve the dilemma that current international investment law is entrusting foreign investors with significant rights while ignoring the needs for the states to regulate for public reasons, developments and reforms have been dedicated to this field through a variety of means. Before states were trying to insert the express general exceptions into the treaties to help reserve the policy space, IIAs have historically left the interest-balancing scope to arbitral tribunals,[26] which may cause arbitrary interpretation due to a lack of explicit treaty language. According to the World Investment Report of UNCTAD 2018, of the 29 agreements reviewed, 19 have general exceptions. Twenty-five of the preambles refer to the protection of health and safety, labor rights, the environment, or sustainable development.[27]

Unlike the general and security exceptions in GATT, modern IIAs take various approaches to including exceptions,[28] as elaborated above. Furthermore, the different contexts and structures of IIAs to save public interest contribute to different considerations on the scope, obligations, and exceptions.[29] One typical example is so-called GATT/GATS style exception, which is widely accepted and has raised a lot of discussion in the literature. Arguments encompassing the interpretation of such provisions mostly focus on three points. The first is the interaction between the GATT/GATS style exception and primary investment obligations in IIAs, such as fair and equitable treatment, non-discrimination, and expropriation. As the precedent cases were reviewed by investment arbitral tribunals, when the substantive obligations were interpreted, it was at the discretion of the tribunal to evaluate various types of policy under substantive obligations. Thus, although exceptions could be a limitation for the arbitrary interpretations of the adjudicators,[30] the pursued objectives, which are enumerated in the subparagraph of the general exceptions, might cause adverse effects by expanding the policy space for the states.[31] Besides, the chapeau requires measures not to be “arbitrary” and “unjustified” or “discriminatory.” While the precondition that obligations on FET are not breached is satisfied, it seems that once the obligations are breached, general exceptions cannot be competent to save them from compensation,[32] which might result in redundancy in accordance with the principle of effectiveness. Second, the interdependence of the GATT/GATS style exception and the WTO law. The issue with regard to whether the general exceptions should be considered as affirmative defense or as permission is under great discussion. Some scholars hold the view that such exceptions should be used for the states to justify their breach on the due obligations, which means the states do not have to take responsibility even when the measures taken by the states are unlawful.[33] This approach is used for the GATT as a rule. Some scholars contend that exceptions understood as permission would help to limit the scope of the substantive investment obligation,[34] which means not to justify the breach but to find that the measure does not fall within the scope of a treaty obligation. Providing that GATT/GATS style general exceptions are incorporated into the IIAs, in terms of its interrelationship with WTO law, the main problem is whether or not the same rule on the structural status of such exceptions should be inherited from WTO law.[35] Third, there is a relationship between GATT/GATS style exceptions and international customary law, such as police powers and the defense of necessity. Because untangling the difference between compensable expropriation and non-compensable public policy expropriation is always a critical issue not only to the adjudicators but also to treaty-makers, delineating the police powers by codifying the general exceptions into IIAs no wonder can be a helpful means. For security exceptions, arbitral tribunals are prone to use the security exception as a *lex specialis* by regarding the exception as a modification or codification of the defense of necessity.[36] Thus, it is necessary to establish the relations between exceptions and international customary law through the interpretive approach.

3. Public interest related cases

(i) WTO dispute settlement

In the history of WTO dispute settlement, many cases related to the regulatory powers of states have been recorded. Furthermore, balancing for public interest and trade protection has been embedded in the WTO agreement since it was established, which contributes to the result that WTO dispute settlement has developed its own standard of review and the approach to decision-making systematically and consistently.

In the subparagraphs of general exceptions in GATT/GATS, several objectives for the challenged measures are enumerated, such as public morals and public health. The first step that the WTO Appellate Body takes is to examine whether the measure in question is designed to address one of the objectives, as the respondent states claimed. In *EC- Asbestos*, the panel consulted with several scientific experts about the health risk in light of the use of chrysotile and deemed that the EC has shown that the policy in question falls within the interest in the *prima facie* case.[37] Then, the Appellate Body confirmed that the panel could enjoy a margin of discretion on the evidence, upholding that the panel did not exceed the bounds of its discretion. Likewise, in *China- Publications and Audiovisual Products*, the panel consented to the contention that reading materials and finished audiovisual products are so-called "cultural goods", whereas China quoted the UNESCO Universal Declaration on Cultural Diversity to prove the importance of cultural goods and concluded that such cultural goods have a major impact on public morals.[38]

After examining the objective of the challenged measure, the nexus between the objectives and the challenged measures on whether or not such measure is “necessary” or “relating to” the objective and the pursued interest will be measured by adjudicators. In the “necessity” test, two important things will be identified, namely, the importance of the objective and the level of protection sought by the respondent states. As in *EC-Asbestos*, the Appellate Body confirmed that “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept them as "necessary" measures designed to achieve those ends.”[39] Furthermore, “WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation,[40] which means that if the claimant provides an alternative measure instead, the alternative measure must not prevent the country from achieving its chosen level of health protection. However, the procedural sequence still requires the panel to analyze 3 stages: (i) the contribution the measure made to the realization of the objective pursued; (ii) the restrictive impact on trade, which requires the alternative measure be ‘less trade restrictive’ and ‘reasonably available’; and (iii) “weighing and balancing” three factors, namely the extent of the contribution, the restrictive impact, and the fact that the protection of such public interest pursued is a highly important governmental interest and that the states have adopted a high level of protection of such interest within its territory. Notably, the third stage of the analysis should not be construed as an isolated one;

in *Brazil-Retread tyres*, the Appellate Body explained that weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment."[41] Finally, the panel or the Appellate Body turns to examine the chapeau of the general exceptions, and most of the states who invoked the exceptions failed to justify their manners in this phase.[42] The chapeau compromises two conditions: the first prohibits measures that discriminate arbitrarily and unjustifiably between countries where the same conditions prevail; the second is prohibiting measures that are applied in a manner constituting a "disguised restriction on international trade."[43]

(ii) Investor-State dispute settlement

An increasing number of disputes concerned with the regulatory powers of the states for public interest purposes were raised in investment arbitration tribunals. However, those cases mainly invoked the bilateral treaties before 2000, which resulted in the missing in action of general exceptions due to the short history of such exceptions being inserted into the treaties. However, the lack of exceptions seemingly did not stop investment arbitral tribunals to weigh and balance conflicting interests. In recent years, investment arbitration has developed its own system of testing public interest and standards of review, although some criticisms about such a system being so obscure and incoherent have been proposed in the legal literature. This approach stemming from German administrative and constitutional law, as developed in the jurisprudence of various domestic and international courts, is called proportionality analysis. Nowadays, proportionality analysis comprises three sub-elements:[44] (i) the principle of suitability, (ii) the principle of necessity, and (iii) the principle of proportionality *stricto sensu*[45]. In the subsequent paragraphs, investment arbitration awards will be used to introduce how the tribunals applied proportionality analysis to balance interests from these three elements.

