MUTRAP
EU - VIETNAM
EUROPEAN TRADE POLICY AND INVESTMENT SUPPORT PROJECT

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TEXTBOOK ON INTERNATIONAL INVESTMENT LAW

Youth Publishing House, 2017

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TEXTBOOK ON INTERNATIONAL INVESTMENT LAW

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HANOI - 2017

This Textbook has been prepared with financial assistance from the European Union. The views expressed herein are those of the authors, therefore in no way reflect the official opinion of the European Union nor the Ministry of Industry and Trade.

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FOREWORD

This Textbook is one of the key outputs reflecting the support provided by the European Trade Policy and Investment Support Project (EU-MUTRAP) funded by the European Union to the Vietnamese universities.

Many national and international academics and investment law experts have contributed to this Textbook, and it was largely benefited from the scientific support and supervision of the Hanoi Law University, especially from the Faculty of International Trade and Business Law. The contributors prepared the Textbook mainly targeting law students and updated it with the recent development of the international investment law, including the new Investment Court System set up by the EU FTAs. It is an excellent example of what are the main challenges in preparing legal regimes for the regulation of foreign investment. Therefore, this Textbook is a good instrument for students, government officials and lawyers daily confronted with the challenges of a dynamic international arena. The availability of both English and Vietnamese versions will also help lawmakers and Courts respectively in their legislative and adjudicative functions. Even if international investment law is dominated by the English language, institutions shall draft legal acts and decisions in Vietnamese languages.

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PREFACE

The regulatory regime of foreign investments should normally respond to two different objectives. On one side, the attraction of foreign investments is a key element to promote the economic and social development of the host countries. On the other side, policy and lawmakers should ensure that the economic and social development is sustainable, i.e. not detrimental to some basic values such as the consumers' health, the environment, the workers' rights or any other domestic objective considered important for the community established in the investment-host States. These objectives require a strong coordination between the investment and the development policy of countries. Countries, especially those in the developing stage of growth, should avoid competition to attract investment through a regulatory race-to-the-bottom strategy, i.e. reducing the costs for foreign investors in adopting poor regulatory regimes protecting the mentioned value. Indeed, indicators show that investors are often more interested in predictable and fair investment regime in host countries than in non-sustainable incentives. Indeed, investing in countries lacking compliance with the basic environmental or social standards harmed their reputation among consumers. However, predictability and fairness of domestic investment legal regimes highly depend on political considerations. The existence of a domestic regulatory investment regime particularly favourable to foreign investment might therefore be challenged by changes in the political leadership of the host States.

International investment law raises the confidence of foreign investors about the stability of a regulatory regime even in presence of changes of countries' leadership, therefore promotes the inflows of foreign investments. In international law, international investment agreements (IIAs) gradually replaced customary international law in providing the principles to be followed by host countries in the regulatory activities towards foreign investment.

International investment law is not a new discipline for Viet Nam, which is member of several bilateral investment treaties (BITs). Since the 18th May 1990, the day of the signature of its first Bilateral Investment Treaty (with Italy), Viet Nam has participated in 65 BITs. However, BITs represent the 'old generation' of IIAs, as a 'new generation' of investment policies and rules emerged since the beginning of the XXI century, also stimulated by the debates among academics, policymakers, lawyers and businessmen about the existing boundaries and conflicts between the needs of attracting investment and the exigency to promote sustainability.

In particular, the concerns and discussions about the procedures (specific to the investment sector) to settle investment disputes (the so-called ISDS - Investor-State Dispute Settlement), normally confined to academic and diplomatic circles, reached the attention of new categories of persons. In some cases, even mass-media reported information about the debates on the opportunity to set up ISDS in the context of IIAs.

The mounting interests in international investment law was also prompted by the concerns within governments and part of the population following the initiation of ISDS proceedings by big multinationals attacking new legal acts of host States aiming to promote the sustainability of investment, therefore causing an increase of costs and alleged losses for foreign investors. At policymaker level, debates focused on the difficulties in establishing the boundaries of the scope of government activities to protect investment sustainability (e.g. through rules protecting the environment or the consumers' health) versus the rights guaranteed to foreign investors.

A 'new generation' IIAs partially reflected these debates. For example, the investment chapter of the recent EU FTAs particularly emphasized the needs of ensuring the sustainability of investment, widening the discretion of investment-host States in adopting regulations protecting values considered fundamental by the national community. Even the new Investment Court System included in the 'new generation' EU FTAs responds to the needs of ensuring the compliance of the investment disputes settlement procedures with ethics rules developed by professional associations. Viet Nam, as a party to several 'new generation' FTAs, is one of the emerging key stakeholders of the international investment law.

A bilingual Textbook on International Investment Law responds therefore to these new needs. The first and second Parts including chapters 1-8, contributed by Prof. Julien Chaisse, focused on the evolution of general principles of international investment law. In providing a comprehensive analysis of all the relevant international investment law principles, the Textbook adopted modern learning methodologies at the beginning of each chapter, the contributor clarified the main learning objectives, while at the end, there are several questions to stimulate debates among all the relevant stakeholders, i.e. students, lawyers,

government officials, judges and researchers. The third and fourth Parts including chapters 9-12, contributed by Dr. Nguyen Thanh Tam, Dr. Trinh Hai Yen, and LLM. Nguyen Quynh Trang, after introducing investor-State contracts (in Chapter 9), addressed the international investment law from the Vietnamese perspective. These chapters of the Textbook include a thorough picture of the investment agreements participated in by Viet Nam (in Chapter 10) and the analysis of the Vietnamese legislation applicable to foreign investment (in Chapter 11). The last chapter, Chapter 12, focuses on the legal framework of the investor-State dispute settlement in Viet Nam. Besides the relevant legal acts, the fourth Part provides an overview of the relevant institutions and government agencies in charge of the different aspects of Vietnamese law on foreign investment.

I am sure that this Textbook will be a valuable academic material and source of reference for those interested in international investment law. It is my hope that this Textbook will be as successful as the other books produced with the financial and expertise supports of the EU-MUTRAP Project in cooperation and under expertise supervision of the International Trade and Business Law Faculty, Hanoi Law University, i.e. the bilingual Textbook on International Trade and Business Law, largely adopted by several universities over the years in Viet Nam.

Academics well know that for each subject taught at university, there is a publication representing the pillar for building the specific relevant knowledge. I hope that, in some years, former students will still remember the 'EU-MUTRAP - HLU Textbook on International Investment Law' as an important instrument in their learning path.

P.S. I am writing this Preface in the last days of the EU-MUTRAP activities, i.e. my last working days in Viet Nam. After twelve years of intense activities (since May 19, 2005), I wish to thank all the Vietnamese persons I worked with, especially my colleagues in the EU-MUTRAP Office, more than 1,000 experts, the colleagues in the different universities, the students who attended my classes, all the friends of the Government and all other institutions. I learned a lot from all of you.

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TABLE OF ABBREVIATIONS

AA	Accord Acts
AANZFTA	ASEAN-Australia-New Zealand Free Trade Area
ACIA	ASEAN Comprehensive Investment Agreement
ADR	Alternative dispute resolution
AFTA	ASEAN Free Trade Area
AFAS	ASEAN Framework Agreement on Services
AIA	ASEAN Investment Area
ASEAN	Association of South-east Asian Nations
BCC	Business cooperation contract
BIS	Bank for International Settlements
BIT	Bilateral Investment Treaty
BOO	Build–Own–Operate Contract
BLT	Build-Lease-Transfer Contract
BTL	Build- Transfer-Lease Contract
BTAs	Bilateral Trade Agreements
CAFTA	Canada–United States Free Trade Agreement
CEPEA	Comprehensive Economic Partnership in the East Asia
CIL	Customary International Law
DCs	Developed Countries
DSB	WTO's Dispute Settlement Body
DSU	WTO's Dispute Settlement Understanding
EC	European Communities; or European Commission
ECOSOC	United Nations Economic and Social Council
E&T	Education and Trainning
EVFTA	EU-Vietnam Free Trade Agreement
EU	Europrean Union
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
FPI	Foreign Portfolio Investment
FPS	Full Protection and Security
FTAs	Free Trade Agreements
GATS	WTO General Agreement on Trade in Services
GATT	WTO General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
HKIAC	Hong Kong International Arbitration Centre
ICSID	World Bank's International Centre for the Settlement of Investment Disputes
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Centre for Dispute Resolution
IEG	Investment Experts Group

IIA	Internatioanal Investment Agreement
IGA	ASEAN Investment Guarantee Agreement
IMF	International Monetary Fund
IPAP	Investment Promotion Action Plan
IOSCO	International Organization of Securities Commissions
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
LDCs	Least-developed Countries
MAI	Multilateral Agreement on Investment
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most Favoured Nation
MUTRAP	EU-Viet Nam Multilateral Trade Assistance Project funded by the EU
NAFTA	North American Free Trade Area
NGOs	Nongovernmental Organizations
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PPP	Public–private partnership
PTAs	Preferential Trade Arrangements
RCEP	Regional Comprehensive Economic Partnership
RTAs	Regional Trade Agreements
R&T	Research and Development
SWFs	Sovereign Wealth Funds
SCM	WTO Agreement on Subsidies and Countervailing Measures
SIAC	Singapore International Arbitration Centre
TIFA	Trade and Investment Framework Agreement
TPP	Transpacific Economic Strategic Partnership Agreement
TRIMs	WTO Agreement on Trade-related Investment Measures
TRIPS	WTO Agreement on Trade-related Intellectual Property Rights
UAE	United Arab Emirates
UN	United Nation
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
USSFTA	Singapore–United States Free Trade Agreement
VCLT	Vienna Convention Law Treaties
VIAC	Vietnam International Arbitration Centre
WB	Word Bank
WTO	World Trade Organization

CONTENTS

PART ONE

INTRODUCTION

International investment law merits serious study both from private and public policy perspectives. As a matter of public policy, it merits serious study as a branch of international economic public policy, or international economic law. Increasingly, it is recognised that domestic regulation of business is within the domain of international economic law. International economic law addresses some of these concerns by promoting cooperation among states and limiting competition.

The scope of international investment law refers to the extent of the area (or subject matter) of international investment agreement. We use the terms bilateral investment treaties ("BITs") and 'bilateral investment agreements' in reference to international instruments specifically devoted to the promotion and protection of foreign investment - such as "Bilateral Investment Treaties", "Foreign Investment Promotion Agreements" or "Investment Promotion and Protection Agreements". We refer as "free trade agreements" ("FTAs") all bilateral, regional or plurilateral arrangements that seek the preferential liberalisation of investment flows, along with trade in goods and in services and, often, provide rules on other areas, such as intellectual property, competition, and movement of natural persons. Both BITs and FTAs with investment disciplines are encompassed under the broader terms of IIAs.[1]

In this respect, a number of issues are important as international investment law means international law relating to foreign investment, but also economic relations, economic development, economic institutions, and regional economic integration. Also, international investment law covers both the conduct of sovereign states in international economic relations, and the conduct of private parties involved in cross-border economic and business transactions. National, regional, and international law policy and customary practices are all elements of international investment law.

[1] Additionally, we refer to "countries" in a broad sense, so as to encompass any geographical entity with international personality and capable of conducting an independent foreign economic policy. The designations employed do not imply the expression of any opinion concerning the legal status of any country or territory.

CHAPTER ONE. OVERVIEW

CHAPTER ONE

OVERVIEW OF INTERNATIONAL INVESTMENT AND INTERNATIONAL INVESTMENT LAW

Learning Objectives
Chapter One

- Present the historical background to the current international investment law regime, including the law of diplomatic protection
- Introduce the customary international law of state responsibility for injuries to aliens, the forerunner to the current treaty-based investment protection regime
- Examine the reasons that investment treaties have come to play a dominant role in investment protection
- Present the tension between a host's interest in retaining unfettered sovereignty and an investor's interest in achieving reassurance and predictability about the regulatory environment for the duration of its investment
- Describe the kinds of political risks investors face, particularly in emerging markets
- Discuss the ways investors can assess their risks in advance
- Present the idea of the "obsolescing bargain"
- Introduce the concept of political risk insurance as an alternative or a supplement to treaty protections and dispute settlement
- Introduce the sources of international investment law

Having now outlined the notion of investment in today's treaties in Section one, this Chapter's Section two turns to the relationship between international investment and globalization. The Section three will deal with the historical development of international investment law. The Section four focuses on the scope of investment treaties. Section five is devoted to the sources of international investment law.

Section One. THE CONCEPT OF 'INVESTMENT' IN THE INTERNATIONAL TREATIES

The concept of "investment" is not a generally accepted definition and it is constantly evolving as a result of the emergence and development of new forms of investment by entrepreneurs, financiers and multinational companies. In the absence of a generally recognized definition of investment, as part of a BIT, such a definition is of paramount importance.

Because usually states consider that the international investment represents a resource assembled for a given period and for future profits, the formal definitions found in international instruments have significant variations. These differences could be classified into two broad categories, depending on the purpose of the treaty. Firstly, instruments which have as their object the border movement of capital and resources tend to define investment in restrictive terms, and consider foreign control of an enterprise as an essential element of such a definition. Secondly, the treaties which are designed to ensure investment protection tend to use broad and comprehensive definitions based on assets, not only to cover the capital that crosses borders, but also other types of assets a business. In general, BITs follow this second approach. The most recent treaties contain a relatively standard definition for direct investment abroad. These treaties therefore emerged in the 1960s and the definition of investment has since undergone very few changes.

Among all definitions of investment, the most commonly used expression is "any type of assets".[1] In this definition, it is also usual to add a list of assets to be included in the definition. The lists of assets protected under a BIT are not exhaustive, and for several reasons. Firstly, most designers of a treaty recognize the difficulty of drafting a comprehensive list. Secondly, in a deliberate way, it was decided to leave the definition of open investment, so that it can absorb new forms of investments

[1] Note that in the bilateral treaties signed by the United States, the term used is that of "any kind of investment".

as they arise. Also, a broad definition avoids the need to renegotiate the treaty in such situations. For others, it is an approach that is both synthetic and analytical which has the effect of enclosing the different elements that can be an investment.[2] Meanwhile, in contrast, a narrow definition of investment could exclude certain new forms of investments that the host country would make as part of its development strategy. In general, it is desirable that each country assesses the effects of each type of definition of investment and compliance with national policies.

Bilateral treaties often contain the term "investment", an investment that is made in accordance with the laws of the host country. For instance, in the bilateral treaty between Malaysia and the United Arab Emirates (UAE), in Article 1, the definition for Malaysia is "approved investment", while for the other side it says, "investments approved and classified as investments by competent UAE authorities in accordance with their legal and administrative practices".

Generally, local laws require the approval of the investment, and this approval could be granted under certain conditions. When this condition is present in the definition, investments that do not comply with national laws will not get the required approval; or if they do not meet the conditions imposed by the authorization in question, they will not be protected by the treaty, because they will not be considered "investments" within the meaning of the treaty. For this reason, some bilateral treaties explicitly point out that they will be applied only to investments made in accordance with the laws and regulations of the host country.

All these types of qualifications allow a country to refuse protection of the treaty to investment which it considers inappropriate for such protection. Thus, establishing a direct correlation between investment protection and compliance with legal requirements, a country would be able to ensure that only those investments which are considered desirable from the standpoint of its development goals will be protected.

[2] Therefore, there is another issue that the host country should consider, and that is whether it wishes to accept this open definition of investment, since it could in the future protect forms of investments for which no specific agreement had been given the treaty was signed. This situation was taken into account in the negotiations under the auspices of the OECD, the multilateral agreement on investment, with especial regard to financial assets. On this occasion, it was stressed that there would be good reason to include in the agreement, provided that they have been acquired for the purpose of establishing lasting economic relations with an enterprise. Similarly, host countries may not find it appropriate to grant the same protection rights for licenses, like other foreign assets.

From this point of view, developing countries can therefore benefit from these skills by identifying a set of priorities and the development of criteria to be taken into account in determining whether an investment should or should not receive the protection of the treaty. However, as a sovereign state, a host country may change its laws, regulations and policies, but these changes may adversely affect the stability of the investment climate. Thus, if laws and policies are changed frequently, the credibility of a state might also be affected.

To ensure that the treaty protection is given only to investments that comply with the national laws of the host country, it is customary to subject the admission of investment to the national laws of the host country. This situation will be discussed in more detail in the paragraph relating to the admission of investment.

BITs often include a provision to ensure that any change in the form in which is invested capital (*e.g.*, a loan that becomes a debt holding) will not affect their classification as investment to ensure the protection of the treaty.

For example, some treaties provide that "*any change in the form of an investment does not affect its character as an investment*".

However, some of these treaties also include the condition that the change of form of investment should not be contrary to the initial approval given to that investment by the host country. Thus, in Article 1, the bilateral treaty between the Community Belgium-Luxembourg and Cyprus states, in the first article, that:

"(a) any change in the form in which assets are invested shall not affect their classification as investment, provided that the change is not contrary to the authorization, if any, granted in respect of assets invested initially".

The purpose of this requirement is to ensure that the reinvestment is not used to avoid restrictions imposed by the host country to the initial investment. A variation of this practice is to demonstrate that reinvestments are not contrary to the laws of the host country: *"(a) possible change in the form in which the investments were made must not affect their substance as investments, and provided that such change does not conflict with the laws and regulations of the other Signatory Party"*.

Another issue identified in the treaties concerns the income obtained as a result of investments. Generally, these revenues are protected in most treaties, which, for example, can guarantee the free transfer of profits out of the host country. There are treaties that protect the revenues realized on investments in a separate clause of investment. In this case, they provide for the definition of the term. Thus, the most common definition, constantly used for many years, says "the amount reported by an investment". Similarly, the vast majority of treaties that define this term also provide a non-exhaustive list of cash flows that are considered investment returns. This list usually includes profits, interest, capital gains, dividends, royalties and fees.

The broad definition of what constitutes an investment, then, is the first reference point in the landscape of the definitions of investment and investor in contemporary BITs. It is so because investment agreements interest all members of the international community.[3] Capital-exporting countries use these rules to seek investment opportunities abroad and to protect their investments in foreign jurisdictions.[4] Capital-importing economies wish to promote inward investment by ensuring foreign investors a stable business environment in line with high international standards.[5] A selected group of developing countries stand on both sides of that road. As developing countries, they wish to benefit from foreign investment. As vigorous and growing economies, it is their interest to expand their businesses into other markets.

Section Two. GLOBALIZATION AND INTERNATIONAL INVESTMENT

International investment played a very important role in the "economic globalization" which is a historical process, i.e. the result of human innovation and technological progress. The notion of economic

[3] See generally Andrew Newcombe & Luís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 41-46 (2009); Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 17-20 (2008); Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 49-59 (2010).

[4] See Amanda Perry, An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality, 15 AM. U. INT'L L. REV. 1627, 1631 (2000).

[5] Joshua Boone, How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, 1 GLOBAL BUS. L. REV. 187, 187 (2011) (indicating that the driving force behind BITs was "to facilitate ... investment flows by the opening up of secure channels for foreign direct investment ... stabilizing the investment climate, granting protective investment guarantees, and providing neutral dispute mechanisms for 'injured' investors"); see also United Nations Conference on Trade and Development (UNCTAD), The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, UN Doc. E.09.II.D.20 p4 (2009)

globalization refers to the increasing integration of economies around the world, particularly through the movement of goods, services, and capital across borders.[6] The term sometimes also refers to the movement of people (labour) and knowledge (technology) across international borders. There are also broader cultural, political, and environmental dimensions of globalization.

1. Economic Globalization

The term 'globalization' began to be used more commonly in the 1980s, reflecting technological advances that made it easier and quicker to complete international transactions-both trade and financial flows. It refers to an extension beyond national borders of the same market forces that have operated for centuries at all levels of human economic activity - village markets, urban industries, or financial centres.[7] There are countless indicators that illustrate how goods, capital, and people, have become more globalised.[8]

The growth in global markets has helped to promote efficiency through competition and the division of labour - the specialisation that allows people and economies to focus on what they do best. Global markets also offer greater opportunity for people to tap into more diversified and larger markets around the world. It means that they can have access to more capital, technology, cheaper imports, and larger export markets. But markets do not necessarily ensure that the benefits of increased efficiency are shared by all. Countries must be prepared to embrace the policies needed, and, in the case of the poorest countries, may need the support of the international community as they do so.[9]

[6] See Michael J. Trebilcock, "Critiquing the Critics of Economic Globalization", 1 J. Int'l L. & Int'l Relations 213-38 (2005).

[7] See Frederick Mayer & Gary Gereffi, Regulation and Economic Globalization: Prospects and Limits of Private Governance, 12 BUS. & POL., no. 3, art. 11, 2010, at 5.

[8] For instance, in response to increasing demand for better measures to analyse the trends of globalization, the OECD took the initiative to draw up a conceptual and methodological framework for gathering quantitative information and constructing indicators. This work has led to the present Handbook on Economic Globalization Indicators. It is the outcome of co-operation among experts from the OECD Secretariat, member countries and international organisations. See OECD, Measuring Globalization: OECD Economic Globalization Indicators 2010, Paris 230 p.

[9] See Cynthia A Williams, "Corporate Social Responsibility in an Era of Economic Globalization" (2002) 35 UC David L Rev 705 at 721, noting that the investment of private capital, particularly from MNEs, is increasingly important for developing countries; Mitchell A Kane, 'Bootstraps and Poverty Traps: Tax Treaties as Novel Tools for Development Finance' (2012) 29 Yale J on Reg 255 at 263-72, discussing the importance and the difficulty of promoting the financing of private sector activities in developing countries as a way to get them out of poverty.

The broad reach of globalization easily extends to daily choices of personal, economic, and political life.[10]

Globalization can also create a framework for cooperation among nations on a range of non-economic issues that have cross-border implications, such as immigration, the environment, and legal issues. At the same time, the influx of foreign goods, services, and capital into a country can create incentives and demands for strengthening the education system, as a country's citizens recognise the competitive challenge before them.

Perhaps more importantly, globalization implies that information and knowledge get dispersed and shared. Innovators - be they in business or government - can draw on ideas that have been successfully implemented in one jurisdiction and tailor them to suit their own jurisdiction. Just as important, they can avoid the ideas that have a clear track record of failure. Joseph Stiglitz, a Nobel laureate and frequent critic of globalization, has nonetheless observed that globalization "has reduced the sense of isolation felt in much of the developing world and has given many people in the developing world access to knowledge well beyond the reach of even the wealthiest in any country a century ago".[11]

The world's financial markets have experienced a dramatic increase in globalization in recent years. The most rapid increase has been experienced by advanced economies, but emerging markets and developing countries have also become more financially integrated.[12] As countries have strengthened their capital markets they have attracted more investment capital, which can enable a broader entrepreneurial class to develop, facilitate a more efficient allocation of capital, encourage international risk sharing, and foster economic growth.

The analysis of the past years reveals two main lessons for countries to consider.

[10] For example, greater access to modern technologies, in the world of health care, could make the difference between life and death. In the world of communications, it would facilitate commerce and education, and allow access to independent media.

[11] Joseph Stiglitz (2003), *Globalization and Its Discontents* (New York: W.W. Norton & Company) at 4.

[12] See David Zaring, "Finding Legal Principle in Global Financial Regulation", 52 Va. J. Int'l L. 683, 701-16 (2012) (identifying shared and comparable characteristics of international financial law and the treaty-based hard international law regimes of the WTO and the EU).

First, the findings support the view that countries must carefully weigh the risks and benefits of unfettered capital flows. The evidence points to largely unambiguous gains from financial integration for advanced economies.[13] In emerging and developing countries, certain factors are likely to influence the effect of financial globalization on economic volatility and growth: countries with well-developed financial sectors, strong institutions, sounds macroeconomic policies, and substantial trade openness are more likely to gain from financial liberalisation and less likely to risk increased macroeconomic volatility and to experience financial crises.[14]

The second lesson to be drawn from the study is that there are also costs associated with being overly cautious about opening to capital flows. These costs include lower international trade, higher investment costs for firms, poorer economic incentives, and additional administrative/monitoring costs. Opening up to foreign investment may encourage changes in the domestic economy that eliminate these distortions and help foster growth.

In any case, countries should still weigh the possible risks involved in opening up to capital flows against the efficiency costs associated with controls, but under certain conditions (such as good institutions, sound domestic and foreign policies, and developed financial markets) the benefits from financial globalization are likely to outweigh the risks.

The development of instant, international communications, the growth of international trade, and other factors have contributed to the creation of an unprecedented global economy. The increasing internationalization of finance can bring major benefits to investors and nations, but it can also have disastrous consequences. Recent economic crises in US, EU and and Russia and their repercussions on world markets have raised the issue of more effective regulations in the new global economic climate.

[13] See David Cowen & Ranil Salgado, "Globalization of Production and Financial Integration in Asia", in FINANCIAL INTEGRATION IN ASIA: RECENT DEVELOPMENTS AND NEXT STEPS 4 (David Cowen, et al. eds., Int'l Monetary Fund, Working Paper No. 06/196, 2006).

[14] For example, well-developed financial markets help moderate boom-bust cycles that can be triggered by surges and sudden stops in international capital flows, while strong domestic institutions and sound macroeconomic policies help attract "good" capital, such as portfolio equity flows and FDI.

2. Regulation of Globalization

With the growth in nation's economy, a lot of new developments evolve that create both challenges and positive contributions. Despite growing regional cooperation, national governments have seen globalization erode much of their ability to control their own economies as traders and corporations move beyond the reach of national law. For the world's market-oriented democracies, erosion of national sovereignty means a reduction in the power of the ordinary citizen's ability to influence events through the vote; hence, it has the potential to erode democracy.

In this partial vacuum, international organizations, new and old, have assumed some functions that national governments once controlled. For example, the International Monetary Fund ("IMF"), an independent agency of the United Nations ("UN"), has become both a safety net for nations in economic crisis and a global enforcer of economic behaviour. Both roles, however, have become controversial, and there have been proposals for a new global economic authority. The World Trade Organization ("WTO") has succeeded the old General Agreement on Tariffs and Trade ("GATT")[15] and has become not only a forum to settle international trade disputes but a court with power to enforce its decisions.[16] Other international bodies, such as the Bank for International Settlements ("BIS") in Switzerland and the International Organization of Securities Commissions ("IOSCO"), are setting up new codes and regulations. These organisations are, in effect, now writing the global economic rulebook for the 21st century.

The absence of integration will create the problem of inability to what extent and how policy formation processes can be integrated. In addition, although, tariff barriers and nontariff barriers to trade in goods have been reduced, less obvious differential applications of embedded legal and regulatory laws have been used to form nontariff barriers not only to trade in goods, but to trade in services and investment. These nontariff barriers, however, have a dual character that makes them difficult to address. One, they are socially rooted, often democratically legitimated, structures that represent a domestic vision of how domestic society should be organised to achieve domestic values. Two, they constitute international trade barriers.

Like a snowball rolling down a steep mountain, globalization seems to be gathering more and more momentum. And the question frequently asked about globalization is not whether it will continue, but at what pace. A disparate set of factors will dictate the future direction of globalization, but one important entity - sovereign governments - should not be overlooked. They still have the power to erect significant obstacles to globalization, ranging from tariffs to immigration restrictions to military hostilities.[17]

Nearly a century ago, the global economy operated in a very open environment, with goods, services, and people able to move across borders with little if any difficulty. That openness began to wither away with the onset of World War I in 1914, and recovering what was lost is a process that is still underway. Along the process, governments recognised the importance of international cooperation and coordination, which led to the emergence of numerous international organizations and financial institutions (among which the IMF and the World Bank, in 1944). Indeed, the lessons included avoiding fragmentation and the breakdown of cooperation among nations.[18]

The world is still made up of nation states and a global marketplace. There is a need to get the right rules in place so the global system is more resilient, more beneficial, and more legitimate. International institutions have a difficult but indispensable role in helping to bring

[15] Confusion arises because the "GATT" was both the name of the agreement reached in 1947 and the name attached to the rudimentary organization that evolved around that agreement with the failure of the GATT members (or "Contracting Parties," as they were originally known) to endorse the creation of an International Trade Organization. This reference in the text is to the original GATT agreement, which as modified now applies to all WTO members. Most of the other references to GATT in the text refer to the organization that preceded the WTO until the latter was created in 1994.

[16] See Gerard Curzon & Victoria Curzon, "The Management of Trade Relations in the GATT", in *International Economic Relations of the Western World: 1959-1971* 141 (Oxford University Press, 1976).

[17] See Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 Va. J. Int'l L. 1, 5 (2002); David Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations", 33 Tex. Int'l L.J. 281, 312-25 (1998).

[18] Reflecting the new spirit of international legal scholarship in the immediate aftermath of the Second World War, Philip Jessup observed in 1946 that "[s]overeignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built." PHILIP JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 2 (1948); see also id. at 157 ("The most dramatic weakness of traditional international law has been its admission that a state may use force to compel compliance with its will."). Among the innumerable later expositions of these post-War changes, see generally Louis Henkin, "That 'S' Word: Sovereignty, and Globalization, and Human Rights", Et Cetera, 68 FORDHAM L. REV. 1 (1999) (discussing the United Nations, the disfavouring of war, and the pursuit of cooperation among nations).

more of globalization's benefits to more people throughout the world.[19] By helping to break down barriers - ranging from the regulatory to the cultural - more countries can be integrated into the global economy, and more people can seize more of the benefits of globalization.

Section Three. HISTORICAL DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW

International investments are one of the key interests of any country's political economy. Foreign investments may help the host country to develop a sound economic structure, increase and diversify manufacturing, offer novel and more developed services, create employment and bring innovative technology, amongst other benefits. Additionally, countries endeavour to foster well-established domestic companies to expand their business into other markets.

National companies abroad bring long-term capital gains, help in building economic and political ties with other nations and may ensure access to key resources that the home country lacks. Governments have at their reach a number of policy tools to work towards these goals. Concluding international agreements with relevant partners is not a minor one.[20]

International investment agreement ("IIA") may signal to international investors a favourable investment environment, and provide them with guarantees that their investments will benefit from adequate regulatory conditions in their business operation.[21]

This Section two on the international law of foreign investment presents the main recent developments in international investment law. It does so by examining investment rulemaking practice at the bilateral agreement and regional level (in both international instrument devoted solely to investment regulation, as in agreements of wider scope that also provide substantial obligations on foreign investment) as well as the multilateral level since some World Trade Organization ("WTO") provisions are relent to the treatment of foreign investment.[22] This Section also makes use of "model BITs" as influential capital exporting states usually negotiate BITs on the basis of their own "model" texts (such as the US model BIT) which provide important innovations as for investment rule-making.[23]

1. Economic Globalization and Investment

National economic policies typically aim to achieve several and often conflicting goals at once, including promoting economic growth, avoiding social unrest, maintaining national security and autonomy, redistributing wealth according to some standard of equity as well as, more or less covertly, maintaining the power of policymakers and according rents to influential persons or groups.[24] Domestic law in many countries therefore remains relatively flexible and traditionally denies a strong protection of investment – domestic and foreign.[25] At the

[19] Sungjoon Cho & Claire R. Kelly, "Promises and Perils of New Global Governance: A Case of the G20", 12 Chi. J. Int'l L. 491, 548-53 (2012) (addressing doubts about the effectiveness of the G20 coordinating functions in the wake of the global financial crisis).

[20] See Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", 25 INT'L REV. L. & ECON. 107, 108 (2005).

[21] See Kenneth J. "Vandevelde, A Brief History of International Investment Agreements", 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005).

[22] See Julien Chaisse, *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy, in The Prospects of International Trade Regulation - From Fragmentation to Coherence* 417 (Thomas Cottier & Panagiotis Delimatsis, eds, Cambridge Univ. Press, 2010).

[23] See, e.g., 2012 US Model Bilateral Investment Treaty arts. 24, 37, 2012, available at (http://www.ustr.gov/sites/default/files/BIT%20text%C20for%C20ACIEP%M˙ eeting.pdf) [hereinafter "2012 US Model BIT"]; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments arts. 9, 10, 2008, available at (http:// www.italaw.com/sites/default/files/archive/ita1025.pdf) [hereinafter "2008 German Model BIT"]; Canada Model Agreement for the Promotion and Protection of Investments arts. 24, 48, 2004, available at (http:// italaw.com/documents/Canadian2004-FIPA-model-en.pdf) [hereinafter "2004 Canadian Model BIT"]; France Draft Agreement on the Reciprocal Promotion and Protection of Investments arts. 7, 10, 2006, available at (http:// italaw.com/documents/ModelTreatyFrance2006.pdf) [hereinafter "2006 French Model BIT"]; Colombian Model Bilateral Agreement for the Promotion and Protection of Investments arts. 9, 10, 2007, available at (http://italaw.com/documents/inv_ model_bit_colombia.pdf) [hereinafter "2007 Colombian Model BIT"]; Indian Model Agreement for the Promotion and Protection of Investments arts. 9, 10, 2003, available at (http://www.italaw.com/sites/default/files/archive/ita1026.pdf) [hereinafter "2003 Indian Model BIT"].

[24] See Ivar Kolstad & Espen Villanger, CHR. MICHELSEN INSTITUTE, *How Does Social Development Affect FDI and Domestic Investment?* 1 (2004) ("Creating a sound investment climate is vital for improving the economic performance of developing countries.").

[25] Investment can be divided into two broad categories: portfolio investment and FDI. The former involves acquiring shares of foreign corporations without exercising any direct control over management of the organization. FDI, in contrast, involves acquiring a significant controlling interest of existing foreign firms or establishing new firms. One measure of a controlling interest is that a foreign investor must hold at least 10 percent of a firm's equity in order for that investment to be classified as FDI. See Approaching the Next Frontier for Trade in Services: Liberalisation of International Investment, INDUS., TRADE, & TECH. REV. 2 (USITC, No. 2962, Apr. 1996). Because the issue of control is less important with portfolio investment, so too are issues of government policy and industrial competitiveness are less significant.

same time, most policymakers agree that inward FDI – that is, foreign investment in one's own country – is suitable to enhance economic growth and thereby general welfare; inward FDI is frequently courted, therefore, with fiscal or other incentives.[26] Tensions between flexibility and legal security, the latter sought by investors, inevitably result.[27]

Enhanced legal security, protecting against the vagaries of internal politics while respecting national sovereignty, has been at the heart of investment protection in customary international law and in bilateral treaty law.[28] Over time, the focus of investor protection efforts has changed. As liberal democracies fought over global predominance with Communism during the Cold War era, what Western investors feared most was outright expropriation by third world regimes implementing socialist economic policies, which happened with some frequency during post-World War II decolonialisation.[29] Consequently, customary law and bilateral investment treaties concluded during that time emphasise rules on nationalisation of assets and compensation. The amount of compensation (full and prompt, adequate or equitable) has been controversial ever since.[30]

However, because FDI often involves issues of significant control over a domestic firm, it raises sovereignty issues for many host countries. Nevertheless, growth in FDI is considered by most developing countries to be beneficial because it enhances economic growth, productivity, and competitiveness. See generally UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS 219 (1996); TRADE AND FOREIGN DIRECT INVESTMENT, supra note 361. An extensive bibliography on trade and investment can be found in TRADE AND FOREIGN DIRECT INVESTMENT. Id. at 46-53.

[26] The evidence as for the economic impact of IIAs is mixed. See, e.g., Todd Allee & Clint Peindhardt, Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment, 65 Int'l Org. 401 (2011)(finding that entering into BITs significantly increases FDI unless the state is then charged with breaching the BIT by an investor in arbitration); Rashmi Banga, Do Investment Agreements Matter?, 21 J. Econ. Integration 40 (2006) (finding that signing BITs with developed countries increased FDI inflows); Matthias Busse, Jens Koniger & Peter Nunnenkamp, FDI Promotion Through Bilateral Investment Treaties: More than a Bit?, 146 Rev. World Econ. 147 (2010) (controlling for endogeneity and other statistical artifacts and finding that BITs increase FDI, with evidence that they may substitute for weak domestic institutions); Tim Büthe & Helen V. Milner, Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis, in The Effect of Treaties on Foreign Direct Investment, supra note 57, at 171, 213?14 (finding a statistically significant increase in FDI as a percentage of GDP with each standard deviation in the number of BITs signed); Peter Egger & Michael Pfaffermayr, The Impact of Bilateral Investment Treaties on Foreign Direct Investment, 32 J. Comp. Econ. 788, 790 (2004) (finding a 30% increase in capital flows from a capital-exporting to a capital-importing country after they enter into a BIT); Kevin P. Gallagher & Melissa B.L. Birch, Do Investment Agreements Attract Investment? Evidence from Latin America, in The Effect of Treaties on Foreign Direct Investment, supra note 57, at 295, 296?99 (2009) (finding a positive correlation between the number of BITs signed and foreign investment inflows to Latin American countries); Robert Grosse & Len J. Trevino, New Institutional Economics and FDI Location in Central and Eastern Europe, in The Effect of Treaties on Foreign Direct Investment, supra note 57, at 273 (finding a significant positive correlation between BITs and inward FDI); Andrew Kerner, Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties, 53 Int'l Stud. Q. 73, 82-98 (2009) (controlling for endogeneity and finding that ratifying a BIT can result in a $600 million increase in foreign direct investment); Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, 33 World Dev. 1567, 1568 (2005) (finding that concluding BITs with a number of capital-exporting states could result in a near doubling of FDI, but that the effect diminishes as domestic legal institutions improve); Clint Peinhardt & Todd Allee, Devil in the Details?

The Investment Effects of Dispute Settlement Variation in BITs, in Yearbook on International Investment Law and Policy 2010-2011, at 837, 854-56 (Karl P. Sauvant, ed. 2012) (finding that, controlling for country-specific characteristics that impact treaty negotiations and thus treaty language, international investment agreements that more strongly commit to investor-State arbitration by omitting reference to domestic dispute resolution are correlated with higher foreign direct investment inflows); Susan Rose-Ackerman, The Global BITs Regime and the Domestic Environment for Investment, in The Effect of Treaties on Foreign Direct Investment, supra note 57, at 311 (finding that BITs have a positive impact on FDI flows to developing countries in interaction with domestic political and economic factors); Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L.J. 67, 95?115 (2005) (finding that concluding a BIT with the United States correlated with increased incoming investment of 77 to 85%, but with other OECD countries had no significant effect).

[27] José Guimon & Sergey Filippov, Competing for High-Quality FDI: Management Challenges for Investment Promotion Agencies, 4 INSTITUTIONS AND ECONOMIES 25, 26 (2012) ("[S]uccess in attracting FDI and capturing the associated benefits for the domestic economy is associated with effective government intervention.").

[28] See Francis J. Nicholson, The Protection of Foreign Property under Customary International Law, 3 B.C. L. Rev. 391, 391-93 (1965) (explaining that the development of international trade and investment created certain principles which placed an obligation on nations to protect the acquired property rights of foreigners).

[29] See RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995) (stating that as a general rule, developing countries have been those that imported capital, and developed countries have been those that exported capital, fostering the North-South exchange). But see UNCTAD, South-South Investments Agreements Proliferating, IIA Monitor No. 1, UNCTAD/WEB/ITE/IIT/2006/1 (Nov. 3, 2005) (stating that current FDI inflows have shown the increasing of South-South interactions). According to the UNCTAD, the South-South cooperation on investment matters has increased in the last years, reflected by the growing numbers of IIAs signed between developing countries. In this sense, developing countries have become more concerned about how they protect their investors abroad. It is indeed a fact that countries like Brazil and China have gained significant preponderance in the global economy. UNCTAD, Recent Developments in International Investment Agreements, IIA Monitor No. 3, 5, UNCTAD/WEB/DIAE/IA/2009/8 (July 3, 2009).

[30] The allegation of expropriation of alien property or foreign investment against the host State is one of the most critical factors that define the nature of foreign investment disputes from the prism of investment treaty arbitration. Expropriation or nationalization of foreign investments in the territory of the host State is permissible under international investment law. However, it must be for a public purpose, in accordance with due process of law and payment of compensation. The payment of adequate compensation has, more often than not, been the bone of contention in cases where expropriation is alleged against the host State by the foreign investor. Expropriation may be direct or indirect. Expropriation may be considered direct and easily ascertained, where an allegation of the actual taking of the alien property or foreign investment in the territory of the host State can be sustained against the latter. See generally Homayoun Mafi, Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal, 18 Int'l J. Humanities 83-85 (2011).

As of July 2017, the international investment framework consists today of a web of roughly 3,500 investment treaties, including bilateral investment treaties between two states, regional agreements, and investment protection provisions in free trade agreements between two or more countries. A key driver of these instruments has historically been the desire of developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-importing states. Consequently, the majority of investment treaties are between developed countries and developing countries or economies in transition, though this is slowly changing.

In today's world, with market economy and capitalism likely to remain the dominant global economic paradigms for the foreseeable future, and with FDI volumes having increased by two orders of magnitude, property protection has been, if not eclipsed, then at least complemented, by regulatory issues: market access, national treatment, extensive regulations amounting to regulatory taking and deficiencies of good governance such as those referred to in the preceding text. FDI is subject to protection by customary international law and to a great number of some 3,500 investment agreements, commonly based on uniform models.

Bilateral investment treaties (or, "BITs") are international agreements establishing the terms and conditions for private investment by nationals and companies of one state in another state.[31]

2. The Successive Generations of IIAs

Before the emerge of investment treaties, there were Friendship, Commerce and Navigation Treaties ("FCNs"), which required the host state to treat foreign investments on the same level as investments from any other state, including in some instances treatment that was as favourable as the host nation treated its own investments. FCNs also established the terms of trade and shipping between the parties, and the rights of foreigners to conduct business and own property in the host state.

In 1996, the OECD nations commenced negotiations to establish a Multilateral Agreement on Investment ("MAI") which was intended to be open for accession to all countries, to introduce the principles of MFN and national treatment for all forms of FDI and to provide a wide range of legal and procedural safeguards for investors.[32] However, MAI negotiators faced systemic hurdles in their ambitious approach to liberalise so broad a field as investment, including the complexity of national tax regimes.[33] They also met with intense public opposition from

[31] See Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law, Global Bus. & Devel. L.J. 337, 338 (2007) (analogously noting that "treaties offer foreign investors a series of economic rights, including the right to arbitrate claims, in hopes of attracting Foreign Direct Investment that will bring a country... economic stability").

[32] See, e.g., CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 219 (2008); Juyrgen Kurtz, NGOs, the Internet and International Economic Policy Making: the Failure of the OECD Multilateral Agreement on Investment, 3 MELB. J. INT'L L. 213, 225-26 (2002) (explaining the role NGOs played in the abandonment of the MAI); Nii Lante Wallace-Bruce, The Multilateral Agreement on Investment: An Indecent Proposal and Not Learning the Lessons of History, 2 J. WORLD INVESTMENT 53 ((2001) (describing the abandonment of the MAI); Andrew Walter, Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment, in NON-STATE ACTORS IN WORLD POLITICS 150-68 (Daphne Josselin & William Wallace eds., 2001).

[33] See Eric Neumayer, Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiatons, 46 Wirtschaftspolitische Bl tter 618 (1999). Trebilcock and Howse have also described the political dynamics that took over the MAI negotiations and ultimately led to their breakdown. By May 1997, agreement had been reached between the negotiators on many elements of the basic architecture of the MAI [Multilateral Agreement on Investment], including MFN and National Treatment. However, important differences of view between countries were surfacing with respect to the relationship of the MAI to environmental and labour standards and cultural policies. As well, considerable disagreement existed concerning whether and how investment incentives should be disciplined, the result being that incentives were simply not dealt with in the draft. At the same time, however, a vigorous public debate was beginning in OECD countries such as Canada, the United States and Australia concerning the impact of the MAI on the democratic regulatory state in general, and on environment, labour rights and cultural protection more specifically. Canadian activist groups were at the forefront of bringing the MAI negotiations into public view. In January 1997, when no public version of the negotiating text was available, Canadian activists obtained a confidential version, and began circulating it to like-minded groups, using the Internet as an effective dissemination tool. In April 1997, accounts of the MAI began to appear in the popular press, and governments were placed on the defensive to justify their negotiating positions to the public at large. Some of the groups in question had unsuccessfully challenged the Canada-US FTA and the NAFTA, often making grossly exaggerated and hypothetical claims about the damage likely to flow from these agreements to the welfare state. With the MAI, their approach was shrewder and more careful. They linked a more general critique of globalization driven by corporate interests with a highly plausible analysis of specific provisions of the draft MAI, or omissions from it, as well as a critique of the way it was negotiated. While many groups took different and overlapping positions, the thrust of the overall attack is well expressed by Tony Clarke and Maude Barlow: We do not wish to leave the impression that we reject the idea of a global investment treaty. We are well aware that transnational investment flows have been accelerating at a rapid pace and that there is a need to establish some global rules. But the basic premise on which the draft versions of the MAI have been crafted is, in our view, largely flawed and one-sided. It expands the rights and powers of transnational corporations without imposing any corresponding obligations. Instead, the draft treaty places obligations squarely on the shoulders of governments . . .

Meanwhile the MAI says nothing about the rules that transnational corporations must

NGOs of the emerging anti-globalization movement which objected to the alleged loss of economic sovereignty and cultural identity. After France's withdrawal from MAI negotiations in 1998 on account of fear for her cultural autonomy, the project was halted. The project design failed to learn the lessons from, and limits of, progressive liberalisation and regulation successfully enshrined in the GATT and in the GATS.

One can later identify three generations of investment agreements as stylised facts of the international investment "system".

A "first generation" set of bilateral investment agreements focuses on the protection of foreign investors, albeit maintaining some important reservations on some key guarantees towards foreign investment, such as national treatment, measures against unlawful expropriation, and access to international arbitration.

A "second generation" of international agreements - embodied by a majority of BITs as well as investment disciplines adopted in some FTAs- provides broader and more substantive obligations in regard to the treatment of foreign investment. Post establishment national treatment - albeit with sectoral reservations in some cases - and no substantial restrictions on the ability of foreign investors to challenge host country measures in international arbitration are standard in this category.[34]

follow to respect the economic, social, cultural, and environmental rights of citizens. The secrecy surrounding the negotiations and the usual cloak-and-dagger behaviour by foreign ministries when faced by early enquiries about the course of the negotiations gave prima facie credence to a conspiratorial view of the whole undertaking. The fact, noted above, that the draft MAI did not contain an environmental or health and safety exception even comparable to that existing in the 1947 GATT lent credibility to the notion that only the interests of capital were reflected in the Agreement. See Michael Trebilcock & Robert Howse, The Regulation of International Trade 444 (3rd Edn Routledge) at 458-60.

[34] A number of Investment Tribunals have not hesitated in mentioning the vague standards enshrined in some IIAs. For intsance, *the Suez, Barcelona and Interagua v Argentina, Suez, Barcelona and Vivendi v Argentina and AWG v Argentina Decision on Liability* observes that:

a) it is a vaguely and ambiguously defined standard, the scope of which is not defined in BITs;

b) it is a standard widely used in hundreds of BITs worldwide; c) the terms defining the standard are flexible and apply to all types of investments and ventures; d) it is a factual standard, because its implementation is closely linked to the particular facts of each case so that judgment about what is fair and equitable cannot be formulated in the abstract but depends on the particular facts of the case; e) its extensive use in BITs, its generality and flexibility suggest that this is a standard developed by the contracting States as the basic standard of treatment they are obliged to mutually grant to foreign investments protected under the BITs. See *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 at 180-181. On a different matter, the *AIG Capital v Kazakhstan Award* observes

Recent model BITs and investment chapters of the growing number of FTAs represent a nascent *"third generation"* of investment agreements. These agreements maintain the high standards on the protection of investments recognised in second generation agreements while they seek to open new investment opportunities in foreign markets through national treatment in regard to entry rights - subject to sectoral exclusions in the forms of positive and negative. Interestingly, "third generation" investment agreements aim also at ensuring that the rights to foreign investors do not override domestic regulatory powers on other key policy areas. Perhaps not surprisingly this trend is pioneered by some of the countries that have been most exposed to international arbitration claims - the European Union, the United States and Canada.

The distinctive feature of many BITs is that they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to International arbitration,[35] often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host State in its own courts.[36] The Convention on the Settlement of Investment Disputes ("ICSID") offers a multilateral framework for the settlement of disputes between governments and private operators.

that there is no universally-accepted word, phrase or concept that describes the standard of "appropriate compensation" due under international law and concludes that despite the diversity of vague and indefinite terms, there is a growing agreement on a standard of compensation that more closely approximates to a "fair market value" of the property taken. See *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 at 12.1.1.

[35] According to the United Nations Conference on Trade and Development ("UNCTAD"), during the past two decades, there have been more than 500 known investor-State disputes submitted to international arbitration.SeeRecent Developments in Investor-State Dispute Settlement ("ISDS"), UNCTAD, (http:// unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf).

[36] Third party dispute resolution is a key component of the BITs "... [it] is a commitment mechanism that resolves a dynamic inconsistency problem for states. It allows the host state to commit itself to a contract without fear that a future government will expropriate, interfere with domestic courts, or otherwise retreat from the promises embodied in the BIT. Regardless of the level of trust among the parties at the time of the investment, the investor will be concerned that a future government may break the current government's promise. Furthermore, the investor may not trust future governments to refrain from interfering with local courts. Ensuring that international arbitration ... is available to hear investment disputes, helps the host government make a credible commitment that it would otherwise not be able to make." Tom Ginsburg, International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, 25 INT'L REV. L. & ECON. 107, 108 (2005) at 113.

In a regional context, the NAFTA Agreement offers extensive protection in its Chapter 11, [37] as do many other FTAs.[38] Apart from WTO rules on goods, services and intellectual property,[39] FDI has to date not been subjected to a comprehensive multilateral legal framework, although many attempts have been made to this effect.[40]

Countries have indeed been very active in this field.[41] At the end of 2017, over 175 countries had concluded amongst each other the thrilling figure of 2,900 bilateral investment treaties ("BITs"). Additionally, over 250 free trade agreements ("FTAs")[42] establish cooperation frameworks in investment with a view to enhancing investment rules in the future or feature substantive rules on investment, alike to those found in bilateral investment agreements. International rules on investment hence stem from a complex and growing web of bilateral, regional and plurilateral agreements on foreign investment, topped by one multilateral agreement, the General Agreement on Trade in Services ("GATS"), that covers international investments when they concern services industries.

[37] See Jamie Boyd, Canada's Position Regarding an Emerging International Fresh Water Market with Respect of NAFTA, 2 NAFTA: LAW AND BUS. REV. AMERICAS, 3 (1999); Charles H. Brower, Investor-State Dispute Settlement Under NAFTA: The Empire Strikes Back, 40 COLUM. J. TRANSNAT'L L. 43 (2001).

[38] On the negotiation of investment chapters within free trade agreements between Latin American countries and the United States, see Roberto Echandi, A New Generation of International Investment Agreements in the Americas: Impact of Investor-State Dispute Settlement over Investment Rule-Making, available at http:// www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf (last accessed Dec. 27, 2014). See also Charles N. Brower, NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA, 97 Am. Soc'y Int'l. L. Proc. 251, 255-57 (2003).

[39] See Keith E. Maskus,The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, 9 Duke J. Comp. & Int'l L. 109, 109 (1998) (listing China, Argentina, and Mexico as examples of developing countries expanding their intellectual property protection).

[40] See Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 HARV. INT'L L.J. 427, 439 (2010).

[41] See UNCTAD, Bilateral Investment Treaties 1959-1999, UNCTAD/ITE/IIA/2 (Dec. 1, 2000); UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, 105-108, UNCTAD/ITE/IIT/2006/5 (Feb. 1, 2007). IIAs have evolved over the time, resulting in the development of different generations of treaties; in this sense, negotiations follow the "model" currently being used by a country. See C. Congyan, Change of the Structure of International Investment and the Development of Developing Countries' BIT Practice. Towards a Third Way of BIT Practice, 8 J. WORLD INV. & TRADE 8, 29 (2007) (stating that there are basically three generations of IIAs: (i) from 1959 (when the first BIT was signed between Germany and the Pakistan) to early 1990s, (ii) from the late 1990s to the years 2000s, and (iii) from the late 2000s up to date).

[42] See David A. Gantz, "The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement", 19 Am. U. Int'l L. Rev. 679, 715 (2003).

3. The Rise of Investment Disputes

Another series of events is further contributing to the development of this decentralised "system" of international investment law. The last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments. For instance, in the *Quasar de Valors v Russia* Award on Preliminary Objections, the Tribunal considered that access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs.[43]

It also means that arbitral panels have been charged with the task of applying the rules of investment agreements in specific cases, a task not often straightforward, given the broad and sometimes ambiguous terms of these arrangements.

This phenomenon of investment litigation has brought about a number of decisions from different arbitral fora, contributing to investment law "system" by giving meaning to its provisions - this too in a decentralised manner. Arbitral interpretations of international investment rules have not been free from controversies, which in turn has led some countries to react by adapting their agreements to these new developments, further contributing to the evolving landscape of investment rulemaking.

The evolution of investment rulemaking interests developed and developing countries. As developing countries become capital-exporting nations, investment agreements may prove to be a useful tool in opening business opportunities abroad.

As developed countries receive foreign companies into their markets they are bound by international investment law too. Many countries' interest in investment agreements is double fold, as leading capital-importing economy and emerging leader in capital exports.

Coping with the quickly evolving nature of the international investment law system and reaping the benefits of international agreements, while ensuring domestic regulatory capacity with a view to sustain its growing economy, remains a crucial challenge for all.

[43] *Quasar de Valors SICAV S.A. et al. (formerly Renta 4 S.V.S.A et al.) v Russian Federation, SCC* Case No. 24/2007, Award on Preliminary Objections, 20 March 2009 at 100.

Section Four. DEFINING THE SCOPE OF INVESTMENT TREATIES

The ambit of application of investment agreements is determined by four main factors: its geographical scope, its temporal application, the subject matter of the agreement, and the persons covered by the agreement. In simple words, the scope of application of an investment agreement can be determined by answering four questions: *where* must the investment be made? *When* must it be made? By *whom*? And importantly, *which* type of investments is covered?

The provisions concerning the scope of the agreement are of key importance, since they delimit the cases where the agreement will apply or fail to apply. In particular, the definition of "investor" and "investment" determine the subject-matter of the agreement. Countries may choose to provide an ample coverage and permit the broadest set of investors to benefit from the agreement, or restrict it to certain qualified investors.

Importantly, the scope of the agreement may be one of the few substantial matters - if not the only one - that escapes the reach of the principle of most favoured nation. Indeed, the examination of the applicability of the agreement comes logically before the application of its substantial obligations. For this reason, for instance, persons that do not qualify as 'investors' in the terms of the agreement that applies to them, may not resort through the MFN principle, to other more liberal definitions found in other agreements.[44] The broader or narrower scope of the agreement - specially as determined by the definitions of "investor" and "investment" - constitutes one of the fundamental elements for granting more of less preferences to investors of one particular country *vis-à-vis* other investors of other countries. The scope of the agreement can hence play an important role in the foreign investment policy of a country, as it allows governments to enter into closer economic ties with some selected partners only.

[44] The arbitral tribunal in *TECMED v United States* case rejected the application of the MFN principle in regard to the temporal coverage of the investment agreement, *"because it deem[ed] that matters relating to the application over time of the Agreement […] due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement[…]. Their application cannot therefore be impaired by the principle contained in the most favoured nation clause*". (*Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2. Award, 29 May 2003. para 69). For a contrary view on the extension of the MFN principle to the definition of "investor", see Meremisnkaya, 2005.

1. Preamble of IIAs

Parties to bilateral investment agreements put forward their motivations to conclude the agreement in the form of preambles. The parties' intention to promote and protect reciprocal investments and their desire to create an adequate environment for such investment logically take a prominent role in these declarations.

Traditionally, the legal value of preambles has received little attention. Nonetheless, the recent increase in international arbitration has brought to light their legal importance. The purpose of a treaty constitutes one the elements to be taken into account in the interpretation of the treaty terms.

The Vienna Convention on the Law of the Treaties recalls that preambles form part of the 'context' that gives meaning to treaty rules.[45]

The growing number of investor-State arbitration, and the need to establish the precise meaning of treaty terms not always clear or unambiguous have brought preambles to an unexpected exposure and granted them a crucial legal role as an interpretative guideline to investment agreements' language.

Two broad categories of preambles can be distinguished: the first group, which is by far the more numerous, includes those that focus on the importance of fostering economic cooperation among the contracting parties, promoting favourable conditions for reciprocal investments and recognizing the impact that such investment may have in generating prosperity in the host countries. The great majority of BITs enrol in this trend. China's BIT with Vietnam of 1993, for instance, features a preamble of this nature, stating that the parties:

Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States,

Have agreed […][46]

[45] Article 31 of the Vienna Convention on 'treaty interpretation' states that: *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2.The context for the purpose of the interpretation of a treaty shall comprise […] its preamble and annexes [...]."*

[46] Vietnam-China (1993) BIT, Preamble.

Arbitral panels have examined preambles of this nature as a means to seek guidelines for the interpretation of certain provisions. Along with the terms of these declarations they have found, for instance, that "[t]he intention of the parties is […] to create favorable conditions for investments and to stimulate private initiative" and the "that the object and purpose of the [agreement] is to provide broad protection of investors and their investments."[47]

In the Award F-W Oil v. Trinidad & Tobago, the Tribunal relied on the treaty's preamble in noting that the BIT was conceived as having "not just a protective role, but a dynamic one in encouraging and stimulating future investment".[48] In the same vein, in the *CMS* case, the arbitrators found the preamble a decisive tool in interpretation the scope and meaning of the fair and equitable treatment obligation noting that:

The Treaty Preamble makes it clear […] that one principal protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.[49]

The adoption of this 'pro foreign investor' interpretation principle has drawn the attention of regulators to the preambles of investment agreements, concerned that investment protection provisions could take priority over other governmental policies. For this reason, some recent investment agreements feature preambles that aim at ensuring that BITs do not purport to promote and protect investment at the expense of other key public policy values, such as health, safety, labour protection and the environment.

[47] Siemens v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 81, and Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004. para. 31 respectively.

[48] See F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago, ICSID Case No. ARB/01/14, Award, 3 March 2006 at 118. More recently, Ickale v. Turkmenistan Award held that it is well-established in international law, including in the jurisprudence of investment treaty tribunals, that preambles to treaties are not an operative part of the treaty and do not create binding legal obligations which are capable of giving rise to a distinct cause of action; the tribunal rejects the Claimant's argument that the reference in the Preamble to the BIT to "fair and equitable treatment of investment [being] desirable" creates a binding legal obligation on which the claimant is entitled to rely to found a claim. See Ickale Insaat Limited Sirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, 8 March 2016 at 337.

[49] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Final Award, 12 May 2005, para. 274.

The US Model BIT of 2004 introduced language in its preamble that expresses the Parties' desire to achieve the investment protection goals "*in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights*." The Draft Multilateral Agreement on Investment (MAI) text expressed the desire to implement its obligations "*in a manner consistent with sustainable development*", as well as it expressed the renewed commitment of the parties their commitment to the Copenhagen Declaration of the World Summit on Social Development.

2. Geographical Scope

The question of territory has always been central to the international legal system. It constitutes the core of the definition of the State, and as such it is tied to the issue of jurisdiction and the extent of the power exercisable by the State. It is also central to the organisation of the international order, for a State-based world community requires rules by which to determine how Territory may be allocated to States and the sanctions that may be applied for violation of territorial integrity. Further, as States appear, disappear and re-emerge in a different guise, principles as to the determination of boundaries become critical.

The natural geographical application of investment agreements is the *territory* of contracting parties. A number of Awards explicitly refer to this criterion to determine the jurisdiction. For instance, *the Inmaris v Ukraine* Decision on Jurisdiction tribunal held that whether it treats the BIT as including a territoriality requirement as an overarching jurisdictional limit, or as including territorial limits among the elements of the substantive protections that underlie the claims, the tribunal must inquire into the territorial nexus of the claimants' investments at the jurisdictional stage.[50]

In the same vein, the *SGS v Philippines* Decision on Jurisdiction noted that the "territory" requirement is clear and is underlined in other references to the territory of the host State in the BIT; accordingly, investments made outside the territory of the respondent State, however beneficial to it, would not be covered by the BIT.[51] Also, the *Deutsche*

[50] *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 at 113-121.

[51] See *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 at 99.

Bank v Sri Lanka Award approved of the approach of the majority in *Abaclat*[52] with respect to determining the territorial nexus of a financial investment; the tribunal finds the hedging agreement in question has a territorial nexus because the funds were made available to Sri Lanka and were linked to an activity taking place in Sri Lanka and served to finance its economy.[53]

The term "territory" under international law commonly comprises not only a state's land and internal waters, but also its air space and territorial sea over which it exercises sovereign rights, and other areas over which the country exercises exclusive jurisdiction.

Some agreements provide a detailed description, such as the Canada-Peru BIT of 2006, Canada's first agreement to follow its renewed model BIT, which defines territory, in respect of Canada, as comprising

> "(a) the land territory of Canada, air space, internal waters and territorial sea of Canada; (b) those areas, including the exclusive economic zone and the seabed and subsoil, over which Canada exercises, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploration and exploitation of the natural resources; and (c) artificial islands, installations and structures in the exclusive economic zone or on the continental shelf."[54]

A description of the term "territory" indicates also the application - or lack thereof - of the agreement to investments made in certain areas or territories with particular status under the constitutional framework of the country concerned.[55]

[52] The "Tribunal finds that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is where the invested funds ultimately made available to the Host State and did they support the latter's economic development? This is also the view taken by other arbitral tribunals." See Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 at 374

[53] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 at 288, 292.

[54] Canada-Peru BIT, Article 1.

[55] In that sense, for instance, the US-Uruguay BIT of 2005 clarifies that, in regard to the United States, the agreement covers "i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico; (ii) the foreign trade zones located in the United States and Puerto Rico […]." US-Uruguay BIT, Article 1.

3. Temporal Application

A second element that defines the scope of the investment agreements pertains to the temporal framework in which the investment is made. Two issues arise in this regard.

The first one consists of whether investments made prior to the entry into force of the BIT are covered by the agreement (or in other words, the provision determines whether the treaty applies to investments and/or measures pre-dating the treaty).

A second aspect concerns the temporal duration of the agreement itself.

In regard to the first element, most BITs signed to date grant protection to both future and already existent investments. Typically, this is addressed in a provision that expressly states so, as it is the case of the Japan-Korea BIT of 2002, which provides that the agreement: "shall also apply to all investments of investors of either Contracting Party acquired in the territory of the other Contracting Party […] prior to the entry into force of this Agreement."[56]

The application of the investment agreement to existent investments, however, does not mean that the agreement has retroactive effects.

Pursuant to Article 28 of the Vienna Convention, international treaties do not have such an effect unless a different intention appears from the text of the treaty or can be otherwise established. The disciplines of the agreement cover only facts or situations that occur after the entry into force of the agreement, or, having commenced before the entry into force and prolonged in time until after the entry into force. This entails that, for instance, an expropriation consummated before the entry into force of the agreement could not give rise to a dispute under the disciplines of the new BIT, or a discriminatory treatment that occurred in past, which has ceased to exist at the time of the entry into force of the BIT would not constitute a breach of the agreement.[57]

[56] Japan-Korea BIT, Article 23.1.

[57] Article 28 of the Vienna Convention, entitled "Non-retroactivity of treaties" provides that *"[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party"*.

In regard to the second aspect, in order to ensure protection and a stable investment environment, investment agreements typically foresee a minimum period of duration.

In the landscape of bilateral investment treaties, the usual minimum term is 10 years, although longer and shorter terms are also provided in some agreements.

Beyond this period, the parties retain the ability to terminate the agreement after an advance notice to the other party, normally of at least one year. However, under what is known as a "sunset clause", existing investors are then still entitled to rely on the protections found in those BITs that have been terminated and remain able to do so for a period after the BIT's termination. Most BITs enshrine such a provision that stipulates that the 'sunset' will last for a 15-year period.[58]

4. Definition of "Investor"

Investment agreements apply to investments made by "investors" of one the contracting parties in the territory of the other party. Together with the concept of 'investment' the definition of the "investor" delimits the subject-matter of the agreement.

Investments made by persons not covered under that definition will fall out of the disciplines of the agreement. Logically, the *BG v Argentina Award*, in discussing applicable law, stated that treaty law determines who qualifies as an "investor".[59] Also, the *Société Générale v Dominican Republic* Preliminary Objections to Jurisdiction found that the treaty does not apply to any acts or omissions that occurred before the date the national acquired the investment because the investor's nationality was different from that required by the treaty.[60]

Investment agreements normally apply to investments made by both natural and juridical persons. In the case of juridical persons, the definition of "investor" specifies what types of legal entities are covered by the agreement.

[58] See e.g. Indonesia - Netherlands BIT (1994) Art 15:2: "In respect of investments made prior to the date of termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement".

[59] *BG Group Plc. v Republic of Argentina*, UNCITRAL, Award, 24 December 2007 at 91-92.

[60] Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, *S.A. v Dominican Republic*, UNCITRAL, Preliminary Objections to Jurisdiction, 19 September 2008 at 105.

Additionally, given the preferential nature of bilateral trade agreements, the definition of "investor" features the link between the investor and one of the contracting parties required by the agreement to cover some investors, and exclude others, from the benefits granted by the agreement - the so-called "rule of origin" of the agreement.

Investments made by individuals are normally covered by investment agreements as well as those made by juridical persons.

A. Natural Persons

As the definition of natural persons entails no ambiguities, the question remaining is investment made by *which* natural persons are covered by the agreement. The rules of origin applied in investment agreements are comparable to those utilised by services agreements.

In this regard, the key criteria for rules of origin in regard to natural persons are:

- *nationality* of the natural persons.
- *residency*, which would include foreigners present in the home country of the investment, but exclude nationals residing abroad.
- *centre of economic interest*, akin to the concept of "substantive business operations" in the case of companies, which focuses on assuring a real link between the investor and the economy of the home country and prevents *treaty shopping*. In the case of natural persons this problem is only of limited relevance, and this rule of origin would normally yield similar results as the residency requirement.

The great majority of investment agreements extend the benefits of the agreement to the natural persons to have the nationality of one of the contracting parties. Some agreements extend their coverage to natural persons that have the right to permanent residency in the territory of one of the parties, such as Singapore - EFTA FTA which defines "investor of a Party" as, *inter alia*, "a natural person having the nationality of that Party or having the right of permanent residence of that Party in accordance with its applicable laws".[61]

[61] Singapore–EFTA FTA, Article 37(d). Canada-Argentina BIT, Article 1(b)(i).

A few agreements address the issue of natural persons having double or multiple nationalities. Such a situation can be addressed either by excluding from the scope of the agreement to individuals that, being covered as an investor of the other party (home country of the investment), also possess the citizenship of the host country. This is the approach taken, for instance, by Canadian bilateral investment agreements.[62]

Alternatively, the issue may be solved by giving predominance to only one of the nationalities of the investors, commonly that one most effectively used by the individual. The US 2012 Model BIT adopts this solution, stating that "a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality".[63]

It is important to also remind that the *Bogdanov v Moldova I* Arbitral Award noted, with respect to the definition of "investor", that in the practice of international investment arbitration it is generally accepted that protection under investment treaties is given to the shareholders of investment companies, even if the investment is actually carried out by a subsidiary constituted under the laws of the host state.[64] In this regard, the *Camuzzi v Argentina I* Decision on Objections to Jurisdiction noted that the applicable BIT's definition of "investment" is broad, as its intent is to extend comprehensive protection to investors, and it includes not only majority shareholders, but also minority or indirect shareholders.[65]

B. *Juridical Persons*

The application of the investment agreement in regard to investments made by juridical persons requires, prior to establishing a link between the company and one of the contracting parties, the identification of the different types of legal entities that may be considered "investors" under the agreement.

Investment agreements may exclude certain types of juridical persons based on their legal form, their purpose, or their ownership structure. The legal form adopted by the company determines, *inter alia*, which assets may be reached by the creditors, or to what extent a juridical person can be legally prosecuted on its own name.

However, exclusions based on the legal form of the investor may be irrelevant to ensure the liability of the investment, and indeed are rare in international agreements. Exclusions based on the purpose of the investor may apply to entities that do not operate for profit. For example, only a juridical person that "operates on a commercial basis"[66] may be eligible to receive benefits under the MIGA convention.[67] The structure of ownership of the investing company may also give certain grounds to be excluded from the benefits from an investment treaty when the company is State-owned rather than private.[68] In practice, however, most investment agreements provide for ample coverage to investors as legal entities. The definitions of 'investor' as a juridical person commonly seek to encompass all types of legal entities, independently of the legal form adopted, whether or not for profit, or whether or not privately-owned.

In addition to the types of juridical person covered by the agreement, the definition of investor features the rule of origin for those juridical persons; that is, the link between that investor and one of the contracting parties that is required in order for the investor to benefit from the preferences granted in the agreement. The rules of origin for juridical persons in investment agreements are commonly construed by two provisions that set out one positive and one negative element. These two elements work together to identify the nationality of the investor.

Firstly, a provision identifies the juridical persons covered by the agreement by linking those persons to one of the contracting parties. Investment agreements commonly take into account three different criteria between the investor and its country of origin, requiring one or a combination of them. These elements include:

- *country of constitution*, incorporation or, more generally organisation, which corresponds to the place of legal establishment of the juridical person. This test has the advantage of providing an immediate and easily recognisable objective element to determine the

62 See Canada Model BIT of 2003, Article 1.

63 US Model BIT of 2012, Article 1.

64 *Iurii Bogdanov Agurdino-Invest Ltd.* and *Agurdino-Chimia JSC v Republic of Moldova*, Arbitral Award, 22 September 2005 at 2.2.1.3.i

65 *Camuzzi International S.A. v Argentine Republic[I]*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005 at 81.

66 MIGA Convention, Article 13(a)(iii).

67 For a more detailed discussion on the purpose of MIGA see Ibrahim F.I. Shihat, MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency 22 (1988).

68 See Julien Chaisse, "Sovereign Wealth Funds in the Making-- Assessing the Economic Feasibility and Regulatory Strategies" (2011) 45(4) Journal of World Trade 837-876.

"nationality" of the juridical person. However, the place of constitution of a company may say little about its true origins, and lends itself to treaty shopping by investors. Indeed, the place of constitution could be chosen exclusively to enable the enjoyment of treaty advantages reserved for nationals of signatory countries.[69] An example of such a link is found in the Argentina - United Kingdom BIT of 1990, which admits that, in respect to the UK, "investors" are "companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom […]."[70]

- *country of seat*, head offices, or headquarters which connotes the place where effective management of the company takes place. As the place of the seat is not easily movable, this test seeks to ensure a true economic link between the investor and the country concerned. In this respect, the *AFT v Slovak Republic* Award list the indicia relevant to determining the existence of a "business seat" in terms of an effective centre of administration of the investor's business operations.[71] It prevents investors from establishing a "mailbox" company that merely seeks to exploit an agreement's preferences and that do not have any commercial interest in the country of establishment. The place of seat, however, may not always be readily identifiable. The Germany - Bulgaria BIT of 1986 features a rule of origin of the nature: "[a] ny juridical person as well as any commercial or other company or association with or without legal personality having its seat in the area of application of this Treaty […]."[72]

[69] It has been pointed out, for instance, the case of Bechtel Corp.'s claim against Bolivia, where Bechtel changed its location of registration from the Cayman Islands to the Netherlands in order to be able to bring the arbitration under the Netherlands–Bolivia BIT (Von Mehren et al., 2004). See also: *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

[70] Argentina-UK BIT, Article 1(c)(i)(bb).

[71] The proof of a business seat, "in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders' meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organised at a given Swiss place." *Alps Finance and Trade AG v Slovak Republic*, UNCITRAL, Award, 5 March 2011 at 217.

[72] Germany-Bulgaria BIT, Article 1(3)2.

- *country of ownership or control*, which looks at the ultimate owner of the juridical person by determining who are the persons that have the legal ability to direct the company's action. It ensures that only companies whose ultimate beneficiaries are nationals of one of the parties may benefit from the preferences of the agreements; however, the country of ownership or control is normally difficult to ascertain, particularly in the case of companies whose stock is traded in major stock exchanges. The investment chapter of the Singapore-Japan FTA combines this element with a substantive business operation test in order to exclude from the disciplines of the agreements investors from third States, as it states that "the term 'enterprise of the other Party' means any enterprise duly constituted or otherwise organised under applicable law of the other Party, except an enterprise owned or controlled by persons of non-Parties and not engaging in substantive business operations in the territory of the other Party."[73]

Secondly, some investment agreements feature a "denial of benefits" provision which allows the parties to exclude from the scope of the agreement those foreign investors who do not maintain a genuine link with the country in which they are located - albeit they may meet the place of constitution test. To this end, investment agreements tend to feature an ownership or control test together with a substantial business operation test.[74] The party may thus deny the benefits of the agreement to those investors who, although they are incorporated in one of the contracting parties, are owned or controlled by persons from a non-party and have no substantial business activities in the territory of the contracting party.[75] For instance, Singapore - Australia FTA, provides that "a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party and has no substantive business

[73] Singapore-Japan FTA, Article 72(h).

[74] For instance, Singapore - Australia FTA, Chapter 8 on Investment, Article 18, provides that "… a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party and has no substantive business operations in the territory of the other Party".

[75] For instance, the *AFT v. Slovak Republic* Award considers a BIT that requires the investor to have its seat and "real economic activities" in one of the contracting parties. *Alps Finance and Trade AG v Slovak Republic*, UNCITRAL, Award, 5 March 2011 at 219-227.

operations in the territory of the other Party."[76]

While some BITs, and not all,[77] include a denial of benefits provision - notably BITs signed by the Canada and the US according to the 2003 and 2012 models, respectively, this clause is more commonly found in investment chapters of free trade agreements, in particular of those that establish a place of constitution test as the primary link between the investor and one of the parties.

In general terms, however, the most common option has been recognising as "investors" those juridical persons that are incorporated or otherwise organised, and having their seat within the territory of the contracting parties.

5. Definition of "Investment"

As mentioned above, the subject-matter of the investment agreement is determined by the definition of the term "investment" together with that of the "investor".[78] The concept of investment governs the assets that fall under the scope of application of the agreement. In other words, it answers the question of *what type* of investments is covered.[79]

[76] Singapore-Australia FTA, Chapter 8 on Investment, Article 18.

[77] For instance, *Sanum v Laos* Award on Jurisdiction rejected reading a real economic activities requirement into the definition of investor. Sanum Investments Limited v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 at 307.

[78] Céline Lévesque, *Abaclat and Others v Argentine Republic: The Definition of Investment*, 27(2) ICSID REVIEW 247 (2012).

[79] Christoph H. Scheuer et al., The ICSID Convention: A Commentary 133 (2009). See also *Salini Costruttori S.P.A and Italstrade S.P.A v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (29 July, 2001), 6 ICSID Rep. 400 (2004). The Salini ICSID Tribunal espoused what is now commonly known as the "Salini Criteria" in determining what constitutes of an "investment" in the context of the ICSID Convention. The decision of the Tribunal contributed immensely to the intellectual foundation of the debate over the meaning of "investment" in the ICSID Convention. At paragraph 52 the Tribunal held inter alia that "... [t]he doctrine generally considers that investment infers: Contributions, certain duration of performance of the contract and participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contribution and duration of the performance of the contract. As a result these various criteria should be assessed globally, even if, for the sake of reasoning the Tribunal considers them individually here."

The prescriptions of the Salini criteria have been criticised because the criteria espoused by the decision are not supported by the ICSID Convention. Thus, it has been argued that applying the Salini criteria could lead to challenging the jurisdictional requirements of the ISCID Convention as a matter of law. See A. Martin, Definition of Investment: Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?, 11 Global Juris. 1, 2 (2011).

A. *Asset-based Definition*

Typically, investment agreements adopt a broad definition that refers to "every kind of asset", suggesting that any economic value is covered by the agreement. In this respect, the *Amto v Ukraine* Final Award found that the definition of investment in the "asset-based" approach of the ECT provides a "wide" definition ("every kind of asset") illustrated by a list of six types of rights.[80] This asset-based definition is indeed usually followed by an illustrative list of assets covered, which includes:

- *movable and immovable property and other property rights*. This category includes property rights on any goods, as well as ownership of land or any sort of real-state interest, such as mortgages, liens and pledges;

- *interests in the property of companies, such as shares, stock and debentures*. Under these terms, there is no minimum equity participation required to be covered by the agreement, nor the foreign investor is required to be in a position of control over the enterprise. Moreover, other forms of participation as bonds and, loans and debt instrument may also be included in this category;

- *claims to money and claims to a performance under a contract having financial value*. This category suggests that the agreement applies not only to property rights, but contractual rights as well. Many agreements expressly refer to rights acquired under concession contracts, including those for the exploitation of natural resources. The inclusion of contractual rights under the definition of investment raises a number of questions as to contractual relations for cross-border trade in goods and services can be considered 'investment' for the purposes of the agreement. The general wording adopted does not seem to restrict the scope of the agreement to long term contracts, for which under this category, any kind of portfolio investment is included;

- *intellectual property rights*. This grouping encompasses trademarks, trade secrets, patents and copyrights. Some BITs expressly include technical processes, know-how, geographical indications and goodwill, indicating that the agreement also covers newer forms of intellectual property rights. There is

[80] See *Limited Liability Company Amto v Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008 at 36.

no express requirement that these rights were registered or acquired under the laws of the host country.

Under this broad-asset based definition of investment, any asset of economic value retained by the investor as a result of its business operations in the host country can be considered to fall under either one of the categories expressly listed by the agreement, or, ultimately, under the all-encompassing terms of the chapeau of the provision, i.e. "every kind of asset".

Some investor-State arbitrations in recent years addressed the definition of investment in several agreements featuring an asset-based definition, although not necessarily including the terms "every kind of asset". Some operations that have been considered to be covered investment include, for instance, the establishment of an office to sell cross-border services, market share through trade, promissory notes, loan agreements, construction contracts, and the establishment of a law firm.

Some countries have included language in their agreement to clarify the scope of the term "investment", and hence the subject matter of the treaty.

In this line, for instance, agreements promoted by Canada feature an exhaustive - rather than illustrative - list of assets which are considered investment for the purposes of the agreement. Additionally, The Canadian Model FIPA of 2003 expressly lists some assets that are *not* an investment and hence fall outside the reach of the agreements, i.e. a) a loan and debt securities to one of the Parties or to an state enterprise; b) a loan granted by or debt security owned by a cross-border financial service provider; and c) claims to money arising from commercial contracts for the cross-border sale of goods and services or any other claims to money, "that do not involve the kinds of interests set out in" the exhaustive list previously featured.[81]

Similarly, the US Model BIT of 2012, while maintaining an open-ended list of assets that have "the characteristics of an investment", has also introduced clarifying language in regard to certain assets. In this sense, a footnote to the definition of investment recognises that

> "[s]some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics." A second footnote further clarifies that: "… [w]hether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorisations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law […]".[82]

The subject-matter of the agreement may also be restricted by introducing additional limitations to the covered investments, other than the definition of "investment" itself. For instance, although the parties would be intend to give the agreement a broad coverage in regard to the types of investments that qualify for the protection of the agreements, they may wish to limit those benefits to the investment that have fulfilled certain formalities. This is the case of some of the BITs concluded by Thailand, that although they commonly feature a broad asset-based definition of investment, they require written approval of the investment by the relevant authorities in order for that investment to be covered by the agreement. In that sense, the "scope of application" clause of the Thailand-Argentina BIT of 2000 provides that,

> "This agreement shall only apply in cases where the investment by the investors of one Contracting Party in the territory of the other Contracting Party has been admitted or otherwise approved in writing, if necessary, by the competent authority in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made".[83]

[81] See Canada Model BIT of 2003, Article 1.

[82] US Model BIT of 2012, Footnotes 1 and 2.

[83] Thailand-Argentina BIT, Article 2. Thailand has included similar restrictions in a number of other agreements. However, variations in the presentation in terms of drafting and heading of the provision may entail important differences in the final coverage of the agreements. The abovementioned provision found in the BIT with Argentina specially relates to scope of the agreement, so that investments that have not been formally approved in written when require would fall out of the coverage of the agreement. Instead, other agreements have included this caveat elsewhere and under different wording. The BIT with the SAR of Hong Kong of 2005, features this restriction under the "promotion and protection of investments and returns" in the following terms: "Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its right to exercise powers conferred by its laws and regulations

B. Enterprise-based Definition

Alternatively, some investment agreements that have been concerned primarily with foreign direct investment have focused on foreign investment in an "enterprise" rather than in a variety of assets.

This *enterprise-based* definition gives attention to the investor's objective of establishing a long-term relation with the economy of the host country, through the acquisition of a lasting interest in the ownership or management control of an enterprise. This approach is found, for instance, in the Denmark-Poland BIT of 1990, which defines investment as: "all investments in companies made for the purpose of establishing lasting economic relations between the investor and the company and giving the investor the possibility of exercising significant influence on the management of the company concerned".[84]

While the overwhelming majority of BITs feature an asset-based definition of investment, a number of free trade agreements with investment chapters have resorted to enterprise-based definitions. The European Community has promoted this approach in its different models, such as the Europe Agreements with Eastern European countries later acceded to the EU, the EuroMed Agreements signed with the its Mediterranean partners, and some of its more developed Association Agreements. The Association Agreement with Chile, for instance, entitles its chapter "establishment" rather than 'investment' and defines establishment as "(i) the constitution, acquisition or maintenance of a legal person; or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Party for the purpose of performing an economic activity".[85]

This is also the approach likely to be followed in future FTAs concluded by the European Union. In the East Asian region, only two FTAs with investment disciplines have departed from the asset-based definition to focus primarily in foreign direct investment. The Framework Agreement on the ASEAN Investment Area ("AIA") expressly excludes portfolio investment from the scope of the agreement,[86] and the Australia-Thailand FTA limit the scope of horizontal investment disciplines to "direct investment" as defined by the International Monetary Fund.[87]

Enterprise-based definitions, in principle, exclude from their coverage portfolio investment.[88] This means that assets such as equity securities, debt securities in the form of bonds and notes, money market instruments, and financial derivatives such as options and a variety of new financial instruments may be also excluded. For this reason, countries with particular concerns about the balance of payments and macroeconomic effects of removing restrictions on foreign investment, especially as it relates to short-term capital movements, may opt for this kind of enterprise-based definition.

Section Five. SOURCES OF INTERNATIONAL INVESTMENT LAW

The sources of international economic law are the same as those sources of international law generally outlined in Article 38 of the Statute of the International Court of Justice. Article 38 (1) read that

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Flowing from the above provisions, the sources of international economic law are conventions, customary international law, judicial

regarding the specific approval in writing (where applicable) of the investments, shall admit such investments" (Article 2.1). Arguably, this approval requirement is not presented here as a pre-requisite for the application of the agreement, so that even investments that have not fulfilled this condition may fall under the scope of the agreement.

84 Denmark-Poland BIT, Art 1(1)(b).

85 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Article 131.d.

86 ASEAN Investment Area agreement, as amended by the 2001 Protocol, Article 2.1. Australia-Thailand Free Trade Agreement, Article 901(c).

87 The IMF's Balance of Payments Manual defines a direct investment enterprise "*as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)*" (International Monetary Fund, 1993, p86).

88 Nonetheless, several questions arise in particular cases, and distinguishing what constitutes "foreign direct investment" or "portfolio investment" may not always encounter a clear-line division. The OECD Code of Liberalisation of Capital Movements, includes financial loans longer than five years in its coverage. On the contrary, the old Canada-US FTA of 1988, adopted an enterprise-based definition and did not cover financial loans, regardless of their term.

decisions and opinion of scholars. Over the years, the International Court of Justice (ICJ) situated at Hague had dispensed justice with help of these various laws and principles.

1. International Treaties on Investment

Investment agreements enshrine a series of obligations on the parties aimed at ensuring a stable and favourable business environment for foreign investors. These obligations pertain to the treatment that foreign investors and their investments are to be afforded in the host country by the domestic authorities, as well as ensuring foreign investor the ability to perform certain key operations related to their investment. The "treatment" granted to investors encompasses all sorts of laws, regulations and practices from public entities that apply to or affect the foreign investors or their investments.

All public entities are bound by the international obligations, including the federal and sub-federal governments, where applicable, local authorities, regulatory bodies, and entities that exercise delegated public powers. Measures adopted by private actors can also - although rather exceptionally - fall under the scope of international agreements when such private measures can ultimately be attributed to the governmental entity.

The set of obligations is rather consistent amongst the great number of IIAs. The core provisions found in investment agreement typically include a most favoured nation treatment obligation, the granting of national treatment, obligation to provide fair and equitable treatment as well as protection and security to foreign investors, and an obligation to allow international transfers of funds. However, while the substance of these principles remains the same throughout the great number of investment agreement, the precise scope and reach of each obligation depends on the precise wording featured in each case.

A discussed above, a BIT is an agreement made between two countries containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories.[89] These agreements establish the terms and conditions under which nationals of one country invest in the other, including their rights and protections. BITs provide protection against nationalisation and expropriation of foreign assets and other actions by a signatory of the BIT that may undermine the ownership or economic interest of a national of the other signatory.

As BITs are negotiated agreements between the signatory parties, their terms vary. However, they generally include the following rights and protections: national treatment; most-favoured-nation treatment; fair and equitable treatment; compensation in the event of expropriation.

One of the main protections under a BIT is that it allows foreign investors to submit claims for breach of the BIT to arbitration under the auspices of the International Centre for Settlement of Investment Disputes rather than to local courts what has the effect to depoliticise disputes.[90] In this respect, under investment treaties, it is the foreign investor (very often a foreign private entity) who enforces rights by bringing claims.

Alongside the evolution of a multilateral trading system under the auspices of the General Agreement on Tariffs and Trade ("GATT") after the Second World War, there has been another development in international economic relations of systemic significance – the rise of regional trading blocs and preferential trade agreements ("PTAs"),[91] in many ways replacing former colonial systems of preferential trade. It is estimated that some 95% of all trade operates under preferential

[89] Vandevelde makes this point clear. On the one hand, he explains that negotiators sought inclusion of investor-state arbitration clauses because they would "ensure [ ] investors of a neutral mechanism for settlement of investment disputes that is wholly insulated from the political relationship between the investor's government and the host government." Kenneth J. Vandevelde, The Bilateral Investment Treaty Program of the United States, 21 Cornell Int'l L.J. 201, 258 (1988). On the other hand, he concludes that "[a]t the same time, the BITs eliminate none of the traditional remedies" as investors may still "pursue espousal of the claim by their own governments" and the "BITs also provide for state-to-state arbitration of disputes arising out of the interpretation or application of the agreement." See Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice 163 (1992) at 163.

[90] Ibrahim Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA", 1 ICSID Rev .- Foreign Inv. L. J. 1, 11-12 (1986); see also Sergio Puig, Emergence and Dynamism in "International Organizations: ICSID, Investor-State Arbitration, and International Investment Law", 44 Geo. J. of Int'l L . 531, 550-52 (2013).

[91] The current textbook uses the term Preferential Trade Agreements rather than Regional Trade Agreement or Free Trade Agreement (or even bilateral and regional trade agreements). As stated by Lester and Mercurio, many of the so-called FTAs favour certain countries in trade relations and are basically discriminatory rather than "free trade." The term PTAs encompass many different kinds of bilateral and regional trade agreements and underscores their common denominator which is to establish preferences for the signatories over other in trade relations. SeeBilateral and Regional Trade Agreements: Commentary and Analysis 4-5 (Simon Lester & Bryan Mercurio eds., 2009).

arrangements. The process was initiated and spearheaded by post-World War II European integration. By way of trade liberalisation and regulation, essential political goals of peace and security were sought and largely achieved. The example inspired other continents to follow suit, albeit to a much lesser degree.[92]

Following the failure of the fourth World Trade Organization ("WTO") Ministerial Conference in Seattle in 1999, the number of regional trade agreements ("RTA") has constantly increased.[93] PTAs really began coming into their own in the 1990s. Prior to that, there were virtually no such agreements until 1970 and less than 50 in 1990.[94] This suggests that greater reduction in trade barriers (both tariff and non-tariff) was achieved in the earlier rounds of the GATT, which precluded the need for countries to resort to PTAs. Once, however, this initial thrust via the multilateral route was saturated, countries took recourse to other avenues for expanding their trading opportunities.[95] Regional cooperation between countries enhances the potential trade in goods or services among themselves as well as helping them to realise economies of scale and greater specialisation in production by overcoming the constraints of the domestic market.[96]

These bilateral agreements are, by definition, intended to further liberalise international trade with WTO agreements representing the minimum requirements.[97] This deepening of the scope of regional trade

[92] For a comprehensive overview of the great variety of FTAs, see generally Regional Rules in the Global Trading System (Antoni Estevadeordal et al. eds., 2009).

[93] See UNCTAD (2011) *World Investment Report 2011- Non-Equity Modes of International Production and Development*, New York and Geneva (UNCTAD/WIR/2011) 26 July 2011.

[94] While the United States started negotiations with other regional groups in 2003, the European Community refrained from doing so at the instigation of Pascal Lamy. As a matter of fact, no agreement of this kind was negotiated after 1999 in order to send a clear message that only a multilateral framework would serve as a reference. See Simon Lester, Bryan Mercurio and Arwel Davies, World Trade Law: Text, Materials and Commentary 330–33 (2012). See also, Sophie Meunier, Trading Voices: The European Union in International Commercial Negotiations, 2005, at 240.

[95] See especially Bhagwati, Jagdish. Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008); Bryan Mercurio (2004), 'Should Australia Continue Negotiating Bilateral Free Trade Agreements? A Practical Analysis' 27 University of New South Wales Law Journal 667.

[96] See Chris Brummer, Regional Integration and Incomplete Club Goods: A Trade Perspective, 8 Chi. J. Int'l L. 535, 535 (2008) ("By providing smaller and more accessible venues for negotiations, regional organizations often make possible a more efficient means of consensus building than that usually available under multilateral frameworks like the World Trade Organization").

[97] See John Braithwaite, Methods of Power for Development: Weapons of the Weak, Weapons

agreements, observed during the last decade, was recently illustrated by the growing recourse to the concept of what is called "WTO Plus" agreements.[98] A "WTO Plus" agreement may be defined as a free trade agreement whose terms go beyond those provided for by WTO law.[99] In addition to the preferential nature of the free-trade agreement in the field of tariffs (as compared to most favoured nation ("MFN") rights), intellectual property rights,[100] and services (as compared to the proposals made within the WTO by State Parties to liberalise services markets), this type of agreement covers areas that are not, or are only partially, regulated by WTO agreements.[101] Section one presents the conditions of validity. Section two provides examples of regional economic integrations.

The United States and the European Union are negotiating since 2013 the Transatlantic Partnership Agreement. For their part, Canada

of the Strong, 26 MICH. J. INT'L L. 297, 313 (2004) (noting that bilateral trade agreements "progressively lock more States into the preferred US multilateral outcome until the point is reached where the United States can attempt to nail that multilateral agenda again"); Ruth L. Okediji, Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection, 1 U. OTTAWA L. & TECH. J. 127, 143 (2004) (noting that "multilateral efforts to harmonise intellectual property norms should be anticipated by developing countries once the network of bilateral agreements is sufficiently dense to warrant a mechanism to consolidate and (perhaps improve) the gains from bilateralism").

[98] Colloquial expression for a non-WTO trade agreement that contributes to the objectives or attainments of the WTO; or, more loosely, for a non-WTO trade agreement which promotes the trading interests of the countries involved. In this sense, the term is contrasted with "WTO-minus" agreements. Regarding accession to the World Trade Organization ("WTO"). All countries are required to commit to 25 mandatory provisions, but some least developed countries (LDCs) must also accept additional "WTO-plus" provisions. For example: binding export subsidies at zero in agriculture; binding pharmaceuticals at zero; joining the optional Information Technology Agreement ("ITA"); binding ITA products at zero.

[99] Taking the subject matter of the World Trade Organization's ("WTO") agreements as a baseline, it is possible to show that the width of FTAs varies, especially with respect to WTO-plus or WTO-extra obligations. Respectively these clauses deepen the level of commitment enshrined in WTO agreements (for instance, by tightening the protection of intellectual property rights) or are simply absent in the WTO package (like those relating to the protection of the environment). See Henrik Horn et al., EU and US Preferential Trade Agreements: Deepening or Widening of WTO Commitments, in Preferential Trade Agreements: A Law and Economics Analysis 150, 156 (Kyle W. Bagwell & Petros C. Mavroidis eds., 2011).

[100] See Henning Grosse Ruse-Khan, The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?, 18J. Intell. Prop. L. 325, 327 (2011) (describing TRIPS-plus standards as those introduced often in Free Trade Agreements that extend IP protection beyond that providing for in TRIPS).

[101] Such as the adoption, under free-trade agreements, of terms in the multilateral Agreement on Public Markets (APM) (mainly concerning the principles of national and non-discriminatory treatment); or even treatment under the above agreement of "new issues for regulation" not yet covered at the multilateral level like investment, protection of geographical indications and competition.

and the European Union concluded in October 2013, a tentative agreement on the Comprehensive Economic and Trade Agreement negotiations. If these agreements were to be signed and ratified, they would consolidate the normative primacy of free trade within the States Parties. These treaties, in addition to promoting a marked increase in cross-border investment should include clauses conferring important legal protection to foreign investors. At a time of economic globalization, the issue of treatment of these transnational investors enlightens us as to the balance of powers and axiological nature of law governing international trade and global financial flows. It may therefore be instructive to take a look to North America, where Chapter 11 of NAFTA which deals with the protection of investors, has now been in effect for two decades.[102] This chapter has given rise to several cases that illustrate the tension between the private interests of investors and the national interest or the common good.

Chapter 11 of NAFTA provides for a dispute settlement mechanism part - a signatory - and an investor of another party. This mechanism gives more rights to investors, including that of NT (Article 1102), the right to treatment in the MFN (Article 1103), the PR ban (Article 1106), the right the minimum standard of treatment (Article 1105), as well as protection against expropriation (Article 1110). These last two rights that deserve to be looked specifically.

These tensions between legal protection now afforded to investors and the regulatory power of the state can be found in the multilateral legal agreement established by NAFTA involving Canada, the United States and Mexico since 1992. Chapter 11 of the Agreement provides for a mechanism to ensure the protection of foreign investments whose scope is considerable. Note that it was not always so, however: the free trade agreement in place since 1988, which initially consisted of the United States and Canada, provided no similar device. It is with the inclusion of Mexico in the free trade area that the United States insisted on its inclusion as part of the NAFTA negotiations.

The United States considered, with a view to protecting the interests of US multinationals, that 'the legal system in Mexico, developing countries were not as mature, predictable and transparent than that of developed countries'. Accordingly, Chapter 11 was to protect the economic rights of foreign investors by providing a stable legal

[102] See HQ Zeng, "Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice" (2014) 17 *Journal of International Economic Law*, at 299–332.

environment, so as to stimulate investment. This was probably a legitimate concern. Nevertheless, it is important to note that Chapter 11 is by its editor, just as applicable in Canada and the United States and Mexico. In this regard, NAFTA is a first: it is indeed the first international legal instrument granting protection to foreign investors in developed countries, a mechanism traditionally which has been reserved for developing countries, including through the use of International Centre for Settlement of Investment Disputes ("ICSID"), established in 1965 by the Washington Convention and part of the World Bank Group.

There would probably be a lot to say about the proliferation of free trade agreements and bilateral investment treaties for several years, a trend that illustrates the primacy given to trade and the economy conceived as essential instruments of the foreign policy of Western states.

2. Customary International Law

Like many concepts of international law, there is unfortunately no comprehensive definition of customary international law to which there is total agreement. The closest we have to a universal definition is "international custom, as evidence of general practice of law" found in Article 38 of the Statute of the International Court of Justice and adopted by nearly every country (or 'state') in the world as members of the United Nations.

A. ICJ and Customary International Law

Despite being unable to create legally binding precedents (Statute Article 59), the ICJ is the "principal judicial organ" of the United Nations and its decisions tend to be followed by other international courts. Its decisions are therefore of great influence for international legal scholars and jurists.

In North Sea Continental Shelf the ICJ explained that there are actually two types of customary international law.[103]

- The first, often overlooked, type comprises legal rules that are logically necessary and self-evident consequences of fundamental international legal principles. For example, because it is a fundamental legal principle that each state is sovereign, it

[103] North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3. at para 39, 77.

is logically necessary (and thus customary international law) that the sovereignty of each state extends throughout that state's own borders.

- The second type, which is the focus of this article, comprises rules called "opinio juris" ('an opinion of law'). To be considered opinio juris a rule must satisfy two criteria: It is settled and uncontroversial practice of states to act (with general consistency - *Nicaragua v. USA*)[104] in obedience to the rule; and States obey this rule because they consider themselves legally bound by it (i.e. not just because of tradition, politeness, or convenience).

The ICJ has said that evidence of satisfaction of these criteria mainly comes from how states physically act (Libya/Malta),[105] but it can also come (to a lesser extent) from the treaties they adopt and other governmental actions.[106] Some *opinio juris* rules are sensible and unsurprising - for example, that acts of self-defence must be necessary and proportionate (*Nicaragua v. USA*).[107] Others are much more niche, such as Costa Rican inhabitants' right to subsistence fishing on their side of the San Juan River border with Nicaragua (Costa Rica v.Nicaragua).[108]

B. Customary International Law and Foreign Investment

For over one hundred years, the international community was divided over what law governed the treatment of foreign investment and what the content of that law was. Capital exporting countries insisted that customary international law (CIL) was applicable and that the law provided for such concepts as:

1. Expropriation only in the public interest, accompanied by prompt effective and adequate compensation (the Hull Formula, as developed by Cordell Hull, a US Secretary of State)

[104] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14 at para. 186.

[105] Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment, I.C.J. Reports 1985, p. 13, at para 27.

[106] Wood, M. 2014, Second report on identification of customary international law, International Law Commission, Sixty-Sixth Session, Official Records of the General Assembly (A/CN.4/672) at para. 41.

[107] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 14, at para. 176, 194, 237.

[108] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009,* p. 213. at para 144.

2. Minimum standards of treatment of foreign investment recognized internationally.

Capital importing states disagreed with these concepts, stipulating that:

1. the laws regarding foreign investment are solely those of the host state

2. the foreign investor is entitled to be treated the same as any domestic investor - no better and no worse. If the domestic law permits expropriation without compensation, then that was the regime that the investor had to accept in that state.

3. Therefore, there is no relationship between CIL and international investments.

This antagonistic situation reached its high-water mark during the 1960's and 70's, with the ostensible vindication of the view of the capital importing states, beginning with:

- UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources in 1962;

- UN GA resolution 3201 (S-VI) - the Declaration on the Establishment of a New International Economic Order of 1974; and

- The Charter of Economic Rights and Duties of States GA Res. 3281(xxix) also of 1974. This Charter of Economic Rights and Duties of States excluded international law and directed that only national law be taken into account.

These resolutions were voted against by the capital exporting states, but were adopted by a majority of UN members, showing their disapproval of what the capital exporting countries stated were the rules governing foreign investment, particularly as it related to expropriation.

However, not long after the New Economic Order and the Charter were adopted in 1974, the tide changed dramatically, such that we rarely hear any references to those documents currently. The key reason was that the capital importing countries realized that if they maintained that doctrine internationally, they would suffer from a dramatic drop in foreign investment into their countries, resulting in little development in those countries.

This conflict ushered in the "Bi-Lateral Investment Treaty wave". The US and western European States sought protection for their nationals when investing in Less Developed and Not-Developed countries because these were the states that were causing the most problems for their investors of decades, claiming that they had no obligation in international law related to foreign investment protection.

While developing countries continued to maintain a posture of rejecting the concepts of international investment law espoused by the developed countries at international forums, they began to negotiate bilateral investment treaties with these capital exporting countries, which essentially contained the protections for foreign investment based upon the viewpoints of the capital exporting countries as set out above. Presently there are over 3,000 binding IIAs in existence, providing these protections to foreign investors.

Customary international law is, evidently, a troublesome issue for the rule of law. Few legal regimes claim the ability to 'discover' and apply amorphous laws to every state on the planet, no matter the ambiguous discretion involved and the inability of those on the receiving end to predict it. Fewer still can claim the ability to impose laws on states without express consent and in contradiction to international treaties. To be sure, were customary international law in the hands of a universally-recognised judicial body with a well-defined mandate to use it, it would be a powerful legal tool in holding to account renegade states that create transnational problems and reject basic human ideals. But amidst the current reality, with supranational bodies worldwide in crises of legitimacy and the existing regime of international customary law opaque and non-consensual, it is one that international jurists (and, in particular investment lawyers) today would be ill-advised to use.

4. International Trade Law and Investment

Despite the rapid increase in the importance of international investment, numerous efforts to conclude an international multilateral investment agreement have failed at the United Nations and the OECD. The site of the attempt to achieve such a multilateral agreement has then shifted to the WTO.[109] Because trade and investment are linked in the real world, the system of rules that governs trade should also govern investment.

A. WTO and Investment

At the 1996 World Trade Organization ("WTO") Singapore Ministerial Conference, an agreement was struck to create a committee (the Working Group on Trade and Investment) to analyse the investment issue. Later, this Group was given a new mandate by Doha Ministerial in 2001. It was required to clarify seven specific issues and to launch negotiations "on the basis of a decision to be taken, by explicit consensus".[110] Too important differences of opinion made negotiations impossible and contributed, in part, to the breakdown of the Cancun Ministerial meeting. In the summer of 2004, WTO members conceded that "no work towards negotiations on [investment] will take place within the WTO during the Doha Round".[111]

The WTO and its predecessor organisation, the General Agreement on Tariffs and Trade ("GATT"), have not directly tackled the broad issue of foreign investment rules. Instead, GATT and the WTO have dealt with a narrow set of very specific issues, which has left nations to formulate their own policies, either through BITs.

The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures ("TRIMs"). Among the issues addressed, GATT and the WTO have dealt with specific aspects of the relationship between trade and investment through the General Agreement on Trade in Services ("GATS"), which concerns the supply of services by foreign companies, and through Trade-Related Investment Measures ("TRIMs"). To the extent that trade in services may require a commercial presence by a foreign service-provider in the territory of another state, the provider may enjoy certain investment rights under the GATS.

Additionally, under WTO rules, investment measures, such as

[109] In the three earlier attempts (the International Trade Organization-1948-1950, under the aegis of the UN, 1972-1992, and the Multilateral Agreement on Investment, the MAI, at the OECD-1995-1997), policymakers were never able to agree even on the objective for such negotiations. In each instance, capital -exporting nations wanted rules to govern entry and post-entry conditions. On the other hand, capital-importing countries wanted obligations that would bind foreign investors as well as investment rules that would help these nations meet their development objectives.

[110] On this point, Gavin Boyd and Alan Rugman, *The World Trade Organization in the new global economy – trade and investment issues in the Millennium Round*, (London : Edward Elgar, 2002)

[111] Christian Deblock, 'Nouveau Régionalisme ou Régionalisme à l'américaine ? Le cas de l'investissement', Cahiers du Centre Études internationales et Mondialisation, Institut d'études internationales de Montréal (2005) at 16-18.

local content rules or tradebalancing requirements, would be prohibited, to the extent that they impact upon trade and violate the GATT rules on national treatment and quantitative restrictions. Three further agreements (the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), the Government Procurement Agreement ("GPA"), and the Agreement on Subsidies and Countervailing Measures ("ASCM") have only indirect effects on investment.[112]

B. The General Agreement on Trade in Services

The GATS deals most with investment issues of all the existing WTO agreements. The GATS modes of supply are: cross-border supply, consumption abroad, commercial presence and the presence of natural persons.

Although GATS does not deal officially with investment, it covers foreign direct investment through its commercial presence mode of supply. The establishment of a commercial presence relates substantially and directly to investment. Services obligations that contemplate a "commercial presence" of foreign service providers necessarily imply that the providers necessarily will be able to make investments necessary to enjoy the benefits of such commercial presence. Hence, if we focus on the substance and the purpose of this mode of supply, the commercial presence mode of supply is, for all practical purposes, a multilateral agreement on investment.

To that extent, one of the key principles of investment treatment (most-favoured-nation treatment) has become a general obligation for dealing with investment in the Agreement. However, market access and national treatment obligations for investment apply only to those sectors and modes of supply that have been put in the schedules of commitments submitted by the Members, limiting in this way the scope of liberalisation for investment on the territory of each WTO Member.

The commercial presence, can directly be linked to the two

[112] The Agreement on Government Procurement deals with public procurements and services because GATS excludes public procurement services. The GPA requirements deal with investment once they apply to procurement of foreign products or services as well as to goods or services produced by locally established foreign suppliers. The Agreement on Subsidies and Countervailing Measures deals with subsidies. Since the Agreement includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly but it does not build up any significant incompatibility between foreign and domestic investment.

criteria of GATS, market access and national treatment, in the sense that governments can either restrict market access by limiting the issue of banking licences in total, irrespective whether or not banks are owned by non-residents or residents. Alternatively, the number of foreign banks allowed to set up subsidiaries can be restricted, thus affecting national treatment. Second, the three other modes of supply (cross-border supply, consumption abroad and movement of natural persons) affect the operational part of banking business, for instance, whether foreign banks are allowed to provide services in local currency or from which services they are excluded compared to local banks.

The conditions and limitations for both market access and national treatment could be entered in the schedules of commitments, again specific to sector and mode of supply. This so called "positive list approach" of enumerating the specific sectors and modes of supply to be covered contrasts with the traditional WTO approach based on general principles. GATS uses in large part the selective liberalisation approach to provide access to foreign service suppliers, i.e. to foreign investors in the field of services. GATS is very important since it seeks to liberalise and to open national economies to investment.[113] International Investment Agreements are primarily protective, that is, the vast majority of commitments are intended to protect established investment, whereas only a minority of IIAs contains liberalisation commitments. However, the GATS also contains elements of both the national and most-favoured-national treatment and it relies on the use of both positive lists of commitments and negative lists of exemptions for different purposes.

Commercial presence as an agreement to open up markets to foreign investment

As we have already mentioned, the GATS deals most with investment issues of all the existing WTO obligations. The investment implications of GATS are largely derived from the key definition of Article I.2, which identifies modes by which services can be supplied. Several of these imply a significant presence (referred to as a "commercial presence" in the legal texts) in the country where the service is provided, and provide the basic protections of GATS to the investments that are an integral part of this presence. The supply of trade in services through

[113] See, Pierre Sauvé, "Investment and the Doha Development Agenda: a look at the issues", in *The Doha Development Agenda, Perspectives from the ESCAP Region*, (New York: United Nations, 2003) at 83.

"commercial presence", which is in essence an investment activity, is covered by the so-called "mode 3".

The notion of "commercial presence", refers to a situation whereby a service provider establishes or has a presence of commercial facilities in another country in order to render a service. The service itself is supplied by setting up a business or professional establishment, such as a subsidiary corporation or a branch or representative office, in the territory of one Member by a service supplier of another Member. Through the provision covering the commercial presence, the GATS is in fact an agreement which aims to open up markets to foreign investment[114] and which can apply to many different sectors of activity: educational services, banking, insurances, telecommunications and so on.

It is only by reference to a country's schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and under what conditions the basic principles of the GATS (market access, national treatment and MFN treatment) apply within that country's jurisdiction. A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule.

The commitments made in the field of "commercial presence" are important since with constitutional principle of MFN obligation, parties to GATS are committed to treating services and service providers from one Member in a no less favourable way than like services and service providers from any other as concerns measures affecting trade in services.[115] National treatment, however, is not automatically accorded across the board. It applies only for scheduled sectors when parties agree to provide national treatment in the context of specific market access commitments. GATS also states that Member may maintain a measure inconsistent with MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

[114] To a lower extent, Mode 4 also tackles investment issues because it deals with the temporary entry of managerial and other key personnel.

[115] The wording of MFN treatment in GATS is the same as in the North American Free Trade Agreement and the United States bilateral investment treaties, using the negative list approach, once it states that with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

The GATS does not set out any operational conditions directly. Nothing surprising since usually BITs provisions are only negligibly regulatory, meaning that host countries continue regulating foreign investment through their domestic legislation and not by directly imposing obligations on foreign investors in IIAs. Nevertheless, there are some general obligations within GATS that certainly affect the investment operational conditions. Such obligations are: domestic regulation, recognition, monopolies and exclusive service suppliers, and business practise obligations.

The domestic regulation affects the operation of investment mostly through an authorization process, qualification requirements, technical standards and licensing requirements, where these conditions and procedures are required for the supply of a service.

The obligations of recognition affect investment in the supply of a service, where services suppliers need to meet standards or criteria for the authorisation, licensing, or certification of their services, or they need to achieve special education or experience.

The obligation on monopolies and exclusive service suppliers within the Agreement states that each Member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the MFN treatment principle. If a supplier fulfils the condition on monopoly and exclusive service supplier, then this Agreement will certainly affect the operation of his/her investment in order not to allow such the supplier to abuse its monopoly position. Regarding the obligations on business practices, the Agreement appeals the Members to eliminate certain business practices of service suppliers that may restrain competition and thereby restrict trade in services.

As in the case of the TRIMs Agreement, GATS promotes the transparency of investment environment. It is an interesting feature of WTO since most BITs are only slightly transparent. They contribute to transparency only insofar as the provisions of the agreements themselves are transparent, but do not require host countries to make their domestic laws transparent. GATS declares that each Member shall publish promptly all relevant measures of general application,[116]which pertain to or affect the operation of trade in services. Where the

[116] On the central notion of transparency in WTO system and its contribution in ensuring the effectiveness of its law, see: Sharif Bhuiyan, *National Law in WTO Law — Effectiveness and Good Governance in the World Trading System*, (Cambridge: Cambridge University Press 2007) at 68-75.

publication is not practicable, the Agreement states such information shall be made otherwise publicly available.

Opening an economy to foreign investment through Mode 3 commitments

Under GATS, all schedules have two sections.[117] First, "horizontal" commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the second section of the schedule, the "sector-specific section" contains entries that only apply to a particular sector (12 sectors, representing about 160 sub-sectors, can be distinguished under the GATS). In determining a country's sector-specific commitment, consideration must also be given to the overall horizontal commitments.

The "horizontal commitments" are those commitments that apply across-the-board to all the services sectors listed in the country's "Schedule of Specific Commitments". These commitments are usually written at the beginning of the schedule. They can refer to economic considerations that may be applicable to all the services sectors and sub-sectors listed in the schedule.

All WTO Member States are expected to have a "Schedule of Specific Commitments" under the GATS. This is the list of commitments for every selected service sector that WTO members came up with during negotiations. WTO members opened up their market in an asymmetric way reflecting their perceptions about how open (or, conversely, how closed) an economy should be to foreign investment. This serves as a guarantee to service providers in other countries that market entry conditions will not become less restrictive, as they can only be improved.

A Mode 3 request, offer, or commitment, like those for the other modes, be for a specific sector or sub-sector, or be horizontal. A WTO Member can, for each service sector or sub-sector, request for, or offer, different level of commitments. That of course applies for each mode of supply even if here we focus on Mode 3.

The commitments and the limitations to market access and national treatment are entered in the service schedule with respect to each of the modes of supply. A Mode 3 request, offer, or commitment is essentially about liberalizing the conditions under which the service providers of Switzerland, for example, can invest and set up branch offices, joint ventures, or subsidiaries in the territory of another WTO Member. It can however have different levels. Indeed, the Mode 3 commitments can lead to a full liberalisation, a limited liberalisation or a retained liberalisation.

[117] T. Brewer and S. Young,"Investment issues at the WTO: The architecture of rules and the settlement of disputes", 3 (1) Journal of International Economic Law (1998) at 460-462.

Table 1. Modalities of liberalization for Mode 3 under GATS

Full liberalisation. A WTO Member can request, offer, or commit to full liberalisation. This means that there will not be any limitation on market access or national treatment for the service sector and mode of supply in which this commitment is written. In this hypothesis, WTO Member writes "none" in its schedule of commitments. This means that it is committing itself to provide full liberalisation of such service sector. It commits itself to allowing the services and service providers of other WTO members full access to the country's market of services consumers and that it will not impose any regulations that would restrict such access or discriminate in favour of domestic services or service suppliers. However, there are certain exceptional circumstances, such as those in GATS Article XIV and XIVbis, under which WTO members can justify the imposition of regulations that violate their GATS obligations.
Limited liberalization. A WTO Member can describe and write specific limitations or conditionalities to market access or national treatment in its "Schedule of Specific Commitments". Such limitations can be those that are required by existing national laws or regulations. Moreover, they can always impose restrictions with respect to commercial presence. In making their commitments, WTO members can specify the limitations or conditions under which they will allow foreign services and service providers under the 4 modes of supply above into their domestic market and compete with domestic services and service providers. These limitations or conditions can be with respect to "market access" or to "national treatment". They can, for example, limit the number of economic operators (GATS Article XVI). These "market access limitations" are restrictions on the entry of foreign services or service suppliers into the domestic market. They can take exceptions from the obligations to accord MFN treatment to foreign service suppliers or from the obligation to accord national treatment (GATS Article II :2 and Article

XVII). A country's commitments may be limited by its MFN exemptions (i.e. the maintenance of measures inconsistent with the MFN obligation). Since MFN is a general obligation that applies to all trade in services, exemptions are listed in a separate schedule indicating: (i) the sectors to which the exception applies; (ii) the measure and why it is inconsistent with the MFN obligation; (iii) the countries to which the measure apply; (iv) the duration of the exemption; and (v) the need for the exemption. Exemptions, in principle may not last longer than 10 years. The national treatment limitations take the form of laws or regulations that effectively discriminate against foreign in favour of domestic services and service suppliers, or provides for market competitive conditions that favour domestic over foreign services and service providers.

Retained liberalization. It is finally possible for a Member to keep control a service sector and to decide not to liberalise it. In that case, a WTO Member must indicates "unbound" in its schedule of commitments for a given sector or mode of supply if it wishes to remain free to introduce or maintain laws or regulations that limit market access or national treatment or favour domestic over foreign firms in that sector or mode of supply. That option will result in a retained liberalisation for given services sector.

SUMMARY OF THE CHAPTER ONE

The most fundamental question determining whether investment treaties are applicable to an investment is whether a given project constitutes a "foreign investment" under international law. Indeed, this definition constantly changes as entrepreneurs, financiers and multinational companies develop innovative investment tools. IIAs tend to adopt a broad definition of 'investment' that refers to "every kind of asset" of a foreign investor in a host country, suggesting the agreement covers any economic value.[118] In many IIAs the oft-used asset-based definition typically includes an illustrative list of assets covered. Alternatively, some IIAs focus on foreign investment as an "enterprise" rather than as a variety of assets.[119]Those following the enterprise-based definition pay particular attention to the investor's objectives for establishing a long-term relation with the economy of the host country — for example, the acquisition of a lasting interest in the ownership or management of an enterprise.[120] The term **"**every kind of asset" establishes an open-ended definition, followed by an illustrative list of assets expressly covered by the agreement.[121] All categories of assets described above fall either expressly or implicitly under the disciplines of the agreement. The categories covered by most BITs remain substantially identical, namely: a) movable and immovable property and other property rights; b) interests in the property of companies; c) claims to money and claims to a performance; d) intellectual property rights; and e) concession rights conferred by law or contract.[122] "Investment" in international law, typically encompasses both the facilities invested in by foreigners (tangible assets) as well as the research and development used to create new technologies (intangible assets). In addition to the WTO law, IIAs has become popular among countries to promote market liberalization and create more investment opportunities. There are two major types of IIAs to be discussed: bilateral investment treaties (BITs) and preferential trade agreements (PTAs). BITs are signed by two countries bilaterally; PTAs are multilateral and usually take forms of free trade agreements (FTAs). One of the significant FTAs is North America Free Trade Agreement (NAFTA) concluded among North American countries. Since IIAs are signed among a number of countries, usually there are negotiations between parties before conclusion. The IIAs are mostly customized based on the needs and conditions of the relative parties, so this increases transparency of regulations and restrictions. Hence IIAs protect both foreign investors and host countries more realistically. Such feature of IIAs helps promote and encourage FDI

[118] *Argentina-United Kingdom Bilateral Investment Treaty* signed on 11December 1990; United Kingdom - Tanzania Bilateral Investment Treaty (BIT) signed on 7 January 1994.

[119] Julien Chaisse, Puneeth Nagaraj (2014) "Changing Lanes: Intellectual Property Rights, Trade and Investment", 37 Hastings Int'l & Comp. L. Rev. 249-51.

[120] For instance, the G3's, i.e. the free trade agreement between Colombia, Mexico and Venezuela, "use of an enterprise-based definition is a positive one. By defining investment in terms of enterprise, the G3 grants protection to non-incorporated forms of FI as well as incorporated forms. The term "enterprise" is more general than the term "corporation", but the former comprises the latter. The drafters of the G3 differentiated between constituting an enterprise and organizing an enterprise. The agreement states that an enterprise will be any entity constituted, organised or protected under domestic laws. Such a provision opens the door for protection of non-incorporated forms of business organizations. Enterprise is an economic term, not a legal term, related to the organization and integration of the business rather than its legal form. In addition, an enterprise does not necessarily have legal personality". Omar E. García-Bolívar, G3 AGREEMENT: A COMPARISON OF ITS INVESTMENT CHAPTER WITH THE EMERGING INTERNATIONAL LAW OF FOREIGN INVESTMENT, 10 L. & Bus. Rev. Am. 779 at 785.

[121] See Céline Lévesque, "Abaclat and Others v Argentine Republic: The Definition of Investment", 27(2) ICSID REVIEW 247 (2012); Julien Chaisse, Puneeth Nagaraj (2014), "Changing Lanes: Intellectual Property Rights, Trade and Investment", 37 Hastings Int'l & Comp. L. Rev. 249-51.

[122] Julien Chaisse, Puneeth Nagaraj (2014), "Changing Lanes: Intellectual Property Rights, Trade and Investment", 37 Hastings Int'l & Comp. L. Rev. 226-227.

around the world. The IIAs also promote FDI by compromising on the dispute settlement mechanisms. Firstly, clearer definitions of investors in some BITs give predictability and certainty to foreign investors. This brings comfort to the foreign investors on how the IIAs protect them in case of disputes.

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) What are the historical bases for the differences between the developed and the developing world in the matter of foreign investment law?
2) Why did states enter into treaties to protect and promote foreign investment? Is an international framework necessary to promote capital flows, or would the money go where it was needed or most useful in the absence of such an infrastructure?
3) Why is international arbitration seen as an attractive method of dispute resolution for disputes regarding investment?
4) Do you think the ICSID Convention mechanism is an effective means of "de-localizing" disputes?
5) What are the conditions that must be satisfied for a dispute to be heard under the ICSID Convention? Why did the states which negotiated the Convention include those conditions?
6) Why has the number of investment agreements risen so sharply in the latter part of the 20th Century?
7) Is foreign investment insurance a better approach to protecting foreign investments than making dispute settlement available? Can both work in concert?
8) Is doing business in developing countries riskier than doing it in developed countries? What factors might make it so?
9) What are the factors investors should consider when considering whether or not to invest in a developing country?
10) What are the reasons states are skeptical about foreign investment and foreign investors? Can you think of "good" reasons? "Bad" reasons?
11) Should investors be more cautious about entering foreign markets?
12) Are there certain sectors of the economy, for example the provision of utilities like electricity and water, that should be reserved to the government?
13) Are you surprised to learn that governments win a bit more than investors?
14) Many people have suggested the establishment of an appellate mechanism for investment arbitration. Do you think such an innovation is necessary? Feasible?
15) Would it be better to have a multilateral investment agreement? What are the pros and cons of such an approach?
16) How does the principle of transparency relate to the idea of settlement of disputes? Would transparency make it easier or harder to settle cases?
17) Do you agree with Jes Salacuse and Nicholas Sullivan that BITs have contributed in a positive way to the formation of customary international law?

READINGS

1. Julien Chaisse and Christian Bellak 'Navigating the Expanding Universe of Investment Treaties - Creation and Use of Critical Index' (2015) 18(1) *Journal of International Economic Law* 79-115
2. Julien Chaisse 'The Shifting Tectonics of International Investment Law-- Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47(3) *George Washington International Law Review* 563-638
3. R. Doak Bishop, James Crawford & W. Michael Reisman, , Foreign Investment Disputes: Cases, Materials and Commentary 1-211; 491-622 (Kluwer 2005).
4. Theodore Moran, Harnessing Foreign Direct Investment for Development 113-141 (Center for Global Development 2006).
5. Peter Muchlinski, *Policy Issues*, in Oxford Handbook of International Investment Law 3, 31-37 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

6. Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L. J. 67, 111-115 (2005).

7. Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 Int'l Law. 875, 885-890 (1999).

8. Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law 1-30 (Oxford 2008).

9. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, Investor-State Arbitration 1-75 (Oxford 2008).

10. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 818-833 (2005).

11. Mariel Dimsey, The Resolution of International Investment Disputes 5-33 (Eleven 2008).

12. Peter Muchlinski, *Policy Issues*, in Oxford Handbook of International Investment Law 3- (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

13. Kenneth W. Hansen, PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure, in Privatising Development: Transnational Law, Infrastructure and Human Rights 75 (Michael B. Likosky ed., Martinus Nijhoff 2005)

14. Andrew Seck, *Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty & Its Implications for Mitigating Political Risk*, 110 inThe Energy Charter Treaty: An East-West Gateway for Investment & Trade (Thomas W. Wälde, ed. 1996).

15. Andrea K. Bjorklund, *Improving the International Investment Law and Policy Regime: Report of the Rapporteur*, in The Evolving International Investment Regime: Expectations, Realities, Options [excerpts re distinctions between types of industries and the protections they should engender] (José E. Alvarez, Karl P. Sauvant & Kamil G. Ahmed eds., Oxford, *forthcoming* 2010).

16. Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, Columbia FDI Perspectives (15 June 2009).

17. L.A. Ahee & Rory E. Walck, *ICSID Arbitration in 2009*, Transnat'l Dispute Management (Provisional Issue, January 2010).

18. Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in Appeals Mechanism in International Investment Disputes 231 (Karl P. Sauvant ed., Oxford 2008).

19. Sauvant, Karl P, *The Rise of TNCs from emerging markets: the issues,* in The Rise of Transnational Corporations from Emerging Markets: Threat or Opportunity? (Karl P. Sauvant et al. eds 2008).

20. Gus van Harten, Investment Treaty Arbitration and Public Law 175-184 (Oxford 2007).

21. Sarah Anderson, *Clash on Investment: Global Trade and an Opportunity for Civil Society* (Institute for Policy Studies, November 2009).

PART TWO.
FUNDAMENTAL PRINCIPLES

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PART TWO

FUNDAMENTAL PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

The set of obligations is rather consistent amongst the great number of IIAs. The core provisions found in investment agreement typically include a MFN treatment obligation, the granting of NT, obligation to provide fair and equitable treatment as well as protection and security to foreign investors, and an obligation to allow international transfers of funds. However, while the substance of these principles remains the same throughout the great number of investment agreement, the precise scope and reach of each obligation depends on the precise wording featured in each case.

The main purpose of international investment treaties, particularly BITs, is to "protect the investments that generate those revenues" and to prevent them from being abused by the host country. Therefore, the international investment regime offers a larger scope of protection to investment.

The protections afforded by individual BITs vary according to the language of the BIT. However, some or all of the following key investor protections are found in the majority of BITs:

The host state will not expropriate the investment without the payment of prompt, adequate and effective compensation;

- The host state will ensure fair and equitable treatment of the investor and its investment;
- Treatment shall be afforded that is no less favourable than that afforded to nationals of the host state (national treatment) or investors of any other state (most favoured nation treatment);
- Full protection and security of the relevant investment within the territory of the host state;
- An umbrella clause, enabling claims arising from a contract between the investor and the host state (or a state-controlled entity) to be heard as a claim under the BIT; and
- A right for the investor to bring arbitration proceedings against the host state for breach of any of the protections afforded by the BIT.

Whilst investors may also be able to acquire protection and the right to bring arbitration proceedings against a state through an investment agreement or via a domestic law on foreign investment, BITs provide a number of advantages. In particular:

- There is no need for a direct contractual relationship between the host state and the investor;
- A qualifying investor can take advantage of the protections under the BIT even if it would not have the leverage to negotiate such protections itself in its own contract with the host state. Even if it has such leverage, the existence of BIT protection may be sufficient to allow an investor to expend its negotiating capital in other areas;
- The right to bring arbitration proceedings directly against the host state is particularly valuable, preventing the investor being forced to seek redress in the host state's own courts. BITs are the basis for state consent to arbitration in the majority of cases that are administered by the International Centre for the Settlement of Investment Disputes ("ICSID"), the best known neutral forum for settling investment disputes; and
- BITs can also be used to reduce the cost of political risk insurance.

In order to be protected and able to bring a claim under a BIT, there will be a number of jurisdictional hurdles for a would-be claimant to overcome. These vary across BITs but usually the claimant must be a qualifying investor (a national or company of one party to the BIT) holding a qualifying investment located in the other state party to the BIT. Also relatively commonplace are requirements to have exhausted the remedies available in the national courts or to attempt amicable settlement of the dispute for a specified amount of time (known as a "cooling off period") before commencing arbitration proceedings.

The Chapter 2 reviews the standard of most-favoured nation. The Chapter 3 explains the standard of national treatment. The Chapter 4 focuses on fair and equitable treatment. The Chapter 5 explores the concept of expropriation. The Chapter 6 provides an overview of dispute settlement in connection to the key investment protection standards. The Chapter 7 complete the review of investment standard by explaining the remaining investment treaties protection. The Chapter 8 reviews the possible exceptions to the key investment protection provisions.

CHAPTER TWO

MOST FAVOURED NATION (MFN)

Learning objectives
Chapter Two

- Identify the components of the most favoured nation.
- Understand the interpretations of most favoured nation by investment tribunals
- Assess the importance of the requirement that the comparators be in "like circumstances"
- Consider the relevance of WTO jurisprudence to the investment context

The scope of the MFN obligation, like any other substantial provision of the treaty, is limited not only by the overall coverage of the agreement, but by the wording introduced in the clause itself (Section One). Several aspects are relevant in this regard which are discussed in the subsequent sections. *First*, whether the obligation applies to investments already established in the country, or whether it applies too to the ability of the investor to claim access to the host country - so called pre-establishment rights (Section Two). *Second*, the language which allows the comparison between the treatment of investors from different countries (Section Three). *Finally*, whether issues pertaining to investor-State dispute settlement procedures are covered by the MFN principle (Section Four).

While the pre-establishment rights and the issue of the comparison between the treatment of investors from different countries are general matters also concern other substantial obligations of the investment treaty, such as NT, the third element (whether investor-State dispute settlement procedures are covered by the MFN) relates exclusively to the operation of the MFN principle.

Section One. THE CONCEPT AND SCOPE OF THE MOST FAVOURED NATION

The principle of the most favoured nation ("MFN") treatment is well rooted in international trade agreements, dating back to the first Friendship, Commerce and Navigation treaties. It aims at preventing discrimination amongst trading parties, setting a level playing field for all foreigners. In regard to investment, it seeks to establish equal conditions of competition for all foreign investors, independently of their country of origin.

The MFN principle constitutes one of the cornerstones of investment agreements and allows investors covered by one agreement to claim equal benefits[1] to those granted to investors from other countries, irrespective of whether those benefits are established in other investment agreements, or in the actual regulatory practice of the

[1] The *Daimler v Argentina* Award observed that the ILC acknowledged that "equality of treatment" is particularly closely attached to the operation of the MFN clause, but that it also pointed out that "equal" is not the same as "identical"; this implies "different" does not automatically mean "less favourable"; rather, the point of the MFN clause is to ensure overall equality of treatment in the sense of creating a level playing field between foreign investors from different countries even if this is sometimes accomplished through non-identical means. See *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 at 242.

host country.[2]

While traditionally regarded as a standard clause without major implications in regard to dispute settlement, and free of the policy sensitivities of other clauses - such as NT - the MFN principle has newly gained attention in the ambit of international investment rulemaking in light of the application of this provision recently made by some arbitral panels.

The scope of most favoured nation ("MFN") clauses in bilateral investment treaties ("BITs") has been a source of rich debate for many years. The *Daimler v Argentina* Award noted that the interpretation and application of MFN clauses is one of the most controversial issues not only between the disputing parties in the case before the tribunal but within the world of international investment law more generally.[3]

In sum, the debate centres around whether MFN "treatment" includes only substantive rules for the protection of investments, or if it also extends to procedural protections such as dispute resolution.

There is no *pro forma* for an MFN clause,[4] although most link BITs by ensuring that parties to one BIT provide treatment no less favourable than the treatment they provide investors of any third nationality, which includes treatment guaranteed under BITs with other states. This complexity can be shown by looking at a sample of BITs concluded by Vietnam (Table 3).

Table 3: Scope of MFN provisions in Vietnam's BITs

Vietnam - Australia (1991) Article 4	**Vietnam - Switzerland (1992) BIT [in French only]** Article 3.2	**Vietnam - Republic of Korea (2003)** Article 3.1
A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of nationals of any third country, provided that a Contracting Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or (b) the provisions of a double taxation agreement with a third country.	Aucune Partie Contractante ne peut soumettre sur son territoire les investissements des investisseurs de l'autre Partie Contractante à un traitement moins favorable que celui qu'elle accorde aux investissements des investisseurs de tout Etat tiers. Les entreprises conjointes auxquelles participent des investisseurs des deux Parties Contractantes bénéficieront de conditions non moins favorables que les entreprises conjointes auxquelles participent des investisseurs de tout Etat tiers.	Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment no less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable to investors.

[2] *Asian Agricultural Products v Sri Lanka* Dissenting Opinion of Samuel K.B. Asante, citing various publicists, noted that most-favoured-nation treatment does not derive from customary law. See *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, 27 June 1990 at 40.

[3] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 at 160. Also, the *Rizvi v Indonesia* Award on Jurisdiction noted the sharply divergent views about the scope of MFN provisions to investor-State dispute settlement. See *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013 at 218.

[4] The *Telefónica v Argentina* Decision of the Tribunal on Objections to Jurisdiction tribunal rightly observed that one should consider the MFN clause as a "standard clause", although the specific language varies from treaty to treaty. See *Telefónica S.A v Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006 at 97. Also, the Impregilo v. Argentina Award noted that the MFN clauses in BITs vary and this has led to different interpretative results (although it finds, by a majority, a "massive volume of case-law" which indicates that, at least when there is an MFN clause applying to "all matters" regulated in the BIT, more favourable dispute settlement clauses in other BITs will be incorporated). See *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 at 103-107.

Vietnam - Japan BIT (2003) Article 2.2	Vietnam - United Arab Emirates (2009) Article 4	China - Morocco (2012) Article 3.1
Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of any third country and to their investments with respect to investment activities.	(1) With respect to the use, management, conduct, operation, expansion and sale or other disposition of investments made in its territory by investors of the other Contracting Party, each Contracting Party shall accord treatment no less favorable than that it accords, in like situations, to investments of investors of any third state ("most favored nation treatment"). (2) The Most Favoured Nation Treatment shall not apply to procedural or juridicial matters.	Each Contracting Party shall in its territory accord to investments by investors of the other Contracting Party a treatment which is not less favourable than that which it accords, in like circumstances, to investments of its own investors or to investments of the most favoured nation.

The selection of MFN clauses shown in Table 2 demonstrates that most BITs are very general in their wording and leave considerable scope to argue competing interpretations.[5] In particular, most BITs are silent

[5] Many tribunals have adverted to the different formulations of the MFN standard in different treaties. The *Salini v. Jordan* Decision on Jurisdiction notes that some BITs provide expressly that the most-favoured-nation treatment extends to the provisions relating to settlement of disputes; others do not contain such a provision, but refer to "all rights" contained in the agreement or to "all matters" subject to the agreement; and in the BIT before the tribunal, the MFN clause does not include any provision extending its scope of application to dispute settlement, nor does it envisage "all rights or all matters covered by the agreement" (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004 at 116-118). The *Tza Yap Sum v. Peru* Decision on Jurisdiction and Competence recognizes the need to analyze the specific wording of each provision of a treaty in accordance with established rules of international law; an *a priori* decision is not appropriate, i.e., it is not possible to decide in general that MFN clauses are efficacious in some sorts of situations while they are not in others; each MFN clause is a world in itself, which demands an individualized interpretation to determine its scope of application (*Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 [Spanish] at 196-198).

Impregilo v. Argentina Award notes that the MFN clauses in BITs vary and this has led to different interpretative results (although it finds, by a majority, a "massive volume of case-law" that indicates that, at least when there is an MFN clause applying to "all matters" regulated in the BIT, more favourable dispute settlement clauses in other BITs will be incorporated) (*Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 at 103-107).

on whether MFN "treatment" includes only substantive rules for the protection of investments or if it also extends to procedural protections, like dispute resolution. Only the Vietnam – Morocco BIT of 2012 excludes ISDS from the scope of the MFN provisions. The other BITs provide MFN with a broad scope of application with a number of variations which will be discussed in the coming Sections.

Section Two. THE MFN OBLIGATION AND PRE-ESTABLISHMENT RIGHTS

The critical question regarding MFN treatment is whether the obligation applies to established investments in the country or whether it also applies to the ability of the investor to claim access to the host country - so-called pre-establishment rights. For example, Article 6 of ACIA provides that a host ASEAN member state must, in like circumstances, provide MFN treatment to ASEAN investors and their covered investment either at pre-establishment or post-establishment stages of investment. However, few Asia-Pacific IIAs expressly extend the coverage of the MFN obligation to pre-establishments rights.

In general terms, Vietnamese investments agreements, like the majority of BITs, do not provide entry rights to foreign investors into their territory. Rather, all BITs signed by Vietnam under review, including its new generation agreements concluded in recent years, provide only a best-endeavour provision regarding the admission of the foreign investments. For example, Vietnam's agreement with Denmark, of 1994, states that "[e]ach Contracting Party shall admit the investments by investors of the other Contracting Party in accordance with its legislation and administrative practice, and promote such investments as far as possible, including facilitating the establishment of representative offices."[6]

The BIT with UAE unambiguously carves out entry right from MFN as it clarifies that the terms "'activities associated with the investments' means the operation, maintenance, use, enjoyment or disposal of those investments by the investor", leaving admission and establishment rights out of the exhaustive list of covered activities.

The text of the MFN provision may nonetheless in some cases encompass pre-establishment rights as illustrated by the Vietnam -

[6] Vietnam – Denmark (1994) Article 2.

Japan BIT which features an unusual broad language for which the parties are obliged to grant MFN treatment to investors from the other party in regard to their "investments and activities associated" with such investment, including with regard to the "investment activities" that include "the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments".[7]

Pursuant to the MFN obligation, Vietnamese investors could claim establishment rights in those countries to the extent that they have signed other BITs with such rights.[8] In this sense, Vietnamese investors could claim the more favourable access conditions recognised by Japan in its BITs with third-countries. This same situation applies to investors from these countries in regard to investments in the territory of Vietnam. However, since no investment agreement signed by Vietnam affords establishment rights to foreign investors, the MFN obligation could apply only in those cases where Vietnam's domestic regulatory framework *de jure* or *de facto* admits investors from certain countries and not from others.

Nonetheless, the MFN principle admits some important exceptions which are only mentioned in this Section as they discussed in detail in Part Eight of this textbook.

First, Vietnam-Foreign BITs have consistently excluded from the MFN obligations any preferences or privileges to foreign investors resulting from a) customs union, free trade agreements, and arrangements for facilitating frontier trade; and b) international agreements on taxation. Under this economic integration exception, establishments rights granted by Vietnam to investors from ASEAN countries in the ASEAN Comprehensive Investment Agreement (ACIA) would be excluded from the MFN obligation enshrined in Vietnamese BITs.

Second, the preferential access conditions and benefits that one investor may obtain based on an individual investment contract negotiated with the domestic authorities - so called, one-off deals also fall outside the MFN principle, since this obligation only applies when this individual behaviour becomes general practice in the host country.

[7] See Vietnam - Japan BIT Article 2.2. (MFN) in relation to Article 2.1.

[8] A cursory review suggests that neither Korea, Finland or Turkey have entered into bilateral investment treaties that feature binding national treatment in regard to pre-establishment rights.

Indeed, in order to be covered by the MFN clause, the treatment has to be the *general* treatment *usually* provided to investors from a given foreign country.

Section Three. STANDARD OF COMPARISON BETWEEN INVESTORS

The principle of the MFN, like its close cousin NT, is a comparative standard. It aims at preventing discrimination amongst foreigners in such a manner that no foreign investors are treated better than others. The precise wording of the MFN obligation is crucial as it sets the standard of comparison between those foreign investors. In other terms, the drafting of the MFN provision establishes which investors are to be compared in order to assess whether one is being treated in more favourable terms than the other. Investment agreements have used different benchmarks for the comparison.

The most restrictive formulation would be to limit the MFN obligation to those investors in the "same" or "identical" circumstances. Some earlier BITs signed by the United Kingdom applied this standard, by establishing that:

> "[n]either Contracting Party shall [...] subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords in the same circumstances to investments or returns of […] nationals or companies of any third State".[9]

A number of investment agreements, notably those concluded by the United States and Canada, limit the application of the MFN obligation - as well as NT- to investors "in like circumstances". Article 10.4:1 of the CAFTA states

> "that Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party".

Other US BITs, like the one with Honduras, refer instead to "like situations".[10] Most FTAs with investment disciplines also include a reference to "like circumstances". Interpreting such a wording, the

[9] UK-Belize BIT, Article 3.1

[10] US-Honduras BIT, Article II.1.

Parkerings v Lithuania Award found that for investors to be in like circumstances, three conditions must be met: the investor must be a foreign investor; they must be in the same economic or business sector; and the two investors must be treated differently.[11]

A different wording for the standard of comparison is presented by the Vietnam - Iran BIT of 2000, which provides that

> "Investments of investors of either Contracting Party effected within the territory of the other Contracting Party shall […] receive […] treatment not less favourable than that accorded to its own investors or to investors of any third state who are in a comparable situation".[12]

The "comparable situation" standard seems to entail a similar benchmark to the "like circumstances".

At the multilateral level, the GATS introduced the standard of "like services and services suppliers". The analogous benchmark of "like investors and investments" was adopted by the ASEAN countries in the ASEAN Investment Area, although only regard to the national treatment obligation, while the MFN provision features no qualification of this nature.[13]

It is unclear whether the scope of the standards of "like circumstances", "comparable situation" and "like investors" are different, and, in that case, which standard would be broader, but it is unambiguous that these formulations would allow to compare a broader set of investors than the one requiring the investors to be in the "same situation".[14] It remains however undefined what are the elements to take into account in the examination of the "likeness" - or "comparability" - of the investors or the circumstances.

[11] "In order to determine whether Parkerings was in like circumstances with Pinus Proprius, and thus whether the MFN standard has been violated, the Arbitral Tribunal considers that three conditions should be met: (i) Pinus Proprius must be a foreign investor; (ii) Pinus Proprius and Parkerings must be in the same economic or business sector; (iii) The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. A contrario, a less favourable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment." See *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 at 371.

[12] China-Iran BIT, Article 4.1

[13] See ASEAN Investment Area agreement, Articles 7.1(a) and 8.1.

[14] For a discussion on the concept of "like circumstances" and "like service and service suppliers" in the context of NAFTA disciplines on investment, see Johnson, 2001.

In an interpretation regarding the national treatment clause in the US-Ecuador BIT, for instance, the arbitral tribunal in *Occidental Exploration and Production Company v. The Republic of Ecuador* considered that the economic sector in which the investor operated was not relevant for the purposes of determining the "like circumstances". Under this understanding, the tribunal considered that less favourable treatment was being granted to an oil exporter as compared to the treatment afforded to exporters of mining products, seafood and flowers.[15]

Finally, the majority of bilateral investment agreements to do not feature any qualification as regard the standard of comparison between investors. This is also the case of most reviewed investment agreements signed by Vietnam, as illustrated in Table 1. These agreements establish that the parties shall grant investors of the other party a treatment no less favourable than the one it accords to "investors of any third State" - or to "its own investors" when it concerns a NT obligation. Traditionally, this approach offers the widest scope for comparison as, in principle, any matter that is relevant to determining whether the foreign investor is being given preferential treatment can be considered.

***Section Four*. MFN AND DISPUTE SETTLEMENT**

The scope of the most favoured nation obligation pertains too to the nature of the disciplines encompassed by the principle. In particular, following to the arbitral decision in the *Maffezini* case, much attention has been drawn to the debate of whether provisions relating to the disputes settlement procedures enshrined in one agreements can be 'imported' into another investment agreement by virtue of the MFN clause.

[15] In the view of the arbitral tribunal "the 'situation' can relate to all exporters that share that condition", so that "no exporter ought to be put in a disadvantageous position as compared to other exporters". See *Occidental Exploration and Production Company v The Republic of Ecuador*, London Court of International Arbitration Case No. UN3467, Final Award of July 1, 2004, paras 167-179. In an analysis of whether measures can be deemed discriminatory comparing different sectors, see also LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision On Liability of October 3, 2006, paras 140-163. For an opposing decision, see *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, paras 285-295.

Box 3: The Maffezzini Case in A Nutshell

- The case was brought by Emilio Agustín Maffezini, an Argentine investor, against Spain on the basis of the Argentina - Spain BIT of 1991. In the decision on jurisdiction, the ICSID arbitral court ruled that the claimant was allowed to by-pass the waiting period of 18 months required the concerned treaty by virtue of its MFN provision, in light of the more beneficial terms - a waiting period of 6 months - recognised in the Chile-Spain BIT.

- The tribunal reached this conclusion on the basis that, compared to the all other investment agreements signed by Spain, its BIT with Argentina featured an exceptionally broad MFN provision, since it applied to "all matters subject to [the] agreement".

- The arbitrators considered that this language gave the MFN obligation a greater coverage than that provided for in other Spanish BITs, that usually featured to the narrower expression "this treatment". Given this broad scope of the MFN principle and the sheer importance of dispute settlement provision for the protection of foreign investors, the tribunal concluded that rights and obligations pertaining to the protection of investors - including in matters relating to dispute settlement- enshrined in other agreements would be covered by the MFN obligation to the extent that these other agreements related to the same subject matter as the basic treaty.

- The tribunal, however, aware of the implications that such a broad interpretation could entail, set the limits for the use of the MFN principle by recognizing that "the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question".[16] In the words of Prof. Gaillard, "[i]n those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through international arbitration rather than through the judicial organs of the host state itself.[17]

There have been conflicting decisions over the years, but the topic has received increased attention in 2011 following French academic and arbitrator Brigitte Stern using her dissenting opinion in an ICSID award in *Impregilo SpA v. Argentina* to warn of the "great dangers"[18] of allowing claimants to bypass a BIT's jurisdictional requirements by invoking an MFN clause. The BIT in *Impregilo* (the Argentina-Italy BIT) used similar generic language and, importantly, provided that it extended to not only "investments", but "all other matters regulated by this Agreement".

One side of the argument (which was the view of the majority in *Impregilo* - Judge Danelius and Judge Bower) is that MFN clauses should be interpreted broadly. The underlying rationale for this side of the argument is that the term "treatment" in MFN clauses is in itself wide enough to be applicable to procedural matters such as dispute settlement. Furthermore, dispute resolution provisions are essential to the protections envisaged under BITs and therefore the MFN clause should be interpreted as giving the claimant the benefit of the wider dispute resolution clause in another BIT. Moreover, as regards "all matters" MFN clauses (such as the MFN clause in *Impregilo*), such a phrase should not be read narrowly as referring to "all similar matters" or "all other matters of the same kind" such that it excludes procedural matters.[19]

The other side of the argument is that MFN clauses relate to the substantial protections afforded to investors and investments and that, therefore, their reach should not extend to procedural issues such as dispute resolution. In particular, procedural issues affect how

[16] *Emilio Augustín Maffezini v Kingom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of Jan. 25, 2000, paras 54-64. For a discussion on the implications of Mafezzini and evolving jurisprudence on MFN and dispute settlement, see, *inter alia*, *Gaillard*, 2005; *Teiteilbaum*, 2005; *Kürtz*, 2004; *Hsu*, 2006; *Freyer and Herlihy*, 2005; *Fernández Masiá*, 2007. In regard to the *Mafezzini* case and its relationship with BITs signed by China, see *Schill*, 2007 and *Cymrot*, 2006.

[17] See *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005 and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 9 November 2004.

[18] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 at 99.

[19] There is a significant volume of case law to support this position. The leading decision is *Maffezini v Spain* (ICSID Case No. ARB/97/7, 25 January 2000), although other examples include: *Gas Natural v Argentina* (ICSID Case No. ARB/03/10, 17 June 2005); *Suez and Vivendi v. Argentina* (ICSID Case No. ARB/03/19, 3 August 2006); and *Camuzzi International v Argentina*, ICSID Case No. ARB/03/2, May 11, 2005). It should, however, be noted that the above cases all concerned "all matters" MFN clauses. Nonetheless, there have also been decisions where less comprehensive MFN clauses which only provided for MFN treatment of investors and investments were found to be sufficient to cover dispute settlement. Examples of such cases are: *Siemens v Argentina* (ICSID Case No. ARB/02/8, 3 August 2004); *National Grid v. Argentina* (UNCITRAL, 20 June 2006); and *RosInvest v. Russian Federation* (SCC Case No. V079/2005, October 2007).

the protections in the relevant BIT operate and are enforced - that is fundamentally different to ensuring investors receive most favourable treatment.[20]

In *Impregilo*, Professor Stern introduced her dissent by stating that she hoped it "will contribute in a modest and constructive manner to the ongoing debate on the way MFN clauses should be applied". Professor Stern took issue with the majority's portrayal of the case law as weighted in favour of their position. She argued that if one looks at the number of arbitrators who are in favour of applying MFN clauses to dispute resolution rather than at the number of awards then the picture looks almost balanced because many of the same arbitrators have been involved in the same cases. In any event, she stated that it is not a legally convincing argument to rely on former cases as if they were binding precedents.

Professor Stern compared the dispute resolution clauses in the Argentina-Italy BIT and the Argentina-US BIT (which was the dispute resolution clause Impregilo sought to import). While the Argentina-Italy BIT requires the investor to exhaust local remedies over 18 months, the Argentina-US BIT provides that the investor may choose to submit the dispute for resolution to the domestic courts or administrative tribunals, or deal with it in accordance with previously agreed dispute settlement procedures, or, after six months from the date on which the dispute arose, to submit it to international arbitration. In such circumstances, importing just a time limit from one mechanism into the other does not really make any sense as it cannot be based on a serious comparison between two clauses with completely different underlying rationales. She concluded that Impregilo had been granted an inexistent favourable treatment that did not correspond to any real situation under any treaty. Indeed, she stated that such an interpretation effectively allowed the claimant to de-structure jurisdictional requirements and pick and choose from a menu of treaty options.

[20] There are decisions to support this side of the argument, examples of which include: *Salini v. Jordan* (ICSID Case No. ARB/02/13, 9 November, 2004); *Plama v Bulgaria* (ICSID Case No. ARB/03/24), 8 February 2005); and *Telenor v. Hungary* (ICSID Case No. ARB/04/15, 13 September 2006). However, it should be noted that none of the above decisions relate to "all matters" MFN clauses. Indeed, there is only one decision to support the position that an "all matters" MFN clause should not extend to dispute settlement (*Berschader v Russian Federation* (SCC Case No. 080/2004, 21 April 2006)), and even then one of the arbitrators did strongly dissent.

Box 4: The dangers of the Maffezini approach: Impregilo S.p.A. v. Argentine Republic, Dissenting Opinion of Professor Brigitte Stern, 21 June 2011

100. It has to be reminded that in *Maffezini*, the tribunal was conscious of the far reaching consequences of its decision to use the MFN clause to modify the dispute settlement procedures and felt compelled to state that "a distinction has to be made between the legitimate extension of rights and benefits by means of operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand." Therefore, the tribunal in trying to keep things under control, added that "there are some important limits that ought to be kept in mind." These limits have been summarised in the following manner: "*As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as is often the case.*"

101. Examples of such necessary limits were given in the decision: the consent of the State should not be set aside through the MFN clause: when the State has conditioned its consent on the exhaustion of local remedies; when it is stated in the BIT that once a choice is made between domestic courts and international arbitration this choice is final and irreversible (this is the so-called "fork-in-the-road" provision); when there is a selection of a specific forum like ICSID; or when a reference is made to a highly institutionalised system of arbitration with precise rules of procedures like the North American Free Trade Agreement ("NAFTA"). As can be seen, among the examples of situations where the MFN clause could not been used, the Tribunal gave the rule of exhaustion of local remedies, that in its view could not be set aside by an MFN clause: " … if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favoured nation clause in relation to a third-party agreement that does not contain this element." I must say that I cannot see the rationale according to which the condition of exhaustion of local remedies could not be set aside by an MFN clause, but the condition of exhaustion of local remedies only during a certain limited period of time could be set aside, as was decided in *Maffezini*.

102. Another very profound concern raised by the application of the general rule stated in *Maffezini* has already been pointed out in the decision itself, it is the risk of "treaty shopping". Several tribunals have raised that concern. For example, in *Salini v Jordan*, the tribunal refused to extend the conditions of existence of a right to ICSID arbitration provided for in Article 9 of the 1999 Italy/Jordan BIT74 and stated that it "shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping'."

103. There are also some other difficult problems raised, if the holding in *Maffezini* were to be accepted with its exceptions, which were necessary in the view of the tribunal to render the extension of jurisdiction brought about by the MFN clause acceptable.

104. Let us take the example concerning the situation in which it is stated in the basic BIT that once a choice is made between domestic courts and international arbitration this choice is final and irreversible, i.e. the situation where a BIT provides for what has become to be known as a "fork-in-the-road" provision. For some unexplained reason, this is said by the tribunal in *Maffezini* to be a situation that cannot be modified by an MFN clause. If we admit this for the sake of reasoning, it is my submission that it would lend to very bizarre conclusions, if we take, for example, the two BITs at stake in our case. The Argentina/Italy BIT provides for a limited recourse to national courts for a period of 18 months before the case can possibly be submitted to arbitration. The Argentina/US BIT on the contrary has a fork-in-the-road provision and therefore does not allow submission of the case to the national courts if the investor wants to submit its case to international arbitration, which he can do on the sole condition that 6 months have elapsed since the date on which the dispute arose. According to Maffezini, an investor under the Argentina/Italy BIT could benefit from the direct submission to international arbitration, after 6 months have elapsed since the dispute has arisen, imported from the Argentina/US BIT, while an investor under the Argentina/US BIT, who would have first submitted the case to national courts but still would not want to be prevented to go to international arbitration by the fork-in-the-road provision, could not invoke Article 8 (2) and (3) to deport that provision. I really do not see how this kind of application of the MFN clause, required if we were to follow *Maffezini*, would bring about the intended goal of an MFN clause which is to accord the same treatment to all investors.

105. Another difficult theoretical problem is raised in the *Maffezini* approach by the fact that the MFN clause may be invoked not in the request for arbitration, but much later, often only in the answer to the State's objections to jurisdiction. As the request for arbitration stands for the investor's consent, the reciprocal consents of the State and the investor have created the jurisdictional basis for the tribunal's jurisdiction at that point in time. Is it acceptable that this arbitration agreement is thereafter upset by an arbitration offer in the incorporated BIT under the MFN clause? In other words, the *Maffezini* approach permits, after beginning one arbitration in regard to one offer in one BIT to subsequently change the arbitration agreement, and could even allow an investor after initiating an ICSID arbitration, to "accept" an offer in another BIT for UNCITRAL arbitration ...

106. The problems are even more serious, as it appears that in the trend favourable to the use of MFN clause to expand jurisdiction, the position is not only to import from the third party treaty into the basic treaty the jurisdictional clause as a whole, but to import only such or such aspect of a jurisdictional clause which appears more favourable, as has been done in the majority Award: in other words there can be a "pick and choose" policy in the implementation of the MFN clause. This aspect has been underlined in an article on MFN clauses, where the author puts forwards the concerns raised by such an approach: "But perhaps the most adventurous and far-reaching aspect of the Siemens decision was the tribunal's rejection of Argentina's further argument that, if the claimant was entitled to import the advantageous aspects of the dispute resolution provisions of the Argentina - Chile BIT, then it should also be required to import the disadvantageous aspects of those provisions. These included, in particular, a "fork-in-the-road" provision that was absent from the Argentina-Germany BIT. The tribunal recognised that 'the disadvantages may have been a trade-off for the claimed advantages', but concluded that an MFN clause 'relates only to more favourable treatment'. As a result, the fork-in-the-road provision could not be incorporated by operation of the MFN clause … in allowing claimants this possibility the tribunal opened the door to a potentially infinite variety of dispute resolution permutations and combinations that different investors

might rely upon so as best to meet their individual circumstances."

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107. It is quite evident that a jurisdictional clause is often a complex arrangement, balancing various requirements. It does not make sense to "de-structure" these jurisdictional clauses, and to "pick-and-choose" just one element that could make sense in the global framework of the third-party treaty, but does not have the same meaning in the basic treaty. The dangers of such a situation have been underscored by the legal doctrine: "*… it is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in Maffezini v. Spain. … It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances.*"

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108. As aptly pointed by Plama, this would create a chaotic situation. I suggest to avoid such a chaotic situation, in endorsing the principle that an MFN clause cannot displace any of the conditions under which a State gives its consent to arbitration to a foreign investor and would therefore endorse the Plama proposal, according to which the principle that should be applied to MFN clauses with regard to jurisdictional clauses "*… should instead be a different principle [than in Maffezini] with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.*"

Professor Stern's dissent is one of the most thorough articulations to date of the case against extending MFN treatment to dispute resolution. In particular, it highlights one of the central issues with this debate - namely, rights on the one hand, and conditions for access to the rights on the other. In Professor Stern's view, an MFN clause can only concern the rights that an investor can enjoy - it cannot modify the fundamental conditions for the enjoyment of such rights. In particular, a conditional right to ICSID cannot "magically"[1] be transformed into an unconditional right by the grace of an MFN clause. Indeed, as Professor Stern notes, if the majority position is taken to its logical conclusion, applying the scope of a MFN clause to dispute resolution provisions would theoretically allow the importation of an ICSID clause into a treaty that does not provide at all for international arbitration.

The question posed by the *Mafezzini* and *Impregilo* decisions ultimately address the general scope of the MFN principle and how the provision is crafted in each individual agreement.

A few investment agreements, notably those signed by the United Kingdom, solve the controversy by including the provisions on dispute settlement procedures amongst those expressly covered by the MFN provision. For instance, the UK-Vanuatu BIT of 2003, states that in regard to the MFN obligation "[f]or the avoidance of doubt it is confirmed that the treatment provided for in [the MFN obligation] shall apply to the provisions of Articles 1 to 11 of this Agreement", which includes Article 9 on ISDS procedures. By inserting such a clarification, the agreement makes clear that the intention of the parties is to include substantive and procedural aspects of dispute resolution amongst the matters subject to the MFN obligation. On the contrary, some agreements have attempted to prevent arbitral tribunals of extending the MFN principle to dispute settlement matters by emphasizing the intention of parties on the contrary. That is the case of recent FTAs promoted by the United States, that introduce and maintain a footnote throughout its negotiating history that explicitly affirms that the *Maffezini* interpretation would not apply to that agreement.[2] The purpose of the footnote is to express the

[1] *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 at 99.

[2] The footnote to Article 4.2 of the draft US-Thailand FTA text, as proposed by the US, reads: "The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favoured-Nation Treatment Article and the Maffezini case. This footnote will be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favoured-nation clause in an Argentina-Spain

intention of the parties which, although the clarification will not form part of the final signed text.

Greater doubts arise instead in those agreements, like the BIT triggering the *Maffezini* case, that do not spell out the coverage of the MFN provisions in regard to dispute settlement. Basically, in those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through international arbitration rather than through the judicial organs of the host state itself.

Accordingly, agreements that feature a broad investment clause and have not introduced a precise clarification on the scope and coverage of the MFN provision can be found to extend the reach of the protection to the investor not necessarily anticipated by the contracting parties. As illustrated by Table 1, agreements signed by Vietnam feature broad coverage for the MFN and have not, like the US or the UK, attempted to clarify the intention of the parties in regard to the reach of the MFN to the dispute settlement provisions of the agreement. While this clarification may not have been necessary in agreements signed by Vietnam until the late 1990s due to restricted access to arbitration granted to foreign investors, new generation Vietnam-Foreign BITs, with ample consent for investor-State arbitration, also leave this question open without an explicit resolution.

SUMMARY OF THE CHAPTER TWO

With regard to investment, MFNtreatment seeks to establish equal conditions of competition for all foreign investors, independent of their country of origin. This principle constitutes one of the cornerstones of investment agreements and allows investors covered by one agreement to claim benefits equal to those granted to investors by other countries, irrespective of whether those benefits are established in other investment agreements or in the actual regulatory practice of the host country. The role of MFN provisions became particularly important after the proliferation of IIAs because the level playing field can be maintained by the MFN clause despite the different treatments given under each IIA. An MFN clause has important implications, especially to the intersected IIAs, because providing differentiated treatment to different partners makes little sense if MFN treatment is included. But at the same time, MFN treatment may even further complicate the complexity of investment regimes.While traditionally regarded as a standard clause without major implications with regard to dispute settlement and free of the policy sensitivities of other clauses - such as national treatment - the MFN principle has gained new attention in the ambit of international investment rule-making in light of this provision's recent application by some arbitral panels. In fact, the scope of the MFN obligation, like any other substantial provision of the treaty, is limited by not only the overall coverage of the agreement but also the wording introduced in the clause itself.

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) The most-favored-nation obligation requires that a state treat a covered foreign investor as favorably as it treats other foreign investors. This can apply to substantive treatment given by states, such as opportunities to invest in a previously closed economic sector. As we see in the reading, it appears that it can apply to the dispute resolution provisions in another investment treaty that are deemed "more favorable." How do you tell what is more favorable? If the claimant asks for it, does that mean it is more favorable in the claimant's judgment, and that is all that matters?

2) The *Maffezini* case put the applicability of MFN to dispute settlement on the map. How would you view the importance of the 18-month period during which an investor need to resort to local courts? Is it merely a procedural burden? Should MFN help claimants take advantage of other treaties that lack such a requirement?

3) In paragraph 63 of the *Maffezini* decision, the tribunal listed a number of possible exceptions to its rule. Read them carefully. Where did the tribunal find them? Do you think they can be very readily applied in practice?

agreement to encompass international dispute resolution procedures. […] By contrast, the Most-Favoured-Nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."

4) Can the differences between *Maffezini* and *Plama* be explained by treaty language?

5) Does the *Maffezini*-type interpretation of MFN give foreign investors the opportunity to cobble together "Frankenstein-like" treaties that no state ever negotiated? Or should states know what they are getting into by virtue of having included an MFN clause in their treaty? Might your answer to this question change if the treaty was negotiated pre- or post- *Maffezini*?

6) One suggestion for dealing with the *Maffezini* situation is to treat MFN as applicable to dispute settlement, but to require that an investor take the whole of the "more favorable" treaty. Is this a reasonable response to the "Frankenstien" problem?

READINGS

1. Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, New York Law Journal (2 June 2005).
2. Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 Journal of International Arbitration 225, 232-237 (2005).
3. *Maffezini v. Spain* (ICSID Case No. ARB/97/7), (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000), pages 14-25.
4. *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction) (8 February 2005)183-227.
5. Impregilo S.p.A. v Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011
6. R. Doak Bishop, James Crawford & W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary 1087-1102; 1133-1165 (Kluwer 2005).
7. Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law 178-190 (Oxford 2008)
8. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, Investor-State Arbitration 397-427 (Oxford 2008).
9. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11 at 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; last updated 2009).
10. Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 251-257; 262-263 (Oxford 2007).
11. Andrew Newcombe & Lluis Paradell, The Law and Practice of Investment Treaties 147-232 (Kluwer 2008).
12. Susan D. Franck, *International Decisions*: Occidental Exploration and Production Co. v. Ecuador, 99 Am. J. Int'l L. 675 (2005).
13. Panel Discussion, *Is Discriminatory Intent Relevant?,* in Investment Treaty Arbitration and International Law 315 (T.J. Grierson Weiler ed., Juris 2008).
    - UNCTAD, National Treatment, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).
    - Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Provision in Investment Arbitration*, in Investment Treaty Law, Current Issues III, at 241 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).
    - Stephan W. Schill, The Multilateralization of International Investment Law 121-196 (Cambridge 2009).

CHAPTER THREE
NATIONAL TREATMENT (NT)

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NATIONAL TREATMENT (NT)

Learning objectives
Chapter Three

- Identify the components of the standard of national treatment;
- Understand the importance of identifying the comparator;
- Understand the interpretations of national treatment developments by investment tribunals;
- Assess the importance of the requirement that the comparators be in "like circumstances";
- Consider the relevance of WTO jurisprudence to the investment context.

Section One. THE CONCEPT AND SCOPE OF THE NATIONAL TREATMENT

The national treatment obligation is the second key provision aimed at preventing discrimination amongst investors. While the MFN principle seeks to establish a level playing field for all *foreign* investors, the national treatment obligation seeks to eliminate distortions between domestic and foreign investors.

The national treatment obligation, like the MFN principle, is a *comparative* standard of treatment. Thus, the considerations in regard to the standard of comparison between investors are also relevant in the context of the national treatment. This is all the more so since investment agreement usually utilise the same language for both provisions.

Section Two. THE NT OBLIGATION AND PRE-ESTABLISHMENT RIGHTS

The operation of the NT obligation is similar to that of the MFN principle. In this sense, considerations regarding the scope of the provision in many cases apply equally to both obligations. In particular, MFN and NT usually follow a same approach in regard to pre-establishment rights and the standard for comparison between investors. In regard to the former, agreements that provide for entry rights to foreign investors in an MFN basis, commonly go further to enshrine those rights on equal terms than domestic investors.

The United States and Canada have been the major promoters of this approach, recently joined by Finland. The US was the first country to support this model, launched under the Bilateral Investment Treaty program during the Reagan administration in 1981. Canada adopted this approach after the signature of the NAFTA. The more recent model BITs of both Canada and the US provide a detailed language by describing the different operations related to the investment to which the treatment obligations applies. For instance, the Canadian Model FIPA of 2004, Art. 3.1 states that:

> "1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory".[1]

[1] Another article with alike drafting refers to most favoured nation treatment. The US Model BIT of 2012 features the same wording in its relevant articles.

Under these provisions, investors from the US and Canada are ensured to be able to establish in other countries in equal conditions of that of domestic investors. The reference to "establishment" as well as "acquisition" and "expansion" makes clear that foreign investors will be in equal condition as nations in regard to both green-field investments or mergers and acquisitions.

One unique case is that of Finland and its agreements signed on the basis of its Draft BIT model of 2001. In principle, Finland's agreements recognise the ability of the parties to regulate the admission of foreign investors 'in accordance to its laws and regulations'. Nonetheless, both its MFN and NT obligations incorporate language explicitly referring to admission rights, as they read, respectively:

"1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments".[2]

Finish BITs hence provide for national treatment (and MFN) obligation in regard to the admission of foreign investors. Further, the term "establishment" appears in the MFN obligation, tough not in the national treatment provision, while 'acquisition' and 'expansion' appear in both. This could be interpreted as granting foreign investors national treatment only in regard to mergers and acquisition, but not on green-field investments, a distinction not easily justifiable on economic policy grounds.

While only a few BITs provide for national treatment in regard to the admission of foreign investors, these rights are more commonly found in investment disciplines in FTAs. Association agreements promoted the EC focus mainly on the establishment of foreign companies, rather than on protection of foreign investors. FTAs concluded by the US and Canada, as well as other agreements following in the NAFTA model - such as FTAs concluded by Taiwan (China), and Korea, and agreements signed by Singapore and Thailand extend national treatment to the establishment phase of the investment, albeit commonly subject to sectoral exclusions.

Section Three. THE NT OBLIGATION AND POST-ESTABLISHMENT RIGHTS

Most bilateral investment agreements do not feature a national treatment obligation in regard to establishment, and the parties remain free to restrict the entry of foreign investors in certain areas. However, post-establishment national treatment is a usual obligation, which prevents established foreign investors to be subject to less favourable conditions than domestic investors.

The national treatment obligation is commonly considered to encompass both de jure and de facto discrimination, i.e. the provision applies not only to law or regulations that are directly addressed to foreign investors, but also those measures that, applying in principle to local and foreign investors alike, have a disproportionate effect on these latter.

In this sense, the arbitral tribunal in *S.D. Myers, Inc. v. Canada* took the view that

> "in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty".[3]

Additionally, the national treatment principle protects foreign investors against less favourable conditions than domestic ones even when such conditions are not necessarily an express objective of the regulator.

[2] Finland-Kyrgyzstan BIT, Article 3.

[3] *S.D. Myers, Inc. v. Canada*, NAFTA Arbitration under UNCITRAL rules, First Partial Award, 13 November 2000, para 252.

The tribunal in *SD Meyer* considered that discriminatory intent is important, but not necessarily decisive on its own, so that the existence of an intent to favour nationals over non-nationals would not give rise to a breach of the national treatment obligation if the measure in question produced no adverse effect on foreign investors. The tribunal concluded that "the word 'treatment' suggests that practical impact is required to produce a breach of" the national treatment obligation".[4]

Unlike BITs promoted by the US and Canada - and in line with BIT concluded by the rest of the world, China's agreements do no feature sectoral exclusion from the national treatment obligation and other main provisions of the agreement.

The grand-fathering clause introduced in its recent agreements would have similar effects to the reservations on "existing measures" maintained by those two countries, albeit it lacks the transparency benefits of a specific list of reservations or commitments. However, the lack the ability to introduce restrictions in other sectors could prevent the host government from introducing restrictions in sectors where no non-conforming measures are maintained at the time of the entry into force of the agreement, but restrictive measures may be deemed in the future - as it would the case under a "future measures" reservations list.

Furthermore, the absence of a grand-fathering clause in the China-Korea BIT in regard to national treatment may have important implications for current agreements, given the breath of the MFN provision and the fact that 'new generation' have amplified the scope of investor-State dispute settlement procedures.

Section Four. CONSIDERATION OF INTENT/MOTIVATION

There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the owner's ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion - 'sole effect doctrine' - or whether the purpose and the context of the governmental measure may also enter into the takings analysis". The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems however that the balanced approach is pre-dominant. A few cases have focused on the effect of the owner as the main factor in discerning a regulation from a taking. In the Tippetts case, the Iran-United States Tribunal held that:

> "the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".

In the *Phelps Dodge* case, a transfer of management was made pursuant to a pre-revolutionary law designed to prevent the closure of factories, ensure payments due to the workers, and protect any debts owed to the Government, which in this case included loans made by a bank that had been nationalised in 1979. Citing Tippetts the Iran-United States Tribunal stated that:

> "The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss".[5]

The *Alpha Projecktholding v. Ukraine* Award cited *Myers v. Canada* for the proposition that intent is important in proving a national treatment violation, but protectionist intent is not necessarily decisive on its own.[6] In this respect, the *Occidental Exploration v. Ecuador* Final Award stated that the claimant received less favourable treatment than that accorded to national companies even if this was not done with the intent of discriminating against foreign-owned companies.[7]

In the same vein, the *Bayindir v. Pakistan* Award finds that there is no requirement to demonstrate subjective intent to discriminate; a

[4] *S.D. Myers, Inc. v. Canada*, NAFTA Arbitration under UNCITRAL rules, First Partial Award, 13 November 2000, para 253. Similarly, the tribunal in the Feldman case, sustained that "it is not self-evident […] that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality" (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002, para 183).

[5] Phelps Dodge, 10 Iran-United States Cl. Trib. Rep. at 130.

[6] *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 at 427.

[7] *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004 at 177.

showing of discrimination of an investor who happens to be a foreigner is sufficient.[8]

Box 5: Consideration of intent in Bayindir v. Pakistan, 2009

If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e. whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is the correct one. This arises from the wording of Article II(2) quoted above. It is also in line with the rationale of the protection as was emphasised in *Feldman v. Mexico*, 109 to which the Claimant referred: *"It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality." […] However, it is not self-evident […] that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favourable treatment for the foreign investor than for domestic investors in like circumstances. […] [R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. […]. If Article 1102 violations are limited to those where there is explicit (presumably de jure) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors."*

[8] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 at 390.

SUMMARY OF THE CHAPTER THREE

The principle of national treatment prohibiting discrimination between investors and investments produced domestically and those from other countries. Together with the MFN obligation, it forms the fundamental principle of non-discrimination in investment law.[9] Essentially, national treatment requires that countries not discriminate against foreign investors in favour of domestic ones. The standard of treatment can be defined in two ways: 'same' or 'as favourable as' treatment or 'no less favourable' treatment. The difference is subtle, but the 'no less favourable' formulation leaves open the possibility that investors may be entitled to treatment that is more favourable than that accorded domestic investors, in accordance with international standards. Often the definition of national treatment ("NT") is qualified by the inclusion of the provision that it only applies in 'like circumstances' or 'similar circumstances'. With the situations of foreign and domestic investors often not being identical, this language obviously leaves room for interpretation. Generally, not all BITs address the NT scope in the same manner. The first group does not deal with the issue at all. The second group - that of the majority - provides NT, but limits its coverage to established investments only (admission). A third group of agreements provides NT to the investors in the pre- and post-establishment phase (right of establishment).

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) Peter Clark says confidently that under NAFTA Chapter 11 a host state must give investors from other NAFTA countries the "best" treatment given any domestic investors (and foreign investments are due the best treatment given any domestic investments). What does this mean? Does this mean equality of competitive opportunity, or does it mean more than that?

2) Following on to that question, does resolving this question involve deciding what constitutes "treatment"? For example, if a

[9] The scope and practical relevance of NT is to a large extent dependent on the reading of the term "like circumstances". Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from domestically produced. Indeed, often the definition of national treatment is qualified by the inclusion of the provision hat it only applies in "like circumstances" or "similar circumstances". As the situations of foreign and domestic investors are often not identical, this language obviously leaves room open for interpretation.

government is putting out a project for tender, does the national treatment obligation mean that all bidders in the tender process must be treated fairly and equally (so that the treatment is in fact the tendering process), or does it mean that the foreign bidders covered by an investment treaty must be given the contract, or a piece of the contract (so that the treatment is the award of the contract)?

3) The national treatment obligation requires that national treatment be afforded covered foreign investors "in like circumstances" with domestic investors. Thus, a lot hinges on the like circumstances determination - if a foreign investor is not in like circumstances with the allegedly favoured domestic investor, then there simply is no claim. How should a tribunal go about deciding who is in like circumstances with whom? Must the investors compete in the same economic sector?

4) In *Occidental v. Ecuador*, the tribunal treated all exporters of goods as being in like circumstances? Was the tribunal justified in doing this?

5) It is well accepted that national treatment extends to both *de jure* and *de facto* claims of discrimination. Most cases are in fact *de facto* cases. Must even those cases carry with them assumptions about an INTENT to treat foreign investors badly? Or is a disparate impact enough to sustain a claim?

6) Is burden shifting - requiring that a claimant make a *prima facie* case of a national treatment violation, and then shifting the burden to the defending state to offer a non-discriminatory reason for the difference in treatment - a reasonable approach to a national treatment case?

7) Parts of the recent bail-out legislation in the United States (and in the U.K., for that matter) have been criticized as too protectionist. Is it too utopian to expect nations NOT to favor their own?

READINGS

1. Peter Clark, *National Treatment under GATT and NAFTA: A Discussion Comment*, 1:3 Transnational Dispute Management (July 2004).
2. Andrea K. Bjorklund, *National Treatment*, in Standards of Treatment 29, 29-36 (August Reinisch ed. , Oxford, 2008).
3. Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 251-257; 262-263 (Oxford 2007).
4. Andrew Newcombe & Lluis Paradell, The Law and Practice of Investment Treaties 147-232 (Kluwer 2008).
5. Susan D. Franck, International Decisions: Occidental Exploration and Production Co. v. Ecuador, 99 Am. J. Int'l L. 675 (2005).
6. UNCTAD, National Treatment, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).
7. *Methanex Corp. v. United States of America*, UNCITRAL (Final Award) (3 Aug. 2005), Part IV, Chapter B.
8. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case. No. UN 3467 (Final Award) (1 July 2004) 1-6, 25-35 (facts), 167-179.
9. *Gami Investments Inc. v. Mexico*, UNCITRAL, (Final Award) (15 November 2004) 12-22 (facts) 111-115.
10. NAFTA Article 1102
11. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11 at 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; last updated 2009).

CHAPTER FOUR. FET & FPS

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FAIR AND EQUITABLE TREATMENT (FET) AND FULL PROTECTION AND SECURITY (FPS)

Learning Objectives
Chapter Four

- Learn what factors distinguish the international minimum standard from fair and equitable treatment;
- Consider what level of government conduct is required by the international minimum standard today;
- Discuss the advantages of the NAFTA Interpretation Process;
- Discuss the disadvantages of the NAFTA Interpretation Process;
- Identify the factors that should guide a fair & equitable treatment analysis;
- Study the scope of the full protection and security standard.

Comparative standards of treatment, like the MFN and NT principles, operate through the extension of rights already afforded to some investors, to investors and investments of the contracting party. They do not, however, provide an objective guarantee of "good" treatment toward foreign investors. Indeed, the MFN and NT obligations would be of little help in the case that *all* investors were subject to equally egregious treatment.

Absolute standards of treatment are meant to ensure that foreign investors are granted an adequate treatment, independently of the treatment that the host country affords to its own investors or to investors from other countries. Several formulations are found in BITs that intend to express the obligation of the host state to provide a certain minimum standard of "good" treatment to foreign investors. Most of these formulations relate to the most common requirement of ensuring a "fair and equitable treatment" ("FET") to foreign investors.

Notwithstanding the common and long-standing use of the fair and equitable principle, the exact content and meaning of the standard is not uniformly understood. UNCTAD points out at least two different views on the precise meaning of the term "fair and equitable treatment": 1) the plain meaning approach; and 2) equating it with the international minimum standard.

Additionally, FET is becoming one of the most important, if not the most important, of the substantive obligations enshrined in investment agreements and a number of major awards for foreign investors have been decided in whole or in part on the breach of this standard.

Section One. CONCEPT, SCOPE AND APPLICATION OF FET

1. Concept and Scope of FET

A number of different aspects of "good governance" have been taken into account by arbitral tribunals as covered by the FET. These different issues include transparency, due process, arbitrary of discriminatory conduct and good faith. Additionally, governmental actions that went beyond the scope of legal authority of the public entity concerned, or measures that hampered the legitimate expectations of the foreign investors were also considered as elements that may entail a breach of the FET.

Among the circumstances where this standard has been applied are the following: i) the non-renewal of a land-fill operations licence in Mexico; ii) the requirement to produce what was termed as "excessive documentation" for export permits in the forestry sector in Canada; iii) the improper transfer by a government official of funds from a private bank account; iv) the failure to give full notice directly to a ship owner regarding the impending seizure of a ship although such notice was placed on the ship.

2. Meaning of FET in International Arbitration

In the context of the NAFTA a number of investor-State arbitrations have addressed the content of the FET standard, which has given rise to contradictory interpretations and controversy regarding the precise obligations that the NAFTA countries wished to undertake under the principle.[1] The FET obligation is enshrined in Art 1105 of the NAFTA, which is headed "Minimum Standard of Treatment", and provides that:

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

In *S.D. Myers v. Canada*, for instance, the Arbitral Tribunal stated that

> A breach of [fair and equitable treatment] occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment raises to the level that is unacceptable from the international perspective",[2] thus paralleling the FET standard with the international minimum.

The Tribunal in *Metalclad v. Mexico* considered, instead, that a certain degree of transparency is included in the concept of FET in the NAFTA. This led the tribunal to conclude that, having Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment, it demonstrated a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA, being therefore in breach of the FET obligation of NAFTA Art 1105.[3]

1 For a detailed review of arbitral decisions on the concept of fair and equitable treatment, see *Schreuer*, 2005.

2 *S.D. Myers v. Canada*, NAFTA Arbitration under UNCITRAL rules, First Partial Award, 13 November 2000, para 263.

3 *Metalclad Corp. v. United State*, Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000, paras 99-101.

The Arbitral Tribunal in *Pope & Talbot v. Canada* noted that it is true that the language of Art. 1105 suggests that fair and equitable treatment is included in the concept of international law. It also mentioned and reviewed the presentations by both Canada and the United States observing that, during the agreements' negotiations, the negotiators of the NAFTA parties did not wish to diverge from the customary international law concept of FET. Nonetheless, the Tribunal found "very strong reasons for interpreting the language of Art 1105 consistently with the language in the BITs", where, in the Tribunal's view, the concept of fairness was additive to the obligations stemming from international customary law.[4]

The arbitral tribunal in *Loewen v. United States* said on 26 June 2003, that as a result of the Free Trade Commission's recently adopted interpretation, "'fair and equitable treatment' and 'full protection and security' are not self-standing obligations. Rather, they constitute obligations of the host State only to the extent that they are recognised by customary international law". The *Loewen* tribunal explained that to the extent that other NAFTA tribunals "may have expressed contrary views, those views must be disregarded".[5]

Attempting to summarise different NAFTA decisions on the concept of FET, the tribunal in *Waste Management v Mexico* reached the conclusion that the standard is to some extent a flexible one which must be adapted to the circumstances of each case" by noting that "the minimum standard of treatment of FET is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process".[6]

The tribunals, like the first NAFTA arbitrations, faced the question of whether this principle entailed additional obligations to those recognised under international customary law. In this regard, the

4 *Pope & Talbot Inc. v. The Government of Canada*, NAFTA Arbitration under UNCITRAL rules, Award on the Merits, 10 April 2001, paras 105-118.

5 *Loewen v the United States*, Award, ICSID Case No. ARB(AF)/98/3, paras 125-128.

6 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3) , Final Award, April 30, 2004, paras 98-99.

tribunal in *Saluka Investments v. Czech Republic* found that the standard "is an autonomous Treaty standard" independent from the international minimum standard of treatment. Under this reading, the principle entailed that the parties without undermining its legitimate right to take measures for the protection of the public interest" have "assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations".[7]

More recently, the *Invesmart v. Czech Republic Award* noted that the content of the FET obligation has been variously and not consistently described as including the different strands of protection of an investor's legitimate expectations, protection against manifestly arbitrary or grossly unfair treatment, requiring consistency of governmental decision-making, transparency, due process and adequate notice, protection against discrimination that does not amount to a breach of the national treatment standard and protection against acts of bad faith.[8] Perhaps, the best summary to date is offered by the *British Caribbean Bank v. Belize Award* which noted in relation to the fair and equitable treatment standard that aspect of the protection of investments has generally resisted the formulation of any comprehensive definition; whether government conduct will be considered "fair" or "equitable" is an inherently contextual determination.[9]

[7] *Saluka Investments BV (The Netherlands) v The Czech Republic, Netherlands-Czech Republic* BIT arbitration under UNCITRAL rules, Partial Award, March 17, 2006, 309.

[8] *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), 26 June 2009 at 200. Also, the Oxus v. Uzbekistan Final Award acknowledges that there is a great variation in the way the standard is applied by international tribunals. See Oxus Gold plc v. Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015 at 313.

[9] *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014 at 281.

Box 6: Fair and equitable treatment in the British Caribbean Bank v. Belize Award (2014)

281. Turning to the standard for fair and equitable treatment, the Tribunal observes that this aspect of the protection of investments has generally resisted the formulation of any comprehensive definition. Whether government conduct will be considered "fair" or "equitable" is an inherently contextual determination. While the protection against expropriation set out in Article 5 of the Treaty is principally focused on the property rights of the investor and defines a series of (relatively) objective requirements for a taking, fair and equitable treatment is focused more subjectively on the intent and context of governmental action, as well as on its effects. Without attempting to advance any comprehensive view of the meaning of fair and equitable treatment, the Tribunal is of the view that, as it emerges from the Parties' arguments, at least two strands of the standard bear upon the events in these proceedings.

282. *First*, fair and equitable treatment is frequently noted to include a prohibition on conduct that is "arbitrary," "idiosyncratic," or "discriminatory". There is an inherent logic to this association. Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be. In the Tribunal's view, this is linked in the Treaty to the requirement that any taking be made for a public purpose. While governmental conduct can be unfair or inequitable and still be in service of a bona fide public purpose, it is difficult to imagine the converse, a situation in which the taking of an investment was not motivated by a public purpose and yet complied with the requirement of fair and equitable treatment.

283. *Second*, as set out in both Parties' discussion of the standard, fair and equitable treatment is generally linked to the concept of an investor's legitimate expectations. While it would be trite to state that an investor has a legitimate expectation in the fulfilment of the remainder of the Treaty, the Tribunal is of the view that an investor can at least legitimately expect that legislation to assume outright ownership of his or her investment will not be adopted except in the service of a public purpose.

284. Having already found (see paragraphs 241 and 243 above) that the Respondent's adoption of the 2009 Act and Orders and the 2011 Act

and Order failed to meet the Treaty's requirement that any taking be made for a public purpose, the Tribunal concludes that the Respondent has also failed to accord the Claimant fair and equitable treatment.

3. Meaning of FET in International Investment Agreements

Nearly all investment agreements enshrine the obligation to grant FET to foreign investors, in many cases together with the guarantee to provide full protection and security in situations of armed conflict or civil distress. This practice has remained unaltered for most countries, whose most recent agreements do not introduce substantive changes in this regard.

This is not case for the agreements of the United States and Canada, whose experience with NAFTA investor-State arbitrations and the controversial decisions adopted in this framework have motivated them to introduce new language to clarify the scope of the fair and equitable treatment obligation.

In effect, it was all three NAFTA countries that acted jointly to set limits to the interpretations of FET adopted in arbitral decisions. On 31 July 2001, the three parties of the NAFTA, through Free Trade Commission, adopted an interpretation of the fair and equitable standard that intended to equate the concept of FET with that of the international minimum standard required by international customary law, making clear the FET principle was not a new, additional obligation on the NAFTA governments.[10]

This concept was expressly later adopted by the arbitral tribunal in the *Loewen* case, as explained above. Both the United States and Canada have since incorporated this concept in their investment agreements, be them BIT or investment chapters in FTAs. The CAFTA provision on Minimum Standard of Treatment, for instance, states that

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including FET and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and "full protection and security" requires each Party to provide the level of police protection required under customary international law".[11]

An additional note to the agreement further clarifies that "'customary international law' results from a general and consistent practice of States that they follow from a sense of legal obligation". In regard to the customary international law minimum standard of treatment of foreign investors, the note specifies that it "refers to all customary international law principles that protect the economic rights and interests of aliens".[12]

Canada's agreements also include a provision on FET modelled on the Free Trade Commission's clarifications. Unlike the US, however, Canada's agreements do not further specify that judicial procedures are covered by the fair and equitable standard, nor it refines the meaning of customary international law.[13]

Most other agreements have not followed the trend set by the US and Canada of expressly restricting the scope of the FET. Rather, some recent agreements include an obligation to ensure that some values that have been considered to form part of the FET principle, like non-discrimination and reasonableness of the governmental measures, are expressly covered by the agreements.

In this sense, the BIT signed with Bosnia-Herzegovina expresses that:

> Investments of investors of each Contracting Party shall at all times be accorded FET and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting

[10] Free Trade Commission Clarifications Related to NAFTA Chapter 11, of 31 July 2001, Section B.

[11] CAFTA-DR, Article 10.5

[12] CAFTA-DR, Annex 10-B 'Customary International Law'.

[13] See Canada's Model FIPA of 2003, Article 5.

Party shall in any way impair by unreasonable or discriminatory measures the expansion, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party".[14]

Most recently, in the European Union-Vietnam FTA, the fair and equitable treatment is defined in a relatively narrow manner.

Box 7. Fair and equitable treatment in EVFTA (2016)

1. Each Party shall accord fair and equitable treatment and full protection and security to investments and investors of the other Party in its territory in accordance with paragraphs 2 to 7.
2. A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) a fundamental breach of due process in judicial and administrative proceedings;

(c) manifestarbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment such as coercion, abuse of power or similar bad faith conduct; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3.

3. Treatment not listed in paragraph 2 may constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided forin Article17.5 (Amendments).
4. When applying the paragraphs 1 to 3, a Tribunal shall take into account whether a Party made a specific representation to an investor to induce an investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.
5. For greater certainty, the term "full protection and security" referred to in paragraph 1 refers to a Party's obligations to act as may be reasonably necessary to protect physical security of investors and investments.
6. When a Party has entered into a written agreement with investors of the other Party or their investments referred to in paragraph (a) of Article 8.8 (Scope) that satisfies all of the following conditions

(a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement;

(b) the investor relies on the written agreement in deciding to make or maintain an investment referred to in paragraph (a) of Article 8.8 (Scope) other than the written agreement itself and the breach causes actual damages to that investment;

(c) the written agreementcreates an exchange of rights and obligations in connection to the said investment, binding on both parties; and

(d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration.

7. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

The EVFTA Article 8.10 (Treatment of Investment) requires a Party to provide fair and equitable treatment to investors of the other Party and their investments.[15] Instead of linking fair and equitable treatment to an outside standard such as minimum standard of treatment under customary international law the Article provides a list of criteria that can be used to determine whether there has been a breach of fair and equitable treatment. This list includes qualifiers such as "fundamental breach of due process", "manifest arbitrariness", "targeted discrimination on manifestly wrongful grounds".[16]

[14] China-Bosnia Herzegovina BIT, Article 2.2.

[15] See Article 8.10 (Treatment of Investment), paragraph 1

[16] See Article 8.10 (Treatment of Investment), paragraph 2

These significantly qualify the measures that can be considered a violation of fair and equitable treatment. Article 8.10(3) also foresees a possibility of expanding this list. Article 8.10(4) specifies that the investor may have legitimate expectations based on a Party's representations made to induce the investment. Should the Party's subsequent action or inaction then be contrary to the initial representations, a dispute resolution Tribunal could take this fact into account. Taken together, the fair and equitable treatment provisions broadly protect the Parties' policy flexibility. The result is that few good faiths legislative, administrative, or judicial measures or practices will breach the provision.

Section Two. CONCEPT, SCOPE AND APPLICATION OF FPS

As for the full protection and security, the extent of the protection was detailed in the *Saluka v. Czech Republic* Award, which noted that the "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence.[17]

It is clear that tribunals are in agreement that the standard applies at least in situations where actions of third parties involving either physical violence or the disregard of legal rights occur, and it requires that the state exercise due diligence to prevent harm to the investor. It is understood that the standard does not grant the investor an "insurance against all and every risk", as noted recently in the *Vanessa Ventures v. Venezuela* Award.[18]

International law has interpreted this due diligence to consider that although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question (a modified objective standard).[19] This extension has been endorsed by subsequent tribunals.[20] In particular, the *Houben v. Burundi Award* finds

[17] *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, (17 March 2006), para 483. Technically, it was *Asian Agricultural Products Limited v. Sri Lanka,* ICSID Case No ARB/87/3,(1991) Final Award on Merits and Damages, (21 June 1990) 30 ILM 577 where the FPS standard was discussed first.

[18] *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, (16 January 2013), para 223.

[19] *Pantechniki v Albania Award*, citing Newcombe and Paradell, *Law and Practice of Investment Treaties*. See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (11 September 2007), paras 81-84.

[20] For instance, *Paushok v. Mongolia* notes that the "legal protection" clause has been raised in a number of BIT cases and it has sometimes been interpreted as a stand-alone clause, aiming at the physical protection of persons or assets against illegal actions by third parties; in the case before the tribunal the treaty provides clearly for "full legal protection to investments of investors of the other Contracting Party" and there is therefore no reason to limit the protection guaranteed to mere physical protection. Sergei Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, (28 April 2011), para 326. See also *Reinhard Unglaube v. Costa Rica* and *Marion Unglaube v. Costa Rica Award* accepted that "full protection" may, in appropriate circumstances, extend beyond the traditional standard focused on physical security. *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, (16 May 2012), para 281.

that the host State has an obligation of "reasonable diligence" under the full protection and security standard to ensure that the investor is protected from the wrongdoing of third parties; this obligation is not absolute, it must not be interpreted to mean that the State shall protect the investment from all possible loss of value, but rather, it must be interpreted to mean that the State must take reasonable measures within its power (See Box 8).[21]

Box 8. Full protection and security Houben v. Burundi Award (2016)

Par ailleurs, un aspect bien établi de la norme est que les États doivent utiliser une 'diligence raisonnable' pour prévenir les dommages injustifiés à la personne ou aux biens des étrangers sur leur territoire et, s'ils n'y ont pas réussi, exercer au moins une 'diligence raisonnable' pour punir les auteurs de tels dommages. Un Etat n'est pas en mesure d'assurer le même niveau de protection contre la conduite de tiers que celle qu'il doit assurer en ce qui concerne la conduite de ses propres organes. L'obligation d'exercer une 'diligence raisonnable' ne signifie ainsi pas que l'État a le devoir d'empêcher tout dommage. Comme l'indique à juste titre le Burundi dans ses écritures, l'Etat d'accueil ne saurait être considéré comme un assureur et n'a pas l'obligation de protéger l'investisseur contre toute perte de valeur possible (ce qui serait l'équivalent d'une responsabilité sans faute). Au contraire, l'obligation est généralement comprise comme exigeant que l'Etat prenne des mesures raisonnables en son pouvoir lorsqu'il est, ou devrait être, au courant d'un risque de dommage.

In addition, the scope of the full protection and security concept has been extended to provide a legal framework, that offers legal protection to investors - including both substantive provisions to protect investments and appropriate procedures that enable investors

[21] *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016 [French] at 161.

to vindicate their rights,[22] and which offers a rich canvass against which foreign investors may prepare their claims.

In the *Biwater*'s case, Tanzania was again found liable for "Full protection and security" breach.[23] In the Claimant view, (investor) under the full protection provision, the State has an obligation of due diligence to protect its investment against physical assault, such as civil strife and physical violence (citing international cases to support it); in this way, the investor argued that Tanzania by its actions, failed to safeguard the physical integrity of its investment against interference by use of force. The alleged actions of the State included, the usurpation the management and control of the company providing water services (owned by the investor), the staff meeting call announcing the termination of the concession and the new state-owned replacement, the removal of the company manager under serious threats of deportation, and finally the occupation and seizure of the entire water services facilities and business; all of these actions were viewed as physical interference used by force. In addition, the claimant argued that the full protection and security standard as seen in their BIT also included a protection from interference with the basic legal framework upon which an investor relied to make its investment. The investor's basic expectation was that the concession contract would at least be performed in good faith; in this case, his expectations were broken with this independent, quite unexpected and against all contractual behaviour staff speech, announcing the termination of the concession.

In response to these allegations, the host State argued that the investor was wrongfully distinguishing the FET provision and the full protection one by enlarging its scope in his way. The State also argued that the statement during the staff speech alleged as a breach was incorrect and therefore do not violate the BIT. In addition, the State tempted to limit the scope of the diligence standard due; indeed, it was argued that the standard only had to do with use of force from outside agencies, such as civil war, riots or natural disasters. The State even refused to see a call for a staff meeting as using force, and doubted the effective effects on physical integrity of the claimant's investment as no

[22] *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, (12 November 2010), para 263.

[23] Tanzania - United Kingdom BIT; "Promotion and Protection of Investments", "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party […]" (Art. 2.2).

quantifiable damages could be found. Concerning the seizure of the services, the State argued that the investor did not possessed the assets and by refusing to give it up, it gave them no choice; despite of that, no physical force was used, neither in the deportation threats only made to protect the water supply and sewage system to fall. Finally, in Tanzania's point of view, the full protection scope should not be seen as a strict liability, but more as a duty of diligence expected from a civilised nation and that while facing a crisis, the authorities only acted to protect the water asset's life.

In its final decision, the tribunal then had to expose the content of full protection and security, citing diverse related international cases, and affirming the duty of diligence as well as the protection of physical integrity of the investment against the use of force. The tribunal even cited the *Azurix* case and adopted their point of view, firmly alleging that full protection standard can go beyond the strict physical force. Indeed, supporting its decision and interpretation, the tribunal clearly stated its adherence to enlarge the scope beyond physical force and adding the commercial financial and legal guarantee of stability. In the tribunal's view, it would be unduly artificial to confine the essence and scope of this international standard. Moreover, the tribunal refused to limit the protection to the State's failure to protect the investment by a third party, but extended it to organs or the host State itself, as the word «full» clearly intended. In conclusion, even without force, unnecessary and abusive acts by the State equally represent a clear breach of full protection and security under the related BIT (and these even if no quantifiable damages were found or proved).

With the *Biwater* case, a third kind of actions can be added to the constitutive body of a full protection breach called the unnecessary and abusive acts. These also represent some other and significant example of acts, threats, or conduct to ovoid in any case for future State concession contactors, expanding the essence of this standard a little bit more.

SUMMARY OF THE CHAPTER FOUR

Comparative standards of treatment, like the most favoured nation ("MFN") and NT principles, operate through the extension of rights already afforded to some investors. They do not, however, provide an objective guarantee of good treatment toward foreign investors. Indeed, the MFN and NT obligations would be of little help in cases where

all investors were subject to equally egregious treatment. Absolute standards of treatment are meant to ensure that foreign investors are granted fair treatment, independent of the treatment that the host country affords to its own investors. Several formulations are found in BITs that intend to express the obligation of the host state to provide a certain minimum standard of 'good' treatment to foreign investors. Most of these formulations relate to the most common requirement of ensuring FET to foreign investors.

Tribunals have avoided grand theories about the meaning of the fair and equitable treatment ("FET") standard. Some authors have endorsed such an approach, stating "FET has only one content which is operating at different thresholds, depending on the context".[24] These different formulations, however, may lead to different interpretative outcomes.[25] Most commonly, any theoretical discussion is limited to a list of examples of the kinds of behaviour that violate the FET standard.[26] Illustrative is the NAFTA award in *Waste Management v. Mexico*. Here, the tribunal held that FET is violated by conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.[27] In applying this standard it is relevant that the treatment is in breach of representations made by the host State were reasonably relied on by the claimant."[28]

[24] See Ioana Tudor, *The FET Standard in the International Law of Foreign Investment* (2008) at 154.

[25] The FET standard is expressed in different ways. Some treaties contain a bare reference to FET; others link FET to international law or to customary international law. Still others include the standard in a clause that also contains prohibitions against arbitrary and discriminatory acts and/or a "non-impairment" obligation. In this regard, the *Sempra v. Argentina* Award notes that fair and equitable treatment is not a clear and precise standard and that it has evolved by case-by-case determinations. See *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para 296. Recently, *El Paso v. Argentina Award*, citing the CMS Annulment Decision, agrees that there is variation in the practice of arbitral tribunals in relation to the fair and equitable standard. See *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para 338.

[26] *Mondev v. United States* observed that the minimum standard of treatment applies to a wide range of factual situations, whether in peace or in civil strife, and to conduct by a wide range of State organs and agencies, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, (11 October 2002), para 95.

[27] *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, (30 April 2004), para 97

[28] *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, (30 April 2004), para 98.

One of the key substantive provisions commonly included in investment treaty texts is the obligation to provide "full protection and security". Different variants in phrasing also exist, such as: "full protection and full security", "constant protection and security", "protection and security", or "physical protection and security". These terms are synonymous and bear no impact on the application of the standard.[29] *Saluka v. Czech Republic* Award, explains that the "full protection and security" standard applies when the foreign investment has been affected by civil strife and physical violence.[30] It is clear that tribunals are in agreement that the standard applies at least in situations where actions of third parties involving either physical violence or the disregard of legal rights occurs.[31] It further requires that the state exercise due diligence to prevent harm to the investor.[32] The standard is commonly understood to not grant the investor an "insurance against all and every risk" as was recently noted in *Vanessa Ventures v. Venezuela Award*.[33] Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence for purposes of these cases is considered that of a host state in the circumstances and with the resources of the particular state in question (a modified objective standard).[34] This extension has been endorsed by subsequent tribunals.[35] More recently, the scope of the full protection and security

[29] *The Parkerings v. Lithuania* Award found that it is generally accepted that the variation of language between the formulation of "protection" and "full protection and security" does not make a significant difference in the level of protection a host state is to provide. See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (11 September 2007), para 354.

[30] *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, (17 March 2006), para 483. Technically, it was *Asian Agricultural Products Limited v. Sri Lanka,* ICSID Case No ARB/87/3,(1991) Final Award on Merits and Damages, (21 June 1990) 30 ILM 577 where the FPS standard was discussed first.

[31] Saluka para 483.

[32] Saluka para 484.

[33] *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, (16 January 2013), para 223.

[34] *Pantechniki v. Albania* Award, citing Newcombe and Paradell, *Law and Practice of Investment Treaties*. See Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8, Award, (11 September 2007), paras 81-84.

[35] For instance, *Paushok v. Mongolia* notes that the "legal protection" clause has been raised in a number of BIT cases and it has sometimes been interpreted as a stand-alone clause, aiming at the physical protection of persons or assets against illegal actions by third parties; in the case before the tribunal the treaty provides clearly for "full legal protection to investments of investors of the other Contracting Party" and there is therefore no reason to limit the protection guaranteed to mere physical protection. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, (28 April 2011), para 326. See also *Reinhard Unglaube v. Costa Rica*

concept has been extended to provide a legal framework, that offers legal protection to investors, including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights and which offers a rich canvass against which foreign investors may prepare their claims.[36]

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) The international minimum standard of treatment is an absolute standard that sets a baseline below which treatment cannot fall and still comport with international standards of minimal due process and fairness. Fair & equitable treatment, on the other hand, is not a "relative" standard in the sense of national treatment or MFN, but does seem to leave room for assessing the treatment accord by reference to the development standard in the host country. Should a tribunal's assessment of a country's culpability for a violation of fair and equitable treatment depend on the development standard of the host country?

2) The language of article 1105 says that the states party shall accord treatment in accordance with international law, including fair and equitable treatment and full protection and security, to investments of investors. What about investors themselves? Why would NAFTA limit the language of Article 1105 in that way?

