On Public Interest in International Investment Agreements

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The relationship between public interest and private interest is a basic issue to be faced with in the modern law. In the past, international investment agreements[1] rarely or never covered this issue, but left it to the host country's domestic laws. As how to achieve the balance between public interest and private interest is the basic content of modern law, it always has been covered in relevant domestic laws of those countries with well-developed law system. Moreover, customary international law have been always admitting that "police power" is a country's inherent power, and the arbitration tribunal may also, while judging whether a country's administrative measures constitute expropriation, take the factor of police power into consideration. For instance, In 1961,the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* stipulates, in its Article 10(5), "An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful." Moreover, the United States specifies in Section 712 of *Restatement of the Law Third, the Foreign Relations of the United States*, "A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of States, if it is not discriminatory". In the context of Too v. Greater Modesto Insurance Associates between Iran and the United States, the arbitration tribunal stated that a State was not responsible for

[1] Agreements for international investment mentioned herein refer to Bilateral Investment Treaties (BIT) and Regional Trade Agreements (RTA) or Free Trade Agreements (FTA) containing the matters of investment.

loss of property or for other value decrease caused to the investor, provided that it was resulted from "bona fide general taxation or any other action that is commonly accepted as within the police power of States", and it was non-discriminatory and was not designed to cause the investor to abandon the property to the State. In the case of Sedco, Inc. v. National Iranian Oil Co., the arbitration tribunal admitted that "a State is not responsible for any economic loss resulting from the true behaviors of administration executed within the police power".

Nevertheless, international investment agreements had gradually covered the handling of such issues along with their development. For instance, UN Conference on Trade and Development (UNCTAD) pointed out in its document that a dense system of treaties might imply higher risks, in other words, a State could not flexibly manage the foreign investments, which brought forward a new issue of appropriately balancing the public and private interests in the international investment agreements. For this reason, some countries started clearly defining the terms and conditions of international investment agreements, and developing more exceptions in international investment agreements, in order to solve the problems regarding public interest, e.g. national security, health or environmental protection[2]. This paper straightens out the clauses in the international investment agreements with regard to public interest, analyzes the causes to the inclusion of public interest in the international investment agreements from the approach of jurisprudence, and endeavors to make clear several problems in the relationship between public interest and private interest in the international investment agreements.

I. Current Embodiments for Balancing of Interests in International Investment Agreements

A traditional agreement for international investment has contained the mechanism for balancing of interests, e.g. clause of expropriation and clause of just and fair treatment, etc., but it endows investor with rights and host country with obligations. Lately, the issue of public interest in international investment agreements attracts the attention, while its terms and conditions gradually involve the matters related to public interest. Based on the existing practices, the matters related to public interest are mainly covered in the clauses of preamble, expropriation, general exceptions, significant security

[2] UNCTAD, *International Investment Rule-making, Stocktaking, Challenges and the Way Forward.*

exception and several new special clauses in international investment agreements, e.g. environment clause and labor clause, etc.

(I) Preamble

Besides adding various exceptions, some international investment agreements have included positive language in their preambles to reinforce the commitments of the contracting parties to safeguard certain values, basically the protection of health, safety, the environment and the promotion of internationally recognized labour rights. Although this approach has legal effects that are different from those of a general exception, it gives the same political signal that contracting parties do not place investment protection above other important public policy objectives. [3] For instance, *North American Free Trade Agreement* (NAFTA) specifies in its preamble, "In order to facilitate the stable growth and strengthen the perfection and implementation of environmental laws and regulations, the States should: (1) Engage in the purpose related to environmental protection; (2) Keep the flexibility to defend the public welfares; (3) Insist on sustainable development; (4) Strengthen the perfection and implementation of environmental laws and regulations". Canada- Peru FTA, in its preamble, "admits that facilitating and protecting investment shall be beneficial to the sustainable development"; the U.S.-Uruguay BIT, in its preamble, claims to "expect to fulfill the objectives by protecting health, safety and environment simultaneously". In the preamble, China-Chile FTA "admits that the implementation of this Agreement shall facilitate the objective of sustainable development in a way consistent with environmental protection".[4]

A preamble has testimonial power, not actual authority. As the objectives of the whole agreement, a preamble plays an important role in supporting and guiding the explanation of terms and conditions in the agreement. Therefore, adding the objective of protecting public interest can provide a correct guidance for the arbitration tribunal to explain the general exceptions. By means of explanatory words, general exceptions and new preamble, international investment agreements have been now experiencing the significant repositioning. Explanatory words and general exceptions will urge arbitrators to work hard for balance and provide more flexibility

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[3] UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Rulemaking*, United Nations, New York and Geneva, 2007, p.142.

[4] Similar provisions could be discovered in the preambles in the models (2004, 2012) of the U.S. BIT, U.S.-Singapore, Canada-Columbia FIT in 2008, India-Singapore FTA in 2005 and other agreements.

for arbitrators to make their rulings more consistent with the facts of the case, and will encourage them to take into account public interest in a more open and systematic manner.

(II) Expropriation clauses

A typical clause of expropriation is the stipulation in paragraph 1 of Article 4 in the China-Finland BIT, specifying that: neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, except: (1) for the public purpose; (2) under domestic law; (3) without discrimination; and (4) against compensation.[5] Recently, it is developed to cover the doctrine of host country's police power exceptions in the clause of expropriation. For instance, the 2012 model of the U.S. BIT states, in Article 4 (b) of Annex B with regard to indirect expropriation, "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." In Annex B to the 2008 U.S.-Ugandan BIT, it is stipulated that, the measures taken by either Contracting Country for the purpose of protecting public welfares to protect its "public health, safety and environment", do not constitute indirect expropriations, for which no compensation will be paid for investors.

(III) Exceptions clauses

How to achieve the balance between protecting and facilitating foreign investments and protecting the local social and public interests is an important challenge in front of international investment agreements. [6] UNCTAD points out in a report that: recently, "against the background of the ongoing debate about possible negative effects of FDI, a growing number of countries emphasize in their BITs that investment protection made must not be pursued at the expense of other legitimate public concerns. To that end, more recourse is made to treaty exceptions, thereby safeguarding the right of the host country to enact regulations--even inconsistent with the obligations in the BIT. In addition to the 'traditional' areas where such exceptions have been a common feature of BIT for many years, namely taxation and

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5 The stipulations of expropriation in most of European BIT are similar to this.

6 Suzanne A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements, 13 J. Int'l Econ. L. 1037.

regional economic integration, more agreement now also exempt from the scope of the BIT—fully or partially—host country measures related to such diverse fields as essential security and public order, protection of health, safety and natural resources, cultural diversity, and prudential measures for financial services. These exceptions show the scale of values in the policy-making of contracting parties, and subordinate investment protection to those other key policy objectives."[7] In practice, several countries are enlightened by the clause of general exceptions in GTAA to gradually develop the clause of general exceptions and the clause of significant security exceptions in international investment agreements, with an attempt to realize the balance. For instance, the 1998 Sweden-Mauritius BIT stipulates, in its Article 11 (3), "any provision in this Agreement shall not be construed to obstruct the necessary measures taken by any contracting party to protect public health or prevent the diseases in animals and plants".

Some agreements have the requirements similar to Article 20 of GATT, specifying the restrictions on the investments that are non-discriminatory and not taken as disguise, but which have the single public purpose. For instance, Article 5 of the 1999 Argentina-New Zealand BIT states, "this Agreement does not restrict any contracting party from taking any necessary measures to protect natural resources and physical resources or human health, which include forced restrictions over damages to animals and plants, forfeiture of properties or stock transfer, etc., but should not constitute random or unfair discriminations". Moreover, Article 15 of the 1999 Australia-India BIT stipulates, "this Agreement shall not keep any contracting party from, in accordance with its justifiable and applicable laws and on the non-discriminatory basis, taking any measures to prevent diseases or pests".