First, the suitability test requires the tribunals to ascertain that the measure adopted is aimed at a legitimate purpose and to establish a causal link between the measure and its objective. In *Saluka v. The Czech Republic*, Saluka claimed that "the measures depriving Saluka of its investment were not taken in the public interest and under due process of law."[46] The tribunal acknowledged that the measure in question was for maintaining public order and admitted the regulatory actions of the states without directly facing the problem proposed by the claimant, nor did they demonstrate the causal relationship between the measure and the objectives. The investment arbitral tribunals are aware of the application of police powers doctrine with regard to expropriation, and in *Philip Morris v. Uruguay*, the tribunals admitted that the measure adopted was a valid exercise of the state's police powers[47] and protecting public health has since long been recognized as an essential manifestation of the state's police powers.[48] While in *Chemtura Corporation (United States) v. Canada*,[49] the tribunal contended that the respondent amply established the concern on lindane and deemed that the evidence that the claimant presented did not show bad faith or disingenuous conduct of the respondent, which showed that the test of suitability requires good faith in the host state's conduct to prove its inefficacy in pursuing the purpose, for which the claimant should hold the burden of proof.

As to a test of necessity, it is quite different from the one in the WTO regime, which serve a much more complicated function. In investment arbitration, this test covers two stages: one is whether a less restrictive measure exists, and the other is whether such measures are equally effective. In *Tecmed v. Mexico*, Mexico had proposed a relocated landfill to the company Cytrar, and the tribunal held the view that they would not put forward such a proposal if a breach of their obligations would not be constituted, unless they deem it in a responsible manner. The tribunal then indicated that it was a socio-political issue rather than a public health and environmental issue.[50]

Furthermore, the final step involves a balance between the effects of the measure on the rights of investors and the importance of the purpose that the state wants to achieve. This step requires several factors to be considered, such as cost-benefit analysis, the degree of interference, and whether the impact is proportional to the gain. In *Tecmed v. Mexico*, the tribunal considered that "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality." It is "due deference" to consider the effect to the public interest and the importance for the states to take measures to protect such values.[51] While some tribunals found it important to evaluate the degree of the measure's interference, including the economic impact and the measure's duration, in *Philip Morris v. Uruguay*, the tribunal discerned that "as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation."[52] In addition, in *lg&e v. Argentina*, "The impact must be substantial in order that compensation may be claimed for the expropriation."[53] Such expropriation must be permanent and cannot have a temporary nature. Besides, the tribunal opined that as long as the measure is adopted to protect public interest, no liability should be imposed on the measure unless it is obviously disproportionate to the need being stressed, which implies that the tribunal showed great deference to the host state.

(iii) Commentary

As outlined before, the WTO Appellate Body examines the legitimate objectives in accordance with a rigorous test, including what is the objective, whether or not it is within public interest, public health, or public morals. Conversely, notwithstanding that the arbitral tribunals are aware of analyzing the objective and its causal link with the manner of the states in proportionality analysis, some tribunals actually evaluate it at a discount, partly due to police powers doctrine. This doctrine was taken into several cases to measure the regulatory autonomy of the host state, as a standard for the tribunals to decide whether the host states should compensate for their manners. The police powers doctrine is applied by the arbitrators as a norm from the customary international law,[54] and it is inherently recognized that all government measures that are legitimate and *bona fide* exercise of powers are part of the police power doctrine.[55] Thus, police power doctrine does not require such evaluation, which makes the rigorous rationale of proportionate analysis to examine the causal link between objectives and measures seemingly dispensable. In fact, the functional interrelationships between police powers, proportionality, and another analysis called "the sole effects" are horizontal, though the tribunals always intertwined the proportionality analysis with police powers. Considering that the arbitral tribunal should show more deference to regulations of the states in the public interest,[56] perhaps the most important question is whether examining the legitimacy of the measures in issue could save more deference to regulations of the states. It is noted that the threshold in connecting the legitimate objectives with the measures in question is low,[57] and the public objectives of the states are broadly admitted. Thus, the evaluation of legitimate objectives made by tribunals would not definitely cause detriment to the policy space. However, if such an evaluation was ignored or conducted without preciseness, it would prejudice the investment tribunals to establish a coherent review system and even the authority of investment tribunals as legal adjudicators. Furthermore, with the increasing number of exceptions in the new generations of IIAs, the introduction of police power doctrine seems to become otiose.[58] Therefore, following the inherent rationale of the proportionality analysis step by step, it can facilitate its practice in international investment arbitration and contribute to the rule of law in terms of the uncertainty of using police power doctrines.

Second, the role and value of the public purpose were not explicitly expressed in investment treaty arbitration. As the WTO Appellate Body emphasized, “the more vital or important the pursued value is, the easier it would be to be accepted as necessary measure.” From this, we can infer that the Appellate Body discerned that by identifying the value of the purpose, the test of necessity will be much easier. On the other hand, not only is the value of the purpose stressed in the WTO regime, it also discerned that except for international common interests, such as public health, human rights, and environmental issues, which might constitute an obligation on the states, the content of such purpose should also be examined in their respective territories, according to their own system and scales of values.[59] However, the arbitral tribunals are not fully aware of that, nor do they precisely ascertain whether the measure adopted should be “reasonable,” “necessary” or “proportionate” to the public purpose.[60]

