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The Necessity, Public Interest, and Proportionality in International Investment Law: A Comparative Analysis

Abdulkadir GÜLÇÜR

Abstract

This article deals with relations of the three concepts of international investment law which can be enumerated as “necessity,” “public interest,” and “proportionality.” These three concepts have been reviewed in the light of the relevant investment tribunals’ decisions and judgments of other international judicial bodies. In democratic governments, legal acts and actions must be based on the “public interest.” However, the “public interest” does not constitute by itself a determinative factor for lawfulness. The proportionality principle has a significant role in the investment arbitrations concerning whether the “public interest” aim is met. Albeit those inferences, the “public interest” claim is not a magic key which opens all doors. Because even if such a claim is asserted, it will be insufficient when some governmental actions are pursued to protect vital interests of the State. Hence, “state of necessity” always has been retained on the agenda of international law. Therefore, the customary law had developed stringent requirements for meeting the conditions of “necessity.”

Introduction

In modern international investment law, one of the major issues is related to government actions, which can be regarded as tantamount to the expropriation of foreign investments. There is no doubt that regulatory measures of the governments have specific value whether such measures, for instance, are undertaken for protection of public interests or the environment; and therefore, can be considered as an expropriation that is economically justified.¹ Economic analysis

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of international law can be a useful tool for that determination. Besides, in necessity cases, economic analysis of law also is a decisive factor concerning whether government fiscal policies have a negative impact on economic exigency. In a series of Argentine cases, “International Centre for Settlement of Investment Disputes” (ICSID) tribunals reviewed that matter. Except for the *LG&E v. Argentine Tribunal*², all of them accepted the contribution of government policies to the financial crisis.

This article will show the boundaries of “necessity” and “public interest” in order to demonstrate how the proportionality principle would carry out its function in the disputes. There are several considerations and distinct theories capable of influencing the consequences. For this reason, it is quite important to examine the large number sources which are included both in the jurisprudence, set by cases of investment arbitration as well as the studies of eminent scholars. Therefore, relevant decisions of ICSID tribunals and other international judicial bodies have been reviewed in the article. Furthermore, particular attention has been paid to the inclusion of opposite views in the doctrine and therefore, has been adhered to the dialectic process.

In Part 1, from the first modern arbitration practice in the so-called *Neptune* case to the Argentine cases which were brought to the ICSID tribunals by American investors, the “necessity” defense of States has been reviewed. Part 2 aims to reveal the intellectual background of “economic analysis of law.” That analysis provides contractual solutions to the disputes. The *Russian Indemnity case* is a historical and appropriate example of this approach. In terms of investment law, determination of the investment definition usually has been reviewed and criticized by the arbitral tribunals and scholars. One of the requirements of the investment definition, which was developed by *Salini Tribunal*, is problematic. According to that re-

Law) for his helpful comments on this article. I feel privileged to have participated in Professor Read’s various courses about American law and tort law at Bahcesehir University from 2011 to 2017. His critiques have provided an inestimable contribution to the article. I am also grateful to my mother, father, and brother for their valuable support and encouragement. All errors are solely my own. E-mails: akgulcur@gmail.com and abdulkadir.gulcur@marmara.edu.tr 1. MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW, 363-364 (2013).

2. See, *infra* note 20.

quirement, a foreign investment must provide a “contribution to host State’s economic development.” That attitude also has a direct relationship with “economic analysis of law.”

Part 3 examines the “public interest” concept and its improvement in modern investment arbitration. Third-party submissions and public participation to the cases have a possible impact on dispute settlements. “Public interest” defenses of States are also observable from cases concerning indirect expropriations related to regulatory measures. For a deeper understanding of the balance between “public interest” of States and legitimate expectations & rights of foreign investors, I allocated Part 4 for the principle of proportionality. The proportionality principle shows up as different sources of international law under the “Article 38/1 of the Statute of the International Court of Justice (ICJ),” as a “treaty provision” or as a “customary international law” rule or as a “general principle of law” depending on the sub-branches of international law. In the sense of international investment law, proportionality principle is acceptable as a “general principle of law” unless there is an existence of a provision in the relevant treaty, mostly in the bilateral investment treaties (BITs).

1. The Necessity Defense in International Investment Law

1.1. The *Neptune* Case

Necessity is one of the oldest defenses of States which have done a wrongful act under international law. The oldest dispute in the modern arbitration practice regarding the “state of necessity” is the *Neptune* case which was taken to the judicial body constituted under the “Jay Treaty.” The “Jay Treaty” is a “Treaty of Amity, Commerce and Navigation between Great Britain and the United States” signed on November 19, 1794.³ The Jay Treaty set up three mixed commissions under articles 5, 6, and 7. Article 7 relates to the complaints of American citizens who had suffered losses because of the illegal capture of their vessels during the maritime war between France and Great Britain.⁴ The case of *Neptune* concerning seized vessels under an order of April 1795 issued by the British government. The order had instructions to the commanders of warships “to stop and detain

3. Hans-Jürgen Schlochauer, *Jay Treaty (1794)*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (VOL. 1), 108 (Rudolf Bernhardt ed., 1981).

4. *Id.* at 109.

all vessels loaded wholly or in part with corn, flour or meal bound for any port in France.”⁵ One of the seized vessels was *Neptune* which was partly loaded with rice and had departed from Charleston to reach to the port of Bordeaux. The vessel was brought to London, and its cargo was sold to the British government under the supervision of the high court of admiralty.⁶

The claimant demanded his possible profit if the cargo would have reached Bordeaux. But the registrar and merchants acted under the rule of order prescribed by the British government and allowed only the invoice price together with a mercantile profit of 10 percent. Thereupon the claimant applied to the board of commissioners under “Article VII of the Jay Treaty” for compensation of his loss. The British government defended itself claiming that, the capture was lawful and must be considered as contraband of war. The board of commissioners, by a majority vote, rejected the argument of the British government and accepted the compensation which was demanded by the claimant.⁷

Commissioner Gore indicated that there is no “state of necessity” for Great Britain, as defined by Grotius, which would justify the seizure of victuals belonging to neutrals.⁸ Another commissioner, Mr. Pinkney, also defended that Grotius considered the right of seizure as the indispensable means of self-defense, not as a means of reduction of the enemy.⁹ He added a quotation from Grotius and defined “necessity” as a real and pressing condition not imaginary. But the statements of the agent of Britain’s to the commission could not justify the requirements of necessity occurring in the facts of the dispute.¹⁰ Lastly, fifth commissioner Mr. Trumbull elaborated the issue differently and specified that if the ship seized in the act of entering or attempting to access a port where besieged or blockaded and known by the neutral master, the capture would be considered as legal and regular under the law of nations.¹¹ Like two other commis-

5. JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, VOL. 4, 3843 (1898).

6. *Id.*

7. *Id.* at 3844.

8. *Id.* at 3853.

9. *Id.* at 3859.

10. *Id.* at 3873.

11. *Id.* at 3878.

sioners, Mr. Trumbull thought that “necessity must be absolute and irresistible and until all other means of self-preservation shall have been exhausted,” the seizure of goods “can be justified by the plea of necessity.” Therefore, he concluded that “the claimant suffered loss and damage by irregular and illegal capture.”¹²

State practice and judicial decisions demonstrate that the necessity defense only precludes wrongfulness under strict requirements.¹³ According to Article 25 of the “ILC Draft Articles on Responsibility of States,”¹⁴ the necessity defense is only acceptable under the two conjunct conditions. To satisfy the “necessity requirements,” the State’s actions must be the “only way for the State to safeguard an essential interest against a grave and imminent peril” and “should not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community.”

1.2. Argentine Cases before the ICSID Tribunals and Committees

Under the ICSID system, some tribunals or committees have allowed the broader “necessity defense,” while others approached it narrowly and did not accept the “state of necessity.” Many investment arbitrations reveal this paradox. In the *CMS Gas v. Argentine* dispute, the Tribunal indicated that the, “Argentine crisis was severe but did not result in total economic and social collapse.”¹⁵ In addition, the Tribunal determined that Argentine’s “government policies and their shortcomings significantly contributed to the crisis.”¹⁶ Thus, the Tribunal concluded that the cumulative requirements of the necessity under customary international law were not satisfied.¹⁷ However, during the annulment proceedings of this “Award of the Tribunal,” the *ad hoc* Committee found some errors of law. According to the Committee, “Article XI of the Argentine-United States

12. *Id.* at 3884-3885.

13. Yearbook of the International Law Commission, 2001, Vol. 2, Part 2, ¶ 14 at 83.

14. International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter referred to as ILC Draft 2001).

15. *CMS Gas Transmission Company v. The Republic of Argentine*, ICSID Case No. ARB/01/8, Award, ¶ 355 at 102. For examination to relevant paragraphs of Award *see also*, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, ¶¶ 101-110 at 26-29.

16. *CMS Award*, *supra* note 15, ¶ 329 at 95. *See*, paragraph 2(b) of Article 25 of the “*ILC Draft 2001*”.

17. *CMS Award*, *supra* note 15, ¶ 331 at 96.

BIT”¹⁸ and “Article 25 of the ILC Draft 2001” are substantially different. “Article XI of the BIT” regulates the measures necessary for maintaining “public order” or the protection of “essential interests” of the parties. Whereas “Article 25 of the ILC Draft 2001” governs the cumulative condition of the “state of necessity.” Thus, the Committee held that these texts had different requirements and found that the Tribunal made an “error of law” when it did not analyze them separately. However, the Committee acknowledged that annulment committees had very limited jurisdiction under Article 52 of ICSID Convention, and accepted that it could not apply its own view to the dispute.¹⁹

The LG&E v. Argentine Tribunal made different conclusions than the CMS Gas v. Argentine Tribunal. In LG&E, the Tribunal determined that the claimants could not prove that Argentine caused the crisis and that the Argentine Government’s attitude exhibited a desire to slow down the crisis “by all the means available.”²⁰ So that, *inter alia* other reasons the Tribunal considered that conditions for invoking the “state of necessity” were met.²¹ Thus, the Tribunal decided that, because of article XI of the BIT, Argentine was exempt from international responsibility as a result of any breaches of the BIT between December 2001 and April 2003.²² The annulment proceedings of LG&E ceased by virtue of the claimants’ request for the discontinuance of the proceeding under Rule 44 of the ICSID Arbitration Rules.²³ Because of that, we never learned how the annulment committee would react to the Tribunal’s Award.

18. “Article XI of the Argentine-United States BIT” reads as follows:

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

19. The decision of the CMS Committee, *supra* note 15, ¶¶ 128-136 at 34-36.

20. LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 256 at 77.

21. *Id.*, ¶ 259 at 78.

22. *Id.*, ¶ 229 at 68.

23. LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, ¶¶ 4-7.

The LG&E v. Argentine decision was criticized by some authors²⁴ because the text of Article XI does not expressly exempt the host State from the international responsibility. Nevertheless, the Tribunal imported “Article 25 of ILC Draft 2001,” and despite Article 27 (b) regarding compensation for any material loss caused by a wrongful act, it exempted the respondent State from responsibility for a term involving the economic crisis. Consequently, the level of damages assessed by the LG&E Tribunal was so low relative to the compensation decisions of other relevant judicial bodies.²⁵

In the *Enron v. Argentine* dispute, the Tribunal pointed out that the “state of necessity” condition is very extreme, and it has strict requirements.. Therefore, notwithstanding the severe crisis, the Tribunal was not convinced that it was affecting the State’s essential interests.²⁶ This case also involved another debate about “Article 27 (b) of ILC Draft 2001.” The claimants argued that article 27 (b) ensures compensation for any material loss derived from the measures which are undertaken,²⁷ while the respondent argued that 27 (b) entails compensation for adopted measures after the “state of necessity” is over. The Tribunal acknowledged that this article does not leave out the probability of an ultimate compensation for past incidents.²⁸

Annulment proceedings in *Enron v. Argentine* are quite impressive because of the different approach to “state of necessity” under “customary international law” which was reflected in “Article 25 of

24. See, e.g., Robert D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, 106 AM. J. INT’L L. 501 (2012); Jose E. Alvarez & Kathryn Khamsi, The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009, at 457-458 (Karl P. Sauvant, ed., 2009) (indicating that several international tribunals have affirmed that the “state of necessity” would not preclude payment of compensation under the customary law. The authors cited the ICJ Gabcikovo-Nagymaros decision which pointed out that “state of necessity” does not excuse a State from its obligation to compensate its partner in any situation. However, they also expressed that the LG&E Tribunal did not address the question of compensation under the customary law requirements of the “state of necessity.” See, Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, ¶ 49 at 39)).

25. Alec Stone Sweet, Giacinto Della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez*, 46 N.Y.U.J. INT’L L. & POL. 929 (2014).

26. *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 304-313 at 97-99.

27. *Id.* ¶ 302 at 96.

28. *Id.* ¶ 345 at 108.