There are some clauses of general exceptions by referring to Article 20 of GATT. For instance, Article 10 of the 2004 Model of Canada FIPT specifies, "In the event that 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (1) necessary to protect human, animal or plant life or health; (2) necessary to secure the implementation of laws or regulations which are not consistent with the provisions of this Agreement;

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[7] UNCTAD, *Bilateral Investment Treaties 1995-2006:Trends in Rulemaking*, United Nations, New York and Geneva,2007, p.142.

(3) necessary to protect the exhaustible or inexhaustible natural resources". In Article 12 of the 2005 U.S.-Uruguay, it states, "Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." In 2009, Article 17 of the revised ASEAN Comprehensive Investment Agreement, after consulting with Article 20 of GATT 1994, stipulates an exemplary clause of general exceptions, specifying, "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (1) necessary to protect public morals or to maintain public order; (2) necessary to protect human, animal or plant life or health; (3) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, (4) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Member State; (5) imposed for the protection of national treasures of artistic, historic or archaeological value; (6) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." As a matter of fact, the aforesaid provision is just a duplicate of Article 14 of GATS. In 2007, Common Market for Eastern and Southern Africa (abbreviated as COMESA) developed the Agreement on Investment Cooperation. In Article 21, it has a slightly different provision, "On condition that such measures do not constitute random and unreasonable discriminations among the same kind of investors or result in a disguised restriction on investment flow, this Agreement shall not be construed to obstruct the adoption or enforcement by a contracting State of measures: (1) necessary to protect national security and public morals; (2) necessary to protect human, animal and plant life and health; (3) necessary to protect the environment; and (4) taken at the free will of the contracting State at any time after being approved by the committee of joint investment region".

Moreover, some BITs include the exceptions of protecting public interests under the title of "general exceptions", and also specify the exceptions of protecting the essential security interests of country. For instance, the general exceptions in Article 15 of Japan-Vietnam agreement for liberaliza-

tion, promotion and protection of investment, contain significant security exceptions and general exceptions.

As shown in the citations, the clause of general exceptions has a variety of forms and a large scope. The scope of general exceptions varies in different investment agreements. Some agreements specify only the exceptions for the single public purpose, e.g. exception of public interest, exception of environmental protection and exception of natural resources protection, etc. Moreover, some agreements include the comprehensive exceptions covering public morals, animal and plant life and health, and protection of natural resources. Moreover, the clause does not clearly define the scope of public purposes, e.g. public morals and public order, etc. Therefore, the clause of general exceptions has an extensive and varying scope.

Besides the aforementioned clause of general exceptions, some agreements for international agreement also include the so-called clause of significant security exceptions from the approach of national security and international peace.

For instance, the 1998 Germany-Mexico BIT specifies, in its Article 3, "The measures taken for the purpose of national security, public interest, public health or public morals shall not bring more disadvantageous treatments to foreign investors". In 1998, Article 14 of the 1998 U.S.-Bolivia BIT states, "This Treaty shall not prevent any contracting State from taking necessary measures and performing duties to defend or restore the international peace and security, or protect the essential security interests of the country". The 2000 Mexico-Sweden BIT stipulates, in its Article 18, "The clause of dispute settlement shall not be applicable to the decisions of a contracting State to forbid or restrict, by reason of national security, the investors in the other contracting State from acquiring the investments owned or controlled by local residents within its territory according to local laws". In Article 18 of the 2008 U.S.-Uganda BIT, it stipulates, "any part of this Treaty shall not be construed to prevent a country from taking any measures which it considers necessary to perform the duties in order to defend or restore the international peace and security, or protect the essential security interests".[8]

[8] Moreover, similar provisions can be also found in the 2003 Vietnam-Japan BIT and the 1998 U.S.-Mozambique BIT, etc.

II. Public Interest in International Investment Agreements Is the Balance between Private Property Right and Host Country's Police Power

Public interest is comprehended and recognized differently, but there are always some consensuses that public interest is an organic combination of private interests in the social state; public interest is the abalienating and sharing of private interests; some kind of private interest is equal to public interest, e.g. the private interest in human life and health is actually public interest, which is a harm that a country is obligated to eliminate; public interest serves private interest.

In the modern society, private interest is essentially consistent with public interest. If public interest is not protected, it will be difficult to realize the protection of private interest. Meanwhile, public interest is on the basis of private interest, and defined and guaranteed for the ultimate goal of realizing and increasing private interest. Public interest is not a special kind of interest superior to private interest or alienated from private interest. It originates from and relies on private interest. Only when public interest can be restored into private interest, it will be authentic, and there is no public interest unrelated to private interest. As Rawls puts it, "there is no national interest or social collective interest that cannot be embodied into private interest".[9] In most cases, people's pursuit of justifiable private interest often facilitates the increase of public interest, while people's behaviors of promoting public interest may also lead to the steady realization of private interest. Essentially, public interest is the protection and improvement of civil rights.

Certainly, rights have a borderline. When an individual exercises his rights, he should also undertake the obligations to enable others to own the same rights. If any conflict occurs between the protection of public interest and a citizen's private property right, we have to consider the property right among the relationship between majority and the citizen. The actual needs in the society also require taking into account social interests while the society protects personal properties, e.g. environmental protection, planning and protection of historic relics, etc. The restriction of public interest with regard to property right should not be limited to the definition of public interest, but should coordinate the balance with public interest on the

[9] Rawls, J., *Justice as Fairness*, trans. by He Huaihong, *et al.*, 1998, China Social Sciences Publishing House, p257.

basis of protecting the private nature of property right. The so-called balance means that it is necessary to at least maintain the equal status for private rights protection and public interest.

Therefore, the provisions regarding public interest in the international investment agreements are actually the fundamental requirements of modern law, not intended to pursue the balance between public interest and private interest. These provisions aim to coordinate the conflict and contradictory between public interest and private interest. While coordinating the conflict and contradictory, the protection of private interest is always the foundation for rule of law, while the protection of public interest is only "exceptional". As Rawls says, everyone has a nature of inviolability based on justice, which should not be trespassed even in the name of collective interest. Therefore, justice refutes the righteousness that someone deprives others of their freedom for enjoying larger interests, and does not admit that larger interests enjoyed by a majority could be enough to compensate for the sacrifices made by a minority. Thus, the equal civil liberty must be assured in a just society, and the rights protected by justice should not be subject to dealing in politics or balancing for public social interest. [10] "Human rights protection and authority restriction are two aspects in the unity of rule by law. Radically, human rights are the starting point and destination of rule by law, while rule by law is the carrier and form of human rights. Rule by law has a large number of objectives, but still centers on human rights and exists for human rights."[11] According to the judgment given by the European Court of Justice, ownership protection follows the general principles of European Community Law. [12] Therefore, the actual realization of public interest must be accomplished by achieving the nonspecific private interest, so as to guarantee the validity of public interest and eliminate people's reasonable doubt about public interest. Public interest is not an ultimate interest that is superior to private interest, indissoluble or not restorable, but a derivative composite interest existing among private interests and consisted of private interests. This interest can have the practical significance and be a true interest when it can benefit the survival and development of most people. The

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[10] Rawls, J., *Justice as Fairness*, trans. by He Huaihong and He Baogang, 1988, China Social Sciences Publishing House, pp1-2.

[11] Wang Xigen, On rule by public law—reflection on positioning of public and private laws, *China Legal Science*, 2002, issue 5.

[12] Rolf, Stober, *Economic Administrative Law of German*, trans. by Su Yingxia and Chen Shaokang, China University of Political Science and Law Press, 1999, p177.

validity of social interest or public interest must be justified by its facilitation of interest and happiness for all people. [13]

Above all, public interest and private interest are not opposing or irreconcilable. To some extent, public interest contains private interest, while private interest demonstrates public interest. However, it is institutionally necessary to restrict the private interest under certain circumstances and make it consistent with public interest, so as to realize the private interest of everybody in the whole society. In some cases of modern law, the "restriction" on private interest must therefore be compensated for the purpose of public welfare (whose costs must be borne by all people enjoying such welfare). In some other cases, no compensation is needed institutionally, e.g. elimination of public nuisance (whose costs must be borne by people causing such nuisance).