Third, one important phenomenon that must not be ignored is the discretion of WTO panels and the Appellate Body rendered to the chosen level of protection of the states. States can decide their own level of risk to protect the public interest of its citizens and observe its international obligations; the WTO panels and Appellate Body delineate the regulatory space by respecting or permitting that a state can deny the full enjoyment of investor rights and play a role only in preventing potential abuse or arbitrary determination while disguising public interest as justification. However, the current state of discourse in international investment law over the degree to which states should be afforded regulatory space can be best described as being in a state of flux,[61] which can also be observed from the approach tribunals applied to evaluate competing interests. There are three approaches as elaborated above, “the sole effects”, police power doctrine, proportionality, and which approach will be used in a particular case is unpredictable. Arbitral tribunals are considered to intrude too much on the state’s regulatory autonomy and impose stringent review of host state manners.[62] On the one hand, proportionality not only examines the ambit of the state’s regulatory power, but also the purpose and effects of such manners. By using this approach, the effects of the other two approaches will also be covered. On the other hand, instead of showing deference to the primary decision-maker, it imposes procedural obligations on states to justify measures and exercises of discretionary power that affect investors. Under such conditions, concerns about proportionality analysis, which may contribute to the fact that tribunals are more apt to substitute their own views for those of national authorities, remain to be solved.[63]

III. Investment Law & Human Rights Law: public interest as human rights

1. Human Rights violations in international investment law

When we consider the potential meaning that public interest may represent, what we can see is not only the policy objectives the states seek, but also the reasons why the states have to take action in order to protect public interest. There are two contrary assumptions for not taking actions: (i) if the states do not have the duty to do so, or (ii) if the investors do not bother the states to complete their duties. However, both assumptions are supported by the fact that investors sabotage the duty that states have to protect their population.

On the plane of international law, states should take public interest into account with regard to two factors: state responsibility and sovereignty. First of all, except that the states shall not violate human rights directly or indirectly, it is their duty to comply with its obligations to take necessary regulations so that people subject to their jurisdiction can exercise and enjoy their rights. Whereas sovereignty means that sovereign states may fulfill their responsibilities and exercise their rights without any interference from outside sources or bodies, it also illustrates the rationale that states can fully take measures to regulate investment for the reason of policy objectives or public interest. However, with the development of FDI, an increasing number of foreign investments actually encroach on the rights of local residents. Such rights can find support in international human rights law, including "the rights to adequate standard of living"[64], "the right to physical and mental health"[65], "the rights to natural wealth and resources"[66], etc., prescribed in International Covenant on Economic, Social and Cultural Rights and other human rights instruments, such as the African Charter of Human and People's Rights (ACHPR), the American Convention for Human Rights (ACHR) and the European Convention of Human Rights (ECHR). To perform its obligations on protecting citizens, states usually play significant roles in delimiting the conduct of investors. Such regulations might be regarded as violating investment protection obligations, which results in investors filing investment arbitration to seek compensation.

One case called *Compañia del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*[67] is related to the potential effects of investment on cultural property. This property is located in the northwest corner of the Costa Rica, consisting of over 30 km of the Pacific coastline, as well as numerous rivers, springs, valleys, forests, and mountains. In addition, this place is home to a variety of flora and fauna. Thanks to its extraordinary view, the claimant intended to develop this property to a tourist resort and residential community. As the government was conscious of the importance of protecting this property, it issued an expropriation decree for the claimant's company and proposed to pay compensation for the intended expropriation of the property. The reason why investors filed a suit to the investment arbitration is that the amount of compensation to be paid for the property remained unsolved for a long time, notwithstanding that the action taken for public purpose is constituted as expropriation without doubt. Finally, the tribunal decides on the amount of compensation. This case implies that foreign investment can sometimes affect the living environment and natural sources enjoyed by the people in their territories, which might positively and directly expropriate such investment for public reasons.

The case of *Apotex Holdings Inc. v. United States of America* is involved in pharmaceutical issues. Due to the fact that this company failed the test on its adulterated drugs according to the US regulatory standards, the US Food and Drug Administration ("FDA") prohibits the market from Apotex Inc.'s new solid dose generic drugs. Controversy encompasses two aspects: jurisdiction and merits. The respondent USA contended that the claimant's complaint is, in fact, directed as a trade measure, it is inappropriate to file an investment claim.[68] As for the merits, the claimant contended that "the actions taken against Apotex Inc. were exceptional, indeed unique, as the FDA had never before pushed to take action against a major pharmaceutical company in the absence of any actual or imminent health hazard."[69] Such measures of the FDA accorded more favored treatment to US investors and US-owned investments in such circumstances. However, the respondent contended that its lawful and appropriate exercise of its authority was to protect the health of its own people in its own territory. The tribunal decided that it has jurisdiction only over the claim of Apotex Holdings, not Apotex Inc. Furthermore, for the claimants' criticism on the FDA's "rush to judgment", the tribunal nonetheless did not accept it, and admitted the discretion given to the FDA by supporting that the regulatory practice was made in good faith and in a non-arbitrary manner. Moreover, relating to the public purpose of the actions in question, the tribunal emphasized "the need for international tribunals to recognize the special roles and responsibilities of regulatory bodies charged with protecting public health and other important public interest."[70] In spite of this, the tribunal only underlined the notion of "public interest," instead of directly pointing out the notion of human rights, namely "the rights to physical and mental health" It is not implausible to infer that the actions taken by the state comply with its obligations to ascertain the enjoyment and exercise of the human rights of the people; otherwise, importing adulterated drugs might cause great harm to public health.

Likewise, contrary to the two above, the case *SAUR International SA v. Republic of Argentina* explicitly envisages the application of human rights. The claimant Saur signed a concession contract with the Argentinian company, abbreviated as OSM and the Province of Mendoza, in order to privatize the public service of production and distribution of drinkable water and treatment of industrial waste. However, unfortunately, the financial crisis in 2002 greatly influenced the application of the contract, and OSM requested the price of water based on suffering important losses. In 2003, Saur submitted a request for arbitration before ICSID. Due to constant negotiations, the arbitration recommenced when Argentina terminated the contract. In this case, Argentina contended that it had no choice but to terminate and renationalize the concession to ensure provision of services and protect the public interest in health and the right to water. The tribunal first examined Argentina's human rights defense, and recognized that "human rights in general, and the right to water in particular…form part of the general principles of international law…access to drinking water constitutes… a fundamental right."[71] The tribunal pointed out that "the legal order can and must reserve for the public authority legitimate functions in order to protect the general interest."[72] Notwithstanding that the tribunal decided that the respondent should compensate for the claimant, it is not contradictory that even if the authorities decided to expropriate an investment to protect human rights, investors could still enjoy their right to be compensated for such treatment.