3) The NAFTA Free Trade Commission received a lot of criticism for issuing its Note of Interpretation on the meaning of Article 1105 NAFTA, especially because the standard was at issue in several pending cases. Should the Note have been considered an amendment, rather than an interpretation? What result if it had been?

4) What are the pros and cons of issuing notes of interpretation?

5) Why does Article 5(2) of the U.S. Model BIT use the language "for greater certainty"? Is it helpful to have the clarification in the annex to the Model BIT? Is the language in Art 5(2) and the annex to the model BIT better or worse than the language in NAFTA Art. 1105? Why?

6) Does the free-standing fair and equitable treatment obligation give too much discretion to arbitrators?

7) In the early 2000s, some would have said that fair & equitable treatment and the international minimum standard had merged, given higher expectations of host state practice in the present day. Does the *Glamis* Award foreclose that argument?

8) Is the *Glamis Gold* interpretation of fair & equitable treatment too limiting? Would any claimant be able to meet that standard? Do you think the claimants in *Wena Hotels* met that standard? In *Merrill & Ring*?

9) Should the full protection & security standard be confined to providing physical protection and security?

10) If the obligation to provide full protection & security means more than providing physical protection, what does the fair & equitable treatment obligation require?

READINGS

1. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*" 39 The International Lawyer 87, 87-94; 100-06 (2005).
2. Schreuer, *Fair and Equitable Treatment*, BIICL, Investment Treaty Forum, 2:5 Transnational Dispute Management (November 2005).
3. *Glamis GoldLtd. v. United States of America,* UNCITRAL (Award) (8 June 2009) 10-15 (facts); 598-626.
4. *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL (Award) (31 March 2010) 26-43 (facts); 182-233.
5. Compare NAFTA art. 1105(1) & U.S. Model BIT arts. 5.1-5.3.
6. NAFTA FTC Notice of Interpretation.
7. Giuditta Cordero Moss, *Full Protection & Security*, in Standards of Investment Protection 131, 138-150 (August Reinisch ed., Oxford 2008).

and *Marion Unglaube v. Costa Rica* Award accepted that "full protection" may, in appropriate circumstances, extend beyond the traditional standard focused on physical security. *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, (16 May 2012), para 281.

[36] *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, (12 November 2010), para 263.

8. Wena Hotels Ltd. v. Egypt, ICSID Case ARB/98/4 (Award) (8 December 2000), 15-69; 80-95.

9. R. Doak Bishop, James Crawford & W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary 953-976; 1007-1071 (Kluwer 2005).

10. Rudolph Dolzer& Christoph Schreuer, Principles of International Investment Law 119-152 (Oxford 2008).

11. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins&Borzu Sabahi, Investor-State Arbitration 491-539 (Oxford 2008).

12. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11 1105.5 - 1105.52 (Kluwer 2006; last updated 2009).

13. Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 226-250 (Oxford 2007).

14. Andrew Newcombe &LluisParadell, The Law and Practice of Investment Treaties 233-319 (Kluwer 2008).

15. Lucy Reed & Daina Bray, *Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?*, in Contemporary Issues in International Arbitration and Mediation 13 (Arthur Rovine ed., MartinusNijhoff 2008).

16. Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in Investment Treaty Law, Current Issues III, at 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

17. Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair & Equitable Treatment Standard*, 55 Int'l & Comp. L. Q. 527 (2006).

18. UNCTAD, Fair & Equitable Treatment, UNCTAD/ITE/IIT/11 (Vol. III) (1999).

19. Todd Grierson-Weiler& Ian A. Laird, *Standards Of Treatment*, in Oxford Handbook of International Investment Law 261 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

20. H.E. Zeitler, *The Guarantee of 'Full Protection and Security' in Investment Treaties Regarding Harm Caused by Private Actors*, 3 Stockholm International Arbitration Review 1 (2005).

CHAPTER FIVE. PROTECTION AGAINST EXPROPRIATION

CHAPTER FIVE

PROTECTION OF FOREIGN INVESTORS AGAINST UNLAWFULL EXPROPRIATION (TAKINGS)

Learning Objectives
Chapter Five

- Distinguish between lawful and unlawful expropriations;
- Identify the factors that help tribunal determine whether a partial taking has amounted to an expropriation;
- Distinguish between regulatory acts that fall short of a taking and those that effect a compensable expropriation;
- Consider the appropriate role of the doctrine of "legitimate expectations"; in determining whether or not there has been a taking;
- Consider the appropriate measure of compensation in the event of a lawful rather than an unlawful taking;
- Identify the types of acts that should be considered "police powers" and therefore not compensable expropriations;
- Consider the wisdom of a government's embarking on a program of privatization of key industries.

This Chapter Five first explains the forms of expropriation (direct and indirect) by paying attention to the wording used in a number of Vietnamese treaties and relevant case-law (Section One). The Section Two refines the analysis by focusing on the difficult case of indirect expropriation which is a notion that only be grasped by delving into the case-law and the progressive development of that notion by investment tribunals. Finally, Section three reviews the conditions for a lawful expropriation.

Section One. CONCEPT AND FORMS OF EXPROPRIATION

1. Concept of Expropriation

The concept of expropriation is known of most national legal orders.[1] Expropriation is a taking of private property or rights by the government for just compensation when it is for a public purpose. It may be the exercise of eminent domain powers. The governmental entity may be a federal, state, county or city government, school district, hospital district or other agencies. The taking of property may be with or without the permission of the owner.

The expropriation process usually involves passage of a resolution by the acquiring agency to take the property (condemnation), including a declaration of public need, followed by an appraisal, an offer, and then negotiation.

The owner who believes that just compensation is not being offered for the taking of their property may bring suit against the governmental agency. However, by depositing the amount of the offer in a trust account, the government becomes owner while a trial is pending.

At the international level, expropriation is a very important legal issue as the protection of foreign investors has historically been the main goal of IIAs. Hence, the inclusion of disciplines against the

[1] The Fifth Amendment (Amendment V) to the United States Constitution provides that "private property [may not] be taken for public use without just compensation." This has been interpreted as preventing government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[.]" See *Penn Cent. Transp. Co. v. City of New York*, 438 US 104, 123 (1978). The Fourteenth Amendment (Amendment XIV) added the requirement of just compensation to state and local government takings.

nationalisation or expropriation of foreign investments constitutes a pivotal guarantee for foreign investors. Almost all investment agreements feature provisions against the taking of property of the investor with some language variations.

2. Forms of Expropriation

Expropriation can mainly take two different forms as it can be either direct or indirect.[2]

Firstly, expropriation could be direct where an investment is nationalised or directly expropriated through the dispossession of the investor's title over its investment. In an international context, a direct expropriation occurs when the host state takes property owned by a foreign investor located in the host state, when there is deprivation of wealth attributable to the state.[3] Direct expropriation is not very frequent in practice. As explained in the *Telenor v. Hungary* Award, direct expropriation is the exception rather than the rule, as States prefer to avoid opprobrium and the loss of confidence of prospective investors by more oblique means.[4]

Secondly, expropriation could also be "indirect" through measures that, although not formally denying the investor of its title, have an impact on the investor's property sufficient to effectively deprive the investor of benefits over its investments, inhibit its management, use or control, or substantially depreciate its value.[5] Indirect expropriation can in turn take the form of regulatory expropriation - where a measure has been taken for regulatory purposes but has an impact equivalent to expropriation,[6] or creeping expropriation[7] - where it is not an individual act, but rather a series of measures that brings about the expropriatory effect.

Investment agreements typically provide guarantees against all forms of expropriation. The US-Australia FTA, for instance, contains a typical clause on the issue.[8] Article 11.7 of the agreements provides that: "Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ("expropriation"), except: for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law".

However, there is a number of other agreements that, with different language, aim at setting the same scope for the clause on expropriation. For example, treaties entered by France refer to "measures of expropriation or nationalisation or any other measures the effect of which would be direct or indirect dispossession". The UK treaties provide that expropriation also covers measures "having effect equivalent to nationalisation or expropriation". Other treaties, such as some of those

2 In this respect, *Enron v. Argentina* Award held that a measure cannot qualify simultaneously as a direct and an indirect expropriation. Enron Creditors Recovery Corporation (formerly Enron Corporation) and *Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 at 250.

3 For instance, the *Generation Ukraine v. Ukraine Final Award* defined direct expropriation as a transfer of proprietary rights to the State or to a third party. See *Generation Ukraine Inc. v Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003 at 20.21. See also the *Burlington Resources v. Ecuador*, Decision on Liability that examined the takeover of the claimant's oilfields under the standard applicable to direct expropriation; accordingly, a measure constitutes expropriation if: (i) it deprives the investor of his investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 at 506.

4 *Telenor Mobile Communications A.S. v Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 at 69.

5 *LESI and Astaldi v. Algeria* Award considered that expropriation cannot only be limited to the confiscation of physical goods owned by an investor; rather, in some instances, expropriation can result from a substantial loss of contractual rights; this second form of expropriation, deemed "indirect" or "creeping" expropriation, has been recognised and sanctioned on numerous occasions by various arbitral tribunals. *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, 12 November 2008 [French] at 131.

6 *AWG v Argentina* Decision on Liability held that in an indirect expropriation, sometimes referred to as a "regulatory taking," host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or canceling investors' legal title to their assets or diminishing their control over them. *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010 at 132. Also, the *SAUR v. Argentina* Decision on Jurisdiction and Liability discussed the meaning of measures equivalent to expropriation, regulatory expropriation and indirect expropriation and notes that the reference to "indirect" highlights the intention of the BIT's drafters to define expropriation broadly. *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 [French] at 369-374.

7 For instance, *Middle East Cement v. Egypt* Award held that when measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation". *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 at 107.

8 United States-Australia Free Trade Agreement, 18 May 2004, (entered into force 1 January 2005). This document is available at: Office of the United States Trade Representative website http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text%20.

concluded by Sweden, refer to "any direct or indirect measure" or "any other measure having the same nature or the same effect against investments". The former US Model BIT covers "measures tantamount to expropriation or nationalisation", while several of its treaties are more specific, prohibiting any other measures or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value…).[9]

Investment agreements entered into, for instance, by China commonly provide a seemingly more restrictive wording, since they usually refer to expropriation or nationalisation, "or similar measures", without an express reference to direct or indirect expropriation, or measures equivalent in effect to expropriation.

This wording is illustrated by the China-Chile BIT of 1994 in Table 2. In a similar vein, the agreement with Switzerland of 1987, refers to "analogous measures" (*mesures analogues*) to expropriation, nationalization, or dispossession (*dépossession*).[10]

[9] NAFTA Free Trade Comm'n [FTC], Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001 available at http:// www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp; see also Carl-Sebastian Zoellner, Note, Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law, 27 Mich. J. Int'l L. 579, 605-16 (2006) (discussing the Metalclad decision and the subsequent effects of the FTC's interpretative note).

[10] China-Switzerland BIT, Article 7.

Table 2: Guarantees against expropriation in Sino-Foreign BITs

China - Kuwait BIT(1985) Article 5.1	**China - Chile BIT(1994)** Article 4	**China - Uganda BIT(2004)** Article 4.1
(1) (i) Investments of any natural or juridical person of either Contracting State shall not be subject to sequestration or confiscation or any similar measures save with the order of a competent court issued in accordance with laws in force. (ii) Investments of any natural or juridical person of either Contracting State can be nationalized or expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory and maritime zones of the other Contracting State only for a public purpose in the national interest of that Contracting State and by giving fair and reasonable compensation and on condition that such measures are taken on a nondiscriminatory basis and in accordance with domestic laws of general application.	(1) Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") againstinvestments of investors of the other Contracting Party in its territory, unless the following conditions are met : (a) for the public or national interest; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.	Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in territory, except for the public interest, without discrimination and against compensation.

Arguably, measures "similar" or "analogous" to expropriation do not encompass measures leading to indirect expropriation. Indeed, if the similarity was to be evaluated by the nature of the measures, and not necessarily by its effect, regulatory takings and creeping expropriations would not be substantially similar to a measure that entails direct expropriation or nationalisation.

Nonetheless, not all Sino-Foreign BITs restrict the expropriation clause to measures "similar to" expropriation or nationalisation. Indeed, some old Sino-Foreign BITs provide guarantees against measures having "effect equivalent" to expropriation or nationalisation.[11]

The agreement with France (1985) alludes to "other measures leading to the same result" (*autres mesures aboutissant au même résultat*), while the BITs with Argentina (1992), Japan (1988), and Turkey (1990), with slightly broader language, refer to measures having a similar effect to expropriation.

Furthermore, a few "new generation" Sino-Foreign BITs, such as the ones with Finland (2004), Germany (2003),[12] Jordan (2005), Mozambique (2001) and Uganda (2004) have a clear reference to the effects of the measures. Of these agreements, the one with Uganda expressly point to measures of direct or indirect nature.

***Section Two*. INDIRECT EXPROPRIATION**

The jurisprudential developments on what constitutes an unlawful indirect expropriation have given raise to similar concerns as those regarding the scope of FET. The controversies do not involve as much the conceptual meaning of indirect expropriation - both in its forms of regulatory takings and creeping expropriation [13] - as to the effective application of these concepts in particular measures taken for legitimate regulatory purposes.

[11] That is the case of the agreement with Kuwait (1985), Denmark (1985) Iceland (1994) Indonesia (1994), Korea (1992), New Zealand (1994), Portugal (1992), Singapore (1985), and the UK (1986).

[12] Agreement between the Federal Republic of Germany and the Peoples Republic of China on the encouragement and reciprocal protection of investments, 1 December 2003 (entered into force 11 November 2005). This document is available at: United Nations Treaty Collection Online website https://treaties-un-org.easyaccess1.lib.cuhk.edu.hk/Pages/showDetails.aspx?objid=08000002800684c9.

[13] *TokiosTokeles v. Ukraine* Award finds that for any expropriation - direct or indirect - to occur, the State must deprive the investor of a "substantial" part of the value of the investment. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 at 120.

On the basic notion of indirect expropriation, the tribunal on *Middle East Cement v. Egypt*, ICSID considered that it refers to "measures […] taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights".[14] Similarly, the arbitral decision on *Lauder v. Czech Republic* considered that, while the concept of indirect (or "*de facto*", or "creeping") expropriation is not clearly defined in the text of the agreements, indirect expropriation "is a measure that does not involve an overt taking, but that effectively neutralises the enjoyment of the property".[15]

In the context of the NAFTA prohibition on measures "tantamount to expropriation" the panel in the *Metalclad* case assessed that the concept of expropriation

> "includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[16]

It has been this focus on the effect of the measures on the property of the investor together with a seemingly indifference towards the legitimate regulatory purposes of the measures reflected on some arbitral decisions that has brought about serious concerns on governmental authorities, especially when the measures under examination pertained to laws and regulations motivated on non-economic policies, such as health or environment protection measures.[17]

[14] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para 107.

[15] *Lauder v Czech Republic, United States-Czech Republic BIT Arbitration under UNCITRAL Rules*, Award (Final), 3 September 2001, para 200.

[16] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award 30 August, 2000, para 103. See also, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May, 2003, para 114.

[17] The arbitral panel on *Santa Elena v. Costa Rica*, considering a direct expropriation measure adopted for environmental purposes, seemed to adopt a particularly harsh stance on this matter, expressing that: "While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which

In this respect, the *Saipem v. Bangladesh* Award stated that according to the sole effects doctrine, the most significant criterion to determine whether actions amount to indirect expropriation is the impact of the measure; the deprivation must be substantial.[18]

Box 1: Saipem v. Bangladesh Award 2009

133. As a preliminary matter, the Tribunal wishes to emphasise that according to the so-called "sole effects doctrine", the most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure. As a matter of principle, case law considers that there is expropriation if the deprivation is substantial, as it is in the present case. That said, given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.

Indirect expropriation can be further divided into regulatory takings, which are those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host country.[19]

adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".

18 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 at 133.

19 UNCTAD, "Taking of Property: Issues in International Investment Agreements", UNCTAD/DITE/2, Vol. V, Geneva, 2000, p. 12. Although there are cases involving other states such as Unglaube and *Unglaube v. Costa Rica*, Award, ICSID Case Nos. ARB/08/1 and ARB/09/20, 16 May 2012 (which involved an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as *TecnicasMedioambientalesTecmed SA v. Mexico*, Award, ICSID Case No. ARB (AF)/00/2, 29 May 2003 (also involving an expropriation finding in relation to a Mexican government agency's Resolution ordering closure of a landfill for environmental

The doctrine of state "police power" was adopted in early colonial America from firmly established English common law principles mandating the limitation of private rights when needed for the preservation of the common good. Police power describes the basic right of governments to make laws and regulations for the benefit of their communities. Under the system of government in the United States, only states have the right to make laws based on their police power.

The law-making power of the federal government is limited to the specific grants of power found in the Constitution.[20] The *BG v. Argentina* Award noted that a state may exercise its sovereign power in issuing regulatory measures measures affecting private property for the benefit of the public welfare.[21]

reasons), the cases involving the Argentina financial crises of 2000-2002 are probably the most famous examples of failed attempts to justify social protection measures on the basis of human rights, public policy, or public interest reasons: *LG & E Energy Corp v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1/3, October 2006, paras 213-66; *Sempra Energy International v. Argentina*, Decision on Argentina's Application for Annulment of the Award, ICSID Case No. ARB/02/16, 29 June 2010, paras 106-223; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/0108, 25 April 2005, paras 315-92; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, May 22, 2007, paras 303-39; *Cont'l Cas. Co. v. Argentina*, Award, ICSID Case No. ARB/03/9, 5 September 2008, paras 219-85; *BG Group PLC v. Argentina*, Final Award, Ad hoc (UNCITRAL), 24 December 2007, paras 361-444; *National Grid PLC v. Argentina*, Ad hoc (UNCITRAL), 3 November 2008, paras 205-62; *Suez v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, *30 July 2010*, paras 249-71; *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December, 2010, paras 482-85; *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, Oct. 27, 2011, paras 552-670; *Impregilo SpA v. Argentine Republic*, Final Award, ICSID Case No. ARB/07/17, 21 June 2011, paras 336-60; *Metalpar SA and Buen Aire SA v. Argentina, Award on the Merits*, ICSID Case No. ARB/03/5, 6 June 2008, paras 208-11; *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007, paras 79 & 354.

20 The right of states to make laws governing safety, health, welfare, and morals is derived from the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." State legislatures exercise their police power by enacting statutes, and they also delegate much of their police power to counties, cities, towns, villages, and large boroughs within the state. Police power does not specifically refer to the right of state and local government to create police forces, although the police power does include that right. Police power is also used as the basis for enacting a variety of substantive laws in such areas as Zoning, land use, fire and Building Codes, gambling, discrimination, parking, crime, licensing of professionals, liquor, motor vehicles, bicycles, nuisances, schooling, and sanitation. If a law enacted pursuant to the police power does not promote the health, safety, or welfare of the community, it is likely to be an unconstitutional deprivation of life, liberty, or property. The most common challenge to a statute enacted pursuant to the police power is that it constitutes a taking. A taking occurs when the government deprives a person of property or directly interferes with or substantially disturbs a person's use and enjoyment of his or her property.

21 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 at 268.

Also, the *Tza Yap Shum v. Peru* Award noted that it has been frequently recognised that there is no State responsibility when there is an exercise of the State's police power in a form reasonable and necessary for the protection of health, security, moral and public welfare; but the deference paid to the State is not unlimited as responsibility will ensure if the exercise is arbitrary or discriminatory.[22]

Despite a number of decisions by tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated. The determination of indirect expropriation very much depends on the specific facts and circumstances of the case.[23]

There are however, three main criteria that arbitrators are likely to consider in evaluating a measure as recently summarised in the *Burlington Resources v. Ecuador*, Decision on Liability. This decision clarifies the criteria to apply and notes that the following requirements must be met in order to find an indirect expropriation: (i) a substantial deprivation of the value of the whole investment (i.e., the degree of interference with the property right (including interference with the investor's reasonable investment-backed expectations); (ii) a permanent measure (i.e., the duration of the measure); and (iii) a measure not justified under the police power doctrine (which basically is review of the measure's purpose).[24]

The unexpected rise of investor-State cases challenging regulatory measures on the basis of its alleged expropriatory effects, caused alarm over the possibility that investment agreements could be

[22] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 [Spanish] at 145-148.

[23] Of course, although there are some variations "in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: (i) the degree of interference with the property right; (ii) the character of governmental measures, i.e., the purpose and the context of the governmental measure; and (iii) the interference of the measure with reasonable and investment-backed expectations." Catherine Yannaca-Small, OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in *International Investment Law: A Changing Landscape* 43 (2005) at 54, http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf. See also Anne Van Aaken, *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. Int'l Econ. L. 507 (2009) at 510-512.

[24] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, (14 December 2012), para 471.

used to limit host country powers to regulate in the field of environment, public health or other public interest areas. For instance, in the Transpacific Partnership negotiations, the potential use of investment arbitration to challenge tobacco regulations has become a source of controversy in Trans-Pacific Partnership ("TPP") negotiations while regulation of ISDS was a key issue in the recent Korea-US ("Korus") FTA. While investor-state dispute settlement is advocated by the US Business Coalition for the TPP, there is also much resistance. At present, Australia has rejected ISDS in the TPP, and it remains to be seen how far this view will influence the other TPP parties. It is too early to say if Australia's change in policy has affected other countries.[25] It also gave raise to fears that the prospect of investor-State arbitrations arising out of alleged regulatory takings could result in a "regulatory chill" on the ground that concerns over liability exposure would lead country authorities to refrain from adopting necessary regulation.

It has been, once again, the developed NAFTA countries that took the lead in adopting language their investment agreements directed to limiting the scope of investment protection obligations that may be used to challenge legitimate regulatory measures. In recent years, the United States has introduced in its BITs and investment chapters in FTAs explanatory language for the concept of expropriation that expresses that prohibitions on expropriation are "intended to reflect customary international law concerning the obligation of States with respect to expropriation", and that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations".[26] Canada has too adopted a substantially identical provision in its agreements, but no other countries have introduced similar caveats in their investment agreements to date.

Concerns about the potential implications of the prohibition on expropriation did arise in the context of the Multilateral Agreement on Investment ("MAI") negotiations in the Orgnisation for Economic Corporation and Development ("OECD"). In response thereto, the MAI negotiators introduced an interpretative note to the expropriation

[25] Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, 14 J. Int'l Econ. L. 515, 517-18 (2011) (discussing attempts by tobacco companies to discredit Australia's TPP plain packaging scheme by looking to international investment law).

[26] US Model BIT 2012, Arts 1 and 4(b).

clause indicating that such an obligation "intended to incorporate into the MAI existing international legal norms. The reference […] to expropriation or nationalisation" and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.[27]

The MAI draft also addressed the relationship between indirect expropriatory measures and environmental and related regulation, highlighting that that "it needs to be made clear that the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation".[28] Finally, the MAI additionally tackled the question whether taxation measures could give raise to expropriation. It explained that "the imposition of taxes does not generally constitute expropriation". In regard to indirect expropriation, the draft text further clarified that "[w]here a taxation measure by itself does not constitute expropriation it would be extremely unlikely to be an element of a creeping expropriation".[29]

Section Three. CONDITIONS FOR LAWFULL EXPROPRIATION

Investment agreements do not prohibit the adoption of expropriatory measures - a sovereign right of the States - but require that they fulfil certain conditions to be considered lawful under international law. Expropriations are required to be for public interest, on a non-discriminatory basis, against the payment of compensation and through due legal process.

Such standard is complemented by the so-called "Hull formula", which set the requirements of a "prompt, adequate and effective compensation" be paid for an expropriation to be considered lawful

[27] Multilateral Agreement on Investment, Draft Consolidated Text, OECD document DAFFE/MAI(98)7/REV1, Interpretative Note to Article 5, p. 143. Available online: http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

[28] Multilateral Agreement on Investment, Draft Consolidated Text, OECD document DAFFE/MAI(98)7/REV1, Annex 2, para. 8.

[29] Multilateral Agreement on Investment, Draft Consolidated Text, OECD document DAFFE/MAI(98)7/REV1, Interpretative Note to Article VIII.2, p. 86.

under international law. The *CME v. Czech Republic* Final Award noted that the BIT"s requirement of compensation to be "just" evokes the Hull Formula providing for payment of prompt, adequate and effective compensation for the taking of foreign owned property and concludes that concordant provisions in today's treaties are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.[30]

A detailed explanation of such requirements is provided by the NAFTA. Article 1110 paragraph 3 of the NAFTA requires that compensation to "be paid without delay and be fully realisable". An adequate compensation shall "be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place, and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value". Moreover, it "shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment". In order not to impair the effectiveness of the compensation, "it shall be freely transferable".[31]

SUMMARY OF THE CHAPTER FIVE

There are significant discrepancies in the way the FET is defined in investment treaties and in countries' practices; this is because some IIAs will cover both direct and indirect expropriation whereas some will not address indirect expropriation.[32] The choice is important because if a treaty covers indirect expropriation, it means that the IIA grants a protection to foreign investors who may be faced with serious alterations of the investment climate, which they could not have reasonably anticipated.[33] There is, however, no clear definition of indirect expropriation. Despite a number of decisions by international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has

[30] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 at 497.

[31] NAFTA, Article 1110: 2, 4, 6.

[32] Rudolf Dolzer, Margrete Stevens, *Bilateral Investment Treaties,* (MartinusNijhoff Publishers 1995) (on the direct or indirect expropriation notion).

[33] Ibid.

not been clearly articulated. Rather, it depends on the specific facts and circumstances of the case.[34] In recent years, a new generation of US and Canadian investment agreements, including the investment chapters of FTAs, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred.[35] Last decade jurisprudence has demonstrated that the cases of indirect expropriation fall short of the actual physical taking of property but that they result in the effective loss of management, use, control, or a significant depreciation of the value of the assets of a foreign investor.[36] Indirect expropriation can be further divided into regulatory takings, which are "those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host country."[37] The issue of regulatory takings is a particular point of concern from the perspective of public policy.[38] Despite a number of tribunal decisions, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated. The determination of indirect expropriation very much depends on the specific facts and circumstances of the case.[39] There are however,

[34] See Anne Van Aaken, "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis", 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW 507 (2009) at 510-512.

[35] See, for a discussion, Rachel D. Edsall, "Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public", 86 BOSTON UNIVERSITY LAW REVIEW, 931 (2006) at 953-961.

[36] As stated by Gemplus Arbitral Tribunal, "an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way". See *Gemplus, S.A., SLP, S.A.* and *Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, (16 June 2010), Part VIII, para 23.

[37] United Nations Conference on Trade and Development, *Taking of Property*, 12, UN Doc. UNCTAD/ITE/IIT/15 (2000) [hereinafter "UNCTAD"].

[38] Julien Chaisse, "Exploring the Confines of International Investment and Domestic Health Protections - General Exceptions Clause as A Forced Perspective", 39(2/3) AMERICAN JOURNAL OF LAW & MEDICINE 332 (2013).

[39] Of course, although there are some variations "in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: (i) the degree of interference with the property right; (ii) the character of governmental measures, i.e., the purpose and the context of the governmental measure; and (iii) the interference of the measure with reasonable and investment-backed expectations." Catherine Yannaca-Small, OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in *International Investment Law: A Changing Landscape* 43 (2005) at 54, http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf. See also Anne Van Aaken, "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis", 12 J. Int'l Econ. L. 507 (2009) at 510-112.

three main criteria that arbitrators are likely to consider in evaluating a measure as recently summarised in the *Burlington Resources v. Ecuador Decision on Liability*.[40] This decision clarifies the criteria to apply and notes that the following requirements must be met in order to find an indirect expropriation: (i) a substantial deprivation of the value of the whole investment (*i.e.*, the degree of interference with the property right (including interference with the investor's reasonable investment-backed expectations); (ii) a permanent measure (*i.e.*, the duration of the measure); and (iii) a measure not justified under the police power doctrine (which basically is a review of the measure's purpose).[41]

[40] *Burlington Resources v. Ecuador*, ICSID, Case No. ARB/ 08/5, Decision on Liability, 14 December 2012.

[41] *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, (14 December 2012), para 471.

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) What criteria should be used to tell the difference between a regulatory action that does not give rise to expropriation and one that does? Is government intent important?

2) If it is, how do you ascertain government intent? Who in the government needs to have the intent?

3) Should every expropriation give rise to a duty to compensate, or only those that do not involve public purposes?

4) Should the measure of compensation differ if the purpose of the expropriation is to effectuate a public purpose, or if the expropriation is wrongful? In other words, should claimants have the ability to claim different measure of damages (and tribunal the authority to award different measures of damages) depending on the kind of expropriation?

5) Are some public purposes permissible, whereas others are not? Anything the government does could be said to be in furtherance of a public purpose; are there limits on that? Should the limits be decided by an arbitral tribunal?

6) Should an owner be compensated if he or she is deprived of the "reasonably-to-be-expected" economic use of his or her property? How flexible must the owner be in trying to adapt to new regulatory circumstances?

7) What is the "sole effect" doctrine? Is it a useful way of looking at expropriation doctrine?

8) Do investors have a right to a market? Can regulation that removes all economic value from a given market give rise to an expropriation?

9) *Methanex* involves a situation where government regulation - the Clean Air Act - actually created the market for MTBE. Should that make a difference in deciding whether or not government regulation can eliminate a market without paying compensation?

10) There has been a recent spate of nationalizations in Latin America, and there are threats of more. Are these reasonable uses of government authority? If there have been warnings, but claimants continue to invest, can claimants prevail on a claim that their legitimate expectations did not include an expropriation?

READINGS

1. Rudolph Dolzer& Christoph Schreuer, *Principles of International Investment Law* 89-118 (Oxford 2008).

2. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review - Foreign Investment L. J. 1 (2005).

3. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 429-489 (Oxford 2008).

4. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* at 1110.8 - 1110.58 (Kluwer 2006; last updated 2009).

5. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 265-313 (Oxford 2007).

6. Andrew Newcombe &Lluis Paradell, *The Law and Practice of Investment Treaties* 321-398 (Kluwer 2008).

7. Andrew Newcombe,'The Boundaries of Regulatory Expropriation in International Law', *20 ICSID Review - Foreign Investment L. J. 1* (2005).

8. G. C. Christie, *What Constitutes A Taking of Property under International Law?* 38 BRIT. YB. INT'L L. 307 (1963).

9. Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. World Investment & Trade 717 (2007).

10. Anne K. Hoffmann, *Indirect Expropriation*, in Standards of Investment Protection 151 (August Reinisch ed., Oxford, 2008).

11. August Reinisch, *Expropriation*, in Oxford Handbook of International Investment Law 407 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

CHAPTER SIX. INVESTOR-STATE DISPUTE SETTLEMENT

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CHAPTER SIX

GUARANTEEING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Learning Objectives
Chapter Six

- Consider why arbitration is often viewed as an attractive alternative to litigation in domestic courts;
- Identify the drawbacks to litigating in either home or host state courts;
- Identify the advantages investor-state disputes settlement holds over state-state dispute settlement;
- Identify the various sources for consent to an investment arbitration;
- Learn about "fork-in-the-road" clauses;
- Consider the potential overlap between domestic causes of action and international investment law claims;
- Examine the waiver of the exhaustion-of-local-remedies rule;
- Review the identity of the most frequent defendants in investment cases;
- Discuss the qualities an arbitrator in an investor-state dispute settlement case ought to have;
- Consider the ethical dilemmas faced by arbitrators in investor-state dispute settlement.

Section One. OVERVIEW OF INTERNATONAL DISPUTE SETTLEMENT

1. Introduction

International dispute settlement is concerned with the techniques and institutions which are used to solve international disputes between states and/or international organisations. International disputes can be solved either by use of force (coercion) or by peaceful settlement. Techniques used for peaceful settlement of international disputes are negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (Art. 33, UN Charter).

For more than a decade, international lawyers and international relations scholars have been fascinated by an ever-increasing number of international courts and tribunals. These are producing more international case-law, thereby replacing the traditional scarcity of international law precedents embodied in a few celebrated International Court of Justice ("ICJ") and Permanent Court of International Justice ("PCIJ") cases.

Today, there is a host of frequently highly specialised international dispute settlement mechanisms like the WTO Dispute Settlement Body, the International Tribunal for the Law of The Sea, the International Criminal Court, various investment tribunals acting under The International Centre for Settlement of Investment Disputes ("ICSID") Convention or other arbitration rules. All apply, interpret and probably "make" international law. One question frequently raised in this context is whether these institutions contribute to the development of a single uniform body of international law or whether they make "their own" ever more fragmented law. To the extent that they must apply specifically agreed upon rules, such as the WTO agreements, various bilateral investment protection treaties or the Law of the Sea Convention, etc., this is of course largely a false problem. In so far as they rely on common rules of international law, coherence vs. fragmentation does indeed arise and is a serious issue. Scholars of international law have intensely debated these problems mostly under the heading "fragmentation" of international law or "proliferation" of international courts and tribunals.

The increased judicialization of the international legal order does not only mean that more international courts and tribunals have

been established; generally, they also have compulsory jurisdiction. And while states retain the formal possibility not to become parties, they may de facto have to do so, for example, in order to benefit from trade regulations under the WTO or foreign investment under bilateral investment treaties ("BITs"). The combined effect means that the international order is, progressively, subject to the rule of law. Moreover, the fact that several international courts and tribunals international courts and tribunals are open to non-state actors, such as individuals and companies, results in far more usage and escalating interference with what have traditionally been considered the internal aspects of states. This contributes to a growing internationalised - or transnational - judiciary.[1]

The judicialization is uneven, in the sense that large areas such as military issues, global financial governance, and the environment are excluded from international courts and tribunals. The international judiciary is also fragile in its dependence on states for funding and for effective implementation of judgments and decisions. While ever more international challenges may require their resolution by international organs like international courts and tribunals, the future development will be determined by geopolitics, including global power shifts. However, states' willingness to establish new international courts and tribunals will also depend on the perceived functioning of existing courts.

The increasing importance of international courts and tribunals raises legal, empirical, and normative issues. The legal issues include relevant methods of interpretation of treaty obligations, such as the use of a dynamic (evolutive) interpretation, the design of remedies, and the relationship between different international courts and tribunals and their interaction with national courts. The empirical questions comprise the origins and the effectiveness of international courts and tribunals, and their usefulness in resolving international issues. The normative aspects concern such matters as the equitable effects of international courts and tribunals, as well as the control of international courts and tribunals as mechanisms for the exercise of power in the international and national legal order. Obviously, there are close connections between the legal, empirical, and normative aspects of the international judiciary.

[1] See Geir Ulfstein, "Nineteenth Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: The Function of Judges and Arbitrators in International Law, Presented in Cooperation with PluriCourts - The Legitimate Roles of the Judiciary in the Global Order", the Faculty of Law of the University of Oslo, *46 N.Y.U. J. Int'l L. & Pol*. 849.

Arbitration and non-judicial dispute settlement mechanisms are of growing importance in international economic transactions. As the world becomes more globalised, arbitration clauses are becoming increasingly prevalent for international businesses, investors and travellers. Arbitration clauses are used in a wide variety of circumstances, governing everything from multinational transactional business conflicts to disputes involving international investment treaties.

Alternative dispute resolution ("ADR") is a dispute resolution process whereby the disagreeing parties can come to an agreement short of litigation. The idea is that using ADR can minimise the time and costs involved in litigation. The most common forms of ADR are arbitration and mediation. With the growth of international commerce, businesses are increasingly using arbitration to resolve their international disputes. Several arbitral institutions specialise in administering arbitrations related to commercial and business disputes. Bilateral investment treaties ("BITs") between two countries have become increasingly common as private investors invest more in foreign countries. Many BITs provide foreign investors the right to pursue arbitration if their rights have been violated.

The cost of litigation can be significantly high depending on various factors involved in the case. There is therefore another form of dispute resolution known as "Alternative Dispute Resolution" more commonly referred to as ADR.

ADR is a method which aims to relieve the problems between the parties but seeks to minimise the costs involved by avoiding expensive court costs. ADR has therefore been used as a collective term for the ways in which parties can settle disputes and is an alternative to a formal court hearing or litigation. The most common forms of ADR include mediation and arbitration.

2. Types of Alternative Dispute Resolution

ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both

the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

A. *Negotiation*

Negotiation is a dialogue between two or more people or parties intended to reach an understanding, resolve points of difference, to gain advantage for an individual or collective, or to craft outcomes to satisfy various interests. Negotiation occurs in business, non-profit organisations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life.

The study of the subject is called negotiation theory. Professional negotiators are often specialised, such as union negotiators, leverage buyout negotiators, peace negotiators, hostage negotiators, or may work under other titles, such as diplomats, legislators or brokers.

B. *Mediation/Conciliation*

Mediation is a form of alternative dispute resolution and it is the form of ADR that is recommended by the judiciary. Mediation is also completely voluntary. The process is also more flexible and it is for the parties to decide whether to settle and on what terms. A settlement after mediation produces an agreement as opposed to an enforceable award in arbitration. The mediator acts as a neutral third party that assists both parties whilst at the same time they remain in control of the whole process.

Conciliation is ADR process whereby the parties to a dispute use a conciliator, who meets with the parties separately in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimises parties' needs, takes feelings into account and reframes representations.

C. *Arbitration*

Arbitration, a form of ADR, is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to arbitration by one or more persons (the "arbitrators","arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts.

To start with, the parties need an arbitration agreement. An arbitration agreement provides the basis for an arbitrator's jurisdiction. An arbitrator will not entertain a request for arbitration in the absence of an arbitration agreement.

The parties may also modify or supplement the applicable arbitration rules by express provision in the arbitration agreement. An arbitration agreement is usually drafted to include claims arising "out of or in connection with" a particular contract. This wording is broad enough to cover tort claims (such as misrepresentation) that relate to the parties' transaction, and generally enables related tort and contract claims to be determined together by the arbitral tribunal.

Arbitration is a legal process which avoids the use of a court judge but at the same time still allows for the issuing of an award to the party who has had their civil rights infringed. The parties to a dispute are referred to one or more persons known as "arbitrators".

In arbitration, an arbitrator will assist the two parties in reaching some form of an agreement. The arbitrator will review the case and then impose a decision that is legally binding for both sides. Arbitration is therefore distinct from other forms of alternative dispute resolution that are not binding in nature. The process is similar to mediation in nature but the primary distinction is that where the mediator aims to reach

a compromise between the two, any decisions made are not legally binding.

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur) and can be either binding or non-binding.

Non-binding arbitration is similar to mediation in that a decision cannot be imposed on the parties. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable. By one definition arbitration is binding and so non-binding arbitration is technically not arbitration. Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. There are limited rights of review and appeal of arbitration awards.

There are hundreds of arbitration institutions that exist today, which oversee arbitrations to ensure that they run smoothly in the absence of court intervention. The best-known arbitration institutions include the ICC in Paris, the LCIA in London, the ICDR in the US, the SIAC in Singapore and the HKIAC in Hong Kong, but many different arbitration institutions exist in most countries.

By far the most important international instrument on arbitration law is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is considered the most successful of the various private international law treaties.[2] More than 140 countries are parties. It appears from 1,400 court decisions reported in the *Yearbook Commercial Arbitration* that the enforcement of an arbitral award is reached in 90% of cases.[3]

The New York Convention has its origins in the growing importance of international arbitration for the settlement of international commercial disputes. This Convention, composed of 16 articles, is often described as universal. The Convention was established because the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 were not satisfactory.

The Paris-based International Chamber of Commerce took the initiative to replace the Geneva protocols by establishing a draft convention in 1953. The Economic and Social Council of the United Nations (ECOSOC-UN) took over in making changes to the draft in 1955. The version was then discussed at a conference held at UN Headquarters between May and June 1958, which led to the adoption of the New York Convention.[4]

The New York Convention has two objectives: (1) the agreement of the signatory States that their courts will refuse to hear a case if the arbitration clause refers to a case of international trade in another signatory state; and (2) that the Member States shall recognise arbitral awards in the business of international trade made in other signatory states.[5] This recognition of arbitration and the arbitral awards in foreign countries signatory to the Convention is certainly the parties' two significant advantages of international arbitration clauses. Indeed, the Convention guarantees the recognition and therefore greatly facilitates the implementation of conflict resolution.[6]

[2] See Michael Reisman (2013), "The Diversity of Contemporary International Dispute Resolution: Functions and Policies", *4(1) Journal of International Dispute Settlement* 47-63.

[3] See *Yearbook Commercial Arbitration 2012* - Volume XXXVII, van den Berg (ed) (2012), ppix-xii

[4] The New York Convention signed in 1958 came into force on 7 June 1959.

[5] William Tetley and Robert C. Wilkins International conflict of laws: Common, civil, and maritime, Intl Shipping Pubns (January 31, 1994)at p.393.

[6] David St.John Sutton, Judith Gill, Matthew Gearing, Russell on Arbitration, Sweet & Maxwell; 23rd edition (December 31, 2007), at 9-10, para1-017.

Firstly, under the New York Convention, the obligation in Article II to recognise and enforce arbitration agreements in writing only exists with respect to agreements concerning a "subject matter capable of settlement by arbitration". In respect of the pre-award (jurisdictional) stage, Article II-1 merely stipulates that arbitration agreements have to be recognised and that national courts have an international obligation to deny jurisdiction (and refer a matter to arbitration) under Article II-3, unless the dispute is not capable of settlement by arbitration. Article V-2a. provides that the obligation to recognise and enforce an award does not exist if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country".

Article V of the Convention provides seven limited and non-cumulative provisions that seek to exercise control over the enforcement of foreign arbitral awards.[7] Five of these seven provisions may be directly invoked by the hostile party enforcement and wishing the annulment of the award namely the invalidity of the arbitration agreement (Article V-1a), the lack of fair trial (Article V-1b), settlement of non-compliant dispute the arbitration agreement (Article V-1c), the irregularity of the constitution of the arbitral tribunal (Article V-1d) and suspension or cancellation of the award by the court of the seat of arbitration or the law of this country (V).

Another innovative feature of the Convention is its implicit requirement of double exequatur (one in the country of origin of the award and the other in the host country) which appeared in the earlier texts. It also establishes a system for the application of more favourable to the execution of sentences as enacted by this rule.

The preferential treatment provided for in Article VII-1 underscores the will to facilitate the recognition, and enforcement of foreign awards led the drafters of the New York Convention to develop a favourable clause contained in Article VII.[8] It is thus possible to make a return to national law to the extent that it is more favourable than the New York Convention.

Since 1958, many national, international laws and conventions have been adopted for arbitration with the aim of improving the recognition of arbitral awards at the national and international level. The New York Convention has contributed dramatically to the development of international commercial arbitration. The New York Convention consolidated two pillars basic legal framework providing for mandatory referral to arbitration by State courts, in the presence of a valid arbitration agreement and the execution of the award.

The Convention has paved the way for the adoption in 1976 of the UNCITRAL Arbitration Rules, which was a huge success, and in 1985 of the UNCITRAL Model Law on International Commercial Arbitration (amended in 2006). This is probably mainly because arbitration using the New York Convention is the most often chosen method of settling international commercial disputes.

Section Two. INVESTOR-STATE DISPUTE SETTLEMENT

In the context of investment treaty arbitration, investment disputes may arise from the violations of foreign investment agreements or contracts as a result of the interference or the omission of the host State to act in a manner envisaged by the applicable legal regime or international investment agreements. There are two different kinds of dispute settlement procedures in IIAs: State - to - State Dispute Settlement and Investor – State Dispute Settlement. Most IIAs have established a process to address disputes between states, regarding the "interpretation or application" of the treaty. However, these procedures have rarely been used. The major issue is whether scope of the procedures covers all provision in IIAs or excludes some. Most state-to-state procedures cover all IIA obligations but some contain exclusions.[9]

The current US Model BIT, for example, excludes the provisions regarding the maintenance of labour and environmental standards. Typically state-to-state procedures require prior consultation between

[7] See Mark Huleatt-James (2000) International law and enforcement of arbitral obligations, Arbitration and Dispute Resolution Law Journal 208-213.

[8] See Thomas H. Oehmke (2013), 'Arbitrating International Claims - At Home and Abroad', *81 American Jurisprudence Trials 1*.

[9] The overall of BITs include a state-state dispute settlement (SSDS) regarding the interpretation and/or the application of the treaty. SSDSs have rarely been used, but recent cases, including *Peru v. Chile* (initiated by Peru during the investor-state dispute *Lucchetti v. Peru* regarding the date of the entry in force of the treaty and, therefore, having direct consequences on the jurisdiction of the ISDS), and *Ecuador v. United States* (initiated by Ecuador, regarding the interpretation given by the investor-state arbitral tribunal in *Chevron v. Ecuador* to the terms "effective means" in Article II(7) of the Ecuador-US BIT), have raised the questions of parallel and subsequent proceedings, and the interplay between the ISDS and SSDS outcomes. See Andrea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority', *55 HARV. INT'L L. J. 1* (2014) (approving the use of state-states arbitration as a mechanism to influence the interpretation and application of IIAs).

the states and then arbitration procedures in case there is no amicable solution after consultation. This state-to-state mechanism at least offers a platform to developing countries and least developed countries to require a developed country to engage with them regarding issues of interpretation. Arbitration procedures have not been traditionally transparent. Proceedings, notifications, and decisions have often not been made public.

Investor State Dispute Settlement is a particular feature of IIAs which differentiate them from all other type of treaties. Investors from one party state are permitted to seek financial compensation from the other party state through binding arbitration on the grounds that the other party state has failed to comply with its obligations under the treaty.

Domestic judicial systems may be biased against foreign interests, and national courts can be more likely to fall under pressures from other branches of government. The ability of foreign investors to bring their disputes to independent arbitrators provides an extra guarantee that domestic authorities will live up to their international obligations, ensuring a favourable and stable investment climate in the host country.

1. The Investor-State Arbitration

One of the key features of investment protection consists hence in allowing foreign investors to challenge host governments' actions before an international arbitral court.[10] Nearly all BITs and most modern FTAs with investment disciplines provide for investor-state dispute settlement procedures.[11]

[10] While some treaties seem to grant an unequivocal right to arbitration, others are not so specific and could open the doubt about the host state consent. For example, while the BIT between Austria and South Korea of 1991 stated that "each contracting Party, by this agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the contracting Party and the investor, to submit any such disputes to [ICSID]," other treaties seem to require an additional manifestation of consent from the host state. See Agreement Between the Republic of Korea and the Republic of Austria for the Encouragement and Protection of Investments, S. Kor.-Arg., Art 8(2), 14 March 1991, available at http:// investmentpolicyhub.unctad.org/Download/TreatyFile/195; UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, 105-108, UNCTAD/ITE/IIT/2006/5 (1 February 2007).

[11] UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, May 2013 [hereinafter "UNCTAD Dispute Settlement"], at 3, available at (http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf) (stating the majority of cases have been brought under the

Investor-to-state arbitration is subject to consent, which traditionally emanates from a pre-existing agreement. That agreement often takes the form of a treaty between the host state and the state of nationality of the foreign investor. It can also be shaped as a contract between the host state and a foreign investor.

In contrast, when given through foreign investment legislations, consent to investment arbitration does not involve an agreement between two states or between a state and a foreign investor. Rather, consent to arbitration proceeds from a unilateral undertaking of the host state in its domestic investment law(s). For instance, a state can decide "by means of a unilateral commitment […] set forth in its legislation" to "propose […] to submit the differences, arisen from any investment or any kind of investment, to the ICSID jurisdiction." In that sense, the "offer to arbitrate" made under national investment codes is broader than the offer to arbitrate made by virtue of BITs or investment contracts.

Consent to arbitration through BITs is an offer limited to foreign investors whose states of nationality have concluded a BIT with the host state against which they intend to initiate arbitration proceedings. In the same vein, consent to arbitration through investment contracts is an offer strictly limited to foreign investors that are parties to those contracts. By contrast, consent to arbitration through national investment legislations constitutes an offer made to the foreign investment community as a whole with no real possibility of individualizing the scope of the offer. This is a particular feature of foreign investment legislation, which should be taken into account by states when deciding to draft such pieces of legislation.

Foreign investors are granted the choice of the forum. They may choose to bring the dispute the dispute to the domestic courts of the host country, or resolve the matter through international arbitration. In order to avoid multiple proceedings on the same matter, however, 'fork in the road' clauses establish that once a dispute has been brought to

ICSID). The ICSID, SCC, and ICC also administer UNCITRAL arbitrations. See SCC, *The SCC Experience of Investment Arbitration under UNCITRAL Rules*, Oct. 2012, available at (http://www.sccinstitute.com/filearchive/4/44668/UNCITRAL Disputes_The SCC Experience_AM.pdf); ICC, ICC to act as appointing authority, available at (http://www.iccwbo.org/products-and-services/arbitration-and-adr/appointing-authority) (allowing parties to use the ICC as an arbitral institution); ICSID, *The ICSID Caseload - Statistics*, Issue 2013-1, at 9, available at (https://icsid-worldbank-org.easyaccess1.lib.cuhk.edu.hk/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41) (showing that the ICSID provides administrative assistance for UNCITRAL arbitrations).

one forum or, in some cases, a decision has been reached- the dispute may not be pursued in another venue.

Most agreements further allow the foreign investor to choose the venue for the arbitration. *Ad hoc* arbitration allows the parties to agree on the procedural rules to the dispute, although countries commonly rely on the established UNCITRAL arbitration rules. The parties may also resort to organisations that provide a venue and have developed their own arbitral procedures.

The International Centre for Settlement of Investment Disputes ("ICSID") established in 1967 under the umbrella of the World Bank, specialised in investor-state disputes, has received the most attention,[12] totalling well over half the investor-state claims brought to day.[13] For the most part, investment agreements feature more than one option for international arbitration. Most investment agreements allow to resort to ICSID, and to *ad hoc* arbitration under UNCITRAL rules. Some agreements additionally allow to bring the claim to other institutions, such as the Stockholm Chamber of Commerce or the International Chamber of Commerce.

[12] See Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road', *5 J. World Investments & Trade Law* 231 (2004). (showing that the ICSID Arbitration Rules and the UNCITRAL Rules are the most commonly used Rules in investment arbitration. State Parties and foreign investors often define "investment" in BIT(s) and other international investment agreements that may be applicable to the investment disputes. Under the other arbitration Rules such as UNCITRAL, ICC, SCC, a definition of investment only need satisfy the BIT or investment agreement definition, whereas an ICSID claim would need to satisfy both the definition in the BIT itself and the ICSID Convention. The test whether an "investment" exists in an ICSID claim is often referred to as the "double barreled" test or the "double keyhole approach". For a further discussion of the "double barreled" test in ICSID arbitral practice, see also K. Yannaca-Small, 'Definition of "Investment": An Open-ended Search for a Balanced Approach', in *Arbitration under International Investment Agreements: A Guide to the Key Issues* 249-50 (2010).

[13] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art 25, opened for signature 18 March 1965, 17 UST. 1270, (entered into force 14 October 1966), available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp [hereinafter "ICSID Convention"]. The ICSID Convention established the International Center for Settlement of Investment Disputes (ICSID). The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the "World Bank"). Article 25 (1) of the ICSID Convention provides: The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State(or any constituent subdivision or agency of a Contracting State designated to the Center by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.

2. Advantages and Disadvantages of Investor-State Arbitration

A. *ISA Fulfils Investors' Needs in the Following Ways:*

- It avoids exposure of the investor to the uncertainties of host state laws and regulation by creating a separate treaty based set of rules to govern host state conduct;[14]
- It gives investors an alternative to the host state judicial system to seek relief from host state actions;
- Investor can determine when there has been a breach of a treaty obligation and launch a claim;
- It is unnecessary for an investor to rely on its home state espousing its claim. There may be various reasons that a state may not want to make a claim against another state in diplomatic relations;
- Committing to investor-state dispute settlement could have advantages for a host state as;
- It sends a positive signal to investors that it is committed to offering a predictable and secure investment regime;
- It creates an incentive to develop domestic polices favourable to attracting new investment and maintaining on-going investment including policies that are predictable, certain and transparent;
- It locks in pro-investment, market opening reform by making it difficult to go back to change domestic policy.

B. *The Disadvantages for Host States Include the Following:*

- In investor-state arbitration, investors only to pursue their commercial interest and do not bother about host state policy goals or the public interest;

[14] A vast literature exists in favour of the use of the precedent doctrine in investment treaty arbitration as to create a reasonable uniformity in the system. See Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration: The Empirical Backing", *4 TRANSNAT'L DISPUTE MGMT*. (2007), available at http://www.transnational-dispute-management.com/article.asp?key_1064; Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of A Developing Jurisprudence", *24 J. INT'L ARB.* 129 (2007); Paul Frieland *et al.*, "ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction", *19 N.Y.U. J. INT'L. L. & POL*. 33 (1986); Christoph Schreuer & Matthew Weiniger, "A Doctrine of Precedent?", in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1188 (2008).

- This is not like state-to–state dispute settlement, where states may apply restraint with respect to pursuing claims. For example, states may not pursue an investor's claim against another state out of concern for their relationship with the other state or because they have measures similar to those that the investor is concerned about that they would not want challenged;

- The cost of being a party to investor-state arbitration is high. Awards can be large and the costs of participating in an arbitration, even if the state is successful, are significant.

- Regulatory Chill - Because of the high costs of investor-state arbitration, states may be reluctant to enact measures that even might be a breach of their obligations. This chilling effect is exacerbated by arbitration decisions that are inconsistent and that have adopted surprising interpretations of investment obligations;

- Investors cannot be made accountable for their actions in investor-state arbitration;

- Arbitration process gives rise to concerns regarding its legitimacy and democratic accountability including (a) Lack of transparency; (b) Lack of access to Civil Society (NGOs) to the process; (c) Lack of knowledge on the part of tribunals regarding non-investment issues related to public policy considerations like human rights, and the environment; (d) Limited knowledge on the part of tribunals about host state domestic laws and policies that must be interpreted in arbitration cases;[15]

- Lack of consistency in the case-law.[16]

[15] See, e.g., Laurence Boisson de Chazournes, "Transparency and *Amicus Curiae* Briefs", *1 J. WORLD INT'L & TRADE* 333 (2004); Laurence Boisson de Chazournes, "Making the Proceedings Public and Allowing Third Party Interventions", *1 J. WORLD INV. & TRADE* 105 (2005); Antonio Crrivellaro, "Making the Proceedings Public and Allowing Third Party Interventions", *1 J. WORLD INV. & TRADE* 99 (2005); Mitsuo Matsushita, Transparency, "*Amicus Curiae* Briefs and Third Party Rights", *J. WORLD INV. & TRADE* 385 (2004); Alexis Moure, "Are *Amicus Curiae* the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?", *5 L. & PRAC. INT'L CTS. & TRIBUNALS* 275 (2006); Thomas Wälde, "Transparency, *Amicus Curiae* Briefs and Third Party Rights", *1 J. WORLD INV. & TRADE* 337 (2004); Thomas Wälde, "Making the Proceedings Public and Allowing Third Party Interventions", *1 J. WORLD INV. & TRADE* 113 (2005) (regarding the participation of *amicus curiae*).

[16] Some of the main contradictory decisions concern (i) the scope of umbrella clauses; (ii) the existence of a state of necessity; and (iii) the interpretation of the fair and equitable treatment. Other controversial issues are (i) the scope of the consent clause, see *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 6 ICSID Rep. 400, ¶ 53 (July 23, 2001); *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, 8 ICSID Rep. 383, ¶ 55 (6 August 2003); *SGS v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 8 ICSID Rep. 518, ¶¶ 131-135 (29 January 2004) (regarding the meaning of the terms "all disputes concerning investments" or "any legal dispute concerning n investment"); (ii) the elements of a covered investment by the treaty, see *Fedax N. V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (1 July 1997); *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 66 (24 May 1999); *L.E.S.I. S.p.A. and ASTALDIS.p.A v. Algeria*, ICSID Case No. ARB/05/03, Decision on Jurisdiction, ¶ 72 (12 July 2006) (discussing the element of the contribution to the economy of the host state); *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶¶ 135-144 (15 April 2009) (adding the bona fide element as a requirement of the investment to be considered covered by the BIT); *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011); *Ambiente Ufficio S. P. A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (both concluding that the sovereign bonds met the requirement for being considered as an investment); and (iii) the application of the MFN clause to procedural issues such as the cooling off period, see *Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7, 5 ICSID Rep. 396, ¶¶ 38-64 (25 January 2000); *Siemens A. G. v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 32-110 (3 August 2004); *Salini v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 115, 119 (29 November 29, 2004); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 216-226 (8 February 2005); *Gas Natural SDG, S. A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶¶ 24-31, 41-49 (17 June 2005). See also "Tai-Heng Cheng, Precedent and Control in Investment Treaty Arbitration", *30 Fordham Int'l L.J.* 1014-49 (2007); Andrea K. Bjorklund, "Investment Treaty Arbitral Awards as Jurisprudence Constante", in *International Economic Law: The State and Future of the Discipline* 265-80 (Colin B. Picker et al. eds., 2008).

3. Recent Developments and Limitations in Investor-State Arbitration

Investor-state dispute settlement procedures have not been free from controversies. At the outset, the ability to bypass domestic courts to challenge governmental measures in an international setting and under international law is a benefit only rarely granted to domestic investors. For this reason, a number of countries have attempted to limit the matters that can be brought to investor-state dispute settlement, or require the fulfilment of certain procedural steps to launch the dispute.

Sino-foreign BITs have only recently joined the overwhelming majority of bilateral investment agreements in providing broad access to investor-state dispute settlement. Traditionally, China has restricted unilateral consent to arbitration to disputes on the amount of compensation to be granted in cases of expropriation. Controversies on other matters, such as the existence of expropriation itself, or breaches of treatment obligations, were to be settled in domestic courts, or could be submitted to arbitration by mutual consent of the investors and national authorities.[17]

[17] China-Korea BIT, Article 9.3.

Some BITs have instead eliminated this substantial restriction, granting unilateral consent to disputes concerning all disciplines of the agreement. China's BIT with Mozambique of 2001, for instance, provides that:

> Any dispute, if unable to settled within six months after resort to [amicable] negotiations […] shall be submitted at the request of either Party to
>
> (a) International Center for Settlement of Investment Disputes (ICSID) [..];or
>
> (b) an ad hoc arbitral tribunal[18]

Restrictions to investor-state arbitration are, although still exceptional, more common in investment disciplines in FTAs. Agreements promoted by the European Community, such as its association agreement with Chile, lack disciplines on investor-State arbitration altogether.

Deviating from usual US practice, the US' FTA with Australia includes only a provision calling for consultations or negotiations on the future establishment of an investor-State dispute settlement mechanism.[19] Japan's FTA with Philippines also calls for such negotiations, while it clarifies that

> [i]n the absence of the mechanism for the settlement of an investment dispute between a Party and an investor of the other Party, the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.[20]

Under these agreements, all investment disputes can only be settled through arbitrations between the contracting parties. Other agreements like the European Free Trade Association ("EFTA") EFTA-Singapore FTA and the New Zealand-Singapore FTA do include disciplines on international arbitration between investors and the host state; nonetheless, the parties refrain from granting unilateral consent to arbitration. The foreign investor must hence reach an agreement with the host government in order to be able to bring a claim to international arbitration.

Other recent investment agreements do grant unilateral consent to arbitration, but have introduced particular limitations in regard to the scope of international arbitration. For instance, in the case of the EFTA-Korea FTA, the parties' previous consent only applies to disputes initiated by foreign investors that already have an investment position in a host country and not to those involving investors that merely seek to make an investment.

Additionally, a number of agreements have restricted the access to international arbitration of investors in financial services - a sector sensitive to regulatory concerns. Recent FTAs signed by the United States, such as CAFTA-DR, and Singapore-US FTA, as well as Nicaragua-Taiwan (China) FTA and the Panama-Singapore FTA, allow investors to challenge governmental measures only on the basis of investment protection provisions - such as, expropriation and compensation, and transfer of funds. Instead, private investors in financial services are prevented from bringing arbitration claims on measures regarding the principal liberalisation obligations of investment agreements-national treatment or market access.

Also in regard to controversies involving investment in financial institutions, other agreements have included special procedures aimed at safeguarding the ability of host governments to adopt prudential measures on financial services. These agreements require authorization from a joint FTA committee to proceed with investor-to-state arbitration, if the defending government invokes one of the exceptions relating to prudential measures, monetary and exchange rate policy, and matters affecting the soundness and integrity of the financial system.[21]

[18] China-Mozambique BIT, Article 7.3.

[19] US-Australia FTA, Article 11.16

[20] Japan-Philippines EPA, Article 107.2

[21] In the East Asian region, these agreements are: EFTA-Korea FTA, the Korea-Singapore FTA, the Nicaragua-Taiwan (China) FTA, the Panama-Taiwan (China) FTA and the Singapore-US FTA. Also, Canada's model BIT of 2003, and US FTAs such as CAFTA-DR and US-Morocco provide for this mechanism. If the joint FTA committee does not reach a conclusion, the EFTA-Korea FTA allows the investor to proceed with its arbitration claim. The Korea-Singapore FTA, the Nicaragua-Taiwan (China) FTA, the Panama-Taiwan (China) FTA, and the Singapore-US FTA instead allow the defending party in this case to request the establishment of a state-to-state arbitration panel that makes a binding ruling on the legality of the exceptions defense.

Finally, a number of investment agreements require the foreign investor to fulfil certain procedural requirements prior to filing the arbitration claim. The most usual procedural restrictions pertain to waiting periods and the exhaustion of local remedies. Both this type of requirements are commonly found in Sino-Foreign BITs. Prior to the launch of the arbitration, foreign investors must hold negotiations with the host country's authorities with a view to reaching an amicable settlement. Should these negotiations fail to bring the parties to a commonly agreed solution within a 6-month period, the investor may bring the claim to international arbitration. While the great majority of Sino-Foreign BITs require a 6-month waiting period, a few agreements require somewhat shorter periods - 3 months: BITs with the Netherlands (2001), Germany (2003), and Finland (2004) - or, exceptionally, no waiting period at all - Ghana (1989).

The exhaustion of local remedies requires foreign investors to seek relief to their claim through domestic procedures, prior to bringing the international dispute. Commonly, the investors would be required to file the claim before the domestic competent court. Should the domestic court fail to settle the dispute, or fail to reach a decision within a given period of time, the investor could would be entitled to launch the international proceedings. The Argentina-Korea BIT of 1994, provides in this regard that the dispute may be submitted to international arbitration

> if one of the parties so requests, where, after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute;[22]

New generation Sino-Foreign BITs provide an alternative local remedies clause, for which foreign investors are required to bring the claim to the relevant administrative authorities for its examination. Administrative review adds to the 6-month negotiation period. In this regard, BITs concluded by China in recent years state that the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before submission of the dispute the aforementioned arbitration procedure.[23]

[22] Argentina-Korea BIT, Article 8.3.

[23] China-Djibouti BIT, Article 9.3.

As previously discussed, the introduction of different procedural requirements across agreements may have important MFN implications, as demonstrated by the *Maffezini* case.

A number of investment agreements provide for expiration periods. Nicaragua-Taiwan (China) FTA, Singapore-Korea FTA, *inter alia*, and the US and Canada's model BITs, condition the consent to arbitration investors to file the claim within three years from the moment they have become aware of the alleged violation of the agreement, while other agreements, like EFTA-Korea BIT extend such period to five years.

The US and Canada's FTAs and Model BITs further provide a detailed set of procedural rules for the arbitration, including provisions aimed at enhancing the transparency of investor-State proceedings, by instituting public hearing and allowing non-parties to the dispute to submit written contributions for the consideration of the arbitral panel.

SUMMARY OF THE CHAPTER SIX

The early 1960s witnessed the early process of negotiating bilateral investment promotion and protection agreements between countries.[24] The proliferation of these agreements set up two competing themes within international investment rules,[25] notably that although an increasing number of developing countries were willing to subscribe to basic standards for investment protection and treatment, they were unwilling to do so at the multilateral level.[26] Many IIAs (other than DTAs) provide for investor–state dispute settlements. About two-thirds of cases are handled under the International Convention on the Settlement of Investment Disputes (ICSID). This convention does not create any substantive obligation on party states, but offers only a dispute

[24] Rudolf Dolzer& Christoph Schreuer, *Principles of International Investment Law* (2008); Jeswald W. Salacuse, *The Law of Investment Treaties* (2009); MuthucumaraswamySornarajah, *The International Law on Foreign Investment* (3rd ed. 2010); *see also* Amnon Lehavi& Amir N. Licht, *BITs and Pieces of Property*, 36 Yale J. Int'l L. 115, 120 (2011); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157 (2005).

[25] Andrew Newcombe, *Developments in IIA Treaty-Making, in* Improving International Investment Agreements 15 (Armand de Mestral& Céline Lévesque eds., 2013) (describing this trend generally).

[26] Gus Van Harten, *International Investment Treaty Arbitration and Public Law 1* (Oxford University Press 2007); *see also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as A Species of Global Administrative Law,* 17 E.J.I.L. 121 (2006).

resolution process for investor-state dispute settlement.[27] There has been a dramatic expansion in international investment treaties.[28] More than 5,900 treaties worldwide are dealing with investment issues. In the last decade, the increase has been about 40%. This complex network of treaties is sometimes referred to as a "spaghetti bowl". Asian countries have generally been leading the recent growth in IIAs. The annual growth rate peaked in 2001, while in the last year there were 33 new BITs. More than 300 bilateral and regional PTIAs have been signed, with 14 new PTIAs in the last year alone. The number of PTIAs doubled between 2003 and 2008.[29] IIAs permit arbitration not only of claims for breach of the treaty's substantive investment protections but also for breach of an investment authorisation or investment agreement. IIAs usually provide for arbitration under the UNCITRAL, ICSID and ICSID Additional Facility rules, as well as under other rules agreed by both parties. However, the some recent IIAs also show some deference to certain forum-selection clauses that might be contained in investment agreements. For instance, TPP Annex 9-L prohibits arbitration of claims for breach of an investment agreement's obligations pursuant to the TPP's ISDS mechanism if the investment agreement already provides for arbitration under one of the following prominent arbitral rules - UNCITRAL, ICSID, ICC or LCIA - and the arbitration would take place outside the territory of the respondent and in a signatory to the New York Convention. Interestingly, this carve-out would not cover investment agreements which provide for arbitration under other, equally recognisable, arbitral rules, such as the rules of SIAC, AAA, HKIAC and ACICA. The main purposes of IIAs are to ensure a stable and predictable environment for investment, through investor protection (including relative and absolute standards, as discussed below) and to give access to investor and state arbitration in case of a breach of a treaty obligation. A few IIAs also provide market access for investors.[30]

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) What are some of the drawbacks to diplomatic protection?
2) What are some of the advantages of diplomatic protection?
3) Treaty arbitration effectively involves an offer by a state to arbitrate unknown disputes that might arise in future, subject to certain jurisdictional limitations. What are some of the drawbacks to advance consent?
4) Would it make sense to re-introduce the requirement that investors exhaust local remedies prior to instituting investment disputes? What are some of the pros and cons of requiring recourse to local courts before instituting investment arbitration?
5) What are the differences in the consent to arbitration found in NAFTA Article 1121 and the US-Ecuador BIT?
6) Both NAFTA Article 1121 and the US-Ecuador BIT encourage disputing parties to seek resolution through conciliation or mediation. What are some of the impediments to successfully resolving disputes via those means?

[27] *See, e.g.,* studies on optimal rational design perspective: Jennifer L. Tobin & Marc L. Busch, *A bit Is Better than A Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 World Pol. 1 (2010); Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, *in* The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows 171 (Karl P. Sauvant & Lisa E. Sachs eds., Oxford University Press 2009); Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 Int'l Org. 811 (2006); Andrew Kerner, *Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*, 53 Int'l Stud. Q. 73 (2009); Srividya Jandhyala, Witold J. Henisz& Edward D. Mansfield, *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. Conflict Resol. 1047 (2011); *see also* Todd Allee& Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions*, 54 Int'l Stud. Q. 1 (2010) (a study on reputational effects of the existence of disputes on investments) and Todd Allee& Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment,* 65 Int'l Org. 401 (2011) (a study on learning effects of facing legal claims on further signing of BITs).

[28] *Bilateral Investment Treaties*, Office of the U.S. Trade Rep., http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (last visited July 31, 2015) (stating that the three aims of BITs are: "(1) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (2) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (3) to support the development of international law standards consistent with these objectives.").

[29] UNCTAD, *Global Value Chains: Investment and Trade for Development*, 101, 196 (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf. There were also another 339 trade agreements, bringing the total number of international investment agreements to 3; ICSID, *ICSID Database of Bilateral Investment Treaties*, https://icsid-worldbank-org.easyaccess1.lib.cuhk.edu.hk/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main (last visited July 31, 2015).

[30] *See* Richard J. Hunter, *Property Risks in International Business*, 15 Int'l Trade L.J. 23 (2006) (distinguishing foreign direct investment from passive portfolio investments not involving control*); see also* Emmanuelle Cabrol et al., *International Investments: Law and Practice*, 6 Int'l Bus. L.J. 796 (2008) (observing that although investment treaties are primarily aimed at protecting property and economic values, they do not exclude, in exceptional circumstances, compensation in moral damages to legal as well as natural persons); *see also* Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment: How Will the New EU Competence on FDI Affect the Emerging Global Regime*, 15 J. Int'l Econ. L. 51 (2012).

7) What was wrong with the claimant's waiver in *Waste Management I*?

8) Did you agree with Professor Highet's approach in the dissent in *Waste Management I*?

9) Do you agree that a claim based in international law is always distinct from a claim based in domestic law? Does it help to focus on the breach at issue, or the measure at issue?

10) Is it a problem that a claimant might seek redress both in local courts and in international arbitration for redress for the same underlying injury?

11) Should the tribunal in *Waste Management II* have permitted the claimant to reinstitute arbitration?

12) Should the tribunal in *Waste Management I* have barred the claimant from reinstituting the dispute with an appropriate waiver? Could it have?

13) If the tribunal in *Waste Management I* had said that the claimant could not move forward, would the second tribunal have been bound by that decision? Even if it was not bound, should it have even if it wasn't required to do so?

14) What kinds of qualities should an arbitrator in an international investment dispute have?

15) What kinds of ethics rules should international arbitrators have to follow?

16) Are so-called "issue conflicts" a threat to the legitimacy of investment arbitration?

17) Ask students to identify the qualities they would like to see in an arbitrator for a particular dispute, such as *Waste Management or Glamis Gold*. Ask them to research likely candidates through publicly available sources, and present their candidates to the class.

READINGS

1. August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in Oxford Handbook of International Investment Law 694, 694-702 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

2. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 820-25 (2005).

3. Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark*), in Pervasive Problems in International Arbitration 217 - 233 (Loukas A. Mistelis& Julian D.M. Lew eds., Kluwer 2006).

4. Emmanuel Gaillard, Vivendi *and Bilateral Investment Treaty Arbitration*, New York L.J. (Feb. 26, 2003).

5. Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17(10) MEALEY'S International Arbitration Report 25-28 (Oct. 2002).

6. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(4) TDM (July 2008).

7. ICSID, *The ICSID Caseload - Statistics (Issue 2010-2),* pp. 8-17.

8. International Institute for Sustainable Development, *Private Rights/Public Problems* 15-20 (2001).

9. Compare: NAFTA art. 1121(1)(b) (no "u-turn"); U.S.-Ecuador BIT art. VI(2) & (3) ("fork-in-the-road"), II(3)(b).

10. *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction)*Waste Management I*(Final Award (Dismissing on Jurisdiction)) (6/2/00), 4-7, 14-31.(Dissenting Opinion (on Jurisdiction)) (6/2/00), 10 – 28.

11. *Waste Management II*

12. (Award on Jurisdiction, second claim) (6/26/02), 2-3, 19-37.

13. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 317-490 (Kluwer 2005).

14. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* 211-229; 238-52 (Oxford, 2008).

15. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 117-131 (Oxford 2008).

16. Meg Kinnear, Andrea K. Bjorklund & John F. G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, at 1121.9 – 1121.38; 1125.2 - 1125.13 (Kluwer 2006; last updated 2009).

17. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 45-56; 95-109 (Oxford 2007).

18. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* 41-73 (Kluwer 2008).

19. Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms - Choosing between Institutionally Supported and Ad hoc; and between Institutions*, in Arbitration Under International Investment Agreements: A guide to the Key Issues 63 (Katia Yannaca-Small ed., Oxford 2010).

20. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Review - Foreign Investment L. J. 232 (1995).

21. Pieter H. F. Bekker, *The Use of Non-Domestic Courts for Obtaining Domestic Relief: Jurisdictional Conflicts between NAFTA Tribunals and U.S. Courts*?, 11(2) ILSA Journal of International and Comparative Law 331-342 (2005).

- Osvaldo Marzorati, *Algunas Reflxionessobre el Alcance de la Protección de las Inversionesen el marco de los Trata dos firma dos por Argentina*, 1 Revista Peruana de Arbitraje, 71-118 (Editoral Jurídica Grijley (2005)

- Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (June 2001), *available at* http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf.

Christoph Schreuer, *Traveling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. World Investment & Trade 231 (2004).

CHAPTER SEVEN. OTHER PRINCIPLES

CHAPTER SEVEN

OTHER PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

Learning Objectives
Chapter Seven

- Distinguish between treaty-based claims and contract-based claims;
- Learn about "umbrella clauses";
- Consider what the purpose or effect of an umbrella clause should be;
- Consider how much deference a tribunal should give to an earlier tribunal decision on the same legal issue;
- Assess differences in treaty language in light of principles of treaty interpretation;
- Consider the effect of umbrella clauses on the law applicable to the arbitration;
- Discuss the availability of counterclaims in contract claims and in treaty claims;
- Consider the relationship between treaty claims and contract claims; if an investor prevails on the latter, should it also prevail on the former?

In addition to the main obligation regarding treatment of foreign investor and guarantees against expropriation without compensation, IIAs normally enshrine other substantive obligations addressed to ensure investors their ability to manage and benefit from the investments.

These provisions include the prohibition of restricting international transfers of capital, facilitation of the establishment and operation of the investment by allowing foreign mangers and experts to carry out their activities in the host country, and, in some cases, the prohibition to demand certain performance requirements from the foreign investments.

Section One. 'UMBRELLA CLAUSE'

Since *SGS v. Pakistan* and *SGS v. Philippines*,[1] there has been much debate on the interpretation of umbrella clauses. These two seminal cases introduced seemingly divergent lines of authorities, respectively, the restrictive and expansive split. The restrictive interpretation either gives no effect to umbrella clauses or attempts to confine their scope, while the expansive interpretation gives full effect to umbrella clauses subject to differing analyses where there is a dispute settlement provision in the investment contract.

This Section explains that while there continues to be issues unresolved with regard to the interpretation of umbrella clauses, much of the divergence in interpretation can be accounted for in the language of the umbrella clause. Where there are questions as to inconsistent reasoning in previous authorities, the expansive interpretation has stronger theoretical support and has emerged as the preferred approach in recent cases. While much importance has been attached to the wording and formulation of the umbrella clause, modern treaty practice has yet to contemplate the significance of effective drafting, clarity of intention and anticipating future developments as to the scope and application of umbrella clauses.

The structure of this Section is as follows: sub-Section (1) begins by explaining the seeming divergence in the interpretation of umbrella clauses, taking into account the jurisprudential development post-*SGS*

[1] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

v. Pakistan and *SGS v. Philippines*. In discussing cases on umbrella clauses, the focus is on jurisprudence from ICSID, which is the most frequently used arbitration facility in the context of investment disputes.[2] Sub-Section (2) then examines the significance of umbrella clauses in modern treaty practice, and surveys the BIT programmes of major investment players on umbrella clauses. Sub-Section (3) explores the controversial development of extending most-favoured-nation (MFN) treatment to umbrella clauses.

1. Reconciling the Restrictive and Expansive Divide

The restrictive and expansive divide results not so much from the inconsistent reasoning of arbitral tribunals, but rather the multiplicity in the way umbrella clauses are formulated. As Crawford puts it:

> There is no such thing such as 'the' umbrella clause; rather, there are umbrella clauses. No doubt where these are in identical or nearly identical terms they should be given the same or similar meaning; but where different language is used compared with existing standard formulas, it may be presumed that some difference in meaning was intended.[3]

As there is no particular requirement on how umbrella clauses should be worded, variance in drafting results in difference in interpretation.[4] Where the wording of the umbrella clause is explicit and all-inclusive, such as covering 'all disputes', it is clear that pure contractual breaches would fall within the ambit of the clause.[5] Such wording generally accounts for the expansive interpretation of the umbrella clause. The *SGS v. Philippines* Tribunal interpreted 'any obligation' as capable of applying to contractual obligations under national law, it also commented that the wording of the umbrella clause in *SGS v. Philippines* was clearer and more categorical than the one in *SGS v. Pakistan*.[6]

2 Sasse, Jan Peter, *An Economic Analysis of Bilateral Investment Treaties* (Gabler Verlag 2011) 59.

3 Crawford, James, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int'l351, 355.

4 Dolzer, Rudolf and Schreuer, Christoph, *Principles of International Investment Law* (Oxford University Press 2012) 167.

5 Schreuer, Christoph, 'Investment Treaty Arbitration and the Jurisdiction over Contract Claims - The Vivendi Case Considered' in Weiler, Todd (ed) *International Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 296.

6 *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [115], [119].

Similarly, the *BIVAC v. Paraguay* Tribunal interpreted 'any obligation' in the umbrella clause as all encompassing, and not limited to international or non-contractual obligations.[7] The *SGS v. Paraguay* Tribunal refused to read any qualifications into the clause which contained 'no limitations on its face - it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally'.[8]

In contrast, umbrella clauses that are less clearly drafted tend to be interpreted restrictively. In *SGS v. Pakistan*, the term 'constantly guarantee the observance' of a statutory, administrative or contractual commitment did not signal with sufficient clarity that the contracting party was accepting a new obligation under international law.[9] In *Salini v. Jordan*, the tribunal found the clause ambiguous, there was no mandatory language, and the term 'create and maintain a legal framework apt to guarantee the compliance of undertakings' in the clause did not amount to an obligation to observe commitments with respect to investments.[10]

A. Theoretical Support

A question then follows as to whether the interpretive divide can be explained by justifications beyond variations in formulation, and if so, whether these justifications are valid. One of the theoretical justifications propounded by those who favour the restrictive interpretation is the floodgates argument, that an umbrella clause is susceptible to 'indefinite expansion', and the elevation of contractual breaches to treaty breaches is 'destructive of the distinction between national legal orders and the international legal order'.[11]

7 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [141].

8 *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [176].

9 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, 6 August 2003 [166].

10 *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004 [126].

11 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, 6 August 2003 [166]; *El Paso Energy International Co v. Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006 [72]-[74], [82]; *Pan American Energy LLC v. The Argentine Republic*, ICSID Case No ARB/03/13 and *BP America Production Co & Others v. The Argentine Republic*, ICISD Case No ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [101]-[103].

It is submitted that there is little force in this argument, as the wording of the umbrella clause confines its scope. The *SGS v. Philippines* Tribunal reasoned that the scope was limited to obligations assumed with regard to specific investments, it could not be an obligation of a general character.[12] It follows that contractual disputes arising out of simple sales or services contracts, which do not qualify as 'investments' under the BIT or the ICSID Convention where applicable, will not be covered by an umbrella clause.[13]

Another attempt to restrict the scope of the umbrella clause is the proposition that the clause only applies to a state's sovereign, as opposed to commercial, conduct.[14] However, such a proposition is not reflected in the language of the umbrella clause.[15] A number of cases also did not recognize such a distinction.[16] The *SGS v. Paraguay* Tribunal pointed out the practical difficulty in determining whether the state was acting in its sovereign or commercial capacity.[17] In addition, Schill criticizes the distinction as disregarding investment practice in that 'the risk of rent-seeking behaviour by the host state can manifest itself in sovereign as well as in commercial conduct'.[18]

Potts comments that the tribunals' reasoning in many of these cases can be internally inconsistent, and that there exists an ideological divide where differences in drafting cannot completely justify.[19] There is some truth in this statement, an example would be the umbrella clauses in *SGS v. Pakistan* and *SGS v. Paraguay*, which were worded identically but where very different outcomes were rendered, this fact was acknowledged by the *SGS v. Paraguay* Tribunal.[20] The *SGS v. Paraguay* Tribunal justified its finding of giving full effect to the umbrella clause by relying on the interpretive rules under Art. 31 Vienna Convention on the Law of Treaties (VCLT).[21] It is submitted that this is the proper approach in interpreting umbrella clauses, as formulated by Yannaca-Small:

> There is diversity in the way the umbrella clause is formulated in investment agreements. Because of this diversity, the proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, its context, and the object and purpose of the treaty, as well on negotiating history or other indications of the parties' intent.[22]

This is indeed the approach adopted by tribunals which interpreted umbrella clauses expansively,[23] thus according the expansive interpretation stronger theoretical grounds. As for the cases which interpreted umbrella clauses restrictively, by way of example, the *SGS v. Pakistan* Tribunal failed to apply the interpretive rules under Art. 31 VCLT at all, while the *Joy Mining v. Egypt* Tribunal imposed an additional restriction that was not apparent from the ordinary meaning of the clause - requiring a clear violation of treaty rights and obligations or a violation of contract rights 'of such a magnitude to trigger the Treaty

12 *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [121].

13 Schill Stephan, 'Umbrella Clauses as Public Law Concepts in Comparative Perspective' in Schill, Stephan (ed) *International Investment Law & Comparative Public Law* (Oxford University Press 2010) 329.

14 *El Paso Energy International Co v. Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006 [81]; *Pan American Energy LLC v. The Argentine Republic*, ICSID Case No ARB/03/13 and *BP America Production Co & Others v. The Argentine Republic*, ICISD Case No ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [108]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007 (Award annulled on 29 June 2010) [310].

15 Yannaca-Small, Katia, 'What about This "Umbrella Clause"?' in Yannaca-Small, Katia (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 495-496.

16 *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 [115]-[134]; *Noble Ventures Inc v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005 [51], [82]; *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008 [325]; *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [135].

17 *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [135].

18 Schill, Stephan 'Umbrella Clauses as Public Law Concepts in Comparative Perspective' in Schill, Stephan (ed) *International Investment Law & Comparative Public Law* (Oxford University Press 2010) 325.

19 Potts, Jonathan, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization' (2010-2011) *51Va J Int'l L* 1005,1028.

20 *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [169].

21 *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [169].

22 Yannaca-Small, Katia, 'What about This "Umbrella Clause"?' in Yannaca-Small, Katia (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 502.

23 *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [116]-[117]; *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 [246]; *Noble Ventures Inc v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005 [52]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [141]; *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [168]-[169].

protection'.[24] The requirement for states to act in their sovereign capacity is, similarly, not found in the ordinary meaning of the clause.[25]

B. Uncertainties Concerning Dispute Settlement Clauses

Uncertainties remain, even amongst authorities that support an expansive interpretation, concerning the effect of dispute settlement clauses in investment contracts. Yannaca-Small observes that this is a matter where the umbrella clause is silent and the difference in language of the umbrella clauses does not account for the difference in outcome.[26]

In *SGS v. Philippines* and *BIVAC v. Paraguay*, the Tribunals found that while they had jurisdiction over the claims under the umbrella clauses, such claims were inadmissible on account of the exclusive jurisdiction clauses in the investment contracts.[27] Crivellaro, in delivering his dissenting declaration in *SGS v. Philippines*, found the majority approach inconsistent. He argued that when a provision intended to confer an advantage on a certain party had two possible meanings, the correct meaning should be the one which was more favourable to the beneficiary.[28] In defence, Crawford, who sat on the Tribunal in *SGS v. Philippines*, explains subsequently that an investor 'invoking contractual jurisdiction pursuant to an offer made by the State must itself comply with its contractual arrangements for dispute settlement with that state'.[29] Similarly, the *BIVAC v. Paraguay* Tribunal reasoned that exclusive jurisdiction was part of the contractual obligation, and the parties could not pick and choose the parts of the contract that they wished to incorporate into an umbrella clause provision and ignore others.[30]

Conversely, the *Eureko v. Poland* Tribunal accepted jurisdiction based on an umbrella clause, and found that the violation of the umbrella clause constituted a cause of action based on a treaty, thus the forum selection clause in the investment contract could not exclude treaty-based arbitration.[31] The *SGS v. Paraguay* Tribunal also assumed jurisdiction under the umbrella clause and found the claims admissible despite the presence of a dispute settlement clause in the investment contract.[32] The Tribunal went even further in its reasoning, believing that declining to hear the case would be 'at risk of failing to carry out its mandate under the Treaty and the ICSID Convention'.[33] In essence, the basis for the *SGS v. Paraguay* ruling is the notion that a claim under an umbrella clause is a legally distinct treaty claim, it is not a contractual claim and can therefore not be affected by a contractual forum selection clause.[34] The Tribunal also made clear that investors should not be able to waive their treaty rights easily, and would not give effect to an implied waiver, though the question of an express waiver was left open.[35]

2. Trends in the Drafting of Umbrella Clauses

Before turning to modern treaty practice, it is important to conceptualize from the cases the underlying purposes for which umbrella clauses are drafted and included in investment treaties. Case authorities recognized the *effet utile* principle - an interpretation that renders a provision effective rather than not is preferred - which favours investors.[36] Such

[24] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, 6 August 2003; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004 [81]

[25] *El Paso Energy International Co. v. Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006 [81]; *Pan American Energy LLC v. The Argentine Republic*, ICSID Case No ARB/03/13 and *BP America Production Co & Others v. The Argentine Republic*, ICISD Case No ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [108]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007 (Award annulled on 29 June 2010) [310].

[26] Yannaca-Small, '*Katia BIVAC v. Paraguay* versus *SGS v. Paraguay*: The Umbrella Clause Still in Search of One Identity' (2013) *28 ICSID Review* 307, 312.

[27] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [154]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [145]-[146].

[28] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Declaration (Dissenting Opinion of Antonio Crivellaro), 29 January 2004 [10].

[29] Crawford, James, 'Treaty and Contract in Investment Arbitration' (2008) *24 Arb Int'l* 364.

[30] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [148].

[31] *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 [92]-[114], [250].

[32] *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [138], [142].

[33] *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [172].

[34] Antony, Jude, 'Umbrella Clauses Since *SGS v. Pakistan* and *SGS v. Philippines* - A Developing Consensus' (2013) *29 Arb Int'l* 607, 626.

[35] *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [177]-[180].

[36] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [116]; *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 [248]-[249]; *Noble Ventures Inc v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005 [52]; *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [90].

a pro-investor approach is a logical consequence of adopting the interpretive rules under Art. 31 VCLT, where the 'object and purpose' of an investment treaty is to provide protection to investments.[37] In this regard, Schreuer points out that the interpretative approach in *SGS v. Philippines* is preferred to *SGS v. Pakistan*, as the former 'does justice to a clause that is evidently designed to add extra protection for the investor'.[38]

Some doubts have been raised about such a pro-investor approach. Douglas criticizes the approach as biased:

> an interpretive approach cannot be correct if the policy of promoting foreign investment can never result in an interpretation favourable to the host State both as a matter of experience and as a matter of logic'.[39] Similarly, Franck warns against an overly exuberant use of the object and purpose test, which will distance the interpretation from an objective analysis of a treaty's text, and promote an interpretation based on subjective whims.[40]

It is argued, respectfully, that these criticisms are misguided. Umbrella clauses are most closely associated with investment contracts known as 'concession agreements' or state contracts, where it is common for terms to be prescribed by national legislation and offered by the host State on a 'take it or leave it' basis.[41] Additional protection given to investors through umbrella clauses should be understood in the context of such investment contracts which tend to significantly favour host States.

When market situations and socio-political conditions fluctuate, host States may be tempted to back out from their original contractual commitments in search of better opportunities.[42] The 'obsolescing bargains between the investor and the host country' arise as a result, as the investor's bargaining power diminishes after the host State has acquired the investment.[43]

In a cost-benefit analysis, the umbrella clause ensures continued state compliance by increasing the costs of a host State in failing to observe contractual commitments, and increasing an investor's bargaining power through a right to bring investor-state arbitration.[44]

Schill thus regards umbrella clauses as an enforcement mechanism for host State promises in mitigating inequalities between foreign investors and the host state, and targeting shortcomings in dispute settlement and enforcement of non-sovereign breaches by the host State in investment contracts.[45] It is for this reason that Schill rejects a restrictive interpretation of the umbrella clause, as he considers it reduces the ability of host States to make credible commitments and lessens efficient cooperation between investors and host States.[46]

A. *Modern Treaty Practices of Major Investment Players*

Bearing in mind the protection of investments as a fundamental concept in the drafting and interpretation of umbrella clauses, we then turn to examine the significance of these clauses in investment treaty practice. It is estimated that of the approximately 2700 BITs currently in existence, about 40% contain an umbrella clause.[47]

This overview warrants a closer examination of the practices of individual states in order to assess whether there is a uniform approach in the drafting of umbrella clauses, and whether such drafting is sensitive to the evolving jurisprudence.

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37 Voss, Jan Ole, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martins Nijhoff Publishers 2011) 254.

38 Schreuer, Christoph, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Fork in the Road' (2004) *5 J World Investment & Trade* 231, 255.

39 Douglas, Zachary, 'Nothing If Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) *22 Arb Int'l* 27, 50.

40 Franck, Susan, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2004) *73 Fordham Law Review* 1521, 1578.

41 Sinclair Anthony, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) *20 Arb Int'l* 411, 414-418; Walde Thomas, 'The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) *6 J World Investment & Trade* 183, 200-209; Blyschak, Paul Michael, 'Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty' (2010) *27 Arb Int'l* 579, 582.

42 Vernon Raymond *Sovereignty at Bay: The Multinational Spread of US Enterprises* (Basic Books 1971) 46.

43 Salacuse Jeswald, *The Law of Investment Treaties* (Oxford University Press 2010) 271-272.

44 Salacuse Jeswald, *The Law of Investment Treaties* (Oxford University Press 2010), 273.

45 Schill Stephan, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' [2009) *Minn J Int'l L* 1, 11.

46 Schill Stephan, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' [2009) *Minn J Int'l L*, 44-45.

47 Yannaca-Small, Katia, 'What about This "Umbrella Clause"?' in Yannaca-Small, Katia (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 483.

In the EVFTA, the Article 8.3 provides for an umbrella clause.

Box 9. EVFTA Umbrella Clause (Art. 8.6)

When a Party has entered into a written agreement with investors of the other Party or their investments eferred to in paragraph (a) of Article 8.8 (Scope) that satisfies all of the following conditions

(a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement;

(b) the investor relies on the written agreement in deciding to make or maintain an investment referred to in paragraph (a) of Article 8.8 (Scope) other than the written agreement itself and the breach causes actual damages to that investment;

(c) the written agreement[48]creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and

(d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration.

The "umbrella clause" provision of Article 8.10(6) clarifies that certain category of written contractual promises made by a Party to an investor of the other Party regarding the investment must be complied with.

The following table surveys umbrella clauses from selected BITs of ten major investment players, which have been ranked by investment promotion agencies as the top ten most promising investor home economies for foreign direct investment from 2013 to 2017.It is noted that there is no centralized database on these treaties and selected sources have been consulted, as specified in the table. The BITs cover partner states from developed and developing states where possible, and subject to the availability of the treaty text in English.

[48] A "written agreement" means an agreement in writing, entered into by a Party with an investor of the other Party or their investment [VN: referred to in paragraph (a) of Article 8.8 (Scope)] and negotiated and executed by both Parties, whether in a single instrument or multiple instruments.

Table 4. Umbrella clauses from selected BITs of ten major investment players

TABLE OF BILATERAL INVESTMENT TREATIES[i,ii]

States	China
Pre-SGS v Philippines (2004)	• China-UK BIT 1986 Art. II.2 (Promotion and Protection of Investment): [FET provision]…Each contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party. • China-Japan BIT 1988: (-)[iii] • China-Australia BIT 1993 Art. 11: A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement. • China-Bahrain BIT 1999: (-) • China-Germany 2003 Art. 10.2 (Other Obligations): Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.
Post-SGS v Philippines (2004)	• China-Belgium BIT 2005 Art.9: Investors of either Contracting Party may make investments under special contracts. Each Contracting Party shall observe any obligations it may have entered into with investors of the other Contracting Party. The above special contracts or obligations shall be in conformity with the laws of the Contracting Party accepting the investments and the provisions of this Agreement.
Model BITs	• n/a[iv]

States	Unites States
Pre-SGS v Philippines (2004)	• US-Panama 1982 Art. II.2: [FET provision]… Each party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Party (Not affected by 2000 amendment) • US-Argentina BIT 1991, US Romania 1992 Art. II ©: Each party shall observe any obligation it may have entered into with regard to investments. • US-Ecuador BIT 1993, US-Moldova BIT 1994, US-Lithuania BIT 1998 Art. II.3 ©: Each party shall observe any obligation it may have entered into with regard to investments. • US-Czech BIT 2003 Art. II.2 ©: Each party shall observe any obligation it may have entered into with regard to investments.
Post-SGS v Philippines (2004)	• US-Uruguay BIT 2005, US-Rwanda BIT 2008: (-), though Art. 24.1 allows investors to submit investor-state arbitration claims concerning a breach of an "investment Agreement"
Model BITs	• 2012: (-), though Art. 24.1 allows submit investor-state arbitration claims concerning a breach of an "investment Agreement"

State	GERMANY[v]
Pre-SGS v Philippines (2004)	• Germany-USSR BIT 1989 Art. 7.2: Each Contracting Party shall comply with any other obligation it assumes in respects of investments made by investors of the other Contracting Party in its territory.
Post-SGS v Philippines (2004)	• Germany-India 1995 Art 3.2 (Applications of other rules): Each Contracting Party shall observe any application it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being only redressed under the terms of the contract underlying the obligations. • Germany-Hong Kong 1996 Art. 8.2: Each of the Contracting Party shall observe any obligation it has assumed with regard to its investment in its area by investors of the other Contracting Party. • Germany-Philippines 1988 Art. 3.5 (Treatment): [NT Provision]…Each Contracting State shall observe any obligation it has assumed with regard to investments in its territory by investors of the Contracting State. • Germany-Yemen BIT 2005 Art. 7.2: Either Contracting Party shall fulfill any other obligation it may have entered into with regard to investments in its territory made by nationals or companies of other Contracting Party. • Germany-Bahrain BIT 2017 Art. 8.2: Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by nationals or company of the other contracting state. • Germany-Afghanistan BIT 2005 Art. 8.2: Each Contracting Party shall observe any obligation it has assumed with regard to investment in its area by investors of the other Contracting Party.
Model BITs	• 2008, Art. 7.2: Each Contracting State shall fulfill any other obligation it may have entered in to with regard to investment in its territory by investors of the other Contracting Party.

State	UNITED KINGDOM[vi]
Pre-SGS v Philippines (2004)	• UK-China BIT 1986 Art. II.2 (Promotion and Protection of Investment): [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into with regard to investment in its territory by nationals or companies of the other Contracting Party. • UK-Jamaica BIT 1987: (-) • UK-USSR BIT 1989 Art 2.2 (Promotion and Protection of Investment): [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments of investors of the other Contracting Party. • UK-India BIT 1994 Art. 3.3 (Promotion and Protection of Investment): Each Contracting Party shall observe any obligation it may have entered into with regard to investment in its territory by nationals or companies of the other Contracting Party, provided that dispute solution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available. • UK-South Africa BIT 1994, UK-Moldova BIT 1996, UK-Hong Kong BIT 1998, UK-El Salvador BIT 1999, Art. II. 2 (Promotion and Protection of Investment): [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of investors of the other Contracting Party. • UK-Lebanon BIT 1999 Art. 10.2 (Other Obligations): Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of investors of the other Contracting Party.
Post-SGS v Philippines (2004)	• UK-Mexico BIT 2006: (-) (Not yet entered in to force) • UK-Ethiopia BIT 2009 Art. 2.2 (Promotion and Protection of Investment): [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of nationals or company of the other Contracting Party (Not yet entered in to force) • UK-Colombia BIT 2010: (-) (Not yet entered in to force)
Model BITs	• 2008, Art. 2.2 (Promotion and Protection of Investment): [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of nationals or company of the other Contracting Party

State	JAPAN
Pre-SGS v Philippines (2004)	• Japan-China BIT 1988 (-) • Japan-Hong Kong BIT 1997 Art. 2.3: [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in it by investors of the other Contracting Party. • Japan-Russia BIT 1998 Art. 3.3 [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory made by investors of the other Contracting Party. • Japan-Korea BIT 2002: (-)
Post-SGS v Philippines (2004)	• Japan-Lao PRD BIT 2008 Art. 5.2 (General Treatment): Each Contract Party shall observe any obligation it may have entered into in a written form with regard to investment of investors of the other Contracting Party. • Japan-Peru BIT 2008 Preamble: Recognising the importance of observance and fulfillment of the obligations that one country may have entered into with regard to investment and investment activities of investors of the other country. • Japan-Colombia BIT 2011 Art. 4.3 (Minimum Standard of Treatment): Each Contracting Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Contracting Party with regard to specific investments of the investor, which the investor could have relied on at the time of establishment, acquisition or expansion of such investment. (Not yet entered into force)
Model BITs	• n/a

State	FRANCE[vii]
Pre-SGS v Philippines (2004)	• France-Hong Kong BIT 1993 Art. 3 (Particular Obligations): Without prejudice of the provisions of this agreement, each Contracting Party shall observe any particular obligation it may have entered in to with regard to investments by investors of the other Contracting Party, including provision more favorable than those of this Agreement. • France-India BIT 1997: (-) • France-Mexico BIT 1998 Art. 10.2 (Special commitments): Each Contracting Party shall observe any obligation it may have entered into in writing, with regard to investment in its territory by investors of the other Contracting Party. Disputes arising from such obligations shall be settled under the terms of the contract underlying the obligation.
Post-SGS v Philippines (2004)	• n/a
Model BITs	• 2006, Art. 9 (Special Commitments) Investment having formed the subject of a special commitment of one Contracting Party with respect to nationals or companies of the other Contracting Party shall be governed, without prejudice to the provision of this Agreement by the terms of the said commitment if the latter includes provisions more favorable than those of this Agreement...[viii]

State	INDIA
Pre-SGS v Philippines (2004)	• India-France BIT 1997: (-) • India-UK BIT 1994 Art 3.3 (Promotion and Protection of Investment): Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available. • India-Germany 1995 Art. 13.2 (Application of other Rules): Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being redressed under the terms of the Contract underlying this obligation. • India-Australia BIT 1999: (-)
Post-SGS v Philippines (2004)	• India-Bosnia BIT 2006: (-) • India-Greece BIT 2007; (-) • India-Mexico BIT: (-) • India-Colombia BIT 2009: (-)
Model BITs	2003: (-)

State	CANADA[ix]
Pre-SGS v Philippines (2004)	• Canada-Hungary BIT 1991: (-) • Canada-Philippines BIT 1995: (-) • Canada-Panama BIT 1996: (-) • Canada-Costa Rica BIT 1998: (-)
Post-SGS v Philippines (2004)	• Canada-Peru BIT 2006: (-) • Canada-Latvia BIT 2009: (-) • Canada-Jordan BIT 2009: (-) • Canada-Czech BIT 2009: (-) • Canada-Slovakia BIT 2010: (-)
Model BITs	• 2004: (-)

State	Republic of Korea
Pre-SGS v Philippines (2004)	• Korea-USSR BIT 1990 Art. 2.4 (Promotion and Protection of Investments): Either Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of investors of the other Contracting Party. • Korea-Argentina BIT 1994: (-)
Post-SGS v Philippines (2004)	• Korea-Vietnam BIT 2003, Korea-Jordan BIT 2004, and Korea-Croatia BIT 2005 Art. 10.3: Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.
Model BITs	• n/a

State	Russian Federation[x]
Pre-SGS v Philippines (2004)	• USSR-UK BIT 1989 Art. 2.2 (Promotion and Protection of Investments): [FET provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investment of investors of the other Contracting Party. • USSR-Germany BIT 1989 Art. 7.2: Each Contracting Party shall comply with any other obligation it assumes in respect of investments made by investors of the other Contracting Party in its territory. • USSR-Netherlands BIT 1989 Art. 3.4: Each Contracting Party shall observe any obligation it may have entered with regard to investments of investors of the other Contracting Party. • Russia-Norway BIT 1995, Russia-Lebanon BIT 1997, Russia-Egypt BIT 1997: (-) • Russia-Turkey BIT 1997 Art. II.2 (Promotion and Protection of Investments): [FET provision]… Each Contracting Party shall observe any obligation it may enter into with regard to investments of investors of the other Contracting party. • Russia-Japan BIT 1989 Art. 3.3: [FET Provision]… Each Contracting Party shall observe any obligation it may have entered into with regard to investments made by an investor of the other Contracting Party. • Russia-Italy BIT 2002: (-)
Post-SGS v Philippines (2004)	• Russia-United Arab Emirates BIT 2010: (-) (Not yet entered in to force)
Model BITs	• n/a

The sources consulted in compiling this survey are as follow:

i. Investment Treaty Arbitration Investment Treaties http://www.italaw.com/investment-treaties

Paparinskis, Martins *Basic Documents on International Investment Protection* (Hart Publishing, 2012)

Rubins, Noah and Mangan, Mark (eds) *Global Arbitration Review Investment Treaty Arbitration Know-How* http://globalarbitrationreview.com/know-how/topics/66/investment-treaty-arbitration/

UNCTAD IIA Databases http://untad.org/en/pages/DIAE/International%20Investment%20(IIA)/IIA-Tools.aspx

ii. All BIT year references cited in this table (except for the Model BITS) refer to the year of signing, as opposed to the year the treaty was entered into force.

iii. '(-)' denotes the absence of an umbrella clause in the relevant treaty.

iv. 'n/a' denotes that the relevant treaty was not available in English or not available at all in the sources consulted.

v. According *to Global Arbitration Review Investment Treaty Arbitration Know-How*, all German BITs contain an umbrella clause.

vi. According *to Global Arbitration Review Investment Treaty Arbitration Know-How*, all UK BITs contain an umbrella clause, except for the ones with Jamaica, Lebanon, Mexico and Colombia. Upon verification, an umbrella clause was found in the UK-Lebanon BIT.

vii. According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, all France BITs contain a typical umbrella clause (those with Hong Kong, Mexico, Russia and Yemen).

viii. A similar wording was adopted in Art. 9 France-Moldova BIT, note that *the Afir v Moldova* Tribunal did not regard this formulation as constituting an umbrella clause, this will be further discussed in section 4.3 of this paper.

ix. According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, all Canadian BITs do not contain an umbrella clause.

x. According *to Global Arbitration Review Investment Treaty Arbitration Know-How*, only twelve Russian BITs in force contain umbrella clauses (those with France, China, Germany, Denmark,

Japan, Korea, Kuwait, The Netherlands, Switzerland, Turnkey and the United Kingdom).

There are three main observations worth noting.

Firstly, some states adopt a consistent regime in relation to umbrella clauses. Canada, France, India and Russia do not generally adopt umbrella clauses in their treaties, while Germany and the UK tend to do so. An interesting example is where these two contrasting practices are at play, for instance, Art. 13.2 India-Germany BIT provided that disputes arising from breach of observance of obligations were limited to the remedies specified under the investment contract, which could potentially exclude investor-state arbitration.[49] Unlike the practices of most German BITs, the clause was placed near the end of the BIT and distanced from provisions on substantive treaty standards, potentially with the aim of diluting the effect of the clause.

Secondly, some states do not demonstrate a consistent pattern in their treaty making, notably, China and Korea. China's situation is particularly unique. 50 out of 120 strong Chinese BITs have an umbrella clause of either a broad or narrow formulation.[50] However, pre-2005 Chinese BITs generally only allow for submission of expropriation claims before investor-state arbitration,[51] the China-Australia BIT and China-Belgium BIT which contained umbrella clauses are such examples.[52] The wording of the umbrella clauses in those two BITs was also restrictive, requiring 'written undertakings' and 'special contracts' respectively. Shan also interprets the latter clause as making clear that host States are not precluded from laying down new laws and regulations on foreign investment.[53]

It is difficult to ascertain the precise reasons behind states adopting an inconsistent regime. Many diverse variables may account for such practices, for example, changes in political environment, adjustment of economic policies, timing of negotiations, and the relative leverage of the partner states in the BITs.

[49] Art. 13.2 India-Germany BIT (13 July 1998).

[50] Shan Wenhua, 'Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former?' (2010) *11J World Investment & Trade* 135, 136.

[51] Shan Wenhua and Gallagher Norah, *Chinese Investment Treaties: Policy and Practice* (Oxford University Press 2009) 177-180, 8.49-8.55.

[52] Art. 11 China-Australia BIT (11 July 1988); Art. 9 China-Belgium and Luxembourg BIT (1 December 2009).

[53] Shan Wenhua, 'Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former?' (2010) *11J World Investment & Trade* 140.

Finally, the treaty practices of Japan and the US seemed to respond to the jurisprudential development in umbrella clauses. Umbrella clauses in post-2004 Japanese BITs tend to have a much more restrictive scope, for instance, both Art. 5.2 Japan-Lao PDR BIT and Art. 4.3 Japan-Colombia BIT required written obligations.[54] In the Japan-Peru BIT, the observation of commitments did not even have a standalone provision, but was reduced into a principle under the Preamble with no binding effect.[55] As for the US, umbrella clauses in pre-2004 US BITs had a very broad formulation, some of these earlier umbrella clauses were subjects of considerable litigation, such as, Art. II.2(c) US-Argentina BIT,[56] Art. II.2(c) US-Romania BIT,[57] and Art. II.3(c) US-Ecuador BIT.[58] Given the disputes surrounding such broad formulation, post-2004 US BITs and the US Model BIT 2012 understandably omitted the umbrella clause, though these treaties reserve the possibility of submitting disputes concerning 'investment agreements' to investor-state arbitration.[59]

It is somewhat surprising that only a minority of these major investment players have modernised the language of recent umbrella clauses or clarified their intentions. In particular, the UK regime seems particularly dated, with Art. 2.2 UK Model BIT 2008 having the same formulation as Art. II.2 UK-China BIT 1986.[60] While much of the debate surrounding umbrella clauses has focused on whether there is a lack of

[54] Art. 5.2 Japan-Lao PDR BIT (3 August 2008); Art. 4.3 Japan-Colombia BIT (Not yet entered into force).

[55] Preamble, Japan-Peru BIT (10 December 2009).

[56] *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No ARB/01/18, Decision on Annulment (Award dated 12 May 2005, partially annulled on 25 September 2007), [95]-[96]; *El Paso Energy International Co. v. Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006 [84]-[85]; *Azurix Corp. v. The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 [384]; *Pan American Energy LLC v. The Argentine Republic*, ICSID Case No ARB/03/13 and *BP America Production Co & Others v. The Argentine Republic*, ICISD Case No ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [114]; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007 (Award annulled on 29 June 2010) [310]-[314]; *Continental Casualty Co. v. The Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008 [300]-[303].

[57] *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008 [60].

[58] *Noble Energy Inc and Machalapower Cia Ltda v. The Republic of Ecuador and Consejo Nacional de Electricidad,* ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 March 2008 [154]-[157]; *Duke Energy Electroquil Partners &Electroquil SA v. Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008 [319]-[325]; *MCI Power Group LC and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment, 19 October 2009 [70].

[59] Art. 24.1 *US-Uruguay BIT* (1 November 2006); Art. 24.1 *US-Rwanda BIT* (1 January 2012); Art. 24.1 *US Model BIT* 2012.

[60] *UK Model BIT* 2008; Art. II.2 *UK-China BIT* (15 May 1986).

consensus amongst tribunals in their interpretation, little has been said about states' lack of responsiveness to jurisprudential development. While it is conceivably difficult for states to issue an express declaration to clarify the scope of their umbrella clauses, as in the case of Switzerland in response to the *SGS v. Pakistan* decision,[61] greater clarity in drafting and expressions of intention in future treaties would assist tribunals in their interpretive exercise.

In light of *SGS v. Paraguay* addressing the issue of implied waiver of treaty rights and potentially express waiver, this has implications as to the questionof onus. The host State is the only party to both the BIT and the investment contract, it is entirely open to the host State to limit the effect of the umbrella clause in the BIT or exclude the application of any BIT in their investment contracts, it should then be responsible for any conflict, and any ambiguity resolved against it.[62] It is thus in the states' interests to engage in more informed drafting and active treaty making. This notion is reinforced in recent developments concerning the extension of MFN treatment to umbrella clauses.

It was odd that the Tribunal here did not examine the wording of Art. 4 France-Argentina BIT and concluded that the *ejusdem generis* principle was satisfied, Gazzini and Tanziobserve that the wording of Art. 4 is not that of a typical umbrella clause, in fact rarely do French BITs contain an umbrella clause of the typical formulation, though the commentators accept that Art. 4 is 'an umbrella clause for all practical purposes'.[63]

Case: Arif v. Moldova

In the most recent case *Arif v. Moldova*, Mr. Arif alleged violations of Art. 9 France-Moldova BIT, he sought to invoke the MFN clause in Art. 4 France-Moldova BIT to import umbrella clauses in Art. 2.2 Moldova-UK BIT and Art. II.3(c) Moldova-US BIT, which were broadly formulated umbrella clauses. Art. 9 France-Moldova BIT provided that:

> Investments having been the subject of a particular [the] specific commitment of one of the Contracting Parties towards the nationals and companies of the other Contracting Party, are regulated, without prejudice to the dispositions of the present Agreement, by the provisions of such commitment as far as it contains more favourable provisions than those provided for in the present Agreement.[64]

The precise formulation of this clause, which had minor variations from Art. 9 of the latest French Model BIT, is of particular interest as the Tribunal here ruled that Art. 9 was not an umbrella clause but a 'preservation of rights' clause:

> *Firstly,* the ordinary meaning of these Articles within their context and in light of the BIT's object and purpose makes the Tribunal find that Article 9 (and Article 5(2) to the extent that it refers to "a specific commitment") has its own specific meaning and purpose, separate from that of an "umbrella" clause, and agrees with Respondent in this regard. According to the ordinary meaning of the text, the specific purpose of these clauses is not to guarantee the observation of obligations assumed by the host State vis-à-vis the investor, but rather to provide investors with the right to claim the application of any rule of law more favourable than the provisions of the BIT. The doctrine refers to such clauses as preservation of rights clauses.[65]
>
> This type of clause, in its usual wording, simply says that in applying or enforcing the existing protections offered by the BIT, attention should be paid to any more favourable provisions contained in domestic law or specific agreements. It therefore confirms that the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made.[66]

Nevertheless, the Tribunal did not agree with Moldova that umbrella clauses were merely procedural in nature, but that they were substantive and capable of importation through an MFN clause.[67]

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61 Letter from the Government of Switzerland to the Deputy Secretary-General of ICSID (1 October 2003).

62 Wong, Jarrod, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006-2007) *14 Geo Mason L. Rev.* 135, 171-172.

63 Gazzini, Tarcisio and Tanzi, Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) 14J World Investment & Trade 978, 980.

64 *Franck Charles Arif v Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013 [385].

65 *Franck Charles Arif v. Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013 [388].

66 *Franck Charles Arif v. Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013 [389].

67 *Franck Charles Arif v. Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013 [395].

The Tribunal then concluded that since the MFN clause was broadly drafted, it could import an umbrella clause from either the Moldova-UK or Moldova-US BIT, and found jurisdiction over Arif's specific commitments claim by importing a more favourable standard of protection granted by either of the umbrella clauses.[68] Gazzini and Tanzi point out that the *Arif v. Moldova* Tribunal fails to make any reference to the *EDF v. Argentina* decision or to the *ejusdem generis* principle.[69] They argue that the *Arif v. Moldova* Tribunal should have rejected the incorporation of the umbrella clause through MFN treatment following its logic, as there were no rights on the same subject matter granted under the basic treaty.[70]

Another issue of concern with regard to the reasoning in *Arif v. Moldova* is that the drafting of Art. 10 France-Argentina BIT in *EDF v. Argentina* only had minor variations to that of Art. 9 France-Moldova BIT in *Arif v Moldova*,[71] the finding in *Arif v. Moldova* that Art. 9 was not an umbrella clause would cast doubt on the ruling in *EDF v. Argentina*, where no close assessment was made with regard to the wording of Art. 10 and its compliance with the *ejusdem generis* principle.

It is proposed that the crux of this issue is the interpretation of the wording and effect of the special commitments provision. In the context of China-France preservation of rights provisions, Shan argues that umbrella clauses and preservation of rights clauses are very similar and differ in terms of perspective, and that the international obligation imposed by the latter is even stronger:

> Unlike the umbrella clauses, which address the issue (of assurance of special investment projects) from the perspective of the host state by forcing it to observe its obligations/commitment towards investments, these "preservation of rights" clauses address the same issue from the angle of the foreign investors, by entitling them to the more favourable treatment under such special undertakings or commitments. In other words, both of them serve the same aim, although the routes taken to achieve it are different.[72]

It is further contended that, contrary to the Tribunal's finding in *Arif v. Moldova*, Art. 9 France-Moldova BIT may be interpreted as an umbrella clause albeit in a limited sense, this possibility is also acknowledged by Gazzini and Tanzi.[73] It would seem that from the language of the clause, where the specific commitment concerning investments contains provisions that are not more favourable or less favourable than that in the BIT, such a specific commitment would then be regulated under the terms of the BIT, which are more favourable. This interpretation is in line with the object and purpose of BITs in promoting and protecting investments, and in effect an umbrella clause albeit having a more restrictive scope than the usual formulation.

A possible extrapolation on the future development in this area is that where there is a broadly drafted MFN clause, and an umbrella clause in the basic treaty, a more widely-drafted umbrella clause in a third-party treaty can be imported through MFN treatment. An umbrella clause in the basic treaty, even where it is very restrictively formulated, should arguably suffice in complying with the *ejusdem generis* principle. The implication of such application is far-reaching, as the importation effectively renders the restrictive and expansive formulation of umbrella clauses illusory and randomizes a state's investment treaty regime with respect to umbrella clauses.

Section Two. OTHER PRINCIPLES

1. Transfer of Funds

The clauses on transfer payments are considered by investors, but also by the host country as the most important in a bilateral treaty. They deal with one aspect of the relationship between the host country and the foreign investor on which their interests can be widely divergent.[74]

[68] *Franck Charles Arif v. Moldova,* ICSID Case No ARB/11/23, Award, 8 April 2013 [396].

[69] Gazzini, Tarcisio and Tanzi, Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 983.

[70] Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 990.

[71] Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 980-981.

[72] Shan Wenhua, 'Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former?' (2010) *11J World Investment & Trade* 144.

[73] Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 990.

[74] The numerous investment claims brought against Argentina in the wake of its 2001 financial crisis have sparked a debate on the risks of not subjecting such guarantees to certain exceptions. But while this particular crisis might have brought attention to this issue, it has always been controversial. Jeswald W. Salacuse thus stated in 1990: "[T]he negotiation of BIT provisions on monetary transfer is often one of the most difficult negotiations to conclude.

Whereas such clauses can and do differ from treaty to treaty, most IIAs stipulate that a wide range of payments and other-investment related funds shall have a right to be transferred out of the host State without delay, and, typically, in a freely convertible currency.[75]

Some IIAs allow deviation from the obligations enshrined in the transfer of funds provision in four cases.[76] Whereas this is most common in FTAs, which usually allow the introduction of safeguards motivated by the balance of payments or external financial difficulties,[77] exceptions of this nature are rather unusual in bilateral investment agreements.

2. Movement of Natural Persons

Many investment agreements provide extra assurances for the foreign investors and their ability to exercise full management over their investment in the host country by featuring provisions on the movement of natural persons related to such investment. Provisions on this nature are usually found in BITs. FTAs with investment provisions, instead, are more likely to include an independent chapter on the movement of natural persons, which normally feature more detailed disciplines and encompass a broader set of persons than those found in BITs. These obligations normally apply to two different situations.

Firstly, a few BITs, namely those promoted by the United States and Canada, ban host country's measures that demand foreign investors to appoint senior managers of a certain nationality. Furthermore, according to these BITs host countries may require that a majority of the board of directors of the foreign company are nationals of or residents in the host country, subject to the conditions that this requirement "does not materially impair the ability of the investor to exercise control over its investment".[78]

Secondly, a number of investment agreements provide for the facilitation of entry and stay to investors and certain personnel necessary for the establishment and operation of the investment. Most investment agreements with such obligations limit the provision to managerial and executive personnel, or in regard to posts that require specialised knowledge. Occasionally those benefits are also extended to family members of the person related to the investment, such as the BIT signed between China and Jordan,[79] or to all persons employed in the foreign company, independently of their seniority or level of expertise, as provided by a number of Sino-Foreign BITs, such as the one with Barbados of 1998.[80] In order not to interfere with the host countries' ability to regulate the entry and stay of foreign persons, these disciplines are commonly subject to the laws, regulations and policies relating to the entry of aliens, or drafted in a way so as to express a best-endeavour obligation.

3. Performance Requirements

Host countries often resort to measures that require certain behaviours from foreign investments that are deemed to bring about certain benefits for their economy. These performance requirements may relate to the promotion of domestic production - requiring foreign investors particular levels of domestic content in their activity; to the improvement of the country's external account, so that a given proportion of the

Capital-exporting countries seek broad, unrestricted guarantees on monetary transfers, while developing countries press for limited guarantees, subject to a variety of exceptions." See Poulsen 2010, p.110. Also see Duncan Williams, 'Policy Perspectives on the Use of Capital Controls in Emerging Nations: Lessons From the Asian Financial Crisis and a Look at the International Legal Regime', 70 *FORDHAM L. REV*. 561, 614 (2001) and Horacio Grigera Naon, 'Sovereignty and Regionalism', 27 *LAW & POL'Y INT'L BUS*. 1073, 1077-1078 (1996).

75 A very comprehensive agreement would normally cover: (i) "returns" on investment, including all profits, benefits, interest, capital gains, royalties, and management, technical assistance or other fees; (ii) proceeds from the liquidation or sale or all or any part of the investment; and (iii) payments under a contract, and earnings of other remuneration of foreigner personnel in connection with the investment. Austria - Hong Kong provides for a relatively broad one (Article 7:1 & 2): "unrestricted right to transfer abroad their investments […] and returns" + "Investors shall also have the unrestricted right to transfer abroad in particular, but not exclusively…]. Article 7:2: "Transfers of currency shall be effected without delay in any freely convertible currency."

76 One option is to subject the transfer clause to domestic laws, in which case the host state is free to limit the flow of capital out of its economy, for instance during economic crises, as long as it is done through law. *E.g.*, Agreement for the Promotion and Mutual Protection of Investments, Portugal - Bulgaria, Article 5, 27 May 1993. Another option is to allow exceptions to the free transfer of funds, but only during balance-of-payments difficulties and typically with a requirement that such restrictions should be necessary, non-discriminatory and on a temporary basis. See, e.g., Agreement for the Promotion and Protection of Investments, UK. - Argentina, Article 6, 11 December 1990. Finally, some treaties include other major limitations that permit restrictions on capital flight, such as certain Chilean BITs attempting to restrict short-term capital in- and outflows. See, *e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Chile-Austria, Protocol, 8 September 1999. Other possible exception: host state should be able to prevent foreign investors from freely transferring revenues and capital out of its country if it were under economic difficulties.

77 See, for instance, Korea-Singapore FTA, Article 10.12, or NAFTA, Article 21.04.

78 See Canada Model FIPA, Article 6.1-2.

79 China-Jordan BIT, Article 2.3.

80 China-Barbados BIT, Article 2.2

investment production must be imported; or to transfer of technology. These measures may be mandatory or voluntary, as conditions to obtain certain benefits.

Some of these measures, those that relate to domestic content and foreign trade balancing go against the WTO agreement on Trade Relate Investment Measures (TRIMs), and are prohibited for all WTO members.

The Mobil and Murphy v. Canada Decision on Liability and on Principles of Quantum found that research and development guidelines imposed requirements to make expenditures on services contrary to Article 1106 and were not covered by the reservation in Article 1108.[81]

Box 10. Mobil and Murphy v. Canada

The Tribunal addresses the structure and operation of Article 1108 in detail in the following section of this Decision. Nevertheless, the Tribunal considers it appropriate to briefly address the issue of Canada's decision to include the Accord Acts provisions on R&D and E&T in its Article 1108 exemptions, and the weight to be attached to that decision for the purposes of an evaluation under Article 1106.

244. In its listing of non-conforming measures, Canada identifies the Accord Acts' requirement that Benefits Plans include R&D expenditures as one such measure in Annex I to the NAFTA. It argues that no negative inference should be drawn from this listing.

245. The Tribunal's analysis of Article 1106 has been undertaken on its own terms. The inclusion of the Accord Acts and their provisions governing R&D and E&T, and the specific reference to Article 1106, tend to confirm that the R&D and E&T requirements of the Accord Acts might be seen as constituting a prohibited performance requirement under Article 1106 of the NAFTA. While the Tribunal does not rely on the Respondent's use of the exemption as the basis for its finding that that the 2004 Guidelines are caught by Article 1106, it nevertheless notes that Canada's decision is consistent with the finding.

246. In conclusion, the Tribunal finds that: (i) R&D and E&T requirements imposed by the 2004 Guidelines are 'services' within the meaning of Article 1106; (ii) the 2004 Guidelines and their implementation impose legal requirements on operators to undertake R&D and E&T expenditures in the Province; and 3) subject to the requirements of Article 1108, the R&D and E&T requirements of the 2004 Guidelines, and the implementation thereof, constitute a prohibited performance requirement under Article 1106 of the NAFTA.

[81] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, at 246.

A number of FTAs with investment disciplines have followed the example of the NAFTA, and introduced restrictions on the use of performance requirements. In some cases, such as the FTAs between India and Singapore, and Japan and Malaysia, these provisions substantially reproduce the obligations already found at the multilateral level.

In many others, instead, the provisions apply to a number of measures not addressed by the TRIMs, such as those relating to technology transfer. This is particularly the case of FTAs entered in by the US and Canada, but also many other agreements concluded by non-NAFTA countries, such as Korea-Chile and Panama-Singapore and Nicaragua-Taiwan (China) FTAs. All performance requirements measures are commonly prohibited - subject to exceptions - when they are mandatory; measures pertaining to technology transfer can instead be introduced as condition to obtain or continue to obtain certain advantages.

BITs do not usually feature a provision on performance requirements, except for the BITs concluded by the US and Canada, which provide a TRIMs-plus clause on the matter. A few other BITs, such as the Finland-Kyrgyzstan BIT of 2002, also prohibit some measures of this nature when they are imposed as mandatory requirements.[82]

SUMMARY OF THE CHAPTER SEVEN

In the context of umbrella clause, regard must be had to the variance in wording when reviewing authorities which demonstrate divergence in the interpretation of umbrella clauses. Though it would seem that recent cases, in addressing inconsistencies in previous case authorities, have been inclined towards the expansive interpretation by giving effect to the umbrella clause. The most recent *SGS v. Paraguay* has accorded, by far, the most expansive interpretation to the umbrella clause. While uncertainties remain and further scrutiny by future tribunals is to be anticipated, prudent treaty practice calls for the clear delineation of the

[82] See Finland-Kyrgyzstan BIT, Article 3.4

scope of umbrella clauses in future investment treaties, and in particular, of the relationship between the treaty clause and a claim under an investment contract with an exclusive jurisdiction clause.[83] In assessing whether MFN treatment can be extended to umbrella clauses, it can never be said that umbrella clauses can always be imported in the presence of an MFN clause. Much like umbrella clauses, variation in wording of MFN clauses can significantly alter their scope. States concerned should refine the drafting of their MFN clauses and consider including umbrella clauses in the schedule of exceptions of their future BITs.

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) It seems there are two types of "umbrella" clauses: one is a general statement that a particular treaty covers all disputes relating to investment, while the second is a more specific clause that says a state "shall abide by its obligations." Should these provisions be read to produce equivalent effect?

2) Emmanuel Gaillard says that an umbrella clause can be read one of three ways: (1) it means essentially nothing; it is a reiteration of the state's desire to abide by its obligations; (2) it elevates a breach of contract into a breach of a treaty; the investment tribunal can hear the claim; (3) the treaty language elevates a breach of contract to a breach of treaty, but tribunal should not exercise that jurisdiction if the contract itself contains a forum-selection clause; in such a case the investment tribunal would not hear any dispute until after the first forum had finished. Is one of these more convincing than the others?

3) Thomas Wälde offered a fourth theory: that an umbrella clause was meant to protect an investor against unfair governmental action - acts taken by the government in its position as sovereign State - rather than against unfair commercial action - breaches of contract taken by the government as a commercial actor. Is this a more convincing explanation of the clause? How do you tell the difference between these two?

4) A cardinal principle of treaty interpretation is that of *effet utile* - that clauses should be interpreted so as to give them some meaning. Does the *SGS v. Pakistan* tribunal's approach give some reasonable effect to Article 11 of the BIT?

5) If one follows the route of the *SGS v. Philippines* tribunal and an investor first goes to the forum provided for in the contract, to what extent should the investment treaty tribunal be bound by (or give deference to) the decision of that first tribunal?

6) If an investor and a state have a dispute resolution clause in their contract, does this mean the investor has waived his rights under the BIT? If so, should that be permitted?

7) If an umbrella clause "elevates" a plain breach of contract to the level of a treaty obligation, what law is applicable to deciding the breach of any contract? The law chosen by the parties in their contract? The law of the host State? International law?

8) Does the placement of the umbrella clause make a difference in interpreting it? The *SGS v. Pakistan* tribunal noted that Art. 11 was not near the other substantive provisions of the applicable BIT, and therefore was better viewed as something other than a "first order" obligation.

9) The *SGS v. Pakistan* and *SGS v. Philippines* decisions are often viewed as conflicting. They are not the only tribunals to have come to opposing views on what seem like the same legal questions. Is this phenomenon bad for investment arbitration? Does it harm its legitimacy?

10) After the *SGS* cases were concluded, Switzerland sent a letter to the ICSID Secretariat about its intent in entering BITs. It asked why the tribunal did not inquire about the State's view in trying to ascertain the intent of the Parties, and stated that Switzerland advocated a broad interpretation of the treaty. Should the Tribunal have asked Switzerland (and Pakistan and the Philippines) its views? If so, what effect should it have given them? What are the pros and cons of this approach?

11) Should tribunal interpreting umbrella clauses be concerned about multiple *fora* with duplicative mandates? All tribunals accept that the same conduct can give rise to different violations in different legal orders. What about double recovery? Is that a concern?

[83] Yannaca-Small, '*Katia BIVAC v. Paraguay* versus *SGS v. Paraguay*: The Umbrella Clause Still in Search of One Identity' (2013) *28 ICSID Review* 313.

12) Ought a state to be able to file a counterclaim in an investment treaty case? Does it matter whether or not there is an umbrella clause?

13) Does Vienna Convention Article 31(3)(c) offer an adequate pathway to systemic integration? Or is the Model BIT approach (exemplified in the IISD Model BIT) better?

14) You learned about the police powers exception in the class on expropriation. Is that another route that a state might use to justify its regulating in order to protect human rights and/or the environment?

15) A senior U.S. State Department Attorney has argued that investment treaties are in the "public interest." Is he right?

16) Does consideration of the "public interest" in investment arbitration necessarily re-politicize disputes?

17) The *Glamis Gold* case involved a mining dispute in an area near ground sacred to the Quechan Indians. Did you think that the tribunal adequately considered the public interest in its decision?

18) Should a tribunal necessarily consider "public interest" issues if it is able to dispose of claims on other grounds?

19) What would you describe as the strengths of the excerpts from the IISD Model BIT? The weaknesses?

20) What factors in the IISD Agreement might make it easier for states to attract investment? What factors might make it harder?

READINGS

1. Nigel Rawding, *Protecting Investments Under State Contracts: Some Legal and Ethical Issues*, 11(4) Arb. Int'l 341-45 (1995).

2. Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims - the* SGS *Cases Considered*, in International Investment Law and Arbitration 325-46 (Todd Weiler ed., Cameron May 2005) (2005).

3. Thomas W. Wälde, *The "Umbrella Clause in Investment Arbitration - A Comment on Original Intentions and Recent Cases*, 6 J. World Investment & Trade 183 (2005); available at 1:4 Transnational Dispute Management (October 2004), pp. 1-4; 15-28.

4. Anne K. Hoffmann, *Counterclaims by the Respondent State in Investment Arbitrations*, SchiedsVZ 2006, Heft 6, at 317.

5. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction) (6 August 2003) 133-73.

6. *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29 January 2004), 92-97; 113-135.

7. *El Paso Energy Int'l Co. v. Argentina*, ICSID Case ARB/03/15 (Decision on Jurisdiction) (27 April 2006), 63-88.

8. Zadek, *The Path to Corporate Responsibility*, Harvard Business Review125 (December 2004).

9. Luke Eric Peterson, *Miner's Claim against South Africa Moves forward Slowly*, 1:13 Investment Arb. Rep. (22 Oct. 2008).

10. Charles H. Brower, II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in 1 YB. on Int'l Investment Law & Policy 347, 347-56; 365-78 (2008/2009) (focus on text, not footnotes).

11. Andrea Shemberg, *Stabilization Clauses and Human Rights,* Research Project Conducted for International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights (11 March 2008), available at http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf, pp. 4-16; 32-41.

12. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Award) (8 June 2009), 10-26.

13. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Non disputing party supplemental submission) (16 October 2006).

14. Konrad von Moltke, IISD, *A Model International Investment Agreement for the Promotion of Sustainable Development* (2004), articles 11-24.

15. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 213-313; 831-36 (Kluwer 2005).

16. Rudolph Dolzer& Christoph Schreuer, *Principles of International Investment Law* 72-78 (Oxford 2008).

17. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins&Borzu Sabahi, *Investor-State Arbitration* 541-562 (Oxford 2008).

18. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 92-103; 109-117 (Oxford 2007).

19. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* 437-479 (Kluwer 2008).

20. Katia Yannaca-Small, 'What about This "Umbrella Clause"?', in *Arbitration Under International Investment Agreements: A guide to the Key Issues* 479 (Katia Yannaca-Small ed., Oxford 2010)

21. Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004).

22. Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?*, in Arbitration Under International Investment Agreements: A guide to the Key Issues 323 (Katia Yannaca-Small ed., Oxford 2010)

CHAPTER EIGHT. EXCEPTIONS

CHAPTER EIGHT

EXCEPTIONS TO THE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

Learning Objectives
Chapter Eight

- Introduce defences that states can raise to investment claims and the concept of circumstances precluding wrongfulness;
- Discuss the essential security clauses found in investment treaties, the customary international law defence of necessity, and the appropriate relation between them;
- Assess whether the customary international law principle of necessity is useful in the context of investor-state arbitration, or whether its provisions are so stringent that they could never be satisfied;
- Discuss whether individual claimants have rights independent of states.

While the promotion and protection of foreign investors and their investment is the main purpose for entering into an investment agreement, host countries have to balance these interests with other policy objectives, including non-economic policies such as those related to health, safety, employment and the protection of the consumers and the environment.

Furthermore, these concerns have to be addressed in the framework of an economic policy that benefits all sectors of society. This entails that, in occasions, regulation of certain economic activities may not fully accommodate to the obligations enshrined in investment agreements.

The need to regulate on these aspects has not traditionally been a concern in investment agreements. Rather, the focus of these instruments rests on the promotion and protection of foreign investments.

The majority of bilateral investment agreements do not provide rules on deviations from the rights and obligation recognised therein. Instead, investment disciplines adopted in the wider context FTAs are usually subject to sectoral reservations, as well as to general exceptions that frame disciplines on investment in the context of other regulatory objectives.

Turning to other examples of exceptions that are relevant to regulatory measures, there are a number of key examples.

Four examples are considered below: general exceptions through annexes, specific exceptions from the expropriation provision; a general exclusion clause modelled on Article XX of the GATT; and the introduction of greater clarity on key terms.

Firstly, the construction of IIAs has followed two general directions: those with general exclusion annexes, and those without. Usually, the use of annexes for exclusions has accompanied those IIAs that include investment liberalisation provisions. But this is not exclusively, and need not necessarily be, the case.[1]

[1] Many IIAs contain three types of annexes: excluding specific sectors from some or all of the obligations of the IIA; excluding existing measures from the obligations of the IIA; excluding future measures from the obligations of the IIA. The more broadly based the exclusions, the greater the likelihood these types of exclusions can also include matters that can lead to claims of expropriation or other obligations relating to regulatory measures. However, it should be noted that this approach should not be used in such a manner as to create a back-door out of the obligations of an agreement.

Secondly, specific exclusions from expropriation clauses. Many agreements include specific provisions excluding certain types of measures from claims under an expropriation provision, most notably taxation measures. In many cases, compulsory licensing under intellectual property regimes is also excluded.[2]

Here again, some serious questions arise: What standards, for example, would be used to gage unreasonable or arbitrary discrimination? Would trade law tests be the tests of first resort, some of which can be very restrictive? As well, what impact would trade law tests on necessity, also a very restricted concept in the WTO system, have here? Further, it is most unclear why the issue of a disguised restriction on trade is raised, as this opens up a back door to investors raising trade law issues in order to confront a measure under an investment agreement. Also, given the nature of remedies under IIAs, it is not clear if either of the above would have any impact in relation to an expropriation claim. On the surface, it is not clear how it would be applied in such a case. Most unclear is whether it would be invoked to determine that a measure is not an expropriation, or that compensation is not required if it is an expropriation. The issue is important in relation to the notion that "nothing in this Agreement shall be construed to prevent a Party from adopting…"The emphasis on prevent here raises the question that nothing in the Agreements prevent an expropriation in the first place, they simply require compensation to be paid if a right or property is expropriated. Thus, if the consequence of an expropriation is payment of compensation under the IIA, it is not clear that the requirement to pay compensation would constitute a legal barrier to the adoption of the measure so as to permit the invocation of this article. Thus, the applicability of this type of article to an expropriation clause is far from clear.[3]

[2] There are multiple examples of this, one of which includes the Columbia Model BIT, Article II.4: "The provisions of this Agreement shall not apply to tax matters." Using this as an example, is it possible to include provisions in a text that also exclude other types of government measures from claims of expropriation, or other breaches of an IIA. For example, future environmental, labour, or human health protection measures can be expressly excluded from claims of indirect expropriation. This type of specific exclusion does not appear to have been used as yet for measures other than taxation and in relation to intellectual property, but it is certainly possible to do so.

[3] The background to these provisions is not well known, and there has been no usage of them in an arbitration that we are currently aware of. Still, it is evident that such provisions can raise as many questions as they seek to answer. The importation of such general exception clauses from trade law should, if it is submitted, be very carefully considered, from both a negotiating perspective and a litigation perspective.

Thirdly, there has been a significant trend in several recent BITs towards providing that investment promotion and protection must not be pursued at the expense of certain other policy areas. For this purpose, a number of BITs have included general exceptions clauses, which confirm the ability of States to take measures to safeguard certain key policy objectives even though such measures may imply deviating from the investment agreement's obligations. These exceptions normally relate to health, safety, and environmental policies.

Nonetheless, measures maintained on legitimate policies grounds may also be used to circumvent the agreement's obligations in regard to the protections of foreign investors, or they can affect their investments in a manner not conducive to the attainment of the desired objective. Agreements normally seek to prevent this misuse of the general exceptions clause. Commonly, they do so by indicating that countries may introduce measures on public grounds "provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade or investment".[4]

While the promotion and protection of foreign investors and their investment is the main purpose for entering into an investment agreement, host countries have to balance these interests with other policy objectives, including non-economic policies such as those related to health, safety, employment and the protection of the consumers and the environment. Furthermore, these concerns have to be addressed in the framework of an economic policy that benefits all sectors of society. This entails that, in occasions, regulation of certain economic activities may not fully accommodate to the obligations enshrined in investment agreements.

The need to regulate on these aspects has not traditionally been a concern in investment agreements. Rather, the focus of these instruments rests on the promotion and protection of foreign investments. The majority of IIAs do not provide rules on deviations from the rights and obligation recognized therein.[5] Instead, investment disciplines adopted in the wider context FTAs are usually subject to sectoral reservations, as

[4] See for example Singapore-New Zealand FTA, Article 71.1, Canada Model FIPA 2003, Article 10.1.

[5] BITs promoted by Chile, Denmark, Finland and Malaysia, for instance, do not provide for any general exceptions or list of reservations. See UNCTAD's compilation of prototype instruments on http://www.unctadxi.org/templates/DocSearch.aspx?id=780 (June 2007).

well as to general exceptions that frame disciplines on investment in the context of other regulatory objectives.

Section One. GENERAL EXCEPTIONS

There has been a significant trend in several recent BITs towards providing that investment promotion and protection must not be pursued at the expense of certain other policy areas. For this purpose, a number of BITs have included general exceptions clauses, which confirm the ability of States to take measures to safeguard certain key policy objectives even though such measures may imply deviating from the investment agreement's obligations. These exceptions normally relate to health, safety, and environmental policies.

General exceptions ensure that the BIT obligations do not prevent the host country from protecting these fundamental values. Furthermore, a number of agreements exclude taxation measures from the main obligations of the investment agreements.[6]

For instance, Singapore-China BIT (1985) and New Zealand-China BIT (1988) feature a rather broad provision of this nature; it reads:

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action directed to the protection of its essential security interests, or to the protection of public health or the prevention of disease and pests in animals or plants.[7]

Nonetheless, measures maintained on legitimate policies grounds may also be used to circumvent the agreement's obligations in regard to the protections of foreign investors, or they can affect their investments in a manner not conducive to the attainment of the desired objective. Agreements normally seek to prevent this misuse of the general exceptions clause. Commonly, they do so by indicating that countries may introduce measures on public grounds "provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade or investment."[8]

6 UNCTAD 2007, p. 80-99, provides a detailed review of exceptions clauses in recent BITs.

7 China-New Zealand BIT. Article 11.

8 See for example Singapore-New Zealand FTA, Article 71.1, Canada Model FIPA 2003, Article 10.1.

The draft MAI recognized two fundamental values which could gave raise to exceptions in the treatment of foreign investors. One the one hand, the draft agreement provided an unconditioned right to introduce restrictions related to the national security of the host country, in particular when the measures were taken in time of war, armed conflict or other international emergency, or they related to the non-proliferation of weapons of mass destruction, or the production of arms and ammunition. On the other hand, the text allowed for the introduction of "any measure necessary for the maintenance of public order," which could be invoked "only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." This general exception additionally featured the usual caveat to prevent the abuse of the clause. These exceptions could not be invoked against obligations on expropriation and protection from strife.[9]

Some recent bilateral investment agreements, namely those promoted by the US and Canada, have inherited from FTAs and the GATS specific rules for the regulation of financial services. As in the GATS, these instruments have introduced a particular exception for measures taken in regard to financial services and financial institutions - the so called 'prudential carve out.'[10]

In order to assess the relevance of the public choice to include an Article XX-like provision in investment treaties and whether it can help governments to regulate domestic non-economic concern, this Section needs to present the "general exceptions" in their context of origin, i.e. the international trade context.[11] The creation within the WTO framework of an obligatory dispute settlement mechanism whose rulings are binding has modified the entire international economic structure.[12]

The Dispute Settlement Body ("DSB")[13] makes the WTO "an

9 Multilateral Agreement on Investment, Draft Consolidated Text, OECD document DAFFE/MAI(98)7/REV1,Chapter V.

10 See Canada Model FIPA 2003, Article 10.2 and US Model BIT 2004, Article 20.1

11 SeeLorand Bartels, "The WTO Legality of the Application of the EU's Emission Trading System to Aviation", *23 Eur. J. Int'l. L. 429*, 450-51 (2012).

12 Julien Chaisse, *Non-Trade Norms in WTO Litigation*, in Normer le Monde: L'énonciation des normes internationales 213 (Yves Schemeil& Wolf-Dieter Eberweineds., 2009).

13 The WTO DSB is established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU, Annex 2). This agreement provides for the establishment of panels and the Appellate Body to deal with disputes between members which both form the DSB. See JOHN H. JACKSON, Editorial Comments, AJIL 91 (1997), pp. 60, 60-4 (see for an extended version of this text AJIL 98 (2004), pp. 109-25) 183.

integration organisation, rooted in contemporary international law. In simple terms, the WTO's sophisticated dispute settlement mechanism makes it a distinctive organisation."[14] Its intrinsic dynamism has led WTO and its organs to judge matters of prime importance in sectors that seem to bear no relation to trade, but whose solution is essential for the natural expansion of its goals.[15] "[t]he WTO tends to attract legal issues which are located, by their nature, at the periphery of trade-related issues" and raises the issue of the delicate balance between equal treatment, trade liberalisation, and the pursuit of other legitimate policy goals, which balance has been part of the GATT regime since its origin.

Through the famous Article XX of the GATT,[16] the WTO system explicitly addresses deviations from key trade principles and from all provisions of the GATT 1994, in particular the deviation from the basic prohibition to operate quantitative import and export restrictions under Article XI.[17] As emphasised by Prof. Wang, the objective and purpose of the general exceptions are to maintain a balance of the right of any Member to invoke an exception - taking a measure inconsistent with the substantive provisions of another article - and the substantive rights of other Members. This is so because the application of any exception

[14] Pascal Lamy, "The Place of the WTO and Its Law in the International Legal Order", *17 Eur. J. Int'l L.* 969, 970 (2006). Indeed, the dispute settlement practice followed by WTO since 1995 shows that the purpose of judicial organs responsible for resolving disputes is a reminder of the legality rather than the protection of particular interests of the contracting governments. What the DSB does is to monitor legality at the international level. *See* Julien Chaisse & Debashis Chakraborty, "Implementing WTO Rules through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System", *28 U. Pa. J. Int'l L.* 153, 168 (2007).

[15] However, the WTO is at a disadvantage because all its decisions have to be taken by consensus which paralyses the progress of negotiations. "In light of the stagnating World Trade Organization ("WTO") negotiations, this article argues that WTO should not only focus on the development of new rules or the resolution of disputes, but should also develop 'soft law' on the basis of informal mechanisms as the successful experiences of the International Competition Network or the International Monetary Fund demonstrate. In this respect, WTO should extend and refine the role of its Trade Policy Review Mechanism (TPRM) in order to be able to address essential issues of contemporary economic concerns and, hence, remain at the centre of global governance." Julien Chaisse & Mitsuo Matsushita, "Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism", *16 J. Int'l Econ. L., 1, 1* (2013).

[16] For a comprehensive presentation of the GATT general exceptions, see Wang Guiguo, "Radiating Impact of WTO on its Members' Legal System: The Chinese Perspective", *Vol. 349 Hague Academy of International Law* (2010) 380-391.

[17] GATT, *supranote* 1465, at art. XI. It justifies deviations from rules, in particular, but not exclusively, from the principle of national treatment and from the prohibition of quantitative restrictions. Ibid. Similar deviations also exist under the GATS. *See* Bartels, *supra note* 1504, at 460-61.

means an erosion of the rights of other Members."[18]

In the practice of WTO law, Article XX of the GATT 1994 is one of the most important provisions which will require to present the general exceptions clause in light of more than a decade of jurisprudence to understand the likely application under investment treaties. This Section further details Article XX (1) and explains how it is applied in WTO litigation (2) while further details the specific circumstances in which it can be applied (3).

1. Anatomy of GATT Article XX

Article XX is composed of two distinct parts:

Firstly, it contains an enumeration of specific motives and conditions for restricting trade, listed in paragraphs (a) through (j). Not all of them are of equal practical importance. The critical provisions which are frequently invoked in practice - as WTO members have become increasingly concerned with environmental and human health issues as well as with the protection of intellectual property rights - refer to measures necessary to protect human, animal or plant life and health (paragraph b), measures necessary to secure compliance with laws relating to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices (paragraph d), and measures relating to the conservation of exhaustible natural resources (paragraph g). Moreover, protection of public morals is provided for (paragraph a). This latter paragraph may gain, along with banning imports from prison labour (paragraph e), increased importance in relation to the protection of human rights;

Secondly, Article XX contains a general provision, the so-called 'chapeau', which applies in addition to the specific motives.[19]

A similar structure can be found in Article XIV of the GATS, which provides for general exceptions in trade services. It is modelled on Article XX of the GATT 1994 and permits members to deviate from obligations set forth in the agreement and to adopt measures necessary to protect public morals (paragraph a), measures necessary to protect human, animal or plant life and health (paragraph b), and - different from Article

[18] Wang Guiguo, "Radiating Impact of WTO on its Members' Legal System: The Chinese Perspective", *Vol. 349 Hague Academy of International Law* (2010) 381.

[19] See GATT, *supranote* 1465, at Art XX.

XX of the GATT 1994 -measures necessary to prevent deceptive and fraudulent practices or to deal with the effect of a default on services contracts and measures necessary to protect privacy and confidentiality in connection with the transmission of data (paragraph c).[20]

Moreover, paragraph (e) refers to agreements on the avoidance of double taxation. Article XIV of the GATS also contains a chapeau that applies to all measures referred to in paragraphs (a) through (e).

2. A Three-Step Analysis

According to consistent GATT 1947 and WTO practice, the correct interpretation and application of Article XX of the GATT 1994 follows a three-step examination.[21] *Firstly*, it is to be determined whether the policy pursued by the member with the adoption of the measure in question falls within the range of policies and motives enumerated in paragraphs (a) through (j). *Secondly*, the measure, depending on the specific paragraph, needs to be either "necessary"[22] for or "relating to"[23] the pursuit of the policy. *Thirdly*, the measure needs to be applied in conformity with the "chapeau".[24]

The Appellate Body illustratively confirmed this three-step analysis in the *US - Import Prohibition of Certain Shrimp and Shrimp Products* case and stressed that the sequence of steps in the analysis of a claim of justification under Article XX reflects not inadvertence or random choice "but rather the fundamental structure and logic of Article XX". Subsequently, such an interpretation has been constantly reiterated as demonstrated by the 2012 Appellate Body ruling in *China - Measures Related to the Exportation of Various Raw Materials.*

3. The Protection of Health under Article XX

In State practice, the motives and policies relating to the protection of the environment and of human, plant, and animal health are of particular importance. In the following, we focus on Article XX paragraphs (b) and (g), which protect human, animal, or plant life or health and the conservation of exhaustible natural resources respectively,[25] with a view to explain the WTO approach to protection of health and national policy determinations under Article XX, the background against which Arbitral Tribunals would have to interpret and apply the incorporated general exceptions in investment treaties.[26]

The case *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*[27] gave an overview of the interpretation and application of

[20] General Agreement on Trade in Service, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art XIV, The Legal Texts: The Results of the Uruguay Round ot Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S 183, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].

[21] Xinjie Luan & Julien Chaisse, *Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade*, 22 Colo. J. Int'l Envtl. L. &Pol'y 79 (2011).

[22] In order to fall within the ambit of subparagraph (b) of Article XX, a measure must "necessary for the protection of human, animal or plant life or health." In *EC - Asbestos*, the Appellate Body was called upon to elaborate on the correct meaning and application of paragraph (b) of Article XX of the GATT 1994. After having determined that the French measure "protects human … life or health" within the meaning of Article XX(b), it turned to examine whether the measure was "necessary" for the protection of public health (*EC - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, 12 March 2001, WT/DS135/AB/R 443). This dispute marks the first decision under the WTO regime in which an otherwise inconsistent measure was found by a panel or the Appellate Body to be justified under Article XX(b) of the GATT 1994. The Appellate Body seized the opportunity to clarify, and to slightly refine, the findings of the panel in relation to the necessity test in Article XX(b). For more information, see Simon Lester, Bryan Mercurio and Arwel Davies, *WORLD TRADE LAW: TEXT MATERIALS AND COMMENTARY* (Hart Publishing, 2012) Chapter 9.

[23] In order to fall within the ambit of subparagraph (g) of Article XX, a measure must relate "to the conservation of exhaustible natural resources" The term "relat[e] to" is defined as "hav[ing] some connection with, be[ing] connected to." Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials,* ¶ 355, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter "Appellate Body Report, *China*"] (citing 2 Shorter Oxford English Dictionary 2519 (W.R. Trumble& A. Stevenson eds., 6th ed. Oxford University Press 2007)).

[24] "[T]he purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of … Article [XX].'" Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, 22 WT/DS2/AB/R (29 April 1996).

[25] This Chapter does not discuss the paragraph (a) which protects public morals and paragraph (d) which essentially deals with marketing regulations and intellectual property rights as these other paragraphs of Article XX of the GATT 1994 have gained less importance.

[26] For a comprehensive review of all the WTO cases dealing with tobacco products, see Chang-fa Lo, *supra* note 1463, at 266-68.

[27] The United States, a large tobacco producing country, campaigned to expand cigarette exports to make up for declining demand in the United States due to increased awareness of health/environmental risks associated with smoking. The US Cigarette Exporters Association (CEA) has targeted markets traditionally closed to foreign cigarette imports. The association, appealing through the office of the United States Trade Representative (USTR), alleged that the target countries' restrictive trade policies with respect to tobacco constitute unfair trade practices, which warrant the imposition of retaliatory sanctions. The US government appealed the case to the GATT and eventually Thailand was forced to open its cigarette import market in order to avoid US sanctions … The complaint alleged that Thailand's state-owned tobacco company (the Thailand Tobacco Monopoly) unfairly restricted imports and sales of foreign cigarettes.

Article XX(b) and (g) of the GATT 1994.[28]

During the course of the GATT proceedings, the United States argued inter alia that Thailand restrictions prohibiting cigarette imports were inconsistent to the GATT articles which prohibit quantitative restrictions and other forms of protection. The Thai government attempted to justify their ban on imported cigarettes under GATT Article XX. The government feared that the country's efforts to control smoking - and consequently smoking related illnesses - would be hindered by an increase in total cigarette sales that result from competition between domestic and imported cigarettes if the latter were allowed to be imported. It cited medical and scientific research which showed that cigarettes are unhealthy products that can cause cancer and numerous other smoking-related diseases.

The United States insisted that the Thai import restrictions constituted arbitrary or unjustifiable discrimination, or disguised restrictions on international trade - abuses of the Article XX health exception for protectionist purposes. The GATT panel concluded in favour of the United States. It noted that Thailand did not restrict domestic production and sales of cigarettes, and found that Thailand's ban was not "necessary" because other, non-discriminatory measures were available to control the quantity and quality of cigarettes for public health reasons. Prompted by this panel report, Thailand entered into an agreement with the United States whereby foreign cigarettes can now be imported freely into Thailand and will be accorded national, non-discriminatory treatment.

But the meaning and scope of Article XX(b) was again prominently discussed, together with Article XX(g), in the two cases relating to the importation of tuna.[29] These reports, both of which were not adopted, represented the first cases in which panels addressed the tense interrelation of the multilateral trading system under the GATT 1947 framework and the protection of the environment. These panel reports were of substantial catalysing effect but did not yet succeed in finding a consistent manner of interpreting and applying Article XX of the GATT to environmental issues.

It was only with the WTO and the establishment of the Appellate Body that a new approach towards Article XX(b) and (g) of the GATT was adopted. Earlier, in *US - Reformulated Gasoline*, the Appellate Body for the first time construed paragraph (g) and strictly applied the basic principle of interpretation as expressed in the Vienna Convention on the Law of Treaties (VCLT) that the words of a treaty, like the GATT and its Article XX, "are to be given their ordinary meaning, in their context and in the light of it."[30] The Appellate Body then turned to the phrase "if such measures are made effective in conjunction with restrictions on domestic production or consumption".[31] The Appellate Body relied on the fact that those rules were "promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources."[32] Even though Brazil and Venezuela had presented arguments suggesting that it was necessary that the purpose of the baseline establishment rules was to ensure the effectiveness of restrictions on domestic production, the Appellate Body did not consider this to be necessary.[33]

In particular, the Appellate Body did not consider that, in order to be justified under Article XX(g), measures "relating to the conservation of exhaustible natural resources" must be primarily aimed at rendering effective restrictions on domestic production or consumption. Instead, the Appellate Body read the terms "in conjunction with" and "quite plainly" as "together with" or "jointly with" and found no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption.[34]

In *EC-Asbestos*,[35] the Appellate Body was called upon to elaborate on the correct meaning and application of paragraph (b) of Article XX

Thai officials maintained that the prohibition of foreign cigarettes was a legitimate measure "necessary to protect the health of Thai citizens."

28 Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S200 (Oct. 5, 1990).

29 Panel Report, *United States - Restrictions on Imports of Tuna* DS21/R - 39S/155 (3 September 1991); Panel Report, *United States - Restrictions on Imports ofTuna*, DS29/R (16 June 1994).

30 Appellate Body Report, *supra* note 1519, at 17. For a detailed analysis of the Appellate Body's usage of the VCLT, see Bryan Mercurio and Mitali Tyagi, "Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements", 19(2) *Minnesota Journal of International Law* 275-326 (2010).

31 Ibid, at 19.

32 Ibid, at 20.

33 See ibid, at 20-21.

34 Ibid.

35 Appellate Body Report, *European Communities - Measures Affecting Asbestos - Containing Products*, WT/DS135/AB/R (12 March 2001).The dispute concerned the French prohibition of the manufacture, processing, sale, import, placing on the domestic market and transfer under any title of asbestos fibres and products containing them. See ibid, 1-2.

of the GATT 1994. After having determined that the French measure "protects human … life or health" within the meaning of Article XX(b), it turned to examine whether the measure was "necessary" for the protection of public health.[36]

This dispute marks the first decision under the WTO regime in which an otherwise inconsistent measure was found by a panel or the Appellate Body to be justified under Article XX(b) of the GATT 1994. The panel decided that chrysotile asbestos fibres and PCG fibres were like products but accepted the different treatment to be justified under Article XX of the GATT 1994.[37] The Appellate Body had justified differential treatment under Article III of the GATT 1994,[38] but it nevertheless seized the opportunity to clarify and slightly refine the findings of the panel in relation to the necessity test in Article XX(b).[39]

In essence, the Appellate Body reached two conclusions of fundamental significance with respect to the protection of health and national policy determinations which involve societal value judgments as to whether to accept a risk and, if not, what measure to select.

Firstly, it noted, "[I]t is undisputed that WTO members have the "right to determine the level of protection of health that they consider appropriate in a given situation."[40]

Secondly, the Appellate Body suggested that there may be divergent levels of scrutiny with which a panel needs to analyze whether

[36] Ibid, 164-75.

[37] See ibid, at 192.

[38] See ibid.

[39] The Appellate Body indicated that: "In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated. Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases." The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France. Ibid. ¶ 174 (citation omitted).

[40] Ibid, 168 (emphasis added).

a measure is "necessary" or not.[41] The degree of deference then could depend on the relative importance of the various objectives or interests at stake.[42]

Section Two. COUNTRY-SPECIFIC EXCEPTIONS

Investment agreements may also allow the parties to exclude certain economic activities from the agreements' core obligations. These exclusions may not necessarily respond to non-economic policy concerns, and may be well based on economic policy considerations. Country-specific reservations are common in FTAs with investment disciplines, as well as in BITs with pre-establishment obligations promoted by Canada and the US. Bilateral investment agreements concluded by other countries, instead, do not generally allow country-specific exceptions and all obligations of the agreements in principle apply to all economic activities.[43]

Country-specific exceptions entail the identification of two elements: the economic activity to be excluded, plus the nature of the non-conforming measures that apply to that activity. These elements can be recorded on a positive basis - identifying what is covered or allowed - or on a negative basis - identifying what is not covered or not allowed, - though hybrid approaches are also possible and indeed very common. The selection of the scheduling approach concerns one key architectural aspect of the agreements, as these techniques trigger different negotiating dynamics. Nonetheless, the structure and substantive content of the investment agreement is not altered by the choice of the scheduling technique. Indeed, the Singapore - India Comprehensive Economic Cooperation Agreement features both types of schedules, depending on the party concerned: Singapore's reservations are listed on a negative list basis, while India's commitments are inscribed on a hybrid schedule.[44]

[41] See ibid. 169-75.

[42] The 2007 *Brazil-Tyres* backs up Asbestos and uses a clear test when looking at necessity since the complaining party needs to identify possible alternatives. *Brazil - Measures Affecting Imports of Retreated Tyres*, WT/DS332/R 12 June 2007.

[43] This is the case for investment agreements concluded by China, with the exception of 'new generation' BITs that allow for the maintenance of existent discriminatory measures, as explained in section 4.b.i) above.

[44] See Singapore - India Comprehensive Economic Cooperation Agreement, Article 6.16:2, and Annexes 6A and 6B.

1. Negative List Agreements

A number of countries have adopted negative lists for reservations in regard to the investment disciplines in their FTAs. The negative lists model introduced by the NAFTA in 1994 has been implemented since then in all agreements signed by the US and Canada, as well as in all FTAs concluded by Japan, Korea, EFTA, Taiwan (China) and most agreements concluded by Chile, Mexico, Singapore, and Australia, *inter alia*.

Negative list agreements provide for *ab initio* universal coverage, while it rests upon the party to indicate the sectors and relevant measure they wish to exclude from the agreements' obligations. Negative list agreements modelled after the NAFTA require the parties to identify the economic activity, as well as the concerned obligations where they wish to maintain non-conforming measures.

Typically, negative reservations can be lodged in regard to only some obligations enshrined in the investment agreement - such as MFN, national treatment, performance requirements and key personnel. Provisions on fair and equitable treatment, expropriation, protection from strife, transfer of funds and investor-State dispute settlement procedures commonly apply across-the board, not being subject to country-specific reservations.

Countries are required to inscribe the existing non-conforming measures that they wish to maintain, as well as indicate the economic activity and nature of restriction that they may introduce after the entry into force of the agreement. Industries and measures not indicated in either these 'existing measures' or 'future measures' lists are bound by the agreements' obligations, and the maintenance or introduction of any non-listed non-conforming measure would imply a breach of the agreement.

Parties must indicate the details of the reservation they wish to maintain.

Agreements following the NAFTA typically require for the indication of:

- *the economic sector or specific industry in which the reservation is taken, and - where applicable - the activity covered by the reservation according to domestic industry classification codes;*
- *the obligation for which a reservation is taken (e. g. MFN treatment, national treatment, performance requirements, nationality requirements for boards of directors);*
- *the level of government applying the restrictive measure (e. g. federal; sub-federal, local);*
- *the law, regulation, or other legal instrument that embodies the restrictive together;*
- *a description of how the restrictive measures operates; and*
- *where applicable, liberalization commitments applying at the entry into force of the agreement, and the remaining non-conforming aspects of the measures, as well as phase-out commitments, if any.*

The indication of the specific details of each reservation enhances the transparency of the measures, as it allows interested actors to readily understand the restrictions that apply for foreign investment in any industry. Nonetheless, the compilation of this information may prove a burdensome task, since it demands a thorough scan of the whole regulatory system of the country.

Some agreements have sought to ease this task by keeping the required information at their minimum, that is, indicating solely the economic activity where the non-conforming measure applies, and the agreement's obligation affected by the concerned measure. Canada's BITs concluded during the second half of the 1990s and the Mercosur Colonia Protocol have followed this approach.[45]

2. Positive / Hybrid List Agreements

Liberalization undertakings can also be inscribed on a positive list basis, by signalling the obligations that apply in regard to certain industries. A 'pure positive' entails the express identification of the industries *and* the nature of the commitments.[46] Under this approach, the party would maintain the right to introduce any restrictive measures that is not positively commitment, even in listed sectors.

[45] See Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR ('Colonia Protocol'), Annex, Ad. Article 2, Paragraph 1, and Canada-Costa Rica BIT, Annex I. UNCTAD, 2006, explain

[46] Such a schedule would read, for instance: 'up to 100% foreign equity participation in car manufacturing industries is allowed' or, more broadly 'full national treatment for established investment in construction services industry'.

'Pure positive' list agreements are rare. China's Closer Economic Partnership Agreements with its Special Administrative Regions of Hong Kong and Macao feature these lists in regard to commitments in trade and investment in services, but no investment agreement has so far adopted this scheduling technique.

Some countries have resorted to 'hybrid lists', developed on the basis pf GATS schedules of commitments and adapted to investment agreements. This scheduling technique was first introduced by the European Community in its association agreement with Chile, and it is likely to be used in future FTAs of the Community.[47] Furthermore, Thailand has followed this model in its FTAs with Australia and New Zealand.

Like the GATS, 'hybrid list' agreements feature a positive list of economic activities - activities not listed fall out of the relevant agreement's disciplines. Further, once a sector is scheduled, parties are required to indicate the restrictions or commitments that they undertake for that particular industry. Parties may do so on a positive basis - indicating the precise liberalization commitments that apply-, or in a negative way - pointing out the restrictions that are maintained or may be adopted in that sector. By definition, hybrid schedules in investment agreements do not record commitments by modes of supply.

Furthermore, unlike the GATS, measures are not scheduled in regard to a specific provision, such as market access or national treatment. Rather the nature of the recorded measure determines to what obligations it applies.

These agreements allow to schedule only measures that affect the national treatment obligation - either in the pre-establishment or post-establishment phase.[48] All other provisions to the agreement - such as MFN, transfer of funds, or guarantees against expropriation - are general in scope and apply unconditionally to all economic sectors covered by the investment chapter.

[47] The European Community had previously negative list agreements in its 'Europe agreements' concluded with Easter European countries, actually acceded to the union.

[48] The language in Thailand - Australia FTA and Thailand - New Zealand CEPA suggests that the parties are required to indicate commitments in regard to pre-establishment on a hybrid list basis, while restrictions on post-establishment national treatment are to be inscribed on a negative list basis. Nonetheless, only New Zealand's schedule reflects this approach, while Thailand and New Zealand seem to have adopted a hybrid list to record non-conforming measures in regard to pre- and post- establishment. See Thailand - New Zealand CEPA, Articles 9.6 and 9.7, and Annexes 4.1 and 4.2; Thailand - Australia FTA, Articles 904 and 906, and Annex 8.

In essence, hybrid lists featured in investment agreements constitute a simplified, two-column (rather than four), version of GATS' schedules of commitments. A first column presents the economic activities that are subject to the agreement's main obligations, while a second column entitled 'reservations' or 'limitations' details the measures that apply to those industries. The sectoral coverage can be indicated at any level of aggregation and, where feasible, references to industry standard classifications may be introduced for greater clarity. Sectors not inscribed in the schedule are excluded from the relevant obligations - as in GATS' schedules of commitments.

Measures affecting national treatment can be inscribed in the form of positive commitments or, more commonly, non-conforming measures. Albeit not required, parties commonly indicate the laws and regulations that embody the restrictive measures for transparency purposes. Inscribed restrictions, however, do not necessarily pertain to existent measures, but may relate to sectors where the parties may wish to introduce restrictions in the future. The inscription 'no limitations' indicates that no non-conforming measures are maintained - nor will be introduced- in the listed sector.

Section Three. CUSTOMARY INTERNATIONAL LAW

When the treaties do not help reach the conclusion of transnational problems, the CIL comes into exercise. When treaties binding between the parties do not include explicit provisions, CIL will then be applied to seek for clarification. In fact, there are quite a number of cases in which CIL was used to reach conclusions.

There are two major doctrines under CIL related in this context, necessity and self-defence, are mostly used when dealing with national security concerns. These two doctrines are uncodified but recognized by the International Law Commission in its Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).

The principles are often included in treaties explicitly, so the legal cases will be considered according to CIL. The ILC Commentary Article 25 provides a framework on how the state can justify the use of security exception under a necessity defence of CIL. Two criteria have to be satisfied: the party who would like to invoke the defence must prove that the questioned measure is 'the only way' to protect its

essential interest, and 'does not seriously impair an essential interest' of 'the international community as a whole.'[49] To avoid any abuse, the ILC Commentary Article 25 strictly limits the conditions of using necessity defence, including national security. However, the inclusion of national security does not automatically mean that the issue concerns with necessity.

The phrase 'the international community as a whole' from the article means to prevent any corruption act so as to encourage an honest investment environment and protect the collective interest of every country. CIL cannot be used as a means to exclude any wrongfulness or as an excuse, because this will affect the collective interest which consequently results in political tensions and influences the global investment environment.

The case *Sempra Energy International v. the Argentine Republic* details how the CIL can be applied to decide whether the related security exception can be invoked. It illustrates that *firstly* the court would check if there is any violation of treaties by interpreting the terms literally. If the concerned treaties do not consist of any self-judging feature, the measures adopted will then be examined to see if the party is in need to invoke the exception.

Lastly, CIL will help define the scope of 'essential security' in this case under ILC Article 25. Therefore, it seems that the CIL acts as a last resort for the state party to justify its breach of obligation due to national security. Some scholars commented that '[t]he notion of necessity ascertained in the CIL is far more accurate than the definition of essential security interest.' This is because the ILC Commentary provides a clear framework on how to justify measures adopted under the necessity defence.

The related cases also further upheld the certainty of such framework. Apart from being used to interpret explicit national security provisions, CIL determines whether there is any implicit exception 'to permit states to respond to emergencies and to hostile actions by others.' Some treaties may not include an explicit provision about national security exemptions, but it is unreasonable that the states have no right on carrying out protective measures to safeguard its security. Hence, CIL can come into place and imply the use of a national security exception.

[49] Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts Draft Articles, Art. 25(1), U.N. Doc. A/56/49 (Vol. I) (Dec. 12, 2001).

It may seem that the CIL is like 'an umbrella for a broad-based, open-ended national security exception.' However, the limited conditions and reluctance of courts do not easily grant the use of necessity defence in relation to national security.

After its economic crisis, Argentina involved in various lawsuits with the United States. Its attempt to use necessity as a defence to its breaches of obligations under the US-Argentina BIT had been an issue to be solved. Also, to what extent an 'essential security interest' means is another question that the Argentine cases looked into. In *LG&E Corp, LG&E Capital Corp. and LG&E International Inc. v. the Argentine Republic*, the ICSID tribunal took CIL into account when construing the non-self-judging term 'essential security.' It held that Argentina encountered an 'extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace.' Therefore, Argentina was exempted from any compensation due to violations of the US-Argentina BIT.[50] In *Continental Casualty Co. v. Argentina*, the tribunal construed the meaning of 'essential security' and whether the measures adopted are 'necessary' in accordance with CIL. The decision illustrated that the CIL could not be used alone, but with the treaty language. Different treaties contain unique terms and are concluded in different languages, so the 'one size fits all' concept does not apply here.

Section Four. NATIONAL SECURITY EXCEPTION

There are two major types of IIAs to be discussed: bilateral investment treaties (BITs) and preferential trade agreements (PTAs). BITs are signed by two countries bilaterally; PTAs are multilateral and usually take forms of free trade agreements (FTAs).

One of the significant FTAs is North America Free Trade Agreement (NAFTA) concluded among North American countries. Since IIAs are signed among a number of countries, usually there are negotiations between parties before conclusion.

The IIAs are mostly customized based on the needs and conditions of the relative parties, so this increases transparency of regulations and restrictions. Hence IIAs protect both foreign investors and host countries more realistically. Such feature of IIAs helps promote and encourage FDI around the world.

[50] LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 46 ILM 36 (2006).

The IIAs also promote FDI by compromising on the dispute settlement mechanisms. *Firstly*, clearer definitions of investors in some BITs give predictability and certainty to foreign investors. This brings comfort to the foreign investors on how the IIAs protect them in case of disputes. *Also*, some BITs even contain clauses about state-state dispute resolutions with narrower scope. The interstate disputes provision with narrower scope but higher certainty not only encourages negotiations instead of arbitrations, but also allows to claim for damages due to any violation of IIAs. *Therefore*, the additional transparency, predictability and certainty achieved by customized features of IIAs and clear procedural dispute settlement mechanisms provided give more protection to either party. This helps investors to plan carefully and wisely to achieve higher return. Thus, IIAs help encourage FDIs.

The aim of IIAs is to promote trade liberalization among the countries. The clauses are based on the principles of most-favoured nation (MFN) or national treatment (NT). However, countries still have to be wary of any investments that may jeopardize the national safety. Therefore, most IIAs also explicitly include national security exceptions to ensure that the treaties protect themselves. However, the difficulty is how the parties strike balance between national security and MFN/NT obligations by control.

The following examples show their positions in the context of the exception under different situations.

- NAFTA is one of the most significant IIAs of all. It was signed by the United States, Canada and Mexico to promote trade liberalization. NAFTA contains an explicit national security exception under Article 2102. The provision construed is very similar to that of WTO law, GATT Article 10 and GATS Article 14*bis*. It is suggested that 'the explicit security provision in NAFTA gives parties considerable discretion in defining their national security interests.'The terms related to national security exception under NAFTA 'any actions that it considers necessary for the protection of its essential security interests'[51] suggests that the exception is 'self-judging', especially with the phrase 'it considers necessary'. It means when the host country suspects or believes that the foreign investment tends to be a threat against public interest, the government may reject or restrict such investment project under this exception in 'good faith'. Another provision from the NAFTA seems to suggest that the national security exception is self-judging. Article 1138 provides that if it is an action to restrict investments, the decision by the host party is not subject to any dispute settlement provision under the treaty. Some commented that 'if the Parties had agreed that Article 2102 were entirely self-judging, Article 1138 would not be necessary.'

[51] North American American Free Trade Agreement art. 2102 (b), Sept. 15 1993, 32 I.L.M. 289.

This agreement was signed by the United States and Singapore. It is worth studying in the context of SWFs and national security not only because recently Singapore has been active in making sovereign investments in foreign countries and is one of the most influential economies in Asia, but also the form of this BIT is quite significant and typical. Singapore has invested in several major financial institutions in the United States as well. The typical negative list approach is used under the USSFTA, meaning that the non-applicable service sectors are listed out in the Annex. The definition of 'investor' is clearly stated in the agreement under Article 15.1, which does not exclude a SWF as a type of investor.

The most concerned section is Chapter 15 (Investment) in the context of SWFs. Similar to other BITs, the USSFTA also contains provisions related to MFN, NT, and national security exception regarding expropriation and compensation etc in this chapter. The chapter raises an issue regarding the national security exception. Most BITs and FTAs that the U.S. has entered into are drafted based on the language from the Treaty in Friendship, Commerce and Navigation (FCNs) or US Model BIT 2004. These two treaties use the phrase 'essential security' instead of 'national security' used in the Foreign Investment and National Security Act (FINSA), which regulates foreign investments in the United States.

The question is whether the BITs or FTAs can be relied on when it comes to investment disputes. The phrase 'essential security' used under the USSFTA Article 21.2 is referred to the GATT Article 10 and GATS Article 14*bis*. However, the ambiguous scope and meaning of this term under the WTO law as mentioned above does not give sufficient assistance in interpretation and clarification. Such reference only cycles the issue of uncertainty and lack of certainty of the term back to the original starting point. Another question is about remedies after the prohibition or restriction is made against SWFs. It has been argued that the IIAs only focus on the post-establishment remedies.

Cases are very useful in filling in the gaps of uncertainty of any IIA provisions regarding national security exception in order to predict the outcome while making investment decisions. As discussed above, the

phrases like 'essential security' or 'national security' are too broad and not conclusive enough. This results in investment disputes which may lead to lawsuits. This section will study some significant cases which give more guidelines on how to interpret the IIAs.

The Argentine Cases

After the Argentine economic crises in 2002, Argentina was involved in a series of lawsuits. The most significant dispute dealing with the national security exception was between Argentina and the U.S. Like most recent BITs, the Argentine-US BIT allows state-state dispute settlement concerning national security exception.

The BIT does contain a security exception provision with the use of phrase 'the protection of its own essential security interests.'[52] In one of the cases, it was held that major economic emergencies are considered as the 'essential security interests.'[53] So, *prima facie*, Argentina could invoke the exception. However, the court continued to express that the article is not self-judging.

The decision clearly shows that the court is reluctant to let the states determine whether they can invoke the exceptions. The judgment also provides a framework that when either party would like to justify its breach of obligations based on the exception of the BIT, one should show the relationship between the measures adopted and the 'resolution of the crisis.'

The Argentine cases provide directions on how the decision would likely to be held which increases certainty. The decisions give more clarifications on how to interpret the security exception provision of a BIT with the key terms being unclear. The case law provided lessons to the states for clearer terms and has assisted the countries in negotiating and concluding new BITs.

After the Argentine case, the US had updated its treaty language based on the U.S. Model BIT. The US has ensured the exception is self-judging for them to invoke easily. Therefore, the claims actually fill in the existing gap and help further better the investment law and promote sovereign investments.

52 Argentina Bilateral Investment Treaty art. 14, Nov. 14, 1991.

53 *CMS Gas Transmission Company v. The Republic of Argentina (CMS v. Argentina)*, ICSID Case No. ARB/01/8, Award 12, 109 (May 2005).

Section Five. TAX EXCEPTIONS

The substantive clauses within the international investment treaties and the international tax treaties are different although they share one common feature, namely, non-discrimination. This is because the purpose of international tax treaties and international investment treaties is not the same. The main purpose of international tax treaties is "to deal with issues arising out of the allocation of revenue between countries" while the purpose of international investment treaties, particularly BITs, is to "protect the investments that generate those revenues" and to prevent them from being abused by the host country. Therefore, the international investment regime offers a larger scope of protection to investment. The better protection of taxpayer/investor's rights from the substantive clauses provided by the international investment treaties and the BITs is one of the reasons why foreign investors have brought the claims based on the BITs instead of the international tax treaties.[54]

The main purpose of international tax treaties is "to deal with issues arising out of the allocation of revenue between countries".[55] It is understood that international tax treaties are agreements between states; they serve several goals, including the anti-double taxation over cross-border investment, prevention of excessive taxation, avoidance of tax evasion, cooperation in tax administrations, and the exchange of information.

One very important reason why international investment treaties are continuing to replace the international tax treaties for tax disputes is because offer more substantive clauses to better protect the taxpayers/investors with regard to their rights of investment.

The substantive clauses include the MFN, NT, FET, guarantees and compensation in respect of expropriation, FPS and dispute settlement provisions through recourse to international arbitration, subject to exceptions. Compared to the non-discrimination provisions under the international tax law regime, which can refer as NT, the MFN, FET, compensation in respect of expropriation, transfer provisions, and FPS have been missed.

Some have commented that number of BITs has carved out the taxation measures or given priority in international tax treaties is *lex*

54 See generally Federico Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges', *E15 Task Force on Investment Policy*, June 15.

55 *Ibid*.

specialis. BITs apply only under certain exceptions, such as expropriation. For example, Article 3 of the Korea - Uruguay BIT mentions that MFN and NT do not apply to tax measures. However, the exclusion is not absolute because these tax measures have not been defined, as to whether they include only direct tax or also the stamp duty, import tax, tax on capital gains, etc.

The treaties are silent on this point. Also, the matter of tax may also be the matter of investment law (See Table 5 for an overview of tax exceptions diversity).

TABLE 5. Typology of Tax Exception in Investment Treaties

Type of exclusion	Examples	Legal effect
General exclusion	Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments (1995): Article 8:2 "The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties."	Such a provision excludes tax matters from the treaty scope of application without any reservation. It is impossible to bring a tax-related disputes before an investment tribunal on the ground of such a treaty.
Conflict clauses in favour of tax treaties application	Agreement between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investments (2000) Article 3:3 "Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any tax convention. In the event of any inconsistency between the provisions of this Agreement and any tax convention, the provisions of the latter shall prevail."	A clause providing priority of taxation treaties over the investment treaty can clarify that investment treaties still applies to taxation, but to the extent that is covered by taxation treaties, the latter shall prevail.
Specific and explicit exclusion based on the distinction between the type of taxes (direct and indirect taxes)	Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (2005) Article 21: Taxation "2. Subject to paragraph 7, Article 3 and Article 4 shall apply to all taxation measures, other than taxation measures relating to direct taxes (which, for purposes of this paragraph, are taxation measures on income, capital gains, or on the taxable capital of corporations or individuals, taxes on estates, inheritances, gifts, and generation-skipping transfers), except that nothing in those Articles shall apply: (a) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention; (b) to a non-conforming provision of any existing taxation measure; (c) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure; (d) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with those Articles […]"	This type of provision restricts treaty application to limited types of taxes. It is also noteworthy to mention that few investment treaties introduce such a distinction which indirectly clarifies the meaning of taxation measure.
Tax veto to expropriation case	Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (2009) Article VII:4 : "Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation."	Investment treaties can grant the national tax authorities the competence to 'veto' a complaint by an investor alleging expropriation arising from a taxation measure by the host state.

Specific and explicit exclusion to the non-discrimination standards (NT and/or MFN standards)	Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (2006): Article 5: "Article 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: […] (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any international agreement or arrangement relating wholly or mainly to taxation to which either Contracting Party is a party. In the event of any inconsistency between the provisions of this Agreement and any such agreement or arrangement, the provisions of the latter shall prevail."	Such a provision excludes the application of both NT and MFN from treatments resulting from 'any matter' related to taxation
Specific and explicit exclusion to fair and equitable treatment	NAFTA (1995) Article 2103(1) stipulates that '[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures'. […] 'Articles 1102 and 1103 [i.e. NT and MFN] […] shall apply to all taxation measures,' and 'Article 1106(3), (4) and (5) [i.e. Performance Requirements] shall apply to taxation measures.'	In this connection, since there is no explicit reference to FET, the tax measures are excluded from consideration in the context of Article 1105. Treaties can also exclude the application of the obligation of fair and equitable treatment on taxation measures.

Combination of diverse exceptions within exclusion	Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (2009) Article VII (Taxation Measures) "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency. Subject to paragraph 2, a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that the measure does not contravene such agreement. Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs 3 and 4 within six months after being notified, the investor may submit its claim for resolution under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party)."	All types of exclusion do not preclude each other. In fact, some IIAs combine several exceptions within the exclusion, resulting in a complex structure, which requires careful scrutiny to identify the scope of application.

Source: compiled by the author

The carve-out clause does not mean carving out everything related to tax measures and the purpose of the carving-out clause is to ensure that the host state retains its sovereignty to determine its tax policy. This would not exclude the administration of taxation *e.g.*, lack of due process. This is affirmed in *Hulley v. Russia*, where the tribunal ruled that "the "taxation measures" carve-out should not be broad and that the expropriatory 'taxes' claw-back was narrow under the Energy Charter Treaty 1994: assuming the taxation measures carve-out applied, the tribunal concluded that any measures carved out would be within the scope of the expropriation claw-back."[56]

Therefore, this case has decided that the carving-out provision should be narrowly construed; if it is a matter affecting the policy setting as a sovereignty, then it should be carved out. However, if the tax measures are outside that scope, it should not be carved out. Also, one vital point of carving-out is that it should be done in *bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the state.[57] If the actions taken are only under the guise of taxation, it should not be carved out.[58]

Therefore, unless it is under *bona fide* taxation actions or unless it affects the tax policy formation, the substantive clauses, namely, MFN, NT, FET, FPS and compensation to expropriation, are generally not able to be carved out just by stating it in the BITs or international investment treaties.

From the research on cases related to tax disputes lost by states, it is found that taxpayers/ investors make their tax measure claims through the BITs or international investment treaties because of two reasons, either the BITs or the international investment treaties provide a better protection or they are the only available options because no bilateral tax treaties or international tax treaties have been concluded between the two parties.

One notable recent pending case on ICSID is that it explicitly mentions that even there is a bilateral tax treaty in place between Republic of Korea and United Arab Emirates (UAE) because the issue is that the

[56] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Award (18 July, 2014).

[57] *Ibid*.

[58] *Ibid*.

Korean National Tax Service has the discretion to withhold 10% of sales tax from the UAE's company, there is nothing can be done under the bilateral tax treaty for the sales tax is unrelated to the double tax issue and so the case is going through the bilateral investment treaty.[59]

There are other cases claimed under the BITs or international investment treaties even where there are bilateral tax treaties in place. In *Feldman v. Mexico*, the US - Mexico Income Tax Convention is in place but the claimant filed the claims on ICSID and the tribunal ruled that Mexico violated NT when imposing the excise tax on cigarettes and customs when exporting cigarettes. Another example is *Ros Invest Co v. Russia*, where the UK-USSR Bilateral Tax Treaties[60] was also in place; however, the claimant took the UK-USSR BIT as the foundation and was awarded for the expropriation on tax evasion investigations and privatization in the oil industry. This is the same as in *Mobil v. Venezula*w here a bilateral tax treaty is in place, but the claim was based on the BITs on indirect expropriation for the increase of the income tax rate.[61]

SUMMARY OF THE CHAPTER EIGHT

The international investment agreement (IIA) regime is experiencing an unprecedented surge in public attention. One of civil society's key concerns is that IIAs unduly restrict the host states' right to regulate in the public interest. The problem is not new, but results from the growing complexity of investment disputes. While the initial focus of IIAs was the protection against unlawful expropriations, foreign investors nowadays use IIAs to challenge a broad range of host states' regulatory policies, including in the spheres of environment or public health. Arbitrators increasingly decide not only on the legal dimension of a dispute, but also on the broader policy rationales of state measures. This gives rise to questions regarding both the expertise and the mandate of arbitrators to assess public policies. Aggravating the problem, some tribunals have considered public interest justifications put forward by host states,

[59] Dini Sejko, *IPIC, The First SWF To File An ICSID Claim,* 2015 at http://statecontrolledentities.com/2015/05/25/ipic-the-first-swf-to-file-an-icsid-claim/

[60] *Convention Between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The Union of Soviet Socialist Republics For the Avoidance of Double Taxation with respect to Taxes on Income and Capital Gains,* (1985) at https://www.gov.uk/government/publications/ussr-tax-treaties-in-force (31 July, 1985).

[61] *Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holding, Ltd., Mobil Corporation, Mobil Venezolana de PetrÛleos Holdings, Inc., Mobil Venezolana de PetrÛleos, Inc., Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award (9 October, 2014).

while others adopt a purely economic point of view. In addition to tax exceptions, national security exceptions and country-specific exceptions which rather have a narrow scope of application, IIAs may also include general exceptions inspired from WTO law. This chapter discussed the interaction of "general exceptions" clauses, such as GATT Article XX, with public interest objectives. In the WTO context, Article XX has served as a last resort stopgap measure, not as a proactive environmental or health policy instrument. This type of clause puts the burden of proof on the party accused of violating non-discrimination principles, and success with using the Article in the GATT has not been high. While in art XX fitting into one of the enumerated settings has not been hard, meeting the "good faith" clause of the chapeau has not been easy. It seems to have caught many arbitrary and disguised restrictions on trade. In the practice of the WTO law, GATT Article XX plays a tremendous role in WTO litigation to balance free trade requirements and other public policy goals, such as health, which is a source of inspiration for international investment treaties, but does not seem to be the ideal tool to ensure that domestic rules and practices do not violate investment treaty commitments.

QUESTIONS (PREPARATION AND CLASS DISCUSSION)

1) Should states make treaty exceptions "self-judging"?
2) Are self-judging treaty exceptions still subject to principles of "good faith"?
3) Read The Argentine Cases.

READINGS

1. Andrea K. Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure', in *Oxford Handbook of International Investment Law* 459; 460-64; 507-16 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).
2. Jürgen Kurtz, 'Adjudging the Exceptional at International Law: Security', Public Order and Financial Crisis, 59 Int'l & Comp. L. Q. 325, 359-71 (2010).
3. José Alvarez & Kathryn Khamsi, The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime, 1 YB Int'l Investment L & Policy 379, 449-460 (2009).
4. Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures', *79 Brit. Y.B. Int'l L.* 264, 331-345 (2008).
5. *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), 101-50
6. *National Grid PLC v. Argentina*, UNCITRAL (Award) (3 Nov. 2008), 250-262.
7. *LG&E v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), 201-14; 226-66
8. *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case ARB(AF)/04/06 (Award) (21 November 2007), 168-180
9. *Corn Products Int'l v. Mexico*, ICSID Case ARB (AF)/04/01 (Decision on Responsibility) (15 January 2008), 161-192.
10. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 1171-1244 (Kluwer 2005).
11. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law 166-171* (Oxford 2008).

12. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, at 1138.5 - 1138.12 (Kluwer 2006; last updated 2009).

13. Andrew Newcombe &LluisParadell, *The Law and Practice of Investment Treaties* 481-528 (Kluwer 2008).

14. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Int'l L. 151 (2003)

15. Andrea K. Bjorklund, *Private Rights v. Public International Law: Why Competition Among International Courts and Tribunals Is Not Working,* 59 Hastings L. J. 241 (2007).

16. Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty*, 16 N.Y.U. J. Int'l L. & Pol. 1 (1983).

17. Julien Chaisse, *Intellectual Property Rights, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Int'l Bus. L.J. 225 (2015).

18. Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation*, 10 Asian J. WTO & Int'l Health L. &Pol'y 193(2015).

PART THREE
INVESTOR-STATE CONTRACTS

CHAPTER NINE. INVESTOR-STATE CONTRACTS

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INVESTOR-STATE CONTRACTS

Learning Objectives Chapter Nine
• Introduction of the concept of Investor-State Contract; • Discussion on some specific Investor-State Contracts; • Assessment of the role of some important clauses in Investor-State Contract; • Discussion on the specificities of contract-based investment claims; some case studies.

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Contracts between the foreign investor and the government of the host country has many names, such as international investment contracts, State contracts, government agreements, ... hereinafter referred to as Investor-State Contracts. In recent years, Investor-State Contracts plays an important role in the development of infrastructure, industrial and agricultural production facilities in countries, especially DCs such as Viet Nam. These projects require large amounts of capital, long repayment period and the Government of Viet Nam's budget is not enough to invest. Investor-State Contracts contributes to improve the economic potential of the host countries, and attract investment flows and high technology from the developed countries, while exploiting the human and natural resources of the country. In addition, the successful signing and implementation of Investor-State Contracts also contribute greatly to multilateral relations, contributing to the strengthening of trade relations among nations; mobilizing capital from the private sector; promoting and increasing public revenue to finance and carry out projects funded by the State; reducing the burden of overspending on the State budget; at the same time creating an effective mechanism for private investment to serve the public interest.

Investor-State contracts are an important instrument for realising foreign investments. The mixture of public and private law, international and domestic law present in these contracts raises a number of interesting legal questions.

Chapter Nine will focus on the following issues:

Firstly, the concept of Investor-State Contract;

Secondly, some specific Investor-State Contracts;

Thirdly, some important clauses in Investor-State Contract;

Fourthly, the specificities of contract-based investment claims.

Section One. **CONCEPT OF INVESTOR-STATE CONTRACT**

1. Definition

According to UNCTAD, the Investor-State Contract is a 'contract concluded between a government or a government entity [...] with a foreign country or a foreign legal entity'.[1] Another view is that this type of contract is 'a contract concluded between a government or a government entity assigned to operate a State-owned monopoly and a foreign entity, to establish a long-term economic relationship with the government or government entities in the economic field'.[2] According to Nguyen Minh Hang, 'the Investor-State Contract is an agreement between a competent State agency and a foreign investor to create, change and terminate the rights and obligations related to the investment in the construction, operation and transfer of infrastructure works'.[3]

An Investor-State Contract is a legal agreement between an investor (often a foreign investor) and a governmental entity that defines the responsibilities of each party, typically with respect to the development, construction and operation of a project by the investor. They are particularly common for large agricultural projects, large infrastructure projects (to construct roads, railways, ports, official buildings, dams, etc.), and exploration and exploitation of natural resources (oil, gas, minerals, water, forestry resources). The contracts for extractive projects often take the form of a license, concession, or production-sharing agreement granting exploration and/or production rights.

Accordingly, the Investor-State Contract has the following basic characteristics:

Firstly, the contracting parties are foreign investors and the government of the host country.

Regarding the concept of 'foreign investor', please see Chapter One, Section three, Sub-section four (Concept of 'investor').

The government of the host country includes central government agencies (such as ministries, ministerial equivalent bodies), local government agencies, State-owed enterprises (in accordance with national law).

Secondly, the content of the contract relates to social concerns, infrastructure, promotion of economic development or special services,

[1] UNCTAD, *Series on Issues in International Investment Agreements, State Contracts* (2004), p. 13.

[2] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), p. 16.

[3] Nguyen Minh Hang, Foreign Trade University (FTU), *Textbook on International Business Law*, p. 410, National University Publishing House, Hanoi, (2010).

such as loan contracts, labor contracts, or large infrastructure projects such as highway construction, port or dam. One of the most popular forms of this type of contract is the concession contract relating to natural resource exploitation.

Thirdly, the duration of the contract usually lasts very long.

Fourthly, this is a type of unexpectedly risky contract.

2. Legal Nature of the Investor-State Contract

Foreign investors always emphasize the 'commercial' aspect of the contract and consider the contract as 'the supreme law'. It can be said, the Investor-State Contract is considered a 'legal document' to protect foreign investment. However, contrary to that view, the government of the host country is concerned about the 'public' nature of the contract, considering the Investor-State Contract as a 'State contract', a 'non-commercial' contract, and this is a 'special' contract, in which one party of the contract - the government - has the jurisdictional immunity.

In addition, the fact that both international law and domestic law of the host country involved in regulating the Investor-State Contract makes this type of contract very complexed in the legal consideration.

Section Two. SOME SPECIFIC INVESTOR-STATE CONTRACTS[4]

Investor-State Contracts have a long history. They range from early concession contracts dealing with exploitation of mineral resources to contemporary contractual arrangements such as service agreements.

1. Traditional Investor-State Contracts

The traditional Investor-State Contracts were called 'concession contracts'. The basic content of the contract was to empower foreign investors to explore and exploit natural resources in large territories.[5] This type of contract usually had a term of up to 100 years. Foreign companies seemed to have huge power in the area of concession, *for example*, establishing and maintaining an infrastructure, building a hospital or school, or building and managing ports. The role of foreign companies was the same as the 'inner government' of the sector in which the host country has almost delegated power to foreign companies. This type of contract impacted to the power of local government, and can not be regarded as 'equal contract'.[6] Western companies at the time were benefiting from the lack of experience of DCs and LDCs. Today, the number of concession contracts for natural resource exploitation has fallen sharply, as the parties to the contract renegotiate, or by the nationalization done by the host government.

2. Some Contemporain Investor-State Contracts

Many contemporain Investor-State Contracts still bear the name of 'concession contracts', but in addition to the content related to natural resource exploitation, they also carry modern contents, such as infrastructure development, provision of public services. There are many types of Investor-State Contracts as below, however it is difficult to see the absolute differences of these types of contracts.

A. *Contemporain Concession Contracts Related to Natural Resource Exploitation*

This is the contract whereby the host country gives the right to explore and exploit natural resources for foreign investors, in return for receiving a fixed interest, making the economic interests of the parties more balanced. Host government control over the operation of foreign companies has increased. Contract term is now shorter. The concession territories are smaller. The benefits of the host country are increased and diversified. Previous mining leases, now replaced by a tax system, product sharing and natural resource extraction fees. One of the most popular contracts is contracts for oil and gas exploration.

B. Product Sharing Agreement (PSA)

PSA is usually applied in the oil and gas sector, so it can be considered as a 'legal successor' of the traditional concesstion contracts granting the exploitation of natural resources.[7] This type of contract is concluded by the foreign investor and the host government, or by State-owed oil companies.

[4] Nguyen Kim Anh, Dissertation, 2015; and Vu Hong Uyen, Dissertation, 2015

[5] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), p. 18.

[6] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), p. 18.

[7] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter ne, (2010), p. 21.

The basic contents of this contract are that foreign companies are granted the right to explore and exploit natural resources, but after a fixed period of time, the operation is handed over to the host government. This type of contract also contains risks for foreign investors.

C. Concession Contracts

This is the type of Investor-State Contracts in which the investor is granted the right to exploit the infrastructure works or to provide public services. There are two types of contracts: Infrastructure Concession Contracts and Public Service Concession Contracts (*e.g.* energy, water and waste treatment).[8]

The basic contents of this type of contract is that the host country has almost no interference in the decisions of the investor (the contractor). Contractors are free to make economic, technical and technological decisions related to the exploitation of resources in the concession area. The contractor shall report to the host government through the accounting system for all revenues and expenditures.

D. Turnkey Contracts

Generally, this type of contract involves large projects in areas where the host country is inexperienced. Accordingly, the foreign company is obliged to deal with an infrastructure work until the construction is completed and ready for operation. Normally, after completion of the works, the parties will sign a technical support contract to replace this type of contract.

E. Public-Private Partnership Contract (PPP)[9]

During the 1990s, the term PPP was not much used. Therefore, unsurprisingly, there are views that the PPP phenomenon is somehow new. In reality, the term may be new, but the contents are not very new. *For example*, concessions under which the Government delegates construction and management of public works to private providers were deployed in France in the 17th century. In many parts of the world, early infrastructure projects were built and operated by the private sector under contracts that could today be called PPP. Examples are Thai and Japanese railways and French water systems.[10] It is the same in Viet Nam to some extent. Even though some forms of PPP have been introduced in Viet Nam since late 1990s (BOT contracts for example), the term was not officially used in legislation until 2014 (in the Law on Investment of 2014). The legal framework for PPP Projects came out even later than that.

Currently, the term PPP does not have a globally accepted definition and each jurisdiction has its own way to define PPP. In common understanding, PPP is known as a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.[11]

Referring from the definition above, there are various types of PPP contracts which can be described in different ways with no international standard. Different jurisdictions use different nomenclatures to describe PPP projects.

Viet Nam's Law on Investment of 2014 has officially recognized PPP as a form of investment. Decree No. 15/2015/ND-CP on Public-Private Partnership Investment Form (hereinafter Decree 15) has built the general legal framework for PPP.

Under Article 3.8 of the Law on Investment of 2014, the PPP contract is 'a contract concluded by a competent State agency and an investor or project enterprise for the implementation of an investment project'.

Article 3.1 of the Decree 15 defines 'Public-private partnership investment form' as

> An investment form to be implemented based on a contract between an authorized State agency and (an) investor(s) and the project enterprise to implement, manage and operate an infrastructure project and to provide public services.

In general, this definition does not differ much from the common understanding of PPP. Besides BOT, BTO and BT contracts, Decree 15 introduces and regulates new contract types, such as Build-Own-Operate (BOO), Build-Transfer-Lease (BTL), Build-Lease-Transfer (BLT)

[8] J. Luis Guasch, World Bank WBI Development Studies, *Granting and Renegotiating Infrastructure Concessions Doing It Right*, p. 27, (2004).

[9] Dang Thu Thuy, Dissertation, 2016.

[10] Michael Klein, *Public-Private Partnership, Promise and Hype.*

[11] World Bank, ADB, IDB, *Public-Private Partnerships Reference Guide*, https://library.pppknowledgelab.org/Knowledge%20Lab/documents/2490/download

and O&M contracts.

In conclusion, PPP can be described as a long-term contract or an investment form between a public partner and a private partner. It can offer solutions to problems which traditional public procurement contracts are not able to solve. However, PPPs have certain limitations. If the regulation is not appropriate, problems including fiscal risks, distortion of investment priorities and failure of PPP implementation may arise. Therefore, a country needs to put serious considerations into drafting the legal framework for PPP. In Viet Nam, the legal framework for PPP contracts, which is made up by Decree 15 and Decree 30, has just come into effect not so long ago. These two decrees are an upgrade of the previous regime for BOT, BTO and BT contracts, which has widen the applicable scope of PPP and provided new regulations on capital resources, PPP project cycle investment guarantees and regulatory bodies. However, the regulation of PPP in Viet Nam still needs further improvements.

Section Three. SOME IMPORTANT CLAUSES IN INVESTOR-STATE CONTRACT[12]

1. Stabilization Clause[13]

Over some past decades, the insert of stabilization clauses in the Investor-State Contracts became a common demand of investors when they invest into DCs. These clauses essentially limit the ability of governments to pass and apply new regulations which make disadvantages to a foreign investor. With respect to the scope of stabilization clauses, two broad categories were identified: fiscal issues (taxes, royalties, rents, rates of payment for services provided, etc. paid to the government or by end users) and non-fiscal regulatory areas, such as environment, labour, health and safety.

A. *The Content of Stabilization Clauses*

Stabilization clauses are stated in the Investor-State Contract whereby the host government undertakes not to amend the law in a way that adversely affects the rights and interests of foreign investors in accordance with the contract.

For example: The Contract on the exploitation and exploration of natural resource betweem LIAMCO Company and Libyan (in *LIAMCO v. Libya*) stipulates stabilization clauses as follows:

> (1) The Government of Libya, Commission and the relevant provincial agencies shall take all necessary steps to ensure that the Company is entitled to all rights set out in the exploration and exploitation contract. Contractual rights created explicitly by the Contract for exploitation and exploration of natural resources shall not be modified, unless agreed by the parties.
>
> (2) Contract for the exploitation and exploration of natural resource during the period of validity under the Petroleum Law and the Regulations shall be effective from the date of implementation of the amended Agreement whereby [paragraph (2)] is included in the Contract for exploitation and exploration of natural resource. Any amendment or repeal of these regulations shall not affect the Company's contractual rights.

The first paragraph clearly states that it is necessary to have the consent of both parties, if the contractual rights guaranteed by the contract for exploitation and exploration of natural resource need to be amended. The second paragraph states that the national law to which the contract refers is stable over a certain period of time, so that no subsequent national legislation may violate the Company's contractual rights.

The key element of the stabilization clauses is the removal of the host government's unilateral right to change domestic law. This confirms that the consent of the investor is necessary before any legal changes affect the investor.

The purpose of the stabilization clauses is to stabilize the terms and conditions of an investment project, thereby contributing to the management of non-commercial risks. Recently, the use of stabilization clauses has been largely limited to investment projects in low- and middle-income countries. Stabilization clauses are prevalent in contracts involving major natural resource, energy and infrastructure projects, which require large capital resource in the project investment period

[12] Nguyen Kim Anh, Dissertation, 2015; and Vu Hong Uyen, Dissertation, 2015.

[13] 'Chapter Ten: Respect for Human Rights in Investor-State Relationships', *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships*, p. 129; Howard Mann, 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' in *Special Issue: Investor-State Contracts and Sustainable Development*, Issue 1, Volume 2, October 2011, Investment Treaty New, p. 6-8.

and take a long time before the project is profitable.