ILC Draft 2001.” As Alvarez emphasizes, this decision endorses broadening the traditional defense of “state of necessity” under “customary international law.”²⁹ In this case, ad hoc Annulment Committee criticized several aspects of the Enron Award. The criticisms focused inter alia on two main areas. According to the Committee, the Tribunal relied upon expert opinion instead of implementing the customary international law rule reflected in “Article 25(1)(a) of ILC Draft 2001.” Also, the Tribunal failed to explain why the “only way” requirement under Article 25(1)(a) was not satisfied. This triggered the “annulment decision under Article 52(1)(b) and (c) of the ICSID Convention.”³⁰

The Enron Annulment Committee’s decision could be seen as an exceptional interpretation compared to other annulment committees’ decisions. Indeed, the CMS Annulment Committee concluded that “whatever may have been the errors made in this respect by the Tribunal, there is no manifest excess of powers or lack of reasoning on the part of the Award concerning the Article XI of the BIT and the state of necessity under customary international law.”³¹ Thus, the CMS Committee only upheld the annulment request concerning the umbrella clause and dismissed other claims.³² Despite accepting the broader necessity defense under customary law, The Enron Committee, like the CMS Committee, noted that “Article 25 of ILC Draft 2001” and “Article XI of the BIT,” are not the same because they have different operations and content. As a result, the Enron Committee annulled the Tribunal’s Award regarding the inapplicability of “Article 25 of ILC Draft 2001” and “Article XI of the BIT” separately.³³

The *Sempra v. Argentine* Tribunal had the opportunity to examine other Awards because it was decided later than other cases filed against Argentine. The *Sempra* Tribunal indicated that the LG&E conclusions were different from the CMS and Enron Awards. From

29. José E. Alvarez, *State Sovereignty is Not Withering Away: A Few Lessons for the Future*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 33 (Antonio Cassese ed., 2012).

30. The Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/3, ¶¶ 377-378 at 154.

31. CMS Annulment Committee, *supra* note 15, ¶ 150 at 40.

32. *Id.* ¶ 159 at 43.

33. Enron Annulment Committee, *supra* note 30, ¶ 405 at 161-62.

the Tribunal's perspective, these differences can be explained with distinct legal interpretations of the "Argentine-U.S. BIT" and evaluation of the facts in each case. Apart from that, the *Sempra* Tribunal admitted that its two arbitrators also sat on the CMS Tribunal. Arguably however, the Tribunal's Constitution influenced their conclusion. Arbitrators were not more convinced than the CMS and Enron Tribunals about the influence of the economic crisis over the government's actions against investors. Consequently, the *Sempra* Tribunal did not accept Argentina's defense concerning the "state of necessity"; however, it acknowledged that economic situations might affect the value of investment and compensation issue.³⁴

The *Sempra* Tribunal pointed out that "state of necessity" was regulated by customary international law, not "Article XI of the BIT." The Tribunal explained that treaty provisions are generally more specific than customary laws. However, the *Sempra* Tribunal does not indicate that "Argentine-U.S. BIT" contains any prerequisites for a "necessity defense." Therefore, one must inevitably look for the "state of necessity" requirements under customary law, not in Article XI.³⁵

After these considerations, the *Sempra* Tribunal concluded Article XI of the BIT was not self-judging, and, because the requirements of necessity in customary international law were not met, there was no need for further judicial review under Article XI of the BIT.³⁶ In the *Sempra* annulment proceedings, the Committee concluded the Tribunal did not implement Article XI of the BIT as an applicable law, and it therefore exceeded its powers by failing to implement Article XI of the BIT.³⁷ The *Sempra* Committee indicated that as long as Article XI could be applied to the dispute, it was not possible to comment on breach of the BIT because Article XI confines the obligations derived from the treaty. Unlike Article XI of the BIT, Article 25 of the *ILC Draft 2001* is a supplementary rule for precluding wrongfulness. Moreover, the state of necessity in Article 25 does not

34. *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 346 at 102-03.

35. *Id.* ¶ 378 at 111.

36. *Id.* ¶ 388 at 114.

37. Decision on the Argentine Republic's Application for Annulment of the Award, ICSID Case No. ARB/02/16, Award, ¶¶ 214-219 at 46.

remove or terminate an international obligation.³⁸ It looks like both the *Sempra* and *CMS* Committees chose the same path on the legal ground for annulment. Both the *Sempra* and *CMS* Tribunals ignored the applicability of Article XI of the BIT and considered that if the state of necessity requirements were not met under customary international law, there is no need to examine applicability of the BIT.

Nevertheless, some authors assert that neither Article XI nor the U.S.-Argentine BIT are *lex specialis*. Furthermore, they deny the view that Article XI of the BIT is self-executing.³⁹ These authors particularly assert the BIT does not constitute a self-contained regime distinct from general international law. They also claim the text of Article XI is not the same as Article 25 of the ILC Draft 2001; thus, the customary international law excuse of necessity is not applicable to Article XI.⁴⁰ However, the authors accept that general international law, especially customary international law, may be significant for interpreting the BIT. As such, the treaty must be construed under the

38. *Id.* ¶ 115, at 20.

39. Alvarez & Khamsi, *supra* note 24, at 417-424. These authors strongly oppose the Burke-White's and von Staden's views regarding the review of NPM clauses in BITs with the standard of "good faith" or accepting such clauses as "self-judging" provisions. See, William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 337-341 (2008). Burke-White and von Staden asserted that the United States and Argentina intended "Article XI of the BIT" to be "self-judging" and subject only to a "good faith review" which is the core of international law; therefore, they indicate that the CMS, Enron, and *Sempra* Tribunals misinterpreted the "Article XI of the BIT." Indeed, the authors' conclusions are similar to the *ad hoc* Committees' annulment decisions regarding those Tribunals' Awards. See, *Sempra* Annulment Decision, *supra* note 37, ¶ 127. The *Sempra* Committee decided that "by disregarding the self-judging nature of Article XI, the Tribunal manifestly exceeded its powers." Compare with, *Enron* Annulment Committee, *supra* note 30, ¶¶ 401-402, 406. The Enron Committee considered that this is not its duty to determine whether the Tribunal's finding concerning the Article XI is not a "self-judging" provision. Instead of that, the Committee annulled the Award of the Tribunal due to the preclusion of Argentina by the Tribunal for resorting on the "Article XI of the BIT" and the "principle of necessity" under the "customary international law."

40. See, e.g., Alvarez & Khamsi, *supra* note 24, at 428; Andrea K. Bjorklund, *Economic Security Defenses in International Investment Law*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009, 495-496 (Karl P. Sauvant, ed., 2009). Bjorklund endorsed the view of Alvarez and Khamsi concerning the phrase of "essential security interests" indicating that the drafters of BIT aimed to preserve customary law principles of the force majeure, distress, and necessity. According to him, the customary law would provide better protection than the BIT in case of a contrary conclusion.

terms of customary international law that parties explicitly or implicitly intended to incorporate.⁴¹

To the contrary, other authors who support the CMS, Enron, and Sempra Annulment Committees' decisions, indicated that, despite the fact that *ad hoc* committees were not authorized to annul awards by "errors in law," these judicial bodies found the errors which they detected.⁴² Thus, these Committees determined that Article XI of the BIT and Article 25 of ILC Draft 2001 separately exist and have different requirements. Likewise, William Burke-White and Andreas von Staden defend the idea of utilizing the clauses of "non-precluded measures" (NPM) in BITs such as Article XI of the U.S.-Argentine BIT. They suggest that, in the case of an NPM clause not being "self-judging," arbitral tribunals can follow up with the doctrine of "margin of appreciation."⁴³ Diane Desierto masterfully explains the difference between circumstances precluding the wrongfulness of States' actions under customary international law and treaty-based non-precluded measures undertaken by States. Desierto points out that when interpreting a treaty, law-appliers must focus on the necessity clause within a specific treaty and avoid any assumptions about other norms in "general international law" such as Article 25 of the *ILC Draft 2001*.⁴⁴ Hereby, law-appliers must contemplate whether the investment treaty permits use of necessity as a justification.⁴⁵

In my opinion, this discernment is helpful to understand some differences between necessity regulation in customary international law and public order regulation in the specific treaty. General international law, especially customary international law can be a useful tool for interpretation of international agreements pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties; however, this does not mean similar provisions should be overlapped as an article in a treaty and as a provision in customary international law. Both of them separately subsist under international law.

However, the complexity of the issue may have originated from the separate foundations of international investment law. Stephan

41. Alvarez & Khamsi, *supra* note 24, at 465.

42. Sweet & Cananea, *supra* note 25, at 930-931.

43. Burke-White & von Staden, *supra* note 39, at 379.

44. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES, 18 (2012).

45. *Id.* at 185.

Schill demonstrates this point specifically from the perspective of investment law. He contemplates investment law as a “discipline that may be more open than other areas of international law in permitting different conceptual and methodological approaches.”⁴⁶ He also asserts that investment law must be considered using a State-market relationship with economic and political interests rather than reference to technical grounds relating to jurisprudence.⁴⁷

2. Economic Analysis of International Investment Law

2.1. Theoretical Approaches

Recently, some writers question investment law from an economic perspective which might be called “economic analysis of law.” Economic analysis of law asserts that financial crises are derived from inadequate and inaccurate policies of governments. As one of the supporters of the economic analysis of law, Alan Sykes states that the host countries’ fiscal and monetary policies frequently contribute to financial crises; therefore, he asserts that if a necessity defense is upheld, it can cause a substantial moral hazard.⁴⁸ He also showed the possibility of liability of public officials from public policies even if actual investment law does not contain it.⁴⁹ Likewise, Daron Acemoglu and James Robinson considered that international organizations (such as the IMF) advise developing countries that macroeconomic issues are not always successful because public officials do not often comply with their advice.⁵⁰ Actually, this opinion was accepted by some of the tribunals mentioned above. Those tribunals admitted that economic policies of the Argentine government contributed to the crisis.⁵¹ Nevertheless, economic analysis of law under various situations can favor host States. For example, assuming a contractually unaddressed risk occurs in an investment, if the relevant risk was (or should have been) known by the investor, a tribunal may dismiss the request for damages unless property is seized without compensation.

46. Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 903 (2011).

47. *Id.* at 904-905.

48. Alan O. Sykes, *Economic “Necessity” in International Law*, 109 AM. J. INT’L L. 296, 313 (2015) (author’s observations on fiscal and currency crises).

49. *Id.* at 315.

50. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL*, 446-447 (2013).

51. *See, e.g.*, CMS Award, *supra* note **Error! Bookmark not defined.**, at ¶ 329.

In such a case, economists can help tribunals determine whether the relevant risk is acceptable as an investment risk.⁵²

Examination of public international law disputes through a contractual basis approach or economic analysis of law is not a new idea. Approximately one hundred years ago, the Tribunal of the *Russian Indemnity*⁵³ case did this review.⁵⁴ This case concerned indemnity for losses suffered by Russian subjects during the 1877-1878 war with Turkey. In 1879, Russia and Turkey signed the Peace Treaty in Istanbul. Article V of the Peace Treaty governed indemnity.⁵⁵ Although partial payments were made, the Turkish government postponed payment for more than twenty years. In 1902, Turkey made the outstanding payment, but Russia demanded interest for the delayed payment. Turkey objected to the Russian demand for interest and asserted “Article V of the Treaty of Peace of 1879 and the Protocol of the same date [did] not provide for interest.”⁵⁶

The parties agreed to take the dispute to an arbitral tribunal. Turkey pled economic exigency, among other things. The Tribunal accepted that Turkey was, from 1881 to 1902 under financial difficulties. But, Russia asserted that “during this same period and especially following the establishment of the Ottoman Bank, Turkey was able to obtain some loans at favorable rates, to redeem other loans, and, finally, to pay off a large part of its public debt, estimated at 350,000,000 francs.”⁵⁷ The Tribunal understood that if the plea were upheld, it would be many times more than the small sum of about six million francs for actual Russian losses. Thus, it dismissed this defense because the conditions for *force majeure* were not met.⁵⁸ From

52. Bastian Gottschling & Willis Geffert, *An Economic Assessment of Contracts, Requests for Contract Reform, and Damages in International Arbitration*, in *THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES*, 319, 326 (Marion Jansen, et al. eds., 2017).

53. See *Russian Claim for Interest on Indemnities (Russ. v. Turk.)*, Award (Perm. Ct. Arb. 1912) [hereinafter *Russian Indemnity*].

54. See also Sloane, *supra* note **Error! Bookmark not defined.**, at 460-61.

55. *Russian Indemnity*, *supra* note 53, at 4.

56. *Id.* at 7.

57. *Id.* at 13.

58. The Tribunal described this plea as *force majeure* but today this defense conforms to “state of necessity.” See, Sloane, *supra* note 33, at 460. Indeed, Russia in its Reply described the “state of necessity”:

“The exception of *force majeure* cited as the most important may be pleaded in opposition in public as well as in private international law; international law must adapt itself to po-

an economic perspective, the judgment of the Tribunal is quite significant. Although this was an inter-State arbitration, the Tribunal dealt with the case as a classic creditor-debtor relation. However, the Russian claim, notwithstanding the economic exigency defense, was rejected because Russia had not explicitly demanded interest for damages before the payment.⁵⁹

The idea of the “conservative analysis of law” requires isolation of other disciplines and circumstances from the legal instruments. This idea protects international law from any interference from other disciplines.⁶⁰ For instance, when handling the relationship between investment law and development, most of the scholars contemplate these disciplines as rival rather than as supportive.⁶¹ However, the fear of some scholars is that if other factors are incorporated into the investment law it may reduce the level of investment protection in international law. Therefore, this approach endorses the notion that investment treaties must be interpreted in the context of international law.⁶² The primary concern is whether such human rights and environmental issues will become dominant factors in investment disputes. But, that anxiety is also thinkable for economic matters. *Dunoff* and *Trachtman* competently describe the fears of “conservatives” about the legal matters. According to them, many international lawyers hesitate to use economics because of a lack of confidence in

litical necessities. The Imperial Russian Government expressly admits that the obligation of a State to fulfill treaties may give way “if the very existence of the State should be in danger if the observance of the international duty is . . . self-destructive.” See, *Russian Indemnity, Award*, at 12.