2. The significance for human rights integration

From all the details outlined above, it is clear that public interest should not be simply regarded as a policy objective, which is rooted in the ambit of domestic law. The public interest of a country should also be directed to its international obligations committed under international treaties, such as international human rights conventions or international environmental agreements, which raise the interests that states seek to a global level. One thing that needs to be discerned from this change is that such interests may not belong to one country solely; they belong to all countries in the world, or explained in a supranational way; they should be connected to all human beings. With regard to it, several scholars came up with the new conception as "global public interest." Kuick (2012) held the view that, on the premise of international investment law can be described as a global public law system, public interest is lifted by ICSID to the international level. Such public interest has legal relevance both in the domestic and international stages; for example, environmental issues are enshrined in domestic legislation, but can perfectly be defined as a global public interest. In his theory, states play the role of the agent of public interest, which is in charge of conveying the interests of the human being.[73] Choudhury (2013) defined those benefits that "can possess with strong qualities of publicness and can extend to a vast proportion of the world, covering more than one group of countries, to both current and future generations of people, and with two characteristics, non-rival and non-excludable, which can be named as global public goods."[74] From the perspective of global governance, Schill (2018) contended that the protection and promotion of foreign investment are primarily afforded not for the private benefit of those foreign investors, but rather in response to the public interest of states in increasing foreign investment flows and in taking advantage of the benefits that foreign investment can bring. For the collectivity of states participating in the IIL system, this interest constitutes a global public interest that is shared by all of them. Examples include economic benefits and sustainable development.[75]

Integrating human rights into public interest is one of the modalities to raise public interest to an international level, which certainly brings tremendous significance to the problems encompassing the asymmetry in investment treaties. First, international law tends to view human rights as being the primary purview of the states, which was copied by the IIAs as a branch of international law. However, even though human rights are only undertaken by the states as obligations, the responsibility of investors to respect the human rights obligations of the states has been accepted as a global norm, and at least a global expectation.[76] By integrating human rights into public interest, on the one hand, the duties of protecting human rights can to some extent be shifted to investors before any violation of human rights, which can save the population from being insulted. On the other hand, it can decrease the risk that the states may not be able to take effective measures to recover the harm once the violation is settled, due to several reasons, such as "regulatory chilling,"[77] or belated efforts. In particular, this can be beneficial for the asymmetrical issue in investment treaties and make investors liable for their actions before the tribunals. Second, as demonstrated above, public interest is rooted in domestic law, whereas human rights come from international law. Contrary to public interest, investors' interests are also stipulated in international investment treaties. Thus, as the main source of investment treaties has evolved from domestic law to international law, which represents the prominence of international law, no wonder investors' interests shall triumph public interest.[78] However, integrating human rights into public interest is similar to lifting justification from domestic law to international law. Now that both of the obligations are all set by international law and there is no hierarchy in the application of different international law, investors' interests shall not be supreme, which can give significant leeway for the states to regulate in order to comply with its human rights obligations.

Based on this, recent reform strategies have been concerned with human rights integration. On the one hand, the states seek to bring human rights considerations into investment treaties, as applicable law. On the other hand, they try to impose human rights violations on investors through investment treaties or other approaches, such as third-party participation or transparency. The next section introduces some of the strategies and demonstrates the integration between human rights law and investment law from four different points of view.

3. Adaptability of human rights integration: imposing obligations on the investors

(i) For investors

In 2010, endorsed by the United Nations Human Rights Council, the Guiding Principles on Business and Human Rights expressed that "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of states' abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations. It exists over and above compliance with national laws and regulations protecting human rights."[79] In the same year, designed to contribute to a favorable investment climate and ensure that multinational enterprises act in harmony with the policies of host states, the OECD guidelines for multinational enterprises also clarified that "enterprises are encouraged to cooperate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process."[80]

Although these guidelines are only soft law with no binding forces, and there were no express provisions prescribing such responsibilities to investors in investment treaties, the development of investors' participation in human rights protection is obvious.

Furthermore, in order to comply with the conduction of investors to necessary policies, new provisions related to investors' responsibilities are negotiated and even bear direct obligations on the investors, although in a limited number. The India Model Bilateral Investment Treaty stipulates that investors and their investment shall be subject to and comply with the law of the host state, including laws relating to natural resources, human rights, and labor.[81] Similarly, the Morocco-Nigeria BIT of 2016 establishes that "Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labor, and human rights obligations to which the host state and/or home state are Parties."[82] Distinguished from such best effort clauses to comply with corporate social responsibility and sustainable development, in SADC (the South African Development Community) model BIT, mandatory obligations upon investors and/or investments to respect the international environmental, labor, and human rights obligations is imposed on the host State.[83] Investors and investments are imposed with human rights responsibilities and obligations not only in treaty provisions but also in investment treaty arbitration. In *Urbaser v. Argentina*, the host state brought a counterclaim to allege that the investors breached its obligations on water supply under the concession contract, although the tribunals confirmed that "Even if this obligation could be imposed upon Claimants, Respondent does not state that such obligation is based on international law…but relies only …based on the Concession Contract." While the tribunal was reluctant to agree that "private parties have no commitment or obligation for compliance in relation to human rights, which are on the states' charge exclusively",[84] it is first accepted as a matter of principle that BITs generally can contain rights of host states and corresponding obligations for foreign investors.[85]

(ii) For states

With an increasing number of modern investments being involved in the interest of local residences, states are dedicated to several strategies to balance investment protection and regulatory power. Some of them have been outlined above, while others, such as integrating human rights law into investment treaties, have recently become prevalent. In response to this, the concept of corporate social responsibility ("CSR") is prescribed to treaties by states attempting to apply human rights responsibilities to investors. For instance, Canada 2014 Model BIT prescribed that:

"Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labor, the environment, human rights, community relations, and anti-corruption."