B. Some Various Forms of Stabilization Clauses

1. 'Freezing' Clauses

Under this clause, the applicable law will be 'frozen' - stable on the day where the contract is concluded and applied during the duration of the contract.[14] This means:

- The host country agrees that any legal changes issued after the date of concluding the contract shall not apply to that contract.
- If there is a conflict between the terms of the contract and any new legal rules, the conflicting elements of the new rules shall not apply to the contract.

For example: In 1998, COTCO Company and the Government of Cameroon concluded a contract for the construction and operation of the Chad-Cameroon oil pipeline that mentions the 'freezing' and 'consistant' clauses (see *5* below), under which the Government of Cameroon will 'not amend the law, tax and exchange management system to adversely affect the rights and obligations of COTCO Company' and shall not apply to any lawmaking project or administrative management measure which is inconsistent with the contract (Articles 24 and 30).[15]

There are two types of 'freezing' clauses: 'full freezing' and 'limited freezing' clauses. Accordingly, 'full freezing' clauses mean that the whole legal system will be stabilized, usually during the investment project period. 'Limited freezing' clauses are to protect investors from the legal restrictions. Although these clauses aim to 'freeze' the host government's rights to regulate some issues of the contract, it does not guarantee against the inherent sovereignty rights of the government entity in matters related to the important interests of the country. These clauses are often used in some areas and becoming more common in the mining exploration sector.

2. 'Economic Equilibrium' Clauses

[14] Prof. Dr. Nathalie Voser, Panel V, *Stabilization and/or Renegotiation Agreements Renegotiation Clauses in Long Term Energy, Arbitration of Energy Disputes: New Challenges*, p. 4.

[15] Lorenzo Cotula, 'Foreign Investment Contracts', *International Institute for Environment and Development*, iied, p. 3.

This is a type of modern stabilization clause, replacing the 'freezing' clauses, in which there is a change in the terms of the contract, to renegotiate the contract, to restore its original economic equilibrium or to compensate.

The positive point of these clauses are that it contributes to stabilize the relationship between the host government and the foreign investor. Many also argue that the two tools of economic equilibrium and negotiation help maintain peace when there is a conflict between the laws of the host country and the expectation of foreign investors in which it is possible that these conflicts would lead to conflict and break the contract.

An *example* related to this clause is Article 17.1 - Product Sharing Agreement of Viet Nam of 2004:

> If, after the date of concluding the contract, there is any amendment or cancellation of applicable laws and regulations as well as the promulgation of laws and regulations issued by Viet Nam ... in any case any adverse effect on the economic rights or expectation of the parties to this Agreement ..., the parties must rapidly meet and discuss with each other and make changes to the contract, if necessary for both parties, to maintain the rights and interests of the parties in the contract below and to ensure that any interest, income or profit generated directly or indirectly from this Agreement shall not be reduced as a result of legal change.[16]

In 2003, an International Project Agreement (IPA) was concluded between a party including the Benin, Ghana, Nigeria and Tongo, and another party which is the West African Gas Pipeline Company, on the construction and operation of the West African Gas Pipeline (WAGP), which provides for an 'economic equilibrium' clause. Under this clause, if a change of law (including law, court decisions and international treaties) is 'having a decisive influence on the Company' or the reputation of the Company is substantially reduced with the shareholders, the State must 'restore' the Company and/or shareholders, or a similar economic position. By default, it must be compensated 'quickly, fully and effectively'.

The 'economic equilibrium' clauses also include two types: 'full economic equilibrium' and 'limited economic equilibrium'. Accordingly,

[16] Abdullah Faruque, *Validity and Efficacy of Stabilization Clauses - Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No. 4, p. 317-336, (2006), p. 320.

the 'full economic equilibrium' clauses are described in the contract as protection against the change of law relating to finance. This 'full economic equilibrium' clause may require parties to negotiate to restore some economic equilibrium.[17]

The 'limited economic equilibrium' clause provides a number of limitations in the application of this clause. *For example*, some 'limited economic equilibrium' clauses require the investor to incur a financial loss before being entitled to compensation. It can be said that the 'limited economic equilibrium' clause deals with specific legal risks. Today, the use of the 'economic equilibrium' clauses is increasing, especially against the 'freezing' clauses. The reason is because of its flexibility in practice. However, the 'freezing' clauses are still used. Even, in some cases, these two clauses coexist in the same contract. *For example*, Chad - COTCO contract for Cameroon's oil pipeline; Host Government Agreement (HGA) related to Baku - Tbilisi - Ceyhan pipeline project (BTC).[18]

It can be seen that investors are gradually moving their priorities for the application of the 'economic equilibrium' clauses instead of the 'freezing' clauses thanks to a clear compensation mechanism. This is because the 'economic equilibrium' clauses are more feasible, as they are regarded as a type of stabilization clauses, at least in obstructing the legislative power of the host country.

However, the compensation mechanism here should also be more detailed, particularly the rate of compensation, in order to avoid uncertainty which is the factor that generates disagreements, which may lead to the very complicated renegotiation process.

3. Hybrid Clauses

These clauses are characterized by both 'freezing' and 'economic equilibrium' clauses. Like the above two clauses, the hybrid clauses also include two types: the full hybrid clauses and limited hybrid clauses.

4. Intangibility Clauses

These clauses stipulate that the contract may only be modified with the consent of the parties and/or a clear commitment that the government will not nationalize the foreign investment. These clauses are often used in oil and gas contracts. These clauses do not clearly waiver the sovereign right, but it prevents unilateral modification by the host government.

For example, in Indonesia's Product Sharing Agreement (PSA) between Pertamina and Oversea Petroleum Investment Corp. and Treasure Bay Enterprise Ltd., of 1995, it states: 'This Agreement shall not be avoided, amended or supplemented in any respect, except in the mutual recognition of the parties with this matter'.[19]

5. In addition, stabilization clauses also include other types:

Firstly, the Consistency Clauses whereby the law of the host country can only be applied to the projects, if it is appropriate to the contract.

Secondly, the clauses contain stable commitments in a number of specific areas, such as strict clauses on finance or on tax structures in public utility projects.

C. Legal Effect of Stabilization Clauses

According to some cases (*Texaco, Aminoil, AGIP and Revere Copper*), international arbitral tribunals have held that these stabilization clauses are legal, valid and binding under international law. Despite the controversy over the legality and obvious binding nature of these clauses in the 1970s and 1980s, it has now been widely accepted that stabilization clauses are legal and binding.[20] The legal validity of stabilization clauses can be further strengthened in BITs, whereby the government is committed to enforce the terms of the contract with respect to other countries.

According to *Liamco Aminoil, AGIP*, if the host country violates the stabilization clauses, compensation must be paid to the investor. The amount of compensation involved:

- The costs incurred by the investor due to the impact of the new regulations;
- Claims in accordance with stabilization clauses.

In sum, stabilization clauses are binding and considered legal

[17] IFC, *Stabilization Clauses and Human Rights*, May 27, (2009), p. 7.

[18] Lorenzo Coltula, *Regulatory Takings - Stabilization Clauses and Sustainable Development, Session 2.2: The Policy Framework for Investment: the Social and Environmental Dimensions*, (2008), p. 7.

[19] Abdullah Faruque, *Validity and Efficacy of Stabilization Clauses - Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No. 4, p. 317-336, (2006), p. 319.

[20] Lorenzo Cotula, 'Foreign Investment Contracts', *International Institute for Environment and Development*, iied, p. 2.

under international law, and its breach results in the host government compensating to investors who are adversely affected from the management measures of that government. Stabilization clauses have been increased to combat the political and legal instability that exists in DCs. Therefore, the conduct of foreign investment in these countries is risky. However, these investment operations are still growing and supported by organizations such as the OECD and World Bank, as a way to help governments build a good investment environment for foreign investors.

In principle, the purpose of the parties is to create a legal framework that will apply it from the beginning to the end of the project. For investors, the most concern is the change in domestic law in the host country, and the extent of this stability affects contracts only between individuals, but not the contracts with host government. Therefore, the existence of stabilization clauses confirm that the contract will not be affected by the changed law of the host country. However, according to Lorenzo Cotula, these clauses are weakened by the ambiguous reference to 'international standards'.[21] Anyway, these clauses are still relevant and found in many contracts, even in agreements with the expectation of restraining any future regulation that could be seen to reduce the profitability of foreign investors, including efforts to tackle corruption, protect human rights (including labor rights), and protect the environment.

2. Renegotiation Clauses/Adaptation Clauses[22]

A. Concept

The renegotiation clause is common in Investor-State Contracts, especially in natural resources exploitation sector. Due to the long term nature of contracts, unforeseen situations are likely to happen, breaking the economic equilibrium of the contracting parties, even destroying the contractual relationships between the parties. The renegotiation clause provides a legal mechanism for the parties to adjust the contract terms and restore the economic equilibrium set up when the contract concluded.

Since 1960s, the decolonization in combination with a debate on the new world economic order and national permanent sovereignty over their natural resources, the debt crises in Middle and South America, the fall of socialism in former Soviet Union and East Europe, and the Asian financial crisis, all demonstrate the clauses of renegotiation as an important method to save Investor-State Contracts. Because, these situations make contracts inoperative or unfair to one of contracting parties, breaking the balance of interests. Although the parties may choose to terminate the contracts, most of the time, the capital intensive projects in these industries can not easily be stopped. Furthermore, from the point of view of the host countries, the termination of the contract by the foreign investors would be a bad record for any other investment of the same investors in the future. Therefore, renegotiation becomes for both parties, a way to avert risks without ruining the benefits of the contractual relationship.

This clause focuses on economic equilibrium rather than legal stability. Difficulties arise when circumstances give rise to the right to renegotiate, usually with the investor, not specified in the contract. It is clear that the renegotiation clauses are based on the criteria for renegotiating the terms of the contract, which are more complex than the stabilization clauses, but are very practical and useful.

A renegotiation clause is understood that when a particular event or events occur, it is required that all parties return to renegotiate the terms of their contract. Renegotiation clauses have become common in all Investor-State Contracts, especially long-term contracts, which are usually contracted for the exploitation of natural resources and energy. It provides a legal mechanism for the parties to revise the contract in order to restore the economic equilibrium between them without destroying their relationship. The economic equilibrium here is considered to be the core element of the contract, in relation to the purpose of the parties when concluding the contract. Based on the agreement of the parties, renegotiation clauses may exist in any form.

Renegotiation clauses often appear in sample contracts for the exploitation of natural resources, *e.g.* the Model Law on PSA of Kurdish Government (KRG), or Viet Nam's PSC, ...

[21] Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Toward A Rethink of Stabilization Clauses*, J. World Energy L. & Bus., p. 158, 174, (2008).

[22] Liang Peng, *Renegotiation Clauses in International Investment Contracts*, http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html, Wednesday, July 27, 2011.

Specific *example* of renegotiation clause - Article 34.12 of the Qatar 1994 Model Contract for Exploitation and Product Sharing:

> While relying on the financial position of the investor, in compliance with the contract, law and regulation that are effective on the date of conclusion, [the parties] agree that, if any law, ordinance or regulation affects to the financial position of the investor in future, particularly the tariff obligation which exceeds [...] percentages during the contract time, both parties shall proceed to negotiations in good faith to reach a fair solution, to maintain the economic equilibrium of this contract. If no fair solution is reached, the matter may be referred to arbitration pursuant to Article 31 of this contract.[23]

Generally, renegotiation clause consists of three parts: trigger event, content of obligation to renegotiation, and the consequences of failure to reach renegotiation agreement.

Because contracts are often lengthy, so the political, economic, and social context can change radically during the duration of the contract as well as the economic benefits that the parties originally expected in the contract. In addition, the use of renegotiation and adaptation clauses will be a 'shield' for protecting both national sovereignty and investors against changes in the law governing contracts. [24]

However, the negotiation clauses are not panacea, so there are certain restrictions that the investor may refuse to include in the contract for some of the following reasons.

Firstly, these clauses may reduce the stability of the contract;

Secondly, inclusion of renegotiation clauses will likely increase transaction costs;

Thirdly, renegotiation may be under government control, so the renegotiation process may be not fair if there is a need to change the agreement.

Although there are potential shortcomings, the negotiation clauses offer certain benefits to the parties, *for example*, it may reduce the possibility of disputes between parties.

[23] Piero Bernadini, *The Renegotiation of Investment Contracts*, 13 FOREIGN INVEST.L.J.411, 416, (1998); John Y. Gotanda, *Renegotiation and Adaptation Clauses in International Investment Contracts, Revisted*, p. 1467, 8/2003.

[24] John Y. Gotanda, *Renegotiation and Adaptation Clauses in International Investment Contracts, Revisited*, Villanova University School of Law.

B. Contract with Renegotiation Clause[25]

Some *examples*:

The 'AMINOIL Clause'

This is contained in the Supplementary Agreement of July 29, 1961 to the concession agreement between the State of Kuwait and the American Independent Oil Company (AMINOIL) of June 28, 1948. The clause was worded as follows:

> Article 9
>
> If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in *benefits* to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties.

The 'Ok Tedi Clause'

The 'OK Tedi Papua New Guinea Concession Agreement' of 1976 contains the following brief and very general clause: 'The parties may from time to time by agreement in writing add to, substitute for, cancel or vary all or any of the provisions of this Agreement'.

The 'Ghana/Shell Clause'

The Petroleum Production Agreement, concluded in 1974 between 'The Government of Ghana and Shell Exploration and Production Company of Ghana Ltd.,' contained the following clause:

> Article 47(b).
>
> It is hereby agreed that if, during the term of this Agreement, there should occur such changes in the financial and economic circumstances relating to the petroleum industry, operating conditions in Ghana and marketing conditions generally as to

[25] Klaus Peter Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', *Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347*, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.

materially affect the fundamental economic and financial basis of this Agreement, then the provisions of this Agreement may be reviewed or renegotiated with a view to making such adjustments and modifications as may be reasonable having regard to the Operator's capital employed and the risks incurred by him always provided that no such adjustments or modifications shall be made within 5 years after the commencement of production of petroleum in commercial quantities from the production area and that they shall have no retroactive effect.

The 'Lasmo Clause'

The Lasmo Group Production Sharing Contract of August 19, 1992 between the 'Viet Nam National Oil and Gas Corporation of the Socialist Republic of Viet Nam, Lasmo Vietnam Ltd. & C. Itoh Energy Development Co., Ltd for Offshore Block 04-2' contained the following clause:

> *Article 17.8.* Introduction of New Laws and Regulations
>
> If after the effective date, new law(s) and/or regulation(s) are introduced in Viet Nam adversely affecting Contractor's interest, or any amendments to existing laws and/or regulations are made then the Parties shall meet and consult each other and shall make the necessary changes to this Agreement to ensure that Contractor is restored to the same economic conditions which would have prevailed if the new law and/or regulation or amendment had not been introduced.

In Article 11, the contract contains an arbitration agreement for 'all disputes arising out of or in connection to the contract'. In Article 17.9, the parties are granted the right to present all 'questions, which are in substance of a technical nature' to an 'independent expert of international reputation'.

The 'Qatar Clause'

The 'Model Exploration and Production Sharing Agreement' of the Sheikdom of Qatar of 1994 contains amongst others the following clause:

Article 34.12. Equilibrium of the Agreement

> Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the effective date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties exceed ... percent during the term of the Agreement, both Parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either Party to arbitration pursuant to Article 31.

C. Contract without 'Renegotiation Clause'[26]

In cases where there is no express renegotiation clause, investors frequently rely on either a *force majeure clause* included in the contract or the *hardship* concept of international contract law.

For example, the Lasmo Group Production Sharing Contract of August 19, 1992 between "Viet Nam National Oil and Gas Corporation of the Socialist Republic of Viet Nam, Lasmo Viet Nam Ltd. & C. Itoh Energy Development Co., Ltd for Offshore Block 04-2' contains the following *force majeure* clause:

> Article 17.7. Force Majeure
>
> The obligations of each of the Parties hereunder, other than the obligation to make payments of money, shall be suspended during a period of Force Majeure, and the term of the relevant period or phase of this Agreement shall be extended for a time equivalent to the period of Force Majeure situation. In the event of Force Majeure, the Party affected thereby shall give notice thereof to the other Party as soon as reasonably practical stating the starting date and the extent of such suspension of obligations and the cause thereof. A Party whose obligations have been suspended as aforesaid shall resume the performance of such obligations as soon as reasonably practical, after the removal of the Force Majeure and shall notify the other Party accordingly.

The UNIDROIT Principles of International Commercial Contracts (PICC) as a restatement of the currently accepted rules and principles of international contract law define *hardship* and its legal consequences as follows:

[26] Klaus Peter Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', *Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347*, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.

Article 6.2.2. Definition of Hardship

There is *hardship* where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3. Effects of Hardship

(1) In case of hardship, the disadvantaged party is entitled to request *renegotiations*. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for *renegotiation* does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time, either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.

These examples show that *force majeure clauses* usually provide for an extension of the contractual performance period and the avoidance of the contract as a measure of last resort. They serve primarily as precautions against the risks posed by economic, political or social events unforeseeable at the time of contracting, though without the aim of ensuring or re-establishing the commercial equilibrium of the contract. However, *force majeure clauses* can also contain an obligation on the parties to negotiate, and to search for ways to overcome the

situation resulting from 'acts of God'. Such a contract is particularly ill-suited for avoidance, due to the complexity and financial obligations already incurred by the parties. The *hardship* concept, in comparison, aims directly at maintaining the commercial equilibrium of the contract in that it is triggered when the burden posed on one party has reached the 'limit of sacrifice'. As a legal consequence of *hardship*, the parties are obliged to renegotiate their contractual relationship. Thus, the *hardship* concept proves to be a special form of the same idea incorporated in renegotiation clauses: making contractual obligations more flexible in light of alterations to the commercial equilibrium of the contract.

Although both the *hardship* concept and the *force majeure* clauses can, in theory, provide a starting point for the renegotiation of the contract in case of changed circumstances, this is rarely the case in practice.

The principle of 'sanctity' of contracts (*pacta sunt servanda*) as the leading maxim of contract law generally has priority over changes in the surrounding economic conditions. Hence, a case of *force majeure* exists not merely because of a change in the economic balance of the parties' respective contractual duties, but rather only in the classic circumstance of interference of 'acts of God', war, strike, terrorist attacks, rebellion, embargo and natural or environmental disasters, unless the parties have agreed on other specific provisions. Also, performance of the contract will not constitute '*hardship*' just because the contract has become unprofitable for one party due to changes in the economic or technical setting. Rather, only a breach of the commercial 'limit of sacrifice' because of a fundamental change in the commercial balance of the contract will suffice. In both cases, the change must have been unforeseeable at the time of concluding the contract:

> Parties entering into international contracts cannot claim unawareness of the risks or macro-economic adversities. Their effects may be extreme, but are nonetheless within the contemplation of financiers who evaluate the reliability of borrowers on the strength of contractual undertakings; and as they are in the contemplation of insurers who assess their willingness to provide cover to investors who also relay on such undertakings.

Thank to this limit of unforeseeable fundamental change in the contractual basis, parties to Investor-State Contracts can overcome the

pacta sunt servanda principle only if the contract contains a renegotiation clause. Only then are international arbitral tribunals inclined to interfere with the content of the contract when economic conditions have changed, assuming that the applicable law permits it.

The basis of this approach is the presumption of professional competence of international businessmen, and the ensuing high level of responsibility for the contents and conduct of their legal relationships. This principle has been continuously emphasized by international arbitral tribunals over the past decades. It serves as the standard for risk distribution within the contract. Based on this presumption, the parties themselves are responsible for taking precautions against adverse changes in the socioeconomic circumstances by agreeing on renegotiation clauses when concluding the contract. If they do not, *force majeure* clauses or *hardship* concept may not serve as a substitute for their negligence at the drafting stage, and will not serve as a pretext for deluting the *pacta sunt servanda* principle. Rather, the parties have to recognize that priority is given to fulfilling contractual promises. Thus, the risk of adverse changes to the economic balance of the contract is to be borne by the parties.

There are exceptions to these principles. One *example* is Article 17(1) of the Russian Act on Production Sharing Contracts. According to this provision, the contract can also be varied without an agreement between the parties, where the requirements of the Russian Civil Code definition of a 'significant change of circumstances' have been met. This brings significant uncertainty into the contractual relationship.

Section Four. THE SPECIFICITIES OF CONTRACT-BASED INVESTMENT CLAIMS[27]

1. Types of Disputes

Disputes relating to Investor-State Contracts include disputes related to property, disputes arising out of interference with the contractual right, disputes arising from changes in circumstances, disputes related to corruption, disputes arising from environmental impacts, disputes related to the violation of human rights, etc.

[27] Nguyen Vuong Nhung, Dissertation, 2015; and Vu Hong Uyen, Dissertation, 2015.

A. Disputes Related to Property

The change in political regime often leads to the nationalization of foreign investors' assets. The cause of political change may be due to revolutions or through the democratic process. When the government nationalizes or confiscates property through administrative measures while undertaking economic reform commitments, in many cases, the expropriation is considered legal. However, disputes arise primarily with regard to the level of compensation for property deprived.

B. Disputes Arising out of Interference with the Contractual Right

The contractual right of the foreign investor is protected by international law, and the interference of the government with these rights has led the investor to seek compensation. Any provision on the permanent sovereignty of the host country for natural resources reflects the tension between monopoly interests in land and the transfer of land use rights through contract.

C. Disputes Arising from Changes in Circumstances

Investor-State Contracts are usually long-term contracts, in which the context of investment operation always change. Changes that do not affect any material levels will be ignored by the parties. But if the investor can not carry out the contract due to lack of skills, or if the contract gives benefits higher than expected due to the good performance of the investor, the government may interfere in the contract.

D. Disputes Related to Corruption

In practice, an important cause of disputes arises from the internal politics of the host country. *For example*, a new government leader comes to power and is objectively reviewing the behavior of the previous government. That clarified the fact that the previous Investor-State Contracts had not been concluded in due course, but investors had bribed former members of the government. Economically, this is the most important dispute because it often involves infrastructure projects, which can be worth billions of US dollars.

Most of these disputes stem from infrastructure projects such as power plants, telecommunication systems, military training facilities

and natural resource mining. Corruption occurs all over the world, and the flow of capital is not only directed to the DC but also between developed countries and oil and gaz producing countries to other countries. Investment-related corruption emerges most in South Asia and the Middle East.[28]

E. *Disputes Arising from Environmental Impacts*

In international investment, business activities that adversely affect the environment can lead to the complete cessation of international investment or the imposition of restrictions on investment, therefore it may result in a dispute. Such interventions are supported by both domestic and international environmental laws. *For example*, when investors are deemed to have a negative impact on the environment, operators are not only violating domestic law but also violating international standards for environmental protection. In such cases, the host country will have a reason to intervene in international investment operation and require foreign investors to compensate for the damage they cause.

F. Disputes Related to the Violation of Human Rights

This dispute arises from allegations that foreign investors have violated the human rights of the host country citizens. In this dispute, the foreign investor is the defendant, which is likely to be sued in the courts of the home country where the investor is a national. They will face a series of plaintiffs being represented by non-governmental organizations willing to support the allegations of the victims. *For example*, where the rights of indigenous peoples are violated by the exploitation of resources on their traditional lands; the allegations that the exploitation affects to the right to self-determination, the destruction of traditional culture and the resulting environmental degradation have been brought before the national courts as well as to the international human rights jurisdictions.[29]

[28] Hilma Raeschke-Kessler (in collaboration with Dorothee Gottwald), 'Corruption in Foreign Investment-Contract and Dispute Settlement between Investors, States, and Agents', in *Oxford Handbook of International Investment Law,* Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., (2008), p. 8.

[29] M. Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, (2000), p. 96.

2. Practical Application of the Contract Clauses that Led to the Dispute

A. *Relating to Stabilization Clauses*

Through the practice of disputes relating to stablization clauses in the Investor-State Contracts, we will see the practical application of these clauses. The following writing will focus primarily on analyzing a dispute relating to these clauses in order to clarify how the parties to the contract apply the stabilization clauses in practice.

Chad - Cameroon Pipeline Project

In concession contracts relating to the exploration and exploitation of natural resources, there are occasions where there are significant conflicts between the implementation of international human rights law and the stabilization clause.

According to a report prepared by the non-governmental organization Amnesty International in 2005, a number of stabilization clauses has the effect of preventing the host country from applying their international human rights obligations. Another study released by the IFC in March 2008 suggested that the stabilization clauses could have a negative impact on the host country's responsibility to enforce its human rights obligations. Amnesty International's 2005 report specifically refers to contracts concluded by Chad and Cameroon with an association run by ExxonMobil to provide the association with extraction and transportation of oil through a long pipeline. Each contract has a stabilization clause to ensure the stability of the legal framework of the project, so that no future rules will be applied to these contracts, if they give rise to obligations to the parties involved in the contract to explore and exploit natural resources. *For example*, the contract with Chad includes the following clause:

In the terms of this Contract, the Chad Republic assures that no law passed after December 19, 1988 shall apply to TOTCO (explorer), without prior agreements between the parties, whether directly or indirectly affected, or because they apply to the shareholders, obligations and variations imposed on this Contract or have a negative impact on the rights and the economic benefits of TOTCO or shareholders are provided in this Contract.

Amnesty International's report has indicated that foreign investors have cited these stabilizations clauses to prevent Chad and Cameroon - the host countries - from carrying out some basic human rights obligations such as health rights of workers and a safe working environment. *For example*, if the Chad government requires investors to comply with some of the more stringent regulations to provide better working environment for workers, the government will be prevented by a stabilization clause. In this regard, there has been a conflict between the actions of the Government of Chad under the stabilization clause and their obligations under international human rights law.

Accordingly, the host government should carefully consider when drafting and inserting a stabilization clause in the Investor-State Contract, since it may cause the government to violate its international obligations under international law.

B. *Relating to the Choice of Law Clause*

Many documents in the first half of the twentieth century defined the domestic law of the host country as the law applicable to foreign investment transactions. In *Serbian Loans*,[30] the Permanent International Court of Justice has pointed out that international law has no relation to the Investor-State transactions between the Government and foreign inestors. Many awards officially support the view that the domestic legal system of the host country will apply to the Investor-State transactions. In *Kahler v. Midland Bank*, in 1950, Judge Radciffe stated that, in the case of a Investor-State contract, the law of the host country is not only stable, but also can modify or abolish the constraints of the contract.

SUMMARY OF CHAPTER NINE

Along with the tendency of trade liberalization in the world today, international investment in countries is also growing. According to the World Investment Report of 2016, the global FDI flows are significantly growing and are expected to surpass USD 1.8 trillion by 2018, in which Asia is expected to attract 16 per cent of FDI flows, equivalent to USD 541 billion, with a focus on East and South Asia.31 In addition, FDI inflows to the G20 countries also increased 57 per cent over the same period in 2015.32 Following this trend, international investment contracts are also increasingly concluded. The conclusion of this type of contract is not only aimed at ensuring that investors would invest effectively, but also at the same time serving the basis for settling disputes arising during the performance of the contract. In fact, there have been many disputes arising from the international investment contracts related to the important clauses in the contract. Therefore, understanding and drafting important clauses in the international investment contract become extremely essential.

QUESTIONS / EXERCISES

1. Explain the contents of stabilization clause.
2. Explain the contents of renegotiation clause.
3. Explain the application of stabilization clause and renegotiation clause in practice.
4. Read and understand the *Chad - Cameroon Pipeline Project Case*; prepare for class discussion.

REQUIRED READINGS

1. 'Chapter Ten: Respect for Human Rights in Investor-State Relationships', State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships; Howard Mann, 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' in *Special Issue: Investor-State Contracts and Sustainable Development*, Issue 1, Volume 2, October 2011, Investment Treaty New.
2. Abdullah Faruque, *VALIDITY AND EFFICACY OF STABILIZATION CLAUSES - LEGAL PROTECTION V. FUNCTIONAL VALUE*, Journal of International Arbitration, Vol. 23, No. 4, (2006).
3. Dang Thu Thuy, Dissertation, 2016.
4. Hilma Raeschke-Kessler (in collaboration with Dorothee Gottwald), '*CORRUPTION IN FOREIGN INVESTMENT-CONTRACT AND DISPUTE SETTLEMENT BETWEEN INVESTORS, STATES, AND AGENTS*',

[30] (1929) PCIJ Series A No. 20.

[31] UNCTAD, World Investment Report 2016, http://unctad.org/en/PublicationsLibrary/wir2016_ en.pdf

[32] OECD, http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-October-2016

in Oxford Handbook of International Investment Law, Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., (2008).

5. http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html, Wednesday, July 27, 2011.
6. IFC, *STABILIZATION CLAUSES AND HUMAN RIGHTS*, May 27, (2009).
7. J. Luis Guasch, World Bank WBI Development Studies, *GRANTING AND RENEGOTIATING INFRASTRUCTURE CONCESSIONS DOING IT RIGHT*, (2004).
8. Jan Ole Voss, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS*, Chapter One, (2010).
9. John Y. Gotanda, *RENEGOTIATION AND ADAPTATION CLAUSES IN INTERNATIONAL INVESTMENT CONTRACTS*, Revisited, Villanova University School of Law.
10. Klaus Peter *BERGER, 'RENEGOTIATION AND ADAPTATION OF INTERNATIONAL INVESTMENT CONTRACTS: THE ROLE OF CONTRACT DRAFTERS AND ARBITRATORS'*, Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.
11. Liang Peng, *RENEGOTIATION CLAUSES IN INTERNATIONAL INVESTMENT CONTRACTS*.
12. Lorenzo Coltula, Regulatory Takings - *STABILIZATION CLAUSES AND SUSTAINABLE DEVELOPMENT*, Session 2.2: The Policy Framework for Investment: the Social and Environmental Dimensions, (2008).
13. Lorenzo Cotula, *'FOREIGN INVESTMENT CONTRACTS'*, International Institute for Environment and Development.
14. Lorenzo Cotula, *RECONCILING REGULATORY STABILITY AND EVOLUTION OF ENVIRONMENTAL STANDARDS IN INVESTMENT CONTRACTS: TOWARD A RETHINK OF STABILIZATION CLAUSES*, J. World Energy L. & Bus., 174, (2008).
15. M. Sornarajah, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES*, Kluwer Law International, (2000).
16. Michael Klein, *PUBLIC-PRIVATE PARTNERSHIP, PROMISE AND HYPE*.
17. Piero Bernadini, *THE RENEGOTIATION OF INVESTMENT CONTRACTS*, 13 FOREIGN INVEST. L. J. (1998).
18. Prof. Dr. Nathalie Voser, Panel V, *STABILIZATION AND/OR RENEGOTIATION AGREEMENTS RENEGOTIATION CLAUSES IN LONG TERM ENERGY, ARBITRATION OF ENERGY DISPUTES: NEW CHALLENGES*.
19. Nguyen Minh Hang, Foreign Trade University, *GIAO TRINH PHAP LUAT KINH DOANH QUOC TE*, National University Publishing House, Hanoi, (2010).
20. UNCTAD, *SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS*, STATE CONTRACTS (2004)
21. World Bank, ADB, IDB, *PUBLIC-PRIVATE PARTNERSHIPS REFERENCE GUIDE*, https://library.pppknowledgelab.org/Knowledge%20Lab/documents/2490/download

PART FOUR.
VIET NAM AND INTERNATIONAL INVESTMENT LAW

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CHAPTER TEN. INTERNATIONAL COMMITMENTS

CHAPTER TEN

INTERNATIONAL COMMITMENTS OF VIET NAM REGARDING INVESTMENT

Learning Objectives Chapter Ten
• Understanding the WTO's commitments of Viet Nam; • Understanding the ASEAN's commitments of Viet Nam; • Understanding the commitments in some FTAs concluded by Viet Nam; • Understanding the commitments in some BITs concluded by Viet Nam.

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Section one. WTO'S COMMITMENTS OF VIETNAM

1. Overview

Vietnam acceded to the Agreement Establishing the World Trade Organization (WTO) (also known as Marrakesh Agreement) and became one of its member since 11 January 2007. Investment related provisions binding upon Vietnam within the framework of the WTO can be found in several Agreements in the Annexes of the Marrakesh Agreement such as the Agreement on Trade-Related Investment Measures (TRIMs),[1] the General Agreement on Trade in Services (GATS),[2]the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[3] and the Agreement on Subsidies and Countervailing Measures (SCM)[4]. These Agreements have been effective with respect to Vietnam since Vietnam's accession to the WTO in 2007, which means 12 years after their entry into force with respect to founding members of the WTO. Preferential provisions on fulfilling obligations under the Agreements granted to developing countries including Vietnam expires. For example, Article 5 of the TRIMs Agreement allows developing countries to eliminate all trade-related investment measures after five transitional years. Since this Agreement entered into force on 1January 1995, Vietnam has to carry out its commitments without enjoying the transitional period.[5]Similarly, delays in applying treaty obligations under TRIPs,[6] GATs,[7] SCM[8] have expired when Vietnam acceded to the WTO.

[1] Annex 1A.

[2] Annex 1B.

[3] Annex 1C.

[4] Annex 1A.

[5] See Article 5.2 of the TRIMs Agreement.

[6] Article 65 of the TRIPs Agreement stipulates that "1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement. 2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5."

[7] Article III.4 of the GATS states that "such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations."

[8] Article 27 of the SCM Agreement provides:

27.1.Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

2. Vietnam's Commitments

A. *The Agreement on Trade-Related Investment Measures (TRIMs)*

The TRIMs Agreement governs investment issues with the purpose of promoting the expansion and progressive liberalisation of world trade and facilitating investment across international frontiers so as increasing the economic growth of all trading partners, particularly developing country Members, while ensuring free competition.[9] The Agreement also takes into account the particular trade, development and financial needs of developing countries.[10]

The TRIMs Agreement applies to investment measures related to trade in goods only and does not cover trade in services.[11] It consists of nine provisions and an annex providing an illustrative list of prohibited measures. According to this Agreement, Vietnam is obligated not to apply any trade-related investment measures inconsistent with Articles III and XI of the GATT on national treatment and quantitative restrictions respectively.[12] These measures impose conditions or incentives for foreign investment which are considered as having trade restrictive and distorting effects. The TRIMs Agreement does not contain a definition of "trade-related investment measures" but lists illustrative prohibited ones in its annex.[13]Business activities conducted by investors of a WTO member in the territory of other WTO members, therefore, shall not be subject to trade restrictive and unfair competition as listed in the TRIMs Agreement. Within 90 days of the date of entry into force of this Agreement for Vietnam, Vietnam have the obligation of notifying the Council for Trade in Goods of all TRIMs it is applying that are not in

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner.

[9] The Preamble of the TRIMs Agreement.

[10] Ibid.

[11] Article 1 of the TRIMs Agreement.

[12] Article 2(1) of the TRIMs Agreement.

[13] *Illustrative List*, Annex of the TRIMs Agreement.

conformity with the provisions of the Agreement.[14] It also undertakes not to take such measures as listed in the illustrative list of the Agreement.[15]

Prohibited TRIMs are categorized into two groups based on their inconsistency with GATT 1994. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include hose which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:[16]

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports

The second group consists of measures that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:[17]

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

As reflected in the title of the Annex and terms used in the provisions on each TRIMs group (for example, "include"), the above mentioned list is not exhaustive and only illustrates TRIMs that are prohibited. In practice, there might be other TRIMs inconsistent with the national treatment principle and the prohibition of quantitative restrictions in trade in goods in WTO law.

[14] Article 5.1 of the TRIMs Agreement.

[15] Article 5.2 of the TRIMs Agreement.

[16] Paragraph 1 of the Illustrative List, Annex of the TRIMs Agreement.

[17] Paragraph 1 of the Illustrative List, Annex of the TRIMs Agreement.

B. *The General Agreement on Trade in Services (GATS)*

In addition to the TRIMs Agreement, Vietnam has made some investment related commitments in other WTO Agreements. The General Agreement on Trade in Services (GATS) regulates an investment mode in services – 'commercial presence', which means any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.[18] When an investor of a WTO Member establishes an investment in services in Vietnam, according to the GATS, Vietnam has several general obligations. *Firstly*, it undertakes to accord immediately and unconditionally to services and service suppliers of a WTO member treatment no less favourable than that it accords to like services and service suppliers of any other country (most-favored-nation treatment).[19] *Secondly*, Vietnam is obligated to publish promptly all relevant measures of general application which pertain to or affect the operation of this Agreement and establish one or more enquiry points to provide specific information on its relevant laws, regulations or administrative guidelines.[20] *Thirdly,* Vietnam has to ensure that all measures of general application affecting trade in services in sectors where it has made specific commitments are undertaken are administered in a reasonable, objective and impartial manner.[21] *Fourthly,* Vietnam cannot apply restrictions on international transfers and payments for current transactions relating to its specific commitments.[22] In Vietnam's Schedule of Specific Commitments in Services, it specifies limitations on market access, national treatment and additional conditions such as limitations on foreign ownerships to foreign service providers. Apart from general obligations and specific

[18] Article XXVIII.d of the GATS.

[19] Article II.1 of the GATS.

[20] Article III of the GATS.

[21] Article VI of the GATS.

[22] Article XI of the GATS.

commitments, the Agreement provides some exceptions preserving for WTO members the freedom to pursue other policy objectives such as to deal with difficulties in balance of payments,[23] to protect public interests,[24] and security interests.[25]

C. *The Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

TRIPS protect intellectual property rights, a type of assets of foreign investors. This Agreement incorporates guarantees under international treaties on intellectual property rights[26] which have been universally accepted before it was concluded. Moreover, it provides additional obligations on issues which have not been adequately dealt with in these treaties. Instead of protecting objects of intellectual property rights separately, the TRIPS Agreement cover comprensively trade aspects of these rights. Accordingly, WTO members including Vietnam, are obligated to comply with the principles and toaccord minimum standards of protectionto intellectual property and may provide higher protection.

D. *The Agreement on Subsidies and Countervailing Measures (SCM Agreement)*

SCM aims to clarify and develop GATT's rules on subsidies. A subsidy is defined as a financial contribution by a government or any public body within the territory of a WTO member and a benefit is thereby conferred[27] and the SCM Agreement establishes multilateral disciplines regulating the provision of industrial subsidies distorting trade, and the use of countervailing measures to offset injury caused by subsidized imports. Although the Agreement does not expressly refer to foreign investment but investment incentives, tax exemption, preferential loans contingent on export performance, local content or the use of domestic over imported goods can be a form of prohibited subsidies under Article 3 of the SCM Agreement. Vietnam has to comply with this rule and cannot grant or maintain such investment-related subsidies.

23 Article XII of the GATS.

24 Article XIV of the GATS.

25 Article XIVbis of the GATS.

26 They are the main conventions of the World Intellectual Property Organization (WIPO) including the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.

27 Article 1.1.1 of the SCM Agreement.

Section Two. ASEAN'S COMMITMENTS OF VIET NAM

1. The ASEAN Agreement for the Promotion and Protection of Investments 1987 (IGA) and the Framework Agreement on ASEAN Investment Area 1998 (AIA)

The Association of Southeast Asian Nations (ASEAN) was founded on 8 August 1967 in Thailand with the purposes of accelerating the economic growth, social progress and promoting regional peace and stability.[28] Vietnam became a member of ASEAN since 28 July 1995,[29] and thus was bound by the obligations with respect to foreign investment from other ASEAN countries and started actively involving in developing the ASEAN legal framework on investment relations.

ASEAN member states consider foreign direct investment (FDI) as an important source of finance for sustaining the pace of economic, industrial, infrastructure and technology development.[30] Although the region was considered as one of the most attractive destinations for FDI in 1990s, ASEAN member states desired to attract higher and sustainable level of direct investment flows in ASEAN.[31] Therefore, in 1987 they concluded ASEAN Agreement for the Promotion and Protection of Investments (IGA), amended by a Protocol in 1996 and in 1998, the Framework Agreement on ASEAN Investment Area 1998 (AIA), amemded by a Protocol in 2001.

Vietnam was bound by the IGA Agreement since it accession to ASEAN. Afterwards, it participated in the negotiation and conclusion of the Protocol to amend the IGA Agreement on 12 December 1996. The Agreement applies to investment of any investors of an ASEAN member established in the territory of another ASEAN member which are specifically approved in writing and registered by the host country.[32] Investment activities made prior to the entry into force of IGA fall within the scope of the Agreement if such investments are specifically approved in writing and registered by the host country.[33]

28 Paragraph 2 of the Asean Declaration (Bangkok Declaration), Bangkok, 8 August 1967.

29 Declaration of the Admission of the Socialist Republic of Viet Nam into ASEAN, 28 July 1995.

30 Preamble of the AIA Agreement.

31 Ibid.

32 Article II.1 of the IGA.

33 Article II.3 of the IGA.

The content of the Agreement focuses on protection standards for intra-ASEAN investment with such common obligations as fair and equitable treatment, full protection and security,[34] most-favoured nation treatment,[35] compensation for damages due to the outbreak of hostilities or a state of national emergency,[36] compensation for expropriation[37] and free monetary transfer.[38] The IGA also provides mechanisms to settle disputes between contracting parties[39] and disputes between foreign investors and the host states.[40]

The AIA Agreement addresses investment liberalization and aims to establish a competitive ASEAN Investment Area with a more liberal and transparent investment environment amongst ASEAN countries, promote ASEAN as the most attractive investment area, and strengthen and increase the competitiveness of ASEAN's economic sectors.[41] The Agreement is intended to progressively reduce or eliminate investment regulations and conditions which may impede investment flows and the operation of investment projects in ASEAN and contribute towards free flow of investments by 2020.[42]

The scope of application of the AIA Agreement is limited to foreign direct investment and excludes foreign indirect investment as well as matters covered by the ASEAN Framework Agreement on Services(AFAS). The 2001 Protocol identifies clearly five economic and service sectors regulated by the AIA Agreement, which are manufacturing, agriculture, fishery, forestry and mining and quarrying.[43] Covered investors defined in the Agreement as a national or a juridical person of an ASEAN country making an investment in another ASEAN member.[44] They must acquire "effective ASEAN equity" in respect of an investment in an ASEAN Member State, which means ultimate holdings and where the shareholding/equity structure of an ASEAN investor

34 Article III.2 of the IGA.

35 Article IV.2 of the IGA.

36 Article IV.3 of the IGA.

37 Article VI.1 of the IGA.

38 Article VII.1 of the IGA.

39 Article IX of the IGA.

40 Article X of the IGA.

41 Article III of the AIA.

42 Ibid.

43 Article 1.2 of the Protocol to Amend the Framework Agreement on the ASEAN Investment Area 2001

44 Article 1 of the AIA Agreement.

makes it difficult to establish the ultimate holding structure, the rules and procedures for determining effective equity used by the Member State in which the ASEANinvestor is investing may be applied.[45]

ASEAN member states have the obligations of openning immediately all its industries for investments by ASEAN investors and according immediately to ASEAN investors and their investments, in respect of all industries and measures affecting investment includingbut not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments, treatment no less favourable than that it accords to its own like investors and investments (national treatment).[46] They can provide exceptions to this provision by submitting a Temporary Exclusion List (TEL) and a Sensitive List (SL) as annexes of the Agreement.[47] The Agreement also provides most-favored nation treatment which applies to any preferential treatment granted under any existing or future agreements or arrangements of an ASEAN country.[48] In addition, the Agreement provides for dispute settlement mechanisms between ASEAN member states,[49] the establishment of an ASEAN Investment Area Council[50]and other matters such as transparency,[51] exceptions,[52] emergency safeguard measures and exceptions in case of serious balance of payments and external financial difficulties or threat.[53]

There have been two cases where ASEAN investors invoked the access to international arbitration to sue the ASEAN host states under the above mentioned ASEAN investment treaties.[54] In 2000, Yaung Chi Oo Trading Pte. Ltd (YCO), a company incorporated in Singapore, brought a claim against Myanmar for violations of their provisions on fair and equitable treatment, full protection and security, compensation for expropriation.[55] However, the Arbitral Tribunal concluded that the

45 Ibid.

46 Article 7 of the AIA Agreement.

47 Ibid.

48 Article 8.2 of the AIA Agreement.

49 Article 17 of the AIA Agreement.

50 Article 16 of the AIA Agreement.

51 Article 11.1 of the AIA Agreement.

52 Article 13 of the AIA Agreement.

53 Articles 14 and 15 of the AIA Agreement.

54 *Yaung Chi Oo v. Myanmar* (ASEAN I.D. Case No. ARB/01/1), Award of 31 March 2003. Available at http://investmentpolicyhub.unctad.org/ISDS/Details/44 (accessed on 6 June 2017).

55 Ibid, para. 8.

investment was not "approved and registered in writing" after the 1987 Agreement became effective to Myanmar when it acceded to ASEAN in 1997. Therefore, YCO's investment was not protected under the Agreement and the Tribunal dismissed its claims for lack of jurisdiction.

The second case involving also a Singaporean company, Cemex Asia Holdings Ltd, was brought against Indonesia before ICSID arbitration in 2004 on the basis of the IGA.[56] The disputing parties reached a settlement agreement during arbitration proceedings which was then recorded in the final award of the Arbitral Tribunal on 23 February 2007.

2. ASEAN Comprehensive Investment Agreement (ACIA)

A. *Introduction*

ASEAN Comprehensive Investment Agreement (ACIA) was concluded on 26 February 2009[57] as part of the establishment of the ASEAN Economic Community in 2015. ASEAN Charter[58] signed two years agocreated a new institutional framework for ASEAN countries to enhance their cooperation in three communities including ASEAN Economic Community (AEC). The ASEAN Comprehensive Investment Agreement (ACIA) was drafted in this context. It replaces the two ealier Agreements, the IGA and AIA. The ACIAdevelops and supplements their ealier rules. When the ACIA entered into force in 2012, the ASEAN IGA and the AIA Agreement was terminated.[59] The earlier treaties may be applied for a period of 3 years after their date of termination at the choice of covered investors.[60] However, the extended application expires without any case brought on the basis on the earlier treaties.

B. *Scope of Application*

ACIA applies to any natural person "possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies"[61] and to any legal entity"duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organization."[62] Compared to ASEAN earlierinvestment treaties, the ACIA has a broader scope with "investor" definition extends to two additional groups which are permanent residents in ASEAN countries and juridical persons from third Statesestablishing companies in ASEAN.

Investment is defined broadly in ACIA, consisting of every kind of asset, owned or controlled, by an investor, including movable and immovable property and other property rights, intellectual property rights, direct and indirect investment.[63] Amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees are also considered as investment.[64] Two qualifications of covered investments is that they have been admitted according to its laws, regulations, and national policies, and specifically approved in writing by the competent authority of the host state ifan ASEAN host country requires in accordance with the procedures stipulated in ACIA.[65]

Regarding the geographical application of the ACIA, this Agreement regulates investment activities in the territoriy of its member.[66]With respect to temporal requirements, the ACIA covers existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement.[67]

The ACIA does not apply to any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation); subsidies or grants provided by an ASEAN country;government procurement;services supplied in the exercise of governmental authority by the relevant body or authority of an ASEAN country; and measures

56 *Cemex Asia Holdings Ltd v. Republic of Indonesia* (ICSID Case No. ARB/04/3), available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/04/3 (accessed on 6 June 2017).

57 ACIA, signed on 26 February 2009, entered into force on 29 March 2012.

58 ASEAN Charter, signed on 20 November 2007, entered into force on 15 December 2008.

59 Article 47.1 of the ACIA.

60 Article 47.3 of the ACIA.

61 Article 4(g) of the ACIA.

62 Article 4(e) of the ACIA.

63 Article 4(f) of the ACIA.

64 Ibid.

65 Article 4(a) of the ACIA.Theprocedures relating to specific approval in writing are specified in Annex 1.

66 Article 3(1) of the ACIA.

67 Article 3(2) of the ACIA.

adopted or maintained by an ASEAN country affecting trade in services under the ASEAN Framework Agreement on Services (AFAS).[68] However, investments in the form of the commercial presence mode of service supply are protected under Articles 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), 14 (Expropriation and Compensation) and 15 (Subrogation) and Section B (Investment Disputes between An Investor and A Member State).[69]

C. Investment Liberalization

The ACIA regulates investment in five economic sectors which are manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidental to these sectors.[70] It can extend liberalization rules to any other economic sectors upon which all ASEAN countries agree.[71] To achieve the objective of liberalizing investment activities, the ACIA eliminates discrimination by providing MFN, NT, prohibition on requirements related to senior management and board of directors (SMBD) and restrictions on performance requirements.[72] The drafting and negotiation of these provisions took into consideration the relevant rules in Chapter 11 on Investment of the North American Free Trade Agreement, Chapter 11 on Investment ofAgreement Establishing the ASEAN-Australia-New Zealand Free Trade Area and ASEAN Investment Agreements with China and South Korea.

Vietnam has to accord investors of any other ASEAN country and their investments are accorded treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[73] Similar to the AIA, the ACIA provides automatic most-favored nation treatment, accordingly ASEAN countries accord to investments of investors of another ASEAN member treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other ASEAN members or a non-Member State.[74] This includes preferential treatment in bilateral and multilateral investment

[68] Article 3(4) of the ACIA.

[69] Article 3(5) of the ACIA.

[70] Article 3(3) of the ACIA.

[71] Ibid.

[72] Articles 7 and 8 of the ACIA.

[73] Article 5 of the ACIA.

[74] Article 6 of the ACIA.

treaties with third states. Nonetheless, the scope of the MFN clause does not extend to investor-State dispute settlement procedures[75] and any sub-regional arrangements between and among Member States or any existing agreement notified by ASEAN members to the AIA Council.[76] Finally, Article 7 of the Agreement requires ASEAN members to comply with the prohibition of trade related investment measures as provided under the TRIMs Agreement of the WTO.ASEAN countries make exceptions to investment liberalization rules in their Reservation lists on national treatment and senior management and board of directors.[77]

D. *Investment Protection*

The ACIA protection standards apply to all covered foreign investments since their establishment in the territory of an ASEAN host state. The Agreement aims to develop and clarify provisions of the IGA 1987 which creates legal security for foreign investment.

Firstly, foreign investment of ASEAN countries receives non-discrimination treatment in ASEAN region in accordance with MN and NT commitments.

Secondly, the ACIA provides general and autonomous standards of protection which are not dependent on the treatment accorded to investors or investments of the host state and third states. "Fair and equitable treatment" is clarified to mean not to deny justice in any legal or administrative proceedings in accordance with the principle of due process[78] and "full protection and security" signifies ASEAN members' commitment to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.[79] In practice, an arbitral tribunal concluded a measure of the host state violated multiple provisions.[80] To avoid this situation, the ACIA provides that a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of the FET or FSP standards.[81]

[75] Footnote 4(a) of the ACIA.

[76] Article 6.3 of the ACIA.

[77] Khoản 2 Điều 9 (Bảo lưu),

[78] Article 11.2.a of the ACIA.

[79] Article 11.2.b of the ACIA.

[80] The tribunal in *Occidental v. Ecuador* found a breach of the FPS standard on a ground of a FET violation. *SeeOccidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004), para. 187.

[81] Article 11.3 of the ACIA.

Thirdly, for foreign investors to benefit from their investment activities, ASEAN countries allow free transfers of funds relating to a covered investment, which include:

(a) contributions to capital, including the initial contribution;

(b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;

(c) proceeds from the total or partial sale or liquidation of any covered investment;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Articles 12 (Compensation in Cases of Strife) and 14 (Expropriation and Compensation);

(f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the Member States to the dispute; and

(g) earnings and other remuneration of personnel employed and allowed to work in connection with that covered investment in its territory.[82]

Transfers shall be made without delay and in a freely usable currency at the market rate of exchange prevailing at the time of transfer.[83]

Fourthly, ASEAN countries undertook to protect intra-ASEAN investments from the risk of expropriation which they are most concerned about. They have to apply only lawful expropriation measures in accordance with the ACIA and provide compensation for expropriated property. The Agreement regulates both direct and indirect expropriation, which is measures equivalent to expropriation or nationalization.[84] Guidance to determine whether an action or series of actions by a Member State constitute an indirect expropriation is provided in Annex 2 of the ACIA. Accordingly, such determination requires a case-by-case, fact-based inquiry that considers, among other factors:

[82] Article 13.1 of the ACIA.

[83] Article 13.2 of the ACIA.

[84] Article 14.1 of the ACIA.

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

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

the character of the government action, including, its objective and whether the action is disproportionate to the public purpose.[85]

To maintain a flexible policy space necessary for the host state, the ACIA provides an exception for this rule. Paragraph 4 of Annex 2 states clearly that non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation.

Although recognizing the sovereign right to expropriate of the host state, like most of other investment treaties, the ACIA imposes four conditions on any takings: for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.[86] Compensation rules aim to return the full value of the taken property to foreign investors. Compensation must be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable.[87] The compensation does not reflect any change in value if the intended expropriation had become known earlier and must be paid without delay after completing legal and administrative processes provided in the laws and regulations of the host state[88] and in the event of delay, the host state has to pay appropriate interest in accordance with its laws and regulations.[89]It also must be be fully realisable and freely transferable in accordance with Article 13 on transfers between the territories of ASEAN members.[90]

[85] Annex 2 of the ACIA.

[86] Article 14.1 of the ACIA.

[87] Article 14.2.b of the ACIA.

[88] Article 14.2.c, a of the ACIA.

[89] Article 14.3 of the ACIA.

[90] Article 14.2.d of the ACIA.

Finally, ASEAN countries undertake to accord restitution, compensation or other valuable consideration to investors for losses caused to their covered investments in their territories due to armed conflict or civil strife or state of emergency.[91] However, in this situation, compensation is not necessarily to be adequate but only has to satisfy a requirement of non-discriminatory treatment between investors, domestic or foreign.[92]

E. *Exceptions*

When accepting international obligations to foreign investments, host states want to maintain flexibility in policy making to pursue and balance different objectives. Therefore, the ACIA provides some exceptions when ASEAN countries need to priotize some policy issues over attracting foreign investment by commitments in protecting them. To avoid abuses of exceptions to disregard obligations in ACIA, however, provisions on exceptions contain detailed qualifications.

Firstly, the host state has the right to prevent or delay monetary transfer to ensure its law enforcement. This exception is conditional on the equitable, non-discriminatory, and good faith application of its laws and regulations. Moreover, it is permitted in some policies areas and to protect the rights and interests of specific groups other than foreign investors. Paragraph 3 of Article 13 lists exhaustively laws and regulations falling within the scope of this exception, which are those relating to bankruptcy, insolvency, or the protection of the rights of creditors; issuing, trading, or dealing in securities, futures, options, or derivatives; criminal or penal offences and the recovery of the proceeds of crime; financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;ensuring compliance with orders or judgments in judicial or administrative proceedings; taxation;social security, public retirement, or compulsory savings schemes; severance entitlements of employees; andthe requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of an ASEAN member.

Secondly, Article 16 of the ACIA allows the host state to adopt or maintain restrictions on payments or transfers related to investmentsso as to maintain a necessary financial reserve adequate for the implementation of its programme of economic development. The situation that the host state may invoke this exception is in the event of serious balance-of-payments and external financial difficulties or threat.In addition, the exception measures must satisfy the following requirements:

(a) be consistent with the Articles of Agreement of the IMF;

(b) avoid unnecessary damage to the commercial, economic and financial interests of another Member State;

(c) not exceed those necessary to deal with this situation;

(d) be temporary and be phased out progressively as the situation improves;

(e) comply with most-favored nation treatment

Thirdly, according to ACIA's general exceptions, theo ngoại lệ chung của ACIA,nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures which are not arbitrary or unjustifiably discriminationatory and necessary to protect such public interests as public morals, public order, human, animal or plant life or health; national treasures of artistic, historic or archaeological value; exhaustible natural resources …[93]

Finally, security exceptions provided under Article 18 states clearly that nothing in this Agreement shall be construed to prevent any ASEAN countries from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to: action relating to fissionable and fusionable materials or the materials from which they derived; action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; action taken in time of war or other emergency in domestic or international relations; action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.

[91] Article 12 of the ACIA.

[92] Ibid.

[93] Article 17 of the ACIA.

F. *Dispute Settlement*

Similar to other investment treaties, the ACIA provides dispute settlement mechanisms for two types of disputes: interstate disputes and investor-state disputes. Regarding the first group of disputes, the ACIA refers to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004.[94] In general, this Protocol follows the model of interstate dispute settlement of the WTO with two levels: *ad hoc* Panel and permanent Appellate Body. The Senior Economic Officials Meeting (SEOM) administers the dispute settlement procedures in accordance this Protocol. It has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.[95]

The ACIA provides the investor-state dispute settlement in detail. The first compulsory procedure is consultations within 180 days of the receipt by a disputing Member State of a request for consultations.[96] The Agreement also encourages disputing parties to resort to conciliations. If they cannot resolve their disputes by diplomatic means,[97] investors have the right to sue the host state and may choose a forum such as domestic courts or administrative tribunals of the host state, ICSID arbitration, UNCITRAL arbitration,the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, or any other arbitration institution which the parties agree upon.[98] When they opt for one of these for a, their choice is final and excludes other fora.[99] The submission of the investment dispute to such arbitration is permitred for a period of three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or a covered investment.[100] Therefore, Vietnam agrees and accepts in advance the jurisdiction of international arbitration

[94] The ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Vientiane, Lao PDR, signed 29 November 2004, entered into force 15-17 March 2005. This Protocol replaces the ASEAN Protocol on dispute settlement mechanism 1996.

[95] Article 2.1 of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004.

[96] Article 32 of the ACIA.

[97] Article 34 of the ACIA.

[98] Article 33 of the ACIA.

[99] Article 33.1 of the ACIA.

[100] Article 34.1.a of the ACIA.

in disputes brought by foreign investors invoking the ACIA. Since Vietnam has not been a party to the ICSID Convention, investors of other ASEAN countries cannot use ICSID arbitration when suing Vietnam. Nonetheless, they still can choose the ICSID Additional Facility Rules.

If foreign investors choose domestic courts or administrative tribunals of the host state, its laws will apply to the adjudicative procedures. If they bring their dispute before international arbitration, the ACIA provides default rules for all types of arbitration such as request for arbitration, selection of arbitrators, transparency, arbitration costs and taxation related disputes. These rules prevails specific arbitration rules such as those of ICSID and UNCITRAL selected by foreign investors. However, the ACIA emphasizes the autonomy of disputing parties when it allows them waive or modify the applicable arbitration rules by written agreement.[101]

ACIA provides on the component of the arbitral tribunal. Accordingly, unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties; and the third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The presiding arbitrator cannot be a national of a non-Member State which has diplomatic relations with the disputing Member State and non-disputing Member State, or have permanent residence in either the disputing Member State or non-disputing Member State.[102] Professional requirement of arbitrators is expertise or experience in public international law, international trade or international investment rules.[103]

The establishment of an arbitral tribunal cannot be delayed by a disputing party because the ACIA specifies appointing authorities if a party does not appoint arbitrator(s) within 75 days from the date that a claim is submitted to arbitration which are the Secretary-General of ICSID in the case of arbitration established under the ICSID Convention, the Secretary-General of the Permanent Court of Arbitration in the case of UNCITRAL arbitration, the Secretary-General, or a person holding equivalent position, of an arbitration centre or institution in case of other arbitrations such as the Regional Centre for Arbitration at Kuala Lumpur.[104]

[101] Article 33.4 of the ACIA.

[102] Article 35.1 of the ACIA.

[103] Article 35.2 of the ACIA.

[104] Articles 35.3 and 28.a of the ACIA.

Arbitral proceedings are bifurcatedwith issues relating to jurisdiction or admissibility decided before merits stages if there are objections to them.[105] Where an investment dispute relates to a measure which may be a taxation measure, the ACIA provides a compulsory procedure before an investor resort to international arbitration.[106] Accordingly, ASEAN countries involved in the dispute will hold consultations to determine whether the measure in question is a taxation measure and at the request of the ASEAN respondent state, hold consultations to determine whether the taxation measure in question has an effect equivalent to expropriation or nationalization.[107] The arbitral tribunal is obligated to accord serious consideration to the decision achieved in these consultations.[108] However, if the concerned ASEAN countries cannot start consultations within 180 days, foreign investors still have the right to international arbitration.[109]

The ACIA Agreement contains a requirement on transparency in international arbitration: the ASEAN respondent state has to notify all other Member States of the receipt of the notice of arbitration within 30 days after the date that such document has been delivered to it.[110] However, confidential information is protected and the publication of awards, and decisions produced by the tribunal is at the discretion of the ASEAN respondent state.[111]

Regarding arbitration costs, ACIA rules are notably different from other investment treaties and arbitration rules. Paragraph 5 of Article 35 of the Agreement states clearly that disputing parties bear the cost of their respective arbitrators to the tribunal and share equally the cost of the presiding arbitrator and other relevant costs. Although the disputing parties may establish rules relating to expenses incurred by the tribunal, including remuneration of the arbitrators but if they cannot agree upon these issues, it is understood that they will decide the remuneration of their appointed arbitrator.[112] Arbitral tribunals have to comply with these cost rules of the ACIA.[113]

[105] Article 36.1 of the ACIA.

[106] Article 36.6 of the ACIA.

[107] Article 36.7 of the ACIA.

[108] Article 36.8 of the ACIA.

[109] Article 36.9 of the ACIA.

[110] Article 39.6 of the ACIA.

[111] Article 39.1-5 of the ACIA.

[112] Article 35.6 of the ACIA.

[113] Article 41.3 of the ACIA.

The ACIA rule on applicable law shows the commitment of the ASEAN countries in multiple cooperation areas which are interrelated and linked with each other. It requires arbitral tribunals to decide the issues in dispute in accordance with not only this Agreement but also any other applicable agreements between them, and the applicable rules of international law and where applicable, any relevant domestic law of the ASEAN respondent state.[114]

Finally, on the review of arbitral awards, the ACIA refers to the annulment procedure of the ICSID Conventionin case of ICSID arbitration.[115] Awards issued by arbitral tribunals established under the ICSID Additional Facility and UNCITRAL Arbitration Rules, domestic courts will have the competence to revise, set aside, or annul the award. When the time frame for reviewing arbitral awards ends,[116] the winning party may seek enforcement and the ACIA provides that ASEAN countries have to provide for the enforcement of an award in its territory.[117]

3. ASEAN's Agreements with External Partners

Vietnam's commitments on promoting and protecting foreign investment as an ASEAN member state in ASEAN's agreements with external partners share *a great deal of similarities* with the ACIA discussed in detail above. At present, ASEAN concluded the following investment treaties: Agreement on Investment with China,[118] Agreement on Investment with Republic of Korea,[119] Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area,[120]Agreement on Investment with India.[121]

[114] Article 40.1 of the ACIA.

[115] Articles 50-55 of the ICSID Convention.

[116] Article 41.7 of the ACIA.

[117] Article 41.9 of the ACIA.

[118] Agreement on Invetsment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China, signed 15 August 2009 and entered into force 1 January 2010.

[119] Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea, signed 2 June 2009 and entered into force 1 September 2009.

[120] Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed 27 Febuary 2009, entered into force 1 January 2010.

[121] Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and India, signed 12 November 2014 and entered into force 1 July 2015.

Section Three. SOME FTAs CONCLUDED BY VIET NAM

Apart from investment treaties concluded under the auspices of ASEAN, Vietnam has been negotiating and signing some multilateral and bilateral free trade agreements with a chapter modeled after an investment treaty. Vietnam and some other countries are parties to many different treaties which result in overlapping and complication in practice. Although investment treaties share a lot of similarities in structure and content, they still contain divergent formulations and wording and thus, different commitments. *For example*, both Vietnam and Japan are parties to the Agreement between Vietnam and Japan for an Economic Partnership (VJEPA),[122] the Trans Pacific Partnership Agreement (TPP), the negotiation of the Regional Comprehensive Economic Partnership Free Trade Agreement (RCEP), not to mention the ASEAN-Japan Agreement on Investment. The chapters on investment relations of the TPP and RCEP, drafted and negotiated recently, have the same comprehensive and detailed content as the ACIA. However, VJEPA does not establish a new legal framework on investment. Instead, it refers to succinct provisions of Vietnam and Japan bilateral investment treaty signed in 2003.[123] Following is the list of Vietnam's free trade agreements with investment chapters up to May 2017.[124]

No.	Short title	Parties	Date of signature	Date of entry into force
1	TPP	Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America	04 February 2016	
2	EU - Vietnam FTA	EU25 (European Union 25)	01 February 2016	
3	Eurasian Economic Union - Viet Nam FTA	Eurasian Economic Union	29 May 2015	05 October 2016
4	Republic of Korea - Viet Nam FTA	Republic of Korea	05 May 2015	20 December 2015
5	Chile - Viet Nam FTA	Chile	12 November 2011	
6	Japan - Viet Nam EPA	Japan	25 December 2008	01 October 2009
7	US - Viet Nam Trade Relations Agreement	United States of America	13 July 2000	13 July 2000
8	RCEP	Australia, China, India, Japan, Republic of Korea, New Zealand		

In the above listed free trade agreements, foreign investors invoked the Vietnam-US bilateral trade agreement (BTA)[125] to sue Vietnam.[126] In 2010, Michael McKenzie, an US national, alleged the Government of Vietnam, specifically the People's Committee of Binh Thuan province, violated its commitments to accord the foreign investor fair and equitable treatment as well as the provisions on indirect expropriation in his project to build the South Fork resort in Binh Thuan. He invoked his right to international arbitration established in accordance with the UNCITRAL Arbitration Rules under the BTA. In 2013, the arbitral tribunal dismissed his claim in an unpublished award for the reason that the foreign investor lacked honesty and good faith since his application for investment permit in Vietnam and thus could not be protected under the BTA.[127]

[122] Agreement between Vietnam and Japan for an Economic Partnership, signed 25 December 2008, entered into force 1 October 2009.

[123] Agreement between Japan and Viet Nam for the Liberalization, Promotion and Protection of Investment, signed 14 November 2003, entered into force 19 December 2004.

[124] Compilation from the UNCTAD website, available at http://investmentpolicyhub.unctad.org/IIA/CountryOtherlias/229#iiaInnerMenu (accessed on 2 June 2017).

[125] Agreement between the United States of America and Viet Nam on Trades Relations, signed 17 March 2000, entered into force 10 December 2001.

[126] Ministry of Justice of Viet Nam, 'Press Release' http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập ngày 8/6/2017.

[127] Ibid.

Most recently, Vietnam joined two free trade agreements: the TPP signed on 4 February 2016 and the EU-Vietnam Free Trade (EVFTA) of which the agreed text was published on 1 February 2016. Both have not entered into force yet. Chapter 9 of the TPP is purported to regulate investment relations among the following signatories: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Similarly, the EVFTA has a part on promoting and protecting reciprocal investments. Their legal frameworks on investment were drafted with the similar approach as the ACIA. However, the EVFTA dispute settlement mechanism has a new and special feature which is the investment tribunal system replacing traditional international arbitration with two phases - the first instance tribunal and the appellate tribunal.

Section Four. SOME BITs CONCLUDED BY VIET NAM

Vietnam are parties to over 60 bilateral investment treaties (BITs). They can be categorized into two groups regarding their content: traditional and modern treaties. The majority of traditional BITs were concluded in the early phase since 1990s. They are usually shorter than the modern ones, with around 10 provisions which are in many aspects vague and indeterminate and do not anticipate the need for flexibility in pursuing different public policies of the host state. Modern treaties have been concluded since the 21st century, reflecting the need for redrafting and amending obligations to reduce bases giving rise to disputes and preserving more freedom for the host state in policy making. Nonetheless, some agreements with partners that Vietnam has limited economic relationships are still in the form of traditional BITs. Modern treaties solve the ambiguity and controversy in many provisions of traditional ones.Experience in arbitration cases has great impact on the drafting and negotiation of the BITs between Vietnam and other countries.

According to UNCTAD statistics, foreign investors brought claims against Vietnam before international arbitration in three cases, of which two were decided in favour of Vietnam and one was settled by agreement between the disputing parties. A case involved the BIT between Vietnam and Netherlands signed in 1994 and two cases were based on the BIT between Vietnam and France signed in 1992.[128]

[128] See the list of the cases that Vietnam involved as a respondent state, available athttp://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2 (accessed 2/6/2017)

In addition to the cases that Vietnam is a disputing party, hundreds of arbitral awards initiated under BITs helped host states to realize the shortcomings of tradition formulations of their commitments. Therefore, modern treaties add clarifications in various matters such as scope of application, substantive standards of promotion and protection of foreign investment and dispute settlement provisions. More specifically, they clarify definitions of investment, investors to such standards as most-favored nation treatment, fair and equitable treatment, full protection and security, indirect expropriation. They also add exceptions and reservations allowing the host state to prioritize public policy interests such as protection of human, animal or plant life or health and environment, public morals and public order…[129]

Following is the list of Vietnam's bilateral investment treaties up to May 2017.[130]

No.	Partners	Status	Date of signature	Date of entry into force
1	Algeria	Signed (not in force)	21 October 1996	
2	Argentina	In force	03 June 1996	01 June 1997
3	Armenia	In force	01 February 1993	28 April 1993
4	Australia	In force	05 March 1991	11 September 1991
5	Austria	In force	27 March 1995	01 October 1996
6	Bangladesh	Signed (not in force)	01 May 2005	
7	Belarus	In force	08 July 1992	24/11/1994
8	BLEU (Belgium-Luxembourg Economic Union)	In force	24 January 1991	11 June 1999
9	Bulgaria	In force	19 September 1996	15 May 1998

[129] *See further* Trinh Hai Yen, *Textbook on International Investment Law,* National Publishing House, Hanoi (2017), pp.163-165.

[130] Compilation from the UNCTAD website, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/229#iiaInnerMenu (accessed on 02 June 2017).

10	Cambodia	Signed (not in force)	01 September 2001	
11	Chile	Signed (not in force)	16 September 1999	
12	China	In force	02 December 1992	01 September 1993
13	Cuba	In force	12 October 1995	01 October 1996
14	Czech Republic	In force	25 November 1997	09 July 1998
15	Denmark	In force	23 July 1993	07 August 1994
16	Egypt	In force	06 September 1997	04 March 2002
17	Estonia	Signed (not in force)	24 September 2009	
18	Finland	Terminated	13 September 1993	02 May 1996
19	Finland	In force	21 February 2008	04 June 2009
20	France	In force	26 May 1992	10 August 1994
21	Germany	In force	03 April 1993	19 September 1998
22	Greece	In force	13 October 2008	08 December 2011
23	Hungary	In force	26 August 1994	16 June 1995
24	Iceland	In force	20 September 2002	10 July 2003
25	India	In force	08 March 1997	01 December 1999
26	Indonesia	Terminated	25 October 1991	03 April 1994
27	Islamic Republic of Iran	Signed (not in force)	23 March 2009	
28	Italy	In force	18 May 1990	06 May 1994
29	Japan	In force	14 November 2003	19 December 2004
30	Kazakhstan	In force	15 September 2009	07 April 2014
31	Democratic People's Rep. of Korea	Signed (not in force)	02 May 2002	
32	Republic of Korea	Terminated	13 May 1993	04 September 1993
33	Republic of Korea	In force	15 September 2003	05 June 2004
34	Kuwait	In force	23 May 2007	16 March 2011
35	Lao People's Democratic Republic	In force	14 January 1996	23 June 1996
36	Latvia	In force	06 November 1995	20 February 1996
37	Lithuania	In force	27 September 1995	24 April 2003
38	Malaysia	In force	21 January 1992	09 October 1992
39	Mongolia	In force	17 April 2000	13 December 2001
40	Morocco	Signed (not in force)	15 June 2012	
41	Mozambique	In force	16 January 2007	29 May 2007
42	Myanmar	Signed (not in force)	15 February 2000	
43	Namibia	Signed (not in force)	30 May 2003	
44	Netherlands	In force	10 March 1994	01 February 1995
45	Oman	Signed (not in force)	10 January 2011	
46	Philippines	In force	27 February 1992	29 January 1993
47	Poland	In force	31 August 1994	24 November 1994
48	Romania	In force	15/09/1994	16/08/1995

49	Russian Federation	In force	16 June 1994	03 July 1996
50	Singapore	In force	29 October 1992	25 December 1992
51	Slovakia	In force	17 December 2009	18 August 2011
52	Spai	In force	20 February 2006	29 July 2011
53	Sri Lanka	Signed (not in force)	22 Octo 2009	
54	Sweden	In force	08 September 1993	02 August 1994
55	Switzerland	In force	03 July 1992	03 December 1992
56	Chinese Taipei	In force	21 April 1993	23 April 1993
57	Tajikistan	Signed (not in force)	19/01/1999	
58	Thailand	In force	30 October 1991	07 February 1992
59	Turkey	Signed (not in force)	15 January 2014	
60	Ukraine	In force	08 June 1994	08 December 1994
61	United Arab Emirates	Signed (not in force)	16 February 2009	
62	United Kingdom	In force	01 August 2002	01 August 2002
63	Uruguay	In force	12 May 2009	09 September 2012
64	Uzbekistan	In force	28 March 1996	06 March 1998
65	Bolivarian Republic of Venezuela	In force	20/11/2008	17/06/2009

SUMMARY OF THE CHAPTER TEN

This Chapter discusses Vietnam's commitments on promoting and protecting foreign investment in four categories: commitments within the framework of the WTO, commitments as an ASEAN member state and commitments in Vietnam's free trade agreements and commitments in Vietnam's bilateral investment treaties. Vietnam undertakes obligations with respect to foreign investment in such WTO agreements as the Agreement on Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (SCM). These rules are fragmented and protect investment in separate aspects such as prohibition of performance requirements, prohibition on discrimination between investments in services, protection of intellectual property rights of foreign investors…

As an ASEAN member state, Vietnam has to comply with provisions on foreign investment of the latest ASEAN agreement, the ASEAN Comprehensive Investment Agreement (ACIA) as well as ASEAN agreements with external partners such as China, South Korea, Australia and New Zealand. They are discussed in detail in the case of the ACIA. Other ASEAN agreements, Vietnam's FTAs and some of its bilateral investment treaties have the content similar to the ACIA and therefore, are briefly introduced. Vietnam's bilateral investment treaties are categorized into two groups, traditional and modern. Traditional ones contain many ambiguous provisions, cause difficulties in their application in dispute settlement. The content and structure of modern BITs are similar to recent ASEAN investment agreements and Vietnam's FTA.

QUESTIONS / EXERCISES

1) Discuss on Vietnam's commitments with regard to foreign investment in WTO.

2) Discuss on Vietnam's commitments with regard to foreign investment in WTO ASEAN.

3) Discuss on Vietnam's commitments with regard to foreign investment in FTA.

4) Discuss on Vietnam's commitments with regard to foreign investment in bilateral investment treaties.

5) Compare the structures and content of Vietnam's traditional investment treaties and modern ones.

6) Exercise: Suppose Company A, incorporated in Japan, build a steel plant in Vietnam, wants to brought a claim against Vietnam for a government decision preventing the plant from operating until solving the water pollution caused by the toxic industrial waste illegally discharged into the ocean through its drainage pipes. What are investment treaties that Company A can invoke to sue Vietnam? Which investment treaty should it invoke? Explain.

REQUIRED / SUGGESTED / FURTHER READINGS

1. Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investmen*t. (Cheltenham (UK) and Northampton (USA): Edward Elgar Publishing, 2016).

2. Jeswald W. Salacuse, *The Law of Investment Treaties*. (New York: Oxford University Press, 2105).

3. Diane A. Desierto, "Investment Treaties: ASEAN" in Hal Hill, Maria Socorro GochocoBautista (eds) *Asia Rising: Growth and Resilience in an Uncertain Global Economy* (Edward Elgar Publishing Limited, 2013).

4. Trinh Hai Yen, "The ASEAN Comprehensive Investment Agreement", in Paul Davidson (ed), *Trading Arrangements in the Pacific Rim: ASEAN and APEC*. (USDA: West Publishing Co, 2012).

5. Trinh Hai Yen, *The Interpretation of Investment Treaties: Problems and Solution*. (Leiden|Boston: Brill Nijhoff, 2014).

6. Trinh Hai Yen, *Textbook on International Investment Law* (Hanoi: National Political Publishing House, 2017), Chapter 9.

CHAPTER ELEVEN. VIETNAMESE LAW

CHAPTER ELEVEN.

VIETNAMESE LAW GOVERNING INTERNATIONAL INVESTMENT RELATIONS

Learning Objectives
Chapter Eleven

- Understanding the legal framework of Vietnamese law governing international investment relations;
- Understanding the the main rules of the legal framework of Vietnamese law governing international investment relations

In a constantly moving world economy, capital demand always exists in all countries. For developing countries, this demand is becoming more and more urgent. However, domestic accumulation in developing countries is not high, thus attracting international investment becomes an important solution to the problem of capital shortage in these countries. Any developing country considers attractting foreign investment an essential way to achieve its goals of economic development. In the capital-raising competition, developing countries focus on improving the investment environment, in which the development and improvement of the policy and law system are the most focused. National law on investment will thus become a key element in attracting international investment. Vietnam is also not out of this trend, taking great efforts in building a favorable investment environment.

Theoretically, the concept of national law on investment, or investment law, has different approaches. *In broad sense*, the national law on investment is the synthesis of rules and regulations governing the social relations that arise in the course of organizing and carrying out investment activities in that country. Meanwhile, social relations arising in the investment sector are quite complex, including the relationship between the state and investors, that between investors and investors, that between investors and managers of a business, and that between investors and other stakeholders ... Therefore, in the broadest sense, the national law on investment is the synthesis of the principles and norms of many different disciplines such as Constitution law, administrative law, civil law, commercial law, land law ... that adjust investment relations. *In the narrow sense,* the national law on investment is the synthesis of rules and regulations governing social relations arising in the process of implementation and management of business investment. According to this approach, the object of the national law on investment is the business investment relationship - the relationship that arises in the course of which the investors contributes their capital by various assets to create the establishments for conducting investment activities (including investment preparation, implementation and management of investment projects).

This chapter of the syllabus approaches the concept of national law on investment in the narrow sense. Thus, Vietnamese law governing international investment relations, which is understood as a synthesis of principles and norms promulgated or recognized by the State, governs

the relationship arising in the process of organization, implementation and managing international investment activities in the territory of Vietnam, including investment activities of foreign investors in Vietnam and investment activities of Vietnamese investors in foreign countries.

Section One. LEGAL FRAMEWORK

1. Historical Development of Law on International Investment in Viet Nam

Since historical conditions, the law governing international investment relations in Vietnam is made rather late and slowly improved. In the period of 1945, after the government had been acquired, the government made certain adjustments to the investment, but legal documents in this period were rather loose and mostly existed only in the form of Presidential Decree. These decrees continued to recognize and allow companies and foreign firms to conduct business in Vietnam (Decree of the Provisional President of the Democratic Republic of Vietnam No. 48 in October 9th 1945), regulated investment of State (Decree 104-SL in January 1st 1948, Decree 127-SL in November 4th 1952), and allowed early investment cooperation between the State and the private (Decree No. 6-SL in January 20th 1950). However, at this stage, the task that was placed at the top of the state was not economic development but "independence". Therefore, in addition to the above-mentioned decrees, there were no additional legal documents issued by the State Authority regulating investment activities.

In the period before 1986, the Party and State of Vietnam advocated the establishment of a centrally planned economy with two main economic sectors, the state-owned industry and the collective sector. In order to regulate the investment activities of entities of these two economic sectors, such as state-owned enterprises, joint-venture enterprises or cooperatives, the State promulgated many legal documents. However, in the central planning mechanism, investment law was not an important tool in adjusting investment activities. During this stage, the private sector was not recognized, so in terms of legal aspects, private sector investment activities were not adjusted. However, for the foreign economic sector, the Party and the State paid certain attention. In particular, the Fourth Party Congress in 1976 affirmed: "The promotion of bilateral relations and cooperation in the economic sector and the development of economic relations with other countries play a very important role". Implementing this guideline, the first separate legal document on foreign investment, promulgated by the Government so as to encourage and regulate foreign direct investment in Vietnam, was Decree No. 115/CP on April 18th 1977 of the Ministers Council promulgating the Charter of Foreign Investment in Vietnam, commonly known as the Charter of Investment in 1977. The Investment Charter 1977 was the precursor of the 1987 Law on Foreign Investment in Vietnam. During this period, the issue of overseas investment was not adjusted. In 1986, the Sixth Party Congress set out reform policies that marked a turning point in the process of developing the national economy, the Party decided to develop a multi-sectoral economy operating under the socialist oriented market mechanism. Congress also emphasized the expansion of international exchanges to attract foreign investment to develop the national economy. Therefore, to implement Resolution No. 19 of the Political Bureau on 17 July 1984 and the Resolution of the 7th Conference of the Party Central Committee (5th tenure) on 20 December 1984 on the supplementation and finalization of provisions of the investment law promulgated in 1977 and torwarded building a fully done law on investment, at the second session of the 8th National Assembly on 31 December 1987, at which Law on Foreign Investment in Vietnam was approved. It can be said that the introduction of the Law on Foreign Investment in Vietnam in 1987 stemmed from the objective requirements of social mobilization, this law has created a higher legal environment to attract foreign investment capital into Vietnam. After the founding of the Law on Foreign Investment in Vietnam in 1987 - the historical milestone so far, the Law on Foreign Investment in Vietnam has been amended twice, the first time in 1990, the second time in 1992.

At the 10th session of the 9th National Assembly on 12 November 1996, the new Foreign Investment Law was passed, often known as the Foreign Investment Law 1996, which was drafted on the basis of consolidating Foreign Investment Law 1987, amended Foreign Investment Law 1990 and amended Foreign Investment Law 1992. On 9 June 2000, the National Assembly adopted the revised Foreign Investment Law with two new provisions and 20 amended provisions in the Foreign Investment Law of 1996. On the basis of the Foreign Investment Law, the Government and ministries have issued a number of documents guiding the implementation of the investment law, regulating fairly comprehensive foreign direct investment in Vietnam. However, despite the many obstacles and certain impacts on investment

attraction, the Foreign Investment Law in Vietnam was still considered incomplete, administerized investment activities and was lack of synchronization.

With efforts to continuously improve the investment environment, legal environment, create unity in the legal system of investment, create a "playground" equality, non-discrimination between investors, simplify investment procedures and create favorable conditions for the attraction and efficient use of investment capital sources to meet the requirements of international economic integration, in 2005, the National Assembly promulgated the Investment Law, which come into force on 01 July 2006. The Law on Investment of 2005 replaces the Foreign Investment Law of 1996 and the Domestic Investment Promotion Law. In order to guide the implementation of the Law on Investment of 2005, the Government issued Decree No. 108/2006/ND-CP on 22 September 2006 detailing and guiding a number of provisions of the Law on Investment. The fundamental difference between the Law on Investment of 2005 and the Foreign Investment Law is that the Law on Investment only regulates the contents relating to investment activities while the contents relating to the organizational structure and operation of the business are adjusted by the Law on Enterprises, tax incentives are adjusted by legal documents on tax and other specific characteristics are regulated by specialized law.

However, after 8 years of implementation, the Law on Investment of 2005 has exposed many shortcomings such as not synchronized with the laws relating to business investment (Law on Securities, Law on Corporate Income Tax, Law on Construction, Law on Land, ...), as these laws have recently been promulgated or amended, or the regulations are not specific, lack transparency, measures to ensure investment have not been updated and fully reflected Vietnam's commitments on investment protection in treaties to which Vietnam is a member ... Therefore, in 2014 Congress has enacted the Law on Investment, came into force from 01 July 2015. The introduction of the Law on Investment of 2014 demonstrates Vietnam's efforts in building a favorable investment environment as well as implementing international commitments.[1]

[1] Read more, Hanoi Law University (2009), Textbook on Law on Investment, The People's Public Security Publishing House, Hanoi, p. 32-38.

2. Basic Legal Documents

International investment relations in Vietnam are governed by a set of legal documents issued by competent state authorities, including:

- Constitution of the Socialist Republic of Vietnam of 2013;
- Law on Investment of 2014;
- Law No. 03/2016/QH14 amending and supplementing the Article 6 and the Appendix 4 on the List of conditional business lines stipulated in the Law on Investment;
- Law on Enterprises of 2014;
- Law on Land of 2013;
- Law on Corporate Income Tax of 2015;
- Law on Export and Import Duties of 2016;
- Law on Non-agriculture Land Use Tax;
- And their implementing legal documents;
- Regulation on Coordination in International Investment Dispute Settlement Issued by the Prime Minister's Decision No. 04/2014/QD-TTg on 14 January 2015;

Section Two. MAIN RULES

1. Investment Activities of Foreign Investors in Vietnam

First of all, the concept of foreign investors and foreign-invested business organizations must be mentioned in accordance with Vietnamese law. At present, 'foreign investor' means an individual holding a foreign nationality or an organization established under foreign laws and making business investment in Vietnam. 'Foreign-invested business organization' means a business whose members or shareholders are foreign investors.[2] Therefore, the Law on Invesment of 2014 also clarifies the regime applicable to foreign investors and foreign invested business organizations in investment activities in Vietnam.

[2] Article 3, Law on Investment of 2014.

A. *Forms of Investment*

Foreign investors may invest capital and assets to carry out investment and business activities in Vietnam in the following forms:

1. Establishment of Business Organizations

Foreign investors may establish business organizations to carry out investment projects and business activities after meeting all the requirements: have investment projects; carry out the procedures for the grant of investment registration Certificates and meet the conditions on charter capital proportions, forms of investment, operating scope and Vietnamese partners participating in investment activities, and other conditions provided by treaties to which Vietnam is a contracting party. Accordingly, foreign investors are allowed own unlimited charter capital in business organizations, excepting restrictions stipulated by the law on securities, equitization and transformation of state-owned enterprises, and by international treaties to which Vietnam is contracting party.

Foreign investors may establish a business organization which a foreign investor hold 100% capital or which is a joint venture economic organization between a foreign investor and a domestic investor. The requirement to establish an business organization is a compulsory requirement for foreign investors to carry out an investment project. However, this requirement will not apply to foreign invested business organizations implementing new investment projects.

2. Capital Contribution, Share Purchase, Capital Contribution to Business Organizations

According to the Law on Investment of 2014, investment activities through capital contribution to a business organization may be carried out according to the following forms:

- Buy shares of joint-stock companies through IPOs or additional issuance;
- Contribute capitals to limited liability companies and partnerships;
- Contribute capital to other business organizations not mentioned in the two above cases.
- Apart from capital contribution, foreign investors may buy shares or capital contributions of business organizations in the following forms:
- Buy shares of joint-stock companies from the companies or their shareholders;
- Buy capital contributions to limited liability companies by their members and become members of limited liability companies;
- Buy capital contributions to partnerships by partners and become partners;
- Buy capital contributions to business organizations other than those mentioned in the above cases.[3]

3. Public-Private Partnership Contract (PPP Contract)

A PPP contract is a contract signed between an investor and a competent authorities to execute an investment project to build new infrastructural works, to improve, upgrade, expand, manage, and operate infrastructural works, or to provide public services.

Foreign investors may invest in the form of PPP contracts with the Government of Vietnam in the form of project contracts, specifically: Build - Operate - Transfer (BOT) contracts, Build - Transfer - Operate (BTO), Build - Transfer (BT), Build - Own - Operate (BOO), Build - Transfer - Lease (BTL), Operate Management Contract (O & M).

4. Business Cooperation Contract (BCC)

A business co-operation contract (BCC contract) is a contract signed between investors for business cooperation to divide profits and to divide products without establishing a new business organization. A BCC contract may be entered into between a foreign investor and a domestic investor, through the establishment of a Coordination Committee for the performance of the BCC.

Form of investment through signing BCC contracts is increasingly selected by domestic and foreign investors carrying out investment activities in lieu of establishment of business organizations such as joint ventures. Since in BCC contracts, there are certain advantages such as increased flexibility and less dependence on investors' partners in course of deciding on investment project issues. However, because of the failure to establish a legal entity, the project does not have a seal

[3] Article 25, Law on Investment of 2014.

so the parties will have to agree on the seal of one of the two parties to serve the operation of the investment project. This can cause a lot of trouble and potential risks for investors.

B. *Procedures for Decision on Investment Policies, Investment Registration and Business Registration*

For indirect investment activities (capital contribution or share or capital contribution purchase), investors only shall carry out the registration procedures in two cases: foreign investors contribute capital to, or purchase shares or capital contributions at, economic organizations operating in the sectors or trades in which business investment activities of foreign investors must meet certain conditions; or the capital contribution or share or capital contribution purchase leads to a situation whereby foreign investors or the economic organizations hold 51% or more of charter capital of the concerned economic organizations. An investor shall submit a dossier to the provincial-level of Planning and Investment Department of the locality where the head office of the concerned economic organization is located.

Depending on the nature, scale and conditions of each project, investment, project, before implementation, must be carried out in one or several procedures:

- Decision on investment policy, issuance of investment registration certificate;
- Establishing business organizations (for foreign investors investing in the form of business organizations);
- Carrying out the procedures for land allocation, land re-allocation, land lease, sublease, and conversion of land use purpose (if any);
- Carrying out construction procedures (if any).

1. Procedures for Deciding Investment Policy

The Law on Investment of 2014 officially recognizes the investment decision procedure while, under the old rules, the policy decision only applies informally to a number of projects. Foreign investors, when carrying out investment projects in Vietnam, should pay attention to whether their projects belong to the project group, which must have an investment policy and if so, and to who has the right to decide on the investment policies.

According to Article 30 of the Law on Investment 2014, the National Assembly has the power to issue decisions on policies for investment projects that have a significant impact on the environment or potentially have a seriously effect on environment; Projects that change purposes of land meant for rice cultivation with two or more crops of 500 hectares or larger; Projects that require relocation of 20,000 people or more in highlands; 50,000 people or more in other areas; Projects that require special policies decided by the National Assembly.

According to Article 31 of the Law on Investment of 2014, the Prime Minister is competent to issue investment decision on a number of investment projects. *Firstly,* irrespective of the source of capital, the Prime Minister decides investment policy of the following projects: Projects that require relocation of 10,000 people or more in highlands; 20,000 people or more in other areas; construction and operation of airports; air transport; construction and operation of national seaports; petroleum exploration, extraction, and refinery; betting and casino services; cigarette production; development of infrastructure of industrial parks, export-processing zones, and specialized sectors in economic zone; construction and operation of golf courses. *Secondly,*the Prime Minister is competent to issue investment decision on Projects in which investment is 5 billion VND or above. *Thirdly,* Projects of investment of foreign investors in sea transport, provision of telecommunications services with network infrastructure; afforestation, publishing, journalism, establishment of wholly foreign-invested science and technology organizations or science and technology with 100% foreign capital. *Forthly,* other projects as prescribed by law.

Pursuant to Article 32 of the Law on Investment of 2014, the People's Committees of provinces shall issue decisions on investment policies of the following projects: Projects that use land allocated or leased out by the State without auction or bidding or transfer; projects that require changes of land purposes (Projects executed at industrial parks, export-processing zones, hi-tech zones, and economic zones in conformity with plan approved by competent authorities are not subject to approval of the People's Committees of provinces), and Projects that use technologies on the List of technologies restricted from transfer prescribed by regulations of law on technology transfers.

Projects, which are subject to investment policy, must be subject to appraisal and verification before the competent authority issues decisions. Investment projects not falling into the above cases shall

not have to apply for investment policies. Foreign investors should pay attention to the following issues in the implementation process of the investment project.

2. Procedures for Issuance of Certificate of Investment Registration

Similar to the investment policy, foreign investors implementing investment projects in Vietnam should pay attention to whether investment projects belonging to project groups which must apply for investment registration certificates in accordance with investment law or not. According to Article 36 of the Law on Investment of 2014, investment projects must apply for investment registration certificates, including:

- Investment projects of foreign investors;
- Investment projects of foreign business organizations that foreign investors holding 51% of charter capital or more, or the majority of the general partners are foreigners if the business organization is a partnership;
- Investment projects of foreign business organizations having 51% of charter capital or more of foreign business organization with foreign owned capital of more than 51% of charter capital or partnerships with majority of foreign members;
- Investment projects of foreign business organizations having 51% of charter capital or more of foreign investors and foreign business organization with foreign owned capital of more than 51% of charter capital or partnerships with majority of foreign members;

Projects, which are not subject to the procedures for issuance of investment certificates (investment projects of domestic investors or business organizations holding less than 51% of charter capital), still on demand for registration are entitled to carry out procedures for issuance of investment registration certificate.

Before the authority executes the procedures for issuance of an investment certificate, the investor must declare online information on the investment project on the National Information System on Foreign Investment. Within 15 days from the receipt of the request, the inquired agencies shall send written responses to the registry office. If national information system on foreign investment is in trouble, the investment registration authority shall apply the contingency method in receiving the dossier in paper of the foreign investor. The private investment registries may be the management boards of industrial zones, export processing zones, high-tech zones, economic zones and relevant Department of Planning and Investment.

The duration for granting investment registration certificates under the Law on Investment of 2014 has been significantly shortened in comparison with the Law on Investment of 2005, 5 days from the date of receipt of the decision on investment policy for investment project which is subject to investment policy, and 15 working days since the investment registration office receives the complete dossier for other projects. This is a regulation that contributes to the reform of administrative procedures and contributes to enhance the attraction of foreign investment in Vietnam.

3. Procedures for Business Registration

In comparison with old regulations, Law on Investment of 2014 has clearly defined the content of investment registration in accordance with procedures for the issuance of investment registration certificate and requirements for registration of establishment of a business organization in accordance with Law on Enterprise. After being granted a investment registration certificate, investor shall carry out procedures for business registration. However, according to Decree No. 118/2015/ND-CP, foreign investors have the right to carry out both procedures at one location. Accordingly, foreign investors submit business registration dossiers and business organization registration dossiers at the Investment Registration Authority. This agency shall have to receive the dossiers and, within 01 working day, send the dossiers of registration of business organization to Registration Authority. Within 2 days, the Business Registration Authority shall have to consider the validity of the dossiers and give its opinion to the Investment Registration Authority.

As such, Vietnamese laws have stipulated certain administrative reforms in the field of international investment aimed at reducing administrative procedures for foreign investors. However, these reforms also require coordination between the Investment Registration Authority and the Business Registration Authority in receiving applications from foreign investors and carrying out the registration procedures.

C. *Implementation of Investment Projects*

After obtaining the investment registration certificate and carrying out the procedures for business registration, the investor shall carry out the legal procedures for the implementation of the investment project. The time of implementation of investment projects is clearly stated in the investment registration certificate. For investment projects inside an economic zone, the duration of the project implementation shall not be longer than 70 years. For investment projects outside an economic zone, the duration of the project implementation shall not be longer than 50 years. However, for projects outside an economic zone, which are carried out in an disadvantaged area or extremely disadvantaged area or a project with slow rate of capital recovery may be longer but not extending 70 years.[4]

For project uses land allocated or leased out by the State, or is permitted by the State to change land purposes. The investor shall pay a deposit for assurance of project execution; the deposit is equal to 1 - 3% of the capital investment, and shall be returned to the investor according to the project schedule, except for the case in which it is not returned.

While implementing the investment projects, there may be some incidents to the projects such as extension of project and suspension of project. For extension of the project, the investor shall submit written proposals to the registry office, and if accepted, extension shall not exceed 24 months, except in force majeure events. For suspension of the project, the investor must notify the registry office in writing or the authority will decide.

When foreign investors invest in the form of BCC Contract, the parties must set up a Coordination Committee to perform the contract. Foreign investors are also entitled to set up executive offices in Vietnam to perform contracts. The Executive Office shall conduct business activities within the scope of the rights and obligations stipulated in the BCC Contract and may terminate its operation ahead of time.

2. Measures of Investment Protection

Investment protection measures can be understood as the protection and preservation of investors' interests in the investment process, in particular the preservation of capital and assets of investors and ensuring profitability when the investors contribute capital and this property into business. Any investor is concerned about the investment assurance because it directly affects the desire to preserve capital and make profits of investors. Investment protection can be made by the investor itself, by financial means, or by law. In particular, legal investment assurance is the surest and most reliable way for investors. Therefore, legal investment protection becomes a core issue in attracting investment capital. Countries that need to attract investment have made every effort to make commitments on investment protection in international agreements and concretize those in domestic legal documents.

Thus, the concept of investment assurance measures approached in this context is the measures prescribed in the legal documents, ensuring the rights and legitimate interests of investors in the process of implementation of investment and business. Investment protection is also understood as the obligations and commitments of the host country to investors, which must be respected and complied with.

Measures to guarantee basic investment such as protection of ownership of assets of investors, transfer of foreign investors' assets abroad, settlement of business investment disputes, are regulated in many legal documents, such as the Law on Investment of 2005 that is basically in line with international practices and commitments of Vietnam at the time. However, in order improve the investment assurance policy in compliance with the international commitments on investment protection that Vietnam has agreed in the past, the Law on Investment of 2014 has made significant additions to the investment protection.

A. *Protection of Ownership*

Deciding to invest a large block of assets in the business, investors always face many challenges in the preservation and profitability of the asset. However, what makes investors, especially foreign investors, the most worried is the risks not coming from the business but from the policies and laws of the investment recipient country. In fact, many investors' assets are nationalized, resulting in that assets are transferred ownership from investors to governments of recipient country. *For example*, the Venezuelien government has nationalized oil companies from 2007 to 2010, involving many foreign companies such as Exxon

[4] Article 43 of the Law on Investment of 2014.

Mobil Corp, ConocoPhillips or Helmerich & Payne Inc in Oklahoma.[5]

Protection of ownership in business investment is a legal regulation governing the social relations relating to asset ownership - specific civil rights for a certain asset of the owner. Protection of ownership of investors is understood as a measure to protect the civil rights of investors in terms of assets owned by them. According to Vietnamese law, ownership right of investors is guaranteed, in particular, the lawful assets of investors will not be nationalized or confiscated by administrative procedures. This principle is recognized in Article 32 of the Constitution of 2013 and Article 9 of the Law on Investment of 2014. This investment protection measure is applied to all investors from the very beginning of the project.

However, although not nationalized or confiscated by administrative measures, but in some cases, the assets of investors may also be requisitioned. This event usually occurs because of national defense, security or national interests, emergency situations, natural disaster prevention. At that time, the investor shall be paid and compensated in accordance with the law on compulsory purchase and requisition of assets and other relevant provisions of law. In essence, because of defense, security or national interests, not only the property of the investor but also the possessions of individuals and households can be confiscated. Thus, basically, the investor's asset is protected by law.

B. *Protection of Business Investment*

In order to comply with Vietnam's international commitments on investment and trade, Vietnamese law provides measures to protect investment and business activities of investors on a general principle: The State ensures to conduct fair and equitable and non-discriminatory treatment between domestic investors and foreign investors in investment activities in accordance with the conditions and roadmaps prescribed in international treaties of which Vietnam is a member.[6] Thus, business investment assurance is the commitment of the state to ensure the investment activities of investors so that these activities are carried out freely in accordance with the spirit of the principle of market opening and the principle of national treatment.

[5] http://www.reuters.com/article/us-venezuela-election-nationalizations idUSBRE89701X20121008, dated 20 May 2017.

[6] Report No. 89/TTr-CP dated 10 April 2014 on the Project of Law on Investment.

Specifically, according to Article 10.1 of the Law on Investment of 2014, investors are not required by the State to satisfy the following requirements:

- Give priority to buying, using domestic goods/services; or only buy, use goods/services provided by Vietnamese producers/ service providers;
- Achieve a certain export target; restrict the quantity, value, types of goods/services that are exported or produced/provided in Vietnam;
- Import a quantity/value of goods that is equivalent to the quantity/value of goods exported; or balance foreign currencies earned from export to meet import demands;
- Reach a certain rate of import substitution;
- Reach a certain level/value of domestic research and development;
- Provide goods/service at a particular location in Vietnam or overseas;
- Have the headquarter situated at a location requested by a competent authority.

For foreign currency issue, one of the most important issues for investors involved in the field of international trade, foreign investors do not have to balance foreign currencies themselves from export sources to meet their import requirements. For investment projects falling under the competence of the National Assembly, the Prime Minister and other investment projects on development of other important infrastructures, the Prime Minister shall ensure that the demand for foreign currency will be met in certain periods.

The mentioned above provisions clearly specify the principle of national treatment in the non-application and non-maintenance of "local content requirements" measures or the principle of market opening in the non-application or non-maintenance of "compulsory export measures". One of the most important issues for investors involved in the field of international trade is that foreign investors do not have to balance foreign currencies themselves from export sources to meet their import requirements. For investment projects falling under the

deciding competence of investment owners of the National Assembly, the Prime Minister and other investment projects on development of other important infrastructures, the Prime Minister shall ensure the satisfaction the demand for foreign currency in certain periods.

C. *Guarantee of Transfer of Foreign Investors' Assets Abroad*

Transferring investors' owned assets abroad is a legitimate and indispensable requirement of foreign investors. Guarantee of transfer of assets of foreign investors abroad as well as other investment assurance measures aims at clarifying and improving the investment environment of the host country. Therefore, the right to freely transfer foreign assets and profits of foreign investors is guaranteed by the Government of Vietnam. According to Article 11 of the Law on Investment of 2014, foreign investors are allowed to transfer assets such as investment capital, investment liquidation, income from investment activities, money and other assets belonging to the lawful ownership of the investor.

In essence, measures to ensure the transfer of assets of foreign investors abroad have been recognized in the provisions of the Law on Foreign Investment in Vietnam of 1996, the Law on Investment of 2005. However, regarding this transfer, the important issue is not the transfer permission but the financial obligation of the investor with Government of Vietnam so that the transfer is permitted by law. For assets as investment capital, investment liquidation, money and assets of the investor shall be subject to the regulations on foreign currency movement. Particularly for annual profits, the provisions on financial obligations of investors in the transfer of profits are subject to certain changes in each period.

In the past, investors had to pay tax on profit transfer abroad after receiving the share of profit after tax of the enterprise. After that, this tax is abolished, investors do not have to pay any additional tax after the enterprise paid enterprise income tax. Currently, based on Circular No. 186/2010/TT-BTC on 18 November 2010 of the Ministry of Finance guiding the transfer of profits abroad by profitable foreign organizations and individuals having profits from direct investment in Vietnam; Circular No. 111/2013/TT-BTC on 15 August 2013 of the Ministry of Finance guiding personal income tax and other documents on tax, foreign investors must fulfill financial obligations by paying 5% of profit to the state budget when making profit transfer abroad.

D. *Protection of Business Investment upon Changes of Law*

In developing countries, where the legal systems are not perfect, changing the law is quite familiar. This change will have a certain impact on the business investment as well as the interests of investors, limiting the ability to attract investment capital. In order to create a stable investment environment to attract foreign investment capital, the State of Vietnam ensures that investors' investment and business activities will be stable in the event of a change of law. Specifically, in the spirit of Article 13 of the Law on Investment of 2014, if a new legal document issued by the competent authority changes in the investor's preference applicable to the investor before the document comes into effect, investors will be entitled to investment incentives in favor of investors.

Firstly, in cases in which new legal documents are promulgated to provide incentives for investment higher than the investment preferences enjoyed by investors, investors shall be entitled to investment incentives in accordance with the provisions of the new legal documents for the remaining incentives period of the project.

Secondly, in cases in which new legal documents are issued with investment preferences lower than the investment preferences previously enjoyed by investors, investors may continue to be applied investment preferences according to the pre-regulations for the remaining incentives period of the project. This means that there will be no retroactive application to the case of a change of law resulting in a reduction in investment preferences.

In particular, investment incentives are guaranteed for investors including investment incentives stipulated in the investment license, business license, investment preference certificate, investment certificate, investment registration certificate, decision on investment policy or other legal documents of competent state authorities.

However, investment incentives will not be maintained in the event of a change of law for reasons of national defense, national security, social order, safety, social morality, community health, environment protection. In order to ensure the interests of investors in this case, the Vietnamese law stipulates the application of one of the following investment protection measures: (1) deduction of actual loss of the investor into taxable income; (2) adjusting the operational objectives of the investment project and (3) assisting the investor to overcome

the damage. In order to be entitled to these investment security measures, the investor must send a written request to the investment registration office together with the necessary documents within three years from the date when the new legal document comes into effect. The investment registration authority shall decide on the application of the investment assurance measure within 30 days or submit it to the competent state authority for consideration and decision.

E. Guarantee of Settlement of Business Investment Disputes

Disagreements and conflicts are common issues when the parties establish a relationship in a business investment. When conflicts and disagreements are large enough to affect the interests of the parties, the dispute may explode. Disputes affect the investment business of investors, certain negative affects whether the plaintiff or the defendant. However, the host country cannot ensure that there is no dispute among the investors, but the best investment protection in this situation is to ensure that the dispute will be resolved in a transparent, fair and equitable way.

In international investment relations, according to subjects of the dispute, the disputes may be divided into: (1) disputes between investors themselves; and (2) disputes between investors and State authorities regarding investment activities. Disputes are solved by modern dispute resolution procedures consistent with international practice.

Per Article 14 of the Law on Investment of 2014, disputes relating to international investment activities in Vietnam shall be resolved through negotiation and mediation/conciliation. It should be noted that negotiation and mediation/conciliation are not the only means by which the parties to the international investment dispute must apply but are encouraging. If the parties cannot resolve the dispute by these means, the parties to the dispute may have access to other modes of settlement.

For other modes of dispute settlement other than negotiation and mediation/conciliation, different types of disputes can access different types of dispute resolution, namely:

Firstly, disputes between domestic investors, foreign-invested business organizations or domestic investors, foreign-invested business organizations and state authorities relating to investment activities in the Vietnamese territory shall be settled by Vietnamese arbitration or Vietnamese courts, except in cases specified in Article 14.3 of the Law on Investment of 2014.

Secondly, disputes between investors, in which at least one party is a foreign investor or a foreign-invested business organization shall be settled through one of the following authorities or organizations: Vietnam's courts, Vietnam's Arbitration, Foreign Arbitration, International Arbitration or Arbitration established by the parties to the dispute.

Thirdly, disputes between foreign investors and competent State authority relating to investment and business activities in the Vietnamese territory shall be settled through Vietnam's arbitrators or Vietnam's courts, except other agreements in accordance with international treaties to which Vietnam is a contracting party.

Thus, basically, the State of Vietnam guarantees a diversified and flexible mechanism of dispute settlement in business investment activities in accordance with international practice. But investors always have to consider separate agreements on dispute settlement in order to have access to dispute settlement mechanisms that meet the criteria of both parties in international investment relations such as foreign arbitration, international arbitration or any other modes. For disputes between foreign investors and the Government of Vietnam (ISDS dispute), the mode of dispute settlement will be decided on the basis of an agreement between the two parties or the relevant international treaty that Vietnam is a member (The BIT Agreement between Vietnam and the home country or other relevant multilateral agreements).

If the foreign investor and the Government of Vietnam have no agreement on mode of dispute resolution, the relevant treaties do not exist or do not provide ISDS dispute resolution, the dispute will be settled before Vietnam's court. In fact, disputes between foreign investors and the Government of Vietnam are usually adjudicated at international arbitration firstly. As the lawsuit in 2004 between investor Trinh Vinh Binh and the Government of Vietnam was settled at Stockholm Chamber of Commerce (SCC) Arbitration Institute; the 2010 lawsuit was between Michael L. McKenzie investor (US) - the investor of South Fork Company and the Government of Vietnam (specifically Binh Thuan People's Committee) at International Arbitration, although the arbitrator later had no jurisdiction over the dispute; the 2011 lawsuit in which Dial Asie (France) filed against the Government of Vietnam at the Permanent Court of Arbitration - PCA (2011) in The Hague (Netherlands) on the

basis of the Vietnam - France Promotion and Protection of Investment Agreement in 1992, and the 2013 lawsuit in which RECOFI (France) claim arising out of alleged outstanding payments by the Government concerning claimant's participation in an assistance programme that provided food and basic commodities to Viet Nam when the country faced food shortages in 1987.[7]

3. Investment Incentives and Support Measures

Investment incentives and support measuresare generally understood as investment incentives. If the investment assurance is a measure for investors to see the protection of the State over the capital, assets and investment activities of investors, investment incentives are measures for investors to see the advantages or benefits that investors enjoy when they participate in business investment. These benefits encourage investors, thereby attracting investment capital effectively.

In the past, Vietnam had distinction between foreign investors and domestic investors in accessing and enjoying investment incentives. However, since the Law on Investment of 2005 and later the Law on Investment of 2014 were made, on the basis of national non-discrimination, investors have been treated equally in receiving investment incentives and support. The criteria for application of investment incentives and support depend on the investment sector, investment area and some specific criteria such as labor use, scale and nature of investment projects.

A. *Measures of Investment Incentives*

1. Sectors and Areas of Investment Incentives

According to Article 16 of the Law on Investment of 2014 and Appendix I of the Decree No. 118/2015/ND-CP in 12 November 2015 of the Government guiding some articles of the Law on Investment, business sectors which can be beneficiaries of investment incentives include:

- High-tech activities, high-tech ancillary products; research and development;
- Production of new materials, new energy, clean energy, renewable energy; productions of products with at least 30% value added; energy-saving products;
- Production of key electronic, mechanical products, agricultural machinery, cars, car parts; shipbuilding;
- Production of ancillary products serving textile and garment industry, leather and footwear industry, and the products in Point c of this Clause;
- Production of IT products, software products, digital contents;
- Cultivation, processing of agriculture products, forestry products, aquaculture products; afforestation and forest protection; salt production; fishing and ancillary fishing services; production of plant varieties, animal breads, and biotechnology products;
- Collection, treatment, recycling of waste;
- Investment in development, operation, management of infrastructural works; development of public passenger transportation in urban areas;
- Preschool education, compulsory education, vocational education;
- Medical examination and treatment; production of medicines, medicine ingredients, essential medicines, medicines for prevention and treatment of sexually transmitted diseases, vaccines, biologicals, herbal medicines, orient medicines; scientific research into preparation technology and/or biotechnology serving creation of new medicines;
- Investment in sport facilities for the disabled or professional athletes; protection and development of cultural heritage;
- Investment in geriatric centers, mental health centers, treatment for agent orange patients; care centers for the elderly, the disabled, orphans, street children;
- People's credit funds, microfinance institutions
- According to Article 16.2 of the Law on Investment of 2014 and Appendix II of the Decree No. 118/2015/ND-CP, areas can be beneficiaries of investment incentives include:

[7] http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2, dated 20 May 2017.

- Areas located in disadvantaged area or extremely disadvantaged areas;

- Industrial parks, export-processing zones, hi-tech zones, economic zones.

2. The Projects which Can Be Beneficiaries of Investment Incentives

- According to Article 15.2 of the Law on Investment of 2014 and Decree No. 118/2015/NĐ-CP, the projects which can be beneficiaries of investment incentives include:

- Investment projects in the industries eligible for investment incentives under the investment domain specified in Appendix I to Decree No. 118/2015/ND-CP. If this group is implemented in areas with disadvantaged area, they shall be entitled to preferences such as preferences for extremely disadvantaged areas;

- Investment projects in disadvantaged area or extremely disadvantaged areasin Appendix II to Decree No. 118/2015/ND-CP, including economic zones, high-tech zones (disadvantaged area) and industrial parks, export processing zones (extremely disadvantaged areas)

- Investment projects in which the capital investment are at least VND 6,000 billion, or at least VND 6,000 billion is disbursed within 03 years from the day on which the Certificate of investment registration or decision on investment policies is issued. These projects receive as much incentives as projects in extremely disadvantaged areas.

- Any investment project in a rural area that employ at least 500 workers (excluding non-fulltime worker and worker under 12 months contract). These projects receive as much incentives as projects in extremely disadvantaged areas.

- High-tech companies, science and technology companies, and science and technology organizations.

- New investment projects and expansion projects

3. Forms of Investment Incentives

According to Article 15.1 of the Law on Investment of 2014, the forms of investment incentives are mainly financial incentives. Investment incentives are applied differently according to the criteria of investment sector and investment area.

a) Enterprise income tax

Enterprise income tax may be exempted, reduced or lower than the ordinary tax rate for a definite duration or the entire duration of project implementation for certain beneficiaries.

The normal corporate income tax rate is 25% for the prospection, exploration and exploitation of oil, gas, and other rare and precious resources, the tax rate is from 32% to 50%. Enterprise income tax incentives will be applied to various projects, which are specified in the Law on Corporate Income Tax of 2008; Law No. 71/2014/QH13 on 26 November 2014 amending and supplementing a number of articles of tax law; Decree No. 118/2015/ND-CP on 12 November 2015 of the Government guiding some articles of the Law on Investment; Circular No. 96/2015/TT-BTC guiding enterprise income tax, and Circular No. 83/2016/TT-BTC on 17 June 2016 of the Ministry of Finance guiding the implementation of investment incentives in accordance with the Law on Investment of 2014 and Decree No. 118/2015/ND-CP.

(i) Cases in which enterprise income tax is exempted and reducted based on criteria of new establishment:

- Newly set up enterprises under investment projects in geographical areas with extreme socio-economic difficulties, economic zones or hi-tech parks; newly set up enterprises under investment projects in the domains of high technology, scientific research and technological development, development of the States infrastructure works of special importance, or manufacture of software products areexempted from tax for no more than 4 years; be entitled to a 50% reduction of the payable tax for no more than 09 subsequent years; and are entitled to the tax rate of 10% for fifteen years.

- Newly set up enterprises newly set up under investment projects in geographical areas with socio-economic difficulties are entitled to tax exemption for no more than two years and a 50% reduction of payable tax amounts for no more than four subsequent years.; and applied a 20% tax rate for 10 years.

Projects requiring special investment attraction at large scale may extend the preferential tax rate for a period of up to 15 years.

(ii) Cases in which enterprise income tax is exempted and reducted based on criteria of investment sector and rate of labor use:

- Enterprises operating in education-training, vocational training, healthcare, cultural, sports and environmental domains: shall be exempted from tax for no more than 4 years; be entitled to a 50% reduction of the payable tax for no more than 09 subsequent years; be applied 10% (indefinite) tax rate;

- Enterprises operating in cultivation, husbandry and processing in the agricultural and fishery sectors not in geographical areas meeting with socio-economic difficulties or except difficulties, the tax rate of 15% shall apply;

- Enterprise operating in production, construction and transportation employing a large number of female workers shall be entitled to reduction of enterprise income tax as much as the additional expenses for female laborers;

- Enterprises employing a large number of ethnic minority laborers shall be entitled to reduction of enterprise income tax as much as the additional expenses for ethnic minority laborers.

However, the incentives do not apply to all taxable income of the enterprise. Enterprise must account incomes earned from production and business activities entitled to tax incentives, separating from incomes earned from production and business activities not entitled to tax incentives; if they can not account them separately, incomes from production and business eligible for tax incentives shall be determined according to the rate of turnover between production and business activities entitled to tax incentives and the total turnover of the enterprises. Enterprises must comply with accounting, invoicing and document regimes and pay tax according to their declarations.

b) Import Duties

Under the Law on Investment of 2014 and the Law on Export and Import Duties of 2016, for both new and expanded investment projects, investors are exempted from import duties on goods imported to create fixed assets including:

(i) Machinery and equipment; Parts, details, parts, spare parts for assembly in synchronous or synchronous use with machines and equipment; raw materials and materials used for the manufacture of machinery and equipment or for the manufacture of components, details, spare parts and spare parts of machinery and equipment;

(ii) Specialized means of transport in the technological line used directly for production activities of the project;

(iii) Domestic materials have not been produced.

However, the exemption of import duties on goods creating fixed assets shall be applied only to investment projects in investment sectors and investment areas in accordance with investment law, in particular Article 16 of the Law on Investment of 2014 and Annex I, Sub-II of the Decree No. 118/2015/ND-CP.

In addition, for some projects, investors are also exempted from import duties on raw materials, components for investment projects, including: raw materials, components and accessories, which have not produced domestically, are imported for production of investment projects on the list of specially privileged industries or areas with specially difficult socio-economic conditions (according to the provisions in Appendix I, II to Decree No. 118/2015/ND-CP). In particular, hi-tech enterprises, science and technology enterprises, science and technology organizations, enterprises shall be entitled to import tax exemption for 5 years from the date of commencement of production. Investment projects on production and assembly of medical equipment shall enjoy this incentive for 5 years from the date of commencement of production. However, this import tax exemption is not applicable to: mineral mining investment projects, projects of producing products with more than 51% of natural resources, minerals and energy out of the value of total value, projects of producing goods and products which are subject to the special consumption tax.

c) Land Use Right Rents and Levy

For direct investment projects, land and buildings that are essential to carry out the investor's business. Apart from financial obligations relating to income or business activities, foreign-invested business organization shall also pay taxes relating to land use right, including land use right rents and levy. In order to encourage investment, especially

foreign investment, Vietnam Government exempt or reduce foreign-invested business organization from land use right rents and levy. These exemption and reduction of financial obligations that are provided and implemented in a number of the instruments, namely: Law on non-agricultural land use tax; Decree No. 53/2011/ND-CP dated 01 July 2011 of Government detailing and guiding the implementation of a number of articles on the Law on non-agricultural land use tax; Circular No. 153/2011/TT-BTC of the Ministry of Finance guiding to non-agriculture land use tax; Circular No. 83/2016/TT-BTC dated 17 June 2016 of the Ministry of Finance guiding the application of investment incentives in accordance with the Law on Investment and the Government's Decree No. 118/2015/ND-CP dated 12 November 2015, guiding the implementation of a number of articles of the Law on Investment; and Decree No. 35/2017/ND-CP dated 03 April 2017 of Government providing for the collection of land use right rents and water surface use right rents in economic zones and hi-tech parks.

Under regulations of non-agriculture land use tax, exemption incentives of non-agriculture land use tax shall be applied to the following subjects:

(i) Investment projects in sectors or business sectors eligible for special investment incentives specified in Section A, Appendix I, or implemented in geographical areas with particularly difficult socio-economic conditions specified in Appendix II to Decree No. 118/2015/ND-CP are exempt from non-agricultural land use tax specified in Clause 1, Article 9 of the Law on Non-Agricultural Land Use Tax;

(ii) Investment projects capitalized at VND 6 trillion or more each and having at least VND 6 trillion in their investment capital disbursed within 3 years after being granted investment registration certificates or obtaining investment policy decisions;

(iii) Investment projects in sectors or business sectors eligible for the investment incentives specified in Section B, Appendix I to Decree No. 118/2015/ND-CP, which are implemented in geographical areas with difficult socio-economic conditions specified in Appendix II to Decree No. 118/2015/ND-CP

Fifty percent reduction incentives of non-agriculture land use tax that shall be applied to a number of projects:

(i) Investment projects in sectors or business sectors eligible for investment incentives specified in Section B, Appendix I, or implemented in geographical areas with difficult socio-economic conditions specified in Appendix II to Decree No. 118/2015/ND-CP;

(ii) Investment projects implemented in rural areas employing at least 500 workers each (exclusive of part-time workers and workers under labour contracts of under 12 months);

Hi-tech enterprises, science and technology enterprises and science and technology organizations defined by the law on high technologies and the law on science and technology may enjoy the non-agricultural land use tax incentives based on their sectors or business lines, geographical areas, capital size or number of employees of their projects.

However, incentives Investment projects on mineral exploitation, and production and trading of excise tax-liable goods and services, except those manufacturing automobiles, are not eligible for the non-agricultural land use tax incentives that mentioned above.

B. Forms of Investment Support

Besides investment incentive measures, investors can approach forms of investment support including:

- Support for development of technical infrastructure, social infrastructure, and beyond the perimeter of the project;
- Support for training and development of human resources;
- Credit support;
- Support for access to business premises; support for relocation of manufacturing facilities from urban areas;
- Support for scientific & technological research, technology transfers;
- Support for market development, information provision;
- Support for research and development.

Beneficiaries entitled to the above support measures are small and medium enterprises, high technology enterprises, science and technology enterprises, science and technology organizations,

enterprises investing in agriculture and enterprises investing in education and dissemination of law and other beneficiaries in line with the socio-economic development orientation in each period. Support investment measures in industrial zones, export processing zones, hi-tech parks and economic zones are now guided in Articles 18, 19 and 20 of Decree No. 118/2015/ND-CP.

4. Offshore Investment Activities

Offshore investment is the act of transferring capital, property of Vietnamese investors to another country in order to proceed with business activities aimed for making profit or other economic purposes. Up to January 2017, Vietnam had 1188 investment projects to 70 countries and dependent territories, with the total registered invested capital was around 21.4 billion US dollar. Among the mentioned above, there were 270 projects in Laos which had the capital of 5.12 billion US dollar; 191 in Cambodia which had the capital of 5.12 billion US dollar; and other potential markets like Russia or Africa…[8]

Offshore investment activities are based on the principle of the investors take full self-responsibility for their act as well as observe Vietnamese investment law and other related law, host countries' law and international treaties to which Vietnam has been a party. Vietnamese investors can invest overseas in two forms: offshore direct investment and offshore indirect investment. According to Article 3.1 of Decree No. 83/2015/ND-CP dated 25 September 2015 of the Government regulating foreign investment: "Foreign investment is the investor' activities of transferring capital, or payment for purchase of part or whole of business establishments, or establishment of ownership for implementing business activities outside Vietnam's territory; and direct involvement in management of such investment activities". This means under this instrument, the term "offshore investment" means offshore direct investment. In addition, according to Decree No. 135/2015/ND-CP dated 31 December 2015 of the Government prescribing offshore indirect investment, offshore indirect investment means offshore investment in the form of purchase and sale of securities or other valuable papers or via securities investment funds or other intermediary financial institutions abroad.

[8] http://tapchitaichinh.vn/kinh-te-vi-mo/kinh-te-dau-tu/viet-nam-dau-tu-ra-nuoc-ngoai-214-ty-usd-102931.html, 20 May 2017.

For offshore direct investment, Vietnamese investors having foreign investment projects shall register with the competent agencies in Vietnam. Depending on the scale and the field of that investment project, the procedures for registering may vary.

- If the projects have foreign investment capital of 20,000 billion VND or above, or the projects that require special policies, the investors shall apply for the permission of National Assembly on foreign investment.
- If the projects have foreign investment capital of 800 billion VND or above, or the banking, insurance, securities, journalism, broadcasting, and telecommunications projects with foreign investment capital of 400 billion VND or above, the investors shall apply for permission of Prime Minister on foreign investment.
- All foreign investment projects that need the approval of National Assembly or Prime Minister shall be appraised. The appraisal time for projects subjected to the competence of National Assembly shall not exceed 155 days and 48 days with the projects subjected to the competence of Prime Minister.[9] Ministry of Planning and Investment shall issue the certificate of foreign investment registration to the investor within 05 working days from the day on which the decision on investment policies is received.
- If the banking, insurance, securities, journalism, broadcasting, and telecommunications projects with foreign investment capital below 400 billion VND and other projects with foreign investment capital below 800 billion VND, the investors shall carry out the procedures for granting of foreign investment registration certificates at Ministry of Planning and Investment. Within 15 working days from the receipt of the dossier, Ministry of Planning and Investment shall issue the Certificate of outward investment registration. If the application is rejected, the investor must be notified in writing and provided with explanation.

The investors shall register at the foreign exchange management agency after receive the certificate of foreign investment registration. This is the new requirement for registering foreign investment stipulated in Law on Investment of 2014. The transfer of money from Vietnam

[9] Articles 55, 56 of Law on Investment of 2014.

abroad and from abroad to Vietnam pertaining to foreign investment must be made via a separate account opened at a permissible credit institution in Vietnam and registered at the State Bank of Vietnam in accordance with regulations on foreign exchange management. The transfer of property, machinery and equipment shall be complied with the law on export and import.

With the profit earned from the foreign investment activities, the investors shall follow the principle of giving priority in transferring all of the profit back to Vietnam, unless that profit is used for overseas investment. Within 06 months from the day on which the annual tax declaration or an equivalent document is available as prescribed by the host country's law, the investors shall transfer the entire profit and other incomes derived from overseas investment to Vietnam, any extension shall be approved by Ministry of Planning and Investment and State Bank of Vietnam. In the case where the Vietnamese investors use the profit earned from the foreign investment activities to increase capital, expand overseas investment shall follow procedures for adjusting the certificate of foreign investment registration and submit a report to the State Bank of Vietnam. Foreign investment projects may be terminated in cases regulated in Article 62 of Law on Investment of 2014.

For offshore indirect investment, investors who have the Vietnamese citizenship may only make offshore indirect investment in the form of participating in programs on bonus provision of overseas issued stocks. Meanwhile, economic institutions may direct purchase and sale of securities and other valuable papers overseas and investment through overseas purchase and sale of securities investment fund certificates or entrustment to other overseas intermediary financial institutions.

SUMMARY OF THE CHAPTER ELEVEN

Vietnamese law governing international investment relations are the principles, the law which governing foreign investment activities in Vietnam and the offshore investment activities of Vietnamese business. However, when referring to the national laws governing international investment relations, the function of governing foreign investment activities is given greater importance. In other words, whether investors are simultaneously subject to the laws of the investing country and the investment recipient country, the law of the investing country has a stronger impact on the business investment of these investors. Therefore, building obvious, transparent, equitable investment laws is an indispensable requirement for Vietnam in order to attract foreign investment.

According Vietnamese laws, foreign investors investing in Vietnam and Vietnamese investors investing abroad are encouraged and provided with certain incentives and supports. Foreign and domestic investors are also treated equally when approaching investment protection measures, investment incentives, investment support, as well as all other measures influencing or relating to the business investment activities. Base on principles of libezalization of international capital movement, Vietnamese law on international investment have been adjusted, amended, supplemented in terms of transparency, reducing administrative formalities and increasing market access opportunities for more investors. In general, the provisions of Vietnamese law governing international investment relations have been compatible with international investment treaties as well as other treaties that Vietnam is member.

QUESTIONS/ASSIGNMENTS

1) Compare the regulations on investment activities of foreign investor and foreign-fund economic organization according to Vietnamese law.
2) What are the modes of investment a foreign investor can carry out in Vietnam? In your opinion, what is the most appropriate mode of investment in Vietnam nowadays?
3) Which area that foreign investor and foreign-fund economic organization can invest in? Give your opinion about the effect of The list of conditional business lines on attracting investment.
4) Which areas are the foreign investor and foreign-fund economic organization can become the beneficiary of the investment incentive?
5) Why foreign investor and foreign-fund economic organization are entitled to have the investment incentives when investing in areas with difficult or very difficult socio-economic conditions?
6) What are the procedures for the foreign investors to carry out in doing business in Vietnam?

7) What kind of foreign investment projects need to be applied for the procedures of approving the investment policy and the investment registration certificate?

8) What kind of investment projects need to be registered the investment registration certificate?

9) What kind of foreign investment activities need to be registered for the business registration?

10) What are the investment protection measures that Vietnamese Government can apply to the investor?

11) What are the measures of investment incentives that Vietnamese Government can apply to the investor?

12) What are the procedures for Vietnamese investor to invest abroad?

13) Which projects are the subjects to the policy of invest abroad?

14) Can Vietnamese investors have the discretion about the profit earned from the foreign investment activities? Why?

READINGS

1. Report No. 89/TTr-CP dated 10 April 2014 on the Project of Law on Investment;
2. Hanoi Law University, *Textbook on Law on Investment* (2009), The People's Public Security Publishing House, Hanoi;
3. Le Huu Nghia, Le Van Chien, Nguyen Viet Thong…, *The Influence of Foreign Direct Investment on Labour Productivity and Technological Level of Vietnam* (2014), The National Political Publishing House - Truth, Hanoi;
4. Nguyen Thi Dung, "Enforcement of the Regulations on Banned Business Sectors and Conditional Business Sectors in Law on Investment of 2014" (January 2016), *Journal of Law* - Hanoi Law University.

WEBSITES:

1. UNCTAD, http://investmentpolicyhub.unctad.org/
2. http://www.reuters.com/
3. http://tapchitaichinh.vn/
4. http://vbpl.vn/

CHAPTER TWELVE. VIET NAM's ISDS

CHAPTER TWELVE
VIET NAM'S ISDS

Learning Objectives
Chapter Twelve

- Understanding the coordiantion process of Viet Nam's ISDS;
- Understanding the practice of Viet Nam's ISDS; Case studies.

An international investment dispute is a dispute between *a foreign investor* and the *host government* in relation to *an investment* of that investor in the territory of the host country, and the dispute arising out of breach of *domestic law of the host country, IIAs, and international investment contracts*. Major events leading to investment disputes are often the withdrawal by the host government of the investment registration certificate or business registration certificate; adjusting / not adjusting contents of the investment registration certificate and business registration certificate; taking land; imposing tax on capital transfer, ...

Since 2010, the number of disputes between foreign investors and State agencies in Viet Nam has increased significantly. By the end of 2017, the Government of Viet Nam has been involved in about 10 ISDS cases,[1] of which 5 have been published on the UNCITRAL website, and the Government of Viet Nam has won three cases, reached the agreement of dispute resolution in one case.[2]

Section One. COORDINATION PROCESS

This Section One will introduce the three following issues:

Firstly, Regulation on coordination in Viet Nam's ISDS ('Regulation 04') (1);

Secondly, Agencies involving ISDS under the Regulation 04 (2);

Thirdly: Process of coordination in the ISDS under the Regulation 04 (3).

1. Regulation on Coordination in the ISDS

'Regulation on coordination in the settlement of international investment disputes' issued in conjunction with Decision No. 04/2014/QD-TTg issued by the Prime Minister on 14 January 2014, effective from 3 March 2014 (hereinafter Regulation 04), with two following main contents:

[1] Lawyer Dinh Anh Tuyet, 'Investment Dispute Prevention in Viet Nam', Workshop Papers, *Toward A Strategy for Prevention of Investment Dispute for Viet Nam* organized by the EU-MUTRAP Project in cooperation with Ministry of Plan and Investment, Hanoi, 24 November 2017.

[2] UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

Firstly, to define the functions, tasks and powers of the State agencies involved in the ISDS.

Secondly, to set procedures and steps for the coordination and participation in the settlement of disputes between the State, State agencies and foreign investors at the international jurisdictions.

2. Involved Agencies

There are three agencies involving the ISDS, including:

- Leading agencies (A);
- Government's legal representative agency (B);
- Involved agencies, organizations and individuals (C).

A. *Leading Agencies*

Leading agencies include 5 following types of agency:

Firstly, defendant agencies. *For example*: Provincial People's Committee of Binh Thuan in *McKenzie v. Viet Nam* (also called *South Fork Case*), 2010.[3]

Secondly, Ministry of Justice (MOJ). MOJ will be leading agency in cases where the legal bases for initiating a lawsuit are an BIT, which provides for the ISDS at the foreign arbitration or jurisdiction agencies.

Thirdly, Ministry of Finance (MOF). MOF will be leading agency in case of lawsuits related to loans, debts of the Government or guaranteed by the Government, bonds, ...

Fourthly, IIAs' negotiating / signing agencies. *For example*: Ministry of Planning and Investment (MPI).

Fifthly, other agencies decided by Prime Minister.

In some situations, *for example*: a dispute in which a defendant is a local authority involved in both BIT and a government loan, it may have multiple leading agencies at the same time, such as the Provincial People's Committee, Ministry of Justice, Ministry of Finance, Ministry of Planning and Investment and other agencies.

[3] Italaw's case, http://www.italaw.com/cases/2370

B. *Government's Legal Representative Agency*

Under Regulation 04, the Ministry of Justice is responsible for the Government's Legal Representative Agency of Viet Nam in ISDS cases.

C. *Involved Agencies, Organizations and Individuals*

This type of coordinating agency includes State agencies, organizations and individuals involved in ISDS and invited or requested by leading agency to participate in specific ISDS case resolution. In fact, organizations and individuals invited to participate in ISDS are usually lawyers, legal experts of ministries, and academics being competent and experienced in the settlement of investment and trade disputes. *For example*: IDVN Lawyers (Viet Nam) is invited by the Ministry of Justice to participate in a number of ISDS cases in which the Government of Viet Nam is the defendant.

3. Coordinating Process under Regulation 04

Coordinating process includes three stages:

- Pre-dispute (A)
- In-dispute (B)
- Post-dispute (C)

A. *Pre-dispute*

Pre-dispute includes two steps:

- Complaint and Consultation by Foreign Investor *(1);*
- Negotiation *(2).*

1. Complaint and Consultation by Foreign Investor

According to Article 9 of the Regulation 04, the agency responsible for settling complaints about the case is the leading agency in charge of handling that case in the pre-dispute stages.

According to Article 10 of the Regulation 04, Government's Legal Representative Agency (Ministry of Justice) is responsible for regularly monitoring the progress of the complaint resolution process. If the complaint-settling agency elaborates the conciliation plan with the foreign investor, the Ministry of Justice gives its opinion on this plan before submitting it to the competent agency for approval.

2. Negotiation

Under common IIAs, when disagreements between a foreign investor and the Government of Viet Nam arise, negotiation is the first stage to be done in a 3-6 month period. Over this period, if negotiation fails, the parties may bring the disputes to the competent judirisdiction in accordance with the provisions of Vietnamese law and international treaties to which the parties are members.

Five steps to coordinate the negotiation:

Step 1: To analyze and assess disagreements based on the law, international commitments and facts of implementation and management of investment;

Step 2: To develop negotiation plans;

Step 3: To consult with the concerned agencies and organizations and to submit for the approval of negotiation plan;

Step 4: To conduct negotiations with the participation of the concerned agencies and organizations;

Step 5: The leading agency shall coordinate with the Government's legal representative agency (e.g. MOJ) to supervise the implementation of the negotiation results.

B. *In-dispute*

There are three methods of ISDS:

- *Firstly*, conciliation *(1);*

- *Secondly*, settlement of disputes at domestic jurisdictions *(2);*

- *Thirdly*, settlement of disputes at the international arbitration or the competent foreign jurisdiction *(3).*

1. Conciliation

Vietnamese law regulates 'grass root' conciliation (in the civil matter) and commercial conciliation (by Decree No. 22/2017/ND-CP on commercial conciliation).

In ISDS, 6 steps to coordinate the conciliation are following:

Step 1: To analyze and assess disputes based on the law, international commitments, including the outcome of the negotiation failed;

Step 2: To develop conciliation plans;

Step 3: To consult with the concerned agencies and organizations and to submit for the approval of conciliation plan;

Step 4: To choose conciliator and conciliation rules;

Step 5: To conduct conciliations with the participation of the concerned agencies and organizations according to the choosen conciliation rules;

Step 6: The leading agency shall coordinate with the Government's legal representative agency (e.g. MOJ) to supervise the implementation of the successful conciliation agreement.

2. Settlement of disputes at domestic jurisdictions

Domestic jurisdictions are interpreted as Vietnamese courts, Vietnamese arbitrators (e.g. Viet Nam International Arbitration Center - VIAC), Vietnamese administrative agencies. The settlement of disputes shall comply with the domestic procedural law of Viet Nam.

Disputes between a foreign investor and a competent State agency related to investment and business activities in the Vietnamese territory shall be settled through a Vietnamese arbitration or a Vietnamese court, unless otherwise agreed upon in a contract or treaty to which the Socialist Republic of Viet Nam is a contracting party.

However, it is worth noting that Vietnamese courts can not hear administrative cases related to national security and external relations. Thus, in the case of foreign investors claiming that their rights and legitimate interests are breached by an administrative decision of a

competent authority, there is no hope of finding a solution through the administrative jurisdiction.

3. Settlement of Disputes at the International Arbitration or the Competent Foreign Jurisdiction

Most of the IIAs that Viet Nam participates in stipulate that the dispute settlement body is an international arbitrator. International arbitration has three forms as follows:

Firstly, institutional arbitration is established by rules and is supervised by international arbitration centres, such as ICSID, PCA, ICC.

Secondly, *ad hoc* arbitration is established under some international arbitration rules, *e.g.* UNCITRAL.

Thirdly, special arbitration mechanism (*e.g.*, arbitration under the EVFTA).

According to Regulation 04 and international arbitration rules, the settlement of disputes at international arbitration or the competent foreign jurisdiction may be divided into 7 coordinated steps as follows:

Step 1: To receive and reply arbitration notice.

To do this, Vietnamese agencies must do the following:

- To develop a strategy for settling international investment disputes;
- To develop and implement a plan for settling the case;
- To hire lawyers, technical experts and to invite witnesses.

Step 2: To establish the arbitral tribunal.

Step 3: Arbitral tribunal and parties agree on arbitration procedural rules.

Step 4: To check the jurisdictional competence of the arbitration tribunal.

Step 5: Submit the Self of Defense (SoD) and related documents to the arbitration tribunal.

Step 6: Arbitration tribunal hearing.

Step 7: Arbitration tribunal issues award.

C. *Post-dispute:*

The post-dispute is the stage where the parties enforce the international arbitration award, if any, through one of the three following ways:

- To request for correction or supplement of the arbitral award;
- To enforce the successful conciliation agreement (if any);
- To recognize and enforce awards issued by arbitration tribunals in Viet Nam or abroad.

Section Two. PRACTICE OF VIET NAM's ISDS

This Section Two clarifies the following 6 issues:

Firstly, the cause of disagreement and conflict between foreign investors and the Government (1);

Secondly, legal basis for initiating an international investment dispute (2);

Thirdly, ways of reaction of foreign investors in Viet Nam (3);

Fourthly, what do foreign investors sue against? (4);

Fifthly, current situation of dispute settlement of Viet Nam's State agencies (5);

Sixthly, measures to prevent international investment disputes (6).

1. The Cause of Disagreement and Conflict between Foreign Investors and the Government

Disagreements between foreign investors and the Government come from a variety of sources including the causes from Vietnamese Government (A) and the causes from foreign investor (B).

A. *Causes from the Government*

There are two main causes from the Government:

Firstly, a certain number of Viet Nam's regulations lack transparency,

facilitating the harassment of competent authorities.

Secondly, the implementation of the law causes many problems for investors.

- State management activities still maintain quite a lot of unreasonable administrative procedures, causing difficulties for investors;
- Practical implementation of law by some State agencies in Viet Nam still creates inequality for foreign investors. *For example*, some State agencies treat foreign investors less favourably than domestic investors.
- When implementing State management activities, some State agencies breach international commitments recognized in international treaties, usually BTAs and BITs. (*e.g.* unfair treatment when State changes policies); some State agencies fail to strictly comply with their commitments in the investment registration certificates or investment contracts.

B. *Causes from Foreign Investors:*

There are two main causes from foreign investor:

Firstly, some foreign investors are dishonest or lack of goodwill when carrying out investment procedures in Viet Nam;

Secondly, some foreign investors are lack of legal knowledge, even breach of Viet Nam's law.

For example, in *McKenzie v. Viet Nam* (also known as the *South Fork* Case), 2010,[4] the Permanent Court of Arbitration (PCA) arbitration tribunal dismissed the plaintiff's claim, because the plaintiffs are dishonest, lacking goodwill right from the time of doing procedures to get investment permission in Viet Nam, and the plaintiff's investment is not protected under Viet Nam - US BTA. In some other cases, investors make complaints that do not follow any process, such as sending a 'call for help', an 'urgent call for help' to many different agencies (The Prime Minister, the President, ...).[5]

[4] Italaw's case, http://www.italaw.com/cases/2370

[5] Lawyer Dinh Anh Tuyet, 'Investment Dispute Prevention in Viet Nam', Workshop Papers, *Toward A Strategy for Prevention of Investment Dispute for Viet Nam* organized by the EU-MUTRAP Project in cooperation with Ministry of Plan and Investment, Hanoi, 24 November 2017

2. Legal Basis for Initiating An International Investment Dispute

Initiating an international investment dispute is mainly based on the following three grounds:

Firstly, domestic law (A);

Secondly, treaties in which Viet Nam is a member (B);

Thirdly, international investment contracts where the State agency is a party (C).

A. *Domestic Law*

According to the Law on Investment of 2014 and Decree No. 15/2015/ND-CP dated 14 February 2015 on investment in the form of PPP and related legal documents, Viet Nam has introduced measures to ensure and investment incentives, including:

Firstly, State guarantees the right to own property, the business investment and transfer of assets of foreign investors abroad, and the guarantee of the Government for some important projects, guarantees business investment in case of change of law.

Secondly, State commits to preferential corporate income tax, import and export taxes, land rent, land use rights and other tax incentives in accordance with the law.

Thirdly, State stipulates the support to investors related to the development of infrastructure within and outside the fence of the project; training and development of human resources; credit; access to production and business premises; to support the relocation of production establishments out of the inner city or inner city; science and technology transfer; market development, information provision, research and development.

Fourthly, State guarantees the foreign currency balance for foreign investors; public service provision.

In the case where foreign investors believe that the Government of Viet Nam has failed to implement the above mentioned guarantee measures and investment incentives, they have the right to sue the Government of Viet Nam.

B. *International Treaties to Which Viet Nam Is A Party*

The plaintiff may rely on the following grounds to sue the Government:

1. Bilateral Investment Treaties (BITs)

Viet Nam has signed more than 60 BITs, in most of which provides on ISDS in one or some clauses, or adds an annnex prescribing the ISDS process. In fact, there have been some cases of foreign investors based on this legal grounds. *For example*: Case Trinh Vinh Binh 2 (*Trinh v. Viet Nam*), 2014[6] and Case Trinh Vinh Binh 1 (*Trinh and Binh Chau v. Viet Nam*), 2004[7] based on BIT Viet Nam - Netherlands of 1994; Case *RECOFI v. Viet Nam*, 2013[8] and the Case *Dialasie v. Viet Nam*, 2011[9] based on BIT Viet Nam - France of 1992.[10]

2. Investment Chapter within A BTA / FTA

For example:

- Chapter IV (Investment) of VN-US BTA. In *McKenzie v. Viet Nam*, 2010 (also known as *South Fork*)[11], foreign investors have based on legal basis of Viet Nam - US BTAin 2000 to sue the Government of Viet Nam.
- Chapter 11 Part B (Investment) of the ASEAN-Australia-New Zealand FTA.
- Viet Nam - Japan Economic Partnership Agreement (VJEPA) in 2008.
- ACIA in 2009; Investment treaties between ASEAN and certain countries (China, Korea, India, …)

6 https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ; http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam

7 Italaw's case, http://www.italaw.com/cases/155

8 Italaw's case, http://www.italaw.com/cases/2404.

9 http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ; http://www.iareporter.com/downloads/20150304

10 UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

11 Italaw's case, http://www.italaw.com/cases/2370

C. *Investor-state Contracts Where the State Agency Is A Party*

For example: The agreement of the Government of Viet Nam on preferential credit loans with foreign lenders; Government guarantees for PPP investment projects and others; commercial loan contracts of enterprises guaranteed by the Government; infratructure contracts (e.g. BTO, BOT, PPP, …); contracts for the construction of urban areas, houses, ...

Under the guarantee agreements signed by the ministries on behalf of the Government of Viet Nam, if the enterprises fail to pay their debts, the Government shall have to pay debts. If the government does not pay the debt, the creditor will initiate a suit and an international investment dispute. Disputes will not only be directly related to the debt, but also to commitments to secure performance obligations and other complex issues.

3. Ways of Reaction of Foreign Investors in Viet Nam

When disputes arise between foreign investors and the government, foreign investors usually have four ways of responding:

Firstly, to find diplomatic interventions to influence the Government of Viet Nam (A)

Secondly, to complain in various forms (B);

Thirdly, to internationally initiate (C);

Fourthly, other (D).

A. *Find the Way to Diplomatically Intervene*

For example:

- The Embassy of the investor's home country sends a diplomatic note to the Government of Viet Nam;
- State bodies of investor's home country send official letters to the State agencies of Viet Nam;
- Exchanges of high ranking leaders during official visits, high-level talks.

B. *Various Forms of Feedback and Complaint*

For example:

- Feedback through business associations (AmCham, EuroCham, ...); through dialogues between government and business leaders;
- Complaints to the authorities handling the case;
- Complaints to higher authorities;
- Complaints to the leaders of the Party and State.

C. *International Lawsuit*

According to UNCTAD statistics, from 2004 to 2014, Viet Nam was sued by foreign investors in five cases, three of which Government of Viet Nam is won and one was reached in dispute settlement agreement.[12] Concretely:

- 2014, *Trinh v. Viet Nam*. Investor: Dutch. The lawsuit was based on Viet Nam - Holland BIT of 1994. Result: Pending.[13]
- 2013, *RECOFI v. Viet Nam*. Investor: French. The lawsuit involved requests for payment of outstanding payments related to RECOFI's participation in the State food aid programme in 1987, when Viet Nam was in the food shortage period. The lawsuit was based on Viet Nam - France BIT of 1992. The case was settled at the Permanent Court of Arbitration (PCA) established under the UNCITRAL Arbitration Rules, with the plaintiff's claim for compensation of $ 66 million. Result of the case was in favour of Government of Viet Nam, with the arbitration award on 28 September 2015.[14]
- 2011, *Dialasie v. Viet Nam*. Investor: French. The lawsuit involved the Government's closing down the kidney clinic in Ho Chi Minh City owned by the local subsidîay of the foreign investor. The lawsuit was based on Viet Nam - France BIT of 1992. The case was settled at the Permanent Court of Arbitration (PCA) established under the UNCITRAL Arbitration Rules, with the plaintiff's claim for compensation of $ 47 million. Result of the case was in favour of Government of Viet Nam, with the arbitration award on 17 November 2014.[15]
- 2010, *McKenzie v. Viet Nam (*also called the *South Fork Case)*.[16] Investor: American. The lawsuit involved the fact that Government did not transfer some land use rights to local subsidiaries of foreign investors to develop a coastal resort in Binh Thuan Province. In this case, foreign investors used Viet Nam - US BTA of 2000 to file a lawsuit against the Government of Viet Nam.

  In 2010, Mr. Michael McKenzie, American investor, said that the Government of Viet Nam, concretly the People's Committee of Binh Thuan Province, violated its commitment to deprivation, fair and equitable treatment standard and transparency toward the project of building a tourist resort namely South Fork in Binh Thuan province. He used his right to sue the host government before the Permanent Court of Arbitration (PCA) established under the UNCITRAL Arbitration Rules under the provisions of the 2000 BTA, claimant compensation of $ 3.7 billion. On 11 December 2013, the arbitral tribunal dismissed his suit, as he was dishonest and lack of good will to do so at the time of applying for investment permission in Viet Nam, and Mr. McKenzie's investment is not protected under the US - Viet Nam BTA. Result of the case was in favour of Government of Viet Nam.
- 2004, *Trinh and Binh Chau v. Viet Nam*. Investor: Dutch. The lawsuit involved the ownership of a food processing factory, a textile factory and other types of tourist assets. Claims arising from the unlawful confiscation of property and other property by the claimant whithout compensation, including the criminal conviction of Mr. Trinh Vinh Binh, claimant compensation of $ 100 million. Lawsuit based on Viet Nam - Holland BIT of 1994

[12] UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

[13] https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ; http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam

[14] Italaw's case, http://www.italaw.com/cases/2404.

[15] http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ; http://www.iareporter.com/downloads/20150304

[16] Ministry of Justice, *Press Release on the Fact that International Arbitration Dismissed All Petition of Mr. Michael McKenzie (US Citizen) to the Government of Viet Nam for the Project of Building A Tourist Resort in Bac Binh District, Binh Thuan Province*, p. 1.

http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, accessed in June 2017;

Italaw's case, http://www.italaw.com/cases/2370

with UNCITRAL arbitration rules; arbitration tribunal: Stockholm Chamber of Commerce (SCC). The case was resolved by the award on 14 March 2007.[17]

D. *Other Methods: Negotiation; Conciliation; Consultation.*

Article 14 of the Law on Investment of 2014 stipulates that all disputes relating to business investment activities in Viet Nam must be resolved first through negotiation and conciliation. Similarly, Article 63 Clause 1 of Decree No. 15/2015/ND-CP on PPP investment form also stipulates that all disputes between competent authorities and investors must be resolved through negotiation and negotiation.

4. What Do Foreign Investors Sue against?[18]

- Expropriation or nationalization of investment assets; taking land use right; ... *E.g*. case *McKenzie v. Viet Nam,* 2010 (also called case *South Fork*);[19] case Trinh Vinh Binh 1 (*Trinh and Binh Chau v. Viet Nam*), 2004.[20]

Most disputes related to land allocation and land clearance issues. Local authorities often slow down the progress of land clearance so that they can not allocate land on time to investors, so that investors can carry out the project after completion of land lease procedures.

- Breach of the FET and FPS. *E.g.* case *McKenzie v. Viet Nam,* 2010 (alsso called *South Fork case*).[21]

In order to attract FDI, many localities 'have promised' 'red carpet' to investors, giving them higher incentives than the law does. However, in practice, when local governments fail to fulfill those promises, the consequence is that they will receive complaints or grievances from investors, as local governments have not acting on the 'legitimate expectation' of the investor, and making that 'expectation' is deceived. In addition, in some cases, State management agencies take improper administrative measures in accordance with the law for foreign investors, causing them to react negatively.

- Breach of MFN and NT principles.
- No compensation for damage as committed in international treaties;
- Breach of commitments allowing foreign investors to freely transfer their investments abroad;
- Denial of justice;
- The Government does not pay the debt properly according to the commitments in the loan contract, government's guarantee contract.

5. Current Situation of Dispute Settlement of Viet Nam's State Agencies

Firstly, Viet Nam State agencies are still passive, no prevention and proactive dispute resolution strategies;

Secondly, no personnel specialized in ISDS;

Thirdly, lack of coordination between related State agencies.

6. Measures to Prevent International Investment Disputes[22]

To prevent international investment disputes, immediate precautionary measures (A) and long-term preventive measures (B) should be combined.

A. *Immediate Precautionary Measures*

These are measures to prevent disagreements, conflicts from developing into international investment disputes:

Firstly, to early detect and settle amicably disagreements before they can develop into disputes;

[17] Italaw's case, http://www.italaw.com/cases/155

[18] Nguyen Thi Chinh, *The Study Report Guiding the Prevention and ISDS Used for Central and Local Officials*, USAID/GIG Project, Thanh Hoa, 9 October 2015.

[19] Italaw's case, http://www.italaw.com/cases/2370

[20] Italaw's case, http://www.italaw.com/cases/155

[21] Italaw's case, http://www.italaw.com/cases/2370

[22] Ministry of Justice, *Specialized Documents on the Settlement of International Trade and Investment Disputes for Officials of the Judicial Agencies, Courts, Procuracies and Legal Experts of State Agencies at the Central Level*, Hanoi, February 2013; Nguyen Thi Chinh, *The Study Report Guiding the Prevention and ISDS Used for Central and Local Officials*, USAID/GIG Project, Thanh Hoa, 9 October 2015.

Secondly, to try to resolve definitively the differences within the framework of domestic legal procedures.

State management agencies, lawyers and legal specialists should have a firm grasp of the current law related to investment and prevention of international disputed disputes, mainly the law on the settlement of complaints. such as Regulation 04 on Coordination in the Settlement of International Investment Disputes of 2014; Law on Complaints of 2011; Law on Administrative Proceedings of 2015; Law on Investment of 2014; Decree No. 22/2017/ND-CP on commercial conciliation, etc. The procedures for settling complaints and disagreements of investors shall comply with the provisions of the Law on Complaints of 2011 and Law on Administrative Proceedings of 2015. In addition, the competent State authorities should try to dialogue directly, resolve conflicts when receiving information and requests of investors.

Thirdly, to share experiences on resolving conflicts among related agencies;

Fourthly, to prioritize conciliation in the ISDS.

Under commitments in most of the BIT and FTAs that Viet Nam participates (such as EVFTA, Viet Nam - Finland BIT, Viet Nam - Singapore BIT), negotiation, conciliation, consultation are mandatory or encouraged the parties to take action before the lawsuit.[23]

In April 2017, the Government issued Decree No. 22/2017/ND-CP on commercial conciliation.

In the event of unsuccessful mediation, the parties will have to participate in international arbitration disputes at a great cost to both the plaintiff and the defendant. The parties will have to pay attorneys' fees, arbitration fees, other administrative costs for the case (such as costs for experts, witnesses, expenses for the hearing, etc.), costs for human resources participating in ISDS (costs of accommodation, traveling abroad for many years). *For example*, if the dispute is resolved in accordance with the ICSID, the estimated cost is as follows:

- Registration fee (arbitration/mediation): the party requesting the lawsuit must pay $ 25,000.00 (non-refundable).
- Registration fee required to complete the procedures after the decision has been issued (decision of adding, modifying, interpreting, avoiding, ...): the requesting party must pay $ 10,000.00 (non-refundable).
- Administrative fees (appointment of arbitration tribunal, conciliation panel, *ad hoc* arbitration): deposit $ 32,000.00.
- Fee for meeting, in the case of non-meeting in Washington headquarters: deposit $ 1,500.00/day.
- Fees for other services (interpreting, photocopying): The requesting party must pay at the rate specified by the WB (deposit must be made in proportion to the amount of money for the service).
- Fee of appointing arbitrators: the requester must pay $ 10,000.00
- Note: The parties to the dispute do not have to pay the arbitrator and related costs for the arbitrator and the mediator at the ICSID meetings ($ 3,000.00 per day + other reasonable expenses, such as food, accommodation, travel expenses under ICSID's cost norms)
- Very high attorney fees (about $ 10 million)

Given the very high cost above, the pursuit of an ISDS case at international arbitration is only the final solution. Mediation/conciliation should be prioritized. In addition, be patient to prepare to take long-term preventive measures (shown below).

B. *Long-term Preventive Measures*

Firstly, to train and use effectively the human resource participating in the ISDS; to raise the knowledge on international commitments, the capacity of enforcement of domestic law on foreign investment by State management agencies; to intensify the dissemination and guidance on the implementation of the law on international investment; to improve the quality of drafting investment registration certificate and Investor-State Contract;

Secondly, to establish right international commitments on investment with partners.

*Third*ly, to promulgate and implement the law consistantly; to ensure that the domestic legal framework can fully implement

[23] Chaper 8, EVFTA

international commitments on investment; to stipulate or take measures to bind the liability of individuals and/or State agencies who promulgate, apply measures contrary to the international commitments on investment;

Fourthly, to closely monitor the implementation of investment projects done by foreign investors.

Fifthly, to identify and strengthen the State management of 'sensitive' areas that are likely to generate disputes with foreign investors. For example:

- Leasing land use rights, renting houses, workshops in Viet Nam. Disputes arisen from the fact that foreign-invested projects have been allocated land or rented workshops but have not implemented the project or implemented it on right schedule, leading to cancellation, postponement or licence withdrawal. To take lessons learned from the case *McKenzie v. Viet Nam,* 2010 (also called *South Fork case*).[24]
- The fields of investment with large foreign capital such as construction of infrastructure, construction of urban areas, housing, ... These disputes usually arise from the progress, the quality of implementation of construction items the duration of the project completion as well as the implementation of other commitments in the contract between the State management agency and the foreign investor.
- Areas of investment incentives for which Viet Nam has a commitment on tax incentives for foreign investors. These disputes are often caused by the general changes of the State and local authorities related to the application of tax policies to foreign invested enterprises.

Sixthly, the central and local State management agencies in charge of foreign investment regularly maintain two-way information channels with foreign investors to detect potential disagreements that may arise dispute;

Seventhly, to be positive and goodwill in resolving conflicts.

[24] Italaw's case, http://www.italaw.com/cases/2370. Read more: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017;

Eighthly, to establish a mechanism for effective mediation/conciliation.

In April, the Government issued Decree No. 22/2017/ND-CP on trade conciliation.

SUMMARY OF CHAPTER TWELVE

After more than 30 years of reform, Viet Nam has gradually accepted the international practice of investment encouragement and protection. Viet Nam has become a member of many IIAs, which recognizes the common principles of international investment law such as MFN, NT, FET, FPS, etc. It shows Viet Nam's desire to build an attractive investment environment, a reliable destination for foreign investors, and an active participation in the global production network.

Viet Nam is now ready to accept ISDS at international arbitration, ready to enforce arbitration awards, as an equal partner in the international trading arena.

QUESTIONS / EXERCISES

1. Explain the Regulation on coordination and involved agencies in Viet Nam's ISDS.
2. Discuss on the practice of Viet Nam's ISDS.

REQUIRE READINGS

1. Bộ Tư pháp, *Bộ tài liệu chuyên sâu về giải quyết tranh chấp thương mại, đầu tư quốc tế cho cán bộ, công chức của ngành tư pháp, tòa án, kiểm sát và cán bộ pháp lý của các cơ quan nhà nước ở Trung ương*, Hà Nội, tháng 02/2013;
2. Nguyễn Thị Chính, *Báo cáo nghiên cứu hướng dẫn việc phòng ngừa và giải quyết tranh chấp đầu tư quốc tế sử dụng cho cán bộ, công chức nhà nước ở Trung ương và địa phương*, Dự án USAID/GIG, Thanh Hóa, ngày 09/10/2015.
3. Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du

lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

4. http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam
5. http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ;
6. http://www.iareporter.com/downloads/20150304
7. https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ;
8. Italaw's case, http://www.italaw.com/cases/155
9. Italaw's case, http://www.italaw.com/cases/2404.
10. Luật sư Đinh Ánh Tuyết, 'Phòng ngừa tranh chấp đầu tư ở Việt Nam', Tài liệu Hội thảo *Xây dựng chiến lược phòng ngừa tranh chấp đầu tư cho Việt Nam* do Dự án EU-MUTRAP phối hợp với Bộ Kế hoạch và Đầu tư tổ chức, Hà Nội, ngày 24/11/2017.
11. http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole

MAIN REFERENCE

MAIN REFERENCE

1. Julien Chaisse and Christian Bellak, 'Navigating the Expanding Universe of Investment Treaties - Creation and Use of Critical Index' (2015) 18(1) *Journal of International Economic Law* 79-115
2. Julien Chaisse, 'The Shifting Tectonics of International Investment Law - Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47(3) *George Washington International Law Review* 563-638
3. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer 2005).
4. Theodore Moran, *Harnessing Foreign Direct Investment for Development* 113-141 (Center for Global Development 2006).
5. Peter Muchlinski, *Policy Issues*, in Oxford Handbook of International Investment Law 3, 31-37 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
6. Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L. J. 67, 111-115 (2005).
7. Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 Int'l Law. 875, 885-890 (1999).
8. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2008).
9. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* (Oxford 2008).
10. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 818-833 (2005).
11. Mariel Dimsey, *The Resolution of International Investment Disputes* 5-33 (Eleven 2008).
12. Kenneth W. Hansen, 'PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure', in *Privatising Development: Transnational Law, Infrastructure and Human Rights* 75 (Michael B. Likosky ed., Martinus Nijhoff 2005)
13. Andrew Seck, *Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty & Its Implications for Mitigating Political Risk*, 110 inThe Energy Charter Treaty: An East-West Gateway for Investment & Trade (Thomas W. Wälde, ed. 1996).
14. Andrea K. Bjorklund, *Improving the International Investment Law and Policy Regime: Report of the Rapporteur*, in The Evolving International Investment Regime: Expectations, Realities, Options [excerpts re distinctions between types of industries and the protections they should engender] (José E. Alvarez, Karl P. Sauvant & Kamil G. Ahmed eds., Oxford, *forthcoming* 2010).
15. Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, Columbia FDI Perspectives (15 June 2009).
16. L.A. Ahee & Rory E. Walck, *ICSID Arbitration in 2009*, Transnat'l Dispute Management (Provisional Issue, January 2010).
17. Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in Appeals Mechanism in International Investment Disputes 231 (Karl P. Sauvant ed., Oxford 2008).
18. Sauvant, Karl P, *The Rise of TNCs from emerging markets: the issues,* in The Rise of Transnational Corporations from Emerging Markets: Threat or Opportunity? (Karl P. Sauvant et al. eds 2008).
19. Gus van Harten, *Investment Treaty Arbitration and Public Law* 175-184 (Oxford 2007).
20. Sarah Anderson, *Clash on Investment: Global Trade and an Opportunity for Civil Society* (Institute for Policy Studies, November 2009).
21. Emmanuel Gaillard, *Establishing Jurisdiction Through A Most-Favored-Nation Clause*, New York Law Journal (2 June 2005).
22. Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 Journal of International Arbitration 225, 232-237 (2005).
23. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* at 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; last updated 2009).

24. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2007).

25. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* (Kluwer 2008).

26. Susan D. Franck, *International Decisions*: *Occidental Exploration and Production Co. v. Ecuador*, 99 Am. J. Int'l L. 675 (2005).

27. Panel Discussion, *Is Discriminatory Intent Relevant?,* in Investment Treaty Arbitration and International Law 315 (T.J. Grierson Weiler ed., Juris 2008).

28. UNCTAD, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).

29. Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Provision in Investment Arbitration*, in Investment Treaty Law, Current Issues III, at 241 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

30. Stephan W. Schill, *The Multilateralization of International Investment Law* 121-196 (Cambridge 2009).

31. Peter Clark, *National Treatment under GATT and NAFTA: A Discussion Comment*, 1:3 Transnational Dispute Management (July 2004).

32. Andrea K. Bjorklund, *National Treatment*, in Standards of Treatment 29, 29-36 (August Reinisch ed., Oxford, 2008).

33. Susan D. Franck, *International Decisions*: Occidental Exploration and Production Co. v. Ecuador, 99 Am. J. Int'l L. 675 (2005).

34. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*" 39 The International Lawyer 87, 87-94; 100-06 (2005).

35. Schreuer, *Fair and Equitable Treatment*, BIICL, Investment Treaty Forum, 2:5 Transnational Dispute Management (November 2005).

36. Giuditta Cordero Moss, *Full Protection & Security*, in Standards of Investment Protection 131, 138-150 (August Reinisch ed., Oxford 2008).

37. Lucy Reed &Daina Bray, *Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?*, in Contemporary Issues in International Arbitration and Mediation 13 (Arthur Rovine ed., MartinusNijhoff 2008).

38. Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in Investment Treaty Law, Current Issues III, at 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

39. Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair & Equitable Treatment Standard*, 55 Int'l & Comp. L. Q. 527 (2006).

40. UNCTAD, *Fair & Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999).

41. Todd Grierson-Weiler& Ian A. Laird, *Standards Of Treatment*, in Oxford Handbook of International Investment Law 261 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

42. H.E. Zeitler, *The Guarantee of 'Full Protection and Security' in Investment Treaties Regarding Harm Caused by Private Actors*, 3 Stockholm International Arbitration Review 1 (2005).

43. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review - Foreign Investment L. J. 1 (2005).

44. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11 at 1110.8 - 1110.58 (Kluwer 2006; last updated 2009).

45. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review - Foreign Investment L. J. 1 (2005).

46. G.C. Christie, *What Constitutes A Taking of Property under International Law?* 38 BRIT. YB. INT'L L. 307 (1963).

47. Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. World Investment & Trade 717 (2007).

48. Anne K. Hoffmann, *Indirect Expropriation*, in Standards of Investment Protection 151 (August Reinisch ed., Oxford, 2008).

49. August Reinisch, *Expropriation*, in Oxford Handbook of International Investment Law 407 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

50. August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in Oxford Handbook of International Investment Law 694, 694-702 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

51. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 820-25 (2005).

52. Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark*), in Pervasive Problems in International Arbitration 217-233 (Loukas A. Mistelis& Julian D.M. Lew eds., Kluwer 2006).

53. Emmanuel Gaillard, Vivendi *and Bilateral Investment Treaty Arbitration*, New York L.J. (Feb. 26, 2003).

54. Claudia T. Salomon, *Selecting An International Arbitrator: Five Factors to Consider*, 17(10) MEALEY'S International Arbitration Report 25-28 (Oct. 2002).

55. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(4) TDM (July 2008).

56. ICSID, *The ICSID Caseload - Statistics* (Issue 2010-2), pp. 8-17.

57. International Institute for Sustainable Development, *Private Rights/Public Problems* 15-20 (2001).

58. Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms - Choosing Between Institutionally Supported and Ad Hoc; and between Institutions*, in Arbitration Under International Investment Agreements: A guide to the Key Issues 63 (Katia Yannaca-Small ed., Oxford 2010).

59. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Review - Foreign Investment L. J. 232 (1995).

60. Pieter H.F. Bekker, *The Use of Non-Domestic Courts For Obtaining Domestic Relief: Jurisdictional Conflicts Between NAFTA Tribunals and U.S. Courts*?, 11(2) ILSA Journal of International and Comparative Law 331-342 (2005).

61. Osvaldo Marzorati, *Algunas Reflxioness obre el Alcance de la Protección de las Inversionesen el marco de los Trata dos firma dos por Argentina*, 1 Revista Peruana de Arbitraje, 71-118 (EditoralJurídicaGrijley (2005)

62. Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (June 2001), *available at*http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf.

63. Christoph Schreuer, *Traveling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. World Investment & Trade 231 (2004).

64. Nigel Rawding, *Protecting Investments under State Contracts: Some Legal and Ethical Issues*, 11(4) Arb. Int'l 341-45 (1995).

65. Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims - the* SGS *Cases Considered*, in International Investment Law and Arbitration 325-46 (Todd Weiler ed., Cameron May 2005) (2005).

66. Thomas W. Wälde, *The "Umbrella Clause in Investment Arbitration - A Comment on Original Intentions and Recent Cases*, 6 J. World Investment & Trade 183 (2005); available at 1:4 Transnational Dispute Management (October 2004), pp. 1-4; 15-28.

67. Anne K. Hoffmann, *Counterclaims by the Respondent State in Investment Arbitrations*, SchiedsVZ 2006, Heft 6, at 317.

68. Zadek, *The Path to Corporate Responsibility*, Harvard Business Review125 (December 2004).

69. Luke Eric Peterson, *Miner's Claim against South Africa Moves forward Slowly*, 1:13 Investment Arb. Rep. (22 Oct. 2008).

70. Charles H. Brower, II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in 1 YB. on Int'l Investment Law & Policy 347, 347-56; 365-78 (2008/2009)

71. Andrea Shemberg, *Stabilization Clauses and Human Rights,* Research Project Conducted for International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights (11 March 2008), available at http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf, pp. 4-16; 32-41.

72. Konrad von Moltke, IISD, *A Model International Investment Agreement for the Promotion of Sustainable Development* (2004), articles 11-24.

73. Katia Yannaca-Small, 'What about this "Umbrella Clause"?, in *Arbitration Under International Investment Agreements: A guide to the Key Issues* 479 (Katia Yannaca-Small ed., Oxford 2010)

74. Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004).

75. Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?,* in Arbitration Under International Investment Agreements: A guide to the Key Issues 323 (Katia Yannaca-Small ed., Oxford 2010) Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in Oxford Handbook of International Investment Law 459; 460-64; 507-16 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

76. Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, 59 Int'l & Comp. L. Q. 325, 359-71 (2010).

77. José Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 1 YB Int'l Investment L & Policy 379, 449-460 (2009).

78. Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 Brit. Y.B. Int'l L. 264, 331-345 (2008).

79. Andrea K. Bjorklund, *Economic Security Defenses in International Investment Law*, 1 International Investment Law & Policy Yearbook 479 (2009).

80. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Int'l L. 151 (2003)

81. Andrea K. Bjorklund, *Private Rights v. Public International Law: Why Competition Among International Courts and Tribunals Is Not Working,* 59 Hastings L. J. 241 (2007).

82. Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty*, 16 N.Y.U. J. Int'l L. & Pol. 1 (1983).

83. Julien Chaisse, *Intellectual Property Rights, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Int'l Bus. L.J. 225 (2015).

84. Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation*, 10 Asian J. WTO & Int'l Health L. &Pol'y 193(2015).

85. Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investmen*t. (Cheltenham (UK) and Northampton (USA): Edward Elgar Publishing, 2016).

86. Jeswald W. Salacuse, *The Law of Investment Treaties*. (New York: Oxford University Press, 2105), pp. 98-99.

87. Diane A. Desierto, 'Investment Treaties: ASEAN' in Hal Hill, Maria Socorro GochocoBautista (eds) *Asia Rising: Growth and Resilience in an Uncertain Global Economy* (Edward Elgar Publishing Limited, 2013).

88. Trinh Hai Yen, 'The ASEAN Comprehensive Investment Agreement", in Paul Davidson (ed), *Trading Arrangements in the Pacific Rim: ASEAN and APEC*. (USDA: West Publishing Co, 2012).

89. Trinh Hai Yen, *The Interpretation of Investment Treaties: Problems and Solution.* (Leiden|Boston: Brill Nijhoff, 2014).

90. Trinh Hai Yen, *Textbook on International Investment Law* (Hanoi: National Political Publishing House, 2017), Chapter 9.

91. Hanoi Law University, Textbook on Investment Law (2009), The People's Public Security Publishing House, Hanoi;

92. Le Huu Nghia, Le Van Chien, Nguyen Viet Thong, *The Influence of Foreign Direct Investment on Labour Productivity and Technological Level of Viet Nam'* (2014), The National Political Publishing House - Truth, Hanoi;

93. Nguyen Thi Dung, 'Enforcement of the Regulations on Banned Business Lines & Conditional Business Lines in Investment Law of 2014' (January 2016), *Journal of Law*, Hanoi Law University.

Legal Documents:

1. NAFTA
2. NAFTA FTC Notice of Interpretation.
3. Report No 89/TTr-CP dated April 10th 2014 on the Project of Investment Law;

Cases:

1. *Maffezini v. Spain* (ICSID Case No. ARB/97/7), (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000), pages 14-25.
2. *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction) (8 February 2005) 183-227.
3. *National Grid PLC v. Argentina*, UNCITRAL (Award) (3 Nov. 2008), 250-262.
4. *LG&E v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), 201-14; 226-66
5. *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction); *Waste Management I* (Final Award (Dismissing on Jurisdiction)) (6/2/00), 4-7, 14-31.(Dissenting Opinion (on Jurisdiction)) (6/2/00), 10 – 28.
6. *Waste Management II* (Award on Jurisdiction, second claim) (6/26/02), 2-3, 19-37.
7. *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), 101-50
8. *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case ARB(AF)/04/06 (Award) (21 November 2007), 168-180
9. *Corn Products Int'l v. Mexico*, ICSID Case ARB(AF)/04/01 (Decision on Responsibility) (15 January 2008), 161-192.
10. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Award) (8 June 2009), 10-26.
11. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Non disputing party supplemental submission) (16 October 2006).
12. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction) (6 August 2003) 133-73.
13. *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29 January 2004), 92-97; 113-135.
14. *El Paso Energy Int'l Co. v. Argentina*, ICSID Case ARB/03/15 (Decision on Jurisdiction) (27 April 2006), 63-88.
15. *Methanex Corp. v. United States of America*, UNCITRAL (Final Award) (3 Aug. 2005), Part IV, Chapter B.
16. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case. No. UN 3467 (Final Award) (1 July 2004) 1-6, 25-35 (facts), 167-179.
17. *Gami Investments Inc. v. Mexico*, UNCITRAL, (Final Award) (15 November 2004) 12-22 (facts) 111-115.
18. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011
19. *Glamis GoldLtd. v. United States of America,* UNCITRAL (Award) (8 June 2009) 10-15 (facts); 598-626.
20. *Merrill & Ring Forestry L. P. v. Canada*, UNCITRAL (Award) (31 March 2010) 26-43 (facts); 182-233
21. *Wena Hotels Ltd. v. Egypt*, ICSID Case ARB/98/4 (Award) (8 December 2000), 15-69; 80-95.

Websites:

1. UNCTAD, http://investmentpolicyhub.unctad.org/
2. http://www.reuters.com/
3. http://tapchitaichinh.vn/
4. http://vbpl.vn/

MUTRAP
EU - VIETNAM
DỰ ÁN HỖ TRỢ CHÍNH SÁCH THƯƠNG MẠI VÀ ĐẦU TƯ CỦA CHÂU ÂU

This project is funded by the European Union

HANOI LAW UNIVERSITY

TRƯỜNG ĐẠI HỌC LUẬT HÀ NỘI

GIÁO TRÌNH LUẬT ĐẦU TƯ QUỐC TẾ

Đồng chủ biên:

GS. TS. Claudio Dordi
Đại học Tổng hợp Bocconi, Italia
và

TS. Nguyễn Thanh Tâm
Trường Đại học Luật Hà Nội

Elite
advertising & printing

HÀ NỘI - 2017

Giáo trình này được biên soạn với sự hỗ trợ tài chính của Liên minh châu Âu. Quan điểm trong Giáo trình này là của các tác giả, do đó không thể hiện quan điểm chính thức của Liên minh châu Âu hay Bộ Công Thương.

CÁC TÁC GIẢ

Julien Chaisse	Từ Chương 1 đến Chương 8 (viết bằng tiếng Anh)
Nguyễn Thanh Tâm	Chương 9 và Chương 12 (viết bằng tiếng Anh và tiếng Việt)
Trịnh Hải Yến	Chương 10 (viết bằng tiếng Anh và tiếng Việt)
Nguyễn Quỳnh Trang	Chương 11 (viết bằng tiếng Anh và tiếng Việt)

NGƯỜI BIÊN DỊCH

Nguyễn Văn Hiến, và Nguyễn Thị Kim Thanh, và Trương Thị Thúy Bình	Các chương 1, 2, 3, 4, 5, 7
Ngô Ngọc Ánh, và Tào Thị Huệ	Chương 6
Đỗ Thu Hương, và Trần Phương Anh, và Trần Thu Yến	Chương 8

LỜI GIỚI THIỆU

Giáo trình này là một trong những kết quả chính của những hỗ trợ mà Dự án Hỗ trợ chính sách thương mại và đầu tư của châu Âu (EU-MUTRAP) do Liên minh châu Âu tài trợ dành cho các trường đại học ở Việt Nam.

Nhiều học giả trong nước, quốc tế và các chuyên gia về luật đầu tư đã góp phần xây dựng nội dung Giáo trình này. Trường Đại học Luật Hà Nội, đặc biệt là Khoa Pháp luật thương mại quốc tế, đóng vai trò chính trong việc hỗ trợ và rà soát nội dung chuyên môn của cuốn Giáo trình. Các tác giả biên soạn Giáo trình này chủ yếu nhằm phục vụ cho sinh viên luật, và cập nhật những thay đổi mới nhất trong Luật đầu tư quốc tế, kể cả hệ thống tòa án đầu tư được thiết lập bởi các hiệp định thương mại tự do (FTA) do EU ký kết. Đây là một ví dụ điển hình cho những thách thức trong việc xây dựng cơ chế pháp lý cho việc ban hành các quy định về đầu tư nước ngoài. Do vậy, cuốn Giáo trình này hy vọng sẽ là một công cụ hữu ích cho sinh viên, cán bộ chính phủ và các luật gia đang hàng ngày đối mặt với những thách thức trong môi trường quốc tế đầy năng động. Việc Giáo trình được xuất bản bằng cả tiếng Anh và tiếng Việt sẽ giúp các nhà làm luật và cơ quan tòa án trong việc thực hiện chức năng lập pháp và xét xử của mình. Mặc dù tiếng Anh là ngôn ngữ chủ yếu trong Luật đầu tư quốc tế, nhưng các cơ quan lập pháp Việt Nam phải soạn thảo các văn bản pháp luật bằng tiếng Việt.

Bùi Huy Sơn

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LỜI MỞ ĐẦU

Cơ chế điều chỉnh hoạt động đầu tư nước ngoài thường phải đáp ứng hai mục tiêu. Một mặt, cần thu hút đầu tư nước ngoài như một nhân tố quan trọng để thúc đẩy phát triển kinh tế-xã hội của quốc gia tiếp nhận đầu tư. Mặt khác, chính sách và các nhà làm luật cần đảm bảo phát triển kinh tế-xã hội một cách bền vững, nói cách khác, là không gây tác động xấu lên những giá trị cơ bản như sức khỏe người tiêu dùng, môi trường, quyền của người lao động, hay bất kỳ mục tiêu nào khác được coi là quan trọng đối với cộng đồng mà quốc gia tiếp nhận đầu tư đã đặt ra. Để đạt những mục tiêu này, cần có sự phối hợp chặt chẽ giữa chính sách đầu tư và chính sách phát triển quốc gia. Các quốc gia, đặc biệt là các quốc gia đang trong quá trình tăng trưởng nhanh, nên tránh kiểu cạnh tranh nhằm thu hút đầu tư thông qua chiến lược 'chạy đua xuống đáy', nghĩa là giảm chi phí cho các nhà đầu tư nước ngoài bằng việc áp dụng các quy định lỏng lẻo để bảo vệ các giá trị cơ bản của quốc gia mình. Trên thực tế, các chỉ số chỉ ra rằng các nhà đầu tư thường quan tâm tới các nước có cơ chế đầu tư dễ dự đoán và công bằng, hơn là các nước có những ưu đãi thiếu bền vững. Trên thực tế, việc đầu tư vào các quốc gia không tuân thủ những tiêu chuẩn cơ bản về môi trường hay xã hội sẽ làm xấu đi danh tiếng của các nhà đầu tư trong mắt khách hàng. Tuy nhiên, tính dễ dự đoán và công bằng của pháp luật đầu tư trong nước lại phụ thuộc rất lớn vào yếu tố chính trị. Do vậy, nếu cơ chế pháp luật đầu tư trong nước đặc biệt ưu tiên đầu tư nước ngoài, thì có thể bị kiện, trong trường hợp định hướng lãnh đạo của quốc gia tiếp nhận đầu tư thay đổi.

Luật đầu tư quốc tế giúp các nhà đầu tư nước ngoài an tâm hơn về sự ổn định của cơ chế pháp luật, kể cả khi định hướng lãnh đạo của các quốc gia thay đổi, từ đó khuyến khích dòng đầu tư từ nước ngoài vào trong nước. Trong luật quốc tế, các hiệp định đầu tư quốc tế (IIAs) đã dần thay thế luật tập quán quốc tế bằng cách đưa ra các nguyên tắc để nước tiếp nhận đầu tư phải tuân thủ trong các hoạt động xây dựng pháp luật đầu tư nước ngoài.

Luật đầu tư quốc tế không còn là một lĩnh vực xa lạ ở Việt Nam - vốn đã là thành viên của nhiều hiệp định đầu tư song phương (BIT). Kể từ ngày 18 tháng 5 năm 1990 - ngày Việt Nam ký BIT đầu tiên (với Italia), Việt Nam đã tham gia 65 BIT. Tuy nhiên, phần lớn các BIT này đã thuộc nhóm BIT 'thế hệ cũ', bởi lẽ từ đầu thế kỷ XXI đã xuất hiện các chính sách và luật đầu tư 'thế hệ mới', được phát triển từ các tranh luận giữa các học giả, các nhà hoạch định chính sách, các luật gia và doanh nhân về

những ranh giới và mâu thuẫn giữa nhu cầu thu hút đầu tư và sự cần thiết phải đảm bảo tính bền vững.

Đặc biệt, sự quan tâm và thảo luận về các thủ tục (cụ thể là trong lĩnh vực đầu tư) nhằm giải quyết tranh chấp đầu tư (gọi là ISDS - Cơ chế giải quyết tranh chấp giữa nhà đầu tư và Nhà nước), trước đây thường bị giới hạn trong khuôn khổ học thuật và ngoại giao, nay đã thu hút sự chú ý của nhiều nhóm đối tượng mới. Trong một vài trường hợp, thậm chí giới truyền thông đại chúng cũng đã đưa tin liên quan đến những tranh luận về cơ hội đưa cơ chế ISDS vào các IIA.

Sự quan tâm ngày càng lớn đối với luật đầu tư quốc tế cũng xuất phát từ sự quan tâm của các chính phủ và một bộ phận dân chúng, sau khi các tập đoàn đa quốc gia lớn khởi kiện bằng cơ chế ISDS, nhằm phản đối các quy định pháp luật mới mà nước tiếp nhận đầu tư đưa ra vì mục tiêu thúc đẩy đầu tư bền vững, nhưng làm tăng chi phí và thiệt hại cho nhà đầu tư nước ngoài. Ở cấp độ hoạch định chính sách, các cuộc tranh luận tập trung vào những khó khăn trong việc thiết lập giới hạn phạm vi hành động của Chính phủ nhằm bảo hộ đầu tư bền vững (ví dụ, thông qua pháp luật bảo vệ môi trường hoặc sức khỏe người tiêu dùng), đồng thời đảm bảo quyền của nhà đầu tư nước ngoài.

Các IIA 'thế hệ mới' phần nào thể hiện những tranh luận này. Ví dụ, chương đầu tư trong các hiệp định thương mại tự do (FTA) của EU thời gian gần đây đặc biệt nhấn mạnh nhu cầu đảm bảo đầu tư bền vững, mở rộng quyền tùy ý quyết định của nước tiếp nhận đầu tư trong việc áp dụng các quy định bảo vệ các giá trị cơ bản của quốc gia. Thậm chí Hệ thống tòa án đầu tư, được thiết lập trong các FTA 'thế hệ mới' của EU, cũng đáp ứng nhu cầu đảm bảo tuân thủ quy trình giải quyết tranh chấp đầu tư với các quy tắc đạo đức do các hiệp hội, tổ chức nghề nghiệp xây dựng. Với việc tham gia vào một số FTA 'thế hệ mới', Việt Nam là một trong những bên liên quan quan trọng đang nổi lên của Luật đầu tư quốc tế.

Vì vậy, một cuốn Giáo trình song ngữ về Luật đầu tư quốc tế sẽ đáp ứng những nhu cầu mới này. Phần 1 và Phần 2 của Giáo trình, bao gồm các chương từ Chương 1 đến Chương 8, do Giáo sư Julien Chaisse biên soạn, tập trung vào sự tiến triển của các nguyên tắc chung của Luật đầu tư quốc tế. Giáo trình đã áp dụng các phương pháp luận hiện đại trong việc phân tích toàn diện những nguyên tắc liên quan của Luật đầu tư quốc tế. Ở đầu mỗi chương, tác giả chỉ rõ mục tiêu học thuật. Tại cuối chương, tác giả đưa ra các câu hỏi thảo luận cho các đối tượng liên quan như sinh viên, luật sư, cán bộ chính phủ, thẩm phán và nhà nghiên cứu. Phần 3 và Phần 4 của Giáo trình, bao gồm các chương từ Chương 9 đến Chương 12, do Tiến sĩ Nguyễn Thanh Tâm, Tiến sĩ Trịnh Hải Yến và Thạc sĩ Nguyễn Quỳnh Trang biên soạn. Sau khi giới thiệu về hợp đồng giữa nhà đầu tư nước ngoài và Nhà nước (Chương 9), Luật đầu tư quốc tế được phân tích dưới góc nhìn của Việt Nam. Phần này bao gồm bức tranh chi tiết về các hiệp định đầu tư mà Việt Nam đã ký kết (Chương 10), và phân tích về pháp luật Việt Nam áp dụng cho quan hệ đầu tư nước ngoài (Chương 11). Chương cuối cùng - Chương 12 - tập trung vào khuôn khổ pháp luật của Việt Nam trong giải quyết tranh chấp đầu tư quốc tế. Bên cạnh các văn bản pháp luật liên quan, Phần 4 cũng cung cấp một cái nhìn tổng quan về các cơ quan, tổ chức và các cơ quan nhà nước chịu trách nhiệm thực thi pháp luật Việt Nam về đầu tư quốc tế.

Tôi tin tưởng chắc chắn rằng cuốn Giáo trình sẽ trở thành một tài liệu học thuật và nguồn tham khảo quý giá cho những ai quan tâm tới Luật đầu tư quốc tế. Tôi hy vọng rằng Giáo trình này cũng sẽ được đón nhận như những cuốn sách khác mà Dự án EU-MUTRAP đã hỗ trợ về tài chính và chuyên môn, với sự hợp tác và giám sát chuyên môn của Khoa Pháp luật thương mại quốc tế, Trường Đại học Luật Hà Nội, như cuốn Giáo trình Luật thương mại quốc tế song ngữ - đã được đón nhận rộng rãi tại nhiều trường đại học ở Việt Nam trong những năm qua.

Giới học giả đều biết rằng, với mỗi một môn học giảng dạy tại trường đại học đều có một cuốn sách làm nền tảng trụ cột, để từ đó xây dựng các kiến thức cụ thể liên quan. Tôi hy vọng rằng, trong một vài năm tới, các cựu sinh viên sẽ vẫn nhớ tới 'Giáo trình Luật đầu tư quốc tế của Dự án EU-MUTRAP và HLU' như một công cụ quan trọng trên con đường học vấn của mình.

Tái bút: Tôi viết Lời mở đầu của Giáo trình này vào những ngày hoạt động cuối cùng của Dự án EU-MUTRAP, cũng là những ngày làm việc cuối cùng của tôi ở Việt Nam. Sau 12 năm hoạt động tích cực (kể từ ngày 19 tháng 5 năm 2005), tôi muốn nói lời cảm ơn tới tất cả những người Việt Nam đã cùng tôi làm việc, đặc biệt là những đồng nghiệp tại Ban quản lý Dự án EU-MUTRAP, hơn 1.000 chuyên gia, các đồng nghiệp tại các trường đại học, các bạn sinh viên đã tham dự các giờ giảng của tôi, và những người bạn từ các cơ quan chính phủ và các ban ngành khác. Tôi đã học được rất nhiều điều từ tất cả các bạn.

Đồng chủ biên:
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Trưởng nhóm Chuyên gia tư vấn quốc tế Dự án EU-MUTRAP
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DANH MỤC NHỮNG TỪ VIẾT TẮT

AA	Đạo luật Hòa hảo (Accord Acts)
ACIA	Hiệp định đầu tư toàn diện ASEAN
ADR	Phương thức giải quyết tranh chấp thay thế
AFAS	Hiệp định khung ASEAN về thương mại dịch vụ
AFTA	Khu vực thương mại tự do ASEAN
AIA	Khu vực đầu tư ASEAN
ASEAN	Hiệp hội các quốc gia Đông Nam Á
BIS	Ngân hàng thanh toán quốc tế
BIT	Hiệp định đầu tư song phương
CAFTA	Hiệp định thương mại tự do Hoa Kỳ - Canada
CHDCND	Cộng hòa dân chủ nhân dân
CEPEA	Quan hệ đối tác kinh tế toàn diện Đông Á
CIL	Luật tập quán quốc tế
DCs	Các nước đang phát triển
DSB	Cơ quan giải quyết tranh chấp của WTO
DSU	Hiệp định về quy tắc và thủ tục điều chỉnh việc giải quyết tranh chấp của WTO
DTA	Hiệp định tránh đánh thuế hai lần
EC	Cộng đồng châu Âu
ECOSOC	Hội đồng Kinh tế và Xã hội của Liên hợp quốc
E&T	Giáo dục và đào tạo
EU	Liên minh châu Âu
EU-MUTRAP	Dự án hỗ trợ chính sách thương mại và đầu tư của Liên minh châu Âu
EVFTA	Hiệp định thương mại tự do Liên minh châu Âu - Việt Nam
FET	Đối xử công bằng và thỏa đáng
FDI	Đầu tư trực tiếp nước ngoài
FIPA	Hiệp định khuyến khích đầu tư nước ngoài
FPI	Đầu tư gián tiếp nước ngoài
FPS	Bảo vệ và an ninh đầy đủ
FTAs	Hiệp định thương mại tự do
GATS	Hiệp định chung về thương mại dịch vụ của WTO
GATT	Hiệp định chung về thuế quan và thương mại của WTO
GPA	Hiệp định về mua sắm chính phủ của WTO
HĐ	Hợp đồng
HKIAC	Trung tâm trọng tài quốc tế ở Hong Kong
ICC	Phòng thương mại quốc tế
ICDR	Trung tâm giải quyết tranh chấp quốc tế
ICJ	Toà án công lý quốc tế (Toà án quốc tế ở La Hay, thuộc hệ thống Liên hợp quốc)
ICSID	Trung tâm giải quyết tranh chấp đầu tư quốc tế
IEG	Nhóm chuyên gia về đầu tư
IFC	Tập đoàn tài chính quốc tế (một trong các cơ quan thuộc Nhóm Ngân hàng thế giới (WB))
IIA	Hiệp định đầu tư quốc tế
IGA	Hiệp định về khuyến khích và bảo hộ đầu tư ASEAN
IMF	Quỹ tiền tệ quốc tế
IPAP	Kế hoạch hành động xúc tiến đầu tư
IPR	Quyền sở hữu trí tuệ
IOSCO	Tổ chức Chứng khoán Quốc tế
ISDS	Giải quyết tranh chấp giữa nhà đầu tư nước ngoài và Chính phủ nước tiếp nhận đầu tư
LCIA	Toà án trọng tài quốc tế London
LDCs	Các nước kém phát triển
MAI	Hiệp định đầu tư đa phương
MERCOSUR	Thị trường chung Nam Mỹ
MFN	Tối huệ quốc
MUTRAP	Dự án hỗ trợ thương mại đa biên EU-Việt Nam do EU tài trợ
NAFTA	Hiệp định thương mại tự do Bắc Mỹ
NGOs	Các tổ chức phi chính phủ
NT	Đối xử quốc gia
OECD	Tổ chức hợp tác và phát triển kinh tế
PCA	Tòa trọng tài thường trực
PCIJ	Tòa thường trực quốc tế
PPP	Hợp đồng đối tác công-tư

PSA	Hợp đồng phân chia sản phẩm
PTA	Hiệp định thương mại ưu đãi
QT	Quốc tế
RTA	Các hiệp định thương mại khu vực
R&D	Nghiên cứu và phát triển
SWFs	Các quỹ đầu tư quốc gia
SIAC	Trung tâm trọng tài quốc tế Singapore
TIFA	Hiệp định khung về thương mại và đầu tư
TPP	Hiệp định đối tác xuyên Thái Bình Dương
TRIMs	Hiệp định về các biện pháp đầu tư liên quan đến thương mại của WTO
TRIPS	Hiệp định về quyền sở hữu trí tuệ liên quan đến thương mại của WTO
UAE	Các Tiểu Vương quốc Ả Rập thống nhất
UN	Liên hợp quốc
UNCITRAL	Uỷ ban của Liên hợp quốc về luật thương mại quốc tế
UNCTAD	Hội nghị Thương mại và Phát triển của Liên hợp quốc
UNIDROIT	Viện quốc tế về thống nhất luật tư
USSFTA	Hiệp định thương mại tự do Hoa Kỳ - Singapore
VCLT	Công ước Viên về Luật điều ước quốc tế
VIAC	Trung tâm trọng tài quốc tế Việt Nam
WB	Ngân hàng Thế giới
WTO	Tổ chức thương mại thế giới

MỤC LỤC

PHẦN MỘT

GIỚI THIỆU

Pháp luật đầu tư quốc tế là lĩnh vực đáng được nghiên cứu một cách nghiêm túc từ góc độ chính sách công và tư nhân. Giáo trình này sử dụng thuật ngữ Hiệp định đầu tư song phương ('BIT') để chỉ các văn bản pháp luật quốc tế có mục đích chính là khuyến khích và bảo hộ đầu tư nước ngoài giữa hai nước. Thí dụ: các 'Hiệp định đầu tư song phương', các 'Hiệp định khuyến khích đầu tư nước ngoài', các 'Hiệp định khuyến khích và bảo hộ đầu tư. Còn đối với tất cả các hiệp định song phương, khu vực hoặc đa phương nhằm mục tiêu tự do hóa trên cơ sở ưu đãi các dòng đầu tư đi cùng với thương mại hàng hoá và dịch vụ, trong đó quy định các quy tắc áp dụng cho những lĩnh vực khác như sở hữu trí tuệ, cạnh tranh, và di chuyển của thể nhân, thì Giáo trình gọi chung là các 'Hiệp định thương mại tự do' ('FTA'). BIT và FTA đi kèm với các nguyên tắc đầu tư đều có thể được gọi chung là các hiệp định đầu tư quốc tế ('IIA'). Bên cạnh đó, khái niệm 'quốc gia' được Giáo trình sử dụng với phạm vi rất rộng, bao gồm một thực thể địa lý có danh tính quốc tế và có khả năng thực hiện một chính sách kinh tế đối ngoại độc lập. Việc sử dụng các địa danh không thể hiện bất cứ quan điểm nào về tư cách pháp lý của bất cứ quốc gia hay vùng lãnh thổ nào.

Ở khía cạnh này, một số vấn đề có ý nghĩa quan trọng khi mà luật đầu tư quốc tế không chỉ là luật quốc tế về đầu tư nước ngoài, mà còn là luật điều chỉnh các mối quan hệ kinh tế, phát triển kinh tế, các thể chế kinh tế và hội nhập kinh tế khu vực. Ngoài ra, luật đầu tư quốc tế còn quy định cả về phương thức hành xử của các quốc gia có chủ quyền trong quan hệ kinh tế quốc tế, và của các bên tư nhân khi tham gia các giao dịch kinh doanh và kinh tế xuyên biên giới. Chính sách, pháp luật trong nước, khu vực và quốc tế cũng như thông lệ, tập quán quốc tế là toàn bộ các khía cạnh của luật đầu tư quốc tế.

CHƯƠNG 1. KHÁI QUÁT

CHƯƠNG 1

KHÁI QUÁT VỀ ĐẦU TƯ QUỐC TẾ VÀ LUẬT ĐẦU TƯ QUỐC TẾ

Mục đích học Chương 1

- Trình bày bối cảnh lịch sử của Luật đầu tư quốc tế hiện nay, trong đó có vấn đề bảo hộ ngoại giao;
- Giới thiệu về luật tập quán quốc tế quy định về trách nhiệm bồi thường thiệt hại đối với ngoại kiều, là tiền thân của cơ chế bảo hộ đầu tư trong các IIA hiện nay;
- Tìm hiểu lý do tại sao các IIA hiện nay lại đóng vai trò quyết định trong bảo hộ đầu tư;
- Trình bày về mối quan hệ căng thẳng giữa mục tiêu đảm bảo chủ quyền, không bị kiểm sóat của quốc gia tiếp nhận đầu tư và mối quan tâm của nhà đầu tư về việc được bảo đảm đầu tư và tính dễ dự đoán của môi trường pháp lý trong thời gian đầu tư của mình;
- Mô tả các loại rủi ro chính trị mà nhà đầu tư phải đối mặt, nhất là ở các thị trường đang nổi;
- Thảo luận các cách thức giúp các nhà đầu tư lường trước những rủi ro của mình;
- Giới thiệu khái niệm bảo hiểm rủi ro chính trị như một biện pháp thay thế hoặc bổ sung cho các biện pháp bảo hộ và giải quyết tranh chấp theo IIA;
- Giới thiệu các nguồn của Luật đầu tư quốc tế.

Sau khi phác họa được khái niệm 'đầu tư' trong các IIA hiện hành tại Mục 1, Mục 2 của Chương này sẽ giải quyết mối quan hệ giữa toàn cầu hóa và đầu tư quốc tế. Mục 3 sẽ bàn về lịch sử phát triển của Luật đầu tư quốc tế. Mục 4 tập trung xác định phạm vi điều chỉnh của các IIA. Cuối cùng, Mục 5 sẽ mô tả các nguồn của Luật đầu tư quốc tế.

Mục 1. KHÁI NIỆM 'ĐẦU TƯ' TRONG CÁC HIỆP ĐỊNH ĐẦU TƯ QUỐC TẾ

Khái niệm 'đầu tư' không phải là một định nghĩa được chấp nhận rộng rãi mà nó thay đổi liên tục do sự ra đời và phát triển của các hình thức đầu tư mới của các doanh nhân, các nhà tài phiệt và các công ty đa quốc gia. Vì không có một định nghĩa được chấp nhận chung về đầu tư, nên định nghĩa như thế nào khái niệm này trong các BIT có ý nghĩa hết sức quan trọng.

Thông thường, các quốc gia đều cho rằng đầu tư quốc tế là việc huy động một nguồn lực trong một khoảng thời gian nhất định để tạo lợi nhuận trong tương lai. Trong khi đó, các định nghĩa pháp lý được sử dụng trong các IIA thường có rất nhiều biến thể, khác nhau về cơ bản. Những khác biệt này có thể được phân thành hai nhóm lớn, tùy thuộc vào mục đích của IIA. Nhóm thứ nhất là các hiệp định có đối tượng là việc dịch chuyển vốn và nguồn lực qua biên giới. Trong nhóm này, khái niệm 'đầu tư' thường được định nghĩa rất hạn chế, trong đó nội dung chính là cơ chế kiểm soát doanh nghiệp. Nhóm thứ hai gồm các IIA hướng tới mục tiêu bảo hộ đầu tư, vì vậy các IIA này có xu hướng đưa ra các định nghĩa rộng và khái quát hơn, dựa trên yếu tố tài sản, bao gồm không chỉ các khoản vốn dịch chuyển qua biên giới, mà còn các loại tài sản khác. Nhìn chung, các BIT chủ yếu tiếp cận theo nhóm thứ hai. Các IIA gần đây nhất thường sử dụng một định nghĩa tương đối chuẩn mực về FDI. Các hiệp định này bắt đầu xuất hiện từ những năm 1960, và kể từ đó tới nay hầu như không thay đổi.

Trong tất cả các định nghĩa về đầu tư, cụm từ được sử dụng nhiều nhất là 'bất kỳ loại tài sản nào'.[1] Định nghĩa này thường đi kèm một danh mục tài sản. Vì một số lý do, danh mục các tài sản được bảo hộ trong một BIT thường không cố định. *Thứ nhất*, 'tác giả' của các BIT đều phải thừa nhận rằng rất khó để xây dựng một danh mục đầy đủ. *Thứ hai*, người ta đã rất thận trọng khi để mở khái niệm 'đầu tư', để nó có thể áp dụng với các hình thức đầu tư mới phát sinh sau này. Thêm nữa, một định nghĩa khái quát sẽ giúp tránh được việc phải đàm phán lại BIT trong các tình

[1] Lưu ý là trong các BIT của mình, Hoa Kỳ thường sử dụng cụm từ 'bất cứ loại đầu tư nào'.

huống đó. Đối với nhiều BIT, đây là cách tiếp cận vừa mang tính tổng hợp, vừa có ý nghĩa phân tích, có khả năng bao hàm mọi yếu tố đa dạng có thể được coi là một khoản đầu tư. Do đó, còn một vấn đề khác nữa mà nước tiếp nhận đầu tư cần xem xét, đó là liệu quốc gia đó có muốn chấp nhận một định nghĩa mở về khái niệm đầu tư hay không? Vì nếu làm như vậy, trong tương lai, nó sẽ bảo hộ được những hình thức đầu tư mà các bên không có thoả thuận cụ thể nào ở thời điểm ký kết BIT. Tình huống này đã được tính đến trong quá trình đàm phán MAI trong khuôn khổ OECD, đặc biệt đối với các tài sản tài chính. Nhân dịp này, người ta đã nhấn mạnh rằng có lý do chính đáng để đưa các hình thức đó vào trong BIT, miễn là các khoản đầu tư được thực hiện để thiết lập quan hệ kinh tế lâu dài với doanh nghiệp. Tương tự, các nước tiếp nhận đầu tư có thể thấy không thích hợp, khi bảo hộ các quyền theo giấy phép ở mức độ tương tự với các tài sản nước ngoài khác.