In the meantime, public interest covers, besides the universal interest of the public to be recognized and protected[14], and "something in which the public as a whole has a stake, especially an interest that justifies governmental regulation"[15]. Therefore, public interest is used to restrict the government's "arbitrary" authority in some cases. For instance, Article 11 of the model of Canada BIT specifies that a contracting party should correspondingly, in the case that both contracting parties realizes it inappropriate to encourage investments by loosening the domestic measures for health, safety and environment, not cancel or reduce such measures or attempt to do so for the purpose of encouraging investors to make, acquire, expand or maintain their investments in its territory. On the condition that a contracting party believes that the other contracting party has offered such encouragement, it may require a negotiation in order to determine a method to avoid such encouragement through consultation between both contracting parties. Thus, international investment agreements do not, strictly speaking, pursue the balance between public interest and private interest. Actually, international investment agreements aim at the balance between protecting private property right and maintaining host country's police power, which is the essential connotation of public interest in the international investment agreements.

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[13] Yang Tongjin: Discussions of Helvetius and Horbach on private interest and social interest, *Journal of China Youth College for Political Sciences*, 1998, issue 4.

[14] Brayan A. Garner (ed.), Black's law Dictionary, 9th ed. West Publishing Co., 2004,P.1266.

[15] Brayan A. Garner (ed.), Black's law Dictionary, 9th ed. West Publishing Co., 2004,P.1266.

(I) Protecting Private Property Right (Private Interest) Is the Core Value of Modern Law

It is generally acknowledged that private property right is a human's basic right and an inherent natural right like life and freedom. As Locke says, the life, freedom and property right are the inherent and inalienable human rights. The absolute basic rights are the core of modern law. Along with social development, an individual is subject to certain restrictions on his interests, especially, property right. Nevertheless, modern law still needs to protect the most basic human rights, including life, freedom and property. For instance, some scholars perform the statistical analysis of constitutions in 110 countries around the world, of which only 44 countries stipulate the protection of private property right and 51 countries require the protection of public and private property rights, totally accounting for 86% of the countries in this analysis. Obviously, it is a mainstream for global constitutionalism to clearly stipulate the protection of property right and the equal protection of public and private property rights in the constitutions. From this analysis, it is concluded that the countries around the world attach high importance to the protection of private property right in their constitutions. A large number of national constitutions specify the protection of public and private properties, and often dedicate more clauses and more detailed descriptions to the protection of private property while underscoring the equal protection. [16] This is not only revealed in the national constitutions, but also widely demonstrated in the covenants of human rights and the international institutions regarding private property right.

1. Freedom of private property is the starting point and destination of market economy

Market economy is an economic pattern depending on market for allocation of resources. In the market, subjects must enjoy the sufficient rights and freedom, and own the right to deal with all operating activities free of any State interference except the compliance with any necessary rules of market order. Therefore, the inviolability of private rights, especially the right to dispose of properties, becomes a prerequisite for the normal operation and prosperity of market economy. Therefore, the premise of market

[16] Cao Pochan, *Direct Election and Protection of Property Right*, http://blog.caijing.com.cn/expert_article-151585-33819.shtml, an interview on May 16th 2012.

deal or personal economic freedom is the protected property right[17]. In other words, private property right is the foundation of market economy, and the logical starting point and destination of market economy is that an individual owns the property right under the complete protection in laws.

Besides the descriptions in the economic theories, the economic history also confirms that the economic target of maximizing private and social welfares by means of division of works is identical to and not against the liberalist ideology of rule by law for maximizing the equal freedom and property right of the masses. [18] The so-called market economy is, essentially, the reasonable and effective allocation of limited social resources in an overall dimension in the whole society (or the whole world if it is in the international society). W. Eucken, a famous German economist believes that economic order assumes the responsibility for constantly and reasonably allocating the working hours of all labors and the numerous material goods for production, in order to eliminate economic shortage as much as possible.[19] The market economy featured by reasonable allocation of resources must ensure that individuals can carry out economic activities in the form of voluntary transaction and fair competition on the basis of equality. For instance, a well-known scholar of international economic law, Petersmann claims that, not only does economic market, which is generated in the voluntary transaction of property right, facilitate the efficient allocation of resources and the distribution of income acclimated to the market as well as the dispersed structure of private needs and supplies, but also the market competition, an "invisible hand", is a structure tending to decentralize the power, and therefore tends to strengthen the protection of various freedom and property rights.[20]

Therefore, the so-called market logic is the free transaction of private rights. [21] Not only does it require the protection from State power, but also needs to eliminate the encroachment of State power, provided that an indi-

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[17] The concept of property right was introduced into China at the early stage of China's reform and opening up, during which it was popularly translated into "▪ ▪" since there was insufficient knowledge of property right and a large number of economists employed this translation. Now, the translation "▪ ▪ ▪" is mainly employed in the law circle.

[18] E. U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, *et al.*, Higher Education Press, 2004, p188.

[19] E. U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, *et al.*, Higher Education Press, 2004, p103.

[20] E. U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, *et al.*, Higher Education Press, 2004, p181.

[21] Zhang Shuguang, Private rights and national powers, In *Market Logic and National Idea*, SDX Joint Publishing Company, 1995, p2.

vidual can legally acquire and possess the properties, freely dispose of own properties without being interfered by external forces, and gain the benefits from them. In other words, private property right and its legal protection system are the prerequisites of market economy. If there is not private property right and legal protection system, market economy will not exist. When there is not private property right or property right is not legally protected, market economy will never exist or develop. Economic subjects can engage in transactions on the premise that they own the complete property right, which is also the motive force for them to engage in market activities. Firstly, a subject without property cannot engage in transactions, so it is not qualified as a subject in the market economy. Secondly, a subject depends on the guarantee of effective property right system to satisfy its desire of maximized benefits, and particularly relies on the exclusiveness of property right and the internalization of maximized benefits.[22] Adam Smith emphasizes that the appropriate operation of market depends on the personal freedom and appropriate transfer of property right, among which the latter is regarded as a motive to private productive activities, and also as a protection against the arbitrary restriction of mercantilism government on personal freedom. [23]

2. National protection of private property right is the basic requirement of market economy

The theory of market economy has a basic logic that people need to protect their own legal property rights and capabilities from being plundered. Only when people have the right and capability to defend own legal property right, they will have the enthusiasm to pursue and create wealth. If an enterprise or individual may have their legal properties expropriated by government, robbed by bandit or stolen by thefts at any time, they will have no desire to create wealth. There is a saying, "people who do not have permanent property have also no permanent confidence". With regard to this, Mancur Olson gives a very systematic description in his work *Power and Prosperity*, "the consensus would probably be that when there is a stronger incentive to take than to make—more gain from predation than from productive and mutually advantageous activities—societies fall to the bottom".[24] This logic of

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[22] Li Xiaoming, *Institutional Value of Private Law*, Law Press China, 2007, p370-371.

[23] E. U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, *et al.*, Higher Education Press, 2004, p101.

[24] Mancur Olson, *Power and Prosperity*, trans. by Su Changhe and Ji Fei, Shanghai People's Publishing House, 2005, p1.

market economy is the cornerstone of market economy system as well as the basic principle that must be followed in the design of market system. Only if a system conforms to the market logic, it can truly maintain the market order and improve the market efficiency. For this reason, a government must establish the relevant systems to sufficiently and effectively protect the private property right, which is the basic function of government in the market logic.