It encourages enterprises to incorporate internationally recognized human rights principles into practice, though details haven't been explicitly settled down yet. Since 2010, Canada has included voluntary CSR provisions in signed BITs. Except for the Canada-Tanzania BIT, all of the new BITs Canada signed with African countries include this provision.[86] Such movement on CSR was also endorsed by UNCTAD, in its 2015 version of the Investment Policy Framework for Sustainable Development (IPFSD). It recommended that "balancing state commitments with investor obligations and promoting responsible investment. In addition, IIAs can refer to commonly recognized international standards and support the spread of CSR standards."[87]

Furthermore, states are trying to oblige the responsibility of protecting human rights to investors by filing counterclaims. In regard with the limited jurisdiction[88] of investment arbitral tribunals, human rights law was not directly contemplated by tribunals. Instead, only claims arising "out of investment" will be accepted by tribunals since it is part of the protection offered to investors.[89] For instance, in *Saluka v. Czech Republic*, the tribunal held that the disputes which have given rise to the Respondent's counterclaim are not sufficiently closely connected with the subject matter of the original claim put forward by Saluka to fall within the Tribunal's jurisdiction under Article 8 of the Treaty.[90] However, only one exception was made.[91] In *Urbaser v. Argentina*, Argentina sought to introduce a counterclaim against the claimants alleging that through their administration of the concession, they had breached international human rights law obligations in the form of human rights to water. Even if the tribunal concluded that there was a connection between Argentina's counterclaim and the claimant's claims,[92] the tribunal rejected the counterclaim by demonstrating that the human rights obligation in international law was imposed on countries, not any companies.[93]

(iii) For third party

In order to get third parties participating in judicial proceedings, which also complies with "the rights to justice," one approach named as "amicus curiae submission" is employed in different kinds of tribunals or courts. For instance, in the European Convention on Human Rights, third parties shall have the right to submit written comments and take part in hearings, and the court can invite them with their own authority.[94] Similarly, in ICJ Statue Article 34(2), the court may request public international organizations' information on their own initiative.[95] However, it is not admitted as an express authority of the ICJ on amicus curiae submission.[96] In the field of investment treaty arbitration, amici curiae submission was initially developed from the case of *Methanex v. USA*, where the tribunal decided that:

"There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties…There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 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."[97]

After that case, an increasing number of tribunals have accepted the amicus curiae submissions,[98] and ICSID amended its arbitral rules to admit that the tribunal may allow written submissions from non-disputing parties who have a significant interest in the proceeding.[99] Notably, among these cases, human rights are frequently mentioned by the amici to argue for third parties who may be affected a lot by the legal outcome, particularly when NGOs are presented as amici.

In *UPS v. Canada*,[100] the Canadian Union of Postal Workers and the Council of Canadians petitioned that the arbitral tribunal requesting standing as parties to the proceeding, or in the alternative, to intervene as amicus curiae. The petitioners contended that the claim raised issues of broad public interest, and they had a direct and unique interest in the proceedings. They then quoted Articles 14 and 26 of the International Covenant on Civil and Political Rights about equality before the court to a fair trial. However, the tribunal rejected its contention and considered that Article 14 is about persons whose rights and obligations in a suit at law are being determined by a court or tribunal.

Bernhard von Pezold and Others v. Zimbabwe[101] was a case based on the land reform in Zimbabwe, which was meant to acquire more land to settle indigenous people. The European Center for Constitutional and Human Rights ("ECCHR") and four indigenous communities of Zimbabwe filed a petition to make submissions as amicus curiae, and asserted that "these cases … raise critical questions of international human rights law, which engage both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous people." The petition was denied by the tribunal due to its lack of independence and neutrality to the disputing parties. The tribunal analyzed that such submission was unrelated to the legal and factual issues with regard to this case.

Except for amicus curiae participation, other approaches for third parties to participate in investment arbitration are relatively rare. In a recent case, *Lotus Holding Anonim Şirketi v. Turkmenistan*, the claimant intended to add a “co-claimant,” while the respondent argued that the tribunal “has not provided any basis or authority permitting joinder.” In terms of reviewing other cases on this issue, nearly all tribunals held the view that “joinder of a new party could only occur with the consent of all parties to the arbitration.”[102] Thus, for disputing parties to have joinders into cases, regardless of whether the third party is on the investors’ side or the states’, it is still implausible for third parties to argue for their own interests in the court as standing parties.

In recent years, transparency and general access to information relevant to the public have been generally acknowledged, which efficiently eliminates the main deficiency such as opacity embedded within the framework of current arbitration. In UNCTRAL transparency rules, relevant provisions explicitly prescribe the criteria for the publication of information and written submissions filed by third parties to tribunals. Following this, framework targeted on two main primary issues as transparency and participation in the “new wave” of FTAs has been established, such as Canada–EU Comprehensive Economic and Trade Agreement (CETA), EU–Vietnam Free Trade Agreement (EVFTA), EU–Singapore Investment Protection Agreement (ESIPA).[103]

(iv) For tribunals

Human rights considerations brought to ISDS are occasionally influenced by the willingness of arbitral tribunals, basically for the reason that it is not easy for the tribunal to assess the responsibility related to two conflicting norms, human rights obligations and investor protection of the host states.

Because the rules employed in investor–state arbitrations have largely been crafted from the model of commercial arbitration tribunals, which do not involve issues of public rights or interests,[104] investment arbitrators might not be familiar with dealing with cases involving human rights issues. Moreover, tribunals tend to be reluctant to take human rights into account, out of several other pragmatic factors. However, either by prescribing human rights provisions into IIAs or by taking human rights law as an applicable law can significantly benefit the system of investor-state dispute settlement. First, even if arbitrators might be prone to the interest of investors so that they can win the prospective appointments, once the express provision about the investors’ obligations on human rights is settled, it is not possible for the arbitrators not to comply and make decisions in accordance with the investment treaties. Second, the investment arbitral tribunal can set no legal precedent, in general or at all, but only produce persuasive effects on subsequent tribunals.[105] If human rights are taken into account as applicable laws by the tribunals, we can undoubtedly expect more of the human rights law accepted by the arbitral tribunals. This has not only a connection to the legitimacy crisis, which means bolstering the role of playing more public law functions. However, it also guarantees the improvement of fragmentation in international investment law. Finally, the limited jurisdiction of investment tribunals and applicable laws has been discussed in academia.[106] Notably, based on investment treaties, the tribunals only have jurisdiction over claims filed by investors arising out of the investment. The counterclaim should be connected to the primary claim raised by the investors.[107] However, expanding the jurisdiction and applicable law by integrating human rights into investment law helps the states to bring up counterclaims to allege the human rights violations committed by the investors. It can promote the working system of investment arbitration or ISDS, so that it plays a more prominent role as an international tribunal.