Trái lại, nếu định nghĩa quá hẹp, thì định nghĩa về đầu tư sẽ bỏ sót những hình thức đầu tư mới mà nước tiếp nhận đầu tư muốn hướng tới trong chiến lược phát triển của mình. Nói chung, mỗi quốc gia cần đánh giá khả năng tác động của từng loại định nghĩa về đầu tư để theo đuổi các chính sách của quốc gia.

Các BIT thường sử dụng khái niệm 'đầu tư, là một khoản đầu tư được thực hiện theo pháp luật của từng nước ký kết hiệp định. *Thí dụ*: trong BIT giữa Malaysia và các Tiểu Vương quốc Ả Rập thống nhất (UAE), theo Điều 1, định nghĩa đầu tư của Malaysia là 'khoản đầu tư được chấp thuận'. Còn đối với phía bên kia, đầu tư được định nghĩa là 'các khoản đầu tư được các cơ quan có thẩm quyền của UAE chấp thuận và phân loại là đầu tư theo pháp luật và quy định của nước tiếp nhận đầu tư.

Nhìn chung, pháp luật trong nước thường yêu việc chấp thuận đầu tư, và việc chấp thuận sẽ được thực hiện với những điều kiện nhất định. Khi điều kiện này được nêu trong định nghĩa, thì các khoản đầu tư sẽ không được chấp thuận, nếu không tuân thủ pháp luật quốc gia, hoặc nếu không đáp ứng các điều kiện do cơ quan có thẩm quyền quy định, khi đó khoản đầu tư sẽ không được bảo hộ theo BIT, vì chúng không được coi là khoản 'đầu tư' theo nghĩa của BIT này. Chính vì lý do này, một số BIT quy định rất rõ rằng chúng sẽ chỉ áp dụng với những khoản đầu tư được thực hiện theo pháp luật của nước tiếp nhận đầu tư.

Trên cơ sở các điều kiện kiểu này, một quốc gia có thể từ chối bảo hộ theo BIT đối với những khoản đầu tư mà quốc gia đó cho là không phù hợp. Do đó, khi xác định mối tương quan trực tiếp giữa bảo hộ đầu

tư và tuân thủ các yêu cầu pháp lý, một quốc gia có thể đảm bảo rằng chỉ có những khoản đầu tư được coi là hấp dẫn, đứng từ góc độ mục tiêu phát triển, mới được bảo hộ.

Từ quan điểm này, các DC có thể tận dụng điều này bằng cách xác định một loạt các ưu tiên và xây dựng các tiêu chí sẽ được tính đến, khi xác định nên hay không nên bảo hộ một khoản đầu tư theo BIT. Tuy nhiên, là một quốc gia có chủ quyền, nước tiếp nhận đầu tư có thể thay đổi pháp luật và chính sách của mình, và những thay đổi này có thể ảnh hưởng xấu tới sự ổn định của môi trường đầu tư. Vì vậy, nếu pháp luật và chính sách thay đổi thường xuyên, thì có thể gây ảnh hưởng không tốt cho uy tín của quốc gia.

Để được bảo hộ, thông thường, việc tiếp cận đầu tư phải tuân thủ pháp luật của nước này. Tình huống này sẽ được thảo luận chi tiết hơn trong phần quy định về tiếp cận đầu tư.

Nội dung các BIT thường có một điều khoản để đảm bảo việc thay đổi hình thức đầu tư vốn (*thí dụ* từ một khoản vay trở thành một khoản nợ) sẽ không làm cho nó mất đi tính chất là một khoản đầu tư, vì thế vẫn được bảo hộ theo BIT. *Thí dụ*: một số BIT quy định: 'Bất cứ sự thay đổi nào về hình thức đầu tư cũng không ảnh hưởng đến tính chất đầu tư của nó'.

Tuy nhiên, một số BIT còn ra điều kiện là việc thay đổi hình thức đầu tư không được trái với nội dung phê duyệt ban đầu mà nước tiếp nhận đầu tư đã đưa ra đối với khoản đầu tư đó. Vì thế, ngay trong Điều 1 của BIT giữa Cộng đồng Bỉ-Luxembourg và Cộng hòa Síp đã quy định:

(a) bất kỳ sự thay đổi nào về hình thức đầu tư tài sản đều không ảnh hưởng đến tính chất đầu tư, với điều kiện là sự thay đổi đó không trái với nội dung cho phép, nếu có, đối với tài sản được đầu tư ban đầu.

Mục đích của yêu cầu này là để đảm bảo không xảy ra tình trạng lợi dụng tái đầu tư để tránh những hạn chế mà nước tiếp nhận đầu tư áp đặt đối với khoản đầu tư ban đầu.

Một phiên bản khác của quy định này là phải chứng tỏ rằng hoạt động tái đầu tư không được trái với pháp luật của nước tiếp nhận đầu tư. Cụ thể:

(a) nếu có thay đổi về hình thức đầu tư, thì việc thay đổi đó không được ảnh hưởng tới nội dung và tính chất của khoản đầu tư, với

điều kiện là thay đổi đó không mâu thuẫn với pháp luật của quốc gia ký kết kia.

Còn một vấn đề khác đã được nhận diện trong các BIT, đó là vấn đề liên quan tới thu nhập từ đầu tư. Nhìn chung, các khoản thu nhập này đều được bảo hộ bởi hầu hết các BIT, *thí dụ* như đảm bảo việc tự do chuyển nhượng các khoản lợi nhuận ra khỏi nước tiếp nhận đầu tư. Có những BIT lại bảo hộ khoản thu nhập từ đầu tư bằng một điều khoản đầu tư riêng. Cụ thể là các BIT đó định nghĩa về khái niệm này. Vì thế, trong nhiều năm, định nghĩa được sử dụng phổ biến nhất quy định rằng đó là 'số tiền được báo cáo của một khoản đầu tư. Tương tự, phần lớn các BIT có đưa ra định nghĩa này cũng đều có thêm một danh sách không cố định các dòng tiền mặt được coi là lợi tức đầu tư. Danh mục này thường bao gồm lợi nhuận, tiền lãi, lợi nhuận từ vốn, cổ tức, tiền bản quyền và phí.

Chính vì vậy, một định nghĩa rộng về khái niệm đầu tư chỉ là điểm tham chiếu đầu tiên trong bối cảnh các định nghĩa về đầu tư và nhà đầu tư trong các BIT hiện hành. Đây là điều mọi thành viên của cộng đồng quốc tế đều quan tâm tới.[2] Các quốc gia xuất khẩu vốn sử dụng nó để tìm kiếm cơ hội đầu tư ở nước ngoài và bảo hộ các khoản đầu tư của mình ở các thị trường xa xôi.[3] Các quốc gia nhập khẩu vốn lại dùng nó để thúc đẩy nguồn đầu tư vào nước mình bằng cách đảm bảo cho các nhà đầu tư nước ngoài một môi trường kinh doanh ổn định, phù hợp với các chuẩn mực cao của quốc tế.[4] Một số DC đang hướng tới cả hai mục tiêu này. Vì là các DC, họ muốn hưởng lợi từ các khoản đầu tư nước ngoài. Vì là các quốc gia đang lớn mạnh, họ muốn mở rộng kinh doanh sang các thị trường khác.

[2] Andrew Newcombe & Luís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 41-46 (2009); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 17-20 (2008); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 49-59 (2010).

[3] Amanda Perry, *An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality*, 15 AM. U. Int'l L. Rev. 1627, 1631 (2000).

[4] Joshua Boone, *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 Global Bus. L. Rev. 187, 187 (2011) (trong đó chỉ rõ động lực đằng sau các BIT là để 'tạo điều kiện thuận lợi ... cho các dòng đầu tư bằng cách mở rộng các kênh an toàn cho FDI ... ổn định môi trường đầu tư, đem lại các biện pháp bảo đảm đầu tư, và tạo ra cơ chế giải quyết tranh chấp trung lập cho 'các nhà đầu tư bị tổn thương'); UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UN Doc. E.09.II.D.20 p. 4 (2009).

Mục 2. TOÀN CẦU HÓA VÀ ĐẦU TƯ QUỐC TẾ

Đầu tư quốc tế đóng vai trò rất quan trọng trong 'toàn cầu hoá kinh tế' - một quá trình có tính lịch sử, là kết quả của sự tiến bộ công nghệ và đổi mới của con người. Khái niệm toàn cầu hoá kinh tế dùng để chỉ sự hội nhập ngày càng tăng của các nền kinh tế trên thế giới, đặc biệt là thông qua việc dịch chuyển hàng hoá, dịch vụ và vốn qua biên giới.[5] Thuật ngữ này đôi khi cũng dùng để chỉ hiện tượng dịch chuyển người (người lao động) và tri thức (công nghệ) qua biên giới. Quá trình toàn cầu hóa có những khía cạnh mang tính văn hoá, chính trị, và môi trường.

1. Toàn cầu hóa kinh tế

Thuật ngữ 'toàn cầu hoá' bắt đầu được sử dụng phổ biến hơn vào những năm 1980, thể hiện những tiến bộ về công nghệ giúp cho việc thực hiện các giao dịch quốc tế - kể cả các dòng thương mại và tài chính - dễ dàng hơn và nhanh hơn. Thuật ngữ này dùng để chỉ sự mở rộng ngoài biên giới quốc gia của các lực lượng thị trường tương tự vốn từng có hàng thế kỷ hoạt động ở mọi cấp độ hoạt động kinh tế của con người - thị trường làng, các ngành công nghiệp đô thị, hoặc các trung tâm tài chính.[6] Có vô số các chỉ số để minh hoạ phương thức toàn cầu hóa của hàng hóa, vốn và người.[7]

Sự phát triển của thị trường toàn cầu đã giúp gia tăng tính hiệu quả thông qua cạnh tranh và phân công lao động - chuyên môn hóa cho phép con người và nền kinh tế tập trung vào những gì họ có thể làm tốt nhất. Thị trường toàn cầu cũng đem lại cho mọi người cơ hội lớn hơn để tiếp cận các thị trường đa dạng và rộng khắp trên toàn thế giới. Điều đó có nghĩa là tiếp cận được nhiều vốn và công nghệ hơn, hàng nhập khẩu rẻ hơn và các thị trường xuất khẩu có quy mô hơn. Song điều đó không có nghĩa là thị trường có thể đảm bảo mọi người được hưởng lợi như nhau từ hiệu quả gia tăng. Các quốc gia phải chuẩn bị tinh thần nắm bắt những chính sách cần thiết, và đối với các nước nghèo nhất,

[5] Michael J. Trebilcock, 'Critiquing the Critics of Economic Globalization', *1 J. Int'l L. & Int'l Relations* 213-38 (2005).

[6] Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POL., No. 3, Điều 11, 2010, at 5.

[7] *Thí dụ*: để đáp ứng nhu cầu ngày càng tăng đối với các biện pháp tốt hơn để phân tính xu hướng toàn cầu hóa, OECD đã có sáng kiến xây dựng một khung khái niệm và phương pháp luận để thu thập các thông tin định lượng và xây dựng các chỉ số. Sổ tay *Các chỉ số toàn cầu hóa kinh tế* là kết quả của sáng kiến này. Đó là kết quả của sự hợp tác giữa các chuyên gia từ Ban thư ký OECD, các nước thành viên và các tổ chức quốc tế. OECD, *Measuring Globalization: OECD Economic Globalization Indicators*, 2010, Paris, 230 p.

có thể phải cần tới sự hỗ trợ của cộng đồng quốc tế.[8] Toàn cầu hóa có thể dễ dàng tác động tới những lựa chọn hàng ngày trong đời sống con người, kinh tế, và chính trị.[9]

Toàn cầu hoá cũng có thể tạo ra một khuôn khổ hợp tác giữa các quốc gia trong một số vấn đề phi kinh tế nhưng lại có hệ lụy xuyên biên giới, *thí dụ* như di dân, môi trường và các vấn đề pháp lý. Đồng thời, dòng chảy hàng hoá, dịch vụ và vốn nước ngoài vào một quốc gia có thể tạo ra động cơ và nhu cầu củng cố hệ thống giáo dục trong nước, vì công dân của nước tiếp nhận sẽ nhận thức được thách thức cạnh tranh trước mắt họ.

Quan trọng hơn cả là toàn cầu hoá là phổ biến và chia sẻ thông tin, tri thức. Các nhà đổi mới - dù là doanh nghiệp hay chính phủ - đều có thể học hỏi từ những ý tưởng thành công của các nước khác và điều chỉnh nó cho phù hợp với hoàn cảnh của mình, đồng thời tránh được những ý tưởng đã từng thất bại. Joseph Stiglitz, người đoạt giải Nobel, mặc dù thường xuyên lên án toàn cầu hóa, cũng nhận thấy toàn cầu hoá góp phần 'giảm bớt cảm giác cô lập ở thế giới đang phát triển và đem lại cho nhiều người sống trong thế giới này cơ hội tiếp cận những tri thức mà cách đây một thế kỷ, ngay cả những người giàu nhất ở bất cứ quốc gia nào, cũng không thể có được'.[10]

Các thị trường tài chính thế giới đã trải nghiệm sự gia tăng mạnh mẽ về toàn cầu hóa trong những năm gần đây. Mặc dù sự tăng trưởng mạnh mẽ nhất diễn ra ở các nền kinh tế tiên tiến, song các thị trường mới nổi và các nước đang phát triển cũng đã hội nhập hơn về tài chính.[11] Khi thị trường vốn của mình đã được tăng cường, các quốc gia thu hút được nhiều vốn đầu tư hơn, có thể tạo điều kiện cho tầng lớp doanh nhân lớn hơn phát triển, phân bổ vốn hiệu quả hơn, khuyến khích chia sẻ rủi ro quốc tế và thúc đẩy tăng trưởng kinh tế.

Các quốc giá có thể cân nhắc hai bài học chủ yếu được rút ra từ việc phân tích tình hình trong những năm gần đây.

Thứ nhất, các kết quả phân tích đều ủng hộ quan điểm cho rằng các quốc gia phải cân nhắc thật kỹ rủi ro và lợi ích của các dòng vốn tự do. Bằng chứng cho thấy những lợi ích rõ ràng mà các nền kinh tế tiên tiến được hưởng từ hội nhập tài chính.[12] Ở các nền kinh tế mới nổi và đang phát triển, một số yếu tố có thể ảnh hưởng đến mức độ tác động của toàn cầu hoá tài chính đối với sự biến động và tăng trưởng kinh tế. Các nền kinh tế mạnh mẽ về tài chính, với các thể chế chắc chắn, các chính sách kinh tế vĩ mô ổn định và mức độ mở cửa thị trường đáng kể sẽ có khả năng hơn trong việc hưởng lợi từ tự do hóa tài chính và ít khả năng gặp phải nguy cơ bất ổn kinh tế vĩ mô và khủng hoảng tài chính. *Thí dụ*: các thị trường tài chính phát triển tốt giúp cải thiện các chu trình bùng nổ-phát triển được kích hoạt bởi sự gia tăng và sụt giảm đột ngột của dòng vốn quốc tế, trong khi đó các thể chế mạnh trong nước và các chính sách kinh tế vĩ mô mạnh mẽ giúp thu hút vốn 'tốt' như vốn cổ phần danh mục đầu tư và FDI.

Bài học *thứ hai* rút ra từ nghiên cứu này là: việc thận trọng thái quá trong việc mở cửa cho nguồn vốn cũng phải trả giá. Cái giá đó bao gồm: thương mại quốc tế thấp hơn, chi phí đầu tư cao hơn cho doanh nghiệp, ưu đãi về kinh tế nghèo, nên gia tăng chi phí hành chính/giám sát. Mở cửa cho đầu tư nước ngoài có thể dẫn tới những thay đổi trong nền kinh tế góp phần loại bỏ những nhược điểm này và giúp tăng trưởng.

Trong bất kỳ trường hợp nào, thì các quốc gia đều nên cân nhắc những rủi ro tiềm ẩn liên quan đến việc mở cửa thị trường thu hút vốn đầu tư so với chi phí hiệu quả liên quan đến các biện pháp kiểm soát, nhưng trong những điều kiện nhất định (như thể chế tốt, chính sách trong nước và nước ngoài ổn định, và các thị trường tài chính phát triển), thì lợi ích của việc toàn cầu hóa tài chính sẽ lấn át các rủi ro.

Sự phát triển của truyền thông quốc tế, thương mại quốc tế và các yếu tố khác đã góp phần tạo ra một nền kinh tế toàn cầu chưa từng có. Gia tăng quốc tế hóa tài chính có thể mang lại nhiều lợi ích to lớn cho các nhà đầu tư và các quốc gia, nhưng cũng có thể để lại hậu quả nghiêm trọng. Những cuộc khủng hoảng kinh tế gần đây ở Hoa Kỳ, EU

[8] Cynthia A Williams, 'Corporate Social Responsibility in An Era of Economic Globalization', (2002) *35 UC David L Rev 705* đoạn 721, nêu rõ đầu tư vốn của tư nhân, đặc biệt là của các công ty đa quốc gia, ngày càng có ý nghĩa quan trọng đối với các DCs; Mitchell A Kane, 'Bootstraps and Poverty Traps: Tax Treaties as Novel Tools for Development Finance' (2012) *29 Yale J on Reg 255*, đoạn 263-72, bàn về tầm quan trọng và sự khó khăn của việc thúc đẩy tài trợ cho các hoạt động của khu vực tư nhân ở các DCs, như một biện pháp để giúp họ thoát khỏi tình trạng đói nghèo.

[9] *Thí dụ*: trong lĩnh vực y tế, sự gia tăng khả năng tiếp cận các công nghệ hiện đại có thể tạo ra sự khác biệt giữa sự sống và cái chết. Trong lĩnh vực truyền thông, nó có thể thúc đẩy và tạo điều kiện cho thương mại và giáo dục, và khả năng tiếp cận truyền thông độc lập.

[10] Joseph Stiglitz (2003), *Globalization and Its Discontents,* New York: W.W. Norton & Company, tr. 4.

[11] David Zaring, 'Finding Legal Principle in Global Financial Regulation', *52 Va. J. Int'l L. 683*, 701-16 (2012) (nhận dạng các đặc điểm chung và có thể so sánh được của luật tài chính quốc tế và các cơ chế khó của pháp luật quốc tế dựa trên hiệp định của WTO và EU).

[12] David Cowen & Ranil Salgado, 'Globalization of Production and Financial Integration in Asia', trong David Cowen, et al. eds., *Financial Integration in Asia: Recent Developments and Next Steps,* 4 Int'l Monetary Fund, Working Paper No. 06/196, 2006.

và Nga cũng như những hệ quả của nó đối với thị trường thế giới đã đặt ra vấn đề cần phải có các quy định hiệu quả hơn trong bối cảnh mới của nền kinh tế toàn cầu.

2. Các quy tắc của toàn cầu hóa

Sự tăng trưởng trong nền kinh tế của một nước đi kèm với rất nhiều yếu tố phát triển mới với những đóng góp tích cực, song cũng đặt ra nhiều thách thức. Mặc dù tăng cường hợp tác khu vực gia tăng, song chính phủ nhiều nước đã nhận thấy xu hướng toàn cầu hóa làm họ mất đi nhiều khả năng kiểm soát nền kinh tế, vì các thương nhân và các công ty đã mở rộng hoạt động ra ngoài phạm vi điều chỉnh của pháp luật quốc gia. Đối với các nước theo định hướng thị trường, sự xói mòn chủ quyền quốc gia đồng nghĩa với việc suy giảm sức mạnh trong khả năng tác động của những người dân bình thường đối với một sự kiện thông qua việc bầu cử, do đó nó có thể làm xói mòn nền dân chủ.

Chính ở khía cạnh này, các tổ chức quốc tế, mới và cũ, đã đảm nhận một số chức năng trước đây của chính phủ các quốc gia. *Thí dụ*: Quỹ tiền tệ quốc tế (IMF), một cơ quan độc lập của Liên hợp quốc (UN), đã trở thành một 'lưới an toàn' cho các quốc gia khi bị khủng hoảng kinh tế và là một cơ quan thực thi quy tắc ứng xử về kinh tế. Tuy nhiên, hai vai trò này đã bị tranh cãi, và đã có những đề xuất được đưa ra về việc thành lập một cơ quan kinh tế toàn cầu mới. Tổ chức thương mại thế giới (WTO) đã thành công trong Hiệp định chung về thuế quan và thương mại (GATT)[13] trước đây, và đã trở thành không chỉ là một cơ quan giải quyết tranh chấp thương mại quốc tế mà còn là tòa án có thẩm quyền thực thi các quyết định của mình.[14] Các tổ chức quốc tế khác, *thí dụ* như Ngân hàng thanh toán quốc tế (BIS) tại Thụy Sỹ và Tổ chức chứng khoán quốc tế (IOSCO), hiện đang xây dựng các quy định mới. Các tổ chức này hiện đang soạn thảo cuốn *Quy tắc kinh tế toàn cầu cho thế kỷ 21*.

Nếu không có hội nhập, sẽ không thể quyết định được mức độ và phương thức tích hợp các quy trình hình thành chính sách. Thêm vào

[13] Có sự nhầm lẫn bởi 'GATT' vừa là tên gọi của Hiệp định được ký kết vào năm 1947, vừa là tên gọi gắn liền với tổ chức sơ khai được hình thành và phát triển liên quan tới Hiệp định đó, với sự thất bại của các thành viên GATT (hay còn gọi là 'các Bên ký kết') trong việc thành lập Tổ chức thương mại quốc tế (ITO). Khái niệm GATT được dùng ở đây là chỉ Hiệp định GATT ban đầu, nhưng được sửa đổi và hiện áp dụng cho tất cả các thành viên WTO. Còn hầu hết các tham chiếu khác tới GATT trong Giáo trình là để chỉ tổ chức tiền thân của WTO trước khi được thành lập năm 1994.

[14] Gerard Curzon & Victoria Curzon, 'The Management of Trade Relations in the GATT', trong *Tạp chí Quan hệ kinh tế quốc tế của thế giới phương Tây: 1959-1971* 141, Nxb. Đại học Oxford, 1976.

đó, mặc dù các rào cản về thuế quan và phi thuế quan đối với thương mại hàng hoá đã giảm, nhưng việc áp dụng khác biệt các quy định và pháp luật nói chung để hình thành các rào cản phi thuế quan không chỉ đối với thương mại hàng hoá, mà còn đối với thương mại dịch vụ và đầu tư, ngày càng trở nên ít rõ ràng. Tuy nhiên, những rào cản phi thuế quan này có tính hai mặt, khiến chúng rất khó giải quyết. *Thứ nhất*, đó là những yếu tố bắt nguồn từ xã hội, thường được dân chủ hoá, đại diện cho tầm nhìn có tính cục bộ về phương thức tổ chức xã hội trong nước để đạt được các giá trị trong nước. *Thứ hai*, chúng là các rào cản thương mại quốc tế.

Giống như một quả cầu tuyết lăn theo triền núi, toàn cầu hóa dường như đang thu nạp ngày càng nhiều động lực hơn. Và câu hỏi thường xuyên được đặt ra về toàn cầu hoá không phải liên quan tới sự tiếp tục của nó, mà chính là tốc độ của nó. Hướng đi trong tương lai của toàn cầu hóa được quyết định bởi một loạt các yếu tố khác nhau, song có một yếu tố rất quan trọng không thể bỏ qua -là các quốc gia có chủ quyền. Họ luôn có khả năng tạo ra những trở ngại đáng kể cho toàn cầu hoá, từ thuế quan, hạn chế nhập cư, đến các hành động quân sự thù địch.[15]

Gần một thế kỷ trước, kinh tế toàn cầu hoạt động trong một môi trường rất cởi mở, với hàng hoá, dịch vụ và con người có thể di chuyển qua biên giới và hầu như không gặp mấy khó khăn. Sự cởi mở đó bắt đầu biến mất khi Chiến tranh thế giới thứ nhất bắt đầu vào năm 1914, và cho tới nay quá trình phục hồi lại những gì đã mất vẫn đang diễn ra. Trong quá trình này, các chính phủ nhận thấy tầm quan trọng của hợp tác và điều phối quốc tế, dẫn đến sự xuất hiện của nhiều tổ chức quốc tế và các định chế tài chính (trong đó có IMF và Ngân hàng thế giới (WB) năm 1944). Quả thật, các bài học rút ra bao gồm phải tránh việc chia cắt và làm rạn nứt sự hợp tác giữa các quốc gia.[16]

[15] Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', *43 Va. J. Int'l L. 1, 5* (2002); David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', *33 Tex. Int'l L.J. 281*, 312-25 (1998).

[16] Phản ánh tinh thần mới của pháp luật quốc tế ngay sau chiến tranh thế giới thứ hai, Philip Jessup đã quan sát thấy vào năm 1946 rằng: 'Chủ quyền, khái niệm thể hiện ý chí tuyệt đối, không bị kiểm soát của một quốc gia, được tự do trông cậy vào phán quyết chung thẩm của chiến tranh, là một vùng cát lún, nơi mà nền tảng của pháp luật quốc tế được xây dựng'. Philip Jessup, *A Modern Law of Nations: An Introduction 2* (1948); xem thêm id. ở 157 ('Điểm yếu lớn nhất của pháp luật quốc tế truyền thống là sự thừa nhận rằng một quốc gia có thể sử dụng vũ lực để bắt buộc nước khác phải tuân thủ ý chí của mình'). Trong số hàng loạt các bài thuyết trình sau này về những thay đổi sau chiến tranh, xem Louis Henkin, 'Từ C: Chủ quyền, và Toàn cầu hoá, và Nhân quyền', v.v…, *68 FORDHAM L. REV. 1* (1999) (bàn về Liên hợp quốc, phản đối chiến tranh, và theo đuổi mục tiêu hợp tác giữa các quốc gia).

Thế giới vẫn bao gồm các quốc gia và một thị trường toàn cầu. Cần phải có các quy tắc phù hợp để hệ thống toàn cầu có thể thích ứng tốt hơn, có lợi hơn và hợp pháp hơn. Các tổ chức quốc tế có vai trò khó khăn nhưng không thể thiếu trong việc giúp mang lại nhiều lợi ích toàn cầu hóa hơn cho nhiều người hơn trên toàn thế giới.[17] Bằng cách hỗ trợ việc phá bỏ các rào cản - từ thể chế cho tới văn hoá - ngày càng nhiều quốc gia đã có thể hội nhập với nền kinh tế toàn cầu, và ngày càng nhiều người có thể nắm bắt được nhiều lợi ích hơn của toàn cầu hóa.

Mục 3. LỊCH SỬ PHÁT TRIỂN CỦA LUẬT ĐẦU TƯ QUỐC TẾ

Đầu tư quốc tế là một trong các mối quan tâm chủ yếu đối với nền kinh tế-chính trị của bất kỳ quốc gia nào. Đầu tư nước ngoài có thể giúp nước tiếp nhận đầu tư xây dựng một cơ cấu kinh tế vững chắc, giúp gia tăng và đa dạng hóa sản xuất, cung cấp các dịch vụ mới và phát triển hơn, tạo việc làm và đem lại công nghệ mới, và nhiều lợi ích khác. Ngoài ra, các quốc gia sẽ cố gắng để xây dựng các doanh nghiệp trong nước vững mạnh, từ đó có thể mở rộng phạm vi hoạt động sang các thị trường khác.

Các doanh nghiệp đa quốc gia ở nước ngoài đem lại nguồn thặng dư vốn dài hạn, giúp xây dựng các mối quan hệ kinh tế và chính trị với các quốc gia khác và có thể bảo đảm việc tiếp cận được các nguồn lực lớn mà nước tiếp nhận đầu tư không có sẵn. Trong phạm vi khả năng của mình, các chính phủ có rất nhiều công cụ chính sách để có thể đạt được những mục tiêu này. Ký kết các IIA với các đối tác liên quan là một công cụ chính sách không hề nhỏ.[18]

Hiệp định đầu tư quốc tế ('IIA') có thể gửi tín hiệu đến các nhà đầu tư quốc tế về một môi trường đầu tư thuận lợi, và bảo đảm với họ rằng các khoản đầu tư của họ sẽ được hưởng lợi từ khuôn khổ pháp lý đầy đủ cho quá trình hoạt động kinh doanh của họ.[19]

Mục 3 trình bày về những diễn tiến chính mới xảy ra trong thời gian gần đây trong luật đầu tư quốc tế. Để đạt được mục đích trên, Mục 3 này sẽ xem xét về hoạt động xây dựng quy định về đầu tư ở cấp độ hiệp định song phương và khu vực (bao gồm hiệp định quốc tế cho

[17] Sungjoon Cho & Claire R. Kelly, 'Promises and Perils of New Global Governance: A Case of the G20', *12 Chi. J. Int'l L. 491, 548-53* (2012) (bàn về những nghi ngờ liên quan tới hiệu quả điều phối các chức năng của G20 sau khủng hoảng tài chính toàn cầu).

[18] Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', *25 Int'l Rev. L. & Econ.* 107, 108 (2005).

[19] Kenneth J. 'Vandevelde, A Brief History of International Investment Agreements', *12 U. C. Davis J. Int'l L. & Pol'y 157*, 169 (2005).

mục đích duy nhất là quản lý đầu tư, như trong các hiệp định có phạm vi rộng hơn trong đó cũng quy định về các nghĩa vụ chính về đầu tư nước ngoài), cũng như ở cấp độ đa phương, bởi lẽ một số quy định của WTO cũng có những nới lỏng đối với chế độ đối xử với đầu tư nước ngoài.[20] Mục này cũng sử dụng các 'BIT mẫu', vì các nước xuất khẩu vốn rất có ảnh hưởng thường đàm phán BIT dựa trên các quy định 'mẫu' của họ (*thí dụ*: BIT mẫu của Hoa Kỳ), trong đó có các quy định đã được cải thiện đáng kể về việc ban hành các quy định về đầu tư.[21]

1. Giới thiệu

Chính sách kinh tế quốc gia thường nhằm mục đích là cùng lúc đạt được một số mục tiêu, mà thường các mục tiêu đó luôn mâu thuẫn với nhau, trong đó có thúc đẩy tăng trưởng kinh tế, tránh bất ổn xã hội, duy trì an ninh và chủ quyền quốc gia, tái phân phối của cải dựa trên một số tiêu chuẩn công bằng, và một cách công khai hoặc không công khai, duy trì quyền lực của các nhà hoạch định chính sách và đem lại lợi ích cho những người hoặc nhóm người có ảnh hưởng.[22] Do đó, luật trong nước của nhiều quốc gia vẫn được giữ ở mức tương đối linh hoạt và thông thường từ chối bảo hộ đầu tư mạnh mẽ - cả đối với đầu tư trong nước và

[20] Julien Chaisse, 'The Regulatory Framework of International Investment: The Challenge of Fragmentation in A Changing World Economy, in The Prospects of International Trade Regulation - From Fragmentation to Coherence', 417, in Thomas Cottier & Panagiotis Delimatsis, eds, Cambridge Univ. Press, 2010.

[21] *Thí dụ*: BIT mẫu năm 2012 của Hoa Kỳ, các điều 24, 37, được công bố tại http://www.ustr.gov/sites/default/files/BIT%20text%C20for%C20ACIEP%Meeting.pdf [sau đây gọi là 'BIT mẫu của Hoa Kỳ năm 2012'];

Hiệp định Mẫu của Đức về Khuyến khích và bảo hộ đầu tư lẫn nhau, các điều 9, 10, năm 2008, được công bố tại http://www.italaw.com/sites/default/files/archive/ita1025.pdf [sau đây gọi là 'BIT mẫu của Đức năm 2008'];

Hiệp định mẫu của Canada về Khuyến khích và bảo hộ đầu tư, các điều 24, 48, năm 2004, được công bố tại http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf [sau đây gọi là 'BIT mẫu của Canada năm 2004'];

Dự thảo Hiệp định về Khuyến khích và bảo hộ đầu tư lẫn nhau của Pháp, các điều 7, 10, năm 2006, được công bố tại http://italaw.com/documents/ModelTreatyFrance2006.pdf [sau đây gọi là 'BIT mẫu của Pháp năm 2006'];

Hiệp định song phương của Colombia về Khuyến khích và bảo hộ đầu tư, các điều 9, 10, năm 2007, được công bố tại http://italaw.com/documents/inv_model_bit_colombia.pdf [sau đây gọi là 'BIT mẫu của Colombia năm 2007'];

Hiệp định mẫu của Ấn Độ về Khuyến khích và bảo hộ đầu tư, các điều 9, 10, năm 2003, được công bố tại http://www.italaw.com/sites/default/files/archive/ita1026.pdf [sau đây gọi là 'BIT mẫu của Ấn Độ năm 2003'].

[22] var Kolstad & Espen Villanger, CHR. MICHELSEN INSTITUTE, *How Does Social Development Affect FDI and Domestic Investment?* 1 (2004) ('Creating A Sound Investment Climate Is Vital for Improving the Economic Performance of Developing Countries.')

nước ngoài.[23] Đồng thời, hầu hết các nhà hoạch định chính sách đồng ý rằng FDI - nghĩa là, đầu tư nước ngoài tại chính quốc gia mình - là phù hợp để tăng cường tăng trưởng kinh tế, từ đó nâng cao phúc lợi nói chung. Do vậy, FDI thường được mời chào các chế độ khuyến khích về tài chính và các chế độ khuyến khích khác.[24] Vì thế, một điều không thể

[23] Đầu tư có thể được chia thành hai loại lớn gồm: đầu tư gián tiếp và đầu tư trực tiếp (FDI). Đầu tư gián tiếp là mua cổ phần trong các doanh nghiệp nước ngoài mà không thực hiện bất kỳ việc kiểm soát trực tiếp nào đối với việc quản lý của doanh nghiệp đó. Ngược lại, FDI là mua phần vốn góp có quyền kiểm soát đáng kể trong các công ty nước ngoài hiện đang tồn tại hoặc thành lập doanh nghiệp mới. Để biết xem phần vốn góp có quyền kiểm soát hay không, nhà đầu tư nước ngoài phải nắm giữ tối thiểu 10% vốn chủ sở hữu của doanh nghiệp, thì khoản đầu tư đó mới được xếp loại là FDI. Xem 'Approaching the Next Frontier for Trade in Services: Liberalisation of International Investment', *Indus., Trade, & Tech. Rev. 2* (USITC, No. 2962, tháng 4/1996). Vì vấn đề kiểm soát ít quan trọng hơn đối với đầu tư gián tiếp, do vậy, vấn đề chính sách của chính phủ và cạnh tranh ngành cũng vì thế mà bớt quan trọng. Tuy nhiên, vì FDI thường liên quan đến các vấn đề kiểm soát đáng kể đối với một doanh nghiệp trong nước, nên FDI dẫn đến vấn đề chủ quyền đối với rất nhiều nước tiếp nhận đầu tư. Tuy nhiên, tăng trưởng về FDI được hầu hết các DC coi là có lợi, vì FDI giúp đẩy mạnh tăng trưởng kinh tế, năng suất, và khả năng cạnh tranh. Nhìn chung, xem UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* 219 (1996); *Trade and Foreign Direct Investment*, đoạn 46-53.

[24] Bằng chứng về tác động kinh tế của IIA hiện đang ở mức hai chiều. Xem Todd Allee & Clint Peindhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment', *65 Int'l Org. 401* (2011) (cho thấy rằng việc ký kết các BIT giúp tăng đáng kể FDI, trừ khi quốc gia đó sau đó bị một nhà đầu tư cáo buộc là đã vi phạm BIT tại cơ quan trọng tài); Rashmi Banga, 'Do Investment Agreements Matter?' *21 J. Econ. Integration 40* (2006) (cho thấy rằng việc ký BIT với các quốc gia phát triển đã giúp tăng dòng FDI); Matthias Busse, Jens Koniger & Peter Nunnenkamp, 'FDI Promotion Through Bilateral Investment Treaties: More than A Bit?', *146 Rev. World Econ. 147* (2010) (kiểm soát những vấn đề nội sinh và các vấn đề ngoại lai theo thống kê khác và cho thấy rằng BIT giúp gia tăng FDI, với bằng chứng rằng BIT có thể giúp thay thế cho các thể chế yếu kém trong nước); Tim Büthe & Helen kiện Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis', in *The Effect of Treaties on Foreign Direct Investment* (cho thấy rằng theo thống kê, tỷ lệ FDI so với GDP tăng đáng kể khi có thêm mỗi BIT được ký kết); Peter Egger & Michael Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment', *32 J. Comp. Econ. 788, 790* (2004) (cho thấy rằng tăng 30% luồng vốn từ quốc gia xuất khẩu vốn chuyển sang quốc gia nhập khẩu vốn sau khi các quốc gia này đã ký kết BIT); Kevin P. Gallagher & Melissa B.L. Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America', in *The Effect of Treaties on Foreign Direct Investment* (cho thấy mối quan hệ tích cực giữa số lượng BIT được ký kết và dòng đầu tư nước ngoài đổ vào các quốc gia Mỹ La-tinh); Robert Grosse & Len J. Trevino, 'New Institutional Economics and FDI Location in Central and Eastern Europe', in *The Effect of Treaties on Foreign Direct Investment* (chi thấy mối quan hệ tích cực giữa số lượng BIT và FDI); Andrew Kerner, 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties', *53 Int'l Stud. Q. 73*, 82-98 (2009) (Kiểm soát các vấn đề nội sinh và chi thấy ra rằng việc phê chuẩn một BIT có thể giúp tăng 600 triệu USD đầu tư trực tiếp nước ngoài); Eric Neumayer & Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', *33 World Dev.* 1567, 1568 (2005) (cho thấy rằng việc ký BIT với một số quốc gia xuất khẩu vốn có thể dẫn đến việc FDI tăng gần gấp đôi, tuy nhiên tác động này sẽ giảm khi các thể chế pháp lý trong nước dần cải thiện tốt lên); Clint Peinhardt & Todd Allee, 'Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs', in *Yearbook on International Investment Law and Policy 2010-2011*, đoạn 837, 854-56 (Karl P. Sauvant, ed. 2012) (cho thấy rằng kiểm soát các đặc điểm đặc thù cho mỗi

tránh được là sẽ dẫn đến xung đột giữa tính linh hoạt và tính an toàn của các quy định pháp luật, mà tính an toàn của các quy định pháp luật là điều mà các nhà đầu tư luôn tìm kiếm.[25] Tăng cường an toàn pháp luật, bảo hộ chống lại sự thay đổi nhanh chóng của chính trị trong nước trong khi vẫn tôn trọng chủ quyền quốc gia, đã và vẫn luôn là trọng tâm của bảo hộ đầu tư trong luật tập quán quốc tế và trong các BIT.[26] Theo thời gian, trọng tâm của các nỗ lực bảo hộ nhà đầu tư đã thay đổi. Trước đây, khi các quốc gia theo đường lối dân chủ tự do và các nước theo đường lối xã hội chủ nghĩa cạnh tranh vị trí áp đảo trên toàn cầu trong suốt giai đoạn Chiến tranh Lạnh, điều các nhà đầu tư phương Tây thời đó sợ nhất là các quốc gia thuộc thế giới thứ ba và các nước áp dụng các chính sách kinh tế xã hội chủ nghĩa có thể thẳng thừng tước quyền sở hữu đối với tài sản của họ, mà điều này đã từng xảy ra thường xuyên trong suốt giai đoạn xóa bỏ chế độ thực dân sau Chiến tranh thế giới thứ hai.[27] Hệ quả là, luật tập quán về đầu tư và các BIT được ký kết trong giai đoạn này đã nhấn mạnh các quy tắc quốc hữu hóa tài sản và bồi thường. Giá trị bồi thường (trên cơ sở bồi thường toàn bộ và ngay lập tức, một cách đầy đủ hoặc công bằng) từ đó đến nay vẫn chưa ngã

quốc gia có ảnh hưởng đến việc đàm phán hiệp định, do đó ảnh hưởng đến nội dung của hiệp định. Các hiệp định đầu tư quốc tế có mức độ cam kết cao hơn về giải quyết tranh chấp giữa nhà đầu tư và chính phủ nước tiếp nhận đầu tư bằng phương thức trọng tài, thay cho việc giải quyết tranh chấp ở trong nước, được cho là giúp gia tăng dòng đầu tư trực tiếp nước ngoài); Susan Rose-Ackerman, 'The Global BITs Regime and the Domestic Environment for Investment', in *The Effect of Treaties on Foreign Direct Investment* (cho thấy rằng BIT có tác động tích cực đến dòng FDI tới các DC trên cơ sở tương tác với các yếu tố kinh tế và chính trị trong nước); Jeswald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', *46 Harv. Int'l L.J. 67, 95?115* (2005) (cho thấy rằng việc ký kết BIT với Hoa Kỳ dẫn đến việc tăng đầu tư nước ngoài từ 77 lên 85%, tuy nhiên các quốc gia OECD khác không có sự gia tăng đáng kể nào).

[25] José Guimon & Sergey Filippov, 'Competing for High-Quality FDI: Management Challenges for Investment Promotion Agencies', *4 Institutions and Economies*.

[26] Francis J. Nicholson, 'The Protection of Foreign Property under Customary International Law', *3 B.C. L. Rev.* 391, 391-93 (1965) (trong đó giải thích rằng việc phát triển thương mại và đầu tư quốc tế đã tạo ra một số nguyên tắc nhất định, theo đó đặt ra nghĩa vụ đối với các quốc gia về việc bảo hộ quyền tài sản có được của người nước ngoài).

[27] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1995) (trong đó quy định rằng một quy tắc chung là các DC là các nước nhập khẩu vốn, và các quốc gia phát triển là các nước xuất khẩu vốn, cùng thúc đẩy thương mại Bắc-Nam). Tuy nhiên, xem UNCTAD, *South-South Investments Agreements Proliferating, IIA Monitor No. 1*, UNCTAD/WEB/ITE/IIT/2006/1 (ngày 03/11/2005) (theo đó các dòng FDI hiện nay đã cho thấy sự gia tăng tương tác Nam - Nam). Theo UNCTAD, hợp tác Nam - Nam về đầu tư đã gia tăng trong những năm gần đây, phản ánh đúng xu hướng gia tăng số lượng các IIA được ký kết giữa các DC. Về khía cạnh này, các DC đã bắt đầu quan tâm hơn về việc làm sao có thể bảo hộ các nhà đầu tư của mình ở nước ngoài. Đây thực sự là chuyện các quốc gia như Brazil và Trung Quốc đã chiếm được vị thế vượt trội đáng kể trong nền kinh tế toàn cầu. UNCTAD, *Recent Developments in International Investment Agreements IIA Monitor No. 3, 5*, UNCTAD/WEB/DIAE/IA/2009/8 (ngày 03/7/2009).

ngũ. Những cáo buộc về tước quyền sở hữu tài sản của đồng minh hoặc đầu tư nước ngoài đối với nước tiếp nhận đầu tư là một trong những yếu tố quan trọng nhất, theo đó thể hiện bản chất các tranh chấp đầu tư nước ngoài từ lăng kính xét xử trọng tài, dựa trên các hiệp định đầu tư. Tước quyền sở hữu hay quốc hữu hóa các khoản đầu tư nước ngoài trong lãnh thổ của nước tiếp nhận đầu tư là điều được phép thực hiện theo luật đầu tư quốc tế. Tuy nhiên, điều này phải được chứng minh trên cơ sở vì mục đích công, theo một quy trình hợp lệ về pháp lý và thanh toán bồi thường. Thanh toán bồi thường một cách đầy đủ đã luôn luôn là điểm mấu chốt dẫn đến tranh chấp trong trường hợp nhà đầu tư nước ngoài cáo buộc nước tiếp nhận đầu tư tước quyền sở hữu của họ một cách bất hợp pháp. Tước quyền sở hữu có thể mang tính trực tiếp hoặc gián tiếp. Tước quyền sở hữu có thể được coi là trực tiếp và dễ dàng được xác định khi có cáo buộc về việc nước tiếp nhận đầu tư tước tài sản của đồng minh hoặc đầu tư nước ngoài trong lãnh thổ của nước tiếp nhận đầu tư. [28]

Tháng 7/2017, khung pháp lý về đầu tư quốc tế bao gồm khoảng 3.500 hiệp định đầu tư, bao gồm các BIT, các hiệp định khu vực, và các quy định về bảo hộ đầu tư trong các FTA giữa hai hoặc nhiều quốc gia. Động lực chính cho việc ký kết các văn kiện này thường là mong muốn của các quốc gia xuất khẩu vốn - các quốc gia phát triển, nhằm bảo đảm rằng bất kỳ ai mang quốc tịch của nước đó cũng sẽ được bảo hộ về tài chính và pháp lý khi thực hiện đầu tư tại các quốc gia nhập khẩu vốn - là các DC. Do vậy, đa phần các IIA được ký kết giữa các quốc gia phát triển và các DC hoặc các nền kinh tế đang chuyển đổi, mặc dù điều này đang dần dần thay đổi.

Trong thế giới ngày nay, khi mà kinh tế thị trường dường như duy trì tốt vị trí là mô hình kinh tế thống trị toàn cầu trong tương lai có thể dự đoán, và với lượng FDI đã tăng gấp đôi, thì các quy định về bảo hộ tài sản chí ít sẽ được bổ sung ở các vấn đề như: tiếp cận thị trường, đối xử quốc gia, tước quyền sở hữu, không tuân thủ quy định về quản trị tốt, ... FDI thuộc diện được bảo hộ theo luật tập quán quốc tế và theo rất nhiều trong số 3.500 IIA, thường là dựa trên các hiệp định mẫu giống nhau.

BIT là những hiệp định quốc tế quy định các điều khoản và điều kiện đối với các khoản đầu tư tư nhân của công dân và các công ty của một quốc gia này tại một quốc gia khác.[29]

[28] Homayoun Mafi, 'Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal', *18 Int'l J. Humanities* 83-85 (2011).

[29] Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law', *Global Bus. & Devel. L.J.* 337, 338 (2007) (trong đó ghi nhận tương tự rằng: 'Các hiệp định đem lại cho các nhà đầu tư nước ngoài các quyền kinh tế, bao gồm quyền kiện ra trọng tài để giải quyết tranh chấp, nhằm thu hút đầu tư trực tiếp nước ngoài, mà đầu tư trực tiếp nước ngoài được cho là giúp các quốc gia ... ổn định kinh tế').

2. Các thế hệ IIA kế tiếp

Trước khi các IIA ra đời, các quốc gia ký kết các Hiệp định Hữu nghị, Thương mại và Hàng hải ('FCN'), theo đó yêu cầu quốc gia tiếp nhận đầu tư phải đối xử đối với các khoản đầu tư nước ngoài giống như được áp dụng đối với các khoản đầu tư từ các quốc gia khác, trong một số trường hợp, bao gồm cả chế độ đối xử ưu đãi mà quốc gia tiếp nhận đầu tư áp dụng đối với các khoản đầu tư của chính mình. FCN cũng quy định các điều khoản thương mại và vận chuyển giữa các quốc gia thành viên, và quyền của người nước ngoài trong việc tiến hành kinh doanh và sở hữu tài sản tại quốc gia tiếp nhận đầu tư.

Năm 1996, các nước OECD bắt đầu đàm phán để xây dựng Hiệp định đầu tư đa phương ('MAI') với dự định sau này sẽ cho tất cả các quốc gia được gia nhập, để quy định các nguyên tắc MFN và NT cho mọi hình thức FDI, cũng như quy định rất nhiều biện pháp bảo đảm về pháp lý và tố tụng cho các nhà đầu tư.[30] Tuy nhiên, các nhà đàm phán MAI đã gặp phải những rào cản mang tính hệ thống đối với tham vọng tự do hóa một lĩnh vực rộng như đầu tư, trong đó có cả sự phức tạp của các chế độ thuế quốc gia.[31] Trebilcock và Howse cũng đã mô tả các động cơ chính trị bao phủ các cuộc đàm phán MAI và cuối cùng khiến cho các cuộc đàm phán này bị thất bại. Tính đến tháng 5/1997, các nhà đàm phán đã đạt được thỏa thuận về rất nhiều yếu tố trong kết cấu cơ bản của MAI, bao gồm MFN và NT. Tuy nhiên, các quốc gia có quan điểm rất khác nhau về mối quan hệ giữa MAI và các tiêu chuẩn về môi trường, lao động, và các chính sách văn hóa. Đồng thời, các quốc gia cũng chia rẽ nghiêm trọng về việc liệu các biện pháp khuyến khích đầu tư có nên bị chế tài, và áp dụng chế tài như thế nào, dẫn đến việc các biện pháp khuyến khích đầu tư sẽ không được đề cập đến trong dự thảo. Tuy nhiên, cùng lúc đó,

[30] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 219 (2008); Juyrgen Kurtz, 'NGOs, the Internet and International Economic Policy Making: the Failure of the OECD Multilateral Agreement on Investment', *3 Melb. J. Int'l L.* 213, 225-26 (2002) (giải thích về vai trò của các NGO trong việc rời bỏ MAI); Nii Lante Wallace-Bruce, 'The Multilateral Agreement on Investment: An Indecent Proposal and Not Learning the Lessons of History', *2 J. World Investment* 53 (2001) (mô tả quá trình rời bỏ MAI); Andrew Walter, 'Unravelling the Faustian Bargain: Non-state Actors and the Multilateral Agreement on Investment', trong *Non-state Actors in World Politics* 150-68 (Daphne Josselin & William Wallace eds., 2001).

[31] Eric Neumayer, 'Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiatons', *46 Wirtschaftspolitische Bl tter* 618 (1999).

tranh luận công khai bắt đầu nổ ra căng thẳng tại các quốc gia OECD như Canada, Hoa Kỳ và Australia về tác động của MAI đối với các quốc gia thành viên nói chung, và đối với môi trường, quyền lao động và bảo hộ văn hóa nói riêng. Các nhà hoạt động Canada dẫn đầu trong việc yêu cầu đưa các cuộc đàm phán MAI ra công chúng để xem xét. Tháng 01/1997, khi không có bất kỳ bản dự thảo nào được công bố công khai, các nhà hoạt động Canada đã có được một bản bí mật, và bắt đầu gửi đến các nhóm có tư tưởng giống họ, và Internet được sử dụng như một công cụ truyền thông hữu hiệu. Tháng 4/1997, vấn đề MAI bắt đầu xuất hiện trên các tờ báo lớn, và các chính phủ bị đặt vào tình thế phải biện hộ để chứng minh cho vị thế đàm phán của mình trước công chúng. Một số nhóm này thậm chí đã thách thức, tuy không thành công, FTA Canada - Hoa Kỳ, cũng như NAFTA, thông thường thông qua việc phóng đại quá mức và khiếu kiện giả định về thiệt hại có thể phải gánh chịu từ các hiệp định này đối với nước tham gia. Với MAI, cách tiếp cận của họ được cho là khôn ngoan hơn và thận trọng hơn. Họ kết hợp việc chỉ trích chung chung hơn đối với toàn cầu hóa xoay quanh động cơ là lợi ích doanh nghiệp, với việc phân tích rất hợp tình hợp lý các quy định cụ thể của dự thảo MAI, hoặc những gì mà dự thảo MAI không quy định, cũng như chỉ trích cách thức tiến hành đàm phán. Mặc dù nhiều nhóm có vị thế khác nhau và chồng chéo nhau, nhưng sức mạnh của cuộc công kích toàn diện đã được Tony Clarke và Maude Barlow mô tả cụ thể như sau:

> Chúng tôi không muốn để lại ấn tượng rằng chúng tôi phản đối ý tưởng về hiệp định đầu tư toàn cầu. Chúng tôi nhận thức rõ ràng rằng các dòng đầu tư xuyên quốc gia đã và đang gia tăng nhanh chóng và cần phải thiết lập một số quy tắc toàn cầu. Tuy nhiên, cơ sở cho việc soạn thảo các dự thảo MAI, theo quan điểm của chúng tôi, có rất nhiều khúc mắc và mang tính một chiều. Nó mở rộng quyền và quyền lực của các công ty xuyên quốc gia mà không hề đặt ra bất kỳ nghĩa vụ tương ứng nào. Thay vào đó, dự thảo hiệp định lại quy định nghĩa vụ cho chính các chính phủ … trong khi MAI không có quy định về các nguyên tắc mà các công ty xuyên quốc gia phải tuân thủ để tôn trọng các quyền kinh tế, xã hội, văn hóa và môi trường của công dân.

Sự bí mật bao trùm các cuộc đàm phán và cách các Bộ Ngoại giao hành động một cách bí ẩn như thường lệ khi được hỏi ngay từ đầu về quá trình đàm phán, đã khiến cho người ta có ấn tượng ngay lập tức rằng toàn bộ cam kết đó đều là bí mật. Việc dự thảo MAI không có quy định về ngoại lệ môi trường, y tế hay an ninh, ngay cả khi ở mức độ ngang bằng với những quy định tương tự trong GATT 1947, khiến người ta cho rằng Hiệp định chỉ quy định về những lợi ích tư bản.[32]

Họ cũng đối mặt với sự phản đối mạnh mẽ của công chúng từ các tổ chức phi chính phủ ('NGO') dưới hình thức phong trào phản đối toàn cầu hóa bắt đầu được hình thành, để phản đối cái được cho là mất đi chủ quyền kinh tế và sự đặc sắc văn hóa. Sau khi Pháp rút khỏi các cuộc thương lượng MAI vào năm 1998 do lo ngại sẽ bị mất tự do văn hóa, dự án đã bị hoãn lại. Khi thiết kế dự án, người ta đã không rút kinh nghiệm từ những bài học và những hạn chế của quá trình tự do hóa đang được thực hiện, cũng như các quy định được đưa vào GATT và GATS một cách thành công.

Sau này, người ta có thể nhận ra ba thế hệ các IIA theo các tình tiết được cách điệu hóa của 'hệ thống' đầu tư quốc tế, bao gồm:

Thứ nhất: Các BIT 'thế hệ đầu' tập trung vào bảo hộ các nhà đầu tư nước ngoài, mặc dù có duy trì một số bảo lưu quan trọng đối với một vài bảo đảm chủ chốt cho đầu tư nước ngoài, như NT, các biện pháp chống tước quyền sở hữu một cách bất hợp pháp, và tiếp cận trọng tài quốc tế.

Thứ hai: Các hiệp định đầu tư quốc tế 'thế hệ thứ hai' - đại diện là đa số các BIT cũng như quy định về chế tài trong đầu tư được đưa vào một số FTA, trong đó quy định các nghĩa vụ có phạm vi rộng hơn và có tính nội dung hơn về chế độ đối xử với đầu tư nước ngoài. Đối xử quốc gia sau đầu tư, mặc dù có một số bảo lưu theo lĩnh vực trong một số trường hợp, và không có hạn chế đáng kể nào đối với khả năng của các nhà đầu tư nước ngoài trong việc đưa các biện pháp của nước tiếp nhận đầu tư ra xét xử tại trọng tài quốc tế, được coi là chuẩn mực trong lĩnh vực này.

Rất nhiều Hội đồng xét xử đầu tư đã không xem xét các tiêu chuẩn không rõ ràng được quy định trong một số IIA. *Thí dụ*: *Phán quyết về trách nhiệm* trong các vụ *Suez, Barcelona and Interagua v. Argentina* và *AWG v. Argentina* nêu rằng:

a) Đây là một tiêu chuẩn không được xác định rõ ràng và khó hiểu, và phạm vi lại không được quy định trong các BIT;

b) Đây là tiêu chuẩn được sử dụng rộng rãi trong hàng trăm BIT trên phạm vi toàn cầu;

[32] Michael Trebilcock & Robert Howse, *The Regulation of International Trade* (tái bản lần thứ 3, Nxb. Routledge) đoạn 458-60.

c) Các điều khoản xác định tiêu chuẩn có tính linh hoạt và áp dụng cho mọi loại đầu tư và đầu tư mạo hiểm;

d) Đây là một tiêu chuẩn thực tế, vì nó được thực hiện trên cơ sở kết nối chặt chẽ với các tình tiết cụ thể của mỗi vụ việc, sao cho phán xét được đưa ra về việc: cái gì được là công bằng và hợp lý thì không thể được xây dựng một cách trừu tượng, mà phải dựa vào các tình tiết cụ thể của vụ việc;

e) Việc được sử dụng rộng rãi trong các BIT, tính tổng quan và linh hoạt của tiêu chuẩn đó cho thấy: đây là một tiêu chuẩn được các quốc gia ký kết hiệp định xây dựng như là tiêu chuẩn cơ bản về đối xử, mà các quốc gia có nghĩa vụ phải trao cho các khoản đầu tư nước ngoài của nước kia như được bảo hộ theo các BIT.[33]

Về một vấn đề khác, trong vụ *AIG Capital v. Kazakhstan Award* cho thấy: không có một từ, cụm từ hay khái niệm được chấp nhận trên toàn cầu để mô tả tiêu chuẩn 'bồi thường thỏa đáng' để áp dụng theo luật quốc tế và kết luận rằng, mặc dù có nhiều thuật ngữ không rõ ràng và không xác định, nhưng ngày càng có nhiều người nhất trí về một tiêu chuẩn bồi thường sát hơn với 'giá thị trường hợp lý' của một tài sản bị trưng thu.[34]

Thứ ba: Các hiệp định đầu tư 'thế hệ thứ ba': Đây là các BIT mẫu gần đây và các chương về đầu tư của ngày càng nhiều các FTA. Các hiệp định này duy trì các tiêu chuẩn cao về bảo hộ đối với các khoản đầu tư đã được công nhận trong các hiệp định 'thế hệ thứ hai', trong khi các hiệp định này mong muốn mở ra các cơ hội đầu tư mới trong các thị trường nước ngoài, thông qua chế độ đối xử quốc gia về quyền tham gia thị trường - phụ thuộc vào những loại trừ theo ngành dưới hình thức (danh mục) chọn cho (positive list) và chọn bỏ (negative list). Một điều thú vị là, các hiệp định đầu tư 'thế hệ thứ ba' cũng nhằm vào việc bảo đảm rằng các quyền trao cho các nhà đầu tư nước ngoài không nhấn chìm các quyền hạn của pháp luật trong nước trong lĩnh vực chính sách quan trọng khác. Có lẽ chẳng có gì ngạc nhiên khi đi đầu xu thế này là các quốc gia mà từ trước đến nay bị kiện ra trọng tài quốc tế nhiều nhất, như EU, Hoa Kỳ và Canada.

[33] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, vụ kiện tại ICSID số ARB/03/17, *Phán quyết về trách nhiệm*, ngày 30/7/2010, đoạn 180-181.

[34] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan*, vụ kiện tại ICSID số ARB/01/6, Phán quyết ngày 07/10/2003, đoạn 12.1.1.

Dấu hiệu nhận biết của rất nhiều BIT là các BIT này cho phép sử dụng cơ chế giải quyết tranh chấp (thay thế) ngoài tòa án, theo đó một nhà đầu tư có quyền theo BIT, nếu bị vi phạm, có thể kiện ra trọng tài quốc tế,[35] mà thường là tại ICSID (Trung tâm giải quyết tranh chấp đầu tư quốc tế), chứ không kiện ra tòa án nước tiếp nhận đầu tư.

Giải quyết tranh chấp bởi bên thứ ba là một yếu tố cấu thành chủ chốt của các BIT.

> ... [Đây] là cơ chế cam kết theo đó giải quyết một vấn đề bất đồng cho các quốc gia. Phương thức này cho phép quốc gia tiếp nhận đầu tư ký kết một hợp đồng mà không sợ chính phủ tương lai sẽ tước quyền sở hữu, can thiệp vào tòa án trong nước, hoặc bằng cách khác sẽ rút lại những hứa hẹn được quy định trong BIT. Bất kể mức độ tin tưởng giữa các bên vào thời điểm đầu tư như thế nào, nhà đầu tư sẽ lo ngại rằng chính phủ tương lai có thể phá vỡ lời hứa của chính phủ hiện tại. Hơn nữa, nhà đầu tư không thể tin tưởng rằng các chính phủ tương lai sẽ không can thiệp vào tòa án trong nước. Bảo đảm rằng trọng tài quốc tế ... luôn sẵn sàng xét xử các tranh chấp đầu tư, sẽ giúp chính phủ nước tiếp nhận đầu tư đưa ra một cam kết đáng tin cậy rằng chính phủ sẽ không thể can thiệp.'[36]

Công ước về Trung tâm giải quyết tranh chấp đầu tư quốc tế ('Công ước ICSID') quy định một khuôn khổ đa phương cho việc giải quyết tranh chấp giữa các chính phủ và nhà đầu tư tư nhân.

Xét ở tầm khu vực, Hiệp định NAFTA bảo hộ đầu tư trên diện rộng theo quy định của Chương 11,[37] giống như các FTA khác.[38] Ngoài các quy

[35] Theo UNCTAD, trong hai thập kỷ vừa qua, đã ghi nhận trên 500 tranh chấp giữa nhà đầu tư và chính phủ được đưa ra trọng tài quốc tế để giải quyết. UNCTAD, *Recent Developments in Investor-State Dispute Settlement ('ISDS')*, http:// unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

[36] Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', *25 Int'l Rev. L. & Econ.* 107, 108 (2005) đoạn 113.

[37] Jamie Boyd, 'Canada's Position Regarding An Emerging International Fresh Water Market with Respect of NAFTA', *2 NAFTA: Law and Bus. Rev. Americas,* 3 (1999); Charles H. Brower, 'Investor-State Dispute Settlement under NAFTA: The Empire Strikes Back', *40 Colum. J. Transnat'l L.* 43 (2001).

[38] Về đàm phán các chương về đầu tư trong các FTA giữa các quốc gia Mỹ La-tinh và Hoa Kỳ, xem Roberto Echandi, *A New Generation of International Investment Agreements in the Americas: Impact of Investor-State Dispute Settlement over Investment Rule-Making*, http:// www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf (truy cập lần cuối vào ngày 27/12/2014); Charles N. Brower, 'NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA', *97 Am. Soc'y Int'l. L. Proc.* 251, 255-57 (2003).

định của WTO về hàng hóa, dịch vụ và tài sản trí tuệ,[39] cho đến nay, vẫn chưa có một khung pháp lý đa phương toàn diện để điều chỉnh FDI, mặc dù đã có rất nhiều nỗ lực để làm điều này.[40]

Các quốc gia thực sự đã rất tích cực trong lĩnh vực này.[41] Các IIA thay đổi theo thời gian, dẫn đến việc phát triển các thế hệ hiệp định. Về khía cạnh này, các cuộc đàm phán đều theo 'mẫu' mà một quốc gia hiện đang sử dụng. [42] Vào cuối năm 2017, trên 175 quốc gia đã cùng nhau ký kết một con số đáng kinh ngạc là 2.900 BIT. Bên cạnh đó, trên 250 FTA[43] đã thiết lập các khuôn khổ hợp tác đầu tư nhằm đẩy mạnh các quy tắc đầu tư trong tương lai hoặc các quy tắc đặc thù về nội dung cho lĩnh vực đầu tư, giống như các quy định tương tự trong các BIT. Do vậy, các quy tắc quốc tế về đầu tư dựa trên một hệ thống phức tạp và ngày càng nhiều các hiệp định song phương, khu vực và đa phương về đầu tư nước ngoài, mà đứng đầu là một hiệp định đa phương - Hiệp định chung về thương mại dịch vụ ('GATS'), trong đó điều chỉnh cả về đầu tư quốc tế khi đầu tư vào các ngành dịch vụ.

3. Sự xuất hiện các tranh chấp đầu tư

Một loạt sự kiện khác đang góp phần vào việc phát triển 'hệ thống' phân cấp luật đầu tư quốc tế này. Trong thập kỷ trước, các tranh chấp đầu tư giữa các nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư đã tăng theo cấp số nhân. *Thí dụ*: trong Phán quyết liên quan đến phản đối quyền tài phán trong vụ *Quasar de Valors v. Russia*, Hội đồng trọng tài cho rằng tiếp cận trọng tài quốc tế là một mong muốn thường xuyên và cơ bản để bảo hộ đầu tư, do vậy đây là một yếu tố có trọng lượng trong việc xem xét đối tượng và mục đích của BIT.[44]

[39] Keith E. Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer', *9 Duke J. Comp. & Int'l L.* 109, 109 (1998) (lấy Trung Quốc, Argentina và Mexico làm các thí dụ về các DC mở rộng phạm vi bảo hộ tài sản trí tuệ).

[40] Jeswald W. Salacuse, 'The Emerging Global Regime for Investment', *51 Harv. Int'l L. J.* 427, 439 (2010).

[41] UNCTAD, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2 ngày 01/12/2000; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 105-108, UNCTAD/ITE/IIT/2006/5 (ngày 01/02/2007).

[42] C. Congyan, 'Change of the Structure of International Investment and the Development of Developing Countries' BIT Practice. Towards A Third Way of BIT Practice', *8 J. World Inv. & Trade 8*, 29 (2007) (trong đó tổng kết rằng về cơ bản, có ba thế hệ IIA: (i) từ năm 1959 (khi BIT đầu tiên được ký kết giữa Đức và Pakistan) đến đầu những năm 1990; (ii) từ cuối những năm 1990 đến những năm 2000; và (iii) từ cuối thập niên 2000 đến nay).

[43] David A. Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement', *19 Am. U. Int'l L. Rev.* 679, 715 (2003).

[44] Vụ *Quasar de Valors SICAV S.A. et al. (trước đây là Renta 4 S.V.S.A et al.) v. Russia, Vụ kiện tại SCC số* 24/2007, Phán quyết liên quan đến phản đối quyền tài phán, ngày 20/3/2009, mục 100.

Điều đó cũng có nghĩa rằng hội đồng trọng tài đã được trao nhiệm vụ áp dụng các nguyên tắc của các hiệp định đầu tư trong các trường hợp cụ thể, một nhiệm vụ thường không đơn giản, do các điều khoản của các hiệp định này luôn rất rộng và đôi khi khó hiểu.

Hiện tượng tranh tụng đầu tư đã dẫn đến rất nhiều quyết định từ các hội đồng trọng tài khác nhau, đóng góp vào 'hệ thống' luật đầu tư bằng cách quy định ý nghĩa cho các quy định của mình - mà điều này cũng mang tính phân cấp. Diễn giải của trọng tài đối với các quy tắc đầu tư quốc tế từ trước tới nay không phải là không có tranh cãi, và tiếp theo dẫn đến việc một số quốc gia phản ứng bằng cách sửa đổi các hiệp định của mình theo những tiến triển mới đó, từ đó lại góp phần làm tiếp tục thay đổi bức tranh về việc xây dựng pháp luật về đầu tư.

Sự thay đổi nhanh chóng của việc xây dựng pháp luật về đầu tư khiến cho các quốc gia đang phát triển và các quốc gia phát triển luôn quan tâm. Khi các quốc gia đang phát triển trở thành các quốc gia xuất khẩu vốn, thì các hiệp định đầu tư có thể được chứng minh là một công cụ hữu hiệu trong việc mở ra các cơ hội kinh doanh ở nước ngoài.

Vì các quốc gia phát triển tiếp nhận các công ty nước ngoài vào thị trường của mình, nên các quốc gia này cũng chịu sự ràng buộc của luật đầu tư quốc tế. Sự quan tâm của nhiều quốc gia dành cho các IIA đã tăng gấp đôi, khi họ là những quốc gia nhập khẩu vốn hoặc xuất khẩu vốn hàng đầu.

Làm thế nào để phản ánh đúng bản chất thay đổi nhanh chóng của hệ thống luật đầu tư quốc tế và thu được những lợi ích từ các IIA, trong khi phải bảo đảm năng lực quản lý trong nước nhằm duy trì nền kinh tế luôn tăng trưởng? Câu hỏi này vẫn luôn là một thách thức khó khăn cho tất cả các quốc gia.

Mục 4. XÁC ĐỊNH PHẠM VI ĐIỀU CHỈNH CỦA CÁC HIỆP ĐỊNH ĐẦU TƯ QUỐC TẾ

Phạm vi áp dụng của các IIA được xác định bởi bốn yếu tố chính: (i) Phạm vi địa lý; (ii) Thời gian áp dụng; (iii) Chủ thể; và (iv) Đối tượng áp dụng. Nói một cách đơn giản, có thể xác định được phạm vi áp dụng của một IIA bằng cách trả lời bốn câu hỏi: đầu tư được thực hiện *ở đâu*? *khi nào*? bởi *ai*? Và quan trọng nhất, là *loại hình* đầu tư nào được bảo hộ theo IIA?

Các quy định về phạm vi của IIA có tầm quan trọng đặc biệt, vì chúng phân định trường hợp nào IIA sẽ được áp dụng và trường hợp nào thì không. Cụ thể là, đối tượng của IIA sẽ được xác định bởi định nghĩa về 'nhà đầu tư và khoản 'đầu tư. Các quốc gia có thể chọn một phạm vi áp dụng rất rộng cho IIA để cho phép tối đa số nhà đầu tư được hưởng lợi từ IIA, hoặc ngược lại, có thể giới hạn ở một số nhà đầu tư đạt tiêu chuẩn nhất định.

Điểm quan trọng là, phạm vi của IIA có thể là một trong số ít những nội dung quan trọng - nếu không phải là nội dung duy nhất - nằm ngoài tầm quy định của nguyên tắc MFN. Thật vậy, về mặt logic, việc kiểm tra đối tượng áp dụng của IIA thường được tiến hành trước khi thực hiện các nghĩa vụ cơ bản quy định trong IIA. *Thí dụ*: những người không đủ tiêu chuẩn là 'nhà đầu tư theo quy định của IIA sẽ không thể dựa vào nguyên tắc MFN để được áp dụng các khái niệm cởi mở hơn trong các IIA khác. Hội đồng trọng tài trong vụ *TECMED v. USA* đã phản đối việc áp dụng nguyên tắc MFN liên quan tới thời gian áp dụng của IIA,

> Vì hội đồng trọng tài cho rằng các vấn đề liên quan tới thời gian áp dụng Hiệp định […] do tính chất và ý nghĩa quan trọng của chúng, là các vấn đề cốt lõi mà các Bên ký kết cần đàm phán cụ thể. Đây là các yếu tố quyết định trước khi các bên chấp nhận Hiệp định […]. Vì thế, việc áp dụng các vấn đề này không thể bị ảnh hưởng bởi nguyên tắc nêu trong điều khoản về tối huệ quốc.[45]

Phạm vi rộng hay hẹp của một IIA - được xác định chủ yếu bởi các định nghĩa về 'nhà đầu tư và 'khoản đầu tư - là một trong những yếu tố cơ bản đem lại nhiều ưu đãi hơn cho nhà đầu tư của một quốc gia so với nhà đầu tư của các quốc gia khác. Do đó, phạm vi của IIA có thể đóng một vai trò quan trọng trong chính sách về đầu tư nước ngoài của một quốc gia, vì nó cho phép các chính phủ duy trì những mối quan hệ kinh tế chặt chẽ hơn với những đối tác mà họ lựa chọn.

1. Phần 'Lời nói đầu' của IIA

Khi tham gia BIT, các bên thường bày tỏ động cơ ký kết của mình dưới hình thức 'Lời nói đầu'. Ý định thúc đẩy và bảo hộ các khoản đầu tư có đi có lại cũng như mong muốn tạo dựng một môi trường thích hợp cho các khoản đầu tư đó của các bên thường là những nội dung nổi bật trong các tuyên bố này.

Từ trước tới nay, giá trị pháp lý của Lời nói đầu ít khi được chú ý. Tuy nhiên, sự gia tăng về số lượng các vụ việc trọng tài quốc tế gần đây đã cho thấy tầm quan trọng pháp lý của phần này. Mục đích ký kết IIA là một yếu tố cần được tính đến khi diễn giải các điều khoản trong IIA.

Công ước Viên về Luật điều ước quốc tế đã nhắc lại rằng Lời nói đầu là một phần quan trọng của 'bối cảnh' đem lại ý nghĩa cho các quy tắc của IIA. Điều 31 Công ước Viên năm 1969 quy định về 'Giải thích điều ước' quy định:

> 1. Một điều ước cần được giải thích với thiện chí phù hợp với nghĩa thông thường được nêu đối với những thuật ngữ của điều ước trong bối cảnh của chúng và chú trọng đến đối tượng và mục đích của điều ước.
>
> 2. Bối cảnh nguyên bản để giải thích một điều ước gồm […] lời nói đầu và các phụ lục của điều ước đó [...].

Số lượng các vụ việc trọng tài giải quyết tranh chấp giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư ngày càng gia tăng, cùng với nhu cầu hình thành một ý nghĩa chính xác cho các điều khoản IIA không phải lúc nào cũng rõ ràng, đã khiến cho Lời nói đầu lâm phải tình huống bất ngờ và có vai trò pháp lý quan trọng như là một hướng dẫn diễn giải ngôn từ của IIA.

Các Lời nói đầu thường có nội dung tập trung vào tầm quan trọng của việc thúc đẩy hợp tác kinh tế giữa các bên ký kết, tạo điều kiện thuận lợi cho các khoản đầu tư có đi có lại, và ghi nhận tác động của những khoản đầu tư đó đối với sự thịnh vượng của các nước tiếp nhận đầu tư. *Thí dụ*: Lời nói đầu trong BIT Trung Quốc - Việt Nam năm 1993 quy định như sau:

> Các bên mong muốn khuyến khích, bảo hộ và tạo thuận lợi cho hoạt động đầu tư của các nhà đầu tư của một quốc gia ký kết này trên lãnh thổ của quốc gia ký kết khác dựa trên các nguyên tắc tôn trọng lẫn nhau về chủ quyền, bình đẳng và hai bên cùng có lợi, vì mục đích phát triển quan hệ hợp tác kinh tế giữa hai quốc gia,
>
> Nay đã thỏa thuận […][46]

Hội đồng trọng tài đã coi phần Lời nói đầu có bản chất như vậy là

[45] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Vụ việc ICSID Số ARB (AF)/00/2. Phán quyết ngày 29/5/2003. Đoạn 69. Để tìm hiểu về quan điểm trái ngược đối với việc mở rộng nguyên tắc MFN đối với định nghĩa 'nhà đầu tư, xem Meremisnkaya, 2005.

[46] BIT Việt Nam - Trung Quốc (1993), Lời nói đầu.

công cụ để tìm kiếm hướng dẫn cho việc giải thích một số quy định. Cùng với các điều khoản của các tuyên bố này mà hội đồng tìm thấy, *thí dụ*:

> '[Ý] định của các bên là […] tạo thuận lợi cho đầu tư và khuyến khích sáng kiến tư nhân' và 'đối tượng và mục đích [của hiệp định] là bảo hộ trên phạm vi rộng cho nhà đầu tư và các khoản đầu tư của họ.'[47]

Trong Phán quyết của vụ *F-W Oil v. Trinidad and Tobago*, Hội đồng xét xử đã dựa vào phần Lời nói đầu của BIT khi ghi nhận rằng BIT được ký kết trên cơ sở 'không chỉ có vai trò bảo hộ, mà còn có vai trò lớn trong việc khuyến khích và thúc đẩy đầu tư trong tương lai'.[48] Phán quyết vụ *Ickale Insaat Limited Sirketi v. Turkmenistan* cho rằng một điều đã được quy định rõ ràng trong luật quốc tế, bao gồm cả trong án lệ của các hội đồng trọng tài về giải quyết tranh chấp theo các IIA, rằng phần Lời nói đầu của các IIA không phải là một phần có giá trị hiệu lực của IIA và không tạo ra nghĩa vụ ràng buộc về pháp lý, mà có thể làm phát sinh nguyên nhân rõ ràng để hành động. Hội đồng trọng tài đã bác lập luận của nguyên đơn rằng phần Lời nói đầu có đề cập đến BIT là 'đối xử công bằng và hợp lý với đầu tư như mong đợi' tạo ra nghĩa vụ ràng buộc về pháp lý theo đó nguyên đơn có quyền dựa vào đó để kiện.[49] Tương tự, trong vụ *CMS*, các trọng tài viên cho rằng phần Lời nói đầu là một công cụ mang tính quyết định trong việc giải thích phạm vi và ý nghĩa của nghĩa vụ đối xử công bằng và thỏa đáng (FET) khi ghi nhận rằng:

> Phần Lời nói đầu của Hiệp định đã quy định rõ […] rằng một trong các hình thức bảo hộ chính được quy định là các nước mong muốn đối xử công bằng và thỏa đáng 'để duy trì một khung pháp lý ổn định cho đầu tư và sử dụng hiệu quả tối đa các nguồn lực kinh tế.' Do đó, cần chắc chắn rằng môi trường kinh doanh và pháp lý ổn định có phải là một yếu tố cần thiết để bảo đảm đối xử công bằng và thỏa đáng hay không.[50]

Việc áp dụng nguyên tắc giải thích 'có lợi cho nhà đầu tư nước ngoài' này đã thu hút sự quan tâm của các nhà quản lý đến phần Lời nói đầu của các IIA, với quan ngại rằng các quy định về bảo hộ đầu tư có thể được ưu tiên hơn so với các chính sách khác của chính phủ. Vì lý do này, một số IIA gần đây đã thiết kế phần lời nói đầu để nhằm đảm bảo sao cho các BIT không tác động tiêu cực đến các giá trị chính sách công chủ chốt khác, như y tế, an toàn, bảo hộ lao động và môi trường, khi theo đuổi mục đích thúc đẩy và bảo hộ đầu tư.

Phần Lời nói đầu của BIT mẫu của Hoa Kỳ năm 2004 thể hiện mong muốn của các bên trong việc đạt được các mục tiêu bảo hộ đầu tư 'theo cách thức phù hợp với việc bảo vệ các vấn đề y tế, an toàn, và môi trường, và thúc đẩy bảo vệ người tiêu dùng và các quyền lao động được quốc tế công nhận.' Nội dung của Dự thảo Hiệp định MAI ghi nhận mong muốn thực hiện các nghĩa vụ 'theo cách thức phù hợp với phát triển bền vững', cũng như thể hiện việc các quốc gia thành viên đưa ra cam kết mới của mình trên cơ sở cam kết đã được đưa ra theo Tuyên bố Copenhagen của Hội nghị thượng đỉnh thế giới về phát triển xã hội.

2. Phạm vi địa lý

Vấn đề lãnh thổ luôn là vấn đề trung tâm trong hệ thống pháp luật quốc tế. Nó cấu thành cốt lõi của định nghĩa quốc gia, do vậy nó gắn chặt với vấn đề quyền tài phán và phạm vi một quốc gia có thể thực hiện quyền hạn của mình. Nó còn là vấn đề trọng tâm khi sắp xếp trật tự quốc tế, bởi lẽ một cộng đồng thế giới dựa trên mỗi quốc gia đòi hỏi phải có các quy tắc để xác định lãnh thổ được trao cho các quốc gia như thế nào, và các biện pháp trừng phạt có thể áp dụng đối với hành vi vi phạm sự toàn vẹn chủ quyền lãnh thổ. Ngoài ra, do các quốc gia xuất hiện rồi biến mất, và tái xuất hiện với một hình thức khác, nên các nguyên tắc để xác định đường biên giới có ý nghĩa cực kỳ quan trọng.

Các IIA lấy ranh giới địa lý tự nhiên làm *lãnh thổ* cho các nước ký kết. Rất nhiều phán quyết trọng tài dẫn chiếu rõ ràng đến tiêu chí này để xác định quyền tài phán. *Thí dụ*: Trong Phán quyết về thẩm quyền trọng tài trong vụ *Inmaris v. Ukraina,* hội đồng trọng tài cho rằng: để trả lời câu hỏi liệu BIT bao gồm các yêu cầu về lãnh thổ như là giới hạn về quyền tài phán chung, hay bao gồm các giới hạn lãnh thổ như là một phần trong các yếu tố bảo hộ về mặt nội dung cho khiếu kiện, thì hội đồng trọng tài phải xem xét mối quan hệ lãnh thổ của các khoản đầu tư của nguyên đơn trên bình diện quyền tài phán.[51]

[47] Vụ *Siemens v. Argentina*, vụ kiện tại ICSID số ARB/02/8, Phán quyết về thẩm quyền xét xử, ngày 03/8/2004, đoạn 81; và vụ *Tokios Tokelés v. Ukraina*, vụ kiện tại ICSID số ARB/02/18, Phán quyết về thẩm quyền xét xử, ngày 29/4/2004. đoạn 31.

[48] *F-W Oil Interests, Inc. v. Trinidad and Tobago*, vụ kiện tại ICSID số ARB/01/14, Phán quyết ngày 03/3/2006 đoạn 118.

[49] *Ickale Insaat Limited Sirketi v. Turkmenistan*, vụ kiện tại ICSID số ARB/10/24, Phán quyết ngày 08/3/2016, đoạn 337.

[50] *CMS Gas Transmission Company v. Argentina*, vụ kiện tại ICSID số ARB/01/8, Phán quyết chung thẩm, ngày 12/5/2005, đoạn 274.

[51] *Inmaris Perestroika Sailing Maritime Services GmbH và các bên khác kiện Ukraina*, vụ kiện tại ICSID số ARB/08/8, Phán quyết về thẩm quyền trọng tài, ngày 08/3/2010, đoạn 113-121.

Tương tự, Phán quyết về thẩm quyền trọng tài trong vụ *SGS v. Philippines* ghi nhận rằng yêu cầu về 'lãnh thổ' là rõ ràng và được nhấn mạnh trong các dẫn chiếu khác đến lãnh thổ của nước tiếp nhận đầu tư trong BIT. Do vậy, các khoản đầu tư thực hiện ngoài lãnh thổ của quốc gia bị đơn, mặc dù đem lại lợi ích cho nước đó, lại không được coi là khoản đầu tư được bảo hộ theo BIT này.[52] Ngoài ra, Phán quyết của vụ *Deutsche Bank v. Sri Lanka* lại chấp thuận việc áp dụng theo đa số trong vụ *Abaclat*[53] liên quan đến việc xác định mối quan hệ lãnh thổ của khoản đầu tư tài chính, theo đó hội đồng trọng tài phát hiện ra rằng hợp đồng bảo hiểm trong vụ này có mối quan hệ lãnh thổ, bởi lẽ các khoản tiền được cung cấp cho Sri Lanka, được kết nối cho một hành động xảy ra tại Sri Lanka và phục vụ cho mục đích cấp vốn cho nền kinh tế của nước này.[54]

Trong vụ *Abaclat,* hội đồng trọng tài cho rằng việc xác định địa điểm đầu tư trước tiên dựa vào bản chất của khoản đầu tư đó. Về khoản đầu tư có bản chất hoàn toàn tài chính, các tiêu chí liên quan không thể giống hệt như các tiêu chí áp dụng đối với một khoản đầu tư cho hoạt động kinh doanh và/hoặc liên quan đến nhân lực và tài sản. Đối với các khoản đầu tư có bản chất hoàn toàn tài chính, các tiêu chí liên quan phải là tiêu chí theo đó số tiền đó cuối cùng được sử dụng ở đâu và/hoặc vì lợi ích của ai, chứ không phải là địa điểm nơi khoản tiền đó được trả hoặc chuyển. Do vậy, vấn đề liên quan là cuối cùng thì khoản tiền đầu tư đó được cấp cho nước tiếp nhận đầu tư ở đâu, và liệu khoản tiền đó có phục vụ mục đích phát triển kinh tế cho nước đó hay không? Đây cũng chính là quan điểm của các hội đồng trọng tài khác.[55]

Thuật ngữ 'lãnh thổ' theo luật quốc tế thông thường bao gồm không chỉ đất và vùng nội thủy của một quốc gia, mà còn bao gồm không gian và vùng lãnh thổ biển mà quốc gia đó có chủ quyền, và các khu vực khác mà quốc gia đó có quyền tài phán đặc quyền.

[52] Xem *SGS Société Générale de Surveillance S.A. v. Philippines*, vụ kiện tại ICSID số ARB/02/6, Phán quyết về thẩm quyền trọng tài, ngày 29/01/2004, đoạn 99.

[53] Xem vụ *Abaclat và các bên khác* (trước đây được gọi là vụ *Giovanna a Beccara và các bên khác*) *kiện Cộng hòa Argentina*, vụ kiện tại ICSID số ARB/07/5, Phán quyết về thẩm quyền trọng tài và thụ lý, ngày 04/8/2011, at 374.

[54] *Deutsche Bank AG vs. Sri Lanka*, vụ kiện tại ICSID số ARB/09/2, Phán quyết ngày 31/10/2012, đoạn 288, 292.

[55] Xem vụ *Abaclat và các bên khác* (trước đây được gọi là vụ *Giovanna a Beccara và các bên khác*) *kiện Cộng hòa Argentina*, vụ kiện tại ICSID số ARB/07/5, Phán quyết về thẩm quyền trọng tài và thụ lý, ngày 04/8/2011, at 374.

Một số IIA quy định chi tiết, *thí dụ* BIT Canada - Peru năm 2006 là hiệp định đầu tiên của Canada được áp dụng theo BIT mẫu được cập nhật, theo đó xác định lãnh thổ của Canada gồm:

(a) Lãnh thổ đất liền của Canada, không gian, vùng nội thủy và vùng biển thuộc lãnh thổ của Canada;

(b) Các khu vực khác, bao gồm cả vùng đặc quyền kinh tế và đáy biển và vùng đất dưới đáy biển, mà theo luật quốc tế, Canada có chủ quyền hoặc quyền tài phán cho mục đích thăm dò và khai thác nguồn tài nguyên; và

(c) Các đảo nhân tạo, các thiết bị lắp đặt và công trình trong vùng đặc quyền kinh tế hoặc trên thềm lục địa.[56]

Mô tả về thuật ngữ 'lãnh thổ' cũng cho thấy sự áp dụng hoặc không áp dụng IIA đối với các khoản đầu tư được thực hiện tại một số khu vực hoặc vùng lãnh thổ có tình trạng đặc biệt theo hệ thống pháp luật của quốc gia đó. *Thí dụ*: BIT Hoa Kỳ - Uruguay năm 2005 nêu cụ thể rằng đối với Hoa Kỳ, lãnh thổ sẽ bao gồm: 'i) lãnh thổ Hoa Kỳ, bao gồm 50 bang, District of Columbia, và Puerto Rico; (ii) các khu thương mại nước ngoài nằm tại Hoa Kỳ và Puerto Rico […].'[57]

3. Phạm vi theo thời gian

Yếu tố thứ hai cho việc xác định phạm vi áp dụng của các IIA là khung thời gian một khoản đầu tư được thực hiện. Về vấn đề này, có hai khía cạnh cần chú ý.

Thứ nhất: Liệu các khoản đầu tư được thực hiện trước khi một BIT có hiệu lực có được coi là khoản đầu tư theo BIT đó hay không? Nói cách khác, các quy định theo đó xác định một BIT có áp dụng với các khoản đầu tư và/hoặc các biện pháp trước ngày có hiệu lực của BIT đó hay không?

Thứ hai: Thời hạn của chính BIT đó.

Về câu hỏi thứ nhất, hầu hết các BIT được ký kết tính đến nay đều bảo hộ cho các khoản đầu tư tương lai và hiện đang tồn tại. Thông thường, điều này được quy định trong một điều khoản trong đó quy định cụ thể, rõ ràng như vậy, giống như trong trường hợp BIT Nhật Bản

[56] BIT Canada - Peru, Điều 1.

[57] BIT Hoa Kỳ - Uruguay, Điều 1.

- Hàn Quốc năm 2002, theo đó quy định rằng BIT 'cũng áp dụng đối với mọi khoản đầu tư của các nhà đầu tư của một quốc gia ký kết có được trong lãnh thổ của quốc gia ký kết kia […] trước ngày Hiệp định này có hiệu lực.'[58]

Tuy nhiên, việc áp dụng BIT đối với các khoản đầu tư đang tồn tại không có nghĩa là BIT đó có giá trị hồi tố.

Theo Điều 28 Công ước Viên năm 1969 về 'Các điều ước không có giá trị hồi tố' quy định rằng:

> [T]rừ khi một ý định khác dường như có thể hình thành từ nội dung của điều ước đó hoặc có thể được xác lập bằng cách khác, các quy định của điều ước không ràng buộc một bên về bất kỳ hành vi hay sự việc nào đã phát sinh, hoặc bất kỳ tình huống nào đã chấm dứt tồn tại trước ngày điều ước có hiệu lực đối với bên đó.

Các quy định về chế tài của BIT chỉ áp dụng đối với các tình tiết hoặc tình huống xảy ra sau ngày BIT có hiệu lực, hoặc nếu đã bắt đầu trước ngày có hiệu lực đó, nhưng kéo dài cho đến sau khi BIT có hiệu lực. Nghĩa là, *thí dụ*: nếu việc tước quyền sở hữu đã hoàn thành trước khi BIT có hiệu lực, thì sẽ không làm phát sinh tranh chấp theo các quy định về chế tài của BIT mới, hoặc nếu một đối xử mang tính phân biệt đã xảy ra trước đó, và đã chấm dứt vào thời điểm BIT có hiệu lực, thì sẽ không được coi là vi phạm BIT.

Về câu hỏi thứ hai, để bảo đảm bảo hộ và môi trường đầu tư ổn định, các BIT thường dự kiến trước một khoảng thời gian thực hiện tối thiểu. Trong hầu hết các BIT, thời hạn tối thiểu thông thường là 10 năm, và một số BIT khác có thời hạn ngắn hơn hoặc dài hơn.

Sau thời gian này, các bên có thể chấm dứt BIT sau khi gửi thông báo trước cho bên kia, thường không ít hơn 1 năm. Tuy nhiên, theo cái được gọi là 'điều khoản về chấm dứt', các nhà đầu tư hiện tại sẽ có quyền dựa vào các bảo hộ quy định trong các BIT đã chấm dứt hiệu lực, và vẫn có quyền đó cho một giai đoạn sau khi BIT chấm dứt. Hầu hết các BIT đều có điều khoản này, theo đó quy định hiệu lực sẽ kéo dài trong một giai đoạn 15 năm sau khi BIT chấm dứt. *Thí dụ*: Điều 15:2 BIT Indonesia - Hà Lan (1994) quy định: 'Đối với các khoản đầu tư đã được thực hiện trước ngày chấm dứt của Hiệp định này, các Điều trên sẽ tiếp tục có hiệu lực cho một giai đoạn 15 năm, kể từ ngày chấm dứt hiệu lực của Hiệp định này'.

[58] BIT Nhật Bản - Hàn Quốc, Điều 23.1.

4. Ai được bảo hộ? - Khái niệm 'Nhà đầu tư'

Các IIA áp dụng đối với các khoản đầu tư do các 'nhà đầu tư của một trong các nước ký kết thực hiện trong lãnh thổ của một quốc gia ký kết khác. Cùng với khái niệm 'đầu tư', khái niệm 'nhà đầu tư' giới hạn đối tượng áp dụng của IIA.

Khoản đầu tư do những người không nằm trong phạm vi định nghĩa này sẽ không được áp dụng các quy định về chế tài của IIA. Về logic, Phán quyết trong vụ *BG v. Argentina*, khi xem xét về luật áp dụng, đã nêu rằng luật điều ước xác định ai đáp ứng các điều kiện để được coi là 'nhà đầu tư'.[59] Ngoài ra, trong vụ *Société Générale v. Dominica,* Phán quyết về phản đối thẩm quyền trọng tài cho thấy rằng BIT không áp dụng đối với bất kỳ hành động hay việc không hành động nào xảy ra trước ngày công dân đó có được khoản đầu tư đó, vì quốc tịch của nhà đầu tư không phải là quốc tịch mà BIT yêu cầu.[60]

Các IIA thường áp dụng đối với các khoản đầu tư được thực hiện bởi cả thể nhân và pháp nhân. Trong trường hợp pháp nhân, định nghĩa 'nhà đầu tư quy định loại pháp nhân nào được áp dụng IIA.

Bên cạnh đó, do bản chất của hiệp định song phương, khái niệm 'nhà đầu tư cho thấy sự kết nối giữa nhà đầu tư và một trong các nước ký kết mà BIT yêu cầu để BIT sẽ áp dụng đối với một số nhà đầu tư này, mà không áp dụng đối với một số nhà đầu tư khác, để cho hưởng các lợi ích mà BIT mang lại - được gọi là 'quy tắc xuất xứ của BIT.

Các khoản đầu tư do các cá nhân cũng như do các pháp nhân thực hiện thường được coi là khoản đầu tư theo BIT.

A. *Cá nhân/Thể nhân*

Vì không có vấn đề gì khó hiểu về khái niệm cá nhân/thể nhân, nên vấn đề còn lại là khoản đầu tư của thể nhân *nào* được coi là khoản đầu tư theo BIT. 'Quy tắc xuất xứ được áp dụng trong các BIT giống với các 'quy tắc xuất xứ' được áp dụng trong các hiệp định thương mại.

Về khía cạnh này, các tiêu chí chính cho 'quy tắc xuất xứ' về cá nhân gồm:

[59] Vụ *BG Group Plc. v. Argentina*, UNCITRAL, Phán quyết ngày 24/12/2007, đoạn 91-92.

[60] Vụ Société Générale liên quan đến DR Energy Holdings Limited và Empresa Distribuidora de Electricidad del Este, *S.A. kiện Cộng hòa Dominica*, UNCITRAL, Phán quyết phán đối thẩm quyền trọng tài, ngày 19/9/2008, đoạn 105.

- *Quốc tịch* của cá nhân.
- *Nơi cư trú*, trong đó bao gồm cả trường hợp người nước ngoài có mặt tại nước đầu tư gốc, nhưng không bao gồm công dân cư trú ở nước ngoài.
- *Cốt lõi lợi ích kinh tế*, giống với khái niệm 'hoạt động kinh doanh thực chất' trong trường hợp của các công ty, tập trung vào việc bảo đảm có được sự kết nối thực sự giữa nhà đầu tư và nền kinh tế của nước gốc và ngăn ngừa tình trạng *giới hạn quyền lợi theo BIT*. Trong trường hợp của cá nhân, vấn đề này không liên quan nhiều, và 'quy tắc xuất xứ' này thường có cùng kết quả như trường hợp áp dụng yêu cầu về cư trú.

Đại đa số các IIA cho phép các lợi ích của IIA được áp dụng cho cá nhân có quốc tịch của một trong các nước ký kết. Một số IIA có phạm vi áp dụng bao gồm cả cá nhân có quyền cư trú vĩnh viễn trên lãnh thổ của một nước ký kết, *thí dụ* như FTA Singapore - EFTA theo đó quy định:

Bên cạnh những trường hợp khác, nhà đầu tư của một nước ký kết là cá nhân có quốc tịch của nước ký kết đó, hoặc có quyền cư trú vĩnh viễn tại nước ký kết đó phù hợp với luật áp dụng.[61]

Một số ít IIA quy định trường hợp cá nhân có hai hoặc nhiều quốc tịch. Trong trường hợp đó, có thể giải quyết bằng cách loại trừ khỏi diện áp dụng của một IIA, nếu các cá nhân đó, trong khi đã được coi là nhà đầu tư theo IIA đến từ của nước kia (nước gốc của khoản đầu tư), lại cũng có cả quốc tịch của nước tiếp nhận đầu tư. Đây là cách làm được áp dụng trong các BIT của Canada.[62]

Ngoài ra, cũng có thể giải quyết vấn đề này bằng cách xác định ưu thế cho một quốc tịch trong số các quốc tịch của nhà đầu tư, thông thường là quốc tịch mà cá nhân đó sử dụng hiệu quả nhất. BIT mẫu của Hoa Kỳ năm 2012 sử dụng giải pháp này, bằng cách quy định rằng 'một cá nhân có hai quốc tịch sẽ được coi là công dân của một nước duy nhất mà người đó sử dụng quốc tịch một cách hiệu quả nhất và nổi trội nhất'.[63]

[61] FTA Singapore - EFTA, Điều 37(d); BIT Canada - Argentina, Điều 1(b)(i).

[62] BIT mẫu của Canada năm 2003, Điều 1.

[63] BIT mẫu của Hoa Kỳ năm 2012, Điều 1.

Một điều quan trọng cũng phải lưu ý là Phán quyết trọng tài vụ *Bogdanov v. Moldova I* ghi nhận khái niệm 'nhà đầu tư' rằng: trong thông lệ xét xử trọng tài về đầu tư quốc tế, một điều được chấp nhận chung là bảo hộ theo IIA được trao cho các cổ đông của công ty đầu tư, ngay cả khi khoản đầu tư đó được tiến hành trên thực tế bởi một công ty con được thành lập theo pháp luật của quốc gia tiếp nhận đầu tư.[64] Về khía cạnh này, Phán quyết về phản đối thẩm quyền trọng tài trong vụ *Camuzzi v. Argentina I* ghi nhận rằng khái niệm theo BIT về 'đầu tư' là một khái niệm rộng, vì dự định của nó là trao bảo hộ toàn diện cho các nhà đầu tư, và không chỉ bao gồm các cổ đông đa số, mà còn áp dụng đối với cổ đông thiểu số và cổ đông gián tiếp.[65]

B. *Pháp nhân*

Để áp dụng IIA đối với các khoản đầu tư do pháp nhân thực hiện, trước khi thiết lập mối quan hệ giữa công ty và một trong các nước ký kết, cần phải xác định các loại pháp nhân khác nhau có thể được coi là các 'nhà đầu tư' theo quy định của IIA đó hay không.

Các IIA có thể quy định loại trừ áp dụng đối với một số loại pháp nhân dựa trên hình thức pháp lý, mục đích thành lập, hoặc cơ cấu sở hữu vốn. Hình thức pháp lý của công ty quyết định, *bên cạnh những nội dung khác*, chủ nợ có thể xử lý tài sản nào, hoặc trong phạm vi nào pháp nhân đó có thể bị truy cứu trách nhiệm pháp lý với tư cách của chính mình.

Tuy nhiên, việc loại trừ dựa trên hình thức pháp lý của nhà đầu tư có thể không liên quan khi bảo đảm trách nhiệm của khoản đầu tư, và trên thực tế, rất hiếm xảy ra trong các IIA. Việc loại trừ dựa trên mục đích của nhà đầu tư có thể áp dụng đối với các tổ chức phi lợi nhuận. *Thí dụ*: chỉ pháp nhân 'hoạt động trên cơ sở thương mại'[66] mới được hưởng các lợi ích theo Công ước MIGA.[67] Cơ cấu sở hữu vốn của công ty thực hiện đầu tư cũng có thể đưa ra một số cơ sở để loại trừ khỏi các lợi ích từ một IIA khi công ty đó là công ty nhà nước, chứ không phải là công ty tư

[64] Vụ *Iurii Bogdanov Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Moldova*, Phán quyết trọng tài ngày 22/9/2005, mục 2.2.1.3.i.

[65] Vụ *Camuzzi International S.A. v. Argentina [I]*, vụ kiện tại ICSID số ARB/03/2, Phán quyết về phản đối thẩm quyền trọng tài, ngày 11/5/2005, đoạn 81.

[66] Công ước MIGA, Điều 13(a)(iii).

[67] Để xem nội dung thảo luận chi tiết hơn về mục đích của MIGA, xem Ibrahim F. I. Shihat, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency*, 22 (1988).

nhân.[68] Tuy nhiên, trên thực tế, hầu hết các IIA quy định phạm vi áp dụng rộng đối với các nhà đầu tư là pháp nhân. Khái niệm 'nhà đầu tư là pháp nhân thường bao gồm mọi hình thức pháp nhân, không phụ thuộc vào hình thức pháp lý của tổ chức đó, bất kể là hoạt động vì lợi nhuận hay không, hoặc bất kể có phải là sở hữu tư nhân hay không.

Bên cạnh các dạng pháp nhân thuộc phạm vi áp dụng IIA, khái niệm 'nhà đầu tư khắc họa 'quy tắc xuất xứ' cho các pháp nhân này, nghĩa là mối quan hệ cần thiết giữa nhà đầu tư đó và một trong các nước ký kết để nhà đầu tư có thể hưởng lợi từ các ưu đãi của IIA đó. 'Quy tắc xuất xứ' của pháp nhân trong các IIA thường được diễn giải theo hai phần. Một phần nêu các yếu tố xác thực và phần kia nêu các yếu tố phủ nhận. Hai yếu tố này được kết hợp lại để xác định quốc tịch của nhà đầu tư.

Thứ nhất, phần xác định pháp nhân được phép áp dụng IIA thông qua mối quan hệ giữa pháp nhân đó với một trong các nước ký kết. Các IIA thường xem xét ba tiêu chí khác nhau giữa nhà đầu tư và nước chủ đầu tư của nhà đầu tư đó, yêu cầu phải có một hoặc sự kết hợp giữa các tiêu chí này. Các tiêu chí này bao gồm:

- *Nước thành lập*: nước nơi pháp nhân đó được thành lập, tương ứng với địa điểm thành lập pháp lý của pháp nhân đó. Việc kiểm tra này sẽ giúp đưa ra yếu tố mục đích mà có thể nhận ra dễ dàng và ngay lập tức để xác định 'quốc tịch' của pháp nhân. Tuy nhiên, địa điểm thành lập của một công ty có thể hầu như không đưa ra thông tin gì về nguồn gốc thực sự của công ty đó, và khiến cho công ty đó bị các nhà đầu tư lợi dụng để hưởng lợi về thuế từ IIA. Thực ra, địa điểm thành lập có thể được lựa chọn cho mục đích duy nhất là được hưởng các lợi ích của IIA, mà chỉ dành riêng cho công dân của các quốc gia ký kết IIA.[69] Có thể xem xét thí dụ cho mối quan hệ này trong BIT Argentina - Vương quốc Anh năm 1990, theo đó công nhận rằng, đối với Vương quốc Anh, 'các nhà đầu tư là 'các công ty, doanh nghiệp, hãng, hiệp hội được thành lập hoặc tạo ra theo pháp luật hiện hành ở bất kỳ địa điểm nào trong Vương quốc Anh […].'[70]

[68] Julien Chaisse, 'Sovereign Wealth Funds in the Making Assessing the Economic Feasibility and Regulatory Strategies', (2011), *45(4) Journal of World Trade*, tr. 837-876.

[69] Điều này đã được chứng tỏ trong vụ *Bechtel Corp. v. Bolivia* khi Bechtel chuyển địa điểm đăng ký thành lập từ Cayman Islands sang Hà Lan để có thể kiện ra trọng tài theo BIT Hà Lan - Bolivia (Von Mehren et al., 2004). Xem cả vụ *Aguas del Tunari S.A. vs. Bolivia*, vụ kiện tại ICSID số ARB/02/3, Phán quyết về thẩm quyền xét xử, ngày 21/10/2005.

[70] BIT Argentina - Vương quốc Anh, Điều 1(c)(i)(bb).

- *Nước đặt trụ sở*: Trụ sở chính là nơi thực hiện việc quản lý công ty. Vì nơi đặt trụ sở không dễ dàng thay đổi, nên việc kiểm tra này giúp bảo đảm có sự kết nối kinh tế thực sự giữa nhà đầu tư và quốc gia liên quan. Về khía cạnh này, Phán quyết trong vụ *AFT v. Slovakia* đã cho thấy dấu hiệu phân biệt liên quan đến việc xác định sự tồn tại của 'trụ sở hoạt động' như là trung tâm quản trị thực sự cho hoạt động kinh doanh của nhà đầu tư.

Bằng chứng về trụ sở hoạt động,

Với ý nghĩa là trung tâm quản trị thực sự cho hoạt động kinh doanh, cần phải có được các yếu tố bổ sung, *thí dụ* các bằng chứng là: nơi ban giám đốc công ty thường họp hoặc các cổ đông tổ chức họp trong lãnh thổ Thụy Sỹ; có một cán bộ quản lý cao nhất của công ty đóng tại Thụy Sỹ; công ty có một số lượng nhân viên làm việc tại trụ sở; một địa chỉ có số điện thoại và số fax để cung cấp cho các bên thứ ba để ký kết hợp đồng với công ty; có phát sinh một số chi phí chung hoặc chi phí phát sinh cho việc duy trì địa điểm trụ sở này và các dịch vụ liên quan, tất cả những bằng chứng này sẽ thể hiện rõ rằng một đơn vị kinh doanh được vận hành tại một địa chỉ trong lãnh thổ Thụy Sỹ.[71]

Nó ngăn ngừa việc các nhà đầu tư tạo ra các công ty 'hòm thư, đơn thuần chỉ vì mục đích lợi dụng những ưu đãi của IIA, mà không có mối quan tâm thương mại nào đến nước thành lập. Tuy nhiên, địa điểm đặt trụ sở, không phải lúc nào cũng có thể dễ dàng xác định. BIT Đức - Bungary năm 1986 có nêu 'quy tắc xuất xứ về bản chất như sau:

> [B]ất kỳ pháp nhân nào, cũng như bất kỳ công ty hay hiệp hội thương mại hoặc công ty hay hiệp hội khác, có hoặc không có tư cách pháp nhân, có trụ sở tại nơi được áp dụng Hiệp định này […].[72]

- *Nước sở hữu hoặc kiểm soát*, nghĩa là xác định ai là người chủ cao nhất của pháp nhân đó, bằng cách tìm xem ai là người có khả năng pháp lý để chỉ đạo các hành động của công ty. Điều này sẽ giúp bảo đảm rằng: chỉ có các công ty mà người hưởng lợi cao nhất là công dân của một trong các bên ký kết, mới được hưởng lợi từ các ưu đãi của IIA. Tuy nhiên, nước sở hữu hoặc kiểm soát thường khó có thể xác định, đặc biệt là trong trường hợp của các công ty có cổ phiếu được giao dịch trên các sàn chứng khoán lớn. Chương về đầu tư của FTA Singapore - Nhật Bản kết hợp yếu tố này với việc kiểm tra hoạt động kinh doanh thực

[71] Vụ *Alps Finance and Trade AG v. Slovakia*, UNCITRAL, Phán quyết ngày 05/3/2011, đoạn 217.

[72] BIT Đức - Bungary, Điều 1(3)2.

chất, nhằm loại trừ các nhà đầu tư từ các quốc gia thứ ba khỏi các quy định về chế tài của IIA, khi quy định rằng:

> Thuật ngữ 'doanh nghiệp từ quốc gia kia' nghĩa là bất kỳ doanh nghiệp nào được thành lập hợp lệ, hoặc bằng cách khác được tạo thành theo luật áp dụng của quốc gia ký kết kia, ngoại trừ doanh nghiệp thuộc quyền sở hữu hoặc kiểm soát của những người thuộc các nước không phải là quốc gia ký kết, và không thực hiện hoạt động kinh doanh thực chất trong lãnh thổ của quốc gia ký kết kia.[73]

Thứ hai, một số IIA có điều khoản về 'không cho hưởng lợi', theo đó cho phép các bên loại trừ khỏi phạm vi của một IIA các nhà đầu tư nước ngoài không có kết nối thực sự với nước nơi mở văn phòng, mặc dù các nhà đầu tư này có thể đáp ứng tiêu chí về địa điểm thành lập. Về vấn đề này, các IIA có xu hướng đưa ra quy trình kiểm tra về quyền sở hữu hoặc kiểm soát, cùng với việc kiểm tra hoạt động kinh doanh thực chất. *Thí dụ*: FTA Singapore - Australia, Chương 8 về Đầu tư, Điều 18, quy định:

> … một Bên có thể từ chối các lợi ích của Chương này đối với một nhà đầu tư của Bên kia là một doanh nghiệp đến từ Bên đó, và đối với các khoản đầu tư của nhà đầu tư đó, nếu Bên đó cho rằng doanh nghiệp đó thuộc quyền sở hữu hoặc kiểm soát của người từ một quốc gia khác - không phải là quốc gia ký kết, và không có hoạt động kinh doanh thực chất tại lãnh thổ của Bên kia.

Do vậy, một quốc gia có thể không cho các nhà đầu tư hưởng lợi theo IIA, mặc dù được thành lập tại một trong các nước ký kết, nhưng các nhà đầu tư này được sở hữu hoặc kiểm soát bởi những người từ một nước không phải là nước tham gia ký kết và không có hoạt động kinh doanh thực chất tại lãnh thổ của quốc gia ký kết. *Thí dụ*: Phán quyết trong vụ *AFT v. Slovakia* cho rằng BIT đòi hỏi nhà đầu tư phải có văn phòng và 'hoạt động kinh tế thực sự' tại một trong các nước thành viên ký kết. [74]

Trong khi một số BIT, và không phải là tất cả,[75] có điều khoản 'không cho hưởng lợi' - đặc biệt là các BIT ký bởi Canada và Hoa Kỳ theo các BIT mẫu năm 2003 và 2012, một cách tương ứng, thì điều khoản này thường được thấy trong các chương về đầu tư của các FTA, đặc biệt là những FTA theo đó quy định cần phải kiểm tra về địa điểm thành lập

[73] FTA Singapore - Nhật Bản, Điều 72(h).

[74] Vụ *Alps Finance and Trade AG v. Slovakia*, UNCITRAL, Phán quyết ngày 05/3/2011, mục 219-227.

[75] *Thí dụ*: vụ *Sanum v. Laos,* Phán quyết về thẩm quyền xét xử từ chối việc đưa ra yêu cầu về 'hoạt động kinh tế thực sự' vào khái niệm nhà đầu tư. Vụ *Sanum Investments Limited v. Laos*, vụ kiện tại PCA số 2013-13, Phán quyết về thẩm quyền xét xử, ngày 13/12/2013, mục 307.

như là mối liên hệ hàng đầu giữa nhà đầu tư và một trong các quốc gia ký kết.

Tuy nhiên, nhìn chung, một lựa chọn phổ biến nhất là việc công nhận rằng các pháp nhân được thành lập hoặc bằng cách khác được tạo lập, và có trụ sở tại lãnh thổ của các nước ký kết là các 'nhà đầu tư.

5. Đối tượng bảo hộ theo IIA - Khái niệm 'Đầu tư'

Như đã nêu ở trên, đối tượng chính của IIA được xác định bằng khái niệm 'đầu tư' cùng với khái niệm 'nhà đầu tư.[76] Khái niệm 'đầu tư' điều chỉnh các tài sản thuộc phạm vi áp dụng của IIA. Nói cách khác, nó trả lời câu hỏi *loại* đầu tư *nào* được coi là khoản 'đầu tư theo IIA.[77]

Trong vụ *Salini Costruttori S.P.A and Italstrade S.P.A v. Morocco*, hội đồng trọng tài ICSID tán thành khái niệm mà hiện nay phổ biến được gọi là 'tiêu chí Salini' khi xác định cái gì tạo nên một khoản 'đầu tư trong ngữ cảnh Công ước ICSID. Phán quyết của hội đồng trọng tài đã đóng góp lớn vào nền tảng tri thức của cuộc tranh luận về định nghĩa 'đầu tư' trong Công ước ICSID. Tại đoạn 52, hội đồng trọng tài đã phán quyết, bên cạnh những nội dung khác, rằng:

> ... [C]ác học thuyết thường coi đầu tư bao gồm: khoản đóng góp, khoảng thời gian nhất định thực hiện hợp đồng và tham gia vào rủi ro giao dịch. Khi đọc phần Lời nói đầu của Công ước, người ta có thể bổ sung việc đóng góp vào sự phát triển kinh tế của nước tiếp nhận như là một điều kiện bổ sung. Trên thực tế, những yếu tố đa dạng này có thể phụ thuộc lẫn nhau. Do vậy, các rủi ro giao dịch có thể phụ thuộc vào khoản đóng góp và khoảng thời gian thực hiện hợp đồng. Kết quả là những tiêu chí đa dạng này cần được đánh giá một cách toàn cầu, ngay cả khi hội đồng trọng tài xem xét chúng một cách riêng rẽ, vì mục đích xác định sự hợp lý.

Việc đặt ra Tiêu chí Salini đã bị chỉ trích vì các tiêu chí đã được xây dựng theo một quyết định mà quyết định đó không được Công ước ICSID ủng hộ. Bởi vậy, người ta lập luận rằng áp dụng 'tiêu chí Salini' có thể dẫn đến việc thách thức các yêu cầu về quyền tài phán của Công ước ISCID như một vấn đề pháp luật.[78]

[76] Céline Lévesque, '*Abaclat and Others v. Argentine Republic*: The Definition of Investment', *27(2) ICSID Review* 247 (2012).

[77] Christoph H. Scheuer et al., *The ICSID Convention: A Commentary* 133 (2009).

[78] A. Martin, 'Definition of Investment: Could A Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice', *11 Global Juris.* 1, 2 (2011).

A. *Khái niệm 'đầu tư' dựa trên tài sản*

Thông thường, các IIA sử dụng khái niệm rộng để chỉ 'mọi loại tài sản', để cho thấy rằng mọi giá trị kinh tế đều được áp dụng IIA. Về khía cạnh này, Phán quyết chung thẩm trong vụ *Amto v. Ukraina* cho thấy khái niệm đầu tư trong phương pháp tiếp cận 'dựa trên tài sản' của ECT đưa ra khái niệm rộng ('mọi loại tài sản') được minh họa bằng một danh sách gồm sáu loại quyền.[79] Khái niệm dựa trên tài sản này trên thực tế thường đi kèm một danh sách minh họa về tài sản theo IIA, bao gồm:

- *Động sản, bất động sản và các quyền tài sản khác*. Phạm trù này bao gồm các quyền tài sản đối với bất kỳ hàng hóa nào, cũng như quyền sở hữu đối với đất hoặc bất kỳ loại quyền lợi bất động sản nào, như thế chấp, quyền cầm giữ và cầm cố;

- *Lợi ích đối với tài sản của công ty, thí dụ như cổ phần, cổ phiếu và trái khoán*. Theo các thuật ngữ này, IIA không yêu cầu nhà đầu tư phải nắm giữ một phần vốn góp tối thiểu để được bảo hộ theo IIA, và nhà đầu tư nước ngoài cũng không phải nắm giữ chức vụ kiểm soát đối với doanh nghiệp. Hơn nữa, các hình thức tham gia đầu tư khác như trái phiếu, cho vay và công cụ nợ cũng được bao gồm trong phạm trù này;

- *Yêu cầu thanh toán tiền và yêu cầu thực hiện việc nào đó theo một hợp đồng có giá trị tài chính*. Phạm trù này cho thấy rằng IIA không chỉ áp dụng đối với các quyền tài sản, mà còn áp dụng đối với cả các quyền theo hợp đồng. Rất nhiều hợp đồng nêu rõ ràng các quyền có được theo hợp đồng cho phép kinh doanh (concession), bao gồm cả các hợp đồng cho phép khai thác nguồn tài nguyên thiên nhiên. Việc đưa các quyền theo hợp đồng vào trong khái niệm đầu tư đặt ra rất nhiều câu hỏi về việc liệu quan hệ hợp đồng cho thương mại hàng hóa và dịch vụ xuyên biên giới có thể được coi là 'đầu tư cho mục đích của IIA hay không. Việc sử dụng từ ngữ chung chung như vậy dường như không có ý định hạn chế phạm vi của một IIA là chỉ áp dụng cho hợp đồng dài hạn mà trong đó, theo phạm trù này, bao gồm mọi khoản đầu tư gián tiếp;

- *Quyền sở hữu trí tuệ*. Nhóm này bao gồm nhãn hiệu hàng hóa, bí mật thương mại, bằng sáng chế và quyền tác giả. Một số BIT quy định rõ ràng là bao gồm cả quy trình kỹ thuật, bí quyết, chỉ dẫn địa lý và vị thế thương mại, từ đó cho thấy IIA cũng áp dụng đối với các loại quyền sở hữu trí tuệ mới. Không có yêu cầu rõ ràng rằng các quyền này phải được đăng ký hoặc có được theo quy định của pháp luật nước tiếp nhận đầu tư.

Theo khái niệm đầu tư dựa trên tài sản theo nghĩa rộng này, bất kỳ tài sản nào có giá trị kinh tế mà nhà đầu tư có được từ hoạt động kinh doanh tại nước tiếp nhận đầu tư đều có thể được coi là thuộc một trong các phạm trù được liệt kê rõ ràng trong IIA, hoặc, cuối cùng là theo các thuật ngữ có phạm vi bao hàm rộng trong điều khoản, *thí dụ* thuật ngữ 'mọi loại tài sản'.

Một số vụ giải quyết các tranh chấp giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư bằng trọng tài trong những năm gần đây đề cập đến khái niệm đầu tư trong một số IIA, trong đó có nêu khái niệm dựa trên tài sản, mặc dù không nhất thiết bao gồm thuật ngữ 'mọi loại tài sản'. Một số hoạt động mà từ trước tới nay vẫn được coi là đầu tư theo IIA bao gồm, *thí dụ*: việc thành lập văn phòng để thực hiện thương mại dịch vụ quốc tế, thị phần thông qua thương mại, kỳ phiếu trả nợ, hợp đồng vay, hợp đồng xây dựng, và thành lập công ty luật.

Một số quốc gia đưa vào trong IIA nội dung để giải thích phạm vi của khái niệm 'đầu tư', do vậy, cho chính đối tượng của IIA.

Về khía cạnh này, *thí dụ*, các IIA của Canada đưa ra một danh mục theo dạng chọn-cho (positive list), chứ không phải danh sách minh họa, các tài sản được coi là đầu tư cho mục đích của IIA. Bên cạnh đó, FIPA mẫu của Canada năm 2003 liệt kê rõ ràng một số tài sản *không phải* là đầu tư, do vậy không được hưởng lợi từ FIPA, *thí dụ*:

a) Một khoản vay hoặc chứng khoán nợ cho một trong các Bên ký kết hoặc cho doanh nghiệp nhà nước;

b) Khoản vay cấp cho hoặc chứng khoán nợ của nhà cung cấp dịch vụ tài chính qua biên giới; và

c) Yêu cầu thanh toán tiền phát sinh từ hợp đồng thương mại cho việc bán hàng hóa, dịch vụ qua biên giới hoặc bất kỳ yêu cầu thanh toán tiền nào khác, 'mà không quy định các loại lãi suất' trong danh mục chọn-cho (positive list) nêu trên.[80]

Tương tự, BIT mẫu của Hoa Kỳ năm 2012, trong khi vẫn duy trì danh mục 'mở' các tài sản mà có 'tính chất là một khoản đầu tư, đã có

[79] *Limited Liability Company Amto v. Ukraina*, Vụ việc trọng tài số 080/2005, Phán quyết chung thẩm, ngày 26/3/2008, đoạn 36.

[80] BIT mẫu của Canada năm 2003, Điều 1.

phần quy định nhằm làm rõ đối với một số tài sản. Về góc độ này, trong một chú thích về khái niệm đầu tư đã ghi nhận rằng:

> [M]ột số loại nợ, như trái phiếu, giấy nhận nợ và kỳ phiếu dài hạn, có nhiều khả năng có tính chất là một khoản đầu tư hơn, trong khi một số loại nợ khác, như yêu cầu thanh toán đối với các khoản thanh toán ngay lập tức đến hạn và bắt nguồn từ việc bán hàng hóa, dịch vụ, thường ít có khả năng có tính chất này.

Chú thích thứ hai giải thích thêm rằng:

> … [V]iệc liệu một loại cấp quyền sử dụng, ủy quyền, cho phép, hay văn bản tương tự (bao gồm cả cho phép kinh doanh (concession), trong trường hợp có bản chất của một văn bản như vậy) cụ thể có hay không có tính chất là một khoản đầu tư phụ thuộc vào các yếu tố như bản chất và phạm vi các quyền mà người có quyền đó có được theo quy định của pháp luật của Bên đó. Trong số các cấp quyền sử dụng, ủy quyền, cho phép, hay văn bản tương tự không có tính chất là một khoản đầu tư, có các cấp quyền sử dụng, ủy quyền, cho phép, hay văn bản tương tự mà không tạo ra bất kỳ quyền nào được luật trong nước bảo vệ […].[81]

Đối tượng của hiệp định cũng có thể bị giới hạn bằng cách áp dụng các giới hạn bổ sung đối với khác khoản đầu tư theo hiệp định, mà không phải là chính khái niệm 'đầu tư. *Thí dụ*: mặc dù các nước ký kết dự định để IIA có phạm vi rộng về các loại đầu tư đáp ứng điều kiện để được bảo hộ theo IIA, nhưng các nước này có thể muốn giới hạn đối tượng hưởng các lợi ích đó là các khoản đầu tư đã hoàn tất các thủ tục nhất định. Đây là trường hợp một số BIT của Thái Lan, trong đó mặc dù các BIT này thường đưa ra khái niệm đầu tư dựa trên tài sản theo nghĩa rộng, nhưng lại yêu cầu phải có văn bản chấp thuận đối với khoản đầu tư của các cơ quan thẩm quyền hữu quan, để cho phép khoản đầu tư đó có thể được coi là đầu tư theo BIT. Về khía cạnh này, điều khoản 'phạm vi áp dụng' của BIT Thái Lan - Argentina năm 2000 quy định:

> Hiệp định này chỉ áp dụng với các trường hợp đầu tư của các nhà đầu tư từ một quốc gia ký kết tại lãnh thổ của quốc gia ký kết kia như đã được phê duyệt hoặc bằng cách khác chấp thuận bằng văn bản, nếu cần thiết, bởi cơ quan có thẩm quyền phù hợp với các quy định pháp luật của quốc gia ký kết có lãnh thổ là nơi thực hiện đầu tư.[82]

[81] BIT Mẫu của Hoa Kỳ năm 2012, chú thích 1 và 2.

[82] BIT Thailand - Argentina, Điều 2.

Thái Lan quy định một số hạn chế tương tự như các BIT khác. Tuy nhiên, sự khác nhau trong ngôn ngữ trình bày khi soạn thảo và đặt tiêu đề cho các quy định có thể dẫn đến các khác biệt quan trọng về phạm vi áp dụng của các BIT. Quy định nêu trên trong BIT với Argentina là quy định cụ thể về phạm vi của BIT, do đó đối với các khoản đầu tư không được phê duyệt chính thức bằng văn bản, thì khi được yêu cầu, có thể sẽ không được áp dụng BIT. Thay vào đó, các BIT khác lại chứa đựng những thông báo trước ở những phần khác và được thể hiện bằng ngôn ngữ khác. BIT với Đặc khu hành chính Hong Kong năm 2005, thể hiện quy định hạn chế này qua phần 'Khuyến khích và bảo hộ đầu tư và các khoản thu hồi' với nội dung như sau:

> Mỗi quốc gia ký kết sẽ khuyến khích và tạo thuận lợi cho các nhà đầu tư của quốc gia ký kết kia để thực hiện đầu tư trong lãnh thổ của mình, và sẽ tiếp nhận các khoản đầu tư đó, tùy thuộc vào các quyền của quốc gia ký kết đó trong việc thực hiện các quyền hạn theo quy định của pháp luật trong nước về các phê duyệt cụ thể bằng văn bản (nếu áp dụng) đối với các khoản đầu tư. (Điều 2.1)

Một điều có thể gây tranh cãi là yêu cầu phê duyệt này không được trình bày ở đây như là một điều kiện tiên quyết cho việc được áp dụng IIA, để ngay cả các khoản đầu tư không đáp ứng điều kiện này cũng có thể thuộc phạm vi điều chỉnh của một IIA.

B. *Khái niệm 'đầu tư' dựa trên doanh nghiệp*

Một số IIA tập trung chủ yếu vào FDI lại chú trọng vào đầu tư nước ngoài trong một 'doanh nghiệp' hơn là vào nhiều loại tài sản khác.

Khái niệm 'đầu tư' dựa trên doanh nghiệp tập trung vào mục đích của nhà đầu tư khi thiết lập mối quan hệ dài hạn với nước tiếp nhận đầu tư, thông qua việc mua lợi ích sở hữu lâu dài trong quyền sở hữu hoặc kiểm soát hoạt động quản lý của doanh nghiệp. Một *thí dụ* là trong BIT Đan Mạch - Phần Lan năm 1990, theo đó định nghĩa đầu tư như sau:

> Mọi khoản đầu tư vào các công ty cho mục đích thiết lập mối quan hệ kinh tế dài hạn giữa nhà đầu tư và công ty và cho phép nhà đầu tư có thể gây ảnh hưởng đáng kể đối với hoạt động quản lý của công ty đó.[83]

Trong khi đại đa số các BIT đưa ra khái niệm đầu tư dựa trên tài

[83] BIT Đan Mạch - Phần Lan, Điều 1(1)(b).

sản, thì nhiều FTA có các chương về đầu tư lại sử dụng khái niệm đầu tư dựa trên doanh nghiệp. Cộng đồng châu Âu đã sử dụng phương thức này trong rất nhiều văn bản mẫu của mình như các Hiệp định châu Âu với các nước Đông Âu sau này gia nhập EU, các Hiệp định EuroMed ký với các nước đối tác Địa Trung Hải, và một số các hiệp định liên kết hiện đại hơn. Thí dụ: Hiệp định liên kết với Chile đặt tên chương là 'Thành lập doanh nghiệp' thay vì 'đầu tư', và định nghĩa 'Thành lập doanh nghiệp' là '(i) việc tạo ra, mua hoặc duy trì pháp nhân; hoặc (ii) thiết lập hoặc duy trì một chi nhánh hoặc văn phòng đại diện, trong lãnh thổ của nước ký kết cho mục đích thực hiện hoạt động kinh tế'.[84]

Đây cũng là cách làm mà có thể sẽ được các FTA tương lai do EU ký kết sẽ áp dụng. Ở Đông Á, chỉ có hai FTA có quy định về chế tài trong đầu tư là không sử dụng khái niệm dựa trên tài sản để tập trung chủ đạo vào FDI. Hiệp định khung về Khu vực đầu tư ASEAN ('AIA') đã loại bỏ đầu tư gián tiếp khỏi phạm vi của một AIA một cách rõ ràng,[85] và FTA Australia - Thái Lan giới hạn phạm vi quy định chung về chế tài trong đầu tư là chỉ áp dụng đối với 'đầu tư trực tiếp' giống như định nghĩa của IMF.

Cẩm nang Cán cân thanh toán của IMF đưa ra khái niệm doanh nghiệp đầu tư trực tiếp:

> Là doanh nghiệp được thành lập hoặc không được thành lập mà trong đó nhà đầu tư trực tiếp, là người cư trú tại một nền kinh tế khác, sở hữu ít nhất 10% cổ phần phổ thông hoặc quyền biểu quyết (đối với doanh nghiệp được thành lập) hoặc tương đương (đối với doanh nghiệp không được thành lập) [86]

Về nguyên tắc, khái niệm đầu tư dựa trên doanh nghiệp loại trừ đầu tư gián tiếp khỏi phạm vi áp dụng. Tuy nhiên, một số vấn đề đã phát sinh trong một số trường hợp cụ thể, và việc phân biệt 'đầu tư trực tiếp nước ngoài' hay 'đầu tư gián tiếp' có thể không luôn luôn cho kết quả rõ ràng. Quy tắc tự do hóa luồng vốn OECD chấp nhận các khoản vay tài chính có kỳ hạn trên 5 năm cũng được áp dụng. Ngược lại, FTA Canada - Hoa Kỳ cũ năm 1988 lại áp dụng khái niệm đầu tư dựa trên doanh nghiệp và không bao gồm các khoản vay tài chính, bất kể thời hạn dài hay ngắn. Điều này có nghĩa là các tài sản như chứng khoán vốn, chứng khoán nợ dưới hình thức trái khoán và trái phiếu, công cụ thị trường tiền tệ, sản phẩm tài chính phái sinh, và rất nhiều loại công cụ tài chính mới, cũng có thể bị loại trừ. Vì lý do này, các quốc gia có quan ngại về cán cân thanh toán và ảnh hưởng kinh tế vĩ mô của việc xóa bỏ các hạn chế đối với đầu tư nước ngoài, đặc biệt liên quan đến các dòng vốn ngắn hạn, có thể lựa chọn loại khái niệm đầu tư dựa trên doanh nghiệp.

[84] Hiệp định thiết lập mối quan hệ liên kết giữa một bên là Cộng đồng châu Âu và các quốc gia thành viên, và bên kia là Cộng hòa Chile, Điều 131.d.

[85] Hiệp định Khu vực Đầu tư ASEAN, sửa đổi theo Nghị định thư 2001, Điều 2.1; FTA Australia - Thái Lan, Điều 901(c).

[86] *Cẩm nang Cán cân thanh toán của IMF*, 1993, đoạn 86.

Mục 5. NGUỒN CỦA LUẬT ĐẦU TƯ QUỐC TẾ

Nguồn của Luật đầu tư quốc tế cũng tương tự nguồn của Luật quốc tế, nhìn chung được nêu tại Điều 38 của Quy chế ICJ. Điều 38 (1) quy định:

> Tòa, với chức năng giải quyết theo luật quốc tế các tranh chấp được trình lên Tòa, sẽ áp dụng: (a) Các điều ước quốc tế, chung hoặc riêng, đã thiết lập những nguyên tắc được các bên tranh chấp thừa nhận; (b) Các tập quán quốc tế là bằng chứng của thông lệ được chấp nhận chung là luật; (c) Các nguyên tắc chung của pháp luật được các quốc gia văn minh công nhận; (d) Phụ thuộc vào các quy định tại Điều 59, các quyết định tư pháp và học thuyết của các học giả có chuyên môn cao nhất của nhiều quốc gia, như là phương tiện bổ trợ cho sự quyết định của Tòa theo nguyên tắc pháp quyền.

Theo quy định trên, nguồn của Luật đầu tư quốc tế là các điều ước, luật tập quán quốc tế, các nguyên tắc chung của pháp luật, án lệ và học thuyết của các học giả. Theo thời gian, ICJ đã thực thi công lý với sự hỗ trợ của các luật lệ và nguyên tắc này.

1. Các hiệp định đầu tư quốc tế (IIA)

Các IIA quy định nhiều nghĩa vụ đối với các nước ký kết nhằm bảo đảm môi trường kinh doanh ổn định và ưu đãi cho các nhà đầu tư nước ngoài. Các nghĩa vụ này thuộc chế độ đối xử mà các nhà đầu tư nước ngoài và các khoản đầu tư của họ sẽ được các cơ quan thẩm quyền trong nước cho hưởng ở nước tiếp nhận đầu tư, cũng như bảo đảm rằng nhà đầu tư nước ngoài sẽ có thể thực hiện các hoạt động chủ chốt liên quan đến khoản đầu tư đó. 'Chế độ đối xử trao cho các nhà đầu tư là kết quả hội tụ mọi loại luật, quy định và thông lệ của các cơ quan công quyền được áp dụng cho hoặc ảnh hưởng đến các nhà đầu tư nước ngoài hoặc các khoản đầu tư của họ.

Mọi cơ quan công quyền đều chịu sự ràng buộc bởi các nghĩa vụ quốc tế, bao gồm chính phủ liên bang và chính phủ cấp dưới, nếu phù hợp, chính quyền địa phương, các cơ quan quản lý, và các đơn vị thực hiện các quyền hạn công cộng được giao. Các biện pháp ban hành bởi khu vực tư nhân, mặc dù rất hãn hữu, cũng có thể thuộc phạm vi của các IIA, khi các biện pháp đó cuối cùng có thể đóng góp cho một cơ quan nhà nước.

Nhóm các nghĩa vụ này khá nhất quán trong rất nhiều IIA. Các quy định chủ chốt trong IIA thường quy định các nghĩa vụ MFN, NT, FET, FPS, và nghĩa vụ cho phép nhà đầu tư chuyển tiền ra nước ngoài. Tuy nhiên, trong khi nội dung của các nguyên tắc này vẫn giữ nguyên qua nhiều IIA, thì độ bao phủ và phạm vi chính xác của mỗi nghĩa vụ lại phụ thuộc vào từ ngữ chính xác trong từng trường hợp.

Như đã trình bày ở trên, BIT là một hiệp định được ký giữa hai quốc gia, chứa đựng các cam kết có đi có lại để thúc đẩy và bảo hộ các khoản đầu tư tư nhân do công dân của các nước ký kết thực hiện tại lãnh thổ của nước kia.

Vandevelde đã giải thích rõ vấn đề này. *Một mặt*, ông giải thích rằng các nhà đàm phán tìm cách đưa vào BIT điều khoản về ISDS bằng trọng tài, vì các điều khoản này có thể giúp 'bảo đảm cho […] các nhà đầu tư một cơ chế trung lập để giải quyết các tranh chấp đầu tư, mà hoàn toàn được bảo vệ khỏi mối quan hệ chính trị giữa chính phủ của nhà đầu tư và chính phủ nước tiếp nhận đầu tư.'[87] *Mặt khác*, ông kết luận rằng: '[Đ]ồng thời, BIT cũng không loại trừ bất kỳ biện pháp khắc phục truyền thống nào', vì các nhà đầu tư vẫn có thể 'thực hiện việc khiếu kiện ra chính phủ của mình', và 'BIT cũng cho phép việc xét xử trọng tài cho tranh chấp giữa các chính phủ đối với các tranh chấp phát sinh từ việc giải thích hoặc áp dụng của hiệp định.'[88]

Các BIT này đưa ra các điều khoản và điều kiện theo đó công dân của một nước đầu tư vào một nước khác, bao gồm cả các quyền và bảo hộ. BIT quy định việc bảo hộ đối với việc quốc hữu hóa và tước quyền sở hữu của nhà đầu tư nước ngoài, và các hành động khác của một nước ký kết BIT mà có thể ảnh hưởng đến quyền sở hữu hoặc lợi ích kinh tế của công dân của nước ký kết kia.

[87] Kenneth J. Vandevelde, 'The Bilateral Investment Treaty Program of the United States', *21 Cornell Int'l L.J. 201*, 258 (1988).

[88] Kenneth J. Vandevelde, 'United States Investment Treaties: Policy and Practice', *163 (1992)* at 163.

Vì BIT là các hiệp định được thương lượng và ký kết giữa các nước ký kết, nên điều khoản của các hiệp định này luôn khác nhau. Tuy nhiên, chúng thường bao gồm các quyền và bảo hộ sau: MFN; NT; FET; bồi thường trong trường hợp tước quyền sở hữu.

Một trong những bảo hộ chính theo BIT là nó cho phép các nhà đầu tư nước ngoài được khởi kiện các hành vi vi phạm BIT tại cơ quan trọng tài thuộc ICSID thay vì các tòa án trong nước, để tránh yếu tố chính trị trong giải quyết tranh chấp.[89] Về khía cạnh này, theo IIA, nhà đầu tư nước ngoài (mà thường là một thực thể tư nhân nước ngoài) thực hiện quyền này bằng cách khiếu kiện.

Cùng với sự thay đổi của hệ thống thương mại đa phương trong phạm vi GATT sau Chiến tranh thế giới thứ hai, đã có một diễn tiến cực kỳ quan trọng khác về quan hệ kinh tế quốc tế mang tính hệ thống - đó là sự xuất hiện các khối thương mại khu vực và các hiệp định thương mại ưu đãi ('PTA'),[90] mà theo nhiều phương diện đã thay thế các hệ thống thương mại ưu đãi thực dân trước đây. Ước tính khoảng 95% khối lượng thương mại được thực hiện thông qua các hiệp định ưu đãi này. Quá trình này được khởi nguồn và tiên phong bởi việc thống nhất Tây Âu sau Chiến tranh thế giới thứ hai. Thông qua tự do thương mại và quản lý, các mục tiêu chính trị về hòa bình và an ninh cần thiết đã được xác lập và đa phần đạt được. Sự thành công này là nguồn cảm hứng cho các châu lục khác tiếp bước một cách phù hợp, mặc dù ở mức độ thấp hơn nhiều.[91]

Sau thất bại của Hội nghị Bộ trưởng lần thứ 4 của WTO tại Seattle năm 1999, số lượng các hiệp định thương mại khu vực ('RTA') đã tăng không ngừng.[92] PTA thực sự đạt đỉnh điểm phát triển vào thập niên 1990. Trước đó, không có hiệp định nào ký kết cho đến năm 1970 và gần 50 hiệp định vào năm 1990.[93] Điều này cho thấy rằng rào cản thương

[89] Ibrahim Shihata, 'Towards A Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA', *1 ICSID Rev.- Foreign Inv. L. J. 1*, 11-12 (1986); Sergio Puig, 'Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law', *44 Geo. J. of Int'l L . 531*, 550-52 (2013).

[90] Phần viết này sử dụng thuật ngữ 'Các hiệp định thương mại ưu đãi' thay vì các thuật ngữ 'Hiệp định thương mại khu vực' hay 'Hiệp định thương mại tự do' (hoặc thậm chí là các 'Hiệp định thương mại song phương và khu vực'). Xem Simon Lester & Bryan Mercurio eds., *Bilateral and Regional Trade Agreement: Comment and Analysis*, 4-5 2009.

[91] Để tìm hiểu tổng quan về các loại FTA khác nhau, xem Antoni Estevadeordal et al. eds., *Regional Rules in the Global Trading System*, 2009.

[92] UNCTAD (2011), *World Investment Report 2011- Non-Equity Modes of International Production and Development*, New York and Geneva (UNCTAD/WIR/2011), ngày 26/7/2011.

[93] Trong khi Hoa Kỳ bắt đầu đàm phán với các nhóm khu vực khác năm 2003, thì Cộng đồng châu Âu chấm dứt hoạt động này theo lời khuyên của Pascal Lamy. Trên thực tế, không hiệp

mại (cả thuế quan và phi thuế quan) đã giảm mạnh hơn trong các vòng đàm phán trước của GATT, theo đó triệt tiêu nhu cầu cần đến PTA của các quốc gia. Tuy nhiên, ngay khi cú huých ban đầu thông qua kênh đa phương này bão hòa, các quốc gia đã phải dùng các nguồn khác để mở rộng thương mại của mình.[94] Hợp tác khu vực giữa các nước thúc đẩy tiềm năng thương mại hàng hóa hoặc dịch vụ giữa các quốc gia, cũng như giúp họ có thể áp dụng các học thuyết như 'tiết kiệm chi phí sản xuất dựa trên phát triển quy mô sản xuất' ('economy of scale') và 'chuyên môn hóa' sâu sắc hơn trong sản xuất bằng cách vượt qua các giới hạn của thị trường trong nước.[95] Những hiệp định song phương này, đúng như theo định nghĩa, là nhằm tự do hóa hơn nữa thương mại quốc tế trên cơ sở các hiệp định của WTO như là các yêu cầu tối thiểu.[96] Việc xoáy sâu vào phạm vi RTA, như đã thấy trong thập kỷ qua, gần đây được thể hiện qua việc người ta ngày càng viện dẫn nhiều đến khái niệm được gọi là các hiệp định 'WTO +'. Đây là cách diễn nôm về hiệp định thương mại ngoài khuôn khổ WTO để hỗ trợ cho các mục đích hay mục tiêu của WTO; hoặc, giải thích một cách xa hơn, đối với một hiệp định thương mại ngoài khuôn khổ WTO nhằm thúc đẩy sự quan tâm đến thương mại của các quốc gia liên quan. Về khía cạnh này, từ này trái ngược với các hiệp định 'WTO –'. Một hiệp định 'WTO +' có thể được hiểu là một FTA có điều khoản quy định nghĩa vụ vượt xa các nghĩa vụ quy định trong WTO. Dựa trên cơ sở các hiệp định của WTO, có thể thấy rằng phạm vi của các FTA rất khác nhau, nhất là khi liên quan đến 'WTO +' hoặc các nghĩa vụ WTO bổ sung. Một cách tương ứng, các điều khoản này khắc sâu thêm mức độ cam kết thể hiện trong các hiệp định của WTO (thí dụ: bằng cách thắt chặt hơn bảo hộ IPR), hoặc đơn giản là không được quy định trong các văn kiện WTO (như các vấn đề về bảo vệ môi trường).[97] Bên cạnh bản chất ưu đãi của FTA trong lĩnh vực thuế quan (so với MFN, quyền sở hữu trí tuệ,[98] và dịch vụ (như so với các đề xuất được đưa ra trong khuôn khổ WTO bởi các quốc gia ký kết để tự do hóa thị trường dịch vụ), loại hiệp định này bao trùm các lĩnh vực mà không được, hoặc chỉ được một phần, điều chỉnh bởi các hiệp định của WTO. *Thí dụ* như việc sử dụng thuật ngữ, theo các FTA, trong Hiệp định đa phương về thị trường công (APM) (chủ yếu liên quan đến các nguyên tắc NT và không phân biệt đối xử); hoặc thậm chí đối xử theo các hiệp định trên đối với 'các vấn đề mới trong quản lý' chưa được điều chỉnh ở cấp độ đa phương như đầu tư, bảo hộ chỉ dẫn địa lý và cạnh tranh.

Hoa Kỳ và EU đàm phán từ năm 2013 về Hiệp định đối tác xuyên Đại Tây Dương. Về phần mình, vào năm 2013, Canada và EU đã hoàn tất một thỏa thuận dự kiến về đàm phán Hiệp định kinh tế và thương mại toàn diện. Nếu những hiệp định này được ký và phê chuẩn, thì các hiệp định này sẽ giúp củng cố tính ưu việt tiêu chuẩn của tự do thương mại trong các quốc gia ký kết. Bên cạnh thúc đẩy mạnh mẽ đầu tư qua biên giới, các hiệp định này sẽ có các điều khoản theo đó cung cấp bảo hộ pháp lý quan trọng cho các nhà đầu tư nước ngoài. Vào thời kỳ toàn cầu hóa kinh tế, vấn đề đối xử với các nhà đầu tư xuyên quốc gia giúp chúng ta hiểu về cán cân quyền lực và chân giá trị của pháp luật điều chỉnh thương mại quốc tế và các dòng tài chính toàn cầu. Do đó, cũng có thể hữu ích khi xem xét trường hợp của Bắc Mỹ, khi Chương 11 của NAFTA quy định về bảo hộ các nhà đầu tư, đã có và được thực hiện trong hai thập kỷ qua.[99] Chương 11 của Hiệp định này đã làm phát sinh một số vụ việc gây căng thẳng giữa các lợi ích tư nhân của các nhà đầu tư và lợi ích quốc gia hay lợi ích công cộng nói chung.

Chương 11 của NAFTA quy định một cơ chế giải quyết tranh chấp cho một bên là một nước ký kết và bên kia là nhà đầu tư từ một nước ký kết khác. Cơ chế này trao nhiều quyền hơn cho các nhà đầu tư, bao gồm theo chế độ NT (Điều 1102), chế độ MFN (Điều 1103), và cấm các yêu cầu về kết quả hoạt động (Điều 1106), quyền hưởng chuẩn mực đối xử

định thuộc loại này được đàm phán sau năm 1999 để gửi đi một thông điệp rõ ràng rằng: chỉ có mô hình đa phương mới được xem xét. Xem Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary* 330-33 (2012). Xem cả Sophie Meunier, *Trading Voices: The European Union in International Commercial Negotiations*, 2005, đoạn 240.

94 Bhagwati, Jagdish, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, Oxford: Tạp chí Đại học Oxford, 2008; Bryan Mercurio (2004), 'Should Australia Continue Negotiating Bilateral Free Trade Agreements? A Practical Analysis' *27 Tập san Luật học Đại học New South Wales* 667.

95 Chris Brummer, 'Regional Integration and Incomplete Club Goods: A Trade Perspective', *8 Chi. J. Int'l L.* 535, 535 (2008) ('bằng cách đưa ra các địa điểm nhỏ hơn và dễ tiếp cận hơn, các tổ chức khu vực thường dễ đạt được nhất trí hơn so với mô hình đa phương như Tổ chức thương mại thế giới').

96 John Braithwaite, 'Methods of Power for Development: Weapons of the Weak, Weapons of the Strong', *26 MICH. J. Int'l L. 297*, 313 (2004) (không quy định nào trong hiệp định thương mại song phương 'có thể khóa các nước vào kết quả đa phương có lợi cho Hoa Kỳ cho đến khi đã đạt được mục đích là khi Hoa Kỳ có thể hoàn thành xuất sắc chương trình nghị sự đa phương lần nữa').

97 Henrik Horn et al., 'EU and US Preferential Trade Agreements: Deepening or Widening of WTO Commitments', in *Preferential Trade Agreements: A Law and Economics Analysis* 150, 156 (Kyle W. Bagwell & Petros C. Mavroidis eds., 2011).

98 Xem Henning Grosse Ruse-Khan, 'The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?', *18J. Intell. Prop. L.* 325, 327 (2011) (Mô tả các tiêu chuẩn 'TRIPS +' là những tiêu chuẩn thường được nêu trong các FTA theo đó mở rộng bảo hộ IPR cao hơn mức quy định trong TRIPS).

99 HQ Zeng, 'Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice', đoạn 299-332.

tối thiểu (Điều 1105), cũng như bảo hộ chống lại hành vi tước quyền sở hữu (Điều 1110). Hai quyền cuối cùng này rất cần được nghiên cứu kỹ.

Mối quan hệ căng thẳng giữa bảo hộ pháp lý dành cho các nhà đầu tư và quyền quản lý của Nhà nước có thể thấy rõ trong NAFTA với sự tham gia của Canada, Hoa Kỳ và Mexico kể từ năm 1992. Chương 11 của Hiệp định quy định cơ chế bảo đảm bảo hộ đầu tư nước ngoài với phạm vi đáng kể. Tuy nhiên, xin lưu ý rằng điều đó không phải luôn xảy ra: FTA áp dụng từ năm 1988, mà đầu tiên chỉ bao gồm Hoa Kỳ và Canada, không có cơ chế tương tự. Chỉ đến khi Mexico tham gia vào FTA thì Hoa Kỳ mới yêu cầu đưa vấn đề này vào nội dung đàm phán NAFTA.

Nhằm bảo vệ lợi ích của các công ty đa quốc gia của mình, Hoa Kỳ cho rằng 'hệ thống pháp luật Mexico và các quốc gia đang phát triển chưa hoàn chỉnh, không thể dự đoán và không minh bạch so với hệ thống pháp luật của các quốc gia phát triển'. Theo đó, Chương 11 nhằm bảo vệ quyền kinh tế của các nhà đầu tư nước ngoài bằng cách quy định một môi trường pháp lý ổn định, nhằm thúc đẩy đầu tư. Đây có thể là một quan ngại hợp lý. Tuy nhiên, một điều quan trọng là lưu ý rằng Chương 11 chỉ áp dụng tại Canada, Hoa Kỳ và Mexico. Về khía cạnh này, NAFTA là hiệp định đi đầu: đây thực sự là một văn kiện pháp lý quốc tế đầu tiên bảo hộ cho các nhà đầu tư nước ngoài tại các quốc gia phát triển, một cơ chế mà trước đây chỉ dành riêng cho các quốc gia đang phát triển, bao gồm cả thông qua việc sử dụng ICSID, được thành lập năm 1965 bởi Công ước Washington và là một cơ quan thuộc Nhóm Ngân hàng thế giới.

Có thể có rất nhiều điều để nói về sự phát triển của các FTA và các BIT trong nhiều năm qua, một xu hướng thể hiện vai trò đứng đầu của thương mại và nền kinh tế, được coi là các văn kiện cần thiết về chính sách ngoại giao của các nước phương Tây.

2. Luật tập quán quốc tế

Giống như nhiều khái niệm trong luật quốc tế, rất tiếc là chưa có bất kỳ khái niệm toàn diện nào về luật tập quán quốc tế mà được tất cả nhất trí. Khái niệm toàn cầu gần nhất có được là 'các tập quán quốc tế là bằng chứng về thực tiễn chung về pháp luật" *(international custom, as evidence of general practice of law*) tại Điều 38 của Quy chế ICJ và được sử dụng bởi hầu hết quốc gia trên thế giới là thành viên của Liên hợp quốc.

A. *ICJ và luật tập quán quốc tế*

Mặc dù không tạo ra những án lệ có giá trị ràng buộc pháp lý, ICJ là 'cơ quan tư pháp cao nhất' của Liên hợp quốc, và các quyết định của ICJ thường được các tòa quốc tế khác áp dụng. Do vậy, các quyết định của ICJ có ảnh hưởng lớn đến các học giả và giới luật gia quốc tế.

Trong Vụ *Thềm lục địa Biển Bắc*, ICJ giải thích rằng thực tế có hai loại luật tập quán quốc tế.[100]

- *Loại thứ nhất*, thường bị bỏ sót, bao gồm các quy tắc pháp luật mà về logic là cần thiết và tự chứng minh là hệ quả của các nguyên tắc cơ bản của pháp luật quốc tế. *Thí dụ*: trên cơ sở nguyên tắc cơ bản theo đó mỗi quốc gia sẽ có chủ quyền riêng, thì một cách logic, điều cần thiết là chủ quyền của mỗi quốc gia sẽ phải được thực hiện trong toàn bộ phần lãnh thổ nằm phía trong đường biên giới của quốc gia đó.

- *Loại thứ hai*, là trọng tâm của điều này, bao gồm các quy tắc được gọi là *opinio juris* ('ý kiến pháp lý'). Để được coi là *opinio juris*, một quy tắc phải thỏa mãn hai tiêu chí: *thứ nhất*, nó phải là một thông lệ ứng xử chung của các quốc gia đã được hình thành và không bị tranh cãi (về tính thống nhất chung - xem Vụ *Nicaragua v. USA*)[101]; *thứ hai*, các quốc gia thực hiện đúng quy tắc này bởi họ cho rằng mình chịu sự ràng buộc của quy tắc đó (nghĩa là không chỉ vì truyền thống xưa nay đều làm như vậy, không phải vì xã giao và cũng không phải vì thông lệ).

ICJ cho rằng bằng chứng về việc thỏa mãn các tiêu chí này chủ yếu thể hiện bằng cách thức các quốc gia đó hành động như thế nào (*Libya/Malta*),[102] nhưng cũng có thể là từ các hiệp định họ thông qua và các hành động chính phủ khác (với tần suất ít hơn).[103] Một số quy tắc *opinio juris* có tính suy đoán và không có gì ngạc nhiên. *Thí dụ*: các hành động tự vệ đất nước phải được coi là cần thiết và phù hợp (*Nicaragua v. USA*).[104] Các quy tắc khác mang tính đặc thù địa lý hơn, *thí dụ*: quyền của

[100] Vụ *Thềm lục địa Biển Bắc*, Quyết định xét xử, Báo cáo ICJ năm 1969, tr. 3 đoạn 39, 77.

[101] *Các hành động quân sự và bán quân sự chống lại Nicaragua (Nicaragua v. USA)*, Quyết định xét xử về nội dung, Báo cáo ICJ năm 1986, tr. 14 đoạn 186.

[102] *Quyết định xét xử về thềm lục địa (Libyan Arab Jamahiriya/Malta*), Báo cáo ICJ năm 1985, tr. 13, đoạn 27.

[103] Wood, M. 2014, *Second Report on Identification of Customary International Law*, International Law Commission, Phần 66, Hồ sơ chính thức của Đại hội đồng (A/CN.4/672) đoạn 41.

[104] *Các hành động quân sự và bán quân sự chống lại Nicaragua (Nicaragua v. USA)*, Quyết định xét xử về nội dung, Báo cáo ICJ năm 1986, tr. 14, đoạn 176, 194, 237.

người cư trú tại Costa Rica được duy trì đánh bắt tại bờ Sông San Juan của họ là đường biên giới với Nicaragua (*Costa Rica v. Nicaragua*).[105]

B. *Luật tập quán quốc tế và đầu tư nước ngoài*

Hơn 100 năm nay, cộng đồng quốc tế không thể nhất trí về luật nào đã điều chỉnh đầu tư nước ngoài và nội dung của luật đó là gì. Các nước xuất khẩu vốn cho rằng luật tập quán quốc tế (CIL) là luật áp dụng và CIL đã đưa ra các khái niệm như:

- Tước quyền sở hữu chỉ được tiến hành, nếu trên cơ sở lợi ích công cộng, sau đó nhanh chóng bồi thường đầy đủ và hiệu quả (Công thức Hull, do ông Cordell Hull, Ngoại trưởng Hoa Kỳ, sáng tạo nên)
- Tiêu chuẩn đối xử tối thiểu cho đầu tư nước ngoài được quốc tế công nhận.

Các nước nhập khẩu vốn không đồng ý với những khái niệm này và cho rằng:

- Pháp luật về đầu tư nước ngoài chỉ đơn thuần là pháp luật của quốc gia tiếp nhận đầu tư.
- Nhà đầu tư nước ngoài cần được đối xử giống như nhà đầu tư trong nước, không hơn không kém. Nếu pháp luật trong nước cho phép tước quyền sở hữu mà không cần bồi thường, thì nhà đầu tư nước ngoài phải chấp nhận cơ chế đó tại quốc gia đó.
- Do vậy, không có mối quan hệ giữa CIL và đầu tư quốc tế.

Tình trạng hai quan điểm đối ngược này lên đỉnh điểm vào thập niên 1960 và 1970, với quan điểm của các nước nhập khẩu vốn được ủng hộ, bắt đầu với:

- Nghị quyết Đại hội đồng Liên hợp quốc số 1803 (XVII) về chủ quyền vĩnh viễn đối với nguồn tài nguyên thiên nhiên năm 1962;
- Nghị quyết Đại hội đồng LHQ số 3201 (S-VI) - Bản tuyên ngôn thiết lập trật tự kinh tế quốc tế mới năm 1974; và
- Nghị quyết Đại hội đồng LHQ số 3281(xxix) cũng trong năm 1974: Điều lệ về quyền và nghĩa vụ kinh tế của các quốc gia. Văn kiện này đã loại bỏ luật quốc tế và quy định rằng chỉ luật trong nước được áp dụng.

Các nghị quyết này đã bị các nước xuất khẩu vốn bỏ phiếu chống, nhưng lại được thông qua bởi đa số các thành viên của Liên hợp quốc, theo đó thể hiện sự phản đối của các nước này đối với cái mà các nước xuất khẩu vốn cho là các quy tắc điều chỉnh đầu tư nước ngoài, đặc biệt là liên quan đến việc tước quyền sở hữu.

Tuy nhiên, không lâu sau khi Trật tự kinh tế mới và Điều lệ được thông qua vào năm 1974, thì tình hình đã thay đổi đột ngột, đến nỗi mà ngày nay chúng ta hiếm khi thấy bất kỳ viện dẫn nào đến các văn kiện này. Lý do quan trọng là các nước nhập khẩu vốn nhận thấy rằng nếu họ vẫn cứ duy trì quan niệm đó trên thị trường quốc tế, thì họ sẽ phải gánh chịu sự suy giảm đáng kể đầu tư nước ngoài tại nước mình, khiến cho các quốc gia này sẽ ngày càng ít phát triển hơn.

Mâu thuẫn này đã dẫn đến 'làn sóng Hiệp định đầu tư song phương'. Hoa Kỳ và các nước châu Âu ở phương Tây tìm kiếm bảo hộ cho các công dân của mình khi thực hiện đầu tư tại các LDC và DC vì đây là những quốc gia gây ra hầu hết các vấn đề cho các nhà đầu tư của họ trong nhiều thập kỷ qua, bởi các quốc gia này tuyên bố rằng không có nghĩa vụ luật quốc tế liên quan đến bảo hộ đầu tư nước ngoài.

Mặc dù các quốc gia DC tiếp tục duy trì thái độ phản đối khái niệm luật đầu tư quốc tế do các quốc gia phát triển đưa ra tại các diễn đàn thế giới, nhưng họ vẫn tiếp tục đàm phán các BIT với các nước xuất khẩu vốn, mà trong đó không thể thiếu vấn đề bảo hộ đầu tư nước ngoài dựa trên quan điểm của các nước xuất khẩu vốn nêu trên. Ngày nay, có khoảng trên 3.000 IIA có giá trị ràng buộc đang tồn tại, đem lại sự bảo hộ cho các nhà đầu tư nước ngoài.

Một điều rõ ràng là luật tập quán quốc tế là một vấn đề hóc búa cho quy tắc pháp quyền. Một số cơ chế pháp luật cho rằng có khả năng 'phát hiện' và áp dụng luật bất thành văn vào mọi quốc gia trên hành tinh này, bất kể mức độ tùy tiện không rõ ràng và những người tiếp nhận không thể đoán trước được. Một số ít hơn vẫn cho rằng không thể áp dụng luật đối với các quốc gia mà không có sự đồng ý rõ ràng và vi phạm các điều ước quốc tế. Chắc chắn rằng luật tập quán quốc tế có nằm trong tay của cơ quan xét xử được công nhận trên toàn cầu, mà cơ quan này được quy định có nghĩa vụ rõ ràng trong việc áp dụng luật tập

[105] *Tranh chấp về quyền hàng hải và quyền liên quan (Costa Rica v. Nicaragua)*, Quyết định xét xử, Báo cáo ICJ năm 2009, tr. 213. đoạn 144.

quán quốc tế này. Tuy nhiên, trong thực tế, các luật sư đầu tư ít khuyến nghị sử dụng nguồn luật này.

3. Luật thương mại quốc tế và đầu tư

Mặc dù tầm quan trọng của đầu tư quốc tế đã tăng không ngừng, nhưng rất nhiều nỗ lực để ký kết một hiệp định đầu tư đa phương đã thất bại tại Liên hợp quốc và OECD. Do đó, người ta đã chuyển những nỗ lực ký kết một hiệp định đa phương như vậy sang cho WTO. Trong ba nỗ lực trước đó (Tổ chức thương mại quốc tế - 1948-1950; trong khuôn khổ UN, 1972-1992; và Hiệp định đầu tư đa phương, MAI, tại OECD - 1995-1997), các nhà hoạch định chính sách đã không thể nhất trí với nhau, ngay cả về mục đích đàm phán. Trong mỗi trường hợp, các quốc gia xuất khẩu vốn mong muốn áp dụng các quy tắc điều chỉnh việc gia nhập và các điều kiện hậu gia nhập. Ngược lại, các quốc gia nhập khẩu vốn lại muốn các nghĩa vụ ràng buộc đối với nhà đầu tư nước ngoài cũng như các quy tắc đầu tư có thể giúp các quốc gia này đáp ứng được các mục tiêu phát triển của mình. Do thương mại và đầu tư được kết nối, nên hệ thống các quy tắc điều chỉnh thương mại cũng sẽ điều chỉnh cả đầu tư.

A. *WTO và đầu tư*

Tại Hội nghị Bộ trưởng WTO tại Singapore năm 1996, đã thống nhất thành lập một ủy ban (Ban công tác về thương mại và đầu tư) để phân tích vấn đề về đầu tư. Sau đó, Ban công tác đã được Vòng đàm phán Doha năm 2001 giao cho nhiệm vụ mới. Ban được yêu cầu làm rõ 7 vấn đề cụ thể và tổ chức đàm phán 'trên cơ sở quyết định sẽ được đưa ra qua sự nhất trí rõ ràng'.[106] Vì các ý kiến đưa ra có khác biệt quá lớn nên đã khiến cho các cuộc đàm phán trở nên bất khả thi và một phần dẫn đến thất bại của Hội nghị Bộ trưởng tại Cancun. Mùa hè năm 2004, các quốc gia thành viên WTO thừa nhận rằng 'sẽ không tiến hành bất kỳ công việc nào liên quan đến việc đàm phán [về đầu tư này] trong khuôn khổ WTO tại Vòng đàm phán Doha'.[107]

WTO và tổ chức tiền thân - GATT, chưa trực tiếp giải quyết vấn đề có phạm vi rộng là các quy tắc đầu tư nước ngoài. Thay vào đó, GATT và WTO đã giải quyết một nhóm vấn đề cụ thể ở phạm vi hẹp, theo đó các quốc gia tự xây dựng chính sách của mình, hoặc thông qua các BIT.

WTO thực hiện hai hiệp định lớn theo đó giải quyết trực tiếp vấn đề đầu tư: GATS và TRIMs (Hiệp định về các biện pháp đầu tư liên quan đến thương mại). Trong số các vấn đề đã giải quyết, GATT và WTO đã giải quyết các khía cạnh cụ thể của mối quan hệ giữa thương mại và đầu tư thông qua GATS, trong đó bao gồm việc các công ty nước ngoài cung cấp dịch vụ, và thông qua Hiệp định TRIMs. Trong trường hợp thương mại dịch vụ có thể đòi hỏi nhà cung cấp dịch vụ nước ngoài phải có hiện diện thương mại trong lãnh thổ của một quốc gia ký kết khác, thì nhà cung cấp có thể hưởng một số quyền đầu tư theo quy định của GATS.

Bên cạnh đó, theo các quy tắc của WTO, các biện pháp đầu tư, *thí dụ*: các yêu cầu hàm lượng nội địa hay cân bằng cán cân thương mại, có thể bị cấm trong chừng mực các yêu cầu đó ảnh hưởng đến thương mại và vi phạm các quy tắc của GATT về NT và loại bỏ hạn ngạch. Ba hiệp định sau đó - TRIPS (Hiệp định về các khía cạnh liên quan tới thương mại của quyền sở hữu trí tuệ), GPA (Hiệp định về mua sắm chính phủ), ASCM (Hiệp định về trợ cấp và các biện pháp đối kháng), chỉ có tác động gián tiếp đối với đầu tư.

GPA quy định về mua sắm và dịch vụ công vì GATS loại trừ dịch vụ mua sắm công. Các yêu cầu GPA quy định về đầu tư, nếu có, bao gồm việc mua sắm hàng hóa hay dịch vụ nước ngoài cũng như hàng hóa hay dịch vụ do các nhà cung cấp nước ngoài có trụ sở trong nước.

ASCM quy định về trợ cấp. Vì Hiệp định này đã đưa vào khái niệm trợ cấp rất nhiều biện pháp khuyến khích đầu tư được sử dụng phổ biến, nên Hiệp định không đề cập đến chủ đề này về khía cạnh phân biệt đối xử giữa đầu tư nước ngoài và đầu tư trong nước. Vì lý do này, Hiệp định này quy định về đầu tư một cách trực tiếp, nhưng nó không thể hiện được sự thiếu tương đồng quan trọng giữa đầu tư nước ngoài và đầu tư trong nước.

B. *Hiệp định chung về thương mại dịch vụ (GATS)*

GATS đa phần đề cập đến các vấn đề đầu tư trong tất cả các hiệp định của WTO hiện hành. Các phương thức cung cấp của GATS gồm: cung cấp qua biên giới, tiêu thụ ở nước ngoài, hiện diện thương mại và hiện diện thể nhân.

[106] Gavin Boyd and Alan Rugman, *The World Trade Organization in the New Global Economy - Trade and Investment Issues in the Millennium Round* (London: Edward Elgar, 2002).

[107] Christian Deblock, *Nouveau régionalisme ou régionalisme à l'Américaine? Le cas de l'investissement,* Cahiers, Viện nghiên cứu quốc tế và toàn cầu hoá, Viện nghiên cứu quốc tế Montréal (2005), 16-18.

Mặc dù GATS không chính thức quy định về đầu tư, nhưng GATS có quy định về FDI thông qua phương thức cung cấp là hiện diện thương mại. Việc thành lập hiện diện thương mại liên quan đáng kể và trực tiếp tới đầu tư. Các nghĩa vụ dịch vụ có quy định 'hiện diện thương mại' của nhà cung cấp dịch vụ nước ngoài có thể được ngầm hiểu là các nhà cung cấp cần phải có khả năng thực hiện đầu tư như cần thiết để hưởng các lợi ích của hiện diện thương mại. Do vậy, nếu chúng ta tập trung vào nội dung và mục đích của phương thức cung cấp này, thì cho mọi mục đích thực tế, phương thức cung cấp theo cách hiện diện thương mại chính là một thỏa thuận đa phương về đầu tư.

Trong trường hợp này, một trong những nguyên tắc cơ bản của chế độ đối xử trong đầu tư - MFN - đã trở thành một nghĩa vụ chung để điều chỉnh về đầu tư trong Hiệp định. Tuy nhiên, các nghĩa vụ về tiếp cận thị trường và NT trong đầu tư chỉ áp dụng đối với những lĩnh vực và phương thức cung cấp được quy định trong các biểu cam kết do các quốc gia ký kết trình lên, như vậy làm giới hạn phạm vi tự do hóa đầu tư trong lãnh thổ của mỗi quốc gia thành viên WTO.

Hiện diện thương mại có thể được gắn liền với hai tiêu chí khác của GATS gồm tiếp cận thị trường và NT, ở chỗ các chính phủ có thể giới hạn tiếp cận thị trường bằng cách hạn chế các tổng số giấy phép ngân hàng, bất kể ngân hàng đó thuộc sở hữu của người không cư trú hay người cư trú. Hoặc số lượng ngân hàng nước ngoài được phép mở công ty con cũng có thể bị giới hạn, do đó ảnh hưởng đến NT. Tiếp theo, ba phương thức cung cấp dịch vụ khác (cung cấp qua biên giới, tiêu thụ ở nước ngoài và di chuyển của thể nhân) ảnh hưởng đến hoạt động ngân hàng, *thí dụ*: liệu ngân hàng nước ngoài được phép hay không được phép cung cấp dịch vụ bằng đồng nội tệ; hoặc các dịch vụ mà họ bị cấm thực hiện, trong khi ngân hàng trong nước không bị cấm.

Các điều kiện và giới hạn cho cả tiếp cận thị trường và NT có thể được đưa vào các biểu cam kết, và cũng cụ thể cho từng ngành và phương thức cung cấp. Đây được gọi là phương thức 'danh mục chọn-cho' ('positive list') để liệt kê các ngành cụ thể và phương thức cung cấp cụ thể sẽ được coi là đầu tư theo hiệp định, chứ không giống như phương thức truyền thống của WTO là dựa vào các nguyên tắc chung. GATS đa phần áp dụng phương thức tự do hóa có chọn lọc cho việc tham gia thị trường của các nhà cung cấp dịch vụ nước ngoài, tức là các nhà đầu tư nước ngoài trong lĩnh vực dịch vụ. GATS rất chú trọng hướng đến tự do hóa và mở cửa các nền kinh tế của các quốc gia để tiếp nhận đầu tư.[108] Các IIA ở mức độ cao nhất mang tính bảo hộ, nghĩa là đại đa số các cam kết là nhằm bảo vệ các khoản đầu tư được quy định, trong khi rất ít IIA có cam kết về tự do hóa. Tuy nhiên, GATS cũng chứa đựng những yếu tố của NT và MFN và dựa vào việc sử dụng cả danh mục chọn-cho các cam kết (positive list) và danh mục chọn-bỏ về các ngoại lệ (negative list) cho các mục đích khác nhau.

Hiện diện thương mại như là một thỏa thuận nhằm mở cửa các thị trường để tiếp nhận đầu tư nước ngoài.

Như đã trình bày ở trên, GATS đa phần quy định về các vấn đề đầu tư liên quan đến mọi nghĩa vụ WTO hiện hành. Những quy định ngầm về đầu tư trong GATS phần lớn là từ khái niệm chủ chốt tại Điều I.2, theo đó xác định phương thức cung cấp dịch vụ. Một số quy định hiện diện đáng kể (được gọi là 'hiện diện thương mại' trong văn bản pháp lý) tại quốc gia nơi dịch vụ được cung cấp, và quy định các bảo hộ cơ bản của GATS đối với các khoản đầu tư mà là một phần không thể tách rời của sự hiện diện này. Việc thực hiện thương mại dịch vụ thông qua 'hiện diện thương mại', mà thực chất là một hoạt động đầu tư, được gọi là 'phương thức 3'.

Khái niệm 'hiện diện thương mại' nói đến trường hợp nhà cung cấp dịch vụ thiết lập hoặc có hiện diện cơ sở thương mại tại một quốc gia khác để cung cấp dịch vụ. Bản thân dịch vụ được cung cấp bằng cách nhà cung cấp dịch vụ của bên ký kết hiệp định khác thiết lập kinh doanh hoặc một cơ sở chuyên nghiệp, *thí dụ*: một công ty con hoặc chi nhánh hoặc văn phòng đại diện, tại lãnh thổ của một bên ký kết. Thông qua việc quy định có hiện diện thương mại, GATS thực tế là một hiệp định nhằm mục đích mở cửa các thị trường cho đầu tư nước ngoài, và có thể áp dụng như vậy cho nhiều lĩnh vực hoạt động: giáo dục, ngân hàng, bảo hiểm, viễn thông, v.v. Ở một mức độ thấp hơn, phương thức 4 cũng đề cập đến các vấn đề đầu tư, vì nó quy định về việc nhập cảnh tạm thời của cán bộ quản lý và các cán bộ chủ chốt khác của công ty.

Chỉ cần xem biểu cam kết của quốc gia đó và danh mục miễn trừ áp dụng MFN (nếu liên quan), có thể thấy các nguyên tắc cơ bản của GATS (tiếp cận thị trường, NT và MFN) có thể áp dụng trong lãnh thổ nước đó đối với ngành dịch vụ nào và theo điều kiện nào. Cam kết cụ thể trong biểu cam kết dịch vụ là một cam kết nhằm cho phép tiếp

[108] Pierre Sauvé, "Đầu tư và Chương trình nghị sự phát triển tại Doha: các vấn đề", trong *Chương trình nghị sự phát triển tại Doha, từ góc nhìn của Khu vực ESCAP*, (New York: Liên hợp quốc, 2003) mục 83.

cận thị trường và NT cho hoạt động dịch vụ liên quan, dựa trên các điều khoản và điều kiện được nêu trong biểu cam kết đó.

Các cam kết được thực hiện trong lĩnh vực 'hiện diện thương mại' có ý nghĩa quan trọng, vì cùng với nguyên tắc bắt buộc về nghĩa vụ MFN, các bên ký kết GATS cam kết đối xử với dịch vụ và nhà cung cấp dịch vụ từ một bên ký kết hiệp định một cách không ít ưu đãi hơn so với dịch vụ và nhà cung cấp dịch vụ tương tự từ bất kỳ quốc gia nào khác như là các biện pháp ảnh hưởng đến thương mại dịch vụ. Thuật ngữ MFN trong GATS giống như trong NAFTA và các BIT của Hoa Kỳ, trên cơ sở sử dụng danh mục chọn-bỏ (negative list) khi quy định rằng: đối với bất kỳ biện pháp nào theo Hiệp định này, mỗi bên ký kết Hiệp định sẽ ngay lập tức và vô điều kiện trao cho các dịch vụ và các nhà cung cấp dịch vụ của bất kỳ bên ký kết hiệp định khác chế độ đối xử không kém ưu đãi hơn so với chế độ đối xử mà nước đó áp dụng đối với dịch vụ và các nhà cung cấp dịch vụ tương tự của bất kỳ nước nào khác. Tuy nhiên, NT không tự động được trao chung cho tất cả các đối tác thương mại. Tương tự, MFN cũng chỉ áp dụng đối với các ngành có trong biểu cam kết, khi các bên đồng ý trao NT trong các cam kết tiếp cận thị trường cụ thể. GATS cũng quy định rằng bên ký kết hiệp định có thể duy trì một biện pháp không giống đối xử MFN, với điều kiện là biện pháp đó cũng được nêu trong Phụ lục về Điều II và đáp ứng các điều kiện của Phụ lục này.

GATS không quy định trực tiếp các điều kiện hoạt động nào. Không có gì đáng ngạc nhiên, vì thường là các quy định của BIT có tính pháp lý không đáng kể, nghĩa là nó không trực tiếp áp đặt các nghĩa vụ lên các nhà đầu tư nước ngoài trong IIA, mà thay vào đó, các nước tiếp nhận đầu tư tiếp tục quản lý đầu tư nước ngoài thông qua hệ thống pháp luật trong nước. Tuy nhiên, có một số nghĩa vụ chung trong khuôn khổ GATS mà chắc chắn sẽ tác động đến các điều kiện hoạt động của khoản đầu tư. Các nghĩa vụ như vậy bao gồm: các quy định trong nước, công nhận văn bằng, độc quyền và các nhà cung cấp dịch vụ độc quyền, và nghĩa vụ thực hiện hoạt động kinh doanh.

Pháp luật trong nước ảnh hưởng đến hoạt động của khoản đầu tư chủ yếu dưới hình thức quy trình cấp phép, các yêu cầu phải đáp ứng, các tiêu chuẩn kỹ thuật và các yêu cầu cấp phép, trong trường hợp các điều kiện và thủ tục đó được yêu cầu cho việc cung cấp dịch vụ.

Nghĩa vụ công nhận tác động đến đầu tư trong lĩnh vực cung cấp dịch vụ, trong đó các nhà cung cấp dịch vụ cần phải đáp ứng các điều kiện hoặc tiêu chí cho việc cấp phép, phê duyệt hoặc chứng nhận cho

các dịch vụ của họ, hoặc họ phải đáp ứng yêu cầu về nền tảng giáo dục hoặc kinh nghiệm đặc biệt.

Nghĩa vụ về độc quyền và các nhà cung cấp dịch vụ độc quyền trong Hiệp định được quy định là mỗi bên ký kết hiệp định sẽ bảo đảm rằng nhà cung cấp độc quyền một dịch vụ trong lãnh thổ đó không hành động theo cách thức trái với nguyên tắc MFN. Nếu một nhà cung cấp đáp ứng điều kiện về độc quyền và nhà cung cấp dịch vụ độc quyền, thì Hiệp định sẽ chắc chắn tác động đến hoạt động của khoản đầu tư đó, để không cho nhà cung cấp đó lạm dụng vị thế độc quyền này.

Về nghĩa vụ tiến hành kinh doanh, Hiệp định kêu gọi các bên ký kết hiệp định loại bỏ một số hoạt động kinh doanh của nhà cung cấp dịch vụ mà có thể dẫn đến hạn chế cạnh tranh, do đó hạn chế thương mại dịch vụ.

Trong trường hợp Hiệp định TRIMs, GATS thúc đẩy minh bạch hóa môi trường đầu tư. Đây là một điểm thú vị của WTO vì hầu hết các BIT thường chỉ có một chút ít minh bạch. Các BIT chỉ đóng góp vào minh bạch hóa từ trước tới nay ở góc độ các quy định của chính các hiệp định đó là minh bạch, chứ không yêu cầu các nước ký kết phải ban hành pháp luật trong nước minh bạch. GATS tuyên bố mỗi bên ký kết hiệp định sẽ nhanh chóng công bố mọi biện pháp áp dụng chung,[109] mà ảnh hưởng đến hoặc thuộc về lĩnh vực thực hiện thương mại dịch vụ. Trong trường hợp việc công bố không khả thi, Hiệp định quy định rằng nội dung thông tin đó sẽ phải được công bố công khai bằng cách khác.

Mở cửa một nền kinh tế cho đầu tư nước ngoài thông qua các cam kết theo phương thức 3

Theo GATS, mọi biểu cam kết đều có hai phần.[110] *Thứ nhất*, các cam kết 'chung' quy định các giới hạn áp dụng cho mọi ngành trong phụ lục đó; thường quy định cho phương thức cung cấp cụ thể, đặc biệt là hiện diện thương mại và hiện diện thể nhân. Do đó, để đánh giá các cam kết trong lĩnh vực cụ thể, một điều bắt buộc là phải xem xét đến các nội dung áp dụng chung. *Thứ hai*, các cam kết 'theo ngành' quy định những nội dung chỉ áp dụng cho ngành cụ thể (GATS quy định chia làm

[109] Về khái niệm minh bạch của hệ thống WTO và đóng góp của khái niệm này trong việc bảo đảm hiệu quả của pháp luật WTO, xem: Sharif Bhuiyan, 'National Law in WTO Law - Effectiveness and Good Governance in the World Trading System', *Cambridge: Tạp chí Đại học Cambridge* 2007) đoạn 68-75.

[110] T. Brewer and S. Young, 'Investment Issues at the WTO: The Architecture of Rules and the Settlement of Disputes', *3 (1) Journal of International Economic Law* (1998) đoạn 460-462.

12 ngành, với khoảng 160 tiểu ngành). Khi xác định một cam kết theo ngành cụ thể của một quốc gia, phải xem xét cả các cam kết chung.

Các cam kết 'chung' là những cam kết áp dụng chung cho mọi ngành dịch vụ được nêu trong 'Biểu cam kết cụ thể' của một quốc gia. Các cam kết này thường được nêu ngay khi bắt đầu phụ lục, và có thể là các cân nhắc kinh tế có thể áp dụng đến mọi ngành dịch vụ và tiểu ngành được nêu trong phụ lục.

Mọi quốc gia thành viên WTO được cho là có 'Biểu cam kết cụ thể' riêng theo GATS. Đây là danh mục các cam kết cho mỗi ngành dịch vụ mà các quốc gia thành viên WTO đạt được thỏa thuận trong đàm phán. Các quốc gia thành viên WTO mở cửa thị trường một cách không đối xứng, thể hiện quan điểm của mỗi nước về nền kinh tế của nước đó, nên có độ mở (hoặc ngược lại, độ đóng) như thế nào đối với đầu tư nước ngoài. Đây là bảo đảm đối với các nhà cung cấp dịch vụ tại các quốc gia khác mà các điều kiện mở cửa thị trường sẽ không ít giới hạn hơn, vì chỉ có thể được cải thiện.

Mỗi yêu cầu, đề nghị hoặc cam kết theo phương thức 3, giống như đối với các phương thức khác, phải cho riêng mỗi ngành hoặc tiểu ngành cụ thể, hoặc là cho chung mọi ngành hoặc tiểu ngành. Cho mỗi ngành hoặc tiểu ngành dịch vụ, một quốc gia thành viên WTO có thể yêu cầu hoặc đề nghị một mức độ cam kết khác nhau. Tất nhiên là việc áp dụng sẽ trên cơ sở cho riêng mỗi phương thức cung cấp, ngay cả khi ở đây chúng ta đang tập trung vào phương thức 3.

Các cam kết và giới hạn về tiếp cận thị trường và NT được ký kết trong biểu dịch vụ cho mỗi phương thức cung cấp. Mỗi yêu cầu, đề nghị hoặc cam kết theo phương thức 3 cần phải là về tự do hóa các điều kiện cho các nhà cung cấp dịch vụ có thể đầu tư và thành lập chi nhánh, liên doanh hoặc công ty con trên lãnh thổ của một quốc gia thành viên WTO khác. Tuy nhiên, có thể có nhiều mức độ khác nhau. Thực tế, các cam kết phương thức 3 có thể dẫn đến việc tự do hóa hoàn toàn, tự do hóa có giới hạn hoặc tự do hóa được bảo lưu.

Bảng 1. Các hình thức tự do hóa cho Phương thức 3 của GATS

- **Tự do hóa hoàn toàn**. Một quốc gia thành viên WTO có thể yêu cầu, đề nghị, hoặc cam kết thực hiện tự do hóa hoàn toàn. Điều đó có nghĩa là sẽ không có bất kỳ giới hạn nào đối với tiếp cận thị trường hay NT cho ngành dịch vụ và phương thức cung cấp mà quốc gia đó cam kết. Trong trường hợp này, quốc gia thành viên WTO ghi 'không hạn chế' trong biểu cam kết. Điều này có nghĩa là quốc gia đó cam kết tự do hóa hoàn toàn đối với ngành dịch vụ. Quốc gia đó cam kết cho phép dịch vụ và nhà cung cấp dịch vụ của các quốc gia thành viên WTO khác được tiếp cận hoàn toàn thị trường người tiêu dùng dịch vụ của quốc gia đó, và quốc gia đó sẽ không áp dụng bất kỳ quy định nào có thể giới hạn việc tiếp cận thị trường đó hay đối xử ưu ái hơn với dịch vụ hoặc các nhà cung cấp dịch vụ trong nước. Tuy nhiên, có một số trường hợp ngoại lệ, *thí dụ*, trong GATS Điều XIV và XIVbis, theo đó các quốc gia thành viên WTO có thể áp dụng các quy định trái với các nghĩa vụ theo GATS của mình.

- **Tự do hóa có giới hạn**. Một quốc gia thành viên WTO có thể quy định và đưa ra các giới hạn và điều kiện cụ thể về tiếp cận thị trường hoặc NT trong 'Biểu cam kết cụ thể'. Các giới hạn này có thể là các giới hạn được quy định trong pháp luật trong nước. Ngoài ra, họ cũng luôn có thể áp dụng các giới hạn đối với hiện diện thương mại. Khi đưa ra các cam kết, các quốc gia thành viên WTO có thể quy định các giới hạn hoặc điều kiện theo đó họ sẽ cho phép dịch vụ và nhà cung cấp dịch vụ nước ngoài theo 4 phương thức cung cấp ở trên được tiếp cận thị trường trong nước và cạnh tranh với dịch vụ và nhà cung cấp dịch vụ trong nước. Các giới hạn hay điều kiện này có thể dưới dạng 'tiếp cận thị trường' hay 'NT'. *Thí dụ*: họ có thể giới hạn số lượng người tham gia thị trường (GATS Điều XVI). Các 'giới hạn tiếp cận thị trường' này là các hạn chế về việc dịch vụ hoặc các nhà cung cấp dịch vụ nước ngoài gia nhập thị trường trong nước. Họ có thể áp dụng các ngoại lệ về nghĩa vụ và thực hiện đối xử MFN cho các nhà cung cấp dịch vụ nước ngoài hoặc ngoại lệ về nghĩa vụ NT (GATS Điều II :2 và Điều XVII). Các cam kết của một quốc gia có thể được giới hạn bằng các ngoại lệ đối xử MFN (tức là duy trì các biện pháp trái với nghĩa vụ đối xử MFN). Do MFN là một nghĩa vụ chung mà áp dụng tới toàn bộ thương mại dịch vụ, nên các ngoại lệ được liệt kê trong các biểu riêng biệt thể hiện: (i) các lĩnh vực áp dụng ngoại lệ; (ii) biện pháp đó và tại sao nó trái với nghĩa vụ đối xử MFN; (iii) các quốc gia bị áp dụng biện pháp đó; (iv) thời gian ngoại lệ; và (v) nhu cầu áp dụng ngoại lệ. Về nguyên tắc, ngoại lệ không được áp dụng lâu hơn 10 năm. Các giới hạn NT được thực hiện dưới dạng ban hành luật, quy định theo đó phân biệt đối xử một cách hiệu quả đối với dịch vụ và nhà cung cấp dịch vụ nước ngoài để ít ưu đãi hơn so với dịch vụ và nhà cung cấp dịch vụ trong nước, hoặc quy định các điều kiện cạnh tranh thị trường theo đó ưu đãi hơn cho dịch vụ và nhà cung cấp

dịch vụ trong nước so với dịch vụ và nhà cung cấp dịch vụ nước ngoài.

- **Tự do hóa được bảo lưu**. Cuối cùng, một bên ký kết hiệp định có thể giữ quyền kiểm soát đối với một ngành dịch vụ và quyết định sẽ không tự do hóa ngành dịch vụ đó. Trong trường hợp này, quốc gia thành viên WTO phải ghi là 'Chưa cam kết' trong biểu cam kết cho một ngành hoặc phương thức cung cấp cụ thể, nếu quốc gia đó mong muốn giữ quyền được tự do ban hành hoặc duy trì luật, quy định giới hạn tiếp cận thị trường hoặc NT hoặc ưu đãi doanh nghiệp trong nước hơn doanh nghiệp nước ngoài trong ngành hay phương thức cung cấp đó. Lựa chọn này dẫn đến tình trạng tự do hóa được bảo lưu cho ngành dịch vụ cụ thể đó.

TÓM TẮT CHƯƠNG 1

Câu hỏi nền tảng nhất để xác định liệu IIA có áp dụng đối với một khoản đầu tư hay không là: liệu dự án đó có được coi là 'đầu tư nước ngoài' theo luật quốc tế hay không? Thực tế, định nghĩa này thường xuyên thay đổi vì các nhà doanh nghiệp, các công ty tài chính và các công ty đa quốc gia luôn phát triển các công cụ đầu tư mới.

IIA có xu hướng áp dụng khái niệm 'đầu tư theo nghĩa rộng để chỉ 'mọi loại tài sản' của nhà đầu tư nước ngoài tại một nước tiếp nhận đầu tư, theo đó cho rằng IIA áp dụng đối với bất kỳ giá trị kinh tế nào.[111] Trong nhiều IIA, khái niệm đầu tư dựa trên tài sản hay được sử dụng, thường bao gồm một danh sách minh hoạ các loại tài sản được bảo hộ theo IIA.

Một số IIA khác tập trung vào FDI thì lại định nghĩa đầu tư dựa trên 'doanh nghiệp' chứ không phải các loại tài sản.[112] Các IIA sử dụng khái niệm đầu tư dựa trên doanh nghiệp thường dành sự chú ý đặc biệt đến mục đích của nhà đầu tư trong việc thiết lập mối quan hệ dài hạn với nền kinh tế của nước tiếp nhận đầu tư, *thí dụ*: việc mua lợi ích sở hữu dài hạn trong quyền sở hữu hoặc quản lý của một doanh nghiệp.

Thí dụ: G3, nghĩa là FTA giữa Colombia, Mexico và Venezuela.

[111] BIT Argentina - Vương Quốc Anh ký ngày 11/12/1990; BIT Tanzania - Vương Quốc Anh ký ngày 07/01/1994.

[112] Julien Chaisse, Puneeth Nagaraj (2014), 'Changing Lanes: Intellectual Property Rights, Trade and Investment', *37 Hastings Int'l & Comp. L. Rev*. 249-51.

Việc sử dụng khái niệm đầu tư dựa trên doanh nghiệp có ý nghĩa tích cực. Bằng cách đưa ra định nghĩa đầu tư dưới hình thức doanh nghiệp, G3 đã bảo hộ cho các hình thức (doanh nghiệp) không thành lập pháp nhân của đầu tư nước ngoài cũng như các hình thức có thành lập pháp nhân. Thuật ngữ 'doanh nghiệp' mang tính bao quát hơn thuật ngữ 'công ty', nhưng lại bao gồm cả hình thức công ty. Các nhà soạn thảo G3 đã phân biệt giữa việc thành lập một doanh nghiệp có pháp nhân với việc tổ chức một doanh nghiệp.

Hiệp định này quy định rằng một doanh nghiệp sẽ là bất kỳ tổ chức nào được thành lập, tổ chức, hoặc bảo hộ theo pháp luật trong nước. Quy định như vậy mở ra cánh cửa để bảo hộ các hình thức tổ chức kinh doanh không thành lập pháp nhân. Doanh nghiệp là một thuật ngữ kinh tế, chứ không phải là thuật ngữ pháp lý, liên quan đến việc tổ chức và hợp nhất kinh doanh hơn là một hình thức pháp lý. Bên cạnh đó, doanh nghiệp không nhất thiết phải có tư cách pháp nhân.[113]

Thuật ngữ **'**mọi loại tài sản' là một khái niệm mở, đi kèm theo một danh sách minh hoạ các tài sản được quy định rõ ràng là thuộc phạm vi áp dụng theo hiệp định.[114] Mọi loại tài sản được mô tả trên đây đều thuộc các quy định về chế tài của hiệp định, cho dù là một cách rõ ràng hoặc ngầm định. Các loại tài sản thuộc phạm vi áp dụng của hầu hết các BIT trùng khớp đáng kể, như: a) động sản, bất động sản và các quyền tài sản khác; b) lợi ích sở hữu trong tài sản của công ty; c) yêu cầu thanh toán tiền, yêu cầu thực hiện; d) quyền sở hữu trí tuệ; và e) quyền kinh doanh đặc quyền (concession) theo quy định của pháp luật hoặc hợp đồng.[115] 'Đầu tư trong luật quốc tế, thông thường bao gồm cả các công trình và thiết bị do người nước ngoài đầu tư (tài sản hữu hình) và các hoạt động nghiên cứu và phát triển để tạo ra công nghệ mới (tài sản vô hình).

Bên cạnh pháp luật WTO, IIA đã trở thành phổ biến ở các nước để thúc đẩy tự do hóa thị trường và tạo ra các cơ hội đầu tư mới. Có hai loại IIA chính, gồm: các BIT và các PTA. BIT được ký kết giữa hai quốc gia trên

[113] Omar E. García-Bolívar, 'G3 Agreement: A Comparison of Its Investment Chapter with the Emerging International Law of Foreign Investment', *10 L. & Bus. Rev. Am. 779* mục 785.

[114] Céline Lévesque, '*Abaclat and Others v. Argentine Republic*: The Definition of Investment', *27(2) ICSID Review* 247 (2012); Julien Chaisse, Puneeth Nagaraj (2014), 'Changing Lanes: Intellectual Property Rights, Trade and Investment', *37 Hastings Int'l & Comp. L. Rev*. 249-51.

[115] Julien Chaisse, Puneeth Nagaraj (2014), 'Changing Lanes: Intellectual Property Rights, Trade and Investment', *37 Hastings Int'l & Comp. L. Rev*. 226-227.

cơ sở song phương; trong khi PTA thường mang tính đa phương và dưới dạng các FTA. Một trong những FTA quan trọng là NAFTA được ký kết giữa các quốc gia Bắc Mỹ. Đa phần IIA thường được điều chỉnh để phù hợp với các nhu cầu và điều kiện của các bên tham gia, do đó giúp cải thiện tính minh bạch của các quy định và các hạn chế đầu tư. Nhờ vậy, IIA giúp bảo hộ cho cả các nhà đầu tư nước ngoài và các nước tiếp nhận đầu tư một cách thiết thực hơn. Đặc điểm này của IIA giúp thúc đẩy và khuyến khích FDI trên toàn thế giới. IIA cũng thúc đẩy FDI bằng cách đạt được thỏa thuận về các cơ chế giải quyết tranh chấp. Điều trước tiên là định nghĩa về các nhà đầu tư rõ ràng hơn trong một số BIT đã giúp cải thiện tính có thể dự đoán và tính chắc chắn cho các nhà đầu tư nước ngoài. Điều này đã giúp các nhà đầu tư nước ngoài thoải mái hơn về cách thức các IIA có thể bảo hộ họ như thế nào trong trường hợp phát sinh tranh chấp.

CÂU HỎI / BÀI TẬP

1. Hãy nêu sự khác biệt giữa quan điểm của các nước phát triển và đang phát triển về luật đầu tư quốc tế.
2. Tại sao các quốc gia ký kết các hiệp định để bảo hộ và khuyến khích đầu tư nước ngoài? Có cần phải có một khuôn khổ pháp luật quốc tế để thúc đẩy các dòng vốn hay không, hay liệu dòng tiền có chảy đến nơi có nhu cầu và nơi có thể được sử dụng hữu ích nhất, mà không cần khuôn khổ pháp luật đó?
3. Tại sao trọng tài quốc tế được coi là cách thức giải quyết tranh chấp hấp dẫn trong lĩnh vực đầu tư?
4. Bạn có nghĩ rằng cơ chế của Công ước ICSID là một công cụ hữu hiệu để xóa bỏ tính 'nội bộ quốc gia' của tranh chấp?
5. Xin cho biết các điều kiện phải được thỏa mãn để có thể đưa một tranh chấp ra giải quyết theo Công ước ICSID? Tại sao các quốc gia khi đàm phán Công ước này đã đưa các điều kiện này vào trong Công ước?
6. Tại sao số lượng các IIA tăng mạnh trong cuối thế kỷ XX?
7. Liệu bảo hiểm cho đầu tư nước ngoài có phải là một lựa chọn tốt hơn để bảo hộ các khoản đầu tư nước ngoài so với việc quy định các hình thức giải quyết tranh chấp? Có thể áp dụng cả hai hình thức này hay không?
8. Phải chăng hoạt động kinh doanh tại các DC gặp nhiều rủi ro hơn so với ở các quốc gia phát triển? Các yếu tố nào dẫn đến tình trạng này?
9. Xin cho biết các yếu tố mà các nhà đầu tư cần cân nhắc khi xem xét có nên đầu tư vào một DC hay không?
10. Hãy cho biết các lý do tại sao các quốc gia hoài nghi về đầu tư nước ngoài và các nhà đầu tư nước ngoài? Bạn có thể cho biết các lý do 'tốt'? Các lý do 'xấu'?
11. Theo bạn, các nhà đầu tư có nên thận trọng hơn khi tham gia các thị trường nước ngoài?
12. Liệu có nên dành riêng một số ngành của nền kinh tế, *thí dụ*: cung cấp tiện ích điện nước, cho các doanh nghiệp nhà nước?
13. Bạn có ngạc nhiên không khi biết rằng các chính phủ thắng kiện nhiều hơn một chút so với các nhà đầu tư trong các vụ kiện ISDS? Tại sao?
14. Rất nhiều người đã gợi ý về việc thiết lập cơ chế phúc thẩm cho giải quyết tranh chấp bằng trọng tài trong lĩnh vực đầu tư. Bạn có nghĩ điều này là cần thiết? Là khả thi?
15. Theo bạn, liệu có nên ký kết một hiệp định đầu tư đa phương? Nếu có, xin cho biết các điểm có lợi và bất lợi của lựa chọn này?
16. Nguyên tắc minh bạch liên quan như thế nào đến vấn đề giải quyết tranh chấp đầu tư quốc tế? Liệu nguyên tắc minh bạch có làm cho việc giải quyết các vụ khiếu kiện trở nên dễ dàng hơn hay khó khăn hơn không?
17. Bạn có đồng ý khi Jes Salacuse và Nicholas Sullivan cho rằng các BIT đã đóng góp một cách tích cực vào việc tạo nên luật tập quán quốc tế?

TÀI LIỆU CẦN ĐỌC

1. Julien Chaisse and Christian Bellak, 'Navigating the Expanding Universe of Investment Treaties - Creation and Use of Critical Index', (2015) *18(1) Journal of International Economic Law,* 79-115.

2. Julien Chaisse, 'The Shifting Tectonics of International Investment Law - Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) *47(3) George Washington International Law Review* 563-638.

3. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 1-211; 491-622 (Kluwer 2005).

4. Theodore Moran, *Harnessing Foreign Direct Investment for Development*, 113-141, Trung tâm phát triển toàn cầu, 2006.

5. Peter Muchlinski, 'Policy Issues', in *Oxford Handbook of International Investment Law 3* (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

6. Salacuse & Sullivan, 'Các BIT có thực sự có tác dụng: Đánh giá các Hiệp định đầu tư song phương và cuộc mặc cả lớn của chúng', *46 Harv. Int'l L. J.* 67, 111-115 (2005).

7. Jeswald Salacuse, 'Từ các nước đang phát triển tới các thị trường đang nổi: Vai trò thay đổi của luật trong thế giới thứ ba', *33 Int'l Law* 875, 885-890 (1999).

8. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* 1-30 (Oxford 2008).

9. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 1-75 (Oxford 2008).

10. Andrea K. Bjorklund, 'Cân bằng giữa chủ quyền quốc gia và bảo hộ nhà đầu tư trong những vụ kiện về công lý bị từ chối', 45 *Va. J. Int'l L.* 809, 818-833 (2005).

10. Mariel Dimsey, *The Resolution of International Investment Disputes* 5-33 (Eleven 2008).

11. Kenneth W. Hansen, *Tư nhân hóa Phát triển: Luật xuyên quốc gia, cơ sở hạ tầng và quyền con người 75* (Michael B. Likosky ed., Martinus Nijhoff 2005).

12. Andrew Seck, 'Đầu tư vào ngành dầu khí của Liên bang Xô viết cũ: Hiệp định Năng lượng & các hệ lụy của nó đối với giảm thiểu rủi ro chính trị', 110 trong *Hiệp định Năng lượng: Cánh cửa Đông - Tây cho đầu tư và thương mại* (Thomas W. Wälde, ed. 1996).

13. Andrea K. Bjorklund, 'Cải thiện Luật đầu tư quốc tế và cơ chế chính sách: Báo cáo của Báo cáo viên', trong *Cơ chế đầu tư quốc tế đang phát triển: Kỳ vọng, hiện thực và phương án lựa chọn* [đoạn trích về việc phân biệt giữa các loại ngành nghề và biện pháp bảo hộ mà họ cần] (José E. Alvarez, Karl P. Sauvant & Kamil G. Ahmed eds., Oxford, *forthcoming* 2010).

14. Susan D. Franck, 'Trọng tài đầu tư quốc tế: Thắng cuộc, Thua cuộc và Tại sao', *Columbia FDI Perspectives* (15 June 2009).

15. L.A. Ahee & Rory E. Walck, *Trọng tài ICSID năm 2009: Quản lý tranh chấp xuyên quốc gia* (Ấn phẩm tạm thời, tháng 01/2010).

16. Barton Legum, 'Các phương án hình thành một cơ chế phúc thẩm cho các tranh chấp đầu tư', trong *Cơ chế phúc thẩm trong giải quyết tranh chấp đầu tư quốc tế* 231 (Karl P. Sauvant ed., Oxford 2008).

17. Sauvant, Karl P, 'Sự trỗi dậy của các TNC từ các thị trường đang nổi: các vấn đề', trong *Sự trỗi dậy của các công ty đa quốc gia từ các thị trường đang nổi: rủi ro hay cơ hội?* (Karl P. Sauvant et al. eds 2008).

18. Gus van Harten, *Trọng tài trong các điều ước đầu tư và công pháp*, 175-184 (Oxford 2007).

19. Sarah Anderson, *Cạnh tranh đầu tư: Thương mại toàn cầu và một cơ hội cho xã hội dân sự* (Viện Nghiên cứu chính sách, tháng 11/2009).

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PHẦN HAI

CÁC NGUYÊN TẮC CƠ BẢN CỦA LUẬT ĐẦU TƯ QUỐC TẾ

Các quy định về nghĩa vụ cơ bản tương đối thống nhất trong phần lớn các IIA. Các điều khoản cốt lõi điển hình trong các IIA bao gồm nghĩa vụ đối xử tối huệ quốc (MFN), đối xử quốc gia (NT), nghĩa vụ đối xử công bằng và thỏa đáng (FET), bảo vệ và an ninh đầy đủ cho nhà đầu tư nước ngoài (FPS), và nghĩa vụ cho phép chuyển tiền quốc tế. Tuy nhiên, mặc dù nội dung của các nguyên tắc này được thể hiện giống nhau trong nhiều IIA, nhưng phạm vi chính xác và đối tượng áp dụng của từng nghĩa vụ lại phụ thuộc vào từ ngữ chính xác trong mỗi trường hợp.