59. *Id.* at 15.

60. LEGITIMACY IN INTERNATIONAL LAW, 395-397 (Rüdiger Wolfrum & Volker Röben eds., 2008).

61. Stephan W. Schill, Christian J. Tams & Rainer Hofmann, *International Investment Law and Development: Friends or Foes?* in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP, 41 (Stephan W. Schill et al. eds., 2015).

62. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 78-79 (2010). *But see*, Charles H. Brower, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009, 378 (Karl P. Sauvant, ed., 2009). Brower points out that there is no international definition of the “public interest” in international law. However, the author suggests that arbitration tribunals not only engage with investors’ protection but also the humanitarian consideration in the disputes. Therefore, he calls for arbitration tribunals to utilize the “public interest” concept with more transparency and systematically.

their quantitative and economic skills. However, the authors point out that many types of economic analysis of law do not require complex mathematical tools.⁶³ Indeed, apart from damage calculations, international law does not involve complex mathematical processes.⁶⁴ Despite that, use of economic tools other than the damage calculation is very rarely used in investment arbitration.⁶⁵

2.2. The Practice of “Investment Definition” in ICSID

Another important issue for economic analysis of law in investment disputes is the definition of “investment” and its requirements. In this regard, the “*Salini* test” is at the center of debates. This test defines the “investment” involving the “contribution of money or assets,” “a certain duration of performance of the contract,” “participation in the risks of the transaction” and the “contribution to the economic development of host State,” which is derived from the ICSID Convention’s Preamble.⁶⁶ The first three conditions exist in the doctrine, but the fourth condition is developed by the *Salini* Tribunal. This last criterion has become very controversial in judicial practice. While some of the tribunals have accepted this criterion⁶⁷,

63. Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 7 (1999). The authors considered that the concerns of international jurists about the law & economics (L&E) could be described with three main thoughts: 1) L&E’s seemingly inaccessible methodologies, 2) L&E’s supposedly conservative political prejudices, 3) L&E’s positivism and its presumed denigration of international law. *Id.* at 6.

64. *Pauwelyn* states that both ICSID and WTO arbitrators calculated the damage amount with a few paragraphs in their decisions in 2000’s years. But over the ten years after these decisions, damages calculations have advanced amazingly. *See*, Joost Pauwelyn, *The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement*, in WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION, (Jorge A. Huerta-Goldman et al. eds., 2013).

Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141357 at 4.

65. *Id.* at 15.

66. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 42, INT’L LEGAL MATERIALS, ¶ 52, at 622 (2003).

67. *See*, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 14, ICSID Rev/FILJ, ¶ 64, at 273 (1999). Following decisions have evolved the fourth criterion from “contribution to the economic development” to “significance of the contribution to the economic development.” *See*; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53, at 12, *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 137, at 37, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Decision on Jurisdiction, ¶¶ 91-92, at 29,

others have rejected it.⁶⁸ Schreuer describes this situation as unfortunate because the Salini test criteria should not be accepted as strict jurisdictional requirements that each one of them must be met separately.⁶⁹ He also indicated that even if one international transaction cannot “contribute to the host State’s economic development,” it does not mean that this operation must be excluded from ICSID Convention’s protection.⁷⁰ Many of ICSID Tribunals have followed specific investment definitions in relevant BITs and accepted various financial tools such as loans, promissory notes, and minority stock shares as investments. However, after the Salini decision, ICSID Tribunals show reluctance to accept this broad investment definition.⁷¹ For instance, in the Malaysian Salvors case, the Tribunal did not recognize a marine salvage contract as an investment because it is not capable of providing a significant “contribution to the host State’s economic development” and could not benefit Malaysian public interest.⁷² The *Joy Mining* case is another example of the application of strict investment requirements. In this dispute, the Tribunal did not qualify either mixed contract or relevant bank guarantees and pledges as an investment.⁷³ Despite the Tribunal’s decisions, it was aware of many

Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 131, at 45.

68. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 111, at 36 (The Tribunal concluded that the condition of the “contribution to the economic development of host state” is one of the objectives of ICSID Convention, this objective is not one of the criteria of investment), *Consortium Groupement L.E.S.I.- DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, Award (English translation from ICSID), ¶ 13(iv), at 21 (The Tribunal considered that there is no separate condition regarding the “contribution of the investment to the host country’s economic development” and accepted that this criterion takes part implicitly in the other three criteria.).
69. THE ICSID CONVENTION: A COMMENTARY, ¶171 at 133 (Christoph H. Schreuer et al. eds., 2nd ed. 2009). He also added that the *Salini* Tribunal emphasized that investment criteria should be contemplated in conjunction. *See, Salini v. Morocco*, Decision on Jurisdiction, *supra* note 66, ¶ 52 at 622.
70. Schreuer, *supra* note 69, ¶ 173 at 134; *See also*, Julian Davis Mortenson, *The Meaning of “Investment”*: ICSID’s Travaux and the Domain of International Investment Law, 51 HARVARD INT’L L. J. 274 (2010).
71. *Id.* at 279. In the same way, Schreuer points out that if “contribution to the economic development” criterion will be applied by the tribunals, arbitrators must show some flexibility. He also suggests that arbitrators should not seek the criterion of contribution to host state’s GDP necessarily. *See*, Schreuer, *supra* note 69, ¶ 174 at 134.
72. *Malaysian Historical Salvors v. The Government of Malaysia*, *supra* note 67, ¶¶ 125-131, at 43-45 [hereinafter *Salvors*].
73. *Joy Mining v. Egypt*, *supra* note 67, ¶ 55, at 13.

ICSID decisions that had given a wider purview to the investment definition. But, it analyzed that other cases have undoubtedly had investment operation or an arbitration clause in their contracts. According to the Tribunal, a “sale or procurement contract,” even if it has sophisticated features, should not qualify as an investment.⁷⁴

Before that narrow interpretation of investment definition occurred in the jurisprudence, some tribunals such as the *Fedax* Tribunal applied the broad interpretation of investment definition test. The *Fedax* Tribunal evaluated promissory notes as an investment because of their benefits for the Venezuela Treasury derived from the existence of fundamental national interests indicated in Venezuela’s “Law on Public Credit.”⁷⁵ The Tribunal also pointed out that the term “directly” in Article 25 of ICSID Convention connected with the “dispute” and not the “investment.” Hence, jurisdictional requirements of ICSID are met as long as a dispute directly emerges from an economic transaction, even if this operation has not been qualified as direct investment by itself.⁷⁶ Similarly, the *CSOB* Tribunal quoted the *Fedax* decision and clarified that issue. The *CSOB* Tribunal decided to follow the *Fedax* Tribunal’s interpretation of the definition of investment. According to the *CSOB* Tribunal, an investment generally consists of several linked transactions, however, some transactions may not, by itself, be qualified as an investment. Although, in terms of the jurisdictional requirements of ICSID, it is important to determine if the whole operation can be qualified as an investment independent from its sub-transactions.⁷⁷

Holiday Inns v. Morocco is a significant case that is a predecessor of the decisions mentioned above. The Tribunal evaluated separate loan contracts within the “general unity of an investment opera-

74. *Id.*, ¶¶ 58-59, at 14.

75. *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997), 37 INT’L LEGAL MATERIALS ¶ 42 at 1386 (1998). *But see* Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT’L L. 720-721 (2007). *Waibel* asserts that so-called “public interest” test does not convert a commercial transaction to the investment. He also considered that such a test does not satisfy the jurisdictional conditions in the Article 25 of ICSID Convention.

76. *Fedax v. Venez.*, *supra* note 75, ¶ 24, at 1383.

77. *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, *supra* note 67, ¶ 72, at 275.

tion.”⁷⁸ It considered that isolating some juridical acts from others is not coherent with economic reality and parties’ intentions.⁷⁹ *Travaux préparatoires* of the ICSID Convention shows that various attempts for limitation of investment definition failed. Consequently, with an endorsement of some delegates, the United Kingdom delegate proposed to exclude the investment definition for hampering jurisdictional obstacles and it was accepted by the Legal Committee.⁸⁰

Recent developments in investment cases show that the “Salini effect”, which identified an investment with a mandatory list of characteristics, is losing its influence.⁸¹ The *Biwater Gauff v. Tanzania* case can be seen as a cornerstone. In this case, the Tribunal explicitly emphasized that the “Salini criteria” are not compulsory as a matter of law and there is no legal basis in the ICSID Convention for applying strict requirements.⁸² Therefore, according to the Tribunal, these criteria are not applicable to all disputes. Hence an appropriate approach must consider all features of the case, particularly the relevant legal instruments which consent to ICSID arbitration.⁸³ Another example, in the same way, is the *Malaysian Salvors Annulment Decision*. *Malaysian Salvors Ad Hoc Committee* quoted the *Biwater Gauff Award* for pointing out the danger of the inflexible “Salini criteria.” With reference to the relevant passage, if tribunals adhere to the “Salini criteria,” there will appear a definitional contradiction between agreements or treaties and the *Salini* definition.⁸⁴ Consequent-

78. Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)-Some Legal Problems*, 51 BRITISH YEARBOOK INT’L L. 159 (1981).

79. *See Id.* Besides the above, some other tribunals mentioned this decision, and when determining whether an investment exists, they examined the entire operation. *See also* Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 110, at 31.

80. *See*, Schreuer, *supra* note 69, ¶ 115, at 115.

81. David A. R. Williams & Simon Foote, *Recent Developments in the Approach to Identifying an “Investment” Pursuant to Article 25(1) of the ICSID Convention*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION*, 63 (Chester Brown & Kate Miles eds., 2011).

82. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 312-313 at 86 (July 24, 2008).

83. *Id.* ¶¶ 313-316, at 86-87.

84. *Id.* ¶ 316 at 87; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 79, at 33-35 (July 24, 2008).

ly, the Committee annulled the Tribunal's Award in accordance with "Article 52(1)(b) of ICSID Convention."⁸⁵

I am of the opinion that these last decisions can be considered as a recovery in ICSID case law through the acknowledgment of a non-restrictive investment definition for the jurisdictional requirement. When some tribunals begin to add supplemental conditions to the *Salini* criteria, jurisdictional thresholds are getting higher.⁸⁶ Therefore, this recovery in the case law is consistent with the intentions of the ICSID Convention drafters and purposes of the Convention. Especially, as Williams and Foote stated, the requirement of "significant contribution to the economy of the host state" is severely weakened in practice.⁸⁷ Actually, this fluctuation either in "investment definition" or "state of necessity" in ICSID case law can be explained by a different problem, that of State sovereignty.⁸⁸ *Brower* and *Schill* defined this problem under the "legitimacy" term and elucidated this issue about investment arbitrations as beyond the problems of predictability and consistency.⁸⁹ According to them, critiques about the

85. *Id.* ¶ 80 at 35. The reasons of the annulment by the Committee are; *i*) Tribunal's limited analysis relating to Article 25 of ICSID Convention *ii*) to fail reviewing the Convention's preparatory work *iii*) disregarding small contributions to the host state's economy such as cultural or historical contributions.

86. *See generally*, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009). In this dispute, the Tribunal added two criteria to the *Salini* test. These supplemental criteria are; *i*) assets invested with *bona fide* and *ii*) assets invested in accordance with the laws of the host State. *Id.* ¶ 114, at 45. Particularly, good faith (*bona fide*) investment criterion is controversial. This criterion can be criticized from the different aspects. First, the "good faith" is one of the "general principles of law" which be applied to the international law, but it was not contemplated as the jurisdictional condition by drafters of the ICSID Convention. Second, this principle is only usable for supportive argument in the reasoning of Tribunal which serves for treaty-based arbitrations. Finally, characterization of investment as "illegal in host state law" or "not made in good faith" does not change qualification of investment in the international arena. *See Saba Fakes v. Turkey*, *supra* note 68, ¶¶ 112-113, at 36-37. Unlike the *Phoenix* Tribunal, the *Saba Fakes* Tribunal even though it did not use the "good faith" principle and restrictive investment definition, it concluded that had not been made any investment by the claimant. *Id.* ¶147, at 47. Some authors have explicitly expressed their concerns about the various financial instruments and non-infrastructure contracts which are under risk of exclusion from the investment definition in ICSID practice. *See*, *Mortenson*, *supra* note 70, at 279.

87. David A. R. Williams & Simon Foote, *supra* note 80, at 63.

88. *See*, *Mortenson*, *supra* note 70, at 312-313.

89. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*, 9 CHICAGO J. INT'L L. 471, 473-74, (2009).

issue consist of two distinct thoughts. The first view is the “Marxist analysis of law” which asserted that investment law is an attempt by developed countries to impose their power on developing countries. The second view defends that investment law is an unequal regime which protects foreign investors and their properties; although, this regime does not ensure sufficient discretion to the host States for their non-investment benefits.⁹⁰ Nevertheless, the last view has become the effective background of some recent cases.