In a market economy, the governmental rules on individual producers, dealers and consumers must be respected and conform to the intrinsic rights and action instincts of individuals as economic subjects. In this way, economy and society can be stable. Assuming that a government arbitrarily interferes with the equal freedom and property right of domestic citizens by means of various trade regulations, the disordered State may be caused and the economic welfare will decrease. [25] Fan Gang, a well-known Chinese economist, points out that a government has an important function, also regarded as its primary function, to provide the protection of property right for all the legal interest groups and individuals. The protection of property right belongs to important "public goods" provided by the government and enjoyed by all the citizens.[26] By straightening out the development history of western legal theory, Professor Kelly also concludes, "a community government should, once it is established, have only one function, that is, to protect the properties of its member States"[27]. In addition, this basic function is one of important contents of constitutional system. In all the laws and regulations, only a provision has the supreme authority, which is the human rights regulation in the constitution. All the rights in a country exist for the purpose of human rights, so all the provisions of laws center on human rights. To measure the effect of legislation, the human rights provision is always taken as the benchmark in the end.[28] The protection of private property right is the central part of human rights provision in the constitution. A human is not only physical existence but also spiritual existence, both inseparable from property right. As a physical existence, a human cannot maintain his life if he does not possess some necessary means of liveli-

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[25] Petersmann, E. U., *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, et al., Higher Education Press, 2004, p189.

[26] Fan Gang, The functions of government as a public institution, In *Market Logic and National Idea*, SDX Joint Publishing Company, 1995, p14.

[27] J. M. Kelly, *A Short History of Western Legal Theory*, trans. by Wang Xiaohong, Law Press China, 2002, p207.

[28] Zhang Wenxian, ed.: *Jurisprudence*, Higher Education Press, Peking University Press, 1999, p193.

hood. As a spiritual existence, a human cannot maintain his independent personality of self-respect if he does not possess some necessary means of livelihood. Thus, property right is closely related to the generation and development of human society. As clearly revealed in the development of human civilization, the admission and protection of property right signifies the beginning of human civilization. "The adoption of several property marks the beginning of civilisation; rules regulating property seemed so central to all morals".[29] Under the guidance of enlightenment, the property right of citizens is protected by means of constitutional division and restriction on State power. As a basic human right, property right is approved in constitution. To protect the human rights including property right is the foundation of modern constitution and the source of its validity. Locke believes that "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property". [30]"Hence it is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure."[31] "Private property creates for the individual a sphere in which he is free of the State. It sets limits to the operation of the authoritarian will," and "it is the soil in which the seeds of freedom are nurtured and in which the autonomy of the individual and ultimately all intellectual and material progress are rooted". [32]

In this regard, the United States Constitution can provide vivid evidence. It does not contain the independent clause of property right, but the Fifth Amendment thereto covers property right. The Fifth Amendment stipulates that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. "Ever

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[29] Hayek, *The Fatal Conceit: The Errors of Socialism*, trans. by Feng Keli, *et al.*, China Social Sciences Publishing House, 2000, p34.

[30] Locke, *Two Treatises of Government* (Book 2), trans. by Ye Qifang and Zhai Junong, Commercial Press, 1964, p77.

[31] Locke, *Two Treatises of Government* (Book 2), trans. by Ye Qifang and Zhai Junong, Commercial Press, 1964, p86

[32] Mises, *Liberalism,* China Social Sciences Publishing House, 1994, pp104-105.

since constitutional order emerged, private property is the core of constitutional order. Once private property right is given up, constitutionalism will be threatened. If there is no property, the 'essential tension' between civil rights and politics will be jeopardized as well."[33] John Adams also advocates, "Property must be guaranteed, or there will be never freedom". At the constitutional assembly, Madison pointed out, "The primary goal of civil society is to protect property right and public security". [34]

The development of human civilization clearly reveals that the admission and protection of property right signifies the beginning of human civilization. "The moment when division of properties is admitted signifies the beginning of civilization, and the standardization of rules on property right is a key to all the morals"[35]. The freedom of creating wealth under the protection of private property right is the prerequisite of all the human freedom. The freedom demonstrated in property right refers to a free individual's right to take actions, change living conditions and pursue happiness. The *Declaration of Human and Civil Rights and Obligations* in France in 1795 believes, "The defense of property right is the foundation of the whole social order". Hence, we can also believe that the national protection of private property right required in the market logic has become a universal idea in human civilization.

When the market logic that requires government to sufficiently and effectively protect the private property right is reflected in the practice of agreement for international investment, agreement for international investment will be inevitably required to provide the sufficient and effective protection for the investments made by foreign investors, and the government of host country will be required not to encroach on or deprive of the same indulgently. Hence, the definition of "investment" is further expanded in agreement for international investment, with an aim to cover the investments made by investors as thoroughly as possible for the protection from the host country's government. Therefore, the latest international investment agreements gradually expand the definition of "investment", indicating that market logic is an essential reflection in the practice of agreement for international investment.

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[33] Elster, *Constitutionalism and Democracy*, SDX Joint Publishing Company, 1997, p389.

[34] Charles Francis Adams, ed., *The Works of John Adams* (Boston: Little, Brown and Company,1851),Vol.6,p.280;Max Farrand, ed., *The Records of the Federal Convention of 787* (New Haven: Yale University Press,1966), p.147.

[35] Hayek, *The Fatal Conceit: The Errors of Socialism*, trans. by Feng Keli, *et al.*, China Social Sciences Publishing House, 2000, p34.

3. International law requires the sufficient protection of investor's property right with regard to protection of foreign property

The protection of foreign property is a traditional part of international law, and a central part in the protection and welfare system of foreigners. A country must respect the foreign property, while foreigners can enjoy the right to peacefully use and enjoy their properties. This rule has been clearly and definitely included. [36] As every country has the right to protect its nationals living abroad, and the corresponding obligation to provide some convenience for foreigners in its territory. In the event that a foreigner has a country's citizenship, he will not be excluded from the laws when he is abroad, but it is necessary to protect his life and property.[37] Every country must protect the life and property of foreigners living in its territory to the lowest limit specified in the international law. With regard to the safety of life and property, foreigners must be treated legally equal to local citizens. Especially, the life and property of foreigners should be guarded against the encroachment of State officials or courts. [38] The situation that State organs or State officials encroach upon foreigners or damage their properties has been always regarded as the preliminary violation of international law. [39]

In the international investment law, the requirements for protection of life and property of foreigners in the international law system are embodied in providing sufficient and perfect protection for foreign investors and their investments. "In the law relating to foreign investments likewise new concepts have developed. They concern mainly the rights of the investor in the country in which his investments are placed and, particularly protection from nationalisation and expropriation of his investment by the sovereign of that country. Further problems which arise here are the transfer of his capital and profit from the developing countries into his own country and the provision of adequate arbitration facilities in the case of investment disputes. The central problem which has emerged in the law of investment is the relationship of the private investor to the government of the country in which the investment takes place. The traditional relationship of the sover-

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[36] Jennings and Watts, *Oppenheim's International Law* (Volume 1, Book 2), Encyclopedia of China Publishing House, 1998, pp323-324.

[37] Lauterpacht, revised, *Oppenheim's International Law* (Volume 1, Book 2), Commercial Press, 1972, pp173-174.

[38] Jennings and Watts, revised, *Oppenheim's International Law* (Volume 1, Book 2), Encyclopedia of China Publishing House, 1998, pp322-323.

[39] Hillier, Timothy, *Principles of Public International Law*, trans. by Qu Bo, China Renmin University Press, 2006, p305.

eign to a private citizen of a foreign nation……"[40] If there is no protection of foreign properties and investments, the effective international economic cooperation will not be possibly achieved. Therefore, the protection of foreign investments and ownership plays a crucial role in international economic law and international law. This is demonstrated in the laws of foreigners among the customary laws, especially in the relevant rules of expropriation. Moreover, the bilateral or multilateral agreements are also entered by countries, in order to improve the degree of protection.[41] The bilateral and multilateral international investment agreements intend to define and institutionalize the contents regarding foreigners and their properties in the international laws and the relevant contents of customary laws. Meanwhile, the contents regarding protection of private property right (including property right of foreigners) in national constitutions and relevant laws should be further affirmed and specified in the international agreements, with an aim to improve the protection of domestic laws to the international level and gain the guarantee from international laws.