Mục đích chính của IIA, đặc biệt là BIT, là 'bảo hộ các khoản đầu tư sinh lợi' và ngăn không cho chính phủ nước tiếp nhận đầu tư lạm dụng các khoản lợi nhuận đó. Do đó, phạm vi bảo hộ đối với các hoạt động đầu tư theo cơ chế đầu tư quốc tế là rất lớn.

Các BIT quy định các biện pháp bảo hộ khác nhau dựa vào ngôn ngữ của BIT. Tuy nhiên, dưới đây là các biện pháp bảo hộ chính đối với nhà đầu tư có thể thấy trong phần lớn các BIT:

- Nước tiếp nhận đầu tư không được tước các khoản đầu tư mà không thanh toán bồi thường nhanh chóng, thỏa đáng và hiệu quả;
- Nước tiếp nhận đầu tư phải đảm bảo đối xử công bằng và thỏa đáng (FET) đối với nhà đầu tư và các khoản đầu tư;
- Việc đối xử dành cho nhà đầu tư không được kém thuận lợi hơn so với công dân của nước tiếp nhận đầu tư (NT), hoặc so với nhà đầu tư của quốc gia khác (MFN);
- Bảo vệ và an ninh đầy đủ đối với khoản đầu tư trong lãnh thổ của nước tiếp nhận đầu tư (FPS);
- Điều khoản bao trùm ('umbrella clause') cho phép các khiếu nại phát sinh từ hợp đồng giữa nhà đầu tư và chính phủ nước tiếp nhận đầu tư (hay một pháp nhân do Nhà nước kiểm soát) được giải quyết như một khiếu nại phát sinh theo BIT; và
- Quyền của nhà đầu tư đưa ra trọng tài xét xử các khiếu nại đối với nước tiếp nhận đầu tư do các hành vi vi phạm bất cứ nghĩa vụ bảo hộ nào nêu trong BIT.

Mặc dù các nhà đầu tư cũng có thể được bảo hộ và có quyền áp dụng thủ tục trọng tài để giải quyết tranh chấp với chính phủ nước tiếp nhận đầu tư thông qua hợp đồng đầu tư hoặc luật đầu tư nước ngoài trong nước của nước tiếp nhận đầu tư, nhưng các BIT có một số lợi thế hơn. Cụ thể:

- Không cần có mối quan hệ hợp đồng trực tiếp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư nước ngoài;
- Một nhà đầu tư đủ điều kiện theo BIT có thể tận dụng các biện pháp bảo hộ theo BIT, ngay cả khi không có ý định đàm phán các biện pháp đó trong hợp đồng đầu tư. Trong trường hợp có ý định này, thì các biện pháp bảo hộ trong BIT cũng là đủ để nhà đầu tư mở rộng phạm vi đàm phán của mình sang các lĩnh vực khác;
- Quyền khởi kiện nước chủ nhà ra cơ quan trọng tài là quyền đặc biệt giá trị. Nó giúp nhà đầu tư có thể đòi bồi thường mà không phải đưa vụ việc ra hệ thống tòa án của nước tiếp nhận đầu tư. BIT là cơ sở để các quốc gia chấp nhận thủ tục giải quyết tranh chấp bằng trọng tài trong hầu hết các vụ việc được xử lý bởi ICSID - một cơ quan tài phán tranh chấp đầu tư trung lập nổi tiếng nhất; và
- BIT cũng có thể được sử dụng để giảm bớt chi phí bảo hiểm rủi ro chính trị.

Để được bảo hộ và có thể đưa ra yêu cầu bồi thường theo quy định của BIT, sẽ có một số rào cản pháp lý mà nguyên đơn phải xử lý. Các rào cản này có thể thay đổi tùy theo từng BIT, nhưng thông thường nguyên đơn phải là một 'nhà đầu tư đủ điều kiện (là công dân hoặc công ty của một bên ký kết BIT), đang nắm giữ một 'khoản đầu tư đủ điều kiện ở quốc gia ký kết BIT kia. Yêu cầu cũng khá phổ biến là khi có tranh chấp, các bên phải áp dụng triệt để toàn bộ các biện pháp chế tài sẵn có trong hệ thống tòa án quốc gia, hoặc phải cố gắng giải quyết tranh chấp đó bằng hòa giải trong một khoảng thời gian nhất định (hay còn gọi là 'giai đoạn lắng dịu'), trước khi bắt đầu thủ tục tố tụng trọng tài.

Chương 2 sẽ rà soát chuẩn mực MFN. Chương 3 giải thích về chuẩn mực NT. Chương 4 tập trung vào FET và FPS. Chương 5 xem xét khái niệm tước quyền sở hữu của nhà đầu tư nước ngoài. Chương 6 trình bày tổng quan về nguyên tắc bảo đảm cơ chế giải quyết tranh chấp đầu tư quốc tế (ISDS). Chương 7 hoàn tất việc rà soát chuẩn mực đầu tư bằng cách giải thích các biện pháp bảo hộ còn lại theo các IIA. Chương 8 điểm lại các trường hợp ngoại lệ đối với các nguyên tắc bảo hộ đầu tư chủ chốt.

CHƯƠNG 2

NGUYÊN TẮC TỐI HUỆ QUỐC (MFN)

Mục đích học
Chương 2

- Xác định các yếu tố cấu thành của nguyên tắc MFN;
- Hiểu về các nội dung diễn giải về nguyên tắc MFN của các cơ quan tài phán đầu tư;
- Đánh giá tầm quan trọng của các tiêu chí so sánh phải được đặt trong những 'hoàn cảnh tương tự';
- Xem xét mức độ liên quan của luật WTO với bối cảnh đầu tư.

Nguyên tắc đối xử tối huệ quốc ('MFN') có nguồn gốc sâu xa từ các hiệp định thương mại, từ thời kỳ của những Hiệp ước Hữu nghị, Thương mại và Hàng hải. Mục đích của nguyên tắc này là ngăn chặn sự phân biệt đối xử giữa các đối tác thương mại, tạo ra một sân chơi bình đẳng cho tất cả các đối tác nước ngoài. Về đầu tư, nó nhằm tạo ra những điều kiện cạnh tranh bình đẳng cho tất cả các nhà đầu tư nước ngoài, không kể quốc gia xuất xứ của họ.

Nguyên tắc MFN hình thành nên những cột mốc quan trọng trong các IIA và cho phép các nhà đầu tư được điều chỉnh bởi một hiệp định cụ thể, và có quyền yêu cầu được hưởng những lợi ích bình đẳng so với những lợi ích mà những nhà đầu tư từ các nước khác được hưởng, bất kể là những lợi ích đó được mang lại từ các IIA khác hay không, hay do việc thực hiện các quy định pháp luật của nước tiếp nhận đầu tư.[1] Phán quyết trong vụ *Daimler v. Argentina* ghi nhận rằng ILC đã công nhận rằng 'đối xử bình đẳng' có mối quan hệ mật thiết với việc thực hiện điều khoản MFN, nhưng cũng chỉ ra rằng 'bình đẳng' không có nghĩa là 'giống nhau'. Điều này cho thấy là 'khác biệt' không phải đương nhiên được hiểu là 'kém thuận lợi hơn'. Hơn thế nữa, đặc điểm này của điều khoản MFN là nhằm đảm bảo bình đẳng toàn diện về đối xử, trên phương diện tạo một sân chơi bình đẳng giữa các nhà đầu tư nước ngoài đến từ các quốc gia khác nhau, cho dù đôi khi điều này đạt được thông qua các phương tiện không giống nhau.[2]

Trong khi theo truyền thống được coi là một điều khoản tiêu chuẩn không có nội hàm cơ bản nào liên quan đến việc giải quyết tranh chấp, và cũng không bị ảnh hưởng bởi những nhạy cảm chính sách của các điều khoản khác, *thí dụ*: NT, gần đây nguyên tắc MFN đã thu hút sự chú ý của những nhà lập pháp về đầu tư quốc tế, do thực tiễn áp dụng điều khoản này trong thời gian gần đây của một số hội đồng trọng tài.

Phạm vi nghĩa vụ MFN, cũng giống như bất kỳ điều khoản quan trọng nào của IIA, bị giới hạn không chỉ bởi phạm vi chung của IIA, mà còn bởi cách diễn đạt của chính điều khoản đó (Mục 1). Một số đặc điểm có liên quan đến khía cạnh này sẽ được thảo luận trong các phần sau. Trước tiên, liệu nghĩa vụ có áp dụng đối với các khoản đầu tư đã được thực hiện tại quốc gia đó không, hoặc liệu nó có được áp dụng đối với

[1] Vụ *Asian Agricultural Products v. Sri Lanka*. Ý kiến bất đồng của Samuel K.B. Asante, trích dẫn ý kiến của nhiều chuyên gia luật quốc tế, theo đó ghi nhận đối xử MFN không xuất phát từ common law. Xem *Asian Agricultural Products Limited v. Sri Lanka*, ICSID Vụ số ARB/87/3, Ý kiến bất đồng của Samuel K.B. Asante, ngày 27/6/1990, tr. 40.

[2] *Daimler Financial Services AG v. Argentina*, ICSID, Vụ số ARB/05/1, Phán quyết ngày 22/8/2012, tr. 242.

khả năng của nhà đầu tư trong việc yêu cầu tiếp cận với nước chủ nhà không - cái được gọi là các quyền trước đầu tư (pre-establishment) (Mục 2). Tiếp theo, ngôn ngữ cho phép có sự so sánh giữa việc đối xử của các nhà đầu tư đến từ các nước khác nhau (Mục 3). Cuối cùng, liệu các vấn đề liên quan đến các thủ tục ISDS có được điều chỉnh bởi nguyên tắc MFN hay không (Mục 4).

Trong khi các quyền trước đầu tư (pre-establishment rights) và vấn đề so sánh giữa việc đối xử với các nhà đầu tư từ các quốc gia khác nhau là những vấn đề chung mà cũng có liên quan đến những nghĩa vụ cơ bản khác của IIA, *thí dụ*: NT, thì nhân tố thứ ba (liệu các thủ tục ISDS có được điều chỉnh bởi nguyên tắc MFN không) lại chỉ liên quan đến việc vận hành nguyên tắc MFN.

Mục 1. KHÁI NIỆM VÀ PHẠM VI CỦA NGUYÊN TẮC MFN

Phạm vi của các điều khoản MFN trong các BIT là một nguyên nhân chính gây ra sự tranh luận trong nhiều năm qua. Phán quyết trong vụ *Daimler v. Argentina* ghi nhận rằng việc giải thích và áp dụng các điều khoản MFN là một trong những vấn đề gây tranh cãi nhiều nhất, không chỉ giữa các bên tranh chấp trong vụ kiện trước tòa án, mà còn ngay cả trong chính giới luật đầu tư quốc tế nói chung.[3] Việc tranh luận này xoay quanh vấn đề liệu 'đối xử' MFN chỉ bao gồm các quy định mang tính nội dung để bảo hộ đầu tư, hay nó còn bao gồm cả việc bảo hộ về mặt tố tụng như việc giải quyết tranh chấp.

Không có *quy ước (pro forma)* nào cho một điều khoản MFN, mặc dù hầu hết đều gắn với các BIT bằng cách đảm bảo rằng các bên trong một BIT đều dành sự đối xử ưu đãi không kém thuận lợi hơn so với sự đối xử dành cho bất kỳ nhà đầu tư quốc tịch thứ ba nào, kể cả việc đối xử theo các BIT với các quốc gia khác. Trong Vụ *Telefónica v. Argentina,* Phán quyết của hội đồng trọng tài về phản đối thẩm quyền trọng tài ghi nhận đúng đắn rằng người ta cần coi điều khoản MFN như là một 'điều khoản tiêu chuẩn', mặc dù ngôn ngữ cụ thể trong hiệp định này khác với các hiệp định khác.[4] Phán quyết trong vụ *Impregilo v. Argentina* cũng

[3] *Daimler Financial Services AG v. Argentina*, ICSID Vụ số ARB/05/1, Phán quyết ngày 22/8/2012, tr. 160. Xem thêm Phán quyết vụ *Rizvi v. Indonesia* về thẩm quyền trọng tài ghi nhận những quan điểm bất đồng về phạm vi các điều khoản MFN đối với tiến trình ISDS. Xem *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Vụ số. ARB/11/13, Phán quyết về thẩm quyền trọng tài, ngày 16/7/2013 tr. 218.

[4] *Telefónica S.A v. Argentina*, ICSID Vụ số. ARB/03/20, Phán quyết của hội đồng trọng tài về phản đối thẩm quyền trọng tài, ngày 25/5/2006, tr. 97.

ghi nhận rằng các điều khoản MFN trong các BIT rất khác nhau, và điều này đã dẫn đến các kết quả giải thích khác nhau, mặc dù nó đã tìm ra, theo đa số, một 'khối lượng lớn án lệ' cho thấy là, ít nhất khi có một điều khoản MFN áp dụng cho 'tất cả các vấn đề' được quy định trong BIT, các điều khoản về giải quyết tranh chấp có lợi hơn trong các BIT khác sẽ được tích hợp để xem xét.[5] Tính chất phức tạp này có thể được minh họa bằng thí dụ về các BIT mà Việt Nam đã ký kết dưới đây (Bảng 3).

Bảng 3: Phạm vi của các điều khoản MFN trong các BIT của Việt Nam

Việt Nam - Australia (1991) Điều 4	**Việt Nam - Thụy Sỹ (1992) [chỉ có Tiếng Pháp]** Điều 3.2	**Việt Nam - Hàn Quốc (2003)** Điều 3.1
Mỗi Bên ký kết sẽ luôn đối xử với những khoản đầu tư trên lãnh thổ của mình không kém thuận lợi hơn sự đối xử với những đầu tư của những nhà đầu tư có quốc tịch của nước thứ ba, với điều kiện là mỗi bên ký kết sẽ không phải mở rộng sự đối xử, ưu đãi và đặc quyền phát sinh từ: (a) Việc tham gia của một bên ký kết vào bất kỳ một liên minh hải quan, tổ chức kinh tế, khu vực thương mại tự do hoặc hiệp định hợp tác kinh tế khu vực nào; hoặc (b) Các điều khoản của Hiệp định tránh đánh thuế hai lần với một nước thứ ba.	Không một bên ký kết nào có thể thực hiện một sự đối xử trên lãnh thổ của mình đối với những đầu tư của các nhà đầu tư của bên kia kém thuận lợi hơn so với sự đối xử dành cho những khoản đầu tư của các nhà đầu tư của bất kỳ nước thứ ba nào. Những doanh nghiệp liên doanh có sự tham gia của các nhà đầu tư của hai bên ký kết sẽ được hưởng những điều kiện không kém thuận lợi hơn những doanh nghiệp liên doanh có sự tham gia của các nhà đầu tư của bất kỳ nước thứ ba nào.	Mỗi bên ký kết, trên lãnh thổ của mình, phải dành cho các khoản đầu tư và thu nhập của nhà đầu tư bên ký kết kia sự đối xử không kém thuận lợi hơn sự đối xử mà bên ký kết đó dành cho các khoản đầu tư và thu nhập của nhà đầu tư nước mình hoặc các khoản đầu tư và thu nhập của bất kỳ quốc gia thứ ba nào, tùy thuộc sự đối xử nào thuận lợi hơn cho nhà đầu tư.

[5] *Impregilo S.p.A. v. Argentina*, ICSID Vụ số ARB/07/17, Phán quyết ngày 21/6/2011, tr. 103-107.

Việt Nam - Nhật Bản (2003) Điều 2.2	Việt Nam - Các tiểu vương quốc Ả rập thống nhất (2009) Điều 4	Trung Quốc - Morocco (2012) Điều 3.1
Mỗi bên ký kết, trong lãnh thổ của mình, sẽ dành cho nhà đầu tư của bên ký kết kia và những khoản đầu tư của họ sự đối xử không kém thuận lợi hơn sự đối xử dành cho các nhà đầu tư của bất kỳ nước thứ ba nào và những đầu tư của họ, trong những hoàn cảnh tương tự, đối với các hoạt động đầu tư.	(1) Về việc sử dụng, quản lý, tiến hành, vận hành, mở rộng và bán hoặc các hình thức chuyển nhượng đầu tư đã được thực hiện tại lãnh thổ của mình bởi các nhà đầu tư của một bên ký kết khác, mỗi bên kí kết sẽ dành sự đối xử không kém thuận lợi hơn sự đối xử, trong các tình huống tương tự, đối với các khoản đầu tư của các nhà đầu tư của bất kỳ quốc gia thứ ba nào (MFN) (2) Nguyên tắc MFN sẽ không được áp dụng cho các vấn đề có tính chất tố tụng hoặc tư pháp.	Mỗi bên kí kết, trong lãnh thổ của mình, sẽ dành cho khoản đầu tư của các nhà đầu tư của bên kí kết kia sự đối xử không kém thuận lợi hơn, trong những hoàn cảnh tương tự, so với sự đối xử dành cho các nhà đầu tư của chính nước mình, hoặc các khoản đầu tư của quốc gia được hưởng MFN.

Việc lựa chọn các điều khoản MFN minh họa trong Bảng trên cho thấy hầu hết BIT đều diễn đạt bằng từ ngữ khá chung chung, và tạo ra một khoảng trống đáng kể cho các cách giải thích khác nhau. Nhiều tòa án đã có sự giải thích khác nhau đối với những cách thức khác nhau trong việc xây dựng tiêu chuẩn MFN trong các hiệp định khác nhau. Phán quyết trong vụ *Salini v. Jordan* về thẩm quyền trọng tài ghi nhận rằng một số BIT quy định rõ đối xử MFN mở rộng tới các điều khoản liên quan đến việc giải quyết tranh chấp; một số BIT khác lại không bao gồm một quy định như vậy, nhưng lại nói đến 'tất cả các quyền' được quy định trong hiệp định đó, hoặc nói đến 'tất cả các vấn đề' chịu sự điều chỉnh của hiệp định; và trong BIT được đưa ra trước trọng tài, điều khoản MFN không bao gồm bất kỳ một quy định nào mở rộng phạm vi áp dụng của nó tới việc giải quyết tranh chấp, và nó cũng không ám chỉ 'tất cả các quyền hay tất cả các vấn đề được quy định trong hiệp định này'.[6] Phán quyết trong vụ *Tza Yap Sum v. Peru* về thẩm quyền trọng tài ghi nhận nhu cầu phân tích cách sử dụng từ ngữ cụ thể của mỗi quy định của một IIA phù hợp với các quy tắc đã được thiết lập của luật quốc tế. Theo đó quyết định suy diễn là không phù hợp, không thể quyết định chung chung, *thí dụ*: các điều khoản MFN có hiệu lực trong một số trường hợp nhất định, nhưng lại không có hiệu lực trong một số trường hợp khác; mỗi điều khoản MFN là một thế giới riêng, nó đòi hỏi phải có sự giải thích cho từng trường hợp một để quyết định phạm vi áp dụng.[7]

Đặc biệt, hầu hết các BIT đều không đề cập gì đến vấn đề liệu 'đối xử' MFN chỉ bao gồm các quy định mang tính nội dung để bảo hộ các khoản đầu tư, hay liệu nó có bao gồm cả những biện pháp bảo hộ về mặt tố tụng, *thí dụ* như việc giải quyết tranh chấp. Duy nhất chỉ có BIT Việt Nam - Morocco năm 2012 không bao gồm quy định về ISDS thuộc phạm vi của các điều khoản về MFN. Các BIT khác quy định MFN có phạm vi áp dụng rộng, trong đó có rất nhiều các biến số mà sẽ được thảo luận ở các mục sau.

Mục 2. NGHĨA VỤ MFN VÀ CÁC QUYỀN TRƯỚC ĐẦU TƯ

Câu hỏi quan trọng liên quan đến đối xử MFN là liệu nghĩa vụ MFN có áp dụng đối với các khoản đầu tư đã được thực hiện ở quốc gia đó, hay liệu nó có áp dụng đối với khả năng của nhà đầu tư trong việc yêu cầu tiếp cận với nước tiếp nhận đầu tư hay không - cái được gọi là các quyền trước đầu tư (pre-establishment rights). *Thí dụ*: Điều 6 của ACIA quy định một quốc gia thành viên ASEAN - là nước tiếp nhận đầu tư - trong những hoàn cảnh tương tự, phải dành đối xử MFN cho các nhà đầu tư ASEAN và các khoản đầu tư của họ hoặc là ở giai đoạn trước, hoặc là sau khi thực hiện đầu tư. Tuy nhiên, chỉ có vài IIA ở khu vực châu Á - Thái Bình Dương là thực sự mở rộng phạm vi nghĩa vụ MFN đến các quyền trước đầu tư.

Nhìn chung, các IIA của Việt Nam, cũng giống như hầu hết các BIT khác, không quy định quyền tham gia đầu tư (entry rights) cho các nhà đầu tư nước ngoài vào lãnh thổ của mình. Tất cả các BIT do Việt Nam ký kết đang trong quá trình rà soát, kể cả các hiệp định thế hệ mới được ký kết trong những năm gần đây, chỉ quy định một điều khoản về nỗ lực cao nhất trong việc chấp thuận đầu tư nước ngoài. *Thí dụ*: BIT Việt Nam - Đan Mạch năm 1994 quy định:

[6] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID, Vụ số ARB/02/13, Phán quyết về thẩm quyền trọng tài ngày 29/11/2004, tr. 116-118.

[7] *Tza Yap Shum v. Peru*, ICSID Vụ số ARB/07/6, Phán quyết về thẩm quyền trọng tài ngày 19/6/2009 [tiếng Tây Ban Nha], tr. 196-198.

> […] Mỗi bên kí kết sẽ chấp thuận đầu tư do các nhà đầu tư của bên ký kết kia theo pháp luật và thông lệ hành chính của mình, và nỗ lực hết sức để thúc đẩy đầu tư, trong đó có việc hỗ trợ thành lập các văn phòng đại diện.[8]

BIT với Các tiểu vương quốc Ả rập thống nhất cũng quy định về quyền tham gia (entry right) trên cơ sở nguyên tắc MFN một cách không rõ ràng, khi mà BIT này quy định cụ thể rằng thuật ngữ 'các hoạt động đi kèm với đầu tư nghĩa là việc vận hành, duy trì, sử dụng, thụ hưởng hay chuyển nhượng các khoản đầu tư của nhà đầu tư, bỏ các quyền chấp thuận, quyền thực hiện đầu tư ra khỏi danh mục đầy đủ về các hoạt động được bao gồm.

Tuy nhiên, nội dung văn bản của điều khoản MFN trong một số trường hợp lại bao gồm các quyền trước đầu tư như được quy định trong BIT Việt Nam - Nhật Bản, trong đó thể hiện một ngôn ngữ có nghĩa rộng bất thường mà theo đó các bên có nghĩa vụ dành quy chế đối xử MFN cho các nhà đầu tư từ bên kia đối với 'các khoản đầu tư và các hoạt động kèm theo' các khoản đầu tư đó, kể cả 'các hoạt động đầu tư bao gồm 'việc thành lập, mua lại, mở rộng, vận hành, quản lý, duy trì, sử dụng, hưởng lợi và bán hoặc một hình thức chuyển nhượng đầu tư khác'.[9]

Theo nghĩa vụ MFN, các nhà đầu tư Việt Nam có thể đòi được hưởng quyền trước đầu tư (pre-establishment right) ở các nước nào đã ký các BIT khác có bao gồm các quyền như vậy. Một đánh giá nhanh cho thấy cả Hàn Quốc, Phần Lan và Thổ Nhĩ Kỳ đều không ký kết các BIT trong đó có quy định bắt buộc về áp dụng MFN đối với các quyền trước đầu tư. Ở góc độ này, các nhà đầu tư Việt Nam có thể yêu cầu được hưởng những điều kiện tiếp cận thuận lợi hơn mà Nhật Bản đã công nhận trong các BIT với các nước thứ ba. Tình huống tương tự cũng sẽ được áp dụng đối với các nhà đầu từ những nước này đối với những khoản đầu tư trong lãnh thổ của Việt Nam. Tuy nhiên, vì không có BIT nào do Việt Nam ký kết có quy định về quyền trước đầu tư cho các nhà đầu tư nước ngoài, nên nghĩa vụ MFN chỉ áp dụng trong các trường hợp khi mà khuôn khổ pháp lý trong nước của Việt Nam công nhận *về pháp lý (de jure)* hoặc *thực tế (de facto)* đối với các nhà đầu tư từ một số quốc gia nhất định, chứ không phải từ các quốc gia khác.

Tuy nhiên, nguyên tắc MFN chấp nhận một số trường hợp ngoại lệ quan trọng.

[8] BIT Việt Nam - Đan Mạch (1994), Điều 2.

[9] BIT Việt Nam - Nhật Bản, Khoản 1 Điều 2.

Thứ nhất, các BIT giữa Việt Nam với các đối tác nước ngoài đều thống nhất bỏ tất cả các ưu tiên, ưu đãi đối với các nhà đầu tư nước ngoài được hình thành từ: a) liên minh hải quan, hiệp định tự do thương mại, các hiệp định tăng cường thương mại biên giới; và b) các hiệp định thuế quốc tế ra khỏi các nghĩa vụ MFN. Theo ngoại lệ về hội nhập kinh tế, các quyền trước đầu tư do Việt Nam dành cho các nhà đầu tư nước ngoài đến từ các nước ASEAN trong khuôn khổ ACIA sẽ bị loại trừ ra khỏi nghĩa vụ MFN được quy định trong các BIT của Việt Nam.

Thứ hai, các điều kiện tiếp cận ưu tiên và lợi ích mà một nhà đầu tư có thể được hưởng dựa trên một hợp đồng đầu tư riêng được đàm phán với các cơ quan có thẩm quyền trong nước - hay được gọi là các hợp đồng một lần (one-off deal) sẽ nằm ngoài phạm vi của nguyên tắc MFN. Bởi vì nghĩa vụ này chỉ áp dụng khi mà hành vi đơn lẻ này trở thành một thông lệ chung của nước tiếp nhận đầu tư. Trên thực tế, để được hưởng đối xử theo điều khoản MFN, sự đối xử đó phải là đối xử *chung, thường* được dành cho các nhà đầu tư từ một nước khác.

Mục 3. TIÊU CHUẨN VỀ SO SÁNH GIỮA CÁC NHÀ ĐẦU TƯ

Nguyên tắc MFN, cũng như các nguyên tắc không phân biệt đối xử, là một tiêu chuẩn mang tính tương đối. Mục đích của nó là để ngăn ngừa phân biệt đối xử giữa những người nước ngoài, để đảm bảo rằng không có nhà đầu tư nước ngoài nào được đối xử tốt hơn những nhà đầu tư khác. Việc diễn đạt chính xác về nghĩa vụ MFN là hết sức quan trọng, bởi vì nó đặt ra tiêu chuẩn về sự so sánh giữa các nhà đầu tư nước ngoài đó. Nói một cách khác, việc soạn thảo điều khoản MFN sẽ xác định nhà đầu tư nào sẽ được so sánh, để đánh giá liệu một nhà đầu tư có được đối xử ưu tiên hơn so với người khác không. Các IIA đã sử dụng các tiêu chuẩn so sánh khác nhau.

Việc xây dựng điều khoản chặt chẽ nhất sẽ là để hạn chế nghĩa vụ MFN đối với các nhà đầu tư trong các hoàn cảnh 'như nhau' ('same') hoặc 'giống nhau' ('identical'). Một số BIT trước đây do Vương quốc Anh ký kết có áp dụng tiêu chuẩn này, bằng cách quy định rằng:

> […] Không một bên ký kết nào được phép đối xử với những khoản đầu tư, lợi nhuận đầu tư của các cá nhân, hoặc công ty của bên ký kết kia kém thuận lợi hơn đối xử mà nó áp dụng trong các hoàn cảnh như nhau đối với các khoản đầu tư, lợi nhuận từ đầu tư của các cá nhân hoặc công ty của bất kỳ quốc gia thứ ba nào.[10]

[10] BIT Vương quốc Anh - Belize, Điều 3.1

Một loạt các IIA, đặc biệt là những hiệp định ký kết giữa Hoa Kỳ và Canada, hạn chế áp dụng nghĩa vụ MFN - cũng như nguyên tắc NT - với các nhà đầu tư trong những 'hoàn cảnh tương tự.

Điều 10.4:1 của Hiệp định CAFTA quy định:

> Mỗi bên sẽ dành cho các nhà đầu tư của bên kia sự đối xử không kém thuận lợi hơn đối xử mà nó dành cho các nhà đầu tư của bất kỳ bên nào khác, hoặc của bất kỳ đối tác nào không phải là một bên trong hiệp định, trong những hoàn cảnh tương tự.

Các BIT khác của Hoa Kỳ, cũng giống như BIT với Hunduras, đề cập đến các 'tình huống tương tự' ('like situations').[11] Hầu hết các FTA, nếu quy định về đầu tư, đều nói đến 'hoàn cảnh tương tự' ('like circumstances'). Khi giải thích cụm từ đó, Phán quyết trong vụ *Parkerings v. Lithuania* thấy rằng có ba điều kiện cần phải thỏa mãn để xác định những nhà đầu tư ở trong những 'hoàn cảnh tương tự': *thứ nhất*, nhà đầu tư đó phải là nhà đầu tư nước ngoài; *thứ hai,* họ phải cùng hoạt động trong một ngành kinh tế, kinh doanh; và *thứ ba,* hai nhà đầu tư phải được đối xử khác nhau.

> Để xác định xem Parkerings có thuộc những 'hoàn cảnh tương tự' như của Pinus Proprius không, để từ đó xác định liệu tiêu chuẩn MFN đã bị vi phạm hay không, hội đồng trọng tài cho rằng phải đáp ứng được ba điều kiện sau: (i) Pinus Proprius phải là nhà đầu tư nước ngoài; (ii) Pinus Proprius và Parkerings phải thuộc cùng một lĩnh vực kinh tế, kinh doanh; (iii) Hai nhà đầu tư phải được đối xử khác biệt. Sự khác biệt đối xử phải là hệ quả của một biện pháp của Nhà nước. Không có chính sách hoặc mục đích nào đằng sau biện pháp nói trên được áp dụng cho đầu tư để biện minh cho các biện pháp đối xử khác nhau. Ngược lại, sự đối xử kém thuận lợi được chấp nhận nếu một mục tiêu chính đáng của Nhà nước biện minh cho cách đối xử khác biệt liên quan đến tính cụ thể của khoản đầu tư.[12]

Một cách diễn giải khác đối với tiêu chuẩn so sánh được thể hiện trong BIT Trung Quốc - Iran năm 2000, trong đó quy định rằng:

> Các khoản đầu tư của các nhà đầu tư của một trong hai bên ký kết bị ảnh hưởng trong phạm vi lãnh thổ của bên ký kết kia sẽ […] nhận được […] sự đối xử không kém thuận lợi hơn đối xử dành cho các nhà đầu tư của nước mình hoặc cho các nhà đầu tư của bất kỳ một quốc gia thứ ba nào ở trong tình huống có thể so sánh được.[13]

Tiêu chuẩn 'tình huống có thể so sánh' ('comparable situation') dường như cũng yêu cầu một tiêu chuẩn gần như 'hoàn cảnh tương tự' ('like circumstances').

Ở cấp độ đa phương, GATS đưa ra tiêu chuẩn về 'các dịch vụ và nhà cung cấp dịch vụ tương tự' ('like services and services suppliers'). Tiêu chuẩn về 'các nhà đầu tư và khoản đầu tư tương tự' được chấp nhận bởi các nước ASEAN trong AIA, mặc dầu chỉ hạn chế ở khía cạnh nghĩa vụ NT, trong khi điều khoản MFN không quy định yêu cầu nào về tính chất này.[14]

Không có sự rõ ràng liệu phạm vi của tiêu chuẩn 'hoàn cảnh tương tự' ('like circumstances'), 'tình huống có thể so sánh' ('comparable situation') và các 'nhà đầu tư tương tự' ('like investors') có khác nhau hay không, và trong trường hợp đó tiêu chuẩn nào sẽ rộng hơn, nhưng rõ ràng là các cách xây dựng thuật ngữ này sẽ cho phép so sánh một tập hợp các nhà đầu tư rộng lớn hơn công thức đòi hỏi nhà đầu tư phải ở trong 'tình huống như nhau'.[15] Tuy nhiên, vẫn chưa xác định được các yếu tố nào cần tính đến trong việc xem xét tính chất 'tương tự' ('likeness'), hoặc 'khả năng có thể so sánh' ('comparability') của các nhà đầu tư hoặc của các hoàn cảnh.

Thí dụ giải thích về điều khoản NT trong BIT Hoa Kỳ - Ecuador, hội đồng trọng tài trong vụ *Công ty Sản xuất và Thăm dò Tây Âu v. Cộng hòa Ecuador* coi ngành kinh tế mà nhà đầu tư đang hoạt động không phù hợp cho mục đích quyết định những 'hoàn cảnh tương tự' ('like circumstances'). Theo giải thích này, hội đồng trọng tài cho rằng một nhà xuất khẩu dầu đã bị đối xử kém thuận lợi hơn so với sự đối xử được dành cho các nhà xuất khẩu các sản phẩm khai thác mỏ, hải sản và hoa. Theo quan điểm của hội đồng trọng tài, 'tình huống' có thể liên quan đến tất cả các nhà xuất khẩu có cùng điều kiện đó, để 'không có nhà xuất khẩu nào bị đặt vào thế bất lợi khi so sánh với các nhà xuất khẩu khác'.[16]

[11] BIT Hoa Kỳ - Honduras, Điều II.1.

[12] *Parkerings-Compagniet AS v. Lithuania*, ICSID vụ ARB/05/8, ngày 11/9/2007, tr. 371.

[13] BIT Trung Quốc - Iran, Điều 4.1.

[14] AIA, các Điều 7.1(a) và 8.1.

[15] Về khái niệm những 'tình huống tương tự' và các 'dịch vụ và nhà cung cấp dịch vụ tương tự' trong bối cảnh các quy định của NAFTA về đầu tư, xem Johnson, 2001.

[16] Vụ *Công ty Sản xuất và Thăm dò Tây Âu v. Cộng hòa Ecuador*, Tòa Trọng tài Quốc tế London, Số UN3467, Phán quyết chung thẩm, ngày 01/7/2004, ký hiệu 167-179. Trong một phân tích về việc liệu các biện pháp có thể được coi là phân biệt đối xử so với các lĩnh vực khác nhau,

Cuối cùng, hầu hết các BIT không quy định bất kỳ yêu cầu nào liên quan đến tiêu chuẩn so sánh giữa các nhà đầu tư. Đây cũng là trường hợp của hầu hết các BIT mà Việt Nam đã ký kết, như được trình bày trong Bảng trên. Các BIT này xác định rằng các bên sẽ dành cho nhà đầu tư của bên kia đối xử không kém thuận lợi hơn đối với nhà đầu tư của bất kỳ nước thứ ba nào, hoặc cho 'nhà đầu tư của mình' khi nói đến nghĩa vụ NT. Theo truyền thống, cách tiếp cận này đưa ra phạm vi rộng nhất để so sánh, bởi lẽ, về nguyên tắc, bất kỳ vấn đề nào có liên quan đến việc xác định liệu nhà đầu tư nước ngoài có được ưu đãi hay không đều có thể được xem xét.

Mục 4. MFN VÀ GIẢI QUYẾT TRANH CHẤP

Phạm vi của nghĩa vụ MFN liên quan đến bản chất của các quy tắc được ghi nhận trong nguyên tắc này. Đặc biệt, theo Phán quyết của trọng tài trong vụ *Maffezini*, khá nhiều tranh luận về việc liệu các điều khoản về thủ tục giải quyết tranh chấp được quy định trong một hiệp định có thể được 'nhập' vào một IIA khác theo tinh thần của điều khoản MFN hay không.

Hộp 3: Tóm tắt vụ Maffezzini

- Vụ này do Emilio Agustín Maffezini, một nhà đầu tư Argentina, kiện chống lại Chính phủ Tây Ban Nha trên cơ sở BIT Argentina - Tây Ban Nha năm 1991. Trong phán quyết về thẩm quyền trọng tài, hội đồng trọng tài của ICSID đã phán quyết rằng nguyên đơn đã được phép bỏ qua thời hạn 18 tháng theo yêu cầu điều ước quốc tế liên quan theo điều khoản MFN trong hiệp định đó, dựa trên các điều kiện có lợi hơn - khoảng thời gian chờ 6 tháng - được ghi nhận trong BIT Chile - Tây Ban Nha. Hội đồng trọng tài đã đi đến kết luận này trên cơ sở so sánh với tất cả các BIT khác do Tây Ban Nha ký kết. BIT của Tây Ban Nha ký với Argentina quy định điều khoản MFN có phạm vi đặc biệt rộng, vì nó áp dụng cho 'tất cả các vấn đề chịu sự điều chỉnh của hiệp định này'.

- Các trọng tài viên cho rằng sự diễn đạt này khiến cho nghĩa vụ MFN có phạm vi lớn hơn mức quy định tại các BIT khác của Tây Ban Nha, mà thông thường có phạm vi hẹp hơn 'đối xử này'. Do phạm vi rộng của nguyên tắc MFN này và tầm quan trọng của quy định về giải quyết tranh chấp để bảo vệ các nhà đầu tư nước ngoài, hội đồng trọng tài kết luận rằng các quyền và nghĩa vụ liên quan đến bảo vệ nhà đầu tư - bao gồm cả các vấn đề liên quan đến giải quyết tranh chấp - được quy định trong các hiệp định khác sẽ được bao gồm trong nghĩa vụ MFN trong phạm vi mà các hiệp định khác có liên quan đến cùng một vấn đề như hiệp định cơ bản.

- Tuy nhiên, do hội đồng trọng tài nhận thức được những hậu quả mà việc giải thích điều khoản MFN theo nghĩa rộng có thể gây ra, nên đã đặt ra các giới hạn cho việc sử dụng nguyên tắc MFN, bằng cách thừa nhận rằng 'người hưởng lợi từ điều khoản này không được vượt quá những cân nhắc về chính sách công mà các bên ký kết có thể đã xem là những điều kiện cơ bản để họ chấp nhận hiệp định đang được đề cập'.[17] BIT gây ra vụ kiện *Maffezini* đã không nêu rõ phạm vi của các điều khoản MFN liên quan đến giải quyết tranh chấp. Theo lời của Giáo sư Gaillard, '[trong] những tình huống đó, ý định của các bên tham ký kết có thể được diễn giải hợp lý để bao gồm toàn bộ các quyền được dành cho các nhà đầu tư của nước thứ ba, trong đó có quyền giải quyết trung lập và hiệu quả các tranh chấp đầu tư của họ thông qua trọng tài quốc tế hơn là thông qua các cơ quan tư pháp của chính nước tiếp nhận đầu tư.'[18]

Trong những năm qua, đã có nhiều phán quyết gây tranh cãi, nhưng chủ đề này đã thu hút được nhiều chú ý hơn trong năm 2011, sau khi trọng tài viên, nhà nghiên cứu người Pháp, Brigitte Stern đã sử dụng ý kiến bất đồng của mình trong một phán quyết của ICSID trong vụ *Impregilo SpA v. Argentina* để cảnh báo về 'những mối nguy hiểm lớn'[19] khi cho phép nguyên đơn bỏ qua các yêu cầu thẩm quyền của BIT bằng cách viện dẫn điều khoản MFN. BIT trong vụ *Impregilo* (BIT Argentina - Italia) đã sử dụng ngôn ngữ chung chung như vậy, và quan trọng là quy định rằng nó mở rộng không chỉ đến 'các khoản đầu tư mà còn tới 'tất cả các vấn đề khác được điều chỉnh bởi Hiệp định này'.

Một mặt của lập luận (đó là quan điểm của đa số trong vụ *Impregilo* - Thẩm phán Danelius và Thẩm phán Bower) là các điều khoản

xem thêm vụ *Tập đoàn Năng lượng LG&E, Tập đoàn Tài chính LG&E, Công ty Quốc tế LG&E v. Cộng hòa Argentina*, ICSID, Vụ số ARB/02/1, Phán quyết về trách nhiệm, ngày 03/10/2006, đoạn 140-163. Đối với quyết định phản đối, xem vụ *Công ty Truyền tải Khí CMS v. Cộng hoà Argentina*, ICSID, Vụ kiện số ARB/01/8, Phán quyết ngày 12/5/2005, đoạn 285-295.

[17] *Emilio Augustín Maffezini v. Spain*, ICSID, Vụ số ARB/97/7, Phán quyết về thẩm quyền trọng tài ngày 25/01/2000, đoạn 54-64; *Gaillard*, 2005; *Teiteilbaum*, 2005; *Kürtz*, 2004; *Hsu*, 2006; *Freyer and Herlihy*, 2005; *Fernández Masiá*, 2007. Về vụ *Mafezzini* và mối quan hệ với các BIT mà Trung Quốc đã ký kết, xem *Schill*, 2007 và *Cymrot*, 2006.

[18] Emmanuel Gaillard, 'Xác định thẩm quyền qua điều khoản MFN', *Tạp chí Luật New York*, Tập 233, Số. 105 (2005) tr. 3.

[19] *Impregilo S.p.A. v. Argentina*, ICSID Vụ số ARB/07/17, Ý kiến đồng thuận và bất đồng của Giáo sư Brigitte Stern, ngày 21/6/ 2011, tr. 99.

MFN cần được giải thích theo nghĩa rộng. Lý do cơ bản cho khía cạnh này của luận điểm này là thuật ngữ 'đối xử' trong các điều khoản MFN tự nó đủ rộng để áp dụng cho các vấn đề thủ tục như giải quyết tranh chấp. Hơn nữa, các quy định về giải quyết tranh chấp là cần thiết đối với các biện pháp bảo hộ được quy định trong các BIT, do đó điều khoản MFN phải được hiểu là đem lại cho bên nguyên đơn những lợi ích của một điều khoản giải quyết tranh chấp theo nghĩa rộng hơn trong một BIT khác. Hơn nữa, đối với các điều khoản MFN quy định 'tất cả các vấn đề' (như điều khoản MFN trong vụ *Impregilo*), cụm từ như vậy không nên được hiểu một cách hạn hẹp như là khi đề cập đến 'tất cả các vấn đề tương tự ('all similar matters') hoặc 'tất cả các vấn đề cùng loại khác' ('all other matters of the same kind') sao cho nó loại trừ các vấn đề về thủ tục.[20] *Mặt khác* của lập luận này là các điều khoản MFN liên quan đến sự bảo vệ về mặt nội dung cho các nhà đầu tư và các khoản đầu tư, do đó phạm vi của nó không nên mở rộng đến các vấn đề thủ tục như giải quyết tranh chấp. Cụ thể, các vấn đề về thủ tục ảnh hưởng đến việc các biện pháp bảo hộ trong BIT có liên quan được vận hành và thi hành như thế nào - về cơ bản là khác nhau, để đảm bảo cho các nhà đầu tư nhận được sự đối xử ưu đãi nhất.[21]

Trong vụ *Impregilo*, Giáo sư Stern đã đưa ra những phản đối của bà bằng cách tuyên bố bà hy vọng rằng 'sẽ đóng góp một cách khiêm tốn và mang tính xây dựng cho cuộc tranh luận đang diễn ra về việc các điều khoản MFN nên được áp dụng như thế nào'. Giáo sư Stern đã đưa vấn đề ra với mô tả của số đông để ủng hộ cho quan điểm của mình. Bà

[20] Có rất nhiều án lệ ủng hộ quan điểm này. Đứng đầu là phán quyết trong vụ *Maffezini v. Tây Ban Nha,* ICSID, Vụ số ARB/97/7 ngày 25/01/2000. Ngoài ra các *thí dụ* khác bao gồm: Vụ *Gas Natural v. Argentina*, ICSID, Vụ số ARB/03/10 ngày 17/6/2005); vụ *Suez and Vivendi v. Argentina*, ICSID, Vụ số ARB/03/19, ngày 03/8/2006); vụ *Camuzzi International v. Argentina*, ICSID, Vụ số ARB/03/2, ngày 11/5/2005.

Tuy nhiên, cần lưu ý rằng các trường hợp trên đều có các điều khoản MFN liên quan 'tất cả các vấn đề'. Tuy nhiên, cũng có những phán quyết trong đó đề cập đến điều khoản MFN có phạm vi hẹp hơn, chỉ quy định đối xử MFN với các nhà đầu tư và các khoản đầu tư cũng được cho là cũng có thể áp dụng đối với việc giải quyết tranh chấp. *Thí dụ* về các trường hợp này bao gồm: vụ *Siemens v. Argentina,* ICSID, Vụ số ARB/02/8, ngày 03/8/2004; *Natinal Grid v. Argentina,* UNCITRAL, ngày 20/6/2006; vụ *RosInvest v. Nga*, SCC, Vụ số V079/2005, tháng 10/2007.

[21] Có nhiều phán quyết ủng hộ khía cạnh này của lập luận trên, *thí dụ:* vụ *Salini-Jordan*, ICSID, Vụ số ARB/02/13, ngày 09/11/2004; vụ *Plama v. Bulgaria*, ICSID, Vụ số ARB/03/24, ngày 08/02/2005; vụ *Telenor v. Hungary,* ICSID, Vụ số ARB/04/15, ngày 13/9/2006. Tuy nhiên, cần lưu ý rằng không có phán quyết nào kể trên liên quan đến điều khoản MFN áp dụng với 'tất cả các vấn đề'. Trên thực tế, chỉ có một phán quyết ủng hộ quan điểm cho rằng điều khoản MFN áp dụng với 'tất cả các vấn đề' không nên mở rộng áp dụng với giải quyết tranh chấp (*Berschader v. Russian Federation*, SCC, Vụ số 080/2004, ngày 21/4/2006, và thậm chí sau đó một trong các trọng tài viên đã phản đối kịch liệt.

lập luận rằng nếu người ta nhìn vào số lượng các trọng tài viên có quan điểm ủng hộ việc áp dụng các điều khoản MFN để giải quyết tranh chấp, chứ không phải số lượng các phán quyết, thì bức tranh này gần như cân bằng, bởi vì có rất nhiều vụ trong đó cùng trọng tài viên tham gia cùng vụ việc. Trong bất kỳ trường hợp nào, bà nói rằng việc dựa vào các vụ kiện trước đây và coi nó là những tiền lệ ràng buộc không phải là lập luận có tính thuyết phục về mặt pháp lý.

Giáo sư Stern so sánh các điều khoản giải quyết tranh chấp trong BIT Argentina - Italia và BIT Argentina - Hoa Kỳ (điều khoản giải quyết tranh chấp mà phán quyết trong vụ *Impregilo* tìm cách đưa vào). Mặc dù BIT Argentina - Italia yêu cầu nhà đầu tư phải sử dụng các biện pháp chế tài trong nước trong 18 tháng, nhưng BIT Argentina - Hoa Kỳ lại quy định rằng nhà đầu tư có thể chọn đưa tranh chấp ra giải quyết tại tòa án trong nước, hoặc tòa án hành chính, hoặc giải quyết theo các thủ tục giải quyết tranh chấp đã được thống nhất trước đây, hoặc đưa tranh chấp ra trọng tài quốc tế, sau 6 tháng kể từ ngày phát sinh tranh chấp. Trong hoàn cảnh như vậy, việc áp dụng một giới hạn thời gian từ cơ chế này vào cơ chế kia thực sự không có ý nghĩa, vì nó không thể dựa trên sự so sánh triệt để giữa hai điều khoản với những cơ sở hoàn toàn khác biệt. Bà kết luận rằng *Impregilo* đã được hưởng một sự đối xử thuận lợi chưa từng có và không tương xứng với bất kỳ tình huống thực tế nào theo bất kỳ hiệp định nào. Thật vậy, bà nói rằng cách giải thích như vậy đã cho phép bên nguyên đơn giải quyết các yêu cầu thẩm quyền và kén chọn từ một 'thực đơn' các IIA.

Hộp 4: Mối nguy hiểm của phương pháp tiếp cận Maffezini: vụ Impregilo S.p.A. v. Argentine Republic, Ý kiến bất đồng của Giáo sư Brigitte Stern, ngày 21/6/2011

100. Cần lưu ý rằng trong vụ *Maffezini*, hội đồng trọng tài đã ý thức được hậu quả lâu dài của phán quyết của mình khi sử dụng điều khoản MFN để điều chỉnh các thủ tục giải quyết tranh chấp, và buộc phải tuyên bố rằng 'cần phải có sự phân biệt giữa việc mở rộng hợp pháp đối với các quyền và lợi ích thông qua việc vận hành điều khoản này, và việc mua bán theo IIA có tính chất gây rối hủy hoại các mục tiêu chính sách của các điều khoản quy định cụ thể quan trọng. Do đó, để cố gắng giữ mọi thứ trong vòng kiểm soát, đã bổ sung rằng 'có một số giới hạn quan trọng cần lưu ý.' Các giới hạn này đã được tóm tắt theo cách sau:

Về mặt nguyên tắc, người thụ hưởng điều khoản này không thể được ưu tiên hơn những cân nhắc về chính sách công mà các bên ký kết có thể coi như là điều kiện cơ bản để họ chấp nhận thỏa thuận đang được bàn đến, đặc biệt nếu người thụ hưởng là một nhà đầu tư tư nhân, như vẫn thường xảy ra.

101. *Thí dụ* về các giới hạn cần thiết như vậy được đưa ra trong phán quyết: không thể bỏ qua sự đồng ý của Nhà nước trong điều khoản MFN: khi Nhà nước quy định về sự đồng ý của mình đối với việc sử dụng các biện pháp chế tài trong nước; khi được nêu trong BIT rằng một khi đã đưa ra sự lựa chọn giữa các tòa án trong nước và trọng tài quốc tế, thì sự lựa chọn này là cuối cùng và không thể thay đổi được (điều khoản này được gọi là điều khoản 'ngã ba đường' ('fork-in-the-road' provision); khi có một sự lựa chọn của một diễn đàn cụ thể như ICSID; hoặc khi viện dẫn đến một hệ thống trọng tài có tính thể chế cao với các quy tắc chính xác về thủ tục như NAFTA. Như đã thấy, trong những thí dụ về các tình huống mà không thể sử dụng điều khoản MFN, hội đồng trọng tài đã đưa quy tắc sử dụng các biện pháp chế tài tại chỗ, theo quan điểm của họ không thể bị bỏ qua bởi điều khoản MFN:

> ... Nếu một bên ký kết đã quy định sự chấp thuận của trọng tài về việc sử dụng các biện pháp chế tài tại chỗ mà Công ước ICSID cho phép, yêu cầu này không thể bị bỏ qua bằng cách viện đến điều khoản MFN liên quan đến một thỏa thuận của bên thứ ba không chứa yếu tố này.
>
> Tôi phải nói rằng tôi không thể tìm thấy căn cứ nào mà theo đó điều kiện về việc sử dụng các biện pháp chế tài tại chỗ không thể bỏ qua bởi một điều khoản MFN, nhưng điều kiện về việc sử dụng các biện pháp chế tài tại chỗ chỉ trong một khoảng thời gian nhất định có thể được bỏ qua, như trong phán quyết trong vụ *Maffezini*.

102. Một mối quan tâm rất sâu sắc khác nảy sinh từ việc áp dụng quy tắc chung trong vụ *Maffezini* đã được chỉ ra trong chính phán quyết của vụ đó, đó là nguy cơ 'mua bán IIA'. Một số hội đồng trọng tài đã nêu ra mối quan ngại đó. *Thí dụ*: trong vụ *Salini v. Jordan*, trọng tài đã từ chối mở rộng các điều kiện về sự tồn tại của quyền đối với trọng tài ICSID được quy định tại Điều 9 BIT Italia - Jordan năm 1999 và tuyên bố rằng: 'chia sẻ mối quan ngại đã được thể hiện ở nhiều nơi liên quan đến giải pháp được thông qua trong vụ *Maffezini*. Sự quan ngại ở đây là các biện pháp phòng ngừa của các tác giả của phán quyết này có thể chứng minh là khó áp dụng trên thực tế, do đó làm tăng tính bất ổn trước nguy cơ 'mua bán hiệp định".

103. Cũng có một số vấn đề hóc búa khác được nêu ra, nếu lập luận trong vụ *Maffezini* được chấp nhận cùng với các ngoại lệ của nó, mà theo quan điểm của hội đồng trọng tài, được coi là cần thiết để khiến việc mở rộng thẩm quyền do điều khoản MFN mang lại được chấp nhận.

104. Chúng ta hãy lấy thí dụ về tình huống mà trong BIT chính có nêu rõ một khi đã đưa ra sự lựa chọn giữa các tòa án trong nước và trọng tài quốc tế, thì sự lựa chọn này là cuối cùng và không thay đổi được nữa, tức là tình huống mà một BIT quy định những gì được biết đến như là một điều khoản 'ngã ba đường' ('fork-in-the-road'). Vì một số lý do không giải thích, hội đồng trọng tài này nói trong vụ *Maffezini* rằng đây là một tình huống không thể thay đổi bởi điều khoản MFN. Nếu chúng ta thừa nhận điều này vì mục đích lập luận, thì tôi cho rằng nó sẽ cho chúng ta những kết luận rất kỳ quái, thí dụ nếu chúng ta lấy 2 BIT cho trường hợp của mình. BIT Argentina - Italia quy định hạn chế việc sử dụng các tòa án trong nước trong khoảng thời gian 18 tháng trước khi vụ việc có thể được đưa ra trọng tài. Ngược lại BIT Argentina - Hoa Kỳ có một điều khoản 'ngã ba đường' ('fork-in-the-road'), do đó không cho phép đưa vụ việc lên tòa án trong nước, nếu nhà đầu tư muốn đưa vụ việc của mình ra trọng tài quốc tế, mà nhà đầu có thể thực hiện với điều kiện duy nhất là 6 tháng đã trôi qua kể từ ngày phát sinh tranh chấp. Theo Maffezini, một nhà đầu tư thuộc phạm vi điều chỉnh của BIT Argentina - Italia có thể được hưởng lợi từ việc nộp đơn trực tiếp lên trọng tài quốc tế, sau 6 tháng đã trôi qua kể từ khi xảy ra tranh chấp, theo quy định của BIT Argentina - Hoa Kỳ, trong khi một nhà đầu tư trong khuôn khổ BIT Argentina - Hoa Kỳ, người ban đầu đã đưa vụ việc ra tòa án trong nước, nhưng vẫn không muốn bị ngăn cản việc nộp đơn lên trọng tài quốc tế giải quyết theo quy định của điều khoản "ngã ba đường' ('fork-in-the-road'), không thể viện dẫn các khoản 2 và 3 của Điều 8 để loại bỏ điều khoản đó. Tôi thực sự không biết làm thế nào áp dụng điều khoản MFN này, nếu chúng ta buộc phải theo *Maffezini*, sẽ thực hiện được mục tiêu đã đề ra của điều khoản MFN là dành sự đối xử như nhau cho tất cả các nhà đầu tư.

105. Một vấn đề lý thuyết hóc búa khác được đưa ra trong cách tiếp cận *Maffezini* bởi một thực tế là điều khoản MFN có thể được viện dẫn không phải từ ngay trong đơn đề nghị giải quyết bằng trọng tài, mà mãi ở giai đoạn sau, thường là cho tới tận khi Chính phủ bị kiện phản hồi về việc phản đối thẩm quyền trọng tài. Khi đơn đề nghị trọng tài

giải quyết thể hiện sự đồng ý của nhà đầu tư, thì sự đồng thuận của Nhà nước và nhà đầu tư đã tạo cơ sở cho thẩm quyền của trọng tài vào thời điểm đó. Liệu người ta có chấp nhận được rằng thỏa thuận trọng tài này sau đó sẽ bị ảnh hưởng bởi một đề nghị trọng tài trong một BIT kết hợp theo điều khoản MFN? Nói cách khác, cách tiếp cận *Maffezini* cho phép, sau khi bắt đầu một thủ tục trọng tài liên quan đến một đề nghị trong một BIT để sau đó thay đổi thoả thuận trọng tài, và thậm chí có thể cho phép một nhà đầu tư sau khi bắt đầu một thủ tục trọng tài ICSID, 'chấp nhận' một đề nghị trọng tài UNCITRAL trong một BIT khác.

106. Các vấn đề này thậm chí còn nghiêm trọng hơn, vì dường như trong xu hướng thuận lợi cho việc sử dụng điều khoản MFN để mở rộng thẩm quyền, quan điểm này không chỉ nhằm đưa toàn bộ điều khoản về thẩm quyền từ hiệp định của bên thứ ba vào hiệp định chính, mà còn nhằm chỉ đưa điều khoản thẩm quyền hoặc một khía cạnh nào đó của một điều khoản về thẩm quyền mà được xem là thuận lợi hơn, như đã được thực hiện trong phán quyết đa số: nói cách khác, có thể có một chính sách theo kiểu 'kén cá, chọn canh' ('pick and choose') trong việc thực hiện điều khoản MFN. Khía cạnh này đã được nhấn mạnh trong một bài viết về các điều khoản MFN, trong đó tác giả đưa ra những mối quan ngại xuất phát từ một phương pháp tiếp cận như vậy:
Nhưng có lẽ khía cạnh mạo hiểm và sâu rộng nhất của phán quyết *Siemens* là sự từ chối của trọng tài đối với lập luận của Argentina, nếu bên nguyên đơn có quyền vận dụng các khía cạnh thuận lợi của các quy định giải quyết tranh chấp của BIT Argentina - Chile thì cần áp dụng các khía cạnh bất lợi của các điều khoản đó. Cụ thể, nó bao gồm điều khoản 'ngã ba đường' ('fork-in-the-road') đã được quy định trong BIT Argentina - Đức. Hội đồng trọng tài công nhận rằng 'những bất lợi có thể là sự đánh đổi đối với những thuận lợi đã được yêu cầu áp dụng', nhưng cũng kết luận rằng điều khoản MFN 'chỉ liên quan đến việc đối xử thuận lợi hơn'. Do đó, điều khoản 'ngã ba đường' ('fork-in-the-road') không thể được áp dụng theo hiệu lực pháp lý của điều khoản MFN ... với việc cho phép bên nguyên đơn khả năng này, trọng tài thỏa hiệp với vô vàn các phương án và sự kết hợp giải quyết tranh chấp mà các nhà đầu tư khác nhau có thể dựa vào để đáp ứng tốt nhất với từng hoàn cảnh riêng của họ".

107. Một điều khá rõ ràng là điều khoản về thẩm quyền xét xử thường tồn tại dưới hình thức một sự sắp xếp phức tạp, cân bằng các yêu cầu khác nhau. Việc 'phá vỡ cấu trúc' các điều khoản về thẩm quyền xét xử, và chỉ 'kén chọn' một yếu tố hợp lý trong khuôn khổ toàn cầu của hiệp định bên thứ ba, nhưng lại không có cùng ý nghĩa trong hiệp định chính thì cũng chẳng có tác dụng gì. Mối nguy hiểm của một tình huống như vậy đã không được đánh giá đúng mức trong học thuyết pháp lý:
Điều quan trọng khi áp dụng điều khoản MFN, cần phải thỏa mãn là các điều khoản được coi là tạo ra đối xử thuận lợi hơn trong hiệp định khác được áp dụng hợp lý, và sẽ không có hiệu lực có ảnh hưởng về cơ bản làm giảm tính chất cân bằng đã được đàm phán kỹ lưỡng của BIT đang được đề cập. Có thể coi rằng đây chính là ảnh hưởng của phán quyết kỳ quái của trọng tài về việc phản đối thẩm quyền trong vụ Maffezini v. Tây Ban Nha. ... Không thể giả định rằng điều này có thể bị gián đoạn bởi một nhà đầu tư lựa chọn theo ý mình từ một 'thực đơn' hỗn hợp gồm các phương án lựa chọn khác nhau được quy định trong các hiệp định khác, mà đã được đàm phán với các quốc gia ký kết khác và trong các hoàn cảnh khác.

108. Theo Plama, việc này tạo ra một tình trạng hỗn loạn. Tôi đề nghị nên tránh tình trạng hỗn loạn đó, bằng việc đồng ý với nguyên tắc là một điều khoản MFN không thể loại bỏ bất kỳ điều kiện nào mà Nhà nước đồng ý sử dụng trọng tài với một nhà đầu tư nước ngoài, do đó sẽ ủng hộ đề xuất Plama, mà theo đó nguyên tắc cần phải được áp dụng cho các điều khoản MFN liên quan đến các điều khoản về thẩm quyền

> ... thì thay vào đó nên là một nguyên tắc khác [hơn là nguyên tắc trong vụ *Maffezini*] với một ngoại lệ duy nhất: điều khoản MFN trong hiệp định chính không được bao gồm toàn bộ hoặc một phần các điều khoản giải quyết tranh chấp được quy định trong một hiệp định khác, trừ khi điều khoản MFN quy định trong hiệp định chính không tạo ra sự nghi ngờ nào rằng các Bên ký kết có ý định kết hợp chúng.

Cho đến nay, ý kiến bất đồng của Giáo sư Stern là một trong những mô tả triệt để nhất về vụ kiện chống lại việc mở rộng biện pháp MFN để giải quyết tranh chấp. Cụ thể, nó nêu bật một trong những vấn đề trọng tâm của cuộc tranh luận này. *Một mặt*, đó là các quyền; và *mặt khác* là các điều kiện tiếp cận các quyền. Theo quan điểm của Giáo sư Stern, điều khoản MFN chỉ có thể liên quan đến quyền mà nhà đầu tư có thể được hưởng - nó không thể thay đổi các điều kiện cơ bản để được hưởng các quyền đó. Cụ thể, một quyền có điều kiện đối với ICSID không thể chuyển đổi một cách 'kỳ diệu'[22] thành quyền vô điều kiện do ưu đãi của điều khoản MFN. Thật vậy, như Giáo sư Stern lưu ý, nếu quan

[22] Vụ *Impregilo S.p.A. v. Argentina*, Vụ ARB/07/17, ICSID, Ý kiến đồng thuận và bất đồng của Giáo sư Brigitte Stern, ngày 21/6/2011, tr. 99.

điểm của đa số được áp dụng cho kết luận logic của nó, thì việc áp dụng phạm vi của một điều khoản MFN đối với các quy định về giải quyết tranh chấp về mặt lý thuyết cho phép áp dụng một điều khoản ICSID vào một hiệp định mà không có quy định gì về trọng tài quốc tế.

Câu hỏi đặt ra bởi các phán quyết trong các vụ *Mafezzini* và *Impregilo* cuối cùng đã giải quyết được phạm vi chung của nguyên tắc MFN, và cách thức mà quy định này được xây dựng trong mỗi BIT.

Một số BIT, nhất là các BIT do Vương quốc Anh ký kết, giải quyết những vấn đề gây tranh cãi này bằng cách áp dụng các quy định về thủ tục giải quyết tranh chấp trong số các quy định được ghi rõ ràng trong điều khoản MFN. *Thí dụ*: BIT Anh Quốc - Vanuatu năm 2003 quy định rằng: về vấn đề nghĩa vụ MFN, '[..] nhằm tránh nghi ngờ, khẳng định rằng sự đối xử được quy định trong [nghĩa vụ MFN] sẽ áp dụng cho các quy định của các Điều từ 1 đến 11 của Hiệp định này', trong đó có Điều 9 về các thủ tục ISDS. Bằng cách bao gồm một giải thích rõ như vậy, BIT này nêu rõ ý định của các bên là sẽ lựa chọn áp dụng những khía cạnh nội dung và thủ tục của giải quyết tranh chấp trong số các vấn đề chịu sự điều chỉnh của nghĩa vụ MFN. Ngược lại, một số IIA đã cố gắng ngăn cản các cơ quan trọng tài mở rộng việp áp dụng nguyên tắc MFN đối với việc giải quyết tranh chấp bằng cách nhấn mạnh ý định của các bên. Đó là trường hợp các FTA gần đây do Hoa Kỳ thúc đẩy, nhằm giới thiệu và duy trì một chú thích trong suốt quá trình đàm phán mà khẳng định rõ rằng sự giải thích trong vụ *Maffezini* sẽ không áp dụng cho IIA đó. Theo chú thích của Điều 4.2 của dự thảo văn bản FTA Hoa Kỳ - Thái Lan, theo đề xuất của Hoa Kỳ:

Các bên đồng ý rằng chú thích sau đây sẽ được bao gồm trong quá trình đàm phán như là sự phản ánh về hiểu biết chung của các bên về điều khoản đối xử MFN và về vụ kiện *Maffezini*. Chú thích này sẽ bị xóa khỏi văn bản cuối cùng của BIT. Các bên ghi nhận quyết định gần đây của hội đồng trọng tài trong vụ *Maffezini (Arg.) v. Tây Ban Nha*, trong đó phát hiện có một điều khoản MFN có phạm vi rộng khác thường trong BIT Argentina - Tây Ban Nha được áp dụng cả đối với các thủ tục giải quyết tranh chấp quốc tế. [...] Tuy nhiên, điều khoản MFN của BIT này rõ ràng chỉ giới hạn phạm vi của nó đối với các vấn đề 'liên quan đến việc thành lập, mua lại, mở rộng, quản lý, tiến hành, vận hành, và bán hoặc các hình thức chuyển nhượng đầu tư khác. Các bên chia sẻ sự hiểu biết và ý định rằng điều khoản này không bao gồm các cơ chế giải quyết tranh chấp quốc tế như những điều được nêu trong Phần B của

Chương này, do đó không thể đưa ra một kết luận tương tự như kết luận trong vụ *Maffezini*. Mục đích của chú thích này là để thể hiện ý định của các bên, mà mặc dù đã được làm rõ, sẽ không phải là một phần của văn bản ký kết cuối cùng.

Nhưng thay vào đó, mối nghi ngại ngày càng lớn hơn lại phát sinh trong các BIT này, giống như BIT đã gây ra vụ kiện *Maffezini*, mà đã không quy định rõ các điều khoản MFN về vấn đề giải quyết tranh chấp. Về cơ bản, trong những tình huống đó, ý định của các bên ký kết có thể được giải thích một cách hợp lý để bao gồm toàn bộ các quyền được dành cho nhà đầu tư của một nước thứ ba, bao gồm quyền được giải quyết các tranh chấp đầu tư của họ một cách trung lập và hiệu quả, thông qua trọng tài quốc tế hơn là thông qua các cơ quan tư pháp của chính quốc gia tiếp nhận đầu tư.

Theo đó, các IIA có điều khoản đầu tư với phạm vi rộng và chưa có quy định rõ ràng, chính xác về mức độ và phạm vi của điều khoản MFN, có thể giúp mở rộng phạm vi bảo hộ cho những nhà đầu tư mà không nhất thiết phải được các bên ký kết lường trước. Như được minh họa trong Bảng trên, các BIT do Việt Nam ký kết quy định phạm vi các điều khoản MFN khá rộng, và không giống như các IIA của Hoa Kỳ hoặc Anh Quốc, đã không cố gắng làm rõ ý định của các bên liên quan đến phạm vi áp dụng của MFN đối với các quy định giải quyết tranh chấp của IIA. Trong khi sự làm rõ này có thể không cần thiết trong các IIA do Việt Nam ký kết cho đến thời điểm cuối những năm 1990, do sự tiếp cận hạn chế với trọng tài dành cho các nhà đầu tư nước ngoài, thì các BIT mới của Việt Nam, với sự chấp thuận rộng rãi việc áp dụng trọng tài để giải quyết các tranh chấp ISDS, vẫn còn thiếu một câu trả lời với một giải pháp rõ ràng cho câu hỏi này.

TÓM TẮT CHƯƠNG 2

Về đầu tư, MFN nhằm tạo ra các điều kiện cạnh tranh bình đẳng cho tất cả các nhà đầu tư nước ngoài, không kể quốc gia xuất xứ của họ. Nguyên tắc này là một trong những nền tảng của các IIA và nó cho phép các nhà đầu tư được bảo hộ bởi một IIA, theo đó đòi hỏi các lợi ích giống như những lợi ích dành cho các nhà đầu tư của các nước khác, bất kể những lợi ích đó được xác lập trong các IIA khác hay trong thực tiễn thi hành pháp luật của quốc gia tiếp nhận đầu tư. Vai trò của các điều khoản MFN trở nên đặc biệt quan trọng sau khi các IIA trở nên phổ biến, vì điều khoản MFN có thể giúp duy trì sân chơi bình đẳng, cho dù mỗi IIA quy định một biện pháp đối xử khác nhau.

Điều khoản MFN có ý nghĩa quan trọng, đặc biệt đối với các IIA, bởi vì việc đưa ra các biện pháp đối xử khác biệt cho các đối tác khác nhau không có ý nghĩa gì, nếu IIA có bao gồm điều khoản MFN. Nhưng đồng thời, đối xử MFN thậm chí có thể làm tăng thêm tính phức tạp của các cơ chế đầu tư. Mặc dù theo truyền thống được coi là một điều khoản tiêu chuẩn mà không có những nội hàm quan trọng liên quan đến giải quyết tranh chấp, và không bị ảnh hưởng bởi những nhạy cảm chính sách của các điều khoản khác (như NT), nguyên tắc MFN đã thu hút được sự quan tâm mới của các nhà lập pháp về đầu tư quốc tế dưới tác động của việc áp dụng điều khoản này trong thời gian gần đây của các hội đồng trọng tài. Trên thực tế, phạm vi nghĩa vụ MFN, giống như bất kỳ điều khoản về nội dung khác của IIA, bị hạn chế bởi không chỉ phạm vi tổng thể của IIA, mà còn bởi cách diễn đạt của chính điều khoản này.

CÂU HỎI / BÀI TẬP

1. Vụ *Maffezini* đưa ra khả năng áp dụng MFN đối với việc giải quyết tranh chấp. Bạn đánh giá như thế nào về thời hạn 18 tháng mà trong đó nhà đầu tư phải đưa tranh chấp các tòa án trong nước? Có phải nó đơn thuần chỉ là gánh nặng về thủ tục? Liệu MFN có nên giúp cho bên nguyên đơn có thể tận dụng các lợi thế của các IIA khác mà không có những quy định về yêu cầu như vậy không?
2. Trong đoạn 63 của phán quyết trong vụ *Maffezini*, hội đồng trọng tài đã liệt kê một số trường hợp ngoại lệ có thể có đối với quy tắc của mình. Hãy đọc kỹ. Câu hỏi: Hội đồng trọng tài đã tìm thấy chúng ở đâu? Bạn có nghĩ rằng chúng có thể được áp dụng dễ dàng trong thực tế không?
3. Liệu sự khác biệt giữa vụ *Maffezini* và vụ *Plama* có thể được giải thích bằng ngôn ngữ của BIT không?

TÀI LIỆU CẦN ĐỌC

1. Emmanuel Gaillard, 'Xác định thẩm quyền thông qua điều khoản tối huệ quốc', *Tạp chí Luật New York*, ngày 02/6/2005.
2. Ruth Teitelbaum, 'Ai sợ Maffezini? Những diễn biến gần đây trong việc giải thích các điều khoản tối huệ quốc', *Tạp chí Trọng tài Quốc tế* số 22 225, 232-237 (2005).
3. Vụ *Maffezini v. Tây Ban Nha*, ICSID, Vụ số ARB/97/7, Phán quyết của trọng tài về phản đối thẩm quyền, ngày 25/01/2000, tr. 14-25.
4. Vụ *Công ty Plama Consortium Ltd v. Bulgaria*, ICSID, Vụ số ARB/03/24, Phán quyết về thẩm quyền, ngày 08/02/2005, ¶183-227.
5. Vụ *Impregilo S.p.A. v. Argentina*, ICSID, Vụ số ARB/07/17, Ý kiến đồng thuận và bất đồng của Giáo sư Brigitte Stern, ngày 21/6/2011.
6. R. Doak Bishop, James Crawford & W. Michael Reisman, *Tranh chấp đầu tư nước ngoài: Án lệ, tài liệu và bình luận*, 1087-1102; 1133-1165 (Kluwer 2005).
7. Rudolph Dolzer and Christoph Schreuer, *Nguyên tắc Luật đầu tư quốc tế*, 178-190 (Oxford 2008).
8. Christopher F. Dugan, Don Wallace JR, Noah D. Rubins & Borzu Sabahi, *Trọng tài nhà đầu tư - Nhà nước*, 397-427 (Oxford 2008).
9. Meg Kinnear, Andrea K. Bjorklund & John F. G. Hannaford, *Các tranh chấp đầu tư theo NAFTA: Hướng dẫn thực hiện NAFTA, Chương 11*, tr. 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006, cập nhật lần cuối năm 2009).
10. Campbell McLachlan, Laurence Shore & Matth Weiniger, *Trọng tài đầu tư quốc tế: Các nguyên tắc về nội dung*, tr. 251-257; 262-263 (Oxford, 2007).
11. Andrew Newcombe & Luis Paradell, *Pháp luật và thực tiễn về các hiệp định đầu tư* 147-232 (Kluwer 2008).
12. Susan D. Franck, *Các Phán quyết quốc tế: Vụ Công ty Sản xuất và Thăm dò Tây Âu kiện Ecuador*, 99 AM. J. Int'l L. 675 (2005).
13. UNCTAD, *Đối xử quốc gia*, UNCTAD / ITE / IIT / 11 (Vol IV) (1999). Yas Banifatemi, 'Những quan điểm mới về đường lối giải thích và áp dụng điều khoản MFN trong trọng tài đầu tư trong *Luật về các hiệp định đầu tư, Số hiện tại III*, tr. 241 (Andrea K. Bjorklund, Ian A. Laird và Sergey Ripinsky eds, BIICL 2009).
14. Stephan W. Shill, *Đa phương hóa Luật đầu tư quốc tế*, tr. 121-196 (Cambridge 2009).

CHƯƠNG 3. NGUYÊN TẮC ĐỐI XỬ QUỐC GIA (NT)

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CHƯƠNG 3

NGUYÊN TẮC ĐỐI XỬ QUỐC GIA (NT)

Mục đích học
Chương 3

- Xác định các yếu tố cấu thành của nguyên tắc đối xử quốc gia (NT);
- Hiểu về tầm quan trọng của việc xác định tiêu chí so sánh;
- Hiểu về các nội dung giải thích về NT của các cơ quan tài phán đầu tư;
- Đánh giá tầm quan trọng của yêu cầu về việc các tiêu chí so sánh phải được đặt trong những 'hoàn cảnh tương tự';
- Xem xét mức độ liên quan của luật WTO với bối cảnh đầu tư.

Mục 1. KHÁI NIỆM VÀ PHẠM VI CỦA NGUYÊN TẮC NT

Đối xử quốc gia (NT) là nguyên tắc quan trọng thứ hai có mục tiêu ngăn ngừa sự phân biệt đối xử giữa các nhà đầu tư. Trong khi nguyên tắc MFN hướng tới việc tạo ra một sân chơi bình đẳng cho tất cả các nhà đầu tư nước ngoài, thì nguyên tắc NT lại nhằm loại bỏ sự phân biệt đối xử giữa các nhà đầu tư trong và ngoài nước.

Cũng như nguyên tắc MFN, NT là một chuẩn mực đòi hỏi phải *so sánh*. Do đó, việc xác định tiêu chí so sánh giữa các nhà đầu tư cũng có liên quan trong ngữ cảnh NT. Điều này ngày càng đúng hơn vì các IIA thường sử dụng cùng ngôn ngữ cho cả hai nguyên tắc nêu trên.

Nguyên tắc NT tương tự như nguyên tắc MFN. Vì thế, những nội dung xem xét về phạm vi nguyên tắc NT trong nhiều trường hợp giống hệt nghĩa vụ MFN.

Mục 2. NT VÀ CÁC QUYỀN TRƯỚC KHI ĐẦU TƯ

MFN và NT có chung một cách tiếp cận đối với các quyền trước khi đầu tư và tiêu chí so sánh giữa các nhà đầu tư. Đối với quyền trước khi đầu tư, các IIA quy định quyền gia nhập cho các nhà đầu tư nước ngoài trên cơ sở MFN thường đi xa hơn để bảo đảm các quyền đó bằng các điều khoản ngang bằng so với các nhà đầu tư trong nước.

Hoa Kỳ và Canada đã và đang là các quốc gia ủng hộ chính cho cách tiếp cận này, gần đây có thêm Phần Lan. Hoa Kỳ là nước đầu tiên ủng hộ mô hình này, được ra mắt trong chương trình Hiệp định đầu tư song phương thời Reagan năm 1981. Canada áp dụng cách tiếp cận này sau khi ký của NAFTA. Các mô hình BIT gần đây của cả Canada và Hoa Kỳ đều quy định chi tiết để mô tả các hoạt động khác nhau liên quan đến khoản đầu tư áp dụng NT. *Thí dụ*: FIPA mẫu của Canada năm 2004, Điều 3.1 nêu rõ:

> 1. Mỗi Bên sẽ dành cho các nhà đầu tư của Bên kia sự đối xử không kém thuận lợi so với sự đối xử mà Bên đó dành cho nhà đầu tư của mình, trong những hoàn cảnh tương tự, đối với việc thành lập, mua lại, mở rộng, quản lý, điều hành, hoạt động và bán hoặc định đoạt đầu tư theo cách khác trên lãnh thổ của mình.[1]

Theo các quy định này, các nhà đầu tư từ Hoa Kỳ và Canada được

[1] Một điều khoản khác được dự thảo tương tự lại đề cập tới đối xử MFN. BIT mẫu của Hoa Kỳ năm 2012 cũng có quy định giống hệt ở một số điều liên quan.

đảm bảo rằng họ có thể đầu tư ở các nước khác với các điều kiện bình đẳng như các nhà đầu tư trong nước. Việc quy định khái niệm 'thành lập' cũng như 'mua lại' và 'mở rộng' cho thấy rõ rằng các nhà đầu tư nước ngoài sẽ hưởng các điều kiện bình đẳng, ngay cả khi đầu tư mới, sáp nhập và mua lại.

Một trường hợp đặc biệt là của Phần Lan và các BIT mà nước này ký kết trên cơ sở mô hình BIT dự thảo của nó năm 2001. Về nguyên tắc, các BIT của Phần Lan thừa nhận việc các bên có thể điều chỉnh việc tham gia của các nhà đầu tư nước ngoài 'theo pháp luật và quy định trong nước của mình'. Tuy nhiên, cả nghĩa vụ MFN lẫn NT đều sử dụng ngôn từ đề cập đến quyền tham gia tương ứng như sau:

1. Mỗi bên ký kết sẽ dành cho các nhà đầu tư của bên ký kết kia và các khoản đầu tư của họ, sự đối xử không kém thuận lợi hơn việc đối xử dành cho các nhà đầu tư và đầu tư của mình đối với việc mua lại, mở rộng, vận hành, quản lý, duy trì, sử dụng, hưởng thụ và bán hoặc định đoạt khoản đầu tư khác theo cách khác.

2. Mỗi bên ký kết sẽ dành cho các nhà đầu tư của bên ký kết kia và đầu tư của họ, sự đối xử không kém thuận lợi hơn so với sự đối xử dành cho nhà đầu tư của quốc gia được ưu đãi nhất và đầu tư của họ đối với việc thành lập, mua lại, mở rộng, vận hành, quản lý, bảo dưỡng, sử dụng, hưởng thụ và bán hoặc định đoạt khoản đầu tư đó theo cách khác.[2]

Vì vậy, các BIT của Phần Lan thường quy định về nghĩa vụ NT (và MFN) đối với việc tham gia của nhà đầu tư nước ngoài. Hơn nữa, thuật ngữ 'thành lập' xuất hiện trong điều khoản MFN, dù không có trong điều khoản NT, trong khi thuật ngữ 'mua lại' và 'mở rộng' xuất hiện trong cả MFN và NT. Điều này có thể được giải thích là các nhà đầu tư nước ngoài chỉ được hưởng NT khi sáp nhập và mua lại, chứ không phải khi đầu tư mới. Đó là một sự khác biệt khó có thể giải thích từ góc độ chính sách kinh tế.

Mặc dù chỉ có một số ít các BIT quy định về NT liên quan đến sự tham gia của nhà đầu tư nước ngoài, song lại có thể gặp nhiều hơn trong các nguyên tắc đầu tư của FTA. Các hiệp định khuyến khích đầu tư của EC chỉ tập trung chủ yếu vào việc thành lập của các công ty nước ngoài, chứ không chú trọng tới việc bảo hộ nhà đầu tư nước ngoài. Các FTA mà Hoa Kỳ và Canada ký kết cũng như các FTA khác đi theo mô hình NAFTA, *thí dụ* như các FTA mà Đài Loan và Hàn Quốc ký kết, và các hiệp định của Singapore và Thái Lan đều mở rộng NT cho cả giai đoạn thành lập, mặc dù thường có ngoại lệ theo ngành.

[2] BIT Phần Lan - Kyrgyzstan, Điều 3.

Mục 3. NT VÀ CÁC QUYỀN SAU KHI ĐẦU TƯ

Hầu hết các BIT không quy định về nghĩa vụ NT liên quan đến việc thành lập, và các quốc gia ký kết vẫn tự do hạn chế sự tham gia của các nhà đầu tư nước ngoài vào một số lĩnh vực nhất định. Tuy nhiên, NT sau đầu tư là một nghĩa vụ thường gặp. Nó giúp các nhà đầu tư nước ngoài sau đầu tư không phải chịu các điều kiện kém thuận lợi hơn so với các nhà đầu tư trong nước.

NT thường được áp dụng đối với cả hành vi phân biệt đối xử theo pháp luật (*de jure*) và phân biệt đối xử trên thực tế (*de facto*), nghĩa là nghĩa vụ này không chỉ áp dụng với luật hoặc các quy định trực tiếp liên quan tới nhà đầu tư nước ngoài, mà còn áp dụng với cả các biện pháp có thể gây ra các tác động không cân xứng đối với nhà đầu tư nước ngoài.

Ở khía cạnh này, hội đồng trọng tài trong vụ *S.D. Myers, Inc v. Canada* đã thể hiện quan điểm như sau:

> Để đánh giá liệu một biện pháp có trái với chuẩn mực đối xử quốc gia hay không, cần phải tính đến các yếu tố sau: tác động thực tế của biện pháp đó có tạo ra lợi ích không cân xứng cho người có quốc tịch so với người không có quốc tịch hay không; biện pháp đó, về hình thức, dường như ưu tiên hơn công dân của một nước so với những người không phải công dân nước đó được bảo hộ bởi hiệp định liên quan hay không.[3]

Ngoài ra, nguyên tắc NT còn bảo hộ các nhà đầu tư nước ngoài đối với các điều kiện kém thuận lợi hơn so với các nhà đầu tư trong nước, ngay cả khi điều này nằm ngoài ý định của các cơ quan quản lý khi ban hành các điều kiện.

Cơ quan tài phán trong vụ *SD Meyer* cho rằng ý định phân biệt đối xử là quan trọng, nhưng không mang tính quyết định, vì vậy nếu có ý định thiên vị hơn công dân của nước mình so với công dân nước ngoài, sẽ không làm phát sinh vi phạm nguyên tắc NT, nếu biện pháp đó không ảnh hưởng bất lợi đến các nhà đầu tư nước ngoài. Cơ quan tài

[3] Vụ *S.D. Myers, Inc. v. Canada*, Cơ quan Trọng tài NAFTA xét xử theo quy tắc UNCITRAL, Phán quyết Một phần Đầu tiên, ngày 13/11/2000, đoạn 252.

phán đã kết luận: 'từ 'đối xử' cho thấy tác động thực tế là cần thiết để cấu thành hành vi vi phạm 'nghĩa vụ đối xử quốc gia".[4] Tương tự, cơ quan tài phán trong vụ *Feldman*, chấp nhận 'không phải hiển nhiên […] là việc đi chệch hướng nguyên tắc NT phải được chứng minh *rõ ràng là* hệ quả liên quan tới quốc tịch của nhà đầu tư'.[5]

Không giống các BIT của Hoa Kỳ và Canada, và phù hợp với BIT của hầu hết các nước còn lại trên thế giới, các BIT của Trung Quốc không có ngoại lệ theo ngành đối với nghĩa vụ NT và các điều khoản chính khác của BIT.

Điều khoản miễn trừ ('grand-fathering') xuất hiện trong những BIT gần đây sẽ có tác động đối với việc bảo lưu những 'biện pháp hiện hành', mà cả hai quốc gia ký kết đang duy trì, mặc dù không có một một danh sách minh bạch nào về các cam kết hoặc bảo lưu cụ thể đó. Tuy nhiên, vì không thể đưa ra những hạn chế cụ thể trong các lĩnh vực khác, chính phủ nước tiếp nhận đầu tư sẽ không thể đưa vào áp dụng các hạn chế trong những lĩnh vực không tồn tại các biện pháp không tương thích ở thời điểm BIT có hiệu lực, nhưng trong tương lai có thể có các biện pháp hạn chế - như trường hợp danh mục bảo lưu 'các biện pháp tương lai'.

Thêm nữa, sự vắng bóng của điều khoản loại trừ liên quan đến NT trong BIT Trung Quốc - Hàn Quốc có thể dẫn tới các hậu quả quan trọng đối với các BIT hiện hành, do tác động của điều khoản MFN, và thực tế là các BIT 'thế hệ mới' đã khuếch đại phạm vi của các thủ tục ISDS.

Mục 4. XEM XÉT Ý ĐỊNH / ĐỘNG CƠ

Một trong những yếu tố cơ bản để xác định liệu một hành vi lập pháp có dẫn tới việc tước quyền sở hữu gián tiếp hay không, chính là mức độ tác động nghiêm trọng của biện pháp đó đối với tình trạng pháp lý của chủ sở hữu, và ảnh hưởng thực tế của nó đến khả năng sử dụng và thụ hưởng tài sản của người đó. Song điều gây tranh cãi hơn cả là 'câu hỏi liệu chú trọng tới hệ quả sẽ là tiêu chí liên quan duy nhất và độc nhất - 'thuyết hệ quả duy nhất' - hay còn có các yếu tố khác như mục đích và bối cảnh chính phủ áp dụng biện pháp này sẽ được tính đến trong quá trình phân tích?'. Trong mọi vụ việc, từ ngữ cụ thể quy định trong điều khoản hiệp định sẽ ảnh hưởng tới kết quả giải quyết vụ việc đó. Tuy nhiên, từ kết quả nghiên cứu lý thuyết đến nghiên cứu tình huống đều cho thấy cách tiếp cận cân bằng tỏ ra nổi trội. Chỉ có một số ít vụ, trong đó cơ quan tài phán chỉ tập trung vào tác động của biện pháp áp dụng đối với chủ sở hữu như là yếu tố chính để kết luận về hành vi tước quyền sở hữu. Trong vụ *Tippetts*, Cơ quan tài phán Iran - Hoa Kỳ đã kết luận:

> Động cơ của Chính phủ khi ban hành biện pháp không quan trọng bằng tác động của các biện pháp đó đối với chủ sở hữu, và hình thức của biện pháp kiểm soát hoặc can thiệp không quan trọng bằng tác động thực tế của chúng.

Trong vụ *Phelps Dodge*, việc chuyển giao quyền quản lý được thực hiện theo một đạo luật ban hành trước cách mạng nhằm ngăn chặn việc đóng cửa nhà máy, bảo đảm thanh toán cho người lao động và bảo hộ các khoản nợ phải trả cho Chính phủ. Trong trường hợp này, bao gồm cả các khoản vay của một ngân hàng đã bị quốc hữu hóa vào năm 1979. Trích dẫn vụ *Tippetts*, Cơ quan tài phán Iran - Hoa Kỳ tuyên bố rằng:

> Hội đồng xét xử hiểu đầy đủ lý do tại sao bị cáo cảm thấy bị bắt buộc phải bảo vệ lợi ích của mình thông qua việc chuyển quyền quản lý này, và hội đồng xét xử cũng hiểu các quan ngại về tài chính, kinh tế và xã hội là động lực ra đời của đạo luật này. Nhưng các lý do và mối quan tâm đó không thể giải phóng bị đơn khỏi nghĩa vụ bồi thường cho những thiệt hại mà Phelps Dodge phải chịu.[6]

Phán quyết trong vụ *Alpha Projecktholding v. Ukraina* đã trích lại nội dung vụ *Myers v. Canada* để xác nhận *động cơ* là yếu tố quan trọng để chứng minh hành vi vi phạm nghĩa vụ NT, nhưng bản thân động cơ bảo hộ không nhất thiết mang tính quyết định.[7] Về vấn đề này, Phán quyết chung thẩm trong vụ *Occidental Exploration v. Ecuador* tuyên rằng nguyên đơn đã phải nhận sự đối xử kém thuận lợi hơn so với sự đối xử dành cho công ty của nước tiếp nhận đầu tư, mặc dù điều này không nhằm ý định phân biệt đối xử các công ty của nước ngoài.[8]

Tương tự, phán quyết trong vụ *Bayindir v. Pakistan* kết luận rằng

[4] Vụ *S.D. Myers, Inc. v. Canada*, Cơ quan Trọng tài NAFTA xét xử theo quy tắc UNCITRAL, Phán quyết Một phần Đầu tiên, ngày 13/11/2000, đoạn 253.

[5] *Marvin Feldman v. Mexico*, Vụ kiện ICSID Số ARB(AF)/99/1, Phán quyết về nội dung, ngày 16/12/2002, đoạn 183.

[6] Phelps Dodge, 10 Iran - United States Cl. Trib. Rep. at 130.

[7] *Alpha Projektholding GmbH v. Ukraine*, Vụ việc ICSID Số ARB/07/16, Phán quyết ngày 08/11/2010, đoạn 427.

[8] *Công ty Sản xuất và Thăm dò Phương Tây v. Ecuador*, LCIA Case No. UN3467, Phán quyết chung thẩm, ngày 01/7/2004, đoạn 177.

không có yêu cầu nào đặt ra là phải chứng minh về ý định chủ quan phân biệt đối xử; chỉ riêng việc chứng tỏ rằng một nhà đầu tư bị phân biệt đối xử, và đó là nhà đầu tư nước ngoài, thế là đủ.[9]

Hộp 5: Xem xét động cơ trong vụ *Bayindir v. Pakistan,* 2009

Nếu yêu cầu của một tình huống tương tự được đáp ứng, cơ quan trọng tài phải tiếp tục tìm hiểu xem liệu Bayindir có bị đối xử kém thuận lợi hơn các nhà đầu tư khác hay không. Điều này đặt ra câu hỏi liệu cách kiểm tra này mang tính chủ quan hay khách quan, nghĩa là phải chứng minh về động cơ phân biệt đối xử hay chỉ cần chứng minh rằng một nhà đầu tư nước ngoài bị phân biệt đối xử là đủ. Cơ quan tài phán cho rằng giải pháp thứ hai là đúng. Điều này phát sinh từ quy định của Điều II (2) trích dẫn ở trên. Nó cũng phù hợp với cơ sở cần thiết của biện pháp bảo hộ như đã được nhấn mạnh trong vụ *Feldman v. Mexico* mà nguyên đơn đã tham chiếu:

'Rõ ràng rằng khái niệm đối xử quốc gia như thể hiện trong NAFTA và các hiệp định tương tự được thiết kế để ngăn ngừa sự phân biệt đối xử dựa trên quốc tịch hoặc 'vì lý do quốc tịch'. [...] Tuy nhiên, không phải hiển nhiên [...] rằng bất kỳ việc đi chệch với nguyên tắc đối xử quốc gia nào cũng đều phải được thể hiện một cách rõ ràng là hệ quả liên quan tới quốc tịch của nhà đầu tư. Không có từ ngữ nào như vậy trong Điều 1102. Thay vào đó, Điều 1102, theo các điều khoản của nó, cho thấy rằng có đủ điều kiện đối xử kém thuận lợi hơn cho nhà đầu tư nước ngoài hơn cho các nhà đầu tư trong nước trong những trường hợp tương tự [...] Đòi hỏi một nhà đầu tư nước ngoài phải chứng minh rằng sự phân biệt dựa trên quốc tịch của mình có thể là một gánh nặng không thể vượt qua đối với nguyên đơn, vì thông tin đó chỉ có thể được cung cấp cho Chính phủ. Nếu vi phạm Điều 1102 chỉ giới hạn ở những trường hợp có sự phân biệt rõ ràng (về mặt pháp luật) đối với người nước ngoài, thí dụ như luật quy định đối xử phân biệt giữa nhà đầu tư nước ngoài và nhà đầu tư trong nước, thì nó sẽ làm hạn chế hiệu quả của khái niệm đối xử quốc gia trong việc bảo vệ các nhà đầu tư nước ngoài'.

TÓM TẮT CHƯƠNG 3

Nguyên tắc NT cấm phân biệt đối xử giữa nhà đầu tư và các khoản đầu tư trong nước và nước ngoài. Cùng với MFN, NT tạo nên bộ nguyên tắc cơ bản về không phân biệt đối xử trong luật đầu tư quốc tế.

Phạm vi mà mức độ liên quan trên thực tế của NT phụ thuộc nhiều vào việc giải thích khái niệm 'hoàn cảnh tương tự'. Về cơ bản, định nghĩa của nó sẽ đặt ra một cơ sở để các cơ quan lập pháp trong nước có thể tự do đối xử với một số mặt hàng nhập khẩu theo cách thức khác với hàng sản xuất trong nước. Quả thật, thông thường định nghĩa NT sẽ là đạt yêu cầu, nếu trong đó có quy định về việc nó chỉ áp dụng trong những 'trường hợp tương tự' hoặc những 'hoàn cảnh tương tự'. Do hoàn cảnh của các nhà đầu tư nước ngoài và trong nước thường không giống nhau, nên rõ ràng cách quy định như vậy là nhằm để ngỏ cho việc giải thích.

Về cơ bản, nguyên tắc NT đòi hỏi các nước không được phân biệt đối xử với nhà đầu tư nước ngoài với mục đích bảo hộ các nhà đầu tư trong nước. Tiêu chuẩn đối xử có thể được xác định theo hai cách: đối xử 'giống nhau' hoặc 'thuận lợi như nhau', hoặc đối xử 'không kém thuận lợi hơn'. Rất khó phân biệt sự khác nhau, nhưng công thức 'không kém thuận lợi hơn' mở ra cho các nhà đầu tư nước ngoài khả năng được đối xử thuận lợi hơn các nhà đầu tư trong nước, phù hợp với các tiêu chuẩn quốc tế.

Nói chung, không phải tất cả các BIT đều xác định phạm vi NT giống nhau. Đa số BIT quy định về NT, nhưng chỉ giới hạn ở các khoản đầu tư đã được xác lập. Một số BIT có quy định về NT cho các nhà đầu tư trong giai đoạn trước và sau đầu tư.

CÂU HỎI / BÀI TẬP

1. Nguyên tắc NT đòi hỏi các nhà đầu tư nước ngoài, 'trong các hoàn cảnh tương tự, phải được đối xử như các nhà đầu tư trong nước. Làm thế nào để một cơ quan tài phán có thể quyết định xem ai là người trong 'hoàn cảnh tương tự'?

2. Trong vụ *Occidental v. Ecuador*, cơ quan tài phán đã đối xử với tất cả các nhà nhập khẩu hàng hóa như thể họ ở trong cùng một 'hoàn cảnh tương tự'? Điều đó có hợp lý không?

3. Điều được chấp nhận rộng rãi là NT mở rộng cho cả các khiếu nại về phân biệt đối xử theo *luật* cũng như *trên thực tế*. Hầu hết mọi vụ việc là phân biệt đối xử trên thực tế. Liệu những vụ việc đó có phải đi kèm với giả định về động cơ phân biệt đối xử tồi tệ của Chính phủ đối với nhà đầu tư nước ngoài hay không? Hay bản thân sự tác động bất cân xứng đã đủ để duy trì khiếu nại bồi thường?

[9] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Phán quyết, ngày 27/8/2009, at 390.

4. 'Chuyển giao gánh nặng', theo đó đòi hỏi vụ việc mà nguyên đơn khởi kiện, thoạt nhìn phải là một vụ vi phạm nguyên tắc NT, sau đó chuyển gánh nặng sang quốc gia bị kiện buộc họ phải đưa ra lý do không phân biệt đối xử để giải thích cho sự khác biệt trong đối xử, có phải là cách tiếp cận hợp lý trong một vụ việc NT không?

TÀI LIỆU CẦN ĐỌC

1. Peter Clark, 'Đối xử quốc gia theo GATT và NAFTA: Ý kiến thảo luận', 1:3 *Quản lý tranh chấp xuyên quốc gia* (tháng 7/2004).
2. Andrea K. Bjorklund, 'Đối xử quốc gia', trong *Các chuẩn mực đối xử* 29, 29-36 (August Reinisch ed., Oxford, 2008).
3. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *Trọng tài đầu tư quốc tế: các nguyên tắc nội dung* 251-257; 262-263 (Oxford 2007).
4. Andrew Newcombe & Lluis Paradell, *Pháp luật và thực tiễn về các hiệp định đầu tư* 147-232 (Kluwer 2008).
5. Susan D. Franck, 'Các phán quyết quốc tế: Occidental Exploration and Production Co. v. Ecuador', 99 *Am. J. Int'l L.* 675 (2005).
6. UNCTAD, *Đối xử quốc gia*, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).
7. *Methanex Corp. v. USA*, UNCITRAL (Phán quyết chung thẩm) (ngày 3/8/2005), Phần IV, Chương B.
8. *Occidental Exploration & Prod. Co. v. Ecuador*, LCIA, Vụ việc số UN 3467, phán quyết chung thẩm, ngày 01/7/2004) 1-6, 25-35 (facts), 167-179.
9. *Gami Investments Inc. v. Mexico*, UNCITRAL, Phán quyết chung thẩm, ngày 15/11/2004, 12-22 (facts) 111-115.
9. NAFTA, Điều 1102.
11. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Tranh chấp đầu tư theo NAFTA: Chú giải hướng dẫn Chương 11 của NAFTA của tại 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; cập nhật lần cuối 2009).

CHƯƠNG 4. NGUYÊN TẮC FET VÀ NGUYÊN TẮC FPS

CHƯƠNG 4

NGUYÊN TẮC ĐỐI XỬ CÔNG BẰNG VÀ THỎA ĐÁNG (FET) VÀ NGUYÊN TẮC BẢO VỆ VÀ AN NINH ĐẦY ĐỦ (FPS)

Mục đích học
Chương 4

- Tìm hiểu những yếu tố nhằm phân biệt tiêu chuẩn đối xử quốc tế tối thiểu (IMS) với tiêu chuẩn đối xử công bằng và thỏa đáng (FET);
- Xem xét mức độ ứng xử của Chính phủ theo yêu cầu của tiêu chuẩn quốc tế tối thiểu (MTS) hiện nay;
- Thảo luận về những lợi thế của quá trình giải thích Hiệp định NAFTA;
- Thảo luận về những bất lợi của quá trình giải thích Hiệp định NAFTA;
- Xác định các yếu tố có vai trò dẫn dắt khi phân tích tiêu chuẩn đối xử công bằng và thỏa đáng (FET);
- Nghiên cứu phạm vi tiêu chuẩn về bảo hộ và an ninh đầy đủ (FPS).

Mục 1. KHÁI NIỆM, PHẠM VI VÀ ÁP DỤNG NGUYÊN TẮC FET

1. Khái niệm nguyên tắc FET

Các tiêu chuẩn đối xử mang tính 'tương đối' như nguyên tắc MFN và nguyên tắc NT thường mở rộng những quyền vốn đã được trao cho một số nhà đầu tư sang cho các nhà đầu tư và các khoản đầu tư của bên kí kết. Tuy nhiên, các tiêu chuẩn này không cung cấp sự đảm bảo khách quan về sự đối xử 'tốt' dành cho các nhà đầu tư nước ngoài. Quả thực, các nghĩa vụ MFN và NT có thể sẽ ít có tác dụng trong trường hợp *tất cả* các nhà đầu tư đều phải được đối xử bình đẳng như nhau.

Các tiêu chuẩn đối xử 'tuyệt đối' nhằm đảm bảo sự đối xử thỏa đáng cho các nhà đầu tư nước ngoài, độc lập với những gì nước tiếp nhận đầu tư dành cho các nhà đầu tư trong nước hoặc nhà đầu tư từ các quốc gia khác. Người ta tìm thấy một số công thức quy định trong các BIT thể hiện nghĩa vụ của nước tiếp nhận đầu tư phải đảm bảo việc đối xử 'tốt' ở chuẩn mực tối thiểu nhất định cho các nhà đầu tư nước ngoài. Hầu hết các công thức này đều liên quan đến yêu cầu phổ biến nhất là đảm bảo sự 'đối xử công bằng và thỏa đáng' ('FET') dành cho các nhà đầu tư nước ngoài.

Mặc dù nguyên tắc FET đã được sử dụng rộng rãi trong thời gian dài, nhưng nội dung và ý nghĩa chính xác của tiêu chuẩn này vẫn chưa được hiểu một cách thống nhất. UNCTAD đã chỉ ra rằng có ít nhất hai quan điểm khác nhau về cách hiểu chính xác của thuật ngữ FET: (i) Hiểu theo ý nghĩa thông thường; và (ii) So sánh tiêu chuẩn này với tiêu chuẩn quốc tế tối thiểu (MTS).

Ngoài ra, FET đang trở thành một trong những nguyên tắc quan trọng nhất, nếu không muốn nói là nguyên tắc quan trọng nhất trong các nghĩa vụ chính được nêu trong BIT, và phần lớn các phán quyết được tuyên cho nhà đầu tư nước ngoài đều được quyết định toàn bộ hay một phần dựa trên vi phạm tiêu chuẩn này.

Một số khía cạnh của khái niệm 'quản trị tốt' được các hội đồng trọng tài coi là thuộc phạm vi của nguyên tắc FET. Những khía cạnh này bao gồm tính minh bạch, quy trình xét xử công bằng, xét xử bằng trọng tài không phân biệt đối xử, và nguyên tắc thiện chí. Bên cạnh đó, những hành động của Chính phủ vượt quá phạm vi thẩm quyền hợp pháp của cơ quan nhà nước có liên quan, hay các biện pháp cản trở những mong ước chính đáng ('legitimate expectation') của nhà đầu tư nước ngoài cũng được coi là những yếu tố có thể dẫn đến vi phạm tiêu chuẩn FET.

Tiêu chuẩn này đã được áp dụng trong nhiều vụ việc, đối với một số hành vi, *thí dụ* như: không gia hạn giấy phép khai thác bãi chôn lấp rác thải ở Mexico; yêu cầu chuẩn bị các tài liệu được xác định là 'quá mức cần thiết' để xin cấp giấy phép xuất khẩu trong ngành lâm nghiệp ở Canada; một quan chức chính phủ chuyển khoản tiền một cách không chính đáng từ tài khoản cá nhân; không gửi thông báo trực tiếp và đầy đủ cho chủ tàu về việc giữ tàu, mặc dù thông báo đó đã được đặt trên tàu; …

2. Áp dụng FET trong thực tiễn trọng tài quốc tế

Trong bối cảnh Hiệp định NAFTA, một số vụ việc ISDS bằng trọng tài đã đề cập đến nội dung tiêu chuẩn FET, từ đó nảy sinh nhiều cách hiểu đối lập hay các tranh cãi liên quan tới những nghĩa vụ cụ thể mà các quốc gia NAFTA mong muốn thực hiện theo nguyên tắc này.[1] Nghĩa vụ FET được ghi trong Điều 1105 của NAFTA dưới tiêu đề 'Tiêu chuẩn đối xử tối thiểu' ('MTS'), cụ thể quy định như sau:

1. Mỗi bên sẽ trao cho các khoản đầu tư của các nhà đầu tư bên kia sự đối xử phù hợp với pháp luật quốc tế, bao gồm đối xử công bằng và thỏa đáng và bảo vệ và an ninh đầy đủ.

Thí dụ: trong vụ *S.D. Myers v. Canada,* trọng tài tuyên bố rằng:

> Một vi phạm [nguyên tắc đối xử công bằng và thỏa đáng] xảy ra khi có thể chứng minh rằng nhà đầu tư bị đối xử một cách bất công và tùy tiện đến mức không thể chấp nhận được theo quan điểm quốc tế,[2] qua đó đặt song song đặt tiêu chuẩn FET với tiêu chuẩn quốc tế tối thiểu.

Thay vào đó, hội đồng trọng tài trong vụ *Metalclad v. Mexico* lại cho rằng khái niệm FET trong NAFTA có quy định về mức độ minh bạch nhất định. Từ đó, trọng tài đưa ra quyết định rằng do không đảm bảo được khuôn khổ pháp lý minh bạch và có thể dự đoán để Metalclad lập kế hoạch kinh doanh và đầu tư, Mexico thể hiện sự thiếu vắng trình tự và sắp xếp kịp thời liên quan tới nhà đầu tư của một bên hành động dựa trên mong ước sẽ được hưởng FET theo NAFTA, do đó cấu thành vi phạm nghĩa vụ FET theo Điều 1105 NAFTA.[3]

Cơ quan tài phán trong vụ *Pope & Talbot v. Canada* ghi nhận rằng

[1] Để rà soát chi tiết các phán quyết trọng tài về khái niệm FET, xem *Schreuer*, 2005.

[2] *S.D. Myers v. Canada*, Trọng tài NAFTA theo quy định của UNCITRAL, Phán quyết một phần lần thứ nhất, ngày 13/11/2000, đoạn 263.

[3] *Metalclad Corp. v. USA*, Phán quyết, Vụ số ARB(AF)/97/1, ICSID, ngày 30/8/2000, đoạn 99-101.

ngôn ngữ trong Điều 1105 cho thấy tiêu chuẩn FET đã được đưa vào pháp luật quốc tế. Cơ quan tài phán cũng đề cập tới và xem xét tuyên bố của cả Canada và Hoa Kỳ, cho thấy trong quá trình đàm phán NAFTA, các nhà đàm phán không muốn tách rời khái niệm FET khỏi luật tập quán quốc tế. Tuy nhiên, cơ quan trọng tài nhận thấy 'lý do rất xác đáng cho việc diễn giải ngôn ngữ trong Điều 1105 theo ngôn ngữ của BIT', trong đó, theo quan điểm của cơ quan xét xử, khái niệm 'công bằng' là sự bổ sung cho các nghĩa vụ xuất phát từ luật tập quán quốc tế.[4]

Trong vụ *Loewen v. USA,* cơ quan tài phán tuyên bố vào ngày 26/6/2003 rằng theo cách diễn giải mới được thông qua gần đây của Ủy ban Thương mại tự do, 'FET' và 'FPS' không phải là những nghĩa vụ độc lập. Nói đúng hơn, nó cấu thành nên nghĩa vụ của nước tiếp nhận đầu tư chỉ trong chừng mực được luật tập quán quốc tế công nhận. Cơ quan tài phán trong vụ này giải thích rằng: nếu các cơ quan tài phán khác của NAFTA 'có thể thể hiện quan điểm trái ngược, thì những quan điểm đó phải được bỏ qua'.[5]

Nhằm tóm tắt các quyết định linh hoạt của NAFTA về khái niệm FET, cơ quan tài phán trong vụ *Waste Management v. Mexico* đã đưa ra kết luận: 'tiêu chuẩn ở mức độ nào đó phải linh hoạt để có thể áp dụng cho từng hoàn cảnh của từng vụ việc', bằng cách lưu ý rằng:

> Tiêu chuẩn đối xử tối thiểu FET bị vi phạm do ứng xử của Nhà nước và gây hại cho nguyên đơn, nếu ứng xử đó mang tính chất tùy tiện, không công bằng, bất công hoặc độc đoán, có sự phân biệt đối xử và đặt nguyên đơn vào tình huống bị thành kiến và phân biệt chủng tộc, hoặc ứng xử đó có liên quan đến việc xét xử không theo trình tự pháp luật, dẫn đến kết quả vi phạm các chuẩn mực tư pháp, như trong trường hợp không bảo đảm thực thi pháp luật một cách công bằng trong các vụ kiện tư pháp, hoặc hoàn toàn thiếu sự minh bạch và công bằng trong các quy trình, thủ tục hành chính.[6]

Các cơ quan tài phán, giống những hội đồng xét xử đầu tiên của NAFTA, phải đối mặt với câu hỏi: liệu các nghĩa vụ này có bổ sung cho những nghĩa vụ đã được ghi nhận trong luật tập quán quốc tế hay không. Về khía cạnh này, cơ quan xét xử trong vụ *Saluka Investments*

[4] Vụ *Pope & Talbot Inc. v. Canada*, Trọng tài NAFTA theo quy định của UNCITRAL, Phán quyết về nội dung, ngày 10/4/2001, đoạn 105-118.

[5] *Loewen v. USA*, Phán quyết, Vụ ICSID Số ARB(AF)/98/3, các đoạn 125-128.

[6] *Waste Management, Inc. v. Mexico*, Vụ số ARB (AF)/00/3), ICSID, Phán quyết chung thẩm, ngày 30/4/2004, đoạn 98-99.

v. Sec nhận thấy tiêu chuẩn độc lập theo NAFTA hoàn toàn không phụ thuộc vào tiêu chuẩn đối xử quốc tế tối thiểu. Theo tài liệu này, nguyên tắc này đòi hỏi các bên:

> Không làm ảnh hưởng tới quyền hợp pháp của mình để thực hiện những biện pháp bảo vệ lợi ích công cộng, đã đảm nhận nghĩa vụ đối xử với khoản đầu tư của các nhà đầu tư nước ngoài theo cách thức không ảnh hưởng tới những mong ước chính đáng và hợp lý của nhà đầu tư.[7]

Gần đây nhất, phán quyết trong vụ *Invesmart v. Sec* lưu ý rằng nội dung nghĩa vụ FET được mô tả rất đa dạng và không thống nhất, như thể nó bao gồm nhiều xu hướng khác nhau để bảo vệ mong ước chính đáng của nhà đầu tư, bảo vệ nhà đầu tư khỏi những đối xử hiển nhiên độc đoán hoặc bất công, yêu cầu có sự nhất quán của Chính phủ trong việc ra quyết định, minh bạch, xét xử đúng quy trình và có những thông báo, biện pháp phù hợp chống phân biệt đối xử mà không vi phạm tiêu chuẩn đối xử của quốc gia, và bảo vệ trước những hành vi kém thiện chí.[8]Có lẽ nội dung tóm tắt hay nhất tới nay là phán quyết trong vụ *Ngân hàng Caribbean của Anh kiện Belize* ghi nhận rằng, liên quan đến tiêu chuẩn FET, khía cạnh bảo vệ đầu tư nhìn chung đã cản trở việc đưa ra một định nghĩa toàn diện; liệu cách hành động của Chính phủ có thể được coi là 'công bằng' và 'thỏa đáng' hay không, thì còn phụ thuộc nhiều vào bối cảnh.[9]

Hộp 6:
***FET trong phán quyết vụ Ngân hàng Caribbean của Anh kiện Belize* (2014)**

281. Về tiêu chuẩn FET, cơ quan xét xử nhận thấy khía cạnh bảo hộ đầu tư này nhìn chung đã cản trở việc xây dựng một khái niệm toàn diện. Liệu ứng xử của Chính phủ có được coi là 'công bằng' và 'thỏa đáng' hay không, thì điều này còn phụ thuộc nhiều vào bối cảnh. Trong khi quy định bảo vệ nhà đầu tư chống lại việc tước quyền sở hữu trong Điều 5 của Hiệp định chủ yếu tập trung vào quyền tài sản của nhà đầu tư, và quy định một loạt các yêu cầu (tương đối) khách quan cho việc tước quyền sở hữu, thì tiêu chuẩn FET tập trung nhiều hơn một cách chủ quan vào ý định và bối cảnh hành động của Chính phủ, cũng như tác động của nó. Do không có ý định xem xét một cách toàn diện khái niệm FET, căn cứ vào tranh luận giữa các bên, cơ quan xét xử cho rằng có ít nhất hai khía cạnh của tiêu chuẩn này ảnh hưởng đến diễn tiến trong các vụ việc này.

282. *Thứ nhất*, tiêu chuẩn FET thường bao gồm việc cấm các ứng xử mang tính chất 'tùy tiện', 'độc đoán', hay 'phân biệt đối xử'. Sự liên hệ này có logic nhất định. Các ứng xử có động cơ không chính đáng, hoặc vì động cơ không liên quan đến các hành vi đã được thông qua, hay không vì động cơ nào khác, thì khó có thể được mô tả là cách ứng xử bất công hay bất bình đẳng, bất kể tác động thực tế của hành động là gì. Theo quan điểm của cơ quan tài phán, điểm này có liên quan tới Hiệp định ở điều khoản yêu cầu là mọi hành vi tước quyền sở hữu phải được thực hiện vì mục đích công cộng. Mặc dù ứng xử của Chính phủ có thể bất công hoặc bất bình đẳng, nhưng vẫn phục vụ cho mục đích công cộng ngay tình, thì rất khó tưởng tượng tình huống ngược lại, khi mà việc tước quyền sở hữu không nhằm phục vụ mục đích công cộng nhưng vẫn tuân thủ yêu cầu đối xử công bằng và thỏa đáng.

283. *Thứ hai*, như được nêu trong phần thảo luận của hai bên, tiêu chuẩn FET thường gắn với khái niệm 'mong ước chính đáng' của nhà đầu tư. Mặc dù việc lập luận rằng nhà đầu tư vẫn mong ước thực hiện phần còn lại của Hiệp định là khá xáo mòn, song hội đồng trọng tài vẫn ủng hộ quan điểm theo đó nhà đầu tư ít nhất có thể mong ước một cách chính đáng rằng pháp luật quy định thu hồi toàn bộ quyền sở hữu đầu tư sẽ không được áp dụng, trừ phi nhằm phục vụ mục đích công cộng.
284. Sau khi trình bày các phát hiện đó (xem điểm 241 và 243 phía trên), việc bị đơn thông qua Đạo luật và Lệnh 2009, và Đạo luật và Lệnh 2011 không đáp ứng được yêu cầu của Hiệp định theo đó quy định: mọi hành vi tước quyền sở hữu phải được thực hiện vì mục đích công cộng, nên cơ quan tài phán kết luận rằng bị đơn đã đối xử công bằng và thỏa đáng với nguyên đơn.

3. Áp dụng FET trong các IIA

Hầu như tất cả các IIA đều ghi nhận nghĩa vụ FET đối với các nhà đầu tư nước ngoài. Trong nhiều trường hợp, nghĩa vụ này còn đi kèm với việc

[7] *Saluka Investments BV (Hà Lan) v. Sec,* Hội đồng trọng tài BIT *Hà Lan - Sec* theo quy định của UNCITRAL, Phán quyết một phần, 17/3/2006, 309.

[8] *Invesmart, B.V. v. Sec*, UNCITRAL, Phán quyết (Được biên tập lại), ngày 26/6/2009 tại đoạn 200. Ngoài ra, Phán quyết chung thẩm trong vụ *Oxus v. Uzbekistan* công nhận cách thức áp dụng tiêu chuẩn của các tòa quốc tế có sự khác biệt rất lớn. Xem *vụ Oxus Gold plc v. Uzbekistan*, UNCITRAL, Phán quyết chung thẩm, ngày 17/12/2015 tại đoạn 313.

[9] *Ngân hàng Caribbean của Anh kiện Chính phủ Belize*, Vụ số 2010-18/BCB-BZ, PCA, Phán quyết, ngày 19/12/2014 tại đoạn 281.

bảo đảm nguyên tắc FPS trong tình huống có xung đột vũ trang hoặc khủng hoảng dân sự.

Trường hợp này không áp dụng với BIT Hoa Kỳ - Canada, trong đó kinh nghiệm về cơ chế ISDS theo NAFTA cũng như các phán quyết gây tranh cãi được thông qua trong khuôn khổ này đã thúc đẩy họ đưa ra các giải thích mới để làm rõ phạm vi nghĩa vụ FET.

Trên thực tế, cả ba quốc gia thành viên NAFTA đã cùng nhau thỏa thuận để giới hạn việc giải thích FET trong các phán quyết trọng tài. Ngày 31/7/2001, ba bên trong Hiệp định NAFTA, thông qua Ủy ban Thương mại tự do, đã cho ra đời một cách giải thích về tiêu chuẩn FET, cùng với tiêu chuẩn quốc tế tối thiểu theo luật tập quán quốc tế, trong đó làm rõ: nguyên tắc FET không phải là nghĩa vụ mới được bổ sung vào nghĩa vụ cho các chính phủ tham gia NAFTA.[10]

Khái niệm này sau đó đã được cơ quan tài phán trong vụ *Loewen* thông qua, như đã giải thích ở trên. Từ đó, cả Hoa Kỳ và Canada đều đã bổ sung khái niệm này vào các IIA, cho dù đó là BIT hay các chương về đầu tư trong FTA. Thí dụ: quy định trong FTA Trung Mỹ - Hoa Kỳ (CAFTA) nêu rõ:

1. Mỗi bên sẽ trao cho các khoản đầu tư theo quy định sự đối xử phù hợp với luật tập quán quốc tế, bao gồm FET và FPS.

2. Để đảm bảo chắc chắn hơn, điểm 1 quy định tiêu chuẩn tối thiểu của luật tập quán quốc tế về ứng xử với các khoản đầu tư có yếu tố nước ngoài như là tiêu chuẩn ứng xử tối thiểu dành cho các nhà đầu tư theo quy định. Khái niệm FET và FPS không yêu cầu những ứng xử bổ sung hay vượt quá những gì được quy định trong tiêu chuẩn, và không tạo thêm các quyền cơ bản. Nghĩa vụ trong điểm 1 nêu rõ: FET bao gồm nghĩa vụ không từ chối công lý trong quá trình tố tụng hình sự, dân sự hay hình chính theo nguyên tắc xét xử theo đúng trình tự pháp luật được nêu trong hệ thống pháp luật của thế giới; và FPS yêu cầu mỗi bên cung cấp mức độ bảo vệ an ninh theo yêu cầu của luật tập quán quốc tế.[11]

Một lưu ý bổ sung trong thỏa thuận cũng làm rõ thêm rằng 'luật tập quán quốc tế' là kết quả của thực tiễn chung có tính nhất quán được các quốc gia áp dụng theo quan điểm về nghĩa vụ pháp lý. Liên quan đến tiêu chuẩn ứng xử tối thiểu đối với các nhà đầu tư nước ngoài của

[10] Chú giải chi tiết của Ủy ban Thương mại tự do liên quan đến Chương 11 trong Hiệp định NAFTA, ngày 31/7/2001, Phần B.

[11] FTA Cộng hòa Dominica - Trung Mỹ - Hoa Kỳ (CAFTA-DR), Điều 10.5.

luật tập quán quốc tế, chú giải đã làm rõ tiêu chuẩn 'đề cập tới tất cả các nguyên tắc trong luật tập quán quốc tế về bảo vệ quyền và lợi ích kinh tế của các nhà đầu tư có yếu tố nước ngoài'.[12]

Các thỏa thuận của Canada còn bao gồm một điều khoản FET được xây dựng theo chú giải chi tiết của Ủy ban Thương mại tự do. Tuy nhiên, khác với Hoa Kỳ, các thỏa thuận của Canada không chỉ rõ thêm rằng tiêu chuẩn FET cũng bao gồm cả quy trình tố tụng tư pháp, và cũng không tinh chỉnh ý nghĩa của luật tập quán quốc tế.[13]

Hầu hết các thỏa thuận khác không theo xu hướng mà Hoa Kỳ và Canada tạo ra nhằm thu hẹp phạm vi của FET. Thay vào đó, một số thỏa thuận gần đây đã bổ sung nghĩa vụ đảm bảo một số giá trị được coi là sẽ tạo nên một phần nguyên tắc FET, như không phân biệt đối xử và tính hợp lý trong các biện pháp của Chính phủ, và được quy định rõ ràng trong các thỏa thuận. Theo nghĩa này, BIT ký với Bosnia-Herzegovina nêu rõ:

> Các khoản đầu tư của nhà đầu tư thuộc bên ký kết sẽ luôn được trao FET và sẽ được hưởng FPS trên lãnh thổ của bên ký kết còn lại. Không bên ký kết nào sẽ bằng các biện pháp bất hợp lý hay phân biệt đối xử làm tổn hại đến việc mở rộng, quản lý, duy trì, hưởng hoặc thanh lý khoản đầu tư của nhà đầu tư thuộc bên ký kết này trên lãnh thổ của bên ký kết còn lại.[14]

Gần đây nhất, trong Hiệp định thương mại tự do Liên minh châu Âu - Việt Nam ('EVFTA'), tiêu chuẩn FET được định nghĩa tương đối hẹp.

Hộp 7. FET trong EVFTA (2016)

1. Mỗi bên sẽ trao sự đối xử công bằng và thỏa đáng và sự bảo vệ và an ninh đầy đủ cho các khoản đầu tư và nhà đầu tư của bên kia trong lãnh thổ của mình theo các điểm 2 đến 7.

2. Một bên bị coi là vi phạm nghĩa vụ đối xử công bằng và thỏa đáng như đề cập ở điểm 1, nếu một biện pháp hay một loạt biện pháp cấu thành nên:

(a) việc từ chối thực thi công lý trong quy trình tố tụng hình sự, dân sự hay hành chính;

[12] FTA Cộng hòa Dominica - Trung Mỹ - Hoa Kỳ (CAFTA-DR), Điều 10-B 'Luật tập quán quốc tế'.

[13] Xem Mô hình của Canada, Hiệp định khuyến khích và bảo hộ đầu tư (FIPA) 2003, Điều 5.

[14] BIT Trung Quốc - Bosnia Herzegovina, Điều 2.2.

(b) một vi phạm cơ bản quy trình xét xử theo trình tự pháp luật trong quy trình tố tụng tư pháp và hành chính;

(c) sự độc đoán thể hiện rõ ràng;

(d) sự phân biệt đối xử nhằm vào đối tượng cụ thể với động cơ phi pháp, như phân biệt giới tính, chủng tộc hay tôn giáo;

(c) sự ngược đãi như áp bức, lạm dụng quyền hay các hành vi lừa dối tương tự; hay

(e) sự vi phạm bất kì yếu tố nào khác trong nghĩa vụ đối xử công bằng và thỏa đáng được các bên thông qua.

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3. Những ứng xử không được liệt kê trong điểm 2 có thể cấu thành vi phạm nghĩa vụ đối xử công bằng và thỏa đáng, nếu có sự đồng ý của các bên theo quy trình nêu tại Điều 17.5 (Sửa đổi).

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4. Khi áp dụng các đoạn từ 1 đến 3, Tòa án có thể xem xét liệu một bên có đưa ra tuyên bố cho một nhà đầu tư để thuyết phục nhà đầu tư, tạo nên mong ước chính đáng, để từ đó nhà đầu tư quyết định thực hiện hay duy trì khoản đầu tư, nhưng sau đó bị thất vọng hay không.

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5. Để đảm bảo chắc chắn hơn, thuật ngữ 'bảo vệ và an ninh đầy đủ' được nhắc đến trong điểm 1 đề cập tới nghĩa vụ của một bên phải có hành động cần thiết để bảo vệ an toàn và an ninh của nhà đầu tư và khoản đầu tư.

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6. Khi một bên kí kết thỏa thuận bằng văn bản với các nhà đầu tư của bên kia hoặc với các khoản đầu tư được đề cập trong điểm (a) của Điều 8 (Phạm vi) thoả mãn tất cả các điều kiện sau:

(a) Thỏa thuận bằng văn bản được kí kết và có hiệu lực sau khi Hiệp định này có hiệu lực;

(b) Các nhà đầu tư dựa vào thỏa thuận bằng văn bản để quyết định thực hiện hoặc duy trì một khoản đầu tư được nêu trong điểm (a) của Điều 8.8 nằm ngoài thỏa thuận bằng văn bản và vi phạm này gây ra thiệt hại thực đối với khoản đầu tư;

(d) Thỏa thuận bằng văn bản tạo nên sự trao đổi quyền và nghĩa vụ liên quan đến khoản đầu tư nói trên và có tính chất ràng buộc với cả hai bên; và

(e) Thỏa thuận bằng văn bản không có điều khoản giải quyết tranh chấp giữa các bên tham gia thỏa thuận đó bằng biện pháp trọng tài quốc tế.

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7. *Một vi phạm điều khoản khác trong Hiệp định này, hoặc vi phạm một điều ước quốc tế riêng biệt,* không cấu thành nên vi phạm Điều khoản này.

Điều 8.10 (Đối xử với Khoản đầu tư) trong EVFTA yêu cầu một bên trao FET cho bên kia và các khoản đầu tư của họ.[15] Thay vì gắn tiêu chuẩn FET với một tiêu chuẩn bên ngoài như tiêu chuẩn đối xử tối thiểu theo luật tập quán quốc tế, điều khoản này cung cấp một danh sách các tiêu chí có thể được sử dụng để xác định vi phạm tiêu chuẩn FET. Danh sách này bao gồm các bước loại trừ như 'những vi phạm cơ bản quá trình tố tụng công bằng', 'sự tùy tiện thể hiện rõ ràng', 'phân biệt đối xử nhằm vào đối tượng cụ thể với động cơ phi pháp'.[16]

Những tiêu chí này làm cho các biện pháp có đủ điều kiện được coi là vi phạm tiêu chuẩn FET. Điều 8.10(3) cũng dự đoán khả năng mở rộng danh sách này. Điều 8.10(4) quy định nhà đầu tư có thể có những mong ước chính đáng trên cơ sở tuyên bố của bên kia nhằm nhu hút đầu tư. Nếu việc một bên hành động hay không hành động trái với nội dung giải thích ban đầu, thì cơ quan tài phán giải quyết tranh chấp có thể xem xét tình tiết này. Các quy định về FET sẽ bảo vệ sự linh hoạt về mặt chính sách của các bên. Kết quả là sẽ có ít biện pháp hay thông lệ lập pháp, hành chính hay tư pháp ngay tình vi phạm các quy định này.

Mục 2. KHÁI NIỆM, PHẠM VI VÀ ÁP DỤNG NGUYÊN TẮC FPS

Đối với nguyên tắc FPS, phạm vi bảo vệ được nêu chi tiết trong phán quyết của vụ *Saluka v. Sec*, trong đó ghi nhận tiêu chuẩn 'FPS' cơ bản áp dụng khi khoản đầu tư nước ngoài đã bị ảnh hưởng bởi xung đột dân sự hoặc bạo lực thể chất.[17]

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[15] Xem Điều 8.10 (Đối xử với Khoản đầu tư), đoạn 1.

[16] Xem Điều 8.10 (Đối xử với Khoản đầu tư), đoạn 2.

[17] *Saluka Investments BV (Hà Lan) kiện Cộng hòa Séc*, UNCITRAL, Phán quyết Một phần (ngày 17/3/2006), đoạn 483; *Asian Agricultural Products Limited v. Sri Lanka,* Vụ số ARB/87/3, ICSID (1991), Phán quyết chung thẩm về các tình tiết của vụ kiện và thiệt hại, (ngày 21/6/1990) 30 ILM 577 trong đó tiêu chuẩn FPS được thảo luận đầu tiên.

Rõ ràng là các cơ quan tài phán đều đồng tình rằng tiêu chuẩn này được áp dụng ít nhất là khi hành động của bên thứ ba xảy ra có liên quan đến bạo lực thể chất hoặc sự bất tuân thủ các lợi ích hợp pháp, và yêu cầu Nhà nước phải thực hiện các điều tra xác minh cẩn trọng để ngăn ngừa thiệt hại cho nhà đầu tư. Điều này được hiểu rằng tiêu chuẩn này không cho nhà đầu tư 'bảo hiểm trước mọi rủi ro', như đã đề cập gần đây trong phán quyết của vụ *Vanessa Ventures v. Venezuela*.[18] Pháp luật quốc tế giải thích điều này rất cẩn trọng để nhận xét rằng: mặc dù nước tiếp nhận đầu tư được yêu cầu tiến hành điều tra chi tiết và cẩn trọng theo tiêu chuẩn tối thiểu khách quan, nhưng tiêu chuẩn chi tiết và cẩn trọng là tiêu chuẩn của nước tiếp nhận đầu tư trong điều kiện và nguồn lực hiện có (tiêu chuẩn khách quan có điều chỉnh).[19] Phần mở rộng này đã được các hội đồng trọng tài sau công nhận. *Thí dụ*: vụ *Paushok v. Mongolia* lưu ý rằng điều khoản 'bảo vệ trước pháp luật' đã được đưa ra trong một số vụ việc BIT, và đôi khi được giải thích như một điều khoản độc lập nhằm bảo vệ thể chất cho người hoặc tài sản chống lại các hành vi phi pháp của bên thứ ba. Trong trường hợp trước trọng tài, Hiệp định quy định rõ ràng 'bảo vệ đầy đủ trước pháp luật các khoản đầu tư của các nhà đầu tư từ bên kí kết còn lại', vì thế không có lý do gì để giới hạn bảo vệ được đảm bảo chỉ ở mức bảo vệ thể chất/vật chất.[20] Phán quyết trong vụ *Reinhard Unglaube v. Costa Rica* và vụ *Marion Unglaube v. Costa Rica Award* chấp nhận rằng trong một số trường hợp thích hợp, 'bảo vệ đầy đủ' có thể được mở rộng ra ngoài tiêu chuẩn truyền thống vốn chỉ tập trung vào an toàn và an ninh thể chất/vật chất.[21] Đặc biệt, phán quyết của vụ *Houben v. Burundi* cho thấy nước tiếp nhận đầu tư, 'với mức độ chi tiết và cẩn trọng hợp lý' theo tiêu chuẩn FPS, có nghĩa vụ bảo đảm cho nhà đầu tư được bảo vệ để chống những hành vi sai trái của bên thứ ba. Nghĩa vụ này không phải là tuyệt đối, và không được hiểu là nước tiếp nhận đầu tư sẽ bảo vệ khoản đầu tư khỏi mọi tổn thất về giá trị có thể xảy ra, mà phải được hiểu là nước tiếp nhận đầu tư sẽ có những biện pháp hợp lý trong phạm vi quyền hạn của mình (Xem Hộp 8).[22]

[18] *Vanessa Ventures Ltd. v. Venezuela*, Vụ số ARB(AF)/04/6, ICSID, Phán quyết ngày 16/01/2013, đoạn 223.

[19] Phán quyết vụ *Pantechniki v. Albania*, trích Newcombe và Paradell, *Luật và thực tiễn thực hiện các hiệp định đầu tư*. Xem vụ *Parkerings-Compagniet AS v. Lithuania*, Vụ số ARB/05/8, ICSID, Phán quyết ngày 11/9/2007, đoạn 81-84.

[20] Sergei Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, Phán quyết về thẩm quyền và trách nhiệm pháp lý ngày 28/4/2011, đoạn 326.

[21] *Reinhard Hans Unglaube v. Republic of Costa Rica*, Vụ số ARB/09/20, ICSID, Phán quyết ngày 16/5/2012, đoạn 281.

[22] *Joseph Houben v. Burundi*, Vụ số ARB/13/7, ICSID, Phán quyết ngày 12/01/2016 [tiếng Pháp] tại đoạn 161.

Hộp 8. FPS - Phán quyết vụ Houben v. Burundi (2016)

Mặt khác, một khía cạnh được thiết lập của tiêu chuẩn này là các quốc gia phải sử dụng 'sự cẩn trọng hợp lý' để tránh những thiệt hại vô lý cho người hoặc tài sản của người nước ngoài trong lãnh thổ của họ và, nếu họ không thành công, ít nhất là một 'sự mẫn cán cần thiết' để áp dụng chế tài đối với những kẻ gây ra thiệt hại như vậy. Một quốc gia không có khả năng cung cấp mức độ bảo vệ như nhau đối với hành vi của bên thứ ba như là điều mà nó phải cung cấp liên quan đến việc thực hiện các cơ quan của chính mình. Nghĩa vụ thực hiện 'sự cẩn trọng' không có nghĩa là Nhà nước có nghĩa vụ ngăn ngừa thiệt hại. Như Burundi đã nêu rõ trong các lời giải thích của mình, nước tiếp nhận đầu tư không thể coi như là một công ty bảo hiểm, do vậy không có nghĩa vụ bảo vệ nhà đầu tư chống lại bất kỳ tổn thất có giá trị nào (có thể là tương đương với trách nhiệm không có lỗi). Ngược lại, nghĩa vụ nói chung được hiểu là yêu cầu Nhà nước thực hiện các biện pháp hợp lý trong phạm vi quyền hạn của mình, khi nó biết hoặc phải biết về nguy cơ thiệt hại.

Bên cạnh đó, phạm vi khái niệm FPS đã được mở rộng ra khuôn khổ pháp lý để bảo vệ nhà đầu tư trước pháp luật - bao gồm các cả các quy định về nội dung để bảo vệ đầu tư và các quy trình thủ tục phù hợp để nhà đầu tư chứng minh quyền của mình,[23] và cung cấp các thông tin cần thiết để nhà đầu tư nước ngoài chuẩn bị khiếu nại của mình.

Trong vụ *Biwater*, Tanzania một lần nữa lại bị cáo buộc vi phạm tiêu chuẩn FPS.[24] Theo quan điểm của nguyên đơn (nhà đầu tư), theo quy định về FPS, nước tiếp nhận đầu tư có nghĩa vụ thực hiện cẩn trọng việc bảo vệ khoản đầu tư để không bị tấn công vật chất như xung đột dân sự và bạo lực thể chất (trích dẫn các vụ kiện quốc tế để chứng minh quan điểm này); theo cách này, nhà đầu tư lập luận rằng bằng hành động của mình, Tanzania đã không bảo vệ được sự toàn vẹn vật chất cho nhà đầu tư trước sự can thiệp bằng vũ lực. Các hành vi của nước tiếp nhận đầu tư được viện dẫn bao gồm tước quyền quản lý và kiểm soát công ty cung cấp dịch vụ nước (do nhà đầu tư là chủ sở hữu), tổ chức họp nhân viên và thông báo về việc chuyển nhượng quyền sở hữu và

[23] *Frontier Petroleum Services Ltd v. Sec*, UNCITRAL, Phán quyết chung thẩm ngày 12/11/2010, Đoạn 263.

[24] BIT Tanzania - Vương quốc Anh: 'Khuyến khích và bảo hộ đầu tư, 'Các khoản đầu tư của công dân hay công ty của mỗi bên kí kết sẽ luôn được trao đổi xử công bằng và thỏa đáng, và được hưởng tiêu chuẩn bảo vệ và an ninh đầy đủ trên lãnh thổ của bên kí kết còn lại […]' (Điều 2.2).

thay thế bằng sở hữu nhà nước, bãi nhiệm người quản lý công ty với đe dọa trục xuất nghiêm trọng, và cuối cùng là chiếm giữ và tịch thu toàn bộ cơ sở vật chất và công việc cung cấp dịch vụ nước. Tất cả những hành vi này được coi là can thiệp bằng vũ lực. Bên cạnh đó, nguyên đơn cũng lập luận rằng tiêu chuẩn FPS trong BIT của họ cũng bao gồm bảo vệ khỏi những can thiệp thông qua quy định pháp luật là cơ sở để nhà đầu tư quyết định tiến hành đầu tư. Mong ước cơ bản của nhà đầu tư là hợp đồng cho phép kinh doanh (concession) ít nhất cũng nên được tiến hành một cách có thiện chí. Trong vụ việc này, mong ước của nhà đầu tư không được đáp ứng, thể hiện qua bài phát biểu đơn phương, bất ngờ và đi ngược lại thỏa thuận đã kí kết trước toàn thể nhân viên để thông báo chấm dứt hợp đồng cho phép kinh doanh (concession).

Đáp lại những cáo buộc trên, nước tiếp nhận đầu tư lập luận rằng nhà đầu tư đã phân biệt sai giữa quy định FET và quy định FPS, vì đã mở rộng phạm vi quy định theo cách có lợi cho mình. Nước tiếp nhận đầu tư cũng cho biết rằng: việc tuyên bố nêu trong bài phát biểu với nhân viên bị cho là vi phạm FPS cũng không chính xác, vì thế không vi phạm BIT. Bên cạnh đó, nước tiếp nhận đầu tư cũng có ý định giới hạn phạm vi của yêu cầu kiểm tra cẩn trọng. Trên thực tế, người ta lập luận rằng tiêu chuẩn này chỉ áp dụng trong trường hợp sử dụng vũ lực của các cơ quan bên ngoài, *thí dụ*: nội chiến, bạo động hay thiên tai. Nước tiếp nhận đầu tư thậm chí còn từ chối không coi việc triệu tập họp nhân viên là hành vi sử dụng vũ lực, và nghi ngờ về những ảnh hưởng đối với sự toàn vẹn vật chất của khoản đầu tư từ phía nguyên đơn, vì không tìm thấy bằng chứng về thiệt hại. Về việc thu giữ cơ sở vật chất, nước tiếp nhận đầu tư lập luận là nhà đầu tư không sở hữu tài sản và vì nhà đầu tư đã từ bỏ quyền đó, nên Nhà nước không còn cách nào khác. Mặc dù vậy, nước tiếp nhận đầu tư không sử dụng vũ lực, và đe dọa trục xuất chỉ được đưa ra để bảo vệ hệ thống cấp thoát nước. Cuối cùng, theo quan điểm của Tanzania, phạm vi FPS không nên được xem như trách nhiệm pháp lý tuyệt đối, mà chỉ là nghĩa vụ xem xét cẩn trọng mà một quốc gia văn minh cần phải làm, và rằng khi đối mặt với khủng hoảng, chính quyền chỉ hành động để bảo vệ tài sản.

Trong quyết định cuối cùng của mình, cơ quan tài phán phải công khai nội dung FPS, trích dẫn các vụ việc quốc tế có liên quan, và khẳng định nghĩa vụ xem xét cẩn trọng cũng như nghĩa vụ bảo vệ sự toàn vẹn vật chất của khoản đầu tư chống lại việc sử dụng vũ lực. Cơ quan tài phán thậm chí còn viện dẫn vụ *Azurix* và áp dụng quan điểm của hội đồng xét xử trong vụ việc đó, khẳng định chắc chắn tiêu chuẩn FPS có thể bao gồm cả bảo vệ khỏi vũ lực. Thật vậy, để củng cố cho quyết định và cách giải thích của mình, cơ quan tài phán tuyên bố rõ ràng sẽ tuân thủ việc mở rộng phạm vi bảo vệ này, đồng thời bổ sung thêm các tiêu chí bảo đảm ổn định pháp lý và tài chính thương mại. Theo quan điểm của cơ quan xét xử, sẽ là máy móc quá mức nếu giới hạn phạm vi và tinh thần của tiêu chuẩn quốc tế này. Thêm nữa, hội đồng xét xử đã từ chối chỉ hạn chế phạm vi bảo hộ trong trường hợp Nhà nước không bảo vệ khoản đầu tư của bên thứ ba, mà mở rộng phạm vi điều chỉnh ra các cơ quan liên quan hoặc chính nước tiếp nhận đầu tư đó, theo đúng tinh thần của từ 'đầy đủ' ('full'). Tóm lại, ngay cả khi không sử dụng vũ lực, những hành vi không cần thiết và lạm quyền của nước tiếp nhận đầu tư cấu thành vi phạm rõ ràng tiêu chuẩn FPS theo BIT liên quan, ngay cả khi không có thiệt hại định lượng nào được tìm thấy hay chứng minh.

Trong vụ *Biwater*, một nhóm hành động thứ ba có thể được bổ sung vào các chi tiết cấu thành vi phạm tiêu chuẩn FPS - gọi là những hành vi lạm quyền và không cần thiết. Các hành động này đại diện cho một số thí dụ tiêu biểu khác về hành vi, đe dọa, hay ứng xử cần tránh trong các vụ việc liên quan đến hợp đồng cho phép kinh doanh (concession) với nước tiếp nhận đầu tư, từ đó mở rộng tinh thần của tiêu chuẩn này thêm một chút.

TÓM TẮT CHƯƠNG 4

Các hội đồng trọng tài đã tránh sử dụng những lý thuyết 'đao to búa lớn' để giải thích ý nghĩa của nguyên tắc FET. Một số tác giả ủng hộ cách tiếp cận này và nêu rõ 'FET chỉ có một nội dung nhưng được áp dụng ở các ngưỡng khác nhau, tùy thuộc vào bối cảnh'.[25] Tuy nhiên, những sắp xếp khác nhau có thể dẫn đến những cách giải thích khác nhau. Tiêu chuẩn FET được thể hiện bằng nhiều cách khác nhau. Một số BIT tham chiếu trực tiếp đến FET. Một số khác lại kết nối FET với pháp luật quốc tế hoặc luật tập quán quốc tế. Một số cách diễn đạt khác bao gồm tiêu chuẩn trong một điều khoản đồng thời bao gồm các quy định cấm các hành vi đơn phương, tùy tiện và phân biệt đối xử và/hoặc nghĩa vụ 'không làm hại' ('non-impairment'). Về vấn đề này, phán quyết vụ *Sempra v. Argentina* ghi nhận tiêu chuẩn đối xử FET không phải là một tiêu chuẩn rõ ràng và chuẩn xác, và rằng nó sẽ phát triển theo từng trường hợp cụ thể.[26] Gần

[25] Xem Ioana Tudor, *Tiêu chuẩn FET trong pháp luật quốc tế về đầu tư nước ngoài* (2008), tại đoạn 154.

[26] *Sempra Energy International v. Argentina*, Vụ số ARB/02/16, ICSID, Phán quyết ngày 28/9/2007, đoạn 296.

đây, phán quyết vụ *El Paso v Argentina*, trích dẫn Quyết định bãi bỏ của CMS, nhất trí rằng có sự khác biệt trong việc thực thi của các tòa trọng tài liên quan đến tiêu chuẩn FET.[27] Thông thường, các cuộc thảo luận lý thuyết thường bị giới hạn trong danh sách minh họa các hành vi vi phạm tiêu chuẩn FET. Vụ *Mondev v. USA* bình luận rằng tiêu chuẩn ứng xử tối thiểu áp dụng cho một loạt các tình huống thực tế, trong điều kiện hòa bình hay xung đột dân sự, và được thực hiện bởi nhiều cơ quan nhà nước.[28] Một *thí dụ* minh họa cho điểm này là phán quyết NAFTA trong vụ *Waste Management v. Mexico*. Ở đây, cơ quan xét xử cho rằng tiêu chuẩn FET bị vi phạm bởi những hành vi 'tùy tiện, không công bằng, bất công hoặc độc đoán, có sự phân biệt đối xử và đặt nguyên đơn vào tình huống bị thành kiến và phân biệt chủng tộc, hoặc ứng xử đó có liên quan đến việc xét xử không theo trình tự pháp luật dẫn đến kết quả vi phạm các chuẩn mực tư pháp - như trong trường hợp không bảo đảm sự thực thi pháp luật luật một cách công bằng trong các vụ kiện tư pháp, hoặc hoàn toàn thiếu sự minh bạch và công bằng trong các quy trình, thủ tục hành chính.[29] Khi áp dụng tiêu chuẩn này, cần đảm bảo rằng ứng xử đó đã vi phạm tuyên bố của nước tiếp nhận đầu tư, vốn đã được nguyên đơn tin tưởng một cách hợp lý.[30]

Một trong những quy định cơ bản thường được đưa vào nội dung các IIA là nghĩa vụ FPS. Ngoài ra cũng có nhiều cách diễn đạt khác nhau như 'bảo vệ đầy đủ và an ninh đầy đủ', 'bảo vệ và an ninh liên tục', 'bảo vệ và an ninh', hoặc 'bảo vệ và an ninh vật chất'. Đây là những cụm từ đồng nghĩa và không ảnh hưởng đến việc áp dụng tiêu chuẩn này. Phán quyết trong vụ *The Parkerings v. Lithuania Award* cho thấy thực tế thường được chấp nhận là việc giải thích ngôn ngữ theo nhiều cách khác nhau của khái niệm 'bảo vệ' và 'bảo vệ và an ninh đầy đủ' không tạo ra khác biệt đáng kể đối với mức độ bảo vệ mà nước tiếp nhận đầu tư cung cấp.[31] Phán quyết trong vụ *Saluka v. Sec* giải thích rằng tiêu chuẩn FPS áp dụng khi đầu tư nước ngoài bị ảnh hưởng bởi xung đột dân sự

[27] *El Paso Energy International Company v. Argentina*, Vụ số ARB/03/15, ICSID, Phán quyết ngày 31/10/2011, đoạn 338.

[28] *Mondev International Ltd. v. USA*, Vụ số ARB(AF)/99/2, ICSID, Phán quyết ngày 11/10/2002, đoạn 95.

[29] *Waste Mgmt., Inc. v Hợp chủng quốc Mexico*, Vụ số ARB(AF)/00/3, ICSID, Phán quyết ngày 30/4/2004, đoạn 97

[30] *Waste Mgmt., Inc. v. Mexico*, Vụ số ARB(AF)/00/3, ICSID, Phán quyết ngày 30/4/2004, đoạn 98.

[31] *Parkerings-Compagniet AS v. Lithuania*, Vụ số ARB/05/8, ICSID, Phán quyết ngày 11/9/2007, đoạn 354.

hay bạo lực thể chất.[32] Rõ ràng là các hội đồng xét xử đều đồng tình rằng tiêu chuẩn này được áp dụng ít nhất là khi hành động của bên thứ ba xảy ra có liên quan đến bạo lực vật chất hoặc khi các quyền lợi hợp pháp bị bỏ qua.[33] Tiêu chuẩn này cũng yêu cầu nước tiếp nhận đầu tư thực hiện việc điều tra cẩn trọng để ngăn ngừa thiệt hại đối với nhà đầu tư.[34] Tiêu chuẩn này thường được hiểu là không trao cho nhà đầu tư 'bảo đảm trước mọi rủi ro' như được nêu ra gần đây trong phán quyết vụ *Vanessa Ventures v. Venezuela*.[35] Mặc dù nước tiếp nhận đầu tư được yêu cầu tiến hành điều tra cẩn trọng theo tiêu chuẩn tối thiểu khách quan, song chuẩn mực được áp dụng trong những vụ việc này là chuẩn mực của nước tiếp nhận đầu tư trong điều kiện và nguồn lực hiện có (tiêu chuẩn khách quan có điều chỉnh).[36] Phần mở rộng này đã được các hội đồng xét xử công nhận.[37] Gần đây, phạm vi khái niệm FPS đã được mở rộng, bao gồm cả khuôn khổ pháp lý để bảo vệ nhà đầu tư về pháp luật, bao gồm các cả quy định cơ bản để bảo vệ đầu tư và các quy trình thủ tục phù hợp để nhà đầu tư chứng minh quyền của mình, và đưa ra các cơ sở pháp lý đa dạng để nhà đầu tư nước ngoài chuẩn bị các khiếu nại của mình.[38]

CÂU HỎI / BÀI TẬP

1. Cách giải thích về FET trong vụ *Glamis Gold* có quá hẹp không? Có nguyên đơn nào đáp ứng được tiêu chuẩn đó không? Anh/chị có cho rằng nguyên đơn trong vụ *Wena Hotels* đáp ứng tiêu chuẩn đó không? Còn vụ *Merrill & Ring* thì sao?

2. Có nên giới hạn tiêu chuẩn FPS ở phạm vi bảo vệ và an ninh về vật chất không?

[32] *Saluka Investments BV (Hà Lan) kiện Cộng hòa Séc*, UNCITRAL, Phán quyết một phần, ngày 17/3/2006, đoạn 483; *Asian Agricultural Products Limited v. Sri Lanka*, Vụ số ARB/87/3, ICSID, (1991) Phán quyết chung thẩm về các tình tiết của vụ kiện và thiệt hại, ngày 21/6/1990, 30 ILM 577 trong đó tiêu chuẩn FPS được thảo luận đầu tiên.

[33] Saluka đoạn 483.

[34] Saluka đoạn 484.

[35] *Vanessa Ventures Ltd. v. Venezuela*, Vụ số ARB(AF)/04/6, ICSID, Phán quyết ngày 16/01/2013, đoạn 223.

[36] Phán quyết vụ *Pantechniki v. Albania*, trích Newcombe và Paradell, *Luật và thực tiễn thực hiện các hiệp định đầu tư*. Xem vụ *Parkerings-Compagniet AS v. Lithuania*, Vụ số ARB/05/8, ICSID, Phán quyết ngày 11/9/2007, đoạn 81-84.

[37] Sergei Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia,* Phán quyết về thẩm quyền và trách nhiệm pháp lý, ngày 28/4/2011, đoạn 326. Xem thêm vụ *Reinhard Unglaube kiện Costa Rica* và phán quyết vụ *Marion Unglaube kiện Costa Rica Award. Reinhard Hans Unglaube v. Republic of Costa Rica*, Vụ số ARB/09/20, ICSID, Phán quyết ngày 16/5/2012, đoạn 281.

[38] *Frontier Petroleum Services Ltd v. Sec*, UNCITRAL, Phán quyết chung thẩm ngày 12/11/2010, đoạn 263.

3. Nếu nghĩa vụ FPS vượt ra ngoài phạm vi bảo vệ vật chất thông thường, thì nghĩa vụ FET sẽ yêu cầu những gì?

4. So sánh Điều 1105(1) NAFTA và các điều 5.1-5.3 Luật BIT mẫu của Hoa Kỳ.

TÀI LIỆU CẦN ĐỌC

1. Rudolf Dolzer, 'Đối xử công bằng và thỏa đáng: Chuẩn mực then chốt trong các hiệp định đầu tư, *39 The International Lawyer* 87, 87-94; 100-06 (2005).

2. Schreuer, *Đối xử công bằng và thỏa đáng*, BIICL, Diễn đàn Hiệp định Đầu tư, 2:5 QUẢN LÝ TRANH CHẤP XUYÊN QUỐC GIA (tháng 11/ 2005).

3. Vụ *Glamis GoldLtd. v. USA,* UNCITRAL (Phán quyết) (8/6/2009) 10-15 (các tình tiết); 598-626.

4. Vụ *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL (Phán quyết) (31/3/2010) 26-43 (các tình tiết); 182-233.

5. Thông báo Giải thích NAFTA FTC.

6. Giuditta Cordero Moss, 'Bảo vệ và an ninh đầy đủ', trong *Tiêu chuẩn bảo hộ đầu tư* 131, 138-150 (August Reinisch ed., Oxford 2008).

7. *Wena Hotels Ltd. v. Egypt*, Vụ việc ICSID ARB/98/4, Phán quyết ngày 08/12/2000, 15-69; 80-95.

8. R. Doak Bishop, James Crawford & W. Michael Reisman, *Các tranh chấp đầu tư nước ngoài: vụ việc, tư liệu và bình luận*, 953-976; 1007-1071 (Kluwer 2005).

9. Rudolph Dolzer & Christoph Schreuer, *Các nguyên tắc của Luật đầu tư quốc tế*, 119-152 (Oxford 2008).

10. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Giải quyết tranh chấp giữa nhà nước và nhà đầu tư bằng trọng tài*, 491-539 (Oxford 2008).

11. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Các tranh chấp đầu tư theo NAFTA: Chú giải chương 11 NAFTA*, 11 1105.5 - 1105.52 (Kluwer 2006; cập nhật lần cuối 2009).

12. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *Trọng tài đầu tư quốc tế: Các nguyên tắc nội dung*, 226-250 (Oxford 2007).

13. Andrew Newcombe & Lluis Paradell, *Pháp luật và thực tiễn về các hiệp định đầu tư*, 233-319 (Kluwer 2008).

14. Lucy Reed & Daina Bray, 'Đối xử công bằng và thỏa đáng: Được áp dụng công bằng và thỏa đáng thay cho tước quyền sở hữu trái pháp luật?' trong *Các vấn đề đương đại của trọng tài và hòa giải quốc tế* 13 Arthur Rovine ed., Martinus Nijhoff, 2008.

15. Meg Kinnear, 'Sự phát triển liên tục của tiêu chuẩn đối xử công bằng và thỏa đáng', trong *Luật về hiệp định đầu tư - Các vấn đề hiện tại III*, at 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL, 2009).

16. Peter Muchlinski, 'Cảnh báo các nhà đầu tư? Mức độ liên quan của ứng xử của nhà đầu tư theo tiêu chuẩn đối xử công bằng và thỏa đáng', *55 Int'l & Comp. L. Q.* 527 (2006).

17. UNCTAD, *Đối xử công bằng và thỏa đáng*, UNCTAD/ITE/IIT/11 (Vol. III) (1999).

18. Todd Grierson-Weiler & Ian A. Laird, 'Chuẩn mực đối xử', trong *Sổ tay Oxford về Luật đầu tư quốc tế* 261 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

19. H. E. Zeitler, 'Bảo đảm 'Bảo vệ và an ninh đầy đủ' trong các hiệp định đầu tư về những thiệt hại do tư nhân gây ra', *3 Stockholm International Arbitration Review 1* (2005).

CHƯƠNG 5. TƯỚC QUYỀN SỞ HỮU

Elite
advertising & printing

CHƯƠNG 5

NGUYÊN TẮC BẢO ĐẢM CHO NHÀ ĐẦU TƯ NƯỚC NGOÀI KHÔNG BỊ TƯỚC QUYỀN SỞ HỮU MỘT CÁCH BẤT HỢP PHÁP

Mục đích học
Chương 5

- Phân biệt hành vi tước quyền sở hữu hợp pháp và hành vi tước đoạt quyền sở hữu bất hợp pháp;
- Nhận dạng các yếu tố giúp cơ quan tố tụng xem xét liệu việc tước quyền sở hữu một phần có được coi là tước quyền sở hữu hay không?;
- Phân biệt các hành vi theo quy định không bị coi là tước quyền sở hữu và những hành vi được coi là tước quyền sở hữu có bồi thường;
- Xem xét vai trò phù hợp của học thuyết 'mong ước chính đáng của nhà đầu tư ('legitimate expectation') khi xác định liệu một hành vi tước quyền sở hữu đã xảy ra hay chưa?;
- Xem xét các biện pháp bồi thường thích hợp trong trường hợp tước quyền sở hữu hợp pháp;
- Xác định các loại hành vi phải được coi là 'quyền trị an' ('police power'), và vì thế không phải là tước quyền sở hữu có bồi thường;
- Xem xét quyết định của chính phủ khi thực hiện chương trình tư nhân hóa các ngành công nghiệp chủ chốt.

Mục 1 sẽ giải thích các hình thức tước quyền sở hữu (trực tiếp và gián tiếp) bằng cách chú ý đến các từ ngữ được sử dụng trong một số IIA của Việt Nam và các án lệ liên quan. Mục 2 sẽ phân tích kỹ hơn bằng cách tập trung vào trường hợp tước quyền sở hữu gián tiếp, vốn là khái niệm khó, chỉ có thể hiểu được khi nghiên cứu án lệ, cùng với sự phát triển tiến bộ của khái niệm đó, với đóng góp của các cơ quan tài phán đầu tư. Cuối cùng, Mục 3 xem xét các điều kiện để có thể tước quyền sở hữu của nhà đầu tư nước ngoài một cách hợp pháp.

Mục 1. KHÁI NIỆM VÀ CÁC HÌNH THỨC TƯỚC QUYỀN SỞ HỮU ('EXPROPRIATION')

1. Khái niệm

Khái niệm tước quyền sở hữu được biết đến trong hầu hết pháp luật của các quốc gia. Nội dung sửa đổi lần thứ 5 (Tu chính án V) của Hiến pháp Hoa Kỳ quy định rằng: 'Tài sản tư nhân [không thể] bị tước đoạt và sử dụng cho mục đích công mà không được bồi thường thỏa đáng.' Quy định này được giải thích là để ngăn không cho chính phủ 'ép buộc một số cá nhân phải đảm nhận những gánh nặng công mà lẽ ra phải do toàn bộ xã hội cùng gánh vác thì mới công bằng và phù hợp […]'.[1] Nội dung sửa đổi lần thứ 14 (Tu chính án XIV) đã bổ sung yêu cầu bồi thường thỏa đáng cho các hành vi tước quyền sở hữu được thực hiện bởi chính quyền liên bang và chính quyền địa phương.

Tước quyền sở hữu là việc chính phủ trưng thu tài sản hoặc các quyền của tư nhân có bồi thường thỏa đáng để phục vụ cho mục đích công cộng. Có thể đây là kết quả thực thi quyền trưng thu của Nhà nước. Cơ quan chính phủ có thể là chính quyền liên bang, tiểu bang, quận hạt hay thành phố, khu trường học, bệnh viện hoặc các cơ quan khác. Việc tước quyền sở hữu có thể được thực hiện với sự cho phép của chủ sở hữu hoặc có thể là không.

Quy trình tước quyền sở hữu thường bao gồm việc thông qua một quyết định trưng thu tài sản của cơ quan có thẩm quyền, kể cả tuyên bố về mục đích công, sau đó là bước thẩm định, đề nghị rồi đến thương lượng.

Các chủ sở hữu tài sản, khi cho rằng khoản bồi thường được đề nghị cho số tài sản được sung công của mình là không thỏa đáng, có thể

[1] *Penn Cent. Transp. Co. v. New York City*, 438 US 104, 123 (1978).

khởi kiện cơ quan chính phủ. Tuy nhiên, bằng cách gửi số tiền đề nghị đó vào một tài khoản tín thác, chính phủ sẽ trở thành chủ sở hữu của tài sản đó trong thời gian vụ việc đang được giải quyết.

Ở cấp độ quốc tế, tước quyền sở hữu là một vấn đề pháp lý rất quan trọng, bởi lẽ việc bảo vệ các nhà đầu tư nước ngoài vốn luôn là mục đích chính của các IIA. Do đó, việc đưa vào nội dung hiệp định các nguyên tắc chống lại việc quốc hữu hóa hay trưng thu các khoản đầu tư nước ngoài là một biện pháp bảo đảm quan trọng cho nhà đầu tư nước ngoài. Hầu như mọi IIA đều có các điều khoản chống lại việc tước quyền sở hữu của nhà đầu tư với một số phiên bản nhất định.

2. Các hình thức tước quyền sở hữu

Tước quyền sở hữu có thể được thực hiện dưới hai hình thức: trực tiếp hoặc gián tiếp. Phán quyết trong vụ *Enron v. Argentina* đã tuyên rằng một biện pháp không thể đồng thời vừa là tước quyền sở hữu gián tiếp, vừa là tước quyền sở hữu trực tiếp.[2]

Thứ nhất: Tước quyền sở hữu trực tiếp xảy ra trong trường hợp khoản đầu tư bị quốc hữu hóa hoặc sung công trực tiếp bằng cách truất quyền sở hữu của nhà đầu tư đối với khoản đầu tư đó.

Trong bối cảnh quốc tế, tước quyền sở hữu trực tiếp xảy ra khi Nhà nước trưng thu tài sản thuộc quyền sở hữu của nhà đầu tư nước ngoài tại nước tiếp nhận đầu tư, và khi có sự tước quyền sở hữu do Nhà nước thực hiện. *Thí dụ*: Phán quyết chung thẩm trong vụ *Generation Ukraine v. Ukraine* đã định nghĩa tước quyền sở hữu trực tiếp là việc chuyển giao quyền sở hữu trực tiếp sang cho Nhà nước hoặc một bên thứ ba.[3]

Theo Phán quyết về nghĩa vụ pháp lý trong vụ *Burlington Resources v. Ecuador* xét xử việc tiếp quản các mỏ dầu của bên khởi kiện theo tiêu chuẩn tước quyền sở hữu trực tiếp, theo đó một biện pháp được coi là tước quyền sở hữu, nếu: (i) nó làm cho nhà đầu tư mất đi khoản đầu tư của mình; (ii) việc lấy mất đó mang tính lâu dài; và (iii) không có cơ sở pháp lý để giải thích việc tước đoạt đó đã được thực thi theo thuyết 'quyền trị an'.[4]

[2] Công ty thu hồi nợ cho các chủ nợ Enron (trước là Công ty Enron) và *Ponderosa Assets, L.P. v. Argentina*, ICSID Số ARB/01/3, Phán quyết ngày 22/5/2007, tr. 250.

[3] *Generation Ukraine Inc. v. Ukraine*, Vụ ICSID Số ARB/00/9, Phán quyết chung thẩm, ngày 16/9/2003, at 20.21.

[4] *Burlington Resources Inc. v. Ecuador*, Vụ ICSID Số ARB/08/5, Quyết định về nghĩa vụ pháp lý, ngày 14/12/2012, tr. 506.

Tước quyền sở hữu trực tiếp không thường xuyên xảy ra trên thực tế. Như được giải thích trong phán quyết của vụ *Telenor v. Hungary*, tước quyền sở hữu trực tiếp là một ngoại lệ chứ không phải là nguyên tắc, vì các quốc gia thường tránh mất uy tín và không muốn làm các nhà đầu tư tiềm năng mất niềm tin, vì thế họ thường dùng các biện pháp gián tiếp.[5]

Thứ hai: Tước quyền sở hữu có thể là gián tiếp thông qua các biện pháp, mặc dù không chính thức, nhằm phủ nhận tư cách của nhà đầu tư, song lại ảnh hưởng đến tài sản của họ, ở mức độ đủ để lấy đi một cách hiệu quả quyền lợi của chủ đầu tư đối với khoản đầu tư đó, để hạn chế việc quản lý, sử dụng hoặc kiểm soát của nhà đầu tư, hoặc làm giảm đáng kể giá trị của khoản đầu tư.

Phán quyết trong vụ *LESI and Astaldi v. Algeria* cho rằng tước quyền sở hữu không chỉ hạn chế ở việc chiếm dụng hàng hóa vật chất mà nhà đầu tư sở hữu. Trong một số trường hợp, tước quyền sở hữu còn là hệ quả của việc mất đáng kể các quyền theo hợp đồng. Hình thức tước quyền sở hữu thứ hai này còn gọi là tước quyền sở hữu 'gián tiếp' hoặc 'dần dần', đã được nhận diện và bị áp dụng chế tài bởi các cơ quan tài phán khác nhau trong một số trường hợp.[6]

Tước quyền sở hữu gián tiếp cũng có thể là hành vi được thực hiện theo quy định của pháp luật - khi mà một biện pháp được thực hiện nhằm mục đích điều tiết, song lại có tác động như tước quyền sở hữu, hoặc tước đoạt quyền sở hữu dần dần, nghĩa là không phải một biện pháp riêng lẻ, mà là một loạt các biện pháp có thể dẫn tới tước quyền sở hữu của nhà đầu tư nước ngoài.

Trong vụ *AWG v. Argentina,* Phán quyết về trách nhiệm pháp lý kết luận rằng một hành vi tước quyền sở hữu gián tiếp đôi khi còn được gọi là 'tước quyền sở hữu theo các quy định pháp luật', vì các nước tiếp nhận đầu tư thường dựa vào thẩm quyền lập pháp của mình để ban hành các biện pháp có thể làm giảm bớt lợi ích của nhà đầu tư từ khoản đầu tư của chính họ, mà không làm thay đổi trên thực tế hoặc không hủy bỏ tư cách pháp lý của nhà đầu tư đối với tài sản của họ, hoặc làm suy yếu quyền kiểm soát của nhà đầu tư đối với tài sản của mình.[7] Tương

[5] *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Phán quyết ngày 13/9/2006, tr. 69.

[6] *LESI, S.p.A. and Astaldi, S.p.A. v. Algeria*, Phán quyết vụ việc ICSID Số ARB/05/3, ngày 12/11/2008 [tiếng Pháp], tr. 131.

[7] Vụ *AWG Group Ltd. v. Argentine*, UNCITRAL, Quyết định về nghĩa vụ pháp lý, ngày 30/7/2010, tr. 132.

tự trong vụ *SAUR v. Argentina,* Phán quyết về thẩm quyền trọng tài và trách nhiệm pháp lý đã bàn về ý nghĩa của các biện pháp tương ứng với tước quyền sở hữu, bao gồm tước quyền sở hữu theo quy định của pháp luật và tước quyền sở hữu gián tiếp, và lưu ý rằng việc tham chiếu tới 'gián tiếp' nhằm để nhấn mạnh ý định của các cơ quan soạn thảo BIT trong việc định nghĩa khái niệm tước quyền sở hữu ở mức độ khái quát.[8]

Phán quyết trong vụ *Middle East Cement v. Egypt* kết luận rằng khi các biện pháp được một Nhà nước thực hiện nhằm tước đoạt quyền sử dụng và hưởng lợi của nhà đầu tư đối với khoản đầu tư của mình, ngay cả khi nhà đầu tư có thể giữ lại quyền sở hữu trên danh nghĩa đối với khoản đầu tư, thì các biện pháp đó thường được gọi là các hành vi tước quyền sở hữu 'dần dần' hoặc 'gián tiếp', hoặc theo như quy định trong BIT, đó là các biện pháp 'có tác động tương đương như tước quyền sở hữu'.[9]

Các IIA thường quy định các biện pháp chống lại mọi hình thức tước quyền sở hữu. *Thí dụ*: FTA Hoa Kỳ - Australia, có một điều khoản điển hình về vấn đề này.[10] Điều 11.7 của Hiệp định quy định:

> Không Bên nào được tước quyền sở hữu hoặc quốc hữu hoá một khoản đầu tư một cách trực tiếp hay gián tiếp thông qua các biện pháp tương tự như tước quyền sở hữu hoặc quốc hữu hóa ('tước quyền sở hữu'), trừ trường hợp: vì mục đích công cộng; theo phương thức không phân biệt đối xử; thanh toán bồi thường nhanh chóng, đầy đủ và hiệu quả; tuân theo đúng quy trình công bằng của pháp luật.

Tuy nhiên, có một số IIA, với các ngôn từ khác nhau, lại hướng tới việc thiết lập cùng một phạm vi cho điều khoản về tước quyền sở hữu. *Thí dụ*: các IIA do Pháp ký kết đều đề cập đến 'các biện pháp tước quyền sở hữu, hoặc quốc hữu hoá, hay bất kỳ biện pháp nào khác có tác động như tước quyền sở hữu trực tiếp hay gián tiếp'. Các IIA của Vương quốc Anh lại quy định rằng việc tước quyền sở hữu bao gồm cả các biện pháp 'có tác động tương đương với quốc hữu hóa hoặc trưng thu'. Các IIA khác, *thí dụ*: một số IIA do Thụy Điển ký, lại đề cập tới 'bất kỳ biện pháp trực tiếp hoặc gián tiếp nào', hoặc 'bất kỳ biện pháp nào có cùng bản chất hoặc có tác động tương tự đối với khoản đầu tư'. Quy định trong BIT mẫu trước đây của Hoa Kỳ thì quy định 'các biện pháp tương tự như tước quyền sở hữu hoặc quốc hữu hóa', trong khi đó một số IIA lại quy định cụ thể hơn, cấm áp dụng một hay một loạt các biện pháp bất kỳ, dù trực tiếp hoặc gián tiếp, tương tự như tước quyền sở hữu (bao gồm cả việc áp thuế, trưng mua toàn bộ hoặc một phần của khoản đầu tư, làm suy giảm hoặc tước quyền quản lý, kiểm soát hoặc giá trị kinh tế, ...).[11]

Các IIA do Trung Quốc ký thường sử dụng ngôn từ có vẻ hạn chế hơn, vì chúng thường nhắc tới tước quyền sở hữu hoặc quốc hữu hóa, 'hoặc các biện pháp tương đương', chứ không quy định cụ thể các trường hợp tước quyền sở hữu gián tiếp hay trực tiếp, hoặc các biện pháp tương tự như tước quyền sở hữu.

Các quy định này nằm trong BIT Trung Quốc - Chile năm 1994 trong Bảng 2. BIT ký với Thụy Sĩ năm 1987 cũng sử dụng giọng văn tương tự bằng các thuật ngữ 'các biện pháp tương tự' (*mesures analogues*) với tước quyền sở hữu, quốc hữu hóa hoặc tước đoạt (*dépossession*).[12]

Bảng 2: Các biện pháp bảo đảm trong trường hợp tước quyền sở hữu trong các BIT của Trung Quốc với nước ngoài

Trung Quốc - Cô Oét (1985) Điều 5.1	**Trung Quốc - Chile (1994)** Điều 4	**Trung Quốc - Uganda (2004)** Điều 4.1

[8] *SAUR International S.A. v. Argentine*, Vụ việc ICSID số ARB/04/4, Quyết định về thẩm quyền trọng tài và nghĩa vụ pháp lý, 6/6/2012 [tiếng Pháp] tr. 369-374.

[9] Vụ *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, Vụ ICSID Số ARB/99/6, Phán quyết ngày 12/4/2002, tr. 107.

[10] FTA Hoa Kỳ - Australia ngày 18/5/2004, có hiệu lực ngày 01/01/2005. Truy cập tại website của Văn phòng Đại diện Thương mại Hoa Kỳ, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text%20.

[11] Ủy ban Thương mại tự do của NAFTA [FTC], *Chú giải một số quy định trong Chương 11*, ngày 31/7/2001, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp; xem thêm Carl-Sebastian Zoellner, Note, 'Minh bạch hóa: Phân tích sự tiến triển của nguyên tắc cơ bản trong Luật kinh tế quốc tế', *27 Mich. J. Int'l L. 579*, 605-16 (2006) (bàn về phán quyết vụ *Metalclad* và hệ quả của chú giải của FTC).

[12] BIT Trung Quốc - Thụy Sĩ, Điều 7.

(1) (i) Đầu tư của thể nhân hoặc pháp nhân của một trong hai nước ký kết sẽ không bị tước quyền sở hữu tạm thời, hay bị trưng thu, hoặc bị áp dụng các biện pháp tương tự, trừ khi có lệnh của Toà án có thẩm quyền theo luật hiện hành. (ii) Đầu tư của thể nhân hoặc pháp nhân của một trong hai nước ký kết có thể bị quốc hữu hóa, hoặc tước quyền sở hữu, hoặc bị áp dụng các biện pháp tương đương với quốc hữu hóa hoặc tước quyền sở hữu trên lãnh thổ hoặc lãnh hải của một trong hai nước ký kết, chỉ trong trường hợp vì mục đích công cộng, vì lợi ích quốc gia của nước ký kết đó, với điều kiện bồi thường công bằng và thỏa đáng, và với điều kiện các biện pháp đó được thực hiện trên cơ sở không phân biệt đối xử theo pháp luật trong nước có tính chất áp dụng chung.	(1) Không bên ký kết nào được phép tước quyền sở hữu, quốc hữu hóa, hoặc thực hiện các biện pháp tương tự (sau đây gọi chung là 'tước quyền sở hữu') đối với đầu tư của các nhà đầu tư của nước ký kết kia trên lãnh thổ của mình, trừ trường hợp đáp ứng các điều kiện sau: (a) Vì lợi ích công cộng hay lợi ích quốc gia; (b) Tuân thủ quy trình pháp lý trong nước; (c) Không phân biệt đối xử; (d) Phải có bồi thường.	Không một bên ký kết nào được thực hiện các biện pháp tước quyền sở hữu, hay quốc hữu hóa, hay các biện pháp khác có tác động tước quyền sở hữu trực tiếp hay gián tiếp, đối với đầu tư của nhà đầu tư của bên ký kết trên lãnh thổ, trừ trường hợp vì lợi ích công cộng, không phân biệt đối xử và có bồi thường.

Điều đáng nói là các biện pháp 'tương tự hoặc 'tương đương' với tước quyền sở hữu không bao gồm các biện pháp dẫn đến chiếm hữu gián tiếp. Thật vậy, nếu tính 'tương tự' được đánh giá dựa trên bản chất của biện pháp chứ không nhất thiết dựa trên hệ quả của nó, thì trưng thu theo các quy định của pháp luật, và tước quyền sở hữu dần dần không thể bị coi là tương tự với một biện pháp tước quyền sở hữu hoặc quốc hữu hóa trực tiếp.

Tuy nhiên, không phải tất cả các BIT của Trung Quốc với nước ngoài đều hạn chế các điều khoản về tước quyền sở hữu ở các biện pháp 'tương tự' như tước quyền sở hữu hoặc quốc hữu hóa. Thật vậy, một số BIT trước đây của Trung Quốc với nước ngoài quy định các biện pháp bảo đảm trong trường hợp áp dụng các biện pháp 'có hiệu lực tương đương' với tước đoạt quyền sở hữu hoặc quốc hữu hóa. *Thí dụ*: các BIT với Cô-oét (1985), Đan Mạch (1985), Iceland (1994), Indonesia (1994), Hàn Quốc (1992), New Zealand (1994), Bồ Đào Nha (1992), Singapore (1985), và Anh Quốc (1986). BIT với Pháp (1985) nhắc đến 'các biện pháp khác dẫn đến kết quả tương tự (*autres mesures aboutissant au même résultat*), trong khi các BIT với Argentina (1992), Nhật Bản (1988) và Thổ Nhĩ Kỳ (1990) lại sử dụng ngôn từ thoáng hơn, đề cập tới các biện pháp có hệ quả tương tự như tước quyền sở hữu. Hơn nữa, một số BIT thế hệ mới của Trung Quốc với nước ngoài, như các BIT với Phần Lan (2004), Đức (2003),[13] Jordan (2005), Mozambique (2001) và Uganda (2004) lại tham chiếu rất rõ tới hệ quả của các biện pháp. Trong số này, BIT với Uganda chỉ rõ về các biện pháp trực tiếp hay gián tiếp.

Mục 2. TƯỚC QUYỀN SỞ HỮU GIÁN TIẾP

Sự phát triển các quy định pháp luật về yếu tố cấu thành hành vi tước quyền sở hữu gián tiếp trái pháp luật đã làm phát sinh các quan ngại giống như quan ngại về phạm vi của FET. Các ý kiến tranh cãi không liên quan tới ý nghĩa của khái niệm của tước quyền sở hữu gián tiếp - dưới hình thức trưng thu theo các quy định của pháp luật và tước quyền sở hữu dần dần, mà liên quan đến việc áp dụng hiệu quả các khái niệm này trong các biện pháp được thực hiện nhằm mục tiêu lập pháp phù hợp. Phán quyết trong vụ *Tokios Tokeles v. Ukraine* cho rằng việc tước quyền sở hữu, dù trực tiếp hay gián tiếp, chỉ xảy ra khi Nhà nước tước đoạt một phần 'đáng kể' giá trị đầu tư của nhà đầu tư.[14]

Trên cơ sở khái niệm về tước quyền sở hữu gián tiếp, trong vụ *Middle East Cement v. Egypt*, trọng tài ICSID đề cập đến 'các biện pháp [...] do Nhà nước thực hiện mà hệ quả của nó khiến nhà đầu tư mất đi quyền sử dụng và hưởng lợi từ khoản đầu tư của mình, mặc dù vẫn duy trì quyền sở hữu danh nghĩa đối với các quyền tương ứng'.[15] Tương tự, Phán quyết trọng tài trong vụ *Lauder v. Sec* nhận định: mặc dù khái niệm tước quyền sở hữu gián tiếp (hoặc 'thực tế' hoặc 'dần dần') không được định nghĩa rõ ràng trong lời văn của IIA, song đó 'là một biện pháp không liên quan đến tước quyền sở hữu công khai, nhưng lại có tác động làm ảnh hưởng đến quyền hưởng thụ tài sản'.[16]

[13] Hiệp định giữa Cộng hòa Liên bang Đức với Cộng hòa nhân dân Trung Hoa về khuyến khích và bảo hộ đầu tư có đi có lại, ngày 01/12/2003 (có hiệu lực ngày 11/11/2005). Tài liệu này có trên trang web Thư viện trực tuyến Các Hiệp định của Liên hợp quốc trực tuyến https://treaties-un-org.easyaccess1.lib.cuhk.edu.hk/Pages/showDetails.aspx?objid=08000002800684c9.

[14] *Tokios Tokelés v. Ukraine*, Vụ việc ICSID Số ARB/02/18, Phán quyết ngày 26/7/2007, tr. 120.

[15] Vụ *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, Vụ việc ICSID Số ARB/99/6, Phán quyết ngày 12/4/2002, đoạn 107.

[16] Vụ *Lauder v. Sec,* Hội đồng trọng tài theo BIT Hoa Kỳ - Sec theo nguyên tắc UNCITRAL, Phán quyết (chung thẩm), ngày 03/9/2001, đoạn 200.

Mặc dù NAFTA cấm áp dụng các biện pháp 'tương tự như tước quyền sở hữu', song hội đồng trọng tài trong vụ *Metalclad* lại nhận định khái niệm tước quyền sở hữu không chỉ:

> Bao gồm việc tước đoạt quyền sở hữu công khai, có chủ ý và được thừa nhận, *thí dụ* như tước quyền sở hữu trực tiếp hoặc chuyển nhượng chính thức theo danh nghĩa có lợi cho Nhà nước, mà còn bao gồm sự can thiệp bí mật hoặc ngẫu nhiên vào việc sử dụng tài sản, dẫn tới việc tước toàn bộ hay một phần đáng kể quyền sử dụng, hoặc lợi ích kinh tế được mong đợi một cách hợp lý từ tài sản đó của chủ sở hữu, nếu không nhất thiết vì lợi ích rõ ràng của nước tiếp nhận đầu tư.[17]

Chính việc chú trọng tới tác động của các biện pháp này tới tài sản của nhà đầu tư, cùng với một số điểm có vẻ như khác biệt đối với các mục đích lập pháp hợp pháp khi ban hành các biện pháp này - thể hiện trong một số các quyết định trọng tài, đã khiến các cơ quan có thẩm quyền của chính phủ quan ngại, đặc biệt là khi các biện pháp được xem xét liên quan tới những văn bản luật và các quy định được ban hành vì các mục đích phi kinh tế, *thí dụ* như các biện pháp bảo vệ môi trường hoặc y tế. Hội đồng trọng tài trong vụ *Santa Elena v. Costa Rica*, khi cân nhắc biện pháp tước quyền sở hữu gián tiếp được áp dụng vì mục đích môi trường, có vẻ như đã đưa ra một quan điểm đặc biệt khắt khe về vấn đề này khi cho rằng:

> Mặc dù tước quyền sở hữu hoặc trưng thu vì lý do môi trường có thể được coi là vì lợi ích công cộng, do đó có thể là hợp pháp, song trên thực tế, tài sản bị trưng thu vì lý do này không ảnh hưởng đến bản chất hoặc biện pháp bồi thường cho việc trưng thu đó. Nghĩa là, mục đích bảo vệ môi trường - vốn là lý do khiến tài sản bị trưng thu - không làm thay đổi tính chất pháp lý của biện pháp trưng thu được bồi thường một khoản thỏa đáng. Quy định quốc tế về nghĩa vụ bảo vệ môi trường cũng không có gì khác biệt. Ở khía cạnh này, các biện pháp môi trường có tính sung công - cho dù về mặt tổng thể nó đáng khen ngợi và có lợi cho toàn xã hội - nhưng thực chất giống với các biện pháp tước quyền sở hữu mà một quốc gia có thể áp dụng để thực hiện chính sách của mình: khi tài sản bị tước đoạt, ngay cả vì mục đích môi trường trong nước hay quốc tế, thì quốc gia đó vẫn có nghĩa vụ phải phải bồi thường.

[17] Vụ *Metalclad Corporation v. Mexico*, Vụ việc ICSID Số ARB(AF)/97/1, Phán quyết ngày 30/8/2000, đoạn 103. Tham khảo thêm vụ *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, Vụ ICSID số ARB (AF)/00/2, Phán quyết ngày 29/5/2003, đoạn 114.

Về vấn đề này, Phán quyết trong vụ *Saipem v. Bangladesh* tuyên rằng căn cứ vào thuyết hệ quả duy nhất, thì tiêu chí có ý nghĩa nhất để quyết định xem liệu một biện pháp nào đó có gián tiếp dẫn tới việc tước quyền sở hữu hay không, chính là tác động của biện pháp đó; và hệ quả của tước quyền sở hữu phải có ý nghĩa đáng kể.[18]

Hộp 1: Phán quyết trọng tài trong vụ Saipem v. Bangladesh năm 2009

133. Việc đầu tiên, cơ quan tài phán muốn nhấn mạnh rằng theo cái gọi là 'thuyết hệ quả duy nhất', thì tiêu chí quan trọng nhất để xác định liệu biện pháp gây tranh cãi có dẫn tới việc tước quyền sở hữu gián tiếp, hay tương tự với tước quyền sở hữu hay không, chính là tác động của biện pháp đó. Về mặt nguyên tắc, án lệ cho thấy tước quyền sở hữu là có xảy ra, nếu việc tước đoạt là đáng kể, như trong vụ việc này. Chính vì thế, căn cứ vào các tình tiết rất đặc biệt của hành động can thiệp này, hội đồng trọng tài đồng ý với các bên rằng việc Saipem bị tước đoạt đáng kể khả năng thụ hưởng lợi ích từ phán quyết ICC không đủ để kết luận rằng biện pháp can thiệp của tòa án Bangladesh là tương tự với việc tước quyền sở hữu. Nếu điều này là đúng, thì việc hủy bỏ phán quyết trọng tài sẽ làm phát sinh khiếu nại về tước quyền sở hữu, ngay cả khi quyết định hủy bỏ đó là của một tòa án có thẩm quyền tuyên dựa trên các cơ sở pháp luật.

Tước quyền sở hữu gián tiếp có thể được phân loại tiếp thành trưng thu theo các quy định của pháp luật - là các hành vi trưng thu tài sản thuộc 'quyền trị an' của Nhà nước, hoặc phát sinh theo cách khác từ các biện pháp của Nhà nước như liên quan tới các quy định về môi trường, sức khỏe, đạo đức, văn hóa, hoặc kinh tế của nước chủ nhà.[19]

[18] Vụ *Saipem S.p.A. v. Bangladesh*, Vụ việc ICSID Số ARB/05/07, Phán quyết ngày 30/6/2009, đoạn 133.

[19] UNCTAD, 'Tước quyền sở hữu: các vấn đề trong các hiệp định đầu tư quốc tế', UNCTAD/DITE/2, Vol. V, Geneva, 2000, tr. 12. Mặc dù có những vụ việc liên quan đến các nước khác như Unglaube và vụ *Unglaube v. Costa Rica*, Phán quyết, Vụ việc ICSID Số ARB/08/1 và ARB/09/20, ngày 16/5/2012 (liên quan đến kết luận về tước quyền sở hữu phát sinh từ các hoạt động lập pháp của Costa Rica nhằm hình thành một khu sinh thái bảo vệ các loài rùa biển và các khu vực làm tổ của chúng), cũng như vụ *Tecnicas Medioambientales Tecmed SA v. Mexico*, Phán quyết, Vụ việc ICSID Số ARB (AF)/00/2, ngày 29/5/2003 (cũng bao gồm việc tước quyền sở hữu liên quan tới Nghị quyết của một cơ quan nhà nước Mexico ra lệnh đóng cửa một khu chôn rác vì các lý do môi trường). Các vụ việc liên quan tới cuộc khủng hoảng tài chính ở Argentina năm 2000-2002 có lẽ là những thí dụ nổi tiếng nhất về những nỗ lực không thành công để biện minh cho các biện pháp bảo trợ xã hội dựa trên nhân quyền, chính sách công, hoặc lý do vì lợi ích công: *Tập đoàn Năng lượng LG&E kiện Argentina*, Quyết định về nghĩa vụ pháp lý, Vụ việc ICSID số ARB/02/1/3, tháng 10/2006, các đoạn 213-66; *Sempra Energy International kiện Argentina*, Quyết định về Đơn đề nghị hủy phán quyết của Argentina, Vụ việc ICSID số ARB/02/16, ngày 29/6/2010, các đoạn 106-223; *Công ty Truyền tải Xăng dầu*

Thuyết 'quyền trị an' của Nhà nước được áp dụng vào thời kỳ đầu của châu Mỹ thuộc địa, dựa trên các nguyên tắc có uy tín trong hệ thống common law ở Anh Quốc, theo đó cho phép hạn chế quyền tư nhân trong trường hợp cần thiết vì lợi ích chung. 'Quyền trị an' mô tả các quyền cơ bản của các chính phủ trong việc ban hành luật và quy định vì lợi ích của cộng đồng. Theo hệ thống chính quyền ở Hoa Kỳ, chỉ có các bang mới có quyền ban hành luật dựa trên 'quyền trị an' của họ.

Thẩm quyền lập pháp của Chính phủ Liên bang được giới hạn trong các trường hợp cụ thể quy định trong Hiến pháp. Theo pháp luật Hoa Kỳ, quyền lập pháp của các bang trong các lĩnh vực an toàn, sức khoẻ, phúc lợi và đạo đức bắt nguồn từ Tu chính án thứ 10 của Hiến pháp Hoa Kỳ, trong đó nêu rõ: 'Các quyền hạn mà Hiến pháp không trao cho Hoa Kỳ nhưng cũng không cấm các bang, sẽ được tương ứng bảo lưu cho các bang, hoặc người dân'. Cơ quan lập pháp của các bang thực thi 'quyền trị an' của mình bằng cách ban hành các đạo luật, và họ cũng ủy thác phần lớn 'quyền trị an' đó cho địa phương là các quận, hạt, thị trấn, làng và các khu lớn trong tiểu bang. 'Quyền trị an' không đề cập cụ thể đến quyền của bang và chính quyền địa phương trong việc thành lập lực lượng cảnh sát, mặc dù 'quyền trị an' có quyền đó. 'Quyền trị an' cũng được sử dụng làm cơ sở ban hành nhiều luật nội dung trong các lĩnh vực như quy hoạch, sử dụng đất, phòng cháy chữa cháy và xây dựng, đánh bạc, phân biệt đối xử, đậu xe, tội phạm, cấp phép cho những người chuyên nghiệp, rượu, xe có động cơ, xe đạp, trường học và vệ sinh. Nếu một luật được ban hành theo 'quyền trị an' mà không thúc đẩy sức khoẻ, an toàn hoặc phúc lợi của cộng đồng, thì đạo luật đó có thể bị coi là việc tước đoạt vi hiến sự sống, quyền tự do, hoặc tài sản. Thách thức phổ biến nhất đối với một đạo luật được ban hành theo thẩm quyền này là nó có thể cấu thành hành vi tước quyền sở hữu. Việc tước quyền sở hữu xảy ra khi chính phủ tước quyền sở hữu của một người, hoặc trực tiếp can thiệp vào, hoặc gây trở ngại nghiêm trọng đến việc sử dụng và hưởng lợi của người đó đối với tài sản của họ.

Phán quyết trong vụ *BGV v. Argentina* đã ghi nhận rằng một quốc gia có thể thực thi quyền chủ quyền của mình để ban hành các quy định quản lý có thể làm ảnh hưởng đến tài sản cá nhân vì lợi ích chung.[20]

Ngoài ra, Phán quyết trong vụ *Tza Yap Shum v. Peru* ghi nhận rằng điều được thường xuyên thừa nhận là Nhà nước sẽ không chịu trách nhiệm khi 'quyền trị an' của Nhà nước được thực thi một cách hợp lý và cần thiết vì mục tiêu bảo vệ sức khoẻ, an ninh, đạo đức và phúc lợi công cộng. Tuy nhiên, quyền hạn này không phải là không có giới hạn, vì Nhà nước sẽ phải chịu trách nhiệm, nếu quyền hạn đó được thực hiện tùy tiện hoặc phân biệt đối xử.[21]

Mặc dù đã có một số phán quyết của cơ quan tài phán, tuy nhiên ranh giới giữa một bên là khái niệm tước quyền sở hữu gián tiếp và một bên là các biện pháp lập pháp của chính phủ không cần phải bồi thường, vẫn chưa được xác định rõ ràng. Việc xác định hành vi tước gián tiếp quyền sở hữu phụ thuộc rất nhiều vào các tình tiết cụ thể và hoàn cảnh của vụ việc. Tất nhiên, mặc dù 'có sự khác nhau trong cách thức mà các cơ quan tài phán sử dụng để phân biệt giữa một bên là các quy định hợp pháp không phải bồi thường có ảnh hưởng đến giá trị kinh tế của các khoản đầu tư nước ngoài, và một bên là tước quyền sở hữu gián tiếp, song kết quả kiểm tra cho thấy, về cơ bản, các cơ quan tài phán đã nhận diện được các tiêu chí có vẻ giống với các tiêu chí được đưa ra trong các IIA gần đây, cụ thể là: (i) mức độ can thiệp vào quyền sở hữu; (ii) bản chất của các biện pháp mà chính phủ áp dụng, nghĩa là mục đích và bối cảnh của biện pháp; và (iii) mức độ can thiệp của biện pháp đó vào sự mong ước chính đáng dựa vào khoản đầu tư. [22]

Tuy nhiên, có ba tiêu chí cơ bản mà các trọng tài viên có thể cân nhắc khi đánh giá một biện pháp như vừa được tóm tắt trong Phán

CMS kiện Argentina, Vụ việc ICSID Số ARB/0108, ngày 25 tháng 4 năm 2005, các đoạn 315-92; *Tập đoàn Enron và Tập đoàn Ponderosa, LP kiện Argentina*, Phán quyết, Vụ việc ICSID Số ARB/01/3, ngày 22 tháng 5 năm 2007, các đoạn 303-39; *Cont'l Cas. Co. kiện Argentina*, Phán quyết, Vụ việc ICSID Số ARB/03/9, ngày 5 tháng 9 năm 2008, các đoạn 219-85; *BG Group PLC kiện Argentina*, Phán quyết chung thẩm, trọng tài theo vụ việc (UNCITRAL), ngày 24 tháng 12 năm 2007, các đoạn 361-444; *Hệ thống lưới điện quốc gia (PLC) của Liên minh châu Âu (ARC) kiện Argentina*, trọng tài theo vụ việc (UNCITRAL), ngày 3 tháng 11 năm 2008, các đoạn 205-62; *Suez kiện Argentina*, Quyết định về nghĩa vụ pháp lý, Vụ việc ICSID Số ARB/03/19, ngày 30 tháng 7 năm 2010, các đoạn 249-71; *Total SA v Argentina* kiện *Argentina*, Quyết định về nghĩa vụ pháp lý, vụ việc ICSID Số ARB/04/1, ngày 21 tháng 12 năm 2010, các đoạn 482-85; *Công ty Quốc tế Năng lượng El Paso kiện Argentina*, Phán quyết, Vụ việc ICSID Số ARB/03/15, ngày 27 tháng 10 năm 2011, các đoạn 552-670; *Impregilo SpA kiện Cộng hoà Argentine*, Phán quyết chung thẩm, Vụ việc ICSID Số ARB/07/17, ngày 21 tháng 6 năm 2011, các đoạn 336-60; *Metalpar SA và Buen Aire SA kiện Argentina*, Phán quyết về nội dung, Vụ ICSID số ARB/03/5, ngày 6 tháng 6 năm 2008, các đoạn 208-11; *Siemens AG kiện Argentina*, Phán quyết và các ý kiến riêng, Vụ việc ICSID số ARB/02/8, ngày 6 tháng 2 năm 2007, các đoạn 79 & 354.

[20] Vụ *BG Group Plc. v. Argentina*, UNCITRAL, Phán quyết ngày 24/12/2007, đoạn 268.

[21] Vụ *Tza Yap Shum v. Peru*, Vụ việc ICSID Số ARB/07/6, Phán quyết ngày 07/7/2011 [tiếng Tây Ban Nha], các đoạn 145-148.

[22] Catherine Yannaca-Small, OECD, 'Tước quyền sở hữu gián tiếp' và 'Quyền lập pháp' trong luật đầu tư quốc tế', trong *Tạp chí Luật đầu tư quốc tế: Một bối cảnh đang chuyển đổi* 43 (2005) tr. 5, http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf. Tham khảo thêm Anne Van Aaken, 'Luật đầu tư quốc tế ở giữa cam kết và tính linh hoạt: Phân tích học thuyết hợp đồng, *12 J. Int'l Econ. L.* 507 (2009) đoạn 510-512.

quyết về trách nhiệm pháp lý của vụ *Burlington Resources v. Ecuador*. Phán quyết này làm rõ các tiêu chí áp dụng, và lưu ý rằng để có thể kết luận về tước quyền sở hữu gián tiếp, cần đáp ứng các yêu cầu sau đây: (i) phải có sự tước đoạt đáng kể giá trị của toàn bộ khoản đầu tư (nghĩa là mức độ can thiệp với quyền sở hữu (gồm cả can thiệp vào các mong ước chính đáng liên quan tới khoản đầu tư); (ii) biện pháp lâu dài (tức là thời gian áp dụng biện pháp); và (iii) không thể biện minh cho biện pháp này theo thuyết 'quyền trị an' (về cơ bản là xem xét lại mục đích của biện pháp).[23]

Sự gia tăng bất ngờ số lượng các vụ kiện ISDS liên quan tới các hoạt động lập pháp bị cáo buộc là dẫn tới tình trạng tước quyền sở hữu, đã rung lên hồi chuông báo động về khả năng các IIA có thể sẽ bị sử dụng để hạn chế quyền điều tiết của nước tiếp nhận đầu tư trong các lĩnh vực môi trường, sức khoẻ cộng đồng hoặc các lĩnh vực lợi ích công khác. *Thí dụ*: trong quá trình đàm phán Hiệp định đối tác xuyên Thái Bình Dương ('TPP'), việc sử dụng trọng tài đầu tư để xem xét các quy định về thuốc lá đã trở thành nguồn gây tranh cãi trong quá trình này, trong khi các quy định về ISDS lại là vấn đề chính trong FTA Hoa Kỳ - Hàn Quốc ('Korus'). Mặc dù Liên minh Doanh nghiệp Hoa Kỳ ủng hộ và vận động tích cực cho ISDS, song cũng có nhiều ý kiến phản đối. Hiện tại, Australia đã phản đối ISDS trong TPP, và điều này sẽ tác động như thế nào tới các nước TPP khác vẫn là vấn đề chưa rõ ràng. Còn quá sớm để nói liệu sự thay đổi trong chính sách này của Australia có ảnh hưởng đến các quốc gia khác hay không.[24] Điều này cũng làm tăng mối lo ngại về khả năng gia tăng các vụ việc trọng tài ISDS liên quan tới các cáo buộc theo đó hành vi tước quyền sở hữu hợp pháp có thể dẫn đến tình trạng 'đóng băng pháp luật' ('regulatory chill'), do lo ngại về khả năng phải chịu trách nhiệm pháp lý sẽ khiến các cơ quan chức trách nhà nước kiềm chế không áp dụng các quy định cần thiết nữa.

Một lần nữa, các quốc gia phát triển NAFTA lại đi đầu trong việc sử dụng trong các IIA của mình những từ ngữ nhằm hạn chế phạm vi các nghĩa vụ bảo hộ đầu tư có thể được sử dụng để chất vấn các biện pháp lập pháp hợp pháp. Trong những năm gần đây, trong các BIT và các chương đầu tư trong FTA của mình, Hoa Kỳ đã đưa vào sử dụng các ngôn ngữ giải thích về khái niệm tước quyền sở hữu, trong đó nêu rõ

[23] *Burlington Resources Inc. v. Ecuador*, Vụ việc ICSID Số ARB/08/5, Phán quyết về trách nhiệm pháp lý, ngày 14/12/2012, đoạn 471.

[24] Tania Voon & Andrew Mitchell, 'Đã đến lúc bỏ cuộc? Đánh giá các khiếu nại đầu tư quốc tế liên quan tới quy định về bao gói thuốc lá trơn ở Australia', *14 J. Int'l Econ. L.* 515, 517-18 (2011) (bàn về nỗ lực của các công ty thuốc lá trong việc loại bỏ các quy định về bao gói trơn trong TPP của Australia bằng cách xem xét pháp luật đầu tư quốc tế).

mục đích của việc cấm các biện pháp tước quyền sở hữu là để 'thể hiện luật tập quán quốc tế về nghĩa vụ của các quốc gia liên quan đến tước quyền sở hữu", và rằng:

> Trừ những trường hợp hãn hữu, mọi hành động lập pháp không phân biệt đối xử của một bên được soạn thảo và áp dụng để bảo vệ các mục tiêu phúc lợi công cộng hợp pháp, *thí dụ* như y tế công cộng, an toàn và môi trường, sẽ không cấu thành hành vi tước quyền sở hữu gián tiếp.[25]

Canada cũng đã thông qua một điều khoản tương tự trong các IIA của mình. Nhưng từ đó tới nay, không có thêm nước nào khác áp dụng các điều khoản như vậy trong IIA của mình.

Mối quan ngại về những hậu quả tiềm ẩn của việc cấm tước quyền sở hữu phát sinh trong bối cảnh đàm phán Hiệp định đa phương về đầu tư (MAI) trong OECD. Đáp lại, các nhà đàm phán MAI đã đưa ra một chú giải cho điều khoản về tước quyền sở hữu, trong đó nêu rõ nghĩa vụ này 'nhằm mục đích lồng ghép vào trong MAI các quy phạm pháp luật quốc tế hiện hành. Việc tham chiếu tới [...] tước quyền sở hữu hoặc quốc hữu hóa' và 'các biện pháp tương tự với tước quyền sở hữu hoặc quốc hữu hoá' phản ánh thực tế là luật quốc tế đòi hỏi phải có bồi thường đối với các hành vi tước quyền sở hữu, bất kể tên gọi của nó là gì, ngay cả khi quyền sở hữu tài sản không bị tước đoạt. Nó không tạo nên một yêu cầu mới đòi hỏi các bên phải bồi thường thiệt hại mà nhà đầu tư hoặc khoản đầu tư có thể phải gánh chịu do việc ban hành quy định, tăng thu và các hoạt động bình thường khác vì lợi ích công cộng do chính phủ thực hiện.[26]

Bản dự thảo của MAI cũng đề cập đến mối quan hệ giữa các biện pháp tước quyền sở hữu gián tiếp và các quy định về môi trường và có liên quan, nhấn mạnh rằng: 'Cần làm rõ là MAI sẽ không ngăn cản việc thực thi các quyền lập pháp thông thường của chính phủ, và rằng việc thực thi các quyền hạn đó không đồng nghĩa với tước quyền sở hữu'.[27] Cuối cùng, MAI còn đề cập thêm tới vấn đề: liệu các biện pháp đánh thuế có thể làm phát sinh hành vi tước quyền sở hữu hay không? MAI giải thích: 'Nhìn chung, việc áp thuế không cấu thành hành vi tước quyền sở hữu'. Liên quan đến tước quyền sở hữu gián tiếp, dự thảo văn

[25] BIT mẫu của Hoa Kỳ, 2012, các Điều 1 và 4(b).