2.3. Non-Investment Factors and the Doctrine of “Margin of Appreciation”

The recent case of *Philip Morris v. Uruguay* is a good example of non-investment factors’ effects on the investment dispute. In this case, the Tribunal reviewed each relevant measure adopted by national agencies relating to the tobacco consumption.⁹¹ Despite claimants’ objections, arbitrators used the doctrine of “margin of appreciation” in this dispute because this doctrine is not only peculiar to the European Convention on Human Rights (hereinafter, ECHR), but is also applicable to bilateral investment treaties especially in “public health” issues.⁹² That is not the first case which an ICSID Tribunal applied a “margin of appreciation.” Before this recent case, the *Continental Casualty v. Argentine* Tribunal explicitly applied this doctrine in another case, which involved another dispute derived from Argentine’s economic crisis. In this case, the Tribunal decided that Article XI of Argentine-U.S. BIT is not “self-judging.” Nonetheless, the Tribunal stated that Article XI of the BIT contained a “margin of appreciation” inherent to each party which invokes it.⁹³

90. *Id.* at 474.

91. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 388 at 111.

92. *Id.* ¶¶ 398-399 at 115.

93. *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 181, 187-188 at 80, 82-83. The Tribunal justified its conclusion with the United States argument in the *Oil Platforms* case. According to the *Continental Casualty* Tribunal, the Article XX, paragraph 1 (d) of the 1955 Iran-United States Amity Treaty had provided to the parties a “margin of discretion.” Nonetheless, ICJ decided that the “self-defense” concept has no ground for the doctrine of the “margin of discretion” due to its strict requirements. *See, Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, ¶ 73 at 196. Therefore, *Continental Casualty* Tribunal underlined that accepting “margin of discretion” in the measures might give rise getting rid of treaty obligations by a party which has been undertaken these measures. But also, the Tribunal has considered that the time of

When we turn back again to the *Philip Morris* case, the dissenting opinion of *Gary Born* is worth mentioning. He indicated that “margin of appreciation” relied on the language of the ECHR and its Protocols (especially the first Protocol); therefore, the Tribunal should not transplant this doctrine from the ECHR to the relevant BIT (Uruguay-Switzerland) or the customary international law.⁹⁴ He continued that the ECHR interprets their Article 1 of Protocol 1 to be very extensive in the expropriation of properties by governments and gives wide range “margin of appreciation” to the governmental authorities about what constitutes “public interest” in the act of expropriation.⁹⁵ In contrast, there is no equivalent provision in the Uruguay-Switzerland BIT. Also, travaux préparatoires, also known as the official records of negotiation, of the BIT does not indicate whether parties intended to accept the “margin of appreciation.”⁹⁶

These inferences of the *Born’s dissenting opinion* are in line with thoughts of the Judge *Anzilotti* in the *Oscar Chinn* case. Judge *Anzilotti* stated that “international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfillment of its engagements.”⁹⁷ ICJ and ICSID Tribunals conformed to this approach and rejected to apply the doctrine of “margin of appreciation” in various cases.⁹⁸ For instance, in the Construction

severe economic crisis provides significant “margin of discretion” to the host States in their measures. *See also*, *Burke-White & von Staden*, *supra* note 39, at 375. The authors support the utilization of “margin of appreciation” doctrine in international investment law. For the authors, that doctrine especially has importance to preserve legitimacy in investor-State arbitration. Therefore, arbitral tribunals may apply the NPM clauses in the BITs. *Burke-White* and *von Staden* suggest that different indications can be applied by the tribunals depending on the nature of the dispute. For instance, while have been granting maximum deference to the States in “public morality” issues; on the other hand, that deference to the States’ measures could be at the minimum level in the “public health” issues which are more scientific.

94. Concurring and Dissenting Opinion of Gary Born, *supra* note 91, Annex B, ¶ 138 at 33.
95. *Id.* ¶ 183 at 42.
96. *Id.* ¶ 184, at 42.
97. The Oscar Chinn Case (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, 65, 112 (Dec.12), (separate opinion by Anzilotti, M.). U.K. v. Belgium, 1934 P.C.I.J. at 184.
98. Philip Morris v. Uruguay, *supra* note 91, ¶ 186-190 (This case is a great example of how non-investment factors can effect an investment dispute. This is one of the rare cases where the Tribunal reviews each measure adopted by national agencies as it related to tobacco consumption and ultimately applied the ‘margin of appreciation.’). *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International*

of a Wall Advisory Opinion, the ICJ decided that the route of the wall, which was chosen by Israel, could not be justified by the requirements of “public order” and “national security.” Therefore, according to the Court, this wall construction breaches Israel’s obligations under international humanitarian law.⁹⁹ The ICJ considered that Israel could not invoke “self-defense” under UN Charter Article 51 or “state of necessity” under the customary international law for the prevention of the wrongfulness of the construction of a wall.¹⁰⁰ Another example from the ICJ’s jurisprudence is the *Whaling in the Antarctica* case, which was rendered by the Court recently. This case is remarkable regarding the respondent’s allegations about having a “margin of appreciation” in scientific research related to the whales. In response to that claim, the ICJ considered that “the killing, taking, and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception.”¹⁰¹ Instead of the using the “margin of appreciation” standard, which was claimed by the respondent, the ICJ preferred the concept of “standard of review”, which is known from the “World Trade Organization” (WTO) jurisprudence.¹⁰²

It seems that if a treaty does not grant the “margin of appreciation” in the

acts of State parties such as Article 1 of Protocol 1 of the ECHR, the doctrine must not be applied by the international judicial bodies. The argument of the “international judicial bodies has inherent power to use this doctrine” cannot justify the issue.¹⁰³ The “margin of appre-

Law? 16 EUR. J. INT’L L. 907, 931-940 (2005), “for the critiques about ICJ decisions which rejected to apply the ‘margin of appreciation.’”

99. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 193, ¶ 137 (July 9).

100. *Id.* ¶ 142 at 195.

101. *Whaling in the Antarctic (Austl. v. Japan)*, Judgment, 2014 I.C.J. Rep. 253, ¶ 61 (Mar. 31).

102. Theodore Christakis, *The “Margin of Appreciation” in the Use of Exemptions in International Law: Comparing the ICJ Whaling Judgment and the Case Law of the ECtHR* (2015), in *WHALING IN THE ANTARCTIC: SIGNIFICANCE AND IMPLICATIONS OF THE ICJ JUDGMENT*, 2016, 139, 151-54 (Malgosia Fitzmaurice & Dai Tamada eds., 2016). The author assumes that even if ICJ would use the “margin of appreciation” doctrine, the conclusion will not change in favor of respondent due to the hardness of accepting the killing of whales under the name of scientific research for the interest of the State.

103. See Shany, *supra* note 98, at 911.

ciation” is neither accepted as the “international customary rule” nor the “general principle of law.” For elaboration on the issue, examining the “International Tribunal for the Law of the Sea” (hereinafter, ITLOS) cases may be useful as they relate to the prompt release of vessels and crews might be useful. For instance, in the *Juno Trader* case, the ITLOS demonstrated which principles prevail when assessing reasonable bond in the prompt release cases. Accordingly, Article 73 of the “United Nations Convention on the Law of the Sea” (hereinafter, UNCLOS) must be evaluated in the light of considerations of humanity and due process of law. The requirement of reasonable bond in prompt release of vessels and crews

follow this approach.¹⁰⁴

The ITLOS chose to follow well-established legal principles instead of the “margin of appreciation” doctrine in the prompt release procedure under the Article 73 of UNCLOS.¹⁰⁵ This preference of the ITLOS seems to have originated from its avoidance of non-well-established concepts and doctrines in international law such as “margin of appreciation.” “Considerations of humanity” and “due process of law” are rooted legal principles compared to “margin of appreciation.” The ICJ applied the principle of “considerations of humanity” in the *Corfu Channel* case for the first time,¹⁰⁶ but it has not maintained the same approach afterward.¹⁰⁷ After the inauguration of the

104. *Juno Trader* (No. 13) (St. Vincent v. Guinea-Bissau), Case No. 13, Judgment of Dec. 18, 2004, 1 ¶ 77, ITLOS Rep. ¶ 77, at 38-39 (emphasis added).

105. In his study, Judge Cot construed that the observation of the ITLOS is not contrary to the “margin of appreciation” doctrine. Jean-Pierre Cot, *The Law of the Sea and the Margin of Appreciation*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES LIBER AMICORUM JUDGE THOMAS A. MENSAH, 389, 403 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

106. *The Corfu Channel Case* (U.K. v. Alb.), Merits, Judgment, 1949 I.C.J. Rep. 22 (Apr. 9). The Court indicated that “elementary considerations of humanity” is general and well recognized principle. *Id.* at 22.

107. In the South West Africa cases, ICJ did not accept that “humanitarian considerations” can generate legal rights and obligations. The Court admitted that all states have interests in such matters, but these considerations have not the juridical character. *South West Africa Cases* (Eth.& Libya v. S. Afr.), Judgment, 1966 I.C.J. Rep. 34, ¶ 49-50 (July 18). However, these reviews have not welcomed by some judges. For example, Judge Jessup stated that for long years international law recognized that states have legal interests other than economic or material issues. *South West Africa Cases* (Eth. & Libya v. S. Afr.), Preliminary Objections, Judgment, 1962 I.C.J. Rep. 425 (Dec. 21) (separate opinion by Jessup, P.). Judge Tanaka also supported to the Judge Jessup and illustrated that states have legal interests in humanitarian issues such as suppression of slave trade, the Genocide Convention and the constitution of the International Labor

ITLOS, this consideration was revived in the practice of international law.¹⁰⁸ In addition to the ITLOS,¹⁰⁹ also some arbitral tribunals¹¹⁰ which were constituted pursuant to Annex VII of UNCLOS, utilized the principle of “considerations of humanity.” Nevertheless, some authors criticized this principle because it was not used enough in State practice.¹¹¹

Even well-established principles such as “considerations of humanity” have been criticized by some scholars in international law for the lack of the justification when they are used by the international judicial bodies. Hence, it was inevitable that the doctrine of “margin of appreciation” would also be critiqued.¹¹² At this point, the ECHR also has been criticized for using the “margin of appreciation” doctrine. Accordingly, that doctrine threatens fundamental rights and

Organization. South West Africa Cases, 1966 I.C.J. Rep. 252 (July 18) (dissenting opinion by Tanaka, K.).

108. ABDULKADİR G.L.R., ULUSLARARASI DENİZ HUKUKU MAHKEMESİNİN YAPISI VE YARGI YETKİSİ, 65 (Onikilevha, 1st ed. 2017).
109. See, *The M/V Saiga (No.2)* (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 1, 22 at ¶155. “In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. *Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.*” (emphasis added).
110. The “*Enrica Lexie*” Incident (It. v. India), Case No. 2015-28, Order, 1, ¶ 104, 106 at 27 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/1707>. Here, the Tribunal considered that it should give effect to the principle of “considerations of humanity” for relaxation to bail conditions of Italian marine Sergeant Girone.
111. Koskenniemi who well-known with his critiques in the international law indicated that no State would deny “elementary considerations of humanity” principle which has been accepted for the practice of their inter-State relations. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 167 (2006). Afterward, he argued that whether this norm has enough past compliance in the State practice for accepting as a customary law rule, is disputed. *Id.* at 408. Chigara is another writer who criticized the ITLOS and ICJ decisions for non-obeyance to the requirements of the Article 38/1(b) of the ICJ Statute which involves *opinio juris*, State practice, and the time element. Ben Chigara, *International Tribunal for the Law of the Sea and Customary International Law*, 22 LOY. LOS ANGELES INT’L & COMP. L. R. 433, 442-451 (2000). According to him, when an international court or tribunal resort to a principle such as “considerations of humanity,” it must justify why it resorts to this principle and clarifies State practice and other requirements. *Id.* at 445.
112. Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT’L L. 545, 558 (2014).

the rule of law.¹¹³ Brauch asserted that the ECHR's European consensus as it related to the "margin of appreciation" did not constitute a legal standard. Neither applicants nor the Member States of ECHR have enough information on how government actions can accommodate this European consensus.¹¹⁴ However, even in the context of the ECHR, the doctrine of "margin of appreciation" has rarely been implemented, especially in "right to life" or "prohibition of torture" cases.¹¹⁵ This situation will likely change under Article 1 of Protocol 15 of the ECHR.¹¹⁶ This provision entrenched the "margin of appreciation" doctrine to the ECHR dispute settlement system. The deference of State actions will be more comprehensive than it used to be in the past after adding that doctrine to the Preamble of the ECHR. However, alteration as mentioned above in the Preamble of ECHR does not cover all of international law. Each dispute settlement system (UNCLOS, ICSID, WTO, etc.) must be assessed in the context of its legal instruments. This assessment must be made by their relevant dispute settlement bodies regarding whether it is required or not by looking either to deference or appreciation of a government's acts in a dispute.

To sum up, each principle or doctrine must be examined in detail when it will be applied to a particular dispute. For instance, it is not appropriate to use the doctrine of margin of appreciation in a dispute relating to a right to life or prohibition of torture argument. Therefore, this doctrine must not be applied to such disputes. Apart from this, if a conflict involves humanitarian issues, the considerations of

113. See, Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 150 (2004).

114. *Id.* at 145-46.