In the international investment relationships, especially international direct investment, the relationship between foreign investors and nation is the most prominent, and not standardized or adjusted by employing the perfect corresponding systems in the traditional domestic laws and international laws. In the practice of international investment, the disputes occur very frequently. How to well eliminate the disputes and prevent them from evolving into political disputes and conflicts among countries has become a problem to be urgently solved in front of the international society. Therefore, international investment agreements will also follow the track of how to prevent the investments of foreign investors from being infringed by a host country's government and how to sufficiently protect the interests of foreign investors. After 1840, around 60 mixed claims commissions were established to solve the disputes arising from the infringement of foreigners' interests. Especially, more and more books have elaborated on the protection of foreigners from the perspective of investing country after around 1890. [42] Most of international investment agreements are protective, but only appropriately loosen the management of investments. In other words,

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[40] Schmitthoff: Clive M. Schmitthoff's Select Essays on International Trade Law, trans. by Zhao Xiuwen, Encyclopedia of China Publishing House, 1993, p40.

[41] Wolfgang Graf Vitzthum, ed., *International Law*, trans. by Wu Yue and Mao Xiaofei, Law Press China, 2002, p634.

[42] Ian Brownlie, *Principles of Public International Law*, trans. by Zeng Lingliang, *et al.*, Law Press China, 2003, p579.

most of obligations are intended to restrict the supervisory discretion to protect the fluidity of investment.[43] In the past decades, the formulation of rules on international investment has facilitated the common foundation of a large degree for the central principles of investment protection. [44] With regard to general entities and procedural provisions of foreign investment protection zone, BIT's contents demonstrate very high consistency in modern times. [45]

With regard to the relationship between foreign investors and host country, it is essentially a part of law of foreigners in the traditional international laws on one hand. On the other hand, foreign investors make investments in a host country, so whether the host country can provide the sufficient protection and safety for their investments appears very important due to the large amounts and long periods of the properties they invest. Therefore, foreign investors often add a series of special terms (normally not included in the international contracts between individuals) to the agreements with the host country, and even require that any disputes in relation to such contracts should be applicable to international law and under the governance of international arbitration institution in order to protect their investments. As a result, international investment agreements pursue the core value of how to protect the properties of foreign investors, in order to realize the value of the law by providing the protection of investment properties for foreign investors. In the meanwhile, the protection of investment property right for foreign investors has the same pursuit of basic value as the abovementioned law of the protection of private property right. It is the specific reflection of the value that a country must sufficiently and effectively protect the private property right in the system of market economy. Free market requires a specific relationship between country and market, which can be described in three principles as follows: (1) a country must establish and protect the legal system of effective transactions regarding the private rights including properties and contracts, and guarantee the acquisition of private rights and the transactions in the market; (2) a country must

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[43] UNCTAD Series on International Investment Policies for Development, International Investment Rule-Making: Stocktaking, Challenges and the Way Forward, UNITED NATIONS New York and Geneva, 2008, p.38.

[44] UNCTAD Series on International Investment Policies for Development, International Investment Rule-Making: Stocktaking, Challenges and the Way Forward, UNITED NATIONS New York and Geneva, 2008, p.76.

[45] Axel Berger, China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making, trans. by Yang Xiaoqiang, *Journal of International Economic Law*, Volume 16, Issue 4, Law Press China, 2010.

follow the distribution of resources by the market and establish the dominating status of the market; (3) a country can interfere with the market at the time of market failure whenever necessary. Correspondingly, free international investment system is the relationship between country and market in consistence with three doctrines. To be specific, they are the doctrine of investment safety—a country protects investment against public and private infringement; the doctrine of neutral investment—a country allows the market to determine the direction and category of foreign investments; the doctrine of market convenience—a country ensures the normal operation of the market. [46]

If there is no protection of foreign properties and foreign investments, it will be impossible to realize the effective international economic cooperation. Therefore, the protection of foreign investments and ownership plays a crucial part in international economic laws and international laws. [47] The protection of foreign investments (including investors and their investment assets and investment activities) is demonstrated not only in the rules on foreigners, especially on the expropriation and treatment of their properties, in the traditional customary international laws; but also in the modern bilateral, regional and global agreements for investment (including all the agreements with the provisions of investments) and in the foreign investment laws of countries. [48]

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[46] Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, *Columbia Journal of Transnational Law*, Vol.36, 1998, pp.504-506.

[47] Wolfgang Graf Vitzthum, ed., *International Law*, trans. by Wu Yue and Mao Xiaofei, Law Press China, 2002, p633.

[48] Foreign investment law normally refers to the legislation of capital importing country (host country) with regard to foreign investments. From the approach of host country, the foreign investment law often focuses on standardizing the foreign investments, but still contains the provisions of protecting foreign investments. For instance, the *Constitution of the People's Republic of China* provides in its Article 18, "All foreign enterprises, other foreign economic organizations as well as Chinese-foreign joint ventures within Chinese territory shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China". In its Article 4, the *Law of the People's Republic of China on Foreign-Capital Enterprises* states, "The investments of a foreign investor in China, the profits it earns and its other lawful rights and interests are protected by Chinese Law." In its Article 4, it stipulates, "The State shall not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures and appropriate compensation shall be made. " From the approach of capital exporting country, the highest degree of protecting private overseas direct investments must be revealed in the "overseas investment insurance system" established in some countries.

(II) Respect to Host Country's Police Power Is an Justifiable Pursuit of Modern Law

Police power is a concept in the American laws. (1) It refers to a power that is enjoyed by sovereignty, necessary to maintain public security, public order, public health, public morals and social justice, inherent and absolute in the due law. It is a basic power essential to government, and should not be abandoned by legislature or transferred from the government. (2) It refers to the power granted to a State pursuant to the 10th Amendment of the United States Constitution, and thereby which the State has the right to formulate and enforce the laws to protect public health, public security and social welfares, or assign the power to a local government. However, a State's enforcement of such power shall be subject to due process and other regulations. (3) It generally refers to a government's interference with the application of private property, e.g. eminent domain of such property.[49] At present, police power has been widely accepted as a country's inherent power to regulate its public interests. Especially, a country's police power is often considered when judging whether a measure of regulation belongs to indirect expropriations, which has become the police powers doctrine in the international law. The customary international law admits that a host country has the right to cause the expropriation by means of regulation or taking other measures obviously affecting the property interests of foreigners but not constituting any necessary compensation. Nevertheless, the said measures must be taken for the legal purpose, dedicated to general welfare, non-discriminatory, and implemented completely within the range of the country's general regulation or administrative power.[50] No compensation should be made for any economic losses caused by the benign and non-discriminatory regulation within the range of its police power, which is a widely recognized doctrine in the customary international law.[51]

In the international investment agreements and practices of investment arbitration, the police powers doctrine has been widely recognized. In the *Restatement (Third) of the Foreign Relations Law of the United States*, Section 712 Doctrine of Police Power Exceptions states, "the country shall not assume responsibilities for any property losses or other negative economic impacts

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[49] Brayan A. Garner (ed.), *Black's law Dictionary*, 9th ed. West Publishing Co., 2009, p.1276.

[50] Caroline Henckels, Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration, *Journal of International Economic Law* 15(1), 223–255.