[26] Hiệp định đầu tư đa phương, Dự thảo văn bản tổng hợp, tài liệu của OECD DAFFE/MAI(98)7/REV1, Chú giải cho Điều 5, tr. 143, http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

[27] Hiệp định đầu tư đa phương, Dự thảo văn bản tổng hợp, tài liệu của OECD DAFFE/MAI(98)7/REV1, Phụ lục 2, đoạn 8.

bản đã làm rõ thêm rằng: 'Khi bản thân biện pháp áp thuế không cấu thành hành vi tước quyền sở hữu, thì biện pháp đó cũng không thể là một phần của hành vi tước quyền sở hữu dần dần'.[28]

Mục 3. CÁC ĐIỀU KIỆN ĐỂ HÀNH VI TƯỚC QUYỀN SỞ HỮU ĐƯỢC COI LÀ HỢP PHÁP

Các IIA không ngăn cấm việc áp dụng các biện pháp tước quyền sở hữu, vì đây là một quyền chủ quyền của các quốc gia, song yêu cầu các quốc gia phải đáp ứng các điều kiện nhất định để biện pháp đó được coi là hợp pháp theo pháp luật quốc tế. Việc tước quyền sở hữu là cần thiết vì lợi ích công cộng, trên cơ sở không phân biệt đối xử, phải có bồi thường và theo đúng quy trình mà pháp luật quy định.

Tiêu chuẩn này được bổ sung bởi 'Công thức Hull', yêu cầu phải thanh toán 'các khoản bồi thường kịp thời, thỏa đáng và hiệu quả'. Có như vậy thì hành vi tước quyền sở hữu mới được coi là hợp pháp theo luật quốc tế. Phán quyết chung thẩm trong vụ *CME v. Sec* lưu ý rằng yêu cầu bồi thường của BIT 'chỉ' thể hiện 'công thức Hull' để yêu cầu việc bồi thường thực hiện kịp thời, thỏa đáng và hiệu quả cho hành động tước quyền sở hữu của nhà đầu tư nước ngoài, và kết luận rằng các điều khoản phù hợp của các IIA ngày nay là những sửa đổi trong cùng một chủ đề cơ bản được nhất trí, đó là khi một quốc gia tước quyền sở hữu của nhà đầu tư nước ngoài thì phải bồi thường đầy đủ.[29]

NAFTA đã giải thích chi tiết các yêu cầu đó. Điều 1110 khoản 3 của NAFTA yêu cầu khoản bồi thường 'phải được thanh toán không chậm trễ và phải đầy đủ nhất có thể'. Một khoản bồi thường thỏa đáng phải 'tương đương với giá thị trường của khoản đầu tư bị tước quyền sở hữu ngay trước khi việc tước quyền sở hữu xảy ra, và không được phản ánh bất kỳ thay đổi về giá trị nào do việc tước đoạt quyền sở hữu dự kiến đã được biết trước'.

Tiêu chí định giá sẽ bao gồm các yếu tố giá trị, giá trị tài sản, kể cả giá thuế đã khai báo của tài sản hữu hình, và các yếu tố khác nếu phù hợp, để xác định giá thị trường hợp lý. Ngoài ra, nó 'sẽ bao gồm khoản tiền lãi tính theo mức lãi suất thương mại hợp lý cho đồng tiền đó cho giai đoạn từ ngày tước quyền sở hữu tới ngày thanh toán thực tế'. Để không ảnh hưởng tới hiệu quả của khoản bồi thường, phải sử dụng 'đồng tiền tự do chuyển đổi'.[30]

[28] Hiệp định đầu tư đa phương, Dự thảo văn bản tổng hợp, tài liệu của OECD DAFFE/MAI(98)7/REV1, Chú giải chi Điều VIII.2, tr. 86.

[29] *CME Czech Republic B.V. v. Sec*, UNCITRAL, Phán quyết chung thẩm, ngày 14/3/2003 đoạn 497.

TÓM TẮT CHƯƠNG 5

Cách định nghĩa về FET trong các IIA cũng như trong thông lệ của các quốc gia còn nhiều khác biệt đáng kể. Lý do là vì một số IIA quy định cả tước quyền sở hữu trực tiếp và gián tiếp, trong khi một số IIA lại không bàn về tước quyền sở hữu gián tiếp.[31] Lựa chọn như thế nào là rất quan trọng, bởi nếu một IIA quy định cả tước quyền sở hữu gián tiếp, thì điều đó có nghĩa là IIA sẽ bảo vệ các nhà đầu tư nước ngoài trong những trường hợp họ có thể đối mặt với những thay đổi nghiêm trọng về môi trường đầu tư mà họ không thể dự đoán một cách hợp lý.[32]

Tuy nhiên, lại không có định nghĩa rõ ràng về tước quyền sở hữu gián tiếp. Mặc dù, đã có một số phán quyết do các cơ quan tài phán quốc tế đưa ra, nhưng ranh giới giữa khái niệm tước quyền sở hữu gián tiếp và các biện pháp lập pháp của chính phủ không đòi hỏi phải bồi thường vẫn chưa rõ ràng. Thay vào đó, nó phụ thuộc vào các tình tiết và hoàn cảnh cụ thể của vụ việc.[33] Trong những năm gần đây, một thế hệ mới các IIA của Hoa Kỳ và Canada, trong đó có các chương về đầu tư của FTA, đã đưa ra các ngôn từ cụ thể và thiết lập các tiêu chí để hỗ trợ xác định xem liệu việc tước quyền sở hữu gián tiếp phải bồi thường đã xảy ra hay chưa.[34] Khoa học pháp lý trong thập kỷ trước đã chứng minh rằng các trường hợp tước quyền sở hữu gián tiếp không phải là trưng thu thực tế các tài sản vật chất, nhưng lại dẫn tới hệ quả là quyền quản lý, sử dụng, hoặc kiểm soát tài sản bị mất, hoặc khiến cho giá trị tài sản của một nhà đầu tư nước ngoài bị khấu hao đáng kể. Hội đồng trọng tài trong vụ *Gemplus* cho rằng: 'Biện pháp tước quyền sở hữu gián tiếp xảy ra khi Nhà nước chủ động lấy đi của nhà đầu tư khả năng sử dụng khoản đầu tư của mình một cách có ý nghĩa'.[35]

[30] NAFTA, Điều 1110: 2, 4, 6.

[31] Rudolf Dolzer, Margrete Stevens, *Các hiệp định đầu tư song phương,* Nxb. Martinus Nijhoff, 1995.

[32] Rudolf Dolzer, Margrete Stevens, *Các hiệp định đầu tư song phương,* Nxb. Martinus Nijhoff, 1995.

[33] Anne Van Aaken, 'Luật đầu tư quốc tế giữa cam kết và tính linh hoạt: Phân tích học thuyết hợp đồng', *12 J. Int'l Econ. L.* 507 (2009) đoạn 510-512.

[34] Rachel D. Edsall, 'Tước quyền sở hữu gián tiếp theo NAFTA và DR-CAFTA: Những điểm bất đồng có thể xảy ra khi Nhà nước đối xử với công chúng', *86 Boston University Law Review*, 931 (2006) đoạn 953-961.

[35] *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico*, Vụ việc ICSID số ARB(AF)/04/3 & ARB(AF)/04/4, Phán quyết ngày 16/6/2010, phần VIII, đoạn 23.

Tước quyền sở hữu gián tiếp có thể được phân loại tiếp thành trưng thu tài sản theo các quy định của pháp luật - là các 'hành vi trưng thu tài sản thuộc 'quyền trị an' của Nhà nước, hoặc phát sinh theo cách khác - từ các biện pháp của Nhà nước liên quan tới các quy định về môi trường, sức khỏe, đạo đức, văn hóa, hoặc kinh tế của nước tiếp nhận đầu tư.[36] Tước quyền sở hữu theo các quy định của pháp luật là một vấn đề được quan tâm đặc biệt, đứng từ góc độ chính sách công.[37] Mặc dù đã có một số phán quyết do các cơ quan tài phán đưa ra, nhưng ranh giới giữa khái niệm tước quyền sở hữu gián tiếp và các biện pháp lập pháp của chính phủ không đòi hỏi phải bồi thường vẫn chưa được xác định rõ ràng. Việc xác định tước quyền sở hữu gián tiếp phụ thuộc rất nhiều vào các tình tiết và hoàn cảnh cụ thể của từng vụ việc. Tất nhiên, mặc dù có sự khác nhau trong cách thức mà các cơ quan tài phán sử dụng để phân biệt giữa một bên là các quy định hợp pháp không phải bồi thường có ảnh hưởng đến giá trị kinh tế của các khoản đầu tư nước ngoài, và một bên là tước quyền sở hữu gián tiếp, song kết quả xem xét và phân tích cho thấy, về cơ bản, các cơ quan tài phán đã nhận diện được các tiêu chí có vẻ giống với các tiêu chí được đưa ra trong các IIA gần đây, cụ thể là: (i) mức độ can thiệp vào quyền sở hữu; (ii) bản chất của các biện pháp mà chính phủ áp dụng, nghĩa là mục đích và bối cảnh của biện pháp; và (iii) mức độ can thiệp của biện pháp đó vào sự mong ước chính đáng dựa vào khoản đầu tư.[38] Tuy nhiên, có ba tiêu chí chính mà các trọng tài viên có thể cân nhắc khi đánh giá một biện pháp đã được tóm tắt trong Phán quyết về trách nhiệm pháp lý của vụ *Burlington Resources v. Ecuador.*[39] Phán quyết này làm rõ các tiêu chí áp dụng và lưu ý rằng: để có thể kết luận về tước quyền sở hữu gián tiếp, các yêu cầu sau đây phải được đáp ứng: (i) phải có sự tước đoạt đáng kể giá trị của toàn bộ khoản đầu tư (nghĩa là mức độ can thiệp với quyền sở hữu (gồm cả can thiệp vào các mong ước chính đáng liên quan tới khoản đầu tư); (ii) biện pháp lâu dài (tức là thời gian áp dụng biện pháp); và (iii) không thể biện minh cho biện pháp này theo thuyết 'quyền trị an' (về cơ bản là xem xét lại mục đích của biện pháp).[40]

[36] UNCTAD, *Tước quyền sở hữu*, 12, tài liệu của UN UNCTAD/ITE/IIT/15 (2000).

[37] Julien Chaisse, 'Khám phá phạm vi của đầu tư quốc tế và các biện pháp bảo vệ sức khỏe trong nước - Điều khoản về những ngoại lệ chung', *39(2/3) American Journal of Law and Medicine 332 (2013)*.

[38] Catherine Yannaca-Small, OECD, 'Tước quyền sở hữu gián tiếp' và 'Quyền lập pháp' trong Luật đầu tư quốc tế', trong Tạp chí *Luật đầu tư quốc tế: Một bối cảnh đang chuyển đổi*, 43 (2005) tr. 5, http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf; Anne Van Aaken, 'Luật đầu tư quốc tế giữa cam kết và tính linh hoạt: Phân tích học thuyết hợp đồng', *12 J. Int'l Econ. L.* 507 (2009) đoạn 510-512.

[39] *Burlington Resources v. Ecuador,* ICSID, Vụ việc số ARB/08/5, Phán quyết về trách nhiệm pháp lý, ngày 14/12/2012.

[40] *Burlington Resources Inc. v. Ecuador*, Vụ việc ICSID Số ARB/08/5, Phán quyết về trách nhiệm pháp lý, ngày 14/12/2012, đoạn 471.

CÂU HỎI / BÀI TẬP

1. Cần sử dụng tiêu chí nào để phân biệt một biện pháp lập pháp không làm phát sinh việc tước quyền sở hữu và một biện pháp lập pháp có dẫn tới tước quyền sở hữu? Ý định của chính phủ có phải là một tiêu chí hay không? Nếu có, anh/chị xác định ý định của chính phủ như thế nào? Ai trong chính phủ là người cần đưa ra ý định đó?

2. Có phải mọi trường hợp tước quyền sở hữu đều làm phát sinh nghĩa vụ bồi thường không, hay chỉ có những trường hợp tước quyền sở hữu không liên quan tới lợi ích công cộng?

3. Biện pháp bồi thường có cần phải khác nhau không, nếu mục đích tước quyền sở hữu là vì lợi ích công cộng, hoặc khi việc tước quyền sở hữu là bất hợp pháp? Nói cách khác, nguyên đơn có thể xin áp dụng một biện pháp bồi thường thiệt hại khác không (và cơ quan tài phán có thẩm quyền ra phán quyết về biện pháp bồi thường thiệt hại khác không) tùy vào hình thức tước quyền sở hữu?

4. Liệu có phải một số mục đích công cộng thì được chấp nhận, còn một số khác thì không? Có phải bất cứ điều gì chính phủ làm đều có thể viện lý do vì mục đích công cộng không? có hạn chế nào đối với điều này không? Các giới hạn đó có cần phải do hội đồng trọng tài quyết định không?

5. Chủ sở hữu tài sản có được bồi thường khi người đó bị tước khả năng 'có thể được mong ước một cách chính đáng" để sử dụng tài sản của mình về mặt kinh tế không? Chủ sở hữu tài sản cần linh hoạt ở mức độ nào để thích ứng với môi trường quy định mới?

6. Học thuyết 'hệ quả duy nhất' là gì? Đó có phải là cách thức hiệu quả để xem xét về thuyết tước quyền sở hữu hay không?

7. Nhà đầu tư có quyền có thị trường không? Liệu một quy định loại bỏ mọi giá trị kinh tế ở một thị trường nhất định có phải là hành vi tước quyền sở hữu không?

8. Vụ *Methanex* liên quan đến tình huống khi một quy định của Chính phủ - Luật về Không khí sạch - đã thực sự tạo ra thị trường cho MTBE. Điều đó có tạo ra sự khác biệt nào khi đánh giá xem liệu một quy định của chính phủ có thể loại bỏ một thị trường mà không phải bồi thường?

9. Gần đây có một loạt các vụ việc quốc hữu hóa xảy ra ở các nước Mỹ La-tinh, và con số này có nguy cơ gia tăng. Đây có phải là việc sử dụng hợp lý quyền hạn của chính phủ không? Nếu đã có cảnh báo nhưng nguyên đơn vẫn cứ đầu tư, thì liệu nguyên đơn có thắng kiện không, nếu cho rằng các mong ước chính đáng của mình không bao gồm khả năng bị tước quyền sở hữu?

TÀI LIỆU CẦN ĐỌC

1. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law*, tr. 89-118, Oxford, 2008.
2. Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', *20 ICSID Review - Foreign Investment L. J. 1* (2005).
3. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration*, 429-489, Oxford, 2008.
4. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA* chương 11, đoạn 1110.8 - 1110.58 (Kluwer 2006; cập nhật lần cuối 2009).
5. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 265-313, Oxford, 2007).
6. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties*, 321-398, Kluwer, 2008.
7. G. C. Christie, 'What Constitutes A Taking of Property under International Law? *38 BRIT. YB. INT'L L. 307* (1963).
8. Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', *8 J. World Investment & Trade* 717 (2007).
9. Anne K. Hoffmann, 'Indirect Expropriation', in *Standards of Investment Protection,* 151 (August Reinisch ed., Oxford, 2008).
10. August Reinisch, 'Tước quyền sở hữu', trong *Oxford Handbook of International Investment Law*, 407 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

CHƯƠNG 6. NGUYÊN TẮC ĐẢM BẢO CƠ CHẾ GIẢI QUYẾT TRANH CHẤP

CHƯƠNG 6

NGUYÊN TẮC ĐẢM BẢO CƠ CHẾ GIẢI QUYẾT TRANH CHẤP ĐẦU TƯ QUỐC TẾ (ISDS)

Mục đích học Chương 6

- Vì sao ngày nay phương thức trọng tài thường xuyên được sử dụng trong giải quyết tranh chấp?
- Phân tích nhược điểm của việc tranh tụng tại tòa án của nước chủ đầu tư và nước tiếp nhận đầu tư?
- Phân tích ưu điểm của việc giải quyết tranh chấp giữa Chính phủ nước tiếp nhận đầu tư và nhà đầu tư quốc tế (ISDS) so với giải quyết tranh chấp giữa Nhà nước với Nhà nước;
- Xác định các nguồn khác nhau để chấp thuận một trọng tài đầu tư;
- Nghiên cứu điều khoản 'ngã ba đường' ('fork-in-the-road');
- Xem xét khả năng chồng chéo giữa các lý do kiện tụng trong nước và các yêu cầu trong Luật đầu tư quốc tế;
- Xem xét sự miễn trừ trong quy tắc 'đã sử dụng hết các biện pháp tố tụng trong nước';
- Trong các vụ kiện về đầu tư, những bị đơn thường xuyên nhất thường có đặc điểm gì?
- Thảo luận về phẩm chất mà một trọng tài viên phải có trong vụ kiện ISDS;
- Xem xét các tình huống khó xử về mặt đạo đức mà các trọng tài viên trong việc giải quyết tranh chấp ISDS có thể gặp phải.

Mục 1. KHÁI QUÁT VỀ GIẢI QUYẾT TRANH CHẤP QUỐC TẾ

1. Khái quát

Giải quyết tranh chấp quốc tế liên quan đến các biện pháp kỹ thuật và thể chế được sử dụng để giải quyết tranh chấp giữa các quốc gia và/hoặc các tổ chức quốc tế. Tranh chấp quốc tế có thể được giải quyết bằng cách sử dụng vũ lực hoặc giải quyết bằng biện pháp hòa bình. Để giải quyết các tranh chấp quốc tế bằng biện pháp hoà bình, người ta thường sử dụng các phương thức thương lượng, điều tra, trung gian, hoà giải, trọng tài, giải quyết tranh chấp tại tòa án, nhờ đến các cơ quan hay tổ chức khu vực, hoặc các biện pháp hòa bình khác do chính họ lựa chọn (Điều 33 Hiến chương Liên hợp quốc).

Trong hơn một thập kỷ qua, các luật sư quốc tế và các học giả quan hệ quốc tế đã bị cuốn hút bởi số lượng các cơ quan tài phán quốc tế ngày càng gia tăng. Từ đó nhiều án lệ quốc tế được hình thành, đánh dấu sự xuất hiện ngày càng nhiều hơn của án lệ quốc tế tại một số vụ việc nổi tiếng tại Tòa án Công lý quốc tế (ICJ) và Tòa án Thường trực quốc tế (PCIJ).

Ngày nay, có rất nhiều cơ chế giải quyết tranh chấp quốc tế có tính chuyên môn cao như Cơ quan giải quyết tranh chấp của WTO (DSB), Toà án Quốc tế về Luật Biển, Toà án Hình sự Quốc tế, các hội đồng trọng tài đầu tư hoạt động theo ICSID, hoặc các quy tắc trọng tài khác. Tất cả áp dụng, giải thích luật quốc tế đều có thể góp phần phát triển và tạo ra pháp luật quốc tế. Câu hỏi được đặt ra trong trường hợp này là, liệu các tổ chức này có thật sự đóng góp vào việc phát triển một bộ luật quốc tế thống nhất không, hay liệu họ lại làm cho pháp luật quốc tế trở nên rời rạc hơn? Trong trường hợp phải áp dụng các quy tắc cụ thể đã được thoả thuận, như các hiệp định của WTO, các BIT, hoặc Công ước Luật Biển, v.v…, thì điều này chắc chắn không khả thi. Tới một chừng mực mà các cơ quan này vẫn còn tuân theo quy tắc chung của pháp luật quốc tế, tính gắn kết và phân tán thực sự phát sinh và sẽ trở thành một vấn đề nghiêm trọng. Các học giả luật quốc tế đã tranh luận khá gay gắt về vấn đề này, chủ yếu dưới tên gọi 'sự phân tán' của luật quốc tế, hoặc 'sự phổ biến rộng rãi' các cơ quan tài phán quốc tế.

'Tư pháp hoá' trật tự pháp lý quốc tế ngày càng phát triển mạnh mẽ không chỉ thể hiện là càng nhiều cơ quan tài phán quốc tế được thành lập. Nhìn chung, các cơ quan tài phán này đều có thẩm quyền

bắt buộc. Mặc dù các quốc gia vẫn để ngỏ khả năng trở thành đối tác, trên thực tế họ buộc phải hợp tác với nhau, *thí dụ* như để hưởng lợi từ các quy định thương mại của WTO hoặc đầu tư nước ngoài theo các BIT. Hiệu quả của sự kết hợp này là trật tự pháp lý quốc tế dần dần phải tuân theo quy tắc của pháp luật. Hơn nữa, một số cơ quan tài phán quốc tế mở cửa cho các tác nhân phi nhà nước, *thí dụ* như cá nhân và công ty, dẫn tới việc can thiệp ngày càng sâu vào các khía cạnh nội bộ của các quốc gia. Điều này đóng góp vào sự phát triển của tư pháp quốc tế - hay tư pháp xuyên quốc gia.[1]

Tư pháp hoá còn chưa đồng đều. Các vấn đề lớn như quân sự, quản lý tài chính toàn cầu và môi trường lại không thuộc phạm vi của cơ quan tài phán quốc tế. Tư pháp quốc tế cũng phụ thuộc vào các nguồn tài trợ của các quốc gia, cũng như việc thi hành các phán quyết và quyết định. Trong bối cảnh ngày càng nhiều những thách thức quốc tế đòi hỏi sự vào cuộc của các cơ quan quốc tế như tòa án quốc tế, thì sự phát triển trong tương lai sẽ được quyết định bởi địa chính trị, bao gồm cả chuyển đổi quyền lực toàn cầu. Tuy nhiên, mong muốn của các quốc gia về việc thiết lập tòa án quốc tế mới còn phụ thuộc vào việc nhận thức chức năng của các cơ quan tài phán hiện nay.

Tầm quan trọng của cơ quan tài phán quốc tế đã đặt ra các yêu cầu về pháp lý, thực nghiệm và quy phạm. Vấn đề pháp lý bao gồm các phương pháp giải thích nghĩa vụ của điều ước, *thí dụ* như việc sử dụng cách giải thích động (theo hướng phát triển), xây dựng các biện pháp chế tài, và mối quan hệ giữa các cơ quan tài phán quốc tế với tòa án quốc gia. Một số câu hỏi thực nghiệm về cơ quan tài phán quốc tế bao gồm nguồn gốc và tính hiệu quả của các cơ quan tài phán này, cũng như sự hữu dụng của chúng trong việc giải quyết các vấn đề quốc tế. Các khía cạnh mang tính pháp lý liên quan đến hiệu quả công bằng của cơ quan tài phán quốc tế, cũng như cách để kiểm soát các cơ quan này, là cơ chế cho việc thực thi trật tự pháp lý trong nước cũng như quốc tế. Rõ ràng là giữa các khía cạnh pháp lý, thực nghiệm và quy phạm của hệ thống tư pháp quốc tế có những mối liên hệ chặt chẽ với nhau.

Trọng tài và các cơ chế giải quyết tranh chấp phi tòa án có vai trò ngày càng quan trọng trong các giao dịch kinh tế quốc tế. Trong bối toàn cầu hóa như hiện nay, các điều khoản về trọng tài được các doanh nghiệp, nhà đầu tư và khách du lịch quốc tế áp dụng rộng rãi. Các điều khoản trọng tài được sử dụng trong nhiều trường hợp khác nhau, có tác dụng điều chỉnh tất cả các tranh chấp từ mâu thuẫn trong giao dịch kinh doanh đa quốc gia cho đến các tranh chấp liên quan đến các IIA.

Các phương thức giải quyết tranh chấp thay thế (viết tắt là 'ADR') là quá trình giải quyết tranh chấp, theo đó các bên tranh chấp có thể đạt được thỏa thuận mà không cần ra tranh tụng trước tòa án. Ý tưởng là việc sử dụng ADR có thể giảm thiểu thời gian và chi phí kiện tụng. Hai hình thức thường được áp dụng của ADR là trọng tài và trung gian/hòa giải. Cùng với sự phát triển của thương mại quốc tế, các doanh nghiệp sử dụng trọng tài để giải quyết tranh chấp quốc tế ngày càng nhiều. Một số tổ chức trọng tài chuyên về quản lý các thủ tục tố tụng trọng tài liên quan đến tranh chấp thương mại và kinh doanh. Các BIT giữa hai quốc gia ngày càng trở nên phổ biến khi các nhà đầu tư tư nhân đầu tư ra nước ngoài nhiều hơn. Nhiều BIT cho phép các nhà đầu tư nước ngoài theo đuổi kiện tụng, nếu các quyền của họ bị vi phạm.

2. Các phương thức giải quyết tranh chấp thay thế (ADR)

Chi phí kiện tụng có thể rất tốn kém, tùy thuộc vào nhiều yếu tố của vụ kiện. Do đó, một phương thức giải quyết tranh chấp khác được gọi là phương thức ADR đã hình thành.

ADR tìm kiếm một phương thức giải quyết tranh chấp giữa các bên mà chi phí kiện tụng được giảm thiểu tối đa. Do đó, đây là một thuật ngữ chung để chỉ cách thức mà các bên có thể sử dụng để giải quyết các tranh chấp mà không cần phải tranh tụng trước tòa án. Hai phương thức phổ biến nhất của ADR bao gồm trung gian/hòa giải và trọng tài.

ADR bao gồm các quy trình giải quyết tranh chấp và các biện pháp kỹ thuật, qua đó các bên tranh chấp có thể đạt được thoả thuận mà không cần ra tranh tụng trước tòa án. Đây là một thuật ngữ chung cho việc giải quyết tranh chấp, có (hoặc không có) sự trợ giúp của bên thứ ba.

Trước đây, phương thức ADR từng vấp phải sự phản đối từ nhiều bên tranh chấp và luật sư của họ. Tuy nhiên, ADR hiện nay đã được cộng đồng và giới luật sư chấp nhận một cách rộng rãi. Trên thực tế, một số tòa án hiện nay yêu cầu các bên sử dụng các phương thức ADR, thường là trung gian/hòa giải, trước khi đưa các vụ kiện ra xét xử.

[1] Geir Ulfstein, 'Hội thảo chuyên đề về pháp luật quốc tế lần thứ mười chín của Herbert Rubin và thẩm phán Rose Luttan Rubin: Chức năng của thẩm phán và trọng tài viên trong Luật quốc tế, phối hợp với PluriCourts - Vai trò hợp pháp của ngành tư pháp trong trật tự toàn cầu', Khoa Luật, Trường Đại học Oslo, *46 N.Y.U. J. Int'l L. & Pol.* 849.

Khi số lượng các vụ kiện tại tòa án truyền thống càng gia tăng, phương thức ADR trở nên phổ biến hơn do nhận thức rằng ADR ít tốn kém chi phí hơn so với kiện tụng, ưu tiên bảo mật thông tin, và đáp ứng mong muốn của một số bên trong việc lựa chọn các cá nhân sẽ đưa ra quyết định về tranh chấp của họ.

A. *Thương lượng*

Thương lượng là một cuộc đối thoại giữa hai hay nhiều bên nhằm đạt được sự thỏa thuận, giải quyết các điểm bất đồng, nhằm đạt được lợi ích cho một cá nhân hoặc tập thể, hoặc để đạt được kết quả thỏa mãn các lợi ích khác nhau. Thương lượng có thể diễn ra trong các doanh nghiệp, các tổ chức phi lợi nhuận, các cơ quan chính phủ, giữa các quốc gia, và cũng trong các tình huống cá nhân như kết nhân, ly hôn, nuôi dạy con cái và ngay trong cuộc sống hàng ngày.

Nghiên cứu về vấn đề này được gọi là lý thuyết thương lượng. Các chuyên gia thương lượng thường là những nhà chuyên môn, như các nhà đàm phán công đoàn, kinh doanh vay nợ, các nhà đàm phán hòa bình, đàm phán con tin, hoặc có thể hoạt động dưới các chức danh khác, như các nhà ngoại giao, nhà lập pháp hoặc môi giới.

B. *Trung gian/Hòa giải*

Trung gian cũng mang tính chất hoàn toàn tự nguyện. Việc áp dụng hình thức trung gian cũng linh hoạt hơn, các bên sẽ tự quyết định việc giải quyết và cách thức áp dụng các điều khoản. Người trung gian sẽ can thiệp như một bên thứ ba trung lập hỗ trợ các bên tranh chấp, trong khi họ vẫn kiểm soát toàn bộ quá trình.

Hoà giải là quá trình ADR, theo đó các bên tranh chấp sử dụng hoà giải viên, người gặp gỡ riêng với từng bên để cố gắng giải quyết những xung đột của họ. Họ làm việc này bằng cách xoa dịu căng thẳng, lắng nghe quan điểm mỗi bên, làm sáng tỏ mọi vấn đề, trợ giúp kỹ thuật, tìm ra giải pháp tiềm năng và đưa ra một thỏa thuận thương lượng. Phương thức hòa giải khác với trọng tài ở chỗ, trong quá trình hòa giải, hoà giải viên thường không có thẩm quyền thu thập chứng cứ hoặc gọi nhân chứng, cũng như thường không đưa ra quyết định và phán quyết. Hòa giải khác với trung gian ở chỗ: mục đích chính của hòa giải là tìm kiếm sự nhượng bộ của các bên. Còn trong phương thức trung gian, người trung gian cố gắng hướng cuộc tranh luận theo cách tối ưu hóa lợi ích của các bên, đưa ra quan điểm riêng của mình để giải quyết tranh chấp một cách hợp lí.

C. *Giải quyết tranh chấp bằng trọng tài*

Trọng tài cũng thuộc các phương thức ADR. Đây là phương thức giải quyết tranh chấp ngoài tòa án. Các bên đưa tranh chấp của họ ra trọng tài ('trọng tài viên', 'người phân xử' hoặc 'hội đồng trọng tài') và đồng ý bị ràng buộc bởi quyết định trọng tài ('phán quyết'). Bên thứ ba đánh giá các bằng chứng trong vụ án và đưa ra quyết định pháp lý bắt buộc đối với cả hai bên và được thi hành tại tòa án.

Để bắt đầu quá trình giải quyết tranh chấp, các bên cần một thoả thuận trọng tài. Thoả thuận trọng tài sẽ tạo cơ sở cho thẩm quyền của trọng tài viên. Trọng tài viên sẽ không giải quyết yêu cầu trọng tài khi không có thoả thuận trọng tài.

Các bên cũng có thể sửa đổi hoặc bổ sung các quy tắc trọng tài hiện hành bằng các điều khoản ghi rõ bằng văn bản trong thỏa thuận trọng tài. Thoả thuận trọng tài thường được soạn thảo bao gồm các yêu cầu phát sinh thuộc phạm vi hoặc không thuộc phạm vi một hợp đồng cụ thể. Các điều khoản trong thỏa thuận có thể bao gồm các yêu cầu bồi thường thiệt hại (*thí dụ* như thông tin sai lệch) có liên quan đến giao dịch của các bên và thường cho phép các bên liên quan giải quyết các khiếu nại và hợp đồng liên quan.

Trọng tài là một thủ tục tố tụng tránh việc sử dụng một thẩm phán tòa án, nhưng đồng thời vẫn cho phép đưa ra phán quyết cho bên bị xâm phạm quyền công dân. Các bên tranh chấp được chuyển đến một hoặc nhiều người được gọi là 'trọng tài viên'.

Trong phương thức trọng tài, trọng tài viên sẽ hỗ trợ hai bên tranh chấp đạt được thỏa thuận. Trọng tài viên sẽ xem xét vụ việc và sau đó áp đặt một quyết định ràng buộc về mặt pháp lý cho cả hai bên. Do đó, hình thức trọng tài khác biệt với các hình thức giải quyết tranh chấp khác ở tính ràng buộc. Bản chất quá trình này tương tự như hình thức trung gian. Tuy nhiên, điểm khác biệt đầu tiên là người trung gian hướng đến sự thỏa hiệp giữa hai bên, các quyết định do người trung gian đưa ra đều không ràng buộc về mặt pháp lý.

Trọng tài thường được sử dụng trong giải quyết tranh chấp thương mại, đặc biệt là trong giao dịch thương mại quốc tế. Tại một số

quốc gia như Hoa Kỳ, phương thức trọng tài cũng thường được sử dụng trong các vấn đề liên quan đến người tiêu dùng và việc làm, thậm chí theo một số điều khoản về việc làm hoặc hợp đồng thương mại, việc sử dụng trọng tài có thể được coi là bắt buộc.

Việc sử dụng trọng tài có thể mang tính chất tự nguyện hoặc bắt buộc (tính chất bắt buộc chỉ khi có quy chế hoặc quy định trong hợp đồng do các bên tự nguyện ký kết, trong đó các bên cam kết đưa ra trọng tài giải quyết mọi các tranh chấp đã hoặc có thể phát sinh trong tương lai, không cần biết những tranh chấp này có xảy ra hay không); và có thể có hiệu lực ràng buộc hoặc không ràng buộc.

Tính chất không ràng buộc trong phương thức trọng tài cũng tương tự như phương thức trung gian, vì không thể áp đặt quyết định cho các bên. Tuy nhiên, điểm khác biệt chính là trong khi người trung gian cố gắng giúp các bên tìm ra một cơ sở để thỏa hiệp, trọng tài (không ràng buộc) hoàn toàn đứng ngoài quá trình giải quyết và chỉ đưa ra quyết định liên quan đến trách nhiệm pháp lý, và đôi khi, quyết định về việc bồi thường thiệt hại. Nếu so sánh với định nghĩa trọng tài có hiệu lực ràng buộc thì có thể nói rằng trọng tài không ràng buộc không phải là trọng tài. Trọng tài là một tiến trình mà trong đó một vụ việc tranh chấp được giải quyết một cách công bằng mà quyết định của người phán quyết được các bên tranh chấp thuận, hoặc do pháp luật quy định, và phán quyết đó là chung thẩm và bắt buộc. Quyền xem xét lại và khiếu nại phán quyết của trọng tài bị hạn chế.

Hiện nay có hàng trăm cơ quan trọng tài đang tồn tại và thực hiện chức năng giám sát các thủ tục tố tụng trọng tài, đảm bảo sự vận hành trơn tru trong trường hợp không có sự can thiệp của toà án. Một số tổ chức trọng tài nổi tiếng trên thế giới có thể kể đến như ICC ở Paris, LCIA ở London, ICDR ở Hoa Kỳ, SIAC ở Singapore và HKIAC ở Hong Kong.

Cho đến nay, văn kiện quốc tế quan trọng nhất về pháp luật trọng tài là Công ước New York năm 1958 về công nhận và thi hành phán quyết trọng tài nước ngoài (Công ước New York), được coi là thành công nhất trong các điều ước tư pháp quốc tế.[2] Hiện nay có hơn 140 quốc gia là thành viên của Công ước. Báo cáo trong *Niên giám trọng tài thương mại* có chỉ ra rằng, trong số 1.400 quyết định của tòa án, 90% các trường hợp quyết định trọng tài đã được thi hành.[3]

[2] Michael Reisman (2013), 'Sự đa dạng của giải quyết tranh chấp quốc tế đương đại: Chức năng và chính sách', *4(1) Tạp chí giải quyết tranh chấp quốc tế*, 47-63.

[3] Van den Berg (ed), *Niên giám Trọng tài thương mại năm 2012 - Chương XXXVII*, 2012, tr. ix-xii.

Công ước New York đã mở đường cho thành công lớn sau này của Quy tắc Trọng tài của UNCITRAL năm 1976, và Luật mẫu về Trọng tài Thương mại Quốc tế của UNCITRAL năm 1985 (sửa đổi vào năm 2006).

Mục 2. GIẢI QUYẾT TRANH CHẤP ĐẦU TƯ QUỐC TẾ

Trong phạm vi các IIA, tranh chấp đầu tư có thể phát sinh từ vi phạm IIA hoặc hợp đồng đầu tư do sự can thiệp hoặc sự không cẩn trọng của nước tiếp nhận đầu tư theo quy định của pháp luật hiện hành, hoặc theo IIA. Có hai loại thủ tục giải quyết tranh chấp trong IIA: (i) Giải quyết tranh chấp giữa Nhà nước - Nhà nước; và (ii) giải quyết tranh chấp giữa nhà đầu tư - Nhà nước (ISDS). Hầu hết các IIA đã thiết lập một quy trình để giải quyết các tranh chấp giữa các quốc gia, liên quan đến việc 'giải thích hoặc áp dụng' IIA. Tuy nhiên, các thủ tục này hiếm khi được sử dụng. Vấn đề đặt ra là phạm vi của các thủ tục có bao gồm tất cả các điều khoản trong IIA không, hay một số điều khoản bị loại trừ. Hầu hết các thủ tục giữa Nhà nước - Nhà nước bao hàm tất cả các nghĩa vụ của IIA, nhưng có loại trừ một số điều khoản.[4]

Thí dụ: BIT mẫu của Hoa Kỳ hiện hành loại trừ các quy định về bảo hộ lao động và các tiêu chuẩn môi trường. Thông thường, thủ tục giải quyết tranh chấp giữa Nhà nước - Nhà nước yêu cầu các nước tham vấn trước, sau đó nếu không đưa ra được giải pháp hữu nghị thì sẽ nhờ đến các thủ tục trọng tài. Tối thiểu cơ chế này cũng cung cấp nền tảng cho các DC và LDC để yêu cầu một nước phát triển liên kết với họ trong việc giải quyết các vấn đề. Các thủ tục trọng tài vốn không được minh bạch. Kiện tụng, thông cáo và quyết định thường không được thông báo công khai.

Giải quyết tranh chấp ISDS là đặc trưng của các IIA, khi phân biệt chúng với các loại hiệp định khác. Các nhà đầu tư từ một nước thành viên được nhận bồi thường tài chính từ nước khác thông qua các phán quyết trọng tài có tính ràng buộc, với lý do nước đó không thực hiện nghĩa vụ của mình theo IIA.

Hệ thống tư pháp trong nước có thể trở nên không công bằng để đổi lấy các lợi ích nước ngoài, các tòa án quốc gia dễ bị sụp đổ do áp lực từ các ngành khác của chính phủ. Việc các nhà đầu tư nước ngoài hoàn

[4] Peter Muchlinski, 'Các vấn đề chính sách', *Cẩm nang Luật đầu tư quốc tế của Oxford* 4,6 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

toàn có khả năng đưa tranh chấp của họ ra các trọng tài độc lập càng đảm bảo rằng, các cơ quan có thẩm quyền trong nước phải thực hiện các nghĩa vụ quốc tế của họ để đảm bảo môi trường đầu tư thuận lợi và ổn định ở nước tiếp nhận đầu tư.

1. Trọng tài giải quyết tranh chấp đầu tư quốc tế

Một trong những yêu cầu chính đối với việc thúc đẩy đầu tư là sự cho phép các nhà đầu tư nước ngoài được khiếu nại hành vi của chính phủ nước tiếp nhận đầu tư ra trọng tài quốc tế. Mặc dù nhiều IIA quy định rõ thẩm quyền của trọng tài, nhưng cũng có một số IIA quy định không cụ thể và không thể hiện rõ sự chấp nhận thẩm quyền của trọng tài của nước tiếp nhận đầu tư. *Thí dụ*: trong khi BIT Áo - Hàn Quốc năm 1991 quy định: 'Mỗi bên ký kết, tuân theo quy định của hiệp định này, ngay cả khi không có thoả thuận riêng về trọng tài giữa bên ký kết và nhà đầu tư, đồng ý giải quyết tranh chấp về đầu tư tại [ICSID]', thì các BIT khác lại như đòi hỏi phải có sự chấp thuận bổ sung của nước tiếp nhận đầu tư đối với thẩm quyền của trọng tài.[5] Gần như trong tất cả các BIT và FTA hiện đại, nếu có quy định về đầu tư, thì đều có quy định về thủ tục giải quyết tranh chấp ISDS.[6]

Trọng tài giải quyết tranh chấp ISDS phải dựa trên sự thỏa thuận, nghĩa là thẩm quyền của trọng tài phải dựa trên cơ sở là một thỏa thuận trước đó của nhà đầu tư và Chính phủ nước tiếp nhận đầu tư. Thỏa thuận này thường được thể hiện trong BIT giữa nước tiếp nhận đầu tư với nước mà nhà đầu tư nước ngoài có quốc tịch; hoặc thỏa thuận được ghi nhận trong hợp đồng đầu tư giữa Chính phủ nước tiếp nhận đầu tư và nhà đầu tư nước ngoài.

[5] Hiệp định giữa Hàn Quốc và Cộng hòa Áo về khuyến khích và bảo hộ đầu tư, S. Kor.-Arg., Điều 8(2), ngày 14/3/1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/195; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 105-108, UNCTAD/ITE/IIT/2006/5 (01/02/2007).

[6] UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, tháng 5/2013 [sau đây gọi là 'UNCTAD Dispute Settlement], at 3, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf. (nêu rõ phần lớn các tranh chấp đã được đưa ra ICSID). ICSID, SCC, và ICC cũng quản lý trọng tài UNCITRAL. Xem: *The SCC Experience of Investment Arbitration under UNCITRAL Rules*, SCC, tháng 10/2012, http:// www.sccinstitute.com/filearchive/4/44668/UNCITRAL Disputes_The SCC Experience_AM.pdf; ICC, *ICC hành động như cơ quan có thẩm quyền được bổ nhiệm*, http://www.iccwbo.org/products-and-services/arbitration-and-adr/appointing-authority) (cho phép các bên sử dụng ICC như một thiết chế trọng tài); ICSID, *The ICSID Caseload - Statistics*, Số 2013-1, tr. 9, https://icsid-worldbank-org.easyaccess1.lib.cuhk.edu.hk/ICSID/FrontServlet? requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41) (cho thấy rằng ICSID hỗ trợ hành chính cho hoạt động xét xử của trọng tài UNCITRAL).

Sự chấp thuận thẩm quyền của trọng tài đầu tư còn được thể hiện trong pháp luật của nước tiếp nhận đầu tư về đầu tư nước ngoài, và có khi không liên quan đến BIT giữa hai quốc gia hoặc hợp đồng giữa Nhà nước và nhà đầu tư nước ngoài. Chấp nhận thẩm quyền của trọng tài trong luật đầu tư của nước tiếp nhận đầu tư là một cam kết đơn phương của nước đó. *Thí dụ*: một quốc gia có thể quyết định 'bằng một cam kết đơn phương [...] đưa ra trong pháp luật của nước mình' để 'chấp thuận [...] đưa những bất đồng, tranh chấp phát sinh từ hoạt động đầu tư hay bất kỳ hình thức đầu tư nào ra giải quyết tại trọng tài ICSID'. Theo đó, phạm vi tranh chấp về đầu tư được giải quyết bằng trọng tài sẽ rộng hơn so với quy định về thỏa thuận trọng tài trong các BIT hoặc hợp đồng đầu tư.

Việc chấp nhận thẩm quyền của trọng tài thông qua BIT, chỉ áp dụng giới hạn đối với các nhà đầu tư nước ngoài có quốc tịch của nước đã ký BIT với nước tiếp nhận đầu tư - nước mà nhà đầu tư có ý định khởi kiện. Đồng thời, chấp thuận thẩm quyền của trọng tài thông qua hợp đồng đầu tư cũng chỉ áp dụng với các nhà đầu tư nước ngoài tham gia vào các hợp đồng đó. Nhưng, chấp thuận thẩm quyền trọng tài quy định trong pháp luật đầu tư của quốc gia thì lại khác, vì nó sẽ tạo thành một cơ chế giải quyết tranh chấp chung cho tất cả các nhà đầu tư nước ngoài.

Các nhà đầu tư nước ngoài được lựa chọn phương thức giải quyết tranh chấp. Họ có thể chọn đưa tranh chấp ra trước tòa án của nước tiếp nhận đầu tư, hoặc giải quyết tranh chấp bằng trọng tài quốc tế. Tuy nhiên, để tránh sử dụng cùng lúc nhiều thủ tục tố tụng về cùng một vụ tranh chấp, các BIT hoặc pháp luật về đầu tư nước ngoài của nước tiếp nhận đầu tư sẽ có điều khoản 'ngã ba đường' ('fork-in-the-road'), nghĩa là khi một khi tranh chấp đã được đưa ra một cơ chế giải quyết cụ thể hoặc đã có quyết định giải quyết tranh chấp, thì không thể dùng một phương thức khác để giải quyết lại vụ tranh chấp đó.

Hầu hết các hiệp định về giải quyết tranh chấp đầu tư đều cho phép nhà đầu tư nước ngoài lựa chọn phương thức trọng tài. Với trọng tài vụ việc (*ad hoc*), các bên tranh chấp có quyền tự thống nhất các thủ tục giải quyết tranh chấp, và thực tế, các quốc gia thường lựa chọn quy tắc trọng tài của UNCITRAL. Các bên tranh chấp cũng có thể giải quyết tranh chấp tại các trung tâm trọng tài, và theo các thủ tục giải quyết tranh chấp của trung tâm đó.

Trung tâm giải quyết tranh chấp đầu tư quốc tế (ICSID) được thành lập năm 1967, dưới sự bảo trợ của Ngân hàng thế giới, có chức năng giải quyết tranh chấp ISDS và nhận được nhiều sự chú ý. Các Quy tắc Trọng tài ICSID và các Quy tắc UNCITRAL là các Quy tắc được sử dụng phổ biến nhất trong trọng tài đầu tư. Các quốc gia thành viên và nhà đầu tư nước ngoài thường xác định 'khoản đầu tư' được đưa vào giải quyết tranh chấp theo quy định của BIT và các IIA khác. Theo các Quy tắc trọng tài khác như UNCITRAL, ICC, SCC, định nghĩa về đầu tư chỉ cần đáp ứng quy định trong BIT hoặc trong IIA, nhưng một tranh chấp về đầu tư muốn được giải quyết theo ICSID bắt buộc phải thỏa mãn quy định trong cả BIT lẫn Công ước ICSID. Việc kiểm tra liệu một 'khoản đầu tư' có được giải quyết theo ICSID hay không, thường được gọi là 'bài kiểm tra kép' ('double barreled' test) hay 'cách tiếp cận ổ khoá kép' ('double keyhole approach').[7] Hiện nay, đa số các tranh chấp đầu tư đều được giải quyết bằng cơ chế này. Điều 25(1) Công ước ICSID quy định:

> Thẩm quyền của Trung tâm sẽ mở rộng cho bất kỳ tranh chấp pháp lý nào phát sinh trực tiếp từ khoản đầu tư, giữa một bên ký kết (hoặc bất kỳ cơ quan hoặc cơ quan nào của một bên ký kết được xác định là Nhà nước) và công dân của bên ký kết kia, nếu các bên tranh chấp thỏa thuận đồng ý bằng văn bản về việc chấp nhận thẩm quyền giải quyết tranh chấp của Trung tâm và gửi đến Trung tâm này. Khi các bên thoả thuận chấp nhận thẩm quyền của trọng tài, thì không một bên nào được phép tự ý rút lại thỏa thuận của mình.[8]

Hầu hết các IIA đều quy định phương thức trọng tài quốc tế, như: cho phép sử dụng trọng tài ICSID, hoặc trọng tài sử dụng quy tắc của UNCITRAL. Một số hiệp định còn cho phép đưa tranh chấp đến các tổ chức trọng tài khác, như: Phòng Thương mại Stockholm hoặc Phòng Thương mại Quốc tế (ICC).

[7] Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road', *5 J. World Investments & Trade Law* 231 (2004); K. Yannaca-Small, 'Definition of "Investment": An Open-ended Search for A Balanced Approach', in *Arbitration under International Investment Agreements: A Guide to the Key Issues* 249-50 (2010).

[8] Công ước giải quyết tranh chấp đầu tư giữa nhà nước và công dân nước ngoài, Điều 25, ký ngày 18/3/1965, 17 UST. 1270 (có hiệu lực ngày 14/10/1966), http:// icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp) [sau đây gọi là 'Công ước ICSID'].

2. Thuận lợi và hạn chế của trọng tài giải quyết tranh chấp đầu tư quốc tế

A. *ISDS đáp ứng nhu cầu của nhà đầu tư theo những cách sau đây:*

- Tránh được sự nghi ngại của nhà đầu tư đối với sự không chắc chắn của hệ thống pháp luật của nước tiếp nhận đầu tư, bằng cách tạo ra một bộ quy tắc riêng biệt dựa trên IIA để điều chỉnh hành vi của Chính phủ nước tiếp nhận đầu tư. Nhiều chuyên gia ủng hộ việc sử dụng án lệ trong giải quyết tranh chấp đầu tư bằng trọng tài để tạo ra một sự thống nhất hợp lý trong cả hệ thống ISDS.[9]

- Cho phép các nhà đầu tư lựa chọn phương thức khác ngoài hệ thống tư pháp của nước tiếp nhận đầu tư, để tìm kiếm sự bảo vệ trước các hành vi vi phạm của nước tiếp nhận đầu tư;

- Nhà đầu tư có thể tự xác định khi nào có vi phạm nghĩa vụ quy định trong IIA và khởi kiện;

- Nhà đầu tư không cần phải hoàn toàn phụ thuộc vào nước mình có quốc tịch để yêu cầu bồi thường. Bởi, trong quan hệ ngoại giao, có nhiều lý do khác nhau khiến cho mà một nước không muốn đưa ra yêu sách để chống lại một nước khác;

- Cam kết giải quyết tranh chấp ISDS cũng có thể mang lại lợi ích cho Nhà nước;

- Đưa ra bằng chứng tích cực giúp cho các nhà đầu tư tin tưởng rằng nước tiếp nhận đầu tư cam kết đưa ra một môi trường đầu tư có thể dự đoán được và an toàn;

- Là động lực khuyến khích phát triển các chính sách trong nước nhằm tạo thuận lợi, để thu hút đầu tư mới và duy trì đầu tư hiện tại, bao gồm các chính sách có thể dự đoán được, nhất quán và minh bạch;

[9] Jeffrey P. Commission, 'Precedent in Investment Treaty Arbitration: The Empirical Backing', *4 Transnat'l Dispute MGMT* (2007), http://www.transnational-dispute-management.com/article.asp?key_ 1064; Jeffrey P. Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of A Developing Jurisprudence', *24 J. Int'l Arb.* 129 (2007); Paul Frieland *et al.*, 'ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction', *19 N. Y. U. J. Int'l L. & Pol.* 33 (1986); Christoph Schreuer & Matthew Weiniger, 'A Doctrine of Precedent?', in *The Oxford Handbook of International Investment Law,* 1188 (2008).

- Đảm bảo môi trường đầu tư ổn định, cải cách để mở cửa thị trường đầu tư, khiến Nhà nước hạn chế thay đổi chính sách trong nước của mình.

B. *Những khó khăn đối với nước tiếp nhận đầu tư*

- Khi giải quyết tranh chấp ISDS bằng trọng tài, các nhà đầu tư chỉ theo đuổi lợi ích thương mại của họ, mà không quan tâm về các mục tiêu chính sách của Chính phủ nước tiếp nhận đầu tư hoặc các lợi ích công cộng;

- Giải quyết tranh chấp ISDS không giống như giải quyết tranh chấp giữa các nước với nhau, bởi các nước có thể áp dụng biện pháp hạn chế khiếu kiện. *Thí dụ*: các nước không để khiếu kiện của nhà đầu tư ảnh hưởng đến mối quan hệ giữa các nước với nhau,và áp dụng những biện pháp trong nước đối với nhà đầu tư, nhằm hạn chế phải tham gia khiếu kiện;

- Chi phí để giải quyết tranh chấp ISDS bằng trọng tài là rất cao. Phán quyết trọng tài có thể có giá trị lớn, nhưng chi phí cho việc tham gia tố tụng trọng tài, kể cả trong trường hợp Nhà nước thắng, vẫn rất tốn kém.

- 'Đóng băng pháp luật' ('Regulatory chill'): Do chi phí của trọng tài ISDS rất cao, nên các nước có thể miễn cưỡng ban hành các quy định để thực hiện phán quyết trọng tài, thậm chí quy định đó có thể là vi phạm nghĩa vụ của họ. Việc ban hành những quy định như vậy sẽ ngày càng trầm trọng thêm, bởi các phán quyết của trọng tài là không nhất quán về căn cứ, cũng như cách giải thích các nghĩa vụ đầu tư;

- Nhà đầu tư không phải chịu trách nhiệm về hành động của mình khi tham gia tố tụng trọng tài giải quyết tranh chấp ISDS;

- Tố tụng trọng tài tạo ra mối lo ngại về tính hợp pháp và tính dân chủ của nó liên quan đến: (i) Sự không minh bạch; (ii) Thiếu sự tiếp cận của các tổ chức phi chính phủ đối với tố tụng trọng tài; (iii) Sự thiếu sự hiểu biết của hội đồng trọng tài về các vấn đề ngoài đầu tư, như chính sách công, quyền con người và môi trường; (iv) Sự thiếu hiểu biết của hội đồng trọng tài về pháp luật và chính sách trong nước của nước tiếp nhận đầu tư, liên quan đến các vấn đề cần được giải thích trong khi trọng tài xét xử;[10]

- Thiếu tính nhất quán trong hệ thống án lệ của trọng tài. Một số phán quyết mâu thuẫn chủ yếu liên quan đến: (i) phạm vi điều khoản bao trùm (umbrella clauses); (ii) sự liên quan tới một nước nhất định; và (iii) việc giải thích FET. Các vấn đề gây tranh cãi khác là: (i) phạm vi của thỏa thuận trọng tài,[11] (ii) các yếu tố để xác định một khoản đầu tư theo quy định của BIT,[12] và (iii) việc áp dụng điều khoản MFN đối với các vấn đề về thủ tục như khoảng thời gian hợp lý đánh giá vấn đề tranh chấp (cooling off period).[13]

[10] Laurence Boisson de Chazournes, 'Transparency and *Amicus Curiae* Briefs', *1 J. World Int'l & Trade* 333 (2004); Laurence Boisson de Chazournes, 'Making the Proceedings Public and Allowing Third Party Interventions', *1 J. World Inv. & Trade* 105 (2005); Antonio Crrivellaro, 'Making the Proceedings Public and Allowing Third Party Interventions', *1 J. World Inv. & Trade* 99 (2005); Mitsuo Matsushita, 'Transparency and *Amicus Curiae* Briefs and Third Party Rights', *1 J. World Inv. & Trade* 385 (2004); Alexis Moure, 'Are *Amicus Curiae* the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?', *5 L. & Prac. Int'l CTS. & Tribunals* 275 (2006); Thomas Wälde, 'Transparency, *Amicus Curiae* Briefs and Third Party Rights', *1 J. World Inv. & Trade*, 337 (2004); Thomas Wälde, 'Making the Proceedings Public and Allowing Third Party Interventions', *1 J. World Inv. & Trade*, 113 (2005).

[11] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, Vụ kiện ICSID No. ARB/00/4, Phán quyết về thẩm quyền xét xử, 6 ICSID Rep. 400, ¶ 53, ngày 23/7/2001; *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Phán quyết trọng tài về phản đối thẩm quyền xét xử, 8 ICSID Rep. 383, ¶ 55, ngày 06/8/2003); *SGS v. Republic of the Philippines*, Vụ kiện ICSID No. ARB/02/6, Phán quyết về thẩm quyền, 8 ICSID Rep. 518, ¶¶ 131-135, ngày 29/01/2004 (về ý nghĩa của 'tất cả các tranh chấp liên quan đến đầu tư hoặc 'bất kỳ tranh chấp pháp lý liên quan đến đầu tư').

[12] *Fedax N.V. v. Venezuela*, Vụ kiện ICSID No. ARB/96/3, Phán quyết của trọng tài về phản đối thẩm quyền xét xử, ngày 01/7/1997; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Vụ kiện ICSID No. ARB/97/4, Phán quyết của trọng tài về phản đối thẩm quyền xét xử, ¶ 66, ngày 24/5/1999); *L.E.S.I. S.p.A. and ASTALDIS.p.A v. Algeria*, Vụ kiện ICSID No. ARB/05/03, Phán quyết của trọng tài về thẩm quyền xét xử, ¶ 72, ngày 12/7/2006 (thảo luận về yếu tố đóng góp vào nền kinh tế của nước tiếp nhận đầu tư); *Phoenix Action Ltd. v. The Czech Republic*, Vụ kiện ICSID No. ARB/06/5, Award, ¶¶ 135-144, ngày 15/4/2009 (bổ sung các yếu tố 'có thiện ý' như là một yêu cầu để xem xét khoản đầu tư có thuộc phạm vi điều chỉnh của BIT hay không); *Abaclat and Others v. The Argentine Republic*, Vụ kiện ICSID No. ARB/07/5, Phán quyết về thẩm quyền và chấp nhận thẩm quyền xét xử, ngày 04/8/2011; *Ambiente Ufficio S.P.A. and Others v. The Argentine Republic*, Vụ kiện ICSID No. ARB/08/9, Phán quyết về thẩm quyền và chấp nhận thẩm quyền xét xử, ngày 08/02/201 (cả hai vụ đều kết luận rằng các trái phiếu chính phủ đáp ứng được yêu cầu để được coi là một khoản đầu tư).

[13] *Maffezini v. The Kingdom of Spain*, Phán quyết của trọng tài về phản đối thẩm quyền xét xử, Vụ kiện ICSID No. ARB/97/7, 5 ICSID Rep. 396, ¶¶ 38-64, ngày 25/01/2000; *Siemens A.G. v. The Argentine Republic*, Phán quyết về thẩm quyền xét xử, ¶¶ 32-110, ngày 03/8/2004; *Salini v. Jordan*, Vụ kiện ICSID No. ARB/02/13, Phán quyết về thẩm quyền xét xử, ¶¶ 115, 119, ngày 29/11/2004; *Plama v. Bulgaria*, Vụ kiện ICSID No. ARB/03/24, Phán quyết về thẩm quyền xét xử, ¶¶ 216-226, ngày 08/02/2005; *Gas Natural SDG, S.A. v. The Argentine Republic*, Vụ kiện ICSID No. ARB/03/10, Phán quyết về thẩm quyền xét xử, ¶¶ 24-31, 41-49, ngày 17/6/2005). 'Tai-Heng Cheng, Precedent and Control in Investment Treaty Arbitration', *30 Fordham Int'l L. J.* 1014-49 (2007); Andrea K. Bjorklund, 'Investment Treaty Arbitral Awards as Jurisprudence Constante', in *International Economic Law: The State and Future of the Discipline* 265-80 (Colin B. Picker et al. eds., 2008).

3. Sự phát triển và những hạn chế mới trong giải quyết tranh chấp ISDS bằng trọng tài

Các thủ tục giải quyết tranh chấp ISDS vẫn gặp phải nhiều ý kiến trái chiều. Ngay từ đầu, việc nhà đầu tư nước ngoài bỏ qua hệ thống tòa án trong nước của nước tiếp nhận đầu tư, để khiếu kiện các biện pháp của chính phủ trong bối cảnh quốc tế, và theo luật pháp quốc tế, là một lợi ích hiếm khi được trao cho các nhà đầu tư trong nước. Vì lý do này, một số nước đã cố gắng giới hạn các vấn đề có thể được đưa ra để giải quyết theo thủ tục giải quyết tranh chấp ISDS, hoặc yêu cầu thực hiện các bước thủ tục nhất định trước khi khởi xướng thủ tục giải quyết tranh chấp này.

Trong các BIT gần đây mà Trung Quốc ký kết với nước ngoài, phần lớn đều quy định cho phép sử dụng các cơ chế giải quyết tranh chấp ISDS. Theo truyền thống, Trung Quốc vẫn hạn chế sự chấp thuận thẩm quyền của trọng tài đối với tranh chấp liên quan tới mức bồi thường, khi nhà đầu tư bị Nhà nước tước quyền sở hữu. Các tranh chấp về vấn đề khác, như sự tồn tại của hành vi tước quyền sở hữu hoặc vi phạm các nghĩa vụ trong IIA, sẽ được giải quyết tại các tòa án trong nước hoặc có thể được đưa ra trọng tài, thông qua sự thoả thuận của các nhà đầu tư và các cơ quan nhà nước có thẩm quyền.[14]

Một số BIT đã loại bỏ sự hạn chế đáng kể này, cho phép đơn phương chấp thuận thẩm quyền của trọng tài với tranh chấp liên quan đến tất cả các nguyên tắc trong IIA. BIT Trung Quốc - Mozambique năm 2001 là một thí dụ:

> Bất kỳ tranh chấp nào, nếu không thể giải quyết trong vòng 6 tháng bằng phương thức thỏa thuận […], phải được đệ trình theo yêu cầu của một trong hai bên đến:
>
> (a) Trung tâm giải quyết tranh chấp đầu tư quốc tế (ICSID) [..], hoặc
>
> (b) Trọng tài vụ việc.[15]

Sự hạn chế sử dụng trọng tài giải quyết tranh chấp ISDS, mặc dù vẫn còn là ngoại lệ, nhưng đã phổ biến hơn trong các quy định về đầu tư theo các FTA. Các hiệp định do Cộng đồng châu Âu ký kết, như: Hiệp định hợp tác với Chile, không có quy định trọng tài ISDS.

[14] BIT Trung Quốc - Hàn Quốc, Điều 9.3.

[15] BIT Trung Quốc - Mozambique, Điều 7.3.

Khác với thực tiễn thông thường của Hoa Kỳ, FTA Australia - Hoa Kỳ chỉ bao gồm một điều khoản yêu cầu tham vấn hoặc đàm phán về cơ chế ISDS trong tương lai.[16] FTA Nhật Bản - Philippines cũng đưa ra quy định về các cuộc đàm phán như vậy, và cũng nêu rõ rằng:

> [N]ếu không có quy định về cơ chế giải quyết tranh chấp đầu tư giữa một bên và một nhà đầu tư của bên kia, thì việc áp dụng phương thức trung gian/hòa giải hoặc trọng tài quốc tế phải được sự thoả thuận của các bên trong tranh chấp. Điều này có nghĩa là, bên tranh chấp có thể tùy ý chấp thuận hoặc từ chối chấp thuận thẩm quyền giải quyết tranh chấp đối với từng tranh chấp đầu tư cụ thể, và nếu không có sự đồng ý bằng văn bản của bên tranh chấp, thì sẽ có không có thẩm quyền giải quyết tranh chấp đầu tư đó bằng trung gian/hoà giải hoặc trọng tài quốc tế.[17]

Theo các IIA này, tất cả các tranh chấp đầu tư chỉ có thể được giải quyết thông qua các thủ tục tố tụng trọng tài giữa các bên ký kết. Các hiệp định khác như Hiệp định thương mại tự do châu Âu (EFTA), FTA giữa EFTA và Singapore, FTA New Zealand - Singapore bao gồm các quy định về trọng tài quốc tế về ISDS. Tuy nhiên, các bên tranh chấp đều không được phép đơn phương chấp thuận thẩm quyền trọng tài. Nhà đầu tư nước ngoài phải đạt được thoả thuận với chính phủ nước tiếp nhận đầu tư mới có thể đưa tranh chấp ra giải quyết tại trọng tài quốc tế.

Các IIA gần đây cho phép việc đơn phương chấp thuận trọng tài, nhưng lại đưa ra các giới hạn cụ thể đối với phạm vi thẩm quyền của trọng tài quốc tế. *Thí dụ*: trong trường hợp FTA giữa EFTA và Hàn Quốc, sự đồng ý trước đó của các bên về thẩm quyền trọng tài chỉ áp dụng với các tranh chấp được khởi xướng từ các nhà đầu tư nước ngoài đã có hoạt động đầu tư ở nước tiếp nhận đầu tư, chứ không áp dụng với các nhà đầu tư đang muốn đầu tư, nhưng chưa có hoạt động đầu tư ở nước tiếp nhận đầu tư.

Ngoài ra, nhiều IIA cũng hạn chế việc sử dụng cơ chế trọng tài quốc tế của các nhà đầu tư vào các dịch vụ tài chính - một lĩnh vực nhạy cảm liên quan tới vấn đề pháp luật. Các FTA gần đây của Hoa Kỳ ký kết như CAFTA - DR, Hoa Kỳ - Singapore, FTA Nicaragua - Đài Loan và FTA Panama - Singapore, cho phép các nhà đầu tư khởi kiện các biện pháp của chính phủ chỉ trên cơ sở các quy định về bảo hộ đầu tư, như: tước quyền sở hữu, bồi thường thiệt hại và chuyển tiền. Thay vào đó, các nhà

[16] FTA Hoa Kỳ - Australia, Điều 11.16.

[17] EPA Nhật Bản - Philippines, Điều 107.2.

đầu tư tư nhân trong các dịch vụ tài chính không được khởi kiện tại trọng tài về các biện pháp liên quan đến các nghĩa vụ tự do hóa của các IIA, là NT hoặc tiếp cận thị trường.

Cũng liên quan đến những tranh luận trái chiều về việc đầu tư vào các tổ chức tài chính, các hiệp định thường quy định các thủ tục đặc biệt, nhằm bảo vệ khả năng của chính phủ nước tiếp nhận đầu tư có thể áp dụng các biện pháp bảo đảm an toàn về dịch vụ tài chính. Các IIA này còn yêu cầu, nếu chính phủ là bị đơn trong vụ kiện cho rằng đây là những trường hợp ngoại lệ liên quan đến các biện pháp bảo đảm an toàn, chính sách tiền tệ, tỷ giá hối đoái, hay các vấn đề ảnh hưởng đến tính hợp lý và tính toàn vẹn của hệ thống tài chính, thì sau khi được Ủy ban FTA (FTA Committee) cho phép, nhà đầu tư nước ngoài mới được phép đưa tranh chấp ra khởi kiện tại trọng tài. Ở khu vực Đông Á, các IIA này gồm: FTA giữa EFTA và Hàn Quốc, FTA giữa Hàn Quốc và Singapore, FTA giữa Nicaragua và Đài Loan, FTA giữa Panama và Đài Loan, và FTA giữa Singapore và Hoa Kỳ. Ngoài ra, mô hình BIT của Canada năm 2003 và các FTA của Hoa Kỳ như CAFTA - DR và Hoa Kỳ - Marocco quy định cơ chế này. Nếu Ủy ban FTA không có kết luận, FTA giữa EFTA và Hàn Quốc sẽ cho phép nhà đầu tư tiến hành thủ tục tố tụng trọng tài. Các FTA giữa Korea và Singapore, giữa Nicaragua và Đài Loan, giữa Panama và Đài Loan, giữa Singapore và Hoa Kỳ, thay vì cho phép bên bị đơn yêu cầu thành lập một hội đồng trọng tài liên quốc gia, thì đưa ra một quy định ràng buộc về tính hợp pháp của các trường hợp ngoại lệ dành cho bị đơn.

Cuối cùng, một số IIA yêu cầu nhà đầu tư nước ngoài phải thực hiện các thủ tục nhất định trước khi đệ trình đơn khởi kiện trong tố tụng trọng tài. Những hạn chế thủ tục thông thường nhất liên quan đến thời gian chờ đợi và phải sử dụng hết các biện pháp giải quyết mâu thuẫn theo các thủ tục trong nước của nước tiếp nhận đầu tư ('exhaust local remedies'). Cả hai loại yêu cầu này thường được tìm thấy trong các BIT của Trung Quốc với nước ngoài. Trước khi đưa ra trọng tài, các nhà đầu tư nước ngoài phải đàm phán với các cơ quan chức năng của nước tiếp nhận đầu tư nhằm hoà giải được mâu thuẫn. Nếu các cuộc đàm phán này không giúp các bên tìm được giải pháp giải quyết mâu thuẫn trong thời hạn 6 tháng, thì nhà đầu tư có thể đưa tranh chấp ra trọng tài quốc tế. Trong khi đa số các BIT Trung Quốc và nước ngoài yêu cầu khoảng thời gian này là 6 tháng, thì cũng có một vài BIT quy định thời gian này chỉ là 3 tháng, như BIT với Hà Lan (2001), Đức (2003) và Phần Lan (2004), đặc biệt, không cần có khoảng thời gian này, như BIT với Ghana (1989).

Việc áp dụng giải quyết tranh chấp theo các thủ tục trong nước của nước tiếp nhận đầu tư đòi hỏi các nhà đầu tư nước ngoài phải tìm cách giải quyết khiếu nại bằng thủ tục trong nước, trước khi sử dụng thủ tục giải quyết tranh chấp quốc tế. Thông thường, các nhà đầu tư sẽ phải nộp đơn khởi kiện trước tòa án có thẩm quyền trong nước. Nếu tòa án trong nước không giải quyết được tranh chấp, hoặc không ra quyết định trong một khoảng thời gian nhất định, thì nhà đầu tư có thể có quyền khởi kiện theo thủ tục giải quyết tranh chấp quốc tế. BIT Argentina - Hàn Quốc năm 1994 quy định về vấn đề này, và tranh chấp có thể được đưa ra giải quyết tại trọng tài quốc tế.

> Nếu một trong các bên có yêu cầu, sau một khoảng thời gian mười tám (18) tháng, kể từ thời điểm tranh chấp được đệ trình lên tòa án có thẩm quyền của bên ký kết là nước tiếp nhận đầu tư, mà tòa án không đưa ra quyết định cuối cùng, hoặc đã có quyết định cuối cùng, nhưng vẫn không giải quyết được tranh chấp.[18]

Các BIT thế hệ mới của Trung Quốc với nước ngoài đưa ra thêm một điều khoản về biện pháp giải quyết tranh chấp trong nước khác, theo đó các nhà đầu tư nước ngoài phải gửi khiếu nại của mình tới cơ quan quản lý nhà nước có liên quan để họ rà soát. Khoảng thời gian để rà soát hành chính này là 6 tháng. Về vấn đề này, các BIT của Trung Quốc trong những năm gần đây quy định rằng:

> Bên ký kết liên quan đến tranh chấp có thể yêu cầu nhà đầu tư phải giải quyết bằng thủ tục hành chính, theo quy định của pháp luật trong nước của bên ký kết đó, trước khi khởi kiện theo thủ tục tố tụng trọng tài.[19]

Như đã trình bày ở trên, việc giới thiệu các yêu cầu về thủ tục khác nhau giữa các hiệp định có thể có ý nghĩa quan trọng đối với việc thực thi nguyên tắc MFN, *thí dụ*: vụ *Maffezini*.

Nhiều IIA quy định thời hạn khởi kiện. Các FTA Nicaragua - Đài Loan, Singapore - Hàn Quốc, các BIT của Hoa Kỳ và Canada, đều quy định thời hạn nhà đầu tư phải nộp đơn khởi kiện tại trọng tài là trong vòng 3 năm, kể từ khi họ xác định được sự vi phạm IIA. Một số BIT khác, như BIT giữa EFTA và Hàn Quốc, thời hạn này kéo dài đến 5 năm.

Các FTA, BTA của Hoa Kỳ và Canada cũng cung cấp một bộ quy tắc

[18] BIT Argentina - Hàn Quốc, Điều 8.3.

[19] BIT Trung Quốc - Djibouti, Điều 9.3.

chi tiết về thủ tục tố tụng trọng tài, bao gồm các điều khoản nhằm tăng cường sự minh bạch của thủ tục ISDS, bằng cách tổ chức phiên xét xử công khai và cho phép các bên không phải là bên tranh chấp, nộp ý kiến bằng văn bản để hội đồng trọng tài xem xét, khi giải quyết tranh chấp.

TÓM TẮT CHƯƠNG 6

Đầu những năm 1960 đã chứng kiến quá trình đàm phán của các hiệp định khuyến khích và bảo hộ đầu tư giữa các quốc gia.[20] Sự phổ biến của các hiệp định này đã tạo ra hai chủ đề gây tranh luận trong khuôn khổ quy tắc đầu tư quốc tế,[21] đặc biệt là mặc dù ngày càng có nhiều DC sẵn sàng áp dụng các tiêu chuẩn cơ bản về bảo hộ đầu tư, nhưng họ không muốn thực hiện ở cấp độ đa phương.[22]

Nhiều IIAs (trừ DTAs) quy định về cơ chế ISDS. Khoảng hai phần ba các vụ việc được giải quyết theo Công ước ICSID. Công ước này không tạo ra bất kỳ nghĩa vụ cụ thể nào đối với các quốc gia thành viên, mà chỉ đưa ra một quy trình để giải quyết tranh chấp ISDS.[23]

Hiện nay, các BIT đang gia tăng nhanh về số lượng, trong đó phía Hoa Kỳ nêu rõ ba mục tiêu của BIT là: (i) bảo vệ đầu tư ra nước ngoài ở các quốc gia mà quyền của nhà đầu tư không được bảo vệ thông qua các hiệp định đã có; (ii) khuyến khích áp dụng các chính sách trong nước có định hướng thị trường để đối xử với nhà đầu tư tư nhân một cách cởi mở, minh bạch, không phân biệt đối xử; và (iii) hỗ trợ xây dựng các tiêu chuẩn pháp luật quốc tế phù hợp với các mục tiêu này.[24] Hơn 5.900 IIA trên toàn thế giới có quy định các vấn đề đầu tư. Trong một thập kỷ qua, sự gia tăng này lên đến khoảng 40%. Mạng lưới các hiệp định phức tạp này đôi khi được gọi là hiệu ứng 'bát mì spaghetti' ('spaghetti bowl'). Các nước châu Á nói chung đang dẫn đầu về sự gia tăng số lượng IIA.[25]

IIA cho phép trọng tài không chỉ có thẩm quyền giải quyết về vi phạm nghĩa vụ bảo hộ đầu tư cơ bản theo hiệp định, mà còn về vi phạm hợp đồng đầu tư. IIA thường quy định trọng tài tiến hành theo các quy tắc của UNCITRAL, ICSID và ICSID phụ trợ, cũng như theo các quy tắc khác, nếu được cả hai bên đồng ý. Tuy nhiên, một số IIA gần đây cũng quy định cho phép các bên lựa chọn cơ chế giải quyết tranh chấp trong các hợp đồng đầu tư. *Thí dụ*: TPP Phụ lục 9-L cấm xét xử trọng tài về khiếu kiện do vi phạm nghĩa vụ của hiệp định đầu tư theo cơ chế ISDS quy định trong TPP, nếu hợp đồng đầu tư đã quy định trọng tài tiến hành theo một trong quy tắc trọng tài sau đây - UNCITRAL, ICSID, ICC hoặc LCIA - và trọng tài sẽ diễn ra bên ngoài lãnh thổ của bị đơn, tại nước là thành viên của Công ước New York. Điều thú vị là quy định cấm này sẽ không áp dụng cho các hợp đồng đầu tư quy định trọng tài tiến hành theo các quy tắc trọng tài khác, như quy tắc của SIAC, AAA, HKIAC và ACICA. Mục đích chính của IIA là đảm bảo môi trường đầu tư ổn định và có thể dự đoán được, thông qua đó để bảo vệ nhà đầu tư (bao gồm các tiêu chuẩn tương đối và tuyệt đối, như đã trình bày ở trên), và cho phép sử dụng trọng tài để giải quyết tranh chấp ISDS khi có vi phạm nghĩa vụ trong hiệp định. Một số IIA cũng quy định về mở cửa thị trường đối với các nhà đầu tư.[26]

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[20] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2008); Jeswald W. Salacuse, *The Law of Investment Treaties* (2009); Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd ed. 2010); Amnon Lehavi & Amir N. Licht, 'BITs and Pieces of Property', *36 Yale J. Int'l L.* 115, 120 (2011); Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements', *12 U.C. Davis J. Int'l L. & Pol'y* 157 (2005).

[21] Andrew Newcombe, 'Developments in IIA Treaty-Making', in *Improving International Investment Agreements 15* (Armand de Mestral & Céline Lévesque eds., 2013) (mô tả xu hướng chung).

[22] Gus Van Harten, *International Investment Treaty Arbitration and Public Law* (Oxford University Press 2007); Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as A Species of Global Administrative Law', *17 E. J. I. L.* 121 (2006).

[23] Jennifer L. Tobin & Marc L. Busch, 'A Bit Is Better than A Lot: Bilateral Investment Treaties and Preferential Trade Agreements', *62 World Pol.* 1 (2010); Tim Büthe & Helen V. Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis', trong *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 171 (Karl P. Sauvant & Lisa E. Sachs eds., Oxford University Press 2009); Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000', *60 Int'l Org.* 811 (2006); Andrew Kerner, 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties', *53 Int'l Stud. Q.* 73 (2009); Srividya Jandhyala, Witold J. Henisz & Edward D. Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy', *55 J. Conflict Resol.* 1047 (2011); Todd Allee & Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions', *54 Int'l Stud. Q.* 1 (2010); Todd Allee & Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment', *65 Int'l Org.* 401 (2011).

[24] *Bilateral Investment Treaties*, Office of the U.S. Trade Rep., http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (truy cập lần cuối ngày 31/7/2015).

[25] UNCTAD, *Global Value Chains: Investment and Trade for Development*, 101, 196 (2013), http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.; ICSID, *ICSID Database of Bilateral Investment Treaties*, https://icsid-worldbank-org.easyaccess1.lib.cuhk.edu.hk/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main (truy cập lần cuối ngày 31/7/2015).

[26] Richard J. Hunter, 'Property Risks in International Business', *15 Int'l Trade L. J.* 23 (2006) (phân biệt đầu tư trực tiếp nước ngoài với đầu tư gián tiếp); Emmanuelle Cabrol *et al.*, 'International Investments: Law and Practice', *6 Int'l Bus. L. J.* 796 (2008) (mặc dù IIA chủ yếu nhằm bảo vệ giá trị tài sản và kinh tế, nhưng họ không loại trừ, trong trường hợp ngoại lệ, phải bồi thường nếu gây ra thiệt hại cho các cá nhân và pháp nhân khác); Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment: How Will the New EU Competence on FDI Affect the Emerging Global Regime', *15 J. Int'l Econ. L.* 51 (2012).

CÂU HỎI / BÀI TẬP

1. Trình bày những hạn chế và lợi ích khi áp dụng biện pháp bảo hộ ngoại giao.

2. Thẩm quyền của trọng tài quy định trong các IIA được coi là sự chấp thuận trước của nước ký kết về thẩm quyền trọng tài, nhằm giải quyết các tranh chấp có thể phát sinh trong tương lai. Và phạm vi tranh chấp thuộc thẩm quyền của trọng tài cũng bị giới hạn. Song, tại sao nhiều quốc gia vẫn hạn chế đưa ra cam kết thể hiện sự đồng ý trước về thẩm quyền của trọng tài?

3. Có nên quy định buộc các nhà đầu tư phải sử dụng hết các biện pháp giải quyết tranh chấp theo các thủ tục trong nước của nước tiếp nhận đầu tư ('exhaust local remedies'), trước khi tiến hành giải quyết tranh chấp đầu tư tại trọng tài quốc tế? Nêu ưu và nhược điểm của thủ tục giải quyết tranh chấp tại tòa án trong nước của nước tiếp nhận đầu tư, trước khi tiến hành tố tụng trọng tài đầu tư quốc tế?

4. Nêu sự khác biệt trong quy định về chấp thuận thẩm quyền của trọng tài tại Điều 1121 NAFTA với BIT Hoa Kỳ - Ecuador?

5. Điều 1121 NAFTA và BIT Hoa Kỳ - Ecuador đều quy định khuyến khích các bên tranh chấp tìm giải pháp thông qua trung gian hoặc hòa giải. Hãy nêu những trở ngại khiến cho việc giải quyết bằng những phương thức này khó thành công?

6. Trình bày việc áp dụng quyền miễn trừ (waiver) đối với nguyên đơn trong vụ *Waste Management I*?

7. Bạn có đồng ý với cách tiếp cận của Giáo sư Highet về những quan điểm đang gây tranh cãi trong vụ *Waste Management I* hay không?

8. Theo bạn, yêu cầu bồi thường dựa trên pháp luật quốc tế có phải luôn luôn khác biệt với yêu cầu bồi thường theo quy định của pháp luật quốc gia hay không? Liệu nó có giúp tập trung vào nội dung vi phạm, hay về biện pháp được đề cập?

9. Có nội dung khiếu kiện nào mà nguyên đơn có thể tìm được cách giải quyết ở cả tòa án địa phương lẫn trọng tài quốc tế để khắc phục thiệt hại của mình hay không?

10. Liệu cơ quan tài phán trong vụ *Waste Management II* có nên cho phép nguyên đơn tái khởi kiện tại trọng tài hay không?

11. Có phải trong vụ *Waste Management I*, cơ quan tài phán đã ngăn cản nguyên đơn giải quyết lại tranh chấp với quyền miễn trừ của mình?

12. Nếu cơ quan tài phán trong vụ *Waste Management I* quyết định rằng nguyên đơn không được yêu cầu xét xử phúc thẩm, thì tòa án cấp phúc thẩm có bị ràng buộc bởi quyết định đó không? Nếu quyết định đó không có giá trị ràng buộc, thì tòa án có nên ra quyết định như vậy hay không?

13. Trọng tài viên ISDS cần phải đạt được những tiêu chuẩn nào? Phải tuân theo những quy tắc đạo đức nào?

14. Yêu cầu sinh viên xác định những phẩm chất cụ thể mà họ cho rằng một trọng tài viên bắt buộc phải có trong một tranh chấp cụ thể, *thí dụ* vụ *Waste Management* hoặc *Glamis Gold*.

TÀI LIỆU CẦN ĐỌC

1. August Reinisch & Loretta Malintoppi, 'Methods of Dispute Resolution', trong *Oxford Handbook of International Investment Law* 694, 694-702 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

2. Andrea K. Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims', *45 Va. J. Int'l L.* 809, 820-25 (2005).

3. Nigel Blackaby, 'Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)', trong *Pervasive Problems in International Arbitration* 217-233 (Loukas A. Mistelis & Julian D.M. Lew eds., Kluwer 2006).

4. Emmanuel Gaillard, Vivendi, 'Bilateral Investment Treaty Arbitration', *New York L. J.* (ngày 26/2/2003).

5. Claudia T. Salomon, 'Selecting An International Arbitrator: Five Factors to Consider', *17(10) MEALEY'S International Arbitration Report* 25-28 (tháng 10/2002).

6. Judith Levine, 'Dealing with Arbitrator "Issue Conflicts"', in *International Arbitration*, 5(4) TDM (tháng 7/2008).

7. ICSID, *The ICSID Caseload - Statistics (Issue 2010-2),* tr. 8-17.

8. *International Institute for Sustainable Development, Private Rights/Public Problems* 15-20 (2001).

9. *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction)

10. *Waste Management I*

    (Final Award (Dismissing on Jurisdiction)) (6/2/00), 4-7, 14-31.

    (Dissenting Opinion (on Jurisdiction)) (6/2/00), 10 – 28.

11. *Waste Management II*

    (Award on Jurisdiction, second claim) (6/26/02), 2-3, 19-37.

12. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 317-490 (Kluwer 2005).

13. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* 211-229; 238-52 (Oxford, 2008).

14. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 117-131 (Oxford 2008).

15. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, at 1121.9 - 1121.38; 1125.2 - 1125.13 (Kluwer 2006; last updated 2009).

16. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 45-56; 95-109 (Oxford 2007).

17. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties,* 41-73 (Kluwer 2008).

18. Ucheora Onwuamaegbu, 'International Dispute Settlement Mechanisms - Choosing between Institutionally Supported and *Ad hoc*; and between Institutions', trong *Arbitration Under International Investment Agreements: A guide to the Key Issues,* 63 (Katia Yannaca-Small ed., Oxford 2010).

19. Jan Paulsson, 'Arbitration without Privity', *10 ICSID Review - Foreign Investment L. J.* 232 (1995).

20. Pieter H.F. Bekker, 'The Use of Non-Domestic Courts for Obtaining Domestic Relief: Jurisdictional Conflicts between NAFTA Tribunals and U.S. Courts?', *11(2) ILSA Journal of International and Comparative Law,* 331-342 (2005).

21. Osvaldo Marzorati, 'Algunas Reflxiones sobre el Alcance de la Protección de las Inversiones en el marco de los Tratados firmados por Argentina', *1 Revista Peruana de Arbitraje*, 71-118 (Editoral Jurídica Grijley (2005)

22. Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (June 2001), http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf.

23. Christoph Schreuer, 'Travelling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road', *5 J. World Investment & Trade* 231 (2004).

CHƯƠNG 7. CÁC NGUYÊN TẮC KHÁC

Elite
advertising & printing

CHƯƠNG 7

CÁC NGUYÊN TẮC KHÁC CỦA LUẬT ĐẦU TƯ QUỐC TẾ

Mục đích học
Chương 7

- Phân biệt giữa các yêu cầu bồi thường theo IIA và theo hợp đồng;
- Tìm hiểu về các 'điều khoản bao trùm' ('Umbrella Clause');
- Xem xét mục đích hoặc tác động của 'điều khoản bao trùm';
- Xem xét mức độ tôn trọng của cơ quan tài phán đối với quyết định của cơ quan tài phán trước đây về cùng một vấn đề pháp lý;
- Đánh giá những khác biệt trong lời văn IIA, đứng từ góc độ nguyên tắc giải thích IIA;
- Xem xét ảnh hưởng của 'điều khoản bao trùm' đối với luật áp dụng cho trọng tài;
- Thảo luận về khả năng bị đòi bồi thường ngược (phản tố) trong các vụ đòi bồi thường theo hợp đồng và theo IIA;
- Xem xét mối quan hệ giữa các yêu cầu đòi bồi thường theo IIA và theo hợp đồng; nếu một nhà đầu tư chiếm ưu thế khi đòi bồi thường theo hợp đồng thì người đó có chiếm ưu thế khi đòi bồi thường theo IIA không?
- Các nguyên tắc khác của Luật đầu tư quốc tế.

Bên cạnh các nghĩa vụ chính liên quan đến đối xử với nhà đầu tư nước ngoài và bảo đảm trong trường hợp bị tước quyền sở hữu không bồi thường, các IIA còn bao hàm những nghĩa vụ khác về nội dung để đảm bảo nhà đầu tư có khả năng quản lý và hưởng lợi từ các khoản đầu tư.

Các điều khoản này bao gồm việc cấm hạn chế chuyển vốn quốc tế, tạo thuận lợi cho việc hình thành và khai thác khoản đầu tư bằng cách cho phép các nhà quản lý và các chuyên gia nước ngoài thực hiện hoạt động ở nước tiếp nhận đầu tư, và trong một số trường hợp, cấm đặt ra một số điều kiện đối với khoản đầu tư nước ngoài.

Mục 1. 'ĐIỀU KHOẢN BAO TRÙM'

Kể từ vụ *SGS v. Pakistan* và *SGS v. Philippines,*[1] đã xảy ra nhiều cuộc tranh luận về việc giải thích 'điều khoản bao trùm'. Hai vụ việc điển hình này cho thấy có vẻ như có sự khác biệt trong cách giải thích của các cơ quan có thẩm quyền, cụ thể là giải thích hạn chế và giải thích mở rộng. Cách giải thích hạn chế làm cho 'điều khoản bao trùm' không có hiệu lực, đồng thời làm hạn chế phạm vi của nó, trong khi cách giải thích mở rộng làm cho 'điều khoản bao trùm' có hiệu lực đầy đủ, tùy thuộc vào sự khác nhau khi phân tích trong trường hợp hợp đồng đầu tư có một điều khoản về giải quyết tranh chấp.

Trọng tâm Mục này là giải thích 'điều khoản bao trùm', mặc dù vẫn còn nhiều vấn đề chưa được làm sáng tỏ, song phần nhiều sự khác biệt trong giải thích là xuất phát từ lời văn của điều khoản đó. Khi có vấn đề về việc lập luận không thống nhất giữa các cơ quan có thẩm quyền trước đây, thì cách giải thích mở rộng có tác dụng hỗ trợ mạnh hơn về mặt lý thuyết, vì vậy đó là cách tiếp cận được ưa thích trong những vụ việc gần đây. Mặc dù lời văn quy định và việc hành thành 'điều khoản bao trùm' rất được coi trọng, song thực tiễn cho thấy các IIA hiện đại vẫn chưa tính tới tầm quan trọng của hiệu quả soạn thảo, sự rõ ràng về ý định và dự đoán được những diễn diến trong tương lai về phạm vi áp dụng của các 'điều khoản bao trùm'.

Mục này có cấu trúc như sau: tiểu mục 1 bắt đầu bằng việc giải thích sự khác biệt trong giải thích 'điều khoản bao trùm', có tính đến sự phát triển của pháp luật sau vụ *SGS v. Pakistan và SGS v. Philippines*. Khi

[1] Vụ *SGS Société Générale de Surveillance SA v. Pakistan*, Vụ ICSID Số ARB/01/13, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 06/8/2003; *SGS Société Générale de Surveillance SA v. Philippines*, Vụ việc ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/01/2004.

thảo luận về các vụ việc liên quan tới 'điều khoản bao trùm', trọng tâm là luật của ICSID - cơ chế trọng tài được sử dụng nhiều nhất trong bối cảnh tranh chấp đầu tư quốc tế.[2] Tiểu mục 2 sau đó nhìn lại ý nghĩa của 'điều khoản bao trùm' trong thực tiễn các IIA hiện đại, đồng thời khảo sát các chương trình BIT của các nhà đầu tư lớn liên quan tới 'điều khoản bao trùm'. Tiểu mục 3 nhìn nhận thực trạng gây tranh cãi về việc mở rộng nguyên tắc MFN cho các 'điều khoản bao trùm'.

1. Cân bằng giữa giải thích hạn chế và giải thích mở rộng

Ranh giới giữa cách giải thích hạn chế và cách giải thích mở rộng không phát sinh từ sự thiếu nhất quán trong lập luận của các cơ quan trọng tài, mà từ chính sự đa dạng trong cách thức xây dựng các 'điều khoản bao trùm'. Crawford mô tả nó như sau:

> Không gì có thể ví như 'điều khoản bao trùm'; mà nói đúng ra là các 'điều khoản bao trùm'. Rõ ràng, có những thuật ngữ giống nhau hoặc gần giống nhau mà chúng cần phải có cùng hoặc ý nghĩa tương tự; nhưng chỉ vì người ta sử dụng ngôn ngữ khác nhau so với công thức chuẩn mực hiện hành, nên sự khác biệt về ý nghĩa được cho là dự định trước đó của họ.[3]

Vì không có yêu cầu cụ thể là 'điều khoản bao trùm' phải sử dụng từ ngữ gì, nên sự khác biệt trong lời văn quy định của điều khoản dẫn tới sự khác biệt trong cách giải thích.[4] Nếu quy định của điều khoản bao trùm rõ ràng và bao hàm tất cả, chẳng hạn điều khoản quy định áp dụng với "tất cả các tranh chấp", thì các vi phạm theo hợp đồng cũng sẽ thuộc phạm vi điều chỉnh của điều khoản này.[5] Cách dùng từ như vậy giải thích cho việc tại sao điều khoản đó lại được diễn giải theo hướng mở rộng. Theo cách giải thích của cơ quan tài phán trong vụ *SGS v. Philippines*, 'bất kỳ nghĩa vụ nào' có thể bao gồm cả các nghĩa vụ hợp đồng theo pháp luật trong nước. Cơ quan tài phán cũng cho rằng từ ngữ của 'điều khoản bao trùm' trong vụ *SGS v. Philippines* rõ ràng hơn và phân loại dễ hơn hơn so với quy định của điều khoản này trong *Vụ SGS v. Pakistan*.[6] Tương tự, cơ quan tài phán trong vụ *BIVAC v. Paraguay* thì lại giải thích 'bất kỳ nghĩa vụ nào' trong 'điều khoản bao trùm' là bao gồm mọi nghĩa vụ chứ không chỉ các nghĩa vụ quốc tế hoặc nghĩa vụ không theo hợp đồng.[7] Còn cơ quan tài phán trong vụ *SGS v. Paraguay* lại từ chối chấp nhận các ẩn ý về điều kiện trong 'điều khoản bao trùm' mà theo cách giải thích của cơ quan này là 'nhìn bề ngoài, quy định của điều khoản không chứa đựng bất cứ hạn chế nào - nghĩa là nó áp dụng với mọi cam kết, cho dù được thiết lập theo hợp đồng hay theo pháp luật, đơn phương hay song phương'.[8]

Ngược lại, khi quy định trong 'điều khoản bao trùm' không rõ ràng, nó có xu hướng bị giải thích hạn chế. Trong vụ *SGS v. Pakistan*, thuật ngữ 'bảo đảm việc tuân thủ liên tục' các cam kết theo luật, cam kết hành chính hoặc theo hợp đồng không thể hiện đầy đủ việc bên ký kết chấp thuận các nghĩa vụ mới theo luật quốc tế.[9] Trong vụ *Salini v. Jordan*, cơ quan trọng tài kết luận rằng điều khoản quy định mơ hồ, không có ngôn ngữ mang tính ràng buộc, và thuật ngữ 'thiết lập và duy trì một khuôn khổ pháp lý nhằm đảm bảo việc tuân thủ các cam kết' được sử dụng trong điều khoản này không bao gồm nghĩa vụ tuân thủ các cam kết đối với đầu tư.[10]

A. *Lập luận ủng hộ về mặt lý thuyết*

Câu hỏi tiếp theo là liệu lý do của sự phân chia trong phương pháp giải thích này có phải do cách quy định khác nhau của 'điều khoản bao trùm' hay không, và nếu đúng thì lý do đó có hợp lệ không? Những người ủng hộ cho cách diễn giải hạn chế 'điều khoản bao trùm' lấy một trong những lý lẽ mang tính lý thuyết là 'điều khoản bao trùm' sẽ dễ bị 'mở rộng không giới hạn', và khi đó, nếu các vi phạm hợp đồng cũng bị coi là vi phạm IIA thì điều đó sẽ 'ảnh hưởng tới sự phân biệt giữa trật tự pháp

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2 Sasse, Jan Peter, *Phân tích các hiệp định đầu tư song phương từ góc độ kinh tế* (Gabler Verlag 2011) 59.

3 Crawford, James, 'Hiệp định và Hợp đồng trong trọng tài đầu tư (2008) *24 Arb Int'l* 351, 355.

4 Dolzer, Rudolf and Schreuer, Christoph, *Các nguyên tắc của Luật đầu tư quốc tế* (Nxb. Đại học Oxford 2012) 167.

5 Schreuer, Christoph, 'Trọng tài theo hiệp định đầu tư và thẩm quyền trọng tài đối với các yêu cầu đòi bồi thường theo hợp đồng - Có xem xét vụ *Vivendi*', trong Weiler, Todd (ed) *Pháp luật và trọng tài quốc tế: Các vụ điển hình của ICSID, NAFTA, các hiệp định song phương và luật tập quán quốc tế* (Cameron, tháng 5 năm 2005) 296.

6 *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/01/2004 [115], [119].

7 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, Vụ ICSID Số ARB/07/9, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/5/2009 [141].

8 *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [176].

9 *Vụ SGS Société Générale de Surveillance SA v. Pakistan*, Vụ ICSID Số ARB/01/13, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 06/8/2003 [166].

10 *Salini Costruttori SpA and Italstrade SpA v. Jordan*, Vụ ICSID Số ARB/02/13, Phán quyết về thẩm quyền trọng tài, ngày 09/11/2004 [126].

luật trong nước và trật tự pháp luật quốc tế'.[11]

Người ta cho rằng, cách lập luận này hầu như không có trọng lượng, vì từ ngữ của 'điều khoản bao trùm' giới hạn chính phạm vi của nó. Cơ quan tài phán trong vụ *SGS v. Philippines* lập luận rằng 'điều khoản bao trùm' chỉ áp dụng với các nghĩa vụ đối với các khoản đầu tư cụ thể, chứ không áp dụng với các nghĩa vụ chung.[12] Thêm nữa, các tranh chấp hợp đồng phát sinh từ các hợp đồng mua bán hoặc dịch vụ đơn giản, vốn không đủ điều kiện được coi là khoản 'đầu tư' theo BIT hoặc Công ước ICSID, sẽ không thuộc phạm vi điều chỉnh của 'điều khoản bao trùm'.[13]

Phạm vi của một 'điều khoản bao trùm' còn có thể bị hạn chế bởi việc xác nhận rằng điều khoản đó chỉ áp dụng đối với hành vi của Nhà nước, chứ không phải hành vi của tất cả các chủ thể thương mại.[14] Tuy nhiên, việc xác nhận đó không được thể hiện bằng ngôn ngữ của 'điều khoản bao trùm'.[15] Trong một số vụ việc, khó nhận ra sự khác biệt đó.[16] Cơ quan tài phán trong vụ *SGS v. Paraguay* đã chỉ ra khó khăn thực tế trong việc xác định xem Nhà nước đang hành động với quyền lực quốc gia hay một chủ thể thương mại.[17] Ngoài ra, Schill chỉ trích sự phân biệt

[11] *Vụ SGS Société Générale de Surveillance SA v. Pakistan*, Vụ ICSID Số ARB/01/13, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 06/8/2003 [166]; *El Paso Energy International Co v. Argentina*, Vụ ICSID Số ARB/03/15, Phán quyết về thẩm quyền trọng tài, ngày 27/4/2006 [72]-[74], [82]; *Pan American Energy LLC v. Argentina*, Vụ ICSID Số ARB/03/13 và vụ *BP America Production Co & Others v. Argentina*, Vụ việc ICISD số ARB/04/8, Phán quyết trọng tài về việc phản đối thẩm quyền trọng tài, ngày 27/7/2006 [101]-[103].

[12] *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/01/2004 [121].

[13] Schill, Stephan, 'Các "điều khoản bao trùm" như là các khái niệm trong công pháp đứng từ góc độ so sánh', trong Schill, Stephan (ed) *Luật đầu tư nước ngoài và Công pháp so sánh* (Nxb. Đại học Oxford 2010) 329.

[14] *El Paso Energy International Co v. Argentina*, Vụ ICSID Số ARB/03/15, Phán quyết trọng tài về việc phản đối thẩm quyền trọng tài, ngày 27/4/2006 [81]; *Pan American Energy LLC v. Argentina*, Vụ ICSID Số ARB/03/13 và *BP America Production Co & Others v. Argentina*, Vụ ICISD Số ARB/04/8, Phán quyết trọng tài về việc phản đối thẩm quyền, ngày 27/7/2006 [108]; Vụ *Sempra Energy International v. Argentina*, Vụ ICSID Số ARB/02/16, Phán quyết ngày 28/9/2007 (Phán quyết bị hủy ngày 29/6/2010) [310].

[15] Yannaca-Small, Katia, 'Vậy còn "điều khoản bao trùm"?', trong Yannaca-Small, Katia (ed) *Trọng tài theo các hiệp định đầu tư quốc tế: Hướng dẫn các vấn đề chủ yếu* (Nxb. Đại học Oxford 2010) 495-496.

[16] *Eureko BV v. Ba Lan*, Phán quyết Một phần, ngày 19/8/2005 [115]-[134]; *Noble Ventures Inc v. Romania*, Vụ ICSID Số ARB/01/11, Phán quyết ngày 12/10/2005 [51], [82]; *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, Vụ ICSID Số ARB/04/19, Phán quyết ngày 18/8/2008 [325]; *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [135].

[17] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [135].

này đã bỏ qua thực tiễn đầu tư, vì 'nguy cơ trục lợi của nước tiếp nhận đầu tư có thể khiến cho nước này thể hiện mình như thể đang hành động theo quyền lực quốc gia và như một chủ thể thương mại'.[18]

Theo nhận xét của Potts, cách lập luận của cơ quan trọng tài trong nhiều vụ việc có thể không thống nhất ngay trong nội bộ, và có tồn tại sự phân chia về ý thức hệ khi không có lý do hoàn toàn hợp lý để giải thích cho sự khác biệt trong soạn thảo.[19] Nhận xét này cũng có một phần sự thật. Lấy thí dụ về các 'điều khoản bao trùm' trong vụ *SGS v. Pakistan* và *SGS v. Paraguay*, mặc dù chúng được quy định giống nhau nhưng kết quả diễn giải lại rất khác nhau. Điều này đã được ghi nhận trong vụ *SGS v. Paraguay*.[20] Cơ quan tài phán trong vụ này đã công nhận hiệu lực đầy đủ của điều khoản bao trùm bằng cách dựa vào các quy tắc diễn giải theo Điều 31 Công ước Viên về Luật điều ước quốc tế.[21] Đây được cho là cách tiếp cận phù hợp để giải thích 'điều khoản bao trùm', như được Yannaca-Small phát triển như sau:

> Cách thức xây dựng 'điều khoản bao trùm' trong các thỏa thuận đầu tư rất đa dạng. Vì thế, làm sao để giải thích cho đúng nội dung của điều khoản này còn phụ thuộc vào lời văn cụ thể của từng hiệp định, ý nghĩa thông thường của từ ngữ được sử dụng, bối cảnh của nó, đối tượng và mục đích của hiệp định, cũng như lịch sử đàm phán hoặc các chỉ dẫn khác về ý định của các bên.[22]

Đây thực sự là cách tiếp cận mà các cơ quan tài phán đã áp dụng khi giải thích các 'điều khoản bao trùm' theo hướng mở rộng,[23] do đó

[18] Schill, Stephan, '"Điều khoản bao trùm" - các khái niệm trong Công pháp từ góc độ so sánh', trong Schill, Stephan (ed) *Luật đầu tư quốc tế và Công pháp so sánh* (Nxb. Đại học Oxford 2010) 325.

[19] Potts, Jonathan, 'Ổn định vai trò của các "điều khoản bao trùm" trong các hiệp định đầu tư song phương: Động cơ, Sự tin cậy, và Quốc tế hóa' (2010-2011) *51Va J Int'l L* 1005, 1028.

[20] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [169].

[21] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [169].

[22] Yannaca-Small, Katia, 'Vậy còn điều khoản bao trùm?', trong Yannaca-Small, Katia (ed) *Trọng tài theo các Hiệp định đầu tư quốc tế: Hướng dẫn các vấn đề chính* (NXB Đại học Oxford 2010) 502.

[23] *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/01/2004 [116]-[117]; *Eureko BV v. Poland*, Phán quyết Một phần, ngày 19/8/2005 [246]; *Noble Ventures Inc v. Romania*, Vụ ICSID Số ARB/01/11, Phán quyết ngày 12/10/2005 [52]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, Vụ ICSID Số ARB/07/9, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 29/5/2009 [141]; *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [168]-[169].

khiến cho cách giải thích này có cơ sở vững chắc hơn về lý thuyết. Đối với những vụ việc mà 'điều khoản bao trùm' bị giải thích có giới hạn, *thí dụ* như vụ *SGS v. Pakistan,* Hội đồng trọng tài đã không diễn giải theo Điều 31 Công ước Viên. Còn Hội đồng trọng tài trong vụ *Joy Mining v. Egypt* lại áp dụng thêm một hạn chế bằng cách yêu cầu phải có một sự vi phạm rõ ràng các quyền và nghĩa vụ theo BIT, hoặc vi phạm các quyền hợp đồng 'ở mức độ đủ nghiêm trọng để có thể áp dụng các biện pháp bảo hộ theo Hiệp định'.[24] Tương tự, việc yêu cầu các quốc gia phải hành động theo năng lực quốc gia cũng không được thể hiện trong ý nghĩa thông thường của 'điều khoản bao trùm'.[25]

B. *Sự không chắc chắn của các điều khoản giải quyết tranh chấp*

Vẫn còn nhiều điều không chắc chắn, ngay cả trong số các cơ quan ủng hộ xu hướng giải thích mở rộng, về hiệu quả của điều khoản giải quyết tranh chấp trong hợp đồng đầu tư. Theo quan sát của Yannaca-Small, đây là vấn đề mà 'điều khoản bao trùm' không đề cập tới, và sự khác biệt về ngôn ngữ quy định trong 'điều khoản bao trùm' không dẫn tới sự khác biệt trong kết quả.[26]

Trong vụ *SGS v. Philippines* và *BIVAC v. Paraguay*, cơ quan tài phán thấy rằng mặc dù họ có thẩm quyền xét xử các yêu cầu bồi thường này theo 'điều khoản bao trùm', song các yêu cầu đó lại không thuộc thẩm quyền của cơ quan trọng tài theo quy định trong điều khoản về quyền tài phán độc quyền nêu trong hợp đồng đầu tư.[27] Crivellaro, khi đưa ra tuyên bố không tán thành trong vụ *SGS v. Philippines*, đã nhận thấy cách tiếp cận đa số là không thống nhất. Ông lập luận rằng khi một điều khoản nhằm tạo một lợi thế cho một bên nhất định, thì điều đó có thể giải thích theo hai nghĩa, và ý nghĩa chính xác nhất là điều khoản đó có

[24] *Vụ SGS Société Générale de Surveillance SA v. Pakistan*, Vụ ICSID Số ARB/01/13, Phán quyết của Hội đồng trọng tài về việc phản đối thẩm quyền trọng tài, ngày 06/8/2003; *Joy Mining Machinery Limited v. Egypt*, Vụ ICSID Số ARB/03/11, Phán quyết về thẩm quyền trọng tài, ngày 06/8/2004 [81].

[25] *El Paso Energy International Co v. Argentina*, Vụ ICSID Số ARB/03/15, Phán quyết về thẩm quyền trọng tài, ngày 27/4/2006 [81]; *Pan American Energy LLC v. Argentina*, Vụ ICSID Số ARB/03/13 và *BP America Production Co & Others v. Argentina*, Vụ ICISD Số ARB/04/8, Phán quyết về phản đối thẩm quyền trọng tài, ngày 27/7/2006 [108]; *Sempra Energy International v. Argentina*, Vụ ICSID Số ARB/02/16, Phán quyết ngày 28/9/2007 (Phán quyết bị hủy ngày 29/6/2010) [310].

[26] Yannaca-Small, '*Katia BIVAC v. Paraguay* so với Vụ *SGS v. Paraguay*: "Điều khoản bao trùm" vẫn đi tìm một sự nhận dạng' (2013) *28 ICSID Review* 307, 312.

[27] *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về phản đối thẩm quyền trọng tài, ngày 29/01/2004 [154]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, Vụ ICSID Số ARB/07/9, Phán quyết của Hội đồng trọng tài về phản đối thẩm quyền trọng tài, ngày 29/5/2009 [145]-[146].

lợi cho bên được hưởng lợi thế đó.[28] Để bảo vệ thành viên của hội đồng trọng tài trong vụ *SGS v. Philippines*, sau đó Crawford giải thích rằng khi một nhà đầu tư 'dựa vào điều khoản thẩm quyền xét xử trong hợp đồng theo đề nghị của một quốc gia, thì bản thân nhà đầu tư đó phải tuân thủ các thoả thuận trong hợp đồng về giải quyết tranh chấp đối với quốc gia đó".[29] Tương tự, cơ quan trọng tài trong vụ *BIVAC v. Paraguay* lập luận rằng thẩm quyền dành riêng là một phần của nghĩa vụ theo hợp đồng, và các bên không thể lựa chọn các phần trong hợp đồng mà họ muốn đưa vào nội dung 'điều khoản bao trùm' mà bỏ qua những phần khác.[30]

Ngược lại, hội đồng trọng tài trong vụ *Eureko v. Poland* lại chấp nhận thẩm quyền trọng tài dựa trên một 'điều khoản bao trùm', và kết luận rằng việc vi phạm 'điều khoản bao trùm' là hành động dựa trên IIA, do đó điều khoản về lựa chọn cơ quan tài phán nêu trong hợp đồng đầu tư không thể loại trừ quy định về trọng tài trong IIA.[31] Cơ quan tài phán trong vụ *SGS v. Paraguay* cũng đảm nhận thẩm quyền trọng tài theo 'điều khoản bao trùm', và đã chấp nhận yêu cầu bồi thường thiệt hại, mặc dù trong hợp đồng đầu tư có điều khoản riêng về giải quyết tranh chấp.[32] Trong phần lập luận của mình, cơ quan tài phán thậm chí còn cho rằng nếu từ chối xét xử vụ việc này, thì cơ quan tài phán 'có nguy cơ không thực hiện được nhiệm vụ của mình theo Hiệp định và Công ước ICSID'.[33] Về cơ bản, cơ sở đưa ra phán quyết trong vụ *SGS v. Paraguay* là quan điểm theo đó yêu cầu bồi thường theo 'điều khoản bao trùm' là yêu cầu theo hiệp định có tính khác biệt về mặt pháp lý, nó không phải là một yêu cầu theo hợp đồng, vì thế không bị ảnh hưởng bởi điều khoản lựa chọn cơ quan giải quyết tranh chấp nêu trong hợp đồng.[34] Cơ quan tài phán cũng nêu rõ rằng các nhà đầu tư không thể bỏ qua các quyền của mình theo hiệp định một cách dễ dàng, và cũng không thể làm cho một hành động bỏ qua đó có hiệu lực, dù chỉ là ngụ ý, cho dù câu hỏi vẫn còn để mở về việc có cần phải tuyên bố cụ thể về việc khước

[28] *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Tuyên bố (Không tán thành ý kiến của Antonio Crivellaro), ngày 29/01/2004 [10].

[29] Crawford James, 'Hiệp định và hợp đồng trong trọng tài đầu tư' (2008) *24 Arb Int'l* 364.

[30] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, Vụ ICSID Số ARB/07/9, Phán quyết của Hội đồng trọng tài về phản đối thẩm quyền trọng tài, ngày 29/5/2009 [148].

[31] *Eureko BV v. Poland*, Phán quyết Một phần, ngày 19/8/2005 [92]-[114], [250].

[32] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [138], [142].

[33] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [172].

[34] Antony, Jude, '"Điều khoản bao trùm" từ vụ *SGS v. Pakistan* và *SGS v. Philippines* - Xây dựng sự đồng thuận', (2013) *29 Arb Int'l* 607, 626.

từ quyền lợi hay không.[35]

2. Xu thế soạn thảo các 'điều khoản bao trùm'

Trước khi tìm hiểu về thực tiễn các IIA hiện đại, điều quan trọng là phải dựa vào các vụ việc để tìm ra lý do cơ bản dẫn tới sự tồn tại của 'điều khoản bao trùm' trong các IIA. Các cơ quan giải quyết tranh chấp đã công nhận một nguyên tắc *effet utile* - cách giải thích làm cho một điều khoản có hiệu quả hơn là không được ưa thích - có lợi cho các nhà đầu tư.[36] Cách tiếp cận có lợi cho nhà đầu tư nói trên là một hệ quả hợp lý của việc áp dụng các quy tắc diễn giải theo Điều 31 Công ước Viên về Luật điều ước quốc tế, trong đó 'đối tượng và mục đích' của IIA là để bảo hộ đầu tư.[37] Về vấn đề này, Schreuer chỉ ra rằng phương pháp giải thích trong vụ *SGS v. Philippines* được ưa chuộng hơn so với vụ *SGS v. Pakistan*, vì vụ kiện Philippines 'đem lại công bằng cho một điều khoản rõ ràng được thiết kế để tăng cường bảo hộ cho nhà đầu tư.[38]

Cách tiếp cận có lợi cho nhà đầu tư như trên đã dấy lên một số nghi ngờ. Douglas chỉ trích cách tiếp cận này, coi đó là cách làm thiên vị:

> Một cách giải thích sẽ không thể chính xác, nếu chính sách khuyến khích đầu tư nước ngoài có thể không bao giờ tạo ra sự giải thích có lợi cho nước tiếp nhận đầu tư, cả về mặt kinh nghiệm lẫn logic.[39]

Tương tự, Franck đã cảnh báo về việc lạm dụng sự kiểm tra dựa trên tiêu chí đối tượng và mục đích, điều đó khiến cho việc giải thích không dựa vào việc phân tích khách quan lời văn hiệp định, và chỉ khiến cho nó dựa trên các phân tích chủ quan.[40]

[35] *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [177]-[180].

[36] *Vụ SGS Société Générale de Surveillance SA v. Philippines*, Vụ ICSID Số ARB/02/6, Phán quyết của Hội đồng trọng tài về phản đối thẩm quyền trọng tài, ngày 29/01/2004 [116]; *Eureko BV v. Poland,* Phán quyết Một phần, ngày 19/8/2005 [248]-[249]; *Noble Ventures Inc v. Romania*, Vụ ICSID Số ARB/01/11, Phán quyết ngày 12/10/2005 [52]; *Vụ SGS Société Générale de Surveillance SA v. Paraguay*, Vụ ICSID Số ARB/07/29, Phán quyết về thẩm quyền trọng tài, ngày 12/02/2010 [90].

[37] Voss, Jan Ole, *Tác động của các hiệp định đầu tư với hợp đồng giữa nước tiếp nhận đầu tư và nhà đầu tư nước ngoài,* Martins Nijhoff Publishers, 2011, tr. 254.

[38] Schreuer, Christoph, 'Tìm hiểu con đường của BIT: Giai đoạn chờ đợi, các "điều khoản bao trùm" và "ngã ba đường"', (2004) *5 Tạp chí Đầu tư và Thương mại Thế giới* 231, 255.

[39] Douglas, Zachary, 'Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) *22 Arb Int'l 27*, 50.

[40] Franck, Susan, 'Khủng hoảng về tính hợp lệ trong trọng tài hiệp định đầu tư: "Tư nhân hóa" Công pháp quốc tế thông qua các phán quyết không nhất quán' (2004) *73 Fordham Law Review* 1521, 1578.

Với tất cả sự tôn trọng, mọi người vẫn cho rằng những lời chỉ trích này là sai lầm. Các 'điều khoản bao trùm' liên quan chặt chẽ nhất với các hợp đồng đầu tư được gọi là 'hợp đồng cho phép kinh doanh' ('concession'), hoặc các hợp đồng nhà nước, trong đó thông thường thì các điều khoản trong hợp đồng đó được quy định trong pháp luật nước nước tiếp nhận đầu tư, và được nước tiếp nhận đầu tư đề nghị đưa vào trên cơ sở 'không có lựa chọn nào khác'.[41] Việc các nhà đầu tư được bảo hộ thêm thông qua các 'điều khoản bao trùm' sẽ được hiểu trong bối cảnh các hợp đồng đầu tư có xu hướng có lợi cho nước tiếp nhận đầu tư.

Khi thị trường và các điều kiện chính trị-xã hội biến động, các nước tiếp nhận đầu tư có thể muốn rút khỏi những cam kết hợp đồng ban đầu của mình để tìm kiếm các cơ hội tốt hơn.[42] Chính vì thế, 'những cuộc mặc cả lỗi thời' ('obsolescing bargains') giữa nhà đầu tư và nước tiếp nhận đầu tư phát sinh, vì vị thế thương lượng của nhà đầu tư đã bị giảm sau khi nước tiếp nhận đầu tư đã mua lại khoản đầu tư.[43]

Khi phân tích chi phí-lợi ích, 'điều khoản bao trùm' đảm bảo sự tuân thủ liên tục của nước tiếp nhận đầu tư với các cam kết của mình, bằng cách tăng chi phí của quốc gia đó, nếu không tuân thủ cam kết hợp đồng và tăng vị thế thương lượng của nhà đầu tư bằng cách quy định về quyền giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư bằng phương thức trọng tài.[44]

Do vậy, Schill coi các 'điều khoản bao trùm' là một cơ chế cưỡng chế thi hành cam kết đối với nước tiếp nhận đầu tư, để giảm thiểu tình trạng bất cân bằng giữa nhà đầu tư nước ngoài và nước tiếp nhận đầu tư, và giải quyết các bất cập trong việc giải quyết tranh chấp.[45] Vì lý do này mà Schill đã bác bỏ cách giải thích hạn chế đối với 'điều khoản bao trùm', vì ông cho rằng nó làm hạn chế khả năng đưa ra các cam kết đáng tin cậy của nước tiếp nhận đầu tư và làm sụt giảm hiệu quả hợp tác giữa nhà đầu tư và nước tiếp nhận đầu tư.[46]

[41] Sinclair, Anthony, 'Nguồn gốc của các "điều khoản bao trùm" trong Luật quốc tế về bảo hộ đầu tư' (2004) *20 Arb Int'l* 411, 414-418; Walde, Thomas, '"Điều khoản bao trùm" trong trọng tài đầu tư: Bình luận về ý định ban đầu và các vụ việc mới đây' (2005) *6 J World Investment & Trade* 183, 200-209; Blyschak, Paul Michael, 'Trọng tài các tranh chấp dầu khí nước ngoài: vi phạm hợp đồng và vi phạm hiệp định' (2010) *27 Arb Int'l* 579, 582.

[42] Vernon, Raymond, *Bước đường cùng của chủ quyền: Tính đa quốc gia của các công ty Hoa Kỳ* (Basic Books 1971) 46.

[43] Salacuse, Jeswald, *Luật về hiệp định đầu tư,* Nxb. Đại học Oxford, 2010, tr. 271-272.

[44] Salacuse, Jeswald, *Luật về hiệp định đầu tư*, Nxb. Đại học Oxford, 2010, tr. 273.

[45] Schill Stephan, 'Trật tự có lợi cho tư nhân: Chức năng, phạm vi và tác động của "điều khoản bao trùm" trong các hiệp định đầu tư quốc tế' (2009), *Minn J Int'l L* 1, 11.

[46] Schill Stephan, 'Trật tự có lợi cho tư nhân: Chức năng, phạm vi và tác động của "điều khoản bao trùm" trong các hiệp định đầu tư quốc tế' (2009), *Minn J Int'l L* 44-45.

A. *Hiệp định hiện đại của các nhà đầu tư lớn*

Cần lưu ý rằng bảo hộ đầu tư là một khái niệm cơ bản trong soạn thảo và giải thích 'điều khoản bao trùm', sau đây chúng ta sẽ xem xét tầm quan trọng của các điều khoản này trong thực tiễn IIA. Ước tính hiện đang có khoảng 2.700 BIT tồn tại, 40% trong số đó có 'điều khoản bao trùm'.[47]

Con số tổng quan cho thấy cần xem xét kỹ hơn thực tiễn của từng quốc gia để đánh giá xem liệu có cách tiếp cận chung trong việc soạn thảo các 'điều khoản bao trùm' hay không, và điều này có mang tính nhạy cảm đối với quá trình phát triển của khoa học pháp lý hay không.

Trong EVFTA, 'điều khoản bao trùm' được quy định tại Điều 8.3.

Hộp 9. Điều khoản bao trùm trong EVFTA (Điều 8.3)

Khi một Bên đã ký kết hợp đồng bằng văn bản với nhà đầu tư của nước bên kia hoặc khoản đầu tư của họ được nêu trong đoạn (a) Điều 8.8 (phạm vi) thỏa mãn các điều kiện sau:

(a) Hợp đồng bằng văn bản đã được ký kết và có hiệu lực sau ngày hiệu lực của Hiệp định này;

(b) Nhà đầu tư dựa vào bản hợp đồng đó để quyết định bắt đầu hoặc tiếp tục việc đầu tư được nêu trong đoạn (a) Điều 8.8 (Phạm vi) chứ không phải bản thân hiệp định và vi phạm gây ra thiệt hại thực tế đối với khoản đầu tư;

(c) Hợp đồng bằng văn bản[48] đã tạo nên sự thay đổi về quyền và nghĩa vụ liên quan tới khoản đầu tư đã nêu và ràng buộc hai bên; và

(d) Văn bản hợp đồng không bao gồm điều khoản nào về giải quyết tranh chấp giữa các bên tham gia hiệp định bằng trọng tài quốc tế.

[47] Yannaca-Small, Katia, 'Vậy còn "điều khoản bao trùm"?' trong Yannaca-Small, Katia (ed) *Trọng tài theo các hiệp định đầu tư quốc tế: Hướng dẫn các vấn đề chính*, Nxb. Đại học Oxford, 2010, tr. 483.

[48] 'Hợp đồng bằng văn bản' là một thỏa thuận bằng văn bản do một Bên ký kết với nhà đầu tư của bên kia hoặc khoản đầu tư của bên đó [VN: được nhắc tới trong đoạn (a) của Điều 8.8 (Phạm vi)] và được đàm phán và thực thi bởi cả hai bên, cho dù nó nằm trong một văn kiện duy nhất hay nhiều văn kiện.

Quy định của 'điều khoản bao trùm' trong Điều 8.10(6) làm rõ các cam kết cụ thể theo hợp đồng mà một quốc gia đã đưa ra bằng văn bản đối với nhà đầu tư của quốc gia bên kia mà mình phải tuân thủ.

Dưới đây là 'điều khoản bao trùm' trong một số BIT của 10 quốc gia được các cơ quan xúc tiến đầu tư xếp hạng 'top 10' nước tiếp nhận đầu tư có triển vọng nhất đối với FDI trong giai đoạn 2013 - 2017. Cần lưu ý rằng không có một cơ sở dữ liệu tập trung về các hiệp định này, vì thế một số nguồn tài liệu văn bản đã phải tham vấn như nêu trong Bảng dưới đây. Chúng tôi đã cố gắng tối đa để có dữ liệu về các đối tác đầu tư đang phát triển và phát triển trong các BIT, phụ thuộc vào sự sẵn có của bản tiếng Anh của hiệp định đó.

Bảng 4. 'Điều khoản bao trùm' trong một số BIT của 10 quốc gia đầu tư hàng đầu
CÁC HIỆP ĐỊNH ĐẦU TƯ SONG PHƯƠNG (I) (II)

CÁC QUỐC GIA	Trung Quốc
Trước vụ *SGS v. Philippines* (2004)	• Điều II.2 (Khuyến khích và bảo hộ đầu tư) trong BIT Trung Quốc - UK: [Quy định về FET] … Mỗi bên sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết liên quan tới đầu tư của công dân hoặc các công ty của phía Bên kia. • BIT Trung Quốc-Nhật Bản 1988 (-) **iii** • Điều 11 BIT Trung Quốc - Australia 1993: Mỗi bên ký kết, căn cứ vào pháp luật của mình, sẽ tuân theo bất cứ cam kết bằng văn bản nào mà một cơ quan có thẩm quyền đã đưa ra đối với công dân của Bên ký kết kia liên quan tới một khoản đầu tư được thực hiện theo pháp luật của mình và quy định của Hiệp định này. • BIT Trung Quốc - Bahrain: 1999 (-) • Điều 10.2 BIT Trung Quốc - Đức 2003: Các nghĩa vụ khác: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình đã ký kết đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện.
Sau vụ *SGS v. Philippines* (2004)	• Điều 9 BIT Trung Quốc - Bỉ 2005: nhà đầu tư của bất cứ bên ký kết nào cũng có thể thực hiện các hoạt động đầu tư theo một hợp đồng đặc biệt. Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các nhà đầu tư của bên ký kết kia. Hợp đồng đặc biệt hay các nghĩa vụ nói trên sẽ phù hợp với pháp luật của bên ký kết chấp nhận khoản đầu tư và các quy định của Hiệp định này. • BIT Trung Quốc - Bulgaria 2007: (-) • BIT Trung Quốc - Canada 2012 (-): Chưa có hiệu lực
Các BIT mẫu	Không áp dụng **(iv)**

CÁC QUỐC GIA	HOA KỲ
Trước vụ *SGS v. Philippines* (2004)	• Điều II.2 BIT Hoa Kỳ - Panama 1982: [Quy định FET]: Mỗi bên sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết liên quan tới khoản đầu tư của các công dân hay các công ty của bên kia (không bị ảnh hưởng bởi Tu chính án năm 2000). • Điều II.2(c), BIT Hoa Kỳ - Argentina 1991, Hoa Kỳ - Romania 1992: Mỗi bên sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết liên quan tới khoản đầu tư. • BIT Hoa Kỳ - Ecuador 1993, Hoa Kỳ - Moldova 1994, Hoa Kỳ - Lithuania 1998, Điều II.3(c): Mỗi bên sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết liên quan tới khoản đầu tư. • BIT Hoa Kỳ - Séc, Điều II.2(c)
Sau vụ *SGS v. Philippines* (2004)	• BIT Hoa Kỳ - Uruguay 2005, Hoa Kỳ - Rwanda 2008: (-) thông qua Điều 24.1 cho phép các nhà đầu tư được đưa ra trọng tài ISDS để giải quyết các khiếu nại liên quan tới vi phạm 'IIA'.
Các BIT mẫu	2012 (-): thông qua Điều 24.1 cho phép các nhà đầu tư được đưa ra trọng tài ISDS để giải quyết các khiếu nại liên quan tới vi phạm 'IIA'.

CÁC QUỐC GIA	ĐỨC (V)
Trước vụ *SGS v. Philippines* (2004)	BIT Đức - Liên Xô (cũ) 1989, Điều 7.2: Mỗi bên ký kết sẽ tuân thủ bất cứ nghĩa vụ nào khác mà mình đưa ra đối với các khoản đầu tư mà nhà đầu tư của bên ký kết kia thực hiện trên lãnh thổ của mình. - BIT Đức - Ấn Độ 1955, Điều 13.2: (Áp dụng các quy tắc khác) Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình mà nhà đầu tư của bên ký kết kia thực hiện, trong đó các tranh chấp phát sinh từ các nghĩa vụ đó sẽ chỉ được giải quyết tuân theo các điều khoản của hợp đồng áp dụng với nghĩa vụ đó. - BIT Đức - Hong Kong 1996, Điều 8.2: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện. - BIT Đức - Philippines 1998, Điều 3.5 (Đối xử): [Quy định về NT]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện.
Sau vụ *SGS v. Philippines* (2004)	- BIT Đức - Yemen 2005, Điều 7.2: Mỗi bên ký kết sẽ thực hiện bất cứ nghĩa vụ nào khác mà mình có thể đã ký kết đối với các khoản đầu tư trên lãnh thổ của mình do các công dân hoặc các công ty của bên ký kết kia thực hiện. - BIT Đức - Bahrain 2007, Điều 8.2: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã ký kết đối với các khoản đầu tư trên lãnh thổ của mình do các công dân hoặc các công ty của bên ký kết kia thực hiện. - BIT Đức - Afghanistan 2005, Đức - Jordan 2007, Điều 8.2: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã ký kết đối với các khoản đầu tư trên lãnh thổ của mình do các công dân hoặc các công ty của bên ký kết kia thực hiện.
Các BIT mẫu	2008, Điều 7.2: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình có thể đã ký kết đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện.

CÁC QUỐC GIA	VƯƠNG QUỐC ANH (VI)
Trước vụ *SGS v. Philippines* (2004)	• BIT Anh Quốc - Trung Quốc 1996, Điều II.2 (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do công dân hoặc công ty của bên ký kết kia thực hiện. • BIT Anh Quốc - Jamaica 1997: (-) • BIT Anh Quốc - Liên Xô (cũ) 1989, Điều 2.2 (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. • BIT Anh Quốc - Ấn Độ 1994, Điều 3.3 (Khuyến khích và bảo hộ đầu tư): Mỗi Bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện, với điều kiện là việc giải quyết tranh chấp theo Điều 9 Hiệp định sẽ chỉ áp dụng với đoạn này khi không có sẵn các biện pháp tư pháp khác áp dụng trong nước. • BIT Anh Quốc - Nam Phi 1994, Anh Quốc - Moldova 1996, Anh Quốc - Hong Kong 1998, Anh Quốc - El Salvador 1999, Điều II.2 (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. • BIT Anh Quốc - Lebanon 1999, Điều 10.2: (các nghĩa vụ khác): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình do các nhà đầu tư của bên ký kết kia thực hiện.
Sau vụ *SGS v. Philippines* (2004)	• BIT Anh Quốc - Mexico 2006: (-) (Chưa có hiệu lực • BIT Anh Quốc - Ethiopia 2009, Điều 2.2: (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do công dân hoặc các công ty của bên ký kết kia thực hiện. (Chưa có hiệu lực) • BIT Anh Quốc - Colombia 2010: (-) (Chưa có hiệu lực)
Các BIT mẫu	• 2008, Điều 2.2: (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do công dân hoặc các công ty của Bên ký kết kia thực hiện.

CÁC QUỐC GIA	NHẬT BẢN
Trước vụ *SGS v. Philippines* (2004)	• BIT Nhật Bản - Trung Quốc 1988: (-) • BIT Nhật Bản - Hong Kong 1997, Điều 2.3 [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. • BIT Nhật Bản - Hàn Quốc 2002: (-)
Sau vụ *SGS v. Philippines* (2004)	• BIT Nhật Bản - Lào 2008, Điều 5.2: (Đối xử chung) Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết bằng văn bản đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. • BIT Nhật Bản - Peru 2008: Lời nói đầu: Công nhận tầm quan trọng của việc tôn trọng và thực hiện các nghĩa vụ mà một bên có thể đã ký kết đối với các khoản đầu tư và hoạt động đầu tư do nhà đầu tư của bên kia thực hiện. • BIT Nhật Bản - Colombia 2011, Điều 4.3: (Tiêu chuẩn đối xử tối thiểu): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào phát sinh từ một thỏa thuận bằng văn bản được ký kết giữa chính phủ hoặc cơ quan trung ương của chính phủ với nhà đầu tư của phía bên kia liên quan tới các khoản đầu tư cụ thể mà nhà đầu tư đã dựa vào đó để quyết định thành lập, mua lại hoặc mở rộng khoản đầu tư của mình (chưa có hiệu lực).
Các BIT mẫu	• Không có

CÁC QUỐC GIA	PHÁP (VII)
Trước vụ *SGS v. Philippines* (2004)	•BIT Pháp - Hong Kong 1995, Điều 3 (Nghĩa vụ cụ thể): Không làm tổn hại tới Hiệp định này, mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ cụ thể nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện, kể cả những quy định thuận lợi hơn so với quy định của Hiệp định này. •BIT Pháp - Ấn Độ 1997: (-) •BIT Pháp - Mexico 1998, Điều 10.2 (Cam kết đặc biệt): Mỗi bên sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình có thể đã thừa nhận bằng văn bản liên quan tới các khoản đầu tư trên lãnh thổ của mình do các nhà đầu tư của bên kia thực hiện. Các tranh chấp phát sinh từ những nghĩa vụ đó sẽ được giải quyết theo các điều khoản nêu trong hợp đồng điều chỉnh các nghĩa vụ đó.
Sau vụ *SGS v. Philippines* (2004)	• Không có
Các BIT mẫu	• 2006, Điều 9: Cam kết đặc biệt: • Các khoản đầu tư tạo thành đối tượng của một cam kết đặc biệt của một Bên ký kết đối với công dân và các công ty của bên Ký kết kia sẽ được điều chỉnh, mà không làm tổn hại tới Hiệp định này, bởi các điều khoản của cam kết đã nêu nếu cam kết nào bao gồm cả các điều khoản thuận lợi hơn với quy định của Hiệp định này. **(viii)**

CÁC QUỐC GIA	ẤN ĐỘ
Trước vụ *SGS v. Philippines* (2004)	•BIT Ấn Độ - Pháp 1997: (-) •BIT Ấn Độ - Anh 1994 Điều 3.3 (Khuyến khích và bảo hộ đầu tư): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện, với điều kiện là việc giải quyết tranh chấp theo Điều 9 của Hiệp định này sẽ chỉ áp dụng với đoạn này khi không có sẵn các biện pháp tư pháp khác áp dụng trong nước. •BIT Ấn Độ - Đức 1955, Điều 13.2: (Áp dụng các quy tắc khác) Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình mà nhà đầu tư của bên ký kết kia thực hiện, trong đó các tranh chấp phát sinh từ các nghĩa vụ đó sẽ chỉ được giải quyết tuân theo các điều khoản của hợp đồng áp dụng với nghĩa vụ đó. •BIT Ấn Độ - Australia 1999: (-)
Sau vụ *SGS v. Philippines* (2004)	•BIT Ấn Độ - Bosnia 2006: (-) •BIT Ấn Độ - Hy Lạp 2007: (-) •BIT Ấn Độ - Mexico 2008: (-) •BIT Ấn Độ - Columbia 2009: (-)
Các BIT mẫu	• 2003 (-)

CÁC QUỐC GIA	CANADA (IX)
Trước vụ *SGS v. Philippines* (2004)	• BIT Canada - Hungary 1991: (-) • BIT Canada - Philippines 1995: (-) • BIT Canada - Panama 1996: (-) • BIT Canada - Costa Rica 1998: (-)
Sau vụ *SGS v. Philippines* (2004)	• BIT Canada - Peru 2006: (-) • BIT Canada - Latvia 2009: (-) • BIT Canada - Jordan 2009: (-) • BIT Canada - Sec 2009: (-) • BIT Canada - Slovakia 2010: (-)
Các BIT mẫu	• 2004 (-)

CÁC QUỐC GIA	HÀN QUỐC
Trước vụ *SGS v. Philippines* (2004)	•BIT Hàn Quốc - Nga 1990, Điều 2.4 (Khuyến khích và bảo hộ đầu tư): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết theo Hiệp định này đối với các khoản đầu tư trên lãnh thổ của mình do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Hàn Quốc - Argentina 1994: (-) •BIT Hàn Quốc - Ấn Độ 1996: (-) •BIT Hàn Quốc - El Salvado 1998, Điều 12.3 (Áp dụng các quy tắc khác): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã có thể ký kết đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện. •BIT Hàn Quốc - Honduras 2000, Điều 10.3 (Áp dụng các quy tắc khác): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã có thể ký kết đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện. •BIT Hàn Quốc - Nhật Bản 2002: (-)
Sau vụ *SGS v. Philippines* (2004)	•BIT Hàn Quốc - Việt Nam 2003, BIT Hàn Quốc - Jordan 2004, BIT Hàn Quốc - Croatia 2005, Điều 10.3: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã có thể ký kết đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện. •BIT Hàn Quốc - Thụy Sĩ 2005: (-) •BIT Hàn Quốc - Bỉ 2006: (-) •BIT Hàn Quốc - Lebanon 2006, Điều 10.2 Các nghĩa vụ khác: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào khác mà mình đã thừa nhận đối với các khoản đầu tư trên lãnh thổ của mình do nhà đầu tư của bên ký kết kia thực hiện.
Các BIT mẫu	• Không có

CÁC QUỐC GIA	LIÊN BANG NGA (X)
Trước vụ *SGS v. Philippines* (2004)	•BIT Liên Xô (cũ) - Anh Quốc 1989, Điều 2.2 (Khuyến khích và bảo hộ đầu tư) [quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Liên Xô (cũ) - Đức 1989, Điều 7.2: Mỗi bên ký kết sẽ tuân thủ bất cứ nghĩa vụ nào khác mà mình đưa ra đối với các khoản đầu tư mà nhà đầu tư của bên ký kết kia thực hiện trên lãnh thổ của mình. •BIT Liên Xô (cũ) - Hà Lan 1989, Điều 3.4: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết theo Hiệp định này đối với các khoản đầu tư trên lãnh thổ của mình do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Liên Xô (cũ) - Canada 1989: (-) •BIT Nga - Hàn Quốc 1990, Điều 2.4 (Khuyến khích và bảo hộ đầu tư): Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết theo Hiệp định này đối với các khoản đầu tư trên lãnh thổ của mình do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Nga - Hy Lạp 1993, Điều 10.2: Áp dụng các quy tắc khác: Mỗi bên ký kết sẽ tôn trọng mọi nghĩa vụ khác mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Nga - Na Uy 1995, BIT Nga -Lebanon 1997, BIT Nga - Ai Cập 1997: (-) •BIT Nga - Thổ Nhĩ Kỳ 1997, Điều II.2 (Khuyến khích và bảo hộ đầu tư) [Quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Nga - Nhật Bản 1998, Điều 3.3 [Quy định FET]: Mỗi bên ký kết sẽ tôn trọng bất cứ nghĩa vụ nào mà mình có thể đã ký kết đối với các khoản đầu tư do các nhà đầu tư của bên ký kết kia thực hiện. •BIT Nga - Italia 2002: (-)
Sau vụ *SGS v. Philippines* (2004)	•BIT Nga - các Tiểu Vương Quốc Ả Rập thống nhất 2010: (-) Chưa có hiệu lực
Các BIT mẫu	• Không có

Chú thích:

(i): Nguồn tài liệu tham khảo để thực hiện khảo sát này gồm:

- Trọng tài theo hiệp định đầu tư, các hiệp định đầu tư www.italaw.com/investmenttreaties
- Martins Paparinskis, *Các tài liệu cơ bản về bảo hộ đầu tư quốc tế*, Nxb. Hart Publishing, 2012.
- Rubin, Noah, and Mangan, Mark (eds), *Global Arbitration Review Investment Treaty Arbitration Know-how.*

UNCTAD IIA các cơ sở dữ liệu.

(ii): Các năm của BIT được tham chiếu trong Bảng này (trừ các BIT mẫu) là năm ký kết hiệp định, khác với năm Hiệp định có hiệu lực.

(iii): (-) nghĩa là Hiệp định không có 'điều khoản bao trùm'.

(iv): *Không có*: Tức là không có Hiệp định tương ứng bằng tiếng Anh hoặc không có trong các nguồn tham khảo.

(**v):** Tham khảo *Global Arbitration Review Investment Treaty Arbitration Know-how:* tất cả các BIT của Đức đều có 'điều khoản bao trùm'.

(**vi):** Tham khảo *Global Arbitration Review Investment Treaty Arbitration Know-how:* tất cả các BIT của Anh Quốc đều có 'điều khoản bao trùm', trừ các Hiệp định với Lebanon, Jamaica, Mexico và Colombia. Khi xác minh lại thì Hiệp định với Lebanon có 'điều khoản bao trùm'.

(vii): Tham khảo *Global Arbitration Review Investment Treaty Arbitration Know-how* chỉ có bốn BIT của Pháp có 'điều khoản bao trùm' (là các Hiệp định với Hong Kong, Nga, Mexico và Yemen).

(**viii):** Điều 9 BIT của Pháp - Moldova sử dụng từ ngữ tương tự, lưu ý là cơ quan tài phán trong vụ *Arif v. Moldova* không coi quy định này là 'điều khoản bao trùm'. Nội dung này sẽ được bàn tiếp trong Mục 4.3 tiếp theo.

(**ix):** Tham khảo *Global Arbitration Review Investment Treaty Arbitration Know-how:* tất cả các BIT của Canada đều không có 'điều khoản bao trùm'.

(x): Tham khảo *Global Arbitration Review Investment Treaty Arbitration Know-how:* chỉ có 12 BIT đang có hiệu lực của Nga là có 'điều khoản bao trùm' (đó là các Hiệp định với Pháp, Trung Quốc, Đức, Hy Lạp, Đan Mạch, Nhật Bản, Hàn Quốc, Cô oét, Hà Lan, Thụy Sĩ, Thổ Nhĩ Kỳ và Anh Quốc).

Có ba bình luận chính. *Thứ nhất*, một số nước có xu hướng áp dụng một chính sách nhất quán liên quan đến 'điều khoản bao trùm'. Canada, Pháp, Ấn Độ và Nga thường không áp dụng các 'điều khoản bao trùm' trong các hiệp định của mình, trong khi Đức và Anh Quốc lại có xu hướng ngược lại. Một *thí dụ* thú vị là có hai thông lệ trái ngược đang diễn ra song song, *thí dụ* Điều 13.2 trong BIT Ấn Độ - Đức quy định rằng các tranh chấp phát sinh từ việc không tuân thủ nghĩa vụ sẽ chỉ được áp dụng các biện pháp chế tài quy định trong hợp đồng đầu tư, và điều này có thể sẽ loại trừ khả năng đưa vụ việc ra trọng tài ISDS.[49] Khác với thông lệ trong hầu hết các BIT của Đức, điều khoản này được đặt ở gần cuối BIT và cách xa các điều khoản chuẩn mực về nội dung trong hiệp định, có khả năng nhằm mục đích làm mờ nhạt tác động của điều khoản này.

Thứ hai, một số quốc gia không có một chính sách nhất quán nào được thể hiện trong các hiệp định của mình, đặc biệt là Trung Quốc và Hàn Quốc. Trung Quốc là trường hợp đặc biệt. 50 trong tổng số 120 BIT quan trọng của Trung Quốc đều có một 'điều khoản bao trùm', dù là ở mức độ rộng hoặc hẹp.[50] Tuy nhiên, các BIT của Trung Quốc từ năm 2005 trở về trước nhìn chung chỉ cho phép nhà đầu tư khiếu nại về việc tước quyền sở hữu ra cơ quan trọng tài ISDS,[51] BIT Trung Quốc - Australia và BIT Trung Quốc - Bỉ đều có các 'điều khoản bao trùm' kiểu này.[52] Ngôn từ quy định trong 'điều khoản bao trùm' ở hai BIT này cũng rất hạn chế, đòi hỏi 'cam kết phải bằng văn bản' và 'các hợp đồng đặc biệt'. Shan cũng đã giải thích về quy định 'các hợp đồng đặc biệt' là làm rõ rằng các nước tiếp nhận đầu tư hoàn toàn có thể ban hành các luật và quy định mới về đầu tư nước ngoài.[53]

[49] Điều 13.2 *BIT Ấn Độ - Đức* (ngày 13/7/1998).

[50] Shan, Wenhua, '"Điều khoản bao trùm" và các hợp đồng đầu tư theo các BIT của Trung Quốc: "Điều khoản bao trùm" có áp dụng với hợp đồng đầu tư không?' (2010) *11 J World Investment & Trade* 135, 136.

[51] Shan, Wenhua and Gallagher, Norah, *Các hiệp định đầu tư của Trung Quốc: Chính sách và thực tế*, Nxb. Đại học Oxford, 2009, 177-180, 8.49-8.55.

[52] Điều 11 BIT Trung Quốc - Australia (ngày 11/7/1988); Điều 9 BIT Trung Quốc - Bỉ và Luxembourg (ngày 01/12/2009).

[53] Shan Wenhua, '"Điều khoản bao trùm" và các hợp đồng đầu tư theo các BIT của Trung Quốc: "Điều khoản bao trùm" có áp dụng với hợp đồng đầu tư không?' (2010) *11 J World Investment & Trade* 140.

Rất khó xác định được những lý do xác đáng giải thích vì sao các quốc gia lại áp dụng một chính sách thiếu thống nhất như vậy. Nhiều biến số khác nhau có thể giải thích cho điều này, *thí dụ* như thay đổi trong môi trường chính trị, điều chỉnh chính sách kinh tế, thời gian đàm phán, và đòn bẩy tương ứng của các quốc gia đối tác trong BIT.

Thứ ba, cuối cùng, các BIT của Nhật Bản và Hoa Kỳ có vẻ như phản ánh đúng nhất thực trạng phát triển của pháp luật về 'điều khoản bao trùm'. Các 'điều khoản bao trùm' trong các BIT của Nhật Bản sau năm 2004 có xu hướng hạn chế hơn, *thí dụ*: cả Điều 5.2 trong BIT Nhật Bản - Lào và Điều 4.3 BIT Nhật Bản - Colombia đều quy định nghĩa vụ phải được đưa ra bằng văn bản.[54] BIT Nhật Bản - Peru thậm chí còn không có một điều khoản riêng quy định về việc tuân thủ cam kết, mà chỉ được thể hiện bằng một nguyên tắc trong Lời nói đầu vốn không có hiệu lực ràng buộc.[55] Đối với Hoa Kỳ, các 'điều khoản bao trùm' trong các BIT của Hoa Kỳ trước năm 2004 có phạm vi rất rộng, một số 'điều khoản bao trùm' trong những BIT đầu tiên của Hoa Kỳ đã từng bị kiện trong những vụ nổi tiếng, như Điều II.2 (c) BIT Hoa Kỳ - Argentina,[56] Điều II.2(c) BIT Hoa Kỳ - Romania,[57] và Điều II.3(c) BIT Hoa Kỳ - Ecuador.[58] Chính vì vậy, có thể dễ dàng hiểu được tại sao các BIT của Hoa Kỳ sau năm 2004 và BIT mẫu của Hoa Kỳ năm 2012 đã bỏ qua 'điều khoản bao trùm', mặc dù các BIT này vẫn bảo lưu khả năng đưa các tranh chấp liên quan đến 'hợp đồng đầu tư' ra trọng tài.[59]

[54] Điều 5.2 BIT Nhật Bản - Lào (ngày 03/8/2008); Điều 4.3 BIT Nhật Bản - Colombia (chưa có hiệu lực).

[55] Lời nói đầu, BIT Nhật Bản - Peru (ngày 10/12/2009).

[56] Vụ *CMS Gas Transmission Co v. Argentina*, Vụ ICSID Số ARB/01/18, Phán quyết hủy bỏ (Phán quyết ngày 12/5/2005, bị hủy bỏ một phần ngày 25/9/2007), [95]-[96]; *El Paso Energy International Co v. Argentina*, Vụ ICSID Số ARB/03/15, Phán quyết về thẩm quyền trọng tài, ngày 27/4/2006 [84]-[85]; *Azurix Corp v. Argentina*, Vụ ICSID Số ARB/01/12, Phán quyết ngày 14/7/2006 [384]; *Pan American Energy LLC v. Argentina*, Vụ ICSID Số ARB/03/13 và *BP America Production Co & Others v. Argentina*, Vụ ICISD Số ARB/04/8, Phán quyết về việc phản đối thẩm quyền trọng tài, ngày 27/7/2006 [114]; *Sempra Energy International v. Cộng hòa Argentina*, Vụ ICSID Số ARB/02/16, Phán quyết ngày 28/9/2007 (Phán quyết bị hủy ngày 29/6/2010) [310]-[314]; *Continental Casualty Co v. Argentina*, Vụ ICSID Số ARB/03/9, Phán quyết ngày 05/9/2008 [300]-[303].

[57] *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, Vụ ICSID Số ARB/04/19, Phán quyết ngày 18/8/2008 [60].

[58] *Noble Energy Inc and Machalapower Cia Ltda v. Ecuador và Consejo Nacional de Electricidad,* Vụ ICSID Số ARB/05/12, Phán quyết về thẩm quyền trọng tài, ngày 05/3/2008 [154]-[157]; *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, Vụ ICSID Số ARB/04/19, Phán quyết ngày 18/8/2008 [319]-[325]; *MCI Power Group LC and New Turbine Inc v. Ecuador*, Vụ ICSID Số ARB/03/6, Phán quyết hủy bỏ, ngày 19/10/2009 [70].

[59] Điều 24.1 BIT Hoa Kỳ - Uruguay (ngày 01/11/2006); Điều 24.1 BIT Hoa Kỳ - Rwanda (ngày 01/01/2012); Điều 24.1 BIT mẫu của Hoa Kỳ năm 2012.

Điều có phần ngạc nhiên là chỉ có một số ít các cường quốc đầu tư này đã hiện đại hóa ngôn ngữ quy định trong 'điều khoản bao trùm' mới đây, hoặc làm rõ ý định của mình trong đó. Đặc biệt, cơ chế của Vương quốc Anh dường như đặc biệt nhất, với Điều 2.2 BIT mẫu của Anh Quốc năm 2008 có cùng công thức với Điều II.2 BIT Vương quốc Anh - Trung Quốc năm 1986.[60] Mặc dù phần lớn nội dung tranh luận xung quanh 'điều khoản bao trùm' tập trung vào việc phải chăng các cơ quan tài phán thiếu sự đồng thuận trong cách giải thích của họ, nhưng chẳng mấy ai nói về việc các quốc gia không đi theo sự phát triển của pháp luật. Mặc dù rất khó để các quốc gia đưa ra một tuyên bố chung làm rõ phạm vi 'điều khoản bao trùm' của mình, *thí dụ* như trường hợp Thụy Sỹ đáp lại quyết định của cơ quan tài phán trong vụ *SGS v. Pakistan*,[61] song nếu nội dung của quy định được soạn thảo rõ ràng hơn và ý định được biểu đạt tốt hơn trong các BIT tương lai, thì điều đó sẽ giúp ích rất nhiều cho việc giải thích quy định của các cơ quan tài phán.

Theo quan điểm được nêu trong vụ *SGS v. Paraguay* về vấn đề bỏ qua các quyền theo BIT dù là ngụ ý hay tuyên bố rõ ràng, vụ này có nhiều hệ quả liên quan tới vấn đề về nghĩa vụ. Nước tiếp nhận đầu tư là bên duy nhất của cả BIT và hợp đồng đầu tư, nên nước tiếp nhận đầu tư hoàn toàn có quyền tự do trong việc hạn chế ảnh hưởng của 'điều khoản bao trùm' trong BIT, hoặc loại trừ việc áp dụng bất kỳ BIT nào đối với các hợp đồng đầu tư của họ, và sau đó sẽ phải chịu trách nhiệm cho xung đột nào phát sinh liên quan đến nó.[62] Chính vì vậy, việc soạn thảo các 'điều khoản bao trùm' rõ ràng hơn và chiến lược xây dựng BIT tích cực hơn, hoàn toàn là vì lợi ích của các quốc gia. Quan điểm này được củng cố trong những diễn tiến gần đây liên quan đến việc mở rộng phạm vi đối xử MFN sang cả các 'điều khoản bao trùm'.

Điều kỳ lạ ở đây đó là hội đồng trọng tài đã không kiểm chứng các từ ngữ tại Điều 4 BIT Pháp - Argentina và kết luận rằng nguyên tắc *ejusdem generis* (nguyên tắc cùng loại) đã được đáp ứng. Gazzini và Tanzi nhận thấy rằng từ ngữ tại Điều 4 không phải là của một 'điều khoản bao trùm' điển hình. Thực tế là hiếm khi các BIT của Pháp bao gồm một 'điều khoản bao trùm' có dạng thức điển hình, mặc dù các nhà bình luận chấp nhận rằng Điều 4 là một '"điều khoản bao trùm" cho tất cả các mục đích thực tế'.[63]

[60] BIT mẫu của Anh Quốc năm 2008; Điều II.2 BIT Trung Quốc - Anh Quốc (ngày 15/5/1986).

[61] Thư của Chính phủ Thụy Sĩ gửi Phó Tổng thư ký ICSID (ngày 01/10/2003).

[62] Wong Jarrod, '"Điều khoản bao trùm" trong các BIT: các vi phạm hợp đồng, vi phạm hiệp định và phân chia giữa các nước đang phát triển và phát triển trong các tranh chấp đầu tư nước ngoài' (2006 - 2007) *14 Geo Mason L Rev* 135, 171-172.

[63] Gazzini, Tarcisio and Tanzi, Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 978, 980.

Vụ Arif v. Moldova

Trong vụ việc gần đây nhất, đó là vụ *Arif kiện Moldova*, ông Arif cáo buộc sự vi phạm Điều 9 BIT Pháp - Moldova. Ông này đã yêu cầu viện dẫn điều khoản MFN trong Điều 4 BIT Pháp - Moldova để đưa vào các 'điều khoản bao trùm' trong Điều 2.2 BIT Moldova - Anh Quốc và Điều khoản II.3 (c) BIT Moldova - Hoa Kỳ, vốn đã được cấu thành là những 'điều khoản bao trùm'. Điều 9 BIT Pháp - Moldova chỉ ra rằng:

> Các khoản đầu tư là đối tượng của một cam kết đặc thù của một trong các bên tham gia Hiệp định đối với các công dân và công ty của Bên tham gia Hiệp định còn lại, được điều chỉnh, không ảnh hưởng đến các giao dịch chuyển nhượng của hợp đồng hiện hành, bằng các điều khoản của cam kết, miễn là nó có nhiều điều khoản hợp lệ hơn những điều khoản đã được quy định trong hợp đồng hiện hành.[64]

Cấu thành chính xác của điều khoản này, vốn đã có những sự khác biệt nhỏ so với Điều 9 trong mô hình BIT mới nhất của Pháp, là vấn đề quan tâm đặc biệt của hội đồng trọng tài, bởi lẽ hội đồng trọng tài ở đây quy định rằng Điều 9 không phải là một 'điều khoản bao trùm' mà là một điều khoản 'bảo vệ quyền lợi':

> *Thứ nhất*, ý nghĩa thông thường của các điều khoản này trong bối cảnh của chúng và dưới góc độ đối tượng, mục đích của BIT, làm cho hội đồng trọng tài nhận thấy rằng Điều 9 (và Điều 5 (2) trong phạm vi liên quan đến 'một cam kết cụ thể') có ý nghĩa và mục đích cụ thể của chính nó, tách biệt với 'điều khoản bao trùm', và đồng ý với bị đơn về vấn đề này. Theo ý nghĩa thông thường của văn bản, mục đích cụ thể của các điều khoản này không nhằm đảm bảo việc tuân thủ các nghĩa vụ mà quốc gia đặt ra đối với nhà đầu tư, mà là để cung cấp cho các nhà đầu tư quyền yêu cầu áp dụng bất kỳ nguồn luật nào thuận lợi hơn các quy định của BIT. Học thuyết này đề cập đến các điều khoản với tư cách là các điều khoản về bảo vệ quyền lợi.[65]
>
> Loại điều khoản này, theo ngữ nghĩa thông thường, đơn giản chỉ ra rằng, trong việc áp dụng hoặc thực thi các biện pháp bảo vệ hiện có do BIT đưa ra, cần lưu ý đến các điều khoản thuận lợi hơn trong quy định của pháp luật quốc gia hoặc các thoả thuận

[64] *Franck Charles Arif v Moldova,* ICSID Vụ số ARB/11/23, Phán quyết ngày 08/4/2013 [385].

[65] *Franck Charles Arif v Moldova,* ICSID Vụ số ARB/11/23, Phán quyết ngày 08/4/2013 [388].

chuyên biệt. Do đó, nó khẳng định rằng, nhà đầu tư có thể được hưởng lợi từ việc đối xử ưu đãi hơn, chứ không thêm một nghĩa vụ mới, một nghĩa vụ cụ thể hay riêng biệt, theo nghĩa vụ tôn trọng hiệp định từ các cam kết đã được đưa ra.[66]

Tuy nhiên, Hội đồng trọng tài đã không đồng ý với Moldova rằng các 'điều khoản bao trùm' về mặt bản chất chỉ đơn thuần là thủ tục, nhưng chúng đã tồn tại một cách độc lập và có khả năng đưa vào thông qua điều khoản MFN.[67]

Sau đó, Hội đồng trọng tài kết luận rằng: vì điều khoản MFN được soạn thảo theo nghĩa rộng, nên nó có thể đưa vào một 'điều khoản bao trùm' từ BIT Moldova - Anh Quốc hoặc BIT Moldova - Hoa Kỳ; và nhận thấy thẩm quyền đối với các cam kết cụ thể của ông Arif bằng cách đưa vào một tiêu chuẩn bảo vệ thuận lợi hơn bởi các 'điều khoản bao trùm'.[68] Gazzini và Tanzi chỉ ra rằng, Hội động trọng tài trong vụ *Arif v. Moldova* chưa tham chiếu một chút nào đến phán quyết của vụ *EDF v. Argentina,* hoặc chưa tham khảo nguyên tắc cùng loại (*ejusdem generis*).[69] Họ lập luận rằng Hội đồng trọng tài trong vụ *Arif v. Moldova* nên từ chối sự kết hợp của 'điều khoản bao trùm' thông qua MFN, bởi theo logic của điều khoản đó, sẽ không có quyền về cùng một vấn đề được cho phép bởi hiệp định cơ bản.[70]

Một vấn đề khác liên quan đến lập luận trong vụ *Arif v. Moldova*, đó là việc soạn thảo Điều 10 BIT Pháp - Argentina ở vụ việc *EDF v. Argentina* chỉ có những thay đổi nhỏ so với Điều 9 của BIT Pháp - Moldova trong vụ *Arif v. Moldova*;[71] vụ *Arif v. Moldova* phát hiện ra rằng nếu Điều 9 không phải là một 'điều khoản bao trùm', thì sẽ gây ra sự nghi ngờ đối với phán quyết của vụ *EDF v. Argentina*, nơi mà không có một đánh giá nào đủ chặt chẽ đối với các từ ngữ tại Điều 10 và sự tuân thủ đối với nguyên tắc cùng loại (*ejusdem generis*).

Có đề xuất cho rằng, mấu chốt của vấn đề này là việc giải thích thuật ngữ và hiệu lực của các điều khoản cam kết đặc biệt. Trong bối

66 *Franck Charles Arif v Moldova,* ICSID Vụ số ARB/11/23, Phán quyết ngày 08/4/2013 [389].

67 *Franck Charles Arif v Moldova,* ICSID Vụ số ARB/11/23, Phán quyết ngày 08/4/2013 [395].

68 *Franck Charles Arif v Moldova,* ICSID Vụ số ARB/11/23, Phán quyết ngày 08/4/2013 [396].

69 Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 983.

70 Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 990.

71 Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) *14J World Investment & Trade* 980-981.

cảnh của các quy định về bảo vệ quyền lợi trong BIT Trung Quốc - Pháp, Shan lập luận rằng, các 'điều khoản bao trùm' và các điều khoản về bảo vệ quyền lợi là vô cùng giống nhau; chúng chỉ khác nhau trong từng trường hợp cụ thể, và điều này có nghĩa là nghĩa vụ quốc tế được ấn định bởi hiệp định có sau sẽ có giá trị cao hơn:

> Không giống như các 'điều khoản bao trùm', cái mà giải quyết vấn đề (đảm bảo cho các dự án đầu tư đặc biệt) từ quan điểm của nước tiếp nhận đầu tư bằng cách buộc phải tuân thủ các nghĩa vụ hoặc cam kết của mình đối với các vấn đề đầu tư, các điều khoản 'bảo vệ quyền lợi' lại giải quyết cùng một vấn đề theo góc độ của các nhà đầu tư nước ngoài bằng cách cho phép họ có quyền đối với những cam kết ưu đãi hơn trong các thỏa thuận hoặc các cam kết đặc biệt tương tự như vậy. Nói cách khác, cả hai đều phục vụ cùng một mục đích, mặc dù những cách thức thực hiện để đạt được mục đích đó là không hoàn toàn giống nhau.[72]

Ngoài ra còn có tranh luận rằng, trái với kết luận của hội đồng trọng tài trong vụ *Arif v. Moldova*, Điều 9 BIT Pháp - Moldova có thể được giải thích như một 'điều khoản bao trùm' với một ý nghĩa hạn chế, khả năng này cũng được thừa nhận bởi Gazzini và Tanzi.[73] Dường như xuất phát từ ngôn ngữ của điều khoản mà tại đó cam kết cụ thể liên quan đến các vấn đề đầu tư có bao hàm các điều khoản không thuận lợi hoặc kém thuận lợi hơn so với quy định tại BIT, thì một cam kết cụ thể sau đó sẽ được quy định thuận lợi hơn theo các điều khoản của BIT. Giải thích này phù hợp với đối tượng và mục đích của các BIT trong việc khuyến khích và bảo hộ đầu tư, và một 'điều khoản bao trùm' có phạm vi hạn chế hơn so với cấu thành thông thường.

Một sự suy đoán có thể xảy ra trong tương lai đối với sự phát triển của vấn đề này - đó là nếu có một dự thảo điều khoản MFN và 'điều khoản bao trùm' trong hiệp định cơ bản, thì một 'điều khoản bao trùm' được dự thảo theo nghĩa rộng hơn trong hiệp định với bên thứ ba có thể được đưa vào thông qua kênh MFN. Một 'điều khoản bao trùm' trong hiệp định cơ bản, ngay cả khi được soạn thảo theo cách tiếp cận rất hạn chế, vẫn có thể được chấp nhận là phù hợp với nguyên tắc cùng loại *ejusdem generis*. Việc áp dụng này có ảnh hưởng tương đối lớn, vì điều này có thể đem lại một công thức vừa hạn chế và vừa mở rộng đối với

72 Shan Wenhua, 'Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former?' (2010) *11J World Investment & Trade* 144.

73 Gazzini Tarcisio and Tanzi Attila, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment aArbitration' (2013) *14J World Investment & Trade* 990.

các 'điều khoản bao trùm', và làm cho chính sách đầu tư của quốc gia bị đa phương hóa đối với 'điều khoản bao trùm'.

Mục 2. CÁC NGUYÊN TẮC KHÁC

1. Bảo đảm cho nhà đầu tư nước ngoài chuyển tiền ra nước ngoài

Các điều khoản về thanh toán chuyển tiền không những được các nhà đầu tư xem xét, mà còn được nước tiếp nhận đầu tư cân nhắc, coi đây như là một phần quan trọng nhất của BIT. Các điều khoản này giải quyết một khía cạnh của mối quan hệ giữa nước tiếp nhận đầu tư và nhà đầu tư nước ngoài, mà trong đó lợi ích của họ có thể rất khác nhau.

Nhiều yêu cầu đầu tư được đưa ra chống lại Argentina trong cuộc khủng hoảng tài chính năm 2001 đã gây ra một cuộc tranh luận về những rủi ro không tuân theo các bảo đảm như vậy đối với một số ngoại lệ nhất định. Tuy nhiên, trong khi cuộc khủng hoảng đặc biệt này có thể gây ra sự chú ý cho vấn đề này, nó đã luôn gây nhiều tranh cãi. Vì vậy, Jeswald W. Salacuse đã tuyên bố vào năm 1990:

> Việc đàm phán các điều khoản của BIT về chuyển tiền thường là một trong những cuộc đàm phán khó khăn nhất để đi đến kết luận cuối cùng. Các quốc gia chuyển vốn tìm kiếm các bảo đảm rộng rãi, không hạn chế đối với việc chuyển tiền, trong khi đó các nước đang phát triển lại nhấn mạnh đến các bảo đảm có giới hạn, tùy vào nhiều ngoại lệ.[74]

Trong khi các điều khoản như vậy có thể và thực sự là khác nhau giữa các hiệp định, thì hầu hết các IIA quy định rằng một loạt các khoản thanh toán và các khoản đầu tư có liên quan đến vốn khác có quyền được chuyển ra khỏi nước tiếp nhận đầu tư ngay lập tức, và thông thường là bằng một đơn vị tiền tệ tự do chuyển đổi.

Một thoả thuận rất toàn diện thường bao gồm: (i) 'doanh thu' về đầu tư, bao gồm tất cả lợi nhuận, lãi, lợi nhuận vốn, tiền bản quyền và quản lý, hỗ trợ kỹ thuật hoặc các khoản phí khác; (ii) tiền lợi tức thu được từ thanh lý hoặc bán hoặc toàn bộ hoặc một phần của khoản đầu tư; và (iii) các khoản thanh toán theo hợp đồng, và các khoản thu nhập khác của người nước ngoài, nhân sự nước ngoài có liên quan đến đầu tư.

[74] Poulsen, 2010, tr. 110; Duncan Williams, 'Quan điểm chính sách về việc sử dụng kiểm soát vốn tại các quốc gia mới nổi: Các bài học từ cuộc khủng hoảng tài chính châu Á và một sự nhìn nhận dưới góc độ pháp luật quốc tế', 70 *Fordham L. Rev*. 561, 614 (2001); Horacio Grigera Naon, 'Sovereignty and Regionalism', 27 *Law & Pol'y Int'l Bus*. 1073, 1077-1078 (1996).

BIT Áo - Hong Kong quy định tương đối rộng (tại Điều 7: 1 & 2):

> Quyền không hạn chế chuyển ra nước ngoài các khoản đầu tư của họ [...] và doanh thu + Nhà đầu tư cũng có quyền chuyển tiền không hạn chế ở nước ngoài nói riêng, nhưng không phải là một cách độc quyền…].
>
> Chuyển tiền sẽ được thực hiện không do dự bằng bất kỳ loại tiền tệ tự do chuyển đổi nào.

Một số BIT cho phép sự sai lệch từ các nghĩa vụ được đề cập trong điều khoản chuyển vốn trong một số trường hợp. Một lựa chọn là áp dụng điều khoản chuyển tiền đối với pháp luật quốc gia, trong trường hợp đó quốc gia tiếp nhận đầu tư có thể tự do hạn chế dòng vốn ra khỏi nền kinh tế, *thí dụ* trong suốt thời kỳ khủng hoảng kinh tế, miễn là được thực hiện theo đúng pháp luật. *Thí dụ*: Điều 5 Hiệp định khuyến khích và bảo hộ đầu tư Bồ Đào Nha - Bulgaria ngày 27/5/1993. Một lựa chọn khác là cho phép ngoại lệ chuyển vốn tự do, nhưng chỉ trong những trường hợp khó khăn về cán cân thanh toán, và thường có một yêu cầu rằng những hạn chế đó là cần thiết, không phân biệt đối xử và trên cơ sở tạm thời. *Thí dụ*: Điều 6 Hiệp định khuyến khích và bảo hộ đầu tư Vương quốc Anh - Argentina ngày 11/12/1990. Cuối cùng, một số hiệp định bao gồm các hạn chế lớn khác như cho phép hạn chế về tháo vốn (ra nước ngoài), *thí dụ*: các BIT của Chile nhất định cố gắng hạn chế dòng vốn ra vào và dòng vốn ngắn hạn. *Thí dụ*: Hiệp định khuyến khích và tương trợ đầu tư Chile - Áo (Nghị định thư ngày 08/9/1999). Những ngoại lệ khác có thể xảy ra, như: Nước tiếp nhận đầu tư có thể ngăn chặn các nhà đầu tư nước ngoài tự do chuyển tiền và vốn ra khỏi nước mình, nếu quốc gia đó đang trong tình hình khó khăn về kinh tế.

Tuy nhiên, điều này là khá phổ biến trong các FTA, cái mà thông thường cho phép đưa thêm vào các biện pháp bảo vệ được thúc đẩy bởi cán cân thanh toán hoặc các rào cản về tài chính từ bên ngoài. *Thí dụ*: Điều 10.12 FTA Hàn Quốc - Singapore, hoặc Điều 21.04 NAFTA. Những ngoại lệ của thực tế này khá là bất bình thường trong các BIT.

2. Di chuyển của thể nhân

Nhiều IIA cung cấp thêm những sự đảm bảo cho các nhà đầu tư nước ngoài và khả năng trong quản lý toàn bộ đầu tư của họ tại nước tiếp nhận đầu tư thông qua các điều khoản riêng về di chuyển của thể nhân liên quan đến vấn đề đầu tư đó. Các điều khoản về vấn đề này thường

được tìm thấy trong BIT. Thay vào đó, các FTA với các điều khoản đầu tư có thể bao gồm một chương độc lập về di chuyển của thể nhân, cái mà vốn thường có các nguyên tắc chi tiết hơn và bao gồm nhiều thể nhân hơn so với các điều khoản được tìm thấy trong các BIT. Những nghĩa vụ này thường áp dụng cho hai tình huống khác nhau.

Thứ nhất, một vài BIT, cụ thể là những BIT của Hoa Kỳ và Canada, cấm nước tiếp nhận đầu tư áp dụng các biện pháp như yêu cầu các nhà đầu tư nước ngoài phải chỉ định những người quản lý cấp cao có cùng một quốc tịch nhất định. Thêm nữa, theo những BIT này, các nước tiếp nhận đầu tư có thể yêu cầu rằng đa số thành viên hội đồng quản trị của công ty nước ngoài phải là các công dân hoặc người cư trú tại nước tiếp nhận đầu tư, tùy thuộc vào các điều kiện mà yêu cầu này 'không làm giảm đi một cách thực chất khả năng của nhà đầu tư trong việc thực hiện kiểm soát đầu tư'.[75]

Thứ hai, một số IIA tạo thuận lợi cho các nhà đầu tư trong việc nhập cảnh và cư trú, cũng như đội ngũ nhân sự cần thiết cho việc thiết lập và vận hành hoạt động đầu tư. Hầu hết các IIA với các nghĩa vụ như vậy làm hạn chế các quy định đối với các nhân viên quản lý và điều hành, hoặc đối với vị trí đòi hỏi kiến thức chuyên ngành. Đôi khi, những lợi ích đó cũng được mở rộng cho các thành viên trong gia đình của người có liên quan đến việc đầu tư, *thí dụ*: BIT Trung Quốc - Jordan,[76] hoặc đối với tất cả những người làm thuê trong công ty nước ngoài, độc lập với thâm niên và trình độ chuyên môn, theo quy định tại một số BIT của Trung Quốc, thí dụ như BIT với Barbados năm 1998.[77] Để không can thiệp vào khả năng của nước tiếp nhận đầu tư trong việc điều chỉnh quy định nhập cảnh và lưu trú đối với người nước ngoài, các nguyên tắc này thường phải phù hợp với các đạo luật, các quy định và những chính sách liên quan đến việc nhập cảnh của người nước ngoài, hoặc được soạn thảo theo một cách thức để thể hiện một nghĩa vụ tôn trọng, tận tâm tốt nhất.

3. Hạn chế áp dụng các điều kiện đầu tư (Restrictions on Performance Requirements)

Các quốc gia tiếp nhận đầu tư thường sử dụng những biện pháp đòi hỏi các hành vi nhất định từ các hoạt động đầu tư nước ngoài, những cái

[75] Hiệp định mẫu của Canada (Canada Model FIPA), Điều 6.1-2.

[76] BIT Trung Quốc - Jordan, Điều 2.3.

[77] BIT Trung Quốc - Barbados, Điều 2.2.

mà được coi là sẽ mang lại những lợi ích nhất định cho nền kinh tế của họ. Các điều kiện đầu tư này có thể liên quan đến việc thúc đẩy sản xuất trong nước; yêu cầu khả năng của các nhà đầu tư nước ngoài về mức độ nội địa hoá trong hoạt động của họ; hay để cải thiện tình hình tài chính ở nước ngoài, hoặc để cho một tỷ lệ được đưa ra của sản lượng đầu tư phải được áp dụng; hoặc chuyển giao công nghệ, v.v... Những biện pháp này có thể là bắt buộc hoặc tự nguyện, như các điều kiện để đạt được một số lợi ích nhất định.

Một số biện pháp này, cái mà liên quan đến yêu cầu hàm lượng nội địa và cân bằng thương mại quốc tế, đi ngược lại Hiệp định của WTO về các biện pháp đầu tư liên quan đến thương mại (TRIMs) và bị cấm đối với tất cả các thành viên của WTO.

Phán quyết trong vụ *Mobil and Murphy v. Canada* về trách nhiệm và nguyên tắc định lượng (Principles of Quantum) cho thấy rằng các hướng dẫn nghiên cứu và phát triển đã đề ra các đòi hỏi về chi tiêu cho các dịch vụ trái với Điều 1106 và không được bảo đảm bởi bảo lưu tại Điều 1108.[78]

Hộp số 10. Vụ Mobil and Murphy v. Canada

243. Hội đồng trọng tài tuyên bố cấu trúc và hiệu lực của Điều 1108 một cách chi tiết trong phần sau của Phán quyết này. Tuy nhiên, Hội đồng trọng tài xem xét nó một cách thích đáng để tuyên bố ngắn gọn về vấn đề Quyết định của Canada bao gồm các điều khoản của Đạo luật Hòa hảo (Accord Acts) về R&D và E&T trong các khoản miễn trừ của Điều 1108 và sự ảnh hưởng gắn liền với quyết định đó đối với các mục đích đánh giá theo Điều 1106.

244. Trong danh sách các biện pháp không phù hợp, Canada xác định yêu cầu của Đạo luật Hòa hảo rằng các Kế hoạch Phúc lợi bao gồm chi tiêu R&D như là một biện pháp trong Phụ lục I của NAFTA. Hiệp định này lập luận rằng không một sự can thiệp tiêu cực nào có thể được rút ra từ danh sách này.

245. Phân tích của Hội đồng trọng tài về Điều 1106 đã được thực hiện theo chính các điều khoản riêng. Sự lồng ghép giữa các Đạo luật Hòa hảo và những điều khoản của nó điều chỉnh về R&D và E&T, và sự tham chiếu đặc thù đến Điều 1106, có xu hướng khẳng định rằng: các yêu

[78] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Vụ số. ARB(AF)/07/4, Phán quyết về trách nhiệm và nguyên tắc định lượng, ngày 22/5/2012, at 246.

cầu về R&D và E&T của Đạo luật Hòa hảo có thể được xem như là sự cấu thành một đòi hỏi hoạt động bị cấm theo Điều 1106 của NAFTA. Trong khi Hội đồng trọng tài không dựa vào việc sử dụng miễn thuế của bị đơn để làm cơ sở cho kết luận của mình rằng: Hướng dẫn năm 2004 đã trùng lắp với Điều 1106, nhưng nó ghi nhận rằng quyết định của Canada là phù hợp với kết luận của Hội đồng trọng tài.

246. Tóm lại, Hội đồng trọng tài tuyên bố rằng: 1) Các yêu cầu về R&D và E&T được ấn định bởi Hướng dẫn năm 2004 là 'các dịch vụ' theo ngữ nghĩa của Điều 1106; 2) Hướng dẫn năm 2004 và những đòi hỏi pháp lý đã ấn định việc thực hiện của chúng đối với các nhà vận hành để thực hiện chi tiêu cho R&D và E&T trong khu vực; và 3) theo yêu cầu của Điều 1108, các yêu cầu về R&D và E&T của Hướng dẫn năm 2004 và việc thực hiện chúng, cấu thành một yêu cầu về hoạt động bị cấm theo Điều 1106 của NAFTA.

Một số FTA với các nhà quản lý đầu tư đã hành động theo tiền lệ của NAFTA, và đã đưa ra các hạn chế về việc sử dụng các điều kiện đầu tư. Trong một số trường hợp, *thí dụ* như FTA giữa Ấn Độ, Singapore, Nhật Bản và Malaysia, các quy định này thực sự tạo ra các nghĩa vụ ở cấp độ đa phương.

Trong nhiều trường hợp khác, những điều khoản áp dụng cho một số biện pháp không được quy định bởi TRIMs, *thí dụ* như các quy định liên quan đến chuyển giao công nghệ. Điều này không chỉ đúng với trường hợp FTA của Hoa Kỳ và Canada ký kết, mà còn đúng với nhiều hiệp định khác do các quốc gia không thuộc NAFTA ký kết như các FTA của Hàn Quốc, Chile, Panama, Singapore, Nicaragua và Đài Loan. Tất cả các điều kiện đầu tư thường bị cấm - theo các ngoại lệ - khi chúng là bắt buộc; các biện pháp liên quan đến chuyển giao công nghệ có thể được coi là điều kiện để có được hoặc tiếp tục có được những lợi thế nhất định.

Các BIT thường không có điều khoản về các điều kiện đầu tư, ngoại trừ Hiệp định đã được ký kết giữa Hoa Kỳ và Canada trong đó có quy định một điều khoản bổ sung với TRIMs về vấn đề này. Một số Hiệp định khác, chẳng hạn như BIT Phần Lan - Kyrgyzstan năm 2002, cũng cấm một số biện pháp tương tự khi chúng được ấn định như các yêu cầu bắt buộc.[79]

[79] BIT Phần Lan - Kyrgyzstan, Điều 3.4.

TÓM TẮT CHƯƠNG 7

Khi nói đến 'điều khoản bao trùm', cần phải chú ý đến sự khác biệt trong từ ngữ khi xem xét cách giải thích sự khác biệt này của các nhà chức trách trong việc giải thích các 'điều khoản bao trùm'. Mặc dù có vẻ như các trường hợp gần đã nghiêng về cách giải thích theo nghĩa rộng bằng việc trao hiệu lực cho 'điều khoản bao trùm', khi định vị những mâu thuẫn trong cách giải thích của các cơ quan có thẩm quyền. Trong vụ việc gần đây nhất, vụ *SGS v. Paraguay* đã được chấp thuận với cách giải thích theo nghĩa rộng về 'điều khoản bao trùm'. Trong khi vẫn còn những điều chưa rõ ràng thì những sự xem xét kỹ lưỡng hơn của các phiên xét xử trong tương lai là một điều rất được kỳ vọng. Thực tiễn cẩn trọng khi ký kết các hiệp định đòi hỏi phải phân định rõ phạm vi của các 'điều khoản bao trùm' trong các IIA trong tương lai, và đặc biệt là mối quan hệ giữa điều khoản của hiệp định với một yêu cầu theo hợp đồng đầu tư với một điều khoản về thẩm quyền tài phán độc lập.[80]

Để đánh giá liệu rằng MFN có thể được mở rộng đối với 'điều khoản bao trùm' hay không, thì điều này có thể không bao giờ được khẳng định trước, rằng các 'điều khoản bao trùm' có thể luôn luôn được đưa vào khi có điều khoản MFN. Giống như những 'điều khoản bao trùm', sự thay đổi trong câu từ của điều khoản MFN có thể làm thay đổi một cách đáng kể phạm vi của nó. Các quốc gia liên quan nên tinh chỉnh việc soạn thảo các điều khoản MFN của mình và bao gồm cả việc xem xét các 'điều khoản bao trùm' trong lộ trình miễn trừ của các BIT trong tương lai.

CÂU HỎI / BÀI TẬP

1. Liệu sự sắp đặt của 'điều khoản bao trùm' có tạo sự khác biệt trong việc giải thích điều khoản đó hay không? Trong vụ *SGS v. Pakistan,* trọng tài đã lưu ý rằng Điều 11 đã không sát nội dung của các điều khoản khác trong việc áp dụng BIT, và vì vậy nên xem xét nó như là một điều khoản khác, hơn là việc coi đây là nghĩa vụ 'yêu cầu đầu tiên'.

2. Phân tích các 'nguyên tắc khác' trong Luật đầu tư quốc tế.

[80] Yannaca-Small, '*Katia BIVAC v. Paraguay versus SGS v. Paraguay*: The Umbrella Clause Still in Search of One Identity', (2013) *28 ICSID Review* 313.

TÀI LIỆU CẦN ĐỌC

1. Nigel Rawding, 'Protecting Investments under State Contracts: Some Legal and Ethical Issues', *11(4) Arb. Int'l* 341-45 (1995).
2. Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims - the SGS Cases Considered', trong *International Investment Law and Arbitration* 325-46 (Todd Weiler ed., Cameron 05/2005) (2005).
3. Thomas W. Wälde, 'The Umbrella Clause in Investment Arbitration - A Comment on Original Intentions and Recent Cases', *6 J. World Investment & Trade* 183 (2005); 1:4 *Transnational Dispute Management* (10.2004), tr. 1-4; 15-28.
4. Anne K. Hoffmann, *Counterclaims by the Respondent State in Investment Arbitrations*, SchiedsVZ 2006, Heft 6, at 317.
5. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction) (6 August 2003) 133-73.
5. *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29/01/2004), 92-97; 113-135.
6. *El Paso Energy Int'l Co. v. Argentina*, ICSID Case ARB/03/15(27/04/2006), 63-88.
7. Zadek, 'The Path to Corporate Responsibility', *Harvard Business Review* 125 (12/ 2004).
8. Luke Eric Peterson, 'Miner's Claim against South Africa Moves forward Slowly', *1:13 Investment Arb. Rep.* (ngày 22/10/2008).
9. Charles H. Brower, II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes', trong *1 YB. on Int'l Investment Law & Policy* 347, 347-56; 365-78 (2008/2009).
10. Andrea Shemberg, *Stabilization Clauses and Human Rights,* Research Project Conducted for International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights (ngày 11/03/2008), http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf, tr. 4-16; 32-41.
11. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (ngày 08/6/2009), 10-26.
12. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (ngày 16/10/2006).
13. Konrad von Moltke, *IISD, A Model International Investment Agreement for the Promotion of Sustainable Development* (2004), Điều từ 11-24.
14. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 213-313; 831-36 (Kluwer 2005).
15. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* 72-78 (Oxford 2008).
16. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 541-562 (Oxford 2008).
17. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* 437-479 (Kluwer 2008).
18. Katia Yannaca-Small, 'What about This "Umbrella Clause"?, trong *Arbitration Under International Investment Agreements: A guide to the Key Issues* 479 (Katia Yannaca-Small ed., Oxford 2010).
19. Anthony Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', *20 Arb. Int'l* 411 (2004).
20. Stanimir Alexandrov, 'Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?', trong *Arbitration Under International Investment Agreements: A guide to the Key Issues* 323 (Katia Yannaca-Small ed., Oxford 2010).

CHƯƠNG 8. NGOẠI LỆ

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CHƯƠNG 8

NGOẠI LỆ CỦA CÁC NGUYÊN TẮC CỦA LUẬT ĐẦU TƯ QUỐC TẾ

Mục đích học
Chương 8

- Giới thiệu các biện pháp phòng vệ mà các nước có thể đưa ra để đối phó với các khiếu nại đầu tư;
- Thảo luận các điều khoản bảo hộ thiết yếu trong các IIA và luật tập quán quốc tế;
- Đánh giá liệu các tập quán quốc tế có hữu ích trong bối cảnh ISDS sử dụng trọng tài hay không? Hay là các quy định đó quá nghiêm ngặt đến mức trọng tài cũng không cảm thấy thỏa đáng?;
- Thảo luận xem mỗi cá nhân có quyền sở hữu độc lập với các quốc gia hay không?

Trong khi việc khuyến khích và bảo hộ đầu tư đối với nhà đầu tư nước ngoài và khoản đầu tư của họ chính là mục đích chính của việc kí kết một IIA, các nước tiếp nhận đầu tư phải cân bằng các lợi ích này với các mục tiêu chính sách khác, bao gồm các chính sách phi thương mại như các chính sách liên quan đến y tế, an ninh, việc làm và các chính sách bảo vệ người tiêu dùng và môi trường.

Hơn nữa, các mối quan tâm này phải được giải quyết trong khuôn khổ một chính sách thương mại có lợi cho tất cả các lĩnh vực của xã hội. Điều này đòi hỏi, trong một số trường hợp, việc điều tiết một số hoạt động kinh tế nhất định có thể không đáp ứng đầy đủ các nghĩa vụ được cam kết trong các IIA.

Sự cần thiết trong việc điều chỉnh các khía cạnh này không phải là mối quan tâm hàng đầu trong việc kí kết những IIA. Thay vào đó, trọng tâm của các công cụ này phụ thuộc vào việc khuyến khích và bảo hộ đầu tư nước ngoài.

Phần lớn các BIT không đưa ra các quy định về sự khác biệt so với các quyền và nghĩa vụ được thừa nhận trong đó. Thay vào đó, các nguyên tắc đầu tư được thông qua trong các văn bản rộng hơn các FTA và thường phải chịu sự bảo lưu theo ngành, cũng như các ngoại lệ chung để đưa ra các nguyên tắc về đầu tư trong sự tương quan với các mục tiêu pháp lý khác.

Chuyển sang các thí dụ về ngoại lệ khác có liên quan đến các biện pháp điều tiết, có một số thí dụ chủ yếu.

Bốn thí dụ được xem xét dưới đây: (i) ngoại lệ chung thông qua các phụ lục; (ii) ngoại lệ cụ thể từ điều khoản tước quyền sở hữu; (iii) một điều khoản ngoại lệ chung được mô phỏng theo Điều XX của GATT; (iv) giới thiệu rõ ràng hơn về các thuật ngữ chính.

Thứ nhất, thông thường, việc sử dụng các phụ lục về ngoại lệ đã đi kèm với các IIA, bao gồm các điều khoản tự do hóa đầu tư. Nhưng điều này không hoàn toàn, và không nhất thiết phải như vậy trong mọi tình huống. Nhiều IIA có ba loại phụ lục: (i) không bao gồm các lĩnh vực cụ thể từ một số hoặc tất cả các nghĩa vụ của IIA; (ii) không bao gồm các biện pháp hiện tại từ các nghĩa vụ của hiệp định thương mại; (iii) không bao gồm các biện pháp tương lai từ các nghĩa vụ của IIA. Việc đưa ra các loại trừ càng rộng rãi thì khả năng các loại trừ này càng lớn, cũng có thể bao gồm những vấn đề có thể dẫn tới các yêu cầu về việc chiếm đoạt hoặc các nghĩa vụ khác có liên quan đến các biện pháp điều tiết. Tuy

nhiên, cần lưu ý rằng cách tiếp cận này không nên được sử dụng theo cách thức để tạo ra cách để thoát khỏi nghĩa vụ của một hiệp định.

Thứ hai, các ngoại lệ cụ thể từ các điều khoản tước quyền sở hữu. Nhiều IIA bao gồm các điều khoản cụ thể loại trừ một số loại biện pháp khỏi các yêu cầu bồi thường theo quy định về tước quyền sở hữu, đặc biệt là các biện pháp áp thuế. Trong nhiều trường hợp, việc cấp licence bắt buộc theo các chế độ sở hữu trí tuệ cũng bị loại trừ. Có nhiều thí dụ về điều này. Một trong số đó có mô hình BIT của Columbia, Điều II.4: 'Các điều khoản của Hiệp định này sẽ không áp dụng cho các vấn đề thuế'. Sử dụng thí dụ này là có thể bao gồm các điều khoản trong văn bản cũng loại trừ các loại biện pháp khác của chính phủ, với các yêu cầu về việc tước quyền sở hữu hoặc những vi phạm khác của IIA. *Thí dụ*, các biện pháp bảo vệ sức khoẻ, môi trường lao động hoặc bảo vệ sức khoẻ con người trong tương lai có thể được loại trừ khỏi các tuyên bố về việc tước quyền sở hữu gián tiếp. Loại loại trừ cụ thể này dường như chưa được sử dụng cho các biện pháp ngoài thuế và liên quan đến sở hữu trí tuệ, nhưng chắc chắn là có thể làm như vậy.

Ở đây, một lần nữa lại phát sinh một số câu hỏi. *Thí dụ*: Tiêu chuẩn nào sẽ được sử dụng để đo lường sự không hợp lý hoặc tùy tiện? Các phép thử pháp luật thương mại có phải là những thử nghiệm đầu tiên, một số có thể rất hạn chế? Cũng như vậy, điều gì sẽ khiến cho các phép thử trong luật thương mại là cần thiết, cũng là một khái niệm rất chặt chẽ trong hệ thống WTO. Hơn nữa, không rõ lý do tại sao vấn đề giới hạn về thương mại được nêu ra, vì điều này tạo ra một lỗ hổng cho các nhà đầu tư đưa ra các vấn đề về luật thương mại để đối phó với một biện pháp theo IIA. Ngoài ra, với tính chất của các biện pháp phòng vệ theo IIA, sẽ không rõ ràng nếu một trong hai bên có thể có bất kỳ tác động nào liên quan đến yêu sách tước đoạt. Về hình thức, nó không chỉ rõ sẽ được áp dụng như thế nào trong trường hợp như vậy. Không rõ ràng ở chỗ liệu nó có được viện dẫn để xác định rằng một biện pháp không phải là một hành động chiếm đoạt, hoặc bồi thường không phải là yêu cầu, nếu nó là một hành vi tước quyền sở hữu. Vấn đề này rất quan trọng trong quan điểm cho rằng 'không có gì trong Hiệp định này được hiểu là ngăn cản một Bên thông qua ...'. Việc nhấn mạnh vào việc ngăn ngừa ở đây đưa ra câu hỏi rằng không có gì trong các IIA ngăn chặn sự chiếm đoạt trong lần đầu tiên, bồi thường phải trả, nếu có quyền hoặc tài sản bị chiếm hữu. Do đó, nếu hậu quả của việc chiếm đoạt là bồi thường theo IIA này, thì không rõ ràng rằng liệu yêu cầu bồi thường sẽ tạo thành rào cản pháp lý cho việc thông qua biện pháp để cho phép yêu cầu viện dẫn điều này hay không. Do đó, việc áp dụng loại điều khoản này vào một điều khoản tước quyền sở hữu là không rõ ràng. Bối cảnh những điều khoản này không được biết đến, và không có cách nào sử dụng chúng trong những vụ giải quyết tranh chấp bằng trọng tài mà chúng tôi hiện đang biết. Tuy nhiên, rõ ràng rằng các quy định như vậy sẽ phát sinh càng nhiều những cấn đề hơn. Việc chuyển hóa các điều khoản ngoại lệ chung như vậy từ luật thương mại phải được xem xét kỹ lưỡng từ góc độ đàm phán và góc độ tranh tụng.

Thứ ba, có một xu hướng đáng kể trong một số BIT gần đây cho thấy việc khuyến khích và bảo hộ đầu tư không được đánh giá cao như vị trí của một số khu vực chính sách khác. Với mục đích này, một số BIT đã bao gồm các điều khoản ngoại lệ chung, xác nhận khả năng của các quốc gia thực hiện các biện pháp bảo vệ các mục tiêu chính sách chủ yếu nhất định, mặc dù các biện pháp đó có thể hàm ý chệch hướng nghĩa vụ của IIA. Những trường hợp ngoại lệ này thường liên quan đến các chính sách về y tế, an ninh và môi trường.

Tuy nhiên, các biện pháp duy trì trên cơ sở chính sách hợp pháp cũng có thể được sử dụng để phá vỡ nghĩa vụ của IIA đối với việc bảo vệ các nhà đầu tư nước ngoài, hoặc có thể ảnh hưởng đến đầu tư của họ theo cách không có lợi cho việc đạt được mục tiêu mong muốn. Các IIA thường tìm cách ngăn chặn sự lạm dụng này đối với các điều khoản ngoại lệ chung. Thông thường, họ làm như vậy bằng cách chỉ ra rằng các nước có thể đưa ra các biện pháp trên nền tảng lợi ích công cộng, 'với điều kiện các biện pháp đó sẽ không được áp dụng một cách độc đoán hoặc vô căn cứ, hoặc 'một hạn chế trá hình về thương mại quốc tế hoặc đầu tư.'[1]

Các nước tiếp nhận phải cân bằng các lợi ích này với các mục tiêu chính sách khác, bao gồm các chính sách phi thương mại như các chính sách liên quan đến y tế, an ninh, việc làm và các chính sách phi thương mại bảo vệ người tiêu dùng và môi trường. Hơn nữa, các mối quan tâm này phải được giải quyết trong khuôn khổ một chính sách kinh tế có lợi cho tất cả các lĩnh vực của xã hội. Điều này đòi hỏi, đôi khi, việc điều tiết một số hoạt động kinh tế nhất định có thể không đáp ứng đầy đủ các nghĩa vụ được cam kết trong các IIA.

Nhu cầu điều chỉnh các khía cạnh này không phải là mối quan tâm hàng đầu trong các IIA. Thay vào đó, trọng tâm của các công cụ này phụ thuộc vào việc thúc đẩy và bảo hộ đầu tư nước ngoài. Phần lớn các

[1] FTA Singapore - New Zealand, Điều 71.1; FIPA mẫu của Canada năm 2003, Điều 10.1.

IIA không đưa ra các quy định về sự khác biệt so với các quyền và nghĩa vụ được thừa nhận trong đó. *Thí dụ*: các BIT do Chile, Đan Mạch, Phần Lan và Malaysia đưa ra, không quy định bất kỳ trường hợp ngoại lệ hoặc danh sách hạn chế nào.[2] Thay vào đó, các nguyên tắc đầu tư được thông qua trong các văn bản rộng hơn các FTA thường phải chịu sự bảo lưu theo ngành, cũng như các ngoại lệ chung để đưa ra các nguyên tắc về đầu tư trong bối cảnh các mục tiêu pháp lý khác.

Mục 1. CÁC NGOẠI LỆ CHUNG

Có một xu hướng đáng kể trong một số BIT gần đây đối với việc khuyến khích và bảo hộ đầu tư không được đánh giá cao như vị trí của một số khu vực chính sách khác. Với mục đích này, một số BIT đã bao gồm các điều khoản ngoại lệ chung, xác nhận khả năng của các quốc gia thực hiện các biện pháp bảo vệ các mục tiêu chính sách chủ yếu nhất định, mặc dù các biện pháp đó có thể hàm ý chệch hướng nghĩa vụ của IIA. Những trường hợp ngoại lệ này thường liên quan đến các chính sách về y tế, an ninh và môi trường.

Ngoại lệ chung đảm bảo rằng các nghĩa vụ trong BIT không ngăn cản nước tiếp nhận đầu tư bảo vệ các giá trị cơ bản. Hơn nữa, một số BIT không bao gồm các biện pháp áp thuế từ các nghĩa vụ chính của BIT.[3]

Thí dụ: BIT Singapore - Trung Quốc (1985) và BIT New Zealand - Trung Quốc (1988) có một điều khoản về nội dung này như sau:

> Các quy định của Hiệp định này sẽ không làm hạn chế quyền của một trong hai bên ký kết áp dụng các điều cấm, hoặc hạn chế dưới bất kỳ hình thức nào, hoặc thực hiện bất kỳ hành động nào khác, nhằm bảo vệ các lợi ích an ninh thiết yếu của mình, hoặc để bảo vệ sức khoẻ cộng đồng, hoặc ngăn ngừa bệnh dịch và sâu bệnh ở động vật hoặc thực vật.[4]

Tuy nhiên, các biện pháp duy trì trên cơ sở chính sách hợp pháp cũng có thể được sử dụng để phá vỡ nghĩa vụ của BIT đối với việc bảo vệ các nhà đầu tư nước ngoài, hoặc có thể ảnh hưởng đến đầu tư của họ theo cách không có lợi cho việc đạt được mục tiêu mong muốn. Các BIT thường tìm cách ngăn chặn sự lạm dụng này đối với các điều khoản ngoại lệ chung. Thông thường, họ làm như vậy bằng cách chỉ ra rằng các nước có thể đưa ra các biện pháp trên cơ sở lợi ích công cộng, 'với điều kiện các biện pháp đó sẽ không được áp dụng một cách tùy tiện hoặc vô căn cứ', hoặc 'cấu thành một hạn chế trá hình về thương mại quốc tế hoặc đầu tư'.[5]

Dự thảo MAI đã công nhận hai giá trị cơ bản có thể tạo ra những ngoại lệ trong việc đối xử với các nhà đầu tư nước ngoài. *Một mặt*, dự thảo cung cấp một quyền vô điều kiện để giới hạn những hạn chế liên quan đến an ninh quốc gia của nước tiếp nhận đầu tư, đặc biệt là khi các biện pháp được thực hiện trong thời chiến, xung đột vũ trang hoặc tình huống khẩn cấp quốc tế khác, hoặc liên quan đến phổ biến vũ khí hủy diệt hàng loạt, hoặc sản xuất vũ khí và đạn dược. *Mặt khác*, văn bản cho phép đưa ra 'bất kỳ biện pháp cần thiết nào để duy trì trật tự công cộng'. Điều này có thể được viện dẫn 'chỉ khi mối đe dọa nghiêm trọng và chính đáng là một trong những lợi ích cơ bản của xã hội'. Trường hợp ngoại lệ chung bổ sung thêm tính năng cảnh báo thông thường để ngăn chặn sự lạm dụng điều khoản. Những ngoại lệ này không thể được viện dẫn để loại trừ các nghĩa vụ khi tước quyền sở hữu và bảo hộ khỏi những xung đột.[6]

Một số BIT gần đây, cụ thể là những hiệp định thúc đẩy đầu tư của Hoa Kỳ và Canada, đã được thừa hưởng từ các FTA và các quy tắc cụ thể của GATS đối với việc điều chỉnh dịch vụ tài chính. Như trong GATS, các công cụ này đã đưa ra một ngoại lệ cụ thể đối với các biện pháp được thực hiện đối với các dịch vụ tài chính và các định chế tài chính - cái gọi là 'an toàn thận trọng'.[7]

Để đánh giá tính phù hợp của sự lựa chọn lợi ích công cộng, bao gồm điều khoản quy định Điều XX GATT giống như trong các IIA, và liệu nó có thể giúp các chính phủ điều chỉnh mối quan tâm phi thương mại trong nước hay không, thì phần này cần đưa ra 'ngoại lệ chung' trong hoàn cảnh đó, nghĩa là bối cảnh thương mại quốc tế.[8] Việc tạo ra trong khuôn khổ WTO một cơ chế giải quyết tranh chấp bắt buộc với những quy định ràng buộc đã làm thay đổi toàn bộ cơ cấu kinh tế quốc tế.[9]

[2] UNCTAD, http://www.unctadxi.org/templates/DocSearch.aspx?id=780 (tháng 6/2007).

[3] UNCTAD, 2007, tr. 80-99, đưa ra một rà soát chi tiết các điều khoản ngoại lệ trong các BIT gần đây.

[4] BIT Trung Quốc - New Zealand, Điều 11.

[5] FTA Singapore - New Zealand, Điều 71.1, FIPA mẫu của Canada năm 2003, Điều 10.1.

[6] Hiệp định đa phương về đầu tư, Dự thảo văn bản hợp nhất, tài liệu của OECD DAFFE/MAI (98) 7/REV1, Chương V.

[7] FIPA mẫu của Canada năm 2003, Điều 10.2 và Mẫu BIT của Hoa Kỳ năm 2004, Điều 20.1.

[8] Lorand Bartels, 'Tính pháp lí của Luật WTO đối với việc áp dụng hệ thống buôn bán khí thải của EU đối với hàng không', *23 EUR. J. INT'L. L. 429*, 450-51 (2012).

[9] Julien Chaisse, 'Non-Trade Norms in WTO Litigation', trong *Normer le Monde: L'énonciation des normes internationales* 213, Yves Schemeil & Wolf-Dieter Eberwein eds., 2009.

Cơ quan giải quyết tranh chấp ('DSB')[10] làm cho WTO trở thành 'một tổ chức hội nhập, bắt nguồn từ luật quốc tế đương đại'. Nói một cách đơn giản, cơ chế giải quyết tranh chấp tinh vi của WTO đã làm cho nó trở thành một tổ chức đặc thù.[11] Thực tế, thực tiễn giải quyết tranh chấp theo WTO từ năm 1995 cho thấy mục đích của các cơ quan tư pháp có trách nhiệm giải quyết tranh chấp là một sự nhắc nhở về tính hợp pháp chứ không phải là bảo vệ các lợi ích đặc biệt của các chính phủ thành viên. Những gì DSB làm là giám sát tính hợp pháp ở cấp quốc tế.[12] Tính năng động nội tại của nó đã khiến WTO và các cơ quan của WTO đánh giá những vấn đề có tầm quan trọng hàng đầu trong các lĩnh vực dường như không liên quan đến thương mại, nhưng những giải pháp của họ là cần thiết cho việc mở rộng các mục tiêu của nó. Tuy nhiên, WTO có điểm hạn chế là tất cả các quyết định của nó phải được đưa ra trên cơ sở sự đồng thuận, bởi lẽ điều này sẽ làm tê liệt tiến trình đàm phán.