115. BAŞAK ALI, *The Authority of International Law*, 82 (OUP Oxford, 2015) (The author describing the "margin of appreciation" as a doctrine which rebuttable duties entail in the ECHR context, but claiming that the scope of rebuttal in the precedents of ECHR is very narrow or non-existent).

116. Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, 24 Eur. Ct. H.R (2013), "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and *that in doing so they enjoy a margin of appreciation*, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention." (emphasis added).

humanity principle can be applied to that case instead of an economic analysis of law application. Wrongful implementation of a principle or doctrine would undermine the legitimacy of international judicial bodies and fair expectations of them. On the other hand, if a dispute has an intensive economic character, such as an investment dispute or trade dispute, the economic analysis of law principle can be applied to it. Hence, investment disputes or trade disputes are not suitable for applying doctrines such as humanitarian consideration or margin of appreciation unless an explicit treaty provision exists.

3. The Public Interest in International Investment Law

3.1. The Debate on the Concept of Public Interest

Above, the relevance of the public interest in the context of defining what constitutes an investment was partially addressed. In this chapter, the issue will be comprehensively reviewed. As basic sources of international law, provisions in treaties and rules of customary international law do not involve a uniform phrase about the public interest. Putting aside various usages, frequently utilized phrases are such things as public (national) security, public purpose, and public interest.¹¹⁷ States aim to provide broader regulatory freedom by placing such clauses in international treaties.¹¹⁸ A State's right to regulate concerning the public interest has a different basis compared to the doctrines of state of necessity, national security, and public order.¹¹⁹ Nevertheless, even if a BIT does not involve a public interest exception clause, some assert that arbitral tribunals may consider public interest review through their reliance on past arbitral decisions rather than interpreting the relevant expression in a BIT.¹²⁰ By

117. PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA, 126 (2015).

118. *Id.* at 124-125.

119. AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW, 101 (2014). See also, Alison Giest, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 CHI. J. INT'L L. 334 (2017).

120. Giest, *supra* note 119, at 328. However, various authors object to adoption of precedents in international investment law. These authors assert that looking for consistency in investment arbitration decisions is not suitable due to the type of dispute resolution. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L., 418, 421-422 (2013). See Alexander Orakhelashvili, *Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen*, 26 J. INT'L ARB., 159, 168-169 (2009). See also Stephan W. Schill, *En-*

contrast, Aikaterini Titi's comment on this issue is much more cautious. According to Titi, if investment agreements have unambiguous public interest provisions, arbitrators must show deference to the host States' regulations regarding the investment. If treaties do not involve such clauses, however, there is no mandatory situation for the tribunals concerning whether to allow broader regulatory freedom for States.¹²¹

Another part of the public interest regulation matter is possible demands for compensation. For clarification, it must be admitted that public interest exception clauses in international investment agreements or treaties do not grant absolute police power to the host States for regulation of foreign investments. The *Marvin Feldman v. Mexico* case is a unique example to understand that question. In this dispute, the Tribunal acknowledged that governments have many ways to reduce the economic profit of businesses, which could be done through "confiscatory taxation, denial of access to infrastructure or necessary raw materials, and the imposition of unreasonable regulatory regimes."¹²² The Tribunal also indicated that if reasonable governmental regulations such as *bona fide* general taxation or alternative actions can be accepted as a non-discriminatory treatment, they are within the regulatory power of governments and do not trigger State liability.¹²³ Consequently, when a State undertakes international obligations through investment treaties, it limits regulatory power, which originated from its sovereignty. As such, if a State goes beyond reasonable regulation according to the relevant public interest provision in a treaty or in general international law, it will be exposed to liability to the investor.¹²⁴ To justly determine this distinction, arbitral tribunals should consider various factors such as aims and characteris-

hancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach, 52 VA. J. INT'L L. 57, 79, 84 (2011) (describing arbitral decisions which deny accepting precedents).

121. Titi, *supra* note 119, at 71.

122. Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002), <https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf> [hereinafter Feldman].

123. *Id.* (stating that "[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this"). See also Titi, *supra* note 119, at 34.

124. See TRINH HAI YEN, THE INTERPRETATION OF INVESTMENT TREATIES, 183 (2014).

tics of the measures or proportionality between public interests and private interests. Those legal indicators determine which government actions or measures count as indirect expropriation.¹²⁵

A valuable critique directed to the public interest concept is its ineffectiveness in international adjudication. Pursuant to the main idea of that critique, international law is based on the consensual regime, and, except for very few peremptory norms, States are free to make an agreement.¹²⁶ Therefore, international law cannot adequately protect public interests because of its consensual structure. Governments always have a chance to back down from their international obligations by repealing treaties.¹²⁷ Thus, Vaughan Lowe considers that protecting public interests is a struggle which can be realizable in the domestic legal arena rather than the international arena.¹²⁸ With regard to ineffectiveness of the public interest idea in international investment law, there is concern international tribunals may curtail the regulatory power of governments, especially for regulations undertaken to protect the environment or human rights.¹²⁹ There are insufficient sources that take into account the public interest as applicable law in treaty-based investment arbitration. Therefore, tribunals hesitate to consider the public interest function because their decisions would risk annulment.¹³⁰

3.2. Public Participation and Transparency in Investor-State Arbitration

One of the dimensions of the public interest concept reflects itself in the rising transparency trend in the international investment regime. The struggle between privacy and transparency in investment arbitration originates from the mixed structure of its proceedings, which involves features from both public international arbitration and

125. *Id.* at 225.

126. Vaughan Lowe, *Private Disputes and the Public Interest in International Law*, in INTERNATIONAL LAW AND DISPUTE SETTLEMENT, 3, 13 (Duncan French et al., eds., 2010). See Brower, *supra* note **Error! Bookmark not defined.**, at 372.

127. Lowe, *supra* note 126, at 15.

128. *Id.* at 16.

129. 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 INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 75, 76 (Stephan W. Schill, ed., 2010).

130. Brower, *supra* note **Error! Bookmark not defined.**, at 372.

private international commercial arbitration.¹³¹ However, some developments in investment arbitration have decreased confidentiality in the proceedings.¹³² These developments can be construed as acceptance of broader transparency and underline the importance of representing the public interest in investor-State arbitration.¹³³ Indeed, besides opening judicial proceedings to the public, transparency separates investor-State arbitration from commercial arbitrations. For example, the ICSID Secretariat routinely registers cases and provides information to the public unlike other arbitral institutes such as the ICC, LCIA, and SCC. During the 1980s, scholars complained about the confidentiality of the awards; however, most of the awards are now available to the public in accordance with Article 48(4) of the ICSID Arbitration Rules.¹³⁴ To further transparency in proceedings, the UN General Assembly recently adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.¹³⁵ The UN General Assembly then adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which entered into force on October 18, 2017.¹³⁶ In accordance with Article

131. See Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, in PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION, 17, 32 (David D. Caron et al. eds., 2015); Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 787, 788 (Stephan W. Schill ed., 2010).

132. See, e.g., U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 6, at 10 (Apr. 1, 2014), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [hereinafter UNCITRAL Rules on Transparency]; U.S. TRADE REPRESENTATIVE [USTR], 2012 U.S. MODEL BILATERAL INVESTMENT TREATY art. 29(1)-(2), at 32 (2012), <https://www.state.gov/documents/organization/188371.pdf> [hereinafter U.S. Model BIT].

133. Ruth Teitelbaum, *A Look at The Public Interest in Investment Arbitration: Is It Unique? What Should We Do About It?* 5 BERKELEY J. INT'L L. PUBLICIST, 54, 55 (2010).

134. Asteriti and Tams, *supra* note 131, at 790. The authors categorize the views about confidentiality in investor-state arbitration under three subheadings; the orthodox approach, moderate orthodox approach and unorthodox approach, *id.* at 789-92. They considered the ICSID rules under moderate orthodoxy view subheading, *id.* at 790-91.

135. U.N. GAOR, 68th Sess., 68th plen. mtg. para. 3, at 2, U.N. Doc. A/RES/68/109 (Dec. 18, 2013).

136. U.N. GAOR, 69th Sess., 68th plen. mtg. para. 2, at 2, U.N. Doc. A/RES/69/116 (Dec. 10, 2014). To date, the Convention (also known as the Mauritius Convention) has been signed by 23 States, including the United States. Only five States (Canada, Switzer-

2(1) of the Convention, the “UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules” unless the respondent State has not made a reservation as a Party of the Convention. According to Article 6, hearings must be public unless there is a confidentiality exception or a need to protect information. Despite these gains, as a rule, ICSID hearings are confidential. Nevertheless, “unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons” to participate in the hearings.¹³⁷ Clearly, the UNCITRAL Rules on Transparency go beyond the ICSID Arbitration Rules and take care of the public interest as an essential point in tribunal proceedings.¹³⁸

Another dimension of the public interest debate is its clash with the common interest in international law. The rising trend in regard to universal human values actually empowers the common interest of the international community against national public interests.¹³⁹ For example, the Inter-American Court of Human Rights recognized the common interest concept, and it determined that “the object and purpose of the [American Convention on Human Rights] is not the exchange of the reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.”¹⁴⁰ Similarly, there is increased acceptance of the independence of human rights issues in the doctrine, although these rights are reciprocal to those of

land, Cameroon, Gambia, and Mauritius) have ratified the Convention thus far. *Status of Treaties*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en. (last visited Feb. 26, 2019). *See also* U.N. Convention on Transparency in Treaty-based Investor-State Arbitration, Feb. 19, 2015, 54 I.L.M. 751 [hereinafter Mauritius Convention].

137. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES [ICSID], ICSID CONVENTION, REGULATIONS AND RULES r. 32(2), at 115 (2006), https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf [hereinafter ICSID ARBITRATION RULES].

138. *See* UNCITRAL Rules on Transparency, *supra* note 132 art. 1(4), at 6.

139. ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 11 (2004).

140. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 27 (Sept. 24, 1982).

the States.¹⁴¹ Bruno Simma commented more generally and concluded international law is entering a new stage where it eliminates the distinctions between governments; instead, it raises the pillar of common interests that belong to the whole international community.¹⁴² Likewise, Louis Henkin agrees that universal human values gradually have superseded nation-State values in international law.¹⁴³ This thought also was demonstrated by Thomas Joseph Lawrence approximately one hundred years ago. He indicated that nations chased their interest naturally, but he asserted the policymakers should go beyond the public interest and make a more fair and well-founded international system.¹⁴⁴ He also pointed out it was a mistake to debate global controversies with patriotic sentiment, and he considered such disagreements national issues rather than international.¹⁴⁵

Investment disputes involve interest conflict between investors and States. However, in some instances regarding environmental issues or human rights, common interests of the international community become relevant.¹⁴⁶ Arbitral tribunals may tend to take into consideration “common interest” arguments as far as their relevance with parties’ benefits. However, increasing *amicus curiae* submissions and allegations of violation concerning rules of the environment protection and human rights in foreign investment cases reflect that “common interest” concept applicable to the international investment law.¹⁴⁷ Even though, so far in the practice of investment arbitrations, defenses of States have not been progressed concerning the preservation of public interest due to human rights consideration. Likewise, *amicus curiae* submissions mostly lack justification about the public

141. See Yoshifumi Tanaka, *Protection of Community Interests in International Law: The Case of the Law of the Sea*, 15 MAX PLANCK Y.B. U.N. L. 329, 334-335 (2011).

142. Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L., 265, 268 (2009).

143. Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L., 31, 32-33 (1995).

144. THOMAS JOSEPH LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW*, 15 (1910).

145. *Id.* at 101.

146. Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA, 1080 (Ulrich Fastenrath, et al. eds., 2011).