[51] OECD. "Indirect Expropriation" and the "Right to Regulate" in International Investment Law[R].*OECD Working Papers on International Investment*, Number 2004/4.

caused by the non-discriminatory taxes, regulation or other behaviors universally regarded within the scope of its police power". In the *First Protocol of European Convention of Human Rights*, Article 1 stipulates, "(1) Every natural person or legal person shall have the right to enjoy their properties peacefully. They shall not be deprived by anyone of their properties except for the purpose of public interest and under the conditions specified in the general principles of laws and international law. (2) The previous provision shall not, for whatever reason, impair the country's right to enforce the laws it considers necessary to control the use of properties for the purpose of public interest, or to ensure the payment of taxes or other special duties or fines". In Article 4(b) of Annex B to the 2004 Model of the U.S. BIT, it states, "Except in a very few cases, the non-discriminatory administrative measures taken by a contracting part to protect the legal goal of public welfares (e.g. public health, safety and environment, etc.) shall not constitute indirect expropriation". The same stipulation is also included in Article 1.3 of Annex B to the model of the Canada BIT. In addition, the country's due administrative and regulatory actions have been also affirmed in Article 3 of *Convention on Protection of Alien Properties* drafted by OECD in 1967 and Article 10(5) of the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* in 1961. The practices of international arbitration have also admitted that a country's due administrative measures for police power do not constitute indirect expropriation. For instance, ICSID expressed the similar attitude in the case of Tecmed v. Mexico, claiming, "A country shall not compensate for any economic losses caused by its execution of sovereign power within the framework of police power as an administrator, which is, in any wise, not in dispute." In the case of Methanex v.USA, the arbitration tribunal believes, "No claim shall be lodged against any economic losses caused by the benign regulation within the range of a country's police power, which is a doctrine of customary international law".[52]

The so-called "Police Power Exceptions" is actually the following doctrine, which was claimed by the arbitration tribunal in this case and has been now recognized in the international laws, "When a country exercises its regulatory power normally in the non-discriminatory form and performs the benign regulation aimed at facilitating the universal welfares, it shall not be legally obligated to pay any compensation to foreign investors". [53] In the case of Tecmed v. Mexico, the arbitration tribunal stated, "A country may

[52] Methanex v.United States[Z].UNCITRAL,Final Award,3 August 2005,para 410.
[53] Saluka Investments BV(the Netherlands) v. The Czech Republic [Z].UNCITRAL, Partial Award, 17 March 2006. para 255.

cause economic losses to those under its governance when it exercises its sovereign power within the framework of its police power, and the country, as an administrator, shall be completely exempt from any compensation, which is an undoubted doctrine". [54]

III. Approaches to Realization of Public Interest in International Investment Agreements

As mentioned above, private property right is exclusive. When a property right owner realizes own private interest, he may violate the public interest. While realizing the public interest, a country may also reduce or restrict the occupation, utilization or disposal of private property right, resulting in the conflict between private interest and public interest. Public interest is people's pursuit of common welfares, but its needs require imposing some restrictions on and even depriving of private property right. Nevertheless, modern law also requires that a government must follow the principle of proportionality, due process of law and just compensation while restricting the private property right. The constitutional principles, i.e. transparency, rule by law, non-discrimination, principle of proportionality, due process, legal protection of private rights, domestic sovereignty, etc., are reflected in the constitutions of legally developed countries as well as in the international economic laws, etc. such as, GATT/WTO, international investment agreements and relevant investment arbitrations, etc.[55] This spirit is well reflected in the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* in 1961, which stipulates both the "Police Power Exceptions" for non-compensation and the conditions for "Police Power Exceptions". In the second part of Article 10(5) of the draft, it stipulates that the exercising of "Police Power Exceptions" shall not be considered illegal provided that it conforms to the following conditions: (a) Not violating the law of the country clearly; (b) not the results of violating any provision[56] in Article 6 to Article 8 in the Draft Convention; (c) not unreasonably violating the just legal principles admitted by main legal

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54 Tecmed v. Mexico, ARB(AF)/00/2 Award, 29 May 2003.

55 Petersmann, E. U., *Constitutional Functions and Constitutional Problems of International Economic Law*, trans. by He Zhipeng, et al., Higher Education Press, 2004, p516-517.

56 In the Harvard Draft Convention, Article 6 specifies no rejection of judicatory or administrative remedy; Article 7 specifies no rejection of justifiable appeal; and Article 8 specifies no administrative decision or judicatory ruling against law. See Louis B. Sohn & R. R. Baxter Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens The American Journal of International Law, Vol. 55, No. 3 (Jul., 1961), pp. 548-584.

systems in the world; (d) not abusing the power specified herein for the purpose of depriving of foreign property.[57] The society-oriented doctrine or emphasis on social public interest in a pure sense is unacceptable in the market economy, and also violates the law of market economy. [58] Hence, it violates the spirit of modern law.

(I) Principle of Proportionality Is an Appropriate Approach to Realizing the Public Interest in International Investment Agreements

The principle of proportionality is originally a basic principle in the domestic administrative law, and also applied in various fields of international law. In the European laws, the principle of proportionality has become a constitutional principle in Europe, and often used to balance the rights of people in the free circulation of goods, services, labors and funds as well as the public interest of member countries.[59] In the fields of international humanism and human rights law, the principle of proportionality has become a basic principle of customary international laws.[60] In 2003, ICSID employed the principle of proportionality for the first time in the case of Tecmed v. Mexico. Later on, the arbitration tribunal, in the cases of LG&E v. Argentina, Aucoven v. Venezuela, CMS v. Argentine, Azurix v. Argentina and Siemens AG v. Argentina, either directly employed the principle of proportionality or mentioned the principle of proportionality in the analysis of relevant problems.

The principle of proportionality normally means that, when administrative organs exercise administrative behaviors, (1) it is necessary to consider the relationship between purpose and means, without taking any unscrupulous means to fulfill the purpose; (2) it is necessary to reasonably balance the realization of public interest and the protection of private interest, without putting too much emphasis on one aspect; (3) it is necessary to pay attention to the necessity of means and the minimization of hazard while the restriction on private interest is required. It is an important basic principle of administrative laws in various countries. It is not only widely applied in a large number of countries in the civil law system, but also

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[57] Louis B. Sohn & R. R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens, The American Journal of International Law, Vol. 55, No. 3(Jul., 1961), pp.548-584.

[58] Sun Xiaoxia, *Concept and Phenomenon of Law*, Shandong People's Publishing House, 2001, p83.

[59] Evelyn Ellis, ed., The Principle of Proportionality, the Laws of Europe (1999).

[60] Military and Paramilitary Activities in and against Nicaragua, Judgment of 27 June 1986, I.C.J. Reports 1986,p.14, paras.176, 194.

transplanted in many countries in the common law system.[61] In the educational circles, it is generally believed that the principle of proportionality consists of three child principles, namely, principle of appropriateness, principle of necessity and principle of narrow sense.

1. Principle of appropriateness means that the measures adopted must be able to fulfill the administrative purpose or at least facilitate the fulfillment of the administrative purpose and be correct means. In other words, the relationship between purpose and means must be appropriate. The principle is a "purpose-oriented" requirement.

2. Principle of necessity means that, it is necessary to choose the mean causing the minimum infringement to civil rights among the means to fulfill the legal purpose, after the aforesaid principle of "appropriateness" is affirmed. It contains two meanings: firstly, there are various behavioral approaches to fulfilling the legal purpose, or the principle of necessity will not be applicable; secondly, it is able to select a mean causing the minimum infringement to the freedom of civil rights among the means to fulfill the legal purpose. Clearly, the principle of necessity standardizes the proportional relationship between administrative power and its measure adopted from the approach of "legal consequence".

3. Principle of narrow sense refers to a necessary proportionality between the measure adopted for administrative power and the purpose to be fulfilled. To put it simple, it requires an administrative subject to find out the most beneficial way to exercise its duties based on the relationship between means and purpose. The principle of proportionality standardizes the proportional relationship between administrative power and its measure adopted from the approach of "value orientation". Nevertheless, the measurement of relationship between purpose and means must be still carried out in a specific case. In other words, the principle of proportionality in a narrow sense is not an accurate principle. It is still an abstract concept. Certainly, the principle of proportionality in a narrow sense is not groundless, but still needs to consider at least three important factors, namely, "inviolability of human dignity", which is a ground rule; importance of commonweal; and degree of appropriateness of means.