> Trong khuôn khổ đàm phán thương mại của Tổ chức Thương mại Thế giới (WTO), điều khoản này cho rằng WTO nên không chỉ tập trung vào việc xây dựng các quy tắc mới hoặc giải quyết tranh chấp mà còn phải phát triển 'luật mềm' trên cơ sở không chính thức, như những kinh nghiệm thành công của Mạng Cạnh tranh Quốc tế hoặc Quỹ Tiền tệ Quốc tế. Về mặt này, WTO nên mở rộng và tinh chỉnh vai trò của Cơ chế rà soát chính sách thương mại (TPRM) để có thể giải quyết các vấn đề thiết yếu của các mối quan tâm kinh tế hiện tại, do đó vẫn là trọng tâm của quản trị toàn cầu.[13]

'WTO có xu hướng thu hút các vấn đề pháp lý, theo bản chất, ở các vấn đề liên quan đến thương mại', và đưa ra vấn đề cân bằng một cách tinh vi giữa đối xử bình đẳng, tự do hóa thương mại và việc theo đuổi các mục tiêu chính sách khác. Sự cân bằng đó là sự kế thừa GATT, kể từ khi ra đời.

[10] DSB được thành lập theo Hiệp định về quy tắc và thủ tục giải quyết tranh chấp (DSU, Phụ lục 2). Hiệp định này quy định về việc thành lập các ban hội thẩm và Cơ quan Phúc thẩm. Xem JOHN H. JACKSON, 'Các nhận xét của Biên tập viên', *AJIL 91* (1997), tr. 60, 60-4 (xem phiên bản mở rộng của văn bản này AJIL 98 (2004), tr. 109-25).

[11] 354 Pascal Lamy, 'Vị trí của WTO và Luật WTO trong hệ thống luật quốc tế', *17 EUR. J. INT'L L.* 969, 970 (2006).

[12] Julien Chaisse & Debashis Chakraborty, 'Thực hiện các quy tắc của WTO thông qua đàm phán và chế tài: Vai trò của cơ chế rà soát chính sách thương mại và cơ chế giải quyết tranh chấp', *28 U. PA. J. INT'L L.* 153, 168 (2007).

[13] Julien Chaisse & Mitsuo Matsushita, 'Duy trì ưu thế của WTO trong trật tự thương mại quốc tế: Một đề xuất cải cách và rà soát vai trò của cơ chế rà soát thương mại", *16 J. INT'L ECON. L.*, 1, 1 (2013).

Thông qua Điều XX của GATT,[14] hệ thống WTO nêu rõ những sai lệch từ các nguyên tắc thương mại quan trọng và từ tất cả các điều khoản của GATT 1994, đặc biệt là sự sai lệch từ việc đưa ra các quy định cấm cơ bản việc áp dụng các hạn chế định lượng về xuất nhập khẩu theo Điều XI.[15] Như Giáo sư Wang đã nhấn mạnh:

> Mục tiêu và mục đích của những trường hợp ngoại lệ chung là duy trì sự cân bằng quyền của bất kỳ nước thành viên nào đưa ra ngoại lệ - áp dụng một biện pháp không phù hợp với các điều khoản nội dung của một điều khoản khác - và các quyền cơ bản của các nước thành viên khác. Điều này là do việc áp dụng bất kỳ trường hợp ngoại lệ nào cũng đồng nghĩa với việc làm ảnh hưởng đến các quyền của các thành viên khác.[16]

Trên thực tế, Điều XX của GATT 1994 là một trong những điều khoản quan trọng nhất khi trình bày về ngoại lệ chung sau một thập kỷ áp dụng, để hiểu được khả năng áp dụng trong các IIA. Mục XX (A) và giải thích nó được áp dụng như thế nào trong vụ kiện của WTO (B), đồng thời nêu chi tiết các tình huống cụ thể mà nó có thể được áp dụng (C).

1. Phân tích Điều XX GATT

Điều XX GATT bao gồm hai phần riêng biệt:

Thứ nhất, nó liệt kê một số động cơ cụ thể và các điều kiện để hạn chế thương mại, liệt kê trong các đoạn từ (a) đến (j). Không phải tất cả chúng đều có tầm quan trọng như nhau. Các quy định quan trọng thường được nhắc đến trong thực tế - vì các thành viên WTO ngày càng quan tâm đến các vấn đề sức khoẻ và môi trường cũng như bảo vệ quyền sở hữu trí tuệ - đề cập đến các biện pháp cần thiết để bảo vệ cuộc sống và sức khoẻ con người (đoạn b); các biện pháp cần thiết để đảm bảo tuân thủ các luật liên quan đến bảo hộ sáng chế, nhãn hiệu và bản quyền, và ngăn ngừa các hành vi lừa đảo (đoạn d); và các biện pháp liên quan đến bảo tồn tài nguyên thiên nhiên có thể cạn kiệt (đoạn g).

[14] Để có một bài trình bày toàn diện về những ngoại lệ chung của GATT, xem Wang Guiguo, 'Radiating Impact of WTO on Its Members' Legal System: The Chinese Perspective', *Vol. 349 Hague Academy of International Law* (2010) 380-391.

[15] Xem GATT, chú thích 1465, ở Điều XI. Nó biện minh cho các sai lệch từ các quy tắc, đặc biệt, nhưng không phải là duy nhất, từ nguyên tắc NT và từ việc cấm các hạn chế về số lượng. *Ibid*. Sự sai lệch tương tự cũng tồn tại theo GATS. Xem Bartels, chú thích 1504, ở số 460-61.

[16] Wang Guiguo, 'Radiating Impact of WTO on Its Members' Legal System: The Chinese Perspective', *Vol. 349 Hague Academy of International Law* (2010) 381.

Hơn nữa, bảo vệ đạo đức công cộng được đưa ra trong (đoạn a). Đoạn sau này có thể đạt được, cùng với lệnh cấm nhập khẩu sản phẩm từ lao động tù nhân (đoạn e), tầm quan trọng ngày càng tăng trong việc bảo vệ quyền con người;

Thứ hai, Điều XX GATT có một quy định chung, cái gọi là 'đoạn bao trùm' ('umbrella'), được áp dụng ngoài các hành vi cụ thể.[17]

Một cấu trúc tương tự có thể được tìm thấy trong Điều XIV GATS. Điều này quy định các trường hợp ngoại lệ chung trong thương mại dịch vụ. Nó được mô phỏng theo Điều XX GATT và cho phép các thành viên thoát khỏi các nghĩa vụ quy định trong hiệp định, để thông qua các biện pháp cần thiết nhằm bảo vệ đạo đức công cộng (đoạn a), các biện pháp cần thiết để bảo vệ cuộc sống và sức khoẻ con người (b), và - khác với Điều XX GATT - các biện pháp cần thiết để ngăn chặn các hành vi gian lận hoặc để đối phó với hậu quả của một sai sót về hợp đồng dịch vụ và các biện pháp cần thiết để bảo vệ sự riêng tư và bảo mật liên quan đến việc truyền tải dữ liệu (đoạn c).[18]

Hơn nữa, đoạn (e) đề cập đến các hiệp định tránh đánh thuế hai lần. Điều XIV GATS cũng chứa một quy định áp dụng cho tất cả các biện pháp được nêu tại các khoản từ (a) đến (e).

2. Phân tích ba bước

Theo thực tiễn GATT 1947 và WTO, việc giải thích và áp dụng đúng Điều XX GATT phải theo một cuộc kiểm tra ba bước.[19]

Thứ nhất, nó sẽ được xác định xem chính sách theo đuổi của thành viên với việc áp dụng các biện pháp được đề cập đến có rơi vào phạm vi của các chính sách và động cơ liệt kê ở các đoạn từ (a) đến (j) hay không.

Thứ hai, tùy thuộc vào từng đoạn cụ thể từ (a) đến (j) nêu trên,

17 Xem GATT, chú thích 1465, tại Điều XX.

18 General Agreement on Trade in Service, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art XIV, The Legal Texts: The Results of the Uruguay Round ot Multilateral Trade, (Negotiations 284 (1999), 1869 U.N.T.S 183, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].

19 Xinjie Luan & Julien Chaisse, 'Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade', *22 Colo. J. Int'l Envtl. L. & Pol'y* 79 (2011).

biện pháp đó phải là 'cần thiết'[20] hoặc 'liên quan đến'[21] việc theo đuổi chính sách.

Để rơi vào phạm vi của đoạn (b) Điều XX, một biện pháp phải 'cần thiết để bảo vệ cuộc sống hoặc tình trạng sức khoẻ con người, động vật hoặc thực vật.' Trong vụ *EC - A-mi-ăng*, Cơ quan Phúc thẩm đã được yêu cầu nghiên cứu kỹ đúng nghĩa và áp dụng đoạn (b) Điều XX GATT. Sau khi xác định rằng biện pháp 'bảo vệ cuộc sống hoặc sức khoẻ của con người' của Pháp theo nghĩa của Điều XX (b), nó đã chuyển sang kiểm tra xem biện pháp đó có 'cần thiết' cho việc bảo vệ sức khoẻ cộng đồng hay không. Tranh chấp này đánh dấu quyết định đầu tiên trong hệ thống giải quyết tranh chấp của WTO, trong đó một Ban hội thẩm hoặc Cơ quan Phúc thẩm đã tìm thấy một biện pháp khác không phù hợp theo Điều XX(b) GATT. Cơ quan Phúc thẩm đã nắm bắt cơ hội để làm rõ và có những chỉnh sửa những phán quyết của Ban hội thẩm liên quan đến kiểm tra tính 'cần thiết' trong Điều XX(b).

Để rơi vào phạm vi của đoạn (g) Điều XX, một biện pháp phải 'liên quan đến việc bảo tồn tài nguyên thiên nhiên có thể cạn kiệt'. Thuật ngữ 'liên quan đến' được định nghĩa là 'có liên quan đến, được kết nối với'.

Thứ ba, biện pháp này cần phải được áp dụng phù hợp với đoạn mở đầu ('đoạn bao trùm') của Điều XX. 'Mục đích và đối tượng của "đoạn bao trùm" của Điều XX nói chung là ngăn ngừa lạm dụng các ngoại lệ của … Điều [XX]'.[22]

Cơ quan Phúc thẩm đã minh họa ba bước này trong vụ *Hoa Kì - Cấm nhập khẩu một số mặt hàng tôm và sản phẩm từ tôm* và nhấn mạnh rằng: trình tự các bước trong phân tích yêu cầu bồi thường theo quy định tại Điều XX phản ánh sự không chủ ý hoặc sự lựa chọn ngẫu nhiên 'cấu trúc cơ bản và logic của Điều XX'. Sau đó, sự giải thích như vậy đã được nhắc lại liên tục như đã được minh chứng bởi phán quyết của Cơ

20 *EC - Các biện pháp ảnh hưởng tới sản phẩm chứa a-mi-ăng và a-mi-ăng*, Báo cáo của Cơ quan Phúc thẩm, ngày 12/3/2001, WT/DS135/AB/R 443. Để biết thêm thông tin, xem Simon Lester, Bryan Mercurio và Arwel Davies, *LUẬT THƯƠNG MẠI THẾ GIỚI: CÁC TÀI LIỆU VÀ BÌNH LUẬN* (Hart Publishing, 2012) Chương 9.

21 Cơ quan Phúc thẩm, Vụ *Trung Quốc - Các biện pháp liên quan đến xuất khẩu các nguyên liệu thô*, 355, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (ngày 30 tháng 1 năm 2012) [sau đây gọi là "Báo cáo Phúc thẩm, Trung Quốc"] (trích dẫn 2 SHORTER OXFORD ENGLISH DICTIONARY 2519 (WR Trumble & A. Stevenson eds, ấn bản lần thứ 6 Oxford University Press 2007).

22 Báo cáo của Cơ quan Phúc thẩm, Vụ *Hoa Kỳ - Các tiêu chuẩn đối với xăng dầu thường và xăng dầu tái chế*, 22 WT/DS2/AB/R (ngày 29/4/1996).

quan Phúc thẩm năm 2012 ở vụ *Trung Quốc - Các biện pháp liên quan đến xuất khẩu các nguyên liệu thô*.

3. Bảo vệ sức khoẻ theo Điều XX

Tại các quốc gia, những mục tiêu và chính sách liên quan tới việc bảo vệ môi trường và sức khỏe con người, động thực vật rất được coi trọng. Trong phần tiếp theo, chúng ta tập trung phân tích điểm (b) và (g) Điều XX, với những quy định về bảo vệ đời sống hoặc sức khỏe con người, động thực vật và vấn đề bảo tồn các nguồn tài nguyên thiên nhiên có nguy cơ cạn kiệt,[23] nhằm mục đích giải thích cách tiếp cận của WTO trong việc bảo vệ sức khỏe con người, động thực vật và chính sách quốc gia thông qua Điều XX, trên cơ sở những giải thích của các Hội đồng trọng tài và việc áp dụng các ngoại lệ chung trong các IIA.[24]

Vụ việc *Thái Lan - Hạn chế nhập khẩu và áp thuế nội địa với thuốc lá* cung cấp cái nhìn khái quát về việc giải thích và áp dụng Điều XX(b) và (g) GATT.[25]

Hoa Kỳ, quốc gia sản xuất một lượng lớn thuốc lá, đã có kế hoạch mở rộng xuất khẩu thuốc lá để bù đắp cho việc sụt giảm tiêu thụ trong thị trường nội địa do người dân ngày càng nhận thức được tác hại của việc hút thuốc tới sức khỏe và môi trường. Hiệp hội Các nhà xuất khẩu thuốc lá Hoa Kỳ (CEA) có những thị trường tiêu thụ truyền thống đã ngừng nhập khẩu thuốc lá. Bằng việc khiếu nại thông qua văn phòng Đại diện Thương mại Hoa Kỳ (USTR), Hiệp hội đã cáo buộc chính sách hạn chế thương mại đối với thuốc lá của các quốc gia đó là những hành vi thương mại không công bằng, và hành vi này có thể bị áp dụng biện pháp trừng phạt trả đũa. Chính phủ Hoa Kỳ đã khởi kiện vụ việc lên GATT và cuối cùng Thái Lan đã bị buộc mở cửa thị trường nhập khẩu thuốc lá để tránh các biện pháp trừng phạt của Hoa Kỳ … Nguyên đơn đã cáo buộc rằng các doanh nghiệp thuốc lá thuộc sở hữu của Chính phủ Thái Lan (doanh nghiệp độc quyền về thuốc lá của Thái Lan) đã hạn chế việc nhập khẩu và buôn bán thuốc lá nhập khẩu. Các cơ quan có thẩm quyền của Thái Lan đã khẳng định rằng lệnh cấm đối với mặt hàng thuốc lá nhập khẩu là một biện pháp phù hợp, 'cần thiết để bảo vệ sức khỏe của người dân Thái Lan'.

Trong quá trình giải quyết tranh chấp theo quy trình GATT, Hoa Kỳ đã cáo buộc rằng các chính sách hạn chế của Thái Lan trong việc cấm nhập khẩu thuốc lá không phù hợp với các quy định của GATT về các biện pháp hạn chế số lượng và những hình thức bảo hộ khác. Chính phủ Thái Lan đã cố gắng chứng minh lệnh cấm đối với thuốc lá nhập khẩu của họ là phù hợp với Điều XX GATT. Chính phủ Thái Lan lo ngại rằng những nỗ lực của quốc gia trong việc kiểm soát việc hút thuốc và những căn bệnh gây ra bởi thuốc lá sẽ bị cản trở, bởi số lượng thuốc lá bán ra được gia tăng, là kết quả của sự cạnh tranh giữa thuốc lá trong nước và thuốc lá nhập khẩu, nếu thuốc lá nhập khẩu được phép tiếp cận thị trường trong nước. Nhiều nghiên cứu y tế và khoa học chỉ ra rằng thuốc lá là sản phẩm có hại cho sức khỏe, việc hút thuốc có thể gây bệnh ung thư và nhiều căn bệnh khác.

Hoa Kỳ khẳng định rằng chính sách hạn chế nhập khẩu của Thái Lan đã gây ra những hạn chế thương mại vô căn cứ, hoặc cố tình che giấu sự vi phạm các quy định về hạn chế thương mại bằng cách lạm dụng ngoại lệ về bảo vệ sức khỏe tại Điều XX. Ban hội thẩm GATT kết luận theo hướng có lợi cho Hoa Kỳ. Ban hội thẩm chỉ ra rằng Thái Lan không cấm việc sản xuất và buôn bán thuốc lá trong nước, và lệnh cấm đối với thuốc lá nhập khẩu của Thái Lan là không 'cần thiết', vì đã có những biện pháp không phân biệt đối xử khác có thể kiểm soát chất lượng và số lượng của thuốc lá, nhằm mục đích bảo vệ sức khỏe cộng đồng. Sau Báo cáo của Ban hội thẩm, Thái Lan đã ký kết một hiệp định với Hoa Kỳ, theo đó thuốc lá ngoại có thể được nhập khẩu tự do vào Thái Lan và sẽ được áp dụng các chính sách không phân biệt đối xử trên cơ sở nguồn gốc xuất xứ.

Tuy nhiên, ý nghĩa và phạm vi áp dụng của Điều XX(b), cùng với Điều XX(g), sau này lại được bàn thảo kỹ lưỡng trong hai vụ việc liên quan tới nhập khẩu cá ngừ.[26] Những báo cáo này, tuy cả hai đều không được thông qua, đã đại diện cho những vụ việc đầu tiên mà Ban hội thẩm chỉ ra những căng thẳng của hệ thống thương mại đa phương trong khuôn khổ GATT 1947 và vấn đề bảo vệ môi trường. Những báo cáo của ban hội thẩm đã có tác dụng thúc đẩy đáng kể nhưng vẫn chưa thực sự thành công trong việc tìm ra một cách giải thích và áp dụng thống nhất Điều XX GATT đối với các vấn đề môi trường.

[23] Chương này không xem xét điểm (a) với những quy định về bảo vệ đạo đức xã hội và điểm (d) điều chỉnh các giao dịch thương mại và quyền sở hữu trí tuệ, vì những quy định này của Điều XX GATT 1994 ít quan trọng hơn.

[24] Để có cái nhìn toàn diện về tất cả các vụ việc của WTO liên quan tới sản phẩm thuốc lá, xem Chang-fa Lo.

[25] Báo cáo của Ban Hội thẩm, *Thái Lan - Hạn chế nhập khẩu và áp thuế nội địa với thuốc lá*, DS10/R-37S200 (ngày 05/10/1990).

[26] Xem Báo cáo của Ban Hội thẩm, *Hoa Kỳ - Hạn chế nhập khẩu cá ngừ* DS21/R-39S/155 (ngày 03/9/1991); đồng thời xem thêm Báo cáo của Ban Hội thẩm, *Hoa Kỳ - Hạn chế nhập khẩu cá ngừ* DS29/R (ngày 16/6/1994).

Chỉ tới khi WTO ra đời và Cơ quan Phúc thẩm được thành lập, một cách tiếp cận mới với Điều XX(b) và (g) GATT mới được thông qua. Trước đây, trong vụ việc *Hoa Kỳ - Xăng cải tiến*, lần đầu tiên Cơ quan Phúc thẩm đã giải thích điểm (g) và áp dụng chặt chẽ nguyên tắc cơ bản của việc giải thích luật được quy định trong Công ước Viên về Luật Điều ước quốc tế (VCLT) rằng các quy định của một điều ước quốc tế, như GATT và Điều XX GATT, 'mang ý nghĩa thông thường trong bối cảnh của điều ước đó'.[27] Cơ quan Phúc thẩm sau đó đề cập đến quy định 'nếu những biện pháp này được thực hiện hiệu quả kết hợp với những hạn chế đối với hàng hóa sản xuất hoặc tiêu thụ trong nước'.[28] Cơ quan Phúc thẩm dựa vào thực tế là những quy định này được 'ban hành hoặc có hiệu lực cùng những hạn chế đối với những nguồn tài nguyên thiên nhiên được chế biến và tiêu thụ trong nước'.[29] Mặc dù Brazil và Venezuela đã đưa ra những lập luận cho rằng điều quan trọng là mục đích của các quy tắc cơ bản là đảm bảo được tính hiệu quả của các biện pháp hạn chế áp dụng với hàng hóa trong nước, Cơ quan Phúc thẩm lại không cho rằng điều này là cần thiết.[30]

Cụ thể, Cơ quan Phúc thẩm đã không xem xét rằng, để phù hợp với quy định tại Điều XX(g), các biện pháp 'liên quan tới bảo tồn những nguồn tài nguyên thiên nhiên có nguy cơ cạn kiệt' phải được thực hiện chủ yếu nhằm đảm bảo sự hiệu quả của các biện pháp hạn chế đối với hàng hóa sản xuất hoặc tiêu thụ trong nước. Thay vào đó, Cơ quan Phúc thẩm đọc các điều khoản 'kết hợp với' và 'khá rõ ràng' là 'cùng với' hoặc 'chung với' và không có yêu cầu bổ sung rằng các biện pháp bảo tồn chủ yếu nhằm mục đích đảm bảo tính hiệu quả của một số biện pháp hạn chế nhất định đối với hàng hóa sản xuất hoặc tiêu thụ trong nước.[31]

Trong vụ *EC - A-mi-ăng*,[32] Cơ quan Phúc thẩm đã được yêu cầu giải thích ý nghĩa và cách thức áp dụng điểm (b) Điều XX GATT. Sau khi quyết định rằng biện pháp 'bảo vệ con người … cuộc sống hoặc sức khỏe' của Pháp nằm trong khuôn khổ của Điều XX(b), Cơ quan Phúc thẩm tiếp tục xem xét liệu biện pháp ấy có 'cần thiết' cho việc bảo vệ sức khỏe cộng đồng hay không.[33]

Tranh chấp này đánh dấu phán quyết đầu tiên của WTO mà Ban hội thẩm hoặc Cơ quan Phúc thẩm đã đưa ra một biện pháp trái ngược và giải thích theo Điều XX(b) GATT. Ban hội thẩm đã quyết định rằng vật liệu a-mi-ăng trắng và vật liệu PCG là sản phẩm tương tự, nhưng chấp nhận chính sách đối xử khác nhau được giải thích theo Điều XX GATT.[34] Cơ quan Phúc thẩm đã giải thích chính sách phân biệt đối xử theo Điều III GATT,[35] nhưng vẫn sử dụng cơ hội này để làm rõ và chỉnh sửa một phần nhỏ phán quyết của Ban hội thẩm liên quan đến việc kiểm tra 'tính cần thiết' quy định ở Điều XX(b).

Cơ quan Phúc thẩm chỉ ra rằng:

> Theo quan điểm của chúng tôi, Pháp không thể kỳ vọng vào việc sử dụng bất kỳ biện pháp thay thế nào, nếu biện pháp đó liên quan đến việc tiếp tục xảy ra những nguy cơ mà Nghị quyết muốn 'ngăn chặn'. Một biện pháp thay thế như vậy, trong thực tế, sẽ ngăn cản Pháp đạt được mục tiêu bảo vệ sức khỏe mà họ đặt ra. Trên cơ sở các bằng chứng khoa học trước đó, Ban hội thẩm thấy rằng, nói chung, hiệu quả của việc 'sử dụng có kiểm soát' vẫn còn phải được chứng minh. Hơn nữa, thậm chí trong trường hợp các phương pháp 'kiểm soát sử dụng' được áp dụng 'với độ chắc chắn cao hơn', các bằng chứng khoa học cho thấy mức độ tiếp xúc có thể trong một số trường hợp vẫn đủ cao để có một 'nguy cơ lớn đối với việc gia tăng các bệnh liên quan tới a-mi-ăng'. Ban hội thẩm đã phát hiện ra rằng hiệu quả của việc 'sử dụng có kiểm soát' là rất đáng nghi ngờ đối với ngành công nghiệp xây dựng và cho những người đam mê DIY, những người sử dụng các sản phẩm xi măng có chứa a-mi-ăng trắng. Với những phát hiện này của Ban hội thẩm, chúng tôi tin rằng việc 'sử dụng có kiểm soát' sẽ không cho phép Pháp đạt được mục tiêu bảo vệ sức khoẻ họ đặt ra bằng cách ngăn chặn sự lan rộng các rủi ro về sức khoẻ liên quan đến a-mi-ăng. Việc 'sử dụng có kiểm soát' sẽ không phải là một biện pháp thay thế mà mà Pháp đã tìm kiếm.

[27] Báo cáo của Cơ quan Phúc thẩm. Để xem chi tiết phân tích của Cơ quan Phúc thẩm về việc áp dụng VCLT, xem Bryan Mercurio và Mitali Tyagi, 'Vấn đề giải thích điều ước quốc tế trong việc giải quyết tranh chấp ở WTO: Những câu hỏi đáng chú ý về tính pháp lý của thủ tục làm việc của các cơ quan giải quyết tranh chấp', 19(2) *Tạp chí Pháp luật quốc tế Minnesota* 275-326 (2010).

[28] Ibid, tr. 19.

[29] Ibid, tr. 20.

[30] Xem ibid, tr. 20-21.

[31] Ibid.

[32] Báo cáo của Cơ quan Phúc thẩm, *Cộng đồng châu Âu - Các biện pháp ảnh hưởng tới hàng hóa có chứa a-mi-ăng*, WT/DS135/AB/R (ngày 12/3/2001). Tranh chấp liên quan tới lệnh cấm của Pháp đối với việc sản xuất, mua bán, nhập khẩu vào thị trường trong nước và vận chuyển bất cứ vật liệu a-mi-ăng nào và các hàng hóa chứa a-mi-ăng.

[33] Ibid.

[34] Ibid.

[35] Ibid.

Về cơ bản, Cơ quan Phúc thẩm đã đạt được hai kết luận có ý nghĩa cơ bản đối với việc bảo vệ sức khoẻ và các quyết định về chính sách quốc gia liên quan đến việc khảo sát xã hội về việc có nên chấp nhận rủi ro hay không, và nếu không thì phải chọn biện pháp nào.

Thứ nhất, Cơ quan Phúc thẩm cho rằng: 'Một vấn đề không thể tranh cãi là các thành viên WTO có 'quyền xác định mức độ bảo vệ sức khoẻ mà họ cho là thích hợp trong một tình huống cụ thể.'[36]

Thứ hai, Cơ quan Phúc thẩm gợi ý rằng có thể có những mức độ giám sát khác nhau mà Ban hội thẩm cần phân tích: liệu một biện pháp là 'cần thiết' hay không.[37] Mức độ tuân thủ sau đó có thể phụ thuộc vào mức độ quan trọng tương đối của các mục tiêu hoặc lợi ích khác nhau đang bị đe dọa.[38]

Mục 2. CÁC NGOẠI LỆ CỤ THỂ CỦA QUỐC GIA

Các IIA cũng có thể cho phép các bên loại trừ một số hoạt động kinh tế nhất định khỏi nghĩa vụ cốt lõi của IIA. Những loại trừ này có thể không nhất thiết phải đáp ứng các quan ngại về chính sách phi kinh tế, mà có thể dựa trên các cân nhắc về chính sách kinh tế. Các bảo lưu cụ thể của quốc gia khá phổ biến trong các FTA với các nguyên tắc đầu tư, cũng như trong các BIT có nghĩa vụ được hình thành từ trước khi thành lập hiệp định do Canada và Hoa Kỳ xúc tiến thực hiện. Tuy nhiên, các BIT do các nước khác ký kết thường không cho phép có các ngoại lệ cụ thể của quốc gia, và về nguyên tắc, tất cả các nghĩa vụ của hiệp định đều áp dụng đối với tất cả các hoạt động kinh tế. Đây là trường hợp liên quan tới các IIA được ký kết bởi Trung Quốc, với ngoại lệ của các BIT 'thế hệ mới', theo đó cho phép duy trì các biện pháp phân biệt đối xử, đã được giải thích ở trên.

Những ngoại lệ cụ thể của quốc gia đòi hỏi phải xác định được hai yếu tố: *thứ nhất*, hoạt động kinh tế được bảo lưu; *thứ hai*, bản chất của các biện pháp bảo lưu áp dụng cho hoạt động đó. Những yếu tố này có thể được ghi nhận theo cách chủ động (positive approach) - xác định đối tượng điều chỉnh hoặc những hoạt động được cho phép thực hiện (chọn-cho), hoặc theo cách thụ động (negative approach) - xác định đối tượng không điều chỉnh hoặc không cho phép thực hiện (chọn-bỏ), mặc dù phương pháp tiếp cận kết hợp cũng có thể được áp dụng và thực sự phương pháp đó cũng rất phổ biến. Việc lựa chọn cách tiếp cận liên quan đến một khía cạnh chính về kết cấu của các hiệp định, vì những cách thức này sẽ thúc đẩy các động lực đàm phán khác nhau. Tuy nhiên, cấu trúc và nội dung của IIA không bị thay đổi bởi việc lựa chọn cách thức tiếp cận vấn đề. Thực tế, Hiệp định Hợp tác kinh tế toàn diện Singapore - Ấn Độ bao gồm cả hai cách tiếp cận trên, tùy thuộc vào các bên liên quan: bảo lưu của Singapore được liệt kê trong một danh sách bằng cách thức thụ động (chọn-bỏ), trong khi các cam kết của Ấn Độ được xác định bằng phương thức kết hợp.[39]

1. Các IIA có danh sách bảo lưu được xác định bằng phương pháp thụ động (chọn-bỏ)

Rất nhiều quốc gia đã thông qua danh sách bảo lưu được xác định bằng phương pháp thụ động (chọn-bỏ) liên quan tới các quy tắc đầu tư trong các FTA của họ. Mô hình danh sách bảo lưu được xác định bằng phương pháp thụ động (chọn-bỏ) do NAFTA đưa ra năm 1994, đã được thực hiện sau đó trong tất cả các hiệp định ký bởi Hoa Kỳ và Canada, cũng như trong tất cả các FTA do Nhật Bản, Hàn Quốc, EFTA, Đài Loan ký kết, và hầu hết các hiệp định của Chile, Mexico, Singapore, và Australia, ngoài những hiệp định khác.

Các thỏa thuận về danh sách bảo lưu được xác định bằng phương pháp thụ động (chọn-bỏ) quy định phạm vi điều chỉnh toàn cầu, trong khi các bên vẫn cần chỉ rõ các ngành và các biện pháp liên quan mà họ muốn loại trừ khỏi nghĩa vụ của hiệp định. Các thỏa thuận này được mô phỏng theo mô hình của NAFTA, buộc các bên xác định hoạt động kinh tế cũng như các nghĩa vụ liên quan mà họ muốn duy trì các biện pháp không phù hợp.

Thông thường, những bảo lưu được xác định bằng phương pháp thụ động (chọn-bỏ) chỉ được thực hiện đối với một số nghĩa vụ được ghi trong IIA như MFN, NT, các yêu cầu về hình thức và nhân sự chủ chốt. Các điều khoản về FET, tước quyền sở hữu, bảo vệ khỏi xung đột, chuyển tiền và các thủ tục ISDS thường áp dụng trên mọi lĩnh vực, không phải là đối tượng của các bảo lưu cụ thể của quốc gia.

Các nước phải chỉ ra các biện pháp bảo lưu mà họ muốn duy trì, cũng như chỉ ra các hoạt động kinh tế và bản chất của biện pháp hạn

[36] Ibid.

[37] Ibid.

[38] Vụ *Brazil - Lốp xe* năm 2007 ủng hộ sử dụng a-mi-ăng và sử dụng các bước kiểm tra khi xem xét sự 'cần thiết', vì nguyên đơn cần xác định các lựa chọn thay thế có thể áp dụng. *Brazil - Các biện pháp ảnh hưởng đến nhập khẩu lốp xe đã qua sử dụng*, WT/DS332/R, ngày 12/6/2007.

[39] Hiệp định Hợp tác kinh tế toàn diện Singapore - Ấn Độ, Điều 6.16:2, và Phụ lục 6A và 6B.

chế mà họ có thể áp dụng sau khi IIA bắt đầu có hiệu lực. Các ngành công nghiệp và các biện pháp không được nêu trong danh mục 'các biện pháp hiện có' hoặc 'các biện pháp hình thành trong tương lai' đều bị ràng buộc bởi nghĩa vụ của IIA, và việc duy trì hoặc áp dụng bất kỳ biện pháp không phù hợp nào không được liệt kê sẽ được coi là hành vi vi phạm IIA.

Các bên phải chỉ ra chi tiết về các bảo lưu mà họ muốn duy trì. Các IIA theo mô hình NAFTA thường yêu cầu chỉ ra:

- Khu vực kinh tế hoặc ngành công nghiệp cụ thể trong đó bảo lưu được thực hiện và - nơi có thể áp dụng được - hoạt động được bảo lưu theo mã số phân loại ngành trong nước;
- Nghĩa vụ phải thực hiện (thí dụ như MFN, NT, yêu cầu về trình độ, yêu cầu quốc tịch đối với người đứng đầu doanh nghiệp);
- Cấp chính quyền áp dụng biện pháp hạn chế (thí dụ: liên bang, tiểu liên bang, địa phương);
- Pháp luật, quy định, hoặc văn bản pháp luật khác cùng quy định về biện pháp hạn chế;
- Mô tả cách thức các biện pháp hạn chế hoạt động; và
- Các lĩnh vực áp dụng các cam kết tự do hoá khi IIA có hiệu lực, và các khía cạnh không phù hợp của các biện pháp bảo lưu, cũng như các cam kết chấm dứt, nếu có.

Việc chỉ ra các chi tiết cụ thể của từng biện pháp bảo lưu nhằm tăng cường tính minh bạch của các biện pháp đó, giúp các bên quan tâm có thể dễ dàng hiểu được các hạn chế áp dụng cho đầu tư nước ngoài trong bất kỳ ngành nào. Tuy nhiên, việc tổng hợp các thông tin này có thể là một công việc khó khăn, vì nó đòi hỏi việc rà soát toàn bộ hệ thống pháp luật quốc gia.

Một số IIA đã tìm cách đơn giản hóa nhiệm vụ này bằng cách chỉ yêu cầu các thông tin bắt buộc ở mức tối thiểu, nghĩa là chỉ ra hoạt động kinh tế mà biện pháp không phù hợp áp dụng, và nghĩa vụ của IIA bị ảnh hưởng bởi biện pháp liên quan. Các BIT của Canada đã kết thúc vào nửa cuối của những năm 1990 và Nghị định thư Colosseo Colonia đã đi theo phương pháp này.[40]

[40] Nghị định thư de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR ('Nghị định thư Colonia'), Phụ lục, Điều 2, đoạn 1; và BIT Canada - Costa Rica, Phụ lục I. UNCTAD, 2006 giải thích.

2. Các hiệp định có danh sách bảo lưu được xác định bằng phương pháp chủ động (chọn-cho) và cách tiếp cận kết hợp

Các cam kết tự do hóa cũng có thể được ghi trên cơ sở danh sách được xác định bằng phương pháp chủ động (chọn-cho) bằng cách chỉ ra các nghĩa vụ áp dụng đối với một số ngành nhất định. Phương pháp 'chủ động thuần túy' đòi hỏi phải xác định rõ ràng các ngành công nghiệp và bản chất của các cam kết. Cách tiếp cận này thường được quy định là, *thí dụ*: 'Cho phép 100% chủ thể có vốn đầu tư nước ngoài tham gia vào các ngành công nghiệp sản xuất xe hơi' hoặc, rộng hơn là 'nguyên tắc đối xử quốc gia đầy đủ áp dụng đối với hoạt động đầu tư đã được thiết lập trong ngành dịch vụ xây dựng'. Theo cách tiếp cận này, bên duy trì quyền đưa ra bất kỳ biện pháp hạn chế mà không phải là cam kết được lập một cách chủ động, thậm chí trong các lĩnh vực được liệt kê.

Rất hiếm thấy các thỏa thuận trong danh sách được thiết lập bằng phương pháp 'chủ động thuần túy'. Các Hiệp định đối tác kinh tế chặt chẽ hơn của Trung Quốc với các Đặc khu hành chính Hong Kong và Macao đã liệt kê các danh mục này trong các cam kết về thương mại và đầu tư về dịch vụ, nhưng chưa có IIA nào áp dụng cách thức này.

Một số quốc gia đã sử dụng 'cách tiếp cận kết hợp', được xây dựng dựa trên cơ sở các cam kết của GATS và phù hợp với các IIA. Cách thức tiếp cận này lần đầu tiên được Cộng đồng châu Âu đưa ra trong hiệp định hợp tác với Chile và có thể sẽ được sử dụng trong các FTA tương lai.[41] Thái Lan đã theo mô hình này trong các FTA với Australia và New Zealand.

Giống như GATS, các thỏa thuận được lập theo 'cách tiếp cận kết hợp' có bao gồm danh sách các hoạt động kinh tế được thiết lập theo cách thức chủ động (chọn-cho), theo đó các hoạt động không được liệt kê nằm ngoài quy tắc của IIA có liên quan. Hơn nữa, một khi ngành được liệt kê vào danh sách, các bên phải nêu rõ những hạn chế hoặc cam kết mà họ áp dụng đối với ngành đó. Các bên có thể làm như vậy trên cơ sở chủ động (chọn-cho), theo đó chỉ ra các cam kết tự do hoá chính xác mà họ áp dụng, hoặc theo cách thụ động (chọn-bỏ), theo đó chỉ ra các hạn chế được duy trì hoặc có thể được thông qua trong ngành đó. Theo lý giải này, cách tiếp cận kết hợp trong các IIA không ghi nhận cam kết theo các phương thức áp dụng.

[41] Cộng đồng châu Âu đã có các IIA được thiết lập bằng phương pháp thụ động (chọn-bỏ) trong các 'hiệp định châu Âu' ký kết với các nước Đông Âu, sau đó đã gia nhập liên minh này.

Hơn nữa, khác với GATS, các biện pháp không được liệt kê vào danh sách bảo lưu liên quan đến một điều khoản cụ thể, *thí dụ* như tiếp cận thị trường hoặc NT. Thay vào đó, bản chất của biện pháp được ghi nhận xác định những nghĩa vụ là đối tượng điều chỉnh của nó.

Các IIA này chỉ cho phép đưa vào danh sách bảo lưu các biện pháp ảnh hưởng đến nghĩa vụ NT, cả trong giai đoạn trước hoặc sau đầu tư. Cách quy định trong FTA Thái Lan - Australia và CEPA Thái Lan - New Zealand cho thấy các bên phải nêu rõ các cam kết liên quan đến trước đầu tư trên cơ sở cách tiếp cận kết hợp, trong khi các hạn chế về NT sau đầu tư phải được ghi vào danh sách được thiết lập bằng cách thức thụ động (chọn-bỏ). Tuy nhiên, chỉ có bảo lưu của New Zealand phản ánh cách tiếp cận này, trong khi Thái Lan và New Zealand dường như đã chấp nhận một danh sách được xây dựng bằng cách thức kết hợp, để ghi lại các biện pháp không phù hợp đối với quá trình trước và sau đầu tư.[42] Tất cả các điều khoản khác của IIA, như: MFN, chuyển tiền, hoặc đảm bảo chống lại việc tước quyền sở hữu, đều có phạm vi chung và áp dụng vô điều kiện cho tất cả các lĩnh vực kinh tế được chương đầu tư quy định.

Về bản chất, các danh sách được lập bằng phương thức kết hợp trong các IIA tạo thành một phiên bản hai cột (chứ không phải là bốn cột), làm đơn giản hóa các cam kết của GATS. Cột đầu tiên trình bày các hoạt động kinh tế phải tuân theo các nghĩa vụ chính của IIA. Cột thứ hai có tựa đề 'bảo lưu' hoặc 'hạn chế', cho biết các biện pháp áp dụng cho các ngành đó. Phạm vi áp dụng có thể được chỉ ra ở bất kỳ cấp độ liên kết nào, và nếu có thể thì đưa các tham chiếu đến phân loại tiêu chuẩn ngành cho rõ ràng hơn. Các ngành không được ghi trong danh sách được loại trừ khỏi các nghĩa vụ có liên quan - như cam kết của GATS.

Các biện pháp ảnh hưởng đến NT có thể được ghi nhận dưới hình thức cam kết chủ động (chọn-cho), hoặc thông thường là các biện pháp không phù hợp. Mặc dù không bắt buộc, các bên thường chỉ ra các luật và quy định bao gồm các biện pháp hạn chế vì mục đích minh bạch. Tuy nhiên, các hạn chế được ghi nhận không nhất thiết liên quan đến các biện pháp hiện có, mà có thể liên quan đến các biện pháp có thể được trong tương lai. Quy định 'không hạn chế' chỉ ra rằng không có các biện pháp không phù hợp nào được duy trì - sẽ được đưa ra - trong lĩnh vực được liệt kê.

[42] CEPA Thái Lan - New Zealand, Điều 9.6 và 9.7 và Phụ lục 4.1 và 4.2; FTA Thái Lan - Australia, Điều 904 và 906, và Phụ lục 8.

Mục 3. CÁC TRƯỜNG HỢP NGOẠI LỆ THEO LUẬT TẬP QUÁN QUỐC TẾ

Khi các điều ước quốc tế không giúp đạt được kết luận về các vấn đề xuyên quốc gia, luật tập quán quốc tế (CIL) sẽ được áp dụng. Khi các điều ước ràng buộc giữa các bên không có quy định rõ ràng, CIL sẽ được sử dụng để tìm kiếm cách giải thích rõ ràng. Trên thực tế, có khá nhiều trường hợp CIL được sử dụng để đưa ra kết luận cuối cùng.

Có hai học thuyết chính trong CIL liên quan đến trường hợp này, đó là 'tính cần thiết' và các biện pháp tự vệ, hầu hết được sử dụng khi giải quyết các mối quan ngại về an ninh quốc gia. Hai học thuyết này chưa được sửa đổi nhưng được Ủy ban Pháp luật quốc tế công nhận trong Quy định về trách nhiệm của Nhà nước đối với các hành động vi phạm pháp luật quốc tế.

Các nguyên tắc này thường được bao hàm trong các điều ước một cách rõ ràng, vì vậy các vụ việc pháp lý sẽ được xem xét theo CIL. Điều 25 ILC cung cấp một khuôn khổ về cách thức Nhà nước có thể giải thích việc sử dụng ngoại lệ an ninh vì một sự bảo vệ cần thiết theo CIL. Cần phải thỏa mãn hai tiêu chí: (i) bên muốn áp dụng các biện pháp bảo vệ phải chứng minh rằng biện pháp này là 'cách duy nhất' để bảo vệ lợi ích thiết yếu của họ; và (ii) 'không gây tổn hại nghiêm trọng đến lợi ích thiết yếu' của 'toàn bộ cộng đồng quốc tế'.[43] Để tránh bị lạm dụng, Điều 25 của ILC đặc biệt hạn chế các điều kiện sử dụng biện pháp phòng vệ cần thiết, kể cả an ninh quốc gia. Tuy nhiên, việc bao hàm vấn đề an ninh quốc gia không có nghĩa là vấn đề này là điều cần thiết.

Cụm từ 'toàn thể cộng đồng quốc tế' có nghĩa là ngăn chặn bất cứ hành động tham nhũng nào nhằm khuyến khích một môi trường đầu tư trung thực và bảo vệ lợi ích tập thể của mọi quốc gia. CIL không thể được sử dụng như một phương tiện để loại trừ bất kỳ sai phạm hay lý do gì, bởi vì điều này sẽ ảnh hưởng đến lợi ích tập thể, dẫn đến căng thẳng chính trị và ảnh hưởng đến môi trường đầu tư toàn cầu.

Vụ *Sempra Energy International v. Argentine* chỉ ra chi tiết cách CIL có thể được áp dụng để quyết định có cần viện dẫn ngoại lệ an ninh có liên quan hay không. Trước tiên tòa án sẽ kiểm tra nếu có vi phạm điều ước nào bằng cách giải nghĩa các từ ngữ theo nghĩa đen. Nếu các điều ước liên quan không bao gồm bất kỳ quy định tự đánh giá nào, các biện pháp được thông qua sẽ được xem xét để xem bên có cần phải viện dẫn ngoại lệ hay không.

[43] 'Luật Quốc tế, Trách nhiệm của các quốc gia đối với các hành động vi phạm pháp luật quốc tế', Bản thảo Các bài báo, 25 (1), U.N. Doc. A / 56/49 (Vol. I) (ngày 12/12/2001).

Cuối cùng, CIL sẽ giúp xác định phạm vi 'an ninh thiết yếu' trong trường hợp này theo Điều 25 của ILC. Do đó, CIL được coi như lý do cuối cùng để các quốc gia thành viên biện minh cho việc vi phạm nghĩa vụ vì lý do an ninh quốc gia. Một số học giả bình luận rằng 'khái niệm về sự cần thiết được xác định trong CIL là chính xác hơn nhiều so với định nghĩa về lợi ích an ninh thiết yếu'. Bởi vì ILC cung cấp một khuôn khổ rõ ràng về cách giải thích cho các biện pháp được áp dụng theo quy định về các biện pháp an ninh cần thiết.

Các vụ việc liên quan cũng tiếp tục duy trì sự chắc chắn của khuôn khổ pháp lý đó. Ngoài việc sử dụng để giải thích các điều khoản về an ninh quốc gia, CIL quyết định có bất kỳ trường hợp ngoại lệ tiềm ẩn nào 'để cho phép các quốc gia ứng phó với các trường hợp khẩn cấp và hành động thù địch của người khác' hay không. Một số điều ước có thể không bao gồm điều khoản rõ ràng về các ngoại lệ về an ninh quốc gia, là không hợp lý mà các quốc gia không có quyền thực hiện các biện pháp bảo vệ để bảo vệ an ninh của nó. Do đó, CIL có thể được đưa ra và áp dụng các ngoại lệ về an ninh quốc gia.

Có vẻ như CIL giống như 'một chiếc ô cho một ngoại lệ mở rộng dựa trên an ninh quốc gia'. Tuy nhiên, điều kiện hạn chế và sự miễn cưỡng của tòa án không dễ dàng cho phép sử dụng biện pháp phòng vệ cần thiết liên quan đến an ninh quốc gia.

Sau cuộc khủng hoảng kinh tế, Argentina đã tham gia vào nhiều vụ kiện khác nhau với Hoa Kỳ. Việc cố gắng sử dụng lý do 'cần thiết' để bào chữa cho các vi phạm nghĩa vụ theo BIT Hoa Kỳ - Argentina là một vấn đề từng phải được giải quyết. Ngoài ra, mức độ 'lợi ích an ninh thiết yếu' cũng là một câu hỏi khác mà các vụ việc của Argentina phải xem xét. Trong vụ *Tập đoàn LG & E Capital và Tập đoàn LG & E International Inc. kiện Argentine*, Trọng tài ICSID đã sử dụng đến CIL khi giải thích thuật ngữ 'bảo đảm sự thiết yếu'. Trọng tài cho rằng Argentina phải đối mặt với 'sự đe dọa nghiêm trọng về sự tồn tại của họ, sự tồn tại về mặt chính trị và kinh tế của họ, với khả năng duy trì các dịch vụ thiết yếu trong hoạt động, và để duy trì hòa bình nội bộ của họ'. Vì vậy, Argentina đã được miễn bồi thường do vi phạm BIT Hoa Kỳ - Argentina.[44] Trong vụ việc *Công ty Casualty của Continental kiện Argentina*, hội đồng trọng tài đã phân tích ý nghĩa của 'an ninh thiết yếu', và liệu các biện pháp được thông qua có phải là 'cần thiết' theo CIL. Quyết định thể hiện rằng CIL không thể được sử dụng riêng lẻ, mà phải kết hợp với quy định của điều ước. Các điều ước khác nhau có chứa các thuật ngữ độc đáo và được kết luận bằng các ngôn ngữ khác nhau, vì vậy khái niệm 'một kích thước phù hợp với tất cả' không áp dụng ở đây.

[44] *LG&E Energy Corp., LG&E Capital Corp., và LG&E Int'l, Inc. v. Argentine Republic*, ICSID Vụ việc số ARB/02/1, Decision on Liability, 46 ILM 36 (2006).

Mục 4. NGOẠI LỆ LIÊN QUAN ĐẾN AN NINH QUỐC GIA

Có hai loại IIA chính sẽ được thảo luận: BIT và PTA. BIT được ký bởi hai quốc gia song phương; các PTA là các thỏa thuận đa phương và thường có hình thức của các FTA.

Một trong những FTA quan trọng là NAFTA được ký kết giữa các nước Bắc Mỹ. Vì IIA được ký kết giữa nhiều quốc gia, nên thường có những cuộc đàm phán giữa các bên trước khi ký kết.

Các IIA chủ yếu được xây dựng dựa trên nhu cầu và điều kiện của các bên liên quan, do đó điều này tăng tính minh bạch của các quy định và các hạn chế. Vì vậy, các IIA bảo vệ cả nhà đầu tư nước ngoài và nhà nước tiếp nhận đầu tư một cách thực tế hơn. Những đặc điểm của IIA giúp thúc đẩy và khuyến khích FDI trên thế giới.

Các IIA cũng thúc đẩy FDI bằng cách thỏa thuận về các cơ chế giải quyết tranh chấp. Trước hết, việc định nghĩa rõ ràng hơn về các nhà đầu tư trong một số BIT cho phép các nhà đầu tư nước ngoài có thể dự đoán trước được và đảm bảo quyền lợi hơn. Điều này mang lại sự yên tâm cho các nhà đầu tư nước ngoài về cách thức IIAs bảo vệ họ trong trường hợp tranh chấp phát sinh. Ngoài ra, một số BIT thậm chí còn chứa các điều khoản về các phương thức giải quyết tranh chấp giữa các quốc gia với phạm vi hẹp hơn. Điều khoản về tranh chấp giữa các quốc gia với phạm vi hẹp hơn nhưng sự chắc chắn cao hơn, không chỉ khuyến khích việc sử dụng biện pháp thương lượng để giải quyết tranh chấp thay vì trọng tài, mà còn cho phép yêu cầu bồi thường thiệt hại do bất kỳ vi phạm nào của IIA. Do đó, sự minh bạch, tính dự đoán trước được và tính chắc chắn đạt được thực hiện bởi các tính năng linh hoạt của IIAs, và các cơ chế giải quyết tranh chấp rõ ràng được đưa ra cung cấp cho sự bảo vệ nhiều hơn dành cho một trong hai bên. Điều này giúp các nhà đầu tư lập kế hoạch cẩn thận và khôn ngoan để đạt được lợi nhuận cao hơn. Như vậy, các IIA giúp khuyến khích FDI.

Mục tiêu của các IIA là thúc đẩy tự do hóa thương mại giữa các quốc gia. Các điều khoản này dựa trên các nguyên tắc MFN hoặc NT. Tuy nhiên, các quốc gia vẫn phải cảnh giác với bất kỳ khoản đầu tư nào có thể gây nguy hiểm cho an ninh quốc gia. Do đó, hầu hết các IIA đều bao

gồm các ngoại lệ về an ninh quốc gia một cách rõ ràng, để đảm bảo rằng các IIA tự bảo vệ mình. Tuy nhiên, khó khăn là cách các bên cân bằng giữa an ninh quốc gia và kiểm soát các nghĩa vụ MFN/NT như thế nào.

Các thí dụ sau đây cho thấy vị trí của nó trong bối cảnh ngoại lệ ở các tình huống khác nhau.

- *NAFTA* là một trong những IIA quan trọng nhất. Hiệp định này được ký kết bởi Hoa Kỳ, Canada và Mexico để thúc đẩy tự do hóa thương mại. NAFTA có một ngoại lệ rõ ràng về an ninh quốc gia theo Điều 2102. Điều khoản này quy định rằng: 'Bất kỳ hành động nào mà Hiệp định này coi là cần thiết để bảo vệ các lợi ích an ninh thiết yếu'.[45] Điều này cho thấy rằng ngoại lệ là vấn đề 'tự xem xét', đặc biệt là với cụm từ 'hiệp đinh này coi là cần thiết'. Điều này có nghĩa là khi nước tiếp nhận đầu tư nghi ngờ hoặc tin rằng đầu tư nước ngoài có xu hướng đe doạ lợi ích công cộng, chính phủ có thể từ chối hoặc hạn chế dự án đầu tư theo trường hợp ngoại lệ này bằng nguyên tắc 'thiện chí'. Một điều khoản khác của NAFTA dường như cũng cho thấy ngoại lệ an ninh quốc gia là vấn đề tự đánh giá. Điều 1138 quy định rằng nếu đó là một hành động để hạn chế đầu tư, quyết định của Chính phủ nước tiếp nhận đầu tư không bị áp dụng bất kỳ điều khoản giải quyết tranh chấp nào theo hiệp định. Một số người bình luận rằng 'nếu các Bên đồng ý rằng Điều 2102 hoàn toàn phụ thuộc vào sự tự đánh giá, thì Điều 1138 sẽ không cần thiết'.

Thỏa thuận này đã được Hoa Kỳ và Singapore ký kết. Cần phải nghiên cứu trong bối cảnh SWFs và an ninh quốc gia, không chỉ vì gần đây Singapore đã tích cực tham gia đầu tư vào các quốc gia nước ngoài và là một trong những nền kinh tế có ảnh hưởng nhất ở châu Á, mà còn là hình thức BIT này khá quan trọng và điển hình. Singapore cũng đã đầu tư vào một số tổ chức tài chính lớn ở Hoa Kỳ. Cách tiếp cận thụ động (chọn-bỏ) được sử dụng theo USSFTA, có nghĩa là các ngành dịch vụ không áp dụng được danh sách liệt kê trong Phụ lục. Định nghĩa 'nhà đầu tư được nêu rõ trong hiệp định theo Điều 15.1, không loại trừ một SWF như một loại nhà đầu tư.

- Án lệ liên quan đến Argentina

Sau cuộc khủng hoảng kinh tế vào năm 2002, Argentina bị dính líu với hàng loạt vụ kiện. Trong đó, tranh chấp giữa Argentina và Hoa Kì là tranh chấp đáng chú ý nhất liên quan đến ngoại lệ an ninh quốc gia. Cũng như hầu hết các BIT hiện nay, BIT Argentina - Hoa Kì thừa nhận mối quan tâm đến ngoại lệ an ninh quốc gia trong cơ chế giải quyết tranh chấp giữa Nhà nước và Nhà nước.

[45] NAFTA, Điều 2102 (b), ngày 15/9/1993, 32 I.L.M. 289.

BIT này chứa đựng điều khoản ngoại lệ về an ninh với cụm từ được dùng là 'bảo vệ lợi ích an ninh thiết yếu của mình'.[46] Một trong những án lệ chỉ ra rằng tình trạng khẩn cấp của nền kinh tế được coi như là 'lợi ích an ninh thiết yếu'.[47] Vì vậy, thoạt nhìn, Argentina có thể đã viện dẫn ngoại lệ này. Tuy nhiên, trọng tài đưa ra quan điểm rằng điều khoản này không phải là 'điều khoản tự đánh giá' để áp dụng.

Quyết định này rõ ràng cho thấy trọng tài miễn cưỡng để cho các quốc gia xác định xem họ có thể viện dẫn các trường hợp ngoại lệ hay không. Phán quyết cũng cung cấp một khuôn khổ rằng khi một trong hai bên muốn biện minh cho hành vi vi phạm nghĩa vụ của mình dựa trên trường hợp ngoại lệ theo như BIT, thì phải đưa ra được mối liên hệ giữa biện pháp áp dụng và 'cách giải quyết cuộc khủng hoảng'.

Án lệ của Argentina hướng dẫn cách thức để tăng khả năng chắc chắn việc có hiệu lực của một quyết định. Các quyết định này làm rõ thêm cách thức giải thích điều khoản ngoại lệ an ninh của một BIT với các điều khoản quan trọng chưa được quy định rõ. Án lệ này cung cấp bài học cho các quốc gia về việc quy định rõ các điều khoản và hỗ trợ các quốc gia trong việc đàm phán, kí kết các BIT mới.

Sau án lệ của Argentina, Hoa Kì cập nhật hoá cách diễn đạt điều ước quốc tế của mình dựa trên mô hình các BIT của họ. Theo đó, họ đảm bảo rằng ngoại lệ 'tự đánh giá' cho phép họ áp dụng dễ dàng. Bởi vậy, chính những yêu cầu này thực sự đã điền vào các khoảng trống còn tồn tại và giúp làm rõ hơn luật đầu tư cũng như thúc đẩy hoạt động đầu tư không giới hạn.

Mục 5. NGOẠI LỆ LIÊN QUAN ĐẾN THUẾ

Các điều khoản quan trọng trong IIA và hiệp định thuế quốc tế là khác nhau, mặc dù chúng đều hướng tới đặc trưng chung là không phân biệt đối xử. Có sự khác nhau này bởi lẽ mục đích chính của hiệp định thuế quốc tế chỉ là 'đối phó với vấn đề phát sinh từ việc phân bổ thu nhập giữa các quốc gia', và ngăn chặn việc thuế bị các quốc gia tiếp nhận đầu tư lạm dụng. Chính bởi vậy, IIA cung cấp phạm vi bảo hộ đầu tư rộng hơn. Việc bảo vệ tốt hơn người đóng thuế, cũng như quyền của nhà đầu tư theo nội dung các điều khoản của các IIA và các BIT là một trong những lý do giải thích việc các nhà đầu tư nước ngoài đưa ra yêu cầu dựa

[46] Điều 14 BIT của Argentina, ngày 14/11/1991.

[47] *CMS Gas Transmission Company v. The Republic of Argentina (CMS v. Argentina)*, ICSID Case No. ARB/01/8, Award 12, 109 (tháng 5/2005).

trên các BIT, thay vì các hiệp định thuế quốc tế.[48]

Mục đích chính của các hiệp định thuế quốc tế là 'đối phó với vấn đề phát sinh từ việc phân bổ thu nhập giữa các quốc gia'.[49] Có nghĩa là các hiệp định thuế quốc tế là những thoả thuận giữa các quốc gia, theo đó họ đưa ra một số mục tiêu, bao gồm cả việc tránh đánh thuế hai lần đối với đầu tư xuyên biên giới, chống thu thuế quá nhiều, tránh trốn thuế, quan hệ hợp tác của các cơ quan hành chính thuế và trao đổi thông tin.

Một lý do quan trọng lý giải vì sao IIA tiếp tục thay thế hiệp định thuế quốc tế khi xảy ra các tranh chấp, chính là việc IIA đưa ra nhiều hơn các điều khoản quan trọng, bảo vệ tốt hơn cho người đóng thuế, đồng thời là nhà đầu tư, liên quan đến quyền lợi của họ trong lĩnh vực đầu tư.

Các điều khoản quan trọng bao gồm MFN, NT, FET, sự bảo đảm và bồi thường khi quốc hữu hoá, vấn đề FPS và điều khoản giải quyết tranh chấp thông qua thoả thuận trọng tài quốc tế, không kể các trường hợp ngoại lệ. So với điều khoản không phân biệt đối xử theo hiệp định thuế quốc tế, một số nội dung như MFN, NT, FET, bồi thường khi quốc hữu hoá, điều khoản về chuyển tiền và vấn đề FPS đều bị bỏ ngỏ.

Có bình luận cho rằng một số IIA không đề cập đến các biện pháp thuế, hoặc nhắc đến những ưu đãi trong các hiệp định thuế quốc tế. Các BIT chỉ áp dụng theo các ngoại lệ nhất định, như tước quyền sở hữu. *Thí dụ*: Điều 3 BIT Hàn Quốc - Uruguay đề cập rằng MFN và NT không áp dụng với các biện pháp về thuế. Tuy nhiên, loại trừ này không phải tuyệt đối, bởi vì biện pháp về thuế là gì thì chưa được định nghĩa, liệu rằng nó chỉ là thuế trực tiếp hay bao gồm cả thuế trước bạ, thuế nhập khẩu, thuế lợi vốn, v.v.?

Có nhiều hiệp định không ghi nhận vấn đề này. Ngoài ra, nội dung về thuế cũng có thể là vấn đề trong luật đầu tư (Xem bảng 5 để thấy được tổng quan sự đa dạng của các ngoại lệ về thuế).

[48] Federico Ortino, *Điều khoản quan trọng trong các Hiệp định đầu tư quốc tế và tương lai đàm phán các Hiệp định: Giải quyết ba thách thức*, Công tác E15 thúc đẩy chính sách đầu tư, ngày 15/6.

[49] Như trên.

Bảng 5: Các ngoại lệ điển hình về thuế trong các IIA

Các cách thức loại trừ	Thí dụ	Hậu quả pháp lý
Các loại trừ chung	Hiệp định khuyến khích và bảo hộ đầu tư giữa Hong Kong và New Zealand (1995), Điều 8:2: 'Các điều khoản của thoả thuận này sẽ không áp dụng đối với vấn đề thuế trong khu vực của một bên ký kết. Vấn đề này sẽ được điều chỉnh bởi luật trong nước của mỗi bên và các điều khoản trong bất kỳ công ước nào liên quan đến thuế, bao gồm cả thoả thuận giữa hai bên về thuế.	Trường hợp này loại bỏ nội dung về thuế ra khỏi phạm vi áp dụng của hiệp định mà không hề có bất kì bảo lưu nào. Và không thể mang tranh chấp liên quan đến thuế đến trọng tài đầu tư trong khuôn khổ hiệp định để giải quyết.
Điều khoản xung đột theo đó ưu tiên áp dụng hiệp định thuế quốc tế.	Hiệp định khuyến khích bảo hộ và đầu tư giữa Mexico và Hàn Quốc (2000), Điều 3:3: 'Hiệp định này sẽ không ảnh hưởng đến các quyền và nghĩa vụ của mỗi bên phát sinh từ bất cứ hiệp định thuế quốc tế nào. Trong trường hợp có bất cứ mâu thuẫn nào giữa các quy định của hiệp định này và bất cứ một hiệp định thuế quốc tế nào, thì sẽ ưu tiên áp dụng hiệp định thuế quốc tế'.	Điều khoản đưa ra sự ưu tiên các hiệp định thuế quốc tế so với IIA có thể làm rõ các IIA, có thể vẫn áp dụng đối với lĩnh vực thuế, nhưng trong phạm vi đã được ban hành trong các hiệp định thuế quốc tế thì sẽ ưu tiên áp dụng hiệp định thuế quốc tế.

Các loại trừ cụ thể và rõ ràng dựa trên sự khác biệt giữa các loại thuế (thuế trực thu và thuế gián thu)	Hiệp định khuyến khích và bảo hộ đầu tư giữa Hoa Kỳ và Uruguay (2005), Điều 21: Các loại thuế '2. Mục 7 Điều 3 và Điều 4 sẽ áp dụng với mọi biện pháp thuế, trừ các biện pháp liên quan đến thuế trực thu (những loại thuế thuộc loại này như các loại thuế trên thu nhập cá nhân, lợi tức hay nói cách khác là thuế trên lợi nhuận chịu thuế của công ty hoặc cá nhân, thuế đối với gia tài, di sản thừa kế, tặng phẩm, việc chuyển giao khoảng cách thế hệ), ngoại trừ rằng không một điều khoản nào được áp dụng trong những trường hợp sau: (a) bất kì nghĩa vụ MFN đối với một lợi thế của mỗi bên theo một hiệp định thuế quốc tế; (b) không phù hợp với bất kì biện pháp thuế nào đang tồn tại; (c) để duy trì hoặc nhanh chóng thay thế quy định hiện hành về thuế không phù hợp; (d) để sửa đổi quy định hiện hành về thuế không phù hợp trong bất kỳ biện pháp thuế nào mà tại thời điểm sửa đổi, nó không làm giảm sự phù hợp của quy định này với những điều luật khác [...]'.	Loại quy định này hạn chế việc áp dụng hiệp định với một số loại thuế. Cũng đáng lưu ý rằng IIA đưa ra sự khác biệt này chính là gián tiếp làm sáng tỏ ý nghĩa của biện pháp thuế đó.
Thuế không phải là một hình thức tước quyền sở hữu	Hiệp định khuyến khích và bảo hộ đầu tư giữa Canada và Romania (2009), Điều VII:4: 'Điều VIII (Tước quyền sở hữu) có thể bị áp dụng dưới dạng một một biện pháp thuế, trừ khoảng thời gian 6 tháng sau khi nhà đầu tư được thông báo rằng họ tranh chấp đối với một biện pháp thuế, cơ quan thuế của các bên trong hiệp định cùng nhau xác định các biện pháp không phải là tước đoạt quyền sở hữu để áp thuế'.	Các IIA có thể trao cho cơ quan thuế quốc gia khả năng bác khiếu nại của nhà đầu tư viện dẫn rằng hành vi tước quyền sở hữu phát sinh từ một biện pháp thuế của nước tiếp nhận đầu tư.

Các loại trừ cụ thể và rõ ràng theo nguyên tắc không phân biệt đối xử (NT và/hoặc MFN)	Hiệp định khuyến khích và bảo hộ đầu tư giữa Anh và Mexico (2006), Điều 5: 'Điều 4 của hiệp định này sẽ không được hiểu là buộc một bên ký kết phải dành cho nhà đầu tư của bên ký kết kia những lợi ích với bất kì sự đối xử, sự ưu tiên hoặc đặc quyền nào phát sinh từ: [...]((b) bất cứ thoả thuận hay dàn xếp quốc tế liên quan toàn bộ hoặc chủ yếu đến thuế mà mỗi bên tham gia kí kết là thành viên. Trong trường hợp có bất cứ mâu thuẫn giữa các quy định của hiệp định này với bất kì thoả thuận hoặc dàn xếp khác, thì sẽ ưu tiên quy định ban hành sau.'	Quy định này loại trừ việc áp dụng cả nguyên tắc MFN và trong điều ước quốc tế do một vấn đề bất kì liên quan đến thuế.
Các loại trừ cụ thể và rõ ràng theo nguyên tắc FET	NAFTA, Điều 2103 (1) quy định rằng: 'Ngoại trừ quy định trong điều này, không nội dung nào trong Hiệp định sẽ áp dụng đối với các biện pháp thuế'. [...] 'Điều 1102 và 1103 [thí dụ về nguyên tắc NT và MFN] [...] sẽ áp dụng với tất cả các biện pháp thuế, và Điều 1106 (3), (4), (5) [thí dụ về yêu cầu thực hiện] sẽ áp dụng với các biện pháp thuế.	Trong mối liên hệ này, vì không có một tham chiếu liên hệ với nguyên tắc FET, nên các biện pháp về thuế trong nội dung Điều 1105 được loại trừ khỏi việc xem xét. Các điều ước cũng có thể loại trừ việc áp dụng nghĩa vụ FET với các biện pháp thuế.

Sự kết hợp đa dạng các ngoại lệ trong phạm vi các loại trừ	Hiệp định khuyến khích và bảo hộ đầu tư giữa Canada và Romania (2009), Điều VII (Biện pháp thuế): 'Ngoại trừ quy định trong điều này, không nội dung nào trong Hiệp định sẽ áp dụng đối với các biện pháp thuế. Không nội dung nào trong Hiệp định ảnh hưởng đến quyền và nghĩa vụ của các bên theo bất kì hiệp định thuế quốc tế nào. Trong trường hợp có bất kì mâu thuẫn nào giữa quy định của Hiệp định này với những hiệp định khác khác, các quy định của hiệp định khác sẽ được áp dụng trong phạm vi mâu thuẫn. Theo Mục 2, một khiếu nại của nhà đầu tư đối với biện pháp thuế của một bên ký kết là vi phạm thoả thuận giữa chính quyền trung ương của một bên ký kết và nhà đầu tư liên quan đến khoản đầu tư, sẽ được coi là một khiếu nại do vi phạm Hiệp định này, trừ trường hợp trong khoảng thời gian 6 tháng sau khi có thông báo khiếu nại của nhà đầu tư, cơ quan thuế của các bên ký kết cùng nhau xác định rằng biện pháp này không trái với Hiệp định. Điều VIII (Tước quyền sở hữu) có thể bị áp dụng dưới hình thức một biện pháp thuế, trừ trường hợp trong khoảng thời gian 6 tháng sau khi nhà đầu tư được thông báo rằng họ có tranh chấp liên quan đến một biện pháp thuế, nếu cơ quan thuế của các bên trong hợp đồng cùng nhau xác định các biện pháp không phải là tước đoạt quyền sở hữu. Trong trường hợp cơ quan thuế của các bên không đạt được quyết định chung theo như đoạn 3 và đoạn 4 trong khoảng thời gian 6 tháng sau khi được thông báo, thì nhà đầu tư có thể gửi khiếu nại của mình để giải quyết theo Điều XIII (cơ chế ISDS)	Mọi dạng loại trừ không loại trừ lẫn nhau. Trên thực tế, một số IIA kết hợp một vài trường hợp ngoại lệ trong loại trừ, dẫn đến một cấu trúc tương đối phức tạp, đòi hỏi cần phải xem xét kỹ lưỡng để xác định phạm vi áp dụng.

Nguồn: Tác giả tổng hợp

Việc loại bỏ điều khoản không có nghĩa là loại bỏ mọi thứ liên quan đến các biện pháp thuế và mục đích chỉ nhằm đảm bảo cho các quốc gia tiếp nhận đầu tư vẫn nắm chủ quyền quốc gia bằng việc quyết định chính sách thuế. Nó cũng không loại trừ việc quản lý của cơ quan thuế, *thí dụ* như những thiếu sót của quy trình. Điều này được khẳng định trong Vụ *Hulley v. Russia*, trọng tài đã đưa ra phán quyết rằng việc loại bỏ các biện pháp thuế để không chống lại sự mở rộng và việc thu hồi thuế sẽ được xem xét kỹ lưỡng như theo Hiệp ước Hiến chương năng lượng 1994: Giả sử các biện pháp thuế bị loại bỏ được áp dụng, trọng tài kết luận rằng bất cứ biện pháp nào bị loại bỏ sẽ thuộc phạm vi của việc thu hồi trưng thu.[50]

Do đó, trong án lệ này đã phán xử rằng việc loại bỏ điều khoản nên được giải thích theo phạm vi hẹp. Nếu nó là một vấn đề ảnh hưởng đến chính sách để thiết lập chủ quyền thì nên loại bỏ nó ra. Tuy nhiên, nếu biện pháp thuế ngoài phạm vi này thì không nên loại bỏ nó ra. Ngoài ra, một điểm quan trọng khi thực hiện việc loại bỏ là nên thực hiện nó như là một hành động thuế có thiện chí, *thí dụ* như hành động này hướng đến mục đích tăng thu nhập thông thường cho Nhà nước.[51] Nếu hành động này chỉ được thực hiện dưới chiêu bài thuế thì nó không nên được loại bỏ.[52]

Vì vậy, những điều khoản quan trọng, như MFN, NT, FET, FPS, quy định bồi thường khi tước quyền sở hữu, không thể bị loại bỏ chỉ bằng cách đưa ra khỏi các BIT hay IIA, trừ trường hợp nó là một hành động thuế có thiện chí, hoặc trừ khi nó ảnh hưởng đến việc hình thành chính sách thuế.

Từ những nghiên cứu các án lệ liên quan đến việc giải quyết tranh chấp của Nhà nước, có thể nhận thấy rằng, người nộp thuế, đồng thời là nhà đầu tư, đưa ra những khiếu nại về các biện pháp thuế thông qua các BIT hay các IIA bởi hai lý do: (i) các BIT hay các IIA đưa ra sự bảo vệ tốt hơn; hoặc (ii) họ chỉ có một lựa chọn có giá trị, bởi không có các BIT hay các IIA được ký kết giữa hai bên.

Một vụ việc đáng chú ý đang được giải quyết trong ICSID như là một minh chứng rằng: dù có một hiệp định thuế song phương giữa Hàn Quốc và các Tiểu vương quốc Ả Rập thống nhất (UAE), thì vụ việc vẫn

[50] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Award (ngày 18/6/2014).

[51] Như trên.

[52] Như trên.

đang được giải quyết thông qua BIT, bởi vấn đề tranh chấp là dịch vụ thuế quốc gia của Hàn Quốc đã tự ý chiếm giữ 10% thuế tiêu thụ từ các công ty của UAE, hành vi này thì không được thực hiện theo như hiệp định thuế song phương đối với thuế tiêu thụ và không liên quan đến vấn đề đánh thuế hai lần.[53]

Cũng có nhiều vụ việc khác đã bị khiếu nại theo BIT hay IIA, dù rằng trong trường hợp đó có hiệp định thuế song phương. Trong vụ *Feldman v. Mexico,* mặc dù có Hiệp định thuế thu nhập giữa Hoa Kỳ và Mexico, nhưng khiếu nại vẫn được đệ trình lên ICSID, và trọng tài đã phán quyết rằng Mexico đã vi phạm nguyên tắc NT khi áp đặt thuế tiêu thụ đặc biệt với thuốc lá và thuế quan khi xuất khẩu thuốc lá. Một *thí dụ* khác là vụ *RosInvestCo v. Russia,* khi cũng có Hiệp định thuế song phương giữa Anh Quốc và Nga,[54] tuy nhiên khiếu nại được đưa ra theo BIT Anh - Nga về việc thiết lập và phán xử cho phép tước quyền sở hữu khi điều tra hành vi lẩn tránh thuế. Vụ khác là *Mobil v. Venezula,* mặc dù có Hiệp định thuế song phương, nhưng vẫn khiếu nại trên cơ sở BIT, khi quốc hữu hoá gián tiếp bằng việc tăng thuế suất thuế thu nhập.[55]

TÓM TẮT CHƯƠNG 8

IIA đang dấy lên sự chú ý chưa từng thấy của xã hội. Một vấn đề xã hội dân sự quan tâm là các IIA có hạn chế quá mức quyền của nước tiếp nhận đầu tư quy định các nội dung vì lợi ích công cộng. Vấn đề này không mới nhưng dẫn đến việc tăng sự phức tạp của các tranh chấp đầu tư. Trong khi trọng tâm ban đầu của các IIA là bảo vệ chống lại việc tước quyền sở hữu bất hợp pháp, thì đến nay các nhà đầu tư nước ngoài sử dụng IIA để thách thức một loạt các chính sách, luật lệ của nước tiếp nhận đầu tư, bao gồm cả lĩnh vực môi trường hay sức khoẻ cộng đồng.

Trọng tài ngày càng tăng những quyết định không chỉ đi chệch vấn đề pháp lý của vụ tranh chấp, mà còn mở rộng việc phân tích nguồn gốc các chính sách của Nhà nước. Điều này làm tăng các câu hỏi liên quan đến cả chuyên môn và sự uỷ thác được trao cho các trọng tài viên khi đánh giá các chính sách công. Trầm trọng hơn nữa vấn đề này, nhiều hội đồng trọng tài thì xem xét những minh chứng lợi ích công cộng được đưa ra bởi quốc gia, số khác chấp nhận quan điểm nó chỉ là vấn đề kinh tế thuần tuý. Ngoài các ngoại lệ thuế, các IIA cũng có thể bao gồm các ngoại lệ chung được mô phỏng từ luật WTO, song ngoại lệ bảo vệ an ninh quốc gia và ngoại lệ trường hợp đặc biệt quốc gia có phạm vi áp dụng khá hẹp. Chương này cũng thảo luận về sự tương tác của các điều khoản 'ngoại lệ chung' với mục tiêu lợi ích công cộng như Điều XX GATT. Trong bối cảnh WTO, Điều XX GATT được đưa ra như là một phương kế thay thế tạm thời cuối cùng chứ không phải là công cụ chính sách chủ động vì môi trường hay sức khoẻ cộng đồng. Điều khoản này đặt gánh nặng chứng minh đối với bên bị cáo buộc vi phạm nguyên tắc không phân biệt đối xử, và thành công của việc sử dụng điều khoản này trong GATT/WTO không nhiều. Trong thương mại dường như vấp phải nhiều hạn chế tuỳ tiện và trá hình. Trong thực tiễn thực thi Luật WTO, Điều XX GATT đóng vai trò to lớn trong tranh tụng tại WTO, nhằm cân bằng yêu cầu tự do thương mại và mục tiêu chính sách công khác như vấn đề y tế. Điều này cũng là nguồn cảm hứng cho các IIA, nhưng dường như không có công cụ lý tưởng để đảm bảo rằng luật lệ trong nước và việc thực thi không vi phạm các cam kết trong IIA.

CÂU HỎI / BÀI TẬP

1. Có nên quy định điều khoản ngoại lệ 'tự đánh giá' không?
2. Có phải ngoại lệ 'tự đánh giá' là một điều khoản vẫn tuân thủ nguyên tắc 'thiện chí'?
3. Đọc, hiểu các vụ kiện chống lại Argentina; chuẩn bị thảo luận trên lớp.

TÀI LIỆU CẦN ĐỌC

1. Andrea K. Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure', trong *Oxford Handbook of International Investment Law* 459; 460-64; 507-16 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
2. Jürgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis', *59 Int'l & Comp. L. Q.* 325, 359-71 (2010).

[53] Dini Sejko, *IPIC, The First SWF To File An ICSID Claim,* 2015 at http://statecontrolledentities.com/2015/05/25/ipic-the-first-swf-to-file-an-icsid-claim/

[54] *Convention between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The Union of Soviet Socialist Republics for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital Gains,* (1985) at https://www.gov.uk/government/publications/ussr-tax-treaties-in-force (31 July, 1985).

[55] *Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holding, Ltd., Mobil Corporation, Mobil Venezolana de PetrÛleos Holdings, Inc., Mobil Venezolana de PetrÛleos, Inc., Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award (ngày 09/10/2014).

3. José Alvarez & Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', *1 YB Int'l Investment L & Policy* 379, 449-460 (2009).

4. Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures', *79 Brit. Y.B. Int'l L.* 264, 331-345 (2008).

5. *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), 101-50

6. *National Grid PLC v. Argentina*, UNCITRAL (Award) (3 Nov. 2008), 250-262.

7. *LG&E v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), 201-14; 226-66

8. *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case ARB(AF)/04/06 (Award) (21 November 2007), 168-180

9. *Corn Products Int'l v. Mexico*, ICSID Case ARB(AF)/04/01 (Decision on Responsibility) (15 January 2008), 161-192.

10. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 1171-1244 (Kluwer 2005).

11. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* 166-171 (Oxford 2008).

12. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, at 1138.5 - 1138.12 (Kluwer 2006; last updated 2009).

13. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* 481-528 (Kluwer 2008).

14. Andrea K. Bjorklund, 'Economic Security Defenses in International Investment Law', *1 International Investment Law & Policy Yearbook* 479 (2009).

15. Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', *74 Brit. Y.B. Int'l L.* 151 (2003)

16. Andrea K. Bjorklund, 'Private Rights v. Public International Law: Why Competition Among International Courts and Tribunals Is Not Working', *59 Hastings L. J.* 241 (2007).

17. Mark S. Bergman, 'Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty', 16 N.Y.U. J. Int'l L. & Pol. 1 (1983).

18. Julien Chaisse, 'Intellectual Property Rights,The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration', *11 Hastings Int'l Bus. L.J.* 225 (2015).

19. Asif H. Qureshi, 'Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation', *10 Asian J. WTO & Int'l Health L. & Pol'y* 193(2015).

PHẦN BA
HỢP ĐỒNG GIỮA NHÀ ĐẦU TƯ NƯỚC NGOÀI VÀ CHÍNH PHỦ NƯỚC TIẾP NHẬN ĐẦU TƯ

CHƯƠNG 9.
HỢP ĐỒNG GIỮA NHÀ ĐẦU TƯ NƯỚC NGOÀI VÀ CHÍNH PHỦ NƯỚC TIẾP NHẬN ĐẦU TƯ

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Mục đích học Chương 9
• Giới thiệu khái niệm về hợp đồng đầu tư quốc tế; • Thảo luận một số loại hợp đồng đầu tư quốc tế cụ thể; • Đánh giá vai trò của một số loại điều khoản quan trọng trong hợp đồng đầu tư quốc tế; • Thảo luận các trường hợp kiện do vi phạm hợp đồng đầu tư quốc tế. Liên hệ thực tiễn.

Hợp đồng giữa nhà đầu tư nước ngoài và Chính phủ nước tiếp nhận đầu tư có nhiều tên gọi, như: hợp đồng đầu tư quốc tế (international investment contracts), hợp đồng nhà nước (State contracts), hợp đồng chính phủ (Government agreements), … sau đây gọi tắt là HĐ đầu tư QT. Trong những năm gần đây, HĐ đầu tư QT đóng vai trò quan trọng trong phát triển cơ sở hạ tầng, các cơ sở sản xuất công nghiệp, nông nghiệp ở các nước, nhất là các nước DCs như Việt Nam. Những công trình này đòi hỏi số vốn lớn, thời gian thu hồi vốn lâu mà ngân sách Chính phủ Việt Nam không đủ để đầu tư. HĐ đầu tư QT góp phần nâng cao tiềm lực kinh tế của nước tiếp nhận đầu tư, thu hút dòng vốn đầu tư và công nghệ cao từ các nước phát triển, đồng thời khai thác được nguồn nhân lực và tài nguyên thiên nhiên của đất nước. Ngoài ra, việc kí kết và thực hiện HĐ đầu tư QT thành công còn đóng góp rất lớn cho quan hệ đa phương, góp phần thắt chặt quan hệ thương mại giữa các quốc gia; huy động được nguồn vốn từ khu vực tư nhân; thúc đẩy, tăng trưởng nguồn thu công để tài trợ và kinh doanh dự án vốn thuộc trách nhiệm của Nhà nước; làm giảm gánh nặng bội chi ngân sách nhà nước, đồng thời tạo ra cơ chế hữu hiệu cho đầu tư tư nhân nhằm phục vụ lợi ích công cộng.

HĐ đầu tư QT là một công cụ quan trọng của hoạt động đầu tư quốc tế. Tính chất hỗn hợp của luật công và luật tư, luật quốc tế và luật trong nước thể hiện trong các HĐ đầu tư QT đã gợi mở nhiều vấn đề pháp lý thú vị.

Chương 9 này sẽ tập trung làm rõ những vấn đề sau đây:

Thứ nhất, khái niệm HĐ đầu tư QT;

Thứ hai, giới thiệu một số loại HĐ đầu tư QT cụ thể;

Thứ ba, một số loại điều khoản quan trọng trong HĐ đầu tư QT;

Thứ tư, kiện do vi phạm HĐ đầu tư QT.

Mục 1. KHÁI NIỆM

1. Định nghĩa

Theo UNCTAD, HĐ đầu tư QT là 'hợp đồng được kí kết giữa một chính phủ hoặc một thực thể của chính phủ […] với một quốc gia nước ngoài hoặc một pháp nhân mang quốc tịch nước ngoài'.[1] Có quan điểm khác lại cho rằng loại HĐ này là 'một hợp đồng được ký kết giữa chính phủ hoặc một thực thể của chính phủ được giao điều hành độc quyền một phần kinh tế nhà nước và một thực thể nước ngoài, nhằm thiết lập một mối quan hệ kinh tế dài hạn với chính phủ hoặc các thực thể của chính phủ trong lĩnh vực kinh tế'.[2] Theo TS. Nguyễn Minh Hằng, 'hợp đồng giữa nhà đầu tư nước ngoài và Chính phủ nước tiếp nhận đầu tư là sự thỏa thuận giữa cơ quan nhà nước có thẩm quyền và nhà đầu tư nước ngoài nhằm làm phát sinh, thay đổi, chấm dứt các quyền và nghĩa vụ liên quan đến việc đầu tư xây dựng, kinh doanh, chuyển giao các công trình kết cấu hạ tầng'.[3]

HĐ đầu tư QT là thỏa thuận pháp lý giữa nhà đầu tư nước ngoài và một cơ quan nhà nước, trong đó quy định trách nhiệm của mỗi bên, chủ yếu liên quan đến việc phát triển, xây dựng và kinh doanh dự án của nhà đầu tư. Các HĐ này đặc biệt phổ biến đối với các dự án nông nghiệp lớn, các dự án cơ sở hạ tầng lớn (xây dựng đường xá, đường sắt, bến cảng, tòa nhà công vụ, công trình thủy lợi, ...), thăm dò và khai thác tài nguyên thiên nhiên (dầu khí, khoáng sản, nước, tài nguyên rừng). Các HĐ cho các dự án khai thác thường dưới hình thức giấy phép (licence), tô nhượng (concession), hoặc HĐ phân chia sản phẩm trao quyền thăm dò và / hoặc sản xuất.

Như vậy, HĐ đầu tư QT có đặc điểm cơ bản sau đây:

Thứ nhất, các bên ký kết HĐ là nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư.

Về khái niệm 'nhà đầu tư nước ngoài', xem Chương 1, Mục 3, Tiểu mục 4 (Khái niệm 'nhà đầu tư').

Chính phủ nước tiếp nhận đầu tư bao gồm: các cơ quan nhà nước cấp trung ương (các bộ, cơ quan ngang bộ), cơ quan nhà nước cấp địa phương (chính quyền cấp tỉnh, cấp bang, …), doanh nghiệp nhà nước (theo quy định của pháp luật quốc gia).

Thứ hai, nội dung HĐ liên quan đến những mối quan tâm xã hội, cơ sở hạ tầng, thúc đẩy phát triển kinh tế hoặc những ngành dịch vụ đặc biệt, như: hợp đồng cho vay, hợp đồng lao động, hoặc những dự án cơ sở hạ tầng lớn như xây dựng đường cao tốc, cảng hoặc đập nước.

[1] UNCTAD, *Series on Issues in International Investment Agreements, State Contracts* (2004), tr. 13.

[2] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), tr. 16.

[3] TS. Nguyễn Minh Hằng, Trường Đại học Ngoại thương, *Giáo trình Pháp luật Kinh doanh quốc tế*, tr. 410, Nxb. Đại học Quốc gia, Hà Nội, (2010).

Một trong những dạng phổ biến nhất của loại HĐ này là HĐ khai thác tài nguyên thiên nhiên.

Thứ ba, thời hạn HĐ thường kéo dài nhiều năm.

Thứ tư, đây là loại HĐ mang tính rủi ro không mong muốn.

2. Bản chất pháp lý của hợp đồng đầu tư quốc tế

Nhà đầu tư nước ngoài luôn nhấn mạnh khía cạnh 'thương mại' của HĐ và coi HĐ như là 'luật tối cao'. Có thể nói, HĐ đầu tư QT được coi là một 'văn bản pháp lí' nhằm bảo hộ đầu tư nước ngoài. Tuy nhiên, đối lập với quan điểm đó, chính phủ nước tiếp nhận đầu tư lại quan tâm đến bản chất 'công' của HĐ, coi HĐ đầu tư QT là 'HĐ nhà nước', HĐ 'phi thương mại' và đây là một dạng HĐ 'đặc biệt', trong đó một bên của HĐ - chính phủ - có quyền miễn trừ tư pháp.

Bên cạnh đó, việc cả luật quốc tế và luật quốc gia của nước tiếp nhận đầu tư đều tham gia điều chỉnh HĐ đầu tư QT làm cho loại HĐ này trở nên rất phức tạp về mặt pháp lý.

Mục 2. MỘT SỐ LOẠI HỢP ĐỒNG CỤ THỂ[4]

HĐ đầu tư QT có lịch sử lâu dài. Chúng bao gồm từ loại HĐ tô nhượng từ thời kỳ rất sớm (concession contracts) để khai thác tài nguyên khoáng sản đến các loại HĐ hiện đại như các HĐ đầu tư QT liên quan đến dịch vụ.

1. Hợp đồng đầu tư quốc tế truyền thống

Các HĐ đầu tư QT truyền thống được gọi là 'concession contract', được dịch ra tiếng Việt là 'HĐ tô nhượng', 'HĐ nhượng quyền', … bởi nội dung cơ bản của HĐ thường là trao quyền cho nhà đầu tư nước ngoài được thăm dò và khai thác tài nguyên thiên nhiên trên vùng lãnh thổ lớn.[5] Loại HĐ này thường có thời hạn đến 100 năm. Các công ty nước ngoài dường như có nhiều quyền lực trong lĩnh vực được đặc nhượng (concession), *thí dụ*: thành lập và duy trì một công trình cơ sở hạ tầng, xây dựng bệnh viện hoặc trường học, hoặc xây dựng và quản lí các bến cảng. Vai trò của các công ty nước ngoài chẳng khác gì một "Chính phủ bên trong" của lĩnh vực mà nước tiếp nhận đầu tư hầu như đã uỷ quyền quyền lực cho các công ty nước ngoài thực hiện. Loại HĐ đầu tư QT này ảnh hưởng tới quyền lực của chính quyền địa phương, và không thể coi đó là 'HĐ bình đẳng'.[6] Những công ty phương Tây thời điểm đó đã có lợi thế nhờ sự thiếu kinh nghiệm của DCs và LDCs. Ngày nay, số lượng các HĐ khai thác tài nguyên thiên nhiên đã giảm nhiều, bởi việc các bên trong HĐ tiến hành đàm phán lại, hoặc bằng hành vi quốc hữu hoá của chính phủ nước tiếp nhận đầu tư.

2. Một số hợp đồng đầu tư quốc tế hiện đại

Nhiều HĐ đầu tư QT hiện đại vẫn mang tên gọi là 'concession contracts', nhưng ngoài nội dung liên quan đến khai thác tài nguyên thiên nhiên, còn mang nội dung hiện đại, như: phát triển cơ sở hạ tầng, cung cấp dịch vụ công cộng. Có nhiều loại HĐ đầu tư QT như dưới đây, tuy nhiên khó phân biệt được sự khác nhau tuyệt đối của các loại HĐ này.

A. *Hợp đồng khai thác tài nguyên thiên nhiên hiện đại*

Đây là HĐ theo đó nước tiếp nhận đầu tư trao quyền thăm dò và khai thác tài nguyên thiên nhiên cho nhà đầu tư nước ngoài, đổi lại việc nhận một lợi ích đã ấn định - khiến cho lợi ích kinh tế của các bên trở nên cân bằng hơn. Sự kiểm soát của chính phủ đối với hoạt động của các công ty nước ngoài đã tăng lên. Thời hạn HĐ ngắn hơn. Vùng đất trao đặc quyền nhỏ hơn. Lợi ích của nước tiếp nhận đầu tư tăng lên và đa dạng hơn. Tiền thuê mỏ trước đây, nay được thay thế bằng hệ thống thuế, phân chia sản phẩm và phí khai thác tài nguyên thiên nhiên. Một trong những HĐ phổ biến nhất là HĐ khai thác dầu khí.

B. *Hợp đồng phân chia sản phẩm (Product Sharing Agreement - PSA)*

PSA thường áp dụng trong lĩnh vực dầu khí, vì vậy có thể được coi như một 'người kế vị hợp pháp' của loại HĐ cho phép khai thác tài nguyên thiên nhiên truyền thống.[7] Loại HĐ này được ký kết giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư, hoặc giữa các công ty dầu khí nhà nước với nhau.

[4] Tham khảo Nguyễn Kim Anh, Khóa luận tốt nghiệp, 2015; và Vũ Hồng Uyên, Khóa luận tốt nghiệp, 2015.

[5] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), tr. 18.

[6] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter One, (2010), tr. 18.

[7] Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Chapter ne, (2010), tr. 21.

Nội dung cơ bản của HĐ này là các công ty nước ngoài được trao quyền thăm dò và khai thác tài nguyên thiên nhiên, nhưng sau một khoảng thời gian ấn định, việc điều hành được bàn giao lại cho chính phủ nước tiếp nhận đầu tư. Loại HĐ này cũng chứa đựng nguy cơ rủi ro đối với nhà đầu tư nước ngoài.

C. *Hợp đồng cho phép kinh doanh*

Đây là loại HĐ đầu tư QT theo đó nhà đầu tư được trao quyền khai thác công trình cơ sở hạ tầng hay cung cấp dịch vụ công cộng. Có hai loại HĐ cho phép kinh doanh: HĐ phát triển cơ sở hạ tầng và HĐ cung cấp dịch vụ công cộng (*thí dụ*: năng lượng, nước và xử lí chất thải).[8]

Nội dung cơ bản của loại HĐ này là nước tiếp nhận đầu tư hầu như không can thiệp vào các quyết định của nhà đầu tư (nhà thầu). Nhà thầu được quyền tự do đưa ra các quyết định về kinh tế, kĩ thuật - công nghệ liên quan đến hoạt động khai thác tài nguyên trong khu vực được trao quyền ('concession'). Nhà thầu báo cáo cho nước tiếp nhận đầu tư thông qua hệ thống kế toán toàn bộ các khoản thu chi và lợi nhuận.

D. *Hợp đồng chìa khoá trao tay (Turnkey Contracts)*

Thông thường, loại HĐ này liên quan đến những dự án lớn trong những lĩnh vực mà nước tiếp nhận đầu tư thiếu kinh nghiệm. Theo đó, công ty nước ngoài có nghĩa vụ phải xử lí một công trình cơ sở hạ tầng cho đến khi công trình này được xây dựng xong và sẵn sàng hoạt động. Thông thường, sau khi hoàn thành công trình, các bên sẽ ký tiếp một HĐ hỗ trợ kỹ thuật để thay thế cho loại HĐ này.

E. *Hợp đồng đối tác công - tư (Public-Private Partnership - PPP)*[9]

Trong những năm 1990, thuật ngữ PPP không được sử dụng nhiều. Do đó, không có gì đáng ngạc nhiên khi có quan điểm cho rằng hiện tượng PPP là khá mới mẻ. Trên thực tế, thuật ngữ PPP có thể là mới, nhưng nội dung của nó thì không mới. *Thí dụ*: những đặc nhượng (concession) mà theo đó Chính phủ ủy quyền cho các nhà cung cấp dịch vụ tư nhân xây dựng và quản lý các công trình công cộng đã được triển khai ở Pháp vào thế kỷ 17. Ở nhiều nơi trên thế giới, các dự án cơ sở hạ tầng sớm được

[8] J. Luis Guasch, World Bank WBI Development Studies, *Granting and Renegotiating Infrastructure Concessions Doing It Right*, tr. 27, (2004).

[9] Đặng Thu Thủy, Luận văn tốt nghiệp đại học, 2016.

xây dựng và vận hành bởi các công ty tư nhân trên cơ sở HĐ mà ngày nay có thể gọi là PPP. *Thí dụ* như đường sắt Thái Lan và Nhật Bản và hệ thống cấp nước ở Pháp.[10] Ở Việt Nam cũng tương tự như vậy. Mặc dù một số hình thức PPP đã được giới thiệu ở Việt Nam từ cuối những năm 1990 (*thí dụ* như các hợp đồng BOT), nhưng thuật ngữ này mới chỉ được chính thức sử dụng trong các văn bản pháp luật từ năm 2014 (theo Luật Đầu tư 2014). Khung pháp lý cho các dự án PPP đã được đưa ra sau đó.

Hiện tại, không có định nghĩa được chấp nhận toàn cầu về 'PPP', và pháp luật mỗi nước đều có cách riêng để định nghĩa 'PPP'. Nhìn chung, PPP được biết đến như là một HĐ dài hạn giữa một bên tư nhân và một cơ quan chính phủ, để cung cấp tài sản công hoặc dịch vụ công, trong đó bên tư nhân chịu trách nhiệm quản lý và rủi ro đáng kể, và khoản tiền thù lao gắn liền với việc thực hiện HĐ.[11]

Từ định nghĩa trên, có nhiều loại hợp đồng PPP có thể được mô tả theo những cách khác nhau mà không có tiêu chuẩn quốc tế nào. Pháp luật các nước sử dụng các tên gọi khác nhau để mô tả các dự án PPP.

Luật Đầu tư năm 2014 của Việt Nam đã chính thức công nhận PPP như một hình thức đầu tư. Nghị định số 15/2015/NĐ-CP về hình thức đầu tư công-tư hợp danh (sau đây gọi là Nghị định 15) đã xây dựng khung pháp lý chung cho PPP.

Theo Khoản 8 Điều 3 Luật Đầu tư năm 2014, HĐ PPP 'là hợp đồng được kí kết giữa cơ quan nhà nước có thẩm quyền và nhà đầu tư, doanh nghiệp dự án để thực hiện dự án đầu tư.

Điều 3.1 của Nghị định 15 định nghĩa 'Hình thức đầu tư công-tư hợp danh' là:

> Hình thức đầu tư được thực hiện trên cơ sở hợp đồng giữa cơ quan nhà nước có thẩm quyền và (các) nhà đầu tư và doanh nghiệp dự án để thực hiện, quản lý và kinh doanh một dự án cơ sở hạ tầng và cung cấp các dịch vụ công cộng.

Nói chung, định nghĩa này không khác nhiều so với sự hiểu biết chung về PPP. Bên cạnh các HĐ BOT, BTO và BT, Nghị định 15 cũng giới thiệu và điều chỉnh các loại HĐ mới như HĐ Xây dựng - Sở hữu - Kinh doanh (BOO); HĐ Xây dựng - Chuyển giao - Cho thuê (BTL); HĐ Xây dựng - Cho thuê - Chuyển giao (BLT) và HĐ Kinh doanh & Bảo dưỡng (O&M).

[10] Michael Klein, *Public-Private Partnership, Promise and Hype.*

[11] World Bank, ADB, IDB, *Public-Private Partnerships Reference Guide*, https://library.pppknowledgelab.org/Knowledge%20Lab/documents/2490/download

Tóm lại, PPP có thể được mô tả như một HĐ dài hạn hoặc một hình thức đầu tư giữa một đối tác công và một đối tác tư nhân. Nó có thể đưa ra giải pháp cho các vấn đề mà HĐ mua sắm Chính phủ truyền thống không thể giải quyết được. Tuy nhiên, PPP cũng có những hạn chế nhất định. Nếu khuôn khổ pháp luật không thích hợp, thì có thể phát sinh những vấn đề như rủi ro tài chính, các ưu tiên đầu tư bị chệch hướng, và thực hiện PPP không thành công. Do đó, một quốc gia cần cân nhắc nghiêm túc việc soạn thảo khuôn khổ pháp lý cho PPP. Tại Việt Nam, khung pháp lý cho các hợp đồng PPP, được đưa ra bởi Nghị định 15 và Nghị định 30, vừa mới có hiệu lực không lâu. Hai nghị định này là sự nâng cấp các quy định trước đây về HĐ BOT, BTO và BT, theo đó mở rộng phạm vi áp dụng của PPP và đưa ra các quy định mới về nguồn vốn, bảo đảm đầu tư chu kỳ dự án PPP. Tuy nhiên, các quy định về PPP ở Việt Nam vẫn cần được tiếp tục hoàn thiện.

Mục 3. MỘT SỐ LOẠI ĐIỀU KHOẢN QUAN TRỌNG TRONG HỢP ĐỒNG[12]

1. Điều khoản ổn định (Stabilization Clause)[13]

Trong vài thập kỷ qua, việc ghi nhận các điều khoản ổn định trong các HĐ đầu tư QT đã trở thành nhu cầu phổ biến của các nhà đầu tư khi đầu tư vào các DC. Những điều khoản này chủ yếu nhằm hạn chế việc các chính phủ nước tiếp nhận đầu tư ban hành và áp dụng các quy định pháp luật mới theo hướng bất lợi cho nhà đầu tư nước ngoài. Về phạm vi của điều khoản ổn định, điều khoản này liên quan đến hai lĩnh vực chủ yếu sau đây: các vấn đề tài chính (như thuế, tiền bản quyền, tiền thuê, tỷ lệ thanh toán cho các dịch vụ đã cung cấp, … trả cho chính phủ hoặc người tiêu dùng), và các vấn đề phi tài chính, như môi trường, lao động, sức khỏe và an toàn.

A. *Nội dung điều khoản ổn định*

Điều khoản ổn định được ghi trong HĐ đầu tư QT theo đó chính phủ nước tiếp nhận đầu tư cam kết không sửa đổi pháp luật theo hướng làm ảnh hưởng xấu đến quyền lợi của nhà đầu tư nước ngoài theo HĐ.

[12] Tham khảo Nguyễn Kim Anh, Khóa luận tốt nghiệp, 2015; và Vũ Hồng Uyên, Khóa luận tốt nghiệp, 2015.

[13] 'Chapter Ten: Respect for Human Rights in Investor-State Relationships', *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships*, tr. 129; Howard Mann, 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' in *Special Issue: Investor-State Contracts and Sustainable Development*, Issue 1, Volume 2, October 2011, Investment Treaty New, tr. 6-8.

Thí dụ: Hợp đồng khai thác và thăm dò tài nguyên thiên nhiên giữa Công ty LIAMCO và Chính phủ Libya (trong vụ *LIAMCO v. Libya*) quy định điều khoản ổn định như sau:

> (1) Chính phủ Libya, Ủy ban và những cơ quan cấp tỉnh có liên quan sẽ tiến hành tất cả các bước cần thiết để đảm bảo rằng Công ty được hưởng tất cả các quyền đã nêu trong hợp đồng khai thác và thăm dò tài nguyên thiên nhiên này. Quyền hợp đồng được tạo ra rõ ràng bởi Hợp đồng khai thác và thăm dò tài nguyên thiên nhiên này không được sửa đổi, trừ khi được sự đồng ý của các bên.
>
> (2) Hợp đồng khai thác và thăm dò tài nguyên thiên nhiên này trong suốt thời gian có hiệu lực theo Luật dầu khí và Quy chế, có hiệu lực kể từ ngày thực thi Thỏa thuận sửa đổi, theo đó [đoạn (2)] được đưa vào Hợp đồng khai thác và thăm dò tài nguyên thiên nhiên. Bất kỳ sửa đổi hoặc bãi bỏ Quy chế này sẽ không ảnh hưởng đến quyền hợp đồng của Công ty.

Đoạn đầu tiên quy định rõ ràng rằng cần thiết phải có sự đồng ý của cả hai bên, nếu cần phải sửa đổi các quyền HĐ được bảo đảm bởi HĐ khai thác và thăm dò tài nguyên thiên nhiên. Đoạn thứ hai khẳng định rằng pháp luật quốc gia mà HĐ dẫn chiếu tới là ổn định trong khoảng thời gian nhất định, do đó không có văn bản pháp luật quốc gia nào ban hành sau đó có thể xâm phạm tới quyền HĐ của Công ty.

Yếu tố quan trọng của điều khoản ổn định là loại bỏ quyền đơn phương sửa đổi luật của chính phủ. Điều này đã khẳng định rằng sự đồng ý của nhà đầu tư là cần thiết, trước khi có bất kỳ sự thay đổi pháp luật nào gây ảnh hưởng tới nhà đầu tư.

Mục đích của điều khoản ổn định là nhằm ổn định các điều khoản và điều kiện trong một dự án đầu tư, qua đó góp phần quản lí những rủi ro phi thương mại. Gần đây, việc sử dụng điều khoản ổn định phần lớn được giới hạn trong các dự án đầu tư ở những nước có thu nhập thấp và trung bình. Điều khoản ổn định được quy định phổ biến trong các HĐ liên quan đến các dự án lớn về tài nguyên thiên nhiên, năng lượng và cơ sở hạ tầng - những lĩnh vực đòi hỏi nguồn vốn lớn trong giai đoạn đầu tư dự án và cần một khoảng thời gian dài trước khi dự án đó có lợi nhuận.

B. *Một số dạng của điều khoản ổn định*

1. Điều khoản 'đóng băng' ('Freezing' Clauses)

Theo điều khoản này, luật áp dụng sẽ bị 'đóng băng' - ổn định vào ngày mà HĐ được ký kết và được áp dụng trong suốt thời gian của HĐ.[14] Điều này nghĩa là:

- Nước tiếp nhận đầu tư đồng ý rằng bất kì sự thay đổi nào về mặt pháp luật được ban hành sau ngày kí kết HĐ thì cũng không áp dụng đối với HĐ đó.
- Nếu có sự mâu thuẫn giữa điều khoản của HĐ và bất kì quy định luật mới nào, thì những yếu tố gây mâu thuẫn của quy định mới đó sẽ không được áp dụng đối với HĐ.

Thí dụ: Năm 1998, Công ty COTCO và Chính phủ Cameroon đã kí kết một HĐ xây dựng và hoạt động của đường ống dẫn dầu Chad - Cameroon có đề cập đến điều khoản 'đóng băng' và điều khoản 'nhất quán' (xem mục *5* dưới đây), theo đó cam kết: Chính phủ Cameroon sẽ 'không sửa đổi luật, thuế và chế độ quản lí hối đoái làm ảnh hưởng xấu đến quyền và nghĩa vụ của Công ty COTCO' và không áp dụng cho bất cứ dự án xây dựng pháp luật nào hay biện pháp quản lí hành chính không phù hợp với HĐ (Điều 24 và Điều 30).[15]

Điều khoản 'đóng băng' có hai loại: 'đóng băng toàn bộ' ('*full freezing*') và 'đóng băng một phần' ('*limited freezing*'). Theo đó, 'đóng băng toàn bộ' nghĩa là sẽ ổn định toàn bộ hệ thống pháp luật, thường là trong khoảng thời gian diễn ra dự án đầu tư. 'Đóng băng một phần' nhằm bảo vệ nhà đầu tư tránh được những hạn chế phát sinh từ chính các quy định pháp luật. Mặc dù điều khoản này nhằm 'đóng băng' quyền của chính phủ nước tiếp nhận đầu tư trong việc điều chỉnh một số vấn đề trong HĐ, nhưng nó cũng không bảo đảm chống lại quyền chủ quyền vốn có của thực thể Chính phủ trong những vấn đề liên quan đến lợi ích quan trọng của quốc gia. Điều khoản này vẫn thường được sử dụng trong một số lĩnh vực và trở nên phổ biến hơn trong lĩnh vực khai thác khoáng sản.

[14] Prof. Dr. Nathalie Voser, Panel V, *Stabilization and/or Renegotiation Agreements Renegotiation Clauses in Long Term Energy, Arbitration of Energy Disputes: New Challenges*, tr. 4.

[15] Lorenzo Cotula, 'Foreign Investment Contracts', *International Institute for Environment and Development*, iied, tr. 3.

2. Điều khoản 'cân bằng kinh tế' ('Economic Equilibrium' Clauses):

Đây là một dạng điều khoản ổn định hiện đại, thay thế cho điều khoản 'đóng băng'. Theo đó có sự thay đổi các điều khoản HĐ, để đàm phán lại HĐ, nhằm khôi phục sự cân bằng kinh tế ban đầu của nó hoặc nhằm bồi thường.

Điểm tích cực của điều khoản này là góp phần làm ổn định mối quan hệ giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư nước ngoài. Nhiều người cũng cho rằng, hai công cụ cân bằng kinh tế và đàm phán giúp duy trì hòa khí khi xảy ra mâu thuẫn giữa những quy định pháp luật của Chính phủ nước tiếp nhận đầu tư và mong muốn của nhà đầu tư nước ngoài, mà rất có thể những mâu thuẫn này sẽ dẫn đến xung đột và phá vỡ HĐ.

Một *thí dụ* liên quan đến điều khoản này là Điều 17.1 - Hợp đồng phân chia sản phẩm của Việt Nam năm 2004:

> Nếu sau ngày kí kết hợp đồng, có bất kì sửa đổi hoặc huỷ bỏ những luật hiện hành và quy định luật nào cũng như việc ban hành luật và những quy định mới được đưa ra bởi Việt Nam ... trong bất kì trường hợp nào ảnh hưởng bất lợi đến quyền kinh tế hoặc những mong muốn của các bên trong hợp đồng này ... thì các bên phải nhanh chóng gặp gỡ và bàn bạc với nhau và đưa ra những thay đổi trong hợp đồng, nếu cần thiết cho cả hai bên, nhằm duy trì quyền, lợi ích của các bên trong hợp đồng dưới đây và đảm bảo rằng bất kì lợi tức, thu nhập, lợi nhuận nào được sinh ra trực tiếp hoặc gián tiếp theo hợp đồng này ... sẽ không bị giảm bớt đi như là một kết quả của sự thay đổi.[16]

Năm 2003, một HĐ dự án QT (International Project Agreement - IPA) được kí kết giữa một bên là các quốc gia: Benin, Ghana, Nigeria và Tongo, và một bên là Công ty đường ống dẫn khí Tây Phi, về xây dựng và hoạt động của đường ống dẫn khí Tây Phi (WAGP), đã đưa ra một điều khoản 'cân bằng kinh tế'. Theo điều khoản này, nếu thay đổi pháp luật (bao gồm cả pháp luật, quyết định của toà án, điều ước quốc tế) mà 'có ảnh hưởng quyết định đến công ty', hoặc uy tín của công ty giảm đáng kể đối với các cổ đông, thì Nhà nước phải 'khôi phục' công ty và/hoặc cổ đông, hoặc một vị trí kinh tế tương tự. Và đương nhiên, nó phải được bồi thường 'nhanh chóng, đầy đủ và hiệu quả'.

[16] Abdullah Faruque, *Validity and Efficacy of Stabilization Clauses - Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No. 4, tr. 317-336, (2006), tr. 320.

Điều khoản 'cân bằng kinh tế' cũng bao gồm hai loại: 'cân bằng kinh tế toàn bộ' *('full economic equilibrium')* và 'cân bằng kinh tế một phần' *('limited economic equilibrium')*. Theo đó, điều khoản 'cân bằng kinh tế toàn bộ' được mô tả trong HĐ với việc bảo vệ chống lại sự thay đổi pháp luật liên quan đến tài chính. Điều khoản 'cân bằng kinh tế toàn bộ' này có thể yêu cầu các bên đàm phán để khôi phục sự cân bằng kinh tế đối với lĩnh vực nào đó.[17]

Điều khoản 'cân bằng kinh tế một phần' quy định một số giới hạn trong việc áp dụng điều khoản này. *Thí dụ*: một vài điều khoản 'cân bằng kinh tế một phần' yêu cầu nhà đầu tư gánh chịu một khoản mất mát tài chính trước khi được hưởng khoản bồi thường. Có thể nói, điều khoản 'cân bằng kinh tế một phần' giải quyết các rủi ro pháp lí cụ thể. Ngày nay, việc sử dụng điều khoản 'cân bằng kinh tế' ngày càng nhiều lên, đặc biệt là so với điều khoản 'đóng băng'. Lí do là bởi tính linh hoạt của nó trong thực tiễn. Tuy vậy, điều khoản 'đóng băng' vẫn được sử dụng. Thậm chí, trong một số trường hợp, hai điều khoản này cùng tồn tại trong cùng một bản HĐ. *Thí dụ*: Hợp đồng Chad - COTCO về ống dẫn dầu Cameroon; hợp đồng Chính phủ nước tiếp nhận đầu tư (Host Government Agreement - HGA) liên quan đến dự án ống dẫn dầu Baku - Tbilisi - Ceyhan (BTC).[18]

Có thể thấy rằng, nhà đầu tư đang dần chuyển sự ưu tiên của mình cho việc áp dụng điều khoản 'cân bằng kinh tế' thay vì điều khoản 'đóng băng' nhờ cơ chế bồi thường rõ ràng. Đó là do điều khoản 'cân bằng kinh tế' có tính khả thi nhiều hơn, vì chúng được coi là một loại của điều khoản ổn định, ít nhất là trong việc cản trở quyền lực lập pháp của nước tiếp nhận đầu tư.

Tuy nhiên, cơ chế bồi thường ở đây cũng cần được quy định chi tiết hơn, cụ thể là mức độ bồi thường, để tránh sự không chắc chắn - yếu tố làm phát sinh những bất đồng, có thể dẫn tới quá trình đàm phán lại rất phức tạp.

3. Điều khoản hỗn hợp (Hybrid Clauses)

Điều khoản này mang đặc điểm của cả điều khoản 'đóng băng' và điều khoản 'cân bằng kinh tế'. Giống như hai điều khoản trên, điều khoản hỗn hợp cũng bao gồm hai loại: điều khoản hỗn hợp toàn bộ (*Full hybrid clauses)* và điều khoản hỗn hợp một phần *(Limited hybrid clauses)*.

[17] IFC, *Stabilization Clauses and Human Rights*, May 27, (2009), tr. 7.

[18] Lorenzo Coltula, *Regulatory Takings - Stabilization Clauses and Sustainable Development, Session 2.2: The Policy Framework for Investment: the Social and Environmental Dimensions*, (2008), tr. 7.

4. Điều khoản 'không thể thay đổi' ('không can thiệp vào hợp đồng') (Intangibility Clauses)

Điều khoản này quy định rằng HĐ chỉ có thể được sửa đổi với sự đồng ý của các bên, và/hoặc cam kết rõ ràng rằng chính phủ sẽ không quốc hữu hoá đầu tư. Điều khoản này thường được sử dụng trong những HĐ đầu tư về dầu khí. Điều khoản này không từ bỏ rõ ràng quyền chủ quyền, nhưng nó lại ngăn chặn việc sửa đổi đơn phương từ phía chính phủ nước tiếp nhận đầu tư.

Thí dụ: Trong Hợp đồng phân chia sản phẩm (PSA) của Indonesia giữa Pertamina và Oversea Petroleum Investment Corp. và Treasure Bay Enterprise Ltd., 1995, có quy định: 'Hợp đồng này sẽ không bị hủy bỏ, sửa đổi, bổ sung ở bất kì khía cạnh nào, ngoại trừ sự công nhận lẫn nhau trong việc soạn thảo của các bên đối với vấn đề này'.[19]

5. Ngoài ra, điều khoản ổn định còn bao gồm những dạng điều khoản khác:

Một là, điều khoản nhất quán (Consistency Clauses), theo đó pháp luật của nước tiếp nhận đầu tư chỉ có thể được áp dụng cho các dự án, nếu phù hợp với HĐ đầu tư QT.

Hai là, các điều khoản có chứa các cam kết mang tính ổn định trong một số lĩnh vực đặc biệt, như: các điều khoản mang tính ổn định về tài chính hoặc về cơ cấu thuế trong các dự án công ích.

C. *Ảnh hưởng pháp lí của điều khoản ổn định*

Theo một số án lệ (*Texaco, Aminoil, AGIP and Revere Copper*), trọng tài quốc tế đã cho rằng những điều khoản ổn định này là hợp pháp, hợp lệ và có tính ràng buộc theo luật quốc tế. Mặc dù có sự tranh cãi về tính hợp pháp và tính ràng buộc đương nhiên của các điều khoản này vào những năm 1970 và 1980, hiện nay người ta đã chấp nhận một cách rộng rãi rằng các điều khoản ổn định có tính hợp pháp và có tính ràng buộc.[20] Giá trị pháp lí của các điều khoản ổn định có thể được tăng cường hơn nữa trong các BIT, theo đó bên chính phủ cam kết thực thi các điều khoản HĐ đối với các quốc gia khác.

[19] Abdullah Faruque, *Validity and Efficacy of Stabilization Clauses - Legal Protection v. Functional Value*, Journal of International Arbitration, Vol. 23, No. 4, tr. 317-336, (2006), tr. 319.

[20] Lorenzo Cotula, 'Foreign Investment Contracts', *International Institute for Environment and Development*, iied, tr. 2.

Theo án lệ *Liamco Aminoil, AGIP*, nếu nước tiếp nhận đầu tư vi phạm các điều khoản ổn định, thì phải bồi thường cho nhà đầu tư. Số tiền bồi thường liên quan đến:

- Những chi phí phát sinh bởi chủ đầu tư do ảnh hưởng từ những quy định pháp luật mới;
- Những yêu cầu bồi thường theo quy định của những điều khoản ổn định.

Tóm lại, điều khoản ổn định có tính ràng buộc và được coi là hợp pháp theo luật quốc tế, và sự vi phạm dẫn đến hậu quả là chính phủ nước tiếp nhận đầu tư phải bồi thường cho các nhà đầu tư bị ảnh hưởng tiêu cực từ biện pháp quản lí của Chính phủ đó. Điều khoản ổn định được gia tăng để chống lại sự bất ổn định về chính trị và bất ổn định về pháp luật đang tồn tại ở các DC. Do đó, việc tiến hành hoạt động đầu tư nước ngoài ở những quốc gia này là mạo hiểm. Tuy nhiên, những hoạt động đầu tư này vẫn phát triển và được sự ủng hộ của những tổ chức như OECD và WB, như là một giải pháp giúp các chính phủ xây dựng môi trường đầu tư tốt cho nhà đầu tư nước ngoài.

Về mặt nguyên tắc, mục đích của các bên là tạo ra một khung pháp lí mà sẽ áp dụng nó từ khi bắt đầu đến khi kết thúc dự án. Đối với nhà đầu tư, mối quan ngại nhất là sự thay đổi luật quốc gia ở nước tiếp nhận đầu tư, và giới hạn của sự ổn định này chỉ tác động đến HĐ giữa các cá nhân, mà không áp dụng đối với nước tiếp nhận đầu tư. Do đó, sự tồn tại của điều khoản ổn định khẳng định rằng HĐ sẽ không bị ảnh hưởng bởi luật mới của nước tiếp nhận đầu tư. Tuy nhiên, theo Lorenzo Cotula, điều khoản này bị suy yếu do sự tham chiếu mơ hồ đến 'các tiêu chuẩn quốc tế'.[21] Mặc dầu vậy, điều khoản này đến nay vẫn còn thích hợp và được tìm thấy trong nhiều HĐ, thậm chí cả trong các hiệp định với kỳ vọng có thể kiềm chế bất kỳ quy định tương lai nào có thể được cho là làm giảm khả năng sinh lời của nhà đầu tư nước ngoài, bao gồm cả những nỗ lực để giải quyết vấn đề tham nhũng, bảo vệ quyền con người (bao gồm cả các quyền lao động), và bảo vệ môi trường.

[21] Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Toward A Rethink of Stabilization Clauses*, J. World Energy L. & Bus., tr. 158, 174, (2008).

2. Điều khoản đàm phán lại / Điều khoản thích nghi (Renegotiation Clauses/Adaptation Clauses)[22]

A. *Khái niệm*

Điều khoản đàm phán lại phổ biến trong các HĐ đầu tư QT, đặc biệt là trong lĩnh vực khai thác tài nguyên thiên nhiên. Do tính chất dài hạn của HĐ, các tình huống không lường trước có thể xảy ra, phá vỡ sự cân bằng kinh tế của các bên ký kết, thậm chí hủy hoại quan hệ HĐ giữa các bên. Điều khoản đàm phán lại sẽ tạo cơ chế pháp lý cho các bên điều chỉnh các điều khoản HĐ và khôi phục lại sự cân bằng kinh tế được thiết lập khi ký kết HĐ.

Từ những năm 1960, phong trào giải phóng dân tộc cùng với tranh luận về trật tự kinh tế thế giới mới và chủ quyền vĩnh viễn của các quốc gia đối với nguồn tài nguyên thiên nhiên, cuộc khủng hoảng nợ ở Trung Mỹ và Nam Mỹ, sự sụp đổ chính quyền xã hội chủ nghĩa ở Liên Xô cũ và các nước Đông Âu, và cuộc khủng hoảng tài chính châu Á, tất cả đều chứng tỏ điều khoản đàm phán lại như là một phương pháp quan trọng để cứu vãn HĐ đầu tư QT. Bởi vì những tình huống này làm cho HĐ trở nên không hiệu quả hoặc không công bằng với một trong các bên ký kết, phá vỡ sự cân bằng lợi ích của các bên. Mặc dù các bên có thể lựa chọn giải pháp chấm dứt HĐ, nhưng phần lớn thời gian, các dự án thâm dụng vốn trong các ngành công nghiệp này không thể dễ dàng dừng lại. Hơn nữa, theo quan điểm của nước tiếp nhận đầu tư nước ngoài, việc chấm dứt HĐ bởi các nhà đầu tư nước ngoài sẽ là một dấu hiệu xấu đối với bất kỳ khoản đầu tư nào khác của nhà đầu tư đó trong tương lai. Vì vậy, đối với cả hai bên, đàm phán lại sẽ là một cách tránh rủi ro mà không làm mất đi các lợi ích trong quan hệ HĐ.

Điều khoản này tập trung vào sự cân bằng kinh tế hơn là ổn định pháp lí. Khó khăn nảy sinh khi hoàn cảnh làm phát sinh quyền đàm phán lại, thường là với nhà đầu tư, không được quy định chi tiết trong HĐ. Rõ ràng là điều khoản đàm phán lại dựa vào tiêu chí cho phép đàm phán lại điều khoản HĐ, được quy định phức tạp hơn điều khoản ổn định, nhưng hết sức thiết thực và hữu ích.

Điều khoản đàm phán lại được hiểu là khi xảy ra một hoặc nhiều sự kiện nhất định, yêu cầu tất cả các bên trở lại bàn thương lượng và

[22] Liang Peng, *Renegotiation Clauses in International Investment Contracts*, http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html, Wednesday, July 27, 2011.

đàm phán lại những điều khoản trong HĐ của họ. Điều khoản đàm phán lại trở nên phổ biến trong tất cả các HĐ đầu tư QT, đặc biệt là những HĐ dài hạn, thường là HĐ về khai thác tài nguyên thiên nhiên và năng lượng. Nó cung cấp một cơ chế pháp lý cho các bên sửa lại HĐ nhằm phục hồi lại sự cân bằng kinh tế giữa các bên mà không phá huỷ mối quan hệ giữa họ. Sự cân bằng kinh tế ở đây được coi là yếu tố cốt lõi của HĐ, liên quan đến mục đích của các bên khi kí kết HĐ. Dựa trên sự quyết định của các bên, điều khoản đàm phán lại có thể tồn tại dưới bất kì dạng nào.

Điều khoản đàm phán lại thường xuất hiện trong những HĐ mẫu về khai thác tài nguyên thiên nhiên, *thí dụ*: luật mẫu PSA của Chính phủ khu vực Kurd (KRG), hay PSC của Việt Nam, …

Thí dụ cụ thể về điều khoản đàm phán lại - Điều 34.12 của Hợp đồng mẫu về khai thác và phân chia sản phẩm của Qatar 1994:

> Trong khi dựa vào vị thế tài chính của nhà đầu tư, theo hợp đồng, theo luật và quy định có hiệu lực vào ngày kí kết, đồng ý rằng, nếu bất kì luật, sắc lệnh hoặc quy định trong tương lai nào ảnh hưởng đến vị thế tài chính của nhà đầu tư, cụ thể là nghĩa vụ thuế quan vượt quá […] phần trăm trong thời gian hợp đồng, cả hai bên sẽ tiến hành đàm phán trong sự thiện chí để đạt được một giải pháp công bằng nhằm duy trì sự cân bằng kinh tế đối với thoả thuận này. Nếu không đạt được một giải pháp công bằng, vấn đề có thể được chuyển đến giải quyết bằng trọng tài theo Điều 31 của hợp đồng này.[23]

Cấu trúc cơ bản của điều khoản đàm phán lại thường bao gồm ba phần: bắt đầu sự kiện, nội dung đàm phán lại và hậu quả khi không đạt được thoả thuận sau khi đàm phán lại.

Bởi vì các HĐ thường kéo dài, nên hoàn cảnh chính trị, kinh tế và xã hội có thể thay đổi triệt để trong thời gian thực hiện HĐ cũng như các lợi ích kinh tế mà các bên đã dự kiến ban đầu trong HĐ. Bên cạnh đó, việc sử dụng điều khoản đàm phán lại và điều khoản thích nghi sẽ là 'lá chắn' bảo vệ chủ quyền quốc gia và bảo vệ nhà đầu tư đối với những thay đổi trong luật điều chỉnh HĐ.[24]

[23] Piero Bernadini, *The Renegotiation of Investment Contracts*, 13 FOREIGN INVEST.L.J.411, 416, (1998). Xem thêm John Y. Gotanda, *Renegotiation and Adaptation Clauses in International Investment Contracts, Revisted*, tr. 1467, 8/2003.

[24] John Y. Gotanda, *Renegotiation and Adaptation Clauses in International Investment Contracts, Revisited*, Villanova University School of Law.

Tuy nhiên, điều khoản đàm phán lại không phải hoàn hảo, bản thân nó vẫn tồn tại những hạn chế nhất định mà nhà đầu tư có thể từ chối đưa vào HĐ với một số lí do cơ bản sau đây:

Một là, những điều khoản này có thể làm giảm tính chất ổn định của HĐ;

Hai là, việc HĐ bao gồm điều khoản đàm phán lại sẽ có thể làm tăng chi phí giao dịch;

Ba là, đàm phán lại có thể nằm trong sự kiểm soát của chính phủ, vì vậy quá trình đàm phán lại này có thể không công bằng khi cần thay đổi thoả thuận.

Mặc dù còn tồn tại những hạn chế tiềm ẩn nhưng điều khoản đàm phán lại vẫn mang lại những lợi ích nhất định cho các bên, *thí dụ*: có thể làm giảm khả năng xảy ra tranh chấp giữa các bên.

B. *Hợp đồng có điều khoản đàm phán lại*[25]

Một số ví dụ:

'Điều khoản AMINOIL'

Điều khoản này được ghi trong Hợp đồng bổ sung ngày 29/7/1961 của Hợp đồng khai thác tài nguyên thiên nhiên (concession agreement) giữa Nhà nước Kuwait và Công ty dầu mỏ độc lập Hoa Kỳ (AMINOIL) ngày 28/6/1948. Điều khoản này được mô tả như sau:

> Điều 9
>
> Do những thay đổi về các điều khoản nhượng bộ (concession) hiện tại hoặc do các điều khoản nhượng bộ được ban hành sau đây, nếu các Chính phủ ở Trung Đông cần phải nhận những *lợi ích* gia tăng, thì Công ty sẽ tham vấn với nhà cầm quyền, về tất cả các tình huống có liên quan, kể cả các điều kiện kinh doanh, và có tính đến tất cả các khoản thanh toán được thực hiện, sao cho bất kỳ thay đổi nào trong các điều khoản của các hợp đồng giữa nhà cầm quyền và Công ty cũng sẽ công bằng cho các bên.

[25] Klaus Peter Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', *Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347*, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.

'Điều khoản Ok Tedi'

'Hợp đồng khai thác tài nguyên thiên nhiên OK Tedi Papua New Guinea' năm 1976 có điều khoản ngắn gọn và rất chung chung sau đây: 'Đôi khi các bên được phép thỏa thuận bằng văn bản bổ sung, thay thế, hủy bỏ hoặc thay đổi tất cả hoặc bất kỳ điều khoản nào của hợp đồng này'.

'Điều khoản Ghana/Shell'

Hợp đồng sản xuất dầu mỏ được ký kết năm 1974 giữa 'Chính phủ Ghana và Công ty thăm dò và sản xuất vỏ hải sản của Ghana' có điều khoản sau:

> Điều 47(b).
>
> Các bên đồng ý rằng, trong thời hạn của hợp đồng này, nếu cần phải có những thay đổi về tình hình tài chính và kinh tế liên quan đến ngành dầu khí, và các điều kiện hoạt động tại Ghana và các điều kiện tiếp thị nói chung sẽ ảnh hưởng đáng kể đến cơ sở kinh tế và tài chính cơ bản của hợp đồng này, thì các điều khoản của hợp đồng này được phép xem xét lại hoặc đàm phán lại, nhằm đưa ra các điều chỉnh và sửa đổi sau khi xem xét hợp lý việc sử dụng vốn của nhà điều hành và những rủi ro phát sinh bởi nhà điều hành, luôn luôn với điều kiện theo đó không được phép có bất cứ điều chỉnh hoặc sửa đổi nào như vậy trong vòng 5 năm, sau khi bắt đầu sản xuất dầu với khối lượng thương mại từ khu vực sản xuất, và các điều chỉnh hoặc sửa đổi không có hiệu lực hồi tố.

'Điều khoản Lasmo'

Hợp đồng phân chia sản xuất của Tập đoàn Lasmo ngày 19/8/1992 giữa 'Tổng công ty dầu khí quốc gia Việt Nam của nước CHXHCN Việt Nam, Công ty Lasmo Việt Nam và Công ty TNHH Phát triển năng lượng Itoh cho Lô 04-2 ngoài khơi' có điều khoản sau đây:

> *Điều 17.8.* Ban hành luật mới và quy định pháp luật mới
>
> Nếu sau ngày có hiệu lực, (các) luật mới và / hoặc (các) quy định pháp luật mới được ban hành tại Việt Nam có ảnh hưởng xấu đến lợi ích của nhà thầu, hoặc bất kỳ sửa đổi nào đối với các luật và / hoặc quy định pháp luật hiện hành, thì các bên sẽ họp và tham vấn lẫn nhau, và sẽ tiến hành những thay đổi cần thiết đối với Hợp đồng này, để đảm bảo rằng nhà thầu được phục hồi các điều kiện kinh tế tương tự sẽ có hiệu lực, nếu luật và / hoặc quy định pháp luật mới hoặc luật sửa đổi không được ban hành.

Tại Điều 11, HĐ quy định một thỏa thuận trọng tài cho 'tất cả các tranh chấp phát sinh từ hay liên quan đến hợp đồng'. Theo Điều 17.9, các bên được phép trình bày 'tất cả các câu hỏi có tính chất kỹ thuật' cho một 'chuyên gia độc lập có danh tiếng quốc tế'.

'Điều khoản Qatar'

'Hợp đồng thăm dò và phân chia sản xuất mẫu' của Qatar năm 1994 quy định điều khoản sau đây:

> *Điều 34.12. Cân bằng Hợp đồng*
>
> Theo Hợp đồng này, khi mà vị trí tài chính của Nhà thầu đã được dựa trên cơ sở các luật và quy định pháp luật có hiệu lực vào ngày có hiệu lực, các bên đồng ý rằng, nếu bất kỳ luật, nghị định hoặc quy định pháp luật nào trong tương lai ảnh hưởng đến vị trí tài chính của nhà thầu, và đặc biệt nếu thuế quan vượt quá ... phần trăm trong thời hạn của Hợp đồng, thì cả hai bên sẽ tiến hành đàm phán một cách thiện chí để đạt được một giải pháp công bằng, từ đó duy trì sự cân bằng kinh tế của Hợp đồng này. Nếu không đạt được thoả thuận về giải pháp công bằng đó, thì mỗi bên đều được phép đưa vấn đề ra trọng tài giải quyết theo Điều 31.

C. *Hợp đồng không có điều khoản đám phán lại*[26]

Trong trường hợp không có điều khoản đàm phán lại một cách rõ ràng, nhà đầu tư thường dựa vào *điều khoản bất khả kháng* trong HĐ hoặc khái niệm *hardship* (tình hình khó khăn) trong pháp luật HĐ quốc tế.

Thí dụ: Hợp đồng phân chia sản xuất của Tập đoàn Lasmo ngày 19/8/1992 giữa 'Tổng công ty dầu khí quốc gia Việt Nam của nước CHXHCN Việt Nam, Công ty Lasmo Việt Nam và Công ty TNHH phát triển năng lượng Itoh liên quan đến Lô 04-2 ngoài khơi' ghi nhận điều khoản *bất khả kháng* sau đây:

> *Điều 17.7. Bất khả kháng*
>
> Nghĩa vụ của mỗi bên trong Hợp đồng này, trừ nghĩa vụ thanh toán tiền, sẽ bị đình chỉ trong suốt thời kỳ bất khả kháng, và thời

[26] Klaus Peter Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', *Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347*, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.

hạn của giai đoạn hoặc giai đoạn liên quan của Hợp đồng này sẽ được kéo dài với thời gian tương đương với thời kỳ diễn ra tình huống bất khả kháng. Trong trường hợp bất khả kháng, bên bị ảnh hưởng sẽ thông báo cho bên kia một cách sớm nhất và hợp lý nhất có thể, trong đó nêu ngày bắt đầu và mức độ đình chỉ nghĩa vụ và nguyên nhân của việc đó. Bên có nghĩa vụ đã bị đình chỉ như nêu trên sẽ tiếp tục thực hiện các nghĩa vụ đó ngay khi có thể thực hiện được một cách hợp lý, sau khi không còn tình huống bất khả kháng, và phải thông báo cho bên kia.

Bộ nguyên tắc về Hợp đồng thương mại quốc tế (PICC) của UNIDROIT đã định nghĩa khái niệm *hardship* (tình hình khó khăn) và hậu quả pháp lý của nó như sau:

Điều 6.2.2. Định nghĩa hardship (tình hình khó khăn)

Có *hardship* khi sự xuất hiện của các sự kiện về cơ bản làm thay đổi trạng thái cân bằng của hợp đồng, do chi phí thực hiện hợp đồng của một bên đã tăng lên, hoặc do giá trị của việc thực hiện hợp đồng mà một bên nhận được đã giảm và

(a) khi có các sự kiện xảy ra hoặc được biết đến làm một bên bị bất lợi sau khi ký kết hợp đồng;

(b) khi có các sự kiện mà bên bị bất lợi đã không thể cân nhắc được một cách hợp lý trong thời gian ký kết hợp đồng;

(c) khi mà các sự kiện nằm ngoài sự kiểm soát của bên bị bất lợi; và

(d) khi mà bên bị bất lợi đã không giả định được rủi ro của các sự kiện đó.

Điều 6.2.3. Hệ quả của hardship

(1) Trong trường hợp hardship, bên bị bất lợi có quyền yêu cầu *đàm phán lại*. Yêu cầu phải được thực hiện không chậm trễ và phải nêu được các căn cứ.

(2) Yêu cầu *đàm phán lại* không tự nó cho phép bên bị bất lợi được miễn trừ thực hiện hợp đồng.

(3) Khi không đạt được thoả thuận trong một thời gian hợp lý, một trong hai bên có thể kiện ra tòa án.

(4) Nếu tòa án thấy có *hardship*, nếu hợp lý, sẽ quyết định:

(a) Chấm dứt hợp đồng theo một ngày và theo các điều khoản đã được ấn định; hoặc

(b) Thích ứng hợp đồng nhằm phục hồi sự cân bằng của nó.

Những thí dụ này cho thấy các điều khoản *bất khả kháng* thường cho phép gia hạn thực hiện HĐ và hủy HĐ như một biện pháp cuối cùng. Chúng chủ yếu phục vụ các biện pháp phòng ngừa rủi ro do các sự kiện kinh tế, chính trị và xã hội gây ra mà các bên không lường trước được khi ký kết HĐ, mặc dù không có mục đích đảm bảo hoặc tái lập cân bằng thương mại của HĐ. Tuy nhiên, các điều khoản *bất khả kháng* cũng có thể quy định nghĩa vụ đàm phán đối với các bên, và tìm cách khắc phục tình huống phát sinh bởi 'hành vi của Thượng đế' ('acts of God'). HĐ như vậy rất khó bị hủy, do sự phức tạp của HĐ và các bên đã thực hiện các nghĩa vụ tài chính. Việc so sánh với khái niệm *hardship* cho thấy, *hardship* nhằm mục đích trực tiếp duy trì cân bằng thương mại của HĐ, theo đó tình huống này được coi là phát sinh, khi trách nhiệm đặt ra cho một bên đã đạt đến 'giới hạn của sự hy sinh'. Như một hậu quả pháp lý của *hardship*, các bên có nghĩa vụ đàm phán lại mối quan hệ HĐ của họ. Do đó, khái niệm *hardship* có cùng ý tưởng với điều khoản đàm phán lại, đó là làm cho các nghĩa vụ HĐ trở nên linh hoạt hơn trong bối cảnh thay đổi sự cân bằng thương mại của HĐ.

Mặc dù về lý thuyết, cả khái niệm *hardship* lẫn các điều khoản *bất khả kháng* đều có thể tạo ra xuất phát điểm cho việc đàm phán lại HĐ, trong trường hợp có thay đổi hoàn cảnh, nhưng điều này lại hiếm khi xảy ra trong thực tế.

Nguyên tắc 'thiêng liêng' của HĐ (*pacta sunt servanda*), như là ngôn ngữ tối cao của luật HĐ, thường được ưu tiên hơn so với lập luận về sự thay đổi hoàn cảnh kinh tế. Do đó, một trường hợp được coi là *bất khả kháng* chủ yếu không phải bởi vì có sự thay đổi về cân bằng kinh tế trong các nghĩa vụ HĐ của các bên, mà đúng hơn là trong các tình huống cổ điển như 'các hành vi của Thượng đế' ('acts of God)', chiến tranh, đình công, khủng bố, nổi loạn, thiên tai hoặc thảm hoạ môi trường, trừ khi các bên thoả thuận các quy định cụ thể khác. Ngoài ra, việc thực hiện HĐ sẽ không tạo thành '*hardship*' chỉ vì HĐ đã trở nên không có lợi cho một bên do thay đổi về mặt kinh tế hoặc kỹ thuật. Thay vào đó, chỉ cần một sự vi phạm 'giới hạn của sự hy sinh' thương mại do thay đổi cơ bản trong cân bằng thương mại của HĐ sẽ là đủ. Trong cả hai trường hợp, sự thay đổi này phải được dự đoán trước vào thời điểm ký kết HĐ:

Các bên tham gia vào các hợp đồng quốc tế không thể tuyên bố rằng mình không nhận thức được những rủi ro hay những mặt trái của kinh tế vĩ mô. Những ảnh hưởng của chúng có thể là cực đoan, nhưng dù sao đi nữa chúng cũng đã được các nhà tài trợ tính toán kỹ khi đánh giá độ tin cậy của người đi vay về sức mạnh của các cam kết trong hợp đồng; và vì chúng đã được các công ty bảo hiểm tính toán kỹ khi đánh giá sự sẵn sàng của họ trong việc cung cấp dịch vụ bảo hiểm cho các nhà đầu tư …

Nhờ có giới hạn về sự thay đổi cơ bản không thể lường trước này trong HĐ, các bên tham gia HĐ đầu tư QT có thể vượt qua nguyên tắc *pacta sunt servanda* chỉ khi HĐ ghi nhận điều khoản đàm phán lại. Chỉ khi đó các hội đồng trọng tài quốc tế có xu hướng can thiệp vào nội dung của HĐ, khi điều kiện kinh tế đã thay đổi, với giả định rằng luật áp dụng cho phép.

Cơ sở của cách tiếp cận này là sự giả định về năng lực chuyên môn của các doanh nhân quốc tế, và mức độ trách nhiệm cao về những nội dung và cách thức thực hiện các mối quan hệ pháp lý của họ. Nguyên tắc này đã được các hội đồng trọng tài quốc tế nhấn mạnh liên tục trong những thập kỷ qua. Nó được coi như là 'chuẩn' cho thỏa thuận phân phối rủi ro trong HĐ. Theo giả định này, các bên tự chịu trách nhiệm về các biện pháp phòng ngừa, trước những thay đổi bất lợi về hoàn cảnh kinh tế xã hội, bằng cách thoả thuận điều khoản đàm phán khi ký kết HĐ. Nếu không, các điều khoản *bất khả kháng* hoặc *hardship* sẽ không thay thế cho sự sơ suất của họ ở giai đoạn soạn thảo HĐ, và sẽ không có cớ gì để hủy bỏ nguyên tắc *pacta sunt servanda*. Thay vào đó, các bên sẽ phải công nhận rằng cần ưu tiên cho việc thực hiện các cam kết theo HĐ. Do đó, các bên sẽ phải chịu trách nhiệm đối với những thay đổi bất lợi đối với sự cân bằng kinh tế của HĐ.

Có những ngoại lệ của các nguyên tắc này. Một *thí dụ* là Điều 17(1) Đạo luật về Hợp đồng phân chia sản xuất của Nga. Theo quy định này, HĐ cũng có thể được thay đổi mà không cần sự thỏa thuận giữa các bên, khi chứng minh được có 'sự thay đổi đáng kể về hoàn cảnh' theo quy định của Bộ luật Dân sự Nga. Điều này tạo ra sự không chắc chắn đáng kể cho quan hệ HĐ.

Mục 4. KIỆN DO VI PHẠM HỢP ĐỒNG[27]

1. Các loại tranh chấp

Các tranh chấp liên quan đến HĐ đầu tư QT bao gồm tranh chấp liên quan đến tài sản, tranh chấp phát sinh do sự can thiệp vào quyền HĐ, tranh chấp phát sinh do thay đổi hoàn cảnh, tranh chấp HĐ liên quan đến tham nhũng, tranh chấp phát sinh do tác động đến môi trường, tranh chấp liên quan đến vi phạm môi trường, nhân quyền, …

A. *Tranh chấp liên quan đến tài sản*

Sự thay đổi chế độ chính trị thường dẫn đến việc quốc hữu hóa tài sản của nhà đầu tư nước ngoài. Nguyên nhân của sự thay đổi chế độ chính trị có thể do các cuộc cách mạng hoặc thông qua quá trình dân chủ. Khi chính phủ quốc hữu hóa hay tịch thu tài sản bằng biện pháp hành chính trong khi thực hiện các cam kết cải cách kinh tế, thì trong nhiều trường hợp, việc tước quyền sở hữu này được coi là hợp pháp. Tuy nhiên, các tranh chấp phát sinh chủ yếu liên quan tới mức bồi thường cho tài sản bị tước đoạt.

B. *Tranh chấp phát sinh do sự can thiệp vào quyền hợp đồng*

Quyền HĐ của nhà đầu tư nước ngoài được bảo vệ bằng pháp luật quốc tế, và sự can thiệp của chính phủ vào các quyền HĐ này đã dẫn đến việc nhà đầu tư kiện đòi bồi thường. Mọi quy định về chủ quyền vĩnh viễn của nước tiếp nhận đầu tư đối với tài nguyên thiên nhiên phản ánh sự căng thẳng giữa các lợi ích độc quyền về đất đai và sự chuyển nhượng quyền sử dụng đất thông qua HĐ.

C. *Tranh chấp phát sinh do thay đổi hoàn cảnh*

HĐ đầu tư QT thường là HĐ dài hạn, trong đó bối cảnh của các hoạt động đầu tư luôn thay đổi. Các thay đổi mà không ảnh hưởng đến bất kì mức độ vật chất nào sẽ được các bên bỏ qua. Nhưng trong trường hợp nhà đầu tư không thể thực hiện HĐ do không có kỹ năng, hay HĐ cho ra lợi nhuận lớn hơn dự kiến do năng lực tốt của nhà đầu tư, thì chính phủ có thể sẽ can thiệp vào HĐ.

[27] Tham khảo Nguyễn Vương Nhung, Khóa luận tốt nghiệp, 2015; và Vũ Hồng Uyên, Khóa luận tốt nghiệp, 2015.

D. Tranh chấp hợp đồng có liên quan đến tham nhũng

Trong thực tiễn, một nguyên nhân quan trọng của tranh chấp xuất phát từ nội bộ chính trị của nước tiếp nhận đầu tư. *Thí dụ*: một lãnh đạo chính phủ mới lên nắm quyền và đang xem xét lại một cách khách quan các hành vi của Chính phủ tiền nhiệm. Việc đó làm sáng tỏ thực tế rằng các HĐ đầu tư QT trước đây đã không được kí kết theo đúng thủ tục, mà do nhà đầu tư đã hối lộ các thành viên Chính phủ tiền nhiệm. Về mặt kinh tế, đây là tranh chấp quan trọng nhất vì nó thường liên quan đến các dự án cơ sở hạ tầng, có thể có giá trị đến hàng tỷ đô la Mỹ.

Hầu hết các tranh chấp này xuất phát từ các dự án cơ sở hạ tầng như nhà máy năng lượng, hệ thống viễn thông, xây dựng cơ sở huấn luyện quân sự và khai thác tài nguyên thiên nhiên. Tham nhũng xảy ra trên khắp thế giới, và dòng chảy của vốn đầu tư không chỉ hướng tới các DC mà còn giữa các nước phát triển, và từ các nước sản xuất dầu khí đến các nước khác. Tham nhũng liên quan đến đầu tư xuất hiện nhiều nhất ở Nam Á và Trung Đông.[28]

E. *Tranh chấp phát sinh do tác động đến môi trường*

Trong đầu tư quốc tế, hoạt động kinh doanh tác động xấu đến môi trường có thể dẫn đến việc chấm dứt đầu tư quốc tế hoàn toàn hoặc áp đặt các hạn chế đối với hoạt động đầu tư, do đó có thể phát sinh tranh chấp. Những sự can thiệp như vậy được hỗ trợ bởi cả pháp luật quốc gia và pháp luật quốc tế về môi trường. *Thí dụ*: khi hoạt động khai thác dầu mỏ của các nhà đầu tư được cho là gây ảnh hưởng không tốt đến môi trường, nhà khai thác không chỉ vi phạm luật trong nước mà còn vi phạm các tiêu chuẩn quốc tế về bảo vệ môi trường. Trong những trường hợp như vậy, nước tiếp nhận đầu tư sẽ có lí do để can thiệp vào hoạt động đầu tư quốc tế và yêu cầu nhà đầu tư nước ngoài bồi thường cho những thiệt hại mà họ gây ra.

F. *Tranh chấp liên quan đến vi phạm nhân quyền*

Tranh chấp này phát sinh từ các cáo buộc nhà đầu tư nước ngoài đã vi phạm nhân quyền của người dân nước tiếp nhận đầu tư. Trong tranh chấp này, nhà đầu tư nước ngoài là bị đơn, có khả năng bị kiện ở các tòa án của chính quốc gia mà nhà đầu tư có quốc tịch. Họ sẽ phải đối mặt với hàng loạt nguyên đơn được đại diện bởi các tổ chức phi chính phủ sẵn sàng ủng hộ các cáo buộc của các nạn nhân. *Thí dụ*: trường hợp quyền của các thổ dân bị vi phạm do việc khai thác tài nguyên trên vùng đất truyền thống của họ; các cáo buộc rằng việc khai thác ảnh hưởng đến quyền tự quyết, phá hủy nền văn hóa truyền thống và dẫn đến suy thoái môi trường đã được đưa ra trước tòa án quốc gia cũng như trước các cơ quan tài phán quốc tế về nhân quyền.[29]

[28] Hilma Raeschke-Kessler (in collaboration with Dorothee Gottwald), 'Corruption in Foreign Investment-Contract and Dispute Settlement between Investors, States, and Agents', in *Oxford Handbook of International Investment Law,* Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., (2008), tr. 8.

2. Thực tiễn áp dụng các điều khoản trong hợp đồng dẫn tới tranh chấp

A. *Liên quan tới điều khoản ổn định*

Thông qua thực tiễn tranh chấp liên quan tới điều khoản ổn định trong HĐ đầu tư QT, chúng ta sẽ thấy được thực tiễn áp dụng của điều khoản này. Phần dưới đây sẽ tập trung chủ yếu phân tích một tranh chấp liên quan tới điều khoản này để làm rõ hơn việc các bên trong HĐ áp dụng điều khoản ổn định như thế nào trong thực tế.

Dự án đường ống dẫn Chad - Cameroon

Trong những HĐ cho phép thăm dò và khai thác tài nguyên thiên nhiên, đôi khi vẫn xảy ra một số vấn đề liên quan đến sự xung đột đáng kể giữa việc thực thi luật nhân quyền quốc tế và điều khoản ổn định.

Theo báo cáo được soạn thảo bởi tổ chức phi chính phủ Amnesty International năm 2005, một số điều khoản ổn định có hiệu lực ngăn cản nước tiếp nhận đầu tư áp dụng nghĩa vụ nhân quyền quốc tế của họ. Một nghiên cứu khác được đưa ra bởi IFC vào tháng 3/2008, cho rằng điều khoản ổn định có thể có một tác động tiêu cực đối với trách nhiệm của nước tiếp nhận đầu tư trong việc thực thi nghĩa vụ nhân quyền của họ. Báo cáo năm 2005 của Amnesty International dẫn chiếu cụ thể tới những HĐ được ký kết bởi Chad và Cameroon với một hiệp hội được điều hành bởi ExxonMobil để cung cấp cho hiệp hội sự khai thác chiết xuất và vận chuyển dầu bằng một đường ống dẫn dài. Mỗi HĐ có một điều khoản ổn định nhằm đảm bảo sự ổn định trong cơ chế pháp lý của dự án, theo đó không có quy định nào hình thành trong tương lai sẽ được áp dụng cho những HĐ này, nếu chúng làm phát sinh nghĩa vụ đối với các bên liên quan trong HĐ cho phép thăm dò và khai thác tài nguyên thiên nhiên. *Thí dụ*: HĐ với Chad bao gồm điều khoản sau:

[29] M. Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, (2000), tr. 96.

Trong điều khoản của Hợp đồng này, Cộng hòa Chad đảm bảo rằng không có luật nào được ban hành sau ngày 19/12/1988 sẽ được áp dụng đối với TOTCO [nhà khai thác], mà không có những thỏa thuận trước đó giữa các bên, được quy định hợp lý tác động một cách trực tiếp, gián tiếp hoặc vì áp dụng đối với các cổ đông, những nghĩa vụ và sự thay đổi được áp đặt lên Hợp đồng này hoặc có tác động tiêu cực đến quyền và lợi ích kinh tế của TOTCO hoặc các cổ đông được quy định trong Hợp đồng này.

Báo cáo của Amnesty International đã chỉ ra rằng nhà đầu tư nước ngoài đã viện dẫn những điều khoản ổn định này để ngăn cản Chad và Cameroon - các nước tiếp nhận đầu tư, thực hiện một số nghĩa vụ nhân quyền cơ bản như quyền y tế của công nhân và môi trường làm việc an toàn. *Thí dụ*: nếu Chính phủ Chad yêu cầu nhà đầu tư tuân theo một số quy định nghiêm ngặt hơn để cung cấp cho công nhân môi trường lao động tốt hơn, thì Chính phủ sẽ bị ngăn cản bởi điều khoản ổn định. Về vấn đề này, đã có sự xung đột giữa hành động của Chính phủ Chad theo điều khoản ổn định và nghĩa vụ của họ theo luật nhân quyền quốc tế.

Như vậy, chính phủ nước tiếp nhận đầu tư cần phải xem xét kỹ lưỡng khi soạn thảo và đưa điều khoản ổn định vào HĐ đầu tư QT, bởi nó có thể khiến cho chính phủ vi phạm nghĩa vụ quốc tế của mình theo luật quốc tế.

B. *Liên quan tới điều khoản chọn luật*

Nhiều tài liệu trong nửa đầu thế kỷ XX xác định luật trong nước của nước tiếp nhận đầu tư là luật áp dụng cho giao dịch đầu tư nước ngoài. Trong vụ *Serbia Loans*,[30] Tòa thường trực quốc tế (PCIJ) đã chỉ ra rằng pháp luật quốc tế không có bất cứ liên quan nào đến các giao dịch giữa Chính phủ và nhà đầu tư nước ngoài. Nhiều phán quyết chính thức ủng hộ quan điểm cho rằng hệ thống pháp luật trong nước của nước tiếp nhận đầu tư sẽ áp dụng cho giao dịch giữa Chính phủ và nhà đầu tư nước ngoài. Trong vụ *Kahler v. Midland Bank*, vào năm 1950, thẩm phán Radciffe tuyên rằng, trong trường hợp liên quan đến một HĐ giữa một bên là Chính phủ và một bên là nhà đầu tư nước ngoài, thì pháp luật của nước tiếp nhận đầu tư không chỉ đơn thuần là ổn định, mà còn có thể sửa đổi hoặc bãi bỏ những ràng buộc của HĐ.

[30] (1929) PCIJ Series A No. 20.

TÓM TẮT CHƯƠNG 9

Cùng với xu hướng tự do hóa thương mại của các quốc gia trên thế giới hiện nay, hoạt động đầu tư quốc tế tại các quốc gia cũng không ngừng phát triển. Theo Báo cáo đầu tư thế giới năm 2016 (World Investment Report 2016), luồng FDI toàn cầu đang có sự tăng trưởng đáng kể và dự kiến sẽ vượt qua con số 1,8 nghìn tỷ USD vào năm 2018, trong đó, các nước châu Á dự kiến thu hút thêm 16% dòng vốn FDI, tương đương với 541 tỷ USD, tập trung chủ yếu vào Đông và Nam Á.[31] Ngoài ra, dòng vốn FDI vào các nước thuộc nhóm G20 cũng gia tăng 57% so với cùng kỳ năm 2015.[32] Theo xu thế này, các HĐ đầu tư QT cũng được ký kết ngày càng nhiều. Việc ký kết loại HĐ này không chỉ nhằm mục đích đảm bảo cho các chủ thể thực hiện hoạt động đầu tư một cách hiệu quả, mà đồng thời còn là cơ sở để giải quyết các tranh chấp phát sinh trong quá trình thực hiện HĐ. Trên thực tế, đã có không ít những tranh chấp phát sinh từ HĐ đầu tư QT liên quan đến các điều khoản quan trọng trong HĐ, do vậy, việc hiểu và soạn thảo các điều khoản quan trọng trong HĐ đầu tư QT trở nên vô cùng cần thiết.

CÂU HỎI / BÀI TẬP

1. Trình bày nội dung điều khoản ổn định.
2. Trình bày nội dung điều khoản đàm phán lại.
3. Thực tiễn áp dụng điều khoản ổn định và điều khoản đàm phán lại.
4. Đọc, hiểu vụ kiện *Dự án đường ống dẫn Chad - Cameroon*; chuẩn bị thảo luận trên lớp.

TÀI LIỆU CẦN ĐỌC

1. 'Chapter Ten: Respect for Human Rights in Investor-State Relationships', State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships, tr. 129; Howard Mann, 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' in *Special Issue: Investor-State Contracts and Sustainable Development*, Issue 1, Volume 2,

[31] UNCTAD, *World Investment Report 2016*, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

[32] OECD, http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-October-2016

October 2011, Investment Treaty New.

2. Abdullah Faruque, *VALIDITY AND EFFICACY OF STABILIZATION CLAUSES - LEGAL PROTECTION V. FUNCTIONAL VALUE*, Journal of International Arbitration, Vol. 23, No. 4, tr. 317-336, (2006).
3. Đặng Thu Thủy, Luận văn tốt nghiệp đại học, 2016.
4. Hilma Raeschke-Kessler (in collaboration with Dorothee Gottwald), '*CORRUPTION IN FOREIGN INVESTMENT-CONTRACT AND DISPUTE SETTLEMENT BETWEEN INVESTORS, STATES, AND AGENTS*', in Oxford Handbook of International Investment Law, Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., (2008), tr. 8.
5. http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html, Wednesday, July 27, 2011.
6. IFC, *STABILIZATION CLAUSES AND HUMAN RIGHTS*, May 27, (2009), tr. 7.
7. J. Luis Guasch, World Bank WBI Development Studies, *GRANTING AND RENEGOTIATING INFRASTRUCTURE CONCESSIONS DOING IT RIGHT*, (2004).
8. Jan Ole Voss, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS*, Chapter One, (2010).
9. John Y. Gotanda, *RENEGOTIATION AND ADAPTATION CLAUSES IN INTERNATIONAL INVESTMENT CONTRACTS*, Revisited, Villanova University School of Law.
10. Klaus Peter *BERGER, 'RENEGOTIATION AND ADAPTATION OF INTERNATIONAL INVESTMENT CONTRACTS: THE ROLE OF CONTRACT DRAFTERS AND ARBITRATORS'*, Vanderbilt Journal of Transnational Law, 36 Vand. J. Transnat'l L. 1347, October, 2003, The Vanderbilt University School of Law Copyright (c) 2003.
11. Liang Peng, *RENEGOTIATION CLAUSES IN INTERNATIONAL INVESTMENT CONTRACTS*.
12. Lorenzo Coltula, Regulatory Takings - *STABILIZATION CLAUSES AND SUSTAINABLE DEVELOPMENT*, Session 2.2: The Policy Framework for Investment: the Social and Environmental Dimensions, (2008).
13. Lorenzo Cotula, *'FOREIGN INVESTMENT CONTRACTS'*, International Institute for Environment and Development.
14. Lorenzo Cotula, *RECONCILING REGULATORY STABILITY AND EVOLUTION OF ENVIRONMENTAL STANDARDS IN INVESTMENT CONTRACTS: TOWARD A RETHINK OF STABILIZATION CLAUSES*, J. World Energy L. & Bus., tr. 158, 174, (2008).
15. M. Sornarajah, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES*, Kluwer Law International, (2000), tr. 96.
16. Michael Klein, *PUBLIC-PRIVATE PARTNERSHIP, PROMISE AND HYPE*.
17. Piero Bernadini, *THE RENEGOTIATION OF INVESTMENT CONTRACTS*, 13 FOREIGN INVEST.L.J.411, 416, (1998).
18. Prof. Dr. Nathalie Voser, Panel V, *STABILIZATION AND/OR RENEGOTIATION AGREEMENTS RENEGOTIATION CLAUSES IN LONG TERM ENERGY, ARBITRATION OF ENERGY DISPUTES: NEW CHALLENGES*.
19. TS. Nguyễn Minh Hằng, Trường Đại học Ngoại thương, *GIÁO TRÌNH PHÁP LUẬT KINH DOANH QUỐC TẾ*, Nxb. Đại học Quốc gia, Hà Nội, (2010).
20. UNCTAD, *SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS*, STATE CONTRACTS (2004)
21. World Bank, ADB, IDB, *PUBLIC-PRIVATE PARTNERSHIPS REFERENCE GUIDE*, https://library.pppknowledgelab.org/Knowledge%20Lab/documents/2490/download

PHẦN BỐN.
VIỆT NAM VÀ LUẬT ĐẦU TƯ QUỐC TẾ

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CHƯƠNG 10. CÁC CAM KẾT ĐẦU TƯ QUỐC TẾ CỦA VIỆT NAM

CHƯƠNG 10.
CÁC CAM KẾT ĐẦU TƯ QUỐC TẾ CỦA VIỆT NAM

Mục đích học Chương 10
• Giới thiệu các cam kết đầu tư của Việt Nam trong WTO; • Thảo luận việc áp dụng các cam kết đầu tư trong WTO của Việt Nam; • So sánh các cam kết đầu tư của Việt Nam trong WTO và ASEAN; • Tìm hiểu về các vụ kiện Việt Nam bị nhà đầu tư nước ngoài khởi kiện theo các BIT mà Việt Nam đã ký kết.

Mục 1. CÁC CAM KẾT CỦA VIỆT NAM TRONG WTO

1. Giới thiệu chung

Việt Nam trở thành thành viên của WTO từ ngày 11/01/2007. Những quy định liên quan tới đầu tư nước ngoài ràng buộc Việt Nam trong khuôn khổ WTO nằm rải rác trong các Phụ lục của Hiệp định Marrakesh (Hiệp định thành lập WTO) như Hiệp định về các biện pháp đầu tư liên quan đến thương mại (TRIMs),[1] Hiệp định chung về thương mại dịch vụ (GATS),[2] Hiệp định về các khía cạnh liên quan đến thương mại của quyền sở hữu trí tuệ (TRIPS)[3] và Hiệp định về trợ cấp và các biện pháp đối kháng (SCM).[4] Các Hiệp định trên có hiệu lực đối với Việt Nam kể từ khi Việt Nam tham gia WTO năm 2007, tức là 12 năm sau khi các hiệp định có hiệu lực đối với các thành viên ban đầu của WTO. Quy định ưu đãi về thời hạn thực thi nghĩa vụ dành cho các DC, trong đó có Việt Nam, đã hết. *Thí dụ*: Điều 5 của Hiệp định TRIMs cho phép các DC có thêm thời gian 5 năm chuyển tiếp để loại bỏ tất cả các biện pháp đầu tư liên quan đến thương mại bị cấm. Do Hiệp định này đã có hiệu lực từ ngày 01/01/1995, nên đến khi Việt Nam gia nhập WTO, phải thực thi đầy đủ các nghĩa vụ của Hiệp định TRIMs ngay mà không có giai đoạn chuyển tiếp.[5] Tương tự, điều khoản ưu đãi gia hạn thực hiện nghĩa vụ của các hiệp định TRIPS,[6] GATS,[7] SCM[8] đã hết hạn khi Việt Nam tham gia WTO.

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1 Phụ lục 1A.

2 Phụ lục 1B.

3 Phụ lục 1C.

4 Phụ lục 1A.

5 Khoản 2 Điều 5 Hiệp định TRIMs.

6 Điều 65 Hiệp định TRIPS quy định:

1. Căn cứ vào các quy định tại khoản 2, khoản 3 và khoản 4, không Thành viên nào có nghĩa vụ phải thi hành Hiệp định này trước khi kết thúc thời hạn chung, kéo dài một năm kể từ ngày Hiệp định WTO bắt đầu có hiệu lực.

2. Bất kỳ Thành viên nào là nước đang phát triển cũng được phép hoãn thời hạn thi hành các quy định của Hiệp định này, trừ các Điều 3, Điều 4 và Điều 5, thêm 4 năm so với thời hạn quy định tại khoản 1.

7 Khoản 4 Điều III Hiệp định GATS quy định:
Các điểm cung cấp thông tin này sẽ được thành lập trong vòng hai năm kể từ ngày Hiệp định thành lập WTO (theo Hiệp định này gọi là 'Hiệp định WTO') có hiệu lực. Mỗi nước Thành viên đang phát triển có thể thỏa thuận thời hạn linh hoạt thích hợp cho việc thành lập các điểm cung cấp thông tin đó. Các điểm cung cấp thông tin không nhất thiết phải là nơi lưu trữ các văn bản pháp luật.

8 Điều 27 Hiệp định SCM quy định:

27.1. Các Thành viên thừa nhận rằng trợ cấp có thể đóng vai trò quan trọng trong các chương trình phát triển của các Thành viên đang phát triển.

2. Nội dung cam kết

A. *Hiệp định về các biện pháp đầu tư liên quan đến thương mại (TRIMs)*

Hiệp định TRIMs điều chỉnh vấn đề đầu tư với mục đích là mở rộng, phát triển tự do hóa đầu tư và thương mại quốc tế để thúc đẩy tăng trưởng, phát triển kinh tế của tất cả các nước thành viên WTO, đặc biệt là DC, trên cơ sở bảo đảm cạnh tranh tự do và công bằng.[9] Các nghĩa vụ trong Hiệp định có tính đến nhu cầu cụ thể về thương mại, phát triển và khả năng tài chính của các DC.[10]

Hiệp định TRIMs chỉ áp dụng đối với các biện pháp đầu tư có liên quan đến thương mại hàng hóa,[11] không áp dụng trong lĩnh vực dịch vụ. Hiệp định gồm 9 điều khoản và một phụ lục nêu danh mục minh họa các biện pháp bị cấm. Theo Hiệp định này, Việt Nam có nghĩa vụ không được áp dụng bất cứ biện pháp đầu tư liên quan đến thương mại nào không phù hợp Điều III của GATT về đối xử quốc gia và Điều XI của GATT về cấm hạn chế số lượng.[12] Đây là những biện pháp đặt ra điều kiện hạn chế hay khuyến khích đầu tư nước ngoài và được xác định có tác động làm hạn chế và bóp méo thương mại. Hiệp định TRIMs không đưa ra định nghĩa rõ ràng về 'biện pháp đầu tư liên quan đến thương mại' nhưng liệt kê những biện pháp không phù hợp trong phụ lục.[13] Vì thế, hoạt động kinh doanh của nhà đầu tư thuộc một thành viên WTO trên lãnh thổ của thành viên khác sẽ được đảm bảo không bị áp đặt những biện pháp cản trở thương mại, cạnh tranh công bằng như được liệt kê trong Hiệp định TRIMs. Ngay từ khi Hiệp định có hiệu lực, trong vòng 90 ngày, các thành viên WTO phải thông báo về các biện pháp đầu

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27.2. Những quy định cấm tại điểm1 (a) Điều 3 sẽ không áp dụng đối với:

(a) Các Thành viên đang phát triển nêu tại phụ lục VII.

(b) Các Thành viên đang phát triển khác, trong thời gian 8 năm kể từ ngày hiệp định WTO có hiệu lực, tuỳ thuộc vào các quy định tại khoản 4.

27.3. Những quy định cấm tại điểm 1(b) Điều 3 sẽ không áp dụng với các Thành viên đang phát triển trong thời gian 5 năm, và sẽ không áp dụng với các Thành viên chậm phát triển trong thời gian 8 năm, kể từ ngày hiệp định WTO có hiệu lực.

27.4. Các Thành viên đang phát triển nêu tại điểm 2(b), sẽ loại bỏ dần trợ cấp xuất khẩu trong vòng 8 năm và tốt nhất là nên làm từng bước.

9 Lời nói đầu Hiệp định TRIMs.

10 Như trên.

11 Điều 1 Hiệp định TRIMs.

12 Điều 2(1) Hiệp định TRIMs.

13 *Danh mục minh họa*, Phụ lục Hiệp định TRIMs.

tư liên quan đến thương mại không phù hợp của họ cho WTO.[14] Việt Nam cũng có nghĩa vụ không được ban hành bất kỳ biện pháp nào nằm trong Danh mục minh họa của Hiệp định.[15]

Các biện pháp bị cấm theo Hiệp định TRIMs được phân loại thành hai nhóm theo tính chất không phù hợp của chúng với Hiệp định chung về thuế quan và thương mại 1994 (GATT). TRIMs không phù hợp với các nghĩa vụ về đối xử quốc gia được qui định tại Điều III của GATT 1994 bao gồm những biện pháp mang tính bắt buộc, hoặc được thực thi thông qua luật trong nước và các quyết định mang tính hành chính, hoặc các điều kiện mà chỉ khi tuân thủ các điều kiện này mới được hưởng một ưu đãi nào đó, và biện pháp này qui định:[16]

(a) Doanh nghiệp phải mua hoặc sử dụng các sản phẩm có xuất xứ trong nước hoặc từ một nguồn cung cấp trong nước, dù yêu cầu đó được xác định theo sản phẩm nhất định, theo số lượng hoặc giá trị sản phẩm hoặc theo tỷ lệ về số lượng hoặc giá trị của sản xuất trong nước; hoặc

(b) Doanh nghiệp chỉ được mua hoặc sử dụng các sản phẩm nhập khẩu được giới hạn trong một tổng số tính theo số lượng hoặc giá trị sản phẩm nội địa mà doanh nghiệp này xuất khẩu.

Nhóm thứ hai bao gồm các biện pháp trái với nghĩa vụ chung về loại bỏ các hạn chế số lượng qui định tại khoản 1 Điều XI của GATT 1994, *thí dụ* như những biện pháp mang tính bắt buộc, hoặc được thực thi thông qua luật trong nước, và các quyết định mang tính hành chính, hoặc các điều kiện mà chỉ khi tuân thủ các điều kiện này mới được hưởng một ưu đãi nào đó, và biện pháp này hạn chế:[17]

(a) Việc doanh nghiệp nhập khẩu sản phẩm để sử dụng cho hoặc liên quan đến sản xuất trong nước dưới hình thức hạn chế chung hoặc hạn chế trong một tổng số liên quan đến số lượng hoặc giá trị sản xuất trong nước mà doanh nghiệp đó xuất khẩu;

(b) Việc doanh nghiệp nhập khẩu sản phẩm để sử dụng cho hoặc liên quan đến sản xuất trong nước bằng cách hạn chế khả năng tiếp cận đến nguồn ngoại hối liên quan đến nguồn thu ngoại hối của doanh nghiệp này;

14 Khoản 1 Điều 5 Hiệp định TRIMs.

15 Khoản 2 Điều 5 Hiệp định TRIMs.

16 Đoạn 1 của Danh mục minh họa, Phụ lục Hiệp định TRIMs.

17 Đoạn 2 của Danh mục minh họa, Phụ lục Hiệp định TRIMs.

(c) Việc doanh nghiệp xuất khẩu hoặc bán để xuất khẩu các sản phẩm, mặc dù được qui định dưới hình thức sản phẩm cụ thể hay dưới hình thức số lượng hoặc giá trị sản phẩm hoặc theo một tỷ lệ về số lượng hoặc giá trị sản xuất trong nước của doanh nghiệp.

Như tiêu đề của Phụ lục và từ ngữ sử dụng trong quy định mỗi nhóm biện pháp (*thí dụ* từ 'trong đó có'), danh sách này không liệt kê toàn bộ mà chỉ mang tính minh họa các TRIMs bị cấm. Thực tiễn có thể có các biện pháp TRIMs khác trái với nguyên tắc NT và nguyên tắc cấm hạn chế số lượng trong thương mại hàng hóa của WTO.

B. *Hiệp định chung về thương mại dịch vụ (GATS)*

GATS điều chỉnh một phương thức đầu tư trong thị trường dịch vụ là hiện diện thương mại, tức là bất kỳ loại hình kinh doanh hay tổ chức nghề nghiệp nào, bao gồm: (i) việc thiết lập, mua lại hay duy trì một pháp nhân, hoặc (ii) thành lập hay duy trì một chi nhánh hoặc văn phòng đại diện, trên lãnh thổ của một Thành viên nhằm mục đích cung cấp dịch vụ.[18] Khi nhà đầu tư của một thành viên WTO thiết lập đầu tư trong lĩnh vực dịch vụ tại Việt Nam, theo quy định của GATS, Việt Nam phải tuân thủ một số nghĩa vụ chung. *Thứ nhất*, Việt Nam cam kết ngay lập tức và không điều kiện dành cho dịch vụ và các nhà cung cấp dịch vụ của bất kỳ Thành viên nào khác, sự đối xử không kém thuận lợi hơn sự đối xử mà Việt Nam dành cho dịch vụ và các nhà cung cấp dịch vụ tương tự của bất kỳ nước nào khác (nguyên tắc MFN).[19] *Thứ hai*, Việt Nam có nghĩa vụ nhanh chóng công bố mọi biện pháp có liên quan hoặc tác động đến việc thi hành Hiệp định GATS và thành lập một hoặc nhiều điểm cung cấp thông tin cụ thể theo yêu cầu của các thành viên WTO khác về các quy định pháp luật, hướng dẫn hành chính liên quan.[20] *Thứ ba,* Việt Nam phải đảm bảo các biện pháp chung ảnh hưởng tới thương mại dịch vụ trong các lĩnh vực Việt Nam có cam kết cụ thể phải được quản lý một cách hợp lý, khách quan và bình đẳng.[21] *Thứ tư*, Việt Nam không được hạn chế việc chuyển tiền và thanh toán quốc tế cho những giao dịch vãng lai liên quan đến các cam kết cụ thể của mình.[22] Trong Biểu cam kết cụ thể về dịch vụ của mình, Việt Nam nêu rõ mức độ mở cửa thị

18 Khoản d Điều XXVIII Hiệp định GATS.

19 Khoản 1 Điều II Hiệp định GATS.

20 Điều III Hiệp định GATS.

21 Điều VI Hiệp định GATS.

22 Điều XI Hiệp định GATS.

trường và đối xử quốc gia, các điều kiện như hạn chế sở hữu nước ngoài cho dịch vụ và các nhà cung cấp dịch vụ nước ngoài. Bên cạnh những nghĩa vụ chung và cam kết cụ thể, Hiệp định quy định một số ngoại lệ cho phép các thành viên WTO tự do theo đuổi các mục tiêu chính sách khác như giải quyết khó khăn về cán cân thanh toán,[23] bảo vệ các lợi ích công,[24] lợi ích an ninh.[25]

C. *Hiệp định về các khía cạnh thương mại của quyền sở hữu trí tuệ (TRIPS)*

TRIPS bảo hộ quyền sở hữu trí tuệ, một loại tài sản của nhà đầu tư nước ngoài. Hiệp định này tích hợp quy định của các công ước quốc tế về quyền sở hữu trí tuệ đã được tham gia rộng rãi trước khi TRIPS ra đời.[26] Hơn nữa, Hiệp định này bổ sung các nghĩa vụ trong các vấn đề mà những điều ước khác không đề cập đầy đủ. Thay vì bảo hộ riêng lẻ các đối tượng của quyền sở hữu trí tuệ, Hiệp định TRIPS điều chỉnh toàn diện khía cạnh thương mại của các loại quyền sở hữu trí tuệ. Theo đó, các thành viên WTO, trong đó có Việt Nam, có nghĩa vụ tuân thủ các nguyên tắc và đảm bảo tiêu chuẩn bảo hộ tối thiểu và có thể quy định bảo hộ ở mức cao hơn.

D. *Hiệp định về trợ cấp và các biện pháp đối kháng (Hiệp định SCM)*

SCM ra đời nhằm cụ thể hóa và phát triển các quy định về trợ cấp của GATT 1994. Trợ cấp là khoản hỗ trợ tài chính của chính phủ hoặc từ cơ quan công quyền và từ đó doanh nghiệp có được một lợi ích nào đó.[27] Hiệp định SCM thiết lập các quy tắc đa phương điều chỉnh trợ cấp cho sản phẩm công nghiệp gây bóp méo thương mại, và việc sử dụng các biện pháp đối khác để bù đắp các thiệt hại do hàng nhập khẩu được trợ cấp gây ra. Tuy Hiệp định không trực tiếp đề cập tới đầu tư nước ngoài, nhưng trợ cấp có thể được thực hiện thông qua một số biện pháp ưu đãi đầu tư, như: miễn thuế và cho các doanh nghiệp vay vốn với lãi suất thấp kèm theo yêu cầu về sản xuất hàng xuất khẩu, yêu cầu về hàm lượng nội địa, hay sử dụng hàng trong nước thay thế hàng nhập khẩu. Những trợ cấp đó bị cấm theo Điều 3 Hiệp định SCM. Việt Nam cũng có

[23] Điều XII Hiệp định GATS.

[24] Điều XIV Hiệp định GATS.

[25] Điều XIVbis Hiệp định GATS.

[26] Đây là những điều ước quan trọng của Tổ chức Sở hữu trí tuệ Thế giới (WIPO), bao gồm: Công ước Paris về bảo hộ sở hữu công nghiệp, Công ước Berne về bảo hộ các tác phẩm văn học nghệ thuật.

[27] Khoản 1.1 Điều 1 Hiệp định SCM.

nghĩa vụ tuân thủ quy tắc này và không sử dụng hay duy trì trợ cấp liên quan tới đầu tư như vậy.

Mục 2. CÁC CAM KẾT CỦA VIỆT NAM TRONG ASEAN

1. Hiệp định khuyến khích và bảo hộ đầu tư ASEAN năm 1987 (IGA) và Hiệp định khung về khu vực đầu tư ASEAN năm 1998 (AIA)

Hiệp hội các Quốc gia Đông Nam Á (viết tắt là ASEAN) được thành lập vào ngày 08/8/1967 tại Thái Lan với mục tiêu cơ bản là đẩy nhanh tăng trưởng kinh tế, tiến bộ xã hội và thúc đẩy hoà bình và ổn định khu vực.[28] Việt Nam trở thành thành viên của ASEAN từ ngày 28/7/1995,[29] do vậy chịu sự ràng buộc của các nghĩa vụ đối với đầu tư nước ngoài từ các nước ASEAN khác, cũng như tích cực xây dựng khung pháp lý của ASEAN về quan hệ đầu tư kể từ khi đó.

Các nước ASEAN coi đầu tư trực tiếp nước ngoài (FDI) là một nguồn vốn quan trọng để duy trì tốc độ tăng trưởng kinh tế, phát triển công nghiệp, hạ tầng và công nghệ.[30] Mặc dù là một khu vực thu hút một lượng lớn vốn FDI trong những năm 1990, các nước ASEAN mong muốn thu hút dòng lưu chuyển vốn đầu tư cao hơn và bền vững trong ASEAN, và tăng sức hấp dẫn của môi trường pháp lý của ASEAN đối với các nhà đầu tư nước ngoài.[31] Vì vậy, năm 1987, các nước ASEAN đã ký kết Hiệp định khuyến khích và bảo hộ đầu tư ASEAN (IGA), được sửa đổi, bổ sung năm 1996, và ký thêm trong năm 1998 Hiệp định khung về khu vực đầu tư ASEAN (AIA), được sửa đổi, bổ sung năm 2001.

Việt Nam chịu sự ràng buộc của *Hiệp định IGA* kể từ khi trở thành thành viên ASEAN. Sau đó, Việt Nam đã tham gia vào quá trình ký kết Nghị định thư sửa đổi, bổ sung Hiệp định IGA ngày 12/12/1996. Hiệp định áp dụng đối với đầu tư của nhà đầu tư của bất kỳ các Bên ký kết nào được tiến hành trên lãnh thổ của các Bên ký kết kia, với điều kiện hoạt động đầu tư đó đã được chấp thuận bởi nước chủ nhà.[32] Các hoạt động đầu tư được tiến hành trước khi Hiệp định có hiệu lực cũng thuộc phạm vi điều chỉnh của Hiệp định nếu chúng được nước chủ nhà chấp thuận và phù hợp với mục đích của Hiệp định.[33]

[28] Đoạn 2 Tuyên bố Hội nghị Bộ trưởng Ngoại giao ASEAN (Tuyên bố Bangkok) ký tại Bangkok, ngày 08/8/1967.

[29] Tuyên bố kết nạp Nước CHXHCN Việt Nam vào ASEAN, ngày 28/7/1995.

[30] Lời mở đầu của Hiệp định AIA.

[31] Như trên.

[32] Điều II.1 của Hiệp định IGA.

[33] Điều II.3 của Hiệp định IGA.

Nội dung của Hiệp định tập trung vào bảo hộ dành cho đầu tư nội khối với những nghĩa vụ phổ biến trong các IIA như FET và FPS,[34] MFN,[35] bồi thường trong trường hợp bạo loạn, khẩn cấp,[36] tước đoạt quyền sở hữu và bồi thường,[37] tự do chuyển tiền.[38] Hiệp định cũng quy định cơ chế giải quyết tranh chấp giữa các quốc gia thành viên[39] và giữa nhà đầu tư với Nhà nước.[40]

Hiệp định AIA tập trung vào khía cạnh tự do hóa đầu tư, nhằm mục đích xây dựng một Khu vực đầu tư ASEAN thông thoáng, đẩy mạnh đầu tư vào ASEAN từ cả các nguồn trong và ngoài ASEAN, đưa ASEAN trở thành khu vực đầu tư thực sự hấp dẫn, củng cố và tăng cường tính cạnh tranh của các lĩnh vực kinh tế ASEAN.[41] Hiệp định hướng tới giảm dần hoặc loại bỏ những quy định và điều kiện đầu tư có thể cản trở các dòng đầu tư và hoạt động của các dự án đầu tư trong ASEAN, góp phần hướng tới tự do lưu chuyển đầu tư vào năm 2020.[42]

Phạm vi áp dụng của Hiệp định AIA giới hạn trong tất cả đầu tư trực tiếp, loại trừ đầu tư gián tiếp và các vấn đề về đầu tư thuộc phạm vi của Hiệp định Khung ASEAN về Dịch vụ (AFAS). Nghị định thư sửa đổi Hiệp định năm 2001 xác định định rõ hơn 5 ngành kinh tế và dịch vụ được điều chỉnh trong Hiệp định là sản xuất, nông nghiệp, trồng rừng, thuỷ sản và khai khoáng.[43] Nhà đầu tư ASEAN hưởng lợi từ Hiệp định được định nghĩa là công dân và pháp nhân của một nước thành viên ASEAN đầu tư vào quốc gia thành viên khác.[44] Họ phải có 'vốn ASEAN thực tế' đối với một khoản đầu tư vào một nước ASEAN, tức là phần vốn nắm giữ cuối cùng và khi cơ cấu cổ phần hoặc cơ cấu vốn của nhà đầu tư ASEAN gây khó khăn cho việc xác định cơ cấu nắm giữ cuối cùng, thì áp dụng các quy tắc và thủ tục xác định vốn thực tế của nước tiếp nhận đầu tư.[45]

[34] Điều III.2 của Hiệp định IGA.

[35] Điều IV.2 của Hiệp định IGA.

[36] Điều IV.3 của Hiệp định IGA.

[37] Điều IV.1 của Hiệp định IGA.

[38] Điều VII.1 của Hiệp định IGA.

[39] Điều IX của Hiệp định IGA.

[40] Điều X của Hiệp định IGA.

[41] Điều III của Hiệp định AIA.

[42] Như trên.

[43] Điều 1.2 của Nghị định thư bổ sung Hiệp định AIA 2001.

[44] Điều 1 Hiệp định AIA.

[45] Như trên.

Thành viên ASEAN có nghĩa vụ mở cửa ngay lập tức tất cả các ngành nghề của nước mình cho đầu tư của các nhà đầu tư ASEAN, và dành cho các nhà đầu tư ASEAN và khoản đầu tư của họ sự đối xử không kém thuận lợi hơn sự đối xử dành cho các nhà đầu tư và đầu tư tương tự của nước mình, trong việc tiếp nhận, thành lập, nắm giữ, mở rộng, quản lý, vận hành và định đoạt đầu tư.[46] Các thành viên tự xác định ngoại lệ của nguyên tắc NT thông qua các Danh mục loại trừ tạm thời (TEL) và Danh mục nhạy cảm (SL) tạo thành phụ lục của Hiệp định. Đồng thời, Hiệp định quy định chế độ đối xử MFN, áp dụng đối với cả các thoả thuận ưu đãi hiện tại và tương lai của các nước ASEAN.[47] Ngoài ra, Hiệp định quy định về cơ chế giải quyết tranh chấp[48] và việc thành lập Hội đồng đầu tư ASEAN[49] và một số vấn đề khác như minh bạch thông tin trong ASEAN,[50] các ngoại lệ chung,[51] các biện pháp tự vệ khẩn cấp và bảo đảm cán cân thanh toán.[52]

Cho tới khi Hiệp định đầu tư toàn diện ASEAN (ACIA) có hiệu lực năm 2012, có hai trường hợp nhà đầu tư ASEAN sử dụng quyền khởi kiện nước tiếp nhận đầu tư ASEAN ra trọng tài quốc tế theo hai hiệp định cũ IGA và AIA.[53] Năm 2000, Yaung Chi Oo Trading Pte. Ltd (YCO), một công ty thành lập ở Singapore kiện Myanmar vi phạm các nghĩa vụ như FET, FPS và tước đoạt tài sản có bồi thường trong hai hiệp định trên.[54] Tuy nhiên, do Hội đồng trọng tài cho rằng khoản đầu tư này chưa được 'phê duyệt và đăng ký bằng văn bản' sau khi Hiệp định 1987 có hiệu lực đối với Myanmar vào năm 1997, khi nước này trở thành thành viên ASEAN. Do đó, khoản đầu tư của YCO không được Hiệp định bảo hộ, và Hội đồng bác đơn kiện vì không có thẩm quyền xét xử.

Vụ tranh chấp thứ hai cũng liên quan tới một công ty Singapore, Cemex Asia Holdings Ltd, khởi kiện Indonesia ra trọng tài ICSID vào năm 2004 trên cơ sở Hiệp định IGA 1987.[55] Hai bên đã đạt được thỏa thuận

[46] Điều 7 Hiệp định AIA.

[47] Điều 8.2 Hiệp định AIA.

[48] Điều 17 Hiệp định AIA.

[49] Điều 16 Hiệp định AIA.

[50] Điều 11.1. Hiệp định AIA.

[51] Điều 13 Hiệp định AIA.

[52] Điều 14 và 15 Hiệp định AIA.

[53] Vụ *Yaung Chi Oo v Myanmar* (ASEAN I.D. Case No. ARB/01/1), xem tại: http://investmentpolicyhub.unctad.org/ISDS/Details/44, truy cập ngày 06/6/2017.

[54] Như trên, đoạn 8.

[55] Vụ *Cemex Asia Holdings Ltd v. Republic of Indonesia* (ICSID Case No. ARB/04/3), xem tại: https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/04/3, truy cập ngày 06/6/2017.

giải quyết tranh chấp giữa tiến trình trọng tài, và nội dung thỏa thuận bí mật của họ được đưa vào phán quyết trọng tài ngày 23/02/2007.[56]

2. Hiệp định đầu tư toàn diện ASEAN (ACIA)

A. *Giới thiệu chung*

Hiệp định đầu tư toàn diện ASEAN (ACIA) được ký kết vào 26/02/2009[57] nhằm đáp ứng mục tiêu thành lập Cộng đồng kinh tế ASEAN (AEC) vào năm 2015. Hiến chương ASEAN[58] ra đời trước đó 2 năm, đã đặt nền móng cho khung thể chế mới để các nước ASEAN hợp tác hiệu quả hơn trong ba cộng đồng, trong đó có Cộng đồng kinh tế ASEAN (AEC). Hiệp định đầu tư toàn diện ASEAN (ACIA) được soạn thảo dựa trên tinh thần này. Hiệp định đầu tư mới thay thế hai Hiệp định trước đó là Hiệp định IGA và Hiệp định AIA. ACIA kế thừa, đồng thời bổ sung, thay đổi quy định của hai Hiệp định cũ. Khi ACIA có hiệu lực vào năm 2012, các hiệp định IGA và AIA cũng chấm dứt hiệu lực.[59] Các hiệp định ký kết trước có thể được áp dụng thêm 3 năm kể từ ngày chấm dứt hiệu lực, nếu nhà đầu tư thuộc phạm vi bảo hộ lựa chọn.[60] Tuy nhiên, thời gian gia hạn áp dụng đã hết mà không có vụ kiện nào viện dẫn các hiệp định ký kết trước.

B. *Phạm vi áp dụng*

Hiệp định ACIA áp dụng với 'bất kỳ cá nhân là công dân hoặc mang quốc tịch hoặc có quyền thường trú tại một Quốc gia thành viên phù hợp với luật, quy định và chính sách của Quốc gia thành viên đó,[61] và với pháp nhân 'là các thực thể pháp lý được thành lập theo luật của các Quốc gia thành viên, vì mục đích lợi nhuận hay phi lợi nhuận, thuộc sở hữu nhà nước hay sở hữu tư nhân, bao gồm bất kỳ doanh nghiệp, công ty, các trust, doanh nghiệp liên danh, liên doanh, doanh nghiệp tư nhân, hiệp hội hoặc tổ chức'.[62] So với các hiệp định đầu tư trước đó của ASEAN, Hiệp định ACIA có phạm vi áp dụng rộng hơn, do định nghĩa về nhà đầu tư có thêm hai nhóm là người thường trú của các nước ASEAN, và pháp nhân từ nước thứ ba thiết lập cơ sở kinh doanh tại ASEAN.

Khoản đầu tư được định nghĩa rộng trong ACIA, là tất cả các loại tài sản thuộc quyền sở hữu hoặc kiểm soát của một nhà đầu tư, bao gồm cả động sản và bất động sản, quyền tài sản phái sinh và quyền sở hữu trí tuệ, hình thức đầu tư trực tiếp và đầu tư gián tiếp.[63] Khoản đầu tư cũng bao gồm các khoản thu được từ khoản đầu tư ban đầu như lợi nhuận, lợi tức, lãi vốn, cổ tức, tiền bản quyền, và các loại phí.[64] Hai điều kiện để khoản đầu tư được bảo hộ là phải được cơ quan có thẩm quyền của nước tiếp nhận đầu tư chấp thuận theo pháp luật và chính sách của nước đó, và phải được cơ quan nhà nước có thẩm quyền của nước đó 'xác nhận bằng văn bản', nếu nước tiếp nhận đầu tư yêu cầu theo trình tự, thủ tục trong ACIA.[65]

Về hiệu lực không gian, ACIA chỉ điều chỉnh các hoạt động đầu tư tiến hành trên lãnh thổ của các nước thành viên.[66] Về hiệu lực theo thời gian, ACIA áp dụng đối với khoản đầu tư được thành lập, được mua lại hoặc mở rộng sau khi Hiệp định có hiệu lực, hoặc khoản đầu tư tồn tại khi hiệp định có hiệu lực, dù thời điểm bắt đầu đầu tư là trước hay sau khi hiệp định có hiệu lực.[67]

Hiệp định không áp dụng đối với các biện pháp thuế (ngoại trừ quy định tại Điều 13 về chuyển tiền và Điều 14 về tước đoạt quyền sở hữu và bồi thường); trợ cấp của Chính phủ; mua sắm Chính phủ; cung cấp dịch vụ của cơ quan nhà nước, kể cả cơ quan, tổ chức được nhà nước uỷ quyền, bao gồm tất cả các loại hình dịch vụ vì mục đích lợi nhuận hay để cạnh tranh; và biện pháp tác động đến thương mại dịch vụ điều chỉnh theo AFAS.[68] Đầu tư dưới hình thức hiện diện thương mại theo Hiệp định AFAS được hưởng các tiêu chuẩn bảo hộ trong ACIA là: tiêu chuẩn đối xử chung đối với đầu tư (Điều 11), bồi thường trong trường hợp khẩn cấp (Điều 12), chuyển tiền (Điều 13), quốc hữu hoá và đền bù (Điều 14), thế quyền (Điều 15) và giải quyết tranh chấp giữa nhà đầu tư và nước tiếp nhận đầu tư (Phần B).[69]

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56 Vụ *Cemex Asia Holdings Ltd v. Republic of Indonesia* (ICSID Case No. ARB/04/3), xem tại: https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/04/3, truy cập ngày 6/6/2017.

57 Hiệp định đầu tư toàn diện ASEAN, ký kết ngày 26/02/2009, có hiệu lực từ ngày 29/3/2012.

58 Hiến chương ASEAN, ký kết ngày 20/11/2007, có hiệu lực từ ngày 15/12/2008.

59 Điều 47.1. Hiệp định ACIA.

60 Điều 47.3. Hiệp định ACIA.

61 Khoản g Điều 4 Hiệp định ACIA

62 Khoản e Điều 4 Hiệp định ACIA

63 Khoản f Điều 4 Hiệp định ACIA.

64 Như trên.

65 Khoản a, Điều 4 Hiệp định ACIA. Thủ tục về việc xác nhận bằng văn bản được qui định ở Phụ lục 1.

66 Khoản 1 Điều 3 Hiệp định ACIA.

67 Khoản 2 Điều 3 Hiệp định ACIA.

68 Khoản 4 Điều 3 Hiệp định ACIA.

69 Khoản 5 Điều 3 Hiệp định ACIA.

C. *Các quy định về tự do hóa đầu tư*

Về tự do hóa đầu tư, Hiệp định ACIA điều chỉnh đầu tư trong 5 lĩnh vực kinh tế là sản xuất công nghiệp; nông nghiệp; thủy sản; lâm nghiệp; khai khoáng và khai thác đá và các dịch vụ liên quan của các lĩnh vực này.[70] Hiệp định có thể mở rộng phạm vi tự do hóa đầu tư ở những lĩnh vực kinh tế khác, nếu các nước thành viên nhất trí.[71] Để đạt được mục tiêu tự do hoá đầu tư, Hiệp định quy định xoá bỏ sự phân biệt đối xử thông qua nguyên tắc MFN, NT, quy định về quản trị cao cấp/hội đồng quản trị (SMBD), và hạn chế các điều kiện, yêu cầu đối với hoạt động đầu tư.[72] Các quy tắc này được soạn thảo, đàm phán dựa trên việc tham khảo quy định của Chương 11 về Đầu tư trong NAFTA, Chương 11 về Đầu tư trong Hiệp định về Khu vực thương mại tự do giữa ASEAN, Australia và New Zealand (AANZFTA), các Hiệp định đầu tư giữa ASEAN và các đối tác như Trung Quốc và Hàn Quốc.

Việt Nam phải dành cho nhà đầu tư của bất kỳ một nước thành viên ASEAN và các khoản đầu tư của họ sự đối xử không kém thuận lợi hơn sự đối xử mà Việt Nam dành cho nhà đầu tư hoặc khoản đầu tư của mình trong các vấn đề chấp thuận, thành lập, mua lại, mở rộng, quản lý, vận hành, mua bán cũng như các định đoạt khác đối với khoản đầu tư (nguyên tắc NT).[73] Tương tự như Hiệp định AIA, Hiệp định ACIA cũng quy định chế độ MFN tự động, theo đó một nước thành viên phải dành cho nhà đầu tư hoặc khoản đầu tư từ nước thành viên khác không kém thuận lợi hơn sự đối xử dành cho nhà đầu tư, hoặc khoản đầu tư từ bất kỳ nước ASEAN, hay nước thứ ba nào.[74] Quy định này bao gồm cả các ưu đãi trong các hiệp định đầu tư song phương hoặc đa phương với bên thứ ba. Tuy nhiên, điều khoản MFN của ACIA không áp dụng trong vấn đề giải quyết tranh chấp,[75] và thỏa thuận tiểu vùng hoặc các thoả thuận đã thông báo cho Hội đồng AIA.[76] Cuối cùng, Điều 7 của Hiệp định yêu cầu các nước thành viên phải tuân thủ quy định cấm các biện pháp đầu tư liên quan đến thương mại theo Hiệp định TRIMs của WTO. Các nước thành viên ASEAN đặt ra các ngoại lệ về tự do hóa đầu tư trong Danh mục bảo lưu đối với nguyên tắc NT và quản trị cao cấp và hội đồng quản trị của mình.[77]

70 Khoản 3 Điều 3 Hiệp định ACIA.

71 Như trên.

72 Các điều 7 và 8 của Hiệp định ACIA.

73 Điều 5 của Hiệp định ACIA.

74 Điều 6 của Hiệp định ACIA.

75 Chú thích 4(a) của Hiệp định ACIA.

76 Điều 6.3 của Hiệp định ACIA.

77 Khoản 2 Điều 9 (Bảo lưu),

D. *Các quy định về bảo hộ đầu tư*

Về bảo hộ đầu tư, ACIA áp dụng đối với mọi khoản đầu tư thuộc phạm vi áp dụng của Hiệp định, kể từ khi đầu tư đó được thiết lập ở nước tiếp nhận đầu tư ASEAN. Hiệp định kế thừa và phát triển theo hướng cụ thể hóa và chặt chẽ hơn các quy định bảo hộ trong IGA 1987. Những quy định này tạo ra một sự bảo đảm pháp lý cho hoạt động đầu tư ở nước ngoài.

Thứ nhất, đầu tư nước ngoài của các nước ASEAN được hưởng sự không phân biệt đối xử trong khu vực ASEAN thông qua các cam kết về NT và MFN.

Thứ hai, Hiệp định ACIA đặt ra các tiêu chuẩn đối xử chung, độc lập, không so sánh với nhà đầu tư của nước tiếp nhận đầu tư hoặc nước thứ ba khác là FET và FPS. Quy định về FET được làm rõ trong ACIA là cam kết không từ chối công lý cho khoản đầu tư trong bất kỳ quá trình tố tụng tư pháp hoặc hành chính nào,[78] và FPS là cam kết thực hiện những biện pháp cần thiết ở mức hợp lý để bảo đảm việc bảo vệ và an ninh cho khoản đầu tư được bảo hộ.[79] Trong thực tiễn, có hội đồng trọng tài đã kết luận biện pháp của nước tiếp nhận đầu tư vi phạm đồng thời nhiều điều khoản.[80] Để tránh trường hợp đó, Hiệp định ACIA nêu rõ việc vi phạm các quy định khác của ACIA hoặc hiệp định khác không cấu thành vi phạm các tiêu chuẩn này.[81]

Thứ ba, để nhà đầu tư nước ngoài có thể thụ hưởng lợi ích tài chính từ hoạt động đầu tư của mình, các nước ASEAN cho phép chuyển tự do và không chậm trễ các khoản tiền liên quan tới khoản đầu tư của họ, bao gồm:

(a) Phần vốn góp, bao gồm cả phần vốn góp ban đầu ;

(b) Lợi nhuận, thu nhập từ vốn, cổ tức, phí thu được từ quyền sở hữu trí tuệ, phí chuyển giao công nghệ, phí hỗ trợ kỹ thuật và phí quản lý, lãi tiền vay và thu nhập vãng lai khác thu được từ bất kỳ khoản đầu tư được bảo hộ nào;

78 Điều 11(2) (a) Hiệp định ACIA.

79 Điều 11(2) (b) Hiệp định ACIA.

80 Hội đồng trọng tài vụ *Occidental v. Ecuador* kết luận điều khoản FPS bị vi phạm khi có vi phạm điều khoản FET. Xem *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004), para. 187.

81 Khoản 3 Điều 11 Hiệp định ACIA.

(c) Tiền thu được từ việc bán toàn bộ hoặc một phần hoặc thanh lý bất kỳ khoản đầu tư được bảo hộ nào;

(d) Các khoản tiền trả theo hợp đồng, bao gồm cả hợp đồng vay;

(e) Các khoản tiền trả theo Điều 7 (Bồi thường thiệt hại) và Điều 9 (Tước quyền sở hữu và đền bù);

(f) Các khoản tiền phát sinh từ việc giải quyết tranh chấp bằng bất kỳ biện pháp nào, bao gồm xét xử tại toà án, trọng tài hoặc thoả thuận giữa các bên tranh chấp; và

(g) Tiền lương và thù lao khác của người lao động thu được ở nước ngoài liên quan đến khoản đầu tư đó.[82]

Việc chuyển tiền phải được thực hiện không chậm trễ bằng đồng tiền tự do chuyển đổi, theo tỷ giá thị trường tại thời điểm chuyển tiền.[83]

Thứ tư, các nước ASEAN đưa ra các cam kết bảo hộ đầu tư nội khối khỏi nguy cơ họ lo ngại nhất khi đầu tư ở nước ngoài là bị tước quyền sở hữu. Họ có nghĩa vụ chỉ áp dụng các biện pháp tước quyền sở hữu hợp pháp theo quy định của ACIA và có đền bù cho nhà đầu tư. Hiệp định điều chỉnh cả biện pháp tước quyền sở hữu trực tiếp và gián tiếp, 'có tác động như tước quyền sở hữu hay quốc hữu hóa.'[84] Cách xác định biện pháp tước quyền sở hữu gián tiếp được làm rõ trong Phụ lục của Hiệp định ACIA. Theo đó, tùy từng trường hợp cụ thể và hoàn cảnh thực tế, việc xác định như vậy cần xem xét nhiều yếu tố, trong đó có:

(a) Tác động kinh tế của hành động của chính phủ, mặc dù việc một hành động hoặc một loạt các hành động có liên quan của một bên ký kết có tác động tiêu cực đến giá trị kinh tế của một khoản đầu tư, một mình nó không đủ cơ sở để xác định rằng việc tước quyền sở hữu đã xảy ra;

(b) Khi hành động của chính phủ vi phạm cam kết ràng buộc bằng văn bản từ trước của chính phủ với nhà đầu tư, bất kể cam kết đó là hợp đồng, giấy phép hoặc văn bản pháp lý khác; và

(c) Tính chất của hành động của chính phủ, mục đích hành động của chính phủ, và liệu hành động đó có mất cân đối với mục đích công.[85]

[82] Khoản 1 Điều 13 Hiệp định ACIA.

[83] Khoản 2 Điều 13 Hiệp định ACIA.

[84] Khoản 1 Điều 14 Hiệp định ACIA.