4. An effective way?

Integrating human rights into international investment law and leaving space for the states to comply with its human rights obligations or the rights to regulate is obviously a feasible approach to eliminate the asymmetrical characteristics of IIAs. However, even if a few states start to take this approach, most countries still do not hold the view that strengthening the rights of the host states would be the optimal choice, and worry if they would lose the free environment to attract foreign investment. One may start to wonder whether this is an effective way in the real economic world. Here, I demonstrate several concerns regarding this problem.

First, it is true that the host states may take actions concerning human rights, such as environmental, cultural, and natural resource issues, but on some occassion, the connection between regulation measures and human rights objective is not strong enough to be deemed as justified by the tribunals For example, Argentina was sued by several foreign investors due to economic crises. Argentina contended that such measures were taken in a state of necessity to preclude the wrongfulness of an act not in conformity with international obligations, such as human rights obligations, which was rejected by the tribunal for not fulfilling all the requirements.

Second, human rights are not only directed to the rights of the population within the host states, but also interact with the rights of property for the investors, which put the states at the position of measuring both kinds of human rights obligations. In IIAs, investors' rights are always predominant, regardless of whether corporate social responsibility clauses are inserted into IIAs to delimit investors' conduct. In the long term, the predominant status of investors' rights will remain unchanged, which may lead to the result that human rights invocation by the states would not play the role as effectively as we expected. Furthermore, although the states have the right to regulate, they should also be prudent to meet the cost-benefit requirement, which means to consider whether such a measure is proportionate. If the human rights of the population are overly protected, the free environment for economic development may be harmed, and vice versa. Only measures suited both to the population and investors are desirable, which is left to the states to decide.

Third, there are three approaches to integrating human rights law into IIAs: (i) prescribe express human rights obligations in IIAs, (ii) use human rights law as one of the applicable laws, and (iii) set additional entry points. The first approach is not hard to understand; if human rights related clauses are prescribed into the treaties, then such clauses might have the same status as the substantive clauses, such as fair and equitable treatment, nondiscriminatory clauses, etc. The fact that such clauses have been adopted by some countries only in the new wave of investment treaties, and most of the investment treaties in effects were signed one or two decades ago, means it would take a long time for the human rights clauses to be employed before investment arbitration. Regarding the second approach, investment agreements refer to human rights in the applicable law through two patterns, domestic human rights law or international human rights law, on the premise that the tribunals do have jurisdiction over human rights-related issues. However, such a reference may likely lead to the consequence that human rights clauses will need quite a long time to be prescribed in the treaties. To reduce time consumption, stipulating human rights clauses into concessions or contracts between investors and host states may be a wise way. Finally, the states can reject or deny the jurisdiction of the investment tribunal or the benefits for investors by contending that the investment in question is illegal, because only lawful investment is eligible for being protected. Thus, if the host states can prove that the investment was established unlawfully by breaching the human rights law, or at least the most fundamental human rights, then the arbitral tribunal may not have jurisdiction over the case.[108] Such an approach may be taken immediately without a time limitation, whereas the situation varies according to the human rights law of the host states and its interplay with international human rights law.

IV. Conclusion

It is obvious that public interest considerations have been developed in international investment law, and current investment treaties and arbitral tribunals are becoming increasingly mature in balancing policy space for states and investment protection. One thing that can be confirmed is that regulatory autonomy can be enjoyed by states in the public interest, whereas the extent to which such enjoyment can be balanced with investment protection is controversial. For a long time, public interest has only been regarded as the policy objective of the states. For example, only actions taken for public interest can be exempted from being liable to violate investment protection, and the tribunal examined public interest as legitimate objectives through proportionality analysis. However, there are still some challenges related to public interest left by the strategies of treaty provisions and investor-state dispute settlement. Considering the human rights violations committed by investors, integrating human rights into public interest has been advocated by some scholars. In essence, human rights integration can play a significant role, which means that the pressure to comply with human rights law is not only put on the states, but also on the investors. In doing so, investors can hold their own responsibility and/or obligations in the economic world. However, this paper is not meant to negate the endeavor that has contributed to leaving an extendable policy space for achieving the public interest objectives of the states. To sum up, this paper only tries to point out that human rights integration could be an effective and indispensable approach to balancing regulatory powers and investment protection. Moreover, human rights integration not only encourages the investors' responsibilities, but also facilitates other interested parties, such as third parties or arbitral tribunals to take part in this proceeding, which could contribute to balance the flawed system of investment law. States are not the only strength, and every interested party can commit its endeavor into it. Regardless of the current status of human rights integration, several questions remain. For example, how can human rights obligations be expressed by investors? Could the counterclaims argued by the states be an approach to introducing human rights obligations? What about the interests or rights of the third party who might be affected by the legal outcome of investment arbitration without proper access to legal proceedings? In addition, under the current situation, underlining the rights to regulate of the states overly may sabotage the enthusiasm of foreign investors. In addition to considering the feasibility in the short term, the willingness of states to carry out such a plan is important. For some developing states dedicated to creating an attractive environment for investment to stimulate economic development, imposing such pressure or even obligations on investors is apparently not a considerable idea. Moreover, even developed countries may be hesitant to seek absolute capacity on human rights obligations for investors. Undoubtedly, contemplating the future reform of the rules in international investment law, in order to achieve the goal that ISDS should play a broader role in maintaining a legal framework as public law for social justice, a number of questions still remain to be explored.

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index.cfm?id=2008, and check the list of screening mechanisms notified by member states, notably every state is meant to protect their security and public order.