147. *Id.* at 1096.

interest concerns relating to the facts of disputes.¹⁴⁸ *Amicus curiae* submissions may be accepted by the tribunals after consultations with parties of the dispute. There are some requirements in the non-disputing party submissions which should be satisfied. First, such a submission must assist the tribunal in the decision making of a factual or legal matter. Second, it must address the matter within the scope of a dispute. Third, a non-disputing party must have a substantial interest in the proceeding.¹⁴⁹ In the first drafts of 2006 amendments to ICSID Arbitration Rules article 37(2), non-disputing party defines as a “person or State.” This wording, however, was found too restrictive and changed as “person or entity.” There is no doubt that the “entity” term encompasses the States.¹⁵⁰ UNCITRAL Rules on Transparency elaborates the issue and separates the provisions as “submission by a third person” (art. 4) and “submission by a non-disputing party to the treaty” (art. 5). “Submission of a non-disputing party” also exist effects on the investment dispute. In this case, the Tribunal reviewed each relevant measure adopted in other fields of international law in addition to the investment law. In ECtHR, ICC, ICTY, and ICTR allow participation of Contracting States, organizations and persons as

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148. Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT’L L. 87 (2014). The author gives the example of *Suez v. Argentine* case. In that case, Argentine and the *amicus curiae* submissions asserted that population’s right to water enables ignoring the obligations under the BITs even if those treaties do not contain such necessity clauses. But the tribunal did not agree to this claim because neither BITs nor international law provides an opportunity like that. In the view of the tribunal, human rights and investment treaty obligations are respectively considerable and equal. Therefore, they are not inconsistent or contradictory. *See, Suez v. Argentine*, Decision on Liability, ICSID Case No. ARB/03/19 (2010), ¶ 262. I am of the opinion that the conclusion of the tribunal is correct, but it missed some features of the relationship between human rights and investment law. Both field separately exists under the international law, but it does not mean that their obligations could not be rival or competitor in some disputes. Therefore, there is a need for explanation in such circumstances about the competing obligations and which one is more relevant in the context of the dispute. Admittedly, it is crucial to choose the correct judicial body for the case either human rights court or investment arbitration tribunal in such a dispute.
149. *See*, Article 37(2) of ICSID Arbitration Rules. “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration” preserves first and third requirements however it excludes the second requirement in the determination of acceptance the written submission of a non-disputing party. *See*, Article 4(3) of UNCITRAL Rules on Transparency.
150. Eloise Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID Rev/FILJ, 368 (2007).

amicus curiae, however, ICJ and ITLOS only accept States and international organizations for written submissions in advisory opinions or contentious proceedings as *amicus curiae*.¹⁵¹

Positive sides of third-party submissions are enumerated as their assistance to provide predictability and stability of investment arbitration and to find the correct interpretation of the treaty.¹⁵² Also, there is another benefit which is asserted about the *amicus curiae* submissions concerning their potential role in the preclusion of fragmentation in international law.¹⁵³ *AES v. Hungary* case is exemplified in the doctrine regarding this assertion¹⁵⁴ which the European Commission's *amicus curiae* submission had been taken into consideration by the tribunal regarding the European Union's (EU) position about the disagreement.¹⁵⁵ Thus, self-contained regimes may more easily reconcile in international law with each other such as EU law and investment law in that case. Last, maybe the most prominent argument which has been claimed by the favors of third-party submissions is it will serve more accountability in investor-State arbitration and eliminate public concerns.¹⁵⁶

To the contrary, opponents of third-party submissions argue that respondent States can represent the public interest and there is no need for NGO's participation in the proceedings. Moreover, NGO's specific agendas could expand the dispute context.¹⁵⁷ For example, in "*Methanex v. United States of America*" case, unlike the U.S. Government arguments about public health concerning undertaken measures, NGO's maintained that environmental issues exist in the dispute.¹⁵⁸ In my view, probably for that reason, unlike ICSID Rules,

151. Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 275 (2005).

152. Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, 345 (2016).

153. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 218 (2011).

154. *Id.* at 217.

155. AES Summit Generation Limited AES-Tisza Erömi Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶ 8.2 (Sep. 23, 2010).

156. Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, 16(2) REV. EUR. CMTY. & INT'L ENVTL. L. 239 (2007).

157. *Id.* See also, Levine, *supra* note 153, at 215.

158. *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," ¶¶ 6-8 (Jan. 15,

UNCITRAL Rules on Transparency excluded one of the acceptance requirements of arbitral tribunals about the third-party submissions which require non-disputing parties addressing the issue within the context of the dispute.¹⁵⁹ Hence, it will be easier to accept amicus curiae submissions for arbitral tribunals. Another counter-argument against transparency is that it has a potential risk, through public proceedings, of disclosing confidential information such as the trade secrets of investors.¹⁶⁰ There is also a discrete critique which asserts that third-party participations may increase the length and process of investor-State arbitrations.¹⁶¹

Consequently, the rising demand for transparency and admittance of “public interest” existence in the litigations affects the new rules in international investment arbitration. However, consideration of “public interests” always does not guarantee or justify interventions to the investors by the host States. For instance, in the dispute of “*Santa Elena v. Costa Rica*,” the Tribunal explicitly pointed out that even if an expropriation of investment has been carrying out for environmental reasons, it does not change the legal character of adequate compensation.¹⁶² According to the Tribunal “public purposes” concerning environmental issues do not affect the duty to pay compensation for expropriation of investor’s property.¹⁶³ *Kulick* commented that the majority of the investment tribunals endorsed (global) public interest considerations either weakly or strongly. Nevertheless, *Metalclad*, *Santa Elena*, and *Tecmed* Tribunals denied holding up environmental concerns against investor rights.¹⁶⁴ Regarding the compensation issue, when we look at the Article 13 of the Energy Charter Treaty and Article 1110 of the NAFTA, these provisions regulate that

2001). It had been emphasized in the submissions that there is a need for amicus participation for preventing the failure to consider environmental and sustainable development goals such as happened in “*Metalclad Corporation v. United Mexican States*” case which known as very restrictive decision about the regulation power of States. Also, it was argued in the submissions that the dispute is concerning the balance between the implementation of environmental regulations and investor’s property rights.

159. *See, supra* note 149.

160. Tienhaara, *supra* note 156, at 240, Levine, *supra* note 153, at 220.

161. *Id.*

162. *Santa Elena v. Costa Rica*, Final Award, ICSID Case No. ARB/96/1, (2000), ICSID Rev/FILJ, ¶71 at 192.

163. *Id.* ¶72 at 192.

164. ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW, 262 (2012).

requirements of “nationalization or expropriation of an investment” and “a measure tantamount to nationalization or expropriation of an investment.” Thus, such a measure must be “for a purpose which is in the public interest, non-discriminatory, carried out under due process of law and accompanied by the payment of prompt, adequate and effective compensation.”¹⁶⁵

There is a remarkable critique which defends the common concerns of the international community and asserts that such disputes are unsuitable for arbitration because of arbitrators are appointed by the disputing parties with private contracts and cannot pretend like impartial judges in State courts. Against that critique, some authors think that arbitrators are impartial and independent dispute resolvers who interpret and apply the law and are subject to various mechanisms that can prevent private interests from taking precedence over public interests.¹⁶⁶ *Schill* suggests analyzing investment law with the glasses of comparative public law which involves domestic public law and other branches of international law as well.¹⁶⁷ For instance, the author explained that the principle of proportionality, which is derived from national public laws for the purpose of providing a balance between investor protection and public interests, can accommodate non-investment concerns and protect of investors’ rights.¹⁶⁸

4. The Proportionality in International Law

4.1. The Proportionality Analysis and Its Reflections under the Sub-Branched of International Law

In international law, proportionality emerges as one of the “general principles of law” or as a rule of “customary international law” or as a “treaty provision” depending on the context of the regime.¹⁶⁹ In terms of some branches of international law, the “proportionality” plays a significant role in settlement of disputes like the “use of

165. Article 13 (1) of Energy Charter Treaty and article 1110 (1) of the NAFTA. *See also* for explanations; MALCOLM N. SHAW, *INTERNATIONAL LAW*, 835 (2008).

166. Brower & Schill, *supra* note 89, at 489. *See also*, Yen, *supra* note 124, at 26. Justifiably, the author pointed delaying attempts of respondents regarding the proceedings by proposing disqualification of an arbitrator. So that, such disqualification proposals do not always withstand suspicion about the impartiality of the arbitrators.

167. Schill, *supra* note 120, at 85.

168. *Id.* at 98.

169. GEBHARD BÜCHELER, *PROPORTIONALITY IN INVESTOR-STATE ARBITRATION*, 67 (2015).

force”.¹⁷⁰ *Higgins* also evaluated the proportionality concept under the different sub-branches of international law. The author prominently indicated that proportionality plays a vital role especially in the maritime delimitation and the use of force. Also added that it is a well-accepted principle in the doctrine under the *jus in bello* concerning its transformation to the specific rules according to the Protocols of 1949 Geneva Conventions. Human rights law is another area which proportionality has been used as a criterion for restriction of freedom, and it has a separate meaning beside necessity (in democratic societies).¹⁷¹

Each regime under the international law has its particular assessment method of proportionality. Admittedly, there are standard features about this principle, but that does not mean there is a “proportionality test” which is tailored for application to all special regimes in international law.¹⁷² The common features (or requirements) of the “proportionality analysis” involves four steps. The first step is that the measure which was undertaken by the State must have a proper purpose, second that the chosen measure and the purpose must have a rational link, and third that the chosen measure must be necessary. It means that there must be no other eligible measure for reaching to the same purpose. The fourth and last step is making a balance between public interest and private interest in a strict manner (*stricto sensu*).¹⁷³

170. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715 (2008). (The principle of proportionality does not only emerge in the armed conflicts but also in the trade or investment disputes and the restriction of human rights.). *See also*, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993).

171. *Higgins*, *supra* note 139, 236-237. *Higgins* also indicated her skepticism about the principle and considered that the status of proportionality as a “general principle of law” is doubtful. Moreover, the author thought that even though the proportionality principle has an essential role in the delimitation of maritime boundaries with the equity principle, it still has full of uncertainties. *Id.* at 230.

172. *See*, Ulf Linderfalk, *Towards A More Constructive Analysis of the Identity of Special Regimes in International Law-The Case of Proportionality*, 2 CAMBRIDGE J. INT’L & COMP. L. 874-878 (2013).

173. AHARON BARAK, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 3 (2012). *See also*, Sweet & Cananea, *supra* note 25, at 917-918. Except for the Barak’s book, in the various studies about the proportionality, authors prefer combining two conditions as one condition; so that, their proportionality analysis involves three steps.

Neither investment arbitration tribunals¹⁷⁴ nor WTO judicial bodies¹⁷⁵ rigorously apply “proportionality analysis” devoted to its steps. Instead, they utilize this principle pragmatically and more in an uncomplicated manner. However, this pragmatic approach has been criticized by various authors. About the issue, *Tecmed v. Mexico* case is very familiar to the international lawyers. The main point of the dispute is the rejection of authorization renewal to operate the landfill by “National Ecology Institute of Mexico” (INE) which is an agency within the Ministry of Environment.¹⁷⁶ In that case, the arbitral tribunal points out that the exigency of reasonable relationship in proportionality between the weight imposed on the foreign investor and the aim expected from the expropriation measure. The Tribunal quoted from ECtHR decisions and indicated that unlike nationals, non-nationals are more defenseless against the host State’s legislation and actions. In this manner, different considerations may apply to non-nationals in terms of “public interest” concept. Thus, it is possible that to bear a greater burden to nationals concerning the “public interest.”¹⁷⁷ The Tribunal also considered that political situations arising from public pressure justified the State’s resolution.¹⁷⁸ However, it concluded that the respondent State did not present any evidence regarding community opposition about consequences of the operation of the Landfill on the environment or the public health.¹⁷⁹ Moreover, the Tribunal reviewed the “fair and equitable treatment” as an expression and part of “good faith” (*bona fide*) principle and, considered that “Article 4(1) of the Spain-Mexico BIT” requires the “Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”¹⁸⁰ Thus, the foreign investor expects that the host State to act consistently not arbitrarily. Also, the investor may know beforehand “any rules and

174. See, Prabhash Ranjan, *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal*, 3 CAMBRIDGE J. INT’L & COMP. L. 864 (2014).

175. Bücheler, *supra* note 169, at 70.

176. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 36, 39 (May 29, 2003).

177. *Id.* at 122.

178. *Id.* at 128.

179. *Id.* at 144.

180. *Id.* at 153-154.

regulations as well as the goals of the relevant policies and administrative practices which will govern its investments.” Therefore, the government must not arbitrarily revoke any past decision or permission which the investor trusted and planned its commercial or business activities.¹⁸¹

The Tribunal’s decision is criticized in the doctrine because it bypassed some elements of the proportionality analysis such as appraising the necessity of the measure.¹⁸² There is another critique about the comprehension of “public interest” by the Tribunal which was asserted that it occurred in a local way. As stated in the detailed critique by *Kulick*, despite quoting *Santa Elena* decision concerning the “public interest” existence does not affect the compensation obligation,¹⁸³ the *Tecmed* Tribunal constructed its reasoning on the idea of “public interest” is an internal concept which serves the interest of the national community.¹⁸⁴ Thus, according to *Kulick*, the Tribunal concluded that there is a requirement of different treatment to domestic investors rather than the foreign investors with regards to participating public interest.¹⁸⁵ Lastly, maybe the most prominent critique is about the appraisements by the *Tecmed* Tribunal concerning the “fair and equitable treatment.” According to *Crawford*, this is an attempt which aiming to rewrite the standard of “fair and equitable treatment” through referring to the hypothetical expectations instead of the specific expectations derived from the facts of each case. Therefore, he called that approach as a “utopian standard” which many governments will fail to meet it.¹⁸⁶ In relation to the subject, it may be said that the standard of “legitimate expectations” which is a useful guide for investment tribunals expanded through that decision.

The standard of “legitimate expectations” is a part of the general principle of “legal certainty” in EU Law and ECHR Law which de-

181. *Id.* at 154.

182. *See*, Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT’L ECON. L. 232-233 (2012). *See also*, Ranjan, *supra* note 174, at 865.

183. *See*, *Tecmed, S.A. v. The United Mexican States*, *supra* note 176, ¶ 121.

184. *Kulick*, *supra* note 164, at 247, 248.

185. *Id.* at 248. (The author defends that the tribunal’s consideration did not coincide with globalized economy’s facts. Indeed, a company despite it has the foreign nationality, can have stronger economic relations in another country.).

186. JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 615 (2012).

rived from domestic laws.¹⁸⁷ For the ECtHR, enacting statutes for the expropriation of properties mostly have “public interest” including the consideration of political, economic and social issues. It seems that the Court recognizes a wide margin of appreciation for national authorities beforehand. However, it also adds that if legislature’s decision has no reasonable foundation about what is the public interest, legitimate expectations of the relevant person may be infringed.¹⁸⁸ Furthermore, the ECtHR has indicated in its various decisions that an applicant have a “legitimate expectation” which “must be of nature, more concrete than a mere hope and be based on a legal provision or a legal act” according to the proper interpretation and implementation of the national law.¹⁸⁹ Concerning the matter, the *Stretch v. The United Kingdom* case has some resemblances with *Tecmed* case in terms of facts and the conclusion.¹⁹⁰ As noted by various writers, the standard of legitimate expectations albeit it has some differences under the separate legal regimes such as national laws, ECHR law, and investment law, it preserves its core elements under each regime.¹⁹¹

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187. VENICE COMMISSION OF THE COUNCIL OF EUROPE, RULE OF LAW CHECKLIST 26 (2016). The Venice Commission evaluates the principle of “legal certainty” under eight sub-headings including the “legitimate expectations.” Indeed, from the context of international investment law, it is also a fact that the “rule of law,” “independent and efficient judicial system,” and the “legal certainty” are critical elements of the favorable investment climate in a country. See, Herdegen, *supra* note 1, at 354.
188. See, e.g., *James and Others v. The United Kingdom*, 98-B Eur. Ct. H.R. (ser. A) at 32-33 ¶ 46 (1986); *N.K.M. v. Hungary*, Eur. Ct. H.R. ¶ 37 (2013).
189. See, e.g., *Bélané Nagy v. Hungary*, Eur. Ct. H.R. ¶ 75 (2016); *Trgo v. Croatia*, Eur. Ct. H.R. ¶ 41 (2009); *Maurice v. France*, 2005-IX, Eur. Ct. H.R. ¶ 63; *Kopecký v. Slovakia*, 2004-IX, Eur. Ct. H.R. ¶ 50; *Pressos Compania Naviera S.A. v. Belgium*, 332 Eur. Ct. H.R. (ser. A) at 21 ¶ 29 (1995); *Pine Valley Developments Ltd and Others v. Ireland*, 222 Eur. Ct. H.R. (ser. A) at 23 ¶ 51 (1991).
190. See, *Stretch v. the United Kingdom*, Eur. Ct. H.R. ¶¶ 33-35 (2003). The applicant, in that case, contracted to lease land from Dorchester Council for a term of 22 years. The lease contract contains an option for renewal for 21 years. Although the applicant gave notice for exercising that option, West Dorset Council who is the successor of the Dorchester as a local authority had considered that its predecessor acted *ultra vires* while granting the option. Hence, according to the Council, the renewal option was invalid. The approach of West Dorset Council was recognized by the English courts likewise. By contrast that, the ECtHR determined that neither party of the agreement had been aware of any legal obstacle when they were dealing the option. Therefore, the Court considered that the applicant had a legitimate expectation for the exercising of renewal option regarding the purposes of “Article 1 of Protocol No. 1 to the ECHR.”
191. See, e.g., Rimantas Daujotas & Ramūnas Audzevičius, *The Concept of Legitimate Expectation in Investor-State Arbitration and the European Court of Human Rights*, 6

Similar to *Crawford*, *Schill* evaluated that the reasoning of the *Tecmed* Tribunal has a severe weakness concerning the interpretation of “fair and equitable treatment.” For the author, interpretation of “fair and equitable treatment” in the *Tecmed* case is acceptable but not a necessary one.¹⁹² In that vein, some tribunals have followed up the path of *Tecmed* Tribunal. However, the *Saluka* Tribunal adopted more refined approach regarding the interpretation of “fair and equitable treatment.”¹⁹³ The Tribunal indicated that the expectations of foreign investors include fundamental standards such as “good faith,” “due process,” and “non-discrimination.”¹⁹⁴ However, it observed that if these terms are taken too literally, “host States’ obligations would be inappropriate and unrealistic.” The “fair and equitable treatment” standard cannot solely be specified by foreign investors’ subjective considerations.¹⁹⁵ No investor may rationally expect that the conditions at the time of making the investment maintain without alteration. For determination of whether there is an infringement of inves-

Вестник Международного Коммерческого Арбитража (Bulletin of the International Commercial Arbitration), 12 (2012) Available at SSRN: <https://ssrn.com/abstract=2197157>; Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID Rev/FILJ, 121 (2013). Compare, ROLAND KLAGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW, 164, 187 (2011). *Klager* points out that investment tribunals have not established yet comprehensive criteria relating the conflict between investors’ legitimate expectations and host States’ public interests. Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49 ALBERTA L. REV. 226, 234-235 (2011). *Zeyl* acknowledges the core elements of the “legitimate expectations” are same in the each one of legal regimes. However, he criticizes the way of implementation of that standard because of against it there are various restrictive doctrines in the domestic laws such as ultra vires principle and separation of powers doctrine, although, investment tribunals have not applied such restriction. Cf. Sornarajah, *supra* note 62, at 354-355. *Sornarajah* opposes the view that the standard of “legitimate expectations” is derived from domestic laws and it can be acknowledged as a “general principle of law.” According to him, that standard has rarely been used as a substantive principle because of the practical difficulties during the proceedings. Therefore, *Sornarajah* asserts that “legitimate expectations” only provide procedural protection under the English law, so that, it has been used as a substantive rule by ICSID tribunals for justifying their Awards concerning the damages caused by the breach of BITs.

192. STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW, 335 (2009).

193. *Id.* at 337.

194. *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 303 (Mar. 17, 2006).

195. *Id.* ¶ 304.

tors' legitimate and reasonable expectations, public interest considerations also must be taken into account by the tribunals concerning the host States' regulation process.¹⁹⁶ Thus, the *Saluka* Tribunal emphasized the importance of proportionality between "investors' expectations" and "public interest considerations" of States. Parallel to the inference of "investment conditions would not maintain without change," the *Duke v. Ecuador*,¹⁹⁷ *Bayindir v. Pakistan*,¹⁹⁸ and *Occidental v. Ecuador*¹⁹⁹ Tribunals prominently noted investors must take into account all circumstances of the host State.²⁰⁰

Unlike the *Tecmed* Tribunal, in the dispute of *Occidental v. Ecuador*, the Tribunal evaluated the "necessity of the measure" in the proportionality test. However, it has also mentioned and has been influenced by the *Tecmed* Award in its judgment.²⁰¹ The Tribunal reviewed that whether the Ecuador administration has any other option except *Caducidad (Expiration) Decree* or not. Then the Tribunal considered that there are some options could be made by Ecuador; therefore, it found that respondent's argument is invalid.²⁰² The same issue was discussed in the annulment proceeding also. Ecuador claimed that the principle of proportionality has not been included by the Par-

196. *Id.* ¶ 305.

197. According to the tribunal "the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State." *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008). The tribunal also bore in mind that the duty to meet the "legitimate expectations" of the investor and population of the State through establishing certainty in the "rule of law." It is understood from that explanation, so as the Tribunal took into consideration of the reality that standard of "legitimate expectations" is a part of "legal certainty" under the "rule of law." *Id.* ¶ 117.

198. *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 Award, ¶179 (Aug. 27, 2009). In that dispute, the tribunal reviewed the expectations of investors, in-depth relating whether recognized as legitimate or not. In this context, the tribunal determined the claimant was aware fragility of the political conditions in Pakistan. The claimant also admitted that it was aware of the potential adverse effect of a change in government. Therefore, the tribunal did not accept the allegation of investor's legitimate expectations be frustrated. *Id.* ¶¶ 193-199.

199. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶383 (Oct. 5, 2012). The Tribunal denied the claimants' assertion regarding the *Caducidad Decree* frustrated their legitimate expectations.

200. Potestà, *supra* note 191, at 118-119.

201. *Occidental v. Ecuador*, *supra* note 199, ¶¶ 406-409.

202. *Id.* ¶¶ 428-436.

ticipation Contract, Ecuadorian law, or in customary international law. But the *ad hoc* Committee did not agree with this argument about the existence of the “error of laws.”²⁰³ Unlike, it shared the same idea about the Tribunal’s findings that the Ecuadorian law and international law contained the principle of proportionality as a general principle of punitive and tort law.²⁰⁴

When switching the scope of review from investment case law to WTO jurisprudence, coming across sophisticated issues is inevitable. *Andenas* and *Zleptnig* pointed out that balancing interests through WTO Agreements is a complicated process and requires comparative research about the proportionality.²⁰⁵ The complexity is originated from the critical mission which is aiming to accomplish the balance between trade interests and non-trade interests.²⁰⁶ The *Korea-Beef* case is an excellent example for reviewing WTO jurisprudence about the proportionality. In that dispute, Korea implemented a quota, dual retail system, and other measures related to importation beef products then defended all of the measures by saying that they were consistent with GATT 1994.²⁰⁷ The panel applied proportionality analysis regarding the dual retail system. However, as mentioned above,²⁰⁸ it did not pursue the steps of the proportionality analysis. Directly, the panel examined the dual retail system and concluded that this implementation was beyond the goals of *Korean Unfair Competition Act*. Therefore, it decided that dual retail system regarding the importation of beef products is disproportionate measure and it could not be justified by “Article XX(d) of GATT.”²⁰⁹ In the Appellate Body phase of the proceedings, Korea claimed that the panel erred in the applying Article XX(d) of GATT. According to the Korean government’s consideration, there is no alternative measure would provide

203. *Occidental v. Ecuador*, Decision on Annulment of the Award, ¶ 349 (Nov. 2, 2015). However, the Committee partially annulled the Award because of the error in the *ratione personae* jurisdiction of the Tribunal concerned transference of %40 shares by claimant into a new investor. *See, Id.* ¶¶ 257-272.

204. *Id.* ¶ 350.

205. Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: in Comparative Perspective*, 42 *TEX. INT’L L. J.* 374 (2007).

206. *Id.* at 377.

207. Panel Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/R WT/DS169/R (adopted Jul. 31, 2000) ¶¶ 62, 146-150. (hereinafter *Korea-Beef Panel Report*).

208. *See, supra* at 30-31.

209. *Korea-Beef Panel Report*, ¶¶ 496, 675-676.

the same conclusion about combating fraud in the market of beef products except the dual retail system.²¹⁰ Nevertheless, the Appellate Body did not accept that claim.²¹¹ Thus, the panel's decision which accepting the dual retail system as a disproportionate measure approved by the Appellate Body.

4.2. Use of Force and The Principle of Proportionality

The principle of proportionality has a different meaning in the use of force compared to other sub-branches of international law in terms of limitation harming others.²¹² Hence, in *jus ad bellum*, proportionality is not a decisive factor in some situations concerning which States can legitimately resort to force. Instead, it observes the way of use of force which is applied.²¹³

Proportionality has become a more important principle in the law of the sea related to the use of force. Recent cases in that field have proved this reality. The arbitration practice under Annex VII of UNCLOS and ITLOS cases have some examples. The "*M/V Saiga (No. 2)*" case which is the first dispute submitted to the ITLOS contains excessive use of force allegation. The ITLOS explicitly stated in the judgment that coastal authorities must avoid excessive use of force which is beyond the reasonable and necessary circumstances.²¹⁴ Afterward, the Tribunal decided that when respondent State's (Guinean) officers used their guns, they did not act carefully about the safety of the ship and the human life on board due to the two persons' injuries and significant damages on board. Thus, the Tribunal found that Guinea violated flag State's (Saint Vincent and the Grenadines) rights under the international law.²¹⁵ By such decisions, arise a view that the "considerations of humanity" increasingly has been displayed in the proportionality test regarding *jus ad bellum* conflicts.²¹⁶ The "Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988" has specific provisions concerning that matter. Article 8*bis* (9) rules that "under

210. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/R WT/DS169/R (adopted Dec. 11, 2000) ¶ 175.

211. *Id.* ¶ 180.

212. Higgins, *supra* note 139, 230.

213. Judith Gardam, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES, 20 (2003).

214. *See, supra* note 109.

215. *Id.* 158-159.

216. *See, Gardam, supra* note 213, at 209.

this article, the use of force must be avoided except when necessary to ensure the safety of officials and persons on board. Any use of force according to this article must not exceed the minimum degree of force which is necessary and reasonable in the circumstances.” Outside the context of that provision, the “law of the sea” tribunals have determined that boarding to a vessel and then using excessive force against persons on board would violate international law.²¹⁷

Arbitral tribunals which are constituted under the Annex VII of UNCLOS has continued the ITLOS’ approach in their cases. For instance, Annex VII arbitral tribunal in the *Arctic Sunrise* case discussed the principles of reasonableness, necessity, and proportionality. The claimant (Netherlands) in that case argued that respondent’s (Russia) actions about suppression to protests in the sea must be reasonable and when they used force, it is essential to obey customary law principles of necessity and proportionality.²¹⁸ Annex VII Tribunal accepted that for the protection of their sovereign rights, coastal States might undertake appropriate measures pursuant to their legitimate aim. Also, the Tribunal indicated that such measures must fulfill the requirements of the principles of reasonableness, necessity, and proportionality.²¹⁹ However, the Tribunal identified some breaches under the UNCLOS regarding unlawful boarding, seizure, and detention of the vessel; so that, it concluded that there is no need to consider the reasonableness, necessity, and proportionality of relevant measures undertaken by respondent.²²⁰

217. ANDREW CLAPHAM, *BRIERLY’S LAW OF NATIONS*, 231 (2014).

218. The “Arctic Sunrise Arbitration” (Netherlands v. Russia), Award on the Merits, 52, ¶ 221 (Perm. Ct. Arb. 2015) It must be mentioned one of the features of that argument. The Netherlands have evaluated the proportionality as a part of the customary law, unlike Ecuador. However, in the *Occidental v. Ecuador* case, Ecuador asserted that customary law does not involve the principle of proportionality. See, *supra* note 203. That difference between two arguments could be explained merely by the content of the cases which belong to different special regimes under the international law. The nature of a dispute can be able to alter the normative position of proportionality. If the proportionality principle is evaluated by an international judicial body in the context of the “use of force,” it must be considered as a part of the customary law by virtue of the ICJ’s jurisprudence. On the other hand, I think that the proportionality principle is acceptable as one of the “general principles of law” in other special regimes of international law such as the investment law, WTO law, and the delimitation of maritime boundaries, under the Article 38/1(c) of the ICJ Statute.