[85] Phụ lục 2 Hiệp định ACIA.

Để duy trì khoảng linh hoạt chính sách cần thiết cho nước tiếp nhận đầu tư, ACIA quy định ngoại lệ cho cam kết này. Khoản 4 của Phụ lục 2 nêu rõ rằng hoạt động quản lý nhà nước trên cơ sở không phân biệt đối xử được thiết kế và áp dụng để bảo vệ các mục đích phúc lợi công cộng chính đáng, như bảo vệ sức khoẻ cộng đồng, an toàn và môi trường, sẽ cấu thành hành vi tước đoạt quyền sở hữu gián tiếp.

Dù công nhận chủ quyền của mỗi nước thành viên trong định đoạt về tài sản, hoạt động kinh tế thuộc quyền tài phán của mình, Hiệp định ACIA yêu cầu việc tước đoạt quyền sở hữu của nhà đầu tư nước ngoài phải thỏa mãn các điều kiện như vì mục đích công cộng, trên cơ sở không phân biệt đối xử, có bồi thường nhanh chóng, đầy đủ và hiệu quả, và phù hợp với thủ tục pháp luật.[86] Quy định về bồi thường hướng tới đảm bảo trả lại toàn bộ giá trị tài sản bị tước đoạt cho nhà đầu tư nước ngoài. Mức bồi thường được xác định theo giá thị trường của khoản đầu tư, vào thời điểm ngay trước khi việc tước quyền sở hữu được công bố, hoặc ngay khi xảy ra việc tước quyền sở hữu.[87] Giá trị này sẽ không tính đến phần bị thay đổi, nếu việc tước đoạt quyền sở hữu bị tiết lộ sớm hơn.[88] Các nước ASEAN cam kết thanh toán bồi thường nhanh chóng, thường ngay sau khi thực hiện các thủ tục hành chính và pháp lý cần thiết, và nếu có chậm trễ, sẽ trả lãi cho nhà đầu tư, tính từ khi tiến hành tước đoạt quyền sở hữu đến khi thanh toán.[89] Khoản bồi thường được tự do chuyển giữa lãnh thổ các nước ASEAN và được thanh toán đồng tiền tự do chuyển đổi, phù hợp với quy định về quyền tự do chuyển tiền ở Điều 13.[90]

Thứ năm, cuối cùng, các nước ASEAN cam kết bồi thường cả trong những trường hợp thiệt hại phát sinh do xung đột vũ trang, bạo loạn hay tình trạng khẩn cấp ở nước đó.[91] Tuy nhiên, trong tình huống này, việc bồi thường không bắt buộc phải là toàn bộ tài sản bị mất đi, mà chỉ cần đảm bảo không phân biệt đối xử giữa các nhà đầu tư nước ngoài, và giữa nhà đầu tư nước ngoài với nhà đầu tư trong nước.[92]

[86] Điều 14 Hiệp định ACIA.

[87] Điều 14(2)(b) Hiệp định ACIA.

[88] Điều 14(2)(a), (c) Hiệp định ACIA.

[89] Điều 14(3) Hiệp định ACIA.

[90] Điều 14(2)(d) Hiệp định ACIA.

[91] Điều 12 Hiệp định ACIA.

[92] Như trên.

E. *Các quy định về ngoại lệ*

Khi chấp nhận các nghĩa vụ quốc tế đối với đầu tư nước ngoài, các nước tiếp nhận đầu tư muốn duy trì sự linh hoạt trong hoạch định chính sách để theo đuổi và cân bằng các mục tiêu khác nhau. Vì thế, Hiệp định ACIA quy định một số trường hợp ngoại lệ khi cần ưu tiên một số vấn đề hơn việc thu hút đầu tư qua cam kết bảo hộ đầu tư. Song để tránh việc lạm dụng ngoại lệ nhằm bỏ qua các nghĩa vụ bảo hộ đầu tư trong ACIA, quy định về ngoại lệ thường kèm theo các điều kiện chặt chẽ.

Thứ nhất, nước tiếp nhận đầu tư có quyền ngăn cản hay trì hoãn việc chuyển tiền để đảm bảo thực thi pháp luật của mình. Ngoại lệ này được điều chỉnh chi tiết với các điều kiện là phải áp dụng luật trong nước một cách công bằng, không phân biệt đối xử và có thiện ý. Hơn nữa, các nước ASEAN chỉ được phép sử dụng ngoại lệ này trong một số lĩnh vực chính sách, hay nhằm bảo vệ lợi ích của các đối tượng khác ngoài nhà đầu tư nước ngoài, như người lao động, chủ nợ và lợi ích công cộng. Khoản 3 Điều 13 liệt kê tất cả các trường hợp pháp luật và quy định thuộc ngoại lệ này là liên quan tới việc phá sản, vỡ nợ, hoặc bảo hộ các quyền của chủ nợ; phát hành, kinh doanh chứng khoán, hợp đồng tương lai, quyền chọn, hoặc các chứng khoán phái sinh; tội phạm hình sự và việc thu giữ tiền có được từ tội phạm; báo cáo tài chính hoặc hạch toán các khoản được chuyển khi cần thiết, để hỗ trợ các cơ quan thực thi pháp luật hoặc quản lý tài chính; đảm bảo tuân thủ các quyết định hoặc bản án trong tố tụng tư pháp hoặc hành chính; thuế; an sinh xã hội, hưu trí, hoặc các chương trình tiết kiệm bắt buộc; quyền thôi việc của người lao động; và yêu cầu đăng ký và đáp ứng các thủ tục khác của Ngân hàng Trung ương và các cơ quan khác có liên quan của một nước thành viên.

Thứ hai, Điều 16 ACIA cho phép nước tiếp nhận đầu tư ban hành hoặc duy trì các hạn chế đối với việc thanh toán và chuyển tiền liên quan đến khoản đầu tư, nhằm duy trì mức dự trữ tài chính cần thiết đầy đủ cho việc thực hiện các chương trình phát triển kinh tế của mình. Hoàn cảnh mà nước tiếp nhận đầu tư được quyền áp dụng ngoại lệ này là trong trường hợp có khó khăn nghiêm trọng hoặc nguy cơ như vậy về cán cân thanh toán và tài chính đối ngoại. Hơn nữa, biện pháp ngoại lệ phải đáp ứng các yêu cầu sau:

(a) Phải phù hợp với Điều lệ IMF;

(b) Không phân biệt đối xử giữa các nước ASEAN;

(c) Hạn chế thiệt hại không cần thiết đối với lợi ích thương mại, kinh tế và tài chính của bất kỳ nước ASEAN nào khác;

(d) Không vượt quá mức cần thiết;

(e) Chỉ mang tính tạm thời và phải loại bỏ dần dần khi tình hình được cải thiện và

(f) Phải đảm bảo chế độ đối xử tối huệ quốc.

Thứ ba, theo ngoại lệ chung của ACIA, không có quy định nào của Hiệp định ngăn cản nước tiếp nhận đầu tư tiến hành các biện pháp không mang tính phân biệt đối xử tùy tiện hay hạn chế trá hình và cần thiết để đạt được những mục tiêu chính sách chính đáng, như bảo vệ an ninh công cộng, đạo đức công, duy trì trật tự công, bảo vệ cuộc sống hay sức khỏe của con người, động, thực vật, bảo tồn tài nguyên thiên nhiên có thể bị cạn kiệt, …[93]

Thứ tư, ngoại lệ an ninh quy định ở Điều 18 nêu rõ rằng Hiệp định không nhằm cản trở việc các nước ASEAN thực hiện các hành động được cho là cần thiết để bảo vệ các lợi ích an ninh thiết yếu của mình, bao gồm nhưng không giới hạn trong: hoạt động liên quan đến vật liệu phân hạch và nhiệt hạch hoặc các vật liệu dùng để sản xuất vật liệu phân hạch và nhiệt hạch; hoạt động liên quan đến việc buôn bán vũ khí, đạn dược và phương tiện chiến tranh, và buôn bán những hàng hóa và các vật liệu khác có thể trực tiếp hoặc gián tiếp phục vụ cho mục đích tiếp tế cho một cơ sở quân sự; hoạt động tiến hành trong chiến tranh hoặc tình trạng khẩn cấp khác trong nước hoặc quốc tế; hoạt động để bảo vệ cơ sở hạ tầng công cộng quan trọng (bao gồm thông tin liên lạc, điện, nước) khỏi những âm mưu phá hoại; hoặc ngăn cản các nước thành viên thực hiện bất kỳ hành động nào thuộc nghĩa vụ của mình theo Hiến chương Liên hợp quốc trong việc duy trì hòa bình và an ninh quốc tế.

F. *Các quy định về giải quyết tranh chấp*

Tương tự như các hiệp định đầu tư khác, ACIA quy định cơ chế giải quyết hai loại tranh chấp: tranh chấp giữa quốc gia với quốc gia và tranh chấp giữa nhà đầu tư nước ngoài và nước tiếp nhận đầu tư (ISDS). Đối với loại tranh chấp đầu, ACIA không quy định cụ thể mà dẫn chiếu tới Nghị định

[93] Điều 17 Hiệp định ACIA.

thư ASEAN về tăng cường cơ chế giải quyết tranh chấp năm 2004.[94] Về cơ bản, Nghị định thư này sử dụng mô hình giải quyết tranh chấp giữa các quốc gia của WTO với hai cấp xét xử là Ban hội thẩm được thành lập theo vụ việc (*ad hoc)* và Cơ quan Phúc thẩm thường trực. Hội nghị các quan chức kinh tế cấp cao ASEAN (SEOM) giám sát quy trình giải quyết tranh chấp quy định trong Nghị định thư. SEOM có thẩm quyền thành lập Ban hội thẩm, thông qua báo cáo của Ban hội thẩm và Cơ quan Phúc thẩm, giám sát việc thực thi các kết luận và khuyến nghị của Ban hội thẩm, Cơ quan Phúc thẩm mà đã được thông qua và cho phép tạm dừng các nhượng bộ thương mại hay nghĩa vụ trong các hiệp định thuộc phạm vi áp dụng.[95]

Cơ chế ISDS được quy định chi tiết trong ACIA. Thủ tục bắt buộc đầu tiên là tham vấn trong thời hạn tối thiểu là 180 ngày, kể từ ngày nước tiếp nhận đầu tư nhận được yêu cầu tham vấn từ nhà đầu tư.[96] Hiệp định cũng khuyến khích các bên tranh chấp sử dụng biện pháp hòa giải. Nếu các nỗ lực ngoại giao bất thành, nhà đầu tư được quyền khởi kiện nước tiếp nhận đầu tư[97] và lựa chọn loại hình cơ quan xét xử như tòa án, tòa hành chính trong nước của nước tiếp nhận đầu tư, trọng tài ICSID, trọng tài UNCITRAL, Trung tâm Trọng tài Khu vực ở Kuala Lumpur, hoặc bất kỳ trung tâm trọng tài khu vực nào khác trong ASEAN, hoặc hình thức trọng tài khác do các bên tranh chấp nhất trí.[98] Khi đã sử dụng một trong các thiết chế tài phán này, lựa chọn của nhà đầu tư mang tính ràng buộc và cuối cùng, không được lựa chọn lại.[99] Thời hiệu khởi kiện được giới hạn trong vòng 3 năm, kể từ khi nhà đầu tư nhận thấy, hoặc đáng lý ra phải nhận thức được rằng việc vi phạm một nghĩa vụ của nước tiếp nhận đầu tư đã gây ra thiệt hại hoặc tổn thất đối với mình, hoặc đối với khoản đầu tư được cấp phép của mình.[100] Như vậy, Việt Nam đã đồng ý trước và chấp nhận thẩm quyền của trọng tài quốc tế trong các vụ kiện do nhà đầu tư nước ngoài khởi xướng trên cơ sở Hiệp định ACIA. Do Việt Nam chưa tham gia Công ước ICSID nên nhà đầu tư thuộc nước ASEAN không được sử dụng trọng tài ICSID để kiện Việt Nam. Tuy nhiên, họ vẫn có thể lựa chọn Cơ chế phụ trợ của ICSID, dành cho các tranh chấp

94 Nghị định thư ASEAN về tăng cường cơ chế giải quyết tranh chấp, Viêng Chăn, Lào, ký ngày 29/11/2004, có hiệu lực từ ngày 15-17/3 năm 2005. Nghị định thư này thay thế Nghị định thư ASEAN về Cơ chế giải quyết tranh chấp năm 1996.

95 Khoản 1 Điều 2 Nghị định thư ASEAN về tăng cường cơ chế giải quyết tranh chấp.

96 Điều 32 Hiệp định ACIA.

97 Điều 34 Hiệp định ACIA.

98 Điều 33 Hiệp định ACIA.

99 Khoản 1 Điều 33 Hiệp định ACIA.

100 Điều 34.1.a Hiệp định ACIA.

liên quan tới một nước thành viên Công ước và một nước không phải là thành viên.

Nếu nhà đầu tư nước ngoài lựa chọn toà án hoặc tòa hành chính của nước tiếp nhận đầu tư, thủ tục tố tụng do pháp luật nước đó điều chỉnh. Nếu nhà đầu tư khởi kiện ra trọng tài quốc tế, Hiệp định ACIA quy định một số vấn đề tố tụng mặc định để áp dụng với mọi loại hình trọng tài như yêu cầu trọng tài, chỉ định trọng tài viên, tính minh bạch, chi phí trọng tài và giải quyết tranh chấp liên quan đến vấn đề thuế. Những quy định này được ưu tiên áp dụng so với quy tắc trọng tài cụ thể mà nhà đầu tư lựa chọn như ICSID, UNCITRAL, … Tuy nhiên, ACIA đề cao quyền tự chủ của các bên tranh chấp khi cho phép họ thỏa thuận hủy bỏ, sửa đổi hoặc điều chỉnh quy định về tố tụng trọng tài áp dụng để giải quyết tranh chấp của họ.[101]

ACIA quy định về thành phần của hội đồng trọng tài, theo đó, trừ khi các bên có thỏa thuận khác, Hội đồng gồm 3 trọng tài viên, mỗi bên tranh chấp được bổ nhiệm một trọng tài viên, và trọng tài viên thứ ba - Chủ tịch Hội đồng trọng tài - do các bên tranh chấp nhất trí bổ nhiệm, có quốc tịch của một quốc gia không phải thành viên ASEAN, và có quan hệ ngoại giao với cả nước ASEAN là bị đơn và nước mà nhà đầu tư có quốc tịch, và không phải người thường trú ở cả hai quốc gia này.[102] Tiêu chuẩn chuyên môn để lựa chọn trọng tài viên là phải có trình độ chuyên môn và kinh nghiệm trong lĩnh vực công pháp quốc tế, luật thương mại hoặc đầu tư quốc tế.[103]

Thủ tục thành lập hội đồng trọng tài không thể bị một bên tranh chấp trì hoãn, vì ACIA ấn định cơ quan chỉ định nếu một bên không chỉ định trọng tài viên trong vòng 75 ngày, kể từ ngày nộp đơn lên trọng tài như Tổng Thư ký của ICSID đối với trọng tài thành lập theo Công ước ICSID hoặc Quy tắc của Cơ chế Phụ trợ ICSID, Tổng Thư ký Tòa án Trọng tài thường trực tại La Hay đối với trọng tài UNCITRAL và Tổng Thư ký hoặc người nắm giữ vị trí tương đương của thiết chế trọng tài đối với loại hình trọng tài khác như Trung tâm Trọng tài Khu vực Kuala Lumpur.[104]

Tố tụng trọng tài được chia thành hai giai đoạn, với giai đoạn xem xét thẩm quyền xét xử phải tiến hành trước giai đoạn xem xét nội dung cụ thể của tranh chấp, nếu bên tranh chấp có ý kiến phản đối về thẩm

101 Khoản 4 Điều 33 Hiệp định ACIA.

102 Khoản 1 Điều 35 Hiệp định ACIA.

103 Khoản 2 Điều 35 Hiệp định ACIA.

104 Khoản 3 Điều 35, Khoản a Điều 28 (a) Hiệp định ACIA.

quyền xét xử hay tính có thể chấp nhận được của đơn kiện.[105] Riêng các tranh chấp liên quan đến khiếu kiện biện pháp thuế cấu thành hành vi tước quyền sở hữu gián tiếp, thì ACIA quy định thêm thủ tục bắt buộc trước khi nhà đầu tư được khởi kiện ra trọng tài quốc tế.[106] Theo đó, các nước ASEAN liên quan tới tranh chấp sẽ tham vấn để xác định xem biện pháp bị khiếu kiện có phải là biện pháp về thuế không, và theo yêu cầu của nước ASEAN là bị đơn, tham vấn xem biện pháp thuế có cấu thành hành vi tước quyền sở hữu gián tiếp hay không.[107] Hội đồng trọng tài có nghĩa vụ xem xét cẩn trọng các quyết định đạt được trong quá trình tham vấn.[108] Tuy nhiên, nếu các bên không thể tiến hành thủ tục tham vấn trong vòng 180 ngày, thì nhà đầu tư vẫn có quyền đệ trình tranh chấp ra trọng tài quốc tế.[109]

Hiệp định ACIA đặt ra một yêu cầu về minh bạch đối với giải quyết tranh chấp bằng trọng tài quốc tế, là quốc gia bị đơn phải thông báo cho các nước ASEAN khác về đơn khởi kiện ra trọng tài quốc tế mà quốc gia đó nhận được trong vòng 30 ngày.[110] Tuy nhiên, thông tin bí mật được bảo vệ và việc công bố phán quyết hoặc quyết định trọng tài thuộc quyền của quốc gia bị đơn.[111]

Vấn đề chi phí trọng tài được ACIA quy định khác biệt với các hiệp định đầu tư và quy tắc trọng tài khác. Khoản 5 Điều 35 của Hiệp định nêu rõ rằng mỗi bên tranh chấp sẽ chịu chi phí cho trọng tài viên mà mình chỉ định và chia đều chi phí cho trọng tài viên làm Chủ tịch Hội đồng trọng tài, và các chi phí liên quan. Dù rằng các bên tranh chấp có quyền quyết định về chi phí cho Hội đồng trọng tài, kể cả tiền công trả cho các trọng tài viên, nhưng nếu họ không thống nhất được, có thể hiểu rằng, mỗi bên tự quyết định việc chi trả cho trọng tài viên do mình bổ nhiệm.[112] Hội đồng trọng tài phải tuân thủ quy định về chi phí này của ACIA.[113]

Quy định về luật áp dụng trong ACIA cho thấy các cam kết của thành viên ASEAN trong những lĩnh vực khác nhau có mối quan hệ, liên kết với nhau, vì yêu cầu hội đồng trọng tài quyết định các vấn đề tranh chấp không chỉ theo quy định của ACIA mà còn theo bất kỳ các hiệp định ràng buộc các nước ASEAN liên quan tới tranh chấp. Ngoài ra, hội đồng trọng tài cũng giải quyết vụ kiện trên cơ sở pháp luật quốc tế và tùy trường hợp cụ thể, luật trong nước của nước ASEAN là bị đơn.[114]

Cuối cùng, Hiệp định quy định việc xem xét lại phán quyết trọng tài ICSID theo cơ chế Ủy ban Hủy phán quyết của ICSID.[115] Trong trường hợp phán quyết của trọng tài thành lập theo Quy tắc của Cơ chế Phụ trợ ICSID hay Quy tắc Tố tụng trọng tài UNICITRAL, tòa án quốc gia có thẩm quyền xem xét việc hủy phán quyết. Hết thời hạn xem xét việc hủy phán quyết,[116] bên thắng kiện có thể yêu cầu công nhận và cho thi hành phán quyết trọng tài và ACIA đặt ra nghĩa vụ cho các nước ASEAN phải quy định về việc đảm bảo thực thi phán quyết trọng tài trong phạm vi lãnh thổ của mình.[117]

3. Các hiệp định của ASEAN với những đối tác khác

Những cam kết của Việt Nam thúc đẩy và bảo hộ đầu tư nước ngoài với tư cách là quốc gia thành viên ASEAN trong các hiệp định giữa ASEAN và các đối tác khác có *nhiều nội dung rất giống* Hiệp định ACIA mà đã được trình bày chi tiết ở trên. Hiện nay, ASEAN có những hiệp định sau: Hiệp định đầu tư giữa ASEAN và Trung Quốc,[118] Hiệp định đầu tư giữa ASEAN và Hàn Quốc,[119] Hiệp định thương mại tự do giữa ASEAN và Australia, New Zealand,[120] Hiệp định đầu tư giữa ASEAN và Ấn Độ.[121]

105 Khoản 1 Điều 36 Hiệp định ACIA.

106 Khoản 6 Điều 36 Hiệp định ACIA.

107 Khoản 7 Điều 36 Hiệp định ACIA.

108 Khoản 8 Điều 36 Hiệp định ACIA.

109 Khoản 9 Điều 36 Hiệp định ACIA.

110 Khoản 6 Điều 39 Hiệp định ACIA.

111 Khoản 1-5 Điều 39 Hiệp định ACIA.

112 Khoản 6 Điều 35 Hiệp định ACIA.

113 Khoản 3 Điều 41 Hiệp định ACIA.

114 Khoản 1 Điều 40 Hiệp định ACIA.

115 Điều 50 -55 của Công ước ICSID

116 Khoản 7 Điều 31 Hiệp định ACIA.

117 Khoản 9 Điều 41 Hiệp định ACIA.

118 Hiệp định về đầu tư trong khuôn khổ Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN và Trung Quốc, ký ngày 15/8/2009 và có hiệu lực từ ngày 01/01/2010.

119 Hiệp định về đầu tư trong khuôn khổ Hiệp định khung về hợp tác kinh tế toàn diện giữa các nước thành viên của ASEAN và Hàn Quốc, ký ngày 02/6/2009, có hiệu lực từ ngày 01/9/2009

120 Hiệp định thành lập Khu vực thương mại tự do ASEAN-Australia-New Zealand, ký ngày 27/02/2009, có hiệu lực từ ngày 01/01/2010.

121 Hiệp định về đầu tư trong khuôn khổ Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN và Ấn Độ, ký ngày 12/11/2014, có hiệu lực từ ngày 01/7/2015.

Mục 3. CÁC CAM KẾT CỦA VIỆT NAM TRONG MỘT SỐ HIỆP ĐỊNH THƯƠNG MẠI TỰ DO (FTA)

Ngoài các IIA ký kết trong khuôn khổ ASEAN, Việt Nam đã và đang đàm phán, ký kết một số FTA song phương và đa phương có một chương giống một hiệp định đầu tư. Việt Nam và một số nước đồng thời là thành viên của nhiều hiệp định khác nhau gây ra sự chồng chéo và phức tạp trong thực tiễn. Dù các hiệp định này có cấu trúc, nội dung khá tương đồng nhưng vẫn chứa đựng những khác biệt về cách thức quy định, từ ngữ lựa chọn trong những điều khoản cụ thể và vì thế, là cam kết khác nhau. *Thí dụ*, Việt Nam và Nhật Bản cùng tham gia Hiệp định Đối tác Kinh tế Việt Nam - Nhật Bản (VJEPA),[122] Hiệp định đối tác xuyên Thái Bình Dương (TPP), Hiệp định Đối tác kinh tế toàn diện khu vực (RCEP), chưa kể đến Hiệp định đầu tư giữa ASEAN và Nhật Bản. Chương về quan hệ đầu tư của các Hiệp định TPP và RCEP được xây dựng trong những năm gần đây, có nội dung mang tính toàn diện và chi tiết như Hiệp định ACIA phân tích ở trên. Trong khi đó, VJEPA không thiết lập khung pháp lý mới về đầu tư mà dẫn chiếu tới các quy định ngắn gọn hơn của BIT Việt Nam - Nhật Bản năm 2003.123 Dưới đây là danh sách các FTA có quy định về đầu tư của Việt Nam với các nước khác tính đến tháng 5/2017.[124]

STT	Tên Hiệp định	Các bên (không tính Việt Nam)	Ngày ký kết	Ngày có hiệu lực
1	Hiệp định đối tác xuyên Thái Bình Dương (TPP)	Australia, Bruney, Canada, Chile, Nhật Bản, Malaysia, Mexico, New Zealand, Peru, Singapore, Hoa Kỳ	04/02/2016	
2	Hiệp định thương mại tự do Việt Nam - EU (EVFTA)	EU 25	01/02/2016	
3	Hiệp định thương mại tự do Việt Nam - Liên minh Kinh tế Á - Âu (VN - EAEU FTA)	Các nước Liên minh Kinh tế Á - Âu	29/5/2015	05/10/2016
4	Hiệp định thương mại tự do Việt Nam - Hàn Quốc (VKFTA)	Hàn Quốc	05/5/2015	20/12/2015
5	Hiệp định thương mại tự do Việt Nam - Chile	Chile	12/11/2011	
6	Hiệp định Đối tác Kinh tế Việt Nam - Nhật Bản	Nhật Bản	25/12/2008	01/10/2009
7	Hiệp định giữa Việt Nam và Hoa Kỳ về Quan hệ thương mại (BTA)	Hoa Kỳ	13/7/2000	13/7/2000
8	Hiệp định đối tác kinh tế toàn diện khu vực	Australia, Chile, Nhật Bản, Malaysia, New Zealand, Trung Quốc, Ấn Độ, Nhật Bản, Hàn Quốc		

Trong số các FTA liệt kê ở trên, nhà đầu tư nước ngoài đã sử dụng BTA Việt Nam - Hoa Kỳ[125] để khởi kiện Chính phủ Việt Nam.[126] Năm 2010, ông Michael McKenzie, công dân Hoa Kỳ, cho rằng Chính phủ Việt Nam, trực tiếp là UBND tỉnh Bình Thuận, đã vi phạm cam kết liên quan đến tước quyền sở hữu của nhà đầu tư nước ngoài, các tiêu chuẩn FET và minh bạch đối với dự án xây dựng khu du lịch nghỉ dưỡng South Fork tại tỉnh Bình Thuận. Ông ta đã sử dụng quyền khởi kiện nước tiếp nhận đầu tư ra Trọng tài quốc tế thành lập theo Quy tắc tố tụng trọng tài UNCITRAL theo quy định của BTA. Năm 2013, Hội đồng trọng tài đã bác đơn kiện của ông ta (trong một phán quyết không công khai) vì ông McKenzie đã

[122] Hiệp định Đối tác Kinh tế Việt Nam - Nhật Bản, ký ngày 25/12/2008, có hiệu lực từ ngày 01/10/2009.

[123] Hiệp định giữa Nhật Bản và Việt Nam về tự do thương mại, khuyến khích và bảo hộ đầu tư, ký ngày 14/11/2003, có hiệu lực từ ngày 19/12/2004.

[124] Tổng hợp từ thống kê các Hiệp định có quy định về đầu tư của UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryOtherlias/229#iiaInnerMenu (truy cập ngày 02/6/2017).

[125] Hiệp định giữa Việt Nam và Hoa Kỳ về quan hệ thương mại, ký ngày 17/3/2000, có hiệu lực từ ngày 10/12/2001.

[126] Bộ Tư Pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập ngày 08/6/2017.

thiếu trung thực, thiếu thiện chí ngay từ khi làm thủ tục xin phép đầu tư tại Việt Nam, và khoản đầu tư của ông McKenzie không được bảo hộ theo BTA Việt Nam - Hoa Kỳ.[127]

Gần đây nhất, Việt Nam tham gia hai FTA đa phương là Hiệp định TPP ký kết ngày 04/02/2016 và Hiệp định thương mại tự do Việt Nam - EU (EVFTA) mà văn bản đàm phán được thông qua ngày 01/02/2016. Tính đến năm 2017, cả hai hiệp định đều chưa có hiệu lực. Chương 9 của Hiệp định TPP nhằm điều chỉnh quan hệ đầu tư giữa các bên ký kết. Tương tự, EVFTA cũng dành một phần quy định về thúc đẩy và bảo hộ đầu tư của nhau. Khung pháp lý về đầu tư trong các Hiệp định này được xây dựng theo hướng chi tiết giống như Hiệp định ACIA. Tuy nhiên, cơ chế giải quyết tranh chấp của EVFTA có một đặc điểm mới, khác biệt - đó là hệ thống tòa án đầu tư với hai cấp xét xử, sơ thẩm và phúc thẩm, thay thế phương thức trọng tài quốc tế.

Mục 4. CÁC CAM KẾT CỦA VIỆT NAM TRONG MỘT SỐ HIỆP ĐỊNH ĐẦU TƯ SONG PHƯƠNG (BIT)

Việt Nam tham gia khoảng hơn 60 BIT. Xét về nội dung, các hiệp định này có thể chia thành hai dạng, truyền thống và hiện đại. Đa số các hiệp định truyền thống được ký kết giai đoạn đầu từ những năm 1990, thường ngắn hơn hiệp định hiện đại nhiều, với khoảng hơn 10 điều khoản có cách quy định vắn tắt, ngữ nghĩa nhiều điểm khó xác định, ít dự liệu, cho phép nước tiếp nhận đầu tư có sự linh hoạt trong việc theo đuổi các mục tiêu chính sách công khác nhau. Hiệp định hiện đại được ký kết từ đầu thế kỷ XXI, phản ánh nhu cầu sửa đổi, soạn thảo lại các nghĩa vụ để giảm thiểu căn cứ phát sinh tranh chấp, và giúp nước tiếp nhận đầu tư tự do hơn trong hoạch định chính sách. Tuy vậy, một số hiệp định với các đối tác mà quan hệ kinh tế và thương mại với Việt Nam còn hạn chế vẫn ở dạng BIT truyền thống. Hiệp định hiện đại giải quyết được sự mập mờ, gây tranh cãi của nhiều điều khoản trong hiệp định truyền thống. Kinh nghiệm từ thực tiễn các vụ kiện trọng tài ảnh hưởng rõ rệt đến quá trình soạn thảo, đàm phán cam kết đầu tư của các nước, trong đó có Việt Nam.

Theo thống kê của UNCTAD, cho đến thời điểm năm 2017, Việt Nam bị nhà đầu tư nước ngoài khởi kiện dựa trên các BIT trong ba vụ, trong đó hai vụ Việt Nam thắng kiện và một vụ đạt được thỏa thuận giải quyết tranh chấp. Một vụ kiện theo BIT Việt Nam - Hà Lan năm 1994 và hai vụ kiện theo BIT ký kết với Pháp 1992.[128] Ngoài những vụ kiện mà Việt Nam là một bên tranh chấp trực tiếp, hàng trăm phán quyết trọng tài giải quyết tranh chấp theo các BIT đã góp phần giúp cho các nước nhận thức rõ bất cập trong các cách thức đưa ra cam kết cũ. Vì thế, BIT làm rõ ngữ nghĩa, bổ sung nội dung ở nhiều khía cạnh như phạm vi áp dụng, quy định thực chất về khuyến khích và bảo hộ đầu tư, các quy định về giải quyết tranh chấp của BIT. Cụ thể, từ định nghĩa 'đầu tư, 'nhà đầu tư đến các tiêu chuẩn đối xử như MFN, FET và FPS, cách xác định tước quyền sở hữu gián tiếp đều được soạn thảo lại. Ngoài ra, nhiều ngoại lệ, bảo lưu cho phép nước tiếp nhận đầu tư ưu tiên theo đuổi các mục tiêu công cộng như bảo vệ sức khỏe, đời sống con người, động thực vật, bảo vệ môi trường, đạo đức cộng đồng, trật tự công, … [129]

Dưới đây là Danh sách các BIT của Việt Nam ký kết với các nước khác (tính đến tháng 5/2017).[130]

STT	Đối tác	Tình trạng	Ngày ký kết	Ngày có hiệu lực
1	Algeria	Chưa có hiệu lực	21/10/1996	
2	Argentina	Đang có hiệu lực	03/6/1996	01/6/1997
3	Armenia	Đang có hiệu lực	01/02/1993	28/4/1993
4	Australia	Đang có hiệu lực	05/3/1991	11/9/1991
5	Áo	Đang có hiệu lực	27/3/1995	01/10/1996
6	Bangladesh	Chưa có hiệu lực	01/5/2005	
7	Belarus	Đang có hiệu lực	08/7/1992	24/11/1994
8	BLEU (Liên minh Kinh tế Bỉ - Luxembourg)	Đang có hiệu lực	24/01/1991	11/6/1999
9	Bulgaria	Đang có hiệu lực	19/9/1996	15/5/1998
10	Căm-pu-chia	Chưa có hiệu lực	01/9/2001	
11	Chile	Chưa có hiệu lực	16/09/1999	
12	Trung Quốc	Đang có hiệu lực	02/12/1992	01/9/1993

[127] Như trên.

[128] Xem chi tiết danh sách các vụ kiện trên website của UNCTAD tại http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

[129] Trịnh Hải Yến, *Giáo trình Luật đầu tư quốc tế*, Nxb. Chính trị quốc gia, Hà Nội, (2017), tr. 163-165.

[130] Tổng hợp từ website của UNCTAD, xem tại http://investmentpolicyhub.unctad.org/IIA/CountryBits/229#iiaInnerMenu (truy cập ngày 02/6/2017).

13	Cuba	Đang có hiệu lực	12/10/1995	01/10/1996
14	Cộng hòa Séc	Đang có hiệu lực	25/11/1997	09/7/1998
15	Đan Mạch	Đang có hiệu lực	23/7/1993	07/8/1994
16	Ai Cập	Đang có hiệu lực	06/9/1997	04/3/2002
17	Estonia	Chưa có hiệu lực	24/9/2009	
18	Phần Lan	Đã đình chỉ thi hành	13/9/1993	02/5/1996
19	Phần Lan	Đang có hiệu lực	21/02/2008	04/6/2009
20	Pháp	Đang có hiệu lực	26/5/1992	10/8/1994
21	Đức	Đang có hiệu lực	03/4/1993	19/9/1998
22	Hy Lạp	Đang có hiệu lực	13/10/2008	08/12/2011
23	Hungary	Đang có hiệu lực	26/8/1994	16/6/1995
24	Iceland	Đang có hiệu lực	20/9/2002	10/7/2003
25	Ấn Độ	Đang có hiệu lực	08/3/1997	01/12/1999
26	Indonesia	Đã đình chỉ thi hành	25/10/1991	03/4/1994
27	Cộng hòa Hồi giáo Iran	Chưa có hiệu lực	23/3/2009	
28	Italia	Đang có hiệu lực	18/5/1990	06/5/1994
29	Nhật Bản	Đang có hiệu lực	14/11/2003	19/12/2004
30	Kazakhstan	Đang có hiệu lực	15/9/2009	07/4/2014
31	Cộng hòa Dân chủ Nhân dân Triều Tiên	Chưa có hiệu lực	02/5/2002	
32	Cộng hòa Hàn Quốc	Đã đình chỉ thi hành	13/5/1993	04/9/1993
33	Cộng hòa Hàn Quốc	Đang có hiệu lực	15/9/2003	05/6/2004
34	Cô-oét	Đang có hiệu lực	23/5/2007	16/3/2011
35	Cộng hòa Dân chủ Nhân dân Lào	Đang có hiệu lực	14/01/1996	23/6/1996
36	Latvia	Đang có hiệu lực	06/11/1995	20/02/1996
37	Litva	Đang có hiệu lực	27/9/1995	24/4/2003
38	Malaysia	Đang có hiệu lực	21/01/1992	9/10/1992
39	Mông Cổ	Đang có hiệu lực	17/4/2000	13/12/2001
40	Ma-rốc	Chưa có hiệu lực	15/6/2012	
41	Mozambique	Đang có hiệu lực	16/01/2007	29/5/2007
42	Myanmar	Chưa có hiệu lực	15/02/2000	
43	Namibia	Chưa có hiệu lực	30/5/2003	
44	Hà Lan	Đang có hiệu lực	10/3/1994	01/02/1995
45	Oman	Chưa có hiệu lực	10/01/2011	
46	Philippines	Đang có hiệu lực	27/02/1992	29/01/1993
47	Ba Lan	Đang có hiệu lực	31/8/1994	24/11/1994
48	Romania	Đang có hiệu lực	15/9/1994	16/8/1995
49	Liên bang Nga	Đang có hiệu lực	16/6/1994	03/7/1996
50	Singapore	Đang có hiệu lực	29/10/1992	25/12/1992
51	Slovakia	Đang có hiệu lực	17/12/2009	18/8/2011
52	Tây Ban Nha	Đang có hiệu lực	20/02/2006	29/7/2011
53	Sri-Lanka	Chưa có hiệu lực	22/10/2009	
54	Thụy Điển	Đang có hiệu lực	08/9/1993	02/8/1994
55	Thụy Sĩ	Đang có hiệu lực	03/7/1992	03/12/1992
56	Đài Loan	Đang có hiệu lực	21/4/1993	23/4/1993
57	Tadgikistan	Chưa có hiệu lực	19/01/1999	
58	Thái Lan	Đang có hiệu lực	30/10/1991	07/02/1992
59	Thổ Nhĩ Kỳ	Chưa có hiệu lực	15/01/2014	
60	Ukraina	Đang có hiệu lực	08/6/1994	08/12/1994
61	Các Tiểu Vương quốc Ả rập thống nhất	Chưa có hiệu lực	16/02/2009	
62	Vương Quốc Anh	Đang có hiệu lực	01/8/2002	01/8/2002
63	Uruguay	Đang có hiệu lực	12/5/2009	09/9/2012
64	Uzbekistan	Đang có hiệu lực	28/3/1996	06/3/1998
65	Venezuela	Đang có hiệu lực	20/11/2008	17/6/2009

TÓM TẮT CHƯƠNG 10

Chương này trình bày các cam kết khuyến khích và bảo hộ đầu tư quốc tế của Việt Nam, phân loại thành bốn nhóm: (i) cam kết trong khuôn khổ WTO; (ii) cam kết với tư cách là một nước thành viên ASEAN; (iii) cam kết trong các FTA; và (iv) cam kết trong các BIT.

Việt Nam có các nghĩa vụ đối với đầu tư nước ngoài theo một số hiệp định của WTO như Hiệp định TRIMs, Hiệp định GATS, Hiệp định TRIPS và Hiệp định SCM. Các cam kết này còn rời rạc, bảo hộ đầu tư theo một số khía cạnh đơn lẻ như cấm các yêu cầu trong hoạt động đầu tư, cấm phân biệt đối xử giữa các đầu tư trong lĩnh vực dịch vụ, bảo vệ quyền sở hữu trí tuệ của nhà đầu tư nước ngoài, …

Là một nước thành viên của ASEAN, Việt Nam phải tuân thủ các quy định về đầu tư nước ngoài trong hiệp định mới nhất của ASEAN, ACIA, cũng như các hiệp định của ASEAN với các đối tác khác như Trung Quốc, Hàn Quốc, Australia, New Zealand và Ấn Độ. Nội dung quy định này được phân tích chi tiết trong trường hợp của Hiệp định ACIA.

Các hiệp định khác của ASEAN, các FTA và một số BIT của Việt Nam cũng chứa đựng các cam kết về đầu tư tương tự như ACIA, nên được giới thiệu ngắn gọn về thông tin chung.

Các BIT của Việt Nam thường phân biệt thành hai nhóm, truyền thống và hiện đại. Các hiệp định truyền thống thường có nhiều điều khoản chưa rõ ngữ nghĩa, gây khó khăn khi áp dụng để giải quyết tranh chấp. Còn nội dung và cấu trúc của BIT hiện đại có nhiều điểm tương đồng với khung pháp lý về đầu tư trong những hiệp định của ASEAN, hay trong các FTA của Việt Nam.

CÂU HỎI / BÀI TẬP

1. Trình bày các cam kết về đầu tư của Việt Nam trong khuôn khổ WTO.
2. Trình bày các cam kết về đầu tư của Việt Nam với tư cách là thành viên của ASEAN.
3. Trình bày các cam kết về đầu tư của Việt Nam trong các FTA.
4. Trình bày các cam kết về đầu tư của Việt Nam trong các BIT.
5. So sánh cấu trúc, nội dung của các hiệp định đầu tư truyền thống và các hiệp định đầu tư hiện đại mà Việt Nam là thành viên.
6. Bài tập: Giả sử Công ty A thành lập ở Nhật Bản, xây dựng một nhà máy gang thép ở Việt Nam, muốn khởi kiện quyết định của chính phủ, theo đó yêu cầu nhà máy ngừng hoạt động cho tới khi khắc phục xong ô nhiễm môi trường do chất thải công nghiệp độc hại từ đường ống xả thải của nhà máy thải ra. Công ty A có thể khởi kiện theo những hiệp định đầu tư nào? Công ty A nên lựa chọn hiệp định nào và khởi kiện những vi phạm cụ thể gì? Giải thích lý do.

TÀI LIỆU CẦN ĐỌC

1. Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investmen*t. (Cheltenham (UK) and Northampton (USA): Edward Elgar Publishing, 2016).
2. Jeswald W. Salacuse, *The Law of Investment Treaties*. (New York: Oxford University Press, 2105), tr. 98-99.
3. Diane A. Desierto, 'Investment Treaties: ASEAN' trong Hal Hill, Maria Socorro GochocoBautista (eds) *Asia Rising: Growth and Resilience in An Uncertain Global Economy* (Edward Elgar Publishing Limited, 2013).
4. Trinh Hai Yen, 'The ASEAN Comprehensive Investment Agreement', trong Paul Davidson (ed), *Trading Arrangements in the Pacific Rim: ASEAN and APEC*. (USDA: West Publishing Co, 2012).
5. Trinh Hai Yen, *The Interpretation of Investment Treaties: Problems and Solution*. (Leiden|Boston: Brill Nijhoff, 2014).
6. Trinh Hai Yen, *Giáo trình Luật đầu tư quốc tế* (Hà Nội: Nhà xuất bản chính trị quốc gia sự thật, 2017), Chương 9.

CHƯƠNG 11. PHÁP LUẬT ĐẦU TƯ CỦA VIỆT NAM

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CHƯƠNG 11

PHÁP LUẬT ĐIỀU CHỈNH QUAN HỆ ĐẦU TƯ QUỐC TẾ CỦA VIỆT NAM

Mục đích học Chương 11

- Trình bày về lịch sử phát triển pháp luật điều chỉnh quan hệ đầu tư quốc tế của Việt Nam
- Giới thiệu khung pháp lý điều chỉnh quan hệ đầu tư quốc tế tại Việt Nam;
- Thảo luận hình thức mà nhà đầu tư nước ngoài có thể đầu tư tại Việt Nam;
- So sánh các cam kết đầu tư của Việt Nam trong WTO và ASEAN;
- Tìm hiểu các quy định nhằm đảm bảo đầu tư cho nhà đầu tư nước ngoài tại Việt Nam

Trong nền kinh tế thế giới không ngừng vận động, nhu cầu vốn luôn tồn tại ở tất cả các quốc gia. Đối với các DC, nhu cầu vốn lại càng trở nên cấp thiết. Tuy nhiên, nguồn tích luỹ trong nước ở các DC không cao, do đó thu hút vốn đầu tư quốc tế trở thành giải pháp quan trọng trong bài toán thiếu vốn sản xuất ở các quốc gia này. Bất kỳ DC nào cũng coi thu hút vốn đầu tư nước ngoài là chính sách thiết yếu, nhằm thực hiện mục tiêu phát triển kinh tế đất nước. Trong cuộc cạnh tranh thu hút vốn, các DC đều chú trọng vào việc cải thiện môi trường đầu tư, mà trong đó việc xây dựng và hoàn thiện hệ thống chính sách, pháp luật được chú trọng hơn cả. Pháp luật quốc gia về đầu tư vì thế sẽ trở thành yếu tố then chốt trong việc thu hút vốn đầu tư quốc tế. Việt Nam cũng không đứng ngoài xu thế này, với những nỗ lực lớn trong việc xây dựng một môi trường đầu tư thuận lợi.

Về mặt lý luận, khái niệm pháp luật quốc gia về đầu tư, hay còn gọi là Luật đầu tư, có các cách tiếp cận khác nhau. *Theo nghĩa rộng,* pháp luật quốc gia về đầu tư là tổng hợp các nguyên tắc, quy phạm điều chỉnh các quan hệ xã hội phát sinh trong quá trình tổ chức và thực hiện hoạt động đầu tư tại quốc gia đó. Trong khi đó quan hệ xã hội phát sinh trong lĩnh vực đầu tư khá phức tạp, bao gồm không chỉ quan hệ giữa Nhà nước với nhà đầu tư mà còn quan hệ giữa nhà đầu tư với nhà đầu tư, quan hệ giữa nhà đầu tư với người quản lý cơ sở kinh doanh, quan hệ giữa nhà đầu tư với các chủ thể khác, … Do đó, pháp luật quốc gia về đầu tư theo nghĩa rộng là tổng hợp các nguyên tắc, quy phạm thuộc nhiều ngành luật khác nhau như luật hiến pháp, luật hành chính, luật dân sự, luật thương mại, luật đất đai, … điều chỉnh quan hệ đầu tư. *Theo nghĩa hẹp,* pháp luật quốc gia về đầu tư là tổng hợp các nguyên tắc, quy phạm điều chỉnh các quan hệ xã hội phát sinh trong quá trình tổ chức thực hiện và quản lý hoạt động đầu tư kinh doanh. Theo cách tiếp cận này, đối tượng điều chỉnh của pháp luật quốc gia về đầu tư là các quan hệ đầu tư kinh doanh - quan hệ phát sinh trong quá trình nhà đầu tư bỏ vốn bằng các tài sản khác nhau để tạo lập cơ sở thực hiện các hoạt động đầu tư (bao gồm chuẩn bị đầu tư, thực hiện và quản lý dự án đầu tư).

Chương này của Giáo trình tiếp cận khái niệm pháp luật quốc gia về đầu tư theo nghĩa hẹp. Như vậy, pháp luật điều chỉnh quan hệ đầu tư quốc tế của Việt Nam được hiểu là tổng hợp các nguyên tắc, quy phạm do Nhà nước ban hành hoặc thừa nhận điều chỉnh quan hệ phát sinh trong quá trình tổ chức, thực hiện và quản lý hoạt động đầu tư quốc tế trên lãnh thổ Việt Nam, bao gồm hoạt động đầu tư của nhà đầu tư nước ngoài tại Việt Nam và hoạt động đầu tư ra nước ngoài của nhà đầu tư Việt Nam.

Mục 1. KHUÔN KHỔ PHÁP LÝ

1. Lịch sử phát triển pháp luật điều chỉnh quan hệ đầu tư quốc tế của Việt Nam

Do điều kiện lịch sử, pháp luật điều chỉnh quan hệ đầu tư quốc tế ở Việt Nam ra đời khá muộn và chậm hoàn thiện. Trong giai đoạn năm 1945, sau khi giành được chính quyền, Nhà nước đã có sự điều chỉnh nhất định tới hoạt động đầu tư, nhưng những văn bản pháp luật trong thời kỳ này khá lỏng lẻo và hầu hết chỉ tồn tại dưới dạng Sắc lệnh của Chủ tịch nước. Các sắc lệnh đã tiếp tục thừa nhận và cho phép các công ti và các hãng ngoại quốc thực hiện hoạt động kinh doanh ở Việt Nam (Sắc lệnh của Chủ tịch lâm thời nước Việt Nam Dân chủ Cộng hoà số 48 ngày 09/10/1945), quy định hoạt động đầu tư của kinh tế Nhà nước (Sắc lệnh 104-SL ngày 01/01/1948, Sắc lệnh 127-SL ngày 04/11/1952) và cho phép sự hợp tác đầu vốn giữa Nhà nước và tư nhân (Sắc lệnh số 6-SL ngày 20/01/1950). Dù vậy, trong giai đoạn này, nhiệm vụ được đặt lên hàng đầu của Nhà nước không phải là phát triển kinh tế mà là giành độc lập. Do vậy, ngoài các sắc lệnh nêu trên cũng không có thêm các văn bản pháp luật do cơ quan quyền lực nhà nước ban hành điều chỉnh hoạt động đầu tư.

Trong giai đoạn trước năm 1986, Đảng và Nhà nước Việt Nam chủ trương xây dựng nền kinh tế vận hành theo cơ chế kế hoạch hoá tập trung với hai thành phần kinh tế chủ đạo là kinh tế quốc doanh và kinh tế tập thể. Để điều chỉnh hoạt động đầu tư của các chủ thể thuộc hai thành phần kinh tế này, như xí nghiệp quốc doanh, xí nghiệp liên hợp hay hợp tác xã, Nhà nước đã ban hành nhiều văn bản pháp luật. Tuy nhiên trong cơ chế kế hoạch hoá tập trung, pháp luật về đầu tư không phải là công cụ quan trọng trong điều chỉnh hoạt động đầu tư. Trong giai đoạn này, khu vực kinh tế tư nhân không được thừa nhận, do đó về mặt pháp lý, hoạt động đầu tư của các chủ thể trong khu vực kinh tế tư nhân cũng không được điều chỉnh. Song đối với khu vực kinh tế nước ngoài, Đảng và Nhà nước đã có sự quan tâm nhất định. Cụ thể, tại Đại hội Đảng lần thứ IV năm 1976 đã khẳng định: 'Việc đẩy mạnh quan hệ phân chia và hợp tác song phương trong lĩnh vực kinh tế và phát triển các quan hệ kinh tế với các nước khác có một vai trò vô cùng quan trọng'. Thực hiện chủ trương này, văn bản pháp quy riêng biệt đầu tiên về đầu tư nước ngoài đã được Chính phủ ban hành nhằm khuyến khích và điều chỉnh hoạt động đầu tư trực tiếp nước ngoài tại Việt Nam là Nghị định 115/CP ngày 18/4/1977 của Hội đồng Bộ trưởng ban hành Điều lệ đầu tư nước ngoài tại Việt Nam, thường được gọi là Điều lệ đầu tư năm 1977. Điều lệ đầu tư năm 1977 là tiền thân của Luật đầu tư nước ngoài tại Việt Nam năm 1987. Trong giai đoạn này, vấn đề đầu tư ra nước ngoài chưa được điều chỉnh.

Năm 1986, Đại hội Đảng lần thứ VI đã đề ra những chính sách đổi mới, đánh dấu bước ngoặt quan trong quá trình trình phát triển kinh tế đất nước với quyết định phát triển kinh tế nhiều thành phần vận hành theo cơ chế thị trường định hướng xã hội chủ nghĩa. Đại hội cũng nhấn mạnh đến việc mở rộng giao lưu quốc tế để thu hút vốn đầu tư nước ngoài nhằm phát triển kinh tế đất nước. Do vậy, thực hiện Nghị quyết số 19 của Bộ Chính trị ngày 17/7/1984 và Nghị quyết Hội nghị Ban Chấp hành Trung ương lần thứ 7 (khoá V) ngày 20/12/1984 về việc bổ sung và hoàn thiện Điều lệ đầu tư đã ban hành năm 1977, tiến tới xây dựng một Luật đầu tư hoàn chỉnh, tại kỳ họp thứ 2 Quốc hội Khoá 8 ngày 31/12/1987 đã thông qua Luật đầu tư nước ngoài tại Việt Nam. Có thể nói sự ra đời của Luật đầu tư nước ngoài tại Việt Nam năm 1987 xuất phát từ những yêu cầu khách quan của sự vận động xã hội, nó đã tạo ra được một môi trường pháp lý cao hơn để thu hút vốn đầu tư nước ngoài vào Việt Nam. Sau khi Luật đầu tư nước ngoài tại Việt Nam ra đời năm 1987, đánh dấu mốc lịch sử hình thành cho đến nay, Luật đầu tư nước ngoài tại Việt Nam đã qua 2 lần sửa đổi, bổ sung vào năm 1990 và năm 1992.

Tại kỳ họp thứ 10 ngày 12/11/1996, Quốc hội Khoá IX, Luật đầu tư nước ngoài mới đã được thông qua, thường gọi Luật đầu tư nước ngoài năm 1996, được soạn thảo trên cơ sở gộp các Luật đầu tư nước ngoài 1987, Luật đầu tư nước ngoài sửa đổi 1990 và Luật đầu tư nước ngoài sửa đổi 1992. Ngày 09/6/2000, Quốc hội đã thông qua Luật đầu tư nước ngoài sửa đổi với 02 điều khoản mới bổ sung và 20 điều khoản được sửa đổi trong Luật đầu tư nước ngoài 1996. Trên cơ sở Luật đầu tư nước ngoài, Chính phủ và các bộ, ngành đã ban hành một số lượng lớn các văn bản hướng dẫn thi hành, tạo ra một hệ thống pháp luật đầu tư nước ngoài điều chỉnh khá toàn diện hoạt động đầu tư trực tiếp nước ngoài tại Việt Nam. Tuy nhiên, dù đã được cải cách rất nhiều và có tác động nhất định trong thu hút đầu tư, song Luật đầu tư nước ngoài tại Việt Nam vẫn được cho là chưa hoàn thiện, hành chính hoá hoạt động đầu tư và thiếu đồng bộ.

Trong nỗ lực không ngừng hoàn thiện môi trường đầu tư, môi trường pháp lý, tạo sự thống nhất trong hệ thống pháp luật về đầu tư,

tạo một 'sân chơi' bình đẳng, không phân biệt đối xử giữa các nhà đầu tư, đơn giản hoá thủ tục đầu tư, tạo điều kiện thuận lợi để thu hút và sử dụng hiệu quả các nguồn vốn đầu tư đáp ứng yêu cầu hội nhập kinh tế quốc tế, năm 2005 Quốc hội đã ban hành Luật đầu tư, có hiệu lực từ ngày 01/7/2006. Luật đầu tư 2005 thay thế Luật đầu tư nước ngoài 1996 và Luật khuyến khích đầu tư trong nước. Để hướng dẫn thực thi Luật đầu tư 2005, Chính phủ đã ban hành Nghị định số 108/2006/NĐ-CP ngày 22/9/2006 quy định chi tiết và hướng dẫn một số điều của Luật đầu tư. Sự khác biệt cơ bản giữa Luật đầu tư 2005 với Luật đầu tư nước ngoài là Luật đầu tư chỉ quy định các nội dung liên quan đến hoạt động đầu tư, còn các nội dung liên quan đến cơ cấu tổ chức và hoạt động của doanh nghiệp thì sẽ do Luật doanh nghiệp điều chỉnh, các mức ưu đãi về thuế sẽ do các văn bản pháp luật về thuế điều chỉnh và các nội dung mang tính chất đặc thù khác do pháp luật chuyên ngành điều chỉnh.

Dù vậy, sau 8 năm thực hiện, Luật đầu tư 2005 đã bộc lộ nhiều điểm hạn chế, bất cập như không đồng bộ với các đạo luật liên quan đến đầu tư kinh doanh (Luật chứng khoán, Luật thuế thu nhập doanh nghiệp, Luật xây dựng, Luật đất đai, …) do các đạo luật này mới được ban hành hoặc sửa đổi, hay các quy định không cụ thể, thiếu minh bạch, các biện pháp bảo đảm đầu tư chưa được cập nhật và phản ánh đầy đủ cam kết của Việt Nam về bảo hộ đầu tư trong các điều ước quốc tế mà Việt Nam là thành viên, … Vì vậy, năm 2014, Quốc hội đã ban hành Luật đầu tư 2014, có hiệu lực từ ngày 01/7/2015. Sự ra đời của Luật đầu tư 2014 thể hiện sự nỗ lực của Việt Nam trong việc xây dựng môi trường đầu tư thuận lợi cũng như thực hiện các cam kết quốc tế.[1]

2. Các văn bản pháp lý cơ bản

Các quan hệ đầu tư quốc tế ở Việt Nam được điều chỉnh bằng hệ thống các văn bản pháp luật do cơ quan nhà nước có thẩm quyền ban hành, bao gồm:

- Hiến pháp nước CHXHCN Việt Nam năm 2013;
- Bộ luật dân sự năm 2015
- Luật đầu tư năm 2014;
- Luật số 03/2016/QH14 sửa đổi, bổ sung Điều 6, Phụ lục 4 về Danh mục ngành, nghề đầu tư kinh doanh có điều kiện của Luật đầu tư;
- Luật doanh nghiệp năm 2014;
- Luật đất đai năm 2013;
- Luật thuế thu nhập doanh nghiệp năm 2015;
- Luật thuế xuất khẩu, thuế nhập khẩu năm 2016;
- Luật thuế sử dụng đất phi nông nghiệp;
- Các luật khác có liên quan và các văn bản hướng dẫn thi hành;
- Quy chế phối hợp trong giải quyết tranh chấp đầu tư quốc tế ban hành kèm theo Quyết định số 04/2014/QĐ-TTg ngày 14/01/2015 của Thủ tướng Chính phủ.

Mục 2. NỘI DUNG CƠ BẢN

1. Hoạt động đầu tư của nhà đầu tư nước ngoài tại Việt Nam

Trước tiên phải nói đến khái niệm 'nhà đầu tư nước ngoài' và 'tổ chức kinh tế có vốn đầu tư nước ngoài' theo pháp luật Việt Nam. Hiện nay, 'nhà đầu tư nước ngoài' được hiểu là cá nhân có quốc tịch nước ngoài, tổ chức thành lập theo pháp luật nước ngoài, thực hiện hoạt động đầu tư kinh doanh tại Việt Nam. 'Tổ chức kinh tế có vốn đầu tư nước ngoài' là tổ chức kinh tế có nhà đầu tư nước ngoài là thành viên hoặc cổ đông.[2] Do đó, Luật đầu tư năm 2014 cũng đã phân rõ chế độ áp dụng riêng đối với nhà đầu tư nước ngoài và tổ chức kinh tế có vốn đầu tư nước ngoài trong hoạt động đầu tư tại Việt Nam.

Nhà đầu tư nước ngoài, tổ chức kinh tế có vốn đầu tư nước ngoài được tham gia đầu tư kinh doanh vào các lĩnh vực khác nhau theo quy định của pháp luật về đầu tư. *Thứ nhất*, nhà đầu tư bị cấm đầu tư kinh doanh trong các lĩnh vực ma tuý, hoá chất, khoáng chất, mẫu vật các loại thực vật, động vật hoang dã, kinh doanh mại dâm, mua, bán người, mô, bộ phận cơ thể người; hoạt động kinh doanh liên quan đến sinh sản vô tính trên người và kinh doanh pháo nổ. *Thứ hai,* nhà đầu tư cần đáp ứng điều kiện nhất định khi tham gia đầu tư kinh doanh trong 243 ngành nghề kinh doanh có điều kiện (Phụ lục 4 - Luật số 03/2016/QH14 sửa đổi, bổ sung Điều 6, Phụ lục 4 về Danh mục ngành, nghề đầu tư kinh doanh có điều kiện của Luật đầu tư).

[1] Trường Đại học Luật Hà Nội (2009), *Giáo trình Luật đầu tư*, Nxb. Công an nhân dân, tr. 32-38.

[2] Điều 3 Luật đầu tư năm 2014.

A. *Hình thức đầu tư*

Nhà đầu tư nước ngoài có thể đầu tư vốn, tài sản để thực hiện hoạt động đầu tư kinh doanh tại Việt Nam theo các hình thức sau:

1. Thành lập tổ chức kinh tế

Nhà đầu tư nước ngoài được thành lập tổ chức kinh tế để triển khai dự án đầu tư và các hoạt động kinh doanh sau khi đáp ứng đủ các yêu cầu: có dự án đầu tư; thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư và phải đáp ứng các điều kiện về tỷ lệ sở hữu vốn điều lệ, hình thức đầu tư, phạm vi hoạt động, đối tác Việt Nam tham gia thực hiện hoạt động đầu tư và các điều kiện khác theo quy định của điều ước quốc tế mà Việt Nam là thành viên. Theo đó, nhà đầu tư nước ngoài được sở hữu vốn điều lệ không hạn chế tại cái tổ chức kinh tế, ngoại trừ những hạn chế theo quy định của pháp luật về chứng khoán, về cổ phần hoá và chuyển đổi doanh nghiệp nhà nước và các điều ước quốc tế mà Việt Nam là thành viên.

Nhà đầu tư nước ngoài có thể thành lập tổ chức kinh tế có 100% vốn của nhà đầu tư nước ngoài hoặc tổ chức kinh tế liên doanh giữa nhà đầu tư nước ngoài và nhà đầu tư trong nước. Yêu cầu thành lập tổ chức kinh tế là yêu cầu bắt buộc đối với nhà đầu tư nước ngoài khi thực hiện dự án đầu tư. Tuy nhiên, yêu cầu này sẽ không áp dụng đối với tổ chức kinh tế có vốn đầu tư nước ngoài khi thực hiện dự án đầu tư mới.

2. Góp vốn, mua cổ phần, phần vốn góp vào tổ chức kinh tế

Theo Luật đầu tư năm 2014, hoạt động đầu tư thông qua góp vốn vào một tổ chức kinh tế có thể thực hiện theo các hình thức:

- Mua cổ phần phát hành lần đầu hoặc cổ phần phát hành thêm của công ty cổ phần;
- Góp vốn vào công ty trách nhiệm hữu hạn, công ty hợp danh;
- Góp vốn vào tổ chức kinh tế khác không thuộc hai trường hợp nêu trên.
- Ngoài góp vốn, nhà đầu tư nước ngoài có thể mua cổ phần, phần vốn góp của tổ chức kinh tế theo các hình thức:
- Mua cổ phần của công ty cổ phần từ công ty hoặc cổ đông;
- Mua phần vốn góp của các thành viên công ty trách nhiệm hữu hạn để trở thành thành viên của công ty trách nhiệm hữu hạn;
- Mua phần vốn góp của thành viên góp vốn trong công ty hợp danh để trở thành thành viên góp vốn của công ty hợp danh;
- Mua phần vốn góp của thành viên tổ chức kinh tế khác không thuộc các trường hợp nêu trên.[3]

3. Hợp đồng đầu tư theo hình thức đối tác công tư (Hợp đồng PPP)

Hợp đồng PPP là hợp đồng được ký kết giữa nhà đầu tư và cơ quan nhà nước có thẩm quyền để thực hiện dự án đầu tư xây dựng mới hoặc cải tạo, nâng cấp, mở rộng, quản lí và vận hành công trình kết cấu hạ tầng hoặc cung cấp dịch vụ công.

Nhà đầu tư nước ngoài có thể đầu tư theo hình thức ký kết hợp đồng PPP với Chính phủ Việt Nam theo dạng hợp đồng dự án, cụ thể: hợp đồng xây dựng - kinh doanh - chuyển giao (BOT), hợp đồng xây dựng - chuyển giao - kinh doanh (BTO), hợp đồng xây dựng - chuyển giao (BT), hợp đồng xây dựng - sở hữu - kinh doanh (BOO), hợp đồng xây dựng - chuyển giao - thuê dịch vụ (BTL), hợp đồng kinh doanh quản lý (O&M).

4. Hợp đồng hợp tác kinh doanh (Hợp đồng BCC)

Hợp đồng BCC là hợp đồng được ký giữa các nhà đầu tư nhằm hợp tác kinh doanh phân chia lợi nhuận, phân chia sản phẩm mà không thành lập tổ chức kinh tế. Hợp đồng BCC có thể được ký kết giữa nhà đầu tư nước ngoài và nhà đầu tư trong nước, thông qua việc thành lập Ban điều phối để thực hiện hợp đồng BCC.

Hình thức đầu tư thông qua ký kết hợp đồng BCC đang ngày càng được nhà đầu tư trong và ngoài nước lựa chọn khi thực hiện các hoạt động đầu tư thay cho thành lập tổ chức kinh tế như công ty liên doanh. Bởi đầu tư qua hợp đồng BCC có nhiều ưu điểm nhất định như tăng tính chủ động, linh hoạt và ít phụ thuộc vào đối tác của nhà đầu tư khi quyết định các vấn đề của dự án đầu tư. Dù vậy, do không thành lập pháp nhân nên dự án không có con dấu, mà các bên sẽ phải thoả thuận lựa chọn con dấu của một trong hai bên để phục vụ hoạt động của dự án đầu tư. Việc này có thể sẽ gây ra nhiều rắc rối và tiềm ẩn nhiều rủi ro cho nhà đầu tư.

3 Điều 25 Luật đầu tư năm 2014.

B. *Thủ tục đầu tư*

Đối với hoạt động đầu tư gián tiếp (góp vốn, mua cổ phần, phần vốn góp vào các tổ chức kinh tế), nhà đầu tư chỉ phải thực hiện các thủ tục đăng ký trong hai trường hợp: (i) nhà đầu tư nước ngoài góp vốn, mua cổ phần, phần vốn góp vào tổ chức kinh tế hoạt động trong ngành, nghề đầu tư kinh doanh có điều kiện áp dụng đối với nhà đầu tư nước ngoài; hoặc (ii) việc góp vốn, mua cổ phần, phần vốn góp, dẫn đến nhà đầu tư nước ngoài, tổ chức kinh tế có trên 51% vốn đầu tư nước ngoài nắm giữ từ 51% vốn điều lệ trở lên của tổ chức kinh tế. Nhà đầu tư nộp hồ sơ tại Sở Kế hoạch và Đầu tư nơi tổ chức kinh tế đặt trụ sở chính.

Đối với dự án đầu tư trực tiếp, tuỳ thuộc vào tính chất, quy mô và điều kiện của từng dự án, dự án đầu tư trước khi được triển khai thực hiện sẽ phải thực hiện theo một hoặc số thủ tục:

- Quyết định chủ trương đầu tư, cấp Giấy chứng nhận đăng ký đầu tư;
- Thành lập tổ chức kinh tế (đối với nhà đầu tư nước ngoài đầu tư theo hình thức tổ chức kinh tế);
- Thực hiện thủ tục giao đất, giao lại đất, cho thuê đất, cho thuê lại đất, cho phép chuyển mục đích sử dụng đất (nếu có);
- Thực hiện thủ tục về xây dựng (nếu có).

1. Thủ tục quyết định chủ trương đầu tư

Luật đầu tư năm 2014 thừa nhận chính thức thủ tục quyết định chủ trương đầu tư trong khi theo các quy định cũ, việc quyết định chủ trương này chỉ áp dụng không chính thức đối với một số dự án. Nhà đầu tư nước ngoài khi thực hiện dự án đầu tư tại Việt Nam cần quan tâm dự án của mình có thuộc nhóm dự án phải có chủ trương đầu tư hay không, và nếu có, dự án đầu tư thuộc thẩm quyền quyết định chủ trương đầu tư của cơ quan nào.

Theo Điều 30 Luật đầu tư năm 2014, Quốc hội có thẩm quyền quyết định chủ trương đối với những dự án đầu tư có ảnh hưởng lớn đến môi trường hoặc tiềm ẩn khả năng ảnh hưởng nghiêm trọng đến môi trường; dự án đầu tư có sử dụng đất có yêu cầu chuyển mục đích sử dụng đất trồng lúa nước từ hai vụ trở lên với quy mô từ 500 héc ta trở lên; dự án đầu tư cần di dân tái định cư từ 20.000 người trở lên ở miền núi, từ 50.000 người trở lên ở các vùng khác và các dự án đầu tư khác có yêu cầu phải áp dụng cơ chế, chính sách đặc biệt cần được Quốc hội quyết định.

Theo Điều 31 Luật đầu tư năm 2014, Thủ tướng Chính phủ có thẩm quyền quyết định chủ trương đầu tư với một số các dự án đầu tư. *Thứ nhất*, không phân biệt nguồn vốn, Thủ tướng Chính phủ quyết định chủ trương đầu tư đối với các trường hợp: di dân tái định cư từ 10.000 người trở lên ở miền núi, từ 20.000 người trở lên ở vùng khác; xây dựng và kinh doanh cảng hàng không; vận tải hàng không; xây dựng và kinh doanh cảng biển quốc gia; thăm dò, khai thác, chế biến dầu khí; hoạt động kinh doanh cá cược, đặt cược, casino; sản xuất thuốc lá điếu; phát triển kết cấu hạ tầng khu công nghiệp, khu chế xuất, khu chức năng trong khu kinh tế và xây dựng và kinh doanh sân gôn. *Thứ hai,* Thủ tướng Chính phủ quyết định chủ trương đầu tư với dự án đầu tư có quy mô đầu tư lớn hơn 5.000 tỷ đồng. *Thứ ba,* dự án của nhà đầu tư nước ngoài trong các lĩnh vực kinh doanh vận tải biển, kinh doanh dịch vụ viễn thông có hạ tầng mạng, trồng rừng, xuất bản, báo chí, thành lập tổ chức khoa học và công nghệ, doanh nghiệp khoa học và công nghệ 100% vốn nước ngoài. *Thứ tư*, các dự án đầu tư khác theo quy định của pháp luật.

Theo Điều 32 Luật đầu tư năm 2014, Uỷ ban nhân dân cấp tỉnh có thẩm quyền quyết định chủ trương đầu tư với các dự án đầu tư: dự án được Nhà nước giao đất, cho thuê đất không thông qua đấu giá, đấu thầu hoặc nhận chuyển nhượng; dự án có yêu cầu chuyển mục đích sử dụng đất (ngoại trừ dự án tại khu công nghiệp, khu chế xuất, khu công nghệ cao, khu kinh tế phù hợp với quy hoạch đã được cấp có thẩm quyền phê duyệt), và dự án có sử dụng công nghệ thuộc Danh mục công nghệ hạn chế chuyển giao theo quy định của pháp luật về chuyển giao công nghệ.

Các dự án thuộc diện quyết định chủ trương đầu tư đều phải thuộc diện thẩm định và thẩm tra trước khi Cơ quan có thẩm quyền đưa ra quyết định. Các dự án đầu tư không thuộc các trường hợp nêu trên thì không phải thực hiện thủ tục xin chủ trương đầu tư. Nhà đầu tư nước ngoài cần quan tâm tới các vấn đề tiếp theo trong quy trình thực hiện dự án đầu tư.

2. Thủ tục cấp Giấy chứng nhận đăng ký đầu tư

Tương tự chủ trương đầu tư, nhà đầu tư nước ngoài khi thực hiện dự án đầu tư tại Việt Nam cần quan tâm xem dự án đầu tư có thuộc nhóm

dự án phải thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư theo pháp luật đầu tư hay không. Theo Điều 46 Luật đầu tư năm 2014, những dự án đầu tư phải thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư bao gồm:

- Dự án đầu tư của nhà đầu tư nước ngoài;
- Dự án đầu tư của tổ chức kinh tế có nhà đầu tư nước ngoài nắm giữ từ 51% vốn điều lệ hoặc đa số thành viên là cá nhân nước ngoài đối với công ty hợp danh;
- Dự án đầu tư của các tổ chức kinh tế có từ 51% vốn điều lệ thuộc các tổ chức kinh tế có vốn đầu tư nước ngoài, hơn 51% vốn điều lệ hoặc công ty hợp danh có đa số thành viên nước ngoài;
- Dự án đầu tư của các tổ chức kinh tế có từ 51% vốn điều lệ thuộc nhà đầu tư nước ngoài, và các tổ chức kinh tế có vốn đầu tư nước ngoài hơn 51% vốn điều lệ, hoặc công ty hợp danh có đa số thành viên nước ngoài;

Những dự án không thuộc đối tượng phải làm thủ tục cấp Giấy chứng nhận đầu tư (dự án đầu tư của nhà đầu tư trong nước hay các tổ chức kinh tế có vốn đầu tư nước ngoài dưới 51% vốn điều lệ) nhưng có nhu cầu, thì vẫn được quyền thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư.

Trước khi thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư thì nhà đầu tư phải kê khai trực tuyến các thông tin về dự án đầu tư trên Hệ thống thông tin quốc gia về đầu tư nước ngoài. Trong thời hạn 15 ngày kể từ ngày kê khai hồ sơ trực tuyến, nhà đầu tư nộp hồ sơ cấp Giấy chứng nhận đăng ký đầu tư cho Cơ quan đăng ký đầu tư. Trong trường hợp Hệ thống thông tin quốc gia về đầu tư nước ngoài gặp sự cố, Cơ quan đăng ký đầu tư sẽ áp dụng phương pháp dự phòng trong việc tiếp nhận hồ sơ của nhà đầu tư nước ngoài là tiếp nhận hồ sơ bằng bản giấy. Cơ quan đăng ký đầu tư có thể là Ban Quản lý khu công nghiệp, khu chế xuất, khu công nghệ cao, khu kinh tế và Sở Kế hoạch và Đầu tư liên quan.

Thời hạn cấp Giấy chứng nhận đăng ký đầu tư theo quy định của Luật đầu tư năm 2014, đã được rút ngắn đáng kể so với Luật đầu tư năm 2005, là 5 ngày, kể từ ngày nhận quyết định chủ trương đầu tư, đối với dự án đầu tư thuộc diện quyết định chủ trương đầu tư, và 15 ngày làm việc kể từ khi Cơ quan đăng ký đầu tư nhận đủ hồ sơ đối với các dự án khác. Đây là qui định góp phần cải cách thủ tục hành chính và góp phần đẩy mạnh hơn nữa thu hút vốn đầu tư nước ngoài tại Việt Nam.

3. Thủ tục đăng ký kinh doanh

So với các quy định cũ, Luật đầu tư năm 2014 đã có sự phân định rõ giữa nội dung đăng ký đầu tư theo thủ tục cấp Giấy chứng nhận đăng ký đầu tư và nội dung đăng ký thành lập doanh nghiệp theo qui định của Luật doanh nghiệp. Sau khi được cấp Giấy chứng nhận đăng ký đầu tư, nhà đầu tư tiến hành thực hiện thủ tục đăng ký kinh doanh. Tuy nhiên, theo Nghị định số 118/2015/NĐ-CP, nhà đầu tư nước ngoài có quyền thực hiện cả hai thủ tục này tại một đầu mối. Theo đó, nhà đầu tư nước ngoài nộp hồ sơ đăng ký kinh doanh và hồ sơ đăng ký doanh nghiệp tại Cơ quan đăng ký đầu tư. Cơ quan này có trách nhiệm nhận hồ sơ và trong thời hạn 01 ngày làm việc, gửi hồ sơ đăng ký thành lập doanh nghiệp cho Cơ quan đăng ký kinh doanh. Trong thời hạn 02 ngày, Cơ quan đăng ký kinh doanh có trách nhiệm xem xét tính hợp lệ của hồ sơ và có ý kiến với Cơ quan đăng ký đầu tư.

Như vậy, pháp luật Việt Nam đã có những quy định cải cách hành chính nhất định trong lĩnh vực đầu tư quốc tế, nhằm mục đích giảm nhẹ các thủ tục hành chính cho nhà đầu tư nước ngoài. Tuy nhiên, điều này cũng đòi hỏi sự phối hợp giữa các Cơ quan đăng ký đầu tư và Cơ quan đăng ký kinh doanh trong việc tiếp nhận hồ sơ của nhà đầu tư nước ngoài và thực hiện các thủ tục đăng ký.

C. *Triển khai thực hiện dự án đầu tư*

Sau khi có Giấy chứng nhận đăng ký đầu tư và thực hiện đầy đủ các thủ tục đăng ký kinh doanh, nhà đầu tư sẽ tiến hành các thủ tục pháp lý để triển khai thực hiện dự án đầu tư. Thời gian triển khai thực hiện dự án đầu tư được thể hiện rõ trong Giấy chứng nhận đăng ký đầu tư. Đối với các dự án đầu tư trong khu kinh tế, thời gian thực hiện dự án không quá 70 năm. Đối với các dự án đầu tư ngoài khu kinh tế, thời gian thực hiện dự án không quá 50 năm. Tuy nhiên với những dự án ngoài khu kinh tế song được thực hiện ở địa bàn có điều kiện kinh tế - xã hội khó khăn hay đặc biệt khó khăn, hoặc dự án có vốn đầu tư lớn mà thu hồi vốn chậm, thì thời gian đầu tư có thể dài hơn các dự án khác, song không quá 70 năm.[4]

[4] Điều 43 Luật đầu tư năm 2014.

Đối với dự án đầu tư được Nhà nước giao đất, cho thuê đất, cho phép chuyển mục đích sử dụng đất, thì nhà đầu tư phải ký quỹ để đảm bảo thực hiện dự án với mức từ 1-3% vốn đầu tư của dự án, và sẽ được hoàn trả cho nhà đầu tư theo tiến độ thực hiện dự án, trừ một số trường hợp.

Trong quá trình triển khai thực hiện dự án, các sự kiện có thể xảy ra với dự án như kéo dài tiến độ thực hiện dự án, tạm dừng thực hiện dự án hay chấm dứt dự án. Đối với việc kéo dài tiến độ dự án, nhà đầu tư phải có đề xuất và nếu được Cơ quan đăng ký đầu tư chấp thuận, thì tổng thời gian dự án đầu tư được kéo dài tiến độ là không quá 24 tháng, trừ trường hợp bất khả kháng. Đối với việc tạm dừng hay chấm dứt thực hiện dự án, thì nhà đầu tư có thể đề xuất hoặc do cơ quan có thẩm quyền quyết định.

Khi nhà đầu tư nước ngoài đầu tư theo hình thức hợp đồng BCC thì các bên phải thành lập Ban điều phối để thực hiện hợp đồng. Nhà đầu tư nước ngoài cũng được quyền thành lập văn phòng điều hành tại Việt Nam để thực hiện hợp đồng. Văn phòng điều hành hoạt động kinh doanh trong phạm vi quyền và nghĩa vụ quy định tại hợp đồng BCC và có thể chấm dứt hoạt động trước thời hạn.

2. Các biện pháp bảo đảm đầu tư

Bảo đảm đầu tư có thể hiểu là sự bảo vệ, bảo toàn những quyền lợi của nhà đầu tư trong quá trình đầu tư, cụ thể là bảo toàn vốn và tài sản của nhà đầu tư, đồng thời đảm bảo sự sinh lời khi đưa vốn và tài sản này vào kinh doanh. Bất kỳ nhà đầu tư nào cũng quan tâm đến vấn đề bảo đảm đầu tư, bởi nó tác động trực tiếp đến mong muốn bảo toàn vốn và kiếm lợi nhuận của nhà đầu tư. Bảo đảm đầu tư có thể được thực hiện bởi chính nhà đầu tư bằng các biện pháp tài chính, hoặc bởi Nhà nước bằng pháp luật. Trong đó, bảo đảm đầu tư bằng pháp luật là biện pháp bảo đảm chắc chắn và đáng tin cậy nhất đối với nhà đầu tư. Vì vậy, bảo đảm đầu tư bằng pháp luật trở thành vấn đề cốt lõi trong hoạt động thu hút vốn đầu tư. Các nước cần thu hút vốn đầu tư đều nỗ lực đưa ra các cam kết về bảo đảm đầu tư trong các hiệp định quốc tế và cụ thể hoá trong các văn bản pháp luật trong nước.

Như vậy, khái niệm biện pháp bảo đảm đầu tư được tiếp cận trong nội dung này là các biện pháp được quy định trong văn bản pháp luật nhằm bảo đảm quyền và lợi ích chính đáng của nhà đầu tư trong quá trình thực hiện hoạt động đầu tư, kinh doanh. Biện pháp bảo đảm đầu tư cũng được hiểu là nghĩa vụ, cam kết của nước tiếp nhận đầu tư trước nhà đầu tư cần phải được tôn trọng và tuân thủ.

Các biện pháp bảo đảm đầu tư cơ bản như: Bảo đảm quyền sở hữu tài sản của nhà đầu tư; Bảo đảm chuyển tài sản của nhà đầu tư nước ngoài ra nước ngoài; Bảo đảm giải quyết tranh chấp trong hoạt động đầu tư kinh doanh, đã được quy định khá sớm trong nhiều văn bản pháp luật như Luật đầu tư năm 2005, và về cơ bản phù hợp với thông lệ quốc tế cũng như các cam kết của Việt Nam tại thời điểm đó. Tuy nhiên, để tiếp tục hoàn thiện chính sách bảo đảm đầu tư phù hợp với cam kết quốc tế về bảo hộ đầu tư mà Việt Nam đã thỏa thuận trong thời gian qua, Luật đầu tư năm 2014 đã có những bổ sung đáng kể về nội dung bảo đảm đầu tư.

A. *Bảo đảm quyền sở hữu tài sản của nhà đầu tư*

Khi quyết định mang một khối tài sản lớn vào thực hiện hoạt động kinh doanh, nhà đầu tư luôn phải đối mặt với nhiều thách thức trong việc bảo toàn và sinh lời từ khối tài sản đó. Tuy nhiên, điều khiến nhà đầu tư, đặc biệt là nhà đầu tư nước ngoài, lo lắng nhất là những rủi ro không đến từ kinh doanh mà đến từ hệ thống chính sách, pháp luật của nước tiếp nhận đầu tư. Trên thực tế, nhiều nhà đầu tư đã bị quốc hữu hoá tài sản, tức là khối tài sản bị chuyển quyền sở hữu từ nhà đầu tư sang chính phủ nước tiếp nhận đầu tư. *Thí dụ*: Chính phủ Venezuela đã tiến hành quốc hữu hoá các Công ty dầu mỏ từ năm 2007 - 2010, liên quan tới nhiều Công ty nước ngoài như Exxon Mobil Corp, ConocoPhillips hay Công ty Helmerich & Payne Inc ở Oklahoma.[5]

Bảo đảm quyền sở hữu tài sản trong đầu tư kinh doanh là một chế định pháp luật điều chỉnh các quan hệ xã hội liên quan đến sở hữu tài sản - quyền dân sự cụ thể về một tài sản nhất định của chủ sở hữu. Bảo đảm quyền sở hữu tài sản của nhà đầu tư được hiểu là biện pháp bảo đảm quyền dân sự của nhà đầu tư về tài sản thuộc sở hữu của mình. Theo pháp luật Việt Nam, quyền sở hữu tài sản của nhà đầu tư được bảo đảm, cụ thể: khối tài sản hợp pháp của nhà đầu tư sẽ không bị quốc hữu hoá hay tịch thu bằng thủ tục hành chính. Nguyên tắc này được ghi nhận tại Điều 32 Hiến pháp năm 2013 và cụ thể hoá tại Điều 9 Luật đầu tư năm 2014. Biện pháp bảo đảm đầu tư này được áp dụng đối với tất cả các nhà đầu tư và dự án đầu tư ngay từ khi bắt đầu triển khai dự án.

[5] http://www.reuters.com/article/us-venezuela-election-nationalizations-idUSBRE89701X20121008, truy cập ngày 20/5/2017.

Tuy nhiên, dù không bị quốc hữu hóa hay tịch thu bằng biện pháp hành chính, song trong một số trường hợp, tài sản của nhà đầu tư cũng có thể bị trưng mua, trưng dụng. Sự kiện này thường xảy ra vì lý do quốc phòng, an ninh, hoặc vì lợi ích quốc gia, tình trạng khẩn cấp, phòng, chống thiên tai. Khi đó, nhà đầu tư được thanh toán, bồi thường theo quy định của pháp luật về trưng mua, trưng dụng tài sản và các quy định khác của pháp luật có liên quan. Thực chất, khi có các lý do quốc phòng, an ninh hay lợi ích quốc gia, thì không chỉ tài sản của nhà đầu tư mà cả tài sản của các cá nhân và hộ gia đình đều có thể bị trưng mua, trưng thu. Như vậy, về cơ bản, tài sản của nhà đầu tư được pháp luật bảo đảm.

B. *Bảo đảm hoạt động đầu tư kinh doanh*

Nhằm thực hiện các cam kết quốc tế của Việt Nam về đầu tư và thương mại, pháp luật Việt Nam đã quy định các biện pháp bảo đảm hoạt động đầu tư kinh doanh của nhà đầu tư trên nguyên tắc chung:

> Nhà nước bảo đảm đối xử công bằng, thỏa đáng và không phân biệt đối xử giữa nhà đầu tư trong nước và nhà đầu tư nước ngoài trong hoạt động đầu tư phù hợp với điều kiện và lộ trình quy định tại các điều ước quốc tế mà Việt Nam là thành viên.[6]

Như vậy, bảo đảm hoạt động đầu tư kinh doanh là những cam kết của Nhà nước trong việc đảm bảo cho hoạt động đầu tư kinh doanh của nhà đầu tư được thực hiện tự do, theo đúng tinh thần của nguyên tắc mở cửa thị trường và nguyên tắc đối xử quốc gia.

Cụ thể: tại Khoản 1 Điều 10 Luật đầu tư năm 2014 quy định:

Nhà nước không bắt buộc nhà đầu tư phải thực hiện những yêu cầu sau đây:

a) Ưu tiên mua, sử dụng hàng hóa, dịch vụ trong nước hoặc phải mua, sử dụng hàng hóa, dịch vụ từ nhà sản xuất hoặc cung ứng dịch vụ trong nước;

b) Xuất khẩu hàng hóa hoặc dịch vụ đạt một tỷ lệ nhất định; hạn chế số lượng, giá trị, loại hàng hóa và dịch vụ xuất khẩu hoặc sản xuất, cung ứng trong nước;

c) Nhập khẩu hàng hóa với số lượng và giá trị tương ứng với số lượng và giá trị hàng hóa xuất khẩu hoặc phải tự cân đối ngoại tệ từ nguồn xuất khẩu để đáp ứng nhu cầu nhập khẩu;

d) Đạt được tỷ lệ nội địa hóa đối với hàng hóa sản xuất trong nước;

đ) Đạt được một mức độ hoặc giá trị nhất định trong hoạt động nghiên cứu và phát triển ở trong nước;

e) Cung cấp hàng hóa, dịch vụ tại một địa điểm cụ thể ở trong nước hoặc nước ngoài;

g) Đặt trụ sở chính tại địa điểm theo yêu cầu của cơ quan nhà nước có thẩm quyền.

Các quy định trên đã thể hiện rõ nguyên tắc NT trong việc không áp dụng và duy trì các biện pháp 'nội địa hoá', hay nguyên tắc mở cửa thị trường trong việc không áp dụng hay duy trì các biện pháp 'xuất khẩu bắt buộc'. Đối với vấn đề ngoại tệ, một trong những vấn đề quan trọng nhất đối với nhà đầu tư khi tham gia vào hoạt động thương mại quốc tế, là nhà đầu tư không phải tự cân đối ngoại tệ từ nguồn xuất khẩu để đáp ứng nhu cầu nhập khẩu. Đối với các dự án đầu tư thuộc thẩm quyền quyết định của chủ trương đầu tư của Quốc hội, Thủ tướng Chính phủ và những dự án đầu tư phát triển kết cầu hạ tầng quan trọng khác, Thủ tướng Chính phủ sẽ bảo đảm đáp ứng nhu cầu ngoại tệ trong từng thời kỳ nhất định.

C. *Bảo đảm chuyển tài sản của nhà đầu tư nước ngoài ra nước ngoài*

Chuyển tài sản thuộc sở hữu của mình ra nước ngoài là nhu cầu chính đáng và tất yếu của các nhà đầu tư nước ngoài. Bảo đảm việc chuyển tài sản của nhà đầu tư nước ngoài ra nước ngoài cũng như các biện pháp bảo đảm đầu tư khác, đều nhằm mục đích minh bạch hoá và hoàn thiện môi trường đầu tư của nước tiếp nhận đầu tư. Vì vậy, quyền tự do dịch chuyển ra nước ngoài tài sản và lợi nhuận hợp pháp của nhà đầu tư nước ngoài được Nhà nước Việt Nam bảo đảm. Theo Điều 11 Luật đầu tư năm 2014, nhà đầu tư nước ngoài được chuyển ra nước ngoài các tài sản: Vốn đầu tư, các khoản thanh lý đầu tư; Thu nhập từ hoạt động đầu tư kinh doanh; Tiền và tài sản khác thuộc sở hữu hợp pháp của nhà đầu tư.

Thực chất, biện pháp bảo đảm việc chuyển tài sản của nhà đầu tư nước ngoài ra nước ngoài đã được ghi nhận tại các quy định của Luật đầu tư nước ngoài tại Việt Nam năm 1996, Luật đầu tư năm 2005. Tuy nhiên, liên quan đến sự dịch chuyển tài sản này, vấn đề quan trọng

[6] Tờ trình số 89/TTr-CP ngày 10/4/2014 về Dự án Luật đầu tư.

không phải là sự cho phép dịch chuyển mà là nghĩa vụ tài chính của nhà đầu tư phải thực hiện với Nhà nước Việt Nam để được phép dịch chuyển. Đối với các tài sản là vốn đầu tư, các khoản thanh lý đầu tư, tiền và tài sản của nhà đầu tư sẽ được áp dụng theo các quy định về dịch chuyển ngoại tệ. Riêng đối với lợi nhuận hàng năm, các quy định về nghĩa vụ tài chính của nhà đầu tư trong việc dịch chuyển lợi nhuận có sự thay đổi nhất định theo từng giai đoạn. Trước đây, nhà đầu tư phải nộp thuế chuyển lợi nhuận ra nước ngoài sau khi nhận phần chia lợi nhuận sau thuế của doanh nghiệp. Sau đó, khoản thuế này lại được bãi bỏ, nhà đầu tư không phải nộp thêm khoản thuế nào sau khi doanh nghiệp nơi họ đầu tư đã nộp thuế thu nhập doanh nghiệp. Song hiện nay, căn cứ vào Thông tư số 186/2010/TT-BTC ngày 18/11/2010 của Bộ Tài chính hướng dẫn thực hiện việc chuyển lợi nhuận ra nước ngoài của các tổ chức, cá nhân nước ngoài có lợi nhuận từ việc đầu tư trực tiếp tại Việt Nam; Thông tư số 111/2013/TT-BTC ngày 15/08/2013 của Bộ Tài chính hướng dẫn về thuế thu nhập cá nhân (TNCN) và các văn bản khác về thuế, nhà đầu tư nước ngoài phải thực hiện nghĩa vụ tài chính là nộp 5% lợi nhuận vào ngân sách nhà nước khi thực hiện chuyển lợi nhuận ra nước ngoài.

D. *Bảo đảm đầu tư kinh doanh trong trường hợp thay đổi pháp luật*

Tại các DC, nơi có hệ thống pháp luật chưa hoàn thiện, thay đổi pháp luật là vấn đề khá quen thuộc. Việc thay đổi này sẽ có tác động nhất định đến hoạt động đầu tư kinh doanh cũng như lợi ích của nhà đầu tư, từ đó có thể hạn chế khả năng thu hút vốn đầu tư. Để tạo môi trường đầu tư ổn định nhằm thu hút vốn đầu tư nước ngoài, Nhà nước Việt Nam bảo đảm hoạt động đầu tư kinh doanh của nhà đầu tư sẽ được ổn định trong trường hợp thay đổi pháp luật. Cụ thể, theo tinh thần của Điều 13 Luật đầu tư năm 2014, nếu văn bản pháp luật mới do cơ quan có thẩm quyền ban hành có quy định làm thay đổi ưu đãi đầu tư đang áp dụng đối với nhà đầu tư trước khi văn bản này có hiệu lực pháp luật, thì nhà đầu tư sẽ được hưởng ưu đãi đầu tư theo hướng có lợi cho nhà đầu tư.

Thứ nhất, trường hợp văn bản pháp luật mới được ban hành quy định ưu đãi đầu tư cao hơn ưu đãi đầu tư mà nhà đầu tư đang được hưởng, thì nhà đầu tư được hưởng ưu đãi đầu tư theo quy định của văn bản pháp luật mới cho thời gian hưởng ưu đãi còn lại của dự án.

Thứ hai, trường hợp văn bản pháp luật mới được ban hành quy định ưu đãi đầu tư thấp hơn ưu đãi đầu tư mà nhà đầu tư được hưởng trước đó, thì nhà đầu tư được tiếp tục áp dụng ưu đãi đầu tư theo quy định trước đó cho thời gian hưởng ưu đãi còn lại của dự án. Điều này có nghĩa, sẽ không áp dụng hồi tố đối với trường hợp thay đổi pháp luật khiến cho ưu đãi đầu tư bị giảm sút.

Trong đó, ưu đãi đầu tư được đảm bảo cho nhà đầu tư bao gồm ưu đãi đầu tư quy định tại Giấy phép đăng ký đầu tư, Giấy phép đăng ký kinh doanh, Giấy chứng nhận ưu đãi đầu tư, Giấy chứng nhận đầu tư, văn bản quyết định chủ trương đầu tư, hoặc các văn bản khác của cơ quan nhà nước có thẩm quyền.

Tuy nhiên, ưu đãi đầu tư sẽ không được duy trì trong trường hợp thay đổi pháp luật vì lý do quốc phòng, an ninh quốc gia, trật tự, an toàn xã hội, đạo đức xã hội, sức khỏe của cộng đồng, bảo vệ môi trường. Để đảm bảo quyền lợi của nhà đầu tư trong trường hợp này, pháp luật Việt Nam quy định áp dụng một trong các biện pháp bảo bảo đảm đầu tư sau, cụ thể: (1) Khấu trừ thiệt hại thực tế của nhà đầu tư vào thu nhập chịu thuế; (2) Điều chỉnh mục tiêu hoạt động của dự án đầu tư; và (3) Hỗ trợ nhà đầu tư khắc phục thiệt hại. Để được hưởng các biện pháp bảo đảm đầu tư này, nhà đầu tư phải chủ động gửi đơn yêu cầu đến cơ quan đăng ký đầu tư kèm theo các giấy tờ cần thiết trong thời hạn 03 năm, kể từ ngày văn bản pháp luật mới có hiệu lực. Cơ quan đăng ký đầu tư quyết định áp dụng biện pháp bảo đảm đầu tư trong thời hạn 30 ngày, hoặc trình cơ quan nhà nước có thẩm quyền xem xét, quyết định.

E. *Bảo đảm giải quyết tranh chấp trong hoạt động đầu tư kinh doanh*

Bất đồng và mâu thuẫn là vấn đề thường xảy ra khi các bên thiết lập mối quan hệ trong hoạt động đầu tư kinh doanh. Khi mâu thuẫn và bất đồng đủ lớn, tác động đến lợi ích của các bên, thì tranh chấp có thể bùng nổ. Tranh chấp khiến cho hoạt động đầu tư kinh doanh của nhà đầu tư, dù là vị trí nguyên đơn hay bị đơn, đều chịu ảnh hưởng tiêu cực nhất định. Tuy nhiên, nước tiếp nhận đầu tư sẽ không thể đưa ra các biện pháp bảo đảm không xảy ra tranh chấp cho nhà đầu tư, mà biện pháp bảo đảm đầu tư tốt nhất trong tình huống này là đảm bảo tranh chấp sẽ được giải quyết một cách minh bạch, công bằng và thoả đáng.

Trong quan hệ đầu tư quốc tế, căn cứ vào chủ thể tham gia tranh chấp có thể chia tranh chấp thành các nhóm: (1) Tranh chấp giữa các nhà đầu tư với nhau; và (2) tranh chấp giữa nhà đầu tư với Cơ quan nhà nước có thẩm quyền liên quan đến hoạt động đầu tư. Các tranh chấp đều được đảm bảo giải quyết bằng các phương phức giải quyết tranh chấp hiện đại, phù hợp với thông lệ quốc tế.

Theo quy định tại Điều 14 Luật đầu tư năm 2014, tranh chấp liên quan đến hoạt động đầu tư quốc tế tại Việt Nam, trước hết được giải quyết thông qua thương lượng và hoà giải. Cần phải thấy rõ, thương lượng và hoà giải không phải là phương thức bắt buộc các bên trong tranh chấp đầu tư quốc tế phải áp dụng mà chỉ mang tính khuyến khích. Nếu không thể hoá giải mẫu thuẫn giữa các bên bằng các phương thức này, các bên tranh chấp có thể tiếp cận các phương thức giải quyết khác.

Đối với các phương thức giải quyết tranh chấp khác ngoài thương lượng và hoà giải, các dạng tranh chấp khác nhau có thể tiếp cận các phương thức giải quyết tranh chấp khác nhau, cụ thể:

Thứ nhất, tranh chấp giữa các nhà đầu tư trong nước, tổ chức kinh tế có vốn đầu tư nước ngoài hoặc nhà đầu tư trong nước, tổ chức kinh tế có vốn đầu tư nước ngoài với cơ quan nhà nước có thẩm quyền liên quan đến hoạt động đầu tư kinh doanh trên lãnh thổ Việt Nam được giải quyết thông qua Trọng tài Việt Nam hoặc Tòa án Việt Nam, trừ trường hợp quy định tại khoản 3 Điều 14 Luật đầu tư năm 2014.

Thứ hai, tranh chấp giữa các nhà đầu tư trong đó có ít nhất một bên là nhà đầu tư nước ngoài hoặc tổ chức kinh tế có vốn đầu tư nước ngoài được giải quyết thông qua một trong những cơ quan, tổ chức: Toà án Việt Nam, Trọng tài Việt Nam, Trọng tài nước ngoài, Trọng tài quốc tế hoặc Trọng tài do các bên tranh chấp thoả thuận thành lập.

Thứ ba, tranh chấp giữa nhà đầu tư nước ngoài với cơ quan nhà nước có thẩm quyền liên quan đến hoạt động đầu tư kinh doanh trên lãnh thổ Việt Nam được giải quyết thông qua Trọng tài Việt Nam hoặc Tòa án Việt Nam, trừ trường hợp có thỏa thuận khác theo hợp đồng hoặc điều ước quốc tế mà Cộng hòa xã hội chủ nghĩa Việt Nam là thành viên có quy định khác.

Như vậy, về cơ bản, Nhà nước Việt Nam đảm bảo cơ chế giải quyết tranh chấp trong hoạt động đầu tư kinh doanh đa dạng, linh hoạt, phù hợp với thông lệ quốc tế. Song nhà đầu tư luôn phải cân nhắc đến những thoả thuận riêng về giải quyết tranh chấp để có thể tiếp cận những cơ chế giải quyết tranh chấp phù hợp với tiêu chí của cả hai bên trong quan hệ đầu tư quốc tế như Trọng tài nước ngoài, Trọng tài quốc tế hay một phương thức nào khác. Đối với tranh chấp giữa nhà đầu tư nước ngoài và Chính phủ Việt Nam (tranh chấp ISDS), phương thức giải quyết tranh chấp sẽ được quyết định dựa trên thoả thuận giữa hai bên hoặc điều ước quốc tế liên quan mà Việt Nam là thành viên (Hiệp định BIT giữa Việt Nam và các nước, hoặc các hiệp định đa phương liên quan khác). Nếu nhà đầu tư nước ngoài và Chính phủ Việt Nam không có thoả thuận gì về phương thức giải quyết tranh chấp, các điều ước liên quan không tồn tại hoặc không quy định về phương thức giải quyết tranh chấp ISDS, thì tranh chấp sẽ được giải quyết trước Toà án Việt Nam. Trên thực tế, các tranh chấp giữa nhà đầu tư nước ngoài và Chính phủ Việt Nam thường xét xử đầu tiên tại trọng tài quốc tế. Như vụ kiện năm 2004 giữa nhà đầu tư Trịnh Vĩnh Bình và Chính phủ Việt Nam tại Viện trọng tài của Phòng thương mại Stockholm (SCC); vụ kiện năm 2010 giữa nhà đầu tư Michael L. McKenzie (Hoa Kỳ) - nhà đầu tư của Công ty South Fork với Chính phủ Việt Nam (trực tiếp là UBND tỉnh Bình Thuận) tại trọng tài quốc tế, dù sau đó trọng tài đã ra phán quyết không có thẩm quyền với tranh chấp này; vụ kiện năm 2011, Công ty DialAsie (Pháp) khởi kiện Chính phủ Việt Nam tại trọng tài quốc tế PCA (2011) tại The Hague (Hà Lan) trên cơ sở Hiệp định về khuyến khích và bảo hộ đầu tư Việt Nam - Pháp năm 1992, và năm 2013, công ty RECOFI (Pháp) đã kiện chính phủ Việt Nam yêu cầu thanh toán các khoản nợ chính phủ khi RECOFI tham gia vào chương trình hỗ trợ lương thực và hàng hoá cơ bản năm 1987.[7]

3. Các biện pháp ưu đãi và hỗ trợ đầu tư

Nhìn chung, các biện pháp ưu đãi và hỗ trợ đầu tư được hiểu là các biện pháp khuyến khích đầu tư. Nếu như biện pháp bảo đảm đầu tư là biện pháp cho nhà đầu tư thấy được sự bảo vệ của Nhà nước với phần vốn, tài sản và hoạt động đầu tư kinh doanh của nhà đầu tư, thì biện pháp khuyến khích đầu tư là biện pháp cho nhà đầu tư thấy được sự thuận lợi hoặc lợi ích nhất định mà nhà đầu tư được hưởng khi tham gia đầu tư kinh doanh. Những lợi ích này có tác động khích lệ nhà đầu tư, từ đó thu hút vốn đầu tư có hiệu quả.

Trước đây, Việt Nam có sự phân biệt giữa nhà đầu tư nước ngoài và nhà đầu tư trong nước trong việc tiếp cận và hưởng những ưu đãi, khuyến khích đầu tư. Tuy nhiên, từ khi có Luật đầu tư năm 2005 và sau này là Luật đầu tư năm 2014, trên cơ sở không phân biệt đối xử quốc gia, các nhà đầu tư được đối xử bình đẳng trong việc nhận các ưu đãi và hỗ trợ đầu tư. Tiêu chí để áp dụng các biện pháp ưu đãi và hỗ trợ đầu tư phụ thuộc vào lĩnh vực đầu tư, địa bàn đầu tư và một số tiêu chí đặc thù khác như sử dụng lao động, quy mô và tính chất dự án đầu tư.

[7] http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2, truy cập ngày 20/5/2017.

A. *Các biện pháp ưu đãi đầu tư*

1. Lĩnh vực và địa bàn ưu đãi đầu tư

Theo quy định Khoản 1 Điều 16 Luật đầu tư năm 2014 và Phụ lục I Nghị định số 118/2015/NĐ-CP ngày 12/11/2015 của Chính phủ quy định chi tiết và hướng dẫn thi hành một số điều của Luật đầu tư, lĩnh vực được ưu đãi đầu tư bao gồm:

- Hoạt động công nghệ cao, sản phẩm công nghiệp hỗ trợ công nghệ cao; hoạt động nghiên cứu và phát triển;
- Sản xuất vật liệu mới, năng lượng mới, năng lượng sạch, năng lượng tái tạo; sản xuất sản phẩm có giá trị gia tăng từ 30% trở lên, sản phẩm tiết kiệm năng lượng;
- Sản xuất sản phẩm điện tử, sản phẩm cơ khí trọng điểm, máy nông nghiệp, ô tô, phụ tùng ô tô; đóng tàu;
- Sản xuất sản phẩm công nghiệp hỗ trợ cho ngành dệt may, da giày và hỗ trợ các sản phẩm điện tử, cơ khí trọng điểm, máy nông nghiệp, ô tô và phụ tùng ô tô; đóng tàu;
- Sản xuất sản phẩm công nghệ thông tin, phần mềm, nội dung số;
- Nuôi trồng, chế biến nông sản, lâm sản, thủy sản; trồng và bảo vệ rừng; làm muối; khai thác hải sản và dịch vụ hậu cần nghề cá; sản xuất giống cây trồng, giống vật nuôi, sản phẩm công nghệ sinh học;
- Thu gom, xử lý, tái chế hoặc tái sử dụng chất thải;
- Đầu tư phát triển và vận hành, quản lý công trình kết cấu hạ tầng; phát triển vận tải hành khách công cộng tại các đô thị;
- Giáo dục mầm non, giáo dục phổ thông, giáo dục nghề nghiệp;
- Khám bệnh, chữa bệnh; sản xuất thuốc, nguyên liệu làm thuốc, thuốc chủ yếu, thuốc thiết yếu, thuốc phòng, chống bệnh xã hội, vắc xin, sinh phẩm y tế, thuốc từ dược liệu, thuốc đông y; nghiên cứu khoa học về công nghệ bào chế, công nghệ sinh học để sản xuất các loại thuốc mới;
- Đầu tư cơ sở luyện tập, thi đấu thể dục, thể thao cho người khuyết tật hoặc chuyên nghiệp; bảo vệ và phát huy giá trị di sản văn hóa; đầu tư trung tâm lão khoa, tâm thần, điều trị bệnh nhân nhiễm chất độc màu da cam; trung tâm chăm sóc người cao tuổi, người khuyết tật, trẻ mồ côi, trẻ em lang thang không nơi nương tựa;
- Quỹ tín dụng nhân dân, tổ chức tài chính vi mô.

Theo quy định tại Khoản 2 Điều 16 Luật đầu tư năm 2014 và Phụ lục II Nghị định số 118/2015/NĐ-CP, địa bàn ưu đãi đầu tư bao gồm:

- Địa bàn có điều kiện kinh tế - xã hội khó khăn, địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn;
- Khu công nghiệp, khu chế xuất, khu công nghệ cao, khu kinh tế.
- *2. Đối tượng hưởng ưu đãi đầu tư*
- Theo Khoản 2 Điều 15 Luật đầu tư năm 2014 và Nghị định số 118/2015/NĐ-CP, các dự án thuộc đối tượng được hưởng ưu đãi đầu tư bao gồm:
- Dự án đầu tư thuộc ngành, nghề ưu đãi đầu tư theo lĩnh vực đầu tư được quy định tại Phụ lục I của Nghị định số 118/2015/NĐ-CP. Nếu nhóm dự án này được thực hiện ở địa bàn có điều kiện kinh tế - xã hội khó khăn, thì sẽ được hưởng ưu đãi như ưu đãi dành cho địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn;
- Dự án đầu tư tại địa bàn ưu đãi đầu tư có điều kiện kinh tế - xã hội khó khăn, đặc biệt khó khăn quy định tại Phụ lục II của Nghị định số 118/2015/NĐ-CP, bao gồm cả khu kinh tế, khu công nghệ cao (khó khăn) và khu công nghiệp, khu chế xuất (đặc biệt khó khăn);
- Dự án đầu tư có quy mô vốn từ 6.000 tỷ đồng trở lên, thực hiện giải ngân tối thiểu 6.000 tỷ đồng trong thời hạn 03 năm kể từ ngày được cấp Giấy chứng nhận đăng ký đầu tư hoặc quyết định chủ trương đầu tư. Nhóm dự án này được hưởng ưu đãi đầu tư như quy định đối với dự án ở địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn;
- Dự án đầu tư tại vùng nông thôn sử dụng từ 500 lao động trở lên (không bao gồm lao động làm việc không trọn thời gian và lao động có hợp đồng dưới 12 tháng). Nhóm dự án này được hưởng ưu đãi đầu tư như quy định đối với dự án ở địa bàn có điều kiện kinh tế - xã hội khó khăn;
- Doanh nghiệp công nghệ cao, doanh nghiệp khoa học và công nghệ, tổ chức khoa học và công nghệ;

- Dự án đầu tư mới và dự án đầu tư mở rộng.

3. Hình thức ưu đãi đầu tư

Theo quy định tại Khoản 1 Điều 15 Luật đầu tư năm 2014, các hình thức ưu đãi đầu tư chủ yếu là ưu đãi về tài chính. Ưu đãi đầu tư được áp dụng khác nhau theo tiêu chí lĩnh vực đầu tư, địa bàn đầu tư.

a) Thuế thu nhập doanh nghiệp

Thuế thu nhập doanh nghiệp có thể được miễn, giảm hoặc áp dụng mức thuế suất thuế thu nhập doanh nghiệp thấp hơn mức thuế suất thông thường có thời hạn hoặc toàn bộ thời gian thực hiện dự án đối với các đối tượng được hưởng ưu đãi nhất định.

Thuế suất thu nhập doanh nghiệp thông thường là 25%, đối với lĩnh vực tìm kiếm, thăm dò, khai thác dầu khí và tài nguyên quý hiếm khác thuế suất từ 32% đến 50%. Ưu đãi về thuế thu nhập doanh nghiệp sẽ được áp dụng với các dự án khác nhau, được quy định cụ thể tại Luật thuế thu nhập doanh nghiệp năm 2008; Luật 71/2014/QH13 ngày 26/11/2014 sửa đổi bổ sung một số điều của các luật về thuế; Nghị định số 118/2015/NĐ-CP ngày 12/11/2015 của Chính phủ quy định chi tiết và hướng dẫn thi hành một số điều của Luật đầu tư; Thông tư số 96/2015/TT-BTC hướng dẫn về thuế thu nhập doanh nghiệp và Thông tư số 83/2016/TT-BTC ngày 17/6/2016 của Bộ Tài chính hướng dẫn thực hiện ưu đãi đầu tư theo quy định của Luật đầu tư năm 2014 và Nghị định số 118/2015/NĐ-CP.

Thứ nhất: Các trường hợp được miễn, giảm thuế thu nhập doanh nghiệp dựa trên tiêu chí mới thành lập:

- Doanh nghiệp thành lập mới từ dự án đầu tư tại địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn, khu kinh tế, khu công nghệ cao; doanh nghiệp thành lập mới từ dự án đầu tư thuộc lĩnh vực công nghệ cao, nghiên cứu khoa học và phát triển công nghệ, đầu tư phát triển cơ sở hạ tầng đặc biệt quan trọng của Nhà nước, sản xuất sản phẩm phần mềm: được miễn thuế tối đa không quá 04 năm; được giảm 50% số thuế phải nộp không quá 09 năm tiếp theo; và được áp dụng thuế suất 10% trong thời gian 15 năm;
- Doanh nghiệp thành lập mới từ dự án đầu tư tại địa bàn có điều kiện kinh tế - xã hội khó khăn: được miễn thuế tối đa không quá 02 năm; được giảm 50% số thuế phải nộp không quá 04 năm tiếp theo; và được áp dụng mức thuế suất 20% trong thời gian 10 năm.

Các dự án cần đặc biệt thu hút vốn đầu tư ở quy mô lớn thì có thể kéo dài thời gian áp dụng thuế suất ưu đãi, song thời gian kéo dài không quá 15 năm.

Thứ hai: Các trường hợp được miễn, giảm thuế thu nhập doanh nghiệp dựa trên tiêu chí lĩnh vực đầu tư và tỷ lệ sử dụng lao động:

- Doanh nghiệp hoạt động trong lĩnh vực giáo dục - đào tạo, dạy nghề, y tế, văn hóa, thể thao và môi trường: được miễn thuế tối đa không quá 04 năm; được giảm 50% số thuế phải nộp không quá 09 năm tiếp theo; và được áp dụng thuế suất 10% (không xác định thời hạn);
- Đối với doanh nghiệp trồng trọt, chăn nuôi, chế biến trong lĩnh vực nông nghiệp và thuỷ sản không thuộc địa bàn có điều kiện kinh tế - xã hội khó khăn hoặc đặc biệt khó khăn thì áp dụng thuế suất 15%;
- Doanh nghiệp sản xuất, xây dựng, vận tải sử dụng nhiều lao động nữ được giảm thuế thu nhập doanh nghiệp bằng số chi thêm cho lao động nữ;
- Doanh nghiệp sử dụng nhiều lao động là người dân tộc thiểu số được giảm thuế thu nhập doanh nghiệp bằng số chi thêm cho lao động là người dân tộc thiểu số.

Tuy nhiên các ưu đãi không áp dụng với tất cả các thu nhập chịu thuế của doanh nghiệp. Doanh nghiệp phải hạch toán riêng thu nhập từ hoạt động sản xuất, kinh doanh được ưu đãi thuế với thu nhập từ hoạt động sản xuất, kinh doanh không được ưu đãi thuế. Trong trường hợp không hạch toán riêng được, thì thu nhập từ hoạt động sản xuất, kinh doanh được ưu đãi thuế được xác định theo tỷ lệ doanh thu giữa hoạt động sản xuất, kinh doanh được ưu đãi thuế trên tổng doanh thu của doanh nghiệp. Các doanh nghiệp phải thực hiện chế độ kế toán, hóa đơn, chứng từ và nộp thuế theo kê khai.

b) Thuế nhập khẩu

Theo Luật đầu tư năm 2014 và Luật thuế xuất khẩu, thuế nhập khẩu năm 2016, và Thông tư số 83/2016/TT-BTC ngày 17/6/2016 của Bộ Tài chính hướng dẫn thực hiện ưu đãi đầu tư theo quy định của Luật đầu tư năm 2014 và Nghị định số 118/2015/NĐ-CP, đối với cả dự án đầu tư mới và đầu tư mở rộng, nhà đầu tư được miễn thuế nhập khẩu đối với hàng hoá nhập khẩu để tạo tài sản cố định bao gồm:

i. Máy móc, thiết bị; linh kiện, chi tiết, bộ phận rời, phụ tùng để lắp ráp đồng bộ hoặc sử dụng đồng bộ với máy móc, thiết bị; nguyên liệu, vật tư dùng để chế tạo máy móc, thiết bị hoặc để chế tạo linh kiện, chi tiết, bộ phận rời, phụ tùng của máy móc, thiết bị;

ii. Phương tiện vận tải chuyên dùng trong dây chuyền công nghệ sử dụng trực tiếp cho hoạt động sản xuất của dự án;

iii. Vật tư trong nước chưa sản xuất được.

Tuy nhiên, việc miễn thuế nhập khẩu đối với hàng hoá tạo tài sản cố định chỉ áp dụng đối với các dự án đầu tư thuộc các lĩnh vực đầu tư và địa bàn đầu tư theo quy định của pháp luật về đầu tư, cụ thể tại Điều 16 Luật đầu tư năm 2014 và Phụ lục I, Phụ lục II Nghị định số 118/2015/NĐ-CP.

Ngoài ra, đối với một số dự án, nhà đầu tư cũng được miễn thuế nhập khẩu đối với nguyên liệu, vật tư, linh kiện để thực hiện dự án đầu tư, bao gồm: nguyên liệu, vật tư linh kiện trong nước chưa sản xuất được nhập khẩu để sản xuất của dự án đầu tư thuộc danh mục ngành, nghề đặc biệt ưu đãi đầu tư hoặc địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn (theo quy định tại Phụ lục I, Phụ lục II Nghị định số 118/2015/NĐ-CP). Trong đó, doanh nghiệp công nghệ cao, doanh nghiệp khoa học và công nghệ, tổ chức khoa học và công nghệ, được miễn thuế nhập khẩu trong thời hạn 05 năm, kể từ ngày bắt đầu sản xuất. Dự án đầu tư sản xuất, lắp ráp trang thiết bị y tế được hưởng ưu đãi này trong 05 năm, kể từ ngày bắt đầu sản xuất. Tuy nhiên, không áp dụng việc miễn thuế nhập khẩu này đối với dự án đầu tư khai thác khoáng sản, dự án sản xuất sản phẩm có tổng giá trị tài nguyên, khoáng sản, năng lượng chiếm hơn 51% giá trị; dự án sản xuất hàng hoá, sản phẩm thuộc đối tượng chịu thuế tiêu thụ đặc biệt.

c) Tiền thuê đất, tiền sử dụng đất, thuế sử dụng đất

Đối với các dự án đầu tư trực tiếp, việc sử dụng đất đai và các công trình xây dựng là điều tất yếu. Ngoài các nghĩa vụ tài chính liên quan đến hoạt động kinh doanh, thu nhập, thì các tổ chức kinh tế có vốn đầu tư nước ngoài còn phải nộp các khoản thuế liên quan đến sử dụng đất bao gồm tiền thuê đất, tiền sử dụng đất, thuế sử dụng đất. Để khuyến khích đầu tư, đặc biệt là đầu tư nước ngoài, Nhà nước Việt Nam thực hiện miễn hoặc giảm tiền thuê đất, tiền sử dụng đất và thuế sử dụng đất cho các tổ chức kinh tế có vốn đầu tư nước ngoài. Việc miễn hoặc giảm các nghĩa vụ tài chính này sẽ được quy định chi tiết và thực hiện theo

một số văn bản, cụ thể: Luật thuế sử dụng đất phi nông nghiệp; Nghị định số 53/2011/NĐ-CP ngày 01/7/2011 của Chính phủ quy định chi tiết và hướng dẫn thi hành một số điều của Luật thuế sử dụng đất phi nông nghiệp; Thông tư số 153/2011/TT-BTC của Bộ Tài chính hướng dẫn về thuế sử dụng đất phi nông nghiệp; Thông tư số 83/2016/TT-BTC ngày 17/6/2016 của Bộ Tài chính hướng dẫn thực hiện ưu đãi đầu tư theo quy định của Luật đầu tư năm 2014 và Nghị định số 118/2015/NĐ-CP và Nghị định số 35/2017/NĐ-CP ngày 03/4/2017 của Chính phủ quy định về thu tiền sử dụng đất, tiền thuê đất, thuê mặt nước trong Khu kinh tế, Khu công nghệ cao.

Hiện nay, ưu đãi miễn thuế sử dụng đất phi nông nghiệp được áp dụng đối với các đối tượng:

i. Các dự án đầu tư vào thuộc ngành, nghề đặc biệt ưu đãi đầu tư quy định tại Mục A Phụ lục I hoặc đầu tư tại địa bàn có điều kiện kinh tế - xã hội đặc biệt khó khăn quy định tại Phụ lục II Nghị định số 118/2015/NĐ-CP;

ii. Dự án đầu tư có quy mô vốn từ 6.000 tỷ đồng trở lên, thực hiện giải ngân tối thiểu 6.000 tỷ đồng trong thời hạn 03 năm kể từ ngày được cấp Giấy chứng nhận đăng ký đầu tư, hoặc kể từ ngày được quyết định chủ trương đầu tư;

iii. Dự án đầu tư thuộc ngành, nghề ưu đãi đầu tư quy định tại Mục B Phụ lục I thực hiện tại địa bàn có điều kiện kinh tế - xã hội khó khăn quy định tại Phụ lục II Nghị định số 118/2015/NĐ-CP;

vi. Ưu đãi giảm 50% thuế sử dụng đất phi nông nghiệp được áp dụng cho một số dự án:

v. Dự án đầu tư thuộc ngành nghề quy định tại mục B Phụ lục I hoặc đầu tư tại địa bàn có điều kiện kinh tế - xã hội khó khăn quy định tại Phụ lục II Nghị định số 118/2015/NĐ-CP;

iv. Dự án đầu tư tại vùng nông thôn sử dụng từ 500 lao động trở lên (không bao gồm lao động làm việc không trọn thời gian và lao động có hợp đồng lao động dưới 12 tháng).

Các doanh nghiệp công nghệ cao, doanh nghiệp KHCN, tổ chức khoa học và công nghệ theo quy định của pháp luật về công nghệ cao và pháp luật về khoa học và công nghệ được hưởng ưu đãi về thuế sử dụng đất phi nông nghiệp tùy thuộc vào điều kiện về ngành nghề, địa bàn, quy mô vốn đầu tư hoặc sử dụng lao động của từng dự án đầu tư cụ thể.

Ưu đãi thuế sử dụng đất phi nông nghiệp không áp dụng đối với dự án đầu tư khai thác khoáng sản, sản xuất, kinh doanh, dịch vụ thuộc đối tượng chịu thuế tiêu thụ đặc biệt, trừ sản xuất ô-tô.

B. *Các biện pháp hỗ trợ đầu tư*

Bên cạnh các biện pháp ưu đãi đầu tư, nhà đầu tư có thể tiếp cận các biện pháp hỗ trợ đầu tư, bao gồm:

- Hỗ trợ phát triển hệ thống kết cấu hạ tầng kỹ thuật, hạ tầng xã hội trong và ngoài hàng rào dự án;
- Hỗ trợ đào tạo, phát triển nguồn nhân lực;
- Hỗ trợ tín dụng;
- Hỗ trợ tiếp cận mặt bằng sản xuất, kinh doanh; hỗ trợ di dời cơ sở sản xuất ra khỏi nội thành, nội thị;
- Hỗ trợ khoa học, kỹ thuật, chuyển giao công nghệ;
- Hỗ trợ phát triển thị trường, cung cấp thông tin;
- Hỗ trợ nghiên cứu và phát triển.

Đối tượng được hưởng các biện pháp hỗ trợ nêu trên là các doanh nghiệp vừa và nhỏ, doanh nghiệp công nghệ cao, doanh nghiệp khoa học và công nghệ, tổ chức khoa học và công nghệ, doanh nghiệp đầu tư vào nông nghiệp, nông thôn, doanh nghiệp đầu tư vào giáo dục, phổ biến pháp luật và các đối tượng khác phù hợp với định hướng phát triển kinh tế - xã hội trong từng thời kỳ. Các biện pháp hỗ trợ đầu tư đối với khu công nghiệp, khu chế xuất, khu công nghệ cao và khu kinh tế, hiện nay được hướng dẫn áp dụng tại Điều 18, 19 và 20 Nghị định số 118/2015/NĐ-CP.

4. Hoạt động đầu tư ra nước ngoài của nhà đầu tư trong nước

Đầu tư ra nước ngoài là sự dịch chuyển vốn, tài sản của nhà đầu tư Việt Nam sang quốc gia khác để tiến hành hoạt động kinh doanh nhằm mục đích sinh lợi nhuận hoặc các mục đích kinh tế khác. Tính đến tháng 01/2017, Việt Nam có 1.188 dự án đầu tư tại 70 quốc gia và vùng lãnh thổ, với tổng vốn đầu tư đăng ký đạt gần 21,4 tỷ USD. Trong số này, Lào có 270 dự án, số vốn 5,12 tỷ USD; Campuchia với 191 dự án, số vốn 2,89 tỷ USD; một số quốc gia như Nga, khu vực châu Phi cũng là những thị trường đầu tư tiềm năng.[8]

Hoạt động đầu tư ra nước ngoài được thực hiện trên nguyên tắc nhà đầu tư tự chịu trách nhiệm với các hoạt động đầu tư kinh doanh ở nước ngoài của mình đồng thời tuân thủ pháp luật Việt Nam về đầu tư và các lĩnh vực liên quan, pháp luật của quốc gia, vùng lãnh thổ tiếp nhận đầu tư cũng như các điều ước quốc tế mà Việt Nam là thành viên. Nhà đầu tư Việt Nam có thể đầu tư ra nước ngoài theo hai hình thức: đầu tư ra nước ngoài trực tiếp và đầu tư ra nước ngoài gián tiếp. Theo Khoản 1 Điều 3 Nghị định số 83/2015/NĐ-CP ngày 25/9/2015 của Chính phủ quy định về đầu tư ra nước ngoài:

> Đầu tư ra nước ngoài là việc nhà đầu tư chuyển vốn; hoặc thanh toán mua một phần hoặc toàn bộ cơ sở kinh doanh; hoặc xác lập quyền sở hữu để thực hiện hoạt động đầu tư kinh doanh ngoài lãnh thổ Việt Nam; đồng thời trực tiếp tham gia quản lý hoạt động đầu tư đó.

Điều này có nghĩa, theo văn bản này, thuật ngữ 'đầu tư ra nước ngoài' được hiểu là hoạt động đầu tư trực tiếp.

Bên cạnh đó, theo Nghị định số 135/2015/NĐ-CP ngày 31/12/2015 của Chính phủ quy định về đầu tư gián tiếp ra nước ngoài quy định các hoạt động đầu tư ra nước ngoài dưới hình thức mua, bán chứng khoán, các giấy tờ có giá khác hoặc đầu tư thông qua các quỹ đầu tư chứng khoán, các định chế tài chính trung gian khác ở nước ngoài, được gọi là 'đầu tư gián tiếp ra nước ngoài'.

Nhà đầu tư Việt Nam có dự án đầu tư ra nước ngoài phải thực hiện các thủ tục đăng ký đầu tư ra nước ngoài với Cơ quan có thẩm quyền của Việt Nam. Căn cứ vào quy mô và lĩnh vực đầu tư của Dự án, thủ tục đăng ký đầu tư ra nước ngoài có thể khác nhau.

Thứ nhất, đối với dự án có vốn đầu tư ra nước ngoài trên 20.000 tỷ đồng hoặc dự án yêu cầu áp dụng cơ chế, chính sách đặc biệt, thì nhà đầu tư phải xin quyết định chủ trương đầu tư ra nước ngoài của Quốc hội.

Thứ hai, đối với dự án có vốn đầu tư ra nước ngoài trên 800 tỷ đồng và dự án có vốn đầu tư nước ngoài trên 400 tỷ đồng vào các lĩnh vực ngân hàng, bảo hiểm, chứng khoán, báo chí, phát thanh, truyền hình, viễn thông, thì nhà đầu tư phải xin quyết định chủ trương đầu tư ra nước ngoài của Thủ tướng Chính phủ.

[8] http://tapchitaichinh.vn/kinh-te-vi-mo/kinh-te-dau-tu/viet-nam-dau-tu-ra-nuoc-ngoai-214-ty-usd-102931.html, truy cập ngày 20/5/2017.

Các dự án đầu tư ra nước ngoài thuộc diện quyết định chủ trương đầu tư ra nước ngoài của Quốc hội hoặc Thủ tướng Chính phủ đều phải thực hiện hoạt động thẩm định dự án. Thời gian thẩm định đối với dự án thuộc diện quyết định chủ trương đầu tư ra nước ngoài của Quốc hội là không quá 155 ngày và của Thủ tướng Chính phủ là không quá 48 ngày.[9] Sau khi nhận quyết định chủ trương đầu tư ra nước ngoài, Bộ Kế hoạch và Đầu tư thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư ra nước ngoài trong thời hạn 05 ngày làm việc.

Thứ ba, đối với các dự án đầu tư ra nước ngoài vào các lĩnh vực ngân hàng, bảo hiểm, chứng khoán, báo chí, phát thanh, truyền hình, viễn thông có vốn đầu tư dưới 400 tỷ đồng và các dự án khác có vốn đầu tư dưới 800 tỷ đồng, thì nhà đầu tư chỉ thực hiện thủ tục cấp Giấy chứng nhận đăng ký đầu tư ra nước ngoài tại Bộ Kế hoạch và Đầu tư. Trong thời hạn 15 ngày kể từ ngày nhận hồ sơ, Bộ Kế hoạch và Đầu tư cấp Giấy chứng nhận đăng ký đầu tư ra nước ngoài cho nhà đầu tư. Trong trường hợp từ chối, Bộ Kế hoạch và Đầu tư phải thông báo cho nhà đầu tư.

Sau khi có Giấy chứng nhận đăng ký đầu tư ra nước ngoài, nhà đầu tư thực hiện thủ tục đăng ký tại cơ quan nhà nước quản lý về ngoại hối. Đây là quy mới về đăng ký đầu tư ra nước ngoài của Luật đầu tư năm 2014. Nhà đầu tư ra nước ngoài khi muốn giao dịch chuyển tiền từ Việt Nam ra nước ngoài hoặc từ nước ngoài vào Việt Nam liên quan đến hoạt động đầu tư ra nước ngoài, thì phải thực hiện thông qua một tài khoản vốn riêng mở tại một tổ chức tín dụng được phép tại Việt Nam, và phải đăng ký tại Ngân hàng Nhà nước Việt Nam theo quy định của pháp luật về quản lý ngoại hối. Đối với việc dịch chuyển tài sản, máy móc, thiết bị, nhà đầu tư cần tuân thủ quy định của pháp luật về xuất khẩu và nhập khẩu.

Đối với lợi nhuận thu được từ hoạt động đầu tư nước ngoài, nhà đầu tư phải chú ý nguyên tắc chuyển toàn bộ lợi nhuận về nước, trừ một số trường hợp sử dụng lợi nhuận để tái đầu tư. Trong thời hạn 6 tháng kể từ ngày có báo cáo quyết toán thuế theo pháp luật của nước tiếp nhận đầu tư, nhà đầu tư phải chuyển toàn bộ lợi nhuận và các khoản thu hợp pháp khác từ nước ngoài về Việt Nam, nếu gia hạn thì phải báo cáo với Bộ Kế hoạch và Đầu tư và Ngân hàng Nhà nước Việt Nam. Trong trường hợp nhà đầu tư Việt Nam muốn sử dụng chính lợi nhuận có được từ hoạt động đầu tư ra nước ngoài để tăng vốn và mở rộng hoạt động kinh doanh sản xuất hoặc đầu tư dự án, thì phải thực hiện thủ tục điều chỉnh Giấy chứng nhận đăng ký đầu tư ra nước ngoài và báo cáo Ngân hàng Nhà nước Việt Nam. Dự án đầu tư ra nước ngoài có thể bị chấm dứt khi xảy ra một trong các trường hợp quy định tại Điều 62 Luật đầu tư năm 2014.

[9] Các điều 55, 56 Luật đầu tư năm 2014.

Đối với hoạt động đầu tư gián tiếp, nhà đầu tư là cá nhân mang quốc tịch Việt Nam chỉ được thực hiện đầu tư gián tiếp ra nước ngoài dưới hình thức tham gia chương trình thưởng cổ phiếu phát hành ở nước ngoài. Trong khi đó, các tổ chức kinh tế có thể thực hiện hoạt động đầu tư gián tiếp ra nước ngoài đa dạng hơn như: trực tiếp mua, bán chứng khoán, các giấy tờ có giá khác ở nước ngoài, và đầu tư thông qua việc mua, bán chứng chỉ quỹ đầu tư chứng khoán ở nước ngoài, ủy thác đầu tư cho các định chế tài chính trung gian khác ở nước ngoài.

TÓM TẮT CHƯƠNG 11

Pháp luật Việt Nam điều chỉnh quan hệ đầu tư quốc tế là các nguyên tắc, quy phạm điều chỉnh hoạt động đầu tư nước ngoài tại Việt Nam và hoạt động đầu tư ra nước ngoài của doanh nghiệp Việt Nam. Tuy nhiên, khi nhắc đến pháp luật quốc gia điều chỉnh quan hệ đầu tư quốc tế thì chức năng điều chỉnh hoạt động đầu tư nước ngoài được chú trọng hơn. Nói cách khác, dù nhà đầu tư đồng thời chịu sự điều chỉnh của pháp luật nước đầu tư và nước tiếp nhận đầu tư, song pháp luật của nước đầu tư có tác động mạnh mẽ hơn cả đến hoạt động đầu tư kinh doanh của nhà đầu tư. Do đó, để thu hút đầu tư nước ngoài, thì việc xây dựng pháp luật về đầu tư rõ ràng, minh bạch, đảm bảo sự bình đẳng là yêu cầu tất yếu đối với Việt Nam.

Theo pháp luật Việt Nam, nhà đầu tư nước ngoài đầu tư vào Việt Nam và nhà đầu tư Việt Nam đầu tư ra nước ngoài đều được khuyến khích và tạo điều kiện ưu đãi, hỗ trợ nhất định. Nhà đầu tư nước ngoài và nhà đầu tư trong nước cũng được đối xử bình đẳng khi tiếp cận những biện pháp bảo đảm đầu tư, ưu đãi đầu tư, hỗ trợ đầu tư cũng như tất cả các biện pháp khác tác động hoặc liên quan đến hoạt động đầu tư kinh doanh. Trên nguyên tắc thực hiện tự do hoá thương mại trong dịch chuyển vốn quốc tế, pháp luật về đầu tư quốc tế của Việt Nam đã có những điều chỉnh, thay đổi, bổ sung theo hướng rõ ràng, minh bạch, giảm bớt các thủ tục hành chính và tăng cơ hội tiếp cận thị trường cho nhiều nhà đầu tư hơn. Nhìn chung, các quy định của pháp luật Việt Nam điều chỉnh quan hệ đầu tư quốc tế đã có sự tương thích với các điều ước quốc tế về đầu tư cũng như các điều ước khác mà Việt Nam là thành viên.

CÂU HỎI / BÀI TẬP

1. So sánh những quy định về hoạt động đầu tư của nhà đầu tư nước ngoài và tổ chức kinh tế có vốn đầu tư nước ngoài theo pháp luật Việt Nam.
2. Nhà đầu tư nước ngoài muốn đầu tư kinh doanh ở Việt Nam có thể thực hiện thông qua những hình thức nào? Theo anh (chị), hình thức đầu tư kinh doanh nào là phù hợp nhất trong điều kiện kinh tế - xã hội của Việt Nam?
3. Nhà đầu tư nước ngoài và tổ chức kinh tế có vốn đầu tư nước ngoài được phép đầu tư kinh doanh vào các ngành nghề nào? Trình bày quan điểm cá nhân về tác động thu hút đầu tư của Danh mục những ngành nghề kinh doanh có điều kiện.
4. Nhà đầu tư nước ngoài và tổ chức kinh tế có vốn đầu tư nước ngoài được ưu đãi đầu tư trong những lĩnh vực nào?
5. Tại sao nhà đầu tư nước ngoài và tổ chức kinh tế có vốn đầu tư nước ngoài được ưu đãi đầu tư khi đầu tư vào những địa bàn có điều kiện kinh tế - xã hội khó khăn hoặc đặc biệt khó khăn?
6. Nhà đầu tư nước ngoài phải thực hiện những thủ tục gì khi tiến hành đầu tư kinh doanh tại Việt Nam?
7. Thủ tục quyết định chủ trương đầu tư và Giấy chứng nhận đăng ký đầu tư áp dụng đối với những dự án đầu tư nước ngoài nào?
8. Thủ tục cấp Giấy chứng nhận đăng ký đầu tư áp dụng đối với dự án đầu tư nào?
9. Thủ tục cấp Giấy đăng ký kinh doanh áp dụng đối với những hoạt động đầu tư kinh doanh nào?
10. Các biện pháp bảo đảm đầu tư nào được Nhà nước Việt Nam áp dụng đối với nhà đầu tư?
11. Các biện pháp ưu đãi đầu tư nào được Nhà nước Việt Nam áp dụng đối với nhà đầu tư?
12. Nhà đầu tư Việt Nam phải thực hiện những thủ tục gì để đầu tư ra nước ngoài?
13. Những dự án đầu tư nào thuộc diện quyết định chủ trương đầu tư ra nước ngoài?
14. Nhà đầu tư Việt Nam có được quyền tự do định đoạt lợi nhuận có được từ hoạt động đầu tư nước ngoài hay không? Vì sao?
15. Nhà đầu tư Việt Nam đầu tư ra nước ngoài chịu sự điều chỉnh của những nguồn luật nào?

TÀI LIỆU CẦN ĐỌC

1. Trường Đại học Luật Hà Nội, *Giáo trình Luật đầu tư* (2009), Nxb. Công an nhân dân, Hà Nội;
2. Lê Hữu Nghĩa, Lê Văn Chiến, Nguyễn Viết Thông, *Tác động của đầu tư trực tiếp nước ngoài đến năng suất lao động và trình độ công nghệ của Việt Nam* (2014), Nxb. Chính trị quốc gia - Sự thật, Hà Nội;
3. Nguyễn Thị Dung, 'Thực thi quy định về ngành nghề cấm kinh doanh và ngành nghề kinh doanh có điều kiện theo Luật đầu tư năm 2014' (tháng 01/2016), *Tạp chí Luật học*, Trường Đại học Luật Hà Nội.

Websites:

1. UNCTAD, http://investmentpolicyhub.unctad.org/
2. http://tapchitaichinh.vn/
3. http://vbpl.vn/
4. https://www.italaw.com/cases/155

CHƯƠNG 12. ISDS CỦA VIỆT NAM

CHƯƠNG 12

GIẢI QUYẾT TRANH CHẤP ĐẦU TƯ QUỐC TẾ (ISDS) CỦA VIỆT NAM

Mục đích học
Chương 12

- Trình bày quy chế phối hợp, các cơ quan tham gia trong giải quyết tranh chấp đầu tư quốc tế của Việt Nam;
- Giới thiệu thực trạng xử lý tranh chấp của các cơ quan nhà nước Việt Nam;
- Thảo luận thực tiễn ISDS tại Việt Nam.

Tranh chấp đầu tư quốc tế là tranh chấp giữa *nhà đầu tư nước ngoài* và *Chính phủ nước tiếp nhận đầu tư* liên quan đến *khoản đầu tư* của nhà đầu tư trên lãnh thổ của nước tiếp nhận đầu tư, và tranh chấp phát sinh từ sự vi phạm *pháp luật trong nước của nước tiếp nhận đầu tư, IIA, và HĐ đầu tư QT*. Các sự kiện chủ yếu dẫn đến tranh chấp đầu tư thường là việc Chính phủ nước tiếp nhận đầu tư tiến hành việc thu hồi Giấy chứng nhận đăng ký đầu tư, Giấy chứng nhận đăng ký kinh doanh; điều chỉnh/không điều chỉnh Giấy chứng nhận đăng ký đầu tư, Giấy chứng nhận đăng ký kinh doanh; thu hồi đất; áp thuế đối với chuyển nhượng vốn, …

Từ năm 2010, số lượng các vụ tranh chấp giữa nhà đầu tư nước ngoài và các cơ quan nhà nước ở Việt Nam tăng đáng kể. Đến thời điểm cuối năm 2017, Chính phủ Việt Nam đã và đang tham gia khoảng 10 vụ ISDS,[1] trong đó có 5 vụ đã được công bố trên website của UNCITRAL, và Chính phủ Việt Nam đã thắng kiện 3 vụ, đạt được thỏa thuận giải quyết tranh chấp 1 vụ.[2]

Mục 1. QUY TRÌNH ĐIỀU PHỐI HOẠT ĐỘNG ISDS CỦA VIỆT NAM

Mục 1 này sẽ giới thiệu 3 nội dung sau đây:

Thứ nhất: Quy chế phối hợp trong giải quyết tranh chấp đầu tư quốc tế của Việt Nam (Quy chế 04) (1);

Thứ hai: Các cơ quan tham gia ISDS theo Quy chế 04 (2);

Thứ ba: Quy trình phối hợp ISDS theo Quy chế 04 (3).

1. Quy chế phối hợp trong giải quyết tranh chấp đầu tư quốc tế

'Quy chế phối hợp trong giải quyết tranh chấp đầu tư quốc tế' ban hành kèm theo Quyết định số 04/2014/QĐ-TTg của Thủ tướng Chính phủ ngày 14/01/2014, có hiệu lực từ ngày 03/3/2014 (sau đây gọi là Quy chế 04), có hai nội dung chủ yếu sau đây:

Thứ nhất: Xác định chức năng, nhiệm vụ, quyền hạn của các cơ quan nhà nước tham gia vào việc giải quyết tranh chấp;

Thứ hai: Quy định thủ tục, trình tự, các bước tiến hành trong việc

[1] Luật sư Đinh Ánh Tuyết, 'Phòng ngừa tranh chấp đầu tư ở Việt Nam', Tài liệu Hội thảo *Xây dựng chiến lược phòng ngừa tranh chấp đầu tư cho Việt Nam* do Dự án EU-MUTRAP phối hợp với Bộ Kế hoạch và Đầu tư tổ chức, Hà Nội, ngày 24/11/2017.

[2] UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

phối hợp và tham gia giải quyết tranh chấp giữa nhà nước, cơ quan nhà nước và nhà đầu tư nước ngoài tại cơ quan tài phán quốc tế.

2. Các cơ quan tham gia ISDS theo Quy chế 04

Có ba cơ quan tham gia ISDS, bao gồm:

- Cơ quan chủ trì (A);
- Cơ quan đại diện pháp lý cho Nhà nước (B);
- Cơ quan, tổ chức, cá nhân liên quan phối hợp (C).

A. *Cơ quan chủ trì*

Cơ quan chủ trì bao gồm 5 loại cơ quan sau đây:

Thứ nhất: Cơ quan bị kiện. *Thí dụ*: Uỷ ban nhân dân tỉnh Bình Thuận trong Vụ *McKenzie v. Viet Nam* (còn gọi là Vụ *South Fork*), 2010.[3]

Thứ hai: Bộ Tư pháp. Bộ Tư pháp là cơ quan chủ trì trong trường hợp cơ sở pháp lý của việc khởi kiện là BIT, trong đó quy định giải quyết tranh chấp đầu tư tại trọng tài hoặc cơ quan tài phán nước ngoài.

Thứ ba: Bộ Tài chính. Bộ Tài chính là cơ quan chủ trì trong trường hợp vụ kiện liên quan đến các khoản vay, khoản nợ của Chính phủ hoặc được Chính phủ bảo lãnh, trái phiếu, …

Thứ tư: Cơ quan đàm phán/đại diện ký IIAs. *Thí dụ*: Bộ Kế hoạch và Đầu tư.

Thứ năm: Cơ quan khác theo quyết định của Thủ tướng.

Trong một số tình huống, *thí dụ*: tranh chấp trong đó cơ quan bị kiện là cơ quan quản lý nhà nước ở địa phương, có liên quan đến BIT và khoản vay của Chính phủ, có thể có nhiều cơ quan đồng thời là cơ quan chủ trì, như: Uỷ ban nhân dân tỉnh, Bộ Tư pháp, Bộ Tài chính, Bộ Kế hoạch và Đầu tư, và các cơ quan khác.

[3] Bộ Tư pháp, 'Thông cáo Báo chí v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

B. *Cơ quan đại diện pháp lý cho Nhà nước*

Theo Quy chế 04, Bộ Tư pháp được trao trách nhiệm làm Cơ quan đại diện pháp lý cho Nhà nước Việt Nam trong các vụ kiện ISDS.

C. *Cơ quan, tổ chức, cá nhân liên quan phối hợp*

Loại cơ quan phối hợp này bao gồm: cơ quan nhà nước, tổ chức, cá nhân có liên quan tới ISDS và được Cơ quan chủ trì mời hoặc yêu cầu tham gia giải quyết vụ việc ISDS cụ thể. Trên thực tế, tổ chức, cá nhân được mời tham gia ISDS thường là các luật sư, các chuyên gia pháp lý bộ, ngành, các nhà khoa học có năng lực và kinh nghiệm trong giải quyết tranh chấp đầu tư và thương mại quốc tế. *Thí dụ*: Văn phòng luật sư IDVN Lawyers (của Việt Nam) được Bộ Tư pháp mời tham gia một số vụ ISDS trong đó Chính phủ Việt Nam là bị đơn.

3. Quy trình phối hợp ISDS theo Quy chế 04

Quy trình phối hợp ISDS gồm ba giai đoạn:

- Tiền tranh chấp (A)
- Giải quyết tranh chấp (B)
- Hậu tranh chấp (C)

A. *Tiền tranh chấp*

Giai đoạn tiền tranh chấp bao gồm hai quy trình:

- Giải quyết khiếu nại và tham vấn của nhà đầu tư nước ngoài *(1);*
- Đàm phán/Thương lượng *(2).*

1. Giải quyết khiếu nại và tham vấn của nhà đầu tư nước ngoài

Theo Điều 9 Quy chế 04, cơ quan có trách nhiệm giải quyết khiếu nại đối với vụ việc là cơ quan chủ trì xử lý vụ việc đó trong giai đoạn tiền tranh chấp.

Điều 10 Quy chế 04 quy định theo đó cơ quan đại diện pháp lý của Chính phủ (Bộ Tư pháp) có nhiệm vụ thường xuyên theo dõi diễn biến của quá trình giải quyết khiếu nại. Trong trường hợp cơ quan giải quyết khiếu nại xây dựng phương án hòa giải với nhà đầu tư nước ngoài,

thì Bộ Tư pháp có ý kiến đối với phương án này trước khi trình cơ quan có thẩm quyền phê duyệt.

2. Đàm phán/Thương lượng

Theo các IIA phổ biến, khi xuất hiện bất đồng giữa nhà đầu tư nước ngoài với Chính phủ Việt Nam, đàm phán/thương lượng là công việc cần thực hiện đầu tiên trong một khoảng thời gian 3-6 tháng. Qúa thời hạn này mà đàm phán/thương lượng không đạt kết quả, thì các bên có thể đưa tranh chấp ra giải quyết tại các cơ quan tài phán, theo quy định của pháp luật Việt Nam và điều ước quốc tế mà các bên tham gia.

Có 5 bước phối hợp đàm phán/thương lượng:

Bước 1: Phân tích, đánh giá mâu thuẫn, bất đồng dựa trên các quy định của pháp luật, cam kết quốc tế và các tình tiết thực tế thực hiện và quản lý khoản đầu tư;

Bước 2: Xây dựng phương án đàm phán/thương lượng;

Bước 3: Xin ý kiến các cơ quan, tổ chức liên quan và trình phê duyệt phương án đàm phán/thương lượng;

Bước 4: Tiến hành đàm phán/thương lượng với sự tham gia phối hợp của các cơ quan, tổ chức liên quan;

Bước 5: Cơ quan chủ trì phối hợp với cơ quan đại diện pháp lý của Chính phủ (Bộ Tư pháp) giám sát việc thực hiện kết quả đàm phán/thương lượng.

B. *Giải quyết tranh chấp*

Có ba cách thức để giải quyết tranh chấp ISDS:

- Hòa giải *(1);*
- Giải quyết tranh chấp tại cơ quan tài phán trong nước *(2);*
- Giải quyết tranh chấp tại trọng tài quốc tế hoặc cơ quan tài phán nước ngoài có thẩm quyền *(3).*

1. Hòa giải

Pháp luật Việt Nam có quy định về hòa giải cơ sở (trong lĩnh vực dân sự) và hòa giải thương mại (tại Nghị định số 22/2017/NĐ-CP về hòa giải thương mại).

Trong lĩnh vực ISDS, việc phối hợp hòa giải tuân theo 6 bước sau:

Bước 1: Phân tích, đánh giá tranh chấp dựa trên các quy định của pháp luật, cam kết quốc tế, bao gồm cả việc xem xét kết quả đàm phán/thương lượng không thành;

Bước 2: Xây dựng phương án hòa giải;

Bước 3: Xin ý kiến các cơ quan, tổ chức liên quan và trình phê duyệt phương án hòa giải;

Bước 4: Chọn hòa giải viên và quy tắc hòa giải;

Bước 5: Tiến hành hòa giải với sự tham gia phối hợp của các cơ quan, tổ chức liên quan theo quy tắc hòa giải đã lựa chọn;

Bước 6: Cơ quan chủ trì phối hợp với cơ quan đại diện pháp lý của Chính phủ (Bộ Tư pháp) giám sát việc thực hiện thỏa thuận hòa giải thành.

2. Giải quyết tranh chấp tại cơ quan tài phán trong nước

Cơ quan tài phán trong nước được hiểu là các tòa án Việt Nam, trọng tài Việt Nam (*thí dụ*: Trung tâm trọng tài quốc tế Việt Nam - VIAC), cơ quan hành chính Việt Nam. Việc giải quyết tranh chấp tuân theo pháp luật tố tụng trong nước của Việt Nam.

Khoản 4 Điều 14 Luật đầu tư năm 2014 quy định:

> Tranh chấp giữa nhà đầu tư nước ngoài với cơ quan nhà nước có thẩm quyền liên quan đến hoạt động đầu tư kinh doanh trên lãnh thổ Việt Nam được giải quyết thông qua trọng tài Việt Nam hoặc tòa án Việt Nam, trừ trường hợp có thỏa thuận khác theo hợp đồng hoặc điều ước quốc tế mà CHXHCN Việt Nam là thành viên có quy định khác.

Tuy nhiên, điều đáng lưu ý là tòa án Việt Nam không thể xét xử các vụ việc hành chính liên quan đến an ninh quốc gia và quan hệ đối ngoại. Vì vậy, trong trường hợp nhà đầu tư nước ngoài cho rằng quyền và lợi ích chính đáng của mình bị vi phạm bởi một quyết định hành chính của cơ quan có thẩm quyền, thì cũng không hy vọng tìm được giải pháp thông qua con đường tài phán hành chính.

3. Giải quyết tranh chấp tại trọng tài quốc tế hoặc cơ quan tài phán nước ngoài có thẩm quyền

Hầu hết các IIA mà Việt Nam tham gia đều quy định cơ quan giải quyết tranh chấp là trọng tài quốc tế. Trọng tài quốc tế có ba hình thức như sau:

Thứ nhất: Trọng tài quy chế (hay trọng tài thiết chế) được thành lập theo quy chế và được giám sát bởi các trung tâm trọng tài quốc tế, như: ICSID, PCA, ICC.

Thứ hai: Trọng tài vụ việc (trọng tài *ad hoc*) được thành lập theo Quy tắc trọng tài quốc tế nào đó, *thí dụ*: UNCITRAL.

Thứ ba: Cơ chế trọng tài đặc biệt (*thí dụ*: cơ chế trọng tài theo quy định của Hiệp định EVFTA).

Theo Quy chế 04 và các quy tắc tố tụng trọng tài quốc tế, việc giải quyết tranh chấp tại trọng tài quốc tế hoặc cơ quan tài phán nước ngoài có thẩm quyền có thể chia thành 7 bước phối hợp như sau:

Bước 1: Nhận và trả lời thông báo trọng tài.

Để thực hiện việc này, các cơ quan phía Việt Nam phải làm được những việc sau đây:

- Xây dựng chiến lược giải quyết vụ kiện;
- Xây dựng, thực hiện kế hoạch giải quyết vụ kiện;
- Thuê luật sư, chuyên gia kỹ thuật và mời nhân chứng.

Bước 2: Thành lập Hội đồng trọng tài;

Bước 3: Hội đồng trọng tài và các bên thống nhất về quy tắc tố tụng trọng tài;

Bước 4: Xem xét vấn đề thẩm quyền xét xử của hội đồng trọng tài;

Bước 5: Nộp bản Tự bảo vệ (SoD) của Chính phủ Việt Nam và các tài liệu có liên quan cho hội đồng trọng tài;

Bước 6: Hội đồng trọng tài xét xử (Hearing);

Bước 7: Hội đồng trọng tài ra phán quyết.

C. *Hậu tranh chấp*

Giai đoạn hậu tranh chấp là giai đoạn các bên thi hành phán quyết của trọng tài quốc tế, nếu có, bằng một trong ba cách sau đây:

Thứ nhất: Yêu cầu sửa chữa, bổ sung phán quyết trọng tài; hoặc

Thứ hai: Thi hành thỏa thuận hòa giải thành (nếu có); hoặc

Thứ ba: Công nhận và thi hành phán quyết trọng tài tại Việt Nam hoặc nước ngoài.

Mục 2. THỰC TIỄN ISDS CỦA VIỆT NAM

Mục 2 này sẽ làm rõ 6 nội dung sau đây:

Thứ nhất: Nguyên nhân của bất đồng, mâu thuẫn giữa nhà đầu tư nước ngoài và Chính phủ (1);

Thứ hai: Cơ sở pháp lý khởi kiện tranh chấp đầu tư quốc tế (2);

Thứ ba: Các cách phản ứng của nhà đầu tư nước ngoài tại Việt Nam (3);

Thứ tư: Các nội dung khởi kiện phổ biến của nhà đầu tư nước ngoài (4);

Thứ năm: Thực trạng xử lý tranh chấp của các cơ quan nhà nước Việt Nam (5);

Thứ sáu: Các biện pháp phòng ngừa tranh chấp đầu tư quốc tế (6).

1. Nguyên nhân của bất đồng, mâu thuẫn giữa nhà đầu tư nước ngoài và Chính phủ

Các bất đồng, mâu thuẫn giữa nhà đầu tư nước ngoài và Chính phủ phát sinh từ nhiều nguyên nhân đa dạng, trong đó có cả nguyên nhân từ phía Chính phủ Việt Nam (A) và nguyên nhân từ phía nhà đầu tư nước ngoài (B).

A. *Nguyên nhân từ phía Chính phủ Việt Nam*

Chủ yếu có hai nguyên nhân sau đây từ phía Chính phủ:

Thứ nhất: Một số quy định pháp luật Việt Nam thiếu minh bạch, tạo thuận lợi cho sự nhũng nhiễu của cơ quan có thẩm quyền.

Thứ hai: Việc áp dụng pháp luật gây nhiều vướng mắc cho nhà đầu tư.

- Hoạt động quản lý nhà nước vẫn còn khá nhiều thủ tục hành chính bất hợp lý, gây khó khăn cho các nhà đầu tư.
- Thực tiễn thực hiện các quy định pháp luật của một số cơ quan nhà nước Việt Nam vẫn tạo sự bất bình đẳng cho các nhà đầu tư nước ngoài. *Thí dụ*: một số cơ quan nhà nước đối xử với nhà đầu tư nước ngoài kém ưu đãi hơn so với nhà đầu tư trong nước.
- Khi thực hiện các hoạt động quản lý nhà nước, một số cơ quan nhà nước vi phạm các cam kết quốc tế được ghi nhận trong các điều ước quốc tế, thường là các BTA và BIT (*thí dụ*: đối xử không thỏa đáng với nhà đầu tư khi thay đổi chính sách, pháp luật); một số cơ quan nhà nước không thực hiện đúng cam kết tại Giấy chứng nhận đăng ký đầu tư hoặc HĐ đầu tư QT.

B. *Nguyên nhân từ phía nhà đầu tư nước ngoài*

Chủ yếu có hai nguyên nhân sau đây từ phía nhà đầu tư nước ngoài:

Thứ nhất: Một số nhà đầu tư nước ngoài thiếu trung thực, thiếu thiện chí khi thực hiện các thủ tục đầu tư tại Việt Nam;

Thứ hai: Một số nhà đầu tư nước ngoài thiếu hiểu biết pháp luật, thậm chí vi phạm pháp luật Việt Nam.

Thí dụ: Trong Vụ *McKenzie v. Viet Nam* (còn gọi là Vụ *South Fork*), 2010,[4] Hội đồng trọng tài PCA (Tòa trọng tài thường trực) đã bác đơn kiện của nguyên đơn, vì nguyên đơn đã thiếu trung thực, thiếu thiện chí ngay từ khi làm thủ tục xin phép đầu tư tại Việt Nam, và khoản đầu tư của nguyên đơn không được bảo hộ theo BTA Việt Nam - Hoa Kỳ. Trong một số trường hợp khác, nhà đầu tư thực hiện hành vi khiếu nại không tuân theo quy trình, thủ tục nào, như: gửi đơn 'kêu cứu', đơn 'kêu cứu khẩn cấp' tới rất nhiều cơ quan khác nhau (Thủ tướng, Chủ tịch nước, …).[5]

[4] Bộ Tư pháp, 'Thông cáo Báo chí v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

2. Cơ sở pháp lý khởi kiện tranh chấp đầu tư quốc tế

Việc khởi kiện tranh chấp đầu tư quốc tế chủ yếu dựa trên ba căn cứ sau đây:

Thứ nhất: Pháp luật trong nước (A);

Thứ hai: Các điều ước quốc tế trong đó Việt Nam là thành viên (B);

Thứ ba: Các hợp đồng đầu tư quốc tế mà Chính phủ/cơ quan nhà nước là một bên (C).

A. *Pháp luật trong nước*

Theo Luật đầu tư năm 2014, Nghị định số 15/2015/NĐ-CP ngày 14/02/2015 về đầu tư theo hình thức PPP và các văn bản pháp luật có liên quan, Việt Nam đã đưa ra những biện pháp bảo đảm và ưu đãi đầu tư, bao gồm:

Thứ nhất: Nhà nước bảo đảm quyền sở hữu tài sản, bảo đảm hoạt động đầu tư kinh doanh, bảo đảm chuyển tài sản của nhà đầu tư nước ngoài ra nước ngoài, bảo lãnh của Chính phủ đối với một số dự án quan trọng, bảo đảm đầu tư kinh doanh trong trường hợp thay đổi pháp luật.

Thứ hai: Nhà nước cam kết ưu đãi thuế thu nhập doanh nghiệp, thuế xuất nhập khẩu, tiền thuê đất, thuê quyền sử dụng đất, các ưu đãi về thuế khác theo quy định của pháp luật.

Thứ ba: Nhà nước quy định việc hỗ trợ nhà đầu tư liên quan đến phát triển cơ sở hạ tầng trong và ngoài hàng rào dự án; đào tạo, phát triển nguồn nhân lực; tín dụng; tiếp cận mặt bằng sản xuất, kinh doanh; hỗ trợ di dời cơ sở sản xuất ra khỏi nội thành, nội thị; khoa học kỹ thuật, chuyển giao công nghệ; phát triển thị trường, cung cấp thông tin, nghiên cứu và phát triển.

Thứ tư: Nhà nước bảo đảm về cân đối ngoại tệ cho nhà đầu tư

[5] Luật sư Đinh Ánh Tuyết, 'Phòng ngừa tranh chấp đầu tư ở Việt Nam', Tài liệu Hội thảo *Xây dựng chiến lược phòng ngừa tranh chấp đầu tư cho Việt Nam* do Dự án EU-MUTRAP phối hợp với Bộ Kế hoạch và Đầu tư tổ chức, Hà Nội, ngày 24/11/2017.

nước ngoài; cung cấp dịch vụ công cộng.

Trong trường hợp nhà đầu tư nước ngoài cho rằng Chính phủ Việt Nam đã không thực hiện được những biện pháp bảo đảm và ưu đãi đầu tư nêu trên, thì họ có quyền khởi kiện chống lại Chính phủ Việt Nam.

B. *Các điều ước quốc tế trong đó Việt Nam là thành viên*

Bên nguyên đơn có thể dựa trên các căn cứ sau đây để khởi kiện Chính phủ:

1. Hiệp định đầu tư song phương (BIT)

Việt Nam đã ký hơn 60 BIT, trong đó hầu hết quy định về ISDS tại một hoặc một số điều khoản, hoặc có phụ lục mô tả về quy trình ISDS. Trên thực tế, đã có một số vụ kiện của nhà đầu tư nước ngoài dựa trên cơ sở pháp lý này. *Thí dụ*: Vụ Trịnh Vĩnh Bình 2 (*Trinh v. Viet Nam*), 2014[6] và Vụ Trịnh Vĩnh Bình 1 (*Trinh and Binh Chau v. Viet Nam*), 2004[7] dựa trên cơ sở BIT Việt Nam - Hà Lan năm 1994; Vụ *RECOFI v. Viet Nam*, 2013[8] và Vụ *Dialasie v. Viet Nam*, 2011[9] dựa trên cơ sở BIT Việt Nam - Pháp năm 1992.[10]

2. Chương Đầu tư trong BTA, FTA.

Thí dụ:

- Chương IV (Phát triển quan hệ đầu tư) của VN-US BTA. Trong Vụ *McKenzie v. Viet Nam,* 2010 (còn gọi là Vụ *South Fork*),[11] nhà đầu tư nước ngoài đã dựa trên cơ sở pháp lý BTA Việt Nam - Hoa Kỳ năm 2000 để khởi kiện Chính phủ Việt Nam.

[6] https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ; http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam

[7] Italaw's case, http://www.italaw.com/cases/155

[8] Italaw's case, http://www.italaw.com/cases/2404.

[9] http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ; http://www.iareporter.com/downloads/20150304

[10] UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

[11] Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

- Chương 11 Phần B (Đầu tư) của FTA ASEAN-Australia-New Zealand.
- Hiệp định đối tác kinh tế toàn diện Việt Nam - Nhật Bản (VJEPA) năm 2008.
- Hiệp định ACIA năm 2009; Hiệp định đầu tư ASEAN và một số nước khác (Trung Quốc, Hàn Quốc, Ấn Độ, …)

C. *Các hợp đồng đầu tư quốc tế mà Chính phủ/cơ quan nhà nước là một bên*

Thí dụ: Thỏa thuận của Chính phủ Việt Nam về vay tín dụng ưu đãi với bên cho vay vốn nước ngoài; thỏa thuận bảo lãnh của Chính phủ cho các dự án đầu tư theo hình thức PPP và một số dự án đầu tư khác; các HĐ vay thương mại của doanh nghiệp được Chính phủ bảo lãnh; các HĐ xây dựng cơ sở hạ tầng (như HĐ BTO, HĐ BOT, HĐ PPP, …); các HĐ xây dựng khu đô thị, nhà ở, …

Theo các thỏa thuận bảo lãnh do các bộ, ngành thay mặt Chính phủ Việt Nam ký, nếu doanh nghiệp không trả được nợ thì Chính phủ phải trả nợ thay. Nếu Chính phủ cũng không trả nợ thì chủ nợ sẽ khởi kiện và xảy ra tranh chấp đầu tư quốc tế. Tranh chấp sẽ không chỉ liên quan trực tiếp đến khoản nợ, mà còn liên quan đến các cam kết về bảo đảm nghĩa vụ thực hiện và các vấn đề phức tạp khác.

3. Các cách phản ứng của nhà đầu tư nước ngoài tại Việt Nam

Khi xảy ra các bất đồng, mâu thuẫn giữa nhà đầu tư nước ngoài và Chính phủ, các nhà đầu tư nước ngoài thường có bốn cách phản ứng như sau:

Thứ nhất: Tìm cách can thiệp ngoại giao để tác động đến Chính phủ Việt Nam (A)

Thứ hai: Khiếu nại theo nhiều hình thức (B);

Thứ ba: Khởi kiện quốc tế (C);

Thứ tư: Cách thức khác (D).

A. *Tìm cách can thiệp ngoại giao để tác động đến Chính phủ Việt Nam*

Thí dụ: Đại sứ quán (của nước mà nhà đầu tư mang quốc tịch) gửi công hàm đến Chính phủ Việt Nam; cơ quan nhà nước (của nước mà nhà

đầu tư mang quốc tịch) gửi thư chính thức đến các cơ quan nhà nước của Việt Nam; trao đổi của lãnh đạo cấp cao trong các cuộc thăm viếng chính thức, hội đàm cấp cao.

B. *Phản ánh, khiếu nại theo nhiều hình thức*

Thí dụ: Phản ánh qua các hiệp hội doanh nghiệp (AmCham, EuroCham, …); qua các cuộc đối thoại giữa lãnh đạo nhà nước với doanh nghiệp; khiếu nại tới cơ quan quản lý nhà nước có thẩm quyền xử lý vụ việc; khiếu nại tới cơ quan cấp trên; khiếu nại tới lãnh đạo Đảng, lãnh đạo Nhà nước.

C. *Khởi kiện quốc tế*

Theo thống kê của UNCTAD, từ năm 2004 đến năm 2014, Việt Nam bị nhà đầu tư nước ngoài khởi kiện 5 vụ, trong đó 3 vụ Việt Nam thắng kiện và 1 vụ đạt được thỏa thuận giải quyết tranh chấp.[12] Cụ thể:

- 2014, Vụ Trịnh Vĩnh Bình 2 (*Trinh v. Viet Nam*). Nhà đầu tư: Hà Lan. Vụ kiện dựa trên cơ sở BIT Việt Nam - Hà Lan năm 1994. Kết quả: đang giải quyết.[13]
- 2013, Vụ *RECOFI v. Viet Nam*. Nhà đầu tư: Pháp. Vụ kiện liên quan đến việc yêu cầu thanh toán các khoản chưa thanh toán liên quan đến việc RECOFI tham gia vào chương trình trợ giúp lương thực của Nhà nước từ năm 1987, khi Việt Nam trong thời kỳ thiếu lương thực. Vụ kiện dựa trên cơ sở BIT Việt Nam - Pháp năm 1992. Vụ kiện được giải quyết tại PCA thành lập theo Quy tắc tố tụng trọng tài UNCITRAL, với yêu cầu đòi bồi thường của nguyên đơn là 66 triệu USD. Kết quả: Chính phủ Việt Nam thắng kiện bằng phán quyết trọng tài ngày 28/9/2015.[14]
- 2011, Vụ *Dialasie v. Viet Nam*. Nhà đầu tư: Pháp. Vụ kiện liên quan đến việc Chính phủ đóng cửa phòng khám thận tại Thành phố Hồ Chí Minh thuộc sở hữu của chi nhánh địa phương của nhà đầu tư nước ngoài. Vụ kiện dựa trên cơ sở BIT Việt Nam - Pháp năm 1992. Vụ kiện được giải quyết tại PCA thành lập theo Quy tắc tố tụng trọng tài UNCITRAL, với yêu cầu đòi bồi thường của nguyên đơn là 47 triệu USD. Kết quả: Chính phủ Việt Nam thắng kiện bằng phán quyết trọng tài ngày 17/11/2014.[15]
- 2010, Vụ *McKenzie v. Viet Nam* (còn gọi là Vụ *South Fork*).[16] Nhà đầu tư: Hoa Kỳ. Vụ kiện liên quan đến việc Chính phủ không chuyển một số quyền sử dụng đất cho các công ty con tại địa phương của nhà đầu tư nước ngoài để phát triển một khu resort ven biển ở tỉnh Bình Thuận. Trong vụ này, nhà đầu tư nước ngoài đã sử dụng BTA Việt Nam - Hoa Kỳ năm 2000 để khởi kiện Chính phủ Việt Nam.
- Năm 2010, ông Michael McKenzie, nhà đầu tư Hoa Kỳ, cho rằng Chính phủ Việt Nam, trực tiếp là UBND tỉnh Bình Thuận, đã vi phạm cam kết liên quan đến tước đoạt quyền sở hữu, các tiêu chuẩn FET và minh bạch đối với dự án xây dựng khu du lịch nghỉ dưỡng South Fork tại tỉnh Bình Thuận. Ông đã sử dụng quyền khởi kiện Chính phủ nước tiếp nhận đầu tư ra PCA thành lập theo Quy tắc tố tụng trọng tài UNCITRAL theo quy định của BTA năm 2000, với yêu cầu đòi bồi thường của nguyên đơn là 3,7 tỉ USD. Ngày 11/12/2013, Hội đồng trọng tài đã bác đơn kiện của nguyên đơn, vì nguyên đơn đã thiếu trung thực, thiếu thiện chí ngay từ khi làm thủ tục xin phép đầu tư tại Việt Nam, và khoản đầu tư của nguyên đơn không được bảo hộ theo BTA Việt Nam - Hoa Kỳ. Kết quả: Chính phủ Việt Nam thắng kiện.
- 2004, Vụ Trịnh Vĩnh Bình 1 (*Trinh and Binh Chau v. Viet Nam*). Nhà đầu tư: Hà Lan. Vụ kiện liên quan đến quyền sở hữu một nhà máy chế biến thực phẩm, một nhà máy dệt và các loại tài sản du lịch. Các khiếu kiện phát sinh từ việc tịch thu bất hợp pháp bất động sản và tài sản khác của nguyên đơn mà không bồi thường, bao gồm cả việc kết án hình sự ông Trịnh Vĩnh Bình, với yêu cầu đòi bồi thường của nguyên đơn là 100 triệu USD. Vụ kiện dựa trên cơ sở BIT Việt Nam - Hà Lan năm 1994; quy tắc trọng tài UNCITRAL;

[12] Xem chi tiết danh sách các vụ kiện trên website của UNCTAD tại http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2

[13] https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ; http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam

[14] Italaw's case, http://www.italaw.com/cases/2404.

[15] http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ; http://www.iareporter.com/downloads/20150304

[16] Bộ Tư pháp, 'Thông cáo Báo chí v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

tổ chức trọng tài: Phòng thương mại Stockholm (Stockholm Chamber of Commerce - SCC). Vụ này đã giải quyết xong bằng phán quyết trọng tài ngày 14/3/2007.[17]

D. *Cách thức khác: Thương lượng; hòa giải; tham vấn.*

Điều 14 Luật đầu tư năm 2014 quy định theo đó mọi tranh chấp liên quan đến hoạt động đầu tư kinh doanh ở Việt Nam phải được giải quyết trước hết thông qua thương lượng và hòa giải. Tương tự, Điều 63 Khoản 1 Nghị định số 15/2015/NĐ-CP về hình thức đầu tư PPP cũng quy định rằng mọi tranh chấp giữa cơ quan có thẩm quyền và nhà đầu tư phải được giải quyết thông qua thương lượng và hòa giải.

4. Các nội dung khởi kiện phổ biến của nhà đầu tư nước ngoài[18]

Thứ nhất: Tước quyền sở hữu; hoặc quốc hữu hóa tài sản đầu tư; thu hồi đất; ... *Thí dụ*: Vụ *McKenzie v. Viet Nam,* 2010 (còn gọi là Vụ *South Fork*);[19] Vụ Trịnh Vĩnh Bình 1 (*Trinh and Binh Chau v. Viet Nam*), 2004.[20]

Hầu hết các tranh chấp liên quan đến vấn đề giao đất và giải phóng mặt bằng. Chính quyền địa phương thường làm chậm tiến độ giải phóng mặt bằng, do đó không thể giao đất đúng hạn cho nhà đầu tư, để nhà đầu tư có thể tiến hành thực hiện dự án sau khi đã làm xong các thủ tục thuê đất.

Thứ hai: Vi phạm nguyên tắc FET và FPS. *Thí dụ*: Vụ *McKenzie v. Viet Nam,* 2010 (còn gọi là Vụ *South Fork*).[21]

[17] Italaw's case, http://www.italaw.com/cases/155

[18] Nguyễn Thị Chính, *Báo cáo nghiên cứu hướng dẫn việc phòng ngừa và giải quyết tranh chấp đầu tư quốc tế sử dụng cho cán bộ, công chức nhà nước ở Trung ương và địa phương*, Dự án USAID/GIG, Thanh Hóa, ngày 09/10/2015.

[19] Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

[20] Italaw's case, http://www.italaw.com/cases/155

[21] Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

Để thu hút FDI, nhiều địa phương đã 'hứa hẹn' 'trải thảm đỏ' đón các nhà đầu tư, trao cho họ những ưu đãi đầu tư cao hơn so với luật định. Tuy nhiên, trên thực tế, khi chính quyền địa phương không thể thực hiện được những lời hứa đó, thì hậu quả tất yếu là sẽ nhận được đơn khiếu nại hoặc khiếu kiện của các nhà đầu tư, vì chính quyền địa phương đã không thực hiện được 'mong ước chính đáng' của nhà đầu tư, và làm cho 'mong ước' đó bị lừa dối. Ngoài ra, trong một số trường hợp, cơ quan quản lý nhà nước áp dụng những biện pháp hành chính không đúng quy trình theo pháp luật đối với nhà đầu tư nước ngoài, gây ra cho họ những phản ứng tiêu cực.

Thứ ba: Các nội dung khởi kiện khác, như: phía Chính phủ Việt Nam vi phạm nguyên tắc MFN, nguyên tắc NT; không bồi thường những khoản thiệt hại theo cam kết tại điều ước quốc tế; vi phạm cam kết cho phép nhà đầu tư nước ngoài chuyển tự do các khoản đầu tư ra nước ngoài; từ chối công lý; Chính phủ không trả nợ đúng theo cam kết tại hợp đồng vay, hợp đồng bảo lãnh Chính phủ; …

5. Thực trạng xử lý tranh chấp của các cơ quan nhà nước Việt Nam

Thứ nhất: Các cơ quan nhà nước Việt Nam còn bị động, đối phó, chưa có chiến lược phòng ngừa và chủ động về ISDS;

Thứ hai: Chưa kịp đào tạo nguồn nhân sự chuyên trách về ISDS;

Thứ ba: Thiếu sự phối hợp giữa các cơ quan nhà nước có liên quan.

6. Các biện pháp phòng ngừa tranh chấp đầu tư quốc tế[22]

Để phòng ngừa tranh chấp đầu tư quốc tế, cần kết hợp các biện pháp phòng ngừa trước mắt (A) và các biện pháp phòng ngừa lâu dài (B).

A. *Các biện pháp phòng ngừa trước mắt*

Đây là các biện pháp nhằm ngăn chặn các bất đồng, mâu thuẫn phát triển thành tranh chấp đầu tư quốc tế.

Thứ nhất: Phát hiện sớm, xử lý thiện chí và xử lý sớm các bất đồng

[22] Bộ Tư pháp, *Bộ tài liệu chuyên sâu về giải quyết tranh chấp thương mại, đầu tư quốc tế cho cán bộ, công chức của ngành tư pháp, tòa án, kiểm sát và cán bộ pháp lý của các cơ quan nhà nước ở Trung ương*, Hà Nội, tháng 02/2013; Nguyễn Thị Chính, *Báo cáo nghiên cứu hướng dẫn việc phòng ngừa và giải quyết tranh chấp đầu tư quốc tế sử dụng cho cán bộ, công chức nhà nước ở Trung ương và địa phương*, Dự án USAID/GIG, Thanh Hóa, ngày 09/10/2015.

trước khi chúng có thể phát triển thành tranh chấp.

Thứ hai: Cố gắng giải quyết dứt điểm các bất đồng theo thủ tục pháp luật trong nước.

Các cơ quan quản lý nhà nước, các luật sư và chuyên gia pháp luật cần nắm vững pháp luật hiện hành liên quan đến đầu tư và phòng ngừa tranh chấp đầu tư quốc tế, chủ yếu là pháp luật về giải quyết khiếu nại, bất đồng của nhà đầu tư, như: Quy chế 04 về phối hợp trong giải quyết tranh chấp đầu tư quốc tế năm 2014; Luật khiếu nại năm 2011; Luật tố tụng hành chính năm 2015; Luật đầu tư năm 2014; Nghị định số 22/2017/NĐ-CP về hòa giải thương mại, ... Các thủ tục giải quyết khiếu nại, bất đồng của nhà đầu tư được thực hiện theo quy định của Luật khiếu nại năm 2011, Luật tố tụng hành chính 2015. Ngoài ra, cơ quan nhà nước có thẩm quyền cần cố gắng trực tiếp đối thoại, giải quyết mâu thuẫn khi nhận được thông tin và yêu cầu của nhà đầu tư.

Thứ ba: Chia sẻ kinh nghiệm về giải quyết bất đồng, mâu thuẫn giữa các cơ quan có liên quan.

Thứ tư: Ưu tiên biện pháp trung gian/hòa giải trong ISDS.

Theo các cam kết trong hầu hết các BIT và FTA mà Việt Nam tham gia (như EVFTA, BIT Việt Nam - Phần Lan, BIT Việt Nam - Singapore), thương lượng, hòa giải, tham vấn được quy định là thủ tục bắt buộc hoặc khuyến khích các bên thực hiện trước khi khởi kiện.[23] Tháng 4/2017, Chính phủ đã ban hành Nghị định số 22/2017/NĐ-CP về hòa giải thương mại. Trong trường hợp hòa giải không thành, các bên sẽ phải tham gia giải quyết tranh chấp tại trọng tài quốc tế với chi phí rất lớn cho cả nguyên đơn và bị đơn. Các bên sẽ phải trả phí luật sư, phí trọng tài, chi phí hành chính khác cho vụ kiện (như: chi phí cho chuyên gia, nhân chứng, chi phí cho phiên xét xử, …), chi phí cho nguồn nhân lực tham gia xử lý vụ kiện (chi phí ăn ở, đi lại ở nước ngoài cho những vụ kiện kéo dài nhiều năm). *Thí dụ*: nếu vụ tranh chấp được giải quyết theo cơ chế của ICSID, thì chi phí ước tính như sau:

- Phí đăng ký vụ kiện (trọng tài/hòa giải): bên yêu cầu vụ kiện phải nộp 25,000.00 USD (không hoàn lại).
- Phí đăng ký yêu cầu làm các thủ tục sau khi phán quyết đã ban hành (quyết định bổ sung, chỉnh sửa, giải thích, hủy, …): bên yêu cầu phải nộp 10,000.00 USD (không hoàn lại).
- Phí hành chính (thành lập hội đồng trọng tài, ban hòa giải, trọng tài *ad hoc*): đặt tiền gửi 32,000.00 USD.
- Phí đi họp, trong trường hợp các bên không họp ở trụ sở Washington: đặt tiền gửi 1,500.00 USD/ngày.
- Phí trả cho các dịch vụ khác (phiên dịch, photocopy): bên yêu cầu phải nộp theo mức tiền quy định của WB (phải đặt tiền gửi tương ứng với số tiền chi cho dịch vụ).
- Phí cử trọng tài viên: bên yêu cầu phải nộp 10,000.00 USD.
- Lưu ý: các bên tranh chấp không phải trả tiền thù lao và chi phí liên quan cho trọng tài viên/hòa giải viên trong những ngày đi họp và ngồi tại vụ kiện, mà ICSID phải trả (mức tiền 3,000.00 USD/ngày làm việc + các chi phí hợp lý khác, như tiền ăn, tiền ở, tiền đi lại theo quy định tài chính của ICSID).
- Phí luật sư rất cao (khoảng 10 triệu USD).

Với sự tốn kém về 'sức người sức của' nêu trên, việc phải theo đuổi một vụ kiện ISDS tại trọng tài quốc tế chỉ là giải pháp cuối cùng. Phương thức trung gian/hòa giải cần được ưu tiên. Ngoài ra, phải kiên trì chuẩn bị cho các biện pháp phòng ngừa lâu dài (được nêu dưới đây).

B. *Biện pháp phòng ngừa lâu dài*

Thứ nhất: Đào tạo và sử dụng hiệu quả nguồn nhân lực tham gia ISDS; Nâng cao kiến thức về cam kết quốc tế, năng lực thực thi pháp luật trong nước về đầu tư nước ngoài của các cơ quan quản lý nhà nước; Tăng cường phổ biến, hướng dẫn công chức nhà nước, doanh nghiệp thực hiện pháp luật về đầu tư quốc tế; Nâng cao chất lượng soạn thảo Giấy chứng nhận đăng ký đầu tư và HĐ đầu tư QT cho công chức nhà nước.

Thứ hai: Xây dựng được các cam kết quốc tế tốt về đầu tư với các đối tác.

Thứ ba: Xây dựng và thực thi pháp luật nhất quán, phù hợp với các cam kết quốc tế; Quy định hoặc có biện pháp ràng buộc trách nhiệm pháp lý của các cá nhân, cơ quan nhà nước ban hành, thực hiện các biện pháp trái với cam kết quốc tế về đầu tư.

Thứ tư: Giám sát chặt chẽ việc thực hiện dự án đầu tư của các nhà

[23] EVFTA, Chương 8 Phần 3 Tiểu mục 2 Điều 5 và Phụ lục 1.

đầu tư nước ngoài.

Thứ năm: Xác định và tăng cường quản lý nhà nước đối với các lĩnh vực 'nhạy cảm' dễ phát sinh tranh chấp với nhà đầu tư nước ngoài. *Thí dụ*:

- Việc nhà đầu tư nước ngoài thuê quyền sử dụng đất, thuê mua nhà, xưởng ở Việt Nam. Trong lĩnh vực này, các tranh chấp có thể phát sinh từ việc các dự án có vốn đầu tư nước ngoài đã được cấp đất, thuê nhà xưởng nhưng không triển khai dự án hoặc triển khai không đúng tiến độ, dẫn tới phải hủy bỏ, đình hoãn, hoặc rút giấy phép. Rút bài học kinh nghiệm từ Vụ *McKenzie v. Viet Nam,* 2010 (còn gọi là Vụ *South Fork*).[24]

- Các lĩnh vực đầu tư có nguồn vốn nước ngoài lớn như xây dựng cơ sở hạ tầng, xây dựng khu đô thị, nhà ở, … Các tranh chấp này thường nảy sinh từ tiến độ, chất lượng thực hiện các hạng mục công trình, thời hạn hoàn thành dự án cũng như thực hiện các điều khoản khác đã cam kết trong HĐ giữa cơ quan quản lý nhà nước với nhà đầu tư nước ngoài.

- Các lĩnh vực ưu đãi đầu tư mà Việt Nam có cam kết ưu đãi về thuế đối với nhà đầu tư nước ngoài. Các tranh chấp này thường phát sinh do việc thay đổi về chính sách thuế của Nhà nước đối với doanh nghiệp có vốn đầu tư nước ngoài.

Thứ sáu: Cơ quan quản lý nhà nước về đầu tư nước ngoài ở trung ương và địa phương thường xuyên duy trì kênh thông tin hai chiều với nhà đầu tư nước ngoài để phát hiện những vấn đề bất đồng tiềm tàng có thể làm phát sinh tranh chấp.

Thứ bảy: Tích cực và thiện chí trong giải quyết bất đồng, mâu thuẫn.

Thứ tám: Xây dựng cơ chế thương lượng, hòa giải hiệu quả.

Tháng 4/2017, Chính phủ đã ban hành Nghị định số 22/2017/NĐ-CP về hòa giải thương mại.

[24] Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. *Xem* văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

TÓM TẮT CHƯƠNG 12

Sau hơn 30 năm đổi mới, Việt Nam đã từng bước chấp nhận thực tiễn quốc tế về khuyến khích và bảo hộ đầu tư. Việt Nam trở thành thành viên của nhiều IIA, trong đó ghi nhận các nguyên tắc phổ biến của luật đầu tư quốc tế như MFN, NT, FET, FPS, … Điều đó cho thấy mong muốn của Việt Nam trong việc xây dựng một môi trường đầu tư hấp dẫn, một điểm đến tin cậy cho các nhà đầu tư nước ngoài, và sẽ tham gia tích cực vào mạng lưới sản xuất toàn cầu.

Việt Nam đã sẵn sàng chấp nhận tham gia giải quyết tranh chấp đầu tư quốc tế bằng cơ chế trọng tài quốc tế, sẵn sàng thực thi phán quyết trọng tài, với tư cách một đối tác bình đẳng trong sân chơi thương mại quốc tế.

CÂU HỎI / BÀI TẬP

1. Trình bày quy chế phối hợp, các cơ quan tham gia trong giải quyết tranh chấp đầu tư quốc tế của Việt Nam.
2. Thảo luận thực tiễn ISDS tại Việt Nam.
3. Thực trạng xử lý tranh chấp của các cơ quan nhà nước Việt Nam.

TÀI LIỆU CẦN ĐỌC

1. Bộ Tư pháp, Bộ tài liệu chuyên sâu về giải quyết tranh chấp thương mại, đầu tư quốc tế cho cán bộ, công chức của ngành tư pháp, tòa án, kiểm sát và cán bộ pháp lý của các cơ quan nhà nước ở Trung ương, Hà Nội, tháng 02/2013;
2. Nguyễn Thị Chính, Báo cáo nghiên cứu hướng dẫn việc phòng ngừa và giải quyết tranh chấp đầu tư quốc tế sử dụng cho cán bộ, công chức nhà nước ở Trung ương và địa phương, Dự án USAID/GIG, Thanh Hóa, ngày 09/10/2015.
3. Bộ Tư pháp, 'Thông cáo Báo chi v/v Trọng tài quốc tế bác bỏ toàn bộ yêu cầu khởi kiện của ông Michael McKenzie (công dân Hoa Kỳ) đối với Chính phủ Việt Nam về dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình Thuận', tr. 1. Xem văn bản đầy đủ tại: http://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/20/TCBC%20

v%E1%BB%A5%20ki%E1%BB%87n%20South%20Fork.doc, truy cập tháng 6/2017; Italaw's case, http://www.italaw.com/cases/2370

4. http://globalarbitrationreview.com/article/1147036/tribunal-hears-billion-dollar-claim-against-vietnam
5. http://globalarbitrationreview.com/news/article/32414/vietnam-faces-new-treaty-claim/ ;
6. http://www.iareporter.com/downloads/20150304
7. https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/ ;
8. Italaw's case, http://www.italaw.com/cases/155
9. Italaw's case, http://www.italaw.com/cases/2404.
10. Luật sư Đinh Ánh Tuyết, 'Phòng ngừa tranh chấp đầu tư ở Việt Nam', Tài liệu Hội thảo Xây dựng chiến lược phòng ngừa tranh chấp đầu tư cho Việt Nam do Dự án EU-MUTRAP phối hợp với Bộ Kế hoạch và Đầu tư tổ chức, Hà Nội, ngày 24/11/2017.
11. http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole

DANH MỤC TÀI LIỆU THAM KHẢO CHỦ YẾU

DANH MỤC TÀI LIỆU THAM KHẢO CHỦ YẾU

1. Julien Chaisse and Christian Bellak, 'Navigating the Expanding Universe of Investment Treaties - Creation and Use of Critical Index' (2015) 18(1) *Journal of International Economic Law* 79-115
2. Julien Chaisse, 'The Shifting Tectonics of International Investment Law - Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47(3) *George Washington International Law Review* 563-638
3. R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer 2005).
4. Theodore Moran, *Harnessing Foreign Direct Investment for Development* 113-141 (Center for Global Development 2006).
5. Peter Muchlinski, *Policy Issues*, in Oxford Handbook of International Investment Law 3, 31-37 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
6. Salacuse & Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L. J. 67, 111-115 (2005).
7. Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 Int'l Law. 875, 885-890 (1999).
8. Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2008).
9. Christopher F. Dugan, Don Wallace Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* (Oxford 2008).
10. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 818-833 (2005).
11. Mariel Dimsey, *The Resolution of International Investment Disputes* 5-33 (Eleven 2008).
12. Kenneth W. Hansen, 'PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure', in *Privatising Development: Transnational Law, Infrastructure and Human Rights* 75 (Michael B. Likosky ed., Martinus Nijhoff 2005)
13. Andrew Seck, *Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty & Its Implications for Mitigating Political Risk*, 110 inThe Energy Charter Treaty: An East-West Gateway for Investment & Trade (Thomas W. Wälde, ed. 1996).
14. Andrea K. Bjorklund, *Improving the International Investment Law and Policy Regime: Report of the Rapporteur*, in The Evolving International Investment Regime: Expectations, Realities, Options [excerpts re distinctions between types of industries and the protections they should engender] (José E. Alvarez, Karl P. Sauvant & Kamil G. Ahmed eds., Oxford, *forthcoming* 2010).
15. Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, Columbia FDI Perspectives (15 June 2009).
16. L.A. Ahee & Rory E. Walck, *ICSID Arbitration in 2009*, Transnat'l Dispute Management (Provisional Issue, January 2010).
17. Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in Appeals Mechanism in International Investment Disputes 231 (Karl P. Sauvant ed., Oxford 2008).
18. Sauvant, Karl P, *The Rise of TNCs from emerging markets: the issues,* in The Rise of Transnational Corporations from Emerging Markets: Threat or Opportunity? (Karl P. Sauvant et al. eds 2008).
19. Gus van Harten, *Investment Treaty Arbitration and Public Law* 175-184 (Oxford 2007).
20. Sarah Anderson, *Clash on Investment: Global Trade and an Opportunity for Civil Society* (Institute for Policy Studies, November 2009).
21. Emmanuel Gaillard, *Establishing Jurisdiction Through A Most-Favored-Nation Clause*, New York Law Journal (2 June 2005).
22. Ruth Teitelbaum, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 Journal of International Arbitration 225, 232-237 (2005).
23. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* at 1102.10-1102.58; 1103.6-1103.27 (Kluwer 2006; last updated 2009).

24. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2007).

25. Andrew Newcombe & Lluis Paradell, *The Law and Practice of Investment Treaties* (Kluwer 2008).

26. Susan D. Franck, *International Decisions*: *Occidental Exploration and Production Co. v. Ecuador*, 99 Am. J. Int'l L. 675 (2005).

27. Panel Discussion, *Is Discriminatory Intent Relevant?,* in Investment Treaty Arbitration and International Law 315 (T.J. Grierson Weiler ed., Juris 2008).

28. UNCTAD, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).

29. Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Provision in Investment Arbitration*, in Investment Treaty Law, Current Issues III, at 241 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

30. Stephan W. Schill, *The Multilateralization of International Investment Law* 121-196 (Cambridge 2009).

31. Peter Clark, *National Treatment under GATT and NAFTA: A Discussion Comment*, 1:3 Transnational Dispute Management (July 2004).

32. Andrea K. Bjorklund, *National Treatment*, in Standards of Treatment 29, 29-36 (August Reinisch ed., Oxford, 2008).

33. Susan D. Franck, *International Decisions*: Occidental Exploration and Production Co. v. Ecuador, 99 Am. J. Int'l L. 675 (2005).

34. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*" 39 The International Lawyer 87, 87-94; 100-06 (2005).

35. Schreuer, *Fair and Equitable Treatment*, BIICL, Investment Treaty Forum, 2:5 Transnational Dispute Management (November 2005).

36. Giuditta Cordero Moss, *Full Protection & Security*, in Standards of Investment Protection 131, 138-150 (August Reinisch ed., Oxford 2008).

37. Lucy Reed &Daina Bray, *Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?*, in Contemporary Issues in International Arbitration and Mediation 13 (Arthur Rovine ed., MartinusNijhoff 2008).

38. Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in Investment Treaty Law, Current Issues III, at 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

39. Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair & Equitable Treatment Standard*, 55 Int'l & Comp. L. Q. 527 (2006).

40. UNCTAD, *Fair & Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999).

41. Todd Grierson-Weiler& Ian A. Laird, *Standards Of Treatment*, in Oxford Handbook of International Investment Law 261 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

42. H.E. Zeitler, *The Guarantee of 'Full Protection and Security' in Investment Treaties Regarding Harm Caused by Private Actors*, 3 Stockholm International Arbitration Review 1 (2005).

43. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review - Foreign Investment L. J. 1 (2005).

44. Meg Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11 at 1110.8 - 1110.58 (Kluwer 2006; last updated 2009).

45. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review - Foreign Investment L. J. 1 (2005).

46. G.C. Christie, *What Constitutes A Taking of Property under International Law?* 38 BRIT. YB. INT'L L. 307 (1963).

47. Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. World Investment & Trade 717 (2007).

48. Anne K. Hoffmann, *Indirect Expropriation*, in Standards of Investment Protection 151 (August Reinisch ed., Oxford, 2008).

49. August Reinisch, *Expropriation*, in Oxford Handbook of International Investment Law 407 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

50. August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in Oxford Handbook of International Investment Law 694, 694-702 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

51. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,* 45 Va. J. Int'l L. 809, 820-25 (2005).

52. Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark*), in Pervasive Problems in International Arbitration 217-233 (Loukas A. Mistelis& Julian D.M. Lew eds., Kluwer 2006).

53. Emmanuel Gaillard, Vivendi *and Bilateral Investment Treaty Arbitration*, New York L.J. (Feb. 26, 2003).

54. Claudia T. Salomon, *Selecting An International Arbitrator: Five Factors to Consider*, 17(10) MEALEY'S International Arbitration Report 25-28 (Oct. 2002).

55. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(4) TDM (July 2008).

56. ICSID, *The ICSID Caseload - Statistics* (Issue 2010-2), pp. 8-17.

57. International Institute for Sustainable Development, *Private Rights/Public Problems* 15-20 (2001).

58. Ucheora Onwuamaegbu, *International Dispute Settlement Mechanisms - Choosing Between Institutionally Supported and Ad Hoc; and between Institutions*, in Arbitration Under International Investment Agreements: A guide to the Key Issues 63 (Katia Yannaca-Small ed., Oxford 2010).

59. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Review - Foreign Investment L. J. 232 (1995).

60. Pieter H.F. Bekker, *The Use of Non-Domestic Courts For Obtaining Domestic Relief: Jurisdictional Conflicts Between NAFTA Tribunals and U.S. Courts*?, 11(2) ILSA Journal of International and Comparative Law 331-342 (2005).

61. Osvaldo Marzorati, *Algunas Reflxioness obre el Alcance de la Protección de las Inversionesen el marco de los Trata dos firma dos por Argentina*, 1 Revista Peruana de Arbitraje, 71-118 (EditoralJurídicaGrijley (2005)

62. Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (June 2001), *available at*http://www.nadr.co.uk/articles/published/arbitration/SelectingArbitrators.pdf.

63. Christoph Schreuer, *Traveling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. World Investment & Trade 231 (2004).

64. Nigel Rawding, *Protecting Investments under State Contracts: Some Legal and Ethical Issues*, 11(4) Arb. Int'l 341-45 (1995).

65. Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims - the* SGS *Cases Considered*, in International Investment Law and Arbitration 325-46 (Todd Weiler ed., Cameron May 2005) (2005).

66. Thomas W. Wälde, *The "Umbrella Clause in Investment Arbitration - A Comment on Original Intentions and Recent Cases*, 6 J. World Investment & Trade 183 (2005); available at 1:4 Transnational Dispute Management (October 2004), pp. 1-4; 15-28.

67. Anne K. Hoffmann, *Counterclaims by the Respondent State in Investment Arbitrations*, SchiedsVZ 2006, Heft 6, at 317.

68. Zadek, *The Path to Corporate Responsibility*, Harvard Business Review125 (December 2004).

69. Luke Eric Peterson, *Miner's Claim against South Africa Moves forward Slowly*, 1:13 Investment Arb. Rep. (22 Oct. 2008).

70. Charles H. Brower, II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in 1 YB. on Int'l Investment Law & Policy 347, 347-56; 365-78 (2008/2009)

71. Andrea Shemberg, *Stabilization Clauses and Human Rights,* Research Project Conducted for International Finance Corporation and the UN Special Representative to the Secretary General on Business and Human Rights (11 March 2008), available at http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf, pp. 4-16; 32-41.

72. Konrad von Moltke, IISD, *A Model International Investment Agreement for the Promotion of Sustainable Development* (2004), articles 11-24.

73. Katia Yannaca-Small, 'What about this "Umbrella Clause"'?, in *Arbitration Under International Investment Agreements: A guide to the Key Issues* 479 (Katia Yannaca-Small ed., Oxford 2010)

74. Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004).

75. Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?,* in Arbitration Under International Investment Agreements: A guide to the Key Issues 323 (Katia Yannaca-Small ed., Oxford 2010) Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in Oxford Handbook of International Investment Law 459; 460-64; 507-16 (Peter Muchlinski, Federico Ortino& Christoph Schreuer eds., 2008).

76. Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, 59 Int'l & Comp. L. Q. 325, 359-71 (2010).

77. José Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 1 YB Int'l Investment L & Policy 379, 449-460 (2009).

78. Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 Brit. Y.B. Int'l L. 264, 331-345 (2008).

79. Andrea K. Bjorklund, *Economic Security Defenses in International Investment Law*, 1 International Investment Law & Policy Yearbook 479 (2009).

80. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Int'l L. 151 (2003)

81. Andrea K. Bjorklund, *Private Rights v. Public International Law: Why Competition Among International Courts and Tribunals Is Not Working,* 59 Hastings L. J. 241 (2007).

82. Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty*, 16 N.Y.U. J. Int'l L. & Pol. 1 (1983).

83. Julien Chaisse, *Intellectual Property Rights, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Int'l Bus. L.J. 225 (2015).

84. Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation*, 10 Asian J. WTO & Int'l Health L. &Pol'y 193(2015).

85. Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investmen*t. (Cheltenham (UK) and Northampton (USA): Edward Elgar Publishing, 2016).

86. Jeswald W. Salacuse, *The Law of Investment Treaties*. (New York: Oxford University Press, 2105), pp. 98-99.

87. Diane A. Desierto, 'Investment Treaties: ASEAN' in Hal Hill, Maria Socorro GochocoBautista (eds) *Asia Rising: Growth and Resilience in an Uncertain Global Economy* (Edward Elgar Publishing Limited, 2013).

88. Trinh Hai Yen, 'The ASEAN Comprehensive Investment Agreement", in Paul Davidson (ed), *Trading Arrangements in the Pacific Rim: ASEAN and APEC*. (USDA: West Publishing Co, 2012).

89. Trinh Hai Yen, *The Interpretation of Investment Treaties: Problems and Solution.* (Leiden|Boston: Brill Nijhoff, 2014).

90. Trinh Hai Yen, *Textbook on International Investment Law* (Hanoi: National Political Publishing House, 2017), Chapter 9.

91. Hanoi Law University, Textbook on Investment Law (2009), The People's Public Security Publishing House, Hanoi;

92. Le Huu Nghia, Le Van Chien, Nguyen Viet Thong, *The Influence of Foreign Direct Investment on Labour Productivity and Technological Level of Viet Nam'* (2014), The National Political Publishing House - Truth, Hanoi;

93. Nguyen Thi Dung, 'Enforcement of the Regulations on Banned Business Lines & Conditional Business Lines in Investment Law of 2014' (January 2016), *Journal of Law*, Hanoi Law University.

Legal Documents:

1. NAFTA
2. NAFTA FTC Notice of Interpretation.
3. Report No 89/TTr-CP dated April 10th 2014 on the Project of Investment Law;

Cases:

1. *Maffezini v. Spain* (ICSID Case No. ARB/97/7), (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000), pages 14-25.
2. *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction) (8 February 2005) 183-227.
3. *National Grid PLC v. Argentina*, UNCITRAL (Award) (3 Nov. 2008), 250-262.
4. *LG&E v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006), 201-14; 226-66
5. *Waste Management v. Mexico I & II* (waiver, admissibility and jurisdiction); *Waste Management I* (Final Award (Dismissing on Jurisdiction)) (6/2/00), 4-7, 14-31.(Dissenting Opinion (on Jurisdiction)) (6/2/00), 10 – 28.
6. *Waste Management II* (Award on Jurisdiction, second claim) (6/26/02), 2-3, 19-37.
7. *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Decision on Annulment) (24 September 2007), 101-50
8. *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case ARB(AF)/04/06 (Award) (21 November 2007), 168-180
9. *Corn Products Int'l v. Mexico*, ICSID Case ARB(AF)/04/01 (Decision on Responsibility) (15 January 2008), 161-192.
10. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Award) (8 June 2009), 10-26.
11. *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Non disputing party supplemental submission) (16 October 2006).
12. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction) (6 August 2003) 133-73.
13. *S.G.S. Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction (29 January 2004), 92-97; 113-135.
14. *El Paso Energy Int'l Co. v. Argentina*, ICSID Case ARB/03/15 (Decision on Jurisdiction) (27 April 2006), 63-88.
15. *Methanex Corp. v. United States of America*, UNCITRAL (Final Award) (3 Aug. 2005), Part IV, Chapter B.
16. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case. No. UN 3467 (Final Award) (1 July 2004) 1-6, 25-35 (facts), 167-179.
17. *Gami Investments Inc. v. Mexico*, UNCITRAL, (Final Award) (15 November 2004) 12-22 (facts) 111-115.
18. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011
19. *Glamis GoldLtd. v. United States of America,* UNCITRAL (Award) (8 June 2009) 10-15 (facts); 598-626.
20. *Merrill & Ring Forestry L. P. v. Canada*, UNCITRAL (Award) (31 March 2010) 26-43 (facts); 182-233
21. *Wena Hotels Ltd. v. Egypt*, ICSID Case ARB/98/4 (Award) (8 December 2000), 15-69; 80-95.

Websites:

1. UNCTAD, http://investmentpolicyhub.unctad.org/
2. http://www.reuters.com/
3. http://tapchitaichinh.vn/
4. http://vbpl.vn/

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Số xác nhận ĐKXB: 2139 - 2017/CXBIPH/ 6-98/TN.
Quyết định xuất bản số: 1166/QĐ-NXBTN cấp ngày 07 tháng 12 năm 2017.
In xong và nộp lưu chiểu năm 2017. Mã ISBN: 978-604-64-8246-0

Room 1203, 12th floor, office area
Ha Noi Tower, 49 Hai Ba Trung str., Hoan Kiem dist., Ha Noi
Tel: 84-24-3937 8472 - Fax: 84-24-3937 8476
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ISBN: 978-604-64-8246-0