[3] Indrani Bagchi, National security in focus as India amends FDI rules. The Times of India, Business [online] (2020). Available At: https://timesofindia.indiatimes.com/business/india-business/national-security-in-focus-as-india-amends- fdi-rules/articleshow/75228015.cms

[4] UNCTAD, 'CHAPTER III: Recent Policy Developments and Key Issues, World Investment Report 2019 - Special Economic Zones' [online] (2019), at 85. Available at: https://unctad.org/system/files/official-document/WIR2019_CH3.pdf

[5] OECD, 'Acquisition- and ownership-related policies to safeguard essential security interests, Current and emerging trends, observed designs, and policy practice in 62 economie'. OECD Publishing[online] (2020), at 6. Available At: http://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf para 1.

[6] See S.W. Schill, 'International Investment Law and Comparative Public Law--- an introduction', in S. W. Schill (ed), International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010). See also, Susan D. Franck, 'The Legitimate Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 Fordham Law Review (2005) 1521.

[7] For analyzing the exceptions used in IIAs and its potential risk at limiting the regulatory policy space, see Andrea Newcombe, 'General exceptions in international investment agreements', in Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011). For contending the important role of exceptions in both litigations and practice as permissions and not as affirmative defense, see Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?', 59 B.C.L. Rev. (2018) 2825. See also, Jorge E. Viñuales, 'Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford: Oxford University Press, 2020).

[8] See Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration', 4 Journal of International Dispute Settlement (2013) 197. See also, William W. Burke-White, Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', 35 Yale J. Int'l L. (2010); Benedict Kingsbury & Stephan W. Schill, 'Public Law Concepts to Balance Investors 'Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality', in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

[9] Diane A. Desierto, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making', ExpressO (2013); Jürgen Kurtz. 'The WTO and International Investment Law: Converging Systems, (Cambridge: Cambridge University Press, 2016).

[10] See Kazuyori Ito, 'The Concept of 'Sustainable Development' as a Norm of Value Adjustments in International Economic Law', 38 Yearbook of World Law (2018) 27; See also, Marie-Claire Cordonier Segger, Markus W Gehring, Andrew Newcombe (eds), *Sustainable development in world investment law* (Kluwer Law International, 2011).

[11] Technically, in order to ascertain their regulatory powers, at least three types are introduced into the treaties, including carve-outs, reservations, and exceptions. The three are applied in different ways with great significance to explore. However, the limitations of this paper prevent me from narrating

them all explicitly; only "exceptions" will be explored in this paper. My discussion will focus more on general exceptions than security exceptions.

[12] See John D. Bessler, 'The Public Interest and the Unconstitutionality of Private Prosecutors ', 47 Arkansas Law Review (1994) 511, at 560.

[13] See Zhang Hui, 'A community of shared future for mankind: the contemporary development of the social foundations theory of international law', 40 Social Sciences in China (2018).

[14] WTO, Agreement on Agriculture, available at: https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm (last consulted 2020/11/29).

[15] WTO, Agreement on Sanitary and Phytosanitary, available at: https://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm (last consulted 2020/11/29).

[16] WTO, Agreement on Technical Barriers to Trade, available at: https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last consulted 2020/11/29).

[17] WTO, WTO analytical index, at 2.

[18] WTO, GATT XX Analytic Index, at 563.

[19] WTO, GATT XXI Analytic Index, at 2. See also, Kazuyori Ito, supra n.10, at 18.

[20] The Brazil–India Investment Cooperation and Facilitation Treaty (signed at 25/01/2020) preamble.

[21] Preamble of the Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed at 08/01/2020).

[22] Preambles of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (signed at 2017).

[23] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (signed at 1/10/1992) Article 5.

[24] Agreement between the Swiss Confederation and the Oriental Republic of Uruguay the Reciprocal Promotion and Protection of Investments (signed at 7/10/1988) Article 5(1).

[25] Agreement between the government of the Republic of Mauritius and the government of the Arab Republic of Egypt on the reciprocal promotion and protection of investments. The Investment Promotion Act. (signed at 25/06/2014).

[26] See Bradly J. Condon, 'Treaty Structure and Public Interest Regulation in International Economic Law', 17 Journal of International Economic Law (2014) 333, at 334.

[27] UNCTAD, 'Recent Policy Development and Key Issues', at 105, Available at https://unctad.org/system/files/official-document/WIR2019_CH3.pdf

[28] Technically in order to ascertain the regulatory powers, at least three types are introduced into the treaties, including carve-outs, reservations and exceptions. Though the three are applied in different ways with great significance to explore, space constraints prevent me from narrating them all explicitly, only the last one "exceptions" will be explored in this essay.

[29] See Bradly J. Condon, supra n.32, at 334-336.

[30] See Andrew Newcombe, supra n.7.

[31] Ibid.

[32] See Alschner, Wolfgang and Hui Kun, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', in: Lisa Sachs, Jesse Coleman, Lise Johnson (eds.), *Yearbook on International Investment Law and Policy* (New York: Oxford University Press, 2018).

[33] See Jorge E. Viñuales, supra n.7.

[34] See Caroline Henckels, supra n.7.

[35] See Jürgen Kurtz, supra n. 9.

[36] See Caroline Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press 2019), at 5.

[37] Appellate Body report, EC-asbestos, at para 157.

[38] Panel Report, China – Publications and Audiovisual Products, at 7.751 & 7.793. See also Appellate Body Report, China – Publications and Audiovisual

Products, at para 243.

[39] Ibid, Appellate Body Report, at para 172.

[40] Ibid, at para 168.

[41] Ibid, at para 182.

[42] See Andrew D Mitchell, James Munro, and Tania Voon. 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks', 757 U of Melbourne Legal Studies Research Paper (2018), Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084663. at 18.

[43] See Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction', 109 American Journal of International Law (2015) 95.

[44] For another way of classification, see Caroline Henckles, 'Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-state arbitration'. 15 Journal of International Economic Law (2012). Henckles introduced that "Investment tribunals should be more deferential in performing proportionality analysis… Such an approach would entail greater deference to host states in evaluating the legitimacy of a measure's objective, the measure's suitability and necessity, and the ultimate balance between the interests of the host state and of the investor." at 227-228.

[45] See Benedict Kingsbury&Stephan W. Schill, supra n.8, at 75-79.

[46] See Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, at 248 (a).

[47] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No ARB/10/7, Award, 8 July 2016, at para 287.

[48] Ibid, at para 291.

[49] Chemtura corporation v. Canada, UNCITRAL, Award, 2 August 2010, at para 138.

[50] Técnicas Medioambientales Tecmed v. Mexico, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, at para 145.