219. *Arctic Sunrise Arbitration, The Merits*, 82, ¶ 326.

220. *Id.* 83, ¶ 333.

More recently another dispute gives plenty of clues from the standpoint of the “law of the sea” tribunals related the principle of proportionality. The Annex VII Tribunal of the *Duzgit Integrity* case reviewed the proportionality dispute between parties. First of all, the Tribunal determined that Article 293 of UNCLOS permits to the courts and tribunals for utilizing relevant general international law rules and principles which not incompatible with UNCLOS. Notably, it emphasized that the principle of reasonableness and its elements which are principles of necessity and proportionality not only applicable in use of force cases but also covers law enforcement measures.²²¹ The substance of the concerned dispute was “ship to ship transfer” and the disagreement between parties was originated from alleged charges of smuggling concluded with the detention of vessel, fines, and indemnification. The Tribunal considered that custom fines imposed by the respondent (São Tomé) which amount more than a one-million-euro were disproportionate. Moreover, it decided that the detention of the vessel and the master, monetary sanctions, and confiscation of entire cargo was excessive compared to the alleged offenses.²²²

Abundant decisions rendered by various international judicial bodies utilize the doctrine of proportionality as a general principle of international law; nonetheless, the principle had preserved its vagueness as a legal norm until recently.²²³ However, it has achieved its legitimacy because of its frequent practice and has mostly wriggled out its ambiguousness.²²⁴

4.3. The Principle of Proportionality as a Legal Balancing Tool Between the Investors’ Rights and the Host States’ Public Interests

International investment agreements do not contain a proportionality analysis; nevertheless, investment tribunals review the cases which they encountered regarding whether the disputes met the requirements of the proportionality principle.²²⁵ However, almost none

221. The *Duzgit Integrity* Arbitration (Malta v. São Tomé and Príncipe), Award, 54-55, ¶¶ 208-210 (Perm. Ct. Arb. 2016).

222. *Id.* 69-71, ¶¶ 254-262.

223. Franck, *supra* note 170, at 716.

224. *Id.* at 718.

225. See, e.g., Bücheler, *supra* note 169, at 132; N. Jansen Calamita, *The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-2014, 372 (Andrea K. Bjorklund, ed., 2015).

of the awards rendered by the arbitral tribunals explicitly resort to the proportionality either as a “general principle of law” or a rule of “customary international law.”²²⁶ Nonetheless, in my opinion, the expanding impact of “public interest” concept in the investor-State arbitration, urges arbitral tribunals to resort the proportionality as a “general principle of law.” Although some doubts have been asserted by the various authors regarding the admittance of proportionality as a general principle of law, such approach can change depending on the acceptance of different views in the debate regarding roots of “the general principles of law recognized by civilized nations” under the “Article 38(1)(c) of Statute of the ICJ.”²²⁷

There are three views about the meaning of “Article 38(1)(c) of Statute of ICJ/PCIJ.” The first view, which is expressed by various authors such as *Anzilotti*, *Castberg* and, *Morelli*, claims that that provision primarily refers to the “general principles of international law” and only in case of secondary situations it admits to obtaining from domestic law principles of different States.²²⁸ The second view, which is supported by *Strupp* and *Scerni*, argues that Article 38(1)(c) can only refer to obtaining from domestic law principles.²²⁹ The third view asserted by *Lauterpacht* claims that “the general principles of law” are, in reality, recognized principles of private law, which are applied both by the international tribunals and the States.²³⁰

226. Calamita, *supra* note 225, at 168.

227. *Id.* footnote 56. The author indicated the lack of acceptance of the proportionality principle as a “general principle of law” in domestic laws outside of Europe and North America, and he gave the example of China which does not recognize proportionality in its constitutional & administrative law. However, a Chinese author expressed that although the absence of proportionality principle in Chinese administrative law and its Constitution, that principle can be found in Chinese traditional culture as a reflection of moderation. Han Xiuli, *On the Application of the Principle of Proportionality in ICSID Arbitration and Proposals to Government of the People’s Republic of China*, 13 *James Cook U. L. Rev.* 254 (2006). Moreover, *Xiuli* suggested to the Chinese government be more careful against BIT clauses regarding ICSID jurisdiction for reducing the probability of implementation of the proportionality principle. He also recommended to the government for the pursuance of legitimate objectives against foreign investors and application of regulatory investment measures according to the proportionality principle. *Xiuli*, at 257. For a suspicious view about the implementation of proportionality as a general principle of law, *see also*, Higgins, *supra* note 139, at 230.

228. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, 2 (1987).

229. *Id.* at 3.

230. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW*, 71, 85 (1927).

In case of the acceptance of second or third view, the proportionality principle cannot be utilized under the “Article 38(1)(c) of ICJ Statute.” Because as mentioned above, the proportionality test neither exists in all civilized nations’ laws nor is admitted as a principle of private law. However, if the first view is upheld, the proportionality would be recognized as a “general principle of international law” especially in the event of an absence of a treaty provision. I think this approach compatible with the draft history of the “Article 38(1)(c) of ICJ/PCIJ Statute.” The Advisory Committee of PCIJ Statute bore in mind while writing the provision that if the international law allows applying only treaties and custom, it may force international judges to commit “denial of justice” by declaring *non-liquet*.²³¹

The arrangement of balance between investors’ rights and public interest of States in expropriation provisions of investment agreements diverges from ECHR and national constitutions.²³² Therefore, that fact would not preclude the international arbitrators to construct their proportionality concept in investment matters which have a different character than other legal regimes such as ECHR and national constitutions. It does not mean that international investment arbitrators produced, an entirely new general principle of law. Instead, they can incorporate a “general principle of law” from other legal systems and apply the same principle in a different manner for providing harmonization this concept with investment law.²³³

4.4. The Proportionality Analysis in Economic Exigency Situations

One of the arguments regarding the interpretation of “Article 25 of the *ILC Draft 2001*” is this provision implicitly involves “least-restrictive-means test,” or “proportionality analysis.” Thus, that provision may be able to justify a wrongful act, if the relevant action is the “only way” for the protection of the State’s vital interest. For this reason, in economic exigency disputes before the investment tribunals, it is suggested the incorporation of the “proportionality analy-

231. Cheng, *supra* note 228, at 18.

232. BÜCHELER, *supra* note 169, at 135. The author also indicated that standard BIT provisions on expropriation had improved the investment protection compared to customary international law implications such as Calvo doctrine and principle of national treatment. Thus, contemporary investment treaties have proved that the foreign investors do not have to accept policy changes of the host States without compensation.

233. Sweet & Cananea, *supra* note 25, at 913.

sis.”²³⁴ Another argument asserted by Bücheler is that the proportionality test cannot replace the “only way” test in Article 25. Bücheler relies on the draft process of Article 25 in his argument because travaux préparatoires shows that the necessity defense in customary law usually comes into question in the disputes which contain the use of force.²³⁵

Apart from that reason, the most important one is acknowledging the “only way” requirement in Article 25 as a threshold which is higher than the proportionality test. As a codified rule of customary law, Article 25 intends to preclude States from their international obligations through necessity defense.²³⁶ Lastly, *Bücheler* suggests that if States aim to provide a balance between the public interest and investors’ rights, it is the best way for them to carry out the incorporation of the NPM provisions in BITs.²³⁷ Otherwise, Article 25 would become a “super-NPM clause” and begin to undermine BITs’ provisions in practice.²³⁸ Similarly, Sweet endorses the idea of utilizing the proportionality test in the disputes related economic crisis such as the Argentine cases.²³⁹ Beyond that, his inferences are remarkable about the topic. Sweet draws attention to the possibility that the CMS, Enron, and Sempra Tribunals arguably bore in mind that their task is based on the protection of the investments. Besides, he indicates that the members of the tribunals might be hesitate to apply the proportionality analysis to refrain from acting like “balancing judge” rather

234. See generally Bjorklund, *supra* note 40, at 487. See also August Reinisch, *Necessity in International Investment Arbitration-An Unnecessary Split of Opinions in Recent ICSID Cases?* 8 J. WORLD INVESTMENT AND TRADE, 200-01 (2007). Reinisch especially criticizes the LG&E decision because of the arbitral tribunal did not implement the proportionality test regarding whether Argentine’s economic recovery package was acceptable as the “only way” to cope with financial crisis. See *LG&E v. Argentine*, *supra* note 20, at ¶ 257. Furthermore, he justifiably points out the risk of accepting the disproportionate solutions as “only way” for the struggle with a crisis. But cf. Alvarez & Khamsi, *supra* note 24, at 447. The authors assert that neither “Article XI” nor the whole “U.S.- Argentine BIT” contains consideration of the proportionality for a balance between regulatory powers of states and the rights of foreign investors.

235. BÜCHELER, *supra* note 169, at 286.

236. *Id.* at 287.

237. *Id.* at 289.

238. *Id.* at 285.

239. Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS. 48, 70 (2010).

than “conventional arbitrators.”²⁴⁰ Consequently, after annulment decisions concerning those Tribunals’ Awards, it can be estimated that unlike traditional “state of necessity” cases in public international law, investment tribunals will begin to adopt the proportionality analysis in treaty-based arbitrations.

Conclusion

In international law, some concerns regarding human rights or preservation of the environment relevant to the international community or public of the States have become more and more influential. Therefore, eminent scholars and arbitral tribunals have taken different positions in various cases. In the history of international law, from very first case to nowadays, respondent States have been tried to justify their internationally wrongful acts by an assertion that they committed such actions for the protection of their essential interests. For that reason, international courts and tribunals have scrutinized necessity defenses of respondent States in many cases. Except for a few cases, international judicial bodies mostly have rejected the necessity defenses because of its strict requirements under the customary law which had been codified in the “Article 25 of the ILC Draft 2001.”

The necessity defense has a higher threshold than the public interest defense for its acceptance. It is understandable because the “state of necessity” is a condition which precludes the wrongfulness of an action made by respondent State; nevertheless, “public interest” is a classical argument of States in cases of expropriation of alien investors’ properties and that argument is especially meaningful in indirect expropriations. In the last years, the “public interest” argument came to the forefront under its different appearances in the investment arbitrations. Besides the preservation of interests of the international community in related disputes which have environmental or human rights matters, protecting host States’ population through the regulations of the governments has come into question commonly before the investment tribunals. Another dimension of the “public interest” concept is also remarkable. Accordingly, it has a key role in the

240. *Id.* at 75. See also Cynthia C. Galvez, “Necessity,” *Investor Rights, and State Sovereignty for NAFTA Investment Arbitration*, 46 *CORNELL INT’L L.J.* 143, 151-52 (2013).

transparency endeavor of the proceedings. It also constitutes a basis for the third-party submissions which is known as *amicus curiae*.

From the perspective of the economic analysis of law, non-economic factors must be excluded from the proceedings of the investment disputes unless there is an existence of the explicit provision in a treaty or an agreement. Accordingly, this approach prioritizes the protection of investments and leave the environmental or humanitarian consideration aside; it also does not support the doctrine of “margin of appreciation.” However, in the considerable number of tribunal decisions, environmental or human rights matters have been taken into consideration. Furthermore, numerous scholars have not embraced the idea of the exclusion of non-investment factors in the investor-State arbitrations.

Deference of the regulation power of governments has substantial importance in decision-making, but adoption of the doctrine of “margin of appreciation” to the investment disputes, features some risks. The main risk concerning the adoption of that doctrine is it may cause unbalance between the weight of the public interest of host States and foreign investors’ rights, along with their legitimate expectations. At this stage, the importance of the proportionality principle in investment disputes must be remembered. In the different areas of international law, the proportionality can play its role in the disagreements as a treaty provision, exercise of “customary international law” or a “general principle of law.” Throughout international law, proportionality can play its role in disagreement in a treaty provision, exercise of “customary international law” or a “general principle of law.” Thus, such a tribunal would find a balance between investor’s rights and a host State’s interests, as well as it may preserve the legitimacy of the investor-State arbitration system through stabilizing each parties’ benefits.

At last, it must be underlined that regarding the relationship between the “state of necessity” and the “principle of proportionality” which the “state of necessity” does not require a proportionality analysis. Customary international law proves that fact. However, “NPM clauses” in the BITs requires the proportionality analysis for the equilibrium between vital interests of the States and protection of the foreign investments. Therefore, in several cases, *ad hoc* annulment committees draw attention to the separability of necessity requirements and the NPM provisions in the BITs. Thus, the committees an-

nulled the awards since the tribunals did not review the applicability of “state of necessity” under the “customary international law” and the “NPM clauses” in the BITs separately.