The principle of proportionality has become one of the most important principles in a society ruled by law. The basic ideas are as follows: (1) re-

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[61] Chen Xinmin, A summary on administrative law, *Administrative Law Review*, 1998, issue 1; Shi Youqi, *On the Protection of Private Property Rights in Public Law*, Peking University Press, 2007, p132.

strict the excessive discretion of governmental organs; (2) reduce the improper infringement of police power to private interest, that is, require administrative organs to measure the relevant public interest and private interest in an all-round way while conducting any behaviors, and take the administrative behaviors causing the minimum restriction or minimum damage to civil rights;[62] (3) inhibit the abuse of administrative power. With regard to the principle of proportionality, it has the ultimate goal to maintain and expand civil rights, always centers on weighing the interests, keeps the most fundamental feature of economic analysis, and exists specifically for maximizing the proportion between public interest and private interest. [63] The principle of proportionality requires balancing the maintenance of commonwealth and the protection of private rights. Only in this way, it can ensure the realization of justice in public interest. Meanwhile, it also restricts a government from abusing its powers in the name of realizing public interest, as the abuse of power often leads to the ignorance of private rights and even excessive damage to private rights. If so, it is obviously difficult to realize the balance. As a result, the principle of proportionality should be taken as an appropriate path to realize the public interest in the international investment agreements.

(II) The Principle of Due Process Is an Effective Guarantee for Realizing the Public Interest in International Investment Agreements

The principle of due process (or due process of law) is an important legal principle, and mainly originated in the countries in the common law system. It means that a government must respect all the legal rights conferred by domestic laws on the people, not a part or majority of such rights. The due process of law is often explained as the restriction of substantive law and procedural law, and used to define the "judicatory power" of a judge (not the "legislative power" of the congress) and protect the people's basic rights, such as, equal right and freedom. Nevertheless, the explanation is controversial to some extent and resembles two concepts used in other areas of law, i.e. natural justice and procedural justice.

The principle of due process has two basic functions: 1. prevent the abuse of public power and inhibit corruption; 2. guarantee human rights and protect the legal rights of citizens, legal entities and other organizations

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[62] Wang Mingyang and Feng Junbo: On the principle of proportionality, Presentday Law Science, 2005, issue 4, p22.

[63] He Jingchun: Comparative study on the principles of administrative proportionality and reasonableness. Administrative Law Review, 2004, issue 2, p38.

from being abused by the subjects of public power or infringed by arbitrary behaviors. The due process of law originated from the principle of "Natural Justice" which underscores that "one does not act as own judge" and "one must give prior notice, explain reasons and hear excuses before conducting any acts harmful to others". Later on, its connotations expanded to contain the modern principles of democratic process, namely, openness, justice, fairness and participation, etc. In the beginning, the due process of law was mainly applicable in the judicial field, and then became applicable in the administrative field and the field of all other national public powers, and even in the field of social public power. The due process of law is essentially to restrict the governmental power and protect the civil rights. *Encyclopedia Britannica* points out that, due process is a course of legal proceedings according to rules and principles that have been established in a system of jurisprudence for the enforcement and protection of private rights. In each case, due process contemplates an exercise of the powers of government as the law permits and sanctions, under recognized safeguards for the protection of individual rights.[64] General speaking, due process is "a legal concept for normative and standard law enforcement. Due process is performed in the principle that a government should not conduct any act arbitrarily and randomly. It means that a government can act only in the way defined in the law and under the restriction imposed on the government for protecting individual rights".[65] After "due process of law" is established in the amendments to the United States Constitution, it has become a core of modern constitutionalism in the west as a cornerstone for guaranteeing human rights.[66]

The principle of due process is an important substantive protection of property right, covering all the explicit and implicit constitutional restrictions on all of a government's behaviors interfering with property right.[67] It implies that a government can only act in the way defined in the law and under the restriction imposed on the government for protecting individual rights.[68] The probably most definite condition of expropriation is that expropriation should not be arbitrary, and subject to the duly adopted

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64 *Encyclopedia Britannica* (Volume V), Encyclopedia of China Publishing House, 1999, p430.

65 Peter, G. Renstorm, *The American Law Dictionary*, trans. by He Weifang, et al., China University of Political Science and Law Press China, 1998, p15.

66 Ji Weidong, Significance of legal procedure, *Social Sciences in China*, 1993, issue 1.

67 Bernard Schwartz, *A History of American Law*, trans. by Wang Jun, *et al.*, Social Sciences in China, 1990, p117.

68 Peter, G. Renstorm, ed., *The American Law Dictionary*, trans. by He Weifang, et al., China University of Political Science and Law Press China, 1998, p15.

law.[69] Therefore, most of national constitutions clearly specify that expropriation must follow the principle of due process. For instance, the Amendment 5 to the United States Constitution provides that, no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. The paragraph 1 of Amendment 14 provides that no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. In addition, the clause of expropriation in most of international investment agreements contains the requirements for due process, and imposes that expropriation must conform to the due process of law. For instance, the 1988 Denmark-Hungary BIT specifies, "Pursuant to the laws of the contracting State that enforces the act of expropriation, investors shall enjoy the right of prompt review by the judicatory or other independent departments". In the 1990 U.S.-Tunisia BIT, it provides, "A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the principles of international law." It has become a powerful guarantee for social public interest, including the fair realization of public interest in the international investment agreements mentioned herein.

(III) The Principle of Compensation Is a Powerful Force of Realizing Public Interest in International Investment Agreements

The restriction on the scope of expropriation and the recognition of expropriation compensation reasonableness are two parts of the balance between expropriation right and property right, which are indispensible. Compensation is indispensible when there is trust and damage, which is the basic commitment of a society ruled by law to social members.[70] The other universally accepted prerequisite of expropriation is the necessary compensation for the expropriated property.[71]

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[69] Jennings and Watts, revised, *Oppenheim's International Law* (Volume 1, Book 2), trans. by Wang Tieya, *et al.*, Encyclopedia of China Publishing House, 1998, p325.

[70] Shi Youqi, *On the Protection of Private Property Rights in Public Law*, Peking University Press, 2007, p109.

[71] Jennings and Watts, revised, *Oppenheim's International Law* (Volume 1, Book 2), trans. by Wang Tieya, *et al.*, Encyclopedia of China Publishing House, 1998, p325.

Property right is a social obligation subject to certain restrictions, which does not mean that property right is not guaranteed. According to the study of Lin Laifan, the guarantee of property right in modern constitutions consists of three parts with regard to the contents of regulations, namely, clause of inviolability (or safeguard clause), clause of restriction (or restrictive clause) and clause of expropriation compensation (or loss compensation clause). Among them, the compensation clause further restricts the property right, so as to not only defend the premise for the clause of inviolability, but also provide the appropriate buffer mechanism inside the whole regulations. Therefore, expropriation compensation is an inevitable requirement and connotation in the guarantee of property right.

As Otto Mayer says, the exercising of any property right is subject to some inherent and social restriction. When the expropriation or limitation of property exceeds this inherent restriction, the problem of compensation is caused. In other words, the inherent social restriction on exercising of ownership is a burden equally borne by all citizens, so no compensation is required. Nevertheless, when this burden is assumed by a citizen, it becomes a special sacrifice, which must be compensated. [72] Whether it can be called as special sacrifice requires considering two elements comprehensively, namely, formal element, which means that the subjects of infringement are the ordinary people in a general sense and the specific individuals or groups; substantive element, which means that the infringement is within the range of social restrictions inside the property right, or exceeds the range to the intensity that almost damages the intrinsic contents of property right. [73]

When property right owner suffers from "special sacrifice" due to expropriation, a country should, in the principles of protecting citizens' property right from being infringed and arranging social members to bear social responsibilities, give compensations to social members that make a "special sacrifice" on behalf of the whole society, according to the theory of expropriation in public law. [74] As analyzed from the approach of economics, a government gives compensation not because of an individual's claim for compensation for property losses, but since "the compensation requires a

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[72] Zhou Hanhua and He Jun ed., *Comparison of National Compensation Systems in Other Countries*, Police Education Press, 1992, p189.