[51] Ibid, at para 122.

[52] Philip Morris v. Uruguay, supra n. 52, at para 286.

[53] lg&e v. Argentina, ICSID Case No. ARB/02/1, Award, 3 October 2006, at para 191.

[54] Philip Morris v. Uruguay, supra n.52.

[55] See Andrew D Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks', Yearbook on International Investment Law & Policy 2016– 2017 Oxford University Press. (2018) 9.

[56] See Caroline Henckles, supra n. 49.

[57] See Andrew D Mitchell, James Munro and Tania Voon, supra n.60, at 21.

[58] See Catharine Titi, 'Police Powers Doctrine and International Investment Law', in Filippo Fontanelli, Andrea Gattini and Attila Tanzi (eds), *General Principles of Law and International Investment Arbitration* (Brill, 2018) 323, at 339.

[59] Panel Report, China – Publications and Audiovisual Products, supra n.43, at 7.759.

[60] See Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay', Asian Journal of International Law (2018) 98.

[61] See Markus Wagner, '*Regulatory Space in International Trade Law and International Investment Law*', 36 U. Pa. J. Int' l. 1 (2014) 70.

[62] See Caroline Henckles, supra n. 49, at 224.

[63] Ibid, at 240.

[64] International Covenant on Economic, Social and Cultural Rights, article 11.

[65] Ibid, art.12.

[66] Ibid, art.25.

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

[68] Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award,

25 August 2014, at 2.37.

[69] Ibid, at 2.26.

[70] Ibid, at 9.37.

[71] Ursula Kriebaum, The Right to Water Before Investment Tribunals, 1 Brill Open Law (2018) 16, at 25. Available at: https://brill.com/view/journals/bol/1/1/article-p16_16.xml?language=en (last consulted at: 2020/12/18)

[72] Ibid, at 26.

[73] See Andrea Kuick, *global public interest in international investment law* (Cambridge: Cambridge University Press, 2012), at 149-154.

[74] See Barnali Choudhury, 'International Investment Law as a Global Public Good', 17 Lewis & Clark Law Review (2013) 481, at 499-502.

[75] See Stephan W. Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law', 33 ICSID Review (2018) 29, at 33.

[76] See Barnali Choudhury, 'Investor Obligations for Human Rights', ICSID Review (2020)1- 23, 4.

[77] See Van Harten, Gus and Scott, Dayna Nadine, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada". Osgoode Legal Studies Research Paper Series (2016) 151.

[78] See Andrea Kuick, supra n.63

[79] United Nations, 'Guiding Principles on Business and Human Rights', at 13, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last consulted: 2020/11/27).

[80] OECD, 'OECD Guidelines for Multinational Enterprises', OECD Publishing (2010), at paragraph 2.

[81] Model Text for the Indian Bilateral Investment Treaty, 2015, article 12.

[82] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed at 3/12/2016, at article 18(4).

[83] See Nour Nicolas, '*Recent Clauses Pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laudable Success or Disappointing Failure?*' Kluwer Arbitration Blog (2019), available at: http://arbitrationblog.kluwerarbitration.com/2019/07/23/recent-clauses-pertaining-to-environmental-labor-and-human-rights-in-investment-agreements-laudable-success-or-disappointing-failure/ (last consulted at 2020/11/27).

[84] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Urbaser v. Argentina) ICSID Case No. ARB/07/26, Award, 8 December 2016, at para 1193.

[85] Eric De Brabandere, 'Human rights and international investment law', in: Markus Krajewski & Rhea T. Hoffmann(eds.) *Research Handbook on Foreign Direct Investment* (Edward Elgar Publishing, 2019) 619.

[86] Rainbow Willard and Sarah Morreau, '*The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?*', Kluwer Arbitration Blog (2015), available at: http://arbitrationblog.kluwerarbitration.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for- canadian-investment-in-africa/ (last consulted, 2020/11/18).

[87] UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), at 9, available at: https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf

[88] See Eric De Brabandere, 'Human Rights Considerations in International Investment Arbitration', in M. Fitzmaurice and P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Brill Publishing, 2013) 183, at 196.

[89] See Eric De Brabandere, ibid.

[90] Saluka v. Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, at para 81.

[91] There is another case, but this case has no dispute on jurisdiction as it is based on an agreement between

Burlington et al. and Ecuador. Burlington v. Ecuador (Burlington v. Ecuador), ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017, at para 60.

[92] Urbaser v. Argentina, supra n. 77, at para 1147.

[93] Ibid, at 1210.

[94] European Convention on Human Rights, article 36, available at: https://echr.coe.int/Documents/Convention_ENG.pdf (last consulted 2020/11/27).

[95] Statue of The International Court of Justice, available at: https://www.icj-cij.org/en/statute (last consulted 2020/11/27).

[96] See Gary Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration', 34 ICSID Review (2019) 626, at 629.

[97] Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, UNCITRAL, at para 49.

[98] For example, Suez/Vivendi v. Argentina; Suez/InterAguas v. Argentina; Biwater v. Tanzania.

[99] ICSID arbitral rules, rule 37.

[100] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

[101] Bernhard von Pezold and Others v. Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No.2, 26 June 2012.

[102] Lotus Holding Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/17/30, [126].

[103] See Joanna Lam and G Ünüvar. 'Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements.' 32 Leiden Journal of International Law (2019) 781.

[104] For discussions on whether investment law should be regarded as public law, see Stephan W. Schill, International Investment Law and Comparative Public Law (Oxford New York: Oxford University Press, 2010). Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 EJIL (2006) 121.

[105] See Alessandra Arcuri & Francesco Montanaro, 'Justice for All? Protecting the Public Interest in InvestmentTreaties', 59 B.C.L. Rev. (2018) 2791.

[106] See Eric De Brabandere, 'Human rights and international investment law', in Markus Krajewski & Rhea T. Hoffmann (ed.) Research Handbook on Foreign Direct Investment (Edward Elgar Publishing, 2019) 619; see also Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law', Hebrew University of Jerusalem Legal Research Paper (2020) 20; Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes', 34 ICSID Review (2019) 136-155.

[107] See supra n.17, at 596-597.

[108] See Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights in International Investment Arbitration', in Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (2018, Brill publisher) 221-268, at 243.

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