[73] Ashibe, Nobuyoshi, *Constitution*, 3rd edition, trans. by Lin Laifan, etc., Peking University Press, 2006, p207.

[74] Chen Xinmin, *Basic Theories of Basic Rights in Constitution* (Part I), San Min Book Co., Ltd., 1996, p285.

government to take responsibilities for excessive expropriation, so as to control the excessive expropriation."[75]

As revealed in relevant research, expropriation right is only subject to double restrictions, namely, "public use" and "reasonable compensation". In this way, the application of expropriation right can generate the net social welfares, and guarantee the effective utilization of property right by citizens. [76]

At present, some international investment agreements also admit that a country has the power to take regulatory measures of public interest for the purpose of environmental protection. For instance, the Annex 10-D (4) (b) to the Chile–United States Free Trade Agreement in June 2003 states, "Except in rare circumstances, nondiscriminatory 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."[77] Now, the practice shows a trend of expansion.

Above all, international law recognizes a country's "police power" and admits that a country has the right to take the regulatory measures. However, it also admits the existence of indirect expropriation as well as the rights of investors. Therefore, we should neither ignore the rights of investors for "police power", nor deny the "Police Power Exceptions" for the protection of investor's interests. For this reason, it is necessary to seek for the balance between the conflicting principles of international law, the balance between investor's interest and national interest, and the balance between economic value and noneconomic value. A new generation of investment agreements pursues larger space for the regulation of host country. The new generation of investment agreements focuses on protecting human health, safety and the environment and facilitating the internationally recognized labor rights. All these efforts intend to explain that the pursuit of the objectives for investment protection and investment liberalization in the investment agreements should not sacrifice these important objectives

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75 Steven Shavell, Foundations of Economic Analysis of Law, Harvard University Press,2004, pp.127-134.

76 Robert Cooter and Thomas Ulen, Law and Economics (fourth edition), Pearson Addison Wesley,2003.

77 United States-Chile Free Trade Agreement, Chapter Ten: Investment[EB/OL].[2010-04-10].http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file1_4004.pdf. The English text is: Except in rare circumstances, nondiscriminatory 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.

of public policy. [78] Nevertheless, the host country's management right of foreign investments (which should be "police power") is added in the new generation of international investment agreements, which neither intends to balance the so-called public interest and private interest nor means that the host country can gain more powers when the agreement for international investment includes more matters related to the host country's management of foreign investments, since the host country must, while exercising all the powers, follow the purpose of public interest, consider its reasonableness in the principle of proportionality, and exercise the powers in the principle of due process. Therefore, we must clearly realize that the international investment agreements still center on protecting the private interest of investors while considering the police power of host country, and the pursuit of their balance on the track of rule by law is the public interest truly pursued in the international investment agreements.

IV. Practices in China

Since China signed the first BIT with Sweden in 1982, the quantity of BITs signed by China with other countries had reached to 130 by August 2010, second only to Germany, among which 100 agreements came into effect. Meanwhile, China had become a contracting country to the 249th agreement for international investment (including BITs, DTTs and RTAs special chapter of investment) by May 2011. It was ranked No. 1 among the developing countries, only after Britain, Germany and France.[79] Through a general view of China's agreements for foreign investment in the past 30 years, the history can be divided into three stages: the first stage is before 1998, during which the contents of agreements for foreign investments were relatively conservative, most of BITs did not give the national treatment to investors, and disputes over compensation in relation to expropriation could be submitted to international investment arbitration court for settlement; the second stage is from 1998 to 2005, during which the China-foreign BIT started showing the trend of opening up, as revealed in the national treatment after investment was made and the acceptance of ICSID for the settlement of conflicts between investor and country; the third stage is from 2006 to the present. Along with the improvement of China's international

[78] UNCTAD, Recent Developments in International Investment Agreements(2005);IIA MONITOR No.2(2005),International Investment Agreements. UNCTAD/WEB/ITE /IIT/2005/1.United Nations,New York and Geneva,2005:5.

[79] 2011 World Investment Report: Non-equity Modes of International Production and Development, United Nations, New York and Geneva, 2011, p100.

status and the influence of the United States—Argentina practical investments, China has started seeking for the balance between private interest and governmental interest and the balance between host country's interest and mother country's interest in the investment agreements. Thus, it is believed that the "third generation of BIT" has arrived in China. [80]

China has signed and enforced 100 China-foreign BITs[81] and four free trade agreements containing a special chapter of investments, [82]among which only China-ASEAN investment agreement contains the clause of general exceptions. In the investment agreement, Article 16 General Exceptions stipulates, "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, the investors of the Parties or the investments made by investors, where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures: (1) necessary to protect public morals or defend public order; (2) necessary to protect human, animal or plant life or health;[83] (3) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement; (4) aimed at ensuring the equitable or effective [84] imposition or collection of direct taxes in respect of investments or investors of any Party; (5) imposed for the protection of national treasures of artistic, historic or archaeological value; (6) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." This

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80 Cai Congyan, China- US BIT Negotiation and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications, Journal of International Economic Law, 2009, p3.

81 Refer to the database of "Bilateral Investment Treaty" on the website of Ministry of Commerce of the People's Republic of China, Department of Treaty and Law. http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html

82 So far, China has signed 9 free trade agreements in total, namely the trade agreements with ASEAN, New Zealand, Costarica, Peru, Chile, Pakistan, Asia Pacific and the arrangement of closer trade relations between mainland China and Hong Kong & Macao, among which only the first four agreements contain the special chapter of investments. See the website of Ministry of Commerce of the People's Republic of China, Department of Treaty and Law for 100 bilateral investment treaties. http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html

83 In the footnote, the Agreement explains that the footnote 5 to Article 14 of General Agreement for Service Trade, i.e. Explanations on Public Order, must be included in the Agreement after necessary modification and be a part of the Agreement.

84 With regard to this clause, the footnote 6 to Article 14 of General Agreement for Service Trade must be included in the Agreement after necessary modification and be a part of the Agreement.

is basically a copy of Article 14 General Exceptions of GATS. In addition, the negotiation of China-Canada investment agreement ended successfully on February 8th 2012 according to the latest statement from Ministry of Commerce, and the *Statement of Intent for Completing the Negotiation on Agreement for Facilitating and Protecting Bilateral Investments between China and Canada* has been also signed, consisting of 35 clauses and 6 additional clauses, including the clause of general exceptions. [85]

Among 100 bilateral investment treaties released by the Ministry of Commerce of China and the UNCTAD, only a few contain the clause of exceptions on essential security interests significant to the host country, including Article 14 of the 2006 China-India BIT, Article 3 of the 2005 China-Finland BIT, Article 17 of the China-ASEAN investment agreement, and only Article 5 (3) of the China-India BIT specifies that the justifiable exercising of police power for the protection of public interest is an expropriation exception. Among them, the 2005 China-Finland BIT stipulates in Article 3 (5) and (6), "(5) Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations; (6) Provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measures necessary for the maintenance of public order." In the 2006 China-India BIT, Article 14 states, "Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis."

Above all, China takes an active part in the practice of signing the international investment agreements, and becomes the second largest country for the quantity of signed agreements in the world. However, China is actually quite "weak" and makes very low achievements in the public interest practice of balancing the police power of host country and the private interest of investors. This may be related to the weakness in China's domestic rule by law and the ideology of jurisprudence in this regard. Certainly, this also relates to whether both parties of the negotiation considers including

[85] See the website of Ministry of Commerce for details, http://tfs.mofcom.gov.cn/aarticle/bc/201202/20120207959567.html, Accessed on February 18th 2012.

the clause to some extent. As shown in the development trend of agreement for international investment, China needs to make further improvement in this regard. During the preparation of the BIT model of China or the negotiation of BITs in the future (or RTA and FTA), the clauses may be included after consulting with the relevant contents of the 2012 model of the United States BIT.